

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 EDC 04279; 23 EDC 02289

<p>Student, by parent or guardian, Father & Mother, Petitioner,</p> <p>v.</p> <p>Wake County Board of Education, Respondent.</p>	<p>FINAL DECISION (REDACTED)</p>
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THIS MATTER was heard before the Honorable Stacey Bice Bawtinheimer, Administrative Law Judge, in-person on May 22-23, 25-26 and 30-31, 2023 virtually via WebEx and at the Office of Administrative Hearings (“OAH”) 1711 New Hope Church Road, Raleigh, North Carolina.

After considering a hearing on the merits held on the above-mentioned dates, arguments from counsel for both Parties, all documents in support of or in opposition to the Parties’ motions, all documents in the record, including the Proposed Decisions and supplemental filings, as well as all stipulations, admissions, and exhibits, the Undersigned concludes that Wake County Board of Education denied Student a free, appropriate public education (FAPE) by: not timely revising the behavioral goals in the Individualized Education Plans (IEPs) and Behavior Intervention Plans (BIPs) to address his shifting behavioral needs in December 2021; by not implementing with fidelity his BIPs and delivery of his social emotional skills instruction during the 2021-2022 and part of the 2022-2023 school years; by not timely considering the Independent Educational Evaluations available at the November 2, 2022 IEP meeting and revising the IEP to include specially designed instruction and goals for Student’s written expression deficits and occupational therapy as a supplemental service for his sensory needs; and, by not timely conducting a Functional Behavior Assessment necessary to address his behavioral and social emotional needs. Based on these denials of FAPE, Student is entitled to compensatory education.

Because Petitioners dismissed their tuition reimbursement claim and that controversy is now moot, although evidence was taken as the first prong of Petitioners’ tuition reimbursement claim, i.e., the appropriateness of the January 19, 2023 IEP (including the February 2, 2023 addendum) and Proposed February 6, 2023 BIP are no longer at issue and any decision regarding that claim would be *dicta*. The January/February 2023 IEP is relevant for other purposes but not for the Appropriateness or Implementation Issues; therefore, the Undersigned dismisses that claim for lack of subject matter jurisdiction.

APPEARANCES

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ISSUES

The Pre-Trial Order contained seven Issues. The Parties filed Proposed Statement of Issue on May 5 and 6, 2023 and both filed Amended Proposed Statement of Issues April 11 and 12, 2023. After a conference call, the Parties were ordered pursuant to an Order for Statement of Issues filed on May 3, 2023, for clarification and final resolution of the issues. On June 6, 2023, the Parties filed a Joint Stipulation as to the Abandonment of Issues Prior to Due Process Hearing. The following Issues are those remaining for determination in this Final Decision:

ISSUE 1: Substantive Appropriateness of IEPs (“Appropriateness Issue”)

1. Whether, from November 11, 2021 through February 6, 2023, the Respondent denied Student a free, appropriate, public education with respect to developing substantively appropriate IEPs and BIPs in the following ways:
 - a. Failing to develop appropriate Individual Education Plan (“IEP”) goals for writing and his social, emotional, and behavioral needs;
 - b. Failing to develop appropriate supplementary aides, services, modifications, and accommodations related to Student’s writing, social, emotional, and behavioral needs;
 - c. Failing to develop appropriate related services related to Student’s social, emotional, and behavioral needs;
 - d. Failing to develop appropriate specially designed instruction (“SDI”) related to Student’s writing, social, emotional, and behavioral needs; and,
 - e. Failing to develop appropriate behavioral intervention plans (“BIPS”) that addressed Student’s social, emotional, and behavioral needs.

The IEPs and BIPs originally involved in Issue 1 are the June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), November 2, 2022 IEP (Annual Review), January 19, 2023 IEP (including February 2, 2023 meeting addendum), and February 6, 2023 BIP (Proposed). However, the appropriateness of the January/February 2023 IEP and Proposed February 2023 BIP were related solely to the first prong of Petitioners' tuition reimbursement claim and that issue has now been mooted by Petitioners' voluntary dismissal.

ISSUE 2: Implementation of IEPs and BIPs (“Implementation Issue”)

2. Whether the Respondent denied Petitioners a free, appropriate public education with respect to material lack of implementation of the IEP goals, supplementary aides, services, accommodations, modifications, specially designed instruction, and behavioral interventions during the applicable time period in the 2021-2022 and 2022-2023 school years.

The IEPs and BIPs involved in Issue 2 are the: November 17, 2020 IEP (Annual Review); September 21, 2021 BIP, October 28, 2021 IEP, June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), and November 2, 2022 IEP (Annual Review).

The “applicable time period” is August 2, 2021 through February 6, 2023. This time period makes the November 17, 2020 IEP (Annual Review) also relevant because its duration was from November 18, 2020 to November 16, 2021, so it fell within the 2021-2022 school year which began on August 2, 2021.

Like with the prior Appropriateness Issue the January 29 and February 2, 2023 IEPs and Proposed February 6, 2023 BIP are not relevant to the Implementation Issue because WCPSS never had an opportunity to implement them. Petitioners cancelled the BIP meeting scheduled for February 6, 2023 and withdrew Student on February 7, 2023 before the IEP/BIP initiation date of February 8, 2023.

ISSUE 3: Failure to Revise IEPs and BIPs (“Revise IEPs/BIPs Issue”)

3. Subject to the same statutorily relevant period as determined in Issue 2, whether the Respondent failed to appropriately revise Student's IEPs and BIPs, from August 2, 2021 through February 6, 2023, to address his progress, or lack thereof, in the areas of writing, social, emotional and behavior.

ISSUE 4: Timeliness of Functional Behavioral Assessment (“Timeliness of FBA Issue”)

4. Subject to the same statutorily relevant period as determined in Issue 2, whether the Respondent failed to timely conduct a functional behavioral assessment (“FBA”) necessary to address Student's social, emotional, and behavioral needs from August 2, 2021 through February 6, 2023.

WITNESSES

For Petitioner: Mother- Mother of Student
Father – Father of Student
Student – Student
Bobbie Grammar- Special Education and Compliance Expert
Jennifer Holmes – Board Certified Behavior Analyst (BCBA),
Behavior and Special Education Expert
Lindsey Ohler, Psych. D. – Psychologist and Behavior Expert

For Respondent: Ms. M.S. – BST Teacher and Case Manager
Corliss Thompson-Drew, Ph.D. -Expert Witness
Lauren Seadore – WCPSS Coordinating Teacher on
Social- Behavior Programming Team
Sey. – WCPSS Occupational Therapist
Ashlie Blanchone – WCPSS Behavior Specialist

EXHIBITS, OFFER OF PROOF, AND TRANSCRIPTS

The following exhibits were received into evidence during the hearing. The page numbers referenced are the “Bates stamped” numbers.

For Petitioner (“Pet’r Ex. __”): The Tribunal admitted into evidence Petitioners’ Exhibits numbers 1, 2, 3, 4, 5 (historical purposes only), 6, 7, 9, 12-14, 16, 17, 22 (historical purposes only), 25, 27-31, 39, 43-49, 58-60, 63, 64-67, 85, 86A, 90-94, and 96.

For Respondent (Resp’t Ex. __”): The Tribunal admitted into evidence Respondent’s Exhibits numbers 13, 18, 20, 23, 26-30, and 43.

Stipulated Exhibits (“Stip. Ex. __”): The Tribunal admitted into evidence Stipulated Exhibits numbers 2, 7, 13, 17-22, 24, 27-28, 31-32, 34, 38, and 40-41.

Note as to Exhibits: The Parties stipulated the authenticity of all WCPSS records produced in discovery. Stip. 8.

Offers of Proof: Pet’r Ex 104 was not received in evidence but was accepted as an Offer of Proof. The document was authenticated in the Offer of Proof found at T vol 4 pp 537:17-539:13.

Transcripts: Volumes one through six, totaling 1063 pages, were received into evidence on July 22, 2023 and are referenced as T vol # p [page:line] (ex. T vol 1 p 36:1-22) in this Final Decision.

Duplicate Exhibits: Stip. Ex. 19 & Pet’r Ex. 49; Stip. Ex. 20 & Pet’r Ex. 17; Stip. Ex. 27 & Pet’r Ex. 63; Stip. Ex. 28 & Pet’r Ex. 59; Stip. Ex. 31 & Pet’r Ex. 60; Stip. Ex. 32 & Pet’r Ex. 64; Stip. Ex. 7 & Pet’r Ex. 13; Stip. Ex. 24 & Pet’r Ex. 58.

BURDEN OF PROOF

Petitioners in special education cases bear the burden of proof in North Carolina. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The standard of proof is by a preponderance of the evidence. *Id.*; N.C. Gen. Stat. §150B-34(a). “Courts give educators “deference... based on the application of expertise and the exercise of judgment by school authorities.” *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017). “By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement,” and a “reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [his] circumstances.” *Id.*

Likewise, the North Carolina Administrative Procedure Act (“APA”) requires deference be given “to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.” N.C. Gen. Stat. § 150B-34(a). Deference was afforded WCPSS’ educators when they gave cogent explanations for how they developed and implemented Student’s IEPs and BIPs. Deference to WCPSS’ BST staff was diminished by their lack of personal knowledge and failures to comply with WCPSS’ own BST Program Manual which required maintenance of certain data and dictated the frequency of FBA’s and BIP reviews.

PROCEDURAL HISTORY

1. Petitioners filed their first Contested Case Due Process Petition (“First Petition”), case file number 22 EDC 4279, on November 14, 2022. Respondent acknowledged receipt of the First Petition on November 18, 2022 and the statutory deadlines for resolution and the due process hearing began. The same day as receipt, Respondent moved and was granted a Motion for an Extension of Time to Respond to the First Petition.

2. A Notice of Hearing and Prehearing Order was issued on November 21, 2022 scheduling the Contested Case Hearing for December 28-30, 2022.

3. The Parties waived the resolution meeting to attend mediation on November 30, 2022.

4. To allow time for the scheduling and preparation for mediation, on December 2, 2022, both Parties jointly moved for a continuance of the hearing and another extension of time for Respondent to respond to the First Petition. For good cause shown and upon request of both Parties, the hearing was continued, and the response deadline extended.

5. On January 9, 2023, the Mediation Results Form indicated that the mediation held on January 5, 2023 was unsuccessful.

6. Respondent responded to the First Petition on January 12, 2023.

7. In light of the mediation failure, the Parties jointly proposed on January 13, 2023 to amend the original scheduling order. An Amended Scheduling Order was issued on January 17, 2023 with a dispositive motion deadline of April 10, 2023 and the hearing rescheduled to May 22-26, 2023, or until completion.

8. Prior to the dispositive motion deadline, on March 31, 2023, in preparation for filing a summary judgment motion, Respondent requested a prehearing conference to discuss clarification of the issues. Prior to the prehearing conference scheduled for April 6, 2023, both Parties submitted Proposed Statements of Issues on April 5 and 6, 2023. After the conference, the Parties amended their Proposed Statements of Issues on April 11 and 12, 2023.

9. Respondent filed for summary judgment on April 14, 2023. Petitioners were granted an extension of time to respond to the summary judgment motion on April 26, 2023. This extension was granted, in part, to allow for a settlement conference with an administrative law judge. Judge Fred G. Morrison, Jr. was appointed on May 1, 2023 to conduct the settlement conference.

10. Petitioners responded to the summary judgment motion on May 4, 2023. Petitioners also moved to strike some of Respondent's exhibits supporting Respondent's summary judgment motion as untimely. Respondent responded and Petitioners' Motion to Strike was denied on May 12, 2023.

11. While summary judgment was pending, Petitioners filed their second Contested Case Due Process Petition ("Second Petition"), case file number 23 EDC 2289, on May 11, 2023. On the same day, Petitioners moved to consolidate both Petitions. A Notice for Expedited Response to the Motion to Consolidate was issued on May 11, 2023. Respondent responded on May 15, 2023. Considering Respondent's concerns about the consolidation's impact on the existing hearing date and deadlines, the Parties filed a Joint Stipulation as to the Motion to Consolidate on May 16, 2023. Based on the Parties' stipulation, the First and Second Petitions were consolidated on May 16, 2023.

12. In addition, Respondent's Motion for Summary Judgment was granted in part for all the claims about the appropriateness of the IEPs and BIPs developed prior to November 11, 2021 and denied with respect to all other claims. As discussed during the Prehearing Conference held on May 16, 2023, this Tribunal does not have subject matter jurisdiction for Petitioners' claims under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 and these claims were formally dismissed on June 2, 2023.

13. The Parties submitted a Proposed Order on Pre-Trial Conference on May 22, 2023 and it was entered on May 23, 2023. In preparing the Proposed Order for the Pre-Trial Conference, Petitioners indicated that they had abandoned some issues. On June 5, 2023, the Parties filed a Joint Stipulation as to Abandonment of Issues Prior to the Due Process Hearing memorializing which issues were abandoned by Petitioners and which issues remained for consideration.

14. A Settlement Conference was held on May 23, 2023 with Judge Fred G. Morrison, Jr. and the Parties but was unsuccessful.

15. Prior to the hearing, Respondent filed a Motion *in Limine* seeking to exclude the expert witness report of Jennifer Holmes, her testimony pertaining to that report, and Dr. Lindsey Ohler's testimony. A verbal order was issued on May 22, 2023, and later memorialized in written form on June 2, 2023, granting Respondent's Motion *in Limine* with respect to the expert witness report of Jennifer Holmes but denying the exclusion of the testimonies of Ms. Holmes or Dr. Ohler.

16. At the close of Petitioners' case in chief, Respondent orally moved pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) the dismissal of some claims including occupational therapy as a related service for Student's fine motor deficits and claims pertaining to Student's handwriting. The

latter claims were dismissed on May 30, 2023, memorialized in written form on June 2, 2023. The Tribunal denied the remainder of Respondent's Rule 41(b) motion.

17. Pursuant to the Post Hearing Order entered on June 2, 2023, the Parties filed their respective exhibits, the stipulated exhibits, offer of proof, and verifications on June 7 and 12, 2023. The six volumes of transcripts totaling 1063 pages were received on June 22, 2023.

18. Prior to the filing of the Proposed Final Decisions on the FAPE issues, after reviewing the admitted evidence and transcripts, the Undersigned requested additional stipulations regarding Student's class periods for seventh and eighth grades, track-out periods, and the meaning of "present" in Respondent's Exhibit 13. These stipulations were filed on July 24, 2023.

19. Proposed Final Decisions and Additional Factual Stipulations on the bifurcated FAPE issue were filed on July 24, 2023.

20. A conference call was held on July 28, 2023, to discuss the inclusion of items in Respondent's Proposed Final Decision which required Official Notice to be taken for admission in the record. *See* subparagraphs 136(b)&(c) in Resp't Pro. Fin. Dec. p. 36.

21. Also, at the July 28, 2023 conference, questions were raised about the viability of Petitioners' tuition reimbursement claim if, within the 10-day notice period before Student's withdrawal, the IEP/Proposed BIP developed in January/February 2023 were appropriate. The Parties were asked to provide statutory authority supporting their respective positions regarding this legal question. This authority was provided on August 31, 2023 and was partially responsible for Petitioners' voluntary dismissal of their tuition reimbursement claim.

22. A Post Conference Order was issued on July 31, 2023 advising the Parties about Respondent's need to request Official Notice by July 31, 2023 and that Petitioners could object to such notice by August 9, 2023. After review of the Respondent's Request for Official Notice filed on July 31, 2023 with Exhibits A-C and Petitioners' Response in Objection, Official Notice was denied on September 2, 2023.

23. In addition, the Parties were invited to file objections to the opposing Party's calculations of Student's time in the BST classroom; to stipulate to dates that data or sign-in sheets were not maintained about Student's attendance in the BST classroom; and to jointly request resumption of the settlement conference, if so desired. The understanding was that if the Settlement Conference was resumed the deadlines for the Proposed Final Decisions and Final Decision were to be extended until the second Settlement Conference was successful or resulted in an *impasse*.

24. Pursuant to the June 2, 2023 Post Hearing Order, by August 3, 2023 the Undersigned verbally advised the Parties that a hearing on the tuition reimbursement claim was necessary. A Notice of Hearing was issued on August 4, 2023 scheduling the tuition reimbursement hearing for August 21-24, 2023. In preparation for the tuition reimbursement claim hearing, Petitioners issued five subpoenas on August 8, 2023.

25. Also on August 8, 2023, the Undersigned issued a Notice of Taking Official Notice of the COVID-19 of the international COVID-19 Pandemic's effects on school closures in North Carolina. On August 23, Respondent filed its Response in Opposition to the Undersigned taking Official Notice of the international COVID-19 Pandemic for various reasons including the relevance of the COVID-19 Pandemic because the Petition did not raise any issues prior to Student's seventh

grade school year (2021-2022). The school records do indicate that Student “started live, in class learning yesterday [November 16, 2020]” of Student’s sixth grade school year (2020-2021). Pet’r Ex. 12 p 66. Accordingly, the Undersigned declined to take Official Notice of the COVID-19 in-person school closures as the relevant information was already on the record.

26. On August 9, 2023, both Parties filed objections to the other’s calculations of time spent in the BST room. In addition, on that day, Petitioners filed another subpoena and Respondent objected to stipulating information about the dates that data/sign-in sheets were missing.

27. On August 11, 2023, the Parties stipulated to the exchange of exhibit and witness lists to August 16, 2023 rather than August 14, 2023. As a result, the Prehearing Conference on the tuition reimbursement claim that had previously been scheduled for August 14, 2023 at 10:00 Mother via WebEx was rescheduled for August 16, 2023.

28. On August 15, 2023, the Parties agreed to participate in another Settlement Conference with Judge Fred Morrison held on August 21, 2023. A Notice of Settlement Conference was issued that day. Later that day, Petitioners unexpectedly filed a Notice of Voluntary Dismissal Without Prejudice of their tuition reimbursement claims. The settlement negotiations were held open for a week. On August 28, 2023 Judge Morrison declared an *impasse*.

29. A WebEx Prehearing Conference, which had been previously scheduled to discuss the hearing of the tuition reimbursement claim alleged in 23 EDC 2289, was held on August 16, 2023. As noted, in the interim time before the conference, Petitioners voluntarily dismissed their tuition reimbursement claim. After the Prehearing Conference concluded, the Undersigned issued a Post August 16, 2023 Conference Order that memorialized the dismissal of Petitioners’ tuition reimbursement claim; the resumption of the settlement conference with Judge Morrison on August 21, 2023; and extension of the Final Decision deadline to September 6, 2023. Another Order was issued that day removing the bifurcated tuition reimbursement claim from the hearing calendar. Later, due to all the intervening motions and documentation during the past few weeks, the Parties also consented to the extension of the Final Decision deadline to September 8, 2023.

30. Upon review of the exhibits filed in the Official Record, it was discovered that Respondent’s Exhibits and the Stipulated Exhibits failed to contain the “bate stamp” numbers. At the hearing, the Parties, the witnesses, and the Undersigned were provided bate stamped copies of all exhibits and the bate stamp numbers are referenced in the Transcripts, Proposed Final Decisions and Final Decision. To correct this error, on September 7, 2023 an Order For Substitution of Bate Stamped Stipulated Exhibits and Respondent’s Exhibits, Amended Respondent's Verification, and Extending Final Decision Deadline was issued allowing the Parties until September 18, 2023 to correct the filing error and, with consent of the Parties, extending the Final Decision deadline to September 20, 2023. Corrected Stipulated Exhibits (with Bates) and Respondent’s Exhibits (with Bates) were filed on September 11, 2023. An Amended Verification of these exhibits was filed on September 12, 2023.

31. On September 20, 2023, the Final Decision was issued and served on the Parties.

FINDINGS OF FACT

Stipulations of Fact

At the start of the hearing in this matter, the Parties agreed to jurisdictional, party, legal, and factual Stipulations in a proposed Pre-Hearing Order, which was approved and filed in the Office of Administrative Hearings on May 23, 2023. These Stipulations are referenced as “Stip. 1,” “Stip. 2,” “Stip. 3,” etc. Additional Stipulations were filed on July 24, 2023. The “Additional Stipulations” are referred to as “Add’l Stip. 1,” “Add’l Stip. 2,” etc. To the extent that the Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on the Pre-Trial Conference and Additional Stipulations are incorporated fully herein by reference.

Prior Orders

Unless specifically contradicted herein, this Final Decision incorporates and reaffirms all Findings of Fact and Conclusions of Law contained in previous Orders entered in this litigation.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the Proposed Final Decisions and all supplemental documents filed in the record, the Undersigned administrative law judge (ALJ) makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed the evidence presented and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, biases, or prejudices the witnesses may have, the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case including, but not limited to, verbal statements at IEP meetings, IEP meeting minutes, IEP documents, and all other competent and admissible evidence.

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

The Parties

1. Petitioner Student is a resident of the State of North Carolina. Stip. 14. Student resides with his Parents, Father and Mother, in Wake County, North Carolina, Stip. 14, within the boundaries of School Middle School (“School”) and the Wake County Public School System (“WCPSS”), Stip. 13

2. Petitioners, Father and Mother (“Parents”), are residents of the State of North Carolina. At all times relevant to the issues in this case, Father and Mother resided within the boundaries of WCPSS in Raleigh, Wake County, North Carolina. Stips. 13 & 14. (Student’s Parents and Student are collectively referred to as “Petitioners.”).

3. Respondent, Wake County Board of Education (“Respondent,” the “Board,” or “WCPSS”), is a local educational agency (LEA) receiving monies pursuant to the IDEA (Stip. 5) and is responsible for providing Student a free and appropriate public education (FAPE).

OVERVIEW OF CASE

4. Although the appropriateness of Student’s IEPs and BIPS is at issue, this is essentially an implementation case. Student’s educational and behavioral programming was based on Respondent’s Behavior Support (BST) program, not on his individualized needs. Respondent’s BST failed to provide the requisite social skills instruction in his IEP and failed to properly implement the BIP’s behavior intervention of self-time-out. In addition, the BST staff did not maintain accurate data collection necessary to properly monitor and gauge Student’s shifting behavior patterns. While much of this oversight may have been due to staff shortages and turnovers, nevertheless, that is not a viable excuse under federal or State law.

5. While reviewing this contested case hearing, key takeaways emerged. First, Student is an intelligent 13-year-old student whose disabling conditions, anxiety, ADHD, and low processing speed, impact his ability to access the general curriculum and his nondisabled peers in the least restrictive environment. In the general education setting, Student is anxious, distracted, impulsive, and unable “to keep up the pace.” Pet’r Ex. 17 p 128. He becomes physically and verbally aggressive when confronted with stimuli. Unlike Student, the majority of his peers (97%) in the regular education setting do not have his processing deficits or the comorbidity of anxiety and attentional problems. The manifestations of Student’s disabling conditions were to escape from frustrating or challenging situations either by inappropriate physical/verbal aggression or task avoidance/self-removal.

6. While Student’s inappropriate physical/verbal aggressive behaviors may have waned somewhat during the relevant school years, his task avoidance/escapism waxed due to the enabled misuse of the behavior intervention strategy referred to as “self-time-out.” Self-time-out (STO)¹ is a BST strategy taught to Students to help them recognize they may need a break because of frustration or anxiety or being upset. Students can take that break in a private safe place to “reset” without any incident before they return to their classroom. T vol 6 p 925:12-23 (T of Blanchone). No evidence was proffered about the efficacy or scientific researched basis for the use of STO and its use was not individualized for Student’s functional needs.

7. “STO is a Student-initiated event in an effort to move away from conflict.” Resp’t Ex 20, p 99. “It is a taught strategy.” T vol 6 p 1019:8-9 (T of Seadore). Unlike the traditional use of time-out,² which is a behavior management technique used for a limited period, self-time-out is untimed. Herein lies the problem. Student became too adept at using STO. His self-removals may have helped avoid some disciplinary consequences, but it became a crutch for escaping his regular coursework and interactions with his nondisabled peers.

8. Although the term “elopement” was used during the hearing by some of Petitioners’

¹ The word “self-time-out” is not an intervention listed on any of Student’s IEPs or BIPs. “STO” and “time-out” are each referenced once on the February 6, 2023 Proposed BIP. Stip. Ex. 22 pp 1 & 3. Otherwise, the only place in the educational records where STO or self-time-out are referenced are the AST/BST Sign-In Sheets and the AST/BST Manual, none of which were provided to the Parents prior to this case. Pet’r Ex. 85 & 86A (sign-in sheets), and Resp’t Ex. 20 (AST/BST Manual).

² N.C. Gen. Stat. § 115C-391.1(b)(11).

witnesses to describe Student's removals from the general education setting, STO is distinguishable from "elopement." STO is a proactive strategy taught to Students to avoid a crisis and they have permission to "self-remove" themselves from the general education setting. T vol 6 p 1019:3-10. "Elopement" is when a Student, without permission or supervision, leaves the classroom. T vol 6 p. 1019:10-13, therefore, this Final Decision uses the terms "self-time-out" or "self-removal."

9. Based on his IEPs and BIPs, during the 2021-2022 and 2022-2023 school years, the BST staff were required to monitor the amount of time Student spent out of the regular setting, process the reasons for his dysregulation, and return him to the regular education setting "as soon as possible." Instead, the BST staff failed to properly monitor Student's self-removals to the BST classroom, thereby enabling Student's misuse of STO. Student's removal, self or teacher initiated, from the regular education setting was rightfully Petitioners' main concern. This unfettered behavior intervention harmed Student by fostering more behavioral problems, denying him access to the general education curriculum, and segregating him from his nondisabled peers.

WITNESSES

Petitioners' Witnesses

10. Petitioners called as fact witnesses Mother, Father, Student, as well as expert witnesses Bobbie Grammar, Jennifer Holmes, and Lindsley Ohler, Psych. D.

Petitioners' Witnesses

Fact Witnesses and Petitioners:

Mother, Mother of Student (T vol 1, pp 17-138)

11. As Student's Mother, Mother has an explicit and implicit bias for her son's best interest. Nonetheless, Mother was forthright about Student's educational needs, disabilities, and her opinions about the inadequacies of his Individualized Education Programs ("IEPs") and Behavior Intervention Plans ("BIPs"). Mother attended and actively participated in all IEP/BIP meetings except for the cancelled February 6, 2023 BIP meeting. However, Mother did not personally observe Respondent's implementation of Student's IEPs/BIPs and her testimony on the Implementation Issue is based solely on information disclosed to her by Student, by school staff at IEP meetings, and through the documentary evidence. Mother's main concern was Student was missing core academic instruction. Although Mother did not personally observe the implementation of Student's educational programming, her concerns were corroborated by WCPSS' own data and the testimonies of Student and Ms. M.S.

Father, Father of Student (T vol 3 pp 274-354, vol 4 pp 450-489)

12. Student's Father, Father, clearly cares for his son's best interests. Father attended and actively participated in all IEP/BIP meetings, sometimes abrasively. He also emailed, after school hours, cancelling the February 6, 2023 BIP meeting. Much of Father's testimony was redundant, and he related the same concerns as Mother. At times, Father's memory of the multiple IEP/BIP meetings

was confusing as he relied on his wife for information or blamed their advocate for certain adverse actions.

Student, *Student (T vol 3 pp 274-354)*

13. Unlike most students, Student (then 13 years old) testified on his own behalf at the hearing. Student's testimony was necessary to prove the Petitioners' Implementation Issue. Although Mother and Father voiced their opinions about the implementation of Student's educational services, neither Student's Parents nor any of Petitioners' expert witnesses had personal knowledge of how Student's IEPs/BIPs were implemented at School Middle School.

14. On the stand, Student appeared very different than the dysregulated Student described in his educational records. Student was mature, courteous, and responsive to both direct and cross examination questions. Although he gave some contradictory responses, these responses did not diminish Student's credibility but were more reflective of the artful nature of counsel's questioning.

Expert Witnesses:

Bobbie Grammar, *Special Education and Compliance Expert (T vol 1 pp 139-192; vol 3 pp 201-252)*

15. Ms. Bobbie Grammar was qualified in IEP development, IEP implementation, and special education with respect to reading, an abandoned issue. *See* Pet'r Ex. 2 (CV). Ms. Grammar's expert opinion was based solely on record review and conversations with Petitioners' counsel. She never interviewed or evaluated Student and did not interview his Parents, teachers, or school staff. Much of Ms. Grammar's testimony was redundant to Ms. Holmes and her expert opinion on legal compliance issues was not particularly helpful.

