

██████████,

STUDENT

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

BEFORE DEBORAH S. RICHARDSON,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-BCNY-OT-23-06854

DECISION

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STATEMENT OF THE CASE

On March 13, 2023, ██████████ and ██████████¹ (Parents), on behalf of their child, ██████████ (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Baltimore County Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);² 34 C.F.R. § 300.511(a) (2022);³ Md. Code Ann., Educ. § 8-413(d)(1) (2022);⁴ Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

¹ The Student’s mother introduced herself at the hearing as Ms. ██████████, but the documentation in this case refers to her alternatively as Ms. ██████████ and Ms. ██████████. I will refer to her as Ms. ██████████ throughout this decision for consistency.

² “U.S.C.A.” is an abbreviation for the United States Code Annotated. Unless otherwise noted, all citations herein to the U.S.C.A. are to the 2017 bound volume.

³ “C.F.R.” is an abbreviation for the Code of Federal Regulations. All citations herein to the C.F.R. are to the 2022 bound volume.

⁴ All citations herein to the Education Article are to the 2022 Replacement Volume of the Maryland Annotated Code.

Specifically, the Due Process Complaint alleged that BCPS failed to provide the Student with a free appropriate public education (FAPE) during the 2022-2023 school year by refusing to identify her as a child with a disability and to provide her with an Individualized Education Program (IEP).

On March 27, 2023, I held a video Pre-Hearing Conference via the Webex videoconferencing platform. COMAR 28.02.01.17; COMAR 28.02.01.20B(1)(b). Amy Brown, Esquire,⁵ participated on behalf of the Student and her Parents were also present. Allyson Huey, Senior Counsel, and Pamela Foresman, Staff Attorney, participated on behalf of BCPS. On March 29, 2023, I issued a Pre-Hearing Conference Report and Order, directing that the merits hearing would begin on May 1, 2023. At that time, I indicated I would issue the decision by May 26, 2023, the business day preceding Saturday, May 27, 2023, which was forty-five days after the resolution period ended on April 12, 2023. 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Educ. § 8-413(h).

On April 3, 2023, the Parents, through counsel, filed an Amended Due Process Complaint on behalf of the Student. Over the objection of BCPS, by letter dated April 7, 2023, I accepted the Student's Amended Due Process Complaint for filing as of April 3, 2023, and cancelled the then-scheduled May 1, 2023 merits hearing. 34 C.F.R. § 300.508(d)(3)(ii); COMAR 13A.05.01.15C(7)(b). The Amended Complaint incorporated the allegations in the March 13, 2023 Complaint and added the allegation that BCPS failed to provide an IEP and should have been alerted to the Student's need for an IEP based on her performance during the 2021-2022 school year.

⁵ Ms. Brown represented that she was admitted to the bar in the State of Georgia and was in the process of applying for admission *pro hac vice* for this hearing.

On May 1, 2023, I held a Second Pre-Hearing Conference by video. Keith Altman, Esquire, represented the Student and Parents, and informed me that Ms. Brown was no longer employed at his law firm.⁶ Also present were Ms. [REDACTED], assisted by an American Sign Language (ASL) interpreter, and Ms. [REDACTED], an educational specialist in Mr. Altman's law firm. Ms. Huey and Ms. Foresman both represented BCPS.

BCPS represented at the Conference that one of its key witnesses would be unavailable for most of May 2023, due to pre-scheduled surgery. Counsel for BCPS was engaged in another due process hearing during the first week of June 2023. Furthermore, Mr. Altman needed sufficient time to ensure he was admitted *pro hac vice*. Md. Code Ann., Bus. Occ. & Prof. §§ 10-215, 10-601(a) (2018); Md. Code Ann., State Gov't § 9-1607.1 (2021); COMAR 28.02.01.08. Therefore, on May 9, 2023, I issued a Second Pre-Hearing Conference Report and Order, that directed that this hearing would take place on June 9, 12, and 13, 2023. Under the regulatory timeline, the decision in this case would ordinarily have been due on June 16, 2023, the business day preceding Saturday, June 17, 2023, which is forty-five days after the resolution period ended on May 3, 2023. As the hearing was scheduled to conclude on June 13, 2023, and I had pre-approved leave on June 15 and 16, 2023, the parties jointly requested a specific extension of the timeframe so that a decision would be issued within thirty days of the close of the record. 34 C.F.R. § 300.515(c); Educ. § 8-413(h). I granted that request and informed the parties I would issue my decision by July 13, 2023.

Unbeknownst to me, on June 7, 2023, Mr. Altman, filed an emergency motion (Motion) for postponement. I received the Motion at 8:00 a.m. on June 9, 2023. I immediately convened with the parties via Webex to hear argument on the Motion and to conduct a pre-hearing

⁶ Mr. Altman is an attorney licensed to practice in Michigan as well as several federal courts. I allowed Mr. Altman to participate in the Second Pre-Hearing Conference for ease of scheduling. COMAR 28.02.01.11B(12).

conference. COMAR 28.02.01.17; COMAR 28.02.01.20B(1)(b). Mr. Altman was present for the Student and Parents and Ms. Huey was present for BCPS.

Mr. Altman represented that he never received the Second Pre-Hearing Conference Report and Order and despite numerous attempts to obtain that order, was unable to do so. Furthermore, Mr. Altman argued that he had only been admitted to practice in Maryland *pro hac vice* days before the scheduled hearing, allowing him insufficient time to request subpoenas in this matter. And finally, Mr. Altman argued that BCPS had objected to his expert witness on the grounds that he had not properly and timely disclosed the substance of his expert witness's anticipated testimony.

Ms. Huey objected to the Motion, arguing that BCPS would be prejudiced. Specifically, Ms. Huey questioned why counsel for the Student had been unable to obtain the scheduling order and pointed out that one need not be admitted *pro hac vice* to request subpoenas from the OAH. Furthermore, several of BCPS' witnesses are ten-month employees and would be very difficult to schedule during the summer.

BCPS is correct that anyone from Mr. Altman's office could have requested subpoenas, and he could have obtained the scheduling order from BCPS. Nevertheless, I found the Student would have been severely prejudiced if she were required to go to a hearing without her expert witness and with counsel who stated he was unprepared. Accordingly, I granted the Motion. COMAR 28.02.01.16E.

At that time, Mr. Altman had other due process hearings scheduled for the remainder of June 2023 and Mr. Huey had several witnesses who were unavailable in June 2023 due to previously scheduled leave. Mr. Altman requested an extension of the regulatory timeframe to allow me to set these hearing dates outside of that timeframe. 34 C.F.R. § 300.515(c); Educ. § 8-413(h).

I granted that extension and scheduled the hearing to begin July 5, 2023. On June 14, 2023, I issued a Third Pre-Hearing Conference Report and Order that this hearing would take place on July 5, 6, and 7, 2023, dates which were agreed to by the parties during the Third Pre-Hearing Conference.

I held the hearing on July 5, 6, and 7, 2023. Mr. Altman represented the Student and Parents and Ms. Huey represented BCPS. The Parents had an ASL interpreter for the entirety of the hearing.

As I allowed the Parents to amend the Due Process Complaint, the applicable timeline for a due process hearing recommenced at the time the party files an amended notice, allowing the parties another opportunity to resolve their disputes through the resolution process. 20 U.S.C.A. § 1415(c)(2)(E)(ii); 34 C.F.R. § 300.508(d)(3), (4); *see also* COMAR 13A.05.01.15C(7), (8), (11). The amended due process complaint was filed on April 3, 2023. Under the applicable law, a decision in this case normally would be due by June 16, 2023, forty-five days after the resolution period ended on May 3, 2023.⁷ 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Educ. § 8-413(h). Once I scheduled the hearing, Mr. Altman and Ms. Huey both requested that I be allowed thirty days from the close of the record to issue a decision in order to have time to fully evaluate the testimony and documents admitted into evidence and issue a cogent decision. I granted that request to extend the timeframe and agreed to issue my decision by August 4, 2023.⁸

Procedure is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Educ. § 8-413(e)(1); Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 13A.05.01.15C; COMAR 28.02.01.

⁷ Forty-five days runs to June 17, 2023, which is a Saturday, therefore I pushed the date back to the last business day, which is Friday, June 16, 2023.

⁸ Thirty days would be Sunday, August 6, 2023, therefore I will issue it by the preceding Friday.

ISSUES

Whether BCPS failed its Child Find obligation to timely identify the Student as a child with a disability in need of special education during the 2021-2022 school year?

Whether BCPS failed to provide the Student a FAPE by refusing to identify her as a child with a disability in need of special education and to provide her with an IEP during the 2022-2023 school year?

SUMMARY OF THE EVIDENCE

Exhibits

A list of the exhibits admitted into evidence is attached to this Decision as an Appendix.

Testimony

The Parents presented testimony from Dr. [REDACTED], an expert in special education, policies and procedures associated with special education, the development of 504 Plans⁹ and IEPs, psychology, Child Find, and compliance; Ms. [REDACTED]; and the Student.

BCPS presented testimony from [REDACTED], BCPS social studies teacher; [REDACTED], an expert in special education; Dr. [REDACTED], an expert in psychology, psychological assessments, and the development of 504 Plans and IEPs; and [REDACTED], an expert in the implementation and compliance of IEPs.

FINDINGS OF FACT

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

The Student's Background

1. In elementary school, the Student earned all As and Bs.

⁹ “504” refers to Section 504 of the Rehabilitation Act of 1973. A “504 Plan” or “Section 504 Plan” is separate and distinct from an IEP. 29 U.S.C.A. §§ 701 through 7961 (2018 & Supp. 2023).

2. In elementary school, the Student fell behind in her schoolwork, but was able to catch up by turning assignments in late.

3. In fourth grade the Student was absent six and a half days and tardy twenty-seven times. In fifth grade she was absent eight days and tardy twenty-nine times. In sixth grade, the Student was absent three and a half days and tardy fifty times.

4. Between the school years 2018-2021, during her time at ██████████ Middle School, the Student earned 4 As, 6 Bs, 4 Cs, 4 Ds, 2 Es, and 9 Ps¹⁰ (COVID years).

5. In seventh grade, during the 2019-2020 school year, Ms. ██████████ contacted the school about the Student's decline in her academic performance, concerns regarding organization, time management, and ability to focus. A Student Support Team (SST) met to discuss the Student. One of the Student's teachers reported that she came late to class often and did not show any initiative to make up any missing work. The SST agreed to use a point sheet to monitor her attendance and being on time for school, attending coach class, and completing classwork.

6. In eighth grade, during the 2020-2021 school year, the Student's classes were virtual, and her performance was very inconsistent.

The 2021-2022 School Year

7. ██████████ High School is the Student's home school and is walking distance from the Student's home.

8. During the 2021-2022 school year, the Student was in ninth grade at ██████████ ██████████ High School (the School) in the ██████████ ██████████ program for ██████████. The School is fifteen to seventeen miles from the Student's home.

¹⁰ "P" is a pass in a pass/fail class.

9. Around October 7, 2021, the Student had a weekend where she slept for excessive periods of time but woke up tired. Ms. [REDACTED] began taking the Student to doctors to address what she suspected was a medical issue.

10. Soon after, Ms. [REDACTED] contacted first the Student's individual teachers about the Student's absences and missing work and then the School's administration to address the Student's slipping grades and her medical situation.

11. On October 20, 2021, an SST met with the Parent to discuss the Student.

12. The Student did not attend the meeting and did not attend any subsequent SST, 504, or IEP meetings. She was invited to attend all of them.

13. At the time of that meeting, the Student's grades were as follows: Chorus – E; Field & Wildlife Biology Honors – C; Advanced Placement (AP) Environmental Science – E; Geometry Honors – E; American Government Gifted & Talented (GT) – D; Creative Writing – B; English 9 GT – E; Spanish 1 – D.

14. Ms. [REDACTED] shared that the Student had been hit on the field during sports three weeks prior and was not able to function on the field athletically, was feeling pins and needles, was not able to keep food down, was tired all the time and had trouble focusing. Ms. [REDACTED] said they had been taking the Student to doctors and had blood work done to figure out what was going on. Ms. [REDACTED] said she was looking for assistance for the Student when she missed school due to medical absences.

15. Ms. [REDACTED] shared that the Student had always struggled with turning in assignments.

16. Dr. [REDACTED], the school psychologist, provided information to Ms. [REDACTED] on how to apply for [REDACTED] ([REDACTED]).¹¹ Ms. [REDACTED] was informed that once she provided a doctor's recommendation, the School would be able to start the paperwork for intermittent and chronic [REDACTED].

17. [REDACTED] must be reapplied for annually and recertified throughout the school year at regular intervals.

18. The SST had collected data from the Student's teachers in anticipation of the meeting. The Student's teachers reported that the Student did a good job when she was present, but attendance was negatively impacting her grades. She also had difficulty remaining on task when in class and spent a lot of time socializing and on her phone.

19. Ms. [REDACTED] planned to have the Student attend the next Saturday school after the meeting.

20. The Student continued to miss a significant number of classes during the remainder of the 2021-2022 school year.

21. On a date unclear from the record, [REDACTED], the Assistant Principal, offered to remove the Student's first period class because the Student was so often tardy to School. As the School alternates between A and B days, with students taking four classes per day, removing first period would have reduced the Student's courseload from eight to six classes. The Parents declined that offer due to the Student taking a class for the [REDACTED] program during her first period. Mr. [REDACTED] was willing to change her schedule to ensure the Student had all the appropriate classes needed for the [REDACTED] program and for playing [REDACTED], which was very important to the Student. The Parents still declined the offer.

¹¹ [REDACTED] services "apply to the provision of instructional services to public school students who are unable to participate in their school of enrollment due to a physical or emotional condition." COMAR [REDACTED]

22. On December 8, 2021, the Student was accepted in the chronic intermittent [REDACTED] [REDACTED] program for the 2021-2022 school year. The Student never received services during the 2021-2022 school year from [REDACTED].

23. On December 17, 2021, reports from the Student's teachers to the SST reiterated that the most pressing problem with the Student's performance, leading to poor grades, was her attendance, but there was also mention that she spent too much time on her phone and socializing in class.

