

XXXX XXXX,
STUDENT

v.

BALTIMORE CITY
PUBLIC SCHOOLS

* BEFORE KIMBERLY A. FARRELL,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH Case No.: MSDE-CITY-OT-14-07867

* * * * *

DECISION

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STATEMENT OF THE CASE

On March 6, 2014, XXXX XXXX (Parent), on behalf of her child XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Baltimore City Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). On May 15, 2014, the Parent filed a pleading seeking to introduce an amended Due Process Complaint. Leave to amend was denied in accordance with COMAR 13A.05.01.15C(7).¹

¹ This regulations states:

- (7) In accordance with 34 CFR §300.508, a party may only amend its due process complaint if the:
- (a) Other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to 34 CFR §300.510; or
 - (b) Hearing officer grants permission at any time not later than 5 days before the due process hearing begins.

BCPS did not consent to an amendment of the complaint and the motion to amend was denied by an Administrative Law Judge (ALJ) assigned to review pending motions prior to the time a case is formally assigned to a particular ALJ. This case was then assigned to ALJ James Power, who subsequently discussed and affirmed the denial of leave to amend at a prehearing conference.

This case was originally assigned to ALJ James Power. ALJ Power held a telephone prehearing conference on May 19, 2014. The Parent represented herself; Darnell Henderson, Esquire, Associate Counsel, represented BCPS. By agreement of the parties, the hearing was scheduled on the earliest available dates: Friday, June 20, 2014, Friday, June 27, 2014, and Tuesday through Friday July 8-11, 2014.² ALJ Power issued a Pre-Hearing Conference Report and Scheduling Order (Order) on May 20, 2014. Then ALJ Power passed away suddenly on May 23, 2014. I notified the parties by letter dated June 5, 2014, that the case had been reassigned to me and that the hearing would proceed in accordance with ALJ Power's Order with one very minor exception regarding my requirement that the parties present hearing exhibits in a tabbed and indexed binder.

The Parent emailed a postponement request after the close of business on June 17, 2014. I received it on June 18, 2014. The Parent had not copied BCPS on the request, so I declined to consider it, and notified the parties of receipt of the request and that it was not being considered. The Parent was given the option of re-filing the request with proper documentation and notice to BCPS. She did not renew her postponement request.

On June 19, 2014, BCPS filed a Motion to Exclude Petitioner's Five Day Disclosure Documents and Witnesses. I ruled on the motion at the beginning of the June 20, 2014 hearing day as more fully explained below.

I held the hearing on June 20 and 27 and July 8, 9, and 10, 2014. The evidentiary portion of the case was completed on July 10, 2014, so we did not convene on July 11, 2014 as scheduled. At the hearing, the Parent represented herself. Darnell Henderson, Esquire, represented BCPS. On July 9, 2014, I instructed the parties to submit to me, not later than Friday, July 11, 2014, a document or documents summarizing when changes were made to the

² The dates were chosen after *lengthy* discussion, taking into account the Parent's availability and request that the hearing be scheduled on Fridays, BCPS' counsel's trial schedule, and leave previously scheduled by ALJ Power.

relevant IEPs and what those changes were. BCPS complied with my instructions; the Parent did not.

The parties asked for permission to submit written closing arguments in lieu of presenting oral argument. I granted the request and gave the parties one week, which was until the close of business on Thursday, July 17, 2014, to submit written closing arguments. The Parent left the hearing before BCPS had completed its presentation. I set the due date for closing arguments based on the date the evidentiary portion of the hearing concluded, so the Parent would not have known when written closing argument was due. Accordingly, I sent the parties written confirmation of the July 17, 2014 due date for closing argument. I sent it by email, which seemed to be the parties' preferred means of communication (and which also was likely to result in a quicker notification of the due date to the Parent). I also sent it via the United States Postal Service. BCPS filed its written closing argument on June 17, 2014. The Parent did not file any closing argument.

The hearing dates requested by the parties fell more than 45 days after the triggering events described in the federal regulations, which is the date my decision would have been due. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2013). The Parties had a resolution meeting on March 20, 2014, which they continued to April 2, 2014. On April 2, 2014, the resolution meeting was continued to April 29, 2014. The Parent did not attend the scheduled April 29, 2014 resolution meeting and sent notice to BCPS on April 30, 2014, that she no longer wished to participate in the resolution process. ALJ Power considered the triggering event to be the April 2, 2014 resolution meeting and advised the parties during the prehearing conference that the forty-five day period for issuing a decision was within a day of the date the May 19, 2014 prehearing conference was being held. Even if the triggering event is considered to be a

later date, such as April 29 or 30, 2014, the first available hearing dates fell more than forty-five days after the triggering event.

The issue of timing was discussed in the prehearing conference and the parties waived the forty-five day time limit, agreeing that ALJ Power should have an extension of time of thirty days from the close of the record to issue the decision. This was documented in the Order. The exact date was to be set when the record actually closed. The record closed on July 17, 2014. Thirty days from that date is Saturday, August 16, 2014. This decision is issuing prior to August 16, 2014, and is therefore falling within the boundaries set by law and the agreement of the parties. 34 C.F.R. 300.515; Md. Code Ann., Educ. § 8-413(h) (2014).

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2013); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES³

1. Whether the Student is receiving those services called for in his IEP.
2. Whether the Student's placement is appropriate.
3. Whether the Student was entitled to extended school year services for the summer of 2013.
4. Whether the Parent is entitled to an Occupational Assessment for the Student.

³ The issues are listed here as they appeared in the Order. During the hearing, the Parent clarified that she was not alleging any problems prior to August 2012. As to all issues, she set the starting date of her complaint as August 2012.

5. Whether the BCPS committed a procedural violation with respect to IEP meetings and notices for denial of services.
6. Whether the Student is entitled to services other than what is called for in the IEP.
7. Whether the Student was illegally removed from gym class.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Student:⁴

Student #1 IEP Team Meeting Attendance Sheet, March 11, 2014
Student #2 IEP Team Meeting Attendance Sheet, February 11, 2014

I admitted the following exhibits on behalf of BCPS:⁵

Notice of IEP Team Meeting

City School 7 - Notice of IEP Team Meeting 3/07/14
City School 9 - Notice of IEP Team Meeting 1/08/14
City School 10 - Notice of IEP Team Meeting 8/22/13
City School 12 - Notice of IEP Team Meeting 2/14/13
City School 13 - Notice of IEP Team Meeting 2/07/13
City School 14 - Notice of IEP Team Meeting 11/21/12

Individual Education Plan (IEP)

City Schools 18 – IEP 3/11/2014
City Schools 19 – IEP 2/11/2014
City Schools 20 – IEP 9/03/2013
City Schools 21 – IEP 5/29/2013
City Schools 22 – IEP 3/06/2013

⁴ ALJ Power explained at length the need to exchange documents in advance of the hearing during the prehearing conference and set out the specific date by which the document exchange was to take place. There was also discussion during the prehearing conference about what methods of transmission were acceptable and which street addresses, email addresses, or fax numbers could be used to facilitate the process. The Parent did not follow the document exchange provisions set forth in the Order. She did not provide any documents to BCPS or to the ALJ at any time before the hearing. BCPS filed a motion to bar the Parent from presenting any documentary evidence. I ruled that she could offer any IEPs for the relevant time period, and any document which had been attached to her original Due Process Complaint. The Parent did not offer any of these documents during her presentation; however, she did offer two attendance sheets. BCPS did not object to these exhibits and I admitted them as evidence. These two exhibits are located in the brown OAH file in the section inside the back cover.

⁵ At my request, BCPS submitted a copy of their exhibit book index electronically so that I could cut and paste it into this decision. All exhibits in the book were numbered and tabbed; many were never marked or admitted in the hearing. I have edited the exhibit list to reflect only those exhibits that were admitted into evidence. This accounts for the spotty numbering. For ease of reference, I left the headings BCPS used to divide the exhibits mostly intact.

Prior Written Notice (PWN)

City Schools 24 - Prior Written Notice 4/9/14

Evaluations

City Schools 28 – Occupational Therapy 5/12/14
City Schools 29 – Psychological Report 5/5/14
City Schools 30 – Educational Assessment 5/5/14
City Schools 31 – Speech/Language Assessment Report 5/5/14
City Schools 33 - Occupational Therapy 2/08/13
City Schools 34 – Behavioral Observation 1/13/14

Progress Reports

City Schools 38 – Psychological Progress Report 1/7/14
City Schools 40 – Psychological Progress Report 6/6/13
City Schools 45 – Psychological Progress Report 8/23/13
City Schools 46 - Psychological Progress Report 2/5/13
City Schools 48 - Psychological Progress Report 12/4/12

Related Services Encounter Logs

A. 2013-2014 School Year

City Schools 55 – OT Encounter Log Report 3/3/14 to 3/31/14
City Schools 56 – OT Encounter Log Report 2/03/14 to 2/24/14
City Schools 58 – SLPRS Encounter Log Report 2/1/14 to 2/27/14
City Schools 60 – SLPRS Encounter Log Report 1/1/14 to 1/31/14
City Schools 62 – SLPRS Encounter Log Report 12/1/13 to 12/31/13
City Schools 64 – SLPRS Encounter Log Report 11/1/13 to 11/30/13
City Schools 66 – SLPRS Encounter Log Report 10/1/13 to 10/31/13
City Schools 68 – SLPRS Encounter Log Report 8/26/13 to 9/30/13

B. 2012-2013 School Year

City Schools 70 – Pysch Encounter Log Report 5/1/13 to 5/31/13
City Schools 72 – Pysch Encounter Log Report 4/1/13 to 4/30/13
City Schools 74 – SLPRS Encounter Log Report 4/1/13 to 4/30/13
City Schools 75 – Pysch Encounter Log Report 3/1/13 to 3/31/13
City Schools 76 – SLPRS Encounter Log Report 3/1/13 to 3/31/13
City Schools 77 – Pysch Encounter Log Report 2/1/13 to 3/1/13
City Schools 79 – Pysch Encounter Log Report 12/31/12 to 2/1/13
City Schools 81 – Pysch Encounter Log Report 12/1/12 to 12/20/12
City Schools 82 – Pysch Encounter Log Report 12/1/12 to 12/12/12
City Schools 84 – Pysch Encounter Log Report 11/1/12 to 12/1/12
City Schools 88 – Pysch Encounter Log Report 8/27/12 to 10/2/12

Resumes

City Schools 92 – XXXX XXXX MS, OTR/L
City Schools 93 – XXXX XXXX MS, OTR/L
City Schools 95 – XXXX XXXX OT/L
City Schools 96 – XXXX XXXX
City Schools 98 - XXXX XXXX, Ph.D., NCSP
City Schools 99 – XXXX XXXX

Other

City Schools 100 – Email to the Parent 6/10/14
City Schools 101 – Email from the Parent 2/12/14⁶

Testimony

The Parent testified on behalf of the Student and was also called as a witness by BCPS. In addition, the Parent presented testimony from Ms. XXXX XXXX, the Student's paternal grandmother. The Parent indicated during the prehearing conference that she would not have any expert witnesses, but expected family members to testify. She did not offer the names of any of her proposed witnesses to BCPS as mandated by the Order and federal regulation. BCPS moved at the hearing to preclude any witnesses from testifying other than the Parent. Over BCPS' objection, I ruled that the Parent could call Ms. XXXX to testify, but that she could not call any other witnesses.

