XXXX XXXX,	*	**BEFORE HARRIET C. HELFAND,**
STUDENT	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
BALTIMORE CITY	*	**OF ADMINISTRATIVE HEARINGS**
PUBLIC SCHOOLS	*	**OAH NO.: MSDE-CITY-OT-14-34141**

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DECISION

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ORDER

STATEMENT OF THE CASE

On September 24, 2014, XXXX and XXXX XXXX (Parents), on behalf of their child, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Baltimore City Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).[1]

The Parents were represented by Wayne D. Steedman, Esquire, and Jeffrey Archer Miller, Esquire. Diana K. Wyles, Esquire, and Darnell L. Henderson, Esquire, represented BCPS. By agreement of the parties, the hearing was scheduled for January 5 through 16, 2015. I

[1] The parties participated in a Resolution Session on October 7, 2014, but did not reach an agreement. The forty-five day period for issuing a decision began on October 7, 2014. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2013). Under these regulations, a decision in this matter was due to be issued on November 21, 2014; however, at the initial prehearing conference, the parties agreed that it was not possible to meet this deadline because, although counsel for the Parents had earlier availability, counsel for BCPS were engaged in other scheduled and documented Special Education hearings and were unavailable for the entirety of November and December 2014. Due to the unavailability of BCPS' counsel, the parties agreed to hold the hearing beginning the first week of January 2015, the closest date to which BCPS counsel could agree.

held three telephone prehearing conferences in this matter on October 28, 2014, November 19, 2014, and December 9, 2014.[2]

I began the hearing on January 5, 2015. Testimony in the hearing concluded on January 12, 2015, and at that time, BCPS requested that it be permitted to submit a written closing argument. Although Parents' counsel offered to make an oral closing, after discussion, the parties agreed to submit written closing arguments by January 14, 2015, and written replies by January 16, 2015, at which time the record would close. Mr. Steedman and Mr. Miller represented the Parents. Ms. Wyles and Mr. Henderson represented BCPS.

The hearing dates requested by the parties, due to BCPS' prior scheduling obligations, fell more than 45 days after the triggering events described in the federal regulations, which is the date my decision is due. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2013). The parties requested an extension of time so that my decision would be issued within thirty days of the close of the record. 34 C.F.R. 300.515; Md. Code Ann., Educ. § 8-413(h) (2014).

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

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act (APA); Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.05.01.15C; and COMAR 28.02.01.

[2] After the initial prehearing conference, the parties each raised issues that led to the two subsequent prehearing conferences, primarily concerning witness lists and stipulations of fact. Prehearing Conference Reports regarding each conference were issued on October 29, 2014, November 20, 2014, and December 11, 2014.

ISSUES[3]

1. Did the Individualized Education Program (IEP) team appropriately address the issue of least restrictive environment (LRE) in the Student's IEP?

2. Is the [School 1] ([School 1]), a public separate day school, able to provide the Student with a free appropriate public education (FAPE) in the LRE? If not,

3. Can the [School 2] ([School 2]), a non-public separate day school, provide the Student with a FAPE in the LRE?

SUMMARY OF THE EVIDENCE[4]

Exhibits

I admitted the following exhibits on behalf of the Parents:

Parent #1	BCPS Early Learning Programs (ELP) Education Assessment Report, dated January 31, 2013
Parent #2	XXXX Institute (XXI), Preschool Pediatric Program, Initial Evaluation Note, dated March 6, 2013
Parent #3	Notes from XXXX XXXX, CCC-SLP, Speech Language (S/L) Pathologist, [School 2], undated
Parent #4	Physical Therapy (PT) Recommendations from XXXX XXXX, Physical Therapist, [School 2], undated
Parent #5	Occupational Therapy (OT) Observations and Recommendations, XXXX XXXX, MS OTR/L, [School 2], dated June 12, 2013
Parent #6	Feeding Observations and Recommendations, XXXX XXXX, MS OTR/L, [School 2], dated June 17, 2013
Parent #7	(not offered)

[3] The issues were suggested and agreed to by the parties following extensive discussion in the prehearing conferences held prior to the hearing.

[4] BCPS and the Parents offered some identical exhibits that were admitted into evidence. A list of these documents is attached as an addendum to the Decision.

Parent #8	Ten (10) Visit Progress Report, XXXX XXXX, MS, CCC-SLP, Hearing and Speech Agency (HASA), dated July 10, 2013
Parent #9	Formal Functional Vision Assessment Report, XXXX XXXX, BCPS, dated July 25, 2013
Parent #10	PT Re-evaluation Note, XXXX XXXX, PT, XXI, dated August 3, 2013
Parent #11	Follow Up Evaluation, XXXX Center for Cerebral Palsy and Neurodevelopmental Medicine, XXI, dated September 1, 2013
Parent #12	Letter from XXXX XXXX, RN, Pediatrics at the XXXX, To Whom It May Concern, dated August 22, 2013
Parent #13	S/L Assessment Report, XXXX XXXX, M.S., C.C.C.-SLP, NDT/C, BCPS, dated September 16, 2013
Parent #14	OT Assessment, XXXX XXXX, MS, OTR/L, BCPS, dated September 23, 2013
Parent #15	PT Assessment, XXXX XXXX, PT, DPT, BCPS, dated October 3, 2013
Parent #16	Observation Report, XXXX XXXX, Educational Consultant, XXXX Education Group, dated October 2, 2013
Parent #17	(not offered)
Parent #18	Nursing Care Plans, XXXX XXXX, RN, Baltimore City Health Department, dated November 4, 2013[5]
Parent #19	Prior Written Notice; IEP Meeting Summary; Addendum to Prior Written Notice, BCPS, dated December 6, 2013
Parent #20	CVI[6] Assessment Report, Functional Vision Assessment, XXXX XXXX, Ph.D., XXXX (XXXX), dated March 5 and 13, 2014
Parent #21	Draft IEP, dated May 6, 2014
Parent #22	Email from XXXX XXXX, M.Ed., to XXXX XXXX, dated August 1, 2014

[5] Nursing Care Plans were developed for the Student's conditions of Asthma, Seizure Disorder, and XXXX (XXXX) Feeding.
[6] CVI is the acronym for Cortical Vision Impairment.

Parent #23	Letter from Wayne D. Steedman, Esquire, to Diana Wyles, Esquire, and Darnell Henderson, Esquire, dated December 24, 2014; Transcript of Voice Mail Message from XXXX XXXX to XXXX XXXX, August 1, 2014, transcribed on December 24, 2014
Parent #23A	CD Recording of Voice Mail Message from XXXX XXXX to XXXX XXXX, August 1, 2014
Parent #24	*Curriculum Vitae*, XXXX XXXX, M.Ed.
Parent #25	*Curriculum Vitae*, XXXX XXXX, Ph.D.
Parent #26	*Curriculum Vitae*, XXXX XXXX, MS, CCC-SLP
Parent #27	*Curriculum Vitae*, XXXX XXXX
Parent #28	*Curriculum Vitae*, XXXX XXXX, PT
Parent #29	*Curriculum Vitae*, XXXX XXXX
Parent #30	*Curriculum Vitae*, XXXX XXXX, RN
Parent #31	*Curriculum Vitae*, XXXX XXXX, LCSW-C
Parent #32	*Curriculum Vitae*, XXXX XXXX, M.Ed.
Parent #33	MSDE Technical Assistance Bulletin 9B, revised September 2010

I admitted the following exhibits on behalf of BCPS:

BCPS #1	(not offered)
BCPS #2	(not offered)
BCPS #3	Draft IEP, dated May 6, 2014
BCPS #4	Draft IEP, dated December 6, 2013
BCPS #5	Draft IEP, dated November 4, 2013
BCPS #6	Draft IEP, dated August 14, 2013
BCPS #7	IEP Team Meeting Attendance Sheet, dated May 6, 2014
BCPS #8	IEP Team Meeting Attendance Sheet, dated December 6, 2013

BCPS #9	IEP Team Meeting Attendance Sheet, dated November 4, 2013
BCPS #10	IEP Team Meeting Attendance Sheet, dated August 14, 2013
BCPS #11	Prior Written Notice, dated May 6, 2014
BCPS #12	Prior Written Notice, dated December 6, 2013
BCPS #13	Prior Written Notice, dated November 4, 2013
BCPS #14	IEP Meeting Summary and Addendum to Prior Written Notice, November 4, 2013 and December 6, 2013
BCPS #15	Notice of IEP Meeting, dated April 11, 2014
BCPS #16	Notice of IEP Meeting, dated November 21, 2013
BCPS #17	Notice of IEP Meeting, dated October 18, 2013
BCPS #18	CVI Assessment Report, Functional Vision Assessment, XXXX XXXX, Ph.D., CBSS, dated March 5, 2014
BCPS #19	PT Assessment, XXXX XXXX, PT, DPT, BCPS, dated October 3, 2013
BCPS #20	OT Assessment, XXXX XXXX, MS, OTR/L, BCPS, dated September 23, 2013
BCPS #21	Formal Functional Vision Assessment Report, XXXX XXXX, BCPS, dated July 25, 2013
BCPS #22	BCPS ELP Education Assessment Report, dated January 31, 2013
BCPS #23	S/L Assessment Report, XXXX XXXX, M.S., C.C.C.-SLP, NDT/C, BCPS, dated September 16, 2013
BCPS #24	Feeding Protocol Recommendations, XXXX XXXX, MS, RN, CSP, LDN, Director of Nutrition and XXXX XXXX, MS, OTR/L, Director of OT, XXI, dated October 28, 2013
BCPS #25	(not offered)
BCPS #26	(not offered)
BCPS #27	(not offered)

BCPS #28 (not offered)

BCPS #29 Letter from XXXX XXXX, Jr., MD, MPH, Director, XXXX Center for Cerebral Palsy and Neurodevelopmental Medicine, XXI, To Whom it May Concern, dated June 26, 2013

BCPS #30 (withdrawn)

BCPS #31 Nursing Care Plans, XXXX XXXX, RN, Baltimore City Health Department, dated November 4, 2013

BCPS #32 Observation Report, XXXX XXXX, Educational Consultant, XXXX Education Group, dated October 2, 2013

BCPS #33 (not offered)

BCPS #34 (not offered)

BCPS #35 (not offered)

BCPS #36 (not offered)

BCPS #37 (not offered)

BCPS #38 *Curriculum Vitae*, XXXX XXXX

BCPS #39 *Curriculum Vitae*, XXXX XXXX

BCPS #40 *Curriculum Vitae*, XXXX XXXX

BCPS #41 *Curriculum Vitae*, XXXX XXXX, MS, OTR/L

BCPS #42 *Curriculum Vitae*, XXXX XXXX

BCPS #43 *Curriculum Vitae*, XXXX XXXX

BCPS #44 (not offered)

