

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
24 EDC 00781

<p>Student, by parents, Mother and Father, Petitioners,</p> <p>v.</p> <p>Wake County Board of Education Respondent.</p>	
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**REDACTED FINAL DECISION**

**24 EDC 0781**

**Originally Issued on September 24, 2024**

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**THIS MATTER** was heard before the undersigned Honorable Stacey B. Bawtinheimer, Administrative Law Judge presiding, on June 3-7, 2024, at the Office of Administrative Hearings (“OAH”), located at 1711 New Hope Church Road, Raleigh, North Carolina.

**APPEARANCES**

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**For Respondent:** David Noland  
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**ISSUES**

The Parties identified three Issues for hearing in the June 4, 2024 Order on Prehearing Conference. At the close of Petitioners’ case-in-chief, Respondent made an oral Motion to Dismiss the third issue identified pursuant to Rule 41(b). Petitioners provided an oral argument in response. After careful consideration of the sworn testimony of the witnesses and the exhibits offered and admitted into evidence, and after hearing arguments on the motion from counsel for both parties, the Undersigned concluded that Petitioners failed to meet their burden regarding any claims related to the issue of “whether the use of restraints, seclusion, or isolation for the period of September 1, 2023 through October 24, 2023, denied Student a free and appropriate public education.

As a result, the remaining issues for determination in this Final Decision include only the following issues:

**Issue 1: Implementation of IEP and BIP (“Implementation Issue”)**

Whether the Respondent denied Student a free, appropriate public education by failing to implement the IEP goals, supplementary aides, services, accommodations, modifications, specially designed instruction, and behavioral intervention plan during the period of September 1, 2023 through March 1, 2024.

**Issue 2: Appropriateness of IEP and BIP (“Appropriateness Issue”)**

Whether the Respondent denied Student a free, appropriate public education by failing to appropriately develop and revise IEPs and BIPs during the period of September 1, 2023 through March 1, 2024.

**Issue 3: Use of Restraint, Seclusion or Isolation (“Restraint Issue”)**

Whether the use of restraints, seclusion, or isolation on October 25, 2023, denied Student a free, appropriate public education.

**WITNESSES**

**For Petitioner:** Private BCaBA – Private BCaBA for Student  
Father – Father of Student  
Student – Student  
Jennifer Holmes – Board Certified Behavior Analyst (“BCBA”),  
Behavior and Special Education Expert  
Jennifer Minnelli – Speech Language Therapist Expert  
Jenna Meehan – Occupational Therapist Expert  
Rebecca Felton, Ph.D. – Reading, Written Expression and Special  
Education Expert

**For Respondent:** SpEd Teacher– WCPSS Special Education teacher,  
Elementary School  
Assistant Principal – WCPSS Assistant principal, Elementary  
School  
Teacher – WCPSS 5th grade teacher, Elementary School  
Behavior Support Teacher – WCPSS Elementary Behavior  
Support 2 teacher, Elementary School  
Amber Boren – WCPSS Behavior Specialist Expert  
Alyssa Taylor – WCPSS School Psychologist  
Jamie Pearson, Ph.D. – Assoc. Professor with NC State University,  
Department of Education and Learning Services,  
Programming and Support for Students with Autism  
Expert

## EXHIBITS AND TRANSCRIPTS

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

**For Petitioner (“Pet’r Ex. p \_\_”):** 1, 2, 3, 5, 8, 9, and 16.

**For Respondent (Resp’t Ex. RESP’T’S \_\_”):** 7, 9, 10, 11, 13, 14, 15, 16, 18, 19, 21, 22, and 23.

**Stipulated Exhibits (“Stip. Ex. STIP \_\_”):** 2, 3, 10, 11, 13, 17, 20, 24, 26, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 49, 51, 54, 55 (pp. 1111-1114, 1179-1185, 1213-1220, 1301), 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, and 74 (pp. 1606-1664; 1753-1755; 1756-1758; 1824-1826; 1829-1831; 1866-1867; 1878-1879; 1894-1895; 1898-1899; 2125-2126; 2173- 2174; 2175-2176; 2418-2419; 2474-2475; 2488).

**Note as to Exhibits:** The Parties stipulated the authenticity of all WCPSS records produced in discovery. Stip. 9.

**Transcripts:** Volumes one through five, totaling 1,239 pages, were received into evidence on June 28, 2024 and are referenced as T vol # [page:line] (ex. T vol 1 36:1-22).

### **Stipulations of Fact**

At the start of the hearing in this matter, the Parties agreed to Jurisdictional, Party, and Legal Stipulations and Factual Stipulations in a Proposed Order on Prehearing Conference, which was approved and filed in the Office of Administrative Hearings on June 4, 2024. These Stipulations are referenced as “Stip. 1,” “Stip. 2,” “Stip. 3,” etc. The Post Hearing Order issued June 11, 2024, ordered the Parties to correct Stipulated Facts 46 and 47, and rename Stipulated Exhibit 67. Those corrections were submitted in the Respondent’s Proposed Decision as follows:

*Stipulated Fact 46* – On January 31, 2024, school psychologist Alyssa Taylor emailed Mother to confirm that Student was scheduled for evaluation at Crossroads II (WCPSS central office) on February 9, 2024.

*Stipulated Fact 47* – On February 28, 2024, the school psychologist began drafting the psychological evaluation and completed it on April 12, 2024. On April 14, 2024, Mother was provided with a copy of the WCPSS psychological evaluation.

*Stipulated Exhibit 67* – name corrected to reflect, “10-25-23 - Student restating SpEd Teacher comments during Restraint.”

Again, on September 20, 2024, the Parties submitted additional stipulations which are referenced within this decision as “Supp. Stip. 1,” “Supp. Stip. 2,” “Supp. Stip. 3,” etc.

To the extent that Stipulations or Supplemental Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on Prehearing Conference, the Joint Post-Hearing Submission, and the changes noted above, 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.

### **BURDEN OF PROOF**

Petitioners in special education cases bear the burden of proof in North Carolina and the Petitioners in this case stipulated (Stip. 3) that the burden of proof in this action lies with them. *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).

Educators are given “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 where applicable. However, even with such deference, a lay witness opinion of WCPSS’ educators was not considered unless it was necessary for the Undersigned to determine the facts in issue. *See* N.C. Gen. Stat. § 8C-1, Rule 701.

Finally, as indicated within this decision, the opinions of expert witnesses, which were based on sufficient facts, were the product of reliable principles and method and the reliable application of reliable principles and methods, were given significant weight. *See* N.C. Gen. Stat. § 8C-1, Rule 702.

### **PROCEDURAL HISTORY**

1. Petitioners filed their first Contested Case Due Process Petition (“First Petition”), case file number 24 EDC 00781, on March 1, 2024. Respondent acknowledged receipt of the First Petition on March 12, 2024, and the statutory deadlines for resolution and the due process hearing began. Respondent moved and was granted a Motion for an Extension of Time to Respond to the First Petition on March 19, 2024.

2. A Notice of Hearing and Prehearing Order was issued on March 13, 2024, scheduling the Contested Case Hearing for April 22, 2024. The Parties waived resolution meeting to attend mediation on April 26, 2024.

3. To allow time for the scheduling and preparation for mediation, without opposition from Respondent, Petitioners moved for a continuance of the hearing on March 26, 2024. For good cause shown and upon request of Petitioners, the hearing was continued on March 27, 2024.

4. Respondent responded to the First Petition on March 28, 2024.

5. On April 16, 2024, Respondent filed a Motion for Protective Order seeking an order with respect to the deposition of Student's mother. Petitioners opposed the motion. On April 17, 2024, the Tribunal issued a Request for Expedited Response to Motion for Protective Order. After a hearing on the motion, Respondent's motion was granted, in part, on April 25, 2024.

6. An Order to Change Caption was issued by the Undersigned on April 17, 2024 which added the father, Father, and differentiated the initials of the minor child (Student) from the Mothers' (Student). The Mother's initials were changed to Mother

7. On May 3, 2024, this Tribunal received the Mediation Results Form indicating that the mediation held on April 26, 2024 was unsuccessful.

8. Since the Parties had conducted the requisite mediation, a Settlement Conference was, unsuccessfully, held on May 14, 2024 with The Honorable Administrative Law Judge Karlene S. Turrentine and the Parties.

9. On May 21, 2024, Respondent filed a Partial Motion to Dismiss, for lack of subject matter jurisdiction, claims related to inappropriate restraints and seclusion, Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and the Americans with Disabilities Act ("ADA"). This motion was partially granted on June 5, 2024 and Petitioners' claims related to Section 504 and the ADA were dismissed without prejudice.

10. Petitioners filed a second Contested Case Due Process Petition ("Second Petition"), case file number 24 EDC 01965, on May 23, 2024. On the same day, Petitioners moved to consolidate both Petitions. A Request for Expedited Response to the Motion to Consolidate was issued on May 24, 2024. Respondent responded in opposition to consolidation in case 24 EDC 0781 on May 31, 2024. Based on the Undersigned's recommendation, the Chief Administrative Law Judge held that a Order of Consolidation was not the correct procedural posture for this IDEA case because Petitioners had not sought leave to amend their Petition in case file 24 EDC 0781. Therefore, Petitioners Motion to Consolidate cases 24 EDC 1965 and 24 EDC 0781 was denied on May 31, 2024.

11. A prehearing conference was held on May 24, 2024. The Parties submitted a Proposed Order on Prehearing Conference on May 31, 2024, and it was entered on June 4, 2024.

12. The 5-day hearing was held, both virtually and in-person, on June 3-7, 2024.

13. On June 4, 2024, Respondent filed a Motion in *Limine* seeking to exclude Petitioners' Supplemental Exhibits 17 through 34. A verbal order was issued on June 4, 2024, and later memorialized in written form on June 5, 2023, granting Respondent's Motion in *Limine* excluding Petitioners' Supplemental Exhibits 17-19, 21-29, and 31-34.

14. 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 the entire "Restraint Issue." The Undersigned granted, in part, Respondent's motion with respect to "whether the use of restraints, seclusion, or isolation during the period of September 1, 2023, through October 24, 2023, denied Student a FAPE" but declined to render judgement on the period starting October 25, 2023. The Undersigned memorialized the decision in written form on June 25, 2024.

15. Pursuant to the Post Hearing Order entered on June 11, 2024, the Parties filed their respective exhibits, the stipulated exhibits, and verifications on June 14, 2024. The transcripts were received on June 28, 2024.

16. Proposed Final Decisions were filed on July 31, 2024.

17. After reviewing the Proposed Final Decisions and the record, questions arose about Student's current educational status, the need for clarification the relevant time period for FAPE violations, whether the amount of compensatory education, if awarded, should also be restricted to the period of September 1, 2023 through March 1, 2024.

18. A post-hearing conference was held on August 27, 2024 with the Parties' respective legal counsel to discuss these questions and the outcome of that conference was the issuance of an Order for Supplemental Proposals on the Compensatory Education and Related Services Remedy on August 30, 2024. This Order gave the Parties until September 9, 2024 to supplement their initial Proposed Final Decisions and, with consent of the Parties, extended the deadline of the Final Decision deadline accordingly.

19. On September 9, 2024, Respondent, with consent of Petitioners, filed a Motion for Extension of Time for filing the Supplemental Proposals which was granted to September 13, 2024 and, with the Parties' consent, the Final Decision deadline extended accordingly. Both Parties' Supplemental Proposals were timely filed.

20. After reviewing the Supplemental Proposals, questions arose about the calculations of the compensatory awards and other ancillary matters, and a WebEx conference call was held on September 18, 2024 to discuss issues raised in their Supplemental Proposals.

21. A Post Conference Order was issued regarding discussions during the WebEx conference and the Parties' responsibilities for submitting additional stipulations and clarifications regarding their Supplemental Proposals. The Parties were ordered to file any stipulations or clarifications on or before September 20, 2024 and that the record was otherwise closed to any new evidence. The Parties consented to an extension of the Final Decision to allow time for review of their joint submission.

22. A Joint Post-Hearing Submission was filed on September 20, 2024 and the supplemental stipulations are adopted herein and referenced in the Findings of Fact.

23. On September 24, 2024, the Final Decision was timely issued and served.

### **FINDINGS OF FACTS**

**BASED UPON** careful consideration of the sworn testimony of the fourteen (14) witnesses appearing at the 5-day hearing, five volumes of transcripts (1,238 pages), sixty-seven (67) exhibits (855 pages), nine audio recordings received and admitted into evidence, the entire record in this proceeding, the Proposed Final Decisions, all Supplemental Compensatory Education Proposals and post hearing filings, 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 such as adverse party admissions documented in the record, and all other competent and admissible evidence.

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

### **RELEVANT TIME PERIOD AND ISSUES**

1. Because of an Offer of Judgment in a prior case, the relevant time period in this case is September 1, 2023 through March 1, 2024. *See* Stips. 30-34. Within that artificial, abbreviated time frame, there are three issues in this contested case.

2. Two issues, that relate to Individualized Education Plans (“IEPs”) and Behavior Intervention Plans (“BIPs”), are the appropriateness (“Appropriateness Issue”) and implementation (“Implementation Issue”). Among these IEPs and BIPs, the implementation of the May 11, 2023 IEP (“May 2023 IEP”) and the November 16, 2022 BIP (November 2022 BIP) are relevant to the Implementation Issue. The Parties stipulated to the number of school days<sup>1</sup> relevant the implementation as for: the November 16, 2022 BIP (September 1 to November 6, 2023) as 37 school days; the May 2023 IEP (September 1 to September 27, 2023) as 16 school days; the September 27, 2023 IEP (September 28 to October 25, 2023) as 16 days. *See* Supp. Stips. 1(a-f) in Jt. Post-Hearing Sub. (filed September 20, 2024). The November 6, 2023 IEP and BIP were never implemented because Student was out of school and did not receive any educational services from WCPSS after October 25, 2023 for a period of 71 days (October 26, 2023 to March 1, 2024). The entire relevant time period from September 1, 2023 to March 1, 2024 is 103 days.

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<sup>1</sup> The Parties stipulated that, based on Stipulated Exhibits 63 and 64, the following are the number of days of instructional time, not including days where Student was suspended, or absent prior to October 25th, 2023, during the relative time period. *See* Jt. Post-Hearing Sub.



3. The IEPs and BIP relevant to the Appropriateness Issue are the September 27, 2023 IEP (“September 2023 IEP”), November 6, 2023 IEP (“November 2023 IEP”) and the November 6, 2023 BIP (“November 2023 BIP”). Although Petitioners are barred from challenging the appropriateness of the November 2022 BIP and the May 2023 IEP because those claims occurred before September 1, 2023, Petitioners contend that this BIP and IEP should have been revised before the September 27, 2023 IEP meeting or the November 6, 2023 IEP meeting. Regardless, the relevant period for determining the Appropriateness Issue and the remedy for any FAPE violation(s) is September 1, 2023 through March 1, 2024.

4. The Restraint Issue concerns the appropriateness of the use of physical restraints only on October 25, 2023 (“October 2023 Restraint”<sup>2</sup>). Although, the Parties’ statement of the Restraint Issue included the use of “seclusion” or “isolation,” Student was not secluded nor isolated that day.

5. If WCPSS failed to provide Student a free appropriate public education (“FAPE”), the final inquiry is the remedy for this violation(s). The Parents are not seeking reimbursement for their private third-party educational or related services provided to Student and his Parents during the relevant time period. These private services included Applied Behavior Analysis (“ABA”) therapy services, parent training, occupational therapy, tutoring, and counseling. Petitioners suggested Fusion Academy as a private school placement option but provided insufficient information about the appropriateness of that placement. T vol. 3 628:7-10.

6. Moreover, the Parents have now withdrawn Student from WCPSS and enrolled him in a public virtual school; therefore, the Undersigned cannot order a transition plan for future educational programming. As such, compensatory special education and/or compensatory related services are only remedies available for any FAPE violation. Plus, by stipulation of the Parties, the remedy period extends only from September 1, 2023 to March 1, 2024.

7. With the Issues and timelines for the FAPE violations delineated, an accounting of the Parties and witnesses is in order.

## **The Parties**

### ***Petitioners***

### ***Student, Minor Student***

8. Petitioner Student’s date of birth is XXXXXX, 2013. Stip. 10. Student was ten (10) years old at the filing of the Petition and at the time of the hearing (he turned eleven the following week). Stip. 12. During the relevant school year, 2023-2024, Student was enrolled as a fifth-grade student at Elementary School (“Elementary”). Stip. 35. Student testified at the hearing.

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<sup>2</sup> Student was restrained multiple times, four (4) times using the child control position and once using the two-team seated control position. These restrains are collectively called the “October 2023 Restraint.”

9. By all accounts, Student is an intelligent, caring, and creative young man who has a diverse range of interest. When emotionally regulated, he has a solid ability to communicate his wants, needs, and thoughts. Stip. Ex. 49 STIP 000548. Despite his average intelligence (General Ability Index 50 percentile), Student has significant academic and functional deficits, and he has weaknesses in behavior, pragmatic language, reading (decoding, and comprehension), written expression (encoding and sentences), attention, executive functioning, anxiety, and social skills. *See* Stip. Exs. 42-47.

10. Student has been diagnosed many disabilities which are: Autism Spectrum Disorder, Level 2, without accompanying intellectual or language impairments; Generalized Anxiety Disorder; Attention Deficit Hyperactivity Disorder, Combined Presentation (Stip. Ex. 44, June 2023 Neuropsychological); Sensory Processing Disorder and Executive Functioning Deficits (Stip. Ex. 443, May 26, 2023 OT Evaluation);, Social (Pragmatic) Communication Disorder, Secondary to Autism; and Disorder of Written Expression (Stip. Ex. 42, May 2023 Minnelli Speech Eval.). In March 2024, Student was diagnosed with Other Reactions to Severe Stress (Stip. Ex. 54, March 2024 Clinical Eval.). In addition, Student has “very clear mental health needs” and not all his behaviors were related to his autism diagnosis. T vol 2 442:4-11 (Holmes); *see also*, Stip. Ex. 54 STIP000711 & 714 (Clinical Assessment Records History).

11. Without significant support and specially designed instruction, the manifestations of Student’s behavior and attentional deficits have adversely impacted his, and his peers’, ability to access the general curriculum. Stip. Ex. 20 STIP00234. Student’s behavioral challenges include aggressive behaviors, tantrums, property destruction, and perseveration.<sup>3</sup> When Student “becomes frustrated or overwhelmed, he may display screaming, yelling, rubbing walls, stomping his feet, covering his ears, rubbing his face, and grabbing his hair.” Stip. Ex. 45 STIP000507 (Holmes FBA). His “perseverating behavior is a typical precursor for severe maladaptive behavior such as aggression and property destruction” (Stip. 74 STIP001661) and was evident prior to the October 2023 Restraint. T vol 4 1026:5-6 (Teacher stating Student asked “why” at least 6 times while behaviors escalated).

12. During the 2023-2024 school year, the most significant behavioral challenges impacting Student’s education were task avoidance and refusals. Student “display[ed] refusal behavior to escape non-preferred tasks of activities including physical aggression and yelling;” he “display[ed] elopement to gain control in disappointing, upsetting, or stressful situation.” Stip. Ex. 45, STIP000515. Because of his maladaptive behaviors, WCPSS staff restrained Student multiple times during his fourth and fifth grade school years. Stips. 23, 24, 39, & 41. Even if the restraints

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<sup>3</sup> *See* Stip. Ex. 2 (March 23, 2022 New York BIP); Stip. Ex. 3 (March 28, 2022 New York IEP); Stip. Ex. 10 (November 16, 2022 FBA); Stip. Ex. 45 (June 9, 2023 Holmes FBA); Stip. Ex. 55 at STIP001180-1185 (Duke medical records describing aggressive behaviors); Stip. Ex. 62 (Mother daily notes reflecting numerous maladaptive behaviors, at home and school); Stip. Ex. 74 (Connect n Care ABA notes reflecting numerous maladaptive behaviors at home); Resp’t Ex. 11 (WCPSS behavior tracking charts); Resp’t Ex. 15 (Teacher’s daily behavior charts); T vol 2 417:4-8 (Holmes); T vol 2 454:21-455:9 (Private BCaBA) (Student exhibits task refusal, tantrums, aggression, property destruction, and perseveration).

were properly conducted, the use of restraint was significant to Student, a vulnerable child. Stip. Ex. 54; Pet'r Ex. 16; *accord*, T vol 4 1149:14-17 (Boren) (restraint is “traumatic” for any student; and “[a]ny restraint is “significant”). After being restrained in March 2023 of his fourth-grade year at Other Elementary School (“Other Elementary School”), Student did not return to in-person instruction at a Wake County school. Stip. 26.

13. Because of his adverse experience at Other Elementary School, Student was reassigned to Elementary School (“Elementary”) for his fifth grade, 2023-2024 school year. Student was restrained multiple times during his fifth-grade school year at Elementary, and Student also did not return to school after the October 25, 2023 restraint. Stip. 42. WCPSS has not provided Student any educational services since that time but was working towards Student’s reentry to school. Stip. 50; *see* Stip. Exs. 37-40. WCPSS contends that Student’s alleged school refusal was not “self-directed” but rather “parent directed” and reinforced because the Parents’ objective is to insure that WCPSS will never physically restrain Student again.

### ***Parents***

14. Petitioners, Mother and Father (“Parents”), are residents of the State of North Carolina. At all times relevant to the issues in this case, Mother and Father resided within the boundaries of WCPSS in Raleigh, Wake County, North Carolina. Stips. 14 & 15 (Student, his Parents, Mother and Father, are collectively referred to as “Petitioners.”).

### ***Mother (“Mother”)***

15. Student’s mother is Mother (“Mother” or “Mother”). Stip. 11. She attended, but did not testify, at the hearing. During the 2023-2024 school year, Mother made many adverse party admissions which are documented in the educational and medical records admitted into evidence.

16. At one time, Mother worked for WCPSS as an AST/BST (autism specialist teacher/behavior support teacher) at a Wake County middle school. Stip. Ex. 20 STIP00028; *see also*, Stip. Ex. 54 STIP000714 (stay-at-home mom, former special education teacher). Only Mother attended the meetings held with school personnel during the 2023-2024 school year. She was also responsible for all written communications with school staff. Although, Mother did not testify at the hearing, during Student’s testimony about the restraints, in contrast to Student’s demeanor, she was quite distressed.

17. At the November 6, 2023 IEP meeting, Mother disagreed with the November 6, 2023 BIP due to its inclusion of CPI<sup>4</sup> de-escalation strategies and the use of physical force as a last resort to maintain safety, welfare, and security. Stip. Ex. 32 STIP000413-414. She also did not agree with the need for a Safety Plan or the contents of the Safety Plan. As a precondition to Student’s return to Wake County Public Schools, she wanted WCPSS “to agree to never to restrain her son.” Stip. Ex. 40 STIP000442.