Jennifer Holmes, *Board Certified Behavior Analyst (BCBA), Behavior and Special Education Expert (T vol 4 pp 492-584)*

16. Ms. Jennifer Holmes was qualified in behavior and behavior intervention plans, and development of IEPs and BIPs for Students with social emotional disabilities. Ms. Holmes was the only Board-Certified Behavior Analyst (BCBA) that testified. *See* Pet'r Ex. 1 (CV). Prior to forming her expert opinion, Ms. Holmes had access to all the Stipulated and proposed exhibits, interviewed Student's Parents (but not Student), and spoke with Petitioners' counsel. She did not interview Student's teachers or school staff and conducted no evaluations of Student. Of all the experts tendered in this case, Ms. Holmes was the most experienced working directly with students diagnosed with behaviors similar to Student's, developing BIPs, conducting FBAs, monitoring the implementation of IEPs and BIPs, and, overall, in analyzing the function of behaviors of students like Student T vol 4 pp 495:10-25; 496:25; 497:1-18. Ms. Holmes works for both parents and school systems. She currently works as a consultant for five public school districts in North Carolina and South Carolina and serves as an independent evaluator for three school districts. Pet'r Exs. 2 & 3. Because of her impartiality and expertise, Ms. Holmes' expert opinion was given significant weight.

Lindsey Ohler, Psych. D., *Psychologist and Behavior Expert (T vol 4 pp 380-449)*

17. Lindsey Ohler, Psych. D. is a Clinical Psychologist who provides therapy to students like Student with childhood anxiety and behavioral problems as well as parent coaching to help their parents understand and support behavioral intervention programming for their child at home and in

the school setting. Dr. Ohler was qualified in clinical psychology for children and adolescents with special needs, and in making recommendations for the development of IEPs and BIPs and academic needs for students and for related services of counseling or therapy in the school setting. *See Pet'r Ex. 3.* Dr. Ohler interviewed Mother and Father, but not Student, in preparation for the due process hearing. T vol. 4 pp 394:10-11; 394:24-25; 395:1-8. Dr. Ohler also reviewed the records provided by the Petitioners and Respondents to form her expert opinion that Student was denied a free appropriate public education. T vol 4 p 394:7-9. Some of Dr. Ohler's testimony was redundant to that of Petitioners' other experts, but her expert opinion that Student and his Parents needed counseling was given significant weight especially in light of her experience in providing counseling to students with anxiety-based maladaptive behaviors.

Respondent's Witnesses

18. Respondent called four fact witnesses, Marcia M.M.S., Lauren Seadore, Marla Sey., Ashlie Blanchone, and one expert witness, Corliss Thompson-Drew, Ph.D.

Fact Witnesses:

M.S., BST Teacher and Case Manager (T vol 5 pp 763-922; vol 6 pp 828-916)

19. M.S. was Student's Special Education/BST Teacher and Case Manager for parts of 7th grade and all his 8th grade. M.S. has worked with the Respondent for 20 years. T vol 5 p 763:19-20. Ms. M.S. had the most personal knowledge about Student's educational, functional, and social emotional needs in the educational setting as she participated in all, except one, of his IEP/BIP meetings; collected and supervised BST data collection; provided social skills instruction during both school years; and was charged with implementation of his behavioral program.

20. M.S. made admissions against her interest. She acknowledged that Student came to the BST room every day during the 2021-22 and 2022-23 school years. T vol 6 p 763:17-20. She also admitted that while she was Student's BST teacher and case manager, she improperly progress monitored his behavior goals until October 2022 after she was advised by her Principal, while on medical leave, that she was doing it incorrectly. Furthermore, she admitted that the homework sheets were not being completed daily as required. T vol 6 pp 886:10-887:17.

21. The Undersigned recognizes that M.S. conceded some of her mistakes and, because of staffing shortages not of her making, was struggling with 14-16 severely behaviorally disabled students, with varying schedules of 8 different classes each (possibly in 3 different grades and 4 different calendar tracks) on her caseload with only two instructional assistants. However, at times, the documentary evidence conflicted with her testimony, she did not comply with WCPSS' BST Programming Manual, and Student was more persuasive about the lack of social educational skills (SES) instruction in her classroom.

Lauren Seadore, Coordinating Teacher on Social-Behavior Programming Team (T vol 6 pp 1013-1053)

22. When she testified in May 2023, Ms. Lauren Seadore had been a Coordinating Teacher on Social-Behavior Programming Team for Respondent since January of 2023. T vol 6 p 1013:2-7. Prior to that, she worked for Respondent as a Secondary Behavioral Specialist for six years (T vol 6 p 1013:8-10) and had previously been the Special Education Chair of Harnett County

Schools for seven years. T vol 6 p 1013:14-19. Ms. Seadore attended the June 2, 2022 IEP because of vacancies in WCPSS' behavioral programming staff. Other than what she learned at that one IEP meeting, Ms. Seadore had never interviewed Student's Parents, evaluated Student, or observed him in any educational setting.

23. Even though Ms. Seadore was only minimally involved with Student's educational programming, she was significantly involved with WCPSS' BST Program. Ms. Seadore helped create and draft the AST/BST Support Programming Manual (Resp't Ex. 20) which outlines the roles and responsibilities of all staff in the AST/BST programs and provides guidelines for behavioral interventions, and data collection for students in those programs. T vol 6 pp 1015:15-1016:9. Ms. Seadore testified that the expectation of the BST staff is to collect data on BIP strategy and IEP goal implementation. T vol 6 p 1047:12-14. She emphasized there is an expectation that specific data must be collected on specific IEP goals and BIP strategies. T vol 6 p 1048:9-15.

24. Ms. Seadore was the most experienced WCPSS teacher in the BST Program that testified and had been a Special Education Department Chair, but Ms. Seadore's testimony was not supported by the IEP documents created at the June 2, 2022 IEP meeting she attended or any IEP/BIP meeting thereafter. Nor was her testimony corroborated by the BST documentation required by the BST Manual she helped create. In fact, at times her testimony contradicted the BST Manual. Moreover, Ms. Seadore was not concerned if Student spent every day at lunch in the BST room. T vol 6 p 1019:23-25. She also attempted to justify Student's avoidance behavior as desirable. T vol 6 p 1019:7-10. Ms. Seadore's testimony was given little weight except for the authentication of the BST Manual.

Sey., WCPSS Occupational Therapist (T vol 6 pp 963-1055)

25. Ms. Sey. is an occupational therapist for the Respondent and has worked for Respondent for approximately 15 years. T vol 6 p 964:5-10. Ms. Sey. was the only witness, other than Ms. M.S., who interacted with Student in the school setting. She taught him seven SES sessions in May 2022. Ms. Sey. was also the only witness who evaluated Student.

26. In February 2022, Ms. Sey. conducted an Occupational Therapy evaluation of his fine motor skills and sensory needs. Pet'r Ex. 63 (02/08/2022 OT Evaluation). Student was not added to Ms. Sey.'s OT caseload until after the January 2023 IEP meeting. Prior to testifying Ms. Sey. was not aware that Student had entered the BST room almost every day during the 2021-22 school year or that Student often stayed in the BST room during lunch. T vol 6 p 996:19-25. The findings about Student's sensory needs in Ms. Sey.'s February 2022 OT evaluation were corroborated by the Independent OT Evaluation finalized on August 4, 2022 and supplemental OT for Student's sensory needs was incorporated in the January/February 2023 IEP. Ms. Sey.'s testimony was persuasive as to Student's need for supplemental occupational therapy services.

Ashlie Blanchone, WCPSS Behavior Specialist (T vol 6 pp 918-962)

27. Ms. Ashlie Blanchone is the Secondary Behavior Specialist for the Respondent. T vol 6 p 918:18-20. Ms. Blanchone has worked for the Respondent for eight and a half years. T vol 6 p 918:7. She only attended the January 19, 2023 IEP and February 2, 2023 IEP meetings. Other than what she heard and read secondhand at those meetings; she had no familiarity with Student's educational, functional, or social emotional needs. Even though a Behavioral Specialist, Ms. Blanchone based her perspective on what she heard and saw at the January/February 2023 IEP

meetings. T vol 6 pp 947:25-948:2. Her testimony was weighed accordingly.

Expert Witness:

Corliss Thompson-Drew, Ph.D., *Expert Witness on Appropriateness Issue Only*
(T vol 5 pp 650-762)

28. Corliss Thompson-Drew, Ph.D. was qualified in school psychology, interpreting evaluation results to support the development of IEPs and behavior plans, and designing behavioral interventions. T vol pp 650:2-6; 659:1-3; Resp't Ex. 43. Dr. Thompson-Drew serves as the current Director of Psychology for the Respondent. T. vol 5 p 650:10. She was proffered as an expert only as to the Appropriateness Issue.

29. When Dr. Thompson-Drew gave an expert opinion, she had not reviewed all the relevant data, all the educational records, attended any IEP/BIP meetings, or interviewed Student, Mother, or Father T vol 5 pp 705:13-21; 742:8-22. Dr. Thompson-Drew only reviewed information she was told to review. T vol 5 pp 750:13-25; 761:15-17. Dr. Thompson-Drew also admitted that her sole preparation was to meet with the school attorney and review select documentation. T vol 5 p 761:18-23. Dr. Thompson-Drew acknowledged that her expert opinion may change once she had an opportunity to review Student's complete educational file which, as a WCPSS school psychologist, was readily available to her any time before her testimony. T vol 5 p 750:13-25. Dr. Thompson-Drew, however, favorably testified for Petitioners that she did not see any written expression specially designed instruction or IEP goals in the IEPs created prior to January 2023, but that it was unlikely Student had just begun having a written expression skill deficit at that time. T vol 5 p 726:20-25.

30. The fact that Dr. Thompson-Drew, as an expert, did not insist on a comprehensive review of all records and instead relied on hand-picked records provided by Respondent's legal counsel, diminished the persuasiveness of her expert opinion. As such, Dr. Thompson-Drew's expert opinion was not based on sufficient facts or data and not the product of reliable principles and methods.³

Credibility of Witnesses

31. Unless otherwise stated in this Final Decision, the Undersigned found all witnesses credible (in that they believed what they said), however the persuasiveness and weight given their testimonies varied depending on whether their testimonies were: based on personal knowledge about specific matters; based on sufficient information about the records and Student's special education needs; and/or conflicted with reliable documentary evidence.

32. With respect to the "Implementation Issue," the documentary evidence was often incomplete as to the implementation of Student's IEPs and/or BIPs. The only witnesses, with personal knowledge of the implementation of Student's social emotional skills instruction (SES) during the relevant period, were Student, M.S. to a limited extent, and Ms. Sey., to an even more limited extent (only seven Thursdays of SES sessions).

³ N.C. Gen. Stat. § 8C-1, Rule 702(a)(1) & (2).

33. Other than M.S., Ms. Sey. was the only witness of Respondent's who had met Student and spoke with his teachers prior to February 2023. *See* Stip. Ex. 27 (February 2022 OT Evaluation). Her OT evaluation corroborated Student's continuing sensory processes differences in visual, auditory, tactile, smell, proprioceptive and vestibular areas. Stip. Ex. 27 p 165. However, since Student was not on Ms. Sey.'s caseload until after the January 19, 2023 IEP meeting, it was not her role to review the BST sign-in sheets or collect progress monitoring data until then. T vol 6 pp 994:22-13; 996:4-7. Ms. Sey. "was also not aware that Student was not able to go into the cafeteria." T vol 6 p 996:2-7.

34. Respondent's fact witnesses, Lauren Seadore and Ashlie Blanchone had very limited interactions with Student and his Parents. They also did not have personal knowledge about the implementations of his IEPs or BIPs. Ms. Seadore's testimony was inconsistent with the documentary evidence that Student self-timed-out excessively during the 2021-2022 school year. According to her, prior to June 2, 2022, there was "no data indicating that Student was using a self-time-out intervention." T vol. 6 p 1040:11-14. Ms. Seadore was also not aware that Student's BST teachers were not appropriately implementing the support programming as required by WCPSS' BST Manual that she helped draft. T vol 6 pp 1015:11-1016:1.

35. Both Petitioners' and Respondent's fact witnesses, including Petitioners themselves, testified about the appropriateness of Student's IEPs and BIPs. Respondent's fact witness Ashlie Blanchone based her lay opinion solely on what she saw and heard at the January/February 2023 IEP meetings. T vol 6 pp 947:25-948:3. Yet, Ms. Sey. did not know at what point a student would be considered "misusing" or "overusing" self-removals to the BST room, (T vol 6 p 1010:1-4), but, if that happened, she agreed it would be inappropriate. T vol 5 p 748:17-19. Ms. Seadore saw no evidence of Student's abuse of self-time-out .T vol 6 p 1044:17. Before making that determination and while agreeing that Student's BIPs should have been reviewed every quarter (T vol 6 pp 1034:15-1035:4), Ms. Seadore did not review any BST sign-in sheets or data documentation to see if there were "patterns in the data" that indicated Student was avoiding a specific class or setting. T vol 6 pp 1031:3-16; 1038:16-1040:1. Ms. Blanchone, on the other hand, did admit that Student spent a significant amount of time in the BST classroom. T vol 6 p 936:16-19.

36. All the fact witnesses gave their opinions about the various issues. Fact witnesses' lay opinions were given the appropriate weight to the extent that they were useful for the determination of a fact in issue but not when their lay opinions were little more than "choosing up sides" which was most often the case.⁴

37. The persuasiveness of the testimonies of both Parties' expert witnesses was also diminished in some respects. None of the expert witnesses interviewed or evaluated Student. None of the expert witnesses interviewed any of Student's teachers or school staff. Petitioners' reading expert witness testified that Student needed reading instruction after looking at one data point on an "iReady" assessment when on the independent psychoeducational evaluation all his reading scores were in the average range, and he passed his 7th grade reading EOG. *See* T vol 4 p 388 (T of Grammar). However, this issue was subsequently abandoned by Petitioners.

38. Respondent's expert witness, Dr. Thompson-Drew, although clearly qualified in her field, had never even met Student or his Parents. Before forming her expert opinion, Dr. Thompson-Drew was "asked to review IEP documents and look at that in light of the evaluations, not any raw

⁴ *See* N.C. Gen. Stat. § 8C-1, Rule 701.

data or tracking sheets or such things of that nature.” T vol. 5 p 750:6-8. Dr. Thompson-Drew was not asked by Respondent to form an “opinion regarding the implementation of any of the IEPs or BIPs.” T vol 5 p 759:12-15. Her expert opinion is limited to “the appropriateness of the IEPs based on the evaluation data” and, as such, will only be considered for the Appropriateness Issue. T vol 5 p 759:16-18.

39. Notably, none of the independent educational evaluators were subpoenaed to testify about their independent evaluations, including Dr. McKissick who completed the latest Functional Behavior Assessment relied upon, almost exclusively, by the school-based members of the IEP team to develop the Proposed February 6, 2023 BIP.

Student’s Unique Circumstances

40. Student’s date of birth is November 30, 2008 and he was thirteen (13) years old at the time of the filing of the petition. Stips. 9&11.

Diagnoses

41. Student has been diagnosed with attention deficit hyperactivity disorder (“ADHD”), mixed hyperactivity/impulsivity type, adjustment disorder with mixed mood and conduct, and Generalized Anxiety Disorder. Pet’r Ex. 12 p 71; Stip. Ex. 7 (10/28/2021 IEP); Stip. Ex. 18 (11/2/2022 IEP); Stip. Ex. 24 (11/21/2019 Psychoeducational Evaluation); Stip. Ex. 27 (3/4/2022 Occupational Therapy Evaluation); Stip. Ex. 18, p. 3. Student also has sensory issues and low processing speed which have historically impacted him academically, socially, emotionally, and behaviorally.

42. The manifestations of Student’s ADHD, anxiety, adjustment disorder, and sensory deficits impact him academically, functionally, and socially in the regular education setting. Because of his ADHD, Student has challenges with inattention, hyperactivity, and executive functioning (planning and organizational skills). In addition, due to his anxiety, Student struggled with emotional regulation, task avoidance and escapism behaviors. Some of his ADHD and anxiety behaviors were managed by medications which were adjusted at various times to increase their efficacy. Pet’r Ex. 60 p 385. Medication management was mentioned at some IEP meetings, but it was not a focus of concern for any of the IEP teams nor was it here.

Average Cognitive Functioning and Low Processing Speed

43. One of Student’s strengths is that he has average intelligence. According to evaluations conducted in 2022, Student has an average standard score (SS) of 93⁵ to high average intelligence standard score of 112. *Compare* Pet’r Ex. 59 p 376 (WCPSS March 18, 2022 Eval. Reynolds Intellectual Assessment Scale 2nd Ed.) to Pet’r Ex. 60 p 301 (IEE August 2022 Eval. Wechsler Intelligence Scale for Children 5th Ed.). Despite his average intelligence, Student’s cognitive proficiency was in the very low range (SS 78) and his processing speed, the ability to process visual information quickly and accurately, was also in the very low range (SS 72) in the 3rd

⁵ Standard scores (SS) vary in ranges depending on the type of evaluation, but they are based on objective, nationally-normed criterion and the average range is usually between a standard score of 90 to 100. *See* Pet’r Exs. 59&60 (psychoeducational evaluations).

percentile. Pet'r Ex. 60 pp 391&393. "Performance in this range [has] impact[ed Student] in the classroom by making it more difficult for him to move through tasks efficiently. Behaviorally speaking, understanding the speed at which [Student] processes information may help set him up for success in classroom and social situations." Pet'r Ex. 60 p 393. Due to Student's "slow processing speed, it takes him a longer time to process through a situation. He has a difficult time analyzing social situations and social cues." Pet. R. 17 p 142. In math class, it was noted that Student works at his own pace and does "not stay with the pace of the teacher." Pet'r Ex. 17 p 128. Student's low processing speed affected him socially, emotionally, behaviorally, and academically.

44. The IEP documentation and data documentation did not reflect how much Student's core academic teachers during his 7th or 8th grade school years understood the impact of Student's low processing speed on his academic and functional abilities. Only one core academic teacher, Student's social studies teacher (R.S.), attended October 28, 2021 and June 2, 2022 IEP meetings during the 2021-2022 school. Student's math teacher (A.S.) did attend the June 27, 2022 IEP meeting two days before the school year ended but she only taught Student part of his eighth-grade school year. Pet'r Ex. 13 p 84; Resp't Ex. p 55; Pet'r 14 p 99; Add'l Stip. 5. Likewise, at the beginning of his 8th grade school year, at the November 2, 2022 Annual Review IEP meeting, one of Student's social studies teacher (Co. attended but no academic teachers were involved until his new 8th grade math teacher (Bo.) attended the January/February 2023 IEP meeting, days before he was withdrawn. Stip. Ex. 20, p 113. Ms. M.S., his BST teacher, however, admitted that it took Student time to process academic information and that he needed "downtime." T vol 6 pp 968:12-18; 874:9-23.

45. Generally, though, WCPSS school records⁶ have documented that Student's "processing speed is significantly below his cognitive ability and negatively impact[ed] his access to the general curriculum." Pet'r Ex. 5 p 22 (end of 5th grade transition meeting for 6th grade); Pet'r Ex. 12 p 68 (November 17, 2020 IEP Annual Review); Pet'r Ex. 13 p 77 (October 28, 2021 IEP Annual Review). Notably though, the most recent WCPSS Psychoeducational Evaluation, dated March 18, 2022, failed to assess, or even discuss, Student's severe processing deficit. *See* Pet'r Ex. 59; *see also* Pet'r Ex. 14 p 92; Pet'r Ex. 16 p 117. The IEP minutes of November 2022 IEP minimized the impact of Student's severe processing deficits as something that could be addressed through accommodations but did not consider how his processing deficits affected him globally especially with respect to his emerging task avoidance and escapism behaviors. *See* Pet'r Ex. 16 p 117.

Functional, Social, Emotional, and Behavioral Deficits

46. Student has a long history of behavioral dysregulation at home and school. Pet's Ex. 60, p 386. Comparison of the teacher and Parent's (Mother) behavior rating scales evidenced that Student's behaviors at home were typically reported to be more significant than in the school setting. *See* Pet'r Ex. 59 pp 378-79 (*compare* parent's 14 Clinically Significant⁷ ratings to teacher's none); Pet'r Ex. 60 pp 393-394 (*compare* Parent's 19 Clinically Significant, 2 At-risk, and 1 Average ratings to teacher's 13 At-risk and 11 Average ratings). Even Student rated his behaviors more critically than his teachers. Pet'r Ex. 60 pp 394-395 (Clinically Significant in School Problems, Internalizing, Inattention/Hyperactivity, Emotional Symptoms Index, Personal Adjustment).

⁶ Petitioner's Exhibits 5, 9, 12, 49, 58, 60, 63 with dates ranging from November 21, 2019 through January 19, 2023 acknowledge Student's processing speed deficits. *See* pp. 22, 36, 68, 258, 358-60, 391-93, 398, 400, 410-11.

⁷ The Clinically Significant range suggests a high level of concern. Scores at the At-Risk range may identify a significant problem that may or may not be severe enough to require formal treatment or may identify the potential of developing a problem that needs careful monitoring. The ratings are compiled into several indexes and compared to a national average of students that are Student's age. Pet'r Ex. 60 p 393.

Although the WCPSS evaluator questioned the validity scales of the Parent’s ratings and stated that “[t]here should be several sources of corroboration for these ratings [the Parent’s] before drawing conclusions,” unlike the independent psychologist, the WCPSS evaluator did not ask Student to complete a Student Rating Scale. Pet’r Ex. 59 p 378. To address these maladaptive behaviors, functional goals and Behavior Intervention Plans (BIPs) were added to all Student’s Individualized Education Programs (IEPs).

47. Despite the variations in the teacher and the Parent’s rating scales, both Parties agreed that when emotionally dysregulated, Student can, and has, become physically and verbally aggressive. According to his BST teacher “[Student’s] outburst may contain yelling or slamming doors and often take 30 minutes to an hour to reregulate.” Pet’r Ex. 59 p 381. In elementary school, Student required a 1:1 aide due to his fighting and eloping behaviors. Pet’r Ex. 60 p 386.

48. As of January 2023, the IEP team continued to report that Student “has definite, predictable fears, has strong emotional outbursts when unable to complete a task, and struggles to interpret body language or facial expressions.” Pet’r Ex. 17 p 142 (Jan./Feb. 2023 IEP). The IEP team also noted that Student struggles to pay attention and looks away from tasks to notice all actions in the room.” *Id.* While the frequency and severity of Student’s physically aggressive behaviors abated during his 7th grade year, the more insidious, but just as academically and functionally detrimental, behaviors of task avoidance and escapism increased.

School History

49. Student attended School Middle School (“School”) for the 6th, 7th, and part of the 8th grade until he was unilaterally withdrawn by his Parents. School operates on a multi-track year-round calendar. Stip.15. Student was on the Track 4 schedule for both the 2021-2022 (7th grade) and 2022-2023 (8th grade) school years. *See* Pet’r Ex. 94 (2021-2022 Year-Round Calendar) and Stip. Ex. 41 (2022-2023 Year-Round Track 4 Calendar). As explained later in this Final Decision, comparison of the BST data with the nontraditional calendars was essential for: understanding Student’s self-removal patterns during each quarter of the two school years, calculating the amount of time out of the general education setting, and determining the compensatory education award.

School Attendance

50. Student has had good attendance at school historically with few out-of-school absences during middle school. Student’s out-of-school attendance patterns were found by WCPSS “not to represent chronic absenteeism, meaning there was no identified lack of appropriate education” that would explain his academic or functional regression. Pet’r Ex. 60 p 387 (IEE Psychoeducational); Pet’r Ex. 43, p 225. The statutory definition⁸ of chronic school absenteeism is immaterial to Student’s self-removals when he is present at school. *See* Resp’t Pro. Fin. Dec. pp 36 ¶ 136.

51. Student’s self-removals occur after Student has already been counted present at school and are sanctioned by implementation of Student’s BIPs and WCPSS’ BST programming. Moreover, under the IDEA, more than 10-days out of school placement for violations of the school code of conduct for disciplinary reasons, although not representative of chronic absenteeism, still represents a change of educational placement significant enough to trigger procedural safeguards

⁸ N.C. Gen. Stat. § 115C-378, the compulsory attendance law is not applicable.

that require a manifestation determination review and invoke due process rights.⁹

Disciplinary Actions

In-School and Out-of-School Suspensions

52. During the 2021-2022 school year, Student was suspended in-school and out. Student served lunch detention on August 6, 2021. On August 11, 2021, Student was suspended out-of-school for one day and in-school suspended for an additional day for physical aggression. He served two other in-school suspensions on August 25, 2021 for fighting. Pet'r Ex. 14 p 87. No other in-school or out-of-school suspensions were documented for the remainder of the 2021-2022 school year.

53. Although Respondent posits that Student's disciplinary infractions improved during his 8th grade year, Student had more disciplinary actions during the 2022-2023 school year. Student had two separate incidents on September 13 and 27, 2022 of short-term, out-of-school suspensions, totaling five school days. Pet'r Ex. 17 p 135. Both incidents were for physical aggression/fighting. *Id.* In addition to the five out-of-school suspensions, Student was assigned in-school suspension for an unknown reason on December 1, 2022 in the BST classroom from 10:10-3:00 pm. Pet'r Ex. 17 p 135 (January 2023 IEP present level does not list reason for ISS). He spent an additional five days in BST, also for unknown reasons, on December 2-8, 2022 during the second and third periods which were the elective classes of Health/PE and Biotech (45 minutes each). Pet'r Ex. 17 p 135 (January 2023 IEP present level does not list reasons for 5-day ISS). Based on his disciplinary history, Student's functional behavior had regressed in the 8th grade.

Academic Regression 7th and 8th Grade School Years

54. Student's grades also regressed. During his middle school years, Student's grades varied with earlier grades of A's and B's then gradually declining to C's, D's, and failing. *See* Pet'r Ex. 60¹⁰ p 387 and Pet'r Ex. 96 (2022-2023 Grade History). Prior to the 7th grade, Student had shown some work completion/task avoidance concerns, however, these work completion deficits became more obvious in November 2021, Fall semester of Student's 7th grade school year. T vol 6 pp 868:15-869:3 (T of M.M.S.). Ms. M.S. admitted that Student had issues with work completion deficits since November 2021. T vol 6 pp 838:7-11; 868:15-869:3. Student's grades continued to drop during the first semester of the 2022-2023 school year because he was not completing assignments. T vol 6 pp 837:21-838:6.

55. By the end of the first quarter of the 8th grade, Student's grades were: ELA¹¹ (62), Math (79), Science (72), and Social Studies (70). Pet'r Ex. 17 p 135. At that point, Student was missing many assignments: 3 of 17 in ELA, 10 of 20 in Math, 2 of 9 in Science, and 4 of 12 in Social Studies. *Id.* Despite his low grades and missing assignments in ELA and Math classes, the IEP team reported that he "does well" in those classes and this was a "strength" for him. Although exemption or modification of assignments and grading modifications were not accommodations on any of

⁹ *See* 20 U.S.C. § 1415(k).

¹⁰ Student's report cards and grade history for the 6th and 7th grades were not introduced into the record. Student's grade history was gleaned from evaluations and IEP documentation.

¹¹ English Language Arts (ELA)

Student's IEPs, in the 8th grade, eleven missing assignments and his "DreamBox"¹² assignment was exempted/excluded from his first quarter grades indicating his grades should have been lower than reported. Pet'r Ex. 17 p 128, *but see*, Respondent's Resp. to Req. for Clarifications pp 4-6 (agreeing that there were no accommodations on any IEP/BIP for exemptions, modified grading, or modified assignments).

56. Although these work completion issues were not new in the Fall of the 2022-2023 school year, during the hearing M.S. attributed this decline to Student's lack of motivation rather than his lack of ability, however, she did not express that sentiment at the January or February 2023 IEP meetings. T vol 5 pp 773:1-3; 868:15-869:3. Student's work completion problems progressively increased through the remainder of his 8th grade school at School. T vol 6 p 838:7-11 (T of M.S.).

