

XXXX XXXX,

STUDENT

v.

BALTIMORE CITY

PUBLIC SCHOOLS

*** BEFORE LAURIE BENNETT,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH NO.: MSDE-CITY-OT-15-24094**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On July 16, 2015, the Student filed a Due Process Complaint with the Office of Administrative Hearings (the OAH), requesting a hearing to review the identification, evaluation, or placement of the Student by the Baltimore City Public Schools (BCPS) under the Individuals with Disabilities Education Act (the IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).¹

I held a prehearing conference on August 27 and 28, 2015. Based on the availability of the parties and their witnesses, I scheduled the hearing for October 27, 28, 29, and 30, and November 2, 3, 4, 5 and 6, 2015. I convened the hearing as scheduled, which concluded on November 4, 2015. Wayne Steedman, Esquire, and Leslie Turner Percival, Esquire, represented the Student. Diana Wyles, Esquire, and Darnell Henderson, Esquire, represented BCPS. On November 10, 2015, the parties submitted post-hearing memoranda.

¹ On August 24, 2015, BCPS filed a Due Process Complaint, alleging that it properly denied the Student's request for payment of an independent educational evaluation. The Student withdrew her request for payment and, on October 21, 2014, BCPS withdrew its complaint.

A special education hearing decision is normally due within 45 days of the date the parties notified the OAH that they waived an otherwise mandatory resolution meeting. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2014). The parties provided such notification on August 4, 2015. The time for issuing the decision, therefore, had passed by the time the hearing concluded. The parties waived the 45-day limitation and I granted an extension for a specific period of time based on the parties' agreement that I would issue a decision within 30 days of the last hearing day, November 4, 2015. 34 C.F.R. 300, 515(c). Md. Code Ann., Educ. § 8-413(h) (2014).

The legal authority for the hearing is IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2014); 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; the Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.05.01.15C, 28.02.01.

ISSUES

Did BCPS deny the Student a free appropriate public education (FAPE) under the September 30, 2014 individualized education program (IEP) and, if so, is the Student entitled to reimbursement for her unilateral placement at [School 1] ([School 1]) beginning on June 22, 2015.²

If BCPS denied the Student FAPE, is she entitled to compensatory education in the form of reimbursement for her education at [School 1] for the 2016-2017 school year?

² The issue is not neatly characterized in terms of the school year. Because the IEP is a year-long document that is reviewed at least annually, the term of the IEP does not necessarily coincide with the school year calendar.

Is the August 4, 2015 IEP reasonably calculated to provide FAPE in the least restrictive environment?

SUMMARY OF THE EVIDENCE

Testimony

For the Student:

1. The Father
2. XXXX XXXX, [School 1] Academic Director
3. XXXX XXXX, MSDE, Nonpublic Special Education Section Chief
4. XXXX XXXX, [School 1] Associate Clinical Mental Health Counselor, admitted as an expert in mental health counseling
5. Dr. XXXX XXXX, Clinical Psychologist, admitted as an expert in psychology
6. XXXX XXXX, an [School 1] teacher, admitted as an expert in special education
7. XXXX XXXX, Independent Consultant in Special Education, admitted as an expert in special education, with an emphasis on working with children with emotional disabilities, development of IEPs, and placement of children with emotional disabilities in day and residential placement
8. XXXX XXXX, BCPS Nonpublic Liaison/Educational Associate for the Office of City Wide and Nonpublic Placement³

For BCPS:

³ Mr. XXXX was a difficult witness on cross examination. He was frequently nonresponsive and occasionally prefaced his answers with, "As you know, Mr. Steedman," which suggested to me that Mr. XXXX bears some degree of hostility toward Mr. Steedman. His demeanor, however, was not a factor in my assessment of his credibility.

1. XXXX XXXX, [School 2] Associate Program Director, admitted as an expert in special education administration, special education academics and instruction, and IEP procedure and implementation
2. XXXX XXXX, [School 2] teacher
3. XXXX XXXX, [School 2] IEP Chair
4. XXXX XXXX, BCPS Nonpublic Liaison/Educational Associate for the Office of City Wide and Nonpublic Placement, admitted as an expert in special education academics and instruction, nonpublic placement, and IEP process, development and implementation
5. XXXX XXXX, [School 3] Program Director, admitted as an expert in special education, nonpublic school administration, and IEP process development and implementation
6. XXXX XXXX, [School 2] Head Teacher, admitted as an expert in special education instruction of students with emotional disabilities, special education academics for mathematics, and IEP development, procedures and implementation
7. The Father
8. XXXX XXXX, [School 4] IEP Chair, admitted as an expert in school administration and supervision and IEP development, process and implementation
9. XXXX XXXX, BCPS Home and Hospital teacher
10. XXXX XXXX, Senior Director of [School 2], admitted as an expert in special education administration, special education instruction of students with emotional disabilities, special education academics and instruction, and IEP process, procedure and implementation

11. XXXX XXXX, Associate Clinical Mental Health Counselor, admitted as an expert in mental health counseling

12. XXXX XXXX, Director of School Operations, [School 5] Programs, Offices of Admissions, Compliance & Transition, [School 5], admitted as an expert in special education, nonpublic school administration, and IEP procedures, development and implementation

Exhibits

I admitted the following exhibits jointly offered by the parties:

6	02/01/2013	Educational Assessment by XXXX XXXX, Special Educator, MDSE
12	04/24/2014	Documents Review Report, XXXX
13	05/21/2014	Documents Review Report, XXXX
14	08/06/2014	Documents Review Report, XXXX
17	08/29/2014	Educational Assessment by XXXX XXXX, Special Educator, MDSE
21	09/24/2014	Psychological Report by XXXX XXXX, M.A., BCPS
23	Not dated	Home & Hospital Incident Report by XXXX XXXX, Tutor
25	10/15/2014	Home & Hospital Return to School Form
26	10/15/2014	Special Education City Wide School Assignment
27	10/21/2014	Approved/Amended IEP, Grade 10, [School 2]
29	11/19/2014	High Risk Evaluation Form, [School 2]
31	11/24/2014	Non-Attendance Notification, [School 2]
32	10 to 12/2014	Communication Log, [School 2]
33	12/12/2014	Non-Attendance Notification, [School 2]

34	01/16/2015	Report Card 2, Grade 10, [School 2]
40	05/14/2015	Letter re: Psychiatric Treatment by Dr. XXXX XXXX, Psychiatric Consultant
46	06/17/2015	BCPS Response Letter to Parent re: Request for payment for residential treatment center
48	06/26/2015	BCPS response letter to Parent re: Request for payment for residential treatment center
49	06/29/2015	Psycho-Social Assessment, Dr. XXXX XXXX, [School 1]
52	07/16/2015	Request for Due Process Hearing
54	07/20/2015	Summary and Score Report by XXXX XXXX, [School 1]
57	07/24/2015	BCPS Response to the Due Process Complaint
61	08/13/2015	Approved/Amended IEP, Grade 10, [School 2]
62	08/14/2015	Petitioners' Motion for Leave to File an Amended Complaint and Amended Due Process Complaint
66	09/10/2015	City School's Response to Petitioners' Amended Administrative Due Process Complaint Notice
75	07/31/2015	E-mail Wyles/Steedman

I admitted the following exhibits offered by BCPS:

8	10/21/2014	Individualized Education Program
9	09/30/2014	Individualized Education Program
12	10/02/2014	Prior Written Notice
13	09/09/2014	Prior Written Notice
14	07/14/2015	Notice of IEP Team Meeting
19	09/11/2014	Psychological Report
30	12/12/2014	Letter from [School 2] to the Father

31	11/24/2014	Letter from [School 2] to the Father
35	12/01/2014	Student Behavior Sheet
35	12/01/2014	Student Behavior Sheet
36	11/24/2014	Student Behavior Sheet
37	11/21/2014	Student Behavior Sheet
38	11/20/2014	Student Behavior Sheet
39	11/19/2014	Student Behavior Sheet
40	11/18/2014	Student Behavior Sheet
41	11/12/2014	Student Behavior Sheet
42	11/11/2014	Student Behavior Sheet
43	11/10/2014	Student Behavior Sheet
44	11/05/2014	Student Behavior Sheet
45	10/29/2014	Student Behavior Sheet
46	10/28/2014	Student Behavior Sheet
47	10/27/2014	Student Behavior Sheet
48	10/27/2014	Student Behavior Sheet
49	10/23/2014	Student Behavior Sheet
50	10/22/2014	Student Behavior Sheet
51	10/21/2014	Student Behavior Sheet
63	08/25/2014- 10/15/2014	Home and Hospital Report Card
63	2013-2014	[School 7] Report Card
65	01/01/2015- 02/27/2015	Encounter Log Report
66	12/01/2014- 12/31/2014	Encounter Log Report

67	11/01/2014- 11/28/2014	Encounter Log Report, City Schools
68	10/01/2014- 10/31/2014	Encounter Log Report
69	06/10/2015	Academic Information and Admissions Agreement
71	06/25/2015	Clinical Progress Note
73	10/24/2014- 12/17/2014	[School 2] Communication Log
74	Not dated	Office of Special Education Procedures for Nonpublic Placement
75	Not dated	Non-public Placement Descriptions
76	10/20/2014 - 12/19/2014	Transportation Log – Student Attendance Roster
78	Not dated	Curriculum Vitae for XXXX XXXX, Jr.
79	Not dated	Curriculum Vitae for XXXX XXXX
80	Not dated	Curriculum Vitae for XXXX XXXX
81	Not dated	Curriculum Vitae for XXXX XXXX
82	Not dated	Curriculum Vitae for XXXX XXXX
83	Not dated	Curriculum Vitae for XXXX XXXX
84	Not dated	Curriculum Vitae for XXXX XXXX
85	Not dated	Curriculum Vitae for XXXX XXXX
87	09/01/2015	Email correspondence re: “group therapy”
88	09/01/2015	Clinical Progress Note
90	08/18/2015	Clinical Progress Note
91	07/16/2015	Psychiatric Evaluation
92	07/05/2015	Best Notes Document by XXXX XXXX

I admitted the following exhibits offered by the Student/Parents:

30	11/20/2014	Progress Reports, [School 2]
35	01/16/2015	Approved/Amended IEP, Grade 10, [School 2]
36	Not dated	[School 2] Enrollment Dates, Mr. XXXX, Student Records
37	Not dated	Attendance Detail Form/Attendance Note, Mr. XXXX, Student Records
38	Not dated	[School 2]/Parent Communication
41	05/15/2015	Team Meeting Notice for 6/05/15
43	06/02/2015	Daily Attendance Summary 2014-15
44	06/08/2015	Letter from the Father to XXXX XXXX
45	06/10/2015	Daily Attendance Summary 2014-15
55	07/20/2015	Master Treatment Plan by Dr. XXXX, [School 1]
56	07/23/2015	Progress Notes by XXXX XXXX, [School 1]
59	08/04.2015	IEP Meeting Transcript
59A	08/04/2015	CD of IEP Meeting
63	08/24/2015	Residential Review, [School 1]
64	08/09/2015	Treatment Review Summary Reports, by XXXX XXXX, [School 1]
65	09/06/2015	Incident Report by XXXX XXXX, [School 1]
67	09/28/2015	Psychiatric Progress Note by XXXX XXXX, [School 1]
68	09/10/2015	Group Progress Notes by XXXX XXXX, [School 1]
69	10/12/2015	Term 1 Progress Report/Attendance/Class Schedule, [School 1]
70	Not dated	[School 1] Resume for XXXX XXXX
71	Not dated	[School 1] Resume for XXXX XXXX
72	Not dated	[School 1] Resume for XXXX XXXX
73	Not dated	Curriculum Vitae for XXXX XXXX, Ph.D.