BCPS #45 *Curriculum Vitae*, XXXX XXXX

BCPS #46 *Curriculum Vitae*, XXXX XXXX, DPT

BCPS #47 (not offered)

Testimony

The Parent[7] testified and presented the following witnesses:

- XXXX XXXX, Special Educator, [School 2], accepted as an expert in special education and CVI[8]
- XXXX XXXX, S/L Pathologist, HASA, accepted as an expert in S/L pathology
- Dr. XXXX XXXX, Department of Counseling, Higher Education and Special Education, College of Education, [University], accepted as an expert in early childhood education, CVI, and teaching of the visually impaired[9]
- XXXX XXXX, S/L Pathologist, [School 2], accepted as an expert in S/L pathology
- XXXX XXXX, Senior PT, [School 2], accepted as an expert in PT
- XXXX XXXX, RN, School Nurse, [School 2], accepted as an expert in nursing
- XXXX XXXX, Senior OT, [School 2], accepted as an expert in OT
- XXXX XXXX[10]
- XXXX XXXX, Educational Consultant, admitted as an expert in special

education

BCPS presented the following witnesses:

- XXXX XXXX, Coordinator, ELP, BCPS, accepted as an expert in early learning programming and special education
- XXXX XXXX, Educational Associate, BCPS, accepted as an expert in elementary education and school administration

[7] The Student's mother is identified as the "Parent."
[8] BCPS objected to Ms. XXXX being accepted as an expert in CVI, since she had been trained in the field, but has not been certified by a nationally recognized organization. I agreed to accept Ms. XXXX as an expert in CVI because she completed an intensive training program with Dr. XXXX XXXX, who is recognized as the leading expert in CVI in the United States, her certification of training from Dr. XXXX, and her completion of academic study in a Ph.D. program, current research for a dissertation in the area of CVI, and work in the field.
[9] Dr. XXXX and Ms. XXXX testified by telephone.
[10] Ms. XXXX is the Student's grandmother.

- XXXX XXXX, BCPS Liaison, accepted as an expert in special education and non-public placement of students
- XXXX XXXX, accepted as an expert in teaching of the visually impaired
- XXXX XXXX, S/L Pathologist, BCPS, admitted as an expert in S/L pathology
- XXXX XXXX, OT, BCPS, accepted as an expert in OT
- XXXX XXXX, RN, Community Health Nurse II, Baltimore City Health Department, accepted as an expert in nursing
- XXXX XXXX, DPT, accepted as an expert in PT
- XXXX XXXX, Assistant Principal, [School 1]

STIPULATIONS OF FACT[11]

Prior to the hearing, the parties agreed to the following Stipulations of Fact:[12]

1. The Student's date of birth is XXXX, 2010.
2. On April 16, 2013, BCPS convened an IEP meeting pursuant to the Parents' request that the Baltimore Infant and Toddler's Program (BITP) refer the Student to BCPS to conduct an IEP eligibility meeting to determine eligibility for services under Part B of the IDEA.
3. The Parents elected to receive the Student's Part B services through an extended Individualized Family Service Plan (IFSP).

[11] The Stipulations of Fact, with annotations, were included in the December 11, 2014 Prehearing Conference Report and Order. 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.

[12] In their submission of Stipulations of Fact, the parties included two "facts," which I consider to be legal conclusions, rather than factual determinations. They are: "13. BCPS has committed no procedural violations of the IDEA in the course of developing the Student's May 6, 2014 draft IEP" and "14. The related services as stated on page 38 of the Student's May 6, 2014 draft IEP and the description of the related services, as stated on page 39 of the Student's May 6, 2014 draft IEP, are appropriate for the Student." Rather than considering these as "facts," I am viewing them as the Parents' acknowledgment of legally proper actions by BCPS.

4. On August 14, 2013, BCPS convened an IEP meeting to review assessments, progress reports and recommendations, address parent concerns, and transition the Student's IFSP to an IEP.

5. On August 14, 2013, the IEP team discussed, reviewed, and considered all available assessments, progress reports, and data received from BITP, XXI, the University of Maryland Medical System, the Parents, and HASA. The IEP team determined that there was enough information to determine that the Student was eligible for Part B direct, indirect, and consult services, with a disability code of Developmentally Delayed.

6. The August 14, 2013 IEP called for the following services:

- 24 hours, 30 minutes per week of classroom instruction outside of general education with two hours for feeding;
- One hour, [and] 30 minutes per week (three 30 minute sessions) of OT, outside of general education in individual and/or group sessions;
- One hour per week (two 30 minute sessions) of PT outside of general education;
- One hour per week (two 30 minute sessions) of S/L therapy outside of general education in individual and/or group sessions;
- Ten minutes of weekly indirect OT consultation services with teachers, classroom staff, and other service providers regarding the Student's fine motor and feeding needs;
- One-to-one nursing services daily to provide care pursuant to a nursing plan;
- 30 minutes per month of indirect S/L consultation services with the Student's teachers to provide classroom support;
- 30 minutes per month of indirect PT consultation services; and

- 30 minutes per year of indirect vision consultation services with the Student's teachers and service providers to monitor and explain medical documentation related to vision needs.

7. On November 4, 2013 and December 6, 2013, BCPS convened additional IEP meetings to review the requested assessments and revise the Student's IEP. Based on a review of the requested assessments, the IEP team revised the IEP as follows:

   - OT indirect services would increase from six to seven hours per year to address the need for a sensory diet; and
   - Vision consultation services would increase from one hour to two hours per year (i.e. one 30 minute session per quarter).

8. On May 6, 2014, BCPS convened another IEP meeting to review the results of a vision assessment and observation provided by the Parents to BCPS. As a result, the IEP team recommended adding fifteen minutes of direct vision services and additional consultation and staff training on CVI, which the Student was at risk of developing, pursuant to the vision assessment report.

9. All of the Student's IEPs provide for collaboration between the multiple service providers by way of consultation services.

10. All IEP meetings convened for the Student by BCPS have been comprised of all required IEP team members as described in 34 C.F.R. § 300.321.

11. The Parents never signed the Student's initial IEP.

12. The Parents have never provided written consent for initiation of special education and related services for the Student.

FINDINGS OF FACT

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

1. The Student's date of birth is XXXX, 2010. She is currently four years old.

2. The Student was a preterm infant, delivered at twenty-five weeks gestation with a birth weight of one pound, three ounces. Following her birth, the Student was hospitalized for five months, during which time she had four bilateral grade intraventricular hemorrhages, and for two months required ventilation. The Student developed hydrocephalus and had a shunt installed. The Student has been diagnosed with cerebral palsy, diplegic; microcephaly; hydrocephalus with operating shunt; seizure disorder; and global developmental delay. The Student remains primarily fed through a XXXX (XXXX).

3. Following the Student's discharge from the hospital after five months, the Student began receiving services through the BITP. The Student also received twice weekly sessions of OT and PT from XXI and S/L services from the [University] and HASA.

4. The Student is delayed in generally all aspects of development. In January 2013, when the Student was thirty-three months old, BCPS ELP conducted an Educational Assessment (EA) of the Student, using the Early Learning Accomplishment Profile (E-LAP), observation, and input from the Parent. The E-LAP assesses children from birth to thirty-six months of age in the following developmental areas: fine motor skills, cognitive skills, language skills, self-help, gross motor skills, and social emotional skills.

5. The January 2013 EA report revealed the following:

- Fine Motor: the Student could hold a crayon and make slight marks on paper, place a circle on a form board, and transfer items from one hand to another. The Student's age equivalent in this area was eight to nine months, indicating a twenty-two to twenty-three month delay.

- Cognitive: the Student was able to uncover a toy that was seen hidden, repeated a laughed at performance, and responded to a verbal request.[13] The Student's age equivalent in this area was nine months, indicating a twenty-two month delay.

- Language: the Student consistently used the words "mom," "yaya," "auntie," "nana," "pop-pop," and "dada;" she could make cat and dog sounds, and can say "hi and bye," but not consistently. The Student was also able to stop activity when told "no-no" and responded more consistently to her name being called. The Student's age equivalent in this area was nine to ten months, indicating a twenty-two to twenty-three month delay.

- Self-Help: although the Student remained dependent on the Parent for self-care needs, she was beginning to assist with dressing skills, and could push her arm through her sleeves. She was starting to taste food by biting, but often pocketed the food. The Student could drink from a cup with supervision. The Student's age equivalent in this area was eight to nine months, indicating a twenty-two to twenty-three month delay.

- Social Emotional: the Student was aware of strangers, but slow to warm up to them. She responded to "no" and to familiar songs, and could play with some toys in a limited, but repetitive manner. The Student's age-equivalent in this area was fourteen months, indicating a nineteen month delay.

- Gross Motor : the Student was just beginning to crawl/scoot, sit unsupported, and could reach for items, but was not yet pulling to stand or crawl across a room. The Student's age-equivalent in this area was seven to eight months, indicating a twenty-three month delay.

6. The recommendation in the EA report was that the Student would benefit from an early learning environment where she would have an opportunity to increase her language skills and all early academic skill areas. The report also recommended it would be beneficial for the Student to be in a learning environment where appropriate peer interactions would be modeled, provided she was medically stable to attend school. The report further noted that the Student

[13] Although it was not observed at the EA, the Parent reported that the Student was able to identify her head, hair, nose and eyes when asked.

would benefit from early intervention services in the areas of early math, early literacy, and emotional skill areas.

7. On April 16, 2013, BCPS convened an IEP meeting pursuant to the Parents' request that the BITP refer the Student to BCPS to conduct an IEP eligibility meeting to determine eligibility for services under part B of the IDEA.

8. On or about June 5, 2013, the Student went to [School 2] for a preadmission screening, where she was observed by XXXX XXXX, an OT, XXXX XXXX, a PT, and XXXX XXXX, a S/L pathologist. At this time, the Student presented at about an eighteen-month level in hand and visual perceptual skills, and was able to use her hands to reach for objects, pick up cubes with a palmer grasp, and release cubes into a container with the use of the lip of the container. Each of the professionals who observed the Student at [School 2] offered written recommendations for services to be provided to the Student in their respective areas.

9. Ms. XXXX, the PT, recommended three thirty minute sessions per week to address grasping, eye-hand coordination self-care/dressing, and to begin prewriting skills. She also endorsed a small, structured classroom, ongoing monitoring and implementation of seating for proper support function and evaluation for adaptive equipment based on the Student's need, as well as the implementation of a daily toilet conditioning program. In the area of feeding, Ms. XXXX recommended daily therapy for oral intake. Ms. XXXX also offered that it would be beneficial for the Student to be exposed to typically developing role models.

10. Ms. XXXX, the S/L pathologist, recommended that the Student receive two individual and one group S/L therapy sessions weekly, along with work on the use of sign

language, increased verbalization, and identification of objects, recognition of prepositions, and following commands.

