

██████████,
STUDENT
v.
MONTGOMERY COUNTY
PUBLIC SCHOOLS

BEFORE EDWARD J. KELLEY,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-23-22059

DECISION

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STATEMENT OF THE CASE

On August 25, 2023, the Office of Administrative Hearings (OAH) received a Due Process Complaint filed by ██████████ (Student) and ██████████ and ██████████ (Parents). The Student requested a hearing to review the identification, evaluation, or placement of the Student by the Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA).¹

On October 12, 2023, I held a pre-hearing conference (Conference) via the Webex video conferencing platform to schedule a due process hearing. Frances Shefter, Esquire, represented the Student and the Parents, who did not attend the Conference. Stacy Swain, Esquire,

¹ 20 U.S.C.A. § 1415(f)(1)(A) (2017); 34 C.F.R. § 300.511(a) (2022); Md. Code Ann., Educ. § 8-413(d)(1) (Supp. 2023); Code of Maryland Regulations (COMAR) 13A.05.01.15C(1). Unless otherwise noted, all citations to the U.S.C.A. are to the 2017 bound volume; all citations to the C.F.R. are to the 2022 bound volume; and all citations to the Education Article are to the 2023 Supplement.

represented the MCPS. After discussing the issues and proposed witnesses, it was determined that the hearing would take seven days to complete.

The parties confirmed at the Conference that on September 8, 2023, they had agreed in writing that no settlement was possible. Under the regulatory framework, the 45-day timeline began to run on September 9, 2023,² which meant the due process hearing needed to be held and a decision issued by Tuesday, October 24, 2023.³ The parties jointly requested an extension of this deadline because it was impossible to hold a seven-day hearing and issue a decision within twelve days. The regulations authorize an extension of time when requested by either party.⁴

A significant portion of the Conference was spent reviewing dates in an attempt to schedule the hearing as soon as possible. The parties indicated that they discussed their respective schedules and the decision deadline prior to the Conference. The parties preferred conducting the hearing on consecutive days. Additionally, the parties stated they needed time to prepare and exchange documents in conformity with the five-day disclosure rule.

The parties and I had numerous conflicts on our October, November, and December calendars due to other prescheduled professional commitments and preplanned leave. My availability in October and much of November was limited due to previously scheduled hearings and preplanned leave. I also had preplanned leave the last week in December 2023. After I reviewed my calendar, Ms. Swain methodically reviewed her calendar each day from November 1, 2023, through January 5, 2024. During that timeframe, Ms. Swain's calendar was booked with other professional obligations every day she was not on leave. These professional

² 34 C.F.R. § 300.510(c)(2).

³ 34 C.F.R. § 300.510(b)(2),(c)(2); 34 C.F.R. § 300.515(a).

⁴ 34 C.F.R. § 300.515(c).

conflicts included other previously scheduled due process hearings at the OAH, IEP meetings, and client meetings. Ms. Swain had preplanned leave for the end of November 2023 and the end of December 2023. Ms. Shefter indicated that she also had matters scheduled in October, November, and December 2023, including other previously scheduled due process hearings with Ms. Swain.

The stated conflicts prevented me from scheduling a seven-day hearing with some consecutive days prior to January 8, 2024. Accordingly, based on the scheduling conflicts, I found that there was good cause to extend the regulatory timeframe as requested by the parties. The parties further requested that I issue a decision within thirty days after the conclusion of the hearing.

I held the hearing on January 8, 9, 10, 11, 16, 17, and 18, 2024, as scheduled.⁵ Ms. Shefter represented the Student and Parents. Williams H. Fields, Esquire, who entered his appearance in November 2023, represented the MCPS. Due to weather-related school closures on January 17 and 18, 2024, the MCPS's witnesses were not available to testify on those dates. As a result, one more hearing date, January 24, 2024, was added, and the hearing concluded on that date. The decision in this case is due by February 23, 2024.

Procedure is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH.⁶

⁵ On December 26, 2023, the MCPS filed a motion for appropriate relief, seeking to quash the Student's subpoena requests and to dismiss the case because the Student sent the subpoena requests to my attention and did not serve the subpoena requests on the MCPS's counsel. On December 27, 2023, the Student responded to the MCPS's motion and separately moved that the MCPS be sanctioned for filing a motion without substantial justification. I considered the motions as a preliminary matter on January 8, 2023, and denied the motions for the reasons stated on the record. Code of Maryland Regulations (COMAR) 28.02.01.12B.

⁶ Educ. § 8-413(e)(1); Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Was the Student denied a Free Appropriate Public Education (FAPE) for the 2021-2022 and 2022-2023 school years based on the MCPS's failure to timely complete and implement a Functional Behavior Assessment (FBA)⁷ and a Behavior Intervention Plan (BIP)?⁸

2. Was the Student denied a FAPE for the 2021-2022 and 2022-2023 school years based on the MCPS's failure to develop and implement Individualized Education Programs (IEP) that adequately addressed the student's educational goals and objectives?

3. If the MCPS denied the Student a FAPE for the 2021-2022 and/or the 2022-2023 school years, what is the proper remedy?

SUMMARY OF THE EVIDENCE

Exhibits

An exhibit list is attached to this Decision as an Appendix.

Testimony

The Student presented the following witnesses:

- Ms. [REDACTED] i (Parent), the Student's mother;
- [REDACTED], special education teacher at [REDACTED] Elementary School ([REDACTED]), accepted as an expert in special education;
- [REDACTED], [REDACTED], accepted as an expert in special education, special education programming and placement, IEP development, reading assessments, learning disabilities, and compensatory education;

⁷ An FBA is "the systematic process of gathering information to guide the development of an effective and efficient behavior interventional plan for the problem behavior." COMAR 13A.08.04.02B(5).

⁸ A BIP is a "proactive, data-based, structured plan that is developed as a result of a functional behavioral assessment which is consistently applied by trained staff to reduce or eliminate a student's challenging behaviors and to support the development of appropriate behaviors and responses." COMAR 13A.08.04.02B(1).

- [REDACTED], MCPS Instructional Specialist, accepted as an expert in special education and speech and language pathology; and
- [REDACTED], MCPS school psychologist, accepted as an expert in special education and psychology.

The MCPS presented the following witnesses:

- [REDACTED], MCPS Program Specialist, accepted as an expert in special education;
- [REDACTED], MCPS Instructional Specialist and Assessment Team Coordinator, accepted as an expert in special education and occupational therapy;
- [REDACTED], [REDACTED], and [REDACTED].

FINDINGS OF FACT

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

Background

1. The Student is an eight-year-old second grader at [REDACTED].
2. The Student is identified by the MCPS as a student eligible for special education services under the IDEA.⁹
3. The Student has a primary disability of autism and has been receiving special education services since preschool.¹⁰

⁹ MCPS Ex. 1.

¹⁰ *Id.*

4. The Student is placed in the [REDACTED] Program at [REDACTED]. He spends the majority of his school day in a self-contained classroom with five other students.¹¹ The Student spends lunch and recess with the general education population.¹²

5. The Student's school day begins at 8:45 a.m. and he returns home around 3:30 p.m.¹³

6. The Student previously participated in Applied Behavior Analysis therapy after school from 4:30 p.m. to 7:30 p.m., but this stopped approximately six months prior to the hearing.¹⁴

7. The Student does not receive any professional therapy on the weekends, but his family attempts to incorporate and reinforce positive strategies during that time.¹⁵

8. The Student's annual IEP meeting is held in March. The annual IEP covers the remaining portion of the school year in which it is drafted and a significant portion of the following school year.¹⁶

The 2020-2021 School Year

9. During the 2020-2021 school year, the MCPS convened an annual IEP meeting on March 25, 2021, to review or revise the Student's IEP (March 2021 IEP).¹⁷

10. The IEP team reviewed data, including the Student's progress on his last IEP goals, as well as an autism evaluation completed by [REDACTED].¹⁸

¹¹ Transcript (T.) 538. Transcript references are to the condensed version.

¹² MCPS Ex. 1.

¹³ T. 65.

¹⁴ T. 65-66, 69.

¹⁵ T. 67.

¹⁶ MCPS Exs. 1, 3, 9.

¹⁷ MCPS Ex. 1.

¹⁸ *Id.*

11. The March 2021 IEP identified the following areas affected by the Student's disability: language and literacy, mathematics, physical well-being and motor development, and social foundations.¹⁹

12. Because the Student was in preschool, the March 2021 IEP focused on addressing early learning skills rather than academic goals.²⁰

13. The March 2021 IEP noted that due to the Pandemic, the Student participated in remote learning for most of the preceding year.²¹

14. The Student returned to in-person learning at ██████████ in March 2021.²²

15. The March 2021 IEP included the Student's present levels of academic achievement and functional performance (present levels). The Student enjoyed singing and humming songs. He was able to follow simple directions when interested in the activity and to sit in his seat for short periods of time. He could identify letters, common objects, and numbers one through ten. He could complete simple puzzles. He was working toward independence in managing his belongings and assisting in bathroom routines. He was beginning to use his hands together for bilateral tasks.²³

16. As of March 2021, the Student needed additional time to process and respond to questions, repetitive directions, and notice of transitions. The March 2021 IEP provided the Student with the following daily instructional supports to address these specific needs: wait time, repetition of directions, picture schedule to set expectations, use of manipulatives, prompt

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

hierarchy, use of graphic symbols, sign language, voice output devices, communication boards, and use of a first-then board.²⁴

17. As of March 2021, the Student engaged in behaviors – climbing, out of area,²⁵ and disruptiveness – that interfered with his learning progress. To address these behaviors, the March 2021 IEP provided the following daily social and behavioral supports: positive reinforcement in academic and non-academic settings, use of manipulatives during instruction, hand-holding when walking outside classroom, close proximity supervision at all times for safety, and frequent change in activities or opportunity for movement.²⁶

18. The March 2021 IEP provided for the Student’s use of assistive technology – picture communication cards and voice output devices.²⁷

19. The March 2021 IEP provided the following supports to address the Student’s need for sensory input: a chewy, a squish ball, a compression vest, a weighted lap pad, and a sensory board.²⁸

20. The March 2021 IEP set several early learning skills goals for the next year.²⁹

21. The March 2021 IEP included two early learning skills goals for physical well-being and motor development:

- “Given prompt hierarchy, opportunities for practice, and close supervision, [the Student] will demonstrate improved adaptive skills.”