BCPS presented testimony from the following witnesses:

- XXXX XXXX, admitted as an expert in rehabilitation and school-based speech language pathology (SL or SLP)
- XXXX XXXX, admitted as an expert in school psychology
- XXXX XXXX, admitted as an expert in school-based occupational therapy (OT)
- XXXX XXXX, admitted as an expert in school-based OT
- XXXX XXXX, admitted as an expert in school-based OT
- XXXX XXXX, admitted as an expert in special education and Individualized Education Program (IEP) process management⁷
- XXXX XXXX, admitted as an expert in special education

⁶ This document was not in the exhibit book when it was submitted, so this exhibit does not appear on the index in the front of the book. It is located in the pocket inside the back cover of the exhibit book.

⁷ Ms. XXXX testified by telephone, which is discussed below.

FINDINGS OF FACT

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

1. The Student was born XXXX, 2008. As of the time of the hearing in this matter, he was six years old.
2. The Student attends [School], a school within the BCPS system. During the 2012-2013 school year, when the Student was four turning five years old, he was in the pre-kindergarten (pre-K) program; during the 2013-2014 year, when he was five turning six, he was in kindergarten.
3. The Student had previously been identified as a child with a disability and had participated in Maryland's Infants and Toddlers Program.
4. He qualified for special education and related services under the IDEA at the time he began attending [School].
5. The Student's disability is Autism.⁸
6. The Student also has an intellectual disability (ID).⁹

⁸ Autism is defined in COMAR 13A.05.01.03B(8) as follows:

"Autism" means a developmental disability that:

- (a) Does not include emotional disability as defined in §B(23) of this regulation;
- (b) Significantly affects verbal and nonverbal communication and social interaction;
- (c) Is generally evident before 3 years old;
- (d) Adversely affects a student's educational performance; and
- (e) May be characterized by:
 - (i) Engagement in repetitive activities and stereotyped movements,
 - (ii) Resistance to environmental change or change in daily routines, and
 - (iii) Unusual responses to sensory experiences.

⁹ Intellectual disability is defined in COMAR 13A.05.01.03B(36) as follows:

"Intellectual disability" means general intellectual functioning, adversely affecting a student's educational performance, that:

- (a) Is significantly subaverage;
- (b) Exists concurrently with deficits in adaptive behavior; and
- (c) Is manifested during the developmental period.

The testing supporting this fact is more fully detailed below, but the Student's global cognitive functioning is scored below 70 and is significantly below average. He also has significant impairment in at least two areas of adaptive functioning – specifically in health and safety and self-direction – and probably also in communication. These manifested during the Student's developmental period.

7. The Parent categorically denies that the Student has any ID.¹⁰
8. The Student has difficulty attending to tasks and requires very frequent redirection to stay focused and on task.
9. The Student has delays in receptive language, that is, in his ability to understand language, and also has delayed pragmatic language, or a delay in his ability to use language. He has been receiving speech and language services from Ms. XXXX since starting in the BCPS system in 2012. Ms. XXXX is an SLP for BCPS.
10. At [School], beginning in the fall of 2012,¹¹ the Student received 90 minutes per week of SL services, divided into three ½ hour sessions. One session took place in the classroom, and two sessions each week were pull-out. Initially the pull-out sessions had to be individual due to behavior issues, but by March of 2013 the Student's behavior had improved to the point where he could attend a group pull-out session.
11. In the fall of 2012, the Student received special education services within the general education classroom.
12. At some point in the 2012-2013 school year, the Student had a specific place in the classroom where he could go if he was feeling pressured or angry or sad so that he could calm himself down. He could also be directed to that spot if he needed time to calm down but did not recognize it for himself.

¹⁰ The Parent also asserted that the Student has additional diagnoses including, but not limited to, Attention Deficit Hyperactivity Disorder, anxiety, and sensory integration disorder. There is no documentation of these diagnoses in this case. I make no findings on these statements by the Parent.

¹¹ The Student had an IEP in effect at the beginning of the 2012-2013 school year, but the Parent did not put that IEP in evidence. I am able to glean some of the components of the IEP from other exhibits or from witness testimony.

13. An IEP team meeting was convened March 6, 2013. The IEP bearing that date called for the Student to have the following supplementary aids, services, program modifications, and supports:¹²

Instructional Support – picture schedule
Instructional Support - check for understanding
Physical/Environmental Support(s) – sensory diet
School Personnel/Parental Support(s) - psychologist consult (indirect service)
Temporary support assistant (TAS)¹³ (an individual assigned exclusively to the Student)

14. A sensory diet in this context is a broad term encompassing a large range of objects and activities to assist students with focus and concentration sometimes by providing comfort, or breaks, or outlets for excess energy (such as fidget toys or walks).

15. A sensory diet is intended to be a flexible type of support, changing to meet the Student's needs and preferences. The individual components of a sensory diet are not listed in the IEP document itself.

16. At the March 6, 2013 meeting, the Parent expressed concerns in connection with the Student's sensory diet, particularly insisting that the Student needed a weighted vest. There are different types of weighted vests, but in this case a weighted vest is a piece of clothing, a vest, which has pockets or pouches in it for weights to be placed. For some children, it gives a sense of being grounded and assists them in feeling more comfortable. School personnel did not believe the Student needed a weighted vest and noted that the letter from XXXX Pediatric Hospital the Parent relied on in requesting the vest was two years old.

17. The Parent also expressed concerns on other topics, such as the BCPS personnel she felt should have filled out certain forms for the Student versus the personnel that actually filled out the form, the Student's potty training status, a recent assessment conducted outside her

¹² The Student had an IEP in effect prior to this meeting, however the Parent did not offer a copy as an exhibit, so I do not know in what ways, if any, it differed from the March 6, 2013 IEP put in evidence by BCPS as City Schools #22.

¹³ The documents and the witness testimony referred interchangeably to the Student's one-on-one aid as a TAS or a TSA. I have used TAS in this decision.

presence, the title on an evaluation document, the OT personnel in attendance at the meeting, the Parent's desire for the Student's quiet area to be prominently labeled with his name, and breaks and transitions within the Student's school day. All of these were discussed by the team.

18. The IEP developed on March 6, 2013 also required that the Student be provided with special education within the general education classroom and with direct speech and language services both within the general education classroom (one half hour each week) and in pull-out individual or small group settings (one hour per week). In addition, the Student was to receive thirty minutes per week of indirect service by way of the school psychologist consulting with the Student's teachers to support social and emotional progress. This was a continuation of a service the Student was already receiving.

19. The March 2013 IEP contained academic goals and objectives in the areas of speech and language- receptive language, speech and language – pragmatics, early literacy, early math literacy, and pre-writing. The IEP also had a behavioral goal with accompanying objectives.

20. The Parent does not challenge any of the goals and objectives contained in any of the IEPs relevant to the time period covered by this case.¹⁴

21. Based on progress reports dated March 22, 2013, the Student was making progress on his goals and objectives.

22. There was no recommendation for extended school year (ESY) for the summer of 2013 as of March 6, 2013.

¹⁴ The Parent testified repeatedly that she was not challenging the goals or objectives contained in any of the IEPs relevant to this case. Attempts to craft a stipulation acceptable to the parties and to me were unsuccessful. The Parent objects to the methods by which progress is measured on every, or nearly every, goal and objective, but she did not raise that issue in this Due Process complaint.

23. The Parent demanded that the March 6, 2013 meeting continue past the end of the school day and until she was finished. It was adjourned at the end of the school day over her objection and she immediately advised that she would request another IEP meeting.

24. The Student's IEP team reconvened at the Parent's request on May 29, 2013. The Parent was late for the meeting.

25. The Parent complained that two persons were in attendance from OT. The Parent believed that the attendance at the IEP meeting by two persons from one discipline constituted a violation of procedural Due Process. One of the OT participants, Ms. XXXX, was designated as the IEP meeting chair because the usual chair, Ms. XXXX, was on maternity leave.

26. Dr. XXXX, [School]'s principal, was sufficiently concerned about the May 29, 2013 IEP meeting that she called Ms. XXXX at home while Ms. XXXX was on maternity leave to talk about the IEP meeting and to ask if Ms. XXXX could attend despite being on maternity leave.

27. At the May 29, 2013 IEP team meeting, the Parent expressed numerous concerns and complaints, including that the newly acquired weighted vest was ill-fitting, her dissatisfaction with the Student's participation in and the TAS' role for gym class, the scheduling of walks for the Student, the fact that sensory diet items were not listed out individually in the IEP, and many other details of the sensory diet. All of these matters were discussed by the team.

28. The Student chose to sometimes wear the weighted vest, but he also took it off independently. He sometimes refused to wear the vest at all. He liked opening the pockets and taking out the weights. School personnel did not notice any benefit from the vest and believed it to be unnecessary. It was provided solely because the Parent insisted upon it. To the extent it provided any benefit, school personnel believed that the Student's expressing of a preference to

wear or not wear the vest was a positive indication that he was self-selecting calming strategies he found to be effective for himself.

29. The team reviewed the criteria for ESY services and determined that the Student did not qualify for ESY for summer 2013. At that time, the IEP team had no data or information available to it that would support a determination that the Student's educational gains during the normal school year would be significantly jeopardized if he did not receive ESY services. At that time, the IEP team had no data or information available to it that would support a determination that there were significant interfering behaviors, emerging skills, breakthrough opportunities, or that the nature and severity of the Student's disabilities suggested a need for ESY services.

30. The Parent believes that carrying a diagnosis of Autism is sufficient in itself to suggest that the "nature and severity" of the Student's disability require ESY services.

31. At the May 29, 2013 IEP meeting, there were no changes to the Student's supplementary aids, services, program modification or supports. His goals and objectives remained the same.

32. The Student's IEP team next met on September 3, 2013. The intended purpose of the meeting was to review and amend if necessary the supplementary aids and supports section of the IEP, including consideration of the Student's TAS. The TAS was listed in the May 29, 2013 IEP as a service provider, but did not have a separate entry in the IEP as a supplementary aid or support.

