

XXXX XXXX,<sup>1</sup>

STUDENT

v.

HOWARD COUNTY

PUBLIC SCHOOLS

\* BEFORE KIMBERLY FARRELL,  
 \* AN ADMINISTRATIVE LAW JUDGE  
 \* OF THE MARYLAND OFFICE  
 \* OF ADMINISTRATIVE HEARINGS  
 \* OAH No.: MSDE-HOWD-OT-16-15264  
 \* & DOE-HOWD-02-16-16908

\* \* \* \* \*

**DECISION**

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**STATEMENT OF THE CASE**

On May 18, 2016, XXXX and XXXX XXXX (Parents), on behalf of their child, the Student, filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the Howard County Public Schools (Public School) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). Simultaneously the Parents, on behalf of the Student, requested a hearing to challenge actions of Public School, which the Parents allege constitute a violation of section 504 of the Rehabilitation Act of 1973. 29 U.S.C.A. § 794(a) (2008).

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<sup>1</sup> In Order to preserve confidentiality and reduce personally identifying information appearing throughout the decision, the Student, the Parents, and others named in this decision are mentioned by name once, but then by their title or position, for example, Parent, consultant, school psychologist, etc. In this decision, reference to a single Parent will mean the Student’s mother. Other identifying information, such as the name of the public or private school at issue have also been changed to generic terms to avoid identifying the individual Student involved in this case.

Public School filed a motion on June 10, 2016, seeking to consolidate the IDEA and 504 complaints. The Student answered that he did not oppose the consolidation request. I granted the motion for consolidation. Public School filed a Motion to Dismiss the section 504 complaint on July 5, 2016. The Student timely filed his response on July 17, 2016. I granted the Motion to Dismiss the section 504 claim on July 19, 2016. I subsequently decided that I had ruled improvidently, and I notified the parties in writing on July 28, 2016 that I was reinstating the section 504 claim.

I held telephone prehearing conferences on June 22, 2016 and July 14, 2016, and a telephone status conference on July 29, 2016. The Parents were represented by Wayne Steedman, Esquire. Jeffrey Krew, Esquire, represented Public School. After careful consideration of counsels' schedules and witness availability, the earliest dates that could be set for hearing were originally July 18-20 and August 2-4, 2016. By agreement of the parties, the hearing was scheduled for those dates. For reasons detailed in pleadings, recorded conferences, and on the record, August 2, 2016 was cancelled and August 22, 2016 was added as a hearing date. We were unable to finish the case on August 22, 2016, and, by agreement of the parties, the hearing was continued to August 25, 2016, commencing at noon.

I held the hearing on July 18, 19, and 20, and August 3, 4, 22, and 25, 2016. The hearing dates requested by the parties fell more than forty-five days after the triggering events described in the federal regulations, which is the date my decision is due. 34 C.F.R. § 300.510(b) and (c) (2015); *id.* § 300.515(a) and (c). Specifically, on May 31, 2016, the parties agreed in writing to waive a resolution session and proceed directly to a hearing. The parties requested an extension of time, waiving the forty-five day time limit and giving thirty days after the close of the record for me to issue a decision. This extension of time was so that I could give proper consideration to the issues, the evidence, and the material submitted in support of the arguments of the parties.

34 C.F.R. § 300.515 (2015); Md. Code Ann., Educ. § 8-413(h) (2014). Thirty days from the close of the record is Saturday, September 24, 2016. This decision is issuing before that date.

The legal authority for the IDEA hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2015); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in an IDEA case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.05.01.15C; COMAR 28.02.01. The parties agreed that in this case the same procedural provisions would also govern the 504 claim.

### **ISSUES**

The issues in the IDEA case are:

1. Did Public School fail to provide services and accommodations needed by the Student to receive a free, appropriate, public education (FAPE), specifically, modifying the way material was presented, modifying times for completing material, and/or modifying ways for the Student to demonstrate mastery of material during the relevant portion of the 2013-2014 school year?

2. Did the amended Individualized Education Program (IEP) developed by Public School in September 2014 fail to offer the Student FAPE?

3. Was the July 2014 psychological evaluation conducted by Public School inadequate in that it was based on inventories provided to the Student rather than standardized tests?

4. Did Public School fail to fully implement the Student's IEP during the relevant portion of the 2013-2014 school year, and if so, did it result in a denial of FAPE?

5. Did Public School fail to fully implement the Student's IEP during the relevant portion of the 2013-2014 school year, and if so, did Public School fail to appropriately address emotional strain placed on the Student due to the failure to fully implement the IEP?

6. Did the Student make significant progress at [School 1] (Private School)?

7. Has any emotional strain the Student experienced in Public School diminished while he has attended Private School?

8. If Public School failed to provide FAPE to the Student, is reimbursement for the Student's tuition at Private School an appropriate remedy?

9. If Public School failed to provide FAPE to the Student, is reimbursement for the transportation costs associated with attending Private School an appropriate remedy?

10. If Public School failed to provide FAPE to the Student, is reimbursement to the Parents of attorneys' fees and costs associated with this action appropriate?

The issues in the 504 case are as follows:

1. Did Public School fail to provide services and accommodations needed by the Student to receive FAPE under section 504, specifically, modifying the way material was presented, modifying times for completing material, and/or modifying ways for the Student to demonstrate mastery of material during the 2013-2014 school year?

2. Was the July 2014 psychological evaluation conducted by Public School inadequate in that it was based on inventories provided to the Student rather than standardized tests?

3. Did Public School fail to fully implement the Student's IEP during the 2013-2014 school year, and if so, did it result in a denial of FAPE under 504?

4. Did Public School fail to provide needed services and accommodations to the Student during the 2013-2014 school year, and if so, did this cause the Student emotional strain that Public School failed to properly address?

5. Did Public School remove the Student from Gifted and Talented (GT) classes he was qualified to take rather than provide the services and accommodations the Student needed to access those classes as adequately as nondisabled peers?

6. Did Public School violate 504 by excluding the Student from access to 7<sup>th</sup> grade GT classes due to his disability?

7. Has Private School provided to the Student the services and accommodations he needs to be successful in high level classes?

8. Has the Student made significant progress since attending Private School?

9. Has any emotional strain the Student experienced in Public School diminished while he has attended Private School as a result of receiving necessary services and accommodations?

10. If Public School violated 504, is reimbursement for the Student's tuition at Private School an appropriate remedy?

11. If Public School violated 504, is reimbursement for the transportation costs associated with the Student's attendance at Private School an appropriate remedy?

12. If Public School violated 504, is reimbursement to the Parents of attorneys' fees and costs associated with this action appropriate?

## SUMMARY OF THE EVIDENCE

### Exhibits

I admitted or marked the following exhibits on behalf of the Parents<sup>2</sup>:

- |     |                       |  |
|-----|-----------------------|--|
| 5.  | 01/17/2012            | Psychological Assessment                                       |
| 8.  | 05/21/2012            | Email, XXXX to XXXX  |
| 9.  | 09/20/2012            | Email, XXXX XXXX to Dr. XXXX                                   |
| 10. | 12/01/2012            | Class Placement report   |
| 12. | 02/20/2013            | G/T Review Placement Data Form                                 |
| 16. | 09/19/2013-05/29/2014 | Emails: Parent to/from Public School ([School 2]) <sup>3</sup> |
| 21. | 01/06/2014            | Neuropsychological (XXXX)                                      |
| 23. | 01/17/2014            | Counseling Report (XXXX Center)                                |
| 24. | 01/14/2014            | Progress reports   |
| 29. | 02/05/2014            | Email to/from XXXX XXXX  |
| 31. | 02/13/2014            | Response to questions re testing (XXXX)                        |
| 36. | 05/20/2014            | Unilateral Notice letter                                       |
| 37. | 05/22/2014            | Response to Unilateral Notice letter (XXXX)                    |
| 40. | 06/06/2014            | Notice of IEP meeting  |
| 42. | 06/18/2014            | IEP Team Meeting Report  |
| 43. | 07/19/2014            | Speech/Language Assessment (Public School)                     |
| 44. | 08/25/2014            | Psychological (Public School)                                  |
| 45. | 08/26/2014            | Email: XXXX to XXXX  |
| 46. | 09/10/2014            | IEP Team Meeting Report  |
| 47. | 09/16/2014            | IEP (Amended, Approved)  |
| 48. | 2014-2015             | Middle School Play Report (Private School)                     |
| 49. | 2015                  | Test Results (Private School)                                  |

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<sup>2</sup> Exhibits for both sides were pre-numbered and presented in indexed, tabbed binders. Some were offered but not admitted, and some were not offered. This accounts for the spotty numbering. I requested that each party submit electronically an exhibit list to be included in this decision, and I edited those submissions to delete documents that were not offered. This accounts for the different formatting between the two lists. The Parents' exhibit book was organized with the exhibits with the highest numbers at the top as the binder was opened, going down through to the lowest numbers, or in other words in the reverse order of what is customary.

<sup>3</sup> This exhibit contains more than 100 pages of email. The individual pages are designated A-Z, followed by AA-ZZ, then AAA-ZZZ, AAAA-ZZZZ, and finally, AAAAA-III. Pages P, Q, T, U, and NNNN were admitted; UUUU was discussed and offered, but not admitted.

50. 04/2015                      Stanford Test Results
59. 05/20/2016                  Observation at Private School (XXXX)
64. 2008                            Gifted and Talented Program Handbook
65. Undated                        CV, XXXX XXXX
66. Undated                        CV, XXXX XXXX
67. Undated                        CV, XXXX XXXX
68. Undated                        CV, XXXX XXXX
69. Undated                        CV, XXXX XXXX
73. Undated                        Montgomery County Public Schools (MCPS) Regulation,  
Employee Conflict of Interest
74. 01/10/2013                  Public School, Board of Education, Policy 2070, Ethics

I admitted, or marked the following exhibits on behalf of Public School<sup>4</sup>:

<b>Board Ex. No.</b>	<b>Date</b>	<b>Description</b>
8	2/20/13	GT Placement Review Data Form for Fifth Grade, Public School
9	2/22/13	Letter to Parents from [School 3] GT Program
11	6/13/13	Marked for identification, but not admitted
16	11/18/13	Admitted, but subsequently withdrawn
16-A	11/25/13	Email to Parent from Dr. XXXX XXXX
17	12/30/13	Application for Private School
17-A	1/3/14	Email to Dr. XXXX XXXX from Parent
17-B		Draft of January 2014 Neuropsychological Evaluation completed by Dr. XXXX XXXX containing comments of the Parent and XXXX XXXX
21-A	1/23/14	Marked for identification, not admitted
22	2/4/14	Review of Independent Assessment - XXXX XXXX, M.S., NCSP
23	2/14/14	Letter to Parents from XXXX XXXX and XXXX XXXX, Private School
25	1/21/14 2/4/14 2/28/14	Public School IEP
25-A	July 2013	Parental Rights - Maryland Procedural Safeguards Notice Booklet

<sup>4</sup> Public School's exhibits were pre-marked as Board exhibits and referenced that way in this decision.

<b>Board Ex. No.</b>	<b>Date</b>	<b>Description</b>
26	2/29/14	Private School Enrollment Agreement - 2014-2015 Academic Year
28	3/11/14 3/12/14	Public School Student Accommodation Refusal Form
30-A	4/8/14	Email to Dr. XXXX XXXX from Parent
32	5/22/14	Letter to Parents from XXXX XXXX
33	June 2014	Public School Sixth Grade Report Card
34	6/18/14	Public School IEP Team Meeting Report
35	7/19/14	Speech-Language Assessment - XXXX XXXX, M.S., CCC-SLP, Pubic School
36	8/25/14	Report of Psychological Evaluation - XXXX XXXX, M.S., Public School
37	9/10/14	Public School IEP Team Meeting Report
38	9/16/14	Public School IEP
41	4/10/15	Email to Parent from XXXX XXXX, Private School
42	4/10/15	Email to Parent from XXXX XXXX, Private School
45	6/8/15	Email to Parents from XXXX XXXX, Private School
46	6/17/15	Private School Overnight Trip Medication Form
47	14-15 S.Y.	Private School Report Card
48	8/11/15	Email to Parent from XXXX XXXX, Private School
57	5/18/16	IDEA Due Process Hearing Complaint
58	5/18/16	Request for Section 504 Impartial Hearing
59	5/31/16	XXXX Group Client Intake Questionnaire
60	5/31/16	XXXX Group, LLC Educational Consultant Agreement
61	5/31/16 - 6/1/16	Email exchange between XXXX XXXX and XXXX XXXX, Private School
64	6/7/16	Email to Parent from XXXX XXXX
65	6/7/16	Email to XXXX XXXX from Parent
66	6/7/16	Email to Parent from XXXX XXXX
67	6/7/16	Email exchange b/w Parent and XXXX XXXX
68	6/7/16	Email to XXXX XXXX from Parent

<b>Board Ex. No.</b>	<b>Date</b>	<b>Description</b>
69	6/13/16	Letter to Wayne Steedman from Jeffrey Krew
84		MCPS Ethics Policy
86		XXXX Invoices
87		Demonstrative exhibit, marked but not admitted
88		XXXX XXXX Curriculum Vitae
89-A		Page from Test Publisher's manual for BASC-2
89-B		Page from Test Publisher's manual for BRIEF

### Testimony

The Student testified and presented the following witnesses:

- XXXX XXXX (Consultant #1), Parents' Consultant, XXXX Consultants, admitted as an expert in special education and executive function as it pertains to strategies for school-age children with Attention Deficit Hyperactivity Disorder (ADHD)
- XXXX XXXX (Consultant #2), Parents' Consultant, XXXX Consultants, admitted as an expert in special education
- XXXX XXXX (Consultant #3), Executive Director, XXXX Group, admitted as an expert in special education and the education of children who are GT/LD<sup>5</sup>
- XXXX XXXX, Department Head of Literature and Composition, Private School, admitted as an expert in general education with an emphasis on reading and writing
- Parent
- XXXX XXXX (Consultant #4), Psy.D., licensed psychologist, admitted as an expert in neuropsychology
- XXXX XXXX (science teacher), science teacher and science team leader (science teacher), Public School (testified only in rebuttal)

Public School presented the following witnesses:

- XXXX XXXX (MCPS employee), Director of Department of Special Education Services for MCPS (Director) (Mr. XXXX testified by telephone)

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<sup>5</sup> GT stands for gifted and talented; LD stands for learning disabled, or a learning disability.

- XXXX XXXX, Administrative Assistant, Private School (Ms. XXXX testified by telephone)
- XXXX XXXX, Nationally Certified School Psychologist (School Psychologist), admitted as an expert in school psychology and educational neuropsychology with an emphasis on evaluating and addressing executive function in the school setting<sup>6</sup>

### **STIPULATIONS**

The parties stipulated to the following facts<sup>7</sup>:

1. The Student is 14 years old.<sup>8</sup>
2. Public School found the Student eligible for special education and related services under the educational disability of a Specific Learning Disability, which was believed to impact him in the areas of written expression and study/organizational skills.
3. On December 30, 2013, the Parents completed an application for the Student's attendance at Private School, a private special education school, during 2014-2015 school year.
4. On January 21, February 4 and February 28, 2014, Public School convened IEP team meetings to conduct the Student's annual review.<sup>9</sup> The team recommended continued placement at Public School for the 2014-2015 school year.
5. On or about February 14, 2014, the Student was accepted by Private School for the seventh grade (2014-2015 school year).
6. On May 20, 2014, the Parents wrote to XXXX XXXX, the Student's case manager, advising that they were rejecting the IEP proposed by Public School for the 2014-2015

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<sup>6</sup> Ms. XXXX was the Public School's psychologist during the Student's time at Public School. She has since retired and moved out of state.

