

[REDACTED]

STUDENT

v.

BALTIMORE COUNTY PUBLIC

SCHOOLS

AND

BALTIMORE COUNTY PUBLIC

SCHOOLS

v.

[REDACTED]

STUDENT

* BEFORE THOMAS G. WELSHKO,
 * AN ADMINISTRATIVE LAW JUDGE
 * OF THE MARYLAND OFFICE
 * OF ADMINISTRATIVE HEARINGS
 * OAH No.: MSDE-BCNY-OT-18-05730
 * OAH No.: MSDE-BCNY-OT-18-10528
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DECISION

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STATEMENT OF THE CASE

On February 20, 2018, [REDACTED] (Parent),¹ on behalf of her grandchild, [REDACTED]
 [REDACTED] (Student), filed a Due Process Complaint (First Complaint) with the Office of
 Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or

¹ Ms. [REDACTED] is the grandmother and legal guardian of the Student. Because Ms. [REDACTED] essentially functions as the Student's parent, I believe that designation is appropriate here.

placement of the Student by Baltimore County Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA).² 20 U.S.C.A. § 1415(f)(1)(A) (2017).³

BCPS declined to mediate the issues raised in the First Complaint. It attempted to schedule a resolution session with the Parent, but had no success getting the Parent to agree to a mutually suitable date. On March 26, 2018, I conducted a telephone prehearing conference (Conference). The Parent represented herself. J. Stephen Cowles, Attorney-at-Law, represented BCPS. On the date of the Conference, the parties formally agreed to waive participation in a resolution session. Both parties submitted written waivers.

On March 26, 2018, BCPS filed a Due Process Complaint (Second Complaint) with the OAH.⁴ This Second Complaint relates to BCPS's refusal to grant the Parent's request for a number of Independent Educational Evaluations (IEEs) to be paid for at public expense. 34 C.F.R. § 300.502(b)(2)(i) (2017).⁵

On April 4, 2018, I issued a Prehearing Conference Report and Order (Order), which set forth the matters discussed during the Conference. By agreement of the parties, the hearing was scheduled for Monday, April 30, 2018 through Thursday, May 3, 2018, at the OAH in Hunt Valley, Maryland, beginning each day at 9:00 a.m.

I advised the parties of the time requirements for issuing a decision, which I discussed at length in my Order. The applicable regulations state the following, in part:

(a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c)—

² OAH Case No. MSDE-BCNY-OT-18-05730.

³ "U.S.C.A." is the abbreviation for the United States Code Annotated. The U.S.C.A. is published by Thomson Reuters and contains the general and permanent laws of the United States, as classified in the official United States Code prepared by the Office of the Law Revision Counsel of the House of Representatives. Unless otherwise noted, all citations herein to the U.S.C.A. are to the 2017 volume.

⁴ OAH Case No. MSDE-BCNY-OT-18-10528.

⁵ The federal regulations that apply to the IDEA are found in Title 34 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all citations herein to the C.F.R. are to the 2017 volume.

- (1) A final decision is reached in the hearing; and
- (2) A copy of the decision is mailed to each of the parties.

34 C.F.R. § 300.515. The regulations in section 300.510 explain the resolution process as follows, in part:

(c) The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

- (1) Both parties agree in writing to waive the resolution meeting;
- (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;
- (3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

Id. § 300.510(c).

The forty-five day timeframe started at the expiration of thirty days from the time of the Parent's request for a due process hearing. The date of the Parent's request for a due process hearing was February 20, 2018, so the forty-five day period began on March 22, 2018. The parties did not waive having a resolution session until the date of the conference, March 26, 2018. Even so, by regulation, March 22, 2018 still controls as the start date for the forty-five day period. In accordance with the above-cited federal regulations, the decision in this case would normally have been due on May 4, 2018.

I may extend the time for issuance of the decision if either party requests on the record a specific extension of time beyond the forty-five day timeframe. *Id.* § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2018).⁶ BCPS requested that I extend the timeframe for issuing a decision to Friday, May 18, 2018. The Parent joined in that request. I found sufficient cause for

⁶ Unless otherwise noted, all citations herein to the Education Article of the Maryland Annotated Code are to the 2018 Replacement Volume.

granting the request and stated in my Order that the final decision would be issued on or before May 18, 2018.

I convened the hearing on Monday, April 30, 2018, and it continued on Tuesday, May 1, 2018, and Wednesday, May 2, 2018, when it concluded a day earlier than scheduled. The Parent represented herself at the hearing, and Mr. Cowles continued to represent BCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1); and Code of Maryland Regulations (COMAR) 13A.05.01.15C. At the conclusion of the hearing, BCPS requested an extension of time for issuance of the decision so that I could comprehensively address the matters raised at the hearing. The Parent joined in that request. By agreement of the parties, my decision for these combined cases is due no later than June 1, 2018, which is thirty days from the conclusion of the hearing.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Did BCPS deny the Student a free appropriate public education (FAPE) during the 2016–17 school year by removing goals, supports and services from his Individualized Education Program (IEP) that had been part of his IEP for the 2015–16 school year?

2. Did BCPS deny the Student a FAPE during the 2017–18 school year by removing academic goals, supports and services from his IEP that had been part of his IEP for the 2015–16 school year?

3. If BCPS denied the Student a FAPE during the 2016–17 and 2017–18 school years by removing goals, supports and services from his IEP for those school years that had been part of his IEP for the 2015–16 school year, is the Student entitled to reinstatement of all of the goals, supports and services that were components of his IEP during the 2015–16 school year?

4. If BCPS denied the Student a FAPE during the 2016–17 and 2017–18 school years by removing goals, supports and services from his IEPs that had been part of his 2015–16 IEP, is the Student entitled to compensatory services to address his regression of his social and academic functioning stemming from BCPS’s denial of a FAPE?

5. If BCPS denied the Student a FAPE during the 2016–17 and 2017–18 school years by removing Special Education-related goals, supports and services from his IEP that had been part of his 2015–16 IEP, is he entitled to a revision of his Behavior Intervention Plan (BIP)?

6. Should BCPS’s denial of the Parent’s request to have BCPS provide her with IEEs at public expense be affirmed?

SUMMARY OF THE EVIDENCE

Exhibits

The Parent offered twenty exhibits, which I admitted into evidence. BCPS offered forty-three exhibits, which I admitted into evidence.⁷ I have attached a complete Exhibit List as an Appendix to this decision.

⁷ BCPS did not offer the following labeled exhibits: BCPS 1, BCPS 14, BCPS 15, BCPS 18, BCPS 19, BCPS 27, BCPS 28, BCPS 29, BCPS 31, BCPS 32, BCPS 34, BCPS 35, BCPS 41, BCPS 46, and BCPS 53.

Testimony

The Parent testified on her own behalf and did not offer any other witnesses. BCPS presented the following witnesses:

- [REDACTED] Occupational Therapist, Team Leader, BCPS, admitted as an expert in Occupational Therapy (OT);⁸
- [REDACTED] Speech-Language Pathologist, [REDACTED] Elementary School ([REDACTED] ES), admitted as an expert in Speech-language Pathology;
- [REDACTED] Fourth Grade Teacher, [REDACTED] ES, admitted as an expert in Elementary Education;
- [REDACTED] School Psychologist, [REDACTED] ES, admitted as an expert in School Psychology;
- [REDACTED] Behavioral Interventionist, [REDACTED] ES, admitted as an expert in Special Education and Behavior Intervention;
- [REDACTED] Special Educator, [REDACTED] ES, admitted as an expert in Special Education; and
- [REDACTED] Assistant Principal, [REDACTED] ES, admitted as an expert in General and Special Education

FINDINGS OF FACT

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

Facts Concerning the Student

1. The Student is ten years old. He is currently in the fourth grade at [REDACTED] ES.
2. The Student has been attending [REDACTED] ES since the beginning of his third grade year (2016–17). Before that, he attended kindergarten through second grade at [REDACTED] Elementary School ([REDACTED]).
3. The Student receives special education and related services (Special Education) as an other health impaired (OHI) student, based on a diagnosis of attention deficit hyperactivity

⁸ [REDACTED] the Student's Occupational Therapist, is on maternity leave.

disorder (ADHD), and handwriting difficulties requiring OT. He began receiving Special Education while he was a kindergarten student at [REDACTED]

4. During the 2015–16 and 2016–17 school years, the Student exhibited ADHD and related behavioral symptoms characterized by inattention, hurrying through school assignments, having tantrums (i.e., throwing objects) and elopement from the classroom. During the 2017–18 school year, the Student exhibited ADHD and behavioral symptoms characterized by inattention, hurrying through school assignments, and refusing to perform assignments, refusing to comply with his teacher’s orders, and refusing to accept the help of adult assistants in the classroom. He has also engaged in occasional acts of elopement.

5. Because the Student has ADHD, conventional functional, cognitive speech-language and educational testing underestimates the Student’s abilities. The following examples illustrate how the Student’s ADHD has skewed his test results:

- During a Speech and Language Assessment in May 2013, the Student had an expressive language score that was higher than his receptive language score. Because individuals generally cannot express more than they understand, such an improbable score inversion suggests that attention factors influenced the Student’s performance.
- The Student tests in the average range in such areas as cognitive ability, phonological processing, reading, writing, mathematics, and word attack. However, during cognitive functioning tests that [REDACTED] a school psychologist, administered to the Student in January and February 2017, on one test, the Student frequently picked picture options without considering all options.
- During computerized tests administered during the school day, the Student engaged in “happy clicker” behavior, as described by his special education teacher, [REDACTED]. In other words, he clicked on test answers without weighing alternatives, just as he chose picture options without considering alternatives during cognitive testing in 2017.
- In January 2017, despite the influence of the Student’s ADHD, educational testing revealed that his educational performance was at his current grade level (third grade) or, in some cases, above his

grade level. The Student's performance remains at grade level for the fourth grade, although he is failing core subjects, such as English Language Arts (ELA) and Mathematics, because he hurries through assignments without thinking about his answers.

