

XXXX XXXX¹,

v.

BALTMOMRE CITY PUBLIC

SCHOOL SYSYEM

* BEFORE MICHAEL W. BURNS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-CITY-OT-14-27815

* * * * *

DECISION

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ISSUES
SUMMARY OF THE EVIDENCE
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DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On August 7, 2014, Mark B. Martin, Esquire, on behalf of [Student] and her parents (Parents), [Mother] and [Father], filed a Due Process Complaint with the Maryland Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the Baltimore City Public School System (BCPS or BCPSS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

Mediation was requested. BCPS declined to participate in mediation. On August 20, 2014, the parties conducted a resolution session which was unsuccessful.

On August 15, 2014, the Student filed a Motion for Production of Documents. On September 11, 2014, the Student filed a Motion to Compel Production of Documents (Motion to Compel). On September 23, 2014, BCPS filed a Response to Motion to Compel Production of

¹ In order to attempt to preserve the Student’s confidentiality, I stressed during the hearing the importance of referring to her by her initials ([Student]). I will continue to refer to the Student as the “Student” or by her initials in this decision after having captioned the decision with her name.

Documents.

On September 29, 2014, I conducted a Telephone Pre-Hearing Conference (TPHC) originating from the OAH in Hunt Valley, Maryland, in which the following individuals participated: Attorney Darnell L. Henderson, on behalf of the BCPS,² and Attorney Mark B. Martin, on behalf of the Student and the Parents.

At the TPHC, the Student requested that I rule on the Motion to Compel. After hearing and considering argument from both parties, I denied the Motion to Compel on the record.

At the TPHC, the parties' representatives were advised of the time requirements for issuing a decision. During ongoing discussion it became clear that the earliest date available to the parties, pursuant to their calendars, for the commencement of the due process hearing was November 10, 2014, with the hearing scheduled for a total of twelve hearing days ending on December 18, 2014.³ Because the hearing dates were more than forty-five days after the conclusion of the resolution meeting, which is the triggering event for the timeframe for a due process decision, the parties requested, and agreed, to waive the forty-five-day deadline found in the regulations and to the issuance of the written decision within thirty days after the close of the record in the hearing.⁴ 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2013); Code of Maryland Regulations (COMAR) 13A.05.01.15C.

A hearing on the record on all open Motions was conducted on November 3, 2014. Mr. Henderson represented the BCPS⁵. Mr. Martin represented the Student and her Parents. The first motion considered was the Parents' Motion for Enforcement of Procedural Safeguards (Motion

² Diana Wyles, Esquire, also was present with Mr. Henderson as co-counsel for BCPS.

³ As will be discussed herein, the hearing actually took a total of 19 days and ended on February 18, 2015. The record closed on February 19, 2015 to permit the Parents to file certain documents for the record.

⁴ Because the thirtieth day after the close of the record on February 19, 2015 falls on Saturday, March 21, 2015, the Parties agreed on the record to extend the date for the issuance of a written decision to Monday, March 23, 2015, the first available business date after March 21, 2015.

⁵ Ms. Wyles was also present with Mr. Henderson as co-counsel for the BCPS and presented argument on behalf of the BCPS.

for Enforcement) dealing with the Student's placement at [School 1] ([School 1]). After hearing and considering argument from both parties, I granted the Motion for Enforcement—to the extent that the Student was ordered to remain at her current placement, [School 1]—on the record. The second matter was the Parent's Motion for Partial Summary Decision and also the BCPS's Motion for Partial Summary Decision. After hearing and considering argument from both parties, I denied both Motions on the record. The BCPS next raised a Motion to Quash Subpoenas requested by the Parents related to XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX and XXXX XXXX. After hearing and considering argument from both parties, I granted, on the record, the Motion to Quash the subpoenas for XXXX XXXX and XXXX XXXX; I denied, on the record, the Motion to Quash the subpoenas for XXXX XXXX, XXXX XXXX and XXXX XXXX.

I conducted a hearing on the merits on November 10, 12, 19, 20 and 21, 2014, on December 8, 9, 10, 11, 16, 17 and 18, 2014, and on February 4, 5, 9, 11, 12, 13 and 18, 2015⁶ at the OAH office in Hunt Valley, Maryland. Mr. Henderson represented the BCPS.⁷ Mr. Martin represented the Student and the Parents.

On December 18, 2014, at the conclusion of the Parents' case, the BCPS made a Motion for Summary Decision. After hearing and considering argument from both parties, I found a dispute as to material facts and denied the Motion on the record on that date.

The record was closed on February 19, 2015 in order to permit the parties to file documents.

⁶ At the TPHC the parties agreed that the hearing would take ten days. Out of an abundance of caution I added two days to that schedule. The hearing eventually took nineteen days as noted. The dates in February were the first available to the parties and to the Administrative Law Judge.

⁷ Diana Wyles, Esquire, also was present with Mr. Henderson as co-counsel for the BCPS until December 16, 2014, at which time Lindsay E. Brecher, Esquire, replaced Ms. Wyles as co-counsel for the BCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511 (2012); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and 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 procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Was the Individualized Education Program (IEP) and placement developed by the BCPS reasonably calculated to provide the Student with a free appropriate public education (FAPE) for the 2014-2015 school year, including the Summer of 2014, and if there was a denial of FAPE, is placement at the [School 1] ([School 1]), a separate private day school, at the expense of the BCPS appropriate?
2. Does FAPE require that the Student be placed in a Maryland High School Diploma (Diploma) bound program?

SUMMARY OF THE EVIDENCE

Exhibits

Unless otherwise noted, I admitted the following exhibits on behalf of the Parents (the exhibits are designated as PRT. Ex.):

Ex. No.	Date	Description
13	6/2012	Middle School Report Card – 7 th Grade (final) – (Jt. Ex. 1) ⁸
18	2/11/13	Educational Assessment Report: by XXXX XXXX (BCPSS) – (Jt. Ex. 2)
20	2/13/13	Speech Assessment Report: by XXXX XXXX (BCPSS) – (Jt. Ex. 3)

⁸ 40 documents were submitted as Joint Exhibits by the parties. I will note them as part of each party's exhibit list as well as by a separate list of Joint Exhibits in the Summary of the Evidence – Exhibits section.

Ex. No.	Date	Description
22	2/22/13	IEP – (Jt. Ex. 4)
23	3/2013	MSA Home Report – Mathematics Grade 8
24	3/2013	MSA Home Report – Reading Grade 8
25	3/2013	MSA Home Report – Science Grade 8
29	5/13/13	Psychological Report: by XXXX XXXX (BCPSS) - (Jt. Ex. 5)
31	6/2013	Middle School Report Card – 8 th Grade (final) – (Jt. Ex. 6)
38	6/28/13	2012-2013 IEP Team Meeting Attendance Sheet – (Jt. Ex. 7)
39	7/8/13	2012-2013 IEP Team Meeting Attendance Sheet – (Jt. Ex. 8)
40	7/26/13	IEP – (Jt. Ex. 9)
41	8/1/13	Prior Written Notice – (Jt. Ex. 10)
42	9/3/13	Prior Written Notice – (Jt. Ex. 11)
43	9/3/13	IEP of 7/26/13 as amended 9/3/13 – (Jt. Ex. 12)
44	9/24/13	Letter from Mr. Henderson to Parents – (Jt. Ex. 13)
50	2/24/14	Transition Planning Inventory (TPI) – completed by: XXXX XXXX
51	2/24/14	TPI – completed by: Parents
52	3/1/14	[School 1] Admission Psychosocial Summary/Progress Report
54	3/5/14	TPI – completed by: Parents
55	3/13/14	BCPS Graduation Requirements
56	2/21/14	BCPS Notice of IEP Team Meeting – (Jt. Ex. 40); (BCPS Ex. 16 ⁹)
58	3/13/14	2012-2013 IEP Team Meeting Attendance Sheet – (BCPS Ex. 9)
59	3/13/14	Prior Written Notice – (BCPS Ex. 12)
60	3/13/14	Reading Progress Report – XXXX XXXX, [School 1] – (BCPS Ex. 34)
61	3/31/14	Confidential Student Observation Report by XXXX XXXX, BCPS – (Jt. Ex. 15)
62	4/3/14	Student Observation Report by XXXX XXXX, BCPS

⁹ The Prehearing Conference Report and Order ordered the parties to stipulate to Joint Exhibits to the extent possible. The parties complied to some extent, but a number of other documents offered as evidence were contained in both the binders submitted by the Parents and by the BCPS. I have, therefore, indicated where appropriate and to the extent possible, in both parties' exhibit lists, where the other party has submitted the same document as an exhibit. I have also indicated if a document is also a Joint Exhibit.

Ex. No.	Date	Description
63	4/3/14	Student Observation Report, Revised, by XXXX XXXX, BCPS
64	4/3/14	Observation of [Student] by XXXX XXXX, BCPS (Jt. Ex. 16)
65	4/7/14	[School 1] Progress Report, Keyboarding and Applications, XXXX XXXX, [School 1] – (Jt. Ex. 17)
66	4/8/14	BCPS Office of Nonpublic Services Student Observation, XXXX XXXX, BCPS – (Jt. Ex. 18)
67	4/10/14	[School 1] Speech-Language Report by XXXX XXXX, [School 1] – (Jt. Ex. 19)
68	4/24/14	[School 1] Progress Report Environmental Science by XXXX XXXX, [School 1] – (Jt. Ex. 20)
69		Not Admitted
70	5/12/14	[School 1] Progress Report English 9A by XXXX XXXX, [School 1] – (Jt. Ex. 21)
71	5/12/14	[School 1] Progress Report English 9B by XXXX XXXX, [School 1] – (Jt. Ex. 22)
72	5/12/14	[School 1] Progress Report Math by XXXX XXXX, [School 1] – (Jt. Ex. 23)
73	5/12/14	Social Studies Progress Report by XXXX XXXX, [School 1] (Jt. Ex. 24)
74	5/12/14	Notice of IEP Team Meeting – (Jt. Ex. 25)
75	5/12/14	IEP Team Attendance Sheet – (Jt. Ex. 26)
76	5/12/14	Individualized Instructional Plan (IIP), draft – (BCPS Ex. 102)
77		Not Admitted
78		Not Admitted
81	5/19/14	Notice of IEP Team Meeting – (BCPS Ex. 14)
82	5/21/14	IEP Team Meeting Attendance Sheet – (Jt. Ex. 27)
84		Not Admitted
85		Not Admitted
86	5/21/14	IIP
87	5/21/14	BCPS Prior Written Notice – (Jt. Ex. 28), (BCPS Ex. 11)
88	5/27/14	Letter from XXXX XXXX, Interim Chief Executive Officer, to [Mother]

Ex. No.	Date	Description
89	5/29/14	Letter from Mr. Henderson to Mr. Martin – (Jt. Ex. 14), (BCPS Ex. 79)
90	5/21/14	IEP
91	5/30/14	Electronic Mail (email) from Mr. Henderson to Mr. Martin – (Jt. Ex. 29)
96	8/7/14	Letter from Mr. Martin to XXXX XXXX, Coordinator of Due Process, BCPS
97	8/17/14	BCPS Response to Due Process Complaint
98	8/29/14	IEP, amended 8/29/14
99		Not Admitted
100		Not Admitted
101		Not Admitted
102		Not Admitted
103		Not Admitted
104		Not Admitted
105	10/27/14	Student Schedule for [Student]
106	First Quarter 2014-15	[School 1] Report Card, [Student]
107		Not Admitted
108	9/1/14	[School 1] Private Pay Tuition Contract
109	9/6/06	MSDE Technical Assistance Bulletin 10
110	April 2012	MSDE Elimination of the Modified Student School Assessment (Mod-MSA)
111	Revised December 2009	MSDE Technical Assistance Bulletin 17
112	7/2/12	Mod-HSA Appendix B: IEP Team Decision-Making Process Eligibility Tool
113	7/2/12	Alt-MSA Appendix C: IEP Team Decision-Making Process Eligibility Tool
115		Curriculum Vitae (CV), XXXX XXXX
116		CV, XXXX XXXX

Ex. No.	Date	Description
117		CV, XXXX XXXX
118		CV, XXXX XXXX, III
119		CV, XXXX XXXX
120		CV, XXXX XXXX
121		CV, XXXX XXXX
125		CV, XXXX XXXX
127		Not Admitted
128		Not Admitted

Unless otherwise noted, I admitted the following exhibits on behalf of the BCPS (the exhibits are designated as BCPS Ex.):

Ex. No.	Date	Description
1	8/17/14	BCPS Response to the Due Process Complaint – (PRT. Ex. 97) ¹⁰
2	8/7/14	Letter from Mr. Martin to XXXX XXXX, Coordinator of Due Process, BCPS – (PRT. Ex. 96)
3	5/21/14	IEP
4	9/3/13	IEP – (Jt. Ex. 12), (PRT. Ex. 43)
6	2/22/13	IEP – (Jt. Ex. 4)
7	5/21/14	IEP Team Meeting Attendance Sheet – (Jt. Ex. 27), (PRT. Ex. 82)
8	5/12/14	IEP Team Meeting Attendance Sheet – (Jt. Ex. 26)
9	3/13/14	IEP Team Meeting Attendance Sheet – (PRT. Ex. 58)
10	7/26/13	IEP Team Meeting Attendance Sheet
11	5/21/14	BCPS Prior Written Notice – (Jt. Ex. 28), (PRT. Ex. 87)
12	3/13/14	BCPS Prior Written Notice – (PRT. Ex. 59)
13	8/1/13	BCPS Prior Written Notice – (Jt. Ex. 10)
14	5/19/14	Notice of IEP Team Meeting – (PRT. Ex. 81)
15	4/29/14	Notice of IEP Team Meeting

¹⁰ See footnote number 9.

Ex. No.	Date	Description
16	2/21/14	Notice of IEP Team Meeting – (PRT. Ex. 56)
17	4/10/14	Report, XXXX XXXX ([School 1]) – (Jt. Ex. 19)
18	5/13/13	Psychological Report by XXXX XXXX (BCPSS) (Jt. Ex. 5), (PRT. Ex. 29)
19	3/5/14	TPI – completed by the Parents - (PRT. Ex. 54)
20	2/24/14	TPI – completed by the Parents - (PRT. Ex. 51)
21	2/24/14	TPI – completed by XXXX XXXX - (PRT. Ex. 50)
22	2/11/13	BCPS Educational Assessment Report – (Jt. Ex. 2), (PRT. Ex. 18)
23	5/12/14	[School 1] Progress Report Math by XXXX XXXX, [School 1] – (Jt. Ex. 23), (PRT. Ex. 72)
24	5/12/14	[School 1] Close Out Progress Report Math by XXXX XXXX, [School 1] – (Jt. Ex. 30)
25	5/12/14	[School 1] Closed Out IEP Report by XXXX XXXX, [School 1] – (Jt. Ex. 31)
26	5/12/14	[School 1] Progress Report English 9A by XXXX XXXX, [School 1] – (Jt. Ex. 21), (PRT. Ex. 70)
27	5/12/14	[School 1] Close Out Progress Report by XXXX XXXX, [School 1] – (Jt. Ex. 32)
28	5/12/14	[School 1] Close Out Progress on Counseling Goals Report by XXXX XXXX, [School 1] – (Jt. Ex. 33)
29	4/24/14	[School 1] Progress Report Environmental Science by XXXX XXXX, [School 1] – (Jt. Ex. 34)
30	5/12/14	Social Studies Progress Report by XXXX XXXX, [School 1] (Jt. Ex. 35)
31	4/7/14	[School 1] Progress Report, Keyboarding and Applications, XXXX XXXX, [School 1] – (Jt. Ex. 17)
33	Undated	[School 1] Communication Close-out Progress Report by XXXX XXXX, [School 1] – (Jt. Ex. 37)
34	3/13/14	Reading Progress Report – XXXX XXXX, [School 1] – (PRT. Ex. 60)
36	3/5/14	Annual Progress Report, Math, by XXXX XXXX, [School 1]
42	6/20/14	[School 1] Report Card, 2013-2014 final
44	2012-2013	[School 2], Middle School Report Card, Grade 8, [Student] – (Jt. Ex. 38)

Ex. No.	Date	Description
45	2011-2012	[School 2], Middle School Report Card, Grade 7, [Student] – (Jt. Ex. 39)
46-71	Various dates	Various work samples of [Student] at [School 1]
72	3/31/14	Confidential Student Observation Report by: XXXX XXXX, BCPS – (Jt. Ex. 15), (PRT. Ex. 61)
73	4/8/14	BCPS Office of Nonpublic Services Student Observation, XXXX XXXX, BCPS – (Jt. Ex. 18), (PRT. Ex. 66)
74	4/3/14	Observation of [Student] by XXXX XXXX, BCPS (Jt. Ex. 16)
75	4/3/14	Student Observation Report, Revised, by XXXX XXXX, BCPS – (PRT. Ex. 63)
76	6/30/14	Letter from XXXX XXXX, Executive Director, Office of Special Education, BCPS, to the Parents
78	5/30/14	Letter from Ms. XXXX to the Parents
79	5/29/14	Letter from Mr. Henderson to Mr. Martin – (Jt. Ex. 14), (PRT. Ex. 89)
82		CV, XXXX XXXX, BCPS
83		CV, XXXX XXXX, BCPS
84		CV, XXXX XXXX, BCPS
85		CV, XXXX XXXX, BCPS
86		CV, XXXX XXXX, BCPS
88		CV, XXXX XXXX
91	July, 2014	<u>Maryland Classroom</u> , Vol. 19, No. 4
93		MSDE Graduation Course Requirements by Local School System, Students entering Grade 9 in 2005 and Beyond
94		English Language Arts Standards, Reading: Literature, Grade 9-10
99	6/12/13	BCPS Student Performance Review Request
102	5/12/14	IIP, draft – (PRT. Ex. 76)

I admitted the following joint exhibits (the exhibits are designated as Jt. Ex.):

Ex. No.	Date	Description
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Ex. No.	Date	Description
1	6/2012	Middle School Report Card – Grade 7(final)
2	2/11/13	Educational Assessment Report by XXXX XXXX (BCPSS)
3	2/13/13	Speech Assessment Report by XXXX XXXX (BCPSS)
4	2/22/13	IEP
5	5/13/13	Psychological Report by XXXX XXXX (BCPSS)
6	6/2013	Middle School Report Card – Grade 8 (final)
7	6/28/13	2012-2013 IEP Team Meeting Attendance Sheet
8	7/8/13	2012-2013 IEP Team Meeting Attendance Sheet
9	7/26/13	IEP
10	8/1/13	Prior Written Notice
11	9/3/13	Prior Written Notice
12	9/3/13	IEP of 7/26/13 as amended 9/3/13
13	9/24/13	Letter from Mr. Henderson to the Parents
14	5/29/14	Letter from Mr. Henderson to Mr. Martin
15	3/31/14	Confidential Student Observation Report by XXXX XXXX, BCPS
16	4/3/14	Observation of [Student] by XXXX XXXX, BCPS
17	4/7/14	[School 1] Progress Report, Keyboarding and Applications, by XXXX XXXX, [School 1]
18	4/8/14	BCPS Office of Nonpublic Services Student Observation by XXXX XXXX, BCPS
19	4/10/14	[School 1] Speech-Language Report by XXXX XXXX, [School 1]
20	4/24/14	[School 1] Progress Report Environmental Science by XXXX XXXX, [School 1]
21	5/12/14	[School 1] Progress Report English 9A by XXXX XXXX, [School 1]
22	5/12/14	[School 1] Progress Report English 9B by XXXX XXXX, [School 1]
23	5/12/14	[School 1] Progress Report Math by XXXX XXXX, [School 1]
24	5/12/14	Social Studies Progress Report by XXXX XXXX, [School 1]
25	5/12/14	Notice of IEP Team Meeting

Ex. No.	Date	Description
26	5/12/14	IEP Team Attendance Sheet
27	5/21/14	IEP Team Meeting Attendance Sheet
28	5/21/14	Prior Written Notice
29	5/30/14	Email from Mr. Henderson to Mr. Martin
30	5/12/14	[School 1] Close Out Progress Report Math by XXXX XXXX, [School 1]
31	5/12/14	[School 1] Closed Out IEP Report by XXXX XXXX, [School 1]
32	5/12/14	[School 1] Close Out Progress Report by XXXX XXXX, [School 1]
33	5/12/14	[School 1] Close Out Progress on Counseling Goals Report by XXXX XXXX, [School 1]
34	4/24/14	[School 1] Progress Report Environmental Science by XXXX XXXX, [School 1]
35	5/12/14	Social Studies Progress Report by XXXX XXXX, [School 1]
36	4/7/14	[School 1] Progress Report, Keyboarding and Applications, XXXX XXXX, [School 1]
37	Undated	[School 1] Communication Close-out Progress Report by XXXX XXXX, [School 1]
38	2012-13	[School 2], Middle School Report Card, Grade 8, [Student]
39	2011-12	[School 2], Middle School Report Card, Grade 7, A.B
40	2/21/14	BCPS Notice of IEP Team Meeting

Testimony

The Student presented testimony from the following witnesses:

1. XXXX XXXX, Educational Associate, Office of Nonpublic Services, BCPS, accepted as an expert in IEP process management;¹¹
2. XXXX XXXX, IEP Coordinator and Program Coordinator, [School 1], accepted as an expert in special education IEP process;
3. Dr. XXXX XXXX, Ph.D., accepted as an expert in psychology and neuropsychology;

¹¹ Ms. XXXX was found to be an expert during the cross/direct examination of the BCPS.

4. XXXX XXXX, Special Education Teacher and Academic Case Manager, [School 1], accepted as an expert in monitoring the progress of students under an IEP and as a special education teacher;
5. XXXX XXXX, Special Education Teacher and Academic Case Manager, [School 1];
6. XXXX XXXX, Special Education Teacher and Academic Case Manager, [School 1], accepted as an expert in IEP process, IEP implementation and a special education teacher in the area of English;
7. XXXX XXXX, Special Education teacher and Academic Case Manager, [School 1], accepted as an expert in IEP implementation and as a special education teacher in the area of social studies;
8. XXXX XXXX, M.Ed., accepted as an expert in IEP process, IEP development and IEP Implementation; and,
9. [Mother], parent.

The following witnesses testified on behalf of the BCPS:

1. XXXX XXXX, Educational Associate, Office of Nonpublic Services, BCPS, accepted as an expert in IEP Process Management;
2. XXXX XXXX, Coordinator of Psychological Services, BCPS, accepted as an expert in school psychology, IEP implementation, and IEP development;
3. XXXX XXXX, Educational Specialist II, BCPS, accepted as an expert in special education transition planning and services;
4. XXXX XXXX, Academic Director of Special Education, BCPS, accepted as an expert in special education administration, special education academics and instruction, reading and literacy instruction, administration and analysis of formal and informal special education assessments, IEP process, IEP procedure, and IEP implementation;
5. XXXX XXXX, Educational Specialist II, BCPS, accepted as an expert in IEP development, IEP implementation, IEP process, and special education programming for students with intellectual disabilities;
6. XXXX XXXX, M.Ed., Educational Specialist II, BCPS, accepted as an expert in IEP process management, IEP development, IEP implementation, and special education curriculum and instruction.