<sup>7</sup> Public School proposed fourteen stipulated facts. The Student agreed with eleven. The stipulations are renumbered here as 1 – 11. I have changed the school district name and the private school name to generic terms to avoid personally identifying information. The original document presented at the hearing containing the stipulations is located in the front pocket part of Public School's exhibit book.

<sup>8</sup> This is the Student's age at the time of the hearing. He was born in 2002.

<sup>9</sup> The IEP developed in these meetings is referred to as the February IEP in this decision. There was some discussion about whether it should be considered a January or a February IEP, but it is referred to in this document as February.

school year [and] of their intent to place the Student at Private School and seek public funding for that placement.

7. On May 22, 2014, XXXX XXXX, a Public School Instructional Facilitator in the Department of Special Education, wrote to the Parents advising Public School was rejecting their request for placement and funding at Private School for the 2014-2015 school year.

8. On June 18, 2014, Public School convened an IEP team meeting. The team determined that there was a need for updated information regarding the Student's anxiety, as well as parental concerns relating to the Student's speech articulation. Therefore, the team recommended psychological and speech-language assessments be completed; to which the Parents consented.

9. On July 18, 2014, [School Psychologist] completed a psychological evaluation (report dated August 25, 2014).

10. On July 18, 2014, XXXX XXXX, M.S., CCC-SLP, a Public School speech-language pathologist, completed a speech-language assessment (report dated July 19, 2014).

11. The Student has attended Private School since the start of the 2014-2015 school year, at the Parents' expense.

### **FINDINGS OF FACT**

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

#### *General background*

1. The Student has never had a 504 plan.
2. During the 2013-2014 school year the Student was in sixth grade.
3. Prior to the sixth grade, the Student was assessed to assist in sixth grade class level placement decisions. He tested as eligible for GT classes in social studies and English language arts. He was placed in GT classes for both of those subjects. His scores suggested that

he would be an average student in these GT classes. Board No. 8;<sup>10</sup> Test. School Psychologist (Vol. 6, at 1279:9 to 1280:15).<sup>11</sup>

4. His test scores did not qualify him for placement in GT science. Eligibility for GT science is based on a score that includes components of math testing in addition to language arts. A score of at least 115 is required for GT science. The Student's score for science placement was 99. Board No. 8.

5. The Parent wanted the Student to be placed in GT science. Public School personnel were reluctant to place the Student in three GT classes, based on the heavy demands associated with that type of class. GT classes are generally taught two to three years above on-grade (also called regular) classes, meaning, for a pupil entering sixth grade like the Student, he would have been expected to learn eighth or ninth grade material in three subject areas. Public School declined the request to place the Student in three GT classes.

6. The Parent appealed and the Student was placed in GT science, as well as the other two GT classes. The GT Placement Committee advised the Parents:

- The committee wants [to] ensure that [the Student] has opportunities to grow and enjoy Middle School at a challenging, but not overwhelming pace. The committee does not doubt [the Student's] ability to do well in Science but is somewhat concerned with the rigorous schedule of three Gifted and Talented Classes.

Please be advised that your child's performance will be continually assessed throughout the 2013-2014 school year to help determine continued eligibility in this class.

Board No. 9 (bulleting as in original).

7. Additionally, the Student was taking honors math. An honors class is usually taught about one year above grade level.

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<sup>10</sup> Citation to one exhibit, case, or portion of transcript does not indicate that it is the only support found in the record for the stated proposition.

<sup>11</sup> The transcript of the hearing is cited by volume number, followed by the page number, a colon and then the line number, with a couple of exceptions where more general cites were appropriate.

8. The Student was taking XXXX for anxiety, and XXXX, a psychostimulant, for ADHD, throughout the time period relevant to this case, except for two specific days discussed below. When he does not take his medication, the Student gets very frustrated and indecisive, and is unable to make choices about things. Parents No. 23, at 1.

*Neuropsychological evaluation*

9. The Parents secured a private neuropsychological evaluation of the Student. A neuropsychological evaluation looks at how behavior is related to brain functioning.<sup>12</sup> Test. Consultant #4 (Vol. 4, at 905-06).

10. Part of the testing was administered by Consultant #2. The rest was conducted by Consultant #4, a neuropsychologist recommended to the Parents by Consultant #2.

11. Consultant #2 is a close personal friend of the Parent and the Student's family.

12. In addition to being a partner in a two-person private educational consulting business, Consultant #2 works as a special education educator and team leader for a Maryland public school system other than the one that is a party to this case.

13. Consultant #2 administered the Woodcock-Johnson III Tests of Achievement (Form A) (Woodcock-Johnson) to the Student on December 9, 2013. Woodcock-Johnson is designed to look at reading, writing, and math. It is comprised of subtests, each of which is scored individually. Certain subtests are then considered in combination to give "broad" scores. The Student's score in broad reading put him high in the average range. His broad math score put him at the low end of the superior range. Consultant #2 did not administer the spelling

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<sup>12</sup> Consultant #4 described a neuropsychological evaluation this way:

Q. And as a neuropsychologist -- well, what does a neuropsychologist look at when you're evaluating, say a child or an adolescent?

A. You're looking beyond just the numbers, so the assessment and the data is an important piece, but it's also tying it to the developmental history, what we know about brain development, what are the expectations, looking at collateral evidence, outside sources that are consistent or not consistent with the data and what we know about brain development.

Test. Consultant #4 (Vol. 4, at 906:10 to 906:19).

subtest to the Student. Because of this, no broad written-language score could be calculated. Written language is a specific area of concern for the Student. Consultant #2 observed that the Student worked at a slow pace, which impacted his fluency scores.

14. Consultant #2 had no explanation for why she did not administer the spelling subtest. She made no notes on the test protocol or elsewhere about this happening, or why.

15. Consultant #2 did not generate any written report of her testing of the Student. She conveyed her test results and information for the private evaluation orally to Consultant #4.

16. Generally, achievement testing scores are accompanied by the qualified administrator's test interpretation and diagnostic impressions. Consultant #2 is a qualified administrator, but the private evaluation did not contain any test interpretation or diagnostic impressions from her.

17. Consultant #4 and the Parent conferred about whether the Student should take his psychostimulant medication on the days he was being tested by Consultant #4. Consultant #4 directed that the Student take his medication for anxiety and any other medications he might ordinarily take, but that he not take his prescribed psychostimulant medication on the days testing was scheduled. The Student's psychostimulant medication clears the body quickly and does not build up to have carry-over effect. Omitting a dose for a day would be expected to have an effect on that day.

18. Initially, testing was scheduled for two days. The first day of testing was November 26, 2013. Testing took place with the Student not taking his psychostimulant medication.

19. When Consultant #4 initiated the first task on the second scheduled day, the Student "shut down and he cried and he was not available for me to test. . . . [H]e was clearly

overwhelmed and distraught, balking at the task.” Test. Consultant #4 (Vol. 4, at 959:9 to 959:13). No testing was accomplished on the second scheduled day.<sup>13</sup>

20. A third day was scheduled, December 5, 2013, this time with Consultant #4 instructing the Parent to administer to the Student his psychostimulant medication on the day of testing. The remaining tests were completed that day.

21. One of the tools used by Consultant #4 in evaluating the Student was the Achenbach Child Behavior Checklists (Achenbach). The checklists were completed by the Parent and the Student’s science and math teachers. A score of 70 or higher is considered clinically significant for this instrument. The checklists completed by the teachers showed “no significant elevations” in any category. Parents No. 21, at 8. The Parent’s checklist showed borderline significant elevations on scales evaluating Anxiety/Depression (69) and Attention Problems (67). The Parent’s checklist showed clinically significant elevations on scales of Withdrawal/Depression (70), Affective Problems (76), and Anxiety Problems (72).

22. The Achenbach usually includes asking the child to fill out a checklist. Consultant #4 did not have the Student fill out a self-report.

23. Consultant #4 also had the Parent and two of the Student’s teachers complete a Behavioral Rating Inventory of Executive Functions (BRIEF), which is a “measure of everyday activities associated with executive functioning skills.” *Id.* at 9. The Student’s math teacher’s and the Parent’s responses were somewhat similar in several categories assessing the Student – both showing some elevation in scores. The Student’s science teacher’s responses generally did not result in elevated scores.

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<sup>13</sup> The date that testing was scheduled does not appear in Consultant #4’s report, nor was she able to say in her testimony what it was.

24. Looking at the math teacher's responses,<sup>14</sup> the Student's BRIEF scores were:

- moderately elevated on Emotional Control, which looks at the impact of executive function on the child's ability to modulate or control emotional responses
- significantly elevated on the Initiate scale, which looks at a child's ability to begin a task or independently problem-solve
- moderately elevated on Working Memory, which is the "capacity to hold information in mind for the purpose for completing a task, encoding information, or generating goals, plans, and sequential steps to achieving goals"
- significantly elevated on Plan/Organize, which measures a child's ability to manage current and future-oriented task demands

*Id.*

25. Another test administered by Consultant #4 was the Weschler Intelligence Scale for Children – Fourth Edition (WISC). It was administered on a day when the Student had not taken his psychostimulant medication. The Student's full scale intelligence quotient was 106, which falls in the average range. His Verbal Comprehension Index was 128, in the superior range, driven in large part by his extremely strong vocabulary. Considering the Student's full scale intelligence quotient, the results of the Woodcock-Johnson achievement tests (administered by Consultant #2 and discussed above) showed that the Student was overachieving, which is one indicia of an appropriate education.

26. Consultant #4 also administered additional tests, including, but not limited to:

- selected subtests of the Weschler Individual Achievement Test – Third Edition (WIAT-III), with results in the average to high average range
- selected subtests of the Comprehensive Test of Phonological Processing (CTOPP), with results in the average to high average range
- the Rapid Automatized Naming Test (RAN), with results ranging from borderline to average, and an indicated weakness in processing speed

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<sup>14</sup> Consultant #4 reported that she used the math teacher's responses because she felt they were most representative of the Student.

- the Test of Written Language – Fourth Edition (TOWL-4), with results ranging from borderline to average
- category fluency testing, which showed results in the high average range
- a Controlled Oral Word Association Test, which yielded average results
- the Rey Complex Figure Test, the results of which were in the limited range, which would be below expectation for the Student (his performance revealed difficulties with the organizational aspects of the task and weaknesses in visual memory skills)
- the California Verbal Learning Test – Children’s Version, on which the Student’s findings were in the average and high average range
- the Wide Range Assessment of Memory and Learning – Second Edition (WRAML-2), on which the Student showed high average scores except for his ability to repeat sentences, which fell in the superior range
- the Intermediate and Auditory Continuous Performance Test, on which the Student performed in the limited to average range, demonstrating significant weaknesses in his ability to sustain attention

27. On December 21, 2013, Consultant #4 sent a draft copy of her neuropsychological evaluation to the Parent and Consultant #2.<sup>15</sup> Board No. 17-A.

28. On January 3, 2014, the Parent replied to Consultant #4 in an email, saying in part that she and Consultant #2:

had a chance to review the draft and had a few issues at which we wanted you to have a look. I have marked the document as needed. I am sending you the document with the appropriate highlights and sticky notes<sup>16</sup>...I hope that it comes through and you can see my notes.

We currently have an IEP annual review meeting with [Public School] scheduled for January 21st. If it is possible, we would love to have the document finalized by Monday or Tuesday if at all possible. Once we have it done, I can also give you the e-mail addresses of the people to whom I would like it sent at the school, in addition to [Consultant #2].

Board No. 17-A.

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<sup>15</sup> According to an accompanying email, a first draft had inadvertently left out certain data and this second draft contained the previously missing material. This second draft is referred to in this decision as the draft – there is no need for this discussion to distinguish between these two drafts.

<sup>16</sup> In this context, “sticky notes” are an electronic means of editing or marking up a document.

29. In Consultant #4's original draft she correctly wrote that the Student's May 14, 2013 IEP stated that he "receives 9 hours of weekly services which address a writing objective." The Parent said in a sticky note "none is currently being offered." Consultant #4 understood this to mean that the Parent wanted the sentence removed from the report and she took it out.<sup>17</sup> There was also an error regarding which specific public middle school the Student was attending, which the Parent wanted amended. The wording of the report suggested that the Student be considered for special education instruction, when he had actually been receiving special education throughout his school career. The Parent pointed out that this needed to be corrected.

30. The Parent had some other thoughts that she conveyed with the sticky notes.

Among them was this:

[Consultant #2] asked if we can add recommended accommodations that mirror [Private School] in its support. smaller class environment, etc. in the way that you described the "scaffold" necessary to get him the support he need [sic] to develop the skills he will need.

Board No. 17-B, at 21 (original in all small case letters).

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<sup>17</sup> Consultant #4 testified as follows:

Q. Well, the IEP didn't change, right? The written IEP of 5/14/13 from which you extracted that information still had that information embedded in it, did it not?

A. Right.

Q. But you took it out because [the Parent] said take it out.

MR. STEEDMAN: Objection, asked and answered.

JUDGE FARRELL: Overruled.

THE WITNESS: Yes.

Test. Consultant #4 (Vol. 4, at 1036:9 to 1036:17).

31. In response to this request, Consultant #4 made several changes to the neuropsychological report, changing it to specifically describe Private School without using its name.<sup>18</sup> These changes, none of which appeared in the draft report, included:

- a new recommendation suggesting a “small, structured academic program with educators trained in instructing students with language based learning and attention disorders.” (Vol. 4, at 1044:7 to 1044:15); Parents No. 21, at 20
- an added recommendation which called for a small student-teacher ratio. (Vol. 4, at 1047:21 to 1048:8); Parents No. 21, at 21
- a recommendation for “visual, auditory, kinesthetic and tactile modalities for learning.” (Vol. 4, at 1051:10 to 1051:12); Parents No. 21, at 21
- a specific recommendation that the Student “benefit from the opportunity to learn with peers of similar cognitive profiles.” (Vol. 4, at 1052:11 to 1052:13); Parents No. 21, at 21

32. The draft report also recommended:

[The Student] and his parents pursue private tutorial services which address his language based learning needs including reading skills (science-based reading intervention which addresses reading fluency and efficiency in reading comprehension) and verbal formulation/written expression skills. He may also benefit from strategies which enhance verbal memory strategies (e.g., quizzing right after learning new material).

[The Student] may also benefit from ‘executive coaching’ which targets the instilling and enhancing of planning, organizational, and problem solving strategies (which will help mitigate anxiety and enhance his ability to tolerate change and unpredictability). I will be happy to provide referrals.

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<sup>18</sup> Cross-examination included the following exchange:

Q. Well, let me back up. You said that you mentioned [Private School] before you wrote your report on January 6, 2014, right?

A. Right.

Q. So [Private School] was a topic of discussion, communication, E-mails between yourself and [the Parent] as well as between yourself and [Consultant #2] prior to the time you wrote your report, right?

A. It wasn't to the extent that you're describing.

Q. Well, did you talk to [the Parent] about [Private School] prior to January 6, 2014?

A. Yes.

Q. And you spoke to [Consultant #2] about [Private School] before January 6, 2014, correct?

A. That I don't recall.

Q. And isn't it true that you wrote your report on January 6, 2014 to support [the Private School] that you discussed with [the Parent], yes or no?

A. Yes.

(Vol. 4, at 1025:16 to 1026:10).

Board No. 17-B, at 23.

33. The Parent addressed this recommendation with a sticky note:

[F]or the IEP meeting, we don't want to state that we need to provide OUTSIDE tutoring. We want to make sure that we are tasking the school to provide this as a quality service.

*Id.* (emphasis in original).

