

██████████ AND ██████████,  
PARENTS,  
ON BEHALF OF ██████████,  
STUDENT,  
v.  
BALTIMORE CITY PUBLIC SCHOOLS

BEFORE DEBORAH RICHARDSON,  
AN ADMINISTRATIVE LAW JUDGE  
OF THE MARYLAND OFFICE  
OF ADMINISTRATIVE HEARINGS  
OAH No.: MSDE-CITY-OT-24-05504

**DECISION**

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

**STATEMENT OF THE CASE**

On February 27, 2024, ██████████ and ██████████ (Parents),<sup>1</sup> on behalf of their child ██████████ (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Baltimore City Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA).<sup>2, 3</sup>

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<sup>1</sup> Parent in the singular refers to ██████████.

<sup>2</sup> 20 U.S.C.A. § 1415(f)(1)(A) (2017) (“U.S.C.A.” is an abbreviation for the United States Code Annotated. Unless otherwise noted, all citations herein to the U.S.C.A. are to the 2017 bound volume.); 34 C.F.R. § 300.511(a) (2023) (“C.F.R.” is an abbreviation for the Code of Federal Regulations. Unless otherwise noted, all citations herein to the C.F.R. are to the 2023 bound volume.); Md. Code Ann., Educ. § 8-413(d)(1) (Supp. 2023) (Unless otherwise noted, all citations herein to the Education Article are to the 2022 Volume of the Maryland Annotated Code.); Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

<sup>3</sup> Amendments to Educ. § 8-413, effective July 1, 2024, are not relevant to this case and I have cited to the law in effect at the time of the events at issue.

I held a video prehearing conference on March 25, 2024. The Parent was present and represented by Wayne Steedman, Esquire. Samara Scott, Esquire, represented BCPS. I held the hearing on May 28, June 7, 10, 11 and 17, 2024. The Parent was present and represented by Wayne Steedman, Esquire and Olivia Miller, Esquire. Samara Scott, Esquire, represented BCPS. [REDACTED], BCPS Educational Specialist, and [REDACTED], BCPS Coordinator of Due Process and Parent Response, appeared as party representatives for BCPS.

Under the applicable law, a decision in this case normally would be due by May 12, 2024, forty-five days after the expiration of the thirty-day resolution period.<sup>4</sup> As May 12, 2024 was a Sunday, the decision would have been due the previous Friday, May 10, 2024. However, the Parents requested hearing dates outside that timeframe due to scheduling restraints.<sup>5</sup> Mr. Steedman was handling other due process hearings during the months of April and May and stated that due to the time he needed to devote to attending and preparing for those hearings, he was unavailable to start this hearing until May 28, 2024. Ms. Scott also wanted time to prepare for the hearing and also requested we look at dates starting on May 28, 2024. Therefore, we began looking at scheduling this matter onwards from May 28, 2024. BCPS needed the case to be concluded by June 17, 2024, at which time some of BCPS' ten-month employees would become unavailable.

On May 29 and 30, Ms. Scott had another previously scheduled due process hearing. On May 31, Ms. Scott's witnesses were unavailable. The Parents were not available June 3 and 4. Ms. Scott was not available due to an IEP meeting on June 5. On June 6, I had a specially assigned case. I had prescheduled leave June 12 through 14. Those conflicts left available only the five hearing days stated above, to which the parties agreed.

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<sup>4</sup> 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Educ. § 8-413(h).

<sup>5</sup> 34 C.F.R. § 300.515(c); Educ. § 8-413(h).

Based on my schedule, and the parties' schedules, the Parents requested that I extend the timeline to allow the case to be heard on the selected dates and to allow sufficient time for me to consider the evidence, evaluate legal arguments, and draft a decision.<sup>6</sup> BCPS did not object to that request. I may grant specific extensions of time at the request of either party.<sup>7</sup> Accordingly, based on the noted scheduling conflicts, I found that there was good cause to extend the regulatory timeframe and I informed the parties I would issue a decision within thirty days after the conclusion of the hearing – July 17, 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.<sup>8</sup>

### **ISSUES**

1. Did BCPS deny the Student a FAPE for the 2023-2024 school year by failing to develop an Individualized Education Program (IEP)<sup>9</sup> with appropriate goals, objectives, and services designed to allow the Student to make progress appropriate for him in light of his circumstances?
2. Did BCPS fail to comply with the procedural requirements of the IDEA in developing the Student's IEP?<sup>10</sup>
3. If BCPS denied the Student a FAPE, what remedies are appropriate?

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<sup>6</sup> 34 C.F.R. § 300.515(c).

<sup>7</sup> *Id.*; *see also* Educ. § 8-413(h).

<sup>8</sup> 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.

<sup>9</sup> As described in more detail in this Decision, the operative IEP is from the January 31, 2024 IEP team meeting. Further, although the Parents agreed to this issue during the prehearing conference, there were no evidence and/or arguments challenging the goals and objectives; only the services and placement. The BCPS did not object during the hearing to the Parents' change in their position.

<sup>10</sup> Specifically, at the prehearing conference, the Parents alleged the IEP team was not a legally constituted team as it did not include a representative who was knowledgeable about the availability of BCPS' resources and that BCPS predetermined the Student's placement prior to the IEP team meeting. As explained below, the Parents added more procedural violations at the hearing but the BCPS did challenge this change.

## SUMMARY OF THE EVIDENCE

An exhibit list is attached as Appendix A

### Testimony

The Parent testified and also presented testimony from [REDACTED], BCPS IEP Team Associate, who testified as an expert in IEP process and development; [REDACTED], Educational Consultant, who testified as an expert in special education and the process and development of IEPs; [REDACTED], Assessment and IEP Coordinator at the [REDACTED] ([REDACTED]), who testified as an expert in special education; and [REDACTED], Program Director at [REDACTED] who testified as an expert in special education and administration.

BCPS presented testimony from [REDACTED], BCPS Speech Language Pathologist, who testified as an expert in speech language pathology for students in specialized populations in educational settings; [REDACTED], BCPS Occupational Therapist, who testified as an expert in occupational therapy and providing services to children in educational settings; [REDACTED] BCPS Coordinator of Compliance and Process, who testified as an expert in special education and IEP process and compliance; [REDACTED], BCPS Educational Specialist, who testified as an expert in special education; and [REDACTED], who testified as an expert in school psychology and special education.

## FINDINGS OF FACT

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

1. The Student was born in 2016.
2. At age three, the Student began attending preschool at the [REDACTED] [REDACTED], in [REDACTED], where his family was then living.

3. Very soon after starting at the [REDACTED], teachers observed the Student audibly grinding his teeth, spending much of his day in solitary activities, and exhibiting social stress in the presence of peers.

4. In December 2019, at age three and a half, the Student was diagnosed with [REDACTED] [REDACTED]-without intellectual delays, with language development delays, and possible oral motor challenges.

5. In January 2020, the Student began attending [REDACTED], [REDACTED], a special education preschool in [REDACTED]. At [REDACTED], the Student was in a class with three children and one special education teacher. The Student received speech language therapy and occupational therapy.

6. In August 2021, while at [REDACTED], the Student:

- Could rote count up to twenty with 70% accuracy and accurately count up to five objects independently;
- Could identify most uppercase letters with 80% accuracy;
- Enjoyed activities that involved movement and hands-on sensory experiences such as shaving foam and paint;
- Needed more work on reading nonverbal cues of other children;
- Misunderstood other children fairly often and got upset;
- Benefitted from adult support to make sense of social situations, to express his thoughts and feelings, to communicate with his classmates in a back and forth manner, and to read non-verbal cues;
- Co-regulated well with adults and calmed down quickly with the help of soothing interactions when upset;
- Could initiate communication with his peers during motor activities in the gym;
- Was not having reciprocal conversations but was able to initiate interactions with peers and adults;
- Could communicate in sentences, for example, to request for a game, to open his snack packet, or to share what he saw in a familiar storybook;
- Was able to transition well to the classroom and the gym;
- Could follow classroom, gym, and outdoor instructions;
- Listened and followed instructions well even when the classroom was noisy;
- Exhibited good gross motor skills but needed additional work to get up to grade level with fine motor skills;

- Was calmer in the classroom environment and able to pay attention to all the classroom activities; and
- Was well regulated emotionally and behaviorally and no longer resisted or refused activities.

7. In November 2021, a speech language assessment revealed that the Student was below average in core and expressive language, and in the low range for receptive language. (Student Exhibit 8).

8. In February 2022, the Student began attending [REDACTED] ([REDACTED]), a special education school in [REDACTED]. At [REDACTED], the Student received occupational therapy, speech language therapy, and attended an occupational therapy social skills group.

9. During the 2022-2023 school year, the Student was in year 1 at [REDACTED], the equivalent of Kindergarten in the United States. He was in a class varying in size from five to twelve students.

10. In November 2022, [REDACTED] prepared a psychoeducational report of the Student which revealed that while at [REDACTED], the Student:

- Would alternate between staying in his seat and getting up out of his seat and jumping around the classroom and crawling under tables;
- At times was engaged in lessons but was more often disengaged;
- Had a tendency to be in his own world and struggled to sustain attention on tasks;
- Promptly complied with the teachers' requests that he return to his seat;
- Often required his teachers to call his name and direct questions at him to keep him engaged;
- Could follow three-step instructions on familiar tasks;
- Could follow adult directions after building rapport with an adult, and wait patiently for his turn;
- Mostly engaged in solitary play but when supported by adults could join a game with peers and enjoyed the company of peers who are active;
- Became upset when peers try to use his classroom items but was quick to calm down when upset; and
- Could become physical by pushing peers when annoyed.

11. On the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition, the Student received a full scale intelligence quotient (IQ) of 65, that fell in the extremely low range – first percentile. The Student received a score of 62 on the General Ability Index, a test that provides an estimate of general intellectual ability that is less reliant on working memory and processing speed. This was in the extremely low range - first percentile. On his nonverbal index, which may offer a more appropriate estimate of overall ability than a full scale IQ for children with expressive language delays, the Student scored 66, which fell in the extremely low range - first percentile. On the cognitive proficiency index, which may provide an estimate of the efficiency with which cognitive information is processed, the Student scored a 70, which is classified as borderline - second percentile.

12. On the Wechsler Individual Achievement Test, Fourth Edition, which assesses an individual's overall academic strengths and weaknesses, the Student was classified overall in the very low range, with very low scores in the four tests of oral language, reading, written expression, and mathematics.

13. With respect to social emotional functioning, the Parent and homeroom teacher rated the Student on the Behavior Assessment System for Children, Third Edition. Both raters noted at risk/clinically significant concerns for withdrawal, social skills, leadership and functional communication. The Student's teacher also noted at risk concerns for attention problems, hyperactivity and aggression, and clinically significant concerns for learning problems. His teacher noted he had a short attention span, was easily distracted, and had trouble staying seated.

14. The [REDACTED] psychoeducational evaluator confirmed the diagnosis of [REDACTED] [REDACTED] with mild intellectual impairment.

15. In July 2023, the Student's family moved to Baltimore City, Maryland, and the Parents registered the Student in first grade at [REDACTED], a non-public school in Baltimore County, Maryland.

16. At [REDACTED], the Student requires moderate to maximum teacher support in order to access the curriculum and maintain attention in reading and literature, math, and written expression. The Student can access the curriculum and maintain attention with moderate teacher support in social studies, science, art, and recreation education.

17. In reading and literature and math, the Student is mostly operating at a pre-Kindergarten level.

18. In art, the Student can follow step-by-step directions and enjoys the assignments.

19. In recreational education, the Student can warm up, and complete activities when given a model. He requires support to maintain participation and to follow directions such as prompting, visual cues, verbal cues and modeling of new tasks.

20. On October 5, 2023, the Parent contacted [REDACTED] ([REDACTED] [REDACTED]) and BCPS to inquire about special education services for the Student.<sup>11</sup> The email indicated the Student was seven years old and [REDACTED], but did not state the Student's grade. [REDACTED], BCPS IEP Team Associate, provided the Parent with the telephone number for the BCPS Child Find office and instructed her to call them, at which time that office would confirm the Student's zoned school and make a referral.

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<sup>11</sup> The Parent testified that she contacted BCPS in September 2023 and did not hear back from anyone. The Parent's October 5, 2023 email to BCPS included a statement by her that she was following up because she had not heard back from a previous email. However, it is not clear from the documentary evidence that an email prior to October 5, 2023 was sent by the Parent or received by BCPS. Also, there appears to have been some type of email communication between [REDACTED] and the Parent on December 2, 2022. (BCPS Ex. 32 p. 16). Either the log of this email is a typographical error, or there was communication in 2022 and that was never explained by either party.