STIPULATIONS OF FACT¹²

Prior to the hearing, the parties agreed to the following Stipulations of Fact:

1. The Student's date of birth is XXXX, 1997.
2. [Student] is a student with Down syndrome.
3. [School 2] ([School 2]), a public charter school founded in 1997, was one of the original schools in the XXXX Initiative of the BCPS.
4. [School 2] is listed and identified as school number XXX in the BCPSS.
5. [School 2] is obligated to provide its students with a FAPE in accordance with State and Federal law.
6. The Student's dates of attendance at [School 2] were the following:
 - a. Kindergarten - 2004-05 school year
 - b. 1st Grade - 2005-06 school year
 - c. 2nd Grade - 2006-07 school year
 - d. 3rd Grade - 2007-08 school year
 - e. 4th Grade - 2008-09 school year
 - f. 5th Grade -2009-10 school year
 - g. 6th Grade - 2010-11 school year
 - h. 7th Grade - 2011-12 school year
 - i. 8th Grade - 2012-13 school year
7. [School 1] is a MSDE non-public special education school.
8. The BCPS places students at [School 1].
9. The Student's dates of attendance at [School 1] were the following:
 - a. 9th Grade - September 3, 2013 – June 20, 2014

¹² In order to create what I consider to be a more coherent narrative, I will incorporate some of these statements in my Findings of Fact.

- b. 10th Grade - July 7, 2014 – present
10. [School 3] ([School 3]), BCPS School number XXX, serves grades 9 through 12 and is a separate public day school. All [School 3] students are special education students.
11. [Student]’s Parents filed a mediation request on or about December 20, 2013.
12. On May 29, 2014, XXXX XXXX emailed the Prior Written Notice (PWN) from the May 12 and May 21, 2014 IEP teams to the Parents.
13. On May 29, 2014, XXXX XXXX emailed the proposed IEP to the Parents.
14. On or about August 7, 2014, the Parents filed for due process.

FINDINGS OF FACT

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

History and Background

1. The Student is female, is seventeen years old (date of birth: XXXX, 1997) and is currently attending [School 1].
2. [Student] is a student with Down syndrome.
3. Down syndrome is a genetic disorder which causes lifelong intellectual disability and developmental delays, and in some people causes health problems.¹³
4. The Student has a history of bilateral fluctuating hearing loss, secondary to middle ear dysfunction. Her hearing loss in the left ear is “educationally concerning.” (BCPS Ex. 4).
5. The Student receives special education and related services as a student whose primary disability is “Intellectual Disability” – see IEP. (PRT. Ex. 98).
6. The Student is functioning at a functional literacy level – see IEP (PRT. Ex. 98).
7. The Student has been a BCPS student since her school enrollment.

¹³ See www.Mayoclinic.org.

8. BCPS is the Local Education Authority (LEA) responsible for providing the Student with a FAPE.
9. The Student attended [School 2] in Baltimore City from Kindergarten through Grade Eight during the period from 2004 through 2013.
10. [School 2] is a public charter school in Baltimore City.
11. IEPs for the Student's final three years at [School 2] determined that the Student's IEPs could be implemented in a general education setting.
12. The Student was evaluated by way of a Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) in 2010.
13. A WISC-IV provides information concerning problem solving strategies that students use and how they use learned information. It provides information about the student's functioning in four areas: verbal comprehension; perceptual reasoning; working memory; and processing speed. A composite score is associated with each of these areas and is made up of subtest scores. The subtest scores have a mean or average score of 10 and the composite scores have a mean of 100. Subtest scores are in the average range when they fall between 9 and 12. (BCPS Ex. 18).
14. WISC-IV examinations are predictors of future learning and academic success. (BCPS Ex. 18).
15. The WISC-IV 2010 results indicated that the Student's functioning was in the "Intellectually Disabled" range, with a full scale score of 45 and composite scores in the 50-59 range.
16. A WISC-IV full scale score is sometimes referred to as an "IQ."¹⁴

¹⁴ "IQ" stands for "Intelligence Quotient."

17. During the Student's eighth grade year at [School 2] the IEP team met to consider options for her transition to high school the next year.

18. On February 11, 2013, the Student had an educational assessment (February 11, 2013 Assessment) completed by the BCPS.

19. As part of the February 11, 2013 Assessment, the Student was administered a Woodcock Johnson Test of Achievement (Woodcock Johnson) examination.

20. According to the February 11, 2013 Woodcock Johnson, the Student's scores were as follows:

Reading vocabulary -	2.9 grade equivalent (G.E.)
Reading comprehension -	2.5 G.E.
Written language mechanics -	2.0 G.E.
Written language expression -	3.0 G.E.
Math calculation -	2.0 G.E.
Math problem solving -	2.5 G.E.

21. The Student had difficulty building verbal responses and was easily frustrated during the administration of the February 11, 2013 Woodcock Johnson.

22. When compared to others at her grade level, [Student]'s performance on the Woodcock Johnson III tests were far below average in reading vocabulary, reading comprehension, written language mechanics, written language expression, math calculation and math problem solving.

23. The Student made progress toward her goals contained in her then-current IEP for eighth grade.

24. The Student had difficulty with grade level skills in eighth grade.

25. There is no evidence that the Parents were concerned regarding the Student's progress at [School 2] or regarding the Student's needs being met in a general education setting.

26. The Student achieved passing grades for all courses during her eighth grade year.

27. The Parents had discussions with [School 2] and BCPS staff regarding the Student's high school options during 2013.

28. The Parents visited several schools during 2013 regarding the Student's high school location.

29. According to the February 22, 2013 IEP, the Parents felt the most appropriate setting for the Student was [School 4], a BCPS public charter school.

30. At an April 12, 2013 IEP meeting, the Parents gave input that the Student's "intellectual functioning is significantly sub-average and there are deficits in her adaptive behavior." July 26, 2013 IEP (PRT. EX. 43).

31. At the April 12, 2013 IEP meeting, the Parents noted that the Student was at an age where inappropriate social behavior can put her in danger and that the Student exhibited difficulty with maintaining appropriate interpersonal relationships, personal boundaries and appropriate behavior on occasions.

32. At the April 12, 2013 IEP meeting, the Parents stated that [School 1] was the best placement for the Student.

33. [School 1] is a non-public, special education, separate day school, located in Baltimore City, Maryland.

34. The IEP team referred the Student for a psychological assessment.

35. On May 13, 2013, XXXX XXXX, school psychologist for the BCPS, conducted a psychological assessment (Psychological Report or Psychological Assessment) for the Student. (BCPS Ex. 18).

36. The Psychological Report included a WISC- IV; a Vineland Adaptive Behavior Scale – Survey Form; an informal parent interview; and a record review.

37. The record review included previous WISC-IV and Vineland results from 2010.

38. The Student was administered the WISC-IV in May of 2013 and achieved the following results:

1) Verbal Comprehension – Score of 53 (range of 49-63)

<u>Subtest</u>	<u>Score</u>
Similarities	4
Vocabulary	1
Comprehension	1

2) Perceptual Reasoning – Score of 45 (range of 42-57)

<u>Subtest</u>	<u>Score</u>
Block Design	1
Picture Concepts	1
Matrix Reasoning	1

3) Working Memory – Score of 52 (range of 48-63)

<u>Subtest</u>	<u>Score</u>
Digit Span	2
Letter Number Sequencing	1

4) Processing Speed – Score of 50 (range of 47-65)

<u>Subtest</u>	<u>Score</u>
Coding	1
Symbol Search	1

39. The scores for verbal comprehension, perceptual reasoning, working memory and processing speed all fell in the “Intellectually Disabled Range.”

40. The full scale score of the WISC-IV was 40 (range of 37-47) which fell in the “Intellectually Disabled Range.”

41. Throughout the WISC-IV administration the Student appeared frustrated.

42. [Mother], the Student’s mother, was the respondent on the Vineland Adaptive Behavior Scale (Vineland) administered in May, 2013 during the Psychological Assessment.

43. The Vineland measures the presence of developmentally appropriate daily living, communication, and social skills. The standard score associated with both the domain and the subdomain scores is based on an average score of 100.

44. The results of the Vineland assessment were as follows:

<u>Subdomain/Domain</u>	<u>Adaptive Level</u>	<u>Age Equivalent/ Standard Score</u>
Receptive	Moderately Low	6.6
Expressive	Moderately Low	5.6
Written	Low	8.0
Communication	Low	68
Personal	Low	6.6
Domestic	Low	6.6
Community	Low	5.1
Daily Living Skills	Low	58
Interpersonal Relationships	Moderately Low	6.8
Play and Leisure Time	Low	7.0
Coping Skills	Low	5.7
Socialization	Low	68
Adaptive Behavior Composite	Low	63

(BCPS Ex. 18).

45. The Student’s composite score on the Vineland is classified as “low” based on a standard score of 63. Her domain scores are described as “moderately low” and “low,” with standard scores falling between 58 and 68. (BCPS Ex. 18).

46. Responses on the Vineland indicate that the Student has the most trouble with expressive language – skills that involve the ability to tell others her needs and to provide them

with information. Responses also indicated difficulty providing a telephone number and sustaining a conversation. (BCPS Ex. 18).

47. As part of the Vineland, the Student's mother said that the Student was then reading at a second or third grade level and that she has difficulty retaining information. (BCPS Ex. 18).

48. As part of the Vineland evaluation, the Student's mother said that the Student does not make telephone calls and would not know who to call in an emergency. (BCPS Ex. 18).

49. As part of the Vineland evaluation the Student's mother said that the Student can play simple games but has difficulty keeping score.

50. The results of the WISC-IV and Vineland indicate significant delays in the Student's cognitive and adaptive functioning. Her academic skills are consistent with students working significantly below her grade level. Her adaptive skills are far below what is expected of other students at her age.

51. The Psychological Report found that the Student needed an instructional program that will assist her in developing skills to build for independent living, including developing age appropriate self-care skills, skills related to telling time and using money, and skills related to practical reading and writing (including filling out forms and reading instructions).

52. The IEP team met several times in 2013 in order to review and revise the Student's program and IEP.

53. On June 7, 2013, an IEP team meeting was conducted. The team noted that the Student "is an extremely vulnerable student" and "has difficulty with personal boundaries and can exhibit inappropriate behavior or feelings."

54. On June 28, 2013, another IEP team meeting was conducted.

55. On July 8, 2013, another IEP team meeting was conducted.

56. At the July 8, 2013 IEP team meeting, XXXX XXXX of BCPS expressed concern with the Student remaining on the Diploma track program. Ms. XXXX noted that the Student was then functioning at a third grade level after eight years of education and questioned how much growth the team should expect of the Student during the next five years. The IEP team discussed whether continuing the Student on the Diploma track was a “disservice” to the Student.

57. Another IEP team meeting was conducted on July 28, 2013.

58. At the July 28, 2013 IEP meeting, the team determined, after discussion and review of information from prior meetings, that the Student continued to be properly coded with an intellectual disability and as eligible for special education and related services. (BCPS Ex. 4).

59. The IEP team based its decisions on input from the Parents, teacher observations, IEP reports, report cards, progress reports, and assessments. (BCPS Ex. 4).

60. The IEP team found that the Student’s “cognitive delays impact her ability to progress academically at an age/grade appropriate rate” and that she “continues to require 1:1 assistance and a high level of instructional support to support her learning.” (BCPS Ex. 4).

61. The IEP team also determined that the Student was a Diploma bound student who would have to take and pass the High School Assessments (HSA), earn 75 service learning hours and complete 21 specific course credits in order to be eligible for a Diploma. (BCPS Ex. 4).

62. The IEP team also determined that the Student was functioning at the following levels: reading vocabulary 2.9 G.E.; reading comprehension 2.5 G.E.; math calculation 2.0 G.E.; math problem solving 2.5 G.E.; written language mechanics 2.0 G.E.; and, written language expression 3.0 G.E. (BCPS Ex. 4).

63. The Parent discussion section of the IEP included the prior discussions from the IEP meetings of April 20, June 7, June 28, and July 8, 2013 IEP meetings. (BCPS Ex. 4).

64. The IEP found that the appropriate program for the Student for ninth grade would be a placement in Least Restrictive Environment (LRE) C placement, a full-time segregated placement within a regular BCPS school.

65. BCPS determined that the July 28, 2013 IEP could be implemented at [School 5] ([School 5]) and notified the Parents by way of a letter.

66. On August 20, 2013, another IEP meeting was conducted. At that meeting, the Parents notified BCPS that they were rejecting the July 28, 2013 IEP and placement and were enrolling the Student at [School 1].

67. On September 5, 2013, the Parents enrolled the Student at [School 1].

68. On December 7, 2013, the Parents filed a request for mediation with the OAH.

69. A mediation session was conducted on February 7, 2014, and an agreement was reached around that same date.

70. Among other things, the mediation agreement stated that the BPSC would fund the Student's tuition at [School 1] for the 2013-2014 school year; conduct four observations of the Student by BCPS staff; and convene an IEP meeting to discuss the Student's progress.

71. The [School 1] 2013-2014 school year ended on June 20, 2014.

72. The Student has never received a placement at [School 1] as the result of an IEP.

IEP DEVELOPMENT FOR THE 2014-2015 SCHOOL YEAR

73. On March 13, 2014, there was an IEP meeting convened to review the Student's IEP and program. During the meeting it was decided that there would be four observations of the Student at [School 1] conducted by BCPS personnel: XXXX XXXX, XXXX XXXX, XXXX XXXX and XXXX XXXX. It was also decided that the IEP team would meet again to review a draft IEP for the Student.

74. XXXX XXXX was the IEP Chair at the March, 2014 IEP meeting and at all subsequent 2014 IEP meetings.

75. The Parents were present for the March 13, 2014 IEP meeting and for all subsequent IEP meetings in 2014.

76. The Parents engaged in, and were given the opportunity to have meaningful participation at, the March 13, 2014 IEP meeting and all subsequent IEP meetings conducted in 2014.

77. The BCPS recommended that it conduct a Language Assessment based on [School 1]'s recommendation that direct speech and language services were needed by the Student, but the Parents did not consent. See PWN, March 13, 2014 (BCPS Ex. 12).

78. A Pragmatic Language Assessment of the Student was conducted by XXXX XXXX, [School 1], on or about April 10, 2014.

79. A PWN dated March 13, 2014 was sent to the Parents. (BCPS Ex. 12).

80. The four observations were conducted as follows: XXXX XXXX (April 8, 2014); XXXX XXXX (April 3, 2014); XXXX XXXX (March 31, 2014); and XXXX XXXX (April 3, 2014).

81. On May 12, 2014, the IEP team convened as scheduled.

82. The IEP team met to review the classroom observation reports from the BCPS, the progress reports from [School 1], the Pragmatic Language Assessment ordered at the March 13, 2014 IEP meeting, the proposed IIP prepared by [School 1] (PRT. Ex.86), and the IEP prepared by the BCPS (PRT. Ex. 98, BCPS Ex. 3)¹⁵ in order to consider revisions to the Student's program, her placement for the 2014-15 school year, and the Parents' concerns.

83. The team also met to discuss the Student's present levels of performance as

¹⁵ When referencing these two exhibits I will, in the future, simply note the Parents' Exhibit number.

ascertained by the results of the evaluative data obtained from various assessments and anecdotal information shared by the Parents and teachers regarding the Student's academic, social/emotional, executive functioning and communication skills needs. The Parents were provided notice of their Procedural Safeguards and Parental Rights.

84. The Parents attended the May 12, 2014 IEP meeting along with their attorney, Mark Martin, and their educational consultant, XXXX XXXX.

85. The May 12, 2014 IEP meeting began with the presentation of the observations made by BCPS Staff.

86. Ms. XXXX stated that she had observed the Student in her homeroom, American Government class, Environmental Science class and Basic Math class at [School 1] on April 8, 2014. (BCPS Ex. 73), (PRT. Ex. 98).

87. On April 8, 2014, it was unclear if the Student actually comprehended the content of the American Government lesson, because Ms. XXXX observed no checks for understanding. The Student was not required to respond to higher level questions or apply knowledge or concepts. The Student uses a strategy of looking back into passages to find answers to factual questions. Neither the concepts nor the curriculum was at a level which would have been expected in a ninth grade high school credit class.

88. On April 8, 2014, the material in the Student's Environmental Science class was on an elementary level based on the reading level and content. The materials were elementary rather than modified to the Student's reading level. The reading level was modified to a fourth to fifth grade level.

89. On April 8, 2014, the Student worked on a worksheet in her Basic Math Class that her teacher indicated to be at a third to fifth grade level.

90. The content of the subjects observed by Ms. XXXX was modified to such an extent that it was not recognizable as ninth grade high school curriculum work.

91. The work that Ms. XXXX observed the Student perform was not work that should be produced by a student working towards a Diploma.

92. Ms. XXXX also reviewed work samples submitted by [School 1] to the BCPS produced by the Student.

93. The work samples reviewed by Ms. XXXX were simplified to such a degree that they were not recognizable as ninth grade work product.

94. At the May 21, 2014 IEP meeting, Ms. XXXX agreed to changes in her evaluation after discussion among the team.

95. XXXX XXXX, Education Specialist II, BCPS, observed the Student in her keyboarding, English 9B, and Environmental Science classes at [School 1] on April 3, 2014. (BCPS Ex. 74), (PRT. Ex. 98).

96. Mr. XXXX met the Student on three occasions and has participated in her IEP meetings since June, 2013.

97. On April 3, 2014, in her keyboarding class, the Student needed assistance to log into the computer and to find the typing program. When the Student was typing a poem, her teacher had to tell the Student to capitalize appropriate letters. When the Student came to the end of the first line, the Student did not know how to start a new line. When this was corrected by her teacher, the teacher had to explain to the Student how to create the second line of text and again told her to capitalize the first letter.

98. In her keyboarding class on April 3, 2014, the Student had difficulty with capitalization skills and required the repeated assistance of her teacher to do her work.

99. The Student understands concrete instruction – such as “capitalize here” – but does not generalize about capitalization or understand the need to capitalize in formats such as a computer.

100. In her keyboarding class on April 3, 2014, the Student did not evidence the ability to retain basic skills, but rather had to be retaught skills.

101. On April 3, 2014, the Student’s 9B class began with an exercise in finding as many green things in the classroom as possible within three minutes as a warm-up exercise.

102. Mr. XXXX had never seen the exercise noted in FOF #101 conducted in a ninth grade education classroom before April 3, 2014.

103. In her English 9B class on April 3, 2014, the Student had difficulty differentiating between fact and fiction during an exercise regarding events in her life, a difficulty which a student in a ninth grade classroom should not experience.

104. In her 9B English class on April 3, 2014, the Student answered many Questions using gestures and not words, and the [School 1] staff did not ask her to use words to express what she expressed in pantomime.

105. Answering questions using gestures instead of words is not an appropriate communication method for a ninth grade student.

106. The Student’s difficulties raise issues regarding her ability to communicate with others, and her safety, outside the [School 1] environment.

107. On April 3, 2014, the Student could stay focused on repetitive tasks but needed help to refocus on non-repetitive tasks.

108. The Student did not display the ability to earn high school credits and pass academic requirements to earn a Diploma on April 3, 2014.

109. On April 3, 2014, the Student evidenced that her intellectual disability causes her to not pick up academic and adaptive skills quickly.

110. The Student exhibited the need for assistance with communication and adaptive skills on April 3, 2014.

111. The staff at [School 1] evidences learning the Student's language rather than teaching her appropriate language skills. This results in the Student not being able to communicate with persons not at [School 1].

112. FOF #111 does not provide the Student with necessary special education skills to address her demonstrated adaptive needs.

113. XXXX XXXX, M.Ed., Educational Specialist II, BCPS, observed the Student in English 9A and American Government at [School 1] on April 3, 2014. (BCPS. Ex. 75), (PRT. Ex. 98).

114. Ms. XXXX's observations included:

- 1) English 9A – the Student required a lot of redirection from her teacher; the skill that the Student was observed working on was a second grade skill not appropriate for a ninth grade student earning a diploma;
- 2) American Government – the work was not ninth grade level work for a student earning a diploma.

(BCPS Ex. 75).

115. The work performed by the Student observed by Ms. XXXX on April 3, 2014 was not work which was appropriate for a ninth grade student working toward a Diploma.

116. The work performed by the Student observed by Ms. XXXX on April 3, 2014 indicates that the Student is unable to complete the requirements for a Diploma.

117. Ms. XXXX agreed to amend her report after discussion among the IEP team.

118. XXXX XXXX, Academic Director of Special Services, BCPS, observed the Student in her Environmental Science, Math, and English 9B classes at [School 1] on March 31, 2014. (PRT. Ex. 98).

119. The work the Student produced in English 9B on March 31, 2014 was not high school level work. The work was very simplified—it indicated a second or third grade level of work—and there was a very high level of prompting involved. The tasks the Student completed would not have been completed absent the prompting provided by [School 1] staff.

120. Mr. XXXX reviewed a number of work samples produced by [School 1] for the Student as well. (BCPS Exs. 46-71).

121. The work samples reviewed by Mr. XXXX for English 9B do not reflect ninth grade work. They indicate work at a late second/early third grade level.

122. The Student was not receiving educational benefit on a Diploma program of study in English 9B at [School 1] on March 31, 2014.

123. At the IEP meeting, XXXX XXXX, [School 1] Speech-Language Pathologist, presented her assessment of the Student completed on April 10, 2014. The evaluation was conducted to evaluate the Student's skills, functioning and pragmatic language skills at the request of the IEP team. The report included an observation of the Student during art therapy. (PRT. Exs. 67 and 98).

124. During the observation by Ms. XXXX, the Student often interrupted and used indirect or inappropriate comments such as: "I like your shirt;" "You look pretty today;" and, "I want to bang it." All of these comments were received as more interruptive than cooperative by her peers and staff and consistently placed the Student outside of the conversation of the group. (PRT. Ex. 67).

125. Ms. XXXX administered two subtests of the Comprehensive Assessment of Spoken Language (CASL) test, a Pragmatic Judgment and Paragraph Comprehension subtest as well as Syntax (Syntax) subtest.

126. The Pragmatic Judgment subtest assesses a student's knowledge and use of social rules.

127. The Student demonstrated difficulty providing appropriate responses when presented with the questions on the Pragmatic Judgment subtest. For example, when provided the situation: "Amber learns that Erik's grandmother has just died. She sees Erik in the hall at school. What can she say to him?", the Student replied with "This is sad." (PRT. Ex. 67).

128. The results of the Pragmatic Judgment subtest indicated the Student had difficulty interacting with peers and adults.

129. The Syntax subtest assesses understanding of the rules of language and grammar utilizing short spoken paragraphs. Difficulty on this subtest indicates difficulty with understanding language structure, difficulty with making inferences and limited word knowledge. This will cause difficulty understanding oral stories, conversations with peers and adults, stories about things outside of her experience, and story structure. (PRT. Ex. 67).

130. The Student was unable to choose the correct answer for several of the presented items during the Syntax subtest and at times needed repetition of test choices.

131. The Student comprehends social situations but does not know how to use language appropriately in those situations. (PRT Ex. 98).

132. The Student has scattered skills and shows inconsistency and lack of generalization of skills. Id.

133. The Student has difficulty answering some questions and has developed a compensatory strategy of using gestures. Id.

134. The Student is often not exhibiting appropriate social skills or the ability to use language appropriately. Id.

135. The Student collects meal trays, which is a good exercise for her because of the language and social skills required and practiced by the Student. Id.

136. Ms. XXXX recommended 45 minutes per week in the IEP for speech and language therapy, and the team agreed with this recommendation.

