

**XXXX XXXX,**

**STUDENT**

**v.**

**BALTIMORE COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE MICHAEL D. CARLIS,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: MSDE-BCNY-OT-16-28347**

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**DECISION**

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DISCUSSION  
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ORDER

**STATEMENT OF THE CASE**

On September 15, 2016, [Mother] and [Father] (Parents), on behalf of their child (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH), requesting a hearing to review the identification, evaluation, or placement of the Student by the Baltimore County Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).<sup>1</sup>

On October 13, 2016, I held a Telephone Pre-hearing Conference with the parties. [Father] represented the Student. J. Stephen Cowles, Associate General Counsel, represented the BCPS. On October 17, 2016, a Pre-Hearing Conference Report and Order (PCR) was mailed to the parties. The due process hearing was scheduled for November 1 and 2, 2016.

Under relevant regulations, a decision from a due process hearing must generally be mailed to the parties no later than forty-five days from the parties' failure to resolve their dispute

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<sup>1</sup> U.S.C.A. is an abbreviation for United States Code Annotated.

in a resolution meeting or in mediation. 34 C.F.R. §§ 300.515, 300.510 (2016)<sup>2</sup>; Code of Maryland Regulations (COMAR) 13A.05.01.15C(13), (14). In regard to this case, the resolution meeting failed to resolve the complaint on September 28, 2016, which meant that the last day for the mailing for the decision to the parties would have been November 10, 2016,<sup>3</sup> just eight days after the anticipated close of the record. In addition, on November 3 and 7, 2016, I was scheduled off from work for an out-of-town commitment and dental surgery, respectively, and November 8, 2016, was Election Day, a holiday for public employees. Based on the limited available time after the end of the hearing to review the record and draft a decision, the BCPS requested, and the Parents agreed, to allow thirty days from the close of the record for me to issue my decision.

The PCR set forth the issues to be addressed at the hearing as follows:

- A. Whether the BCPS properly implemented the Student's Individualized Education Program (IEP)<sup>4</sup> during the 2014-2015 and 2015-2016 school years; and if not,
- B. What is the appropriate remedy?

On November 1, 2016, the hearing was convened at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. The Student was present, as were the Parents. [Mother] represented the Student. The BCPS was present. Mr. Cowles represented the BCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2016); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); and COMAR 13A.05.01.15C.

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<sup>2</sup> "C.F.R." is the Code of Federal Regulations.

<sup>3</sup> The forty-fifth day would have been Saturday, the 12th; and the forty-fourth day would have been Veteran's Day, the 11th of November and a national holiday.

<sup>4</sup> An "IEP" is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title." 20 U.S.C.A. § 1401(14) (2010); *see* Md. Code Ann., Educ. § 8-405(a)(4) (Supp. 2016). An IEP must include, among other things, "[a] statement of . . . supplemental aids and services . . . to be provided to the child . . . [t]o advance appropriately toward obtaining the annual goals . . . [and] [t]o be involved in and make progress in the general education curriculum[.]" 34 C.F.R. § 300.320(a)(4)(i), (ii) (2016).

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

At the close of the Student's case at the hearing on November 1, 2016, the BCPS moved for judgment (Motion) against the Student pursuant to COMAR 28.02.01.12E. The parties argued the merits of the Motion on the record. I deferred a final ruling on the Motion, and instructed the BCPS to file the Motion in writing, with arguments and supporting authority, no later than November 4, 2016, and I instructed Parents to respond to the Motion no later than November 10, 2016.<sup>5</sup> The BCPS filed the Motion on November 3, 2016, and the Parents filed the Student's response on November 10, 2016.<sup>6</sup>

On November 21, 2016, I issued a Ruling on the Motion. I granted the Motion with regard to the Student's claim that the BCPS violated the IEP for the 2014-2015 school year. However, I denied the Motion with regard to the Student's claim that the BCPS violated the IEP for the 2015-2016 school year. Therefore, the due process hearing was reconvened on December 12, 2016. Although December 13, 2016, had also been set aside to continue the hearing for a second day, if necessary, both parties concluded their case presentations on December 12, 2016, and the record was closed on that date. As a result, by agreement of the parties, which I have discussed above, my decision became due to be mailed to the parties thirty days from December 11, 2016, or January 11, 2017.

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<sup>5</sup> Because the Parents were representing the Student without legal counsel, I decided it fair and appropriate to give them additional time for thought, reflection, and argument before ruling on the Motion. The parties agreed to resume the merits hearing, if necessary, on December 12 and 13, 2016.

<sup>6</sup> Under COMAR 28.02.01.02B(5), "filed" is defined to include "when the document is postmarked." The Student's response was postmarked on November 10, 2016, but not date-stamped as received at OAH until November 14, 2016, and not served on the BCPS until it was mailed by the OAH to the BCPS on November 15, 2016.

## ISSUES

The issues are:

- A. Whether the BCPS properly implemented the Student's IEP during the 2015-2016 school year; and if not,
- B. What is the appropriate remedy?

## SUMMARY OF THE EVIDENCE

### Exhibits<sup>7</sup>

I admitted the following exhibits for the Student:

- Parents 1.4: IEP, amended on August 23, 2016, and approved;
- Parents 2: Student report card through the third quarter of the 2015-2016 school year ending April 8, 2016;
- Parents 3: Judicial Branch Quiz, dated March 7, 2016;
- Parents 4.1-4.6: Screen shots from the BCPS' on-line information system;
- Parents 5: *Fences* Act II Comprehensive Questions quiz, undated;
- Parents 6: MSDE letter, dated August 2, 2016; and
- Parents 9: Acknowledgement of IEP, dated August 29, 2016.

I admitted the following exhibits for the BCPS, with the exception of BCPS 11:

- BCPS 1\*: Acknowledgement of IEP, dated August 20, 2015;<sup>8</sup>
- BCPS 2: IEP from the IEP Team Meeting on March 13, 2015;
- BCPS 3: IEP from the IEP Team Meeting on March 3, 2016;
- BCPS 8: IEP Team Summary, dated March 13, 2015;

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<sup>7</sup> The Binder of the Parents' exhibits identifies exhibits by Roman numerals. I have converted the numbering to Arabic numerals. The numbering of the Parents' and the BCPS' exhibits is not sequential because some of the pre-labelled exhibits in their binders were not offered.

<sup>8</sup> "1\*" distinguishes this exhibit from BCPS 1 that is a different exhibit found in the BCPS' binder, but which was not offered at the hearing.

BCPS 9A: IEP Team Summary, dated March 3, 2016;

BCPS 9B: IEP Summary, dated June 8, 2016;

BCPS 9C: IEP Summary, dated August 24, 2016;

BCPS 11: Objection to admissibility sustained;

BCPS 12: Daily Attendance Profile for the Student, except for page 1 of 1 beginning with September 1, 2016;

BCPS 13: Annual Secondary School Performance Data Summary;

BCPS 19: Copies of assignments from the Student's English class;

BCPS 20: Materials from the Student's Art class;

BCPS 21: Materials from the Student's Math class;

BCPS 22: Materials from the Student's Science classes;

BCPS 23: Attendance for the Student in his American Government class;

BCPS 24: Materials from the Student's American Government class;

BCPS 25: Materials from the Student's American Government class;

BCPS 26: Reports of grades on assignment for the Student in his American Government class;  
and;

BCPS 27: Materials from the Student's World History class.<sup>9</sup>

### Witnesses

The following testified for the Student:

- [Mother];
- the Student; and, as a rebuttal witness,

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<sup>9</sup> At the end of the parties' presentation of their cases, I reviewed my exhibit list to identify for the parties which exhibits had been admitted. With regard to BCPS 27, I informed the parties that I had listed it on my witness sheet, but had not marked it with a check to indicate its admission into the record. Because I recalled testimony about the exhibit, I mistakenly told the parties that I thought I had admitted it. Both parties also mistakenly concurred that BCPS 27 had been admitted. However, the transcript of the hearing indicates that I did not admit BCPS 27 at the hearing. Nonetheless, because BCPS thought the exhibit had been admitted, and the Parents were "fine with that," I have treated BCPS 27 as part of the record.

- XXXX XXXX, IEP and Special Education Chair at [School] ([SCHOOL]), previously accepted as an expert in Special Education.

The following testified for the BCPS:

- XXXX XXXX;
- XXXX XXXX, Social Studies teacher at [SCHOOL], accepted as an expert in teaching Social Studies at the secondary education level;
- XXXX XXXX, Social Studies teacher at [SCHOOL], also accepted as an expert in teaching Social Studies at the secondary education level; and
- XXXX XXXX, Supervisor of Compliance in the Office of Special Education at the BCPS.

### **FINDING OF FACT**

1. During the 2015-2016 school year the Student was enrolled in the tenth grade at [SCHOOL].
2. During the 2015-2016 school year the Student had an IEP. The Student was eligible for special education services as a student with Other Disabilities, listed as Attention Deficit Disorder (ADD) and Attention Deficit/ Hyperactivity Disorder (ADHD).
3. The Student's IEP for the 2015-2016 school year included that the BCPS would provide the Student with instructional supports and program modifications.
4. The supports and modifications in the IEP included providing the Student with copies of student/teacher notes on a daily as needed basis and providing the Student with altered or modified assignments on a daily as needed basis.
5. During the 2015-2016 school year the Student was enrolled in the following classes: English 11, American Government, World History, Geometry, Biology, Earth/Space Science, Fundamentals of Art, and Engr & Tech Concepts.<sup>10</sup>

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<sup>10</sup> The record does not explain the meaning of the "Engr" abbreviation.

6. The Student's end-of-year grades were E's in English, American Government, World History, Geometry, Fundamentals of Art, and Engr & Tech Concepts, and D's in Biology and Earth/Space Science.

7. The Student received notes and modified assignments consistent with his IEP in Biology and Earth/Space Science.

8. The Student did not receive notes and modified assignments consistent with his IEP in World History.

9. The failure of the BCPS to provide the Student with notes and modified assignments in World History was a material violation of the Student's IEP.

10. The Student was absent from school on 45.5 days of the 180 school days during the 2015-2016 school year.

11. The Student did not complete many assignments or pay attention in class in at least some of the classes in which he was enrolled when he was present.

12. The Parents filed a complaint with the MSDE in June 2016, complaining that the BCPS was not providing the Student with notes and modified assignments as required by his IEP. In August 2016, the MSDE decided that the BCPS did not provide the Student with notes and modified assignments and required the IEP team to determine compensatory education or other remedies.