11. Ms. XXXX, the PT, recommended that the Student receive three sessions of thirty minutes per session of direct PT services, as well as indirect PT services to monitor her musculoskeletal status and fit of orthotics, with consultation with orthopedist, if needed. Ms. XXXX also endorsed setting up and monitoring a program for positioning the Student in a stander and monitoring the fit of adaptive equipment and consultation with a rehabilitation equipment specialist, as needed.

12. On or about July 10, 2013, XXXX XXXX, the Student's S/L pathologist at HASA, reported that although she had not performed formal testing, based on clinical observation and clinician's judgment, the Student was performing at the fourteen-month age range for receptive language and the seventeen-month range for expressive language.

13. The Student also has visual impairments, which include nystagmus, characterized by involuntary, jerky eye movements, hyperopia (farsightedness), and astigmatism, an irregular curvature of the cornea. Her visual acuity, which is consistent with nystagmus, is central, unsteady, and maintained. Despite these conditions, the Student can see well and does not require eyeglasses.

14. On July 25, 2013, XXXX XXXX, a teacher for the visually impaired for BCPS, conducted a formal functional vision assessment of the Student. As a result of her assessment, Ms. XXXX recommended that the Student should continue to have her visual health monitored, as recommended by her physician. Ms. XXXX also recommended that the Student be exposed to high contrast and brightly colored materials to help her focus, multisensory materials to allow

her to develop tactile and auditory skills, and consultative services by a teacher for the visually impaired twice a year for thirty minutes per session.

15. On August 14, 2013, BCPS convened an IEP meeting to review assessments, progress reports and recommendations, address parent concerns, and transition the Student's IFSP to an IEP. The Student accompanied her Parents at the IEP meeting.

16. On August 14, 2013, the IEP team discussed, reviewed, and considered all available assessments, progress reports, and data received from BITP, XXI, the University of Maryland Medical System, the Parents and HASA. The IEP team determined that there was enough information to determine that the Student was eligible for Part B direct, indirect, and consult services, with a disability code of Developmentally Delayed.

17. The August 14, 2013 IEP called for the following services:

- 24 hours, 30 minutes per week of classroom instruction outside of general education with two hours for feeding;
- One hour, [and] 30 minutes per week (three 30 minute sessions) of OT, outside of general education in individual and/or group sessions;
- One hour per week (two 30 minute sessions) of PT outside of general education;
- One hour per week (two 30 minute sessions) of S/L therapy outside of general education in individual and/or group sessions;
- Ten minutes of weekly indirect OT consultation services with teachers, classroom staff, and other service providers regarding the Student's fine motor and feeding needs;
- One-to-one nursing services daily to provide care pursuant to a nursing plan;
- 30 minutes per month of indirect S/L consultation services with the Student's teachers to provide classroom support;

- 30 minutes per month of indirect PT consultation services;
- 30 minutes per year of indirect vision consultation services with the Student's teachers and service providers to monitor and explain medical documentation related to vision needs; and
- The Student is eligible for Extended School Year (ESY) services.

18. The Student attends a day care program at XXXX Leaning Place (XXXX), a licensed home day care center run by her grandmother, XXXX XXXX. She has been attending XXXX since she was approximately one year old. The Student currently attends XXXX three days a week, for approximately seven and one-half hours each day (8:30 a.m. to 4:00 p.m.).[14] Although the number of day care children fluctuates, generally six children, including the Student, attend XXXX. The Student is the only child disabled under IDEA, attending XXXX; all of the other children are not disabled.

19. The Student fully participates in all of the day care activities with the other, non-disabled children. These activities include morning circle time that involves stories and songs, playtime with toys and blocks, reading activities, and lunch.

20. Although the Student cannot sing the words of songs, she follows the example of the other children by clapping, raising her hands, and shouting out "yay." The other children in day care help the Student to bounce and roll and play with a ball. During reading time, the Student can turn pages. During floor play, all of the children play together, including the Student. The Student can use some words, such as "hi," "bye," "yes," and "no," as well as sign language to communicate with the other children.

[14] During the remaining two days of the work week, the Student engages in various therapies, accompanied by the Parent.

21. All of the day care children eat lunch together, sitting at a table with chairs.[15] Lunch is served family style. Although the Student is primarily fed through her XXXX, she is able to eat finger foods by herself, but needs some assistance with a spoon.

22. Throughout the day, the non-disabled students model behavior and skills for the Student, who frequently imitates them and engages them to assist her with activities.

23. On September 16, 2013, XXXX XXXX, S/L pathologist for BCPS, conducted an S/L assessment on the Student in the Student's home, with the Parent, who also provided information, present. Ms. XXXX used the Preschool Language Scale-Fifth Edition (PLS-5), the PLS Home Communication Profile, and the Communication Matrix Profile for Parents and Professionals, as well as her observations, to assess the Student. Ms. XXXX assessed the Student's receptive language and expressive language scores at an age equivalent of nine months. As a result of her assessments, Ms. XXXX recommended a number of items to integrate language in an educational setting for the Student, including small class size, development of turn-taking, play skills, modeling, use of daily routines and structure to help with adjustment to a new situation, and multi-disciplinary collaboration.

24. Also on September 16, 2013, in the afternoon, XXXX XXXX, OT with BCPS, conducted an OT assessment of the Student in the Student's home. Assessments used by Ms. XXXX included the Developmental Programming for Infants and Young Children (Michigan), the Sensory Processing Measure: Preschool Home Form (based on a questionnaire completed by the Parent), and her informal clinical observations.

25. Ms. XXXX found the Student to be within the developmental level of a twelve to fifteen month old in perceptual/fine motor skills, and within the sixteen to nineteen month old

[15]Initially, the Student sat in a high chair; she now uses a regular chair at the communal table.

level in self-care skills. In the Sensory Processing Measure, Ms. XXXX found that the Student's scores ranged from "typical" in social participation and touch; "some problems" with body awareness and balance and motion; and "definite dysfunction" with vision, hearing, and planning and ideas, with a rating of "some problems" for total sensory systems.

26. As a result of her assessment, Ms. XXXX recommended that the Student have direct OT services for ninety minutes per week to be provided in three sessions of thirty minutes. She also recommended indirect OT services for ten minutes per week for consultation with the Student's teacher, classroom staff, and other service providers.

27. On September 18, 2013, XXXX XXXX, an educational consultant with the XXXX Education Group, observed the Student at XXXX from 10:30 a.m. to 11:15 a.m. Prior to his observation, Mr. XXXX reviewed the Student's August 2013 IEP.

28. At XXXX, Mr. XXXX observed the Student responding to the overall environment and to her non-disabled peers. During the opening activities, the Student smiled as she watched the other children and joined in with their laughter. She frequently tried to imitate the other children by moving to the rhythm of the songs, humming, and making sounds as the other children sang and listened to a story. With assistance from her grandmother, the day care provider, the Student made clapping gestures, moved her body from side to side, spun around and lifted her hands above her head when these actions were part of a song. Throughout Mr. XXXX's observation, the Student was social and interacted with the other children, who returned her attention by helping her hold a book and turn the pages and playing with her by rolling a ball to her and helping her roll it back. The Student was attentive to the other children and visually reacted when a child left the room, looking to see where he was.

29. Around the time he observed the Student at XXXX, Mr. XXXXX also accompanied the Parent on a tour of [School 2]. At [School 2], in addition to viewing classrooms and learning about services [School 2] could provide, Mr. XXXX and the Parent also observed a day care classroom with non-disabled children and were informed that [School 2]'s disabled students spend one and one-half hours a day integrated with the non-disabled children to have planned interaction with their non-disabled peers.

30. Following his visit to [School 2], on October 2, 2013, Mr. XXXX issued a report in which he stated that [School 2] would be able to implement the Student's IEP and provide the Student with the following services:

- Opportunity for integration with non-disabled peers for at least one and one-half hours per day;
- Individualized feeding therapy;
- Sensory integration therapy;
- Small group and individualized instruction, PT, OT, and S/L therapy.

31. On September 24, 2013, XXXX XXXX, PT, BCPS, conducted a PT assessment of the Student. During the course of the assessment, the Student spent much of the time crying and attached to the Parent, and was not willing to participate in most of the activities. Allowing for the Student's reluctance to participate, Dr. XXXX was able to conduct a general gross motor examination and the E-LAP, along with informal clinical observations of the Student.

32. Dr. XXXX concluded that the Student demonstrated gross motor skills in the eight-month level, according to the E-LAP. She further recommended school-based direct PT services for thirty minutes twice a week and thirty minutes per month of indirect consultation services.

33. On November 4, 2013 and December 6, 2013, BCPS convened additional IEP meetings to review the requested assessments and revise the Student's IEP.[16] Based on a review of the requested assessments, the IEP team revised the IEP as follows:

- OT indirect services would increase from six to seven hours per year to address the need for a sensory diet; and

- Vision consultation services would increase from one hour to two hours per year (i.e. one 30 minute session per quarter).

34. Following the November 4, 2013 and December 6, 2013 IEP meetings, BCPS produced an addendum to its December 6, 2013 Prior Written Notice describing the discussions and determinations that took place during the IEP meetings. Part of the discussion included the Parents' request that the Student have opportunities to interact with non-disabled peers, and that this feature be reflected in the IEP. IEP team members from BCPS did not agree that the Student should have "access to non-disabled peers" as part of the IEP. BCPS team members stated, however, that a Head Start program with non-disabled children was housed at [School 1] and that the disabled [School 1] students interacted with them in non-academic based activities such as lunch, playground, field trips, and assemblies.

35. At the IEP meetings, the Parents requested that the Student be placed at [School 2], where she would have access to non-disabled peers. BCPS recommended placement at [School 1], which it believed could appropriately implement the Student's IEP.[17] BCPS

[16] On November 4, 2013, the IEP team also obtained a Nursing Care Plan from XXXX XXXX, RN, from the Baltimore City Health Department, outlining the nursing services that BCPS would provide to the Student in the areas of Asthma, Seizure Disorder, and XXXX Feeding, as well as general nursing services.

[17] The Student's school that she would attend if non-disabled is [School 3]. There was no dispute that the Student's IEP could not be implemented there.

acknowledged that [School 2] would be able to implement the Student's IEP, but that the Student did not need [School 2]'s environment to make educational progress.[18]

36. The Parent visited [School 1] on two occasions, neither of which times students were present. The first visit was brief, and the Parent simply was shown the school building. On the second visit, the Parent met with XXXX XXXX, Principal, and XXXX XXXX, Vice Principal. At this time, Mr. XXXX and Ms. XXXX showed the Parent a classroom, stated that most of the students at [School 1] were severely disabled, and went over all of the services that would be provided to the Student at [School 1]. When the Parent asked about interaction with non-disabled children at [School 1], Mr. XXXX explained that although a Head Start program with non-disabled children is housed at the [School 1] location, the Head Start students are not allowed at [School 1] and there was no interaction between the [School 1] students and the non-disabled Head Start children.

