

XXXX XXXX

v.

MONTGOMERY COUNTY PUBLIC  
SCHOOLS

\* BEFORE LAURIE BENNETT,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: MSDE-MONT-OT-13-03887

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### **DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
ORDER

### **STATEMENT OF THE CASE**

On February 1, 2013, XXXX XXXX (the “Mother”) and XXXX XXXX (the “Father”) (together, the “Parents”), on behalf of their child, XXXX “[Student]” XXXX (the “Student” or “[Student]”), filed a Due Process Complaint with the Office of Administrative Hearings (the “OAH”) requesting a hearing to review the services and placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). On March 5, 2013 and March 13, 2013, the Parents amended the complaint (the “Amended Complaint”).

By notice dated February 5, 2013, the parties exercised their right to waive the required prehearing resolution meeting. 34 C.F.R. §300.510(a)(3)(i) (2012).

I convened a telephone prehearing conference on February 20, 2013. The Parents did not participate, but Michael J. Eig, Esq., represented them. Jeffrey A. Krew, Esq., represented MCPS. I issued a prehearing order on February 28, 2013.

Based on the availability of the attorneys and their witnesses, I convened the hearing on

March 20 and 21, and April 4, 5, 10, 12 and 25, 2013, at which time I closed the record. The hearing proceeded on all scheduled dates in Rockville, Maryland.

The legal authority for the hearing is provided by the IDEA, associated federal regulations, implementing State law, and associated State regulations. 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2012); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C. Procedure is governed by the contested case provisions of the Administrative Procedure Act; the Maryland State Department of Education's procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A .05.01.15, 28.02.01.

Under the federal regulations, a hearing must be conducted and a decision is due within forty-five days of certain triggering events. 34 C.F.R. 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2012). The parties' requested hearing dates fell outside of the forty-five-day timeframe; therefore, they waived their right to have the hearing within the forty-five-day period. I granted the parties' request for an extension of time for the decision to thirty days after the record closed. 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2008). The record closed on April 25, 2013; thirty days hence is Saturday May 25, 2013 and Monday, May 28, 2013 is a State holiday. The parties amended their agreement for an extension to Tuesday, May 29, 2013.

### **ISSUES**

1. Did MCPS offer [Student] a free appropriate public education in the least restrictive environment in the autism program at [School 1] for the 2011-2012 and 2012-2013 school years?
2. If not, was [Student]'s unilateral placement in a home-based program for the 2011-2012 school year and home-based and school-based programs for the 2012-2013 school years appropriate?

### **SUMMARY OF THE EVIDENCE**

## Exhibits

Unless otherwise noted, I admitted the following exhibits on behalf of the Parents:

<b>Ex. No.</b>	<b>Date</b>	<b>Description</b>
3		Not Admitted
4		Not Admitted
6		Not Admitted
7		Not Admitted
10		Not Admitted
11		Not Admitted
13	1/22/11 <sup>1</sup>	Elementary Teacher Report for IEP Team Meetings
16	2/25/11	MCPS Functional Behavioral Assessment
17	2/25/11	MCPS Behavior Intervention Plan
19	7/18/11	Mediation Request from the Parents
28	5/18/11	[SCHOOL 2] Observation
34	1/17/12	Observation Report by XXXX XXXX
35	3/17/12	Psycho/Educational Evaluation by XXXX XXXX
36	5/14/12	Letter to XXXX XXXX, Esq. from Michael J. Eig, Esq.
37	5/25/12	[SCHOOL 2] Individualized Treatment Plan Progress Report
42	Rec'd 7/26/12	MCPS Draft IEP
47	9/19/12	[SCHOOL 2] Observation
51	12/5/12	Letter to Michael J. Eig, Esq. from XXXX XXXX with Resolution Meeting Tracking Form
58	3/1/13	[SCHOOL 2] Treatment Plan Progress Report
62		Resume of XXXX XXXX
63		Resume of XXXX XXXX
64		Resume of XXXX XXXX
65	3/13/13	Observation Report by XXXX XXXX

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<sup>1</sup> Although the document itself says 2010, the parties stipulated that this is the correct year.

<b>Ex. No.</b>	<b>Date</b>	<b>Description</b>
66	9/2/12	[SCHOOL 2] XXXX Commonwealth of [State] License to Operate
67	11/07	Publication: Early intensive behavioral intervention: outcomes for children with autism and their parents after two years
68	7/05	Publication: A comparison of intensive behavior analytic and eclectic treatments for young children with autism
69	3/10	Publication: Research in Autism Spectrum Disorders
70	4/13/13	Publication: A Comparative Look at School-Based and Center-Based ABA Programs
71	1/17/12	Services for Students on the Autism Spectrum, Office of Legislative Oversight, Report Number 2012-3

I admitted the following exhibits on behalf of MCPS:

<b>Ex. No.</b>	<b>Date</b>	<b>Description</b>
1	3/12/10	Functional Behavioral Assessment and Behavioral Intervention Plan
6A	9/13/10	Email communications among XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX (XXXX), and XXXX XXXX
7	9/22/10	Notification of Continuing Placement in an English Language Development Program
15	6/11	Kindergarten Report [SCHOOL 2]
17	8/15/11	Home Schooling Notification
18	10/11/11	Request for Due Process Hearing
18A	Undated	Handwritten notes
31		XXXX XXXX Curriculum Vitae
32		XXXX XXXX Curriculum Vitae
34		XXXX XXXX Curriculum Vitae
39		XXXX XXXX Curriculum Vitae
40		XXXX XXXX Curriculum Vitae
51		School attendance chart

I admitted the following joint exhibits:

<b>Ex. No.</b>	<b>Date</b>	<b>Description</b>
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<b>Ex. No.</b>	<b>Date</b>	<b>Description</b>
1	3/12/10	IEP Team Meeting Documentation
2	5/25/10	Bilingual Psychological Assessment Report - XXXX XXXX, M.A., NCSP
3	6/20/10	Developmental Profile - XXXX XXXX, MA Ed., special educator; XXXX XXXX, OT/L; XXXX XXXX, MS CCC-SLP; and XXXX XXXX, PT
4	6/4/10	Parent Report
5	6/9/10	IEP Team Meeting Documentation
6	10/19/10	Speech-Language Status Report - XXXX XXXX, CCC-SLP
7	10/28/10	IEP Team Meeting Documentation
8	1/11	Elementary Teacher Report for IEP Team Meetings
9	3/2/11	IEP Team Meeting Documentation
10	5/19/11	IEP Team Meeting Documentation
11	7/5/11	Individualized Treatment Plan Progress Report - XXXX XXXX, M.S., B.C.B.A, XXXX, Inc.
12	1/5/12	Letter to XXXX XXXX from Michael J. Eig, Esq.
13	8/8/12 8/6/12 7/16/12	IEP Team Meeting Documentation
14	12/17/12	Consultation Summary - XXXX XXXX
15	1/3/13	Letter to XXXX XXXX from Michael J. Eig, Esq.
16	1/14/13	Letter to Michael Eig from XXXX XXXX
17	1/23/13	IEP Team Meeting Documentation
18	3/5/13	Letter to XXXX XXXX from Michael J. Eig, Esq.
19	3/5/13	Amended Request for Due Process Hearing
20	3/13/13	Letter to XXXX XXXX from Michael J. Eig, Esq.
21	3/13/13	Amended Request for Due Process Hearing

### Testimony

The Student presented the following witnesses:

- The Mother

- XXXX XXXX, Educational Consultant for and a partner in XXXX Services, Psychological and Learning Support Services, who testified as an expert in special education
- XXXX XXXX, Senior Managing Supervisor at the [State] office of the Center for Autism Related Disorders, Inc., who testified as an expert in Applied Behavior Analysis (ABA) with an emphasis on its use related to educating children with autism
- XXXX XXXX, Ph.D., Psychologist in private practice, who testified as an expert in school psychology
- XXXX XXXX, Board Certified Behavior Analyst (“BCBA”),<sup>2</sup> Senior Clinical Supervisor, Center for Autism Related Disorders, Inc., who testified as an expert in the use of Applied Behavior Analysis with children with autism

MCPS presented the following witnesses:

- XXXX XXXX, Special Education Program Specialist, who testified as an expert in special education with an emphasis on early childhood education of children with autism
- XXXX XXXX, Itinerant Resource Teacher, who testified as an expert in special education with an emphasis on educating students with autism
- XXXX XXXX, School Psychologist, who testified as an expert in school psychology with an emphasis on autism spectrum disorders
- XXXX XXXX, Special Education Supervisor, MCPS, who testified as an expert in special education

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<sup>2</sup> Certification means that a person has taken specific classes in using behavioral analysis protocol and procedures and has completed field time before taking a competency examination in behavioral analysis. [State] requires certification before a person can instruct using ABA. The record did not establish Maryland’s requirement.

- XXXX XXXX, Assistant Principal, [School 3], who testified as an expert in elementary school administration

### **FINDINGS OF FACT**

I find the following facts by a preponderance of the evidence:

#### ***Miscellaneous/Background***

1. “[Student]’s date of birth is XXXX, 2004.” (Parties’ Stipulation.)
2. [Student] and her parents are native XXXX speakers. The Parents speak English to [Student] at home.
3. [Student] is learning to speak English but is not proficient.
4. “[Student] was first found eligible for special education by MCPS as a student with developmental delays in 2008.” (Parties’ Stipulation.)
5. [Student] is currently diagnosed with autism. Autism is a developmental disorder typically occurring in a child’s first three years. A child is first diagnosed with a developmental disorder and, as applicable, the disabling condition is changed to autism. Among [Student]’s most prevalent symptoms are language delays, poor social interactions, and maladaptive behaviors.
6. MCPS students may pursue a Maryland High School diploma (“Diploma”) or a Maryland High School Certificate of Program Completion (“Certificate”). Students pursuing a Diploma are instructed in the regular Maryland State curriculum and must pass certain Maryland School Assessments (the “MSAs”) in grades three through eight.<sup>3</sup> Students pursuing a Certificate are not instructed in the regular curriculum and take the Alternate Maryland School Assessments (“Alt/MSAs”). The curriculum in a Certificate program (also referred to as a fundamental life skills program) is modified from the general

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<sup>3</sup> MSA “means the tests in algebra/data analysis, biology, English, and government developed by the [Maryland State] Department [of Education] that are aligned with and measure a student’s skills and knowledge as set forth in the content standards for those subjects.” COMAR 13A.03.02.02B(5).

curriculum and focuses on skills necessary to function in the community. The special education and related services a student receives through an Individualized Education Program (“IEP”) are aligned with whether the student is pursuing a Certificate or Diploma.

7. A student who engages in maladaptive behavior may nevertheless possess the cognition to pursue a Diploma.
8. At all relevant times, [Student]’s residence school, commonly referred to as the home or neighborhood school, is [School 4] (“[School 4]”).

### ***Preschool***

9. “In 2008 [for the 2008-2009 school year], MCPS funded [Student] in the private program, XXXX Center.” (Parties’ Stipulation.)
10. Starting in September 2009, when [Student] was almost five years old, MCPS placed her at [School 5] (“[School 5]”) in the [Program 1] (“[PROGRAM 1]”), a six-hour-per-day program with one-to-one instruction four hours per day. In that program, she received instruction using Applied Behavior Analysis (“ABA”)<sup>4</sup> throughout the 2008-2009 school year. ABA is commonly used to help educate students with autism. By functionally assessing the relationship between a targeted behavior and the environment, ABA can be used to change that behavior by the use of various instructional methods, including discrete trial and natural environment, to teach students to plan, organize and attend to instruction. Nothing about ABA is inherently inconsistent with pursuing a Diploma.
11. An ABA therapy program is different than a program based on ABA. An ABA therapy program is a highly intensive, daily program used to address a student’s deficits in all domains using discrete trial techniques and reinforcers, and it is usually done one-to-one

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<sup>4</sup> MCPS questioned whether ABA is an instruction or a therapy. MCPS agrees that [Student] needs ABA to receive educational benefit. Whether ABA is an instructional method or a therapy is therefore immaterial to the issues at hand.



in the student's home where there are no distractions. A program based on ABA can mean a range of programs, including an ABA therapy program on one end of the spectrum and ABA support, reinforcers and discrete trial in a mainstreamed classroom on the other end.