33. On September 3, 2013, the team decided to continue the TAS and the IEP was amended to add a separate entry regarding the TAS. There were no changes to the other supplementary aids and services, nor was there any change to the goals and objectives.

34. The Parent, who participated by telephone, expressed concern that the Student was at risk for elopement. School personnel had not seen any elopement behavior from the Student.

35. The Parent complained that BCPS had not yet obtained a new weighted vest for the Student and there was ensuing discussion.

36. The Parent again raised concerns about the Student's performance in gym class and how it necessitated testing and observation by a physical therapist. During the IEP team meeting, the Parent requested that a licensed physical therapist observe and test the Student. Although not documented in the IEP, the Student began receiving indirect OT services in September 2013.

37. The Parent complained that she had not received ten business days notice of the IEP meeting and there was discussion about whether the requirement was for ten business days notice or ten calendar days notice.

38. The IEP team next met on February 11, 2014. The meeting was scheduled to start at 1:00 p.m. but started fifteen minutes late because the Parent did not arrive on time. The meeting went until 3:00 p.m.

39. The IEP document from February 11, 2014 team meeting lists Dr. XXXX XXXX as an IEP team participant. Dr. XXXX was not at the February 11, 2014 IEP team meeting.

40. Sometime prior to the meeting, the Parent provided BCPS with a report from XXXX, an outside provider of speech and language, OT, and behavioral services to the Student. Ms. XXXX read and considered the report in developing new goals for the Student in the speech and language area.

41. The team documented the following:

Based on review of special education report dated 2/11/14, speech and language report dated 2/11/14, previous assessment reports, work samples, anecdotal

records, TAS report, teacher observations in the area of early literacy, [the Student] requires more time with responding to wh questions¹⁵ and participating with decreasing prompts in simple poems, rhymes and finger play and literacy activities. [The Student] can write some letters in the alphabet like M [and] I but he does not display consistently the skills and concepts he learns. He writes his name with visual and verbal cues provided. He cannot write his name independently. He recognizes his name on his locker and in the classroom. He improves his interaction with his peers and adults in the classroom. He does not throw temper tantrums and aggressive behavior but he needs constant redirection and visual/verbal cues by the TAS. He expresses his frustration by making unnecessary movements like raising his eyebrows up and down, non stop laughing and even humming. He can count numbers 0-10 but he cannot recognize any number in isolation. He does not like to write, but he loves to cut and color objects. He can recognize individual shapes like circle or triangle but he cannot identify and name them when mixed together either in paper or actual shapes. He does not show any mastery of any skills taught as shown in his assessment results in Units 1-6. His pretest and post test results show no evidence of mastery or acquiring skills from the concept taught. He took most of the assessments with rephrasing, modeling, trials and modification of directions or actual demonstrations on how to answer questions.

There [are] times that Ms. XXXX [the Student's classroom teacher] had to stop the assessment and met [with] Ms. XXXX to plan on ways and strategies to administer the test items to [the Student]. Even with the [presence] of the TAS [the Student] is sitting close to the teacher and peers who can give him support. He also receives small group instruction to learn the skills taught. [The Student] also receives additional support outside of the general education and special education services for reading from Ms. XXXX as a Tier 2 intervention at [School] (3 times a week for 45 minutes) along with other students in Kindergarten whose Reading level is considered to be far below grade level. This is a model adopted by [School] to address Reading needs of students with or without Special Education Services. In spite of the support and other modifications in place[] in the general education setting, [the Student's literacy result assessment results [from two different assessments] show that he is still in PC (Print Concept).

42. At the February 11, 2014 IEP meeting, the school psychologist, Dr. XXXX, suggested lowering the Student's indirect psychological services from 30 minutes weekly to 15 minutes weekly. The Parent disagreed with Dr. XXXX' recommendation for decreased indirect services. She wanted no decrease in the indirect services and she wanted the addition of direct psychological services for the Student.

¹⁵ "Wh" questions include things like who, what, and where.

43. Dr. XXXX also suggested a cognitive assessment because there was not one on file. The team agreed that a cognitive assessment should be done.

44. The team also agreed on February 11, 2014, that an educational assessment should be done.

45. At the February 11, 2014 IEP meeting, the team kept all of the previous supplementary aids, services, and program modifications and supports, although the indirect psychological consultation was decreased from 30 minutes per month to 20 minutes per month on the recommendation of Dr. XXXX. The team also added 30 minutes per month of indirect service in the form of consultation between the special educator and the regular educator.

46. The team decided that the Student qualified for ESY services for summer 2014 and added that to his IEP.

47. The February 11, 2014 IEP contained changed academic goals and objectives in the areas of speech and language- receptive language, speech and language – pragmatics, early literacy, early math literacy, pre-writing, and social/emotional behavior.

48. The team also added a new goal and objectives for fine motor skills. The goal and objectives were written based on Ms. XXXX's observations of the student, consultation with the Student's teacher, and the report from XXXX provided to the school by the Parent. Ms. XXXX is a licensed OT with BCPS.

49. As a related service, the team added two thirty-minute pull-out sessions each month of occupational therapy.

50. The speech and language services were unchanged from the last IEP.¹⁶

¹⁶ There was a typographical error in the February 11, 2014 IEP. It said in one place that the pull-out sessions were for one-half hour per week. The pull-out sessions were actually for two one-half hour sessions each week. The IEP states elsewhere within the document the correct amount of service and the Student received all services as the team intended. The typographical error did not result in any confusion or reduction in services.

51. The Parent wanted to read out loud reports she had from outside providers and complained when she was not allowed to do so.

52. With respect to OT services, the IEP was approved February 11, 2014, which fell on a Tuesday. Ms. XXXX, the OT at [School], serves other schools and is only present at [School] on Mondays. The next Monday, February 17, 2014, was a school holiday. OT sessions missed because school is closed for a holiday are not subject to being made up. Ms. XXXX held a session with the Student on Monday, February 24, 2014. There were no more Mondays in February.

53. The Parent complained that the Student had not received all the OT services called for in his IEP because the IEP called for two sessions per month and he received only one session in February. Although BCPS did not agree that the Student had not received the appropriate amount of services in February, BCPS made up the “missed” February session.

54. The appropriateness of the Student’s placement was discussed at the February 11, 2014 IEP meeting. Ms. XXXX, the Student’s grandmother, inquired about moving the Student to a small group setting with a special educator and a TAS. Dr. XXXX advised that [School] did not have a self-contained classroom for kindergarten students. She advised that she would contact BCPS’ early learning office to consider possible placement elsewhere.

55. In the meantime, the team added thirty minutes per day of individual pull-out special education services with Ms. XXXX, who had worked with the Student in the general education classroom since his arrival at [School], except for three months at the end of the 2012-2013 school year when she was on maternity leave.

56. On February 12, 2014, the day after the February 11, 2014 IEP meeting, the Parent emailed [School]’s principal Dr. XXXX requesting another IEP meeting. The Parent made a number of complaints about the February 11, 2014 meeting, including that no one from

the early learning office had been present, and she made demands about the next meeting in terms of personnel to attend and timing issues.

57. On March 7, 2014, BCPS sent notice to the Parent of an IEP meeting to be held, according to the notice, on March 18, 2014. The meeting was actually to be held on March 11, 2014 and was held on March 11, 2014. The Parent was notified of the actual date of the meeting by BCPS well in advance of the meeting,¹⁷ although not a full ten days before the meeting was held. The Parent, Ms. XXXX, and another family member attended the IEP meeting and fully participated. They presented many complaints and expressed dissatisfaction with many aspects of the Student's education at BCPS.

58. The IEP document from March 11, 2014 lists Dr. XXXX XXXX as an IEP team participant. Dr. XXXX was not at the March 11, 2014 IEP team meeting.

59. For the IEP team meeting that occurred on March 11, 2014, there was a separate attendance sheet for individuals to sign. Dr. XXXX's signature does not appear on the sign-in sheet. Dr. XXXX nevertheless attended the March 14, 2014 IEP team meeting.¹⁸

60. The meeting started at 12:10 p.m. Dr. XXXX attempted to adjourn the meeting at 3:15 p.m. Dr. XXXX explained that she could not keep personnel past a certain time after school dismissal or the personnel may file a grievance. The Parent ignored the need to adjourn. She continued presenting concerns, adding that BCPS' attempts to put time limits on IEP meetings was another of [School]'s failures in meeting the Student's needs.

61. At the March 11, 2014 meeting, the date was set for the next IEP meeting as April 8, 2014.

¹⁷ The Parent estimated that she was notified of the correct date six or seven days ahead of time.

¹⁸ The IEP's Present Level of Achievement and Functional Performance states that Dr. XXXX attended the meeting and the meeting notes mention Dr. XXXX's participation in the meeting in at least two places regarding two different topics. Ms. XXXX also testified very credibly that the Parent had requested or instructed Dr. XXXX not attend the meeting, but Ms. XXXX encouraged Dr. XXXX to attend anyway and sat beside Dr. XXXX at the IEP meeting. The Parent was positive that Dr. XXXX was not in attendance, however, because her signature did not appear on the separate attendance sheet that the Parent prides herself on monitoring.

62. Among other things, the team agreed at the March 11, 2014 meeting to have the Student undergo a Social/Emotional assessment, a Functional Behavioral assessment and a new OT assessment.

63. There was extensive discussion at the March 11, 2014 IEP meeting regarding the Parent's position that the Student should receive direct psychological services, an issue she had also raised at the February meeting. Ms. XXXX, Coordinator of Psychological Services, as well as Ms. XXXX, the school psychologist, explained that direct psychological services were not recommended for the Student because in the school setting, persons with Autism demonstrate an inability to transfer skills learned in psychological sessions to the classroom. Additionally, the Student was making good progress on his social/emotional goals. He had friends among his peers and would interact with them. He was able to make eye contact. He was able and willing to go with strangers for assessments and was transitioning better between activities.

64. The Parent also again expressed concern about elopement. School personnel saw no signs of elopement behavior in the 2013-2014 school year.

65. For some period of time in early 2014, the Student enjoyed being chased by an adult. The Student would start running, trying to get an adult to follow him. The Student made no attempt to leave the school and did not try to elope when engaged in this behavior, which was eventually extinguished in the school setting by the adults around the Student ignoring it.

66. The Parent was persuaded these runs were actually attempts to elope.

67. On sporadic occasions, the Student's speech and language sessions have been slightly less than thirty full minutes. These occasional shortfalls are generally in the range of two to five minutes of service being missed.

68. On approximately nine occasions, the Student did not receive his required one-half hour pull-out special education session after that service was added to his IEP on February

11, 2014. On approximately six occasions, the Student received a pull-out special education session that was less than thirty full minutes. Some of the missed or partial sessions occurred because the special educator was losing time on days when the Student's IEP meetings were lengthy; some occurred when school was scheduled for half-days because the Student usually received his services after the half-day dismissal time.