74	Not dated	Curriculum Vitae for XXXX XXXX, Ph.D.
77	09/21/2015	E-mail XXXX XXXX/Parent
79A	06/19/2015	E-mail Steedman/XXXX
80	06/19/2015	E-mail W. Steedman/XXXX XXXX
81	07/29/2015	Transcript of telephone conference

During closing argument, I received the additional following documents from the Student:

1. Eric R. Herlan, *LUA 10: Truancy: Disabled or Disinterested?*, Drummond Woodsum & McMahon (2009)
2. Family-Like Environment Better for Troubled Children and Teens, American Psychological Association, <http://www.apa.org/research/action/family.aspx>

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

Background⁴

1. The Student was born in 1998.
2. The Student lives with her ultra-orthodox XXXX parents and siblings in Baltimore City, Maryland and is the eleventh of thirteen children.
3. From first grade (2005-2006) through eighth grade (2012-2013), the Student attended [School 6], an orthodox XXXX school.
4. Throughout school, the Student has always had attendance issues and has needed academic support (e.g., resource center, learning support group).

⁴ I offer these findings to give some background. I did not receive evidence about the Student's elementary or middle school education. Additional information about her early education is not germane to the issue at hand.

5. On December 19, 2012, when the Student was in the 8th grade, an IEP team referred her for an educational assessment, which was completed on January 30, 2013. The Student demonstrated low to average academic ability. Her strengths included writing samples, writing fluency, reading of simple sentences, basic math facts, and reading words in isolation. Areas of need included reading comprehension, applying math skills, calculations (more specifically division and fractions), and spelling.

6. In February 2013, as a result of an educational assessment, Baltimore County Public Schools found the Student eligible for special education services under IDEA, with coding under the category of Other Health Impaired, based on a diagnosis of Attention Deficit Hyperactivity Disorder.⁵

7. Baltimore County did not develop an IEP because the Student was attending a private school at her parents' expense for the 8th grade.

8. Starting in the 9th grade, the Student wanted a more modern school experience than she had experienced at [School 6]. Thus, for the 2013-2014 school year, the Parents enrolled her at their expense at [School 7], a private religious day school. Because she was attending a private school at her parents' expense and was never enrolled with BCPS or another public agency, the Student did not receive services under an IEP.

9. The Student was overwhelmed with the academic program at [School 7] and had trouble keeping pace. She did not always attend class or complete assignments and had difficulty establishing and maintaining friendships. She missed thirty-four days of school and was late on eighteen days.

⁵ The Student asserted in her Due Process Complaint that Baltimore County handled her case because that is where [School 7] is located.

10. Starting in the spring of 2014, the Student completed her school year at home. With academic support, she nevertheless passed all of her classes for the 2013-2014 school year.

11. The Student is diploma bound.

Psychiatric hospitalizations

12. XXXX Health System (XXHS) is a psychiatric hospital that offers day and inpatient services.

13. The Student was admitted to XXHS' day hospital from April 24, 2015 through May 5, 2014, and May 21, 2014 through May 22, 2014. During those periods, the Student reported to hospital staff that, two months earlier, she had cut her arms and intermittently had suicidal ideation. She expressed concern that no one at school liked her, that she used to sneak out with a boy whose friends falsely told people that she did drugs and was a "slut," that she had conflict at home, and that her family would prefer that she was more orthodox.

14. The Student was admitted as an XXHS inpatient from July 21, 2014 through July 25, 2014 for self-injurious behavior and suicidal ideation. She cut herself with a razor and said goodbye to people, hoping that her family would stop her from committing suicide.

15. During these admissions, XXHS treated the Student for an anxiety disorder, not otherwise specified, and major depressive disorder, recurrent severe, without psychotic features.

Home and Hospital Teaching

16. On August 27, 2014, an IEP team referred the Student for an educational assessment, which revealed that the following:

[The Student] demonstrated academic ability that ranged from low to high average. She demonstrated scatter of skills, with strength in the area of Writing Samples, and basic reading and math fluency. [The Student] demonstrated difficulty in reading and math comprehension, accuracy, spelling. Educational scores obtained through this testing are comparable to educational testing that was previously administered with more difficulty noted in reading during this round of

assessment. *In some areas it was unclear if difficulty was due to lack of sustained effort and attention or if the work was too complex for [the Student] to understand.*

Emphasis added. Joint Ex. 17.

17. The parents were unsuccessful in their efforts to have the Student do online schooling and to enroll her in a GED program. The Student was required to take a GED placement test and she panicked and left the testing area.

18. The parents requested Home and Hospital Teaching as a last resort, and BCPS granted the request.

19. In the 10th grade, the Student attended Home and Hospital Teaching from August 25, 2014 to October 15, 2014. Joint Ex. 25.

20. On September 11, 2014, when the Student was nearly sixteen years old, BCPS gave her a psychological assessment. The Student was diagnosed with a specific learning disability and an emotional disorder because:

[h]er school functioning has been adversely affected by the presence of a condition characterized by depressive symptoms generally manifested by a negative self-image, a very low confidence level in her ability to make decisions, difficulty establishing and maintaining close relationships with others, feeling lonely and misunderstood, and generally feeling like an outsider in most settings. This condition appears to have existed for a long period of time and to a marked degree, as documented by her past hospitalizations.

Joint Ex. 27, p. 11.

21. In September 2014, while attending Home and Hospital Teaching, the Student was uncooperative and refused to participate in the lesson offered by the teacher, who then left the Student's home. Joint Ex. 23.

22. The Student's attention span was often low and fragmented, she appeared disinterested, and she stated that she did not understand much of the material.

23. The Student's English/history teacher questioned whether her purported lack of understanding was likely the result of disinterest rather than inability.
24. At that time, the Student was reading at the beginning fifth grade level. Joint Ex. 27.
25. The Student received passing grades for the first marking period in all of her courses at Home and Hospital Teaching (e.g. a 60 in English II and American Government, a 76 in Environmental Science, a 90 in GEO CCSS,⁶ and a 70 in Spanish 1).
26. On September 9, 2014, BCPS issued to the parents Prior Written Notice, advising them, "Given recent developments relative to the Student's Social/Emotional state, the [IEP] team agreed that additional information is needed for purposes of reevaluation." BCPS Ex. 12. Accordingly, the IEP team ordered both a social/emotional and a cognitive assessment.
27. On September 30, 2014 and October 2, 2014, a BCPS IEP team met to review recently completed formal assessments, the Student's progress, and the Student's needs. Her parents and their educational advocate, XXXX XXXX, attended the meeting. The IEP team concluded that the Student's primary disability was an Emotional Disability and that her disability affected her academic, social, emotional, and behavioral functioning. As quoted below, the team considered whether to conduct a functional behavioral assessment (FBA):

Given the nature and severity of her disability, the team (with important input from all team members) considered whether or not it would be appropriate to order [an FBA] for the [S]tudent so that a Behavior Intervention Plan might be developed. Given that the [S]tudent is not currently being educated in a classroom setting (the student is currently receiving service through city school's Home and Hospital Program) and that collecting meaningful data for an FBA would therefore be impossible, the team agreed (unanimously) that the decision to order an FBA should be made by the IEP Team at [the Student's new placement].

Joint Ex. 27, p. 12.

⁶ The record does not define "CCSS."

28. The Student was a patient of Dr. XXXX XXXX, Clinical Psychologist, from March 11, 2014 to June 2014. They had about ten visits. The Student was not in school at the time, having just been hospitalized for suicidal ideation and self-injurious behavior.
29. Dr. XXXX treated the Student for suicidal ideation and self-injurious behavior, anxiety, mood regulation, stress tolerance, and family issues.
30. The Student generally refused to do school work, she did not complete assignments, she had tremendous anxiety (e.g. obsessively thinking others were talking about her), and she could not focus. The Student thought the work was too easy and, at the same time, she said that she could not understand what the teachers were telling her. The Student had average intelligence, she processed information quickly, and she had trouble with comprehension and abstract thinking (which the middle school curriculum was based on).
31. An IEP (the September 30, 2014 IEP) resulted from the two IEP meetings.
32. The IEP team, including the parents, agreed that the goals and objectives on the September 30, 2014 IEP were appropriate. .
33. The IEP team noted in the IEP that “it would be appropriate for the parents to request an IEP Team Meeting once the student has begun attending the school to which she [was] assigned.” BCPS Ex. 9, p. 12.
34. On October 2, 2015, BCPS issued to the parents Prior Written Notice (of a change in the Student’s educational placement). BCPS advised the parents that the Student required a therapeutic educational setting and, as such, recommended a public separate day school. BCPS advised the parents that, as the IEP team recommended, it was deferring the decision to order an FBA to that new school. BCPS did not advise the Father that BCPS expected him to have to ask for an FBA.

35. Further, by letter dated October 15, 2014, BCPS notified the parents that the Student needed more services than she could receive from Home and Hospital Teaching and was placing the Student at [School 2] ([School 2]), effective October 21, 2014. The parents agreed to implement the IEP at [School 2]. The Father was hopeful that [School 2] would work out for the Student.

36. On October 21, 2014, the IEP team amended the IEP.⁷

37. The September 30, 2014 IEP, including any amendments, was effective upon the Student's admission to [School 2], and the goals and objectives were projected to begin on October 3, 2014 and end on September 29, 2015.⁸

[School 2]

38. [School 2] is a separate public day school in Baltimore City, owned and operated by XXXX, Inc., a for-profit corporation.

39. [School 2] accepts only BCPS-enrolled students and operates on the BCPS calendar.

40. XXXX XXXX is [School 2]'s Director and XXXX XXXX is an Associate Director.

41. [School 2] endeavors to address a student's academic and behavioral needs. Its goal is to manage students' behavior so that they can receive academic instruction and make educational progress

42. [School 2] has 140-160 students, all with specialized needs. About 90% of the students have emotional disabilities.

43. [School 2] has 60 staff members.

⁷ I am unclear about the specific amendment.

⁸ The begin date is the day after the October 2, 2014 IEP meeting and predates the Student's actual admission to [School 2] by nearly three weeks. The end date reflects that an IEP is a yearly document and does not neatly coincide with the public school year. In other words, unless amended, the goals and objectives would remain in effect after the start of the 2015-2016 school year. An IEP team would conduct an annual review and develop a new IEP by September 29, 2015. 34. C.F.R. 300.324(b)(1).

