

██████████,
STUDENT
v.
BALTIMORE CITY
PUBLIC SCHOOLS

BEFORE MARY PEZZULLA,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-CITY-OT-23-21726

RULING ON MOTIONS

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STATEMENT OF THE CASE

On August 21, 2023, Wayne Steedman, Esquire, on behalf of ██████████ (Student) and her parents ██████████ and ██████████ (Parents), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH), requesting reimbursement for the costs of an Independent Educational Evaluation (IEE) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. §§ 1400-1419 (2017).¹ The Complaint alleges that the Baltimore City Public Schools (BCPS) violated the IDEA by failing to either respond to the Parents' request for an IEE or filing its own due process complaint to show that its evaluation was appropriate. The requested remedy is reimbursement for the costs of the Student's neuropsychological evaluation, reimbursement for attorneys' fees and costs related to the action, and any further relief that justice demands.

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

On September 13, 2023, the Student filed a Motion for Summary Decision (Motion for SD). On September 22, 2023,² I conducted a remote prehearing conference (Conference) in the captioned matter. Mr. Steedman participated on behalf of the Parents and Student. Manisha S. Kavadi, Esquire, participated on behalf of the BCPS. During the Conference, Ms. Kavadi noted that the BCPS intended to file its own dispositive motion. On September 25, 2023, I issued a Prehearing Conference Report and Order (Report and Order), which, among other things, set forth a motions schedule.

On October 6, 2023, the BCPS filed one document containing both its dispositive motion and opposition to the Student's Motion for SD, entitled "Baltimore City Public Schools' Opposition to Petitioner's Motion for Summary Decision and Baltimore City Public Schools' Motion to Dismiss, and in the Alternative, Motion for Summary Decision" (BCPS Motion or BCPS Opposition). On October 23, 2023, the Student filed "Petitioners' Reply to Baltimore City Public Schools' Opposition to Petitioners' Motion for Summary Decision and Petitioners' Response to City Schools' Motion to Dismiss or Motion for Summary Decision" (Response). On November 27, 2023, I held a motions hearing on the cross motions. Mr. Steedman presented argument on behalf of the Parents³ and Student. Ms. Kavadi presented argument on behalf of the BCPS.^{4,5}

² The Conference was originally scheduled for September 21, 2023. Ms. Kavadi and Mr. Steedman both appeared on behalf of their clients. Ms. Kavadi requested a brief emergency postponement as she was actively ill. Mr. Steedman did not oppose the request but was not available later that day. I found good cause and postponed the matter to September 22, 2023, at 8:00 a.m. Code of Maryland Regulations (COMAR) 28.02.01.16C, E.

³ Mr. [REDACTED] was also present for the motions hearing.

⁴ On December 8, 2023, eleven days after the close of the record for the motions hearing, the BCPS filed a Supplemental Memorandum to the BCPS Motion and Opposition. During the Conference, the parties agreed to a detailed motions schedule, which included the November 27, 2023 motions hearing. The motions hearing convened more than two months after the Conference and more than a month after the Student's Response to the BCPS Motion was filed. At the motions hearing on November 27, 2023, the BCPS did not request permission to file a supplement to its motion or for the record to remain open. As the parties had sufficient time to file written motions and responses and to make arguments, I find no good cause to modify or waive the time periods established in the Report and Order issued on September 25, 2023. COMAR 28.02.01.11B(8). I additionally find that reopening the record regarding the motions is not in the interest of procedural simplicity or administrative fairness. COMAR 28.02.01.11B(10). The deadlines established in the September 25, 2023 Report and Order were agreed to by the parties, gave ample response time and opportunity to be heard, and were fair to both parties. As the record is closed regarding the motions, I shall not consider the BCPS's Supplemental Memorandum.

⁵ On December 12, 2023, the Parents filed a "Motion to Strike and Opposition to Baltimore City Public Schools Supplemental Memorandum." As the record is closed regarding the motions, and I am not considering the BCPS's Supplemental Memorandum, I shall also not consider the Parents' additional filing.

ISSUES

- (1) Is the Student entitled to summary decision because there is no genuine dispute of material fact?
- (2) Is the BCPS entitled to summary decision because there is no genuine dispute of material fact?
- (3) Should the Student's Complaint be dismissed as moot?

SUMMARY OF THE EVIDENCE

Exhibits

The Student submitted the following exhibits in support of her Motion for Summary Decision and Response^{6,7}:

- Stud. Ex. 1 - Affidavit of [REDACTED], dated September 10, 2023
- Stud. Ex. 2- Affidavit of [REDACTED], dated September 10, 2023
- Stud. Ex.3- BCPS Notice and Consent for Assessment, dated June 1, 2022
- Stud. Ex.4- BCPS Psychological Report of Psychological Evaluation by [REDACTED], Psy. D and School Psychologist, dated September 28, 2022
- Stud. Ex. 5- BCPS Prior Written Notice form, dated October 10, 2022
- Stud. Ex. 6- Email Correspondence between BCPS Attorney Katherine Stump and Mr. Steedman, dated October 12, 2022
- Stud. Ex. 7- Email Correspondence between Ms. Stump and Mr. Steedman, dated October 26, 2022
- Stud. Ex. 8- Neurophysiological Evaluation by [REDACTED], dated February 21, 2023

⁶ The Student continued the numbering of her exhibits from the Motion for SD into the Response. For the purpose of clarity, I have continued the numbering but will refer to the exhibits attached to the Response as "Resp. Ex."