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<sup>4</sup> CPI stands for Nonviolent Crisis Prevention. T vol 4 1059:14-16 (Behavior Support Teacher)

***Father (“Father”)***

18. Student’s father is Father (“Father”). Father testified at the hearing.

19. He is a registered behavior technician (“RBT”) and training to become a Board-Certified Behavior Analyst (“BCBA”). T vol 3 524:7-525:4. Father attended the IEP meetings held on November 16, 2022, January 26, 2023, and March 22, 2023 but did not attend any of Student’s IEP meetings relevant to this proceeding. *See* Stips. 21, 22, & 27; T vol 3 599:3-15. Like Mother, Father does not agree with the use of physical force and wants WCPSS to promise to never restrain their son again.

***Respondent, Wake County Board of Education (“Respondent,” the “Board,” or “WCPSS”)***

20. The Wake County Board of Education (“Respondent,” the “Board,” or “WCPSS”), is a local educational agency (“LEA) receiving monies pursuant to the IDEA (Stip. 6) and is responsible for providing Student a free and appropriate public education (“FAPE”) regardless of the severity of Student’s academic or functional deficits. WCPSS is also responsible for ensuring the safety of all its students, visitors, and staff in the school setting.

**WITNESSES**

**Credibility of Witnesses**

21. 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; on sufficient information about the records and Student’s special education needs; or conflicted with reliable documentary or testimonial evidence.

**PETITIONERS’ WITNESSES**

22. Petitioners called three fact witnesses, Student, Father, and Private BCaBA, and four expert witnesses, Jenna Meehan, Occupational Therapist; Jennifer Minelli, Speech-Language Pathologist; Jennifer Holmes, Board Certified Behavior Analyst (“BCBA”); and Rebecca Felton, Ph.D., Reading Specialist.

**Petitioners’ Fact Witnesses**

***Father, Father (T vol 3 522-633)***

23. As Student’s father, Father is understandably concerned about the well-being of his child. He did not, however, participate in any of the relevant IEP meetings. Mother was the primary spokesperson about the “Parent’s Concerns” in the IEPs, the inappropriateness of the IEPs/BIPs,

and the use of restraints. According to Father, the use of restraint and seclusion is “a dark past of behaviorism” and not allowed in the clinic where he works. T vol 3 528:15-22. His position on the use of restraint was consistent with his wife’s.

24. During his testimony about the October 25, 2023 restraints, Father became very emotional. T vol 3 530:9-531:16; 533:1-6; 534:12-18; 537:6-20. Consideration was given to the sensitive nature of his testimony, however, Father’s description of Student’s injuries purportedly caused by the October 2023 Restraint were inconsistent with the medical records and Student’s activities immediately after the restraint and the following day.

25. Giving him the benefit of the doubt though, Father may have conflated the October 2023 Restraint with the injuries purportedly caused by the March 15, 2023 restraint. *Compare* Stip. Ex. 20 STIP0002228. (May 2023 IEP “Parent Concern” in IEP described “[i]njuries included grab marks/bruised all over Student’s body, bloody nose, bloody shirt, blood from open wound on arm, nail lines on chest, nail lines on back of arm nail lines on back of neck, bruises on legs ...”) to T vol 3 558:12-25 (October 25, 2023 injuries Father stating bruises all over Student’s body, “bruises on backs of legs, entire length of each calf ... the entire length of the back of upper arms ... petechiae, broken blood vessels, of finger line around each of his arms ad wrist. Additionally, to his neck, upper shoulders ... markings on his neck, upper shoulders... and every notch of his spine had its own individual bruise from top to tailbone.”).

26. However, Student’s medical records from the October 25, 2023 Urgent Care visit, indicated (and included photographs showing) minor contusions on one arm, [,] minimal bruising on his legs, [,] and reflecting [ed] that Student was “in no apparent distress,” was “moving all extremities [with] motor strength [in] upper and lower extremities 5/5 throughout,” and indicating that the “physical exam is reassuring”). Stip. Ex. 55 STIP001213-1220. Also contrary to Father’s testimony that Student was unable to walk unassisted and lift his arms, on the same day of the incident, Student was able to participate in ABA therapy from 4:30 p.m. to 8:00 p.m. T vol 3 559:9-12 (Father stating Student was unable to walk unassisted or lift his arms and that his body was covered with bruises for weeks); Stip. Ex. 74 001824-26. Likewise, Student was able to participate in ABA therapy the next day, October 26, 2023, from 10:00 a.m. to 3:00 p.m. Stip. Ex. 74 STIP001829-1831 (therapist notes no concerns).

27. Even allowing for his conflation of the injuries, Father’s testimony had other inconsistencies, such as his statements that school staff refused to let Mother speak with Student on the phone and Student was forced to sit in a 10x13 inch cubby. *Compare* T vol 3 545:14-16 (Father); T vol 4 887:4-21 (SpEd Teacher called Mom); 972:2-13 (Bown) (Mom talked to Student on speaker phone) 1076:6-19 (Behavior Support Teacher) (Dad and Mom were on the phone talking to Student); *compare also*, T vol 1 214:24-215:2 (Student testimony saying they did not force him into a cubby) to T vol 3 622:7-11 (Father saying he did not tell school staff that Student alleged he was forced into the cubby); *compare also*, T vol 4 884:24-25 (Student sat in the cubby); to T vol 4 1007:19-1008:9; 1029:12-20 (Teacher) (description of cubby large enough for him to sit in with head down 18 x 36 inches) to T vol 3 p 548:7-15. (Father saying cubby was about 10 x13 inches). These inconsistencies significantly affected the weight given his testimony.

***Student, Student (T vol 1 200-218)***

28. Student testified on his own behalf at the hearing about the implementation of the IEPs/BIPS and the October 2023 Restraint. On the witness stand, Student appeared very different from the dysregulated student described in his educational records and by school staff. Student was mature, courteous, and responsive to both direct and cross examination questions.

29. As of October 25, 2023, Student had been restrained multiple times by WCPSS staff. He testified that he was afraid of going back to Wake County Public Schools because “they hurt me and they tried to kill me.” T vol 3 203:9-12; 206:10-11. Despite this, Student did “miss school and [his friends], but [he] d[id not] miss getting hurt.” T vol 1 206:13-18. Student was willing to try to return to another public or a private school, but just not a Wake County School. T vol 1 211:21-212:1.

30. While J.R.’s anxiety about school appeared genuine, his testimony about the injuries caused by the October 2023 Restraint parroted his Father’s<sup>5</sup> and differed significantly from the testimonies of the school staff, his activities after the October 2023 Restraint, and other documentary evidence including his medical records. T vol 1 205:4-8, 16-20 (Student stating after the October 2023 Restraint, his “body really hurt badly”, “it hurt really badly” to walk and he really could not lift his arms); 205:21-24 (stated had bruising on “my arms, my body, my legs, and my head. Everywhere.”); 205:13-14 (but he went to “Urgent Care and was fine, though”). The credible evidence proved that Student was not physically injured by any restraints during the 2023-2024 school year.

31. In light of Student’s age, his identified deficits in narrative retelling, recall, and pragmatic language as well as the inconsistencies in his testimony with otherwise undisputed testimony and evidence from other sources (*i.e.* medical and Connect n Care records), his testimony about “how” he perceived these restrains on October 25, 2023 was given less weight. T vol 1 203:19-20 (“they threw me in a chair”). However, his testimony about the implementation of the behavior interventions in the November 2022 BIP prior to the October 25, 2023 assembly was corroborated by WCPSS’ documentary evidence and staff testimonies.

***Private BCaBA, Private ABA Therapist (T vol 2 450-513)***

32. Private BCaBA (“Private BCaBA”) testified as a fact witness. She was very credible, knowledgeable, courteous, and responsive to direct, cross, and redirect questions as well as questions from the Tribunal. She is a Board-Certified Assistant Behavior Analyst (“BCaBA”). T vol 2 451:3-8. She is employed with Connect n Care ADA. T vol 2 451. Private BCaBA worked as a BCaBA with Student from August 2023 to June 4, 2024. T vol 2 453:25. Connect n Care does not allow the use of physical restraint, and she has never restrained Student

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<sup>5</sup> Curiously, Petitioners’ legal counsel also cross examined school staff about if they were aware that Student “there was bruising on Student’s calves,” “that on his back there was bruising on every notch of -- I guess that’s his vertebrae,” “had on his shoulder,” “bruising on his right hip area,” “had bruising on his stomach area after the October 25, 2023 incident?” T vol 4 1050:13-1051:4.

33. Since August 2023, Private BCaBA had worked with Student at least three times per week for 1.5 hours per session in the areas of behavior reduction, maladaptive behavior reduction, and skill acquisition. Other therapists worked with him at different times. *See Stip. Exs. 51 & 74.* For maladaptive behaviors Private BCaBA worked with Student to reduce tantrums, aggression, property destruction, inappropriate language, perseveration and task refusal. T vol 2 454:10-25; T vol 2 455:1. For skill acquisition she worked with Student on increasing pragmatic communication, functionally equivalent behaviors, self-management, independent living skills, and community safety skills. T vol 2 455:12-18. Similar to the instruction in Student's IEPs, her ABA therapy focused on remediating Student's functional deficits in communication, social emotional skills, and behavior. Private BCaBA was the only witness, other than Father, who has been face-to-face with Student after the October 2023 Restraint, however, she could not recall if she had spoken to Student about school at all. T vol 2 503:16-18.

### **Petitioners' Expert Witnesses**

34. Petitioners' expert witnesses were knowledgeable in their areas of expertise and each had personally evaluated Student during the summer before the 2023-2024 school year. They attended IEP meetings (on September 7 or 11) with Elementary School staff and Mother to review their evaluations. None of them were members of the IEP teams that developed the September 26, 2023 IEP, November 6, 2023 IEP, November 6, 2023 BIP, or the Safety Plan. Even though the independent evaluators did not attend the subsequent IEP meetings, the IEPs, BIPs, and Safety Plan were based on their evaluations and recommendations.

35. Since the summer of 2023, only Ms. Meehan had any interaction with Student T vol 1 105:1-16 (Ms. Meehan spoke with Student via FaceTime for 15-25 minutes while he was in the car traveling with his family a few days before the hearing). Otherwise, Petitioners' expert witnesses' opinions were based on Student's educational records, the exhibits, and their year old evaluations conducted the summer before the 2023-2024 school year.

36. None of Petitioners' experts were qualified to testify about whether the October 2023 Restraint caused or reasonably could have caused Student foreseeable long term psychological impairment. Moreover, none of Petitioners' experts testified that the October 2023 Restraint was the reason Student would not return to a Wake County Public school.

37. As to their expert opinions about the amount of compensatory education award, Petitioners' experts were not aware that the award of compensatory education was limited to the period between September 1, 2023 through March 1, 2024. Therefore, any compensatory award will be based on their expert opinions about the amounts of appropriate service delivery for specially designed instruction ("SDI") and related services which should have been in the September and November 2023 IEPs.

***Jennifer Holmes, Board Certified Behavior Analyst (BCBA) (T vol 2 335-435)***

38. Jennifer Holmes was qualified as an expert in the areas of behavior, social-emotional, Autism Spectrum Disorder (“ASD”), appropriate use of restraints, isolation, and seclusion, academics in special education related to the development and implementation of IEPs and BIPs, trauma-informed IEPs and BIPs. T. vol 2 342:1-12. She conducted a Functional Behavior Assessment (“FBA”) and IEE (“FBA-IEE”) for Student on June 9, 2023. Her FBA-IEE was used by the September 27, 2023 IEP team to revise Student’s May 2023 IEP, and the November 6, 2023 IEP team to revise Student’s November 2022 BIP and develop a Safety Plan. *See* Stip. Exs. 45, 32-36. Neither of WCPSS’ experts criticized her evaluation results and recommendations. Ms. Holmes’ testimony was consistent with her findings and recommendations in her June 2023 FBA-IEE. *See* Stip. Ex. 45.

39. Prior to forming her expert opinion, Ms. Holmes had access to all the Stipulated and proposed exhibits, conducted an FBA-IEE, and met with Elementary School staff to review her FBA-IEE and her recommendations. T. vol 2 342:14-16, 361:21-22; 362:1, 346:5-25, 347:1-3; Stip. Ex. 45 STIP000506-507.

40. 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 Pet’r Ex. 1; T vol 2 pp 337:3-25; 338:1-8. Because she was the only Board-Certified Behavior Analyst (BCBA), Ms. Holmes’ expert opinion was given more weight than WCPSS’ experts. *See* Pet’r Ex. 1 (Holmes CV). Her opinion was also given more weight than WCPSS’ experts because Ms. Holmes as a “certified” behavior analyst has conducted ABA evaluations; provided ABA therapy to students like Student in the public school setting; worked with both parents and school systems about ABA therapy; and worked as a behavioral consultant for five public school districts in North Carolina and South Carolina. *See* Pet’r Ex. 1.

***Jenna Meehan, Occupational Therapist (T vol. 1 23-43)***

41. Jenna Meehan is a licensed Occupational Therapist and was qualified as an expert witness in the “fields of occupational therapy, executive functioning, writing, social-emotional, sensory processing, ... special education... [and] behavior related to occupational therapy needs and supports” T vol 1 32:25; 33:1-3; 35:16-19; *see also*, Pet. Ex. 5 (Meehan Resume).

42. Ms. Meehan evaluated Student’s need for direct Occupational Therapy (“OT”). Her Independent Educational Evaluation (“OT-IEE”) of Student is dated May 26, 2023. *See* Stip. Ex. 43. Overall, the results of her OT-IEE were consistent with WCPSS’ 2022 OT evaluation and data about Student’s sensory and social-emotional deficits compiled by WCPSS staff during the 2023-2024 school year.

43. Ms. Meehan attended an IEP meeting on September 7, 2023 to review her evaluation results with the IEP team. Stip. Ex. 24. Based on her OT-IEE, she recommended Student receive direct Occupational Therapy services, rather than consultative, in the areas of sensory



processing, executive functioning, self-regulation, visual motor, fine motor, and social participation skills. Stip. Ex. 43 p 12. Because Ms. Meehan was the only Occupational Therapist to testify in this case, her expert opinion was unopposed and given significant weight with respect to Student's need for direct OT.

***Jennifer Minnelli, Speech-Language Pathologist (T vol 2 227-300)***

44. Jennifer Minnelli testified as an expert in the areas of communication, executive functioning, behavior related to communication, and special education related to communication. T. vol 2 233:1-4; *see also*, Pet. Ex. 2 (Minnelli CV). Ms. Minnelli evaluated Student's social communication, pragmatic language, and written language skills and prepared an Independent Educational Speech Language Evaluation ("Speech-IEE") report on May 17, 2023. Stip. Ex. 42. She diagnosed J. R. with Social (Pragmatic) Communication Disorder, Secondary to Autism and a Disorder of Written Language. Stip. Ex. 42 STIP000472-473. She attended an IEP meeting on September 11, 2023 to review her Speech-IEE with the Elementary School staff. Stip. Ex. 26. During the September and November 2023 IEP meetings, none of the school-based members of the IEP team refuted her Speech-IEE results or her recommendations.

45. As Ms. Minnelli was the only licensed Speech Language Therapist who testified in this case, her unopposed expert opinion was given significant weight with respect to Student's social communication, pragmatic and narrative language needs.

***Rebecca Felton, Ph.D. Reading and Written Expression Expert (T vol 1 148-212)***

46. Rebecca Felton, Ph.D. was qualified as an expert witness in the fields of reading, written expression, and special education." T vol 1 151:9-11. Dr. Felton's career has focused extensively on researching and the remediating reading disabilities; teaching teachers, school administrators, and parents about reading disabilities; lecturing at Statewide and National conferences; authoring peer reviewed publications about dyslexia (a reading disability); consulting with public and private schools about reading disabilities; and assisting the North Carolina Department of Public Instruction in improving reading instruction for all reading disabled students in North Carolina. *See* Pet'r Ex. 3 (Felton CV).

47. Dr. Felton conducted an IEE in the areas of reading and written expression ("Reading/Writing-IEE") dated July 20, 2023. Stip. Ex. 47. She noted Student's deficits in the areas of decoding and encoding and made specific recommendations to address those areas of need. Stip. Ex. 47 STIP000543-544. Dr. Felton also determined that Student struggled with Sound-Symbol Knowledge and was performing on a second-grade level in that area. T vol 1 162:4-23. She reviewed her evaluation at the September 7, 2023 IEP meeting with Elementary School staff. T vol 1 162:23-25; 162:1; Stip. Ex. 24. The results and recommendations of Dr. Felton's Reading/Writing IEE were supported by three other evaluations. *See* Stip. Ex. 42, 44, & 46. Dr. Felton's expert opinion with respect to Student's reading and written expression deficits was given significant weight considering her specialized expertise.

## RESPONDENT'S WITNESSES

48. The Respondent called five (5) fact witnesses, SpEd Teacher, Assistant Principal, Alyssa Taylor, Teacher, and Behavior Support Teacher, and two (2) expert witnesses, Jamie Pearson, Ph.D., and Amber Boren.

### **Respondent's Fact Witnesses**

#### ***SpEd Teacher, Student's Special Education Teacher (T vol 4 pp 831-958)***

49. SpEd Teacher is a special education teacher at Elementary School. She has worked in that position for 22 years at two different schools. T vol 4 831:5-14. Every year in her work history she has had one to two students on her caseload with autism ("AU") and during the 2023-2024 school year there were four students with AU including J.R on her case load. T vol 4 832:8-13. SpEd Teacher attended all the IEP and BIP meetings held during the 2023-2024 school year as the Special Education Teacher. *See* Stip. Ex. 24, 26, 27, 31, 37 & 39. SpEd Teacher was responsible for the delivery of special education services to Student. Her testimony focused primarily on the implementation of service delivery from August 28, 2023 until October 25, 2023.

50. Prior to working with Student, she has had experience working with students with behavioral needs. T vol 4 832:14-16. During the 2023-2024 school year, SpEd Teacher had 23 students with various disabling conditions on her caseload including Student T vol 4 892:5-11. Because of the severities of Student's instructional needs, in early October 2023, she took a 40-hour virtual RBT training to help provide supports to Student and other students in WCPSS with autism. T vol 4 833:5-8. SpEd Teacher did not appear to have had CPI training because she did not participate in the October 2023 Restraint although she was present part of the time. She observed and interacted with Student prior to the October 2023 Restraint but left the area before he was restrained. *See* T vol 4 883:13-885:23.

51. SpEd Teacher's testimony was given more weight than Student's and Petitioners' experts who had no personal knowledge about the implementation of the IEP's and BIP's on a day-to-day basis.

#### ***Assistant Principal, Assistant Principal (T vol 4 959-1009)***

52. Assistant Principal is the Assistant Principal at Elementary School. She is trained in CPI techniques. T vol 4 989:7-16. Assistant Principal was present in the classroom during the October 2023 Restraint involving Student and assisted Behavior Support Teacher with the CPI two-seated team controlled position. *See* T vol 4 986:13-971:21. She also communicated with Student's parents on the phone and in-person after the restraint. T vol 4 974:3-20. Assistant Principal's and Ms. Behavior Support Teacher' descriptions of how the physical restraints were performed corroborated each other and were given more weight than Student's due to his heightened dysregulation during the restraint and his exaggerations of his injuries afterwards.

***Behavior Support Teacher, EC Department Chair (T vol 4 1058-1107)***

53. Behavior Support Teacher is the EC Department Chair at Elementary School. Even though, she was not Student's EC teacher, she provided him with some social skills instruction in the Behavior Support Teacher ("BST") classroom for two days a week with other students. T vol 4 1092:7-18. Behavior Support Teacher is CPI-certified. T vol 4:1059:11. She testified about Student's behavioral needs, interactions with Petitioners, and the October 2023 Restraint. Behavior Support Teacher's testimony corroborated Assistant Principal's testimony regarding how the restraints were performed. T vol 4 1085: 23-25. Behavior Support Teacher's testimony was given more weight than Student's.

***Teacher, Student's Regular Education 5<sup>th</sup> Grade Teacher (T vol 4 1010-1057)***

54. Teacher was Student's 5th grade regular education classroom teacher at Elementary School for the relevant time period and at that time had 19 students in her class. T vol 4 1035:1-11. She testified regarding her work with Student, his unique needs, including behavioral needs, and the events precipitating the October 2023 Restraint. As his Regular Education Teacher, she also attended all the IEP, BIP, and Safety Plan meetings during the 2023-2024 school year. She was responsible for implementing his IEPs and BIPs in the general education setting. *See* Stip. Exs. 24-27, 31-40. The evidence did not indicate whether she was trained in CPI techniques or had taken the 40-hour RBI training.

55. For her own use, but not as data collection or progress monitoring, Teacher kept anecdotal notes of Student's behaviors. T vol 4 1016:23-1017:8-17; 1018:3-4; *see* Resp't Ex. 15 (Teacher's Daily Behavior Charts). In her notes, she documented Student's daily maladaptive behaviors including multiple elopements from class, many task refusals, and noncompliance during class, adverse incidents with peers, and Student's behavior immediately before the October 2023 Restraint. *See* Resp't Ex. 15; T vol 4 1018:20-1020:19.

56. Although, Teacher admitted that she was aware that Student's sensory processing, communication deficits, lack of self-advocacy, and his dysregulation caused his maladaptive behaviors (T vol 4 1033:23-1034:21), she noted that these manifestations of Student's disabilities were deliberate misconduct. Resp't Ex. 155 RESP'TS000180 ("He is so adamant sometimes and doesn't want to listen. He was so rude, dis-respectful."). Despite this sentiment, Teacher's testimony was consistent with the documentary evidence and the testimonies of Student, Behavior Support Teacher, SpEd Teacher, and Assistant Principal.

***Alyssa Taylor, School Psychologist (T vol 3 767-820)***

57. Alyssa Taylor was the school psychologist serving Elementary School during the relevant time period. T vol 3 767:12-13. Ms. Taylor appeared to genuinely care for Student T vol 3 807:5 (stating "I love Student Love working with him."). Ms. Taylor attended Student's IEP meetings on September 7, 2023, September 11, 2023 and November 14, 2023. T vol 3 785:3-7; 788:20-25; 787:22-788:5.

58. After the November 14, 2023 IEP meeting, Ms. Taylor was tasked with determining “What is the function of Student’s school refusal?” Stip. Ex. 49 STIP000548. Ms. Taylor concluded that Student’s refusal to attend school stemmed from several factors including “a profound dislike of school and its expectations.” Stip. Ex. 49 STIP000549. Although Ms. Taylor was not tendered as an expert witness, she is a Nationally Certified School Psychologist and had personally interacted with Student in the school setting during the relevant period. As such, her lay opinion testimony about the reason Student did not want to return to school was illustrative.

### **Respondent’s Expert Witnesses**

#### ***Jamie Pearson, Ph.D., Assistant Professor N.C. State University (T vol 3 646-757)***

59. Jamie Pearson, Ph.D. was received as an expert witness, without objection, in: evaluating and determining educational needs of students diagnosed with Autism Spectrum Disorder (“ASD”); developing IEPs for students, including students diagnosed with ASD, inclusive of identifying present levels, drafting goals, determining service delivery and placement, identifying and developing appropriate supplemental aids and services, identifying and implementing related services, and determining the least restrictive environment; developing and conducting functional behavior assessments for students, including students diagnosed with ASD; creating and implementing Behavior Intervention Plans (“BIPs”) for students, including students diagnosed with ASD; behavior management of students, including students diagnosed with ASD; use of ABA programming within and outside of the traditional public school setting for students diagnosed with ASD; and, identifying circumstances in which seclusion or restraint are appropriate interventions for students with ASD, as well as the proper and safe implementation of those interventions. T. vol 3 650:14-25; 651:1-10; *see also*, Resp’t Ex. 22 (Pearson CV). Dr. Pearson did not opine on each designated area of expertise.