137. The Student requires the practice of social skills.

138. The IEP team reviewed [School 1] progress reports for the Student at the May 12, 2014 meeting.

139. XXXX XXXX presented the Student's progress in English 9A.

140. According to Ms. XXXX, the Student's range is early fourth grade in overall comprehension.

141. Comprehension in an early fourth grade range is not consistent with ninth grade academic course work.

142. XXXX XXXX presented the Student's progress in English 9B.

143. According to Mr. XXXX, the Student has knowledge of capitalizing the beginning of a sentence, can use end-punctuation, and can use commas in a series.

144. Capitalizing the beginning of a sentence, using end-punctuation, and using commas in a series are not indicative of ninth grade academic course work.

145. XXXX XXXX presented the Student's progress in Basic Math.

146. BCPS accepts Basic Math as an elective but not as a math course.

147. The Student is able to add and subtract numbers with three addends and to Count monetary bills up to \$100.

148. Adding and subtracting numbers with three addends and counting monetary bills up to \$100 is not indicative of ninth grade academic course work.

149. XXXX XXXX presented the Student's progress in Environmental Science.

150. XXXX XXXX presented the Student's progress in her Keyboarding and Application class.

151. The IEP team then reviewed the Continued Evaluation Eligibility Data section of the IEP. The team determined that the Student continued to require special education services under IDEA as a student with an Intellectual Disability and continued to require specialized instruction and related services to address deficits in academics and other areas.

152. The Psychological Assessment of May 13, 2013, and the results of both the WISC-IV and the Vineland Behavior Study indicate delays in the Student's cognitive and adaptive functioning.

153. The Student's ability is in the Intellectually Disabled Range with a FS IQ of 40 and a range of 37-47.

154. The Student's Adaptive Behavior Composite on the Vineland was 63 which is in the low range.

155. Other assessments and reports that document the Student's disability and the need for special education and related services include: Student Observation Reports completed by BCPS staff; a Speech and Language Assessment Report (April 10, 2014); Transitional Planning Inventories; [School 1] Progress Reports; a Psychological Report (May 21, 2013); and, an Educational Assessment Report (February 13, 2013). (PRT. Ex. 98).

156. The IEP team then reviewed the Student Participation on District/Statewide Assessments and Graduation Information section (Participation Section) of the IEP. There was extensive discussion among the IEP team regarding the Participation Section of the IEP at the

May 12, 2014 meeting, particularly regarding the appropriateness of the Student pursuing a Maryland High School Diploma (Diploma or Diploma track).

157. During the discussion regarding the Diploma, the Student's Parents expressed that having the Student pursue a Diploma is an important value.

158. Based on the information presented at the IEP meeting, BCPS disagreed with the Student pursuing a Diploma.

159. Based on the information presented at the IEP meeting, including the observations conducted by BCPS personnel and the work samples submitted by [School 1], the BCPS expressed a belief that a Certificate of Completion course of study was more appropriate for the Student's needs than a Diploma course of study.

160. There was lengthy discussion at the May 12, 2014 IEP meeting regarding the issue of the Student's pursuing a Diploma or a Certificate of Completion. This discussion included a discussion of the Alt-MSA assessment and the criteria for taking that assessment. This discussion continued at the May 21, 2014 IEP meeting, which also included state-testing issues.

161. All of the required criteria for the Alt-MSA assessment were considered at the IEP meetings.

162. There was extensive disagreement between the Parents and the [School 1] staff on one hand and BCPS staff on the other regarding the Student's course of study and various aspects of the IEP at the May 12 and May 21, 2014 IEP meetings.

163. The Parents, their attorney and [School 1] staff participated extensively in the May 12 and May 21, 2014 IEP meetings.

164. The IEP team agreed to meet again on May 21, 2014 to continue the discussion regarding the Student's IEP.

165. The IEP team met again on May 21, 2014.

166. The team continued to discuss the Student's present levels of performance as ascertained by the results of the evaluative data obtained from the assessments and anecdotal information shared by the Parents and teachers regarding the Student's academic, social/emotional, executive functioning and communication skills needs. The Parents received notice regarding their Procedural Safeguards and Parental Rights.

167. The IEP team considered both the IIP created by [School 1] (PRT. Ex. 86) and the IEP created by the BCPS. (PRT. Ex. 98, BCPS Ex. 3).

168. Ms. XXXX commenced the meeting by noting that the May 12, 2014 IEP meeting ended with a disagreement between the Parents and the [School 1] staff and the BCPS regarding whether the Student should be placed in a Diploma program or a Certificate of Completion program.

169. The disagreement regarding the Diploma track versus the Certificate of Completion track was not resolved by agreement among the IEP team members at the May 21, 2014 meeting.

170. The IEP team then discussed the Present Level of Academic Achievement and Functional Performance (Present Levels of Performance) of the Student.

171. There was a great deal of discussion at the IEP meeting regarding the Student's Present Levels of Performance.

172. The [School 1] IIP found the following Present Levels of Performance instructional grade level performance for the Student:

Academic

- 1) Reading vocabulary - early grade four
- 2) Reading comprehension - late grade four to early grade five
- 3) Fluency - late grade five to early grade six

- 4) Written language mechanics - early grade four
- 5) Written language expression - grade four
- 6) Math calculation - beginning third grade
- 7) Math problem solving - beginning third grade
- 8) Comprehension - late grade four to early grade five

Behavioral

- 1) Social interaction - below age/grade level
- 2) Self-management - below age/grade level
- 3) Pragmatics - below age/grade level

173. None of the Present Levels of Performance found in the [School 1] IIP found the Student to be within four years of her grade level.

174. None of the academic levels contained in the [School 1] IIP Present Levels of Performance indicated that the Student was capable of succeeding in a Diploma program.

175. The BCPS disagreed with the [School 1] Present Level of Performance regarding reading vocabulary finding a Present Level of Performance at a late third-grade level.

176. After discussion among the IEP team, the team agreed that the Present Level of Performance for reading vocabulary was early grade four level.

177. During the discussions, the Parents' attorney wanted the Woodcock Johnson results from the Educational Assessment of February, 2013 deleted from the Present Level of Performance.

178. [School 1] did not conduct any formal educational assessment of the Student, and the Woodcock Johnson is the last such formal educational assessment conducted.

179. It would not have been inappropriate for the IEP team to delete the Woodcock Johnson results from the Present Levels of Performance in the IEP.

180. The BCPS declined to delete the Woodcock Johnson results from the Present Levels of Performance in the IEP.

181. BCPS disagreed with the [School 1] Present Level of Performance finding of a reading comprehension level of late fourth to early fifth grade, finding a level of early fourth grade more accurate.

182. The Student's performance on the Steiglitz Informal Reading Inventory (SIRI) was discussed.

183. When the SIRI was administered using the standard administration procedure of asking open-ended questions and with the Student giving a response of her own, the Student did not respond correctly to any of the questions.

184. When the SIRI was modified to give the Student three answer choices and a written response, the Student was able to respond correctly in some instances.

185. The IEP team then discussed the math calculation present level of performance. During these discussions, it was the position of [School 1] staff that although the information from the observations conducted by BCPS was accurate, it did not reflect the Student's present level of performance.

186. There was discussion at the IEP meeting regarding the Student's present level of written language mechanics performance. The BCPS disagreed with the [School 1] finding of an early fourth grade instructional level for written language mechanics, believing the correct level to be late first grade. There was also disagreement as to the Student's written language expression level, with the BCPS disagreeing with the [School 1] finding of late third-early fourth grade level, believing the correct level to be late second grade level.

187. There was no agreement among the team as to the Present Levels of Performance.

188. The IEP team discussed the Pragmatic/Communications level.

189. The IEP team reviewed the social interaction level. During the discussion, it was noted by [School 1] staff that the Student had recently evidenced poor boundaries and inappropriate social skills.

190. The IEP team reviewed and agreed upon the special considerations section of the IEP.

191. The IEP team then reviewed and discussed the instructional and testing accommodations portions of the IEP in detail.

192. The IEP team also reviewed the Supplementary Aids and Services (SAS) portion of the IEP.

193. After extensive discussion, with changes, the IEP team agreed to the SAS portion of the IEP.

194. The IEP team then discussed the Extended School Year (ESY) portion of the IEP. There was extensive discussion of the proposed IEP goals and objectives among the IEP team. Changes were made to various portions of various goals and objectives during these discussions.

195. The IEP team agreed to provide the Student with various services, including: 30 hours and 25 minutes of special education to be delivered outside of general education; 45 minutes a week of speech and language therapy; 45 minutes a week of counseling; and 1 hour of audiology.

196. Throughout the discussions, Ms. XXXX made numerous changes to the proposed BCPS IEP as a result of the discussions.

197. At the IEP team meeting on May 21, 2014, the team, including the Parents, reviewed the IEP developed by the BCPS.

198. An IEP was developed and agreed to by the LEA team members (BCPS participants) for the Student. (PRT. Ex. 98, BCPS Ex. 3).

199. The IEP was not agreed to by the Parents or the [School 1] staff who participated in the IEP meetings.

200. It is the responsibility of the LEA to provide a student with a FAPE.

201. The evaluative data used to develop the Student's IEP for the 2013-2014 school year was ascertained from the Psychological Report of May 21, 2013, including the psychological assessments of May 13, 2014 (which included the results of the WISC-IV and the results of the Vineland assessments conducted during the May 13, 2013 psychological assessment as part of the Student's reevaluation); observation reports completed by BCPS representatives XXXX XXXX (April 8, 2014), XXXX XXXX (April 3, 2014), XXXX XXXX (March 31, 2014) and XXXX XXXX (April 3, 2014); a Speech and Language Assessment Report from [School 1] (April 10, 2014); Transitional Planning Inventories; [School 1] progress reports in English 9 Part A (May 12, 2014), English 9 Part B (May 12, 2014), Math (May 12, 2014), Environmental Science (May 12, 2014), Social Studies (May 12, 2014), Keyboarding and Applications (April 7, 2014).

202. As previously found, on May 13, 2013 a psychological assessment was conducted for the Student (BCPS Ex. 18) to evaluate the Student's cognitive and academic abilities. See Findings of Facts (FOF) numbers 33-48. As part of the assessment, both the WISC-IV and the Vineland were administered.

203. The IEP found the following regarding the Student's Present Level of Academic Achievement and Functional Performance:

Academic

- 1) Reading Fluency - Instructional Grade Level Performance: late Fifth Grade to early Sixth Grade; Needs – Although the student has skills in this area above her skills in other areas, her achievement is still significantly below age/grade level norms and affects her ability to use and understand grade level text. The Student needs to increase her speed of reading in order to help increase the amount of text she can read with independence and comprehension. She also needs to demonstrate that she can comprehend what she is reading.

- 2) Reading Vocabulary - Instructional Grade Level Performance: early Fourth Grade; Needs – The Student needs to work on vocabulary skills that target her instructional level and also her needs related to adapted grade level text. Direct instruction of vocabulary is essential for the Student. She needs to be able to recognize word parts and use them to help her figure out the meanings of words. She also needs to continue to work on discussing grade level and instructional text, instruction and conversation. She needs to be able to recognize patterns of word changes that affect meaning or parts of speech.
- 3) Reading Comprehension - Instructional Grade Level Performance: early Fourth Grade; Needs – The Student needs goals and objectives that target her needs at her instructional grade level and that target the areas where she will need the most direct instruction and support in adapted grade level text. She is not a student who will necessarily be able to generalize skills that she may be able to do in a lower grade level text. She has significant language needs that affect her ability to comprehend what she reads.
- 4) Math Calculation - Instructional Grade Level Performance: beginning Third Grade; Needs – [Student] needs to be able to determine equivalent fractions. She will also need to read, write, represent and simplify mixed numbers.
- 5) Math Problem Solving - Instructional Grade Level Performance: beginning Third Grade; Needs – The Student will need to explain and justify her answers when solving two-step word problems and using one operational symbol and explain her reasoning behind her answers. She will also need to solve varied word problems using money, percentage and time. She will also need to be able to create and solve inequalities and expressions.
- 6) Written Language Mechanics - Instructional Grade Level Performance: early Second Grade; Needs – The Student will need to self-monitor her writing mechanics including her step and process of writing and her time. She needs to use a checklist to correct errors in capitalization, subject/verb agreement, and run on and incorrectly written sentences. It is important that she increase the complexity of her sentences. Her paragraphs currently contain many complete but choppy sentences. She needs to use conjunctions to join independent and dependent clauses.
- 7) Written Language Expression - Instructional Grade Level Performance: late Second Grade; Needs – [Student] needs to develop her paragraph writing skills more fully to persuade and inform. When given a non-preferred topic, the Student requires adult support, checklists and graphic organizers. She needs to compose short research reports that use the information she has gathered and organize it into a logical format. She needs to develop her paragraph writing more fully to persuade and inform. She needs to continue to work on composing arguments and informational/descriptive writing. She needs to compose concluding sentences that are concise and restate her claims. She needs to summarize in her own words and not plagiarize portions of text. She needs to demonstrate the ability to evaluate text that is relevant to a topic and

identify facts and details from the text using a graphic organizer. She needs to find resources from a computer and from traditional forms to research topics.

- 8) Communication - Instructional Grade Level Performance: Below expectations for age and grade; Needs – The Student needs to improve in the following areas: increasing length of utterances to aid in comprehension by her communication partner; understanding point of view; understanding of appropriate vs. inappropriate social behavior, expressing her needs/wants/strengths using appropriate conversational skills (i.e. taking turns, staying on point, paying attention) with peers and staff; demonstrating active listening skills as evidenced by answering questions, following directions, monitoring her rate of speech/intelligibility, and identifying and labeling emotions in herself and in others.
- 9) Cognitive - Instructional Grade Level Performance: Intellectually Disabled Range – The Student achieved the following scores on the WISC-IV (2/15/13): Verbal Comprehension = 53 (49-63 range); Perceptual Reasoning = 45 (42-57 range); Working Memory = 52 (48-63); Processing Speed = 50 (47-65 range); Full Scale Score = 40 (all scores are in the Intellectually Disabled Range). The Student achieved the following scores on the Vineland Adaptive Scale: Communication = 68 (Low); Daily Living Skills = 58 (Low); Socialization = 68 (Low); Adaptive Behavior Composite = 63 (Low). Her current disability is Intellectual Disability. When responding to items on the WISC-IV, she often had difficulty giving complete responses and using and organizing information that she had been given to build a response. The impact on her classroom performance may include difficulty responding to questions that do not use information as it was presented. She is also likely to have difficulty explaining why or how she chose a particular response. Her adaptive skills are not consistent with children of her age. For example, she may have difficulty maintaining a conversation with others of her age.

Behavioral

- 1) Social Interaction Skills - Level of Performance: Below age/grade level expectations; Needs – The Student needs to increase on-topic conversation, reciprocal conversation and to distinguish between mature and immature behavior. She needs to increase her understanding of others, her self-awareness and her social and emotional development.
- 2) Self-Management - Level of Performance: Below age/grade level expectations; Needs – The Student needs to greet staff and peers appropriately across settings and needs to maintain personal space. She will benefit from gradually adding generalization opportunities to her program over time.

Health

- 1) Hearing – Testing indicates that hearing in the right ear is adequate for school testing and instruction. She has, however, mild hearing loss in her left ear which is educationally concerning.

204. The Student's Intellectual Disability impacts her progress in math calculation, math problem solving, reading comprehension, reading fluency, written language mechanics, written language expression, self-management, social interaction, communication and hearing to a severe degree. IEP.

205. The Student's instructional level is significantly below her actual grade level, and she requires significant modification to the curriculum and an intensive level of cues, prompts, and adult support to complete assignments.

206. The Student requires explicit instruction in functional life skills in order to increase and promote independence.

207. The Student demonstrates communication deficits impacting her ability to verbally participate in the classroom and interact socially with both peers and adults.

208. The Student often speaks using one word responses or short phrases, does not engage in reciprocal conversation beyond two turns, and has difficulty staying on topic.

209. The Student often does not maintain appropriate personal boundaries and makes inappropriate comments to others which indicate a lack of understanding related to maintaining personal safety.

210. The Student requires adult support to perform vocational tasks.

211. The Student's hearing is monitored due to mild hearing loss, and she requires preferential seating in the classroom.

212. The IEP team considered the Participation.

213. After considering the data and information received during the IEP meeting process, the IEP team determined the Student would be pursuing a Maryland High School

Certificate Program Completion (Certificate of Completion) while participating in a five year plan.

214. The IEP team determined that the Student would not participate in the Maryland High School Assessment (HAS) aligned with Common Core learning goals.

215. The IEP discussed the Partnership for Assessment of Readiness for College and Careers (PARCC) assessment at the IEP meeting.

216. The IEP team determined that the Student would not participate in the HSA/modified achievement standards in assessed course assessment (Mod-HSA).

217. The team determined that the Student would participate in the Alternate Maryland School Assessment aligned with alternate academic/course achievement standards (Alt-MSA) in her assessed grade with appropriate testing accommodations after discussions that included all the criteria for taking the Alt-MSA.

218. The Student meets all the criteria set forth in the Alt-MSA eligibility tool.¹⁶

219. The Student is learning at a functional literacy level.

220. The Student's IEP documents her need for explicit and ongoing instruction of functional skills (including interpersonal skills and social interaction skills).

221. The Student requires substantial modifications of the general education curriculum.

222. The Student requires intensive instruction and support as documented by the IEP in order to generalize knowledge and skills across multiple settings.

223. The Student requires extensive support to participate in daily activities.

¹⁶ The Parents made repeated, extensive presentations and argument throughout the hearing regarding the fact that this optional tool was not formally utilized during the IEP meeting process. Since I find that all relevant criteria for the Alt-MSA were properly considered during the IEP meeting process, I find that the failure to use an optional formal tool at the IEP meetings is irrelevant.

224. The annual goals that the IEP team determined to be appropriate on May 21, 2014, reflect the areas of deficits identified on the IEP as ascertained from the evaluative data and the Student's then-present levels of performance.

225. The Student has special communication needs in the area of pragmatics. IEP.

226. The Student does not need assistive technology. IEP.

227. With regard to instructional and testing accommodations, the Student requires the following:

- A human reader or audio recording for verbatim reading of entire text of instructional and testing materials
- Use of visual clues
- Mathematics tools and calculation devices
- Graphic organizer
- Extended time
- Multiple and/or frequent breaks
- Change of schedule or order of activities – within one day
- Reduce distractions to Student
- Reduce distractions to other students

228. With regard to supplementary aids/services, and modifications, the Student requires the following:

- Instructional supports
- Check for understanding
- Prompt hierarchy using least to most
- Provide alternative ways for Student to demonstrate learning
- Highly predictable routine
- Home/School communication
- Modified language of instruction
- Limit answer choices to three
- Provide proofreading checklist
- Allow the use of manipulatives
- Allow the use of highlighters during instruction and assignments
- Require the Student to read passages aloud whenever possible
- Concrete step-by-step process charts
- Preteaching and reteaching
- Repetition of directions
- Frequent and/or immediate feedback
- Program modifications
- Modified content
- Altered/modified assignments

- Social/behavioral supports
- Encourage/reinforce appropriate behavior in academic and non-academic settings
- Encourage student to ask for assistance when needed
- Physical/environment supports
- Preferential seating

229. The IEP considered an Extended School Year (ESY) for the Student. The IEP team found:

- 1) The Student's IEP included critical life skills;
- 2) The Student was likely to regress in life skills due to the normal school break and fail to recover those skills in a reasonable time;
- 3) The Student is demonstrating progress toward mastery of her IEP goals related to critical life skills;
- 4) There is the presence of breakthrough opportunities in written language and vocabulary;
- 5) The nature and severity of the Student's disability warrants ESY;
- 6) The Student was currently provided with an eleven month program in her current school, and she is transitioning to a ten month program;
- 7) The Student was eligible for ESY.

230. The IEP found that the Student required the following ESY services:

- Classroom instruction (18.5 hours per week);
- Counseling services (45 minutes per week);
- Speech/language therapy (45 minutes per week).

231. The IEP team considered and established transition for the Student, noting that the Student would participate in a program to prepare her for employment in her chosen course of study. The IEP projected that the Student would exit with a Certificate of Completion at the end of the school year in which the Student turns 21.

232. With regard to transition services/activities, the Student requires employment training and independent living services.

233. The Student has been referred to the Maryland Developmental Disabilities Administration (DDA) and been found eligible.

234. The Student will be referred to the Maryland Division of Rehabilitative Services in the fall semester prior to her last year of school.

235. The team also considered the Least Restrictive Environment (LRE) and Placement for the Student.

236. The team discussed the continuum of possible educational environments, which went from general education with no services to a private separate day school.

237. After discussion, the team rejected general education with no services, and several inside general education options.

238. The option of a public separate day school was discussed.

239. A public separate day school is a small school setting, with a small pupil to teacher ratio, which provides opportunities for students to go into the community. There is also a transition component that assists students in transitioning out of school. A public separate day school does not offer the opportunity to obtain a Diploma.

240. The public separate day school option was selected by the IEP team BCPS members, because it provided the Student with the level of adult support and supervision required for the implementation of the IEP.

241. The Student's academic, vocational, communication and social/emotional/behavioral needs can be met in this placement.

242. The IEP team also discussed whether a private separate day school was required for the Student. The Parents felt that this was the case and that the placement should be at [School 1].

243. The BCPS stated that since the IEP had the Student on an appropriate Certificate of Completion track and was no longer pursuing a Diploma, her needs and services could be provided for in a public separate day school as the LRE.

244. The public separate day school LRE determination was rejected by the Parents, who believe that the Student should be placed in [School 1], a private separate day school, at the expense of the BCPS.

245. A private separate day school is a more restrictive environment than a public separate day school.

246. A public separate day school is the least restrictive environment for the implementation of the IEP.

247. A public separate day school is an appropriate placement for the implementation of the IEP.

248. The May 21, 2014 IEP provides educational benefit to the Student.

249. After the conclusion of the IEP meeting on May 21, 2014, the BCPS sent the Parents a PWN which informed the Parents that BCPS believed that the Student's academic, vocational, social and emotional needs could best be met by working toward a Certificate of Completion. (BCPS Ex. 11).

250. The PWN also informed the Parents that based on the data, observations and information considered at the IEP meetings, the Student did not meet the standards and criteria for obtaining a Diploma.

251. The PWN explanation for the proposed placement in a public separate day school on a Certificate of Completion program included the following:

City School's believes that [Student]'s academic, vocational, and social and emotional needs can best be met by working toward a Certificate of Completion. [Student]'s instructional grade levels are significantly below her actual grade level and despite her academic work being modified to a significant degree she continues to struggle. She requires an intensive level of 1:1 instruction, adult support and prompting and even with this level of support she struggles at times and has difficulty generalizing skills. It is projected that [Student] will earn only 2.25 credits for the 2013-14 school year while she was a student at [School 1]. There is a vocational component to [Student]'s current educational program and there is concern

about the impact of this on the pace of [Student]'s earning credits. [Student] also requires adult support to perform her vocational tasks in her current education setting.

252. On May 27, 2014, XXXX XXXX, Interim Chief Executive Officer, BCPS, sent Parent [Mother] a letter, by way of email, in response to an email sent by [Mother] on May 13, 2014, informing her that based on the considerations described therein, the BCPS had determined that the Student's right to a FAPE would be best served by moving her to a Certificate of Completion track and placing her at a separate public day school. (BCPS Ex. 75).

253. On May 29, 2014, Darnell Henderson, Esquire, Associate Counsel, BCPS, notified Mr. Martin that the BCPS was declining the Parents' request to place the Student at [School 1] and to fund that placement. (BCPS Ex. 79).

