

XXXX XXXX,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

\* BEFORE MICHELLE W. COLE,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: MSDE-MONT-OT-17-14092

\* \* \* \* \*

**DECISION ON REMAND**

STATEMENT OF THE CASE  
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FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
ORDER

**STATEMENT OF THE CASE**

On March 7, 2016, the Student's Parents (Parents),<sup>1</sup> on behalf of their child, 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 Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 United States Code Annotated (U.S.C.A.) § 1415(f)(1)(A) (2017).

I held telephone prehearing conferences on April 22 and April 27, 2016. The Parents were not present, but were represented by Michael J. Eig, Esquire. Jeffrey A. Krew, Esquire, represented MCPS. Based on the availability of the parties and their witnesses, I scheduled the hearing for June 20 and 21, and July 6 through 8, 2016.<sup>2</sup> On June 20, 2016, I convened the hearing at the MCPS' offices in Rockville, Maryland, as scheduled. Michael J. Eig, Esquire, represented the Parents. Jeffrey A. Krew, Esquire, represented MCPS.

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<sup>1</sup> Each Parent will be identified separately as Mother or Father.

<sup>2</sup> At the beginning of the hearing, the parties requested that two days be added to the schedule: July 11 and 12, 2016. I agreed to this request.

Within forty-five days of the date that the parties notify the OAH that they are unable to reach an agreement through the resolution process, a hearing must be held and the decision issued. 34 C.F.R. § 300.515(a) (2016). On April 11, 2016, the parties attended the required resolution session. On April 14, 2016, they notified the OAH that they were unable to reach an agreement. As such, the forty-five day period was triggered on April 14, 2016. Forty-five days from April 14, 2016 fell on a Sunday. According to the regulations, my decision following the multiple-day hearing would have been due on Friday, May 27, 2016. The hearing dates requested by the parties fell outside this forty-five-day period. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c).

At the prehearing conference, the parties expressly waived their right to have the hearing within the forty-five-day period and requested that the hearing be held on the proposed dates and the decision would be issued no later than thirty days after the final date of the hearing when the record closed. 34 C.F.R. 300.515 (2016); Md. Code Ann., Educ. § 8-413(h) (Supp. 2016). Both parties submitted memoranda of legal authorities following closing arguments. The hearing concluded and the record closed on the last hearing date of July 12, 2016. On August 5, 2016, I issued a decision and ordered that the Student's Due Process Complaint be dismissed. The Parents, on behalf of the Student, appealed my decision.

On March 22, 2017, the Supreme Court issued a decision in *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), addressing the standard to determine when a disabled student attains sufficient educational benefit to satisfy the requirements of the IDEA. On May 3, 2017, the United States District Court for the District of Maryland issued a Letter Order of Remand for further consideration of this case in light of *Andrew F.* in order to “produce an administrative record more conducive to efficient judicial review.”

The parties supplemented the record with written briefs according to an agreed schedule and appeared at the OAH for oral argument on July 20, 2017. Michael J. Eig, Esquire, represented the Parents, who were present. Jeffrey A. Krew, Esquire, represented MCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R. § 300.511(a) (2016); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES**

Was the Individualized Education Program (IEP) and placement developed by MCPS for the 2015-2016 school year reasonably calculated to provide the Student with a free appropriate public education (FAPE)?

If there was a denial of FAPE for the 2015-2016 school year, is tuition reimbursement for the 2015-2016 school year at [School 1] ([School 1]), the Parents' unilaterally chosen non-public school placement, appropriate?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

At the 2016 Hearing, I admitted the following exhibits on behalf of the Parents:

- 1 Request for Due Process, 3/7/16
- 2 [City] Public Schools IEP, 5/22/12
- 3 XXXX Initial Occupational Therapy Evaluation, January 2013
- 4 [City] Public Schools Speech/Language Report, 2/12/13

- 5 [City] Public Schools Psychoeducational Report, 2/13/13
- 5A Emails between Parents and Dr. XXXX XXXX, 3/8/13
- 6 [School 1] Application for Admission, 3/19/13
- 7 Neuropsychological Evaluation by Dr. XXXX XXXX, 3/31/13
- 8 [City] Public Schools IEP, 5/15/13
- 8A Emails between Parents and their realtor, 6/13/13
- 8B Emails between Parents, XXXX XXXX, and Dr. XXXX XXXX, 6/18/13 through 7/5/13
- 9 Emails between Parents and MCPS staff, 7/31/13
- 9A Emails between Parents, XXXX XXXX, and XXXX XXXX, 7/31/13 through 8/5/13
- 10 MCPS IEP, 8/15/13
- 11 MCPS IEP Meeting Notes by Dr. XXXX XXXX, 8/15/13
- 12 Emails between Parents and Dr. XXXX XXXX, 8/16/13 to 8/28/13
- 13 Emails between Parents and [School 2] staff, 8/20/13 & 8/26/13
- 13A Emails between Parents and XXXX XXXX, 8/26/13
- 14 [School 3] ([SCHOOL 3]) Summer Progress Report, Summer 2014
- 15 [School 1] Application for Admission, 10/31/14
- 16 B.A.S.I.C.S. ABA Therapy FBA Form and Behavior Intervention Plan, November 2014
- 17 [School 1] Assessment Summary and Treatment Recommendations, 11/19/14
- 18 [SCHOOL 3] Report Card and DPG Progress Reports through the Second Quarter of the 2014-15 School Year, December 2014
- 19 [SCHOOL 3] Visual Behavior Data, undated
- 19A [SCHOOL 3] Behavior Plan, December 2014
- 20 Email from [SCHOOL 3] to parents regarding student withdrawal, 12/22/14
- 21 [School 1] Speech Language Evaluation Report, 2/24/15
- 22 [School 1] Third Quarter Progress Report, March 2015
- 23 [School 1] Sample Behavior Data Daily Tracking Form, 2014-15 SY, 3/12/15

- 23A Emails between [School 1] staff and [SCHOOL 3] staff, 4/28/15
- 24 [School 1] Work Samples, May 2015
- 25 [School 1] 2014-2015 Tuition Contract, December 2014 and May 2015
- 26 [School 1] IEP, 5/12/15
- 27 [School 1] Annual Educational Report, January 2015 to May 2015
- 28 [School 1] Behavior Intervention Plan, 5/12/15
- 29 [School 1] 1:1 Justification and Fading Plan, 5/12/15
- 29A Email from XXXX XXXX to Parents, 5/13/15
- 30 XXXX Diagnostic and Evaluation Information, 5/25/15
- 31 XXXX Neuropsychological Evaluation, 5/28/15
- 32 [School 1] 2014-15 School Year Statement of Account, 5/31/15
- 33 [School 1] Revised Tuition Contract for 2015-16 School Year, 6/5/15
- 34 XXXX Speech Language Evaluation, 6/9/15
- 35 [School 1] Final Report Card for 2014-15 School Year, June 2015
- 36 [School 1] Behavior Data, January 2015 to June 2016
- 37 Letter to Dr. XXXX from Dr. XXXX XXXX, 7/8/15
- 38 [School 1] Psychosocial Assessment, 7/14/15
- 39 Letter to Parents from [School 1] regarding mental health counseling, 7/15/15
- 40 [School 1] IEP Meeting Notes by Dr. XXXX XXXX, 7/28/15
- 41 MCPS IEP Meeting Notes, 7/30/15
- 42 MCPS Educational Assessment Report, 8/12/15
- 43 Email to Parents from MCPS Speech Language pathologist, 8/19/15
- 44 MCPS draft IEP, 8/20/15
- 44A Student Intake Form by Dr. XXXX XXXX, 9/1/15
- 44B [School 1] Observation Notes by Dr. XXXX XXXX, 9/10/15
- 45 [School 1] IEP progress report, 9/30/15

- 46 [School 1] Occupational Therapy Evaluation Report, 10/13/15
- 47 MCPS IEP and Prior Written Notice, 10/23/15 and 10/29/15
- 48 MCPS CIEP Meeting Notes by Dr. XXXX XXXX, 10/23/15
- 49 Emails between Parents, Dr. XXXX XXXX, and [School 4] ([School 4]) staff, 10/24/15 to 10/28/15
- 50 Letter to Parents from [School 1] regarding Occupational Therapy, 10/28/15
- 51 [School 4] Observation Notes by Dr. XXXX, 10/30/15
- 52 Emails between Parents and Dr. XXXX XXXX, 10/30/15
- 53 [School 1] Sample Behavior Data Daily Tracking Form, 2015-16 SY, 10-30-15
- 54 MCPS Occupational Therapy Assessment Results, 11/5/15
- 55 [School 1] Student Work Samples, Fall 2015
- 55A Email from XXXX XXXX to Parents, 12/15/15
- 56 Letter to XXXX XXXX enclosing complaint, 3/7/16
- 57 Letter to XXXX XXXX confirming resolution session meeting, 4/5/16
- 58 [School 1] Final Report Card for 2015-16 SY, 6/9/16
- 59 [School 1] Final IEP Progress Reports for 2015-16 SY, 5/24/16
- 59A [School 1] draft IEP markup by Dr. XXXX XXXX, 5/22/16
- 60 [School 1] Annual Educational Report for the 2015-16 SY, May 2016
- 61 [School 1] IEP, 5/24/16
- 61A [School 1] IEP Meeting Notes by Dr. XXXX XXXX, 5/24/16
- 62 [School 1] 1:1 Justification and Fading Plan, 5/24/16
- 63 [School 1] Statement of Account for 2015-16 SY, 5/31/16
- 64 National Association of State Directors of Teacher Education and Certification, "Model Code of Ethics for Educators"
- 65 Resume of Dr. XXXX
- 66 Resume of XXXX XXXX
- 67 Resume of XXXX XXXX

- 68 Resume of XXXX XXXX
- 69 Not Admitted
- 70 Emails between Parents and [School 1] staff, 1/14/15 to 5/27/16
- 71 [School 1] IEP Meeting Notes, 3/11/15, 7/26/15, 2/12/16 & 5/24/16
- 72 [School 1] Behavior Intervention Plan Update Sheet and Fading Record Sheet, January 2015 to May 2016

At the 2016 Hearing, I admitted the following exhibits on behalf of MCPS:

- 1 Neuropsychological Evaluation - XXXX XXXX, Ph.D., 8/2/12
- 1A Email exchange between the Parents and Dr. XXXX XXXX, 3/7/13 - 3/10/13
- 2 [School 1] Application for Admission, 3/19/13
- 2A Email exchange between the Parents and XXXX XXXX, [School 1], 3/20/13
- 3 [SCHOOL 3] Application for Admissions, 3/21/13
- 4 Neuropsychological Evaluation - XXXX XXXX, Ph.D., 3/31/13
- 4A Email exchange between Parents and XXXX XXXX, [School 1], 4/24/13
- 4B Letter to Parents from XXXX XXXX, [SCHOOL 3], 5/2/13
- 5 Not Admitted
- 5A [SCHOOL 3] Private Enrollment Contract 2013-2014 Academic Year, 6/13/13
- 6 MCPS IEP, 8/15/13
- 6A [SCHOOL 3] Private Enrollment Contract 2014-2015 Academic Year, 7/14/14
- 7 Summer 2014 [SCHOOL 3] Summary Progress Report - XXXX XXXX
- 8 [School 1] Application for Admission, 10/31/14
- 9 Assessment Summary & Treatment Recommendations - XXXX XXXX, M.Ed., BCBA, [School 1] Outreach Programs, 11/19/14
- 10 Letter to Parents from XXXX XXXX & XXXX XXXX, [School 1], 12/19/14
- 11 [School 1] Acknowledgment of Attendance for 2014-2015 S.Y., 12/22/14
- 12 [School 1] Related Services Agreement, 12/22/14
- 13 [School 1] Tuition Contract 2014-2015 S.Y., 12/23/14

- 14 [School 1] Behavioral Data, 1/12/15 - 4/29/15
- 15 Speech-Language Evaluation Report - XXXX XXXX, M.A., CF-SLP, [School 1], 2/24/15
- 16 [School 1] Progress Report, 3/2015
- 17 Letter to Parents from XXXX XXXX, Education Director, [School 1], 4/15/15
- 18 [School 1] Speech-Language Therapy Agreement, 4/16/15
- 19 [School 1] Revised Tuition Contract 2014-2015 S.Y., 5/11/15
- 20 May 2015 [School 1] Annual Educational Report January 2015-May 2015
- 21 [School 1] IEP, 5/12/15
- 22 [School 1] 1:1 Justification & Fading Plan - XXXX XXXX, MA, BCBA & XXXX XXXX, MA, BCBA, 5/12/15
- 23 [School 1] Behavior Intervention Plan - XXXX XXXX, MA, BCBA & XXXX XXXX, MA, BCBA, 5/12/15
- 24 Letter to MCPS from Parents, 5/25/15
- 25 Speech-Language Evaluation - XXXX XXXX, MA, CCC-SLP, XXXX, 4/30, 5/7 & 5/28/15
- 26 [School 1] Statement of Account 2014-2015 S.Y., 5/31/15
- 27 [School 1] Revised Tuition Contract 2015-2016 S.Y., 6/5/15
- 28 [School 1] Report Card 2014-2015 S.Y., 6/8/15
- 29 MCPS Authorization to Request/Release Student Records, 6/18/15
- 30 [School 1] IEP Progress Report - Quarter 1, 6/18/15
- 31 Not Admitted
- 32 Letter to Parents from XXXX XXXX, MCPS, 6/22/15
- 33 [School 1] Behavioral Data, 7/6/15 - 5/10/16
- 34 [School 1] Psychosocial Assessment - XXXX XXXX, LCSW-C, RPT, 7/14/15
- 35 Team Consideration of External Report - XXXX XXXX, MA, CCC-SLP, MCPS, 7/30/15
- 36 Team Consideration of External Report - XXXX XXXX, MA, CCC-SLP, MCPS, 7/30/15

- 37 Team Consideration of External Report - XXXX XXXX, School Psychologist, MCPS, 7/30/15
- 38 MCPS IEP Team Meeting Documentation, 7/30/15
- 39 [School 1] IEP, 8/3/15
- 40 Educational Assessment - XXXX XXXX, Special Education Teacher, MCPS, 8/12/15
- 41 MCPS Authorization for Assessment, 8/13/15
- 42 MCPS IEP, 8/20/15
- 42A Email to Dr. XXXX XXXX from Parents, 8/26/15
- 43 Authorization for Release of Information & Representation - Dr. XXXX XXXX, 9/1/15
- 43A XXXX XXXX, Ed.D., XXXX, Inc. Retainer Agreement, 9/1/15
- 44 [School 1] Related Services Documentation – Speech, 9/2 – 9/30/15
- 45 [School 1] IEP Progress Report - Quarter 2, 9/30/15
- 46 [School 1] Report Card 2015-2016 S.Y. - 1st Quarter
- 47 MCPS IEP Team Meeting Documentation, 10/5/15
- 48 [School 1] Occupational Therapy Evaluation Report – XXXX XXXX, MS OTR/L, 10/13/15
- 49 MCPS IEP, 10/23/15
- 50 Email to XXXX XXXX, XXXX XXXX and XXXX XXXX from XXXX XXXX, 10/23/15
- 50A Email to XXXX XXXX from Dr. XXXX XXXX, 10/27/15
- 51 [School 1] Occupational Therapy Agreement, 11/1/15
- 52 Summary Review of Non-MCPS Occupational Therapy Report - XXXX XXXX, M.S., OTR/L, MCPS, 11/2/15
- 53 [School 1] IEP Progress Report - Quarter 3, 1/15/16
- 54 Due Process Hearing Complaint, 3/7/16
- 55 Letter to Michael Eig from Jeffrey Krew, 3/16/16
- 56 [School 1] Report Card 2015-2016 S.Y. - 3rd Quarter, 4/12/15
- 57 [School 1] IEP Progress Report - Quarter 4, 4/14/16

- 58 [School 1] Annual Educational Report 2015-2016 S.Y., 5/18/16
- 59 Letter to Parents from XXXX XXXX, [School 1], 5/19/16
- 60 [School 1] 1:1 Justification & Fading Plan - XXXX XXXX, MA, BCBA, LBA, 5/24/15
- 61 [School 1] IEP, 5/24/16
- 62 [School 1] Acknowledgment of Attendance for 2016-2017 S.Y., 5/24/16
- 63 [School 1] Statement of Account 2015-2016 S.Y., 5/31/16
- 63A [School 1] Statement of Account 2016-2017 S.Y., 5/31/16
- 64 XXXX XXXX Curriculum Vitae
- 65 XXXX XXXX Curriculum Vitae
- 66 XXXX XXXX Curriculum Vitae
- 67 XXXX XXXX Curriculum Vitae
- 68 XXXX XXXX Curriculum Vitae
- 69 XXXX XXXX Curriculum Vitae
- 70 XXXX XXXX Curriculum Vitae
- 71 XXXX XXXX Curriculum Vitae

Testimony

I will rely on the testimony as set forth in the transcripts of the 2016 Hearing. The Parents testified and presented the following witnesses:

- Dr. XXXX XXXX, admitted as an expert in special education
- XXXX XXXX, admitted as an expert in school psychology
- XXXX XXXX, Principal of [School 4]
- XXXX XXXX, admitted as an expert in speech-language pathology
- Father
- XXXX XXXX, admitted as an expert in behavioral analysis

MCPS presented the following witnesses:

- XXXX XXXX, admitted as an expert in special education with an emphasis on the educational placement of special needs students
- XXXX XXXX, Principal of [School 4], admitted as an expert in special education

### **FINDINGS OF FACT**

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

1. The Student is twelve years old (born in 2004).
2. The Student is identified by MCPS as a student eligible for special education services under the IDEA. Beginning at three years of age, the Student started having seizures, which have contributed to her cognitive impairment. She has several disabilities, including autism, epilepsy, speech-language impairment, and Attention Deficit/Hyperactivity Disorder (ADHD).
3. The Student and her Parents currently are residents of Montgomery County, Maryland.
4. The Student has never attended a MCPS school or program even though the Parents have twice participated in the MCPS IEP process to develop an IEP with an appropriate placement.
5. For kindergarten through first grade, the Student and her Parents were living in [City], [State]. She was determined eligible for special education services under the classifications of Other Health Impairment and Communication/Speech Disorder. (P 2; MCPS 1 at 180). The Student was in a general education classroom at a public school for the first grade with an IEP. Throughout her education in [State], the Student received special education services in a general education setting. (P 2).

6. On May 16, 2012, XXXX XXXX, Ph.D., conducted a neuropsychological screening evaluation to provide information about the Student’s cognitive functioning. Dr. XXXX determined that the Student’s ability to process information was delayed and recommended that the Student receive “support in a mainstream academic environment.” (MCPS 1 at 184). He also recommended monitoring the impact of seizure medications, more formal academic support as set forth in an IEP, additional assessments, providing accommodations for the Student’s pace of work and level of attention, developing effective focusing strategies at home, dietary adjustments, and counseling. (*Id.* at 186-87).

7. On December 18, 2012, Dr. XXXX was asked to conduct a follow-up evaluation.

8. Dr. XXXX administered the Wechsler Intelligence Scale for Children (WISC) IV to the Student as part of the May 16, 2012 screening and the December 18, 2012 follow-up evaluation, with the following results:

<b>Scale</b>	<b>Composite Score 5-16-2012</b>	<b>Composite Score 12-18-2012</b>
Verbal Comprehension	93	93
Perceptual Reasoning	75	79
Working Memory	54	59
Processing Speed	65	65
Full Scale IQ	68	71
General Ability Index	84	84

(MCPS 4 at Apx. A). Dr. XXXX observed that the Student needed “much less support than she needed previously” during the May assessment, but “continued to have significant difficulty with tasks requiring mental effort.” (MCPS 4 at 10681-10682).

9. On April 16, 2013, the Father contacted Dr. XXXX and told him that the Student was making progress at home, but not at school. (MCPS 4 at 10686). He also told Dr. XXXX that the family would be moving to Maryland and was working with an education consultant to “help with [the Student’s] transition to Maryland.” (*Id.*). Following this conversation, Dr. XXXX made new recommendations that were not included in his first report, including that the Student “requires a full-time, 100% self-contained special education setting . . . [and] a low student: teacher ratio, a high degree of structure and social skills training.” (*Id.*). This recommendation addressed all concerns raised by the Father.

10. For the 2013-2014 school year, the [State] IEP did not change. The Student continued to receive special education services in a general education setting. (P 8 at 12, 29). The Parents’ primary concerns were the Student’s social development, language processing, and academic development. (P 8 at 3).

11. On March 19, 2013, the Parents submitted an Application for Admission to [School 1]. (MCPS 2). [School 1] is a non-public self-contained special education school, which relies on continuous data collection and Applied Behavioral Analysis (ABA) principles. The students receive instruction in small groups with a low student to teacher ratio. Any additional services beyond the standard program are provided to the Student at an additional cost to the Parents. If the Parents do not agree to pay for these services, [School 1] will not provide the services regardless of the Student’s need.