6. The Student's handwriting is negatively affected by a medical issue as well as the Student's ADHD. Although the Student is left-hand dominant, a painful cyst on his left hand has compelled him to use his non-dominant right hand to write. The Student continues to receive OT services as a supplemental aid, service, modification and support under his current IEP.

7. Comprehensive testing has failed to show that the Student has a learning disability, suffers from dyslexia, or has any other disability affecting his ability to access the general educational curriculum other than ADHD and related behavioral issues and his limited need for OT services.

8. The Student has been on a BIP since October 2014. The Student's non-complaining and eloping behaviors in class, beginning in the second semester of his third grade year, prompted a [REDACTED] IEP Team to perform a new Functional Behavior Assessment (FBA) for the Student in January 2017. In February 2017, an IEP Team met and subsequently approved a revised BIP for the Student and added behavior goals and objectives on his IEP.

Facts Concerning IEP Team Meetings and IEP Implementation

9. When the Student came to [REDACTED] ES from [REDACTED] in the fall of 2016, he began the school year with an IEP that a [REDACTED] IEP Team had produced. The date of that IEP was September 28, 2015.

10. The September 28, 2015 IEP had the following goals and objectives and supplemental aids, services, modifications and supports for the Student:

September 28, 2015 IEP⁹

<p>Behavior GOAL Goal: Work Habits/on Task Behavior: the Student will increase his on task behavior. Evaluation Method: Observation Record With: 80% Accuracy</p>	<p>Objective 1: Work Habits/On Task Behavior: Given instruction, reminders, and proximity control, the Student will initiate tasks within 1 minute. Evaluation Method: Observation Record With: 80% Accuracy</p> <p>Objective 2: Work Habits/On Task Behavior: Given instruction, reminders, and proximity control the Student will remain on task 10 minutes. Evaluation Method: Observation Record With: 80% Accuracy</p>
<p>Written Language GOAL Goal: Grammar: the Student will comprehend and apply standard English punctuation and capitalization in written language at grade level. Evaluation Method: Informal Procedures With: 80% Accuracy</p>	<p>Objective 1: Given modeling and prompting, the Student will be able to use capital letters for first letters of names and [at] the beginning of a sentence. Evaluation Method: Classroom-Based Assessment Informal Probe/portfolio With: 80% Accuracy</p> <p>Objective 2: Given modeling and prompting, the Student will be able to consistently use end punctuation, such as period, question mark, exclamation mark Evaluation Method: Classroom-Based Assessment Informal Probes/portfolio With: 80% Accuracy</p> <p>Objective 3: Given modeling and prompting, the Student will be able to use commas correctly in dates, addresses, salutations and closings and items in a series. Evaluation Method: Informal Procedures Informal Probes/portfolio With: 80% Accuracy</p>
<p>Perceptual Motor GOAL Goal: Given verbal cues and/or visual cues, the Student will demonstrate adequate visual motor integration skills to complete writing, drawing, and tracing activities with 80% accuracy by 09/28/2016. Evaluation Method: Observation Record With: 4 out of 5 targeted trials</p>	<p>Objective 1: Given minimum of verbal cues, the Student will be able to copy shapes/designs with 2–3 intersecting/adjoining parts with 80% accuracy by 09/28/2016. Evaluation Method: Observation Record With: 4 out of 5 targeted trials</p> <p>Objective 2: Given 3/8" wide pathways with curves and angles and minimum verbal cues, the Student will be able to accurately guide a pencil through the pathway with 2 or fewer errors by 09/28/2016. Evaluation Method: Observation Record With: 4 out of 5 targeted trials</p> <p>Objective 3: Given lined paper, minimum verbal cues and/or visual cues, the Student will line upper and lower case letters properly between lines by 09/28/2016. Evaluation Method: Observation Record With: 4 out of 5 targeted trials</p>
<p>Supplementary Aids, Services, Program Modifications and Supports</p>	<p>Instructional Supports: Have the Student repeat and/or paraphrase information (periodically)</p> <p>Social/Behavior Supports: Frequent eye contact/proximity control (periodically) and</p>

⁹ I have attempted to reproduce pertinent IEP information verbatim. Even so, I corrected some typographical errors.

	advanced preparation for schedule changes (periodically)
	Physical/Environmental Supports: Preferential seating (daily)
	School Personnel/Parental Supports: Social worker consult (one 30-minute session weekly in general education) provided by the school social worker; occupational therapy provided by an occupational therapist and certified occupational therapist assistant (three 30-minute sessions per month outside general education); transportation; and adult support (daily) provided by an instructional assistant.

11. The Student made adequate progress toward all of his IEP goals and objectives while at [REDACTED].

12. On September 20, 2016, PGES convened an IEP Team meeting to conduct an annual review of the Student's educational performance and to discuss whether the Student needed extended school year (ESY) services. [REDACTED] ES provided the Parent with copies of draft IEP revisions prior to that meeting.

13. [REDACTED], Administrator/Designee; [REDACTED], General Educator; the Parent; [REDACTED] Guidance Counselor; [REDACTED] Occupational Therapist; [REDACTED] Special Educator; and [REDACTED] School Psychologist, attended the September 20, 2016 IEP Team meeting.

14. On September 20, 2016, the IEP Team discussed the Student's educational performance and progress, his strengths and his areas of need. The team determined that the Student needed an additional social work goal on his IEP, based on the Student's transition to a new school setting. Mrs. [REDACTED] the school social worker, could not attend the IEP Team meeting, but had called the Parent to discuss her report and proposed social work goal before the meeting.

15. The September 20, 2016 IEP had the following goals and objectives and supplemental aids, services, modifications and supports for the Student:

September 20, 2016 IEP

<p>Behavior GOAL Goal: Work Habits/on Task Behavior: the Student will increase his on task behavior. Evaluation Method: Observation Record With: 90% Accuracy</p>	<p>Objective 1: Work Habits/On Task Behavior: Given one reminder, the Student will remain on task for at least 20 minutes. Evaluation Method: Observation Record With: 90% Accuracy</p>
	<p>Objective 2: Work Habits/On Task Behavior: Given one reminder, the Student complete his assigned tasks and make necessary changes once feedback is given by an adult. Evaluation Method: Observation Record With: 90% Accuracy</p>
<p>Written Language GOAL Goal: By 09/13/2017, when given an illustration from a grade-level story, the Student will correctly apply standard English punctuation in written language at grade level[;] example, use commas in a series when describing an illustration in 4 out of 5 targeted trials. Evaluation Method: Classroom-based Assessment With: 80% Accuracy in 4 out of 5 trials</p>	<p>Objective 1: Given teacher modeling and instruction, the Student will be able to commas correctly in dates. Evaluation Method: Classroom-Based Assessment With: 4 out of 5 targeted trials</p> <p>Objective 2: Given teacher modeling and instruction, the Student will be able to use commas correctly in salutations and closings. Evaluation Method: Classroom-Based Assessment With: 4 out of 5 targeted trials</p> <p>Objective 3: Given teacher modeling and instruction, the Student will be able to use commas correctly in a series. Evaluation Method: Classroom-Based Assessment With: 4 out of 5 targeted trials</p>
<p>Social Emotional GOAL Goal: By 01/13/2017, when the Student participates in a social work counseling session, within 3 visual or verbal prompts, the Student will actively work on the assigned tasks, use attentive posture (e.g., sitting up), and will refrain from off-task behaviors (e.g., daydreaming, walking around) for the duration of the activity (e.g., 20 minutes), for 4 out of 5 activities. Evaluation Method: Informal Procedures With: 4 out of 5 targeted trials</p>	<p>Objective 1: By the end of the first quarter [10/28/2016], during periods when the Student is distracted, he will use visual or verbal prompts to become focused to task for the duration of the activity in 3 out of 5 trials. Evaluation Method: Informal Procedures With: 3 out of 5 activities targeted trials</p> <p>Objective 2: By the end of the second quarter [01/13/2017], during periods when the Student is distracted, he will use visual or verbal prompts to become focused on task for the duration of the activity in 4 out of 5 trials. Evaluation Method: Informal Procedures With: 4 out of 5 activities targeted trials</p>
<p>Supplementary Aids, Services, Program Modifications and Supports</p>	<p>Instructional Supports: Have the Student repeat and/or paraphrase information (periodically as needed)</p> <p>Social/Behavior Supports: Frequent eye contact/proximity control (periodically as needed)</p> <p>Physical/Environmental Supports: Preferential seating (periodically as needed)</p> <p>School Personnel/Parental Supports: Special Education Services (three 30-minute sessions weekly and two 15-minute sessions weekly) provided by the Student's general education teacher and special education teacher; social worker consult (one 30-</p>

	minute session weekly in general education) provided by the school social worker; occupational therapy provided by an occupational therapist and certified occupational therapist assistant (two 30-minute sessions per month in general education); transportation; and adult support (daily) provided by an instructional assistant.
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16. The Student initially made progress toward his IEP goals and objectives, but beginning in November 2016, his classroom behavior began to deteriorate. He started having tantrums and eloping from class. The Student often threw objects when he had tantrums.

17. Despite the Student's behavior problems, the Student continued to make passing grades in his core subjects as well as his special area subjects (Library, Art, Vocal Music and Physical Education).