²⁴ *Id.*

²⁵ MCPS defines “out of area” as leaving a designated area at a distance of three feet. S. Ex. 10.

²⁶ MCPS Ex. 1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

- “Given therapeutic intervention, modeling, visual supports, and multi-sensory strategies, [the Student] will use his hands together to functionally grasp and manipulate school materials.”³⁰

22. The objectives for these goals measured the Student’s ability to independently hang-up his coat, unpack his belongings, assist with the bathroom routine, use both hands to complete a functional task, and identify, choose, and use a writing tool.³¹

23. The March 2021 IEP included three early learning skills goals for language and literacy:

- “Given systematic instruction, a fading prompt hierarchy, and repeated practice, [the Student] will demonstrate vocabulary and comprehension skills by receptively identifying pictures of common objects, engaging in receptive directions with objects, and receptively identifying 15 Uppercase letters on 3 out of 4 trials.”
- “[The Student] will demonstrate understanding of language by pointing, imitating, and following directions given no more than two models, prompts or cues.”
- “[The Student] will use multimodal communication (ex: gestures, signs, pictures, sound, devices, words or word approximations) for a variety of communicative purposes with peers and adults given no more than two models, prompts or cues.”³²

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

24. The objectives for these goals measured the Student's ability to identify common and preferred objects, look toward a speaker when his name was called, and follow directions without prompting.³³

25. The March 2021 IEP included an early learning skills social foundations goal: "Given verbal cues, opportunities for practices, prompt hierarchy, and close supervision, [the Student] will demonstrate improved social skills in the school setting." The objectives of this goal measured the Student's ability to respond to his name being called; to sit through structured activities for three to five minutes; and to respond to directions without protest.³⁴

26. The March 2021 IEP included an early learning skills mathematics goal: "Given small group instruction, opportunities for practices, use of manipulatives, and close supervision, [the Student] will demonstrate increased knowledge of the mathematics concepts and number concepts." The objectives for this goal measured the Student's ability to count to ten with one-to-one correspondence and to identify numbers.³⁵

27. The March 2021 IEP placed the Student in the [REDACTED] Program where he spent twenty-six hours and ten minutes of specialized education outside of the general education setting.

28. The March 2021 IEP provided the Student with occupational therapy for thirty minutes each week and speech and language therapy for forty minutes each week.³⁶

29. The March 2021 IEP approved the Student for Extended School Year (ESY) in the Summer of 2021.³⁷

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

30. ESY is a program of special education services provided in the Summer to maintain critical life skills and prevent regression.³⁸

31. The March 2021 IEP noted: “The IEP Team feels that the benefits that [the Student] receives from his educational program during the regular school year will be significantly jeopardized without ESY services.”³⁹

32. The Student attended only part of the ESY session in the Summer of 2021.⁴⁰

The 2021-2022 School Year

33. In September 2021, the Student began kindergarten at [REDACTED].⁴¹

34. Progress notes reflect that between September 2021 and January 2022, the Student made sufficient progress on his physical well-being and motor development goals, although he still exhibited the need for substantial prompting and redirection because he was easily distracted.⁴²

35. Progress notes reflect that as of January 2022, the Student was not making sufficient progress on his language and literacy, social foundations, and mathematics goals due to his interfering behaviors, such as climbing and out of area. These behaviors caused him to detach from small and large-group learning activities.⁴³

36. Because the Student was not making sufficient progress toward some of his goals and demonstrated interfering behaviors, the IEP Team held an IEP meeting on January 26, 2022.⁴⁴

³⁸ T. 82.

³⁹ MCPS Ex. 1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

37. As a result of the January 2022 IEP meeting, the March 2021 IEP was amended to reflect the Student's present levels, and the Student's goals and objectives were updated. The IEP team proposed that the MCPS conduct an FBA.⁴⁵

38. The amended March 2021 IEP continued to provide the Student with the same assistive technology and daily supports. The Student's placement was maintained.⁴⁶

39. The Parents authorized the FBA in February 2022.⁴⁷

40. On March 8, 2022, the MCPS convened the annual IEP meeting to review or revise the Student's IEP (March 2022 IEP). The Student's present levels were updated. The Student was using hand gestures to express his wants and needs. He was labeling food items in the classroom and engaging in direct and whole group instruction with frequent reinforcement. The Student's seated work tolerance increased, although his performance depended on his level of engagement in the activity. The Student increased his ability to walk to, and sit in, his chair. The Student mastered matching letters A-D and was progressing on matching other letters. He was able to receptively answer who, what, where questions when reinforced and given opportunities to practice. He could match numbers one to ten and identify the same numbers from a number line. He was making appropriate gestures with his hands to demonstrate wants and needs.⁴⁸

41. The March 2022 IEP reflected the Student's transition from preschool to kindergarten and set early learning skills goals, academic goals, and a behavioral goal for the next year.⁴⁹

⁴⁵ MCPS Ex. 2.

⁴⁶ MCPS Ex. 1.

⁴⁷ T. 107.

⁴⁸ MCPS Ex. 3.

⁴⁹ *Id.*

42. The March 2022 IEP introduced a new academic goal for reading comprehension: “Given grade level modified texts with visual supports, repetition, a faded prompt hierarchy, and increasing field sizes, [the Student] will demonstrate reading comprehension skills and story elements by answering who, what, and where questions across 4 texts on 3 out of four trials by March 7, 2023.” The objectives for this goal measured the Student’s ability to identify characters, setting and plot.⁵⁰

43. The March 2022 IEP introduced a new behavioral goal: “Given visual cues, a fading prompt hierarchy, and repeated practice, [the Student] will demonstrate appropriate social behaviors by remaining in his seat with a calm body for the duration of an activity or task during whole group and direct instruction by March 7, 2023.” The objectives for this goal measured the Student’s ability to sit and maintain a calm body for an extended period of time while attending and participating in group instruction.⁵¹

44. The March 2022 IEP introduced a new academic goal for reading vocabulary: “Given grade level modified texts with visual supports, repetition, and a faded prompt hierarchy, [the Student] will demonstrate reading vocabulary skills by receptively identifying letters A-Z, receptively identifying 15 pictures of common objects, engage in receptive directions with objects across 8 targets, and follow 8 receptive directions with 100% accuracy for the three consecutive days by March 7, 2023.” The objectives for this goal measured the Student’s ability to identify letters and common objects, as well as follow directions.⁵²

45. The March 2022 IEP introduced a new academic goal for written language content: “Given prompts to gain or maintain attention, modeling, a fading prompt hierarchy,

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

repetition of activities, templates, and reinforcement, [the Student] will complete functional tasks to demonstrate pre-writing skills by matching the letters in his first and last name, spelling his name with a model on 3 out of 4 trials by March 7, 2023.” The objectives for this goal focused on measuring the Student’s ability to identify letters and spell his name.⁵³

46. The March 2022 IEP introduced a new academic goal for math calculation: “Given prompts to gain or maintain attention, structured activities, reinforcement, manipulatives, repetition of tasks, and a fading prompt hierarchy, [the Student] will demonstrate counting and cardinality skills by receptively identifying numbers 1-20, matching to sequence numbers 1-10, and counting using 1:1 correspondence, with 100% accuracy for three consecutive days by March 7, 2023.” The objectives for this goal focused on measuring the Student’s ability to identify, count, and sequence numbers one through twenty.⁵⁴

47. The March 2022 IEP kept the same two early learning skills goals for physical well-being and motor development that were in the March 2021 IEP.

48. The March 2022 IEP kept the same two early learning skills goals and objectives for language and literacy that were in the March 2021 IEP.