12. Discrete trial instruction involves breaking skills into the smallest steps, teaching each step of the skill intensively until mastered, providing lots of repetition, prompting the correct response, fading the prompts as soon as possible and using positive reinforcement procedures. [Student]'s ABA instructor used discrete trial instruction to train her in academics.
13. The purpose of preschool placement generally, and for [Student] in particular at [PROGRAM 1], was to teach her pre-academic skills to get her ready for learning in elementary school. Early intervention for students with autism is essential.
14. When [Student] started at [PROGRAM 1], she was below grade level in reading, her verbal skills were poor and she did not necessarily answer "wh" (who, what, when, where and why) questions. She could communicate what she wanted, but she did not engage in social communication.
15. The Parents wanted [Student] to have mainstreaming opportunities, which staff accommodated by having [Student] spend time in the pre-K class at [School 5]. [Student] did not show a lot of interest in her peers. She was compliant with classroom routines until near the end of her attendance at [PROGRAM 1] when she showed some noncompliance, but, even then, staff easily redirected her and her behavior was manageable.
16. [Student] started the 2009-2010 school year in [PROGRAM 1] at [School 5]. After several months, MCPS convened an IEP team meeting to consider whether [Student] should move to one of its XXXX Programs ("XXXX"). XXXX has two components:

[Program 2] and the more-restrictive [Program 3] (“[PROGRAM 3]”).

17. The IEP team agreed that [Student] needed a structured classroom with a low teacher-to-student ratio. The team believed that [Student]’s needs required a more restrictive program than was available in [Program 2], but agreed to [Student]’s placement there at the Parents’ request after the Parents shared information that [Student] was attending XXXX daycare on the days that she did not attend [PROGRAM 1] and that she was doing some nice work.<sup>5</sup>
18. At the Parents’ request and with the IEP team’s consent, [Student] attended the less-restrictive [Program 2] at [School 6] starting on January 12, 2010. [Program 2] is a two-and-one-half-hour-per-day program. [Program 2] did not use ABA and was less structured and had a higher student-to-teacher ratio than [PROGRAM 1]. [Student]’s class had between eight and twelve students, a teacher, and an aide.
19. At [School 6], [Student] demonstrated some non-compliance with classroom routines; inappropriate reactions to frustration; inappropriate responses to peers and adults; and disruptive behaviors, including kicking, hitting, throwing and biting. [Student]’s maladaptive behaviors occurred at all times of the day and in all settings when she was denied her own way, when she sought attention from adults, and when demands were placed on her for classroom activities, instruction, and routines.
20. On March 12, 2010, XXXX XXXX performed a Functional Behavior Assessment (“FBA”) on [Student]. An FBA is an analysis of maladaptive behavior.<sup>6</sup> The FBA took

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<sup>5</sup> XXXX XXXX testified about the information the Parents shared at the IEP meeting and commented that the Parents had shown the team [Student]’s “nice work.” She did not elaborate.

<sup>6</sup> XXXX XXXX explained an FBA in simple terms as follows:

So when one conducts a functional behavior assessment, you identify the behaviors, you define them, and then you determine what happens. You analyze them, so you look at what happens right before a behavior occurs and what happens right after the behavior. And you look for a pattern to see if it is for attention or for escape or because they are denied access to a tangible item or if they are receiving some kind of sensory enjoyment or sensory reinforcement. So it’s an internal reinforcement. So those are typically the four areas that you would see the purpose of a behavior.

into consideration the following behaviors that [Student] exhibited: non-compliance with classroom directions, school rules and routines/procedures; inappropriate reactions to frustration/tension; inappropriate responses to peers and adults; and destructive behaviors, including kicking, hitting, throwing and biting.

21. At the time of the FBA, [Student] needed a behavior management system that would facilitate her understanding and internalization of expected behaviors, among other things.
22. As a result of the FBA, MCPS developed a Behavior Intervention Plan (“BIP”) to address [Student]’s maladaptive behaviors.<sup>7</sup> The BIP addressed three goals: to increase [Student]’s compliance with classroom directions, school rules and routines/procedures during structured and unstructured classroom activities; to increase her appropriate methods of dealing with frustration and tension during structured and unstructured classroom activities; and to increase appropriate reactive behaviors with peers and adults during structured and unstructured classroom activities and with teacher-modeling. The BIP included strategies for meeting its goals, such as praising good behavior, scheduling quiet time, giving [Student] a drink of water or juice when she was upset, rehearsing demands/requests, and removing her from a situation when she demonstrated non-compliant behavior.
23. “[Student] was not successful in the [Program 2] program; [she] experienc[ed] significant difficulty adapting to routine, attending to instruction, and controlling her behavior.”  
(Parties’ Stipulation.)

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(Tr. 932-933.)

<sup>7</sup> XXXX XXXX explained the BIP in simple terms as follows:

So once the team determines what the function of the behavior is, then you create strategies or a plan that would hopefully reduce those problem behaviors. So if the behavior is ‘serving for attention,’ you would not give attention to that behavior. You would ignore that behavior so that the behavior will be put on the extinction or will disappear.

(Tr. 932.) (The Court Reporter reported the language “serving for attention,” which I suspect is an error. The witness probably said “striving for attention.” Ms. XXXX’s explanation is nevertheless understandable.)

24. A student who is engaging in maladaptive behaviors in the classroom may be unavailable for learning while still possessing the cognitive ability to learn.
25. The Parents and the IEP team agreed that [Student] should attend the more-restrictive [PROGRAM 3] to complete the 2009-10 school year.
26. “[Student] then switched into the [PROGRAM 3], a more supportive program where she made some progress.” (Parties’ Stipulation.)
27. [PROGRAM 3] is a three-hour-per-day program with one teacher and two paraeducators. [Student] participated in [PROGRAM 3], where she received special education and related services for a total of fifteen hours per week.
28. [PROGRAM 3] did not use ABA as an instructional method.
29. [Student] did well in small groups with reduced distractions at [PROGRAM 3]. [Student]’s attention span and level of cooperation during classroom activities improved at [PROGRAM 3]. When provided with movement breaks prior to seated activities, [Student] could participate in preferred group activities, such as circle time, for up to thirty minutes with fluctuating attention. [Student] usually transitioned to circle time independently after hearing the transition song. During circle time, she raised her hand to volunteer, to check in and choose songs. She was an active participant during art, music, media and physical education. She participated in music independently, singing along to songs and imitating gestures. During art class, she had difficulty sharing art materials and taking turns. She sometimes protested during less preferred art activities or when she did not get what she wanted. With verbal cues from an adult, she participated in physical education activities, but she was distracted by the loud music and the variety of equipment in the therapy room.
30. [Student] benefited from extended time, multiple/frequent breaks, and a change in the order of activities to best demonstrate skills on testing and to benefit from instruction.

31. MCPS convened an IEP meeting and prepared an IEP on March 12, 2010. The team checked the box to note that it had explained graduation requirements to the Parents but did not check the box to note whether [Student] would pursue a Diploma or a Certificate. The team further checked the appropriate box to note that [Student] would not participate in the MSAs in grades three through eight and did not check any boxes to note that she would participate in the Alt/MSA; the basis of the team's decision was that [Student] was not in an assessed grade.
32. While at [PROGRAM 3], [Student] showed improvement in literacy skills, and she displayed strengths in identifying concepts about print, letter identification, phonemic awareness, and oral language. Her areas of need included increasing her reading comprehension skills.
33. While at [PROGRAM 3], [Student] made steady progress in her acquisition of math readiness skills, but her understanding of quantity and learning to sort and regroup items by a variety of attributes were areas of need.
34. While at [PROGRAM 3], [Student] made progress in her acquisition of social skills and turn-taking with preferred materials. Increasing and sustaining appropriate social interactions with peers continued to be areas of need.
35. While at [PROGRAM 3], [Student]'s attention span and level of cooperation during classroom activities improved.
36. In May 2010, XXXX XXXX conducted a psychological evaluation of [Student], with the assistance of a XXXX interpreter and an aide. Evaluation instructions were read to [Student] in XXXX and English and she sometimes answered in English and sometimes in XXXX. When [Student] responded to questions in English, she tended to give short, grammatically incorrect answers. When [Student] responded to questions in XXXX, she tended to use short, grammatically correct sentences. When responding to questions

during playtime, [Student] gave long, grammatically correct answers.

37. [Student]’s test scores need to be viewed cautiously because:
- a. the tests were administered in English and XXXX, thus compromising the standard quality of some of the tests;
  - b. the normative sample of the various tests did not represent [Student]’s background;
  - c. the tests were culturally specific (and therefore foreign to [Student]); and
  - d. [Student]’s short attention span and her reluctance to respond without breaks and food rewards likely had a negative impact on her performance.
38. [Student]’s verbal IQ was 73, which is in the borderline-delayed range, and her nonverbal IQ was 52, which is in the moderately delayed range.<sup>8</sup> The discrepancy between the scores suggests that it was easier for [Student] to complete tasks requiring verbal skills as opposed to tasks requiring nonverbal skills.
39. Ms. XXXX administered a test to evaluate [Student]’s Fluid Reasoning, Knowledge, Quantitative Reasoning, Visual Spatial Reasoning and Working Memory, the results of which she explained as follows:
- a. The Fluid Reasoning factor evaluates a person’s ability to solve verbal and nonverbal problems using inductive or deductive reasoning. [Student] exhibited difficulty performing tasks that required fluid reasoning.
  - b. The Knowledge factor assesses a person’s accumulated knowledge acquired at home or in school. [Student] tested in the mildly-delayed-borderline range on this factor.

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<sup>8</sup> [Student]’s full scale IQ, which is a composite of the verbal and nonverbal, was 61, meaning she is moderately delayed. Ms. XXXX observed that the full scale is “meaningless, as it not accurately reflect the level of [Student]’s nonverbal skills not that of her verbal skills [sic].” Joint Ex. 2, Bates 5. The grammatical error makes it impossible for me understand which skills – verbal or nonverbal – the full scale IQ accurately reflects. The more important finding is that [Student] had greater verbal than nonverbal ability.

- c. The Quantitative Reasoning factor assesses a person's facility with numbers and numerical problem solving, on which [Student] scored in the borderline-delayed range. Although [Student]'s scores suggest that she has difficulty recognizing mathematical concepts and quantitative problem solving, [Student] is more proficient with mathematical concepts if they are presented verbally.
  - d. The Visual Spatial factor assesses a person's ability to see patterns, relationships, spatial orientations or the gestalt. [Student] scored on the mildly delayed range.
  - e. The Working Memory factor assesses a person's ability to store information in the short term memory, sort it and transform it. [Student] scored in the borderline-delayed range on this factor.
40. [Student]'s visual motor coordination was assessed within the low range, or below age expectations.
41. [Student]'s performance varied with her mood and the environment, making it impossible to reach conclusions about her overall ability until her cognitive strengths and weaknesses were better understood.<sup>9</sup> [Student]'s lack of fluency in English further skewed performance.
42. At the time of Ms. XXXX's assessment, [Student] was learning pre-academic skills. She knew her upper case letters and the sounds associated with some of them; she was beginning to decode simple words and she was able to identify her name.
43. Although [Student] was delayed in many areas and maladaptive behavior made it difficult for her to learn, she had the cognitive ability to pursue a diploma.
44. In June 2010, PEP performed a development profile, which it necessarily does as students transition from pre-kindergarten to kindergarten. The purpose of the profile was to

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<sup>9</sup> I have made no effort to make more findings about Ms. XXXX's many conclusions. Her assessment and its resulting report are extensive and may be read in its entirety at Joint Exhibit 2. I have attempted to highlight areas of the report that are particularly valuable in deciding whether MCPS offered [Student] FAPE in the 2011-2012 school year.

determine whether [Student] was a student with an educational disability and eligible for special education and related services.