12. ABA is the application of behavior analysis to children or adults. It focuses on increasing skills that support a student’s independence. ABA is commonly used for students with autism.

13. [School 1] uses a token economy to reinforce positive behaviors whereby a Student is awarded points for positive behaviors which she can cash in at the end of the day for a reward.

14. On March 20, 2013, a representative from [School 1] notified the Parents by email that she was “unsure” whether a space would be available for the Student for the 2013-2014 school year at [School 1]. She also told the Parents that they would have to complete an intake process. (MCPS 2A).

15. On March 21, 2013, the Parents submitted an Application for Admission to [SCHOOL 3], another self-contained special education non-public day school located in XXXX, Maryland. (MCPS 3).

16. On June 13, 2013, the Parents signed an enrollment contract with [SCHOOL 3]. (MCPS Ex. 5A).

17. In June 2013, the Parents first contacted MCPS. They provided a copy of the Student’s IEP from [State] and requested a meeting. The principal from the neighborhood school reviewed the IEP and requested information, including proof of Maryland residency. (P 8A, 8B, 9, & 9A). MCPS will not schedule an IEP meeting until a family has provided proof of residence in Montgomery County.

18. On August 15, 2013, the Parents met with the MCPS IEP team to discuss the Student’s IEP and placement. At that time, the Student was entering the second grade, but was performing on a kindergarten instructional level. The Student’s primary disability was identified as Other Health Impairment, based upon diagnoses of ADHD and a seizure disorder. (P 10; MCPS 6).

19. The Parents' special education consultant recommended that the Student be placed in an eleven-month self-contained special education program. (P 11 at 3). [School 1] is an eleven-month self-contained special education program.

20. The MCPS IEP team recommended a self-contained special education classroom at [School 2] ([School 2]), a public general education school, with two hours per week speech-language services and visual cues as a multi-sensory accommodation. (P 10; MCPS 6).

21. Following the IEP meeting, the Father visited [School 2] and met with its principal.

22. The Parents did not enroll the Student at [School 2]. The Student attended [SCHOOL 3] for the 2013-2014 school year.

23. During the 2013-2014 school year, the Student exhibited behavioral problems, including yelling, growling, and kicking. [SCHOOL 3] responded to this behavior by providing a one-to-one aide and removing the Student from the classroom. (MCPS 8 at 10761). On one occasion, the Student was suspended "due to the severity of her aggression." (MCPS 9 at 336).

24. The Student's receptive-expressive speech improved between 2013 and 2014 at [SCHOOL 3]. However, the Student remained in the bottom 5% of the testing population in all categories of speech. (MCPS 8 at 10761, 10765).

25. On July 14, 2014, the Parents signed an enrollment contract for the 2014-2015 school year at [SCHOOL 3]. (MCPS 6A). The Parents declined the one-to-one aide add-on service. (*Id.* at 2). Under the contract, the Parents agreed to pay monthly tuition installments. (*Id.* at 1).

26. While at [SCHOOL 3], the Student attended the XXXX and XXXX social skills program held at [School 1] on weekends.

27. On October 31, 2014, the Parents submitted a second Application for Admission to [School 1] for the 2014-2015 school year.

28. On December 19, 2014, [School 1] sent a letter to the Parents informing them that a space was available for the Student in the XXXX (XXXX) at [School 1] for the remainder of the 2014-2015 school year.<sup>3</sup> (MCPS 10).

29. On December 22, 2014, [SCHOOL 3] released the Parents from the enrollment contract for the remainder of the 2014-2015 school year.

30. On December 23, 2014, the Parents signed a tuition contract with [School 1].

31. On January 12, 2015, the Student started at [School 1].

32. [School 1]'s programs rely on data collection involving observations of specific behavior which is recorded in five-minute intervals. The data is entered into a computer model and displayed in charts. (MCPS 14). The charts are used to determine if interventions are successful in eliminating behavior problems.

33. [School 1] conducted a Functional Behavioral Assessment (FBA) and collected data throughout the first several months of the Student's attendance.

34. On February 24, 2015, [School 1] recommended 60 minutes of speech-language services, which are an additional service not included in the base tuition. (MCPS 15).

35. Once the Parents approved the recommendation for speech-language services and agreed to pay for the cost of additional services, the Student started receiving the additional service on May 12, 2015. (MCPS 17-19, 21). Prior to the May 2015 IEP, the Student was not receiving speech-language therapy even though she had a severe communication delay which required services.

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<sup>3</sup> The [School 1] year begins in July and ends in June of the following year.

36. On May 12, 2015, [School 1] developed an IEP and Behavioral Intervention Plan (BIP). The BIP was developed to target inappropriate vocalizations, disruptive behavior, and aggression. The Student was assigned a one-to-one aide to implement the BIP. (MCPS 22 at 10829; MCPS 23).

37. The May 2015 [School 1] IEP provided for 29 hours per week of special education instruction, 60 minutes per week of speech/language therapy, and 30 hours per week of a one-to-one aide. (MCPS 21).

38. In May 2015, XXXX XXXX, Ph.D., administered the WISC-V as part of a neuropsychological assessment. (P 31). The Student's working memory score increased by 13 points from the 2012 WISC-IV.<sup>4</sup> (P 31 at 16). All other areas showed a decrease: verbal comprehension score decreased 20 points; processing speed decreased 2 points; general ability index decreased 21 points; and full scale IQ decreased 13 points. (*Id.*).

39. In May 2015, Dr. XXXX diagnosed the Student with Autism Spectrum Disorder. At that time, the Student had delays in cognitive ability, motor skills, social learning, communication, and speech-language.

40. Dr. XXXX recommended "a highly specialized, special education placement that includes therapeutic supports and highly individualized special education instruction (i.e., access to educators with experience and training for working with children with medical and developmental complexities, ASDs, visual processing impairments, learning difficulties, and emotional-behavioral difficulties." (P 31 at 9). She stated: "[The Student's] current placement in XXXX at [School 1] is appropriate for meeting her learning, adaptive skill, and emotional-behavioral needs." (*Id.*).

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<sup>4</sup> I am comparing the Student's scores on the WISC-IV that was administered on May 16, 2012, not the scores from the test administered on December 18, 2012, in order to avoid any practice effect that may have occurred with the second test being administered within seven months of the first.

41. On May 25, 2015, the Parents sent a letter to MCPS requesting an IEP meeting so that the Student may “possibly . . . reenter the school system.” (MCPS 24).

42. Between July 6, 2015 and October 7, 2015, the Student was regularly removed by [School 1] staff from her classroom for problem behaviors including inappropriate vocalizations. (MCPS 14 at 10782, 10784).

43. In August 2015, the [School 5]<sup>5</sup> IEP team referred the case to the MCPS Central IEP (CIEP) team. The CIEP is able to make placements that the local IEP team could not, including private school placements.

44. On August 26, 2015, the Parents contacted Dr. XXXX to retain her services and stated: “We have begun the placement process with Montgomery County schools and our case has been referred to ‘Central Office.’” (MCPS 42A). The Parents told Dr. XXXX their belief that the Student was doing well at [School 1]. (*Id.*).

45. On October 6, 2015, the Parents, Dr. XXXX, and [School 1] staff met with the CIEP team. After Dr. XXXX proposed significant revisions to the IEP, the meeting was rescheduled for October 23, 2015 to consider the suggested revisions.

46. On October 23, 2015, the Parents, Dr. XXXX, and [School 1] staff met with the MCPS CIEP team to discuss the Student’s IEP and placement.

47. The IEP provided for a self-contained 100% special education program in a small setting with a BIP to decrease problem behaviors, one hour per week of speech-language services, extended school year services, and one-to-one adult support for aggression across all academic areas. (MCPS 49).

48. The Parents and the IEP team agreed to all provisions in the IEP except the proposed placement. The Parents, Dr. XXXX, and the [School 1] staff endorsed placement at

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<sup>5</sup> [School 5] was the neighborhood public school.

[School 1]. Mr. XXXX, the chair of the CIEP, proposed placement at [School 4]. Ms. XXXX, MCPS Psychologist for [School 4], reported that the IEP could be implemented at [School 4]. XXXX XXXX, MCPS Placement Specialist, had concerns about the Student's transition and was conflicted, but believed the IEP could be implemented at [School 4]. XXXX XXXX, MCPS Psychologist at [School 5], stated her concern about the Student's level of supports. After discussion, the CIEP recommended placement at [School 4]. (MCPS 49 at 11111-11112).

49. XXXX XXXX observed the Student at [School 1] prior to the CIEP meeting. On that date, the Student was removed from the classroom for disruptive behavior, including loud screaming. When she was removed from the classroom, her behavior escalated. At the CIEP meeting, Ms. XXXX stated her concerns regarding the level of support required by the Student and questioned whether [School 4] would be able to provide this level of support. Ms. XXXX did not visit [School 4] before the CIEP meeting.

50. Ms. XXXX conducted one observation of the classrooms at [School 4] after the CIEP meeting on October 23, 2015. Ms. XXXX had not previously visited the school and was not knowledgeable in the supports or services provided by [School 4]. After the visit, she remained concerned about the level of support required by the Student.

51. On October 30, 2015, Dr. XXXX and the Student's Mother visited [School 4]. They were in the building for one hour. During the visit, they spoke with [School 4]'s Principal, Ms. XXXX, and visited 4<sup>th</sup> grade and 5<sup>th</sup> grade classes. (Tr. 6/20/16 at 189-91). Dr. XXXX repeatedly expressed her opinion that [School 4] was not an appropriate placement for the Student during this visit.

52. [School 4] is a self-contained special education public school with small classes and low student to teacher ratios. [School 4] uses ABA, Positive Behavioral Intervention and Supports (PBIS),<sup>6</sup> Positive Action with Students (PAWS),<sup>7</sup> and behavior management strategies.

53. When a [School 4] student exhibits problem behaviors in the classroom or requests time to calm herself, the Student may be removed to a time-out room. [School 4] has two time-out rooms that are decorated according to a theme and identified as “the Beach” and the “Jacuzzi.” These rooms are used to employ calming strategies so that the Student can return to the classroom.

54. If the Student attended [School 4], she would have been in a self-contained 100% special education classroom consisting of nine or ten students with one certified teacher, two paraprofessionals, and her one-to-one support.