⁷ The Student also attached a copy of *Cobb Cnty. Sch. Dist. v. D.B.*, No. 16-11077, slip op. (11th Cir. Nov. 14, 2016) to the Response. This document was not marked as an exhibit. No other case law was attached to the Response.

- Stud. Ex.9- Email Correspondence between Mr. Flacks and Ms. Stump, dated January 24, 2023
- Stud. Ex. 10- Email Correspondence between Mr. Flacks and BCPS Attorney Patrice Wedderburn Taylor, dated February 24, 2023
- Stud. Ex. 11- BCPS Prior Written Notice form, dated April 27, 2023
- Stud. Ex. 12- Email Correspondence between Mr. Steedman and Ms. Wedderburn Taylor, dated June 7, 2023
- Stud. Ex. 13- Email Correspondence between Mr. Steedman and Ms. Wedderburn Taylor, dated June 14, 2023
- Stud. Ex. 14- Email Correspondence (response) between Ms. Wedderburn Taylor and Mr. Steedman, dated June 14, 2023
- Resp. Ex. 15- Email Correspondence between Mr. Steedman and Ms. Wedderburn Taylor, dated August 2, 2023
- Resp. Ex. 16- Affidavit of [REDACTED], dated October 19, 2023
- Resp. Ex. 17- Email Correspondence between Ms. Kavadi and Mr. Steedman, dated October 6, 2023
- Resp. Ex. 18- Email Correspondence between Ms. Kavadi and Mr. Steedman, dated October 6, 2023
- Resp. Ex. 19- Email Correspondence between Mr. Steedman and Ms. Kavadi, dated October 7, 2023

The BCPS submitted the following exhibits in support of the BCPS Motion and Opposition:

- BCPS Ex. A - Complaint, dated August 21, 2023
- BCPS Ex. B- Prehearing Conference Report and Order, dated September 25, 2023
- BCPS Ex. C- Email Correspondence between Ms. Wedderburn Taylor and Ms. [REDACTED] dated August 24, 2023
- BCPS Ex. D- Email Correspondence between Mr. Steedman and Ms. Wedderburn Taylor, dated August 24, 2023

BCPS Ex. E- Email Correspondence between BCPS Attorney Samara Scott and the OAH; attachment of BCPS Notice of Outcome of Resolution Meeting, dated September 1, 2023

BCPS Ex. F- Email Correspondence between Mr. Steedman and Ms. Kavadi, dated September 8, 2023

BCPS Ex. G- Email Correspondence between Ms. Wedderburn Taylor and Mr. Steedman, dated June 24, 2023

BCPS Ex. H- Letter from Ms. Kavadi to Mr. Steedman, dated October 6, 2023

UNDISPUTED FACTS

Upon review of the Complaint, the Student's Motion for SD, the BCPS Motion and Opposition, and the Response, I find the following to be undisputed material facts:

1. The Student is fifteen years old⁸ and has been identified by the BCPS as a student with Multiple Disabilities under the IDEA.

2. During the 2022-2023 school year, the Student was in the eighth grade at [REDACTED].

3. On June 1, 2022, the parties participated in an Individualized Education Plan (IEP) meeting, during which updated assessments were recommended for the Student, including a psychological evaluation.

4. The BCPS assessments took place over three days, although the Student did not participate on the third day, and on September 28, 2022, the BCPS completed its psychological evaluation of the Student.

5. The Student was unable to complete all of the required testing; as a result, the Student's General Intellectual Ability score could not be calculated and was not included in the report.

⁸ At the time of filing of the Complaint, the Student was fourteen years old.

6. On October 10, 2022, the parties participated in an IEP meeting at which the BCPS psychological evaluation was discussed.

7. On October 12, 2022, the Parents' attorney sent an email to Kathy Stump, legal counsel for the BCPS, requesting an IEE at public expense due to the Parents' disagreement with the September 28th psychological assessment.

8. The BCPS responded that same day, acknowledging the request and indicating a response would be provided.

9. By January 2023, the Parents had not received a response from the BCPS regarding their IEE request, nor had the BCPS filed a due process complaint asserting that the September 28th psychological assessment was appropriate.

10. On January 18 and 23, 2023, the Parents had a private neuropsychological evaluation of the Student completed by Dr. [REDACTED] of [REDACTED].

11. On January 24, 2023, the Parents informed the BCPS that a private neuropsychological evaluation of the Student was complete and the report would be available in February 2023.

12. On February 21, 2023, the Parents sent the findings and recommendations of the private neuropsychological evaluation to the BCPS.