18. The deterioration of the Student's behavior prompted [REDACTED] ES staff to convene an IEP Team meeting on December 6, 2016 to review and revise the Student's IEP.

19. Ms. [REDACTED] Ms. [REDACTED] the Parent, Ms. [REDACTED] Ms. [REDACTED] Ms. [REDACTED] and [REDACTED] Behavior Interventionist, participated in the December 6, 2016 IEP Team meeting.

20. Before the December 6, 2016 IEP Team meeting, [REDACTED] ES sent a draft BIP to the Parent.

21. On December 6, 2016, the IEP Team discussed the Student's educational performance and progress, his strengths and his areas of need. Ms. [REDACTED] expressed her concern that the Student had not continued with the same types of on task behaviors as in the first quarter. In her opinion, his tantrum and eloping behaviors were impacting his ability to complete work and demonstrate his knowledge/learning.

22. The Parent indicated that she did not wish to review the draft BIP, because it was based on an outdated FBA. Consequently, the IEP Team agreed that since three years had

elapsed since the last time the Student was comprehensively assessed, it was necessary to perform a comprehensive battery of assessments, including an updated FBA, before any changes could be made to his current IEP. The team agreed to defer action on revising the Student's BIP and IEP until all assessments were completed.

23. In January and February 2017, [REDACTED] ES performed comprehensive assessments of the Student in the following areas:

- Psychological
- Educational
- Speech and Language
- OT
- FBA

24. Psychological testing of the Student on January 26, 2017 and February 6, 2017 revealed that the Student's cognitive functioning, verbal ability, nonverbal reasoning and spatial reasoning were all in the average range for a child of the Student's age. He had a "clinically significant" score with regard to social/emotional and behavioral functioning, due to his ADHD. Very elevated levels of hyperactivity, inattention and executive functioning problems were consistent with the Student's diagnosis of ADHD.

25. Ms. [REDACTED] who performed the psychological testing of the Student, used a variety of assessment tools in obtaining her results, such as employing the Differential Abilities Scale, Second Edition (School Age Battery) (DAS-II), Basic Assessment System for Children, Second Edition (BASC-2) and Conners Third Edition (Conners 3). She also considered teacher and student reports. All tests were in the Student's native language (English).

26. Educational testing of the Student on January 4, 2017 measured the development of the Student's academic skills in fluency and application in the areas of reading, mathematics, and written language. The Student's individual cluster scores, when compared to others at his age level, revealed that his skills were in the average range.

27. Ms. [REDACTED] used the Woodcock Johnson IV Test of Achievement, which included various subtests in areas such as sentence reading fluency, broad reading, written expression, math facts fluency, math calculation skills, etc. All tests were in the Student's native language.

28. A Speech and Language Assessment of the Student performed on February 6, 2017, revealed that the Student had average expressive and receptive language skills and no significant pattern of weaknesses.

29. [REDACTED], a speech-language pathologist, used the Oral Language Skills Second Edition (OWLS II) to measure the Student's speech and language performance. The OWLS II is a comprehensive assessment that provides a measure of a broad range of receptive and expressive language skills. The speech-language pathologist administered the OWLS II to the Student in his native language.

30. The OT Assessment of the Student on January 18, 2017 and February 7, 2017, revealed that the Student had average fine motor, visual perceptual/motor and visual motor integration skills. His classroom work from the previous and current quarter, during both structured and unstructured activities, revealed spacing accuracy across work consistently eighty percent or greater, with most short samples being between eighty-eight to one hundred percent accurate for spacing between words.

31. Although Ms. [REDACTED] the occupational therapist, did not find any specific reason to recommend continued OT services for the Student, she recommended that the OT services that the Student was receiving should continue, based on his engaging in behaviors that interfered with his ability to be “learning ready.”

32. Ms. [REDACTED] used clinical observations, a teacher interview and standardized testing (i.e., the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2)), to perform her assessment. She did not only evaluate the Student’s handwriting. The occupational therapist administered all testing to the Student in his native language.

33. The FBA performed on January 19, 2017 by the IEP Team, addressed the Student’s tantrum and eloping behaviors. Among other things, the FBA noted that on one occasion, the Student’s classmates had to be removed from the classroom because of the Student’s unsafe behaviors.

34. The IEP Team also developed a BIP based on the FBA results to address the Student’s most prominent negative behaviors, tantrums and eloping.

35. On March 16, 2017, [REDACTED] ES convened an IEP Team meeting to discuss the assessment results and to review or revise the Student’s IEP.

36. Ms. [REDACTED] Ms. [REDACTED] the Parent, Ms. [REDACTED] Ms. [REDACTED] Ms. [REDACTED] Ms. [REDACTED] and Ms. [REDACTED] participated in the March 16, 2017 IEP Team meeting.

37. On March 16, 2017, the IEP Team discussed the results of the recent assessments, along with the Student’s educational performance and progress, his strengths and his areas of need. The IEP Team provided a copy of the proposed BIP to the Parent for review before the IEP Team meeting. During the IEP Team meeting, Ms. [REDACTED] stated that the proposed BIP addressed the Student’s aberrant behaviors, possible replacement behaviors and the Student’s

behavioral goals. She indicated that the BIP identified skill development strategies to help the Student to replace negative behaviors with positive ones.

38. The Parent shared that she believed there was more need for structure, expectations of behavior, “and what we are doing before the problems.” She shared a proposed chart that the Student could use to track his behaviors while in class. The chart included ten categories and fifty-two items for the Student to check off for self-monitoring during the school day. The IEP Team discussed the Parent’s proposed chart and considered it too overwhelming for the Student to complete. School-based team members recommended another monitoring chart that the Student could use that would not be so overwhelming.

39. The Parent disagreed with the FBA and proposed BIP, because she felt most of the Student’s offending behaviors centered on his significant writing and fine motor issues. After an extensive discussion, without obtaining the Parent’s approval, the [REDACTED] ES members of the IEP Team approved the FBA and proposed BIP. They completed the necessary Document of Disagreement to memorialize the Parent’s refusal to acquiesce to the results of the FBA and proposed BIP.

40. On March 24, 2017, the Student met his Written Language goal on his IEP. This prompted the school-based members of the April 6, 2017 IEP Team to remove the Written Language goal from the Student’s IEP, while retaining the OT services that the Student had been receiving to improve his handwriting.

41. On April 6, 2017, the [REDACTED] ES-members of the March 16, 2017 IEP Team issued and began implementing a revised IEP for the Student and an updated BIP. The Parent did not sign the April 6, 2017 IEP or BIP.

42. The April 6, 2017 IEP had the following goals and objectives and supplemental aids, services, modifications and supports for the Student:

April 6, 2017 IEP

<p>Behavior-Compliance GOAL Goal: By 04/06/2018, when given an assignment, the Student will demonstrate compliance by following the direction and completing the assignment for 3 out of 4 assignments given. Evaluation Method: Informal Procedures With: 95% of targeted trials</p>	<p>Objective 1: Given a direction to report to a specific area in the classroom, the Student will go to and remain in the assigned location. Evaluation Method: Informal Procedures With: 95% of targeted trials</p>
	<p>Objective 2: Given up to three visual or verbal reminders, the Student will complete the assigned task. Evaluation Method: Informal Procedures With: 75% of the targeted trials</p> <p>Objective 3: Given a behavior chart and reward system, the Student will be safe in all areas of the school setting. Evaluation Method: Informal Procedures With: 95% of the targeted trials</p> <p>Objective 4: Given up to three visual or verbal reminders, the Student will initiate tasks. Evaluation Method: Informal Procedures With: 30% of the targeted trials</p>
<p>Social Emotional-Increase self-control and positive self-expression GOAL Goal: By April 2018, the Student will use positive self-expressive language with adults during times when asked to do a less preferred activity, in 3 out of 4 interactions. Example of Verbalizing an I-Message: I feel (express emotion) when you (describe the action that affects you or relates to the feeling) because (explain how the action affects you or relates to the feeling). "I feel (mad) when you (tell me to get off the computer) because (I was having fun)." Evaluation Method: Informal Procedures and Other Informal Procedures With: 3 out of 5 targeted trials</p>	<p>Objective 1: By June 2017, during social work sessions, the Student will be able to demonstrate at least 3 self-calming strategies (e.g., belly breathing, progressive muscle tension/release, wall push-ups, positive self-talk, strength and resiliency-based strategies) and apply them to example scenarios, so he can use strategies across school settings. Evaluation Method: Informal Procedures in social work sessions With: 4 out of 4 targeted trials</p> <p>Objective 2: By November 2018, during social work sessions, the Student will be able to demonstrate and apply respectful communication (i.e., "I statements," emphatic language), to example scenarios in 4 out of 4 trials. Evaluation Method: Informal Procedures in social work sessions With: 4 out of 4 targeted trials</p> <p>Objective 3: By April 2018, the Student will use positive self-expressive language with adults and peers during times when asked to do a less preferred activity, in 3 out of 5 interactions.</p>
<p>Supplementary Aids, Services, Program Modifications and Supports</p>	<p>Instructional Supports: Have the Student repeat and/or paraphrase information (periodically as needed) Social/Behavior Supports: Frequent eye contact/proximity control; social skills training; crisis intervention; home-school communication system (periodically as needed)</p>

	<p>Physical/Environmental Supports: Preferential seating and adaptive equipment (daily)</p> <p>School Personnel/Parental Supports: Special Education Services (one 15 minute session daily, five times per week) provided by the Student's general education teacher and special education teacher; social worker consult (one 30-minute session weekly in general education) provided by the school social worker; occupational therapy provided by an occupational therapist and certified occupational therapist assistant (two 30-minute sessions per month in general education); transportation; and adult support (daily) provided by the Student's general education teacher, special education teacher and an instructional assistant.</p>
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43. After implementation of the April 6, 2017 IEP, and the February 7, 2017 BIP, from April 27, 2017 through June 8, 2017, the Student engaged in tantrum behaviors, such as throwing school materials on the floor, knocking over a chair, sliding his desk back and forth, ripping up schoolwork, slamming a door and grabbing aggressively at another student's seat cushion. On May 23, 2017, he eloped from the classroom after forgetting his homework. Ms. [REDACTED] in her capacity as a Behavioral Interventionist, intervened in each of these situations in an effort to deescalate the Student's behavior and calm him.¹⁰

44. On September 13, 2017, the Parent sent an e-mail to [REDACTED] Assistant Principal, and requested that an IEP Team meeting be scheduled to address the Student's FBA and BIP. [REDACTED] ES scheduled an IEP Team meeting for October 17, 2017 in response to the Parent's request.

