

**XXXX XXXX,**

**STUDENT**

**v.**

**BALTIMORE CITY**

**PUBLIC SCHOOLS**

**\* BEFORE MARY SHOCK,**

**\* AN ADMINISTRATIVE LAW JUDGE**

**\* OF THE MARYLAND OFFICE**

**\* OF ADMINISTRATIVE HEARINGS**

**\* OAH No.: MSDE-CITY-OT-17-30146**

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

**DECISION**

STATEMENT OF THE CASE  
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ORDER

**STATEMENT OF THE CASE**

On September 22, 2017, the Parents, on behalf of the Student, filed a Due Process Complaint with the Office of Administrative Hearings (OAH). The Parents allege Baltimore City Public Schools (BCPS) violated the Individuals with Disabilities Education Act (IDEA or Act) by denying the Student a free appropriate public education for the 2017-2018 school year. 20 U.S.C.A. § 1415(f)(1)(A) (2017).<sup>1</sup>

On October 30, 2017, I held a telephone prehearing conference. Wayne Steedman, Esquire, represented the Parents. Darnell Henderson, Esquire, represented BCPS. By agreement of the parties, I held the hearing at OAH in Hunt Valley, Maryland, on December 8, 2017, December 11 through 13, 2017, and December 15, 2017. Mr. Steedman represented the Parents and Mr. Henderson represented BCPS.

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<sup>1</sup> U.S.C.A. is an abbreviation for United States Code Annotated. All references to the U.S.C.A. are to the 2017 volume.

On October 18, 2017, after a resolution meeting, the parties agreed in writing they could not reach an agreement. As a result, a decision was due on December 1, 2017. Because the hearing dates requested by the parties fell more than forty-five days after the triggering events described in the federal regulations, the parties requested an extension of time until January 12, 2018, for me to issue a decision. 34 C.F.R. §§ 300.510(b)-(c), 300.515(a), (c) (2017);<sup>2</sup> Md. Code Ann., Educ. § 8-413(h) (Supp. 2017).

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A.; § 1415(f); 34 C.F.R. § 300.511(a); Educ. § 8-413(e)(1); 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; the Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES**

The issues are:

1. Was the Student's Individualized Education Plan (IEP) for the 2017-2018 school year with placement in the general education classroom for twenty-seven hours a week and five and one-half hours outside the general education classroom at [School 1] ([School 1]) reasonably calculated to provide the Student a free appropriate public education (FAPE)?
2. If not, is non-public placement at the [School 2] appropriate?

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<sup>2</sup> C.F.R. is an abbreviation for Code of Federal Regulations. All references to the C.F.R. are to the 2017 volume.

## SUMMARY OF THE EVIDENCE

### Exhibits

I admitted the following exhibits for the Parents:

- P-1 Not offered
- P-2 Email correspondence between Parents and [School 3], August 28, 2012 to April 29, 2013
- P-3 Email correspondence between Parents and [School 4], October 25, 2013 to May 30, 2014
- P-4 Neuropsychological Evaluation, XXXX XXXX, Ph.D., June 11 and 19, 2013
- P-4A Pediatric Occupation Therapy, XXXX XXXX, ORT/L, February 10, 2014
- P-5 Psychological Evaluation, XXXX XXXX, Ph.D., May 7 and 22, 2014
- P-6 Not offered
- P-7 [School 2], Personalized Education Plan, May 5, 2016
- P-8 Letter from Parents to XXXX XXXX, Principal, [School 1], June 23, 2015
- P-9 Letter from Parents to XXXX XXXX, Principal, [School 1], August 29, 2016
- P-10 Statement, XXXX XXXX, Ph.D., October 13, 2016
- P-11 Occupational Therapy Assessment, XXXX XXXX, M.S., ORT/L, October 27, 2016
- P-12 Speech Language Assessment Report, XXXX XXXX, M.S., CCC-SLP, November 4 and 7, 2016
- P-13 Educational Achievement Assessment Report, XXXX XXXX, Special Educator, November 3, 2016
- P-14 Psychological Report, XXXX XXXX, M.A., Certified School Psychologist, November 14, 2016
- P-15 Letter from XXXX XXXX, M.D., to XXXX XXXX, M.A., December 2, 2016
- P-16 IEP, December 12, 2016
- P-17 Not offered
- P-18 Not offered
- P-19 Not offered
- P-20 [School 2], Counseling Services Annual Progress Report, April 6, 2017
- P-21 Not offered
- P-22 Neuropsychological Evaluation, XXXX XXXX, Ph.D., March 8 and 23, 2017
- P-23 Not offered
- P-24 [School 2], Personalized Education Plan, April 27, 2017
- P-24A [School 2], Progress Notes, October 25, 2017
- P-25 [School 2], Report, 2016-2017 School Year
- P-26 Not offered
- P-27 IEP, June 2, 2017

- P-28 Not offered
- P-29 Not offered
- P-30 XXXX XXXX, Ph.D., Curriculum Vitae
- P-31 XXXX XXXX, Ph.D., Curriculum Vitae
- P-32 XXXX XXXX, M.Ed., Curriculum Vitae
- P-33 XXXX XXXX, M.Ed., Curriculum Vitae
- P-34 XXXX XXXX, OTR/L, Curriculum Vitae
- P-35 Not offered
- P-36 Not offered
- P-37 Not offered
- P-38 Excluded
- P-39 Email from Parents to XXXX XXXX, [School 1], July 30, 2017

I admitted the following exhibits for BCPS:

- BCPS-1 Not offered
- BCPS-2 BCPS's Response to the Due Process Complaint, October 3, 2017
- BCPS-3 Request for Mediation/Due Process Hearing, September 22, 2017
- BCPS-4 Not offered
- BCPS-5 Psychological Report, XXXX XXXX, M.A., Certified School Psychologist, November 14, 2016
- BCPS-6 Psychological Report, XXXX XXXX, M.A., Certified School Psychologist, November 14, 2016
- BCPS-7 Occupational Therapy Assessment, XXXX XXXX, M.S., ORT/L, October 27, 2016
- BCPS-8 Educational Achievement Assessment Report, XXXX XXXX, Special Educator, November 3, 2016
- BCPS-9 Speech Language Assessment Report, XXXX XXXX, M.S. CCC-SLP, November 4 and 7, 2016
- BCPS-10 Not offered
- BCPS-11 BCPS Contact Log, September 13, 2016 to January 20, 2017
- BCPS-12 IEP, June 2, 2017
- BCPS-13 IEP, December 12, 2016
- BCPS-14 Prior Written Notice, June 2, 2017
- BCPS-15 Prior Written Notice, December 20, 2016
- BCPS-16 Prior Written Notice, December 12, 2016
- BCPS-17 Prior Written Notice, November 21, 2016
- BCPS-18 Prior Written Notice, October 14, 2016
- BCPS-19 Not offered
- BCPS-20 Not offered
- BCPS-21 Not offered
- BCPS-22 Letter from Parents to XXXX XXXX, [School 1], January 6, 2017
- BCPS-23 IEP Parental Input Statement, December 16, 2016
- BCPS-24 Letter from XXXX XXXX, M.D., to XXXX XXXX, M.A., December 2, 2016
- BCPS-25 Statement, XXXX XXXX, Ph.D., October 13, 2016

- BCPS-26 IEP Team Meeting Attendance Sheet, June 2, 2017
- BCPS-27 Personalized Education Plan, April 27, 2017
- BCPS-28 Not offered
- BCPS-29 Not offered
- BCPS-30 Receipt of Parental Rights Notice, December 12, 2016
- BCPS-31 Notice and Consent for Assessment, October 14, 2016
- BCPS-32 BCPS Child Find Referral Notification, October 4, 2016
- BCPS-33 Not offered
- BCPS-34 XXXX XXXX, M.S., OTR/L, Curriculum Vitae
- BCPS-35 XXXX XXXX, Curriculum Vitae
- BCPS-36 XXXX XXXX, M.Ed., Curriculum Vitae
- BCPS-37 Not offered
- BCPS-38 XXXX XXXX, M.A., Certified School Psychologist, Curriculum Vitae
- BCPS-39 XXXX XXXX, Ed.D, Curriculum Vitae
- BCPS-40 XXXX XXXX, M.S., CCC-SLP, Curriculum Vitae
- BCPS-41 Not Offered
- BCPS-42 [School 2], Accident/Incident/Crisis Report Forms,  
November 18, 2015 to May 25, 2017
- BCPS-43 [School 2], Student Schedule, 2017-2018 School Year

### Testimony

The following individuals testified for the Parents:

1. Student's mother;
2. XXXX XXXX, Ph.D., accepted as an expert in Neuropsychology;
3. XXXX XXXX, M.Ed., accepted as an expert in Special Education;
4. XXXX XXXX, M.Ed., Educational Director, [School 2], accepted as an expert in Special Education;
5. XXXX XXXX, Ph.D., accepted as an expert in Psychology with an emphasis in anxiety disorders;
6. XXXX XXXX, OTR/L, Head, Upper School, [School 2], accepted as an expert in Occupational Therapy (OT) with an emphasis in sensory integration; and
7. Student's father.

The following individuals testified for BCPS:

1. XXXX XXXX, M.A., Nationally Certified School Psychologist, accepted as an expert in School Psychology, Special Education, and IEP development and implementation as it relates to social/emotional behaviors and cognition;
2. XXXX XXXX, M.S., ORT/L, accepted as an expert in OT and IEP development and implementation as it relates to OT;
3. XXXX XXXX, M.S., CCC-SLP, accepted as an expert in Speech and Language Pathology (SLP), conducting SLP assessments, and IEP development and implementation as it relates to SLP;

4. XXXX XXXX, M.Ed., Principal, [School 1], accepted as an expert in Education and School Administration;
5. XXXX XXXX, IEP Chair, [School 1], accepted as an expert in Special Education and IEP process management; and
6. XXXX XXXX, Ed.D., accepted as an expert in Special Education, the IEP process, and IEP implementation.

### **STIPULATIONS**

The parties stipulated to the following facts:

1. The Student was born on XXXX, 2006.
2. The Student attended kindergarten and first grade at [School 3] for the 2011-2012 and the 2012-2013 school years.
3. The Student attended second grade at [School 4] for the 2013-2014 school year.
4. The Student is currently in the sixth grade at [School 2] ([School 2]).
5. The Student has been enrolled at the [School 2] from the fall 2014, for the third grade, to the present.
6. At all times relevant, the Parents have privately placed the Student at [School 2].
7. The Student has never attended BCPS.
8. BCPS has identified the Student with a disability under the IDEA with the disability code Multiple Disabilities (Emotional Disability and Other Health Impairment).
9. The most recent IEP and the subject of the hearing is dated June 2, 2017.
10. The Student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD).
11. The Student is diagnosed with Obsessive-Compulsive Disorder (OCD).
12. The Student is diagnosed with Generalized Anxiety Disorder.
13. The Student has weaknesses in Math Calculation.
14. The Student reads at or above grade level.

