[redacted]	*	**BEFORE STEVEN V. ADLER,**
STUDENT	*	**ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
MONTGOMERY COUNTY	*	**OF ADMINISTRATIVE HEARINGS**
PUBLIC SCHOOLS	*	**OAH No.: MSDE-MONT-OT-18-01909**

* * * * * * * * * * * * *

DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On January 18, 2018, Holly L. Parker, Esquire, of the Law Offices of Holly L. Parker, acting on behalf of Drs. [redacted] and [redacted] (Parents) and [redacted] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH)[1] requesting an evidentiary hearing to determine whether the MCPS violated the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).[2]

On February 2, 2018, the parties engaged in a resolution meeting but were unable to resolve the dispute to the parties' mutual satisfaction. On the same date, after the resolution meeting, I conducted a telephone pre-hearing conference (Conference) at the OAH in Hunt

[1] On January 18, 2018, Ms. Parker faxed a "Request for Mediation/Due Process Hearing" (Complaint) to the OAH. On the same date, the OAH sent correspondence to the Montgomery County Public Schools (MCPS) requesting a completed transmittal for the Maryland State Department of Education (MSDE) pertaining to the Complaint. On January 19, 2018, the MCPS faxed a completed transmittal to the OAH, which noted that both parties agreed to attend mediation.

[2] "U.S.C.A." is the abbreviation for the United States Code Annotated. The U.S.C.A. is published by Thomson Reuters and contains the general and permanent laws of the United States, as classified in the official United States Code prepared by the Office of the Law Revision Counsel of the House of Representatives.

Unless there is a change in the substantive law that was in effect at the time of the events at issue in this case, all citations herein to the U.S.C.A. are to the current 2017 volume.

Valley, Maryland. Ms. Parker represented the Student.[3] Eric C. Brousaides, Esquire, of Carney, Kelehan, Bresler, Bennett, and Sherr, LLP, represented the MCPS.

On February 9, 2018, I issued a Pre-Hearing Conference Report and Order (Order), which set forth the matters discussed during the Conference. By agreement of the parties, the hearing was scheduled for five days on March 21 and 22 and April 24, 25, and 30, 2018, at the offices of the Board of Education in Rockville, Maryland, beginning each day at 9:30 a.m.

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

> (a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c)—
>
> (1) A final decision is reached in the hearing; and
>
> (2) A copy of the decision is mailed to each of the parties.

34 C.F.R. § 300.515 (2017).[4] The regulations in section 300.510 explain the resolution process as follows, in pertinent part:

> (b) *Resolution period.*
>
> (1) If the [local educational agency] has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.
>
> (2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period.
>
> . . . .
>
> (c) *Adjustments to 30-day resolution period.* The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:
>
> (1) Both parties agree in writing to waive the resolution meeting;
>
> (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;

[3] When I use the term "Student" in this decision I am referring to both the Student himself and the Student as a party to the case, which I intend expansively to include his Parents as well.

[4] The federal regulations that apply to the IDEA are found in Title 34 of the Code of Federal Regulations (C.F.R.). Unless there is a change in the substantive law that was in effect at the time of the events at issue in this case, all citations herein to the C.F.R. are to the 2017 volume.

(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

Id. § 300.510(c).

Therefore, in accordance with these regulations, the decision ordinarily would be issued on or before March 20, 2018, which is forty-five days after February 3, 2018, the day after the parties attended the required resolution session and notified the OAH that they did not resolve their dispute.

I may extend the time for issuance of the decision if either party requests on the record a specific extension of time beyond the forty-five day timeframe. *Id.* § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2018).[5] The parties requested that I issue the decision thirty days after the close of the record. I found sufficient cause for granting the request and stated in my Order that the final decision would be issued thirty days after the close of the record.

On March 21, 2018, the date the hearing was scheduled to commence, State offices were closed due to inclement weather. I postponed the hearing and convened it on April 24, 2018. The hearing continued for seven additional days on April 25 and 30, May 8, 21-22, 30, and June 18, 2018. The Student was represented by Ms. Parker and Warren E. Tydings, Jr., Esquire. Mr. Brousaides represented the MCPS. I allowed the parties to submit written closing statements, with attached authority, and closed the record on June 20, 2018.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Educ. § 8-413(e)(1); and Code of Maryland Regulations (COMAR) 13A.05.01.15C. The procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; MSDE procedural regulations; and the Rules of Procedure of the

[5] Unless there is a change in the substantive law that was in effect at the time of the events at issue in this case, all citations herein to the Education Article of the Maryland Annotated Code are to the 2018 Replacement Volume.

OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1) Is the Student's Individualized Education Program (IEP) reasonably calculated to provide the Student with a free, appropriate, public education (FAPE)?

2) If it is not, what remedy is available to the Student?

SUMMARY OF THE EVIDENCE

Exhibits[6]

I admitted the following exhibits on behalf of the Student:

Student[7] Ex. 22 – Letter from [redacted] Elementary School ([redacted]) to Parents, dated September 7, 2016, with attached Draft IEP

Student Ex. 52 – Grade Three Report Cards (Terms 1-2), 2017-2018; Progress Report, dated October 11, 2017; Letter from [redacted] Behavior Specialist, [redacted] School, to "To whom it may concern," undated, with attached picture, dated March 9, 2018

Student Ex. 55 – Email from [redacted], Director of Education, [redacted] undated, with attached editorial, "A Painful Lesson on Child Sexual Abuse," in *Jewish Week Editors*, dated January 17, 2018

Student Ex. 61 – Letter from Dr. [redacted] to "To Whom It May Concern," dated May 21, 2018

Student Ex. A – Résumé of [redacted]

Student Ex. B – Résumé of [redacted]

Student Ex. C – Résumé of [redacted]

Student Ex. D – Résumé of [redacted]

I admitted the following exhibits on behalf of the MCPS:

MCPS Ex. 1 – Letter from [redacted] to Parents, dated December 8, 2015

[6] Any omissions in the sequential numbering of the parties' exhibits reflect exhibits marked by the parties prior to the commencement of the hearing, but not offered or admitted in evidence.

[7] These exhibits were initially marked as Parent Exhibits and renamed Student Exhibits at the hearing.

MCPS Ex. 2 – Evaluation from Dr. [redacted] dated October 26, 2015

MCPS Ex. 3 – Letter from Dr. [redacted] to "To Whom It May Concern," dated December 17, 2015

MCPS Ex. 4 – Authorization for Release of Confidential Information, dated December 17, 2015

MCPS Ex. 5 – Team Consideration of External Report, dated January 7, 2016

MCPS Ex. 7 – Section 504 Evaluation, dated February 4, 2016

MCPS Ex. 8 – Section 504 Plan, dated February 4, 2016

MCPS Ex. 10 – Classroom Observation, dated March 2, 2016

MCPS Ex. 11 – Teacher Referral, undated

MCPS Ex. 12 – Letter from [redacted] to Parents, dated March 8, 2016

MCPS Ex. 13 – Functional Behavioral Assessment, dated March 10, 2016

MCPS Ex. 14 – Behavioral Intervention Plan, dated March 10, 2016

MCPS Ex. 16 – Consultative Support to Staff, dated March 21, 2016

MCPS Ex. 17 – Educational History, dated April 4, 2016

MCPS Ex. 18 – Meeting Information, dated April 7, 2016

MCPS Ex. 19 – E-mail from [redacted], Behavior Support Teacher, MCPS, to [redacted] et al., dated May 9, 2016

MCPS Ex. 20 – Educational Assessment Report, dated May 11, 2016

MCPS Ex. 23 – Psychological Evaluation, dated June 1, 2016

MCPS Ex. 26 – Meeting Information, dated June 2, 2016

MCPS Ex. 27 – Emotional Disability: Multidisciplinary Evaluation Form, dated June 2, 2016

MCPS Ex. 28 – IEP, dated June 9, 2016

MCPS Ex. 29 – E-mail from [redacted] to Parents, dated June 13, 2016

MCPS Ex. 32 – Second Grade Report Card (Terms 1-4)

MCPS Ex. 33 – Letter from [redacted], Principal, [redacted], to Parents, dated July 12, 2016

MCPS Ex. 34 – Letter from Holly Parker to Zvi Greismann, Esquire, MCPS, dated August 12, 2016

MCPS Ex. 36 – Letter from Greismann to Parker, dated August 23, 2016

MCPS Ex. 37 – Letter from [redacted] to Parents, dated August 23, 2016

MCPS Ex. 38 – Letter from [redacted] to Parents, dated August 24, 2016

MCPS Ex. 39 – Letter from Parker to Greismann, dated August 26, 2016

MCPS Ex. 40 – Letter from Parker to Greismann, dated September 1, 2016

MCPS Ex. 41 Letter from Rebecca Bixler, Assistant General Counsel, MCPS, to Parker, dated September 6, 2016

MCPS Ex. 42 – Letter from [redacted] to Parents, dated September 6, 2016

MCPS Ex. 43 – Letter from Bixler to Parker, dated September 7, 2016

MCPS Ex. 44 – Letter from [redacted] to Parents, dated September 7, 2016

MCPS Ex. 45 – Letter from Parker to Greismann, dated September 14, 2016

MCPS Ex. 46 – Letter from [redacted] to Parents, dated September 15, 2016

MCPS Ex. 47 – Letter from Parker to Greismann, dated September 20, 2016

MCPS Ex. 48 – Letter from Bixler to Parker, dated October 4, 2016

MCPS Ex. 49 – IEP, dated October 6, 2016

MCPS Ex. 51 – Authorization for Release of Confidential Information, dated October 6, 2016

MCPS Ex. 52 – Letter from [redacted] to Parents re: suspension, dated October 10, 2016

MCPS Ex. 53 – Letter from [redacted] to Parents re: restraint, dated October 10, 2016

MCPS Ex. 54 – Documentation of Physical Interventions or Seclusion, dated October 10, 2016

