

**XXXX XXXX,**

**STUDENT**

**v.**

**MONTGOMERY COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE NANCY E. PAIGE,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: MSDE-MONT-OT-15-28847**

**\* \* \* \* \***

**DECISION**

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

**STATEMENT OF THE CASE**

On August 27, 2015, XXXX and XXXX XXXX (Father and Mother, respectively, and collectively Parents), on behalf of their son XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

MCPS had conducted Individualized Educational Program (IEP) team meetings which determined that the Student’s educational placement for the 2015-2016 school year should be at [School 1] ([SCHOOL 1]). On August 20, 2015, the Parents advised MCPS that they were enrolling the Student at [School 2] ([School 2]), a nonpublic, special education school located in Montgomery County. The Parents are now seeking to have the Student’s placement at [School 2] funded by MCPS.

The parties attended a dispute resolution meeting on September 9, 2015. On September 17, 2015 MCPS notified the OAH that no agreement was reached.

I held a telephone prehearing conference on September 25, 2015. Michael J. Eig, Esquire represented the Parents. Jeffery A. Krew, Esquire, represented MCPS. By agreement of the parties, the hearing was scheduled for November 16 through 20, 2015. The starting date was chosen because it was the earliest date available to the parties' attorneys.

I convened the hearing on November 16, 2015, at MCPS offices in Rockville, Maryland, as scheduled. Michael J. Eig, Esquire, and Benjamin A. Massarsky<sup>1</sup>, Esquire, represented the Parents. Jeffrey A. Krew, Esquire, represented MCPS. At the commencement of the hearing, Mr. Eig advised that he had injured his ankle the day before and required medical attention. I therefore adjourned the hearing and reconvened on November 17, 2015. The hearing continued on November 18-20, 30, and December 3, 2015, and January 7, 8, 11 and 12, 2016. The scheduling and duration of the hearing were dictated by the availability of the parties, counsel and witnesses.

The hearing dates requested by the parties fell more than forty-five days after the events described in the federal regulations, which establish the date my decision is due. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2015). The parties waived their right to have the hearing within the forty-five-day period and agreed that the decision in this case would be issued no later than thirty days after the record closed.<sup>2</sup> 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2014). At the close of the hearing, the Parties requested the opportunity to provide memoranda. I allowed them to do so by January 15, 2016, which they did, and I closed the record on that day.

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<sup>1</sup> Admitted *Pro Hac Vice*

<sup>2</sup> Forty-five days from the date MCPS advised the OAH of the outcome of the resolution meeting was Sunday, November 1, 2015. As the parties could not begin the hearing prior to November 16, 2015, the decision could not have been rendered by November 1, 2015.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2015); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

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

### **ISSUES**

1. Did MCPS violate the IDEA by denying the Parents a meaningful opportunity to participate in the decision to place the Student at [SCHOOL 1]?
2. Was the placement developed by MCPS at [SCHOOL 1] reasonably calculated to provide the Student with a free appropriate public education (FAPE) for the 2015-2016 school year?
3. If FAPE was denied for the 2015-2016 school year, is tuition (and related expenses and costs) reimbursement for the 2015-2016 school year at [School 2], the Parents' unilaterally chosen non-public school placement, appropriate?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

Unless otherwise noted, I admitted the following exhibits on behalf of the Parents:

1. Request for Due Process, 8-27-15;
2. Letter to Parents from Dr. XXXX XXXX, 8-3-07;
3. Letter to XXXX XXXX from Dr. XXXX XXXX, 9-16-07;
4. Letter to XXXX XXXX from Dr. XXXX XXXX, 5-2-10;
5. XXXX Medical Center Genetics Consultation, 1-20-11;
6. XXXX Medical Center Genetics Consultation, 5-13-11;

7. Letter to Dr. XXXX XXXX from Dr. XXXX XXXX, 7-13-11;
8. **Not admitted** - [School 3] Occupational Therapy Evaluation, July 2011;
9. **Not admitted** - Letter from XXXX Therapy Center, 1-31-12;
10. **Not admitted** - XXXX Therapy Center Evaluation, November 2012;
11. [School 4] Psychological Evaluation, November 2012;
12. Emails between Parents and Dr. XXXX XXXX, 1-17-12 & 1-31-13;
- P-12A. Emails between Parents and [School 2] staff, November 2012 to February 2013;
13. Letter to Parents from [School 5] regarding suspension, 2-1-13;
14. **Not admitted** - [School 5] Occupational Therapy Quarterly Progress Report, 3-28-13;
15. Letter to Parents from [School 5] regarding suspension, 4-11-13;
16. Emails between Parents and Dr. XXXX XXXX, 10-7-13 & 10-9-13;
17. Letter to Parents from [School 5] regarding suspension, 10-16-13;
18. MCPS draft IEP, 11-5-13;
19. **Not admitted** - Email from Parents regarding suspensions at [School 5], 11-20-13;
20. [School 5] Functional Behavior Assessment and Behavior Intervention Plan, 12-2-13;
21. MCPS Amended IEP, 1-17-14;
22. Prior Written Notice to Parents from XXXX XXXX, 1-24-14;
23. Letter to Dr. XXXX XXXX from Dr. XXXX XXXX, 1-27-14;
24. **Not admitted** - [School 5] Progress Report, 3-3-14;
25. **Not admitted** - Genetic Testing Report from the XXXX, 3-18-14;
26. Emails between Parents, Dr. XXXX XXXX and Dr. XXXX XXXX, 3-23-14;
27. MCPS Amended IEP, 4-8-14;
28. **Not admitted** - Emails between Parents and Dr. XXXX XXXX, 4-20-14;
29. Maryland School Assessment Report, June 2014;
30. [School 5] Final Report Card for 2013-14 School Year, June 2014;
31. [School 5] Progress Report on IEP Goals, January to June 2014;
32. Instructional Planning Report and Annual Progress Report, 9-3-14;
33. Emails between Parents and [School 5] staff, 9-8-14 to 10-14-14;
34. Student Diagnostic Report and Annual Progress Report, 10-15-14;
35. Emails between Parents and [School 5] staff, 10-22-14;
36. Reading and Math Data Charts, November 2014;
37. [School 5] Occupational Therapy Annual Review Report, 11-6-14;
38. Letter to Parents and Incident Report from [School 5] regarding suspension, 11-12-14;
39. [School 5] Speech and Language Annual Review Report, 11-18-14;
40. Email to Parents and Incident Report from [School 5], 11-19-14;
41. [School 5] Counseling Annual Review Report, 12-4-14;
42. Letter to Dr. XXXX from Parents enclosing updated information, 12-14-14;
43. **Not admitted** - MCPS draft IEP, 12-22-14;
44. Emails between Parents and [School 5] staff, 1-14-15;
45. Student Diagnostic Report, Instructional Planning Report, and Annual Progress Report, 1-15-15;
46. Emails between Parents and XXXX XXXX, January and February 2015;
47. [School 5] Behavior Reports, January to February 2015;
48. [School 5] Functional Behavior Assessment and Behavior Intervention Plan, 3-17-15;
49. MCPS Amended IEP, 3-24-15;
50. **Not admitted** - XXXX Center Physical Therapy Evaluation, 3-27-15;
51. **Not admitted** - Letter to Parents from [School 5] regarding failure to provide related services, 4-6-15;

52. **Not admitted** - Emails between Parents, [School 5] staff, and XXXX XXXX, 4-22-15;
53. **Not admitted** - Emails between Parents and [School 2] staff, 5-12-15;
54. Emails between Parents and Dr. XXXX XXXX, 5-13-15;
55. Student Application to XXXX Foundation for Group Homes, 5-19-15;
56. **Not admitted** - Emails between Parents, [School 5] staff, and XXXX XXXX, 5-2015;
57. Instructional Planning Report, Student Diagnostic Report, and Annual Progress Report, 5-22-15;
58. **Not admitted** - Emails between Parents and [School 2] staff, 5-27-15 to 6-9-15;
59. Emails between Parents and Dr. XXXX XXXX enclosing authorization, 5-28-15;
60. Student Application to [School 2], 5-28-15;
61. **Not admitted** - Emails between Parents, [School 5] staff, and XXXX XXXX, 6-1-15;
62. MCPS Psychological Reevaluation Report by Dr. XXXX XXXX, 6-3-15;
63. Emails between Parents and Dr. XXXX XXXX, 6-4-15;
64. Emails between Parents, [School 5] staff, and XXXX XXXX, 6-8-15;
65. Letters to Parents, [School 2], and [School 6] ([School 6]) from MCPS regarding placement recommendations, 6-11-15;
66. Emails between Parents and [School 2] staff, 6-11-15 to 6-16-15;
67. Emails between Parents and XXXX XXXX, 6-19-15;
68. Emails between Parents and [School 2] staff, 6-22-15;
69. **Not admitted** - Instructional Planning Report, 6-22-15;
70. [School 5] Related Services Log, July 2014 to June 2015;
71. [School 5] Final Report Card for 2014-15 school year, June 2015;
72. [School 5] Progress Report on IEP Goals, January to June 2015;
73. Emails between Parents and XXXX XXXX, 7-7-15;
74. **Not admitted** - Emails between Parents and [School 2] staff regarding school visits, 7-14-15;
75. Email to Dr. XXXX from XXXX XXXX, 7-20-15;
76. [School 2] Admissions Visit Overview, 7-21-15;
77. Emails between Parents and [School 2] staff, 7-24-15;
78. Emails between Parents, [School 2] staff, and XXXX XXXX, 8-4-15;
79. Letter of Acceptance to XXXX XXXX from XXXX XXXX, 8-4-15;
80. Emails between Parents and [School 2] staff, 8-5-15;
81. Emails between Parents, 8-6-15;
82. Emails to XXXX XXXX from Parents with screenshot of phone call, 8-7-15;
83. MCPS Amended IEP, 8-7-15;
84. Email to XXXX XXXX from Parents, 8-7-15;
85. **Not admitted** (85-2 only) - Emails to Ashley Vancleef, Esq., from Parents, 8-7-15 & 8-9-15;
86. Emails between Parents, XXXX XXXX and [School 5] staff, 8-11-15 to 8-16-15;
87. Prior Written Notice letter to Parents from XXXX XXXX, 8-19-15;
88. Emails between XXXX XXXX and XXXX XXXX, 8-19-15;
89. [School 2] Tuition Contract, 8-19-15;
90. [School 2] Multiple Learning Needs Program Information;
91. Letter to Parents from Director of [School 2], 8-20-15;
92. Letter to Zvi D. Greismann, Esq., from Michael J. Eig, Esq., 8-20-15;
93. Letter to Michael J. Eig, Esq. from Zvi Greismann, Esq., 8-24-15;
94. Emails between MCPS staff, 8-25-15;
95. Letter to XXXX XXXX enclosing hearing request, 8-27-15;