## **FINDINGS OF FACT**

I find the following facts by a preponderance of the evidence:

1. During the 2011-2012 and 2012-2013 school years at [School 3], the Student was in a class of approximately fifteen students. He would blurt out noises and repeat what teachers or other students said. On one occasion he slammed a locker door repeatedly and slammed his body against the locker. He would slap his hand on the desk over and over. He yelled and screamed when other students were excited and clapping. He would get out of his seat. In art class on January 11, 2013, he required teacher redirection over twenty times.

2. During the 2013-2014 school year at [School 4], the Student was in a class of approximately fifteen students. He was disrespectful to staff and students. He pulled his shirt over his head and made noises. He was fidgety. He distracted the other students. He would have to leave the classroom and go the library where it was quiet and he could sit in a beanbag chair.

3. The Student has a sensory integration disorder with dysfunctions in the areas of vision, hearing, and balance and motion.

4. The Student is prescribed medication to treat the symptoms of Generalized Anxiety Disorder and ADHD. He has been under the care of a psychiatrist since 2012.

5. The Student's disabilities affect his education in the academic areas of cognition, math calculation, speech and language pragmatics, and written language mechanics.

6. The Student's disabilities affect his education in emotional/behavioral areas and in the physical area of sensory processing.

7. The Student is pursuing a high school diploma.

8. The Student falls in the average range in reading, phonemic awareness and reading fluency skills, compared to his peers at his age and grade level. His reading comprehension is above average.
9. The Student falls in the low-average range in written language mechanics skills and in the average range in written language expression skills.
10. The Student performs below grade level in math calculation skills. He performs in the average range in math problem solving skills.
11. The Student has difficulty solving social problems. He becomes upset when others do not understand what he is trying to say and he is not always able to rephrase.
12. The Student has difficulty coping with distracting noises and paying attention in class.
13. The Student's cognitive problem-solving ability falls within the average range, with strong verbal reasoning skills. His visual spatial reasoning abilities are a significant and unusual weakness. He has difficulty interpreting information in graphs, tables, and other visual formats. His ability to retain visual information is less well developed than his auditory working memory.
14. The Student can act without thinking, not wait his turn, interrupt, or speak out of turn. He has an aggressive response pattern, he argues when denied his way, loses his temper, teases, bullies others, and annoys others on purpose.
15. The Student worries, appears tense, and is easily stressed. He is often pessimistic, irritable, or negative. He cries easily.
16. The Student's fine motor skills fall in the average range.



17. In sensory processing, the Student is typical in social participation, planning and ideas. He has difficulty with touch and body awareness, showing signs of distress in touching certain textures or in reacting to accidental touch; he is over-responsive to this stimuli. He frequently spills contents of a container when opening it because he is unaware of the amount of force required. He uses increased pressure when writing. Rather than walk, he engages in sensory-seeking behaviors such as running, hopping, or bouncing to get adequate input to his muscles.

18. The Student experiences definite dysfunction in vision, hearing, and balance and motion. He is distracted by nearby visual stimuli and frequently complains about lighting or bright sunlight. He makes noises, speaks too loudly, and is distressed by loud sounds, singing by others, and musical instruments. He rocks, fidgets, and runs his hands along the wall.

19. The Student's educational disabilities affect his ability to regulate his sensory energy levels, respond to frustration, organize materials, and approach tasks. He requires access to calming and alerting activities for improved sensory processing, counseling to increase generalization of coping skills in the classroom setting, and supplementary aids and modifications in the school setting.

20. On June 2, 2017, the IEP team recommended the following supplementary aids and services to be implemented in a general education classroom with twenty-to-twenty-five students:

- Type writing assignments;
- Monitor independent work to ensure pace is appropriate and see if Student is able to persist and work through frustration;
- Spelling assistance – frequently misspelled word list, spell check, teacher monitor and assist in correcting;
- Calculator;
- Alternate way for Student to demonstrate learning, when stops working on task, staff will prompt the Student to select alternate way to demonstrate understanding.

For example, if asked to work in a group of four peers, he can work independently or with teacher support;

- Assistance with organization;
- Frequent or immediate feedback on level of alertness, praise;
- Repeat or paraphrase information, due to attention difficulty;
- Allow use of manipulatives for anxiety;
- Word bank to reinforce vocabulary and when extended written work is required;
- Break down assignments into smaller units for deficit in storing visual information;
- Provide directions in a clear, concise manner to manage frustration;
- Offer the Student a task when he is required to wait to address impulse control;
- Use positive, concrete reinforcements; for example, a token board to earn an edible item;
- Manipulative and sensory activities to promote listening and focusing skills;
- Frequent changes in activities, opportunities for movement to address restlessness;
- Frequent eye contact and proximity control, teacher proximity;
- Encourage and reinforce appropriate behavior for social skills and self-regulation;
- Encourage the Student to ask for assistance to build independence in solving social and academic problems;
- Implement strategies to initiate and sustain attention;
- Advance preparation for schedule changes;
- Social skills training, interpreting nonverbal language, tolerating noise and distractions, communication after conflict or disagreement;
- Access to alternative seating, alternative to standard classroom chairs;
- Preferential seating, seated away from distractions and close to instruction, use floor, chair, or ball; and
- Occupational therapist consult for sensory strategies, seat cushion, resistance band on chair legs to kick while seated, comfortable seat in noisy environments, chewing gum, distraction-free area facing away from cluttered boards, distance from peers, and headphones.

21. The June 2, 2017 IEP provides the Student will receive one hour a day in a special education classroom for mathematics.

22. The June 2, 2017 IEP provides the Student will receive counseling outside the general education setting. The IEP also states counseling will be provided in the general education setting.

23. The June 2, 2017 IEP does not provide a time or duration for the OT consult.

24. The supplementary aids and services section of the June 2, 2017 IEP provides the Student will receive direct instruction in social skills; but the IEP does not have goals for this area.

25. [School 1] is a combined elementary and middle school with over 1,000 students and general education classrooms with twenty-to-twenty-five students.

26. To advance on grade level, the Student requires special education supports throughout the school day, integrated social skills training, and OT and counseling supports.

27. To advance on grade level the Student requires a small classroom, with fewer than ten to eleven students, with controlled lighting and reduced noise. He requires a distraction-free area, facing away from cluttered boards and distance from his peers. He requires intense, frequent, and immediate attention from teachers and staff.

28. The Parents attended BCPS IEP team meetings on October 14, 2016, November 21, 2016, December 12, 2016, and June 2, 2017. The team discussed the Student's placement, including placement in a smaller classroom with fewer students.

29. The June 2, 2017 prior written notice documents that the team considered Dr. XXXX's assessment, [School 2] counselling progress reports, and the [School 2]'s Personalized Education Plan (PEP).

30. By email dated July 30, 2017, the Parents notified BCPS they would not accept the IEP, were placing the Student at [School 2], and were seeking reimbursement for the placement.

31. [School 2] provides an arts-based, multi-sensory, integrated program for students of average intelligence with specific learning disabilities and other health impairments.

32. [School 2] is certified by MSDE as a special education school. The school's enrollment is 135 students.

33. When the Student came to [School 2] he was below grade level in reading comprehension. He is currently on grade level.

34. For the 2015-2016 school year at [School 2], the Student was in a class of ten children. He and other boys taunted a girl student by calling her a cow and making a mooing sound. The Student also took packets of chewing gum from other students' strategies bins.

35. On May 23, 2017, during the 2016-2017 school year, the Student threw a chair when a teacher instructed him to turn the volume down on his iPad. [School 2] suspended the Student for one day. On that same date, the Student called out at the start of a lesson. When the teacher redirected the Student, he yelled "screw you."

36. For the 2017-2018 school year at [School 2], the Student is in a class of four students. He has goals in written language content, written language mechanics, math calculation, social/emotional behavior, and social interaction skills. His behavior has improved.

37. For the 2017-2018 school year at [School 2], the Student receives instructional supports including extended time and frequent and immediate feedback. His program modifications include integrated related services in speech and language, OT, and social work. Those services are provided in the classroom at least one time a week and are available as needed. The Student receives social and behavior supports throughout the school day, including strategies for verbal and non-verbal positive reinforcement. He has frequent planned breaks and a weekly social skills group with peers and a counselor. He has access to alternative seating such as the floor, a ball chair, or a hokki stool.

38. All the classrooms at [School 2] have windows and natural light. The teachers have control over the lighting. They are able to turn off overhead lights and use floor and desk lamps if needed.

39. At [School 2], the Student has an individually designed fitness program devised by an OT. He jumps, performs resistive work, experiences deep pressure, and moves at an intense rate.

## **DISCUSSION**

### **1. Applicable Law**

Under the IDEA, every disabled child has the right to receive a FAPE. A FAPE is defined as special education and related services provided at public expense, under public supervision, that meet the standards of the state educational agency, include appropriate education, and are provided in conformity with the child's IEP. 20 U.S.C.A. § 1401(9). Special education means specially designed instruction, *id.* § 1401(29), and specially designed instruction means instruction that adapts the content, methodology, or delivery of instruction to ensure a student's access to the general education curriculum. 34 C.F.R. § 300.39(b)(3).

An IEP is a written statement for a student that includes the following: 1) the student's present levels of academic achievement and functional performance; 2) how the student's disability affects the student's involvement and progress in the general educational curriculum; 3) measurable goals; 4) a description of how progress will be measured; 5) the special education, related services, and supplemental aids and services the educational agency will provide the student; 6) an explanation of the extent to which the student will not participate in the regular classroom; and 7) the appropriate accommodations that are necessary to measure the student's academic achievement and functional performance. 20 U.S.C.A. § 1414(d)(1)(A).

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, the Supreme Court noted that state and local educational agencies are required to meet both the procedural and substantive requirements of the IDEA. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). The procedural rules include requirements that parents have the opportunity to participate in IEP team meetings and that the school system provide the parents prior written notice of the action the agency has decided to take. In the prior written notice, the educational agency must include a description of the options the IEP team considered but rejected and the reason those options were rejected. 20 U.S.C.A. § 1415(b)(1), (c)(1). In a hearing where the parents allege a procedural violation, the hearing officer may find a child did not receive a FAPE only if the procedural inadequacy impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. § 1415(f)(3)(E)(ii).