21. On October 11, 2023, BCPS generated a Child Find referral notification indicating the child was seven years old and attending Kindergarten at [REDACTED].

22. On October 23, 2023, an IEP team met to address the Student's eligibility for special education services. The team consisted of [REDACTED]; [REDACTED], a BCPS speech language therapist; [REDACTED], a BCPS occupational therapist; [REDACTED], a BCPS special educator; [REDACTED], a BCPS school psychologist; the Parent; and [REDACTED], the Parent's educational advocate.

23. At the October 23, 2023 meeting, the IEP team reviewed existing data<sup>12</sup> that had been submitted by the Parent and requested parental consent for an additional speech language assessment, in the area of receptive, expressive and pragmatics, and a classroom observation. [REDACTED] was already in the process of conducting a speech language assessment and the IEP team agreed to rely on that assessment. The Parent agreed in writing on October 27, 2023 to BCPS observing the Student at [REDACTED].

24. The prior written notice (PWN) for the October 23, 2023 IEP team meeting indicated the Student was in third grade. The PWN was sent to the Parent on October 27, 2023.

25. The basis for the decision for the Notice and Consent for Assessment reflected that there were parent and teacher concerns about social skills, academic skills, and communication skills. The notice stated the Student is easily distracted, has a short attention span, seeks movement regularly, and has difficulty staying seated.

26. In October 2023, [REDACTED] speech language assessment revealed the Student's moderate receptive and expressive language disorder that is characterized by deficits in receptive and expressive vocabulary, sentence formulation, syntax, semantics, verbal organization and expression, inferential thinking, and pragmatics.

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<sup>12</sup> The then-existing data was that described in findings of fact 5-14 and 16-19.

27. Specifically, the October 2023 speech language assessment revealed the Student:

- Is friendly with peers and staff;
- Is compliant with given academic tasks;
- Requires verbal prompting and extended wait time to engage in routine social conversation with peers and staff and his responses are often one to two words in length;
- Does not initiate conversations and/or maintain conversations with reciprocal exchanges;
- Can follow directions in class given guided prompts;
- Occasionally asks questions related to needed materials but does not self-advocate for understanding of directions;
- Often repeats oral stimuli from both peers and adults;
- Does not demonstrate interest in conversing with or playing with peers;
- Can complete activities in a group setting but does not engage with peers while doing so; and
- Plays by himself during recess but appears to be content, smiles, and enjoys his time.

28. On October 27, 2023, the Parent emailed [REDACTED] informing her that although the PWN stated the Student was in third grade, he was enrolled in Kindergarten/first grade.

29. On October 27, 2023, [REDACTED] sent a series of emails to BCPS staff attempting to correct the Student's grade in the computer system and noted that the Parent indicated the Student was in Kindergarten/first grade.

30. On October 27, 2023, [REDACTED] observed the Student at [REDACTED].

31. During the observation, the Student:

- Participated fairly well;
- During reading class required redirections in order to complete his tasks, was extremely fidgety, but participated verbally when asked to do so;
- During math class, worked on his electronic device with minimal redirections and remained engaged in the math lesson for ten minutes before losing interest;
- Responded appropriately to redirection by his teacher;
- Was very active and stood to work, walked around the room, laid across the table, and fidgeted with items on the table; took off his shoes, danced, growled quite loudly, looked at his hand in front of his face for a few minutes, swung his legs, tapped on the table, and spun his finger in a circle for a few minutes; and
- Did not seem to interact with other students.

32. In November 2023, an occupational therapist at [REDACTED] authored an occupational therapy evaluation of the Student. The report revealed the Student's sensory processing differences lead to his reduced availability for learning and the need for significant external supports in order to participate in learning. Specifically, the Student:

- Struggles to complete tasks in a noisy setting;
- Can participate in functional academic tasks for five to ten minutes with adult support and engagement and can attend to high interest tasks with constant feedback, such as a letter writing application or a game for ten to fifteen minutes;
- Is redirectable and maintains good self-regulation at times, but loses focus and interest easily;
- Is almost always on the move during the school day, and seeks vestibular and proprioceptive input the most;
- Tolerates auditory and visual stimuli well, but a lot of it will increase his energy level and cause his pacing and jumping to increase;
- Had typical gross motor skills and he likes to climb and run;
- Has tactile hypersensitivity;
- Has basic fine motor skills with pencil grasp being an area of concern while cutting was functional;
- Exhibits functional letter formation of all capital letters and knows letter formation of some lowercase letters; and
- Can access computers and tablets for his development level and is able to use a mouse;
- Can independently get his lunch box, return to his seat, and manage all objects and zippers to start eating.

33. On December 20, 2023, the IEP team met to address the Student's eligibility for special education. The team consisted of the Parent, [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. The team reviewed data that had been collected since the prior meeting, including the report of [REDACTED]'s October 27, 2023 observation, the October 2023 speech language assessment and the November 2023 occupational therapy assessment. The team determined the Student was eligible for special education services with a coding of [REDACTED].

34. The PWN from the December 20, 2023 IEP team meeting indicated the Student was in third grade.

35. On January 2, 2024, the Parent emailed [REDACTED] telling her that the Student was not in third grade.

36. On January 3, 2024, [REDACTED] sent the Parent a draft IEP indicating the Student was in Kindergarten.

37. On January 5, 2024, [REDACTED], the Student's teacher at [REDACTED], sent an email to [REDACTED] stating that although the Student's grade level was listed as Kindergarten on the draft IEP, [REDACTED] did not have Kindergarten and included only grades one through five.

38. On January 8, 2024, the IEP team met to review, revise, and finalize the draft IEP for the Student.

39. The following people attended the meeting: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and the Parent.

40. At the January 8, 2024 IEP team meeting, the Parent stated that the Student was in Kindergarten. Neither [REDACTED] nor [REDACTED] corrected the Parent's statement that the Student was in Kindergarten.

41. The IEP team agreed to the following impact statement being included in the IEP:

[The Student's] disability of [REDACTED] affects his reading, writing and math skills, attentional skills, executive functioning skills, processing speed skills, visual perceptual skills, visual motor deficits skills, receptive skills, expressive skills, pragmatic language skills, fine motor skills, self-management skills, lack of engagement skills, social deficits skills, and impulsivity. All of these areas affect his ability to function independently in a classroom setting without significant specialized instruction and supports. [The Student] will require specialized instruction and supports in following directions, making transitions, interacting with peers, being attentive to classroom instruction and activities, working in collaboration with peers, demonstrating self-help skills and advocating for his wants and needs. He will require interventions to help him stay on task, sit with a group, transition, initiate interactions with peers and individualized instruction to learn and retain academic concepts.

[The Student's] functional communication delays affect his receptive, expressive, and pragmatic language skills as well as his visual motor and sensory processing skills and significantly inhibit his ability to fully participate and make progress in the general education curriculum.

(Student Ex. 26).

42. The IEP team agreed on the Student's present level of academic achievement and functional performance. The team also agreed on special considerations, accommodations and goals, and supplementary aids and supports.

43. With respect to services, the team agreed the Student would receive two thirty-minute occupational therapy sessions per week outside of general education and three thirty-minute speech language therapy services per week outside of general education. The team agreed that the Student would receive four weeks of extended school year (ESY) services in the summer. The only data to support this decision were the evaluations previously mentioned and the Parent and [REDACTED] team members stating that the Student met the criteria for ESY.

44. All students in grades one through five in BCPS attend forty to fifty minutes per day of specials, which consists of art, physical education, vocal music, instrumental music, and dance.

45. When it came time to discuss the remaining service hours, [REDACTED] stated that she was not authorized to offer a placement that day because the Student was in Kindergarten, and [REDACTED] had contacted a BCPS educational specialist with knowledge of Kindergarten programs, but that person had not responded or attended the meeting that day. [REDACTED] stated that she was not asking [REDACTED] to decide placement, but only to decide service hours, which would later drive a placement decision. [REDACTED] was still reluctant to decide service hours, as

she did not even know how many hours there were in a day in the different special education Kindergarten programs.

46. Ultimately, at [REDACTED] urging, the IEP team conceded that the Student required thirty-one service hours per week of special education classroom instruction outside of general education per week in addition to occupational therapy and speech language therapy services. This number was based on the assumption that a full class week was thirty-three hours and twenty minutes, and subtracting from that the two and a half hours for speech therapy and occupational therapy per week. This number represented the Student receiving specially designed instruction every minute he was not in a pull-out service.<sup>13</sup>

47. [REDACTED] suspended the IEP meeting without finalizing the IEP and informed everyone that the meeting would reconvene with someone knowledgeable about early learning programs to discuss placement.

48. On January 17, 2024, [REDACTED] issued the PWN of the January 8, 2024 IEP team meeting stating that the parties had agreed to two thirty-minute sessions of occupational therapy, three thirty-minutes session of speech language therapy, four weeks of ESY, and thirty-one hours of special education services weekly. The PWN also stated that [REDACTED] informed the team that she would require the assistance of a BCPS Specialist before continuing with the least restrictive environment decision.

49. Sometime between January 10, 2024 and January 31, 2024, [REDACTED] was informed that due to a BCPS enrollment policy and the Student's age, the Student was required to enroll in first grade and not Kindergarten.<sup>14</sup>

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<sup>13</sup> The parties rounded to thirty-one hours in the interest of simplicity. To account for the full school day without going over, the service hours should have been thirty hours and fifty minutes.

<sup>14</sup> Neither party introduced this policy into evidence.

50. On January 28, 2024, [REDACTED] forwarded [REDACTED] and the Parent a draft IEP which included thirty-one hours of special education services weekly and four weeks of ESY as discussed at the January 8, 2024 meeting.

51. On January 31, 2024, the IEP team met to finish drafting the Student's IEP. The following people were in attendance: [REDACTED]; [REDACTED]; [REDACTED], a BCPS special educator; [REDACTED], a BCPS general educator; [REDACTED], a BCPS Educational Specialist; [REDACTED]; [REDACTED]; [REDACTED]; and the Parent.

52. At the January 31, 2024 meeting, the team again reviewed and agreed on the Student's present levels of performance, special considerations and accommodations, goals, and supplementary aids and services.

53. The IEP team agreed to the same impact statement that had been agreed to on January 8, 2024 being included in the IEP:

[The Student's] disability of [REDACTED] affects his reading, writing and math skills, attentional skills, executive functioning skills, processing speed skills, visual perceptual skills, visual motor deficits skills, receptive skills, expressive skills, pragmatic language skills, fine motor skills, self-management skills, lack of engagement skills, social deficits skills, and impulsivity. All of these areas affect his ability to function independently in a classroom setting without significant specialized instruction and supports. [The Student] will require specialized instruction and supports in following directions, making transitions, interacting with peers, being attentive to classroom instruction and activities, working in collaboration with peers, demonstrating self-help skills and advocating for his wants and needs. He will require interventions to help him stay on task, sit with a group, transition, initiate interactions with peers and individualized instruction to learn and retain academic concepts. [The Student's] functional communication delays affect his receptive, expressive, and pragmatic language skills as well as his visual motor and sensory processing skills and significantly inhibit his ability to fully participate and make progress in the general education curriculum.

(Student Ex. 27).

54. When it came to the number of service hours, ██████ questioned why the team had previously agreed to thirty-one hours of special education outside the general classroom. The team informed ██████ that number was based on the number of hours in the school day. ██████ asked for the data to support the Student's need to be outside of general education for lunch/recess<sup>15</sup> and specials.

55. Believing there to be no data to support a full day of special education services, the BCPS members of the team agreed to twenty-five hours of special education, which would cover all the Student's academic time, in addition to two thirty-minute occupational therapy sessions per week and three thirty-minute speech language sessions per week.<sup>16</sup> The team declined to include ESY. The BCPS members of the team deferred the decision for ESY until after the Student enrolled and began school and data was collected on his progress towards his new goals.

56. The twenty-five service hours on the January 31, 2024 IEP includes all of the Student's academic classes but excludes lunch/recess and specials. The IEP includes five hours and twenty minutes in general education.

57. The BCPS members of the IEP team offered placement in a self-contained special education classroom for all of the Student's academic classes, with the Student participating in lunch/recess and specials with general education students, at ██████, the Student's districted school.