254. Mr. Henderson's letter further noted that the obligation of BCPS to fund the Student's attendance at [School 1] ended with the last day of the 2013-14 school year on June 20, 2014.

255. On May 29, 2014, Ms. XXXX sent the Parents a letter, enclosing copies of the PWN, attendance list, and the IEP developed at the May 12 and 21, 2014 IEP meetings. (BCPS Ex. 78).

256. On June 30, 2014, XXXX XXXX, Executive Director, Office of Special Education, BCPS, notified the Parents that after a careful review of the information presented in the Student's current IEP it had been determined by the LEA BCPS that the Student would be assigned to the [School 3] ([School 3], a public separate day school, beginning on August 25, 2014. (BCPS Ex. 76).

257. [School 3], BCPS School number XXX, serves grades 9-12. All [School 3] students are special education students.

258. The Student's educational needs can be met at [School 3].

259. Based on the information developed at the IEP meetings on May 12 and 21, 2014, particularly the observations of BCPS staff and Student work samples provided by [School 1], the Student will not be able to meet the criteria for a Diploma.

260. On August 7, 2014, the Parents filed for Due Process.

DISCUSSION

Burden of Proof

The Parents contend that the Student's IEP for the 2014-2015 school year was not reasonably calculated to provide her with a FAPE. They assert that [School 1], a private separate day school, is the appropriate placement for the Student. They also contend that FAPE requires that the Student be placed on a Diploma bound program. The burden of proof on these issues is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009).

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parents bear the burdens of proving that the Student's IEP was not reasonably calculated to provide educational benefit to her, that placement at a separate private day school, [School 1], is appropriate, and that FAPE requires the Student be on a Diploma track.

With regard to the appropriateness of the Student's IEP, to prove their case by a preponderance of the evidence the Parents must convince me that it is more likely than not that the Student's IEP failed to provide the Student a FAPE. Merely expressing opinions or raising doubt does not constitute proof by a preponderance of the evidence. Only if I find that the IEP does not provide a FAPE do I reach the issue of whether [School 1] is the appropriate placement for the Student.

The issue raised by the Parents regarding the Student's participation in a Diploma program is intimately connected to the general issue of the IEP providing a FAPE and will be considered as part of the determination of the issue of whether the IEP provides the Student with a FAPE.

For the reasons that follow, I find that the Parents have not met their burdens.

Legal Framework

The identification, assessment, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010); 34 C.F.R. Part 300 (2010); *see also* Md. Code Ann., Educ. §§ 8-401 through 8-419 (2014) and COMAR 13A.05.01. The IDEA provides federal assistance to state and local education agencies for the education of disabled students, provided that states comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. §§ 1412-14; 34 C.F.R. § 300.2.

As a condition of receiving federal assistance, state and local public educational agencies must have in effect policies and procedures which assure that children with disabilities residing in the state have access to a FAPE "that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C.A. §§ 1400(d)(1)(A) and 1412(a)(1)(A); *see* Md. Code Ann., Educ. §§ 8-401 through 8-419; COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412.

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. 20 U.S.C.A. § 1414 (a)(1)(C)(i), (b)(2)-(3).

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

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

20 U.S.C.A. § 1414(d)(3) (2010).

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

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

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. In

Rowley, the Supreme Court defined a FAPE as follows:

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child... We therefore conclude that the basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to give educational benefit to the handicapped child.

458 U.S. at 200-201.

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

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

Id. at 459-460.

The question before me is not, therefore, whether the Student can perform better at [School 1].¹⁷ The question is whether the Student can receive some educational benefit from the proposed IEP program.¹⁸

¹⁷ “As discussed above, IDEA’s FAPE standards are far more modest than to require that a child excel or thrive. The requirement is satisfied when the state provides the disabled child with ‘personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.’[citation omitted]” *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 330 (4th Cir. 2004). That is the LEA’s responsibility under the law. The Parents’ and the [School 1] personnel’s oft-stated goal to see the Student “challenged” and “excel” is laudable but not the legal standard for a FAPE.

¹⁸ Courts have held in *Rowley*, and subsequent cases, that a public school authority complies with the IDEA when it devises an IEP that is “reasonably calculated to enable the child to receive educational benefits” and when it places a child in a program that “provides opportunity for some educational progress.” *Rowley*, 102 S.Ct. at 3051; *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir. 1983); the IDEA requires an IEP to provide a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetcourt*, 908 F.2d 1200, 1207 (4th Cir. 1990). However, the benefit conferred by an IEP and placement must be “meaningful” and not merely “trivial” or “de minimus.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 838 (1989); *Board of Education v. Diamond*, 808 F. 2d 987, 991 (3rd Cir. 1986). The proposed IEP and placement in this case clearly does just that.

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. “It is possible for a school district’s failure to abide by the IDEA’s procedural requirements to constitute an adequate basis for contending that the district has failed to provide a disabled child with a FAPE.” *MM v. Sch. Dist. Of Greenville*, 303 F.3d 523, 533 (4th Cir., 2002). However, “[w]hen such a procedural defect exists, we are obligated to assess whether it resulted in the loss of an educational opportunity for the child, or whether, on the other hand, it was a mere technical contravention of the IDEA.” *Id.*

Under appropriate circumstances, a procedural error may justify reimbursement of tuition paid to a private institution in which a student is enrolled. *Tice v. Botetourt* 908 F. 2d 1200, 1207-08 (4th Cir. 1990). *See., Sch. Comm. of Burlington v. Dep’t of Ed.*, 471 U.S. 359, 369 (1985).

Second, it must be determined whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 207. Once an IEP is shown to be procedurally proper, the judgment of the school system’s educators regarding the child’s placement should be questioned only with great reluctance by the reviewing authority. *Tice*, 908 F.2d at 1207. There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit, as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *A.B. by D.B. v. Lawson*, *supra*, 354 F.3d at 325-329; *M.M. ex rel. D.M. v. School Dist. Of Greenville Co.*, 303 F.3d 523, 532-533 (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 County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

In *Rowley*, the Supreme Court “cautioned that courts lack the ‘specialized knowledge and expertise’ necessary to resolve ‘persistent and difficult questions of educational policy.’” 458 U.S. at 208. The Court clearly warned that:

In assuring that the requirements of the Act (IDEA) have been met, courts must be careful to avoid imposing their view of preferable education methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, was left by the Act to state and local education agencies in cooperation with the parents or guardians of the child.

458 U.S. at 207.¹⁹

Parental participation does not equate to giving parents the power to control or veto educational decisions related to their disabled child. *Fitzgerald v. Fairfax County Sch. Bd.*, 556 F. Supp. 2d 543, 551 (E.D. VA 2008). *See, e.g., A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 683 n.10 (4th Cir. 2004) (stating that “the right conferred by the IDEA on parents to participate in the formulation of their child’s IEP does not constitute a veto power over the IEP Team’s decisions”). The IDEA does not require the LEA and the parents to reach a consensus regarding the education of a child. 556 F. Supp. 2d at 558. “Instead, if a consensus cannot be reached, the LEA must make a determination and the parents’ only recourse is to appeal that determination. “*Id.*

The “state and local agencies” mentioned are termed the “Local Education Agency” (LEA) by the IDEA. 20 U.S.C.A. § 1401(19). It is the LEA which is mandated to provide a student with a FAPE, and the BCPS is the LEA in this case. When there is no consensus among the LEA and other participants in an IEP process, the LEA must determine the final IEP for a student. This was

¹⁹ I pointed out both of these passages to both of the parties on numerous occasions during the hearing.

explained clearly by the United States Department of Education (USDOE), Office of Special Education and Rehabilitative Services, in a January 7, 2010 letter responding to a letter seeking guidance:

The IEP team meeting serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child. The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority “vote.” If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency’s determinations regarding the child’s educational program . . .

USDOE Letter to Richards, January 7, 2010.

As discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically from those obtained by another student, depending on the needs that are present in each student. 458 U.S. at 202. Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or receipt of passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991) (finding that a student’s passing grades and advancement does not resolve the inquiry as to whether a FAPE has been afforded to the student).

The IEP Developed for the 2014-2015 school year complied with the procedures set forth in the IDEA and was reasonably calculated to provide the Student with a FAPE

The Student is a seventeen year old female who has been identified as a student with a Primary Disability found to be an “Intellectual Disability” as a result of a diagnosis of Down syndrome (as well as having a hearing issue). Down syndrome is a genetic disorder which causes lifelong intellectual disability and development delays. The Student’s condition has affected her academic performance and her behavior since she began to attend school. The

Student lives in Baltimore City and has attended BCPS. The Student has received special education and related services since she began attending school.

The Student attended [School 2], a public charter school, from kindergarten through eighth grade (2004-2013). The Student has had IEPs prepared for her over her school career. Her last agreed upon and implemented IEP was dated February 22, 2013. Her Parents seem pleased with the Student's placement and progress at [School 2].

As part of the process of transitioning from middle school to high school, the Student's Parents investigated various options for the Student's high school attendance during 2013, including visiting various schools. According to the February 22, 2013 IEP, the Parents believed that the most appropriate high school for the Student was [School 4], a BCPS public charter school.

An IEP was to be developed for the Student for the 2013-2014 school year. At an April 12, 2013 IEP meeting the Parents expressed their view that the Student's intellectual functioning was significantly sub-average and there were deficits in her adaptive behavior. The Parents noted that the Student had difficulty maintaining personal relationships, personal boundaries and appropriate behavior. On April 12, 2013, the Parents gave their opinion that the best placement for the Student to attend high school was [School 1], a non-public separate day school.

The Parents have, since April 12, 2013, never wavered in their strong conviction that [School 1] is the appropriate location for their daughter.

The IEP process continued through July of 2013. Several IEP team meetings were conducted in which at least one Parent was present and actively participated. During these meetings, XXXX XXXX, M.Ed., BCPS Education Specialist II, raised concerns that the Student's proposed placement on a Diploma course of study was ill-advised. Ms. XXXX pointed out that the Student was found to be functioning at a third grade level after eight years of

education, and she questioned how the Student could possibly be expected to successfully complete the requirements of ninth grade course work and for obtaining a Diploma. There was discussion among the IEP team regarding the appropriateness of the Student being on a Diploma track. The IEP team found that the Student's cognitive delays impacted her ability to progress academically at an age/grade appropriate rate and that she required a high level of assistance and support to support her learning.

The IEP developed by the IEP team (July 26, 2013 IEP) found the Student to have a second to third grade functioning level in various reading, mathematics and written language areas. The IEP also found that the appropriate program for the Student would be a placement at a full-time segregated BCPS school (eventually determined to be [School 5]) on a Diploma course program of study.

The Parents did not agree to the placement or the proposed location contained in the IEP and rejected the IEP. They placed the Student in [School 1] in September of 2013 for ninth grade.

As a result of a mediation conducted by the OAH in February, 2014, BCPS agreed, among other things, to fund the Student's tuition at [School 1] for the 2013-14 school year. The parties also agreed that an IEP team would convene to consider the Student's progress and that BCPS staff would conduct four observations of the Student as part of the IEP evaluation process. It was decided at an IEP team meeting conducted on March 13, 2014 that the four observers would be BCPS staff members XXXX XXXX, XXXX XXXX, XXXX XXXX, and XXXX XXXX. It was also decided that the IEP team would meet again to discuss the student and review a draft IEP.

The four observations took place in March and April of 2014. On May 12 and 21, 2014, the IEP team met. The IEP team considered a number of data points during those two meetings, including the BCPS observations, progress reports presented by [School 1] staff, a Pragmatic Language Assessment, the IEP proposed by [School 1], the IEP proposed by the BCPS and other

relevant data to consider revisions to the Student's program and her placement for the 2014-15 school year.

There was a great deal of information presented at these two meetings regarding the Student. The IEP meetings were chaired by XXXX XXXX of the BCPS. There was much discussion among the participants as well. The Parents, as well as their attorney and their educational consultant, participated actively in the two meetings. Their views were considered by the BCPS staff. During the discussions, numerous suggestions made by participants, including [School 1] staff, the Parents and the Parents' attorney, were incorporated by the BCPS into the draft IEP. The IEP describes these discussions and the resulting actions and decisions in detail.

At the hearing before me, both parties presented numerous witnesses regarding the IEP meetings and the development of the IEP for the Student. I will first describe the testimony of the Parents' witnesses and then proceed to the testimony of the BCPS witnesses.

The Parents first called Ms. XXXX as a witness. Ms. XXXX is an Educational Associate in the Office of Nonpublic Services with BCPS. She serves as the BCPS case manager at [School 1], which she described as a full-time special education private school. Her work includes reviewing the progress and the appropriateness of the placement of students and also includes chairing IEP meetings.

Ms. XXXX explained the IEP process in detail. Present levels of performance for a student are developed using observations, work samples, informal and formal assessments which are designed to illustrate a student's strength and needs. The IEP team assesses the impact of a disability on a student's performance. Social and emotional issues are considered as well. She described the process as a "snapshot" of where the student is then performing. Goals and objectives are then formulated in an IEP with services and accommodations considered.

For the Student, Ms. XXXX said that for most of the academic areas considered as part of the IEP review, the Student demonstrated less than one year's growth in the areas under review with a disturbingly slow rate of progress. She noted that the Student was in ninth grade but that she was working far below that grade level. She described in detail discussions among team members regarding individual levels of performance. Her testimony illustrated that although there were some disagreements between the Parents and [School 1] staff and BCPS staff as to the exact grade level, there were also areas of agreement. For example, for Reading Fluency both agreed on a late fifth grade level, for Reading Vocabulary both agreed to an early fourth grade level, for Math Calculation both agreed to a beginning third grade level. There were, as noted, some disagreements. For Reading Comprehension, [School 1] found a late fourth/early fifth grade level while BCPS found, and placed in the IEP, an early fourth grade level. Other areas of present level disagreement included Reading Comprehension, Written Language Mechanics, and Written Language Expression.

What was clear from Ms. XXXX's testimony, from the IEP and from the draft [School 1] IIP was that the Student was, by any measure, functioning far below the ninth grade level academically. The progress made by the Student at [School 1] was mixed when compared to prior levels in the unimplemented July 23, 2013 IEP, with progress in some areas but not in others. Certainly, while there was evidence of progress on some of her academic goals, there was little empirical indication that the Student was catching up on the academic portion of her IEP Diploma course of study program in any meaningful fashion.

Ms. XXXX also testified regarding the Diploma and Certificate of Completion issue. Ms. XXXX agreed that in order for a student to be removed from a Diploma course of study, she must first be found to be eligible for the Alt-MSA assessment, which includes six criteria. There was lengthy discussion of an optional IEP Decision-Making Process Eligibility Tool (Alt-MSA

tool) produced by the MSDE, which “encouraged” IEP team use. Ms. XXXX said that the Alt-MSA tool was not used at the IEP meetings but that the team had covered and reviewed the required criteria and determined that the Student was eligible for the Alt-MSA assessment. This was disputed by the Parents. I specifically questioned the witness regarding the Alt-MSA issue:

JUDGE: . . . You see those six criteria there?
THE WITNESS: Yes, I do.
JUDGE: Miss XXXX, I believe you testified that Miss - - you have to, you and the IEP team - - forget have to. In [Student]’s IEP, these six criteria had to be considered; right?
THE WITNESS: Correct.
JUDGE: Were they considered by the IEP team?
THE WITNESS: Yes.

(November 10, 2014, T. 132:20-25; T.133:1-3). Ms. XXXX reviewed the IEP and pointed out some of the areas which memorialized the team’s discussion regarding the Alt-MSA at the IEP meetings. Her testimony on the issue of the discussion of the IEP’s consideration of the Alt-MSA issue was credible, complete and persuasive. I found no reason to disbelieve her testimony.

Ms. XXXX testified on cross-examination as well.²⁰ She noted that she is a speech language pathologist, certified by the MSDE. She has been with the BCPS for 25 years and has participated in approximately 2500 IEP meetings and chaired approximately 1000 IEP meetings. She was found to be an expert in IEP Process Management. She testified as to the difference between location and placement of a student. Placement is an IEP term for the type of program outlined for a student in an IEP whereas location is where the program and placement will be implemented. She explained the process for the determination of location: a specialist in the BCPS receives an IEP and then determines the appropriate location for the student’s placement after review of the IEP.

²⁰ For purposes of judicial economy and scheduling, I permitted BCPS to combine the questioning on cross examination with direct examination of the witness. I then allowed the Parents to engage in both re-direct and cross examination of Ms. XXXX’ direct testimony.

Ms. XXXX described in clear detail the process of determining the LRE for a student, explaining the continuum of placement options. She described the LRE process in the IEP. The proposed placement in the IEP is appropriate. She pointed out that the public separate day school recommended by the IEP was less restrictive than the private separate day school ([School 1]) recommended by the Parents.

Ms. XXXX then described her observation of the Student on April 8, 2014. She said that the Student “had some really wonderful skills.” In the American Government class she observed, however, the concepts were supposed to be for a ninth grade curriculum but the rigor of the task was not what would be expected in a ninth grade credit-bearing class. She explained that the work she saw the Student doing “did not require analysis, explanation, comparisons, like would be required for ninth grade students working in a class to earn credit.” (November 12, 2014, T. 271: 9-11) and “that there was no application of the concepts.” (November 12, 2014, T. 271: 4). In Environmental Science, she observed a modified fourth to fifth grade reading level and a coloring activity which was not appropriate for a credit-bearing ninth grade class. She stressed that the content of the work she observed for the Student had been simplified to an extent that it was not recognizable as ninth grade curriculum. She noted that she had also reviewed several other work samples supplied by [School 1] produced by the Student and submitted to the BCPS and found them to be simplified to a degree not recognizable as ninth grade work. Ms. XXXX stressed that this work for the Student was not work that a student studying for a Diploma should be producing in ninth grade and did not meet the Common Core Curriculum Standards for ninth grade. This work did not evidence that the Student was being prepared to take the required state assessments for a Diploma. It was her view that the Student was not evidencing work showing she was complying with the requirements of being on a Diploma course of study.

Ms. XXXX also reviewed the IEP during her testimony and referenced it to explain that the Student was not performing at a level to be expected at a high school credit course level. Based on the work samples and the progress reports, it was Ms. XXXX' conclusion that the Student would not be able to succeed on the HSA or the Mod-HSA. The instruction of the Student had been modified to such an extent that the Student would need to take the alternate assessments (Alt-MSA assessments).

The issue of credits was discussed. Ms. XXXX said that there was concern from herself and other BCPS staff as to the pace of the Student's earning credits and how [School 1] expected the Student to earn credits for purposes of a Diploma. She said a "roadmap" of how the Student would achieve her high school credits had been requested but had not been produced by [School 1] during the IEP meetings. Ms. XXXX noted that there was "a lot" of discussion concerning the "diploma track versus the certificate track" at the IEP meetings – there was also discussion about the level of instruction, the earning of high school credits, vocational needs, social needs, functional needs and how to program for those areas. The IEP was developed based on the information received during the two days of IEP meetings. Options were considered, and it was felt that the Student pursuing a Diploma was not the appropriate course of educational benefit; instead, the Student's needs could be better addressed and more appropriately on a certificate of completion track.

She noted that the Student had definite functional needs and needed instruction in these skills which were included in the IEP developed by the BCPS. According to Ms. XXXX, the Student is a ninth grade student whose reading skills are at a fifth grade level. She is at a functional literacy level which requires support and instruction in basics. She requires longer time to learn concepts and a great deal of modification and support. She requires her language and vocabulary to be simplified. The Student has an Intellectual Disability with an IQ of 40. In

addition, the LRE placement of a public separate day school was found to be the most appropriate placement for the Student. It was her opinion that the IEP can be implemented at the suggested location of [School 3] since it is a separate public day school where the academic and behavior skills and services in the IEP can be implemented based on the resources available at that school.

Referencing the PWN of May 21, 2014, Ms. XXXX explained why the BCPS made the decisions found in the IEP. She noted that the IEP team members from the BCPS agreed with her regarding the appropriateness of the IEP. The Parents, their attorney, their advisors and the [School 1] staff did not agree to the IEP.

I found Ms. XXXX to be a very effective witness for the BCPS. Her testimony was clear and considered; she often paused to think about the question and consider her answers. She was concise, often answering “yes/no” or “correct/incorrect” to questions. There was no attempt to color her testimony to present it in a manner favorable to the BCPS. She often asked for clarification to make sure she understood the question. Her experience is extensive and was displayed during her presentation. I saw no evidence she was biased towards the Student, her Parents, or [School 1] – in fact, she presented herself as a very professional witness explaining what occurred and why the BCPS came to the conclusions it did in this IEP. Her testimony was factual, and she often referenced exhibits while testifying. I found her testimony to be persuasive and thorough. She explained in detail what had occurred at the IEP meetings, how the IEP was developed, and how the IEP is appropriate for, and provides educational benefit – both academic and behavioral – to the Student. I found her testimony as to the basis for the Certificate of Completion course to be clearly-explained and sound. Her testimony as to both the IEP process and the IEP itself was quite clear, detailed and credible. I saw no evidence that Ms. XXXX did anything other than consider the facts in reaching her conclusions, which I found to be sound, well-supported and persuasive. Her conclusions regarding the work performed by the Student

and the suitability of a Certificate of Completion program were sound and supported. Her description of the LRE process of the IEP was very detailed, clear and persuasive as well.

As to the Alt-MSA issue, I found Ms. XXXX's testimony to be quite credible – she attempted to reconstruct the process by which the Alt-MSA was discussed and the criteria considered during her testimony, and she utilized the IEP itself to point out where the issue had been considered in order to support her testimony. I believe her evidence that the Alt-MSA criteria were fully discussed at the IEP meetings and that the issue was fully considered by the IEP team and is memorialized accurately and honestly in the IEP. In light of the fact that the Parents and their attorney showed no reticence about bringing up issues at the IEP meetings—and also considering the completeness of the memorialization of events in the IEP which Ms. XXXX' testimony and the IEP itself illustrate—I find it significant, relevant and persuasive that there is no evidence, other than in the testimony of various witnesses for the Parents, that indicates that the Alt-MSA issue was not fully considered by the IEP team and that the issue was decided without full consideration of relevant legal and factual concerns.

In sum, the testimony of Ms. XXXX was persuasive evidence on many levels that the IEP process was sound, the IEP team considered the relevant information, all parties received a fair hearing at the IEP meetings, the IEP developed by the IEP team provides the Student with educational benefit and the placement is well-considered, appropriate and sound.

The Parents also presented five witnesses from [School 1]. XXXX XXXX, IEP Coordinator and Program Coordinator, testified. She was accepted as an expert in the special education process. She has been associated with [School 1] for 28 years. She noted that [School 1] is a non-public school which deals with students with special needs and described the school. She described the Student as “pretty remarkable.” She also spoke about the Student's history with [School 1]. She explained that [School 1] “basically” took the IEP developed in July, 2013

by the BCPS and put it into the IIP it developed for the Student. She stated that the July, 2013 IEP “seemed appropriate.” According to her, the teachers were “very pleased” with the Student’s progress at [School 1]. She noted that the two days of the IEP meeting lasted 6-8 hours each, and it was one of the longest IEP meetings in which she has participated.