The substantive requirements of the Act mandate, as stated above, that state and local education agencies make a FAPE available to children with disabilities. 20 U.S.C.A. § 1412(a)(1). Turning to the definition of a FAPE to determine if a school offers the student an appropriate program, the *Rowley* Court found, because special education and related services must meet the state's educational standards, the scope of the benefit required by the Act is an IEP reasonably calculated to permit the student to meet the state's educational standards; generally, to pass from grade-to-grade on grade level. *Rowley*, 458 U.S. at 204; 20 U.S.C.A. § 1401(9).

The Supreme Court further refined the meaning of a FAPE in a recent case, holding that for an educational agency to meet its substantive obligation under the IDEA a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988 (2017).

In addition to the IDEA's requirement that a disabled student receive educational benefit, the Act mandates the student be placed in the "least restrictive environment." This requirement means to the extent possible, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5)(A).

Finally, if a school district fails to offer a student a FAPE, it must fund private placement if the placement is appropriate. *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 369 (1985). To be appropriate, the private placement and program must be reasonably calculated to provide the student an educational benefit. *Carter v. Florence Cty. Sch. Dist. Four*, 950 F.2d 156, 163 (4th Cir. 1991), *aff'd*, *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

The burden of proof in an administrative hearing is by a preponderance of the evidence and, under the IDEA, is placed on the party seeking relief. Md. Code Ann., State Gov't § 10-217 (2014); *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parents have the burden of proving both that the Student's IEP was not reasonably calculated to provide educational benefit and that non-public placement at [School 2] is appropriate.

## **2. Parties' Positions**

The parties agree on many points. The Student is able to achieve on grade level. The BCPS 2016 assessments are valid and the findings correct. The Student's present levels of academic achievement and functional performance (present levels of performance) as set out in the June 2, 2017, IEP are accurate. The supplementary aids and services identified in the IEP are appropriate. (P-27.)

The Parents raise issues concerning their request for an evaluation in June 2015, their participation in the 2016 and 2017 IEP team meetings, and BCPS's prior written notices. The Parents also present issues related to counseling services identified in the IEP, and they argue

additional goals are required for an appropriate educational plan. BCPS raises the matter of the Parents' notice to BCPS that they were rejecting the June 2, 2017, IEP and enrolling the Student in [School 2]. However, the crucial controversy in this case relates to the severity of the Student's disabilities, whether he requires specialized instruction throughout the day and integrated related services, and whether he has the ability to function in a general education classroom with twenty or more students.

The Parents maintain the Student's anxiety disorder is pervasive and his sensory processing deficits are severe. They assert those conditions must be effectively managed for the Student to learn and benefit from his educational program. Specifically, they claim that he requires special instruction throughout the day in all subjects, small class sizes, an integrated social skills curriculum, and integrated related services.

BCPS maintains the Student's anxiety and sensory processing deficits can be adequately addressed with the supplementary aids and services identified in the IEP. BCPS asserts that those aids and services will permit the Student to participate in the general education classroom with his non-disabled peers. BCPS also argues that placement at [School 2] is too restrictive and the Student lacks the opportunity to interact with his non-disabled peers in that setting.

It is undisputed that except for math calculation, the Student is currently performing on grade level in all academic areas, thereby meeting the educational standards of the MSDE, the state educational agency. As a result, in accordance with *Rowley*, BCPS is required to offer the Student an IEP reasonably calculated to permit him to continue to meet those standards; generally, to pass from grade-to-grade and achieve on grade level. Also, in accordance with *Andrew F.*, BCPS is required to offer the Student an IEP reasonably calculated to allow him to make progress appropriate in light of his circumstances. For the reasons discussed below, I find



the Parents have met their burden of proof to show the June 2, 2017, IEP is not reasonably calculated to provide the Student a FAPE and that the Student's placement at [School 2] is appropriate.

### **3. Procedural Violations**

#### **a. Parental Participation in IEP Team Meetings and Prior Written Notice**

BCPS held IEP team meetings on October 14, 2016, November 21, 2016, December 12, 2016, and June 2, 2017, and provided prior written notice to the Parents following each meeting. (BCPS-14 to BCPS-18.) The Parents first allege BCPS predetermined the Student's placement because the IEP team did not revise the IEP after the team reviewed Dr. XXXX's assessment, and as a result the Parents were prevented from fully participating in the process. I find the Parents failed to prove this point.

The June 2, 2017, prior written notice documents that the team considered Dr. XXXX's assessment, [School 2] counselling progress reports, and [School 2]'s PEP. The team changed the disability code to multiple disabilities, added supplementary aids and services, and updated the Student's math goal. The team also considered whether the Student should attend the general education math class or, if the Student came to [School 1], whether he might need a small class, particularly in the subject area in which he had most difficulty. (BCPS-14.) Although the team continued to call for placement in the general education classroom, there is no evidence the team predetermined the matter. The Parents failed to point to any specific evidence that BCPS failed to consider that would mandate a different placement or demonstrated predetermination.

Second, the Parents maintain that in the two notices addressing the development of the IEP on December 12, 2016 and June 2, 2017, BCPS failed to note the Parents' request for full-time placement in a small classroom, outside the general education setting, and to state why

the team rejected that option. (BCPS-14, to BCPS-16.) 20 U.S.C.A. § 1415(c)(1). Although BCPS failed to identify the team's rejection of a smaller class size in the prior written notices, the Parents' failed to present evidence to prove the error impeded the Student's right to a FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. § 1415(f)(3)(E)(ii). The parties do not dispute that the IEP team discussed the Parents' request for a smaller class size, and the Parents knew the IEP team was recommending placement in a general education classroom of twenty-to-twenty-five students. The Parents failed to identify an adverse effect due to the omission of those discussions in the prior written notices.

**b. Parental Notice of Private Placement**

If the local educational agency makes a FAPE available to a child and the parents elect to place the child in a private school, the agency is not required to pay for the cost of that education. 34 C.F.R. § 300.148(a). If the local educational agency fails to make a FAPE available, parents may enroll their child in private school without the consent or referral of the local educational agency and seek reimbursement for the placement. § 300.148(c). A court or hearing officer may limit reimbursement if the parents fail to inform the IEP team either at the most recent team meeting, or in writing at least ten business days before removal of the child from public school, that they are rejecting the placement proposed by the public agency, stating their concerns, and declaring their intent to enroll the child in a private school at public expense. § 300.148(d)(1).

BCPS presented evidence indicating the Parents failed to provide proper notice. The Parents entered into evidence a July 30, 2017, email to XXXX XXXX, IEP Chair, stating they disagreed with the IEP and they would be enrolling the Student in [School 2] for the 2017-2018 school year. They stated their concerns and requested funding for the placement. (P-39.)

Ms. XXXX testified she did not receive the email, although she checks her email through the summer months when she is not working. The Parents offered the email in their rebuttal case and had not disclosed the document to BCPS five business days before the hearing. 34 C.F.R. § 300.512(a)(3). The Student's mother testified she did not know why. The Student's father testified he wrote and sent the email on July 30, 2017.

BCPS did not argue in its closing statement that I should limit reimbursement based on failure of the Parents to provide notice. I address the issue because the parties present significant testimony concerning notice. I accept the father's testimony and, although not conclusive, find it significant the email was sent during the summer when Ms. XXXX was not working and when correspondence might be more easily overlooked. As a result, I find the evidence fails to show the Parents did not to provide notice and reimbursement should be limited as a result. 34 C.F.R. § 300.148(d)(1).

**c. Parents' Request for Evaluation**

A local educational agency is required to conduct an initial evaluation within sixty days of receiving parental consent for the evaluation. *Id.* § 300.301(c). The Parents offered a June 23, 2015, letter to XXXX XXXX, Principal of [School 1], to show they requested an initial evaluation at that time. (P-8.) Mr. XXXX testified he did not receive the letter. There is no evidence the Parents followed up with BCPS when they did not receive a response. In their closing statement, the Parents did not argue or request a remedy based on the alleged delay in evaluating the Student. Again, I address the issue because the parties presented significant testimony concerning the issue. Having considered the evidence and the fact that the Parents did not follow up with BCPS, I find the Parents failed to prove a substantive procedural violation of IDEA based on BCPS's alleged failure to timely evaluate the Student.

#### **4. Offer of a FAPE**

##### **a. State Educational Standards**

As stated above, except for math calculation, the Student is currently achieving on grade level in academics, thereby meeting the standards of MSDE, the state educational agency. As a result, in accordance with *Rowley*, BCPS is required to offer the Student an IEP reasonably calculated to permit him to continue to meet those standards; generally, to pass from grade-to-grade and achieve on grade level.

##### **b. Educational Disabilities**

The parties agree the Student has multiple disabilities, including an anxiety disorder, OCD, and ADHD. The parties further agree the Student's disabilities affect him in the following skills areas: 1) math calculation; 2) written language mechanics; 3) speech and language pragmatics; 4) cognition; 5) social/emotional behavior; and 6) sensory processing. (P-27.)

The disagreement concerns the extent of the Student's disabilities, particularly the severity of the Student's anxiety and sensory integration deficits, and the educational program he requires as a result. As discussed below, I find the Parents have shown the Student's anxiety and sensory integration disorders are severe and significantly impact his ability to progress in the general curriculum.

XXXX XXXX, Ph.D., testified for the Parents and was accepted as an expert in Neuropsychology. Dr. XXXX received his doctorate in Clinical Psychology in 1983. He then completed a Clinical Neuropsychology Post-Doctoral Training Program through the XXXX University. He has worked as a Clinical Psychologist since 1984. His professional affiliations include, among others, the National Academy of Neuropsychology and Fellow, Maryland

Psychological Association. He has co-authored articles published, for example, in the [publication], most recently in 2013. (P-30.)

Dr. XXXX explained that neuropsychology deals with neurodevelopmental disorders, such as autism, and with neurocognitive disorders, which might result from a traumatic brain injury or a seizure disorder. He evaluated the Student in 2013 and 2017. (P-4, P-22.) Dr. XXXX noted that in 2013 the Student's cognitive functioning was good and his academic ability was average-to-high-average. The Student had difficulty with executive functioning skills. The Student had received OT services addressing visual-motor integration and sensory processing needs. (P-4 at 10-11.)

