

Legal Aid of North Carolina, Inc.

Advocates for Children's Services

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Via U.S. Mail and email (Bill.Hussey@dpi.nc.gov and state_ec_complaints@dpi.nc.gov)

William J. Hussey, Director of EC Division

NC Department of Public Instruction

6356 Mail Service Center

Raleigh, NC 27699-6356

Re: Formal Systemic State Complaint filed against Wake County Public School System

To Whom It May Concern:

Please consider this a Formal Systemic State Complaint filed on behalf of seven (7) students with mental health disabilities or related behavior needs who have not received appropriate supports and protections while attending schools in the Wake County Public School System ("WCPSS" or "the District"). Some of the students have trauma-correlated behaviors. Several of the students have significant, co-occurring learning disabilities.

All student complainants have experienced significant violations of their special education rights. Specifically, WCPSS has violated the named students' rights by:

- (1) failing to conduct manifestation determination review ("MDR") meetings in a timely fashion and according to North Carolina Policies' Procedural Safeguards;
- (2) failing to provide continuation of services guaranteeing a free appropriate public education ("FAPE") starting on the 11th day of suspension; if WCPSS eventually provides these services after-the-fact, they are neither adequate to provide a FAPE nor individualized based on child-specific data;
- (3) failing to conduct adequate functional behavior assessments ("FBAs") and implement adequate behavior intervention plans ("BIPs"), resulting in continued behavior challenges for students, denial of access to a FAPE, and recommendations for inappropriately restrictive environments;
- (4) denying students consideration of needed related services, resulting in continued behavior challenges for students, denial of access to a FAPE, and recommendations for inappropriately restrictive environments;

"The test of the morality of a society is what it does for its children." -Dietrich Bonhoeffer



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- (5) failing to convene Individualized Education Program (“IEP”) team meetings with properly constituted IEP teams for students in alternative learning programs;
- (6) failing to offer a FAPE by failing to conduct appropriate progress monitoring and reporting;
- (7) failing to revise the IEPs of students in disciplinary-related placements to match the services they actually receive, resulting in significant IEP non-implementation and data disparities;
- (8) failing to implement students’ IEPs – including by routinely failing to timely set up and provide transportation, resulting in summary denials of students’ access to a FAPE; and
- (9) failing to offer a continuum of services for students with mental health disabilities, resulting in unnecessarily restrictive placements or placement referrals.

These actions in violation of the Individuals with Disabilities Education Act (“IDEA”) and corresponding federal regulations and state laws, regulations, and policies have deprived the named students of a FAPE in the least restrictive environment (“LRE”).

We are filing this systemic complaint today because the individual student violations are indicative of the District’s clear, continuing pattern and practice of failing to appropriately support students with mental health disabilities or related behavioral needs, resulting in the deprivation of a FAPE to all similarly-situated students in the District. Individual remedies alone have been and continue to be insufficient to ensure that these and other WCPSS students with disabilities are not treated in the same manner in the future. WCPSS has at times attempted to remedy significant violations via individual compensatory education, which does not address the widespread systemic noncompliance with state and federal law. Systemic remedies are necessary. For selected students, additional individual remedies are also needed to compensate them for the District’s violation of their rights.

INTRODUCTION

The IDEA and its predecessor laws were passed in large part to limit the deprivation of a FAPE for students with mental health and behavior disabilities. Referring to the IDEA’s predecessor law, the Supreme Court of the United States stated: “Among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet.” *Honig v. Doe*, 484 U.S. 305, 309 (1988). The Supreme Court in *Honig* stated that a central purpose of the law was to strictly limit schools’ ability to exclude emotionally disabled students from school: “We think it is clear . . . that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from

school.” *Id.* at 323. Unfortunately, WCPSS has routinely excluded students with mental health disabilities from educational opportunity, as outlined in this complaint and in direct opposition to the purposes of the IDEA. Recent data¹ show that WCPSS disproportionately excludes its students with disabilities from traditional school environments. In the 2016-2017 school year, 12% of the District’s student population were students with disabilities. However, 52% of students disciplinarily re-assigned to long-term District alternative learning programs were students with disabilities. Students with disabilities were also 34% of the total number of students suspended by the District. Not only is the disability disproportionality egregious, but the intersection of race and disability disproportionality gives rise to grave concern as well. Three times as many Black students with disabilities were suspended than White students with disabilities in the District during the 2016-2017 school year.

The IDEA requires districts to *meet* the needs of students with mental health disabilities – rather than exclude them – by providing them a FAPE in the LRE. Expounding on this legal duty, the U.S. Department of Education has also outlined example elements of a district’s responsibility to students with behavior needs:

“Incidents of child misbehavior and classroom disruptions, as well as violations of a code of student conduct, may indicate that the child’s IEP needs to include appropriate behavioral supports. This is especially true when a pattern of misbehavior is apparent or can be reasonably anticipated based on the child’s present levels of performance and needs. To the extent a child’s behavior including its impact and consequences (e.g., violations of a code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures) impede the child’s learning or that of others, the IEP Team must consider when, whether, and what aspects of the child’s IEP related to behavior need to be addressed or revised to ensure FAPE. If the child already has behavioral supports, upon repeated incidents of child misbehavior or classroom disruption, the IEP team should meet to consider whether the child’s behavioral supports should be changed.”²

The mandate to provide a free appropriate public education in the least restrictive environment for students with behavior disabilities applies fully to Wake County Public School System. It is in the District’s context of disproportionate exclusion that the facts of the complainant students, found below, illustrate how the District has been violating both the letter and spirit of the IDEA when it comes to low-income students with mental health disabilities and behavioral needs – some of the District’s most vulnerable young people.

¹ 2016-17 Annual Suspension Report, The Office of Student Due Process, Wake County Public School System, on file with Complainants.; “April 2017 by LEA with ADM,” <https://ec.ncpublicschools.gov/reports-data/child-count/reports/april-1> (using ages 5-21 student population data).

² U.S. Department of Education, Office of Special Education and Rehabilitative Services. Dear Colleague Letter, August 1, 2016, <https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf>.

FACTS**Student 1: Longview School³, District High School 1, District Alternative Program A**

STUDENT 1 is an X-year-old Xth grade⁴, African-American student with learning and mental health disabilities. He has received special education services under the IDEA through the District since early elementary school. His area of eligibility is Serious Emotional Disability (“SED”).

STUDENT 1 has struggled to achieve academic and behavioral success in the District. He has longstanding disabilities that can manifest as verbal and physical aggression, impulsivity, and other behavioral challenges. STUDENT 1 has been diagnosed with mental health disabilities, including Oppositional Defiant Disorder.

The District has repeatedly violated STUDENT 1’s rights under the IDEA, and a previous state complaint was filed with the Department of Public Instruction. The allegations in this complaint reflect *additional* violations that the District has committed in the past year since the previous complaint with respect to STUDENT 1’s education.

STUDENT 1 finished the 2016-2017 school year at Longview School. After living out of the county for several months, STUDENT 1 returned to the District and was placed at District High School 1. Despite his longstanding behavioral struggles within WCPSS school settings, the District declined to create or implement a behavior intervention plan for STUDENT 1 upon his return to Wake County, instead planning to gather data for the first several weeks prior to implementing any formal behavior plan.