69. The Parent complained about this loss of service to the Student. All nine of the missed sessions were made up.

70. On one occasion in February 2014, the Student was out-of-control in his gym class. He was behaving in such a way as to present a danger to himself and others. He was removed from gym class for the remainder of that class. He attended his next regularly scheduled gym class.

71. During the 2013-2014 school year, the Student made slow progress. He learned to write his first name, although he does so inconsistently. He learned to count from 0-10, although he cannot identify numbers in isolation. He learned some colors and some shapes. He made progress in his communication skills and increased his vocabulary. He also made progress in his social skills, improving interaction with both peers and adults in the school setting.

72. The Parent and Ms. XXXX acknowledge modest social and academic progress by the Student over the course of his time at BCPS, but attribute the progress made to efforts undertaken at home rather than to any effort by BCPS.

73. The Student needs constant redirection to stay on task. If the Student enjoys the activity, he needs slightly less redirection and cueing, but all team members agree that the Student still requires the services of a TAS.

74. At some point, the Parent learned of the [Program] program. She described it as a reading program created for children with one year or more of a learning gap. The Parent wants the Student to participate in [Program].

75. The Parent enrolled the Student in a reading tutorial program; however the Student was unable to write sentences, which was a required skill for participation in the tutorial program.

76. There were somewhere between twenty-seven and thirty-four children in the Student's kindergarten class during the 2013-2014 school year.¹⁹

77. Ms. XXXX, a special educator with BCPS, conducted an educational assessment of the Student on March 28 and April 1, 2014, producing a report dated May 5, 2014.

78. The Student had an OT assessment conducted by XXXX XXXX, a licensed OT. Ms. XXXX generated a report dated February 8, 2013. The Student had another OT assessment conducted by XXXX XXXX MS, OTR/L, an OT for BCPS. Testing took place March 28 and April 30, 2014. Ms. XXXX generated a report dated May 12, 2014.

79. XXXX XXXX, M.S., CCC-SLP, conducted a Speech and Language Assessment of the Student in March and April 2014 and generated a report dated May 5, 2014.

80. XXXX XXXX, Ph.D., Nationally Certified School Psychologist, conducted a Psychological Assessment of the Student and prepared a report dated May 2, 2014. The assessment took place on March 3, and April 1, 3, 8, 10, 22, and 24, 2014. Based on data collected during the assessment Ms. XXXX reported that the Student's "intellectual functioning

¹⁹ The Parent testified there were thirty-four children in the class, which BCPS did not dispute; however, on visiting the classroom service providers reported twenty-seven children in the classroom.

is within the Extremely Low range²⁰ and is significantly below age level expectations.” City Schools Ex. 29, pg. 7. The Student’s full scale intelligence quotient as measured during the assessment was 56.

81. Ms. XXXX used the following in evaluating the Student: review of records; an interview of the Student’s teacher; classroom testing and observations; Weschler Intelligence Scale for Children – Fourth Edition; Weschler Nonverbal Scale of Ability, Adaptive Behavior Assessment System, Second Edition: Parent and Teacher forms; Gilliam Autism Rating Scale, Second Edition: Parent and Teacher Report; and portions of the Behavior Assessment System for Children, Second Edition: Parent and Teacher Rating Scales.²¹

82. Ms. XXXX has suggested in one or more IEP meetings that the Student’s primary disability code should be changed to ID because in her professional opinion the ID is what is most significantly affecting the Student’s academic progress. The Parent resisted this suggestion and the team has left the primary disability coding as Autism. The Student’s goals and objectives are appropriate for him at this point regardless of the disability coding.

83. BCPS is making changes in its general curriculum, moving towards what is referred to as a “common core” curriculum.

²⁰ During the hearing, the Parent became emotional and upset when participants described the Student’s intellectual capacity as “low functioning” or when participants referred to the Student as having a low IQ, or words to that effect. After discussion, the parties and I agreed that the term “intellectual disability” would be used to convey these concepts during the hearing. I am, however, unable to fairly evaluate the Parent’s Due Process claims regarding the appropriateness of the Student’s IEPs and placement without acknowledging the depth of the Student’s intellectual disability.

²¹ The Parent did not complete her portion of this evaluation, so Ms. XXXX was unable to consider Parent input on this assessment. In total, Ms. XXXX asked the Parent to fill out three questionnaires to aid in evaluating the Student. There were two short questionnaires and one long one. The Parent fully completed one short form. The Parent completed all but a small portion of the long form. Believing this to be an oversight, Ms. XXXX made numerous attempts to invite the Parent back to complete the form. The Parent stated that she could not come during business hours either to the school or to headquarters to fill out the remaining material. Ms. XXXX then tried to have the Parent answer the few remaining questions on the long form over the phone. The Parent stated that Ms. XXXX would have to make an appointment with her for a telephone meeting and then would not agree to any appointment date. The Parent asked that the form be sent home and Ms. XXXX explained that that was against BCPS policy. The Parent insisted that Ms. XXXX consult with a supervisor which she did. The supervisor confirmed that the document could not be sent home. The Parent then insisted on written confirmation, which BCPS provided. The Parent never submitted any portion of the second short form.

84. The Student's behavior in the presence of the Parent is different from when the Parent is not present; he exhibits better behavior when she is not present.

85. In May 2014, BCPS offered to provide the Student with 30 hours of special education tutoring services. The Parent accepted the offer in June. Tutoring had not yet begun as of July 9, 2014. The parties disagree about why tutoring had not begun, each suggesting the other was at fault for the delay.

86. In IEP meetings occurring after the Parent filed her complaint the team has considered progress reports and the results of recent evaluations and has increased the amount of special education services the Student is to receive. The details are not a part of the record of this case.

DISCUSSION

Motion for Judgment and Withdrawal of Issue

Under the OAH Rules of Procedure, a party may move for judgment at the close of the evidence offered by an opposing party, as provided in COMAR 28.02.01.12E:

E. Motion for Judgment.

(1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.

(2) When a party moves for judgment at the close of the evidence offered by an opposing party, the judge may:

(a) Proceed to determine the facts and to render judgment against an opposing party; or

(b) Decline to render judgment until the close of all evidence.

COMAR 28.02.01.12E is patterned after Md. Rule 2-519, Motion for Judgment, and is the OAH equivalent. Rule 2-519 allows the court to proceed "as the trier of fact to determine the facts and to render judgment" at the end of the opposing party's case. In deciding a motion for

judgment, the fact finder is not required to view the evidence in a light most favorable to the non-moving party. Md. Rule 2-519. The burden of proof in a due process hearing is by a preponderance of the evidence and rests with the party challenging an IEP. *Schaffer v. Weast*, 546 U.S. 49 (2005).

BCPS moved for judgment as to all issues at the close of the Parent's evidence stating the grounds for its position as to each issue. When given the opportunity to respond to the motion, the Parent withdrew the issue regarding an OT Assessment for the Student. That was listed as Issue 4 in the prehearing Order.

Additionally, I granted the motion for judgment as to Issue 7: Whether the Student was illegally removed from gym class. In her Due Process complaint, the Parent did not mention any issue with gym class, but did mention problems with "disciplinary actions imposed by the school."²² During the prehearing conference the Parent clarified that in referring to discipline, she was protesting the Student's one-time removal from gym class.

The evidence presented by the Parent on this issue consisted of her testimony and testimony from Ms. XXXX. The Parent testified that on one occasion in February 2014 the Student had been acting in a manner that presented a danger to himself and others. He was removed from gym class. He was returned to gym class when it next appeared on his regular schedule. There were no consequences to the Student other than missing part of that one gym

²² The complaint at issue reads in its entirety:

I am being denied IEP meetings and requested OT assessments for my child. The school has not provided his related service of special education. I disagree of (sic) the disciplinary actions imposed by the school. Despite the need for Extended Year Service he has been denied for two consecutive years. His current school is not an appropriate placement for him. Consistent lack of prior notice for IEP meetings.

The description of proposed resolution reads:

To receive OT (recent) assessment for my child. Make-up missed related services. Utilize proper disciplinary actions. Allow him to be placed in an appropriate setting where the educators have a basis in ASD.

class. Ms. XXXX used nearly identical language to describe the incident, except that she added that the Student was “a little out-of-control.”

As the trier of fact, I have no idea what conduct the Student engaged in, although the Parent and Ms. XXXX confirmed that whatever it was it presented a danger to the Student and to others. I have no information about how the Student was “removed” from class. Further, I have no information to suggest that the manner in which BCPS undertook its absolute obligation to abate this admittedly dangerous situation constituted a disciplinary act against the Student or was otherwise illegal. For these reasons, I granted BCPS’ motion for judgment as to this issue.

I denied the motion for judgment as to the other five issues presented in this case; however, even as to those issues, argument and discussion on the motion served to narrow the focus. Specifics will be detailed as the individual issues are discussed below.

Overview of the Legal Framework

The IDEA provides federal assistance to state and local agencies for the education of disabled children. To receive this federal assistance, a state must provide special education services that are designed to meet the unique and individual needs of a child with a disability. The identification, assessment, and placement of a child in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010); 34 C.F.R. Part 300; Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2013); COMAR 13A.05.01. The IDEA defines a “child with a disability” as follows:

(A) In General. The term “child with a disability” means a child—

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof needs special education and related services.

20 U.S.C.A. § 1401(3). Maryland law defines “child with a disability” similarly. Md. Code Ann., Educ. § 8-401(a)(2) (Supp. 2013).

Under both federal and state law, a child with a disability has the right to a free appropriate public education (FAPE). A FAPE also is defined in the IDEA:

(9) Free appropriate public education

The term “free appropriate public education” means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9). Maryland law defines FAPE similarly. Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2013).

In the context of a FAPE, courts have defined the word “appropriate” to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Decision-makers in cases brought under the IDEA must assess the evidence to determine whether the Student’s IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *See In re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991).

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)(3).

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.A. § 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. *Id.* § 1414(a)(1)(C)(i), (b)(2)-(3).

In *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court stated that implicit in the congressional purpose in enacting the IDEA is a requirement that the education to which access is provided is sufficient to "confer some educational benefit upon the handicapped child." *Rowley* at 204. Providing a student with access to specialized instruction and related services, however, 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 (4th Cir. 1983) (citing *Rowley*, 458 U.S. 176).

In *Doe v. Bd. of Educ. of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993), the Court stated:

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 459-60.

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 a 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. 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. *Rowley*, 458 U.S. at 206-208. 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. *See, e.g., A.B. v. Lawson*, 354 F.3d 315, 325-29 (2004); *M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 532-33 (4th 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 Cnty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998). "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 Cnty.*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).