45. The Student continued to learn and make academic progress during the first quarter of his fourth grade year, which included progress toward attaining his IEP goals, but his interfering behaviors caused him to receive failing grades in some subjects.

¹⁰ During the spring of 2017, the Parent filed a written complaint with the MSDE concerning [REDACTED] ES's alleged failure to provide appropriate Special Education to the Student. On August 4, 2017, the MSDE issued a written response, in which it found no merit in the Parent's complaint. (BCPS Exhibit No. 1/36.) I will not discuss this complaint and response here, because I heard the instant complaints *de novo* and am not relying on any findings that the MSDE made.

46. On October 17, 2017, PGES convened an IEP Team meeting to review or revise the Student's IEP, particularly with regard to the social work services that the Student was receiving.

47. Ms. [REDACTED] serving as Administrator/Designee; [REDACTED] General Educator; the Parent; Ms. [REDACTED] and Ms. [REDACTED] participated in the October 17, 2017 IEP Team meeting.

48. At the October 17, 2017, IEP Team meeting, the Parent expressed her dissatisfaction with the social work services being offered to the Student; she wanted [REDACTED] ES to engage a social worker other than Ms. [REDACTED] to work with the Student. She also wanted the Student's behavior point sheets amended so they were "not all or nothing." The school-based members of the IEP Team concluded that the Student needed social work services for social emotional support. They agreed to look into amending the Student's point sheets. Ms. [REDACTED] agreed to confer with her supervisor about whether a new social worker could be assigned. No changes to the Student's IEP resulted from the discussions that took place during the October 17, 2017 IEP Team meeting.

49. On November 15, 2017, PGES convened an IEP Team meeting to review or revise the Student's IEP.

50. Ms. [REDACTED] Mr. [REDACTED] the Parent, Ms. [REDACTED] [REDACTED] Occupational Therapist, Ms. [REDACTED] Ms. [REDACTED] and Ms. [REDACTED] participated in the November 15, 2017 IEP Team meeting.

51. On November 15, 2017, based on a report submitted by Ms. [REDACTED] the school-based members of the IEP Team determined that the Student no longer needed social work services, because other school staff could adequately address the Student's emotional outbursts. The Parent brought up the possibility of getting pull-out services to address the Student's writing

needs. Ms. [REDACTED] responded that there were drawbacks to that idea, but indicated that reestablishing a writing goal for the Student was something the team should consider.

52. On November 15, 2017, the [REDACTED] ES-members of the November 15, 2017 IEP Team issued and began implementing a revised IEP for the Student. The Parent did not sign the November 15, 2017 IEP.

53. On November 15, 2017, the IEP Team revised the Student’s IEP as follows:

November 15, 2017 IEP

<p>Behavior-Compliance GOAL Goal: By 04/06/2018, when given an assignment, the Student will demonstrate compliance by following the direction and completing the assignment for 3 out of 4 assignments given. Evaluation Method: Informal Procedures With: 95% of targeted trials</p>	<p>Objective 1: Given a direction to report to a specific area in the classroom, the Student will go to and remain in the assigned location. Evaluation Method: Informal Procedures With: 95% of targeted trials</p>
	<p>Objective 2: Given up to three visual or verbal reminders, the Student will complete the assigned task. Evaluation Method: Informal Procedures With: 75% of the targeted trials</p> <p>Objective 3: Given a behavior chart and reward system, the Student will be safe in all areas of the school setting. Evaluation Method: Informal Procedures With: 95% of the targeted trials</p> <p>Objective 4: Given up to three visual or verbal reminders, the Student will initiate tasks. Evaluation Method: Informal Procedures With: 30% of the targeted trials</p>
<p>Social Emotional-Increase self-control and positive self-expression GOAL Goal: By April 2018, the Student will use positive self-expressive language with adults during times when asked to do a less preferred activity, in 3 out of 4 interactions. Example of Verbalizing an I-Message: I feel (express emotion) when you (describe the action that affects you or relates to the feeling) because (explain how the action affects you or relates to the feeling). “I feel (mad) when you (tell me to get off the computer) because (I was having fun).” Evaluation Method: Informal Procedures and Other Informal Procedures With: 3 out of 5 targeted trials</p>	<p>Objective 1: By April 2018, the Student will be able to demonstrate and apply respectful communication (i.e., “I statements,” emphatic language), to example scenarios in 3 out of 5 trials. Evaluation Method: Informal Procedures With: 3 out of 5 targeted trials</p> <p>Objective 2: By April 2018, the Student will use positive self-expressive language with adults and peers during times when asked to do a less preferred activity, and 3 out of 5 interactions. Evaluation Method: Informal Procedures With: 3 out of 5 targeted trials</p>

Supplementary Aids, Services, Program Modifications and Supports	Instructional Supports: Have the Student repeat and/or paraphrase information (periodically as needed)
	Social/Behavior Supports: Frequent eye contact/proximity control; social skills training; crisis intervention; home-school communication system; other social/behavior supports behavior chart, scheduled movement break (periodically and daily as needed)
	Physical/Environmental Supports: Preferential seating and adaptive equipment (periodically as needed)
	School Personnel/Parental Supports: Occupational therapy provided by an occupational therapist and certified occupational therapist assistant (two 30-minute sessions per month outside general education); transportation; Special Education Services (one 15 minute session daily, five times per week) provided by the Student's general education teacher and special education teacher; and adult support (daily) provided by the Student's general education teacher, special education teacher and an instructional assistant; and other school personnel/parental supports, guidance and/or psychological consult.

54. The Student's February 7, 2017 BIP remained in place after the implementation of the November 15, 2017 IEP; Ms. [REDACTED] continued to provide behavioral intervention services when the Student acted out in school.

55. Beginning in the second quarter of his fourth grade year, the Student's behavior changed. He went from acting out through tantrums to resisting and refusing adult assistance, refusing to do assignments and refusing to comply with teacher directives. Some of his refusals resulted in school suspensions. His elopement decreased, but when he did elope, it became more problematic.

56. To address the Student's changed and deteriorating behavior, [REDACTED] ES scheduled an IEP Team meeting on January 31, 2018 to obtain the Parent's permission to perform a new FBA of the Student. The Parent gave her permission for the FBA.

57. Typically, it takes up to eight weeks to perform an FBA, because information about a student's behavior has to be drawn from different sources.

58. ■■■ ES staff members completed a draft FBA of the Student on March 12, 2018 and a draft BIP for the Student on March 15, 2018. ■■■ ES submitted those drafts to the Parent for review. There has been no IEP Team meeting to discuss those drafts because the Parent did not wish to participate in any additional IEP Team meetings until the conclusion of the due process hearing that she requested on February 20, 2018.

59. The Student is currently failing his core subjects, mainly based on his rushing through assignments. Despite his failing grades, the Student retains the functional capacity to perform fourth grade work and the ability to learn.

DISCUSSION

I. Introduction

A. First Complaint

In her Complaint, the Parent alleges that the BCPS violated the IDEA by denying the Student a FAPE during his third and fourth grade school years (2016–17 and 2017–18). According to the Parent, the Student participates in the regular education curriculum, but receives Special Education based on diagnoses of ADHD, handwriting problems and a developmental delay. He also has behavioral issues, which has required BCPS to implement a BIP. The Parent contends that BCPS has improperly removed goals, supports and services from the Student's IEP over the past two school years, which has caused the Student to regress socially and academically. In fact, she asserts that at the beginning of the current school year, the principal of ■■■ ES, the

school the Student is attending, told her the Student was in danger of failing the fourth grade. She maintains that the Student has a latent learning disability¹¹ that proper testing would uncover.

The Parent seeks the following remedies:

- full independent Psychological, Educational, Speech and Language, Occupational Therapy and FBA evaluations at public expense as requested in February 2018;
- compensatory services to address regression of social and academic functioning;
- reinstatement of all services [and] supports to [the Student's] IEP removed since the 2015–16 school year;
- a revised BIP; and
- copies of school requested information and IEPs in [the Student's] school file for the school year 2016–forward.

BCPS agrees with the Parent that over the past two years goals, supports and services were removed from the Student's IEP. Nevertheless, those removals occurred through the regular IEP Team meeting process, when the IEP Team convened to review the Student's program. Moreover, some goals, supports and services were actually added during this two-year interval. During the IEP Team meetings that took place during that two-year period, IEP Team members reviewed various evaluations of the Student and determined that some of the Student's Special Education needs had diminished, while others had increased. Accordingly, the data gained from the evaluation process resulted in changes to the Student's IEP.