13. On March 20, 2023, the parties participated in an IEP meeting that included the review of the private neuropsychological evaluation. The BCPS school psychologist agreed with the findings in the assessment and its recommendations for the Student.

14. At a subsequent IEP meeting on April 27, 2023, the BCPS amended the Student's IEP to reflect information provided in the private neuropsychological evaluation.

15. On June 7, 2023, the Parents' counsel sent an email to Patrice Wedderburn Taylor, legal counsel for the BCPS, attaching a receipt for the IEE and again requesting reimbursement from the BCPS for the IEE.

16. The Parents' counsel sent a subsequent email on June 14, 2023, again requesting reimbursement for the IEE.

17. On June 14, 2023, Ms. Wedderburn Taylor responded, stating that the BCPS was reviewing the request.

18. On August 2, 2023, Parents' counsel again emailed Ms. Wedderburn Taylor, requesting a response regarding the IEE within ten days, and explaining if no response was received, the Student would file a due process complaint. The BCPS did not respond to this email.

19. At the time this Complaint was filed, the BCPS had not reimbursed the Parents for the IEE, nor had it filed a due process complaint alleging the BCPS evaluation was appropriate.

20. On August 21, 2023, the Parents filed the Complaint in this matter. The Complaint requested attorney fees and expenses in addition to reimbursement of the IEE.

21. On August 24, 2023, the BCPS notified the Parents that the BCPS had approved payment for the IEE and required either the Parents' or their attorney's W-9 information in order to process the payment. The Parents declined this settlement offer and did not provide the BCPS with the W-9 information.

22. The BCPS made additional attempts to settle this matter, including after the record had closed for the motions hearing, but the settlement offers⁹ were not accepted by the parents.

⁹ For reasons not explained by either party, the parties have, in various pleadings and exhibits, disclosed the substance of the settlement offers. The substance of any settlement offers is not relevant to this matter, will not be discussed in this ruling, and had no impact on this decision.

DISCUSSION

Legal Framework

Motion to Dismiss

The OAH's Rules of Procedure provide for consideration of a motion to dismiss under COMAR 28.02.01.12C, which provides as follows: "Upon motion, the ALJ^[10] may issue a proposed or final decision dismissing an initial pleading that fails to state a claim for which relief may be granted." In considering a motion to dismiss, an ALJ may not go beyond the "initial pleading," defined by COMAR 28.02.01.02B(9) as "a notice of agency action, a request for a hearing on an agency action, or any other transmittal that initiates a proceeding scheduled by the Office." Here, the initial pleading is the August 21, 2023 Complaint.

When a motion to dismiss requires the decision maker to look beyond the initial pleading, then the motion may properly be treated as a motion for summary decision. *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772 (1992), *cert. denied*, 330 Md. 319 (1993). When ruling on a motion for summary decision, an administrative law judge may also consider admissions, exhibits, affidavits, and sworn testimony for the purpose of determining whether a hearing on the merits is necessary. As the BCPS attached exhibits to its Motion, its Motion is properly treated as one for summary decision. *See Davis v. DiPino*, 337 Md. 642, 648 (1995) (noting distinctions between a motion to dismiss and a motion for summary judgment including that under the Maryland Rules a motion to dismiss is converted into a motion for summary judgment "when a trial court considers matters outside the pleadings in reaching its decision").

Motion for Summary Decision

Motions for summary decision are governed by COMAR 28.02.01.12D, which states:

¹⁰ Administrative Law Judge.

(1) A party may file a motion for summary decision on all or part of an action on the ground that there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law.

(2) A motion for summary decision shall be supported by one or more of the following:

- (a) An affidavit;
- (b) Testimony given under oath;
- (c) A self-authenticating document; or
- (d) A document authenticated by affidavit.

(3) A response to a motion for summary decision:

- (a) Shall identify the material facts that are disputed; and
- (b) May be supported by an affidavit.

(4) An affidavit supporting or opposing a motion for summary decision shall:

- (a) Conform to Regulation .02 of this chapter;
- (b) Set forth facts that would be admissible in evidence; and
- (c) Show affirmatively that the affiant is competent to testify to the matters

stated.

(5) The ALJ may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

The requirements for summary decision under COMAR 28.02.01.12D are analogous to those for summary judgment under Maryland Rule 2-501, which contemplates a “two-level inquiry.” *See Richman v. FWB Bank*, 122 Md. App. 110, 146 (1998). The *Richman* court held in pertinent part that:

[T]he trial court must determine that no genuine dispute exists as to any material fact, and that one party is entitled to judgment as matter of law. In its review of the motion, the court must consider the facts in the light most favorable to the non-moving party. It must also construe all inferences reasonably drawn from those facts in favor of the non-movant.

To defeat a motion for summary judgment, the non-moving party must establish that a genuine dispute exists as to a material fact. A material fact is one that will somehow affect the outcome of the case. If a dispute exists as to a fact that is not material to the outcome of the case, the entry of summary judgment is not foreclosed.