44. [School 2] has related service providers on staff (e.g. a speech/language pathologist, a psychiatrist, a psychologist, social workers, and a physical therapist).
45. The Student started attending [School 2] on or about October 21, 2014.
46. The Student's schedule at [School 2] started with home room at 7:15 a.m. Classes ended at 2:05, and the Student returned to her home room at 2:20, when her school day ended.
47. [School 2] did not convene an IEP team meeting to decide whether to do an FBA, as the IEP team had recommend. [School 2] personnel reasoned that the Student had only recently enrolled at [School 2] and it lacked sufficient data about her behaviors to conduct an FBA. [School 2] staff further reported that the Student had appropriate relationships with staff and peers and, as a result, an FBA was unnecessary.
48. When the Student enrolled at [School 2], staff was aware that the Student had experienced attendance issues at [School 7].
49. When the Student started at [School 2], she was prescribed medication, as needed for panic attacks, and scheduled dosages for attention deficit hyperactivity disorder and depression. The Father notified [School 2] about the Student's medication regimen and filled out a form to permit administration of the as-needed medication.
50. The Student's anxiety nevertheless increased when she started at [School 2]. She had temper tantrums at home because she did not want to go to school. To keep the peace, the parents would eventually relent to her tantrums and tell her she did not have to go. The Student reported to her family that she was having difficult keeping close friends.
51. [School 2] endeavors to instill self-advocacy (e.g. "I'm frustrated and I need a break") When a student takes a time out, staff talks to the student. Time out is beneficial because the student might otherwise walk away without taking the time to process what happened.

52. [School 2] uses a behavior point system, which allows a student to receive pluses or minuses for positive or negative behavior. When a student earns three minuses, he/she receives zero points. Students are monitored for points every half hour. Pluses and minuses and any resulting points are noted on a point sheet. Staff members, including teachers and others, complete one point sheet for each day of attendance and for each period, starting with the student's entrance into the building. The sheets are color-coded: blue sheets mean a student was at the highest behavior level and green is the next highest. The higher the behavior level the better the behavior.

53. During her tenure at [School 2], the Student was always on the green or blue level, meaning she was functioning well from a behavior standpoint.

54. During the Student's first twenty days at [School 2], she was absent about ten times.

55. Ten days after the Student started at [School 2], Mr. XXXX thought it was appropriate for an IEP team to consider moving the Student to a less restrictive placement even though the Student was absent for five of the ten days. Mr. XXXX reasoned that on the days the Student attended school, she behaved appropriately. Even though Mr. XXXX was already forming an opinion about the appropriateness of the Student's placement at [School 2], he further opined that [School 2] did not have enough data to do an FBA and, thus, he did not refer her to an IEP team to consider conducting an FBA.

56. [School 2] has an Interdisciplinary Leadership Team (ILT) that discusses the necessity for interventions for individual students. The ILT did not meet to discuss the Student.

57. At 11:15 a.m. on November 19, 2014, the Student became anxious and ignored an instruction to return to class or to go to the time out room. She banged her head against a wall for about three minutes. Staff employed TACT 2, a therapeutic aggression hold technique for a

student engaged in self harm. The goal of TACT 2 is to deescalate the behavior and to move the Student back to the classroom. After [School 2] staff de-escalated her, staff called the Father, who took the Student to the emergency room where she was evaluated for a concussion and treated for a sprained wrist.

58. At [School 2], the Student never used the resource room and she used the quiet room two or three times.

59. On November 20, 2014, the Student's geometry teacher reported that her strengths were performing operations with integers, solving for unknown, and working well with others but that she needed to attend class more consistently.

60. In or around November 2014, the Student's Spanish teacher noted that the Student was doing well in some areas (e.g. she employed organizational skills, used appropriate language, respected herself and others, used shop safety, worked independently, kept her hands, feet and objects to herself, and respected and followed shop rules). She needed improvement in other areas (e.g. general performance, personal attitudes and habits, classwork, preparation, following task directions, modeling good work habits for other students, remaining on task and raising her hand to speak.) The teacher commented that the Student had very poor attendance and that she was not showing any academic or behavioral improvement.

61. On November 21, 2014, the Student's English teacher reported that the Student was a diligent and accurate worker and that her "only weakness is that she has periods when she will sleep through an entire class."⁹

⁹ The record includes point system reports from October 21, 23, 24 and 27, 2014. These points show that the Student earned points in English. The Student noted that the sheets do not reflect whether she slept those days. The Student would not have received any points if she slept throughout an entire class. Absent evidence to the contrary, I have to assume that because the Student earned points on these days, she was not sleeping.

62. On November 20, 2014, the Student's Social Studies teacher noted that the Student had great literary skills and stayed on task with little or no direction but that she went off task if she was not kept from negative behavior.¹⁰

63. On November 20, 2014, the Student's art teacher reported that the Student was progressing satisfactorily, attended school regularly, participated in classwork, and used appropriate language, but that she did not have adequate self-control or follow task directions. The teacher commented that although the Student participated in class, she had trouble dealing with redirection, she liked to argue when prompted to stay on task, she gave excuses when she did not want to participate, and she slept in class.

64. On November 20, 2014, the Student's science teacher reported that the Student's strengths were in writing and working with others, but that she needed improvement in staying on task throughout the day and handling frustration appropriately. The teacher commented that the Student needed to slow down when working and needed to stay on task more consistently.

65. [School 2] convened an informal teachers' conference in November 2014.¹¹

66. [School 2] has a protocol for addressing attendance issues. First, teachers call parents weekly. Second, [School 2] sends the parents form letters, inviting the parents to request a meeting with a school administrator to discuss attendance. Third, [School 2] does a home visit.

67. By November 24, 2014, [School 2] noted that the Student had a pattern of nonattendance. It sent the Father a form letter, dated November 24, 2014, advising him that he could request a meeting to discuss the problem. The Father did not respond to the letter.

68. The Student's last day of attendance at [School 2] was December 1, 2014.

¹⁰ Staying on task with little or no direction strikes me as inconsistent with going off task if the Student is not kept from negative behavior.

¹¹ The record does not reveal the discussions or outcome of this conference, except that it did not result in the scheduling of an IEP meeting.

69. On December 5, 2014, XXXX XXXX, one of the Student's [School 2] teachers, called the Father. The Student had been absent for a few days and she asked what was wrong. The Father told Ms. XXXX that he was thinking of a different placement for the Student because he did not think [School 2] was working for her and that he wanted a meeting with the Student and XXXX XXXX. Ms. XXXX assumed that the Father wanted a meeting for his "personal knowledge." She did not inquire whether he wanted an IEP meeting. Unless a parent specifically asks for an IEP meeting, Ms. XXXX assumes the parent wants an informal conference. The Father did not specifically ask for an IEP meeting, nor did he use the words "informal meeting." Ms. XXXX did not ask the Father why he thought the program was not working out, nor did she clarify whether he wanted an IEP meeting.

70. At an informal meeting, the Father and school personnel may discuss the Student's education, but they cannot make changes to the IEP. Only at an IEP meeting may an IEP team decide to make changes to a student's IEP.

71. Immediately after Ms. XXXX's conversation with the Father, she texted Mr. XXXX to say that the Father wanted an informal meeting. Mr. XXXX called the Father, who said that [School 2] was not working out and he wanted to talk about other options.¹² Mr. XXXX offered to discuss transportation options to get the Student to school. The Father responded that transportation was not the problem and it would not make a difference if [School 2] arranged for daily taxi service. Mr. XXXX did not schedule an IEP meeting to discuss the Student's attendance problem or the Father's request to explore other options.

¹² Mr. XXXX and the Father had only one other conversation about a peer the Father (or the Student) wanted to invite to his house.

72. On December 12, 2014, [School 2] sent another form letter about the Student's attendance and, again, advised the Father that he could request a meeting to discuss the problem. The Father did not respond to the letter.

73. Ms. XXXX again called the Father on December 17, 2014, to find out when the Student would return. The father told Ms. XXXX that [School 2] was not working out. BCPS did not convene an IEP meeting to find out why the Father believed [School 2] was not going to work out or to discuss options.

74. Mr. XXXX assumed that the Student was not attending school because the Father did not like the peers the Student was hanging out with and thought [School 2] was not going to work out. Mr. XXXX did not consider doing anything to improve the Student's educational program, believing that if she was not going to attend school, he saw no point. Also, Mr. XXXX believed that [School 2] need not hold an IEP meeting to address a student's attendance and [School 2]'s practice was to wait for twenty consecutive absentee days after which it would consider the Student suspended from special education. Mr. XXXX believed the Student's attendance problem was "further reaching" than [School 2] could deal with. He did not do a home visit because he thought a visit would be fruitless because the Father said that [School 2] was not working out.

75. During the second reporting period, from October 30, 2014 to January 16, 2015, the Student was present at [School 2] eleven days and absent thirty four days.

76. The Student was absent from [School 2] due to her mental health issues (e.g. she was hospitalized three times in 2014 for injurious behavior and suicidal ideation, she had an anxiety disorder, she was unable to regulate her mood, and she had stress intolerance).

77. The Student gets anxious in school and panics when school is inaccessible. When she panics, she can become violent (e.g. the November 19, 2014 head banging incident).

78. Following the Student's twentieth consecutive day of nonattendance at [School 2], BCPS administrators declared the Student a dropout and disenrolled her from BCPS. BCPS transmitted this information to [School 2], which, on January 16, 2015, unilaterally amended the Student's IEP to discontinue all special educational and related services on the basis that the Student dropped out.

79. On the amended IEP, [School 2] reported that the Student was making "sufficient progress" on most academic goals, including reading comprehension, math calculation, math problem solving, and written language expression, even though she was making only "minimal progress."

80. The Student did not attend school between December 1, 2014 and her first day at the [School 1] ([School 1]) on or about June 22, 2015.

The August 4, 2015 IEP meeting

81. In May 2015, the Father asked [School 2] for a letter supporting his request for the Student's attendance at [School 1], a residential treatment center in [State], and for certain [School 2] educational records. XXXX XXXX, [School 2]'s Associate Program Director, provided the records but declined to write the letter on the basis that the Student "was successful [at [School 2]] and displayed no serious behaviors while attending our program." Parents' Ex. 38.

82. On May 15, 2015, BCPS sent the Father and others notice of an IEP meeting scheduled for June 5, 2015, "to review existing information to determine the need for additional data" and "to review and, if appropriate, revise the IEP." Parents' Ex. 41. BCPS cancelled the meeting.

83. On June 8, 2015, the Father mailed written notice to XXXX XXXX and XXXX XXXX, [School 2]'s IEP Chair, that he was rejecting the Student's placement at [School 2], that he was unilaterally placing her at [School 1] and that he was requesting that BCPS reimburse him for her special education at [School 1], including relating services and transportation.

84. On June 10, 2014, the Father signed an admissions agreement for the Student to attend [School 1].

85. The Student started attending [School 1] on or about June 22, 2014, without BCPS' agreement and at her parents' expense. [School 1] developed the admissions agreement so that the parents understood their responsibilities. The agreement includes an Academic Information section that the Father completed. The Father wrote that the Student dropped out of [School 2] in November 2014. The Father did not intend to use the legal definition of the term dropout; rather, he meant to convey only that the Student stopped attending school, not that she abandoned secondary education.

86. BCPS scheduled an IEP meeting for June 10, 2015, then cancelled the meeting and rescheduled it for June 26, 2015.

87. On June 19, 2015, the Student's attorney, Mr. Steedman, advised Ms. XXXX, the IEP Chair at [School 2], that he would be representing the Student at the June 26 IEP meeting. The Father and Mr. Steedman appeared for the meeting at the assigned date, time and place, but no one from BCPS showed up. The Father e-mailed Mr. XXXX, who responded that the Father had received an invitation to the June 26, 2015 meeting in error and that Mr. XXXX was still waiting for the Father's response to a letter the Father should have received from BCPS' attorney. Mr. XXXX asked the Father to contact him about his availability for a meeting on one of the dates offered in the letter from the attorney. The Father, however, had not received the attorney's

letter, dated June 17, 2015, because it had been incorrectly addressed. After Mr. XXXX's e-mail to the Father, BCPS's attorney, Ms. Wyles, e-mailed the Father a copy of the June 17, 2015 letter and asked him to confirm his mailing address. The Father received the e-mail and attached letter, in which BCPS denied the Father's request for reimbursement for the Student's unilateral placement at [School 1]. On June 26, 2015, BCPS corrected the address and re-mailed the letter. Thereafter, the Father received the letter.