49. The March 2022 IEP maintained the same assistive technology and daily supports as the March 2021 IEP.⁵⁵

50. The Student continued to receive occupational therapy and speech and language therapy each week.⁵⁶

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

51. The March 2022 IEP placed the Student in the [REDACTED] at [REDACTED] where he spent twenty-six and one-half hours per week outside of general education. As of March 2022, the Student was on the high school diploma track.⁵⁷

52. The Parents agreed to the March 2022 IEP.⁵⁸

53. The March 2022 IEP approved the Student for ESY and again noted: “The IEP Team feels that the benefits that [the Student] receives from his educational program during the regular school year will be significantly jeopardized without ESY services.”⁵⁹

54. The Student did not attend ESY for the Summer of 2022.⁶⁰

55. The MCPS did not complete the FBA by the end of the 2021-2022 school year.⁶¹

56. Progress report notes from April and June 2022, indicate that the Student was making progress on his behavioral goal. Although he frequently eloped from his seat during work time, he was able to be redirected with prompting. The MCPS was working with the Student to maintain a calm body in his seat for extended periods of time by implementing redirection, visual cues, positive reinforcement, close supervision, frequent changes and opportunities for movement.⁶²

The 2022-2023 School Year

57. At the start of the 2022-2023 school year, the Student entered first grade and transitioned to a new teacher, Ms. [REDACTED].⁶³

⁵⁷ *Id.*

⁵⁸ MCPS Ex. 4.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ T. 542-544, 566-68.

⁶² *Id.*

⁶³ MCPS Ex. 9.

58. The MCPS completed the FBA on September 9, 2022, and took into account Ms. [REDACTED] observations in the beginning of the school year. The completed FBA recognized that the Student engaged in the following behaviors that interfered with his learning:

- out of area, *i.e.*, instances where the Student leaves a designated area at a distance of three feet, eighteen episodes per day on average, with a range of five to thirty episodes per day;
- climbing, *i.e.*, any instance of elevating one's body onto objects/furniture, eight episodes per day on average, with an average duration of twelve minutes, with a range of one to thirty minutes per episode; and
- physical disruption, *i.e.*, any instance of throwing or swiping materials from a previous location to an alternate location, one episode per day on average, with a range of zero to three episodes per day.⁶⁴

59. The Student engaged in the described behaviors to gain attention, gain access to tangible or preferred items, to obtain sensory stimulation, and to escape from demands.⁶⁵

60. The MCPS finalized the Student's BIP on September 9, 2022. The BIP provided comprehensive strategies to curb the Student's problem behaviors and increase replacement behaviors. These strategies included structured and close supervision of the Student, immediate reinforcement of positive behaviors, immediate curtailment of problem behaviors, and frequent breaks. The BIP identified specific goals to reduce problem behaviors by March 7, 2023.⁶⁶

61. On September 16, 2022, the MCPS convened an IEP meeting to review and revise the March 2022 IEP in light of the FBA and the BIP. Following the September meeting, the

⁶⁴ S. Ex. 10.

⁶⁵ *Id.*

⁶⁶ S. Ex. 11.

March 2022 IEP was amended to update the Student's present levels and incorporate the FBA and BIP.⁶⁷

62. As of September 2022, the Student had made progress in several areas. He improved his ability to imitate simple actions and complete tasks with his hands. He demonstrated the ability to use a writing tool to point to his choice. With prompting and reinforcement, he was able to pack and unpack his belongings. He mastered identifying letters A-K and other objects.⁶⁸

63. The amended IEP introduced four new behavioral goals:

- “Given visual supports, individualized reinforcement schedule, opportunities to practice, and strategies outlined in the behavioral intervention plan, [the Student] will decrease the frequency of out of area behaviors no more than 12 times per day for ten consecutive days by March 7, 2023.”
- “Given visual supports, individualized reinforcement schedule, opportunities to practice, and strategies outlined in the behavioral intervention plan, [the Student] will decrease the frequency climbing behaviors no more than 4 times per day for ten consecutive days by March 7, 2023.”
- “Given visual supports, individualized reinforcement schedule, opportunities to practice, and strategies outlined in the behavioral intervention plan, [the Student] will decrease the duration of climbing behaviors no more than 5 minutes per episode for ten consecutive days by March 7, 2023.”
- “Given visual supports, individualized reinforcement schedule, opportunities to practice, and strategies outlined in the behavioral intervention plan, [the Student]

⁶⁷ MCPS Ex. 5.

⁶⁸ *Id.*

will decrease the frequency of physical disruptions no more than zero occurrences daily for ten consecutive days by March 7, 2023.”⁶⁹

64. In September 2022, the IEP Team reclassified the language and literacy goals from early learning skills to academic, but the other annual goals and objectives remained the same as the March 2022 IEP. The supports, services, assistive technology, and placement also remained the same.⁷⁰

65. In September 2022, the IEP Team determined that the Student would be instructed using alternate standards, meaning he would pursue a certificate of program completion rather than a high school diploma.⁷¹

66. The Parents expressed concern that the IEP repeated goals from prior IEPs. Additional IEP team meetings were held on October 11 and November 1, 2022, to address the Parents’ concerns.⁷²

67. Between September and December 2022, the MCPS did not have a speech and language pathologist at ██████████ to provide services to the Student as required by the IEP. At the October 11, 2022, meeting, the IEP Team addressed the absence of a speech and language pathologist at SCMES and its effect on the Student’s academic progress.⁷³

68. Following the November 1, 2022, IEP meeting, the IEP team again amended the March 2022 IEP. The amended IEP included new data measuring the Student’s behaviors in the 2022-2023 school year. The amended IEP added six hours of daily one-to-one critical staffing to assist implementation of the BIP and the Student’s instructional needs. The school team concluded that the ██████████ remained the proper placement for the Student.⁷⁴

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² MCPS Ex. 8.

⁷³ *Id.*; T. 270, 500.

⁷⁴ MCPS Ex. 7.

69. The Parents did not agree with the school team's November 2022 placement recommendation.⁷⁵

70. According to progress notes, as of November 2022, the Student was making sufficient progress to meet his reading comprehension goal, his behavioral goals, his vocabulary goal, his written language goal, his math calculation goal, and his physical well-being and motor development goal. Because there was no speech and language therapy being provided, the Student's speech and language progress was not evaluated in this timeframe.⁷⁶

71. The MCPS hired a speech and language pathologist in November 2022, who began providing services to the Student in December 2022. The MCPS proposed a plan to provide the Student with additional speech and language services to compensate the Student for all of the missed speech and language therapy.⁷⁷

72. In January 2023, the Student achieved his receptive language goal, his reading comprehension goal, and his written language content goal.⁷⁸

73. On February 28 and March 3, 2023, the MCPS convened an annual IEP meeting to review or revise the Student's IEP (March 2023 IEP). The Student's present levels were updated. As of this date, the Student increased his ability to scan a field of answer choices. He mastered receptive directions and identification with certain common objects. The Student was able to answer who, what and where questions related to a text. He mastered matching numerals one to nine in sequence when given a number line. He mastered identifying numerals one to twenty when given a field of three answer choices. He independently responded to a speaker who

⁷⁵ MCPS Ex. 8.

⁷⁶ MCPS Ex. 7.

⁷⁷ T. 103-04.

⁷⁸ MCPS Ex. 7.

called his name and followed one-step directions. There was a decrease in the quantity and duration of out of area behavior. He was able to receptively identify letters A-Z.⁷⁹

74. The March 2023 IEP updated the Student's daily instructional and behavioral supports by establishing a specific daily schedule for the Student's sensory needs. The schedule identified the sensory item and the specific time and duration that item needed to be utilized. The March 2023 IEP maintained the hand-holding support, but introduced a plan to transition from hand-holding to close supervision. The IEP added an elevated slant board support to assist visual performance skills including reading and writing. The IEP also added a home-school communication support requiring a minimum of two means of communication with the Student's family per week.⁸⁰

75. Based on the updated present levels, the March 2023 IEP set goals to be achieved by the next annual review.⁸¹

76. The March 2023 IEP set new behavioral goals for self-management:

- “By February 2024, when given opportunities to practice and individualized enforcement, [the Student] will independently complete 60% of his arrival and dismissal routines for 4 out of 5 trials as measured by observation record.”
- “By February 2024, when given opportunities to practice and individualized enforcement, [the Student] will complete a one piece picture activity schedule with no more than two gestural prompts for 4 out of 5 trials as measured by observation record.”

⁷⁹ MCPS Ex. 9.

⁸⁰ *Id.*

⁸¹ *Id.*

- “By February 2024, when given opportunities to practice and individualized enforcement, [the Student] will transition within the classroom for 4 out of 5 given opportunities as measured by observation record.”⁸²

77. The objectives for these goals measured the Student’s ability to complete his unpacking and packing routine, complete a one-piece picture activity, and transition within the classroom.⁸³

78. The March 2023 IEP introduced a new academic goal for receptive language: “Given direct instruction, strategies to initiate and sustain attention, repetitions as needed, visual supports (e.g. picture choices, sentence frames) and no more than two multisensory cues or prompts, [the Student] will follow directions and describe location of objects with targeted prepositions, as well as receptively and expressively respond to wh- questions about orally presented information as measured by informal language probes in 4 out of 5 trials by February 2024.” The objectives for this goal measured the Student’s ability to follow one-stop directions, to describe the location of objects, and respond appropriately to who, what, and where questions.⁸⁴

79. The March 2023 IEP introduced a new academic goal for expressive language: “Given direct instruction, structured situations set-up to elicit targeted skills, strategies to initiate and sustain attention, visual supports and no more than two multisensory prompts, [the Student] will use multimodal communication (e.g. verbalizations, pictures, speech generating device) to produce 1-3 word utterances to initiate requests for needed or desired objects or actions, as well as protest non-preferred/desired objects or actions as measured by informal language probes at least 5 times per session across three consecutive sessions by February 2024.” The objectives

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

for this goal measured the Student's ability to request a desired item and refuse an undesired item.⁸⁵

80. The March 2023 IEP included a physical goal for fine motor coordination: "Given demonstration, visual models, sensory input, prompts and adaptations as indicated, [the Student] will demonstrate the fine motor, bilateral coordination, and visual motor skills needed to use school tools (e.g. writing utensil, scissors) effectively and to manage his belongings in 3 out of 4 opportunities across a 5 week period as measured by work samples, observations, and teacher reports by February 2024." The stated objectives measured the Student's ability to use his hands to do various personal and school-related tasks.⁸⁶

81. The March 2023 IEP included a new academic goal for reading comprehension: "By February 2024, when given a field of three answer choices, level B texts, individualized reinforcement, and an elevated Velcro board, [the Student] will answer questions about key details across 6 texts with 100% accuracy in three out of four date days as measured by cold probe data." The stated objectives measured the Student's ability to identify characters, plot, and setting.⁸⁷

82. The March 2023 IEP included the following behavioral goals:

- "By February 2024, when given visual supports, individualized reinforcement schedule, opportunities to practice and strategies outlined in the behavior intervention plan, [the Student] will decrease the frequency or out of area behaviors no more than 5 times per day for ten consecutive days."
- "By February 2024, when given visual supports, individualized reinforcement schedule, opportunities to practice and strategies outlined in the behavior

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

intervention plan, [the Student] will decrease the frequency of climbing behaviors no more than 5 times per day for ten consecutive days.”