24. In January 2022, the Student was diagnosed with [REDACTED] [REDACTED] ([REDACTED]). [REDACTED] is a condition in which an individual has symptoms and lab test results that indicate a systemic autoimmune disorder or connective tissue disease, but which do not meet enough characteristics to indicate a diagnosis for a well-defined connective tissue disease such as rheumatoid arthritis, lupus, or scleroderma.

25. [REDACTED] causes the Student to experience fatigue, brain fog, and joint pain. The Student has trouble sleeping and often wakes tired. The symptoms of [REDACTED] wax and wane and are unpredictable.

26. [REDACTED] is fairly rare in the Student's demographic. Most cases of [REDACTED] are in women aged thirty-two to forty-four years old.

27. Although the Student was diagnosed in January 2022, the Parents did not have documentation to provide to the School at that time.

28. On February 8, 2022, Ms. [REDACTED] asked the School for a "true IEP meeting" but also stated they were not getting answers fast enough from doctors.

29. On February 11, 2022, Ms. [REDACTED] informed the School they had received a diagnosis of [REDACTED] for the Student and requested an IEP for the Student.

30. On February 17, 2022, the School held an IEP team meeting.

31. The IEP team looked at the Student's grades at the time of the meeting, which were as follows: Chorus – C; Field & Wildlife Biology Honors – A; AP Environmental Science – E; Geometry Honors – E; American Government GT – A; Creative Writing – E; English 9 GT – C. The team noted that the E in AP Environmental Science was due to assignments not having been turned in and the Creative Writing E was due to one large poor grade and an assignment that had not yet been graded.

32. At the time of the IEP meeting, the Student had been absent twenty-five full days that year, or 24% of the school days.

33. During the IEP meeting, the team discussed present intervention strategies and teacher reports, including that on October 13, 2021, the SST had decided [REDACTED] was the best option for the Student at that time; the Student was attending Saturday school and coach class to work on missing assignments; and teachers were reporting that phone use was a major distraction to the Student during class time.

34. During the IEP meeting, the team discussed the Student's [REDACTED] and her symptoms, which caused daily fatigue and her to miss classes often.

35. Ms. [REDACTED] informed the team that the Student was on medication to keep the disease from progressing and she had seen an improvement in the Student's demeanor and energy level since starting the medication. Ms. [REDACTED] requested a notetaker for the Student, a recorder for teacher lectures, and for assignments to remain open for submission through the end of the quarter.

36. The IEP team reiterated that it was very important for the Student to access [REDACTED] [REDACTED] and that it might be possible for the Student to access [REDACTED] for the first period classes she was missing consistently.

37. At the meeting, Dr. [REDACTED] explained that the Student did not have an educational disability, an emotional disability, or a cognitive disability and therefore an IEP was in all likelihood not appropriate for the Student. The team declined to recommend assessments.

38. On February 28, 2022, the Student's doctor at [REDACTED] ([REDACTED]) wrote a letter addressing the Student's [REDACTED]. That letter was shared with the School sometime around that date. The doctor requested a 504 Plan with accommodations to:

- allow her to make up missed assignments without penalty;
- extended time to make up missed work;
- copies of notes and/or recordings of lectures she missed;
- extra tutoring and support before and after school to keep her caught up;
- not be required to copy notes from a peer;
- two sets of textbooks, one for home and one for school;
- shortened assignments to focus on mastery of important material that was missed;
- that school personnel develop and implement a procedure for the Student to receive missed assignments in a timely manner; and
- that the Student be allowed to use the elevator, have extra time to walk between classes, a locker on each floor, and permission to carry a water bottle and take bathroom breaks

39. The letter also included recommendations on how to prevent the spread of illness because she would be taking medications to suppress her immune system.

40. On March 7, 2022, an SST met to discuss the Student's eligibility for a 504 Plan.

41. The SST agreed the Student's physical or mental impairment substantially limited one or more major life activities including concentrating, walking, performing manual tasks, working, and standing.

42. The SST recognized the Student had been diagnosed with [REDACTED], which had symptoms like rheumatoid arthritis, systemic lupus, or scleroderma. Her symptoms were reported as prolonged hours of sleep, exhaustion, and internal cramping.

43. On the day of the SST meeting, the SST developed a 504 Plan with the following accommodations:

- Extended time (1.5) to complete class assignments, homework and quizzes during the current academic quarter
- Incomplete/extended time to complete assessments within established school division parameters for grade reporting provided that faculty and staff have prior/concurrent notice of absences
- Provision of textbooks to take home in courses where textbooks are used
- Provision of time to print assignments from Schoology¹² when paper copies of work is assigned
- Water and lavatory breaks as needed, a locker in the main building and annex, extra time to move between classes
- Reminders to check Schoology regularly for grading updates and help if needed to schedule coach class/tutoring

(P. Ex. 7, p. 14).¹³

44. On March 14, 2022, all of the Student's teachers signed an acknowledgement of having received the Student's 504 Plan.

45. Sometime between January and March 2022, the Student was informed that she was academically ineligible to play [REDACTED]. Several weeks after the second quarter had ended, the Student's American Government teacher agreed to reopen her gradebook for the second quarter of the 2021-2022 school year and the Student submitted enough assignments to change

¹² Schoology is the online learning management system used by BCPS and includes assignments, grades, resources, and some assessments.

¹³ The phrasing of this and all subsequent 504 Plans was modified slightly for readability.

her grade from a D to a B. As a result, the Student's quarter grade moved to a 2.0, making her eligible to play ██████ in the Spring 2022.

46. The Student played ██████ on the School team Spring 2022. The Student also played ██████ for a travel team.

47. In March 2022, the School suggested the Student drop one of her classes that she was failing – AP Environmental Science/Field & Wildlife Biology Honors. The Student did not drop the class.

48. In May 2022, the Parents explained to the School that the Student had been unable to access ██████ because she was not missing full days of school. The School explained that in 2022-2023, if a physician certified that the Student could only attend partial days due to her medical condition, they could request that ██████ deliver instruction just for the classes she was missing.

49. The Student's end of school year grades for the 2021-2022 school year were as follows: AP Environmental Science – E; English 9 GT – C; Chorus – C; Geometry Honors – E; American Government GT – C; Spanish I – C; Field & Wildlife Biology Honors – B; Creative Writing – B.

50. During the 2021-2022 school year, the Student was absent forty-one days. Most of the absences were unexcused. The Student also had excused tardies to ten class periods and unexcused tardies to 110 class periods.

51. On June 22, 2022, the School sent the Parents a letter informing them the Student had failed AP Environmental Science and Honors Geometry. The Letter informed the Parents the Student could make up credits through the Extended Day Learning Program (night school) and the Extended Year Learning Program (summer school). The Student did not enroll in either program.

The 2022-2023 School Year

52. During the 2022-2023 school year, the Student attended the School as a tenth grader in the [REDACTED] [REDACTED] program.

53. On August 26, 2022, the Student's teachers signed an acknowledgement of having received the Student's 504 Plan that had been developed on March 7, 2022.

54. The Student continued to have many absences and poor grades due to her not making up missed work.

55. On September 28, 2022, the Student's doctor at [REDACTED] wrote a letter confirming the Student had been diagnosed in January 2022 with [REDACTED] and was being monitored by them. The letter requested that the Student receive a 504 Plan at school allowing her to:

- make up missed assignments without penalty;
- have extended time to make up missed work, such as extending assignment deadlines or postponing a test date;
- when a class is missed, allowing teachers to provide a copy of the notes and/or recording of the lecture;
- extra tutoring and support before or after school to keep her caught up;
- not be expected to copy notes from a peer;
- two sets of textbooks, one for home and one for school;
- shortened assignments to focus on mastery of important material that was missed; and
- that school personnel develop and implement a procedure for the Student to receive missed assignments in a timely manner.

56. Sometime after September 28, 2022, and before October 19, 2022, Ms. [REDACTED] provided the letter to the School.

57. On October 19, 2022, an SST met to review the Student's 504 Plan per Ms.

█'s request. The areas of concern noted were attendance, work completion, and medical.

58. At the time of the SST meeting, the Student's grades were as follows: Spanish 2 – C; AP World History – B; Chorus – A; Aquatic Science – B; Living Systems/Biology GT – E; Algebra 2 – E; Psychology Honors – A; English 10 GT – A.

59. Ms. █ attended the meeting with the Student's educational advocate, Ms. █. Ms. █ expressed her concern that the Student was no longer college bound due to her disorder impacting her on a day-to-day basis.

60. The SST informed Ms. █ of alternative options for tutoring when the Student missed class, which included virtual tutoring, Saturday school, and after school coach class. As of the date of that meeting, Ms. █ had still not applied for █ for the 2022-2023 school year.

61. The SST spoke to Ms. █ about providing documentation of the Student's absences because many of the Student's absences had not been documented and had been marked as unexcused.

62. Ms. █ asked about dropping the Student's first period class. Mr. █ replied that it would cause [the Student] to fall further behind with the classes in the █ program because the Student had failed the █ program classes in ninth grade. The Parents ultimately declined to have the Student drop any classes.

63. The Student's 504 plan was revised to add the following accommodations:

- When documentation is provided for [the Student's] absences, [the Student] is required to only complete assignments that show mastery to content.
- When documentation is provided for [the Student's] absences, [the Student] will work with her instructor to ensure an appropriate time frame to make-up the missed assessment.

64. As an action item from the October 19, 2022 meeting, the SST agreed to meet again in forty-five days.

65. On October 26, 2022, the Student's teachers all signed an acknowledgement of having received the Student's revised 504 Plan.

66. The Student continued to miss many classes due to her illness and the Student only sporadically made up her missed work.

67. On some date prior to November 4, 2022, the School again suggested the Student drop her first period class but that was declined by the Parent.

68. On November 28, 2022, an SST met to review the Student's 504 Plan.

69. At the time of the SST meeting, the Student's grades were as follows for the quarter: Spanish 2 – E; AP World History – E; Chorus – A; Aquatic Science – E; Living Systems/Biology GT – C; Algebra 2 – A; Psychology Honors – no grade at that time; English 10 GT – C.

70. Prior to the meeting, Ms. [REDACTED] sent an email stating she and the Parent would like to address the following at the SST meeting:

- Removal of the “end of quarter” boundary for make-up work
- Weekly progress meetings facilitated by the guidance counselor to review past due work in all classes
- A list of outstanding assignments, including clear differentiation for those that have been excused for each class to be sent home to parents weekly
- Specific wording in the 504 (or IEP if determined applicable) reflecting a reduction of work requirements to just the work required to show “mastery” of the subject matter
- Scheduling of non-academic courses early in the day (as a safeguard for subsequent scheduling)

71. As of the date of the meeting, the Student still had many unexcused absences.

72. At the meeting, Ms. [REDACTED] said that she spoke with the Student's doctors about her confusion and brain fog. The doctor completed a medication adjustment and Ms. [REDACTED] reported that the Student had been a little less confused over the previous month.

73. The SST asked for more information about the Student's medical diagnosis to better understand how her condition was affecting her education.

74. The SST discussed a variety of options to best support the Student including a point sheet for grade tracking and weekly meetings to work on executive functioning skills. It was agreed that Ms. [REDACTED], the SST chair, would meet with the Student on Fridays during lunch to work on executive functioning strategies (ways to check gradebook, make a list, etc). After any meeting with the Student, Ms. [REDACTED] was to send a follow-up email to Ms. [REDACTED] and Ms. [REDACTED]. The first meeting was to be on December 2, 2022.

75. The SST discussed Ms. [REDACTED]' question about the Student only needing to complete assignments that show mastery to content. The team explained that assignments in the "minor" grading category is an assignment related to show mastery of content due to them leading towards the final assessment. "Major" assignments show mastery to content because those grades represent each of the building blocks from the minor assignments. Practice assignments are non-graded.

76. The SST discussed the Parent's request that it remove the end of quarter boundaries due to the Student's medical impairment and because even when she was in school, she was not 100 percent and not always able to complete her assignments effectively due to the brain fog. The team did not agree to this request.

77. Ms. [REDACTED] asked for an IEP team meeting due to the SST not understanding the requests being made. Ms. [REDACTED] advised Ms. [REDACTED] to request the IEP in writing.

78. On November 30, 2022, Ms. [REDACTED] and [REDACTED], another one of the Student's educational advocates, requested an IEP evaluation for the Student.

79. On November 30, 2022, a Child Find Referral was made for the Student. The reasons for the referral were cognitive/intellectual, social/emotional behavioral, math calculation, and math problem solving. It was noted that the Student had difficulty with organization and difficulty completing tasks/assignments, difficulty with math computation, difficulty sleeping, difficulty with short- and long-term memory, and inconsistency in performance.

80. On November 30, 2022, Mr. [REDACTED] and Ms. [REDACTED] both sent emails to the School raising several points of contention regarding the Student's 504 Plan, including that it was not appropriate that the quarters would close without the Student having an opportunity to make up work; refusal to give her incompletes; it being unfair to punish the Student for absences not being excused because this was an administrative oversight as a result of poor communication; that some of the Student's team question the validity of her medical condition; asking for a staff member to check in weekly with the Student regarding missing assignments; reduction in workload to the work required to show mastery; and notes/recordings of all missed classes.

81. On December 1, 2022, the School responded stating that all of the accommodations requested in the September 28, 2022 letter had been incorporated into the Student's 504 Plan and asking what specifically was not being implemented.

82. On December 2, 2022, Ms. [REDACTED] started meeting weekly with the Student to go over her missing assignments from her classes with the goal of helping her to advocate for herself and then decrease those meetings. Ms. [REDACTED] kept meeting with the Student until January 2023, when she turned the meetings over to [REDACTED], because the Student's absences made it difficult for Ms. [REDACTED] to meet the Student at different times each week whereas Mr. [REDACTED]'s schedule was more flexible.

83. On December 14, 2022, an IEP team convened to determine which assessments would be completed and to discuss modifying the Student's 504 Plan.

84. At the meeting, Ms. [REDACTED] stated they were requesting an IEP because the accommodations on the 504 Plan were not being met and the Student was still struggling in School.