88. On June 29, 2015, the Student underwent a psycho-social assessment at [School 1]. The Father reported to the assessor, XXXX XXXX, that the Student had dropped out of [School 2]. The Father did not intend to use the legal definition of the term dropout; rather, he meant to convey only that the Student stopped attending school and not that she abandoned secondary education. Consistent with previous diagnoses, Ms. XXXX, in consultation with Dr. XXXX, diagnosed the Student with depressive disorder, not otherwise specified; anxiety disorder, not otherwise specified; and attention deficit disorder, combined type. The diagnoses were formed from the Student's reports, the parents' reports, and educational and medical records.

89. BCPS and Mr. Steedman agreed to reschedule the IEP meeting for July 13, 2015. For an unspecified reason, the meeting did not take place.

90. On July 20, 2015, Ms. XXXX administered the Woodcock-Johnson III to the Student to test her present levels of performance.¹³ Ms. XXXX produced a summary of the results and the specific test scores.

91. The Woodcock-Johnson revealed the following results:

- a. The Student's visual processing and short-term memory were in the high-average range.

¹³ BCPS witnesses testified correctly that Ms. XXXX did not use the most recent version of the Woodcock Johnson. They did not testify, however, that using an earlier version gave an inaccurate assessment of the Student's present level of performance.

- b. Her long-term retrieval, auditory processing, fluid reasoning, and processing speed were in the average range.
- c. Her comprehension-knowledge score was in the low-average range.
- d. Her academic skills were in the low average range.
- e. Her fluency with academic tasks and her ability to apply academic skills were average.
- f. Her comprehension-knowledge score was in the average range.
- g. Her broad reading, basic reading skills, reading comprehension, brief reading, math reasoning and brief writing displayed low average intelligence.
- h. Her broad mathematics, math calculation, brief mathematics, broad written language and written expression were average.
- i. The Student's "achievement is significantly lower than predicted in the area of academic knowledge."

92. On July 15, 2015, Dr. XXXX developed a Master Treatment Plan. The plan addressed the Student's anxiety:

During her enrollment at [School 1], [the Student] will identify and begin to understand the nature of her worries, fears, and/or anxiety, as well as the link between ineffective thought patterns and resulting anxiety. She will learn strategies for challenging distorted thinking and for creating more effective thinking patterns that lead to a reduction in the frequency and intensity of anxious feelings. By engaging in the therapeutic processes of individual, group, and family therapy, she will begin to make significant progress toward resolving key issues that relate to the source of her anxiety or fear. Becoming immersed in the academic, social, therapeutic and family-like atmosphere of the program will provide opportunities for growth and progress toward increased confidence, better problem-solving ability, improved self-care, and the development of necessary life-skills.

Parents Ex. 55, pps. 83-84. The treatment plan also includes goals for oppositional behavior, identity issues, social problems, and parent-child relationship issues.

93. On July 29, 2015, BCPS initiated a telephone conference with the Father, Mr. Steedman, Ms. Percival, Mr. XXXX, Ms. Wyles, XXXX XXXX, [School 1] therapist, XXXX XXXX, [School 2] School Psychologist, and XXXX XXXX, [School 1]'s Educational Director. [School 1] staff described [School 1]'s program in general, the Student's program in particular, and the Student's experience during the sixteen or eighteen school days she had attended [School 1] thus far.¹⁴ BCPS invited [School 1] staff to attend the August 4, 2015 IEP meeting. Ms. XXXX told BCPS that [School 1] staff would be unavailable due to a school-wide camping trip. No one asked to postpone the meeting to a time more convenient for [School 1] staff.

94. The following people attended the August 4, 2015 meeting: the Father; XXXX XXXX, Mr. Steedman and the Student's other attorney, Ms. Percival; XXXX XXXX; XXXX XXXX; and Ms. Wyles. [School 1] staff could not attend the meeting because they were on an annual school camping trip. On the day of or day before the meeting, the team received about thirty-five pages of documents from [School 1], which the team considered.¹⁵

95. The IEP team recommended that the Student attend an eleven or twelve-month day program; accordingly, it did not recommend that she return to [School 2] since it is only a ten-month program. Mr. Steedman advised the team that the Student needed a residential placement.

96. BCPS members of the IEP team rejected the request for residential placement and approved the Student to attend an eleven-month private day school. BCPS suggested four possible private placements: [School 5], [School 7], [School 8], or [School 3]. [School 7] ends at the 8th grade, and its high school students go to [School 8]. The only significant difference between the private placements and [School 2] is that the private placements are eleven-month

¹⁴ [School 1]'s grading period ended on July 17, 2015 and school had not resumed at the time of the conference call. Staff did not see the Student in the interim.

¹⁵ The Student had only recently started at [School 1] and it appears that the school sent BCPS all of her records.

programs, they accept students from any public agency, and they do not have to follow the BCPS academic calendar.

97. [School 5] has a high school program in which every student has an IEP. The school has two academies: one for diploma bound students and one for certificate bound students. The student population has a variety of disabilities, including emotional disorders. The school has crisis intervention for students with an emotional disorder; it implements positive behavior intervention systems in which students can earn virtual money to use in the school store and café, etc. [School 5] provides related services, on site, to support the curriculum, including a psychiatrist, a psychologist, a social worker, a speech language therapist, physical therapy, occupational therapy, and nurses. The staffing ratio is two adults to eight to thirteen students, depending on the academy. The school accepts BCPS students. The school does not have a residential program.

98. [School 3] serves kindergarten through twelfth grade, and its students are primarily on the autism spectrum, although some students have emotional disorders and are other health impaired. Some students have an anxiety disorder. The school has clinical support and the full complement of related services. It provides immediate crisis intervention, including a social worker who ensures wraparound services (i.e. mental health services, respite for family, and ensuring that the family has sufficient medication). Staff would work with the Student's family to see what supports are available in the morning to get the Student to school. The Student would receive counseling at school and would work on her generalized anxiety. If the Student's attendance did not improve, [School 3] would schedule an IEP meeting.

99. [School 8] serves students ages fourteen through twenty-one in grade nine through twelve. It has a day component only. It has nursing services on site. It offers a range of related

services, including individual, group, and family counseling; speech and language therapy; crisis intervention; occupational therapy; and physical therapy.

100. The Father rejected a day placement on the basis that the Student required a residential placement to ensure her attendance at school.

101. The IEP team acknowledged that the Student needed an attendance goal, which it added to the IEP. The goal calls for 95% attendance.

102. The team agreed to but did not add a goal specifically addressing the Student's anxiety, which was impacting her ability to attend school and receive educational benefit.

103. The team considered the results of the July 20, 2015 Woodcock-Johnson III. The goals and objectives do not necessarily correlate with the Student's test results. For example, even though the Student's then present level of performance in math calculation was 13.0 (i.e. above the level of a twelfth grade peer], the corresponding IEP goal calls for her to reach a mid-sixth grade level.

[School 1]

104. [School 1] is accredited by XXXX Accreditation Commission and reaccredited every six years.

105. XXXX XXXX is the Academic Director.

106. The 35-acre campus has school buildings and homes. [School 1] has a "teaching family model" that relies heavily on supervision and consultation. [School 1] has three components: academic, therapeutic and residential.

107. [School 1] has 210 school days in a calendar year.

108. [School 1] has 70 students on campus. About 30% of the students have IEPs.¹⁶

109. For the first week the Student attended [School 1], she was very anxious and tearful, and manipulative to staff and her parents. She wanted to go home to Baltimore, but her parents refused. She was not motivated to engage in any activities, especially academics. In the next two weeks or so, she was overwhelmed and reluctant to try school assignments. She said she did not understand the work and gave up easily. She received a zero on a math test because she gave up, or "shut down."¹⁷ In class, the Student refused to do even simple tasks. Even a task as simple as putting her name on paper made her shut down.

110. The Student is manipulative at her [School 1] home (as she was with her family in Baltimore) and at school when she does not get what she wants.

111. The Student lives on the [School 1] campus in a house with nine other students and a married couple – “the family teachers” – and their child. Family teachers receive training, including shadowing another family teacher, and they undergo a background check. The family teachers live in the home and run the home. Family teachers have supervisors on call and they undergo an external review. The goal is to set up a home that mirrors a regular home and to make transitioning easier and healthier for the Student and to eventually return the Student to her family. Residential staff role play how to better handle situations.

112. The Student’s family teachers, XXXX XXXX and XXXX XXXX, work under the supervision of XXXX XXXX, Residential Supervisor. The residential supervisor convenes a monthly meeting to review the Student’s progress in the residence.

¹⁶ Some students have an individual learning plan, or ILP. An ILP is a plan for a student who has some needs for which teachers need to make accommodations. The Student does not have an ILP, nor is there any argument that she should have one.

¹⁷ Shutting down was an oft-used term to describe how the Student gives up, disengages, refuses to participate, becomes anxious, screams, cries, is unable to calm herself, etc.

113. The Student has breakfast in the home and does chores.
114. She walks to school.
115. [School 1] operates on a token economy that is based on points that a student earns for positive behavior. Both residential and academic staff use the point system.
116. [School 1]'s core teachers are certified in their respective core areas and many hold dual certifications in special education; each academic department has a special education teacher.
117. The Student's English, math and science teachers are certified in special education. The school's special education director also teaches a study skills class that the Student attends.
118. Certain courses are not taught by a special educator, including gym and consumer math (i.e. hands on financial literacy around math applications in the real world).
119. The Student has a full-time academic schedule at [School 1].
120. Her classes have an average of eight to ten students and, for licensure purposes, no more than twelve students.
121. Her schedule includes library time and one hour of homework per day.
122. [School 1] has two behavior specialists in the hallway at school to help the Student if she is anxious and cannot remain in the classroom.
123. XXXX XXXX, Clinical Mental Health Counselor, started working with the Student in June 2015 at [School 1]. The Student has one hour per week of individual therapy, one hour per week of family therapy, and ninety minutes per week of group therapy.
124. Individual therapy addresses the Student's anxiety in interpersonal relationships at school and with parents and her depressive issues. Ms. XXXX also does cognitive therapy to identify the Student's thought belief roadblocks. The Student expresses anxiety regarding her relationships, that she is a failure and that people do not like her; these irrational thoughts and

beliefs affect her at home and at school, where she becomes anxious and overwhelmed and says that she cannot do the work. At home and school, she has a lack of control over herself. She had difficulty accepting consequences and would tend to argue and had difficulty with social skills. When she started at [School 1], she refused to do tests and would instead accept a zero grade.

125. The Student has difficulty with executive function (e.g. concentrating, paying attention, feeling overwhelmed, initiating tasks, prioritizing, controlling emotions, flexibility). The Student works on executive functioning in study skills class, and she is making progress. .

126. Ms. XXXX consults weekly or bi-weekly with everyone who works with the Student, including the family teachers. Staff meets monthly to assess the Student's progress.