37. On March 5 and 13, 2014, Dr. XXXX XXXX, of XXXX, conducted a Functional Vision Assessment of the Student, with emphasis on an assessment for CVI. Dr. XXXX conducted the assessment over two visits to the Student's home.

38. CVI is a vision impairment that manifests in individuals who have essentially healthy eyes, but have difficulty processing visual information in the brain. The Student was not diagnosed with CVI, but was determined at risk for the condition due to her bilateral intraventricular hemorrhages and hydrocephalus.

39. After conducting the CVI assessment,[19] Dr. XXXX determined that the Student demonstrated a number of characteristics typical of children with CVI, including latency, need

[18] The IEP team also discussed having the Student remain in day care for a half-day and be in special education for the other half of the day. Ultimately, the team agreed that the Student required a full-day special education program.

for movement, difficulties with complexity and novelty, light-gazing, and difficulties with distance viewing. Dr. XXXX recommended several visual strategies to be employed with the Student, including, among others, reducing the complexity of sensory input, gaining the Student's visual attention before showing her materials, giving opportunities for matching and sorting, moving materials closer to her, watching for signs of visual fatigue, and educating the Student's educational team in the area of CVI.

40. On May 6, 2014, BCPS convened another IEP meeting to review the results of the vision assessment and observation provided by the Parents to BCPS. As a result, the IEP team created a draft IEP that recommended adding fifteen minutes of direct vision services and additional consultation and staff training on CVI.

41. In the portion of the IEP regarding communication, the IEP displays the question "[d]oes the student have special communication needs?" The answer to this question on the IEP is "no." The IEP also includes a section concerning assistive technology; however, there is no entry in the IEP regarding the Student's access to assistive technology.

42. In the "Placement Data" (LRE Decision Making & Placement Summary) portion of the May 6, 2014 draft IEP, the section entitled "What placement options did the IEP team consider," contains the following:

> The team rejected services in a comprehensive setting due to [the Student's] medical academic and cognitive needs. The team is recommending a public separate day school. The team considered private separate day school that the parent requested but determined the services of direct/indirect OT, PT, SPL, and 1:1 nurse. There she will receive services in a 3 year old pre-school program with the related program offered at the [School 1] (sic). The IEP would be beneficial from a full day in a public separate

[19] The CVI Assessment tool was developed by Dr. XXXX XXXX, who is considered to be the premiere expert on CVI.

> day program with her non disabled peers. She can be referred to the [School 4] for a student with visual needs. The [School 4][20] would determine if she is an appropriate candidate. There are non disabled peers in their preschool program. The [Parents] rejected the city completing the referral to the [School 4].

43. In the "Placement Data" (LRE Decision Making & Placement Summary) portion of the May 6, 2014 draft IEP, the section entitled "[p]rovide an explanation to the extent, if any, the student will not participate with non-disabled peers in academic, non-academic, and extracurricular activities," contains the following: "[t]he student will participate with her disabled peers in academic, non-academic and extracurricular activities."

44. The Parents did not sign the May 6, 2014 draft IEP.

45. On July 31, 2014, XXXX XXXX, an educational consultant, visited [School 1] on behalf of the Student. Ms. XXXX was given a forty-five minute tour of the school by the Principal, XXXX XXXX. At this time of year, ESY classes were in session. Ms. XXXX saw a classroom, but primarily observed students in the cafeteria at lunch.

46. During the visit, Ms. XXXX asked Mr. XXXX whether [School 1] students had interactions with non-disabled children at school. Mr. XXXX answered no. Ms. XXXX inquired about the Head Start program housed at [School 1], which was not operating on that day. Mr. XXXX told Ms. XXXX that occasionally the Head Start children go into the auditorium with the [School 1] students, but that was the extent of the exposure.

47. On August 1, 2014, Ms. XXXX sent Mr. XXXX an email with some follow-up questions regarding her visit to [School 1]. One of the questions Ms. XXXX asked Mr. XXXX was "[d]o any of the students currently have IEPs that say they will participate with non-disabled

[20] This is an abbreviation for [School 4].

peers in academics or non-academic classes?"[21] On the same day, August 1, 2014, Mr. XXXX called Ms. XXXX and left a voice mail message that stated:[22]

> Hi Ms. XXXX-good meeting you yesterday also. I just wanted to follow up. Um, some of our students will, um operate their wheel chair independently according to their needs and so that's very few and we will not put on the IEP that children won't participate with their non-disabled peers because we don't have them in the building and so that would be a violation and um the children um playground and kindergarten students who are on the playground, that would be teacher discretion.
> Good seeing you and um, I hope you have a great summer and thank you for coming to visit. XXXX XXXX—[School 1].

48. On August 12, 2014, Ms. XXXX spent about an hour and fifteen minutes observing the Student at XXXX. At XXXX, Ms. XXXX watched the Student interact with five other children singing, playing a bowling game, and placing plastic coins in a piggy bank. During these activities, the Student watched the non-disabled children and modeled her actions after theirs. The play was collaborative, and the non-disabled children encouraged the Student as they played together.

49. On September 11, 2014, the Student spent a full day "shadowing" at [School 2]. The Parent was also at [School 2] that day, as well as Ms. XXXX, who spent the morning there. The morning activity, which lasted about one and one-half to two hours, consisted of a classroom activity with a mix of disabled and non-disabled children, taught by XXXX XXXX. The morning activity consisted of the Pledge of Allegiance, circle time, singing, story time, an art project, and other collaborative play activities. At lunch, all of the children, disabled and non-

[21] In her email, Ms. XXXX also asked whether students operate their wheelchairs independently and whether pre-school and Kindergarten students use the playground outside during the school year.
[22] The Parents offered a transcript, supported by affidavit, of Mr. XXXX's voice mail message, as well as a recording of the message, as exhibits. BCPS objected to the admission of the transcript and recording. Since I found both the transcript and recording reliable, probative, and relevant, I admitted them into the record (see Parent #23 and #23A). The recording and transcript both include verbal stops, such as "um," which I have also included in this finding, for completeness.

disabled, sat together at a table to eat and drink. In the afternoon, following lunch, there was free time, which the Student spent with Ms. XXXX, who worked with the Student individually, as well as "personal care," which included toileting for the group. After this, the Student participated in an OT session with XXXX XXXX, [School 2]'s OT, which included both disabled and non-disabled children.

50. While participating at [School 2], the Student observed and copied the non-disabled children's actions in a musical activity, clapping and engaging with the music. She joined in reciprocal play with the day care children, sharing toys with them, and having the non-disabled children model playing with toys.

[School 1]

51. [School 1] is a BCPS public separate day school for students from the ages of two or three to twenty-one with disabilities, who require special education and related services. Many of the [School 1] students are severely disabled and/or medically fragile. All of the [School 1] students have IEPs. Students attending [School 1] do not participate in the general educational curriculum and are not on a diploma track. All students attending [School 1] participate in life skills training. [School 1] is located in Baltimore, Maryland.

52. [School 1] has approximately 160 to 180 students, with twenty-three classrooms. Most classes have six to eight students. Classes contain students with mixed functioning (e.g. severely disabled students with less severely disabled students). In resource groups (e.g. art, kitchen skills), students are grouped with more similarly-disabled peers. Many of the [School 1] students have one-to-one aids and/or private duty nurses (PDN).

53. [School 1] offers a variety of special education and related services, including PT, OT, S/L therapy, vision services, feeding services, as well as academics. [School 1] is staffed with full-time nurses.

54. There are three lunch periods at [School 1]: 11:00 a.m., 12:00 p.m., and 1:00 p.m., in order to accommodate the large number of students. Students with feeding needs can eat in the cafeteria with other students at a communal table, in a classroom or kitchen skills area, or at a separate table in the back of the cafeteria, depending on the student's needs.

55. A Head Start program for young non-disabled children leases space in the same building as [School 1], but is a separate entity. The [School 1] students and the Head Start have separate entrances to their respective spaces. The Head Start children may have limited, incidental exposure to the [School 1] students that can occur in the hallways or auditorium. Head Start children share no classes with [School 1] students.

[School 2]

56. [School 2] is a non-public separate day school and is affiliated with XXXX (formerly XXXX). [School 2] is located in XXXX, Maryland.

57. [School 2] provides an eleven-month school program.

58. Approximately thirty-one students between the ages of two and twenty-one attend [School 2]. All of the [School 2] students have disabilities.

59. [School 2] provides special education (academics) and support services, including PT, OT, S/L therapy, vision therapy, and feeding services. [School 2] maintains a partnership with XXXX, a program that supports individuals with vision and hearing impairments. [School

2] offers a multi-sensory demonstration classroom taught by XXXX XXXX, a special educator with training in CVI.

60. A number of professionals also accompany students in a [School 2] classroom, including assistant teachers, classroom aides, and one-to-one aides for students. Some [School 2] students are also accompanied by PDNs.

61. BCPS has placed children receiving services under IDEA at [School 2].

62. [School 2] can implement the provision of special education and support services included in the Student's IEP.

63. [School 2] also houses a day care program for children of staff, as well as other young children. Day care children, who are not disabled, are included with disabled students each day in classroom learning for approximately one and one-half to two hours in the morning.[23] All of the children learn and participate together in classroom learning and other free activities during this time, as well as eat lunch together. In the afternoon, [School 2] students generally engage in individual and group therapeutic activities, such as PT, OT, and S/L therapy. Some of the therapeutic groups, such as OT and S/L therapy, also include non-disabled day care children.

DISCUSSION

Motions

BCPS Motion for Summary Decision

[23] [School 2] students who attend pre-class day care at [School 2] also interact with non-disabled day care children in the morning before classes begin.

On December 23, 2014, BCPS filed a Motion for Summary Decision (Motion).[24] On January 2, 2015, the Parents filed an Opposition to the Motion. The OAH Rules of Procedure provide the criteria for consideration of a motion for summary decision pursuant to COMAR 28.02.01.12D. That regulation provides:

> D. Motion for Summary Decision
>
> (1) Any party may file a motion for summary decision on all or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavits.
>
> (2) The response to a motion for summary decision shall identify the material facts that are disputed.
>
> (3) An affidavit supporting or opposing a motion for summary decision shall be made upon personal knowledge, shall set forth the facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.
>
> (4) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

An administrative law judge ruling upon a motion for summary judgment, or summary decision is concerned with whether a dispute of material fact exists and whether the moving party is entitled to judgment strictly as a matter of law.[25] *Tri-Towns Shopping Ctr., Inc. v. First Fed. Sav. Bank of W. Md.*, 114 Md. App. 63, 65 (1997). Maryland courts have provided the

[24] Because of the proximity of the filing of the Motion for Summary Decision to the hearing, and the intervening State holidays, I permitted the parties to offer argument on BCPS' Motion and deferred my ruling on the Motion. Since I believed that if the Motion were denied, scheduling a merits hearing farther out in time would be detrimental, I decided to go forward with the hearing on the merits, as scheduled.