60. In opining about the appropriateness of the September and November 2023 IEPs, Dr. Pearson focused on the “structure” of the IEP goals and whether they met the SMART (“specific, attainable, relevant, and time bound”) goal standard. She also opined about the appropriateness of the supplemental aids/accommodations section in the IEPs and the appropriateness of the BIPs. T vol 3 665:21-666:10; 679:18-680:23; 688:12-690:5. Dr. Pearson did not opine about the appropriateness of the Present Levels of Academic and Functional Performance (“Present Levels”), the service delivery of the Specially Designed Instruction (“SDI”) in the IEPs, or the implementation of the IEPs and BIPs.

61. Although Dr. Pearson teaches IEP development, she has never implemented an IEP. T vol 3 692:16-25; 693:1-4. Similarly, although she was qualified as an expert in the use of ABA programming with AU students, she had never provided implemented provided ABA services in the public school setting. *See* Resp’t Ex. 22 RESP’TS000233 (implemented ABA in home-based programs).

62. The persuasiveness of her expert opinion was diminished because prior to forming her expert opinion, she relied on the Stipulated Exhibits and not all of the records provided by both Parties. T vol 3 703:14-15. During her testimony, Dr. Pearson was not asked about the teaching staff’s monitoring data. Resp’t Exs. 11, 13, 15, & 19. She also did not interview Student, Mother,

or Father. Nor did she interview Student's educators or Student's related service providers even though, as WCPSS' employees, they could have been made available to her. T vol 3 702:22-25; 703:1-15. Instead, Dr. Pearson only spoke with WCPSS' attorneys two (2) weeks before the hearing. T vol 3 703:5-7.

63. When comparing the more specialized expertise of Petitioners' experts (licensed Occupational Therapist, licensed Speech-Language Pathologist, certified BCBA, and Nationally Recognized Reading Specialist) against Dr. Pearson's more generalized expertise along with her emphasis of "form over substance," Dr. Pearson's expert opinions were less persuasive.

***Amber Boren, WCPSS Behavior Specialist (T vol 4 1109-1161; vol 5 1166-1228)***

64. Amber Boren is employed by WCPSS as a Behavior Specialist for the Northwestern Region, Eastern Region, and EBS-AU Programs ("Emotional Behavior Support-Autism"). Resp't Ex. 23 RESP'TS000258. (Boren Resume). Ms. Amber Boren was received, without objection, as an expert in the areas of evaluating and determining educational needs of students diagnosed with Autism Spectrum Disorder ("ASD"); developing IEPs for students diagnosed with ASD; developing and conducting functional behavioral assessments and creating and implementing BIPS for students diagnosed with ASD; behavioral management of students diagnosed with ASD; use of ABA programming in and outside of the public school setting for students diagnosed with ASD; training public school staff on the use of nonviolent physical restraints; training public school staff to support students with ASD; identifying circumstances in which seclusion or restraint are appropriate interventions for students with ASD, and proper and safe implementation of those interventions. T. vol. 4 1120:18-19; 1121:1-10; *see also*, Resp't Ex. 23 (Boren Resume).

65. Despite her expertise as a behavioral specialist employed by WCPSS, Ms. Boren had never taught Student nor supported him behaviorally. T vol 5 1187:19-25; 1188:1-2. Ms. Boren had not met Student T vol 5 1188:18-21; 1189:2; 1189:6. She did, however, once interact with Student's Parents at the May 11, 2023, IEP meeting at which time the Parents first requested a RBT and ABA therapy. T vol 5 1189:14-17. According to Ms. Boren, ABA therapy was denied at the May 2023 IEP meeting because the IEP team had "no data to support that Student required ABA therapy at school or that Student would benefit from ABA therapy" and "Student at the time was not currently participating in private ABA therapy even privately" so the IEP team did not have any "current data to show that ABA therapy was an effective intervention for him." T vol 4 1132:23-1133:9 (Boren). In forming her expert opinion, she did not review the private ABA data (T vol 1198:1-6) and was not aware that Student was receiving ABA private therapy during the 2023-2024 school year. T vol 5 1194:18-20.

66. While she criticized ABA therapy in the clinical setting, Ms. Boren was a "huge proponent of ABA therapy in the school setting" as a related service to "ensure the implementation with fidelity" of evidence-based behavior intervention practices, the very reason Petitioners wanted an RBT. T vol 4 1128:20-1129:7. Although Ms. Boren testified as an expert about ABA programming, at that time she was still in training (800 of 2000 hours of supervision) to become an BCBA. T vol 4 1197:2-3. More weight was given to Petitioner's expert witness, Ms. Holmes,

because she was already Board Certified, had implemented ABA therapy in the public schools, and supervised ABA therapists like Ms. Boren. Pet'r Ex. 1 002.

67. Even though Ms. Boren was qualified as an expert in developing and conducting FBAs and developing and implementing BIPs, she also did not testify about the appropriateness of the FBAs or BIPs; the implementation of the IEP or BIP prior to the October 2023 Restraint.

68. Other than the May 2023 IEP meeting, Ms. Boren did not attend any IEP, BIP, or Safety Plan meetings on Student's behalf during the 2023-24 school year. T vol 5 1189:18-1190:2. Like Dr. Pearson, Ms. Boren's opinion about the appropriateness of the IEP goals and services was based on how they were "constructed" not what she knew about Student T vol 5 1220:24-1221:4. On direct examination, she was not asked to opine about the Present Levels or service delivery in the September/November 2023 IEPs. Other than the independent evaluators' recommendation' for ABA therapy with an RBT for Student, Ms. Boren did not refute any of the findings or recommendations in the independent evaluations.

69. Ms. Boren was the only CPI trainer who testified. T vol 5 1175:1-13. She agreed with Petitioners' expert witnesses that physical restraint may only be used when the student is an imminent danger to self or others. T vol 4 1148:8-12. According to her, restraint is used as a last resort on any student, not just students with autism because it is "traumatic," "difficult," and "hard for all involved." T vol 4 1149:14-17. "Any restraint is significant" in her expert opinion. T vol 5 1200:11. Ms. Boren opined that the October 2023 Restraint itself was appropriate but did not testify as to whether the November 2022 BIP was appropriately implemented prior to the assembly restraint. T vol 5 1210:20-25. Ms. Boren opined that it "was the parents' choice not to send [Student] to school" not because of Student's fears. T vol 5 1160:18-1161:1.

### **2023-2024 FIFTH GRADE SCHOOL YEAR**

70. The 2023-2024 school year began August 28, 2023. Stip. 36. At that time, Student had not attended school since March 16, 2023. Stip. 16. WCPSS made transition arrangements when Student was reassigned to Elementary School. Student did "walk-through" with School Psychologist Taylor, SpEd teacher, and Behavior Support Teacher on August 23, 2023. *See* T vol 3 769:17-770:4; 904:1-8; 1060:19-1061:18 (Behavior Support Teacher). He met his 5<sup>th</sup> grade teacher in advance of the school year. During the first week of school, his SpEd Teacher took him for another tour and explained the use of the paint line dots (for person space) in the hallways. T vol 4 839:9-14 (McPhail). When he was deregulated, Student was encouraged to use Ms. Taylor's office as a "safe place" especially during the lunch which could be very over stimulating to him. *See* T vol 3 772-782 (Taylor).

### **Student's Maladaptive Behaviors Began As Soon as School Started**

71. Based on WCPSS' documentation, Student's maladaptive behaviors, elopement, noncompliant, verbal and physical aggressiveness, began the first day of school and continued through October 25, 2023. *See* Resp't Exs. 19, 11 & 15. Soon after school began, Student was restrained for the first time on September 5, 2023, then again on September 26, 2023, and finally

again on October 25, 2023, after which he did not return to school. Student was not physically injured during any of these restraints.

### **Implementation of Behavior Intervention Plans (“BIPs”)**

72. The implementation of two Behavioral Interventions Plans (BIPs) are at issue during Student’s fifth grade school year. They are the November 16, 2022 BIP (“November 2022 BIP”) and the November 6, 2023 (“November 2023 BIP”). The November 2022 BIP was drafted on November 16, 2022 and was implemented during part of Student’s fourth grade school year. Stip. 22, 23, & 24. After several restraints in February and March of that year, Student did not return to school for the remainder of the 2022-2023 school year. Stips. 23, 24, 25 & 26. A separate due process case resolved issues pertaining to that school year. *See* Stips. 28-33. The appropriateness of the November 2022 BIP is no longer at issue but its implementation during the 2023-2024 school year from September 1, 2023 until the timeliness of its revision on November 6, 2023 are still relevant.

73. With respect to the November 2023 BIP, the implementation issue is easily resolved – it was not implemented. Student did not attend school after October 25, 2023. Therefore, the only issue remaining as to the November 2023 BIP is its appropriateness.

### **November 16, 2022 BIP**

74. The November 2022 BIP was the only operative BIP in effect during the period from September 1, 2023 to October 25, 2023. Stip. Ex. 11. The November 2022 BIP described the evidence-based practices and strategies that school staff were supposed to implement in the school setting to support Student in decreasing the target behaviors as identified in the most recent Functional Behavior Assessment (“FBA”) available before its development. T vol 3 659:21- 660:4 (Pearson). These strategies were used to reinforce positive behaviors and prevent the target maladaptive behaviors.<sup>6</sup> The target behaviors in the November 2022 BIP were “follow directions/redirections.” Stip. Ex. 11 STIP000108.

75. The November 2022 BIP contained the following strategies and designated staff to implement these strategies and the school staff responsible for implementation noted within brackets:

1. Provide Student with visual schedule to support transitions and any expected changes to his day. [Teacher, CCR<sup>7</sup> Teacher]
2. Provide Social Stories for special events, PE, Lunch, Recess. [Teacher, CCR Teacher]

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<sup>6</sup> *See generally Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions*, 81 IDELR 138 (OSERS 2022) (stating a BIP generally describes the behavior that inhibits the child from accessing learning and the positive behavioral interventions and other strategies that are to be implemented to reinforce positive behaviors and prevent behavior that interferes with the child’s learning and that of others.).

<sup>7</sup> CCR means Cross-Categorical Resource. Supp. Stip. 2.

3. Social Skills instruction for desired and replacement behaviors. [CCR Teacher]
4. When met with resistance, provide Student with a redirection with direct and simple phrases for desired outcome in a positive way (i.e. “first work, then \_\_\_\_\_”). [Teacher, CCR Teacher, Specialist Teachers, Staff]
5. Check list for activities to be completed with earned break, specify the break and give one option (For example: legos, cars, draw, etc.). Aim for non-electronic option. [Teacher, CCR Teacher, Specialist Teachers, Staff]
6. Sensory Breaks to regulate his body (can be scheduled or as needed) Breaks include: walking within the school environment, sensory pathway, heavy work, weighted sensory equipment as needed. [Teacher, CCR Teacher, Specialist Teachers, Staff]

Stip. Ex. 11 STIP000108

### ***Implementation of the November 2022 BIP***

76. The first inquiry is whether the November 2022 BIP was implemented with fidelity. The documentary data evidence maintained by WCPSS’ staff and their testimonies evidenced that the November 2022 BIP intervention strategies were implemented prior to October 25, 2023. T vol 4 841:25-845:11; 852:7-9; 865:3-867) (SpEd Teacher) (lots of visual cards, four square breathing, fidgets, teaching coping skills, task list, use of emotional gas gauge; first/then break, review expectation every morning, token system); *see also*, Resp’t Exs. 10 & 14. Heavy weight-type activities were “always offered.” T vol 4 851:18-22 (SpEd Teacher); T vol 4 1036:20-1037:2 (Kuhns) (social skills instruction); *and*, T vol 4 839:10-12 (SpEd Teacher) (floor “hallway dots” used to learn personal space).

77. Petitioners’ behavior expert testified that she did not believe the November 2022 BIP was implemented with fidelity because she did not see behavioral progress. *See generally* T vol 2 369:15-25 (Holmes). However, BIPs are not monitored for progress, instead, they represent the strategies for staff to implement when Student engages in the target behavior. A lack of progress may gauge the effectiveness of the intervention strategy for behavior modification but is not the right standard to determine implementation. T vol 3 688:12-689:9 (Pearson). Moreover, Petitioners’ experts did not inquire and were not aware of other intervening factors which contributed to Student’s lack of behavioral progress. Other than the day of the October 25, 2023 assembly, the credible evidence proved that the November 2022 BIP was appropriately implemented.

### ***Restraints During 2023-2024 School Year***

78. Student was restrained twice before the pivotal restraint on October 25, 2023. Physical restraint was used on September 5 and 26, 2023 because Student was in imminent danger of self-harm. A review of Student’s actions and his Parents’ responses to the use of physical



restraint in these instances helped determine whether Student's school refusal was "self-directed" or "parent directed."

*September 5, 2023 Restraint Top of Stair Rail and Potential of Falling*

79. Student was first restrained on September 5, 2023. Resp't Ex. 19 RESP'TS0000198-200. That day, after being disruptive and noncompliant in his afternoon classes, Student eloped from his English Language ("EL") class, wandered around the school, ran from staff a few times, "ran to the top of the stairs and tried to climb over the railing of the stairs. Staff had to quickly react so [Student] did not go over the upstairs railing." Resp't Ex. 19 RESP'TS000200. After school staff explained Student's unsafe conduct to Mother, she "insisted that each staff swear that they will not put hands on J[R.] and individually went to each staff member to say this." Resp't Ex. 19 RESP'TS000200. Thereafter, Student's Parents have consistently objected to the use of any physical restraint by WCPSS staff.

*September 26, 2023 Restraint*

80. Student was restrained again on September 26, 2023. Stip. 39. Immediately prior to that restraint, Student had hidden in a utility closet and climbed up stacked gym mats which "almost touched the ceiling." T vol 1 p 217:1-3 (Student). According to Student, he had to lie on his belly, or his head would touch the roof. T vol 1 p 217:3-5 (Student) (testifying "Yes, it almost touched the ceiling. So, when I was there, I was, like, on my belly or my head so I did not touch the roof."). Because he was in danger of harming himself, WCPSS school staff climbed up the mats, restrained him, and safely brought him down.

81. Although the restraint was for Student's safety, his perception was that school staff were "trying to hurt him" and "that they dragged him to the principal's office" and restrained him there. T vol 1 211:1-4 (Student). Student's reaction was typical because he did get overwhelmed easily and did not feel comfortable when people were close to him. T vol 1 211:9-12; 212:2-9 (Student). Like the stairwell incident, the September 26, 2023 restraint was an emergent situation which did not allow sufficient time for WCPSS staff to implement Student's BIP. Stopping immediate intervention to tell a "social story" or "sensory break" was not feasible and would have been dangerous when Student was teetering off a stairwell or a pile of gym mats. Still, the Parents complained that this restraint was an "aversive procedure" that denied Student a FAPE. *See* Pet. p. 14 ¶ 26. This claim was dismissed by the Rule 41(b) Order at the end of Petitioners' case in chief.

*The October 25, 2023 Restraint*

82. The restraint central to this dispute occurred on October 25, 2023 (the "October 2023 Restraint"). As framed by the Parties, the "Restraint Issue" also questioned whether the "use of seclusion" and "isolation" denied Student a FAPE. The credible evidence proved that Student was not "secluded" or "isolated" at any point on October 25, 2023. T vol 4 1080:18-1081:13 (Behavior Support Teacher) (Student was never alone during the incident). Also not in dispute was that the school staff using the restraints were properly trained. T vol 4 p 1059:11 (Behavior Support Teacher)(CPI-certified); *and*, T vol 4 989:7-16 (Assistant Principal) (CPI certified).

Moreover, Petitioners proffered no credible evidence that the methods of restraint were improper or that Student was physically injured.

83. Behavioral experts tendered by both Parties agreed that physical restraint may be properly utilized as a last resort, following attempts to deescalate any student using nonrestrictive interventions, and as reasonably necessary to protect the safety of the student or others. T vol 2 367:6-368:10 (Holmes); T vol 3 671:7-672:11 (Pearson); T vol 4 1148:8-1153:10 (Boren). Petitioners' behavior expert also includes the use of physical restraint in her FBA/IEE's Crisis Plan. Stip. Ex. 45 STIP000519.

84. The Parents assert that WCPSS "failed to implement the [November 2022] BIP on October 25, 2023, prior to the physical restraint and seclusion, during the physical restraint and seclusion, and directly after the physical restraint and seclusion leading to Student's school refusal behaviors and inability to return to public school from October 26, 2023 to March 1, 2023." Pet'r Pro. Final Dec. p. 11 ¶ 19. Petitioners also assert that this "use of physical restraint" denied Student a FAPE because it resulted Student's "inability to return to public school" and his "deep fear of attending any WCPSS school." *Id.* ¶ 20. Based on Petitioners' framing of this claim, the "harm" purported caused by the failure to implement the November 2022 BIP was Student's "school refusal." WCPSS disagreed and so does the Undersigned.

85. Foremost, Petitioners bear the burden of proof by a preponderance of the evidence on each element of their claim. For a substantive FAPE violation, Petitioners must prove that the failure to implement the November 2022 BIP or the use of physical restraint on October 25, 2023 caused Student's school refusal. With Petitioners' burden forefront, the focus turns to what happened before and during the October 2023 Restraint.

86. During the events leading up to October 2023 Restraint, the evidence showed that November 2022 BIP was not implemented with fidelity prior to the assembly scheduled for that day. When Elementary School staff knew about the timing of assembly is unknown, but it was evident that they had not adequately planned beforehand to implement all of Student's behavior interventions that day. Resp't Ex. 16 RESP'TS000191; T vol 4 881:25 (SpEd Teacher) ("found out about the assembly late").

87. Earlier that day, though SpEd Teacher had explained to Student that the assembly might be loud and asked if Student wanted headphones, she did not provide any social stories or visuals to prepare him for it. T vol 4 882:4-883:12 (SpEd Teacher) (he seemed ok, declined headphones). Complicating implementation of the BIP was that Mr. Assistant, Student's usual assistant, was absent. T vol 3 573:20-574:5.

88. The timing for school staff was also problematic. The assembly was held at the end of the school day around 2:45 p.m. Teacher had less than 10 minutes to explain the assembly expectations to her 19 students and have her class pack up for the end of the day. T vol 4 1035:1-11 (Teacher); 887::23-25 (SpEd Teacher) (the carpool lines usually start at 3:00 p.m.) 1034:25-1035:2. School staff knew that Student had significant difficulty with transitions as the BIP was supposed "to support transitions and expected changes to his day." Stip. Ex. 11 STIP000108. Whether they remembered he was "frequently distressed by assemblies" is debatable because this

information is buried within the 55 pages of the September 2023 IEP. *See* Stip. Ex. 27 STIP000333 (“frequently becomes distressed by assemblies, lunch, or other large gatherings”).

89. During the 10 minutes, that Teacher had to give her 19 students directions “as best as [she could] in a quick manner,” Student starts interrupting asking “why” questions, gets out of his chair, starts walking towards her, getting closer, asking louder and louder, and was becoming aggravated, upset, and dysregulated. T vol 4 1025;20-1026:12 (Teacher). Student continued to escalate asking “Why? Why?” Teacher could not answer any of Student’s questions about the assembly because she did not know any of the specifics and she was preoccupied with getting her students ready. T vol 4 1025:1-10. At this point it was too late to “spell it out in writing and with visuals” about “what’s happening, this is who’s coming, these are the noises and the sensory experiences that are going to occur” or “provide an opt-out well before” the event “so that [Student] had time for processing and deciding” if “this is a good match for his sensory system”. T vol 2 243:15-244:4 (Minnelli) (explaining what should have occurred).

90. Instead, Teacher took her entire class out into the hallway leaving Student in the room. T vol 4 1026:20-24. Not understanding, Student tried to follow the other students into the hallway but was blocked by Teacher and Ms. Assistant. T vol 4 883:19-23. Teacher then took her class to the assembly and leaves Student with Ms. Assistant and SpEd Teacher in the classroom. T vol 4 1027:5-20. Understandably, Teacher was focused on getting her class ready and had little time to implement Student’s November 2022 BIP. T vol 4 1037:17-23; 1040:20-24 (“attempted to redirect him”). But, other staff could have implemented the BIP. Stip. Ex. 20 STIP000265-271 (May 2023 IEP requires “adult assistance as needed”)

91. Although neither the May 2023 IEP nor the November 2022 BIP designated a one-on-one assistant for Student, all the teachers, assistants, and staff were responsible for implementing the November 2022 BIP. Stip. Ex. 11 STIP000108. Ms. Assistant a classroom assistant, did talk calmly to Student but otherwise did not implement the strategies in Student’s BIP. T vol 4 1026:19-1027:5; 1037:24-1038:3. Instead, she texted SpEd Teacher who in response came to the classroom. T vol 4 1027:2-5. SpEd Teacher then instructed Student multiple times to back away from the door and go back into the classroom where he could calm down and get regulated, but nothing worked as Student “kept hitting at [them], kicking at [them], and calling [them] names” until Ms. Behavior Support Teacher and Ms. Second Assistant went into the room at which point Ms. Assistant and SpEd Teacher left the area. T vol 4 884:18-885:21. Soon thereafter, Assistant Principal joined Behavior Support Teacher and Ms. Second Assistant in the room with Student T vol 4 885:17-25.

92. Assistant Principal and Behavior Support Teacher continued to provide Student with space, as much as practicable, while maintaining safety; continued to engage with him using calm language; and attempted other evidence-based de-escalation techniques. T vol 4 968:24-969:9, 970:8-14 (Assistant Principal) (Behavior Support Teacher was stepping back, providing Student with space, and attempting to use breathing techniques for de-escalation prior to the restraint); T vol 4 1066:4-17, 1070:4-18 (Behavior Support Teacher) (she spoke to Student using a calm voice, provided him with space, used direct language, limited verbal language to allow him time to process, provided if/then statements, and utilized breathing techniques to attempt to de-escalate). Nonetheless, Student continued to become increasingly dysregulated and aggressive,

which necessitated the use of physical restraint to maintain safety. T vol 4 970:15-24 (Assistant Principal) (restraint began following Student striking Behavior Support Teacher in the face); T vol 4 1067:7-1072:25; (Behavior Support Teacher) (she attempted to give Student space, deescalate, and deflect when he would physically attack, and the restraint only occurred when he struck at her face); T vol 4 1093:1014 (Behavior Support Teacher) (“charging and hitting” her).