Academic Ability in Reading, Math, and Written Expression

57. Student's Math and ELA grades were not a reflection of his reading and math abilities. His ELA grade may have been affected by his written expression deficits though. Based on Student's average cognitive ability with adequate support for his processing speed deficit (i.e., extended time, graphic organizers, teacher notes), Student should have been able to access grade level content. In March 2022 and August 2022, both WCPSS' and the Independent Psychoeducational Evaluations indicated that Student had average math and reading standard scores. Pet'r Ex. 59 p 376 (math composite SS 101; reading composite SS 96); Pet'r Ex. 60 pp 388, 390 (math composite SS 90; reading composite SS 97). His reading teacher reported that "[Student] struggles with anxious feelings in class more than any other Student." Pet'r Ex. 59 p 381. Student's anxiety and emotional status (angry or upset) factored in his off-task and avoidance behaviors for all academic coursework, but Student did not need math or reading goals in his IEPs to be able to access the general curriculum.

58. The March 2022 and August 2022 achievement testing disclosed that Student's written expression was an area of relative weakness, he had difficulty with sentence formulation skills (SS 86 and 85 low average) and essay composition (SS 82 low average) which impeded his ability to write the complex sentences required for higher grade level work. According to the independent psychologist, "[a]s children with ADHD grow older and writing expectations become more complex, it is common to see difficulties in this area become more pronounced." Pet'r Ex. 60 pp 388-389. Consistent with this, Student's writing deficits became more apparent during his 7th and 8th grade school years, necessitating the need for additional specially designed instruction in written expression.

59. In sum, Student is an intelligent young man who has struggled historically with emotional regulation and aggressive responses to stimuli when dysregulated. In the 7th and 8th grades, Student's physical aggressive behaviors shifted to predominantly task avoidance behaviors; he was still being suspended for violations of the code of Student conduct; and his academic achievement regressed.

¹² "DreamBox is a progress monitoring tool used in Wake County to measure a student's progress in math." Pet'r Ex. 59 p 372.

Autism and Behavior Support Program (AST/BST Program or BST Program)

60. During both his 7th and 8th grade school years, Student was on the case load of the Behavior Support Program (BST classroom) at School. At the beginning of his 7th grade school year, the BST classroom was separate from the Autism Support Classroom (AST). Because of staffing issues, the autism and behavior support classrooms were combined in November 2021 (then became known as the AST/BST classroom¹³) of his 7th grade year and all his 8th grade school year. T vol 5 pp 787:14-18; vol 6 pp 847:1-8; 853:6-22 (T of M.S.). Prior to November 2021, each BST and AST teacher had 8-9 Students on their caseload with one assistant. T vol 6 pp 853:18-854:8. From November 2021 until March 2022, the combined AST/BST classroom had 14-16 Students overall with one BST teacher and two assistants. T vol 6 pp 847:1-855:4.

61. Because Student had a BIP and needed intensive social/behavioral/emotional support, he was added to the AST/BST caseload. Through the AST/BST Program (hereafter “BST”) Student’s behavioral goals and BIPs were supposed to be implemented and progress monitored. For administrative convenience, all Student’s specially designed instruction in all his IEPs was implemented in the BST classroom during the Social Emotional Skills (SES) instruction provided to all students in his grade on the BST caseload. *See* Resp’t Ex. 20 p 135. The SES instruction was not individualized to Student’s unique needs. Student’s BIP behavior intervention strategies were also based on the BST Program’s strategies, not his individualized needs. There was no evidence proffered that the BST Program or its curriculum was even scientifically, researched based.

62. The purpose of the WCPSS’ Behavior Support Program is to assist Students with severe social, behavioral, and/or emotional needs in developing socially acceptable, age-appropriate behaviors. Resp’t Ex. 20, p 92. The “Autism and Behavior Support Programming Manual” (“BST Manual”) dictates the responsibilities of the BST staff, both teachers and instructional assistants, and the implementation procedures for fidelity of the programming. *See* Resp’t’ Ex. 20 (June 23, 2021 ed. of 80 pages with links to forms, hard copies were not included); T vol 6 p 1016:2-10 (T of Seadore). As previously mentioned, Respondent’s witness, Lauren Seadore, was part of the team that created and drafted the BST Manual. T vol 6 pp 1015:21-1016:1. Program fidelity checks would have been done by a Behavior Specialist like Ashlie Blanchone. The Behavioral Specialist ensures the quality of BST instruction and programming. Resp’t Ex. 20 p 97. Based on their involvement with the BST Program and knowledge of the BST Manual both Seadore and Blanchone would have known that “every student [including Student] should have an up-to-date FBA and BIP” and the BIP should be reviewed “at least every quarter.” Resp’t Ex. 20 p 103 (emphasis in original).

63. The BST Program is supposed to be data driven and BST teachers, including all of Student’s, had to “proactively” collect data and maintain documentation of this data. Resp’t Ex. 20 p 128. All the BST staff at School should have known these requirements because they are provided with a digital copy of the manual at the beginning of each school year and receive training in early September and quarterly professional development thereafter. T vol 6 pp 1016:18-1017:18 (T of Seadore).

¹³ The terms BST classroom and AST/BST classroom were used interchangeably throughout the hearing and exhibits.

The overall purpose of the BST Program is:

to provide students who have social emotional skill deficits with specially designed instruction in hopes of increasing positive outcomes for them, such as increasing attendance, reducing suspension. But overall, we want to increase those social emotional skills and be able to generalize those into the general education setting.

T vol 6 p 1017:6-13 (T of Seadore).

BST Program Interventions

64. The BST Program has numerous interventions designed to help students manage their behavior so that they can access the general education curriculum. The “self-time-out” (STO) intervention or “self-removal” is at issue in this case. Petitioners’ main complaint was about the amount of time Student spent in the BST classroom. The most “problematic behavior” was that Student was away from the general curriculum and his nondisabled peers. T vol 4 p 524:19-22 (T of Holmes); *see also*, T vol 1 pp 172:19-173:2 (T of Grammer).

Escalation of Task Avoidance and Escapism Behaviors

Self-Removal from Academic and Nonacademic Activities

65. Student was not able to generalize strategies that were taught in the BST room in academic and nonacademic regular education settings. T vol 3 p 354:17-19. Instead, Student would leave the regular classroom when agitated or overwhelmed. T vol 3 pp 279:15-280. He also left when he was overstimulated by certain classroom scenarios. T vol 3 p 303:12-20. Student struggled to apply calming strategies in the classroom environment and sought sanctuary in the BST classroom. T vol 3 pp 301:12-302:7. Student would even sometimes leave the general education classroom when he did not need to go to the BST room. T vol 3 p 317:11-15 (T of Student).

66. Student testified that he went to the BST classroom every day and his testimony was not refuted by his BST teachers G. and J., who did not testify. The documentary evidence corroborates his testimony. Even M.S., his BST teacher, conceded that from November 2021 through March 2022 and from June 2022 through February 2, 2023, Student went to the BST classroom nearly every day, if not every day. T vol 6 pp 842:3-14, 843:2-6, 844; 903:5-6.

Lunch

67. In addition to leaving his academic general curriculum, Student self-removed from lunch, a nonacademic activity. Student went to BST room at lunch due to incidents and not being able to sit near friends; as well as perceived and actual name calling/harassment from peers, which made his emotions stronger and made coping in the crowded environment more challenging for him. T vol 3 pp 298:12-299:9. Student described how, “the cafeteria is very soft spot for me. It was the place that I was picked on, I would say the most, so it usually resulted in me being told to move. . .” T vol 3 p 299:17-20. According to M.S., not only did Student escape from his nondisabled peers during lunch but she worked on Student’s goals during lunch and did most of the IEP progress monitoring during the lunch period. T vol 5 pp 786:10-787:4.

68. Respondent asserts that his lunch time removals to the BST room were harmless because they were necessary for managing his sensory deficits due to the noisy crowded cafeteria conditions. Also, Respondent contends that lunch was not an “academic or instructional period.” While lunchroom attendance is not an academic issue, Student’s ability to regulate his maladaptive behaviors and appropriately integrate with his nondisabled peers in a social setting at lunch or in any other nonacademic school activities (hallway transitions) was a targeted functional skill in both his IEPs and BIPs. Moreover, Respondent’s position is inconsistent with its own BST Manual which recognizes that students should not be staying in the BST room for lunch or because of a substitute teacher, substitute teachers were a known trigger.

69. Misuse of the BST for lunch was so significant to the drafters of the BST Manual that they wrote in red bold letters:

***If a student is staying in the AST/BST room for lunch or for the presence of a substitute teacher, this should be supported by data that is documented on the IEP in the Present Level of Academic and Functional Performance (PLAAFP) and in the service delivery.**

Interventions should be put into place and instruction should be delivered in order to move the student toward consistent participation in their scheduled setting. Data should be collected to determine if interventions are effectively supporting the student’s transition to the scheduled setting.

Resp’t Ex. 20 p 100 (bold and red letters in original).

70. While the Parties dispute the harm caused by Student going to the BST room for lunch. It is undisputed that Student is a “child with a disability” as that phrase is defined in Individuals with Disabilities Education Act of 2004 (Stip. 12) and entitled to appropriate educational programming to address the adverse manifestations of his disabilities, whatever their nature and wherever they manifested, so he could access the general curriculum and his nondisabled peers. Interventions should have been put into place and instruction should be delivered in order to move Student toward consistent participation in his scheduled setting. Student’s lunchroom attendance in the BST classroom was inappropriate when his least restrictive environment was general education and there were other ways to help Student decompress. T vol 4 p 506:2-10 (T of Holmes); *accord* T vol 1 pp 165:21-25; 166:1-20 (T of Grammer) *and* T vol 4 p 416:18-21 (T of Ohler).

FBA and BIP Review

71. The BST Manual also explains the purposes and correct implementation of a FBA and BIP. *Id.* pp 103-104. According to the BST Manual, for students on the BST caseload, the IEP team must:

convene a minimum of once per quarter to review the BIP for any student with a BIP. However, if there is a marked increase/change in the target behavior, your team should reconvene **as often as necessary** to review progress monitoring data on the student’s response to interventions and the Student’s behaviors.

Resp’t Ex 20 p 103 (underline and bold in original) *see also*, p 101 (stating “The BIP should be reviewed **no less than once a quarter** unless the student’s behaviors and data indicate more frequent

modifications to the BIP.”) (emphasis in original); *and* T vol 6 pp 1034:15-1035:4 (T of Seadore stating BIP needed to reviewed every quarter). Moreover, when data supports mastery of a replacement behavior but there are other behaviors present, the IEP team should request a Functional Behavior Assessment (FBA)¹⁴ and update the BIP with a current relevant replacement behavior. Resp’t Ex 20 p 120. The BST Manual requires that the FBA be completed before the BIP can be revised with the new replacement behavior. T vol 6 pp 1045:22-1047: 9 (T of Seadore).

BST Teacher Support in the General Education Classroom

72. Within each BST classroom, the behavior support teacher provides direct and indirect instruction and support to students with social/ behavioral/emotional and academic deficits to help them access their least restrictive environment. Resp’t Ex. 20 pp 92 & 96. The BST teacher wears many hats and is supposed to consult with regular education teachers, conference/consult with student, conduct curriculum assistance, teach and model social skills, supervise/support instruction during transitions, provide in-class support, provide short-term stabilization, and act as school-wide behavior consultant. Resp’t Ex. 20 pp 99-100. The BST teacher can also provide academic recovery in the BST classroom if needed, but this “should never supersede the primary goals of the class, which is to provide social skills instruction and working toward progress on social emotional annual goals and the replacement behavior in the Behavior Intervention Plan.” Resp’t Ex. 20 p 99.

Mandatory Proactive Data Collection

73. One of the most important responsibilities of the BST staff is that they are supposed to “proactively” collect data¹⁵ on their students’ performance for progress monitoring of the IEP goals and BIPs. T vol 5 p 802:17-19; vol 6 pp 851:15-853:5 (T of M.M.S.). Behavioral data is collected from various sources including sign-in sheets when the Student enters the BST classroom, point sheets, self-reflection sheets, stabilization plans, Conflict-Cycle worksheets, processing worksheets required for period stabilization, etc. Resp’t Ex. 20 p 128-129.

74. “All BST classrooms are required to use the **Classroom Sign-In Sheet (*WS 2 Example)** provided by the Behavior Specialist Team. **BSTs and ASTs will be required to maintain a paper form of the sign-in sheet that can be viewed at any time.**” Resp’t Ex. 20 p 125 (emphasis in original). “Every” student’s visit to the BST classroom for STO or other stabilization requires the BST teacher to follow the Period Stabilization (PS) procedures which in turn requires the teacher to complete the “sign-in” sheet and the student to complete a “Processing Worksheet.” Resp’t Ex. 20 p 125. This sign-in data is supposed to be maintained in the student’s “Behavioral Portfolio” (“Student Portfolio”) which “can be viewed at any time.” Resp’t Ex. 20 p 125. Moreover, “[m]odifying or removing IEP goals and/or target behavior(s) and/or interventions on the BIP should be based on data derived from progress monitoring. Any data should be placed in the student’s portfolio.” Resp’t Ex. 20 p 129.

¹⁴ Data for an initial FBA for prospective AST/BST students must be collected for 3 weeks. Resp’t Ex. 20 p 121.

¹⁵ The BST data collection in this case consisted of: BST Room Check-In (Sign-In Sheets), August 2021 to March 2022 (Resp’t Ex. 21); BST Notes of Logs 03/15/22, 03/23/22 (Resp’t Ex. 22); AST/BST Sign-In Sheets 2022-2023 (Resp’t Ex. 26 and Pet’r Ex. 86A); RAMS¹⁵ Daily Point Sheets 07/29/22-08/31/22 (Resp’t Ex 27 and Pet’r Ex. 85); RAMS Daily Point Sheets and Homework Sheets from 06/06/22 to 01/31/23 (Pet’r Ex. 90); Monthly Progress Calendars June to September 2022 (Resp’t Ex. 28); Daily Check-In Sheet for Transitions 08/01/22 to 09/28/22 (Resp’t Ex. 29); and Daily Progress Monitoring Sheets October 2022 to January 2023 (Resp’t Ex. 3 and Pet’r Ex. 91).

75. Although IEP data collection was “[o]ne of the main purposes” (T vol 6 p 897:9-19) of the BST teacher and the data collection in this case was voluminous, much of it was not properly documented or analyzed. The BST data on Student should have been readily available to all the IEP/BIP teams and was information that the IEP team should have listed in their Prior Written Notices (PWN). The Prior Written Notices require the IEP team to identify the “source of relevant information” and describe “each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action(s).”¹⁶ All of the PWNs¹⁷ drafted by Student’s BST Teachers J. and M.S. failed to contain the source of information used in the decision-making process. An extensive review of the BST data demonstrated disturbing patterns in Student’s behaviors as discussed below.

SEVENTH GRADE 2021-2022 SCHOOL YEAR

76. Student had in-person instruction in the 7th grade during the 2021-2022 school year. Add’l Stip. 3. As a Track 4 Student, his school year started on August 2, 2021 and ended June 29, 2022¹⁸. Pet’r Ex. 94 (2021-22 Year-Round School Calendar). A review of School’s nontraditional year-round calendars was necessary to understand the calculations, discussed later, of the time Student missed from the general curriculum. During the 2021-22 school year, Student was tracked out of school from October 4-October 22, December 23-January 21, and March 28-April 15 (track-out periods). Add’l Stip. 3. “Tracked out” periods vary for each of the 4 different tracks and each track-out period lasts approximately 3 weeks. *See* Pet’r Ex. 94; Stip. Ex. 41.

77. In a regular school calendar, the 4 grading periods are every 9 weeks, but in the year-round calendar, the track-out periods delineate the beginning and ending of the quarter grading periods. For Student’s Track 4, during the 2021-2022 school year his first quarter started on August 2 and ended on September 30, 2021; second quarter started October 25, 2021 and ended December 22, 2021; third quarter started January 24, 2022 and ended March 25, 2022; and fourth quarter started April 18, 2022 and ended June 29, 2022. Pet’r Ex. 94; *see also* Appendixes A&B.

78. Student’s schedule during the 2021-22 school year included eight periods, as follows (times and teachers in parentheses):

1st Period: 30 minutes (8:15-8:50am) – Ramp Up/Social Skills (J., M.S., & G.)

2nd Period: 56¹⁹ minutes (8:54-9:50am) – Social Studies (R.S.)

3rd Period: 55 minutes (9:52-10:47am) – Science (E.)

¹⁶ *But see*, Pet. Ex. 22 p 164 (11/17/2020 PWN drafted by J. “Source of Relevant Information” not completed); Pet. Ex. 25 p 171 (10/28/2021 PWN drafted by J. “Source of Relevant Information” not completed); Pet. Ex. 27 p 176 (06/02/2022 PWN drafted by M.S. “Source of Relevant Information” not completed); Pet. Ex. 28 p 178 (06/27/2022 drafted by M.S. PWN “Source of Relevant Information” not completed); *and*, Pet. Ex. 29 p 180 (06/27/2022 drafted by M.S. PWN “Source of Relevant Information” not completed); *but note*, once the Parents started questioning the appropriateness of Student’s educational programming and involved an advocate (Alexandria Bergman), subsequent PWNs prepared by other WCPSS staff did reference this data. *See* Pet. Ex. 30 p 184; p 185 (11/02/2022 PWN prepared by M.S. stating reviewed existing data); Pet Ex. 31 p 191 (02/02/2023 PWN prepared by A.C. stating “review of education history/records, review of existing data, and review of IEEs, AT, Pragmatic Rating Scale, etc.”).

¹⁷ The Parties stipulated that Petitioners received a Prior written Notice from the October 1, 2021 IEP meeting (Stip. 18) but a copy of that PWN was not proffered for admission in the record during the hearing.

¹⁸ Track 1, 2, & 3 started school on July 8, 2021. The school year for Track 1 ended on June 6, 2022 and Tracks 2, 3, & 4 ended on June 29, 2022. Pet’r Ex. 94.

¹⁹ For purposes of the calculation of missing general education classroom, all core classes are 55 minutes, electives 45 minutes, and lunch 30 minutes.

4th Period: 45 minutes (10:50-11:35am)– Spanish (Ei.)
5th Period: 30 minutes (11:38 am-12:08pm)– Lunch
6th Period: 45 minutes (12:11-12:56pm)– PE (H.)
7th Period: 55 minutes (1:00-1:55pm) – Math (A.S.)
8th Period: 56 minutes (1:58-2:54pm)– ELA (C.)

Add'l Stip. 2.

2021-2022 Individualized Education Plans (IEPs) and Behavior Intervention Plans (BIPs)

November 17, 2020 Individual Education Program (November 2020 IEP)

79. The operative IEP for Student's 7th grade year was the November 17, 2020 IEP (November 2020 IEP), duration dates of November 18, 2020 to November 16, 2021, developed during the 6th grade. Pet'r Ex. 12 p 66. Although not contested, there is some confusion in the IEP records about Student's area of eligibility, in the November 2020 IEP and all subsequent IEPs, his category was Other Health Impaired (OHI).²⁰ On the present level of academic and functional performance (PLAAFP), all Student's teachers reported that he did "a very good job with participating in their classes"; "showed on task tendencies most of the time"; and "completed most of the tasks assigned to him." Pet'r Ex 12 p 68.

The November 2020 IEP contained no academic goals and one functional goal which read:

Given a situation that cause [sic] Student to become anxious or upset, Student will use learned strategies to remain calm, seek out a preferred adult to speak with, given no more than 2 teacher prompts on 4 out of 5 trials.

Pet'r Ex. 12 p 71.

80. The specially designed instruction (SDI) service delivery for the social emotional skills (SES) instruction was 30 minutes 4 times per week in the special education classroom. *Id.* This SES instruction service delivery in the special education classroom stayed the same for all the subsequent IEPs. Some additional SES instruction in the regular education setting was added later. As previously stated, neither the SES instruction nor its service delivery were individualized for Student's unique needs. For administrative convenience, it was based on what the BST Program offered.

81. The supplemental aids/services/accommodation/modifications used for Student to access the general curriculum were small group testing of 15 or less students, marks in test book (not for online assignments) and testing in a small group. Pet'r Ex. 12 pp 72-73. The IEP had the same accommodations for State testing and district-wide testing. Pet'r Ex. 12 p 73. Although during his 7th grade and especially his 8th grade, Student was not penalized for failing to complete assignments, neither this IEP nor any subsequent IEPs contained the accommodations of: exemption from testing or assignment, modified grading, modified coursework, removal from the lunchroom or classes other

²⁰ The IEP does not list his eligibility category but at the October 1, 2021 IEP meeting, held to discuss reevaluations, the IEP team indicated his "current" eligibility category was OHI and that they would evaluate to determine if he met criteria for Autism and Specific Learning Disability. Pet'r Ex. 43 p 226 (Meeting Minutes); *but see*, Stipulation 16 (stating "Prior to September 2021, Student was eligible for special education services under the category of Emotional Disability/Disturbance").

than to “seek out a preferred adult to speak with.” Student’s least restrictive environment (LRE) was the general education setting for his academic and nonacademic activities (lunch). The LRE did not change in any of Student’s subsequent IEPs.

Social Emotional Skills Instruction (SES) Implementation

82. Because of staff turnover at School during the 7th grade, Student had three different BST teachers at various times and occasionally an occupational therapist (OT) who were supposed to implement his 30 minutes of SES instruction four times a week during his first period “Ramp Up” class. The various dates of service, names of the instructors, and number/hours of SES sessions per instructor are as follows:

August 2, 2021 – November 23, 2021	J. (54 sessions, 27 hrs. less 4 days out-of-school suspension= 50 sessions, 25 hrs.) Pet’r Ex. 94.
November 29, 2021 – March 25, 2022	M.S. (51 sessions 25.5 hrs.) T vol 5 p 771:7-9.
March 26, 2021 – May 13, 2022	G. (33 sessions 16.5 hrs. excluding Thursdays from May12-June 23) Resp’t Ex. 13 p 55.
May 12, 19, 26, June 3, 9, 16, 23, 2022	Sey. (OT) (Thursdays for 7 weeks)
May 14, 2022-June 29, 2022	No instructor (21 sessions 6.5 hrs., 27 total minus 6 sessions provided by OT)

83. Student creditably testified that, during the 7th grade, he received no SES instruction from BST teachers J. and G. He also credibly described about the dysfunctionality of the BST classroom and how the BST assistants were not always there to assist because of staff turnover or lack of training and there was “a decent amount of time when there was no assistant.” T vol 3 p 330:4-5. Moreover, according to Student even when there was an assistant, they were getting “sick,” were “awkward” with the programming, “didn’t know what to do” and “it was kinda very on and off.” T vol 3 pp 329:18-331:1. For this school year, WCPSS failed to credibly refute Student’s testimony as BST teachers J. and G. and none of the assistants testified. M.S.’ observations from another room were not reliable; and no documentation was admitted as evidence of their implementation of SES during the time they purportedly taught Student in the BST classroom.

84. The evidence proved that WCPSS materially failed to implement Student’s specially designed instruction (30 minutes 4 times a week) as required by the service delivery in his IEP during the 7th grade in the amount of 104 sessions (J. 50; G. 33, no instructor 21), a total of 52 hours of social skills instruction for the 7th grade. From this amount, 4 sessions (2 hrs.) have been deducted for the 4 days of the 5-day out-of-school suspension in the beginning of this school year. WCPSS denied Student a free and appropriate public education because the BST staff failed to materially implement the service delivery of SES instruction in the BST classroom during his 7th grade school year.

85. Moreover, the 58 sessions (29 hours) of SES implemented by M.S. and Sey. were inappropriately implemented because the SES instruction was not individualized for Student’s unique needs but rather provided for the harmonious interests of all the SES Students and for administrative convenience. As a result, Student is entitled to an additional 29 hours of

compensatory SES for this denial of FAPE. In sum, WCPSS materially failed to appropriately implement 81 hours of SES during the 2021-2022 school year.

September 21, 2021 Functional Behavior Assessment (September 2021 FBA)

86. On September 21, 2021, Student's IEP team, including Father and Mother, met to conduct an Functional Behavior Assessment (FBA) and develop Student's September 21, 2021 Behavior Intervention Plan (September 2021 BIP). Petitioners received a Prior Written Notice from this meeting. Stip. 17. After this meeting, despite Student's shifting behaviors, another FBA was not completed until over a year later sometime in December 2022²¹ and the FBA was not reviewed by the IEP team until January 19, 2023, 1 year and 4 months after the initial September 2021 FBA. Pet'r Ex. 66 (FBA); Pet'r Ex. 17, pp 134-135; *see also*, T vol 1 p 58:5-8 (T of Mother). WCPSS offered no cogent or rational explanation for this significant delay and Student was educationally harmed as evidenced by his lack of academic and functional progress.

September 21, 2021 Behavior Intervention Plan (September 2021 BIP)

87. When Student transitioned to middle school, he did not have off-task behavior significant enough to warrant a behavior goal or target replacement behavior intervention. *See* Pet'r Ex. 5 p 22. This progressively changed during his 7th and 8th grade school years. During the 2021-22 school year (7th grade), Student had a BIP in place. Stip. Ex 2; Pet'r Ex 6. This BIP was based on the September 2021 FBA. The behaviors identified as concerns were "becoming angry, frustrated, or upset." Stip. Ex 2; Pet'r Ex 6. Consistent with the behavior goal in the September 2021 IEP, the targeted replacement behavior was "Student will seek out a preferred adult to speak with." Stip. Ex. 2; Pet'r Ex. 6. The following were listed as steps teachers/staff would take when Student became angry, frustrated, or upset:

1. Teachers will give Student a verbal reminder to go to the BST staff when he shows signs of being angry, frustrated, or upset.
2. *Teachers will allow Student to remove himself* from the classroom setting when he feels that he needs to speak with a preferred adult.
3. BST staff will provide closer proximity to Student during transitions and times of the day that are less structured.
4. Staff will give advanced notification to BST staff, when possible, of absences to allow for proactive teaching opportunity when a substitute will be present.
5. *When Student needs to remove himself from class, BST staff will process through the current situation and will get Student back to his class as soon as possible.*
6. Teachers will communicate with Student when consequences will be given to other Students.

Stip. Ex 2/Pet'r Ex 6 (italics added, name redacted).

²¹ The independent FBA was conducted by Bethany McKissick, Ph.D. Based on Petitioners' testimonies, they did not select this evaluator. T vol 1 p 60:13-23 (T of Mother); vol 4 pp 480:16-481:2 (T of Father); vol 5 pp 696:20-697:8. Mother believed the FBA was completed in November 2022, but based on the report this cannot be the case. T vol 1 p 59:1-5. The initiation and completion dates were not identified in Dr. McKissick's report, but she began the FBA with a review of records and interviews of Student's case manager/special educator in October 2022. Over the course of several months, Dr. McKissick observed Student for a total of 10.25 hours. Her last observation was December 19, 2022. Pet'r Ex. 66 pp 424-425. When WCPSS and Petitioners received this report is unknown, but, based on the evidence in the record, it was first reviewed by the IEP team at the January 19, 2023 IEP meeting. *See* Pet'r Ex. 17 pp 134-135.

88. The appropriateness of this BIP or the FBA are no longer at issue having been dismissed previously by dispositive motion. Moreover, implementation of Steps 1, 3, and 4 are not truly contested. However, the implementation of the September 2021 BIP is still a viable claim particularly with respect to the implementation of italicized Step 2 and 5, Student's self-removal from the regular education setting.

89. According to the BIP, with permission of his teachers, Student could remove himself from the general education classroom. Although not named²² such in this document, Student's "self-removal" was "self-time-out" (STO). Per the BIP, the BST staff was supposed to process the situation and get him "back to class as soon as possible." Pet'r Ex. 6. However, this BIP and all subsequent BIPs contained no time limitations on how long Student should remain in the BST classroom or any data collection requirements to monitor the use or appropriateness of this intervention.

Parents' September 21, 2021 Reevaluation Request

90. At the September 21, 2021 meeting, Student's Parents requested a reevaluation for Student and in response a Reevaluation Determination meeting was scheduled for October 1, 2021. Pet'r Ex. 43 p 224. Student's last Psychoeducational Evaluation (2019 Psychoeducational Evaluation) had been completed three years earlier in October/November 2019 while Student was in the 5th grade. Pet'r Ex. 58. Based on the 2019 Psychoeducational Evaluation, Student's academic achievement scores in reading (SS 94), math (SS 106), and written expression (SS 97) were in the average range with a relative weakness in reading comprehension (SS 89). Pet'r Ex 58 pp 360-361. His intelligence quotient (IQ) scores were in the average (SS 98) range but his processing speed²³ was in the very low average range (SS 77; 6th percentile). This low processing speed had a significant impact on his overall full-scale IQ scoring and suggested that strict time limits on written tasks may be difficult for Student Pet'r 58 pp 358-359, 366.