Dr. XXXX reevaluated the Student in March 2017. He found the Student's developmental trajectory problematic. The Student's anxiety had increased and he exhibited symptoms of OCD. Dr. XXXX stated OCD causes recurring intrusive thoughts. The Student engages in behavior, such as stomping his feet repetitively, to deal with the thoughts. The OCD also causes the Student to become stuck on an idea and he becomes oppositional when someone asks him to move off the point. Dr. XXXX noted the BCPS's OT assessment showing the Student has sensory processing issues. He stated the Student has difficulty pulling in sights, sounds, and touch and also has problems with his balance. He becomes overwhelmed by sound and touch and, as a result, overreacts.

Dr. XXXX considered the results of the Achenbach Child Behavior Checklist as part of his assessment. Those results showed areas of concern across all behaviors including anxiety, depression, social problems, thought problems, attention problems, rule-breaking, and aggressive behavior. (P-22 at 8.) Dr. XXXX also considered the Autism Diagnostic Observation Schedule and the Autism Spectrum Rating Scales, which indicated autism. (P-22 at 12-13.) Further, Dr.

XXXX found the Student performed less well on the social perception test in 2017 than in 2013, which was consistent with Parent and teacher reports of problems with social skills. (P-22 at 11.)

Dr. XXXX found the Student exhibited some features of an autism spectrum disorder. He showed rigid, repetitive behavior, and when overwhelmed his social skills deteriorated.

However, Dr. XXXX testified he is deferring the diagnosis of autism until the Student's OCD and anxiety disorder are under control. He explained his reasoning in his report. The Student has difficulty interacting with peers and adults, but he can be friendly, kind, and empathetic.

Although he has difficulty making new friends, he has maintained friendships over time. This pattern, along with formal language test results, suggest the Student's emotional, sensory, and executive functioning problems, rather than core deficits in social pragmatic skills, account for most of his relationship problems. For these reasons, Dr. XXXX has not diagnosed the Student with an autism spectrum disorder. (P-22 at 16.)

Dr. XXXX noted the Student's anxiety disorder dates back to pre-school. The disorder results in fears and worries that interfere with the Student's functioning. The Student has a heightened sense of irritability. Dr. XXXX found it significant that the symptoms of the Student's anxiety disorder have stayed with him despite persistent intervention including medication, therapy, and school and home supports. The Student is prescribed XXXX for anxiety and XXXX for ADHD. (P-22 at 2.) Dr. XXXX finds the Student's anxiety disorder severe because the Student has shown a pattern of improvement-relapse-improvement; the cycle means the condition is severe. In Dr. XXXX's opinion, the severe anxiety has an educational impact. A state of anxiety causes a cognitive drain and the Student focuses on his fears and worries and not the lesson.

In Dr. XXXX's opinion ADHD has an adverse educational impact on the Student. ADHD is another layer of cognitive difficulty causing inattention and impulsivity. The Student is unable to think through consequences, and he says and does things that are upsetting to other students and teachers. His executive functioning ability is low.

In Dr. XXXX's opinion OCD has a negative educational impact on the Student. He becomes stuck, and if he is obsessing about a mistake and finds a situation unfair and cannot move off of that thought, he cannot attend to teaching.

In Dr. XXXX's opinion the Student's sensory integration processing deficits have an adverse educational impact. The Student's has difficulty processing visual and auditory stimuli, and difficulty with his balance. He cannot process loud noise or integrate lights. He becomes upset and stuck.

Dr. XXXX testified that, overall, the Student's had not progressed developmentally as he would have expected based on his evaluation in 2013. The Student's conditions have not stabilized despite treatment, including higher doses of medication and counseling. Because he is not responding positively to treatment, the Student now requires intensive intervention.

XXXX XXXX, Ph.D., testified for the Parents and was accepted as an expert in Psychology with an emphasis on anxiety disorders. Dr. XXXX has a doctorate in Clinical Psychology and, in June 2013, completed a Post-Doctoral Fellowship in Child and Family Therapy. She has worked as a clinician since 2006. She has co-authored peer-reviewed articles published in journals such as [journal] in 2016, [publication] in 2013, and [publication] in 2012. (P-31.)

Dr. XXXX testified she primarily treats children and teenagers for anxiety and stress. She has treated the Student and his family since May 2016. She sees the Student alone every other

week and the family every alternate week for a forty-five-to-fifty-minute session. She treats the Student for anxiety, works on his social skills, and addresses his ability to regulate his emotions. Dr. XXXX testified she accepts the diagnoses made by XXXX XXXX, Ph.D., in 2014. (P-5.) Dr. XXXX concluded the Student had an autism spectrum disorder, ADHD, and an unspecified anxiety disorder. Notwithstanding Dr. XXXX's opinion to the contrary, in Dr. XXXX's opinion, the Student has an autism spectrum disorder. Dr. XXXX bases her opinion on the Student's struggle to understand social relations, his perseverative behavior (meaning he becomes rigid or stuck on a thought), and his lack of awareness of the reaction of those around him to his behavior.

Dr. XXXX also addressed the Student's sensory processing deficits. She testified the Student becomes irate, oppositional, and disrespectful when he is unable to manage stimuli. She stated one disruptive child can throw the Student off, and that he would be overwhelmed and have difficulty just staying in a large classroom. In Dr. XXXX's opinion, the Student's anxiety disorder, autism spectrum disorder, and ADHD have an impact on the Student's ability to access an education program without supports.

XXXX XXXX, M.Ed., testified for the Parents and was accepted as an expert in Special Education. She was a special education teacher from 1994 to 1999. She received a Master of Education with a concentration in reading, from XXXX University, [location], in 1999. She has worked as an educational and behavioral consultant since 2002. (P-32.)

Ms. XXXX observed the Student three times at [School 2]. In March 2017, during the [Club], the Student had a difficult time; he called out and wanted to be heard. He moved around in his chair and went in and out of the classroom. During music, with ten students, he was better



and sat at the side wearing headphones. In a smaller group called XXXX, he performed even better. In a class of four students, the Student's sensory issues and anxiety were more regulated.

In April 2017, Ms. XXXX observed the Student in a writing class with ten students in three groups. The Student was with two other children and was engrossed in the topic. He could not tolerate other students' responses if they were taking too long. The teacher had a visual system to cue the Student; she gave him a colored block. Writing on the computer, the Student composed an elaborate story, but he read what he was writing aloud and kept looking over to see what other students were doing.

XXXX XXXX, M.Ed., Education Director for [School 2], testified for the Parents and was accepted as an expert in Special Education. Ms. XXXX has observed the Student in school. He is a perfectionist, has difficulty working in groups, acts impulsively, and is distractible and distracting. He makes noises and becomes upset when others make noise. When required to stand in line, the Student stands back and protects his own personal space. If someone touches him unexpectedly, he might turn around and yell. The light bothers him. When the lights in his fifth grade classroom were too bright, the teacher turned off the lights and allowed only the natural lights from the classroom windows.

XXXX XXXX, OTR/L, testified for the Parents and was accepted as an expert in OT with an emphasis in sensory integration. Mr. XXXX is the Head of Middle School at [School 2]. He described the Student's behavior. The Student is affected by light and textures. He is over-responsive to touch. If another student bumps into him he may cry out, complain, or shove. His reaction is outside the acceptable range. He can also take a disrespectful tone. His behavior is destructive.

Further, Mr. XXXX testified the Student's movement needs are atypical. He rocks in his chair and chews gum. He is unable to handle a visually rich environment like things on the wall and the lighting. He has a difficult time filtering out the stimuli. Although he has improved, the Student's sensory-seeking behavior still causes him to be disruptive; he rocks and needs space. He also requires immediate attention and feedback. He becomes anxious quickly, and if staff does not attend he becomes immediately stuck and his behavior deteriorates. On cross-examination, Mr. XXXX stated the Student is able to get back on track quickly once he applies sensory strategies; for example, if he chews gum or jumps on the trampoline.

The Parents presented evidence documenting the Student's treatment with a psychiatrist, XXXX XXXX, M.D., since 2012, for Generalized Anxiety Disorder, OCD, and ADHD. (P-15.)

The Student also was evaluated by an OT in February 2014. (P-4A.) The OT identified numerous sensory issues including: tactile - becoming fearful or anxious with unexpected touch; proprioceptive – seeking out jumping, bumping, crashing activities; vestibular – losing balance easily; auditory – becoming distracted by sounds not normally noticed by others, making noise for noise sake; visual – sensitivity to bright lights; auditory language processing dysfunction – difficulty filtering out sounds; emotional – difficulty accepting changes in routine, easily frustrated, impulsive; self-regulation – excessive irritability; and internal regulation – severe mood swings, easily overstimulated.

XXXX XXXX, M.A., Certified School Psychologist, testified for BCPS and was accepted as an expert in School Psychology and Special Education as it relates to IEP development and implementation in the areas of social/emotional and cognitive skills. Ms. XXXX received an MA in School Psychology from XXXX University in 2007. She received a

Graduate Certificate in School Administration and Supervision from XXXX University in 2017. She has been a School Psychologist at [School 1] since 2007. (BCPS-38.)

Ms. XXXX conducted a psychological assessment of the Student and observed him in the classroom at [School 2]. (BCPS-5.) At school, the Student was in a classroom of six with a special educator and an assistant. The Student was fidgeting with a cup, but raised his hand to respond to questions. He also played with putty. When he stood to put pressure on the putty, the assistant asked him to use his putty under the table. The Student complied. When called on to respond, the Student said he needed to think and rested his head in his arms. The class then took a break. The teacher reported to Ms. XXXX that the Student's behavior was representative of what she expected from the Student. (BCPS-5 at 4-5.)

As part of her assessment, Ms. XXXX completed the Revised Children's Manifest Anxiety Scale, the Student's self-reporting measure. The Student's overall functioning was no more problematic than that of most of his peers. (BCPS-5 at 10.) On the Children's Depression Inventory, also a self-reporting measure, the extent and severity of the Student's depressive symptoms were in the average range. (BCPS-5 at 10-11.) Ms. XXXX testified the scales were consistent with her classroom observations. Ms. XXXX also administered the Behavior Assessment System for Children with reports provided by the Student's mother and teachers. On that measure, the Student's functioning was markedly discrepant from the behavior of his peers in the areas of hyperactivity, aggression, anxiety, and depression. (BCPS-5 at 9.)

Ms. XXXX testified the Student's was progressing in school. Based on the Student's present levels of performance, she has reason to believe the Student would be successful at [School 1] in the general education classroom. He was progressing at [School 2] and testing showed he had problem-solving abilities. The supplemental aids and services identified in the

IEP address the Student's needs while allowing him independence. Based on the Student's strengths and abilities, he will make further progress. Ms. XXXX testified she was aware of the sensory processing concerns and agreed they would interfere with the Student's success in a large classroom, but, in Ms. XXXX's opinion, the supplemental aids will minimize the impact of the Student's deficits in that area.

