

[REDACTED]

STUDENT

v.

BALTIMORE COUNTY PUBLIC

SCHOOLS

* BEFORE EILEEN C. SWEENEY,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-BCNY-OT-18-18944

* * * * *

DECISION

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STATEMENT OF THE CASE

On June 14, 2018, [REDACTED] (Parent), on behalf of her son, [REDACTED] [REDACTED] (Student), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Baltimore County Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA).¹ 20 U.S.C.A. § 1415(f)(1)(A) (2017).² A resolution meeting was held on July 5, 2018. On July 31, 2018, the OAH received a Notice of Outcome of Resolution Session signed by BCPS on July 5, 2018 and by the Parent on July 27, 2018, indicating that no agreement was possible.

¹ The Parent also requested mediation; however, BCPS declined.

² U.S.C.A. is an abbreviation for United States Code Annotated. Unless otherwise noted, all citations herein to the U.S.C.A. are to the current 2017 volume.

In the Complaint, the Parent alleges that BCPS violated the IDEA by denying the Student a free, appropriate, public education (FAPE) for the 2017-2018 and 2018-2019 school years.³ As remedies, the Parent seeks the development and implementation of an appropriate IEP, placement of the Student in an appropriate private placement funded by BCPS, and transportation to and from the private placement.

On August 1, 2018, I conducted a prehearing conference (Conference) in the captioned matter at the OAH in Hunt Valley, Maryland.⁴ I held the hearing on August 8, 2018. The Parent represented the Student in both proceedings; J. Stephen Cowles, Esquire, represented BCPS.

The legal authority for the hearing is as follows: 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a) (2017);⁵ Md. Code Ann., Educ. § 8-413(e)(1) (2018); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

In this case, although a resolution meeting was held on July 5, 2018, the parties did not agree in writing within thirty days of the OAH's receipt of the due process complaint that no agreement is possible. Thus, pursuant to the applicable federal regulation, a decision is due on August 28, 2018 (forty-five days after the thirtieth day following the OAH's receipt of the Complaint). 34 C.F.R. §§ 300.510(b)(1), (2), (c), 300.515(a).

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.

³ The Complaint also refers to an alleged violation of section 504 of the Rehabilitation Act, Title II of the Americans With Disabilities Act, 42 U.S.C.A. §§ 12132, 12134 (2013), but the Parent pursued only the issues relating to alleged violation of the IDEA, as indicated in my August 2, 2018 Prehearing Conference Report and Order.

⁴ A telephone prehearing conference scheduled for July 27, 2018 was postponed because BCPS' attorney had a documented pre-scheduled commitment.

⁵ C.F.R. is an abbreviation for the Code of Federal Regulations. Unless otherwise noted, all citations herein to the C.F.R. are to the 2017 volume.

ISSUES

(1) Did BCPS deny the Student a FAPE for the 2017-2018 and 2018-2019 school years by:

(a) Failing to develop and implement an appropriate IEP addressing bullying the Student has experienced on the school bus and at school;

(i) Was the alleged bullying so severe that the failure of BCPS to address it in the Student's IEP resulted in a denial of FAPE?

(2) Did BCPS deny the Student a FAPE for the 2017-2018 school year by failing to communicate daily with the Parent as provided in the Student's IEP?⁶

(3) Is the Student entitled to the following remedies:

(a) the development and implementation of an appropriate IEP that addresses the bullying the Student has experienced on the school bus and at school;

(b) placement of the Student in an appropriate private school funded by BCPS;

(c) transportation to and from the private placement?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parent:

Parent Ex. 1 October 12-13, 2017 email exchanges between the Parent and [REDACTED]
[REDACTED]

Parent Ex. 2 December 8-15, 2017 email exchanges between the Parent, [REDACTED]
[REDACTED] Ms. [REDACTED] and [REDACTED]

Parent Ex. 3 March 19, 2018 letter from Ms. [REDACTED] to the Parent

⁶ The Parent did not raise any other substantive issues and did not allege any procedural violations.

- Parent Ex. 4 March 15-20, 2018 email exchanges between the Parent, Ms. [REDACTED] Ms. [REDACTED] [REDACTED] "transportation-contactus," [REDACTED] and [REDACTED]
- Parent Ex. 5 June 2-11, 2018 email exchanges between the Parent, [REDACTED] [REDACTED]⁷ Ms. [REDACTED] and Ms. [REDACTED]
- Parent Ex. 6 March 1, 2018 email from [REDACTED] to the Parent; March 1, 2018 email from [REDACTED] to the Parent
- Parent Ex. 7 Middle School Report Card for the marking period ending June 15, 2018
- Parent Ex. 8 March 9, 2018 Teacher Summary Report
- Parent Ex. 9 Page from the Student's IEP, printed on March 27, 2018
- Parent Ex. 10 Page from the Student's IEP, printed on June 12, 2018
- Parent Ex. 11 December 21, 2017 letter from Ms. [REDACTED] to the Parent

I admitted the following exhibits on behalf of BCPS:

- BCPS Ex. 1 June 7, 2018 IEP
- BCPS Ex. 2 June 7, 2018 IEP Team Summary
- BCPS Ex. 3 March 27, 2018 IEP Team Summary
- BCPS Ex. 4 March 27, 2018 IEP
- BCPS Ex. 5 Not submitted
- BCPS Ex. 6 May 2, 2017 IEP
- BCPS Ex. 7 Not submitted
- BCPS Ex. 8 Not submitted
- BCPS Ex. 9 Not submitted
- BCPS Ex. 10 List of BCPS social work services provided during the 2017-2018 school year
- BCPS Ex. 11 October 12, 2017 Student Write-up

⁷ This individual was referred to alternately as Ms. [REDACTED] and Ms. [REDACTED]. For purposes of consistency, I will hereafter refer to her as Ms. [REDACTED]

- BCPS Ex. 12 December 11-12, 2017 Student Write-ups; December 8-11, 2017 email exchange between and among the Parent, Ms. [REDACTED] Ms. [REDACTED] Ms. [REDACTED] and [REDACTED]
- BCPS Ex. 13 Not submitted
- BCPS Ex. 14 March 13, 2018 Student Write-ups; two undated Student Write-ups; March 12, 2018 telephone message; March 12, 2018 email exchange between the Parent and Ms. [REDACTED] Ms. [REDACTED] and [REDACTED]
- BCPS Ex. 15 June 4-5, 2018 Student Statements; June 7, 2018 email from Ms. [REDACTED] to Ms. [REDACTED]
- BCPS Ex. 16 *Curricula vitae* for [REDACTED] and [REDACTED]

Testimony

The Parent testified and presented the following witnesses:

- [REDACTED] Jr. (Father)
- [REDACTED] (Aunt)

BCPS presented the following witnesses:

- [REDACTED] Special Education Teacher, [REDACTED] Middle School, accepted as an expert in special education
- [REDACTED] Assistant Principal, [REDACTED] Middle School, accepted as an expert in education

FINDINGS OF FACT

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

General

1. The Student is a twelve-year-old boy who is eligible for services under the IDEA as a student identified with autism.⁸ He has difficulty with communication skills and academics (retaining and applying skills). His cognitive functioning ranges from below average to average;

⁸ The Complaint indicates that the Student also has "Teerett's," which I assume refers to Tourette's Syndrome.

his best performance has been observed on measures of fluid reasoning. Expressive vocabulary is problematic, as is verbal working memory.

2. The areas affected by the Student's disability are Behavior, Reading, Mathematics, Communication, and Writing. As a result, his academic performance falls below grade expectancy in Reading, Writing, and Mathematics skills.

3. The Student requires the provision of special education and related services in order to participate fully in a general education environment. He requires support for attention and participation in order to complete classroom tasks. He requires support and modifications in order to complete reading, writing, and mathematics grade level assignments.

2016-2017 School Year at [REDACTED] Elementary School

4. During the 2016-2017 school year, the Student was a fifth grade student at [REDACTED] Elementary School, BCPS ([REDACTED]).

5. At the time of the Student's May 2, 2017 IEP, with regard to his Behavioral-Behavior present level of academic achievement and functional performance, the Student performed below grade level expectations in his social interactions and classroom behaviors. He was able to follow classroom routines with the help of his adult assistant and/or teacher. He had progressed nicely in his willingness to participate with the class. The Student was willing to work in small groups with a variety of adults and was willing to share his work with others. He continued to require an additional adult in order to help him process sensory needs and take breaks. He continued to struggle with sensory processing at times in the school setting. The Student's strengths included improved emotion management, improved impulse control, responsiveness to routines, strong family support, and work completion with direct adult support. His needs included on-task behavior and sensory processing.

6. At the time of his May 2, 2017 IEP, the Student's instructional grade level performances were 2.4 in Reading and 2.1 in Mathematics. With regard to Academic: Communication, the Student presented with a significant pragmatic language disorder and a moderate receptive/expressive language disorder, which had a negative impact on his academic performance in the classroom. In Academic: Writing, he had an instructional grade level performance of 3.7.

7. The Student's May 2, 2017 IEP did not require daily home-school communication.

8. The May 2, 2017 IEP contained the following supplementary aides, services, program modifications, and supports:

Program Modification:

- Altered/modified assignments daily as needed
- Break down assignments into smaller units daily as needed

Social/Behavior Supports

- Dismissal modification daily
- Encourage Student to ask for assistance daily as needed
- Provide manipulatives and/or sensory activities to promote listening and focusing skills daily as needed
- Advance preparation for schedule changes daily as needed
- Provide frequent changes in activity or opportunities for movement daily
- Home-school communication system daily as needed

School Personnel/Parental Supports

- School Counselor periodically as needed
- Occupational therapist consult periodically as needed
- Adult support daily in all settings⁹

9. The Student's May 2, 2017 IEP provided:

[The Student] benefits from daily home-school communication through his agenda and/or daily written notes in order to support increased positive behaviors within the school. [The Student] will be able to go to the resource room, office, or on a walk with an adult if he needs a break or quiet space to work. [The Student] will receive advanced warning about schedule change to reduce anxiety. The occupational therapist will be

⁹ See the clarification section indicating this was to occur in all general education settings.

available for sensory strategies and suggestions to the classroom teacher and/or the additional adult working with [the Student] to help him with sensory processing in the school environment as needed. [The Student] does well once he has adjusted to the classroom environment and he gets used to the new routines so suggestions may be more necessary in the early part of the school year. [The Student] requires encouragement to ask for assistance when needed. [The Student] will also be dismissed at the end of the day with his adult assistant 3-5 minutes before the rest of his classmates to assist with his anxiety when traveling in large groups.

(BCPS Ex. 6.)

10. The Student's May 2017 IEP provided:

[I]n all general education settings, [the Student] will receive additional adult support. This will aid his time on task, support comprehension through asking questions and paraphrasing, support [the Student] handling difficult feelings by offering breaks and walks, support [the Student's] social interactions through modeling and discussions and utilizing social stories in the moments. The adult assigned will utilize and promote skills learned in therapies across all settings. The adult assigned will support organization of classroom materials and daily routines, while promoting increased independence. The occupational therapist will monitor [the Student's] continued success with sensory processing in school and will be available for suggestions/strategies as needed. Due to [the Student's] anxiety he will have access to meet with the school counselor when needed.

(*Id.*)

11. The Student's goals and objectives as set forth in the May 2017 IEP were as follows:

Reading Goal: By May 2018, after reading or listening to a grade level text, the Student will respond in writing or verbally, describing the characters, setting, major events, and details with 70% accuracy.

Objective 1: After reading, viewing, or listening to a text at grade level, the Student will be able to answer explicit questions about the text in writing and/or orally with 80% accuracy.

Objective 2: After reading, viewing, or listening to a text at grade level, the Student will answer implicit questions about a text in writing and/or orally with 60% accuracy.

Written Language Goal: By May 2018, when given a topic prompt, the Student will compose a 5 sentence writing piece with 1 topic sentence, linking words/phrases (e.g. also, because, another), temporal words/phrases (e.g., first, next, last, before, as soon as), 3 detail sentences that are directly in support of the prompt and 1 conclusion sentence scoring 2 out of 3 targets.¹⁰

Objective 1: Given an instructional level writing prompt, the Student will be able to write a clear topic statement that establishes the focus of a text with 2/3 targeted trials.

Objective 2: Given an instructional level writing prompts, the Student will be able to write 3 correctly sequenced transition words/phrases (e.g. “also,” “either,” “actually”) within his paragraph with 2/3 target trials.

Objective 3: Given an instructional level writing prompt, the Student will be able to write, 3 details related to the topic with 2/3 targeted trials.

Objective 4: Given an instructional level writing prompt, the Student will compose a concluding sentence in relation to the topic and his details with 2/3 target trials.

Mathematics Goal: By May 2018, when given 5 words involving the addition or subtraction of fractions with like denominators, the Student will use a fraction strip broken into the same number of pieces as the denominator to solve by placing the first fraction on the fraction strip, then moving to the right when adding on or moving to the left when subtracting from a fraction with 80% accuracy.¹¹

Objective 1: Given math tools, the Student will highlight, circle, or underline relevant information necessary to solve grade level work problems that may include addition, subtraction, multiplication, division, and/or fractions with 80% accuracy.

Objective 2: Given a word problem at grade level, the Student will utilize his calculation tools in order to correctly plan and solve grade level word problems that may include addition, subtraction, multiplication, division, and/or fractions with 80% accuracy.

¹⁰ The IEP did not contain an accuracy percentage for this.

¹¹ The Mathematics goal at one point refers to 60% accuracy; however, the specific goal of 80% accuracy is otherwise referred to in the Mathematics goals and objectives.

Communication Goal¹²: When provided with an assigned responsibility and the rules for discussion, the Student will participate in and follow the rules of discussion by attending to the speaker and answering questions appropriately in 4/5 targeted trials with 4/5 targeted trials.

Objective 1: Given a model and no more than one verbal prompt, [the Student] will maintain topics of conversation by answering a variety of Wh¹³-questions with 4/5 targeted trials.

Objective 2: Given a model and no more than one verbal prompt, the Student will maintain topics of conversation by answering a variety of Wh-questions with 4/5 targeted trials.

Objective 3: Given a model and no more than one verbal prompt, the Student will be able to identify social problems and provide solutions to social problems when presented with social stories/scenes given cues and a model with 4/5 targeted trials.

Communication Goal: By May 2018, during a retell of a grade-level text, the Student will orally share at least 5 complete sentences to clearly retell the key events of the story, in (4 of 5) story-retelling opportunities with 4/5 target trials.

Objective 1: Given a model and no more than one verbal prompt, the Student will answer simple Wh-questions about a story using a complete, grammatical sentence with 4/5 target trials.

Objective 2: Given model and no more than one verbal prompt, the Student will use a complete sentence with appropriate grammatical structures to describe events/pictures in a story with 4/5 targeted trials.

Objective 3: Given a model and no more than one verbal prompt, the Student will give one synonym for targeted vocabulary from the story with 4/5 targeted trials.

12. The Student's May 2, 2017 IEP provided that he was to receive the following special education services:

- Classroom instruction in general education 5 sessions, one hour weekly. The Student was to receive support in reading and writing in the general education for 1 hour daily and support in mathematics for 1 hour daily. The Student benefited from small

¹² No goal date was included.

¹³ Who, what, when, and where.

group instruction, manipulatives, quiet settings, repetition and review, and consistent routines.

- Occupational therapy outside general education for one 15 minute session per quarter during the regular school year for sensory strategies and suggestions, with front loading services in the beginning of year to help him adjust to the new class environment. Dismissal routines had been beneficial for the Student.
- Direct speech/language therapy 1 time per week for 30-minute sessions for the duration of this IEP.

