

[REDACTED]

STUDENT

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

* BEFORE WILLIS GUNTHER BAKER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-BCNY-OT-19-10397

* * * * *

DECISION

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STATEMENT OF THE CASE

On April 2, 2019, [REDACTED] grandmother and legal guardian (Parent), on behalf of her grandchild, [REDACTED] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Baltimore County Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).¹

I held a prehearing conference on April 24, 2019. The Parent represented herself. J. Stephen Cowles, Esquire, represented the BCPS. By agreement of the parties, the hearing was scheduled for June 10, 11, 12, and 14, 2019 at the Office of Administrative Hearings (OAH).

I held the hearing on June 10, 11 and 12, concluding on June 12, 2019. The Parent represented herself. J. Stephen Cowles, Esquire, represented the BCPS.

¹ U.S.C.A. is an abbreviation for United States Code Annotated.

At the prehearing conference, the parties indicated that they had waived a resolution meeting and had an unsuccessful mediation just prior to the conference and were at an impasse. Therefore, I used April 24, 2019 as the end to the resolution period, and began counting the forty-five day decision period from there. 34 C.F.R. § 300.515 (2017).² Forty-five days from April 24, 2019 is Saturday, June 8, 2019, so the forty-five day period ended on Friday June 7, 2019. I may, however, grant specific extensions of time at the request of either party. 34 C.F.R. § 300.515(c). Counsel for BCPS provided a list of conflicts for the month of May and the Parent stated she was unavailable the first week of June. Therefore, the parties requested that the hearing take place the week of June 10, 2019. The hearing dates requested by the parties fell more than forty-five days after the triggering events described in the federal regulations, which is the date my decision is due. 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a), (c) (2018). The Parties requested an extension of time until July 12, 2019 for me to issue a decision. § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2018).

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

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 13A.05.01.15C; COMAR 28.02.01.

² C.F.R. is an abbreviation for Code of Federal Regulations.

ISSUES

The issues for the hearing agreed upon by the parties are:

1. Whether BCPS failed to provide the Student with a Free Appropriate Public Education (FAPE), by:
 - a. Failing to allow the Parent adequate participation in the Individualized Education Program (IEP) Process:
 - b. Failing to properly develop and implement the IEP, including but not limited to, failing to consider the Student's academic, medical and social needs;
 - c. Failing to provide appropriate placement reasonably calculated to meet the Student's needs and provide educational benefit in the least restrictive environment.
2. What is the proper remedy if BCPS failed to provide the Student with a FAPE; should the Student receive at BCPS expense: private placement at a nonpublic school; compensatory services; or reimbursement for private tutoring services paid for by the Parent?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parent:³

Parent Ex. 1A - IEP, January 22, 2019 (also admitted as BCPS Ex. 19)

Parent Ex. 1B - IEP, October 19, 2017

Parent Ex. 1C - IEP, August 30, 2017

Parent Ex. 1D - IEP, August 10, 2016

Parent Ex. 3 - Family Educational Rights and Privacy Act (FERPA) Complaint to MSDE, January 18, 2019

³ The following exhibits were offered by the Parent, but not admitted: 1E – 1I, 2, 5, 9, 26, 28, 32.

- Parent Ex. 4 - Student Profile Assessments, Grades 1-7
- Parent Ex. 6A - MSDE Response to Appellant's Complaint, August 19, 2017
- Parent Ex. 6B - Emails between the Parent and BCPS May 8, 2018 through August 27, 2018
- Parent Ex. 6C - Emails to BCPS from the Parent, January 16 and 23, 2019
- Parent Ex. 7 - Educational Assessment and Classroom Observation Report, January 2018
- Parent Ex. 8A - [REDACTED] Report, October 18, 2018
- Parent Ex. 8B - Student Report Card 2018-19, marking periods 1 and 3
- Parent Ex. 8C - Student Report Cards Grade 3-5, 2014-2017
- Parent Ex. 10 - Emails between the Parent and BCPS, September 2017
- Parent Ex. 11 - Emails between the Parent and BCPS, October 2017
- Parent Ex. 12 - Emails between the Parent and BCPS, November 2017
- Parent Ex. 13 - Emails between the Parent and BCPS, December 2017
- Parent Ex. 14 - Emails between the Parent and BCPS, January 2018
- Parent Ex. 15 - Emails between the Parent and BCPS, March 2018
- Parent Ex. 16 - Emails between the Parent and BCPS, April 2018
- Parent Ex. 17 - Emails between the Parent and BCPS, May 2018
- Parent Ex. 18 - Emails between the Parent and BCPS, September 2018
- Parent Ex. 19 - Emails between the Parent and BCPS, October 2018
- Parent Ex. 20 - Emails between the Parent and BCPS, November 2018
- Parent Ex. 21 - Emails between the Parent and BCPS, December 2018
- Parent Ex. 22 - Emails between the Parent and BCPS, January 2019
- Parent Ex. 23 - Emails between the Parent and BCPS, February 2019
- Parent Ex. 24 - Emails between the Parent and BCPS, March 2019
- Parent Ex. 25 - Emails between the Parent and BCPS, April 2019

- Parent Ex. 27 - [REDACTED] Occupational Therapy Evaluation January – February 2015, emails and correspondence between the Parent, [REDACTED]⁴ and BCPS August-September 2016, May 2017, November 2017, January 2018, and April 2018
- Parent Ex. 29 - Home and Hospital Program Documents, October 2016, January – April 2017
- Parent Ex. 30 - Emails between the Parent and BCPS, October 2017 - December 2018, [REDACTED] medical records January 30, 2018 and December 17, 2018
- Parent Ex. 31 - Emails between the Parent and BCPS, April 2018, January – February 2019
- Parent Ex. 33 - BCPS Behavioral Intervention Plan (BIP), October 19, 2017

I admitted the following exhibits on behalf of BCPS:⁵

- BCPS Ex. 1 - Baltimore County Public Schools Eligibility Determination, March 12, 2018
- BCPS Ex. 2 - Eligibility Determination, June 15, 2018
- BCPS Ex. 3 - [REDACTED] Psychological Evaluation, April 4, 2016
- BCPS Ex. 4 - Educational Assessment, January 9, 2018 (also admitted as Parent Ex. 7)
- BCPS Ex. 5 - Psychological Assessment, June 1, 2018
- BCPS Ex. 6 - Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP), June 15, 2018
- BCPS Ex. 7 - IEP Team Summary, March 12, 2018 and supporting documents
- BCPS Ex. 8 - IEP Team Summary, May 9, 2018 and supporting documents
- BCPS Ex. 9 - IEP Team Summary, June 15, 2018 and supporting documents
- BCPS Ex. 10 - IEP Team Summary, September 13, 2018 and supporting documents
- BCPS Ex. 11 - IEP Team Summary, January 22, 2019 and supporting documents
- BCPS Ex. 12 - Parent Notification of IEP Team Meeting, March 14, 2019
- BCPS Ex. 13 - Parent Notification of IEP Team Meeting, March 19, 2019
- BCPS Ex. 14 - Parent Notification of IEP Team Meeting, March 26, 2019
- BCPS Ex. 17 - IEP, January 26, 2018

⁴ [REDACTED]

⁵ BCPS Exhibits 15, 16, 28, 29, and 34 were withdrawn and not offered into evidence.