- “By February 2024, when given visual supports, individualized reinforcement schedule, opportunities to practice and strategies outlined in the behavior intervention plan, [the Student] will decrease the frequency of physical disruption behaviors to no more than one occurrence per day for ten consecutive days.”⁸⁸

83. The March 2023 IEP changed the target for the frequency of daily out-of-area behaviors from twelve times per day to five times per day for ten consecutive days, which made the goal more challenging for the Student than the amended March 2022 IEP. The March 2023 IEP changed the target for the frequency of daily climbing behaviors from four times per day to five times per day for ten consecutive days, making it slightly easier to achieve for the Student than the March 2022 IEP. The March 2023 IEP changed the target for the frequency of daily physical disruption behaviors from zero occurrences per day to one occurrence per day for ten consecutive days, making it slightly easier to achieve for the Student. The stated objectives addressed curbing the Student’s interfering behaviors.⁸⁹

84. The March 2023 IEP included an academic goal for reading vocabulary: “By February 2024, when given a field of three answer choices, individualized reinforcement, and an elevated Velcro board, [the Student] will receptively identify letter sounds (A-Z) with 100% accuracy for three out of four trials as measured by cold probe data.” The stated objectives measured the Student’s ability to meet this goal by focusing initially on identifying letter sounds of the first third of the alphabet before progressing to the remaining letters.⁹⁰

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

85. The March 2023 IEP introduced a new written language content goal: “By February 2024, when given a field of three answer choices, individualized reinforcement, and elevated Velcro board, [the Student] will demonstrate pre-writing skills by identifying his first and last name in print with 100% accuracy for three consecutive days as measured by cold probe data.” The stated objectives measured the Student’s ability to identify his first and last name with and without picture prompts.⁹¹

86. The March 2023 IEP introduced a new academic goal for math calculation: “By February 2024, when given manipulatives, individualized reinforcement, and a number line, [the Student] will demonstrate counting and cardinality skills by answering the question “How many?” and will sequence numerals 1-10 with 100% accuracy in three out of four trials.” The stated objectives measured the Student’s ability to count, sequence, and identify numbers.⁹²

87. The IEP team maintained the Student’s placement in the [REDACTED] Program. The IEP team proposed updated speech and language, educational, and psychological assessments for the Student.⁹³

88. The MCPS completed the speech and language assessment on March 14, 2023. The assessment employed the Peabody Picture Vocabulary Test, the Test for Auditory Comprehension of Language, record review, and classroom observation. The Student demonstrated significant needs in receptive and expressive language skills and these deficits impeded his ability to understand what he hears, express himself, and interact socially with peers and adults.⁹⁴

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ MCPS Ex. 11; S Ex. 15.

89. The MCPS completed the educational assessment on March 22, 2023. The assessment employed the Brigance Inventory of Early Development III Standardized test, which is designed to measure a child's performance compared to that of same-aged children. The Student tested in the "very weak" range in all categories tested, meaning that his scores were substantially less than his same-aged peers. The Student exhibited strengths in letter, color, and shape recognition and noted gains in visual performance. The Student exhibited a need to scan larger field sizes and number concepts. He also needed to work on reading comprehension and letter sound identification. The report recommended that the Student's educational program include visual support, fields of answer choices, multi-modal communication systems, an individualized reinforcement schedule, broken down assignments, direct instruction, opportunities for practice and repetition, and low student-to-teacher ratios.⁹⁵

90. The MCPS completed the psychological assessment on April 12, 2023. The assessment employed the Leiter-3 test, which measures non-verbal intelligence in fluid reasoning and visualization. The Student performed in the very low/mild delay range. While the Student demonstrated strength in problem solving with visual information, his cognitive functioning was below what was expected for his age. The Student still needed adult support to communicate his needs, interact appropriately with others, and carry out daily living tasks.⁹⁶

91. On April 12, 2023, the MCPS convened an IEP meeting to review the Student's placement based on the completed evaluations. The Student's placement in the [REDACTED] Program continued.⁹⁷

92. Following the April 12, 2023, meeting, an amended IEP was issued that updated the Student's present levels.

⁹⁵ MCPS Ex. 12; S Ex. 16.

⁹⁶ MCPS Ex. 13; S. Ex. 13.

⁹⁷ MCPS Ex. 14.

93. The March 2023 IEP approved the Student for ESY in the Summer of 2023 but he chose not to attend.

DISCUSSION⁹⁸

BURDEN OF PROOF

The standard of proof in this case is a preponderance of the evidence. COMAR 28.02.01.21K(1). To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). The burden of proof rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). The Parents are seeking relief and bear the burden of proof to show that the challenged actions by the MCPS did not meet the requirements of the law.

School officials should be afforded deference based on their expertise, and the IDEA “vests these officials with responsibility for decisions of critical importance to the life of a disabled child.”⁹⁹ Yet, this respect and deference is not limitless.¹⁰⁰ Therefore, “the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate.”¹⁰¹ “Indeed, if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then

⁹⁸ My findings, analysis, and legal conclusions are based upon consideration of all of the parties’ arguments and the credible evidence of record. All testimonial and documentary evidence was considered and given the weight it was due, regardless of whether it has been recited, cited, referenced, or expressly set forth in the Decision. *See, e.g., Mid-Atl. Power Supply Ass’n v. Md. Pub. Serv. Comm’n*, 143 Md. App. 419, 442 (2002) (emphasizing that “[t]he Commission was free to accept or reject any witness’s testimony” and “the mere failure of the Commission to mention a witness’s testimony” does not mean that the Commission “did not consider that witness’s testimony”).

⁹⁹ *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017). *See also Lessard v. Wilton-Lyndeborough Coop. Sch. Dist. (Lessard II)*, 592 F.3d 267, 270 (1st Cir. 2010) (“The standard of review is thus deferential to the educational authorities, who have ‘primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs.’”).

¹⁰⁰ *See Cnty. Sch. Bd. of Henrico Cnty. v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the [judge] of the obligation to determine as a factual matter whether a given IEP is appropriate.”).

¹⁰¹ *Id.*; *see also Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993).

administrative hearings conducted by an impartial decisionmaker would be unnecessary”¹⁰² and “would render meaningless the entire process of administrative review.”¹⁰³

FAPE UNDER THE IDEA

The identification, evaluation, and placement of students in special education are governed by the IDEA.¹⁰⁴ The IDEA offers States federal funds to assist in educating children with disabilities. In exchange for the funds, a State pledges to comply with a number of statutory conditions. Among them, the State must provide a FAPE to all eligible children.

The IDEA requires “that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.”¹⁰⁵ To be eligible for special education and related services under the IDEA, a student must meet the definition of a “child with a disability” as set forth in section 1401(3) of the U.S.C. and the applicable federal regulations.

The Supreme Court addressed the FAPE requirement in *Board of Education of the Hendrick Hudson Central School District v. Rowley*,¹⁰⁶ holding that a FAPE is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”¹⁰⁷ The Court identified a two-part inquiry to analyze whether a local education agency satisfied its obligation to provide a FAPE: first, whether there has been compliance with the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit.¹⁰⁸

¹⁰² *Id.*

¹⁰³ *Sch. Bd. of Prince William Cnty., Va. v. Malone*, 762 F.2d 1210, 1217 (4th Cir. 1985) (citation omitted).

¹⁰⁴ 20 U.S.C. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; COMAR 13A.05.01.

¹⁰⁵ 20 U.S.C. § 1400(d)(1)(A); *see also* Educ. § 8-403.

¹⁰⁶ 458 U.S. 176 (1982).

¹⁰⁷ *Rowley*, 458 U.S. at 201 (footnote omitted).

¹⁰⁸ *Id.* at 206-07.