After his first disciplinary incident at the school – a fight, STUDENT 1 was recommended for long-term suspension for the remainder of the school year. This incident occurred *after* the school’s self-imposed timeframe had ended during which the school was supposed to collect and review behavior data and develop behavior interventions. At the time of the fight, the IEP team still had not reviewed the behavior data or developed a behavior intervention plan. An MDR was held. The IEP team found the fight *not* to be substantially related to his disabilities – despite STUDENT 1’s long history of similar behavior in school and instead relied on STUDENT 1’s progress while living out of the county. The IEP team also found that STUDENT 1’s IEP had not been implemented fully, as the team had never fully revised the IEP to reflect STUDENT 1’s transition from Longview to District High School 1. However, the IEP team found that STUDENT 1’s behavior was *not* a manifestation of his disabilities and decided that STUDENT 1 would be placed in an alternative learning program.

³ Longview School is the District’s public separate school for students with behavior disabilities. Students at Longview do not interact with their nondisabled peers while at school. Data from the 2016-2017 school year show that Longview suspends students at a disproportionately high rate, though it is supposed to have targeted supports for students with behavioral disabilities.

⁴ Grades listed are based on enrolled grades during the 2017-2018 school year.

STUDENT 1's family – through counsel – strongly disagreed with the finding of no manifestation.

At that meeting, the IEP team created an FBA and refused to include aggression as a target behavior even though his most persistent pattern of behavior since elementary school was verbal and physical aggression and his most recent and only suspension so far that school year involved physical aggression. The IEP team determined that lack of work production was the only target behavior. The FBA eventually created was based on informal evidence, with no formal data as to the antecedents or consequences of STUDENT 1's behavior – though the District considers an FBA to be a formal evaluation requiring parental consent. The only documented, measurable data was about the frequency of work production, gathered from grade books and Behavior Support Team (BST) “proactive check-ins”. The IEP team created a BIP that did not address aggression – saying that STUDENT 1 had not shown that aggression was an area of need.

After the decision was made to place STUDENT 1 in an alternative learning program, STUDENT 1's guardian and counsel adamantly requested that he be placed in a full-day educational program so as to best support his academic and behavioral needs. Nevertheless, STUDENT 1 was placed at the District Alternative Program A, where he received only 12 hours per week of instruction, delivered four days a week for three hours. The District's justification for its refusal to place STUDENT 1 at the full day District Alternative Program B was that there were “distractions” there.

It took the District over a month to set up transportation to the District Alternative Program A, during which time STUDENT 1 sat at home with no instruction at all. The District claimed that transportation was delayed because STUDENT 1's guardian had declined District Alternative Program A, but the guardian had never declined it; she had simply expressed a preference for a full day program so that STUDENT 1 could get more hours of education.

In Spring 2018, after an episode of verbal aggression at the District Alternative Program A, STUDENT 1 was suspended for five days, for a total of 15 cumulative days of suspension in the 2017-18 school year. The District High School 1 IEP team met and declined to conduct an MDR, asserting that the suspension did not amount to a change of placement. In finding no change of placement, WCPSS staff made false distinctions between verbal and physical aggression, though the two had been repeatedly linked in STUDENT 1's behavior and IEP documents. The IEP team also claimed that they could not look to previous years in assessing for evidence of substantially similar behavior in the change of placement decision, contrary to clear guidance from the U.S. Department of Education.⁵ Notably, District Alternative Program A staff had noted a pattern of verbal aggression during the spring 2018 semester, but no one from the District Alternative Program A was present at the meeting. It was determined that, during the suspension, STUDENT 1 would only receive special education supports in the form of his

⁵ U.S. Department of Education, Office for Civil Rights, Memorandum. February 24, 1989. *See* 307 IDELR 07.

Home/Hospital teacher being provided social skills lessons to give him, even though his IEP required that he receive special education supports in the area of content support and math as well. He did not receive those noted services beginning on the 11th cumulative day of suspension. To date, he still has not received those services.

Also at that meeting, the District High School 1 IEP team placed STUDENT 1 on homebound instruction as a BIP “intervention” to support the BIP replacement *school-based* behavior. His IEP was not changed to reflect the homebound placement decision. No other options—including a reevaluation, increased accommodations, or the addition of related services—were considered in order to help him be successful in a less restrictive setting. After advocacy from STUDENT 1’s counsel, the homebound placement decision was reversed, and STUDENT 1 returned to the District Alternative Program A.

Days later, STUDENT 1 was suspended from the District Alternative Program A for the last day of the 2017-2018 school year. STUDENT 1’s guardian received notice of this suspension via text. An MDR was not held, and STUDENT 1 did not receive any continuation of FAPE services during that suspension. When STUDENT 1’s guardian specifically inquired about how his continuation of FAPE services would be provided, she was informed that “it always takes time to put a teacher in place. That is something that would be worked out at central office.”⁶

For the duration of STUDENT 1’s placement at the District Alternative Program A, STUDENT 1’s IEP team remained the team from District High School 1, even though STUDENT 1 had not attended that school since Fall 2017. In a Winter 2018 meeting, no one from the District Alternative Program A was present. As a result, no one was at the meeting who was involved in the implementation or monitoring of STUDENT 1’s IEP. WCPSS justified this absence and the continual listing of District High 1 on the IEP, saying that STUDENT 1’s placement at District Alternative Program A was a temporary placement. STUDENT 1’s IEP was not revised to reflect his placement and services at the District Alternative Program A, though the program provided only a fraction of the instruction and special education services specified in STUDENT 1’s IEP from District High School 1. WCPSS’ attorney stated that the District does not change service delivery on IEPs when a student is in a temporary placement, resulting in a mismatch between IEPs and service receipt.

⁶ Received via text message by the guardian from STUDENT 1’s administrator. On file with complainants and available by request.

Student 2: District High School 2, District Alternative Program B

STUDENT 2 is an X-year-old Xth grade, African-American student with learning disabilities and a documented history of school behavioral problems. His area of eligibility is Specific Learning Disability (“SLD”).

In Fall 2017, STUDENT 2 was involved in a fight and was recommended for long-term suspension for the remainder of the semester. The behavior was found not to be a manifestation of STUDENT 2’s learning disability; the IEP team did not appropriately consider the documentation of STUDENT 2’s behavioral needs in his file. The team noted the need to create a BIP, but no FBA or BIP was created. STUDENT 2 was placed at District Alternative Program B. However, despite his mother’s repeated attempts to work with the District to set up transportation and enrollment, transportation was never provided by the District. STUDENT 2 received no educational services for approximately three months. STUDENT 2 returned to District High School 2 after his suspension was over.

In Winter 2018, STUDENT 2 was involved in a physical altercation and was recommended for long-term suspension through the end of the school year. The IEP team found the behavior not to be a manifestation of STUDENT 2’s disabilities, though noting “numerous behavior problems” including several episodes of physical aggression/fighting. STUDENT 2 was placed again at the District Alternative Program B. There was still no FBA or BIP in place. STUDENT 2’s guardian had repeatedly requested a BIP for STUDENT 2.