- BCPS Ex. 18 - IEP, September 13, 2018
- BCPS Ex. 19 - IEP, January 22, 2019
- BCPS Ex. 20 - Student Discipline History, 2017-2018 and 2018-2019 School Years
- BCPS Ex. 21 - Behavior Intervention Log, 2018-2019 School Year
- BCPS Ex. 22 - 2018-2019 School Year, 1st Quarter, Positive Praise Sheets
- BCPS Ex. 23 - 2018-2019 School Year, 2nd Quarter, Positive Praise Sheets
- BCPS Ex. 24 - 2018-2019 School Year, 3rd Quarter, Positive Praise Sheets and Daily Point Sheets
- BCPS Ex. 25 - Summary of School Social Work Services, December 21, 2017
- BCPS Ex. 26 - Summary of School Social Work Services, April 24, 2018
- BCPS Ex. 27 - Health Suite Visit Record, 2017-2018 and 2018-2019 School Years and supporting documents
- BCPS Ex. 30 - IEP Progress Report, IEP, January 26, 2018
- BCPS Ex. 31 - IEP Progress Report, IEP, January 22, 2019
- BCPS Ex. 32 - E-mail Communications between Parent and BCPS, May 2018-March 2019
- BCPS Ex. 33 - Discipline Records, October 2018-April 2019

Testimony

The Parent testified and presented no other witness.

The BCPS presented the following witnesses:

- [REDACTED] Behavior Interventionist, [REDACTED] Middle School (MS)
- [REDACTED] Assistant Principal, [REDACTED] MS, admitted as an expert in school administration
- [REDACTED] Special Educator
- [REDACTED] IEP Chair, [REDACTED] MS, admitted as an expert in special education
- [REDACTED] Specialist, Office of Special Education Compliance, admitted as an expert in special education and special education compliance

FINDINGS OF FACT BY STIPULATION

Based upon the stipulated agreement of the parties, I find the following facts by a preponderance of the evidence:

1. The Student's Birthdate is [REDACTED] 2006.
2. The Student has attended public schools within BCPS since kindergarten.
3. The student was initially evaluated and determined eligible for special education services under the IDEA in March 2013 and the first IEP was developed at that time.
4. The Student started middle school in the 2017-18 school year at BCPS [REDACTED] Middle School [REDACTED] M).
5. The Student transferred to BCPS [REDACTED] MS in the middle of the 2017-18 school year.
6. At the time of the hearing, the Student was just completing the seventh grade at [REDACTED] MS.
7. The Student received a psychological evaluation from Dr. [REDACTED] Ed.D., at [REDACTED] in February 29, 2016. The Parent provided Dr. [REDACTED]'s April 4, 2016 Report ([REDACTED] Report, BCPS Ex. 3) to BCPS.
8. The Student has been identified by the BCPS staff as a student with an emotional disability (ED) which impacts his social/emotional, behavioral, and academic performance since the initial determination of eligibility.

ADDITIONAL FINDINGS OF FACT

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

9. The Parent is the paternal grandmother of the Student and is his legal guardian. The Student's father died when he was young and the Student has had difficulty coping with the loss. The Student's mother is not involved with him on a regular basis.

10. The student has a gastrointestinal issue (GI issue) called [REDACTED] and there is a bathroom schedule created by the school nurse that allows the Student to use the restroom at scheduled times and as needed.

11. The Student had a Functional Behavior Assessment (FBA) that resulted in a Behavioral Intervention Plan (BIP) in February 2015 (Parent Ex. 5).

12. The Student's home school, i.e. the school he would attend if not disabled under IDEA, is [REDACTED] M. The Student currently attends [REDACTED] MS in order to receive the services required in his IEP and BIP through the BCPS [REDACTED] Program at [REDACTED] MS.

13. The [REDACTED] Report (BCPS Ex. 3) determined that the Student displayed a psychiatric condition of major depression and post-traumatic stress disorder (PTSD) that had a significant impact on his academic functioning, qualifying him for special education services for an emotional disability (ED). The [REDACTED] Report also stated a reported history of attention-deficit/hyperactivity disorder (ADHD), which could qualify the Student for special education as "other health impaired." The PTSD diagnosis related to the death of the Student's father.

14. The Student's most recent educational assessments in Math, Reading and Written language skills were completed January 9, 2018 (BCPS Ex. 4, Parent Ex. 7). In math, the Student had a standard score of 97, which fell into the average range for his same age/grade level peers. In reading, the Student had a standard score of 112, which fell into the high average range for his same age/grade level peers. In written language, the Student had a standard score of 100, which fell into the average range for his same age/grade level peers.

15. The Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) has an average standard score of 100 and an average range of scores falls between 90 and 109. The Student scored between 69 and 119, a low to average range, with a Full Scale Intelligence Quotient (FSIQ) of 85, within the low average range.

16. In the Comprehensive Executive Function Inventory (CEFI), scores below 90 are considered clinically significant. The Student scored : Attention - 91, Emotional Regulation - 88, Flexibility - 86, Inhibitory Control - 87, Initiation – 89, Organization – 88, Planning – 85, Self-Monitoring – 92, Working Memory – 91. The Full Scale score of 88 on the CEFI falls in the low average range and is equal to, or greater than, 21% of those obtained by children his age in the standardization group.

17. The Student was reevaluated by BCPS and determined eligible for special education services as a student with an ED on March 12, 2018 (BCPS Ex. 1).

18. The Student was referred for a psychological assessment that was completed on June 1, 2018 (BCPS Ex. 5).

19. The Student was reevaluated by BCPS and determined eligible for special education services as a student with an ED on June 15, 2018 (BCPS Ex. 2).

20. On June 15, 2018, a FBA was completed and a BIP was developed that included updated strategies, skills development, and consequences for the Student (BCPS Ex. 6). The FBA and the BIP were discussed at the June 15, 2018 IEP Meeting.

21. The Student engages in disruptive and inappropriate behavior at school, including leaving class without permission, wandering the halls, utilizing his computer device for non-educational purposes, using the device and his phone at inappropriate times, being aggressive with peers, and being disrespectful to faculty. The Student often refuses to complete assessments in class and does not complete and return take-home make-up work.

22. The Student requires frequent sessions with the Behavioral Interventionist at MS in order to calm, redirect, and prepare him to return to the classroom. The Student was referred for behavioral intervention services fifty-one times between September 4, 2018 and January 11, 2019, totaling 1,703 minutes of intervention.

23. The BIP (BCPS Ex. 6) was designed to develop strategies to provide the Student with: choices and rewards for behavior, individual assistance to direct behavior in a positive way, repetition of directions, and corrective feedback in a calm and private setting. Positive Praise Sheets are also utilized to track the Student's behavior and response to positive intervention. (BCPS Exs. 22-24).

24. The Student is currently in general education classes for Reading, Language Arts, and College and Career, and is in modified classes, i.e. [REDACTED] special education classes, for World Culture, Pre-Algebra, Science, Physical Education and Health. Reading and Language Arts are considered inclusion education classes because there are students in the class who are on an IEP, as well as regular education students, so there is an instructional aide in addition to the teacher.

25. The IEP team met regarding the Student on January 26, 2018, May 9, 2018, June 15, 2018, September 13, 2018, and January 22, 2019. The Parent was present and participated in each IEP meeting. BCPS worked with the Parent's schedule on each occasion to ensure her attendance. (BCPS Exs. 8-19).

26. The Student's IEPs have consistently provided for instructional supports, program modifications, social/behavioral supports, and adult support to assist with meeting his Behavioral Goals and Mathematics Goal set forth in the IEPs. (Parent Exs. 1A-1D, BCPS Exs. 17-19).

27. At the January 22, 2019 IEP team, BCPS recommended that the Student be provided math on a daily basis through the [REDACTED] program's math assistance course and also suggested that the Student be considered for full time in the [REDACTED] Program. The Parent objected, so the Student's classes were not changed.