13. As of June 13, 2017, the Student was making sufficient progress to meet all of his goals.¹⁴

2017-2018 School Year at [REDACTED] Middle School

14. During the 2017-2018 school year, the Student was a sixth grade student at [REDACTED] Middle School, BCPS ([REDACTED] or school).

15. The IEP developed at [REDACTED] was implemented at [REDACTED] after the Student's arrival.

16. At all relevant times, the procedure at [REDACTED] for addressing a report of bullying was as follows: a form to report bullying is available in the Student Handbook, on the BCPS website, in the front office, and provided in a letter to parents.¹⁵ [REDACTED] Assistant Principal, speaks to the child making the report and asks for a summary in writing. She then speaks to the accused child and any witnesses the child states were there. Depending on the results of her investigation, Ms. [REDACTED] may or may not take disciplinary action against a student(s).

17. At the beginning of the 2017-2018 school year, the Student rode the regular school bus to and from [REDACTED]

¹⁴ I note that neither party submitted a copy of the Student's fifth grade report card into evidence. As discussed below, I have found that a comparison of his grades in elementary school with his grades in middle school serves little purpose.

¹⁵ As discussed below, the Parent contended that she was not made aware of such a form.

18. On October 12, 2017, the Student was involved in an incident on the bus with another student, [REDACTED]. The Parent notified the school on that date that the Student had reported [REDACTED] threatened him, and pulled his hair.

19. Ms. [REDACTED] investigated the October 2017 bus incident. She spoke to the Student and [REDACTED] and obtained written statements from them and any alleged witnesses.¹⁶

20. The Student told Ms. [REDACTED] that he and [REDACTED] had been going back and forth and that he put up his middle finger to [REDACTED]. In a subsequent Student Write-Up, he reported:¹⁷

I did a little accident this morning. I didn't mean to do this. [word redacted] kid threatened me on the bus. He put his hand between the seat and I accidentally pulled the middle finger up and I shouted "never¹⁸ do that" and that's the accident that I did and [illegible] [name redacted] said he was going to punch me.

(BCPS Ex. 11.)

21. The BCPS Counselor did a threat assessment of the October 12, 2017 incident and determined that "it was just two kids going back and forth." (Test. [REDACTED]) Ms. [REDACTED] directed the bus driver to separate the two students on the bus and asked him/her to monitor their interactions and report any concerns to her. She asked any teacher who had the two students together in class to monitor their interactions and report anything concerning to her.

22. Based on her investigation and the Counselor's threat assessment, Ms. [REDACTED] determined that "both sides played a role," and felt that she sufficiently resolved the matter by taking the aforementioned action. (*Id.*) She emailed the Parent advising of the action she had taken.

¹⁶ The BCPS exhibits did not include copies of written statements from [REDACTED] and/or any alleged witnesses; however, the Parent presented no evidence to contradict Ms. [REDACTED]'s testimony that she obtained those statements.

¹⁷ For purposes of clarity, I made some spelling and grammatical corrections to the students' error-riddled written statements. I did not make such corrections in communications from adults as I do not believe those errors will interfere with the reader's understanding of what was said.

¹⁸ The Write-up says "ever," but taken in context, I believe the Student meant to write "never."

23. At the time of the October 12, 2017 and subsequent bus incidents, the Parent asked to see bus tapes; however, it was not Ms. [REDACTED]'s practice to share bus tapes with a parent unless she was disciplining his or her child.

24. As of November 3, 2017, the Student was making sufficient progress to meet his Reading goal. He was doing an excellent job with comprehension Language Arts. In situations where he was having difficulty, he returned to "upgrade"¹⁹ and receive additional instruction. (BCPS Ex. 6.) He achieved approximately 70% accuracy toward his Reading goal. He had also demonstrated the ability to work well with a peer at developing a PowerPoint presentation.

25. As of November 3, 2017, the Student was making sufficient progress (more than 66% accurate) to meet his Written Language goal. He did a good job at completing graphic organizers with appropriate details and evidence. With adult support to scribe and help him remain organized in his oral expression, the Student created effective writing pieces to meet the demand of the prompt. He could create a topic sentence, develop two reasons with evidence, and choose transition words when given a choice or reminder.

26. As of November 3, 2017, the Student was making sufficient progress to meet his Mathematics goal. During the first quarter, using a standard algorithm, he was 50% accurate when working independently. Given 1-2 prompts and graphic step/concept organizers, the Student's success rate went up to 60% or higher.

27. As of November 3, 2017, the Student was making sufficient progress to meet his first Communication goal. He remained very quiet in conversation unless prompted to speak. With a prompt he maintained conversations by commenting, (not asking questions) generally in 3 out of 5 trials. With a prompt nearly every occasion, the Student would maintain a topic of conversation by answering a question. He was able to identify problems and provide solutions to

¹⁹ Neither party explained this term.

problems when presented with an activity in 4 out of 5 trials. The Student generally needed to be brought back to attention several times in a lesson.

28. As of November 3, 2017, the Student was making sufficient progress to meet his second Communication goal. In a limited sample, he was answering wh-questions in 2 out of 3 trials. He used sentences to describe events in a story.

29. The Student received the following grades for the first quarter:

Physical Education	B
Reading Foundations	S
Science	B
World Cultures	D
Language Arts	C
Art	A
Mathematics	C

30. The course work at [REDACTED] was different from the course work at [REDACTED]. The Student did well considering the generally difficult transition from elementary to middle school.²⁰

31. On December 8, 2017, the Student was involved in another incident on the bus where [REDACTED] hit him on the head. On that same date, the Parent reported the incident to the school; she sent a follow-up email on December 11, 2017.

32. Ms. [REDACTED] spoke to the Student and [REDACTED] and obtained written statements from them and any alleged witnesses. She emailed the Office of Transportation requesting the bus tape and advising that a parent had reported an issue on the bus.

33. On December 11, 2017, the Student reported in a Student Write-up as follows:

On Friday, December 8, 2017, the [name redacted] kid came to me and hit me on the head super hard on the bus when there was a substitute driver on the bus and he did not get caught on the bus.

(BCPS Ex. 11.)

²⁰ The Parent testified that the Student got all A's and B's at [REDACTED] however, neither party submitted the Student's fifth grade report card into evidence showing his grades and the courses he took. As discussed below, I have found that comparison of the Student's grades at [REDACTED] and [REDACTED] serves limited purpose.

34. On December 11, 2017, [REDACTED] reported in a Student Write-up, "I did not hit anybody." (BCPS Ex. 12.)

35. On December 11, 2017, [REDACTED] and [REDACTED]'s older brother threatened to beat-up the Student on the bus. On that same date, the Parent reported the incident to the school.

36. On December 12, 2017, [REDACTED] tried to take the Student's cell phone on the bus. On that same date, the Parent reported the incident to the school.

37. On December 12, 2017, [REDACTED] Principal, [REDACTED] emailed the Parent that she or Ms. [REDACTED] would be in touch with her when they received the tape. On December 14, 2017, the Parent sent a follow-up email to the school.

38. After Ms. [REDACTED] viewed the bus tape showing [REDACTED] hitting the Student on the back of the head, [REDACTED] was suspended for two days;²¹ Ms. [REDACTED] also spoke to the bus driver and asked him to separate the two students on the bus. On December 15, 2017, Ms. [REDACTED] emailed the Parent advising her of the action she had taken.

39. On December 21, 2017, Ms. [REDACTED] sent a letter to the Parent, stating:

This letter provides a summary of the results of the investigation of the initial report of bullying [by [REDACTED] made on behalf of your son

Please be advised that a thorough and impartial investigation was conducted into the allegations raised in the report. The process of the investigation involved the following actions: personal interviews, including the victim; review of records; review of video; review of statements; consultation with staff and administrators; interviews with the alleged perpetrator and witnesses.

As a result of the investigation it was determined that your child may have been the subject of bullying behaviors as reported. The school administration has handled this case by administering and implementing disciplinary actions consistent with Board of Education Policies and Superintendent's Rules 5510; Positive Behavior, 5550; Disruptive Behavior and 5580: Bullying, Cyberbullying, Harassment, or Intimidation.

²¹ As discussed below, Ms. [REDACTED] did not indicate in her testimony what her determination was with regard to the alleged threats made by [REDACTED]'s brother on December 11, 2017, and the Principal's December 21, 2017 letter to the Parent regarding the results of the investigation referred only to a report of bullying by [REDACTED]

Additionally, supports and/or interventions have been established for those involved.

Although I cannot provide details related to the actions against the perpetrator, I can assure you that [BCPS's] staff is committed to creating and maintaining a learning environment free from all forms of bullying. We are concerned that your child feels safe at school and ask that both you and your child report to this office any future problems which you believe constitute bullying. Supports are available if you or your child feels this would help. Please contact your child's counselor.

(Parent Ex. 11.)

40. As of January 19, 2018, the Student was making sufficient progress to meet his Reading goals. During the second quarter, when given limited or chunked text material, the opportunity to discuss the text and related background information, the Student was approximately 70% accurate for grade level summative assessments in ELS²² and World Cultures. The Student was more successful in his response to implicit questions when offered the opportunity to respond orally.

41. As of January 19, 2018, the Student was making sufficient progress to meet his Written Language goal. He remained better than 66% accurate in his work submitted, which was completed with adult support either at home or in school. The [REDACTED]'s Special Educator anticipated that as the year progressed, there would be additional opportunities for the Student to attempt lengthier writing assignments with more independence; she hoped to see the Student practice Speech to Text software and additional keyboarding to support his academic independence.

42. As of January 19, 2018, the Student was making sufficient progress to meet his Mathematics goal. During the second quarter, he used calculations tools including a calculator to independently solve word problems that involved addition and subtraction of fractions with like

²² Neither party explained this acronym.

and unlike denominators, with 40% accuracy. The Student demonstrated 60% accuracy with problems involving denominators.

43. As of January 19, 2018, the Student was making sufficient progress to meet his first Communications goal. Given a prompt, he joined into conversation by asking questions and making comments in 4 out of 5 trials. He also maintained conversation by answering questions in nearly 4 out of 5 trials. He was able to identify problems from scenarios and provide a good solution in nearly 4 out of 5 trials.

44. As of January 19, 2018, the Student was making sufficient progress to meet his second Communications goal. He was able to answer questions from a story, given choices, with more than 3 out of 5 trials. He was using complete sentences to describe events in a story. The Student was able to choose a synonym for a vocabulary word in a story in 4 out of 5 trials.

45. The Student's grades for the second quarter were as follows:

Physical Education	B
Reading Foundations	S
Science	C
World Cultures	C
Health	C
Language Arts	C
Art	A
Mathematics	B ²³

46. On March 1, 2018, the Student's Mathematics teacher, [REDACTED] emailed the Parent:

I think [the Student] may be over stimulated in my math class. During instruction, I can see the frustration in his face and hands and he is often not able to grasp the concept of what is being taught. When he is pulled out in small group it seems that he can focus better and actually "get" the concepts. I can see a big difference in his achievement since his one on one support has been pulled.

(Parent Ex. 6.)

²³ The Student's grade went down in Science, but his grades in World Cultures and Mathematics went up.

47. On March 1, 2018, [REDACTED] emailed the Parent:

[The Student] has been doing pretty well with getting assignments completed and transitioning from lunch to my class. He works great with adults in the room, and participates, though I'd like to see him participate a little more.

Here's Ms. [REDACTED]'s²⁴ feedback:

[The Student] is a joy to work with.

He does well with:

- Following Classroom Procedures
- Transitioning between classes

Using his green folder to keep his completed work together. This is more effective when he regularly uses his agenda book to keep track of work as well. He has a positive rapport with peers, primarily. Students are very supportive of him, especially, when they see his sillier/playful side.

(*Id.*)

48. On or about March 2, 2018,²⁵ the Student was involved in an incident on the bus with some seventh graders who took some of the Student's fundraising candy.

49. Ms. [REDACTED]'s investigation revealed that some of the seventh graders had said they would pay the Student the next day. She involved the families, the money was paid, and the students involved received consequences ranging from a parent conference, detention, and in-school suspension in the Resource Room. Ms. [REDACTED] also spoke to the bus driver.

50. Ms. [REDACTED] determined that the March 2, 2018 incident probably involved bullying or harassment.²⁶

51. On March 12, 2018, the Student was involved in an incident on the bus with [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]*. On that same date, the Parent notified the school the Student had reported that another student had pulled out an orange knife and put it near the Student's face.²⁷ Another

²⁴ Ms. [REDACTED] identified Ms. [REDACTED] as one of the Student's aides.

²⁵ There were no exhibits presented referring to this incident.

²⁶ Ms. [REDACTED] did not clarify how she reached that conclusion.

²⁷ It was later determined that the accused student was [REDACTED]

student (█) hit the Student in his arm, pulled his hair, and tried to choke him; other students (█), (█), (█), and (█*)²⁸ made threats and picked on the Student. The Parent also informed the school that the bus driver gave assigned seats that day and put the Student in the back of the bus.

52. On or about March 12, 2018, the Parent made arrangements to transport the Student back and forth to school with the help of the Aunt and the Father for the rest of the school year.

53. In response to the Parent's report, Ms. █ immediately contacted the Resources Officer and the next day █ was pulled off of the bus and searched; a hair pick was found on him. Ms. █ spoke to the students involved, obtained written statements from them and alleged witnesses,²⁹ and viewed the bus tape.

54. █ admitted that he talked to the Student but told Ms. █ that he was just using his hands and pointing the hair pick at the Student while talking to him.

55. On March 13, 2018, the Student reported in a Student Write-up:

(█), (█), (█), (█), and (█*) were threatening me on the bus and (█'s] brother put an orange knife in my face and said that I'm racist and they also said they will beat me up and kill me too.

(BCPS Ex. 14.)

56. On March 13, 2018, multiple students indicated in Student Write-ups that the Student had been using racial slurs on the bus on March 12, 2018. Several students heard him talking about guns. None of the students reported seeing a knife or hearing threats to beat up or kill the Student.³⁰

²⁸ I have used an asterisk to distinguish students whose names begin with '█'.

²⁹ I note that, except for the Student's, the names of the other writers were redacted, some of them entirely and some partially. It was difficult to tell whether the writer(s) were the accused or alleged witnesses.

³⁰ One student wrote, "I am not sure but I think one smacked him?" (BCPS Ex. 14.)

57. On March 13, 2018, the Student reported in a Student Write-up: "I was talking about guns and I said a lie about guns because they were threatening me." (*Id.*)

58. Because other students who were involved in or witnessed the March 12, 2018 incident reported to Ms. [REDACTED] that the Student said the Father had guns, Ms. [REDACTED] informed the Resources Officer of those reports. The Resource Officer and/or police subsequently searched the Father's home with his permission, finding no guns.

59. Ms. [REDACTED] determined that the March 12, 2018 incident did not involve bullying or harassment based on the Student's reported inappropriate language and "the not unwarranted response" as viewed by her on the bus tape. (Test. [REDACTED].)

60. On March 15, 2018, the Student was involved in another incident with [REDACTED]* in an area of the school known as the "Commons," when [REDACTED]* told the Student, "I will kill you." (Parent Ex. 4.) On or about that same date, the Student began picking his eyebrows and holding in tears, and the Parent notified the school of the incident and the Student's new behaviors.³¹

61. Mr. [REDACTED] (position with BCPS unknown) investigated the March 15, 2018 incident.

62. Between March 17 and 19, 2018, the Parent exchanged emails with the Transportation Office regarding her safety concerns and about viewing the bus tape.