13. The IEP team agreed that the BCPS would provide the Student with sixty hours of compensatory education during the 2016-2017 school year, which it is providing or has provided.

14. Under the circumstances of this case, there is no appropriate equitable remedy available to the Student.

## DISCUSSION

### *General Context*

The Student's more specific allegation against the BCPS is that the BCPS failed to provide him with notes and modified assignments as required in the Instructional Supports and the Program Modification sections of the Student's IEP for the 2015-2016 school year.

According to the Student, that failure by the BCPS was the reason he failed six of the eight classes in which he was enrolled during the 2015-2016 school year.

The Student received the following final grades in that school year: English 11: E, American Government: E, World History: E, Geometry: E, Biology: D, Earth/Space Science: D, Fundamentals of Art: E, and Engr & Tech Concepts: E.<sup>11</sup> Parent 2; BCPS 13. The Student did not allege a failure to implement the subject parts of the IEP in the other two classes. There was no dispute that the teacher in those classes (Ms. XXXX) provided the Student with notes and modified assignments. The Student passed those classes with a D.

During the 2015-2016 school year, the Student attended the tenth grade at [SCHOOL]. Two separate IEPs covered that full school year. The IEP team executed the IEPs at meetings on March 13, 2015, and March 3, 2016. In all relevant parts, the IEPs are essentially identical.<sup>12</sup>

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<sup>11</sup> The record is ambiguous in regard to Geometry. BCPS 13 is the "Annual Secondary School Performance Data Summary" that lists the Student's grades during the 2013-2014, 2014-2015, and 2015-2016 school years. Geometry is listed twice in BCPS 13, with separate grades of E and B. The record also includes a "Student Schedule Report" that lists the Student's weekly schedule of classes. BCPS 9b. Two Geometry classes are listed. One is further described by the word "Apex." The record does not explain the meaning of Apex. This exhibit also lists two "Resource" classes in lieu of any listing of Fundamentals of Art and Engr & Tech Concepts. Finally, the record includes a "High School Report Card" for the Student that lists his classes and the grades in those classes for three of the four quarters of the 2015-2016 school year. Parent 2. The column for the last quarter grades is blank. Only eight classes are listed on the report card because Geometry is listed only once, with a grade of E in all three quarters. This ambiguity was not clarified at the hearing.

<sup>12</sup> Hereinafter, I refer to the IEPs in the singular: IEP.



The Student was deemed eligible for special education services as a student with “Other Health Impairment: ADD/ADHD.” BCPS 2, 3. The IEP describes the basis for the eligibility decision as follows: “Based on current assessments and team reports, [the Student] has deficits in mathematics and attention.” BCPS 2, 3.

The IEP placed the Student in General Education 100% of the time. In regard his services, the IEP provided for services to address his attention needs and for math. For the Student’s attention and math needs, he was to receive fifteen weekly sessions of special education services of twenty minutes per week from a general educator, a special educator, or an instructional assistant from August 2015 to March 2016, and from only a general educator from March 2016 to June 2016. The Student did not challenge anything related to the IEP except for the alleged failure of the BCPS to provide him with notes and modified assignments in the six classes identified above.

The IEP addresses “Supplemental Aids, Services, Program Modifications and Support” that the Student was to receive in section III. The Supplemental Aides subsection is organized into four subcategories that describe the services as follows:

**Instructional Supports**

Have student repeat and/or paraphrase information	Daily as needed
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Provide student with copy of student/teacher notes	Daily as needed
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Clarify the location and manner in which Supplemental Aids, Services, Program Modifications and Supports to or, on behalf of, [sic] the student will be provided: Due to [the Student’s] ADD it is necessary that he repeat/paraphrase information to ensure understanding and focus. Copies of notes will provide him appropriate support for times he may need to go to the resource room or homework.

**Program Modification**

Break down assignments into smaller units	Daily as needed
Chunking of texts	Daily as needed
Altered/modified assignments	Daily as needed
Reduce number of answer choices	Daily as needed

Clarify the location and manner in which Supplemental Aids, Services, Program Modifications and Supports to or, on behalf of, [sic] the student will be provided: Due to [the Student's] ADD, breaking assignments down and chunking of text will provide him the support to focus on the task or text at hand. Altered/modified work should be provided on an as needed basis to include the essential curriculum needed for mastery. For example, odd vs even, 1 page vs 3 pages, reduced answer choice to show mastery of essential curriculum.

**Social/Behavior Supports**

Frequent eye contact/proximity control	Daily as needed
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Clarify the location and manner in which Supplemental Aids, Services, Program Modifications and Supports to or, on behalf of, [sic] the student will be provided: Due to [the Student's] ADD, keeping proximity control and frequent eye contact will provide the support he needs to initiate tasks and to remain on task throughout the lesson.

**Physical/Environmental Supports**                      Daily as needed

Preferential seating

Clarify the location and manner in which Supplemental Aids, Services, Program Modifications and Supports to or, on behalf of, [sic] the student will be provided: Providing [the Student] preferential seating will provide the support he needs to initiate tasks and remain on task throughout the lesson. A signal should be developed between he [sic] and his teacher to regain his focus. This seating should be near the point of instruction.

Documentation to support decision(s): Decision based on current assessments, file review, current progress, teacher reports and parental input.

BCPS 2, 3, page 10 of 19 in both.

At the hearing, the Parent's almost exclusive focus was on the BCPS' alleged failure to provide the Student with notes and modified assignments. The Parents did not mention the social/behavior and physical/environmental supports.<sup>13</sup>

### *Legal Context*

The identification, assessment, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2016), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2016) and COMAR 13A.05.01. The IDEA gives all students with qualifying disabilities the right to a Free Appropriate Public Education (FAPE). 20 U.S.C.A. § 1412 (2010). Courts have defined the word "appropriate" to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. To determine whether a student has received an appropriate education, a decision-maker must assess the evidence to determine whether the Student's IEP and placement were reasonably calculated to enable him to receive some educational benefit. *See In Re Conklin*, 946 F.2d 306 (4th Cir. 1991).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit a student to benefit educationally from that instruction. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined a FAPE as follows:

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is

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<sup>13</sup> The record does not adequately clarify the distinction between breaking down assignments into smaller units and chunking of texts or among breaking down assignments, altering or modifying assignments, and reducing the number of answer choices. For the purposes of this decision, I treat breaking down an assignment into smaller units and reducing the number of answer choices as a modified assignment. In addition, the IEP also addresses "Instructional and Testing Accommodations" as part of "Special Considerations and Accommodations." This subsection requires the following accommodations to address the Student's ADD: (1) a human reader for selected readings, (2) additional processing time for assignments and assessments, and (3) access to areas of reduced distractions to complete assignments and assessments. BCPS 2, 3 at page 9 of 19. The Student did not allege a violation of this part of the IEP or address these accommodations at the hearing.

provided be sufficient to confer some educational benefit upon the handicapped child. . . .We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. 458 U.S. at 200-01.

In addition, the Supreme Court in *Rowley* set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA; second, there must be a determination as to whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. 458 U.S. at 206-07. As alluded to above, the Student did not claim non-compliance with the procedures set forth in the IDEA.

To provide a FAPE, the student’s educational program must be tailored to the student’s particular needs and take into account:

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

20 U.S.C.A. § 1414(d)(3)(A) (2010).

Among other things, an IEP depicts a student’s current educational performance, sets forth annual goals and short-term objectives and measurement of improvements in that performance, describes the specifically-designed instruction and services that will assist a student in meeting those objectives (supplemental aids and services), and indicates the extent to which a student will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A) (2010). *See also M.M. v. School Dist. of Greenville Cty*, 303 F.3d. 523, 527 (4th Cir. 2002).

“Supplemental aides and services” are “aids, services, and other supports that are provided in

regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with section 1412(a)(5) of this title.” 20 U.S.C.A. § 1401(33) (2010); *see also* 34 C.F.R. § 300.42 (2016); COMAR 13A.05.01.03B(79).

In addition, while a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system. *Rowley*, 458 U.S. at 208. “Ultimately, the [IDEA] mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of that education to state and local school officials.” *Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991). The IDEA is not intended to deprive educators of the right to apply their “professional judgment.” *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3rd Cir. 996, 1001 (4th Cir. 1997).

#### *Summary of the Student’s evidence*

#### **[Mother]’s testimony**

[Mother] testified during the first day of hearings on November 1, 2016, by, in large part, identifying exhibits and explaining some of their content. In addressing the Student’s IEP, she read from the from Parents 1.4 that the Student was to receive notes daily as needed and broken down assignment into smaller units, chunking of texts, altered or modified assignments, and/or reduced number of choices daily as needed.<sup>14</sup> [Mother] testified: “What I am disputing is that those, those services were not presented to my child last year, that his IEP was not implemented with fidelity,” which she explained meant that those services “weren’t

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<sup>14</sup> Parents 1.4 is the Student’s IEP for the 2016-2017 school year, which is similar to the relevant portion of the IEP for the 2015-2016 school year.

implemented” and “not provided according to the IEP.” Transcript (Tr.), page (p.) 20, lines (Ins.) 21-24; p. 21, Ins. 16-25; and p. 22, Ins. 6, 8-9.

[Mother] also identified Parent 6 as the MSDE’s response to the Parents’ earlier complaint that contained essentially the same allegations made in the Student’s due process complaint. Parent 6 shows that the MSDE “investigated the allegation that the BCPS has not ensured that the student has been provided with modified work or daily notes[.]” Parent 6 also lists factual findings based on an investigation, which include the following: “There is no documentation that supports are being provided as required by the IEP.” The MDSE concluded that “the student was not provided with modified assignments or notes, as required by his IEP.” Parents 6, p. 3.

In addition, [Mother] testified that she inquired from [SCHOOL] where the notes and modified assignments that the IEP required the teachers to provide the Student could be found, and the Vice Principal told her they could be found on the BCPS’ Engrade system.<sup>15</sup> According to [Mother], she reviewed the calendars of the Student’s teachers for each month of the 2015-2016 school year on Engrade in an attempt to locate those documents. [Mother] explained that the calendars are color-coded, with a green indicating an attached file.