34. Consultant #4 removed the entire quoted section when she issued her final report.

35. Consultant #4 diagnosed the Student with ADHD, Specific Learning Disorder with impairment in reading, Specific Learning Disorder with impairment in written expression, Developmental Coordination Disorder – Dysgraphia, Speech Sound Disorder, by history, and Unspecified Anxiety Disorder. Parents No. 21, at 1.

36. Reports from outside evaluators are reviewed by appropriate school personnel. When School Psychologist reviewed Consultant #4's report, she questioned why some tests were administered with the Student taking his psychostimulant medication and others were not. She took issue with an assertion in the report that behavioral checklists completed by the Parent and the Student's teachers revealed anxiety. She also noted that the recommendation for a "small, structured academic program with educators trained in instructing students with language based learning and attention disorders" was not supported by the data in Consultant #4's report. Board No. 22.

*Formation of the February IEP*

37. When the Student's IEP team met for his annual review in early 2014, it considered the Student's then-current levels of academic achievement and functional performance. The team considered teacher input, Parent input, observations, and the private neuropsychological evaluation.

38. The Student had difficulty managing written assignments – organizing them, completing them, and turning them in. This was particularly true with long-term assignments. He sometimes seemed overwhelmed in classes, particularly in social studies, which was scheduled late in the school day, but in other classes as well. The Student was also sometimes resistant to accepting help that was offered to him by school personnel or using organizational tools or techniques to help himself stay organized. The Student sometimes experienced anxiety, tearfulness, and frustration.

39. The Student had an extensive vocabulary, actively participated in class discussions, and had a broad base of background knowledge.

40. The Student had strong verbal skills, particularly with vocabulary, but his relative weakness in processing speed and working memory impacted him in the school setting.

41. To address the Student’s deficits in the areas of written expression, study and organizational skills, the February IEP developed in early 2014 contained two goals and accompanying objectives.

42. The first goal addressed written language skills: “[The Student] will compose in a variety of modes by developing content, employing specific forms, and selecting language appropriate for a particular audience and purpose, across all academic areas” with 80% accuracy. The goal did not list an evaluation method. Board No. 25, at Bates 00546.<sup>19</sup>

43. The objectives accompanying the written language goal were:

- (1) Compose texts using the prewriting and drafting strategies of effective writers and speakers-
  - a. Use a variety of self selected prewriting strategies to generate, select, narrow, and develop ideas
    - Begin a coherent plan for developing ideas
    - Explore and evaluate relevant sources of information

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<sup>19</sup> Some, but not all of Public School’s exhibits have Bates numbering. For the most part, I use page numbers of individual documents when citing to exhibits, but the page numbers on this document are cut off, so I am using the Bates numbering for easier reference on this and a few other exhibits.

- b. Select, organize, and develop ideas appropriate to topic, audience, and purpose
  - Organize information logically
  - Select or eliminate information as appropriate
  - Verify the effectiveness of paragraph development by modifying topic, support, and concluding sentences as necessary
- (2) Locate, retrieve, and use information from various sources to accomplish a purpose-
  - a. Identify, evaluate, and use sources of information on a self selected and/or given topic
  - b. Use various information retrieval sources (traditional and/or electronic) to obtain information on a self selected and/or given topic
  - c. Use appropriate note taking procedures, organizational strategies, and proper documentation of sources of information
- (3) Compose oral, written, and visual presentations that express personal ideas, inform, and persuade-
  - a. Compose to express personal ideas by experimenting with a variety of forms and techniques suited to a topic, audience, and purpose
    - Support, modify, or disagree with a position and generate convincing evidence to support it
    - Use authoritative citations
  - b. Use writing-to-learn strategies such as journals, quick writes, and mind maps to make connections between learning and prior knowledge
  - c. Manage time and process when writing for a given purpose

*Id.*

44. The goal addressing the Student’s needs in study and organizational skills reads as follows: “[The Student] will practice the organizational skills and self-advocacy (for organizational supports) needed to complete and submit all assignments by their due dates” with 85% accuracy. The goal listed informal procedures as the evaluation method. *Id.* at Bates 00548.

45. The objectives accompanying this goal were:

(1) The Student will break down large assignments or tasks into small parts or steps, working steadily with focus until completed with 80% accuracy.

(2) The Student will record all assigned homework and upcoming tests/quizzes in his agenda or with electronic device with teacher check for accuracy 90% of the time.

(3) The Student will independently maintain an organized system of paper or electronic organization with 90% accuracy.

(4) The Student will request assistance [from] his teacher regarding methods of organization, time-management, and planning if he is unable to manage the task demands independently 90% of the time.

46. The February IEP included the following instructional and testing accommodations:

- electronic word processing (including spelling and grammar checks)
- monitoring of test response
- mathematics tools and calculation devices
- graphic organizer
- extended time (time and a half)
- multiple or frequent breaks
- reduced distractions
- mathematics tools and calculation devices

47. The IEP from February 2014 included the following supplementary aids, services, program modifications, and supports to assist the Student with progressing in the general curriculum:

- allow the Student to orally rehearse ideas prior to writing
- use of a word processor to type longer responses and use spelling and grammar applications
- provide student with a copy of student or teacher notes
- provide home sets of textbooks/instructional materials
- allow the Student to photograph assignments with an electronic device
- provide assistance with organization
- check for understanding
- frequent and/or immediate feedback
- allow use of highlighters during instruction and assignments
- human reader of selected sections of assignments
- break down assignments into smaller units with interim due dates
- preferential seating
- psychologist consult – as needed to address and support the Student’s level of frustration and anxiety in the classroom

48. The February IEP included as a service four hours per week of special education instruction in the general education setting across all content areas to support the writing and organization/study skills objectives.

49. As of February 2014, the Parents were aware that Public School did not plan to place the Student in any GT classes for the 2014-2015 school year.

50. The Parent was dissatisfied with the IEP developed by the school-based members of the IEP team.

*Events after the annual IEP process concluded but before notice of unilateral placement*

51. The Parent signed a contract dated February 29, 2014,<sup>20</sup> enrolling the Student at Private School. The contract required a non-refundable deposit of \$3,145.00, which the Parents paid. The contract bound the Parents to pay a full year of tuition (\$31,450.00) for the Student for the 2014-2015 school year unless the Parents gave certain specified written notice, which Private School had to receive not later than May 15, 2014. Board No. 26.

52. On March 19, 2014, the Parent sent to Public School personnel the following email:

Good Morning, gentlemen. While discussing the class reassignment for [the Student] from GT Geography to on grade level Geography with my husband, I wanted to clarify for him the reasons. [The Student] is failing (currently with 18% class average) GT Geography for the second straight quarter. As I summarized our conversations for him, I told him that there is not support provided to the kids in the GT level classes. [The Student] is a kid who is missing some critical skills in composition and processing speed that are negatively impacting his ability to produce work product and thereby demonstrate his higher level of understanding. Basically, he has the gifted capability, but is missing some critical skills to demonstrate his knowledge. Because there isn't the manpower to provide training in those specific skills within the GT curriculum, he isn't doing [his] best at school right now. *This change is an opportunity to allow him [to] access material with the support he needs to formulate responses as there are more support opportunities in the on grade level environment. This will also serve to reduce his stress level.*

Please let me know if I have adequately summarized the situation.

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<sup>20</sup> The contract, an enrollment agreement, has two different signature lines – one for each of the Parents. Each is hand-dated February 29, 2014. Board No. 26, at 2. After the hearing, when writing this decision, I checked a 2014 calendar because I did not believe 2014 to be a leap year. It was, in fact, not a leap year. There was no February 29 in 2014.

Parents No. 16, at NNNN (emphasis added to highlight material referenced in the next Finding of Fact).

53. The same day, March 19, 2014, the Student’s Case Manager replied: “Hi! I believe the last two sentences define the benefits of the change very clearly...take care!” *Id.*

54. The Parent forwarded her email and the Case Manager’s response to Consultant #2 that same day, remarking, “Just thought you might be interested to see what they will say, but NOT put in writing.” *Id.* (emphasis in original).

55. On April 8, 2014, the Parent sent an email to Consultant #4:

I met with an education attorney today with regard to [the Student]. He wanted to know if there are tests which could measure [the Student’s] difficult areas, such as the Test of Written Language and something in reading fluency, that could be given to [the Student] in June 2014 and then again in January 2015 that could be used to benchmark his levels of competency at the end of 6th grade, and then again after the first semester of 7th grade at [Private School]. We are looking to see if there is anything that we can use as a quantifiable measure of his success/progress as a direct result of his moving to [Private School].

Board No. 30-A.

56. The first day of the fourth quarter of the 2013-2014 school year, March 28, 2014, the Student was removed from GT social studies and placed in an on grade class.

57. The Student’s grades for the fourth quarter of 2013-2014 were:

English Language Arts (GT)	C
Innovation and Inquiry Reading Modules	B
Math	B
Science I (GT)	D
Geography/World Cultures <sup>21</sup>	C
Music	B
Physical education	C
Health	C

Board No. 33.

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<sup>21</sup> Geography/World Cultures is the Student’s social studies class.

*Notice of unilateral placement and events occurring thereafter*

58. By letter dated May 20, 2014, the Parents notified Public School that they believed that it had not identified all of the Student's areas of need, had not provided the accommodations and services that the Student needed to be successful in classes appropriate for his intellectual level, and had not fully implemented the supports documented in his IEP. The Parents stated that as a result of these failures on the part of Public School, the Student's "performance and his emotional well-being have deteriorated." Parents No. 36. The letter protested the removal of the Student from GT classes, stating that this was being done because Public School lacked appropriate resources to support the Student in GT classes. The letter concluded by advising Public School that the Parents were rejecting the proposed IEP for the 2014-2015 school year and would be placing the Student at Private School, for which they were seeking funding from Public School. *Id.*

59. By letter dated May 22, 2014, Public School advised that it would schedule an IEP meeting to address the concerns raised by the Parents in their letter. The letter also informed the Parents that Public School was rejecting the request for public funding of the unilateral private placement. It further stated Public School's position that the February IEP provided the Student with FAPE. Parents No. 37.

60. A June 18, 2014, IEP team meeting was scheduled to address the concerns raised by the Parents in their May 18, 2014 letter.

61. By the time of the June 18, 2014 IEP team meeting, the Parents had paid over \$9,000.00 in non-refundable tuition to Private School.

62. Among many topics discussed at the June IEP meeting were the Parents' perceptions that:

- the Student was experiencing frustration and anxiety

- the Student had deficits in composition skills and was writing below the level of his ability, including problems with paragraph structure, spelling, and grammar
- the Student sometimes refused supports that were supposed to be provided because he was anxious and because he felt singled out
- the Student had deficits in fluency of conversational speech which impacted his written language skills
- the Student had deficits in organization
- the Student had difficulty with all transitions, including, packing up from one class and getting to the next class on time, to include physical education, where he had to change clothes
- the Student had difficulty managing his emotions and anxiety<sup>22</sup>
- the Parent wanted the Student to be required to practice writing every day in school
- the Parent was concerned that accommodations reducing the size or number of work product items would adversely affect the Student's self-image and raise his anxiety if he perceived that he was doing something different from what other students were doing
- the Parents were concerned about the size of and effort required for GT projects and reported that although they believed he had the ability to do the work, the Student would assert that he could not do the projects and that he did not understand why he was required to complete assigned projects

Board No. 34, at 1-2.

63. By the end of the 2013-2014 school year Public School had assigned someone to assist the Student on a daily basis regarding organization. School personnel also noted that the Student had been observed in school moving between classes, apparently happy and talking with friends. *Id.* at 2.

64. After discussion, the team proposed an updated assessment in the area of speech/language to consider any educational impact, based on concerns raised by the Parent about the Student's articulation. The team further proposed further psychological evaluation, looking at the anxiety reported by the Parent. The evaluation was being done to supplement the private evaluation, which had not used self-reporting by the Student in measuring various aspects of emotional and executive functioning. The team also proposed a referral to the IAT<sup>23</sup> at the beginning of the 2014-2015 school year. *Id.* This referral would have assessed the Student's

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<sup>22</sup> The Parent reported that she felt that the Student felt pressured when he was asked to produce homework, or even when he was asked if he needed help.

<sup>23</sup> This acronym was used by several witnesses. None could say what all the letters stand for.

access to the curriculum and would have determined whether additional technological devices might have assisted the Student in demonstrating understanding and mastery of the curriculum.

65. The Parents consented to the proposed evaluations and the IAT referral.

66. The consent form for the psychological assessment specifically said that it would be looking at the Student's self-report. *Id.*

67. On July 18, 2014, Public School conducted the evaluations as detailed in the stipulations.

68. The speech/language evaluation determined that the Student had certain issues that should be addressed in his IEP because they impacted his academic achievement or functional performance. Board No. 35.

69. The school psychologist administered to the Student the following evaluations:

- Connor's Third Edition, to assess the frequency of symptoms of inattention, hyperactivities, impulsivity, and other problematic behavior as compared with other children of his age. All of the Student's scores were in the average range and validity indices indicated there was no reason to question the validity of the Student's responses. The results indicated that the Student did "not see himself as having significant difficulties with attention, over activity, learning, aggression or family relations." Parents No. 44, at 3. It further showed that the Student believed that he was "occasionally irritable when anxious and occasionally worries . . . also . . . he feels that his concerns do affect his schoolwork and grades." *Id.* (emphasis omitted)
- Manifest Anxiety Scale for Children (MASC), 2nd Edition, to assess various dimensions of anxiety – the Student's scores indicated a low probability of his having an anxiety disorder
- Behavior Rating Inventory of Executive Function (BRIEF) – Self Report, to assess the Student's perception of his difficulties with executive functioning; all of the Student's scores were in the average range
- BarOn Emotional Quotient Inventory – Youth Version, to measure emotional coping skills; the Student's scores were all average or better, and his emotional quotient was in the high range indicating the his perception was that he was dealing with daily demands and that he was typically happy<sup>24</sup>

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<sup>24</sup> School Psychologist clarified that this did not necessarily mean that the Student was dealing well with daily demands, but it was an accurate indicator of how the Student saw the situation. (Vol. 6, at 1546:13 to 1547:4).

- School Motivation and Learning Strategies Inventory (SMALSI), which examines academic motivation and learning and study strategies – the Student’s results indicated below average study skills and that the Student saw himself as having below average reading comprehension skill, outside these areas the Student’s scores were all in the average range

Board No. 36.

70. School Psychologist issued a report on August 25, 2014. Her summary and recommendations based on the July 2014 evaluations were as follows:

The results of this self-report assessment of [the Student’s] executive functioning skills/study habits and emotional functioning reflect significant difficulties with planning, time management, and the application of effective reading strategies. Evaluation of his social/emotional competencies (emotional intelligence) shows [the Student] to demonstrate age appropriate skills in the areas of his general mood, stress management skills, interpersonal relations, and emotional expression. Based on his own report, [the Student] does not display significant anxiety related to social, academic/performance, or separation fears. The information shared by [the Student] via this self-report assessment do not indicate a need for social emotional goals to be added to [his] IEP.

Board No. 36, at Bates 00579 (emphasis omitted).

71. Based on the testing, School Psychologist disagreed with Consultant #4’s conclusion that the Student had Unspecified Anxiety Disorder. Rather, she thought the Student’s anxiety was an outgrowth of his executive function problems. She also disagreed with the diagnoses of Reading Disorder and Dysgraphia. She concurred with Consultant #4’s diagnoses of ADHD and Written Expression Disorder. Test. School Psychologist (Vol. 6, at 1414:4 to 1415:2).

72. On August 21 and August 22, 2014, Public School attempted to contact the Parent, leaving messages suggesting an IEP team meeting date of September 10, 2014. Parents No. 45.