63. On March 19, 2018, Ms. [REDACTED] sent a letter to the Parent, stating:

This letter provides a summary of the results of the investigation of the initial report of bullying or intimidation made on behalf of your son on March 1st and 12th, 2018.³²

Please be advised that a thorough and impartial investigation was conducted into the allegations raised in the report. The process of the investigation involved the following actions: personal interviews, including the victim; review of records; review of statements and

³¹ A June 10, 2018 email from the Parent indicates the Student also began trying to eat his eyebrow hairs, but it was not made clear when that behavior began. As discussed below, there was no evidence that the Student exhibited any of those behaviors in the school setting until June 2018.

³² As indicated, the letter did not address the alleged March 15, 2018 incident.

affidavits; consultation with staff and administrators; and/or interviews with the alleged perpetrator and witnesses.

As a result of the investigation it was determined that your child may have been the subject of bullying or intimidation behaviors as reported. The school administration has handled this case by administering and implementing disciplinary actions consistent with Board of Education Policies and Superintendent's Rules 5510; Positive Behavior, 5550; Disruptive Behavior and 5580: Bullying, Cyberbullying, Harassment, or Intimidation. Additionally, supports and/or interventions have been established for those involved.

Although I cannot provide details related to the actions against the perpetrator(s), I can assure you that Baltimore County Public Schools' staff is committed to creating and maintaining a learning environment free from all forms of bullying or intimidation. I believe these actions will eliminate the potential for further incidences of bullying or intimidation.

(Parent Ex. 3.)

64. Between March 19 and 20, 2018, the Parent and BCPS' Superintendent's Office exchanged emails relating to the Parent's safety concerns, dissatisfaction with the school's response, and about viewing the bus tapes.

65. As of March 27, 2018, the Student was making sufficient progress to meet his Reading goal. When given limited or chunked text material, the opportunity to discuss the text and related background information, the Student was approximately 73% accurate for grade level summative assessments in Language Arts and World Cultures. The Student continued to be more successful in his response to implicit questions when offered the opportunity to respond orally.

66. As of March 27, 2018, the Student was making sufficient progress to meet his Written Language goal. The Student continued to need significant help with writing assignments that were longer than two sentences. When he was provided academic tools such as organizers, paragraph frames, and/or copies of text (so he could highlight important details and vocabulary)

and direct support from an educator trained additional assistant, he could express himself accurately (greater than 65%) with grade level curriculum.

67. As of March 27, 2018, the Student was making sufficient progress to meet his Mathematics goal. The Student used calculations tools to work independently to solve real world problems. He could be stubborn at times about accepting help to improve his accuracy of a concept or new skill. He showed approximately 50% accuracy with problems involving fractions.

68. As of March 27, 2018, the Student had achieved his first Communication goal. The Student initiated conversations and maintained conversation by asking questions, commenting and answering questions in more than 4 out of 5 trials, given that he was not distracted. Given a scenario, he was able to identify problems and provide a solution in 4 out of 5 trials.

69. As of March 27, 2018, the Student was making sufficient progress to meet his second Communication goal. The Student was answering Wh-questions about a story and describing events/pictures, using complete sentences in nearly 3 out of 4 trials. He was able to provide a synonym for targeted vocabulary in nearly 3 out of 4 trials.

70. On March 27, 2018, an IEP meeting for the Student was held at [REDACTED] to conduct an annual review and determine extended school year (ESY) services.³³

71. At the time of the March 27, 2018 IEP meeting, the general educator expressed no concerns and indicated that the Student worked well within the group. The IEP Team discussed current progress and the IEP.

72. As of the date of the March 27, 2018 IEP meeting, the Student's Language Arts teacher had observed that the Student's participation had improved, he did "great with his

³³ The IEP team determined that the Student did not qualify for ESY.

P.A.”;³⁴ he completed assignments, homework, and projects and worked well with adults. (Parent Ex. 8.) He preferred to work alone and when assigned a group he did not actively participate.

73. As of the date of the March 27, 2018 IEP meeting, the Student’s Science teacher had observed that the Student was an excellent student: he worked hard and self-advocated. The teacher indicated that she would like to see the Student try to complete his work before relying on “Ms. [REDACTED]”³⁵ (Parent Ex. 8.)

74. As of the date of the March 27, 2018 IEP meeting, the Student’s Mathematics teacher had observed that the Student seemed to grasp mathematics concepts quickly. He needed calming tools, one-on-one adult support to provide focus with whole group distractions and to monitor his focus to completing tasks when working independently. The Student’s Mathematics Assistant had observed that the Student was willing to work if she sat down next to him; he did not ask questions if he did not understand. He needed socialization: he did not communicate with his peers.

75. As of the date of the March 27, 2018 IEP meeting, the Student’s Reading teacher had observed that the Student applied himself to all of his work, studies, and did his homework. He had needs in comprehension, making inferences and with reading fluency with complex-grade level test.

76. As of the date of the March 27, 2018 IEP meeting, the Student’s teachers had observed that the Student’s language had minimal to no negative impact on his educational performance. With regard to oral language skills within the classroom, the Student “sometimes” conversed with peers and participated in classroom discussions and applied conversation rules. (BCPS Ex. 3.)

³⁴ Neither party explained the abbreviation “P.A.”

³⁵ Neither party identified “Ms. [REDACTED]”

77. As of the date of the March 27, 2018 IEP meeting, the Student's teachers had observed that with regard to Social Interaction/Communication, the Student "sometimes to frequently" participated in group activities, interacted with adults and oriented/attended to the speaker; he "sometimes" interacted with peers and established friendships and "rarely to sometimes" understood slang. (*Id.*) With regard to conversational skills, the Student "sometimes to frequently" interrupted appropriately (one teacher stated, "rarely"), maintained topics appropriately, commented appropriately to indicate active participation, told story events in sequence, used an appropriate tone of voice, volume and rate and took turns appropriately in conversation. (*Id.*) With regard to nonverbal communication, the Student "frequently" respected personal space and "sometimes to frequently" used appropriate gestures, postures, facial expressions, and responded appropriately to nonverbal cues; he "sometimes" understood body language/facial expression. (*Id.*) With regard to academic communication, the Student "sometimes to frequently" interacted appropriately in structured group activities and participated in classroom discussions; he "sometimes" (one teacher said "rarely") responded to questions requiring inferential reasoning and understood others' intentions, thoughts, and perspectives. (*Id.*)

78. As of the date of the March 27, 2018 IEP meeting, the Parent had observed with regard to social interaction/communication that the Student "frequently" interacted with peers and familiar adults; he "sometimes" participated in group activities, established friendships, oriented/attended to a speaker, and understood slang and "rarely" interacted with adults in the community. (*Id.*) Regarding conversational skills, the Student "rarely" used an appropriate volume at home; regarding nonverbal communication; he "sometimes" respected personal space, understood/used body language/facial expression, and responded appropriately to nonverbal cues. (*Id.*) With regard to social communication, the Student "sometimes" gained the attention

of conversational partners appropriately, interacted appropriately in group activities, responded to questions with relevant information, understood figurative language, and understood others' intentions, thoughts, and perspectives. (*Id.*)

79. As of the date of the March 27, 2018 IEP meeting, the Parent had observed with regard to oral language skills that the Student's language was much improved, but that it continued to significantly impact his social interaction at home and in the community. She had observed that the Student sometimes had difficulty making appropriate, relevant comments during social interactions.

80. At the March 27, 2018 IEP meeting, the IEP Team offered special transportation; however, the Parent declined that offer for the remainder of the 2017-2018 school year, indicating that the Student's family members would continue to drive him to and from school; the Student would then ride the regular school bus during the 2018-2019 school year.

81. At the time of the Student's March 27, 2018 IEP, with regard to his Behavioral: Behavior present level of academic achievement and functional performance, the Student was still performing below grade level expectations in his social interactions and classroom behaviors. He was able to follow classroom routines with the help of his adult assistant and/or teacher. He was willing to participate by answering questions, or being a helper, however, he had a difficult time participating in a small group activity. He was willing to sit with the small group, but gave little to no input. The Student continued to require an additional adult in order to help him process sensory needs and take breaks. He continued to struggle with sensory processing at times in the school setting.³⁶

³⁶ The Student's strengths and needs remained the same.

82. At the time of the Student's March 27, 2018 IEP, the Student's instructional grade level performances were a 3.8 in Reading³⁷ (up from 2.4 in May 2017) and 4.0 in Math (up from 2.1 in May 2017). With regard to Academic: Communication, the Student presented with a moderate pragmatic language disorder³⁸ and a mild to moderate receptive/expressive language disorder, which has a negative impact on his academic performance in the classroom. In Academic: Writing, he had an instructional grade level performance of 3.7 (the same as in May 2017).

83. At the March 27, 2018 IEP meeting, the Parent shared concerns about the frequency of the Student's additional adult support. There was discussion about the Student's aide being taken away for part of the day earlier in the school year. Ms. [REDACTED] explained that the way the [REDACTED] IEP Team had written the service on the Student's earlier IEP only justified the Student having an aide for part of his day.

84. The following additional supplementary aids, services, program modifications and support was added to the Student's IEP:

Physical Environmental Supports

- Preferential seating daily

85. The following was added to the Supplementary Aids, Services, Program Modifications and Supports section of the Student's IEP with regard to physical/environmental supports:

Provision of an individual picture schedule system, available as a fixed classroom feature, or as a portable system to use in other school locations as needed during transitions between classroom activities and school/locations. Provision of preferential seating during group instructional situations. [The Student] should be provided preferential seating in all areas, even on the bus. [The Student] should be sat in the

³⁷ Ms. [REDACTED] testified that the reported 2.4 was a typographical error.

³⁸ The May 2, 2017 IEP indicated a significant pragmatic language disorder.

front of the bus. He should be given a visual tool to present to the bus driver.

(BCPS Ex. 4.)

86. The language of the Supplementary Aids, Services, Program Modifications and Supports section of the Student's IEP was modified to provide: "The designated one-on-one and additional adult supports will support organization of classroom materials and daily routines, while promoting increased independence. The occupational therapist will be available to consult with school staff as needed for suggestions regarding sensory strategies." (*Id.*)

87. The Student's Reading, Written Language, and Mathematics goals and objectives set-forth in the Student's March 27, 2018 IEP remained substantially the same as before.³⁹

88. A fourth objective was added to the first Communication goal in the Student's March 27, 2018 IEP: "Given a prompt as necessary, [the Student] will indicate attending in conversation by repeating what his peer has said, if questioned." (*Id.*)

89. The following second Communication goal and objectives were included in the Student's March 27, 2018 IEP:

Communication Goal: By March 2019, when provided with an assigned responsibility and the rules for discussion, [the Student] will participate in and follow the rules of discussion by attending to the speaker and answering questions appropriately in 4/5 targeted trials.

Objective 1: Given no more than one verbal prompt, the Student will listen and maintain topics of conversation by asking questions and making appropriate comments with 4/5 targeted trials.

Objective 2: Given prompting as necessary, the Student will make a good transition when indicating a change in a conversational topic with 4/5 targeted trials.

Objective 3: Given a model and no more than one verbal prompt, the Student will be able to identify social problems and provide solutions to social problems when presented with social stories/scenes given cues and a model with 4/5 targeted trials.

³⁹ An accuracy goal of 70% was added to the Mathematics goal.

Objective 4: Given a prompt as necessary, the Student will indicate attending in conversation by repeating what his peer has said, if questioned with 4/5 targeted trials.

90. The following changes were made to the Student's IEP with regard to special education services:

- Classroom instruction in general education 3 sessions, 50 minutes, daily. "[The Student] will receive support in reading and writing in the general education for all content subjects." (*Id.*)
- [The Student] will receive support in mathematics for 50 minutes daily. Occupational therapy outside general education for one session 15 minutes quarterly for sensory strategies and suggestions if needed.

91. There was discussion at the March 27, 2018 IEP meeting about counseling. The team recommended a social work referral. Ms. [REDACTED] and [REDACTED] (Administrator/Designee) were to submit the referral to [REDACTED] the school social worker. The Parent requested that counseling remain on the IEP.

92. The Student's grades for the third quarter were as follows:

Physical Education	B
Reading Foundations	S
Science	B
World Cultures	C
Language Arts	C
Art	B
Mathematics	C ⁴⁰

93. Beginning April 17, 2018, Ms. [REDACTED] saw the Student once a week during lunch bunch.⁴¹

94. While the Aunt was picking the Student up on June 1, 2018, she observed a Resource Officer move on from the hallway area and then observed two boys and a girl in the

⁴⁰ The Student's grade went up in Science, but his grades in Art and Mathematics went down.

⁴¹ For unexplained reasons, Ms. [REDACTED] did not see the Student on May 22, 2018. She did not see him on June 7 or 12, 2018 because he did not return to school after June 4, 2018.

hallway – one of them “wanted to throw a shoe in the can.” (Test. Aunt.) She heard the Student, who was behind the lockers, yell, “Leave me alone, [REDACTED] or I am going to get mad!”⁴² (*Id.*) She then saw three students surrounding the Student, and she asked them if there was a problem. The Aunt did not report the incident to the school; she told the Parent.

95. On June 2, 2018, the Parent emailed the school about the June 1, 2018 incident.

96. On June 4, 2018, in the cafeteria, the Student was involved in an incident with another student, [REDACTED]. They agreed to fight each other, the Student “bucked” at [REDACTED], and [REDACTED] hit the Student in the face.⁴³

97. On June 4, 2018, in Language Arts class, [REDACTED]* and the Student were involved in another incident during which they called each other names.⁴⁴

98. When he returned from school on June 4, 2018, the Student reported the June 4, 2018 incidents to the Parent. The Student told the Parent that he was scared to return to school and never wanted to go back to [REDACTED] again.

99. On June 4, 2018, the Parent emailed the school:

After several more recent bullying incidents (Friday 06/1/18 and Monday 06/4/18) I am formally requesting an emergency IEP to discuss [the Student’s] current placement. I have reached out to many different staff and tried several different approaches, services, accommodations over the last several months without resolve. [The Student] has always loved school and is now afraid to attend? [The Student] came home today and was very upset. He reported several different incidents that occurred today (starting at lunch time). He stated that he “is scarred to come to school” and “never wants to come back to [REDACTED] again.” He has been displaying new behaviors and regressing socially. I have strong concern for his safety and social ability to navigate through the hallways at [REDACTED] . . . with full support. I do not feel safe sending [the Student] back into school until we meet.

(BCPS Ex. 5.)

⁴² As discussed below, it was not clear made clear if this was [REDACTED]* who was involved in other incidents.

⁴³ As indicated below, [REDACTED] reported he hit the Student softly in the jaw.

⁴⁴ The Parent referred in her testimony to a third incident on June 4, 2018 in Science class, but did not provide the details of that alleged occurrence.

100. Ms. [REDACTED] investigated the June 4, 2018 incidents. She spoke to and obtained written statements from the Student and other students involved, as well as any alleged witnesses.

101. In a June 4, 2018 Student Statement, the Student wrote:

[REDACTED] was wanting to fight me at lunch and I agreed and I [illegible] fighting him because I was scared he gave me a [illegible] punch in the face and I got very mad because he wants to fight me. I bucked at him 4 times because I was mad. I was very scared to fight [illegible]. [REDACTED] told me to fight him and I did not want to. I should have said I do not want to fight and [REDACTED] told me to calm down.

(BCPS Ex. 15.)

102. In a June 5, 2018 written statement, [REDACTED] stated:

So I was at lunch. [The Student] was being dirty and then he said [he] wanted to fight me and bucked at me and said he loves me. Then I hit him soft in the jaw then walked to class and calmed down.