Ms. XXXX writes in her assessment that the Student presents with an emotional condition which has been present to a marked degree for a long period of time, given elevated scores related to a general pervasive mood of unhappiness and inappropriate types of behavior under normal circumstances, including an aggressive response pattern, arguing, losing his temper, teasing, bullying others, and annoying others on purpose. The rating scales indicate elevated anxiety, and the Student almost always worries about making mistakes. He often appears tense and is easily stressed. The Student's depression often causes him to be pessimistic, irritable, or negative. He can cry easily. The Student's conditions result in social impairment. (BCPS-5 at 12.)

XXXX XXXX, M.S., OTR/L, testified for BCPS and was accepted as an expert in OT and IEP development and implementation in the area of OT. She received a Master of Science from XXXX College in 2005. She has worked at the XXXX Medical Center and the XXXX. She has been employed by BCPS since 2008. (BCPS-34.)

Ms. XXXX did not conduct the OT assessment for BCPS; XXXX XXXX, M.S., OTR/L performed the testing. (BCPS-7.) Ms. XXXX reviewed the assessment. She testified the results of the assessment show that, in sensory processing, the Student exhibits a definite dysfunction in the areas of vision, hearing, and balance and motion. He showed some problems in touch and

body awareness. He was typical in the areas of social participation and planning and ideas. On average, the Student exhibited a definite dysfunction in the area of sensory processing.

Ms. XXXX concluded in her report that the Student demonstrates sensory processing difficulties which may impact his academic performance. He has difficulty maintaining attention to tasks, especially if in close proximity to his classmates and in an environment with harsh lighting and significant visual stimuli. He may be a distraction to others if he is demonstrating sensory-seeking behaviors such as stomping, rocking, fidgeting, or humming. (BCPS-7 at 7.)

The evidence demonstrates the Student's anxiety and sensory processing deficits are severe. Dr. XXXX provided the most cogent explanation for his opinion on the severity of the Student's educational disabilities. Particularly significant is his opinion that the Student has not progressed developmentally as he would have expected. Dr. XXXX based his opinion, in part, on the social perception test scores that decreased between 2013 and 2017. He also considered the results of the Achenbach Child Behavior Checklist as part of his assessment. The measure showed areas of concern across all behaviors including anxiety, depression, social problems, thought problems, attention problems, rule-breaking, and aggressive behavior. (P-22 at 8.)

Dr. XXXX further relied on the Student's pattern of improvement-relapse-improvement despite extensive interventions, including medication, counselling, and school and home supports. Those interventions have not had the desired effect of stabilizing the Student's conditions. Dr. XXXX's testimony is supported by the evidence that the Student has been treated by Dr. XXXX since 2012, and continues under the psychiatrist's care. (P-15.)

Also, Dr. XXXX was careful in his diagnosis of the Student's conditions and explained why a diagnosis of autism spectrum disorder was not appropriate at this time, notwithstanding

scales indicating such a disorder. As a result, I found Dr. XXXX's opinion relating to the nature and extent of the Student's anxiety disorder and sensory processing deficits persuasive.

Dr. XXXX testimony describing the Student behavior supports Dr. XXXX's conclusion that the Student's disabilities are severe.

As stated above, Ms. XXXX noted that, on the self-reported anxiety and depression scales the Student's results were within the normal or average range. However, on the Behavioral Assessment System, his functioning was markedly discrepant from the behavior of his peers in the areas of hyperactivity, aggression, anxiety, and depression. While Ms. XXXX testified the scales were consistent with her classroom observations, she did not otherwise reconcile the conflict between the Student's self-report and the Student's mother's and teachers' ratings.

Because Dr. XXXX presented the most direct and persuasive testimony related to the severity of the Student's anxiety, I find the Parents established the disorder is severe. As noted above, I found significant Dr. XXXX's testimony that the Student's disabilities, including anxiety, cycle through improvement-relapse-improvement. The Student takes medication for anxiety and receives counselling and has done so for several years. Despite these interventions, his anxiety persists. As a result, notwithstanding the anxiety and depression measure in the average range, the evidence demonstrates the Student anxiety is severe.

With regard to the Student's sensory processing deficits, I find the Parents presented sufficient evidence to prove those deficits are severe. Ms. XXXX did not testify, but the Sensory Processing Measure she administered shows the Student has definite dysfunction in sensory processing. (BCPS-7 at 3.) There is no evidence in the record contradicting Ms. XXXX's testing results, and corroborating the results are Ms. XXXX's, Ms. XXXX's and Mr. XXXX's descriptions of the Student's behavior caused by an atypical sensitivity to light, noise, and touch.

Also, Ms. XXXX's conclusions are supported by the Student's 2014 OT assessment. Ms. XXXX testified she would not rely on the document because the therapist did not sign the report. (P-4A.) Ms. XXXX is correct; the OT did not sign the assessment. The Parents did not explain the omission of the signature. However, the report is on professional letterhead and is dated. Consequently, I find the report sufficiently reliable and give it weight as supporting evidence. The evidence demonstrates the Student's sensory processing deficits are severe and impact his ability to benefit from his educational program.

**c. Present Levels of Performance**

The parties did not dispute the present levels of performance as stated in the IEP. (P-27.) The parties' disagreement concerns the educational program the Student requires as the result of his performance.

**d. Special Considerations and Accommodations - Supplementary Aids, Services, Program Modifications and Supports**

The parties agree the supplementary aids and services identified in the IEP are appropriate for the Student. (P-27.) The parties' disagreement concerns whether BCPS is able to implement those supplementary aids and services in a general education classroom with twenty-to-twenty-five students. I will discuss that issue below.

**e. Goals**

**i. Math Calculation**

The parties agree the goal for math calculation is appropriate.

**ii. Speech and Language Pragmatics**

The Parents maintain the IEP must include a goal for speech and language pragmatics. BCPS maintains the Student's deficit in this area is properly addressed through supplementary aids and services.

The present level of performance states that the Student may need more instruction and practice in determining solutions to social problems. The Student is able to identify a problem, but has difficulty thinking through a variety of ways to resolve the problem. He has difficulty coping with noise. He becomes upset when others do not understand him and he is unable to express himself in a different way. He does not always understand tone of voice and sarcasm. (P-27 at 11.)

The June 2, 2017, IEP addresses social skills in the supplementary aids and services section and states the Student requires support and direct instruction in social skills and peer interactions. He requires training in interpreting nonverbal language, tolerating noise and distractions, and repairing social communications. (P-27 at 30.) Additionally, the Student has a social/emotional goal with an objective related to social speech. The objective provides that the Student will practice and role-play typical adult and peer interactions using a variety of communication styles, and making predictions about how word choice, tone, and delivery will affect the listener's emotional state. (P-27 at 38.)

Ms. XXXX testified on cross-examination that not all deficits must have a goal and objectives. Some deficits can be address through supplemental aids and services. However, in Ms. XXXX's opinion, because speech and language pragmatics is identified as an area of need, the Student requires a goal and direct instruction in that area.

XXXX XXXX, M.S., Speech Language Pathologist, testified for BCPS and was accepted as an expert in SLP, conducting SLP assessments, and IEP development. Ms. XXXX received a Master of Science from XXXX University, [location], in SLP and Audiology in 2006. She has worked for BCPS since 2004. (BCPS-40.)



Ms. XXXX explained that pragmatic language means social language. She performed an assessment of the Student's speech/language abilities. She found the Student's performance in the average range, with some difficulty making introductions and adjusting to conversation when topics change. (BCPS-9 at 2.) Ms. XXXX testified that during her observation, the Student was not perseverative and was able to adjust and shift during conversation. She stated the Student does not require a goal and direct instruction by a SLP in pragmatic language. She stated other professionals, such as social workers, are able to provide pragmatic language instruction. In Ms. XXXX's expert opinion, the Student's pragmatic language deficits are appropriately addressed through the supplemental aids and services identified in the IEP. Teachers and staff in the general education classroom are able to implement those measures.

Conversely, in her report, Ms. XXXX recommended some strategies that might be helpful to teachers and staff working with the Student, including providing direct instruction in the rules of conversation involving taking turns, maintaining eye contact, topic maintenance, tact and politeness markers, appropriate word choice, and topic choice. (BCPS-9 at 6.) Additionally, although the IEP identified social skills training as a supplementary aid and service, the IEP also includes a statement that the Student will need support and "direct instruction" with social skills and peer interactions, specifically when working through and following social situations and problems. The support and direct instruction should address repairing social communication with peers and adults when experiencing a conflict or disagreement. (P-27 at 30.) BCPS did not explain why direct instruction is noted as the manner in which staff will provide support when there is no other provision for direct instruction in speech and language pragmatics. Finally, I find no provision in the IEP clearly addressing introductions and changes in topic, the two areas of difficulty Ms. XXXX identified.

The Parents proved the Student requires a goal and direct instruction in speech and language pragmatics based on the following factors. First, speech and language pragmatics is identified as an area of need for the Student. Second, the IEP calls for direct instruction in social skills and peer interactions, and training in interpreting nonverbal language, tolerating noise and distractions, and repairing social communications. Third, Ms. XXXX initially found that the Student requires direct instruction in the rules of conversation involving taking turns, appropriate word choice, and topic choice. Fourth, it is not clear if the supplementary aids and services address introductions and adjusting to conversation when topics change; the two areas where Ms. XXXX found the Student exhibited difficulties.

However, the evidence does not show the Student requires direct instruction provided by a SLP. The Parents did not offer evidence to contradict Ms. XXXX's testimony that other professionals are able to provide pragmatic language instruction. As a result, the evidence demonstrates the Student requires a goal and direct instruction in speech and language pragmatics, but not by a SLP.

### **iii. Written Language Mechanics**

The supplementary aids and services provided in the June 2, 2017 IEP state the Student will have the instructional support of spelling assistance. He will have access to a "frequently misspelled list" and spell check on the word processor. His teachers will monitor and review his work to look for spelling errors and assist in correcting. He will have a word bank to assist during extended writing tasks. (P-27 at 23-24, 26.) The Parents maintain the IEP must include a written language mechanics goal addressing spelling. BCPS maintains the Student's deficit in this area is properly addressed through supplementary aids and services.