[Mother] testified that when she opened the files on Ms. XXXX’s calendars — Ms. XXXX taught the Student the two classes, Earth/Space Science and Biology, he passed with “D’s,” — she found notes and modified assignments. [Mother] testified:

Almost every day, Monday through Friday, there are notes and/or modified assignments[.] . . . [S]he would specify the dates that those notes were

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<sup>15</sup> [Mother] described the Engrade system as follows: “[A]n online system where the teacher and the student, student has access to BCPS’ Engrade Website where they go on and it has, if you look at one of those pic – documents that you’re looking at [Parent 4.1 – 4.6], it has several different choices on what they can do on the site. So it has like their class Website, it has lessons, it has calendar, it has assignments. You can send a message back and forth to your teacher. It’s a communication piece for parents and students and the teacher to all keep in touch about each other as to what’s going on in the classroom.” Tr., p. 32, Ins. 20-25; p. 33, Ins. 1-6. Engrade is now called BCPS One.

supposed to be used for, so I'm not arguing Ms. XXXX, Ms. XXXX, there's notes and modified assignments, it's clear that there are plenty of green on here for [the Student] to access and every month thereafter there's lots of green that [the Student] can use for his notes and/or modified assignments. And that's in both of those classes, noting that both of those classes are the classes that he passed.<sup>16</sup>

Tr., p. 38, lns. 1-2, 15-24. [Mother] testified that, on the other hand, Parents 1.1–1.5 show a paucity of green tabs on each monthly calendar for the Student's other six classes. [Mother] testified that she did not find notes and modified assignments on Engrade for the remainder of the Student's classes.<sup>17</sup>

[Mother] also identified Parents 2 as the Student's incomplete report card for the 2015-2016 school year. In addition to showing the Student's grades for each quarter, the report card lists ten "performance factors" and permits a teacher to rate the student with an "S" (Superior), "N" (needs improvement), or "No Mark" (satisfactory). The performance factors are: (1) attendance in class, (2) promptness to class, (3) class participation, (4) homework preparation, (5) test performance, (6) requirements completed, (7) work habits, (8) behavior, (9) effort, and (10) initiative. [Mother] testified that "if [the Student] was not meeting in success, the success for any classes, then Ns should have been all the way across in every class." Tr., p. 53, lns. 20-23. [Mother] pointed out that in the Student's Fundamentals of Art class, he received "E's" in each of the three graded quarters, but the teacher rated him as superior in work habits, behavior, effort, and initiative.

On cross-examination, [Mother] agreed that the relevant IEP does not require any teacher to put either notes or modified assignments on Engrade (Tr., p. 40, lns. 10-13; Tr., p. 45, lns. 17-21), and she conceded that a teacher's failure to do so does not violate the IEP. Tr., p.20. lns. 23-

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<sup>16</sup> [Mother] admitted that none of the Student's exhibits is an example of note or modified assignment that she claimed she saw on the Engrade system. Tr., p. 45, lns. 2-7.

<sup>17</sup> [Mother] acknowledged that Parents 3 is an example of a modified quiz from the Student's American Government class that the Student received on March 7, 2016.

25. In addition, [Mother] acknowledged that as a result of the MSDE’s findings and conclusions discussed above, the BCPS has been providing the Student with compensatory education.

### **The Student’s testimony**

The Student testified that “almost every day or every other day” Ms. XXXX would “hand me a packet of notes” or “if it wasn’t through hand it would be put on the Engrade for me to access[.]” Tr., p. 66, lns. 1-14. The following is the Student’s testimony about the other classes:

Q. Okay. The other six teachers, how – did you receive notes and modified assignments?

A. That is false, no.

...

Q [by the ALJ]. I’m sorry, I didn’t hear your answer.

A. That is – no, I did not receive notes.

Q. Did you ever receive notes or modified assignments?

A. Yeah, from Ms. XXXX –

Q. Okay.

A. – which is why I passed those two classes that I had her in.

...

Q. Okay. So if you did not receive notes or modified assignments in hand like you did from Ms. XXXX, what would you then do when you got home to access notes or modified assignments for those classes?

A. I would try to go online.

Q. Okay. And if they weren’t there, then what?

A. I’m stuck.

Q. Then you – you’re stuck how, you can’t what?

A. I can’t do the work.



...

Q. Do you feel that the School followed your IEP?

A. No.

Q. What was different about Ms. XXXX's two classes from the others?

A. I guess I had a, more of an easier understanding of her with our communication I guess. I don't know, I just, I felt like I could talk to her. It's just different from all the other teachers, they didn't really seem like as if I could be as open to them with my education. Yeah, I guess that's really it.

Q. So are you saying that the reason for you passing those two classes is because of the notes and modified assignment?

A. (Inaudible).<sup>18</sup>

Tr., p. 66, lns. 23-25; p. 67, lns. 4-25; p. 68, lns. 1-5, 14-25; p. 69, lns. 1-7.

#### *Summary of the BCPS' evidence*

#### **Ms. XXXX's testimony**

Ms. XXXX testified that, as the IEP Team Chair at [SCHOOL], she "oversee[s] the implementation of the IEPs." Tr., p. 96, lns. 22-23; p. 97, lns. 2-4. She ensures implementation of an IEP by being a "facilitator" or "the overseer at meetings" and, "if things come up," by directing "the case manager to be the face-to-face person with the teacher implementing the IEP." Tr., p. 97, lns. 9-15. "I don't typically go into the classroom to ensure monitoring. If there's a concern about the implementation of an IEP I will first meet directly with the case manager and then if necessary results don't happen, I will meet directly with the general ed[ucation] teacher." Tr., p. 97, lns. 16-23. Ms. XXXX had "interactions" with the Student "in the hallway as well as in IEP meetings" and, if [Mother] emailed about a concern, she would "go down and speak with him." Tr., p.101, lns. 17-21.

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<sup>18</sup> In addition to reading the transcripts of the Student's testimony, I listened to the recording of the hearing and took notes during the hearing. On the recording of the hearing, the Student's answer is inaudible. However, my notes clearly indicate that the Student's answer was: "Yes, 100%."

Ms. XXXX identified BCPS 8 as the notes from the IEP team meeting on March 13, 2015. She noted that the team modified language in the IEP related to Supplemental Aids and Services. BCPS 8 contains the following:

During the discussion of the Supplemental Aids and Services, the team added Altered/Modified Assignments with a discussion resulting in work should be provided on an as needed basis to include the essential curriculum needed for mastery. For example, odd vs. even, 1 page vs. 3 pages, reduced answer choice, to show mastery of essential curriculum as well as reduced answer choices for assignments and assessments. These additions is [sic] necessary to aid the [Student] in the mastery of goals and equal access to the curriculum.

Ms. XXXX also identified BCPS 9A as an IEP team meeting on March 13, 2016. The notes from this team meeting include the following:

[Mother] reported that [Student] does not consistently receiving [sic] notes. He told her that he does not see the value in the classes he is currently taking. He would prefer to have his classes focus on job applications, budgeting, more real life skills.

The team is considering credit recovery at this point to work toward [the Student] getting the sufficient credits to graduate with his cohort.

Ms. XXXX identified BCPS 9B as documentation of a team meeting on June 8, 2016, to discuss [Mother]'s request for compensatory education. Ms. XXXX was present at this meeting.<sup>19</sup> Ms. XXXX testified that "[[Mother]] felt as though the reason behind [the Student] not passing classes is because we, as a school system, did not provide him notes." Tr., p. 117, lns. 13-17. BCPS 9B contains the following summary of [Mother]'s input at this IEP meeting:

[Mother] stated she that she [sic] understands that [the Student] plays a part in his lack of success, but feels that in the classes than [sic] he is not have [sic] a positive relationship with all his teachers and is she is not able [sic] to access assignments on BCPS One to print out and work with him at home.

[Mother] feels that [the Student's] IEP has not been has not been [sic] implemented with fidelity in the aspects that he has not been provided notes on a consistent basis therefore his [sic] was not able to access his classwork, homework to be successful in his classes. She also indicated she did not receive

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<sup>19</sup> In addition to others, [Mother], the Student, Ms. XXXX, and Ms. XXXX were present at this meeting.

data throughout the year that notes were provided.

The IEP states that notes should be provided daily on an as needed basis. The team clarified that “notes” could be any resource utilized to support his learning. The team, with the exception of [Mother], felt that these supports were being provided. Mr. XXXX provided other additional concerns regarding work submittal, turning in assignment sheets, unexcused absences and [the Student’s] lack of motivation to work at this time. He also stated that on May 12, per [Mother]’s request, modified assignments were provided for each content area.

Ms. XXXX also identified BCPS 12 as the Student’s attendance record during the 2015-2016 school year. BCPS 12 shows 45.5 days of absences and 12 days of tardiness. Ms. XXXX opined that “if a student is not there for instruction it’s going to impact whether or not they are able to pass the class.” Tr., p. 127, lns. 22-25; p. 128, lns. 1-2.

Ms. XXXX testified that the implementation of the Student’s IEP was reviewed at every IEP team meeting. When asked her opinion on whether the teachers were implementing the IEP, she opined: “I believe that they were implementing the IEP, yes, to the best of their ability.” Tr., p. 128, lns. 9-25; p. 129, lns 1-2.

Ms. XXXX identified BCPS 19 as copies of modified assignment from Mr. XXXX’s English class during the 2015-2016 school year.<sup>20</sup> An unsigned and undated notation on a cover page reads:

Notes and resources were provided as needed based on the lesson plan and/or needs of [the Student]. At times notes were refused or left behind. Not every single lesson requires notes. Many accommodations were made when lessons were prepared for the entire class based on the needs of the class as a whole.

Ms. XXXX testified that she talked with Mr. XXXX about “accommodations and supports” in a meeting with the Student and [Mother]. She testified:

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<sup>20</sup> During Ms. XXXX’s rebuttal testimony, [Mother] asked Ms. XXXX to compare Parents 5 with one of the documents contained in BCPS 19. Parents 5 and BCPS 19, pages 4-6, are identical quizzes, except the quiz in BCPS 19 has been modified by deletions of question 5, 9, 10, 12, 13, and an unnumbered question, but in Parents 5 the quiz is not modified. Ms. XXXX agreed.

In the meeting with Mr. XXXX very, I want to say emphatically, said that yes, he was providing [the Student] notes and that would be that cover letter.

I believe what he said that day was there were times that notes were left behind, not taken with [the Student] on the times they were provided.

Tr., p. 131, lns. 6-11.