(*Id.*)

103. In a June [day illegible], 2018 Student Statement, another student wrote that in the cafeteria on June 4, 2018: “[The Student] kept saying that he can beat [REDACTED] up in a fight so then [REDACTED] got mad and punched [the Student] and then [the Student] did not do anything.” (*Id.*)

104. With regard to the June 4, 2018 incident in class involving [REDACTED]*, on a June [day illegible], 2018 Student Statement, the Student wrote:

I made fun of [REDACTED]* on accident. I made a mistake. “I should of didn’t do it” and Mrs. [REDACTED] sent me in the [illegible] and I went to the office to write a yellow sheet.

(*Id.*)

105. On a June [day illegible], 2018 Student Statement, [REDACTED]* wrote that in class, the Student called him “a fish” and that [REDACTED]* “did not say none to him.” (*Id.*) “Then he called me a dinosaur so I called him a faggot.” (*Id.*)

106. On June 7, 2018, the Student's Language Arts teacher emailed Ms. [REDACTED]

I don't recall how it started, [REDACTED] was upset about something [the Student] did or said. I asked [the Student] to apologize and he said he was sorry, but said [REDACTED]'s name wrong. I told him how to say [REDACTED]'s name, and he repeated the apology saying [REDACTED]'s name correctly. I told them both to pretend the other didn't exist and to ignore each other. [The Student] said "Ok, I'll just pretend he's a dinosaur." I then told [the Student] that I wanted to speak to him in the hallway, and he followed my directions. I wanted to just speak to him about what happened, and he wasn't in trouble with me. Before I walked out, [REDACTED] called [the Student] a "faggot." I then sent [REDACTED] to the office.

(Id.)

107. Based on her investigations, Ms. [REDACTED] determined that the June 4, 2018 incidents did not involve bullying because the Student was not a target – it was just two children engaged in a disagreement.

108. Ms. [REDACTED] allowed the School Counselor and Ms. [REDACTED] to handle and mediate the second June 4, 2018 incident.

109. Ms. [REDACTED] communicated with the teachers who had the students involved in the June 4, 2018 incidents at the same time in their class, asked them to separate the students, monitor their interactions, and bring any concerns to Ms. [REDACTED] or the School Counselor. Ms. [REDACTED] communicated with the IEP Team leader to ensure that if anything needed to be changed in the IEP, the Team leader had the necessary information.

110. The Parent kept the Student home from school after June 4, 2018 (nine days before the end of the school year).

111. As of the end of the 2017-2018 school year, the Student was making sufficient progress to meet his Reading goal. He was making progress with reading and answering questions about the text. When asked explicit questions about the text, the Student was orally able to answer 3 out of 4 questions accurately. When asked implicit questions about the text, the Student was orally able to answer 2 out of 4 questions accurately.

112. As of the end of the 2017-2018 school year, the Student was making sufficient progress to meet his Written Language goal. He was making progress with his written work. He was able to write a clear topic statement in 1 out of 3 trials. The Student was able to write 3 correctly sequenced transition words within his paragraph 1 out of 3 trials. He included 3 details related to the topic in 2 out of 3 trials. The Student was able to compose a concluding sentence in 1 out of 3 trials.

113. As of the end of the 2017-2018 school year, the Student was making sufficient progress to meet his Mathematics goal. He was making sufficient progress to solve grade level word problems including all operations. When asked to identify relevant information to solve a problem, he was able to identify the information and select the appropriate operation with 40% accuracy. The Student was able to utilize calculation tools in order to solve problems with 40% accuracy.

114. As of the end of the 2017-2018 school year, the Student was making sufficient progress to meet his first Communication goal. When given a model and one verbal prompt, the Student maintained conversation by asking and answering questions in 3 out of 5 targeted trials. He identified problems when given picture prompts in 4 out of 5 trials and provided solutions in 3 out of 5 trials.

115. As of the end of the 2017-2018 school year, the Student was making sufficient progress to meet his second Communication goal. When given a model and one verbal prompt, the Student was able to answer simple Wh-questions about stories in 3 out of 5 trials. He used complete sentences with appropriate grammar 3/5 trials and identified one synonym when given contextual clues in 2 out of 5 trials.

116. On June 7, 2018, the IEP team convened an emergency meeting pursuant to the Parent's request regarding bullying issues.

117. As of the date of the June 7, 2018 IEP meeting, the Student was still plucking his eyebrows and was trying to eat them; he had also been having nightmares.

118. As of the date of the June 7, 2018 IEP meeting, Ms. [REDACTED] had witnessed the Student "plucking himself in the face." (BCPS Ex. 1.)

119. On the day of the June 7, 2018 IEP Team meeting, the Parent arrived at [REDACTED] [REDACTED] approximately twenty minutes early to observe students' behaviors in the halls. She observed students hitting and groping each other in the hallway and "making out" in corners. (Test. Parent.)

120. At the June 7, 2018 IEP Team meeting, the Parent expressed concern about the Student's inconsistent additional adult support. She agreed that he requires support in order to be successful in school. She felt the Student's accommodations had not been met and that lack of communication with the Parent had been a huge issue.

121. The Parent was also concerned about bullying issues and indicated that after the last IEP meeting, she felt that things would be put in place to assist the Student with social interaction. She reported his plucking behaviors and that she believed he had socially regressed. Ms. [REDACTED] reported the plucking behaviors she had observed at school.

122. Ms. [REDACTED] shared that some reports of bullying were founded and some were unfounded due to the Student's role in them.

123. Special education bus transportation was offered but declined by the Parent. The need for counseling was discussed and social work services were added two times per week for thirty minutes.

124. Based on the Parent's concerns relating to social interaction and the Student's resistance to returning to school, the IEP Team felt that smaller classes with the same instruction would be beneficial on a non-permanent basis. The IEP Team felt that the Student could benefit

from a smaller classroom environment with a special educator as the teacher of record. Services were changed to reflect the Student receiving five sessions of OGE fifty minutes daily, with special education support for all major content subjects. He will receive mathematical instruction for one hour daily inside the general education setting with supports.

125. Adult support in unstructured times (e.g., hallways) from a single individual assigned to the Student was also added to the additional adult support he was already receiving in his classes. The Supplementary Aids, Services, Program Modifications and Supports section of the Student's IEP was modified to state:

[I]n all general education settings, [the Student] will receive a designated one-on-one special education employee for meeting him at his locker in the morning, hallway transitions, transitioning into and out of cafeteria and navigate safely to his bus or carpool at the end of day. The designated one-on-one special education [employee] will utilize and promote skills learned in therapies across all settings. During all scheduled classes that are OGE, an additional adult support or a designated one-on-one will aid his time on task, support comprehension through asking questions and paraphrasing, support [the Student] handling difficult feelings by offering breaks and walks, support [the Student's] social interactions through modeling and discussions and utilizing social stories in the moments. The designated one-on-one and additional adult supports will support organization of classroom materials and daily routines, while promoting increased independence. The occupational therapist will be available to consult with school staff as needed for suggestions regarding sensory strategies. Due to [the Student's] anxiety he will have access to meet with the school counselor when needed."

(*Id.*)

126. Small group for lunch was added to the Physical Environmental supports. Under the clarification section of Supplementary Aids, Services, Program Modifications and Supports of the Student's IEP was added: "Consideration should be taken during lunch time for [the Student] to eat in another location with an adult for a . . . quieter setting with less distraction. This could be in a small lunch bunch or alternate location such as a resource room or teacher classroom." (*Id.*)

127. The following goal and objectives were added to the Student's IEP:

SEL – Anxiety Management and Self Advocacy Goal: By March 27, 2019, during a frustrating moment that interrupts a school activity, the Student will use a calming strategy and with support, will respectively advocate for himself, and return to the activity within 4-6 minutes, for 4 out of 5 frustrating moments, with 4 out of 5 targeted trials.

Example frustrating moments:

- Schedule changes
- Non-preferred tasks
- Conflicts with classmates

Example teacher prompt:

- "Let's take three deep breaths."

Example student response:

- Student takes three deep breaths and returns to activity.

Objective 1: The Student will use a pre-taught calming strategy (Social Thinking Strategies, breathing, progressive muscle relaxation, mindfulness strategies, brief sensory breaks, brief breaks, etc) in 4 out of 5 frustrating moments, with 4 out of 5 targeted trials

Objective 2: After using a de-escalation strategy, the Student will use taught assertive language to respectively advocate for himself 4 out of 5 frustrating moments, with 4 out of 5 targeted trials.

128. Social work services were added due to the referral that was completed at the last team. (Ms. [REDACTED] had been seeing the Student weekly.)

129. On June 10, 2018, the Parent emailed Ms. [REDACTED], Ms. [REDACTED], Ms. [REDACTED] and Ms. [REDACTED].

After reading through the drafted IEP from Thursday/June 7 "emergency IEP meeting" requested, I noticed a LOT of information we discussed was NOT documented in the IEP? I want to again be clear and request my concerns to be documented in the "parental input section" of the IEP.

I want [the Student's] IEP to clearly state that I have:

1. I have requested a unilateral placement outside of the public school setting due to the ongoing unresolved bullying over this school year 2017-2018. I am also requesting the funding for the private placement more appropriate for [the Student].

2. Inform you that I am filing a complaint due to [REDACTED] . . . failing to provide [the Student] with F.A.P.E. in a timely manner
3. Document the new behaviors that I was concerned about along with the Special Educator noted? I informed the team how [the Student] has been plucking his eye brows and trying to eat them. He has also been having nightmares and social regression. Ms. [REDACTED] (special educator) noted that she has witnessed [the Student] "plucking himself in the face."

These are again very important to note in his IEP and I AGAIN request it all added to parental input section.

I was confused to why after the 2 and half hour team meetings my parental notes were not added? I thought the meeting was being recorded properly to document my ongoing, unresolved concerns for [the Student's] education being appropriate and acceptable for him to be SAFE and receive meaningful academics. I believe I was clear in stating many reason to feel as though [REDACTED] is out of compliance and failed to meet [the Student's] academic needs in a meaningful, timely manner.

I spoke with [the Student] about the idea of coming into the school to help process some of the final days of bullying that Ms. [REDACTED] suggested. He is still very closed off to the idea of ever returning to [REDACTED] I believe [the Student] has suffered some real emotional traumas over this last year especially his last day on Monday June 4th. I again have never seen my son respond the way he has been about the situations that occurred. Even with the adjustments and accommodations that were made were not enough to keep him safe. Please add all my information and concerns to the IEP.

(BCPS Ex. 5.)

130. On June 10, 2018, Ms. [REDACTED] emailed the Parent:

I have some concerns about the service page and putting [the Student] in outside General Ed. Classes. I know Ms. [REDACTED] says it's something that should "of or be" offered/tried, but I Believe it's moving [the Student] backward in terms of social skills and possibly even academics. Also as you pursue other placements, I'm not sure whether "OGE" classes might limit choices for [the Student]. I am going to do some research tomorrow and see if it matters as you look into other options.

(Parent Ex. 5.)

131. On June 10, 2018, the Parent emailed Ms. [REDACTED]

I truly believe we have done all we could to support [the Student] in the general education environment at [REDACTED]. I think that OGE should

have been recommended before the bullying continued and escalated to the point where [the Student] is not terrified of school. I am requesting compensatory education in a private school setting due to the violation of F.A.P.E. The school failed to resolve these issues and it has greatly effected his progress. I am looking into the best school options for [the Student] to be fully supported socially, emotionally and academically. I am not sure if I will be granted this request but I am going to try and move forward in this regard. I looked into [REDACTED] and would appreciate any recommendations. [The Student] has been moved to so many different schools over his years in a special education that it would greatly benefit [the Student] to find a school that goes to grade 12 so he doesn't have to adjust to another new school.

(Id.)

132. On June 11, 2018, Ms. [REDACTED] emailed the Parent:

The [REDACTED] certainly is one to explore.

I understand the concern you have about the bullying situations this year. Sadly, I don't believe, at least here at [REDACTED], that OGE would keep that from occurring. Maybe minimize the occurrences, at best. I say this because our kids who are currently in OGE move throughout the building at the same times as their grade peers for class transitions and lunch, as well as attend specials with the general education population. This also includes going in and out of lockers (the Commons) and to and from the bus. In a public setting, I think a Designated adult one on one support (that is scheduled and meets [the Student] with fidelity) can best support [the Student]. He or she can make/suggest adjustments to improve [the Student's] quality of education, safety, and mental health based on varied changes in either the school day or social interactions. Just subtitles like not going to the locker area, but rather keeping [the Student's] belongings in his homeroom or upstairs in guidance is sometimes helpful. Also, a daily log book that goes between the adult support and you can help you interpret some of the social conflicts that arise for [the Student].

ONE last College TRY . . . Please ask [the Student] if he would be willing to meet after school Thursday or Friday to enjoy a Rita's with Ms. [REDACTED] and myself. Of course this is only if it's not too inconvenient for someone to bring him to [REDACTED] for a ½ hour visit. The busses will be gone by 12:30, so anytime between then and 3:00 p.m. I completely understand if not. I just wanted to give him an opportunity to create a positive visual (and delicious) impression of Middle School.⁴⁵

(Id.)

⁴⁵ The Student did not accept Ms. [REDACTED]'s invitation.

133. The Student's grades for the fourth quarter were as follows:

Physical Education	C
Reading Foundations	S
Science	C
World Cultures	C
Language Arts	B
Art	B
Mathematics	C ⁴⁶

134. The Student received the following final grades⁴⁷:

<u>Course Name</u>	<u>Final grade</u> ⁴⁸
Physical Education	B
Reading Foundations	P
Science	C
World Cultures	C
Health	C
Language Arts	C
Mathematics	C

135. The Student was absent seventeen days during the 2017-2018 school year, including nine days he refused to return to school after June 4, 2018.

DISCUSSION

Applicable General Law

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. of the Hendrick Hudson Cent. Sch. Dist. 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 those required by the IDEA, through Title 8,

⁴⁶ The Student's grade went down in Physical Education and Science; his grade in Language Arts went up.

⁴⁷ No one explained the Annual Secondary School Performance Data Summary. (BCPS Ex. 9.)

⁴⁸ No one explained the Skills and Conduct grades.

Subtitle 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 education⁴⁹ and related services⁵⁰ 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]”).

A FAPE is defined as special education and related services provided at public expense, under public supervision, that meet the standards of the state educational agency, include appropriate education, and are provided in conformity with the child’s IEP. 20 U.S.C.A. § 1401(9).

An IEP is a written statement for a student that includes the following: 1) the student’s present levels of academic achievement and functional performance; 2) how the student’s disability affects the student’s involvement and progress in the general educational curriculum; 3) measurable goals; 4) a description of how progress will be measured; 5) the special education, related services, and supplemental aids and services the educational agency will provide the student; 6) an explanation of the extent to which the student will not participate in the regular

⁴⁹ Special education means specially designed instruction, 20 U.S.C.A. § 1401(29), and specially designed instruction means instruction that adapts the content, methodology, or delivery of instruction to ensure a student’s access to the general education curriculum. 34 C.F.R. § 300.39(b)(3).

⁵⁰ 20 U.S.C.A. § 1401(26) provides:

A) In general.

The term “related services” means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluative purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

classroom; and 7) the appropriate accommodations that are necessary to measure the student's academic achievement and functional performance. *Id.* § 1414(d)(1)(A).

In the case of a child whose behavior impedes the child's learning or that of others, the C.F.R. requires the IEP Team to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" 34 C.F.R. § 300.324(a)(2)(i).