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<sup>15</sup> Although there was testimony about the Student's recess at ██████, there was virtually no testimony about recess in the general education context. Since, as discussed below, the IEP offered by BCPS included specially designed instruction only for academic subjects, it is reasonable to conclude that all references to lunch in general education also included recess.

<sup>16</sup> The IEP team's math was wrong. A full week is thirty-three hours and twenty minutes. Twenty-five hours of special education, plus two and a half hours of services, equals twenty-seven and a half hours. The difference is five hours and fifty minutes, which does not equal the amount of time required for lunch and specials every day. For purposes of this Decision, I accept the parties' general agreement that the thirty-one hours originally listed on January 8, 2024 draft IEP would have included lunch and specials and the twenty-five hours on the January 31, 2024 draft IEP does not include lunch and specials.



58. Although never signed by the Parent and therefore not consented to, the version of the IEP created on January 31, 2024 was BCPS' final offer of FAPE.

59. On February 2, 2024, [REDACTED] sent to the Parent the PWN of the January 31, 2024 meeting noting that the entire team agreed on eligibility, participating planning, academic present levels, goals and objectives, special consideration, instruction and assessment accommodations, supplementary aids and services, occupational therapy service hours, speech language service hours and transportation as a related service. The PWN noted the team deferred a decision on ESY until more data was collected. The PWN also noted that the team refused a placement for the Student which included a special education setting for lunch/recess and specials based on a lack of data to support a more restrictive environment.

60. The January 31, 2024 IEP has the following behavioral – social interaction skills goal:

By Jan 2025, given explicit social skills instruction, modeling and opportunities for practice and fading adult support through social skills services, [the Student] will demonstrate expected social school behavior through application of appropriate play skills, social communication skills, social competencies skills, and emotional regulation i.e. establishing eye contact when interacting with peers/adults, reciprocal conversations with one or two turn taking in 4 out of 5 opportunities, as measured by behavioral data, direct observation and teacher report.

(Student Ex. 27).

61. The January 31, 2024 IEP has a section entitled supplementary aids, services, program modifications and supports. The following instructional supports are included: sufficient wait time for oral responses; paraphrase questions and instructions; teacher modeling; repetition of directions; provide short and explicit instructions; pre-teaching new concepts and unknown vocabulary. The provider listed for each of these instructional supports is a special education

classroom teacher and the supports are to be provided daily, except for pre-teaching new concepts, which is to be provided weekly.

62. The following program modifications are listed on the January 31, 2024 IEP: altered/modified assignments – provided daily; break down assignments into smaller units – provided daily; chunking of texts – provided weekly; and use pictures to support reading passages, whenever possible – provided weekly. All of these modifications are to be provided by a special education classroom teacher.

63. The following social/behavioral supports are provided on the IEP: prompting (to ensure the Student is an active participant within the classroom and to be provided within all academic settings); provide frequent changes in activities or opportunities for movement; strategies to initiate and sustain attention; provide manipulatives and/or sensory activities to promote listening and focusing skills. All of these social/behavioral supports are to be provided by a special education classroom teacher. All of these supports are to be provided daily except providing manipulatives and/or sensory activities, which are to be provided weekly.

64. The IEP includes an occupational therapy consult monthly to be provided by an occupational therapist to support goals and objectives, supplementary aids, services, program modifications and supports, and special education/related services. The IEP states that the occupational therapist “will provide strategies for improving self regulation in the classroom setting, specifically in the sensory areas of most need- visual, auditory, and movement.” (Student Ex. 27).

65. The documentation to support that decision was “Review of information indicates a need for supplementary aids, services, program modifications and supports for [the Student] to be successful in the classroom and to access grade level curriculum.” (Student Ex. 27).

66. The only consultative service provided for in the IEP is the occupational therapy consult. There is no consultation specifically provided for the lunchroom aides.

67. The IEP has no social/emotional or behavioral goals that were to be provided during lunch/recess or specials.

68. The IEP does not include a behavior intervention plan.

69. The speech language and occupational therapy services provided for in the IEP are pull out services, meaning the Student is pulled out of his classroom to receive these services, rather than having the therapist pushed in to the general education setting.

70. On February 6, 2024, the Parent and [REDACTED] visited the [REDACTED] special education class. They observed a science/math class with four students and lunch with 100 students.

71. There are typically around 100 students in the lunchroom at any time. There are no teachers present in the lunch room but there are a few adults, i.e., lunch aides.

72. On February 12, 2024, the Parent visited [REDACTED] to observe special education students participating in a general education physical education class with twenty-seven students, and a special education reading and writing class with four students.

73. [REDACTED] is a self-contained special education school serving students in grades one through twelve with 180 students total. All classes are a four to one student to teacher ratio; usually eight students in a classroom with one certified special education teacher and one assistant.

74. The Student is enrolled in a classroom with seven other students, a lead teacher, and an assistant teacher. The Student eats lunch in his classroom with his teachers. The Student

attends specials with his classmates. The Student receives specially designed instruction thirty-one hours per week, which includes lunch/recess and specials.

75. ██████ has developed an IEP for the Student. He receives an hour and a half of speech language therapy per week and an hour of occupational therapy per week.

76. The Student has been making progress at ██████.

77. ██████ is appropriate for the Student's needs and also provides services beyond the Student's needs.

## DISCUSSION<sup>17</sup>

### LEGAL FRAMEWORK

#### The burden of proof and deference

The standard of proof in this case is a preponderance of the evidence and is borne by the Parents as the party seeking relief.<sup>18</sup> 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.”<sup>19</sup> Yet, this respect and deference is not limitless.<sup>20</sup>

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<sup>17</sup> 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”); *see also Kornecky v. Comm'r of Soc. Sec.*, 167 Fed. App'x 496, 508 (6th Cir. 2006) (“[A]n ALJ can consider all the evidence without directly addressing in his[her] written decision every piece of evidence submitted by a party. Nor must an ALJ make explicit credibility findings as to each bit of conflicting testimony, so long as his[her] factual findings as a whole show that he[she] implicitly resolved such conflicts.” (citation omitted)).

<sup>18</sup> *Schaffer ex rel. Schaffer v. West*, 546 U.S. 49, 56-58 (2005); COMAR 28.02.01.21K(1).

<sup>19</sup> *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.’”).

<sup>20</sup> *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.”).

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.”<sup>21</sup> “Indeed, if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary”<sup>22</sup> and “would render meaningless the entire process of administrative review.”<sup>23</sup>

#### FAPE under the IDEA

The identification, evaluation, and placement of students in special education are governed by the IDEA.<sup>24</sup> 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.”<sup>25</sup> 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.A. 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*,<sup>26</sup> 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.”<sup>27</sup> 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

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<sup>21</sup> *Id.*; see also *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993).

<sup>22</sup> *Jackson*, 4 F.3d at 1476.

<sup>23</sup> *Sch. Bd. of Prince William Cnty. v. Malone*, 762 F.2d 1210, 1217 (4th Cir. 1985) (citation omitted).

<sup>24</sup> 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; COMAR 13A.05.01.

<sup>25</sup> 20 U.S.C.A. § 1400(d)(1)(A); see also Educ. § 8-403.

<sup>26</sup> 458 U.S. 176 (1982).

<sup>27</sup> *Rowley*, 458 U.S. at 201 (footnote omitted).

second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit.<sup>28</sup>

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.<sup>29</sup> Consideration of the student’s particular circumstances is key to this analysis; the Court emphasized in *Andrew F.* that the “adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”<sup>30</sup>

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.<sup>31</sup> 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.’”<sup>32</sup>

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<sup>28</sup> *Id.* at 206-07.

<sup>29</sup> *Andrew F.*, 137 S. Ct. 988.

<sup>30</sup> *Id.* at 1001.

<sup>31</sup> *Id.* at 999.

<sup>32</sup> *Id.* (quoting *Rowley*, 458 U.S. at 206).

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.”<sup>33</sup>

Regarding procedural violations, the IDEA<sup>34</sup> 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*,<sup>35</sup> the Fourth Circuit Court of Appeals explained:

It is clear that, under the IDEA, the failure of a school district to have a final IEP in place at the beginning of the school year is a procedural defect. When such a procedural defect exists, we are obliged 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. 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.<sup>36</sup>

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<sup>33</sup> *Id.* at 1002; *see also R.F. ex rel. E.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237 (4th Cir. 2019).

<sup>34</sup> 20 U.S.C.A. § 1415(f)(3)(E)(ii).

<sup>35</sup> 303 F.3d. 523 (4th Cir. 2002).

<sup>36</sup> *Id.* at 533-34 (citation omitted); *T.B. ex rel. T.B. v. Prince George’s Cnty. Bd. of Educ.*, 897 F.3d 566, 573 (4th Cir. 2018).

Stated another way, procedural violations of the IDEA are subject to a harmless error analysis.<sup>37</sup> A procedural violation can survive the harmless error analysis only when it interferes with the provision of a FAPE and not just the ability of the parents to participate in the development of their child's IEP.<sup>38</sup>

### 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 take into account:

- (i) the strengths of the child;
- (ii) the concerns of the Parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child;  
and
- (iv) the academic, developmental, and functional needs of the child.<sup>39</sup>

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 specially 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.<sup>40</sup>

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<sup>37</sup> See *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 190 (4th Cir. 2002) ("To 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.").

<sup>38</sup> *Id.* at 190–91.

<sup>39</sup> 20 U.S.C.A. § 1414(d)(3)(A).

<sup>40</sup> 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A.



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) . . . .”<sup>41</sup> 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.”<sup>42</sup> 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.<sup>43</sup> However, a “school district is only required to continue developing IEPs for a disabled child no longer attending its schools when a prior year’s IEP for the child is under administrative or judicial review.”<sup>44</sup>

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 services, supplementary aids, program modifications, supports, and accommodations.<sup>45</sup> 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. . . .”<sup>46</sup>

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<sup>41</sup> 34 C.F.R. § 300.320(a)(1)(i).

<sup>42</sup> *Id.* § 300.324(a)(2)(i).

<sup>43</sup> *Id.* § 300.324(b)(1).

<sup>44</sup> *Greenville*, 303 F.3d at 536 (citation omitted).

<sup>45</sup> 20 U.S.C.A. § 1414(d)(1)(A)(i)(II), (IV), (VI).

<sup>46</sup> COMAR 13A.05.01.09D(3).

### Least Restrictive Environment

In addition to the IDEA's requirement that a disabled child receive educational benefit, the child must be placed in the "least restrictive environment" to achieve a FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom.<sup>47</sup> Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program.<sup>48</sup> At a minimum, the statute calls for school systems to place children in the "least restrictive environment" consistent with their educational needs.<sup>49</sup> Placing disabled children into regular school programs may not be appropriate for every disabled child, and removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved.

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like BCPS to offer a continuum of alternative placements that meet the needs of children with disabilities.<sup>50</sup> The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services to be provided in conjunction with regular class placement.<sup>51</sup>

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<sup>47</sup> 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117.

<sup>48</sup> *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989).

<sup>49</sup> 20 U.S.C.A. § 1412(a)(5)(A).

<sup>50</sup> 34 C.F.R. § 300.115.

<sup>51</sup> *Id.* § 300.115(b); COMAR 13A.05.01.10B(1).

Removal of a child from a regular educational environment may be necessary when the “nature or severity of [a child’s] disability is such that education in regular classes” cannot be achieved.<sup>52</sup> In such a case, a FAPE might require placement of a child in a nonpublic school setting that the child’s public school district would fully fund.<sup>53</sup>

### Unilateral Placement

Parents may be entitled to retroactive reimbursement from the state for tuition and expenses for a child unilaterally placed in a private school if it is later determined that the school system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education.<sup>54</sup> The issue of reimbursement for unilateral placement was expanded in *Florence County School District Four v. Carter*,<sup>55</sup> where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Parents may recover the cost of private education only if (1) the school system failed to provide a FAPE; (2) the private education services obtained by the parent were appropriate to the child’s needs; and (3) overall, equity favors reimbursement.<sup>56</sup>

Like an IEP, a parental placement is appropriate if it is “reasonably calculated to enable the child to receive educational benefits.”<sup>57</sup> Evidence of actual progress is important but not dispositive in determining the appropriateness of the placement.<sup>58</sup> The private education services need not be provided in the least restrictive environment, but the tribunal may consider the restrictive nature of a placement in determining whether the placement was appropriate.<sup>59</sup>

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<sup>52</sup> COMAR 13A.05.01.10A(2).