55. The Student’s weaknesses, including difficulty with higher level decision-making, unexpected situations, and intrusions into her personal space, are the same weaknesses shared by students at [School 4].

56. The Student’s cognitive scores are consistent with scores of other students at [School 4], placing her in the middle to low range of the student population.

57. All the teachers at [School 4] are dual-certified in elementary education and special education. All staff are trained and certified by the Crisis Prevention Institute, which recognizes a student’s anxiety and teaches responding to the student at the student’s level. This program encourages providing choices so that a student may become independent.

58. [School 4] has on staff one certified behavioral analyst, one school psychologist, three speech-language pathologists, three occupational therapists, and one physical therapist.

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<sup>6</sup> PBIS is a program utilized in all public schools that is based on positive reinforcement through earned rewards.

<sup>7</sup> PAWS is a reinforcement tool which permits a student to earn credits, which are represented by paws. Paws may be converted to student dollars. At the end of the week, the student may cash in his or her paws for a reward. (Tr. 1060-61).

59. The Student takes several medications throughout the day for her seizure disorder and ADHD, including XXXX for ADHD. These medications affect her behavior. When her medications are properly adjusted, the Student exhibits fewer problem behaviors. (MCPS 9 at 336; MCPS 33 at 452-453, 455; P 36 at 12-15).

60. [School 4] was capable of implementing the Student’s IEP for the 2015-2016 school year.

61. The Parents, at all times, have considered the only appropriate placement for the Student to be [School 1].

### **DISCUSSION**

In its Letter Order, the United States District Court remanded the case with direction to “reconsider[] . . . the matter in light of the Supreme Court’s recent clarification of the level of educational benefit required to meet the standard of a free appropriate public education (“FAPE”) in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017).” Having reviewed the record and considering the language of the IDEA, the Maryland regulations, and *Endrew F.*, I conclude that the Student’s IEP and placement developed by MCPS for the 2015-2016 school year was reasonably calculated to provide the Student with a FAPE.

The identification, assessment and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2017); 34 C.F.R. pt. 300 (2016); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2016); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE which “emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]” 20 U.S.C.A. § 1400(d)(1)(A).

FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. *Endrew F.*, 137 S. Ct. at 999; *Bd. of Educ. of the Hendrik Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181-82 (1982). 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. 20 U.S.C.A. § 1414(d).

In *Rowley*, the United States Supreme Court first addressed the FAPE requirement as follows:

Implicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of [FAPE], in addition to requiring that States provide each child with “specially designed instruction,” expressly requires the provision of “such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education.” § 1401(17) (emphasis added). 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 (emphasis added and footnote omitted). The Court explained that FAPE entitles a student to an IEP that is “reasonably calculated to enable the child to receive educational benefits” and that this requires that “the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Id.* at 200, 207.

Absent more definitive direction regarding the standard to be employed to determine “when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act,” courts applied various interpretations of the level of benefit that is required. *Id.* at 202. The Fourth Circuit, taking its lead from the Tenth Circuit, formulated the test as whether the school system adopted an IEP calculated to confer “some” educational benefit

on the student, “meaning a benefit that is more than minimal or trivial, from special instruction and services.” *See O.S. ex rel. Michael S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (“In this circuit, the standard remains the same as it has been for decades: 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.”).

Thirty-five years later, the parties in *Andrew F.* asked the Supreme Court to go further than it did in *Rowley* and set forth a test for measuring whether a disabled student attained sufficient educational benefit. The framework for the decision was the Tenth Circuit’s interpretation of the meaning of “some educational benefit,” which construed the level of benefit as “merely . . . ‘more than *de minimis*.’” *Andrew F. ex rel. Joseph F. v. Douglas Cty. School Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

The Supreme Court set forth the following “general approach” to determining whether a school has met its obligation under the IDEA:

While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.*, at 207, 102 S. Ct. 3034. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. *Id.*, at 208-209, S. Ct. 3034. Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.*, at 206-207, 102 S. Ct. 3034.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *See* §§ 1414(d)(1)(A)(i)(I)-(IV). This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.”’ *Rowley*,

458 U.S., at 179, 102 S. Ct. 3034 (*quoting* H.R. Rep. No. 94-332, p. 2 (1975)). A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be "*especially designed*" to meet a child's "*unique needs*" through an "*[i]ndividualized education program.*" §§ 1401(29), (14) (emphasis added).

*Andrew F.*, 137 S. Ct. at 998-99. The Court expressly rejected the Tenth Circuit's interpretation of what constitutes "some benefit":

When all is said and done, a student offered an educational program providing "merely more than *de minimus*" progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to "sitting idly . . . awaiting the time when they were old enough to 'drop out.'" *Rowley*, 458 U.S., at 179[.] The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

*Id.* at 1001.

Notwithstanding the new language in *Andrew F.*, providing a student with access to specialized instruction and related services does not mean that a student is entitled to "[t]he 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) (*citing Rowley*, 458 U.S. at 176). FAPE does not require "the best possible education that a school system could provide if given access to unlimited funds." *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991). It does, however, require the State to provide personalized instruction with sufficient support services to permit the handicapped child to benefit educationally.

In addition to the IDEA's requirement that a disabled child receive educational benefit, the child must be placed in the "least restrictive environment" to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same

classroom. 20 U.S.C.A. § 1412(a)(5) (2017); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117 (2016). Indeed, mainstreaming children with disabilities with nondisabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). At a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). Placing disabled children into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved.

Nonetheless, the issue is not whether another school is better or even as appropriate as the school offered by the school district but whether the school district has offered a FAPE. The Court has upheld the right of the parents to unilaterally place a learning disabled child in a private school and to recover reimbursement from the local educational agency (LEA) when the educational program offered by school authorities is not reasonably calculated to provide a FAPE. *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359 (1985). However, the IDEA does not require a LEA to pay for the cost of private education if the agency has made a FAPE available to the child and the Parents have nevertheless elected to place the child in a private school. 34 C.F.R. § 300.148(a) (2016). Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (*citing Burlington*, 471 U.S. at 373-74). Parents may recover the cost of private education only if they satisfy a two-pronged test: (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parent were appropriate to the child’s needs. *Burlington*, 471 U.S. at 370.

The Parents assert that the Student was denied FAPE based on the Student's proposed placement at [School 4]. The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). Accordingly, as the Parents are seeking relief on behalf of the Student, they bear the burden to prove by a preponderance of the evidence that MCPS failed to provide the Student with a FAPE in the least restrictive environment for the 2015-2016 school year. For the reasons that follow, the Parents have failed to meet that burden.

### **The Parents' Case**

The Parents claim that MCPS has denied the Student a FAPE by failing to propose an appropriate placement for the Student. They ask that the IEP include placement at [School 1] as an appropriate non-public special education program at public expense. The Parents assert that the [School 1] program is the "only" appropriate placement for the Student. They rely on the program's unique data collection system and behavioral management strategies. They also contend that [School 4]'s program was not able to meet the Student's needs.

The Father testified that the Parents were living in [State] when they first noticed problems with the Student, their only child. These problems started with the Student's seizure disorder at three years of age. While in [State], the Student attended a private Montessori preschool and transitioned to a public full day program. The Student had an IEP and was receiving special education services while in a general education classroom. During that time, the Student was taking medications for her seizure disorder and ADHD. While in the first grade, the Student started exhibiting problem behaviors. According to the Father, school staff made accommodations within and outside the classroom. The Parents also paid for additional tutors and services.

Based on the Parents' belief that the schools in [State] could not meet their daughter's needs, the Parents started looking for options in Maryland, where they had additional family supports. The Parents started by identifying schools listed online. They reported that they did not identify any public schools because they did not know in what area they were going to live. The Parents also hired a special education consultant to help identify appropriate schools.

After submitting applications to [School 1] and [SCHOOL 3], and being informed that there was no available space at [School 1], the Parents signed a tuition contract with [SCHOOL 3] for the 2013-2014 school year. On June 13, 2013, the Parents signed an enrollment contract. (MCPS Ex. 5A).

Soon after moving to Maryland in July 2013, the Parents requested a meeting to discuss public school options. Following the first MCPS IEP meeting in which the IEP team proposed placement at [School 2], the Father met with [School 2]'s principal to discuss what resources would be available for the Student. Ultimately, the Parents decided that [School 2] could not meet their daughter's needs. The Parents placed the Student at [SCHOOL 3]. The Father testified that he understood that he could get funding for [SCHOOL 3], but did not understand the process for doing so at that time. The Parents privately funded the tuition at [SCHOOL 3].

The Father testified that the Student's problem behaviors increased and spilled over from the school setting to home. According to the Father, the Student would hit and bite him and his wife and would throw objects. He did not believe she was progressing academically. At this time, the Student was participating in an outreach program through [School 1] and, according to her Parents, was doing well. On October 31, 2014, the Parents submitted a second application for admission to [School 1], which was accepted.

The Father testified that the Student had a rough start at [School 1] and was frequently removed from the classroom. He reported that he contacted MCPS to see what other options

were available. He stated that he would select a public school option if the school could meet his daughter's needs.

During this time, the Parents developed concerns about the services being provided by their first educational consultant and subsequently hired Dr. XXXX to assist with the "placement process." (MCPS 42A). When the Parents contacted Dr. XXXX, the Student was already attending [School 1] and, in the Father's opinion, had "done well at [School 1]." Dr. XXXX became involved prior to the October 6, 2015 MCPS IEP meeting.

Regarding the October 23, 2015 IEP meeting, the Father testified that everyone was permitted to express their opinions as to the Student's proposed placement. The Father stated that Mr. XXXX "bullied" Ms. XXXX when she gave her opinion that the Student's "best interests" would be served at [School 1]. The Father reported that the dialogue stopped after Mr. XXXX reprimanded Ms. XXXX.

At the time of the IEP meeting, the Father believed that the Student's needs were being met at [School 1] and that [School 1] was the appropriate placement. He recounted seeing a difference in his daughter's behavior when [School 1] moved her from a group in which there was another child with whom the Student was having difficulty. He attributed this move to improved behavior by the Student and less time that she was removed from the classroom.

At the hearing, the Father again stated his preference that the Student stay at [School 1]. This preference was based on Dr. XXXX's recommendation, the Student's progress at [School 1], and the Father's belief that the programs offered by [School 1] are exceptional. The Father stated his strong belief that Ms. XXXX undersold the benefits of the [School 1] programs. The Father admitted that his only knowledge of [School 4] was the information available on the internet. He also testified that his wife was upset following the observation at [School 4] because the principal told her that the IEP could not be implemented completely at [School 4].