STUDENT 2’s IEP team is from District High School 2, though he has not attended that school regularly since Fall 2017. No staff from District Alternative Program B attended his IEP meeting in Spring 2018. In late Spring 2018, STUDENT 2’s IEP team convened and created an FBA and BIP for STUDENT 2. The FBA was created without formal observations or data collection beyond the suspension notices. During the FBA meeting, the IEP team discussed informally which antecedent and consequence boxes to check on the FBA form. The IEP team included two staff members from District Alternative Program B, neither of whom were STUDENT 2’s teachers, per STUDENT 2’s guardian.

In June 2018, WCPSS verbally offered an unspecified number of hours of compensatory services to STUDENT 2 to remedy the months of instruction missed when no transportation was sent to transport him to District Alternative Program B in the first semester of the 2017-2018 school year. As of the filing of this complaint, there has been no update from WCPSS’ counsel on the compensatory services offer for STUDENT 2.

In mid-July 2018, STUDENT 2’s guardian received STUDENT 2’s fourth quarter report card, which showed 1) passing grades for quarters 1 and 3, 2) all failing grades for quarter two, when the District did not send transportation to the Alternative Program, and 3) no grades for quarter four, though STUDENT 2 attended the Alternative Program during that quarter. The report card had “Retained,” stamped on it – requiring STUDENT 2 to repeat the grade.

Student 3: District High School 3, Homebound, Longview School

STUDENT 3 is an X-year-old Xth grade, African-American student with learning and mental health disabilities. He has received special education services under the IDEA through the District since middle school. His primary area of eligibility is Other Health Impairment (“OHI”).

STUDENT 3 has been diagnosed with Attention Deficit Hyperactivity Disorder and Anxiety Disorder.

In Spring 2017, STUDENT 3 was involved in a behavioral incident.

The IEP team met in Spring 2017, to review behavior evaluations. The IEP team met again in Spring 2017, without STUDENT 3 or his guardian, to review re-evaluations. In Summer 2017, the principal of District High School 3 notified STUDENT 3 that she was recommending that he be long-term suspended from the District – though the behavioral incident occurred the previous semester. Nearly a month later, STUDENT 3’s guardian received Prior Written Notice indicating that school personnel determined on that day that STUDENT 3 was subject to a disciplinary removal constituting a change of placement; an MDR was held days later – more than four months after the incident. The behavior was found not to be a manifestation of STUDENT 3’s disability. STUDENT 3 was placed on homebound instruction.

STUDENT 3’s homebound IEP provided for five 2-hour sessions per week of content support only. The District’s proposed homebound services would have required STUDENT 3’s guardian to leave work and drop STUDENT 3 off at another location during the work day. The District did not provide him with any educational services at all until late Fall 2017, when STUDENT 3 and his guardian retained counsel. At that time, WCPSS planned to provide educational services, but the family declined services due to STUDENT 3 already feeling so behind from being out of school.

Student 4: District Middle School 4A, District Middle School 4B

STUDENT 4 is an X-year-old Xth grade, African-American student with learning and mental health disabilities. He began receiving special education services under the IDEA through the District in 2012. His primary area of eligibility is Serious Emotional Disability (“SED”). Previously, his primary area of eligibility was Specific Learning Disability (“SLD”) and – prior to that – Other Health Impairment (“OHI”).

STUDENT 4 has experienced longstanding behavioral struggles within the school environment but has also experienced periods of behavioral success. STUDENT 4 has received mental health diagnoses of Adjustment Disorder with Mixed Disturbance of Emotions and Conduct and ADHD.

During the 2017-2018 school year, STUDENT 4 was out-of-school suspended for at least 43 days. Even apart from scheduling challenges, several MDRs were not held in a timely manner, and the District frequently did not offer timely continuation of FAPE services.

Despite longstanding, significant behavioral struggles, STUDENT 4 has no related services relating to behavioral support on his IEP and has never had them. STUDENT 4 receives Behavior Support Team (“BST”) support. STUDENT 4’s BST teachers at District Middle School 4A changed during the 2017-2018 school year. The BST teachers have expressed that they lacked strategies to effectively support STUDENT 4. During an MDR meeting in Spring 2018, it was found that District Middle School 4A was not implementing STUDENT 4’s IEP/BIP.

STUDENT 4 has an FBA and a BIP, which has been revised several times. His most recent FBA is from Spring 2017. It was created during an IEP team meeting with only informal data as to the antecedents and consequences of his behavior.

For violations occurring in 2016 in which the District failed to provide STUDENT 4 special education services for nearly two months, WCPSS offered him 30 hours of compensatory education. Other compensatory services appear to be pending.

Student 5: District High School 5, Alternative Treatment Program

STUDENT 5 is an X-year-old Xth grade, White student with learning and mental health disabilities. He began receiving special education services under the IDEA in elementary school. His primary area of eligibility is Other Health Impairment (“OHI”).

STUDENT 5 has experienced longstanding behavioral struggles. STUDENT 5 has received mental health diagnoses of Disruptive Mood Dysregulation Disorder and ADHD.

During the 2017-2018 school year, STUDENT 5 started the year having some behavioral success, while having some behavioral challenges. In Fall 2017, an FBA was requested, with review of results planned for 3-4 weeks later.

WCPSS did not hold an FBA meeting in that time frame.

In late Fall 2017, a behavioral incident occurred. An MDR was held, in which the behavior was found to be a manifestation of STUDENT 5’s disability. An FBA was created using informal data or educated guesses – particularly regarding antecedents and consequences of behavior – and a BIP developed. The District proposed an Alternative Treatment Program placement or placement at the District Alternative Program B, with homebound instruction until a late Fall meeting to determine placement. No other options—including a reevaluation, increased accommodations, or the addition of related services—were considered in order to help him be successful in a less restrictive setting. The homebound instruction consisted of one visit of 30 minutes at a local library, before it was realized that the teacher was not a certified special education teacher. The next tutor had little availability. No further homebound instruction was received, though approximately 4-6 hours per week was planned.

In late Fall 2017, STUDENT 5’s family decided to pursue the placement at Alternative Treatment Program, with transportation to be provided by the District. STUDENT 5’s family toured the Alternative Treatment Program. However, for several weeks WCPSS failed to set up transportation to the program. WCPSS sought to extend STUDENT 5’s Alternative Treatment Program placement due to their own neglect in providing transportation. Prior to STUDENT 5 attending the Alternative Treatment Program once transportation was set up or returning to District High School 5, STUDENT 5’s family moved out of the District. STUDENT 5 reported feeling so far behind from being out of school that he saw no point in returning to school. He has since dropped out.

Student 6: District Middle School 6A, District Middle School 6B, District Alternative Program C

STUDENT 6 is an X-year-old Xth grade, African-American student with learning and mental health disabilities. He began receiving special education services under the IDEA through the District in 2016. His primary area of eligibility is Serious Emotional Disability (“SED”), and his secondary area of eligibility is Other Health Impairment (“OHI”).

STUDENT 6 has experienced longstanding behavioral struggles but had no suspensions in the second semester of the Xth grade. He did receive several failing grades in the second semester. STUDENT 6 has received mental health diagnoses of Oppositional Defiant Disorder, Conduct Disorder, and ADHD.