85. The team recommended assessments of academic performance in reading, mathematics and written language, intellectual/cognitive functioning, emotional/social/behavior development and observation.

86. Ms. [REDACTED] informed the team that the Student only had so many workable hours in a day. On her best day, the Student is able to complete work from 10:00 a.m. to 9:00 p.m. but the majority of the time she is not fully awake or functioning when she is present in School. The IEP team suggested the Student may want to look into Extended Day Learning Program (evening school), due to it being held from 5:00 p.m. to 9:00 p.m. The IEP team also encouraged the Student's use of [REDACTED].

87. Several members of the IEP team stated there was a discrepancy between what Ms. [REDACTED] and Ms. [REDACTED] were requesting and what was listed on the physician's report that was provided to the team. The team did not understand how the Student's health condition affected how she did in class. Therefore, the IEP team requested to speak with the Student's treating physician to further understand the condition. Ms. [REDACTED] did not respond.

88. On December 14, 2022, the IEP team sent a request for release of medical records to the Parents. The Parents did not return the release.

89. On December 14, 2022, the Student's 504 Plan was amended to include the following accommodations:

- To Support [the Student] in the management and completion of assignments and assessments:

- Teachers will prioritize and only require the completion of assignments that are essential for grading to demonstrate master of the specific course learning outcomes/standards. (Note: This may vary depending upon each course and the required learning outcomes/standards.)
- Teachers will identify the prioritized assignments for [the Student] so she can maximize time and focus on what's most important
- [The Student] will not be penalized (i.e., earn a zero) for not completing and submitting assignments identified as non-essential
- [The Student] will be provided with textbooks to take home in courses where textbooks are used. [The Student] will be provided with time to print assignments from Schoology when paper copies of work is assigned.
- [The Student] will be reminded to check Schoology regularly for grading updates and help if needed to schedule coach class/tutoring.
 - To support [the Student] when she has missed instruction due to an absence, late arrival, or break from class related to her 504 impairment:
 - Teachers will provide [the Student] extended time to complete essential assignments and assessments (up to 100% of time/double-time). If additional time is needed beyond 100% or double time, [the Student] will contact the teacher to request more time.
 - Note: For essential assignments assigned close to or at the end of the quarter, [the Student] will be provided the same extended time (100% or double time) to complete and submit the assignment even if the quarter has closed.
 - [The Student] may also refer to the board policy & rule to request an "I" (Incomplete) for a specific course at the end of a quarter, as needed. If an "I" is approved, all board policy and rule procedures apply.
 - When [the Student] has missed instruction due to her disability, teachers will make available supporting resources, such as notes, PowerPoints, outlines, readings or videos, etc. (Note: Other supporting resources that may be available to address missed instruction due to absences includes Chronic & Intermittent Home & Hospital Services -pending approval, and coach class and/or Saturday School, as scheduled school staff.)

- To support [the Student] in managing symptoms related to her 504 impairment:
 - [The Student] will have water and lavatory breaks as needed, can be issued a locker in the main building and annex, and has extra time to move between classes.

(P Ex. 7, p. 30).

90. On December 14, 2022, all of the Student's teachers signed an acknowledgement of having received the Student's revised 504 Plan.

91. On December 14, 2022, Ms. [REDACTED] sent Notice and Consent for Assessment to Ms. [REDACTED] for the IEP assessments.

92. As of December 14, 2022, the Parents had still not applied for [REDACTED] for the 2022-2023 school year. On December 14, 2022, the School sent Ms. [REDACTED] the paperwork for [REDACTED].

93. After the December 14, 2022 meeting, Ms. [REDACTED] met with each of the Student's teachers to review the revised 504 Plan and determined how each class managed their classwork (Schoology, paper copies, etc.) and shared that information with the Student.

94. On January 6, 2023, the school resent Ms. [REDACTED] the paperwork for [REDACTED].

95. On January 11, 2023, Ms. [REDACTED] returned the Notice and Consent for Assessment to Ms. [REDACTED] with a signature and date of January 5, 2023.

96. On a date unclear from the record, sometime between December 2022 and March 2023, the Parents submitted a [REDACTED] application for the Student.

97. On January 13, 2023, an SST meeting was held to review the Student's 504 Plan at the request of the Student's educational advocate. There were several things the advocate thought had been resolved at the December 14, 2022 meeting that were not reflected in the revised 504 Plan.

98. Ms. [REDACTED] emailed in advance that she wanted to discuss at the meeting 1) how the identified accommodations were being implemented (with specificity); 2) the plan/process intended to evaluate and implement a comprehensive reduction of the Student's workload; and 3) boundaries of quarter closings.

99. Ms. [REDACTED] requested at the SST meeting that all of the Student's missing assignments remain open until Friday, January 20, 2023 to ensure she would be eligible to play [REDACTED] in the Spring of 2023. The SST was not in agreement, as it felt she had been provided her accommodations according to the 504 Plan.

100. No further changes were made to the Student's 504 Plan at the January 13, 2023 SST meeting.

101. Ms. [REDACTED] agreed to meet with the Student's teachers to notate on Schoology when the Student's assignments were due based on the 504 Plan. Ms. [REDACTED] also met with the Student's teachers to review examples of when and how workload may be reduced per the 504 Plan.

102. In January 2023, the Student began meeting weekly with Mr. [REDACTED] to go over the Student's missing assignments. Those meetings continued until January 25, 2023, when the Parents requested that those meetings stop because they were not helpful to the Student.

103. In January 2023, Ms. [REDACTED] expressed concern to the School about the Student not being allowed to turn in late assignments and excusing non-essential work. The School explained that if, under particular circumstances, the Student needed time beyond that provided by her 504 Plan, she needed to contact her teachers to request that additional time.

104. As of January 13, 2023, the Parents had still not returned the [REDACTED] paperwork to the school.

105. On January 18, 2023, Ms. [REDACTED] emailed the School asking that all paper assignments be put in a folder and sent to the office weekly for the Student to collect those assignments.

106. On January 19, 2023, Ms. [REDACTED] sent an email to the Parents discussing potential schedule adjustments, including e-Learning, a Distance Learning Program through [REDACTED], the Student's home school, and Extended Day Learning Program (evening school).

107. On January 23, 2023, Ms. [REDACTED] emailed the School to inquire about late assignments that the School would not accept and also to address the Student's AP World History class, which occurred during a time of day when the Student was often tardy. She asked whether there were other options for completing this class.

108. On January 24, 2023, the School emailed the Parent about alternatives to the Student's AP World History class. The School offered that the Student could switch from AP World History to Standard World History, and the Extended Day Learning Program, which would involve the Student taking live instruction through her computer in the evening, which ran from 5:00-9:00 p.m.

109. Sometime in January 2023, the Student was informed that she was academically ineligible to play [REDACTED] in the Spring.

110. On January 31, 2023, the School reminded Ms. [REDACTED] that it had not yet received the Student's [REDACTED] application.

111. On February 13, 2023, the IEP team convened to review the completed assessments. Both Parents and their two educational advocates attended the meeting.

112. The assessments included three classroom observations conducted on January 25, 2023 in Living Systems; January 31, 2023 in Algebra 2; and February 6, 2023 in Algebra 2, each for the length of one classroom period. During the first observation, the Student left the room for

a twenty-one minute bathroom break, during which time she was seen in the hallway speaking with another staff member for a portion of that time, but was otherwise generally on task. In the second, the Student interacted appropriately with the teacher asking questions on an independent assignment, worked for about three minutes, then used her cell phone for four minutes, before leaving class fifteen minutes early to use the bathroom without returning. During the third, the Student was on and off her phone during the entire class, but completed the assignment appropriately. The vast majority of categories for observation were checked off as “no problems” with the exception of some problems for work habits and task completion.

113. All of the Student’s teachers reported the Student as capable, but that the barriers to her learning were her attendance, and her socialization in class.

114. Academic testing showed the Student was in the average to above average in every area, except one subtest in math calculation showed the Student in the low average range.

115. The psychological assessment revealed no areas of concern. The Student did report some paranoia, but attributed that primarily to some medication she was taking.

116. The Student scored in the 58th percentile on the Weschler Adult Intelligence Scale-Fourth Edition yielding a scaled IQ of 105.

117. The Behavior Rating Inventory of Executive Function, Second Edition was administered to assess the Student’s use of executive functioning skills. The scores from one of the Student’s teachers was in the 64th percentile and from Ms. [REDACTED] was in the 54th percentile, falling within the average range relative to same-age peers, indicating few difficulties with respect to overall executive functioning skills.

118. Teacher and parent broad scale ratings on the following indexes were all within the average range: the Behavior Regulation Index, a measure of self-regulation skills and skills related to the monitoring of your own behavior; Emotional Regulation Index, a measure of skills

in regulating your own emotions as well as adjusting to change in your environment; and Cognitive Regulation Index, a measure of skills in managing and controlling cognitive processes and problem-solving skills.,

119. On the Behavior Assessment System for Children -3, the Student's Parent rated her within the average range, indicating few concerns when you compare her behavior and social-emotional functioning to that of her same-age peers. The Student's teacher expressed some concerns with her absences, time out of class, spending time on her cell phone and peers during class with an overall rating within the average range.

120. The IEP team determined the Student has an Other Health Impairment (OHI) that adversely impacts her education.

121. The school-based members of the IEP team determined that the Student did not require specially designed instruction to make adequate progress in the educational program and the Student was not eligible as a student with a disability who requires special education services. The Parents and their advocates disagreed.

122. On February 21, 2023, a Nurse Practitioner at the [REDACTED] [REDACTED] wrote a letter confirming the Student was being seen there for management of her formally diagnosed Chronic Migraine disorder. The letter was shared with the School sometime thereafter but no later than March 7, 2023. The Student's migraine disorder is part of her [REDACTED]. The letter stated that: "For most patients, school attendance is a primary concern and remains a priority, despite sometimes debilitating symptoms of headache syndromes (often involving moderate to severe pain, visual alterations, sensitivity to typical light and sound, nausea &/or vomiting, of which may contribute to difficulty with routine tasks or concentration)." (P Ex. 4, p. 7).

123. The letter requested that Student be supported in the school setting with accommodations including avoidance of identified triggers (such as excessive noise (band), strong odors (carpentry), and prolonged exertion (track/PE), opportunity to carry water, bathroom breaks, snacks throughout the day, access to print materials instead of digital, rest breaks in a dark, quiet area, access to over the counter and prescription medications, additional help and extended time to complete assignments, exam or quizzes if experiencing migraine symptoms, access to teacher's notes concerning class content missed, ability to make up missed assignments, and extended time on assignments.

124. On February 22, 2023, the Student's doctor at [REDACTED] in the Division of Pain Medicine for chronic pain related to [REDACTED] wrote a letter stating that the Student suffered from chronic pain related to [REDACTED], which can interfere with her ability to maintain energy, pay attention, and sit or engage for extended periods of time. The doctor requested the following accommodations:

- breaks as needed/scheduled breaks, because chronic pain results in difficulty concentrating;
- limit work to minimal necessary to demonstrate the concepts;
- extended time on homework assignments and exams;
- flexibility in attendance; and
- identifying a single person at school who can work directly with the student and parents to create a plan so that all staff and teachers involved will respond consistently and constructively to pain episodes.

125. This letter was shared with the School sometime before March 29, 2023.

126. On February 27, 2023, Ms. [REDACTED] reinstated weekly meetings between Mr. [REDACTED] and the Student.

127. On March 7, 2023, the Student's doctor at [REDACTED] wrote a letter addressing the Student's [REDACTED]. The doctor wrote that the Student has alopecia, arthralgia (joint

aches), Raynaud (extreme color changes in the hands and feet in response to cold) with negative antinuclear antibodies and autoantibodies. The letter stated [REDACTED] impacts the Student's daily functioning by making it difficult for her to concentrate in school and attend school regularly and on time every day, causes her to experience constant fatigue, brain fog, and joint pain. The Patient is prescribed medication which may cause side effects including headaches, dizziness, loss of appetite, nausea, diarrhea, stomach pain, vomiting and rash. The letter states [REDACTED] has unpredictable flares that mean her [REDACTED] symptoms may worsen some days more than others.

128. The letter asks that the Student be allowed to have extended time to complete assignments when she is absent from class and when she is present, up to two weeks to complete all assignments. The letter recommends the Student have a pass/fail grading system to allow her to complete her work without the penalty to her Grade Point Average (GPA) and extra-curricular eligibility. This letter was shared with the School sometime prior to March 29, 2023.

129. On March 29, 2023, the SST met with the Parent to review the Student's 504 Plan. The purpose of the meeting was to address additional documentation provided from [REDACTED] and [REDACTED] regarding the Student's medical condition, specifically the chronic migraine disorder causing headache syndromes, moderate-severe pain, visual alterations, sensitivity to light and possibly vomiting. The Parents and the Student's educational advocates were aware of the meeting and informed the School they would not be attending.

130. At the time of the meeting, the Student's 3rd quarter grades were as follows: Aquatic Science – E; Chorus – B; AP World History – E; English 10 GT – E; Algebra II – E; Health – A; Living Systems GT – E; Spanish II – B.

131. The SST added chronic migraine disorder to [REDACTED] under the developmental/health information on the 504 Plan. Specific limitations included prolonged hours

of sleep, exhaustion, internal cramping, headache syndromes, moderate-severe pain, visual alterations, sensitivity to light, and possible vomiting.

132. The SST discussed the recommendation of an alternate grading system for the Student such as pass/fail, but rejected this recommendation as pass/fail classes are only allowed for certificate bound (non-High School diploma) students.

133. The SST agreed to the recommendation that the Student have two weeks to complete all assignments when she is absent. The Student continued to have 100% extended time to complete assignments when she is in School.

134. To address the Student's migraines, the SST discussed ways to accommodate the Student's potential onset of migraines and agreed the Student should use the Nurse's Suite for all bathroom and other breaks because it was a less stimulating setting, and a medical professional could monitor her time out of class. The SST noted the Student had not requested she be allowed to take over the counter medications at School, and the nurse forwarded the form to Ms. [REDACTED] so that could occur.