93. The Restraint Notification Form documented the restraint as follows:

[Student] was pushing and pulling on staff when Behavior Support Teacher [I] was asked to assist. I went into the room and ask him to stop. I could see he was dysregulated. I stood between him and the other staff to protect them and he began to swing at me. Ms. Second Assistant and myself remained in the room and everyone else left and I asked that Assistant Principal be contacting.[Student] continued to hit and kick at me, which was deflected. When he hit me in my face he was placed in a child-control position. He dropped to the floor and was released. He got up and started to attack me and was deflected until he began to hit me in the face and he was placed in a child-control position again. He continued to hit at me and when I placed him in a child-control position, Assistant Principal asked if we should do a team control position. He dropped to the floor and was released again. The next time he hit Behavior Support Teacher, Assistant Principal and Behavior Support Teacher placed him in a seated team control position. He bit Assistant Principal. Ms. Second Assistant, maintaining safety, tried to cool him but it seemed to bother him more. So she continued to watch and maintain safety. [Student] wiggled and went to the floor where he was released. He got up and began to pick up and attempt and at times throw chairs. He roamed and picked up items, throwing them. He threw a laptop at Behavior Support Teacher. Eventually when Assistant Principal was able to get in touch with mom he sat in a cubby calming down.

Stip. Ex. 58 STIP001561.

94. Behavior Support Teacher physically restrained Student four times using the CPI “child control position” during a twenty-minute period and the restraints lasted no more than 10 seconds before he dropped to the floor and she released him. T vol. 4 1085:1-25, 1088:5. Then together, Behavior Support Teacher and Assistant Principal used the CPI “two-seated team control position” for probably a minute because Student “was moving all the time” and they “were trying to gain control.” T vol 4 980:10-12; 981:24-982:5 (Assistant Principal). Even Student acknowledged that prior to the restraint, he “got mad” and physically engaged with staff who were standing there in the room with him “when I shouldn’t have.” T vol 1 216:4-20 (Student)

95. At that time, Assistant Principal and Behavior Support Teacher were in the best position to assess whether, under the circumstances, physical restraint was appropriate and necessary. T vol 3 672:4-11 (Pearson); T vol 4 1148:13-1149:8 (Boren). During the restraints, Student was dysregulated, aggressive, and could not be redirected through other means. T vol 4 968:13-970:24 (Assistant Principal); T vol 4 1065:11-25 (Behavior Support Teacher).

96. While WCPSS staff were unable to implement the strategies in the November 2022 BIP because of Student’s dysregulated state, they followed the protocol in the “Crisis Plan”<sup>8</sup> recommended by Petitioners’ behavioral expert. *See* Stip. Ex. 45 STIP000519 (Holmes’ “Crisis Plan”). The Safety Plan developed at the November 6, 2023 IEP meeting copied verbatim portions of Ms. Holmes’ Crisis Plan. *Compare* Stip. Ex. 36 STIP000429 (“Safety Plan”) *with* Stip. Ex. 45 STIP000519 (Holmes’ “Crisis Plan” in FBA/IEE). The Parents disagreed with their own expert about the appropriate use of physical force. Stip. Ex. 33 STIP000417 (stating “Mother is not in agreements with the Safety Plan”).

97. To the extent Student testified about the day of the restraint, his testimony was internally inconsistent and contradicted by reliable testimony from all other witnesses with personal knowledge. *Compare* T vol 1 203:16-23 (Student testified on direct he was forced into a small cubby) *with* T vol 1 215:1-15 (Student testified on cross he was not forced into the cubby and he went into the cubby himself following the restraint); *and*, T vol 1 209:9-15, 213:21-214:1 (Student testified that the principal was involved on September 14 and that the principal and SpEd Teacher were in the room during the restraint on October 25) *with* T vol 4 975:10-15 (Assistant Principal) (the principal was not on campus on either September 14 or October 25), *and*, T vol 4 885:17-886:5 (McPhail) (SpEd Teacher left the room prior to the restraint and did not return). Student exhibited deficiencies in narrative language related to retelling an event or a story. T vol 2 244:20-245:20 (Minnelli).

98. The use of physical force on October 25, 2023 was appropriate and proportionate to Student’s “risk behaviors towards others and [he] was not responsive to nonrestrictive interventions.” T vol 4 1154:22-1155:5 (Boren). There was no expert testimony presented by Petitioners that the method of restraint at that time was inappropriate. *See* T vol 2 397:17-25 (Holmes) (declining to opine whether the use of physical restraint denied a FAPE when explicitly asked on direct.); T vol 2 407:11-18 (Holmes) (opining in response to the question of whether Student was denied a FAPE because of the October 25 restraint that he was denied FAPE because “other strategies were not implemented first” and the behaviors leading to the restraint weren’t addressed). Instead, Petitioners’ experts focused on the proactive strategies which “could have

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<sup>8</sup> Once Student became emotionally dysregulated, they cleared the other students out of the classroom; two adults were present (Student’s 1:1 assistant and Behavior Support Teacher who was familiar with Student’s IEP and BIP); they stood in front of the classroom door so Student could not elope; they used limited verbal language; provided access to sensory items; they asked and waited to see if Student was calm; they used the CPI Children’s Control Position and CPI Two-Seat Team Control Position to prevent physical contact between him and themselves when threatened with physical harm; they immediately released the holds once Student slipped out; stopped intervening once Student became calm; and they completed a Crisis Report to document what happened. *See* Stip. Ex. 45 STIP000519 (Holmes’ “Crisis Plan”).

been taken to minimize the need for physical restraint.” T vol 2 397:12-16 (Holmes); *accord*, 243:2-244:9 (Minnelli).

99. Moreover, there was also no evidence proffered that the restraints were carried out inappropriately. The undisputed testimony by the trained professionals involved was that they utilized appropriate physical intervention techniques<sup>9</sup> (the “child control position” and “two-seated team control position”), as a last resort when nonrestrictive interventions were not successful, that restraint was used only when Student’s actions posed a danger to himself or others, and that any physical interventions were released promptly upon Student sliding to the floor or otherwise ceasing the dangerous activities. T vol 4 970:22-973:2, 978:17-983:1 (Assistant Principal); T vol 4 1066:4-1076:8 (Behavior Support Teacher); *accord*, Stip. Ex. 45 STIP000519 (restraint followed Holmes’ “Crisis Plan”). The October 2023 Restraint was necessary for Student’s and the staff’s safety.

100. The harm caused by the November 2022 BIP implementation failure was that Student did attend the assembly that day. [Whether] the October 2023 Restraint caused Student to refuse to attend a WCPSS school is a different matter.

### ***Was School Refusal Caused By Use of Physical Restraint***

101. Petitioners must prove that the implementation failure or the physical restraint denied Student a free appropriate public education, and they must also prove by a preponderance of evidence that these FAPE violations caused Student's inability to attend any WCPSS school. This they did not do.

102. While Student may have been anxious about returning to school, Petitioners’ behavior expert agrees that such anxiety is not the same as “school refusal,” and a failure to attend school is not the same as “school refusal.” T vol 2 419:7-420:21 (Holmes).

103. Notably, none of Petitioners’ expert witnesses had met with, observed, or evaluated Student following the October 2023 Restraint. The only expert witness who had even spoken with Student since that time (Ms. Meehan) FaceTimed him for 15-25 minutes while he was in a car with his family. Other than the Parents, two third parties had face-to-face interactions with Student immediately after the October 2023 Restraint. They were Dr. Brian Walker from Duke Health and Connect n Care therapist Emani Taylor. Dr. Walker did not diagnose Student with PTSD or other adverse reaction to the restraint. Stip. Ex. 55 STIP001219 (spent 35 minutes in both face-to-face and non-face-to-face activities). ABA Therapist Taylor did not observe and adverse effect during her therapy sessions with Student after the restraint or the next day. Stip. Ex. 74 STIP001826

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<sup>9</sup> During the “child control position”, the school staff stands behind the standing student holding the student’s wrists with the student’s arms crisscrossed in front. If the student drops to the floor, the restraint is immediately released. The “two-seated team control position” involves two staff members seated next to a student holding the seated student’s arms. Again, if the student slides to the floor, the student is immediately released.

(10/25/23 note “session went well”) & STIP001831 (10/26/23 note Student “was very positive today as well the whole session”).

104. None of Student’s treating physicians or mental health professionals testified at the hearing. To the extent any of the Petitioners’ expert witnesses testified regarding the cause of Student’s school refusal, such testimony was entirely predicated on double hearsay, that is information about Student’s conversations or behaviors in the home setting which were shared by Mother who, again, did not testify at the hearing.

105. Contrary to the assertions by Father and representations made by counsel to this Tribunal that Student has a severe emotional response and/or a meltdown at the mere mention of the school system, Student’s affect during his testimony and as recorded by his Parents while discussing the incidents at issue presented as calm and controlled. Stip. Ex. 55 STIP001213-1220 (medical records immediately after the October 2023 Restraint, indicated Student was “comfortable, cooperative, in no apparent distress[,] [with] appropriate mood and affect.”); Stip. Ex. 70 (recording of Student discussing restraint in response to questions from Mother); Stip. Ex. 71 (recording of Student at Urgent Care on October 25, 2023); Stip. Ex. 72 (recording of Student in car on October 25, 2023).

106. The only evidence somewhat supportive of Petitioners’ position on school refusal is the WCPSS evaluation completed on April 12, 2024 by School Psychologist Alyssa Taylor. However, Ms. Taylor assumed Student was engaged in school refusal as that was what had been reported by Mother (Stip. Ex. 49). Also, Ms. Taylor was unable to meet face-to-face with Student to assess him because Mother refused to bring Student to the scheduled evaluation. T vol 3 796:16-797:18 (Taylor). Therefore, Ms. Taylor completed the evaluation based solely on rating scales provided by Mother and these rating scales suggested that Student struggled with attending school due to “fear of separation from ‘safe’ adults, feeling judged, and a profound dislike of school and its expectations” not that he was afraid of returning to school. Stip. Ex. 49 at STIP000549.

107. The only private evaluation conducted during the relevant period was a Post Traumatic Stress Syndrome (“PTSD”) Assessment<sup>10</sup> completed by a clinician at Hope Services LLC on November 22, 2023. Stip. Ex. 54. That assessment indicated that “[w]hile client meets criteria for PTSD based on the measure, we are unable to timeline symptoms as beginning after the school restraints. Per mom's report, client exhibited these behaviors prior to the school restraints and could be attributed to his previous diagnoses.” Stip. Ex. 54 at STIP000716. Despite the fact the evaluation explicitly stated it could not connect the PTSD to the school restraints, Mother nonetheless falsely informed other medical professionals that the evaluation indicated the PTSD was related to the restraints. Stip. Ex. 55 at STIP001301. Mother also falsely indicated to the November 6, 2024 IEP team members that Student had been diagnosed with PTSD. Stip. Ex. 33 STIP000417.

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<sup>10</sup> Incredibly, Father testified that he had never seen this evaluation and was unaware of his child’s diagnosis with PTSD. T vol 3 630:9-631:5.

108. It is undisputed that Student has not attended a WCPSS school since October 25, 2023, but the Tribunal finds that there is no evidentiary support for a conclusion that Student was or has been engaged in school refusal behavior preventing him from returning to in-person instruction. WCPSS was ready and willing to provide services, but it was the Parents' choice not to send him. T vol 4 1160:18-1161:1 (Boren).

***Timeliness of the Revision of November 2022 BIP***

109. Although Petitioners have waived the appropriateness of the November 2022 BIP, a sub-issue is whether the November 2022 BIP should have been revised sooner than the November 6, 2023 IEP meeting. Petitioners contend that the November 2022 BIP was based on outdated behavioral data prior to Student's school refusal in March 2023 and should have been revised before the beginning of the 2023-2024 school year. Per Petitioners, once the new FBA was completed on June 9, 2023, the IEP team should have reconvened to revise the November 2022 BIP. T vol 2 372:9-16 (Holmes).

110. However, Student was initially responsive to the behavior interventions and instruction through the month of September until mid-October. T vol 4 897:2-10 (SpEd Teacher). Thereafter, intervention and instruction became more difficult because Student engaged in a lot of refusal behaviors and "often wanted to leave the room to call his mom." T vol 4 897:12-23 (McPhail). SpEd Teacher reached out to the school psychologist (Taylor), EC department Chair (Behavior Support Teacher), and district support people who observed and offered suggestions. T vol 4 897:898:9. Also during that time, to help support Student better, SpEd Teacher took the RBT training and met with a private BCBA from Stepping Stones, ABA. T vol 4 901:4-16. School staff began collecting data on Student's task refusals for a Functional Behavior Assessment which was developed on November 6, 2023 and incorporated recommendations from the independent FBA. *See* Stip. Ex. 34 (11/06/23 FBA) *and* Stip. Ex. 45 (06/09/23 Holmes' FBA-IEE).

111. In the home setting, other factors were affecting Student's behavior. In August 2023 Student began private ABA therapy<sup>11</sup> for 25 hours a week and as part of the private ABA program; his Parents started participating in "Parent Training" one hour per week with Connect n Care, ABA. Stip. Ex. 74; STIP001641, 1643, 1647. Student had a Cognitive Behavior Therapy ("CBT") clinician. Stip. Ex. 55 STIP001184. Student also participated in Group Family Training 2 hours per month (Stip. Ex. 74 STIP001647) and received cognitive skills training during his private ABA therapy sessions. *See* Stip. Ex. 74 STIP001753, 1756, 1824, & 1829. In the meanwhile, Student was having behavioral meltdowns at home about twice a week over "minute things." Stip. Ex. 55 STIP001184. Pharmaceutically there were other changes. Student's medications were being adjusted to try control his outbursts, negativity, aggressiveness, and sleep problems. Stip. Ex. 55 STIP001183. While the use of medication is not required to receive special education services, the

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<sup>11</sup> Later at the September 27, 2023 IEP meeting, Mother did tell WCPSS that Student was having private ABA therapy, but not how much and the frequency. This information was not shared soon enough for school staff to review any of the ABA data before that IEP meeting to determine the appropriateness of ABA therapy in the school setting. *See* Stip. Ex. 27 at STIP000296.



changes in Student was relevant to his behavior and important information for the IEP team to consider because medication can affect a student's behaviors. *See* Stip. Ex. 36 STIP000428 ("Safety Plan" included preventative measure [that] parent notify school staff if Student began or changed medication protocols).

112. The conjunction of the home and school factors during the beginning of the 2023-2024 school year coincided with the increase in Student's maladaptive behaviors. By mid-October, the need for additional behavior support and training became obvious to school staff. While the November 2022 had not been timely revised, when implemented with fidelity, it appropriately addressed Student's behaviors until those behaviors intensified by mid-October 2023. The November 6, 2023 IEP meeting was held after requisite two-week data collection. Stip. Ex. 34 STIP000419 (The November 6, 2023 FBA stating that "If no data [on the target behavior] is available, discuss context, then reschedule meeting after 2 weeks of data collection.").

113. Both of WCPSS's experts conceded that the November 2022 BIP should have been revised sooner than it was. T vol 5 1179:7-12 (Boren) (admitted that the BIP should have been reviewed and revised) (at least in early October 2023); T vol 3 708:11-709:4 (Pearson) (stating school refusal in March 2023 was a new behavior which should have triggered a new FBA and another BIP should have been developed from that new FBA). Even the November 2022 BIP indicated that the plan of review was every 3-6 weeks, and it should have been revised by January 31, 2023 [sic]. Stip. Ex. 11 STIP000110.

114. An independent FBA had already been developed on June 6, 2023 by Jennifer Holmes. Stip. Ex. 34. Among other recommendations, the Ms. Holmes' FBA-IEE recommended intensive behavioral support and consistent implementation by a trained one-on-one Registered Behavior Technician ("RBT")<sup>12</sup> assistant, functional communication training, and direct counseling services. *See* Stip. Ex. 45. At the May 11, 2023 IEP meeting, WCPSS staff knew that the Parents had requested a trained as one-on-one RBT with BCBA supervision but the school-based members of the IEP team denied this support and continued to deny this support until discussion about it resurfaced at the November 14, 2023 IEP meeting. *See* Stip. Ex. 27, 31-33, 37 & 38.

115. Also, prior to the November 6, 2023 IEP meeting, the IEP team had multiple IEP meetings at which time the November 2022 BIP could have been revised. The IEP team reviewed the June 2023 FBA-IEE on September 11, 2023 with Ms. Holmes but did not revise the BIP. Stip. Ex. 26. Another IEP meeting was held on September 27, 2023 but, even though the IEP team reviewed Holmes' FBA again and pasted some of her recommendations verbatim in the IEP, the IEP team did not revise the November 2022 BIP. *See* Stip. Ex. 27.

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<sup>12</sup> RBT certification requires a 40-hour course; then a competency review from a BCBA certified in supervision to sit for the RBT exam. T vol 3 6-13; 21-528:5; vol 4 1112:20-1113:9. Even with certification, an RBT must still be supervised by a Board Certified Behavior Analyst (BCBA). T vol 2 405:4-12 (5 % supervision by BCBA required).

116. Only after the October 2023 Restraint, did the IEP team meet on November 6, 2023 to revise the November 2022 BIP. By that time, school staff had collected data on his target behaviors. *See* Stip. Ex. 34 (data information under Step 3). The data evidenced that most of Student’s task refusal occurred during his core academic courses and during transitions. Stip. Ex. 34 (11/6/23 FBA) (class refusals: science 54%; English Language (“EL”) 46%; world language 46%; transition refusals the most during “lunch to World Language” and “recess to class”).

117. Student’s refusal rates [during] delivery of his special education services were equally concerning. His refusal rates exceeded 50 percent. *See* Stip. Ex. 34 (reading 77%, task completion 50%, behavior/desired activity 76%, writing 64%, social skills 100%, behavior/proximity to peers 67%, sensory break/maintain calm body 85%). Stip. Ex. 34. With that data and Ms. Holmes’ June FBA, the team created another FBA (the “November 6, 2023 FBA”), a new November 6, 2023 BIP (“November 2023 BIP”), and a Safety Plan. *See* Stip. Exs. 33-36, 45. The IEP team identified Student’s disruptive behaviors as “refusal, yelling, physical aggression, and elopement.” Stip. Ex. 34 STIP000419. The target behavior was “non-preferred task or activity refusal.” Stip. Ex. 34 STIP000419.

118. Based on the preponderance of the evidence, the IEP team should have reconvened to revise the November 2022 BIP before the beginning of the 2023-2024 school year or at least three weeks into the 2023-2024 school year after collecting the necessary behavior data. WCPSS provided no cogent or rational explanation as to why the November 2022 BIP was not revised prior to the 2023-2024 school year especially since the June 9, 2023 FBA was available to the IEP team at that time. Nor did WCPSS explain why the revision of the BIP was delayed until November 6, 2023 when three other IEP meetings had been held in the interim on September 7, 11, and 27, 2023. *See* Stip. Exs. 24, 26 & 27. WCPSS’ failure to timely revise the November 2022 was a procedural violation.

119. Still to prevail on a FAPE denial claim, Petitioners must prove that this procedural violation caused substantive harm. Petitioners’ substantive harm argument appears to flow along these threads. That the procedural violation denied Student a FAPE because had the November 2022 BIP been properly implemented or timely revised, then Student would not have had to be restrained on October 25, 2023. Due to these procedural mishaps, Petitioners argue Student was substantively harmed and unable to return to in-person school instruction.

120. Three of Petitioners’ experts opined about timely revision of the November 2022 BIP. Ms. Holmes agreed that WCPSS denied Student a FAPE by not timely revising his November 2022 BIP, but she did not explain the nexus between this procedural violation and the substantive harm to Student T vol 2 407:1-5; 373:13-374:1(similar to her report but not implemented as she described); *accord*, 296:4-9 (Minnelli)(generally failure to revise IEP after September 27, 2023 but not asked about November 2022 BIP). Ms. Meechan opined that the revision of the November 2022 BIP after the October 2023 Restraint denied Student a FAPE because he was out of school and “wasn’t able to access it [the November 2023 BIP].” T vol 1 93:20-94:2. She did not opine that WCPSS’ failure to revise the November 2022 BIP denied Student a FAPE before October 25, 2023. At best, Ms. Holmes opined that steps could have been taken to minimize the need for physical restraint. T vol 2 397:12-16.

121. Both of WCPSS's experts conceded that the November 2022 BIP should have been revised sooner than it was. T vol 5 1179:7-12 (Boren) (admitted that the BIP should have been reviewed and revised) (at least in early October 2023); T vol. 3 708:11-709:4 (Pearson) (stating First School Refusal was a new behavior which should have triggered a new FBA and another BIP should have been developed from that new FBA). Even the November 2022 BIP indicated that the plan of review was every 3-6 weeks, and it should have been revised by January 31, 2023 [sic 2024]. Stip. Ex. 11 STIP000110.

122. But even if the November 2022 BIP had been revised before the October 2023 Restraint, it is ["at best"] speculative to assume that Student would not have been restrained on October 25, 2023 had school staff properly implemented the November 2022 BIP or the revised November 2023 BIP. Petitioners have failed to prove that the delay in the revision of the November 2022 BIP caused a substantive denial of FAPE to Student

### **Revision of May 2023 IEP**

123. Petitioners also asserted that WCPSS failed to timely revise the May 2023 IEP. Numerous factors interfered with the revision of the May 2023 IEP. After the May 11, 2023 IEP meeting, the Parents requested six (6) independent evaluations which were conducted from May 17 to July 20, 2023. During this time, WCPSS' school staff were preparing for another due process case scheduled for hearing in early September 2023. That case was ultimately settled by an Offer of Judgement on September 7, 2023 (Stips. 30-33) but preparation for the hearing still factored into the availability of the Parents, school staff, and independent evaluators (Petitioners' experts) to prepare and attend IEP meetings.

### **Independent Educational Evaluations and Functional Behavior Assessment**

124. In June and July 2023, six (6) educational evaluations, including an independent functional behavioral assessment, were conducted to determine Student's Present Levels of Academic and Functional Performance ("Present Levels"). *See* Stip. Exs. 42-47 (IEEs and FBA-IEE). Completion of the evaluations and preparation of the reports would have taken additional time. Moreover, review of all the evaluation reports had to be conducted based on the availability of all the independent evaluators. In addition, school staff would need time to collect data on the effectiveness of the May 2023 IEP instruction and current BIP interventions.

### ***September 7, 2023, IEP Meeting***

125. During the September 7, 2023, IEP meeting, Dr. Rebecca Felton, Dr. Kelly Anthony, Ms. Jeena Meehan, and Private BCaBA attended and the evaluators discussed their independent educational evaluation results with the school-based IEP members. Stip. Ex. 24; Stip. 37; T vol 1 74:2-12 (Meehan); 161:16-20 (Felton). The school-based members of the IEP team were Assistant Principal; Courtney Tucker, CT/SpEd; SpEd Teacher, Case Manager; Teacher, 5<sup>th</sup> Grade Teacher; George Canton, Behavior Specialist; Alyssa Taylor, Psychologist; McKaila Higgins, OT; and David Noland, WCPSS Attorney. All these IEEs were stipulated exhibits and were admitted into evidence without objection.