Witness Testimony

BCPS called a number of witnesses and qualified each as an expert in some area related to the case, except for the Parent. The first witness was XXXX XXXX, who was admitted as an expert in rehabilitation and school-based speech language pathology. Ms. XXXX has a Bachelors degree as well as a Masters degree in Speech-Language Pathology, obtaining her Masters degree in 1999. She has worked in various setting as a graduate student clinician, a clinical fellow, and as a therapist. In addition to other positions, she worked from February 2006 to September 2008 and again from January 2010 to August 2013 as a contract SL therapist for BCPS. Her duties included, among many other things, the development and implementation of IEP for BCPS students. From August 2013 to the present she has been a full-time clinician for BCPS. Ms. XXXX has worked with the Student since his arrival at [School] in the fall of 2012.

The Parent questioned Ms. XXXX's expertise, as she did for all BCPS witnesses, in part because she believes that to speak authoritatively about the Student, each individual witness should have some specific expertise in Autism or Autism Spectrum Disorders (ASD). I overruled this as a basis for excluding otherwise qualified expert witnesses.²³ Ms. XXXX was a knowledgeable and credible witness. Her interactions with the Student were substantial – essentially an hour and a half each week for two school years. Ms. XXXX wrote the SL goals for any IEPs developed after the Student arrived at [School]. The goals and objectives targeted the Student's areas of weakness. Ms. XXXX had extensive records detailing her sessions with the Student in the form of Encounter Log Reports, which Ms. XXXX and some other witnesses

²³ In overturning a District Court decision which failed to accord proper respect for the credentials of a student's service providers, the Fourth Circuit said, "We think the Court's admonition that the IDEA does not require 'the furnishing of every special service necessary to maximize each handicapped child's potential,' *Rowley*, 458 U.S. at 199, encompasses the notion that the IDEA likewise does not require special education service providers to have every conceivable credential relevant to every child's disability." *Hartman*, 118 F.3d at 1004.

referred to as a tracker log or tracker notes. These notes contain objective and subjective information collected during contacts with the Student.

Ms. XXXX expressed her opinion that the goals and objective contained in the various IEPs at issue were appropriate and that the Student had made significant educational progress in SL. She offered her opinion that the level of service – three sessions a week, one in-class and two as pull-out – was appropriate and sufficient. Ms. XXXX also noted that the Student experienced substantial benefit from being placed with non-disabled peers, who could act as natural “cues,” rather than having an adult try to correct inappropriate behavior by the Student.

Ms. XXXX conducted a SL assessment of the Student in March and April 2014. Ms. XXXX summarized the findings as follows: “[The Student’s] receptive language skills, expressive language skills, and pragmatic language skills are functioning at the level expected when compared to his cognitive skills.” City Schools 31, pg. 11. In testimony, Ms. XXXX listed the Student’s relative strengths as his receptive vocabulary, functional expressive vocabulary and pragmatic skills. She listed his relative weaknesses as understanding complex questions, using descriptive details, and forming complicated sentences. Ms. XXXX also confirmed that from the perspective of SL needs, the Student did not qualify for ESY for summer 2013.

BCPS next called XXXX XXXX, Ph.D., NCSP, admitted as an expert in school psychology. Ms. XXXX received dual Bachelor of Arts degrees in Psychology and Sociology in 1996. She obtained her Masters of Science degree in Developmental Psychology in 2001, and her Doctor of Philosophy in 2011. She is certified nationally and in Maryland as a school psychologist. Among other professional positions, she worked as a school psychology intern in Montgomery County Public Schools 2006-2007. She has been a school psychologist for BCPS from 2007 to the present, and the school psychologist at [School] from 2012 to the present. Her

duties include but are not limited to evaluating students, providing direct and indirect services to students, and attending IEP meetings. Ms. XXXX has provided indirect services to the Student since his arrival at [School] but for a few months when she was on maternity leave in late 2012. The indirect services consisted of working with those around the Student, such as his classroom teacher, his special education teacher, or his TAS.

Ms. XXXX saw the Student make progress over time. His classroom behavior became more appropriate. He was afforded a quiet place in the classroom marked off for him, where he could be directed or elect to go himself if he was sad or angry. He used the space less and less as the end of the 2013 school year rolled into the 2013-2014 school year. The Student was able to make friends among peers and interact more appropriately with adults. Ms. XXXX offered her opinion that the amount of service was appropriate. It was sufficient to support the educators around the Student to allow them to form strategies that were successful for him.

During the 2013 portion of the 2012-2013 school year, which was the main portion she was offering indirect services to him in that school year, Ms. XXXX did not see signs of regression over breaks or long weekends. She did not feel that ESY was indicated for the summer of 2013. The psychological assessment of the Student undertaken by Ms. XXXX was detailed in the Findings of Fact. It pointed to the conclusion that the Student will have very significant difficulties keeping up with peers. He can learn, but it takes him longer and he needs extensive repetition and redirection to tasks.

Towards the end of the 2013 school year, Ms. XXXX felt that the Student's indirect service time could be reduced with no loss of benefit to the Student. She noted it in school records, but did not recommend it at that time. When she did recommend a reduction to fifteen minutes each session of indirect service rather than thirty minutes in the 2013-2014 school year, the Parent was very upset and insisted that the Student needed to have the same or more indirect

services as well as the addition of direct services. The Parent did not offer any information supporting these demands.

The Parent elicited testimony from Ms. XXXX regarding the Student's temper tantrums and elopement. Ms. XXXX related that during the 2012-2013 school year the Student's tantrums became less frequent over time, and that there was no documented elopement. Ms. XXXX further related that the Student was making progress this year with tantrums and had no elopement. The Parent asked if Ms. XXXX recalled that the Parent reported an elopement attempt during the 2013-2014 school year. Ms. XXXX advised that the school did not consider the episode to represent any attempt to elope, but rather the Student was engaging in a game wherein he tried to get adults to chase him. After the Parent expressed concern about the elopement a chart was created to track any elopement attempts by the Student. There were none.

Considering all available information, Ms. XXXX was of the opinion that the Student had made good progress and that his placement was appropriate. Her expertise and notes reflecting experience with the Student's teachers and TAS offered support for her testimony, which I accepted.

XXXX XXXX, MS, OTR/L, testified in the area of OT. Ms. XXXX has Bachelor of Science degree in Health and Human Occupation and a Masters degree in Occupational Therapy which she earned in 2005. She is certified by the National Board of Certification of Occupational Therapists and is licensed by the State of Maryland as an occupational therapist. She has worked as an OT for BCPS since July of 2008. She was offered and accepted as an expert in school based OT.

Ms. XXXX had relatively little contact with the Student. She met with him twice, on March 28 and April 30, 2014. She performed an OT assessment of the Student during those meetings. Ms. XXXX testified that she did not know why she was assigned to perform the

testing. Her supervisor, XXXX XXXX, testified later in the hearing that, at the time of the assessment, Ms. XXXX had fewer pupils on her caseload and was more readily available to undertake the assessment.

Ms. XXXX observed that the Student was easily distracted, needed a lot of prompts, and moved around a lot. She was favorably impressed by the Student's social skills in meeting her for the first time and transitioning with a stranger to a different activity in a different location.

Ms. XXXX used informal clinical observation, interviews with the Student's teacher and TAS, record review, and the Wide Range Assessment of Visual Motor Abilities (WRAVMA) as tools during her assessment. The WRAVMA consists of three subtests: drawing, which looks at visual-motor skills; matching, which examines visual-spatial skills; and pegboard, which reviews fine motor skills. The subtests were administered in the order above. The Student experienced a marked decrease in performance on each test in sequence. His drawing score placed him slightly above age level. His matching score placed him below age level, and his pegboard score was even more significantly below age level expectations. In Ms. XXXX's opinion, the Student became more and more distracted and disinterested which negatively impacted his performance. The Student's WRAVMA visual-motor ability (VMA) composite score placed him at 1%. Nevertheless, with his twice monthly half-hour sessions, the Student was making progress on his OT goal and objectives. Additional services were not required to provide the Student with benefit.

The Parent attacked Ms. XXXX and the results of the OT assessment based on Ms. XXXX's general lack of familiarity with the Student. She raised and repeated the issue so many times in cross-examination, sometimes multiple times within the same question, that I eventually had to instruct her not to mention it again in questioning the witness. She suggested that Ms.

XXXX acted unethically in providing an assessment, an accusation that was without foundation and inaccurate.

BCPS called XXXX XXXX, MS, OTR/L to testify. Ms. XXXX is the Coordinator of the Related Services Department for BCPS, a position she has held since 2006. In that position she manages the OT, PT, audiology, and low incidence departments for BCPS. She earned her Masters of Science in 2000. Ms. XXXX attended IEP meetings for the Student while he was in the Infants and Toddlers Program before he came to [School] and has continued to attend IEP meetings while the Student is at [School], many times at the request of the Parent. Prior to OT being included in the Student's IEP, Ms. XXXX came to IEP meetings to review outside reports submitted by the Parent and to participate in discussions of the Parent's concerns. She was present at the May 29, 2013 IEP meeting where the team discussed the criteria for ESY services and determined that the Student did not qualify for ESY for summer 2013. Ms. XXXX agreed with the assessment that the Student did not qualify for ESY services for the summer of 2013.

Ms. XXXX elaborated on the Student's sensory diet. It is a flexible array of options designed to help individual students with sensory needs. The existence of a sensory diet is noted in the IEP, but the individual components of a sensory diet are not made a part of the IEP because the sensory diet must be able to adapt immediately to the changing needs of the Student. The Student's BCPS sensory diet was based on information provided from an outside source. It included movement breaks, assistance with transitions, and other items. It did not include a weighted vest. BCPS purchased two weighted vests in quick succession because the Parent was so insistent that it be used. BCPS professionals and the team did not believe that a weighted vest was necessary and did not discern any benefit to the Student when he had it. Once the Student realized he could take the vest off and refuse to put it back on, he refused it most of the time.

BCPS also called XXXX XXXX, OT/L. She is the OT who works directly with the Student pursuant to the direct OT services added to his IEP at the February 11, 2014 IEP team meeting. She and Ms. XXXX formulated the Student's OT goal and objectives based on her observations of the Student, and the report from XXXX which had been provided by the Parent. The Student was making progress on his goal and had met one or more objectives in the few months she worked with him. In her professional opinion, the amount of service provided to the Student was appropriate and sufficient to enable him to make progress on his goal and objectives.