[25] There is no substantive difference between a motion for summary judgment and one for summary decision. *Compare* Md. Rule 2-501 and COMAR 28.02.01.12D.

following guidance about what constitutes a "material fact," about the method of proving such facts, and about how a judge ruling upon such a motion should weigh the information presented:

> "A material fact is a fact the resolution of which will somehow affect the outcome of the case." A dispute as to a fact "relating to grounds upon which the decision is not rested is not a dispute with respect to a *material* fact and such dispute does not prevent the entry of summary judgment." We have further opined that in order for there to be disputed facts sufficient to render summary judgment inappropriate "there must be evidence on which a jury could find for the [non-moving party]."
>
> The trial court, in accordance with Maryland Rule 2-501(e), shall render summary judgment forthwith if the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. The purpose of the summary judgment procedure is not to try the case or decide factual disputes, but to decide whether there is an issue of fact that is sufficiently material to be tried. Thus, once the moving party has provided the court with sufficient grounds for summary judgment, it is…incumbent upon the other party to demonstrate that there is indeed a genuine dispute as to a material fact.

Id. at 65-66 (citations omitted) (emphasis in original).

As the moving party, BCPS bears the burden to demonstrate both the absence of material disputes of fact and that it is entitled to judgment as a matter of law. *See Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); *Comm'r of Labor & Indus. v. Bethlehem Steel Corp*., 344 Md. 17, 34 (1996). For the reasons stated below, BCPS has failed to demonstrate by affidavit and otherwise the absence of material disputes of fact or its entitlement to judgment as a matter of law.

BCPS alleges that it is entitled to summary decision based on the stipulated facts that 1) all IEP meetings convened for the Student by BCPS have been comprised of all required IEP team members as described in 34 C.F.R. § 300.321; 2) the Parents never signed the Student's initial IEP; 3) the Parents have never provided written consent for initiation of special education and related services for the Student; 4) BCPS has committed no procedural violations of the

IDEA in the course of developing the Student's May 6, 2014 draft IEP; and 5) the "related services" as stated on page 38 of the Student's May 6, 2014 draft IEP, are appropriate for the Student. BCPS contends that not having consented to the implementation of the May 6, 2014 draft IEP, the Parents have essentially forfeited their right to contest the actions of BCPS in a due process hearing regarding the appropriateness of the draft IEP and BCPS' proposed placement of the Student at [School 1].

In support of its position, BCPS cites 34 C.F.R. § 300.300(b), which provides, in pertinent part:[26]

> (1) A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child
>
> (2) The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.
>
> (3) If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public agency—
>
> > (i) May not use the procedures in Subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.516) in order to obtain agreement of a ruling that the services may be provided to the child;
> >
> > (ii) Will not be considered in violation of the requirement to make FAPE available to the child because of the failure to provide the child with special education and related services for which the parent refuses to or fails to provide consent; and

[26] In its Motion, BCPS cited a different version of the regulation than is current. This is the current version of the pertinent regulation.

(iii) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child.

BCPS further argues that the Parents' admission that they did not sign the Student's May 6, 2014 draft IEP, and agreement that BCPS committed no procedural violations of the IDEA in the course of development of the Student's May 6, 2014 draft IEP, effectively bars the Parents from contesting any provision in the IEP, including the proposed placement of the Student.

The Parents counter that 34 C.F.R. §§ 300.507(a)(1) and 300.503(a)(1) and (2) legitimize the Parents' due process complaint, notwithstanding their reluctance, and ultimate choice not to consent to a placement which they consider inappropriate for the Student. These regulations provide, as follows, in pertinent part:

> (a)(1) A parent or public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

34 C.F.R. § 300.507(a)(1).

> (a) …[w]ritten notice…must be given to the parents of a child with a disability a reasonable time before a public agency—
>
> (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
>
> (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child…

34 C.F.R. § 300.503(a)(1) and (2).

The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and

independent living…[and] to ensure that the rights of children with disabilities and parents of such children are protected… " 20 U.S.C A. § 1400(d) (2010). This expression of policy more than suggests, indeed emphasizes, that the focus and intent of the law is to make available special education and related services for all children with disabilities. While the regulations set forth the procedures for implementing the IDEA, the thrust is inclusionary, not exclusionary. That is, the law seeks to establish the process and means to provide disabled children with special education, not place barriers on the provision of services.

A public agency may not call upon due process to impose special education services on a child whose parents fail to respond or refuse to consent to services. 34 C.F.R. § 300.300(b)(3). However, the regulations also do not automatically preclude the parent of a child who does not agree with a draft IEP from exercising the right to due process to challenge the actions of the school system. The regulations provide that if a parent refuses to consent to the initial provision of special education and related services or fails to respond to the school system's request to provide consent, the school system will not be considered to be in violation of the requirement to make FAPE available to the child for failure to provide the services for which the public agency requests consent. 34 C.F.R. 300.300(b)(4). The local education agency (LEA) cannot provide services without parental consent; this restriction, however, does not absolve the school system from developing an IEP that offers FAPE in the LRE.

In the instant case, the Parents clearly are seeking special education and related services for the Student, and unmistakably gave consent for BCPS to engage in the IEP process. They have fully participated in multiple IEP meetings, provided reports and assessments, and made the Student available for evaluations requested by BCPS. The Parents' disagreement with BCPS is

over the issue of LRE, not the provision of special education and related services or whether those supports and services, *per se,* would provide FAPE. The Parents are not alleging that BCPS has failed to provide services to the Student, but that it failed to offer a FAPE in the LRE. This distinguishes the instant complaint from the scenario envisioned in 34 C.F.R. § 300.300(b)(4)(i). To suggest, as BCPS has, that in order to secure the right to protest the placement/location designated by the school system, the Parents must initially, and superficially, agree to an IEP and placement/location which they oppose, defeats the intent of the IDEA and improperly elevates form over substance.

The Parents' complaint raises issues regarding the educational placement of the Student, a child with a disability, and clearly falls within the ambit of the IDEA. Simply disagreeing with the placement/location offered by BCPS does not preclude them from seeking resolution at a due process hearing. Accordingly, BCPS' Motion is denied.

Parents' Motion in limine

On January 2, 2015, the Parents filed a Motion *in limine*, requesting that BCPS be precluded from introducing any evidence that could contradict the portion of the May 6, 2014 draft IEP related to the extent to which the Student would be able to participate with non-disabled peers. At the outset of the hearing, I denied the Parents' Motion *in Limine*, essentially based on the following rationale.

A motion *in limine* is a motion to limit or exclude certain evidence at a hearing or trial. It is a prehearing motion to obtain an advance ruling on the admissibility of evidence. The rationale for a motion *in limine* has been described in case law, to wit:

> The purpose in filing a motion in limine to suppress evidence or to instruct opposing counsel not to offer it is to prevent the asking of prejudicial

> questions and the making of prejudicial statements in the presence of the jury with respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suit. It is the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence, not the prejudicial effect of the evidence itself, which a motion in limine is intended to reach.

Vergie M. Lapelosa, Inc., v. Cruze, 44 Md. App. 202 (1979) (citing *Bridges v. City of Richardson*, 163 Tex. 292 (1962)). "Generally, the function of a motion *in limine* is to permit a party to obtain a preliminary order before or during *trial* excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use. Its purpose is to prevent introduction of such evidence to the trier of fact, in most instances a jury." *State v. Metz*, 671 N.Y.S.2d 79, 83 (1998).

The primary issue in evaluating criteria for granting a motion *in limine* is whether the evidence sought to be admitted is, in fact, admissible. The moving party has the burden to establish both the grounds upon which it claims that the evidence is inadmissible, as well as the reason that it would be prejudicial to address admissibility by way of objection at the hearing.

The APA, which governs hearings before the OAH, sets forth a statutory scheme for the consideration of evidence in a contested case. Section 10-213 of the APA provides, in pertinent part, as follows:

> § 10-213. Evidence.
>
> (a) In general.—(1) Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record.
>
> (2) If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency shall make the evidence part of the record.
>
> (b) Probative evidence.—The presiding officer may admit probative evidence that reasonable and prudent individuals commonly accept

in the conduct of their affairs and give probative effect to that evidence.

(c) Hearsay.—Evidence may not be excluded solely on the basis that it is hearsay.

(d) Exclusions.—The presiding officer may exclude evidence that is:
(1) incompetent;
(2) irrelevant;
(3) immaterial; or
(4) unduly repetitious.

Md. Code Ann., State Gov't § 10-213(b) (2014); see also COMAR 28.02.01.11B and 28.02.01.21.

In an administrative proceeding, such as this one, there is no jury being protected from the prejudicial effect of introducing otherwise inadmissible evidence. Accordingly, as the trier of fact, I am charged with the duty of weighing the probative, admissible evidence, and determining the weight to place upon it. In this matter, I considered the Parents' request, and finding the material admissible, as well as acknowledging my duty to create a full record, determined that draft IEPs and other material considered before the May 6, 2014 draft IEP had relevance to the issues in the hearing, and that I would be able to give it weight that I deemed appropriate. Accordingly, I denied Parents' Motion *in limine*.

BCPS' Motion for Judgment

At the conclusion of the Parents' case, BCPS offered a Motion for Judgment, arguing that the Parents had failed to make a *prima facie* case, or produce evidence to satisfy elements of proof, and therefore BCPS was entitled to judgment. The OAH regulation governing motions for judgment is found at COMAR 28.02.01.12E, as follows:

.12 Motions
…

E. Motion for Judgment.

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

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

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

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

(3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

In order for the Parents to survive BCPS' motion, they were required to offer some probative evidence to establish, at a minimum, that the IEP team did not appropriately address the issue of LRE in the Student's IEP; that [School 1] would not offer the Student a FAPE in the LRE; and that [School 2] would be able to offer the Student FAPE in the LRE. In their case in chief, the Parents offered testimony from ten witnesses, as well as over thirty exhibits, that produced probative and relevant evidence to support their case. In so doing, they overcame the hurdle of judgment, and, accordingly, I denied BCPS' motion and directed BCPS to continue with the presentation of its case.

Case on the Merits

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer*, 546 U.S. at 56-58. Accordingly, the Parents have the burden of proving, by a preponderance of the evidence, the allegations made against BCPS. Md. Code Ann., State Gov't § 10-217 (2014). To prove their case by a preponderance of the evidence, the Parents must show that it is more likely than not that 1) the IEP team did not appropriately address the issue of LRE in the Student's IEP; 2) [School 1] cannot provide the Student with a FAPE in the LRE; and 3) [School 2] can provide the Student with a FAPE in the LRE. For reasons that follow, I find that the Parents have met their burden.