Id. (citations omitted). A genuine issue of fact exists if the evidence would allow a “reasonable [fact finder to] . . . return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In considering a motion for summary decision, it is not my responsibility to decide any issue of fact or credibility, but only to determine whether such issues exist. *See Eng'g Mgmt. Servs., Inc. v. Md. State Highway Admin.*, 375 Md. 211, 228 (2003) (“[S]ummary judgment . . . is not a procedural vehicle to be used to determine factual disputes, but rather to determine whether there is a dispute over a material fact or facts that should be tried.”); *accord Jones v. Mid-Atlantic Funding Co.*, 362 Md. 661, 675 (2001) (“The purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried.”).

As there are cross motions, the moving party for each motion bears the burden to demonstrate both the absence of material disputes of fact and that it is entitled to judgment as a matter of law. COMAR 28.02.01.12D; COMAR 28.02.01.21K(3). If a party opposing a motion for summary decision fails to offer sufficient proof to dispute a rational and legal reason for an alleged wrongful action, an award of summary judgment to the moving party is proper. *See Williams v. Md. Dep't of Human Res.*, 136 Md. App. 153, 166 (2000).

The Positions of the Parties

The Student argues that pursuant to federal and state regulations, when a parent requests an IEE at public expense, the public agency, or school system, shall either approve or disapprove the IEE in writing within thirty days or file its own due process complaint. The Student further argues that it is undisputed that the Parents requested an IEE at public expense on October 12, 2022 and that as of the date of filing of the Complaint the BCPS had neither approved nor disapproved the request for an IEE, although it had relied on the private assessment in the creation of the Student's April 2023 IEP, nor had it filed a due process complaint. The Student asserts that there are no material facts in dispute in this matter, and as such, she is entitled to judgment as a matter of law.

The BCPS contends that the Student's Complaint should be dismissed or that it is entitled to judgment as a matter of law because the controversy in this matter is moot. It argues there is no longer an existing controversy because the BCPS has offered to pay for the IEE, and the only reason that payment has not been effectuated is because the Parents have not provided the necessary W-9 information to the BCPS. It further maintains that the only reason the Parents are proceeding with the Complaint is to attempt to obtain attorneys' fees, which cannot be awarded by an administrative law judge for a violation of the IDEA. The BCPS further argues that any delay in the BCPS' payment of the IEE is merely a procedural violation, which has not led to any denial of a free appropriate public education (FAPE) for the Student, and therefore, no award can be made to the Student.

For the reasons that follow, I find that the matter is not moot, and that the Student has shown that there are no material facts in dispute and that she is entitled to judgment as a matter of law.

Analysis

The BCPS Motion

As noted above, a motion for summary decision must be supported by an affidavit, testimony under oath, a self-authenticating document, or a document authenticated by an affidavit. COMAR 28.02.01.12D(2). The BCPS did not attach any affidavits to its motion, nor did it present any testimony at the hearing on the motions. Three of the exhibits, the Student's Complaint, the Prehearing Conference Report and Order, and the Notice of Outcome of Resolution Meeting, are documents that are already part of the record before me, having been either filed by the parties or issued by the OAH. BCPS Exhibits C, D, F, G, and H, however, are all communications between the parties. They are not self-authenticating documents¹¹ and their

contents have not been attested to, either by affidavit or testimony. As such, BCPS Exhibits C, D, F, G, and H are not proper documents to be considered for the BCPS Motion and shall be considered only for purposes of the Opposition in this matter.

Similarly, BCPS Exhibits A, B, and E, the Student's Complaint, the Prehearing Conference Report and Order, and the Notice of Outcome of Resolution Meeting, do not provide a basis as to why the BCPS would be eligible for judgement as a matter of law. Exhibits A, B, and E do not establish that there is not a genuine dispute of material fact, rather they support the Student's position that the BCPS has failed to reimburse the Parents for the IEE and that the matter has not settled prior to the hearing in this matter. They likewise do not support the BCPS' argument that the issue in this matter is moot. As discussed in more detail below, the BCPS' Motion, when considered a motion for summary decision, must fail, not because I find that there are material facts in dispute, but rather because although there are no material facts in dispute, the Student and not the BCPS is entitled to judgment as a matter of law.

Mootness

Although I am not granting the BCPS' Motion, I must still address the issue of mootness that it raised in its motion.¹² The Supreme Court has addressed mootness in a host of cases and generated ample precedent on the issue. The Court has found that there must be a "live" issue and the parties must have a "legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (internal citations omitted); *see also Honig v. Doe*, 484 U.S. 305, 317-318 (1988) (noting that unless there is an exception, the Court can only hear matters involving an ongoing controversy). Similarly, the Fourth Circuit has held that a question is moot if, at the

¹¹ The Maryland Rules provides guidance regarding self-authenticating documents, and the authentication of evidence. *See* Maryland Rule 5-902, setting forth a list of types of evidence that, if certain conditions are met, are considered self-authenticating.