Ms. XXXX testified the Student requires direct instruction in spelling rather than just an aid or service; the word bank will not help. She testified the Student requires a written language goal to address spelling and close the gap. If there is no gap to close, then the area should not be identified as an area of need in the IEP.

XXXX XXXX, IEP Chair, testified for BCPS and was accepted as an expert in Special Education and management of the IEP process. Ms. XXXX received a Bachelor of Arts in Elementary and Special Education in 1999, and a Master's equivalency in 2009. She has worked for BCPS since 1999, as a special education teacher from 1999 to 2009, and as an IEP Chair from 2009 to the present. (BCPS-35.)

Ms. XXXX testified that because the Student's reading skills fell within the average range, spelling could be addressed through supplementary aids and services rather than through direct instruction and without identifying a goal in that area.

XXXX XXXX, Special Educator, conducted an Educational Assessment for BCPS. (BCPS-8.) She did not testify at the hearing. Ms. XXXX found the Student's spelling was in the low-average range. She writes that while the Student was able to spell the initial items easily and accurately, spelling of later items reflected a need for further skill development. (*Id.* at 5.)

Ms. XXXX failed to sufficiently explain the basis of her opinion that the Student requires a spelling goal. She stated the Student requires a goal in spelling because he shows a deficit in that area. While she presents a good point, she failed to explain why the supplementary aids and services are insufficient. She did not say why those aids and services will not close the gap. Her reasoning was circular.

Ms. XXXX supported her opinion with the fact that the Student's reading skills fall within the average range. Additionally, the results of the Educational Assessment suggest the

Student's difficulty with spelling may be related to attention and focus; he begins by spelling accurately, but misspells later items. Consequently, a word bank for extended writing could reasonably be expected to be an effective supplementary aid. The Parents have the burden of proof in this case, and without clearer testimony on the basis for their expert's opinion I find they failed to prove the IEP requires a goal and direct instruction in spelling.

**iv. Social/Emotional Behavioral**

The parties agree the social/emotional goal in the Student's IEP is appropriate. The goal provides the Student will utilize strategies to manage his emotional response in an expected manner. He will identify triggers, identify his thoughts, feelings, and bodily responses when triggered, and he will apply appropriate, previously-practiced behavioral responses in the school setting. (P-27 at 37.)

The Parents point out, however, that the goal and the related counseling service described in the IEP are confusing and contradictory. The IEP provides that the goal will be addressed with a psychologist in a weekly thirty-minute counseling session outside general education. Conversely, the description of the delivery of services provides the school psychologist will provide weekly counseling services inside the classroom setting to allow the Student to generalize what he has learned. (P-27 at 39.)

Ms. XXXX testified the IEP calls for the skills identified in the goal and objectives to be addressed in counseling sessions and generalized in the classroom, during recess, and at lunch. Similarly, Ms. XXXX testified the related service would be provided inside and outside the general education classroom.

The goal and objectives and related services provisions, when read together, show the IEP intended to address the Student's social/emotional goal through individual counseling and in

the general education classroom or other settings where the skills could be generalized.

However, the Parents are correct; the IEP is confusing and contradictory. The Parents could not be certain of the program offered based on the IEP as currently written. Nevertheless, the mistake or uncertainty could be clarified with a question to the IEP team. As a result, I find the Parents failed to prove the IEP is inappropriate based solely on the social/emotional goal and the related counseling service described in the IEP.

With regard to integrated social/emotional behavioral instruction, Dr. XXXX testified the Student's anxiety and sensory integration deficits cause the Student to engage in bad social interactions intermittently throughout the day. He refuses to work, talks back, and annoys and distracts teachers and students. As a result, the Student requires intervention right away to address the problematic behavior when it occurs. Ms. XXXX testified the Student's social skills are typical until things do not go his way or the subject does not interest him. He requires social skills training provided by a special education teacher throughout the day.

BCPS maintains the goal is properly addressed by the counselor, by opportunities to generalize skills in different school settings, and through supplementary aids and services. Those supports include: provide directions in concise specific manner; offer the Student tasks to complete when he is required to wait; use positive, concrete reinforcement; use manipulatives and sensory activities; frequently change activity or provide opportunities for movement; make frequent eye contact and maintain proximity control; encourage and reinforce appropriate behavior; encourage the Student to ask for assistance; implement strategies to initiate and sustain attention; prepare in advance for schedule change; and implement social skills training. (P-27 at 27-30.)

Because the parties agree on the Student's social/behavioral goal, and based on the number of supplementary aids and supports identified in this area, I find the Parents have failed to prove that the Student's deficits in this area are not sufficiently addressed in the IEP. The supplementary aids are integrated into instruction across the school day.

**f. Services**

**i. Related Services - Counseling**

The Parents noted the counseling provided in the IEP is a one-on-one session with no opportunity for generalization and no social work services integrated into the classroom. Confusing the matter are contradictory statements in the IEP about where services will be provided — inside or outside the classroom. As discussed above, however, the Parents failed to prove this defect alone results in a failure of BCPS to offer the Student an appropriate IEP.

**ii. Related Services - OT Consult and Physical/ Sensory Processing**

Ms. XXXX acknowledged the IEP does not include a time for the OT consult. (P-27 at 31.) Like the counselling issue, the mistake or uncertainty could be clarified with a question to the IEP team. As a result, I find the Parents failed to prove the IEP is inappropriate based only on the failure to state a time for the OT consult.

The Parents also contend that based on the Student's sensory processing needs, OT and strategies addressing the Student's behavior that results when he is overwhelmed must be immediate and integrated throughout the school day. BCPS maintains the Student's deficits in these areas are properly addressed through supplementary aids and services.

The supplementary aids and services in the IEP addressing the Student's sensory processing deficits overlap with several social/behavioral aids and include providing manipulatives and sensory activities and frequent changes in activities or opportunities for

movement. (P-27 at 28.) He will also have preferential seating away from distractions and close to instruction and alternative seating, such as the floor, a chair seat, or a ball. (P-27 at 31.)

Based on the OT consult and the supplementary aids and supports identified to address the Student's sensory processing challenges, I find the Parents have failed to prove the IEP is inappropriate because it lacks immediate and integrated strategies to address the Student's sensory needs. The IEP requires the supports be immediate and integrated into the general education classroom across the school day. As will be addressed below, the issue is whether those supports can be implemented in the general education classroom with twenty-to-twenty-five students.

### **iii. Special Education – Location of Services and Classroom Instruction**

As discussed above, the Parents maintain the Student requires specialized instruction from a special education teacher in every class throughout the school day. Conversely, BCPS maintains the Student does not require specialized instruction in any academic area but mathematics, and his other educational disabilities are appropriately addressed through supplementary aids and supports.

The Parents correctly point out that specially-designed instruction is instruction that adapts not just instructional content and methodology, but also delivery of instruction. 34 C.F.R. § 300.39(b)(3). Here, they argue, the delivery of instruction must be adapted to meet the needs of the Student and enable him to access the general education curriculum. The adaptation requires the Student receive instruction in a classroom with fewer than ten students where special education teachers are able to provide an integrated social skills program, interventions for sensory processing deficits, and a positive behavioral support system. Most significantly, for

successful delivery of instruction under the Student's circumstances, the environment must be adapted. The Student requires an environment with reduced stimuli.

Generally, delivery of instruction concerns the means by which a teacher conveys a lesson. However, in an unpublished decision, the United States District Court for the District of Maryland found special education services must be broadly defined to include instruction in a setting for students who require greater support services in their learning environment, but who otherwise are intellectually capable of mastering the general education curriculum. *Bd. of Educ. v. S.G. ex rel. N.G.*, 2006 WL 544529 (D. Md. 2006), *aff'd*, *Bd. of Educ. v. S.G.*, 230 Fed. App'x 330 (4th Cir. 2007) (special education services include a therapeutic setting for a child diagnosed with schizophrenia). The *S.G.* court relied in part on a Tennessee case which found that a child who maintained satisfactory grades in a general education setting but was unable to remain in that setting due to her emotional disturbance was eligible for and in need of special education services. 2006 WL 544529, at \*14 (citing *Johnson v. Metro Davidson Cty. Sch. Sys.*, 108 F. Supp. 2d 906 (M.D. Tenn. 2000)).

The present case is similar and, although not binding, the Court's reasoning in *S.G.* is persuasive. The Student does not require a therapeutic setting, but he does require greater support services and in an environment with reduced stimuli. The evidence demonstrates that the Student cannot reasonably be expected to remain in the general education setting with twenty-to-twenty-five students because it is too distracting. For the reasons set out below, I find the Parents have shown the Student requires intensive, immediate attention throughout the school day in a classroom with reduced stimuli, including reduced light, noise, and proximity to other students.



The Student's mother described the Student's experience at [School 3] in kindergarten and first grade, and at [School 4] in second grade. She stated that during those years the Student was in classrooms of thirteen-to-fifteen students and he enjoyed school but was overwhelmed. At [School 3] the Student was anxious around the other children and upset by unanticipated movements and movement between classes. He would become fixated on a thought, for example, that the teacher hated him, and then he would have a bad day. The Student also might make unpredictable noises. He would blurt out sounds, say words over and over, and have a hard time stopping. He might stop and then start again; he could not keep himself under control. He made the other children uncomfortable.

At [School 4], the Student's behavior became more severe. He would scream, run out of the classroom, and speak disrespectfully to teachers, staff, and students. He was unable to stay to the end of the school day, and the Student's mother would pick him up early.

Both [School 3] and [School 4] notified the Student's mother of her son's behavior difficulties and worked with her to resolve the issues. However, the interventions were unsuccessful and the schools would not agree to have the Student return.<sup>3</sup> (P-2 and P-3.)

In Dr. XXXX's opinion, the Student requires support in every classroom and a small class size; not more than five or six students. At [School 2] during the 2016-2017 school year the Student was in a class of ten and had problems. The more sound and activity, which the Student cannot process, the more upset he becomes. This year, he is in a class of four and is performing better. With regard to social skills, Dr. XXXX stated that to be effective teachers must address any problems immediately. He stated the Student is emotionally fragile and lacks the ability to

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<sup>3</sup> The Student's mother testified she knew [School 3] did not want the Student to return and, so, the Parents did not re-enroll him in that school. [School 4]'s told the Parents the Student could not return.

emotionally self-regulate. In Dr. XXXX's opinion, the June 2, 2017 IEP cannot provide the Student with appropriate educational supports. Because BCPS does not recognize the severity of the Student's disabilities, the IEP fails to target the Student's issues and fails to provide correct supports, including regulating the environment to reduce stimuli.