On cross-examination, the Parent had Ms. XXXX review the things one would expect of a typical 6 ½ year old child. They would be expected to know the alphabet and be able to form all the letters, for example, and would be expected to be able to dress independently. She asked the witness where she would place the Student's abilities and Ms. XXXX stated that in her opinion the Student's skills were about on par with a typical four-year-old. The Parent then asked if Ms. XXXX was doing all she could to close the Student's gap. Ms. XXXX's reply encompassed the notion of doing what was appropriate. The question and answer point out some of the difficulties in this case. The Parent wants the absolute best of everything for her child, but that is different from what is required by law – that BCPS provide an appropriate education. Ms. XXXX also observed that it was necessary, in considering services, goals, and objectives for the Student, to take into account his cognitive abilities and current skill level. She explained that it is not best for the child to say, in effect, 'well he is two and a half years behind so we will have to go fast fast fast.'

BCPS next called XXXX XXXX, the Special Education and IEP Chair at [School], who also was the Student's special education teacher. Ms. XXXX has a Bachelors degree in Elementary Education and a Masters in Special Education, both from XXXX University in the

[Country]. As a preliminary matter, BCPS had advised me on an earlier hearing date that Ms. XXXX was on vacation in [State] and requested that the witness be permitted to testify by telephone. The Parent objected and I heard her argument as to why the witness should not be allowed to testify by telephone.²⁴ I overruled her objection. The Parent deeply mistrusts Ms. XXXX and believed that I should be able to observe the witness personally to assess her demeanor during her testimony. I acknowledged that in-person testimony is preferable, but found no good cause to deny the request for telephone testimony. The Parent re-raised the issue of this witness testifying by telephone on a separate hearing day and was permitted to fully air her reasons for objecting. I once again found no good cause to deny the request for telephone testimony.

Ms. XXXX was called as a witness on the afternoon of the fifth day of the hearing, which was July 10, 2014. Upon reaching the witness by telephone, there was initially a considerable amount of background noise. Ms. XXXX was asked to find a quiet place from which to testify, which she did. I then asked her questions about where she was and who else could hear her testimony. The Parent had been very concerned about any materials Ms. XXXX might use for reference during her testimony. I asked about any reports, records, or other documents the witness might have to use during her testimony. She reported having none. It became clear at that point that BCPS had not forwarded any material to the witness to aid in her testimony. I was

²⁴ The OAH regulation governing telephone testimony is COMAR 28.01.02.20B, which reads in pertinent part:

B. Telephone Hearings.

- (1) The judge may conduct all or part of a hearing by telephone or other similar audio-electronic means, provided each party has an opportunity to participate in and hear the entire proceeding.
- (2) If a party establishes good cause in opposition to the holding of a hearing by telephone or other similar audio electronic means, the hearing shall be held in person or by video conferencing or other similar audiovisual electronic means.
- (3) All substantive and procedural rights apply to telephone hearings, subject only to the limitations of the physical arrangement.
- (4) Documentary Evidence. For a telephone hearing, documentary evidence to be offered shall be mailed or delivered by the proponent to all parties and the Office at least 5 days before the hearing.

surprised about this. The Parent expressed concern about her ability to cross-examine the witness. Shortly thereafter I asked the witness when she was returning to Maryland,²⁵ as I too was concerned about the Parent's ability to fully cross-examine the witness. Cross, however, is dependent to a large extent on direct and I decided to allow direct examination to start.

Ms. XXXX started testifying regarding her credentials. The Parent objected partway through, asserting that the witness was reading from something. I asked Ms. XXXX if she was reading from a document and she advised that she was. She had jotted down notes so she would not forget things she wanted to say and she was using those notes. Since they were nothing official she did not think my earlier questions had been aimed at this type of paperwork. I admonished the witness, reinstructed her regarding the use of any paperwork whatsoever, and asked questions designed to determine if she fully understood my instructions at this point and if she intended to comply with them. I was satisfied that the witness would not be referring to any manner of reference material going forward. The Parent was not and renewed her objection to telephone testimony. I overruled the objection.

As Ms. XXXX began testifying about substantive matters a date was mentioned, from May 2013, which was the date of an IEP meeting which Ms. XXXX did not attend. The Parent objected, saying that there was no way the witness could remember that date independently without reference material. I stopped the direct examination of the witness and questioned her about how she remembered the date. Ms. XXXX testified that she was on maternity leave with a new baby but that Dr. XXXX had been so concerned about that particular IEP meeting that she had called Ms. XXXX at home to discuss the upcoming IEP meeting and to ask if Ms. XXXX could come in for the meeting. I found this a reasonable explanation of why the witness could recall the date and permitted direct examination to continue.

²⁵ The witness was returning to Maryland on Sunday, July 13, 2014, and was returning to work on Monday, July 14, 2014, so had it been necessary to require the witness to appear in person for cross-examination, it could have been scheduled promptly.

From there things deteriorated rapidly. Ms. XXXX mentioned a second date, February 11, 2014, the date of another IEP meeting. The Parent was becoming louder and louder and talking over me, counsel for BCPS, and the witness, insisting that I was letting the witness read and testify from some kind of documents or records. The February 11, 2014 IEP meeting was a watershed meeting. It does not surprise me that Ms. XXXX would recall the date of that meeting without referring to anything other than memory. Her services to the Student were changed that day to include one-half hour per day of pull-out special education services.

When Ms. XXXX testified that the Student could sing the alphabet some to “J” but no further, the Parent expressed her dissatisfaction with and disappointment in the proceedings and left, stating, among other things, that I had let the witness read “five times,” and that unless it was one’s own child a witness simply could not recall the details Ms. XXXX was testifying about, particularly the dates and the part about the letter “J,” unless she had records or notes to draw from. The Parent did not return to the hearing or further participate in any aspect of the proceedings.

I do not believe that Ms. XXXX took school records about the Student with her on her [State] vacation. It is also clear that BCPS did not provide the witness with any documents to use while testifying. I remain persuaded that due to the difficult circumstances presented by all of the Student’s IEP meetings and Ms. XXXX’s daily one-on-one work with the Student, her testimony was from her memory and that she was not making further use of reference materials.

Ironically, Ms. XXXX, out of all the witnesses called by BCPS, offered testimony that was the most favorable to the Student. She acknowledged that there were instances where she had not provided the services called for in the IEP. She believed that if she was in an IEP meeting for the Student, particularly the way they were prolonged by the Parent, she did not have to make up missed services. She also had not provided services on some half-days, because the

Student's assigned time was after the time of half-day dismissal. When the Parent pointed out that services were not being provided in accordance with the IEP and school policy, Ms. XXXX began making up the missed sessions. She provided the Parent with a schedule every week showing when make-up work was being done. The Parent does not believe Ms. XXXX is honest or credible. She has accused Ms. XXXX of lying and argued with her about whether services were actually made up.

Ms. XXXX, when asked if the Student's placement was appropriate, said that it was not – that the Student needed more special education services. In follow-up questions she clarified that she thinks that based on the Student's intellectual disability, the information provided in recent evaluations and assessments and reports, her work with the Student, and recent changes related to the common core curriculum, more special education services are now necessary. She also offered her opinion that the Student's placement was appropriate based on all available information for all of the period covered by this Due Process complaint. She added that in IEP meetings occurring after the period covered by this Due Process complaint, additional hours of special education have been added for the Student.

The last professional witness called by BCPS was XXXX XXXX. Ms. XXXX has Bachelor of Science degrees in Elementary Education, Special Education, and Psychology and a Juris Doctorate, and has completed coursework for a Doctoral program in Special Education Urban Leadership. Ms. XXXX's experience includes, among other things, serving as a special education teacher in BCPS from 1980 – 1996, and then serving as a special education inclusion/instructional specialist for BCPS from 1996-2000. She became the Coordinator of BCPS' Special Education Parent Response Unit in 200 and stayed in that position until 2011, when she became an Education Specialist for BCPS.

As an Education Specialist, Ms. XXXX does intake of parent concerns, addresses issues

related to special education, assists parents, gather information, reviews IEPs and the results of educational assessments, works to resolve parent or school concerns, and addresses non-compliance issues when they are found. She has a case load and the Student and the Parent are on her caseload. She has received many Parent reports of dissatisfaction with the IEP process including complaints about various notices, complaints about IEP attendance – sometimes demanding that certain persons attend, sometimes demanding that certain persons leave, requests for additional services, including increased SL services, provision of OT services, and provision of direct psychological services.

Ms. XXXX attended the Student's March 11, 2014 IEP meeting and his April 2014 IEP meeting. She was able to attest to Dr. XXXX's attendance at the March 11, 2014 meeting. This was an issue because the Parent had requested that Dr. XXXX not attend the meeting and Dr. XXXX's signature did not appear on the March 11, 2014 IEP meeting attendance sheet. The Parent was persuaded that Dr. XXXX did not attend the meeting; however, although Dr. XXXX was not planning on attending, she came at Ms. XXXX's urging and sat beside her during the meeting.

Having reviewed the Student's records, Ms. XXXX explained that the Student is "going to struggle; he has some abilities and is going to progress, but at a very slow rate." Ms. XXXX also testified regarding the September 2013 IEP. It addressed the Student's weaknesses and offered the Student many benefits in terms of being with non-disabled children so as to experience peer modeling. She noted that the Student made progress in academic skills and socially. She noted that he improved in study and learning habits, he improved his ability to remain quiet, to walk into a classroom and take a seat. She believed the Student's placement was appropriate. Ms. XXXX had also seen personally the difference in the Student's behavior in a matter of minutes depending on whether the Parent was present. The Student's behavior

deteriorated with the Parent present.

I will review the Parent's testimony and that of Ms. XXXX as it relates to each of the issues left for consideration, but first I will make some general observations. The Parent testified that working with BCPS has been "gruesome, tedious, stressful, cumbersome, [and] mentally and physically exhausting." She believes that in seeking what is best for the Student her "cries fell on deaf ears." She testified to her belief that BCPS falsifies documents and cannot be trusted. She emphasized that she did not feel that her "concerns were *ever* heard." She broke down sobbing after testimony about the Student's intellectual disability, stating, "I don't feel as though his IQ is low and I don't feel like he has an intellectual disability." She wanted BCPS to refrain from using vocabulary that suggested otherwise, such as low IQ and low functioning. After a break to allow all participants to refresh themselves and consider the matter, the parties discussed the issue on the record and it was agreed that BCPS witnesses would be instructed to use the term "intellectual disability" if the topic arose during testimony. That agreement was observed even after the Parent left the hearing.

The Parent believes that BCPS has not made any efforts to assist the Student except when the Parent has done the groundwork or when family members have pushed. The Parent offered testimony as to each of the issues listed in the Order, and clarified and narrowed the issues in argument. On cross-examination her answers often reflected her distrust of BCPS. Routine identification of documents was rendered impossible because the Parent refused to agree that any document was what it purported to be due to her oft-repeated assertion that BCPS falsified documents.