¹¹ When she testified, the Parent did not specifically state that the Student had an undiscovered learning disability. In the First Complaint, however, she wrote, "BCPS and [REDACTED] staff did not provide documentation demonstrating they used valid [Response to Intervention (RTI)] processed (sic) based on a child's response to Scientific, research-based intervention when demonstrating my child's specific learning disability(ies)." Moreover, in the First Complaint and during the hearing, the Parent also focused BCPS's alleged failure to develop an IEP that enabled the Student to make "academic and functional advancement," an assertion that further substantiates the Parent's belief that the Student has a learning disability. (RTI is a general education program that is defined as a "tiered instructional approach to support achievement of all students with emphasis on those students who are not demonstrating grade appropriate skill and content mastery.")
http://archives.marylandpublicschools.org/NR/rdonlyres/5DBC056D-578E-4F1D-80A6-69EEBF0D8B35/17125/Tiered_Instructional_ApproachRtl_June2009.pdf

BCPS notes that the Student's current IEP from November 2017 contains essentially behavior-related goals. This is because he is deemed eligible for Special Education under the category of OHI. Evaluations conducted under the auspices of BCPS have revealed that the only disability affecting the Student's ability to learn in the classroom relates to his behavior, stemming from his diagnosis of ADHD. BCPS contends that testing does not support the Parent's view that the Student had a developmental delay.

The Student, as the moving party, bears the burden of proof by a preponderance of the evidence on the First Complaint. *Schaffer v. Weast*, 546 U.S. 49 (2005). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

B. *Second Complaint*

In its Complaint, with regard to its denial of the Parent's request for IEEs paid for at public expense, BCPS asserts that the Psychological, Educational, Speech and Language and OT Assessments that it conducted in early 2017 were performed using appropriate assessment and evaluation protocols. Therefore, there is no justification for the Parent to seek IEEs at public expenses in those areas. Additionally, according to the permission to access document dated January 31, 2018, BCPS did not have the opportunity to complete the FBA. (It has been subsequently completed but has not been reviewed at an IEP Team meeting.) Because there was no current FBA the Parent could dispute, BCPS contends the Parent would not be entitled to an independent FBA at public expense.

The Parent questions the reliability of BCPS's evaluations, because she alleges there were many deficiencies in how BCPS administered those evaluations to the Student. She asserts that she wanted BCPS's evaluators to have her full input when they tested the Student. That was not

done. She wanted a hearing component added to the Speech and Language Assessment. That was not done. She also wanted the Student's OT Assessment performed "in totality," and not just focused on his handwriting skills. That was not done. The school psychologist promised that the Student would have additional time to complete tasks during his Psychological Assessment. That was not done. With regard to BCPS's Educational Assessment, the Parent indicated that she does not disagree with the results of that assessment, but with what the IEP Team did with those results.

The Parent also related that during one of the evaluations, the Student was supposed to write about his family. The Parent emphasized that it is traumatic for the Student to write about his family, because his father is deceased and his mother is absent. The Parent further noted that when she asked the administrator of the test if the Student could be given an alternate question, the test administrator responded, "The question is the question."¹² The Parent asks that I allow her to obtain the various-noted IEEs at public expense. BCPS, as the moving party, bears the burden of proof by a preponderance of the evidence on the Second Complaint. *Schaffer v. Weast*, 546 U.S. 49 (2005).

II. General Legal Framework

A. Provision of a FAPE

Maryland receives federal education funding, and as such, Maryland school districts are required to comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. § 1412; 34 C.F.R. § 300.2; *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180–81 (1982). Maryland implements the IDEA for elementary and secondary students and adds additional procedural safeguards and substantive requirements beyond

¹² The above-noted response from the Parent came from what the Parent stated during the telephone prehearing conference on March 26, 2018. She never addressed her request for independent IEEs at public expense when she testified at the hearing.

those required by the IDEA, through Title 8, Subtitles 3 and 4 of the Education Article of the Maryland Annotated Code and through COMAR 13A.05.01.

Maryland law and the IDEA demand “that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); *see also* COMAR 13A.05.01.01 (ensuring “a [FAPE] . . . in accordance with the student’s [IEP]”).

When a disability is suspected, a local education agency (generally in Maryland a county school system) must perform an evaluation of the student. 20 U.S.C.A. § 1414(a)(1), (b); 34 C.F.R. §§ 300.301, 300.304, 300.305. The results of the evaluation are used to determine whether the student has a qualifying disability and whether the student is in need of Special Education. 20 U.S.C.A. § 1414(a)(1)(C)(i), (b)(4); 34 C.F.R. § 300.306; COMAR 13A.05.01.06D. If it is determined the student has a disability as defined by the IDEA and is in need of Special Education, a school system must develop an IEP for the student. 34 C.F.R. §§ 300.306(c)(2), 300.324–300.328; COMAR 13A.05.01.07–.09.

An IEP is “the primary vehicle through which schools provide a particular [disabled] student with a FAPE.” *M.S. v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009). An IEP must include: a description of the student’s present levels of academic achievement and functional performance; a statement regarding how the student’s disability affects his or her involvement and progress in the general education curriculum; measurable annual academic and functional goals for the student; a description of how the student’s progress toward meeting those goals will be gauged; the special education and related services, and supplementary aides and services, that will assist the student in advancing toward attaining the goals; the program modifications or supports that will be provided for the student; and, when possible, a description

of how the student will be involved in and make progress in the general education curriculum. 20 U.S.C.A. § 1414(d)(1)(A). It must be developed through a collaborative process between the school district (including teachers and school officials) and the student's parents. *See Andrew F.*, 137 S. Ct. at 994. The process of developing the IEP must be a "fact-intensive exercise . . . [that is] informed by the expertise of school officials . . . [and] by the input of the child's parents or guardians." *Id.* at 999.

As the "centerpiece" of the IDEA's "education delivery system" for disabled students, an IEP is a "comprehensive plan" for the "academic and functional advancement" for the student. *Id.* at 994, 999. It must be tailored to the student's "unique needs" with "careful consideration" of the student's present levels of achievement, disability and potential for growth. *Id.*; *see also* 20 U.S.C.A. § 1401(29). The IEP must be "appropriately ambitious," *Andrew F.*, 137 S. Ct. at 1000, and it must provide for "specially designed instruction" that is "reasonably calculated to enable the child to receive educational benefits" and to "make progress appropriate in light of the student's circumstances." *Id.* at 996, 999 (quoting *Rowley*, 458 U.S. at 207). The amount of progress anticipated for the student should be "markedly more demanding than the 'merely more than *de minimis* test'" applied in the past by many lower courts. *Id.* at 1000.

The test for whether an IEP is "appropriately ambitious," *id.*, and "reasonably calculated to enable the student to receive educational benefits," *id.* at 996, is different for each student; there is no bright-line rule or formula to determine whether an IEP provides a FAPE.¹³ *Id.* at 1000–01. For a student who is fully integrated in the regular classroom, a FAPE would generally require an IEP to be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 996, 999 (citing *Rowley*, 458 U.S. at 203–04). However, for

¹³ In *Rowley*, the Supreme Court also held that a FAPE may be found to have been denied a student when a school fails to comply with the procedures set forth in the IDEA. 458 U.S. at 206; *see also Bd. of Educ. v. I.S. ex rel. Summers*, 325 F. Supp. 2d 565, 580 (D. Md. 2004).

a student that is not fully integrated and/or cannot be reasonably expected to achieve grade-level advancement, the “educational program must be appropriately ambitious in light of [the student’s] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *Id.* at 1000. Regardless, “every child should have the chance to meet challenging objectives.” *Id.*

When assessing whether a student was offered, given or denied a FAPE, a judge must “afford great deference to the judgment of education professionals.” *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (quoting *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)). A judge should not substitute their own “notions of sound educational policy for those of the school authorities which they review.” *Andrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 206). Additionally, a judge “should be reluctant . . . to second-guess the judgment of education professionals.” *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). A judge should be mindful that local educators deserve latitude in determining the IEP most appropriate for a disabled child, and that the IDEA does not deprive these educators of the right to apply their professional judgment. *See Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). Additionally, a judge must be careful to avoid imposing his or her view of preferable educational methods upon a school district. *Rowley*, 458 U.S. at 207; *see also A.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004). However, a reviewing judge may fairly expect the school system’s professionals “to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [his or her] circumstances.” *Andrew F.*, 137 S. Ct. at 1002.

The *Andrew F.* Court confirmed that a FAPE does not promise an “ideal” education. *Id.* at 999. Nor does it promise that a student with a disability will be provided with “opportunities to

achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.” *Id.* at 1001. A reviewing court must determine whether the IEP is “reasonable.” *Id.* at 999. It is also important to remember that the IDEA does not require “the best possible education that a school could provide if given access to unlimited funds.” *Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). Nor does it require the “furnishing of every special service necessary to maximize each handicapped child’s potential.” *Hartmann*, 118 F.3d at 1001.

The development of an IEP is a prospective process. *See Andrew F.*, 137 S. Ct. at 999. Thus, a judge in a due process hearing must look to what the IEP Team knew when it developed the IEP, and whether that IEP, as designed, was reasonably calculated to enable the child to receive educational benefit. An IEP is essentially a “snapshot” in time and “cannot be judged exclusively in hindsight.” *See K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 818 (8th Cir. 2011); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). However, evidence of actual progress during the period of an IEP may also be a factor in determining whether a challenged IEP was reasonably calculated to confer educational benefit. *M.S.*, 553 F.3d at 327; *see also M.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002). The Supreme Court in *Rowley* similarly observed that a student’s achievement of passing marks and advancement from grade to grade is an important factor in determining if a student received educational benefit. *Rowley*, 458 U.S. at 207 n.28.