73. The Student began attending Private School on or prior to August 26, 2014.<sup>25</sup>

74. The afternoon of August 26, 2014, the Parent sent an email to Public School. In it she expressed the belief that Public School had not treated the family's concerns with sufficient urgency, and that they were standing by their May 20, 2014 rejection of the IEP and program offered to the Student for the 2014-2015 school year. The Parent agreed to attend an IEP meeting on September 10, 2014, but made it clear that the Student would not be attending Public School. *Id.*

75. On September 10, 2014, the IEP team reconvened to discuss the results of the evaluations.

76. When the September 2014 IEP was completed, most of it was identical to the February 2014 IEP. Under present level of academic achievement and functional performance, however, information was added reflecting the results of the speech/language assessment, and updated information was added under parental input. The Parent indicated that the Student was already attending Private School and that he would not be attending Public School for the 2014-2015 school year. She stated an intention to return the Student to Public School for the 2015-2016 school year.

77. The September IEP had progress reports from June 20, 2014 updating the Student's status as to progress on his written language and study/organizational goals.

78. The September IEP was updated to reflect that the Student had special communication needs and that the July 2014 evaluation revealed needs in the areas of rate of speech and speech fluency.

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<sup>25</sup> The Parent initially testified, in reference to Parents No. 45, an email dated August 26, 2014, that August 26, 2014 was the Student's first day at Private School. She later testified that she did not recall testifying to that and that she did not know what the Student's first day at Private School had been. *Compare* Vol. 3, at 734:2 through 734:7, *with id.* at 836:12 through 837:1.

79. A speech fluency goal was added to the IEP, with two objectives under it. speech/language services were also added to the IEP in the form of three thirty-minute sessions per month outside the general education setting.

80. The team added an additional objective under the Student's existing study/organizational goal. The evaluation method was observation and recording; the objective was to be attained with 90% accuracy. The objective read as follows:

With guidance from instructional staff, [the Student] will review teacher feedback on returned assignments, grades on classwork, homework, tests and quizzes (on which his grade is less than a C), as well as errors on written assignments in developing his acceptance and understanding of the need to utilize instructional supports (i.e. inspiration) and develop improved study habits.

Parents No. 47, at 15.

81. Between the September 2014 IEP meetings and the filing of the Due Process and 504 complaints in May 2016, there was no contact between the Parents and Public School.

*Selected information from Private School*

82. Private School administered to the Student in April 2015, the Stanford Achievement Test, 10th Edition. The Student scored in the above average range in every category of testing. The grade equivalent noted for every tested category is post high school.

Parents No. 50.

*Request for Due Process hearing and 504 complaint*

83. On May 18, 2016, the Parents filed a request for a Due Process hearing and a 504 complaint.

*Consultant #3*

84. The Parents retained Consultant #3 on or about May 31, 2016. Board No. 60. Prior to mid-May of 2016, when he was contacted by the Student's attorney, Consultant #3 had no connection to the Student or his family. After being retained, Consultant #3 reviewed

records, spoke to Private School staff, spoke with the Student's psychiatrist, spoke to the Parent, and observed the Student at the Private School's summer program.<sup>26</sup> He also spoke with the Student on July 7, 2016, after he had formulated his opinion. Test. Consultant #3 (Vol. 2, at 441:8 to 441:16).

85. Consultant #3 wanted to request that he be allowed to conduct an observation at Public School. He knew that his request would be denied because that was Public School's policy once a Due Process hearing request was filed.

86. Consultant #3 contacted the Parent on June 7, 2016 asking that she, the Parent, contact the school and let them know that she was working with an educational consultant to form an expert opinion about what would be "best for [the Student] educationally." Board No. 64.

87. The Parent responded by email, asking: "As I have a rising 6th grader, is it better to leave [the Student's] name off the letter? My other son also has [an] IEP, so it is plausible. I don't want to meet any resistance with getting you in quickly." Board No. 67.

88. Consultant #3 responded that they had "to be straight forward and put [the Student's] name on the request." *Id.*

89. In evaluating the Student, Consultant #3 reviewed Public School's Gifted and Talented Program Handbook for Middle School Resource Teachers (Handbook). Parents No. 64. The Handbook lists characteristics, both strengths and weaknesses, which may be useful in differentiating twice exceptional students. A twice exceptional student is one who is both gifted and learning disabled. The term twice exceptional is synonymous in this context with GT/LD.

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<sup>26</sup> The observation took place at Private School's summer program, not during the regular school year, Board No. 64, because Consultant #3 was retained too late to make any observations during the regular school year.

90. The Handbook lists some thirteen weaknesses that may be observed in GT/LD students. Consultant #3 found that the Student was well described by most of the listed factors, specifically that the Student:

- struggles to complete simple tasks but can finish more sophisticated activities
- has poor spelling
- exhibits poor handwriting
- has difficulty taking timed tests
- has difficulty in responding well or consistently to auditory instructions or information
- exhibits poor organizational skills, and fails to complete or turn in assignments
- translates minor academic failure to feelings of overall inadequacy
- exhibits affective behaviors such as low self-esteem, unrealistic expectations, and reluctance to take risks
- is frequently off task
- frustrates easily

91. Consultant #3 found that the Student was also described by most of the Handbook's twelve strengths that may be observed in GT/LD students:

- strong abstract reasoning skills
- above average vocabulary
- great knowledge and passion for subjects of interest to the Student
- exceptional skills in mathematical reasoning
- divergent thinking
- good sense of humor
- preference for adult interaction over peer interaction
- being an "expert" in topics of particular interest

92. Consultant #3 opined that the Student would be well-served by the following strategies for supporting GT/LD students, which he acknowledged were, for the most part, best practice in supporting any student:

- focusing on the Student's strengths
- giving the Student every opportunity to follow their interests
- collaborating with other professionals in the school setting
- communicating regularly with parents
- teaching brainstorming and organizational strategies
- teaching the Student to use technology to promote productivity
- encouraging self-awareness of individual strengths and weaknesses
- providing mentoring experiences with GT/LD adults
- providing appropriate, ongoing feedback

- schools facilitating professional development and awareness of the needs of the GT/LD population
- developing a selection of strategies with regard to coping tactics, studying, test-taking, note taking, and staying organized
- teaching self-advocacy skills

93. Consultant #3 also opined that the Student particularly needed strategies other than written output being used to measure the Student's mastery of material and he needed learning experiences not entirely dependent on reading or writing. The Consultant emphasized the value of chunking – breaking tasks and activities into smaller integral parts. He also advised that it was crucial that the Student be given extra time to accomplish tasks.

94. Consultant #3 opined that the September IEP did well in describing the ways in which the Student's disability affected his involvement in the general education curriculum, Parents No. 47, at 5, but further opined that the IEP failed to adequately address the concerns listed. Test. Consultant #2 (Vol. 2, at 379:11 through 380:17).

## **DISCUSSION**

### *General organization of this discussion*

This decision first addresses the statutes of limitations applicable to the IDEA complaint and the 504 claim. Following that, I discuss the IDEA complaint and then consider the 504 claim.

### *Statutes of limitations*

The time period in which to request a Due Process hearing with the OAH is controlled by the limitations period under Maryland law enacted to comply with the IDEA. *See* 20 U.S.C.A. § 1415(f)(3)(C) (2010). The applicable statute of limitations provides that the Due Process complaint must be filed within two years of the date the Parents knew or should have known of the action that formed the basis for the complaint. Md. Code Ann., Educ. § 8-413(d)(3) (2014); *see also* COMAR 13A.05.01.15C(1); 34 C.F.R. §§ 300.507(a)(2), 300.511(e) (2015). The IDEA

requires that the school district inform parents of the two-year limitations period applicable to the request for a Due Process hearing. 20 U.S.C.A. § 1415(d)(2)(E)(i) (2010). In this case, there is no allegation of any type of procedural violation. The Parents were appropriately advised of the two-year limitations period. The request for a Due Process hearing was filed on May 18, 2016. The Parents may properly complain about action or inaction on the part of the school occurring on or after May 18, 2014, which they did not know or have reason to know of before May 18, 2014.

Contemporaneous with the Due Process hearing request, the Parents filed a 504 complaint. The parties disagreed about what the applicable statute of limitations would be for such an action. They presented oral argument and also written pleadings on this question. On August 5, 2016, I issued a written ruling finding that the statute of limitations for the type of 504 claim at issue in this case, which is one for educational injury that sought relief identical to the accompanying IDEA case, would be two years. Accordingly, the statutes of limitations for these consolidated cases are the same. The Parents are limited in the 504 case to claims that they did not know or have reason to know before May 18, 2014. The written ruling that I issued on August 5, 2016 is attached as Appendix 1 and is incorporated by reference in this decision as if fully set forth herein.

#### *IDEA Due Process Complaint*

##### *Burden of Proof*

Because the Parents are the party seeking relief, they bear the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014).

*IDEA framework*

The identification, assessment, and placement of students in special education is governed by the IDEA (the Act), 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2016); 34 C.F.R. pt. 300 (2015); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2015); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (2010).

The touchstone case in the IDEA arena is *Board of Education of the Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982). In it, the United States Supreme Court described FAPE as follows:

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

*Id.* at 200-01 (footnote omitted).

The IDEA defines FAPE this way:

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

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

FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. *Rowley*, 458 U.S. at 181-82. COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of the student and the special education and related services to be provided to meet those needs.

The goals, objectives, activities, and materials must be adapted to the needs, interests, and

abilities of each student. *See* 20 U.S.C.A. § 1414(d) (2010). A student’s IEP must be reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07.

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 Md.*, 700 F.2d 134, 139 (4th Cir. 1983). FAPE requires the State to provide personalized instruction with sufficient support services to permit the handicapped child to benefit educationally. The Fourth Circuit Court of Appeals recently reiterated, though, 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 Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015).

Although special education law is constantly evolving and undergoing interpretation, the *Rowley* case still sets the standard for determining whether a child is being accorded a FAPE under the IDEA. In *Rowley*, the Supreme Court set forth a two-part analysis. First, a determination must be made as to whether there has been compliance with the procedures mandated by the Act. In this case, there is no allegation of any procedural defect. Next under *Rowley*, it must be determined whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefits.

Once an IEP is shown to be procedurally proper, the judgment of education professionals regarding the child’s placement should be questioned only with great reluctance by the reviewing authority. *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). The Fourth Circuit Court of Appeals summarized:

We have always been, and we should continue to be, reluctant to second-guess professional educators. As we observed in [*Tice*], “once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.” Indeed, we should not “disturb

an IEP simply because we disagree with its content,” and we are obliged to “defer to educators’ decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides.”

*MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002) (citations omitted). Courts have held that “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.” *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998).

In many cases the IDEA’s mandate to educate children with disabilities in the least restrictive environment (LRE) requires careful consideration:

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) (2010). In this case, however, no issue was raised suggesting that the Student’s placement in Public School did not represent the LRE. The only time LRE came up in this particular hearing was when Public School alleged that Private School did not represent the LRE appropriate for the Student’s education. Because I find that Public School offered FAPE, I have no reason to examine that LRE question.

*Development of the February 2014 and September 2014 IEPs*

The first issue for consideration in the IDEA case is whether Public School failed to provide services and accommodations needed by the Student to receive FAPE during the relevant portion of the 2013-2014 school year. This issue encompasses complaints about the content and development of the February 2014 IEP;<sup>27</sup> it is therefore barred by the statute of

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<sup>27</sup> The Student also complained about implementation issues. That is covered under issue number four.

limitations on IDEA actions. The February IEP was developed in a series of meetings occurring in January and February 2014. The Parent was an active participant in the IEP process, attending all of the IEP meetings. She was fully aware of the IEP content, and she knew at the moment the IEP was developed that she was dissatisfied with it. She was advised of all of her options with regard to her Parental Rights and Procedural Safeguards. The Parents did not file their Due Process complaint until May 18, 2016. That is more than two years after they knew of the action that formed the basis of this issue.

The next issue for consideration is whether the September IEP offered the Student FAPE. The case presents an interesting dilemma in terms of whether to consider the September IEP to be a modest amendment of the February IEP, or a brand new, fully-constituted IEP in its own right.<sup>28</sup> The distinction between these two has implications for the extent to which the September IEP should be reviewed given the IDEA's two-year limitations statute.

Public School takes the position that the only things that should be considered about the September IEP are the things added or changed from the February IEP as well as changes that were requested by the Parent in May or June 2014, but not added or changed in the September IEP. This is in line with what Public School nicknamed the "reboot" argument. The reboot argument posits that it is inappropriate to allow the Parents to complain about aspects in the September IEP that had been there since February and were otherwise outside the statute of limitations merely because they made some complaint or request about the IEP. Public School pointed out that this could allow the Parents to manipulate the statute of limitations by making a request for a change and treating the granting or the denial of it as a brand new IEP with a newly

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<sup>28</sup> Board No. 87 is a complete list of the differences between the February and the September IEPs. Counsel for Public Schools created the list and wanted it to be admitted as an exhibit. Counsel for the Student agreed that it was an accurate list and wanted the list added as a stipulation of the parties. Public School would not agree to have the information added as a stipulation, and the Student would not withdraw an objection to the exhibit. I did not admit Board No. 87 as an evidentiary exhibit, but marked and used it as a demonstrative exhibit.

started two-year limitations period – a reboot of the limitations period.

The Student, on the other hand, argued that in developing the September IEP, the team was free to consider all aspects of the IEP and that it should be taken as a new, and, in their opinion, inadequate document fully open to review. This view necessarily permits the Student to raise problems with portions of the IEP that would otherwise be time-barred because they did not change between February and September. It is not necessary to resolve this legal difference of opinion on the facts of this case. Under any analysis both IEPs offered FAPE.

The starting point for that analysis is the February IEP. The Student had previously been identified as a Student with a specific learning disability, which was thought to impact him in the areas of written expression and study/organizational skills. Prior to the IEP meetings centered on developing the February IEP, the Parents arranged for a neuropsychological evaluation of the Student. Evidence presented at the Due Process hearing raises questions about the trustworthiness of that evaluation, discussed below, but in early 2014, when the Parent presented the evaluation to Public School, Public School referred the evaluation to School Psychologist, per usual procedure. School Psychologist questioned why the Student would be tested without the psychostimulant medication he otherwise took every day, and she noted that the data did not support the recommendation for a small structured academic program with educators trained in instructing students with language based learning and attention disorders.

The IEP team, including the Parent, considered the Student's then-current levels of academic achievement and functional performance. The team considered teacher input; Parent input, which included information and suggestions provided by the educational advocate accompanying the Parent; observations; and the private neuropsychological evaluation. The IEP that was developed included two goals – one addressing each of the Student's specific needs – written expression and study/organizational skills.

The transition into middle school is a difficult one for most students. The Student was overwhelmed as early as October 2013 with three GT classes and honors math. On October 3, 2013, the Student's science teacher wrote an email to the Parent detailing the difficulties the Student was having in the GT science class. She spoke extensively of the efforts she was making to help the Student, including using many of the accommodations included in his IEP, and also other techniques she was trying, including soliciting the Student's suggestions as to how to help him. She noted that the Student was sensitive to being singled out in the small class of eleven students,<sup>29</sup> but she also noted that the Student was not completing homework. She expressed concern about the Student's "ability to keep up with the workload of a GT science class." Parents No. 16, at P. The science teacher was not the only teacher noticing that the Student was having substantial trouble with his written work. Parents No. 24.

The Student had difficulty managing written assignments – organizing them, completing them, and turning them in. This was particularly true with long-term assignments. He sometimes seemed overwhelmed in classes, particularly in social studies, which was scheduled late in the school day, but in other classes as well. *Id.* The Student was also sometimes resistant to accepting help that was offered to him by school personnel or using organizational tools or techniques to help himself stay organized. The Student sometimes experienced anxiety, tearfulness, and frustration.