In 2017, the Supreme Court revisited the meaning of a FAPE, holding that for an educational agency to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student’s circumstances.¹⁰⁹ Consideration of the student’s particular circumstances is key to this analysis; the Court emphasized that the “adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”¹¹⁰

The “reasonably calculated” qualification recognizes that crafting an appropriate education program requires a prospective judgment by school officials. The IDEA contemplates that this fact-intensive exercise will involve consideration not only of the expertise of school officials but also the input of the child’s parents or guardians. Any review of an IEP must include the recognition that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.¹¹¹ Directly adopting language from *Rowley*, and expressly stating that it was not making any “attempt to elaborate on what ‘appropriate’ progress will look like from case to case,” the *Andrew F.* Court 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.’”¹¹² At the same time, the *Andrew F.* Court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, “[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.”¹¹³

¹⁰⁹ *Andrew F.*, 137 S. Ct. 988.

¹¹⁰ *Id.* at 1001.

¹¹¹ *Id.* at 999.

¹¹² *Id.* (quoting *Rowley*, 458 U.S. at 206).

¹¹³ *Id.* at 1002; see also *R.F. by and through E.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237 (4th Cir. 2019).

Regarding procedural violations, the IDEA¹¹⁴ states:

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

The existence of a procedural violation does not necessarily establish the presence of a substantive one. In *MM ex rel. DM v. School District of Greenville County*,¹¹⁵ the Fourth Circuit Court of Appeals explained: "When such a procedural defect exists, we are obliged to assess whether it resulted in the loss of an education opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA. . . . If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations."¹¹⁶

THE IEP

COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of a student and the special education and related services to be provided to meet those needs. The IEP must 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.¹¹⁷

¹¹⁴ 20 U.S.C.A. Section 1415(f)(3)(E)(ii).

¹¹⁵ 303 F.3d 523 (4th Cir. 2002).

¹¹⁶ *M.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 533-34 (4th Cir. 2002); *T.B. Jr. by and through T.B., Sr. v. Prince George's Cnty. Bd. of Educ.*, 897 F. 3d 566, 573 (4th Cir. 2018). See also *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir.1997) ("[T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.").

¹¹⁷ 20 U.S.C. § 1414(d)(3)(A).

Among other things, the IEP describes a student's current educational performance, explains how the student's disability affects a student's involvement and progress in the general curriculum, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular educational programs.¹¹⁸

IEP teams must consider the student's evolving needs when developing their educational programs. The student's IEP must include "[a] statement of the child's present levels of academic achievement and functional performance, including . . . [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 non-disabled children). . . ."¹¹⁹ If a child's behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, the use of positive behavioral interventions, strategies and supports to address that behavior.¹²⁰ 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.¹²¹

To comply with the IDEA, an IEP must, among other things, allow a disabled child to advance toward measurable annual academic and functional goals that meet the needs resulting from the child's disability or disabilities, by providing appropriate special education and related

¹¹⁸ 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A.

¹¹⁹ 34 C.F.R. § 300.320(a)(1)(i).

¹²⁰ *Id.* § 300.324(a)(2)(i).

¹²¹ *Id.* § 300.324(b)(1).

services, supplementary aids, program modifications, supports, and accommodations.¹²² It is not enough to develop an IEP that meets these standards; the public school also has an obligation to implement the IEP “as soon as possible after the meeting where the IEP is developed or revised.”¹²³

The development of an IEP is a prospective process.¹²⁴ The test of the appropriateness of the IEP is *ex ante* and not *post hoc*.¹²⁵ Thus, a judge in a due process hearing must look to what the IEP team knew when it developed the IEP, and whether that IEP, as designed, was reasonably calculated to enable the child to receive educational benefit. An IEP is essentially a “snapshot” in time and “cannot be judged exclusively in hindsight.”¹²⁶ However, evidence of actual progress during the period of an IEP may also be a factor in determining whether a challenged IEP was reasonably calculated to confer educational benefit.¹²⁷

Positions of the Parties

The Student contends that the MCPS failed to provide a FAPE for the 2021-2022 and 2022-2023 school years. The Student first asserts that he was denied a FAPE based on the MCPS’s failure to timely complete and implement the FBA and the BIP. The Student also asserts that he was denied a FAPE because the MCPS failed to develop and implement IEPs that adequately addressed his educational goals and objectives. He notes that the MCPS failed to provide the speech and language services set forth in the IEP from September to December 2022.

¹²² 20 U.S.C. § 1414(d)(1)(A)(i)(II), (IV), (VI).

¹²³ COMAR 13A.05.01.09D(3).

¹²⁴ See *Andrew F.*, 137 S. Ct. at 999.

¹²⁵ *Adams v. State*, 195 F.3d 1141, 1149 (9th Cir.1999); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993); *J.P. ex rel. Popson v. W. Clark Cmty. Sch.*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002) (“[T]he measure of appropriateness for an IEP does not lie in the outcomes achieved. While outcomes may shed some light on appropriateness, the proper question is whether the IEP was objectively reasonable at the time it was drafted.”) (Citation omitted).

¹²⁶ See *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d. 795, 818 (8th Cir. 2011); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).

¹²⁷ *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009); see also *M.M.*, 303 F.3d at 532.

The Student also posits that the annual IEPs repeated or reduced goals, which demonstrates that he was not making progress and that the IEPs did not provide a FAPE. As a remedy, the Student requests compensatory education in the form of a private school placement at the MCPS's expense.

The MCPS counters that it provided the Student with a FAPE for the 2021-2022 and 2022-2023 school years. The MCPS acknowledges that it should have completed the FBA and the BIP by the end of the 2021-2022 school year. The MCPS contends that this procedural violation did not result in a denial of FAPE because the FBA and the BIP were completed and implemented within two school months of the deadline and during that time, the MCPS was adequately addressing the Student's interfering behaviors. The MCPS further asserts that the Student's IEPs the 2021-2022 and 2022-2023 school years were reasonably calculated to enable a student to make appropriate progress in light of his circumstances. The MCPS contends that the continuation or relaxation of certain IEP goals does not prove a denial of a FAPE. Finally, the MCPS asserts that even assuming a denial of a FAPE as alleged, the Student produced no evidence to justify a private placement as compensatory education.

For the reasons that follow, I conclude that the Student failed to prove that delayed completion of the FBA and the BIP resulted in a substantive denial of a FAPE for the 2021-2022 and the 2022-2023 school years. I conclude that the Student's IEPs for the 2021-2022 and the 2022-2023 school years were reasonably calculated based on his needs and provided a FAPE. I

conclude that the MCPS denied the Student a FAPE during a portion of the 2021-2022 school year by not providing the Student with the speech and language services required by his IEP. As a result, the Student is entitled to compensatory education in the form of speech and language services equal to the amount of services lost. The Student's request for compensatory education in the form of a private placement is denied.

ANALYSIS

I. **Delayed completion and implementation of the FBA and the BIP did not result in a denial of FAPE for the 2021-2022 or the 2022-2023 school years.**

When determining whether an IEP complies with the IDEA, courts make a two-part inquiry.¹²⁸ The first part of such inquiry is procedural, namely, whether the state has complied with the procedures set forth in the IDEA.¹²⁹ The “failure to comply with the IDEA’s procedural provisions may be a sufficient basis for finding that the local educational agency failed to provide a student with a FAPE.”¹³⁰

When a procedural defect exists, the next step is “to assess whether it resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA.”¹³¹ “The failure to conduct an adequate FBA is a serious procedural violation because it may prevent the [IEP team] from obtaining necessary information about the student’s behaviors, leading to their being addressed in the IEP inadequately or not at all.”¹³² A failure to conduct an FBA will not always rise to the level of a denial of FAPE, but “when an FBA is not conducted, particular care must be taken to ensure that the IEP adequately addresses the child’s problem behaviors.”¹³³ If the IEP created and implemented a plan to

¹²⁸ *Rowley*, 458 U.S. at 206; *S.S. v. Bd. of Educ. for Harford Cnty*, 498 F. Supp. 3d 761, 780 (D. Md. 2020).

¹²⁹ *Id.*

¹³⁰ *Bd. of Educ. of Frederick Cnty. v. I.S. ex rel. Summers*, 325 F. Supp. 2d 565, 580 (D. Md. 2004); *see also Gerstmyer v. Howard County Public Schools*, 850 F. Supp. 361, 364 (D. Md. 1994).

¹³¹ *M.M.*, 303 F.3d at 533 (4th Cir. 2002).

¹³² *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012); *accord Z.B. v. D.C.*, 888 F.3d 515, 524 (D.C. Cir. 2018).

¹³³ *R.E.*, 694 F.3d at 190.

address the student's most problematic behaviors, it is not legally inadequate.¹³⁴

The Parents agreed to the FBA in February 2022. The purpose of the FBA was to assess the Student's specific behaviors that interfered with his learning progress, such as climbing, out of area, and disruptiveness. By all accounts, the FBA should have been completed within ninety days, which would have been early May 2022.¹³⁵ Ms. [REDACTED] and Ms. [REDACTED] testified that [REDACTED], an MCPS Program Specialist, substantially completed the FBA by May 2022.¹³⁶ Ms. [REDACTED] acknowledged that Ms. [REDACTED] should have fully completed the FBA by May 2022 and then immediately scheduled an IEP meeting, but she did not do so.¹³⁷ No witness explained why Ms. [REDACTED] failed to complete this important task.

The MCPS's failure to timely complete the FBA is a serious procedural violation, and the MCPS's conduct in this regard is troubling. Nevertheless, the evidence does not support a finding that this procedural violation resulted in a substantive denial of FAPE for either the 2021-2022 or the 2022-2023 school years.