During the 2016-2017 school year, STUDENT 6 was long-term suspended for behavior that was substantially related to his disabilities. However, the IEP team found there was no manifestation. STUDENT 6 was placed at District Alternative Program C for the remainder of the school year. While there, STUDENT 6 was long-term suspended again. He received no MDR and no continuation of FAPE services for well over a month. An MDR was held in Spring 2017, upon request by counsel once involved. In that meeting, MDRs for three suspensions from STUDENT 6’s time at District Alternative Program C were conducted. All were found to have been manifestations of STUDENT 6’s disabilities. The District did not provide continuation of FAPE services during any of these three suspensions.

During the MDR meeting, the only regular education and special education teachers present were from District Middle School 6A. No teachers were present from District Alternative Program C, even though STUDENT 6 had received all of his educational services at District Alternative Program C. STUDENT 6 had received no educational services from either of the teachers present for approximately eight months. The only representative from District Alternative Program C was an assistant principal.

During the annual review IEP meeting, no personnel from District Alternative Program C was present. The only teachers present were from District Middle School 6A. The teachers at the meeting had not taught STUDENT 6 in over eight months, and had no data as to STUDENT 6’s present levels of academic achievement and functional performance. As a result, the IEP developed on that day for STUDENT 6 was not based on child-specific data, incorporated substantial guesswork as to appropriate goals and services, and was not individualized to meet STUDENT 6’s unique needs. The IEP team planned to collect additional data in order to revise STUDENT 6’s IEP at a later date.

The District offered 80 hours of compensatory special education services for STUDENT 6 to be accessed before July 31, 2018. Due to STUDENT 6 moving out of the District for several months during the 2017-2018 school year, the compensatory teacher’s scheduling difficulties, and other constraints, STUDENT 6 has not been able to meaningfully access all of the compensatory services.

Student 7: Longview School, District Middle School 7

STUDENT 7 is an X-year-old Xth grade, African-American student with mental health disabilities. He has received special education services under the IDEA through the District since 2011. His area of eligibility is Other Health Impairment (“OHI”).

STUDENT 7 has been diagnosed with ADHD, Oppositional Defiant Disorder, Intermittent Explosive Disorder, and Disruptive Mood Dysregulation Disorder. STUDENT 7 finished the 2016-2017 school year at Longview School. He has primarily been served in a separate setting while a student in the District. At the beginning of the 2017-2018 school year, STUDENT 7’s IEP team agreed that he could be appropriately served in a less restrictive environment, and he enrolled at District Middle School 7. His only related service is special transportation.

With a few minor amendments, STUDENT 7’s BIP intervention strategies, rewards, and consequences remained the same from the creation of STUDENT 7’s BIP in Winter 2017 through the end of the 2017-2018 school year.

STUDENT 7 was suspended 12 times during the 2017-2018 school year, resulting in approximately forty-one (41) days out of school. All of the offenses resulting in suspensions were Level I or Level II violations in the District Code of Student Conduct. For each suspension for which an MDR was held, the behavior was determined to be a manifestation of his disability. For at least one suspension in Winter 2018, the MDR was not held until several weeks later. For another suspension in Winter 2018 and possibly yet another, no MDR was held, though required.

In Spring 2018, it was noted on the Change in Placement Worksheet that STUDENT 7 would be provided 51 hours of “Home Hospital services to address both special education and general education services missed due to 17 days of suspension (17 * 3).” STUDENT 7’s guardian reports that some, but not all, of these hours were completed. STUDENT 7 states that during these compensatory services, the teacher would simply provide him with answers so that STUDENT 7 could do some make up work but did not teach him any of the material.

At a Spring 2018 MDR meeting, it was recorded that STUDENT 7’s behavior occurred when his “de-escalation plan did not work” but went on to provide the conflicting conclusion that the “[t]eam believes BIP is working.” The team refused to review the behavior plan.

On X date in Spring 2018, STUDENT 7 was suspended for three days. Four days later, the school principal called STUDENT 7’s parent and informed her that after a further investigation, the suspension was being increased to five days for “Disruptive Behavior.” The MDR for this suspension was held two days later, at which time the team determined that the behavior was a manifestation of STUDENT 7’s disability. The team noted that the BIP was “inconsistently working,” but did not make any changes to it. The team instead placed STUDENT 7 on modified day, stating on the DEC 5/Prior Written Notice that he “would benefit from modified day to help with on task behavior and to reduce major disruptive behaviors in the

school environment.” STUDENT 7’s IEP services were not changed to reflect his modified day schedule. The same IEP noted that STUDENT 7 was badly failing most of his classes, including having a “0” in Literacy class and “No grades recorded due to tardies” in Reading.

On another date in Spring 2018, STUDENT 7 was suspended again for five days for “Disruptive Behavior, Inappropriate Language, Disrespect, Noncompliance.” The general education and special education services to be provided during the period of suspension were recorded as “student will be given dependent [*sic*] work to complete at home” on the Change in Placement Worksheet. At the MDR, the team determined that the suspension was a result of STUDENT 7’s disability, and that his placement would change to Home/Hospital “until [his] medicine is stabilized as behaviors have increased in frequency and intensity.” STUDENT 7’s guardian opposed the placement change to home/hospital.

The updated BIP created at the meeting stated that home/hospital was proposed “until he can stabilize his mood disorder and ADHD.” Despite only attending school on a modified schedule for a week, it was decided that “modified day has not been successful.” The DEC 5 stated that the BIP was updated to “reflect current behaviors,” but none of the intervention strategies, reinforcements, or consequences were changed.

According to STUDENT 7’s guardian, he received a total of eight hours of home/hospital services, which were not delivered until after the school year had ended. STUDENT 7’s guardian also stated that STUDENT 7 did return to school to take end-of-grade exams, but that STUDENT 7 felt very unprepared for the testing after he had missed so much school throughout the year while suspended, and that the school had refused to provide him with any study materials so that he could prepare in the days leading up to the testing.

The District has regularly held MDRs when STUDENT 7 had (or had nearly) served the full-term of his suspension, and then offered compensatory services for that time when the suspension was found to be a manifestation. The District has held MDRs beyond the ten-day time limit.

STUDENT 7’s IEP services were not updated to reflect his modified day or homebound placements.

VIOLATIONS

The facts outlined above give rise to several violations of the IDEA and corresponding federal regulations and state laws, regulations, and policies.

1. WCPSS routinely fails to conduct manifestation determination review (“MDR”) meetings according to North Carolina Policies’ Procedural Safeguards.

Students 1, 2, 3, 4, 6, 7

NC Policies Governing Services for Children with Disabilities (“NC Policies”) 1504-2.1(e) requires an MDR to be completed “within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.” NC Policies 1504-2.1(e) further requires an MDR team to consider “all relevant information in the student’s file, including ... any relevant information provided by the parents” in making the manifestation determination. This requirement harkens back to the initial intent of the IDEA, which was to stop the practice of emotionally disabled students being excluded because of disability-related behaviors. *Honig v. Doe*, 484 U.S. 305, 323 (1988) (“In drafting the law, Congress was largely guided by recent decisions. . . which involved the exclusion of hard-to-handle disabled students.”).

In Wake County, vulnerable students with emotional disabilities continue to be routinely excluded from school for long periods of time as a result of disability-related behaviors. For the majority of the named complainants, including STUDENT 1, STUDENT 3, STUDENT 4, STUDENT 6, and STUDENT 7, the District did not complete timely MDRs within the required 10-day timeline. Several times, MDRs were held weeks after the ten-day limited expired. In other cases, MDRs still have not been held as of the filing of this complaint. On more than one occasion, a required MDR was eventually held only because counsel became involved and explicitly requested a meeting.