45. [Student] was 66 months old at the time. She scored 50 months in cognitive matching and 60 months in cognitive counting. [Student]'s strengths included rote memory, which is how skills are taught in pre-school. Letter identification, for example, is a rote memory skill. [Student] had minor delays in matching and counting. Abstract learning and abstract concepts were more difficult for her. Critical thinking might include, for example, sorting by color, shape, and size.
46. MCPS found [Student] to have an educational disability and to be eligible for special education.

***Kindergarten in the 2010-2011 school year***

47. XXXX does not have a kindergarten program.
48. "In June 2010, the IEP team convened to determine [Student]'s kindergarten school placement." (Parties' Stipulation.)
49. [Student]'s maladaptive behaviors had improved and, as a result, behavioral issues were not the team's focus.
50. XXXX XXXX, the Principal at [School 3], attended the meeting because the team discussed whether [Student] should attend her school's [Program 4] ("[PROGRAM 4]") program.
51. [PROGRAM 4] serves students who need over 50% of their school day supported through direct instruction, paraeducators and supplementary aids and services. Students spend a portion of the day in regular education. [PROGRAM 4] students spend only a couple of hours per day in a self-contained class.
52. The [PROGRAM 4] program was not as structured or supported as [PROGRAM 3] or [Program 2].



53. “After discussing programs at [School 3] (“[School 3]”) and [[School 4]], the team determined that [Student] should attend [School 3] for kindergarten in the 2010-2011 school year.” (Parties’ Stipulation.)
54. At [School 3], [Student] attended the [PROGRAM 4] program, where she received ten hours per week of specialized classroom instruction for reading out of the general education setting and five hours per week of specialized classroom instruction in general education. For supplementary aids and services, she was provided one hour of speech and language therapy per week, one thirty-minute session of occupational therapy per week, and one thirty-minute session of physical therapy per week. [Student] had to navigate many transitions during the day. Her class included about twenty-five students and one teacher and she had a one-on-one aide.
55. Although staff implemented [Student]’s BIP, she displayed maladaptive behaviors, including aggression, eloping, and protesting. She was intermittently engaged in her lessons.
56. [Student]’s maladaptive behaviors worsened over time at [School 3] because the program was too unstructured for her. Her rate of maladaptive behavior largely made her unavailable for learning.
57. [Student] did not interact with peers.
58. [Student] was absent from [School 3] about 47.5 out of 186.5 days due to illness.
59. The [School 3] program proved too unstructured for [Student] and she received no educational benefit.
60. As of October 2010, [Student]’s speech/language performance was based upon her mood, attention, and willingness to comply; she preferred communicating in XXXX; and she tended to answer questions with one word responses or short phrases. She demonstrated the ability to use prepositional phrases. Her performance improved with the use of verbal

and visual cueing. She required frequent repetition of questions and directions. She responded well to multi-sensory approaches to learning. [Student]’s speech/language goals included answering “wh” questions and she showed the ability to answer simple “wh” questions.

61. [Student] did not receive educational benefit at [School 3].

***May 2010 Developmental Profile***

62. In June 2010, when [Student] was five years and six months old, she underwent a mandatory assessment to determine whether she has learning behavior that may be negatively affecting her progress in the areas of concept acquisition and speech/language development. The evaluation was conducted with a XXXX interpreter, instructions were given in English and in XXXX, and [Student]’s answers in either language were accepted.
63. [Student] refused instructions to change rooms during the assessment and she needed frequent breaks. She appeared confused by the change in her daily routine and protested during much of the assessment. [Student] needed frequent verbal prompts to visually attend to testing materials and testing occurred over the course of two days due to her poor attention span. Because of [Student]’s difficult adjusting to a change in her daily routine and her poor attention span, the evaluation results do not provide a complete picture of [Student]’s learning strengths and needs.
64. [Student]’s performance on expressive and receptive tasks was in the low-average range. She had difficulty expressing her thoughts and providing grammatically correct and logical explanations in a variety of settings. [Student]’s difficulty in understanding and using language was possibly influenced by learning two languages at one time. [Student] exhibited weakness in oral communication and, specifically, in the areas of content, form and use, which may negatively impact her educational performance.

*2011-2012 school year*

65. On May 19, 2011, MCPS convened an IEP meeting to consider [Student]’s placement for the 2011-2012 school year. [Student] was below grade level in reading, math, and written language and below age expectations in oral language and behavior. The team recommended continuing the BIP that was developed and implemented at PEP and [School 3]. [Student] continued to have problems with oral language; she needed prompting to engage in conversation with peers and adults; and she did not consistently and spontaneously use language to communicate. [Student] continued to need English as a second language (“ESOL”) services.<sup>10</sup> The team believed that [Student] needed a small group setting in a special education class with maximum adult support to assist her behavior, communication, and attention to task.
66. The team recommended that [Student] attend the autism program at [School 1] (“[School 1]”)<sup>11</sup> where she would participate in special education twenty-three hours and thirty minutes per week, would attend lunch and recess with typical peers with adult support and would receive speech and language therapy, occupational therapy, and physical therapy.
67. [School 1] classes have a maximum of six children with one teacher and two paraeducators. The verbal ability of the children changes from year to year. The students have a range of maladaptive behaviors from self-stimulation to elopement. The students’ cognitive skills range from pre-academic to just-below-grade level in reading, math and science.
68. “[School 1] is a quality, MCPS, general education, comprehensive elementary school.”

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<sup>10</sup> On September 22, 2010, MCPS issued a Notification of Continuing Placement in an English Language Development Program which states that [Student] remains eligible for ESOL services. Board Ex. 7. The record is unclear when [Student] started with ESOL; the exact year is immaterial.

<sup>11</sup> [School 1] is a comprehensive general education program that houses a self-contained autism program. Unless otherwise noted, the short title, “[School 1]” means the autism program.

(Stipulation of the Parties.)

69. The team explained to the Parents that [School 1] students may only pursue a Certificate. The Parents expressed opposition to [School 1] because they wanted [Student] to pursue a Diploma. The team believed that [Student] could not pursue a Diploma because her maladaptive behaviors made her unavailable for learning academics.
70. The Parents argued in favor of placing [Student] at her home school, [School 4], with appropriate supports, where she would pursue a Diploma.<sup>12</sup> The team rejected [School 4].
71. [School 1] is a thirty-hour-per week program that incorporates the principles of ABA and all of its staff are trained in ABA. The low student-to-teacher ratio permits staff to focus on a student's interfering maladaptive behaviors.
72. The team's decision to place [Student] at [School 1] had more to do with her behavioral issues, which [School 1] could address, than with her cognitive ability to pursue a Diploma.
73. Students at [School 1] may make sufficient progress that they transition to Diploma-track placements. Two such students made the transition in the 2011-2012 school year.
74. "The [P]arents disagreed with the [School 1] placement and rejected the proposed IEP." (Parties' Stipulation.) The Parents rejected [School 1] because they wanted [Student] to pursue a Diploma in a less restrictive setting.
75. The Parents decided to home school [Student] and, to that end, retained the [School 2] ("[SCHOOL 2]") in [State] to administer a home-based ABA program for her for the 2011-2012 school year.
76. [SCHOOL 2]'s goal was to teach [Student] the skills she needed to progress to a less-

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<sup>12</sup> The IEP includes a space for the team to note the Parents' request. Joint Ex. 10, Bates 38. XXXX XXXX testified that the IEP should have but did not include such information, other than to say that the Parents disagreed with the team's recommendation. The absence of such information does not render the IEP as a whole deficient, and the Student has not argued as much.

restrictive placement. The home-based program had two components: academic skill acquisition and behavioral intervention and, within that context, she was working on language concept skills, play skills, and social skills, and reducing maladaptive behaviors.

77. At [SCHOOL 2]'s intake meeting with [Student], she spoke primarily XXXX and showed little skill in English.
78. [Student] started at [SCHOOL 2]'s home-based program on July 5, 2011, with one-to-one ABA instruction.
79. [SCHOOL 2] developed an IEP for [Student] that included goals and objectives keyed towards teaching her as many age-appropriate skills as possible to keep her Diploma-bound. [SCHOOL 2] used the [State] and Maryland standard curriculum for first grade.
80. One-to-one instruction provided [Student] with much-needed structure and continuity of instruction. Furthermore, the instructor could modify the instruction in the moment as necessary.
81. Because discrete trial training is inappropriate to address behavior issues, [SCHOOL 2] staff instead used natural environment training to address [Student]'s maladaptive behavior. [Student] was learning to request cessation of an activity rather than engaging in maladaptive behavior to get what she wanted. For example, if [Student] exhibited maladaptive behavior to get what she wanted, the instructor would prompt her to appropriately use language to make her needs known.
82. One-to-one ABA instruction took place primarily upstairs in [Student]'s home for part of the day. ABA is widely used and recognized to address the skill deficits of autistic children across all domains, including in academics and at home.
83. [Student] spent the rest of the day downstairs in the XXXX's XXXX-language day care

center with her ABA therapist.<sup>13</sup> The day care center had approximately ten children, ages three to four years.<sup>14</sup> Children of that age were inappropriate peer models for [Student]. It was not appropriate for [Student] to participate in XXXX-language activities.

84. One day, the children in day care were learning the XXXX alphabet and handwriting. [Student] wanted to draw instead of write. She responded positively to redirection by her ABA instructor when told she should first work on the lesson and, then, she could draw (referred to by witnesses in the short-handed way, “first this, then that.”).
85. [SCHOOL 2] worked with [Student] on academics, including, for example, recognition of sight words. She was using the Dolch Primer, which is a list of the most commonly-used first- grade sight-level words. Memorizing sight words helps a student learn to read. Teaching [Student] word comprehension started with matching words to pictures so that [Student] would understand that the written words represented something real and finished with combining words into sentences. The ABA therapist used systematic prompts until [Student] demonstrated that she understood a word, after which the therapist faded the prompts.
86. By the end of the 2011-2012 year, [Student] was gaining English words and was consistently talking in English sentences and, thus, had the ability to learn English.
87. By the end of the 2011-2012 school year, as a result of the structured program and ABA instruction, [Student] mastered some of her goals and made improvement in other goals related to reading, writing, math and social skills.<sup>15</sup>
88. By the end of the 2011-2012 school year, as a result of the structure and ABA instruction,

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<sup>13</sup> The record is unclear whether the ABA therapist was always with [Student] in the day care center.

<sup>14</sup> One witness said she observed ten children ages, three to four years. Another witness said there were six children, age four years. The XXXX testified that she is licensed to have twelve children. The precise number of students in attendance when [Student] was there and whether they were three or four years old is immaterial.

<sup>15</sup> Rather than recite at considerable length [Student]’s progress on the individual goals, I accept as fact [SCHOOL

[Student] engaged in less maladaptive behavior, e.g., aggression, tantrums and fixation.

She continued to argue, to verbally protest and to exhibit stereotypy, such as echolalia.<sup>16</sup>

Stereotypy is behavior that becomes self-reinforcing and that is either ritualistic or repetitive in nature. Stereotypy is common in children with autism.

89. By the end of the 2011-2012 school year, [Student] had shown some limited ability to interact with other children, primarily in the form of parallel play or when prompted by staff or her parents.
90. [Student] received educational benefit in her home-based ABA instruction in the 2011-2012 school year.
91. [Student]'s attendance at the XXXX's XXXX home day care was inappropriate, regardless whether she received ABA instruction there.