DISCUSSION

The time period in which to request a due process hearing with the OAH is controlled by the limitations period under Maryland law enacted to comply with the IDEA. *See* 20 U.S.C.A. §

1415(f)(3)(C) (2017). The applicable statute of limitations provides that the due process complaint must be filed within two years of the date the Parent knew or should have known of the action that formed the basis for the complaint. Md. Code Ann., Educ. § 8-413(d)(3) (2018); *see also* COMAR 13A.05.01.15C(1); 34 C.F.R. §§ 300.507(a)(2), 300.511(e) (2018). The IDEA requires that the school district inform parents of the two-year limitations period applicable to the request for a due process hearing. 20 U.S.C.A. § 1415(d)(2)(E)(i) (2017). While the Parent had ongoing concerns for several years about the Student's progress and well-being while attending BCPS, the parties acknowledged that the issues to be determined in this case are limited to the 2017-18 and 2018-19 school years. BCPS argued that the case should be limited to any issues subsequent to January 2018 when the Student was transferred to [REDACTED] MS following an agreement by the parties at a resolution meeting, but no document was produced demonstrating the extent of that agreement nor that the Parent had waived her right to pursue relief for a longer period, so I will not apply the more restrictive time period.

The burden of proof in an administrative hearing under IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parent (on behalf of the Student) has the burden of proving by a preponderance of the evidence the elements of her claim, i.e., that the Student was denied FAPE because BCPS failed to: allow the Parent adequate participation in the Individualized Education Program (IEP) process; properly develop and implement the IEP, considering the Student's academic, medical and social needs; and provide appropriate placement reasonably calculated to meet the Student's needs and provide educational benefit in the least restrictive environment. The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487, 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2017), and COMAR 13A.05.01. The

IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1).

FAPE is statutorily defined as “special education and related services” that are provided “in conformity with the [IEP] required under section 1414(d)” of the IDEA. 20 U.S.C.A. § 1401(9). In 2017, the United States Supreme Court ruled that FAPE “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017)(restating and clarifying principles originally set forth in *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982)).⁶

Directly adopting language from *Rowley*, and expressly stating that it is not making any “attempt to elaborate on what ‘appropriate’ progress will look like from case to case,” the Court in *Andrew F.* instructs that the “absence of a bright-line rule . . . should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Andrew F.*, 137 S.Ct. at 1001 (citing *Rowley*, 458 U.S. at 206). The Court wrote that in determining the extent to which deference should be accorded to the school system, “a reviewing court may fairly expect [school] authorities 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 circumstances.” *Andrew F.*, 137 S.Ct. at 1002.

An IEP is the “primary vehicle” through which a public agency provides a student with a FAPE. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F. 3d 315, 319 (4th Cir. 2009). To comply with the IDEA, an IEP must, among other things, include measurable academic and functional goals to enable a child with a disability to make progress, by providing appropriate

⁶ In *Andrew F.*, the Court observed that it remains “[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided.” *Id.* (comparing 20 U.S.C. § 1401(18) (1976 ed.) with 20 U.S.C. § 1401(9) (2012 ed.)).

special education and related services, supplementary aids, program modifications, supports, and accommodations. 20 U.S.C.A. § 1414(d)(1)(A)(i). In developing the IEP the team “shall consider— (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). “[I]n the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C.A. § 1414(d)(1)(B)(i).

An IEP shall include “[a] statement of the child’s present levels of academic achievement and functional performance, including” and, specifically, “[h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children).” 34 C.F.R. § 300.320(1). A public agency is responsible for ensuring that the IEP is reviewed at least annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision. 34 C.F.R. § 300.324(b).

“To the maximum extent appropriate,” an IEP should provide for a disabled child’s education in the LRE. 20 U.S.C.A. § 1412(a)(5)(A); see also 34 C.F.R. §§ 300.114-300.120; COMAR 13A.05.01.10A. “Mainstreaming of [disabled] children into regular school programs where they might have opportunities to study and to socialize with non[disabled] children is not only a laudable goal but is also a requirement of the [IDEA].” *DeVries ex rel. DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). However, while the IDEA’s mainstreaming provision establishes a presumption for a student to remain in the general education setting, it is not an inflexible federal mandate. *Id.* (“The Act’s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every [disabled]

child.”). The IDEA explicitly states that removal of children from the regular educational environment is appropriate “when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C.A. § 1412(a)(5)(A). Congress thus recognized that regular classrooms are not always a suitable setting for the education of some disabled students. *Rowley*, 458 U.S. at 181, n.4; *see also* 34 C.F.R. § 300.115 (continuum of alternative placements). The nature of the LRE necessarily differs for each child, but could range from a regular public school to a residential school where twenty-four-hour supervision is provided. See COMAR 13A.05.01.10B. It is under this rubric that we consider the Parent’s complaint.

Parent’s Case

The Parent testified, but presented no other witnesses. She stated that the Student came into special education in 2013 as a result of being found to have an emotional disturbance. She testified that the behavioral goals that were initially set have become more restrictive and that BCPS dealt with the Student in the 2014-2016 time frame by restraint and seclusion, subjecting the Student to punitive measures for years. She testified that while the Student has been making progress on his behavioral goals historically, he has come to know and expect punitive treatment from the school system, making positive behavioral intervention more difficult.

The Parent testified that the Student was initially placed at ██████ M for sixth grade (2017-18 school year) upon returning to school after being on Home and Hospital Care. She felt that the 2017 IEP meeting did not address appropriate supports for his transition back into the school environment and assistance with navigating the physical building. She testified that the August 30, 2017 IEP was “scheduled and held without Parent involvement” and resulted in the Student being placed in a more restrictive setting at ██████ MS.

She testified that the Student has a GI issue that the school did not address at all in the IEP meetings. The GI issue, a condition called [REDACTED] causes the Student to have [REDACTED] [REDACTED] which creates a "behavior component" with managing the condition at school. The Parent testified that there is a bathroom schedule on file with the school nurse and that the Student's teachers are aware that they need to allow him to use the bathroom upon request and allow bathroom use in accordance with the bathroom schedule.

The overarching concerns of the Parent are that the GI issue is not being supported by BCPS, that the BIP has not been updated to reflect new means of intervention because the old interventions have not worked, and that the IEP is not reflective of what she wants for the Student and is not updated to provide for academic growth, evidenced by the fact that his test scores indicate he is within average ranges, but he is currently failing all of his classes. She believes that the placement of the Student in special education classes with students who have severe emotional disturbances causes the Student to mimic the bad behaviors and that if he were in all regular education classes he would be able to model normal peer behavior. She testified she is particularly concerned about his math achievement and is told by BCPS that he is capable of understanding and doing the work, but that they have nothing to grade him on because he does not complete the assignments and tests.

The Parent testified that the Student is in some general education classes for Reading, Language Arts, College and Career, and Art and is in modified classes for World Culture, Pre-Algebra, Science, Physical Education and Health. She indicated that his homeroom is with children with severe behavioral disabilities and that the Student is attacked as soon as he enters the room. He attends classes in large blocks of time of approximately ninety minutes to two hours and some days attends all regular education classes, while other days it is all modified classes, so some days he has "no access to peers," which impacts his school day and causes

inconsistency in his school environment. The Parent testified that the Student has no direct support consistently provided by the school social worker or psychologist to help the Student “process the learning environment.” She believes that he is not being given support and there is no recognition of what is working, but only penalties and consequences for his bad behavior.

The Parent offered dozens of emails she exchanged with BCPS from September 2017 to the present (Parent Ex. 10-26) relating to concerns about bullying, bus issues, IEP meetings, document requests, test data, GI issues, make-up work, and the Student’s behavior. The Parent testified that she had “no issue with the assessments being done,” but it was “how” they were done that concerned her. She testified that there were issues in April of 2018 with the Student’s bus transportation and that it took him two hours to get to school and he was often late for his first period class, which made him miss the beginning of class and aggravated his GI condition (Parent Ex. 16).