Ms. XXXX identified BCPS 20 as documents from an art teacher who Ms. XXXX could not identify. BCPS 20 includes an unsigned cover page and a large number of attached documents. None of the documents is signed or dated. The following notation appears at the top of the cover page: “Notes for Mr. XXXX [Vice Principal] pertaining to [the Student’s] IEP accommodations[.]” The cover page includes the following:

Class Notes:

- All class notes are placed in a folder labeled “Need a Handout?”
- Class notes from the entire year are included in the folder
- Class notes consist of a printed slide that list [sic] the requirements of a sketchbook page, step by step guidelines that list the criteria for a project and any visual aids or worksheets that could benefit the student’s understanding of the given assignment.
- This folder is located in the center of the classroom with all of the class supplies and it is brightly painted, so it’s hard to miss
- Students may take any of these notes with them to aid with their work
- The contents of this folder are changed once every quarter
- My sketchbook has examples of every sketchbook assignment – this is available for all students during the class, it tends to float around each table
- I encourage students to take pictures (on their cell phones) of my presentation or my example

Modification for [the Student]

- Modifications are determined on a case by case basis. Some examples of modified assignments are smaller paper size, reduced number of sketches and reduced number of criteria for a project

Ms. XXXX also identified BCPS 21 as a cover page and examples of notes from the Student’s math teachers. When asked to identify the documents in BCPS 21, Ms. XXXX testified: “[T]he colored [sic]<sup>21</sup> page is going to be the explanation of the implementation of the

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<sup>21</sup> The transcript incorrectly substituted “colored page” for “cover page.” My notes from the hearing; my review of

IEP in the classroom as a brief overview. And there are examples of the notes, I'm assuming that were provided, that were completed. It looks as though they were completed by a teacher identifying what was classwork, what was homework." Tr., p. 133, lns. 23-25; p. 123, lns. 1-4.

The following testimony ended Ms. XXXX's direct examination:

Q. Ms. XXXX, knowing that there are work and modified assignments contained in this notebook, do you have an opinion whether or not teachers were providing that information to [the Student] during the '15-'16 school year?

A. I feel as though they were providing the information.

Q. And do you believe the IEP was effective for [the Student]?

A. I do.

Q. And why do you believe so even though he did not pass the classes during the '15-'16 school year?

A. A student has to be present both physically and mentally in class in order to get the curriculum, in order to get instruction. And we had many meetings with the parent and the student and that wasn't always the case.

Tr., p. 136, lns. 7-23.

### **Ms. XXXX's testimony**

Ms. XXXX taught American Government to the Student during the 2015-2016 school year. Ms. XXXX explained that the Student "often came late to school or had issues being on his phone and did not always follow through with submitting work assignments, classroom projects, homework, etcetera." Tr., p. 166, lns. 14-17.

Ms. XXXX identified BCPS 23 as an accounting of the Student's attendance in her class and a summary of how she provided him with notes and modified assignments. BCPS 23 shows the Student's attendance as follows: first quarter (August 24 – October 30, 2015): three days absent; second quarter (November 2, 2015 – January 15, 2016): fourteen days absent and one

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the recording; and the context of the quotation make clear Ms. XXXX said "cover page."

day tardy); third quarter (January 20 – April 8, 2016): sixteen days absent and one day tardy; and fourth quarter (April 11 – June 9, 2016): twenty-four days absent and three days tardy.

Ms. XXXX described how she implemented the Student’s IEP as follows:

**Accommodations & Modifications**

- Please see folder for sampling of many modifications that [the Student] and other IEP students would have received
- Some modifications on handouts and classwork are made on the spot. For example, I may walk around with a pen and cross off a certain portion of a handout for students with IEPs
  - *Example: instead of writing three pros for this system of government, I would cross off one so that students only write two pros*
  - These modifications may have been already embedded into the handout or made on an as needed basis. These types of modifications are reflected in the samples in this folder and demonstrate the types of modifications [the Student] received.
- **Class Notes:** [The Student] was provided class notes on an as needed basis per his IEP. However, this class is not a lecture-based class, so in many cases class notes were not beneficial. When needed, [the Student] was provided a copy of my handwritten notes, vocabulary sheets, etc. A sampling of these are included as well.
- **Tests and Quizzes:** [The Student] received a modified version of all tests/quizzes, with one answer choice eliminated. [The Student] also received the opportunity to test in an alternate environment (i.e. the resource room) with a special educator when she was available. [The Student] did not always opt to test in an alternate location.

BCPS 23.

Ms. XXXX testified that her American Government class was not lecture-based and notes were not taken daily. She testified that her handwritten notes were given to the Student in class.

Ms. XXXX identified BCPS 24 as “class notes” (Tr., p. 181, lns. 23-25; p. 182, lns. 1-2).

She testified how classroom material was provided to the Student as follows:

Q. . . . First off, when looking at them [the many documents contained in BCPS 24] are these ones that you would have provided to [the Student]?

A. Yes, these are.

- Q. Okay. Tell me how in your class information was provided to him.
- A. So depending on what the assignment was in looking at the first couple documents, these are vocabulary sheets that would have been given in the beginning of the unit for the major concepts of what they need to know. So that would be physically handed to him. Some of the other ones are copies of my handwritten notes that I would display on the screen for all students and then physically give to any students who still needed them. A couple of them are vocabulary sheets that were given during a classroom assignment as an additional support for them while they were working on something in class. And I'm also seeing a couple PowerPoints that would have been available as well of my notes. Most of them are handwritten notes.
- Q. Okay. So when you say there were PowerPoints available, would those have been provided to students that requested them, or would you have just handed them out based on need? How was that done?
- A. If the student requested them I would either e-mail them or print them out for them.
- Q. Okay. And in [the Student's] case did you provide the PowerPoints pursuant to the IEP or in any other manner?
- A. The PowerPoints were provided if he requested them.
- Q. Okay. And what about your notes? Were they provided at request or did you hand them to him?
- A. It was probably a little bit of both. In some cases I would just walk over and hand them to him. Like if he needed them, then sometimes he requested them.
- Q. Okay. All right. Now, you indicated that there are PowerPoints, there are different types of notes. Were you ever told that one particular method was required?
- A. No, I was not.

Tr., p. 169, lns. 10-25; p. 170, lns. 1-25; p.171, ln. 1.

Ms. XXXX also identified BCPS 25 as tests and quizzes that were modified for the Student during the 2015-2016 school year. She explained the meaning of some markings on specific documents contained in this exhibit, for example, a marking that read "notes" indicated notes were given with the assignment to the Student, and other markings that showed modifications were made to the documents for the Student.

Ms. XXXX explained the reason the Student failed her class as follows:

[The Student] was very inconsistent in turning in work and it got progressively worse as the year went on. So he turned in very few assignments. . . . His attendance got worse as well. So it was hard to give him the assignments and give him the accommodations necessary when he wasn't in class.

Tr., p. 173, lns. 22-24; p. 174, lns. 1-4.

BCPS 26 lists the Student's numerical score on assignments given in Ms. XXXX's class during each quarterly marking period and those assignments that the Student failed to turn in. It shows the following: first quarter: the Student failed to turn in six of thirty-four assignments; second quarter: the Student failed to turn in thirteen of thirty-one assignments; third quarter: the Student failed to turn in nineteen of twenty-seven assignments; and fourth quarter: the Student failed to turn in twenty of thirty-one assignments.

Ms. XXXX testified that she offered to assist the Student with his classwork outside of the classroom, but the Student took advantage of her offer only once. Ms. XXXX also testified that she provided the Student with the assignments and notes that he missed by placing all make-up work in a bin that she kept in the front of the room. However, on cross-examination, Ms. XXXX testified that her notes were kept a binder or file, separate from the bin, and the Student would have had to ask her for copies of notes that he missed when he did not attend class. Ms. XXXX also testified on cross-examination that she sometimes initiated giving notes to the Student, and sometimes the Student would ask her for notes. According to Ms. XXXX, she gave him notes when she thought he needed them. She also testified: "It's not a notes-based class. So most assignments did not really require class notes. It's not a lecture class." Tr., p. 178, lns. 21-23.

Ms. XXXX opined that she provided the Student with the supports he needed to be successful in her class. She explained this opinion as follows:



[The Student] was provided always with the modified assignments. He did utilize the resource [room] for him to take tests. I communicated with his parents about attending coach class and meeting with me one-on-one to get things done and to make things up. I don't think he took advantage of that as much as he could have. He didn't seem motivated to get his work done and attend class on a regular basis.

Tr., p. 175, ln. 25; p. 176, lns. 1-12.

The following exchange took place related to providing notes to the Student.

Q. (by the ALJ): Okay. So I'm not quite sure what all the documents in Exhibit 24, what they represent. What are they?

A. This folder right here are copies of class notes.

Q. So Number 24, we're looking at Baltimore County Public School's Exhibit 24.

A. Yes.

Q. Everything in 24 is a class note; is that what you're saying?

A. Yes. Some of them -- it looks like there's one in the back that's a modified reading, but yes.

Q. So it would be accurate for me to say that almost every one of these represent class notes from the 2015-2016 school year; is that correct?

A. Yes.

Q. And the IEP called for providing [the Student] with notes daily as needed, correct?

A. Correct.

Q. And I'm trying to just understand what your testimony was. And is this correct that your testimony was that you did provide [the Student] with notes. Sometimes you directly provided him with notes; is that correct?

A. Correct.

Q. But sometimes you didn't provide him with notes because he didn't ask for them; is that correct?

A. Correct.

Q. So what was your understanding regarding your direction from the IEP regarding providing [the Student] with notes as needed during the 2015-2016 school year? What was your understanding of the IEP's instruction to you to do that?

A. My understanding is that was for some of the bigger things. We would give him the notes ahead of time. But otherwise, those notes he would need to come to us to ask for them.

Q. So you understood that to mean that for some of the bigger things you would provide the notes, you would take the initiative and provide [the Student] with the notes, correct?

A. Correct.

Q. But for all the others that were not part of some of the bigger things, you wouldn't take the initiative to provide him with notes, but if [the Student] came to you and requested notes you would give them to him?

A. Some of these, and I can't speak to every single one, but some of these I would just physically give to him at the end of the period and then ask him to give it back when he was done.

Q. Okay. Well, I'm just trying to understand your testimony. I just was rephrasing your testimony. So was I incorrect in how I summarized your testimony which was for the bigger things you would take the initiative, you would provide him with notes, but for things that were not part of the bigger things you would not provide him with notes unless he came and asked you for the notes; is that your testimony?

A. Yes.

Q. Okay. And was there some standard or some measure or some way in which you made a determination between bigger things and then other notes that weren't bigger things?

A. The notes that he got in the beginning of the unit were basically all the notes that he really needed for every classwork assignment. So those were always given in the beginning. These vocabulary sheets were always given in the beginning of the unit.