91. On behavior rating scales, Student's Mother reported more clinically significant ratings (7 items) than any of the other responder – Father (none); special education teacher (2 somatization and internalizing problems composite) and regular education teacher (none). Overall, based on the Parents' and teachers' rating scales, some of Student's behaviors had improved but he continued to have signs of anxiety-based physical complaints. In the 5th grade, the WCPSS school psychologist recommended the provision of SDI to teach Student about how his anxiety "affects the body and methods of reducing it during everyday life." Pet'r Ex. 58 p 366. There is no evidence that this occurred. Two years later, Dr. Ohler and Ms. Holmes made similar recommendations. *See* T vol 4 p 421:9-13 (T of Ohler); T vol 4 pp 519:2-520:20 (T of Holmes needed "for sure after December of 2021").

²² None of Student's IEPs, BIPs, Prior Written Notices, Meeting Minutes and/or other educational records of Student created during the 2021-2022 and 2022-2023 school years, defined the word "self-time-out" or "STO" or otherwise explained to the Parents about how "self-time-out" or "STO" would be implemented for Student. Other than in WCPSS' BST Manual, not provided to the Parents during IEP meetings, the word self-time-out is mentioned only on Pet'r Ex. 14 p 87 (June 27 2022 IEP Addendum); Pet'r 16 p 116 (Nov. 2022 IEP); Pet'r Ex. 85 p 504 (2021-2022 BST Sign-In Sheets).

²³ The Processing Speed Index (PSI) measures speed and accuracy of visual identification, decision making, and decision implementation. Performance on the PSI is related to visual scanning, visual discrimination, short-term visual memory, visual-motor coordination, and concentration. The PSI assessed Student's ability to rapidly identify, register, and implement decisions about visual stimuli. Pet'r Ex. 58 p 359.

***October 1, 2021 Reevaluation Determination Meeting
(October 2021 Reevaluation Meeting)***

92. At the end of the first quarter on October 1, 2021, Student's IEP team, including Father and Mother, met to consider conducting a reevaluation (October 2021 Reevaluation Meeting) and agreed on the types of evaluations/assessments. Petitioners received a Prior Written Notice from this meeting. Stip.18. At the Reevaluation Meeting, Student's Parents expressed their concerns about Student's academic process particularly in reading. The current "iReady" data (taken 09/21/21) indicated that Student was at a sixth-grade level in literature comprehension and fifth-grade level in vocabulary. Pet'r Ex. 43 p 225. His Parents were concerned that Student's reading comprehension was the reason for his declining grades. Student had received "As" and "Bs" during his sixth-grade year. During the first quarter of the 7th grade, his grades particularly dropped in Math, Science and ELA to "C's," but his Computer, PE, and Social Studies remained "As" and a "B."

93. Also at the October 2021 Reevaluation Meeting, Student's Parents "reported that they were very concerned about the amount of time Student has been removed from the LRE [least restrictive environment] due to physically acting out episodes." Pet'r Ex. 43 p 225. However, during the first quarter, according to the information given to the Parents by the IEP team, Student had only two reported incidents requiring disciplinary action and removal from the general education setting. Pet'r Ex. 43 p 225. At that time, the Parents did not know the extent that Student was being allowed to use self-time-out to escape from the general education classes. Up to October 1, 2021, Student signed-in the BST classroom 28 times. None of these sign-ins were for physically acting out episodes, and only two were for testing accommodations. *See* Stip. Ex. 26 pp 180-191; *but compare*, Exhibit A attached to Resp't Fin. Dec. (Student missed only 7 classes for STO and 5 classes for test accommodations). Mother also questioned the teachers' reports that he was an active participant in class and putting forth good effort in the work that was assigned because these reports did not match what was happening at home where he would become combative about task completion. Pet'r Ex. 43 p 225. These teacher reports also did not match what was actually happening in the regular education classrooms either.

94. In response to the Parent's requests, at the October 1, 2021 meeting, the IEP team properly decided to conduct a comprehensive reevaluation including a psychoeducational evaluation; review of exiting data (attendance, grades/work samples, local and State assessments); sensory processing evaluation; motor evaluation; medical evaluation; speech-language/communication evaluation; adaptive behavior evaluation; social/developmental history; health screening; observations, behavior assessments; and education history/records review. *See* Pet'r Ex. 43 (meeting minutes; the PWN was not introduced into evidence).

Delay In Reevaluation Completion

95. Although the decision to reevaluate was appropriate, the seven-month (223 days) delay in the reevaluation process was not. The reevaluation process was not completed until sometime in March 2022. The Occupational Therapy and Psychoeducational Evaluations did not even begin until February 2, 2022, but once began they were completed within 30 days on March 4 and 18, 2022 respectively. Pet'r Ex. 59 (March 18, 2022) & Stip. Ex. 27 p 166 (March 4, 2022). Even though these evaluations were completed in March 2022, the reevaluation results were not reviewed by the IEP team until May 13, 2022 and the IEP was not revised until June 2, 2022, at the end of Student's 7th grade school year. Stip. 20; *see also* Pet'r Ex. 27 ("PWN"); *see* Pet'r Ex. 94 (4th quarter began April 18, 2022).

96. The 2021-2022 school year ended on June 29, 2022, two days after the BIP was revised on June 27, 2022 and too late for implementation of the June 2022 BIP in the 7th grade. Pet'r Ex. 14. WCPSS failed to provide a cogent and rational explanation for its failure to timely review its own reevaluation results and revise Student's IEPs and BIPs. T vol 4 p 536:13-15 (T of Holmes). Later, WCPSS also inappropriately delayed review of the independent evaluations.

October 28, 2021 Annual Review IEP (Duration Dates 10/29/2021 to 10/27/2022)

97. Before completion of the reevaluations, on October 28, 2021, Student's IEP team, including Father and Mother, met to conduct an annual review of his IEP and developed a new IEP with duration dates of 10/29/2021 to 10/27/2022 (October 2021 IEP). The appropriateness of this IEP is not at issue, but its implementation is. Petitioners received a Prior Written Notice from this meeting. Stip. 19.

98. At this meeting, Student's Parents brought an advocate (Alexandria Bergman), and the Parents expressed the following concerns which were recorded in the October 2021 IEP as follows:

1. We believe that Student has not undergone a full comprehensive academic re-evaluation since kindergarten.
2. All previous academic testing indicates below average accomplishment.
3. Student is significantly behind grade level in reading comprehension and processing.
4. Student's issues with literacy affect his performance in ALL other subjects.
5. Student is being removed from LRE as punishment due to hist [sic] frustration and anxiety towards peers being allowed to escalate to physical confrontation and then not being given appropriate classwork to remain current in his classes.
6. Student is not allowed to practice behavior mitigation techniques such as leaving class for a quiet environment.
7. Student has no tolerance to himself, or his property being physically touched leading to increases frustration and anxiety, causing negative impact on his social status.
8. Student is being required to use special education transport while not appropriate.
9. Student does not have good time management or organizational skills.
10. Previous IEPs mention strategies that "are working" but fail to mention what those strategies are comprised of.
11. Prior IEPs mention data collection by teachers, but data has not been shared.
12. RMS has historically been noted as having a high incident of fighting in several prior years.

Pet'r Ex. 13 p 76.

98. Based on Petitioners' concerns, as of October 28, 2021, Petitioners thought that WCPSS staff were removing Student from the general curriculum because of his behaviors towards his peers and he was not given general education assignments in the BST classroom so he could keep current with his classwork. However, Petitioners did not and could not have known the extent to which WCPSS were enabling Student to abscond from the general education setting to the BST classroom. This was because the BST staff was not appropriately collecting the data that was

supposed to be “**readily accessible at any time**” and “**available upon request.**” Resp’t Ex. 20 p 128 (emphasis in original). Nor did Petitioners know the BST Manual mandated the collection of this data, that they had repeatedly asked for, the maintenance of the data in Student’s Student Portfolio, and that “it can be viewed at any time.” Resp’t Ex. 20 p 125.

99. With respect to the Parent’s concerns about Student’s academics and while the reevaluations were still pending. The IEP team developed two social/emotional goals each with two objectives. The goals were:

1. Given a frustrating situation, (ie [sic] nonpreferred tasks, substitute, undesired peer behavior) Student will self-advocate for himself by seeking out the [sic] a trusted adult to speak of learned strategies he will need to utilize to be successful given no more than 2 teacher prompts on 4 out of 5 trials.
2. When given a situation of conflict in any school setting, Student will independently perform non-conflict provoking behavior (e.g., walking away, ignoring, seek assistance), improving conflict avoidance skills from 0/10 opportunities in ten consecutive trials to 8/10 opportunities in ten consecutive trials.

Pet’r Ex. 13 p 80. The “seeking out a trusted adult” portion of this goal facilitated Student’s self-removal from the general education setting.

100. The first goal was supposed to be progress monitored with a “log of teacher observations” and “anecdotal records”; the second goal was to be monitored by “anecdotal records” and “data sheets.” Pet’r Ex. 13 p 80. Appropriate progress monitoring is essential for developing appropriate present levels of academic and functional performance from which the social emotional annual goals are derived. Resp’t Ex. 20 p 121. The monitoring data drives the behavioral programming and should be ongoing and proactive to determine if there are changes in behaviors which need to be addressed by the IEP team. Resp’t Ex. 20 p 128.

101. M.S. admitted that during the 7th grade and part of the 8th grade, she improperly monitored Student’s social/educational goals. This continued until October 26, 2022, after the Principal instructed M.S., who was on medical leave at the time, to revise her progress monitoring because it was inappropriate. T vol 6 p 886:10-23. Throughout the 7th and part of the 8th grade school year, M.S. had improperly progress monitored Student’s goals. *See* Pet’r Ex. 91. Even after being instructed how to properly monitor his goals, M.S.’ data sheets still tracked other anecdotal behaviors, not those listed on the IEP goals. *See* Pet’r Ex. 91.

102. Per the BST Manual, every single time, Student left²⁴ his assigned classes or lunch for Period Stabilization (PS) because of a behavioral disturbance or emotional dysregulation, there should have been sign-in logs and Processing Worksheets completed. Resp’t Ex. 20 p 137. This is consistent with the September 2021 BIP which stated that the “BST staff will process through the current situation and will get Student back to class as soon as possible.” Pet’r Ex. 6 p 25. According to the BST Manual, in addition to the data collection of the IEP goals, the BST teachers were supposed to collect data on fly-by instruction, drop-in instruction, and in-class support instruction.²⁵ Resp’t Ex. 20 p 128. Sign-in logs were not maintained with fidelity nor was there any written

²⁴ Removal from the classroom for behavioral/emotional dysregulation includes when the student walks out of the room with the intention of going to the BST classroom. Resp’t Ex 20 p 137.

²⁵ *See* definitions in Resp’t Ex. 20 p 128.

evidence that the BST staff consistently “processed” incidents with Student.

103. As in his previous IEPs and all subsequent ones, Student’s least restrictive environment was the general education classroom with pull-out services in social emotional skills instruction only for 30 minutes, 4 times per week. Stip. Ex 7 p 6. Instead of implementing that setting, Student was routinely being removed to a more restrictive setting with no educational benefit. After the October 2021 IEP meeting, during the rest of the 2nd quarter and the 3rd quarter, Student’s self-removals increased.

104. Student’s October 28, 2021 IEP had the following accommodations for Career Technical Education, English Language Arts, Health, Math, Science, and Social Studies: Student marks answers in test booklet (not for online); separate setting for testing with no more than 15 Students; L[.M.] will have a safe place to go when he becomes angry, agitated, or anxious; graphic organizers for projects; and additional time for projects (48 hrs.). Stip. Ex. 7 pp 6-8.

105. The accommodations for State and district-wide testing in Math, Reading, and Science: Student marks answers in a test book and testing in a separate room with no more than 15 Students. Stip. Ex. 7 p 8. There were no other accommodations listed in the October 28, 2021 IEP. Stip. Ex. 7. These accommodations were supposed to enable Student to access the general education curriculum, instead, the “having a safe place” accommodation reduced his access. The October 28, 2021 IEP did not contain any related services.

Period from October 28, 2021 to June 2, 2022

106. No IEP documents were admitted into evidence for any IEP meeting held after the October 28, 2021 IEP until the June 2, 2022 IEP meeting. During that time, the reevaluations had been completed by March 18, 2022. WCPSS had not conducted another Functional Behavioral Assessment since the September 2021 FBA and did not conduct one during the interim period. Student’s BIP was not reviewed or revised during either the second or third quarters of his 7th grade school year. Pet’r Ex. 94 (3rd quarter October 25, 2021 to December 22, 2021). Without a new FBA, the BIP was finally reviewed two days before the end of the fourth quarter on June 27, 2022. Pet’r Ex. 94 (4th quarter ended June 29, 2022). WCPSS’ BST Manual requires that the IEP team reconvene to review the BIP at “a minimum, of once per quarter.” Resp’t Ex. 20 pp 103, 120 (underlining in original).

Pattern of Self-Removals From August 9, 2021 to May 13, 2022 (Data collection documentation kept for 121 of 177 school days)

107. Accurate calculation, to the extent possible based on the documentation, of the frequency and number of removals from general education setting is important for two reasons. First, the frequency of self-removals shows a pattern of escapism/avoidance behavior. Second, if Petitioners prevail, the amount of time out of the regular education setting is necessary to determine the amount of compensatory education. As requested, the Parties both submitted their own calculations of the number of self-removals during both school years. Pet’r Pro. Fin. Dec. pp 33-48; Resp’t Pro Fin. Dec. pp 34-38, Exhibit A (chart of removals). Both Parties objected to each one’s calculations of the time Student spent in the BST room. *See* Pet’r Objections (filed 08/09/2023) *and* Resp’t Objections (filed 08/09/2023). Not surprisingly, based on the state of the BST staff’s record keeping and the Parties objections to each other’s calculations, the Parties calculations did not align with each other.

108. In an attempt to reconcile these calculations, the Tribunal parsed through many educational records and juxtaposed the submissions from both Parties.²⁶ The educational records provided information about additional removals that the Parties' submissions did not, and the BST staff's data collection also did not report. The BST staff's inadequate record keeping necessitated this tedious endeavor as the exact number of removals should have been readily available, not just to the Tribunal but to all the IEP teams at every IEP/BIP meeting. *See Resp't Ex. 20 pp 46-48.* However, Tribunal's calculations are a close estimate of the time Student spent in the BST classroom away from the general curriculum and his nondisabled peers.

109. Using Respondent's Exhibit A from Respondent Proposed Final Decision as a starting point, Appendixes A and B attached to this Final Decision are copies of Respondent's Exhibit A including the addition of Petitioners' varying dates/times noted, additional dates and times of removals gleaned from other educational records, and commentary about the erroneous calculations. All disciplinary removals (in-school or out-of-school) and removals for testing accommodations have been deducted from the totals. Appendix A is the chart for the 2021-2022 school year and Appendix B represents the removals for the 2022-2023 school year. Appendixes A and B are referred to and incorporated wholly by reference in this Final Decision.

Limited Data Documentation of Removals

110. From the limited documentation available for the 2021-2022 school year (177 school days), which the record indicates was a total 121 school days from August 9, 2021 to March 25, 2022, Petitioner's calculation of the total regular education time missed amounted to 31 hours and 57 minutes.²⁷ *See attached Appendix A.*

111. Broken down by individual classes, the amount of time removed calculated by Petitioners and the frequency, based on Petitioners' Proposed Final Decision and Objections to Respondent's calculations, are as follows:

ELA	Math	Social Studies	Science	Spanish	PE	Ramp Up	Lunch	Total Time Missed
6 hours 23 min	8 hours 20 min	2 hours	2 hours 7 min	11 hours 28 min	1 hour 42 min	0	0	31 hours 57 min
28x	30x	9x	10x	36x	9x	0	0	116x

See Appendix A compared to Pet'r Pro. Fin. Dec. pp 33-37 and Pet'r Objections pp 1-3.

²⁶ On the attached Appendixes of calculations of removals for each school year, when the Parties' calculations differed, each Parties' number are noted side by side with Petitioners' number first and Respondent's second, e.g., 25/30.

²⁷ Every minute amount Petitioner listed as removed in each class was added, then subtracted from that was any time removed due to disciplinary removal from Petitioner's calculations, along with days that Respondent labeled as test accommodation.

112. Meanwhile, Respondent’s calculation of the total time missed amounted to 38 hours and 11 minutes.²⁸ *Id.* Broken down by individual classes, the amount of time removed calculated by Respondent’s Proposed Final Decision and Objections to Petitioners’ calculations, are as follows:

ELA	Math	Social Studies	Science	Spanish	PE	Ramp Up	Lunch	Total Time Missed
6 hours 29 min	8 hours 30 min	2 hours 25 min	2 hours 7 min	10 hours 52 min	1 hour 48 min	1 hour 50 min	4 hours 10 min	38 hours 11 min
24x	16x	5x	6x	33x²⁹	<i>See fn. 26</i>	5x	10x	99x

See Appendix A compared to Exhibit A attached to Resp’t Pro Fin. Dec. pp. 35-36 and Resp’t Objections pp 1-3.

113. From both Petitioners’ and Respondent’s calculations, time-out of the general education classes for testing accommodations and disciplinary removals have been deducted from the total time missed. While the disciplinary removals are uncontested, the number of removals for testing accommodations seemed excessive during the 2021-2022 school year based on comparisons to the 2022-2023 school year testing removals. During the first quarter, second quarter, and 47 days of the third quarter of the 2022-2023 school year, Student was removed for testing accommodation only two (2) times. Whereas, during that same period in his 2021-2022 school year, he was removed for testing accommodations twenty-three (23) times. *See Resp’t Ex A to Pro. Fin. Dec. pp 1-2.* This is suspect and lends more credibility to Petitioners’ claims about the number of inappropriate removals.

114. Additionally, the Parties were unable to provide precise time records for the fourth quarter from March 26 – May 13, 2022. Both Parties’ calculations are incomplete because the BST staff did not properly monitor Student’s sign-ins to the BST classroom the entire fourth quarter³⁰ of his 7th grade school year. However, according to the June 2, 2022 IEP’s Present Level of Academic and Functional Performance (PLAAFP), from March 26, 2022 to May 13, 2022 (a period of only 19 school days), Student checked into the BST classroom 33 times for various reasons. *Resp’t Ex. 13 p 43 see also Pet’r Ex. 14 p 87 (June 27, 2022 IEP Addendum).*

115. The accuracy of the reasons for removal to the BST class stated in the June 2022 IEPs are debatable, based on the poor record keeping and absence of sign-in sheets. Nevertheless, according to the June 2022 IEPs, Student spent an average of 40 minutes a visit. *Id.* Therefore, for 33 visits, Student spent 1320 minutes, or 22 hours, in the BST room during this time. The June 27, 2022 IEP Addendum states that “all except a couple were for more morning SEL, testing, working on projects.” *Id.* The PLAAFP then states that “several” of the visits were due to missing fun Friday, one was an alternative ISS after an altercation with another Student, two were self-time outs, and

²⁸ This calculation includes every minute amount Petitioner listed as removed in each class, then subtracted from that was all time removed due to disciplinary removal and any time Respondent labeled as test accommodation. Further, Respondent listed amounts of time removed for “Lunch” when they should have been listed as time removed for “Elective” based on the time of the sign-ins, which are more accurately depicted in Petitioner’s calculations.

²⁹ Respondent did not differentiate between Spanish and PE but combined them both as an “Elective.”

³⁰ The third quarter ended on the last day with sign-in data, March 25, 2022. Student was tracked out from March 26, 2022 to April 14, 2022. The fourth quarter started on April 18, 2022 and ended June 29, 2022, a period of 51 school days. *See Pet’r Ex. 94 (2021-2022 Year-Round Calendar).*

“several” more were lunch visits, which contradicts the statement that “all except a couple were for morning SES, testing, working on projects.” *Id.* The 22 hours were added to the total calculations of removals for the 2021-2022 school year.

116. Further, no information was available from May 14, 2022 to June 3, 2022, a period of 14 school days. However, the RAMS data collected from June 6, 2022 to June 20, 2022 (15 school days), indicated Student spent 2 periods in BST during Spanish class (110 minutes or 1 hour and 50 minutes) on June 13 and 14, 2022 and had EOG testing on June 16 and 17, 2022 which would have been done in the BST classroom. Pet’r Ex. 90 pp 555-67. Combining the 22 hours documented in the June 2022 IEPs and the RAMS data, Student was removed an additional 23 hours and 50 minutes during the fourth quarter of the 2021-2022 school year.

117. As the grand total for the 2021-2022 school year, this Tribunal added Respondent’s calculated total time removed from all classes, including lunch, for the first three quarters to the calculated amount of time removed in the fourth quarter. This was in accordance with the WCPSS’ BST Manual which states that:

If a student is staying in the AST/BST room for lunch or for the presence of a substitute teacher, this should be supported by data that is documented on the IEP in the Present Level of Academic and Functional Performance (PLAAFP) and in the service delivery. Interventions should be put into place and instruction should be delivered in order to move the student toward consistent participation in their scheduled setting. Data should be collected to determine if interventions are effectively supporting the student’s transition to the scheduled setting.

Resp’t Ex 20 p 9.

118. Student was scheduled for a general education lunch with other general education students. His continued use of the BST room during lunch warranted an intervention to support his transition to the scheduled setting of general education lunch. This intervention never occurred, which was a violation of his right to access to the general education setting. Further, Respondent’s calculation of time removed (minus disciplinary time and test accommodations) is a larger amount than Petitioner’s calculation of time removed (minus disciplinary time and test accommodations). Because this is averse to Respondent’s position, this Tribunal chooses to use Respondent’s values in calculating the compensatory education awarded in this case.

119. According to the records, Student was removed 38 hours and 11 minutes of instructional time in the first three quarters. Resp’t Ex A to Pro. Fin. Dec. pp 1-2. In the fourth quarter, he was removed 23 hours and 50 minutes of instructional time. Pet’r Ex. 14 p 87. Therefore, Student missed a grand total of 62 hours and 1 minute of instructional time in the 2021-2022 school year, which is rounded to 62 hours.

120. The duration of the removals is not as alarming as the frequency of the removals. Based solely on the present levels documented in the June 2 and 27, 2022 IEPs, during a period of 121 days (August 9, 2021 to March 25, 2022) with 119 removals, Student was removed 98% of the school days. For the remainder of the period documented in the IEP, from March 26 to May 13, 2022, a period of 19 school days with 33 removals, the frequency of removals increased exponentially to 174% of the school days.

Timeliness of IEP, BIP Revisions and FBA

121. When asked at what “point between November 11, 2021 through February 6, 2023, should the IEP team have revised the IEP to address the leaving the classroom behavior,” based on what the June 2020 IEP reported, Ms. Holmes reflected that Student left the classroom 16 times³¹ by December 2021, a jump from the five or so times he left the class in November 2021.” T vol 5 p 515:1-11. She concluded that because of the “massive jump from November to December and the increase in ‘escape-maintained behaviors’” the IEP team “should have met and updated the FBA and BIP to look at addressing escape-maintained behavior.” T vol 4 p 515:7-11. The Undersigned agrees and her recommendation is consistent with WCPSS’ own BST Manual requirement of “at least” quarterly reviews of the BIP. Resp’t Ex. 20 p 103. Also consistent with Ms. Holmes’ expert opinion that a new FBA was necessary during that period, the WCPSS’ BST Manual also required a new FBA because Student’s behaviors had changed after the first quarter. *Id.*

122. Ms. Holmes further opined that “they [the BIPs and IEPs] should have been reevaluated in December of 2021, after that huge increase in escape behaviors” because after December of 2021, they were no longer addressing the primary problem behavior.” T vol 4 p 533:14-20. The Undersigned concurs that: “Student’s lack of being in the classroom and being on-task and completing assignments, those are what really impacted his academic performance.” T vol 4 p 533:10-13. Moreover, the BST staff was not implementing the BIP with fidelity because there was no evidence that they processed the situation and got Student “back to his class as soon as possible.” Pet. Ex. 6 p 25. Respondent’s failure to timely review and revise Student’s IEPs and BIPs impeded Student’s right to a free appropriate public education and caused a deprivation of educational benefits by denying him access to the general curriculum. T vol 4 p 536:13-25 (T of Holmes); T vol 1 pp 188:10-189:5 (T of Grammer); and T vol 4 pp 416:18-21; 421:9-23 (T of Ohler).

June 2, 2022 IEP (June 2022 IEP) Duration Dates 06/03/22-10/27/22

123. The first IEP whose appropriateness is before this Tribunal is the one developed at the June 2, 2022 IEP meeting. This meeting was held nineteen (19) days before the end of Student’s seventh grade school year. *See* Pet’r Ex. 94. The IEP meeting was held primarily to review his eligibility, to determine if he needed specially designed instruction in any additional areas, to revise one social emotional goal to deal with Student’s problem of staying in class, to add proposed accommodations, and to add 10 minutes of check in time in the regular education classroom on his service delivery. Pet’r Ex. 25 pp 176-177 (PWN); Pet’r Ex 27. The duration dates of the June 2, 2022 IEP were from 06/03/2022 to 10/27/2022. Resp’t Ex. 13.

124. At the June 2, 2021 IEP meeting, for the first time, WCPSS revealed to his Parents Student’s excessive 152 self-removals from the regular education setting from August 9, 2021 to May 13, 2022. None of this information was reported in the June 2, 2022 Prior Written Notice nor was any source of relevant information reported from where this data was derived. Pet’r 27 p 176 (June 2, 2022 PWN). Justifiably, Student’s Parents “voiced concern regarding the number of pull outs that were Student driven vs. staff directed.” Pet’r Ex. 45 p 235 (June 2, 2022 Meeting

³¹ According to Respondent’s first and second quarter data, excluding test accommodations and disciplinary removals, Student left the regular education setting, 8 times during the first quarter and 16 times the second quarter. *See* Resp’t Ex. A attached to Resp’t Pro. Fin. Dec.

Minutes).³² Petitioner Mother “expressed that she wants the whole thing [the BIP] redone.” Pet’r Ex. 46 p 240. She continued to question “if things are being done according to the behavior plan” and “whether or not the BIP was being followed.” Pet’r Ex. 46 p 241. These inquiries and the Parent’s concerns indicated that as of June 2, 2022 Student’s Parents “knew or should have known” that Student was being allowed to excessively leave his general education setting. This means that the statute of limitations for Petitioners’ Implementation Issue started on June 2, 2022 and ran to June 2, 2023. Since the Petition was filed on November 14, 2022, none of Petitioners’ implementation claims are time barred.

125. At the June 2, 2022 IEP meeting, the IEP team agreed to provide Student’s Parents with “monthly progress reports” in addition to the IEP progress reports on his SES goals and Student’s quarterly grade reports. Pet’r Ex. 27 p 176 (PWN). This agreement for “monthly reports to Parents” was documented on the IEP. Resp’t Ex. 13, p 55. None of these “monthly parent reports” were proffered at the hearing or referenced in any of the subsequent IEPs’ Present Levels Of Academic and Functional Performance.

126. The June 2, 2022 IEP described Student’s needs as:

- a. Student continues to require support while with his general education peers due to his impulsive and aggressive behaviors. He also requires support in implementing coping strategies when he is feeling highly anxious.
- b. Evaluations have noted [Student’s] processing speed is significantly below his cognitive abilities and negatively impacts his access to the general curriculum.
- c. Sensory processing evaluation in March 2022 indicated that Student has sensory processing differences in the areas of visual, auditory, tactile, smell, proprioceptive and vestibular. However, Student does not require any specific sensory related equipment in the classroom and sensory strategies can be addressed with the implementation of classroom structures and supports.
- d. Student continues to need extra support in lesser structured environments, as well as with substitutes to help with his difficulty with impulse control.

Pet’r Ex. 14 pp 90-92 (June 27, 2022 IEP Addendum containing same information). These identified needs in the IEP were consistent with some needs identified by WCPSS evaluations but failed to comprehensively capture all Student’s emerging and existing social, emotional, and behavioral needs. Student’s task avoidance and escapism behaviors were demonstrative well before the June 2, 2020 IEP meeting.