The FBA determined that the Student exhibited three problem behaviors: out of area, climbing, and physical disruption.¹³⁸ These are the same problem behaviors identified in the Student's prior IEPs; no new problem behaviors were identified. Of these problem behaviors, only out of area and climbing occurred on average more than once a day.¹³⁹ Out of area was

¹³⁴ *Rosaria M v. Madison City Bd. of Educ.*, 325 F.R.D. 429, 439 (N.D. Ala. 2018),

¹³⁵ The parties did not provide authority for this undisputed timeline at the hearing, but COMAR 13A.05.01.06E provides that assessments used to revise a student's IEP must be implemented by the IEP team within 90 days.

¹³⁶ T. 342, 344-45, 547, 557, 568-69.

¹³⁷ T. 568-69.

¹³⁸ S. Ex. 10.

¹³⁹ *Id.*

occurring eighteen times per day on average; climbing was occurring eight times per day on average, and physical disruptions were occurring one time per day on average.¹⁴⁰ In response to these problem behaviors, the BIP recommending strategies, which included: setting expectations, positive reinforcement, close supervision, access to sensory activities and materials, and immediate redirection.¹⁴¹

Significantly, both the amended March 2021 IEP and the March 2022 IEP directly addressed the Student's interfering behaviors of out of area, climbing, and physical disruptions.¹⁴² The IEPs included daily services addressing these behaviors, such as daily close supervision, substantial positive reinforcement, frequent breaks, and frequent change in activities or opportunity for movement.¹⁴³ The March 2022 IEP also implemented a behavioral goal that addressed his problem behaviors by working on the Student's ability to sit in his chair with a calm body for extended periods of time.¹⁴⁴

Ms. [REDACTED] and Ms. [REDACTED] both testified that the MCPS was addressing the Student's interfering behaviors at the end of the 2021-2022 and the beginning of the 2022-2023 school years, notwithstanding that the FBA and the BIP had not been completed.¹⁴⁵ Ms. [REDACTED] indicated that the behavior interventions already being employed in the classroom pursuant to the March 2022 IEP were addressing the Student's problem behaviors.¹⁴⁶ Ms. [REDACTED] and Ms. [REDACTED] expert testimony was not contradicted, and it was based on direct interaction with the Student in the classroom environment. I find their testimony credible and give it substantial weight. Their testimony is consistent with the progress notes for April and June 2002, which

¹⁴⁰ *Id.*

¹⁴¹ S. Ex. 11.

¹⁴² MCPS Exs. 1, 3.

¹⁴³ *Id.*

¹⁴⁴ MCPS. Exs. 3, 5.

¹⁴⁵ T. 542-544, 566-68.

¹⁴⁶ T. 342, 579.

demonstrated that the Student was making progress on the behavioral goal that addressed the Student's problem behaviors.¹⁴⁷

The Student did not produce any evidence regarding how delayed completion of the FBA and the BIP negatively impacted the 2021-2022 school year. Based on the evidence presented, in the best-case scenario, the FBA and BIP would have been implemented in late May 2022, which was the very end of the 2021-2022 school year. None of the witnesses testified that implementing the FBA and the BIP this late in the school year would have had any impact on the Student's educational progress. The Student did not attend ESY in the Summer of 2022, so no benefit was lost there.

The FBA and the BIP were completed on September 9, 2022, which was the very beginning of the 2022-2023 school year. An IEP meeting was held on September 16, 2022, and the FBA and the BIP were incorporated into the Student's IEP. The FBA and the BIP were part of the Student's IEP for the remainder of the 2022-2023 school year. The Student did not produce any concrete or reliable evidence regarding what would have happened differently in the 2022-2023 school year had the FBA and the BIP been completed in May 2022 instead of September 2022.

Case law supports the conclusion that the procedural defect in this case did not result in a substantive denial of FAPE. *R.E. v. New York City Department of Education* is instructive.¹⁴⁸ There, the court considered three cases asserting procedural violations of the IDEA based on the school system's failure to create and implement an FBA and a BIP. In the first case, the court determined there was no substantive violation of the IDEA because although delayed, the FBA and the BIP were created and implemented. Additionally, the IEP identified the student's

¹⁴⁷ MCPS Ex. 5.

¹⁴⁸ 694 F.3d 167 (2d Cir. 2012).

interfering behaviors and included numerous strategies to address those behaviors.¹⁴⁹ In the second case, the court determined there was a substantive violation of IDEA because the school system did not create an FBA and a BIP, notwithstanding the student's clear and uncontradicted interfering behaviors.¹⁵⁰ In the third case, the court determined that there was no substantive violation of the IDEA because the student's behavior was not sufficient to warrant an FBA and a BIP.¹⁵¹

This case mirrors the first case. The IEPs addressed the Student's interfering behaviors and contained services and strategies for dealing with them. Ms. [REDACTED] and Ms. [REDACTED] testified that those strategies were being implemented during the time the FBA was being created. Although delayed, the FBA and the BIP were created, and there is no dispute regarding their sufficiency.

In *S.S. v. Board of Education of Harford County*, the student exhibited extreme behavioral issues that were not addressed in her IEP despite notice to the school system.¹⁵² The school system inexplicably delayed creating an FBA and BIP and then implemented an IEP that did not address the student's behaviors.¹⁵³ The court found in these specific circumstances, the delayed completion and implementation of the FBA and the BIP contributed to denial of a FAPE.¹⁵⁴ By contrast, in this case, there was less delay, the IEPs did address the Student's problem behaviors, and the FBA and the BIP that were created and implemented directly addressed the Student's interfering behaviors.

¹⁴⁹ *Id.* at 193.

¹⁵⁰ *Id.* at 194.

¹⁵¹ *Id.* at 195.

¹⁵² 498 F. Supp. 3d at 781.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

The evidence demonstrates that the Student's IEPs adequately addressed the Student's interfering behaviors during the short period of time the FBA and the BIP were delayed. There is no evidence that delayed completion and implementation of the FBA and the BIP negatively impacted the Student's educational progress during this period. For these reasons, I find that the delay in completing the FBA and BIP did not result in a substantive denial of a FAPE for the 2021-2022 and 2022-2023 school years.¹⁵⁵

II. The Student's IEPs for the 2021-2022 and 2022-2023 school years were reasonably calculated to address his unique needs and provided a FAPE.

Three annual IEPs covered the 2021-2022 and 2022-2023 school years: the March 2021 IEP, the March 2022 IEP, and the March 2023 IEP. The Student only directly challenges the March 2022 IEP and the March 2023 IEP on the basis that those two IEPs, as amended, repeated or reduced the Student's goals and objectives from the prior year without any cogent justification and responsive explanation for such action. The evidence does not support the Student's claims.

The Student presented one fact witness, the Parent, and four expert witnesses, Ms. [REDACTED], Ms. [REDACTED], Ms. [REDACTED], and Ms. [REDACTED]. The Parent testified generally to the Student's perceived lack of academic progress during the 2021-2022 and 2022-2023 school years, her lack of faith in the MCPS, and her belief that the Student has potential to achieve more academically in a private school setting.¹⁵⁶ The Parent testified that notwithstanding her specific requests, the MCPS refused to provide her with data to confirm that the Student was making the progress set forth in the Student's IEPs.¹⁵⁷ The Parent understandably wants the Student to reach his maximum potential, and she believes that the MCPS has not shared this ambition. While I find the Parent's testimony sincere, she is not an expert in special education or related

¹⁵⁵ *R.E.*, 694 F.3d at 190; *Rosaria M.*, 325 F.R.D. at 439. M.M., 303 F.3d at 535 (holding that procedural defect does not result in a substantive denial of a FAPE absent proof of a lost educational opportunity).

¹⁵⁶ T. 53-68.

¹⁵⁷ *Id.*

services. Therefore, her testimony provides only minimal insight on whether the Student was denied a FAPE for the 2021-2022 and 2022-2023 school years.

Significantly, three of the four expert witnesses presented by the Student, Ms. [REDACTED], Ms. [REDACTED], and Ms. [REDACTED], all indicated that the Student's IEPs were reasonably calculated to enable the Student to make progress and demonstrated that the Student was making progress. Ms. [REDACTED] is the Student's current teacher and has worked with the Student daily in the classroom since September 2022.¹⁵⁸ She completed the Student's educational assessment and participated in the development and implementation of his IEPs.¹⁵⁹ Ms. [REDACTED], an MCPS psychologist, has worked directly with the Student and the Student's teachers on developing strategies to address the Student's interfering behaviors.¹⁶⁰ Ms. [REDACTED] completed the Student's psychological assessment and has participated in the development of his IEPs.¹⁶¹ Ms. [REDACTED], an MCPS speech and language pathologist, participated in the Student's IEP meetings, reviewed the Student's record, observed the Student and consulted with staff about him.¹⁶² I find the expert testimony of these witnesses, who also testified on behalf of the MCPS, to be credible and persuasive because their testimony is based on substantial direct experience with the Student in his actual educational environment. Thus, the testimony of three of the expert witnesses called by the Student does not support his claim that he was denied a FAPE for the 2021-2022 and 2022-2023 school years based on deficient IEPs.

Only one of the Student's expert witnesses, Ms. [REDACTED], provided a contrary opinion in favor of the Student. She testified that the Student's IEPs demonstrate the Student was not making academic progress during the 2021-2022 and the 2022-2023 school years and

¹⁵⁸ T. 147-48.