¹² *See S-I v. Spangler*, 832 F.2d 294, 296 (4th Cir. 1987) noting that mootness should be addresses as a preliminary matter, even if not pled by the parties as it can implicate a court's jurisdiction over an appeal.

time it is before the court, there is no longer an existing controversy between the parties and a court is not able provide effective remedy. *Porter v. Clarke*, 852 F.3d 358 (4th Cir. 2017); *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697 (4th Cir. 2008); *see also, Powell v McCormack*, 395 U.S. 486, 496 (1969). In other words, when issues presented are no longer “live,” it is impossible for a court to grant effective relief to the prevailing party and the case is moot and must be dismissed. *Int’l Bhd. Of Teamster v. Airgas, Inc.*, 885 F.3d 230, 235 (4th Cir. 2018).

The BCPS argues that the issue in this matter is moot because the BCPS has, once the Student filed a Complaint, offered to pay for the IEE. It alleges that as it has agreed to pay for the IEE for the Student, this matter is only about attorneys’ fees, and attorneys’ fees by themselves are not sufficient to keep a moot issue alive. Since payment for the IEE is the only relief that can be granted in this administrative matter, the BCPS contends the issue is no longer a live controversy. The BCPS relies on *S-1 v. Spangler*, a Fourth Circuit case in which parents were seeking, not only to be reimbursed for tuition expenses, but also injunctive and declaratory relief regarding the promulgation and enforcement of certain rules regarding state hearing examiners in North Carolina. *S-1 v. Spangler*, 832 F.2d 294 (4th Cir. 1987).

Spangler, however, is distinguishable from this matter. In *Spangler*, the parents filed not only against the City Board of Education, but also against the State Board of Education and its Chairman. While the appeal was pending, the parents settled their claim with the City Board and entered into a voluntary dismissal regarding the City Board claims. The court in *Spangler* did not hold that the settlement regarding the claims against the City Board of Education mooted the claims against the other parties “in strict constitutional case or controversy terms” but for “prudential reasons.” *Id.* at 297. The court proceeded in this manner because the remaining issues were regarding injunctive and declaratory relief – no such relief is sought in this matter.

The BCPS also cites to *Dep't of Edu. v. Rodarte ex rel. Chavez*, 127 F. Supp. 2d 1103 (D. Haw. 2000) to support its position, noting that a court “need not decide the merits of an administrative appeal to determine the issues of attorneys’ fees. (BCPS Motion, p. 4). The BCPS’s reliance on *Rodarte* is misplaced. The *Rodarte* case has a complicated factual history, wherein the parents filed with the district court for attorneys’ fees as the prevailing party, and the school filed an appeal of the administrative proceeding, and a motion for summary judgment and motion to dismiss regarding an award of compensatory services; the student then filed a cross motion for summary judgment. The court found the school’s appeal to be moot since the school had already provided the compensatory services, and the student had then graduated from high school. *Rodarte* at 1114. The court then analyzed if it had to “decide the merits of the appeal solely for the purposes of determining if Rodarte should be the prevailing party, despite the appeal's mootness.” *Id.* at 1115. The court determined that it did not have to address the merits of the appeal in order to address attorneys’ fees and then proceeded to make an award of attorneys’ fees to Rodarte. *Id.* at 1117. In this matter, the BCPS is arguing the matter is moot, the case should be dismissed, and therefore the Student is not a prevailing party.

Although the BCPS argues in the pleadings that it was unable to pay the Parents because it is the school’s requirement to have W-9 information for a party before issuing a check, the BCPS conceded at the hearing that it now has that information but still not made payment. I also note that it is seemingly a BCPS internal policy not to issue a check without W-9 information. This requirement is not mandated by statute or regulation. While the BCPS may have sound reasons for its policy, the undisputed facts in this matter are that the BCPS had months prior to the filing of the Complaint in this matter to determine a way to reimburse the Parents for the IEE. The BCPS took no action to reimburse the expense of the IEE prior to the filing of the Complaint.

I agree with the BCPS that *if* the Parents had entered into a settlement regarding payment of the IEE, the issue in this matter would be moot. Typically, any such settlement agreement would have included a release or requirement that the Complaint be withdrawn. I also understand that the BCPS wanted this matter to settle and is frustrated that it has not. However, the fact remains that it has not settled. Based on the record before me, the BCPS made no attempt to reimburse the Parents for the IEE prior to the filing of the Student's Complaint. After filing, the parties attempted settlement negotiations but were not able to reach an agreement. The fact that the BCPS now wishes to do what it should have done, and what it was required to do ten months ago, does not render this matter moot. Although it is clear from the pleadings that the Student plans to seek attorneys' fees, both parties acknowledge that attorneys' fees cannot be awarded in an order from the OAH. I decline to speculate on the Student's ability to prevail on an award of attorneys' fees before a different ruling body. At issue before me is whether the facts show that the Student is entitled to reimbursement of the cost of the IEE.