The Student had an extensive vocabulary, actively participated in class discussions, and had a broad base of background knowledge. He also exhibited strong verbal skills, particularly with vocabulary, but his relative weakness in processing speed and working memory impacted

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<sup>29</sup> Science teacher taught three sections of GT science. The Student's section of eleven students was unusually small because many students were involved in the school's music program, which was scheduled at the same time as the Student's science class.

him in the school setting.

The goals designed to address his academic deficits in written expression and organization and study skills appropriately targeted and addressed the Student's needs. Under each goal, the Student had several objectives. The objectives under the written expression goal covered a broad range of skills to be developed, including many aspects of different types of writing – to inform or persuade for example. The goal should have included a method of measuring the objectives and it did not, but the Student is not entitled to a perfect IEP, only one reasonably calculated to provide educational benefit. The goal addressing the Student's study and organizational skills was stronger, with objectives such as breaking down large assignments or tasks into small parts or steps, working steadily with focus until completed with 80% accuracy. This practice of breaking large work assignments down into smaller, more manageable pieces is called "chunking." Other objectives aimed at helping the Student stay organized by working with him to write down all of his assignments or, in deference to his written expression deficits, to use technology to record assignments, such as taking a picture of an assignment written on the blackboard rather than trying to copy it down. The objectives sought to encourage independence on the Student's part, but also to equip him to recognize when he was in need of assistance and to provide strategies for seeking out assistance from teachers (self-advocacy).

The IEP team recognized that the Student sometimes was overwhelmed and sometimes shut down or cried. The independent neuropsychological report diagnosed the Student as having an Unspecified Anxiety Disorder, a new diagnosis. Of the twenty-nine suggestions Consultant #4 made in her report with respect to the school setting, many could be expected to have an effect on the Student's anxiety, for example, avoiding scheduling multiple tests on one day. The only recommendation directly aimed at anxiety in and of itself was the suggestion of identifying

a mentor to provide support in several ways, including, identifying “when it may also be helpful to obtain counseling services, if necessary, for symptoms of anxiety or frustration related to his attention and learning disorders.” Parents No. 21, at 21-22. School Psychologist pointed out that the report stated that certain behavioral checklists completed by the Student’s mother and “teachers revealed anxiety and significant deficits in executive functioning skills consistent with the diagnoses of Anxiety Disorder and ADHD, respectively.” *Id.* at 20. School Psychologist noted in reviewing the report that the results of the teachers’ checklists did not reveal clinically significant anxiety. Board No. 22.

The team did not write any goal specifically for anxiety. School Psychologist advised that due to his executive functioning difficulties, the Student might not be ready for the rigors of upper level and GT classes. She suggested that middle school could be viewed as a “developmental training ground to develop the skills necessary to be successful in high school in higher level classes.” Board No. 25, at Bates 00540.

The February 2014 IEP provided the following instructional and testing accommodations:

- electronic word processing (including spelling and grammar checks)
- monitoring of test response
- mathematics tools and calculation devices
- graphic organizer
- extended time (time and a half)
- multiple or frequent breaks
- reduced distractions
- mathematics tools and calculation devices

The February IEP also included the following supplementary aids, services, program modifications, and supports:

- allow the Student to orally rehearse ideas prior to writing
- use of a word processor to type longer responses and use spelling and grammar applications
- provide student with a copy of student or teacher notes
- provide home sets of textbooks/instructional materials
- allow the Student to photograph assignments with an electronic device

- provide assistance with organization
- check for understanding
- frequent and/or immediate feedback
- allow use of highlighters during instruction and assignments
- human reader of selected sections of assignments
- break down assignments into smaller units with interim due dates
- preferential seating
- psychologist consult – as needed to address and support the Student’s level of frustration and anxiety in the classroom

Additionally, the February IEP called for four hours per week of special education instruction in the general education setting across all content areas to support the writing and organization or study skills objectives.

The February IEP as written incorporated many of Consultant #4’s recommendations.

These included:

- continued special education instruction to access the general curriculum
- strategies to address his deficits in planning, organizational, and related problem solving skills
- extra response and processing time
- repetition of instructions
- checks to ensure comprehension
- access to electronic devices such as laptop with spell and grammar check
- hands-on assistance with organization
- chunking of assignments and projects
- regular checks to ensure homework/project completion
- use of technology for calendar management, to record homework and due dates, and to have access to other organizational tools
- preferential seating
- extra time (150%) for in-class testing, assignments, and standardized testing
- reduced distractions
- two sets of text books – one for school and one for home

The February IEP did not include the suggestions added to the original report at the Parent’s request, and Public School was unaware at the time of the backstory on those items.

The IEP did not specifically approve dictation of assignments, but the Parent did sometimes have the Student dictate assignments to her and Public School did not penalize this practice. Also, the IEP made provision for oral rehearsal of ideas before any writing took place. Other

recommendations not adopted on the IEP included elimination of redundancy or repetition, credit for math problems without having to show all of the work, and a positive reinforcement system. The IEP did not assign a mentor, but did provide for psychology consultation to address and support the Student's frustration and anxiety.

Some of Consultant #4's suggestions were somewhat less than clear. For example, Consultant #4 suggested "[r]ubrics to support reading comprehension and written expression." Parents No. 21, at 21. If this means the Student was to be provided with standard rubrics for projects and assignments, then the suggestion was incorporated into the IEP; if it means something in addition to that, it is not clear what she meant. As another example, Consultant #4 suggested "[o]ppportunity for extra credit for late assignments or extended deadlines for homework assignments." *Id.* It is not clear whether late or extended would be a reference to something beyond the time and a half already allotted to the Student.

The February IEP was reasonably calculated to meet the unique needs of the Student and to provide educational benefit to the Student. The last meeting finalizing the February IEP was held February 28, 2014. The Parents were dissatisfied with the IEP approved by the Student's team.

Prior to the January and February meetings, the Parents had been taking certain action to ensure that they could place the Student in a private school if they deemed it appropriate. It is not clear from the evidence when the Parent first became interested in accessing Private School. She testified that Consultant #4 had recommended Private School in her written neuropsychology report. That was inaccurate, and the Parent subsequently testified that Consultant #4 recommended it to her in some conversation that they had.

Because the structure of the Findings of Fact and the Stipulations splits up the timeline of events, it is useful to see things in their chronological sequence:

11/26/13 and 12/5/13 Consultant #4 administered tests to the Student

12/21/13 Consultant #4 sent a draft copy of her report to the Parent

12/30/13 Parents submitted an application for the Student to attend Private School

1/3/14 Parent sent an email advising Consultant #4 that she had a few issues with the draft report and that she marked it as needed. The sticky notes requested, among other things, (1) that Consultant #4 add recommended accommodations that mirror the private school to which she had just submitted an application for the Student and (2) that Consultant #4 delete material from the report

1/6/14 Consultant #4 issued her final report in which she added recommended accommodations that mirrored Private School and deleted material per the Parent's request. On or after this date the report was submitted to Public School.

1/21/14 and 2/4/14 IEP meetings

2/14/14 The Student was accepted at Private School

2/28/14 February IEP was finalized

2/29/14 The date appearing on enrollment contract Parents signed and submitted to Private School accompanied by a non-refundable check for \$3,145.00

3/19/14 The Parent emailed the Student's Case Manager about GT classes. Parent immediately shared the Case Manager's response with one of her educational consultants.

4/8/14 The Parent emailed Consultant #4 advising that she had consulted with an attorney specializing in education law. The email sought information from Consultant #4 about testing that would "benchmark [the Student's] levels of competency at the end of 6th grade, and then again after the first semester of grade 7th grade at [Private School]," the purpose of which was to have "a quantifiable measure of [the Student's] success/progress as a direct result of his moving to [Private School]." Board No. 30-A.

5/15/14 Deadline for withdrawing the Student from Private School or receiving any refunds

5/20/14 Parents notified Public School of their decision to unilaterally place the Student at Private School.

5/22/14 Public School notified the Parents it would not fund the unilateral placement and advised that it would schedule an IEP meeting

6/18/14	IEP meeting to discuss the Parents' concerns and the Student's needs. By this time the Parents had made additional payments to Private School, bringing the total to something over \$9,000.00. The team agreed to perform testing regarding speech and language issues raised by the Parents, and anxiety.
7/18/14	Testing performed by Public School to address questions about speech language pathology and
8/21 and 22/14	Public School tried to contact Parent to set up an IEP meeting to discuss the results of testing
8/26/14	After the Student was already attending Private School, the Parent contacted Public School to set up an IEP meeting
9/10/14 and 9/16/14	IEP meetings
9/16/14 – 5/17/16	No contact between Parents and Public School regarding the Student
5/18/16	Filing of Due Process and 504 actions

Fleshing out this sequence of events, the Parents elected, as they have every right to do, to apply to a private school. Those applications have a particular season to them and there is nothing inappropriate in applying to a private school in a timely fashion while ongoing work is occurring on an IEP. It gives parents an option that could well be foreclosed by delaying an application until the IEP meetings are finished and an IEP is finalized. One Court put it this way:

A further observation is in order. The mere fact that parents may enroll their child in a private school while the IEP process is underway . . . is not by itself proof of bad faith on their part. In the great run of cases, the parents will simply be bowing to reality. Enrollments in special education facilities may fill up quickly. They may not always be available . . . when the IEP is finally ready. As before, the key consideration is that the parents pursue in good faith the development of the IEP and the possibility of public school placement.

*Kitchelt v. Weast*, 341 F. Supp. 2d 553, 557 n.1 (D. Md. 2004).

In this case, though, the Parent, very early in the process, tried to and was successful in skewing the information presented to the IEP team in the neuropsychological report. She made very specific requests about the report – it was to be re-vamped to fit the school to which she had

just submitted an application. It was further to be re-vamped in that it was to delete material. After those changes were made, she had the report submitted to Public School.

Without being maudlin, I will say that beyond the usual allowances I would make for any witness, a parent in a special education case should be understood to see the world through a filter of wanting the absolute best for his or her child whether that is the legal standard applicable to the situation or not. At times, a parent's version of reality with respect to his or her child may not match what others see or believe. Parents sometimes see a child's strengths or weaknesses better than any others; sometimes their vision on these issues is clouded. Testimony in line with a parent's perspective, whatever that might encompass, rather than an objective and wholly rational perspective is not necessarily a sign of a credibility problem. In this case though, the Parent's credibility issues extend beyond these allowances.

The Findings of Fact set out the Parent's requests with respect to changes to be made to the neuropsychological report. During the Parent's cross-examination, the following exchange occurred<sup>30</sup>:

Q. So by the time you applied to [Private School], the testing by [Consultant #4] had been completed, but she had not yet written her report, right?

A. I don't recall the specific sequence.

Q. Well, the report is dated January 6, 2014.

A. Okay.

Q. And you applied on December 30, 2013, correct?

A. Yes.

Q. And the testing was done on November 26 and December 5 of 2013.

A. Yes.

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<sup>30</sup> When this part of the cross-examination was conducted, either Public School did not have a copy of the draft with the sticky notes, or did not realize that it had one, which is why the questioning is general, rather than specifically tied to the actual content of the sticky notes. It later became clear that the content of the sticky notes was available.

Q. So when you talk about timelines, the timeline here is the testing occurred, you applied to [Private School] and then the written report came out, right?

A. Yes.

Q. But there was a step in between there that we haven't mentioned and that was your communication back and forth with [Consultant #4] about what that report would say and not say; isn't that true?

A. I have a hard time answering that question. May I have some latitude to

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JUDGE FARRELL: You may tell me why you are having difficulty answering that question.

THE WITNESS: Because she shared draft copies with me in advance of the written report *only to check facts*.

JUDGE FARRELL: So as to the original question there was communication back and forth. The answer would be yes? What part of the question —

THE WITNESS: Yes.

JUDGE FARRELL: -- made you —

THE WITNESS: So he made it sound as if I was dialoging with [Consultant #4] about what the ultimate report findings were going to be when that was never in question in my dialogue. [Consultant #4] shared a draft report with me prior to the release of the final report that is dated January 6.

[interruption due to a cell phone]

MR. STEEDMAN: May I? The question is, as I understood it, Your Honor, was you were having communication with [Consultant #4] about what should and should not go into the report. I think that was the difficulty [the Parent] was having.

JUDGE FARRELL: All right. So you may ask your next —

BY MR. KREW: Q. *Well, do you deny that there was communication back and forth between you and [Consultant #4] about what should and shouldn't be in the report? Do you deny that?*

A. *I deny that.*

Test. Parent (Vol. 3, at 768:24 to 771:9) (emphasis added).

Later in cross-examination the Parent testified as follows:

Q. So I thought originally you said that all you did was made some slight changes to the statement of facts, right?

A. Can you be more clear, what changes are you saying?

Q. Isn't that what you said? You said that the only thing that you had suggested that [Consultant #4] change were some of the facts –

A. That's not what I said.

Q. Tell me exactly what it is you asked [Consultant #4] to change in the draft report.

A. I don't know that I asked her to change anything. I think I had questions about what she was stating, how her suggestions could be implemented, what they would look like in a classroom setting. I am not an educator and I needed some assistance.

Q. Well, what you said was that you had issues. I have a few issues, that you and [Consultant #2] have a few issues that we wanted to have you look at. You're not asking her how to implement the recommendations. You're saying you have issues with it, right? What were the issues that you had with her draft report? Can you tell us?

A. I think I've already stated that my issues had to do with how her recommendations could be implemented. I didn't want to return a report to the school that was unable to have any bearing on how we could help [the Student].

Q. Okay. Tell me -- turn to [Parents No.] 21 and just tell me specifically what areas you told her to change.

A. *I can't do that because I didn't tell her to change anything.*

Q. *You didn't tell her to change anything?*

A. *I did not tell her to change anything.*

*Id.* at 780:14 to 781:20 (emphasis added).

The Parent's statements denying that there was communication back and forth about what

should be in the report were untrue. The Parent's statements that she did not tell Consultant #4 to change anything in the report were untrue. In fact, the Parent's January 3, 2014 email to Consultant #4 makes this abundantly clear. In it, the Parent tells Consultant #4 that "[i]f it is possible, we would love to have the document finalized by Monday or Tuesday . . . . *Once we have it done, I can also give you the e-mail addresses of the people to whom I would like it sent at the school . . . .*" Board No. 17-A (emphasis added). The Parent did not consider the report final and she was not willing, at the point she sent this email, to give Consultant #4 the opportunity to send it to school personnel until it was changed. This testimony damaged the Parent's credibility, particularly when considered against the bigger picture.

The IEP was finalized February 28, 2014, and on a date not proven on the evidence in this case (given that there was no February 29, 2014), but purporting to be the day after the IEP was finalized, the Parents signed and submitted an enrollment contract for Private School, one that required a non-refundable down-payment in excess of \$3,000.00. Again, the Parent is permitted to take action to keep this option open, even if it requires expenditure of significant funds. "[P]arents are not to be faulted simply because they may have been of a firm mind to send their child to private school, while engaged in developing an IEP for the child." *S.M. v. Weast*, 240 F. Supp. 2d 426, 436 (D. Md. 2003).

In March, the Parent sent an email to the Student's Case Manager regarding the ongoing problems with the Student in GT classes. The email did not read like an ordinary email from a parent to an educational professional, but appeared to be trying to get Public School personnel to agree to a very particular phrasing of certain issues, under the guise of the Parent wanting to explain to her husband why the Student was being taken out of GT Geography.