127. At this IEP meeting, the results of WCPSS’ Psychoeducational Evaluation indicated that Student did not need occupational therapy for his sensory needs or any reading and writing goals. Because Student’s off-task and escapism behavior caused him to miss reading and math instruction, Ms. Holmes was surprised that his special education programming did not include reading or math goals and recommended 170 hours of compensatory education for each subject. T vol 4 pp 560:25-21; 563:14-19 (T of Holmes). The Undersigned disagrees on this point. Student

³² The Meeting Minutes are not dated but the June 2, 2022 IEP meeting was the only IEP meeting that WCPSS psychologist Emma Harshman attended, and she is listed as present for this meeting in the minutes. See Pet’r Ex. 45 p 232, and compare to Pet’r Ex. 27 p 177 (PWN for June 2, 2022 IEP meeting).

does not qualify for special education in reading or math because the determinant factor for Student's reading and math regression was the lack of appropriate regular education instruction in reading and math, not any learning disabilities.³³ Although Ms. Holmes recommended compensatory amount seems excessive in light of the amount of time Student was out of the regular education setting, Student did miss instruction in his ELA and Math classes for which he should be compensated.

The June 2³⁴ IEP and June 27, 2022 IEP Addendum set the following annual goals for Student:

When presented with a problem (non-preferred task, frustrating situation, criticism/correction), Student will accurately determine the size of the problem (big problem, little problem) and determine the appropriate emotional response (take a break, talk with teacher, take a deep breath, replace frustration with good thoughts, etc.) and return to task at hand in 4 out of 5 trials.

When given a situation in any school setting, Student will independently perform taught coping skills strategies for self-management and de-escalation on 8/10 opportunities.

Pet'r Ex. 14 pp 10-11.

128. Based on the 2021-2022 data, remaining in the general education curriculum had become increasingly difficult for Student. These goals were not much different than their predecessors in that they did not address the predominant target behaviors which were now task avoidance and escapism. Moreover, the goal of "return to task at hand in 4 out of 5 trials" might measure the frequency of off-task behaviors but does not address the length of time Student was having off-task behaviors. No reading or writing goals were added to the June 2022 IEPs, nor was there any documented need for reading or writing goals at that time.³⁵

129. Even though Student's primary problem was leaving the regular education setting, the IEP team inexplicably decided to "delete the goal to remain in class." Pet'r Ex. 27 p 177 (PWN). Doing so, the June 2022 IEP team deleted the one goal that partially addressed Student's self-removals. Otherwise, the IEP team did not further address Student's pattern of abusing self-time-outs. T vol 4 p 417:2-25 (T of Ohler). Deleting the goal for Student "to remain in class" was inconsistent with the progress monitoring data that demonstrated Student had not mastered that goal and was instead significantly regressing. Resp't Ex. 20 p 129.; T vol 4 pp 532:14-533:2 (T of Holmes) (Student regressed in primary behavior of leaving the classroom and his behaviors were escalating). That decision also flies in the face of the Parents' concerns about the amount of time Student had been removed from class. Moreover, the June 2022 IEP was inappropriate because it

³³ "[A] child shall not be determined to be a child with a disability if the determinant factor for such determination is the lack of appropriate instruction in reading, including the essential components of reading instruction" or lack of instruction in math." 20 U.S.C. § 1414(b)(5)(A) & (B).

³⁴ Even though Student's eligibility was already Other Health Impaired, after reviewing the WCPSS evaluation results, the IEP team changed Student's primary eligibility category from Emotional Disturbance (ED) to Other Health Impaired (OHI). Pet'r Ex. 27 p 175 (June 2, 2022 PWN).

³⁵ The Independent Psychoeducational Evaluation (August 2022) corroborated the WCPSS' Psychoeducational Evaluations (Nov. 2019 and March 2022) the IEP team's findings that Student did not need reading or writing goals on his 7th grade IEPs. See Stip. Exs. 24, 28, and 31. The August 2022 Independent Psychoeducational Evaluation did, however, support the IEP team's subsequent decision in January 2023 that Student needed specially designed instruction for written expression.

failed to contain goals for Student's lack of work completion. T vol 1 p 172:18-23 (T of Grammer).

130. As of June 2022, the school-based members of the IEP team had plenty of data, albeit incomplete, to show that Student was abusing the self-time-out intervention. This should have been a "red flag" to the educators that something needed to be done about the self-removals. Ms. Seadore³⁶ attended the June 27, 2022 IEP meeting and since she reviewed the data, she should have seen the "red flags" about Student's behaviors. Ms. Seadore defined a "red flag" as: "[i]f a Student seemed to be avoiding a particular class or a particular subject area or spending too much time, we may set expectations such as using a timer to guide them on when they're going to specifically return." T vol 6 pp 1039:22-1040:2 (T of Seadore).

131. By the end of the 7th grade school year, WCPSS' data showed that Student was avoiding in this order, Spanish, Math, and ELA. WCPSS behavior specialist, Ashlie Blanchone, admitted that if the data showed Student was having work avoidance and task completion behaviors as early as August of 2022, then it should have been addressed earlier than January 2023. T vol 6 pp 944:21-945:2. Contrary to Ms. Seadore's testimony, that there was no "data to show that he is abusing that self-time-out procedure" (T vol 6 p 1014:5-6), at the June 2, 2022 IEP the team had sufficient data to prove that he, in fact, was abusing the self-time-out intervention, the intervention was inappropriate, and his avoidance behavior was not desirable. *But see* T vol 6 p 1019:7-10 (T of Seadore attempting to justify Student's avoidance behavior as desirable).

132. At the June 2, 2022 IEP meeting, the school-based members of the IEP team recommended curriculum assistance (CA) to provide more SES and academic support. Pet'r Ex. 27 p 176. The BST/CA class was a separate 45-minute elective class set up specifically to provide daily behavioral and academic support with the primary goal of working on social emotional annual goals and the target replacement behavior on the BIP. *See* Resp't Ex. 20 p 99. At that time, it was reasonable not to add CA to Student's schedule because it would have to be substituted for an existing elective class. Such a schedule change would have been disruptive to Student's class schedule as there were only 18 school days remaining. Appropriately, the IEP team agreed to "reconsider this option before the beginning of the new school year." Pet'r Ex 27 p 176 (PWN); *see also*, Pet'r Ex. 45 p 236 (minutes stating that team agreeing to reconvene to amend IEP if "CA is still shown to be necessary."). This did not happen, but the IEP team should have reconvened before the beginning of the 2022-2023 school year and added CA as an elective to Student's schedule.

133. Like the prior IEPs, direct special education services in the June 2/27, 2022 IEP continued to be provided by the BST teacher, with the 30 minutes of social skills instruction 4 times a week (2 hours total) during his Ramp Up class in the special education setting. An additional 10 minutes daily of "check in time" was added to the service delivery for a total of 50 additional minutes a week in the general education setting. Pet'r Ex. 27 p 175 (PWN). The total amount of specially designed instruction was increased from 2 hours to 2 hours and 50 minutes per week.

134. After the June 2022 IEP meeting, the BST staff started tracking the implementation of the Daily Check-in Sheets from August 1, 2022 but inexplicably after September 28, 2022 discontinued the tracking. Resp't Ex. 29 pp 244-245. The BST staff did not start monitoring Student's June 2022 IEP goals until October 26, 2022 and even that monitoring was inappropriate. *See* Resp't Ex. 30 pp 284-286 (June 2022 IEP goals added to Daily Progress Monitoring Sheets)

³⁶ The June 2nd IEP team reconvened on July 27, 2021 to review the BIP. Although Ms. Seadore's name was on the June 27, 2021 IEP Addendum (Pet'r Ex. 14 p 99), she did not attend the June 27th IEP meeting. T vol 6 p 7:15.

135. In addition to his direct SES instruction, the June 2/27 2022 IEPs provided some accommodations to address Student’s handwriting needs and organization skills such as: access to teacher notes if not provided in google docs or hyper docs; graphic organizers for projects; additional time for projects. (48 hrs.); and testing in a Separate Room-Small Group. Petitioners’ witnesses did not challenge these accommodations in the IEP, except for the accommodation that the BST classroom being the “safe place” where Student would be removed. This “safe place” accommodation, and the similar provisions of the behavior intervention plan, were the primary focus of Petitioners’ complaints about Student’s special education program. To the extent that the issues of Student’s handwriting ability or his organizational skills were raised at a threshold level, the IEP team considered support for those needs and included them in the IEP.

136. As for related services, the June 2/27, 2022 IEPs did not include counseling as a related service, nor was there any discussion about the inclusion of counseling or parent coaching as related services. Petitioners’ experts persuasively opined that WCPSS should have provided “counseling services for the generalized anxiety that [L.M] experiences” in the school setting which affected him educationally. T vol 4 p 409:3-7 (T of Ohler) *accord* T vol 4 p 535:16-25 (T of Holmes). In response, Respondent’s expert, Dr. Thompson-Drew testified that the benefits provided by counseling could have been obtained in other ways, such as through Student’s social skills classes. T vol 5 pp 661:14-25, 662:1-23 (T of Dr. Thompson-Drew). Thus far, however, Student had not benefited from his social emotional skills classes enough to negate his need for counseling.

137. The Undersigned finds Petitioners’ experts more persuasive because Dr. Ohler has specifically treated Students with anxiety-based behavioral issues like Student and Ms. Holmes is a certified behavior specialist. WCPSS denied Student a free, appropriate public education when Respondent failed to provide him with school counseling as a related service in the June 2, 2022 IEP and all subsequent IEPs. Neither Dr. Ohler nor Ms. Holmes recommended a set amount of counseling to be included in the IEP, but Ms Holmes recommended 70 hours of compensatory services in counseling and that amount is reasonable.

138. Dissatisfied with WCPSS’ evaluations, at the June 2, 2022 IEP meeting, Student’s Parents requested Independent Educational Evaluations (IEEs). Stip. 2. Despite the changes in Student’s behaviors, WCPSS had not completed a FBA since September 2021 and Student’s Parents also requested an Independent FBA. Although these were supposed to be independent evaluations, WCPSS selected all the evaluators not the Parents.

139. In sum, the June 2, 2022 IEP was not appropriate to meet Student’s individualized needs. T vol 4 p 533:6-13 (T of Holmes); T vol 4 p 416:18-21 (T of Holmes). Other than with respect to the accommodations and writing goals, the Petitioners met their burden of proof that the June 2, 2022 IEP was inappropriate.

The June 27, 2022 Addendum and BIP Revision

140. On June 27, 2022, Student’s BIP was updated. The replacement behavior remained the same as his seventh grade BIP – “Student will seek out a preferred adult to speak with when he becomes angry, frustrated, or upset.” Stip. Ex. 13.

141. Changes to the Steps on the BIP were bolded and are as follows:

1. Teachers will give [Student] a verbal reminder to go to the BST staff when he shows signs of being angry, frustrated, or upset. **Change as of June 2022: Teachers will provide [Student] with a visual and call BST. The visual will have steps on it. Step one, Wait while BST is called. Step two, While waiting, practice learned calming strategies. Step three, walk with BST to a safe and quiet setting. Step 4: De-escalate with preferred adult.**
2. Teachers will allow [Student] to remove himself from the classroom setting when he feels that he needs to speak with a preferred adult. **Change as of June 2022: Teachers will allow [Student] to show a visual to them to be excused from class if he feels anxious or agitated.**
3. **Change will include school staff rather than a specific staff** will provide closer proximity to [Student] during transitions and times of the day that are less structured.
4. Staff will give advanced notification to AST/BST staff, when possible, of absences to allow for proactive teaching opportunity when a substitute will be present.
5. When [Student] needs to remove himself from class, AST/BST staff will process through the current situation and will get [Student] back to his class as soon as possible.
6. Teachers will communicate with [Student] when consequences will be given to other Students. **As of June 2022, this will be altered. A staff member will process with [Student] about accountability of all those involved within an incident.**
7. **June 2022 - Teachers will provide [Student] with a behavior sheet and homework sheet on a daily basis.**
8. **Teachers will use strategies for a short break when [Student] becomes off task or agitated.**

Stip. Ex. 13 (bold in original, name redacted)

142. The June 27, 2022 BIP enabled Student to self-time-out and self-remove as much if not more than its predecessor. His regular education teachers could “provide [Student] with a visual can call BST” so he could “walk with BST to a safe and quiet setting.” Student was allowed to be “excused from class,” and “[w]hen [Student] needs to remove himself from class” he could without limitation.

143. Although Student was supposedly given a list of positive reinforcers to choose from, (Stip. Ex 13) these reinforcers were not individualized for Student’s preferences. T vol 3 pp 297:9-298:8. The behavior sheets (RAMS) used were also not individualized for Student’s unique needs. See Resp’t Ex. 27. Often the regular education teachers did not complete the behavior or homework

sheets. *Id.* Moreover, the BST staff did not get Student “back to his class as soon as possible” but rather enabled him to regularly escape his general education core classes.

144. The new “consequences” for behavior, added to the June 27, 2022 BIP, anticipated that the BST support or appropriate personnel will provide support in the classroom, but the consequences still allowed Student to “be removed from the classroom setting.” Stip. Ex. 13. “Lunch in the BST classroom” was now offered as “support” which further rewarded his self-removal from the general education setting. *Id.* These consequences did not deter his escapism behavior but rather enabled it.

145. Moreover, even after the June 27, 2022 BIP was developed, the BST staff were not providing Student with sufficient behavioral support in the classroom. The evidence and testimony show that Student’s behavioral support was not being provided in the general educational setting during the 2022-23 school year but rather in the BST classroom. *See* Stip. Ex 26. The BST classroom was not Student’s least restrictive environment, yet he used it almost daily to escape from his regular education setting. *See e.g.*, Stip. Ex 18 p 6; T vol 6 p 763:17-20 (T of M.S.).

146. Despite some changes, Student’s June 27, 2022 BIP did not appropriately address Student’s task avoidance and escapism behaviors and instead continued to allow him to self-remove from the classroom. T vol 4 p 533:6-13 (T of Holmes); T vol 1 p 177:9-19 (T of Grammer); T vol 4 p 416:12-21 (T of Ohler) (June 27 BIP not appropriate and all BIPs created after November 11, 2022 were also inappropriate to meet Student’s individualized needs). Also, LM had sensory issues which partially contributed to his self-removals, but these were not adequately addressed through his June 2022 IEP/BIP. Student’s work completion problem was a skill deficit that can be addressed via a BIP or IEP. Neither Student’s BIPs nor IEPs addressed his skill deficits regarding work completion or his sensory issues. Instead of teaching Student to apply his coping skills in the environment in which he was triggered, the IEPs and BIPs developed by WCPSS continued to foster Student’s self-removals from the general education environment.

July 12, 2022 IEP Meeting for Assistive Technology (AT) Reevaluation

147. Before Student’s 8th grade school year, another IEP meeting was held on July 12, 2022 to discuss his Parent’s request for an Assistive Technology (AT) Evaluation. Pet’r Ex. 47. Student’s Parents felt that he needed more help with his writing assignments than simply the use of Chromebook and Goggle Read/Write. Pet’r Ex. 47 p 245. Although WCPSS’ AT evaluator (J. Bateman) disagreed that an AT evaluation was necessary, the IEP team approved it. *Id.* The AT Evaluation and Independent OT Evaluation both proved that Student needed assistive technology to deal with his fine motor deficits and that it was provided appropriately.

148. Before the beginning of the 8th grade school year, an appropriate IEP must be in place.³⁷ The July 12, 2022 IEP team should have revisited the Curriculum Assistance decision as previously agreed or rescheduled another meeting before the beginning of the 2022-2023 school year. Student clearly needed individualized social skills and academical assistance outside of what the June 2022 IEP provided. The BST/ Curriculum Assistance (BST/CA) class would have provided Student with additional social skills instruction, teaching of organization/study skills, and facilitated work completion including homework and class projects, as well as included closer monitoring of Student’s overall grades and/or credits. Resp’t Ex. 20 p 134. The combination of additional SES and academic support was consistent with Ms. Holmes’s expert opinion that the IEP service delivery

³⁷ 34 C.F.R. § 300.323.

should have an hour a day of SES instruction plus at least an hour a week of BST support in the general education classroom. T vol 4 pp 518:21-519:1 (T of Holmes). The BST/CA class (45 minutes a day) combined with the 30-minute SES instruction and 50 minutes regular education support would have been appropriate for Student. *See* Resp't Ex. 20 p 134.

149. As indicated by its name, the BST/CA class would have helped Student with task/assignment completion for his regular education classes, assisted him with managing his daily academic responsibilities, as well as taught him and retaught him the necessary replacement skills to assist him with moving towards more prosocial behaviors in his assigned classes and within the school and community. Resp't Ex. 20 p 134. The goal of the BST/CA is to provide more behavioral/social/emotional and academic support than just the SEM.S. Resp't Ex. 20 p 134. Ms. Holmes' opinion about increasing service delivery is corroborated by Ms. M.S.' Progress Monitor Sheets from October 26, 2022 through January 30, 2023 which indicated she or the BST assistants provided significant daily SES and behavioral support when they pushed into the regular classes to keep Student on-task. Resp't Ex. 30, *see also* Resp't Ex. 29 (evidencing more consistent observations and supports during transitions).

150. For some unknown reason, the IEP team never revisited Student's need for Curriculum Assistance before the beginning of the 2022-2023 school year. Instead, WCPSS staff used his self-removals to the BST classroom as academic assistance. T vol 5 p 786:10-23 (T of M.S.) (worked on goals a lot during lunch); T vol 5 pp 786:24-787:4 (T of M.S.) (progress monitored goals during lunch). There were 92 school days between July 29, 2022 until Student's last day of February 2, 2023. This would equate to an additional 69 hours (92 school days x 45 minutes) of behavioral/social/emotional and academic support necessary to provide Student a free appropriate public education that WCPSS failed to provide.

EIGHTH GRADE 2022-2023 SCHOOL YEAR

151. Student was in eighth grade during the 2022-23 school year. Add'l Stip. 4. His 8th grade school year started July 29, 2022. When school started the Independent Educational Evaluations were under way except for the FBA Evaluation. The Independent Psychoeducational and Occupational Therapy Evaluations were completed by the end of August 2022, in time for the annual IEP review deadline of October 27, 2022. *See* Resp't Ex. 13 June 2, 2022 IEP Addendum (duration dates 06/03/22-10/27/22) and Pet'r Ex. 14 June 27, 2022 IEP Addendum for BIP (duration dates 06/27/22-10/27/22).

152. Student's 8th grade schedule included eight periods, as follows (duration, times, and teachers in parentheses):

- 1st Period: 30 minutes (8:15-8:50am) – Ramp Up / Social Skills (M.S.)
- [2nd Period: 46 minutes (8:54-9:40am) – Spanish (no teacher named)]
- 2nd Period: 46³⁸ minutes (8:54-9:40am) – Health / PE (E.R.)
- [3rd Period: 45 minutes (9:44-10:29 am)- H/PE (B.)]
- 3rd Period: 45 minutes (9:44-10:29am) – BioTech (S.R.)
- 4th Period: 55 minutes (10:33-11:28am) – Math (S./Bo.)
- 5th Period: 55 minutes (11:30am-12:25pm) – ELA (Ba.)

³⁸ For purposes of calculating the duration amounts of Student's self-removals, all electives were counted as 45 minutes even though one was 46 minutes long.

- 6th Period: 30 minutes (12:28-12:58pm) – Lunch
- 7th Period: 55 minutes (1:01-1:56pm) – Science (D. /Ca.)
- 8th Period: 55 minutes (1:59-2:54pm) – Social Studies (Co.)

Add'l Stip. 5

153. Student's schedule was rearranged at the beginning of his 8th grade school year. Originally Student's 2nd period elective course was Spanish, but this course was dropped on August 31, 2022 and his schedule was changed to substitute Biotechnology (BioTech) in its place. Pet'r Ex. 90 p 605. During the previous 2021-2022 school year, Student had the most self-removals from the Spanish class and he was unable to continue with Spanish during his 8th grade school year.

Social Emotional Skills Instruction

154. In 8th grade, M.S. was, again, Student's BST teacher and she instructed him along with 14-16 Students during these time periods:

2022-2023 School Year

July 29, 2022 – September 12, 2022	M.S. (23 SES sessions 11.5 hrs.)
September 13, 2022 – October 28, 2022	None (M.S. on medical leave for 14 SSI sessions, 7 hrs.) Stip. Ex. 41
October 31, 2022 – February 2, 2023	M.S. (37 SES sessions 18.5 hrs. minus 4 of 5-day out-of-school suspension=35 sessions or 16.5 hrs.)

155. Only M.S. and Sey. (the OT) testified at the hearing regarding the implementation of Student's SES instruction during the 8th grade. Student did not dispute that M.S. provided his social emotional skills instruction during this time "just about" every morning during Ramp-up time. T vol 3 pp 319:19-320:3. This is consistent with M.S.'s testimony that she only missed giving SES instruction, 14 sessions (7 hours), while she was on medical leave from September 13, 2022 through October 28, 2022. However, the other 60 sessions provided by M.S. were inappropriately implemented because the social emotional skills instruction was not individualized for Student's unique needs. After deducting 2 hours for the 4 sessions missed, for 4 days of his 5-day out-of-school suspension removal, of Student's SES instruction, WCPSS failed to implement 7 hours (14 sessions) and inappropriately implemented 29 hours (58 sessions) of SES instruction in the special education setting; therefore, Student is entitled to 36 hours of compensatory SES instruction.

156. Also, there was no testimonial evidence or documentary evidence about the provision of the 50 minutes of SES instruction a week in the general education setting. For the first nine-week quarter Student was entitled to 7.5 hours of SES in the general education setting. Beginning his second quarter though, when the progress monitoring of his goals began, from October 26, 2022 through January 30, 2023, SES push-in service in the general setting were documented. See Pet'r Ex. 9. Combining the SES hours missed in both the special education and the regular education settings during the 2022-2023 school year, Respondent materially failed to implement 43 hours and 30 minutes (36 hrs. and 7.5 hrs.) of SES during Student's 8th grade year.

157. The first quarter of the 8th grade ended September 30, 2022 and Student was tracked out from October 3-24, 2022. The annual review of Student's IEP was due October 27, 2022. In violation of WCPSS's BST procedures, Student's BIP was not reviewed during the first quarter. During the first quarter, Student was again failing to complete assignments. Pet'r Ex. 17 p 128. His first quarter grades in his core academic courses were ELA-73, Math-79, Science-72, and Social Studies-70. *Id.* By the end of the first quarter, September 30, 2022, Student had self-removed from the regular education setting 50 times and spent a significant amount of time in the BST room. *See* Exhibit B; T vol 6 p 936:16-19 (T of Blanchone).

IEEs Available By September 1, 2022

158. Two of the Independent Educational Evaluations requested at the May 13, 2022 IEP meeting and the AT Reevaluation requested at the July 12, 2022 meeting were completed by August 31, 2022. *See* Pet'r Exs. 60 (Independent Psychoeducational Evaluation dated 08/31/2022), 64 (Independent OT Evaluation completed 08/04/22), and 67 (WCPSS AT Reevaluation completed 08/09/22). The only evaluation pending was the new FBA. It is undisputed that the other three evaluations were completed and available to the IEP team by early September 2022. Despite their availability, none of these IEEs were reviewed at the November 2, 2022 IEP Annual Review³⁹ meeting. Mother even asked about both the Independent Psychoeducational and OT evaluations at the November 2, 2022 IEP meeting but was not told by the school-based members of the IEP team that WCPSS had already received them or why WCPSS chose not to review them at that time. Pet'r Ex. 48 p 250.

159. When asked why the independent evaluations were not reviewed even after Mother asked about them, M.S. speculated: "I'm pretty sure that we didn't, I don't think we reviewed it because perhaps the parents didn't – I don't know 100 percent, but I think it was because everybody wanted or the parents wanted us to wait until the speech evaluation was completed before we went over all of them." T vol 6 p 883:4-9. Nothing in the November 2, 2022 IEP documents supports M.S.'s speculation.⁴⁰

160. The only pending evaluation not completed by that date was the one labeled "Functional Behavior Assessment for Wake County" by Bethany McKissick, Ph.D. Pet'r Ex. 60. Although Dr. McKissick was supposedly an independent evaluator, the Parents did not choose her, she was selected by WCPSS. *See* T vol 1 p 60:17-23. For reasons unknown, the FBA began a month later than the others on October 6, 2022. Pet'r Ex. 66 p 424 (indicating evaluator first initiated contact with Parents). The FBA's initiation date was during the first quarter track-out period (October 3-24, 2022) and while M.S. was on medical leave (Sept. 13– Oct. 28, 2022).

161. None of the available IEEs were reviewed at the November 2, 2022 IEP meeting. None of the IEEs were reviewed until after Petitioners sent their 10-day Notice ("Notice") of private school placement and because of the Notice an IEP meeting was scheduled for January 19, 2023. WCPSS offered no cogent and rational explanation why the IEP meeting was delayed over 4 ½ months (141 days) after the availability of the Independent Psychoeducational and Independent Occupational Therapy Evaluations. T vol 5 pp 721:7-724:4 (T of Dr. Thompson-Drew agreeing that

³⁹ The November 2, 2022 Annual Review was held four days late.

⁴⁰ M.S. did not even attend this meeting. *See* Stip. Ex. 18 p 76 (participant list).

the Independent Psychoeducational Evaluation was available in early September 2022 but not reviewed until January 19, 2023).

162. A review of the timeline and concurrent events suggests that either Respondent never intended to hold an IEP meeting to review the IEEs until their hand was forced by Petitioners' 10-day Notice or the more logical explanation for this dilatory review of the IEEs is that WCPSS did not sufficient data collect to conduct the FBA. At the time of the November 2, 2022 IEP meeting no appropriate progress monitoring data had been taken by the BST staff during the first or second quarters; the progress monitoring form had just been corrected on October 26, 2022; M.S. was out on medical leave until October 28, 2022 (the end of the second quarter); the IEP annual review was due October 28, 2022; the Annual Review but not the BIP review is held on November 2, 2022; M.S. and the other BST teacher were not interviewed until November 7, 2022 (Pet'r Ex. 66); and observations for the Independent FBA had not been completed until December 19, 2022. Pet'r Ex. 66 (first Student observation - November 28, 2022; last observation - December 19, 2022). This timeline of plausible excuses, however, did not relieve WCPSS of providing Student a FAPE.

163. According to Respondent's BST Manual, a FBA is required before a BIP can be revised. Resp't Ex. 20 p 12. During the FBA progress new baseline data must be collected, and the review must include progress monitoring data. *Id.* A minimum of three weeks of data is needed to complete a FBA. Resp't Ex. 20 p 13. The November 2, 2022 IEP team did not have 3 weeks of accurate progress monitoring data because the data collection process had been done incorrectly. To allow for the full three weeks of data collection, the very earliest a BIP meeting could be scheduled would have been the week of Thanksgiving which is what WCPSS staff had originally proposed. *See* Stip. Ex. 41 (calendar). However, the BIP was not reviewed at that time either. Instead, an IEP meeting was scheduled 2 ½ months later on February 6, 2023.

November 2, 2022 IEP (Annual Review)

164. The second quarter of Student's 8th grade school year began October 25, 2022. Again, in violation of WCPSS's BST procedures, Student's BIP was not reviewed during this quarter.

165. On November 2, 2022, the IEP team did, however, conduct an annual review and update Student's IEP. Stip. 23. According to the classroom data reviewed on November 2, 2022, Student's grades had dropped from A's and B's during the 7th grade to C's during the first quarter of his 8th grade year and dropped even lower to C's, a D, and a failing grade in the second quarter. Student's grades were going down because he was leaving the regular education classroom, losing instructional opportunities, and not completing assignments. T vol 6 pp 893:14-894:4 (T of M.S.). Student also had many missing assignments during the first quarter: 3 out of 17 in ELA, 10 out of 20 in Math, 2 out of 9 Science, and 4 out of 12 in Social Studies. Stip. Ex. 18 p 68. During the first quarter grading period, Student failed to complete any "DreamBox" assignments and did not complete the End of Unit 4 Assessment. Pet'r Ex. 17 p 128. In addition, eleven (11) missing assignments were exempted/excluded from his final math grade. *Id.* By the end of the second quarter, Student was failing math with a grade of 42. Pet'r Ex. 17 p 129.