96. **Not admitted** - Letter to Parents from MCPS Transportation Department;
97. Letter to Ashley Vancleef, Esq., from Michael J. Eig, Esq., 8-31-15
98. Emails between Parents and [School 2] staff, 9-2-15;
99. Emails between Parents and [School 2] staff, 9-8-15;
100. Letter from Dr. XXXX XXXX, 9-9-15;
101. Due Process Resolution Meeting Tracking Form, 9-9-15;
102. [School 2] Crisis Management Procedures, 9-18-15;
103. Email to Michael J. Eig, Esq., & Benjamin W. Massarsky, Esq., from Parents, 9-18-15;
104. Emails between Parents and [School 2] staff, 9-21-15;
105. Letter to Judge Paige from Michael J. Eig, Esq., 9-29-15;
106. [School 2] 2015 Year Statement of Account, 10-1-15;
107. Emails between Parents and [School 2] staff, 10-7-15;
108. **Not admitted** - [School 2] Multiple Learning Needs High School Snapshot, 10-9-15
109. [School 2] Behavior Graphs, September to October 2015;
110. [School 2] Occupational Therapy Evaluation Report, 10-20-15;
111. Letter to Parents from [School 2] enclosing quarterly progress report, 10-22-15;
112. [School 2] staff meeting notes, 9-18-15, 10-16-15 & 10-26-15;
113. Letter to Michael J. Eig, Esq., from Jeffrey Krew, Esq., 10-26-15;
114. **Not admitted** - [School 2] Speech Language Evaluation Report, 10-27-15;
115. Emails between Dr. XXXX XXXX and [School 2] staff, 10-27-15;
116. Email to [SCHOOL 1] Principal from Dr. XXXX XXXX, 10-28-15;
117. Letter to Jeffrey Krew, Esq., from Michael J. Eig, Esq., 10-28-15;
118. Emails between Parents and [School 2] staff, 10-29-15;
119. [School 2] Behavior Incident Reports, 9-8-15 to 10-29-15;
120. Letter to Dr. XXXX XXXX from Jeffrey Krew, Esq., 10-30-15;
121. Emails between Parents and [School 2] staff, 11-2-15;
122. Letter to Parents from [School 2] recommending related services, 11-3-15;
123. Letter to Judge Paige from Michael J. Eig, Esq., 11-3-15;
124. Letter to Michael J. Eig, Esq., from Jeffrey Krew, Esq., 11-4-15;
125. [School 2] Behavior Intervention Plan, 11-6-15;
126. [School 2] One-to-One Justification and Fading Plan, 11-6-15;
127. [School 2] IEP, 11-9-15;
128. [School 2] Vocational Training Information;
129. [School 2] Certificate Track Plans for 2015-2016 school year;
130. Consultation Report by Dr. XXXX XXXX, 11-7-15;
131. **Not admitted** - [SCHOOL 1] Information;
132. Resume of Dr. XXXX XXXX;
133. Resume of Dr. XXXX XXXX;
134. Resume of Dr. XXXX XXXX (XXXX);
135. Resume of XXXX XXXX;
136. Resume of XXXX XXXX;
137. Resume of XXXX XXXX; and
138. [School 2] Transition Plan, 11-6-15.
139. Letter to [SCHOOL 1] Staff from XXXX XXXX and Dr. XXXX, 1/15/15
- P-140. XXXX Social Worker Contract
- P-141. 2012-2014 School Improvement Plan
- P-142. 2014-2015 Performance Results
- P-143. Gallup Staff Survey Results

- P-144. Student Engagement Survey
- P-145. 2014-2015 School Year
- P-146. SWIS Behavioral Data Graphs
- P-147. Leadership Week Staff Comments

I admitted the following exhibits on behalf of MCPS:

<b>Board Ex. No.</b>	<b>Date</b>	<b>Description</b>
A	3/4/10	IEP Notes
1	11/12/12	Email to XXXX XXXX, Admissions Coordinator, - [School 2], from Mother
2	Spring 2014	Maryland School Assessment Scores
3	9/3/14 - 5/19/15	Annual Progress Report (Math): Enterprise Test - [School 5]
4	9/3/14 - 5/19/15	Annual Progress Report (Reading): Enterprise Test - [School 5]
5	10/31/14	Letter to Parents from XXXX XXXX, Associate Director, [School 5]
6	11/11/14	Letter to Parents from XXXX XXXX, Supervisor, Placement and Assessment Services Unit, MCPS
7	11/12/14	Letter to Parents from XXXX XXXX, Associate Director, [School 5]
8	11/18/14	Counseling Related Services Annual Review - XXXX XXXX, M.Ed., [School 5]
9	11/19/14	[School 5] Incident Report
10	11/20/14	Academic Summary - [School 5]
11	12/4/14	Counseling Related Services Annual Review - XXXX XXXX, M.Ed., [School 5]
12	12/15/14	Summary of Instructional Levels of Performance - [School 5]
13	12/16/14	Email to Mother from XXXX XXXX, Admissions Coordinator, [School 2]
14	12/18/14	Email to XXXX XXXX, Admissions Coordinator, [School 2], from Mother
15	12/23/14	IEP Team Meeting Documentation
16	1/14/15-2/18/15	Email string between Mother and XXXX XXXX, Placement Specialist – MCPS
17	2/21/15 3/17/15	Functional Behavior Assessment and Behavioral Intervention Plan – [School 5]
18	3/24/15	IEP Team Meeting Documentation
19	3/31/15	Audiologic Evaluation - XXXX XXXX, Audiologist, XXXX Outpatient Center
20	5/11/15	Email to XXXX XXXX, Admissions Coordinator, [School 2], from Mother
21	5/12/15	Email to XXXX XXXX, Admissions Coordinator, [School 2], from Mother
22	5/12/15	Email to Mother from XXXX XXXX, Placement Specialist, MCPS

<b>Board Ex. No.</b>	<b>Date</b>	<b>Description</b>
23	5/12/15 - 5/13/15	Email string between Mother and XXXX XXXX, School Psychologist, MCPS
24	5/27/15 - 5/28/15	Email string between Mother and XXXX XXXX, Admissions Coordinator, [School 2]
25	6/2/15	Email string between Mother and XXXX XXXX, Admissions Coordinator, [School 2]
26	6/3/15	Report of School Psychologist - XXXX XXXX, Ph.D., School Psychologist, MCPS
27	6/4/15	Email to XXXX XXXX, Placement Specialist, MCPS, from Mother
28	6/8/15	Email to XXXX XXXX, Admissions Coordinator, [School 2], from Mother
29	6/10/15	Referral - XXXX XXXX, Placement Specialist, MCPS
30	6/10/15	[School 2] Application for Admission
31	6/11/15	Letters to [School 6] and [School 2] from XXXX XXXX, Supervisor, Placement and Assessment Services Unit, MCPS
32	6/11/15	Email string between XXXX XXXX, Admissions Coordinator, [School 2], and Mother
33	6/15/15	Email string between XXXX XXXX, Admissions Coordinator, [School 2], and Mother
34	6/16/15	Email to XXXX XXXX, Admissions Coordinator, [School 2], from Mother
35	6/19/15	Email to XXXX XXXX, Placement Specialist, MCPS, from Mother
36	6/19/15	Email to XXXX XXXX, Admissions Coordinator, [School 2], from Mother
37	14-15 S.Y.	Attendance Summary - [School 5]
38	14-15 S.Y.	Report Card with IEP goal and objective progress pages - [School 5]
39	6/26/15	Email to Mother from XXXX XXXX, Admissions Director, [School 6]
40	7/1/15	Email string between XXXX XXXX, Admissions Coordinator, [School 2], and Mother
41	7/6/15	Email to XXXX XXXX, Admissions Coordinator, [School 2], from Mother
42	7/6/15	Email XXXX XXXX, Placement Specialist, MCPS, from Mother
43	7/12/15	Email to XXXX XXXX, Paraeducator, [School 5], from Mother
44	7/14/15	Email to Dr. XXXX from Mother
45	7/24/15	Email to XXXX XXXX, Program Director, [School 2], from Mother
46	8/3/15	Email to XXXX XXXX, Program Director, [School 2], from Mother
47	8/3/15	Email to XXXX XXXX, Admissions Coordinator, [School 2], from Mother
48	8/3/15	Letter to Parents from XXXX XXXX, Director, [School 2]
49	8/3/15	Letter to Parents from XXXX XXXX, Director, [School 2]
50	8/3/15 - 8/4/15	Email string between Mother and XXXX XXXX, Placement Specialist, MCPS
51	8/4/15	Email to Mother from XXXX XXXX, Admissions Coordinator, [School 2]