(Tr. 607). He acknowledged that the Student would have received significant educational benefit at [School 4], but was concerned with the Student's behavioral issues. (Tr. 614). Because the Student's primary limitation was her behavior, the Father preferred that she remain at [School 1].

Dr. XXXX XXXX, the Parents' special education expert, testified at length regarding the unique process of data collection at [School 1]. She stated that this intensive data collection was "critically important" to meet the Student's needs. (Tr. 332). She explained that "in order to program appropriately, it is important, it is critical to take data, analyze the data, see what's working, see what's not working and make changes on the way." (*Id.*). She opined that the Student's needs could not be met without this form of data collection. (Tr. 336). Upon her review of various [School 1] documents, including progress reports and report cards, Dr. XXXX opined that the Student was making progress, both behaviorally and academically, at [School 1].

Dr. XXXX compared the programs at [School 4] and [School 1], and concluded that [School 4] could not meet the Student's needs. She explained that ordinary data collection is insufficient and noted that [SCHOOL 3] collected data without success because the information was not specific enough. She likened the manner of data collection at [SCHOOL 3] with the process at [School 4]. She indicated that she was familiar with [School 4]'s programs based on her eleven observations at the school over several years. Further, she criticized the labels assigned to the rooms where students are taken for disruptive behavior:<sup>8</sup>

I have an issue I'll try to say about [the Student], but I mean, who would call a place that you only go to when you can't be managed in your classroom "The XXXX"? The XXXX is where you go with your family to have fun and you go to Funland and you get smoothies and those kinds of things. I wouldn't call anything that we're trying to give the message this is not a place you want to be. We should call things what they are....

(Tr. 1128). She explained that "we ought to call things what we mean. And if it's a room to get

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<sup>8</sup> XXXX XXXX testified that two rooms are utilized as transition or time-out rooms to assist students who exhibit disruptive behavior. These rooms, identified as "the XXXX" and "the XXXX," are decorated according to a theme, which is intended to be calming to the student.

yourself together then that's what we ought to call it." (*Id.*). She also stated her opinion that PBIS is insufficient to address the Student's behavioral problems because it does not include intensive data collection and is not specific for autistic students. Finally, she noted that two other clients had had problems at [School 4] which required their removal to other schools.

Regarding the October 2015 IEP meetings, Dr. XXXX stated that the first meeting was postponed so that her mark-ups of the IEP could be considered. On October 23, 2015, the team met again with the Parents, Dr. XXXX, and [School 1] staff. Dr. XXXX reported that everyone agreed on the contents of the IEP except on the issue of placement. While she agreed that the participants were permitted to express their opinions on the Student's placement, she stated that Mr. XXXX ultimately made the decision to place the Student at [School 4]. She expressed shock at Mr. XXXX's behavior in response to Ms. XXXX's opinion that an [School 1] placement was in the best interests of the Student. She believed his reprimand of Ms. XXXX prevented further discussion on the issue of placement.

Dr. XXXX testified that she and the Mother visited [School 4] after the IEP meeting. She noted that the gym class that they observed was loud, an environment in which the Student does not have the behavioral control to manage. She did not see any students at [School 4] with problem behaviors like the Student. She stated that the Mother offered Principal XXXX the opportunity to visit [School 1] in order to observe the Student. According to Dr. XXXX, Principal XXXX told them that she would not tell MCPS if she had any concerns following her observation. Dr. XXXX sent an email to the Parents recommending that they retain an attorney:

At this point, given what we know [the Student] needs and XXXX XXXX's representation this morning on two points – one, that [School 4] cannot provide the staffing that [School 1] can and two, that [School 4] staff will not tell MCPS [the Student] can't be served there whether or not that is what they believe (noting further that you, as parents, would need to move forward with mediation and/or due process – I am recommending that you contact an attorney for advice on next

steps [sic].

(P 52). The Parents withdrew their authorization for Ms. XXXX to conduct an observation at this time.

XXXX XXXX, Director of [School 1]’s XXXX, testified about the offerings of the [School 1] program and the Student’s history at the school. She explained that many of the students have a diagnosis of Autism Spectrum Disorder and have additional behavioral management needs. The [School 1] programs, including the XXXX, are based on ABA, which she described as a system of strategies and methods which support learning. She stated that ABA principles are applied to all students. One-to-one aides are used when students have significant disruptive or aggressive behaviors or medical needs.

According to Ms. XXXX, the Student did not have any behavioral issues for a short period of time after she started in the XXXX, but thereafter the Student’s behavior became disruptive. According to Ms. XXXX, in her first year at [School 1], the Student made “slow progress” in academic skills because of her frequent outbursts and emotional behaviors. She reported the Student’s problem behaviors as yelling, screaming, pushing materials off her desk, swatting at peers and staff, and throwing objects. She identified some triggers that preempted problem behaviors such as being presented with difficult tasks, having another student encroach on the Student’s personal space, and having the teacher select another student to respond when the Student wanted to respond. Ms. XXXX explained that ABA is applied at [School 1] in a manner whereby behavioral data is collected and charted, the team uses the data to discuss goals and the application of interventions for the student, and these methods are implemented. This process was utilized in the Student’s case because the Student’s behavior was interfering with learning. According to Ms. XXXX, one of the responses used for the Student’s disruptive behavior was removing her from the classroom.

Ms. XXXX explained that additional services beyond the standard curriculum may be provided to a student at an additional cost to the parents. The parents must agree to pay for the additional services in order for services to be included regardless of the student's needs. For the 2014-2015 school year, the Student was in a class of seven students, receiving instruction on a first grade level in groups of two to four students. She has had a one-to-one aide since her admission at [School 1]. After several months of data collection, the Student's team recommended the addition of speech-language services, which the Parents approved. More recently, mental health services were included as an additional service.

Ms. XXXX was present at [School 1] on the day that XXXX XXXX observed the Student. She recounted that the Student was removed from the classroom and exhibited "particularly disruptive behavior and aggressive behavior" on that date. (Tr. 7/6/16 at 478). According to Ms. XXXX, once the Student was removed from the classroom, her behavior escalated. (Tr. 7/6/16 at 541-42). Ms. XXXX was present for the triggering event, the Student's disruptive behavior, her removal from the classroom, and the escalation of behavior after removal. Ms. XXXX believed that the Student's behavior on this date was consistent with her behavior on other dates when she also was removed from the classroom.

XXXX XXXX, Clinical Coordinator and Behavioral Analyst for the [School 1] XXXX, testified as an expert in ABA. In addition to supervising the behavior analysts at [School 1], she was the Student's behavior analyst for several months in 2016. She explained the implementation of ABA in the XXXX at [School 1]. She stated that ABA focuses on increasing a student's independent skills and reducing maladaptive learning behaviors. At [School 1], this process relies on data collection which is converted to graphs that are analyzed on a weekly basis to determine if interventions are effective. Ms. XXXX also explained the benefit of small group instruction on the Student's instructional level. She stated that the Student has been in groups as large as four

students with an instructor and her one-to-one aide. She identified the Student's problem behaviors such as yelling, noncompliance, clearing objects from her desk, throwing objects, and sometimes hitting peers or teachers. She explained that the Student's behaviors would often escalate if the initial problem behavior was ignored. She reported that a token economy is one intervention used by [School 1] to reinforce positive behaviors. She opined that data collection was important to implement programs and meet a student's needs. However, it was not required for ABA.

Ms. XXXX also discussed the role of the one-to-one aide at [School 1]. She explained that "[t]he one-to-one supports the program by implementing the behavior plan," which may be "needed if the classroom team cannot implement the behavior plan." (Tr. 736). The Student was assigned a one-to-one aide because her problem behaviors required frequent removal from the classroom. The one-to-one aide accompanied the Student to the transition room and encouraged positive behaviors with reinforcement.

XXXX XXXX, [School 4]'s principal, testified that [School 4] is a public special education day school which serves students with communication and behavioral problems. She reviewed the materials submitted by the Parents prior to the IEP meeting, but did not attend the IEP meeting because she had a scheduling conflict. XXXX XXXX, [School 4]'s psychologist, attended the meeting instead and reported what occurred to Ms. XXXX.

Sometime after the IEP meeting, Dr. XXXX and the Mother came to visit [School 4]. Ms. XXXX recounted that Dr. XXXX and the Mother met with her. She provided information on the school and they provided information about the Student. She did not recall the specific words that she used during the conversation. However, she denied telling the Mother and Dr. XXXX that if she had concerns regarding [School 4]'s ability to implement the IEP, she would not report this information to MCPS. She believed that Dr. XXXX misconstrued her statement

that as a public school, [School 4] will not refuse a student who is sent to the school. Ms. XXXX affirmed that she has a responsibility to report circumstances when the school cannot implement an IEP or meet a student's needs. She acknowledged that [School 4] does not have the level of staffing that [School 1] was reported to have,<sup>9</sup> but stated her belief that [School 4] was able to implement the IEP in this case and meet the Student's needs.

XXXX XXXX, a MCPS psychologist, testified that she became involved in this case during the development of the Student's IEP. She reviewed documents and reports, observed the Student at [School 1], and participated in the IEP meeting on October 23, 2015. At that meeting, she expressed her "concerns about the level of support that [the Student] needs and wasn't sure if [School 4] would be able to provide that." (Tr. 358). She stated that her concerns were based on information supplied during the IEP meeting and her observation at [School 1]. According to Ms. XXXX, Mr. XXXX disagreed with her statement. However, she denied that Mr. XXXX screamed at her in response to this statement. Prior to the IEP meeting, Ms. XXXX had not visited [School 4] and was not knowledgeable of its programs. After the IEP meeting concluded, Ms. XXXX visited [School 4]. During her visit, she did not see any significant behavioral problems or disruptive behavior. While she remained concerned about the level of support that the Student may require, she stated that she would defer to Ms. XXXX as [School 4]'s psychologist on the issue of whether [School 4] could implement the IEP and meet the Student's needs. Ms. XXXX agreed that Ms. XXXX was more knowledgeable about the supports available at [School 4] than she.

### **MCPS' Case**

MCPS contends that the IEP team correctly determined that the Student would have been provided a FAPE in the least restrictive environment at [School 4]. It maintains that the IEP

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<sup>9</sup> Ms. XXXX believed that the staffing at [School 1] permits one-to-one instruction for every student. (Tr. 409).

team was required to consider public options before moving on to private options because a public school is less restrictive than a non-public school, and therefore is a preferred placement under the IDEA. It also contends that the IEP was reasonably calculated for the Student to achieve meaningful educational progress at [School 4]. As such, MCPS asserts that the analysis ends on the first test under the two-prong analysis of *Burlington* and *Carter*. However, if the second prong of the analysis needs to be considered, MCPS contends that the Parents' unreasonable conduct should be considered in determining whether tuition reimbursement is warranted.