In April 2014 the Parent spoke to an attorney specializing in education law. Based on that conversation she sent Consultant #4 an email. The email was seeking specific information

on what testing could be performed at the end of the Student's sixth grade year in Public School and again at the end of the Student's first semester at Private School to show by "quantifiable measure" the Student's "success/progress as a direct result of his moving to [Private School]." Board No. 30-A. The email was written in a way that makes it clear the Parent believed the Student would attend Private School for the 2014-2015 school year. It was not written in a way that suggests she was exploring what was possible if that should turn out to be the case. The Parent was looking, in April 2014, to build a case for seeking reimbursement from Public School for the cost of Private School. She is allowed to do that.

The problem arises from the Parent's insistence that this was not the case. The Parent testified that no decision regarding the Student's attendance at Private School was made until May 20, 2014, the date the Parents gave notice that they were unilaterally placing the Student at Private School. The letter stated:

Specifically, we feel that his current program has not identified all of his areas of need, provided the accommodations and services that he requires to be successful in classes appropriate for his intellectual level, or fully implemented the supports documented in his IEP. As a result, [the Student's] performance and his emotional well-being have deteriorated. The solution proposed by the school has been to remove [the Student] from gifted and talented classes and place him in regular general education classes.

Parents No. 36.

The Parent testified on direct:

Q. So in sending this letter, what -- and I'm not going to ask you to read the letter or recite from the letter, but what was prompting this letter, what prompted you to write this letter to make this decision at this time?

A. It was a very difficult letter to write. It was a very difficult place to be in. Forgive me. At this point in this school year he was -- he was decompensated to the point that I was very concerned for his well-being. He was very sad. He felt unaccomplished. He came home one day and told me he felt worthless and -- I'm sorry.

We decided at that point that at this moment in time on May 20th that we were going to take avenue B, which was to place him elsewhere because I was not able to get his needs met in the public school.

Test. Parent (Vol. 3, at 702:20 to 703:10). The Parent's testimony was moving, and I do believe that the Student told her at some point that he felt worthless, and that that statement would be a blow to nearly any parent and was to this Parent. What I do not find credible, based on the chain of events established by the evidence, is (1) that the decision to send the Student to Private School occurred at that pinpoint moment in time, and (2) that after that the Parents were still considering sending the child to Public School for the 2014-2015 school year, a possibility the Parent maintained that she enthusiastically embraced.

Upon receiving the notice of unilateral placement, Public School promptly responded that it was not funding the placement and that it would schedule an IEP meeting to address the Parents' concerns. At the IEP meeting the Parents raised the following issues for discussion:

- Anxiety-related concerns
  - the Student was experiencing frustration and anxiety
  - the Student sometimes refused supports that were supposed to be provided because he was anxious and because he felt singled out
  - the Student had difficulty managing his emotions and anxiety
  - the Parent was concerned that accommodations reducing the size or number of work product items would adversely affect the Student's self-image and raise his anxiety if he perceived that he was doing something different from what other students were doing
- Written expression-related concerns
  - the Student had deficits in composition skills and was writing below the level of his ability, including problems with paragraph structure, spelling, and grammar
  - the Parent wanted the Student to be required to practice writing every day in school
- Speech-language pathology-related concerns
  - the Student had deficits in fluency of conversational speech, which impacted his written language skills
- Executive function-related concerns

- the Student had deficits in organization
- the Student had difficulty with all transitions, including, packing up from one class and getting to the next class on time, to include physical education, where he had to change clothes
- GT/executive function/anxiety – related concern
  - the Parents were concerned about the size of and effort required for GT projects and reported that although they believed he had the ability to do the work, the Student would assert that he could not do the projects and that he did not understand why he was required to complete assigned projects

The Team discussed these areas and decided that further testing was needed to explore the Parents' concerns with respect to speech/language pathology and anxiety. The team also determined that an IAT referral was appropriate. The testing took place on July 18, 2014. The speech/language testing revealed difficulties. When the team reconvened in September 2014, it developed a new goal and objective to address this need. The Student advised that his IDEA complaint did not include anything regarding Public School's handling of the speech/language issue. While on the one hand, given the Student's position, it might be reasonable to omit any material about it in this decision, on the other hand that would fail to give a full picture of how Public School responded to areas of concern raised by the Parents. For this reason I have included how this parental concern was addressed even though it is not an issue to be resolved in the merits hearing.

With respect to the anxiety reported by the Parent, the team wanted to supplement the neuropsychological evaluation conducted by Consultant #4. Consultant #4 had not administered certain checklists for the Student related to anxiety even though she had the Parent and teachers fill them out. The team thought it would be valuable to examine how the Student perceived his anxiety. The authorization that the Parent signed for testing specifically noted that the testing would look at the Student's self-report. Board No. 34, at Bates 00568. The testing was completed July 18, 2014. School Psychologist's report was not completed until August 25,

2014. By that time the school had already been attempting to contact the Parent to schedule an IEP meeting.

School Psychologist concluded that the information in the original neuropsychological report supplemented by the July 2014 testing did not support a diagnosis of an anxiety disorder. Just because an individual has anxiety does not mean that he or she has an anxiety disorder under the Diagnostic and Statistical Manual of Mental Disorders (DSM).<sup>31</sup> The school recognized that the Student suffered from anxiety, but in looking at how to address the Student's specific needs, testing revealed, in School Psychologist's opinion, that more attention needed to be given to his executive functioning needs, because that was the underlying source of his anxiety. This is as contrasted with creating a goal to address an anxiety disorder that School Psychologist did not believe that the Student had, or addressing anxiety in a general way, which she likened to treating the symptoms without trying to eliminate the root cause of the anxiety.

The Parent complained that Public School did not act with sufficient urgency in conducting the testing, preparing the psychological testing report, or attempting to schedule an IEP meeting before school started for the 2014-2015 school year. The complaints are not well taken. As Public School was wont to point out unduly often, the Parents controlled the timing of many of the events in this case.

The Parent was dissatisfied with the IEP in February; she knew that the Student was not going to be in GT classes for the 2014-2015 school year in February; she knew he was being pulled out of GT Geography in March; she gave the appearance of trying to obtain a statement against interest from the Student's Case Manager in March; she was seeking professional advice from an education attorney no later than April 8, 2014; she was seeking advice from Consultant #4 on April 8, 2014, about how to conduct testing for the specific purpose of collecting data to

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<sup>31</sup> The DSM-5 was the version in use during the relevant period of Consultant #4 and School Psychologist's testing and analysis.

support a later claim for tuition reimbursement from Public School to pay for Private School; the Parents were paying many thousands of dollars for the Student's enrollment in Private School. Nevertheless, the Parents did not give notice of unilateral placement until May 20, 2014.

In waiting until so late in the school year, the Parents knew that it would be difficult for Public School to convene a prompt IEP meeting, conduct necessary testing and prepare reports over the summer (when personnel availability is spotty and unpredictable), and reconvene an IEP meeting to discuss the testing results and make any appropriate changes in the IEP. Further, the Parent did not immediately respond to school attempts to contact her to schedule an IEP meeting. She waited five days, until the Student was already attending Private School, before she touched base to schedule an IEP meeting. This is not a situation where there was no IEP in effect or where a school district was dilatory.

The Parents are free to give unilateral notice when they choose, so long as it occurs at least ten days before the Student is removed from the public school setting. 34 C.F.R. § 300.148(d)(1)(ii) (2015). The Parents pointed out that they gave notice months in advance of that. While true, looking at the entire picture of what was going on, the timing gives every appearance of being a piece of the Parents' strategy for obtaining reimbursement. I do not find that Public School was unresponsive or sluggish in addressing the parental concerns raised in the June 2014 IEP meeting.

During the September 2014 IEP meetings, the team made changes to the IEP designed to address concerns raised by the parents in the areas of anxiety, speech/language pathology, and executive function. Although there were no changes to the written expression goal or objectives, this might well have been different had the Student been available for the IAT consult that was approved by the team. This consult would have looked at how technology might have been incorporated into the Student's IEP beyond the accommodations he already received. This could

easily have resulted in additional changes to the IEP to adapt the written expression goal and objectives or the executive function goal and objectives.

At the merits hearing, the Student produced several witnesses to attack the sufficiency and appropriateness of the September IEP. The first was Consultant #1. Consultant #1 became involved with the Student's education in January 2014 when her partner, Consultant #2, who had been advising the family and who had tested the Student as part of a neuropsychological evaluation, was unavailable. Consultant #1 has a Bachelor's of Science in Special Education and a Masters in Reading. Her training and experience qualified her as an expert in special education and executive function as it pertains to strategies for school-age children with ADHD. She has been a business partner of Consultant #2 since 2007 and she has also worked since 2010 at XXXX Center where she is the Director of Executive Function and Testing Programs.

Consultant #1 opined that the September 2014 IEP was lacking in that it did not adequately address the Student's frustration and anxiety and his executive function needs. She said that too much of it was the same as the February 2014 IEP; that the written expression goal had no method of measurement for its objectives; that the IEP indicated progress but did not specifically state the data on which that conclusion was drawn; that there was not enough specificity about how certain things would be implemented.

Some of these issues bring to the forefront the reboot argument outlined above. For example, the written expression goal and objectives did not change from the February to the September 2014 IEP. Should complaints about this be time-barred because the Parents had the opportunity to include alleged defects in the February 2014 IEP in their Due Process complaint but elected not to in choosing May 18, 2016 as their filing date? Or should the Parents be allowed an opportunity to challenge the September IEP as if it were a newly minted document? Does the answer to this hinge on the specifics of the Parent's complaint in the notice of unilateral

placement, the topics covered in the June IEP meeting, or something else? I do not resolve this question in the decision. It is clear that the Parents did not honor the spirit of the IDEA, which emphasizes prompt resolution of educational disputes.<sup>32</sup> The Parents operated within the letter of the regulations with their carefully selected filing date, but they did not seek to promptly resolve their unilateral placement issues. Nevertheless, whether looked at as changes to an existing IEP or as a fresh IEP starting a new two-year limitations period, either analysis results in a conclusion that the IEP was calculated to provide educational benefit and offered the Student FAPE.

The February IEP was finalized February 28, 2014. From March 2014 through June 2014, the Student made progress, according to notations on the September IEP. The issues that were raised by the Parents in the unilateral placement letter and at the June 2014 IEP meeting were considered and addressed in a substantial way, with testing and follow-up. Even before the September 10, 2014 IEP meeting, the Student was attending Private School and the Parent was very clear that the family was not revisiting that decision. Parents No. 45. Although the Parent attended the September IEP meetings, she was not giving any consideration to moving the Student back to Public School for the 2014-2015 school year.

The present levels of academic achievement and functional performance were modestly updated, but I do not find it to be a fatal flaw in the September IEP that this information was not mined in richer detail under the circumstances of this case. Public School added an objective under executive function based on the testing by School Psychologist. Although it appeared under the executive function goal, School Psychologist believed that it would result in reducing the Student's anxiety and frustration.

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<sup>32</sup> This is evidenced by, among other things, the highly regimented and expedited timelines for addressing complaints once they are filed.

The next expert presented by the Student was Consultant #2. Consultant #2 is a long-time friend of the Parent. She was admitted as an expert in special education. She has worked for a public school system for over twenty-five years. Currently she is a special education educator and a team leader. She also is certified as a general education teacher and serves as a Preschool Education Program parent educator. In addition to working for MCPS, Consultant #2 is a partner to Consultant #1 in an educational consulting business.

Public School attempted to question Consultant #2's ethics and professionalism based on Consultant #2 having a private practice, in addition to working for a public school system, particularly when, as here, the consulting work results in Consultant #2 testifying against a public school system in a Due Process hearing. The parties urged me to consider various public schools' ethics policies and conflict of interest regulations in a sort of mini-trial about how another public school system might view this conduct by Consultant #2. As was eventually revealed, one or more witnesses for both sides, Consultant #2, Consultant #3, and School Psychologist, had all engaged in private educational practices of one type or another while they were simultaneously employed by a public school system. I make no determination on whether this is a conflict of interest or an ethics violation. I also give it no weight in assessing the credibility of the three experts. With respect to Consultant #2, however, this topic raised different credibility issues.

Experienced, determined, skilled counsel can make virtually anybody look bad on cross-examination. The attorneys in this case were skilled, experienced, and, at times, determined. I give a generous amount of consideration to witnesses who endured lengthy direct examinations, constantly interrupted by objections, and equally disrupted, lengthy, sometimes withering, cross-examinations. I tried not to let any slip of the tongue or genuine mistake influence my perception about witness credibility. Nevertheless, some witnesses proved very problematic.

Consultant #2 was one of them.

Consultant #2 testified that the Director, who had formerly been her cluster supervisor and who currently has the title of Director of the Department of Special Education Services for the public school system where Consultant #2 is employed, was aware of her business and further that “he shared it was not a conflict of interest.” Test. Consultant #2 (Vol. 1, at 226:23). This appeared to conflict with an unsolicited written statement that Consultant #2 had provided to Public School’s counsel on the day she testified.<sup>33</sup> In that statement she related that the Director was aware of her business and had “never shared that it would be a problem or a conflict of interest.” *Id.* at 230:4 to 230:5.

Questioned about whether these statements said “very different” things – that is, the contrast between the Director apparently not saying anything on the issue and the Director affirmatively stating that the arrangement was not a problem – Consultant #2 agreed that they were very different. She reiterated, “What I am telling you right now at this table is that he was - is aware of my business and shared it would not be a conflict of interest.” *Id.* at 230:23 to 230:25. Soon thereafter the Director testified by telephone. He flatly denied any knowledge that Consultant #2 had a private education consulting firm or that she had ever told him that she did.

As detailed in the Findings of Fact, Consultant #2 is a qualified examiner for certain test procedures, however, when she tested the Student, she failed to administer a relevant subtest, an irregularity for which she had no explanation, even after being allowed to check the test protocols where she ordinarily would have recorded the circumstances surrounding this error or diversion from normal practice. She made no written report of her findings, instead reporting her

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<sup>33</sup> This written statement was never marked for identification nor was it offered as an exhibit.

information orally to Consultant #4.<sup>34</sup> She either provided no test interpretation or diagnostic impressions in the information she conveyed, or Consultant #4 omitted them from the report. If the latter is the case, there is no indication that Consultant #2 tried to amend the report to include her findings, although she made suggestions about other changes that she thought the Parent should request to the neuropsychological evaluation.

In preparation for the hearing, Public School subpoenaed invoices from Consultant #2 and/or her business for services rendered to the Student. Consultant #2 disregarded that portion of the subpoena and in testimony gave the impression that no invoices were available. When pressed, she acknowledged that the business could produce invoices.<sup>35</sup> When produced, the

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<sup>34</sup> Consultant #4 included Consultant #2's information in her report, but had no idea how she received the information from Consultant #2 – orally, by written report, by reviewing notes on the test protocols, or by some combination.

<sup>35</sup> From Consultant #2's cross examination:

Q. I asked for billing statements, why didn't you give me those?

A. Because I don't typically save those e-mails. To be honest with you, I don't ever save -- save the invoice statements that I send out.

Q. Well, I'm not interested in hard copy. You have them on your hard drive of your computer, don't you?

A. I -- no, I don't save it.

Q. You -- you don't have any record of invoices?

A. No.

Q. Do you pay taxes on the money that you make --

A. Yes.

Q. -- through -- well, how are you able to substantiate your income if you don't keep records?

....

BY MR. KREW:

Q. So just so I'm clear, there is no way that you can recover billing statements?

A. -- our billing is done --

Q. Just answer the question, please, is there any way you can recover, do you have them on a hard drive, do you have them on a thumb drive, do you have them?

A. -- yes.

Q. You do?

A. We -- we have them on a -- a system, on a banking system that we use --

Q. Okay.

A. -- for --

Q. Well, I --

A. -- for --

Q. -- asked -- I asked for that though, why didn't you produce it?

A. -- I don't know.

Test. Consultant #2 (Vol. 1, at 293:18 to 297:7) (selected lines).

invoices showed that Consultant #2 or her two-person firm gave the Parents a 75% discount off her regular testing fee of \$800 and a 25% discount for most other services. Board No. 86. The most recent invoice was dated October 1, 2014.