<b>Board Ex. No.</b>	<b>Date</b>	<b>Description</b>
52	8/4/15	Letter to XXXX XXXX, Placement Specialist, MCPS, from XXXX XXXX, Director, and XXXX XXXX, Admissions Coordinator, [School 2]
53	8/7/15 6/9/15	IEP Team Meeting Documentation
53-A	8/7/15 6/9/15	XXXX XXXX Notes
54		[SCHOOL 1] Information from MCPS website
55		[SCHOOL 1] Brochure
56	8/7/15	Email to XXXX XXXX, Admissions Coordinator, [School 2], from Mother
57	8/7/15	Email to XXXX XXXX, Placement Specialist, MCPS, from Mother
58	8/11/15	Email to [School 5] staff from Mother
59	8/11/15	Email to [School 5] staff from Mother
60	8/17/15	Email XXXX XXXX, Admissions Coordinator, [School 2], from Mother
61	8/19/15	Email to XXXX XXXX, Admissions Coordinator, [School 2], from Mother
62	8/19/15	Email to XXXX XXXX, Program Director, [School 2], from Mother
63	8/19/15	Email to Mother from XXXX XXXX, Program Director, [School 2]
64	8/19/15	[School 2] Tuition Contract for 2015-2016 school year
65	8/20/15	Email to XXXX XXXX, Program Director, [School 2], from Mother
66	8/20/15	Letter (revised) to Parents from XXXX XXXX, Director, [School 2]
67	8/20/15	Letter to Zvi Greismann from Michael Eig
68	8/21/15	Email to [School 5] staff from Mother
69	8/24/15	Letter to Michael Eig from Zvi Greismann
70	8/25/15	Email string between XXXX XXXX, Program Director, [School 2], and Mother
71	8/27/15	Due Process Hearing Complaint
72	9/2/15	Email string between Father and XXXX XXXX, Program Director, [School 2]
73	9/8/15	Email string between Mother, XXXX XXXX, Program Director, and XXXX XXXX, Program Coordinator, [School 2]
74	9/8/15	Email to Parents from XXXX XXXX, Program Coordinator, [School 2]
74-A	9/8/15 - 10/29/15	[School 2] Behavior Incident Forms & Physical Restraint Documentation Forms
75	9/8/15	[School 2] Crisis Management Procedures
76	9/8/15	Letter to Michael Eig and XXXX XXXX from Jeffrey Krew
77	9/8/15 - 9/9/15	Email string between Mother and XXXX XXXX, XXXX General Hospital
78	9/15/15	Email to Parents from XXXX XXXX, Program Coordinator, [School 2]

<b>Board Ex. No.</b>	<b>Date</b>	<b>Description</b>
79	9/18/15 - 9/19/15	Email string b/w XXXX XXXX, Program Coordinator, [School 2], and Mother
80	9/21/15	Email to Mother from XXXX XXXX, Program Coordinator, [School 2]
81	9/29/15	Email to Parents from XXXX XXXX, Program Coordinator, [School 2]
82	10/1/15	[School 2] 2015 Statement of Account
83	10/1/15	Email to Mother from XXXX XXXX, Program Coordinator, [School 2]
84	10/1/15	Email to Parents from XXXX XXXX, Speech-language Pathologist, [School 2]
85	10/17/15	Email to XXXX XXXX, Program Director, and XXXX XXXX, Program Coordinator, [School 2], from Mother
85-A		Data Sheets
86	10/19/15	Email string between Mother and XXXX XXXX, Program Coordinator, [School 2]
87	10/19/15 - 10/20/15	Email string between Dr. XXXX XXXX and XXXX XXXX, Program Coordinator, [School 2], with Behavior Graphs
88	10/29/15	Email to XXXX XXXX, Program Director, [School 2], from Mother and Email to Father and Dr. XXXX XXXXX from Mother
88-A	11/13/15	Revised [School 2] Tuition Contract for 2015-2016 school year
89		XXXX XXXX Curriculum Vitae
90		XXXX XXXX Curriculum Vitae
91		XXXX XXXX Curriculum Vitae
92		Dr. XXXX XXXX Curriculum Vitae
93		XXXX XXXX Curriculum Vitae
94		XXXX XXXX Curriculum Vitae
95		XXXX XXXX Curriculum Vitae

**Witnesses**

The Parents presented the following witnesses:

- The Father;
- The Mother;
- Dr. XXXX XXXX, who was accepted as an expert in psychiatry;
- Dr. XXXX XXXX, who was accepted as an expert in special education; and
- Dr. XXXX XXXX, who was accepted as an expert in special education with an emphasis on behavioral management.

MCPS presented the following witnesses:

- Dr. XXXX XXXX, who was accepted as an expert in school psychology;
- XXXX XXXX, who was accepted as an expert in special education with an emphasis on placement of students with complex needs;
- XXXX XXXX, who was accepted as an expert in special education; and
- XXXX XXXX, who was accepted as an expert in special education with an emphasis on education of children with behavioral issues, and an expert on the placement process.

### **FINDINGS OF FACT**

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

1. The Student was born on XXXX, 2000. He is currently almost sixteen years old.
2. The Student and his family are residents of Montgomery County, Maryland.
3. The Student is identified as a student with multiple disabilities under the IDEA, including Intellectually Disability (ID), hearing impairment, and other health impairments.
4. The Student has exhibited a range of behavioral and emotional regulation problems consisting of impulsivity, disinhibition, inattention, and temper outbursts since nursery school. He has had an IEP for his entire formal education.
5. The Student has been educated in non-public schools, funded by MCPS, since the fourth grade. He attended the [School 4] ([School 4]) from the fourth grade through the beginning of the sixth grade and [School 5] ([SCHOOL 5]) for the remainder of the sixth grade through the eighth grade.
6. The Student suffers from a rare genetic disorder known as XXXX syndrome.<sup>3</sup> He has been under the care of a psychiatrist, Dr. XXXX XXXX, since he was about six years old. He

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<sup>3</sup> XXXX are the first initials of the first three patients diagnosed with this disorder. The Student was not diagnosed until he was about fourteen years old. The diagnosis, *per se*, has not affected his medical care or his educational programming.

sees Dr. XXXX about once a week for behavioral issues, including medication monitoring and adjustments.

7. The Student carries diagnoses of bipolar disorder, attention deficit hyperactivity disorder (ADHD), executive functioning deficits and cognitive deficits. He also has impaired social skills. In addition, the Student suffers from severe constipation as a result of abnormal development of his intestinal track, and is small for his age; his hearing is impaired and he has deficiencies in fine and gross motor skills.
8. In addition to Dr. XXXX, Dr. XXXX XXXX, a professor of pediatrics at XXXX Medical School with expertise in pediatric psychopharmacology, has provided ongoing consultation for the Student's care since 2007.
9. The Student takes as many as fifteen psychiatric and somatic medications. His medical regimen is complicated by his age (many of the medications that have been tried are not generally used in children) and the tendency of some of the medications to aggravate his intestinal problems. He also has responded unevenly to medications intended to regulate his behavior, resulting in frequent adjustments and changes.
10. In 2007, the Student was evaluated at XXXX General Hospital. The evaluation placed the Student's overall intellectual ability in the low average range with deficits in working memory and processing speed. Tests of academic achievement placed his mathematical and reading abilities below his intellectual abilities.
11. MCPS placed the Student at [School 4] in the fourth grade. [School 4] specializes in the education of children with significant behavioral problems. The Student's behavior improved at [School 4], but the academic program was taught at grade level and could not effectively address the Student's cognitive deficits.
12. The Student's behavior improved sufficiently at [School 4] for him to be moved to

[SCHOOL 5] in the sixth grade, where he continued through the eighth grade.

13. [SCHOOL 5]'s program is designed for children with learning disabilities, particularly in reading, who are pursuing a Maryland high school diploma, but not for children with extreme behavioral issues.
14. Despite intensive support and modification of the curriculum, the Student made minimal educational progress at [SCHOOL 5]. His reading and math levels at the end of eighth grade were at the first grade to second grade level, with some reading functions below the first grade level and some math functions at the third grade level.
15. While the Student's behavior had improved to the point that [SCHOOL 5] was willing to have him continue to high school in its program, the Student continued to exhibit inappropriate behaviors which were described as low frequency, but high intensity.
16. As of December 2013 (seventh grade), the following behaviors were sufficiently significant to be included in the Student's Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP) :

- Bullying, physically and verbally abusive towards staff and students;
- Attempts to gain control of his environment by bargaining with you to do what he wants to do, telling others to leave the room, yells, or screams at others;
- Inappropriate language, name calling towards staff and students;
- Refuse to attend and/or participate in rotation – task avoidance;
- Refuse to stay in designated area with staff;
- Interrupts rotations - demand that the attention is focused on him;
- Argues, talks back, and refuses to follow staff directions;
- Difficulty waiting for concerns to be addressed;
- Refuse to accept responsibility for behavior; and
- Refuse to take ownership of his behavior.

Ex. P-20

17. The Student was suspended for one day at least three times during the sixth grade at [SCHOOL 5]. He was not suspended during the seventh grade and was suspended once for one day during the eighth grade.

18. During the eighth grade, [SCHOOL 5] reported the following behavioral incidents to the

Parents:

September 8, 2014 – The Student refused to do his work and threw tantrums;

September 17, 2014 – The Student banged on porta potties, grabbed a reward he had not earned (but then voluntarily returned it unopened) and said a cuss word;

October 14, 2014 – The Student told another student he was going to punch him in his face and called other students names;

November 12, 2014 – The Student took a marker from his teacher and put it in his pants. When another student tried to get it back, he hit the other student. The Student was suspended one day;

November 19, 2014 – The Student told another student in the lunchroom that he was going to kill him; and

January 14, 2015 – The Student called another student a name and jumped at her like he was going to hit her. He admitted “bullying” the other student.

Exs. P-33 and P-44.

Of the above incidents, only the November 12, 2014 incident resulted in a formal Incident Report, as well as a one-day suspension.