126. The IEP minutes from the September 7, 2023 IEP meeting do not indicate any disagreement with any of the evaluation results. *See* Stip. Ex. 24. The only discrepancy between the IEP minutes about the independent evaluations and the experts' opinions was that Occupational Therapist Meehan recommended a specific amount of direct OT services which was not included in her evaluation. Stip. Ex. 24 STIP000289; Stip. Ex. 27 STIP000339. Otherwise, the independent evaluators relied on their evaluations when opining about the appropriateness of the subsequent September/November 2023 IEPs.

127. At this IEP meeting, the IEP team did not make any substantive changes to the May 2023 IEP and did not modify the November 2022 BIP. Another meeting was scheduled for September 11, 2023 to review the rest of the independent evaluations. Stip. Ex. 24 STIP000290.

### ***September 11, 2023, IEP Meeting***

128. None of the independent evaluators who attended the September 7 meeting attended the September 11, 2023 IEP meeting. At this IEP meeting, WCPSS received information from Jennifer Holmes and Jennifer Minnelli regarding their respective IEEs. Stip. Ex. 26; Stip. 38; T vol 2 309:21-24 (Minnelli); 346:5-16 (Holmes). The same school-based members of the September 7, 2023 IEP team attended with the addition of Sheila Richards and the omission of David Noland. Stip. Ex. 26 STIP000293. Stip. 26. There is no evidence that any WCPSS employee recommended an amendment to Student's IEP and BIP to reflect the new information from either the September 7, 2023 IEP meeting or the September 11, 2023 IEP meeting. Ms. Holmes and Ms. Minnelli's IEEs were stipulated exhibits and admitted into evidence without objection.

129. Soon thereafter, a third IEP meeting was scheduled for September 27, 2023 to develop Student's annual review IEP. Stip. Ex. 26:40. These IEP teams reviewed a lot of information and reconvened on September 27, 2023 to develop Student's new IEP. *See* Stip. Ex. 27. To the extent a procedural violation occurred, the five-week delay was reasonable and necessary for the IEP team to be equipped with accurate and current information to develop the September 27, 2023 IEP.

## **IMPLEMENTATION OF IEPs**

### **May 11, 2023, September 27, 2023, and November 6, 2023 IEPs**

130. The implementations of three (3) IEPs are at issue. The first IEP whose implementation is before this Tribunal is the addendum May 11, 2023 ("May 2023 IEP"). This addendum IEP was written to be implemented through November 15, 2023 but was later revised at the September 27, 2023 IEP meeting. *See* Stip. Exs. 20 & 27. Therefore, the May 2023 IEP was the first IEP whose implementation is at issue and the implementation period was September 1 through 27, a period of 16 school days for Student. Supp. Stip. 1(a). The second IEP at issue is the implementation of the September 27, 2023 IEP ("September 2023 IEP") from September 28 through October 25, 2023, a period of 16 school days for Student. Supp. Stip. 1(b). Finally, the implementation of the November 6, 2023 IEP ("November 2023 IEP") was also at issue. The implementation period for the November 2023 IEP was 62 school days. Supp. Stip. 1(e).

Therefore, in total, the compensatory education period for a failure to implement these IEPs from September 1, 2023 through March 1, 2024 was 103 school days. Supp. Stip. 1(f).

### ***Implementation of May 11, 2023 IEP and September 27, 2023 IEP***

131. Now turning to the implementation of the May 2023 and September 2023 IEPs. None of Petitioners' experts talked to Student, his Parents, or WCPSS school staff about the implementation of any of Student's IEPs. Nor did any of Petitioners' experts reference WCPSS' exhibits which evidenced implementation of both the May 2023 IEP and the September 2023 IEP. *See* Resp't Exs. 11, 13, 15, 19 & 21. The only reference to the implementation of the May 2023 IEP from any of Petitioners' witnesses was Ms. Minnelli's testimony that the IEP would have been in place at the beginning of September 2023. T vol 2 267:21-25 (Minnelli). Petitioners' expert witnesses were only questioned about and testified to what they *wanted* to see in the IEP instead of referring to any evidence reflecting a lack of implementation. *See e.g.*, T vol 1 119:21-25, 120:1-2 (Meehan).

132. In fact, Petitioners' expert witnesses failed to identify any evidence that proved the May or September 2023 IEPs were not implemented, they testified that they were even unsure of what was provided on a day-to-day basis to Student, and they admitted that the basis for their belief that the IEPs were not implemented was a lack of documentation of every instance. *See e.g.*, T vol 1 123:23-25, 127:1-23 (Meehan); T vol 1 178:23-25; 179:1-3 (Felton). This is a standard not expected in any progress monitoring. Moreover, this lack of evidence does not, by itself, meet the Petitioners' burden of proof. It is their sole obligation to bring forward the evidence to prove implementation of the May and September 2023 IEPs did not happen – not that it *may* not have because there was not documentation of *every* instance when the IEP was implemented. Student also testified about the implementation of these IEPs, but his testimony was given little weight.

133. In contrast, Student's special education teacher (SpEd Teacher), credibly testified with specificity, regarding the instruction she provided to Student to address each of the goals in the IEPs. *See e.g.*, T vol 4 838:21-840:4; 841:12-25; 842:1-7, 20-25; 843-49:1-25; 850:1-21 (SpEd Teacher).<sup>13</sup> Student's regular education (Teacher) and special education (SpEd Teacher) teachers also credibly testified, with specificity, how Student was provided with each of the supplemental

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<sup>13</sup> *See also*, Implementation of Student's IEP and BIP monitored by a Reward Chart and Daily Behavior Tracking Charts, and a Reminders and Visual Schedule were created by SpEd Teacher. Resp't Exs. 10, 11, 14. Student's progress was monitored beginning August 28, 2023 with a Progress Monitoring Data created by Behavior Support Teacher. Resp't Ex. 13 (noted 21 elopements as well as numerous maladaptive behaviors). Teacher and SpEd Teacher kept Daily Behavior Charts and Detailed Teacher Notes/ Service Document. Resp't Exs. 15 (Daily Behavior Charts) & 19 (Service Document). SpEd Teacher kept the Teacher Notes because she "was well aware that this would be a case was under litigation." T vol 4 876:9-11; 876:1-881:9 (Teacher, Behavior Support Teacher, and Ms. Assistant contributed). A first quarter Progress Monitoring Report indicated that Student did not master any of his IEP goals. Stip. Ex. 30; *but see*, T vol 3 740:20-741:4; 744:8-9 (Pearson) (did not see any progress monitoring data). Other than these documents, there was no written documentation of the implementation of Student's IEPs and BIP.

aids, services, accommodations, and modifications listed in the IEPs., as well as presented documentary evidence of the same *See e.g.*, T vol 4 842:9-19, 847:25-848:16, 850:22-851:-3, 852:2-25, 855:15-25, 856:1-12; 860:18-863:2 (McPhail); T vol 4 1015:4-13 (Kuhns); *see generally*, Resp't Exs. 10, 11, & 14; *see also*, T vol 1 210:23-25 (Student) (discussed choice time).

134. Further, there was no testimony from Petitioners' experts challenging the implementation of the specially designed instruction ("SDI") in the May or September 2023 IEP. Again, Petitioners' witnesses could only state they did not see evidence of how the IEP was implemented in the records they reviewed. *See e.g.* T vol 1 178:23-179:3 (Felton).

135. It is undisputed that the November 2023 IEP was not implemented because Student was in school. Otherwise, Petitioners have failed to prove that the May 2023 IEP and September 2023 IEP were not appropriately implemented.

### **APPROPRIATENESS OF SEPTEMBER 2023 AND NOVEMBER 2023 IEPS**

136. The September 27, 2023 ("September 2023 IEP") and November 6, 2023 IEP ("November 2023 IEP") are essentially the same (collectively referred to as "September/November 2023 IEPs").

137. Except for the exclusion of information from Ms. Meehan's OT Evaluation Report, Petitioners' experts did not criticize the Present Levels. The September/November 2023 IEPs copied pages and pages of information from their independent evaluations in the "Present Levels" as the sources of relevant information. *See* Stip. Ex. 27 STIP000302-304, 306-309, 315-317, 321-324, & 331-332; Stip. Ex. 31STIP000365-372, 378-387, & 394-395. Based on the information from the IEEs and school data, the goals were developed from these Present Levels.

### **September 27, 2023 IEP and November 6, 2023 IEP Goals**

138. The September 27, 2023 IEP and November 6, 2023 IEP contained the same nine (9) goals, four (4) of which were in the May 2023 IEP (see underlined goals). Even though Student had not mastered all the goals in his May 2023 IEP, the subsequent IEPs did not carry over four (4) of the behavior and social emotional goals from the May 2023 IEP. *Compare* Stip. Ex. 20 (May 2023 IEP) *to* Stip. Ex. 27 (Sept. 2023 IEP) *and* Stip. Ex. 31 (Nov. 2023 IEP). Instead, the IEP team added five (5) new goals.

139. The September and November 2023 IEPs' goals were:

- a. Reading
  - i. Providing verbal and/or visual cues, Student will independently make inferences about a text (by expressing in writing, verbally, or using pictures) what it is saying and what it actually means) with 80% accuracy on 4 out of 5 trials.
- b. Behavior
  - i. When given a task and a check-list (up to 3 steps to complete), and a verbal and/or visual cue, Student will begin his task within 1 minute and remain on task for up to 20 minutes of working time in 80% of opportunities.

- ii. When denied access to a desired/activity, Student will independently respond by making another choice or using a pre-taught coping strategy without yelling, physical aggression or property destruction in 80% of opportunities.
- c. Written expression
  - i. Given a writing prompt and graphic organizer, Student will write a paragraph with an introduction, 3 supporting details, and a conclusion with 80% accuracy in 5/7 opportunities.
- d. Speech/Language
  - i. Student will be able to predict what other people will say next based on their non- verbal cues and previously spoken words in 4 of 5 opportunities given prompts for him to "use your social tools" (eyes/ears/brain/understanding of situation)".
  - ii. In conversation with peers, Student will use the skill of asking questions, asking follow up questions and use of supportive comments to sustain the conversation for 3-4 conversational exchanges in 4 of 5 opportunities.
- e. Social-Emotional
  - i. Given a scenario of an upsetting social situation, Student will be able to describe expected vs unexpected behavior, provide one problem-solving strategy and one coping skill that he can use to prevent from becoming emotionally dysregulated in 80% of opportunities.
  - ii. When in close proximity to peers, Student will use strategies (i.e.: bubble space, marked spots on hallway floors) to manage personal space with no more than 1 prompt (verbal or visual) in 80% of opportunities
  - iii. When in need of a sensory break or transition to a separate environment, Student will use provided visual cues to self-advocate for needs appropriately maintaining a calm voice, calm body, and nice words for the intended want/need in 80% of opportunities.

Stip. Ex. 27 (Sept. IEP) STIP000297-334; Stip. Ex. 31(Nov. IEP) STIP000399-402.

140. The new goals in the September 2023 and November 2023 IEPs were based on Student's demonstrated areas of need and included new speech, reading, and behavioral goals recommended by the independent evaluators. Stip. Ex. 27 STIP000297-334; Stip. Ex. 31 STIP000399-402; Stip. Ex. 42 (May 17, 2023 Minnelli speech-language evaluation); Stip. Ex. 43 (May 26, 2023 Meehan OT evaluation); Stip. Ex. 45 (June 9, 2023 Holmes independent FBA); Stip. Ex. 47 (July 20, 2023 Felton reading evaluation). But even with these additional goals, these IEPs failed to capture the entirety of Student's academic and functional deficits.

### ***Academics Deficits***

141. The September/November 2023 IEPs' goals fell into several subcategories: academic, reading and writing, and functional, behavioral, social emotional, and pragmatic language.

142. The academic reading and written expression goals in the September/November 2023 IEPs were not appropriate and did not reflect Dr. Felton's recommendations. T vol 1 161:2-

7; 167:18-24 (Felton). Nor did the IEPs consider the same areas of Student's unique needs documented in the evaluations of Dr. Felton, Ms. Minnelli, and Dr. Anthony. T vol 1 174:17-175:3. The reading and written expression goals did not include decoding or spelling. T vol 1 161:6-15. The September/November 2023 IEPs were also inappropriate because they failed to address Student's needs in reading comprehension and written expression. T vol 1 175:4-13. Instead, the IEPs contained one reading goal which "only addressed a tiny, tiny fraction of what [Student] need[ed] to have addressed." T vol 1 176:15-18 (Felton). Likewise, the written expression goal was not sufficient because it did not address his spelling or his difficulty understanding how to write sentences. T vol 1 176:19-177:5 (Felton).

143. Moreover, the reading and written expression instruction was only to be provided in the general education setting, and the service delivery did not address his need for more specially designed instruction in the special education setting. T vol 1 177:6-16 (Felton). To address all his skill levels in written expression, word reading and spelling Dr. Felton persuasively opined that Student should have received 60 to 90 minutes per day of specially designed instruction in reading, spelling, and written expression, which could, in part, be provided in the general education setting but most should be provided in the special education setting. T vol 1 177:17-178:22 (Felton).

144. Student is entitled to compensatory education because the September/November 2023 IEPs failed to appropriately address his reading and written expression deficits and thereby denied him a FAPE. The only concern about an award of compensatory academic instruction, is that Mother "report[ed] no academic deficits" to Student's physicians on May 3, 2024 and that Student "has stayed on grade level despite ADHD." Pet'r Ex. 16 p 162. In the intervening period since Dr. Felton's evaluation, Student received tutoring from his "grandmother [who] is a retired school teacher from NY and has been video calling him every night to teach him a school curriculum while he is out of school." Stip. Ex. 54 STIP000712 (clinician's encounter note dated 11/17/23). Student benefited from private tutoring during the relevant period and Petitioners conceded that any compensatory education award should be reduced for this private tutoring. *See* Pet'r Supp. Com. Ed. Pro. pp 14-16.

### ***Functional Deficits***

145. Along with Student's academic deficits, his functional deficits in behavioral and social emotional deficits, sensory deficits, and pragmatic language impaired his ability to access the general curriculum.

### ***Behavioral and Social Emotional Deficits***

146. The September/November 2023 IEPs were inappropriate because they did not provide significantly more specially designed instruction for Student's severe behavioral and social emotional deficits. T vol 2 394:8-16, 394:17-20; 406:20 (Holmes).

### ***Registered Behavior Technician and ABA Therapy***

147. Because of Student's behaviors, his Parents have repeatedly asked that school staff be trained on how to de-escalate Student's behaviors so that physical restraint will not be



necessary. They asked for a Registered Behavior Technician (“RBT”) to assist Student during his school day. Student’s Parents first requested ABA therapy at the May 2023 IEP meeting but the IEP team decided there was no data to justify ABA therapy at that time. T vol 5 1193:9-17 (Boren).

148. RBT certification is a long process, it requires a 40-hour course; then a competency review from a BCBA certified in supervision to sit for the RBT exam. T vol 3 6-13; 21-528:5; vol 41112:20-1113:9. Even with certification, an RBT must still be supervised by a Board Certified Behavior Analyst (BCBA) for 2000 hours. T vol 2 405:4-12 (5 % supervision by BCBA required).

149. Student needed Applied Behavior Analysis (“ABA”) extinction procedures to help modify his disruptive and distracting behaviors and prevent them from escalating T vol 2 358:23-359:17, 404:15-405:3 (Holmes); *accord*, Stip. Ex. 44 (Dr. Boothe recommended ABA therapy). ABA therapy can be provided in the school setting. T vol 4 1228:18-1229:16 (Boron) (“huge proponent of ABA therapy in the school setting”). However, this would require a one-on-one certified RBT trained in ABA to utilize modeling to prompt correct responses, using prompt-fading hierarchy throughout the school day and 5 percent supervision by a BCBA or BCABA of the RBT’s hours. T vol 2 359:18-23, 405:4-12.

150. At the beginning of the 2023-2024 school year, none of WCPSS’ teaching staff were trained in ABA. Despite being a special education teacher for 22 years (T vol 4 831:7-14) “sometime” in September 2023 EC Teacher SpEd Teacher reached out to central office for more training to support Student T vol 4 901:17-902:3. From October 3 through October 14, SpEd Teacher received 40 hours of virtual RBT training. T vol 4 833:5-8. The EC Department Chair, Behavior Support Teacher, also took the 40-hour RBT training sometime during the 2023-2024 school year. T vol 4 1060:2-7; 1103:4-13. Neither two had been supervised by a BCBA. Amber Boren now has the most ABA training having completed the 40-hour RBT training and has 800 of the 2000 hours of fieldwork supervision required for a BCBA license. T vol 4 1112:20-1113:9. This level of training and lack of supervision was inappropriate for Student’s needs. WCPSS staff should have been trained in sufficient time for Student to be provided a RBT at the beginning of the school year or WCPSS should have contracted with private ABA providers.

151. Even though WCPSS did not provide Student the ABA therapy, his Parents obtained private home-based ABA services at the beginning of the 2023-2024 school year for 25-30 hours a week. Stip. Ex. 74 STIP001607. His Parents, however, are not seeking reimbursement for the costs of their private ABA therapy either because they chose not to, or they did not incur any out-of-pocket expenses. Petitioners do concede that any award of compensatory ABA therapy should deduct the overlapping amount of private ABA therapy. *See* Pet’r Supp. Com. Ed. Pro. pp 14-17.

#### *Occupational Therapy (“OT”)*

152. The September/November 2023 IEPs were inappropriate because they failed to contain direct occupational therapy (“OT”). An occupational therapist should have been a holistic member of Student’s IEP teams; assisted Student with his sensory, social, communication, and self-advocacy needs; and helped build the skills he did not have. T vol 1 33:13-34:2; 35:7-20; 45:2-

24 (Meehan). At that time, Student did not yet have the awareness and ability to communicate his own body's dysregulation. T vol 1 76:7-25.

153. Ms. Meethan's OT-IEE was reviewed at the September 7, 2023 meeting, but at the subsequent September 27, 2023 IEP meeting, the IEP team did not address these skill deficits in the September 2023 IEP. T vol 1 45:25-46:5; 67:1-24. Yet, at that time, Student did not yet have the awareness and ability to communicate his own body's dysregulation. 76:7-25.

154. In addition, the September/November IEP goals did not appropriately focus on what Student should do to identify his sensations which lead to his dysregulation (T vol 2 79:11-19) or consider that "Student doesn't have the language or ability to self-advocate for those needs." T vol 2 74:21-75:16; 71:18-22; 81:25-82:3 (Meehan) ("Right now we're just really teaching him how to feel safe, and when he doesn't feel safe, how do we keep ourselves safe and keep others safe?").

155. In sum, the September/November 2023 IEPs' occupational therapy goals did not adequately address Student's OT needs in behavior, sensory, and writing. T vol 1 70:25-82-15. Moreover, the September/November 2023 IEPs contained only consultative OT which was inappropriate and Student needed direct OT services to address Student's identified needs. T vol 1 82:16-22; 92:4-16. The service delivery should have included 60 minutes of direct OT and 15 minutes of consultative per week. T vol 1 p 146:1-7 (Meehan). Student is entitled to compensatory OT for this denial of FAPE.

156. Petitioners conceded that the 4 hours of private OT services should be deducted from any compensatory award. *See* Jt. Post-Hearing Sub. p 4.

### *Pragmatic Language*

157. Students use their narrative language and pragmatic language to access almost all the academic and social curriculum. T vol 2 252:18-21 "[M]any, if not all, aspects of academic and behavioral participation in school would be affected by these impairments." T vol 2 253:7-9 Student's narrative language impairment directly impacted his access to academics. T vol 2 249:17-250:1

158. Although the September/November IEPs incorporated two of Ms. Minnelli's recommended goals, the IEPs did not address all Student's skill deficits identified in her report so they were not appropriate. T vol 2. 258:10-16, 269:23-270:6-274:4; 277:5-18, 19-24. Student has "deficits with conversational reciprocity which is part of the autistic neurotype." T vol 247:5-7. Even though Student has average intelligence and vocabulary skills that are consistent with his grade level, his pragmatic language<sup>14</sup> is severely impaired. T vol 2 254:16-24. At that time, his pragmatic language age equivalent is around three (3) years old. Student's listening

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<sup>14</sup> Areas incorporated into pragmatic language: narrative language, planning conversational reciprocity, conversational filtering, noticing nonverbal cues. T vol 2 254:12-15 (Minnelli)

comprehension was “pretty impaired” and his narrative retelling “significantly impaired.” T vol 249:4-5 (Minnelli).

159. Critical thinking and that inferential reasoning was a core deficit for Student, and the September/November IEPs did not contain [any] specially designed instruction to address these deficits. T vol 2 250:2-11. Student requires specialized instruction to master these skills otherwise he will continue to have behavioral challenges with his teachers and his peers. 257:5-16.

160. Moreover, the pragmatic language and written language goals were not sufficient to address his narrative language deficits. T vol 2 251:11-22. Likewise, the September/November IEPs failed to provide direct speech language services that Student needed. T vol 2 274:25-275:3.

161. Direct speech-language services should have been provided 2-3 hours a week for both speech and written expression combined. T vol 2 278:10-20. Student received only 30 minutes a week of direct speech-language instruction in his September/November 2023 IEPs. Stip. Ex. 27 STIP000340; Stip. Ex. 31 STIP000403. The September/November IEPs denied Student a FAPE because the goals and service delivery were not appropriate for Student’s speech language needs. *Accord* T vol 2 295:19-296:9 (Minnelli).

### ***Supplemental Aids, Services, Accommodations, and Modifications***

162. The September/November 2023 IEPs contained many of the same appropriate supplemental aids, services, accommodations, and modifications (collectively referred to as “supplemental aids”) included in the May 2023 IEP and aligned with the independent evaluators’ recommendations. T vol 1 82:23-83:23 (Meehan); vol 2 390:22-391:13 (Holmes); *see also*, Stip. Ex. 27 STIP000000341-347; Stip. Ex. 31 STIP000408-411; T vol 3 652:14-658:20; 679:18-681:18 (Pearson) (were “all...sound and aligned with...Student’s needs ...many of them are evidence-based practices...”); T vol 4 1137:5-1138:18 (Boren) (“ very appropriate....address[ed] the needs and concerns that were present for Student at the time.”). Likewise, Petitioners’ experts generally opined that the supplemental aids and services listed in the September/November 2023 IEPs were appropriate. T vol 1 82:23-83:23 (Meehan); T vol 2 390:22-391:13 (Holmes); and T vol 2 279:21-25 (Minnelli). Therefore, Petitioners failed to prove that the supplemental aids in the September/November 2023 IEPs were inappropriate.

### **Service Delivery of Special Education and Related Services**

163. The most significant change in the September/November 2023 IEPs was the reduction in the service delivery of special education and related services. Despite Student’s additional academic deficits and increasingly maladaptive behaviors, his special education and related services were reduced in the September and November 2023 IEPs by approximately by 50% from the May 2023 IEP. Although the May 2023 IEP contained fewer academic and functional goals, the amount of service delivery was higher than that of the September /November 2023 IEPs.