MCPS Ex. 59 – Classroom Observation, dated November 28, 2016

MCPS Ex. 60 – Classroom Observation, dated November 29, 2016

MCPS Ex. 61 – Meeting sign-in sheet, dated November 29, 2016

MCPS Ex. 62 – Section 504 Plan, dated November 29, 2016

MCPS Ex. 63 – Section 504 Evaluation, dated November 29, 2016

MCPS Ex. 64 – Receipt from Parent of *Section 504 of the Rehabilitation Act of 1973: Due Process Safeguards* information, dated November 29, 2016

MCPS Ex. 65 – Letter from [redacted] to Parents, dated December 1, 2016

MCPS Ex. 68 – Letter from Parker to [redacted], Supervisor, MCPS, dated December 2, 2016

MCPS Ex. 69 – Letter from [redacted] to Parents, dated December 6, 2016

MCPS Ex. 70 – List of evacuations, attendance, and suspensions, dated December 8, 2016

MCPS Ex. 71 – E-mail from [redacted], Third Grade Teacher, [redacted] to Parents, dated September 7, 2016; E-mail from [redacted] to Parents, dated September 9, 2016; E-mail from [redacted] to Parents, dated September 12, 2016; E-mail from [redacted] to Parents, dated September 15, 2016; E-mail from [redacted] to Parents, dated September 16, 2016; E-mail from [redacted] to Parents, dated September 20, 2016; E-mail from [redacted] to Parents, dated September 22, 2016; E-mail from [redacted] to Parents, dated September 25, 2016 (6:02 pm); E-mail from [redacted] to Parents, dated September 25, 2016 (6:16 pm); E-mail from [redacted] to Parents, dated September 26, 2016; E-mail from [redacted] to [redacted] and [redacted], dated September 26, 2016; E-mail from [redacted] to Parents, dated September 25, 2016; E-mail from [redacted] to [redacted] and [redacted] dated September 27, 2016; E-mail from [redacted] to Parents, dated October 2, 2016 (1:33 pm); E-mail from [redacted] to Parents, dated October 2, 2016 (1:47 pm); E-mail from [redacted] to Parents, dated October 4, 2016; E-mail from [redacted] to Parents, dated October 10, 2016; Redacted e-mail to [redacted] et al., dated October 11, 2016; E-mail from [redacted] to Parents, dated October 16, 2016; E-mail from [redacted] to Parents, dated October 19, 2016; E-mail from [redacted] to Parents, dated October 20, 2016; E-mail from [redacted] to Parents, dated October 21, 2016; E-mail from [redacted] to Parents, dated October 26, 2016; E-mail from [redacted] to Parents, dated October 28, 2016; E-mail from [redacted] to Parents, dated November 1, 2016; E-mail from [redacted] to Parents, dated November 2, 2016; E-mail from [redacted] to [redacted] et al., dated November 3, 2016; E-mail from [redacted] to Parents, dated November 7, 2016; E-mail from [redacted] to Parents, dated November 14, 2016; E-mail from [redacted] to Parents, dated November 15, 2016; E-mail from [redacted] to Parents, dated November 16, 2016; E-mail from [redacted] to [redacted] et al., dated November 16, 2016; E-mail from [redacted] to Parents, dated November 17, 2016 (8:09 pm); E-mail from [redacted] to Parents, dated November 17, 2016 (7:04 pm); E-mail from [redacted] to Parents, dated November 18, 2016; E-mail from [redacted] to [redacted] dated November 18, 2016; E-mail from [redacted] to [redacted] et al., dated November 18, 2016; E-mail forwarded from [redacted] to [redacted] re: "[Student's] day 11/5/16," dated November 21, 2016; E-mail forwarded from [redacted] to [redacted] re: "[Student's] day 11/9/16," dated November 21, 2016; E-mail forwarded from

[redacted] to [redacted] re: "[Student's] day 11/10/16," dated November 21, 2016; E-mail forwarded from [redacted] to [redacted] re: "[Student's] day 11/11/16," dated November 21, 2016; E-mail from [redacted] to [redacted], dated November 29, 2016; E-mail from [redacted] to [redacted] dated December 1, 2016; E-mail from [redacted] to [redacted] dated December 8, 2016; E-mail from [redacted] to Parents et al., dated December 9, 2016; Student notation, dated December 6; Student notation, dated December 5; Student notation, dated November 11; Student notation, dated November 16 & 17; Student notation, dated November 18; E-mail from [redacted] to [redacted] dated December 1, 2016

MCPS Ex. 72 – Letter from [redacted] to Parker, dated December 13, 2016

MCPS Ex. 73 – Letter from Bixler to Parker, dated December 16, 2016

MCPS Ex. 75 – Suspension Log, dated February 6, 2017

MCPS Ex. 77 – Letter from Bixler to Parker, dated January 5, 2017

MCPS Ex. 79 – Application for Interim Instructional Services, dated February 24, 2017

MCPS Ex. 80 – Letter from Parker to Bixler, dated March 3, 2017

MCPS Ex. 85 – E-mail from [redacted] Interim Instructional Services, [redacted] to Parents, dated May 5, 2017

MCPS Ex. 87 – Letter from Parker to Greismann, dated June 19, 2017

MCPS Ex. 88 – Third Grade Report Card (Terms 1-4)

MCPS Ex. 89 – Letter from [redacted] to Parents, dated June 19, 2017

MCPS Ex. 90 – Letter from Bixler to Parker, dated June 22, 2017; Letter from Bixler to Parker, dated January 5, 2017; E-mail from Parker to Bixler, dated December 20, 2016; Letter from Bixler to Parker, dated December 16, 2016; Letter from [redacted] to Parents, dated October 10, 2016; Letter from [redacted] to Parents, dated October 10, 2016; Letter from [redacted] to Parents, dated October 13, 2016; Letter from [redacted] to Parker, dated December 13, 2016;

MCPS Ex. 91 – Letter from [redacted] to Parents, dated June 28, 2017

MCPS Ex. 92 – Meeting sign-in sheet, dated July 19, 2017

MCPS Ex. 93 – Letter from Parker to Bixler, dated August 3, 2017, with attached Letter from Dr. [redacted] to "Whom it may concern," dated July 31, 2017

MCPS Ex. 94 – Notice of IEP Team Meeting, dated August 30, 2017

MCPS Ex. 95 – Eligibility Status Report, dated September 11, 2017

MCPS Ex. 96 – Meeting notes, dated September 11, 2017

MCPS Ex. 97 – Notice of Documents Provided After an IEP Meeting, dated September 15, 2017

MCPS Ex. 98 – Draft IEP, dated September 11, 2017

MCPS Ex. 99 – Letter from [redacted] LCSW-C, to "To whom it may concern," undated

MCPS Ex. 103 – Letter from [redacted] Head of School, [redacted] School, to Parents, dated June 6, 2017, with attached Enrollment Contract

MCPS Ex. 105 – Résumé of [redacted]

MCPS Ex. 106 – Résumé of [redacted]

MCPS Ex. 107 – Résumé of [redacted]

MCPS Ex. 109 – Résumé of [redacted]

MCPS Ex. 112 – Résumé of [redacted]

MCPS Ex. 113 – Résumé of [redacted]

There were no other exhibits offered or admitted.

Testimony[8]

The Student presented the following expert and fact witnesses:

Name	Title	Fact	Expert
Parent	Father	Yes	No
[redacted] LCSW-C	Social Worker	Yes	Yes
[redacted]	Dean of Students, [redacted] School	Yes	No
[redacted] BCBA	Behavior Specialist, [redacted] School	Yes	Yes
[redacted]	Fourth Grade Teacher, [redacted] School	Yes	Yes
[redacted] Ed.S	School Psychologist, MCPS	Yes	No

[8] All expert witnesses were admitted upon stipulation of the parties as to the witnesses' expertise in his or her respective field of study.

The MCPS presented the following expert and fact witnesses:

Name	Title	Fact	Expert
[redacted]	Second Grade Teacher, [redacted]	Yes	No
[redacted]	Third Grade Teacher, [redacted]	Yes	No
[redacted]	Special Educator, [redacted]	Yes	No
[redacted]	School Counselor, [redacted]	Yes	Yes
[redacted]	Special Education Supervisor, MCPS	Yes	Yes
[redacted] Ed.D	Supervisor for Social and Emotional Support Services, MCPS	Yes	Yes
[redacted] Ed.S	School Psychologist, MCPS	No	Yes

FINDINGS OF FACT[9]

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

1. The Student enrolled in the MCPS, at [redacted], as a second grade student, in early December 2015.

2. Prior to enrolling in the MCPS, the Student was sexually abused by a respected member of his religious community, from which he suffers posttraumatic stress disorder (PTSD). *E.g.*, Student Ex. 55.

3. The Student also suffers from an unspecified anxiety disorder and attention-deficient/hyperactivity disorder (ADHD). MCPS Ex. 93.

[9] Any citations to the record are for illustrative purposes only; my findings, analysis, and legal conclusions are based on consideration of the credible evidence of record *in toto*. All testimonial and documentary evidence was considered and given the weight it was due, regardless if recited, cited, referenced, or expressly set forth in the Decision. *See, e.g.*, *Walker v. Sec'y of Health & Human Servs.*, 884 F.2d 241, 245 (6th Cir. 1989) (an administrative law judge need not address every piece of evidence in the record); *Mid-Atl. Power Supply Ass'n v. Md. Pub. Serv. Comm'n*, 143 Md. App. 419, 442 (2002) (emphasizing that "[t]he Commission was free to accept or reject any witness's testimony" and "the mere failure of the Commission to mention a witness's testimony" does not mean that the Commission "did not consider that witness's testimony").

4. This constellation of impairments and their invasive symptoms directly and deleteriously affect the Student's ability to access the educational curriculum and to be available for learning.

5. The Parents candidly informed faculty, staff, and administrators at [redacted] of the abuse the Student suffered. Test. Parent.

6. A Section 504[10] evaluation was conducted on February 4, 2016, the Student was found eligible for services under Section 504, and a Section 504 Plan was developed to implement those services. MCPS Exs. 7-9.

7. In March 2016, the Student was referred by Ms. [redacted] for a screening for special education services. MCPS Ex. 11.