Additionally, Consultant #2 was involved in assisting the Parent with reviewing Consultant #4's draft neuropsychological report and, according to the sticky notes written by the Parent, Consultant #2 suggested changing the recommendations to mirror Private School.

Perhaps no one of these matters would have done much damage to her believability, but cumulatively the effects were considerable. Offering a written statement that conflicted with her testimony, acknowledging that they conflicted and insisting that the testimony is what should be believed, and then being contradicted by a witness from a different public school system with absolutely no interest in the case, was only the start. That was followed by Consultant #2 making every effort to offer misleading testimony suggesting that she could not produce her billing statements when she could. The billing statements were not particularly interesting; there is no misconduct in giving a friend a discount, but trying so hard to create a false impression while under oath catches an adjudicator's attention. These problems were coupled with faulty and poorly documented administration of her portion of the testing, as well as efforts to change the recommendations in the draft report in a way that was not supported by the data. For all these reasons, I find Consultant #2 lacking in credibility, and I give little or no weight to her testimony.

The Student also called Consultant #4 as an expert. Consultant #4 is a neuropsychologist recommended to the Parent by Consultant #2. She is a well-credentialed professional with a Doctorate of Psychology in Clinical Psychology, which she earned in 2001. After obtaining that degree, she worked a little less than a year as a Registered Psychologist Assistant in [State], followed by more than a decade in positions of increasing responsibility at XXXX Associates

located in [City], Maryland. For a little over three years Consultant #4 has owned her own independent consultative and assessment practice focusing on children, adolescents, and adults with ADHD; learning differences; neurodevelopmental disorders; and psychiatric, emotional, and behavioral disorders.

While Consultant #4's education and experience make her well-qualified to administer testing to the Student and to offer opinions regarding appropriate diagnoses and accommodations, what happened in actual practice in this case raises a host of red flags. First, Consultant #4 directed the Parent to bring the Student for testing without giving him his psychostimulant medication. The Parent and Consultant #4 understood that the Student's test performance was likely to be negatively impacted by the failure to give to the Student on testing days that medication that the Student otherwise took every day without exception.<sup>36</sup>

Consultant #4 testified that she wanted to look at the Student's "deficits and strengths without any influence." (Vol. 4, at 958:1 to 958:4). She did not explain why, if this was the case, she instructed the Parent to omit the psychostimulant medication but not the other medications taken by the Student, such as the anxiety medication. She also did not explain how she could make proper recommendations regarding the Student if she was seeing him under circumstances where he was very frustrated, more indecisive, and less able to make decisions than would be the norm on his medication.<sup>37</sup> School Psychologist testified that it would be highly unusual to test a child who regularly took a psychostimulant medication without the

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<sup>36</sup> As Consultant #4 testified, with respect to the third day of testing:

And so I knew from the student's mother that he performs better with medication. He's much able -- better able to manage his frustration and he's more available and focused. So I decided, because I wanted him to be fully available for the testing, to have him go on his medication.

(Vol. 4, at 960:8 to 960:13).

<sup>37</sup> This description of the Student without his psychostimulant medication is from Parents No. 23, at 1, a report from XXXX Center, signed by XXXX XXXX, MD, on February 22, 2014.

medication unless there was a concern that the medication might be ineffective.<sup>38</sup> I found her testimony to be persuasive on this issue, and question the reason for Consultant #4 attempting to test the Student while he was not given his psychostimulant medication.

This is bolstered by the way this issue was handled in Consultant #4's written report. In reading the report, the dates of evaluation appear on the third line after the title on the first page. Parents No. 21. There is no mention of the scheduled but unsuccessful day of attempted testing. It is not until page thirteen that there is mention of there actually being three days on which testing was scheduled but only two on which testing was accomplished owing to the Student's inability to cope on the second scheduled day. That single paragraph on page thirteen is also the only place where it mentions that on some testing days the Student was not taking his

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<sup>38</sup> School Psychologist testified on direct:

Q. Let me ask you this, was there any indication as to what test was given on what day?

A. No.

Q. Why did that matter?

A. Because the testing that's completed as -- the list of tests that are at the front of the evaluation is a combination of neuropsychological, academic and standard psychological tests and each of those tests have, are lengthy and have differing levels of executive functioning demands and concentration and focusing demands. So it was difficult -- and so not taking medication some days could affect his scores if medication was helping his attention and he wasn't -- and he took tests, but I didn't know which tests he was taking medication for and which ones he wasn't and it was difficult to use that to look at his every day functioning.

Q. So do you have an opinion with regard to whether a child who is taking XXXX and XXXX would be expected to do as well, less well or about the same if he is withdrawn from his medication the day of testing?

....

THE WITNESS: The psychostimulant medication, the medication for attention leaves the system very quickly, so not giving medication one day takes the effects of that medication out of the system. So I would expect, and I have always seen that students who are tested when they are not on their medications score lower than when they're on their medication.

BY MR. KREW:

....

Q. And what was your opinion of [Consultant #4's] rationale for removing [the Student] from medication on the day of his testing?

A. I was -- I've never -- I was shocked, I totally was, was totally unexpected.

Q. Why is that?

A. Because typically -- my experience has been with private practitioners and with psychologists in the school systems, system, we want the student to be taking the medication that they normally take every day, unless it's not effective for their functioning.

Q. Did you see any acceptable rationale for doing so?

A. No.

Test. School Psychologist (Vol. 6, at 1390:8 to 1392:10).

psychostimulant medication but that for one day he was. Further, from Consultant #4's report, there was no way to tell which tests were administered while the Student was taking his psychostimulant medication as opposed to when he was not. Public School had to specifically request that information.

There were also serious problems arising from Consultant #4's draft report review procedures. There was conflicting testimony about the appropriateness *vel non* of allowing clients to review a draft report. Without making any determination about the ethics or appropriateness of the practice generally, I find that in this case it went desperately awry.

Consultant #4, as detailed above, removed accurate statements from her draft report because the Parent wanted them eliminated. Omitting a sentence about what the then-current IEP offered, as she did with respect to nine hours of weekly services aimed at addressing a writing objective, is innocuous. The same cannot be said of Consultant #4 removing her specific recommendations that the Parents pursue private tutorial services and that the Parents consider executive coaching for the Student, for which Consultant #4 offered to provide referrals. These suggestions were in addition to many, many (twenty-nine) suggestions<sup>39</sup> aimed at the school setting, so it is clear that Consultant #4 was not failing to consider what responsibilities the school should bear. Consultant #4, despite believing these were appropriate professional recommendations, took them out of her report at the Parent's instruction.

She also added recommendations, very *specific* recommendations, that were not supported by the data and not, apparently, any product of her independent professional judgment. She did this because the Parent and Consultant #2 wanted the recommendations to look exactly like what the Student would get if he went to Private School. Although detailed in the Findings

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<sup>39</sup> School Psychologist testified credibly that this lengthy list of suggestions was something she found in other of Consultant #4's reports and that they were not tailored to the Student, but rather represented a general list of suggestions for individuals with certain diagnoses that could be found in books or other sources.

of Fact, these additions bear repeating:

- a small, structured academic program with educators trained in instructing students with language based learning and attention disorders;
- a small student-teacher ratio;
- visual, auditory, kinesthetic, and tactile modalities for learning; and
- benefit from the opportunity to learn with peers of similar cognitive profiles.

Parents No. 21, at 20-21.

Consultant #4 also removed a paragraph in her recommendations which discussed “the most effective methods for developing fluency” according to the National Reading Panel (2000). This paragraph was removed because another Parent sticky note indicated that it should be stricken. The Parent did not provide any reason for this change in her sticky note and Consultant #4 did not offer any testimony that her opinion had changed, only that her report had.<sup>40</sup>

As quoted above, Consultant #4 directly testified that these changes to her neuropsychological report were made to mirror Private School, although she later stated that Private School was not the only setting where one could find these specific conditions. She

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<sup>40</sup> The paragraph read as follows:

According to the National Reading Panel (2000), the most effective methods for developing fluency emphasize repeated oral reading with feedback and guidance. Most strategies for fluency depend on the principal of over-learning information so that it is ingrained. Over-learning may be necessary for the development of automaticity. Guidelines for fluency training include the following:

- Fluency training should require only minutes a day.
- Practice must be consistent and extended over a period of weeks or months.
- Fluency is built on accuracy.
- Children should practice on materials they can already decode. They must be able to read the passage they choose with a high degree of accuracy making no more than one error for every 20 words read.
- Practice means re-reading the same passages at least four times.
- Fluency can be practiced at home and at school.

Board No. 17-B, at 23-24.

stated that she did not suggest Private School by name, because that would have been limiting suitable options for the Student.

Consultant #4 also relied to an unusual extent on information provided solely by the Parent. Often psychologists, school psychologists, or neuropsychologists will observe a client in the classroom if the client is of school age. This can be a good source of information regarding functioning in the school setting. Often a psychologist or neuropsychologist will speak with a pupil's teachers to gain insight into the client's functioning in a school setting. Consultant #4 did not make any attempt to collect information from school sources other than certain checklists that she gave the Parent to distribute to two teachers. She did not follow up with any additional teacher checklists when the two submitted revealed very different perceptions about the Student in the school setting. The value of a wider range of sources was confirmed by Consultant #4, although in the context of her critique of School Psychologist's testing administered in July 2014:

Q. Let me ask you, in terms of an evaluation that is based on self-report, what, if any, concerns does that bring to mind?

A. That it's coming from one source versus multiple sources of information.

Q. And is there any statement or -- well, what would be considered best practices overall in terms of psychological testing as it relates to obtaining information from one source versus multiple sources?

A. To get a clear picture, it's best to obtain information from multiple sources.

Test. Consultant #4 (Vol. 4, at 986:18 to 987:4).

With respect to that critique, Consultant #4 questioned the validity of some of School Psychologist's testing, opining that School Psychologist had failed to follow proper test protocols in asking the Student to rate how he felt over a period of months. Consultant #4 offered her understanding that for the tests at issue, the individual evaluating himself should not

be asked to give answers going back more than about two weeks.<sup>41</sup> School Psychologist contradicted this testimony, saying the instructions did not give that limitation and that it was permissible to ask the Student to think back over a longer period of time. Public School offered excerpts from the MASC 2 instructions, which permit asking a subject to rate how he might have been thinking, feeling, or acting “in the last while.” Board No. 89-A. Public School also offered an excerpt from the BRIEF2 Self-Report Form instructions. They indicated that those filling out the BRIEF2 should be asked “to indicate whether you have had problems with these behaviors over the past 6 months.” Board No. 89-B. Consultant #4’s criticism of School Psychologist’s administration of the MASC 2 and BRIEF2 self-reports on this basis was not well founded.

The Board raised other issues concerning Consultant #4’s conclusions about diagnoses (particularly with respect to an anxiety disorder); her report’s emphasis on reporting only anomalous or clinically significant findings without counterbalancing with or mentioning results falling within the normal range;<sup>42</sup> the extent of the clinical interview performed by Consultant #4 given that virtually nothing arising from a clinical interview found its way to her report;<sup>43</sup> etc.

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<sup>41</sup> Consultant #4 subsequently amended her testimony to say that for the BRIEF, a six-month lookback period was appropriate.

<sup>42</sup> School Psychologist said this about Consultant #4’s method of reporting anomalous scores without any mention of inconsistent scores that fell within average or normal ranges or choosing one score to report over another without explaining why:

Q. First, do you have an opinion with regard to the methodology that she followed in reaching combined scores?

A. Yes, this was one of the things that I expressed concern about on my review of this assessment on the review form that we discussed earlier.

What [Consultant #4] is doing here is combining scores from two different settings and they’re not consistent. It’s similar to reporting the scores earlier where she mentioned the scores that were a problem as identified by [the Parent] and at risk but not mentioning what was in the expected range.

Here, combining scores from two different settings, *something I have never, ever before seen in a neuropsychological or a psychological evaluation and it is not, does not give you objective information about the recorders.*

Test. School Psychologist (Vol. 6, at 1378:7 to 1378:24) (emphasis added).

<sup>43</sup> School Psychologist’s testimony on this topic is found at Vol. 6, at 1394:3 to 1395:8. She explained the types of information a clinical interview should cover and particularly an interview when anxiety is a consideration. She found Consultant #4’s report lacking in that it barely mentioned discussing anything with the Student, much less symptoms of anxiety that he might have experienced. She concluded that from the report, it would appear that no clinical interview was conducted.

There is no reason to discuss these issues in detail.

Public School, unaware of most of the problems detailed here, accorded respect to the neuropsychological evaluation's recommendations in the IEP process and meetings. I give Consultant #4's testimony slight or no weight. It is possible to see, through reading the sticky notes and comparing the first draft report to the final report, that Consultant #4 was willing to remove accurate material from the report and add unsupported material to the report at the behest of the Parent.<sup>44</sup> What cannot accurately be probed is whether the *first* draft represented a balanced and accurate assessment of the Student or was infected with the same problems. This is a concern because, outside the specific tests administered (some on and some off medication), (1) almost all of the background information available to Consultant #4 came from the Parent and not from a variety of sources, and (2) Consultant #4 was willing to incorporate the wishes of the Parent into the report.<sup>45</sup>

Consultant #1's testimony demonstrated how problematic Consultant #4's conduct was:

Q. [H]ow much input or control does the Parent have with regard to your position -- the position you take in terms of your advocacy for the student?

A. They have minimal control, because we have to go based on what the -- what the data shows, what the law is. You can't just say, I want this, it has to -- there has to be an educational need for it.

Test. Consultant #1 (Vol. 1, at 211:21 to 212:3).

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<sup>44</sup> Consultant #4 averred that she did not add anything that she did not agree with to the report. That is probably true. One could ask rhetorically whether there is any student who would not benefit from a small, structured academic program with low student-teacher ratios in a classroom where all the professionals are specifically trained to deal with the strengths or weaknesses possessed by that individual. The point is that the recommendations should not have represented a wish list. They should have been independent, professional, data-supported judgments about what the Student actually needed to access the curriculum and to receive FAPE.

<sup>45</sup> On re-direct examination, Consultant #4 expressed it this way:

Q. So why did you have the parents approve your report before you signed off on it?

A. Because I want to make sure that they're comfortable with the document. It's their document. It's their child. It's their document. It's their child's history. I want them to feel comfortable with it.

(Vol. 4, at 1121:11 to 1121:17). This would not seem to comport with the purpose of a professional evaluation, which would be to get a professional opinion not influenced by the emotional factors that color a parent's view of his or her child.

The Student also called Consultant #3 as a witness. Consultant #3 was a very well-credentialed witness. He has a Bachelor's degree in Elementary/Early Childhood Education. He has a Master's in Education; he has more than thirty credits of post-Master's education from various institutions. Since 2005 he has served as the managing member of an educational consulting LLC that bears his name. He has extensive experience in Maryland's public school system beginning in 1975 and ending in 2004. The last six of those years he had the title of Instructional Specialist. In that position he was the county-wide coordinator for all aspects of a public school system's GT/LD program. His earlier positions with the public school system also included work with GT/LD students. He has taught on these topics and has authored books and other publications.

Public School suggested that Consultant #3 was a "hired gun" in this case.<sup>46</sup> (Vol. 2, at 344:18). Consultant #3 had no connection with this Student, this family, or this case until the case was filed. Consultant #3 never provided the exact date he was contacted by counsel, but his roundabout testimony would put the date within a day or two of May 18, 2016, the day the IDEA and 504 actions were filed. Test. Consultant #3 (Vol. 2, at 346:22 to 346:24). After speaking with the Student's attorney, Consultant #3 was contacted by the Student's family. After one or more discussions with the Parent, Consultant #3 was retained by the Student's family on May 31, 2016.