19. In addition to the reports to the Parents, [SCHOOL 5] recorded the following behaviors during the eighth grade:<sup>4</sup>

January 5, 2015 -The Student took a highlighter from the assistant teacher and did not give it back until he saw that his one-to-one aide was watching;

January 12, 2015 -The Student threw food at his aide, then apologized without a prompt;

January 22, 2015 - The Student refused to do independent work and began taunting other students. It is noted that this happens often when the Student attempts to avoid work;

January 23, 2015 - Prior to coming to class, the Student smacked a girl on the behind and hit her. He would not stop when asked to, and then began bullying another

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<sup>4</sup> These incidents are recorded in a document entitled, “[Student’s] Bridge to Good Behavior.” According to the testimony of the Student’s eighth grade teacher, XXXX XXXX, this document was maintained by his one-to-one aide. It is not clear what was done with the document, or whether it was provided to the Parents on a regular basis. Additionally, several of the documents contain duplicate entries.

student when he got into the class. He wrote apologies when directed to do so;

January 23, 2015 - The Student stopped working and started to bully another student, saying he was going to beat him up;

February 2, 2015 - The Student used foul language toward another student;

February 3, 2015 - The Student “almost had a tantrum” after he had difficulty finding a website, then found it on his own. It is noted that if the Student is left alone when he has difficulty, he begins the task after a few minutes, but if he is pushed, he becomes more oppositional; and

February 6, 2015 - The Student became upset and walked out of the classroom. The teacher coaxed him back and he subsequently had a “great day.”

Ex. P-47.

20. As of February 21, 2015 (eighth grade), the following behaviors were sufficiently significant to be included in the Student’s FBA and BIP :

- Vocal outburst when frustrated or overwhelmed;
- Becomes distracted and overwhelmed with class work that he perceives as being difficult or challenging; and
- Work avoidance – refuse[s] to try assignments when he feels overwhelmed.

Exs. Bd-17/ P-48.

21. On December 16, 2014, the Student, his Mother, and Dr. XXXX visited Dr. XXXX for further consultation on the Student’s ongoing behavior problems. Dr. XXXX recommended that the Student’s educational program be changed to a program with a vocational and life skills component, with basic reading and basic math. He also recommended that the Parents contact the Developmental Disabilities Administrations to put him on a waiting list for a group home.

22. As of December 23, 2014, the Student was pursuing a Maryland high school diploma. At an IEP meeting on that date, the Mother informed the IEP team of Dr. XXXX’s advice. Her report suggested a change in placement from the [SCHOOL 5] diploma program to a certificate of completion program. [SCHOOL 5] does not offer a certificate program.

23. Before a change from the diploma track to the certificate track could be made, a re-evaluation of the Student was necessary. At a March 24, 2015 IEP meeting, the IEP team formulated diagnostic questions to be addressed in a re-evaluation and subsequently arranged for a psychological assessment by the school psychologist.
24. Dr. XXXX XXXX, MCPS School Psychologist, conducted a re-evaluation of the Student and issued a report on June 3, 2015. She conducted two behavioral observations and administered the Kaufman Assessment Battery for Children - Second Edition (KABC-II) and the Adaptive Behavior Assessment System, Second Edition (ABAS-II). The Mother completed the Child Behavior Checklist and the Student's teacher completed the Teacher Report Form, both part of the Achenbach System of Empirically Based Assessment.
25. The Student scored in the lower extreme (below the 0.1 percentile) on all scales of the KABC-II. His Fluid Crystallized Index (FCI), which is equated to IQ, was 47.
26. Based upon her evaluation, Dr. XXXX concluded that the Student's slow academic progress was commensurate with his performance on the KABC-II. She found that he meets the criteria for intellectual disability and that "specific learning disability" was no longer appropriate. She recommended a highly structured educational setting, small group instruction with a low student-to-teacher ratio, and an education program with academic demands as well as explicit instruction in functional life skills.
27. Between December 23, 2014 and June 9, 2015, in anticipation of a change in the Student's placement to a certificate program, the Mother had conversations with XXXX XXXX, the MCPS Placement Specialist who had monitored the Student's placement at [SCHOOL 5], about available certificate programs that could meet the Student's needs. The only two schools discussed were [School 2] and [School 6]. Ms. XXXX recommended that the Parents visit those schools, which they did.

28. On or about June 8, 2015, the Mother learned from a former tutor of the Student that [SCHOOL 1] was a public certificate track school and that MCPS was likely to recommend placement of the Student there. This was the first time the Mother had heard of [SCHOOL 1].
29. The Mother briefly visited [SCHOOL 1] on the morning of June 9, 2015, prior to a Central IEP (CIEP) meeting previously scheduled to discuss the Student's re-evaluation. The Mother did not think that the teaching method and class size she observed would meet the Student's needs.
30. At the June 9, 2015 meeting, the Student's IEP was changed to reflect that he would be pursuing a certificate of completion instead of a diploma. His disability code was changed from LD (learning disability) to ID (intellectual disability). XXXX XXXX, chair of the CIEP meeting, recommended that the Parents visit [SCHOOL 1]. The meeting was continued to permit the Parents to do so.
31. On June 11, 2015, MCPS sent referral letters to [School 6] and [School 2]. The letters stated, "[MCPS] is considering placement for [the Student] in your program." Exs. Bd-31/P-65-2. Subsequently, MCPS sent referral packets, including the Student's current IEP and re-evaluation, to these two schools.
32. Ms. XXXX was unfamiliar with [SCHOOL 1] and never considered [SCHOOL 1] as an option for the Student until shortly before the June 9, 2015 CIEP meeting.
33. The Parents and Dr. XXXX subsequently toured [SCHOOL 1] and the Mother spoke at length to XXXX XXXX, Principal of [SCHOOL 1]. The Mother's concerns about [SCHOOL 1] did not change from her first impression.
34. The Parents applied to [School 2] on June 10, 2015. The Student was accepted by [School 2] on August 3, 2015. [School 2] sent notice of the acceptance to MCPS as well as the Parents.

35. During the week before August 7, 2015, Dr. XXXX spent several hours reviewing the Student's complete file at the CIEP office. She did not attempt to contact the Student's teachers at [SCHOOL 5] and she did not seek to meet the Student or observe him in class.
36. The CIEP meeting reconvened on August 7, 2015. At the meeting, the Parents and Dr. XXXX (who participated by telephone) expressed their concerns about [SCHOOL 1] and their preference for the [School 2] program. Dr. XXXX spoke at length about the [SCHOOL 1] program and why she believed it was appropriate for the Student.
37. The IEP team decided to place the Student at [SCHOOL 1] over the Parents' objection. The Student's IEP was amended accordingly.
38. By letter of August 20, 2015, counsel for the Parents notified MCPS that the Student would attend [School 2] for the 2015-2016 school year and requested that MCPS place him and fund his placement at that school.
39. The Student started school at [School 2] on September 2, 2015 in the XXXX High School Program, a program for students pursuing a certificate of completion, rather than a high school diploma.
40. On September 8, 2015, the Student's behavior became sufficiently aggressive at [School 2] that crisis management procedures were instituted, including three-person physical restraint. His behaviors included hitting and kicking, property destruction, attempting to elope, yelling and crying, and attempting to undress. The Student was given medication and was able to return to regular class participation after twenty-five minutes.
41. [School 2] records data on student behavior at five minute intervals. The Student's Data Sheet for September 8, 2015 reflects that he was disruptive from 9:20 to 9:55 a.m., that he was non-compliant from 9:20 to 10:55, and that he was aggressive from 9:20 to 9:35 and again at 9:50.

42. On September 21, 2015, the Student became non-compliant, banging on the table, yelling and crying, and attempted to elope. A two-person transport was implemented and he was transported to an alternate space. After about twenty-five minutes, he was sufficiently compliant to be returned to class.
43. On October 16, 2015, the Student attempted to elope, running outside of the school. He was verbally persuaded to return to the building, but then threw food against the window. He was subsequently successfully directed to clean up the food and eventually transitioned back to class.
44. On October 19, 2015, the Student was non-compliant with instructions, grabbed and pulled staff, threw a binder on the floor and tore instructional materials. He was directed out of the classroom and was able to return in about two minutes.
45. On October 29, 2015, the Student was non-compliant with instructions, began banging on the desk and was directed to walk to a transition room. While there, he engaged in non-compliance, disruptions, cursing, and verbal threats. After about twelve minutes, he was able to return to class. His Data Sheet reflects that he was disruptive and non-compliant from 9:25 to 9:50 a.m. and from 2:10 to 3:00 p.m. and aggressive from 2:45 to 3:00 p.m.
46. On November 5, 2015, the Student's Data Sheet reflects that he was disruptive, non-compliant, and aggressive from 10:00 to 10:25 a.m. and again, briefly, at 1:00 p.m., and that he had an incident of non-compliance and aggression at 1:00 p.m. on November 6, 2015.  
(No Data Sheets were provided after November 17, 2015.)
47. [SCHOOL 1] prepares students to earn the Maryland certificate of completion of high school. It does not have a diploma track program.
48. The [SCHOOL 1] program is designed to serve children with significant cognitive disability and complex emotional, behavioral or sensory needs. It has a total of 85 students with IQs

ranging from the lower extreme (40s) to low average (70s to 85).

49. Several students at [SCHOOL 1] exhibit behaviors associated with a low emotional age, such as tantrums, which are difficult to manage in high school students.
50. [SCHOOL 1] implements Applied Behavioral Analysis (ABA) methodologies in dealing with behavior problems. It does not collect data at five or ten minute intervals, but does so on a daily, weekly or monthly basis, depending upon the specific student behavior patterns. Behavior teams meet several times a week, or less frequently depending upon the specific behavior characteristics of individual students, to analyze behavior and adjust responses. They employ physical intervention if necessary for the safety of students and staff.
51. The physical arrangement of [SCHOOL 1], such as uncrowded hallways and a small lunchroom, is designed to support behavioral/emotional needs of the students.
52. Class size at [SCHOOL 1] is determined based upon the needs of the individual students, but is generally four to five students. The average adult-to-student ratio is one teacher and two paraprofessionals for six to seven students. Classes are generally larger during the summer session.