8. On March 10, 2016, the MCPS conducted a Functional Behavioral Assessment (FBA)[11] of the Student. MCPS Ex. 13.

9. On the same date, March 10, 2016, the MCPS developed a Behavior Intervention Plan (BIP) for the Student. MCPS Ex. 14.

10. Educational and psychological evaluations of the Student were conducted by the MCPS on May 11 and June 1, 2016, respectively. MCPS Exs. 20, 23; *see also* MCPS Ex. 18.

11. These evaluations revealed that the Student is generally cognitively and academically average or above-average in certain disciplines like mathematics, and his primary needs lie in social and emotional supports to overcome deficits in those areas of functioning. Hr'g Tr. at 1212, 1216-17; MCPS Ex. 20, at 8; MCPS Ex. 23, at 5; *see also* MCPS Exs. 59, 60.

[10] Section 504 of the Rehabilitation Act of 1973.

[11] "An FBA is the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment." *M.H. v. N.Y. City Dep't of Educ.*, 685 F.3d 217, 232 (2d Cir. 2012) (internal quotation marks omitted).

The results of these evaluations were in the accord with the Student's private evaluation and the Parents' informal assessments of the Student's abilities and needs. MCPS Ex. 2; MCPS Ex. 5; Hr'g Tr. at 140, 1212.

12. An eligibility IEP meeting was held on June 2, 2016, where the testing results were reviewed. The Student was found eligible for special education services under the IDEA as a student with another health impairment code. MCPS Ex. 26.

13. The IEP proposed that the Student receive fifteen hours per week of service outside of the general education setting in a self-contained classroom for his core academic classes; fifteen hours of service in the general education setting with the support of a para-educator for specials (art, music, and physical education (PE)), lunch and recess; and fifteen minutes per week of counseling service. *E.g.*, MCPS Ex. 28.

14. The Parents did not express any disagreement with the content of the proposed IEP, including the Student's disability code, his present levels of performance, the proposed hours of service, the accommodations and modifications, the supplementary aids and services, or the goals and objectives, during the IEP team meetings. *E.g.*, Hr'g Tr. at 1123.

15. The IEP team proposed that the IEP be implemented in the Emotional Disability, or Social Emotional Support Services, program at [redacted] Elementary School ([redacted].

16. In proposing placement at [redacted], the IEP team considered the opinions and assessments of the Student's private evaluators and treating clinicians for an academically rigorous environment in a nurturing setting, with a small class size, where the Student can develop social skills, learn to regulate his behavior, and where he can feel safe. Hr'g Tr. at 389, 1011-12, 1017, 1074-75, 1230-31 1304, 1341-42; MCPS Exs. 2, 93, 99.

17. At [redacted] the Student would receive instruction in his core academic classes in a self-contained classroom, and he would receive instruction in specials (art, music, and PE) in

a general education classroom with his nondisabled peers with the support of a para-educator. Hr'g Tr. at 1009.

18. The Student's class size in the self-contained classroom at [redacted] would be between eight to ten students and the number of students in his specials would be between twenty-five to thirty. Hr'g Tr. at 1009.

19. In addition to the educators and para-educators, staffing at [redacted] includes licensed clinical social workers, a psychologist, and a behavioral support teacher. Hr'g Tr. at 1014.

20. The Parents did not accept or reject the proposed placement at this IEP meeting. *E.g.*, MCPS Ex. 28.

21. The Parents did not provide consent for the initiation of special education services and the Student remained enrolled at [redacted] as a general education student for his third grade year. Hr'g Tr. at 1224; MCPS Exs. 33, 34, 36.

22. The Student's third grade teacher, Ms. [redacted] communicated with the Parents, by email, to provide them with a précis of the Student's daily performance and behavior in the classroom. MCPS Ex. 71. These emails reflect that on a near-daily basis, the Student was disruptive in the classroom and unavailable for learning for appreciable periods of the school day. *Id.*

23. During both the second and third grade, the Student was provided with the accommodations in his Section 504 plan, such as providing or offering him frequent breaks, allowing him to leave class to see his mentor (Mr. [redacted], providing him with movement breaks, and providing him with prompting and redirection. MCPS Exs. 8-9.

24. Despite these accommodations, the Student was unable to conform his behavior to socially acceptable norms for his peer group in order to be available for learning in the

classroom. By way of illustration and non-exhaustively, the Student would routinely invade the personal space of other students; interrupt his classmates as they were attempting to work; grab other students' materials; refuse to comply with directions from his teacher; refuse to participate in classroom instructional activities; wander around the classroom while making growling noises; pull a pencil from a student's hand; burp in students' faces; blow up a Ziploc bag and bat it around the classroom; throw objects at students; kick his water bottle around the room while saying "soccer"; throw a paper airplane around the room; pull the elastic on his hat and shoot it around the room; bat around a paper ball; pretend to kick students; make loud animal noises in students' ears; shoot paper balls into the trash; curse; make goat sounds during a lesson; dive under desks to retrieve objects he had thrown; shoot science materials into the air; bang on the teacher's computer; break the classroom's document camera; leave the classroom without permission; and a myriad of other disruptive behaviors. MCPS Ex. 71.

25. As a result, the Student was off-task and unavailable for instruction for significant portions of the school day, and he presented a major disruption to the learning of his classmates.

26. During the fall of 2016 (third grade), due to the Student's disruptive behaviors, the other students in his classroom were evacuated from the classroom on eight occasions. MCPS Exs. 70, 71. The Student was suspended from school for disruptive behaviors for one day on September 9, 2016; two days on October 10, 2016; one and one-half days on December 1, 2016; and two days on December 6, 2016. *Id.*

27. The Student did not return to [redacted] following his December 6, 2016, suspension.

28. On January 3, 2017, the MCPS received from correspondence from the Student's attorney, which included an application for Interim Instructional Services (IIS)[12] for the Student.

[12] IIS was sometimes referred to at the hearing and in the parties' exhibits as Home and Hospital Instruction.

MCPS Ex. 77. The MCPS approved the IIS, which continued through the last day of school on June 16, 2017. MCPS Exs. 79, 80, 81, 82, 85.

29. On June 6, 2017, the [redacted] School ([redacted])[13] sent the Parents an enrollment contract for the 2017-2018 school year directing them to sign and return the contract, along with a non-refundable deposit of $4,038.00, by June 16, 2017. MCPS Ex. 103.

30. The Parents executed the contract and returned it with the deposit to the [redacted] School within a couple days after June 6, 2017. Test. Parent.

31. On July 19, 2017, Ms. Parker and Rebecca Bixler, counsel for the MCPS, had a one to one conversation where Ms. Parker notified Ms. Bixler that the Parents were seeking funding for placement at the [redacted] for the 2017-2018 school year.[14]

32. As of the date of the hearing, the Student remains enrolled in [redacted]

DISCUSSION

I

Governing Law

The IDEA's Requirement for a FAPE in the LRE

The identification, assessment, and placement of students in special education is governed by the IDEA.[15] 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-419; COMAR 13A.05.01. "Congress enacted IDEA in 1970 to ensure that all children with disabilities are provided a free appropriate public education which emphasizes special education and related services designed to meet their unique needs and to assure that the rights of such

[13] [redacted]s program is primary focused on addressing the social and emotional needs of its students, but it does not provide mental health services to its students. Hr'g Tr. at 237, 289, 346-47.
[14] This finding is by stipulation of the parties.
[15] Maryland's special education law is a creature of State statute, based on the IDEA, and is found beginning at section 8-401 of the Education Article. The Maryland regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

children and their parents or guardians are protected." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (internal quotation marks, brackets, and footnote omitted).

The IDEA requires "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . ." 20 U.S.C.A. § 1400(d)(1)(A). The IDEA provides federal assistance to state and local education agencies for the education of disabled students, provided that states comply with the extensive goals and procedures of the IDEA. *Id.* §§ 1412-1414; 34 C.F.R. § 300.2; *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Additionally, to the maximum extent possible, the IDEA seeks to mainstream, or include, the child into regular public schools; at a minimum, the statute calls for school systems to place children in the "least restrictive environment" (LRE) consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A).

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. COMAR 13A.05.01.10B. The IDEA requires specialized and individualized instruction for a learning or educationally-disabled child. Nonetheless, "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities," must be "educated with children who are not disabled . . . ." 20 U.S.C.A. § 1412(a)(5)(A). It follows that the State and federal regulations that have been promulgated to implement the requirements of the IDEA also require such inclusion. 34 C.F.R. §§ 300.114 through 300.120; COMAR 13A.05.01.10A(1).

The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. 20 U.S.C.A. § 1412(a)(5)(A); *Rowley*, 458 U.S. at

181 n.4; *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997); *see also Honig v. Doe*, 484 U.S. 305 (1988).

II

Burden of Proof

As the moving party and the party seeking relief, the Student bears the burden of proof, by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

For the reasons set forth below, and for different reasons from those propounded by the parties, I find the Student has met his burden.

III

Positions of the Parties

The Student contended the MCPS violated the IDEA by failing to provide him with a FAPE. Specifically, the MCPS erred, the Student averred, by proposing a placement in an inappropriate student population and in a program with a seclusion room. The Student did not dispute the goals, objectives, and supports set forth in the IEP, but maintained that implementing it at [redacted] was improper. For these reasons, the Student seeks compensatory education and tuition reimbursement for his unilateral placement at [redacted] for the 2017-2018 school year.

The MCPS vigorously disputed the Student's assessment of the failings of the proposed placement and contended, through its expert and fact witnesses, that [redacted] is an appropriate placement reasonably calculated to provide a FAPE to the Student in the LRE. For these reasons, the MCPS contended the Student's Complaint should be denied and the decision of the IEP team and the MCPS affirmed.

IV

Analysis

A. The provision of a FAPE

A school system's obligation under the IDEA is to provide all children with disabilities a FAPE. 20 U.S.C.A. § 1400(d)(1)(A); 34 C.F.R. § 300.101(a).