127. The Student is improving her coping skills when she becomes anxious.

128. The Student is working on social skills in group therapy, she is accepting the answer "no," she is learning how to accept consequences, she is accepting boundaries, and she is worrying less about other people's problems.

129. The Student has a poor self-image and low self-confidence that affect her ability to make educational progress. She feels that she cannot do the work and is a failure. The Student is improving with therapy, and she is starting to recognize that she can do the school work.

130. At [School 1], the primary goal of family therapy for the Student and her parents is to "[i]ncrease ability to build and maintain relationships and increase ability to cope with and understand thinking and feeling to resolve anxious feelings." BCPS Ex. 90.

131. After school, the Student meets with her homeroom teacher and then goes to her [School 1] home for a 90-minute group session three days per week.

132. After the group session, the Student has free time. She may, for example, go horseback riding if she has earned the privilege, or she may go to the gym.

133. Sometimes the Student goes grocery shopping. The Student starts preparing for bed around 9:00 or 10:00 p.m.

134. XXXX XXXX, M.D., conducted a psychiatric evaluation of the Student on July 16, 2015 at [School 1]. The Student reported problems she had at home over the prior two years (e.g. cutting herself, sneaking out of the house, getting drunk, feeling bullied by friends, friends calling her names and spreading rumors about her, and having psychiatric hospitalizations). The Student further reported that she was doing better recently, but her parents sent her to [School 1] anyway.

135. At [School 1], the Student is working on and making progress on her social emotional functioning.

136. The Student is participating in individual, group, and family therapies as recommended at [School 1], and she is making progress on her treatment plan goals.

137. In the home setting and in group therapy, she is learning social skills and how to regulate her emotions.

138. For the first term of the 2015-2016 school year, the Student's schedule included algebra, consumer math, geometry, math tutoring, earth science, English, interpersonal growth and family development, study skills and physical education. On Fridays, she is involved in various clubs of her choice (e.g. art, gardening, swimming, Zumba, or American Sign Language).

139. In study skills, the Student works on executive functioning (e.g. organization, task initiation, emotional control, flexibility, prioritization), which helps her succeed in the classroom. The Student has good attendance in this class and other activities.

140. At [School 1], the Student has learning challenges. Anxiety impacts her ability to consistently attend school; ADHD and her emotional disorder impact ability to access the

general education curriculum. [School 1] had not yet observed a specific learning disability, notwithstanding a prior diagnosis.

141. [School 1] is dealing with the Student's anxiety so that she does not deteriorate behaviorally and her behavior does not interfere with the classroom. Because she is now accessing school, she is learning that she can do school and that is improving her self confidence.

142. When the Student first arrived at [School 1], her anxiety level was high and she required many breaks in the school day. The Student is permitted to ask a teacher for a 2-5 minute break; if so, she meets in the hallway with a behavior management specialist to de-escalate her anxiety. If she needs a longer break, she can go to a room to sit quietly and de-escalate. These tools effectively address her anxiety. The Student used to escalate two to three times a day and go to the hallway for up to 30 minutes; as of the end of October 2015, the Student escalated one to two times per week and she used the hallway for two to five minutes.

143. On September 17, 2015, XXXX XXXX convened a meeting with various staff members¹⁸ to review the Student's progress in the residence. The Student was making progress and had areas of continued need:

- a. Clinical review: The Student was progressing in several areas, including accepting feedback in therapy and problem solving for herself. She continued to need to recognize her own self-control, self-efficacy, and recognize others' perceptions to gain more respect, tolerance, and understanding of control.
- b. Residential review: The Student made:

[i]mprovements in her ability to say okay to family teachers and associates when they are speaking with her. She has improved in her ability to ask less questions that she knows the answer to. She is also making improvements in

¹⁸ Staff included XXXX XXXX; XXXX XXXX and XXXX XXXX, the Student's Family Teachers; XXXX XXXX, Associate Family Teacher, who works in the residence under the Family Teachers; and XXXX XXXX, Association Family teacher.

her ability to accept consequences by staying calm and writing consequences on her skill card. [The Student] has shown some slight improvements in her ability to admit to her mistakes when she has made them.” She continued to need “to improve in her ability to not argue with family teachers and associates when receiving no as an answer. She also needs to improve in being more assertive with the requests she makes with family teachers and associates and ensure she isn’t asking for things that aren’t needs or asking for too many things all the time. She needs to also improve in her ability to accept feedback from her peers.

Parents. Ex. 64

144. On September 6, 2015, the Student had a serious incident at [School 1]. She earned a negative consequence for not following instructions. She started to argue about the consequence, and she was issued another consequence. She argued again. Staff asked her to go upstairs to the landing. She complied but was very upset. The Student started yelling and went in the bathroom and threatened to kill herself. Staff directed her to come out of the bathroom which she did after several minutes. Staff conducted intensive teaching for about 35 minutes until the Student was calm and ready to go back to her peers. The Student contracted for safety.

145. As of September 29, 2015, the Student was “increasing her ability to cope with and understand thinking and feelings to resolve anxious feelings. She is also working on increasing her understanding of rules, boundaries and authority figures and [her ability to] learn to interact appropriately with them.” Parents Ex. 67.

146. Between August 4, 2015 and October 2, 2015, the Student had near perfect attendance at [School 1]. She missed only geometry class on September 9, 2015, consumer math on September 15, 2015, and earth science on September 14, 2014.

147. The Student is making educational progress at [School 1]. [School 1]’s highly collaborative system, where staff members immediately communicate important issues to each

other, helps the Student understand expectations; meet her therapeutic needs; and regulate her emotions. She can now recognize her emotions before they become crippling.

General facts

148. An IEP team may need to amend an IEP during the school year, depending on a student's progress. When drafting an IEP, however, the team should consider where the student will likely be in a year, so that the team does not need to continuously amend the IEP; on the other hand, the bar should not be set so high that the student cannot achieve his or her goals and objectives.

149. A student's performance, not the student's grade, dictates the IEP.

150. The Student's anxiety in the classroom caused her to score higher on standardized tests than she performs in the classroom.

151. Because the Student has average cognitive ability, she can probably achieve one year's growth in one school year with appropriate special education and related services.

152. The Student needs specialized instruction for the entire academic day in a small group placement.

153. When the Student feels pressured, she thinks about self harm and suicide.

154. Anxiety is the primary impediment to the Student accessing school. She has obsessive thinking and, then, she panics and makes herself completely unable to access education.

155. The Student has mental health and educational diagnoses (significant learning disabilities) that feed off each other and cause her to have anxiety and mood dysregulation that, in turn, lead to inappropriate behaviors.

156. The Student has personality characteristics that allow her to divide people and pit them against each other that, in turn, prevent her from receiving education.

157. She cannot participate in education unless rules are consistency applied that follow her across all domains, including home and school. In a residential setting, staff communicates with each other as soon as there is a problem and staff then consistently deals with problems.

158. Treatment for the Student's panic attacks and irrational/obsessive thoughts must be implemented in the classroom. When the Student has a panic attack, she acts out and can get aggressive (i.e. the head banging incident) or she does not engage (i.e. when she left the GED site).

DISCUSSION

The Student is seeking reimbursement for her unilateral placement at [School 1] beginning on June 22, 2015, due to BCPS's alleged failure to provide FAPE in her 2014-2015 school year at [School 2]; for compensatory education for BCPS' alleged failure to provide FAPE during the 2014-2015, at [School 2]; and for reimbursement for the Student's unilateral placement at [School 1] under the August 2015 IEP, on the alleged basis that the IEP is not reasonably calculated to provide FAPE. Because the Student is seeking relief, she bears the burden of proof. *Schaffer*, 546 U.S. at 56-58. The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). For the reasons that follow, I find that the Student met her burden on her requests for reimbursement but not on her request for compensatory education.

Legal Framework

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (2010), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 and Supp. 2015), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a free appropriate public education (FAPE). 20

U.S.C.A. § 1412(a)(1). “Appropriate” means personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Clearly, no bright line test can be created to establish whether a student is progressing or could progress educationally; rather, the decision-maker must assess the evidence to determine whether the student’s IEP and placement were reasonably calculated to enable him or her to receive appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991).

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

Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court stated as follows:

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

458 U.S. at 200-201. The *Rowley* court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities: first, was there compliance with the procedures set forth in the IDEA; and, second, is the IEP reasonably calculated to enable the child to receive educational benefit. 458 U.S. at 206-207. See also, *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 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 non-public, that money can buy” or “all the 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.

Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or received passing marks, since it is quite possible that a student can advance in grade from year to year without gaining educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991) (finding that a student's passing grades and advancement does not resolve the inquiry as to whether a FAPE has been afforded to the student). Similarly, a finding that a student is not progressing at the same speed as his or her peers does not shed light on whether a student has failed to gain educational benefit. As discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically from those obtained by another student, depending on the needs that are present in each student. 458 U.S. at 202.

An IEP is the "primary vehicle" through which a public agency provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax County School Bd.*, 553 F. 3d 315, 319 (4th Cir. 2009). The IEP "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *M.M. v. School District of Greenville County*, 303 F. 3d 523, 527 (4th Cir. 2002); *see* 20 U.S.C.A. § 1414(d)(1)(A). "At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP."

An IEP team collaborates to develop and review an IEP. The public agency is responsible for ensuring that the team includes the student's parents; a regular education teacher if the student is or may participate in regular education; the child's special education teacher;

and, at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and when appropriate, the child with the disability.¹⁹ 34 C.F.R. § 300.321(a).

An IEP shall include “[a] statement of the child's present levels of academic achievement and functional performance, including” and, specifically, “[h]ow the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children).” 34 C.F.R. § 300.320(1). If a child’s behavior impedes his or her learning or that of others, the IEP team, in developing the child’s IEP, must consider, if appropriate, development of strategies, including positive behavioral interventions, strategies and supports to address that behavior, consistent with 34 C.F.R. 34 C.F.R. § 300.324(a)(2)(i). A public agency is responsible for ensuring that the IEP is reviewed at least annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision. 34 C.F.R. § 300.324(b).

BCPS denied the Student FAPE during the 2014-2015 school year

The parties stipulate that the Student’s September 30, 2014 was reasonably calculated to provide FAPE at the time it was drafted. The parties disagree about whether it continued to provide FAPE over time at [School 2]. The Student asserts that she was denied FAPE because BCPS did not address her attendance issues, did not conduct an FBA at [School 2] as the

¹⁹ The Student stipulated that no procedural violations were committed in anticipation of the August 4, 2015 IEP. She nevertheless argued that BCPS did not fulfill its responsibility to schedule the IEP meeting at a time that [School 1] staff could attend. Notwithstanding the stipulation, I find that, at worst, BCPS committed a harmless procedural error. BCPS convened a conference call with [School 1] staff, the Father, and Mr. Steedman on July 29, 2015, at which time BCPS received detailed information about [School 1] and the Student’s program. Neither the Father nor Mr. Steedman asked to postpone the August 4, 2015 meeting to permit [School 1] staff to attend. The evidence does not show that the IEP team was impaired by the absence of input from [School 1] staff. BCPS had 35 pages of documents from [School 1] about the Student. If any member of the team, including the parents, thought that information was lacking, it could have asked to continue the meeting to obtain the information. In fact, the Father testified that a postponement was not necessary because the team had all the necessary information from [School 1].