Ms. XXXX noted her disagreement with the WISC-IV results from the May, 2013 Psychological Report. She testified that the full scale of 40 from the WISC-IV test was “not accurate” as to how the Student performs educationally. She claimed that the Student’s skills were above what would be expected from the Student’s “appearance and testing.” She provided, however, no factual basis to dismiss the results as inaccurate. Ms. XXXX asserted that the Student “rises to expectations” and needed to have the “bar” set “high.” She found the Student was achieving her objectives and was making “reasonable progress” in all of her classes but was not at a functional reading level. Ms. XXXX admitted that the Student needs to work on communication skills. She said that it was inappropriate for the Student to be placed in a functional life skills program because it is “far below” where the Student’s abilities were. Ms. XXXX also discounted the results from the Woodcock Johnson test, because it was over a year old.

Ms. XXXX discussed the Alt-MSA issue. It was her testimony that the IEP team did not discuss the criteria for the Alt-MSA (testimony contradicted by not only Ms. XXXX but also by various entries in the IEP itself). Ms. XXXX said she was “astounded” by a statement at the IEP meeting that the Student qualified for the Alt-MSA and noted it was an “error” not to use the optional Alt-MSA tool during the IEP meetings. She said that the Student is learning at “content standards.” She said at one point that no members of the [School 1] team believe that the Student met the criteria for the Alt-MSA.

Ms. XXXX accompanied Mr. XXXX, Mr. XXXX and Ms. XXXX when they conducted their observations of the Student. In an effort to explain some of the observations of BCPS staff regarding the Student's observed class behavior, she asserted that the Student is "distracted" and that her "silliness" increases if outsiders come into her class. She did not express support for the validity of the BCPS observations. For example, she met with Ms. XXXX after Ms. XXXX's observation and noted that "we had a very different take on what we both observed" and said she told Ms. XXXX in response to Ms. XXXX's observations "that's not what I saw." Ms. XXXX stated that Ms. XXXX's report "does not reflect [Student]'s level of performance." She stated that an observation is a snapshot of instruction being received. She also said that work samples are a "very small" piece of instruction and indicated they should not be outweighed.

Ms. XXXX did not agree with the IEP as produced. Although she agreed that the LEA is "legally required to provide FAPE" and is "ultimately" responsible for FAPE, she believed that the BCPS was skeptical of the reports of [School 1] teachers regarding the Student and did not consider the views of the [School 1] staff in developing the IEP. (I note the IEP itself is replete with evidence to the contrary regarding the latter.) She believes the IEP will cause the Student to regress and that "regression does not provide educational benefit" but she also noted that the Student can obtain "some educational benefit" from the IEP. Ms. XXXX later said that the IEP "as a whole" does not provide educational benefit and, based on these contradictory statements, I was left in doubt as to her actual conclusion regarding the educational benefit of the IEP.

I did not find Ms. XXXX to be a persuasive witness for the Parents. I found her to be more an advocate for the Student's placement at [School 1] than a credible witness. For example, her claim that the results from the WISC-IV were not accurate because of the Student's educational performance and work produced is difficult to accept considering the low levels of present academic performance [School 1] staff themselves claimed for the Student during the

May, 2014 IEP meetings, the numerous work samples submitted by [School 1] to BCPS which indicate work far below ninth grade credit-earning class levels, and the observations of the four BCPS representatives of the Student at [School 1] in March and April of 2014. Her discounting of the Woodcock Johnson because it was, in her view, stale, was not supported by facts during her testimony. I also found Ms. XXXX's claims that the Student is making progress on her Diploma curriculum, achieving her objectives and yet is not at a functional reading level difficult to reconcile with many of the facts in evidence.

Her statements about the Student's performance while being observed by BCPS officials seemed defensive and designed to minimize these observations. She made dismissive excuses for the Student rather than responding directly on the merits of the observations that related to the Student's behavior during the observations. Ms. XXXX discredited the observations of the BCPS staff strongly and repeatedly – she did not seem at all willing to accept the validity of what the BCPS staff observed. Tellingly, she stated that what Ms. XXXX observed is not what Ms. XXXX “saw” during the Student's observation and she indicated that an observation, being a “snapshot,” was a less credible source of information than the opinions of teachers of the Student. Because of her demeanor, I was left with the conclusion that Ms. XXXX viewed the observations as either incompetent or biased. I find little basis to believe that she found them to have any merit as being simply different perspectives on the Student which should be seriously considered for validity. Based on the demeanor and statements of the witness, I did not see evidence that Ms. XXXX had seriously considered the validity of the views of the BCPS staff or the possibility that the IEP does provide the Student with a FAPE when rendering her opinions and testimony at the hearing.

I found her claims regarding the Alt-MSA difficult to credit. Considering the lengthy nature of the IEP meetings and the evidence that the Parents, their advocates and the [School 1] staff intervened repeatedly in the discussion, I find it difficult to believe the testimony of several [School

1] witnesses, including Ms. XXXX, that the Alt-MSA criteria were never discussed. Their testimony is all the credible evidence I have that the Alt-MSA was not, in fact, fully considered and discussed. The IEP certainly does not confirm her allegations. BCPS witnesses also painted a different picture which I, frankly, found to be more believable as to the discussions involving the Alt-MSA. I find it difficult to believe that during two lengthy days in which the evidence is clear that many issues were discussed and debated, Ms. XXXX simply decided to ignore the Alt-MSA criteria and then make up a memorialization in the IEP that the criteria were discussed. Such does not comport with my observations of Ms. XXXX' multi-day testimony at the hearing or other credible evidence. Ms. XXXX clearly voiced her concerns throughout the IEP process, and I find it hard to believe that she (and other advocates for the Student) was not more forceful if she truly found the decision to have the Student take the Alt-MSA test, without adequate discussion, to be so "astounding."

Ms. XXXX seemed more an advocate for the correctness of the Student's placement at [School 1] rather than a source of facts and information, especially as regards the IEP not providing the Student with a FAPE. I found her credibility damaged, because her testimony always seemed filtered through a lens of advocating for the Student's placement at [School 1]. I also noted that she gave little credence to the observations, views, opinions or conclusions of BCPS staff that did not coincide with her view of the Student and the appropriateness of the educational program proposed by [School 1]. I found, for example, that her statement that work samples of the Student were a very small part of the Student's instruction to be another example of a general tendency to explain away, deny the validity of, or minimize data and observations which did not fit her own opinions and conclusions.

Ms. XXXX also emphasized during her testimony the importance to her of challenging the Student to excel, and she criticized the IEP because it did not enable the Student to maximize her

potential. Laudable as that goal is, it does not assist me in deciding if the IEP provides a FAPE to the Student. Ms. XXXX's presentation, although it did criticize the IEP, seemed much more focused on extolling the virtues of [School 1] and the appropriateness of the Student's program in the proposed IEP. As previously noted, the question before me is not whether the Student can perform better at [School 1]. The question is whether the Student can receive some educational benefit from the proposed IEP program. When judged by that standard, I did not find Ms. XXXX's evidence to be persuasive that the IEP does not provide the Student with a FAPE.

XXXX XXXX, a special education teacher and academic case manager at [School 1], also testified for the Parents. Ms. XXXX was accepted as an expert special education teacher and also in monitoring the progress of students under an IEP. She has participated in the development of over one hundred IEPs. She was the Student's English 9A teacher. It was her testimony that the Student can do her work with supports, extra time and extra help. Ms. XXXX emphasized that the most appropriate program for the Student is one which pushes her to the "utmost" and that the Student "thrives on the challenge of doing" her work. She emphasized that "it makes you a whole person when you are as challenged as you can be."

Her opinion is that the Student is functioning at an early fourth grade level for reading vocabulary and at a late fifth grade/early sixth grade level for reading fluency. Although she described the Student as learning at a "pretty basic level," Ms. XXXX stated that the Student is not on a functional level—a conclusion I found hard to accept considering her level of functioning as evidenced in the record and by Ms. XXXX's own statements—but does have deficits and requires help. She is concerned that the Student would "get bored" under the IEP and "would not get as much education" as under the IIP. She stated that Ms. XXXX observed her class, and she indicated that she disagreed with Ms. XXXX's observations saying that it is "hard for an outside

person to come in” and that conducting one observation for the Student is not an accurate way to access a “complex kid” such as the Student.

Ms. XXXX stated that the Alt-MSA assessment is not appropriate for the Student and that there was no review of the criteria for the Alt-MSA during the IEP meetings (which she noted was one of the top two longest IEP meetings she had attended for a single student). It is her view that the Student should be pursuing a Diploma and would not make academic progress on a Certificate of Completion track of study. According to Ms. XXXX, there was no direct discussion of moving the Student off of the Diploma track at the IEP meetings, a statement the credible evidence flatly contradicts.

Ms. XXXX stated that the “IEP has a lot of things in it that are very appropriate” for the Student, providing personalized instruction and supports that will benefit the Student. It was her opinion that “with changes” it could be an “excellent” IEP for the Student. She continued her emphasis on the need for the IEP to “challenge” the Student.

I found much of what Ms. XXXX said to be irrelevant to the issues, but some of her testimony was actually supportive to the position that the IEP provides the Student with a FAPE. Her own assessed grade levels for the Student in several areas are far below grade level, and she said the Student made “about” a year’s worth of progress on her program, both of which lend support to the concerns about the Student’s ability to progress successfully on a Diploma program. She repeated several times that there were aspects of the IEP that were appropriate and that the IEP – with undescribed “changes” – could be excellent for the Student.

I did not find her critique of Ms. XXXX’s observation to be persuasive; rather, like Ms. XXXX, her testimony was more geared toward criticizing the observation process in and of itself (for example, it being hard for an outside person to come in; one observation for the Student was not accurate, etc.) rather than responding in detail to the substance of Ms. XXXX’s observations

(which is something I found from other [School 1] witnesses regarding other observations by BCPS staff as well).

It was clear that Ms. XXXX's focus was not on whether the IEP provides the Student with a FAPE as she repeatedly emphasized the need of the IEP to challenge the Student. Ms. XXXX seemed more concerned with the Student being challenged by her IEP as opposed to her IEP providing appropriate special education services to provide the Student with a FAPE.

XXXX XXXX, a special education teacher and academic case manager at [School 1], also testified. He taught the Student foundational mathematic skills in her Basic Math class. He stated that the Student completed all her course work with a grade of D or above and achieved "pretty reasonably" her goals and objectives. Mr. XXXX said that the Student has "mastered" pre-algebra skills – a statement I found very hard to square with the descriptions of the Student by both [School 1] and BCPS staff, the Student's present levels of performance, her work samples, and the BCPS observation of his class. He stated that he gave his opinion at the IEP meeting that the Student should be on a Diploma track, not a Certificate of Completion, track. He noted that there was no discussion as to where the IEP would be implemented at the IEP meeting.

Mr. XXXX gave very negative statements regarding the IEP meeting process. He said that he felt that the BCPS did not value his opinion, that Mr. Henderson was "mean-spirited" and that the decision had been made regarding the Student's IEP before he got to the meeting.

Mr. XXXX was obviously angry at what he perceived had occurred at the IEP meetings. As noted, he repeatedly criticized Mr. Henderson as "mean-spirited." He said that when the Parents or [School 1] staff spoke, they were "shut down," a statement which numerous entries in the IEP clearly refute. His negative demeanor and presentation severely undermined the credibility of his testimony, and I did not find Mr. XXXX's testimony to be persuasive or credible on behalf of the Parents' position.

XXXX XXXX, another special education teacher and academic case manager at [School 1], testified as well. He was accepted as an expert in IEP process and implementation as well as a special education teacher in the area of English. Mr. XXXX taught the Student English 9B. It was his opinion that the Student was making progress working toward a Diploma and that she would not receive educational benefit from the IEP if she took the Alt-MSA assessment. He said that the BCPS questioned the data presented by [School 1] at the IEP meetings and seemed offended by that having occurred.

I found Mr. XXXX's testimony to be conclusory – he did not provide any detailed factual support for his observations or opinions. His testimony did not present persuasive evidence in favor of the Parents' case.

XXXX XXXX, yet another special education teacher and academic case manager at [School 1], also testified. He was accepted as an expert in IEP implementation and as a special education teacher in the area of social studies. Because he did not teach the Student until July of 2014, after the IEP meetings and the development of the IEP, I did not find his testimony relevant to the issues to be decided.

The Parents also presented the testimony of two outside experts. One of these was XXXX XXXX, who was accepted as an expert in IEP process, development and implementation. She works with children with disabilities, and also with schools, conducting assessments and classroom observations. She has drafted a number of IEPs and has attended approximately 2000 IEP meetings. She observed the Student at [School 1] and has attended IEP meetings for the Student, including the meetings which developed the IEP.

Ms. XXXX described the May IEP meetings she attended. She said that there was discussion between teachers and BCPS officials. Much of the meeting was spent on “making sure” the reports reflected what the Student could do in a classroom setting. She also noted that

there were “multiple” disagreements between [School 1] and BCPS staff as to the Student’s present levels of performance. She failed to note, however, that after discussion, several of the present levels of performance in the IEP were amended by BCPS to take into account the views of [School 1] staff and the Parents.

Ms. XXXX reviewed the Student’s progress in various areas, finding various rates of progress in different subjects. It was her opinion that the IEP was not procedurally correct, because it had incorrect present levels of performance and had goals and objectives “far below” what the Student could already do. It was her opinion that the recommendations of [School 1] were “100 percent reliable.” She also opined that the Student was not learning at a functional “literacy” level. The IEP places the Student’s academic skills at a functional level below where her skills are currently, according to Ms. XXXX.

Ms. XXXX described the meeting as “pretty hostile” and said it was “not a discussion; it was more of an argument.” She summarized her opinion that IDEA procedure was not followed because: 1) the present levels of performance in the IEP were incorrect, and 2) the Parents’ input was not considered in the debate over the Diploma/Certificate of Completion tracks.

Ms. XXXX emphasized her disagreement with the IEP’s present levels of performance, but I found most of her opinion was based on the fact she that agreed with the assessment of [School 1] rather than that of BCPS and, consequently, she did not agree with aspects of the IEP. It was abundantly clear during the hearing that this was one of the areas of disagreement between [School 1] and BCPS in the process. Although I have considered her opinion as to the validity of the [School 1] reports, I do not find it persuasive in support of the position that [School 1]’s present levels of performance were correct and the BCPS levels were incorrect.

As to the issue of participation of the Parents, I frankly found Ms. XXXX’s position meritless, because there is a host of evidence in the record, including documents and testimony,

indicating that the Parents participated fully throughout the IEP meetings and that their views were considered by BCPS. For example, both the present levels of performance and BCPS observations were amended after discussions involving the Parents and/or their attorney and/or [School 1] staff. The evidence is clear that the views of the Parents were considered by the BCPS throughout the IEP meetings, including as to the specific issue of the Diploma/Certificate of Completion track for the Student. What happened was not that the Parents were not permitted to participate or that their views were not considered; rather, the BCPS officials who participated in the IEP meetings simply disagreed with the views of the Parents, the [School 1] staff, and Ms. XXXX as to the suitability of the Student continuing on a Diploma track. That is not evidence of non-participation; it is evidence of a disagreement. To disagree is not to ignore. It is simply factually incorrect to assert, as Ms. XXXX does, that the Parents were not involved in a meaningful way in the IEP process as regards the issue of the Diploma versus the Certificate of Completion track.

Ms. XXXX noted that “not one person from [School 1]” supported moving the Student from the Diploma to the Certificate track and, conversely, no one from the BCPS expressed support for leaving the Student on the Diploma track. I find that credible as evidenced in the record. Ms. XXXX noted during her testimony that the LEA makes the final decision. It is clear that, because of irreconcilable differences of opinion, that is precisely what occurred here.

Ms. XXXX said at the hearing that her “loyalty is to [the Student] and what [the Student] needs.” As praiseworthy as that loyalty is, it is not relevant to the key issue of whether or not the IEP provides the Student with a FAPE. As I stressed repeatedly during the hearing and continue to stress in this decision, the issue is not whether the placement at [School 1] or the proposed IIP is “better” for the Student; the issue is whether the proposed IEP provides the Student with a FAPE. I found Ms. XXXX, like Ms. XXXX and other witnesses presented by the Parents, to be

more an advocate for the Student's best interests and for a placement at [School 1] rather than a credible source of evidence as to the issue of the IEP providing a FAPE.

Dr. XXXX XXXX, Ph.D., also testified. He was accepted as an expert in psychology and neuropsychology. He is a licensed psychologist in the State of Maryland. Dr. XXXX has a multidisciplinary practice in which he serves children, adolescents and adults with neurobehavioral disorders and includes learning and development disorders. His work includes the educational needs of children. He has observed students and attended hundreds of IEP meetings. He has also administered the WISC and Woodcock Johnson assessments as well.

Dr. XXXX is familiar with the Student. He met her in June of 2014 when he was hired by the Parents to observe and evaluate her. He observed her one time at [School 1] on July 17, 2014. As part of his evaluation, he reviewed education records as well. Among the records he reviewed were the WISC-IV, the Vineland Assessment, the Transition Inventories, and the psychological report of May 13, 2013 regarding the Student.

Dr. XXXX stated that the Student has a cognitive disability. She has an expressive language restriction as well. According to Dr. XXXX, the Student is, however, functioning at a higher level than what would be expected. Dr. XXXX noted that the WISC-IV assessment from May, 2013 found a full scale IQ score of 40. He explained that an IQ score provides "an idea" of a child's cognitive ability and that the WISC-IV is one test used to measure that. It was Dr. XXXX's opinion that the WISC-IV from May, 2013 did not measure the Student's ability correctly, because the WISC-IV is a language dependent test and the Student has a language impairment. According to Dr. XXXX, this results in an underestimation of the Student's accurate score. He testified that her work samples were not consistent with the WISC-IV score of 40 and that her IQ score would not have predicted that she could produce the work she has done.

Dr. XXXX further said that a functional life skills program teaches practical and adaptive skills and that the Student's "capabilities" go well beyond evidencing a need for a functional life skills program. It was his opinion that her adaptive skills are not at a level to qualify her for the Alt-MSA assessment based on his observations of the Student and her performance at [School 1]. It was his opinion that Student was appropriately placed on a Diploma track and that removing her would limit her capacity to acquire skills. Stressing functional life skills would, in Dr. XXXX's words, "create an opportunity lost" for the Student. He used the phrase "an opportunity lost" for the Student repeatedly during his testimony.

On cross examination, Dr. XXXX said that he had never attended an IEP meeting for the Student and had no questions as to the validity of the actual administration of the WISC-IV assessment. He said he did not think that the Student has an IQ of 40 but believes that her IQ is in the range of 60-70, which he said was "educable," although he failed to define what "educable" meant or what intellectual level or disability level that range indicated for the Student. He also provided no sound basis for his conclusion regarding reaching the 60-70 range as an accurate measurement for the Student. He did state that the Student has language and hearing difficulties and "there is no doubt that she has a fairly significant disability." For example, he noted that her comprehension of words is lower than a sixth grade level. A Diploma track would, however, provide the Student with a "different trajectory" for her life.

On redirect examination, Dr. XXXX said [School 1] was appropriate for the Student and that she would not receive educational benefit on a "non-diploma" track. Once again, he said such would result in "an opportunity lost" for the Student.

I found Dr. XXXX's testimony to be significant, but not in support of the Parents' case. First, I note that the Parents presented evidence from Ms. XXXX who criticized the observations of BCPS personnel because it is "hard for an outside person to come in" and because conducting

one observation for the Student is not an accurate way to assess a “complex kid” such as the Student. I find it significant that Dr. XXXX also relied on one classroom observation, as well as reviewing work samples and other materials, and that the four BCPS observers did the same in their evaluations. The Parents presented Dr. XXXX’s opinions as having validity; on the other hand, they presented evidence, and argued, that a similar process of evaluation by the BCPS staff was not valid.

Second, I do not find Dr. XXXX’s factually unsupported criticism of the May, 2013 WISC-IV results to be credible or persuasive. His opinion that the Student’s language deficits, which he failed to explain or describe in any detail, rendered the WISC-IV invalid was conclusory and was only supported by his statement that the results were not consistent with the Student’s work at [School 1]. I did not find his opinion at all persuasive as to the invalidity of the WISC-IV test. Additionally, I found his dismissal of the results of this widely-utilized test—which he himself administers and relies upon in evaluating students—to be based more on the results than the process. Frankly, had the WISC-IV results been more favorable to the Student and the Parents’ case, I have genuine doubts whether Dr. XXXX would have been so dismissive of the relevance of the results. His conclusory dismissal of this credible, objective standard assessment undermined his credibility substantially. Like so many other witnesses for the Parents, I found Dr. XXXX more a “cheerleader” for the Student rather than a credible witness regarding the issue of the IEP’s formation, educational benefit and FAPE.

Dr. XXXX was yet another witness for the Parents who stressed that the Student should be placed at [School 1] and on a Diploma track not because of the failure of the IEP to provide a FAPE, but because placing her in a non-Diploma track would result in what Dr. XXXX repeatedly referred to as “an opportunity lost” for the Student. Dr. XXXX was only one in a long series of witnesses for the Parents who believe that placing the Student at [School 1] and her receiving

instruction on a high school diploma track is a better program for her than the proposed BCPS IEP program. As previously stated in this decision, however, the responsibility of the LEA to provide the Student with a FAPE does not mean that the Student is entitled to the best education, public or non-public, that money can buy or to all the services necessary to maximize her potential. *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. 176). The issue is not whether the placement advocated by the Parent or [School 1] staff or Ms. XXXX or Dr. XXXX is better, or even appropriate for the Student, but whether BCPS has offered an appropriate program for the Student at the placement which it recommended. *A.B. ex rel D.B. v. Lawson*, 354 F.3d 315, 324 (4th Cir. 2004). If the proposed IEP is reasonably calculated to provide educational benefits to the Student, it is in compliance with the requirements of the IDEA. *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455, 459-460 (6th Cir. 1993). The issue is not whether the Student can perform better at [School 1], which placement and program maximizes her potential, or whether the BCPS IEP is “an opportunity lost” for the Student; the question is whether the Student can receive some educational benefit from the proposed IEP program. As was the case with the other witnesses presented by the Parents, Dr. XXXX failed to provide any persuasive evidence that the BCPS IEP fails to do so.

The Student’s mother, [Mother], was the final witness called by the Parents. [Mother] described her daughter in warm detail with pride. She explained the Student’s educational history as well. She has attended IEP meetings for the Student since she was a toddler. She is pleased with the Student’s progress at [School 1], which she noted is two miles away from the Student’s home. She is concerned with the Student’s level of independence – according to [Mother], the Student needs guidance when dealing appropriately with adults and in communicating her needs clearly. (Both of these needs were also discussed by BCPS witnesses, are important needs of the Student, and are addressed in the IEP.)

She described the May 12, 2014 IEP meeting as quite long and contentious. Much of the meeting was spent reviewing the observations of BCPS staff. She was very critical of, and directly criticized, the BCPS staff stating that the BCPS staff had not ever taught her daughter, had unfairly challenged the validity of the reports of the [School 1] teachers, and would not maintain their views of her daughter's level of functioning if they had seen her function in the community. I found her to be dismissive of and hostile toward the BCPS personnel and their observations and recommendations.

[Mother] said the subject of the Student being on the Diploma track came up at the end of the May 12, 2014 IEP meeting. She said that she was surprised and objected to consideration of removing the Student from the Diploma track. She described discussions between various parties at the IEP meeting regarding the Diploma track which I found contradicted the testimony of other [School 1] witnesses.

[Mother] has visited the proposed IEP placement location, [School 3], twice and is concerned that the Student is operating at a level much above the students at [School 3].