Legal Framework

The identification, assessment and placement of students in special education are governed by the IDEA, associated federal regulations, as well as Maryland law and regulations. 20 U.S.C.A. §§ 1400-1482 (2010 & 2014); 34 C.F.R. Part 300; Md. Code Ann., Educ. §§ 8-401 through 8-471 (2014) and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1)(A).

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. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined 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 provide educational benefit to the handicapped child.

Id. at 200-01. *See also In Re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991). The IDEA contains the following, similar definition of FAPE:

> Special 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). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (2014); COMAR 13A.05.01.03B(27).

In *Rowley*, the Supreme Court set out a two-part inquiry to determine whether an LEA satisfied its obligation to provide FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, 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 206-07. In the instant case, it has been stipulated that BCPS committed no procedural error in the development of the Student's May 6, 2014 draft IEP; therefore, this part of the analysis need not be addressed.

FAPE is satisfied when a child's IEP is designed to allow the child to receive educational benefit, or, more specifically, 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 ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 527 (4th Cir. 2002), citing *Rowley*, 458 U.S. at 207; *A.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004).

The IDEA requires an IEP to provide a "basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt*, 908 F.2d 1200, 1207 (4th Cir. 1990).

Yet, 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*, 488 U.S. 1030 (1989); *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).

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 "all services necessary" to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. at 176. Instead, a FAPE entitles a Student to an IEP that is *reasonably calculated* to enable that Student to receive educational benefit. *Id.*

Courts have also determined the propriety of placement of a disabled child in a non-public school. Although in the instant case, the Student has not yet been placed in such a setting, as requested by the Parents, the case law provides a framework for determining when placement in a non-public institution at public expense is permitted. 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), where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Citing *Burlington*, the Court found that the IDEA imposes only 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.

LRE

In addition to offering a disabled child a FAPE, a school system is also required to provide special education and related services in the LRE. Section 1412(a)(5) provides, as follows:

> (5) Least Restrictive Environment
>
> A. In General. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.A. § 1412(a)(5)(A).

The governing federal regulations that address LRE provide, as follows, in pertinent part:

§ 300.114 LRE Requirements.

(a) General.

> (1) Except as provided in § 300.324(d)(2)…. The State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 and 300.120.

(2) Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that the education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a).

§ 300.115 Continuum of alternative placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R.§ 300.115

§ 300.116 Placements. In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—

(a) The placement decision—

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

(b) The child's placement—

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116

§ 300.117 Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

34 C.F.R. § 300.117

§ 300.118 Children in public or private institutions. Except as provided in § 300.149(d)…, an SEA must ensure that § 300.114 is effectively implemented, including, if necessary, making arrangements with public

and private institutions (such as a memorandum of agreement or special implementation procedures).

Maryland regulations similarly provide for special education and related services in the LRE. COMAR 13A.05.01 provides, in pertinent part:

.10 Least Restrictive Environment (LRE).

A. General. A public agency shall ensure that:

(1) To the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, are educated with students who are not disabled; and

(2) Special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services, as described in Regulation .09A(1)(d) and (e) of this chapter, cannot be achieved satisfactorily.

B. Continuum of Alternative Placements. A public agency shall ensure that:

(1) A continuum of alternative placements is available:

(a) To the extent necessary to implement the IEP; and

(b) To meet the needs of students with disabilities for special education and related services;

(2) Alternative placements include the settings as listed in Regulation .03B(71) of this chapter;[27] and

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[27] **.03 Definitions.**

(71) Special Education.

(a) "Special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of a student with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.

(b) "Special education" includes speech-language pathology services, travel training, career and technology education, and instruction in physical education if the service consists of specially designed instruction.

(3) Provisions for supplementary services, such as resource room and itinerant instruction, are available in conjunction with regular class placement.

C. Placements.

(1) A public agency shall ensure that:

(a) The educational placement decision of a student with a disability is:

(i) Made by the IEP team;

(ii) Made in conformity with the LRE provision of the Act and Regulation .10 of this chapter;

(iii) Determined at least annually;

(iv) Based on the student's IEP; and

(v) As close as possible to the student's home;

(b) Unless the IEP of a student requires some other arrangement, the student is educated in the school or typical early childhood setting that the student would attend if not disabled;

(c) In selecting the LRE, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs;

(d) A student with a disability is not removed from education in an age-appropriate regular classroom or typical early childhood setting solely because of needed modifications in the general curriculum; and

(e) If the IEP team determines a student with a disability cannot be educated in the school or typical early childhood setting the student would attend if not disabled, the IEP shall document the specialized transportation needs of the student as defined in Regulation .03B(81) of this chapter, including consideration of the effect transportation may have on the student in relation to the:

(i) Student's age and disability;

(ii) Specialized equipment needs of the student;

(iii) Personnel needed to assist the student during transportation;

(iv) Amount of time involved in transporting the student; and

(v) Distance the student will be transported.

> (2) If a public agency provides a preschool program for students without disabilities, the public agency shall ensure that the requirements of §B of this regulation are met.
>
> (3) If a public agency does not provide a preschool program for students without disabilities, the public agency:
>
> (a) Is not required to initiate a program as described in §C(2) of this regulation to satisfy the requirements of §B of this regulation; and
>
> (b) May meet the requirements of §B of this regulation through alternative methods including:
>
> > (i) Providing opportunities for preschool students with disabilities to participate in preschool programs operated by other agencies;
> >
> > (ii) Placing preschool students with disabilities in private school programs for nondisabled preschool students or private school preschool programs that integrate students with disabilities and nondisabled students; and
> >
> > (iii) Locating classes for preschool students with disabilities in regular elementary schools.

Case law also provides insight into how the issue of LRE affects a special education student's placement. In *DeVries v. Fairfax County School Board*, 882 F.2d 876 (4th Cir. 1989), the Fourth Circuit acknowledged that mainstreaming disabled children where they may have opportunities to study and socialize with nondisabled children "is not only a laudable goal but is also a requirement of the [IDEA]." *Id.* at 878. Although in *DeVries*, the Court found that mainstreaming is not appropriate for every handicapped child, it nonetheless held that even if a segregated program was able to provide a superior program, if the non-segregated program could provide educational benefit while providing access to non-disabled peers, the segregated program would be inappropriate under the IDEA. *Id*. at 878-79, *quoting Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.) (citation omitted), *cert. denied*, 464 U.S. 864 (1983).

In most circumstances, the requirement of providing FAPE in the LRE is satisfied by providing disabled children opportunities to interact with non-disabled children in a general education setting. This method, however, is not an exclusive technique for integrating disabled and non-disabled students. In some circumstances, a means of providing exposure can take the form of reverse inclusion (also termed reverse mainstreaming), in which non-disabled children are included in a special education setting to effectuate beneficial contact with their disabled peers. While not widespread, reverse inclusion has been accepted as a legitimate factor in determining the LRE for disabled students. In *Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir. 2002), the Seventh Circuit held that placing a disabled student in a special education classroom with reverse mainstreaming opportunities satisfied both provisions of the IDEA requiring FAPE and LRE. In *Beth B.*, the court found that a disabled student, who had not received more than a "modicum of developmental achievement" in a regular classroom, could be placed in a special education setting "so long as it includes reverse mainstreaming opportunities, as well as time spent with nondisabled peers in nonacademic classes, during special projects, lunch, and the like" and that this method of inclusion "is at an acceptable point along the 'continuum of services' between total integration and complete segregation, and satisfies the requirement that [the student] be mainstreamed to the maximum extent appropriate." *Id*. at 499.

Did the IEP Team Appropriately Address the Issue of LRE in the Student's IEP?

The Parents allege that the IEP team failed to appropriately address the issue of LRE in the Student's IEP. While the evidence demonstrates that the issue of LRE was not altogether ignored by the IEP team, neither was it given great consideration. Clearly, it was not *per se* unreasonable to recommend that the Student, who has multiple and serious disabilities, be placed

in a highly restrictive educational setting that could meet all of her academic and medical needs. What the IEP team lacked was discernment, and the recognition that the Student had both the right and capacity to have meaningful interaction with non-disabled peers, as well as viable options for providing an appropriate placement to address her needs.

There is no doubt that great effort was expended in the development of the Student's IEP. The IEP was created over many months, with the input of a number of individuals and the collection of multiple assessments, evaluations, and observations of the Student by BCPS, [School 2] staff, and private professionals.[28] The great divide separating the stakeholders was the Parents' insistence on LRE and BCPS' inability to envision the appropriate application of LRE for this Student in the context of a separate day school.

Several of BCPS' witnesses attempted to justify the lack of exposure to non-disabled children proposed in the IEP by offering that a separate day school with students displaying disparate degrees of disability somehow satisfied the requirement of the LRE. This is a distortion of the law and the intent of the IDEA. The IDEA is clear that the intent of the LRE provisions is that disabled students be educated with <u>non-disabled</u> peers. Surely, if the intent of the LRE provisions were to mandate a graduation of the level and extent of disabilities within a student population, it would have been made clear. No such provision exists.

Even if BCPS were unconvinced of the benefit that the Student would derive from exposure to non-disabled peers, it remained incumbent for it to explain its rationale properly in the IEP. BCPS' reply to the final question in the LRE portion of the IEP was cursory and

[28] One of the Parents' contentions was that the IEP improperly included notes of the IEP meetings in the section of the document designated for parents' concerns. BCPS witnesses explained that several school systems have adopted a policy of placing the IEP notes in this section and, while including parents' comments, other's statements were not excluded in this portion of the IEP. I do not find that the inclusion of notes in this section resulted in a flawed IEP; it appeared to be an editing decision of inclusion, rather than displacement of the Parents' concerns.

unresponsive. Instead of explaining why it believed exposure to non-disabled student was either unnecessary or non-beneficial, BCPS simply stated that the Student would be educated with disabled peers.

Notes included in the Addendum to Prior Written Notice for the November and December 2013 IEP meetings regarding the Parents' request that the Student be involved in activities with non-disabled peers, state that although the IEP team considered the request, along with Mr. XXXX's observation and recommendation that the Student would benefit from these interactions at [School 2], "given [the Student's] significant developmental delays and her need for full-time special education instruction, the school team members did not feel that [exposure to non-disabled peers] was required."