¹⁵⁹ T. 147, 154.

¹⁶⁰ T. 567-68.

¹⁶¹ T. 338.

¹⁶² T. 265-66.

therefore he was denied a FAPE. Ms. [REDACTED] testified that the Student's annual IEPs were not reasonably calculated to meet the Student's unique needs because the Student's goals were either repeated or made easier to achieve.¹⁶³

I do not find Ms. [REDACTED] testimony reliable or persuasive. First, unlike Ms. [REDACTED], Ms. [REDACTED], and Ms. [REDACTED], Ms. [REDACTED] had no direct contact with the Student in his learning environment.¹⁶⁴ She never met the Student or interacted with him. She never assessed him.¹⁶⁵ She observed the Student in the classroom virtually on one occasion in June 2023 for an unknown time period.¹⁶⁶ Ms. [REDACTED] opinion was based solely on her review of the IEPs, the FBA, the BIP, the assessments, and a conversation with the Parent.¹⁶⁷ The absence of any personal interaction with the Student renders her opinion much less reliable than the expert opinions of educators who are familiar with the Student, work with him on a regular basis, and directly participated in the development of his annual IEPs.

Second, the force of Ms. [REDACTED] testimony – that the Student's IEP goals and objectives were repeated or reduced year after year – is not supported by the evidence. As set forth above in the finding of facts, the March 2022 IEP included new a behavioral goal, as well as new academic goals for reading comprehension, reading vocabulary, written language, and math calculation that were not in the March 2021 IEP. In September 2022, following completion of the FBA and the BIP, the IEP Team met and amended the March 2022 IEP to add new behavioral goals not previously included in the March 2021 IEP or the original March 2022 IEP. The March 2023 IEP added three new goals for behavioral self-management and new academic goals for receptive language, expressive language, reading comprehension, reading vocabulary,

¹⁶³ T. 199, 202.

¹⁶⁴ T. 196-98.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

written content language, and math calculation that were not included in prior IEPs. The evidence indicates that from year to year, most of the Student's goals and objectives were new and supported fully by the comprehensive observational and analytical data set forth in the IEPs.

It is true that some of the Student's annual goals and objectives were repeated or made slightly easier from one IEP to the next IEP. For instance, the March 2022 IEP repeated the same early learning skills goals for language and literacy even though it was noted that the Student was not making progress on those goals.¹⁶⁸ The March 2022 IEP also repeated the early learning skills goals for physical well-being and motor development when the Student was noted as making progress on those goals.¹⁶⁹ The March 2023 IEP contained slightly easier behavior goals for climbing frequency and physical disruptions than the amended March 2022 IEP, even though the Student was noted as making progress on those goals.¹⁷⁰

The Student contends that the repetition or relaxation of goals and objectives reflects a lack of progress and regression, which proves a denial of FAPE. The Student's argument is contrary to the Supreme Court's recognition in *Andrew F.* that "crafting an appropriate program of education requires a prospective judgment by school officials."¹⁷¹ *Andrew F.* reinforced the principle that courts must be mindful that they are reviewing the forward-looking decisions of school authorities.¹⁷² Whether a challenged IEP provides a FAPE is based on the information available to the public school *at the time* the IEP is formulated. Repetition or relaxation of goals contained in a prior IEP does not violate the IDEA as long as the IEP as a whole is reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances.¹⁷³

¹⁶⁸ MCPS Exs. 1, 3.

¹⁶⁹ *Id.*

¹⁷⁰ MCPS Exs. 7, 9.

¹⁷¹ 137 S. Ct. at 999.

¹⁷² *Id.*

¹⁷³ *S.S.*, 498 F.Supp.3d. at 778 (holding that the fact that student is not meeting IEP goals does not in and of itself suggest a denial of a FAPE; a student's educational program is not inappropriate when the student does not achieve

The Student's contention that the MCPS failed to provide a cogent and responsive explanation for repeating or relaxing certain goals is mistaken. Mr. ██████ testified that IEP goals are evaluated yearly and the objective is to design goals at the time of the IEP meeting that are achievable by the next annual meeting.¹⁷⁴ Ms. ██████, Ms. ██████, and Ms. ██████ similarly testified that IEP goals must be reevaluated at the IEP meetings and crafted based on the Student's present levels of performance.¹⁷⁵ Ms. ██████ testified that the behavioral goals set forth in the March 2023 IEP were consistent with the Student's present levels and appropriate given that they were relatively new goals for a young Student.¹⁷⁶ She noted that while the Student exhibited some progress toward these goals, the Student was not consistently achieving the goals over an extended period of time, demonstrating that the Student had not mastered the goals and needed to continue working on them.¹⁷⁷

As the Court explained in *Andrew F.*, the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.¹⁷⁸ Additionally, when reviewing the adequacy of an IEP, there is a deference to the educational authorities, who have the primary responsibility for formulating the education to be accorded to a student with disabilities, and for choosing the educational method most suitable to the child's needs.¹⁷⁹ In this case, I accord deference to the MCPS experts' opinions because I find those opinions to be credible and supported by the evidence.

all of the goals and objectives in the IEP); *J.B. by and through Belt v. District of Columbia*, 325 F. Supp.3d. 1, 9 (D.D.C. 2018) ("In short, limited academic progress does not ipso facto signal a violation of the IDEA any more than does the existence of substantially similar IEPs year over year.").

¹⁷⁴ T. 152-53.

¹⁷⁵ T. 277, 292, 295-96, 355, 474.

¹⁷⁶ T. 359, 378-79.

¹⁷⁷ T. 382-84.

¹⁷⁸ *Id.* at 1001.

¹⁷⁹ *Id.*

Finally, it bears noting that COMAR 13A.05.01.09, which sets forth the required content of an IEP, makes clear that an IEP is substantially more than simply the goals and objectives stated therein.¹⁸⁰ In this case, not only did the Student's IEPs address his annual goals and objectives, but they also provided a litany of services to optimize the Student's academic progress. All of the Student's IEPs provided daily instructional supports to address the Student's specific needs to process and respond to questions, repetitive directions, and notice of transitions: wait time, repetition of directions, picture schedule, use of manipulatives, prompt hierarchy, use of graphic symbols, sign language, voice output devices, communication boards, and use of a first-then board.¹⁸¹ All of the Student's IEPs incorporated daily social and behavioral supports to address the Student's interfering behaviors: positive reinforcement in academic and non-academic settings, use of manipulatives during instruction, hand-holding when walking outside classroom, close proximity supervision at all times for safety, and frequent change in activities or opportunity for movement.¹⁸² All of the Student's IEPs provided the Student with the use of assistive technology.¹⁸³ All of the Student's IEPs provided supports to address the Student's need for sensory input.¹⁸⁴ All of the Student's IEPs provided occupational and speech and language

¹⁸⁰ See also *M.L. v. Smith*, 2018 WL 3756722, *1 (D. Md. Aug. 7, 2018) (noting that an IEP addresses a student's current educational status, annual educational goals, the need for special educational services or other aids necessary to meet those goals, and whether the student may be educated in regular classroom with non-disabled students).

¹⁸¹ *Id.*

¹⁸² MCPS Ex. 1.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

therapy. All of the Student's IEPs provided the Student with ESY, which he opted not to attend.¹⁸⁵

After implementation of the FBA and the BIP, the amended March 2022 IEP added six hours of daily one-to-one critical staffing to assist implementation of the BIP and the Student's instructional needs.¹⁸⁶ Thereafter, the March 2023 IEP updated the Student's daily instructional and behavioral supports by establishing a specific daily schedule for the Student's sensory needs. The schedule identified the sensory item and the specific time and duration that item needed to be utilized. The March 2023 IEP maintained the hand-holding support, but introduced a plan to transition from hand-holding to close supervision. An elevated slant board support was added to assist visual performance skills including reading and writing. A home-school communication support was added requiring a minimum of two means of communication with the Student's family per week.¹⁸⁷ The extensive services provided to the Student through the IEPs is further evidence the IEPs were reasonably calculated to enable the Student to make progress appropriate in light of his circumstances. The Student does not contend otherwise.

The evidence indicates that the Student's disability affects critical areas of academic learning and that the Student's interfering behaviors have negatively impacted the Student's academic progress. Nevertheless, the Student's IEPs addressed these concerns and show the Student has made progress. While the Parent is understandably frustrated that the Student did not make greater progress in the 2021-2022 and the 2022-2023 school years, the evidence demonstrates that his IEPs were not deficient. To the contrary, I find that the Student's IEPs were reasonably calculated to enable the Student to make progress in light of his unique

¹⁸⁵ The Student attended part of the 2021 ESY session. He did not attend the 2022 or 2023 ESY sessions. The Student's IEPs warned that failing to attend ESY could significantly jeopardize the benefits the Student received from his educational program and could result in regression. MCPS Exs. 1, 3, 5, 7, 9, 14.

¹⁸⁶ MCPS Ex. 7.

¹⁸⁷ *Id.*

circumstances, and therefore, were sufficient to provide a FAPE for the 2021-2022 and the 2022-2023 school years.

III. The MCPS denied the Student a FAPE during the 2022-2023 school year by failing to provide speech and language services between September 2022 and December 2022.