Dr. XXXX stated in her October 13, 2016, letter that given his emotional and behavioral needs, the Student requires a placement that provides a small teacher-to-student ratio, a school-wide positive behavior intervention system, access to staff trained in behavioral intervention, access to a social-skills group, and opportunities for frequent structured breaks. (P-10.) She testified that in a large school with more than 1,000 students, the Student would experience difficulty staying in the classroom. He would be overwhelmed by the size of the school and the number of students. His negative behavior would increase because he could not tolerate the stimuli. He would become irate, oppositional, disrespectful, and perhaps throw a chair, as he did at [School 2] last year. Dr. XXXX stated that at present the Student is blossoming; he is developing positive thoughts about himself. A large school would have a harmful effect on the Student; his condition would deteriorate.

Ms. XXXX stated she visited [School 1] in spring 2017. The school is a combined elementary and middle school with over 1,000 students. The school can be loud and chaotic. The Student would have a hard time even entering the building. He would start the day in a very anxious state and his behavior would deteriorate. He would be overwhelmed and run away. In Ms. XXXX's opinion, the biggest issue is a small classroom; the Student requires a small classroom because in a larger setting his anxiety skyrockets and his behaviors deteriorate. The Student would have a very difficult time managing the environment of a classroom with twenty students. He would be distracted and would distract other students. The Student also requires a

special education teacher in all classes because such a teacher is trained in the whole child and is able to individualize the supports the Student requires. Without these support, the Student would be unable to make progress.

Further, Ms. XXXX testified that in her opinion, the Student requires a structured classroom; he must know exactly what will happen. He requires breaks, hand fidgets, and headphones. The supplementary aids and services set out in the IEP are appropriate, but in a classroom of twenty-to-twenty-five students the Student would not be successful even with those services. Additionally, it would be difficult for a general education teacher to implement all the aids and services identified in the IEP for a child like the Student who requires intense, frequent, and immediate attention.

Ms. XXXX testified that in her opinion, the general education classroom was not too large an environment for the Student. She relied on the Student's cognitive profile and problem-solving skills. Ms. XXXX recognized the Student's sensory processing deficits and agreed those deficits could interfere with the Student's success in a large classroom. However, she stated he also has the ability and skills to navigate the general education classroom with the supports set out in the IEP, which minimize the impact of the Student's sensory-processing difficulties. The Student's lack of success in the class of fifteen at [School 3] and [School 4] did not change Ms. XXXX's opinion. She based her opinion on the Student's present levels of performance, not his school history, because children mature and develop skills. Ms. XXXX stated the Student might have trouble in the large classroom due to his unique needs, but not because of the number of students.

As discussed above, Ms. XXXX noted in her OT assessment that the Student experiences definite dysfunction in vision, hearing, and balance and motion. He becomes distracted by nearby visual stimuli and frequently complains about classroom lighting or bright sunlight. He

exhibits difficulty attending due to rich visual stimuli within the classroom setting. He makes noises, speaks too loudly, and frequently shows distress at loud sounds. The Student is unable to use and process information because these behaviors affect his ability to focus. Ms. XXXX writes the Student's behaviors are not only detrimental to his peers' learning, but they also may increase the teacher's distractibility. (BCPS-7 at 4.) Ms. XXXX recommends providing the Student with a distraction-free area, facing away from cluttered boards and allowing him some distance from his peers. (BCPS-7 at 7.)

In her report, Ms. XXXX recommended some strategies related to the Student's pragmatic language deficits that might be helpful to teachers and staff working with the Student. The recommendations include preferential seating and reducing extraneous noise such as conversation, radio, and television. (BCPS-9 at 5.)

BCPS maintained that I should give the testimony of the school's expert more weight than the Parents' experts because [School 1] staff attended the IEP team meetings where the team members collaborated. BCPS pointed out that none of the Parent's witnesses attended the IEP team meetings. Further, BCPS argued that I am required to defer to the opinions of the school system's educational professionals and, in support of its position, cites *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004).

In *A.B.*, the court explained that its role in reviewing an IDEA administrative decision does not include "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities they review." *Id.* at 325 (citing *Rowley*, 458 U.S. at 206.) That deference, however, is not applicable to hearing officers. Hearing officers are not required to defer to school authorities or to explain in detail their reasons for accepting the

testimony of one witness over that of another. *Cty. Sch. Bd. v. Z.P. ex rel. R.P.*, 399 F.3d 298, 306-307 (4th Cir. 2005).

That said, I have considered that the BCPS experts attended the IEP meetings and are professional special educators. Those educators reasonably testified they did not rely on the Student's experiences at [School 3] and [School 4] because children grow and mature between kindergarten and sixth grade. Also, although [School 3] and [School 4]'s staff cooperated with the Parents and attempted some modifications for the Student, such as a beanbag chair in the library (BSCP-42), the Student did not have an IEP with supplementary aids and services devised by professional educators. Further, BCPS properly relied on their assessments to determine the Student's present levels of performance. The assessments show the Student is cognitively able to progress in the general education curriculum. Ms. XXXX observed the Student in the classroom at the [School 2], where his behavior was under control. These factors provide some evidence that the Student would progress in the BCPS-recommended placement at [School 1] with the supports identified in the IEP.

However, no BCPS witnesses explained the steps [School 1] could or would take to modify the environment for light, noise, and student proximity. The IEP provides for an OT consult for sensory strategies including possibly a seat cushion, a resistance band on chair legs to kick while seated, a comfortable seat in noisy environments, chewing gum, a distraction-free area facing away from cluttered boards, distance from peers, and headphones. (P-27.) Ms. XXXX testified the Occupational Therapist providing the consult could advise the general education teacher not to post too many items on the walls. But no BCPS witness could definitely state that teachers would actually post fewer items on the walls. No witness addressed whether the lights in the classroom could be altered. No witness described how distance from peers could

be accomplished in a classroom of twenty-five, or how effective a comfortable seat would be in calming the Student in the presence of noise, light, and many children.

When faced with BCPS assessments and [School 2] reports verifying the Student's sensory processing dysfunction in vision, hearing, balance and motion, his distraction by visual stimuli, aversion to light and noise, and tendency to yell out if touched by another student, BCPS witnesses stated with little explanation that the supplementary aids and services will address those deficits. Only Ms. XXXX's testimony that the Student has shown problem-solving abilities touched on the issue. However, she did not go the step further to explain how those abilities can effectively assist the Student in dealing with overwhelming sensory stimuli and the anxiety that results.

The education and experience of the Parents' expert witnesses, particularly Dr. XXXX and Dr. XXXX, were impressive. Both hold doctorate degrees. Dr. XXXX has been practicing clinical psychology since 1984. He received a post-doctorate training in neuropsychology. As discussed above, I found Dr. XXXX's testimony particularly thorough. He clearly explained the basis of his opinions. Dr. XXXX specializes in anxiety disorders in children. She has published peer-reviewed articles in the area. Further, Dr. XXXX has been the Student's treating psychologist for over eighteen months and is in a position to know the effect of the Student's disabilities on his performance in the classroom and what he requires for success. Both Dr. XXXX and Dr. XXXX found the Student's anxiety increases and his behavior deteriorates when he is unable to manage sensory stimuli in the environment. As discussed earlier, I found Dr. XXXX's and Dr. XXXX's testimony persuasive on the issue of the severity of the Student's anxiety and sensory processing deficits. Consequently, based on the severity of those disabilities,

it is reasonable to accept their testimony that the Student requires a small classroom with reduced stimuli to progress educationally.

Additionally, the Student's mother, Ms. XXXX, and Mr. XXXX presented detailed descriptions of the Student's behavior in the classroom over time, not just on one occasion as with Ms. XXXX. Although the Student's mother is a party to the case and stands to gain if successful in this action, I found her testimony credible. Her demeanor was calm and focused and her description of the Student's behavior straightforward; she did not appear to be exaggerating. Similarly, Ms. XXXX and Mr. XXXX did not appear to be exaggerating and I find no evidence in the record to support a reason they would lie or provide inaccurate statements. As a result, I have given these witnesses' testimony substantial weight and find their descriptions accurate. Those descriptions show a child who requires reduced light and noise, and immediate, individual attention to manage his focus and symptoms of anxiety.

Earlier, I found the IEP appropriately addresses the Student's disabilities in the areas of social/emotional behavior and sensory processing based on the number of supplemental aids and services identified in the IEP to be provided throughout the school day. However, the Student must receive those interventions immediately to prevent the problematic behaviors that result when the Student becomes anxious and overstimulated by the environment. Given the attention the Student requires, no BCPS witnesses explained how a general education teacher would be able to provide the Student frequent and immediate feedback in a class of twenty-five, or how the supplemental aids and supports could be practically implemented in the general education classroom.

I find the expert testimony of Dr. XXXX and Dr. XXXX more persuasive than the expert testimony of BCPS witnesses, and I accept their opinions that the Student requires a small class

size to allow special education teachers to appropriately implement the aids and services the Student requires to progress in his education. Additionally, while not conclusive, I find the Student's experience in [School 3] and [School 4] in a classroom of fifteen students, and his problems in a class of ten at the [School 2] during the 2016-2017 school year, support the conclusion that the Student would be unsuccessful in a larger classroom.

I conclude that the Parents have demonstrated that the special education services the Student's requires include instruction in a setting where the environment is adapted to reduce stimuli. Additionally, the Parents proved the Student requires a small classroom to allow a special education teacher, trained in behavioral intervention, to provide the immediate attention the Student needs to manage his symptoms of anxiety, OCD, and ADHD, and permit him to successfully access the curriculum.

**g. Placement**

The Student's mother described her visits to [School 1] to observe different classes. She described one classroom as tight, with papers and folders on the counters, and lots of items on the wall. There was no alternate seating available, and students were close to one another. The amount of stimuli in the class was high. The Student's mother also observed recess outside and lunch in the cafeteria with over 100 children. She described recess as chaotic with children running around playing ball. The cafeteria was extremely loud with students talking, lining up for food, and generally moving around. She stated the Student would be unable to handle the situation, would experience sensory overload, and would react negatively.

BCPS objected to the Student's mother bringing a page of notes with her to the witness stand, suggesting some wrongdoing; that she was coached or that her testimony was otherwise tainted. Witnesses are permitted to have notes on the witness stand but must show them to the



opposing party if requested, which occurred here. The Student's mother stated the notes concerned her observations, and she relied on the notes to testify to the number of children present in the classrooms, at recess, and at lunch. I do not give the Student's mother's testimony less weight or otherwise find her testimony unreliable because she relied on notes.