<sup>53</sup> COMAR 13A05.02.14B.

<sup>54</sup> *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985) (emphasis in original).

<sup>55</sup> 510 U.S. 7 (1993).

<sup>56</sup> *Carter*, 510 U.S. at 15-16.

<sup>57</sup> *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

<sup>58</sup> *Id.* at 327.

<sup>59</sup> *Id.* at 369-70.

### Equitable Relief

Equitable considerations are relevant in fashioning relief, and the tribunal enjoys broad discretion in fashioning such relief.<sup>60</sup> Administrative hearing officers or courts fashioning discretionary equitable relief under the IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required.<sup>61</sup> Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable.<sup>62</sup>

### **POSITIONS OF THE PARTIES**

The Parents' assertion that the IEP failed to offer the Student a FAPE for the 2023-2024 school year relies on several procedural and substantive premises. Procedurally, the Parents argued that BCPS (1) convened an IEP meeting without a properly constituted team; (2) had a policy requiring an educational specialist in order to make placements outside of home schools; (3) took more than thirty days to develop an IEP after finding the student eligible for special education; (4) failed to honor an IEP team agreement that the Student required thirty-one service hours weekly made at the January 8, 2024 meeting; (5) and predetermined the Student's placement prior to the January 31, 2024 meeting. With respect to substantive FAPE violations, the Parents contended that: (1) that the Student requires thirty-one service hours weekly, including specially designed instruction during lunch/recess and specials; (2) that the Student cannot function effectively in a general education environment for any part of the day making his least restrictive environment a fully contained special education school; and (3) that the IEP as written provides no specially designed instruction or supplemental aids and services

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<sup>60</sup> *Burlington*, 471 U.S. at 374, 369.

<sup>61</sup> *Carter*, 510 U.S. at 16.

<sup>62</sup> *Id.*

during lunch/recess and specials.<sup>63</sup> The Parents assert that BCPS having failed to provide FAPE, [REDACTED] is an appropriate placement, and they are entitled to reimbursement for tuition from that school.

As to the alleged procedural violations, BCPS argues that at the time of the January 8, 2024 meeting, BCPS believed the Student was in Kindergarten and that [REDACTED] needed the assistance of an educational specialist to discuss Kindergarten programs. As to the decision to change thirty-one service hours to twenty-five, BCPS argues that BCPS IEP team members were bullied by the Student's educational advocate at the January 8, 2024 meeting, and in any event, the meeting was continued to January 31, 2024, making any decisions made at the prior meeting preliminary only. As to the alleged substantive violations, BCPS argues that there was no data to suggest the Student requires specially designed instruction during lunch/recess and specials, making twenty-five service hours appropriate. BCPS contends that the least restrictive environment in which to implement the IEP is a self-contained special education classroom with the Student participating in lunch/recess and specials with general education students, with appropriate supports, at [REDACTED]. As BCPS asserts it has fulfilled its obligation to provide FAPE, it is inappropriate to order tuition reimbursement for the Parents' unilateral placement of the Student at [REDACTED].

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<sup>63</sup> While the Parents argued that the failure to include ESY in the January 31, 2024 IEP was a material alteration of the agreement made at the January 8, 2024 meeting, they did not specifically focus on the lack of ESY as a denial of FAPE. Moreover, ESY was not mentioned in either the Parents' Due Process Complaint or at the prehearing conference. Therefore, it will not be addressed here. *See* 34 C.F.R. § 300.511(d) ("Subject matter of due process hearings. The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise.").

## SUMMARY OF DECISION

As discussed in detail below, I find that BCPS did not commit procedural violations that resulted in the denial of FAPE for the Student for the 2023-2024 school year. I also find that while the Student requires specially designed instruction in all academic areas, he does not require specially designed instruction during lunch/recess and specials. He would be able to participate in the least restrictive environment, which is a self-contained special education classroom, while participating with general education students for lunch/recess and specials, with appropriate supports and accommodations. However, the January 31, 2024 IEP does not provide the Student with adequate supports and accommodations to participate in general education for any portion of his school day. Therefore, BCPS failed to provide a FAPE for the 2023-2024 school year.

As such, I find that the Student's education at [REDACTED] was reasonably calculated to enable the Student make progress and therefore is appropriate for purposes of the tuition reimbursement analysis. I am ordering BCPS to pay the Student's tuition from February 1, 2024 through the end of the school year. I am also ordering BCPS to convene an IEP meeting forthwith to re-write an IEP for the Student in conformity with this Decision.

## ALLEGED PROCEDURAL VIOLATIONS

### Missing Member of the IEP Team at the January 8, 2024 Meeting

Federal and state statute and regulation require that the IEP team, among other things, shall include a representative of the school system who is knowledgeable about the availability of resources of the public agency.<sup>64</sup> There was an enormous amount of confusion about the Student's grade prior to and at the January 8, 2024 IEP meeting. [REDACTED] testified that she believed the Student would be enrolled in Kindergarten at the time of the January 8, 2024

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<sup>64</sup> 20 U.S.C.A. § 1414(d)(1)(B)(iv)(III); 34 C.F.R. § 300.321(a)(4)(iii); COMAR 13A.05.01.07A(1)(d)(ii).

meeting, and she therefore needed a BCPS educational specialist knowledgeable about BCPS Kindergarten resources in order to discuss placement. She had reached out to that person before the meeting several times but received no response.

██████████ belief that the Student was in Kindergarten was entirely reasonable under the circumstances.<sup>65</sup> In October of 2023, the Parent contacted BCPS, which initiated a Child Find referral notification indicating the child was seven years old and attending Kindergarten at ██████████. (BCPS Ex. 5). This information could only have come from the Parent. On October 27, 2023, the Parent emailed ██████████ informing her that although the PWN listed the Student being in third grade, that he was then enrolled in Kindergarten/First grade. (BCPS Ex. 31). On January 3, 2024, ██████████ sent the Parent a draft IEP indicating the Student was in Kindergarten. (Student Ex. 23). And then at the January 8, 2024 meeting, the Parent plainly stated the Student was in Kindergarten. (Student Ex. 24). That statement was not contradicted by ██████████ attendees at the IEP meeting. It turned out that not only would BCPS insist that the Student be registered as a first grader based on his age, but he was also already enrolled in the first grade at ██████████. (Findings of Fact 15, 49).

Apparently this confusion continues to this very day, as at the hearing Mr. Steedman suggested BCPS was remiss in not knowing the Student was in first grade, based on the January 5, 2024 email from ██████████ stating that ██████████ did not have Kindergarten, even though the Parent herself unequivocally told the team at the January 8, 2024 meeting that the Student was in Kindergarten. In any event, BCPS should have confirmed the Student's grade before the January 8, 2024 meeting in order to have someone present who was authorized to discuss placement.

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<sup>65</sup> Per statute, a student would ordinarily attend Kindergarten before first grade in the public school setting. Educ. § 7-301.

But at the time of the January 8, 2024 meeting, ██████ believed the Student to be in Kindergarten and BCPS did not have someone at the IEP meeting on January 8, 2024 knowledgeable about the resources available for a Kindergarten student with the Student's profile. ██████ testified that she was not authorized to discuss placement as she did not know the different programs available or how many hours were in a day for those programs. Accordingly, ██████ suspended the meeting on January 8, 2024 and continued it to January 31, 2024, at which time she knew she could have an educational specialist present. Ultimately, between January 8, 2024 and January 31, 2024, all parties learned that the Student would need to be enrolled in BCPS as a first grader. The IEP team did have someone knowledgeable about the resources of BCPS for the Student as a first-grade student on January 31, 2024 – both ██████ and ██████. Given the confusion about the Student's grade, and the fact that ██████ suspended the January 8, 2024 and reconvened very soon after with a fully constituted team on January 31, 2024, I find that any error in this regard is harmless.<sup>66</sup>

There is simply no evidence the Student was denied a FAPE because BCPS had a missing team member on January 8, 2024 and had to continue the meeting until January 31, 2024. There is no indication that the Student's right to FAPE was impeded.<sup>67</sup> The January 8, 2024 IEP team meeting was the first part of the initial IEP development meeting and as explained further below, it was convened within the required timelines in order for the parent to provide informed consent.<sup>68</sup> The slight delay in having all required members twenty-three days later did not impede the Student's right to FAPE because the January 31, 2024 meeting was also held close to the statutory timeline,<sup>69</sup> and did not result in a denial of FAPE, as explained below.

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<sup>66</sup> *Greenville*, 303 F.3d at 533-34.

<sup>67</sup> 20 U.S.C.A. §1415(f)(3)(E)(ii)(I).

<sup>68</sup> 34 C.F.R. §300.300(b)(1).

<sup>69</sup> COMAR 13A.05.01.08A(1); *see also* 34 C.F.R. §300.323(c)



For these same reasons, I find that there was no deprivation of educational benefits to the Student.<sup>70</sup>

The evidence demonstrates that the Parent had the opportunity to fully and meaningfully participate in the IEP development process at the January 8, 2024 meeting. She received proper advance copies of the documents to be discussed at the meeting, including the draft IEP, (BCPS Ex. 12), and her input as well as her educational advocate's input was considered by the IEP team and documented in the PWN. (BCPS Ex. 17). The same holds true for the subsequent meeting on January 31, 2024. (BCPS Exs. 14, 18). Therefore, I do not find that BCPS' failure to have all required members at the January 8, 2024, impeded parental participation in the IEP development process in any way.<sup>71</sup>

The Parents also argued that BCPS' policy requiring any placement made outside a home school to involve an educational specialist violates COMAR 13A.05.01.07B(1)(b), which requires an IEP to be developed by the IEP team, and COMAR 13A.05.01.10C(1)(a)(i), which says that placement is made by IEP team. The Parents argue that BCPS policy empowers one individual with the authority to overrule the team.

In fact, ██████████ testified that a BCPS IEP team may offer resources they have at their own school, but if the IEP team is looking at district allocated resources, also called city-wide resources, outside of their own school, then BCPS has someone from its Office of Special Education attend the IEP meeting to help allocate that resource. In accordance with 34 C.F.R. § 300.321(a)(6), at the discretion of the parent or public agency, other individuals who have knowledge or special expertise regarding the child may attend the IEP meeting.

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<sup>70</sup> 20 U.S.C.A. § 1415(f)(3)(E)(ii)(III).

<sup>71</sup> 20 U.S.C.A. § 1415(f)(3)(E)(ii)(II).

The determination of the knowledge or special expertise of these individuals must be made by the party (parent or public agency) who invited the individual to be a member of the IEP Team.<sup>72</sup> In this respect, the parent cannot dictate which BCPS members are a part of the IEP team. Nothing about this BCPS practice violates the regulation. In either case, someone is present who is knowledgeable about the school's resources. And in the case of an educational specialist being present, that person too becomes part of the IEP team, and an equal participant. Contrary to the Parents' argument, ██████ did not overrule the team, he asked questions about data to support the number of service hours and a more restrictive placement. BCPS team members collectively agreed that the Student's needs could be met at the public school. Therefore, the team considered his input and then each member, including the Parent and her educational advocate who disagreed, made an independent decision regarding the placement.

#### IEP Development Timeline Went Beyond Regulatory Requirements

The Student also alleges a procedural violation in BCPS going beyond the regulatory timeline. A school system in Maryland shall complete an initial evaluation of a student suspected of having a disability within ninety days of receipt of a request for an evaluation.<sup>73</sup> Then, a “[school system] shall ensure that an IEP team meets to develop an IEP for a student within a disability within thirty days of the evaluation.”<sup>74</sup>

The Parent contacted BCPS on October 5, 2023, (Finding of Fact 20), and all of the evaluations were completed by BCPS and ██████ at the end of November. The evaluation occurred on December 20, 2023, when the IEP team reconvened to review the ██████ assessments and the BCPS observation and determined that the Student was eligible. (BCPS Ex. 16). The first meeting to draft the IEP was convened on January 8, 2024.

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<sup>72</sup> 34 C.F.R. § 300.321(c).

<sup>73</sup> COMAR 13A.05.01.06A(1)(b).

<sup>74</sup> COMAR 13A.05.01.08A(1); *see also* 34 C.F.R. § 300.323(c).

However, the IEP team was not able to complete the IEP draft on January 8, 2024, and the meeting carried over to January 31, 2024. (BCPS Ex. 17).