XXXX XXXX, Coordinator of Placement and Assessment Services for MCPS, testified as an expert in special education with an emphasis on educational placement of special needs students. He set forth the IEP process in general and explained that the Student's case was forwarded to the CIEP team because the CIEP team could make placements that the local IEP team could not. In preparation for the IEP meeting, Mr. XXXX reviewed documents provided by the Parents, including Dr. XXXX's neuropsychological report, speech language reports, and [School 1] assessments and documents. Regarding the CIEP team meeting, he stated that all parties, including the Parents, agreed on the present levels of performance, supplemental aids and services, testing accommodations, and hours of special education and speech-language services. He noted a discussion regarding whether the Student should remain on a diploma track based on the drop in IQ between 2012 and 2015, which he found to be significant. However, the parties agreed that the team would continue to monitor this area while the Student remained on a diploma track. The only area on which the parties could not agree was the Student's placement.

According to Mr. XXXX, the parties talked about the Student's strengths, weaknesses, and needs. XXXX XXXX, [School 4]'s psychologist, stated her opinion that [School 4] could implement the IEP, as did Mr. XXXX. The Parents, Dr. XXXX, and the [School 1] staff wanted

the Student to remain at [School 1]. Ms. XXXX stated her concern regarding the level of support required by the Student and [School 4]'s ability to meet this need. On this basis, she questioned whether it was in the Student's best interests to move from [School 1]. Mr. XXXX explained that he considered all of the opinions stated, but had to make a decision as the chair of the CIEP and as LEA representative because the participants could not agree on placement. Moreover, he noted that while he had experience in the placement of students with both greater needs and lesser needs than the Student in this case, Ms. XXXX had limited knowledge of the programs at either [School 1] or [School 4].

Mr. XXXX explained that before he could consider placement at a non-public school he was required to rule out public options first. Because [School 4] could implement the IEP and meet the Student's needs, he could not recommend placement at [School 1]. Mr. XXXX credited [School 1] as a "very special school" with strong instructional and behavioral programs. He testified that he has proposed [School 1] as a placement in other cases where the public school options could not meet the student's needs. Because there was a public option available in this instance which could implement the IEP and meet the Student's needs, Mr. XXXX determined that the appropriate placement was [School 4].

XXXX XXXX, [School 4]'s principal, testified regarding the programs available at [School 4], a separate 100% special education public day school. She explained that most students at [School 4] have communication problems and/or behavioral problems, which she stated are often related. She estimated that about 80% of her students had autism, which is sometimes combined with other impairments. She reviewed Dr. XXXX's neuropsychological report and stated her opinion that the Student's profile was similar to most students at [School 4]. The Student's weaknesses (difficulty with making higher level inferences, being surprised; and issues regarding personal space) were similar to those of [School 4]'s student population. Ms.

XXXX reported that the Student's cognitive scores were consistent with scores of other students at [School 4], placing her in the middle to low range of the student population. She described the procedures that are implemented for behavioral problems, including removal from the classroom to a separate space where calming strategies are employed so that the student may return to the classroom. She reported that the goal is for students to access the curriculum and to achieve independence.

According to Ms. XXXX, [School 4] uses ABA, data collection, and PBIS. [School 4] has one certified behavior analyst on staff and two staff members who are in training, but are not certified. Data collection is used for some students in order to look at certain behaviors, which is measured in fifteen minute intervals to see trends in behavior. She explained that she is looking to see problem behaviors decrease and replacement behaviors increase. PBIS is used for all students to reinforce positive behaviors by encouraging positive working habits. A reward system, PAWS, is employed in which students earn paws for good behavior and may cash them in for a reward at the end of the week.

Ms. XXXX reviewed the Student's needs as identified in her [School 1] Annual Educational Report, (B20), and noted the few differences between [School 4]'s program and [School 1]'s program. Other than labeling, both programs employ the same strategies involving providing frequent rule reminders, posting visual reminders or appropriate behaviors, and providing rewards for good behavior. Ms. XXXX distinguished the reward systems for the two programs: [School 4]'s reinforcement system allows a student to cash in paws at the end of the week; and [School 1]'s token economy permits a student to cash in points at the end of a day. Ms. XXXX also testified what [School 4] does not provide. She explained that the program does not monitor self-esteem or concentrate on emotional regulation. She also noted that the language used by staff members to reinforce positive behaviors may not always be consistent, which she

claimed was a positive difference from [School 1]’s approach because it reflected the real world.

Finally, Ms. XXXX reviewed the October 23, 2015 IEP. She indicated that the goals and objectives were typical of students successfully programmed for [School 4]. She noted that the language regarding the one-to-one aide was unusual compared to what she normally sees in a MCPS IEP. However, she agreed that the Student would be assigned enhanced staffing of a one-to-one support person based on the IEP. She concluded that [School 4] was capable of implementing the IEP and providing meaningful educational progress for the Student.

**The IEP and placement developed by MCPS for the 2015-2016 school year was reasonably calculated to provide the Student with a FAPE in the least restrictive environment.**

The Parents do not claim any procedural violation and thus the first prong of *Rowley* is satisfied. They raised several arguments as to why they believe that the Student has not been offered a FAPE for the 2015-2016 school year: (1) MCPS failed to utilize appropriate decision-making tools in reaching its decision regarding the Student’s placement;<sup>10</sup> (2) MCPS has failed to provide a clear description of the one-to-one support service provided in the IEP; (3) the Student’s response to the [SCHOOL 3] program demonstrates that the type of intervention MCPS intends to use is not reasonably calculated to provide a benefit; (4) the Parents have participated in the IEP process in good faith;<sup>11</sup> and (5) MCPS failed to offer an IEP and placement calculated to offer educational benefit when it proposed placement at [School 4]. (Parents’ Memorandum at 1-8). The only issue properly before me is whether the Student was denied a FAPE based on her placement at [School 4], the issue that was raised in the Parents’ due process complaint.<sup>12</sup> *See* 34 C.F.R. § 300.511(d) (“the party requesting the due process hearing may not

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<sup>10</sup> At the remand hearing, the Parents asserted that Mr. XXXX failed to offer a cogent and responsive explanation regarding his decision, which they claim is inconsistent with *Andrew F.*

<sup>11</sup> I will not address this issue because I have found that the Parents are not entitled to reimbursement for [School 1] funding because MCPS provided the Student with a FAPE.

<sup>12</sup> At the beginning of the hearing, I asked the parties if my understanding of the issue being limited to the Student’s placement, including location and program, was correct, and the parties confirmed that the only issue raised was the placement at [School 4]. (Tr. 8-10).

raise issues at the due process hearing that were not raised in the due process complaint, . . . unless the other party agrees otherwise.”). To the extent that the arguments asserted by the Parents in their memorandum and at the remand hearing relate to this issue, I will address those in turn.

At the 2016 hearing, the Parents presented a wealth of evidence regarding [School 1]’s benefits, arguing that the [School 1] program is the “only” appropriate placement for the Student. Most of the evidence presented by the Parents concentrated on the XXXX at [School 1] and the Student’s participation in that program. The Parents argued that the Student could not make meaningful progress without [School 1]’s unique program, which relies on small learning groups, continuous data collection, and ABA. They were concerned that [School 4] could not provide complex behavioral strategies and supports that were appropriate for the Student. It was their strong preference for [School 1] that drove the Parents’ actions in this case. From the very beginning, the Parents wanted the Student to attend [School 1], their preferred school. The Parents have expressed their desire to keep the Student at [School 1] because they believe she is making progress both in her behavior and academically. However, the issue is not whether another school is better or even as appropriate as the school offered by the school district but whether the school district has offered a FAPE.

On the record before me, I am not persuaded that the Student was denied a FAPE by MCPS based on the decision to place the Student at [School 4]. As previously stated, I am not required to compare the programs at [School 4] and [School 1] to determine which program best serves the Student. *See Hessler*, 700 F.2d at 139 (*citing Rowley*, 458 U.S. at 176) (stating that providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy”). Even if I were to find that the [School 1] program is a better program than [School 4]’s

program, I could not order that the placement be changed on that basis. The question is whether placement at [School 4] provides the Student with a FAPE in the least restrictive environment.

The thrust of the Parents' case rests on the testimony of their special education consultant, Dr. XXXX. I accepted Dr. XXXX as an expert in the field of special education based on her impressive background in the field. She has served as a competent source of information and an advocate for students for many years. However, I do not place great weight on Dr. XXXX's opinions regarding the appropriateness of the [School 4] program and the Student's placement in that program. Dr. XXXX's exposure to the [School 4] program is limited. While Dr. XXXX has visited [School 4] on several occasions in her role as a special education consultant,<sup>13</sup> she is not affiliated with the school or particularly knowledgeable of its programs. Moreover, her strong bias in favor of [School 1] and against [School 4] was inherent in her testimony.

Dr. XXXX testified that she has had a close working relationship with [School 1] throughout her career. She holds the program in high regard. Dr. XXXX repeatedly asserted her belief that the [School 4] program was inferior to [School 1]'s program. Indeed, she explained how Ms. XXXX appreciated her criticisms and guidance when she visited the school during her observation following the CIEP meeting. On this issue, I find it significant that Dr. XXXX did not have a single positive opinion on any aspect of the [School 4] program. She even extended her criticisms to [School 4]'s labeling of its time-out rooms, and suggested that no child could be appropriately placed at [School 4] based on her experience with two other students who she recommended be moved to other schools. The best compliment that Dr. XXXX afforded to [School 4] was that "it's a fine program" where she has had students placed. (Tr. 114). In comparison, Dr. XXXX described [School 1] as follows:

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<sup>13</sup> Dr. XXXX testified that she has visited [School 4] with regard to eleven students over several years.

I happened to be at [School 1] a lot this year, again, from, for clients from various jurisdictions, including Montgomery County, and, you know, when you asked me surely they must have changed, yeah, they've only gotten better, it's like fine wine.

(Tr. 111).