*2012-2013 school year*

92. "In March 2012, [Student] underwent a Psycho/Educational Evaluation with Dr. XXXX XXXX." (Parties' Stipulation.) [Student] was seven years, three months old at the time. [Student] was still in the early stages of acquiring English, and Dr. XXXX conducted her evaluation in English without assistance from a XXXX interpreter. At the time, [Student] spoke English with her teachers, but her family spoke primarily XXXX at home.
93. Dr. XXXX administered various tests, including the Wechsler Intelligence Scale for Children, Fourth Edition ("WISC-IV"). [Student]'s full-scale IQ was 62, which is in the intellectually disabled range. The full-scale IQ is not a precise indicator of a student's cognition.
94. The two most crucial subtests for determining how smart someone is are the verbal comprehension test, which tests verbal reasoning, and the perceptual reasoning test,

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2]'s statement of such progress as stated on her May 25, 2012 report card. XX Ex. 37, Bates 37-2 through 37-7.

<sup>16</sup> Ms. XXXX testified that [Student] was "still" showing signs of stereotypy. The record is vague about [Student]'s history of such behavior.

which tests non-verbal thinking and reasoning. [Student]’s verbal comprehension score was in the low-average range and her perceptual reasoning was in the extremely low range. [Student]’s behavior interfered with the testing, except that [Student] stayed focused when a test involved strictly verbal information. Interfering behaviors included a need for breaks, shifting in her seat, and meltdowns. [Student]’s scores on the subtests offer an inaccurate assessment of [Student]’s skills for two reasons: her English language difficulties (her primary language was still XXXX even though she was very adept at English at the time), and her behavior.

95. Dr. XXXX also administered the Bender test, which is a test of fine visual-motor copying ability. The Bender is not indicative of a person’s overall IQ. [Student] scored in the intellectually disabled range, meaning that her visual-motor coordination was not as well developed as her ability to talk about what she knows.<sup>17</sup>
96. Dr. XXXX administered the ABAS-II, which is based on parent and teacher observations. The test showed that [Student]’s adaptive behavior, involving daily living skills, was low. This test did not assess [Student]’s IQ.
97. Scoring on a social responsiveness scale confirmed [Student]’s difficulty with social behavior.
98. Dr. XXXX administered academic achievement tests. [Student] fared well when she read words in isolation and not as well when it came to reading and comprehending a passage. Her word attack skills, meaning her ability to apply phonetic processing skills to read, were in the low-average range. [Student] had difficulty with mathematics problems that

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<sup>17</sup> Dr. XXXX described the test:

So, there’s a – I think it’s a three-by-five [card], or a six-by-four, I can’t remember, with a figure on it and then they copy it onto here. And what you do is you look at how well they copied it and then their organization. And, you know, most kids they – they put one here and one here and one here and one here and by her age, but this is pretty much a mishmash of stuff. And then what you do is look at the quality of each of the figures that she copied and you score it against, you know, how – how well she did.



were visual, but she nevertheless scored above the intellectually-disabled range.

[Student] was in the low-average range on the writing test.

99. Nothing in [Student]'s test scores suggests that she is unable to pursue a Diploma.
100. At least as of July 2012, [Student] was working in four target areas: academic skills, executive functioning, cognitive skills, and self-help skills.
101. In terms of academics, the focus was on building her technique and fluency, decoding skills, and basic computation skills. [Student] was making progress and her strengths were in decoding and beginning writing.
102. In terms of executive functioning, [Student] was working on social and nonsocial flexibility. She was improving her ability to cope during change. [Student] was still having tantrums, but they were reduced in frequency.
103. In terms of cognition, [Student] was working on identifying emotions and starting to understand how to read other people's desires. She was making progress.
104. In terms of adaptive skills, she was working on brushing her teeth as well as zipping/unzipping and buttoning/unbuttoning her clothing. [Student] was making progress.
105. "A copy of Dr. XXXX's report was shared with the school system." (Parties' Stipulation.)
106. "An IEP meeting was held on January 23, 2013." (Parties' Stipulation.) "MCPS also maintained [Student]'s [C]ertificate track and Alt/MSA status[] in its most recent IEP." (Parties' Stipulation.)
107. The January 2013 IEP meeting involved a periodic review, at which time the team continued its decision to place [Student] at [School 1], where she would pursue a Certificate. [Student] is scheduled for both an annual review of her IEP and a new

evaluation on August 5, 2013.

108. Although [Student] was cognitively delayed and had maladaptive behavior that interfered with her ability to learn, she was cognitively able to pursue a Diploma.
109. The Parents elected to maintain [Student] in her home-based ABA program administered by [SCHOOL 2].
110. [Student] remained in the home-based program until January 2013, when the Parents, in consultation with the [SCHOOL 2] team, moved her to its XXXX School building (the “XXXX School”). The [SCHOOL 2] team believed [Student] would benefit from a more classroom-like setting and interaction with peers. Her transition to the XXXX School went smoothly with the aid of her one-to-one ABA therapist.
111. All of the students at the XXXX School have autism and the student to teacher ratio is one-to-one. [Student] receives ABA at the XXXX School.
112. The State of [State] has licensed the XXXX School to accept up to twelve students with autism, known by [SCHOOL 2] as clients, and the school has three classrooms. The school building is only two years old; previously, [SCHOOL 2] had meeting space but provided services mostly in the clients’ homes. [SCHOOL 2] currently has 55 clients, including ten at the XXXX School.
113. At the XXXX School, [Student] is on a Diploma track using the [State] and Maryland core standards. Students do not graduate from [SCHOOL 2] because the school only accepts students to age fifteen. Rather, students graduate from other institutions and receive diplomas in various states, including Maryland.
114. Although [Student]’s class at the XXXX School includes sixth and eighth grade children, [Student] is chronologically in the second grade. Each child has his/her own curriculum.
115. Staff at the XXXX School speaks only English to [Student].
116. [Student]’s class at the XXXX School has seven children ranging from one nonverbal

student to typically-developing language students. [Student] interacts with the verbal children and benefits from that interaction.

117. She attends two social skills groups at the XXXX School with as many as nine children, ranging from six to nine years old. The group includes nondisabled children, who for the most part are the [SCHOOL 2] students' family members, and as many as two to four nonverbal children. Interaction with nondisabled peers who are other students' siblings or nonverbal is not ideal, nor is it inappropriate. Ideally, [Student] would have a school experience that exposes her to nondisabled, verbal student peers.
118. "IEP meetings were held on July 16, August 6 and August 8, 2012." (Parties' Stipulation.)
119. "The school system also determined that [Student] would participate in the [Alt/MSAs]. . . ." (Parties' Stipulation.)
120. "In the Prior Written Notice from her August 6, 2012 IEP, the school system noted that [Student] would remain on the Alt/MSA track as long as she remained in the [a]utism program." (Parties' Stipulation.)
121. "In November 2012, the [P]arents filed a due process complaint alleging MCPS had denied [Student] a FAPE by failing to propose an appropriate program or placement for [Student] for both the 2011/2012 and 2012/2013 school years." (Parties' Stipulation.)
122. "A dispute resolution session meeting was held on November 28, 2012, at which the parents agreed to allow XXXX XXXX, an MCPS resource teacher, to complete an in-home observation of [Student]'s instructional program and to speak with [Student]'s [SCHOOL 2] therapist and the family's consultant, Ms. XXXX." (Parties' Stipulation.)
123. "The parties agreed to return to an IEP meeting after Ms. XXXX's observation and, as a result, the [P]arents withdrew their hearing request." (Parties' Stipulation.)
124. "Ms. XXXX observed [Student] in her family's home daycare in December 2012 and

saw her one-on-one work with her [SCHOOL 2] therapist.” (Parties’ Stipulation.)

125. Since the summer of 2012, [Student] improved in her ability to do addition. She is learning to do subtraction and she now understands the concepts of lesser and greater. [Student] is working on a first-grade reading curriculum. She still has a problem with comprehension, and her decoding is stronger than her understanding. She is writing brief sentences in English. She is improving in transitions (e.g., moving from workstations to group snack time or group circle time), in asking peers for materials, and in following through on staff’s prompting to ask questions of peers. [Student] still needs one-to-one support when working on new skills. She needs less than one-to-one support to complete simple addition worksheets, to draw a picture to go with a sentence or with something she has read, or to take turns in a game. Generally she does not have tantrums in situations requiring less than one-to-one support. [Student] still exhibits maladaptive behavior, but her rate of compliance has improved, she is gaining attention using appropriate behavior, and she is destroying property less often. The use of ABA and a BIP has reduced [Student]’s maladaptive behaviors. Her social skills have improved; she is willing to participate in facilitated interactions with peers. [Student] is now working on higher-level cognition skills, such as cause-and-effect; understanding someone’s desires; peer play and parallel play; and appropriately gaining attention.
126. ABA may be used to help a child with social-emotional needs (e.g., self-concept, feeling good about one’s self). [Student] has yet to progress to this level.
127. In the 2012-2013 school year, [Student] received educational benefit from her attendance at [SCHOOL 2], and in particular from a small, structured classroom with a low student-to-teacher ratio and ABA instruction. [Student] remained prompt-dependent and did not learn in a group. Her behavior has improved, her English has improved, and she has made progress in her academic goals. She has gained the ability to imitate peers and

adults.

128. She still benefits from and requires ABA instruction and a small classroom with a low student-to-teacher ratio.<sup>18</sup> She remains prompt-dependent for many activities.

129. Although it is unnecessary that everyone in [Student]’s class have equal or better verbal skills than she has, [Student] nevertheless benefits from having peer models who are verbal.

## **DISCUSSION**

### **Burden of Proof**

Because the Parents have challenged MCPS’ placement decisions for the 2011-2012 and 2012-2013 school years, they bear the burdens of proof and persuasion. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). For the reasons that follow, I find that the Parents have met those burdens.

### **Legal Framework**

The identification, assessment, and placement of students in special education is governed by the IDEA. 20 U.S.C. §§ 1400-1482 (2010); 34 C.F.R. Part 300 (2010); *see also* Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008) and COMAR 13A.05.01. The IDEA provides federal assistance to state and local education agencies for the education of disabled students, provided that states comply with the extensive goals and procedures of the IDEA. 20 U.S.C. §§ 1412-14; 34 C.F.R. § 300.2.

As a condition of receiving federal assistance, state and local public educational agencies must have in effect policies and procedures which assure that children with disabilities residing in the state have access to a FAPE “that emphasizes special education and related services designed to meet their unique needs.” 20 U.S.C. §§ 1400(d)(1)(A) and 1412(a)(1)(A); *see* Md. Code Ann., Educ. §§ 8-401 through 8-417; COMAR 13A.05.01.

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<sup>18</sup> I have used the term student-to teacher-ratio with the understanding that teacher may be read broadly to include paraeducators and other educational staff. At times, the evidence substitutes the term staff-to-student ratio, which arguably is a better description.

To comply with the IDEA an IEP must, among other things, allow a disabled child to advance toward measurable annual academic and functional goals that meet the needs resulting from the child's disability or disabilities, by providing appropriate special education and related services, supplementary aids, program modifications, supports, and accommodations. 20 U.S.C.S. § 1414(d)(1)(A)(i)(II), (IV), (VI). The child's disability or disabilities and resulting needs are determined by using a variety of relevant functional, developmental, and academic information, including assessments and other evaluative materials. 20 U.S.C.S. § 1414(a)(1)(C)(i), (b)(2)-(3).

An educational program offered to a student must be tailored to the particular needs of a child with disabilities through the development and implementation of an IEP, taking into account:

- (i) the strengths of the child;
- (ii) the concerns of the parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child;
- and
- (iv) the academic, developmental, and functional needs of the child.

20 U.S.C.A. § 1414(d)(3) (2010).

The IEP identifies a student's present levels of academic and functional performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those goals and objectives, and indicates the extent to which the child will be able to participate with children without disabilities in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A).

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the Supreme Court stated that the congressional purpose in enacting the IDEA is the provision of a free appropriate public education ("FAPE") to children with disabilities. Implicit in this purpose is a requirement that the education to which access is provided is sufficient to "confer some educational benefit upon the handicapped child." 458 U.S. at 204.