The 90-day evaluation deadline from the October 5, 2023 referral date would have been January 3, 2024. The team met prior to January 3, 2024, on December 20, 2023, so there is no violation of COMAR 13A.05.01.06A(1)(b). The IEP team determined that the Student was eligible and identified him as a Student with a disability in need of special education and related services on December 20, 2023. Had BCPS taken the full 90-day evaluation period, the thirty-day deadline to develop an initial IEP from January 3, 2024 would have been February 2, 2024. However, because the Student was determined eligible on December 20, 2023, the thirty-day deadline for IEP development would have been January 19, 2024. Between the January 19, 2024 deadline and the January 31, 2024 continuation of the IEP team meeting, the Student continued to attend [REDACTED]. The Parent did not prove or argue how the twelve calendar day delay impeded the Student's right to FAPE or impeded the parent's right to participate meaningfully in the IEP development process at either of the IEP team meetings.<sup>75</sup>

#### Agreements Made at January 8, 2024 Meeting Not in Final IEP

I heard an enormous amount of testimony at the hearing about the January 8, 2024 IEP meeting and the draft IEP that was created at that meeting. Although he never explicitly stated so, Mr. Steedman seems to allege that the failure to abide by the terms of the IEP agreed to at the January 8, 2024 meeting was a procedural violation on the part of BCPS. BCPS argues that the IEP was not finalized at the January 8, 2024 meeting, meaning that any revision to the draft IEP was not a violation.

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<sup>75</sup> *Greenville*, 303 F.3d at 533-34; *T.B. ex rel. T.B. v. Prince George's Cnty. Bd. of Educ.*, 897 F.3d 566, 573 (4th Cir. 2018); see also *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 190 (4th Cir.2002).

Moreover, BCPS argues that any agreements on service hours reached at the January 8, 2024 IEP meeting was due to bullying on the part of [REDACTED], the Parent's educational advocate.

The January 8, 2024 draft IEP was just that – a draft – and the IEP team was free to revisit issues before it at the January 31, 2024 meeting.<sup>76</sup> The January 8, 2024 IEP was unequivocally not completed and not ready for parent signature,<sup>77</sup> as there had been no agreement, or even discussion, about placement.<sup>78</sup> (BCPS Ex. 17). Just as a school system can bring a draft of an IEP to a meeting in order to save time,<sup>79</sup> there is nothing to stop an IEP team itself from going through several drafts of an IEP before finalizing its offer of FAPE. The IEP team acted with corrected data to inform its decision at the January 31, 2024 meeting which differed from that which it had at the January 8, 2024 meeting. This correction included clarification of the Student's grade level, (Finding of Fact 49), and clarification about the data to support a more restrictive environment. (Findings of Fact 3-14, 16-19, 26-32, 54). The corrected data led the BCPS members to determine a different level of services, which was not made arbitrarily or capriciously as contended by the Parent.<sup>80</sup> Therefore, it is entirely unnecessary for me to decide whether BCPS team members were bullied into making an agreement.

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<sup>76</sup> An IEP is essentially a “snapshot” in time and “cannot be judged exclusively in hindsight.” See *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 818 (8th Cir. 2011); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).

<sup>77</sup> “A public agency shall obtain written parental consent before the initial provision of special education and related services to a student with a disability.” COMAR 13A.05.01.13B(1); see also 34 C.F.R. § 300.300(b)(1). Furthermore, “[c]onsent for initial evaluation may not be construed as consent for initial placement.” COMAR 13A.05.01.13B(7).

<sup>78</sup> The LRE discussion is a mandatory component of the IEP made by the IEP team. See COMAR 13A.05.01.10(C)(1)(a); see also COMAR 13A.05.01.09(A)(1)(e); 34 C.F.R. § 300.320(a)(5).

<sup>79</sup> See *Nack v. Orange Cnty. Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006) (“Predetermination is not synonymous with preparation.”); see also COMAR 13A.05.01.08B(3) (parent or public agency may request meeting at any time to review and revise a student's IEP).

<sup>80</sup> *Berkshire Life Ins. Co. v. Md. Ins. Admin.*, 142 Md. App. 628, 671 (2002) (citations omitted) (“The word ‘arbitrary’ means a denial subject to individual judgment or discretion, and made without adequate determination of principle. The word ‘capricious’ is used to describe a refusal to pay a claim based on an unpredictable whim.”).

### Predetermination

The IDEA’s emphasis on meaningful parental participation and involvement is a core tenet of the statute. The IDEA requires that parents have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child . . . .”<sup>81</sup> Equally important to the parents’ ability to provide input is the receptiveness of school staff to consider that parental feedback, without which parental participation would not be considered meaningful and would simply be ignored. Thus, for example, “[a] school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.”<sup>82</sup>

However, preparation does not equal predetermination.<sup>83</sup> Courts have declined to find predetermination even where school staff come to IEP meetings with a proposal in mind, as long as they remain open to input from the parents and their experts. The United States District Court for the District of Maryland explained that “while a school system must not finalize its placement decision before an IEP meeting, it can and should have given some thought to that placement.”<sup>84</sup>

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<sup>81</sup> 20 U.S.C.A. § 1415(b)(1); *see also id.* § 1414(e) (“Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.”); 34 C.F.R. § 300.501(c)(1).

<sup>82</sup> *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003), *superseded by statute on other grounds*, 20 U.S.C.A. § 1414(d)(1)(B), *as recognized in G.M. ex rel. Marchese v. Dry Creek Joint Elementary Sch. Dist.*, 595 F. App’x 698, 699 (9th Cir. 2014).

<sup>83</sup> *Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006).

<sup>84</sup> *Hanson ex rel. Hanson v. Smith*, 212 F. Supp. 2d 474, 486 (D. Md. 2002).

“[S]chool evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions.”<sup>85</sup> Meaningful parental participation has also not been interpreted by courts to mean that school staff cannot disagree with parental input.<sup>86</sup> “To avoid a finding of predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents’ opinions and support for the IEP provisions they believe are necessary for their child.”<sup>87</sup> “A state can make this showing by, for example, evidence that it ‘was receptive and responsive at all stages’ to the parents’ position, even if it was ultimately rejected.”<sup>88</sup>

Mr. Steedman argued that the January 31, 2024 IEP team predetermined the Student’s placement. As evidence of this alleged predetermination, Mr. Steedman points to Student Exhibit 35, a January 2, 2024 email in which [REDACTED] asks [REDACTED] whether he needed to be at the meeting in order for the team to consider a city-wide placement. [REDACTED] responded, “I am not understanding as to why any options other than the LRE in your school would be considered.” (Student Ex. 35). [REDACTED] then inquired whether a “Let’s Grow Program” might be an appropriate placement option for the Student. (Student Ex. 35). [REDACTED] responded, “That’s your only option unless you want to have a conversation with the Early Learning office.” (Student Ex. 35). Those emails were sent when the IEP team still believed the Student would be in Kindergarten and in advance of the January 8, 2024 meeting. The draft IEP did not contain

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<sup>85</sup> *Nack*, 454 F.3d at 610 (quoting *N.L. ex rel. Ms. C. v. Knox Cnty. Schs.*, 315 F.3d 688, 694 (6th Cir. 2003)); see also *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947-48 (1st Cir. 1991) (finding no predetermination when school district came to team meeting with draft IEP and approved it at a subsequent meeting); *K.D. ex rel. C.L.*, 665 F.3d 1110, 1123 (9th Cir. 2011) (finding no predetermination where district had a placement in mind before meeting but considered other options and reasonably rejected them).

<sup>86</sup> See *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) (“[I]f the school system has already *fully* made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input.” (emphasis added)).

<sup>87</sup> *R.L. ex rel. O.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014).

<sup>88</sup> *Id.* (quoting *Doyle*, 806 F. Supp. at 1262).

service hours or placement; therefore, the team could have considered general education and special education classes or a combination thereof at ██████ in making its LRE decision at the January 8, 2024 meeting. I take the email communication to simply be information-gathering by one team member, ██████, to be shared with the rest of the IEP team, including the Parent and her educational advocate. The team did not finalize any placement decision, but considered and documented ██████ request for a specific amount of special education services. This collaboration as documented in the PWN is the exact opposite of predetermination.

As to predetermination at the January 31, 2024 meeting, the presence of ██████, an educational specialist, does not amount to predetermination. BCPS requires an educational specialist to be present in order for a team to discuss placement outside of the Student's home school. Therefore, ██████ presence suggests the possibility of a city-wide placement and belies a finding of predetermination. Further, the IEP team fully discussed placement options at ██████, as well as data to support a more restrictive placement. The IEP team considered the Parent's input as well as that of her educational advocate, prior to making its final decision.

The Parent was given the opportunity at both the January 8 and January 31 meetings to provide evidence that the Student required a placement more restrictive than the one ultimately offered. While the Parent certainly disagreed with BCPS' decision, the record, detailed in the findings of fact above, does not include data and evidence provided to the IEP team to support that disagreement. In the absence of evidence that the Student could not handle a general education environment for lunch/recess and specials, the IEP team reasonably concluded that the least restrictive environment for the Student was the one offered. That decision does not amount to predetermination.<sup>89</sup>

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<sup>89</sup> *Hanson*, 212 F. Supp. 2d at 486.

## **ALLEGED SUBSTANTIVE DENIAL OF FAPE**

All parties agree that the Student requires specially designed instruction for all of his academic subjects. The dispute is whether the Student requires specially designed instruction during lunch/recess and specials. As discussed above, BCPS' change from thirty-one to twenty-five service hours did not constitute a procedural violation that denied the Student FAPE. As to BCPS' original agreement with thirty-one hours, ██████████ testified that she based that agreement on the belief that the Student was in Kindergarten, and that some placements outside of the school are self-contained and have different hours. This assertion puts the cart before the horse - the team should have decided the number of service hours necessary and then determined the least restrictive environment and placement. But this argument is of no import – the January 8, 2024 IEP was not completed and was ultimately revised. The January 31, 2024 IEP is what was ultimately offered by BCPS and what is at issue in this case.

The Parents take no issue with the IEP's impact statement or goals and objectives. The argument is that the student requires thirty-one hours of special education to include specially designed instruction during specials and lunch/recess. The Parents then argue that even if the Student does not require specially designed instruction throughout the entire school day, the Student cannot function in the least restrictive environment proposed by the IEP team because the Student cannot be with general education Students for lunch/recess and specials. And finally, the Parents argue that even if the Student could function with general education students for lunch/recess and specials with appropriate supports, the IEP as written provides no such supports.



### Student's Need for Specially Designed Instruction During Lunch/Recess and Specials

To qualify for special education under the IDEA, the student must “1) have a qualifying disability and 2) by reason thereof need special education and related services.”<sup>90</sup> The IDEA defines special education as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including –

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.<sup>91</sup>

The regulations define specially designed instruction as:

[A]dapted, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.<sup>92</sup>

Although a student must receive specially designed instruction in order to qualify for an IEP, a student does not necessarily require specially designed instruction in all subject areas or throughout his or her entire school day.<sup>93</sup>

In addition to specially designed instruction, special education includes supplementary aids and services. “*Supplementary aids and services* means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular

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<sup>90</sup> *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 382 (5th Cir. 2007) (quoting 20 U.S.C.A. § 1401(3)(A)).

<sup>91</sup> 20 U.S.C.A. § 1401(29).

<sup>92</sup> 34 C.F.R. § 300.39(b)(3).

<sup>93</sup> *Andrew F.*, 136 S. Ct. at 1001 (“[The] adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”).

and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116.”<sup>94</sup>

The school system is also required to provide supplementary aids and services with respect to nonacademic and extracurricular services.<sup>95</sup> To that end, an IEP must contain:

[A] statement of the program modifications or *supports for school personnel* that will be provided to enable the child—

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.<sup>96</sup>

██████████, the Parents’ educational advocate, testified to the Student’s extensive needs for all academics, communication, self-regulation, and sensory processing. Specifically in the area of sensory processing, she testified that the Student gets overwhelmed, dysregulated,<sup>97</sup> is constantly jumping and moving, and has difficulty sitting down. She said that the Student can become overwhelmed around lots of people and lots of talking. ██████████ testified that the Student requires a full day of specially designed instruction, which would include help following directions, making transitions, listening, attending, interacting with peers, advocating for himself, sitting in a group, speaking, and listening to others.

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<sup>94</sup> 34 C.F.R. § 300.42 (emphasis added).

<sup>95</sup> 34 C.F.R. § 300.107.