It is clear from the record and testimony that [Mother] is knowledgeable, caring, and diligent with regard to the Student's academic, social and emotional needs. The record reflects that she has been an active participant in the IEP process for the Student for a number of years. In observing [Mother]'s demeanor while testifying, however, it was clear that she does not accept as valid the observations, assessments, or opinions of the BCPS as involves the formation and drafting of the IEP. As with other witnesses called by the Parents, there was a definite "us against them" feeling coming from [Mother] as regards the IEP process and the disagreements between the Parents, their representatives and [School 1] staff on one side and the BCPS staff on the other side.

The formation of an IEP is a very important part of the life and future of this Student, and it is understandable that emotions would run high during contentious IEP meetings. It is clear to me, however, that the Parent, like other witnesses called by the Parents, does not accept as credible the observations of BCPS staff, their recommendations concerning the Student, and the proposed IEP. They simply cannot conceive of another placement other than [School 1] or a different program for the Student which does not include the Diploma track. I saw little evidence that [Mother] or the [School 1] staff had any willingness to consider the validity of the observations and recommendations of the BCPS IEP team members. I found, frankly, more willingness to consider opposing views among Ms. XXXX and the BCPS staff as opposed to the Parents, their advocates and the [School 1] staff. This is borne out in testimony as well as memorialized within the IEP. Considering these facts it is understandable that no consensus was reached at the IEP meetings regarding the Student's IEP. That lack of consensus resulted in the entity charged by law with developing an IEP for the Student, the LEA BCPS, making the final decisions in order for there to be an IEP developed for the Student.

Based on the evidence, including my observation of her demeanor and testimony, I do not believe that [Mother] has ever considered the possibility that the IEP provides her daughter with educational benefit. I believe, in addition, that she has never seriously considered the possibility that it provides an appropriate program for her daughter. [Mother] and her husband decided at some point on or about April 12, 2013 that [School 1] was the appropriate school for their daughter and nothing has changed that opinion. As illustrated by the Parents' reaction to the July 28, 2013 IEP placement, the issue of [School 1] is not negotiable to the Parents. This was true even though that IEP had the Student on a Diploma track.

[Mother] has adopted a preference for a particular school, [School 1], and therefore she has decided that this is the only placement and location where the Student can learn and make

progress. That conclusion, from a parent, is understandable. Her desire to accept the favorable observations and reports regarding her daughter from [School 1] staff is also understandable, as is her reluctance to hear and accept reports from BCPS that cast doubt on the picture painted by [School 1] which indicate a child performing at a lower level who has a need for serious functional skills assistance. Less understandable is the reluctance I saw from every [School 1] witness to consider the validity of those same observations and reports from the BCPS in a genuine manner.

Also understandable is [Mother]'s fierce resistance to accepting that a Certificate of Completion is the appropriate program for her daughter at this time. [Mother] wants her daughter to excel – and who can fault that in a mother? In spite of her pride in her daughter and her desire to see her daughter succeed on a Diploma program, however, [Mother] failed to present credible evidence to establish that the program and placement offered and developed by BCPS is inappropriate for the Student or that a FAPE requires the Student to be on a Diploma track. In this she mirrored the other witnesses and evidence presented by the Parents at the hearing. The Parents did not persuade me by a preponderance of the evidence that the IEP of the BCPS does not provide the Student educational benefit and a FAPE, or that FAPE requires the Student to participate in a Diploma program as of May, 2014. As noted previously, opinions and conclusions are not evidence, and the Parents' multi-day presentation was a testament to [School 1], not an effective or persuasive evidentiary critique of the IEP's FAPE.

The witnesses of the BCPS were, on the other hand, knowledgeable, professional, credible and persuasive as regards the propriety of the IEP process and the provision of educational benefit and a FAPE by the IEP, including the appropriateness of the Student's program being on a Certificate of Completion track. The BCPS presented six witnesses on behalf of its case regarding the Student's IEP.

XXXX XXXX testified, and that testimony has been discussed above.

XXXX XXXX, Coordinator of Psychological Services, BCPS, also testified on behalf of BCPS. She was accepted as an expert in school psychology, as well as IEP implementation and development. Ms. XXXX supervises approximately 85 school psychologists in her position. She has participated in approximately 800 IEP meetings. She has created or assisted with the creation of IEP goals and objectives for approximately 300 IEPs. She has administered the WISC approximately 200 times. She is familiar with the Student, having attended an IEP meeting, reviewed the Student's educational record, and reviewed the May, 2013 Psychological Report.

Ms. XXXX described the Psychological Report in great and effective detail. The 2010 WISC-IV score of 45 indicated a moderate range of intellectual disability for the Student. Unlike Dr. XXXX, Ms. XXXX described meaning of the WISC-IV data in detail during her testimony. For example, she stated that the full scale score of 40 for the 2013 test fell in a range of 37-47, which meant that there was a 95% chance that the Student would score in that range if tested again pursuant to the test's dynamics. She said that the full scale IQ score is a very accurate predictor of future student performance and that it is one of the most relevant factors to be considered by an IEP team. She dissected the meaning of the scores, noting, for example, that the scores indicated that the Student was functioning at a low level. She noted a 10 point decline in the perceptual score from the 2010 WISC test which indicated that the Student had not acquired new skills over the period of 2010-2013.

Ms. XXXX also discussed the Vineland Adaptive Behavior Scale results. The scores indicated that the Student was clearly functioning at a level far less than her age. Her daily living scores result was also far below what Ms. XXXX would have expected for a student of her age. Ms. XXXX stated it was "very appropriate" for the IEP team to consider this psychological evaluation of the Student, noting that it was the most current evaluation of the Student's cognitive

and adaptive functioning available to the IEP team. She also pointed out that during the July 28, 2013 IEP meeting, the Parents had not objected to utilizing the results of the May, 2013 Psychological Report.

Ms. XXXX stated that in her opinion the May 21, 2014 IEP was “completely appropriate” to meet the Student’s education and adaptive needs. She said the Certificate of Completion track was also appropriate, because it gives the Student specialized training and adaptive functioning skills which she requires to function more effectively, as well as appropriate academic instruction.

Because of her intellectual disability the Student will not, according to Ms. XXXX, be able to pass the required high school assessments or meet other Diploma requirements. It was her conclusion that it was not appropriate to place the Student on a Diploma track on May 21, 2014. Such a program was not appropriate to meet the Student’s cognitive and adaptive needs as found during the IEP process. The Diploma track is not a program that would provide the Student with a FAPE, according to Ms. XXXX. Such a program would not give the Student the balanced level of academic instruction and adaptive needs instruction that the Student requires and that should be in the Student’s IEP.

Ms. XXXX was very knowledgeable about the subjects of her testimony. She presented clear testimony, and her conclusions were supported by facts. Her description of the WISC-IV was, for example, much clearer and more detailed than Dr. XXXX’s. I found her observations regarding that test more knowledgeable, more clearly explained, and more credible than Dr. XXXX’s dismissal of the 2013 test results. She tied the two WISC-IV scores together to present a more detailed explanation of what they indicated for the Student’s present levels in May of 2014. Her testimony related aspects of the test to the Student’s performance and to her cognitive needs. She also tied the psychological report results to the development of the IEP and the

validity of considering the psychological report in the determination of the Student's present levels of performance, her needs, and her goals and objectives.

On rebuttal, Dr. XXXX offered a critique of Ms. XXXX's testimony, noting once again that the Student's functional behavior was not, in his opinion, consistent with the IQ score from the 2013 WISC-IV test. He stated that the score should not be over interpreted. I was left with the impression that Dr. XXXX was advocating that his subjective criteria should receive more weight in evaluating the Student rather than the objective scores received from the WISC-IV examinations, a conclusion I did not share. He indicated that subjective observations and evaluations were more credible than the WISC-IV results, a conclusion I again do not find credible. Certainly observations, grades and work samples have validity, but to argue as Dr. XXXX did that they outweighed the WISC-IV results seemed, again, to be more of a case of "sentence first, verdict after," by which I mean that the results of the WISC-IV dictated the validity attached to them by Dr. XXXX, and the low score, since it did not conform to his evaluation, had to be criticized, minimized and dismissed as having of no validity. This further undermined my confidence in Dr. XXXX's value as a witness in this case.

XXXX XXXX, Educational Specialist II with the BCPS, also testified at the hearing. He was accepted as an expert in special education transition planning and services. He described transition services as part of the services provided in an IEP for students with a focus on post-secondary goals and planning. Mr. XXXX has attended "hundreds" of IEP meetings over a period of ten years. He assists in the preparation of IEPs with a focus on post-secondary goals, and he designs activities in line with student weaknesses and abilities.

Mr. XXXX is familiar with the Student and attended a number of IEP meetings for the Student in 2013-2014. His role at these meetings was as a transition consultant planning for the Student upon graduation. He focuses on certain outcomes, including employment, education,

training, and independent living. Each year he identifies activities which are connected with services to be provided to assist a student. Mr. XXXX described the post-secondary goals in the IEP. It was his recollection that there was not any objection to the transition plan in the IEP.

It was Mr. XXXX's conclusion that the transitional plan was "very beneficial" in providing the Student with educational benefit. He testified that [School 3] is one of the 14 schools in his coverage network and that he is very familiar with that school. He said that the identified placement location in the IEP, [School 3], would meet the Student's transition needs, and he explained that opinion in detail.

I found Mr. XXXX to be a credible and knowledgeable witness. He had an obvious expertise in the preparation, implementation and appropriateness of transition sections in IEPs. His testimony as to the transition portion of the IEP was direct, and he clearly explained why he believed it was appropriate for the Student and provided her with educational benefit. I found his testimony in support of the [School 3] location credible and valuable. He provided credible evidence that the IEP, particularly the transition portion of the IEP, provided the Student with educational benefit and a FAPE.

XXXX XXXX, Academic Director of Special Education, BCPS, was a witness for BCPS as well. He was accepted as an expert in special education administration, special education academics and instruction, reading and literacy instruction, administration and analysis of formal and informal special education assessment, IEP process, IEP procedure, and IEP implementation. He has attended approximately 180 IEP meetings.

Mr. XXXX provided a great deal of detailed information regarding the development and implementation of IEPs. He explained that an educational "placement" is the program that an IEP develops for a student and that "location" is the school to implement that IEP. He defined "Least Restrictive Environment" as part of the IDEA, and said that it requires that services under an IEP

be implemented in the most appropriate environment with non-restricted students. A public separate day school such as [School 3] is, for example, less restrictive than a private separate day school such as [School 1]. Mr. XXXX said that IEPs and special education services are “all based on the student’s needs.”

Mr. XXXX observed the Student at [School 1] on March 31, 2014. He reviewed the Student’s record, including the July 26, 2013 IEP, and a number of work samples. He observed the Student’s Environmental Science, Mathematics and English 9B classes. His conclusion was that the work he observed was not high school level work. He said that the Student appeared relaxed during her classes. He observed a very high level of prompting in the classes and stated that the Student would not have completed her tasks without the prompting that was provided to her. It was his opinion that high school course work complexity was voided by the level of prompting he observed – the Student simply did not produce a high school level of work or evidence of the ability to do so. As to English 9B, the rigor of the work performed by the Student that was presented as appropriate English 9B work was simply not English 9B level work.

He then discussed the various high school assessment tests in detail and explained why the Student would not be able to take the HSA or the Mod-HSA assessments. Based on his observations, review of work samples from the Student, and other data he believes the Student was not eligible for these assessments.

Mr. XXXX defined FAPE and stated that appropriate FAPE for the Student was to be on a Certificate of Completion program. His view was that it would be detrimental to the Student to continue her on an inappropriate Diploma program. He said that the Student’s current level of performance indicated a significant gap between where the Student was performing and where the Student should be on a Diploma track – a gap he described as “very wide”—and there was no evidence that the Student could possibly bridge that gap.

The witness explained in detail that “there are no diploma bound goals,” *i.e.* goals are not designed for a high school standard. All IEP academic goals are content standards. In effect, the IEP develops the appropriate goals and objectives for a student, academic and behavioral, and the appropriate course of study follows – not *visa versa*.

For example, his observation and the assignments and work samples he saw as part of ninth grade academics did not reflect ninth grade level work. They reflected, according to Mr. XXXX, early elementary – late second/early third grade – level work. The Student evidenced early elementary functional skills. The Diploma track would not, according to Mr. XXXX, provide the Student with a FAPE. He discussed English 9B in detail to support his opinions and stated that as to English he did not see evidence that the Student was receiving educational benefit on the Diploma track at [School 1]. According to Mr. XXXX, the Student as he saw her was “a student working toward a certificate of completion.” It was his opinion at the IEP meetings, and it remains his opinion, that the Student should be on a Certificate of Completion program to provide her with educational benefit and a FAPE. I found his evidence to be powerful and persuasive regarding these matters.

Mr. XXXX described the IEP itself in detail, describing why the IEP provided the Student a FAPE. His description included details of the appropriateness of the Present Levels of Academic Achievement and Functional Performance, various Special Considerations and Accommodations, and Goals (and Objectives). As to placement, he noted that a specific school location was not determined at the IEP meeting. That determination would come later, because it was an administrative function of the LEA to determine a student’s location under an IEP after the IEP had determined the appropriate placement (a finding consistent with law).

He stated that [School 3] was an appropriate location to implement the IEP, because that school has the staff and resources to implement the IEP. Mr. XXXX noted that [School 3], a

separate public day school, was a more restrictive placement location than a regular public general school but was less restrictive than a separate non-public day school such as [School 1].

As to the consideration of the Alt-MSA issue, Mr. XXXX stated that criteria contained in the voluntary Alt-MSA eligibility tool were discussed in the IEP meeting and criteria contained in the eligibility tool were demonstrated in the IEP. He said that “we applied the criteria for the “Alt” and “the Alt is appropriate.” I found no reason to believe that Mr. XXXX falsified these statements, which were given naturally during his presentation.

Mr. XXXX confirmed the obvious – that there were serious disagreements during long discussions at the IEP meetings that remained unresolved by the IEP meeting process. He stated that BCPS was the entity ultimately responsible for providing the Student with a FAPE, and it had fulfilled that responsibility in the IEP.

I was struck by Mr. XXXX’s depth of knowledge concerning the IEP process in general, the IEP meeting process here in particular, and the details of the resulting IEP. His written observation was the most deeply detailed of the four observations and contained a great deal of actual data as well as his observations. He continually evidenced what I can only describe as remarkable knowledge as to a number of aspects of these relevant areas and matters throughout his testimony. His testimony was clear, detailed, knowledgeable, concise, pointed and informed. He was direct and articulate in his answers, which were often supported by detailed descriptions of events and facts. His depth of knowledge as to the details of the IEP was quite obvious and impressive. His explanations of why the IEP provided the Student with educational benefit and a FAPE was also detailed and persuasive – I found that his testimony strongly supported the position of the BCPS. His testimony as to the issue of the suitability of a Certificate of Completion program for the IEP was genuinely impressive, comprehensive, and strongly supported why the Certificate of Completion program was found to be appropriate for the

Student. Like other BCPS witnesses, I also saw no evidence that Mr. XXXX shaded his testimony to cover up a failure to fully consider the criteria for the Alt-MSA assessment at the IEP meetings.

Mr. XXXX's presentation mirrored what I saw from other BCPS witnesses – that the actions and decisions of BCPS personnel were made in good faith to the best of their professional judgment, based on their responsibility to evaluate the Student for purposes of her IEP fairly and accurately; that their conclusions were sound, supportable and based on facts; and that the IEP was honestly developed by the BCPS to provide the Student with a FAPE to the utmost extent possible. Mr. XXXX himself provided ample evidence of why the Parents were not able to carry their evidentiary burdens in this case – the facts simply prove that the IEP provides the Student with educational benefit appropriate to her needs and provides her with a FAPE. That FAPE includes the Certificate of Completion program contained in the IEP as well.

XXXX XXXX, Educational Specialist II, BCPS, was another witness called by the BCPS at the hearing. He was accepted as an expert in IEP development, implementation and process, as well as special education programming for students with intellectual disabilities. Part of his responsibility is to assist teachers and to insure IEPs are being correctly implemented. He has worked with the Alt-MSA and is familiar with it. He has attended at least 350 IEP meetings and attends IEP meetings for students from elementary through high school. He has taught special education students in the classroom, all of whom were seeking a Certificate of Completion. He is often called in to consult in schools for students who are Diploma bound and stated that his personal goal is to get more students from the Certificate of Completion to the Diploma track.

Mr. XXXX has met the Student and also observed her at [School 1] on April 3, 2014. He has attended all of her IEP meetings since June of 2013. The Student has a significant intellectual disability – she has significantly sub-average intelligence along with significant deficits in

adaptive behavior. He observed her in keyboarding class, English 9B and Science. His observations confirmed that the Student needs to be taught skills directly, including functional skills, and that the Student's adaptive needs were not being met in her classes. He noted that the Student had difficulty determining between fact and fiction in her English class, which is a difficulty a ninth grade student should not have.

He also found significant the fact that the Student answered many questions in her English class using gestures instead of words. He said that such behavior was not appropriate for a ninth grade student in a high school diploma program and indicated a serious deficit. The [School 1] staff did not ask the Student to state in words what she had gestured in pantomime. He found it quite significant, and disturbing, that the [School 1] staff was learning her language rather than teaching her how to communicate with others. He described it as "they were learning her language," which was not an appropriate response to her behavior and her communication deficit. He felt this type of instruction resulted in the Student communicating in a way those outside of [School 1] could not understand. That result would provide the Student with no benefits and leave her in possession of a debilitating and serious communication shortcoming that could follow her throughout life. Mr. XXXX emphasized this issue in his testimony, stating that the Student has communication needs that had to be addressed in the IEP. She needs to be able to communicate with persons outside the school setting, and the IEP must assist her with that as indeed it does.

Mr. XXXX testified that the Student needs the communication goals and objectives in the IEP, which he termed "crucial" to her education. He also stated that the behavioral and social interaction skills addressed in the IEP were incredibly important for the Student to have as well. He pointed out, quite significantly, that quite a few of the goals and objectives contained in the IEP were actually written by [School 1] staff as part of the IIP but were in the IEP as well.

He stated that the Certificate of Completion track is appropriate for the Student and that the IEP “leads to that.” His opinion is that the IEP provides the Student with educational benefits, outlining a program that addresses her academic, adaptive, socialization, communication, and safety needs. He said that the IEP decision to place the Student on a Certificate of Completion track is “a good decision” and that it would do her a disservice not to focus on her adaptive needs, because that would put her even further behind her peers and others with whom she interacts. It was his opinion that the Student does not have the time in a Diploma program to focus on both her academic and adaptive needs. A separate public day school is the most appropriate setting to implement the IEP, because the Student can work with peers and teachers to practice both academic and non-academic skills in a supportive setting. [School 3] is such an appropriate location.

Mr. XXXX was a thoughtful, knowledgeable and passionate witness. His demeanor and presentation made clear that he takes his work quite seriously and that he genuinely cares about the students with whom he interacts. His vast experience teaching and working with students on the Certificate of Completion track added significant credibility to his observations and conclusions in this case, especially as regards the Parents’ claim that the Student requires Diploma course of study. I found Mr. XXXX’ presentation and evidence in and of itself more relevant, credible and persuasive regarding the appropriateness of the Certificate of Completion track versus a Diploma track issue than all of the evidence presented by the Parents.

His observation of the Student’s communication difficulty and the response from [School 1] staff was striking and genuinely important. It gave a concrete basis for his discussion of the communication difficulties of the student and why the IEP had to deal with those difficulties. It provided a real-life face to a portion of the IEP, and it was a clear example of the process by which BCPS staff took observations, assessments and work samples and utilized them to prepare

an IEP. It was also an example of how the Student did not receive educational benefit at [School 1]. This area of testimony provided me with clear evidence of how BCPS worked to insure the development of an appropriate IEP that addressed the Student's needs, both academic and behavioral, and provided her with a FAPE.

XXXX XXXX, M.Ed., Educational Specialist II, was the final witness presented by BCPS. She was accepted as an expert in IEP process management, development and implementation, as well as special education curriculum and instruction. From 2009 to the present she has been responsible for conducting professional development for the BCPS, including training IEP team managers and providing instructional support to new classroom teachers. She was also a classroom special education teacher herself.

Ms. XXXX met the Student at an IEP meeting in June of 2013. She has attended several IEP team meetings held for the Student since that time. Ms. XXXX noted that every year an IEP team has to make a determination as to the student's IEP. Team members change, data changes, the student's performance changes over time. According to Ms. XXXX, a student's IEP program is a decision dictated by what the data and present levels indicate. Her description of this process was clear, and her demeanor was businesslike.

As part of the IEP process, the issue of the Student's IEP was reviewed in 2013 for her transition to high school. The issue arose during that process of the Student's suitability for a Diploma course of study. Ms. XXXX stated that based on the data presented during the IEP meetings, it was her conclusion in 2013 that the Student struggled very much and that a Diploma track was not appropriate. After discussion, the IEP team determined, however, that the Diploma course of study was appropriate.

The Student's IEP was reviewed again in 2014. As part of the IEP review and revision process, Ms. XXXX observed the Student at [School 1] on April 3, 2014. She observed the

Student in her English 9A class. She found that the Student required a great deal of redirection from her teacher, Ms. XXXX. She also noted that the skill which the Student worked on was a second grade level skill. According to Ms. XXXX, such a skill level was not appropriate for a ninth grade class. Ms. XXXX observed the Student in her American Government class and observed work which she described as modified fourth grade level reading and work that a student in the ninth grade would not produce to earn credit.

Ms. XXXX explained that the IEP team developed the IEP for the Student in May of 2014 based on the data presented, her present levels of performance, and progress observed. She stated that it was a cohesive document that was based on the Student's needs and was appropriate for the Student. Ms. XXXX testified that the Student was not exhibiting academic progress on the Diploma track. It was her opinion that the older the Student gets, the wider the gap becomes between her levels of performance and her grade level. Ms. XXXX said it was negligent not to take the Student's academic gap into consideration and respond to it in the IEP. She said the decision to have the Student on a Certificate of Completion track as the projected category of exit was "extremely appropriate."

Ms. XXXX went over the continuum of services considered during the LRE consideration and explained in detail how the continuum was considered from the least restrictive environment (a general education classroom) until the team reached a public separate day school environment, which the BCPS part of the team agreed was the appropriate environment for the implementation of the IEP. It was her evaluation that there was nothing provided for in the IEP that could not be provided in a public separate day school.

Ms. XXXX discussed the requirement that the LEA provide a student with a FAPE in an IEP and further opined that the Student's IEP "absolutely provides FAPE to her." She elaborated

that the IEP had been built based on the data provided and on what the Student needs. It was her conclusion that the IEP process was properly followed as well.

Ms. XXXX was a thoughtful and intelligent witness who considered her answers before answering questions. She paid close attention in order to answer the question that was actually asked, and her answers were usually directly responsive to questions, often resulting in a “yes” or “no” answer. I found her presentation to be clear and her observations and conclusions persuasive. I saw no evidence of bias in her testimony and no evidence of decision-making based on anything other than her professional evaluation of the Student, her deficits and her needs. I believe that she genuinely concluded that the Student should not be on a Diploma track during the 2013 IEP review and that her April, 2014 observations of the Student at [School 1] only added further corroboration of that conclusion. She explained her observations well, and her reasoning was cogent. I got the impression that Ms. XXXX felt that the Student’s failure to exhibit progress while on the Diploma track was obvious and that to leave the Student on that track was not only inappropriate educationally, but also that it would lead to the Student falling further behind as she tries to make educational progress. It was clear she felt the IEP provides the Student not only with a FAPE, but an appropriate FAPE that address the Student’s present levels, her deficits and her needs (both academic and functional).