Student's IEP team had recommended; and improperly labeled her a dropout, all of which resulted in her parents' decision to unilaterally place her at [School 1], a private residential school. BCPS responded that it had ample reason to consider the Student a dropout and residential placement is needlessly restrictive.

When the Student started at [School 2], the parents were satisfied the goals and objectives on her IEP were reasonably calculated to provide FAPE, and the Father was hopeful that [School 2] could meet her needs. Beyond that, the parties disagree about nearly every aspect of the Student's time at [School 2], including the date she first attended and the number of days she was present. An administrative assistant at [School 2] who identifies himself as Mr. XXXX wrote, in one letter, that the Student enrolled on October 23, 2014 and, in another letter, that she started on October 30, 2015. The year 2015 is obviously incorrect and even the Student agrees that she started before October 30. The Father testified that the Student started on either October 21 or 23. [School 2]'s attendance record for the entire school year, August 18, 2014 through June 2, 2015, shows that the Student was present for eleven days and absent for thirty four. Her precise first day of attendance immaterial. The fact remains that the Student attended either eleven days, as she claims, or seventeen, as BCPS claims. In either event, the Student's attendance was problematic and made it impossible for her to achieve educational benefit.

BCPS and [School 2] personnel knew that the Student had a history of attendance problems at [School 7], and BCPS knew she sometimes refused to participate in Home and Hospital teaching. This is an important point because BCPS was on notice that any attendance problems at [School 2] were typical for the Student. Thus, it had every reason to be especially attentive and responsive to her attendance at [School 2].

The Student had poor attendance immediately after starting at [School 2]. She was absent ten of the first twenty days. The Student did not return to [School 2] after December 1. XXXX XXXX, Senior Director of [School 2], and an expert in special education administration, special education instruction of students with emotional disabilities, special education academics and instruction, and IEP process, procedure and implementation, testified about the school's protocol for dealing with attendance. First, a student's teacher will call the parents. Second, staff will send the parents a letter about the problem. Third, staff will conduct a home visit.

XXXX XXXX, one of the Student's teachers at [School 2], called the Father on December 5, 2015 to inquire when the Student would be returning to school. The Father told Ms. XXXX that he did not think [School 2] was working out and that he wanted a meeting with Mr. XXXX to discuss placement options. Ms. XXXX did not ask why the Student was not attending school and she did not specifically inquire whether the Father wanted an informal meeting or an IEP meeting. Rather, she assumed the Father wanted an informal meeting. Ms. XXXX explained that, unless a parent specifically uses the buzz words "IEP meeting," she believes that the parent is only asking for an informal meeting. Also, she stated that it is not her responsibility to set up an IEP meeting.

A parent is surely not responsible for knowing the proper legal terminology or for realizing that he or she needs to differentiate between an informal meeting and an IEP meeting. At the very least, someone at [School 2] should have explained the difference and asked the Father exactly what he wanted. What the Father meant was obvious – he did not think [School 2] was an appropriate placement. An appropriate placement cannot be decided outside of an IEP meeting, BCPS cannot avoid responsibility for failing to schedule an IEP meeting just because the Father did not use the correct buzz words.

After Ms. XXXX talked to the Father, she texted Mr. XXXX about their conversation. Mr. XXXX called the father and offered to make transportation arrangements other than the bus. The Father responded that the bus was not the problem. Mr. XXXX did not ask why the Student was not attending and he did not offer to schedule an IEP meeting to discuss attendance or placement options.

Mr. XXXX then spoke to Mr. XXXX about the Father's request. Mr. XXXX reported that the Student was having attendance problems. Nevertheless, Mr. XXXX did not take further action because Mr. XXXX said he had a good working relationship with the Father and Mr. XXXX was trying to work things out. Mr. XXXX did not know what efforts Mr. XXXX had made, other than sending letters to the Father and talking to him. I cannot fault Mr. XXXX for wanting to work things out or Mr. XXXX for leaving the communications to Mr. XXXX. The problem is that, at some point, when informal efforts did not work out, BCPS should have convened an IEP meeting to consider the Father's concern that [School 2] was not working out and, more specifically, to address attendance issues.

Ms. XXXX, [School 2]'s IEP Chair, testified that if a teacher told her that a parent stated that [School 2] is not working and the parent wants to discuss placement options, she would call the parent to find out whether the parent wants an IEP meeting. No one at [School 2], or from BCPS, ever made such an inquiry to the Father.

Ms. XXXX testified that only action taken at a "formal meeting" - that is, an IEP meeting - may result in changes to an IEP and, conversely, discussions at informal meetings, about behavior, interventions, and academics, do not result in IEP changes. If only an IEP team can make placement decisions and the Father wanted to discuss placement options, it is axiomatic that BCPS should have convened an IEP meeting. A school system cannot ignore its obligation

to convene an IEP meeting to consider changes under the guise that it was only conducting an informal meeting, which, incidentally, [School 2] never convened.

Ms. XXXX made a second call to the Father on December 17, 2015, again asking when the Student would return. The Father told her that [School 2] was not working out. Ms. XXXX did not ask why it was not working out. Nothing came of this conversation.

Mr. XXXX acknowledged that attendance was a problem. His staff therefore sent the Father letters offering him the opportunity to request a meeting to discuss the Student's attendance. The Father denied receiving the letters. Assuming the Father received the letters, or even if he did not, when [School 2] did not hear from the Father, it should have moved to the third step in the protocol that Mr. XXXX articulated: a home visit.

Mr. XXXX testified that making a home visit would have been "fruitless" because the Father had already said he did not think [School 2] was working. Mr. XXXX's decision not to order a home visit is troubling. First, he did not testify that a home visit is only necessary when [School 2] believes a visit will bear fruit. Second, no one at [School 2] every inquired why the Father thought [School 2] was not working.

In addition to testifying about what [School 2] does to address absenteeism, Mr. XXXX testified about what [School 2] does *not* do. That is, [School 2] does not schedule an IEP meeting to address the attendance of even a child with known special needs. Mr. XXXX testified that dealing with attendance is beyond [School 2]'s reach. Interestingly, Mr. XXXX did not say that [School 2] had exhausted all reasonable efforts to ensure the Student's attendance and the problem was simply beyond the school's reach. On the contrary, he said more generally that attendance problems are beyond the school's reach. Mr. XXXX's own staff and BCPS disagree with him.

Mr. XXXX, [School 2]'s Associate Program Director and an expert in special education administration, special education academics and instruction, and IEP procedure and implementation, testified about the protocol for addressing attendance problems. The first intervention is to call home and possibly have an informal meeting to talk to the parents and the student to find out what is happening, and if those efforts fail and a student is absent for ten or fifteen consecutive days, [School 2] should call an IEP meeting. Mr. XXXX did not say that an IEP meeting was only necessary if the Father specifically asked for one.

Mr. XXXX, BCPS' Nonpublic Liaison/Educational Associate for the Office of City Wide and Nonpublic Placement, and an expert in special education academics and instruction, nonpublic placement, and IEP process, development and implementation, testified unequivocally that [School 2] should have called an IEP meeting to address the Student's attendance problem.²⁰ Mr. XXXX did not say that an IEP meeting was only necessary if the Father specifically asked for one.

Thus, at a minimum, [School 2], on BCPS's behalf, should have, but did not, perform a home visit and schedule an IEP meeting.

Mr. XXXX testified that he might have called an IEP meeting if someone had alerted [School 2] that the Student was not attending school because of anxiety. BCPS and [School 2] knew the Student had an anxiety disorder. She was on medication for anxiety when she started at [School 2], and she was hospitalized three times earlier in the year. [School 2] knew that, on November 19, 2014, the Student had a panic attack in which she repeatedly banged her head on the wall. Had [School 2] convened an IEP meeting, as BCPS expected it to do and as Mr. XXXX said it should have done, [School 2] would have learned about why the Student was not

²⁰ Mr. XXXX testified that another option for compelling a student's attendance is for the school system to seek a court order. BCPS did not consider this option and the Student is not contending it should have.

attending school. Instead, as Mr. XXXX said, [School 2] waited for the Student to miss twenty consecutive days and then dismissed her from special education.

Mr. XXXX impressed me as someone who earnestly wants to do a good job, and he was forthcoming and honest at the hearing. I am nevertheless bewildered by his testimony that he does not know why the Student did not attend school. Mr. XXXX talked to the Father; yet he did not deem it necessary to ask *why* the Student was not attending. It is indefensible to not ask why the Student is not attending school while you are having a conversation with her parent about her nonattendance.

Mr. XXXX was asked who decides whether to call an IEP meeting. He responded that it is not any one person and [School 2] would call the parent to find out what he/she wants. He testified that no one made such a call to the parents because the Father was already in touch with Mr. XXXX about the Student's attendance. Mr. XXXX was apparently unaware that Mr. XXXX did not offer the Father an IEP meeting because Mr. XXXX believed that [School 2] did not need to have IEP meetings to deal with attendance issues. When asked what [School 2] did to address the Student's attendance issues, Mr. XXXX answered that he really cannot say because he was not directly involved.

Holding an IEP meeting to address the Student's attendance problem is surely common sense. To dismiss attendance as beyond [School 2]'s reach, without first exhausting all reasonable avenues for change, is beyond the pale. If a student does not attend school, he/she is doomed to make no progress on an IEP – or at best minimal progress as [School 2] claims the Student made in the eleven or seventeen days she was present in school. As [School 2] pointed out in attendance letters addressed to the Father, attendance is crucial. I therefore conclude that [School 2] denied the Student FAPE when it did not adequately address her attendance problem.

It is even more disconcerting that BCPS declared the Student a dropout following her twentieth consecutive day of nonattendance and dismissed her from special education. Maryland regulations define dropout as:

(1) A student who terminates the student's formal education is a dropout. A dropout is defined as a student who, for any reason other than death, leaves school before graduation or the completion of a Maryland-approved educational program (including a special education program) and is not known to enroll in another school or State-approved program during a current school year.

(2) A dropout includes a student:

(a) Who drops out for the reasons as identified in the Maryland Pupil Attendance Register;

(b) Who leaves school and enters a program not qualifying as an elementary/secondary school;

(c) Of any age who drops out;

(d) From special education who drops out.

(3) A dropout does not include a student:

(a) Who dies;

(b) Out of school for temporary periods, for example, extended suspension, reinstatements of expulsion during the school year, or extended illness;

(c) Who transfers to another public elementary/secondary school, to another State-approved elementary/secondary educational program that continues the student's education, or to a nonpublic elementary/secondary school;

(d) Transferred to another public institution with an educational program;

(e) Placed at another grade level.

COMAR 13A.08.01.07C.

MSDE imposes certain obligations on school systems who declare a student a dropout, as follows:

Each local school system shall develop and implement a procedure to conduct an educational interview with all students who leave school before graduation, or with their parent or guardian, or all of the above. At a minimum, the interview should encourage the student to remain in the student's current school program or enroll in an alternative school program, verify the reason, or reasons, for a student dropping out of school, and ensure that the parent or guardian is informed.

COMAR 13A.08.01.07E. BCPS did not offer any document or other evidence of its procedure for addressing a possible dropout, as mandated by the regulations. The procedure for addressing nonattendance (i.e. first attempting a telephone conversation with the parents, following up with letters, conducting a home visit and, in the case of the Student, scheduling an IEP meeting) is different from addressing her as an alleged dropout. The regulation specifically mandates a procedure for someone who has left school before graduation, not someone who is in danger of leaving school before graduation due to nonattendance or other reason. Moreover, the evidence does not support a finding that the Student dropped out, as the regulation contemplates.