The Parent also testified regarding ongoing issues with the Student “accessing inappropriate material” on his school-provided computer. She complained that the Student is often getting into trouble at school related to downloads onto and use of his computer to play games and search the internet for non-education materials and that she found it perplexing that the school computer’s security was not configured to limit the Student’s access to the internet and complained to BCPS regarding this issue. (Parent Ex. 21).

Perhaps the greatest concern articulated by the Parent was the Student’s exposure to other students with “severe behavioral issues.” The Parent testified that she communicated with BCPS during the 2017-18 school year about bullying and attacks on the Student, which twice required medical attention at [REDACTED] (Parent Ex. 30). She stated that she struggled with sending the Student to school because she feared he would be harmed. She testified that she alerted school staff, but that no adults intervened to protect the Student. She testified that bullying was

discussed at the most recent IEP meeting, but that BCPS only referred to a single incident in November 2018 that BCPS did not deem a threat. The Parent filed a second bully report on December 21, 2018 (Parent Ex. 30), but she stated she “is not being heard and is tired of filing reports.”

The Parent testified that because the Student was a “good student” academically, she inquired about having the Student participate in BCPS’s eLearning program due to her bullying concerns and the Student’s GI condition. She tried to address it in the June 2018 IEP meeting, but was told that the team would not support it. The Parent testified that Mr. [REDACTED] Office of eLearning, stated that the Student was not eligible for eLearning due to his disability classification because special education students could not receive their required services through this program. (Parent Ex. 31).

The Parent testified that she felt that the Student’s IEP does not address his unique needs and that the services do not support his education nor provide educational benefit. She stated that the IEP has not been developed to address the Student’s ongoing medical and safety needs. She testified that the Student is not in the least restrictive environment and the BIP is not consistently updated to address current behaviors. The Parent testified that the Student is currently in a smaller class setting with five or six disabled peers, that is too restrictive and not providing appropriate, grade level academics in an environment that is too “disruptive for a child that requires structure and flow” and is detrimental to the Student’s education.

The Parent testified that the Student should be in regular education classes and be provided the supports and services for working memory, including an aide who can sit with him and help him stay on task. She testified that the Student’s issues of working memory were diagnosed in the [REDACTED] Report and in his 2018 Education Assessment. She wants the Student to be tested for a learning disability.

The Parent testified that the Student's placement at [REDACTED] MS has not had a significant impact on improving the Student's grades or behavior and the only way the general education setting will be beneficial is to provide "full supports" that include parent and professional opinions. She stated that the Student needs assistance with "transition" within the school building, help with organization, refocusing and keeping him on task in the classroom, and materials to engage him in his lessons. She stated that a one-to-one aide would help him "navigate" where the safety issues arise and would like BCPS to at least give that a short term try.

On cross-examination the Parent agreed that she had provided BCPS the [REDACTED] Report, it was discussed at the March 12, 2018 IEP meeting, and the parties agreed to having an updated psychological assessment performed. The Parent also agreed that there was a June 15, 2018 FBA and a BIP (BCPS Ex. 6), but denied that the BIP was discussed at the June 15, 2018 IEP meeting. The Parent testified that the Student has only been "identified with ADHD, not behavioral disturbance." She stated that she did participate in the September 2018 IEP meeting at [REDACTED] MS and that her concerns focused on the Student's math abilities because he had previously achieved a B grade and she did not know how that correlated to the Student's Woodcock Johnson math abilities test. The Parent agreed she attended the January 22, 2019 IEP meeting to discuss her safety concerns wherein she expressed her disagreement with the Student's placement at [REDACTED] MS.

The Parent acknowledged that she has provided BCPS only the [REDACTED] Report, and has provided no other assessments, records, or other documents that BCPS should be considering in the development of the Student's IEP. She agreed that there are no assessments that she has requested that BCPS has not performed.

The Parent testified that the Student is no longer on the medications Zoloft and Adderall that he had taken previously and that neither she nor his current therapist consider the Student to

have a behavioral problem, but she agreed she has not provided BCPS with any psychological reports other than the [REDACTED] Report.⁷

The Parent stated on redirect that while she is invited and has attended the Student's IEP meetings, her participation is not included in the development of the IEP. She felt that the testing and assessments do not match the grades the Student is receiving and believes that BCPS has a "duty to dig deeper when no progress is being made" and that the Student is not making progress based on the IEPs developed by BCPS. She stated that particularly in the area of math, the Student tested as average or low average for grade level, but for his actual class grade his teacher states that he has no grades because he refuses to take tests or do homework so there is nothing to evaluate, and his actual ability is "a question mark." She testified that the assessment of grade level ability is not consistent with his failing grades in many of his classes.

In rebuttal after the BCPS's case, the Parent offered no new evidence, but argued that the January 2019 IEP did not address supports for the Student's behavior issues, and was a review of subjective teacher reports that did not address how the changes recommended by BCPS would provide better results. She stated that the disability should be changed from ED to Other Health Impaired (OHI) due to the Student's GI condition and that the Student should be placed in a program outside the BCPS environment in order to meet with better success.

Motion for Judgment

At the close of the Parent's case BCPS moved for judgment. BCPS argued that this case is simply about the Parent disagreeing with what occurred at the IEP meetings. BCPS claimed the Parent participated in the IEP team meetings and there were discussions at those meetings of her concerns. The updated psychological assessment and updated BIP were discussed at recent IEP meetings in March and June 2018 and the IEP was updated. BCPS argued that the Parent

⁷ The Parent did not submit any additional psychological assessments into evidence.

presented no evidence that BCPS has failed to implement the IEP. It stated that the evidence showed that the Student received adult supervision in the classroom and had math goals in the IEP to address the Parent's concerns. BCPS argued that the Parent was unable to articulate what other services would be appropriate to address the Student's needs or why the supports currently provided are insufficient.

BCPS noted that the Parent has not alleged any procedural violations and that BCPS did nothing to prevent the Parent's participation in developing the IEP. The Parent provided no outside reports to be considered by the IEP team. And while the Parent alleged the failure of the team to address the GI medical issues, the Parent acknowledged she did not raise the issue at the IEP team.

The Parent responded that the Student has shown no success with the IEPs that have been developed. She stated that while she has attended IEP meetings, she has not been allowed to participate in the development of the IEP. She stated that the GI issue has not been supported. She argued that the Student is not receiving all of the services documented in the IEP to help him have meaningful access to education and that intervention is required in order for the Student to be supported and receive education.

I declined to grant the Motion and allowed the proceeding to continue on the merits.

BCPS's Case

██████████ the Behavioral Interventionist at ████████ MS, testified that it is his responsibility to support students with emotional or behavioral disabilities, distribute progress sheets and positive praise sheets, and provide behavioral intervention services. He provides pro-active services in the classrooms and provides space outside the classroom to help students de-escalate, process the situation, and prepare for re-entry back into the classroom without disruption. Mr. ████████ also testified that he conducts peer mediations between students to help them work out conflict and

teaches the social skills curriculum with the school social worker. He stated he is trained in Crisis Prevention Intervention (CPI) and therapeutic safe restraint/hold if a child is at risk of hurting themselves or others. Mr. [REDACTED] stated that he has never restrained the Student.

Mr. [REDACTED] presented the Student's behavioral intervention services and behavioral log to the IEP. He noted that at the January 22, 2019 IEP meeting, the behavioral logs showed that between September 4, 2018 and January 11, 2019, the Student was referred for behavioral interventions fifty-one times for such things as disrespect of teachers, peer aggression, misuse of his device and wandering the halls.