The complainants’ experiences further demonstrate that, when MDRs are conducted in the District, IEP teams routinely fail to appropriately consider all relevant information when making manifestation determinations. For example, in STUDENT 2’s Winter 2018 MDR, the MDR documents state that the IEP team declined to find that STUDENT 2’s behavior was caused by or had a direct and substantial relationship to his disability because the team looked narrowly at his IDEA eligibility label of SLD rather than considering “all relevant information” in his entire special education and cumulative files. By fully neglecting to give due weight to the extensive documentation of similar behavioral struggles that was included in STUDENT 2’s file, the IEP team ultimately reached a manifestation decision that was in error and that resulted in significant violations of his rights and detrimental academic outcomes.

Additionally, in STUDENT 1’s late Fall 2017 MDR, the IEP team found that STUDENT 1’s behavior of physical aggression was not related to his disability, despite being presented with diagnostic criteria of his disability which included physical aggression and being presented with relevant academic research linking STUDENT 1’s disability and his behavior.

2. WCPSS routinely fails to provide continuation of services guaranteeing a FAPE starting on the 11th day of suspension. If WCPSS eventually provides these services after-the-fact, they are neither adequate to provide a FAPE nor individualized based on child-specific data.

Students 1, 2, 3, 4, 5, 6, 7

NC Policies 1504-2.1(d) requires a District to provide continuing educational services – including, if applicable, related services – that afford the student a FAPE and enable a student to progress in the general education curriculum and to make progress on his/her IEP goals. Furthermore, federal regulations and comments make clear that these services must be provided no later than the 11th cumulative day of suspension in a school year. 71 Fed. Reg. 46717 (2006) (“Beginning on the 11th cumulative day in a school year that a child with a disability is removed from the child’s current placement, and for any subsequent removals, educational services must be provided to the extent required in 300.530(d), while the removal continues.”)

As evidenced by the experiences of the named students, the District as a matter of pattern and practice fails to provide uninterrupted access to required educational services for students with disabilities who are suspended for more than 10 cumulative days. None of the students involved in this complaint received access to appropriate educational supports beginning on the 11th day of suspension. At times, students were wholly denied any educational services at all for weeks at a time. Notably, STUDENT 1’s guardian was explicitly informed that continuation of FAPE services “always take[] time” to put in place and that those services had to be coordinated through Central Office. In this manner, it is made clear that the District does not have a mechanism through which it is even equipped to provide uninterrupted access to services beginning on the 11th day of suspension, and instead has a de facto policy of simply providing services after-the-fact.

While the District has in certain circumstances, after the involvement of students’ counsel, offered compensatory services for its failures to provide uninterrupted access to a FAPE during suspensions, these services cannot fully compensate students for time and opportunities lost to learn with their peers, access a FAPE, and not fall behind.

When continuation of FAPE services (or compensatory services after-the-fact) have eventually been offered for complainant students, they have been grossly inadequate or not individualized based on child-specific data. For STUDENT 1, continuation of FAPE services or compensatory services – when offered – did not always include the behavior support, content support, and math instruction in his IEP. For STUDENT 3, continuation of FAPE homebound instruction was offered in content support only, despite his need to make progress towards a high school diploma and despite also having organizational/study skills and social/emotional skills instruction on his previous IEP. For STUDENT 4, continuation of FAPE services and compensatory services – when offered – did not include the behavior support instruction in his IEP and appeared to be limited to one hour per missed day, despite his being below grade level performance in all academic areas. For STUDENT 5, compensatory services were offered at a

rate of one hour per missed day, though STUDENT 5 received intensive special education services when in school. For STUDENT 7, continuation of FAPE services were once listed as “student will be given dependent [*sic*] work to complete at home.” For STUDENT 2, the District has still not formalized an offer of compensatory services, despite denying STUDENT 2 continuation of FAPE services for months in the first semester of the 2017-2018 school year.

Moreover, after-the-fact compensatory services do nothing to remedy the systemic practice that continues to summarily violate the rights of students with disabilities across the district who accumulate more than 10 days of suspension in a given school year.

3. WCPSS routinely fails to conduct adequate functional behavior assessments (“FBAs”) and implement adequate behavior intervention plans (“BIPs”), resulting in continued behavior challenges for students, denial of access to a FAPE, and recommendations for inappropriately restrictive environments.

Students: 1, 2, 3, 4, 5, 7 + Policy/Practice Statement

The U.S. Department of Education finds that an FBA may be a formal evaluation, and – indeed – WCPSS considers them to be so, requiring parental consent. *See also* 71 Fed. Reg. 46,643 (2006). An FBA without sufficient collected data as to antecedents and consequences of behavior can result in a district’s denial of FAPE via development of an ineffective IEP or BIP. *See Cobb County Sch. Dist. v. D.B.*, 66 IDELR 134 (N.D. Ga. 2015). WCPSS routinely develops FBAs without adequate data concerning the antecedents or consequences of behavior, leading to IEPs and BIPs which together do not offer a FAPE.

In addition, NC Policies 1504-2.1 requires a District to conduct an FBA and/or develop or revise a BIP, as needed, to address behavioral violations in circumstances relevant to each of the complainant students. NC Policies 1503-4.1(a)(4) requires that the IEPs created by a District include “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, ... that will be provided to enable the child to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum ..., and to be educated ... with nondisabled children.” FBAs and BIPs are supports provided in education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate; per NC Policies 1500-2.34, FBAs and BIPs thus qualify as supplementary aids and services, which must be based on peer-reviewed research to the extent practicable, in order to comport with the law. The IDEA sets here a high bar, which the District has failed to meet for the complainant students – instead relying on informal evidence to support FBAs for students with intensive behavioral disabilities resulting in the creation of plans with inadequate behavior interventions, leading to continued behavioral challenges for students and increasingly restrictive placements.

There are ample peer-reviewed and evidence-based practices relating to functional behavioral assessment and behavior intervention planning.⁷ At the heart of the peer-reviewed research base are two inseparable requirements: 1) that an FBA include objectively gathered data on the antecedents, frequency/intensity/duration, and consequences of the target behavior, and 2) that a BIP be individualized – based on the FBA.