B. *Independent Educational Evaluation*

When a local education agency performs an evaluation of a student, the student’s parents have the right to seek an IEE as a procedural safeguard. 20 U.S.C.A. § 1415(b)(1). The right to obtain an IEE at public expense, however, is qualified. The federal regulations provide the following, in pertinent part:

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

34 C.F.R. § 300.502(b).

The appropriateness of an evaluation, however, is not determined by the progress, or lack thereof, that a student experiences after being evaluated, or whether all parties agree with the findings and recommendations of an evaluation. The focus of the determination of the appropriateness of a student assessment is a review of the procedures, methodology, and assessment tools that are employed, and the qualifications of the evaluator, in accordance with the requirements of the IDEA and its accompanying regulations. *See D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. 2012); *see also E.P. v. Howard Cty. Pub. Sch. Sys.*, No. ELH-15-3725, 2016 WL 6217119 (Oct. 25, 2016). While an evaluation should be tailored to the specific problems a potentially disabled student is experiencing, it need not be designed to identify and diagnose every possible educational disability. *D.K.*, 696 F.3d at 250.

The regulations provide guidance in determining whether an assessment is appropriate.

The regulations require that certain standards be met when evaluating a child:

(b) *Conduct of evaluation.* In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) *Other evaluation procedures.* Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304(b) and (c). Similarly, COMAR 13A.05.01.05C provides:

C. Assessment Materials.

(1) A public agency shall ensure that testing and assessment materials and procedures used to assess a student's need for special education and related services are:

(a) Technically sound; and

(b) Provided and administered in the student's native language or other mode of communication, in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer.¹⁴

III. Analysis

A. *Did BCPS deny the Student a FAPE during the 2016–17 school year by removing goals, supports and services from his IEP that had been part of his IEP for the 2015–16 school year?*

¹⁴ 20 U.S.C.A. § 1414(b)(2) and (3) contain similar requirements and those statutory subsections impose a duty on local education agencies to comply with those requirements when administering evaluations to students.

B. *Did BCPS deny the Student a FAPE during the 2017–18 school year by removing goals, supports and services from his IEP that had been part of his IEP for the 2015–16 school year?*

The Parent's Complaint concerning BCPS's alleged denial of a FAPE to the Student during the 2016–17 and 2017–18 school years is flawed, because the Parent grounds her Complaint on three important unproven assertions. Those assertions are: (1) the Student has a developmental disability, (2) the Student has a learning disability and (3) BCPS staff members at ██████ ES systematically (and presumably arbitrarily), removed goals, supports and services from the Student's IEP. I will address each one of those flawed assertions in turn.

The Parent contends the Student had (and has) a developmental disability. None of the voluminous documents offered by the parties during the hearing, nor any witness, confirmed that the Student ever had a developmental disability. A mere contention without any support carries no evidentiary weight.

The Parent also maintains the Student has a latent learning disability that testing by BCPS has failed to discover. BCPS's assessments produced no evidence that the Student has a learning disability. The Parent produced no contrary *expert* testimony or documentary evidence from an expert to try to prove that the Student might have a learning disability. Moreover, every school-based assessment dating back to the Student's kindergarten year indicates that the Student functions educationally in the average ranges, which is consistent with his abilities. Most recent testing in 2017 revealed that the Student is capable of performing grade level work. Earlier testing, however, showed something even more striking—during a Speech and Language Assessment performed in May 2013, the Student had an expressive language score that was higher than his receptive language score. This inverted score strongly suggests that the Student

has attention issues, which skewed results of that evaluation, because individuals usually cannot speak about more than they know.

With regard to BCPS IEP Team members at ██████ ES systematically removing goals, supports and services from the Student's IEP, an examination of the salient parts of the Student's IEPs from late 2015 through late 2017 shows this did not occur. While the school-based members of the IEP Team removed some goals, supports and services from the Student's IEP, they added, changed and refined others. When removal of a goal, support or service took place, school-based IEP Team members provided a basis for that removal. An example of this occurred in the spring of 2017, when the Student met his Written Language goal. The Student had been receiving OT services to help him improve his handwriting. When the Student met his Written Language goal on April 6, 2017, however, the school-based members of the IEP Team removed the Student's Written Language goal, but did not remove OT services from his IEP.

The Parent has also alleged that BCPS staff at ██████ ES committed two significant procedural errors during the IEP Team meeting process that deprived the Student of a FAPE. First, the Parent contends that school-based IEP Team members always rejected out of hand any suggestions that she made to modify the Student's IEP. She insists that once ██████ ES staff drafted an IEP for the Student in anticipation of the IEP Team meeting and mailed it to her for her review, the team would always refuse to consider any of her suggested changes. Second, the Parent contends that ██████ ES staff has refused to share Student progress reports to allow her to monitor the Student's academic performance.

As noted earlier, procedural errors committed by a school district can be grounds for finding a denial of a FAPE. *Rowley*, 458 U.S. at 206; *Hall*, 774 F.2d at 635. Nevertheless, the procedural error at issue must be such that it has caused a student to lose educational

opportunity. *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); *Tice*, 908 F.2d at 1207; *see also G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 949 (1st Cir. 1991).

Here, either school-based IEP Team members did not commit any procedural errors or, even assuming *arguendo*, that they did commit them, those errors did not deny the Student a FAPE. Although 20 U.S.C.A. § 1414(d)(1)(B)(i) and 34 C.F.R. § 300.321(a)(1) state that parents are necessary members of any IEP Team, no statutory or regulatory authority requires school system participants in an IEP team meeting to incorporate parent suggestions into an IEP.¹⁵ Moreover, 34 C.F.R. § 300.322(a) states the following as it relates to parent participation in IEP Team meetings:

(a) Public agency responsibility—general. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including—

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place.

The evidence indicates, however, that school-based members of ■■■■■'s IEP Teams considered what the Parent suggested during the IEP Team meeting process and actually incorporated some of her suggestions into the Student's IEP. Oftentimes, though, they incorporated the Parent's suggestions in ways that differed from what the Parent had originally proposed. For example, on December 6, 2016, when the ■■■■■ IEP Team was considering changes in the Student's BIP after the Student had started exhibiting tantrum and eloping behaviors, the Parent balked at considering changes to the Student's BIP until ■■■■■ completed a new FBA. School-based IEP Team members agreed with the Parent that the Student needed an updated FBA and scheduled an FBA for the Student—along with a full battery of other

¹⁵ It is true that *Andrew F.* states that the act of crafting an IEP is one that will be "informed" by "the input of the child's parent or guardian." *Andrew F.*, 137 S. Ct. at 999. Nevertheless, that case does not mandate school-based members of an IEP Team to incorporate Parent suggestions into an IEP.

evaluations. The IEP team completed that FBA on January 19, 2017. Another example of the school-based IEP Team taking a suggestion from the Parent was during the March 16, 2017 IEP Team meeting. The Parent shared a behavior-tracking chart she had made with the school-based members of the team. The Parent suggested that the Student could use this chart to track his behaviors while in class. The chart included ten categories and fifty-two items for the Student to check off so he could self-monitor during the school day. The team discussed the Parent's proposed chart and considered it too overwhelming for the Student to complete. The school-based team members recommended an alternative monitoring chart that the Student could use that would not be so overwhelming. Although the school-based members of the IEP Team did not agree to the Parent's proposed behavior monitoring chart for the Student, they recommended a less daunting, similar chart for him and incorporated self-monitoring chart use into the Student's IEP.

With regard to sending her draft IEPs in advance, that practice not only does not violate the law, it conforms to it. Section 8-405(d)(1)(i) of the Maryland Education Article states the following:

(d)(1)(i) Except as provided in paragraph (2) of this subsection, and subject to subparagraphs (ii) and (iii) of this paragraph, at least 5 business days before a scheduled meeting of the individualized education program team or other multidisciplinary education team for any purpose for a child with a disability, appropriate school personnel shall provide the parents of the child with an accessible copy of each assessment, report, data chart, *draft individualized education program*, or other document that either team plans to discuss at the meeting.

Md. Code Ann., Educ. § 8-405(d)(1)(i) (emphasis added).

With regard to ■■■■ ES staff providing the Parent progress reports, the Parent was vague. She had a number of Post-It notes pasted to her exhibits, such as 4/4, 8/8 and 16/16, indicating that ■■■■ ES staff failed to provide her with certain Student progress reports (including standardized test results), but specifics are lacking. Again, though, even if ■■■■ ES staff had been

remiss in providing the Parent with Student progress reports (which I am not finding), the Parent did not connect that alleged violation with any loss of educational benefit that the Student might have suffered. Consequently, the Parent is not entitled to any remedy vis-à-vis progress reports.

In contrast to the nebulous case that the Parent presented, BCPS solidly backed its case with evidence from its experts and many documents. Two witnesses in particular—Ms. [REDACTED] School Psychologist, and Ms. [REDACTED] Behavioral Interventionist—firmly established that the Student is eligible for Special Education, not as a Student with a developmental disability or learning disability, but as a student with an OHI, namely ADHD. In commenting about the results of her psychological testing, Ms. [REDACTED] bluntly asserted, “There is nothing out of the ordinary about [the Student].” According to Ms. [REDACTED] the Student’s lack of attention and attendant behavioral problems are the culprit in preventing him from being available for education in the classroom. Ms. [REDACTED] noted the Student has consistently tested in the average or, in some cases, above average range on tests measuring his intelligence.¹⁶ Educational testing that Ms. [REDACTED] conducted shows that the Student is capable of assimilating grade level material in his core subjects of ELA and Mathematics. This means the Student is accessing the general curriculum and *is* learning. Yet, Ms. [REDACTED] testified that despite the Student having the capability to learn, his misbehavior in class impedes that process. As the Student’s Behavioral Interventionist, she has attempted to devise calming strategies and ways to turn the Student’s negative behavior into positive behavior. For example, if the Student wants to elope from class, she has encouraged the Student to take an in-class break.¹⁷ If the Student wants to avoid work, again, Ms. [REDACTED] has encouraged him to take a break or take deep breaths.