164. A comparison of the May 2023 IEP service delivery of specially designed instruction (“SDI”) with the September /November 2023 IEPs visualizes the reduction in SDI. The May 2023 IEP service delivery was:

***May 2023 IEP’s Specially Designed Instruction:***

<b>Service</b>	<b>Amount of Time in Minutes</b>	<b>Frequency</b>	<b>Location</b>
Behavior	30 minute(s)	3 per week	Special Education
Social / Emotional Skills	30 minute(s)	4 per week	Special Education
Writing	30 minute(s)	3 per week	General Education
Academic Skills	30 minute(s)	4 per week	General Education
Social / Emotional Skills	30 minute(s)	5 per week	General Education

Stip. Ex. 20 STIP000264

165. In contrast, the specially designed instruction as reduced in the September/November IEPs was:

***September/November 2023 IEPs’ Specially Designed Instruction:***

<b>Service</b>	<b>Amount of Time in Minutes</b>	<b>Frequency</b>	<b>Location</b>
Writing	30 minute(s)	2 per week	General Education
Behavior	15 minute(s)	3 per week	Special Education
Reading Comprehension	30 minute(s)	3 per week	General Education
Social / Emotional Skills	10 minute(s)	5 per week	General Education

Stip. Ex. 27 STIP000339 & Stip. Ex. 31 STIP000402

166. Based on the May 2023 IEP’s service delivery, Student received 2.5 hours of special education and three days a week of 1.5 hours of special education services, a total of 9.5 hours of special education. Of this, only 2 hours and 30 minutes were provided in the special education setting and the remaining 7 hours were provided in the general education setting. The September/November IEPs inappropriately reduced the provision of special education despite the increase in Student’s maladaptive behaviors.

167. In the May 2023 IEP, consultative related services were provided in the areas of occupational therapy and counseling, one time per week, within the general education setting. Stip. Ex. 20 STIP000264-65. The related service delivery in the September 2023 IEP included 20 minutes per week of direct counseling [services], added 30 minutes a week of speech/language [therapy], and continued the consultative occupational therapy all of which were provided in the general education setting. Stip. Ex. 31 STIP000402-403.

168. The SpEd Teacher admitted that Student's maladaptive behaviors escalated beginning mid-September through October 2023, but that neither the September 27, 2023 nor the November 6, 2023 IEP teams increased his specially designed instruction to address those behaviors. T vol 4 952:11-953:3. This was corroborated by the November 2023 FBA which evidenced that Student had refused 50% academics attempts in World Language, Science and English Language ("EL"). Stip. Ex. 34 STIP000419. Similarly, during delivery of his special education, Student refused more than 50% of tasks in all academic and functional skills. Stip. Ex. 34 STIP000419 (November 2023 FBA).

169. Upon questioning by the Undersigned for clarification of the service delivery, SpEd Teacher stated that even after the September 2023 IEP was developed, she continued to work with Student for 2 hours 50 minutes daily as well as during other periods during the school day, and that his one-on-one (Ms. Assistant or Mr. Assistant) was with him most of the day. T vol 4 953:4-954:10 (SpEd Teacher). Moreover, WCPSS EC staff recognized that Student needs more SDI because even after the service delivery was reduced at the September 27, 2023 IEP meeting, SpEd Teacher continued to provide the same service delivery as before and Student continued to have 30 hours of one-on-one assistance.

170. Based on the evidence and SpEd Teacher's testimony, WCPSS provided more specially designed instruction even when the service delivery was reduced by 50% at the September 27, 2023 IEP meeting. None of WCPSS' school staff or experts testified about the reason for the reduction of the service delivery in the September/November 2023 IEPs.

171. Even though WCPSS' data evidenced Student was refusing more than 50% general education instruction and special education instruction, WCPSS' experts, Boren and Pearson, were not asked about the appropriateness of the reduction of the service delivery in September/November 2023 IEPs.

172. WCPSS did not provide a rational or cogent explanation for why the service delivery was reduced at the September 27, 2023 IEP meeting even though Student's maladaptive behaviors had intensified, and the revised September/November 2023 IEPs contained more goals.

173. Overall, Petitioners experts persuasively opined that the service delivery in the September/November IEPs did not appropriately address the severity of Student's "escape-maintained behaviors", academic needs, special language needs, social emotional skills, and his dysregulation. T vol 1 252:11-252:12 (Minnelli) (IEPs do not sufficient address his pragmatic language, narrative language deficit and executive functions needs); T vol 1 33:13-34:2; 35:7-20; 45:2-24 (direct OT needed for Student's written expression, sensory, social, communication, and self-advocacy needs); 82:6-22; 92:4-16 (OT services insufficient to address his identified needs) (Meehan); T vol 1 177:6-16 (service delivery in general education setting not sufficient to address his reading and written expression needs)(Felton); T vol 2 268:1-13 (IEP failed to provide direct speech language services he needs) (Minnelli); and T vol 2 406:11-19 (IEPs did not provide specially instruction he needs for his escape-maintained behaviors)(Holmes). Petitioners met their burden of proving that the service delivery of specially designed instruction in the September/November 2023 IEPs was inappropriate.

## INTERIM PERIOD AFTER OCTOBER 25, 2023 RESTRAINT

174. After the October 25, 2024 Restraint in an effort to facilitate Student’s return to in-person instruction, WCPSS contracted with an independent ABA agency, Stepping Stones ABA, to observe Student in the home, to review progress monitoring data, train WCPSS staff, and make recommendations to the IEP team. Stip. Ex. 32 (11/06/23 PWN). The independent BCBA’s made three attempts to schedule “in school” and “in home” observations. Stip. Ex. 32 (11/06/23 PWN). Although Mother initially agreed to this proposal, she later refused to allow the independent BCBA’s observe Student in the home. Her excuse was that [] the BCBA’s unethically supported the inclusion of CPI restraint in the November 2023 BIP. Resp’t Ex. 7 RESP’TS000008.

### NOVEMBER 6, 2023 IEP MEETING

175. After the October 2023 Restraint, another IEP meeting was held on November 6, 2023 to review Student’s IEP, update the FBA, revise the BIP, develop/discuss a Safety Plan for Student, and update the “Parental Concerns” section of the IEP. Stip. Ex. 32 “(Prior Written Notice)”. The September 2023 IEP was not revised at this meeting, but the November 2023 BIP was developed. A Safety Plan was also drafted even though a Safety Plan is not part of the IEP process. T vol 5 1169:15-1170:6 (Boren). Two private BCBA’s from Stepping Stones ABA (M. Fleeton and J. Johnson) attended the November 6, 2023 IEP meeting to discuss home observations of Student. Student’s private BCaBC from Connect N Care also attended.

### November 6, 2023 BIP

176. The appropriateness of the November 6, 2023 BIP (“November 2023 BIP”) is the next issue. Juxtaposing the November 2022 to the more robust November 2023 BIPs demonstrated that the November 2023 BIP contained many of the same strategies as the November 2022 BIP but with enhanced descriptions of how to implement those strategies. *Compare* Stip. Ex. 11 to Stip. Ex. 35. Many additional strategies were added to the November 2023 BIP, some of which (gas gauge, designated area in back of classroom, wait time) were already being implemented by SpEd Teacher.

177. The only other significant additions to the November 2023 BIP were “access to a counselor” and the use of “CPI de-escalation strategies and physical support ... as a last resort to maintain safety, welfare, and security.” Stip. Ex. 35 STIP000424. The IEP minutes clarified that if Student’s “refusals escalate to unsafe behaviors to himself or others, we will utilize physical restraint.” Stip. Ex. 33 STIP000417. The Parents disagreed with the inclusion of CPI de-escalation strategies and physical restraint even as a “last resort.” *See* Stip. Ex. 32 STIP000413 (Mother was “not in agreement with the [November 2023] BIP” and “not in agreement with the [November 6, 2023] Safety Plan.”).

178. Even though the Petitioners asserted that the combination of the new strategies in the November 2023 BIP was inappropriate, Petitioners’ experts opined otherwise. Petitioners’ and WCPSS’ expert witnesses opined that the strategies were appropriate and addressed Student’s needs. T vol 2 281:16-23 (Minnelli) (the BIP “does have a lot of the components that would help address some of his communication deficits”); T vol 2 373:16-21 (Holmes) (some strategies

similar to what she recommended in her evaluation and November 2023 BIP “overall does a better job of addressing his needs”); T vol 3 688:12-689:9 (Pearson) (strategies are “overall evidence-based strategies or practices that we use in the field to support students with autism and related disabilities. They are specific to supporting Student in terms of his visual schedule and support throughout the day, aligned with supporting transitions. They’re descriptive...”); *see also*, T vol 2 375:12-376:4 (Holmes) *and* T vol 3 689:10-690:5 (Pearson) (both experts agreeing November 2023 BIP was appropriate and met his needs)).

179. Notably, even though the Parents object to inclusion of physical restraint in the November 2023 BIP, State law allows the use of physical force even if it's not in a student's IEP, BIP, or Section 504 Plan. The November 2023 BIP could have excluded the “CPI de-strategies and physical restraint ... as a last resort” but that would not have prevented Student from being restrained in the future if the need arose. Instead, that language narrowed the circumstances when restraint could be used on Student to only “as a last resort.” State law is more expansive as to when physical restraint can be used. Petitioners failed to prove by a preponderance of evidence that the November 6, 2023 BIP was inappropriate.

### **Parents’ Request for Mental Health Evaluation**

180. On October 31, 2023 prior to the November 6, 2023 IEP meeting, Mother requested WCPSS conduct a school “refusal/avoidance evaluation.” Stip. Ex. 37 STIP 000431. Mother wanted the “team [to] conduct a mental health evaluation, a school refusal/avoidance evaluation and an anxiety evaluation to determine the cause of [Student’s] school refusal.” Stip. Ex. 32 STIP000415 (PWN). School Psychologist Taylor rejected this request because this was a medical service. T vol. 3 789:10-15. She did not know that a diagnostic mental health evaluation could be a related service. T vol 3 823:19-23. Instead, Ms. Taylor recommended a behavioral emotional evaluation to address some of the “potentially underlying causes of Student’s anxiety towards school.” T vol 3 789:19-23. Mother and the school-based members of the IEP team agreed to do this type of emotional evaluation (T vol 3 790:16-22) at the next meeting which was scheduled for November 14, 2023. Stip. Ex. 38 STIP000434.

### **Parents’ Private Mental Health Evaluation**

181. After the November 6, 2023 IEP meeting on November 17, 2023, Mother had a private mental health evaluation of Student from Hope Services, LLC. Stip. Ex. 54. There, Mother asked for a Post Traumatic Stress Disorder (“PTSD”) assessment to determine the reason for Student’s school refusal. Stip. Ex. 54 STIP000711. During the assessment, Student responded to the “Child PTSD Symptom Scale” with “mom interjecting at times.” Stip. Ex. 54 STIP000716-717. However, Student “did not verbalize the event or the effect it had on him.” Stip. Ex. 54 STIP000716. The Clinician diagnosed Student with “Other Reactions to Severe Stress” not PTSD and recommended Student “participate in the CPSS-V or other trauma assessment one-on-one with a clinician” which Mother declined. Stip. Ex. 54 STIP000716.

## **November 6, 2023 FBA**

182. By November 6, 2023, Student's maladaptive behaviors were significantly interfering with his ability to access the general curriculum. Based on data collected by school staff as part of the November 6, 2023 FBA, during the 40 days of the first quarter, Student attended only 34 days (absent 6 days). *See* Stip. Exs. 63 (calendar) & 64 (attendance record). Of those 34 days, Student eloped 21 times (62%) from instruction. Resp't Ex. 13 RESP'TS 000169 (progress monitoring); Stip. Ex. 38 STIP000433. In addition, WCPSS' data showed that Student had a 50% refusal rate in all academic subjects, task completion, social skills, behavior/proximity to peers, and use of sensory break/maintain calm body. Stip. Ex. 34 STIP000419. At best, Student was able to attend for 20 minutes to complete his "task chart" on several days, but otherwise could not attend or stay on task for other instruction. *See* Resp't Ex. 13 RESP'TS000160-161; and Stip. Ex. 34. Although the teacher data reported some good days, most school days, Student was involved [in] disruptive, maladaptive behavior including cursing, screaming, property destruction, disrespectful behavior, noncompliance, elopement, and task refusals. *See* Resp't Ex. 11, 13, & 15.

### ***November 6, 2023 BIP's Use of CPI De-Escalation Strategies and Physical Support***

183. At the November 6, 2023 IEP meeting, school-based members of the IEP team modified the November 6, 2023 BIP to include the use of restraint but only as a "last resort," and stated that "CPI de-escalation strategies and physical support [would] be used as a last resort to maintain safety, welfare, and security." Stip. Ex. 35 STIP000424 (BIP 11-6-23); *but compare*, Stip. Ex. 11 (BIP 2022 did not include CPI de-escalation strategies and physical support). The November 6, 2023 IEP Minutes clarified that "If [Student]'s refusal escalates to unsafe behavior to himself or others, we will utilize physical restraints. This will be used as a "last resort." Stip. 33 STIP000417. Mother did not agree with the use of any physical restraint. *Id.* Even though WCPSS had clarified that physical restraint would only be used as a "last resort," the Parents did not return Student to school after this meeting.

### ***Safety Plan***

184. A Safety Plan was also developed at the November 6, 2023 IEP meeting which elaborated on the use of physical restraint. Stip. Ex. 36 (11-6-23 Safety Plan). Petitioners objected to the Safety Plan because it "included the use of physical restraint without consideration of Student's history of engaging in significant school refusal after being physically restrained." Pet'r Pro. Final Dec. p 45, ¶ 199. Since the Safety Plan was not part of Student's IEP or BIP, this Tribunal has no authority to determine the appropriateness of the Safety Plan. However, the use of physical restraint as defined by the Safety Plan aligned with State law and Petitioners' behavior expert's recommendations. *See* Stip. Ex. 45 STIP000519 (Holmes' FBA-IEE).

### ***Parents' Request for Private RBT to Attend School With Student***

185. At the November 6, 2023 IEP meeting, WCPSS again refused Parent's request for Student's "insurance-covered" private RBT to attend school with him "because [Student] does not require a RBT to access FAPE and he has the current accommodation of an SAIA [Specially Assigned Instructional Assistant]." Stip. Ex. 32 STIP000414.



186. At the Parent's private ABA clinic, Connect n Care, physical restraints are not allowed and instead the ABA staff uses "blocking" and padded equipment when needed. Likewise, the clinic where Father works does not allow physical restraints. The private ABA clinic's philosophy about the use of restraint aligns with the Parents.

187. Although the school-based members of the IEP team had disagreed with ABA therapy, for the first time, at the November 6, 2023, IEP meeting, the WCPSS IEP team members were willing to consider ABA services. WCPSS had proactively invited Jennifer Johnson and Marquito Fleeton, both BCBA's from Stepping Stones, ABA, attended the meeting. Since Student was not in school, Mother was asked if the Stepping Stones BCBA's could observe Student at home. Initially, Mother indicated that she might allow the Stepping Stones' BCBA's observe Student in the home. Resp't Ex. 7 RESP'TS000008.

### **Evaluation and Observation Attempts**

188. On November 6 and 8, 2023, BCBA Jennifer Johnson emailed Mother about scheduling a home visit to observe Student on November 9, 2023 from 9 a.m. to 11 a.m. Resp't Ex. 7 RESP'T000009-10. Although originally receptive, Mother responded that she "now feel(s) uncomfortable having these BCBA's come to my house and observe my child" because "they openly [sic] and unethically supported keeping this type of corporal punishment [referring to CPI restraint] on his [BIP] plan." Resp't Ex. 7 RESP'TS000007-8. According to Mother, a "CPI restraint will not reduce behavior or teach socially significant behavior skills. Such methodology will only cause escalation of behaviors. It is a corporal punishment used to enforce compliance, as was described in Student's recorded BIP meeting. A BCBA must know that this type of practice would escalate behavior, not reduce it." Resp't Ex. 7 RESP'TS000007-8. Curiously, Mother accused the private BCBA's as being unethical for agreeing with the recommendations that came directly from Ms. Holmes's FBA-IEE. *See* Stip. Ex. 45.

### ***November 14, 2023 IEP Meeting***

189. On November 14, 2023, the IEP team and Mother met to discuss her request for a mental health evaluation and the provision of educational services at the home or the local library. Stip. Ex. 37; T vol 3 789:3-7 (Taylor). Also in attendance were the Stepping Stones BCBA's (Johnson and Fleeton) and Senior WCPSS Administrative Staff. Stip. Ex. 37 STIP000432.

190. The IEP team agreed "to conduct a Behavioral Emotional Evaluation to target an[d] address school refusals, anxiety and stress." Stip. Ex. 37 STIP000431 (PWN). This evaluation could also address some of the "potentially underlying causes of Student's anxiety towards school." T vol 3 789:19-23 (Taylor). The IEP team agreed to use the rating scales specifically

requested by Mother which were: the School Refusal Assessment Scale, Fear Survey Schedule for Children, and Child Manifest Anxiety Rating Scale.<sup>15</sup> Stip. Ex. 38 STIP000434.

191. Also, at the meeting, Mother “requested that while J[R.] is refusing to attend school that he be provided educational services in person as her home or local library. This request was refused as the team noted that this is considered Home Hospital [,] and this placement is not appropriate as his least restrictive environment. The team did agree that his classroom teacher [would] send home his work.” Stip. Ex. 37 STIP000431 (PWN).

192. With respect to Student’s interim placement pending the emotional evaluation, WCPSS’ expert opined persuasively that, considering Student’s task refusal, home/hospital or virtual instruction would not have been appropriate for him. T vol 5 1159:10-1160:17 (Boren). Petitioners’ behavioral expert agreed that virtual instruction at home would be inappropriate because such instruction would not sufficiently address Student’s mental health needs and he would not be in a setting with same-age peers. T vol 2 442:12-443:2 (Holmes). WCPSS’ goal was to transition Student back to in-person services.

193. On November 26, 2023, Mother returned a consent for evaluation to WCPSS. Stip. 45. The evaluation was scheduled for February 9, 2023. Stip. 46. On January 31, 2023, School Psychologist Taylor emailed Mother to confirm that Student was scheduled for evaluation at Crossroads II (WCPSS central office) because Student was purportedly afraid to go into a WCPSS building. Stip. 46. But Mother refused to bring Student to the scheduled evaluation so Ms. Taylor was unable to meet one-on-one with Student to ensure he understood the questions on the student rating scales and to personally ask Student the questions on the Student Forms as required by the evaluation protocol. T vol 3 796:16-797:18. Mother did not return the parent and student rating scales to Ms. Taylor until February 27, 2024. T vol 805:2-15 (Taylor); Stip. Ex. 49 STIP000548. Afterwards, Ms. Taylor began scoring the results and drafting the Psychoeducational Evaluation. Stip. 47. Ms. Taylor’s report was completed on April 12, 2024 and provided to Mother on April 14, 2024. Stip. 47.

#### ***April 15, 2024 IEP Meeting***

194. On April 15, 2024, the IEP team met and reviewed the Psychoeducational Evaluation (rating scales) report. Stip. Ex. 39 STIP000437 & Stip. Ex. 40 STIP000440. The IEP team viewed the results with caution because the rating scales were completed at home rather than with the School Psychologist. Stip. Ex. 39 STIP000436 (PWN); T vol 3 803:2-9 (Taylor). “The results indicated that Student’s top function of behavior is to receive attention from his parents

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<sup>15</sup> Multidimensional Anxiety Scale for Children (MASC 2) (Parent and Student Forms); Fear Survey Schedule for Children (FSSC-R) (Student Form); and School Refusal Assessment Scale- Revised (SRAS-R) ((Parent and Student Forms).

(stay at home where he feels safe) and his second function is to stay away from objects or situations at school that make him feel unsafe.” Stip. Ex. 39 STIP000436 (PWN). Mother was still dissatisfied with the results because “the evaluation did not address the use of seclusion and restraint, which is why [she] believes that Student is refusing to return to school.” Stip. Ex. 39 STIP000436 (PWN).

195. After the evaluation was reviewed, Student’s re-entry into the school setting was briefly discussed at an April 15, 2023 IEP meeting. Suggestions were made by WCPSS staff for Student’s gradual re-entry back to school starting with “Step 1”. *See* Stip. Ex. 40 STIP000441-42. School Psychologist Taylor recommended a “collaborative and individualized approach” for reintroducing Student back to the school environment. *See* Stip. Ex. 49 STIP000549-550. Such an approach would support his successful reintegration into the school environment. Stip. Ex. 49 STIP000550. Ms. Taylor’s re-entry recommendations were consistent with the collaborative process endorsed by WCPSS behavior expert for Student’s transition back to the school setting. *See* T vol 5 12226:23-12228:3 (Boren). Student’s in-person school re-entry to a full day of school could take him “the good part of six months” and “would have to be a very data-driven, very Student-driven process” not “time” or “schedule driven”. T vol 5 1226:23-12228:3 (Boren). The IEP team planned to implement “Step 1” starting April 22, 2024. Stip. Ex. 39 STIP000436. Unfortunately, Mother had placed an unreasonable time restraint of only one-hour for the April 15<sup>th</sup> meeting and the IEP team was not able to complete discussions regarding Student’s return to school. Stip. Ex. 39 STIP 000438.

196. WCPSS offered again to have Stepping Stones’ BCBA’s work with Student in the home, but Mother wanted to speak with Father before deciding. Stip. Ex. 39 STIP000437; Stip. Ex. 40 STIP000441-42. The school staff also inquired if the Stepping Stones BCBA’s could collaborate with Student’s Private BCBA but Mother, again, deferred deciding until after she spoke with her husband. Stip. Ex. 40 STIP000441-42. There was no indication in the record that the Parents agreed to either of these proposals. What was clear at the April 15, 2024 IEP meeting was that Mother “wanted the school to agree to never restrain her son.” Stip. Ex. 40 STIP000442. That was a promise that no public school could make.

### ***May 23, 2024 Middle School Transition Meeting***

197. Near the end of the school year,<sup>16</sup> on May 23, 2024, the IEP team unsuccessfully met with Mother, to discuss “Student’s transition to middle school and associated support, among other purposes.” Stip. 49.

### **Student’s Current Public Virtual School Placement**

198. Student was withdrawn from WCPSS on August 27, 2024. Supp. Stip. 5. According to Petitioners, Student was accepted and enrolled into Pine Springs Preparatory Virtual Academy on September 5, 2024 and his first day of instruction there was on September 11, 2024. Jt. Post-Hearing Sub. p 2, Pet’r submissions 8 and 9.

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<sup>16</sup> The last day of the 2023-2024 school year was June 12, 2024. Stip. Ex. 63 STIP0001594.

## **COMPENSATORY SPECIAL EDUCATION AND RELATED SERVICES**

### **Compensatory Relief Period**

199. September 28, 2023 to October 25, 2023 is the compensatory relief period available to the Petitioners for WCPSS' failure to timely revise the November 2022 BIP, failure to appropriately implement the November 2022 BIP before the October 25, 2023 assembly, and for the inappropriateness of the September/November IEPs. During this period, Student attended 16 school days the equivalence of 3 school weeks. Supp. Stip. 1(b).