A FAPE is defined in the IDEA as special education and related services that—

> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A § 1401(9); *accord* 34 C.F.R. § 300.17.[16]

In *Rowley*, the Supreme Court described a FAPE as follows:

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

458 U.S. at 200-01. The Court held that a FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Id.* at 188-89. However,

> [a]s noted by the Third Circuit, "*Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a 'mainstreamed' classroom." Since Amy Rowley was receiving passing grades and otherwise succeeding in school, the only question

[16] A FAPE is defined in COMAR 13A.05.01.03B(27) as "special education and related services" that:
(a) Are provided at public expense, under public supervision and direction;
(b) Meet the standards of the Department, including the requirements of 34 CFR §§ 300.8, 300.101, 300.102, and 300.530(d) and this chapter;
(c) Include preschool, elementary, or secondary education; and
(d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

> before the Court was whether the school was required to give Amy sufficient assistance to allow her to receive the same educational benefit as her non-disabled peers. The *Rowley* Court did not have occasion to consider the question of what level of educational benefit the school district would have been required to provide Amy Rowley had she not been progressing successfully through school in a regular education classroom.

Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 863 (6th Cir. 2004) (citation omitted).

After *Rowley*, a split in the circuits of the United States Courts of Appeal developed over precisely what "some educational benefit" meant. Some circuits, notably the Fourth and Tenth, understood it to mean "some" benefit more than a "*de minimis*," "minimal," or "trivial" benefit; while others, such as the First, Third, and Ninth Circuits interpreted the standard to mean a "meaningful" benefit. *Compare O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015), *and Endrew F. v. Douglas Cty. Sch. Dist. RE–1*, 798 F.3d 1329, 1338-41 (10th Cir. 2015), *with D.B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012), *and N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008), *and Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988).

The Supreme Court resolved the split in the circuits by granting *certiorari* to review the Tenth Circuit's opinion in *Endrew F.* The Supreme Court held a FAPE must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" and finding that "[t]he IDEA demands more" than "an educational program providing merely more than *de minimis* progress from year to year." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 1001 (2017) (internal quotation marks omitted).[17]

[17] The Fourth Circuit has acknowledged that "[o]ur prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by *Endrew F.*" *M.L. ex rel. Leiman v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 752 (2018). For these reasons, any opinions of the Fourth Circuit or any circuit that adopted a no more than "*de minimis*" standard and any district court within those circuits that are cited or discussed below are not relied upon for their definition of a FAPE, but for other legal principles for which they remain the state of the law in this circuit and controlling precedent or persuasive authority.

B. The M.O. of the IDEA—the IEP

To provide a FAPE, the educational program offered to a student must be tailored to the particular needs of the disabled child by the development and implementation of an IEP, taking into account:

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

20 U.S.C.A. § 1414(d)(3)(A); *see also Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985) ("The *modus operandi* of the Act is the already mentioned individualized educational program." (internal quotation marks omitted)).

The IEP depicts the student's current educational performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically designed instruction and services that will assist the student in meeting those objectives, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A); *accord* 34 C.F.R. § 300.22; Educ. § 8-405(a)(4).

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. *Endrew 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.*; *see also* 20 U.S.C.A. § 1401(29). The IEP must be "appropriately ambitious," *Endrew F.*, 137 S. Ct. at 1000, and it must provide for "specially designed instruction" that is "reasonably calculated to enable the child to receive educational benefits" and to "make progress appropriate in light of the student's circumstances." *Id.* at 996, 999 (quoting *Rowley*, 458 U.S. at 207). The amount of progress anticipated for the student should be "markedly more demanding than the

merely more than *de minimis* test" applied in the past by many lower courts. *Id.* at 1000 (internal quotation marks omitted).

The test for whether an IEP is "appropriately ambitious," *id.*, and "reasonably calculated to enable the student to receive educational benefits," *id.* at 996, is different for each student; there is no bright-line rule or formula to determine whether an IEP provides a FAPE.[18] *Id.* at 1000-01. For a student who is fully integrated in the regular classroom, a FAPE would generally require an IEP to be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 996, 999 (citing *Rowley*, 458 U.S. at 203-04). However, for a student who is not fully integrated and/or cannot be reasonably expected to achieve grade-level advancement, the "educational program must be appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom." *Id.* at 1000. Regardless, "every child should have the chance to meet challenging objectives." *Id.*

When assessing whether a student was offered, given, or denied a FAPE, a judge must "afford great deference to the judgment of education professionals . . . ." *O.S.*, 804 F.3d at 360 (quoting *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)). A judge should not substitute their own "notions of sound educational policy for those of the school authorities which they review." *Endrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 206). Additionally, a judge "should be reluctant . . . to second-guess the judgment of education professionals." *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). A judge should be mindful that local educators deserve latitude in determining the IEP most appropriate for a disabled child, and that the IDEA does not deprive these educators of the right to apply their professional judgment. *See Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001

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

(4th Cir. 1997). Additionally, a judge must be careful to avoid imposing his or her view of preferable educational methods upon a school district. *Rowley*, 458 U.S. at 207; *see also A.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004). However, a reviewing judge may fairly expect the school system's professionals "to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [his or her] circumstances." *Endrew F.*, 137 S. Ct. at 1002.

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

The development of an IEP is a prospective process. *See Endrew F.*, 137 S. Ct. at 999. The test of the appropriateness of the IEP is *ex ante* and not *post hoc*. *Adams v. State*, 195 F.3d 1141, 1149 (9th Cir.1999); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993); *J.P. ex rel. Popson v. W. Clark Cmty. Sch.*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002) ("[T]he measure of appropriateness for an IEP does not lie in the outcomes achieved. While outcomes may shed some light on appropriateness, the proper question is whether the IEP was objectively reasonable at the time it was drafted." (citation omitted)). Thus, a judge in a due process hearing must look to what the IEP team knew when it developed the IEP, and whether that IEP, as designed, was reasonably calculated to enable the child to receive educational

benefit. An IEP is essentially a "snapshot" in time and "cannot be judged exclusively in hindsight." *See K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d. 795, 818 (8th Cir. 2011); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). However, evidence of actual progress during the period of an IEP may also be a factor in determining whether a challenged IEP was reasonably calculated to confer educational benefit. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009); *see also M.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002). The Supreme Court in *Rowley* similarly observed that a student's achievement of passing marks and advancement from grade to grade is an important factor in determining if a student received educational benefit. *Rowley*, 458 U.S. at 207 n.28.

C. Appropriateness and Adequacy of the Student's IEP

i. Counseling Services

Guided by these standards, I turn to the facts of this case.

It takes little imagination to contemplate how the numerous traumas the Student suffered impacted every aspect of his functionality and how he understood himself and the world around him while in school. Many hundreds of pages of the hearing transcript and numerous exhibits set forth with precision an iteration of the behaviors engaged in by the Student, while in his second and third grade years at [redacted] that prevented him from being available for learning and from accessing the curriculum, and often by virtue of his intrusive and disruptive behaviors, equally prevented his entire class from so doing. *E.g.*, MCPS Exs. 69-71, 75. The evidence of record on this matter is without dispute or equivocation.

Every intervention the MCPS attempted—para-educator support; development of a FBA and a BIP; allowing the Parents to take the Student out of school as needed; frequent and as needed sensory and movement breaks; prompting; redirection; use of teacher-mentors; and daily access to guidance counseling, to name but a few—was without appreciable and sustained

success. The Student caused significant disruptions daily or on a near daily basis; his teachers had to frequently evacuate the classroom to protect staff and children from him; he threw sharp objects at other students, sometimes striking them in the face, and at teachers; other students, faculty, and staff felt unsafe around him; and he felt unwanted and unappreciated. This was patently an untenable and unsustainable dynamic that was inimical to learning.

Recognizing the Student's behavior may have been driven by an impairment or disability cognizable under the IDEA, the MCPS evaluated the Student and determined him eligible for special education and related services under the IDEA. 34 C.F.R. § 300.8(a), (c). The evidence suggests that many, though not all, of the Student's disruptive and intrusive behaviors were occasioned by his response to trauma and that by engaging in these behaviors he was unable to learn. *E.g.*, Hr'g Tr. at 488; MCPS Ex. 2. To address these behaviors—described with crystalline clarity and in, what was for the Parents, excruciating detail by the Student's teachers and administrators, and undisputed on the record before me—and to make the Student available for learning, the IEP team proposed an IEP with nine goals, seven of which address the Student's social and emotional functioning and provided for fifteen minutes of counseling weekly, or three minutes per day, with a psychologist.[19] *E.g.*, MCPS Ex. 28, at 36.

In his less than ten years of existence on this Earth, and not necessarily in chronological order, the Student's home burned down; he was diagnosed with a seizure disorder; he was hospitalized in a pediatric intensive care unit for ten days after suffering from [redacted] syndrome, an allergic reaction from prescribed medication that involved the *en masse* shedding of at least half the skin cells in his body; and he suffered protracted sexual abuse at the hands of a respected religious leader in his community. Hr'g Tr. at 508-10, 739. The Student has been diagnosed with PTSD, an unspecified anxiety disorder, and ADHD. Test. [redacted] MCPS Ex.

[19] The parties agree that the substance of the IEP developed on June 9, 2016, generally mirrors the substance of the IEP's developed on October 6, 2016, and September 11, 2017.

93. I reasonably infer that the cause of the Student's maladaptive behaviors is a complex constellation of these conditions and their symptoms.

Ms. [redacted] the Student's guidance counselor at [redacted] and the MCPS's witness with the most training and experience dealing with the intersection of the educational and psychosocial needs of children, and who had frequently counseled the Student in the past interacting with him on a near daily basis during his third grade year, offered, without prompting, her expert opinion that fifteen minutes of counseling per week was not adequate to address the Student's disruptive behaviors. She opined that sixty minutes per week would be an appropriate level of counseling services. I agree.

I am unpersuaded by the MCPS's attempts to rehabilitate Ms. [redacted][20] or with Dr. [redacted]'s or Ms. [redacted]'s testimony about the wraparound, multidisciplinary, and embedded mental health services and supports in the program at [redacted]. Hr'g Tr. at 1011, 1074-75. While certainly credible and competent evidence, Dr. [redacted] and Ms. [redacted]'s testimony lacked the specificity and persuasive precision[21] to overcome Ms. [redacted]'s initial and freely offered expert opinion and the undisputed evidence of record establishing the pervasive and invasive nature of the Student's behavioral problems and their essential prevention of his ability to access the educational curriculum and to learn that counseling service was proposed to address. Moreover, Ms. [redacted]'s opinion is supported by the opinion of the school psychologist, Mr. [redacted] who opined that "I would agree that 15 minutes to *start* with is certainly reasonable." Hr'g Tr. at 1233 (emphasis added). I infer from Mr. [redacted]'s testimony that he too believes the

[20] Ms. [redacted] later contended, upon examination from the MCPS's counsel, that the fifteen minutes of counseling provided for the Student in the IEP was a mere starting point and could be revisited and readjusted, however, the IEP makes no such proviso nor contains such a caveat.