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. *Andrew F.*, 137 S. Ct. 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.* at 999; *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. 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 child 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.⁵¹ *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 999 (citing *Rowley*, 458 U.S. at 203–04). However, for a student that is not fully integrated and/or cannot be reasonably expected to achieve grade-level

⁵¹ 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 205–06; *see also Bd. of Educ. of Frederick Cty. v. I.S. ex rel. Summers*, 325 F. Supp. 2d 565, 580 (D. Md. 2004).

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.*

An IEP must be developed through a collaborative process between the school district (including teachers and other school officials) and the student’s parents. *See id.* at 994. The process of developing the IEP must be a “fact-intensive exercise . . . [that is] informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians.” *Id.* at 999.

Additionally, “to the maximum extent appropriate,” an IEP should provide for a disabled child’s education in the least restrictive environment (LRE). 20 U.S.C.A. § 1412(a)(5)(A); *see also* 34 C.F.R. §§ 300.114-300.120; COMAR 13A.05.01.10A. “Mainstreaming of [disabled] children into regular school programs where they might have opportunities to study and to socialize with non[disabled] children is not only a laudable goal but is also a requirement of the [IDEA].” *DeVries ex rel. DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). However, while the IDEA’s mainstreaming provision establishes a presumption for a student to remain in the general education setting, it is not an inflexible federal mandate. *Id.* (“The Act’s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every [disabled] child.”). The IDEA explicitly states that removal of children from the regular educational environment is appropriate “when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C.A. § 1412(a)(5)(A). Congress thus recognized that regular classrooms are not always a suitable setting for the education of some disabled students, and the IDEA provides that federal funds may be used to educate some disabled students in private setting

at public expense. *Rowley*, 458 U.S. at 181 n.4; *see also* 34 C.F.R. § 300.115 (continuum of alternative placements). The nature of the LRE necessarily differs for each child, but could range from a regular public school to a residential school where twenty-four-hour supervision is provided. *See* COMAR 13A.05.01.10B.

A local educational agency will pay for a child's private school tuition when the child is placed in, or referred to, such a school by the State or the local agency as a means of complying with its legal obligations. *See id.* § 1412(a)(10)(B)(i).

In *Rowley*, the Supreme Court noted that state and local educational agencies are required to meet both the procedural and substantive requirements of the IDEA. 458 U.S. 176. If a reviewing court determines that a student was denied a FAPE, the court may “grant such relief as [it] determines is appropriate.” 20 U.S.C.A. § 1415(i)(2)(C)(iii). The ordinary meaning of these words confers “broad discretion” to the court to grant an appropriate remedy. *School Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369 (1985). An administrative adjudicator “has broad discretion to fashion a remedy where he finds that a school district has denied a child a FAPE[. . .] sitting in equity, [an administrative adjudicator’s] authority is flexible and case-specific.” *Lopez-Young v. District of Columbia*, 211 F. Supp. 3d 42, 57 (D.D.C. 2016) (citations omitted).

Illustrative of the broad grant of remedial authority and relevant here, courts have held that a “finding that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school” is not improper on its face. *Adams v. District of Columbia*, 285 F. Supp. 3d 381, 393 (D.D.C. 2018). “[T]his remedy was a reasonable reflection of the issues before the Hearing Officer and the administrative record. It appears, moreover, that such relief is not unusual in IDEA cases, including those in which the plaintiff requests private-school placement.” *Id.* (citing *Pinto v. District of Columbia*, 938 F. Supp. 2d 25, 28 (D.D.C. 2013) (noting that Hearing Officer determined that school system had

developed an inappropriate IEP, but declined to grant placement at private school and instead ordered District to “convene a meeting to revise [the] IEP as appropriate within 30 days of a written request by Plaintiffs”); *Struble v. Fallbrook Union High Sch. Dist.*, 2011 WL 291217, at *7–8 (S.D. Cal. Jan. 27, 2011) (rejecting argument that ALJ erred by “ordering the parties to meet again and develop a new IEP . . . rather than ordering a placement”). The *Adams* Court further explains:

Even when a Hearing Officer finds “an actionable violation of the IDEA,” courts have therefore upheld an HOD ordering the parties to “convene an . . . IEP meeting within ten days of [the decision]” so that prospective placement would “not be addressed by this Court, but instead, by the IEP team, as soon as practicable.” . . . Such relief comports with the collaborative, team-based process envisioned under IDEA as the best way of pursuing the “fact-intensive exercise” of “crafting an appropriate program of education” for students with disabilities.

Id. at 397.

As the moving party and the party seeking relief, the Parent bears the burden of proof, by a preponderance of the evidence.⁵² *Schaffer v. Weast*, 546 U.S. 49 (2005); Md. Code Ann., State Gov’t § 10-217 (2014). 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) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)); see also *Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

Law Relating to Bullying

The Supreme Court and Maryland courts have not yet defined “bullying” in the context of the IDEA. I find helpful the definition provided by the U.S. Department of Education in a

⁵² The Parent asserted that pursuant to House Bill 1489 (2018 Session), BCPS has the burden of proof in this case; however, that bill did not pass.

2013 Dear Colleague Letter providing guidance to schools relating to the bullying of students with disabilities:

Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g., cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Servs., *Dear Colleague: Bullying of Students with Disabilities 2* (Aug. 20, 2013), available at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf>.

The Office of Special Education and Rehabilitative Services (OSERS) and Office of Special Education Programs (OSEP) in the U.S. Department of Education have taken the position that “bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of [FAPE] under the IDEA that must be remedied.” *Id.* at 2-3.

Maryland has not yet addressed bullying under the IDEA. The Second Circuit recently addressed that issue in *T.K. ex rel. L.K. v. New York City Department of Education*, 810 F.3d 869 (2d Cir. 2016). In that case, the Parents of an autistic child specifically requested that the IEP team address bullying of their child on two occasions, but the school declined to do so. Frustrated by the school's refusal to address the alleged bullying in the context of the IEP, the parents unilaterally placed their child in a private school and sought reimbursement, alleging that the school's failure to prevent bullying deprived the child of a FAPE. The Second Circuit concluded as follows:

The Department's persistent refusal to discuss L.K.'s bullying at important junctures in the development of her IEP "significantly impede[d]" [the parents'] right to participate in the development of L.K.'s IEP. This constituted a **procedural** denial of FAPE⁵³

Id. at 877 (emphasis added) (citation omitted).

Because the court was holding that the school denied FAPE as the result of procedural violations, the court expressly noted:

[W]e also need not and do not reach the question whether the bullying at issue here was so severe that the failure to address it . . . resulted in a substantive denial of FAPE. For the same reason, we express no opinion as to whether the District Court's four-part test for determining when bullying results in the substantive denial of a FAPE correctly states the law.

Id. at 876 n.3.

The District Court had held:

[U]nder IDEA the question to be asked is whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities.

. . . .
Conduct need not be outrageous to fit within the category of harassment that rises to a level of deprivation of rights of a disabled student. The conduct must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment. . . .

The rule to be applied is as follows: When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future.

. . . .
It is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education. The bullying need not be a reaction to or related to a particular disability.

T.K. ex rel. L.K. v. N.Y. City Dep't of Educ., 779 F. Supp. 2d 289, 316-17 (E.D.N.Y. 2011).

⁵³ I note that the Parent in the case before me did not allege any procedural violations; she did not allege that BCPS failed to discuss the bullying with her.

That court further stated: “Where bullying reaches a level where a student is substantially restricted in learning opportunities she has been deprived [of] a FAPE. Whether bullying rose to this level is a question for the fact finder.” *Id.* at 318.

The Eastern District of Pennsylvania has also addressed the issue of bullying as it relates to the IDEA. *N.M. ex rel. W.M. v. Cent. Bucks Sch. Dist.*, 992 F. Supp. 2d 452 (E.D. Pa. 2014). In *N.M.*, the Court affirmed a Hearing Officer’s decision that a student with Post Traumatic Stress Syndrome (PTSD) was not denied FAPE based in part on bullying. The assistant principal had raised the issue of programs to address bullying and “collaborated with teachers to develop a plan to ‘quickly’ address ‘any issues that came up.’” *N.M.*, 992 F. Supp. 2d at 459. The school also placed the student’s locker “in a highly visible area,” arranged a place for him to go if a situation arose, and disciplined students identified as being involved in incidents that did occur. *Id.* Finally, the IEP team drafted an IEP that “contained significant changes to address the social/emotional needs of the student” and “a Behavioral Intervention Plan providing for coping skills, social skills, and self-regulating breaks.” *Id.* at 461. The Court also noted that the Hearing Officer found that the school’s proactive response included not just disciplining perpetrators, but also the administrator collaborating with the student’s teachers about observation and being proactive if they noticed any bullying. *Id.* at 470-71.

On the issue of bullying, the Hearing Officer found as follows:

[T]here is compelling evidence that the District did not deny the student FAPE in its handling of the student’s social/emotional needs. First, the District was proactive in every regard in its response to those needs when such needs were brought to its attention. Second, each District witness testified quite credibly that they saw no school-based difficulties with the student in terms of bullying or peer relations. Indeed, the District was never dismissive of any parent or student inquiry or request in [this] regard; but the District witnesses were all quite credible when they testified that such reports surprised them because they observed no incidents as suggested in the reports and the student’s general affect was engaged, pleasant, and seemingly not affected by the reported incidents.

Id. at 462 (citations to evidence omitted).

In *S.S. ex rel. Street v. District of Columbia*, 68 F. Supp. 3d 1 (D.D.C. 2014), the Parent sought injunctive and declaratory relief against the District of Columbia under the IDEA,⁵⁴ alleging among other things that the District of Columbia Public Schools (DCPS) violated the IDEA by failing to provide S.S. a FAPE due to disability harassment; failing to implement the IEP; failing to protect S.S. from bullying; and failing to provide home instruction. The court rejected the parent's argument that the Hearing Officer erred in finding that parent failed to prove S.S. was denied a FAPE due to disability harassment and bullying.

In *S.S.*, the Hearing Officer had found that the student missed 103 days of school in one school year due to hospitalization, and his absence—rather than bullying—resulted in failure to make academic progress during that year. *Id.* at 15. The Hearing Officer further found that the parent failed to show that S.S.'s fear and avoidance of school during another school year was due to bullying. *Id.*

In *M.L. v. Federal Way School District*, 394 F.3d 634, 650 (9th Cir.2005), the Ninth Circuit recognized that unremediated teasing by classmates can deny a FAPE. In that case, the court considered whether a teacher was deliberately indifferent to bullying and the abuse so severe that a child can derive *no* educational benefit.

In the case before me, BCPS stipulated that under some circumstances, bullying can result in the denial of a FAPE. This is consistent with the above case law and with the position taken by the U.S. Department of Education in its 2013 Dear Colleague Letter:

Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP. The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related

⁵⁴ The Parent also alleged violations of Section 504 of the Rehabilitation Act.

services are needed to address the student's individual needs; and revise the IEP accordingly. Additionally, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a parental request for an IEP Team meeting where a student's needs may have changed as a result of bullying.

Bullying of Students with Disabilities, supra, at 3.

The U.S. Department of Education elaborated in 2014 as follows:

[F]or the student with a disability who is receiving IDEA FAPE services . . . a school's investigation should include determining whether that student's receipt of appropriate services may have been affected by the bullying. If the school's investigation reveals that the bullying created a hostile environment and there is reason to believe that the student's IDEA FAPE services . . . may have been affected by the bullying, the school has an obligation to remedy the effects on the student's receipt of FAPE. Even if the school finds that the bullying did not create a hostile environment, the school would still have an obligation to address any FAPE-related concerns, if, for example, the school's initial investigation revealed that the bullying may have had some impact on the student's receipt of FAPE services.

.....
Ultimately, unless it is clear from the school's investigation into the bullying conduct that there was no effect on the student with a disability's receipt of FAPE, the school should, as a best practice promptly convene the IEP team . . . to determine whether, and to what extent: 1) the student's educational needs have changed; 2) the bullying impacted the student's receipt of IDEA FAPE services . . . ; and 3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly.

U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Servs., *Dear Colleague* 4-5, 7

(Oct. 21, 2014) (footnotes omitted), *available at*

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>.

The 2014 Dear Colleague Letter further indicates that changes that might trigger the obligation to convene the team and amend the student's IEP might include a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral outbursts, or a rise in missed classes.

Parties' Contentions

In her Complaint, the Parent alleged that the Student began to struggle at [REDACTED] as a result of bullying he experienced on the bus and in the school setting. According to the Parent,

although she notified the school immediately after each bullying incident and expressed her concern about the Student's safety, the school did not respond appropriately. Instead, the school minimized the bullying and its effect on the Student and inferred that he was at fault. Each time, the school would discuss new ways to support the Student but "would not consistently provide the supports or accommodations as written in his IEP to keep him safe or progressing."

According to the Parent, as a result of BCPS' failure to provide a FAPE, the bullying on the bus started to also occur at school and continued over the 2017-2018 school year. The Parent maintains that the bullying affected the Student's academic performance, social and emotional behavior and mental health, caused him to be unable to ride the bus, and ultimately caused him to resist attending school. Furthermore, according to the Parent, one of the resolutions offered by BCPS, i.e., more OGE, would be ineffective since most of the bullying took place outside of the instructional setting.

The Parent alleged that BCPS denied the Student a FAPE for the 2017-2018 and 2018-2019 school years by failing to develop and implement an appropriate IEP addressing the severe bullying the Student has experienced on the school bus and at school. She further alleged that BCPS denied the Student a FAPE for the 2017-2018 school year by failing to communicate daily with the Parent as provided in the Student's IEP.

The Parent contends that as a result of BCPS' failure to provide a FAPE, the Student is entitled to the development and implementation of an appropriate IEP that addresses the bullying the Student has experienced on the school bus and at school; placement of the Student in an appropriate private school funded by BCPS; and transportation to and from the private placement.

BCPS denies that it failed to provide the Student with a FAPE. It questioned whether the Student experienced bullying that impacted his ability to receive meaningful educational benefit.

It contends that [REDACTED] staff worked with the Parent to address the behaviors reported, including conducting thorough investigations and taking appropriate disciplinary action. BCPS also modified the Student's IEP to address those behaviors, adding social work services, additional adult services, self-management, and self-advocacy. According to BCPS, the Student made academic progress in the 2017-2018 school year as reflected in teacher reports, his grades, and his IEPs, and his IEP for the 2018-2019 school year will provide the Student with a FAPE.

Parent's Case

The Parent described the following incidents as they were reported to her by the Student, which she contended involved bullying:

- October 12, 2017: [REDACTED] threatened to punch the Student and pulled the Student's hair more than twice on the bus
- December 8, 2017: [REDACTED] punched the Student in the head on the bus
- December 11, 2017: [REDACTED] and his older brother threatened the Student on the bus
- December 12, 2018: [REDACTED] tried to take the Student's cell phone on the bus
- March 2, 2018: some seventh graders (whose names were not provided at the hearing) took part of the Student's fundraising candy on the bus
- March 12, 2018: [REDACTED] put a knife in the Student's face on the bus; [REDACTED] hit the Student on the arm; and [REDACTED], [REDACTED], [REDACTED] and [REDACTED]* threatened him
- March 15, 2018: [REDACTED]* threatened to kill the Student in the Commons
- June 1, 2018: three unidentified students surrounded the Student in the hallway
- June 4, 2018: [REDACTED] fought the Student in the cafeteria
- June 4, 2018: [REDACTED]* said unacceptable things to the Student in class

The Parent described her communications with the school regarding the incidents and BCPS' response, as set forth in my Findings of Fact. The Parent testified that she informed the BCPS Superintendent about the incidents because she wanted to get the Student services that

could help. According to the Parent, Ms. [REDACTED] told her that she had reviewed the bus tape from the March 12, 2018 incident and that the tape was “alarming.”