¹⁶ Ms. [REDACTED] conjectured that her testing might have actually underestimated the Student’s cognitive functioning, because of the Student’s “inconsistent attention.” In picture tests, for example, she described the Student as “fidgety,” and having a tendency to pick a picture answer without looking over all the options.

¹⁷ Ms. [REDACTED] wanted the Student to use a “flash pass,” so he could ostensibly leave the classroom with tacit permission at times that he wanted to elope. The Parent, however, vetoed that idea, because she did not want the Student to leave class.

The Student's ADHD and related behavioral issues have taken a turn for the worse recently, which according to Ms. [REDACTED] the Student's general education teacher, Mr. [REDACTED] and the Student's special education teacher, Ms. [REDACTED] have presented challenges for [REDACTED] ES's IEP Team. BCPS's expert witnesses and documents supporting their testimony showed that when the Student first came to [REDACTED] ES from [REDACTED] his IEP focused on having him maintain on task behaviors. (BCPS Exhibit No. 4/2.) Beginning in November 2016 (or the second quarter of the Student's third grade year), the Student began having tantrums (throwing objects and moving classroom furniture, for example) and eloping from class. As discussed above, this behavioral change required [REDACTED] ES to convene a number of IEP Team meetings in the late fall of 2016 and winter of 2017 to contemplate changes to the Student's BIP and, if necessary, his IEP. To reiterate, during the December 6, 2016 IEP Team meeting, school-based IEP Team members acquiesced to the Parent's request of having an updated FBA of the Student performed (along with the other assessments already alluded to). On March 16, 2017, the school-based members of the [REDACTED] ES IEP Team adopted a new BIP and IEP for the Student. The BIP contained workable strategies to address the Student's tantrums and elopement behavior, as suggested by Ms. [REDACTED] and the Student's April 6, 2017 IEP contained Behavior *and* Social-Emotional goals and objectives. The Parent refused to sign the April 6, 2017 IEP. Nevertheless, the programming by the school-based members of the IEP Team was "appropriately ambitious" to remove the implements to learning caused by the Student's ADHD and associated behavior problems existing at the time, as required by relevant federal and State statutes and regulations and in accordance with the *Rowley* and *Andrew F.* decisions.

During the beginning of Student's fourth grade school year (2017-18), the Student's behavior changed again. He went from throwing tantrums to resisting and refusing adult assistance. (Elopement remained an issue, but its prominence had diminished, for the most

part.¹⁸) The Student exhibited his recalcitrance by reacting to adult commands by, in one instance, telling his general education teacher, Mr. [REDACTED] his (Mr. [REDACTED]s) breath stunk and moving his desk away from him. (The Parent and Mr. [REDACTED] both related this incident when they testified.) Ms. [REDACTED], the Student's special education teacher, indicated that the Student now "refuses to work with any of us."

It is true that at the November 15, 2017 IEP Team meeting, the school-based members of the IEP team decided to remove social work services from the Student's IEP. The team's school-based members supported this decision by noting that the Student's assigned social worker, [REDACTED] wrote a report in which she recommended that other school-based staff, such as Ms. [REDACTED], Ms. [REDACTED], Mr. [REDACTED], Ms. [REDACTED], his guidance counselor, and the Student's in-class instructional aide, could provide the same services to the Student as she was providing. (The Parent, by contrast, did not want social work services removed; she wanted a new social worker assigned to the Student to replace Ms. [REDACTED].) Noteworthy, though, is that the Student's November 15, 2017 IEP retains a "Social Emotional—Increase self-control and positive self-expression" goal and related objectives. As Ms. [REDACTED] noted when she testified, as far as the school-based members of the IEP Team were concerned, the behavioral and social emotional services offered by [REDACTED] ES staff to the Student through his BIP and IEP were appropriate based on information that [REDACTED] ES staff had available at the time. I agree and find no denial of a FAPE based on the removal of social work services from the Student's IEP. I will add, however, that when the Student's tantrums morphed into resistance, [REDACTED] ES staff recognized the change and scheduled

¹⁸ There was an incident during the current school year in which the Student both refused to comply with adult directives and subsequently eloped from the classroom. Mr. [REDACTED] testified that during a lockdown drill, the fourth grade was outside and needed to come in. Seven students had to be pulled into another classroom to meet time requirements. Mr. [REDACTED] stated he had to follow-up and report these seven students missing. The Student came running in and took a paper towel to wash his shoes. Mr. [REDACTED] told the Student to go upfront, but he refused to comply. According to Mr. [REDACTED] the Student went around him and grabbed more paper towels, and Mr. [REDACTED] asked him again to go upfront. Mr. [REDACTED] reported that the Student then tried to leave the classroom, so he put his arms out, but the Student ran around them and ran out the door. Mr. [REDACTED] noted he had to put a call in to look for the Student.

an IEP Team meeting on January 31, 2018 to determine what needed to be done to address that change.

At the January 31, 2018, IEP team meeting, the school-based members of the team deemed it appropriate to get the Parent's permission for an updated FBA for the Student. The Parent gave that permission. School-based team members performed an updated FBA and drafted a BIP for the Student in March 2018, but PGES has not been able to implement a new BIP for the Student, because when the Parent requested the due process hearing on February 20, 2018, she placed a moratorium on further IEP Team meetings until the hearing process was completed. The actions of the school-based members of January 31, 2018 IEP Team under these circumstances in no way denied the Student a FAPE. The team endeavored to address the Student's educational needs by obtaining an FBA to modify his BIP and IEP. They have not been able to move forward to discuss the results of the FBA or the Student's new draft BIP, because of circumstances beyond their control.

As mentioned above in another context, the Parent has objected to the removal of a Written Language goal from the Student's IEP. The school-based members of [REDACTED] ES's IEP Team removed that goal beginning with the Student's April 6, 2018 IEP, because on March 24, 2017, his occupational therapist and teachers concluded that he had achieved that goal, which primarily concerned the Student's handwriting. I conclude that removing this goal did not deny the Student a FAPE. On IEPs predating April 6, 2017, the Student had objectives connected with his Written Language goal related to capitalization and punctuation. The Student mastered his capitalization and punctuation skills, so retaining a Written Language goal for these objectives after he achieved them would have been superfluous. Additionally, though, although school-based members of the IEP Team deleted the Written Language goal for the Student, it did not remove OT services from his IEP, although they reduced the amount of time he spent receiving those

services. There does not have to be goals and objectives for services. (34 C.F.R. § 300.320(a)(2)(i) requires measurable annual academic and functional goals; services are provided as a means for a student to attain those goals.)

With regard to OT services, the evidence reflects that the Student does not have as great a need for those services as the Parent believes. Ms. [REDACTED]'s OT Assessment revealed that the Student had average fine motor, visual perceptual/motor and visual motor integration skills. His classroom work from the previous and current quarter, during both structured and unstructured activities, revealed spacing accuracy across work consistently eighty percent or greater, most short samples being between eighty-eight to one hundred percent accurate for spacing between words. (BCPS Exhibit No. 6/55.) What is astounding, though, is that the Student is left-hand dominant, but because he has a painful cyst on his left hand, he has been compelled to use his non-dominant right hand to write. Neither party highlighted this fact during the hearing, although Ms. [REDACTED] alluded to it during her testimony almost as an aside. I find it remarkable that the Student can write as well as he can considering that circumstances have forced him write with his non-dominant hand.¹⁹ Based on Ms. [REDACTED]'s testimony, Ms. [REDACTED]'s assessment and common sense, I conclude a student with considerable OT needs would not have been able to adapt his non-dominant hand to write in the way the Student has done in such an extraordinary way.

I find no denial of a FAPE to the Student by BCPS during the 2016–17 and 2017–18 school years.

C. If BCPS denied the Student a FAPE during the 2016–17 and 2017–18 school years by removing goals, supports and services from his IEP for those school years that had been part of his IEP for the 2015–16 school year, is the Student entitled to reinstatement of all of

¹⁹ The Parent mentioned the Student's cyst on his dominant left hand during the December 6, 2016 IEP Team meeting and his need to his non-dominant right hand to write so as not to be in pain while writing. (BCPS Exhibit No. 10/5.) She mentioned the Student's cyst again during the November 15, 2017 IEP Team meeting, noting then that the Student will need surgery to remove it. (BCPS Exhibit No. 34/11.) The Parent did not explain why, to date, the Student has not had surgery to remove the cyst, so he could regain the full use of his dominant left hand.

the goals, supports and services that were components of his IEP during the 2015–16 school year?

For the reasons noted above, the Student's current IEP is designed to provide him with a FAPE based on data available through January 31, 2018. IEP Team members at PGES are in the process of recommending changes to the Student's BIP and his IEP to address his recent behavioral changes. The Student is not entitled to have his IEP changed so that it would be identical to the one he had at [REDACTED] during the 2015–16 school year, because the Student's behavioral needs stemming from his ADHD have changed.

D. *If BCPS denied the Student a FAPE during the 2016–17 and 2017–18 school years by removing goals, supports and services from his IEPs that had been part of his 2015–16 IEP, is the Student entitled to compensatory services to address his regression of his social and academic functioning stemming from BCPS's denial of a FAPE?*

Because BCPS did not deny the Student a FAPE during the 2016–17 and 2017–18 school years, he is not entitled to any compensatory services. Moreover, the Parent failed to prove that the Student regressed in his social or academic functioning. While the Student might be failing core classes, he remains functionally and educationally intact but for his ADHD and related behavioral issues.