[21] By this I simply mean that Dr. [redacted] and Ms. [redacted] provided credible testimony about the general nature of the [redacted] program, but could not tell me with exactitude or certainty how much time the Student would spend with mental health professionals as a part of the [redacted] program on a daily or weekly basis such that I could independently determine whether that would substantially and meaningfully substitute for the forty-five minutes of weekly counseling not provided in the IEP and reach the level of therapeutic treatment time recommended by Ms. [redacted] at the hearing.

provision of only fifteen minutes of counseling a week, as set forth in the IEP, is inadequate, otherwise his discussion of fifteen minutes as a "start" would be of no meaning.

Moreover, of all the witnesses of record, Ms. [redacted] is most qualified to offer an opinion on the appropriateness of the proposed number of hours of counseling for the Student, as she was both the Student's guidance counselor while he attended [redacted] and was the sole witness qualified to offer opinions in the field of school counseling. For these reasons, I give her initial and freely offered opinion great weight and credit it above any testimony to the contrary.

I am particularly mindful that the body of controlling case law from the Supreme Court and the Fourth Circuit in this area makes plain that great deference is owed to the professional opinion of the educators who have worked with the Student. *Endrew F.*, 137 S. Ct. at 1001; *Rowley*, 458 U.S. at 206-07; *A.B.*, 354 F.3d at 325-29; *M.M.*, 303 F.3d at 532-33; *Hartmann*, 118 F.3d at 1001; *Tice*, 908 F.2d at 1207; *O.S.*, 804 F.3d at 360. However, it is this very deference I am applying when I consider and give weight to the expert opinion of the Student's guidance counselor about the Student's counseling needs.

For these reasons, I find the MCPS violated the IDEA by proposing an IEP that only allotted fifteen minutes of counseling a week for a Student who suffers from multiple mental health impairments and whose behaviors are of an extreme, violent, and unmanageable nature in the general education setting.[22]

I conclude this provision of related services is so central to the fundamental question of the Student's ability to access to the curriculum and to be available for learning that absent an

[22] The record is replete with innumerable and unrefuted episodes of the Student's aggressive and harmful behaviors in the classroom. Witnesses credibly testified and contemporaneously reported occurrences where the Student lunged at his guidance counselor and assistant principal with pointed scissors, hit, kicked, and threw objects at them, threw sharpened pencils at the face of his classmates, and bit, punched, and choked his assistant principal using his necktie, pulled his hair, and attempted to draw upon his person with markers. The Student's behaviors were so severe they have required his second grade teacher to seek medical attention and be excused from work as a result of her injuries, caused classroom evacuations on a daily or near daily basis in both second and third grade, caused his peers and teachers to feel unsafe in the classroom, and required near-constant intervention from administration and counselling staff, all to no avail. *See, e.g.*, Hr'g Tr. at 799-803, 857-58, 919-20; MCPS Ex. 71.

adequate and appropriate level of counseling, the IEP is not reasonably calculated to provide a FAPE.[23]

ii. Notice

I am also particularly mindful that neither the Complaint nor my Order expressly set this forth as an issue, and both the IDEA and the controlling provisions of the federal regulations prohibit a party from raising issues at the hearing not raised in the Complaint. 20 U.S.C.A § 1415(f)(3)(B); 34 C.F.R. § 300.511(d). I understand this to be a requirement grounded in principles of fairness and notice so the school system is able to be on notice of the issues, to allow for resolution of the issues through a non-adversarial dispute resolute mechanism if the parties are mutually agreeable, and for it to reasonably defend itself against a due process complaint. *C.F. v. N.Y. City Dep't of Educ.*, 746 F.3d 68, 78 (2d Cir. 2014) ("The key to the due process procedures is fair notice and preventing parents from 'sandbag[ging] the school district' by raising claims after the expiration of the resolution period." (brackets in original)).

However, "the waiver rule is not to be mechanically applied" nor does it demand blind obedience any and all other considerations notwithstanding. *Id.* "[T]he IDEA itself contemplates some flexibility. The statute does not require that alleged deficiencies be detailed in any formulaic manner . . . ." *Id.* While noting that trial courts in the Second Circuit have held that an issue that is not raised in a due process complaint is foreclosed from judicial review, the Court declined to prohibit review of the contested issue in *C.F.*, and considered several factors in

[23] I find this distinguishable from the facts of *J.P. ex rel. Popson*, cited by the MCPS in its brief, which involved "minor" procedural violations the District Court found curable by ordering the IEP to be amended and without finding a failure to provide a FAPE and a violation of the IDEA. 230 F. Supp. 2d 910, 931-32, 948. "The Court notes that it is clearly within a hearing officer's prerogative to order minor adjustments in a student's proposed IEP, without invalidating the whole thing." *Id.* at 948; *see also S.M. v. Weast*, 240 F. Supp. 2d 426, 434 (D. Md. 2003). I do not find the adjustment I contemplate here "minor" or merely procedural or technical in nature. I have also considered the other cases cited in the MCPS's Closing Memorandum and find those cases distinguishable from the case at bar as they contemplate procedural violations that do not impact the provision of a FAPE. Unlike those cases, my findings here are not an exaltation of form over substance, but, instead, a recognition of the profoundly significant substance that is at issue; that is, the very lynchpin of the IEP—making the Student accessible for learning.

its analysis. *Id.* Chiefly, and in no particular order, the Court found of significance that the issue was reached on the merits by the administrative adjudicator at the due process hearing and accordingly there was a developed record for judicial review, the issue went to heart of the dispute, and the complaint contained a general allegation of the larger issue that was sufficient to provide "fair notice" to the school system of the contested narrower issue. *Id.*

Applying the *C.F.* Court's holding in *J.W. v. New York City Department of Education*, 95 F. Supp. 3d 592, 603 (S.D.N.Y. 2015), the U.S. District Court for the Southern District of New York found the *C.F.* factors met and held the contested issue was properly before it for review. In its analysis, the *J.W.* Court gave significant weight in its analysis to the record development before the administrative adjudicator noting that "because the Department cross-examined the Parents' witnesses extensively on the issue of methodology, it cannot genuinely claim that it was prejudiced by the [administrative adjudicator's] consideration of such evidence." *Id.* at 603 (internal quotation marks omitted). *See Adam D. v. Beechwood Indep. Sch. Dist.*, 482 F. App'x 52, 57-58 (6th Cir. 2012) (finding that even if the school system lacked pre-hearing notice the issue was raised at the hearing and the school system had "ample opportunity to present a defense on that matter during the four-day hearing"); *Dist. of Columbia v. Pearson*, 923 F. Supp. 2d 82, 87-88 (D.D.C. 2013) (finding that where an issue was not raised in the due process complaint nor was there any evidence adduced at the hearing in support or opposition, it was error for the administrative adjudicator to raise and decide the issue as a matter of first instance in his opinion); *Brown v. Dist. of Columbia*, 568 F. Supp. 2d 44, 51 (D.D.C. 2008) (finding an issue not expressly set forth in a due process complaint was properly before the administrative adjudicator and, considering the conduct of the parties at the hearing, observing that "no one argued that this issue was not properly raised[i]n fact, all parties appeared to agree to the contrary"); *see also M.H. v. N.Y. City Dep't of Educ.*, 685 F.3d 217, 250 (2d Cir. 2012) ("[I]t

does not follow from the fact that the [school system] bears the burden of demonstrating that the IEP provides a FAPE that it should be permitted to argue issues outside the scope of the due process complaint without opening the door for the plaintiffs." (internal quotation marks omitted)); *Morgan v. Greenbrier Cty. W. Va. Bd. of Educ.*, 83 F. App'x 566, 570 (4th Cir. 2003) (observing that Court did not "have before us the issue of the appropriateness of any IEP that was developed or any actions taken after the due process hearing").[24]

Although not specific to the IDEA and the law of special education, I have also considered general principles of administrative law that even when notice is not provided prior to an administrative hearing, "due process is not offended if an agency decides an issue the parties fairly and fully litigated at a hearing." *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992) ("[T]he test is one of fairness under the circumstances of each case—whether the [defendant] knew what conduct was in issue and had an opportunity to present his defense." (quoting *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir.1981))).

I find this authority persuasive and it guides my analysis here. Applying the *C.F.* factors and the holdings of the cases set forth above to the facts of the case at bar and considering the general principles of fairness, I conclude the issue of the adequacy of the Student's counseling services was properly raised at the hearing, which spanned eight vigorous and robust days of testimony and argument, and was fully litigated in that time, and therefore properly before me, without the MCPS being "sandbagged,"[25] even if not expressly set forth in the Complaint. I explain.

[24] My review of the case law did not yield any controlling precedent that mandated a different outcome. The U.S. District Court of Maryland had recent occasion to note the issue but did not address the legal correctness of the administrative law judge's decision to exclude an issue not explicitly set forth in the due process complaint. *E.P. v. Howard Cty. Pub. Sch. Sys.*, No. CV ELH-15-3725, 2017 WL 3608180, at *32 (D. Md. Aug. 21, 2017), *aff'd*, 75 F. App'x 55 (4th Cir. 2018) (per curiam).

[25] Perhaps a gentle dusting of the finest grains of sand, at most.

Even a cursory review of the complaint makes plain the Student was robustly contesting the adequacy of the IEP and its provision of a FAPE, although focused on the issue of placement. While not expressly set forth in the Complaint, I am satisfied the issue of the adequacy of counseling services contained in the IEP is subsumed and encompassed in the broader issues set forth in the Complaint and, in that sense, was properly before me at the hearing and at least some notice of the issue was provided to the MCPS.