At one point the Parent was asked if her name appeared on a typed list on a document. She answered in the negative several times despite the fact that her name did appear on the list. She understood perfectly well what was being asked but did not budge from her position.

Eventually it became clear that due to a small typographical error, her name was written on the list as “XXXX XXXX” instead of “XXXX XXXX.” Instead of just explaining that her name was misspelled, she wasted valuable time insisting that her name did not appear on the list. At one point during cross-examination the Parent was being asked about an agreement she entered into with BCPS regarding hours of tutoring. Her evasiveness about whether and when she signed the exhibit was perplexing. The Parent’s testimony was clearly heartfelt, but lacking in expertise, sometimes lacking in detail, and almost completely unsupported by anything other than her own ideas about what she wants for the Student.

Ms. XXXX is a very involved grandparent. She testified that her son, the Student’s father, is ill, so she helps with the Student. She also expressed frustration with BCPS, echoing many of the Parent’s sentiments. She believes that BCPS is unresponsive to the family’s concerns about the Student’s lack of progress. She works with the Student on homework and generally on trying to teach him letters, numbers, and other basics. She sees the Student falling behind and does not understand why BCPS has not been more proactive in addressing his learning gap. She acknowledges that the Student has made some progress over the past two school years, but believes that most of the progress the Student has made is attributable to the efforts the family makes outside of school.

Issue 3: Whether the Student was entitled to ESY services for the summer of 2013²⁶

The Fourth Circuit has “articulated . . . a formal standard for determining when ESY Services are appropriate under the IDEA: ‘ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.’” *Dibuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 189-90 (4th Cir. 2002) (citing *MM v. Sch. Dist. of Greenville*

²⁶ I am discussing the issues out of the sequence they appeared in the Order for organizational purposes.

Cnty., 303 F.3d 523, 537-38 (4th Cir. 2002)). “In *MM*, we carefully emphasized that, under this standard, ‘the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school.’” *Dibuo*, 309 F.3d at 190.

In pertinent part, COMAR 13A.05.01.08B provides:

(2) Extended School Year Services.

(a) At least annually, the IEP team shall determine whether the student requires the provision of extended school year services in accordance with Education Article, §8-405, Annotated Code of Maryland.

(b) The IEP team shall consider:

- (i) Whether the student's IEP includes annual goals related to critical life skills;
- (ii) Whether there is a likelihood of substantial regression of critical life skills caused by the normal school break in the regular school year and a failure to recover those lost skills in a reasonable time;
- (iii) The student's degree of progress toward mastery of IEP goals related to critical life skills;
- (iv) The presence of emerging skills or breakthrough opportunities;
- (v) Interfering behaviors;
- (vi) The nature and severity of the disability; and
- (vii) Special circumstances.

(c) Following the consideration of factors described in §B(2)(b) of this regulation, the IEP team shall determine whether the benefits the student with a disability gains during the regular school year will be significantly jeopardized if that student is not provided with an educational program during a normal break in the regular school year.

“‘Critical life skill’ means a skill determined by the individualized education program (IEP) team to be critical to the student’s overall educational progress.” COMAR 13A.05.01.03B(15).

The question of ESY for summer 2013 was discussed at the May 30, 2013 IEP meeting. Each qualifying factor was considered. The team decided that that the Student did not qualify and the IEP stated that conclusion. The IEP states that the Parent accepted the team decision on this issue. The Parent’s position is that she expressed disagreement at the time and that BCPS falsified the IEP material in saying that she agreed.

The Parent believes that the Student qualified for ESY because of the nature and severity of his disability. In taking that position, the Parent appears to equate a diagnosis of Autism with automatic qualification as having a disability of such nature and severity as to authorize ESY services. On this point, as for all others, the Parent offered no expert testimony. BCPS offered testimony from credible professionals with appropriate credentials that no specific diagnosis provides any automatic entitlement to ESY, rather the decision is made individually, as the law requires, for each student. The Parent also offered testimony herself and from Ms. XXXX to show that the Student regressed during breaks. There was no data or documentation to support that position and the team found to the contrary; however, even if regression did occur, case law has made clear that regression is a reality for most or all students and the idea that a student might regress is insufficient to mandate ESY to provide FAPE.

The Parent has failed to meet her burden of proof on this issue.

Issue 5: whether BCPS committed a procedural violation with respect to IEP meetings and notices for denial of services

This issue was discussed when BCPS made its motion for judgment. The Parent narrowed the alleged procedural violations to the following:

- lack of 10 days notice for the IEP meeting occurring March 11, 2014;
- the attendance of two OT professionals at an IEP meeting; and
- time constraints placed on the length of meetings.

The Parent also believed that her complaint that BCPS did not consider outside reports she submitted in making decisions falls under this issue. BCPS believed that the issue was not fairly raised by Parent's complaint and was not included under this issue by ALJ Power. To try to resolve this disagreement between the parties, I reviewed the recording of the prehearing conference for a second time on July 9, 2014. I found it difficult to determine whether ALJ

Power intended that it be included. He indicated that the Parent could offer testimony on the matter, but it is less clear whether he considered it to be an issue for decision. Under those circumstances, out of an abundance of caution, I will consider that complaint as well.

The Parent asserted in her complaint that there was a “consistent lack of prior notice for IEP meetings.” She repeated the substance of this statement numerous times in her presentation, emphasizing her perception of the repeated nature of this violation. When BCPS was reviewing the numerous relevant IEP meeting notices in its exhibit book, the Parent complained about the tedious nature of the exercise and narrowed down the timeframe of her complaint from August 2012 to March 2014. Later still, when pressed as to the evidence in support of her position at the end of her case, she limited this allegation to a single occurrence. With respect to the March 2014 meeting, it was a continuation of the February 2014 meeting and was scheduled at the Parent’s request. The Parent estimated that she had six or seven days of actual notice before the hearing date, but stood on the *de minimus* technical violation. She and Ms. XXXX both attended the meeting and fully participated.

The lack of ten days notice of the IEP meeting is a procedural violation. That does not end the inquiry, though. This particular procedural violation did not in any way impact the Parent’s ability to fully participate in the meeting and the IEP process. It in no way impacted the Student’s FAPE. As the Fourth Circuit observed:

We now turn to the threshold question presented in this appeal: Whether a procedural violation of the IDEA can support a finding that a school district failed to provide a disabled child with a FAPE when the procedural violation did not actually interfere with the provision of a FAPE to that child. The answer to this question, under well-established circuit precedent, is no.

Dibuo, 309 F.3d at 190.

The Parent proved that two OT professionals attended at least one IEP meeting. She offered no authority for the proposition that this constituted a procedural violation and I find no

procedural violation based on this occurrence.

The Parent calls for frequent IEP meetings. She routinely arrives late to the meetings, keeping rooms full of people waiting. She draws out the meetings and refuses to respect reasonable boundaries for ending the meetings, putting BCPS at risk for employee grievances.

The Parent characterized her usual speaking voice as loud, which is not an exaggeration. Her voice frequently escalates in volume from that baseline. Asked if she shouted or screamed at BCPS personnel in IEP meetings or in other encounters the Parent skirted the question by saying that she is passionate about the Student's education. Ms. XXXX, upon being asked by BCPS if the Parent's demeanor degrades in some IEP meetings to yelling or screaming at other participants, acknowledged that the Parent's voice is very loud and that she is "passionate" and "very aware of her rights." Tellingly, when asked on redirect by the Parent whether her (the Parent's) level of intensity rose to yelling or screaming, Ms. XXXX stated that while that was not her perception, it was probably somebody's perception that the Parent did yell or scream.

Yet there is documentation from every single IEP meeting that the Parent's concerns were solicited and discussed, often at great length. Every single witness, including the Parent and Ms. XXXX, testified to some extent about IEP meeting discussions centering on Parent concerns. Consideration of Parent concerns also took the form of countless emails, phone calls and in-person discussions taking place outside of formal IEP meetings.

The Parent did not prove through evidence she presented that there was any limitation on time for the meetings; however, various IEPs and other documents in evidence show that there were sometimes problems ending the meetings. Also, in City Schools Exhibit 101, an email from the Parent to BCPS, the Parent makes mention of a "two hour time frame" for the next IEP meeting.

BCPS is not totally at the Parent's mercy. It can set reasonable limits on IEP meeting

times. The Parent offered so little evidence on this point that I really do not know the details of the alleged procedural violations – which meetings are alleged to have been involved, what limits were set, whether there was any “enforcement” of limits, etc. Further, the Parent offered no authority for her assertion that anything that was proven in this case equates to a procedural violation. Finally, if this is a procedural violation, there was no evidence of any harm or any deprivation of FAPE that resulted from it.

Lastly under this issue, the Parent stated repeatedly that reports that she submitted were never considered. The credible evidence in this case shows otherwise. The evidence shows that BCPS personnel reviewed relevant reports and incorporated them in formulating the Student’s BCPS sensory diet, his OT goals and objectives, and in shaping other facets of his IEP. The Parent did not offer proof of any specifics (except the report from XXXX). She just made sweeping statements about the lack of consideration her outside reports received. She did not offer any evidence about what such reports might have shown or recommended or how the Student’s IEP should have differed based on outside reports. I find the Parent has not sustained her burden of proof on this point.

I find that overall the Parent proved one procedural violation on the part of BCPS, but no denial of the Parent’s ability to participate in the process and no denial of FAPE as a result of that violation.

Issue 1: Whether the Student is receiving those services called for in his IEP

In discussion on the motion for judgment, the Parent narrowed this issue to a consideration of the Student’s special education pull-out services which were to have been initiated with the February 11, 2014 IEP. More specifically, she alleged that the Student was deprived of nine full sessions of one-half hour each and indeterminate parts of six additional sessions. The Student did miss nine full sessions. Neither side presented evidence regarding the

dates, but Ms. XXXX readily acknowledged that initially she did not believe she had to make up sessions for half days or days when she was doing other work specifically related to the Student, such as attending an IEP meeting for him. She was mistaken about this and when the IEP team considered the Parent's complaint, Ms. XXXX was instructed to make up the sessions. I find by a preponderance of the evidence that she did make up those nine missed sessions. There was a temporary detour from the letter of the requirements of the IEP, but there was no deprivation of FAPE under these circumstances.

With the partial sessions, I have no evidence when they occurred or how much time is really involved. With the OT sessions, the Parent complained about discrepancies as small as two minutes and as large as ten minutes. Assuming the same type of time range for missed special education sessions, I find that this is not a substantial deviation from the IEP. The Parent has presented no evidence that would support a finding that the Student's FAPE has been significantly impacted by this lapse. The 5th Circuit framed small lapses in IEP implementation this way:

Therefore, we conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000).