The daily classwork assignments I may not have even collected. So if it was something that was not collected it may not have had notes that went with it. We really just didn't have a lot of notes/notes. It was a lot of more that they were formulating an opinion, they're doing something with a group, they're looking at a document to come to a conclusion. So the note wasn't like a daily

- thing where we're just taking notes.
- Q. You said it was not a note taking class.
- A. Correct.
- Q. Okay. So now you've testified, did you say the beginning of each chapter?
- A. Of each unit, correct.
- Q. Of each unit. So would you again testify to that and tell me what you meant?
- A. The beginning of the unit notes would be like, and again notes would be the vocabulary terms and concepts that they would need to know for that unit.
- Q. So the notes that you're referring to for each unit, they would be vocabulary words that would be used during the teaching of the unit that they would need to know?
- A. Correct.
- Q. And would you always provide that to [the Student]?
- A. Yes.
- Q. And then modified assignments. So we're moving away from notes and now talking about modified assignments. Did you give written assignments to your students during class during the 2015-2016 school year?
- A. Yes.
- Q. And when you gave assignments to your class, you've already testified you had 10 special ed[ucation] kids in your class. When you gave modified assignments to your class during the 2015-2016 school year, did you always give a modified assignment to [the Student]?
- A. Yes.
- Q. Always? That's my question.
- A. No. Sometimes the modifications would be made during class.
- Q. What do you mean by that?
- A. So we would maybe walk around and say, okay, instead of doing two of these just do one.

Q. So sometimes the assignments would not have the modifications on them, correct?

A. Correct.

Q. And sometimes they would?

A. Correct.

Q. But you would give [the Student] all the assignments and sometimes they would have modifications on them?

A. Correct, yes.

Q. And when they didn't have modifications on them, what would you do?

A. Sometimes even when I collected them -- when I'm grading them I would say, okay, well, he only got two pros instead of three, but I wouldn't necessarily take off a point for that. So the modifications would be made as I'm comparing everyone's papers in front of me.

Q. So my question is, are you prepared to testify under oath that for every assignment you gave to [the Student] during the 2015 to 2016 school year the assignments were either modified on them or you walked around the class and verbally told him something that modified the assignment, or when you graded them you graded them in a modified way?

A. Yes.

Tr., p. 181, lns. 23-25; pp. 182-186; p. 187, lns. 1-14.

### **Testimony of XXXX XXXX**

The Student was enrolled in Ms. XXXX's World History class during the 2015-2016 school year. Ms. XXXX teaches World History by focusing on historical themes in a sequential manner, using "primary sources" to stimulate discussion and learning. She described the Student as follows:

He was not very engaged in the work. I didn't get a lot of completed work back from him. There were many, many times where he was on his electronic device in class. I would ask him to put it away. He would be respectful about putting it away. It would be right back out.

He would, from time to time, go to the resource room, sometimes with the IA [Instructional Assistant] in the class, and sometimes with the person who was in that classroom all the time. And the work that would come back would sometimes be complete, but the majority of the time it was not. And so the work that I was getting back, there was not much to grade.

Tr., p. 194, lns. 2-14.

Ms. XXXX testified that the Student would receive modified tests; notes, as needed; and chunked or modified assignments. According to Ms. XXXX, she “would always have materials out in the front of the classroom” (Tr., p. 195, lns. 23-24) to be picked up by the Student or she or the IA would give the packet to the Student. Ms. XXXX also testified that she had a “make-up bin in the back [of the classroom]” (Tr., p. 201, lns. 11-15) where the assignments were kept so that the Student could get them for the days that he was not in class.

Ms. XXXX identified the undated documents contained in BCPS 27 as “an assortment of primary sources” (Tr., p. 196, lns. 16-17) that were “chunked” down or modified and “given to all students,” (Tr., p. 198, ln. 16) in her classroom. Ms. XXXX conceded that none of the documents in BCPS 27 was an assignment that had been individually modified for the Student. According to Ms. XXXX, she or the IA might further modify assignments for the Student: “I may sit down with [the Student] . . . [and] “might cross out some things.” Tr., p. 205, lns. 8-11.

Ms. XXXX testified that her social studies class was not a “notes-based class.” Tr., p. 205, lns. 18-20. The following testimony ensued:

- Q. Is it your understanding that notes are in addition to the curriculum or they are a part of the curriculum?
- A. So in terms of the curriculum, we don't have notes as part of that. Someone could provide something in addition to the curriculum and all the materials that I'm giving are in addition to the curriculum. The curriculum is very minimal.
- Q. Okay. So you would say that because it's not a notes-based class, [the Student] was not provided notes on a daily basis?

A. I would say that the idea of notes is that we are teaching kids to write down the content, and we are not doing that in Social Studies. We are asking them to look at the actual primary sources and go through them and they are building through that.

Tr., p. 206, lns. 14-25; p. 207, lns. 1-4.

Ms. XXXX testified that she complied with the IEP requirement to give the Student with “notes, daily as needed,” but what she gave the Student she “would not consider it notes”; rather, “I would consider it elements of what they are doing.” Tr., p. 207, lns. 13-19. Ms. XXXX went on to explain further that “from time to time” (Tr., p. 208, ln. 4) and “very rare[ly]” (Tr., p. 208, ln. 19) the students in her class students might “report out” from the group in which they were working a paper or a poster with some of their thoughts and that might form the basis of a “note” that would be provided to the Student.

Ms. XXXX opined that the Student received the supports listed in his IEP. She explained the Student’s failure to pass her class as follows: “I believe that he was not interested in completing the work, that he was very often choosing to be on his electronic device. There was large periods of times where he was absent. And so he wasn’t working towards a goal, in my opinion.” Tr., p. 203, lns. 12-22.

**The testimony of XXXX XXXX**

Ms. XXXX testified that, in her capacity as Supervisor of Compliance, she investigates those complaints that parents file with the MSDE and tries to resolve them with the MSDE. Ms. XXXX testified that she believed [SCHOOL] complied with the Student’s IEP. However, because the MSDE found that [SCHOOL] had violated the IEP, the Parents eventually agreed that [SCHOOL] would provide the Student with sixty hours of compensatory education during the 2016-2017 school year. Ms. XXXX acknowledged that [Mother] agreed only because the

[SCHOOL] rejected her request for grade changes from E's to D's.

### **The Parent's arguments**

[Mother] argued that [SCHOOL] failed to provide the Student with notes and modified assignments during the 2015-2016 school year. [Mother] averred that [SCHOOL]'s violation was shown "in this case . . . before you" and by the MSDE findings. [Mother] pointed out that when the Student received the subject services in Ms. XXXX's classes he receiving a passing grade. "Had [the Student's] IEP been followed he . . . would not have failed six of eight classes." [Mother] emphasized that the IEP required the Student's teachers to provide him with daily notes and modified assignments and that the teachers admitted at the hearing that they failed to do that. The Parents requested that I change the Student's failing grades to passing grades.

### **The BCPS' Arguments**

Mr. Cowles argued that that the Student received notes and modified assignments consistent with the language of his IEP. Mr. Cowles specifically mentioned the testimony of Ms. XXXX and Ms. XXXX and the exhibits that contain supporting documentation.

Mr. Cowles also argued that the Student's poor attendance was one reason he did not receive modified assignments and notes at the rate [Mother] claims the Student's IEP required.

According to Mr. Cowles, there was no material violation of the Student's IEP and that not only poor attendance, but also the Student's lack of participation in class, failure to complete work assignments, and poor motivation were factors that must be considered.

Mr. Cowles additionally argued that the IEP did not require the teachers to post notes and modified assignments on the Engrade system. Finally, he argued that, even if I were to find some material violation of the Student's IEP, the BCPS already is providing the Student with compensatory education.

## *Analysis*

The burden of proof is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Accordingly, in this matter, the Parents have the burden.

The Student challenged only a part of his IEP that addressed instructional supports and program modifications. He claims that he failed six of his eight classes during the 2015-2016 school year because (1) in the area of instructional supports, the teachers of those classes failed to provide him with student or teacher notes daily as needed and (2) in the area of program modifications, the teachers failed to provide him with altered or modified assignments daily as needed.<sup>22</sup>

There is no dispute between the parties related to the grades the Student received in the eight classes he took during the 2015-2016 school year. The Student's final grade in English, American Government, World History, Geometry, Fundamentals of Art, and Engr & Tech Concepts was an E. The Student's final grade in Biology and Earth Space/Science was a D. The parties also agreed the Ms. XXXX, who taught Biology and Earth Space/Science, provided the Student with notes and modified assignments consistent with the IEP. The dispute between the parties is whether the teachers in the other six classes provided the Student with notes and modified assignments.

I will first review the Student's evidence because, as noted above, the Student has the burden of proof. [Mother] testified that the Student did not receive daily notes and modified assignments. [Mother] did not provide a foundation for that testimony, except to say that she

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<sup>22</sup> The institutional support section also provides that his teachers will have the student repeat and/or paraphrase information. The program modification section also provides that his teachers will break down assignments into smaller units, chunk texts, and reduce the number of answer choices. At the hearing, the Student exclusively focused on student or teacher notes and altered or modified assignments. He offered no evidence relevant to the other listings.



could not find copies of notes or modified assignments on Engrade for the Student's English, American Government, World History, or Geometry classes.

According to [Mother]'s testimony, when she inquired of [SCHOOL] where she could obtain copies of notes and modified assignments for the Student's classes, [SCHOOL]' Vice Principal told her that such documentation could be found on the Engrade system. [Mother] testified that she found such documentation for Ms. XXXX's two classes, but not for the Student's English, American Government, World History, and Geometry classes.<sup>23</sup>

Of critical consequence, however, is [Mother]'s admission that the Student's IEP for the 2015-2016 school year did not require his teachers to post student/teacher notes or altered or modified assignment in the Engrade system. It is for this foundational reason that I find [Mother]'s testimony has no probative weight regarding whether the BCPS provided notes and modified assignments to the Student in his English, American Government, World History, and Geometry classes during the 2015-2016 school year. In addition, [Mother] conceded, and I agree, that a teacher's failure to post notes or modified assignments in the Engrade system is not a violation of the IEP.

The Student also relied heavily on the MSDE's written decision that the BCPS violated his IDEA rights by not documenting the implementation of his IEP to argue that the Student had proved before me that the BCPS' violated the same provisions of the IEP. For the following reason, I do not now give any weight to the MSDE's findings or conclusion that the Student was not provided with modified assignments or notes or its findings of fact because the basis for the MSDE decision is different from the full hearing record before me.

The MSDE decision includes the following findings of facts, among others:

1. The IEP requires that the student be provided modified assignments

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<sup>23</sup> [Mother] did not mention Fundamentals of Art or Engr & Tech Concepts.