E. *If BCPS denied the Student a FAPE during the 2016–17 and 2017–18 school years by removing goals, supports and services from his IEP that had been part of his 2015–16 IEP, is he entitled to a revision of his BIP?*

I shall answer the above-noted question, couched as an issue, by stating, yes, the Student is entitled to a revised BIP, but not because BCPS denied him a FAPE. He is entitled to it because school-based members of the Student's IEP Team agreed to develop a revised BIP for the Student based on the results of the March 12, 2018 FBA. This issue is moot because [REDACTED] ES

IEP Team members have drafted a revised BIP for the Student and are only waiting to schedule an IEP Team meeting where its school-based members can discuss that proposed BIP with the Parent.

F. *Should BCPS's denial of the Parent's request to have BCPS provide her with IEEs at public expense be affirmed?*

BCPS has met its burden of proof to show that it properly denied the Parent's request for IEEs at public expense. The Parent sought IEEs, as noted, because, with one exception, she essentially disagrees with the methods that BCPS's experts used in conducting them. Yet, the law does not mandate BCPS to comply with a parent's dictates when conducting evaluations (also termed "assessments"). Instead, its staff must conduct evaluations that comply with the requirements of 34 C.F.R. § 300.304 and COMAR 13A.05.01.05C. For ease of access, I am reproducing the standards that pertinent regulations state must be met when evaluating a child:

(b) *Conduct of evaluation.* In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) *Other evaluation procedures.* Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate

information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304. Similarly, COMAR 13A.05.01.05C provides:

C. Assessment Materials.

(1) A public agency shall ensure that testing and assessment materials and procedures used to assess a student's need for special education and related services are:

(a) Technically sound; and

(b) Provided and administered in the student's native language or other mode of communication, in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer.

The Parent requested BCPS provide five IEEs at public expense. Those evaluations consist of a Psychological Assessment, an Education Assessment, an OT Assessment, a Speech and Language assessment and an FBA. I shall address each in turn.

School Psychologist [REDACTED] performed psychological testing of the Student on January 26 and February 6, 2017. She used a variety of assessment tools in obtaining her results, such as employing technically sound testing instruments, such as the DAS-II, BASC-2 and Conners 3. She also considered teacher and student reports. All tests were in the Student's native language. By virtue of her being a school psychologist, Ms. [REDACTED] was qualified to perform a psychological evaluation of the child. She testified about how she administered the various testing instruments at the hearing. The Parent did not allege that the Psychological Assessment that Ms. [REDACTED] performed was in any way discriminatory or culturally inappropriate. There is no evidence that the one question about his family that the Student refused to answer had any bearing on the overall results of the Psychological Assessment. Therefore, I conclude that BCPS's Psychological Assessment complied with 34 C.F.R. § 300.304 and COMAR 13A.05.01.05C.

To recap, Ms. [REDACTED]'s psychological testing revealed that the Student's cognitive functioning, verbal ability, nonverbal reasoning and spatial reasoning were all in the average range for a child of the Student's age. He had a "clinically significant" score with regard to social/emotional and behavioral functioning, due to his ADHD. His very elevated levels of hyperactivity, inattention and executive functioning problems were consistent with the Student's

diagnosis of ADHD. These results are consistent with results obtained by other evaluators and the Student's classroom performance (when not affected by ADHD and behavioral issues).

The Parent complained that Ms. [REDACTED] had promised her that she would give the Student more time to complete tasks that were part of the various psychological subtests. However, the Parent failed to offer evidence to show that Ms. [REDACTED] failed to do this or, if she did not offer more time to the Student to complete tasks, whether this violated any testing protocol. In general, the Parent complained that she wanted BCPS's evaluators to have "her full input," when conducting the evaluations. The Parent cited no statute, regulation, case or other legal authority which requires evaluators to have a parent's "full input" when conducting evaluations. (This conclusion applies to all of the evaluations that BCPS's experts conducted, so I find no need to repeat this conclusion with respect to all of the other evaluations.)

Ms. [REDACTED] the special educator who performed the Educational Assessment of the Student on January 4, 2017, used the Woodcock Johnson IV Test of Achievement, which included various subtests in areas such as sentence reading fluency, broad reading, written expression, math facts fluency, math calculation skills, etc. All tests were in the Student's native language and not culturally biased. That testing revealed that when compared to others his age, the Student's individual cluster scores revealed that his skills were in the average range.

The Parent stated that she did not disagree with the results of the Student's January 4, 2017 Educational Assessment, but what the school-based members of [REDACTED] ES's IEP Team did with the results of that assessment. This is not a valid basis for a parent to seek an IEE under 34 C.F.R. § 300.502(b)(1). The Parent must actually disagree with the evaluation conducted by the school district.

The Parent objected to the Speech and Language Assessment completed by Ms. [REDACTED] on February 6, 2017, because Ms. [REDACTED] apparently did not incorporate a hearing component

as the Parent had requested. Again, the validity of an evaluation is not contingent upon the evaluator complying with every parent desire when evaluating a student. Moreover, although Ms. [REDACTED] did not give the Student a hearing test *per se*, she did administer the OWLS II to him in his native language. The OWLS II is a comprehensive language assessment tool that measures a student's oral language, *listening comprehension* and oral expression. Given that Ms. [REDACTED] assessed the Student's listening comprehension using the OWLS II, it follows that hearing would be a component of that subpart of the assessment. The Student scored 100 on the listening comprehension component of the OWLS II, which placed him in the fiftieth percentile of all third grade students or in the average range. Ms. [REDACTED] is a speech-language pathologist and, therefore, has the necessary credentials to perform a speech and language evaluation of the Student. The Parent never asserted that this evaluation was culturally biased. Given the totality of the circumstances, I conclude Ms. [REDACTED]'s Speech and Language Assessment complied with 34 C.F.R. § 300.304 and COMAR 13A.05.01.05C.

The Parent contends that BCPS's OT Assessment is invalid because it focused primarily on the Student's handwriting and was not done "in totality." This is not true. Ms. [REDACTED] performed a comprehensive OT Assessment of the Student on January 18, 2017 and February 7, 2017. As an occupational therapist, Ms. [REDACTED] is qualified to administer this evaluation. In performing her OT Assessment, Ms. [REDACTED] used clinical observations, a teacher interview and standardized testing (i.e., BOT-2), to perform her assessment. Ms. [REDACTED] did not only evaluate the Student's handwriting. Ms. [REDACTED] administered all testing to the Student in English. There is no evidence in the record that that evaluation was culturally biased.

As noted previously, the FBA is not at issue, because there has been no IEP Team meeting conducted to allow the team to discuss the results of that assessment. In short, there is

no “official” FBA with which the Parent can disagree until an IEP Team meeting takes place. *See* 34 C.F.R. § 300.502(b)(1). I made a ruling during the hearing concerning this matter as well.

IV. Conclusion

After two and half hearing days and many hours of examining the voluminous record in this case, I conclude that the Parent is doing the Student a disservice by continuing her quest to prove that he has a learning disability. The Student simply does not have a learning disability. Comprehensive testing by BCPS by qualified experts in multiple disciplines, not only in 2017, but also in 2013, has identified the Student’s disability as ADHD with an attendant behavioral component. That compound disability impedes the Student from learning in the general educational curriculum. BCPS’s rigorous testing has also shown that the Student has the capability to learn and learns when his ADHD/behavior is not a factor. Additionally, the poor handwriting samples that the Student has been producing more likely than not stemmed from the effects of a painful cyst on the Student’s dominant left hand that has compelled him to write with his non-dominant right hand. Possibly, once the Student has the cyst surgically removed from his left hand and can resume using that hand to write, his handwriting would improve markedly.

In OAH Case No. MSDE-BCPS-OT-18-05730, the Parent has not shown that BCPS denied a FAPE to the Student during the 2016–17 and 2017–18 school years and, therefore, is not entitled to any remedies. In OAH Case No. MSDE-BCPS-OT-18-10528, BCPS has shown that its evaluations of the Student were appropriate and, therefore, the Parent is not entitled to independent Psychological, Educational, Speech and Language and OT evaluations at public expense. In the case of the FBA, there is no FBA to which the Parent can disagree, because an IEP Team has not met to discuss the proposed March 12, 2018 FBA and related BIP with the Parent.

CONCLUSIONS OF LAW

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

1. Baltimore County Public Schools did not deny the Student a free appropriate public education during the 2016–17 and 2017–18 school years. 20 U.S.C.A. §§ 1400(d)(1)(A), 1414(d)(1)(A) (2017); 34 C.F.R. §§ 300.306(c)(2) (2017), 300.324–300.328; Md. Code Ann., Educ. § 8-403 (2018); COMAR 13A.05.01.07–.09; *Andrew F. v. Douglas Cty. Sch. Dist. RE-I*, 137 S. Ct. 988 (2017); and *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

2. Baltimore County Public School’s denial of the Parent’s request for IEEs at public expense should be affirmed, because its evaluations were appropriate. 20 U.S.C.A. § 1414(b)(2) and (3) (2017); 34 C.F.R. §§ 300.303–300.306 (2017); *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3rd Cir. 2012).

ORDER

I **ORDER** that:

The Parent’s Due Process Complaint filed on February 20, 2018 (First Complaint) **BE DENIED AND DISMISSED**; and I further,

ORDER that Baltimore County Public Schools’ denial of the Parent’s request for Independent Educational Evaluations at public expense (the Second Complaint) **BE AFFIRMED**.

May 25, 2018
Date Decision Issued

Signature Appears on Original

Thomas G. Welshko
Administrative Law Judge

TGW/sw
#173718

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 with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2018). 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.

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