<sup>96</sup> 34 C.F.R. § 300.320(a)(4) (emphasis added).

<sup>97</sup> No one defined dysregulation at the hearing. The dictionary definition of “dysregulated” is that it is “used to describe people who are unable to control their emotions in the same way that others can.” <https://dictionary.cambridge.org/us/dictionary/english/dysregulated> (last visited July 3, 2024).

When questioned whether a general education environment would cause any harm to the Student, ██████ replied “yes,” and that “it would be a waste of time for him” because this Student needs to work on his social, academic, and communication skills every second of his day. (T1. 188).<sup>98</sup> She contends that because the Student is so far behind “every minute he’s not getting specially designed instruction is harmful to him. He needs every minute to be learning.” (T2. 188, 218). When asked to describe exactly what that specially designed instruction would look like, ██████ said it would be the Student in a small group of students with a special educator or speech pathologist to help facilitate conversations and keeping the environment calm to allow the Student to have conversations.

As far as the data ██████ relied on, she testified that the Parent laid out “all the previous educational experiences that he had that he was not able to gain any benefit at this time of being with general education peers.” (T1. 188). She said that the Parents said the Student was not mimicking other students or gaining any better language skills from them. This testimony is bewildering, because there is no evidence the Student attended any general education settings since preschool at age three. Moreover, not being able to gain benefit from general education peers does not translate to the need for specially designed instruction.

██████ is obviously a very qualified expert in special education. She has extensive experience in teaching special education and guiding families through the IEP process. I do not doubt her qualifications as an expert; instead, I question the basis for her expert opinion in this case and her definition of specially designed instruction. She testified that when a family hires her consulting company, she does a classroom observation and that she conducts observations twice a week, but she did not testify about when, for how long, or how many times she observed

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<sup>98</sup> Transcript references are as follows: T1: May 28, 2024; T2: June 7, 2024; T3: June 10, 2024; T4: June 11, 2024; and T5: June 17, 2024.

this Student. She attended the observation with [REDACTED] in October 2023, but the record is silent how many times she observed the Student on her own. If [REDACTED] only observed the Student in his special education classroom, she would not have seen the Student being overwhelmed like she testified to – it would only have been information provided to her from the Parent, and outdated information in an educational context, as the Student had not been in a general education setting since age three. [REDACTED] also did not testify about what data she provided to the IEP team to support her opinion. She testified that [REDACTED] did not base his recommendation to the IEP team that the Student could attend lunch/recess and specials in general education on any new data obtained between January 8 and January 31, but she did not herself give concrete examples to the IEP team why the Student could not.<sup>99</sup>

The Parent also did not present any concrete data or examples to the IEP team about why the Student required specially designed instruction for lunch/recess and specials. When the team at the January 8, 2024 meeting discussed thirty-one hours, the Parent asked if that included lunch/recess and specials. (Student Ex. 24, p. 97). She was told “yes” and then the Parent said “because he needs. I mean, he needs it for everything, not just for math and reading, but he needs it for everything. You.”<sup>100</sup> (BCPS Ex. 35 p. 145). But she provided no elaboration on why he needed it. The record shows that the Parent sent [REDACTED] a parental impact statement on January 10, 2024, to be included in the IEP, but neither party introduced that statement into evidence and it was not evident it was ever included in the IEP. (BCPS Ex. 31).

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<sup>99</sup> The transcript of the January 8, 2024 IEP meeting is in the record as Student Ex. 24 and BCPS Ex. 35. I did not admit into evidence Student Ex. 29, the transcript of the January 31, 2024 IEP meeting, because the Parent recorded that meeting without informing the parties they were being recorded and obtaining their permission to do so. The parties testified about what was presented and discussed at the January 31, 2024 meeting and I am relying on that testimony here.

<sup>100</sup> There is nothing after “You” in the transcript.

██████████, from ██████████, testified the Student requires specialized instruction because he needs modeling and prompting on how to communicate with his peers and self-regulation and for someone to help him sit.

Specially designed instruction involves a special educator adapting the content, methodology, or delivery of curriculum for a special education student. There is no curriculum for lunch/recess. To the extent there is a curriculum for specials, the Parent, ██████████, and ██████████ testified the Student needs a quiet atmosphere, redirection, modeling, and assistance to stay seated and on-task. These in and of themselves, as testified to by the Parents' witnesses, are supplementary aids and supports. These needs do not demand specially designed instruction and could have been addressed with supplementary aids and services, such as, for example, a small group lunch in a quiet location, an instructional aide during specials, or consultative services by special educators to the general educators of the Student's specials.

██████████ and the Parent's assertion that the Student requires specially designed instruction is essentially that he needs a quiet, supportive atmosphere and needs to take advantage of that time to work on his behavioral goals outlined in the IEP. The Student has social skills goals on his IEP from ██████████, and there was testimony at the hearing that special educators work on these goals with the Student all day long, including during lunch/recess and specials. The Parent and ██████████ wish to have this same level of service provided through BCPS. However, this was not discussed at either of the IEP meetings.

The BCPS IEP does not have any goals or objectives on his IEP that relate specifically to lunch/recess and specials, but only his general social/emotional/behavioral goals. ██████████ testified that there are students who have IEP goals related to self-care, such as feeding, and they would receive specially designed instruction during lunch/recess. But the Student does not have

any goals specifically related to lunch/recess or specials. And the Parent agreed to the goals and objectives proposed by the BCPS IEP team and did not request any social/emotional/behavioral goals that would necessitate them being taught during lunch/recess and specials. Special education resources are limited to providing specially designed instruction only when called for in an IEP. As to him needing a quiet, calm place for his lunch and specials, that could have been addressed with supplementary aids and services.

At [REDACTED], the Student requires moderate teacher support in art and recreation education. (Finding of Fact 16). He enjoys his art assignments and is able to follow step-by-step directions. (Finding of Fact 18). In recreation education, the Student participates in warm-ups and completes activities given a model, prompting and visual cues. (Finding of Fact 19). He plays by himself at recess and eats lunch in his classroom independently. (Findings of Fact 27, 32). While he is easily distracted in all settings due to his short attention span, seeks movement regularly, and has difficulty staying seated, [REDACTED] occupational therapy evaluator noted that he tolerates auditory and visual stimuli well, although a lot could increase his energy level, cause pacing, and jumping. (Finding of Fact 32). The Parent's evidence regarding examples of what supports the Student's needs in these settings are addressed in listed in the January 31, 2024 IEP, i.e., teaching modeling, repetition of directions, short/explicit instructions, prompting for active participation with all activities; frequent changes/opportunities for movement, strategies to initiate/sustain attention, sensory activity to promote listening/focusing skills, and an occupational therapy consult for self-regulation in classroom settings. (Student Ex. 27). The BCPS had no data to suggest that the strategies and supports utilized by the Student in his current education setting would no longer work for him in the general education setting.

Mr. Steedman argued that the impact statement alone supports the need for specialized instruction. The impact statement does establish that the Student's disability affects every aspect of his school day. (Finding of Fact 53). But it does not say that every aspect of his school day requires specially designed instruction. Among other things, the impact statement states that the Student "will require interventions to help him stay on task, sit with a group, transition, initiate interactions with peers and *individualized instruction to learn and retain academic concepts.*" (Student Ex. 27 (emphasis added)). There are aspects of the Student's school day that could be adequately supported with supplementary aids and services.

Moreover, the substance of the Parent's testimony before me was not provided to the IEP team. The IEP team relied on the reports from the Student's previous experiences at [REDACTED], [REDACTED], and more recently and more importantly, [REDACTED]. (Findings of Fact 3-14, 16-19, 26-32, 54). The reports of the Student's most recent behavior at [REDACTED] is that the Student can attend to non-preferred activities successfully for five to ten minutes, but ten to fifteen on preferred activities. (Finding of Fact 32). Both reports from [REDACTED] and [REDACTED] report that the Student is frequently off task and can even engage in disruptive behaviors such as fidgeting, running, pacing, and laying on tables. (Findings of Fact 31, 32). However, the Student is able to be verbally redirected, receive teacher prompting, or positive reinforcement to return to instruction or to cease the negative behavior. (Finding of Fact 31, 32). These are all supports that can be provided by supplementary aids and services and do not require specially designed instruction.

The development of an IEP is a prospective judgment based on then-existing data. While it may have been ideal for the Student to be in a special education environment for his entire school day, the Student is not guaranteed ideal by the IDEA, he is guaranteed an IEP that is

reasonable to allow him to make appropriate progress in light of his circumstances.<sup>101</sup> The Parents disagreed with the decision to not provide specially designed instruction throughout the entire school day, beyond the academic subjects, but BCPS has provided “a cogent and responsive explanation for [its] decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”<sup>102</sup>

Least Restrictive Environment With General Education for Lunch/Recess and Specials

Because the Student absolutely requires specially designed instruction during academic subjects and BCPS IEP team members were of the belief that he did not require it for specials and lunch/recess, the recommendation for the least restrictive environment was for the Student to attend a self-contained special education classroom for academic subjects, and participate with general education students during lunch/recess and specials. The Parents contend the Student simply cannot succeed in an environment with general education students.

██████████ testified that the Student has no problems whatsoever during recess at ██████████ with sixteen students. When asked whether he could participate in a general education lunch/recess, she testified:

[t]he results of [the Student] being in the lunchroom with a hundred other students would be absolutely devastating. He would be – his sensory would be completely overwhelmed. He would have a meltdown. He would have a hard time functioning. He doesn’t have the communication skills to be able to advocate for assistance when he needs assistance. He needs that close teacher proximity and that modeling and that communication to be able to function.

(T2. 281). She also testified that the Student would have a meltdown in an art class with a group of thirty because he needs modeling and prompting and direct instruction even in a group of eight. However, ██████████ acknowledged during cross-examination that she had never observed

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<sup>101</sup> *Andrew F.*, 136 S. Ct. at 999 (citing *Rowley*, 458 U.S. at 206).

<sup>102</sup> *Id.* at 1002; see also *R.F. ex rel. E.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237 (4th Cir. 2019).



the Student have a meltdown at [REDACTED], nor was he known to have them there. She explained that her testimony was based on what she had heard from the Parents about the Student's history and temperament in other situations.

The Parent testified about a recent BBQ her family attended at a home with friends and approximately fifteen children, most of whom the Student had met before. The Parent said that the Student had a meltdown. The Student's meltdowns manifest with crying, lots of stimming, arm flapping, and repeating parts of a show or a book. In this case, the Student entrenched himself in the living room alone, and the adults had to turn off the music at the party. The Parent had to spend a lot of time soothing the Student, and eventually found a swing set to help the Student calm down. The Student was eventually able to return to the party but stayed with the adults rather than the children and his family left the party early. This information was never shared with the IEP team.

[REDACTED] was at the observation at [REDACTED] with [REDACTED]. [REDACTED] was asked to extrapolate from her observation of the Student in his special education classroom of five students to how he would do in a class of twenty to thirty. She testified to the following:

I think he would be running around the classroom, jumping around the classroom. I don't think he'd even be able to sit down unless someone was sitting one on one in a quiet area with him. He's not going to sit and listen to whole group instruction. He's not going to listen to a teacher standing at the front of the room giving a lesson. He doesn't have the skills yet to do that.

(T2. 225-226). Extrapolation is conjecture and is inappropriate. The Student's success in his special education class does not translate to the inability to succeed in a general education class for specials with appropriate aids and services. During the Student's special education classes, while he has trouble staying in his seat, moves around the room, and loses interest in the subject matter, all reports show that he is amenable to redirection. The Student responds well to

prompting, reminders, cueing, and modeling. These could be provided via supplementary aids and services, which are “aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116.”<sup>103</sup>

The Parent and ██████ observed the lunchroom cafeteria at ██████. At the end of an academic block, one special education student stayed behind in the classroom and did not go to the cafeteria for lunch. She stayed in the classroom watching videos by herself with an aide in the room, but they were not interacting. ██████ testified that there were three or four students from the special education classroom in the lunchroom sitting at general education tables by themselves, not integrated with the general education students. The lunchroom was very loud and chaotic. She testified that this would be extremely difficult for the Student based on what the Parent had told her about the Student becoming overstimulated and dysregulated, causing “behaviors.” The Parent testified that in a situation like this lunchroom, if the Student were to be bumped, he might feel the need to bump them back. She testified that once he is in an environment like that, he can be dysregulated for a good part of the day, and it is difficult to get him back to a situation in which he can learn and be calm. She testified, “[i]t could be disastrous.” (T2. 347).