In addition, I note this issue was clearly raised and appreciable testimony was adduced at the hearing. The issue was also revisited at some length in closing argument and extensively and thoroughly briefed by the parties in written closing memoranda. Neither party was unaware of the significance of this issue nor deprived of the opportunity fully to address it at the hearing. This militates against any possible concerns of undue surprise or unfairness.

I have also considered that to resolutely refuse to address this palpable deficiency in the Student's IEP and its impact on his ability to access the curriculum is to ignore the very purpose of the IDEA: that is, to provide eligible disabled children with a FAPE. To ignore what I have found to be the reason this IEP is inadequate to provide a FAPE would be to elevate legal formality over the remedial purpose of the statute.

Therefore, I conclude that consideration of this issue is not contrary to the spirit and overarching purpose of the IDEA and its implementing regulations and taking guidance from the case law discussed above, is not improper.

Before I can determine the appropriate remedy for this violation of the IDEA, I must first consider any remaining deficiencies in the IEP and then determine whether the Parents' decision to decline to consent to the IEP team's proposed placement was a refusal to consent to the

implementation of the initial IEP and the provision of special education services, and, if so, whether this relieves the MCPS of liability for its violation of the IDEA.[26]

ii. Placement at [redacted]

The Parents declined to consent for the provision of special education and related services for the Student based not on a disagreement with the present levels of performance; supplementary aids and services; modifications; goals and objectives; and hours of proposed service contained within the IEP, but solely based on their concerns about the propriety of a quiet, or seclusion, room in the classroom at [redacted] after one visit to the program where the room was not in use; no other aspect of the IEP was objected to. *E.g.*, Hr'g Tr. at 1123, 1222, 1224-26, 1238, 1307-08.

This concern, in turn, was reinforced by the opinion of Ms. [redacted] who is neither a special nor general educator, has no knowledge or expertise on how, when, and under what circumstances the MCPS teachers and support staff use the room, had only observed the Student once during school at [redacted] in order to assess his educational needs, had never been to [redacted] and labors under certain misapprehensions about its structure, such as class size, that are fundamental in nature and despite her role as the Student's treating therapist, greatly limit the weight I give her opinion and factual testimony.

[26] The Student also raised other alleged violations of the IDEA, including improper coding and a failure to consider present levels of performance in crafting the IEP. Even if proven, I am not persuaded these are violations of the IDEA that impact the provision of a FAPE. I explain. I am persuaded by the authority, recitation of testimony, and arguments set forth in the MCPS's Closing Memorandum that coding merely serves to establish threshold eligibility under the IDEA and does not drive the formulation of the IEP and the provision of special education service. MCPS Closing Memorandum at 66 (citing *Heather S. v. State*, 125 F.3d 1045, 1055 (7th Cir. 1997), and *Letter to Williams*, 21 IDELR 73 (Mar. 14, 1994)). I am further persuaded, for the same reasons, that the MCPS did rely on at least some present levels of performance in drafting the Student's IEP and even if it did not, or failed to consider all data available to it, the Student did not protest this at any IEP team meeting nor has suffered more than a technical procedural violation from which he has not proven that it is more likely so than not so to have interfered with the provision of a FAPE. *See Sanger v. Montgomery Cty. Bd. of Educ.*, 916 F. Supp. 518, 526-27 (D. Md. 1996) ("[T]o the extent that there may be failure to comply strictly with IDEA's procedures, the Court must consider whether the failures have caused the loss of educational opportunity or are merely technical in nature." (internal quotation marks omitted)); MCPS Closing Memorandum at 63-81.

Further, Ms. [redacted] testified that being restrained or observing a fellow student being restrained would trigger PTSD for the Student. However, restraint can and has been performed for the Student in the general education setting at [redacted] without any evidence of lingering ill effects and suggests Ms. [redacted] has conflated seclusion with restraint and presumes the use of the quiet room requires a mechanical or physical restraint, which is not supported by any other evidence of record. COMAR 13A.08.04.05;[27] MCPS Exs. 73, 90. Significantly, Ms. [redacted] did not opine that the mere presence or even the use of a seclusion room would trigger PTSD for the Student, but instead "restraint," and acknowledged that the Student's IEP does not call for seclusion to be used in the event of a behavioral occurrence. Hr'g Tr. at 434.

I note that Ms. [redacted] also offered her opinion that the placement of the Student's desk in the classroom and the lack of certain supports offered to the Student during his third grade year at [redacted] triggered his PTSD. *Id.* at 437-38. However, Ms. [redacted] despite my express invitation so to do, failed to persuasively explain how these experiences are connected to the trauma he suffered and why these experiences would trigger the Student's PTSD, how long these episodes will last and their severity, how they would impact the Student's availability for learning, and if these events are different from those triggered by the use or sight of others being restrained or other PTSD triggers. Ms. [redacted] also expressed concerns about the student population at [redacted] and opined that the Student's peer group would render [redacted] an inappropriate placement, but acknowledged she had never been to [redacted] and had no knowledge of the IEPs of the students in that program, the impairments from which they may suffer, and how those impairments impact their behavior.

Finally, Ms. [redacted] authored a letter she furnished to the school system members of the IEP team that avers that she engaged in "several observations of [the Student] in the classroom,"

[27] On June 20, 2018, the MSDE adopted amendments to this regulation, effective July 16, 2018.

but acknowledged under cross-examination, that she had only observed the Student in the classroom on one occasion. *Compare* MCPS Ex. 99, *with* Hr'g Tr. at 416-17, 445-46. This inconsistency deleteriously impacts Ms. [redacted]s credibility and the weight I can accord her testimony.

Ms. [redacted]s opinion notwithstanding, Dr. [redacted] and Ms. [redacted] credibility testified at length about the small class size and nature of the [redacted] program and the emotional regulation, cognitive flexibility, and social skills it inculcates in its students. Hr'g Tr. at 1011-12, 1017, 1074-75, 1304, 1341-42. Dr. [redacted] and Ms. [redacted] clearly and persuasively explained how the placement allows for the implementation of the Student's IEP, which, in turn, incorporates the recommendations of the IEP team, and the Student's private examiners, evaluators, and his treating therapist for an academically rigorous program in a small class setting in a nurturing environment, where the Student can receive personalized attention from his teachers, develop social and emotional regulation skills, and where he can feel safe. *Id.*; Hr'g Tr. at 389, 1230-31; MCPS Exs. 2, 93, 99.

Dr. [redacted] credibly described the student population at [redacted] as being remarkably similarly situated to the Student; average to above-average cognitively and suffering from profound psychological pain and trauma and noted that many students at [redacted] have been "diagnosed with posttraumatic stress and there are strategies and interventions that the mental health team that we talked about earlier put in place to address those needs." Hr'g Tr. at 1047.

Directly addressing the Parent's concern about the presence of a room within a room at [redacted] Dr. [redacted] credibly explained that there is no "seclusion room" in the proposed placement. Rather, there are

> different spaces in our program. Each classroom has what's called a quiet room which is located in the classroom and students and staff use this room in -- in a variety of ways. It can be just to take a break. It can be to go to a quiet place to problem solve with an adult. It could be to mediate a situation with another

> student and an adult. It also can be used if a student is a danger to himself or others and may need to be physically restrained or in a private space. We have spaces outside of the classroom as well. We have a room that's called our student support area which has desks and tables and chairs and is used for a variety of reasons. Sometimes students just need another place to work. It could be used for small group work. It could be used to help a student problem solve through a difficult situation and then return to instruction. And then, lastly, we have a sensory room which is – it's actually the size of a regular classroom and we have mats in there and we have balls and different kinds of games that the social workers and psychologists use to help students with emotional regulation and often that room is used to hold counseling groups. It's also used for movement and sensory breaks. So, all of these spaces are available for our students because they need, sometimes, those opportunities to work through a difficult time that they might be having.

Id. at 1012-13. Dr. [redacted] also made clear that these various rooms at [redacted] are not used for disciplinary purposes. *Id.* at 1069.

Additionally, there is credible evidence to conclude that [redacted] is a less restrictive environment than [redacted] as it allows for daily opportunities for social—lunch and recess—and academic interactions—specials such as music, art, and physical education—with the Student's non-disabled peers as well as the social skills development and the small self-contained classes in a nurturing environment for core academics recommended by the Student's treating providers and evaluators. *Id.* at 1009, 1230-31; *M.M.*, 303 F.3d at 526.

Finally, all of the MCPS's expert special educators and mental health experts were of the opinion that the program at [redacted] is appropriate for the Student and reasonably calculated to provide a FAPE; I give these opinions great weight. These witnesses are better positioned to offer opinions of the adequacy and appropriateness of the proposed placement than the Student's expert and lay witnesses because they have the greatest knowledge about the nature and functioning of the [redacted] program and its student population and have knowledge about the Student and his academic, social, and emotional needs obtained either first-hand through direct interactions, observations, or testing of the Student, or through IEP team meetings, and in the case of Ms. [redacted] extensive knowledge from nearly daily contact. Test. [redacted] ("Based on [the

Student's] needs, present levels of performance, the IEP goals that we reviewed, and the intensity of his needs at this time. I think that the services we offer are a solid set of services to meet his needs and help him to be a successful student in the least restrictive environment." Hr'g Tr. at 1018); [redacted] ("My opinion is that given the behavioral support teacher, the support of -- of folks like a licensed clinical social worker, school psychologist, working in tandem with an integrated team of general educators, special educators, paraeducators, that that would be an appropriate support system for [the Student]." Hr'g Tr. at 1229); [redacted] ("In my opinion it would meet his needs and give him opportunities to have the inclusion of the general ed peers -- general ed peers. . . . Because it has the layers of the mental health piece and the behavior supports. It offers a -- self-contained classes, you know, to make -- be successful . . . for his core academics. And so, allow him that chance to be -- and it also lets him to have the opportunity to practice generalization of the strategies he's learning." Hrg Tr. at 1303-04); and [redacted] ("The supports and the resources available, yes. I feel that it would be beneficial for [the Student] with -- for the social/emotional support, as well as with the smaller classes." Hr'g Tr. at 1125).