Mr. [REDACTED] testified the Student attends his social skills development group and has been called to intervene when the Student exhibits oppositional behaviors such as roaming the halls, violation of school rules, and poor conduct. He is sometimes called into the classroom if the Student is being disrespectful to the teacher or if there is a peer conflict. He provides the Student a safe place to calm down in the behavioral support room, which he identified as Room [REDACTED] in the behavioral logs (BCPS Ex. 21). The Student is sometimes required to come to his room, but can also voluntarily "take space" if he needs to calm down.

Mr. [REDACTED] identified BCPS Exhibit 21 as his behavioral logs for the Student for the 2018-19 school year. The logs are where he documents every interaction with the Student. He testified that the Student does not respond well to redirection or limits, and exhibits defiant behavior. Mr. [REDACTED] has curbed his style of interceding with the Student to avoid escalation. He testified that he interacts with the Student in many ways, providing instruction time with him and allowing the Student to bring classwork to his room. Mr. [REDACTED] testified that the Student is working toward his IEP goals when Mr. [REDACTED] is with him. In Mr. [REDACTED]'s social skills class, the students learn to manage emotions, to recognize the signs of extreme stress, strategies and coping

skills, conflict resolution and problem solving. The services provided are consistent with the Student's BIP and IEP.

Mr. [REDACTED] testified he has used many of the strategies from the BIP with the Student including providing choices, using incentives of preferred activities, and frequent movement breaks. He also noted that sometimes the Student initiates movement breaks without permission and ignores redirection. He stated that there are no particular strategies that consistently work with the Student so he tries to give him time to calm down on his own. Mr. [REDACTED] testified that the Student's needs are identified in the IEP, BIP, and FBA and that he assists teachers in their implementation of the BIP for the Student.

[REDACTED] is the Assistant Principal at [REDACTED] MS and was accepted as an expert in school administration. Mr. [REDACTED] testified that the Student came to [REDACTED] MS in the middle of sixth grade and is currently in seventh grade. He identified BCPS Exhibit 20 as the Student's Discipline History Report and Exhibit 33 as the Student Complaint forms filed by or about the Student. He noted that the Student has been disciplined for such behaviors as refusing to comply with teacher directions, walking the halls, not reporting where he belonged, and inappropriate peer interactions. Mr. [REDACTED] testified that the Parent did report an incident of bullying in November 2018 claiming the Student had been pushed. Mr. [REDACTED] investigated by interviewing the students involved and the witnesses, reviewing the video, and considering any history between the students. He determined that it was not a case of bullying, but appeared to be an instance of name-calling and did not find that any pushing occurred. (See December 3, 2018 letter to Parent, BCPS Ex. 30, p.13). He also described an incident in December 2018 when the Parent filed a report about the Student being punched and thrown to the ground by another student and the other student did receive consequences for his behavior.

Mr. [REDACTED] testified that the overall goal of discipline is to modify student behavior through consequences. Mr. [REDACTED] described several complaints received about the Student from other students and from the bus. He indicated that the Student has been suspended out of school twice this year, once for fighting in class and once for bullying behavior in gym class and in the hallway. He has observed the Student when he gets off the bus, in the halls, in the cafeteria and at dismissal and has seen both positive and negative interactions between the Student and his peers, including name calling and chasing other students in the hall. He has observed the Student not following directions of staff and being in the cafeteria or halls when he is not supposed to be there. Staff attempt interventions to help guide the student, remove him from situations, and give him opportunities to work with counselors and administration.

[REDACTED] testified as a Special Educator and the IEP Case Manager for the Student's IEP at [REDACTED] MS. Ms. [REDACTED] is responsible for gathering all of the paperwork and data, attends the IEP meeting and drafts the IEP document. Ms. [REDACTED] testified that she was the Student's IEP Case Manager for the 2018-19 school year and participated in the IEP meetings in September and January. She discussed the accommodations and supports set forth in the September 13, 2018 IEP that were in place in the beginning of the school year (as a result of the June 15, 2018 IEP meeting) (BCPS Ex. 18) and also discussed the January 22, 2019 IEP (BCPS Ex. 19).

Ms. [REDACTED] testified that her role involved meeting with the Student, speaking to the Student's teachers and receiving updates at least quarterly, observing the Student in the classroom, advising and assisting teachers with the implementation of the Student's IEP, focusing on items specific to his classroom instruction. She collected, reviewed, and assembled quarterly teacher logs designed to capture specific incidents of negative actions, interventions, and choices given to or taken by the Student to get a better understanding of daily interactions.

Ms. [REDACTED] testified about the team notes of the January 22, 2019 IEP meeting (BCPS Ex. 11) which indicated that the Student often dropped things off in his classroom, then left, did not complete assignments, would isolate himself, and often played games on his device. The Student's academic abilities were discussed and his main area of need was identified as math. There was discussion that it was difficult to determine if the progress reports and report card were an accurate reflection of the Student's ability because the Student did not complete assignments and assessments.

Ms. [REDACTED] testified that the teacher logs she collects are anecdotal and are the teacher's observations that are used to get the whole picture of the Student, whereas the Progress Notes record data. She stated that the teacher logs help assess the effectiveness of supports and whether the Student is responsive or making progress with the supports. She described the [REDACTED] ([REDACTED]) homeroom that the Student attends as being for students who have a "behavior emotional disturbance that prevents them from being successful in a larger group" and indicated that it can have up to ten students, but the Student's homeroom currently only has four students.

She described the Progress Reports contained in BCPS Exhibits 30 and 31, which showed the Student's progress toward IEP goals in January 2018 (prior to transfer to [REDACTED] MS) and January 2019, respectively. Ms. [REDACTED] testified that BCPS Exhibit 31 showed that the Student was not making progress in his IEP behavioral goals during the 2018-19 school year, but initially showed progress in math in the first quarter, that later changed to not making progress in quarters two and three because the Student failed to complete most of his assignments.⁸ She testified that the BIP was not discussed in the January 22, 2019 IEP meeting because it had been recently updated.

⁸ Only the first three progress reports were completed as of April 23, 2019.

The IEP Chair and Special Education Chair at MS, [REDACTED] was qualified as an expert in special education. She testified that she first met the Student and his family at a meeting at M when the BCPS was considering the Student for the MS [REDACTED] program. She described the [REDACTED] as a regional program designed to manage emotions and behaviors in order to assist students to access curriculum. The [REDACTED] provides structure in all core academics and special education classes and includes social skills class, while always having behavior intervention available. She testified that the Student came to MS [REDACTED] as a result of a resolution meeting and was placed in [REDACTED] part-time for Math, Science, Social Studies and Social Skills, receiving regular education in Reading and English.

Ms. [REDACTED] testified that shortly after the Student transferred to MS they held an IEP meeting on March 26, 2018, conducted the annual review, and created the updated IEP (BCPS Ex. 7). Following the updated assessments conducted in June, the group came back together on June 15, 2018 to review the assessments, update the BIP, and reevaluate eligibility to continue services. (BCPS Ex. 2 and 9). Ms. [REDACTED] stated that the Parent expressed her concern at that meeting that BCPS was not modifying the Student's work appropriately, but the team noted that the Student was not attempting to complete his work in Math despite modifying his work to allow a slower pace. The Student would not even attempt to do the work, but would crumple the assessment. Ms. [REDACTED] testified that based on the Student's January 2018 Assessments, he demonstrated strong math skills and should have been able to perform the work with the June 2018 IEP modifications that addressed concerns with the Student's math calculations ability.