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or to “all services necessary to maximize his or her potential.” *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4<sup>th</sup> Cir. 1983) (citing *Rowley*, 458 U.S. 176). “[T]he issue is not whether [the placement advocated by the parents] is better, or even appropriate, but whether [the school system] has offered...an appropriate program for the Child at [the placement which it recommended].” *A.B. ex rel D.B. v. Lawson*, 354 F.3d 315, 324 (4<sup>th</sup> Cir. 2004). In *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455 (6<sup>th</sup> Cir. 1993), the Court found:

The [IDEA] requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant’s use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to the appellant, and is therefore in compliance with the requirements of the IDEA.

*Id.* at 459-460.

Although the law in special education has undergone a significant evolution in the past few decades, the *Rowley* case still sets the standard for determining whether a child is being accorded a FAPE under the IDEA. In *Rowley*, the Supreme Court set forth a two-part analysis for determining whether a school district has offered FAPE. First, a determination must be made as to whether there has been compliance with the procedures set forth the IDEA. *Rowley*, 458 U.S. at 207. Under appropriate circumstances, a procedural error may justify reimbursement of tuition paid to a private institution in which a student is enrolled. *Tice v. Botetourt* 908 F. 2d 1200, 1207-08 (4<sup>th</sup> Cir. 1990). *Cf.*, *Sch. Comm. of Burlington v. Dep’t of Ed.*, 471 U.S. 359, 369 (1985).

Second, it must be determined whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 207. Once an IEP is shown to be procedurally proper, the judgment of the school

system's educators regarding the child's placement should be questioned only with great reluctance by the reviewing authority. *Tice*, 908 F.2d at 1207. There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit, as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *A.B. by D.B. v. Lawson, supra*, 354 F.3d at 325-329; *M.M. ex rel. D.M. v. School Dist. Of Greenville Co.*, 303 F.3d 523, 532-533 (4<sup>th</sup> Cir. 2002). Courts have held that "[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartman v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997).

*MCPS did not commit any procedural violations*

Using the two-prong inquiry under *Rowley* as a guide for discussion, the first question is whether MCPS committed any procedural violations. While not specifically alleging a procedural violation, the Mother testified extensively that MCPS failed to notify the Parents that [Student] was on a Certificate track and the information in [Student]'s IEPs led them to believe she was on a Diploma track. MCPS claims that it shared with the Parents at IEP meetings all pertinent information about whether [Student] was on a Diploma track and when she transferred to a Certificate track. Although the IEPs do contain some incorrect and at times confusing information, the record as a whole does not support the Parents' claim.

A public agency like MCPS is responsible for taking steps to ensure that parents are present at or are afforded the opportunity to participate at each team meeting. 34 CFR § 300.322(a). MCPS afforded the Parents such opportunity and, in fact, one or both of them attended the IEP at issue in this case. At all appropriate times, the Parents exercised the opportunity offered to them to advocate in favor of [Student] pursuing a Diploma.

The first pertinent IEP meeting pertinent to this issue occurred on March 12, 2010. Joint



Ex 1, Bates 3. The IEP that resulted from that meeting is silent as to whether [Student] would participate in the Alt-MSAs, which would have been a clear indication that MCPS considered [Student] a Certificate student. The IEP notes that the team explained graduations requirements to the Parents and that [Student] would not participate in the MSAs because the “Student is not in an assessed grade.” The team did not check the appropriate box to specifically note whether [Student] would pursue a Diploma or a Certificate. The record does not explain why the team did not check the Diploma or Certificate box, except perhaps that [Student] was in pre-school.

Six months later, on the October 28, 2010 IEP, the team met again and did not check boxes on the IEP to note one way or the other whether it had explained graduation requirements, whether [Student] would pursue the MSAs or the Alt-MSAs because she was “not in assessed grade,” or whether she would pursue a Diploma or a Certificate. Joint Ex 7, Bates 3. The record again does not explain why the team did not check the Diploma or Certificate box.

Yet another four months later, on March 2, 2011, the team checked the box to say that it had disclosed graduation requirements and that [Student] would pursue a Diploma. As to whether [Student] would take the MSAs, the team said that [Student] was “Not in Assessed grade.” The IEP specifically stated that [Student] would not take the Alt-MSAs, which further confirms that she was on a Diploma track at the time. Joint Ex. 9, Bates 2.

Even though the team decided [Student] should attend [School 1], the May 19, 2011 IEP indicated that [Student] was pursuing a Diploma. The team made no notation about the MSAs and noted that [Student] would not participate in the Alt-MSAs because she still was not in an assessed grade. Joint Ex. 10, Bates 3. Ms. XXXX explained that the Diploma notation was an error. She testified that the meeting that resulted in this IEP was a periodic review of the prior IEP in which [Student] was on a Diploma track at [School 3]. As the team methodically moved from one page to the next of the IEP form in May, the scrivener allegedly checked the Diploma box because *at that point in the meeting* [Student]’s Diploma status had not changed from the

prior IEP meeting. By the end of the May meeting, however, the team had decided to place [Student] at [School 1], which is a Certificate only program. The scrivener should have but did not go back to the earlier part of the form and change it to a Certificate track. Ms. XXXX further testified that XXXX XXXX told the parents that [School 1] was a Certificate-track program and that the Parents were very vocal in their opposition to such a program. I conclude that because [School 1] is a Certificate program and such information was conveyed to the Parents, the Diploma notation was indeed a mistake. The team corrected the mistake on the August 6, 2012 IEP, where the team noted that it had not explained graduation requirements and that [Student] would pursue a Certificate and participate in the Alt-MSAs. Joint Ex. 13, Bates 3. Likewise, the January 23, 2013 IEP, in which the team continued [Student]’s placement at [School 1], notes that [Student] would pursue a Certificate and if she continued in the autism program there she would participate in the Alt-MSAs.

A preponderance of the evidence proves that [Student] started on a Diploma track and that the IEP team changed her to a Certificate track in accordance with its recommendation that she attend [School 1]. [Student] could not have pursued a Diploma at [School 1] because it has no such curriculum. The evidence does not show that the IEP team intended to place [Student] in a Diploma-track program for either the 2011-2012 or 2012-2013 school year. The IEP team discussed the change and the Parents had the opportunity to voice their objection. Having said all of that, the question is whether the team should have placed [Student] on a Diploma-track program for those school years.

*MCPS’s proposed IEP’s for the 2011-2012 and 2012-2013 school years were not reasonably calculated to enable [Student] to receive educational benefits in the least restrictive environment*

Under *Rowley’s* second prong, the question is whether MCPS’s proposed IEPs for the 2011-2012 and 2012-2013 school years were reasonably calculated to enable [Student] to receive educational benefit. “Educational benefit” requires that “the education to which access is

provided be sufficient to confer *some* educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200 (emphasis added). *See also, MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 526 (4<sup>th</sup> Cir. 2002), citing *Rowley*; *see also A.B. ex rel D.B. v. Lawson*, 354 F.3d 315 (4<sup>th</sup> Cir. 2004). The IEP is not required to “maximize” educational benefit. It does not require the “ideal.” *A.B. ex rel D.B. v. Lawson*, 354 F.3d at 330. Its goals are more “modest.” *Id.* The IDEA requires an IEP to provide a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990). It is sufficient that the benefit conferred by the IEP be “meaningful,” not merely “trivial” or “*de minimus*.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *see also, Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6<sup>th</sup> Cir. 2004), *cert. denied*, 546 U.S. 936 (2005); *Bd. of Educ. of Frederick County v. Summers*, 325 F. Supp.2d 565, 576 (D. Md. 2004).

Further, while a school system must offer a program which provides some educational benefit, the choice of the particular educational methodology employed is left to the school system. *Rowley*, 458 U.S. at 208. “Ultimately, [IDEA] mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of that education to state and local school officials.” *Barnett v. Fairfax County*, 927 F.2d 146, 152 (4<sup>th</sup> Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).<sup>19</sup>

In addition to the IDEA’s requirement that a child with disabilities receive some educational benefit, the child must be placed in the “least restrictive environment” to achieve FAPE, meaning that children with disabilities must be educated with children without disabilities in the regular education environment to the maximum extent appropriate; separate schooling or other removal from the regular educational environment should occur only when the nature or severity of the

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<sup>19</sup> The IDEA is not intended to deprive educators of the right to apply their “professional judgment.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997).

child's disability prevents satisfactory education in regular classes with the use of supplementary aids and services. 20 U.S.C.A. § 1412(a)(5)(A) (2010); *see also*, 34 C.F.R. § 300.114(a)(2)(i) and 300.117 (2012).

The IDEA has always expressed a statutory preference for educating children with learning disabilities in the least restrictive environment with their non-disabled peers, concerning which the IDEA provides at 20 U.S.C. 1412(a)(5)(A) (Supp. 2010) as follows:

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

To the maximum extent possible, the IDEA seeks to mainstream, or to include, the child in regular public schools; at a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). To this end, the IDEA requires public agencies like MCPS to offer a continuum of alternative placements that meet the needs of children with disabilities for special education and related services. 34 C.F.R. §§ 300.114-16. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. 34 C.F.R. §§ 300.114- 116, 300.38; COMAR 13A.05.01.10B.

Although the IDEA requires specialized and individualized instruction for a learning- or educationally-disabled child, it also mandates that “to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities,” must be “educated with children who are not disabled[.]” 20 U.S.C.A. § 1412(a)(5)(A). “Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the

school that he or she would attend if nondisabled.” 34 C.F.R. §§ 300.116(b). “In selecting the [least restrictive environment], consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.” 34 C.F.R. §§ 300.116(d). “A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.” 34 C.F.R. § 300.116(e).

The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. *Honig v. Doe*, 484 U.S. 305 (1988); *Hartmann v. Loudon County Bd. of Educ.*, 118 F.3d 996 (4<sup>th</sup> Cir. 1997). Removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved. 34 C.F.R. § 300.114(a)(2)(ii). In some instances, a FAPE might require placement of a child in a private school setting that would be fully funded by the child’s public school district. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. at 369.

The Fourth Circuit in *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4<sup>th</sup> Cir. 1989), followed the *Sixth Circuit’s* mainstreaming standard, stating as follows:

The [IDEA]’s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child. As the Sixth Circuit Court of Appeals stated:

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive

force in the non-segregated setting.

*DeVries* at 878-79, *quoting Roncker v. Walter*, 700 F.2d 1058, 1063 (6<sup>th</sup> Cir. 1983), *cert. denied*, 464 U.S. 864.

In *Hartmann v. Loudon County Bd. of Educ.*, 118 F. 3d 996, 1001 (4<sup>th</sup> Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998), the Fourth Circuit reconfirmed the mainstreaming standards set forth above, noting that the IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate. Nevertheless, both *DeVries* and *Hartmann* mandate that school systems mainstream all disabled children unless the one of following situations exist:

- The disabled child cannot receive educational benefit from a general education class;
- Any marginal benefit from including a student in general education is significantly outweighed by benefits that feasibly could be obtained only in a separate instructional setting; or
- The disabled child is a disruptive force in the general education environment.

MCPS argued that [School 1] was the least restrictive environment in which to implement [Student]'s IEP. More specifically, MCPS stated as follows:

When [[Student]] was in highly supported ABA program such as the [PROGRAM 1] program, she did well. When she was in programs that were not supported, that were not ABA, she did not do well.

....

[W]hen [Student] was at [School 3] in an [PROGRAM 4] program with very little support, despite the fact that her FBA and BIP were implemented, her behaviors were very challenging, challenging to the point that it impeded not only [Student]'s ability to learn but her classmate's ability to learn, and when you look at the programs that she's attended over the years, it just becomes very evident that [Student] requires [[School 1]] the program that has been recommended twice now.

....