The Student also argues that even if I found the issue to be moot, it is still a live issue as it falls under an exception to the mootness doctrine of being capable of repetition yet evading review. Although I have not found the matter to be moot, I will also address this argument for completeness of the record. To support the contention that the matter is capable of repetition yet evading review, the Student cites to *Honig v. Doe*, 484 U.S. 305 (1988). In *Honig*, a disabled student had moved out of the specific school district from which he had been expelled, but still resided in California. The Court found that the matter regarding the alleged violation of the Education of the Handicapped Act, (a predecessor to the IDEA) remained live because the student remained entitled to a FAPE within the state of California, reasoning that due to the "nature of [the student's] disability, and [the school system's] insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct, we have

little difficulty concluding that there is a ‘reasonable expectation,’... that [the Student] would once again be subjected to [expulsion]...” *Id.* at 318. The Student avers that her underlying disability is what led to her not being able to complete the school’s evaluation, and since her disability is ongoing, there is a reasonable expectation that she will be faced with the same issues the next time assessments are required.

The BCPS argues that *Honig* is distinguishable in that, at that time, California had a policy to exclude disabled children for what it deemed dangerous conduct and was making unilateral placement changes because of this policy. Here, it argues, the BCPS has no policy against paying for IEEs, so the conduct of not paying for an IEE is not likely to repeat. I agree that the BCPS does not have a formal policy of not reimbursing parents for IEEs once they approve the IEE. However, based upon the facts of this case, I disagree that the conduct of not responding to a request for an IEE and then not paying for the IEE is not likely to be repeated.

The BCPS has provided no explanation as to why it did not reimburse the Student for the IEE. There are many reasons why reimbursement could be legitimately delayed, but clearly, by April 2023 when the BCPS relied on the IEE in the creation of the Student’s April 2023 IEP, it knew it was not contesting the reasonableness of the IEE or the deficiency of the school’s assessment. Even after that, there were subsequent communications from the Parents and their counsel regarding the reimbursement of the IEE, but still no action by the BCPS. At the motions hearing, the BCPS tried to characterize the situation as simply an oversight in which the IEE had been approved, but the approval had not been conveyed to the Parents. This self-serving explanation is not supported by the record. With no explanation regarding non-payment for a ten-month period – ten months during which the BCPS could have corrected the situation but did not – I cannot find that these circumstances are not likely to occur the next time the Student

requires assessments. As such, I find that even if the issue in this matter were moot, it would fall under an exception to the mootness doctrine of being capable of repetition, yet evading review.

The Student's Motion for SD

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations. Under the IDEA, “[a] parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.” 34 C.F.R. § 300.502(b)(1); *see also* Educ. § 8-405(b)(4)(i)(1); COMAR 13A.05.01.14B(1). In Maryland, a parent may also obtain an IEE if the local educational agency (LEA) fails to respond within 30 days of the parent’s request; or approves the request but fails to convene an evaluation IEP meeting within sixty days of receipt of the parent’s request, or within ninety days during a state of emergency. Educ. § 8-405(b)(4)(i)(2). Upon receiving a request for an IEE at public expense, a LEA has one of two choices: provide the evaluation at public expense¹³ or file a special education due process complaint to defend its evaluation. 34 C.F.R. § 300.502(b)(2)(i)-(ii); Educ. § 8-405(b)(4)(iii)-(iv).

It is undisputed that between October 12, 2022 and August 24, 2023, a period of time over ten months, the BCPS did not approve the request for the IEE, nor did it reimburse the cost of the IEE. In April 2023, the BCPS relied on the results of the IEE and amended the Student’s IEP to incorporate the recommendations of the IEE. But still, the BCPS made no attempt to reimburse the Parents for the IEE.

There is nothing in the record to indicate that prior to the Student’s filing of the Complaint *any* action had been taken regarding the approval of payment for the IEE. The BCPS did not even issue a written response approving or denying the request, as is required to do by statute. Requests for the approval of the IEE prior to the completion of the assessment went

¹³ “When a parent requests an [IEE] at public expense, the public agency shall provide a written response approving or denying the request within 30 days of the date the request was made.” COMAR 13A.05.01.14B(2); *see also* Educ. § 8-405(b)(4)(ii).

unanswered by the BCPS. (Motion for SD Ex. 7). Counsel for the Student emailed Ms. Wedderburn Taylor twice in June 2023 requesting reimbursement for the IEE, which by that time had been relied on for the Student's IEP. Ms. Wedderburn Taylor responded that the BCPS was reviewing the information and would respond shortly. (Motion for SD Ex. 14). It is difficult to fathom what still required review as the issue of the IEE had been known to the BCPS for approximately eight months. Counsel for the Student even sent an email prior to filing the Complaint, alerting the BCPS that if the BCPS did not make payment for the IEE, the Student would file a due process complaint. (Stud. Ex. 15). The BCPS did not respond to this email. It was not until three days after the August 21, 2023 Complaint was filed, that Ms. Wedderburn Taylor attempted to communicate with counsel for the Student, or at least with his office, regarding the BCPS' decision regarding the IEE and sought the Parents' W-9 information. (Resp. Ex. 16). At that time, because the Complaint had already been filed, the Parents did not provide the W-9 information as they did not wish to settle.