According to the Parent, the Student began showing new behaviors in March 2018 as a result of the bullying, i.e., plucking his eyebrows and eating them; Ms. [REDACTED] later observed the Student plucking at his face. The Parent also observed that he was having nightmares and she believed he was regressing socially.

The Parent testified that she learned at the Student’s annual IEP Team meeting on March 27, 2018 that information about the bullying had not been shared previously with the team. After that information was shared, the Team discussed services and accommodations to support the Student. A social worker was to do “lunch bunch” with the Student, but the Student told her that this did not occur.

According to the Parent, after the June 4, 2018 incidents, the Student came home crying. The Student told the Parent that he was scared to go to school and never wanted to go back to [REDACTED] again. He has not been back since.

At the Parent’s request, an emergency IEP meeting was held on June 7, 2018. The Parent testified that the changes to the Student’s IEP made at that meeting will not help the Student because they simply remove him from the general education setting and place him in more OGE classes. She emphasized that this will not help because the bullying was not taking place during instructional time. The Student needs additional supports outside the classroom, e.g., in the halls, lunchroom, and on the bus.

In addition, the Parent pointed out that Ms. [REDACTED] expressed concerns in emails about the service page of the revised IEP and about putting the Student in OGE classes. Ms. [REDACTED] also expressed to the Parent the belief that OGE would not keep bullying of the Student from occurring at [REDACTED] because OGE students move throughout the building at the same time as

their grade peers for class transitions and lunch, and attend specials with them. OGE students also move with general education students going in and out of lockers and to and from the bus. Ms. ██████ expressed her opinion in a June 11, 2018 email to the Parent that a designated adult one-on-one support scheduled to meet the Student “with fidelity” could best support the Student: “[h]e or she can make/suggest adjustments to improve [the Student’s] quality of education, safety, and mental health based on varied changes in either the school day or social interactions.” (Parent Ex. 5.) The Parent asserted that if this had been done before June 2018, it may have helped. However, now the Student is too scared to return to ██████. She also emphasized the chaotic nature of the hallway student interaction as observed by her on the day of the June 7, 2018 IEP Team meeting: she saw students hitting and groping each other and “making out” in corner and opined how difficult it must be for the Student to cope with.

According to the Parent, the Student’s grades went from all A’s and B’s at ██████ to C’s at ██████;⁵⁵ he passed but his grades show that his academics were impacted by the bullying.

The Parent referred to the School Personnel/Parental Supports of the Student’s March 27, 2018 IEP calling for Adult Support daily in all settings.⁵⁶ She complained that the aides who were supposed to be supporting the Student during the 2017-2018 school year were inconsistently provided, in particular in math class. According to the Parent, the Student was focusing more on surviving middle school than on his social skills and IEP goals. She testified that the Student “missed a few days from the bullying, but really so in June.” (Test. Parent)

The Father testified that he and the Parent are divorced, but they are “friendly co-parents.” The Student lives with the Father part of the week and the Father is involved with his schedule.

⁵⁵ Again, neither party submitted the ██████ report card into evidence.

⁵⁶ As discussed below, the comments on the March 27, 2018 IEP show that the Student was to receive additional adult support in all general education settings.

The Father testified that at the beginning of the school year, the Student used school bus transportation to get to and from [REDACTED]. The Father, the Parent, or the Aunt would make sure that he was getting on and off the bus, but they were working on having the Student be more independent.

The Father recalled that in March 2018, the Student came home from school with candy for a fundraiser. Half the candy was missing and the Student at first told the Father that it was given to him like that. He later told the Father that other students on the bus stole the candy. The Parent subsequently received a letter from the school saying it was being handled but the school could not disclose other information. According to the Father, he never gave the school permission to question the Student about the incident.

The Father testified that the Student told him he got picked on at school every day.⁵⁷ The Father also recalled that the Student had reported that he had been threatened with a knife on the bus.

The Father recalled that in March 2018, the police called his house because the Student had made comments that there were guns in the Father's home and that he (the Student) knew how to use them. (The Father was not sure if the Student made those comments to other students or to the police.) He allowed the police to look through his house and they found nothing. Around that time, the Parent and the Father decided not to let the Student take the bus to school anymore. They would drive him to school; in the afternoon, they or the Aunt would go to the office to sign the Student out and drive him home. Arrangements were made for the Student to be excused from his last class because of time issues and because it was better for him to avoid the mob in the hallway at regular dismissal.

⁵⁷ It was not made clear when the Student said this.

The Father testified that during the 2017-2018 school year, the Student indicated that he did not want to go to school “because of the situations.” (Test. Father)

The Father did not feel that [REDACTED] fully resolved the bullying issue. He testified that the Student passed all his academic classes, but struggled a lot during the 2017-2018 school year especially with Mathematics. According to the Father, at one point, the Student’s World Cultures teacher said the Student was doing “OK” but he was struggling. The Father was concerned that in order to get a passing grade in that subject, the Student had to pass the next test.

According to the Father, the Student got all A’s and B’s at [REDACTED]. At [REDACTED] he got C’s and D’s.

The Aunt testified that she lives next door to the Father and that the Student’s bus stop is approximately a five to ten minute walk from their homes. As she pulled into the street after picking up her children from school, she would see the Student walking from the bus to the Father’s home. She testified that she noticed the Student running home and he said someone was following him.⁵⁸ The Student did not talk to her about what was going on the bus.

The Aunt testified that she began picking the Student up at school at the Parent’s request “because of a lot of incidents on the bus” and that the Student would leave a class early. (Test. Aunt) She testified that “something was going on almost every day” in the hall, including cursing and things being thrown from a balcony. There is a camera, but she never saw teachers or other staff monitoring the hallways when she picked the Student up.⁵⁹

The Aunt testified that when she picked the Student up on June 1, 2018, after the Resource Officer had moved on, she saw two boys and a girl in the hallway – one of them “wanted to throw a shoe in the can.” (*Id.*) She heard the Student, who was behind the lockers,

⁵⁸ The Aunt did not say when this occurred or how, if at all, it related to bullying.

⁵⁹ The Aunt later testified that on June 1, 2018, she had seen a Resource Officer in the hallway.

yell, "Leave me alone, [REDACTED]⁶⁰ or I am going to get mad!" (*Id.*) She then saw three students surrounding the Student and she asked them if there was a problem. The Aunt did not report the incident to the school; she told the Parent.

BCPS' Case

Ms. [REDACTED] was admitted as an expert in special education. Ms. [REDACTED] testified that her duties as Special Education Teacher, [REDACTED] include acting as a case manager for special education students, managing IEP records, testing, teaching OGE class, and co-teaching in inclusion classes for various subjects. She has a Master's equivalency from [REDACTED] College in Special Education and has been a Special Education Teacher since 2008. She holds the following Maryland Professional Certifications: Advance Certification in Special Education, 1-8; Highly Qualified Elementary/Middle School General Education, 1-8; and Highly Qualified Middle School English/Language Arts.

Ms. [REDACTED] was familiar with the Student – she saw him daily during the 2017-2018 school year, in morning homeroom, and Mod 6. She was familiar with his IEPs for the relevant period. She testified an IEP developed at [REDACTED] was implemented at [REDACTED] after the Student's arrival. It included certain supports and services, such as altered and modified assignments, and an agenda book, which she described as a "communication system. The Student writes down information and the teacher initials or writes in it." (Test. [REDACTED]) He also had opportunities to use the sensory room if he was having an "edgy" day or access to an additional adult support who might take him to the library. (*Id.*)

Ms. [REDACTED] reviewed the Student's Reading, Written Language and Mathematics goals and testified that at the time of his March 27, 2018 IEP meeting, he was making sufficient

⁶⁰ It was not made clear if "[REDACTED]" was "[REDACTED]" but the Parent seemed to think so.

progress to meet those goals. He had achieved his first Communication goal and was making sufficient progress to meet his second Communication goal.

With regard to the Student's present levels of academic achievement and functional performance, Ms. [REDACTED] testified that at the time of his May 2017 IEP, the Student had an instructional grade level performance of 2.4 in Reading and 2.1 in Math. At the time of his March 27, 2018 IEP meeting, he had grade levels of 3.8⁶¹ and 4.0 respectively.

Ms. [REDACTED] testified that she participated in the Student's IEP meetings at [REDACTED]. She referred to a March 29, 2018 IEP Team Summary indicating that the Parent discussed issues the Student was having on the bus and his resistance to riding the bus. "The team discussed special transportation, however, [the Parent] would like to continue with the regular bus. She shared that [the Student] will not ride the bus for the remainder of the year, but will continue next school year." (BCPS Ex. 3.) Ms. [REDACTED] explained that a special education bus arrives at the school earlier so that at the first dismissal bell only a few students leave (with adult support) to get on the bus that is not shared with the general education population.

Ms. [REDACTED] testified that at the March 2018 IEP meeting, the Team generally discussed how the Student was progressing academically and accommodations and services were discussed. The school social worker, Ms. [REDACTED] discussed attention concerns and bus concerns, and she began working with the Student after that meeting.

When asked about the Student's social skills and interactions, Ms. [REDACTED] stated that she was "proud of him." (Test. [REDACTED]) She observed that he was usually laughing and joking in the halls, he was attentive to getting to class and lunch, and he understood his schedule. She did not notice problems he was having socially unless he brought it to her attention. She

⁶¹ Ms. [REDACTED] testified that the reported 2.4 was a typographical error.

explained that the Student got additional adult support, an aide or special education teacher in the room co-teaching, and he had a good relationship with his adult support.

Ms. [REDACTED] testified that the IEP Team also addressed the Parent's concerns relating to bullying at the June 7, 2018 IEP Team meeting. Social work services were added to the Student's IEP (she noted that Ms. [REDACTED] was already seeing the Student once a week at lunch bunch). They also discussed moving his lunch to different locations. Additional adult support was already in place, but the team discussed adding adult support in non-class settings.

Ms. [REDACTED] noted that the goals and objectives already in the IEP still met the Student's needs and testified that in June 2018, the team added a Social Emotional Behavioral goal in response to the Parent's concerns. It was her opinion that the related services set forth in the IEP also met the Student's needs. She noted that the team added two thirty minute social work services weekly, in either a small group setting or individually based on the Student's needs.

Ms. [REDACTED] testified that there was an increase in the Student's special education services on the June 7, 2018 IEP to make sure that he could still meet his academic needs. The Student is to receive five sessions of OGE fifty minutes daily, with special education support for all major content subjects. He will receive mathematical instruction for one hour daily inside the general education setting with supports.

Based on her informal testing, it was Ms. [REDACTED]'s opinion that the Student received educational benefit during the 2017-2018 school year. He had an increase in his present levels of performance in reading and math, he developed more independence in writing through the use of assistive technology, he was using cooperative learning opportunities and receiving positive feedback from teachers. He was working hard and receiving support at home. Ms. [REDACTED] testified that the Student's grades (mostly "C's") were not unusual for a sixth grade student, with

or without issues, transitioning from elementary school. She described his grades as “better than par” and emphasized that he was doing well after a huge transition.

When asked if she felt the incidents the Parent had testified about impacted the Student’s ability to receive educational benefit, Ms. [REDACTED] answered, “Broadly? No. He presented that he was on task when I saw him. I didn’t see behaviors altering his academics.” (*Id.*)

Ms. [REDACTED] was asked about an email she sent to the Parent on June 11, 2018. She testified that she did not have concerns regarding how additional adult support was written into the IEP and that in terms of academics, the Student’s needs could be met with general education or OGE. She testified that to her, on the one hand, OGE was going backwards and was unnecessary. On the other hand, she did not think OGE would harm the Student. Ms. [REDACTED] also noted that she “was always looking for the LRE.” (*Id.*)

On cross-examination, Ms. [REDACTED] testified that she heard vaguely in December 2017 that there had been some trouble on the bus but that it was being addressed. She was not aware until the March 27, 2018 IEP meeting that bullying was an issue for the Student. She was also not told that there was a problem with an agenda and/or daily written notes. She observed in Language Arts that the Student had an agenda book on his desk and that adult support checked it.

When asked on cross-examination if she believed the Student could have made more progress if he had not been focused on the bullying, Ms. [REDACTED] responded that she did not think his educational progress had been impacted.

When asked by the Parent if she believes the social goal of working independently in the classroom had been met, Ms. [REDACTED] responded that she felt the Student does well with supports and accommodations set forth in the IEP. When asked what supports were provided after bullying was discussed at the March 2018 IEP Team meeting, Ms. [REDACTED] referred to

“putting Ms. [REDACTED] into play to begin meeting with [the Student] at lunch bunch,” and clarification regarding support personnel in all his content areas.

In response to the Parent’s questions, Ms. [REDACTED] testified that it was her opinion that the Student made substantial progress, including socially and with goals of independence. She noted that his struggles were outside the classroom setting. When asked if she considered eight incidents from October 2017 through June 2018 to be a substantial amount of bullying for a sixth grade student, she responded – “If it was eight instances of being targeted.” (*Id.*) When asked if she agreed Ms. [REDACTED] should have advised her, as the Student’s special education case manager, of the bullying incidents, Ms. [REDACTED] responded that “[m]ore information is always helpful Bullying doesn’t necessarily have to do with an IEP. As case manager, it is good to know, but it is not something [I] would manage as case manager.” (*Id.*)

Ms. [REDACTED] did not agree that the change in the Student’s placement should have been made in October 2017. She felt that it was too soon after transitioning from fifth grade.

Ms. [REDACTED] was admitted as an expert in education. Ms. [REDACTED] has a B.S. in Elementary Education with Math Concentration from University of [REDACTED] and a Masters of Arts, Educational Leadership, from [REDACTED] University. She has the following Maryland Certifications: Highly Qualified in Middle School Mathematics; Highly Qualified Secondary Mathematics; Highly Qualified Elementary Education; and Administrator I. She was a Mathematics Teacher from 2003 to 2013. She testified that her duties as Assistant Principal, [REDACTED] include working with teachers to ensure the safety and security of the building, investigating reports of bullying, handling discipline, and working with the school counselor, IEP Chair and other staff.

Ms. [REDACTED] described [REDACTED]’s procedure for reporting and investigating bullying. There is a form available in the Student Handbook, on the BCPS website, in the front office, and

provided in a letter to parents. Ms. [REDACTED] speaks to the child making the report and asks for a summary in writing. She then speaks to the accused child and any witnesses the child states were there.

Ms. [REDACTED] testified regarding her investigation and determinations with regard to the reported incidents as discussed in greater detail below.

According to Ms. [REDACTED] transportation was discussed at the March 27, 2018 IEP meeting. In addition, the Student began receiving social services: Ms. [REDACTED] subsequently met with him on April 17 and 24, 2018, and on May 1, 8, 15, and 29, 2018.

Ms. [REDACTED] testified that an IEP meeting was held at the Parent's request on June 7, 2018. At that meeting, bullying/harassment was discussed. Ms. [REDACTED] shared that some bullying was founded and some was unfounded due to input from the Student. The need for counseling was discussed and special education bus transportation was offered but declined by the Parent. Social work services were added two times per week for thirty minutes (which she described as an increase from what had already been provided). In addition, based on the Parent's concerns relating to social interaction and the Student's resistance to returning to school, the Team felt that smaller classes with the same instruction would be beneficial on a non-permanent basis. Adult support in unstructured times (e.g., hallways) from a single individual assigned to the Student was also added to the additional adult support he was already receiving in his classes.