## **DISCUSSION**

### **I. The Legal Framework**

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the Supreme Court stated that the congressional purpose in enacting the IDEA was the provision of a FAPE to children with disabilities. The court stated that implicit in this purpose was a requirement that the education to which access is provided is sufficient to “confer some educational benefit upon the handicapped child.” 458 U.S. at 200. The court identified the basic inquiry as twofold: first, has the education agency complied with procedures set forth in the IDEA; and second, was the child’s IEP, developed through IDEA procedures, “reasonably

calculated to enable the child to receive educational benefits?” If these two requirements are met, the requirements of IDEA have been met. 458 U.S. at 206-207.

**A. FAPE**

The identification, assessment, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2015), 34 C.F.R. Part 300 (2015); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2015); COMAR 13A.05.01. The IDEA provides that all students with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412 (2010). Courts have defined the word “appropriate” to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Clearly, no bright line test can be created to establish whether a student is progressing or could progress educationally. Rather, the decision-maker must assess the evidence to determine whether the Student’s IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306 (4th Cir. 1991).

To provide a FAPE, the student’s educational program must be tailored to the student’s particular needs and 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.

20 U.S.C.A. § 1414(d)(3)(A) (2010).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*. Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive educational benefit. The IEP is not

required to “maximize” educational benefit; it does not require the “ideal.” *A.B. ex rel B.B. v. Lawson*, 354 F.3d 315, 327, 330 (4th Cir. 2004).

Furthermore, while a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system. *Rowley*, 458 U.S. at 208. “Ultimately, the [IDEA] mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of that education to state and local school officials.” *Barnett v. Fairfax County School Board*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).<sup>5</sup>

### **B. Least restrictive environment (LRE)**

In addition to the IDEA’s requirement that a disabled child receive some educational benefit, a student must be placed in the least restrictive environment (LRE) to achieve a FAPE. Pursuant to federal statute, disabled and nondisabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5)(A) (2010). Yet, placing disabled children into regular school programs may not be appropriate for every disabled child. Consequently, 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. *Id.* ; 34 C.F.R. § 300.114(a)(2) (2013). In such a case, a FAPE might require placement of a child in a private school setting that would be fully funded by the child’s public school district. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369 (1985).

### **C. Procedure/ Predetermination**

With respect to procedural violations, the IDEA provides:

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

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<sup>5</sup> The IDEA is not intended to deprive educators of the right to apply their “professional judgment.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F. 3rd Cir. 996, 1001 (4th Cir. 1997).

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 decisionmaking [sic] process regarding the provision of a free appropriate public education to the Parents' child; or*
- (III) caused a deprivation of educational benefits.

Emphasis added. 20 U.S.C.A. § 1415(f)(3)(E)(ii) (2010).

An IEP team collaborates to develop and review an IEP. The public agency is responsible for ensuring that the team includes: the student's Parents; a regular education teacher if the student is or may participate in regular education; the child's special education teacher; and, at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and when appropriate, the child with the disability. 34 C.F.R. § 300.321(a). As to the parent's role, the Supreme Court observed, in *Rowley*:

It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving Parents and guardians a large measure of participation at every stage of the administrative process, see, *e.g.*, §§ 1415(a)–(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

*Rowley*, 458 U.S. at 205-06.

A school system's pre-determination of the services or placement in an IEP, before the IEP team meeting is held, is a deprivation of the parent's right to meaningful participation. *Nack v. Orange City School District*, 454 F.3d 604, 610 (6<sup>th</sup> Cir. 2006); *Deal v. Hamilton County Board of Education*, 392 F.3d 840, 857 (6<sup>th</sup> Cir. 2004). The school system is not permitted to make a decision before the IEP is developed. *Spielberg ex rel. Spielberg v. Henrico County*

*Public Schools*, 853 F.2d 256, 258-259 (4<sup>th</sup> Cir. 1988). There is no pre-determination if school system personnel come to an IEP meeting with open minds, and several options are discussed and considered before a final recommendation is made. *Hanson ex rel. Hanson v. Smith*, 212 F.Supp.2d 474, 486 (D.Md. 2002). There the court said,

As explained in *Doyle v. Arlington County Sch. Bd.*, 806 F.Supp. 1253, 1262 (E.D.Va.1992), if 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. The Court in *Doyle* went on to state that the holding of *Spielberg* required the school board to come to the table with an “open mind,” but did not require them to come to the IEP table with a “blank mind.” *Id.* Thus, 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. *Id.*

#### **D. Unilateral placement**

The IDEA does not require a local educational agency to pay for the cost of private education if the agency has made a FAPE available to the child and the Parents have nevertheless elected to place the child in a private school. 34 C.F.R. § 300.148(a) (2013). Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (*citing Burlington, supra*, at 373-74). Parents may recover the cost of private education only if they satisfy a two pronged test: (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parent were appropriate to the child’s needs.

#### **E. Burden of Proof**

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Accordingly, as to their claim of predetermination, the Parents have the burden of proving that MCPS had “fully made up its mind,” before the Parents became involved in the decision, to place the Student in the [SCHOOL 1] program. If they do not meet that burden, they must prove that the Student’s IEP, specifically

as it pertains to the Student's proposed placement for school year 2015-2016 in the program at [SCHOOL 1], was not reasonably calculated to provide educational benefit to the Student. If I determine that a FAPE was not afforded to the Student, then the Parents have the burden of showing that [School 2] is an appropriate non-public school placement.

## **II. Positions of the Parties**

### **A. The Parents**

The Parents' primary contention is that MCPS predetermined the Student's placement at [SCHOOL 1] and did not give meaningful consideration to the Parents' objections to that placement. Central to that claim is the Mother's report that on the morning of the August 7, 2015, IEP meeting, XXXX XXXX told her that, despite Ms. XXXX's reassurances over the previous several weeks that the IEP team would likely agree with the Mother's preference for [School 2], "XXXX [XXXX] is sending [the Student] to [School 1]."

The Parents further contend that the [SCHOOL 1] program is not an appropriate placement because that school would not guarantee that the Student would be in a small class setting at all times, and it would not implement a behavior modification program that would be effective for the Student. They also claim that there are safety problems at [SCHOOL 1] that make it an unsafe environment for the Student.

Finally, the Parents contend that [School 2] is an appropriate and beneficial placement for the Student. They point to his good adjustment after a difficult transition, his current good behavior and apparent educational progress.

## **B. MCPS**

MCPS denies that the decision to place the Student at [SCHOOL 1] was predetermined. It maintains that there was no violation of IDEA procedures and that the Parents were afforded meaningful participation in the decision-making process.

MCPS further contends that the IEP team correctly determined that the Student would have been provided a FAPE in the LRE at [SCHOOL 1]. It points out that a public school is less restrictive than a non-public school and therefore is a preferred placement under the IDEA. It contends that the IEP was reasonably calculated for the Student to achieve meaningful educational progress at [SCHOOL 1]. MCPS maintains, therefore, that under the applicable law, the analysis ends on the first test under the two-prong analysis of *Burlington* and *Carter*.

However, if the second prong of the analysis needs to be considered, MCPS contends that [School 2] would not provide the Student appropriate management of his behavioral needs and points to the fact that crisis management was employed, including permissible restraint, during the first week of the Student's attendance and that his negative behaviors at [SCHOOL 5] were far less severe than at [School 2] and did not require restraint (which was not permitted at [SCHOOL 5]).

## **III. The Student and his Educational History**

### **A. The Student**

The Student is currently almost sixteen years old and has always been in a special education setting in and out of the public school system. The Mother described severe misbehavior from an early age and recounted an incident at [School 4] when the Student was removed by the police in handcuffs at the age of ten. Both the Parents and Dr. XXXX described great difficulty in managing the Student's behavior medically, with frequent adjustments and changes in medications, some of which were not generally recommended for children, but were

tried when others failed, and some of which had to be abandoned because of unacceptable side effects, including exacerbation of severe constipation. The Student has taken as many as fifteen medications at times. Because of the difficulty of managing his symptoms, Dr. XXXX recommended consultation with Dr. XXXX in XXXX, a specialist in pediatrics and psychopharmacology. Dr. XXXX has followed the Student's progress since 2007 and ultimately recommended the change in educational programming that led to the current dispute.

The Student also has deficits in small and large motor skills, as well as hearing impairment, all of which hamper his educational progress. Additionally, he is prone to constipation which is so severe that it has resulted in two hospitalizations for several days each during his last year at [SCHOOL 5]. As noted, this problem has affected his ability to use certain drugs. It has also exacerbated the discomfort of his bus transportation to [SCHOOL 5], which amounted to three to four hours daily. [School 2], in contrast, is located only blocks from the Student's home.

## **B. Educational history**

The difficulty of managing the Student's education is evidenced by the fact that he has attended six schools since kindergarten, [School 2] being the seventh, and despite the fact that MCPS has funded five out of the last six years in non-public schools, he is still performing academically between the first and second grade levels.

Except for a brief period at the beginning of the first grade, the Student attended public school from kindergarten through the third grade. In the fourth grade, because of his severe misbehavior, MCPS moved the Student to the [School 4], a non-public school for children with emotional disabilities. While the Student's behavior improved at [School 4], the program was not designed to meet his academic needs and MCPS moved him to [SCHOOL 5] in the sixth grade. [SCHOOL 5]'s primary focus is learning disability, but despite significant modification

of the program and intense support, the Student made little academic progress.

[SCHOOL 5] is a diploma track school. It does not provide a certificate track program. The decision at the June 9, 2015 IEP meeting to change the Student to a certificate track necessitated a change in schools. After visiting [School 2] and [School 6], the Parents and Dr. XXXX identified [School 2] as their preferred school for the Student.