In numerous FBA and BIP meetings for the complainant students and as noted in reviewing these students' FBAs and BIPs, these requirements were not met. WCPSS sometimes collects formal data on the frequency of a target behavior, and less often collects data on the intensity and duration of the behavior. However, the behavior intervention planning most clearly breaks down due to a lack of data collected on the antecedents of the behavior or the consequences (what happens after – e.g., escape from the situation) of the behavior. During FBA meetings for the complainant students, WCPSS' IEP teams often sat and discussed – based on what they seemed to remember – the possible antecedents and consequences of behavior. This aspect of the FBA process was rarely rooted in any formal data collection. This is of utmost significance because students – such as STUDENT 1, STUDENT 2, STUDENT 4, STUDENT 5, and STUDENT 7 – have all faced placement in or been recommended for placement in more restrictive environments away from their nondisabled peers due to their behaviors and lack of adequate behavior supports. When data *is* collected on the frequency of a target behavior, the District has used data collection tools such as ClassDojo, which results in unhelpful data such as the following – taken from STUDENT 7's IEP:

“According to [STUDENT 7's] class dojo points, he has 37% positive behaviors since beginning [District] Middle. ... As of [DATE] [STUDENT 7's] positive behaviors broken down are the following: teacher praise 12%, positive attitude 3%, listening 2%, good manners 1%, working hard 4%, helping others ½%, participating ½%, thoughtful actions ½%, on task 15%. [STUDENT 7's] negative behaviors broken down are the following: OSS [out-of-school suspension] 20%, refusal to turn over phone 3%, sleeping 9%, playing in the hallway 1%, Refusal to do work 3%, disrespect 6%, yelling 1%, walked out of class 1%, late to class 1%, talking out of turn 1%, period detention 5%, silent lunch ½%, wasting time/not working 5%, off task 4%, not dressed out for PE 1%, ISS [in-school suspension] 1%, Arguing 1%. This is data collected through drop ins and fly bys; as well as teacher reports.”

As evidenced, this type of data collection does not meet the standards of helpful data to be collected for an FBA or BIP. Reinforcers and consequences are listed as behaviors, antecedents and consequences other than discipline are not given, data is unhelpful for behavior planning (such as the data point that STUDENT 7 helped others ½% of the time), and the data is collected

⁷ See, e.g., Office of Special Education Programs. “What are Student Level Tier 3 Systems?” <https://www.pbis.org/school/tier-3-supports/what-are-student-level-tier-3-systems?text-only> (sections on descriptive assessment and FBAs for students with intensive behavioral needs); see also *id.* (listing numerous research articles supporting best practices for FBAs for students with intensive behavioral needs).

through “drop ins and fly bys” rather than formal observations. It is no surprise that with such data collection, STUDENT 7 has continued to experience behavioral challenges that interfere with his learning, per his IEP and IEP progress reports, and ended the year in the most restrictive setting possible – homebound.

Lack of adequate behavior intervention planning is also seen in actions such as listing “homebound” as an “intervention” on a BIP for STUDENT 1 that addresses *school-based* behavior. And for STUDENT 7, despite the numerous MDRs and findings of manifestation throughout the 2017-2018 school year, only minor changes were made to STUDENT 7’s BIP. STUDENT 7 was then put on modified day for less than a week before being moved to homebound. The District also apparently uses many of the same interventions, rewards, and consequences on students’ BIPs such as Fun Fridays and Period/Daily Stabilization for most students who receive BST services – calling into question whether the District’s behavior intervention planning processes are appropriately individualized.

Finally, the District does not consistently use peer-reviewed, trauma-informed strategies for students with trauma-related behaviors. This year, a District behavior specialist stated in an IEP meeting that one of their colleagues had some training in trauma, indicating that not all behavior specialists have this important training. It is concerning that not all of the District’s behavior specialists have training in trauma-informed interventions, given the efficacy and importance of trauma-informed strategies in the peer-reviewed behavior intervention planning literature.

4. WCPSS repeatedly denies students consideration of needed related services, resulting in continued behavior challenges for students, denial of access to a FAPE, and recommendations for inappropriately restrictive environments.

Students: 1, 2, 4, 5, 7

NC Policies 1503-4.1(a)(4) requires that the IEPs created by a District include “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, ... that will be provided to enable the child to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum ..., and to be educated ... with nondisabled children.” Related services may include, among others, counseling services, psychological services, and social work services in schools (NC Policies 1500-2.27). These related services may involve: psychological or other group and individual counseling, consultation on effective learning/teaching strategies, referring children and families to community agencies, and “assisting in developing positive behavioral strategies” (NC Policies 1500-2.27). Related services are required, as needed, *in addition to* special education services.

As evidenced by the IEPs of the complainant students, it is the District’s practice to offer social-emotional specially designed instruction for behavior support (BST) and not to offer

behaviorally supportive related services to many students who need it, where such support would allow the student to more effectively access a FAPE in the LRE.

STUDENT 4 was denied related services due to having the support of BST social-emotional instruction, though the BST struggled with assisting with STUDENT 4's behavior. During the 2017-2018 school year, the District suggested a possible move for STUDENT 4 to the District's most restrictive school placement at Longview School; STUDENT 4 continues to have no related services. STUDENT 1 was denied related services initially due to having the support of BST. While his behavior improved temporarily at the District Alternative Program A, it subsequently worsened to the point that the IEP team proposed homebound – the most restrictive placement possible. STUDENT 1 continues to have no related services. STUDENT 2 was long-term suspended twice during the 2017-2018 school year. At no point did the IEP team seriously consider related services. STUDENT 5 was recommended for an Alternative Treatment Program, but at no point did the IEP team discuss amending his IEP to include related services. STUDENT 7 was suspended for several dozen days during the 2017-2018 school year and had numerous findings of manifestation in MDRs, but behavior-related related services (other than special transportation) were never considered. This was true even at the point that the school put STUDENT 7 on homebound – the most restrictive placement possible.

Violations 5-7 Overview: WCPSS systemically violates the rights of students who are disciplinarily placed in alternative learning programs (“ALPs”) by failing to properly update their IEPs and failing to convene properly constituted IEP teams while those students are in the alternative setting.

The following three sections apply to students who are disciplinarily placed in one of the District's alternative learning programs (“ALPs”). The District does not make all of this information publicly available, but Complainants have learned through experience with the named students and through other clients and colleagues that the policies and procedures outlined below govern how students with disabilities are served while in an alternative learning program incident to suspension.⁸

In the WCPSS, when a student is suspended and his behavior is not found to be a manifestation of his disabilities, his IEP team is charged only with making the determination of whether the student needs a home-based placement (including homebound instruction) or a school-based placement as an alternative setting. (WCPSS' Parents Guide to Alternative Learning Programs, on file with Complainants). If the IEP team decides that a school-based option is needed, staff at Central Office are then the ones charged with making the determination of *which* school-based placement the student will be reassigned to one of two full-day/full-week programs or one of the three evening programs, which offer instruction four days a week for three hours a day. (*Id.*) Generally, these reassignments are made after a long-term suspension

⁸ Again, over half of students assigned to long-term alternative learning programs in the District in the 2016-2017 school year were students with disabilities. See footnote 1.

recommendation. However, WCPSS' IEP teams also can place a student in an ALP or recommend an alternative program even if behavior was found to be a manifestation of a student's disabilities.

Once a student is disciplinarily reassigned to an alternative program, no changes are made to the student's school placement on his IEP or to the IEP's service delivery in order to ensure that it matches what the student is actually receiving in the alternative program. Any IEP reviews that take place during the student's placement at the ALP are then often held at the student's base school with only IEP team members who are not currently serving that student and who may not have even interacted with the student for months.

5. WCPSS repeatedly fails to convene IEP team meetings with properly constituted IEP teams for students in alternative learning programs.

Students: 1, 2, 6 + Policy/Practice Statements

NC Policies 1503-4.2(a) states that WCPSS "must ensure that the IEP team for each child with a disability includes -- ...not less than one regular education teacher *of the child*...[and] not less than one special education teacher *of the child*" (emphases added). In Wake County, this requirement is being summarily violated for students who are disciplinarily placed in ALPs.