135. The SST determined the Student qualified for Social Work Services for twenty minutes bi-weekly, and that Mr. [REDACTED], a School Social Worker, would meet with the Student to check in on how the Student was doing with her grades and if she required any additional support from her teachers.

136. On March 29, 2023, the Student's 504 Plan was revised to include the following:

- To Support [the Student] in the management and completion of assignments and assessments:
 - Teachers will prioritize and only require the completion of assignments that are essential for grading to demonstrate mastery of the specific course learning outcomes/standards. (Note: This may vary depending upon each course and the required learning outcomes/standards.)

- [The Student] will not be penalized (i.e., earn a zero) for not completing and submitting assignments identified as non-essential
- [The Student] will be provided with textbooks to take home in courses where textbooks are used. When the Student is absent from a class period[,] she will be provided assignments via the initial method for which the assignment was provided. If the assignment was a paper assignment, each teacher is supplied a folder.
- The teacher will place the paper copy in the folder and at the end of the week, the teacher will provide the folder to a designated adult so the material can be signed out on the main office.
- The Student will be reminded to check Schoology regularly for grading updates and help if needed to schedule coach class/tutoring.
- To support [the Student] when she has missed instruction due to an absence, late arrival, or break from class related to her 504 impairment:
 - When the Student is PRESENT in school, teachers will provide the Student extended time to complete essential assignments and assessments (up to 100% of time/double-time). If additional time is needed beyond 100% or double time, the Student will contact the teacher to request more time. When ABSENT, the Student will have 2 WEEKS from the date of the assignment is due to turn that assignment in.
 - Note: For essential assignments assigned close to or at the end of the quarter, [the Student] will be provided the same extended time (100% or double time) to complete and submit the assignment even if the quarter has closed.
 - [The Student] may also refer to the board policy & rule to request an “I” (Incomplete) for a specific course at the end of a quarter, as needed. If an “I” is approved, all board policy and rule procedures apply.
 - Encourage the Student to take notes and supplement them with teacher outlines/notes, as available, when the Student has times of brain fog or misses large portions of instruction.
 - When [the Student] has missed instruction due to her disability, she will have access to supporting resources, such as notes, PowerPoints, outlines, readings or videos, etc., as available. (Note: Other supporting resources that may be available to address missed instruction due to absences includes Chronic & Intermittent ██████████)

██████████ -when eligible and accessed by the parent, and coach class and/or Saturday School, as scheduled by school staff.)

- To support [the Student] in managing symptoms related to her 504 impairment:
 - All breaks OUTSIDE of the classroom, including bathroom breaks, will take place in the nurse's suite to allow for health check-ins and monitoring, and to support the Student as needed.
 - During a break, she may access to water and/or snack to mitigate pain, as needed.
 - If requested, [the Student] will have access to locker in the main building and the Annex.
 - Movement breaks INSIDE the classroom – permit the Student movement breaks within the classroom throughout the class period in order to decrease pain throughout the school day (Ex. Stretch breaks, discreetly moving to an alternative seat in the classroom).
 - To manage a pain episode the Student is to go to the school nurse to support the management of symptoms. The Student will be provided with an alternative space other than the nurse's office (example: SEL Office) when experiencing an onset of a migraine or severe headaches. This should be an area with less light and reduced noise.
 - To manage the Student's migraines when using electronically screened devices she may do any of the following: increase her screen font size, decrease her light brightness, change the color contrast of the background and font, and/or take frequent screen breaks by briefly looking away from the screen.

(P Ex. 8, p. 37).

137. On March 29, 2023, all of the Student's teachers signed an acknowledgment of having received the Student's revised 504 Plan.¹⁴

138. After March 29, 2023, the Student met a few times with the School's social worker, but those meetings were discontinued at the Student's request.

¹⁴ The date on this document is March 28, 2023, but the meeting to revise the 504 Plan was March 29, 2023, leading to the inference that the date was a typographical error.

139. On April 11, 2023, the Student was placed in the chronic intermittent [REDACTED] [REDACTED] for the 2022-2023 school year.

140. At a resolution session during April or May 2023, the Parents' education advocate requested that the School conduct a Functional Behavioral Assessment (FBA) to develop a Behavioral Intervention Plan (BIP) to support the Student by targeting adaptive behaviors, self-advocacy skills, and utilizing supports appropriately.

141. On May 12, 2023, the School sent the Parents a request for consent to conduct an (FBA). The Parents never consented.

142. The Student's attendance for the 2022-2023 school year by period was as follows:

A Days	B Days
1A – Aquatic Science 41.7%	1B Chorus 54.2%
2A AP World History 63.1%	2B GT English 10 78.3%
3A Algebra 2 75%	3B Semester 1 Psychology 95.3%
	Semester 2 Health 85%
4A GT Living Systems/ 76.2 % Biology	4B Spanish 2 89.2%

143. For the 2022-2023 school year, the Student was absent for 34 full days out of a possible of 174 days. Eleven of the 34 were excused and 23 of the 34 were unexcused. The Student had excused tardies for 116 class periods and unexcused tardies for 55 class periods.

144. The Student's grades for the 2022-2023 school year by period were as follows:

A Days	B Days
1A – Aquatic Science E	1B Chorus C
2A AP World History E	2B GT English 10 E
3A Algebra 2 D	3B Semester 1 Psychology B
	Semester 2 Health B
4A GT Living Systems/Biology E	4B Spanish 2 C

145. The Student's failing grades are attributable to her not turning in assignments.

146. Starting in June 2023, the Student played ██████ in the Spring 2023 for a non-School based travel team. The Student’s coach allows her to miss practice and games and tournaments when she is not feeling well.

DISCUSSION

Legal Framework

Burden of Proof

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

Motion for Judgment

At the conclusion of the Parents’ case, BCPS made a Motion for Judgment (Motion) arguing that the Parents have failed to meet their burden of proof. COMAR 28.02.01.12E. I reserved ruling on the issue. COMAR 28.02.01.12B(6), E(2)(b). BCPS presented its case. COMAR 28.02.01.12E(3). I am denying BCPS’ Motion, although I found in favor of BCPS, as discussed more fully below. COMAR 28.02.01.12E(2)(b).

IDEA

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-420; and COMAR 13A.05.01.

Child Find

The IDEA imposes an affirmative obligation known as “Child Find” on states, as follows:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C.A. § 1412(a)(3). The “Child Find” provision applies to, among others, “[c]hildren who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade” 34 C.F.R. § 300.111(c)(1). Conversely, “Child Find does not demand that schools conduct a formal evaluation of every struggling student.” *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012).

To implement its Child Find obligations, local educational agencies (LEAs) are further required to evaluate children to determine whether they meet the definition of “child with a disability.” 20 U.S.C.A. § 1414(a); *see also* 34 C.F.R. § 300.122. LEAs are required to conduct a “full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability.” 20 U.S.C.A. § 1414(a)(1)(A); 34 C.F.R. § 300.301(a). The purpose of the initial evaluation is “(I) to determine whether a child is a child with a disability . . . and (II) to determine the educational needs of such child.” 20 U.S.C.A. § 1414(a)(1)(C)(i); *see also* 34 C.F.R. § 300.301(c)(2). Either a parent of a child or an LEA “may initiate a request for an initial evaluation to determine if the child is a child with a disability.” 20 U.S.C.A. § 1414(a)(1)(B); 34 C.F.R. § 300.301(b).

In conducting the evaluation, the LEA shall:

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic

information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 U.S.C.A § 1414(b)(2); *see also* 34 C.F.R. § 300.304(b). The LEA must also ensure that the assessment includes “all areas related to the suspected disability.” 34 C.F.R. § 300.304(c)(4); 20 U.S.C.A § 1414(b)(3)(B).

Maryland law provides that an initial evaluation must be conducted within “60 days of parental consent for assessments” and “90 days of the public agency receiving a written referral.” COMAR 13A.05.01.06(A)(1)(a), (b). Absent such a request, a school district must begin the evaluation process within a “reasonable time” after the district is on notice of a disability requiring special education. *D.K.*, 696 F.3d at 250; *E.H. v. McKnight*, No. TDC-21-2297, 2022 WL 3908630, at *9 (D. Md. Aug. 30, 2022).

After the LEA conducts its evaluation, the IEP team, including the parents, must meet to determine whether the child is a “child with a disability” and the educational needs of the child. 20 U.S.C.A § 1414(b)(4)(A); 34 C.F.R. § 300.306(a)(1). As part of the evaluation process, the IEP team is required to review existing evaluation data on the child, including evaluations and information provided by the parents of the child. 20 U.S.C.A § 1414(c)(1)(A)(i); 34 C.F.R. §

300.305(a)(1)(i). Based on the IEP team’s review of existing evaluation data, and input from the child’s parents, the team must identify what additional data, if any, is needed to determine:

- (i) whether the child is a child with a disability . . . and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;
- (ii) the present levels of academic achievement and related developmental needs of the child;
- (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
- (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

20 U.S.C.A § 1414(c)(1)(B); *see also* 34 C.F.R. § 300.305(a)(2). The LEA “shall administer such assessments and other evaluation measures as may be needed to produce the [additional] data identified by the IEP Team.” 20 U.S.C.A § 1414(c)(2); *see also* 34 C.F.R. § 300.305(c).

Failure to meet the Child Find obligation may constitute a procedural violation of the IDEA. *T.B. v. Prince George’s Cnty. Bd. of Educ.*, 897 F.3d 566, 572 (4th Cir. 2018). But such a procedural violation “will be ‘actionable’ only ‘if [it] affected the student’s substantive rights.’” *Leggett v. District of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015) (quoting *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 832, 834 (D.C. Cir. 2006)). According to Maryland law,

In matters alleging a procedural violation, an administrative law judge may find that the child did not receive a free appropriate public education only if the procedural inadequacies:

- (i) Impeded the child’s right to a free appropriate public education;

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

(iii) Caused a deprivation of educational benefits.

Educ § 8-413(g)(2); *see also* 20 U.S.C.A. § 1415(f)(3)(E).

Eligibility

To be eligible for special education and related services under the IDEA, a student must meet the definition of a "child with a disability" as set forth in Section 1401(3) and the applicable federal regulations. The statute defines "child with a disability" as a child:

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, ***other health impairments***, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

20 U.S.C.A. § 1401(3)(A) (emphasis added); *see also* 34 C.F.R. § 300.8(a)(1); Educ. § 8-401(a)(2); and COMAR 13A.05.01.03B(78). Thus, to qualify for special education under the IDEA, the student must "1) have a qualifying disability and 2) by reason thereof need special education and related services." *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 382 (5th Cir. 2007) (internal quotation marks omitted).

The Student here was evaluated under the criteria for other health impairment. Other health impairment is defined as:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child’s educational performance.

34 C.F.R. § 300.8(c)(9); *see also* COMAR 13A.05.01.03B(51).

The IDEA defines special education as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including –

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C.A. § 1401(29). The regulations define specially designed instruction as:

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

(i) To address the unique needs of the child that result from the child’s disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

Related services is defined by regulation to mean:

transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

34 C.F.R. § 300.34(a); *see also* 20 U.S.C.A. § 1401(26)(A).

Federal regulation provides that if a child has a listed disability, “but only needs a related service and not special education, the child is not a child with a disability” under the IDEA, unless

“consistent with § 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards” 34 C.F.R. § 300.8(a)(2)(i), (ii).

FAPE and IEP

The IDEA requires “that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living” 20 U.S.C.A. § 1400(d)(1)(A); *see also* Educ. § 8-403.

The IDEA defines a FAPE as special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9); *see also* Educ. § 8-401(a)(3).

The IEP is the “primary vehicle” through which a public agency provides a student with a FAPE. *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009); *see also Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 391 (2017). The IEP must consider:

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

20 U.S.C.A. § 1414(d)(3)(A).

IEP teams must consider the student’s evolving needs when developing their educational programs. The student’s IEP must include “[a] statement of the child’s present levels of academic achievement and functional performance, including . . . [h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same

curriculum as for non-disabled children)” 34 C.F.R. § 300.320(a)(1)(i).

To comply with the IDEA, an IEP must, among other things, allow a student with a disability to advance toward measurable annual academic and functional goals that meet the needs resulting from the child’s disability or disabilities, by providing appropriate special education and related services, supplementary aids, program modifications, supports, and accommodations. 20 U.S.C.A. § 1414(d)(1)(A)(i)(II), (IV), (VI).

At the beginning of each school year, each local educational agency is required to have in effect an IEP for each child with a disability in the agency’s jurisdiction. 20 U.S.C.A. § 1414(d)(2)(A). At least annually, the IEP team is required to review a child’s IEP to determine whether the goals are being met. 20 U.S.C.A. § 1414(d)(4)(A)(i).

Analysis

The Student’s Position

The Parents argued that everyone agrees the Student has an Other Health Impairment (OHI) that adversely affects her educational performance. Thus, the only issue is whether she needs special education and related services. They argue that this need is met by the Student’s failing grades and the fact that the accommodations offered by the School have not worked. They argue that the Student’s frequent and intermittent absences require a differentiation in the delivery of instruction, and instruction in executive functioning as the School does not offer the Student instruction when she misses class, only opportunities to make up her work. The Parent’s expert testified that the Student is a qualifying child with a disability entitled to an IEP.