When asked by the Parent on cross-examination how she followed up to make sure that the aforementioned resolutions of the incidents had worked, Ms. [REDACTED] testified that because the Student stopped taking the bus after the March 2018 incidents, she did not have the opportunity to see if her resolutions worked in the context of the bus. She further testified that she felt the Student would be safe on the bus. She also noted that the Student had not returned to

school but testified that it is her practice to meet with the teachers as a group once a month to see if there are any new concerns and with the counselor and grade level coordinator once a week. She added that Ms. [REDACTED] would have been asked to monitor students involved in the incidents if she had them together in class.

Ms. [REDACTED] testified that it is typical for students at the middle school level to walk through the hall unattended during transitions such as to the bathroom. She acknowledged that for some parts of the day, all students transition at the same time. According to Ms. [REDACTED] the school also has hallway monitors, and teachers who are not in class monitor.

Ms. [REDACTED] acknowledged that she believed the Student was responsible for some of the incidents. When asked if it was typical to have this number of incidents, she responded, "For some, yes. If they are making statements to other children, other children are going to respond." (Test. [REDACTED])

Ms. [REDACTED] testified that she believed the Student received meaningful academics at [REDACTED] and that the bullying had no impact on his academics. She acknowledged, however, that she is not a special educator.

Analysis

October 12, 2017 Incident

I find that the one incident on October 12, 2017 did not constitute bullying. The Parent reported that [REDACTED] had been cursing and hitting (it was not clear who he cursed at or hit), threatened to punch the Student, and pulled his hair. That is different from what the Student told Ms. [REDACTED] i.e., that he and [REDACTED] had been going back and forth and that he put up his middle finger to [REDACTED]. In his written summary, the Student indicated that [REDACTED] was putting his hand between the seat and the Student "accidentally put[] the middle finger up." (BCPS Ex. 11.) The Student's statement indicates [REDACTED] threatened to punch him, but not that [REDACTED] pulled his hair.

There was no indication [REDACTED]'s behavior was repeated behavior or that, at that time, the school had reason to believe it had the potential to be repeated. Even if that one incident could be considered bullying, the evidence established that the school investigated the incident. Ms. [REDACTED] spoke to both students and obtained written statements from them and any alleged witnesses. She asked the bus driver to change their seats and asked him/her and any teachers who had both students together in class to monitor their interactions and report anything concerning to her. Ms. [REDACTED] advised the Parent to let her know of any future problems. In addition, Ms. [REDACTED] had the BCPS counselor perform a threat assessment, with the outcome that "it was just two kids going back and forth." (Test. [REDACTED]) Based on my review of the investigation results, I concur.

I note that Ms. [REDACTED] presented as a competent, well-qualified professional in the field of education. The Parent presented no evidence of bias on Ms. [REDACTED]'s part with regard to her investigation of this incident and the incidents that follow. My review of the investigation results and consideration of Ms. [REDACTED]'s testimony with regard to the alleged bullying incidents indicates that Ms. [REDACTED] used sound professional judgment.

In any event, there was no evidence that the school had reason to believe that [REDACTED]'s behavior in October 2017 affected the Student's ability to receive meaningful educational benefit. Thus, the school was not alerted to a need for an IEP meeting to determine to what extent additional or different special education or related services were needed to address the Student's individual needs and revise his IEP accordingly. For example, there was no sudden decline in grades, onset of emotional outbursts, increase in the frequency or intensity of behavioral outbursts, or rise in missed classes.⁶²

⁶² The Parent testified generally that the Student had a lot of absences. His Middle School Report Card for 2017-2018 shows seventeen days absent, ten of them in the fourth quarter. As discussed below, the Student refused to return to school during the last nine days of the year. Except for those nine days, the Parent failed to make any connection to alleged bullying at school.

Even if I had found that bullying occurred on October 12, 2017, the Parent presented no expert testimony to contradict Ms. [REDACTED]'s testimony and the information entered in the Progress Reports on the Student's IEP on November 3, 2017, indicating that he benefited educationally.

Ms. [REDACTED] although not as candid and forthcoming in her testimony as in her emails, presented at the hearing as a competent professional with the Student's best interests in mind. Her testimony and the school records indicate that the Student was making sufficient progress after the October 12, 2017 incident to meet his Reading, Written Language, Mathematics, and Communications goals. Ms. [REDACTED] observed throughout the year that the Student exhibited social skills and interactions of which she was proud – she observed that he was usually laughing and joking in the halls, he was attentive to getting to class and lunch, and he understood his schedule. She did not notice problems he was having socially unless he brought it to her attention.

Furthermore, the Parent did not offer any expert testimony to contradict Ms. [REDACTED]'s testimony that the Student's grades were "better than par" for this transitional year and he was receiving educational benefit. When the Student entered sixth grade, the curriculum changed and became more challenging to the Student. Nevertheless, the Student showed either satisfactory or better grades in all subjects.

With the exception of one D in World Cultures the first quarter, the Student had received an A (Art), B's, C's, and an S. The Parent and the Father indicated that the Student's grades were lower than at [REDACTED] however, they presented no evidence that the courses and subject matter were substantially identical. Ms. [REDACTED] testified that the Student's grades at [REDACTED] [REDACTED] were typical of a middle school student who had transitioned from elementary school.

December 8, 11, and 12, 2017 Incidents

I find that the incident on December 8, 2017 did not constitute bullying. The Parent reported, and the evidence established that [REDACTED] punched the Student in the head. However, there was insufficient evidence that [REDACTED]'s behavior was repeated behavior⁶³ or that there was reason to believe it would be repeated. Furthermore, even if this incident could be considered bullying, the evidence establishes that the school investigated the incident. Ms. [REDACTED] spoke to both students and obtained written statements from them and any alleged witnesses. She reviewed the bus tape and determined that [REDACTED] did hit the Student. She asked the bus driver to make sure the two students were separated on the bus and she asked the Parent to let her know immediately if the problems continued.

The behavior was repeated on December 11, 2017, however. The Parent reported that [REDACTED] and his older brother had threatened to beat the Student up. Furthermore, the Parent's testimony indicates that on December 12, 2017, she sent another email to Ms. [REDACTED] advising that [REDACTED] tried to take the Student's phone on the bus.

On December 15, 2017, Ms. [REDACTED] emailed the Parent advising that consequences had been issued for the situation. Although it was not clear when the consequence occurred, Ms. [REDACTED] testified that [REDACTED] was suspended for two days.

A December 21, 2017 letter from the Parent to the Principal indicates that the school conducted "personal interviews, including the victim; review of records;⁶⁴ review of video; review of statements; consultation with staff and administrators; and interviews with the allege[d] perpetrator and witnesses." (Parent Ex. 11.) It also indicates that as a result of the investigation it was determined that the Student "may have been" the subject of bullying behaviors involving [REDACTED] as reported. The December 21, 2017 letter and Ms. [REDACTED] did not refer to the report of [REDACTED]'s brother threatening the Student. Nor did BCPS present evidence that the

⁶³ Again, the earlier October 2017 incident was determined to have involved just "back and forth" between two students.

⁶⁴ BCPS did not explain what records were reviewed.

school investigated this incident relating to [REDACTED]'s brother. Based on my review of the evidence, I find that bullying of the Student did occur on December 11 and 12, 2017.

Regardless, there was no evidence that the school had reason to believe that the incidents in December 2017 were having an effect on the Student's ability to receive meaningful educational benefit, alerting the school to a need for an IEP meeting.

The Parent also failed to prove that the Student actually lost educational benefit as a result of the December 2017 bullying. She presented no expert testimony to contradict Ms. [REDACTED]'s testimony and the information entered in the Progress Reports on the Student's IEP on January 29, 2018, indicating that he benefited educationally. He was making sufficient progress to meet his Reading, Written Language, Mathematics, and Communication goals. Nor did the Parent offer any expert testimony to contradict Ms. [REDACTED]'s testimony that the Student's grades were "better than par" for this transitional year. During the second quarter, he had received an A, B's, C's, and an S.⁶⁵ My review of BCPS records indicates that although the Student was having some difficulty focusing in math class after his one-on-one support had been pulled, overall, his teachers reported that he was performing satisfactorily.

The Parent presented no evidence that any of the Student's teachers or adult support noticed any significant social/emotional issues after the December 2018 incidents. One teacher reported that his participation had improved. One reported that he did not communicate with his peers; another reported that he had a positive rapport with his peers. Again, Ms. [REDACTED] who saw the Student almost daily, reported she observed no issues with his social skills and interactions.

⁶⁵ His grade went down from a B in Science to a C; however, his grade in World Cultures went from a D to a C, and his grade in Mathematics went from a C to a B.

March 2, 12, and 15, 2018 Incidents

March 2018 brought more bullying of the Student by students on the bus. The Parent testified that on March 2, 2018, some seventh graders took part of the Student's fundraising candy.

The evidence established that Ms. [REDACTED] investigated the incident. She spoke to the students and involved the families. The money was paid, and the students who took the candy received consequences ranging from a parent conference, detention, and in-school suspension in the Resource Room. Ms. [REDACTED] testified that she determined the incident probably did involve bullying. Based on my review of the evidence, I concur.

The Parent reported another incident on March 12, 2018, when a student [REDACTED] allegedly pulled out a knife on the bus and put it near the Student's face, and another student ([REDACTED]) hit the Student in the arm, pulled his hair, and tried to choke him several times. Students [REDACTED], [REDACTED], [REDACTED], and [REDACTED]* allegedly made threats.⁶⁶

The evidence established that the school investigated that incident. The Resource Officer pulled [REDACTED] off the bus the next day and searched him, finding a hair pick. Ms. [REDACTED] spoke to the students involved and obtained written statements from them and alleged witnesses. After viewing the bus tape, Ms. [REDACTED] determined that the incident had not occurred as described by the Student. Rather, students on the bus reacted to racist slurs made by the Student. Based on my review of the results of the investigation, I concur.

The Parent felt that the investigation was unfair and that the school paid more attention to the allegations made against the Student regarding guns than the allegation that the Student was threatened with a knife. However, I saw no grounds for that conclusion in my review of the evidence.

⁶⁶ Statements reportedly made by the Student on the bus that his Father owned guns resulted in the Father's home being searched (with the Father's consent and revealing no guns).

A March 19, 2018 letter from the Principal to the Parent indicates that the school had investigated the March 1 and 12, 2018 incidents, i.e., “personal interviews, including the victim; review of records;⁶⁷ review of statements and affidavits; consultation with staff and administrators; and/or interviews with the alleged perpetrator and witnesses.” (Parent Ex. 3.) Based on its investigation, the school determined that the Student “may have been” the subject of bullying or intimidation behaviors.⁶⁸

On March 15, 2018, the Parent reported that ■* (one of the students involved in the March 12, 2018 incident), said to the Student in the Commons, “I will kill you.”⁶⁹ (Parent Ex. 4.) Based on the Student’s uncontradicted statement to the Parent, I find that a preponderance of the evidence established that the incident occurred. I further find that this threatening behavior by ■* did constitute bullying.

A March 15, 2018 email from Ms. ■ to the Parent indicates that “Mr. ■” was investigating the March 15, 2018 incident. BCPS presented no evidence as to the outcome of that investigation; however, the Parent presented no evidence that it did not occur. Thus, I find that a preponderance of the evidence established that BCPS did investigate the incident.

I further find that the school was made aware of a potential impact of the March 2018 bullying incidents on the Student’s academics: on or about March 15, 2018, the Parent noticed new behaviors exhibited by the Student. The Parent noticed he was picking his eyebrows and holding in tears. The Student’s racial outbursts were also a red flag. In any event, as discussed below, the school convened an IEP meeting shortly thereafter (March 27, 2018).

Ms. ■ acknowledged that the Student did not have adult support during transitions up to this point and that it certainly would have been beneficial; however, the Parent presented

⁶⁷ Again, the record review was not described.

⁶⁸ The letter did not specify if the school made that determination as to both incidents.

⁶⁹ The Parent did not refer to this incident in her Complaint. Nonetheless, BCPS did not object to her presentation of evidence regarding it. Therefore, I have addressed it as well in my Decision.

no expert testimony to contradict Ms. [REDACTED]'s testimony and the information in the Student's March 27, 2018 IEP that he nonetheless benefited educationally. Nor did the Parent offer any expert testimony to contradict Ms. [REDACTED]'s testimony that the Student's grades were "better than par" for this transitional year. During the third quarter, he had received all B's and C's, and an S.⁷⁰

The Parent presented no expert testimony that the Student's plucking behaviors at home were a result of bullying at school and/or that this new behavior had carried over into school, affecting his education. He stopped riding the bus, but a preponderance of the evidence indicates this was the result of a parental decision.⁷¹ Furthermore, the Parent did not present evidence that the Student's "new behaviors" affected his ability to access meaningful educational benefit.

On March 1, 2018, the Student's Mathematics teacher emailed the Parent regarding frustration the Student was exhibiting; however, the teacher attributed the frustration to a lack of one-on-one support rather than on bullying or social/emotional issues. In a March 9, 2018 Teacher Summary, one teacher indicated that the Student preferred to work alone and did not actively participate when assigned to a group; another indicated that he did not communicate with his peers. The Student's Language Arts teacher indicated on that same date, however, that the Student had "a positive rapport with peers, primarily. Students are very supportive of him, especially, when they see his sillier/playful side." (Parent Ex. 6.)

The Student's March 27, 2018 IEP describes the Student as a friendly child motivated to be successful in his work and demonstrating pride in his accomplishments. The Student was eager to develop friendships and had established friendships across all school settings.

⁷⁰ The Student's grade in Science went from a C to a B; his grade in Art went from an A to a B; and his grade in Mathematics went from a B to a C.

⁷¹ The March 27, 2018 IEP Team Summary refers only vaguely to the Parent's discussion of "[the Student's] resistance to now ride the bus." (BCPS Ex. 3.)

Thus, I find that a preponderance of the evidence established that as of the March 27, 2018 IEP meeting, the Student had not lost meaningful educational benefit as a result of bullying and that his IEP provided him a FAPE.

March 27, 2018 IEP Meeting

The evidence showed that at the Student's annual IEP meeting on March 27, 2018, the IEP Team discussed the bullying, considered its potential effect on the Student's education, and revised his IEP accordingly. The Parent questioned why the IEP Team had not been informed previously of the bullying issue; however, she presented no evidence that the failure to do so affected the Student's ability to obtain meaningful educational benefit prior to the March 27, 2018 IEP meeting.

The evidence established that the school adjusted the description of the Student's additional adult support service so that he would receive an additional adult support across all settings with the exception of lunch. He continued to be able to go to the resource room, office, or on a walk with an adult if he needed a break or quiet space to work and to be dismissed at the end of the day with his adult assistant three to five minutes before the rest of his classmates to assist with anxiety when traveling in large groups. He continued to have access to meet with the school counselor "as needed" due to his anxiety. (BCPS Ex. 4.)

The IEP Team Summary indicates that there was discussion at the March 27, 2018 IEP meeting about a counselor and that the IEP Team recommended a social work referral. Ms. [REDACTED] and Ms. [REDACTED] were to submit it to Ms. [REDACTED]. The Parent requested that counseling remain on the IEP. Ms. [REDACTED] and Ms. [REDACTED] indicated that based on the results of the social work referral, Ms. [REDACTED] met with the Student once a week at "lunch bunch beginning April 17, 2018."⁷²

⁷² Ms. [REDACTED] acknowledged that Ms. [REDACTED] may have been out a week in May.