Although Consultant #3 couched his employ in terms of being hired to develop an opinion, no reasonable person would believe that he was a blank slate at the time he was retained by the Parents. The fair inference from the facts before me are that the preliminary

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<sup>46</sup> *Merriam-Webster* defines a hired gun first as someone hired to kill someone, which Consultant #3 was not. *Hired Gun*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/hired%20gun> (last visited September 21, 2016). The secondary definition is "a person who is hired to do a specific job and especially one that some people consider to be morally wrong." *Id.* This is the definition Public School sought to apply to Consultant #3.

conversations between Consultant #3, the attorney, and the family led everybody involved to believe that Consultant #3 agreed with the Student's position. I believe that had he found that he could not support the Student's position he would have advised the family and the attorney of that, but he was not hired merely because he was an expert in the subject matter in the hope that he would eventually come to opine favorably to the Student.

It is further the case that Consultant #3 suffered disadvantages in working on this case due to his being hired at the eleventh hour. Public School has a policy against permitting observations once a Due Process complaint has been filed. Consultant #3 was well aware of this policy, but still asked to make an observation so that he would be on record as asking and Public School would be on record as having denied the request. To his credit, he did not agree to the Parent's suggestion that they try to deceive the school about which of her children was the subject of the observation in an effort to end-run Public School's policy. Board No. 67. Even if he had been able to make an observation at Public School, it would have been two years after the Student attended, in the waning days of the school year, which are often times not a good snapshot of a typical school day. He did not speak or ask to speak to any of the Student's teachers from Public School.

He also was not able to make any observation of the Student in regular classes at Private School. Its school year had ended and Consultant #3 observed the Student during Private School's summer program. Nevertheless, his testimony was helpful. Between direct and cross, this witness provided a fuller picture about the IEP process, about GT/LD learners, about certain best practices and other information.

Consultant #3 testified about how the Student compared with the general characteristics listed in the Handbook in terms of his strengths and weaknesses. He also highlighted strategies that would be particularly crucial in meeting the needs of the Student. He stated that the

September IEP did a good job of summarizing how the Student's disability affects his involvement in the general education curriculum. That paragraph reads:

[The Student's] specific learning disability impacts his written output and work completion in all academic areas where extended writing is required. On occasion, he requires verbal rehearsal to organize his ideas, find just the right wording to express those ideas, and to write sentences. [The Student's] speed of processing and organizing his thoughts when approaching a multi-step problem or task is relatively slow and can cause him much frustration. [The Student] continues to experience difficulties with organizing, planning, and staying focused on a task long enough to complete it, which can impact his classroom performance in all content areas. [The Student] tends to demonstrate a need for perfection and is prone to increased anxiety that may impact his emotional and behavioral functioning across settings. [The Student's] mood affects his productivity with classwork.

Parents No. 47, at 5. Consultant #3 went on to say:

And it strikes me because while this is a great description and it's still under the present levels, there's no carry-over between this present level and the rest of the development of the IEP in all of those areas that I just mentioned, other than in this IEP there is now planning and organization, but nothing to deal with anxiety, frustration, perfectionism, mood, organizing his thoughts and processing . . . .

Test. Consultant #3 (Vol. 2, at 379:25 to 380:7).

He continued:

So the two goals here are written language and study, organizational skills. There are no goals addressing the other areas from page 5, anxiety, frustration, perfectionism, mood, organization of thoughts.

*Id.* at 384:21 to 384:25.

While there were no goals titled anxiety, frustration, perfectionism, mood, or organization of thoughts, that did not mean that the IEP did not attempt to address those areas of concern. Consultant #3 later agreed that certain accommodations in the September IEP would or could address these areas. Specifically, he testified that:

- orally rehearsing ideas prior to writing would address frustration, executive functioning, and organization of thought
- use of a word processor with spelling applications to type longer responses might address

frustration, organization, or thoughts

- checking for understanding would potentially address frustration and anxiety
- immediate feedback could potentially address frustration, anxiety, and mood
- breaking down assignments into smaller units with interim due dates (which, in addition to being called chunking, some witnesses referred to as scaffolding) could help in these areas
- if utilized, the psychological consult would be a meaningful way to address frustration, anxiety, and mood

Consultant #3 also offered testimony that “the fact that [the Student] did not have appropriate supports while in the GT classes, which were an appropriate placement for him, was what exacerbated his anxiety.” *Id.* at 502:7 to 502:10. This was in response to the suggestion that the Parent had contributed to the Student’s anxiety by insisting that he be placed in three GT classes, particularly since he did not qualify for the GT science class that proved to be overwhelming to him and a source of much anxiety and frustration. The Parent took the position that since the Student was very interested in science and was highly intelligent, he should be in the science class because it would engage him.

The testimony surrounding the Student’s intelligence level was fascinating. Although everybody agreed about the result of his testing in terms of the raw numbers, the experts were all over the place in terms of interpreting the results. The Student had slow processing speed and poor working memory, which would be expected to negatively impact certain other scores and some composites. His extremely high verbal scores had the effect of raising certain composite scores. This is not an uncommon profile for a GT/LD student. As a generalization, the Student’s scores were overwhelmingly average – sometimes low average, sometimes high average, sometimes average with no qualifier. Witnesses could not agree on whether he was brilliant, average, or somewhere in between.

In the end, though, it turned out that these questions about GT classes, whether the Student should or should not have been in them, or how many or which, are all mooted by the statute of limitations.<sup>47</sup> The Parent knew which GT classes the Student was in and why for the 2013-2014 school year; she knew that Public School did not plan to put him in any GT classes for the 2014-2015 school year; she knew that he had been removed from GT geography and placed in an on grade level course. She knew all these things more than two years before the Parents filed the instant cases.

Public School called School Psychologist as a witness. School Psychologist is a very well-credentialed professional. She has a Bachelor's degree in Education, and a Master's degree in Educational Psychology; she completed a Specialist Program in School Psychology. The latter is a nationally accredited program for school psychologists. She has additional training and certification in neurobehavioral assessment and intervention, and a Neurobehavioral Psychology Certificate. She had a long-term particular interest in executive function issues as they presented in the school environment.

She worked as a school psychologist in the Public School's county system for twenty-nine years, retiring in 2015. She made a professional presentation as recently as July 2016 at an International School Psychology Association Conference in Amsterdam. Although retired, she has kept up with the training and educational requirements to maintain her certification as a school psychologist.

Much of what she testified about has been incorporated in the discussion of other witnesses. Generally I found her to be a credible witness. She was detailed and meticulous in her answers.

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<sup>47</sup> The testimony had some relevance to anxiety, beyond straightforward questions about the GT classes themselves.

She testified that the Student's GT placement data showed that the Student would be expected to do average or a little above average in GT classes such as English or social studies. His math score put him below average for GT classes, the implication being that he would be expected to struggle in GT math or in science courses because of the math involved in advanced science. Board No. 8. These numbers take into account that GT classes are two to three years above grade level. I mention this even though the GT courses are not really before me because it leads into one of the only statements she made that seemed less than credible. She testified that the Student was not really gifted and talented. Given that by Public School's testing he qualified for two GT classes and an honors class, and that the school, although not agreeing that it was a good idea, allowed him to be placed in GT science, it seems incongruous to now say that he was not GT. She had suggested that he might not be ready for that kind of course load back in 2014, Board No. 25, at Bates 00556, but that seems different from asserting that he somehow did not qualify as a gifted and talented student. She testified as to what grades the Student's results from GT placement tests in fifth grade would predict for the Student's GT classes. His fourth quarter grades at Public School were right in line with those expectations in science and language arts. The Student had been moved to on-grade geography by that point.

That aside, she testified about the testing that had been done in the past, her testing, and the conclusions that she reached. When asked why she made the recommendations that she did rather than recommendations similar to those advocated by the Student's experts, she put it this way:

Q. If you knew that there were days that he had meltdowns and you knew that there might have been a day that he cried, and you knew that there were all these other problems that Mr. Steedman talked about, how is it that you did not recommend a social and emotional goal?

A. Because the areas that he was having difficulty with, the situations when he was melting down were specific to when he was having difficulties with

the executive functioning components of his learning, and that meant that the way to work with him was to work at helping him manage and self-advocate for the executive functioning weaknesses.

Q. Okay. And why did you add the fifth objective to the planning and organizational goal?

. . . .

THE WITNESS: Sorry, it's late.

The, I added it because, that after completing my assessment and seeing . . . [the Student's] lack of insight about the difficulties in connect -- that he was having in connection with the need to have him access and use his accommodations to be successful, that the objective talks about using teacher data, like his actual performance data to show him this is why you need to do this. When you don't use your accommodations for extra time, you don't get the same grade on tests, or if you don't use the organization strategies.

So to get his buy-in to self-advocate for and utilize the accommodations that were recommended.

Test. School Psychologist (Vol. 6, at 1602:8 to 1603:16).

This is not a situation where Public School ignored the concerns expressed by the Parents. It is a situation where professional educators and school personnel, based on appropriate assessments, disagreed with the Parents' experts on the root cause of the Student's anxiety, which in turn resulted in disagreements about how to address it. Case law teaches that an adjudicator should be "reluctant" to "second-guess the judgment of education professionals" in such a scenario. *Tice*, 908 F.2d at 1207; *accord MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002). Circling back, at long last, to the issues in this case, the first set deals with development of the various IEPs. To reiterate what was explicitly stated above, the development of the February IEP is beyond the reach of this case based on IDEA's statute of limitations. The amended IEP, developed in September 2014, did not fail to offer the Student FAPE. It was reasonably calculated to confer educational benefit on the Student. This disposes of issue number two.

As part of developing the September IEP, Public School conducted testing of the Student in July 2014. The express purpose of that testing was to supplement the private

neuropsychological report by testing how the Student viewed and experienced his anxiety. The testing was done with parental consent. School Psychologist used appropriate test instruments and procedures. She produced a detailed report that was shared with the Student's family and the rest of the IEP team. The evaluation was not inadequate due to its focus on inventories and tests that were administered only to the Student.

*IEP Implementation Issues*

Issue number four asks whether Public School failed to fully implement the Student's IEP during the relevant portion of the 2013-2014 school year. The boundaries of the "relevant portion of the school year" are set by the statute of limitations. Based on the filing date of the IDEA complaint, only implementation issues occurring between May 18, 2014 and the end of the school year in mid-June are open to consideration. Even after that date, if the Parents knew, or should have known, about the alleged problem with implementation prior to May 18, 2014, the issue is time-barred. There is no evidence to prove that the Student's IEP was not properly implemented resulting in a denial of FAPE in late May or early June 2014. It follows that there is no proof that any implementation failure during that time period caused emotional strain to the Student, which was then not suitably addressed by Public School. This disposes of issues number four and five.

*Private School-related questions*

Issues number six and seven focus on Private School. Issue six asks whether the Student made progress at Private School and issue seven is aimed at the Student's emotional strain, or anxiety, while at Private School. Because Public School offered the Student FAPE, it is not necessary to examine these questions. Questions about the appropriateness of the private unilateral placement arise only where there has been a denial of FAPE. 34 C.F.R. § 300.148(a), (c) (2015).

*Issues regarding relief*

Issues number eight through ten deal with relief for the Student. Because Public School offered FAPE, no relief is warranted.

*504 Claim*

*Procedural posture – Motion for Summary Decision*

OAH's Rules of Procedure permit an administrative law judge to grant a proposed or final summary decision "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." COMAR 28.02.01.12D(4). Under MSDE's regulations, Due Process hearings are to be held in conformance with COMAR 28.02.01. COMAR 13A.05.01.15C(12). By agreement of the parties in this case, IDEA procedures are being applied to this 504 claim.

In interpreting this rule (COMAR 28.02.01.12D), administrative law judges have looked for guidance to both Maryland Rule 2-501 and Rule 56 of the Federal Rules of Civil Procedure governing summary judgments. In that context, it has been held that material facts are facts satisfying elements of the claim or defense or otherwise affecting the outcome of the case. *King v. Bankerd*, 303 Md. 98, 110-12 (1985).

Public School made a motion for summary decision at the close of the Student's case. After hearing argument, I reserved on that motion. Two additional witnesses were presented after that occurred – School Psychologist and Science Teacher. I think it is awkward to try to rule at this point without considering all of the evidence presented – what was adduced before the motion and what was presented afterwards. Therefore, so the record is clear, I will deny the motion.

*Merits*

Section 504 of the Rehabilitation Act of 1973 provides, in pertinent part, as follows:

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C.A. § 794(a) (2008). It is undisputed that the Student is an individual with a disability for section 504 purposes and that Public School is a program receiving Federal financial assistance.

The Court of Appeals for the Fourth Circuit held in *Sellers v. School Board of Manassas*, 141 F.3d 524 (4th Cir. 1998), that to establish a violation of section 504, the person alleging the violation must prove that he or she has either been subjected to discrimination or excluded from a program solely by reason of his or her disability. The *Sellers* court further held that in section 504 cases involving educational services, liability for discrimination must be based on something more than an incorrect evaluation, or a substantively faulty individualized education plan. To find discrimination, there must be either bad faith or gross misjudgment. *Id.* at 528-29. Nothing that Public School did or failed to do in this case could reasonably be interpreted as meeting that standard.

The Parents charge Public School with violating section 504 for failing to place the Student in GT classes for the 2014-2015 school year. In viewing the Parents' allegations in light of the legal standard under section 504, I find that they have not proven a claim of discrimination under section 504. No expert witness testified that there was bad faith or gross misjudgment in the educational decisions made by Public School, and the facts presented do not support any such conclusion.

I am, however, putting the cart before the horse. As stated in the discussion above, this claim is time barred. The Parent had actual notice of all of the facts she alleges constitute a 504

violation by March 2014, perhaps earlier. She did not file this action until May 2016. No further discussion is warranted. *See* Appendix 1 and authorities cited therein.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that with respect to the IDEA case, Public School offered FAPE in both the February and the September 2014 IEPs (issues 1 and 2); the evaluation conducted by School Psychologist in July 2014 was adequate and proper for its intended purpose, which was to supplement an existing neuropsychological report (issue 3); the Student did not prove any failure to implement the February IEP in the relevant time period between May 20, 2014 and the end of the 2013-2014 school year (issues 4 and 5); because FAPE was offered in the IEPs prepared by Public School, no considerations regarding Private School, reimbursement for private school, or other relief are necessary (issues 6-10). *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Schaffer v. Weast*, 546 U.S. 49 (2005); *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354 (4th Cir. 2015); *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523 (4th Cir. 2002); *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998); *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990); 20 U.S.C.A. § 1414(d) (2010); Md. Code Ann., Educ. § 8-401(a)(3) (2014); COMAR 13A.05.01.09.

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that with respect to the 504 case, consideration of the issues raised by the Student is barred by the statute of limitations. *See* authorities cited in Appendix 1.

**ORDER**

With respect to the IDEA case, I **ORDER** that the Student's request for reimbursement for unilateral placement at Private School is **DENIED**.

With respect to the 504 case, I **ORDER** that the Student's claim is **DISMISSED**.

September 23, 2016

Date Decision Issued

\_\_\_\_\_  
Kimberly Farrell  
Administrative Law Judge

KAF/kkc

**REVIEW RIGHTS FOR THE IDEA ACTION**

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. 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. Md. Rule 1-325.

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.

**APPEAL RIGHTS FOR THE 504 ACTION**

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Child resides in Baltimore City, or with the circuit court for the county where the Child resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. 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. Md. Rule 1-325. The Office of Administrative Hearings is not a party to any appeal process.