BCPS’ Position

BCPS agreed that the Student has an OHI that adversely affects her educational performance. However, it disagreed that the Student needs special education and related services. BCPS argues that it developed and implemented numerous 504 Plans which provided

accommodations including extended time, which BCPS contends the Student did not take advantage of. BCPS also offered other strategies and supports which included [REDACTED], a reduced class schedule, evening classes, summer classes, virtual learning, Saturday school, coach classes, lunchtime tutoring, and an FBA intended to develop a BIP, all of which were either rejected by the Parents or not consistently used by the Student. BCPS provided expert testimony that it tested the Student and nothing in her profile revealed a need for special education. Finally, BCPS argued that to the extent the Student alleged the failure to properly devise and implement a 504 Plan, that should be the subject of a 504 case, of which this is not.¹⁵

Need for Special Education

The parties agree that the Student's [REDACTED] qualifies as an OHI and that it adversely affects her educational performance. Thus, the only issue with respect to qualification for an IEP is whether the Student needs special education and related services. As discussed above, special education is defined as "specially designed instruction." 20 U.S.C.A. § 1401(29). To prove the Student needs specially designed instruction, the Parents introduced testimony from three witnesses and introduced hundreds of pages of exhibits, all of which I have reviewed. To contest the Student's case, BCPS introduced testimony from four witnesses and also introduced hundreds of pages of exhibits, all of which I have reviewed. The relevant Student's and Parent's testimony was as follows:

The Student's Testimony

The Student testified that her [REDACTED] causes her to suffer from joint pain and muscle pain on a daily basis. She sometimes has headaches and an upset stomach and has trouble focusing. She regularly sees a rheumatologist, a pain management specialist, and a headache specialist. She has good days and bad days, and her symptoms are unpredictable, although fairly seasonal,

¹⁵ As discussed below, I informed Mr. Altman at the beginning of the hearing that the OAH did not have jurisdiction to hear a 504 case arising out of Baltimore County.

in that she does quite well in September and October, and in the Spring, but much more poorly in November through February or March.

The Student testified that she is unable to complete her assignments in the same time frame as her peers because she misses classes due to her illness. She said that even though she was granted extended time on assignments, she often did not understand the extended due date, she sometimes was sick during the extended time to make up the assignment, and sometimes suffers from brain fog and difficulty focusing both at home and in School. When asked what she needed to be successful, the Student responded that she needed extended time, not merely two or three days, but a week or more to go past the weekend so she would have time to see her tutor. She also said she needed an easy and consistent system to get her work from school, because that has not been the case thus far. The Student also testified that she needed her breaks from class to not be treated as criminal.

The Student testified that she has never been disciplined for using her cell phone in class nor has she been told that she uses it too much. If she uses her phone in class, it is because she has completed all of her work and there are only a few minutes left of class, which is not enough time to complete another assignment, so she might pull out her cell phone.

The Student never mentioned specially designed instruction, or anything that would fit into the category of specially designed instruction. The Student never suggested that she needed any differentiation in instruction. The Student's complaints were that the 504 Plan: was not properly crafted, in that it initially did not provide sufficient extended time; and was not properly implemented, in that she did not understand the extended due dates, there was no consistent manner of getting missing assignments to her, and her teachers did not always follow the 504 Plan. Moreover, the Student testified that some of the subtle instructions for assignments that

were discussed in class were sometimes not conveyed to her when she missed class. She suggested that recording some of her classes would be helpful.

As to the alternate strategies that were offered to her by the School, the Student stated that evening school would not work for her because she does not function well at 9:00 p.m. The Student sporadically attended Saturday school in ninth grade for Environmental Science and in tenth grade for World History as well as coach class after school. However, since Saturday school is in the mornings, she finds it difficult to attend.

Ms. [REDACTED]'s Testimony

Ms. [REDACTED] testified that high school had been smooth sailing for the Student until early October 2021, when the Student had a weekend during which she slept for long stretches of time without waking up. Ms. [REDACTED] suspected a health issue and took the Student first to her primary care physician, and then to a rheumatologist. After several months of testing, she was eventually diagnosed with [REDACTED], which causes headaches, joint aches, numbness, pain, tingling, hair loss, and fatigue. Some days the Student wakes up nauseous and takes some time to get herself together. The Student has good and bad days, but if she does too much on a good day, it will catch up with her and she will become lethargic later into the evening and have trouble getting up the next day. Ms. [REDACTED] testified that the Student not only regularly missed School, but also missed ordinarily adolescent activities, like a School dance or a sleepover, because she was often simply too tired to attend or stay late.

Ms. [REDACTED] testified that it was extremely difficult to get missing assignments for the Student. At some point, she brought folders to School for each of the Student's classes and asked the teachers to put paper assignments into the folders and bring them to the front office where she would pick them up on Fridays so the Student could work on assignments over the weekend. Sometimes the teachers did not use the folders, and sometimes they said they had used the folder,

but they were not in the office to be picked up, both of which were extremely frustrating to the Student.

Ms. [REDACTED] testified that the Student's extended time was not extended far enough because sometimes the Student would be sick during the make-up period. Moreover, it was not always clear to her when an extended time assignment was due.

Ms. [REDACTED] testified she did her best to keep the school informed about what was going on with the Student and to provide the requested medical documentation. Ms. [REDACTED] testified that the Student feels confused and does not understand what is going on with her body. She is angry and the medication is not working.

When asked what kind of supports the Student needs, Ms. [REDACTED] responded some kind of social psychiatric support, extended time that will work for her, in-person tutoring, and a note-taker. Ms. [REDACTED] never discussed specially designed instruction or anything that would fit that description. When asked why she was pursuing an IEP, she replied that it would hold the School more accountable and that no one was accountable with the 504 Plan.

As to the alternate strategies offered by the School, Ms. [REDACTED] testified that [REDACTED] was not a viable option for the Student because they did not support AP classes, only provided virtual tutoring, and that the Student was only eligible for [REDACTED] tutoring when she missed two full days in a row and the Student did not usually miss full days, but more often was late and/or left early. Ms. [REDACTED] also testified that the 504 Plan was not properly designed or implemented in that the Student was not given sufficient extended time, she and the Student did not understand the extended due dates, and the time given might not be enough given the possibility the Student might be sick during the extended time frame, and the School did not have an adequate system to get missing assignments to the Student. Evening school was not an option for the Student because she did not function well in the evening. The Parents did not want

to transfer the Student to her home school, which would have much less travel time, because it was a failing school and did not have much to offer her. And Ms. [REDACTED] did not remember exactly why they did not agree to a reduced schedule by dropping the Student's first period class. Ms. [REDACTED] testified that some of the strategies offered by the School were rejected by the Student because she did not want to appear different in front of her peers.

Child Find

The Parents alleged that BCPS had reason to suspect that the Student qualified as a student with a disability during the 2021-2022 school year and that it should have proceeded with conducting formal assessments as a result of the February 17, 2022 IEP team meeting. In addition to the Student's and the Parent's testimony, the Parent presented the expert testimony of Dr. [REDACTED] to support their Child Find violation argument.

Dr. [REDACTED] has a Ph.D. in school psychology and has been a professor of school psychology, and a national consultant, author and lecturer for over forty years. I accepted Dr. [REDACTED] as an expert in special education, policies and procedures associated with special education, the development of 504 Plans and IEPs, psychology and child find and compliance.

As to IDEA violations, Dr. [REDACTED] testified that no eligibility assessment was done after Ms. [REDACTED] emailed asking for an IEP in February 2022 and the School pre-judged that the Student would not qualify as a student with a disability. Dr. [REDACTED] referred to the Parent's email dated February 8, 2022, where she asked for a "true IEP." (P Ex. 2, p. 2). Dr. [REDACTED] opined that the LEA rejected the Parent's request by prejudging that the Student would not qualify as a student with a disability, as documented in the February 17, 2022 meeting notes where Dr. [REDACTED] stated that since the Student does not have an educational or cognitive disability an IEP is in all likelihood not appropriate. He further testified that Dr. [REDACTED] decided the Student did not have a disability without any assessments being done. Although the LEA

qualified the Student for a 504 Plan in March 2022, Dr. [REDACTED] testified that at that time the LEA should have conducted assessments regarding Child Find to see if the Student qualified for special education. Furthermore, Dr. [REDACTED] highlighted that on February 9, 2023, Ms. [REDACTED] told the Parents, the IEP team could not determine if the Student qualifies outside of the team meeting because the purpose of the meeting is to determine if she qualifies; but a year before, in February 2022, the IEP team decided the Student's eligibility without the meeting.

Dr. [REDACTED] has a Ph.D. in school psychology and has worked as a school psychologist since 1999. I qualified her as an expert in psychology, psychological assessments, and the development of IEPs and 504 Plans. Dr. [REDACTED] testified that in February 2022, no assessments were recommended because at that time there were no psychological or educational concerns. Moreover, the team determined that [REDACTED] was the most appropriate resource to address the Student's primary issue – which was attendance.

A school district must evaluate all children “who are suspected of being a child with a disability” who is “in need of special education.” 34 C.F.R. § 300.111(c)(1); *see also T.B.*, 897 F.3d at 571-72. The United States District Court for Maryland recently addressed the standard for child find violations in *E.H. v. McKnight*, which states:

For the Court to sustain Plaintiffs' procedural Child Find claim, Plaintiffs must show that Defendants overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate. A school district meets its Child Find duty by initiating the IDEA-eligibility process.

2022 WL 3908630, at *9 (citations and quotation marks omitted). However, if “the LEA does not suspect that the child has a disability, it is permitted to deny a request for an evaluation.” *JA.B. v. Wilson Cnty. Bd. of Educ.*, 61 F.4th 494, 503 (6th Cir. 2023) (internal quotation marks omitted) (footnote omitted). And a school does not “violate its child-find responsibilities by first

attempting other interventions for a student instead of immediately referring for an evaluation.”

Id.

The Fourth Circuit has also reasoned that a parent request for special education eligibility and parental disagreements with eligibility determination are not *de facto* Child Find violations.

More specifically, the Fourth Circuit has stated that:

But the child find obligation does not require schools to provide an IEP to any student whose parent believes their child is entitled to one. Rather, when a school district has convened an IEP team and comprehensively evaluated a student’s eligibility for services, and where the State maintains and follows detailed policies to evaluate children needing such services, the child find obligation has been satisfied. Miller’s disagreement with the outcome of J.M.’s evaluation does not amount to a failure to conduct an evaluation in the first instance.

Miller v. Charlotte-Mecklenburg Schs. Bd. of Educ., 64 F.4th 569, 575 (4th Cir. 2023) (citation omitted).

On February 8, 2022, Ms. [REDACTED] asked the School for a “true IEP meeting” but also stated they were not getting answers fast enough from doctors. On February 11, 2022, Ms. [REDACTED] informed the School they had received a diagnosis for the Student and requested an IEP for the Student. On February 17, 2022, an IEP team meeting was held. The following required IEP team members attended the February 17, 2022 IEP team meeting: [REDACTED], a School Administrator, [REDACTED], one of the Student’s general educators, [REDACTED], a Special Educator, Dr. [REDACTED], the School psychologist, [REDACTED], a School guidance counselor, and both of the Student’s Parents. During this February 17, 2022 IEP team meeting, the IEP considered all available existing data including prior general education interventions through the SST meetings, teacher observations/reports, parent input, and grades. The Parents participated in the meeting and had the opportunity to request specific accommodations, (*see* Findings of Fact #35), and to provide information about the Student’s symptoms. However, the

Parents did not provide the School with medical documentation for its consideration. Mr. [REDACTED], one of the Student's teachers, reported that the Student is distracted by her phone at times and does not always complete missing assignments from her absences, which was negatively affecting her grade. (BCPS Ex. 6, p. 3). Based upon this information, the team concluded that there was no basis to suspect an educational, emotional, or cognitive disability and that no additional data through formalized assessment was necessary to make an eligibility determination. *D.K.*, 696 F.3d at 249 ("Child Find does not demand that schools conduct a formal evaluation of every struggling student."). As a result, the IEP team determined that the Student did not qualify as a student with a disability under the IDEA and provided the Parents with the meeting notes and their procedural safeguards on February 17, 2022. (BCPS Ex. 6, p. 5). The IEP team also emphasized the importance of accessing [REDACTED].

In *E.H.*, the

ALJ . . . found that E.H.'s diagnoses of depression and anxiety were not shared with MCPS until January 2020, and that none of his teachers reported social or emotional concerns with his classroom performance during the January 2019 EMT meeting convened in response to E.H.'s grades and the cutting incident.

2022 WL 3908630, at *7. The District Court affirmed the ALJ's determination that the LEA "did not have reason to suspect in ninth grade that [E.H.'s] ADHD required special education services" and "that there was no reason to suspect in ninth grade that [E.H.] had some other undiagnosed disability that required the provision of special education services." *Id.* at *10. Similar to *E.H.*, BCPS did not learn of the Student's medical impairment when it was first diagnosed and none of the student's teachers reported any academic, social, or emotional concerns at the time of the February 17, 2022 IEP team meeting that indicated a suspected disability. The exact date when the Parents provided medical documentation to the School is unclear; however, the February 28, 2022, [REDACTED] letter addressing the Student's

██████ did not exist at the time of the February 17, 2022 IEP team meeting. Upon receiving this February 28, 2022 letter which recommended 504 accommodations, the School held an SST meeting on March 7, 2022, to determine 504 eligibility, found the Student eligible under 504, and developed a 504 Plan which was subsequently provided to all of the Student's teachers for implementation on March 14, 2022.

I also find *Richard S. v. Wissahickon Sch. Dist.*, 334 F. App'x 508 (3d Cir. 2009), to be persuasive. In *Richard S.*, the Third Circuit found that there was no Child Find violation where there was extensive evidence in the record which showed that a middle school student was "perceived by professional educators to be an average student who was making meaningful progress, but whose increasing difficulty in school was attributable to low motivation, frequent absences, and a failure to complete homework." *Id.* at 511. Like *Richard S.*, the Student's teacher similarly reported that the Student was often distracted by her cell phone use in class and bathroom breaks, which contributed to her incomplete and missing work assignments and poor grades, versus any suspected educational disability requiring special education services.

For all of these reasons, I do not find that BCPS actions constitute a child find violation. 20 U.S.C.A. §§ 1412(a)(3), 1414(a), (b)(3)(B); 34 C.F.R. §§ 300.111(c)(1), 300.122, 300.304(c)(4).

I also do not find the Parent's argument regarding prejudice to have merit. The IDEA affords parents equally important procedural and substantive rights in ensuring that their child receives a FAPE under the statute as required. The essence of the procedural safeguards afforded under the IDEA is to ensure full and meaningful participation of concerned parties, including the parents of a child, throughout the IEP development process.

Certain procedural violations may result in a finding that a child was denied a FAPE. In relevant part, the IDEA states the following:

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

- (I) impeded the child’s right to a free appropriate public education;
- (II) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or
- (III) caused a deprivation of educational benefits.