A Physical Environmental support was added: the Student was to have preferential seating in all areas, even on the bus. He was to sit in the front of the bus and be given a visual tool to present to the driver. In addition, the school offered the Student special bus transportation so that he would not have to ride with the same students; however, the Parent declined both options, choosing to have family members transport the Student to and from school.

For those reasons and the reasons discussed below, I find that the Parent failed to prove that the March 27, 2018 IEP did not provide the Student a FAPE. The IEP that has been implemented and revised for the 2017-2018 school year was appropriate to meet the Student's needs. A preponderance of the evidence established that the Student's IEP was reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances.

June 1 and 4, 2018 Incidents

There was no evidence that the school investigated the June 1, 2018 incident observed by the Aunt; however, I find that the Parent failed to prove by a preponderance of the evidence that bullying occurred on that date.

The Aunt did not present facts establishing bullying. She testified that she observed three students in the school hallway and that one of them "wanted to throw a shoe in the can." (Test. Aunt.) She heard the Student, who was behind the lockers, yell, "Leave me alone, [REDACTED]⁷³ or I am going to get mad!" (*Id.*) She then saw three students surrounding the Student and she asked them if there was a problem. In addition, the Parent simply stated vaguely in a follow-up email that "3 students . . . were saying different things to [the Student]." (BCPS Ex. 5.)

The final alleged incidents occurred on June 4, 2018. The Student reported to the Parent that another student, [REDACTED], told the Student he wanted to fight and then hit the Student in the face.

⁷³ It was not clearly established "[REDACTED]" was the same "[REDACTED]" who was involved in earlier incidents. I note that Ms. [REDACTED] testified that the Student told her that he did not know the other students' names.

Ms. [REDACTED]'s testimony established that she investigated the incident; she spoke to and obtained written statements from the Student and [REDACTED] as well as alleged witnesses. She determined that the incident did not involve bullying because the Student had not been the target. She determined that it was just two children engaged in a disagreement in the cafeteria, which carried over into the next class. Based on my review of the investigation results, I concur.

I also concur with Ms. [REDACTED]'s determination that the Student was not bullied in class by [REDACTED]* on June 4, 2018. Rather, the evidence shows mutual name calling and that Ms. [REDACTED] properly allowed the School Counselor and Ms. [REDACTED] to mediate the situation.

I note also that Ms. [REDACTED] nonetheless communicated with all teachers who had these students in class at the same time and asked them to separate them, monitor their interactions, and report any concerns. Ms. [REDACTED] also communicated with the IEP Team leader to ensure she had any necessary information.

Accordingly, I find that by early June 2018, the Student had been subjected to bullying four times: on December 11 and 12, 2017 on the bus, March 2, 2018 on the bus, and March 15, 2018 in the Commons.

I further find that as of June 4, 2018, the school was made aware that the Student now was refusing to return to school and thus, of the potential impact on his education from the bullying or at the very least, his increasing difficulty in navigating certain social interactions and situations as a result of his disability. In addition, Ms. [REDACTED] acknowledged that she had witnessed the Student "plucking himself in the face." (BCPS Ex. 1.) Thus, the school was aware of that alarming behavior, occurring this time in the school setting. An IEP meeting was properly held at the Parent's request on June 7, 2018.

The Parent presented no expert testimony to contradict Ms. [REDACTED]'s testimony and the information entered in the Progress Reports of his IEP that the Student received educational

benefit during the 2017-2018 school year. He was making sufficient progress to meet his Reading, Written Language, Mathematics, and Communication goals. He had an increase in his present levels of performance in Reading and Mathematics, he developed more independence in writing through the use of assistive technology, he was using cooperative learning opportunities and receiving positive feedback from teachers.

Nor did the Parent offer any expert testimony to contradict Ms. [REDACTED]'s testimony that the Student's grades were "better than par" for this transitional year and he was receiving educational benefit. The Student had received B's, C's, and an S for the fourth quarter.⁷⁴ His final grades were a B in Physical Education, Pass in Reading Foundations, and C's in all other subjects.

As did earlier IEPs, the Student's June 7, 2018 IEP describes the Student as a child who is friendly, motivated to be successful in his work, and demonstrates pride in his accomplishments. The Student is eager to develop friendships and has established friendships across all school settings.

For the aforementioned reasons, I find that the Parent failed to prove by a preponderance of the evidence that BCPS failed to provide a FAPE to the Student for the 2017-2018 school year.

The evidence shows that the Parent advocated fiercely for the Student during the 2017-2018 school year and she continued to do so at the hearing. I have no doubt that she and the Father are extremely concerned about the Student's safety and the effect of bullying on the Student's education. The Parent teared up several times during the hearing, and when he was not testifying, the Father spent most of the time with his head in his hands. Nonetheless, it is important to note that the educators are the ones who actually see the Student in the classroom

⁷⁴ The Student's grade in Physical Education went from a B to a C and his grade in Science went from a B to a C.

environment and have educational expertise. The Parent did not have the opportunity to directly observe how the Student was doing at [REDACTED]. Thus, I placed more weight on the testimony of BCPS's witnesses and the reports of BCPS staff as to the Student's progress academically during the 2017-2018 school year than I did upon the Parent's perception in that regard.

June 7, 2018 IEP Meeting/2018-2019 IEP

Appropriate Modifications to the IEP

Again, based on the Student's new behaviors (refusing to return to school and plucking at his face while at school), the school properly held an IEP meeting on June 7, 2018 at the Parent's request. The evidence shows that the IEP Team discussed the bullying, considered its potential effect on the Student's education, and revised his IEP.

Special education bus transportation was offered but declined by the Parent. The need for counseling was discussed and social work services were added two times per week for thirty minutes. Small group for lunch was added to the Physical Environmental supports.

Significantly, the Supplementary Aids, Services, Program Modifications and Supports section of the Student's IEP was modified to provide for adult support in unstructured times by a single individual assigned to the Student, in addition to the adult support he was already receiving in his classes:

[I]n all general education settings, [the Student] will receive a designated one-on-one special education employee for meeting him at his locker in the morning, hallway transitions, transitioning into and out of cafeteria and navigate safely to his bus or carpool at the end of day. The designated one-on-one special education will utilize and promote skills learned in therapies across all settings. During all scheduled classes that are OGE, an additional adult support or a designated one-on-one will aid his time on task, support comprehension through asking questions and paraphrasing, support [the Student] handling difficult feelings by offering breaks and walks, support [the Student's] social interactions through modeling and discussions and utilizing social stories in the moments. The designated one-on-one and additional adult supports will support organization of classroom materials and daily routines, while promoting increased independence. The occupational therapist will be available to consult with school staff as needed for

suggestions regarding sensory strategies. Due to [the Student's] anxiety he will have access to meet with the school counselor when needed.

(BCPS Ex. 1.)

In addition, an Anxiety Management and Self Advocacy goal, with accompanying objectives, was added to the Student's IEP: "By 3/27/19, during a frustrating moment that interrupts a school activity, [the Student] will use a taught calming strategy and with support, will respectfully advocate for himself, and return to the activity within (4-6) minutes, for (4 out of 5) frustrating moments." (*Id.*)

I find that all of the above contribute to the provision of a FAPE for the Student for the 2018-2019 school year. The Parent questions why the aforementioned changes to the Student's IEP were not made after the March 2018 incidents;⁷⁵ however, as discussed above, the Parent presented insufficient evidence of an effect on the Student's academics during the 2017-2018 school year. When Ms. [REDACTED] reported in June 2018 that she had observed new disturbing behaviors in school and when the Student refused to return to school, BCPS attempted to address those issues at the June 7, 2018 IEP meeting.

Flaws in June 7, 2018 IEP

Nevertheless, I find that the IEP, as drafted, is flawed. First, based on the Parent's concerns relating to social interaction and the Student's resistance to returning to school, services were changed to reflect the Student is to receive five sessions of OGE fifty minutes daily, with special education support for all major content subjects. He will receive mathematical instruction for one hour daily inside the general education setting with supports. The IEP Team felt that smaller classes with the same instruction would be beneficial on a non-permanent basis.

⁷⁵ The Parent also complained that adult support was not provided during the school year as previously provided by the Student's IEP, but she failed to establish how such support in the general education setting would have made a difference with regard to the bullying the Student experienced on the bus and in the Commons.

I find that the placement in the OGE setting to avoid bullying is not appropriate and is a denial of FAPE. Such a strategy is contrary to the provisions of the IDEA requiring the Student's placement in the LRE. See *DeVries ex rel. DeBlazy v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); see also 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114-300.120; COMAR 13A.05.01.10A. The evidence does not establish that the Student can no longer receive a FAPE in his current LRE placement. Thus, the IEP Team must meet to discuss alternatives to the placement of the Student in OGE for Math, Reading, Language Arts, Science, and Social Studies.

In reaching my conclusion regarding LRE, I rely upon a June 10, 2018 email to the Parent, in which Ms. [REDACTED] stated:

I have some concerns about the service page and putting [the Student] in outside General Ed. Classes. I know Ms. [REDACTED] says it's something that should "of or be" offered/tried, but I Believe it's moving [the Student] backward in terms of social skills and possibly even academics. Also as you pursue other placements, I'm not sure whether "OGE" classes might limit choices for [the Student].

(Parent Ex. 5.)

Ms. [REDACTED] also noted that placement in OGE would not prevent the Student from being bullied because "[the students] who are currently in OGE move throughout the building at the same times as their grade peers for class transitions and lunch, as well as attend specials with the general education population. This also includes going in and out of lockers (the Commons) and to and from the bus." (*Id.*)⁷⁶ She offered good suggestions, such as keeping the Student's belongings in his homeroom or upstairs in the guidance office, and a daily log book that goes between the adult support and the Parent to help her interpret some of the social conflicts that arise for the Student.⁷⁷

⁷⁶ Ms. [REDACTED] also acknowledged that a designated one-on-one support would best support the Student.

⁷⁷ This appears to be different than the agenda book kept by the Student.

As stated by the United States Department of Education:

The IDEA placement team (usually the same as the IEP Team) should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. While it may be appropriate to consider whether to change the placement of the child who was the target of the bullying behavior, placement teams should be aware that certain changes to the education program of a student with a disability (e.g., placement in a more restrictive “protected” setting to avoid bullying behavior) may constitute a denial of the IDEA’s requirement that the school provide FAPE in the LRE. Moreover, schools may not attempt to resolve the bullying situation by unilaterally changing the frequency, duration, intensity, placement, or location of the student’s special education and related services. These decisions must be made by the IEP Team and consistent with the IDEA provisions that address parental participation.

Bullying of Students with Disabilities, supra, at 3.

Second, the June 4, 2018 IEP calls for a designated adult to accompany the Student in all settings, except lunch and the bus.⁷⁸ I find that BCPS did not provide good reasons why those settings were excluded from this support. The IEP provides only that “[c]onsideration should be taken during lunch time for [the Student] to eat in another location with an adult [.]” (BCPS Ex.

⁷⁸ The Parent believes that the Student would not, under the June 7, 2018 IEP, have adult support in “unstructured times” such as in the hallways, lunch, and gym, and Ms. ██████ expressed concerns relating to the risk to the Student while transitioning. However, my review of the IEP indicates that adult support was provided for transitioning.

6.) As Ms. [REDACTED]'s email and history suggest, the Student may be at risk for bullying in the bus and cafeteria settings.⁷⁹

Despite the aforementioned flaws in the Student's June 7, 2018 IEP, because the evidence in this case does not establish that a suitable public school is unavailable for the Student, I find that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school. *Adams v. District of Columbia*, 285 F. Supp. 3d 381, 393 (D.D.C. 2018).

Daily Communication

Finally, I find that the Parent failed to prove that BCPS denied the Student a FAPE for the 2017-2018 school year by failing to communicate daily with the Parent as provided in the Student's IEP. The Student's IEP for the relevant period indicated that the Student "benefits" from daily home-school communication through his agenda book and/or daily written notes to support increased positive behaviors in school. Under Social/Emotional Supports, the Student's IEP called for home-school communication system daily "as needed." (BCPS Ex. 6.) Thus, the Student's IEP did not require such daily communication. Furthermore, Ms. [REDACTED] testified that she had seen the agenda book on the Student's desk and had seen the teacher signing it. I can only speculate as to why the Parent did not see it at home.

⁷⁹ Although the Parent did not allege any procedural violations in this case, I note also that the IEP team did not discuss with the Parent the performance of a Functional Behavioral Assessment (FBA). See 20 U.S.C.A. § 1415(k)(F). This is perplexing in light of the Student's new behaviors (refusing to return to school and plucking in school) and the school's apparent conclusion that the Student's behaviors contributed to some of the above incidents and/or that he may be reacting inappropriately in social interactions. An FBA "identif[ies] the purpose—and more specifically the function—of problem behaviors by investigating the preexisting environmental factors that have served the purpose of these behaviors." Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 Seattle U. L. Rev. 175, 175 (2011). FBAs are often completed prior to and become the basis of a student's Behavior Intervention Plan (BIP), which is the "concrete plan of action for reducing problem behaviors." *Id.*

I am aware that the IDEA only *requires* school districts to conduct an FBA or to implement a BIP if there is a disciplinary change in placement of the student. See 20 U.S.C.A. § 1415(k)(1)(D)(ii). The IDEA also provides, however, that in developing and revising a student's IEP, the IEP team must, "in the case of a child whose behavior impedes the child's learning or that of others, *consider* the use of positive behavioral interventions and supports, and other strategies, to address that behavior." *Id.* § 1414(d)(3)(B)(i) (emphasis added); see also 34 C.F.R. § 300.324(a)(2)(i).

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that BCPS did not deny the Student a FAPE for the 2017-2018 school year by failing to develop and implement an appropriate IEP which addressed bullying the Student has experienced on the school bus and at school. 20 U.S.C.A. §§ 1401(9), 1412(a)(1) (2017); *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

I further conclude as a matter of law that BCPS did deny the Student a FAPE for the 2018-2019 school year by failing to develop and implement an IEP appropriately addressing bullying the Student has experienced on the school bus and at school, and which places the Student in the LRE. 20 U.S.C.A. §§ 1401(9), 1412(a)(1) (2017); *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *DeVries ex rel. DeBlacy v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114-300.120; COMAR 13A.05.01.10A.

I further conclude as a matter of law that BCPS did not deny the Student a FAPE for the 2017-2018 school year by failing to communicate daily with the Parent as provided in the Student's IEP. COMAR 13A.05.01.01.

I further conclude as a matter of law that the placement of the Student in the OGE setting for Math, Reading, Language Arts, Science, and Social Studies for the 2018-2019 school year is not the Student's LRE. The Student is entitled to the development and implementation of an IEP that appropriately addresses the bullying the Student has experienced, the Student's behaviors, and his refusal to go to school, in the Student's LRE. *Adams v. District of Columbia*, 285 F. Supp. 3d 381, 393 (D.D.C. 2018).

ORDER

I **ORDER** the parties to convene an IEP meeting within ten business days of this Decision to develop an IEP for the 2018-2019 school year that addresses the bullying the Student has experienced, the Student's behaviors, and his refusal to go to school, in the Student's LRE, in accordance with my Decision.

If corrective action is required by this decision, the local education agency shall, within 30 days of the date of this decision, provide proof of compliance to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, the Maryland State Department of Education.

August 28, 2018
Date Decision Issued

Signature Appears on Original

Eileen C. Sweeney
Administrative Law Judge



ECS/emh
#175544

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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