For completeness of the record, I note that at the hearing on the motions, the Student raised for the first time that furnishing social security numbers to the BCPS for purposes of a W-9 is violative of the requirement of 34 C.F.R. § 300.502(a)(3)(ii) that the IEE be at "public expense." According to the Student, since the regulation requires that the IEE be at "public expense" and if the BCPS files a W-9, there could be repercussions for the Parents' income taxes as the reimbursement could be considered income, meaning the Parents' may have to pay some additional moneys for the evaluation by way of taxes. This argument is purely speculative. There is nothing in the record that suggests or supports that the Parents would have to report any reimbursement of payment for the IEE as income, even if the BCPS reports it as such. Even if the Parents did report the payment as income, there is nothing in the record to show that it would affect their payment of income taxes. There is also nothing in the record to support that the

Parents ever informed the BCPS that concerns regarding taxes were the reason for not providing the W-9 information or requested that the payment be made without the information. The Parents have not shown that providing W-9 information, which is essentially a social security number, would somehow render the IEE not at public expense. I reject this argument.

The BCPS argues that even if I find that it violated the IDEA and its implementing regulations by not responding to the request for the IEE in a timely manner and not making payment for the IEE, this violation is merely procedural, not substantive, and therefore an award cannot be made to the Student. The BCPS asserts that there was no denial of a FAPE to the Student, therefore, the Student cannot be granted relief.

The BCPS cites to *DiBuo v. Bd. of Educ. of Worcester Cnty*, 309 F.3d 184 (4th Cir. 2002), to support these arguments. In *DiBuo* the Fourth Circuit held that a school board's refusal to consider evaluations submitted by the parents at an IEP meeting did not violate their right to participate in the IEP process and that they were not entitled to reimbursement of the cost of private services. However, the facts in *DiBuo* are distinguishable from those in this case. In *DiBuo*, the parents sought reimbursement for the private placement of their child in speech/language therapy and occupational therapy. Here, the Student seeks reimbursement for an IEE – an IEE that the BCPS does not contest is appropriate, and which has already been implemented through the Student's IEP.

The BCPS also cited *R.F. v. Cecil Cnty Pub. Sch.*, 919 F.3d 237 (4th Cir. 2019), to support its argument that as there was not denial of a FAPE for the Student, the Student is not entitled to compensation. The facts in *R.F.* also concern the private placement or compensatory education of a student, which are not at issue in this matter. The court in *R.F.* specifically held that, "Unless an ALJ determines that a given procedural violation denied the child a FAPE, she *may only order compliance with the IDEA's procedural requirements* and cannot grant other

forms of relief, such as private placement or compensatory education.” *R.F.*, 919 F.3d at 248 (emphasis added). The Student has made no allegations of a denial of a FAPE, but is seeking compliance with a procedural requirement of the IDEA.

While the parties have raised interesting arguments about tangential issues, ultimately, I find that there are no material facts in dispute between the parties. The Student requested an IEE at public expense because the Parents believed that the school’s psychological assessment was not complete and therefore was improper. The BCPS did not respond to this request, nor did it file its own due process request seeking a finding that the BCPS’ evaluation was appropriate. Prior to August 21, 2023, the BCPS had not reimbursed the Student for the IEE, despite conceding that the IEE was necessary and appropriate, and subsequently relying on the IEE to develop the Student’s IEP. Ultimately, the BCPS does not contest that it should reimburse the Parents for the IEE. Clearly, what is underlying this matter is an award for attorney’s fees, something that both parties agree cannot occur at the administrative hearing level.¹⁴ The fact that the Parents did not wish to accept a settlement offer after the filing of the Complaint does not moot this matter, nor does it create a material fact in dispute between the parties.

CONCLUSIONS OF LAW

Upon consideration of the Student’s Motion for Summary Decision, the BCPS’s Motion and Opposition, and the Student’s Response, I find that the issue of whether the Student is entitled to reimbursement by the BCPS for the February 21, 2023 IEE is not moot. *Murphy v. Hunt*, 455 U.S. 478 (1982); *S-1 v. Spangler*, 832 F.2d 294 (4th Cir. 1987).

I conclude that the BCPS’s Motion requires that I look beyond the initial pleading, and therefore, is more appropriately considered to be a motion for summary decision. COMAR

¹⁴ See 34 C.F.R. §300.517 regarding attorneys’ fees.

28.02.01.12C and D. I further conclude that, considering the BCPS' Motion to be one for summary decision, the Motion must be denied because the exhibits upon which it relies are not self-authenticating, and there is no affidavit or testimony attesting to their authentication.

COMAR 28.02.01.12D.

I further conclude as a matter of law, there are no genuine disputes of material fact, and that the Student is entitled to judgment as a matter of law. COMAR 28.02.01.12D. Finally, I conclude that although there has been no allegation, and therefore no finding, that the BCPS' failure to reimburse the Student for the IEE resulted in a denial of a FAPE, the Student is entitled to reimbursement for the IEE, which can be awarded at the administrative proceedings level. *R.F. v. Cecil Cnty Pub. Sch.*, 919 F.3d 237 (4th Cir. 2019).