Ms. [REDACTED] testified that the Student's BIP was revised in June 2018 with the Parent's input and based on the recent FBA (BCPS Ex. 6). The June 2018 IEP meeting was continued until September 13, 2018. The Parent expressed her concern that she was not in agreement with the testing results, particularly related to the Student's math ability, because she believed

that the Student was not able to do basic math. Ms. [REDACTED] explained that the Parent also expressed concerns about using a point system in assessing the Student's behavior because it increased the Student's anxiety by losing points, so BCPS had instead created Positive Praise Sheets to track the Student's behavior. (MSDE Exs. 22-24). The Parent also expressed to the team that she did not want the Student to have "edible" rewards due to his GI issues.

Ms. [REDACTED] testified that on January 22, 2019 the IEP team met to review the placement decision and revise the Student's IEP to reflect his participation and success at [REDACTED] MS. The Parent expressed that she felt [REDACTED] MS left the Student in a "dangerous and unsupported environment" and Ms. [REDACTED] indicated that these concerns were discussed. Mr. [REDACTED] was present to address the bullying and harassment concerns. Ms. [REDACTED] testified that the team determined that the Student was placed appropriately, was not in danger, continued to need social and emotional support. Ms. [REDACTED] believed that the Student should be immersed full time in the [REDACTED] program, rather than half time. This was due to the fact that the Student was still roaming the building, playing on his device, noncompliant with teachers (particularly in his general education Language Arts and College and Career classes), and his grades were starting to drop. Ms. [REDACTED] pointed to the Student's most recent report card (Parent Ex. 8B) to demonstrate that the Student is doing well in his [REDACTED] Social Studies and Science courses with mostly C's, while failing his two regular education classes, Language Arts and College and Career. Ms. [REDACTED] testified that the Student could have been removed from the College and Career class and placed in a math assistance class which would provide math daily to the Student, but the Parent refused to allow his removal from the general education classes. Ms. [REDACTED] stated that currently there are 3-6 students in the Student's [REDACTED] Math and Social Studies classes and 25-30 students in his general education classes. Ms. [REDACTED] stated that in her expert opinion, the Student would be better served in smaller academic classes in the [REDACTED] program. She testified the [REDACTED] classes are

taught by a special education teacher and an instruction assistant, so there are two adults for the four to six students in the class, there are “chill zones” within the classroom, and the classes are better equipped to deal with the social/emotional piece of the Student’s IEP and BIP.

Ms. [REDACTED] testified that the January 2019 IEP recommended that the Student be placed in the Math Assistance class and the [REDACTED] Language Arts, but the Parent did not agree and filed the due process complaint, so the Student’s classes have not been changed. She testified that the accommodations, services and supports outlined in the Student’s IEP (Parent Ex. 1A, pp. 15-16) can be implemented in the [REDACTED] program and have been implemented in the Student’s general education and special education classrooms. Ms. [REDACTED] stated that she works with all the Student’s teachers to implement the IEP and it is an “ongoing, living document.” She has personally worked with the Student in the crisis room when he was having difficulty with behavior by helping him process the issues and return to the classroom.

Per Ms. [REDACTED] the Student receives direct social work services, both individually and in small groups, and can be pulled from class for social work services as necessary as provided for in his IEP. Ms. [REDACTED] identified BCPS Exhibits 25 and 26 as the Student’s social work record of services.

Ms. [REDACTED] testified that the Student’s GI condition has been addressed by BCPS with the bathroom schedule developed with the school nurse. The nurse notes when the Student comes to visit and the Student is allowed to leave the classroom and use the bathroom in the nurse’s office when necessary. (BCPS Ex. 27). The nurse has communicated with all of the Student’s teachers via email and they are aware that the Student is allowed to leave class to use the bathroom, even if he does not go to the nurse.

While the team considered the Parent's concerns, Ms. [REDACTED] testified that the Parent has provided no assessments or documents to indicate a recommendation for other academic, behavioral, or medical supports.

Ms. [REDACTED] testified that the Student struggles with the behavior goals set forth in the IEP, particularly compliance with appropriate behavior and peer interaction. (Parent Ex. 1A, pp. 21-23). Ms. [REDACTED] testified in her expert opinion that the January 22, 2019 IEP is drafted to provide the Student with academic benefit and is appropriate; has been implemented as written; and addresses the Student's social and emotional needs, but believes the Student would have better gains if he were placed fully in the [REDACTED] program. She also stated that it is her expert opinion that the Student has not had academic success because he has been unable to address his behavioral issues.

On cross-examination Ms. [REDACTED] testified that she is not aware of any bullying or physical incidents between the Student and other [REDACTED] students. She stated that she felt the Student was safe in the [REDACTED] program and in the [REDACTED] MS environment. She testified that the team used the behavioral data from Mr. [REDACTED] and the teacher reports to develop the FBA and the BIP. She stated that they looked to where teachers reported success with behavioral interventions so they could be implemented in other classes. She indicated that none of the Student's teachers have expressed any concern with implementing the IEP. Ms. [REDACTED] testified that the Student's behaviors in the general education classes is concerning because it impacts the twenty five other students in the class and cannot be appropriately addressed despite the additional adult aide in the classroom.

[REDACTED] was accepted as an expert witness in Special Education and Special Education Compliance. Ms. [REDACTED] is a Specialist with the BCPS Office of Special Education Compliance and is familiar with the Student and his IEP, having participated in the

resolution session prior to moving the Student to [REDACTED] MS. She stated that she participated in the May 9, 2018 and January 22, 2019 IEP meetings and that the Parent was an active participant whose concerns were considered by the team. Ms. [REDACTED] testified that the May 9, 2018 IEP meeting was for the annual review and to discuss extended school year (ESY) services for the summer. (BCPS Ex. 8). The January 22, 2019 meeting was convened due to the Parent's concern regarding the Student's safety in school and on the bus. The team reviewed the data and recommended that the Student have less time in regular education classes, but the Parent did not agree, instead wanting a one-to-one aide assigned to the Student. Ms. [REDACTED] testified that the IEP already included additional adult support, and that BCPS did not think the Student would do well with a one-to-one aide because they believed that being constantly monitored and being given feedback would actually trigger the Student's bad behavior because he did not respond well to that level of oversight. She stated that BCPS Exhibit 11, the Team Summary, included comprehensive notes regarding the meeting, captured what occurred appropriately, and that the appropriate team members were present.

Ms. [REDACTED] discussed the Student's PARCC⁹ scores in math for the assessments given during the 2014-15 (3rd grade) school year and the 2017-18 school year (6th grade) (Parent Ex. 4). Ms. [REDACTED] explained that in the 3rd grade the Student was scored in the lowest level and was not meeting expectations, but in 6th grade the Student was in the middle of level two and was beginning to meet expectations, demonstrating growth, and closing the gap to meet the district average. Ms. [REDACTED] also discussed the Student's MAP¹⁰ scores and referred to the

⁹ Partnership for the Assessment of Readiness for College and Careers, taken from BCPS 2018-19 Assessment Calendar: https://draa.bcps.org/UserFiles/Servers/Server_9046340/File/Department/Assessment/Testing-Calendar.pdf (last reviewed July 3, 2019).

¹⁰ Measure of Academic Progress. MAP is a pair of tests, one in reading and one in mathematics, which students will take on their computer devices two times during the school year. http://parkvillems.bcps.org/assessments/m_a_p_growth (last viewed July 3, 2019).

charts contained in Parent Exhibit 4 and how they demonstrated that the Child has been making progress at a consistent level, tracking the progress of peers, albeit at a lower level. Ms.

██████████ stated that the tests demonstrated the Student was receiving academic benefit and making progress.