Upon the whole, I found the BCPS witnesses to be professional, knowledgeable, honest, clear, thorough, unbiased, credible and persuasive. I found no evidence that any BCPS participant in the Student’s IEP process in 2014 did anything other than evaluate the information they were supplied fairly and honestly. They also made their decisions fairly and honestly based on that information, their professional evaluation of that information and their obligation to produce an IEP for the Student which provided her with the most appropriate FAPE possible. Their experience and expertise in special education, and their past involvement in IEP process and

procedure, was displayed throughout the hearing. The IEP reflects extensive evidence that supports their findings and conclusions in this matter. I found their testimony, when considered in its totality, much more relevant and persuasive than the evidence presented by the Parents.

I also found that the BCPS staff who participated in the IEP process was willing to consider contrary views and opinions throughout the IEP meeting process. The record is replete with examples of the BCPS officials agreeing to changes in their observations and to the IEP based on argument presented by the Parents, their advocates and the [School 1] staff. Ms. XXXX, the IEP team chair, particularly evidenced a willingness to allow all views to be presented at the IEP meetings and demonstrated a readiness to amend the IEP in response to input from team participants. She clearly approached her task with an unbiased professionalism which is evidenced in the IEP and in the testimony she herself presented at the hearing.

The BCPS members of the IEP team considered opposing viewpoints throughout the process. Frankly, upon my consideration of the record in this case, I have found little evidence of a similar willingness to consider opposing views among the Parents and the [School 1] staff during the IEP meetings.

The IEP itself contains a number of items in common with the [School 1] IIP, which is also indicative that the BCPS participants in the IEP process had no difficulty adopting the opinions, observations and views of the [School 1] participants when they found them to be persuasive and appropriate for the Student's IEP. Their actions provide support to the conclusion that the IEP is the result of their best effort to produce an IEP which provides the Student with educational benefit and a FAPE.

I. First Prong of Rowley: Alleged Procedural Violations

The *Rowley* Court explained that it is “no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents . . . a large measure of

participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard.” *Rowley*, 458 U.S. at 205-06.

Not every violation of a procedural requirement under the IDEA is sufficient grounds for relief. *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002). In *Doyle v. Arlington Co. School Board*, 806 F.Supp. 1253 (E.D. Va. 1992), *affd*, 1994 U.S. Lexis 30495 (4th Cir. 1994), the court stated:

The Parents concede, as they must, that only serious procedural violations could be grounds for finding that the school system had by that alone, denied a free appropriate public education to [the student]... The Fourth Circuit and other courts have equally recognized that mere technical violations of EHA procedures, which do not deny meaningful parental participation, do not render a school system’s proposed program inappropriate... Any other rule would exalt form over substance.

“[T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.” *DiBuo, Id., quoting Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); *see also MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 534 (4th Cir. 2002); *Wagner v. Bd. of Educ. of Montgomery County*, 340 F.Supp.2d 603, 617 (D. Md. 2004).

The Parents raised four procedural violation issues: 1) failure to comply with COMAR 13A.03.02.09D.(3) – that the decision to award a student with disabilities a Maryland High School Certificate of Program Completion will not be made until after the beginning of the student's last year in high school; 2) the Student does not qualify for the Alt-MSA assessment and was not properly found to qualify for that assessment; 3) the determination of the location of the placement in the IEP was improper; and 4) the Parents were denied meaningful participation in the IEP process. For the reasons that follow, I find no merit in any of the claimed procedural violations.

1. There was not a failure to comply with the requirements of COMAR regarding receipt of a High School Diploma

The issue of whether a student with a disability will receive a high school diploma or a certificate of program completion when he/she graduates from school is not addressed in the IDEA. State law exclusively determines diploma and graduation requirements. The standards for a Diploma and a Certificate of Completion are established by the MSDE. COMAR 13A.03.02.

The Parents' first procedural violation claim is that there was a failure to comply with the requirements of COMAR 13A.03.02.09D(3), which states that the decision to award a student with disabilities a Maryland High School Certificate of Program Completion will not be made until the beginning of the student's last year in high school.

The record makes clear that no such decision has been made and, hence, there is no violation of this requirement. What was determined by the IEP team and by IEP itself, was that – based on the Student's academic, social, functional and behavioral needs – the Student would be on a Certificate of Completion program during the 2014-2015 school year and not a Diploma program.

The Parents seem to assert that because their ninth grade daughter was found to be appropriate for the Certificate of Completion track in the IEP, she has, therefore, been irrevocably placed on that track and a final decision has been made as to her receiving a Certificate of Completion rather than a Diploma.

That is clearly not the case. If one were to accept the Parents' argument, that the mere placement of a ninth grade student on the Certificate of Completion track in an IEP violates COMAR 13A.03.02.09D(3), then BCPS would be prohibited from placing the Student, or any student, on a Certificate of Completion track before the beginning of the student's last year in high school, regardless of whether the IEP process found the student should be on a Certificate of Completion track or not. That would be the case even if an IEP assessment indicated that a student was incapable of passing mandated assessments or completing the requirements for

obtaining a high school Diploma in a year before the beginning of their last year in high school.

Such a result would mandate that many special education students would receive improper IEPs because they had to be on a Diploma track, regardless of the possibility that their individual yearly IEP assessments indicated that program course was appropriate or not. That would obviously not provide those students with a FAPE for that IEP and, therefore, run afoul of federal law and numerous court decisions. I do not believe that the State of Maryland intended such a clearly erroneous result here and find this argument to be completely without merit.

What the COMAR language indicates is that no final decision is to be made on **awarding** a student a Certificate of Completion until the beginning of that student's last year in high school, not that the student cannot be placed on a Certificate of Completion **program** until their last year of high school. What the IEP does is entirely proper as regards this issue.

There is no merit to the Parents' first claimed procedural violation.

2. The Student was properly found to qualify for the Alt-MSA assessment

As the record, the Findings of Fact, my lengthy discussion of witness testimony and the Discussion itself make clear, claimed procedural violations One and Two are a part of the Parents' assault on the IEP determination that the Student be placed on a Certificate of Completion program track rather than a Diploma program track. Part and parcel of this effort is the second claimed procedural violation: that the Student does not qualify for the Alt-MSA assessment.

As has been and will be further discussed, I find that providing the Student a FAPE for the 2014-2015 school year does not require her to be on a Diploma track. Since the Diploma track issue is, therefore, tied in with these other issues it will be discussed, as appropriate, within my rulings on the alleged procedural violations as well as within the separate discussion regarding whether the IEP provides the Student with a FAPE.

I have extensively reviewed the testimony of the witnesses in this decision, and that review includes various discussions regarding the issue of whether the Student qualifies for the Alt-MSA assessment and whether that determination was properly considered at the IEP meetings of May 12 and 21, 2014. To some extent, this is the classic “he said/she said” argument – the Parents and the [School 1] staff claim that Alt-MSA was barely mentioned and the criteria for that assessment were not discussed at the IEP meetings. The BCPS staff testified to the contrary.

Based on my review of the evidence, particularly the evidence in the IEP as well as comparing the testimony of the various relevant witnesses, I find that it is far more likely that the BCPS version regarding considering of the Alt-MSA assessment discussion is accurate and is in fact what occurred.

I have already noted my finding that Ms. XXXX’ testimony on this issue was very believable and persuasive. I reiterate that I found her to be an entirely believable witness. She presented an open and professional manner. I find it extremely hard to believe that the detail-oriented and professional woman I personally observed at the hearing, who clearly went to great lengths during the IEP meeting process to be fair to the Parents and to [School 1] staff, who was so knowledgeable concerning the IEP process and the IEP itself and so experienced in the IEP meeting process, simply forgot to bring up the Alt-MSA criteria or, even worse, decided to ignore those criteria at the IEP meetings and later fabricated in the IEP that the Alt-MSA criteria were considered. Not only does that fly in the face of my observations of Ms. XXXX’ presentation and demeanor, it is difficult to credit considering the fact that Ms. XXXX’ pointed out various sections of the IEP which memorialized such discussions taking place.

Additionally, I can find no rational reason for Ms. XXXX and the BCPS team not to have considered the Alt-MSA criteria at the IEP meetings as they have testified to and the IEP itself documents. The IEP meetings lasted two full days. The IEP itself is replete with evidence that

the IEP team conducted very detailed discussions involving the development of the IEP. There were substantial disagreements noted and summarized. It simply stretches credibility to believe that Ms. XXXX and the BCPS team, including Mr. Henderson, chose to not discuss the criteria for the Alt-MSA at the IEP meetings. There is no rational reason for them to have not done so, nor is there any evidence in the record that the BCPS team chose not to fully discuss and consider any other items raised during the IEP meeting process.

I also find it difficult to believe that Ms. XXXX, the Parents and Mr. Martin simply were so – in Ms. XXXX’s words – “astounded” by the BCPS position that the Student be placed on a Certificate of Completion track that they failed to vigorously and repeatedly object to the alleged failure of BCPS to examine the criteria for the Alt-MSA, especially considering the fact that the May 12, 2014 meeting ended with disagreement over the specific Alt-MSA issue.

The Parents placed great emphasis on the failure of the IEP team to utilize an optional tool to assist with the consideration of the suitability of the Alt-MSA assessment during the IEP process. I emphasize for the record the word “optional.” Considering my findings that the IEP meeting participants did consider the required criteria for consideration of the Alt-MSA assessment in the Student’s IEP, I do not find it significant or even mildly concerning that the IEP team did not utilize an “optional” tool to consider the same criteria they considered anyway. This would truly place form over substance. I found the emphasis placed on the use or non-use of this tool by the Parents, in light of my finding that the criteria required to be considered were actually considered, to be without merit. The IEP itself notes in the section on Student Participation on District/Statewide Assessments and Graduation Information that: “[The Student] will participate in the Alt-MSA with appropriate testing accommodations. She meets all the criteria set forth in the Alt-MSA eligibility tool.” I find that statement factual.

As also previously noted, there was ample factual justification for the IEP team's BCPS members to find that the Alt-MSA assessment was appropriate for the Student. The numerous items considered and reviewed by the IEP, the clearly supported present levels of performance found, and the Student's documented academic and functional deficits provide ample justification for the decision that the Student not be on a Diploma track and could not succeed in taking assessments other than the Alt-MSA.

I realize that the findings of the BCPS team members are difficult for the Parents to accept – the [School 1] staff presented a different picture of the Student to some extent – but the findings are supported by both empirical and anecdotal data, by personal observations and professional evaluations, by experienced special education BCPS staff members and by, frankly, some of the evidence presented by the Parents themselves. [Mother] herself provided the answers to the Vineland assessment of 2013 which noted a number of serious deficits in the Student's functional levels. Even if one accepts the Present Levels of Performance of the [School 1] staff as gospel – and there was an enormous amount of evidence, counter-evidence and flat-out bickering between counsel at the hearing regarding those grade level evaluations by both [School 1] and BCPS staff IEP members – it is still indisputable that the Student's academic present levels of performance in May of 2014 were substantially below her actual grade and age levels. She had – even by [Mother]'s own admissions – serious functional, behavior and communications needs, and there were, consequently, legitimate doubts to be raised that the Student was truly receiving a FAPE on a Diploma program at [School 1] in May of 2014. The Student is currently in high school – there is only a limited amount of time still available to address her needs - which include not only academics but also independent living skills, her daily living skills, her adaptive skills, her transition requirements, her social skills and her communication deficits. In short, the IEP needs to help prepare the Student to live the rest of her life - the clock is ticking.

The decision of the BCPS personnel regarding the Alt-MSA assessment and a Certificate of Completion track has been clearly proven to be legitimate and to have been placed within the IEP based on factual data and justifiable concerns in order to fulfill the required purpose of providing this Student with real educational benefit and a FAPE in her IEP. The decisions to place the Student in the Alt-MSA assessment and on a Certificate of Completion track were factually supported and sound and were the result of proper procedures being followed by the IEP team. There was no procedural violation here.

3. The determination of the location of the placement in the IEP was not improper

The Parents raised an issue as to the selection of [School 3] as the proper location for the IEP Placement. They have cited the fact that [School 3] was not specifically raised at the IEP meetings as the proposed location as a procedural error. It is not such an error. Educational Placement, as used in the IDEA, means educational program – not the particular institution where the program is implemented. *See, e.g., A.W. ex rel. Wilson v. Alexandria Co. Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004); *White Ex Rel. White v. Ascension Parish School Bd.*, 343 F.3d 373, 379 (5th Cir. 2003); *Sherri A.D. v. Kirby*, 975 F.2d 193 (5th Cir. 1992). IDEA also does not require parental participation in such site selection. The IEP clearly identifies the proposed location for implementation. *See, A.K. ex rel. J.K. and E.S. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007).

The United States Department of Education, Office of Special Education Programs (OSEP) has indicated that the location where special education services will be provided, including the particular school and classroom, is an administrative determination, provided that it is consistent with the IEP team's educational placement decision. While OSEP opinions are not legally binding, courts have deferred to OSEP guidance in resolving issues where the IDEA is ambiguous, and the United States Supreme Court has also been guided by OSEP policy.

The Parents claim that the location of the Student's placement, [School 3], was not proper because it was not reviewed by the IEP team. They claim that the IEP fails to provide the Student with a FAPE and that the proper placement location, if that is the case, is [School 1].

As just noted, the Parents' true objection here is to the placement – their proposed location involves, and results from, a different placement than the location resulting from the IEP placement.

What they have not proven is that the placement decided upon by the IEP team, a public separate day school, is not consistent with the location selected, [School 3], which is a public separate day school in the BCPS. In closing argument, the Parents' attorney stressed that the Parents were denied their right to participate in a discussion about where the Student's location would be under the IEP placement.

As previously discussed, the Parents were given ample opportunity to participate in the LRE discussion at the IEP meeting. They disagree with the finding – a public separate day school – but they clearly had and exercised meaningful participation in the LRE determination process.

The Parents were notified of the Student's placement location by way of a letter from XXXX XXXX, Executive Director, Office of Special Education for BCPS, dated June 30, 2014. In that letter, Ms. XXXX notified the Parents that after a review of the IEP it had been administratively determined that the Student's placement location would be at [School 3].

There was credible evidence from multiple sources that this is the standard procedure engaged in by BCPS for determining location of a placement after placement is determined in an IEP. Here, the LRE placement was determined to be in a public separate day school (LRE-F in the placement continuum) in the IEP, albeit by the BCPS team members only. The nature of a public separate day school—a small school setting with a small pupil to teacher ratio which

provides both academic and functional instruction on a Certificate of Completion program track and provides opportunities for student to go into the community – was discussed at the IEP meeting of May 21, 2014, but such a placement was not agreed to by the Parents. The location of the placement was decided upon, however, as per standard administrative procedure, at a later time by the BCPS. Moreover, there was nothing in the record to support the proposition that [School 3] would not be able to provide the Student with educational benefit under the IEP.

As noted above, the location where special education services will be provided, including the particular school, is an administrative determination, provided that it is consistent with the IEP team's educational placement decision. [School 3] is a public separate day school, and its administrative selection by BCPS was consistent with the IEP's educational placement decision of a public separate day school for the Student's program.

The Parents were not denied a right to participate in the decision process regarding this issue and this claim is found to be without merit.

4. The Parents were not denied meaningful participation in the IEP process.

I find no merit whatsoever in the allegation that the Parents were denied meaningful participation in the IEP process. The evidence is all to the contrary. Ms. XXXX's testimony, and the IEP itself, reflect numerous instances where the views of the Parents, as well as their lawyer and their advisor, were not only considered but resulted in changes and additions to the IEP. This was also true of the contributions of [School 1] team members. I found testimony from [Mother] and certain [School 1] witnesses to the contrary unbelievable. Based on the record, the IEP team members of BCPS, in particular Ms. XXXX, professionally and actively considered all views when developing the IEP, including the views of the Parents. To argue that the Parents were "shut down" (as one witness did) is simply not reflected in the record. There is no evidence that Ms. XXXX ever precluded any IEP team member from expressing a view or opinion or that such

were not seriously considered by Ms. XXXX and by other IEP members. Testimony to the contrary I find meritless.

I stress again that parental participation does not equate to giving parents the power to control or veto educational decisions related to their disabled child. *Fitzgerald v. Fairfax County Sch. Bd.*, 556 F. Supp. 2d 543, 551 (E.D. Va. 2008). *See, e.g., A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 683 n.10 (4th Cir. 2004). The IDEA does not require the LEA and the parents to reach a consensus regarding the education of a child. *Fitzgerald*, 556 F. Supp. 2d at 558. If a consensus cannot be reached at the IEP meetings, the LEA must determine the final IEP for a student. *Id.*

What I believe actually aggrieves the Parents is not that their views were ignored – it is that they were not implemented by the BCPS staff. I believe they equate honest disagreement with being ignored. As previously noted, it was Ms. XXXX and BCPS staff who agreed to changes in their observations and to the IEP in response to contrary argument – I saw no evidence in the record that the Parents or the [School 1] staff did the same. There was a clear defensive inflexibility evidenced from both the Parents and the [School 1] throughout the IEP meetings that I did not find evidenced by the BCPS staff. The contentious nature of the IEP process was still very much on display at the hearing. Testimony at the hearing indicated that the IEP process resulted in hurt feelings, frayed nerves and bitterness. This has been a contentious and difficult process for many of those involved.

The Parents were clearly permitted to have all the meaningful participation they desired throughout the IEP process. What they did not get was what they wanted – an IEP with their daughter placed at [School 1] at BCPS expense on a Diploma program. They did not receive that, because the ultimate decision maker, BCPS, came to the conclusion that neither educational benefit nor a FAPE for the Student required either of those Parental desires be implemented in the IEP. Although one can understand the Parents' strong disagreement with those results, their

disagreements are not evidence that they were not permitted to have meaningful participation in the IEP process. The actual evidence is all to the contrary, and I find no merit whatsoever in this claimed procedural error.

I find, therefore, that there were no procedural errors in the formation of this IEP, and I will move on to an examination of the second prong of the *Rowley* test.

II. Second Prong of Rowley: Was the IEP, as developed through the required procedures, reasonably calculated to enable the child to receive educational benefit and a FAPE?

The IDEA provides that all children with disabilities between the ages of three and twenty-one have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (2010). In *Rowley*, the United States Supreme Court described FAPE. The definition bears repeating:

Implicit in the congressional purpose of providing access to [FAPE] is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child. . . . We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 200-01 (emphasis added). *See also In re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991).

The IDEA contains the following similar definition of FAPE:

[S]pecial education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge...[and that have been] provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9) (2010). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (2014); COMAR 13A.05.01.03B(27).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to the best education, public or nonpublic, that money can buy or to all services necessary to maximize educational benefits. *Hessler*, 700 F.2d at 139. A FAPE

entitles a student to an IEP that is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 207. A finding that a child is not progressing at the same speed as her peers does not shed any light on whether a child has failed to gain educational benefit. As discussed in *Rowley*, what constitutes educational benefit for two different children may differ dramatically, depending on the disabilities that are present. *Id.* at 202.

Therefore, “educational benefit” requires that “the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200. *See also MM*, 303 F.3d at 526 (4th Cir. 2002), *citing Rowley*, 458 U.S. at 207. Thus, the IDEA requires an IEP to provide a “basic floor of opportunity that access to special education and related services provides.” *Tice*, 908 F.2d at 1207. Yet, the benefit conferred by an IEP and placement must be “meaningful” and not merely “trivial” or “de minimis.” *Polk*, 853 F.2d at 182-3, *see also Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005); *Bd. of Educ. of Frederick County v. Summers*, 325 F.Supp.2d 565, 576 (D.Md. 2004).

The Court of Appeals for the Fourth Circuit has recognized that no bright line test can be created to establish whether a student is progressing or could progress educationally. Rather, the decision-maker must assess the evidence to determine whether the Student’s IEP and placement were reasonably calculated to enable the Student to receive appropriate educational benefit. *See In re Conklin*, 946 F.2d at 316; Md. Code Ann., Educ. § 8-403 (2008). The IEP is the tool for providing necessary services to the disabled child. 20 U.S.C.A. § 1414(d) (2010).

Furthermore, while a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system. *Rowley*, 458 U.S. at 208. “Ultimately, [IDEA] mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of

that education to state and local school officials.” *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).²¹

An IEP is the “primary vehicle” through which a school provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax County School Bd.*, 553 F. 3d 315, 319 (4th Cir. 2009). The IEP “must contain statements concerning a disabled child’s level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child’s progress.” *M.M. v. School District of Greenville County*, 303 F. 3d at 527; *see* 20 U.S.C.A. § 1414(d)(1)(A). The IEP should be the result of a collaborative process, usually one or more meetings, in which the parents, and their representatives, discuss the child’s abilities and needs with LEA and school staff. If there is no consensus among the IEP team participants, the LEA must determine the final IEP for a student.

The IEP team met on March 13, May 12 and May 21, 2014 to discuss the Student’s academic progress and review and revise her IEP as appropriate. The IEP team consisted of the Parents, the Parents’ attorney, the Parents’ consultant, various family and friends of the Parents, staff from [School 1], and representatives from the BCPS. BCPS staff was in the minority at the meetings.

At the March 13, 2014 IEP meeting, it was agreed that four observations of the Student would be conducted by BCPS. They were conducted, as previously described in detail, by XXXX XXXX, XXXX XXXX, XXXX XXXX and XXXX XXXX. XXXX XXXX, [School 1] Speech- Language Pathologist, also conducted an assessment of the Student in April of 2014 at the request of the IEP team in order to evaluate the Student’s social and pragmatic skills.

²¹ The IDEA is not intended to deprive educators of the right to apply their “professional judgment.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

The IEP team met again on May 21, 2014. Again, BCPS staff was in the minority at the meeting. In accordance with federal and State regulations, the team first determined the Student's present levels of academic achievement and functional performance. Ms. XXXX, Mr. XXXX, Ms. XXXX, and Mr. XXXX presented their observations, which, as previously found, indicated that the Student was not producing ninth grade academic work in her current program, which included a Diploma track. The observations also indicated that the Student exhibited serious functional deficits and needs, including communication needs. Their observations were factual and credible.

There was a great deal of discussion and debate over the observations of the BCPS personnel. The Parents, their attorney and the [School 1] all participated. At the suggestion of the Parents' attorney and other participants, both Ms. XXXX and Ms. XXXX agreed to alter portions of their observation reports.

Ms. XXXX presented her assessment. Ms. XXXX administered subtests of the CASL test to the Student and also observed her in a class. The results she reported illustrated that the Student had functional difficulties – she was not exhibiting appropriate social skills or the ability to use language and communicate effectively. Because of her language deficits, the Student utilizes a compensatory strategy of gestures to communicate, a serious deficit that must be addressed. I note that Mr. XXXX independently reported almost exactly the same findings from his separate observation of the Student, which lends credibility to both his and Ms. XXXX's observations and testimony. Ms. XXXX recommended that the Student receive 45 minutes per week of speech and language therapy which was incorporated into the IEP as a related service.

The observation reports of the BCPS staff were complete, detailed and credible. They indicated clearly that there was empirical evidence that the Student was not progressing on her current course and that she had serious functional needs in areas including communication, which

needed to be addressed in the IEP. They also provided evidence that the Student could receive educational benefit on a Certificate of Completion course of study, which would blend the Student's academic needs and abilities in a program which also addressed her significant functional needs and deficits in an appropriate manner from which she would receive a FAPE.