20 U.S.C.A. § 1415(f)(3)(E)(ii) (emphasis added); *see also* 34 C.F.R. § 300.513(a)(2).

The IDEA’s emphasis on meaningful parental participation and involvement is a core tenet of the statute. The IDEA requires that parents have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child” 20 U.S.C.A. § 1415(b)(1); *see also id.* § 1414(e) (“Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.”); 34 C.F.R. § 300.501(c)(1). Therefore, predetermination of eligibility could in theory be a procedural violation.

Equally important to the parents’ ability to provide input is the receptiveness of school staff to consider that parental feedback, without which parental participation would not be considered meaningful and would simply fall on deaf ears. Thus, for example, “[a] school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003), *superseded by statute on other grounds*, 20 U.S.C.A. § 1414(d)(1)(B), *as recognized in G.M. ex rel. Marchese v. Dry Creek Joint Elementary Sch. Dist.*, 595 F. App’x 698, 699 (9th Cir. 2014).

However, preparation does not equal predetermination. *Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006). Courts have declined to find predetermination even where school staff come to IEP meetings with a proposal in mind, as long as they remain open to

input from the parents and their experts. The United States District Court for the District of Maryland explained that “while a school system must not finalize its placement decision before an IEP meeting, it can and should have given some thought to that placement.” *Hanson ex rel. Hanson v. Smith*, 212 F. Supp. 2d 474, 486 (D. Md. 2002). “[S]chool evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions.” *Nack*, 454 F.3d at 610 (quoting *N.L. ex rel. Ms. C. v. Knox Cnty. Schs.*, 315 F.3d 688, 694 (6th Cir. 2003)); *see also G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947-48 (1st Cir. 1991) (finding no predetermination when school district came to team meeting with draft IEP and approved at subsequent meeting); *K.D. ex rel. C.L.*, 665 F.3d 1110, 1123 (9th Cir. 2011) (finding no predetermination where district had a placement in mind before meeting but considered other options and reasonably rejected them).

Meaningful parental participation has also not been interpreted by courts to mean that school staff cannot disagree with parental input. *See Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) (“[I]f the school system has already *fully* made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input.” (emphasis added)). “To avoid a finding of predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents’ opinions and support for the IEP provisions they believe are necessary for their child.” *R.L. ex rel. O.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014). “A state can make this showing by, for example, evidence that it ‘was receptive and responsive at all stages’ to the parents’ position, even if it was ultimately rejected.” *Id.* (quoting *Doyle*, 806 F. Supp. at 1262).

Here, the IEP team held an eligibility meeting within nine calendar days of the Parent’s referral on February 8, 2022. The Parents were present during the February 17, 2022 IEP team

meeting and had the opportunity to provide input, which was documented in the meeting notes. The IEP team made a decision during the meeting considering Dr. [REDACTED]' input and there was no evidence that they made any decision prior to the scheduled meeting. That the School ultimately disagreed with the Parents request and did not find data to support the need for assessments does not mean that the School had predetermined the Student's eligibility.

Specially Designed Instruction

With respect to the 2022-2023 school year, the Student alleges that BCPS improperly refused to identify her as a child with a disability entitled to an IEP. As stated above, BCPS conceded that the Student's [REDACTED] qualifies as an OHI and that it adversely affected the Student's education. Therefore, the only remaining issue as to eligibility is whether the Student requires specially designed instruction. The Student presented testimony from herself and Ms. [REDACTED]. Not surprisingly, these two lay witnesses never mentioned specially designed instruction. Therefore, the evidence could only have come from Dr. [REDACTED], the Student's expert witness.

Dr. [REDACTED] testified that the disability at issue here is an OHI yet there were no medical personnel involved in the eligibility determination and the Student's OHI had caused adverse effects to her educational performance. He opined that the assessments conducted in January 2023 were incomplete and flawed, and the teachers were never trained about the breadth and depth of the Student's disability and how it manifested. Further, Dr. [REDACTED] testified that the School could have given the Student an IEP with just related services, that the Student qualifies as a student with an OHI, and that the Student did not receive a FAPE. Dr. [REDACTED] testified about the specific items he would recommend being included in an IEP for the Student, which I will address below.

As to the need for special education, Dr. [REDACTED] never outright discussed what specially designed instruction the Student required. Instead, Dr. [REDACTED] first focused his testimony on the allegation that BCPS had systemic 504 violations based on publicly available information. Given an incomplete analysis of the data surrounding this issue, that conclusion is unsupported and, in any event, is entirely irrelevant to this case. Dr. [REDACTED] then went on to explain what he perceived to be 504 violations in this case. Again, that is irrelevant to IEP eligibility.

At Mr. Altman's direction, Dr. [REDACTED] went on to state that the many 504 violations were also IDEA violations. But violations of the IDEA do not in and of themselves establish eligibility. Eligibility is established by a child with a disability who is in need of special education.

Dr. [REDACTED] testified there was a violation of IDEA because the disability at issue was OHI, but the assessments ordered included cognitive and psychological, but did not include "health," one of the options on the form.¹⁶ The record shows that both Mr. [REDACTED] and Mr. [REDACTED] were present at the meeting when the IEP team decided what assessments to order, and there is no indication either of them asked for any kind of health assessment. Rather, the IEP team later asked the Parents for a release of medical records to better understand the Student's medical issues, and that release was not provided. Dr. [REDACTED] also complained that there was no nurse or medical person involved in what everyone agrees is a determination on an educational disability based on a medical condition. Although deficient regarding the Student's need for special education, the Parents had already submitted medical documentation to the School at the time of

¹⁶ When Ms. [REDACTED] contacted the School in October of 2021, she suggested that the Student had been hit on the field and was having medical issues as a result of that. Dr. [REDACTED] suggested at the hearing that there was a 504 and/or IDEA violation in the School not following concussion protocol. However, there is no evidence that the Student suffered a concussion, or made the School aware the Student might have suffered a concussion. It was not even clear from the record whether the "hit" mentioned was to the head or that the "hit" occurred during a school athletic event. And when Ms. [REDACTED] provided medical documentation to the School, there was never any mention of concussion.

the eligibility meeting. Mr. Altman did not point to any requirement that medical personnel participate in an eligibility determination for an OHI.

Dr. [REDACTED] testified that the Student was in need of related services, and someone can have an IEP with only related services. This is not supported by the law. 34 C.F.R. § 300.8(a)(2)(i), (ii) (If a child has a disability “but only needs a related service and not special education, the child is not a child with a disability” under the IDEA.).

Dr. [REDACTED] also testified that an IEP can be written without no educational services and instead only with consultative services, i.e. a student can be in regular classroom the whole time but there would be someone in the school training, supervising, mentoring and coaching the classroom teachers so the special education program is being executed in regular classrooms. Although “consultative services” are not specifically delineated in the federal regulations, they fall under the supplementary aids and supports section of an IEP. “*Supplementary aids and services* means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116.” 34 C.F.R. § 300.42. Germane to Dr. [REDACTED]’s testimony, an IEP must contain:

- [A] statement of the program modifications or *supports for school personnel* that will be provided to enable the child—
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
 - (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

34 C.F.R. § 300.320(a)(4) (emphasis added).

The types of supports that Dr. [REDACTED] has described are just a component of an IEP after the student has already been determined eligible. Dr. [REDACTED] did not explain why inclusion of a consult with other specialized staff members could not be an accommodation on the Student's 504 Plan. Furthermore, Mr. Altman did not provide any legal authority to suggest that any need for such consultative services alone qualifies a student to be eligible to receive specially designed instruction.

Dr. [REDACTED] testified that the Student needs special education because her medical disability impacts her attendance, her engagement, and her ability to stay up to speed. These characteristics really speak to the Student's OHI and not to the need for special education. Specifically, he stated if she was getting resource room support, appropriate accommodations, and social emotional counseling, she would have every potential to academically succeed. Dr. [REDACTED] seemed to suggest that a resource room was something available only to someone with an IEP. BCPS witnesses testified that a resource room may or may not be staffed by special education educators, and was a room available to a student with an IEP, or a 504 Plan, to do their homework and possibly get assistance with executive function skills. Therefore, the access to a resource room is more akin to a 504 accommodation than specially designed instruction.

Dr. [REDACTED] testified that the fixed amount of extended time that was afforded the Student in the 504 Plan does not work for her given the intermittent nature of her symptoms. While this could be a material argument made relative to a 504 violation, it is not relevant to the Student's eligibility for an IEP. Both at the pre-hearing conference and at the outset of this hearing, I reminded Mr. Altman that many of his arguments and exhibits were directed at alleged 504 violations and that OAH had no jurisdiction over those matters. Unlike matters involving alleged violations by a school system of the IDEA, *see* 20 U.S.C.A. § 1415(f)(1)(A); 34 C.F.R. § 300.511(a); Educ. § 8-413(e)(1); and COMAR 13A.05.01.15C, there is no legal authority

directly providing authority to the OAH to hear complaints arising under Section 504. Section 10-205(a)(1) of the State Government Article of the Maryland Annotated Code, allows for the delegation of such authority to the OAH; however, my review of the OAH's Delegations of Authority reveals that, as asserted by BCPS, there is no such delegation from BCPS to the OAH to hear Section 504 complaints. Section 504 complaints against BCPS are enforced through an entirely separate mechanism. *See Boyd v. Supervisor of Assessments of Balt. City*, 57 Md. App. 603, 608 (1984) (“[A]n administrative agency cannot enlarge its own jurisdiction nor can [subject-matter] jurisdiction be conferred upon the agency by the parties before it.” (internal quotation marks omitted)).

Dr. [REDACTED] also testified that the Student's teachers were never trained on the depth and breadth of her disability. He testified that the evidence suggested that some teachers did not believe her disability and most certainly did not understand how it manifested. Again, if this were true, it may be the basis for an allegation of a 504 violation, and not a violation of a special education eligibility determination.

Dr. [REDACTED] testified that if the Student qualified for an IEP, he would suggest the following be included:

- resource room;
- counseling and social work;
- accommodations;
- consultative services from special educators or related personnel to the general education teachers so they understand the educational impact of her disability;
- services until she is twenty-one years old;
- extended school year (ESY) (because she is struggling to complete academic work, the ESY would give her time to get her work done);
- assistive supports, such as tape-recorded material,
- everything printed for her, that may facilitate her learning and mastery of academic work;
- quarterly IEP compliance meetings and that the compliance meetings include an outside person (advocate) to make sure that the district holds its part of the bargain.

This list of IEP suggestions really puts the cart before the horse. One only receives an IEP once they have been determined eligible, so the testimony really should have been what she needed, not what he would include in an IEP. But, assuming this was simply the result of an inartfully worded question or answer, I will analyze what Dr. [REDACTED] stated he would include in the IEP as him identifying the Student's need for special education.

The Student was already receiving accommodations, counseling and social work under her 504 Plan. BCPS adequately explained that a resource room is something that can be provided to a 504 Plan recipient and does not necessarily include specially designed instruction. Services until age twenty-one are provided to an eligible student with a disability under the IDEA and are automatic depending on their needs. While annual IEP team meetings are required under IDEA, the suggested "quarterly compliance meetings" can be requested once one has been deemed eligible; it does not make one eligible. BCPS witnesses adequately explained that ESY is intended to prevent already eligible special education students from significant learning loss over the summer and is not intended as an opportunity for a Student to make up missed work from the school year. As far as printed and tape-recorded materials, printed materials are already provided to the Student in her 504 Plan and BCPS explained that its teachers' union prevents recording classes and in any event BCPS would decline that request based on student privacy concerns.

BCPS provided several witnesses who all opined that the Student did not need specially designed instruction and that the alternate strategies and accommodations afforded to the Student were sufficient to level the playing field and ensure her success, including Ms. [REDACTED], Ms. [REDACTED], Dr. [REDACTED], and Ms. [REDACTED]. Three of the BCPS witnesses had personal knowledge of the Student's academic progress, classroom behaviors, and 504 plan accommodations.

Ms. [REDACTED] was the Student's teacher for AP World History during the 2022-2023 school year. She was made aware the Student had a 504 Plan during the teacher in-service week before the school year started when the School mailed 504 Plans and IEPs to all teachers for their students. She understood the Student was to be provided textbooks to take home, extended time to complete assignments, water and bathroom breaks as needed, printed materials, and reminders to check Schoology regularly. The Student's 504 Plan changed over the year, and she received an update each time it was modified.

Ms. [REDACTED] keeps a crate in her classroom with folders for student work with their names on them. When a student is absent, Ms. [REDACTED] collects all the materials and notes for the work they did in class that day and puts it in the folder along with homework with a due date on it. When the Student would return to class after having been absent, Ms. [REDACTED] would physically hand her the folder. At the beginning of the year, she would put the due date without the extended time on the top of any assignments, as the school year went on and the 504 Plan was modified, she would note the extended time due date in Schoology. Eventually she started putting the assignments in a folder to be picked up or given to Ms. [REDACTED] per Ms. [REDACTED]'s request. Ms. [REDACTED] recognized that the Student received an accommodation to minimize non-essential work, but because she teaches toward the AP test for World History, other than extra credit she does not assign anything other than essential work.

Ms. [REDACTED] made herself available after school on Wednesdays or during lunch for the Student to receive any assistance she needed and to make up tests and quizzes. She also referred the Student to Saturday school to make up assignments. The Student never contacted Ms. [REDACTED] to state there was a specific reason she could not turn in assignments or to ask for additional time if she had been sick during the make-up period for an assignment. When the Student did attend class, she would usually take a bathroom break for approximately twenty to

thirty minutes and the Student was not always focused on working but instead spent time on her phone. The Student's failing grade is attributable to her missing assignments. Ms. [REDACTED] did not see any need for specially designed instruction.

Ms. [REDACTED] has a Master's and Bachelor's degree in Special Education and is the chair of the IEP, 504, and SST teams at the School and was qualified, over objection by Mr. Altman, as an expert in special education. Ms. [REDACTED] testified about the history of the Student's 504 Plan as well as all of the revisions to the Plan. Ms. [REDACTED] ensured that all of the teachers were aware of the Student's accommodations and the subsequent revisions.