Ms. ██████████ testified that an IEP is not a guarantee of success, but is a plan based on data, developed to address the Student's needs and provide supports to meet his needs. She stated that the team collected a lot of data to support the Student's goals and track his responses to services. The team determined that the Student would be best served if he was fully immersed in the ██████████ program and attending the Math Assistance course, but the Parent would not accept.

Ms. ██████████ addressed the Parent's contention that the Parent was not invited nor included in team meetings by identifying BCPS Exhibits 12-14 and 32 to demonstrate invitations and ongoing discussions with the Parent regarding IEP meetings and supports. She testified that the Parent participated in IEP meetings where the Student's Assessments and the plans to target his specific needs were discussed. She testified that the January 22, 2019 is the most recent IEP and that it is appropriate to meet the Student's needs. Mrs. ██████████ testified that the parties attempted to schedule a resolution meeting regarding the Parent's Due Process Complaint, but the Parent would not provide available dates. She stated that the team sought to schedule another IEP meeting after January 2019, but the Parent asked that it not be scheduled.

Analysis

The Parent argued that the Student has been "boxed in" by his ED classification and she believed that with his GI Issues, OHI would be a more appropriate classification. She felt that the ██████████ program at ██████████ MS lacked structure and exposed the Student to violent students, the Student was not supported in the environment, and there was no measure of progress. She argued that the January 2019 IEP meeting was a discussion of subjective teacher reports with no

review of the IEP and no discussion of the BIP. She argued that the BIP was not being utilized as a mechanism to address the Student's behaviors, as observed by staff and professionals. She felt that the social skills program was carried out without the support of the social worker or school psychologist and that neither of those staff members presented testimony of how they are actually supporting the Student and how he might benefit more from other services.

She argued that the Student needed a placement outside the BCPS environment where there is better skilled staff and IEP development; the Student would not be in fear; and the Student could meet with better success for life after school. She stated that the Student is in a classroom where he experiences fear for learning due to peer conflict with other social/emotional kids. She argued the environment is jolting and disruptive to his learning and that the BCPS "go-to" is excluding him, and the school environment does not welcome his access to learning. The Parent argued that she still cannot understand how progress is measured and that the IEP goals are behavioral goals that do not change from year to year. She argued that the math goals have only become more restrictive and have not served the Student well. She argued that while she is present at IEP meetings, she is not given full, meaningful participation. She lamented that no one can tell her what the social emotional program at MS looks like for the Student. She argued that the Student is capable of being successful, and would be if he had a more skilled, aware, and willing team to assist him. She argued that ED is not the same as an emotional disturbance and the Student is not benefitting from the current program.

BCPS argued that the fact that the Parent "disagrees" with the IEP team does not render the IEP illegal or wrong. It noted that the Parent disagrees with the Student's classification of ED even though it was based on the [REDACTED] report that she provided to BCPS and the recent evaluation that echoed the [REDACTED] Report. Noting that the burden of proof is on the Parent, BCPS argued that the Parent has participated in the IEP meetings, but has never offered any

additional assessments for consideration; has provided no medical records or further information for consideration regarding the Student's GI issues other than what she has discussed at team meetings; and that teachers have often contacted the Parent to discuss the Student's behaviors and try to provide makeup work to evaluate his progress, but the Student refuses to do the work. BCPS argued that they, too, are not satisfied with the Student's progress, as evidenced by the four IEP meetings since he came to ■ MS.

BCPS argued that the Parent's contention that the IEP has not been properly developed was clearly refuted by every witness's testimony. The witnesses spoke to the development of supports to address the Student's behaviors and sought to provide the math assistance program, but the Parent refused. It countered that the Student was succeeding in the ■ classes and that a one-to-one aide was contra-indicated for the Student based on his triggers. BCPS argued that the IEP team met, considered the data and developed the IEP, while the Parent offered no solutions or assessments for consideration, other than moving the Student from the ■ classes where he was experiencing growth, to fully inclusive classes where he was currently failing.

It is clear that the Parent wants what she believes is best for the Student and is fearful of him losing ground during the important middle school years. However, the Parent has the burden of proof in this matter and she did not present any expert witnesses, nor any expert reports to contradict the evidence provided by BCPS, although she had the opportunity to do so. Nevertheless, I considered the evidence as a whole, considering whether the testimony of the BCPS expert witnesses could support any aspect of the Parent's case.

Courts have held that "[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

The evidence presented shows that the Parent was concerned about the Student's placement during the 2017-18 school year when he began middle school and that the Parent sought a smaller class size environment for the Student (Parent Ex. 12). There was disagreement about whether the Student's move to ■ MS was by agreement as the result of a resolution meeting, but the Student was moved to ■ MS during the winter of 2018 in order for him to participate in the specialized ■ program available there. The Student was placed in some ■ classes with a special educator and instructional aide, and four to ten students; and some general education classes with approximately twenty five students, with a regular education teacher and an instructional aide. The evidence demonstrated that the Student has emotional deficits that impacts his ability to interact appropriately with peers, follow instruction, and respect school rules. The BCPS witnesses each described their own frustration with trying to develop helpful and consistently useful tools and strategies to assist the Student in modifying his behavior to reach his IEP goals. Everyone, including the Parent, believed the Student would benefit from more individualized attention, with the Parent favoring a one-to-one aide in general education and BCPS recommending full inclusion in the ■ for smaller class sizes. It is of note that the Student was placed in the ■ at ■ MS in 2018 because the Parent was unhappy with the Student's treatment at ■ M and wanted the Student in smaller classes. Despite making the move to ■ MS, the Parent remained concerned about the provision of services and sought due process in April 2019.

Issue 1: Did BCPS deny the Student FAPE by failing to allow the Parent adequate participation in the Individualized Education Program (IEP) Process?

The Parent concedes that she attended all of the IEP team meetings at ■ MS from May 9, 2018 to January 22, 2019. However, she contends that she was denied the ability to meaningfully participate because the team did not consider nor address her concerns. The record clearly demonstrates that the team communicated with the Parent to ensure her attendance and rescheduled each of the IEP meetings around the Parent's schedule. The Parent's statements and participation in

the discussion are captured in the team notes from each meeting (BCPS Exs. 8-11) and there is no question she was an active participant and was given the opportunity to voice her concerns and offer solutions. There is also no question that the Parent did not provide any medical reports, psychological or educational assessments, or any other documentation to the team for further consideration at any time, other than the 2016 [REDACTED] Report.

The only suggestion that the Parent testified that she made that BCPS failed to implement is the provision of a one-to-one aide for the Student in the general education curriculum. BCPS provided ample expert testimony as to why this request would not be of educational benefit to the Student based on his psychological and educational assessments and their experience with the Student and his aversion to feedback and constant oversight.

In developing the IEP, the IDEA does not require that the team ignore its own expertise and accept the Parent's suggestions, but merely requires that "the concerns of the parents for enhancing the education of their child" are allowed to be presented. 20 U.S.C.A. § 1414(d)(3)(A).

The Parent presented no credible evidence to support her claim of denial of FAPE for her lack of participation in the IEP process. BCPS provided significant evidence of the Parent's inclusion and participation, and BCPS's consideration of her concerns and suggestions. Therefore, I find for BCPS regarding this issue.

Issue 2: Did BCPS deny the Student FAPE by failing to properly develop and implement the IEP, including but not limited to, failing to consider the Student's academic, medical and social needs?