However, MSDE has an established policy that provides that LRE determinations may not be based on the significance of a child's disability. In its Technical Assistance Bulletin 9B, entitled "*Placement Determination of Preschool Students with Disabilities, 3-5 years old in the Least Restrictive Environment (LRE)*", revised September 2010, MSDE poses the question: "[w]hat relevant factors must an IEP team consider in determining a student's placement in the LRE?" MSDE's answer to this query is:

> In determining whether a placement is appropriate, the following factors are relevant:
>
> - The educational benefits to a preschool student with a disability in a Regular Early Childhood program, when supplemented with appropriate aids and services, in comparison to the educational benefits to a preschool student with a disability in an early childhood educational setting; and
>
> - The non-academic benefits to a preschool student with a disability interacting with nondisabled peers and the degree of disruption of the education of other students, resulting in the

> inability to meet the unique needs of the preschool student with a disability.
>
> However, local school systems **MAY NOT** make placements based solely on factors such as the following:
>
> - Category of disability;
> - Significance of the disability;
> - Configuration of delivery system;
> - Availability of educational or related services;
> - Availability of space; or

Moreover, with the exception of Ms. XXXX and Dr. XXXX, who each conducted evaluations of the Student in S/L and PT for approximately an hour, none of the BCPS witnesses had any substantial, personal exposure to the Student, or conducted any observation of the Student interacting with other children.[29] Clearly, their opinion of the Student, her needs and capacity for learning, and the benefit she could derive from exposure to non-disabled peers was solely based on their consideration of her disability.

MSDE's Technical Assistance Bulletin 9B also contains a section that asks "[w]hat is the relationship between the IEP and the documentation of a preschool student's placement in the LRE? What must be documented?" At the conclusion of MSDE's description of the statements of achievement, measureable goals, services to be provided, supplementary aids and support, and modifications, MSDE requires documentation of

> An explanation of the extent to which the student **WILL NOT** participate with nondisabled peers in the Regular Early Childhood Program, and, if appropriate, nonacademic and extracurricular activities and **WHY NOT**.

(emphasis in original)

[29] Several BCPS witnesses stated that they "knew" the Student, having seen her briefly in the room when she accompanied her Parents to an early IEP meeting. I found this claim of familiarity specious.

The May 6, 2014 draft IEP plainly does not follow this instruction. The "explanation" offered in the IEP, "[t]he student will participate with her disabled peers in academic, non-academic and extracurricular activities," is completely non-responsive to MSDE's requirement of an explicit justification for the total exclusion of a disabled child's exposure to non-disabled peers. This failure to adequately explain its decision to reject the Student's opportunity to interact with non-disabled peers strongly suggests that the IEP team did not properly or appropriately address the issue of LRE in the May 6, 2014 draft IEP.[30]

An additional concern is the IEP team's consideration of the continuum of placements and its determination of the hierarchy of placement in the development of the Student's IEP. MSDE's Technical Assistance Bulletin 9B asks the following: "[w]hat constitutes the continuum of alternative placements?" In response, MSDE states:

> Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of preschool students with disabilities for special education and related services. The continuum must include instruction in:
>
> - **Regular Early Childhood Program for 10 or more hours per week:**
> With the majority of special education and related services delivered **within** the Regular Early Childhood Program; or
>
> With the majority of special education and related services delivered in **some other location.**
>
> - **Regular Early Childhood Program for less than 10 hours per week:**
>
> With the majority of special education and related services delivered **within** the Regular Early Childhood Program; or

[30] The IEP mentions a possible referral of the Student to [School 4]; however, no information was provided about the services offered at [School 4], the student population, or any other aspect of the school, or whether [School 4] could be an appropriate placement for the Student. The Student is not blind, and her vision problems have been clearly stated to not arise from any ocular condition. I did not infer any action or inaction on the part of the Parents by their decision not to pursue the Student's admission to [School 4].

With the majority of special education and related services delivered in **some other location.**

- Special Education Early Childhood Program;
- Home;
- Separate schools;
- Residential Facilities; and
- Service Provider Locations.

The continuum does not distinguish between public and non-public separate day schools. Although "public and non-public" schools are given as examples of "separate settings," they are not designated as discrete hierarchical choices in the continuum, although in the hearing, BCPS attempted to describe them as such, with a public separate day school categorized as a lesser restrictive environment than a non-public separate day school. This essentially formed the basis for BCPS' recommendation, ostensibly guided by LRE, that the Student be placed at [School 1], rather than [School 2], both separate day schools. However, when I asked various BCPS witnesses what made a non-public separate day school inherently less restrictive than a public separate day school, no witness was able to provide a cogent or consistent explanation for the distinction.

XXXX XXXX, who was accepted as an expert in early learning programming and special educations, is currently the coordinator of early learning programs for BCPS. When asked the question regarding the LRE continuum distinction between public and non-public separate day schools, Ms. XXXX speculated that the difference might be related to the source of funding, with the local school system being responsible for funding a public separate day school and parents being responsible for the cost of a non-public separate day school. Ms. XXXX also ventured that a difference could be that a public entity serves the community, whereas a non-

public school can draw its population from a more diverse area. Ms. XXXX hypothesized that a public school could offer more sharing between parents and staff and proximity to resources. Ms. XXXX offered no concrete support for either conjecture, and did not appear to have ever contemplated the distinction.

When asked the same question, XXXX XXXX, BCPS' representative for special education and IEP liaison with non-public schools, who was accepted as an expert in special education and the non-public placement of students, had a similarly difficult time crafting a convincing answer. Ms. XXXX' explanation of the distinction in the level of "restrictedness" between a public and non-public separate day school referred only to the location of the institution, hypothesizing that being with students "out of the community" somehow created a more restrictive environment.

Neither Ms. XXXX's nor Ms. XXXX' attempt to describe the qualities that would render a public separate day school inherently less restrictive than one that is non-public addressed the legal standard of LRE, leading me to question whether either truly understood the concept. Neither explanation included mention of the exposure of disabled to non-disabled students, nor even alluded to how this quality, the legal essence of LRE, was distinguishable in the two settings.

The differences surmised by Ms. XXXX and Ms. XXXX appeared to suggest the notion of location of services, rather than placement along the continuum of placement options. Educational placement, as used in the IDEA, means educational program—not the particular institution where the program is implemented. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003), *citing Sherri A.D. v. Kirby*, 975 F.2d 193 (5th Cir. 1992)

(educational placement is not a place, but a program of services). In terms of the program of services offered, as described by BCPS, [School 1] and [School 2] share identical space on the continuum as separate day schools. Moreover, no evidence was produced to support the notion that simply being in a setting within the geographical confines of a school system offered more value than one not in that system, independent of the services offered. By asserting that either financing or "community" were the operative distinctions between [School 1] and [School 2], BCPS essentially acknowledged that the provision of special education and related services was fundamentally equal between the two schools, and that its decision did not properly include the consideration of LRE.

Also vital to the discussion of LRE is its value to the Student being placed in an environment with genuine exposure to non-disabled students. While many of BCPS' witnesses derided the benefit the Student would receive from such exposure, due to her disability, I did not find their diminishment of benefit convincing. None of the BCPS' witnesses had significant contact with the Student in any setting, much less one in which she interacted with non-disabled peers. To the contrary, evidence offered by the Parents, including Mr. XXXX's report and testimony from individuals who had actually observed the Student relating to non-disabled children provided a clear and descriptive account of the benefit she derived from her exposure.

Ms. XXXX, [School 2] special educator, specifically described the Student's beneficial exposure to the non-disabled day care students at [School 2], in a situation that was sustained and fully interactive. Ms. XXXX, whose detailed testimony I found convincing, due to her direct experience educating disabled and non-disabled students in a combined environment, attested to the benefit derived from this collaborative setting for disabled children, including the Student, as

well as danger of further developmental delay for the Student were she to be denied genuine exposure to non-disabled peers.

XXXX XXXX, an S/L pathologist who has been working with the Student since 2010 (before the Student's first birthday), observed the Student at XXXX on two occasions. Ms. XXXX, who has had prolonged experience with the Student, noted that during the totality of her observations, the Student was included and fully participated in all activities with her non-disabled peers. In circle time, she greeted the other children and responded to the music and singing activity. Ms. XXXX also noted that the Student appeared to be intrigued by the other children and paid a great deal of attention to them. During Ms. XXXX's second observation, she was present as all of the children, including the Student, ate lunch together, and took turns rolling a ball. Ms. XXXX was particularly attuned to the Student's relationship with another day care child, toward whom the Student deliberately pulled herself toward in order to share a space at nap time. Ms. XXXX offered that this non-disabled child called to the Student and encouraged her to move over to her. It was Ms. XXXX's observation and opinion that having the non-disabled children model appropriate pragmatic and social skills, as well as language skills, greatly benefitted the Student, an effect she also noticed during the course of her S/L therapy. Ms. XXXX further opined that segregating the Student from non-disabled peers would negatively impact, and thus impede, her progress towards language development.

Ms. XXXX, who possesses broad experience in special education, both for public and non-public entities, strongly endorsed the Student's participation with non-disabled peers, based not only on her expertise, but also on her observation of the Student in both XXXX and [School

2] settings. Ms. XXXX offered detailed and descriptive examples of the Student engaging in interactive rapport with non-disabled peers in each setting she observed.

Although not educational professionals, the Student's Parent and her grandmother each painted a detailed landscape of the Student's delight and participation in activities with non-disabled peers. Even accounting for their obvious interest in this matter, I found their examples believable and compelling. The Student followed the behavior modeled by the other children, permitted them to assist her in participating in included activities, and displayed obvious interest and pleasure in her participation. While it is probably difficult to precisely gauge "meaningful educational benefit" to a disabled preschooler, I believe the evidence offered by the Parents confirmed that the Student derived demonstrable and significant benefit from her interactions and exposure to her non-disabled peers.

The final step in the development of an IEP is the determination of LRE, based on the evidence before the IEP team. Although the issue of the Student's exposure to non-disabled peers was discussed in the IEP process, it was never adequately addressed in the IEP. BCPS' basis for not allowing exposure to non-disabled peers was its stance that the Student was too severely disabled to derive any benefit from inclusion. This conclusion, however, was not supported by the evidence, which demonstrated that the Student would benefit from such exposure. Whether BCPS' miscalculation was the result of professionals not having a proper understanding of the concept of LRE, a bias in favor of public placement, or because a public placement that both fit the Student's needs and provided meaningful exposure to non-disabled students simply did not exist, it nevertheless remained incumbent on the IEP team to correctly document and make a reasoned, legally supported distinction between public and non-public

separate entities which essentially fit the same slot in the continuum of LRE. In this matter, that distinction was lacking, rendering the IEP inadequate, due to the IEP team's failure to appropriately address the issue of LRE. Although a hallmark of special education is the concept that the IEP drives placement, I suspect in this matter, something akin to the opposite occurred. The lack of an appropriate public placement does not absolve BCPS from offering a placement that provides FAPE in the LRE in an IEP. Without a viable public alternative, the IEP team simply discarded evidence of the benefit the Student would derive from exposure to non-disabled peers and chose not to properly follow the imperative of LRE in the May 6, 2014 draft IEP. Accordingly, I find that the Parents have met their burden, by a preponderance of the evidence, to show that the IEP team did not appropriately address the issue of LRE in the Student's IEP.[31]

Is [School 1] Able to Provide the Student with a FAPE in the LRE?