The Parents applied to [School 2] on June 10, 2015, immediately after the IEP meeting. According to the Mother, Ms. XXXX encouraged her to do so, on the understanding that MCPS was considering referrals to both [School 6] and [School 2], and the expectation was that he would be placed at [School 2] if he were accepted.

There was much evidence adduced with respect to the Mother's efforts to secure the Student's admission to [School 2], including requests to Dr. XXXX to amend her re-evaluation report to de-emphasize "aggression" and substitute "frustration," and to eliminate references to emotional disability (ED) upon the Mother's understanding that [School 2] would not admit the Student if he carried the ED code. (In fact, while the Student had apparently been coded ED in the past, that code does not appear in his December 23, 2014 or subsequent IEPs.) The Student was accepted on August 3, 2014 and started attending [School 2] on September 2, 2015.

#### **IV. Predetermination**

As discussed above, a school system violates the IDEA if it fails to give parents a meaningful voice in deciding matters affecting their children's education. The Parents claim that MCPS committed such a violation by "predetermining" the Student's placement at [SCHOOL 1], before it had heard from the Parents at the August 7, 2015 CIEP meeting.

The Mother testified that on December 23, 2014, the date of the IEP meeting that first addressed the possibility of changing the Student to the certificate track, XXXX XXXX told her to consider [School 6], because it was starting a certificate program, and agreed that [School 2]

was also a school to consider. As the IEP process progressed, when the Mother expressed concerns about MCPS approving placement of the Student at [School 2], Ms. XXXX reassured her that she believed MCPS would approve [School 2]. On the morning of August 7, 2015, however, before the scheduled CIEP meeting, Ms. XXXX called the Mother. The Mother testified to the following conversation:

Okay. So, she said, "I'm not supposed to be calling you, but I feel that in light of the discussion that we had the night before, the day before, that I owe it to you to call you." She said, "Everything I said yesterday about [School 2] forget. Come in ready for a fight." And I said, "Why?" . . . And she said, "XXXX [XXXX] is sending [the Student] to [School 1]."

Tr. 685-87. Ms. XXXX admits that she called the Mother that morning, but denies the conversation reported by the Mother.

About an hour after that conversation, the Mother sent an email to XXXX XXXX, Admissions Coordinator at [School 2], in which she wrote:

I called XXXX XXXX yesterday. She said don't worry at all. The County will approve [School 2]. She just called me off the record and said she'd get into trouble if XXXX [XXXX] knew she called me.

She said and I quote "come in ready for a fight"

"XXXX said that by law the County needs to consider the least restrictive option. And [School 1] will meet his [the Student's] needs. . . ."

Ex. P-82 (punctuation in original).

Ms. XXXX, by her own admission has a "really, really bad memory." Tr. 1570-71. I find it unbelievable, as MCPS suggests, that the Mother concocted this story to write to Ms. XXXX (as well as other emails in the record), in order to create a record for a possible due process hearing in the future. In any event, the conversation, even as reported by the Mother, does no more than convey Ms. XXXX's understanding of Mr. XXXX's intentions, which is not dispositive.

Assuming the Mother's email to Ms. XXXX accurately reports Mr. XXXX's statements

to Ms. XXXX (which are remarkably similar to his testimony in this case), it may be that once Ms. XXXX focused on the availability of a public certificate program for children like the Student, she realized that a non-public placement was no longer likely. In fact, as the Mother testified, that was exactly what the Mother had been told on June 8, 2015, by a former tutor of the Student, and it was that conversation that prompted the Mother to visit [SCHOOL 1] on her way to the June 9, 2015 meeting.

Mr. XXXX testified that the only conversation he had with Ms. XXXX before the August meeting was that letters that had been sent to the Parents summarizing the outcome of the June 9, 2015 meeting should be revised to reflect that referrals were sent to the non-public schools at the Parents' request. The Mother confirmed that that was part of the message conveyed by Ms. XXXX in the August 7, 2015 telephone conversation.

It is abundantly clear that Mr. XXXX believed [SCHOOL 1] offered a public school program that was designed for children like the Student and that, once the Student changed to a certificate program, non-public schools should only be considered if the [SCHOOL 1] program could not serve his needs. As he explained, with respect to discussions at the June 9, 2015 meeting,

We had a public option and I wanted her [the Mother] to have time to visit [School 1] to see [School 1] for herself . . . there was more discussion about the public option at the June – at the August 7<sup>th</sup> meeting, but that statement was made that we had to exhaust public options first at the [June] meeting.

Tr. at 1371. The Parents have not challenged this premise.

After the June 9 meeting, letters were sent to [School 2] and [School 6] indicating that MCPS was considering placing the Student in their respective programs. There was much debate at the hearing as to whether the referrals were made “at the Parents’ request;” MCPS argued fervently that they were, the Parents argued just as fervently that the various post-hearing notes that the referrals were made “at the Parents’ request” were inaccurate and self-serving.

The Parents' insistence that the referrals were not sent at their request was apparently intended to support their contention that, until just before the August 7 meeting, Ms. XXXX had consistently led them to believe that MCPS would send the Student to [School 2], so long as he was accepted. There was considerable evidence to support that contention, regardless of who requested the referrals to the non-public schools. Ms. XXXX, however, had no authority to make that decision on her own, which was understood by all concerned. Particularly in view of her admitted unfamiliarity with [SCHOOL 1], her reassurances to the Parents were ill-considered and unauthorized.

Additionally, whether the letters were sent at the specific request of the Parents at the meeting, it is clear that the Parents wished the referrals to be made and communicated that wish to MCPS. The Mother wrote to XXXX XXXX on June 4, 2004 that,

Our hope is that as a result of the meeting, the County will be sending [Student]'s file to the [School 2], [School 6], and, if appropriate, any other school with a certificate Program that the team believes we should consider.

Ex. P- 64.

Mr. XXXX's obvious attention to documenting that the referrals were made at the Parents' request, reflected in his meeting notes and his instructions to Ms. XXXX, may reflect his concern that there be a record the Parents' participation in the IEP process, possibly in anticipation of the arguments in this case. His insistence that the referrals were made *only* because the Parents requested they be made (and his testimony that he "would not have done it otherwise," tr. 1371), however, does not advance the Board's case. Rather, it suggests that Mr. XXXX was convinced, as early as June, that [SCHOOL 1] was the appropriate program for the Student, and that the IEP team would approve that placement. As he testified, MCPS was obligated to have a school placement for the Student by the beginning of the school year. The next IEP meeting was not scheduled until August 7. If the team rejected [SCHOOL 1], despite

his opinion that it was a viable option, there would be little time to find another school for the Student to attend when school opened at the end of August. Thus, unless the choice of [SCHOOL 1] was a foregone conclusion, there was good reason for MCPS to send the referrals to the non-public schools in June, regardless of whether the Parents requested it.

If Mr. XXXX had refused to send the referrals, he would have impeded the process, possibly forcing a decision in favor of [SCHOOL 1], regardless of the team's recommendation. The fact is, however, that the referrals were made and both non-public schools accepted the Student prior to the August 7, 2015 meeting. As a result, three schools were available for consideration by the IEP team. Thus, despite his apparent conviction that the appropriate placement was at [SCHOOL 1], by sending the referrals, Mr. XXXX preserved the ability of the IEP team to consider [School 2] and [School 6] as well as [SCHOOL 1].

XXXX XXXX, Principal of [SCHOOL 1], participated in the August meeting, along with a school psychologist (not Dr. XXXX, who had done the Student's most recent evaluation), a speech and language pathologist, and the Parents. Dr. XXXX participated by telephone. By Mr. XXXX's account, and without contradiction from the Parents, there was a robust discussion about [School 2] and [SCHOOL 1] – although [School 6] was also available, the Parents preferred [School 2] and there is no further mention of [School 6]. The Mother confirmed that she was given an opportunity to explain why she felt [School 2], and not [SCHOOL 1], was the right school for the Student, that each participant at the meeting was given an opportunity to speak ("we went around the room," tr. at 693), including Dr. XXXX, and that all of the participants, except Dr. XXXX and the Parents, expressly agreed with the choice of [SCHOOL 1]. According to the Mother, after all of the participants had expressed their opinions, the speech and language pathologist said she had a question for Dr. XXXX. Mr. XXXX responded, "No more questions," but when the Mother protested, that person was permitted to ask Dr. XXXX

why he objected to [SCHOOL 1]. According to the Mother, Dr. XXXX responded and there was no further discussion. Tr. at 694-95. The Mother further testified that when she specifically asked Ms. XXXX what she thought of the decision, Ms. XXXX replied that she had confidence in Ms. XXXX and therefore supported the recommendation. Ms. XXXX testified that she was not familiar with [SCHOOL 1] before the meeting; she had not visited the school in six or seven years, and she never thought of [SCHOOL 1] until Mr. XXXX brought it up, but she said that, after listening to Ms. XXXX, she agreed that the [SCHOOL 1] program was appropriate for the Student.

Thus, according to the Mother's testimony, there was a full opportunity for the Parents to present their case to the IEP team. Although Mr. XXXX apparently believed before the August 7, 2015 meeting that [SCHOOL 1] offered an appropriate program for the Student, I find no evidence that he coerced or intimidated or, other than the conversation with Ms. XXXX, even discussed his opinion with the rest of the team before the meeting. While, as Mr. XXXX testified, he could have, as the MCPS representative, made the decision if the team was unable to reach consensus, that is not what happened. Clearly, there was no consensus, but all of the MCPS participants, by the Mother's account, supported the decision. Therefore, even if Mr. XXXX came to the meeting convinced of the appropriateness of [SCHOOL 1], it was the majority of the team, not Mr. XXXX, who made the decision.