“daily as needed” and that student or teacher notes are to be provided “daily as needed,” for appropriate support in the resource or for homework. These supports are to be provided to assist the student with a goal to improve his “work habits and on-task” behavior.

2. There is no documentation that supports are being provided as required by the IEP.

Parent 6. The MSDE decision concluded as follows: “Based on the Findings of Facts #1 and #2, the MSDE finds that the student was not provided modified assignments or notes, as required by the IEP.” *Id.* I now have a full record before me, including witness testimony under oath and twenty-five exhibits, that does not fully support the same findings and conclusions reached by the MSDE. For the purpose of this decision, the full record before me determines my findings of fact and conclusions of law. The full record before me is significantly different from the record before the MSDE. Furthermore, and of determinative significance in regard to my determination not to give probative weight to the MSDE decision, Parent 6 does not include, other than a cursory listing, any description of the documents the MSDE reviewed to reach its decision and it appears that the MSDE did not interview the Student’s teachers during its investigation to solicit relevant information from them. Therefore, I reject the Student’s argument that Parent 6 lends evidentiary support to the argument that the BCPS violated the Student’s IEP.

The Student testified “that is false, no” and “I did not receive notes,” when asked whether he received notes and modified assignments from any of his teachers other than Ms. XXXX. First, I note here that the Student did not testify that he did not receive modified assignments. The Student confined his testimony to notes. Second, the Student is, obviously, a party with a direct interest in the outcome of this proceeding. His testimony is self-serving and must be closely scrutinized to determine its believability. Third, as will be discussed further below, Ms. XXXX testified that she provided notes and modified assignments to the Student. The record

includes some documentation that corroborates her testimony. For that reason, and based on the confidence with which she testified, I found her a credible witness. Because her testimony directly contradicted Student's testimony, and for the other reasons discussed above, I cannot accept the Student's limited testimony as believable.

However, I have determined that Ms. XXXX testimony is proof that she did not comply with the Student's IEP. When asked how the notes and modified assignments were provided to the Student, Ms. XXXX testified that she always had "material out in front of the classroom for students to pick up on the way in." Tr., p. 195, lns. 23-25. As examples of the "materials," BCPS relied on BCPS 27. BCPS 27 is a seventy-eight-page exhibit of materials from Ms. XXXX's World History class. Although Ms. XXXX testified that these materials were examples of modified or chunked assignments, Ms. XXXX also testified that all of the documents that constitute BCPS 27 were modified in the exact same way for all the students in her general education classroom:

Q. Okay. So what you are indicating is that you would modify the curriculum as a whole for your entire class?

A. That is correct.

Q. So including students with disabilities and those without you provided modified assignments?

A. That is correct.

Tr., p. 199, lns. 19-25.

By this testimony, the BCPS has conceded that, in regard to how the Student's IEP was implemented in World History class, the "individualized" requirement of matching the modification of assignments to the unique nature and extent of the Student's disability was not

followed. This evidence is an admission that the Student's IEP, as it applies to modified assignments, was not implemented.<sup>24</sup>

In regard to notes, Ms. XXXX testified that World History was not a notes-based class. Tr., p. 205, lns. 18-20. When first asked about whether she provided notes to the Student, her testimony was evasive, and suggestive of an acknowledgment that the Student did not receive notes in her class. *See* Tr. p. 206, lns. 22-25; Tr., p. 207, lns. 1-4; Tr., p. 207, lns. 13-19. Ms. XXXX's later testimony was that notes might have been provided to the Student "from time to time," based on written material that the students in the class produced from an in-class assignment. Tr., p. 208, lns. 1-13. However, there was not "tons of that" and it was "very rare." Tr., p. 108, lns. 11-13, 19-22. Furthermore, the BCPS did not offer any documentation to corroborate that any student or teacher notes had ever been provided to the Student during the 2015-2016 school year. I find that this evidence corroborates the Student's general testimony as it relates to the receiving of notes in his World History class during the 2015-2016 school year consistent with the requirement of his IEP.

The IEP provides a clarification of the purpose of providing the student/teacher notes "daily as needed" as follows: "Copies of notes will provide him [the Student] appropriate support for times he may need to go to the resource room or homework." I interpret this explanatory notation to mean that the teacher must provide teacher or student notes to the Student only if the

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<sup>24</sup> I have considered Ms. XXXX's testimony that she sometimes crossed out additional material on the already modified assignments that she gave the Student as a member of the class. My consideration of that testimony does not change my determination that Ms. XXXX's overall testimony supports a finding that she did not modify assignments for the Student pursuant to his IEP. Ms. XXXX's testimony about further modifying the Student's assignments was qualified. She testified it occurred only "from time to time," (Tr., p. 205, ln. 8), and suggested it occurred very infrequently by her acknowledgment that the problem with crossing off additional material from assignments was that the material would be too diluted to stimulate effective learning the subject matter. *See* Tr., p. 205, lns. 12-17. Furthermore, the BCPS offered no documentation of a single instance where that had occurred. In addition, although the IEP does state that the "[a]ltered/modified work should be provided on an as needed basis to include the essential curriculum as needed," Ms. XXXX offered no testimony to explain how further modification of the Student's assignment would have compromised the "essential curriculum."

Student needs the notes effectively to facilitate his acquisition of subject matter information when using the resource room or while doing homework.<sup>25</sup> Therefore, it is not enough for that the record supports finding that the Student did not receive notes in a class, the record must also support finding that the Student used the resource room or was required to complete homework during the 2015-2016 school year.<sup>26</sup> The record contains such evidence at BCPS 9B. This exhibit includes teacher reports on the Student's performance during at least part of the 2015-2016 school year. Ms. XXXX attended this IEP team meeting and discussed the Student's performance. In that discussion, Ms. XXXX was recorded as reporting the following regarding the Student: "Will usually go to the resource room for small group work with the IA[.]" Accordingly, I find that Ms. XXXX also did not provide the Student with teacher or student notes during the 2015-2016 school year as required by the IEP.<sup>27</sup>

In sum, I am persuaded, for the reasons discussed above, that the record supports a finding that the BCPS violated the Student's IEP as it was implemented in the his World History class during the 2015-2016 school year. I have found that Ms. XXXX's testimony, as it related to modified assignments, conclusive evidence that the Student did not receive modified assignments in World History class consistent with the IEP. Further, I have found Ms. XXXX's testimony and BCPS 9B, which was corroborative of the Student's testimony, sufficient proof

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<sup>25</sup> See generally *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997), and *Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991), for support of the proposition that, under the IEP, the teacher makes the discretionary decision of when the Student needs an instructional support or program modification.

<sup>26</sup> The IEP specifies that all special education services will be provided inside the general education classroom. The instructional and testing accommodation section of the IEP calls for the Student to have access to areas to reduce distractions to complete assignments and assessments. This suggests the Student might have used a resource room from time to time.

<sup>27</sup> I note here that Ms. XXXX also reported the following: "As we do not do class notes in class (it is a primary source document based class not a lecture-based class), he receives a copy of the reading we use each day." BCPS 9B. When the structure or nature of a classroom is incompatible with the requirement of an IEP, the proper course is not to ignore one's responsibility to implement the IEP but to reconvene the IEP team to address the matter and explore alternative instructional supports that address the Student's disabilities. See 34 C.F.R. § 300.324(b) (2016); COMAR 13A.05.01.07B(1)(c).

that the Student did not receive student or teacher notes in the World History class. Accordingly, as discussed above, I find that the BCPS violated the IEP as it was implemented in his World History class by not providing the Student with student or teacher notes or modified assignments tailored to his individual needs as required by the IEP.

I now address whether the record supports a similar finding of IEP noncompliance in regard to the Student's other classes: English, American Government, Geometry, Fundamentals of Art, and Engr & Tech Concepts. For the following reasons, I find that it does not.

As discussed above, I have made the following determinations that are pertinent to this part of the decision. First, the probative weight of the Student's general testimony is suspect due to its bias and self-serving nature; by itself it is not persuasive. Second, the only other evidence the Student offered in support of his complaint against the BCPS was [Mother]'s testimony and the MSDE decision. Third, [Mother]'s testimony and the MSDE decision have no probative value.

Ms. XXXX taught American Government to the Student. She testified that she provided the Student with notes and modified assignments. I found Ms. XXXX a credible witness based on her demeanor during her testimony. Further, at least some of the documents in BCPS 24 and 25 corroborated her testimony. Accordingly, even if I had given any probative weight to the evidence offered by the Student, Ms. XXXX testimony and BCPS 24 and 25 were effective countervailing evidence. Accordingly, I find that the Student's allegation that BCPS violated the IEP in his American Government class has failed.

The remaining four classes in which the Student was enrolled during the 2015-2016 school year were English, Geometry, Fundamentals of Art, and Engr & Tech Concepts. None of the teachers who taught these classes testified at the hearing. In addition, the BCPS' exhibits that

purportedly show that the Student's IEP was properly implemented in these classes have very limited, if any, probative value.<sup>28</sup> The probative value of the evidence offered by BCPS to support a finding that it provided notes and modified assignments to the Student in Geometry, English, and Fundamentals of Art is weak. Nonetheless, the Student has the burden of proof, and for the reasons discussed above, the Student's evidence does not support a finding that he was not provided with notes and modified assignments in those classes, or Engr & Tech Concepts.

**Is the BCPS' violation of a single part of the Student's IEP in one class a denial of FAPE?**

I have been persuaded that the BCPS violated the IEP in the Student's World History class by not providing him with notes and modified assignments daily as needed.<sup>29</sup> The BCPS argued that even if I found that the BCPS failed to provide the Student with the instructional supports and program modifications contained in his IEP, such a violation would not be material and, therefore, would not constitute a violation of the IDEA. In this regard, the BCPS argued that the Student received services in a general education classroom; the services he received were

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<sup>28</sup> Ms. XXXX identified these exhibits and generally described the documents contained within. Ms. XXXX identified BCPS 21 (Geometry) as containing examples of modified assignments, but when describing them she used vague and imprecise language such as "I'm assuming," "most likely," "it appears," and "[i]t looks as though." The cover page to BCPS 21 lists the names of the general educator and special educator assigned to the class, but the cover page is not dated or signed. It mentions assignments by stating: "[W]e gave him assignments with less problems when he was actually in class." Many of the documents in BCPS 21 are dated within the 2015-2016 school year, but none is obviously a modified assignment. Ms. XXXX identified BCPS 19 (English) as "copies of modified assignments." Tr., p. 130, ln. 7. However, BCPS 21 contains very few documents, all of which are about a single play, "Fences." Ms. XXXX also testified to a meeting she had with Mr. XXXX, the English teacher, [Mother], and the Student, during which, according to Ms. XXXX, Mr. XXXX emphatically said he was providing notes to the Student. Neither, [Mother] nor the Student refuted that testimony. Ms. XXXX testified that the documents in BCBS 20 (Fundamentals of Art) are notes, but she could not identify the teacher and did not testify that any of the documents were examples of modified assignments. An unsigned and undated cover letter states that modifications are determined on a case by case basis and could include smaller paper size and reduced number of sketches and criteria for a project. None of the documents contained in BCPS 20 is an obvious example of a modified assignment.