Ultimately, it is not the MCPS's burden to prove the appropriateness of the placement, but the Student's burden to prove its inappropriateness and after carefully considering the Student's position, I remain unpersuaded of [redacted]'s inappropriateness to implement the IEP. For these reasons, I am entirely unpersuaded the proposed placement at [redacted] was improper and am unpersuaded the MCPS violated the IDEA in so doing.

D. Parental Consent for Implementation of the IEP and the provision of Special Education Services

> (b) *Parental consent for services.* (1) A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.
>
> (2) The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.

(3) If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public agency—

(i) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;

(ii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent . . . .

34 C.F.R. § 300.300(b).

It is without dispute that the Parents declined to consent to the Student's placement at [redacted] It is equally without dispute that the MCPS treated this as the Parent's refusal to consent to the provision of any special education services for the Student. MCPS Ex. 36. The Student contends that the MCPS had an obligation to implement any goals and services set forth in the IEP to which the Parents consented and relies upon section 300.300(d)(3) of the C.F.R. for the authority for this proposition. This regulation provides that "[a] public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a), (b), (c), or (d)(2) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part." The plain language of the regulation appears to be in accord with the Student's position. However, at the time of the most recent amendment to this regulation, in 2008, the Department of Education (Department), the federal agency that promulgated the regulation at issue, provided in response to a comment from the public made after the notice of proposed rulemaking that "[u]nder § 300.300(b)(1), parental consent is for the initial provision of special education and related services generally, not for a particular service or services." 73 Fed. Reg. 73,006, 73,011 (Dec. 1, 2008). As the Secretary of the Department is the framer of these regulations implementing the IDEA, I must construe them in such a manner

as to give effect to the Secretary's intent unless that intent runs contrary to the enabling statute—the IDEA.

Finding the Secretary's construction is not in discord with the statute, I conclude that consent for the initial provision of special education and related services means consent for these services generally and not a particular service and therefore the MCPS could not have implemented some, but not all of the Student's initial IEP. Even should I find the Parents' construction more correct then the MCPS's and conclude therefore that the MCPS could have implemented the Student's initial IEP in part, this does not meaningfully alter my ultimate analysis or decision. I explain.

The record contains no evidence the Parents consented to the provision of any "service, benefit, or activity," as those terms are used in the controlling regulation. In his written closing statement, the Student contends he requested services, but cites only to two letters, one of which is an exhibit not offered or admitted in evidence (MCPS Ex. 56) and the other (MCPS Ex. 68) is a request for one-to-one para-educator support under the Student's 504 plan. Student's Written Closing Statement at 4. This does not support the Student's contention; a one-to-one para-educator support is not provided for in the Student's IEP so I could not reasonably conclude the Parents were consenting to a service that was never offered. Moreover, Ms. [redacted] who was present at several IEP team meetings, testified in her direct examination, regarding the September 11, 2017 IEP team meeting, in response to the question "[d]id the parents agree to the services that were offered?" "No." Hr'g Tr. at 391. Upon cross-examination, Ms. [redacted] revisited the subject of the Parent's desired outcome and offered further testimony about the Parent's intentions that "[t]hey [the Parents] were – they were rejecting the one place that they were given the option of. They wanted to see – to have a one to one put back in place. They wanted to see if services could be put in place to help [the Student] before having to move him to

a – the most restrictive environment." *Id.* at 402. The question, however, is not what services the Parent's sought or were agreeable to in a merely conceptual way, but what consent to services, if any, the Parents gave and conveyed to the MCPS.

In cross-examination, Mr. Brousaides (Q) questioned Parent (A), in relevant part, as follows:

> Q. But, ultimately, you did not consent to this IEP being implemented, correct?
>
> A. Yes.

Id. at 566.

> Q. And the second paragraph from the bottom states that if you decide not to sign the IEP [the Student] would continue to attend school at [redacted] Elementary School as a general education student. However, he would not receive the additional supports and services that were recommended through the special education process, correct?
>
> A. Yes.
>
> Q. So, you were fully aware that if you did not sign this IEP [the Student] wouldn't be getting the full range of supports that had been proposed for him for the third grade, correct?
>
> A. Yes. Yes.
>
> Q. So, that was a considered decision that you made?
>
> A. Yes.

Id. at 571 (emphasis omitted).

> Q. This letter to your attorney states, the second to last paragraph, to date your clients have not signed the IEP or consented for the provision of special

education services. As such, [the Student] will attend [redacted] on August 29, 2016 as a general education student.

A. Yes.

Q. That is what you knew was going to happen if you returned to [redacted] for third grade, correct?

A. Yes.

Id. at 573 (emphasis omitted).

Q. He [the Student] wasn't given support because you declined to give consent to implement the IEP, correct?

A. We -- yes, that's correct. We -- we didn't --

Q. You've answered --

A. -- sign the IEP

Id. at 601.

Q: And the only reason he was at [redacted] in third grade was because you refused to provide consent to implementation of the IEP, correct?

A. That is correct. And there were --

Q. You've answered my --

A. And we had reasons.

Id. at 658. Later, on re-cross, another exchange between Mr. Brousaides (Q) and Parent (A) transpired as follows:

Q. Your testimony when I asked you just minutes -- a minute ago was that at the October 2016 IEP meeting you told the team about the concerns you expressed today regarding the length of transportation to [redacted] Do you have a distinct memory of telling that to the IEP in October 2016?

A. I'm telling you we -- we raised all of our concerns --

Q. Sir, my question to you is specifically --

A. I can't -- I can't tell you if I raised it myself or raise it through the -- the lawyer, but we did not sign the IEP and did not agree with the IEP – with this IEP resolution because of all of our concerns. It's not one thing or the other. It's the whole package.

Id. at 703.

These exchanges make clear that the Parents were declining, and understood they were declining, all special education and related services for the Student. Nothing in these exchanges suggest parental consent for implementation of part of the IEP.

In closing argument, the Student contended that it is unreasonable to require the Parents to make a clear statement of their consent for special education services for the Student, as they are lay to the law. While few, if any, would suggest the IDEA was enacted for the purpose of erecting unnecessary procedural barriers for the parents of a disabled student—the opposite in fact—the regulatory requirement is one of "consent," and I am mindful that all persons are presumed to know the law and act in conformity therewith, without regard to their actual knowledge.

"Consent" is defined in the controlling regulations to mean, as relevant here, "[t]he parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity . . . ." 34 C.F.R. § 300.9(b). While there is little dispute that the Parents did not note any objection to, or disagreement with, the goals, objectives, and supports discussed in the IEP team meetings and set forth in the IEP, I cannot find, or reasonably infer, this is an agreement "in writing to the carrying out of the activity for which . . . consent is sought." *Id.*

In an August 12, 2016 letter to the MCPS, Ms. Parker explains that she is counsel for the Student and "representing [the Student] in all special education matters." In her August 12, 2016 letter Ms. Parker writes that "[t]he parents are not in agreement with MCPS' change of placement recommendation and will continue [the Student's] placement at [redacted] . . for the 2016-2017 [sic]." Nowhere does Ms. Parker write that the Parents' consent to the provision of any special education or related services for the Student.[28]

Therefore, there is no credible evidence in the record that the Parents expressed their consent to any special education or related services for the Student, either in proper person or by and through counsel, formally or informally, written, verbal, or otherwise.

This finding alone however, does not relieve the MCPS of its obligation to provide the Student with a FAPE. 34 C.F.R. § 300.300(b)(3)(ii); Letter to Manasevit, 42 IDELR 233 (July 19, 2004). This is a mandatory statutory requirement for school systems that receive federal funding and cannot be waived or its noncompliance excused. *M.M.*, 303 F.3d at 526. While the regulatory provisions, supplemented and clarified by guidance from the Office of Special Educations Programs within the Department, make plain that a parent's refusal to provide consent for the implementation of special education services that provides a FAPE relieves a school system of liability for a failure to implement those services; it does not relieve the school system of its fundamental obligation to make a FAPE available to the Student, which, for the reasons discussed above, I find has not occurred here. 34 C.F.R. § 300.300(b)(3)(ii); Letter to Manasevit, 42 IDELR 233 (July 19, 2004).

[28] The letter also contains an allegation that the Parents were not "advised of their special education rights regarding the IEP being an initial IEP." MCPS Ex. 34. While I am not entirely certain precisely what deficiency is alleged to have occurred, Parent, upon cross-examination, acknowledged that he had been provided with procedural safeguards under both "Section 504 and the IDEA." Hr'g Tr. at 593; *see also id.* at 561. Moreover, on August 23, 2016, Zvi Greismann, counsel for MCPS, replied to Ms. Parker's correspondence of August 12 and 16, 2016, advising in writing that "[a]s this was an initial IEP for [the Student], prior to the provision of any special education services by [the MCPS], your clients' consent is required." *Id.* Assuming solely for the purposes of argument, the MCPS failed to notify the Parents of the legal requirement of consent prior to this moment, it certainly did so through the Student's counsel and this knowledge is imputed to the Student.

E. Is There a Remedy under the IDEA Available to the Student?

A remedy for a violation of the IDEA is discretionary, sounds in equity, and is governed by certain statutory and regulatory requirements relevant to the analysis here. 20 U.S.C.A. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d)(1), (3); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Sch. Comm. of Burlington v. Dep't of Educ of Mass.*, 471 U.S. 359, 367, 369, 374 (1985).

The IDEA furnishes a broad grant of authority to fashion an appropriate remedy for a failure to provide a FAPE that is flexible and uniquely tailored to the facts of the case. This remains true even if the student is an adult or otherwise no longer attends public school, or when the parents do not object to the hours of service at this time of the IEP's proposal or implementation. *See Burlington*, 471 U.S. at 369 (The IDEA grants "broad discretion" to the Court to fashion appropriate grants of relief.); *G. ex rel R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003) (holding that a grant of compensatory education is proper in the Fourth Circuit; reviewing with approval opinions from sister circuits granting compensatory education to students who are adults or are no longer in public schools; and distinguishing its precedent in "*Combs* [*v. Sch. Bd. of Rockingham Cty.*, 15 F.3d 357, 363 (4th Cir. 1994), which] referred only to liability of the school district where its actions were in compliance with the IDEA, and is inapplicable here"); *Lopez–Young v. District of Columbia*, 211 F. Supp. 3d 42, 57 (D.D.C. 2016) (noting that the administrative adjudicator "has broad discretion to fashion a remedy where he finds that a school district has denied a child a FAPE[, s]itting in equity, [an administrative adjudicator's] authority is flexible and case-specific" (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. Dist. 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 (citation omitted).