The March 2022 IEP required the MCPS to provide the Student twenty minutes of speech and language therapy twice per week.¹⁸⁸ It is undisputed that the Student did not receive speech and language services from September to December 2022 because the MCPS did not have a speech and language pathologist on staff at ██████ ES.¹⁸⁹ As a result, the Student missed 580 minutes of speech and language services required by the Student’s IEP.¹⁹⁰ The absence of these services impacted the Student’s learning because his progress in speech and language could not be addressed or measured during this time period.¹⁹¹ The MCPS’s failure to provide the speech and language services required by the IEP from September to December 2022 resulted in the denial of a FAPE during this portion of the 2022-2023 school year.

IV. Remedy

Having found that the MCPS failed to provide a FAPE for a portion of the 2022-2023 school year, I must next determine the appropriate relief for the Student. The Student only requested that the Student be placed in a non-public placement. However, I do not find that the MCPS’s failure to provide speech and language services between September and December 2022 entitles the Student to this remedy.

The IDEA’s procedural safeguards direct district courts to “grant such relief as the court determines is appropriate.”¹⁹² Where a school district has failed to provide a FAPE, “a court

¹⁸⁸ MCPS Ex. 3.

¹⁸⁹ T. 270-73, 500.

¹⁹⁰ T. 274.

¹⁹¹ T. 270-73, 500.

¹⁹² 20 U.S.C.A. § 1415(i)(2)(C)(iii); *School Committee v. Dept. of Educ.*, 471 U.S. 359, 369 (1985).

will evaluate the specific type of relief that is appropriate to ensure that a student is fully compensated for a school district’s past violations of his or her rights under the IDEA and develop an appropriate equitable award.”¹⁹³ The equitable relief authorized by 20 U.S.C.A., § 1415(i)(2)(C)(iii) most commonly results in reimbursement for private placement when the child was denied a FAPE, or prospective compensatory education.¹⁹⁴ Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to account for the period of time that a student was deprived of her right to a FAPE. Courts have held that to accomplish the IDEA’s purposes, a compensatory education award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.”¹⁹⁵

The Student missed 580 minutes of speech and language therapy between September and December 2022.¹⁹⁶ Ms. ██████ testified that the MCPS affirmatively instituted a plan for providing additional speech and language services to the Student after the ██████ MS hired a speech and language pathologist in December 2022.¹⁹⁷ Ms. ██████ stated that between February and June 2023, the Student was provided 220 extra minutes of speech and language therapy during the week to account for the 580 minutes that were missed.¹⁹⁸ The MCPS accomplished this by

¹⁹³ *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 498-99 (3d Cir. 2012) (quoting *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 720 (3d Cir. 2010)).

¹⁹⁴ *G. ex rel R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d. 295, 308 (4th Cir. 2003).

¹⁹⁵ *Reid ex rel Reid v. Dist. of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

¹⁹⁶ T. 273-74.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

adding an additional twenty-minute speech and language session per week to the Student's services.¹⁹⁹ Ms. [REDACTED] testimony was not contradicted or disputed.

As neither side has provided evidence to show that it would be equitable to provide less services or more services, I find that the equitable remedy is to provide the Student with the 360 minutes of speech and language therapy that he missed. Therefore, I will order compensatory services for the Student equivalent to 360 minutes of speech and language services with a speech and language pathologist.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student failed to prove that delayed completion and implementation of the FBA and the BIP resulted in a denial of a FAPE for the 2021-2022 and the 2022-2023.²⁰⁰ I further conclude that the Student's IEPs for the 2021-2022 and 2022-2023 school years were reasonably calculated to enable the Student to make progress in light of his unique circumstances, and therefore, provided a FAPE.²⁰¹ I further conclude that the MCPS denied the Student a FAPE during a portion of the 2022-2023 school year by failing to provide the Student with speech and language services between September 2022 and December 2022. As a result, the Student is entitled to compensatory education in the form of speech and language services equal to the amount of services lost, 360 minutes.²⁰² The Student's request for compensatory education in the form of a private placement is denied.

¹⁹⁹ *Id.*

²⁰⁰ *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167 (2d Cir. 2012); *S.S. v. Bd. of Educ. for Harford Cnty*, 498 F. Supp. 3d 761 (D. Md. 2020).

²⁰¹ *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

²⁰² 20 U.S.C.A. § 1415(i)(2)(C)(iii).

ORDER

I **ORDER** that:

1. The Montgomery County Public Schools will provide the Student with 360 minutes of additional speech and language therapy with a speech and language pathologist.
2. The Montgomery County 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.

February 23, 2024
Date Decision Issued

Edward J. Kelley
Administrative Law Judge

EJK/dlm
#209695

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) (Supp. 2023). 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.

Copies Mailed and Emailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ABDULLAH ALQOQA,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE EDWARD J. KELLEY,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-23-22059

APPENDIX - FILE EXHIBIT LIST

Except as noted, I admitted the following exhibits on behalf of the Student:

- S. Ex. 1 - Preschool IEP, 4/15/2020 (NOT OFFERED)
- S. Ex. 2 - Preschool Quarter 2 Report Card Addendum, 1/2020 (NOT OFFERED)
- S. Ex. 3 - IEP team consideration of external report, 1/2021 (NOT OFFERED)
- S. Ex. 4 - Preschool Quarter 3 Report Card Addendum, 3/2021 (NOT OFFERED)
- S. Ex. 5 - IEP with Progress Notes, 3/2021
- S. Ex. 6 - Preschool Quarter 4 Report Card Addendum, 6/2021
- S. Ex. 7 - Kindergarten Quarter 1 Report Card, 11/2021 (NOT OFFERED)
- S. Ex. 8 - Kindergarten IEP, 3/8/2021
- S. Ex. 9 - Kindergarten Quarter 4 Report Card, 6/2021
- S. Ex. 10 - MCPS Functional Behavior Assessment, 9/9/2022
- S. Ex. 11 - MCPS Behavior Intervention Plan, 9/9/2022
- S. Ex. 12 - IEP Meeting Prior Written Notice, 11/7/2022
- S. Ex. 13 - Psychological Evaluation, 2/27/2023
- S. Ex. 14 - Approved First Grade IEP, 2/28/2023
- S. Ex. 15 - Speech-Language Evaluation, 3/14/2023
- S. Ex. 16 - Educational Evaluation, 3/22/2023
- S. Ex. 17 - Classroom Observation, 3/28/2023
- S. Ex. 18 - First Grade Quarter 3 Report Card, 4/2023
- S. Ex. 19 - First Grade Amended IEP, 4/4/2023
- S. Ex. 20 - Another First Grade Amended IEP, 4/12/2023
- S. Ex. 21 - IEP Meeting Prior Written Notice, 4/14/2023
- S. Ex. 22 - Psychologist Report for re-evaluation, 4/2023
- S. Ex. 23 - Conditional Acceptance Letter – Sheppard Pratt, 6/6/2023
- S. Exs. 24-28 Legal authorities (NOT ADMITTED)
- S. Ex. 29 - Private Functional Behavior Assessment (NOT OFFERED)
- S. Ex. 30 - Private Therapy Updated Progress Report (NOT OFFERED)
- S. Ex. 31 - Private Therapy Updated Progress Report (NOT OFFERED)
- S. Ex. 32 - Curriculum Vitae – Evelyn Fromowitz (NOT OFFERED)
- S. Ex. 33 - Behavior Treatment Note Charts (NOT OFFERED)
- S. Ex. 34 - Curriculum Vitae – Jennifer Engel Fisher (NOT ADMITTED)
- S. Ex. 35 - Fisher – Expert Report (NOT ADMITTED)

I admitted the following exhibits on behalf of MCPS:

- MCPS Ex. 1 - Amended IEP, 1/26/2022
- MCPS Ex. 2 - Prior Written Notice (PWN), 2/3/2022
- MCPS Ex. 3 - IEP, 3/8/2022
- MCPS Ex. 4 - PWN, 3/15/2022
- MCPS Ex. 5 - Amended IEP, 9/16/2022
- MCPS Ex. 6 - PWN, 9/22/2022
- MCPS Ex. 7 - Amended IEP, 11/1/2022
- MCPS Ex. 8 - PWN, 11/7/2022
- MCPS Ex. 9 - IEP, 2/28/2023
- MCPS Ex. 10 - PWN, 3/7/2023
- MCPS Ex. 11 - Speech and Language Assessment, 3/14/2023
- MCPS Ex. 12 - Educational Assessment, 3/22/2023
- MCPS Ex. 13 - Psychological Evaluation, 4/12/2023
- MCPS Ex. 14 - Amended IEP, 4/12/2023
- MCPS Ex. 15 - PWN, 4/14/2023
- MCPS Ex. 16 - Curriculum Vitae, Sondra Aisenberg
- MCPS Ex. 17 - Curriculum Vitae, Brandi Bechtold
- MCPS Ex. 18 - Curriculum Vitae, Wanda Coates (DID NOT TESTIFY)
- MCPS Ex. 19 - Curriculum Vitae, Catherine Dunn
- MCPS Ex. 20 - Curriculum Vitae, Lynn Tozzi
- MCPS Ex. 21 - Curriculum Vitae, Christian Schneider (DID NOT TESTIFY)
- MCPS Ex. 22 - Curriculum Vitae, Katie Archer
- MCPS Ex. 23 - Curriculum Vitae, Kristin Secan (DID NOT TESTIFY)