There is absolutely nothing in the record to say that [Student] is on a diploma track, that [Student] is doing work that would allow her to pass the Maryland School Assessments...[nor] any reasonable expectation of achieving a diploma.

(Tr. 737-38.)

The Parents respond that [Student] is cognitively capable of earning a diploma and, thus, [School 1] was an inappropriate placement for both school years at issue and MCPS should have placed [Student] in the least restrictive placement, at her residence school, [School 4], with appropriate supports. They claim it is a disservice to [Student] to put her on a Certificate track at such a young age.

When the IEP team was reviewing [Student]'s placement for the 2011-2012 school year, it had a great deal of information from which to conclude that [Student] could not be mainstreamed at [School 4] as the Parents request. [Student] had demonstrated a need for a small, highly structured program, with ABA instruction and a low student-to-teacher ratio. [Student] did well at [PROGRAM 1] under these conditions. [Student] did less well at [Program 2], where she did not receive ABA instruction and the program in general was less structured than [PROGRAM 1]. [Student] did better at the more structured [PROGRAM 3] than at [Program 2], but she still lacked the ABA instruction from which she had already received benefit. Indeed, Ms. XXXX testified that in evaluating whether [Student] should move from XXXX to [School 3] for kindergarten the IEP team did not focus on her behavior because her behavior issues had improved. Unfortunately for [Student], [School 3] proved too unstructured and she did very poorly in all aspects of her educational program and her maladaptive behavior worsened to the extent that she was not available for learning.

The Parents assert that [Student] was unsuccessful at [School 3] in large part because school staff did not implement her BIP. In support, the Parents pointed to the MCPS's improper conclusion that [Student] did not need a BIP. Ms. XXXX testified that such information on the IEP is correct because [Student] already had a BIP at [School 3] and [Student] therefore did not need one. Ms. XXXX testified that the life of a BIP is one year and [Student]'s was not scheduled to expire until March 2011. It is impossible to know what the Maryland State Department of Education intended when it asked on the IEP whether a student needs an BIP –

that is, whether it meant that the team acknowledges that the Student already has one that the school district was implementing or, as Ms. XXXX suggested, that the Student needed a new BIP. At worst, the information solicited on the IEP form is confusing. [School 3] was in fact implementing a BIP, irrespective of how one might interpret the form.

The Parents alternatively assert that if [School 3] was implementing [Student]'s BIP, it was not doing so with fidelity. Ms. XXXX testified that she observed [Student] at [School 3] in February 2011. According to Ms. XXXX, [Student] had a one-to-one aid who was offering behavioral support, but [Student] was receiving negative attention for her maladaptive behaviors, [Student] was manipulative, and staff cajoled and coaxed her, and she was unreasonably challenged by having too many transitions in her day. Ms. XXXX opined that behavioral supports were not implemented as systematically as necessary and that [School 3] was simply too much for [Student] to manage. I cannot conclude from one observation that [School 3] staff was not implementing [Student]'s BIP with fidelity. At the hearing, the Parents requested that MCPS produce data showing the extent to which [School 3] implemented the BIP and [Student]'s rate of progress. MCPS refused, and the Parents did not pursue the issue. Thus, I am left with Ms. XXXX's persuasive testimony that her staff did in fact implement the BIP. As [School 3]'s principal, Ms. XXXX is in a better position to know that Ms. XXXX.

MCPS asserts that [Student] also failed at [School 3] because she was absent for a total of nearly 50 days over the course of the year. Ms. XXXX opined that the absences contributed to [Student] not receiving educational benefit. [Student] was sick during the year and was unable to attend school. It is reasonable to conclude that so many absences interfered with her ability to progress.

Notwithstanding any learning problems that resulted from missing so much school, [School 3] was an inappropriate placement for [Student]. Her maladaptive behaviors were so severe during that school year that when the IEP team considered her placement for the next



school year, 2011-2012, her behavior was a significant factor. Given [Student]’s educational history, the team’s belief that [Student] needed a far more restrictive program than Ms. XXXX’s recommended mainstream class was well founded. .

[School 1] on its face seemed like an ideal choice. The Student was in a small self-contained class with a lower student to teacher ratio and ABA instruction. [School 1]’ Program is very similar to the XXXX School, which [Student] has attended since January 2013 and where she has received educational benefit. The Parents agree that [School 1] is a highly-regarded program for students with autism, and they do not doubt the sincerity of the IEP team’s decision to place her there. Although the Parents wanted [Student] to attend her residence school, their fundamental disagreement with [School 1] was that [Student] would not have the opportunity to pursue a Diploma.

MCPS asserts that [School 1] students may eventually progress to a Diploma track program; that is what happened to two students in the 2011-2012 school year. Whether [Student] may eventually matriculate from [School 1] and pursue a Diploma in another program is not the issue.

Ms. XXXX offered undisputed testimony that an IEP’s goals and objectives must align with whether the student is pursuing a Diploma or a Certificate, and a student on a Certificate track will not necessarily receive education in the general education curriculum. It goes without saying that the decision to pursue a Diploma or a Certificate has lifelong consequences. A Diploma certifies that a student has completed the State’s enrollment, credit, and service requirements, has completed the local school system’s requirements, and has successfully completed the MSAs. COMAR 13A.03.02.09B. A student who pursues a Certificate is not instructed with the regular Maryland curriculum and is not expected to attend college. A Certificate is generally awarded to a student with a disability who has “developed appropriate skills for the individual to enter the world of work, act responsibly as a citizen, and enjoy a

fulfilling life, with the world of work including but not limited to: (i) [g]ainful employment; (ii) [w]ork activity centers; (iii) [s]heltered workshops; and (iv) [s]upported employment[.]”  
COMAR 13A.03.02.09D(1)(a).

If [Student] were able to pursue a Diploma, it is axiomatic that an IEP that was geared toward a Certificate, even in first and second grades, would not have been reasonably calculated to provide her with educational benefit. Bearing in mind that IDEA mandates that students receive education in the least restrictive environment and the least restrictive environment on the continuum is the regular education classroom with regular education peers *who are pursuing a Diploma*, an unwarranted placement in a Certificate program violates the IDEA’s least restrictive environment requirement.

The evidence does not support MCPS’ assertion that [Student]’s behavior *and* her low cognitive ability prompted the IEP team in May 2011 to place her at [School 1]. Indeed, the record fails to establish that the IEP team gave any serious consideration to [Student]’s cognitive ability in deciding her placement in either year.

Ms. XXXX was asked whether the IEP team discussed [Student]’s cognitive ability at meetings in July and August 2012. She testified “I believe we had a discussion about all of her areas of strengths and needs.” (Tr. 805.) That response tells me very little about whether the team had a reasonably thorough discussion of [Student]’s ability to earn a Diploma.

XXXX XXXX, who is an expert in special education with an emphasis on early childhood education of children with autism and who chairs MCPS’s IEP meetings for students with autism, gave crucial testimony on this point. Ms. XXXX explained why she agreed with the team that [Student]’s educational needs could be appropriately met at [School 1]:

So at th[e] time of the May IEP meeting, she was engaging in high rates of problem behaviors that really made her unavailable for instruction. So we discussed having her come to the Autism Program. We discussed working on the problem behaviors and we talked about the [fundamental life skills] curriculum and how it relates to the State curriculum. And then we talked about even if, once

we got her behaviors under control, we could even explore other options.

(Tr. 959.) Ms. XXXX was then asked what weight, if any, the team gave to [Student]'s cognitive functioning in reaching a programmatic recommendation, and she testified as follows:

I don't believe we used that information at the time of the May meeting. I think we looked at her current rate or progress and her academic skills. We looked at her behaviors that were impeding her learning. We looked at what she needed. The private therapists were recommending similar strategies [for managing her behavior] and we made a decision based on the information that we had at the time.

(Tr. 957.)

Ms. XXXX was questioned about whether she saw anything in Dr. XXXX's report led her to believe at the time she reviewed it in July 2012 for [Student]'s second grade placement that [Student] had any reasonable expectation of pursuing a Diploma, and she replied:

I don't think that I really looked at it that way, to say that if she had this, she can. Because I think you have to incorporate all of who the child is, their availability for learning, their behaviors, their language. And not only their verbal comprehension, but their reasoning skills and their ability to kind of take in and analyze themselves and then pull to and respond.

And so I didn't really look at this report to say, oh wow, a score of 81 equals a high school diploma.

I think that this is hard for me to determine today. I think that if we look at where she was at the time of her behaviors, I would say that, at that time, that her behaviors were some impeding her learning that, at that time, the diploma was not something that was available to her. But that's the reason why we have that conversation every year.

(Tr. 973-74.)

Unquestionably, the team focused on [Student]'s behaviors and not her cognitive ability. Even when Ms. XXXX talked about what it would take for [Student] to leave the autism program and pursue a Diploma, she again emphasized [Student]'s interfering behaviors:

Well, it's not a checklist per se, but certainly we are looking at learning behaviors. So we are looking to see that there are not interfering behaviors, that the child can learn from a group, that there is some independent learning, as most classrooms are now -- there is a lot of independent learning expected.

We look at the child's language skills as well, their social interaction

skills, if they are able to learn from their peers, because that is what they use in high education as well. Not higher education as in college, but as they {get] older.

(Tr. 974-75.)

Ms. XXXX testified that she observed [Student] on July 23, 2012, in [Student]'s home-based program. She believed that [Student] was working on pre-kindergarten or kindergarten skills, that her academic skills were consistent with a kindergartener and she was about one-and-one-half grades below grade level. In response to a question about whether, at that time, she had any realistic expectation of pursuing a Diploma, Ms. XXXX testified "I would - - I don't know what her progress would be, but at that time, she would have a lot of catch-up to do in order to receive a [D]iploma." (Tr. 983.)

Ms. XXXX further testified that [School 1] is the only program that can decrease [Student]'s problem behaviors and make her available for learning and there is no reason to believe she will find success in another setting. On the contrary, the evidence shows that [School 1] is the only self-contained autism program that MCPS administers that can possibly decrease her behaviors. Ms. XXXX conceded, however, that [Student]'s behaviors improved in a very stringent environment, such as her home-based program, with a one-to-one instructor. Thus, Ms. XXXX was incorrect to say that [School 1] is the only program that can decrease [Student]'s problem behaviors or that she could not find success in another setting.

What I glean from Ms. XXXX's testimony as a whole is that the primary reason for the team's decision to place [Student] at [School 1]'s was that her behavior impeded her ability to learn, not that she was cognitively unable to learn. [Student] surely has significant delays. If [Student] were on grade level over the last two years, she would not have needed special education. Thus, the fact that she was and remains behind, even one-and-one-half grade level behind as Ms. XXXX believes, is not persuasive evidence that [Student] was unable to pursue a Diploma.

It was unrealistic to expect at the time MCPS convened IEP meetings and recommended [School 1] that [Student] would receive educational benefit at [School 4], even with a BIP and significant supports. The IEP team, however, never considered placing [Student] in a small, highly structured, self-contained autism program with ABA instruction and a low student-to-teacher ratio where staff could manage or at least attempt to manage her behavior *and* where she could pursue a Diploma because no such program exists within the Montgomery County public school system. Forcing [Student] to forgo pursuing a Diploma *in the first and second grades* because the school district does not have an appropriate program violates the spirit of the IDEA in general, and its least restrictive alternative requirements in particular. [Student]’s interfering behaviors may have justified keeping her out of the Parents’ preferred placement at [School 4], but [School 1] was an equally inappropriate placement because a preponderance of the evidence shows that [Student] possessed the cognitive ability to pursue a Diploma.

With regard to MCPS’s assertion that there is no reasonable expectation that [Student] will ever pass the MSAs (which a Diploma student must pass), XXXX XXXX testified that successful performance on the MSAs requires that a student have a high degree of language, even with the most accommodations available. [Student] was going into the first grade when MCPS proposed that she enter [School 1] for the 2011- 2012 school year. It is not unexpected that, as a student with autism – and thus development delays – [Student] would not *yet* possess the requisite language skills. Moreover, [Student]’s lack of fluency in English was an impediment that she was successfully working to overcome. The record shows that [Student] had the ability to achieve the necessary skills.