Of the student complainants who were disciplinarily placed in an ALP, all three had IEP meetings convened by the District that consisted primarily or exclusively of staff from the students' base schools who were not directly instructing the student or otherwise implementing the student's IEP.

In STUDENT 1 and STUDENT 6's cases, the district held IEP meetings consisting exclusively of staff from their base schools and not from the alternative programs they actually attended. In a meeting for STUDENT 1 in Winter 2018, a District administrator stated that staff from the alternative program could not be in attendance because they were teaching at that time. This is evidence of a practice in which ALP staff are not required at the District's IEP meetings, though they are often the only staff who have been teaching the student or have data about the student for months. The same meeting minutes continued with the District administrator stating that District High School 1 is listed as STUDENT 1's base school, but a different school staff (District Alternative Program A) will be implementing the IEP. The District maintained that IEP information would be "shared" with District Alternative Program A, as ALP staff was not present in the meeting. After counsel for STUDENT 1 raised objections over the IEP being reviewed and updated by a team that was not even serving him, the District agreed to reconvene the meeting with staff from the District Alternative Program A. However, when the meeting was reconvened, the program director—who was responsible only for overseeing the general program and provided no direct services or instruction to STUDENT 1—was the only attendee from the ALP. Accordingly, no current regular education or special education teachers were in attendance at any of STUDENT 1's IEP meetings while he was placed in an ALP, including in meetings to revise STUDENT 1's IEP, to determine change of placement based on data which the instant IEP team did not have, or to put STUDENT 1 on homebound. In defense of the IEP team

composition, the District stated its policy that the base school on the IEP did not need to change since “[District Alternative Program A] is a temporary setting.” The same policy was verbally stated in reference to STUDENT 6’s IEP meeting, which included no one from District Alternative Program C.

STUDENT 2’s Spring 2018 IEP team meeting did not include regular and special education teachers from District Alternative Program B; STUDENT 2’s IEP base school continued to be District High 2. Two staff from District Alternative Program B attended STUDENT 2’s late Spring 2018 IEP meeting, but they were not STUDENT 2’s regular and special education teachers.

Nothing in the IDEA allows one school’s IEP team to write the IEP for a student who is receiving all of his instruction from staff at another District school. The statements in the Winter 2018 meeting minutes for STUDENT 1, STUDENT 2’s Spring 2018 IEP teams’ composition, and STUDENT 6’s Spring 2017 IEP team composition as well as the verbal statements made in those IEP meetings are evidence of a policy and practice that WCPSS fails to convene appropriate IEP teams that consist of the child’s actual teachers, which significantly impairs meaningful revision and monitoring of the IEP.

6. WCPSS routinely fails to provide a FAPE to students who are disciplinarily placed in ALPs by failing to conduct appropriate progress monitoring and reporting.

Students: 1, 2

A FAPE requires that a student’s education be individualized. Data tracking through progress monitoring is required to know how a child is progressing towards achieving annual goals, and what needs to be changed to offer an individualized FAPE. NC Policies 1503-4.1(a)(3) requires “periodic reports on the progress the child is making toward meeting the annual goals.”

By using incorrect IEP teams for students who are placed in ALPs, WCPSS further denies those students access to a FAPE by carrying out inadequate progress monitoring of behavior and academics. STUDENT 1’s fourth quarter IEP progress report states only that progress is inconsistent due to attendance issues at District Alternative Program A. This phrase is repeated as the only evidence of IEP progress reporting for each and every one of STUDENT 1’s IEP goals. For all academic and behavior goals for STUDENT 2, his fourth quarter progress report states only: “Due to [STUDENT 2] absences [*sic*] and assigned to the [District Alternative Program B] [*sic*], there has not been adequate amount of time and/or opportunities to monitor progress.” At the time of that progress report, STUDENT 2 had been attending District Alternative Program B for months. However, because his base school remained responsible for tracking his progress monitoring even when its staff were not actually serving him, no meaningful progress monitoring was actually conducted.

7. WCPSS repeatedly fails to revise the IEPs of students in temporary, behavior-related placements to match the services they actually receive, resulting in significant IEP non-implementation and data disparities.

Students: 1, 2, 5, 7 + Policy/Practice Statements

NC Policies 1503-4.1(a)(4) requires that the IEPs created by a District include “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, ... to enable the child to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum ..., and to be educated ... with nondisabled children.”

It is the policy and practice of WCPSS *not* to revise the service delivery or accommodations sections of the IEPs of students who are in temporary placement, including temporary disciplinary placements.

In STUDENT 1’s Winter 2018 IEP meeting minutes, it is stated by the District’s attorney that “[the District] do[es] not change the service delivery because it is a temporary placement due to behaviors.” While STUDENT 1 was in District Alternative Program A, his IEP called for specially designed instruction 180 sessions per year, or the approximate equivalent of five days per week. However, STUDENT 1 was only receiving services four days per week. STUDENT 1’s IEP was also not changed to reflect homebound placement when homebound was to be used as a BIP intervention.

Similarly, STUDENT 2’s IEP was not changed to ‘separate school’ when he was re-assigned to District Alternative Program B – a program that serves only students with disabilities. It is unclear if STUDENT 2 received the specially designed instruction at the amount required by his IEP while at District Alternative Program B.

STUDENT 5’s IEP was not changed to reflect planned placement in an Alternative Treatment Program.

STUDENT 7’s IEP was not changed to reflect modified day or homebound placement.

By not aligning the IEP services, placement, and other IEP elements with what students are actually receiving, WCPSS engages in 1) significant IEP non-implementation and 2) intentional skewing of the data concerning where and how students are receiving services. The IDEA does not envision or allow IEPs to be out of compliance and incorrect, even temporarily, and especially not when ‘temporary’ placements last for months – as in the case of STUDENT 1 and STUDENT 2.

8. WCPSS routinely fails to implement students' IEPs, including by routinely failing to timely set up and provide transportation, resulting in summary denials of students' access to a FAPE.

Students: 1, 2, 3, 5

NC Policies 1501-1.1 requires a District to make a FAPE available to each eligible child residing within the District. A FAPE means special education and related services that ... are implemented in conformity with an IEP. (NC Policies 1500-2.13(d)). NC Policies 1501-2.5 requires every District to "take steps to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities" Nonacademic services may include transportation. (*Id.*)

For STUDENT 1, STUDENT 2, and STUDENT 5, transportation to their assigned alternative educational settings was severely delayed – resulting in weeks or sometimes months of lost instruction and IEP non-implementation. This is an egregious, per se denial of FAPE – and is part of a pattern and practice of the District regarding transportation to alternative placements.

9. WCPSS routinely fails to offer a continuum of services for students with mental health disabilities, resulting in unnecessarily restrictive placements or placement referrals.

Students: 1, 4, 7

NC Policies 1500-2.20 and 1501-3 require that "to the maximum extent appropriate, children with disabilities shall be educated with children who are not disabled, and ... separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

The IEPs of the complainant students reveal that there is an enormous gap in the provision of social-emotional skills instruction in the District. In traditional schools, social-emotional specialized instruction is often limited to 20-46 minutes per day or less, as for STUDENT 1, STUDENT 4, and STUDENT 7. At the District's separate school for behavior disabilities (Longview), it is standard to offer approximately 300 minutes daily of social-emotional specialized instruction.