166. The IEP team acknowledged that Student's grades were affected by his off-task behaviors, resistance to handwriting in a workbook, and easy distractibility. Pet'r Ex. 17 p 128. Student's off-task behaviors and lack of work completion have been long-lasting behavioral deficits. These maladaptive behaviors took a marked downturn in his 8th grade school year from his 6th grade

school year when all his teachers reported “an overall good job ... completed most of his assignments.” Pet’r Ex. 12 p 68.

167. According to the school data reported in the November 2, 2022 IEP, Student accessed the BST classroom 16 times in August 2022 and 21 times in September 2022; 18 times were lunch visits and 10 were self-time outs. Stip. Ex. 18 p 68. This data is inconsistent with Respondent’s Exhibit A which shows that Student accessed the BST classroom 25 times in August 2022 and 27 times in September 2022 of which 21 times were lunch visits. *See* Resp’t Pro. Fin. Dec. Ex. A. Before the November 2, 2022 IEP meeting, Student accessed the BST classroom an additional 16 times (3 lunch visits) in October 2022, most of which were for work completion. *Compare* Stip. Ex. 18 p 68 to Resp’t Pro. Fin. Dec. Ex. A. The IEP team did not report these additional 16 visits to the Parents.

168. Based on this present level of functional performance, the IEP team revised his IEP behavioral goals as follows:

1. When Student becomes agitated/angry, he will use strategies (breathing techniques, removing self from the environment, walking, etc....) to cope with his feeling on 3 out of 5 occasions.
2. When engaging with his peers, Student will initiate a reciprocal conversation 2 out of 5 occasions.
3. Given a situation, Student will use[sic] identify his triggers and use strategies to self-regulate 70% of the time.
4. Given a hypothetical situation, Student will accurately identify his anxiety and be able to independently resolve his feelings by using a visual 70% of the time.

Stip. Ex. 18 pp 71-72

169. All these goals were to be progress monitored by data sheets. *Id.* None of the progress monitoring sheets though actually monitored progress on these goals. Instead, they monitored the following behaviors - has materials, on task, completed work, and homework written. *See* Pet’r Ex. 91 pp 665-712. Despite his academic and behavioral regression, the service delivery remained the same for Student’s social emotional skills instruction, that is 30 minutes, four times a week in the BST setting. In addition, despite his increasing dependence on the BST classroom, his service delivery for support during transitions in the general education setting was reduced from 10 minutes to 5 minutes each day per week (50 minutes to 25 minutes) for a total of SES instruction of 2 hours in the special education setting and 25 minutes in the regular education setting a week. Stip. Ex. 18 p 72.

170. The IEP accommodations were revised somewhat to address his needs in handwriting, sensory, processing speed, and executive functioning skills. Specifically, the IEP team added the following new accommodations to his existing accommodations from the June 2022 IEP: for assignments a paragraph or longer, use Google Read/Write to assist with writing; access to noise cancelling headphones as needed; have a signed homework document from each teacher; and chunking of projects and longer assignments. Stip. Ex. 18 pp 73-75.

171. Respondent argues that Petitioners failed to prove the November 2, 2022 goals were inappropriate because “Petitioners’ witnesses did not provide any specific testimony challenging the appropriateness of the revised goals, and in fact; Petitioners’ counsel asked no questions about the

appropriateness of the November 2, 2022 IEP.” Resp’t Pro. Fin Dec. p. 20, ¶ 71. On the contrary, Petitioners’ experts focused on the failures of this IEP, like its predecessors, to contain goals appropriate to address the totality of Student’s academic and behavioral needs. *See* T vol 4 p 533: 6-13 (T of Holmes IEPs did not appropriately meet his academic and behavioral needs); T vol 4 p 534:18-24 (T of Holmes IEPs did not appropriately address his processing speed deficits); T vol 4 pp 532:20-25; 533:1-2 (T of Holmes primary behavior was leaving the classroom and that he regressed, and his behaviors were escalating). Moreover, Petitioners experts had already opined that the BIP (revised June 27, 2022), which was part⁴¹ of the November 2, 2022 IEP, was inappropriate. *See* Stip. Ex. 18, p 69.

Pattern of Self-Removals from July 29, 2022 to February 2, 2023

172. During the first half of the 2022-2023 school year, Student had more self-removals than the entire period documented for the 2021-2022 school year. Student only attended the 2022-2023 school year for 92 school days from July 29, 2022 to February 2, 2023. The same review was conducted for the frequency and duration of self-removals for this school year as for the previous school year.

173. Petitioners’ calculation of the total time missed amounted to 47 hours and 45 minutes.⁴² *See attached* Appendix B. Broken down by individual classes, the amount of time missed calculated by Petitioner and the frequency of removals are as follows:

ELA	Math	Social Studies	Science	Elective	Lunch	Ramp Up	Total Time Missed
7 hours 29 min	5 hours 48 min	5 hours 56 min	6 hours 36 min	6 hours 36 min	13 hours 33 min	1 hour 47 min	47 hours 45 min
12x	11x	10x	15x	11x	31x	4x	94x

See Appendix B compared to Pet’r Pro. Fin. Dec. pp 41-48 and Pet’r Objections pp 3-5.

174. Petitioner failed to include time for visits on December 8, 20, and 21, 2022. Records indicated that Student missed twelve hours and twenty minutes combined from December 8, 12, 14, 15, 20, and 21. Pet’r Ex. 17 p 135. Respondent indicated that Student missed 373 minutes on December 12, 14, and 15, 2022. Resp. Ex. A to Pro. Fin. Dec. pp 3-4. Therefore, 367 minutes are missing from what the Parties indicated. These six hours and seven minutes were added to the calculated total. Therefore, Petitioner’s total time missed for a portion of the 2022-2023 school year adds up to 53 hours and 52 minutes, which were rounded to 54 hours with a frequency of 94 removals.

175. Meanwhile, Respondent’s calculation of the total time missed amounted to 47 hours and 24 minutes.⁴³ *See attached* Appendix B. Broken down by individual classes, the amount of time removed calculated by Respondent and the frequency of removals are as follows:

⁴¹ November 2, 2022 IEP asks if a Student has behaviors that impede his/her learning how is that behavior being addressed? The IEP team’s response was “Behavior Goals” and “Behavior Intervention Plan.”

⁴² This calculation added up every minute amount Petitioner listed as missed in each class, then subtracted all time missed due to disciplinary removal from Petitioner’s calculations.

⁴³ Every minute amount Petitioner listed as missed in each class was added, then from that amount was subtracted all time missed due to disciplinary removal and any time Respondent claimed as test accommodation.

ELA ⁴⁴	Math	Social Studies	Science	Elective	Lunch	Ramp Up	Total Time Missed
7 hours 59 min	5 hours 32 min	5 hours 27 min	5 hours 34 min	7 hours 32 min	13 hours 33 min	1 hour 47 min	47 hours 24 min
12x	8x	9x	14x	9x	29x	4x	85x

See Appendix B compared to Ex. A attached to Resp't Pro. Fin. Dec. pp 37-38 and Resp't Objections pp 3-5.

176. Additionally, Respondent failed to include the time for visits on December 8, 20, and 21, 2022. These six hours and seven minutes were also added to Respondent's calculated total. Therefore, Respondent's total time missed for a portion of the 2022-2023 school year adds up to 53 hours and 31 minutes, which rounded to 54 hours with a frequency of 88 removals.

177. The Parties' calculations are fairly aligned for the 2022-2023 school year. These calculations are also aligned with the Attendance Chart provided in the record. See Pet'r Ex 96 p 738. The Attendance Chart indicates Student missed a total of 38 hours and 28 minutes through absences.⁴⁵ This value does not include the time missed from Lunch, which Respondent indicates is 13 hours and 45 minutes. See Resp't Ex A to Pro. Fin. Dec. pp 3-4. When the time missed for Lunch added to Attendance Chart amount, the total equates to 52 hours and 13 minutes of compensatory education for the 2022-2023 school year which corroborates the values of the Parties' calculations as amended above. Based on additional removals shown on Appendix B, there were 93 removals for the 2022-2023 school year. Since the Parties' calculations are approximately the same, 54 hours is the number of self-removals for the 2022-2023 school year. During the 2022-2023 school year, Student self-removed from the regular education setting 100% of the school days.

Total Self-Removals

178. Because of his self-removals and self-time outs, Student missed a grand total of 62 hours of instructional time in the 2021-2022 school year. In the 2022-2023 school year (July 29, 2022 to January 30, 2023), Student missed a total of 54 hours. Therefore, from the start of the 2021 school year until his withdrawal, Student missed a grand total of 116 hours of instructional time from the general education setting and self-removed from the regular education setting 100% of the school days.

Off-Task and Avoidance Behaviors

179. During Dr. McKissick's 3 days of observations (11/28/22, 12/15/22, and 12/19/22) and 10.5 hours of observations, she observed the problem behavior of task avoidance behaviors. These were the same off-task behaviors, M.S. admitted, that had been behavioral issues before November 2021. T vol 6 pp 818:15-869: 3. Dr. McKissick provided specific data about her observations. Pet'r Ex. 66 p 425. There were no occurrences of physical aggression during any of her observations, but she did observe "multiple occurrences of being off-task (i.e., Student would

⁴⁴ Respondent's Exhibit A indicate that on 12/15/2022, Student self-time-out 55 minutes during ELA but. Dr. McKissick observed Student in his entire ELA class that day. See Pet'r Ex. 66 pp 424,426-428.

⁴⁵ Five days' worth of absences (370 minutes per day) were subtracted due to disciplinary removal in this calculation.

initially comply with teacher direction, but stop engagement) or non-compliance (i.e., did not follow teacher direction as it related to starting and finishing in-class task/assignment).” *Id.*

180. In addition, Dr. McKissick reviewed the RAMS data and noted that Student’s ELA teacher gave him “all 2s and one 1 [on his RAMS data sheet] which did not match the 9 redirections she provided during the class.” Pet’r Ex. 99 p 633. Comparison of the corresponding RAMS data sheets for those days evidenced that the data collection point system was not sufficiently individualized for accurate monitoring of Student’s maladaptive behaviors. Even so, the RAMS data does note that during the 3-day observation Student had to be redirected more than 3-4 times in at least one class every day. *See* Pet’r Ex. 90 pp 633 (11/28/22), 657 (12/15/22), and 659 (12/19/22).

181. The RAMS point system is not based on the amount or duration of Student’s off-task behaviors but instead is based on the number of “redirects,” 2-point equals less than 2 redirects, 1-point equals 3-4 redirects, 0-point equals more than 5 redirects. *See* Pet’r Ex. 90. After the June 2, 2022 IEP meeting, the BST teacher and general education teachers started completing the RAMS sheets for data collection on Student’s behaviors. Based on the RAMS data collected for 12 days, Student had to be redirected 3-4 times in at least one class, usually ELA, for 7 of these days or 58% of the time. *See* Pet’r Exs. 90 pp 555-567. The first quarter of the 2022-2023 school year (8th grade) had 44 school days, of these only 18 days of data was collected. During the 18 days of data collection, Student had to be redirected 3-4 times in at least one class, usually ELA, for 10 of these days or 55% of the time. Pet’r Ex. 90 pp 568-606.

182. The BST staff collected 24 days of data when Student was in his regular education classes during the 37 days of the second quarter of the 8th grade which started October 25, 2022. Pet’r Ex. 90 607-660 (excluding dates Student was in the BST classroom all day 10/26, 10/27, 12/8, and 12/14/2022). During those 24 days, Student was only redirected 3-4 times in at least one class, usually ELA, for 5 of these days or 21% of the time. Pet’r Ex. 90 pp 568-606. Student off-task behaviors improvement coincided with the “pushing into” assistance provided by the BST staff which started on October 26, 2022 and continued until January 30, 2023. During that time, the BST staff monitored that Student had materials, was on task, completed work, and had homework assignments written down. This evidences that Student could stay on task when given appropriate support by the BST staff within the regular education classroom.

Timeliness of Functional Behavioral Assessment (FBA)

182. Despite the evidence in the record showing a substantial change in Student’s behavioral patterns, a Functional Behavioral Assessment had not been completed after the original September 21, 2021 FBA until sometime in December 2022. In June 2022, Student’s Parents had requested an Independent Functional Behavioral Assessment (FBA), but instead of waiting for an Independent FBA, the BST staff should have conducted a new FBA themselves before the end of the 2nd quarter, December 22, 2021, of Student’s 7th grade school year.

183. Respondent unjustifiably blames Student’s Parents for the FBA delay and inaccurately asserts: “There was undisputed evidence that the independent FBA was delayed until December 2022 by the *Petitioners’ unavailability*, not any fault of the district.” Resp’t Pro Fin Dec. p 44, ¶32 (emphasis in original). Not so, for two reasons. First, the Parents did not view this as an “Independent” FBA and in fact the FBA is labeled “Functional Behavior Assessment **For** Wake

County (School).” Pet’r Ex. 66 p 1 (emphasis added). Second, WCPSS’ procedures and BST Manual required timely completion of a functional behavior assessment before a new replacement behavior can be included in a BIP. T vol 6 pp 1046:22-1047:9 (T of Seadore); Resp’t Ex. 20 p 103 (BST Manual). Neither federal nor State law requires this. Under the IDEA, a FBA is only required when the IEP team must determine the manifestation of Student’s conduct with respect to a code of Student conduct violation.⁴⁶

184. Had WCPSS followed their own procedures, a FBA should have been conducted during the second quarter of Student’s 2021-2022 and every quarter thereafter. Resp’t Ex. 20 p 103. Frequent behavioral assessments were necessary because students in the BST program required more intense monitoring since the BST class is “the last stop before you would go to like a special, a separate school.” T vol 5 p 766:2-5 (T of M.S. describing the BST classroom as “more intensive”).

185. Initiation of the WCPSS FBA did not begin until October 2022 and ended in mid-December 2022. Pet’r Ex. 66 (FBA 12/19/2022). Seven months overdue, Dr. McKissick completed her FBA and identified, what the school staff already knew, that Student had all but eliminated much of his aggressive responses to situations and had developed a resistance to work completion that was impacting his academic performance. Dr. McKissick recommended development of a BIP targeting off-task and avoidance behaviors. Pet’s Ex 66. M.S. reviewed Dr. McKissick’s FBA in December 2022 (T vol 6 p 881:18-20) but the IEP meeting was delayed until after Student’s track-out period ended. WCPSS offered no cogent or rational explanation why the FBA could not have been completed sooner or reviewed sooner even during January 3-13, 2023 while the other 3 tracks were in session. *Compare* Pet’r Ex. 94 to Stip. Ex. 41. The school-based members of the IEP adopted Dr. McKissick’s recommendations as evidenced by the Proposed BIP they forwarded to Petitioners on February 6, 2023.

Timeliness of IEPs and BIPs Revision

186. Respondent failed to timely review the Independent Education Evaluations and incorporate their recommendations for supplementary aides, services, modifications, and accommodations; and as a result, Respondent failed to timely review and revise Student’s IEPs. T vol 1 pp 188:10-25; 189:1-5; 190:20-25; 191:1-2 (T of Grammer). Student’s IEPs did not appropriately align with his academic and behavioral needs; the IEPs and BIPs in place between September 21, 2021 through February 6, 2023 did not appropriately address Student deficits; and Respondent did not timely revise Student’s IEPs and BIPs during the period September 21, 2021 through February 6, 2023. T vol. 4 pp 533:6-13; 534:18-24; 536: 13-25 (T of Holmes). Respondent’s failure to timely review and revise Student’s IEPs and BIP denied him a FAPE. *Accord*, T vol 4 p 536:13-25 (T of Holmes); T vol 1 pp 188:10-189:5 (T of Grammer); and T vol 4 pp 416:18-21; 421:9-23 (T of Ohler).

January 6, 2023 Parent’s 10-Business Day Notice

187. On January 6, 2023, during the third track-out period, Petitioners notified WCPSS via email of their intent to withdraw Student and unilaterally place him in a private school. Stip. 24. On January 19, 2023, the tenth business day during the beginning of the third quarter of the 2022-2023 school year and the first day of track-in for Track 4, WCPSS timely held an IEP meeting to address Petitioners’ request for private school placement.

⁴⁶ 20 U.S.C. § 1415(k)(1)(E) & (F)(i)

January 19, 2023 and February 2, 2023 IEP Meetings

188. As indicated below in the Conclusions of Law, the claims pertaining to the January 19, 2023 and February 2, 2023 IEP (January /February 2023 IEP) and February 6, 2023 Proposed BIP (Proposed 2023 BIP) have been dismissed. However, these IEP meetings have relevance for other reasons. At the January and February 2023 IEP meetings, the IEP team, for the first time, reviewed and considered all the Independent Educational Evaluations' results and updated Student's IEP and BIP. Stip. 25.

189. The Present Levels of Academic and Functional Performance were updated to include the data from the Independent Educational Evaluations, FBA, classroom-based data, and district assessments from the first semester of the 2022-2023 school year. According to the latest classroom data, Student's grades had dropped during the 2nd quarter from C's to C's, a D, and a failing grade. His 2nd quarter grades in these core subjects were ELA 70; Math 72; Science 56; and Social Studies 60. Stip. Ex. 20 p 88. Based on this data, Student had regressed both academically and behaviorally. During the 92 school days in the Fall semester of his 8th grade school year until February 2, 2023 (the last day STO was reported), Student had been removed to the BST classroom 90 times. *See Appendix B* (excludes suspensions and testing accommodations but includes dates not documented in Parties' submissions)

190. Finally, the school-based members of the IEP team acknowledged in writing what they already knew that Student's primary needs had shifted—his aggressive behaviors had largely disappeared but his anxiety and overreactions to stimuli remained, and his work completion concerns had increased. Based upon the recommendations in Dr. McKissick's FBA and the Independent Psychoeducational Evaluation, the IEP team revised the behavioral goals and developed a new written expression goal. Finally, the new behavioral goals addressed Student's self-regulation in the classroom and had distinct timeframes for him to initiate and work on in-class assignments. Pet'r Ex. 17 pp 144-145

191. As recommended earlier in the August 31, 2022 Independent Psychoeducation Evaluation, a writing goal was also added to address Student's weakness in producing grammatically correct proper complex and compound sentences. Pet'r Ex. 17 p 144; Stip. Ex 31, p 219; Stip. Ex 20, p 106. The IEP service delivery was revised to include 15 minutes 2 times per week of specially designed instruction in writing to be provided in the general education classroom. Pet'r Ex. 17 p 145.

192. Because the August 31, 2022 Independent Psychoeducation Evaluation was available to the November 2, 2022 IEP team, the same written expression goal and specially designed instruction should have been added in the service delivery of the November 2, 2022 IEP. Student was inappropriately denied 11 weeks of written expression specially designed instruction and is entitled to 5.5 hours⁴⁷ of compensatory written expression instruction.

⁴⁷ November 2, 2022 to February 2, 2023: 11 weeks x 30 minutes ÷ 60 minutes = 5.5 hrs. of missing SDI in written expression. *See* Stip. Ex. 41 (2022-2023 Year-Round Track 4 Calendar).

193. The new IEP also added supplementary aids and services recommended by the occupational therapist to address Student's self-regulation and provide Student calming/interoceptive awareness skills in general education setting. Stip. Ex 20, pp 108, 111; T vol 6 pp 973:22-25, 974:1-8. Occupational therapy for Student's sensory needs was added to the service delivery for 30 minutes once per week on a supplemental basis. M.S. admitted that Student's sensory issues had impacted his behavior before November 2021 but had never been addressed by his IEPs or BIPs before January 2023. T vol 6 pp 869:19-25; 888:19-889:9. Although the November 2, 2022 IEP team did not disclose to the Parents they had the Independent Occupational Therapy Evaluation, the same supplemental occupational therapy services should have been added in the November 2, 2022 IEP. Because it was not, Student was inappropriately denied 10 weeks of supplemental occupational therapy services. He is entitled to 5.5 hours of compensatory supplemental occupational therapy services for his sensory deficits.

The Proposed February 2023 BIP

194. Because the Proposed February 2023 BIP was not included on the Invitation to Conference, Petitioners refused to consider it during the February 2nd meeting. Despite this, Petitioners did agree to reschedule another IEP meeting on February 6, 2023 to discuss the Proposed BIP. Resp't Ex. 18 p 85. However, the next day February 3, 2023, after school hours, Father sent an email cancelling the meeting because of the unavailability of their attorney. Stip. Ex. 21 p 122. Before another meeting could be scheduled, on February 6, 2023, also after school hours, Student sent another email stating Student would be withdrawn from School and that he is "currently enrolled in a private school." *Id.* Petitioners withdrew Student from WCPSS on February 7, 2023. Stip. 26.

195. WCPSS sent the Proposed BIP as an offer of what Student would be provided if he remained with WCPSS. T vol 6 p 921:18-24. The new target behavior on the BIP was based on Dr. McKissick's recommended replacement behavior that instead of avoiding or not completing an assigned task, Student would initiate a task within 2 minutes of teachers' directions. *See* Stip. Ex. 22 p 123; Pet'r Ex. 66 p 429 (FBA). Dr. McKissick's recommendations corroborated Petitioners' experts' opinions that Student needed a behavioral plan to address his off-task and task avoidance behaviors. These same avoidance behaviors, which according to M.S., were evident during Student's 7th grade school year.

SUMMARY

196. Based on the Findings of Fact, Stipulations, sworn testimony, and other evidence in the record, the Undersigned finds that Respondent substantively denied Student a free appropriate public education because the IEPs and BIPs at issue were not reasonably calculated to enable Student to make progress appropriate considering his unique circumstances and were not materially implemented.

197. All claims pertaining to the January 19 and February 2, 2023 IEPs and Proposed February 6, 2023 BIP are dismissed as moot; therefore, none of the Issues are relevant to them.

Appropriateness Issue

198. From November 11, 2021 until February 6, 2023, WCPSS denied Student a free, appropriate, public education with respect to developing substantively appropriate IEPs and BIPs

because: the June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), November 2, 2022 IEP (Annual Review), failed to contain appropriate goals for Student's social educational and behavioral needs; and, the November 2, 2022 IEP failed not only to contain appropriate social, emotional, and behavioral goals but also because it failed to contain a written expression goal. Student is entitled to compensatory education from November 11, 2021 until February 6, 2023 for his social, emotional, behavioral needs, and from November 2, 2022 for his written expression deficits.

Statute of Limitations Defense

199. From August 2, 2021 until June 2, 2022, Petitioners did not know and could not have known that Respondent failed to materially implement the November 20, 2020 IEP, September 21, 2021 BIP, October 28, 2021 IEP, June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), and November 2, 2022 IEP (Annual Review). The applicable statutory time period for Issues 2, 3, and 4 is August 2, 2021 through February 6, 2023.

Implementation Issue

200. From August 2, 2021 through February 6, 2023, Respondent denied Student a free, appropriate public education with respect to its material failures to implement the IEP goals, supplementary aides (homework sheets and behavioral data collection), specially designed instruction, and behavioral interventions in the November 17, 2020 IEP (operative IEP for beginning 2021-2022 school year); September 21, 2021 BIP, October 28, 2021 IEP, June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), and November 2, 2022 IEP (Annual Review).

Failure to Revise IEPs and BIPs Issue

201. In December 2021, by the end of two quarters of the 2021-2022 school year, WCPSS should have reconvened the IEP team to revise the September 21, 2021 BIP and October 28, 2021 IEP to add new behavioral goals to address Student off-task, avoidance and escape behaviors; increased the social skills service delivery; removed the use of self-time-out; and added the related service of counseling. Every quarter thereafter, the IEP team should have reviewed and revised Student's BIP as his social, emotional, and behavior needs changed. The delay in the revision of the September 21, 2021 BIP and October 28, 2021 IEP until the development of the June 2, 2022 IEP and June 27, 2022 BIP (IEP Addendum), which were also inappropriate, caused Student educational harm and denied him a free appropriate public education.

202. WCPSS failed to reconvene before the beginning 2022-2023 school year to amend the already inappropriate June 2, 2022 IEP to add curriculum assistance to his schedule. WCPSS' failed to timely reconvene the IEP team to review and revise Student's inappropriate June 2, 2022 IEP and the inappropriate June 27, 2022 BIP within 30 days of WCPSS' access of the Independent Psychoeducational Evaluation and Independent Occupational Therapy Evaluation. The school-based IEP team's decision to delay revelation of the independent evaluations' recommendations at the November 2, 2022 was inappropriate and denied Student a FAPE. Overall, WCPSS failures to timely reconvene the IEP team to revise inappropriate Individualized Educational Programs and inappropriate Behavior Intervention Plans from September 21, 2021 through February 6, 2023 caused Student educational harm and substantively denied him a free appropriate public education.

Timeliness of FBA Issue:

203. Similarly, the IEP team should have reconvened in December 2021 to conduct a Functional Behavioral Plan and revise Student's September 21, 2021 BIP to add new replacement behaviors for his off-task, avoidance, and escapism behaviors. Every quarter thereafter, the IEP team should have reviewed Student's BIP and revised it as his social, emotional, and behavior needs changed. The delay in completion of the Functional Behavioral Plan caused Student educational harm and substantively denied him a free appropriate public education.

REMEDY

204. Having analyzed and resolved the issues in this case, what remains is to consider the compensatory education necessary to make up for the denials of FAPE found above. Determining the amount of compensatory education for denials of FAPE is often difficult. Such determination requires figuring out both what position a Student would be in absent a FAPE denial and how to get the Student to that position. Nevertheless, the effort cannot be avoided, and the Tribunal has painstakingly attempted to be as accurate as possible with the calculations of these numbers.

205. Ms. Holmes opined that Student should be awarded 85 hours of compensatory services in writing, 170 hours of compensatory services in reading, 170 hours in math, and 170 hours in social emotional learning; 70 hours of compensatory services and behavior support to be provided on a weekly indirect basis so that teachers have training and support on implementing best practices for Students like LM; 70 hours of compensatory services in counseling specifically focused on Cognitive Behavioral Therapy (CBT) and exposure therapy; and 10 hours compensatory services for parent training so Student's Parents could also be on the same page as far as how to address his school escape maintained behavior. T vol 4 pp 535:16-536:7.

206. In sum, Ms. Holmes recommended 745 hours. T vol 4 p 563:14-19. Of this sum, 665 hours were compensatory education and related services for Student, 10 hours were for Parent training; and 70 hours were for indirect staff training and support. Likewise, Dr. Ohler opined that Student should receive compensatory counseling services but she did not recommend how much. Ms. Holmes' compensation plan equates to 120 school days of compensatory education. T vol 4 p 563:14-24. Ms. Holmes did not explain what she based these numbers on or how she derived them. Although encouraged to do so, WCPSS offered no alternative remedy.

207. Of the 665 compensatory education hours recommended for Student, 340 hours (170 for reading and 170 for math) must be deducted because Petitioners abandoned any reading claims and withdrew their math goal claims. This deduction reduces Student's compensatory educational hours to 325 hours. But even that amount must be adjusted to match the denials of FAPE.

208. Ms. Holmes recommendation of 240 hours (170 hours social emotional instruction & 70 hours of counseling related services) of social, emotional, and behavioral compensatory services for Student is close to the actual amount of SES instruction that Student was denied. Based on the FAPE denials, the actual total amount of social, emotional, and behavioral services Student missed are 202 hours and 15 minutes calculated as follows:

2021-2022	52 hrs.	(SES instruction not implemented)
	29 hrs.	(SES instruction inappropriately implemented)
2022-2023	7.5 hrs.	(SES instruction not implemented in regular class)
	36 hrs.	(SES instruction inappropriately implemented)
	69 hrs.	(missed 92 days of BST/CA at 45 minutes each)
	<u>9 hrs.</u>	<u>(supplemental OT for 18 weeks x 30 minutes)</u>

Total: 202.5 hours

209. The 70 hours of compensatory counseling has already been deemed appropriate previously in this Final Decision; therefore, Student is entitled to 202 hours and 30 minutes of compensatory social, emotional, and behavioral education and 70 hours of compensatory counseling as related services for a total of 272 hours and 30 minutes of social, emotional, and behavioral compensatory education and related services.