Ms. [REDACTED] explained that in December 2022 she began meeting with the Student at the Parent's request to go over her missing assignments, and that duty was later transferred to Mr. [REDACTED] until the Parents requested those meetings cease. In December 2022/January 2023, the team met to review and revise the Student's 504 Plan even while they were evaluating the Student for a possible IEP in order to properly support the Student since they had received additional medical documentation since the 504 had first been developed.

The results of the educational assessment for IEP eligibility were that the Student scored in the average range with respect to reading, writing and math, with one sub-test in the low-average range for calculation. The IEP team agreed that the Student had an OHI that adversely affected her education, but that she did not require specially designed instruction and therefore did not qualify for an IEP.

Ms. [REDACTED] testified that the school nurse was present at four of the five SST meetings. Ms. [REDACTED] testified that none of the doctor's notes requested specially designed instruction, only accommodations that were provided on the 504.

In Ms. [REDACTED]'s opinion, the Student failed because of attendance and incomplete assignments, which could have been ameliorated by the 504 Plan accommodations and alternate

strategies offered by the School. The School offered a modified scheduled, evening classes, coach class, lunch time tutoring, Saturday School, virtual tutoring, and [REDACTED], most of which was rejected by the Student. She opined that the Student did not require specially designed instruction, there was no need to modify the curriculum in any way, she only needed to take advantage of the accommodations that were offered to her. The School did not offer unlimited time to return assignments, as was requested by the Parents, because the School noticed that the longer the amount of time the Student had to return an assignment, the less likely she was to actually turn it in. Ms. [REDACTED] also testified that the Student was invited to all of her SST meetings, and that the School encourages high school students to attend those meetings, yet the Student did not attend. She testified the Student might have been more successful had she attended her SST meetings, so that the Student herself would understand her accommodations and better be able to access them and advocate for herself.

Ms. [REDACTED] testified that the Student's advocate requested an FBA, and the School agreed and sent a request to conduct an FBA to the Parents. The goal of completing an FBA would be to develop a BIP to address the Student's attendance and incompleteness of assignments. The Parents did not consent.

Dr. [REDACTED] has a Ph.D. in school psychology and has worked as a school psychologist since 1999. I qualified her as an expert in psychology, psychological assessments, and the development of IEP and 504 Plans. Dr. [REDACTED] reported that the Student's assessments in 2023 yielded an average IQ, solid average scores on her cognitive functioning, and executive functioning, which is the ability to manage and regulate your behavior, emotions, and cognitive functioning. The Student reported to her during her interview that she has some symptoms of paranoia, which she attributes primarily to the medication she was then taking to control her symptoms.

Dr. [REDACTED] opined that the Student was having trouble academically because of attendance and completing work, but that there were no concerns, from teachers or the test results, that indicated difficulty understanding or keeping up with materials. Dr. [REDACTED] opined that the Student failed because she was not utilizing the current supports offered through her 504 Plans.

Ms. [REDACTED] received a Master's in Elementary Education in 2003, I qualified her as an expert in implementation and compliance of IEPs within the IDEA. She worked as a classroom teacher, then as a special education teacher, before moving into the role of an IEP facilitator in 2022 and then as an IEP compliance specialist.

Ms. [REDACTED] reiterated that the Student has an OHI that adversely affects her education, but that she does not require specially designed instruction. She determined this based on the Student's educational test scores, her cognitive scores, and the requests made by the doctors, which were for 504 accommodations only. Ms. [REDACTED] explained that specially designed instruction differed from accommodations. In her opinion, specially designed instruction must be different from the same instruction the child next to you might be receiving. Specially designed instruction is required by a student with an IEP in order to make academic progress.

Ms. [REDACTED] testified about the strategies offered to make up for the Student's missed classes, such as social work services, evening school, virtual school, and [REDACTED], all of which were declined by the Student. She said that a BIP could have helped monitor the Student's progress towards assignment completion and attendance, her greatest barrier to success.

Mr. Altman argued that Dr. [REDACTED] is entitled to much more deference than BCPS' experts because they do not have the same experience as Dr. [REDACTED], with him having decades of

experience in special education on a national level as a lecturer and consultant and because he does not have a bias in favor of the decision the school system had already reached. While Dr. [REDACTED] certainly has extensive experience in special education, including serving as an expert witness in numerous jurisdictions, his professional experience is much broader than special education, having worked and published on a variety of topics falling under the umbrella of school psychology. Ms. [REDACTED] has been in the field for a much shorter period of time, having received her Bachelor's in special education in 2017 and her Master's in special education in 2022. However, she has worked professionally exclusively within special education, as a teacher from 2017 until 2022 and as IEP/504 Chair at the School since August 2022, in which role she provides support, guidance, and consultation in the identification of students with disabilities. Ms. [REDACTED] also worked directly with the Student and the Student's teachers. While Dr. [REDACTED] is quite learned and reviewed all of the Student's records, he never observed the student in an educational setting. Ms. [REDACTED]'s testimony was also consistent with that of Ms. [REDACTED] and Dr. [REDACTED], who herself has decades of experience. Moreover, "there is no presumption in favor of outside evaluators." *D.L. ex rel. J.L. v. Clear Creek Indep. Sch. Dist.*, 695 F. App'x 733, 737 (5th Cir. 2017).

BCPS expert witnesses all testified the Student's test results revealed no need for specially designed instruction. Their explanation of these tests, and the results, were clear and conclusive. *See R.F. ex rel. E.F. v. Cecil Cnty. Pub. Schs.*, 919 F.3d 237, 245 (4th Cir. 2019) ("[C]ourts should not 'substitute their own notions of sound educational policy for those of the school authorities which they review.'" (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982))). Dr. [REDACTED] testified that reliance on these tests was inappropriate, as the Student was not present in the classroom during a significant portion of the class time observed. Yet the many, many emails and documents in the record suggest this is

fairly typical behavior for the Student. She regularly takes long restroom breaks from each class and when in class is often on her phone or socializing. Dr. [REDACTED] also testified that Dr. [REDACTED] [REDACTED] should have received teacher input from multiple respondents in multiple settings. This simply is not the requirement under the law. Nor did Dr. [REDACTED] testify it was a requirement of the creators of the testing instrument. Moreover, the Parents certainly had the opportunity to request their own evaluation of the Student had they determined the School's evaluation was inadequate. 34 C.F.R § 300.502(a)(1); COMAR 13A.05.01.14B. They did not do so.

BCPS witnesses also say that the Student could have succeeded had she taken advantage of the many different options that were offered to her to make up for her missed class time, for example, [REDACTED]. [REDACTED] applies "to the provision of instructional services to public school students who are unable to participate in their school of enrollment due to a physical or emotional condition." COMAR [REDACTED]. If an eligible student with an IEP applies for and is approved for [REDACTED], the IEP must also comply with the provisions of COMAR [REDACTED]. COMAR [REDACTED]. If a student has a 504 Plan and applies for and is approved for [REDACTED], the LEA must comply with all requirements of Section 504 of the Rehabilitation Act of 1973. COMAR [REDACTED].

The record with respect to [REDACTED] is confusing. There was evidence from the Student that [REDACTED] did not support the Student's classes, that it was difficult to obtain because the Student had to miss two or more consecutive days, that the tutoring was virtual, and that the approval process was severely delayed during the 2022-2023 school year. BCPS presented evidence that [REDACTED] supported the Student's classes, the tutoring was in-person, there was the possibility [REDACTED] could support less than a full day's absence given the Student's fairly unique medical symptoms, and that the Student was approved for [REDACTED] but chose never to use it. It is clear that the Student applied for, was

approved, but never utilized [REDACTED] during the 2021-2022 school year. During the 2022-2023 school year, it is not clear exactly when the Student applied and whether there was a significant delay between that application and approval. Also, there are documents suggesting the Student did utilize [REDACTED] in April and May of 2023, but the testimony suggests she never utilized [REDACTED].

[REDACTED] in theory should have been an excellent solution for this Student's needs. If in practice it was not, that would have been a 504 issue, as even Dr. [REDACTED] testified that the overly-rigid qualification process for [REDACTED] should have been overridden by a 504.

In any event, [REDACTED] is a service that is available to any student with or without a 504 Plan and does not necessarily equate to specially designed instruction. While special education must be administered in school, home or in the hospital, that does not mean that education taking place in the home or hospital is therefore special education.

Mr. Altman insisted several times that [REDACTED] did not amount to instruction and therefore the Student was in need of specially designed instruction to compensate for the instruction time she lost due to absences. BCPS presented credible evidence that the lost instruction time was and would have been provided through Saturday school, coach class, lunchtime tutoring, and [REDACTED], all of which the Student did not adequately avail herself of.

Evening school also in theory should have been an excellent solution to the Student's medical needs. Evening school, which is offered by BCPS from 5:00 to 9:00 p.m., was rejected by the Student because she said she did not function well at 9:00 p.m. However, the Student offered no explanation why she could not take one or two evening classes beginning at 5:00 p.m. but ending long before 9:00 p.m.

Likewise, Ms. [REDACTED] testified that the Student had only so many good hours within which to complete assignments throughout the day. And that she needed to maintain some level of normalcy in her life, to include [REDACTED] when possible and regular adolescent social activities. For that reason, a reduced schedule, which included dropping the Student's first period classes, in theory should have been an excellent strategy to address the Student's needs. That option, along with evening school, and virtual learning, were all rejected by the Student.

The major accommodation offered by the School was extended time. The Student and Ms. [REDACTED] testified that the extended time was too little and not properly implemented. It was difficult for the Student to understand her extended due dates, and completion within the extended time was not always possible given that she might be sick during that time. The Student's extended time on her 504 Plans was extended even further several times over the two years at issue, starting with time and a half, to double time, to two weeks past the due date, with the end of quarter boundary removed as requested by the Parents. The Student's extended time was extended as the School received more medical documentation from the Student's doctors. This was done by BCPS even though their data showed that the longer the Student had to complete an assignment, the less likely she was to turn it in. If the 504 Plan was not properly crafted to accommodate the Student, or if it was not properly implemented, this would be a 504 violation that is not in front of me in this IEP eligibility case.¹⁷

The final accommodation offered by BCPS and refused by the Parents was an FBA. Ms. [REDACTED] testified that high school had been smooth sailing for the Student until early October 2021, when the Student slept for long stretches of time over a weekend without waking up,

¹⁷ BCPS introduced a policy which provides that students are permitted to make-up missed work when they have an excused absence. There was testimony and documentation that despite several requests by the School, the Parents did not consistently document that the Student's absences were attributable to her [REDACTED]. Indeed, the Student had many unexcused absences and tardies over the two-year period at issue. Nevertheless, there is nothing in the record to suggest that the Student was ever precluded from making up any assignments that had not been excused by proper documentation. Therefore, the issue of whether an absence is excused or unexcused is not relevant to my analysis.

alerting her to the potential that the Student had a medical disorder. The record actually suggests that the Student exhibited this behavior prior to being diagnosed, i.e., significant absences in middle school and always struggling to turn in assignments since she started high school. Therefore, not all of her academic troubles may have been attributable to her more recent [REDACTED] diagnosis. An FBA would have been helpful to track the Student's attendance and behavior in making up missed assignments.

All of the requests by the Student fit in the category of accommodations that have already been provided to the Student under her 504 Plan, or related services, which alone do not make her eligible for an IEP. For example, in *McIntyre v. Eugene School District 4J*, the Court noted that the accommodations at issue in that case, providing an alternate quiet location to take exams, extra time to complete exams, and complying with an emergency health protocol, did not constitute special education. 976 F.3d 902, 914 (9th Cir. 2020) (“These accommodations cannot be construed as ‘special education,’ because they do not provide ‘specially designed instruction.’ (citing federal law and secondary sources)).

The Student relied heavily here on her need for executive functioning assistance and argued that constituted special education she could only receive under an IEP. In *N.N. v. Mountain View-Los Altos Union High School District*, No. 20-cv-08010-VKD, 2022 WL 3109588 (N.D. Cal. Aug. 4, 2022), at issue was whether the Student needed specially designed instruction. The Student had received certain services, at a prior placement, which included “academic instructional support, executive functioning skills, and individual, group, and family counseling services.” *Id.* at *37. The parents acknowledged that the individual and group therapy were related services, therefore the question was whether the support services regarding executive functioning skills constituted special education. Those support services included an educator supervising study hall, providing after-school tutoring, helping the student create

weekly study plans and yearly academic goals, assisting with reading and editing her written work, and making sure the student was organized, used her time wisely, and generally assisted with executive functioning skills. The District Court held that this was not specially designed instruction and discussed it in detail as follows:

Nothing in Ms. Johnston’s testimony suggests that the support she provided constituted “[s]pecially designed instruction.” The Court agrees with the District that the support Ms. Johnston provided to N.N. resembles the kind of support a parent provides for a child at home. Indeed, in distinguishing the support she provided at Explorations and the support that a parent might provide at home, Ms. Johnston noted only that she could provide a structured study environment with a level of professional detachment that parents may not be able to provide due to time or financial constraints or because of strained relationships with their children. Additionally, Ms. Johnston did not refer N.N. for special education because N.N. had a 504 plan at TFHS that Ms. Johnston believed was sufficient. Plaintiffs point out that Ms. Hardy testified that executive functioning instruction could be special education if it is provided by a special education teacher and is “uniquely adapted to the learning profile of that one student.” They further argue that Ms. Johnston’s support falls within Dr. Nutter’s own description of an “intervention.” Here, they note that Dr. Nutter generally agreed that an “intervention” could address executive functioning needs, and is “something that is not provided to the general class or the general group something specialized and specific with a determined goal that is linked to an identified deficit.” However, Dr. Nutter also testified that an “intervention” requires “an instructional component.” Here, Ms. Johnston’s weekly reports reflect that she assisted N.N. after school in keeping track of her assignments, organizing her approach to homework and other tasks, studying every school night in study hall, encouraging her to read more, and providing comments for N.N. to use in independently editing her written work.

For the reasons discussed above, plaintiffs have not demonstrated that Ms. Johnston’s support services constitute “[s]pecially designed instruction” as defined by 34 C.F.R. § 300.39(a)(1).

Id. at *38 (citations omitted).