BCPS also pointed out that it had offered and the Parent had accepted thirty hours of tutoring services to remedy any possible loss suffered by the Student. The Parent did not present any evidence that there was any loss of FAPE due to these partial missed sessions. The Parent has failed to meet her burden of proof on this issue.

Issue 6: Whether the Student is entitled to services other than what is called for in the IEP

The Parent divided this issue into two categories. The first category represented services that the Parent believed the Student should be but was not receiving: reading support, math support, and direct psychological services. The second category encompassed services he was receiving but at levels the Parent deemed inadequate: special education services and OT.

The Parent denies that the Student has any intellectual disability. She dismisses the overwhelming evidence of an intellectual disability and maintains that BCPS used inappropriate tools in its assessments and evaluations and has generally failed to uncover the Student's learning style. BCPS presented compelling evidence that the Student is intellectually disabled and I find based on the evidence that he is intellectually disabled. The clash of the Parent's position on this issue and BCPS' lays the groundwork for most of the sub-points under this issue and for the next issue I will address – the appropriateness of the Student's placement.

The Student does not keep up with his grade-level peers. The reality is that he cannot keep up with grade level peers because of his intellectual disability, but the Parent does not acknowledge this and blames BCPS for the widening gap. BCPS is hard-pressed to address this directly, because of the Parent's inability to tolerate the suggestion that the Student is intellectually disabled. Piling more services on the Student is not going to resolve the underlying problem. The Student had a series of IEPs all of which were reasonably calculated to afford him educational benefit, he made progress, and he was in fact provided with FAPE.

The Parent's request for reading support appears to center on her assertion that the Student should be placed in the [Program] program and testimony as to her opinion that BCPS should assign a reading specialist with expertise in autism. The Parent presented a very cursory summary of the [Program] program. She testified in a few sentences about who created it and why it was created. She did not offer any information whatsoever about how the program operates, what the curriculum entails, or why the Student would be a suitable candidate for the

program. The Parent similarly offered no information about how a reading specialist with expertise in autism would address the Student's needs. The Parent's request for math support was even less developed. She testified that BCPS has math support personnel and that the Student did not receive assistance from that personnel. That BCPS has math support available in the school does not say anything about whether it would be appropriate for the Student or whether the Student was denied FAPE. The Parent's assertions that the Student is entitled to these services are not supported by the evidence.

The Parent presented no evidence in support of her contention that the Student should be provided with direct psychological services. There was evidence in the record that the Student would not benefit from direct psychological services because at this point in the Student's life he would be unable to transfer any skills he might learn in therapy sessions to situations outside the therapy setting. Ms. XXXX, an expert in school psychology, testified that the Student had appropriate goals and objectives and that he was making progress on them. She testified that direct services were not indicated for the Student. In fact, the Student was doing well enough that she recommended a decrease in the indirect services offered to the Student, a recommendation the team accepted despite the Parent's objection. The Parent offered no expert testimony to counter that of Ms. XXXX. Even in her own testimony she offered no reason why the Student needed direct psychological services or what would be addressed or accomplished in therapy sessions if they were instituted.

The Parent has failed to prove that any of the services not provided to the Student resulted in a denial of FAPE.

The Parent also failed to prove that the IEPs at issue failed to provide an adequate amount of OT or special education services. BCPS undertook an OT assessment at the Parent's request in the 2012-2013 school year. The findings did not indicate a need for direct services at that

time. The Parent raised concerns again in the next school year and after consideration by the team, direct OT services were added to the Student's IEP. His OT provider, Ms. XXXX, qualified as an expert in her field, squarely addressed the question of the amount of services in her testimony. She related that OT services must be based on consideration of the Student's needs, his skill level, and his cognitive abilities. She emphasized that it is not reasonable to say that the Student is two years behind so progress must be fast. It does not work that way. The Student's goal and objectives in this area were appropriate and he was making progress.

The IEPs the Student has had at [School] have always included special education services in the general education classroom. As of February 11, 2014, the Student was scheduled for daily pull-out services. The parties advised me that additional special education services are being added to his current IEP – one developed after the filing of this complaint. The appropriate level of service is a work in progress, shaped by the increasing demands of the curriculum and the needs of the Student. The Parent has failed to prove by a preponderance of the evidence that the IEPs at issue in this case were not reasonably calculated to confer educational benefit on the Student, that he failed to make progress, albeit slow, or that he was denied FAPE.

The addition of new services or an increase in the level of existing services is not to be interpreted as proving that a previous IEP was inadequate:

[R]eview of IEPs under the IDEA is meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was reasonably calculated to enable the child to receive educational benefits. But this prospective review would be undercut if significant weight were always given to evidence that arose only after an IEP were created. Judicial review would simply not be fair to school districts, whose decisions would be judged in hindsight based on later assessments of a student's needs at [a] later point in time. And more importantly, if services added to a later IEP were always used to cast doubt on an earlier one, school districts would develop a strong disincentive against updating their IEPs based on new information. This scenario is the exact opposite of what Congress intended when it provided for regular review and revision of IEPs, *see* 20 U.S.C. § 1414(d)(4)(A), and it would

do little to help the interests of disabled children.

Schaffer v. Weast, 554 F.3d 470, 477 (4th Cir. 2009) (internal quotation marks, citations, and parentheticals omitted).

Issue 2: Whether the Student's placement is appropriate

As stated above, once a proper IEP is constituted, the placement decision of educational professionals is accorded great deference. On arguing against summary judgment on this issue, the Parent did not address goals and objectives. She did not suggest that the Student's IEP could not be implemented at [School]. She spoke about an amalgam of ideas, including the Student's lack of mastery of any of the six academic units presented to him in the 2013-2014 school year as of the February 11, 2014 IEP meeting, the lack of the assignment of an autism specialist to the Student, the overcrowding of his classroom, passing reference to "behavioral issues," and "homework," and items such as the general proposition that it should not be that the Student cannot count beyond 10 and it should not have taken him a whole year to learn to write his name, and that he should have mastered sight words.

A good deal of the Parent's argument on this issue is bound up in the Student's intellectual disability, which I have already discussed. This Student will take much longer to learn to count, to learn to write, and to master sight words than his same-age peers.

As to behavioral issues, at school, the Parent's presence changes the Student's behavior for the worse.²⁷ Given this, her frame of reference with respect to the Student's behavior while he is at school is skewed to the negative. Even when the parties witness the same incident, they sometimes do not agree on how to characterize what is occurring. The Parent is adamant that the

²⁷ See, e.g., City Schools 21, pg. 9 ("[T]here are multiple documented reports where [the Student's] performance significantly changes when his mother is present and it is a frequent occurrence that [the Student] performs well in school but his behavior and skill levels deteriorate in the presence of his mother."); City Schools 22, pg. 9 ("[I]t was documented on previous reports that [the Parent's] attendance at prior assessments had a negative affect (sic) on [the Student's] behavior and performance."); City Schools 58, pg. 3 (Encounter log progress note regarding contact with XXXX, "It was also reported [by XXXX] that the Student's mother seems to have a lot to do with [the Student's] behavior."); Testimony of XXXX XXXX.

Student tried to elope during the 2013-2014 school year. BCPS is just as adamant that the Student's behavior in that incident was his attempt to get an adult to chase him and was not related to any attempt at elopement.

As to class size, the Parent testified that the Student's pre-K classroom had 34 students. The fair inference is that 34 in a class is too many and that any student would benefit in a reduction from that number, but she did not present evidence of how it impacted the Student or interfered with his receiving educational benefit. He has the benefit of a full-time one-on-one aid who constantly works with him in addition to his general education and special education teachers. The Parent did not request placement in any particular school program.

Although the obligation of BCPS to educate the Student in the least restrictive environment (LRE) is not a separate issue in this case, it is certainly a component for consideration in an analysis of the appropriateness of his placement. The IDEA has always expressed a statutory preference for educating children with learning disabilities in the LRE with their non-disabled peers. The IDEA provides at 20 U.S.C.A. § 1412(a)(5)(A) 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). BCPS has tried to keep the Student with his non-disabled peers and the credible testimony is that the Student has benefitted from having non-disabled peers as role models and playmates. In the future it may be that the Student will be better served by other arrangements, but his placement in the time under consideration in this case comported with

LRE ideals which seek to mainstream students to the greatest extent possible.

Witness after witness for BCPS testified in their respective areas of expertise – psychology, SL, OT, and special education – that the goals and objectives in the IEP were appropriate for the Student, that he was making progress on those goals, and that his educational placement was appropriate.

I find that the Parent has failed to meet her burden of proving that the Student's placement was inappropriate.

Summary

I find that the Parent proved one minor procedural violation by BCPS, but that she did not prove any resulting loss of FAPE. The Parent is not entitled to relief in this matter.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student received the services called for in his IEPs dated March 16, 2013, May 29, 2013, September 3, 2013, and February 11, 2014. 20 U.S.C. 1414(d); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

I further conclude as a matter of law that the Student's placement from September 2012 through March 2014 was appropriate. 20 U.S.C. 1414(d) and (e); 20 U.S.C.A. § 1412(a)(5)(A); *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *A.B. v. Lawson*, 354 F.3d 315 (2004); *M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523 (4th Cir. 2002).

I further conclude as a matter of law that the Student was not entitled to extended year services for the summer of 2013. COMAR 13A.05.01.08B; *Dibuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 189-90 (4th Cir. 2002).

I further conclude as a matter of law that BCPS committed one minor procedural

violation; however, there was no resulting harm to the Parent's ability to participate in the IEP process and no denial of FAPE. *Dibuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 189-90 (4th Cir. 2002).

I further conclude as a matter of law that the Student's IEPs dated March 6, 2013, May 29, 2013, September 3, 2013, and February 11, 2014 were reasonably calculated to provide the Student with meaningful educational benefit and that the Student was not entitled to additional services or higher levels of service in order for BCPS to provide FAPE. 20 U.S.C.A. § 1401(9); Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2013); *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Hessler v. State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983); *Doe v. Bd. of Educ. of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993).

I further conclude as a matter of law that BCPS was entitled to summary decision on the issue of whether the Student was illegally removed from gym class. COMAR 28.02.01.12E; *Schaffer v. Weast*, 546 U.S. 49 (2005).

ORDER

Therefore, it is ORDERED the Student's March 6, 2013, May 29, 2013, September 3, 2013, and February 11, 2014 BCPS IEPs and his placement at [School] for the 2012-2013 and 2013-2014 school years are AFFIRMED, and that the Parent's requests for relief on behalf of the Student are DENIED.

August 1, 2014
Date Decision Issued

Kimberly A. Farrell
Administrative Law Judge

KAF/kkc

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) (2014).

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.