For WCPSS students who may need more than one-quarter or one-half a block period of social-emotional instruction/support, the District's only option is a separate school placement away from all non-disabled peers – which offers *fifteen times* the amount of social-emotional skills instruction and has poor academic outcomes. Also, as students are recommended for, transferring into, or transferring out of Longview School, they experience sharp changes in the level of social-emotional instructional support offered – often without corresponding evidence

for such dramatic shifts. This “all-or-little” service provision would never be the case for a student with a reading disability, for example – who may need more than half an hour per day of academic instructional support but less than separate school placement.

In the extreme, the most restrictive homebound placement is used, as in the case of STUDENT 7, rather than an intermediate level of behavioral support service provision.

If WCPSS offers behavioral support on an intermediate level of service intensity, it has not been observed by the undersigned in the last two years – particularly as available to low-income students of color.

Compensatory educational services, while necessary to right past wrongs, should not be part of a District’s pattern and practice for serving students with mental health disabilities.

NC Policies 1501-1.1 requires a District to make a FAPE available to each eligible child residing within the District. NC Policies envision that FAPE is made available in a timely manner, such as in the requirement of continuing educational services to be provided by the 11th day of suspension (NC Policies 1504-2.1(d)).

WCPSS has a pattern and practice of relying on compensatory education as a service delivery mechanism for students with significant mental health disabilities. Compensatory services offers were made to STUDENT 1, STUDENT 2, STUDENT 4, STUDENT 5, STUDENT 6, and STUDENT 7 – but all *only* after counsel became involved in the students’ cases. In many cases of compensatory services offers observed, the offers came with stipulations – such as forfeiture of compensatory services upon passage of a District-designated period of time. Particularly for low-income families like those of complainant students, the details of the compensatory services offers may make the services significantly inaccessible. Further, the offer of compensatory services is often delayed, causing students to fall behind their peers in their access to the general curriculum and fall behind in their progress toward IEP goals. For example, for STUDENT 2, a compensatory services offer is still being developed, though STUDENT 2 has already been given failing grades, missed out on high school credits, as is being recommended for grade retention. Finally, compensatory services alone do not address the system-wide patterns and practices identified in this complaint which rob low-income students – often students of color – with mental health and behavior disabilities of their rights under state and federal law. For this reason, systemic relief, in addition to outstanding compensatory services, is sought.

REMEDIES

Such stark violations require immediate corrective action to remediate the named students *and* to ensure that students like them do not suffer the same harms.

Therefore, it is requested that DPI order the following:

Comprehensive Audits

1. Comprehensive District-wide audits by DPI of:
 - a. MDR timing deficiencies for all students with IEPs and, particularly, for students receiving IDEA services under the SED or OHI category.
 - b. Deficiencies in continuation of FAPE services by the 11th day for all students with IEPs and, particularly, for students receiving IDEA services under the SED or OHI category.
 - c. Delays setting up and implementing transportation to alternative programs for all students assigned to such programs.
 - d. Deficiencies in data used in the FBA process, including deficiencies in data on antecedents and consequences of behavior.
 - e. Deficiencies in reviewing and meaningfully revising BIPs upon a finding of manifestation in MDRs.
 - f. Deficiencies in revising the IEPs of students in temporary placements, including alternative programs, WCPSS-initiated day treatment, modified day, and homebound.

District-wide Policy Revisions

2. Revision of WCPSS' Special Education Services policies/practices in order to ensure that:
 - a. Continuation of FAPE services are provided as of the 11th day of suspension.
 - b. A regular education and special education teacher from the relevant alternative program are members of the IEP team for each student in an alternative program, no matter the duration of the student's placement in that program.
 - c. A student's IEP is revised to reflect his/her current placement, even if that placement is in a temporary alternative program, WCPSS-initiated day treatment, or homebound.
 - d. Implementation of related services is considered *prior to* recommending a student for a more restrictive environment such as Longview or homebound. Current receipt of specially designed instruction (i.e., BST support) will not be seen as a substitute for related services where needed.
 - e. Homebound instruction, continuation of FAPE services, and compensatory services all include needed related services.
 - f. Homebound is not used as a BIP intervention.
3. WCPSS' creation of a plan to eliminate transportation delays to alternative programs and WCPSS-initiated day treatment.
4. WCPSS' development and implementation of a full continuum of services for students with mental health disabilities.

Training

5. Training by DPI in evidence-based FBA practices, data collection, and data analysis and their application to the development of BIPs using peer-reviewed practices.
6. Training by DPI on the individualization of homebound, continuation of FAPE, and compensatory services.

7. Training by DPI on the appropriate use of related services, particularly behavior-focused related services, including counseling, psychological services, and social work services in schools.
8. Training by an expert in trauma on 1) the manifestations of ADHD and trauma in school-aged youth, 2) trauma-informed practices as part of FBAs and BIPs, and 3) trauma-informed strategies for MDRs.
9. Training by an expert in 1) racial equity and systemic racialized oppression and 2) how school systems can work to eliminate common barriers to education created by poverty. The District's Equity Director may provide this training to special education staff.
10. All trainings will include all Special Education Services district-level staff, lead special education teachers at each school, and district behavior specialists, as well as special educators as appropriate.

Documents & Meetings

11. Require WCPSS to convene an IEP meeting for each student in an alternative placement for any portion of the 2017-2018 school year or set to begin the 2018-2019 school year in an alternative placement to determine if related services are appropriate for the student and, if so, to amend the IEP to include related services.
12. Require WCPSS to conduct a new FBA for all FBAs deemed by DPI to have been created with insufficient data. Require each new FBA to be completed by a trauma-informed practitioner if deemed necessary by each IEP team after receiving training on identifying signs of trauma in school-aged youth and using a trauma screener. Require WCPSS to contract with an independent behavior expert to conduct the new FBAs, if needed. All new FBAs will include formally collected data on the antecedents, frequency/intensity/duration, and consequences of the target behavior.
13. Require WCPSS to revise the BIP for any student whose FBA was revised under Remedy 12. Require revised BIPs to include peer-reviewed behavioral intervention strategies, including restorative practices and trauma-informed approaches as appropriate.

Monitoring

14. Continuous monitoring for at least two years by DPI of:
 - a. WCPSS' compliance with MDR timelines.
 - b. WCPSS' compliance with continuation of FAPE services by the 11th day.
 - c. WCPSS' compliance with transportation to alternative programs.
 - d. WCPSS' compliance with using correct IEP teams and correctly revising IEPs to reflect placement in alternative programs, for students in alternative programs.
 - e. WCPSS' compliance with using evidence-based FBA and behavior planning practices, based on peer-reviewed research.

Compensatory Services

15. Appropriate compensatory services for all complainant students and similarly situated students affected by the violations in this complaint. Compensatory services should be individualized and not only offered during the summer. Compensatory services should not assume a maximum award of only one hour per missed school day but should be individualized based on student needs.

Other

16. Other remedies deemed appropriate by DPI in order to address the systemic violations found in investigating this complaint.

Sincerely,



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Cc: Ms. Cathy Moore, Superintendent, Wake County Public School System