With this framework directing and guiding my analysis, I turn to the facts of this case.

i. Compensatory Services

"When a FAPE is not provided to a disabled student, the student's parents may seek an award of compensatory education. These educational services are ordered by the court to be provided prospectively to compensate for a past deficient program, i.e., the school system's failure to provide the student with a FAPE." *Y.B. v. Bd. of Educ. of Prince George's Cty.*, 895 F. Supp. 2d 689, 693-94 (D. Md. 2012) (internal citation and quotation marks omitted).

As discussed above, I am persuaded that the IEP team's decision to allot fifteen minutes of counseling to the Student a week is a denial of a FAPE and the IDEA. In addition to amending the IEP to reflect sixty minutes of counseling a week, I conclude an additional appropriate remedy under the IDEA is, and I order, compensatory services for the Student equivalent to sixty minutes of counseling, with a mental health professional trained in counseling children, per week for the 2016-2017 and 2017-2018 school years. *See Burlington*, 471 U.S. at 369; *Fort Bragg Dependent Sch.*, 343 F.3d at 309; *Lopez–Young*, 211 F. Supp. 3d at 57.

ii. Tuition Reimbursement

I have considered the Parent's request for reimbursement for the unilateral placement of the Student at [redacted] but am unpersuaded this is an appropriate remedy for a number of reasons: regulatory, statutory, and equitable.[29] The controlling regulation provides, in pertinent part:

> (d) *Limitation on reimbursement.* The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—
> (1) If—
> (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
> (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section . . . .

34 C.F.R. § 300.148(d)(1).

[29] Additionally, I have considered the Student's requests for reimbursement for private evaluations conducted by Dr. [redacted] and Ms. [redacted] but find persuasive the MCPS's argument that the record does not contain any evaluations, within the meaning of the relevant provisions of the IDEA and the federal regulations, conducted by Ms. [redacted] or Dr. [redacted] 34 C.F.R. § 300.502(a)(3)(i). Therefore, I conclude this request is unsupported by the record and I decline to grant it. I have also considered the Student's request for compensatory services of two hours per week for therapy services provided by Ms. [redacted] for the 2017-2018 school year, however, I have already ordered the period of compensatory services I am persuaded is proper based on the credible evidence of record and there is no factual support in the record for this specific request, which was not explained or supported with any evidence, only argument, which I do not find compelling. For these reasons, I decline to grant this request for relief.

In response to cross-examination from Mr. Brousaides, the Parent was unable to provide the exact date, but acknowledged that he executed the enrollment contract and submitted it to [redacted] a couple days after June 6, 2017. Hr'g Tr. at 611-15. I infer that once a student enrolls in a new school he is removed from his prior school and find analogous and persuasive the opinion of Judge Smalkin of the U.S. District Court of Maryland cited in, and attached to, the MCPS's Closing Memorandum, in the case of *Pollowitz v. Weast*, Civil No. S 99-3118 (D. Md. Apr. 26, 2000), *aff'd*, 90 F. App'x 438 (4th Cir. 2001) (per curiam).

A letter from Ms. Parker to Mr. Greismann, counsel to MCPS, dated June 19, 2017, provides that "the parents are considering alternative school placement for [the Student] and are seeking placement and funding of said program by MCPS." MCPS Ex. 87. The parties also entered into a stipulation of fact that on July 19, 2017, Ms. Parker verbally informed Rebecca Bixler, counsel to MCPS, of the Parents decision to remove the Student from MCPS and to seek funding for his placement at [redacted] for the 2017-2018 school year. These missives, taken singly or collectively, fail to meet the Student's regulatory burden to provide written notice setting forth with specificity the requirements of the controlling regulation at least ten days before the removal of the Student. 34 C.F.R. § 300.148(d)(1)(ii); *see Pollowitz*, 90 F. App'x at 442. This alone forms a proper basis to deny reimbursement. 20 U.S.C.A. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d)(1)(ii).[30]

I am further persuaded that funding for the Student's unilateral private placement in this case is improper after a review of the relevant case law. The violation of a FAPE established on the record before me was not the basis for the Parents decision to unilaterally place the Student, only their disagreement with the proposed placement, based on one visit to [redacted] and a

[30] There is no evidence in the record to suggest the Parents informed the MCPS of their removal of the Student and their intention to enroll him at [redacted] at the most recent IEP team meeting *prior* to making this decision. 34 C.F.R. § 300.148(d)(1)(i); Hr'g Tr. at 617, 1327 (The first IEP meeting where the Parents requested funding for their unilateral placement of the Student at the [redacted] School was on September 11, 2017.).

series of unsupported inferences based in turn on Ms. [redacted] s uninformed opinion. This is distinguishable from the facts of *Burlington*, where the Supreme Court held that:

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

471 U.S. at 370.

The Court had occasion to revisit the question of reimbursement under the IDEA some eight years later in *Carter* and explained that "once a court holds that the public placement violated IDEA, it is authorized to grant such relief as the court determines is appropriate." 510 U.S. at 15-16 (internal quotation marks omitted). From these cases, I conclude that reimbursement is a proper remedy under the IDEA if the public placement was improper.

For the reasons discussed above, I am wholly unpersuaded the public placement proposed here was improper. This alone makes crafting a discretionary award for tuition reimbursement improper. *Id.* Furthermore, had the Parents raised issues with the number of counseling services provided in the IEP with the IEP team and those numbers increased as I have ordered here, those additional hours of service could have been implemented in the proposed placement and would not have required or warranted a placement in a more restrictive setting.[31] *Id.*

In *Burlington*, the Court approved the consideration of equitable factors contemplated by the First Circuit to determine appropriate reimbursement under the IDEA. 471 U.S. at 374; *see also Carter*, 510 U.S. at 16. The First Circuit, in turn, noting the IDEA's preference for a cooperative IEP process and changes in placement by agreement, cognized a distinction "between a unilateral parental transfer made after consultation with the school system, yet still an action without the system's agreement, and transfers made truly unilaterally, bereft of any

[31] These facts also suggest the Parents did not act reasonably in their action to unilaterally place the Student at [redacted] which supplies an independent regulatory reason to deny reimbursement. 34 C.F.R. § 300.148(d)(3).

attempt to achieve a negotiated compromise and agreement on a private placement." *Town of Burlington v. Dep't of Educ. for Mass.*, 736 F.2d 773, 799 (1st Cir. 1984), *aff'd sub nom. Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359 (1985).

There is no evidence to suggest the Parent's consulted with the MCPS on the placement at [redacted] or sought a compromise or agreement in advance of their unilateral decision to remove the Student from the MCPS and enroll him in [redacted] *Id.* For these reasons, even if reimbursement was not prohibited by the Parent's regulatory noncompliance, or improper under the case law interpreting reimbursement under the IDEA and requiring a finding of improper placement, balancing the equities, I conclude that the MCPS ought not to bear the cost of the Student's private placement, which is a more restrictive environment than the proposed placement at [redacted] and when, after amendment, I am persuaded by the credible evidence of record, the Student's IEP will be reasonably calculated to provide a FAPE in the least restrictive setting, and where the Parent's did not attempt any consultation or agreement with the MCPS on the question of the private placement before unilaterally placing the Student at [redacted]

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Montgomery County Public Schools violated the Individuals with Disabilities Education Act by failing to provide the Student with a free appropriate public education by proposing an Individualized Education Program providing fifteen minutes of counseling services per week. *C.F. v. N.Y. City Dep't of Educ.*, 746 F.3d 68, 78 (2d Cir. 2014); *Adam D. v. Beechwood Indep. Sch. Dist.*, 482 F. App'x 52, 57-58 (6th Cir. 2012); *J.W. v. N.Y. City Dep't of Educ.*, 95 F. Supp. 3d 592, 603 (S.D.N.Y. 2015).

I further conclude, as a matter of law, that the Montgomery County Public Schools did not violate the Individuals with Disabilities Education Act by proposing placement for the Student at [redacted] Elementary School. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Sch. Comm. of Burlington v. Dep't of Educ of Mass.*, 471 U.S. 359, 369 (1985); *Adams v. Dist. of Columbia*, 285 F. Supp. 3d 381, 393 (D.D.C. 2018).

I further conclude, as a matter of law, that Montgomery County Public Schools did not violate the Individuals with Disabilities Education Act by improperly coding the Student as other health impairment to receive special education and related services. *Heather S. v. State*, 125 F.3d 1045, 1054-55 (7th Cir. 1997); *Sanger v. Montgomery Cty. Bd. of Educ.*, 916 F. Supp. 518, 526-27 (D. Md. 1996).

I further conclude, as a matter of law, that Montgomery County Public Schools did not violate the Individuals with Disabilities Education Act by formulating an Individualized Education Program for the Student without using the Student's present levels of performance. *Heather S. v. State*, 125 F.3d 1045, 1054-55 (7th Cir. 1997); *Sanger v. Montgomery Cty. Bd. of Educ.*, 916 F. Supp. 518, 526-27 (D. Md. 1996).

I finally conclude, as a matter of law, that the Montgomery County Public Schools is not required to provide tuition reimbursement for the Parents' unilateral placement of the Student at the [redacted] School for 2017-2018 school year. 20 U.S.C.A. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d)(1)(ii); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993).

ORDER

I **ORDER** that:

The Montgomery County Public Schools shall provide compensatory services for the Student equivalent to sixty minutes of counseling, with a mental health professional trained in counseling children, per week for the 2016-2017 and 2017-2018 school years.

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.

Signature Appears on Original

July 17, 2018
Date Decision Mailed

Steven V. Adler
Administrative Law Judge

SVA/da
#174773

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) (Supp. 2017). 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.

Copies Mailed To:

[redacted]

[redacted]

[redacted]