<sup>29</sup> Although [Mother] did not argue that the language of the IEP required that the BCPS provide the Student daily modified assignments, she mentioned it several times throughout the hearing. As discussed above, the program modification subsection of the Student's IEP provided that the Student should receive modified assignments "daily as needed." Although an ambiguous phrase, it surely does not mean simply daily, because if it did, the phrase "as needed" would be wholly superfluous. The accompanying notation that follows the program modifications subsection provides that "altered or modified work shall be provided on an as needed basis[.]" Therefore, considering the language of the entire program modification subsection, I construe "daily as needed" to mean that modifications to assignments can be provided as often as daily but must be provided only as often as the teacher determines is needed to accomplish its purpose to help the Student focus on learning.

provided by highly qualified and certified teachers; and, the Parents conceded that in two of his classes he was receiving all the services to which they thought the Student was entitled.

The BCPS did not cite to any authority to support the argument that a failure to provide notes and modified assignments in some of the Student's classes would not be a material violation of the IEP. However, it made a similar argument in support of its Motion for Judgment and cited to *Sumter Cty. Sch. Dist. 17 v. Jefferson, ex rel. TH*, 502 F.3d 478 (4th Cir. 2011); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F. 3rd 811 (9th Cir. 2007); and *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

The *Jefferson* and *Clark* cases only refer to the general rule of law that there must be a material failure to implement a child's IEP for there to be a violation of the IDEA. Those cases, however, do not contain facts that are similar to the facts in this case or propound the general rule of law as part of its holding. The *Van Duyn* case, an Eighth Circuit case, holds that "a material failure to implement an IEP violates the IDEA." *Van Duyn*, 502 F.3d at 822 (emphasis in the original). The Court goes on to say that "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." The Court also states as follows:

[W]e clarify that the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided. For instance, if the child is not provided the reading instruction called for and there is a shortfall in the child's reading achievement, that would certainly tend to show that the failure to implement the IEP was material.

*Id.* at 822.

With these principals and commentary in mind, I find that the BCPS's failure fully to implement the IEP in the Student's World History class was a material violation of the IEP. I



make this finding even without consideration of the facts that (1) he failed his World History class and (2) in the two classes where the Student's receipt of notes and modified assignments was not disputed (Biology and Earth/Space Science), he passed. Those facts are addressed further later in this decision.

The Student's qualifying disabilities are ADD and ADHD. These conditions concededly interfered with the Student's ability to access educational material as effectively as his non-disabled peers and learn from the curriculum because the conditions made it difficult for him to focus on his school work. The IEP team agreed that modifying classroom assignments would "provide him the support to focus on the task or tasks at hand" and providing him with notes would assist his learning in the resource room or while doing homework. Therefore, the failure to provide these services in World History meant that the Student's full opportunity effectively to benefit from instruction was ignored and left unattended. That I have found this was proved to occur only in his World History class makes it no less material than if the Parents had proved it occurred in more of his classes. It cannot be denied that a disabled student is just as much entitled to a full opportunity to learn in one class as he or she is entitled to learn in more than one class. For these reasons, I find that the BCPS's failure to provide the Student with proper notes modified assignments in World History class is a material violation of the Student's IEP.

**What is the appropriate remedy?**

The Student requested that I change his grades from an F's to a D's. He offered no authority that authorizes an ALJ to change a student's grades when a violation of the IDEA has been determined. The BCPS did not address this issue in its closing argument.

In *G ex rel. RG v. Fort Bragg Dependent Schools*, 343 F.3d 295 (4th Cir. 2013), the Court reversed and remanded the lower court's finding that a 1997 IEP offered FAPE, holding

instead that the record was “not sufficient to support a reasoned analysis and conclusion” regarding the ability to implement the IEP as written. *Fort Bragg*, 343 F.3d at 308. The Court also held that a failure to object to a child’s IEP neither deprives a child of his or her right to FAPE nor categorically bars injunctive relief as to that IEP. *Id.* at 309.

In reaching its decision, the Court also observed that “‘appropriate relief’ under the IDEA . . . encompasses the full range of equitable remedies,” *id.* at 308-09 (quoting 20 U.S.C.A. §1415(i)(2)(C)(iii) (2010) (“the court . . . shall grant such relief as the court determines is appropriate”)). The *Fort Bragg* Court explained:

Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student. We agree with every circuit to have addressed the question that the IDEA permits an award of such relief in some circumstances.

*Id.*

In *School Board of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928 (E.D. Va. 2010), the federal district court cited *Fort Bragg* as authority when upholding an administrative hearing officer’s compensatory education order of future counseling services to compensate for a past deficiency.

In *Hogan v. Fairfax County School Bd.*, 645 F. Supp. 2d 554 (E.D. Va. 2009), the same court rejected a hearing officer’s summary denial of compensatory relief. The hearing officer had found that the student was denied a FAPE, but also found that the student’s parent acted unreasonably, and largely on that ground denied any compensatory education. Noting that the denial of a FAPE does not “translate[] automatically into an award of compensatory education as of right,” 645 F. Supp. 2d at 573,<sup>30</sup> the *Hogan* court nevertheless held that there was insufficient

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<sup>30</sup> “The Fourth Circuit’s decision in *Fort Bragg* does not create an unimpeachable right to compensatory education. It states that the award of compensatory education is ‘discretionary’ and that the IDEA ‘permits an award of such

factual and legal support to deny compensatory education entirely. Because the record showed that the student had made “measurable progress” as a result of increased instruction provided after the period in question, the court awarded eight weeks of extended school year services as “an appropriate equitable compensation” for the remaining educational deficit that she suffered. *Id.* at 574, 575.

Cases from other circuits offer some additional guidance. In *Reid ex. rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), a hearing officer awarded a sixteen-year-old student with severe learning disabilities one hour of compensatory education for each day during a four-and-a-half-year period when he was denied FAPE. *Reid* found the hearing officer’s “mechanical” hour-per-day calculation merited no deference and rejected the student’s proposed hour-per-hour formula as “equally mechanical.” 401 F.3d at 518. Instead, it adopted “a qualitative standard: compensatory awards should aim to place disabled children in the same position that they would have occupied *but for* the district’s violations of IDEA.” *Id.* (emphasis added). To provide guidance on remand, the D.C. Circuit offered the following analytical framework for determining an appropriate award of compensatory education:

[T]he Supreme Court has emphasized that IDEA relief depends on “equitable considerations.” See [*Florence Cty. School Dist. Four v. Carter*, 510 U.S. at 15–16, 114 S. Ct. 361[, 366 (1993)]; [*School Comm. of Burlington [v. Dep’t of Educ. of Mass.]*, 471 U.S. at 374, 105 S. Ct. 1996[, 2005 (1985)]. Accordingly, “compensatory education is not a contractual remedy, but an equitable remedy, part of the court’s resources in crafting ‘appropriate relief.’” *Parents of Student W. v. Puyallup School Dist., No. 3*, 31 F.3d [1489,] 1497 [(1994)] . . . . “The essence of equity jurisdiction” is “to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.” *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S. Ct. 587, 88 L. Ed. 754 (1944). In keeping with that principle of case-specific flexibility, we agree with the Ninth Circuit that “[t]here is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” *Parents of Student W.*, 31 F.3d at

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relief in some circumstances,’ not that the Act always requires the remedy or that it should be automatically awarded . . . .” *Id.* at 572.

1497.

[T]he substantive FAPE standard . . . also carries a qualitative rather than qualitative focus. . . . [J]ust as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments . . . . In addition, courts have recognized that in setting the award, equity may sometimes require consideration of the parties' conduct . . . . In every case, however, the inquiry must be fact-specific and, *to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.*

*Reid*, 401 F.3d at 523-24 (emphasis added).

*Walker v. Dist. of Columbia*, 786 F. Supp. 2d 232 (D.D.C. 2011), relied upon *Reid*. In *Walker*, an administrative hearing officer awarded tuition reimbursement but declined to require any compensatory education. The child's IEP called for physical therapy, which the District's school did not provide. The hearing officer found, however, that in spite of that lack the child progressed physically to the point where he no longer needed physical therapy, and apparently for that reason the decision did not discuss compensatory education.

The school system argued that the family “produced no evidence at the hearing that could support an award of compensatory education because they . . . failed to show that [the student] was harmed by the lack of physical therapy services.” *Walker*, 786 F. Supp. 2d at 238. The court held, however, that “compensatory services for the missed physical therapy are appropriate.” *Id.* Because the hearing officer did not “discuss how [the student's] development would have been affected had the District provided the required physical therapy” and “did not determine what services, if any, were required to put [him] in the same position he would have been [in] but for the District's violations,” *id.*, the court concluded that the administrative record “lack[ed] sufficient information for it to make an informed decision as to the proper amount, if any, of compensatory education”—including “the type(s) and amount(s) of services” that would

return the student to the position he would have been in if the services required by the IEP had been provided. *Id.* at 238-39. The *Walker* court summarized its holding as follows: “Once a student has established a denial of the education guaranteed by the IDEA, the Court or hearing officer must undertake ‘a fact-specific exercise of discretion’ designed to identify those services that will compensate the student for that denial.” *Id.* See also *Mary McCleod Bethune Day Academy Public Charter School v. Bland*, 434 F. Supp. 2d 109, 115 (D.D.C. 2008) (“[I]f a parent presents evidence that her child has been denied FAPE, she has met her burden of proving that he is entitled to compensatory education.”).

However, in a more recent case, *Phillips ex rel. T.P. v. District of Columbia*, 932 F. Supp. 2d 42, 50 n. 4 (D.D.C. 2013), the same Court stated that “the weight of authority in this Circuit . . . recognizes that an award of compensatory education is not *mandatory* in cases where a denial of a FAPE is established.” *Phillips ex rel. T.P. v. District of Columbia*, 932 F. Supp. 2d 42, 50 n. 4 (D.D.C. 2013) (emphasis in original). It quoted its prior decision in the same case as follows:

[I]f . . . the plaintiff is unable to provide . . . evidence that demonstrates that additional educational services are necessary to compensate [the student] for the denial of a free and appropriate public education . . . , then the Hearing Officer may conclude that no compensatory award should issue.