As proof that the Student dropped out, BCPS presented evidence that when the Father waved the school bus away in the morning, he was essentially identifying her as a dropout. Mr. XXXX testified that he talked to the bus company, which confirmed that the Father waved away the bus, and he believes the Father prohibited the Student from getting on the bus to go to school. The Father testified that he waved the bus away because he saw no value in making the bus wait when the Student was still in bed.²¹ Also, the Father's statement to Ms. XXXX that he did not think [School 2] was working out and that he wanted to discuss placement options undermines any claim that the Student dropped out.

As further evidence that the Student dropped out, BCPS points to the [School 1] admissions agreement, on which the Father wrote that the Student dropped out of [School 2] in November 2014. The Father's use of the term dropout was colloquial – that is, he meant to

²¹ The Father's testimony in this regard is consistent with a statement he made at the August 4, 2015 IEP meeting.

convey that the Student stopped attending, not that she made a conscious decision to discontinue her secondary education (and certainly not that he was prohibiting her from attending school). It is disingenuous for BCPS to hold the Father to the legal definition of dropout, while at the same time not pursuing the requirements for handling dropouts. It is true that the Student stopped attending school, more likely than not because she has an anxiety disorder that impaired her ability to attend school and no one was addressing her anxiety and/or non-attendance.

The only real evidence that BCPS offered to prove that the Student made a decision not to attend school is that she did not attend school. Mere nonattendance does not mean the Student was a dropout. It is important to remember that the Student had three psychiatric hospitalizations earlier in the year and nonattendance was a problem at her prior placement. Moreover, BCPS's assertion about the willfulness of the Student's behavior is undermined by the IEP team's conclusion that the Student's functioning is characterized by depressive symptoms and a very low confidence in her ability to make decisions.

BCPS violated MSDE's mandate when, for insufficient reasons, it declared the Student a dropout and did not comply with COMAR 13A.08.01.07E. Because BCPS did not have cause to classify the Student a dropout, it should not have dismissed her from special education without complying with certain procedures.

A public agency must give parents prior written notice whenever the public agency takes certain action, including proposing to change a student's educational placement or the provision of FAPE. 34 C.F.R. § 300.503(a)(a). BCPS did not give prior written notice of its decision to discontinue all special education and related services.

Ms. XXXX, [School 2]'s IEP chair, testified correctly that only an IEP team can make changes to a student's IEP. 34 C.F.R. § 324(a)(16) BCPS unilaterally changed the Student's

IEP to discontinue services, without notice to the parents and without scheduling an IEP meeting. BCPS denied the Student FAPE by discontinuing services effective January 16, 2015.

BCPS also denied the Student FAPE when it did not consider conducting an FBA. Before the Student enrolled at [School 2], a BCPS IEP team recommended an FBA and deferred a final decision to [School 2]. The recommendation was made following IEP meetings on September 30 and October 2. The Student asserted that BCPS recommended an FBA specifically to consider the Student's nonattendance at school. BCPS disagrees that is the reason for the recommendation. The September 30, 2015 IEP does not specifically mention nonattendance as a possibly interfering behavior warranting an FBA; rather, the IEP speaks to the Student's depressive symptoms, negative self-image, low confidence in making decisions, difficulty establishing and maintaining close relationships with others, feeling lonely and misunderstood, and feeling like an outsider. Thus, these behaviors are the likely basis for the team FBA recommendation. [School 2] declined to perform an FBA on the alleged basis that it lacked sufficient data about the Student's behaviors because she had only recently enrolled there and because [School 2] staff had reported that the Student had appropriate relationships with staff and peers, rendering an FBA unnecessary.

Even if attendance was not the reason the IEP team recommended an FBA, the Student's nonattendance at [School 2] quickly became a serious problem, as Mr. XXXX acknowledged. [School 2], on BCPS's behalf, should have convened an IEP team to decide whether to do an FBA. An FBA is used to determine whether a student has behavior attributable to a disability that interferes with the student's ability to receive educational benefits. Non-attendance at school is an interfering behavior.

BCPS argued that it did not do an FBA because the Father did not ask for one. Even assuming the Father did not make such a request, BCPS's argument fails. BCPS's IEP team did not require the father to ask for an FBA. Rather, it deferred a decision to [School 2]. [School 2] staff are the experts; they did not need to wait for the Father to ask for an FBA when it became obvious that the Student's attendance interfered with her ability to receive education.

The Student's circumstance highlights the need for an FBA: ample evidence shows that her anxiety disorder prevents her from attending school and nonattendance resulted in BCPS' decision – albeit erroneous decision – that the Student had dropped out. BCPS argued that the Student is to blame for her own bad decisions not to attend school. That is one possibility. On the other hand, to say that she is to blame ignores that the Student was sixteen years old and that she had (and continues to have) serious mental health issues. At the very least, BCPS should have convened an IEP meeting to determine whether an FBA was needed to assess the voluntariness of the Student's actions

Because BCPS did not address the Student's attendance issue, the Student made only minimal progress in school. [School 2] teachers agree that the Student made "minimal" progress and that she failed courses due to nonattendance. Ms. XXXX testified that minimal progress is nevertheless progress, albeit not as much progress as [School 2] would like. Ms. XXXX is correct that there are "degrees" of progress and minimal progress falls somewhere on that continuum. BCPS is incorrect that minimal progress is all that IDEA requires. An IEP that provides the opportunity for only "trivial advancement" is insufficient and denies the student a FAPE. *Cavanaugh v. Grasmick*, 75 F. Supp. 2d 446, 456-57 (D. Md. 1999) ("[I]t is imperative that the educational placement 'be likely to produce progress, not regression or trivial educational advance'"), quoting *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.

1985); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3rd Cir. 1999) (reiterating its earlier holding in *Polk*, 853 F.2d at 182, that the “IDEA ‘calls for more than a trivial educational benefit’ and requires a satisfactory IEP to provide ‘significant learning,’ . . . and confer ‘meaningful benefit’”) (citation omitted). As recently as the start of this hearing, the Fourth Circuit Court of Appeals reiterated that “a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.” *O.S. v. Fairfax County School Bd.*, No. 14-1994 (Oct. 19, 2015).

The Student has average cognitive intelligence. BCPS is correct that the Student is *capable* of making progress with appropriate special education and related services. The converse is equally true: if the Student does not attend class, she cannot make progress. The Student did not attend after December 1, 2015, she was present, at most, seventeen days, and, according to her teachers, she slept in class. It is difficult to understand how [School 2] and BCPS can defend the degree of the Student’s progress.

Ms. XXXX testified that [School 2] did not schedule an IEP meeting to address the Student’s minimal progress on her IEP because the IEP showed that she was actually making sufficient progress. Ms. XXXX explained that [School 2] uses MSDE’s standardized online IEP document. The document has a drop down box where the Student’s teachers checked that she was making sufficient progress, which meant that an IEP meeting was not necessary, even though the teachers also commented below the dropdown box that the Student was making minimal progress. Ms. XXXX testified that when a teacher checks the box to say that a student is making sufficient progress due to nonattendance, it is not her responsibility to overrule the teacher. [School 2]’s rigid adherence to a checked box and Ms. XXXX’s “it’s not my responsibility” defense do not impress me. While Ms. XXXX may not have authorization to

overrule a teacher, someone must take responsibility for noting all of the information on the IEP, not just the checked boxes. Teachers' comments that the Student was making only minimal progress were red flags that BCPS had to but failed to heed.

While it may be true that a student with an attendance problem can nevertheless make progress, that was not the Student's circumstance. Even during the period when the Student had uneven attendance, Mr. XXXX conceded that nonattendance was affecting her ability to make educational progress. BCPS should have scheduled an IEP meeting to consider revising the Student's IEP and possibly to conduct an FBA. Disenrolling her from school and dismissing her from special education is not an acceptable response.

For all of these reasons, BCPS denied the Student FAPE at [School 2] under the September 30, 2014 IEP. The next inquiry is whether she is entitled to reimbursement for her education at [School 1].

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

The issue of unilateral placement/reimbursement was 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. *Florence County* at 12.

The parents unilaterally placed the Student at [School 1]. The Student is making educational progress at [School 1] and I therefore find it is an appropriate placement.

First and foremost, the Student is actually attending school at [School 1]. She walks herself to school and she has near perfect attendance. [School 1] is addressing the Student's anxiety, which in turn makes school more accessible to the Student. [School 1] has a highly integrated program, where academic and residential staff work to ensure that the Student is working on her academic and social/emotional needs. The Student is therefore entitled to reimbursement for the cost of [School 1], starting on June 22, 2015. The question, though, is whether she remains entitled to reimbursement starting with her next annual IEP, in which BCPS recommends a separate private day school.

BCPS argued that it stands ready to provide FAPE under the Student's most recent IEP, developed at an IEP meeting on August 4, 2015. To this end, the parties presented evidence about whether that IEP is reasonably calculated to provide FAPE. The Student stipulated that the goals are appropriate with the exception that the IEP lacks a goal to address anxiety. BCPS argued that anxiety is imbedded in coping and frustration goals.

At the August 4, 2015 IEP meeting, however, Mr. Steedman specifically asked for such a goal and Ms. Wyles responded "that's not an unreasonable request," and, later in the discussion, "we can add a separate goal of anxiety and objectives related to it." Parents' Ex. 59 p. 62, 63. Ms. XXXX concurred. Parents' Ex. 59, p. 63. Mr. XXXX confirmed, "So we're going to add the goal to anxiety." Parents' Ex. 59, p. 63. Ms. XXXX seemed to suggest that goals related to coping and frustration would also address anxiety:

[O]bjectives related to positive strategies for applying coping and problem solving skills can deal with issues related to her mood and anxiety. And then recognizing internal and external triggers to frustration – that’s definitely going to cover any mood or anxious issues that she’s having in school.

Parents’ Ex. 59, p. 70. Whether addressing anxiety is imbedded in other goals does not negate the fact that Mr. XXXX, Mr. XXXX and Ms. Wyles all agreed that the IEP should have contained a specific goal to address the Student’s anxiety. The finalized IEP does not have such a goal.

The Student further argued that the goals and objectives on the August 4 IEP do not reflect her present levels of performance, as noted on the Woodcock-Johnson III. The Student claims that the IEP will cause her to lose education where her present level of performance is higher than the grade level a particular goal/objective expects her to achieve during the course of the year that the IEP is in place. Witnesses for both parties offered relevant testimony. BCPS witness XXXX XXXX, Head Teacher at [School 2] and an expert in special education instruction of students with emotional disabilities, special education academics for mathematics, and IEP development, procedures and implementation, and XXXX XXXX, an [School 1] teacher, admitted as an expert in special education, testified that the Student may perform better on standardized tests, where she is working one to one with the tester, than in class. Thus, absent more evidence, I cannot conclude that the goals/objectives are inappropriate based solely on the Student’s present level of performance.

The August 2015 IEP could be amended to include an anxiety goal. Thus, I do not find that the absence of an anxiety goal is tantamount to a denial of FAPE warranting unilateral placement. I do find, however, that even with appropriate goals and objectives, the Student has proven that residential placement is the least restrictive environment within which her IEP can be implemented, even if it is amended to include an anxiety goal.