I do not believe that the outcome of that meeting was "predetermined" as that term is used in the case law. Mr. XXXX denied discussing [SCHOOL 1] with the team before the meeting, but even if he did, there is no evidence whatever that he overrode the independent judgment of the other members of the team. The Parents did not claim that he hampered their ability to present their concerns. There is no evidence that Dr. XXXX was inhibited from presenting his opinions; the Mother testified to the contrary. Additionally, by sending the

referral to [School 2] in time for the Student to be admitted prior to the August meeting, MCPS assured that the Parents were afforded the opportunity for meaningful consideration of that school.

Unlike *Speilberg*, the Parents were advised in June that [SCHOOL 1] was under consideration and were advised and given an opportunity to visit that school *before* the issue of placement was presented to the IEP team. The record is replete with evidence that the Mother fully understood that, as a public option, [SCHOOL 1] was to be considered first, before non-public options, as required by the IDEA. What the evidence reflects is that the team, with the exception of the Parents, but including Ms. XXXX, was persuaded by the presentation at the August 7, 2015 meeting that [SCHOOL 1] could implement the Student's IEP in the LRE, again as required by the IDEA.<sup>6</sup> The team was not persuaded by the Parents' objections - which I will discuss further - and made its decision accordingly.

I also note that school system representatives are not required to come to an IEP meeting with "blank minds." *Hanson, supra*. Although the cases speak to keeping an "open mind," it makes no sense to invalidate a team decision because a participant with a strong opinion in advance of the meeting was not dissuaded from that opinion, so long as the Parents were given a meaningful opportunity to participate in the decision-making process. It is clear that the Parents were given that opportunity here.

I therefore reject the Parents' contention that MCPS violated the IDEA by "predetermining" to send the Student to [SCHOOL 1]. I find that the Parents were not denied meaningful participation in the IEP process, but that MCPS conducted an IEP meeting in accordance with the IDEA, and that the decision to send the Student to [SCHOOL 1] was made by the IEP team, not by Mr. XXXX individually, after full consideration of the Parents' concerns

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<sup>6</sup> The Parents did not dispute that, even though [SCHOOL 1] served only disabled students, it was a less restrictive environment than a non-public school.

as well as the specific components of the [SCHOOL 1] program.

## **V. The [SCHOOL 1] Program**

Ms. XXXX testified at length at the hearing and I, like the Mother<sup>7</sup> and Ms. XXXX, was impressed with her competence, her knowledgeability and her commitment to the [SCHOOL 1] program. Although Ms. XXXX did not speak to the Student's teachers at [SCHOOL 5] or seek to meet the Student or observe him in class, she testified that she had spent several hours reviewing his entire school record the week before the August meeting. She responded to the Parents' concerns about class size and teaching methods by explaining that the classes they and Dr. XXXX had observed were summer school classes, not typical of instruction during the school year. She was quite candid that she could not guarantee that the Student would never be in an instructional group of more than four or five students, but that group size was tailored to the students' needs and that most instruction was in small groups. Exceptions were instances in which a larger group was better suited to a particular need, for example, to permit more opportunity for socializing and to prepare students for dealing with larger groups of people outside of school. She also noted that occasionally scheduling resulted in larger classes.

Ms. XXXX testified that [SCHOOL 1] was able to implement the Student's IEP. As noted, she indicated that class size is determined based upon the Student's needs and that [SCHOOL 1] could limit the size of the Student's instructional group as needed. She described the vocational program, extracurricular activities including cooperative programs involving students from other schools, and social activities, such as dances. She explained the school's approach to behavioral challenges and expressed the view that, based upon the Student's record, the school could address his behavioral needs. Although her knowledge of the Student came only from the paper record, she felt that the [SCHOOL 1] certificate program was well-suited to

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<sup>7</sup> The Mother testified that she "liked [Ms. XXXX] very much," and that she had a more favorable impression of [SCHOOL 1] after she had talked to Ms. XXXX. Tr. at 666.

the Student's profile and that the school could provide him a FAPE in the LRE. That the IEP team was persuaded by her presentation does not surprise me, based upon my own observations.

Mr. XXXX testified that, with the Student's transition from the diploma to the certificate track, [SCHOOL 1] provided an option that was not previously available. He testified that he was very familiar with [SCHOOL 1] and that the school has built-in mental health supports, a very strong vocational program, as well as "real school kinds of activities, prom, plays, chorus." Tr. at 1390-91. He felt the Student would fit in somewhere in the middle of the class in terms of social and cognitive abilities, at neither the highest nor lowest end of the scale reflected by the student body.

The Parents' objection to [SCHOOL 1] included two components. First, they presented the testimony of Dr. XXXX XXXX, an expert in special education, who testified that [SCHOOL 1] could not meet the Student's behavioral needs. Secondly, they argued that MCPS had done a poor job in educating the Student up to the ninth grade and therefore its competence to determine his current placement was questionable.

Dr. XXXX's strong opinion was that the Student has failed to make meaningful academic progress largely because his negative behaviors interfere with his access to learning. She testified that [SCHOOL 1] was not able to meet his behavioral needs because it did not collect data with sufficient frequency to anticipate negative behaviors and to respond promptly. Her knowledge of [SCHOOL 1] was based upon experience over a period of about three years with another student who she said had similar behavior issues that [SCHOOL 1] was not able to successfully address and, as a result, that student was transferred to a non-public school sometime last summer. She also relied on documents supplied by MCPS that reflected staff suggestions for more intensive data collection, which she said supported her opinion that the data collection conducted at [SCHOOL 1] was insufficient to inform responses that would result in

behavior modification. It was her opinion that the Student requires the intensive data collection conducted at [School 2], so that ABA methods could be implemented. Dr. XXXX explained that ABA is “the process of collecting data with a high enough frequency that allows for changes in the programming as necessary.” Tr. at 97-98. As noted, [School 2] collects data at five minute intervals.

While I do not doubt that the Student has ongoing behavioral needs, I find Dr. XXXX’s conclusion that the Student cannot make meaningful academic progress unless data is collected with something like the frequency employed at [School 2] to be contrary to the evidence.

In the first place, the re-evaluation done by Dr. XXXX, which all parties agreed was competent and valid, reflects that the Student’s cognitive abilities are in the “lower extreme” range on every scale of the KABC-II. Dr. XXXX also concluded that the Student’s academic performance is commensurate with these scores. Therefore, the objective evidence is that the Student’s poor academic progress is the result of cognitive deficits, not behavioral interference. Additionally, while poor behavior may, at times, interfere with learning, the evidence is that such interfering behaviors are sporadic, rather than frequent, and that the Student’s behavior has improved since the fourth grade, when he was transferred to [School 4], but his academic performance has remained essentially flat.

Additionally, a comparison of the behavior history at [SCHOOL 5] with the behavior at [School 2] shows that the Student exhibited behavior which was significantly more severe and of longer duration during the first two months at [School 2] than during his last year at [SCHOOL 5]. On September 8, 2015, a week after he started at [School 2], the Student became non-compliant with directions. The incident escalated to the point that he became aggressive and restraint procedures were initiated. He was not able to return to class for twenty-five minutes. The incident on September 8, 2015 was more severe than anything reported by [SCHOOL 5],

both in terms of the duration and the need to employ restraint to preserve the safety of all involved.

On September 21, 2015, the Student's behavior again resulted in restraint and removal from class for twenty-five minutes. On October 29, 2015, the Student was removed from class for twelve minutes. He was disruptive and non-compliant for periods of twenty-five and fifty minutes, including fifteen minutes during which he became aggressive. On November 5, 2015, he was again non-compliant and aggressive for twenty-five minutes. No Data Sheets were supplied after November 17, 2015, and the Mother and Dr. XXXX, the director of the [School 2] program, testified that his behavior has improved, that he is happy at school and making academic progress.

The [SCHOOL 5] Bridge to Good Behavior documents (Ex. P-47) reflect that, during the Student's eighth grade, when the Student was non-compliant or oppositional, the incidents lasted for intervals of five minutes or less, as compared to periods of twenty-five minutes or more at [School 2]. None of the reports to the Parents of misbehavior indicate that the Student had to be removed from the classroom during his last year at [SCHOOL 5] and most of the incidents involved name-calling and other inappropriate language, albeit some threatening language, but only two incidents in which the Student actually hit another Student or staff. It is worth noting that the Student's December 2013 FBA/BIP states that, "[the Student] has repeatedly been removed from class due to aggressive and disruptive behavior during instruction." That language was removed from an otherwise similar paragraph in the February /March 2015 FBA/BIP. This is consistent with Dr. XXXX's comment to the IEP team at the December 23, 2014 IEP meeting that "the last few (6) months have been very good for [the Student]." Bd. Ex. 15 at 39.

A review of data collected by [School 2], from September through November 17, 2015, reflects behavior not notably different from behavior observed at [SCHOOL 5], in addition to the

serious incidents discussed. In both settings, the Student ignored directions or resisted compliance from time to time. When frustrated, he occasionally became aggressive. The testimony that the Student's behavior improved after the first two months at [School 2] is not persuasive that the Student requires the [School 2] approach to behavior modification in order to succeed. The [SCHOOL 5] record also shows that, while there were a number of reported incidents during the first six months of the eighth grade, there were none reported for the rest of the year.

Thus, neither the behavior record at [SCHOOL 5] nor the cognitive testing support Dr. XXXX's conclusion that the Student's negative behavior was a significant contributor to his poor academic achievement. Additionally, the evidence shows that the Student's behavior has improved over the years, apparently without the [School 2] approach to behavior modification. The Mother confirmed this, although she attributed the improvement to better medical management, but the school records also confirm this. The Student was able to move from [School 4] to [SCHOOL 5], and [SCHOOL 5] was willing to keep him for the high school program; nonetheless his academic performance did not improve.