Ms. XXXX XXXX further testified that [Student] is not acquiring the necessary coursework that would allow her to pursue a diploma. When Ms. XXXX observed [Student] in her home-based program, [Student] was working on basic concepts, such as the opposites dirty/clean and empty/full, which is a pre-k concept and was learning to add single digits, which

is a skill generally learned at the end of kindergarten. Ms. XXXX observed that [Student] was two- or perhaps one-and-one-half levels below grade level and, in short, she was working at the kindergarten level. Again, as a student with a disability, it stands to reason that [Student] would work below grade level. At this early stage, whether she is working below grade level does not dictate whether [Student] should be permitted to pursue a Diploma. Rather, the question is whether [Student] has the cognitive ability to learn and to pursue a Diploma *with appropriate special education and related services*. A preponderance of the evidence establishes that [Student] had such ability in the two school years at issue.

When the IEP team met to consider the 2011-2012 school year, it had available a variety of information about [Student]'s cognitive ability, including the Developmental Profile prepared in June 2010. The purpose of the profile was to determine whether [Student] was a student with an educational disability, and therefore eligible for special education and related services, not to determine whether [Student] possessed the cognitive ability to pursue a Diploma. The record does not include any one document produced to answer that question, nor would I expect such a document. Dr. XXXX and XXXX XXXX agreed that no one score assesses cognition, and a professional must develop an opinion about cognition based on available information. The profile nevertheless includes a wealth of important information about [Student]'s cognitive ability, as follows:

Since her entry into the [PROGRAM 3] program in March 2010, [Student] has made steady progress in her acquisition of pre-academic skills. In February and May [2010], [Student] was assessed using the MCPS Pre-Kindergarten Reading Assessment Program (MCPSAP Reading). The MCPSAP Reading is a formative assessment that monitors students' program in foundational literacy skills over the course of the school year. The four foundational reading skills assessed are oral language letter identification, phonemic awareness and concepts about print. Based upon the accommodations outlined in her IEP, [Student] was given frequent breaks and tested in a separate room with minimal distractions. During breaks in between testing sections, [Student] engaged in a preferred activity for a few minutes such as reading a book or playing with dolls. [Student]'s attention span fluctuated during the testing . . . sessions and the assessment was complet[ed] over the course of two days.

When [Student] was tested using the MCPSAP Reading assessment in February, she achieved an overall score of 70 out of 94 possible points. In May 2010, [Student] demonstrated further increase in her oral language skills, phonemic awareness and understanding of concepts about print, and some regression in her letter identification skills, scoring a total of 79 out of 94 possible points on the MCPSAP Reading assessment. In February, [Student] scored 21 out of 24 possible points in the oral language sections of the MCPSAP Pre-Kindergarten Reading assessment. In May, she scored a total of 22 out of 24 points. [Student]'s performance during the Oral Language section of the assessment demonstrated her strengths in her ability to identify pictures, the functions of familiar objects and to verbally imitate sentences up to 6 words. In the letter identification section of the assessment, [Student] demonstrated strengths in her ability to expressively identify most upper and lower case letter so the alphabet. During the May assessment, she may have identified some of the letters incorrectly because she had difficulty visually attending and needed frequent reminders to look at the test materials.

During the May testing session, [Student] demonstrated overall progress in her acquisition of phonemic aware skills. In February, she score[d] 6 out of a possible 12 points in the phonemic awareness section of the test. In May, she scored 9 out of a possible 12 points. In February, she did not appear to understand the concept of rhyme and did not identify any of the pairs of rhyming words correctly. In both the winter and the spring, [Student] demonstrated consistent mastery of beginning sounds, identifying 6 out of 6 beginning sounds correctly out of a field of three possible words represented by pictures. [Student] has made great progress in . . . her understanding of concepts about print. In February, [Student] was able to identify the front of the book and demonstrated directionality, reading from left to right. During the May testing session, [Student] identified the front of the book, discriminated between print and pictures, and demonstrated directionality.

[Student]'s developing literacy skills are also reflected in her performance during a variety of classroom activities in the [PROGRAM 3] classroom. After repeated readings of preferred books, [Student] will answer a variety of "What," "[W]ho" and "Where" questions about the story. She tends to listen more actively to stories when they are paired with multi-sensory props such as puppets and stuffed animals and read with great affect. For example, while reading Eric Carle's The Very Hungry Caterpillar, [Student] matched the quantity of fruit to printed numerals using felt board manipulative[s] and a caterpillar/butterfly puppet. When new books are initially introduced, [Student] will make predictions about the story topic based upon the cover of the book and the title. While reading big books, [Student] enjoys using a pointer to "read" words and demonstrates and understanding of directionality. She is beginning to decode some familiar sight words while "reading" b[i]g books."

While playing a rhyming words check-in game, [Student] identifies pairs of rhyming words inconsistently, depending upon her level of distractibility. She demonstrates a strong understanding of letter sounds while playing a letter-sound matching game with "Fridge Phonics" magnets and picture symbols. Using a

variety of classroom materials, [Student] will sort a variety [of] items by beginning sounds after initial cues in a field of two. She imitates writing most letters of the alphabet and writes her first name in correct . . . case with inconsistent legibility. She imitates making many letters with “Handwriting without Tears” sticks. In terms of [Student]’s literacy skills, her strengths including identifying concepts about print, letter identification, phonemic awareness, and oral language. Areas of need include increasing her reading comprehension skills.

Joint Ex 3, Bates 4-6.

With regard to mathematics,

In February and May 2010, [Student] was assessed using the MCPS Pre-Kindergarten Math Assessment Program (MCPSAP Math). The MCPSAP Math is a formative assessment that monitors students’ progress in foundational math skills over the course of the school year. The concepts assessed are counting with one-to-one correspondence, cardinality (quantity), numeral recognition, and sorting by given attributes. In February, [Student] scored a total of 8 out of 18 points on the MCPSAP Math. In May, [Student] scored a total of 11 out of 18 possible points.

During the May assessment, [Student] demonstrated progress in her acquisition of math readiness skills. She counted groups of 7 and 10 bears and pictures of 5 and 10 geometric shapes with one-to-one correspondence correctly. She was able to make a group of 2 bears and identified how many bears were in a group of 3 bears without recounting. [Student] identified numerals 1-9 in print receptively in a field of 4 to 5 numerals. When she was asked to sort a group of attribute blocks by color, shape and size, [Student] became frustrated and tried to throw the blocks. In February, [Student] had difficulty following most tasks on the MCPSAP Math. She counted only one set of 5 bears with one-to-one correspondence and identified numerals 1-9 correctly.

[Student] demonstrates her understanding of math concepts on a more consistent basis during a variety of activities in the [PROGRAM 3] classroom. When she is the “calendar helper,” she counts all of the days in the month and identifies the day, date, and month with some verbal prompts. In addition, [Student] demonstrates an ability to count by rote up to 50. While playing a game of “Sing a Skill” using picture symbols representing positional and directional words, [Student] demonstrates an understanding of most prepositions. After taking a turn to spin the wheel, [Student] followed each direction to sit on top, next to, inside, in front of and behind a barrel. During sorting activities in the [PROGRAM 3] classroom, [Student] is able to sort a set of objects by one attribute such as color or shape, but [h]as difficulty regrouping the same set of objects according to a variety of different attributes. After singing the “Pattern Song,” [Student] has demonstrated her ability [to] replicate and extend patterns using a variety of items such as fruit, different colored utensils, shapes, etc. Using a variety of textures, [Student] extended simple ABAB, AABGB, and ABC patterns while making a textured pattern collage. Overall, [Student] has made steady progress in her acquisition of math skills, however increasing her



understanding of quantity and learning to sort and regroup items by a variety of attributes continue to be areas of need.

Joint Exhibit 3, Bates 6-7.

I conclude from the above profile that [Student] was acquiring important skills and possessed the cognition to continue doing so and to progress toward a Diploma. Her behavior and placement at [School 3] may have impaired her ability to continue acquiring skills during that kindergarten year, but it is undeniable prior to then she was acquiring them. To conclude after an unsuccessful experience at [School 3] that she suddenly lacked the cognition to move forward in her academic career is simply incorrect and a preponderance of the evidence shows otherwise.

The IEP team also had XXXX XXXX's Bilingual Psychological Assessment report. Ms. XXXX advised that the test results should be viewed with extreme caution for four reasons: she administered the tests in XXXX and in English, the tests contained an inappropriate representation in the normative sample because the sampled students had a different background than [Student], some of the test instruments were culturally specific (and, again, not [Student]'s XXXX culture), and [Student]'s short attention span and her reluctance to respond without breaks and food rewards was a factor to be considered. To be sure, Ms. XXXX reported that [Student]'s skills are delayed. That said, Ms. XXXX further noted as follows:

[Student]'s level of performance varies according to her mood and the environment. Consequently, no definitive conclusions should be reached about her overall ability until her cognitive strengths and weaknesses are better understood. Until then, the current data should be used as the base line against which her progress in the future [is] measured. Strengths were noted in verbal quantitative reasoning (scaled 8[0] Average Range) and in verbal working Memory (scaled Score 80 Average Range).

(Joint Ex. 2, Bates 12.) Accordingly, it is unreasonable to draw any conclusion from the test results that [Student] is not cognitively able to learn and to pursue a Diploma.

Viewing the two reports together, I conclude that [Student] may well have been facing

significant cognitive deficits going into the first grade, and only time will tell if they are insurmountable in terms of her pursuit of a Diploma. Nevertheless, a preponderance of the evidence establishes that she possessed the cognitive ability to do so if she were placed in a small highly structured program with ABA instruction and a low student-to-teacher ratio. Such a placement has the potential for meeting her behavioral and academic needs. Again, the only reason the IEP team did not consider such a placement is that one does not exist in the county's public school system.

In anticipation of [Student]'s placement in the 2012-2013 school year, the IEP team had additional information from Dr. XXXX's Psycho-Educational Evaluation of March 2012. Dr. XXXXs' full scale IQ for [Student] was 62, which is in the intellectually disabled range, but Dr. XXXX also cautioned against just looking at the number.

Dr. XXXX administered a battery of tests, but she testified that the two most crucial tests for determining how smart someone is are verbal comprehension test, which tests verbal reasoning, and the perceptual reasoning, which tests non-verbal thinking and reasoning. Dr. XXXX tested [Student]'s skills in these areas using the WISC-IV. [Student]'s verbal comprehension score was in the low-average range and her perceptual reasoning was in the extremely low range. Dr. XXXX testified that when she was a psychologist for MCPS hundreds of children, at the least children with [Student]'s profile, were on a Diploma track, although she could not say whether any of those children actually received a Diploma because she did not follow their progress.

Furthermore, Dr. XXXX testified that [Student]'s behavior interfered with the testing, except that [Student] stayed focused when a test involved strictly verbal information. Interfering behaviors included a need for breaks, shifting in her seat and meltdowns. Dr. XXXX noted that [Student] has strong verbal skills.

Dr. XXXX opined that the WISC-IV does not give an accurate assessment of [Student]'s

skills for two reasons: her primary language was still XXXX, even though she was very adept at English at the time, and her behavior was an interfering factor. Thus, she opined that [Student]'s cognitive ability is actually higher than the test scores would otherwise suggest, and nothing in [Student]'s test results suggested that she is incapable of pursuing a Diploma.

MCPS sought to discredit Dr. XXXX for not having included in her report that she administered to [Student] the WISC-IV Integrated rather than just the WISC-IV. Dr. XXXX conceded that for completeness she should have included the word "Integrated" in her report. She testified that the WISC-IV Integrated includes additional tests but she, in fact, administered the WISC-IV. Dr. XXXX testified that MCPS mischaracterized the WISC-IV Integrated as less rigorous than the WISC-IV. She testified that she administered the standard battery of tests to [Student] that she would on most other students, including for example, the test of verbal abstract reason and the vocabulary test.