### ***Revision of November 2022 BIP and Implementation of November 2023 BIP***

200. Petitioners met their burden that the November 2022 BIP should have been revised sometime in mid-September 2023. Petitioners also proved that the behavior interventions in neither the November 2022 BIP nor the November 2023 BIP, had it been in place, were implemented with fidelity before the assembly on October 25, 2023. This procedural violation, however, only rises to the level of substantive harm if it materially impacted Student's right to a free and appropriate public education.

201. Although, neither BIP was implemented with fidelity before the October 25, 2023 assembly, Petitioners have failed to meet their burden of proving that the implementation failure or the untimely revision of the November 2022 BIP caused Student's inability to return to school.

202. Instead, the credible and persuasive evidence proves that the Parents elected not to bring Student back to school because they objected to the inclusion of CPI de-escalation strategies and the use of physical restraint as described in the November 6, 2023 BIP. Stip. Ex. 33 STIP000417; Stip. Ex. 32 STIP000413. Petitioners also thwarted WCPSS' efforts to transition Student back to in-person instruction by disallowing school staff access to Student. or his Private BCaBA. As the Parents unilaterally elected not to return Student to Wake County Schools after October 25, 2023, they are not entitled to any compensatory education for these procedural violations.

### **Compensatory Academics and Behavioral and Social-Emotional Instruction**

203. Petitioners are, however, entitled to compensatory education in academics, reading and writing, and behavior/social emotional instruction.

### ***September/November 2023 IEPs***

204. Petitioners met their burden of proving that the September/November 2023 IEPs failed to provide Student a FAPE because it did not appropriately address all his academic and functional deficits. Whether these deficits currently exist is unknown.

205. During the intervening time (almost a year) after the IEEs were conducted, on May 3, 2024, Mother reported to Student's Duke physicians that Student "has stayed on grade level

despite ADHD” and has “no academic deficits.” Pet’s Ex. 16 p 161. Based on this statement, Student may not need any academic compensatory services.

206. In addition, the Parents have procured educational and related services from private providers. If Student received all of the critical services deficient in the September/November 2023 IEPs, then the Parents cannot establish any harm caused by the FAPE violations. As a result, the awards of compensatory education and related services will be adjusted to exclude the private services.

#### *Reading and Written Expression*

207. From September 27, 2023 to October 25, 2023, there was no evidence presented which suggested that the September 27, 2023 IEP was not appropriately implemented with respect to reading or writing instruction. Dr. Felton’s opined that “about 60 to 90 minutes” was the appropriate amount of reading/writing special education instruction Student should have received in the September/November 2023 IEPs. Student received 30 minutes per day of reading/writing instruction while at Elementary School. Which means at most he would be entitled to 30 minutes to 1 hour per day of compensatory reading/writing special education services. Student attended 16 days during this period which equates to a total of 8-16 hours of compensatory services for reading and writing.

208. WCPSS argues that “[b]ecause of the increased intensity of compensatory services compared to typical specially-designed instruction in the special education setting” that “an award at the lower end of that range would be most appropriate.” Resp’t Supp. Pro Dec. p 6, ¶ 21. Petitioners assert that Student was not homeschooled<sup>17</sup> but Student received 4 to 5 hours a week of tutoring from his grandmother from October 27, 2023 to January 30, 2024, a total of 40-52 hours and that a 50% reduction (20-26 hours) in that amount would be appropriate. Pet’r Supp. Pro. on Comp. Ed. p 16. Based on Petitioners’ numbers (20-26 hours of private tutoring minus 8-16 hours of compensatory education), no compensatory services for reading and writing instruction needs to be awarded.

#### *Behavioral and Social-Emotional Instruction, ABA Therapy, and RBT*

209. In looking at behavioral and social-emotional instruction, Ms. Holmes suggested that 4 hours per day – which would equate to 20 hours per week – of specially designed instruction might be appropriate. T vol 2 412:4-9. She subsequently clarified that time included *all* specially-designed instruction, not just the behavioral and social-emotional deficits. T vol 2 413:13-23. This behavioral and social-emotional instruction should be provided by ABA Therapy with a certified Registered Behavior Technician (RBT) utilized who would model to prompt correct responses using prompt-fading hierarchy. T vol 2 359:18-23 (Holmes). The one-on-one RBT would work with Student throughout the school day and at least 5 percent of the RBT’s hours should be supervised by a BCBA. T vol 2 405:4-12. Per Ms. Holmes, ABA therapy should have started at the beginning of the school year. T vol 2 405:23-406:3

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<sup>17</sup> Contrary to this, the Connect n Care records indicated that, as of November 29, 2023, Student was being homeschooled. Stip. Ex. 51 STIP000599.

210. During the relevant time of September 1, 2023 through March 1, 2024, Student received ABA services from Connect n Care. Stip. Ex. 74 STIP001649. His private ABA therapy included a RBT with 5% BCaBC or BCBA supervision and addressed the same functional skill instruction recommended by Petitioners' experts and the private evaluation of Dr. Boothe. Stip. Exs. 51 STIP000605 & STIP000694; Stip. Ex. 74 STIP001618. The amount of private ABA Student received during the compensatory period was disputed.<sup>18</sup> On July 13, 2023 the recommended amount of private direct 1:1 ABA therapy with a supervised RBT was 25-30 hours per week. Stip. Ex. 74 STIP001610 & 1647.

211. Student received ABA therapy throughout the relevant time period for approximately 25 hours per week. Stip. Ex. 51, at STIP000598; Stip. Ex. 74, at STIP001607. This therapy targeted similar areas of need as his behavioral and social emotional IEP goals. *Compare* Stip. Ex. 20, at STIP000262-264, and Stip. Ex. 27, at STIP000336-339 (IEP goals focusing on areas including communication, self-advocacy, and functional behavior, among others), *with* T vol 2 455:12-18 (testimony of Private BCaBA) (ABA therapy working on skill acquisition in the areas of increasing communication, functionally equivalent behaviors, self-management skills, independent living skills, and community safety skills).

212. From September 27, 2023 through October 25, 2023, Student received 5 to 6 hours a daily of ABA therapy. Even with the assumption that Ms. Holmes recommended 4 hours only for social emotional and behavior compensatory services, Student received more than her recommended compensatory amount for these services through his private ABA provider for which the Parents are not seeking reimbursement. Normally, Petitioners would be reimbursed the expense of the private ABA therapy, if they incurred any, but either the Parents did not have any out-of-pocket expenses or have opted not to seek any reimbursement. Therefore, any deficits resulting from any denial of FAPE based on the inappropriateness of the September/November IEPs with respect to Student's behavioral and social-emotional instruction have been remedied by Student's private ABA therapy. No compensatory behavioral and social-emotional instruction is owed.

### **Related Services**

213. Petitioners are seeking compensatory related services. During the compensatory period, Petitioners obtained private occupational therapy, counseling, and parent training. Again, the Parents are not seeking reimbursement, if any, of their expenses. To the extent that Student or the Parents received the related services of parent training, counseling, speech-language therapy,

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<sup>18</sup> The Parents indicated to their legal counsel that Student received only 15 hours per week of ABA therapy from Connect n Care from November 1, 2024 [sic] through March 1, 2024. Pet's Supp. Pro. Comp Ed. p 16. In contrast, Dr. Elizabeth Ann Briere's progress note (Stip. Ex. 55 STIP001383) states that Student received 25 hours of ABA therapy during this time. *Id.* pp 16-17. Dr. Briere's note is consistent with the Connect n Care ABA records that in August 2023 Student began receiving at least 25 hours per week of ABA therapy. Stip. Ex. 74 STIP001647. Moreover, the Connect n Care records that are admitted into evidence indicate that Student had ABA sessions earlier than November 1, 2023. Stip. Ex. 74 STIP001665 (9/26 3 ½ hrs.), 1756 (9/27 3 ½ hrs.), 1759 (10/25/ 3 ½ hrs.), 1829 (10/26 5 hrs.), 1866 (9/22 1 ½ hrs.), 1878 (10/5 2 hrs.), 1894 (9/6 1 hrs.), & 1899 (9/15 45 minutes).

or occupational therapy from a third-party provider, they have not been harmed from the FAPE violation.

### ***Parent Training***

214. To the extent that “parent training” would be an appropriate part of the compensatory services award, through Connect n Care, Student’s Parents were privately “parent trained” one hour a week from July 24, 2023 to January 24, 2024. *See* Stip. Ex. 74 STIP001641-1643; STIP001647; *see also*, Stip. Ex. 51 STIP000689. The purpose of the private “parent training” was to assist the Parents with understanding Student’s special needs and to assist with the maintenance and generalization of skills. On March 20, 2024, Mother discontinued “parent training” because it was a “waste of her time”, and she was “a professional (master’s in special education).” Stip. Ex. 74 STIP002488. Given that the Parents had received more “parent training” than recommended by their expert and now have declined future participation, “parent training” will not be included as part of the compensatory services remedy.

### ***Speech Language Services***

215. Regarding speech language services, Ms. Minnelli testified that Student should receive 3 hours a week of direct speech and language services for his pragmatic language deficits. T vol 2 297:8-15. Student did receive 30 minutes per week of direct speech language instruction, on goals which Ms. Minnelli agreed were appropriate. T vol 2 274:6-11, 275:4-9. There was no evidence presented which suggested that Student’s IEP speech-language services were not implemented.

216. Moreover, Student’s private ABA therapy addressed many of the functional communication deficits that Ms. Minnelli identified as needed in Student’s September/November 2023 IEPs. Subtracting the amount of speech-language provided by WCPSS, any compensatory speech language services should be calculated based on 2.5 hours per week, for 3 weeks, which equates to a total of 7.5 hours for compensatory speech language services.

### ***Occupational Therapy***

217. For occupational therapy, Ms. Meehan opined that Student should receive 90 minutes of direct occupational therapy per week, in addition to consultative occupational therapy (which he already received). T vol 1 95:17-25. It is undisputed that Student did not receive direct occupational therapy (“OT”) services during this time from WCPSS but he did receive private Occupational Therapy services once a week during this period. *See* Jt. Post-Hearing Sub. p 4 ¶ 12. Therefore, based on the 3 weeks he attended Elementary School; the compensatory occupational therapy services would total 4.5 hours. With a reduction of the 4 hours of private occupational therapy services, the compensatory occupational therapy services are reduced to 30 minutes.

### ***Counseling***

218. For counseling, Ms. Holmes opined that Student would need 60 minutes per week of counseling, including both inside and outside of the general education setting. It is undisputed

that Student did not receive direct counseling services from WCPSS from September 27 to October 25, 2023. He did, however, receive 1 hour a week of Cognitive Behavior Therapy (“CBT”) from Foundation Restoration. Pet’r Ex. 16 p 162. He also participated in group counseling 2 hours a month with Connect n Care (Stip. Ex. 74 STIP001647) for which Petitioners have not sought reimbursement.

219. Therefore, based on the 3 weeks he attended Smith Elementary, compensatory counseling services would have been 3.5 hours. After subtracting the private CBT and group counseling, no compensatory counseling will be awarded.

### **Parties’ Positions About the Use Of Physical Restraints**

220. The Parties had serious "philosophical differences" about the appropriateness of the use of physical restraints which dominated the IEP decision-making process and the hearing.

#### ***The Parents Objected to Any Use of Any Physical Restraint At School***

221. The Parents were understandably apprehensive about the use of restraints on their son considering their prior allegations of abusive treatment during the 2022-2023 school year. *See* Stip. Ex. 55 STIP0001114 (Mother’s comment to Duke physicians that she was apprehensive prior to the start of the 2023-2024 about “how WCPSS uses restraint” and had “mommy concerns with [Student’s] return to school.”).

222. And, they have consistently advocated against the use of restraint even to the extent of unsuccessfully seeking a medical prohibition against its use on Student before the beginning of the 2023-2024 school year. On July 10, 2023, Mother wrote to Student’s pediatrician stating that “WCPSS will not legally refrain from restraining him without a letter from his doctor stating so” and asking the pediatrician “Please help us help Student by writing this letter to let WCPSS know that because of his heart condition, he cannot be restrained.” Stip. Ex. 55 STIP000111.

223. In response, Student’s Cardiologist stated, “there is no MEDICAL reason due to his cardiac condition that restraint is harmful.” Stip. Ex. 55 STIP0001114 (emphasis in original). Likewise, Student’s Pediatrician refused to “write a letter justifying a medical reason that Student cannot be restrained.” Stip. Ex. 55 STIP0001114 (emphasis in original).

224. During the 2023-2024 school year, Student’s Parents sought to prohibit the use of any restraint even in the face of imminent danger to Student and others. For example, the September 5, 2023 staircase incident after which staff explained to Mother that Student was restrained because he was on top of a staircase railing and in danger of falling. Still, Mother “insisted that each staff swear that they will not put hands on Student and individually went to each staff member to say this.” Resp’t Ex. 19 RESP’TS000200.

225. Similarly, after the September 26, 2023 gym mat incident where Student climbed up to the ceiling on stacked P.E. mats and was in danger of falling, the Parents still insisted that the restraint used to ensure his safety was “aversive” and “inappropriate.” Pet. p 14 ¶ 26; p 15 ¶30. Although Mother refused to allow WCPSS school staff restrain Student when he was in danger at



home, she has restrained Student to “decrease the chances of hurting himself ...[and]...to keep him safe.” T vol 2 497:1-10; 477:17-21 (BCaBA describing restraint when Student tried to escape from a window at home).

### ***WCPSS – Physical Restraint As a “Last Resort”***

226. WCPSS recognized that the use of “any restraint is significant” especially for a child with autism like Student who is averse to touch. T vol 5 1200:11 (Boren); T vol 3 671:17-18 (Pearson). As such, physical restraint should only be utilized as a last resort when the student is in “imminent danger” to himself or others. T vol 3 671:7-672:11 (Pearson); T vol 4 1148:8-1153:10 (Boren); T vol 5 1225:15-17 (Boren) (“imminent danger” does not include property destruction); *see also*, T vol 2 497:1-10 (Private BCaBA) (testifying about need for Mother to restrain Student to keep away from going through a window). WCPSS’ philosophy was that restraint should be used “as the last resort because no matter how you look at it, restraint is traumatic. Restraint is difficult. Restraint is hard for all involved. And that's why we only use it as a last resort, when a student is an imminent threat to themselves or others.” T vol 4:14-20 (Boren).

227. While Student’s Parents had philosophical differences with WCPSS about the use of physical restraint, their philosophical stance cannot usurp WCPSS’ obligation to protect staff and students. Moreover, the Parents’ position was inconsistent with State law which allows the use of physical restraint by school personnel, their behavior expert’s opinion that physical restraint is necessary in certain circumstances, and Student’s medical providers who indicated no medical reason prohibited the use of physical restraint on Student.

228. Petitioners made it clear that they would not return Student to WCPSS unless WCPSS agreed not to restrain him. Considering the severity of Student’s maladaptive and aggressive behaviors, their request was unreasonable and would put Student and those around him at risk.

### **SUMMARY**

229. Petitioners prevailed on some of their issues. For the “Appropriateness Issue,” they met their burden of proof by a preponderance of evidence that WCPSS denied Student a FAPE because the September/November 2023 IEPs failed to have sufficient academic and functional goals; failed to include direct occupational therapy, direct speech language therapy, counseling, and parent training as related services. The IEPs also failed to have the appropriate amount of service delivery. Petitioners also proved that WCPSS failed to timely revise the November 2022 BIP, but did not show substantive harm to Student due to this procedural violation.

230. With respect to the “Implementation Issue,” Petitioners prevailed, in part, by proving that the November 2022 BIP was not appropriately implemented before the assembly on October 25, 2023 and Student could not attend. Otherwise, the November 2022 BIP, May 2023 IEP, and September 2023 IEP were implemented with fidelity. Although Petitioners contend that substantive harm was caused by this implementation failure, Petitioners have proffered no credible evidence from a mental health professional that Student cannot return to school; therefore, there was no denial of FAPE.

231. Likewise, regarding the “Restraint Issue,” Petitioners have not met their burden of proving that the October 2023 Restraint was unnecessary, inappropriately conducted or otherwise denied Student a free, appropriate public education. On the contrary, the credible evidence proved that the restraint did not cause school refusal. Instead, the Parents unilaterally chose not to bring Student back to a WCPSS school because they objected to the use of physical force on Student, even as a “last resort.”

**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**

1. 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).

2. The Office of Administrative Hearings has jurisdiction over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education (“FAPE”) pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §§ 1400 *et seq.* and implementing regulations, 34 C.F.R. Part 300. Stips. 4 & 7.

3. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Part 300. The controlling State law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9. Stip. 5.

4. 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). Petitioners, 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.

5. Respondent, Wake County Schools Board of Education (“WCPSS” or “Respondent”), is a local education agency receiving monies pursuant to the Individuals with Disabilities Education Act responsible for providing Student a free appropriate public education. Stip. 6.

6. 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.

7. 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). Moreover, the administrative law judge must decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a). Stip. 3.

8. 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). Stip. 8.

### ***North Carolina Rules of Evidence***

9. The North Carolina Rules of Evidence in Chapter 8C of the General Statutes govern all contested cases proceedings in this Tribunal. 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 and has been done in this case. 26 NCAC 03 .0122 (1) & (2).

### ***Testimony of Expert Witnesses***

10. The testimony of expert witnesses must be based on sufficient facts or data, the product of reliable principle and methods, and these principles and methods must be applied reliably to the facts of the case. N.C. Gen. Stat. § 8C-1, Rule 702(a).

11. Petitioners' experts who opined on the reason for Student's failure to attend school did not have sufficient facts to make that determination because crucial information about the Parents' actions were either deliberately withheld from Petitioners' experts or the experts made assumptions about the reasons Student did not return to school. At best, Petitioners' experts relied on double hearsay from the Parents telling them what Student purportedly said. Such facts are not the type reasonably relied upon by experts. N.C. Gen. Stat. § 8C-1, Rule 703.

12. Moreover, none of Petitioners' experts spoke with school staff regarding the events of October 25, 2023 and did not review deposition testimony of school staff because no school staff were deposed prior to the hearing. In addition, none of Petitioners' experts were qualified to opine about the causation of Student's alleged school refusal because they were neither a child psychiatrist, clinical counselor, clinical psychologist, nor any other mental health professional who has seen or interacted one-on-one with Student since October 25, 2023.

### ***Deference to Educators***

13. 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).

14. 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).

15. “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).

16. Instead of second guessing the emergent nature of a situation, deference was given to the WCPSS school staff who were in the best position in real time to determine whether Student’s actions were imminently dangerous to himself or others and the appropriateness of the use of physical restraint. Moreover, unlike the opinions of an expert witness, the lay opinion of a nonexpert educator, such as the School Psychologist Taylor, which was based on first-hand knowledge or observation assisted the Undersigned to get a clear understanding of some facts in issue. N.C. Gen. Stat. § 8C-1, Rule 701.

17. The Undersigned afforded appropriate deference to WCPSS’ school staff 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.

### ***Hearsay of a Party Opponent***

18. The hearsay statements of Mother as documented in Student’s educational and medical records were admissible evidence because she was a party opponent. N.C. Gen. Stat. § 8C-1, Rule 801(d).

## **OVERVIEW OF IDEA**

19. Analysis of Petitioners' substantive and procedural FAPE claims properly begins with an overview of the Individuals with Disabilities Education Improvement Act (“IDEA”), 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).

20. Congress enacted the IDEA to ensure "that children with disabilities receive needed special education services." *G.M. v. Barnes*, 2024 U.S. App. LEXIS 22421 \*\*2-3 (4<sup>th</sup> Cir. September 4, 2024) (quoting *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 137 S. Ct. 743, 748, 197 L. Ed. 2d 46 (2017)). The IDEA requires that States, in return for federal funding, guarantee certain children with physical and intellectual disabilities a "free appropriate public education" (FAPE). *Bouabid v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 62 F.4th 851, 856 (4th Cir. 2023) (quoting 20 U.S.C. § 1412(a)(1)(A)).

21. For most children, a FAPE entails an education "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017) (internal quotation marks omitted). Where general education is sufficient to provide such an education, the IDEA is satisfied, and no relief is required. See *Miller v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 64 F.4th 569, 575 (4th Cir. 2023). Where it is insufficient, the IDEA requires schools to work with parents to furnish "special education and related services" enabling the child to receive a FAPE. 20 U.S.C. § 1401(3)(A), (9); see also, *id.* §§ 1412, 1414.

22. In addition to this substantive right, the IDEA guarantees certain procedural rights, including the rights of parents to "examine all records" relating to their child and to "participate in meetings" regarding the identification, evaluation, and placement of their child. 20 U.S.C. § 1415(b); see also, *R.F. ex rel. E.F. v. Cecil Cnty. Pub. Schs.*, 919 F.3d 237, 248 (4th Cir. 2019).

23. The IDEA envisions a "cooperative process" between parents and educators, who are expected to work together to determine whether the child has a disability, whether that disability requires special education, and what any special education should look like. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005). But, as in this case, the IDEA anticipates that "parents and educators will not always agree." *Bouabid*, 62 F.4th at 856.

24. 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.*

25. To satisfy the IDEA requirements, WCPSS must offer an IEP that is "reasonably calculated to enable a [Student] to make progress appropriate in light of [his] circumstances." *Andrew F.*, 580 U.S. at 399. 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 U.S. App. LEXIS 12215, \*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

26. 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).

27. In this case, the substantive violations concern the appropriateness of Student’s IEPs and BIPs. Petitioners contend that the IEP teams did not adequately review the contents of the IEEs and revise the IEP/BIP in accordance with the independent evaluators’ recommendations. WCPSS must assess the child in all areas of suspected disability and evaluations must be sufficiently comprehensive to identify all Student’s special education and related services needed for a FAPE. 34 C.F.R. § 300.304(c)(4). The timely review and revision of the IEPs/BIPs in light of the independent evaluations and FBA involves issues pertaining to the substantive appropriateness of the goals, specially designed instruction, and service delivery.

28. The IDEA does not require the IEP team to accept all the results and recommendations of an IEE; however, if the independent educational evaluation meets agency criteria, it must be considered by the public agency in any decision made with respect to the provision of a FAPE to the child and may be presented by any party as evidence at a hearing on a due process complaint regarding their child. 34 C.F.R. § 300.502(c)(1)&(2). The independent educational evaluation, including the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation. 34 C.F.R. § 300.502(e). Nor does the IDEA “require school districts to defer to the opinions of private evaluations procured by a parent. To the contrary, the IDEA instructs school districts to rely on diverse tools and information sources in making an eligibility assessment.” *Miller v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 64 F.4th 569, 576 (4<sup>th</sup> Cir. 2023) *citing* 20 U.S.C. § 1414(b)(2)(A).

29. If the IEP team refuses to change the provision of FAPE to the child, the IEP team must document in the Prior Written Notice (“PWN”) each evaluation procedure, assessment, record, or report the IEP team used as the basis for the proposed or refused action. 34 C.F.R. § 300.503(a)(2), (b)(2) & (3). Except for the provisions of a RBT, during the 2023-2024 school year, the school-based members of the IEP teams did not document in the Prior Written Notices any “refusals” to the results or recommendations contained in the IEEs. On the contrary, the IEPs adopted many of the recommendations from the IEEs and FBA-IEE.