ORDER

For the reasons set out in the Discussion above, I hereby **ORDER** that:

1. The Baltimore City Public Schools shall reimburse the Student for the cost of the February 21, 2023 private neuropsychological evaluation conducted by [REDACTED].

2. The Baltimore City Public Schools shall, within thirty [30] days of the date of this decision, provide proof of compliance with this Order to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, Maryland State Department of Education.

3. The merits hearing in this matter scheduled for January 16 and 17, 2024 is hereby, **CANCELLED.**

December 15, 2023
Date Ruling Mailed

Mary Pezulla
Administrative Law Judge

MP/ja
#208354

REVIEW RIGHTS

A party aggrieved by this final decision may file an appeal within 120 days of the issuance of this decision with the Circuit Court for Baltimore City, if the Student resides in Baltimore City; with the circuit court for the county where the Student resides; or with the United States District Court for the District of Maryland. Md. Code Ann., Educ. § 8-413(j) (2022). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

A party appealing this decision 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 appeal. The written notification must include the case name, docket number, and date of this decision, and the court case name and docket number of the appeal.

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

Copies Mailed and Emailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

██████████,
STUDENT

v.

BALTIMORE CITY

PUBLIC SCHOOLS

BEFORE MARY PEZZULLA,
AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-CITY-OT-23-21726

FILE EXHIBIT LIST

The Student submitted the following exhibits in support of her Motion for Summary Decision and Response:

- Stud. Ex. 1 - Affidavit of **██████████**, dated September 10, 2023
- Stud. Ex. 2- Affidavit of **██████████**, dated September 10, 2023
- Stud. Ex.3- BCPS Notice and Consent for Assessment, dated June 1, 2022
- Stud. Ex.4- BCPS Psychological Report of Psychological Evaluation by **██████████**, Psy. D and School Psychologist, dated September 28, 2022
- Stud. Ex. 5- BCPS Prior Written Notice form, dated October 10, 2022
- Stud. Ex. 6- Email Correspondence between BCPS Attorney Katherine Stump and Mr. Steedman, dated October 12, 2022
- Stud. Ex. 7- Email Correspondence between Ms. Stump and Mr. Steedman, dated October 26, 2022
- Stud. Ex. 8- Neurophysiological Evaluation by **██**, dated February 21, 2023
- Stud. Ex.9- Email Correspondence between Mr. **██████████** and Ms. Stump, dated January 24, 2023
- Stud. Ex. 10- Email Correspondence between Mr. **██████████** and BCPS Attorney Patrice Wedderburn Taylor, dated February 24, 2023
- Stud. Ex. 11- BCPS Prior Written Notice form, dated April 27, 2023
- Stud. Ex. 12- Email Correspondence between Mr. Steedman and Ms. Wedderburn Taylor, dated June 7, 2023

- Stud. Ex. 13- Email Correspondence between Mr. Steedman and Ms. Wedderburn Taylor, dated June 14, 2023
- Stud. Ex. 14- Email Correspondence (response) between Ms. Wedderburn Taylor and Mr. Steedman, dated June 14, 2023
- Resp. Ex. 15- Email Correspondence between Mr. Steedman and Ms. Wedderburn Taylor, dated August 2, 2023
- Resp. Ex. 16- Affidavit of [REDACTED] (Administrative Assistant of The Steedman Law Group, LLC), dated October 19, 2023
- Resp. Ex. 17- Email Correspondence between Ms. Kavadi and Mr. Steedman, dated October 6, 2023
- Resp. Ex. 18- Email Correspondence between Ms. Kavadi and Mr. Steedman, dated October 6, 2023
- Resp. Ex. 19- Email Correspondence between Mr. Steedman and Ms. Kavadi, dated October 7, 2023

The BCPS submitted the following exhibits in support of the BCPS Motion and Opposition:

- BCPS Ex. A - Complaint, dated August 21, 2023
- BCPS Ex. B- Prehearing Conference Report and Order, dated September 25, 2023
- BCPS Ex. C- Email Correspondence between Ms. Wedderburn Taylor and Ms. [REDACTED] dated August 24, 2023
- BCPS Ex. D- Email Correspondence between Mr. Steedman and Ms. Wedderburn Taylor, dated August 24, 2023
- BCPS Ex. E- Email Correspondence between BCPS Attorney Samara Scott and the OAH; attachment of BCPS Notice of Outcome of Resolution Meeting, dated September 1, 2023
- BCPS Ex. F- Email Correspondence between Mr. Steedman and Ms. Kavadi, dated September 8, 2023
- BCPS Ex. G- Email Correspondence between Ms. Wedderburn Taylor and Mr. Steedman, dated June 24, 2023
- BCPS Ex. H- Letter from Ms. Kavadi to Mr. Steedman, dated October 6, 2023