The Parent visited ██████ a second time and observed several first-grade special education students in a second-grade general education physical education class. There was a lead teacher and a few other adults in the room. There were twenty-seven general education students and two special education students. The Parent described the room as loud, boisterous,

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<sup>103</sup> 34 C.F.R. § 300.42.

and lots of activity while the kids were at stations shooting basketball and playing with hula hoops. One of the special education students was sitting with a blanket against the wall on her laptop, while another was spinning and stimming a little bit and running around, but not part of the organized class activity. No adults interacted with the special education students at all.

While it is unfortunate that no adults interacted with the special education students during that observation, we have no way of knowing the behavioral and learning challenges of those children or what is provided for in their IEPs. As to this Student, there is insufficient data to support the notion that the Student could not handle the lunchroom and/or specials with appropriate supplementary aids and services.

██████████, ██████████, ██████████ and ██████████, all also qualified as experts, testified the Student could succeed in general education specials and lunch/recess with external supports and accommodations. Several BCPS witnesses testified that several special education students have available to them the option to have lunch quietly with a much smaller group if they are unable to handle the large lunchroom. ██████████ testified that when special education students go to specials with general education students, they are usually accompanied by specialists, behavioral aides, one-on-ones, or paraeducators, who have experience at offering prompts, which, as discussed above, come under the umbrella of supplementary aids and services rather than specially designed instruction. Also, part of ██████████' role is to collaborate behavior and classroom management strategies with general education teachers to help them meet the needs of special education students. She testified that the school has a robust internal communication system that allows teachers and other professionals to communicate throughout the day about students and how best to support them.

The United States District Court for the District of Maryland addressed an issue very similar to this in *A.H. v. Smith*, 367 F. Supp. 3d 387 (D. Md. 2019). A.H. had [REDACTED], an intellectual disability, common variable immune deficiency and pediatric acute onset neuropsychiatric syndrome. The IEP offered by Montgomery County included specially designed instruction for all of the student’s academic classes and lunch and recess in general education with “special education support.”<sup>104</sup> The parents requested inclusion in a fully self-contained special education program and alleged the IEP at issue did not offer A.H. FAPE because it included lunch and recess in a general education setting “which offered no educational benefit to A.H. and presented safety concerns given A.H.’s significant behavioral dysregulation.”<sup>105</sup> Montgomery County documented the parents’ concerns but concluded there was no “data that would suggest the student cannot be included during lunch and recess.”<sup>106</sup> After a due process hearing, the ALJ found that the IEPs at issue provided A.H. with a FAPE.<sup>107</sup> Reviewing the ALJ’s decision, the District Court held:

In support of this argument, [REDACTED] testified that A.H. would not benefit from inclusion in the general education setting because “he is barely available for guided and structured social interactions” and does not have the skills to imitate his non-disabled peers. Similarly, Ms. Quinn testified that, based on her experience with A.H. at Ivymount, exposing him to a less-structured setting would not be beneficial. Ms. Quinn admitted, however, that she was not qualified to opine as to whether A.H. would benefit from inclusion in the general education setting because she only has observed him at Ivymount, which has a 100% disabled population. Because A.H. has never been included in the general education setting, MCPS concluded that there was no data to support A.H.’s removal from the general education setting for lunch and recess. However, MCPS explained that data would be collected upon his enrollment and then they would determine whether A.H.’s

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<sup>104</sup> *Id.* at 397.

<sup>105</sup> *Id.* at 393-394.

<sup>106</sup> *Id.* at 399.

<sup>107</sup> *Id.* at 405.

continued inclusion in this setting was appropriate. This plan was reasonable, and the evidence demonstrates that A.H.'s initial inclusion in the general education setting for lunch and recess was appropriate. That is, Ivymount reported that A.H. was “highly motivated to interact with adults and peers,” and, indeed, that “when [A.H.] earns reinforcement, he most often chooses to interact with adults or peers.” Similarly, MCPS physical therapist Jane Juliano reported that, during her two-hour observation of A.H., he was “engaged with staff members, greeted them.” In addition, Ms. Garland and Ms. Stanley testified that A.H. would benefit from inclusion in the general education setting for lunch and recess because it would give him an opportunity to model appropriate behavior and continue developing his social skills. Taken together, this evidence demonstrates that the ALJ properly deferred to MCPS's determination that A.H.'s inclusion in the general education for lunch and recess, with special education support, was appropriate.<sup>108</sup>

The Student’s IEP team was required to place the Student in the least restrictive environment. After placing the student in a small, self-contained special education classroom for all of his academic subjects, the offered placement is less restrictive than a full-day program within an entirely self-contained special education school. Just as in *A.H. v. Smith*, there was insufficient evidence before the IEP team to conclude that the Student could not succeed within the supportive environment described above. Moreover, the Student would have the opportunity to benefit from exposure to his non-disabled peers. I am not guaranteeing that he will succeed in that environment, but for a young student who has not been in a general education environment since he was three years old, the Parent did not prove by a preponderance of the evidence, overcoming BCPS’ cogent explanation of its exercise of judgment, that he could not succeed in a general education environment with the proper supports and services.

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<sup>108</sup> *Id.* at 416 (citations omitted).

### Supplementary Aids and Services on the Student's IEP

Having found the Student could have succeeded along with general education students for lunch/recess and specials with appropriate services and accommodations, I next look at what services and accommodation were offered to him. First, there was much testimony about lunch/recess. [REDACTED] also testified that she told the Parent at the January 31, 2024 IEP meeting that if the Student was not ready to participate in lunch with his peers, he could participate in lunch with a small group outside of the cafeteria in a small group setting with other students who are not ready to participate in lunch with a larger group.

This accommodation is never mentioned in the Student's IEP. The problem is not cured by BCPS offering this to the Parent at the IEP meeting or testifying about it before me. I am to limit my review to IEP itself.<sup>109</sup> “The appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed.”<sup>110</sup> A deficient IEP cannot be remedied by testimony supporting a modification that is materially different from the IEP.<sup>111</sup> The IEP must contain:

[A] statement of the program modifications or *supports for school personnel* that will be provided to enable the child—

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.<sup>112</sup>

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<sup>109</sup> *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007).

<sup>110</sup> *S.S. v. Bd. of Educ. of Harford Cnty.*, 498 F. Supp. 3d 761, 785 (Md. D. 2020).

<sup>111</sup> *Id.* at 785.

<sup>112</sup> 34 C.F.R. § 300.320(a)(4) (emphasis added).

The Student's impact statement, which explains that the Student is affected throughout his entire day, and the Student's behavioral and emotional goals, which illustrate the Student's shortcomings, all evidence that this Student needs supports and services throughout his entire school day. Supports and services to meet the Student's social, emotional and behavioral needs could have been provided to the Student in several different ways. First, the section of the IEP entitled special considerations and accommodations, could have listed that the Student's services would be delivered by someone other than the special education classroom teacher, such as a general education teacher, paraeducator, instructional aide, or a one-to-one. Yet only one was noted, an occupational therapy consult was to be performed by the occupational therapist. All other services were to be provided by the special education classroom teacher in the special education classroom.

Second, the IEP team could have written the Student specific social/emotional or behavioral goals that were to be provided during lunch/recess or specials. It did not. Third, the IEP team could have developed for the Student a behavioral intervention plan to address his social/emotional or behavior needs in the general education setting. It did not. Fourth, the IEP team could have provided for a consult which could have been done by special educator for the lunch aides and general educators for the specials. The only consult provided in the IEP is a monthly consult from occupational therapy. At the IEP meeting a BCPS member suggested this might be for fifteen minutes. Once a month for such a short period of time is simply insufficient to adequately support this Student's varied needs when in the general education environment. Fifth, the IEP could have provided that related services, such as speech language therapy, occupational therapy, or adaptive physical education, would be pushed in to general education

settings so that the Student's needs would have been addressed in lunch/recess and specials. But all related services in the Student's IEP were to be provided as pull-out services.

BCPS did not provide evidence of how the Student's social/emotional and behavioral needs would be met in nonacademic (lunch/recess) and general education settings (specials) in the January 31, 2024 IEP. [REDACTED] testified that the Student, in a general education setting, would receive all of the supplementary aids, program modifications and supports that were written in to the Student's IEP. She never testified *which* supplementary aids, program modifications and supports she anticipated being delivered in a general education setting. [REDACTED] [REDACTED] intimated in her questions of [REDACTED] that there might be adult one-to-one assistance for instruction for a Student in a small group in art class. This is never mentioned in the IEP. [REDACTED] [REDACTED] testified that the Student could be successful in a general education setting with the supports and accommodations that had been mentioned. The only accommodation mentioned at the IEP meeting was the possibility that the Student eat lunch with a smaller group, but even that accommodation was not written into the IEP. When asked what he meant by accommodations [REDACTED] said, "I was referring to accommodation that was on the IEP with the supplementary aids and services to accommodate him to be successful in the school setting." (T3. 576). This non-answer is circular. And in any event, there were no supplementary aids and services to accommodate the Student in a general education setting on the IEP.

BCPS effectively acknowledged at the hearing that the Student would not be able to participate in general education specials and lunch/recess without appropriate supplementary aids and services. BCPS' witnesses repeatedly mentioned that he would be able to succeed in that setting with all of his modifications and services, but never testified specifically to what those



were. While BCPS may have intended to provide those supports, it did not. As such, the January 31, 2024 IEP is deficient and for that reason, fails to provide the Student a FAPE.

## REMEDY

The Parents request an Order requiring BCPS to provide reimbursement to the Parents for the 2023-2024 school year tuition, related services and transportation at [REDACTED]. The Parents did not request that I order the placement of the Student at [REDACTED] for the 2024-2025 school year.

After BCPS failed to provide a FAPE for the 2023-2024 school year, my inquiry turns to whether [REDACTED] was appropriate.<sup>113</sup> Just as the question about an IEP is whether it is *reasonable*, not whether the court regards it as ideal,<sup>114</sup> the question about [REDACTED] is whether it is appropriate. I find that it is, and provides more than that required to provide the Student with a FAPE, i.e., it provides what the Parents consider ideal. As outlined above, adhering to the requirement that the school system implement the Student's IEP in the least restrictive environment, the data now supports the Student being in special education classes for academic subjects and general education for lunch/recess and specials. A FAPE could have been provided by BCPS through a properly drafted IEP.

[REDACTED] provides more than what is required to provide the Student a FAPE, as the Student is in a special education setting throughout his entire day. But the Parents do not have the same obligation to place their child in the least restrictive setting.<sup>115</sup> All of the Parents' witnesses testified that the Student has been making progress at [REDACTED]. That testimony was uncontroverted. BCPS also acknowledged that the Student has been doing well at [REDACTED]. As such, I find that the Student's education at [REDACTED] was reasonably calculated to enable the

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<sup>113</sup> *Burlington*, 471 U.S. at 370.

<sup>114</sup> *Id.* at 999.

<sup>115</sup> See *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009).

Student make progress and therefore is appropriate for purposes of the tuition reimbursement analysis.<sup>116</sup>

Although the Parents enrolled the Student at ██████ in July 2023, upon moving to Baltimore, the Parents did not contact BCPS to inquire about special education services until October 2023. The Parents have established that BCPS failed to provide a FAPE after January 31, 2024, at which time BCPS offered an IEP that did not provide sufficient support for the Student while in a general education environment. It was the BCPS' development of the January 31, 2024 IEP that denied the Student FAPE, not any of the procedural irregularities that may have occurred. Therefore, it would not be equitable to order reimbursement for July 2023 through the end of January 2024. Rather, reimbursement shall begin on February 1, 2024, the date the FAPE violation began.<sup>117</sup> Consequently, I conclude that the Parents have established that they are entitled to reimbursement for tuition at ██████ for the months of February 2024 through July 2024. The Parents presented no evidence about the monthly, or even yearly, tuition and related costs at ██████. Despite this failure, equity still mandates an order of reimbursement.

As the IEP offered by BCPS on its face covered a full year (January 31, 2024 through January 30, 2025), BCPS' failure to provide FAPE continues to the present. Nevertheless, it can be cured by reconvening an IEP meeting for the team to consider what supports the Student needs in order to succeed in the general education environment during lunch/recess and specials and to consider any other revisions based on updated data.

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<sup>116</sup> *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 326 (4th Cir. 2009) (quoting *Carter*, 950 F.2d at 163 and *Burlington*, 471 U.S. at 369).