Although the Student does have an OHI, the Student has failed to prove by a preponderance of the evidence that she is in need of specially designed instruction. “The IDEA does not cover every student who is struggling in school; rather, its protections are limited to a student who has a qualifying disability and who, for that reason, ‘needs special education and related services.’” *Miller*, 64 F.4th at 575 (quoting 20 U.S.C. § 1401(3)(A)). “But a student does not ‘need’ such services if the student is already getting what would qualify as a free appropriate public education *without* them.” *Id.*

The Student suffers from [REDACTED] and her symptoms can at times be quite disruptive to her life, her studies, and her engagement as an ordinarily adolescent. The Student also undeniably has educational needs that arise from her illness. But the issue in this case is very limited – to whether she qualifies as a child with a disability in need of special education. The strategies and accommodations offered by the School both informally and in her 504 Plan were appropriate to address her needs. She has not established that she has a need for specially designed instruction that would make her eligible for an IEP.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that BCPS met its Child Find obligations with regard to the Student during the 2021-2022 school year. 20 U.S.C.A. §§ 1412(a)(3), 1414(a), (b)(3)(B); 34 C.F.R. §§ 300.111(c)(1), 300.122, 300.304(c)(4).

I further conclude that BCPS did not fail to provide the Student a FAPE by refusing to identify her as a child with a disability in need of special education and to provide her with an IEP during the 2022-2023 school year. 20 U.S.C.A. § 1401(3)(A), (29); Md. Code Ann., Educ. § 8-401(a)(2) (2022); 34 C.F.R. §§ 300.8(c)(9), 300.301, 300.39(b)(3) (2022); COMAR 13A.05.01.03B(51); COMAR 13A.05.01.03B(78).

ORDER

I **ORDER** that:

The Parents' April 3, 2023 Amended Due Process Complaint be and the same hereby is
DENIED.

August 2, 2023
Date Decision Issued

Administrative Law Judge
Deborah S. Richardson

DSR/ja
#206204

REVIEW RIGHTS

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

A party appealing this decision must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing of the filing of the appeal. The written notification must include the case name, docket number, and date of this decision, and the court case name and docket number of the appeal.

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

Copies Mailed and/or Emailed To:

[Redacted] *(Mailed and Emailed)*

[Redacted] *(Mailed and Emailed)*

[Redacted] *(Mailed and Emailed)*

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

STUDENT

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

BEFORE DEBORAH S. RICHARDSON,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-BCNY-OT-23-06854

APPENDIX: FILE EXHIBIT LIST

I admitted the following exhibits into evidence on behalf of the Student:

- P Ex. 1 Emails amongst Parents and the School, various dates 2021
- P Ex. 2 Emails amongst Parents and the School, various dates 2022
- P Ex. 3 Emails amongst Parents and the School, various dates 2023; BCPS Response to Request for Production of Documents, May 25, 2023
- P Ex. 4 Letter from [REDACTED] To Whom It May Concern, February 28, 2022; Letter from [REDACTED] To Whom It May Concern, September 28, 2022; Letter from [REDACTED] To Whom It May Concern, February 21, 2023; Letter from [REDACTED] February 22, 2023; [REDACTED] School Release Note, February 22, 2023; Letter from [REDACTED] To Whom It May Concern, March 7, 2023
- P Ex. 5 SST Summary Form, January 13, 2020
- P Ex. 6 SST/504 Teacher Reports, October 19, 2021; SST Summary Form, October 20, 2021; SST/504 Teacher Reports, December 17, 2021
- P Ex. 7 General Educator Student Progress and Classroom Performance Report, undated; emails amongst school staff, various dates; IEP Team Summary, February 17, 2022; Student Eligibility Form for Students Identified with a Disability Under Section 504, March 7, 2022; 504 Plan, March 14, 2022; SST Summary Form, October 19, 2022; 504 Plan December 14, 2022
- P Ex. 8 SST Summary Form, January 13, 2023; Department of Special Education Educational Assessment including classroom

observations, and psychological assessment, February 3, 2023; Prior Written Notice, February 13, 2023; Student Eligibility Form for Students Identified with a Disability Under Section 504, March 29, 2023; 504 Plan, March 29, 2023

- P Ex. 9 Curriculum Vitae of [REDACTED], Ph.D., undated
- P Ex. 10 [REDACTED], Frontiers in Pharmacology, [REDACTED], 2022
- P Ex. 11 Letter from [REDACTED] To Whom It May Concern, September 28, 2022
- P Ex. 12 Letter from [REDACTED] To Whom It May Concern, February 21, 2023
- P Ex. 13 Letter from [REDACTED], February 22, 2023
- P Ex. 14 Letter from [REDACTED] To Whom It May Concern, March 7, 2023
- P Ex. 15 U.S. Department of Education—Office of Civil Rights: Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, undated
- P Ex. 16 SST Summary Form, January 13, 2020
- P Ex. 17 Student Eligibility Form for Students Identified with a Disability Under Section 504, March 7, 2022; 505 Plan, March 14, 2022
- P Ex. 18 SST Summary Form, October 20, 2021
- P Ex. 19a CDC Fact Sheet on Concussions for School Professionals, August 2019
- P Ex. 19b Email amongst School staff, January 31, 2023
- P Ex. 20 Prior Written Notice, December 14, 2022
- P Ex. 21 U.S. Department of Education Parent Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools, December 2016

- P Ex. 22 Acknowledgement of 504 Plan, August 26, 2022; SST/504 Student Information Reports, October 10, 2022; SST Summary Form, October 19, 2022; Acknowledgment of 504 Plan, October 26, 2022; email from [REDACTED], School Nurse to Ms. [REDACTED] November 4, 2022, with attachment; emails between Ms. [REDACTED] and the Parent, various dates
- P Ex. 23 [REDACTED] Program Applications and accompanying emails, various dates 2021-2022
- P Ex. 24 Emails between the Parent and the School, various dates, 2022; Parent Notification of IEP Team Meeting, November 30, 2022; IDEA Regulations, undated; Child Find Referral, November 30, 2022; Parent Notification of IEP Team Meeting, December 14, 2022; Notice and Consent for Assessment, December 14, 2022, received January 11, 2023; Prior Written Notice, December 14, 2022; Referral for Psychological Assessment, December 14, 2022
- P Ex. 25 Emails amongst School staff, various dates, 2022-2023; IEP Team Summary, February 17, 2022
- P Ex. 26 Email from [REDACTED], School Nurse to Ms. [REDACTED], November 4, 2022, with attachment
- P Ex. 27 IDEA Regulation, undated; Letter of Guidance from Office of Special Education Programs (OSEP) Director, undated; Psychological Evaluation, January 21, 2023 and February 1, 2023; Classroom Observation, January 23, 2023; Classroom Observation, January 31, 2023; Classroom Observation; February 6, 2023; Prior Written Notice, February 13, 2023
- P Ex. 28a Excerpt from Maryland Statewide IEP Process Guide, August 1, 2019
- P Ex. 28b Maryland Statewide IEP Process Guide, August 1, 2019
- P Ex. 28c Maryland Assessment, Accessibility & Accommodations Policy Manual (October 1, 2017)
- P Ex. 28d Maryland Accommodations Manual (July 2, 2012)
- P Ex. 28e 2023 Maryland State Department of Education: The Individualized Education Program (IEP), undated
- P Ex. 28f Letter from OSEP to [REDACTED], March 8, 2007

- P Ex. 29 Letter from the School to the Parents, June 6, 2023
- P Ex. 30 The Student's 2022-2023 Final Report Card
- P Ex. 31 Letter from the School to the Parents, June 23, 2023

I admitted the following exhibits into evidence on behalf of BCPS:

- BCPS Ex. 1 Parent Notification of SST Meeting, October 14, 2021
- BCPS Ex. 2 SST-504 Student Information Reports, October 19, 2021
- BCPS Ex. 3 SST Summary Form, October 20, 2021
- BCPS Ex. 4 Parent Notification of SST Meeting, December 13, 2021
- BCPS Ex. 5 Parent Notification of IEP Meeting, February 14, 2022
- BCPS Ex. 6 IEP Team Summary, February 17, 2022
- BCPS Ex. 7 Parent Notification of SST Meeting, March 4, 2022
- BCPS Ex. 8 Student Eligibility Form for Students Identified with a Disability Under Section 504, March 7, 2022
- BCPS Ex. 9 504 Plan, March 14, 2022
- BCPS Ex. 10 Acknowledgement of 504 Plan, March 14, 2022
- BCPS Ex. 11 Acknowledgement of 504 Plan, August 26, 2022
- BCPS Ex. 12 Parent Notification of SST Meeting, October 5, 2022
- BCPS Ex. 13 Parent Notification of SST Meeting, October 10, 2022
- BCPS Ex. 14 SST Summary Form, October 19, 2022
- BCPS Ex. 15 504 Plan, October 19, 2022
- BCPS Ex. 16 Parent Notification of SST Meeting, November 16, 2022
- BCPS Ex. 17 SST Summary Form, November 28, 2022
- BCPS Ex. 18 Child Find Referral, November 30, 2022
- BCPS Ex. 19 Parent Notification of IEP Team Meeting, November 30, 2022

- BCPS Ex. 20 504 Plan, December 14, 2022
- BCPS Ex. 21 Acknowledgement of 504 Plan, December 14, 2022
- BCPS Ex. 22 Parent Notification of IEP Team Meeting, December 14, 2022
- BCPS Ex. 23 Prior Written Notice, December 14, 2022
- BCPS Ex. 24 Notice and Consent for Assessment, January 5, 2023
- BCPS Ex. 25 Parent Notification of SST Meeting, December 30, 2022
- BCPS Ex. 26 SST Summary Form, January 13, 2023
- BCPS Ex. 27 Classroom Observation of Student Performance,
January 25, 2023
- BCPS Ex. 28 Classroom Observation of Student Performance,
January 31, 2023
- BCPS Ex. 29 Classroom Observation of Student Performance,
February 6, 2023
- BCPS Ex. 30 Department of Special Education Educational Assessment,
February 3, 2023
- BCPS Ex. 31 Referral for Psychological Assessment, February 6, 2023
- BCPS Ex. 32 Notice of Documents, February 6, 2023
- BCPS Ex. 33 Prior Written Notice, February 13, 2023
- BCPS Ex. 34 Parent Notification of SST Meeting, March 7, 2023
- BCPS Ex. 35 Acknowledgement of 504 Plan, March 28, 2023
- BCPS Ex. 36 SST Summary Form, March 29, 2023
- BCPS Ex. 37 Student Eligibility Form for Students Identified with a Disability
under Section 504, March 29, 2023
- BCPS Ex. 38 Notice of Consent for Assessment, May 12, 2023
- BCPS Ex. 39 Prior Written Notice, May 3, 2023

- BCPS Ex. 40 Letter from [REDACTED] To Whom It May Concern, September 28, 2022; Letter from [REDACTED] To Whom It May Concern, February 21, 2023; Letter from [REDACTED], February 22, 2023; Letter from [REDACTED] To Whom It May Concern, March 7, 2023
- BCPS Ex. 41 BCPS Policy 5120: Students: Enrollment and Attendance, May 4, 2022
- BCPS Ex. 42 BCPS Rule 5120: Attendance and Excuses, September 27, 2022
- BCPS Ex. 43 BCPS Policy 5140: Assignment and/or Special Permission Transfer, March 7, 2017
- BCPS Ex. 44 BCPS Rule 5140: Assignment and/or Special Permission Transfer, March 19, 2019
- BCPS Ex. 45 BCPS Policy 5210: Grading and Reporting, September 14, 2021
- BCPS Ex. 46 BCPS Rule 5210: Grading and Reporting, September 28, 2021
- BCPS Ex. 47 BCPS Policy [REDACTED]: [REDACTED] Programs, [REDACTED] 2022
- BCPS Ex. 48 BCPS Rule [REDACTED]: [REDACTED] Programs, [REDACTED] 2022
- BCPS Ex. 49 BCPS Policy 6402: Special Education Services, April 5, 2022
- BCPS Ex. 50 BCPS Rule 6402: Special Education Services, May 4, 2022
- BCPS Ex. 51 BCPS Policy 6702: Extracurricular Activities, November 5, 2019
- BCPS Ex. 52 BCPS Rule 6702: Extracurricular Activities, November 19, 2019
- BCPS Ex. 53 Maryland Public Secondary School Athletic Association Handbook 2022-2023
- BCPS Ex. 54 Application for Instructional Program for Homebound or Hospitalized Students, November 11, 2021; School Referral Physical/Pregnancy/Emotional Conditions – SY 2021-2022, December 18, 2021; SST-504 Student Information Reports, December 17, 2021; Application for Instructional Program for Homebound or Hospitalized Students, October 18, 2021; Memorandum from [REDACTED] to Attendance Secretary for [REDACTED] HS, May 18, 2023

- BCPS Ex. 55 Emails amongst Parents and School staff, various dates 2021-2023
- BCPS Ex. 56 Emails amongst Parents and School staff, various dates 2021-2023
- BCPS Ex. 57 Emails amongst Parents and School staff, various dates 2021-2023
- BCPS Ex. 58 BCPS Nursing Assessment, November 10, 2022
- BCPS Ex. 59 The Student's Attendance Records, 2021-2022 School Year, 2022-2023 School Year; communication log, September 20, 2021 to May 8, 2023
- BCPS Ex. 60 Letter from [REDACTED] to the Parents, June 22, 2022
- BCPS Ex. 61 The Student's Grade Reports, School Year 2022-2023
- BCPS Ex. 62 The Student's Report Cards, School Year 2022-2023
- BCPS Ex. 63 The Student's Report Cards, School Year 2021-2022
- BCPS Ex. 64 The Student's Schoology Usage Analytics, January 19, 2023 to May 31, 2023
- BCPS Ex. 65 The Student's Schoology data, various dates 2021-2023
- BCPS Ex. 66a [REDACTED] Resume, undated
- BCPS Ex. 66b [REDACTED] Resume, undated
- BCPS Ex. 66c [REDACTED] Resume, undated
- BCPS Ex. 66d [REDACTED] Resume, undated
- BCPS Ex. 67 The Student's Fourth Quarter Report Card, 2022-2023 School Year