I also considered Dr. XXXX's interest in the outcome of this matter as a paid advocate. The Parents hired Dr. XXXX to assist with the "placement process" for MCPS after they had secured the Student's placement at [School 1]. (MCPS 42A). It is clear that the Parents have always held a preference for [School 1] and have made orchestrated efforts, including hiring Dr. XXXX, to keep her in the program. The Parents chose [SCHOOL 3] only after [School 1] informed them that it did not have an available space. However, as soon as a space became available, they immediately moved the Student to [School 1]. Notwithstanding the Student's significant behavioral problems and her minimal academic progress at the time that they sought placement assistance, the Parents informed Dr. XXXX that the Student had "done well" at [School 1]. (MCPS 42A). The Parents did not ask for guidance on identifying other relevant programs and did not seek information on [School 4]. Based upon the testimony and evidence, it is clear that Dr. XXXX was charged with securing placement at [School 1], not identifying whether another program would provide educational benefit. As such, I cannot place significant weight on her evaluation of the [School 4] program.

In comparison to Dr. XXXX's biased opinions, I found Mr. XXXX's more balanced evaluation to be persuasive. He provided background on both programs, credited the attributes of the [School 1] program, and explained the reason that he ultimately selected [School 4] as the appropriate placement. He stated that he could not consider a private placement until he eliminated all public options. Since [School 4] was a public option, he was required to consider whether it was an appropriate placement.

I found Mr. XXXX to be a credible witness. In response to the allegation that he acted

inappropriately during the discussion of placement at the CIEP meeting, Mr. XXXX explained that he took offense to Ms. XXXX's suggestion that he was not considering the Student's best interests, because he always considers the best interests of the students. He acknowledged that his manner has been perceived as abrasive before, but stated that he has worked on his manner after having been accused of "bullying" in the past. He did not believe that his statements at the CIEP meeting had any effect on the conversation. He defended his selection of [School 4] as the appropriate placement, and stated that he could not ignore the availability of a viable public option when the IEP could be successfully implemented at that location.

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

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

20 U.S.C.A. § 1412(a)(5)(A); *see* 34 C.F.R. § 300.114(a). The CIEP team was required to consider the placement options available, and to propose a placement in the least restrictive environment which could provide the Student with a FAPE. Federal regulations provide for a continuum of educational placements, including regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115. Maryland regulations similarly provide for special education and related services in the least restrictive environment. COMAR 13A.05.01.10.

In *DeVries v. Fairfax County School Board*, the Fourth Circuit instructed:

The [IDEA]'s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child. As the Sixth Circuit Court of Appeals stated:

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.

*DeVries*, 882 F.2d at 878-79 (quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), *cert. denied*, 464 U.S. 864). [School 4], a public self-contained special education school, was able to provide the Student with a FAPE in the least restrictive environment.

While I understand the Parents concern that [School 4] may not be able to provide the same level of support or data collection that [School 1] provides, I am persuaded that [School 4] can meet the Student's needs. I do not agree that [School 1] is the only placement which can provide meaningful educational benefit to the Student. Dr. XXXX's opinion that the Student could not receive meaningful benefit without [School 1]'s intensive data collection is contradicted by the Parents' expert in behavioral analysis. Ms. XXXX testified that ABA does not require data collection and that there are other ways to improve behavior without data collection. (Tr. 815, 819). Clearly, the Student has behavior problems that interfere with her learning. The MCPS October 23, 2015 IEP identifies a need for services based on disruptive behaviors. (MCPS 49 at 11082). Ms. XXXX reviewed the MCPS IEP and stated that the goals, supplemental aids, and objectives were consistent with ABA.

The record also fails to support the Parents' claim that [School 1]'s program is the only program which can manage the Student's behavior. A review of the data collected by [School 1], from January 12, 2015 through June 9, 2015, reflects behavior notably similar to the Student's behavior observed at [SCHOOL 3]. Regarding her first several months at [School 1],

the Father testified as follows:

She was having – she was getting pulled out of the classroom an average of three times a day. Not only were her outbursts long when they occurred, they were frequent and [School 1] was – the thing that we really appreciate about them – I’m a scientist ; I ran a basic science lab for, you know, eight years – is that they collected tons of behavioral data and so they had a plan for which to – that they would use to document and access her behaviors to hopefully modify their responses to improve outcomes and we really respected that, but she wasn’t making progress in the springtime.

(Tr. 589). The evidence shows that the Student continued to exhibit loud and prolonged inappropriate vocalizations, throwing objects, and hitting peers and teachers while [School 1] staff continuously collected data and adjusted the BIP. Even though the Parents may have appreciated the scientific approach employed by [School 1], the Student was not showing improvement in her behavior or academic achievement as a result of the intensive data collection. The testimony that the Student’s behavior improved after many months at [School 1] is not persuasive evidence that the Student requires the [School 1] approach to behavior modification in order to receive meaningful educational benefit.

While it is clear that the Student’s behavior is a major obstacle to her academic achievement, the evidence suggests that the interventions utilized by [School 1] which have contributed to the Student’s improvement, are the same interventions employed at many other schools including [School 4]. Ms. XXXX testified that, while the labels placed on the strategy may be different, [School 4] applies ABA and many other methods used at [School 1], including providing frequent rule reminders, posting visual reminders of appropriate behaviors, and providing rewards for good behavior. Like the token economy at [School 1], [School 4] rewards students for good behavior through PBIS and PAWS. The evidence suggests that these common strategies can be successfully employed without intensive data collection and still provide the Student with meaningful educational benefit.

Dr. XXXX equated the data collection at [School 4] with that which she claims was

unsuccessful at [SCHOOL 3], and opined that this “very general” level of data collection is not specific enough to benefit the Student. (Tr. 1127-28). However, there was no evidence that Dr. XXXX was particularly knowledgeable about the data collection at either [SCHOOL 3] or [School 4]. Nor was there evidence that the differing levels of data collection had an effect on the Student’s learning. To the extent that the charts help to identify trends in behavior based on interceding conditions, I agree that the data charts as a tool are helpful. However, I find that this tool may be equally helpful without data collection at five minute intervals. Certainly, the evidence does not support the Parents’ claim that this form of data collection is necessary for the Student to receive meaningful educational benefit.

There was evidence, however, that the Student benefited from strategies regularly utilized at both [School 1] and at [School 4]. The adjustment of the Student’s medication had an effect on her behavior. The Student’s Mother reported to [School 1] that “when on high doses of certain anti-seizure medication, [the Student] engaged in problem behaviors at home.” (MCPS 9 at 336). These behaviors stopped when the dosage was adjusted. (*Id.*). The Student’s behavior charts support this fact. After adjustments to the Student’s ADHD medication, her disruptive behaviors appeared to increase regardless of changes to behavior interventions. (*See* P 36 at 1, 4-5, 11-15). There also was evidence that moving the Student away from other students with which she had problems was effective in decreasing problem behavior. The Father testified that the Student’s behavior improved when this occurred. Further, the IEP team agreed that the Student requires small group instruction, visual reminders, and positive reinforcement. [School 4] is able to employ all of these strategies.

Ms. XXXX, [School 4]’s principal, reviewed the IEP and stated her opinion that the IEP could be implemented at [School 4]. I am not persuaded that Ms. XXXX told the Mother and Dr. XXXX that she would not report to MCPS [School 4]’s inability to meet the Student’s needs

if she found that it was unable to do so. Ms. XXXX stated her belief that her statements regarding the nature of a public school, to not turn away students sent to the school, were misconstrued. I find her explanation reasonable. This interpretation is supported by the inconsistent reports by Dr. XXXX and the Mother regarding what actually was stated by Ms. XXXX.<sup>14</sup> At the hearing, Ms. XXXX stated her responsibility to report circumstances under which the school could not meet a student's needs. In this case, she reviewed the Student's profile and stated that it is consistent with the profile of other [School 4] students. She reviewed the [School 1] Annual Report, which discusses the school's strategies for addressing problem behaviors and tools for behavior management, and indicated that [School 4] utilizes many of the same. Further, she testified that [School 4] has had students with greater behavior problems than the Student and lesser behavior problems than the Student. She acknowledged that [School 4] does not have the same level of staffing as [School 1]. However, she believes that [School 4] could implement the IEP and meet the Student's needs.

The Parents' witnesses emphasized the apparent progress the Student is making at [School 1], a fact, they argue, is supported by the decrease in problem behaviors. However, success at [School 1] is immaterial to the question of whether the recommended placement was appropriate for the Student. As already stated, I am not tasked with determining the best possible program for the Student to achieve maximum benefit. Based on the evidence, I have concluded that the IEP and placement offered by MCPS were reasonably calculated to enable the Student to make progress appropriate in light of her circumstances.

In my 2016 decision, I included language from *Rowley* and *O.S.*, describing the measurement of benefit as an educational program that would confer some educational benefit to the Student, "meaning a benefit that is more than minimal or trivial." (Decision at 22 (*quoting*

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<sup>14</sup> The Mother told the Father that Ms. XXXX said that [School 4] could not implement the IEP completely. (Tr. 607). Dr. XXXX reported that Ms. XXXX stated that she would not tell MCPS if [School 4] could not meet the Student's needs. (P 52).

*O.S.*, 804 F.3d at 360)). By quoting *O.S.* in my initial decision, I did not intend to convey a belief that MCPS sought to provide the Student with an educational placement which would provide the Student with an opportunity for barely minimal progress. I do not believe that such is the goal of educators, and I did not find this to be the circumstance in the present case. Ms. XXXX considered the Student's needs as identified in the Student's [School 1] Annual Educational Report and her October 23, 2015 IEP when she concluded that [School 4] was capable of implementing the Student's IEP. She reviewed the Student's cognitive scores, which placed her in the middle to low range of the [School 4] student population. She also recognized the Student's weaknesses and described the procedures that are implemented for behavioral problems. Finally, she noted that the language used by staff members to reinforce positive behaviors may not always be consistent, a difference from [School 1], which she claimed was a positive difference from [School 1]'s approach because it reflected the real world. Based on the evidence, I am persuaded that the placement developed by MCPS for the 2015-2016 school year was reasonably calculated to provide the Student with a FAPE.

Accordingly, an analysis pursuant to the second prong of *Burlington* and *Carter* is inapplicable; the issue of whether the Parents' unilateral placement is appropriate or beneficial does not need to be addressed in this decision.

**The MCPS decision should be accorded deference.**

The Parents argue that the MCPS decision on the Student's placement should not be accorded deference because this decision was not based on evaluations and observations of participants who knew and understood the Student's needs. (Parents' Memorandum at 1-2). At the remand hearing, they claimed that *Andrew F.* required greater weight to be assigned to the Student's experts who had observed the Student and were keenly aware of the Student's needs. The record fails to support these contentions. In large part, the Parents complain that Mr.