Although Dr. XXXX reviewed the Student's records from [SCHOOL 5], she made no inquiry with respect to the behavior modification approach used there and, while it is quite clear that the Student's behavior had improved by the end of the eighth grade, there is no evidence that [SCHOOL 5] kept the type of data that [School 2] does. Ms. XXXX spoke at length about the use of data at [SCHOOL 1] to adjust approaches to poor behavior. There was no specific evidence that these strategies could not be effective in dealing with the Student's behavior.<sup>8</sup> I am thus not persuaded that only the [School 2] approach will serve the Student's needs, or that [SCHOOL 1] could not successfully deal with the Student's negative behaviors.

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<sup>8</sup> Dr. XXXX testified that [SCHOOL 1] was unable to deal with what she described as her other client's similar behavior. Obviously, no two students are the same, and failure to succeed with one student does not, in itself, prove that the school would be unable to succeed with another.

It is a fair inference that the Student's move to a less demanding academic program has had a positive effect on his behavior. There was much evidence that the Student's frustration with his inability to perform the tasks demanded of him was a frequent antecedent to his negative behaviors (a fact apparently acknowledged by the Mother in her unsuccessful effort to have Dr. XXXX change her report to substitute "frustration" for "aggression"). The Student is now in an academic environment more appropriate to his cognitive abilities. It is not surprising that he is happier and that his negative behaviors have diminished.

While Dr. XXXX's experience with another student gave her considerable exposure to the methods used at [SCHOOL 1], her only specific criticism of the school's program was that data-keeping was inadequate to bring about behavior modification. After what she described as three years of fairly intense involvement with [SCHOOL 1], including yearly class observations, participation in multiple IEP meetings, and regular participation in development of her client's IEP, she offered no criticism of teaching methods or class size, the two issues that most concerned the Mother.

The Parents also claim that [SCHOOL 1] is not safe for the Student, especially considering his small stature. They rely on a January 15, 2015 letter to school staff written by Ms. XXXX to address what she described as "ongoing safety issues at [School 1]." Ex. P-139. The letter lists a number of steps taken to address these concerns, including a temporary hold on new admissions until additional supports were in place. That hold was lifted in mid-February 2015, six months before the Student would have started school at [SCHOOL 1]. Ms. XXXX testified that an additional social worker was hired and an additional quiet room provided. There was no evidence that the school was not safe for the Student as of September 2015.

The Parents point to the Student's minimal academic progress and his most recent levels of performance at the first or second grade levels as evidence that MCPS has failed to properly

program for the Student in the past, and argue that its most recent IEP should, therefore, not be trusted to do so going forward. There is no question that the Student's lack of academic progress is a major concern. It is also difficult to understand why it took a recommendation from Dr. XXXX, who is not an educator, for MCPS to revisit the Student's assignment to the diploma track. XXXX XXXX, the Student's sixth and eighth grade teacher at [SCHOOL 5], testified that she had concerns in the sixth grade as to the Student's ability to access the standard curriculum, even with extensive modifications and intensive support, but said she did not suggest abandoning the diploma track because all approaches had not been exhausted. Nonetheless, even when her concerns were heightened in the eighth grade, she made no suggestion for revisiting the Student's academic programming.

On the other hand, it is noteworthy that testing relied on by Dr. XXXX in 2007 indicated that the Student had low average intelligence, as compared to the "low extreme" levels of the most recent testing. Dr. XXXX offered no criticism of the Student's educational programming until December 2014, the beginning of eighth grade. Even Dr. XXXX was reluctant to criticize MCPS's choice of [School 4] in the fourth grade, four years after the testing referenced by Dr. XXXX, also because of the Student's higher test scores at that time. Her criticism was that his continuing poor academic progress was not adequately addressed and that [SCHOOL 5] was not an appropriate school for him because he was so far below grade level when he entered.

Dr. XXXX, however, who appears to know the Student, and certainly his psychological profile, almost as well as the Student's Parents, complimented MCPS effusively at the December 23, 2014 IEP meeting on the Student's progress at [SCHOOL 5]. According to the notes of that meeting, he said, "[T]he school [[SCHOOL 5]] is doing great by [the Student]. . . . The last few (6) months have been very good for [the Student]. [SCHOOL 5] has done an excellent job with him and [Dr. XXXX] thanked the staff very much." Ex. Bd 15 at 39.

The Parents argued persuasively that the Student's profile is complicated. It is clear that MCPS attempted to address his needs throughout his school life, and paid for non-public school for five years in an effort to do so. While it is equally clear that the various programs have not resulted in academic progress, there has been acknowledged progress in addressing interfering behaviors over the years. It is a fair inference that MCPS previously shared Dr. XXXX's belief, albeit in error, that this would lead to academic progress.

Additionally, although Mr. XXXX has been involved in the CIEP process since the beginning, the team that recommended [SCHOOL 1] for the 2015-2016 school year is not the same team that oversaw his programming in previous years. Assuming the decisions to place and keep the Student at [SCHOOL 5] were not valid, such errors are not probative of the validity or lack thereof of the decision to place the Student in the [SCHOOL 1] program. In any event, my decision is based principally on the failure of the Parents to demonstrate that [SCHOOL 1] was not reasonably likely to provide a FAPE to the Student, not on any generalized deference to the expertise of the MCPS witnesses.

The Parents' witnesses emphasized the apparent success the Student is enjoying at [School 2], and I have no reason to doubt their reports. Success at [School 2] is immaterial, however, to the question of whether the IEP in question was reasonably calculated to lead to educational progress and the recommended placement was appropriate for the Student. I have concluded that the IEP and placement offered by MCPS were reasonably calculated to provide the Student a FAPE. Accordingly, an analysis pursuant the second prong of *Burlington* and *Carter* is inapplicable; the issue of whether the Parents' proposed placement is appropriate or beneficial does not need to be addressed in this decision.

In sum, I conclude that the Parents have failed to establish that they were denied a meaningful role in the IEP process or that the Student's 2015-2016 IEP, with placement at

[SCHOOL 1], would not have provided the Student a FAPE. I will therefore deny their request for reimbursement of the costs of their unilateral placement of the Student at [School 2].

In view of the intensive effort by MCPS to persuade me that the Mother was not a credible witness, was improperly motivated and engaged in improper behavior in the course of the process that led to this hearing, I feel obliged to note that my decision is in no way based upon such contentions. To the contrary, I found the Mother, both by demeanor and the substance of her testimony, to be candid and credible. None of the MCPS witnesses described her as anything but honorable and cooperative with the IEP process. If, as MCPS claims, her efforts to secure her son's admission to [School 2] were overly aggressive or manipulative of that process, they were pursued with the full knowledge and participation of the admissions director and had no bearing on the IEP process, other than to secure the Student's admission in time for consideration at the August meeting. My decision is based upon my conclusion that the evidence does not establish the elements of the Parents' claims, not upon any negative impression of the integrity or behavior of the Mother.

## **VI. Discovery Disputes**

Discovery disputes persisted throughout the hearing in this matter. In addition to an inordinate amount of time spent during the hearing, the Parents filed a Motion to Compel, which I granted in part on December 14, 2015, and were required to recall a witness to address [SCHOOL 1] documents that were not produced timely.

Ultimately, MCPS produced about an inch and a half of paper in response to requests for documents related to [SCHOOL 1]. Ms. XXXX confirmed that no other documents responsive to the requests existed. In addition, one of the Parents' requests for documents was for all notes written by MCPS participants in the various IEP meetings related to the events that transpired at those meetings. No such notes were produced, but on December 3, 2015, the sixth day of

hearing, Mr. XXXX testified not only that he had notes of the August 7, 2015 CIEP meeting, but that he had them with him. In addition to engendering a heated and lengthy discussion about why they had not been produced, this resulted in an interruption of the hearing while the notes, one page front and back, were copied.

The Parents have asked that I consider the failure of MCPS to cooperate in discovery in rendering my decision. While I find MCPS's response to discovery unacceptable and without excuse, in the long run, the documents in issue were produced and were of minimal significance.

My decision with respect to the events that transpired at the August 7, 2015 meeting is based upon the Mother's testimony, not Mr. XXXX's notes, and the content of those notes does no more than confirm Mr. XXXX's testimony with respect to the June referral letters. As discussed above, I did not consider that evidence to be helpful to MCPS.

The Parents were permitted to address all issues related to the [SCHOOL 1] documents, although they were required to recall Dr. XXXX after the documents were produced. Dr. XXXX testified, in essence, that the documents confirmed the opinions she had previously expressed. I do not believe the efficacy of the Parents' case was diminished as a result of MCPS's failure to timely produce those documents.

In short, the failure of MCPS to appropriately respond to the Parents' discovery requests has not resulted in any advantage to MCPS.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parents have failed to establish that MCPS denied them a meaningful opportunity to participated in the IEP process. 20 U.S.C.A. § 1415(f)(3)(E)(ii) (2010); *Hanson ex rel. Hanson v. Smith*, 212 F.Supp.2d 474, 486 (D.Md. 2002).

I further conclude that the Parents have failed to establish that the IEP offered by MCPS

was not reasonably calculated to offer the Student a meaningful educational benefit for the 2015-2016 school year. 20 U.S.C.A. §§ 1400- 1482 (2010 & Supp. 2015).

I further conclude that the IEP and placement proposed by MCPS for the 2015-2016 school year is reasonably calculated to offer the Student a FAPE in the LRE. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993).

As I have concluded that the Student would have been provided a FAPE in the LRE at [SCHOOL 1], the Parents are not entitled to receive reimbursement as a result of their unilateral placement of the Student at [School 2] for the 2015-2016 school year. 34 C.F.R. § 300.148 (2015).

**ORDER**

I **ORDER** that the Parents' request to have their expenses reimbursed for the costs of the Student's attendance at the [School 2] for the 2015-2016 school year is **DENIED**.

February 12, 2016  
Date Decision Issued

NEP/emh

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Nancy E. Paige  
Administrative Law Judge

## **REVIEW RIGHTS**

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2014). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number. The Office of Administrative Hearings is not a party to any review process.