The Parent did not challenge that the IEPs were developed within the requirements of the IDEA and contained all necessary elements. The Parent offered no expert testimony nor provided any independent evaluations, medical records or any other documentation to BCPS for consideration. BCPS conducted an Educational Assessment that was completed in January 2018 (BCPS Ex. 4) and a Psychological Assessment and FBA that were completed in June 2018 (BCPS

Exs. 5 and 6) and utilized these documents to create the IEPs and the BIP that followed. BCPS determined that the Student's social and emotional needs would be best served by placing him in the [REDACTED] program at [REDACTED] MS.

The Parent raised a concern that the Student's GI issue was not being adequately addressed, but provided no medical records regarding what BCPS should be doing differently and did not testify to any specific issue that BCPS has failed to address. The only suggested action was a passing reference to the eLearning program where the Student could take online courses. While the Parent testified that she was advised that the Student was not a candidate for the eLearning program because of his IEP services, she did not raise the denial in her due process complaint nor present any evidence of how that determination related to a denial of FAPE in this case. And while the Parent alluded to Home and Hospital Care that the Student had utilized in the past, it was unclear whether his prolonged absence from school related to his GI issue or other social/emotional concerns.

Educational placement, as used in the IDEA, means the educational program—not the particular institution where the program is implemented. In *A.W. v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004), the Court determined that “educational placement” does not secure a student's right to attend school in a particular classroom at a particular location, but the “placement” is driven by the program available in the target school.

There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *A.B. by D.B. v. Lawson*, 354 F.3d 315, 325-329 (4th Cir. 2004); *M.M. ex rel. D.M. v. School Dist. of Greenville Co.*, 303 F.3d 523, 532-533 (4th Cir. 2002); *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991). There are no legal requirements that mandate a school system provide all manner of programs at each of its schools; the law only mandates that the school system have an appropriate

program available to the student in its system, and only if that cannot be satisfied that the student be permitted a non-public placement.

BCPS determined that the Student's academic, social and medical needs as developed through the IEP would be best served through the [REDACTED] program at [REDACTED] MS. The IEP team summaries, supporting documents, and the Student's Assessments all support the IEP team determination of the Student's placement. The evidence shows that placement was designed to provide the Student FAPE. The Parent has not presented any credible evidence to challenge that determination. She has simply provided her own opinion suggesting that BCPS has not done enough to help the Student and that his needs are not being met because he is failing his classes. The Parent has not, however, demonstrated what she believes that BCPS can or should do differently, what supports are needed but not being provided, and how that would assist the Student in reaching his IEP goals.

BCPS has demonstrated that it has created an IEP that considers all aspects of the Student, including social, emotional, educational and medical issues and has been designed to provide the Student FAPE. The Student's current academic performance is not dispositive that BCPS has failed, but is reflective of the Student's inability to accept the supports provided and complete his assigned work that has been reasonably calculated to provide him with FAPE. Therefore, I find for BCPS on this issue.

Issue 3: Did BCPS deny the Student FAPE by failing to provide appropriate placement reasonably calculated to meet the Student's needs and provide educational benefit in the least restrictive environment (LRE)?

BCPS recommended at the January 22, 2019 IEP meeting that the Student be placed full time in the [REDACTED] program, noting that his best grades are in the [REDACTED] Science and Social Studies classes, and that the Student is failing his general education classes and his [REDACTED] Math class. Were he to be in the [REDACTED] program full time, he would receive math instruction daily. The Parent wanted the Student to be in all general education classes and be assigned a one-to-one aide.

The nature of LRE necessarily differs for each child but could range from a regular public school to a residential school where 24-hour supervision is provided. COMAR 13A.05.01.10B. Although the IDEA requires specialized and individualized instruction for a learning- or educationally-disabled child, it also mandates that "to 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 Act also require such inclusion. 34 C.F.R. § 300.114 through 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. *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997). In the present case, BCPS is seeking to educate the Student in the LRE which is consistent with FAPE in the ■ MS ■ program, where appropriate and adequate supports exist, including smaller class size, a special education teacher and aide, and an environment designed to address emotional/social issues as displayed by the Student. There are non-■ peers in the ■ MS setting with whom the Student can interact.

The removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular educational environment cannot be achieved. 34 C.F.R. § 300.114(a)(2)(ii). Based on the unanimous opinions of qualified, experienced educators who testified at the hearing, it is clear that the removal of the Student from a regular educational environment and placement in the ■ at ■ MS is necessary for the Student to receive the services that will assist in the full implementation of the IEP and the delivery of FAPE. There is no question that the Student is disruptive, easily distracted and in need of frequent redirection to allow him to even minimally participate in his

academic classes and can negatively impact the learning environment for the other students in the room. While the Parent may take issue with the other students in the [REDACTED] program, she has provided no credible evidence that the Student has suffered in the [REDACTED] learning environment. Indeed, the evidence seems to support that he has received particular educational benefit from that environment. It simply does not make sense to take the Student from the [REDACTED] program and remove him to full integration in the regular education classes simply because the Parent believes the other students in [REDACTED] frighten the Student. She provided no evidence, anecdotal or otherwise, of any specific peer interactions between the Student and other [REDACTED] students to suggest that the Student is in danger or incapable of receiving meaningful education in that program. Indeed, the Parent herself provided documentation of conversations with BCPS in November 2017 wherein she requested an IEP meeting to discuss removing the Student from [REDACTED] M to a placement with smaller class sizes, which is what BCPS provided at [REDACTED] MS with the [REDACTED] program. (See Parent Ex. 12).

At the hearing the Parent offered two alternate and completely contradictory resolutions, the first being full inclusion at [REDACTED] MS, the second being placement at a nonpublic school. Neither of these options is supported with evidence, expert or otherwise, and the Parent failed to challenge the overwhelming evidence provided by BCPS that its plan for the Student was an appropriate placement reasonably calculated to meet the Student's needs and provide educational benefit in the least restrictive environment.

When assessing whether a student was offered, given or denied a FAPE, a judge must "afford great deference to the judgment of education professionals" *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (quoting *E.L. ex rel. Lorsson v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)). Judges 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 ex rel. 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 ex rel. Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). 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.

BCPS’s witnesses were experienced and well-trained in education and the needs of students with emotional disabilities. The Student’s strengths, limitations and behaviors were discussed and the expert opinions presented concurred that the Student’s IEP was designed to provide FAPE and give him the supports he needs to have academic achievement. Certainly everyone who testified, including the Parent, was frustrated by the Student’s recent lack of success, but stellar achievement is not required under IDEA and grade level achievement is not the standard. BCPS need only demonstrate that it has provided FAPE by designing “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. supra*, 137 S. Ct. at 1001. The evidence supports the conclusion that BCPS has done this.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion:

I conclude as a matter of law that the Parent was provided all procedural safeguards to allow her to fully and meaningfully participate in the IEP process. 20 U.S.C.A. § 1414(d)(3)(A).

I further conclude as a matter of law that the Parent has failed to prove by a preponderance of the evidence that the IEP of January 22, 2019, offered by the Baltimore County Public Schools did not consider the Student's academic, social and medical needs and was not reasonably calculated to enable the Student to make progress appropriate in light of his circumstances. 20 U.S.C.A. §§ 1400 - 1487 (2010).

I further conclude, as a matter of law, that the IEP and placement developed for the Student by the Baltimore County Public Schools for the 2018-2019 school year at [REDACTED] Middle School is reasonably calculated to offer the Student a free appropriate public education in the least restrictive environment in light of the Student's circumstances. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017).

ORDER

I **ORDER** that Parent's due process complaint filed on behalf of the Student on April 2, 2019 is **DENIED AND DISMISSED**.

July 11, 2019
Date Decision Issued

Signature Appears on Original [REDACTED]
Willis Gunther Baker
Administrative Law Judge [REDACTED]

WGB/ej
#180580

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2018). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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

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

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]