The IEP team also reviewed the [School 1] progress reports. Ms. XXXX, Mr. XXXX, Mr. XXXX presented their reports regarding the Student's progress, which found, as previously discussed, that the Student was making some educational progress and was projected to earn some high school credits during the 2013-2014 school year. XXXX XXXX of [School 1] presented the Student's progress report for Environmental Science and Government and also noted progress and the earning of a partial credit. Ms. XXXX presented the Keyboarding and Application class report. The Student was passing her courses at [School 1].²²

The IEP team reviewed the Continued Evaluation Eligibility Data Page (Evaluation Page), which indicated that the Student remained a student with Intellectual Disability. The Evaluation Page listed the documents utilized as the basis for the decision, which included the May 13, 2013 Psychological Assessment (including the WISC-IV and Vineland results), BCPS Student observation reports, and [School 1] progress reports.²³

The Student's Intellectual Disability impacts her progress in math calculation, math problem solving, reading comprehension, reading fluency, written language mechanics, written language expression, self-management, social interaction, communication and hearing to a severe degree. The agreed-upon Evaluation Page indicated that the Student maintained an

²² As previously noted, however, determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or has received passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991).

²³ It is important to note that although Dr. XXXX dismissed the WISC-IV IQ finding of 40 from the Psychological Assessment, that finding was an undisputed basis at the IEP meeting, which included the Parents, for the Eligibility Data evaluation and conclusions.

Intellectual Disability which was evidenced by empirical data from the WISC-IV and the Vineland assessments, both of which provided support for addressing the Student's academic and functional needs and deficits.

The IEP team then considered the Participation Section of the IEP. There was extensive discussion and debate among the participants regarding the appropriate assessments for the Student to participate in and the appropriate course of study – Diploma or Certificate of Completion. It was the position of the Parents, their attorney, their consultant and the [School 1] that the Student should be on a Diploma track and that the Alt-MSA assessment was not appropriate for the Student. It was the position of BCPS personnel that the evidence documented that the Student was learning at a functional level and needed explicit and ongoing instruction in functional skills – including interpersonal, social interaction and communication skills—which was indicated by the observation report, the WISC-IV assessment, the Vineland assessment, and other data. Based on the observations reports and data presented, the BCPS personnel found that the Student required substantial modification of the general education curriculum and required extensive instruction and support in basic social, behavioral and communication skills.

The position of the BCPS officials was supported by data and observations and was sound. The Certificate of Completion track in the IEP provides a blending of academic and functional skills to the Student and provides her with educational benefit in both areas.

There was no resolution to the issue of assessments and Diploma versus Certificate of Completion track at the May 12, 2014 IEP meeting, which ended with an agreement to reconvene the IEP meeting.

On May 21, 2014, the IEP team reconvened. The Parents brought five new persons, including an educational consultant, to the meeting. The IEP team met to consider the draft IEP from BCPS and the draft IIP from [School 1]. Ms. XXXX summarized that the IEP team had

previously reviewed the BCPS observations, [School 1] progress reports, the [School 1] Speech and Language Assessment, [School 1] draft IIP, and BCPS draft IEP. These were reviewed at the prior meeting as well. Ms. XXXX noted that the May 12, 2014 meeting had ended with a disagreement as to the Student's participation section, including assessments. This area continued to be an area of disagreement and despite discussion at both meetings, no agreement was reached regarding the appropriate assessment for the Student or the appropriate track – Diploma or Certificate of Completion – for the Student's IEP.

This discussion involved the consideration of the Alt-MSA assessment. After considering all of the required criteria for the Alt-MSA, the BCPS team members found it to be the appropriate assessment for the Student. Testimony from Ms. XXXX and other witnesses make that clear. This is also reflected in the Student Participation section and throughout the IEP.

There was also disagreement as to whether the Student should pursue a Diploma or a Certificate of Completion. As the record reflects, there was a great deal of discussion regarding this issue throughout the IEP meetings. There was no agreement on this issue, and the BCPS, as the LEA, made the final decision to designate the Student as pursuing a Certificate of Completion. That decision, encompassed in the IEP, was sound, considered, detailed and supportable. That decision, as it relates to the IEP, provides the Student with educational benefit and with a FAPE as outlined in this decision and in the IEP. There is no requirement under federal or state law that the Student must be placed on a Diploma program, and the BCPS has found an appropriate alternative to that program of study as it outlined completely in the IEP. COMAR 13A.03.02.

The IEP team turned to the Present Levels of Performance. There was extensive discussion of, and disagreement over, the Present Levels of Performance. Many suggestions were made for changes in the IEP Present Levels of Performance by Mr. XXXX, Ms. XXXX, various

[School 1] staff members, and other participants. Some suggestions were agreed to and others were not.

There was considerable argument and debate regarding Instructional Grade Level Performance in the various academic areas and present levels in the IEP. I was truly struck by the extensive and zealous argument from the Parents' advocates and the [School 1] staff at the IEP meeting regarding the precise grade level performance of the Student (this was just one area that illustrated that the Parents truly participated in a meaningful way throughout the IEP meetings). What particularly stood out was their fierce insistence on changes which often would have resulted in a change involving a year or less in the present grade level performance under discussion. As previously noted, I found Ms. XXXX and the BCPS staff willing to consider opposing views but saw no evidence of a similar willingness among the Parents, their representatives or the [School 1] staff.

In spite of the arguments made regarding the precise Instructional Grade levels and some of the language contained in the Summary of Assessment Findings, what was completely clear was that even if one accepted each and every change suggestion by Mr. XXXX and the [School 1] staff and accepted each and every precise Instructional Grade Level proposed by them, what remained were still present levels that showed conclusively that the Student was functioning at an academic level far below the ninth grade and that her academic process in the ninth grade had been inconsistent and meager at best as evidenced by her academic present levels.

The evaluation of the BCPS that the Student's Academic present levels were significantly below her grade and age level and indicated serious ongoing academic needs and deficiencies was well-considered, supported by both documentary and anecdotal evidence, and sound. According to [School 1], the Student's present levels ranged from the beginning of grade three to early grade six – most present levels were in the range of third to fourth grade. BCPS levels were generally

slightly lower. By any measure, however, such levels are far below the level of academics a high school Diploma-bound ninth grade student should be achieving.

In addition, the Student's Cognitive present level, based on the neutral WISC-IV assessment, indicated serious and ongoing intellectual and communication difficulties impacting her academic learning. Her Behavioral and Self-Management present levels also presented documented social and behavioral deficits that needed to be addressed in the IEP. The Vineland assessment, completed with the participation of the Student's mother, indicated numerous functional deficits as well.

The BCPS found the Student in May of 2014 was functioning at a seriously disadvantaged level academically, socially and behaviorally. Their conclusion that she was at a functional level was aptly supported by the evidence before the IEP team in May of 2014 and is clearly supported by the Present Levels of Performance listed in the IEP.

The IEP team next considered the area of Special Considerations and Accommodations. The IEP provisions regarding Instructional and Testing Accommodations were agreed upon by the IEP team, a welcome change from unresolved disagreements in other IEP areas. These provide the Student with various appropriate accommodations to assist the Student, which include the following:

- A human reader or audio recording for verbatim reading of entire text of instructional and testing materials
- Use of visual clues
- Mathematics tools and calculation devices
- Graphic organizer
- Extended time
- Multiple and/or frequent breaks
- Change of schedule or order of activities – within one day
- Reduce distractions to Student
- Reduce distractions to other students

These are appropriate and comprehensive and provide the Student with clear educational benefit.

The IEP team then considered Supplementary Aids, Services, Program Modifications and Supports. There was extensive discussion among the team regarding these issues, and numerous changes and additions were agreed to by the team. Several suggestions were also rejected by BCPS as well. The IEP provides a number of appropriate aids, services, program modifications and supports to the Student, including:

- Instructional supports
- Check for understanding
- Prompt hierarchy using least to most
- Provide alternative ways for Student to demonstrate learning
- Highly predictable routine
- Home/School communication
- Modified language of instruction
- Limit answer choices to three
- Provide proofreading checklist
- Allow the use of manipulatives
- Allow the use of highlighters during instruction and assignments
- Require the Student to read passages aloud whenever possible
- Concrete step-by-step process charts
- Preteaching and reteaching
- Repetition of directions
- Frequent and/or immediate feedback
- Program modifications
- Modified content
- Altered/modified assignments
- Social/behavioral supports
- Encourage/reinforce appropriate behavior in academic and non-academic settings
- Encourage student to ask for assistance when needed
- Physical/environment supports
- Preferential seating

The IEP team covered this area thoroughly, and the IEP provides appropriate, detailed aids, services, modifications and supports to the Student.

The IEP then considered the ESY section of the IEP. After discussion the IEP found the following ESY services appropriate:

- Classroom instruction (18.5 hours per week);
- Counseling services (45 minutes per week);
- Speech/language therapy (45 minutes per week).

These services were appropriate for the Student and assisted with the implementation of the IEP and clearly provided educational benefit for the Student.

The IEP team discussed the Transition Activities section of the IEP. Again there was extensive discussion with suggested changes offered by team members made to this section. The final IEP product provides appropriate transition activities to assist the Student's eventual transition from school to the outside world. This section also projected that the Student would exit with a Certificate of Completion at the end of her high school career, but did not mandate that result, which is consistent with the needs reflected in, and the projected services contained in, the transition activities section of the IEP and, indeed, the entire IEP.

There was then extensive discussion of the Student's Goals and Objectives in academic, behavioral and health areas of focus. Many of the Goals and Objectives contained in the IEP were, either in whole or in part, also in the draft IIP submitted by [School 1]. The Academic Goals – in the areas of Reading Fluency, Reading Vocabulary, Reading Comprehension, Math Calculation, Math Problem Solving, Written Language Mechanics, Written Language Expression and Communication – reflect the areas of deficit identified in the IEP and are based on the evaluation data considered by the IEP team and by the Student's demonstrated Present Levels of Performance. That is also true of the Behavioral Goals involving Social Interaction Skills and Self-Management. They were well-considered, appropriate and rational. Finally, the Goal involving the Student's hearing issues was appropriate as well.

The Goals also reflect the decision by the BCPS team members who finalized the IEP that the Student was to take the Alt-MSA assessment and receive academics as part of a Certificate of Completion course of study. The Parents and [School 1] Staff did not concur in those decisions. Those decisions are, however, consistent with, and supported by, the data considered by the IEP and the provisions of the IEP. They are backed by observations, reports, examinations,

assessments and standardized tests and assessments. Those decisions, as well as the IEP as a whole, provide the Student with clear and appropriate educational benefit and a FAPE.

The IEP team considered in detail what LRE placement for the Student would be appropriate under the provisions of the IEP. The team considered a continuum of educational settings which ranged from a general education placement to a private separate day school option – least to most restrictive. After consideration, the IEP team rejected several placement options as inappropriate, including general education with no special education services and various inside general education options. The IEP team then discussed the next continuum option – a public separate day school.

A public separate day school is a small school setting with a small teacher to student ratio. It also provides opportunities for students to go out into the community as part of their program. There is also a transition component to the public separate day school option . The setting does not, however, offer a student an opportunity to take academics pursuant to achieving a Diploma.

The BCPS staff members of the IEP team properly determined that the public separate day school placement was the LRE in which the IEP could be implemented. It provides the appropriate level of adult support and supervision for the implementation of the Student's IEP. The Student, as demonstrated in her IEP, requires an intensive level of such support and supervision due to her demonstrated instructional level and related instructional needs, as well as her limited verbal communication skills and her social skill deficits. A public separate day school is appropriate in addressing these deficits. The Student's demonstrated academic, vocational, communications, social, emotional and behavioral needs can be addressed in this placement setting, which provides the small, highly structured learning environment that that can address her needs. The BCPS team, when developing the IEP for the 2014-2015 school year, considered the continuum of alternative placements identified in 34 C.F.R. section 300.39, as required, and

determined that the public separate day school option was the appropriate LRE. Clearly, a public separate day school is the appropriate LRE²⁴ for the implementation of this IEP.

A private separate day school placement was also discussed by the IEP team. A private separate day school is, however, a more restrictive setting than a public separate day school, and it is not required for the implementation of the IEP. A private separate day school would not be the appropriate placement under the IEP.

Not surprisingly, the Parents disagreed with the proposed LRE placement. The Parents felt that the Student requires a private separate day school placement, specifically found by them to be [School 1], to make progress on a program to earn a Diploma. Because the IEP provides the Student with educational benefit and a FAPE, however, a private day school placement is not required or appropriate.

The Parents notified the BCPS at the meeting that they were rejecting the public separate day school placement and were giving notice that they believed that the Student should continue attending [School 1] at the expense of BCPS under a Diploma course of study.

After the IEP meeting ended, BCPS sent the Parents a PWN that informed the Parents that based on the information considered at the IEP meetings, the Student did not meet the standards and criteria for obtaining a Diploma. They were also informed that a public separate day school was found to be the appropriate LRE placement for the implementation of that IEP.

As illustrated in this opinion, those conclusions are supported by considerable data, observations, and reports, which also include a host of assessments and tests including the results from the WISC-IV and Vineland assessment. Those conclusions were part of extensively reviewed and discussed matters at two long, detailed and often contentious IEP meetings. These

²⁴ [School 3], a public separate day school, has the staff, program, and resources to implement the IEP and, as discussed, was the location selected later by the BCPS for implementation of the Student's IEP. It is clearly an appropriate location to implement the IEP.

decisions, and all decisions, were considered carefully and fully by the IEP team, and were developed into an IEP by the BCPS (which included real input from the Parents and [School 1] staff), which is a detailed and comprehensive special education program designed specifically to address the Student's needs with concrete programs and clear goals and objectives for measuring the Student's progress on the IEP.

I cannot stress too strongly my conclusion that this IEP was produced in a procedurally correct fashion and is a document that clearly provides both educational benefit and a FAPE to the Student. This IEP is carefully crafted, exhaustive, thorough, and provides the Student with a host of needed accommodations and services to address her demonstrated academic, vocational, behavioral and communications needs and deficits. It takes into account not only the Student's academic needs but also her very real and documented functional needs as well. It is a skillful blending of academic and functional programs and resources. It is an impressively complete and well-crafted document. It is clearly the result of the sincere, professional efforts of the BCPS to provide the Student with a FAPE. It is sound and supportable and provides the Student with a FAPE.

BCPS' explanation in the PWN regarding the IEP placement in a public separate day school is a good summary of the reasoning behind that placement:

City School's believes that [Student]'s academic, vocational, and social and emotional needs can best be met by working toward a Certificate of Completion. [Student]'s instructional grade levels are significantly below her actual grade level and despite her academic work being modified to a significant degree she continues to struggle. She requires an intensive level of 1:1 instruction, adult support and prompting and even with this level of support she struggles at times and has difficulty generalizing skills. It is projected that [Student] will earn only 2.25 credits for the 2013-14 school year while she was a student at [School 1]. There is a vocational component to [Student]'s current educational program and there is concern about the impact of this on the pace of [Student]'s earning credits. [Student] also requires adult support to perform her vocational tasks in her current education setting.

The evaluative data used to develop the Student's IEP for the 2013-2014 school year was ascertained from many sources: the Psychological Report of May 21, 2013, the psychological assessments of May 13, 2014, the results of the WISC-IV, and the results of the Vineland assessments conducted during the May 13, 2013 psychological assessment as part of the Student's reevaluation, observation reports completed by BCPS representatives XXXX XXXX (April 8, 2014), XXXX XXXX (April 3, 2014), XXXX XXXX (March 31, 2014) and XXXX XXXX (April 3, 2014), a Speech and Language Assessment Report from [School 1] (April 10, 2014), Transitional Planning Inventories, and [School 1] progress reports in English 9 Part A (May 12, 2014), English 9 Part B (May 12, 2014), Math (May 12, 2014), Environmental Science (May 12, 2014), Social Studies (May 12, 2014), and Keyboarding and Applications (April 7, 2014).

BCPS fairly and objectively considered that data to develop the IEP. BCPS actively considered the views of the Parents, their representatives and advisors, and [School 1] staff during the entire IEP process. They were open to suggestions and changes in their draft IEP. They carefully considered the Student's present levels, her needs, and how and where those needs could be addressed. The record is replete with credible evidence that when the BCPS team developed the Student's program, they considered the Student's strengths, the Parents' concerns, the most recent assessments, and the Student's deficits.

The text of the disputed IEP was developed in accordance with the applicable law and regulations. The BCPS IEP team developed an IEP that included goals and objectives to address the Student's identified academic, social/emotional, functioning and communication skills needs. The team truly considered all of the evaluative data to ascertain the Student's levels of performance, to consider the Student's academic and behavioral needs, and to develop a program to assist the Student with those needs. The final IEP is a considered, fair and sound document. It provides the Student with educational benefit and with a FAPE.

The Parents do not agree. They continue to believe that the Student should be placed at [School 1] under an IEP which contains the Diploma course of study program. As this decision demonstrates, however, the Parents have not proved that the IEP herein does not provide their daughter with educational benefit and a FAPE. The fact that [School 1] provides the Student with services and a program that the Parents personally find more appropriate or “better” than the proposed IEP is legally irrelevant.

Based on the observations of the BCPS staff of the Student, a review of the work samples produced by [School 1] for the Student, progress reports, formal and informal testing results, parental input and an evaluation of other pertinent data, the BCPS came to the conclusion that the work being produced by the Student was not indicative of work leading to earning a Diploma. The Student was not progressing on the Diploma track. In addition, BCPS found that other Student deficits needed to be addressed – needs including independent living skills, adaptive skills, communication skills, and social skills. BCPS concluded, based on its review of the evidence, that a Certificate of Completion program, addressing both academics and the Student’s substantial other functional needs, is appropriate. The IEP developed meets the Student’s academic and other needs, provides her with educational benefit and was produced in a procedurally correct manner. The fact that the Parents continue to object to the IEP because of the decision to place the Student in a Certificate of Completion program does not change those facts.

In sum, I find that the BCPS team discussed the Student’s needs with input from the Parents and [School 1] staff. They refined goals and objectives based on the input of the Parents, the Student’s teachers at [School 1], and the proposed IIP. The team considered that the Student is in a high school setting and that the IEP program best implemented a program suited to her unique needs. The Parents and the [School 1] teachers disagreed with the BCPS in many matters

involved within the IEP (but agreed with others), but those disagreements do not rise to the level of proving the IEP does not provide FAPE. The BCPS officials were charged with providing the Student with a FAPE. The differences among the IEP team members were irreconcilable. The BCPS officials, therefore, made the final decision as they are required under the law. The IEP they approved and the placement therein was procedurally correct and provides the Student with a FAPE. The proposed location at [School 3] would be in the LRE and is legal.

The Student is not Entitled to Placement at [School 1]

In *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985), the Supreme Court held that parents who believe that the education proposed by the public school system is inappropriate may unilaterally place their child in a private school. In addition, the Court held that parents are entitled to reimbursement from the state for tuition and expenses if it is later determined that the school system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education. *Id.* at 370.

The issue of unilateral placement/reimbursement was further expanded in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993). Citing *Burlington*, the Court found that the IDEA imposes two prerequisites to reimbursement: 1) that the program proposed by the state failed to provide FAPE; and 2) that the private school in which the child was enrolled succeeded in providing FAPE. *Id.* at 12.

With regard to the appropriateness of the Student's program at [School 1], in order to prevail, the Parents must prove, therefore, that the placement determined by the public agency will amount to a denial of a FAPE and that the identified private school, [School 1], is an appropriate placement.

In *Carter*, the Supreme Court upheld a lower court's decision to order reimbursement to the parents for private tuition, after the court's determination that the IEP was inappropriate and

that the private school selected by the parents would offer the child an appropriate education. Parents are “entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act.” *Carter*, 510 U.S. at 15 (emphasis added). Here, the Parents have the burden of proof and, unlike in *Carter*, they have failed to establish that BCPS did not develop an appropriate IEP and placement for the school year in question. To the contrary, with regard to the IEP team meetings where the IEP was reviewed and revised, the public agency ensured that the IEP team developed an IEP that included special education and related services designed to meet the unique needs of the Student that arose from the Student’s disability.

When a FAPE has been offered that meets the special education and related services needs of a student with a disability, and the parents elect not to accept the program offered to their child by the public agency and instead choose to enroll their child in an independent school facility or residential setting, the public agency is not required to pay for that student’s education.

In this case, the Parents are challenging the May 21, 2014 proposed IEP and placement. Therefore, the hearing is limited to what was proposed at that time.²⁵ I noted this repeatedly during the hearing in order to keep the focus of the evidence and witness testimony on the relevant matters to be considered. The issue of the Parents’ proposed placement at [School 1] is relevant only if I find the denial of a FAPE in the BCPS IEP and placement. Having found no denial of a FAPE, the issue of the appropriateness of the proposed [School 1] placement is moot.

Both parties argued regarding the appropriateness of [School 1] as a private placement for the Student. Pursuant to *Carter*, 510 U.S. 7 the appropriateness of the Parent’s private placement choice is, however, analyzed only if the IEP results in a denial of a FAPE. *Burlington*, 471 U.S.

²⁵ *County School Bd. of Henrico County, Virginia v. Z.P. ex rel R.P.*, 399F. 3d 298, 306 (4th Cir. 2005) (“We believe that the hearing officer properly focused on what was actually contained in the written IEP when determining the appropriateness of that IEP.”)

359. In this matter, I have concluded that the IEP and placement offered by the public agency offers the Student a FAPE. Accordingly, an analysis pursuant *Burlington and Carter* is inapplicable, and the issue of whether the Parent's proposed placement is appropriate does not need to be addressed in this decision.

To sum up, after carefully reviewing all of the evidence presented by the Parents and BCPS, I find that BCPS developed an appropriate IEP and placement for 2014-2015, including the summer of 2014, and that the IEP was reasonably calculated to provide a FAPE for the Student. Additionally, I find that FAPE does not require that the Student be placed in a Diploma course of study program for the 2014-2015 school year.

Having failed to meet their evidentiary burdens, the Parents' claims are denied.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

1. The proposed IEP and placement for the 2014-2015 school year, including the summer of 2014, would have provided the Student with a free appropriate public education (FAPE); *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); 20 U.S.C.A. §§ 1400 - 1487 (2010); COMAR 13A.03.02;

2. FAPE does not require that the Student be placed in a Maryland High School Diploma bound program for the 2014-2015 school year, including the summer of 2014; *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. §§ 1400 - 1487 (2010); COMAR 13A.03.02;

3. Because the proposed IEP and placement for the 2014-2015 school year would have provided the Student with a FAPE, it is unnecessary to address whether the Student's placement

at [School 1] is proper under the IDEA. *Florence County School District Four v. Carter*, 510 U.S. 7, 15 (1993); and

4. An Order will be issued declaring that the decision of the May 21, 2014 IEP team to place the Student at [School 3] for the 2014-2015 school year provided her with a FAPE in the LRE. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200-201 (1982); 20 U.S.C.A. § 1412(a)(5); COMAR 13A.03.02.

ORDER

I **ORDER** that the Baltimore City Public Schools' proposed IEP and placement for the 2014-2015 school year at [School 3] would have provided the Student with a free appropriate public education in the least restrictive environment and,

I **FURTHER ORDER** that the Parents' request for continued placement at [School 1] at the expense of Baltimore City Public Schools is hereby **DENIED**.

March 20, 2015
Date Decision Mailed

Michael W. Burns
Administrative Law Judge

MWB/dlm

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.