[School 1] is a public separate day school with a population of approximately 180 students, all of whom are disabled. Many of the [School 1] students are severely disabled and medically fragile, and require both one-on-one educational aides and nursing care. [School 1] accommodates these students both academically and according to their medical needs. It offers small classes and many supports and services. What [School 1] does not provide, however, is access to non-disabled students in even a remotely meaningful way.

The IDEA provides that, to the maximum extent appropriate, children with disabilities are to be educated with non-disabled students. The Student has the capacity to derive

[31] In its written closing argument, BCPS asserted that the testimony of witnesses from [School 2] should be disregarded since the Student visited [School 2] after the May 6, 2014 IEP meeting, and therefore, any observation would be retrospective. I found this argument unavailing, as evidence describing the Student's interaction with non-disabled peers was readily available to the IEP team through Mr. XXXX's October 2, 2013 report, as were the observations of the Parents. The testimony from [School 2] staff, as well as Ms. XXXX, who also observed the Student subsequent to May 2014, fully comported and was consistent with Mr. XXXX's report and the Parents' observations. As such, I found the testimony of the witnesses relevant.

educational benefit from exposure to non-disabled children. Her experiences at day care, as well as the observation of adults who have witnessed her in such a setting, attest to her ability to mimic and learn from non-disabled peers in a non-trivial way. [School 1]'s lack of meaningful exposure to non-disabled peers renders it an inappropriate placement for the Student at this time.

While BCPS witnesses and personnel touted the Head Start program housed in the same building as [School 1] as an adequate provision of LRE-sanctioned exposure, there was no convincing support for this proposition. Although several of BCPS' witnesses professed some knowledge of the Head Start program, none were able to offer substantive or useful information regarding its relationship with [School 1] and the [School 1] student population.

Ms. XXXX, BCPS S/L pathologist, offered that although there was no scheduled interaction between the Head Start and [School 1] students, there might be opportunities for interaction in the cafeteria, field trips, and other programs. These "opportunities," however, were merely speculative, and Ms. XXXX was unable to provide any concrete information about these possible encounters regarding frequency, duration, or content, and also termed them "incidental." Ms. XXXX related that, in the past, [School 1] did participate in a "reverse inclusion" program in which non-disabled children were brought into classes in the third, fourth, and fifth grades to provide peer modeling. According to Ms. XXXX, this practice was eventually halted due to a lack of financial resources.

Irrespective of [School 1]'s previous practice of reverse inclusion, BCPS' current attempt to conflate the [School 1] students' negligible contact with Head Start children to the nature and extent of exposure required to satisfy the requirement of LRE is unavailing. Mr. XXXX, [School 1]'s principal, specifically told the Parent that [School 1] students do not interact with Head Start

children. Communication between Ms. XXXX and Mr. XXXX further confirms that there is no meaningful or sustained relationship between the [School 1] and Head Start children. At the hearing, XXXX XXXX, [School 2] social work administrator, testified that during a visit to [School 1] with a social work intern[32] in November 2014, the social worker at [School 1] expressly told her that there was no interaction between the non-disabled Head Start children and [School 1]'s disabled students. For BCPS to suggest that either exposure to lesser disabled students or occasional 'passer-by' eye contact with non-disabled children meets the standard for LRE would so diminish the concept of FAPE in the LRE as to render it meaningless. Accordingly, I find that [School 1] is unable to provide the Student with a FAPE in the LRE.

Can [School 2] Provide the Student with a FAPE in the LRE?

While school systems are required to provide a FAPE in the LRE, private placements only have to be proven appropriate. *Carter*, 510 U.S. at 12-14. The IEP team members acknowledged that [School 2], a non-public separate day school with a small population, could fully implement the Student's IEP. [School 2] employs a host of professional educators and service providers with expertise in special education and all of the related services that the Student requires, including PT, OT, S/L therapy, and nursing support. Therefore, there is no dispute that [School 2] can provide the Student with a FAPE. While this conclusion is sufficient to essentially end this portion of the discussion in this matter, the parties agreed that the issue of whether [School 2] constituted the LRE was relevant to this case. What this analysis facilitates is the distinction between [School 2] and [School 1]—that is, what [School 2] has, [School 1] lacks, namely, significant and meaningful exposure to non-disabled peers. Although LRE is a

[32] As part of her position, Ms. XXXX also directs social work interns from the [University] School of Social Work at [School 2] and takes them on tours of other school programs, including public programs.

factor for which [School 1] must account, but for which [School 2], as a non-public school is essentially exempted, the contrast further bolsters [School 2]'s appropriateness as a setting that offers the Student educational benefit, and therefore, a FAPE.[33]

[School 2]'s practice of integrating non-disabled day care children with disabled students for an extended portion of the day distinguishes it both qualitatively and quantitatively from any incidental exposure to non-disabled peers [School 1] might provide. While any benefit derived from [School 1]'s tangential, at best, exposure, is questionable, if non-existent, it is clear that the [School 2]'s program offers substantial benefit to all of its participants.

[School 2] teacher XXXX XXXX provided detailed testimony about her morning class that includes disabled and non-disabled children in a 50/50 ratio, with sixteen students, eight each of disabled and non-disabled children. The class commences in a traditional "circle time" in which customary rituals, such as the Pledge of Allegiance and story time, are shared. The students remain together for one and a half to two hours, substantially the entire morning, for reading, vocabulary, social studies, mathematics, or language arts, and also join each other for lunch. It is not until the afternoon that the disabled students receive individualized or group therapy in the various services they require.[34]

XXXX XXXX, S/L pathologist at [School 2], described [School 2]'s S/L services, which include both group and individual therapy. Ms. XXXX noted that, at times, non-disabled children also participate in some group S/L therapy sessions. Ms. XXXX conducted a pre-

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[33] Contrary to BCPS' assertion that any exposure to non-disabled peers that [School 2] offers is maximization of the Student's potential, a factor that is not essential or even required to reach a determination of FAPE (*see Hessler*. 700 F.2d at 139; *Doe v. Bd. Of Educ. of Tullahoma City Sch*., 9 F.3d 455 (6th Cir. 1993)), I find that [School 2]'s program of inclusion is not applicable to the issue described in the cited cases. LRE is a separate issue, and the purpose of LRE is not to provide a maximal educational benefit, but to give disabled children exposure to non-disabled peers to the maximum extent possible, a clear distinction.

[34] Ms. XXXX also noted that some of the non-disabled children also are included in OT.

admission screening of the Student and recommended assistive technology as well as traditional S/L therapy. During her testimony, Ms. XXXX asserted that the Student would derive benefit from participating in S/L therapy with non-disabled peers. On cross-examination, counsel for BCPS asked whether placing the Student in such a mixed setting would "be maximizing her opportunity for speech services." (Tr. P.363) After answering that "…I think in group settings she, she'll learn from her non-disabled peers so I think that would be a good mix in a group," (Tr. P. 363) counsel repeated the question, clearly seeking an answer from Ms. XXXX to mimic the characterization of integrated S/L services at [School 2] as "maximizing opportunity."[35] As previously mentioned, despite the use of the term "maximize," I found a clear distinction between the maximization of benefit that is not required in order to provide a FAPE and the benefit derived by inclusion of disabled students with non-disabled peers. LRE is not legally limited to the lowest threshold benefit that would occur from inclusion, but rather is predicated on the overall benefit conferred by including disabled and non-disabled students to the maximum extent possible, clearly indicating a preference, where possible, for inclusion. *See De Vries*, 882 F.2d 876.

Although BCPS' witnesses questioned the extent and value of [School 2]'s integrated program, as well as argued that the inclusion of day care students was not, *per se*, part of what is deemed a special education separate school, I did not find these arguments persuasive, or sufficient to negate a finding that the [School 2] program would provide FAPE.[36] All of the

[35] Ultimately, Ms. XXXX answered "Yes, it would, it would help her with her speech, yes." (Tr. P. 364)
[36] Ms. XXXX testified that during a brief visit to [School 2] she observed a class in which disabled and non-disabled children, although combined, were seated at tables and not engaged in play. I did not find that her statement persuasively countered the Parents' description of [School 2]'s more extensive interactions, due to the brevity of Ms. XXXX's observation and because a portion of an academic lesson would not necessarily include comprehensive or collaborative opportunities for all of the students in the class.

services and supports found in the Student's IEP can be fully implemented at [School 2]. Accordingly, I find that [School 2] can provide the Student with a FAPE, even independent of its ability to provide a FAPE in the LRE. The LRE it provides, in the form of reverse inclusion, while a benefit to the Student, does not create a maximizing situation, but further serves to support the finding that it would provide the Student with a FAPE and reinforce the appropriateness of the Student's placement at [School 2] for the 2014-2015 school year.

Conclusion

The IDEA requires that disabled children be provided with a FAPE in the LRE. When an appropriate public setting cannot be provided, a disabled child may be permitted to attend a non-public school at the expense of the local school system. In this matter, despite the severity of the Student's disabilities, she remains able to derive significant educational benefit from exposure to non-disabled peers. The May 6, 2014 draft IEP offered by BCPS failed to recognize this crucial factor, neglected to properly address LRE, and offered placement at [School 1], a public separate school that could provide all of the special education and support services the Student needs, but without the mandated exposure to children without disabilities. [School 2], a non-public school that can implement all of the features of the May 6, 2014 IEP, can also provide an environment that includes substantial exposure to non-disabled peers. With the reminder that this is a limited ruling that only affects the 2014-2015 school year, I find that the Parents have met their burden, by a preponderance of the evidence, to show that the May 6, 2014 draft IEP failed to appropriately address the issue of LRE; that [School 1] cannot provide the Student a FAPE in the LRE; and that [School 2] is able to provide the Student a FAPE, as well as provide it in the LRE.

CONCLUSIONS OF LAW

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

(1) the IEP team did not appropriately address the issue of LRE in the Student's IEP;

(2) [School 1] is not able to provide the Student a FAPE in the LRE; and

(3) [School 2] is able to provide the Student a FAPE in the LRE. 20 U.S.C.A. §§ 1400(d)(1)(A); 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114; 300.115; 300.116; 300.117; COMAR 13A.05.01.10; *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

ORDER

I **ORDER** that the Parents' request for the Student's placement at [School 2] for the 2014-2015 school year be, and is hereby **GRANTED**; and I further **ORDER** BCPS to pay the Student's tuition for the 2014-2015 school year.

January 30, 2015
Date Decision Issued

Harriet C. Helfand
Administrative Law Judge

HCH/tc

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.