MCPS's witness, Ms. XXXX, testified that best practice required Dr. XXXX to note within the four corners of her report that she had administered the WISC-IV Integrated because it encompasses additional subtests. She explained that the WISC-IV includes ten core subtests that are also in the Integrated version and the Integrated version includes an additional three tests that are not part of the WISC-IV. Ms. XXXX testified that some of the Integrated subtests are in a multiple choice format and it is important to know that when interpreting the test results. Dr. XXXX conceded that best practice required the inclusion of the word Integrated in her report.

While I understand that the Integrated version may have additional subtests and professionals reading the report need to know specifically what subtests were administered, the more important inquiry at this point is whether Ms. XXXX, now knowing what subtests Dr. XXXX administered, disagrees with Dr. XXXX's ultimate findings. Ms. XXXX was asked two important questions:

Q. What evidence, if any, have you seen anywhere in the record to

indicate to you that [Student] at this time has any reasonable expectation of achieving the course work and passing the assessments that would be required for a Maryland state diploma by age 21?

A. I can't really answer that because I'm not familiar enough with the core standard to know.

Q. To what extent, if any, do you believe that [Student] has a realistic expectation of achieving a high school diploma at this time?

A. I can't really answer that. I'm not familiar enough with the core standards.

With due respect to Ms. XXXX, who is a school psychologist and who testified as an expert in school psychology with an emphasis on autism spectrum disorders, her testimony about Dr. XXXX's report does not cause me to question Dr. XXXX's ultimate conclusion about [Student]'s cognitive ability and her ability to pursue a diploma.

Dr. XXXX is an expert in psychology who worked for many years for MCPS. She is currently retired from MCPS and in private practice conducting psychological testing. Her credentials are unassailable and, absent compelling evidence to the contrary, I accept her findings and her ultimate conclusions about [Student]'s cognitive ability, particularly as Ms. XXXX was unable or unwilling to offer an opinion to the contrary.

Moreover, as the IEP team reviewed [Student]'s placement options for the 2012-2013 school year, it had perhaps the most compelling evidence of [Student]'s cognitive ability to continue acquiring pre-academic and academic skills necessary to pursue a Diploma: her educational progress in the home-based program during the prior school year. [Student] was still below grade level to be sure, but, again, that is expected given that she has an educational disability. Her behavior improved in the small, structured environment with ABA instruction and she experienced academic progress.

Finally the Parents introduced evidence of events occurring after January 23, 2013, and MCPS objected on relevancy grounds. MCPS argued that this so-called after-occurring or after-acquired evidence does not help me decide whether it offered FAPE to [Student] for the 2011-2012 and 2012-2013 school years. The after-occurring evidence was related to [Student]'s

progress at the XXXX School. MCPS argued that the IEP team's placement decisions are based on information it had at the time the decisions were made. As discussed, I have ruled that, based on the evidence that the team had at the time it made each placement decision, the IEPs were not reasonably calculated to provide educational benefit in the least restrictive environment. I do not need the after-occurring evidence to reach that finding, but such evidence is relevant to whether the Parents' unilateral placement at the XXXX School is appropriate.

***The Parents are entitled to reimbursement for [Student]'s unilateral placement in the 2011-2012 and 2012-2013 school years***

When a school district fails to provide a FAPE, the child's parents may remove the child to a private school and then seek tuition reimbursement from the state. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). Under the IDEA, parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (citing *Burlington* at 373-374). Parents may recover the cost of private education only if (1) the school system failed to provide a FAPE; (2) the private education services obtained by the parent were appropriate to the child's needs; and (3) overall, equity favors reimbursement. *Carter*, 510 U.S. at 12; *M.M. ex rel. D.M.*, 303 F.3d at 533-34. The private education services need not be provided in the least restrictive environment. *See, e.g., M.S. v. Fairfax County School Bd.*, 553 F.3d 315, 327 (4<sup>th</sup> Cir. 2009).

MCPS argued that [Student]'s placement in the home-based program for the 2011-2012 school year and her placement in the home-based program followed by the XXXX School in the 2012-2013 school year were not appropriate because they were too restrictive. Ms. XXXX, the Parents' witness, testified that the home-based program was too restrictive and she testified that she came to believe the XXXX School was too restrictive not long after [Student] started there. While school systems are required to provide a FAPE in the least restrictive environment (LRE),

private placements only have to be proven appropriate. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

In both the home-based program and the XXXX School, [Student] received educational benefit from ABA instruction. When XXXX XXXX was asked about why the team was unwilling to place [Student] at [School 4]'s school-based learning center instead of [School 1], she testified about [Student]'s need for ABA instruction:

The data that we had from the family, as well as from the schools, is that ABA was an effective methodology to be used, that she does better in a small class with more staff, and that the less restrictive environments that she had tried thus far, she had failed in.

So I really felt that getting her back in school in a comprehensive elementary school, which requires transitions inside and outside of the classroom, using the effective strategies that the family had shared with us and that we believed to be still effective, were the ABA and getting her in the school, using ABA, which we knew was going to be the right methodology, finding her successfully in an elementary school, and then we could move on from there as appropriate.

(Tr. 990.) Intensive ABA instruction allowed [Student] to make progress on her academic goals and objectives and on behavior issues. MCPS recommended that [Student] receive ABA instruction at [School 1], and thus MCPS cannot reasonably argue that the Parents' unilateral ABA placements were inappropriate on that ground.

[Student]'s placement in the XXXX's day-care center was not appropriate, if for no other reason than because the instruction was in XXXX at a time when [Student] desperately needed to learn English. Ms. XXXX testified that [Student]'s time in day care was not part of [SCHOOL 2]'s home-based ABA program, and thus the fact she had inappropriate three- and four-year-old XXXX-speaking role models is irrelevant. Ms. XXXX testified that it was nevertheless appropriate for [Student] to take the language and other skills she gained in the home-based ABA program and practice them in the day care where she would have peer models for turn taking, sharing, engaging in story time and song, etc.

Ms. XXXX explained the connection between [Student]'s XXXX-language day-care

program and [SCHOOL 2]'s home-based program as follows:

So when [Student] had gained sufficient skills in language and had practiced her play skills and her social skills with a therapist and became pretty fluent, and behavior management over her tantrums and noncompliance were under control at low levels, then we decided to start giving her opportunities in the same setting as those peers, to go downstairs during the structured morning circle and free play opportunity so we could start to have models for turn taking, models for sharing toys, engaging in the song and story time that the XXXX was providing in the morning.

(Tr. 633.) Ms. XXXX further testified that [Student]'s exposure to three- and four-year-old XXXX-speaking children was inappropriate. (Tr. 631-632.) [Student] has speech language needs that demanded she receive education in English. The evidence is clear that [Student]'s scores on standardized tests are skewed downward because her English is poor. [Student]'s ABA therapist worked with her in the day-care center, making the line between the two programs blurry. The evidence is abundantly clear, though, that [Student]'s time in the day-care center with XXXX-speaking children was inappropriate. [Student] needed to learn English. Dr. XXXX offered undisputed testimony that [Student]'s lack of fluency in English negatively affected her assessment scores, and it was therefore crucial that she learn and use English in an educational setting. MCPS further argues that the XXXX School is inappropriate because [Student]'s social groups include nondisabled children who, for the most part, are siblings of [SCHOOL 2]'s students and, although the Parents are insistent that [Student] attend school with verbal peers (so that she has role models), the groups also include as many as two nonverbal children. Ms. XXXX offered undisputed testimony that using siblings and having nonverbal children in the group is not ideal, but nor is it inappropriate. [School 1]'s exposure of its students with autism to nondisabled peers through a buddy system with fourth graders from regular education classrooms. Using siblings is not a far cry from [School 1]'s practice. Using siblings does not render the XXXX School an inappropriate placement.

I find that the Parents are eligible for reimbursement for the cost of their unilateral

placement in the home-based [SCHOOL 2] program in the 2011-2012 school year and from the start of the 2012-2013 school year until [Student]'s transfer to the XXXX School in January 2013, except that the Parents are ineligible for reimbursement for any ABA or other instructional costs associated with the provision of special education and related services to [Student] in the XXXX's day-care center. The Parents are eligible for reimbursement for the cost of their unilateral placement of [Student] at the XXXX School from January 2013 through the end of the 2012-2013 school year.

*[Student]'s placement for the 2013-2014 school year*

The Parents argue that I “must also determine an appropriate program for [Student] moving forward,” meaning the 2013-2014 school year. (Parents’ Memorandum of Law on After-Occurring Evidence, p. 3.) In support, the Parents cited *Ash v. Lake Oswego School District*, 980 F.2d 585 (9<sup>th</sup> Cir. 1992), as holding that it is important to consider the child’s overall needs and not limit a decision to the specific school year in question. That case is clearly distinguishable. The issue in *Ash* was whether a 1989 IEP prepared by the school district could provide educational benefit to the child without placing him in a residential setting. The school district argued that the District Court below erred by focusing on evidence of the child’s educational needs in 1991. The Court of Appeals held that the District Court did not err in finding the 1991 evidence relevant because judgment in the case required the school district to reimburse the parents for past placement *and to support the student’s future residential placement*. *Id.* at 588. Thus, I disagree with the Parents that *Ash* requires me to make a decision about [Student]’s future placement.

Moreover, the Parents filed a complaint about and requested only a remedy for the 2011-2012 and 2012-2013 school years. In the Parents’ most recent amended due process complaint, they wrote:

The parents request that MCPS place [Student] in first grade at her local



school, [School 4]. They further request that during the school day at [School 4], MCPS fund an aide to assist [Student] during her school day to provide support and behavior intervention that could help [Student] be successful in her general education class, with the ability to supplement the general education program with period services from the self-contained special education classroom. The parents also seek reimbursement for their costs for the successful ABA services and [SCHOOL 2] placement during the 2011-2012 and 2012-2013 school years. Finally, the parents request that MCPS reinstate Occupational Therapy<sup>20</sup> and fund [Student]'s home services.

(Joint Ex. 21, p. 9.)

[Student] is expected to have an annual IEP review in August of 2013, presumably to determine her placement for the coming school year. She also is scheduled to have an evaluation in June of 2013. Even if I have the discretion to make a prospective placement decision, it makes little sense to do so without the evaluation results. Rather, an IEP team needs to meet to make a placement decision for the 2013-2014 school year.

### **CONCLUSIONS OF LAW**

I conclude as a matter of law as follows:

1. MCPS failed to offer [Student] a free appropriate public education in the least restrictive environment in the autism program at [School 1] for the 2011-2012 and 2012-2013 years.
2. With the exception of the Student's instruction in the XXXX's day-care center, [Student]'s unilateral placements in a home-based program for the 2011-2012 school year and the home and school-based program for the 2012-2013 school year were appropriate.

### **ORDER**

I **ORDER** that the Amended Due Process Complaint filed by the Parents on February 1, 2013, and amended on March 13, 2013 is **GRANTED**; and

I further **ORDER** that MCPS reimburse the Parents for the cost of their unilateral placement of [Student] in the home-based [SCHOOL 2] ABA program for the 2011-2012 school

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<sup>20</sup> The Parents did not present evidence or argument on this request at the hearing and I have therefore made no findings or conclusion of law.

year, excluding any costs of instruction in the XXXX's day-care center; and

I further **ORDER** that MCPS reimburse the Parents for the cost of their unilateral placement at [Student] in the [SCHOOL 2] home-based and XXXX School programs for the 2012-2013 school year.

May 28, 2013  
Date Decision Mailed

\_\_\_\_\_  
Laurie Bennett  
Administrative Law Judge

LB/

### **REVIEW RIGHTS**

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. §8/413(j) (2008). Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number. The Office of Administrative Hearings is not a party to any review process.