*Id.* at 50 (quoting *Phillips ex rel. T.P. v. District of Columbia*, 736 F. Supp. 2d 240, 249 n. 4 (D.D.C. 2010)).

This principal of no relief despite a violation of FAPE was also addressed in *Garcia v. Bd. of Educ.*, 520 F.3d 1116 (10th Cir. 2008). In *Garcia*, the hearing officer found several “irregularities” in the school district’s actions, including failure to implement certain “reading instruction components” of the student’s IEP. *Garcia*, 520 F.3d at 1121. He nevertheless ruled that the student was not denied FAPE—rather than deciding she was not entitled to any equitable

relief—because she either was excessively absent from school or resisted any efforts to help her when in school: “A school cannot provide FAPE to a student who is not there, either physically or by virtue of her attitude.” *Id.*

Upon review, a state administrative appeal officer found that the “District’s failure to have a current IEP in place in the Fall semester of 2003 . . . cannot be blamed on Student’s behavior or truancy . . . .” *Id.* He found a denial of FAPE, and as a compensatory award “ordered the school district to conduct a new and independent evaluation of [the student’s] needs and to develop a reading program for her based upon the evaluation’s findings.” *Id.* at 1122. The school district complied for the following school year, but the student continued to attend class sporadically and did not return at all after the end of the fall semester.

The student then brought suit in federal district court, where the judge ruled in favor of the school district on all counts. Even if the schools’ procedural failures had given rise to any liability, the court held

no award of compensatory educational services was warranted as a matter of equity in light of the fact that [the student] had demonstrated a pattern of failing to use the educational opportunities provided to her by the school district despite the district’s “exceptional” efforts to reengage her in school. According to the district court, “[t]here is no basis for granting what is essentially equitable relief to someone who neither deserves it nor wants it.”

*Id.*

The Tenth Circuit agreed that “backward-looking relief to make up for past deprivations” is entirely consistent with and appropriate under the IDEA, *id.* at 1124, “because an award of compensatory education vindicates the student’s *substantive* right to receive a FAPE and compensates for a past deprivation of educational opportunity rather than a deprivation of purely procedural rights.” *Id.* at 1125 (emphasis in original). Based on the statute authorizing courts to “grant such relief as the court determines is appropriate,” 20 U.S.C.A. § 1415(i)(2)(C)(iii)

(2010), therefore, “a district court may grant equitable relief to remedy a demonstrated violation of IDEA. But, perhaps less obviously, a district court may also choose to withhold relief despite a demonstrated (or in this case, assumed) statutory violation if it has a valid basis in equity for doing so.” 520 F.3d at 1128.

My research has found two cases that address an ALJ’s authority to change a student’s grades upon a finding of a denial of FAPE. In *Christopher W. v. Portsmouth School Committee*, 877 F.2d 1089 (1st Cir. 1989), the school system had a policy that “if a student is absent 25% of the time from a class, the student is removed from the class and receives a failing grade.” 877 F.2d at 1091. The student was absent, late, and suspended so many times during the period at issue that he received no credit for any of his classes. The due process complaint sought, among other things, that he be given “the academic credits he had earned and would have received but for” the school system’s policy. *Id.* at 1092. The district court granted the school’s motion for a directed verdict on the ground that the student had failed to administratively exhaust his claims. The First Circuit affirmed, holding that the request for academic credit could have been addressed in an administrative hearing:

Christopher W. has presented no evidence that the administrative process is not able to grant the relief he seeks. . . . [T]he granting of course credit and expunging the suspensions from Christopher W.’s permanent school record is certainly the type of relief within the hearing officer’s province.

*Id.* at 1098 (emphasis added). *Christopher W.* thus stands for the proposition that an order to give course credit for a failed course, effectively changing a grade, may be granted as compensatory education relief under the IDEA.

Citing *Christopher W.*, the Court in *Ruecker v. Sommer*, 567 F. Supp. 2d 1276 (D. Or. 2008), upheld a grant of summary judgment on exhaustion grounds in a 42 U.S.C. § 1983 action. The student’s § 1983 action sought, *inter alia*, modification of his grades based on § 504 of the

Rehabilitation Act and the IDEA. As the result of a prior administrative grievance process the school had agreed to “create[] a credit recovery program permitting [the student] to earn passing grades in three classes.” *Id.* at 1284. The student did not request an administrative due process hearing, prior to filing his § 1983 action in the federal district court. Granting the school’s motion for summary judgment on exhaustion grounds, the *Ruecker* court observed:

[T]he administrative process provided at least some relief . . . . It provided a process for [the student] to alter his grades by completing work . . . . It also offered to expunge one of his poor grades . . . . *Even after graduation, the ALJ could have ordered changes to [the student’s] grades and other injunctive relief.*

*Id.* at 1292 (emphasis added). It later added the following:

[A] review of [the student’s] claims shows that the relief he now seeks was available through the administrative process. As a result, it was not futile . . . to exhaust the administrative processes available under the IDEA prior to bringing his claims even though he had graduated.

*Id.* at 1298.<sup>31</sup>

With consideration of the legal principles, I address whether compensatory education is appropriate under the circumstances of this record. For the following reasons, I find that no additional equitable relief is appropriate.

First, the Student offered insufficient evidence to establish that the failure to obtain notes and modified assignments in World History was the reason, or even a reason, for his failing grade. The Student argued that his passing grades in his Biology and Earth/Space Science classes where he received notes and modified assignments show that had he obtained those services in his other classes, he would have passed them, too. This argument has some logical

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<sup>31</sup> I note here that I do not agree that an ALJ is, or should be, authorized to change a student’s grade as a remedy for a violation of the IDEA. Such a remedy improperly encroaches on the authority and expertise of teachers to determine the extent to which a student has acquired knowledge of a subject matter. Furthermore, such a remedy is antithetical to the IDEA’s purpose of opening up public education to disabled children so that those children have an equal opportunity to benefit from educational instruction to the same or at least substantially the same extent as a nondisabled student. *See generally* 20 U.S.C.A. § 1400 (2010). The promised right afforded by the IDEA to disabled children is the opportunity to obtain knowledge and improved skills, not to be given a false imprimatur of the acquisition of knowledge.



appeal, but it does not rise to the level of competent evidence that supports its conclusion. In addition, although the Student received notes and modified assignments in Biology and Earth/Space Science and passed both classes, he barely passed them with “D’s.” Furthermore, the Student attributed his relative success in those classes to something different from the receipt of notes and modified assignments. When asked directly how Ms. XXXX’s classes differed from the others, he testified: “I guess I had a, more of an easier understanding of her with our communication I guess. I don’t know, I just, I felt like I could talk to her. It’s just different from all the other teachers, they didn’t really seem like as if I could be as open to them with my education. Yeah, I guess that’s really it.” Based on the above, I am not persuaded that the Student would have been able to academically benefit at the level of at least a D in his World History class had he obtained notes and modified assignments consistent with his IEP.<sup>32</sup>

Second, there is evidence in the record that provides a more reasonable explanation for the Student’s failing grade in World History than the failure to receive notes and modified assignments. The Student was absent from school on 45.5 of the 180 school days during the 2015-2016 school year, or slightly over 25% of the time. Further, Ms. XXXX attributed the Student’s failure in class to the following: “[H]e was not interested in completing work”; “he was very often on his electronic device;” and he was absent “for long periods of time.” Tr., p. 203, lns. 18-22; *see also* Tr., p. 194, lns. 2-7. Ms. XXXX reported these same concerns in the IEP team meetings on March 3, 2016, and June 8, 2016. BCPS 9A, B. Similar concerns to those of Ms. XXXX’s were testified to by Ms. XXXX and Ms. XXXX. Ms. XXXX, an expert in Special Education, attributed the Student’s failing grades to his poor attendance and lack of interest and participation in class. She testified that he failed his classes because he was often

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<sup>32</sup> I also note here that there is sufficient persuasive evidence in the record that he received notes and modified assignment in American Government. Despite that, he received an E in that class.

not in school and not “present mentally” when in class. Tr., p. 136, lns. 19-23. Ms. XXXX testified that the Student failed her class because he “turned in very few assignments” and “his attendance got worse as school went on.” Tr., p. 173, lns. 22-25; p. 174, lns. 1-4. Ms. XXXX, and other teachers, also put these same observations of the Student’s frequent absences from and disinterest and non-participation in school in writing for review at the IEP team meetings on March 3, 2016, and June 8, 2016. BCPS 9A, B.

Finally, the parties agreed that as a result of the MSDE decision in August 2016, the BCPS began providing the Student with sixty hours of compensatory education in the form of tutoring. Both parties agreed to this, although the BCPS agreed that the Parents remained steadfast during discussions that the most appropriate remedy was grade changes. I have found no Fourth Circuit authority for such a remedy, and, as discussed above, I consider such a remedy not appropriate. For all the reasons discussed above, I have decided to decline to order any equitable relief.

### **CONCLUSIONS OF LAW**

I conclude as follows:

A. The Student did not prove that the Baltimore County Public Schools failed to implement the Instructional Supports and Program Modifications contained in the Student’s IEP for the 2015-2016 school year in the Student’s American Government, English, Geometry, Fundamentals of Art, and Engr & Tech Concept classes. 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV) (2010); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

B. The Baltimore County Public Schools violated the Student’s IEP for the 2015-2016 school year by not properly providing the Student with notes modified assignments in his World History

class. 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV) (2010); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

C. The Baltimore County Public Schools' failure to provide the Student with notes and modified assignments in his World History class during the 2015-2016 school year, consistent with his IEP, was a violation of the IDEA. *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011).

D. Under the circumstances of this case, there is no appropriate relief available to the Student. *See G ex rel. RG v. Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2013); *Phillips ex rel. T.P. v. District of Columbia*, 932 F. Supp. 2d 42, 50 n. 4 (D.D.C. 2013).

### **ORDER**

I **ORDER** that that the September 16, 2016, Due Process Complaint filed by the Parents on behalf of the Student be, and hereby is, **DISMISSED** because, under the circumstances of this case, no remedy is appropriate.

January 11, 2017  
Date Decision Mailed

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Michael D. Carlis  
Administrative Law Judge

MDC/da

## **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.