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## Issue 1: Implementation of IEP and BIP (“Implementation Issue”)

**Whether the Respondent denied Student a free, appropriate public education by failing to implement the IEP goals, supplementary aides, services, accommodations, modifications, specially designed instruction, and behavioral intervention plan during the period of September 1, 2023 through March 1, 2024.**

30. The IEPs and BIPs relevant to this issue are the November 2022 BIP, May 2023 IEP, September 2023 IEP, November 2023 IEP, and November 2023 BIP.

31. 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 with fidelity. 34 C.F.R. § 300.323 (c).

32. The Fourth Circuit 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.”).

33. “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).

34. “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 (emphasis added).

35. The “proportion of services” mandated in the November 2022 BIP were strategies to assist Student successfully transition from the classroom to the assembly. WCPSS’ failure to implement the BIP strategies on October 25, 2023 caused Student to miss one assembly, on one school day, during one school year. This implementation failure did not cause Student to miss school for the remainder of the school year. That was his Parents’ choice because they did not want Student restrained.

36. Petitioners have failed to meet their burden of proof by the preponderance of the evidence that the May 2023 IEP and September 2023 IEP were not materially implemented. They have also failed to meet their burden of proof that the November 2022 BIP was not materially implemented.

37. With respect to the October 2023 Restraint incident, Petitioners have failed to prove the causal link between Student’s purported school refusal and the implementation failure. Essentially, correlation does not equate to causation. Petitioners did not prove that Student’s dysregulated state would have been mitigated had school staff implemented the strategies in the November 2022 BIP. Once Student’s behaviors became a danger to himself or others, implementation of the BIP was no longer possible.

38. Instead, school staff were required by State law to protect the safety of Student and others around him.

39. Immediately before the October 2023 Restraint, WCPSS did implement the Safety Plan (consistent with Ms. Holmes’ Crisis Plan) but Student’s escalating dysregulation made the implementation of his BIP futile. Congress could not have intended that implementation of a BIP would take priority over the safety of students and school staff. In fact, the IDEA contemplates situations where the rights of a child with disability are superseded by the need to protect other students and staff from dangerous students. *See* 20 U.S.C. § 1415(k)(1)(G).

40. As to the implementation of the November 2023 IEP and November 2023 BIP, Petitioners unilaterally chose not to return Student to the public-school setting and their actions interfered with WCPSS’ ability to implement these plans. Moreover, Petitioners thwarted WCPSS’ attempts to transition Student back to the public-school setting so that the IEP and BIP could be implemented. WCPSS did not fail to materially implement the November 2023 IEP and November 2023 BIP. Instead, the Parents’ interference precluded that implementation.

## **Issue 2: Appropriateness of IEPs and BIPs (“Appropriateness Issue”)**

### **Whether the Respondent denied Student a free, appropriate public education by failing to appropriately develop and revise IEPs and BIPs during the period of September 1, 2023 through March 1, 2024.**

41. There are two sub-issues within the Appropriateness Issue: the appropriateness of the IEPs and BIPs and the timely revision of them. Petitioners contend that the November 2022 BIP and May 2023 IEP were not timely revised in light of the new information available to the IEP teams after completion of the IEEs.



42. Petitioners also contested the appropriateness of the September 2023 IEP, November 2023 IEP, and November 2023 BIP. The appropriateness of the May 2023 and November 2022 BIP are not at issue because their development fell outside the September 1, 2023 through March 1, 2024 time frame. As indicated previously, other than a notation in the “Parental Concerns” section, the September 2023 IEP and November 2023 IEP were identical (“collectively referred to “September/November 2023 IEPs”). Therefore, only the timely revision of the May 2023 IEP and November 2022 BIP along with the appropriateness of the September/November 2023 IEPs remain at issue.

43. “At the beginning of each school year, each public agency must have an effect, for each child that disability within its jurisdiction an appropriate IEP.” 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a). 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).

44. The IDEA requires both Parents and school staff, as members of the IEP team, have meaningful participation in developing Student’s educational program. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. §1414(d)(1)(B) (internal quotation marks omitted). These procedures emphasize collaboration among parents and educators and require careful consideration of the child’s individual circumstances. 20 U.S.C. §1414. The IEP is the means by which special education and related services are “tailored to the unique needs” of a particular child. *Andrew F.* 580 U.S. at 391 (citing *Rowley*, 458 U. S., at 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690).

45. While a student 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.” *Andrew F.*, 137 S.Ct. at 999; *see also M.C.*, 858 F.3d at 1200 (finding in *Andrew 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)). However, 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.S. at 188-89 (1982); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir.2004).

46. Specifically, when developing Student’s IEP, the IEP teams were required to consider “the strengths of the [Student]; the concerns of the parents for enhancing the education of [their] child; the results of the . . . most recent evaluation of [Student]; and the academic developmental, and functional needs of [Student].” 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).

47. Student’s IEPs must include: “a statement of the child’s present levels of academic achievement and *functional performance*”; “a statement of measurable annual goals, including academic and *functional goals*, designed to—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 [ ] 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 [ ] to advance appropriately toward attaining the annual goals [ ] to be involved in and make progress in the general education curriculum . . . and to participate in extracurricular and other nonacademic activities; and [ ] to be educated and participate with other children with disabilities and nondisabled children . . .”. 20 U.S.C. § 1414(d)(1)(A) (emphasis added).

#### ***Appropriateness of Academic and Functional Goals***

48. The IDEA requires that Student’s IEPs and BIPs be tailored to his unique needs and circumstances. 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 his “progress in the general education curriculum.” 20 U.S.C. § 1414(d)(1)(A) (i)(IV)(bb).

49. For delivery of special education and related services, 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” that will enable Student “[t]o be involved in and make progress in the general education curriculum . . . , and to participate in extracurricular and *other nonacademic activities . . .*,” like school assemblies. 34 C.F.R. § 300.320(a)(4) (emphasis added).

50. Petitioners met their burden of proof that the September/November 2023 IEPs failed to contain appropriate reading, written expression, behavioral/social emotional, speech language, and occupational therapy goals. In addition, Petitioners proved that the IEPs failed to contain appropriate service delivery of special education and related services. Petitioners are the prevailing party, in part, with respect to the “Appropriateness Issue.”

### *Appropriateness of Supplemental Aids, Accommodations, and Services*

51. 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.

52. 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).

53. Based on the preponderance of credible and probative evidence, Petitioners did not meet their burden of proof that the September/November 2023 IEPs were inappropriate because they failed to contain appropriate supplementary aides, services, modifications, and accommodations related to Student’s academic and functional needs.

### *Appropriateness of Related Services*

54. The final subpart of the “Appropriateness Issue” is whether the related services in the IEPs were appropriate considering Student’s communication, social-emotional, and behavioral needs. The “related services” relevant to this case are speech-language services, occupational therapy, counseling services which are required to assist Student to benefit from special education. 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a).

55. “Speech language pathology services include the provision of speech and language services for the habilitation or prevention of communicative impairments. 34 C.F.R. § 300.34 (c)(15). “Counseling services” means services provided by qualified social workers, psychologist, guidance counselors, or other qualified personnel. 34 C.F.R. § 300.34(c)(2). “Occupational therapy” means “(i) services provided by a qualified occupational therapist; and (ii) includes (A) improving, developing, or restoring functions impaired or lost through illness, injury or deprivation; (B) improving ability to perform tasks for independent functioning if functions are impaired or loss; and (C) preventing through early intervention initial or further impairment or loss of function.” 34 C.F.R. § 300.34(c)(6). “Parent counseling and training” means assisting parents in understanding the special needs of their child; ... and helping parents to 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)&(iii).

56. Petitioners met their burden of proof that the September/November 2023 IEPs were inappropriate because they failed to contain the related services of ABA therapy with a RBT, speech language therapy, occupational therapy, counseling services, and parent training.

### **Appropriateness of the November 2023 BIP**

57. Petitioners' experts opined that the November 2023 BIP was appropriate; therefore, Petitioners failed to prove a denial of FAPE on this claim.

### **Timely Revision of the May 2023 IEP and November 2022 BIP**

58. The IDEA requires that an IEP must be reviewed periodically but no less frequently than annually to determine whether the IEP is appropriate. 20 U.S.C. § 1414(4)(A)(i). The IEP must be revised to address the results of any reevaluation or lack of progress. 20 U.S.C. § 1414(4)(A)(ii).

59. Petitioners met their burden of proof that the November 2022 BIP was not timely revised after the June 2023 FBA was available. However, in light of extenuating circumstances, Petitioners failed to prove that the May 2023 IEP was not timely revised. Even though Petitioners proved that the November 2022 BIP was not timely revised, Petitioners failed to prove any substantive harm caused by this delay.

### **Issue 3: Use of Restraint, Seclusion or Isolation (“Restraint Issue”)**

#### **Whether the use of restraints, seclusion, or isolation on October 25, 2023 denied Student a free appropriate public education.**

60. State law allows the use of restraint, seclusion, and isolation on any student in limited circumstances. *See* N.C. Gen. Stat. § 115C-391.1. However, Petitioners do not have a private right of action under State law. The statute expressly states that “[n]othing in this section shall be construed to create a private cause of action against any local board of education, its agents or employees, or any institutions of teacher education or their agents or employees.” N.C. Gen. Stat. § 115C-391.1(k). Petitioners asked this Tribunal to examine the appropriateness of the use restraint, seclusion, and isolation within the context of the implementation of a behavior intervention plan under the IDEA.

61. The IDEA does not address the use of restraint, seclusion, or isolation. It does, however, require the IEP team: “in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B)(i).

62. Arguably, IDEA does not allow the IEP team to consider the use of restraint, seclusion, or isolation in a BIP because these are not “behavioral management techniques,” nor are they “other strategies” that proactively “address” disruptive behavior. *See* N.C. Gen. Stat. § 115C-391.1(b)(8)&(10). However, North Carolina law anticipates that the use of physical restraint may be included in a student’s IEP, Section 504 Plan, or BIP. *See* N.C. Gen. Stat. § 115C-391.1(c)(1)(f). Regardless of the exclusion of physical restraint in the November 2022 BIP or its inclusion in the November 2023 BIP, State law allows the use of physical restraint. The Parents had no legitimate reason for prohibiting the lawful use of physical restraint on Student if necessary.

### *State Law Definitions of Restraint and Seclusion*

63. Restraint, seclusion, and isolation are defined by State law. “Physical restraint” is “the use of physical force to restrict the free movement of all or a portion of a student’s body.” N.C. Gen. Stat. § 115C-391.1(b)(8). “Seclusion” is “the confinement of a student alone in an enclosed space from which the student is [p]hysically prevented from leaving by locking hardware or other means [or] [n]ot capable of leaving due to physical or intellectual incapacity.” N.C. Gen. Stat. § 115C-391.1(b)(10). “Isolation” is like seclusion, but the student is permitted to leave the space after a reasonable duration period. N.C. Gen. Stat. § 115C-391.1(f). As previously stated, Student was not secluded or isolated in this case. Only the appropriateness of the use of physical restraint is at issue.

64. According to State law, physical restraint can only be used in certain circumstances, which are:

- a. As reasonably needed to obtain possession of a weapon or other dangerous objects on a person or within the control of a person.
- b. As reasonably needed to maintain order or prevent or break up a fight.
- c. As reasonably needed for self-defense.
- d. As reasonably needed to ensure the safety of any student, school employee, volunteer, or other person present, to teach a skill, to calm or comfort a student, or to prevent self-injurious behavior.
- e. As reasonably needed to escort a student safely from one area to another.
- f. If used as provided for in a student's IEP or Section 504 plan or behavior intervention plan.
- g. As reasonably needed to prevent imminent destruction to school or another person's property.”

N.C. Gen. Stat. § 115C-391.1(c)(1).

65. If used for other purposes, including as a disciplinary consequence, the use of physical restraint is not considered a reasonable use of force. N.C. Gen. Stat. § 115C-391.1(c)(1)&(3). Contrary to Petitioners’ assertions, there was no evidence that the physical restraints in this case were used for disciplinary purposes. *See* Pet. p 15 ¶ 28.

66. Per State law, the use of physical restraint does not require imminent physical harm to a student or others. Although seclusion is not at issue in this case, unlike physical restraint, the seclusion of a student by school personnel may be used in limited circumstances including “as reasonably needed when a student's behavior poses a threat of imminent physical harm to self or others ...”. N.C. Gen. Stat. § 115C-391.1(d)&(e). Contrary to the CPI de-escalation strategies and the opinions of the Parties’ experts that physical restraint should only be used as a “last resort,” State law does not require the threat of imminent physical harm to self or others before allowing the use of physical restraint.

67. State law does, however, require school districts provide parents written notice of any restraint within a reasonable period of time, but in no event later than 30 days after the incident. N.C. Gen. Stat. § 115C-391.1(j)(3)&(4). The written incident report must include: “the date, time of day, location, duration, and description of the incident and interventions; the events or events that led up to the incident; the nature and extent of any injury to the student; and, the name of a school employee the parent or guardian can contact regarding the incident.” N.C. Gen. Stat. § 115C-391.1(j)(4). Petitioners were provided notice consistent with this requirement on October 25, 2023.

68. When physical restraint results in injury to the student, the parents must also be notified and receive additional information about the nature and extent of any injury to the student. N.C. Gen. Stat. § 115C-391.1(j)(4). There was no credible evidence that Student was injured by the use of restraint on October 25, 2023.

69. Petitioners contend that the use of restraint was an “aversive procedure” that caused Student to be afraid to go back to public school. *See* Pet. p 14 ¶ 26. An “aversive procedure” is defined by State law as “a systematic physical or sensory intervention program for modifying the behavior of a student with a disability that causes or reasonably may be expected to cause one or more of the following: a. significant physical harm, such as tissue damage, physical illness, or death; b. serious foreseeable long term psychological impairment...”. N.C. Gen. Stat. § 115C-391.1(b)(2). The use of aversive procedures is prohibited in North Carolina public schools. N.C. Gen. Stat. § 115C-391.1(h).

70. To the extent that Petitioners contend Student was denied a FAPE because of the October 2023 Restraint, there was no evidence of “aversive procedures” used during the restraints relevant to this case. Petitioners failed to prove that the October 2023 Restraint caused Student physical harm. Nor did Petitioners prove by a preponderance of the evidence that the use of physical restraint on October 25, 2023 caused Student serious foreseeable long term psychological impairment as none of Petitioners’ experts were qualified as experts to opine on Student’s long term mental health. Moreover, Petitioners failed to prove by a preponderance of the evidence that the October 2023 Restraint caused Student not to attend or that it denied him a free appropriate public education.

### **Compensatory Education and Related Services**

71. “[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)).

72. “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)). “[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).

73. “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). Compensatory education includes provision of educational services necessary to compensate for the education that a child should have received. *Johnson v. Charlotte-Mecklenburg Schs. Bd. of Educ.*, 20 F.4th 835, 840 (4<sup>th</sup> Cir. 2021) (citing *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 496 (3d Cir. 2012)).

74. Under certain circumstances, parents may be entitled to reimbursement for out-of-pocket expenses for private services they paid for as a result of a school district’s failure to provide a FAPE. *See Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985) (reimbursement for private school tuition); *M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 325 (4th Cir. 2009).

75. A parent’s interference with services that were or could have been provided by the district should factor into a court’s determination of appropriate compensatory services. *See Parents of Student W. v. Puyallup Sch. Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994) (holding that “[t]he behavior of Student W’s parents is also relevant in fashioning equitable relief,” and affirming district court’s decision to limit compensatory services due to parents’ failure to request services when student re-enrolled in District and their decision to decline offers of summer school instruction).

76. Under the circumstances present here, any compensatory services owed Student are limited to the time period from September 28, 2023 to October 25, 2023, his last day of school attendance. Student is not entitled to compensatory education or compensatory related services after October 25, 2023 because his Parents unilaterally chose not to return him to school even though WCPSS was ready and prepared to transition him back to in-person instruction.

77. Both Parties’ compensatory education award proposals have been carefully reviewed. *See* Pet. pp 67-68; Pet’r. Supp. Pro. on Comp. Ed. pp 4-6, 9-10,14-16; *and*, Resp’ts Pro. on Com. Ed. pp 2-10; *see also*, Jt. Post-Hearing 1-4. Petitioners provided both quantitative and qualitative approaches to the compensatory education award based on the recommendations from their expert witnesses. However, Petitioners’ experts were not asked and appeared unaware that the Parties have framed the applicable period as September 1, 2023 through March 1, 2024. Moreover, when making their compensatory education recommendations, Petitioners’ experts did not take into account the educational and related services Student received from private third-party providers procured by the Parents for which the Parents have not sought reimbursement.

78. Any compensatory services are further limited to the days during that period that Student was in attendance at school from September 28, 2023 to October 25, 2023 which was sixteen (16) school days or three full school weeks. Supp. Stip. 1(b). Therefore, the amount of compensatory services is limited to 16 school days or 3 school weeks.

79. In this decision, the compensatory services were calculated using the quantitative approach which is based on the period of FAPE deprivation. *See, e.g., M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 391–92, 396–97 (3d Cir.1996), and *Sch. Dist. of Philadelphia v. Post*, 262 F. Supp. 3d 178, 197 (E.D. Pa. 2017) (“Where compensatory education is warranted, the student ‘is entitled to [it] for a period equal to the period of deprivation, excluding the time reasonably required for the school district to rectify the problem.’”).

80. In addition, to the extent that the Parents’ private third-party providers remedied any deficits resulting from the implementation failures or other FAPE violations, the compensatory education award was reduced. *See Moreland Fam. v. Mary M. Knight Sch. Dist.*, 2024 U.S. Dist. LEXIS 130928 (W.D. Wash. 07/24/24) (no implementation failure of closed-captioning when student could access using personal closed-caption device); *Abigail P. v. Old Forge Sch. Dist.*, 105 F4th 57 (3<sup>rd</sup> Cir. 03/14/24) (no harm because student received behavioral instruction from a third-party); and *C.G. and D.G. v. New York City Dep't of Educ.*, 2024 U.S. Dist. LEXIS (S.D.N.Y. 03/30/24) (denying compensatory education because the services a 17-year-old with SLD received at her private school remedied any deficits resulting from the three years the district denied her FAPE). Compensatory education awards may be denied if the Parents cannot establish any harm resulted from the violation.

81. As indicated in the Findings of Fact, after considering all relevant factors, Petitioners are awarded compensatory education and related services in the amount equivalent with what the September 2023 IEP should have contained from September 28, 2023 through October 25, 2023. The services provided by the Parents’ private third-party providers were deducted from this award which in some cases negated the amount of compensatory services. The amounts awarded for WCPSS’s failure to provide FAPE to Student are reasonable and consistent with the discretionary equitable relief permitted by *Carter*, 510 U.S. at 16.

### **Other Remedies**

82. With respect to other remedies proposed by Petitioners, this Tribunal finds that there is no basis to support additional remedies.

83. While Petitioners have suggested that Student might benefit from attending a private school, they have not met either their procedural or substantive burden to establish that he should be placed in private school at public expense. Nor have they even identified a potential private school at which he could be placed, let alone presented evidence to establish any such placement would be appropriate. Further, Petitioners did not present evidence to establish that Student could not be appropriately served in the future within WCPSS. While Petitioners presented testimony that Student *could* have received home or virtual instruction, again they did not present evidence or opinions that he *must* have received home or virtual instruction to receive a FAPE.



Moreover, IDEA requires that each district provide FAPE in the least restrictive environment (“LRE”). 34 C.F.R. § 300.101(a); and 34 C.F.R. § 300.114 (a).

84. Student’s least restrictive environment is in the public-school setting. Because of their philosophical aversion to the use of any physical restraints for any reason, Student’s Parents intentionally obstructed and sabotaged WCPSS’ attempts to transition Student back into the public-school setting.

### **FINAL DECISION**

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

1. Wake County Schools Board of Education denied Student a free appropriate public education (FAPE) because the September 27, 2023 and November 6, 2023 IEPs failed to contain appropriate service delivery of specialized instruction and related services. Moreover, the goals in the IEPs failed address all of Student’s academic and functional deficits.

2. Petitioners did not meet their burden of proof that the May 11, 2023 IEP and November 16, 2022 BIP should have been revised before September 27, 2023 because they were unable to prove substantive harm so this claim is dismissed with prejudice.

3. Petitioners did not meet their burden of proof that the November 6, 2023 BIP was inappropriate.

4. Petitioners proved that WCPSS failed to materially implement the November 16, 2022 BIP prior to the assembly held on October 25, 2023 and that failure caused Student to be unable to attend the assembly. However, Petitioners failed to prove any substantive harm because of this procedural violation so this claim is dismissed with prejudice.

5. Petitioners failed to prove that the October 2023 Restraint incident denied Student a FAPE; the restraint did not impede Student’s right to receive a FAPE; nor did the October 2023 Restraint significantly impact Petitioners’ opportunity to participate in the decision-making process under the IDEA. Instead, the Parents’ philosophical beliefs about the use of physical restraint impeded WCPSS’ ability to provide Student a FAPE after October 25, 2023 when the Parents unilaterally chose did not let Student attend school. The October 2023 Restraint claim is dismissed with prejudice.

6. For the denial of FAPE due to the inappropriate September 27, 2023 and November 6, 2023 IEPs, Petitioners are entitled to compensatory related services. Because Petitioners obtained private third-party services which remedied some of the deficits resulting from this denial of FAPE but are not seeking reimbursement for any out-of-pocket expenses, the compensatory services award shall be reduced. After the deduction of Petitioners’ privately obtained services,

the amount awarded for compensatory related services is 7 hours and 30 minutes for Speech Language Therapy and 30 minutes for Occupational Therapy. A licensed speech language Pathologist and a licensed Occupational Therapist employed by WCPSS shall provide these services. Petitioners may choose to have these related services provided either at their home or virtually. On or before October 10, 2024<sup>19</sup>, a representative from Wake County Schools shall contact the Parents to schedule mutually agreeable dates and times for the provision of these related services. The provision of all compensatory related services shall be completed on or before March 31, 2025.

7. All relevant factors have been considered in determining the appropriate relief to award Petitioners for Respondent's denial Student's right to a free appropriate public education.

8. Petitioners were prevailing parties, in part, on the "Appropriateness Issue" with respect to the September and November 2023 IEPs but not with regard to the appropriateness of the November 6, 2023 BIP.

9. Otherwise, WCPSS is prevailing party for the "Implementation Issue," "Restraint Issue," and, in part, the "Appropriateness Issue."

10. All claims for which Petitioners failed to prove by a preponderance of the evidence are **DISMISSED WITH PREJUDICE**.

11. To the extent that ancillary claims have not been specifically addressed, Petitioners have failed to meet their burden of proof as to any of those ancillary claims and they are **DISMISSED WITH PREJUDICE**.

12. 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.**

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<sup>19</sup> See "Correction of Scrivener's Error" (issued 10/04/2024).

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.**

Original Final Decision Served on the 24<sup>th</sup> day of September, 2024.

Redaced Final Decision For Publication Purposes Only  
Served on the 14<sup>th</sup> day of October, 2024.



Stacey Bice Bawtinheimer  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

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

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