XXXX's decision that the appropriate placement is [School 4] is contrary to the opinions of Dr. XXXX, [School 1] staff, and Ms. XXXX, participants in the IEP meeting who observed the Student at [School 1]. They assert that Mr. XXXX did not bring his experience to the table because he did not accord more weight to the opinions of those who knew the Student better than he. Further, they complain that Mr. XXXX failed to provide a cogent and responsive explanation for his decision. I find no merit in these arguments.

Once an IEP is shown to be procedurally proper, the judgment of educational professionals regarding the child's placement should be questioned only with great reluctance by the reviewing authority. *Tice v. Botetourt County Sch. Dist.*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990). There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *A.B. v. Lawson*, 354 F.3d 315, 325-329 (4<sup>th</sup> Cir. 2004); *M.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 532-533 (4<sup>th</sup> Cir. 2002); *Barnett*, 721 F. Supp. at 762. Further, 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 County Bd. of Educ.*, 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998).

Here, the evidence shows that Mr. XXXX considered the reports, assessments, and other documents submitted by the Parents, and the statements of all participants in the IEP meetings before reaching his conclusion that [School 4] was an appropriate placement for the Student. I accepted Mr. XXXX as an expert in the field of special education with an emphasis on the placement of special needs students based on his lifetime of experience in this area. The Parents raise no contention about Mr. XXXX's consideration of the Student's needs as they relate to the

goals, objectives, and other components of the IEP. With regard to the Student's placement, Mr. XXXX testified as he did as to other areas of the IEP, that he reviewed all reports and considered the statements of all the participants in the IEP meeting. He employed the same procedure that is required and that he employs for all IEP meetings. Only when the parties could not agree on placement did he make the ultimate decision that the Student should be placed at [School 4] because it was a viable public school option that could implement the IEP. The fact that his decision is contrary to the preference of the Parents, their special education consultant and the [School 1] staff, all parties with an interest in the Student's placement remaining at [School 1], does not render Mr. XXXX's decision unreasonable or inappropriate.

Dr. XXXX acknowledged Mr. XXXX's experience and stated her opinion that the MCPS IEP teams are always well-prepared and knowledgeable about the offerings of both public and private options. No one disputed Mr. XXXX's qualifications or his knowledge of the available programs. Mr. XXXX stated his understanding of both the [School 4] program and [School 1]'s program, giving details about the benefits of each. He explained that he has placed students at [School 1] when their needs could not be met by other programs or schools. However, in this instance, [School 4] could implement the IEP and meet the Student's needs in the least restrictive environment. As such, Mr. XXXX applied his knowledge of the several options available to the Student based on her needs and what the schools could offer. With this knowledge, after considering the documents, reports and testimonial evidence, when faced with disagreement on the appropriate placement, he determined that [School 4] was the appropriate placement.

The record fails to support the Parents' claim that Mr. XXXX failed to provide a cogent and responsive explanation for his decision. Mr. XXXX clearly articulated what information was presented to the IEP team and the reasons for his decision when the parties disagreed on placement. I find that Mr. XXXX and the IEP team considered the Student's unique

circumstances and needs in developing the IEP and placement and that Mr. XXXX communicated these facts at the hearing.

To the extent that the Parents argue that Mr. XXXX did not know the Student when he proposed the [School 4] placement, Mr. XXXX testified that he rarely interviews students or observes students as part of the IEP process. He did not think interviewing the Student would add to the process because he considered the relevant information provided in order to develop the IEP. Moreover, it is clear that Dr. XXXX developed her opinion regarding placement based on the same information considered by Mr. XXXX. She also did not personally interview the Student. While she observed the Student at [School 1], she brought that knowledge to the IEP meeting, which was communicated to Mr. XXXX. Likewise, Ms. XXXX, who observed the Student at [School 1], recognized her limited knowledge of [School 4]'s program and provided her opinion on placement at the CIEP meeting. Moreover, all parties have acknowledged that the Parents, who know the Student the best, and [School 1] staff, who know the Student well, participated in the development of the IEP and provided input at the IEP meeting. Indeed, there is no complaint regarding all other aspects of the IEP, which were developed through cooperation of the IEP team.

**The Student's educational experience at [SCHOOL 3] has no bearing on the appropriateness of the [School 4] placement.**

The Parents also claim that [School 4]'s program is sufficiently similar to the program which it claims was unsuccessful at [SCHOOL 3]. (Parents' Memorandum at 4). As such, they maintain that [School 4] is not a proper placement because it is equivalent to a placement that has been proven inappropriate for the Student. As already stated, the decision to place the Student at [School 4] was based on competent evidence which established that the placement provided the Student with a FAPE. The Parents' decision to move the Student from [SCHOOL 3] to [School 1] has no bearing on my decision.

The programs at [School 4] and [SCHOOL 3] are distinct programs. The most glaring difference is the fact that [SCHOOL 3] is a non-public school and [School 4] is a public school. As such, [SCHOOL 3], like [School 1], is not bound by an IEP and may deny services to a student regardless of her need if her parents do not agree to pay for the cost of the additional service. In fact, while at [SCHOOL 3], the Parents initially denied to pay for a one-to-one aide. The Student was not provided this service until the Parents agreed to [SCHOOL 3]' recommendation. Had the Student attended [School 4], she would have received one-to-one support and all other services provided in the IEP.

Moreover, contrary to the Parents' argument, the evidence shows that the Student benefitted from the [SCHOOL 3] program. The Student's receptive-expressive speech improved while she was at [SCHOOL 3]. (MCPS 8 at 10761, 10765). Moreover, it appears that the Parents moved the Student to [School 1], their preferred school, as soon as a space became available, not because the Parents were dissatisfied with the Student's achievement at [SCHOOL 3].

I am convinced that the Parents did not truly consider any placement other than [School 1]. Prior to moving to Maryland, the Parents provided information to Dr. XXXX which supported his recommendation for a school similar to [School 1]. While working with the Parents in 2013, the Parents' special education consultant, XXXX XXXX, suggested that the Student required an eleven-month 100% special education program, which clearly describes [School 1]. While waiting for a space to become available at [School 1], the Parents chose to keep the Student at [SCHOOL 3]. The record fails to support a conclusion that the Parents were seeking alternatives to the [SCHOOL 3] program. Indeed, they did not seek public school options during this time. Rather, they submitted another application to [School 1] and moved the Student when they were able. Further, the Student made progress at [SCHOOL 3]. As such, the

record does not support the Parents' contention that the [SCHOOL 3] program did not benefit the Student and does not support the extended argument that the Student would not have been successful had she accepted the [School 4] placement under the IEP.

**To the extent properly raised, the inclusion in the IEP of the supplementary service of one-to-one adult support for aggression did not deny the Student a FAPE.**

As already noted, in their due process complaint, the Parents did not challenge the contents of the IEP except on the issue of placement. They did not raise any issue regarding the purpose of the one-to-one support. Nonetheless, the Parents now argue that the language regarding the purpose for one-to-one support as a supplementary service "for aggression" was not sufficiently clear in the IEP. They claim that it is inconsistent with Mr. XXXX's recollection of what was discussed at the IEP meeting regarding the need for one-to-one support to assist the Student with her transition. (Parents' Memorandum at 2-3). They rely on this language and state that the IEP was not reasonably calculated to provide meaningful benefit to the Student. (*Id.* at 7). As already stated, this contention is not properly raised. 34 C.F.R. § 300.511(d).

To the extent that the Parents contend that this argument supports their claim that the Student's placement denied her a FAPE, I will address that complaint. All participants in the IEP meeting testified that the parties agreed to the contents of the IEP with the exception of the Student's proposed placement. There was little discussion of the supplementary service of a one-to-one support person at the IEP meeting because everyone agreed to the proposed supplementary services. On the issue of enhanced staffing, Mr. XXXX testified that he supported the inclusion of one-to-one adult support in the IEP because he believes that it would be helpful for the Student's transition from [School 1] to [School 4]. He stated that he provided this opinion at the IEP meeting. While several witnesses opined that a one-to-one support person was not required "for aggression," Mr. XXXX's testimony regarding what was discussed at the IEP meeting was not contradicted by any other witnesses. Ms. XXXX testified that the language

was different than what she normally sees when an IEP calls for enhanced staffing at [School 4], but agreed that the student would receive enhanced staffing according to the IEP.

The Parents now contend that one-to-one support is required to collect data. (Parents' Memorandum at 2-3). There was no discussion regarding this need at the IEP meeting or in the due process complaint. In her rebuttal testimony, Dr. XXXX testified that one of the services supplied by the one-to-one aide was to collect data. However, Ms. XXXX testified that a one-to-one aide is utilized at [School 1] for disruptive or aggressive behaviors or medical need. Moreover, as already stated, the record fails to support the Parents' claim that intensive data collection is required to provide the Student with a FAPE. As such, even if one-to-one support was utilized for data collection at [School 1], the Student would not require this service in order to receive meaningful benefit at [School 4].

Additionally, the fact that the IEP includes one-to-one adult support for aggression does not render the IEP inappropriate, particularly where the parties did not raise any complaint regarding the language prior to the hearing and there was evidence that the Student exhibited aggressive behaviors that may require one-to-one support. Ms. XXXX testified that a one-to-one aide may be utilized at [School 1] to divert aggressive behaviors. Certainly, the Student's problem behaviors have included aggressive behaviors like growling, kicking, swatting at students and teachers, and throwing objects. (MCPS 8 at 10761). During the 2013-2014 school year, the Student was suspended from [SCHOOL 3] "due to the severity of her aggression." (MCPS 9 at 336). As such, the inclusion of one-to-one support for aggression would be appropriate.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the IEP and placement proposed by MCPS for the 2015-2016 school year was reasonably

calculated to offer the Student a FAPE in the least restrictive environment. 20 U.S.C.A. § 1412(a)(5) (2017); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117 (2016). *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988 (2017); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993).

As I have concluded that the Student would have been provided a FAPE in the least restrictive environment at [School 4], I further conclude that the Parents are not entitled to receive reimbursement as a result of their unilateral placement of the Student at [School 1] for the 2015-2016 school year. 34 C.F.R. § 300.148 (2016).

### **ORDER**

I **ORDER** that the March 7, 2016 Due Process Complaint filed by the Parents on behalf of the Student is hereby **DISMISSED**.

August 15, 2017  
Date Decision Issued

\_\_\_\_\_  
Michelle W. Cole  
Administrative Law Judge

MWC/dlm

### **REVIEW RIGHTS**

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) (Supp. 2016). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.