210. For academic compensatory services, the amount of time Student was out of his regular education classes due to the inappropriate self-time-out intervention was 116 hours (62 hours for the 2021-2022 school year, 54 hours for the 2022-2023 school year). In addition, he should have had 4 hours of written expression (from November 2, 2022 forward). Although Student was not found eligible for reading or math goals and was awarded very little writing compensatory education, both his behavioral deficits and the intermittent interruptions in his core curriculum negatively impacted his academics as evidenced by his grades. The total academic compensatory education awarded is 120 hours.

211. The 10 hours Ms. Holmes recommended for Parent training as a related service is reasonable because it will assist Student's Parents with understanding his disabilities and supporting his educational programming. If Student enrolls back into Wake County Schools, future staff training and support may be necessary to support him but because his enrollment status is unknown, the 70 hours recommended by Ms. Holmes for staff training and support will not be awarded. In sum, the total compensatory education and related services award is 402 hours and 30 minutes (202.5 hours - SES, 70 hours - counseling, 120 hours- academic, and 10 hours - parent training).

BASED UPON the foregoing Findings of Fact, Stipulations, sworn testimony, relevant laws, legal precedent and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

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

1. The Office of Administrative Hearings has jurisdiction over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education

(“FAPE”) pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400 *et seq.* and implementing regulations, 34 C.F.R. Part 300.

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

3. Petitioner Student is a “child with a disability” as defined by the IDEA and entitled to a free appropriate public education. 20 U.S.C. § 1401(3). Petitioner’s Mother and Father, as parents of a minor child with a disability, and Student are guaranteed procedural safeguards with respect to the provision of FAPE which includes contesting the appropriateness of educational decisions made by Wake County Public Schools and the implementation of Student’s educational programming. *See* 20 U.S.C. § 1415.

4. Respondent, Wake County Board of Education, is a local education agency receiving monies pursuant to the Individuals with Disabilities Education Act responsible for providing Student a free appropriate public education.

5. The Parties are properly before the Undersigned administrative law judge and jurisdiction and venue are proper. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The Parties received proper notice of the hearing in this matter.

6. Petitioners have the burden of proof in this contested case and must establish the facts required by N.C. Gen. Stat. § 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a). The administrative law judge must decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a).

7. Petitioners, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition unless the other party agrees otherwise. 20 U.S.C. § 1415(f)(3)(B); NC 1504-1.12(d).

8. The North Carolina Rules of Evidence in Chapter 8C of the General Statutes govern all contested cases proceedings. N.C. Gen. Stat. § 150B-29; 26 NCAC 03 .0122 (1). All evidence admitted into the official record that has probative value must be considered by the administrative law judge as has been done in this case. 26 NCAC 03 .0122 (1) & (2).

Deference to Educators

9. 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).

10. In special education cases in particular, “deference 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 U.S. 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 was reasonably calculated to enable the child to make progress appropriate in light of his

circumstances.” *Id.* 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). “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). Moreover, unlike the opinions of an expert witness, the lay opinion of a nonexpert educator must be based on first-hand knowledge or observation and helpful for the Undersigned to get a clear understanding of a fact in issue. N.C. Gen. Stat. § 8C-1, Rule 701.

11. The Undersigned afforded appropriate deference to Respondent’s school witnesses regarding educational decisions for Student where they demonstrated first-hand knowledge and expertise. However, little deference was afforded to witnesses who were not involved in the development of Student’s IEPs; were not responsible for implementing Student’s IEPs; or where the documentary evidence was contradictory to their testimony.

Statute of Limitations Defense

12. Before addressing the IDEA claims, Respondent asserts that all Petitioners’ implementation claims prior to October 28, 2021 should be dismissed for untimeliness because Petitioners “knew or should have known” that Respondent failed to materially implement the IEPs and BIPs. Resp’t Pro Fin. Dec. pp 26-27, ¶¶ 101-107. The Undersigned disagrees as explained herein.

13. The IDEA provides the complaint must “set[] forth an alleged violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint” and allows states to establish a distinct statute of limitations “for such a [due process] complaint.” 20 U.S.C. § 1415(b)(6)(B). In North Carolina, “[n]otwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition.” N.C. Gen. Stat. § 115C-109.6(b).

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

15. The operative IEP in effect at the beginning of Student’s 2021-202 school year was the November 17, 2020 IEP (November 2020 IEP) with duration dates of November 18, 2020 to

November 16, 2021. Like its successors during the 2021-2022 and 2022-2023 school years, the November 2020 IEP contained the same social skills instruction service delivery of four, 30-minute sessions a week. While Student's Parents may have suspected something was wrong by October 28, 2021, there is no way they could have possibly known the extent of WCPSS' implementation malfeasance until, at the earliest, the June 2, 2022 IEP meeting. Based on the data documentation in this case, it is doubtful that even then Student's Parents actually knew the gravity of their implementation claims until after filing their contested case and receipt of the data documentation during discovery.

16. The IDEA and State law also provide two exceptions to the one-year statute of limitations: the specific misrepresentation and withholding of required information under State or federal law. 20 U.S.C. § 1415(f)(3)(D); N.C. Gen. Stat. §115C-109.6(c). An argument could also be made that WCPSS' withholding from Student's Parents the data documentation they requested and that was required for progress monitoring of Student's IEP goals fits the withholding exception. 20 U.S.C. § 1415(f)(3)(D)(ii); N.C. Gen. Stat. § 115C-109.6(c)(ii).

17. Based on either theory, dismissal of Petitioners implementation claims prior to November 11, 2021 is **DENIED**. The statutorily relevant period for Issue 2 is August 2, 2021 through February 6, 2023. As Issues 3 and 4 reference the statutory time period determined for Issue 2, August 2, 2021 through February 6, 2023 also applies to Issues 3 and 4. The Issues statements for Issues 2, 3, and 4 have been revised below to reflect the decision on the statutorily relevant time period.

Mootness of Petitioners' January/February 2023 IEP and Proposed BIP Claims

18. After the first bifurcated part of the contested case hearing on the FAPE and implementation claims and before resumption of the hearing on tuition reimbursement claim, Petitioners voluntarily dismissed their tuition reimbursement claim. Prior to that unexpected action, questions had already arisen as to what IEPs/BIPs were relevant to the tuition reimbursement claim. After its dismissal, new questions arose about the status of Petitioners' claims regarding the January 19, 2023 IEP (including February 2, 2023 meeting addendum), and February 6, 2023 BIP (Proposed). The implementation date of this January/February 2023 IEP and Proposed BIP was February 8, 2023. Student was withdrawn from WCPSS before the implementation date on February 7, 2023. Petitioners are not entitled to compensatory education for an IEP that was not implemented. Having dismissed their tuition reimbursement case, no remedies could be awarded to Petitioners for the alleged inappropriateness of the January/February 2023 IEP and Proposed BIP.

19. At the Undersigned's request, the Parties submitted briefing on the issue of whether the January/February 2023 IEP and Proposed February 2023 BIP was the only IEP/BIP relevant to the award of tuition reimbursement or if tuition reimbursement could be awarded for the inappropriateness or implementation violations related to the prior IEPs/BIPs.

20. The Respondent's argument was most persuasive. According to the IDEA, "[a] court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c). In *A.B. ex rel. D.B. v. Lawson*, the Fourth Circuit Court of Appeals interpreted that standard to mean: "The parent may recover if (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parents

were appropriate to the child's needs.” 354 F.3d 315, 320 (4th Cir. 2004). In *Z.W. v. Smith*, the court concluded that “the record fully supports the ALJ's conclusion that AACPS's proposed placement at High Road for the 2002–2003 school year offered Z.W. a FAPE and therefore precluded the parents' request for tuition reimbursement.” 210 F. App'x 282, 287 (4th Cir. 2006) (concluding further that “Because we hold that AACPS offered AB a FAPE, the issue of reimbursement under *Burlington*, supra, and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993), is clearly inapplicable.”).

21. It is undisputed that the January/February 2023 IEP and Proposed February 2023 BIP were WCPSS’s proposals of FAPE after Petitioners gave their 10-day notice and before they enrolled Student in the private school program. Based on review of the Parties’ submissions, the Undersigned concludes that only the January 19, 2023 IEP (including February 2, 2023 meeting addendum), and February 6, 2023 BIP (Proposed) are relevant to the tuition reimbursement claim; none of the preceding IEPs or BIPs are relevant.

22. As remedy for Petitioners’ claims pertaining to the earlier IEPs/BIPs, Petitioners are seeking compensatory education, not prospective private school placement or tuition reimbursement. Petitioners have no substantive compensatory implementation claim on the January/February 2023 IEP and Proposed February 2023 BIP because Student was withdrawn before implementation. Moreover, the appropriateness of the January/February 2023 IEP and Proposed February 2023 BIP were related solely to the first prong of Petitioners’ tuition reimbursement claim which is now moot because it was voluntarily dismissed.

23. Respondent objects to dismissal of the January/February 2023 IEP and Proposed February 2023 BIP claims because evidence had been taken on the appropriateness of those claims and Petitioners had rested on the FAPE issue. See N.C. Gen. Stat. § 1A-1, 41(a)(a)(i). However, Petitioners had not rested their tuition reimbursement claim scheduled for hearing on August 21 through 24, 2023. Notice of Hearing (issued 08/04/2023).

24. Regardless of Respondent’s objection, this Tribunal cannot adjudicate a moot issue even if the Parties agree otherwise. The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent. *In re K.J.L.*, 363 N.C. 343, 345-46, 677 S.E.2d 835, 837 (2009) (quotation omitted). *In re Peoples*, 296 N.C. 109, 147 (1978), the Supreme Court of North Carolina held that:

[w]henver, during the course of litigation it develops that the relief sought has been granted or that questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

25. Moreover, lack of subject matter jurisdiction cannot be waived and can be raised at any time, including for the first time even on appeal. *B&D Integrated Health Services v NC DHHS and Alliance Health*, COA23-44 *18 (05/09/2023) citing *Water Tower Office Assocs. v. Town of Cary Bd. of Adjust.*, 131 N.C. App. 696, 698, 507 S.E.2d 589, 591 (1998) (citation omitted). “When a court decides a matter without the court’s having jurisdiction, then the whole proceeding is null and void, i.e., as if it had never happened.” *Id.* *19 citing *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 718 (2013) (citation omitted). “‘If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action’ for lack of subject matter jurisdiction.” *Cumberland Cty. Hosp. Sys., Inc. v. N.C. Dep’t of Health & Human*

Servs., 242 N.C. App. 524, 528, 776 S.E.2d 329, 333 (2015) (quoting *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994)).

26. Applying the doctrine of mootness to the instant case, the issues originally in controversy between the Parties, namely the appropriateness and implementation of the January 19, 2023 IEP with February 2023 Addendum and Proposed February 6, 2023 IEP are no longer at issue. Although the tuition reimbursement claim and appropriateness of this IEP and the Proposed BIP are dismissed, some facts regarding the January/February 2023 IEP are still relevant to other issues. As this Tribunal lacks subject matter jurisdiction over Petitioners' claims pertaining to the January/February 2023 IEP and Proposed February 2023 BIP and there are no remedies available for those claims, they are **DISMISSED WITHOUT PREJUDICE** as moot.

OVERVIEW OF IDEA

27. Analysis of Petitioners' substantive and procedural FAPE claims properly begins with an overview of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* The IDEA was enacted to "throw open the doors of public education" and help Students with disabilities who had previously been "either completely ignored or improperly serviced by American public schools." *T.B., Jr. ex rel. T.B., Sr. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 571 (4th Cir. 2018). The IDEA requires that states, in return for federal funding, ensure that every child with a disability has the opportunity to achieve a "free appropriate public education," also known as a "FAPE." *Id.* (quoting 20 U.S.C. § 1412(a)); *M.M. v. Sch. Dist.*, 303 F.3d 523, 526 (4th Cir. 2002). A FAPE refers to "special education and related services" that are "(1) without charge, (2) meet the standards of the state educational agency, (3) include the appropriate level of education in the state involved and (4) are provided in conformity with an individualized education program ('IEP')." *K.I. v. Durham Pub. Schs. Bd. of Educ.*, 54 F.4th 779, 785 (4th Cir. 2022). The IEP is prepared by a team of teachers, school officials, and the Student's parents, and it serves as the "primary vehicle for ensuring the Student receives a FAPE." *Id.*

28. To satisfy the IDEA requirements, the school must offer an IEP that is "reasonably calculated to enable a child [Student] to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017). Both the Supreme Court and the Fourth Circuit have emphasized that an IEP must be "reasonable," not "ideal." *Id.*; *A.B. by L.K. v. Smith*, 2023 WL 3533595, at *2 (4th Cir. May 18, 2023). But still, the special education and related services in the IEP must be designed to meet Student's "unique needs and prepare [him] for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

Substantive and Procedural Violations of FAPE

29. 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).

30. In this case, the substantive violations concern the appropriateness and implementation of Student's IEPs and BIPs. The procedural violations are less clear. Per Respondent, the procedural issues are the revision of the IEP/BIP and timeliness of the FBA review. For those issues, Petitioners view these as more of a hybrid of procedural and substantive claims.

Both Parties agree that the timeliness of the review of the IEEs and completion of the FBA are procedural issues. But, Petitioners also contend that the IEP team did not adequately review the contents of the IEEs and revise the IEP/BIP in accordance with the independent evaluators' recommendations. The Undersigned agrees that the timely review and revision of the IEPs/BIPs in light of the independent evaluations and FBA involves both substantive and procedural elements because the present levels of academic and *functional* performance, derived from these IEEs and the FBA, are the bases for development of the goals and everything thereafter in an IEP/BIP.

APPROPRIATENESS ISSUE

31. The first issue raised is about the substantive appropriateness of IEPs and BIPs from November 11, 2021 through February 6, 2023 (the "Appropriateness Issue"). The IEPs and BIPs now involved in Issue 1 are the June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), and November 2, 2022 IEP (Annual Review). In addition to removing January/February 2023 IEP and Proposed February 2023 BIP claims, claims within the Appropriateness Issue, although the same, have been reordered from the Parties' version to reflect the order typically organized in an IEP.

ISSUE 1: SUBSTANTIVE APPROPRIATENESS OF IEPS

The first issue asks:

Whether, from November 11, 2021 through February 6, 2023, the Respondent denied Student a free, appropriate, public education with respect to developing substantively appropriate IEPs and BIPs in four subparts.

The four subparts are addressed individually below.

ISSUE 1(a): Failing to develop appropriate Individual Education Plan ("IEP") goals for writing as well as his social, emotional, and behavioral needs.

32. The first subpart is whether Respondent failed to develop appropriate Individual Education Plan ("IEP") goals for reading, writing, as well as his social-emotional and behavioral needs? Except for reading, the answer to this question is "yes."

33. It is undisputed that Student is a child with a disability entitled to an IEP and has been identified under the categories Serious Emotional Disturbance (Emotional Disturbance) and Other Health Impaired (OHI) due to his maladaptive behaviors.

34. 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)). "[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).

35. 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”). “[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)).

36. School districts are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. *Rowley*, 458 U.M.S. at 189-90. The Undersigned recognizes that WCPSS is not required to maximize Student’s educational performance. *See e.g. Rowley*, 458 U.S. at 188-89 (1982); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir.2004).

37. 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). 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).

38. 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;

(III) 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;
- (IV) 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).

Appropriateness of Goals and Services

39. The IDEA requires that Student’s IEPs and BIPs be tailored to his unique needs, not the fidelity of the BST program. The IEPs must accurately describe his present level of academic and functional achievement, including explaining “how [his] disability affects [his] involvement and progress in the general education curriculum.” 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa). In addition, the IEPs must then set out “a statement of measurable annual goals ... designed to ... enable [Student] to be involved in and make progress in the general education curriculum,” along with a description of specialized instruction and services that the child will receive. 20 U.S.C. § 1414(d)(1)(A)(i)(II) & (IV). The instruction and services must likewise be provided with an eye toward “progress in the general education curriculum.” 20 U.S.C. § 1414(d)(1)(A) (i)(IV)(bb).

40. WCPSS’s failures to address Student’s known deficiencies resulted in the absence of appropriate goals in Student’s areas of need. *See A.D. v. Creative Minds International Public Charter School*, 120 LRP 30541 (D.C., August 14, 2020) (citing *Endrew F. v. Douglas Cty. Sch. Dist.*, 290 F. Supp. 3d 1175, 1183-84 (D. Colo. 2018) concluding the IEP was inappropriate given the Student’s needs in math and the absence of math goals in the Student’s IEP).

41. When developing goals or determining eligibility of specially designed instruction, “[a] single measure or assessment cannot be the sole criterion for [] determining an appropriate education program for a child.” 20 U.S.C. § 1414(b)(B). Student is also entitled to the provision of specially designed instruction in the least restrictive environment (“LRE”). 20 U.S.C. § 1412(a) (1) & (5); *see also Endrew F.*, 137 S.Ct. at 999 (“[T]he IDEA requires that children with disabilities receive education in the regular classroom ‘whenever possible.’”). This is known as a “mainstreaming requirement,” *DeVries by DeBlaay v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989), the IDEA provides:

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

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

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

42. The IDEA prefers full integration in the regular classroom, *Endrew F.*, 137 S.Ct. at 999, and emphasizes the integral role of supplemental aids and services to allow disabled Students to access the regular classroom. 34 C.F.R. § 300.114(a)(2)(ii). WCPSS did not create an IEP or BIP that provided him strategies to remain in his LRE when agitated or upset. Student was denied access to his LRE when his IEPs/BIPs created a behavior of avoidance and caused him to be out of the general education setting daily during the 2021-22 and 2022-23 school years.

43. Moreover, lunch is a nonacademic activity but still part of the “regular educational environment,” and an important time for Students to develop appropriate social emotional skills that can carry forward to adulthood. Because Student was routinely removing himself from the lunchroom and going to the BST room, where he did not receive social-emotional support to enable him to return to the lunchroom and where he was allowed to continue this pattern of behavior, he was denied a FAPE.

44. Because of his disabilities, Student has been removed from the regular education setting for being disruptive or aggressive and has been taught avoidance behaviors that have resulted in a loss of instructional time. With appropriate specially designed instruction, appropriately implemented supplementary aids and supports, he does not have to be removed from the regular education classroom and he can continue to access the general curriculum without disrupting his peers. Because the BST staff removed Student from the general education setting and taught him avoidance behaviors rather than providing him support in his least restrictive environment (the regular education setting), WCPSS has denied Student a FAPE.

45. Based on the preponderance of credible and probative evidence, Petitioners met their burden of proof that from November 11, 2021 until February 6, 2023 that:

the June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), and November 2, 2022 IEP (Annual Review) failed to have appropriate goals for Student’s social, emotional and behavioral needs; and,

that the November 2, 2022 IEP failed not only to contain appropriate social, emotional, and behavioral, goals but also it failed to contain a written expression goal.

Student is entitled to compensatory education from December 2021 until February 6, 2023 for his social, emotional, and behavioral needs, and from November 2, 2022 for his written expression deficits.

ISSUE 1(b): Failing to develop appropriate behavioral intervention plans (“BIPS”) that addressed Student’s social, emotional, and behavioral needs.

46. The second subpart of the Appropriateness Issue concerns the appropriateness of Student’s behavior intervention plans (“BIPS”). A BIP is developed from a functional behavior assessment (“FBA”). The FBA is used to determine the causal relationship between Student’s disability and its manifestations in the general education setting. 20 U.S.C. § 1415(k)(F)(i). Student’s behavior intervention plans are required to be developed and modified as needed to address the targeted behaviors which impacted his access to the general curriculum and his nondisabled peers. *See* 20 U.S.C. § 1415(k)(F)(ii).

47. Because Student’s “behavior impedes his learning and that of others,” the IEP team must consider “the use of positive behavioral interventions and supports, and other strategies to address that behavior.” 20 U.S.C. § 14114(d)(3)(B)(1). All the IEP teams determined that Student’s behavior impeded his learning and the learning of his nondisabled peers. Instead of addressing his maladaptive behaviors to keep him in the general education curriculum with his nondisabled peers, the IEP teams developed and implemented behavioral interventions and supports, and strategies that kept him out of the general education setting.

48. Contrary to Respondent’s assertions, Student’s BIPs are part of his IEPs as the means of implementing his behavioral goals. Respondent argues that “the substantive appropriateness of a behavior intervention plan is not a viable legal claim” and “not subject to review.” Resp’t Pro Fin Dec. p. 18, ¶¶ 59&60. In support, Respondent cites *Alex R., ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221*, 375 F.3d 603, 614 (7th Cir. 2004). More recently and closer to home, the Federal Western District Court of North Carolina, citing the same case, came to the opposite conclusion and stated:

However, as part of the IEP plan, to meet the FAPE standard a BIP should be reasonably tailored to meet the needs of the Student while being appropriately ambitious in light of the Student's circumstances. *Andrew*, 137 S.Ct. at 999-1000. A school's failure to develop a BIP can result in denial of FAPE.

Bouabid v. Charlotte Mecklenburg Schs. Bd. of Educ., 2021 U.S. Dist. LEXIS 237161, *25-26 (citing *Neosho R V Sch. Dist. v. Clark*, 315 F.3d 1022, 1028 (8th Cir. 2003); *Enter. City Bd. of Educ. v. M.S.*, No. 1:19-CV-748, 2020 U.S. Dist. LEXIS 103536, at *18-19 (M.D. Ala. June 12, 2020)), *aff’d Bouabid v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 2023 U.S. App. LEXIS 6417 (4th Cir. N.C., Mar. 15, 2023).

49. Adopting the Fourth Court’s reasoning, the Undersigned concludes that the IEP teams did not incorporate all the probative data evidence of Student’s behaviors and social-emotional needs when drafting Student’s BIPs, therefore, the BIPs were not designed to enable Student to make progress in light of his unique functional needs. Moreover, as stated above in ISSUE 1(a) and ISSUE 2 below, the implementation of the BIPs denied him access to the regular educational environment.

50. Based on the preponderance of credible and probative evidence, Petitioners met their burden of proof that the BIPs incorporated in the June 2, 2022 IEP, amended on June 27, 2022 at the Addendum IEP meeting and in the November 2, 2022 IEP were not reasonably tailored to meet the unique social, emotional, and behavioral needs of Student which resulted in a denial of FAPE.

Appropriateness of Supplementary Aids and Services

ISSUE 1(c): Failing to develop appropriate supplementary aids, services, modifications, and accommodations related to Student’s writing, social, emotional, and behavioral needs.

51. The third subpart concerns the appropriateness of the supplementary aids, services, modifications, and accommodations as they relate to Student’s writing, social, emotional, and behavioral needs. As stated previously, Student did not have a reading disability but his reading and other academic performances were affected by his low processing speed and the appropriateness of the supplement aids and services were viewed in that light.

52. Before removing Student from the general education curriculum for academic and nonacademic activities, the IDEA requires WCPSS to meaningfully consider the provision of appropriate supplementary aids and services needed for him to be able to participate in the general curriculum including nonacademic activities such as meals. 34 C.F.R. § 300.117. “[A] Student with disabilities must be placed ‘in the least restrictive environment that will provide the child with a meaningful educational benefit.’” *H.L. v. Downington Area Sch. Dist.* 624 F. App’x 64, 68 (3d Cir. 2015) (citing *D.M.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 556-57 (3d Cir. 2010)).

53. The IDEA defines supplementary aids and services as “aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities, like Student, to be educated with nondisabled children to the maximum extent appropriate in accordance with Section 1412(a)(5)” of the IDEA. 20 U.S.C. § 1401(33).

54. Based on the preponderance of credible and probative evidence, Petitioners did not meet their burden of proof that the June 2, 2022 IEP and June 27, 2022 BIP (IEP Addendum) were inappropriate because they failed to contain appropriate supplementary aides, services, modifications, and accommodations related to Student’s writing needs.

55. Petitioners did, however, meet their burden of proof that the supplementary aides, services, modifications, and accommodations as they relate to Student’s social, emotional, and behavioral needs were inappropriate because Student needed modifications, and accommodations due to his low processing speed and supplemental occupational therapy services for Student’s sensory issues so that he could access the general education classroom and nonacademic lunchroom setting. Student is entitled to compensatory services of occupational therapy for his sensory needs.

Appropriateness of Related Services

ISSUE 1(d): Failing to develop appropriate related services related to Student’s social, emotional, and behavioral needs.

56. The final subpart questions whether the related services in the IEPs were appropriate related to Student’s social-emotional and behavioral needs. The IDEA defines related services as “transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education.” 34 C.F.R. § 300.34(a). These services include, but are not limited to, speech-language pathology and audiology services, psychological services, occupational therapy, counseling services, and parent counseling. 34 C.F.R. § 300.34(a).

57. Every IEP must contain:

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

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

34 C.F.R. § 300.320(a)(4) (emphasis added)

58. Student’s participation in extracurricular and other nonacademic activities, like lunch, is part of being involved in and participating with other children with disabilities and nondisabled children in the least restrictive environment.

59. “Counseling” is a related service provided by qualified social workers, psychologists, guidance counselors or other qualified personnel to enable Student to access the general curriculum and his peers. 34 C.F.R. § 300.349(c)(2). Likewise, “parent counseling” assists parents in understanding the special needs of their child and “helping parents acquire the necessary skills that will allow them to support the implementation of their child’s IEP.” 34 C.F.R. § 300.34(c)(8)(i)&(ii). Psychological services includes “psychological counseling for children and parents” and “assisting in developing positive behavior intervention strategies.” 34 C.F.R. § 300.34(c)(10)(v)&(vi).

60. Based on Student’s testimony and persuasive testimony of Petitioners’ expert witnesses, Petitioners met their burden of proof that Student needed school-based counseling to assist him to access the general education curriculum, an academic activity, and lunch, a nonacademic activity, with his nondisabled peers. Likewise, Student’s Parents are entitled to parent counseling to assist them in acquiring the necessary skills to support the implementation of Student’s IEP. As recommended by Ms. Holmes, Student’s compensatory services in counseling should be focused on Cognitive Behavior Therapy (CBT) and exposure therapy.

Summary of ISSUE 1(a-d)

61. After reviewing the BST data for the first two quarters of the 2021-2022 school year which ended December 22, 2021, Petitioners’ expert witness Ms. Holmes opined that WCPSS should have revised Student’s IEP in December 2021. Therefore, as of December 2021, Petitioners met their burden of proof that Respondent denied Student a free, appropriate, public education with respect to developing substantively appropriate IEPs and BIPs by failing to develop appropriate social, emotional, and behavioral goals; failing to include the related service of counseling for Student and his Parents; and providing specially designed instruction insufficient to address his social, emotional, and behavioral needs.

62. As of November 2, 2022, Petitioners met their burden of proof that Respondent denied Student a free, appropriate, public education with respect to developing substantively appropriate IEPs and BIPs by failing to develop an appropriate written expression goal, specially designed instruction for written expression, and supplemental service of occupational therapy for his sensory needs.

IMPLEMENTATION ISSUE

ISSUE 2: Implementation of IEPs and BIPs

63. The second Issue questions whether Respondent appropriately implemented Student's IEPs and BIPs and asks:

Whether during the statutorily relevant period from August 2, 2021 to February 6, 2023, the Respondent denied Student a free, appropriate public education with respect to material lack of implementation of the IEP goals, supplementary aides, services, accommodations, modifications, specially designed instruction, and behavioral intervention plans.

64. As indicated above in the statute of limitation section, the statutorily relevant period is August 2, 2021 (beginning of 2021-2022 school year) through February 6, 2023; therefore, this is the statutorily relevant period for Issue 2. The IEPs and BIPs involved in Issue 2 are the November 17, 2020 IEP, September 21, 2021 BIP, October 28, 2021 IEP, June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), and November 2, 2022 IEP (Annual Review), but not the January 19, 2023 IEP (including February 2, 2023 meeting addendum), and February 6, 2023 BIP (Proposed).

65. Originally, the January/February 2023 IEP and Proposed February BIP were included in the Issue 2 implementation claim. The initiation date for the January/February 2023 IEP and February 2023 BIP was February 8, 2023. Before either of them could be implemented, Student was withdrawn from Wake County Public Schools on February 7, 2023. WCPSS was never afforded an opportunity to implement the January/February 2023 IEP or Proposed February BIP; therefore, Petitioners have no substantive implementation claims for either this IEP or BIP and those claims are **DISMISSED WITH PREJUDICE**.

66. The Supreme Court identified, "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)). Under the IDEA, WCPSS is required to implement all components of Student's IEPs and BIPs. 34 C.F.R. § 300.323 (c).