<sup>117</sup> *Carter*, 510 U.S. at 16.

Courts have held that a “finding that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school” is not improper on its face.<sup>118</sup> The *Adams* Court further explained:

Even when a Hearing Officer finds “an actionable violation of the IDEA,” courts have therefore upheld an HOD ordering the parties to “convene an . . . IEP meeting within ten days of [the decision]” so that prospective placement would “not be addressed by this Court, but instead, by the IEP team, as soon as practicable.” . . . Such relief comports with the collaborative, team-based process envisioned under IDEA as the best way of pursuing the “fact-intensive exercise” of “crafting an appropriate program of education” for students with disabilities.<sup>119</sup>

Guided by this principle, in deference to the evolving nature of the Student’s needs, the educational expertise of the IEP team, and acknowledging the Parents’ failure to meet their burden of establishing that the Student required specially designed instruction during lunch/recess and specials, I find that it is appropriate to order the IEP team to convene within thirty days of its receipt of this Decision, to develop an IEP for the 2024-2025 school year,<sup>120</sup> rather than to order prospective placement at [REDACTED] for the 2024-2025 school year.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

1. The Student was not denied FAPE by virtue of any procedural violations during the IEP development process for the 2023-2024 school year. *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 190 (4th Cir. 2002).

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<sup>118</sup> *Adams v. Dist. of Columbia*, 285 F. Supp. 3d 381, 393 (D.D.C. 2018) (“[T]his remedy was a reasonable reflection of the issues before the Hearing Officer and the administrative record. It appears, moreover, that such relief is not unusual in IDEA cases, including those in which the plaintiff requests private-school placement.”); *see also Pinto v. Dist. of Columbia*, 938 F. Supp. 2d 25, 28 (D.D.C. 2013) (noting that Hearing Officer determined that [school system] had developed an inappropriate IEP, but declined to grant placement at private school and instead ordered District to “convene a meeting to revise [the] IEP as appropriate within 30 days of a written request by Plaintiffs”).  
<sup>119</sup> *Id.* at 387.

<sup>120</sup> As this decision will be issued no later than July 17, 2024, a meeting within thirty days will have occurred with sufficient time in advance of the start of the 2024-2025 school year so that an IEP can be in place and that the Parents can be on notice of its contents, should they disagree and need to exercise their procedural safeguards.

2. The Student does not require specially designed instruction for lunch/recess and specials. 20 U.S.C.A. § 1401(29); 34 C.F.R. § 300.39(b)(3).
3. BCPS' January 31, 2024 IEP did not provide the Student with a FAPE in the least restrictive environment because the IEP did not provide sufficient support for the Student in the general education environment. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990).
4. The Parents' placement of the Student at [REDACTED] was appropriate. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315 (4th Cir. 2009); *Carter v. Florence Cnty. Sch. Dist. Four*, 950 F.2d 156 (4th Cir. 1991), *aff'd*, 510 U.S. 7 (1993).
5. The Parents are entitled to reimbursement for their unilateral placement of the Student at [REDACTED] during the period of February 1, 2024 through the end of the 2023-2024 school year. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).

### **ORDER**

I **ORDER** that:

1. Baltimore City Public Schools shall reimburse the Parents for tuition, related services, and transportation associated with their placement of the Student at [REDACTED] for the period of February 1, 2024 through the end of the 2023-2024 school year;<sup>121</sup>
2. Baltimore City Public Schools shall convene an IEP team meeting on or before August 17, 2024;

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<sup>121</sup> Because the Parents did not provide proof of tuition and other expenses, they must offer proof of expenses to BCPS in order to effectuate the reimbursement.

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

July 16, 2024  
Date Decision Issued

Deborah S. Richardson  
Administrative Law Judge

DSR/sh  
#212321

### **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.

**Copies Mailed To:**

[REDACTED]

Wayne Steedman, Esquire

[REDACTED]

Olivia A. Miller, Esquire

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

██████████ AND ██████████,  
PARENTS,  
ON BEHALF OF ██████████,  
STUDENT,  
v.  
BALTIMORE CITY PUBLIC SCHOOLS

BEFORE DEBORAH RICHARDSON,  
AN ADMINISTRATIVE LAW JUDGE  
OF THE MARYLAND OFFICE  
OF ADMINISTRATIVE HEARINGS  
OAH No.: MSDE-CITY-OT-24-05504

**FILE EXHIBIT LIST – Appendix A**

I admitted the following exhibits on behalf of the Student:

- Student Ex. 1 - ██████████ Resume, undated
- Student Ex. 2 - ██████████ Curriculum Vitae, undated
- Student Ex. 3 - ██████████ Resume, undated
- Student Ex. 4 - Due Process Complaint Packet, February 26, 2024<sup>1</sup>
- Student Ex. 5 - Parents' Request for Production of Documents, April 23, 2024; BCPS Response, May 12, 2024
- Student Ex. 6 - Neurodevelopmental Evaluation Clinical Summary, December 16, 2019
- Student Ex. 7 - ██████████ Portfolio, 2021
- Student Ex. 8 - ██████████ Report, November 10, 2022
- Student Ex. 9 - ██████████ Speech & Language Therapy Goals, June 12, 2023
- Student Ex. 10 - Academic Progress Summary, ██████████, ██████████, August 24, 2023
- Student Ex. 11 - ██████████ Speech & Language Evaluation, October 4, 2023

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<sup>1</sup> Dated February 26, 2024 but filed at OAH February 27, 2024.

- Student Ex. 12 - BCPS Notice of IEP Team Meeting, October 12, 2023
- Student Ex. 13 - BCPS Notice and Consent for Assessment- Initial Evaluation, October 23, 2023
- Student Ex. 14 - BCPS Prior Written Notice, October 23, 2023
- Student Ex. 15 - Occupational Therapy Evaluation, [REDACTED],<sup>2</sup> November 10, 2023
- Student Ex. 16 - BCPS Notice of IEP Team Meeting- Eligibility, November 20, 2023
- Student Ex. 17 - BCPS Classroom Observation, December 15, 2023
- Student Ex. 18 - BCPS Evaluation Report and Determination of Initial Eligibility, December 20, 2023
- Student Ex. 19 - BCPS Prior Written Notice, December 20, 2023
- Student Ex. 20 - Contact Log, 2023-2024
- Student Ex. 21 - Emails, 2023-2024
- Student Ex. 22 - IEP Meeting Participants, 2023-2024
- Student Ex. 23 - BCPS Updated Draft IEP, January 3, 2024
- Student Ex. 24 - Transcript of Draft IEP Meeting, January 8, 2024
- Student Ex. 25 - BCPS Prior Written Notice, January 8, 2024
- Student Ex. 26 - BCPS Notice of Documents and Draft IEP, January 28, 2024
- Student Ex. 27 - BCPS Draft IEP, January 31, 2024
- Student Ex. 28 - BCPS Prior Written Notice, January 31, 2024
- Student Ex. 29 - NOT ADMITTED - IEP Meeting Recording Otter Transcript, January 31, 2024
- Student Ex. 30 - [REDACTED] Visit Notes, February 6, 2024

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<sup>2</sup> [REDACTED], [REDACTED], and [REDACTED].



- Student Ex. 31 - [REDACTED] Visit Notes, February 12, 2024
- Student Ex. 32 - [REDACTED] IEP Progress Report, March 15, 2024
- Student Ex. 33 - [REDACTED] IEP, 2023-2024
- Student Ex. 34 - NOT ADMITTED – [REDACTED] Work Samples, April 2024
- Student Ex. 35 - Email chain amongst BCPS employees, December 21, 2023 to January 3, 2024
- Student Ex. 36 - Thumb drive video of January 8, 2024 IEP meeting

I admitted the following exhibits on behalf of BCPS:

- BCPS Ex. 1 - BCPS Response Re: Request for Production of Documents, May 12, 2024
- BCPS Ex. 2 - Parents' Request for Production of Documents, April 23, 2024
- BCPS Ex. 3 - OAH's Pre-Hearing Conference Report and Order, February 26, 2024
- BCPS Ex. 4 - Due Process Complaint, February 27, 2024
- BCPS Ex. 5 - Child Find Referral, October 11, 2023
- BCPS Ex. 6 - Meeting Invitation for October 23, 2023 IEP Meeting, October 12, 2023
- BCPS Ex. 7 - Meeting Invitation for October 23, 2023 IEP Meeting, Signed by Parent October 20, 2023
- BCPS Ex. 8 - Receipt of Parental Rights Document, Signed by Parent October 20, 2023
- BCPS Ex. 9 - Notice and Consent for Assessment October 23, 2023, Signed by Parent October 27, 2023
- BCPS Ex. 10 - Meeting Invitation for December 20, 2023 IEP Meeting, November 20, 2023
- BCPS Ex. 11 - Evaluation Report and Determination of Initial Eligibility, December 20, 2023

- BCPS Ex. 12 - Advance Documents Notice for January 8, 2024 IEP Meeting, January 3, 2024
- BCPS Ex. 13 - Meeting Invitation for January 31, 2024 IEP Meeting, January 18, 2024
- BCPS Ex. 14 - Advance Documents Notice for January 31, 2024 Meeting, January 28, 2024
- BCPS Ex. 15 - Prior Written Notice, October 23, 2023
- BCPS Ex. 16 - Prior Written Notice, December 20, 2023
- BCPS Ex. 17 - Prior Written Notice, January 8, 2024
- BCPS Ex. 18 - Prior Written Notice, January 31, 2024
- BCPS Ex. 19 - [REDACTED], [REDACTED] ([REDACTED]) "Individual Education Plan" (IEP), August 2021
- BCPS Ex. 20 - Draft IEP for 1/8/2024 IEP Meeting, January 3, 2024
- BCPS Ex. 21 - Revised Draft IEP Incorporating January 8, 2024 Meeting, January 3, 2024
- BCPS Ex. 22 - Draft IEP, January 31, 2024
- BCPS Ex. 23 - Draft IEP, January 31, 2024
- BCPS Ex. 24 - [REDACTED] Developmental and Behavioural Pediatrics Clinic Neurodevelopmental Evaluation Clinical Summary, December 16, 2019
- BCPS Ex. 25 - [REDACTED] Psychoeducational Report, November 10, 2022
- BCPS Ex. 26 - [REDACTED] Speech and Language Evaluation, October 4, 2023
- BCPS Ex. 27 - [REDACTED] Occupational Therapy Evaluation, November 10, 2023
- BCPS Ex. 28 - City Schools Classroom Observation, October 27, 2023

- BCPS Ex. 29 - [REDACTED] School Speech and Language Progress Report, June 12, 2023
- BCPS Ex. 30 - [REDACTED] Academic Progress Summary, Undated
- BCPS Ex. 31 - Parent Contact Log #1, October 5, 2023 – March 5, 2024
- BCPS Ex. 32 - Parent Contact Log #2, December 2, 2022 – March 5, 2024
- BCPS Ex. 33 - Maryland Association of Nonpublic Special Education Facilities Membership Directory, 2019-2020
- BCPS Ex. 34 - [REDACTED] Office of the State Superintendent of Education Nonpublic School Profile: [REDACTED], Undated
- BCPS Ex. 35 - Transcript of Audio Recording from Part I IEP Meeting, January 8, 2024
- BCPS Ex. 36 - Emails re: Child Find Referral and Request for IEP, October 5, 2023 – October 13, 2023
- BCPS Ex. 37 - Emails re: Student’s Enrolled Grade, October 20, 2023 – October 30, 2023
- BCPS Ex. 38 - Emails re: Evaluations and Assessments, October 31, 2023 – November 6, 2023
- BCPS Ex. 39 - Emails re: Eligibility Meeting, November 20, 2023 – December 13, 2023
- BCPS Ex. 40 - Emails re: Student’s Enrolled Grade & IEP Development Meeting Part I, January 2, 2024 – January 15, 2024
- BCPS Ex. 41 - Emails re: IEP Development Meeting Part II, January 26, 2024 – March 5, 2024
- BCPS Ex. 42 - [REDACTED] Resume, undated
- BCPS Ex. 43 - [REDACTED] Resume, undated
- BCPS Ex. 44 - [REDACTED] Resume, undated
- BCPS Ex. 45 - [REDACTED] Resume, undated

BCPS Ex. 46 - [REDACTED] Resume, undated

BCPS Ex. 47 - [REDACTED] Resume, undated

BCPS Ex. 48 - [REDACTED] Resume, undated