XXXX XXXX, Ph.D., testified for BCPS and, although she did not offer an expert opinion, she was accepted as an expert in Special Education and IEP implementation. Dr. XXXX testified that she accompanied the Parents on the classroom observations at [School 1]. The first class they visited was a self-contained math class of ten students. Three adults were present including the teacher, a teacher's aide, and a one-on-one assistant for one of the students. She stated there was minimal noise in the room. Next, she and the Parents observed a general education science class of twenty-to-twenty-five students, where the noise was minimal. In a general education math class the students were talking, and students were on and off task, but there were no outbursts and no unusual behavior. Finally, they observed recess.

On cross-examination, Dr. XXXX stated there were thirty-to-fifty students at recess. The activity level was high, students were running around. At lunch, 100 students were present in the cafeteria. Dr. XXXX testified the noise level was high; it was loud, there was a lot of movement, and children were lining up for food. On re-direct, Dr. XXXX stated if the lunch room was a problem for the Student, he could eat in the classroom with a teacher.

Dr. XXXX further acknowledged that the skill level of the students in the special education math class was two-to-three grade levels below the Student.

The evidence demonstrates that placement in a general education classroom at [School 1] does not provide the adapted or regulated environment the Student requires to mitigate the anxiety and sensory-processing deficits that impede his functional performance, and, in turn,

affect his academic achievement. Additionally, the nature and extent of the behavioral interventions the Student requires, including frequent, immediate, and direct intervention to help the Student focus and correct his problematic behavior, could not be effectively implemented in a general education classroom with twenty-to-twenty-five students. The supplemental aids and services are too numerous to be provided in that setting. The Parents have shown it is not reasonable to expect the Student to achieve grade-level performance if placed in the general education classroom with the supplemental aids and services identified in the June 2, 2017 IEP.

Finally, there is no evidence that [School 1] has a special education classroom with ten or fewer students where the environment can be adapted, where interventions are immediate, and where the students are of average intelligence working on grade-level material. Nor is there any evidence BCPS offered the Student such a placement. The Parents have shown BCPS failed to offer the Student an IEP reasonably calculated to provide the Student a FAPE in light of his circumstances.

#### **5. [School 2]**

The Parents maintain the [School 2] program is reasonably calculated to provide the Student an educational benefit. BCPS does not argue the [School 2] program is inappropriate, but contends the placement is too restrictive because the [School 2] educates only children with disabilities and the Student will not have the opportunity to interact with non-disabled peers. BCPS cites the IDEA's preference for "mainstreaming" disabled students as the basis for its position that the IEP placement at [School 1] is superior to [School 2]. However, education with non-disabled peers is pursued only so long as it is consistent with the Act's primary goal of providing disabled students with an appropriate education. Where necessary for educational reasons, mainstreaming assumes a subordinate role in formulating an educational program.

*Carter v. Florence Cty. Sch. Dist. Four*, 950 F.2d 156, 160 (4th Cir. 1991) (citing *Rowley*, 458 U.S. at 181 n.4). *Carter* further noted that the IDEA's preference for mainstreaming was aimed at preventing schools from segregating disabled students, not restricting parental options when public schools fail to comply with the requirements of the Act. *Id.* However, the Fourth Circuit also has held that it is not an error for a hearing officer to consider the least restrictive environment policy as one factor in determining if private placement is appropriate. *M.S. ex rel. Simchick. v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009).

For the 2017-2018 school year at the [School 2] the Student has goals and objectives in the following areas: written language content; written language mechanics; math calculation; social/emotional behavior; and social interaction skills. His accommodations include extended time and multiple or frequent breaks. He has a setting accommodation to reduce distractions to other students. He has frequent and immediate feedback, predictable routines, reminders of changes to schedule, and alternate seating. (P-24.) He is in a classroom of four students.

Ms. XXXX testified the [School 2] is certified by MSDE as a special education school. Class size is generally four-to-six students. All [School 2] teachers are certified in special education, except teachers in special areas such as music and physical education who are certified in their specialty areas with some dually certified in special education.

Ms. XXXX described the [School 2] program as an arts-based, multi-sensory program with speech language, OT, social work, and psychological services integrated into the classroom. For students' sensory needs, the school has two Occupational Therapists on staff, a large sensory gym, tools in the classroom, and built-in breaks. Additionally, Ms. XXXX testified that every classroom at [School 2] has a variety of available seating. The Student is able to sit or stand. He

is able to fidget. Ms. XXXX stated the Student has a sensory diet although that term is not used in the school's PEPs.

In Ms. XXXX's opinion, the Student's challenges to accessing education include his anxiety, ADHD and OCD. She testified that when the Student came to [School 2] he was below grade level in reading comprehension. He is now on grade level. Ms. XXXX also stated the Student is improving this year, but still exhibits a lot of anxiety and perfectionism. He meets individually with a social worker once a week.

Ms. XXXX described some of the features of the Student's program. The Student is given extra time in reading comprehension so he is able process the information. The requisite learning skills identified in the Student's program, such as using appropriate tone and volume when speaking, or selecting a coping strategy when working in a group, are skills the Student works on to access the curriculum. Also, the Student requires less verbal communication in order to calm down; his teacher last year used sign language, and this year his teacher uses signs or points. The Student responds well when the teacher privately speaks with him about his behavior, and his teachers do so when necessary.

On cross-examination, Ms. XXXX testified [School 2] does not perform Functional Behavior Assessments. Instead, the school has an integrated positive behavior program. The Student has a behavior goal sheet with rewards. The teachers meet and create the plan. She acknowledged that the Student had been suspended during the 2016-2017 school year.

Mr. XXXX, OTR/L, testified [School 2] serves children with average-to-above-average intelligence and moderate-to-severe learning disabilities. The student body also includes children, like the Student, who have emotional disabilities. Mr. XXXX stated the middle school has forty-four students. He testified that when he learned the Student was entering middle school, he

intentionally placed the Student in the class with the fewest students because he was aware of the Student's problematic behavior in fifth grade in a class of ten. In the classrooms the students sit at six-foot tables with two students to a table, but in some classes the Student has a table to himself. The classrooms have natural light, and floor and desk lamps. [School 2] limits items on the walls.

Mr. XXXX described the OT services available at [School 2]. The school has a sensory gym with equipment such as trampolines. All students receive integrated OT services, including for example, a fitness program. The Student's fitness program involves jumping, performing resistive work, and moving at an intense rate. He is learning about his body in space. His anxiety decreases when he learns where his body is located in space. With decreased anxiety, the Student requires fewer teacher interactions. In Mr. XXXX's opinion, daily regularly-scheduled exercise is essential to make the Student available for learning. Further, because of the Student's balance and motor issues, the Student is not required to line up at [School 2].

Finally, Mr. XXXX stated the Student receives OT and speech and language services in the classroom weekly. The school uses "Visualized/Verbalizing" a Lindamood-Bell program, and "Social Thinking" a program about mindfulness and monitoring thoughts. Like Ms. XXXX, Mr. XXXX noted the Student can overreact to verbal commands, so the [School 2] has initiated non-verbal commands like hand gestures or a voice-level chart. He is progressing this year.

On cross-examination, Mr. XXXX stated the Student is able to get back on track quickly once he applies sensory strategies; for example, if he chews gum or jumps on the trampoline.

In Dr. XXXX's opinion, [School 2]'s provides the Student with appropriate educational supports. Related services are integrated into the classroom, the classroom size is small, and the program addresses the Student's anxiety disorder, OCD, inattention, and sensory processing

difficulties. In Dr. XXXX's opinion, [School 2] offers the Student an appropriate educational program.

In Dr. XXXX's opinion, [School 2] is able to provide the Student an appropriate educational plan. The school program includes a positive behavior intervention program, which rewards good behavior for all students. The Student is not singled out, which lessens his anxiety. [School 2] works on the Student's social skills, implements planned breaks, and incorporates prompting and cueing into the educational program. The small class size also permits the teacher to immediately address the Student's social difficulties, distractions, frustration, and anger.

Ms. XXXX testified she has visited [School 2] between ten and twelve times. She has spoken with the Student's teachers. Based on her visits, conversation with teachers, and the Student's [School 2] records, Ms. XXXX found the Student was making progress. In her opinion, [School 2] provides an appropriate educational program for the Student.

BCPS entered into evidence [School 2] incident reports from the 2016-2017 school year. (BCPS-42.) The reports show that the Student, with other students, engaged in taunting behavior toward another student and stole chewing gum. He also received a one-day suspension for knocking a chair off a desk. These disciplinary reports do not prove [School 2]'s program is inappropriate for the Student because he has failed to progress. As set out above, while Ms. XXXX and Mr. XXXX stated the Student is making progress, they both agree he still requires significant interventions. The evidence demonstrates the Student is doing better this year in a class of four; BCPS did not present any evidence to the contrary.

The Parents have shown [School 2] offers the Student a program and placement reasonably calculated to provide the Student educational benefit. [School 2] educates students with at least average intelligence, like the Student, but with educational disabilities such as

specific learning disabilities and emotional disabilities. [School 2] provides a school-wide positive behavior intervention system, access to staff trained in behavioral intervention, opportunities for frequent structured breaks, and a controlled environment in a class of fewer than ten students. As a result, although the Student is in the restrictive environment of a private special education day school, the program and placement address his specific needs. Because the Student receives instruction and services to manage the symptoms of his anxiety and sensory-processing deficits, he can reasonably be expected to advance from grade-to-grade according to the State's educational standards.

### **CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parents proved the Student's IEP for the 2017-2018 school year, with placement in the general education classroom, was not reasonably calculated to provide the Student a free appropriate public education. 20 U.S.C.A. §§ 1401(9), 1412(a)(1) (2017); *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988 (2017); *Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982).

I further conclude as a matter of law that the Parents proved by a preponderance of the evidence that placement in [School 2] is appropriate and they are entitled to reimbursement for that placement. *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985); *Carter v. Florence Cty. Sch. Dist. Four*, 950 F.2d 156 (4th Cir. 1991), *aff'd*, *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

### **ORDER**

I ORDER that Baltimore City Public Schools reimburse the Parents for the Student's placement at [School 2] and provide transportation for the 2017-2018 school year.

I further ORDER that if corrective action is required by this decision, Baltimore City Public Schools shall, within thirty days of the date of this decision, provide proof of compliance to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, Maryland State Department of Education.

January 11, 2018  
Date Decision Issued

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Mary Shock  
Administrative Law Judge

MKS/cmg

### **REVIEW RIGHTS**

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2017). 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.