67. The Fourth Circuit has affirmed that "a material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA." *Sumter 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.").

68. "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)). 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).

69. "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.

70. Because of the lack of data, inconsistent data, lack of testimony from any regular education teachers indicating the IEPs and BIPs were implemented at various times that Student testified they were not, and inconsistent testimony from Respondent's witnesses, from August 2, 2021 through February 6, 2023, the November 18, 2020 IEP, September 21, 2021 BIP, October 28, 2021 IEP, June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), and November 2, 2022 IEP (Annual Review) were not materially implemented. Moreover, even when the Social Emotional Skills instruction was implemented, its implementation was inappropriate because the instruction was not individualized to meet Student's unique needs.

71. Student is entitled to compensatory education for the period when Behavior Support Teachers Graham and Johnson failed to implement and inappropriately implemented the four, 30-minute sessions a week of Social Emotional Skills instruction during Student's 7th grade school year and during his 8th grade school year. Student is also entitled to compensatory education for the BST staff's failures to materially and appropriately implement the behavioral supports in the regular classroom as required by the service delivery in each IEP.

REVISE IEPs/BIPs ISSUE

ISSUE 3: Failure to Revise IEPs and BIPS

Subject to the same statutory relevant period determined in Issue 2, whether the Respondent failed to appropriately revise Student's IEPs and BIPs, to address his progress, or lack thereof, in the areas of writing, social, emotional, and behavior.

72. Issue 3 queries whether Respondent failed to appropriately revise Student's IEPs and BIPs, to address his progress, or lack thereof, in the areas of writing, social-emotional, and behavior. The relevant time period is from August 2, 2021 to February 6, 2023. The IEPs and BIPs involved

in Issue 3 are the November 17, 2020 IEP, September 21, 2021 BIP, October 28, 2021 IEP (Annual Review), June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), and November 2, 2022 IEP (Annual Review). Respondent asserts that this issue is purely a procedural matter. The Undersigned disagrees.

Procedural Violations

73. 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 decision-making 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). Petitioners have abandoned their parent participation claims; therefore, the only procedural violations still viable are those that impeded Student’s claims to FAPE. These are Issue 3, failure to appropriately revise Student’s IEPs and BIPs, and Issue 4, timeliness of the functional behavioral assessment.

74. For a procedural defect in the development of an IEP to entitle a claimant to relief, the defect must result in a loss of educational benefit and not simply be a harmless error. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 684 (4th Cir. 2007). To the extent that the procedural violations do not actually interfere with the provision of FAPE, these violations are not sufficient to support a finding that a district failed to provide a FAPE. *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997). If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations. *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir.1990).

Timeliness of IEP and BIP Review

75. An initial IEP meeting must be convened within 30 days of the determination that the child needs special education and related services. 34 C.F.R. § 323(b). For a child with a disability that has an IEP, an appropriate IEP must be in effect at the beginning of each school year. 34 C.F.R. § 323(a). After the IEP is developed, the IEP team must review the IEP “periodically, but not less than annually, to determine whether the annual goals and for the child are being achieved” and “revise[] the IEP periodically, but not less than annually, to address any lack of expected progress toward the annual goals and in the general curriculum, if appropriate.” 20 U.S.C. § 1414(4)(A)(i)(ii)(I); 34 C.F.R. § 300.324(b)(ii).

76. Respondent posits that the “only legally relevant question under this issue is whether the IEP team complied with the IDEA’s requirement that the IEP be reviewed ‘at least annually’ ...[and that] [t]his Tribunal can require no more” than an annual review. Resp’t Pro Fin. Dec. pp 42-43 ¶¶ 20. Respondent further asserts there are no procedural violations because Student’s IEPs were reviewed and revised at least once a year but even if the IEPs were not reviewed within that one-year period, that procedural violation did not result in a loss of educational benefit. The only procedural violation which did not result in a loss of educational benefit was the 5-day delay in convening the October 28, 2021 IEP’s annual review due October 27, 2022, not November 2, 2022.

77. Contrary to Respondent’s position, IDEA is more expansive in its review requirements than what Respondent asserts. Per IDEA, an IEP must be reviewed “*periodically, but not less than annually*” and revised “*periodically, but not less annually*, to address any lack of expected progress toward the annual goals and in the general curriculum.” 20 U.S.C. § 1414(4)(A)(i)(ii)(I); 34 C.F.R. § 300.324(b)(ii) (emphasis added).

78. The IEP team must also periodically, but not less than annually, address: the results of any reevaluations; information about the child provided to, or by, the parents; the child's anticipated needs; or other matters." 20 U.S.C. § 1414(4)(A)(i)(ii) (II-IV); 34 C.F.R. § 300.324(b)(ii)(B-E). Similarly, the IEP team is also required to consider any Independent Educational Evaluations in any decision made with respect to the provision of FAPE to Student 34 C.F.R. § 300.502(c)(1).

79. By November 2, 2022, the school-based members of the November 2, 2022 IEP team had access to the information in the Independent Psychoeducational and Occupational Therapy Evaluations but did not disclose this information to Petitioners. In the subsequent January 19, 2023 IEP meeting, based on this exact same information, the IEP team determined that Student needed special education for his written expression deficits and supplemental occupational therapy services for his sensory needs.

80. Considering Student's need for new behavior goals, his growing estrangement from the general educational setting, and information contained in the IEEs, the IDEA did require more than an annual review. Student's IEPs and BIPs should have been reviewed and revised periodically during both his 2021-2022 and 2022-2023 school years beginning in December 2021, long before the June 2022 IEP meetings, and especially so after receipt of the August 2022 IEEs, not months later on November 2, 2022.

81. Petitioners proved that Respondent failed to appropriately revise Student's IEPs and BIPs, to address his progress, or lack thereof, in the areas of writing, social, emotional, and behavioral needs even though the school-based IEP members had access to the Independent Psychoeducational and Occupational Therapy evaluations. This procedural violation caused a substantial denial of FAPE.

TIMELINESS OF FBA ISSUE

ISSUE 4: Timeliness of Functional Behavioral Assessment

Subject to the same statutorily relevant period as determined in Issue 2, whether the Respondent failed to timely conduct a functional behavioral assessment ("FBA") necessary to address Student's behavioral and social-emotional needs from August 2, 2021 through February 6, 2023.

82. The final Issue concerns only whether WCPSS timely conducted a functional behavioral assessment ("FBA") during the time period from August 2, 2021 through February 6, 2023. An FBA was completed on September 21, 2021 at the September 2021 IEP meeting. Based on that FBA, the IEP team developed the one behavior goal targeting physical aggression and noncompliance. No other FBAs were conducted during the remainder of Student's 7th grade. Only after Student's Parents requested an independent FBA, did WCPSS begin the FBA process sometime in October 2022 but this FBA was not completed until sometime before the January 19, 2023 IEP meeting.

83. Neither the IDEA, State law or regulations address when or how often a functional behavioral assessment must be conducted except in the manifestation determination context. A functional behavioral assessment is not required by the IDEA except when there is a change of

placement, removal from more than 10 consecutive school days or a series of removals that constituted a pattern, and the IEP team needs to determine if the student's conduct that gave rise to the change in placement was a manifestation of the child's disability. 34 C.F.R. § 300.530(f). Although usually the case, a 10-day change in placement does not always have to arise from a disciplinary incident. A school district can improperly change a student's placement by asking the Parents to come pick up a child early from school because of the child's behavioral issues on a regular basis without reconvening the IEP team. But other than during a manifestation determination, IDEA and State law leave it up to the local educational agency to determine when and how often a FBA is necessary to provide a free appropriate public education to a child with a disability.

84. WCPSS's own BST Manual provides such guidance on how often, at least, Respondent contends that the BIP and FBA should be revisited for a Student with severe behaviors on the BST caseload. The BST Manual emphatically states repeatedly that: "every student should have an up-to-date FBA and BIP" (Resp't Ex. 20 p 103); "It is best practice to revisit the FBA, which is a formal assessment, during each reevaluation" (Resp't Ex. 20 p 103) (emphasis in original); the "expectation" is that the IEP team convene a minimum of once a quarter to review the BIP" (Resp't Ex. 20 p 103) (emphasis in original); and, "the BIP should be reviewed no less than once a quarter unless the student's behavior and data indicate more frequent modifications to the BIP." Resp't Ex. 20 p 101 (emphasis in original). Even then, "if there is a marked increase/change in the target behavior, [the IEP] team should reconvene as often as necessary to review progress monitoring and make changes to interventions, reinforcers, and consequences." Resp't Ex. 20 p 103.

85. The Undersigned recognizes that guidance documents, like the BST Manual, are nonbinding interpretive statements. N.C. Gen. Stat. § 150B-2(7a). Although a FBA is not a required component of the IEP under 34 C.F.R. § 300.320 (*see* 71 Fed. Reg. 46,629(2006)), the FBA helps the IEP team determine the behavioral goals as well as the "positive behavioral interventions and supports" that are required components of an IEP. 34 C.F.R. § 300.324(a)(2)(i).

86. Without a current FBA, Student's IEP teams could not develop appropriate present levels of functional behavior for his behavior goals or determine appropriate behavioral support. Eligibility and educational needs are determined by assessments and evaluations (or reevaluations) such as a FBA which must consist of a "variety of assessment tools and strategies to gather relevant functional, development, and academic information, including information provided by the parent" to determine "the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum." 20 U.S.C. § 1414(b)(2)(ii).

87. An initial evaluation for eligibility and determination of a child's academic and functional needs must be completed within 60 days of the parent's consent. 20 U.S.C. § 1414(a)(1). A reevaluation can occur not more frequently than once a year, unless the parent and LEA agree otherwise, and at least 3 years, unless the parent and LEA agree that a reevaluation is not necessary. 20 U.S.C. § 1414(a)(2). Other than the 3-year requirement for determining if a reevaluation is necessary, neither the IDEA nor North Carolina Law or regulations specify the timeframe for conducting and reviewing reevaluations or IEEs. 20 U.S.C. § 1414(a)(2). Moreover, neither the IDEA nor State law define an FBA or explain what steps must be taken to complete one.

88. For both the Emotional Disturbance and Other Health Impairment categories of eligibility, the North Carolina's State Board of Education's Policies (NC Policies) require certain initial evaluation and reevaluation procedures for Students with social, emotional and behavioral

deficits. The NC Policies require two scientific research-based interventions to address behavior/emotional skill deficient and documentation of the results of the interventions including progress monitoring documentation, review of existing data, and observation across settings to assess functional skills. NC Policies 1503(d)(5)(i)(C), (F) & (H); 1503(d)(10)(i)(C), (E). *NC Policies Governing Services for Students with Disabilities* (March 2018). Student's IEPs must contain accurate present levels of academic and functional performance and the present levels are based, in part, on information from the evaluations. Updated and accurate information is essential because the present levels of functional performance, which guided the development and revisions of Student's behavioral interventions in his BIP, were data driven.

89. Pinpointing an exact date for when the FBA should have been conducted is difficult but based on the pattern of Student's behaviors as evidenced by the BST progress monitoring data certain time periods emerge. The first such period is by the end of the second quarter in December 2021 and, after track-out and the holidays, sometime near the beginning of the third quarter which started on January 24, 2022. In any event, the FBA should have been completed no later than the middle of the third quarter mid-February 2022 and well before the June 2, 2022 IEP meeting. Moreover, before holding the June 27, 2022 IEP and finally revising the September 2021 BIP in February 2023, the IEP team should have conducted an up-to-date FBA without waiting for completion of Dr. McKissick's FBA.

90. As Student's off-task and escapism behaviors continued to intensify throughout the third and fourth quarters of his 7th grade school year, another FBA should have been conducted before the beginning of his 8th grade school year which started July 29, 2022. IDEA requires that an appropriate IEP with appropriate behavioral goals, interventions, and support must be in effect at the beginning of each school year. 34 C.F.R. § 300.323. Although Dr. McKissick's FBA was pending during the first two quarters of Student's 8th grade school year, nothing prevented WCPSS from conducting an internal FBA in the meanwhile so that Student had an appropriate BIP in his IEP before the 8th grade started.

91. The preponderance of the evidence, corroborated by WCPSS's own BST Manual, proved that WCPSS should have conducted a FBA by the end of the second quarter of Student's 7th grade school year which was December 22, 2021 or at least no later than the third quarter of that year. Moreover, instead of waiting for completion of Dr. McKissick's FBA, nothing prevented WCPSS from conducting another one anytime during the 2022-2023 school year. This procedural violation resulted in a denial of FAPE because the BIP in Student's IEP was not timely revised to appropriately address his shifting behavioral needs.

REMEDY

92. “[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)); and 20 U.S.C. § 1415(i)(2)(C)(iii). 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)).

93. “Courts fashioning discretionary equitable relief under [the] IDEA must consider all relevant factors” *Carter*, 510 U.S. at 16. “The relief granted by courts under section 1415(i)(2)(C)(iii) is primarily compensatory education. Compensatory education, however, is not

defined within IDEA and is a judicially created remedy. It is intended as ‘a remedy to compensate [the Student] for rights the district already denied . . . because the School District violated [the] statutory rights while [the Student] was still entitled to them.’” *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717 (3d Cir. 2010) (citing *Lester H. v. Gilhool*, 916 F.2d 865, 872(3d Cir. 1990)).

94. “[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). “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). “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).

95. As indicated in the Findings above, after considering all relevant factors Petitioners’ compensatory education and services request was amended to an award of 402 hours and 30 minutes for the denial of FAPE from August 2, 2021 to February 6, 2023. This amount is reasonable and consistent with the discretionary equitable relief permitted by *Carter* for WCPSS’s failure to provide FAPE to Student *Carter*, 510 U.S. at 16.

FINAL DECISION

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

1. Respondent’s affirmative defense seeking dismissal of Petitioners’ implementation claims prior to November 11, 2020, based on the statute of limitations, is **DENIED**.

2. Due to the withdrawal of Petitioners’ tuition reimbursement claim, all of Petitioners contested issues with respect to the January 19/February 2, 2023 IEP (Addendum) and Proposed February 6, 2023 BIP are **DISMISSED WITHOUT PREJUDICE** as **MOOT**.

3. Petitioners met their burden of proof, by a preponderance of the evidence that Respondent failed to comply with the procedural and substantive requirements of the IDEA resulting in a denial of FAPE to Student based on the following:

- a. The behavior goals in Student’s June 2, 2022 IEP, June 27, 2022 BIP (IEP Addendum), November 2, 2022 IEP (Annual Review) were inappropriate to meet all of Student’s social, emotional, and behavioral needs.
- b. In addition, the November 2, 2022 IEP was inappropriate because it was not timely revised to include a writing goal, service delivery for written expression, and the supplemental services of occupational therapy for Student’s sensory needs.
- c. Excluding any determination of the appropriateness of the Proposed February 6, 2023 BIP, the Behavioral Intervention Plans from September 21, 2021

through February 6, 2023 were inappropriate because they failed to address all of Student's social, emotional, and behavioral needs.

- d. Respondent failed to materially implement the specially designed instruction and behavioral interventions in Student's IEPs and BIPS from August 2, 2021 through February 6, 2023.
 - e. Respondent failed to appropriately revise Student's IEPs and BIPs, from December 2021 through February 6, 2023, to address his lack of progress and increased off-task and avoidance behaviors in the areas of social, emotional, and behavior deficits, which caused him educational harm.
 - f. Respondent failed to timely conduct a functional behavioral assessment necessary to address Student's social, emotional, and behavioral needs from December 2021 until completion of Dr. McKissick's FBA and this failure caused Student educational harm.
 - g. Petitioners are the prevailing party.
 - h. The total compensatory education award is 402 hours and 30 minutes. As compensatory education for the denial of FAPE found herein, within 10 business days after requested by Petitioners, WCPSS will contract with independent providers of Petitioners' choice for 70 hours of 1:1 counseling service for Student; 10 hours of parent training for Mother and Father through a counselor; and 392 hours and 30 minutes of 1:1 academic recovery and social, emotional, and behavioral skills instruction for Student. The compensatory academic and social emotional skills instruction shall be divided as determined appropriate by Petitioners with assistance of their educational and behavioral consultants. All compensatory education and related services are to be completed within 18 months of this Final Decision to avoid administrative burdens on Respondent, and any unused hours shall be forfeited.
 - i. In lieu of compensatory education and related services, if the costs of any of these services have already been incurred by Petitioners, Respondent shall reimburse Petitioners for such costs within thirty (30) calendar days upon the presentation of receipts documenting the provision of such services and the reimbursement rates shall be at the prevailing provider rates in the community, not to exceed \$50.00 per hour for educational and social emotional skills instruction. Compensatory counseling shall be provided by a clinician or otherwise qualified person with comparable licensure and experience like Dr. Ohler and paid for or reimbursed at the customary rate for such providers.
 - j. All relevant factors have been considered in determining the appropriate relief to award Petitioners for Respondent's procedural and substantive violations of Student's right to a free appropriate public education.
4. Appendixes A and B are fully incorporated into this Final Decision.

5. Prior to publication of this Final Decision, all personally identifiable information about Student or other information which may make it possible to identify Student with reasonable certainty **SHALL BE REDACTED.**

NOTICE OF APPEAL RIGHTS

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

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

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

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

IT IS SO ORDERED.

This the 20th day of September, 2023.



Stacey Bice Bawtinheimer
Administrative Law Judge

TIME OUT OF GENERAL EDUCATION 2021-2022

	ELA/Reading	Math	Science	Social Studies	Lunch	Spanish/P.E.	Ramp Up	Total	
Q1: 8/2/21 – 9/30/21 (records began 8/9; 38 school days; 5 test accommodations)⁴⁸									
8/9/2021						40		40	
8/11; 25-26/2021	Student received out of school suspensions these days. These suspensions are worth 370 minutes/day. ⁴⁹								1110
8/25/2021		21				26	15/0	62/47	
8/26/2021	56	55	55	17	30	90		303	
9/9/2021		25						25	
BIP on 9/21/21⁵⁰									
9/24/2021	24/27	45/55	44		30	90		233/246	
9/30/2021						10		10	
Q2: 10/25/21 – 12/22/21 (38 school days; 7 test accommodations)⁵¹									
10/25/2021						20/25		20/25	
10/27/2021						20		20	
10/28 IEP Meeting- discussed off-task behaviors⁵²									
11/16/2021	56	20						76	
11/18/2021	2/0	30				20		52/50	
11/19/2021	25							25	
11/30/2021						25		25	
12/1/2021						25		25	
12/6/2021	7	30				25/30		62/67	
12/7/2021						30		30	
12/8/2021				16				16	
12/10/2021	1/0	30						31/30	
12/13/2021	1	45						46	
12/14/2021	49							49	
12/15/2021	56	55			30	50		191	
12/17/2021		35				30		65	
12/20/2021						25		25	
12/21/2021			32/28			20		52/48	
Q1 + Q2 Totals of Non-Test and Non-Discipline: 9 hours and 56 minutes									
Q3: 1/24/22 – 3/25/22 (45 school days; 23 test accommodations)⁵³									
1/26/2022						15		15	
1/27/2022						17		17	
1/28/2022		40						40	
1/31/2022			41	5	20/0			66/46	
2/1/2022						26/16		26/16	
2/2/2022				20				20	
2/3/2022			13			19		32	
2/4/2022				15				15	
2/7/2022		33						33	
2/8/2022	7	30				12		49	
2/9/2022	21	23				8/16		52/60	

⁴⁸ Pet'r Ex 94 p 737.⁴⁹ Pet'r Ex 14 p 87.⁵⁰ Pet'r Ex 6 p 25.⁵¹ Pet'r Ex 94 p 737.⁵² Pet'r Ex 13 p 76.⁵³ Pet'r Ex 94 p 737.

2/10/2022						14		14
2/11/2022	6/7	40		35				81/82
2/14/2022	0/2	25						25/27
2/15/2022		40			30/0	4		74/44
2/16/2022	1	42						43
2/17/2022	56	46	25					127
2/18/2022		45	37			46		128
2/21/2022	32	40	14			26		112
2/22/2022	12	40		20				72
2/23/2022	16/14	10/0		46/49		58	10/0	130/11
2/24/2022	0/4		22			20		42/46
2/25/2022	6	25				26	25/0	82/57
2/28/2022	11/9					30		41/39
3/1/2022			40			19		59
3/2/2022	48/46					21		69/67
3/3/2022	8/0	45/50			21/0		30/0	104/50
3/4/2022	11/9	15				21	30/0	77/45
3/7/2022	11	37/47			13/0			61/58
3/8/2022						25		25
3/9/2022	14/12		19	17	26/0			76/48
3/10/2022			10			10		20
3/11/2022	14/12	38/50			28/0			80/62
3/14/2022		39						39
3/15/2022				28/0		0/28		28/28
3/16/2022	6/4		17			27		50/48
3/18/2022	16/14				30/0			46/14
3/21/2022		36			30/0			66/36
3/22/2022		45			22/0	27		94/72
3/23/2022	6/4							6/4
3/24/2022	6/4				30/0			36/4
3/25/2022						34		34
FIRST THREE QUARTERS INSTRUCTION MISSED FOR NON- TEST BST VISITS (minutes)	389/382	510/500	127/127	145/120	250/0	760/788	110/0	TOTAL minus Test Accommodation and Disciplinary removal: 2291/1917 38 hours 11 minutes/ 31 hours 57 minutes

QUARTER 4: March 26, 2022 – June 20, 2022 (51 school days)⁵⁴

* Parties failed to provide precise time records for the Fourth Quarter.

* Records indicate Student made 33 visits for an average of 40 minutes per visit from March 26, 2022 – June 3, 2022, for a total of 1320 minutes. Resp. Ex 13 p 43.

* Further, from June 6, 2022 – June 20, 2022, Student spent 2 periods in BST during Spanish class (110 minutes). Pet'r Ex 90, pp 555-67. Therefore, the total time spent in the BST room in the Fourth Quarter was 1430 minutes, or 23 hours and 50 minutes.

GRAND TOTAL INSTRUCTION MISSED FOR NON-TEST BST VISITS

FOR THE 2021-2022 SCHOOL YEAR: 62 HOURS 1 MINUTE ROUNDED TO 62 HRS

KEY:

Varying time values are designated as “Respondent’s value/Petitioner’s value e.g., “20/25.”

Yellow shaded squares: Test Accommodation times designated by Respondent and deducted from the total minute calculations.

Red shaded squares: Disciplinary Removals deducted from the total minute calculations.

Green shaded squares: Information about quarter track-in dates, relevant school days, and total testing accommodations per quarter.

⁵⁴ Pet'r Ex 94 p 737.

TIME OUT OF GENERAL EDUCATION 2022-2023

	ELA/Reading	Math	Science	Social Studies	Lunch	Spanish/ BioTech/P.E.	Ramp Up	Total
Q1: 7/29/22 – 9/30/22 (44 School days; 2 test accommodations)⁵⁵								
7/29/2022					25	15		40
8/1/2022					20			20
8/5/2022	12		40/45		25			77/82
8/8/2022	55	55	55	55	30	39/45		289/295
8/12/2022	50				30			80
8/17/2022						91/39		91/39
8/22/2022	45			54/34	30	25		154/134
8/23/2022	0/5				30			30/35
8/25/2022	55	37	27		30			149
8/26/2022		40					35	75
9/2/2022	6	55			35	68/58		164/154
9/6/2022				38	30			68
9/9/2022				13	30			43
9/12/2022					24			24
9/13/2022			55	24	30			109
Record indicates Student received a 1 day out of school suspension on 9/13/2022.⁵⁶								
9/14/2022					25			25
9/15/2022					25			25
9/16/2022					25			25
9/20/2022		22						22
9/21/2022				53/47	30			83/77
9/22/2022	10				30			40
9/23/2022					30		35	65
9/26/2022	10/0		0/55	0/55	30			40/150
9/27/2022	55/30	39/55				9		103/94
Record indicates Student received a 4 day out of school suspension on 9/27/2022.⁵⁷								
Q2: 10/25/22 – 12/21/22 (37 School days; 15 test accommodations)⁵⁸								
10/26/2022	55	55	55	55	30	101		351
10/27/2022	55	55	55	55	30	101	35	386
10/28/2022	10				30			40
11/2/2022				10				10
11/9/2022					30			30
11/10/2022	*Record indicates Student visited the BST room today, no indication of how much time he spent. ⁵⁹							
11/14/2022	28	5						33
11/28/2022 ⁶⁰						45		45
11/29/2022						14		14
12/1/2022	55	55	55	55	30	27		277
12/1/2022	NOTE: Record indicates Student was suspended (in-school) this day from 10:10-3:00, which is 290 minutes. ⁶¹							
12/6/2022						46		46
12/2/2022; 12/5-8/2022	Student was assigned In School Suspension for his Elective (2 nd period) and Biotech (3 rd period) each of these days. These suspensions amounted to 91 minutes per day, 455 minutes total (7 hours and 35 minutes). ⁶²							
12/8/2022	*Along with 12/20 and 12/21, missed time adds up to 367 minutes. ⁶³							

⁵⁵ Stip. Ex 41.

⁵⁶ Pet'r Ex 17 p 135.

⁵⁷ Pet'r Ex 17 p 135.

⁵⁸ Stip. Ex 41.

⁵⁹ Pet'r Ex 91 p 703.

⁶⁰ Dr. McKissick observed Student's PE Elective and noted no visits to BST room during this time.

⁶¹ Pet'r Ex 17 p 135.

⁶² Pet'r Ex 17 p 135.

⁶³ Pet'r Ex 17 p 135.

12/9/2022	*Record indicates Student visited the BST room today, no indication of how much time he spent. ⁶⁴							
	ELA/Reading	Math	Science	Social Studies	Lunch	Elective	Ramp Up	Total
12/12/2022						46		46
12/13/2022	28	14		21				63
12/14/2022	55	38	55	55	30			233
12/15/2022 ⁶⁵	55		9		30			94
12/16/2022	55	55	14		30	54	2	210
12/20/2022	*Along with 12/8 and 12/21, missed time adds up to 367 minutes. ⁶⁶							
12/21/2022	*Along with 12/8 and 12/20, missed time adds up to 367 minutes. ⁶⁷							
Q3: 1/19/23 – 3/24/23 (47 School days)⁶⁸								
1/20/2023			29	4	20			53
1/22/2023			14		17			31
1/24/2023			8		13			21
1/25/2023			8		13			21
1/26/2023			9/11		18			27/29
1/27/2023							35	35
2/1/2023			11		18			29
2/2/2023		12						12
INSTRUCTION MISSED FOR NON-TEST BST VISITS (minutes)	479/449	332/348	334/396	327/356	813/813	452/396	107/107	TOTAL minus Test Accommodation and Disciplinary removal: 2844/2865 47 hours 24 minutes/ 47 hours 45 minutes

* Parties failed to include time for visits on December 8, 20, and 21, 2022. Records indicate that Student missed 12 hours and 20 minutes combined from December 8, 12, 14, 15, 20, and 21. Pet'r Ex 17 p 135.

* Parties indicate that Student missed 373 minutes on December 12, 14, and 15, 2022. Resp. Ex A to Proposed Final Decision pp 3-4. Therefore, 367 minutes are missing from what Parties indicated. These 6 hours and 7 minutes are added to the calculated total.

**GRAND TOTAL INSTRUCTION MISSED FOR NON-TEST BST VISITS
FOR THE 2022-2023 SCHOOL YEAR**

53 HOURS 31 MINUTES/ 53 HOURS 52 MINUTES rounded to 54 HOURS

KEY:

Varying time values are designated as “Respondent’s value/Petitioner’s value e.g., “20/25.”

Yellow shaded squares: Test Accommodation times designated by Respondent and deducted from the total minute calculations.

Red shaded squares: Disciplinary Removals deducted from the total minute calculations.

Green shaded squares: Information about quarter track-in dates, relevant school days, and total testing accommodations per quarter.

Orange shaded squares: Time added from Respondent’s Exhibit 30 included in total minute calculations.

⁶⁴ Pet'r Ex 91 p 708.

⁶⁵ Dr. McKissick observed Student’s ELA and Science classes and noted no visits to the BST room during this time.

⁶⁶ Pet'r Ex 17 p 135.

⁶⁷ Pet'r Ex 17 p 135.

⁶⁸ Stip. Ex 41.

CERTIFICATE OF SERVICE

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

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This the 20th day of September, 2023.



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