A public agency is required to provide special education and related services in the least restrictive environment:

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); see 34 C.F.R. § 300.114(a).

Federal regulations provide for a continuum of educational placements to “[i]nclude the alternative placements listed in the definition of special education under § 300.38²² (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions).” 34 C.F.R. § 300.115. Special Education is defined to include “instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.” 34 C.F.R. § 300-39(a)(1)(i).

Generally, mainstreaming children with disabilities with nondisabled peers is preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax County School Board*, 882 F.2d 876 (4th Cir. 1989). BCPS is not proposing any mainstream opportunity for the Student. Rather, it proposes a separate private day school.

One of proposed programs is [School 5]. XXXX XXXX is the Director of School Operations, [School 5] Programs, Offices of Admissions, Compliance & Transition, and an expert in special education, nonpublic school administration, and IEP procedures, development and implementation. He described the [School 5] high school program. Every student has an IEP. It has two academies: one for diploma bound students and one for certificate bound students. The student population has a variety of disabilities, including emotional disorders. The

²² 300.38 defines the term “Secretary.” The correct citation is 300.39.

school has crisis intervention for students with an emotional disorder; it implements positive behavior intervention systems in which students can earn virtual money to use in the school store and café, etc. [School 5] provides related services, on site, to support the curriculum, including a psychiatrist, a psychologist, a social worker, a speech language therapist, physical therapist, occupational therapist, and nurses. The staffing ratio is two adults to eight to thirteen students, depending on the academy. The school accepts BCPS students. The school does not have a residential program.

BCPS also presented XXXX XXXX, Program Director at [School 3], who testified as an expert in special education, nonpublic school administration, and IEP process development and implementation. She described her program. [School 3] serves kindergarten through twelfth grade, and its students are primarily on the autism spectrum, although some students have emotional disorders and are other health impaired. Some students have an anxiety disorder. The school has clinical supports and the full complement of related services. It provides immediate crisis intervention, including a social worker ensures wraparound services (i.e. mental health services, respite for family, and ensuring that the family has sufficient medication).

Ms. XXXX testified that the school would work on attendance, as the September 4, 2015 IEP requires. Staff would work with the Student's family to see what supports are available in the morning to get her to school. The Student would receive counseling at school and would work on her generalized anxiety. If the Student's attendance does not improve, an IEP team would convene.

[School 3], [School 7], and [School 5], as private separate day schools, are not qualitatively different than [School 2], a public separate day school. The private schools accept students from any public agency; the public school accepts students only from BCPS. The

private school may have a longer school year than the public school, which operates on the BCPS calendar. The private schools offer the same special education and related services that [School 2] offers, including behavioral programming and crisis intervention. Thus, I am not persuaded that the private schools would offer something substantially different from what the Student received, or should have received, at [School 2], where she did not receive educational benefit.

In support of BCPS' assertion that the Student does not need a residential placement, it presented testimony from XXXX XXXX, [School 2]'s Associate Program Director. Although Mr. XXXX testified as an expert in special education administration, special education academics and instruction, and IEP procedure and implementation, I was underwhelmed with his knowledge of the Student and, thus, I have given his testimony no weight. Mr. XXXX did not review the August 4, 2015 IEP or the Student's [School 2] report card, he was unaware of her attendance issues and the extent to which she slept in class, and he was unaware that the Student's Spanish teacher reported she was having behavior problems. Mr. XXXX testified about his contact with the Student: he saw her in the morning when she checked in, in class and in the hallway, but he never observed her in class. When asked to explain the obvious inconsistency in his testimony – that he saw her in class but never observed her in class – Mr. XXXX explained that he meant that he saw her in her classroom as he was walking by the classroom. BCPS might reasonably argue that an expert can have a valid opinion about a student based on a record review, but that is not even the case with Mr. XXXX. In addition to overstating his contact with the Student, Mr. XXXX was not familiar with her record.

Also, Mr. XXXX initially testified that he could only "vaguely recall" whether the Student was sleeping in class. On cross examination, he admitted that the Student was sleeping

in several classes. He testified that while sleeping in class is not condoned or encouraged, it is not necessarily a problem. If a student sleeps through first period on Monday, for example, it is “not a terrible thing,” but it may be a problem if the student sleeps in several classes. The Student did sleep in class, and Mr. XXXX did not know why, and he did not inquire.

Mr. XXXX also testified that the Student was having an attendance problem at [School 2] early in her enrollment but it became a problem toward the final two or three weeks. He did not know how long the Student attended [School 2]. On cross examination, Mr. XXXX admitted that the Student was having attendance problems early on and throughout her enrollment.

On the issue of entitlement to residential placement, BCPS cited *Shaw v. Weast*, 364 Fed.App’x 47 (4th Cir. 2010). The Student objected on the basis that the decision is unpublished and the decision itself bears the disqualifier “[u]npublished opinions are not binding precedent in this circuit.” Rule 32.1 of the Federal Rule of Appellate Procedure, Local Rules of the Fourth Circuit, states that a court may not prohibit or restrict the citation of federal judicial opinions issued after January 1, 2007 that have been designated as unpublished.²³ Thus, while BCPS may cite an unpublished opinion, presumably as persuasive authority, the opinion does not set precedent.

²³ Local Rule 36(a) controls the publication of decisions and provides that: Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

- i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
- ii. It involves a legal issue of continuing public interest; or
- iii. It criticizes existing law; or
- iv. It contains a historical review of a legal rule that is not duplicative; or
- v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the Court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten days and an inquiry to the non-acknowledging judge's chambers has confirmed that the opinion was received.

In *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir.1990), the court held that “[i]f the educational benefits which can be provided through residential care are essential for the child to make *any* educational progress at all, then residential care is required under the EHA [the precursor to the IDEA].” However, the IDEA “does not authorize residential care merely to enhance an *otherwise sufficient* day program.” *Id.* (quoting *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir.1983) (emphasis in original)). “If residential placement is necessitated by medical, social, or emotional problems that are segregable from the learning process, then the local education agency need not fund the residential placement.” *Id.* at 980. *See also Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir.1990) (finding student’s hospitalization was primarily for medical and psychiatric reasons and the state was therefore not required to fund it).

In *Board of Education of Montgomery County v. Brett Y*, 155 F.3d 557 (4th Cir 1998), the court denied funding for residential placement of a teenager with ADHD, oppositional defiant disorder, and anxiety disorder. Brett Y’s IEP placed him at the Regional Institute for Children and Adolescents, but his parents enrolled him at a private school for residential treatment. The court followed the *Denton* court’s holding and found that the child’s emotional needs were segregable from his educational needs and thus denied residential placement.

In this case, the Student’s emotional needs are not segregable from her educational needs. Dr. XXXX, a Clinical Psychologist who testified as an expert in psychology, testified that the Student has mental health and educational diagnoses (significant learning disabilities) that feed off each other, causing her to become anxious and suffer mood dysregulation and that leads to inappropriate behaviors. The Student has personality characteristics that allow her to divide people and pit them against each other, which in turn makes her unable to receive education.

The Student does not participate in education unless there are rules that follow her across all domains, including home and school; she needs absolute consistency by all the stakeholders. If she does not live at school, she will not go to school.

BCPS argues under *Shaw* that the Student is eligible for residential placement only if she can otherwise not make any progress whatsoever. I find that she meets the *Shaw* standard. The Student was absent from [School 2] for nearly the entire 2014-2015 school year. I question how her teachers concluded she was making progress in the few days she did attend, especially when she sometimes slept in class. If she does not attend school, she cannot make any educational progress whatsoever.

BCPS suggested that the Student does not need residential placement because she reported at [School 1] that she was doing better, but her parents sent her to [School 1] anyway. The Student made that statement to Dr. XXXX in a July 16, 2015 psychiatric evaluation. While I respect the Student's perspective, I do not put much stock in her belief that she was doing better and that her parents seemingly had no motive for enrolling her in school in [State]. Indeed, because the parents are ultraorthodox members of the XXXX faith, I assume that placing the student in a non-orthodox environment halfway across the country was a difficult decision. The Student had a wholly unsuccessful experience at [School 2]; it is unreasonable to conclude that she was doing better, except that because she did not attend school, she did not suffer the ill effects of her anxiety.

The Student is rapidly approaching the end of her secondary school life. Residential placement is the only placement that has helped the Student achieve near perfect attendance [School 1] is able to and is addressing the Student's emotional disorder and her academic needs. The record shows that the Student is capable of reaching graduation, and, without residential

placement, she is at risk of not attending school and losing all possibility of educational benefit. The Student's request for reimbursement for the cost of her education at [School 1] under the August 4, 2015 IEP is granted.

In addition to reimbursement for the cost of the Student's education at [School 1], she requested reimbursement for the cost of her parents' transportation to [School 1] for family therapy. The parents expect to visit [School 1] every six weeks for family therapy. The primary goal of family therapy at [School 1] for the Student and her parents is to "[i]ncrease ability to build and maintain relationship and increase ability to cope with and understand thinking and feeling to resolve anxious feelings." BCPS Ex. 90. The record does not establish that the therapy is necessary for the Student to make educational progress. I therefore deny the Student's request for reimbursement of her parents' travel expenses.

The Student requested compensatory education in the form of reimbursement for the cost of her education at [School 1] for the 2016-2017 school year as compensation her failure to receive FAPE at [School 2] during the 2014-2015 school year. Compensatory education is an equitable remedy that the court may award in crafting appropriate relief. *See Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994); *Reid v. District of Columbia*, 401 F.3d 516, 523-524 (D.C. Cir. 2005). It is available to remedy an educational deficit created by a school system's failure to provide a student with a FAPE over a given period of time. The record does not include any evidence that the Student requires compensatory education to make up for the denial of FAPE. Absent evidence that [School 1] cannot make up lost ground in the normal course of its program, I decline to order compensatory education. The hearing started at the end of October 2015. It is simply too early to know what the Student will need in September 2016.

CONCLUSIONS OF LAW

I conclude as a matter of law that:

1. BCPS did not provide FAPE to the Student during the 2014-2015 school year, and the Student is eligible for reimbursement for her unilateral placement at [School 1] starting June 22, 2015. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *School District Four v. Carter*, 510 U.S. 7 (1993).
2. The least restrictive environmental in which to implement the Student's September 30, 2015 IEP is residential. 34 C.F.R. § 300.116; see COMAR 13A.05.01
3. The Student is not entitled to compensatory education at [School 1] during the 2016-2017 school year. *G v. Fort Bragg Independent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

ORDER

I **ORDER** that:

1. Baltimore City Public Schools shall reimburse the Student for the cost of special education and related services at [School 1] and transportation costs to and from [School 1], including breaks when [School 1] students typically travel home, beginning with her enrollment on June 22, 2015; and further
2. Baltimore City Public Schools shall amend the Student's August 4, 2015 individualized education program to state that the Student will attend [School 1], and it will reimbursement the Student for the cost of special education and related services at [School 1] and transportation costs to and from [School 1], including breaks when [School 1] students typically travel home, for the duration of the individualized education program; and further

3. Baltimore City Public Schools shall not pay the cost for the Student's parents to attend family therapy at [School 1]; and further

4. Within 30 days of the date of this decision, Baltimore City Public Schools shall provide proof of compliance with this Order to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, the Maryland State Department of Education.

December 4, 2015
Date Decision Issued

Laurie Bennett
Administrative Law Judge

LB/kc

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). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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.