

XXXX XXXX,¹

STUDENT

v.

CECIL COUNTY

PUBLIC SCHOOLS

* BEFORE MARY R. CRAIG,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-CECL-OT-17-01881

* * * * *

DECISION

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

STATEMENT OF THE CASE

On January 17, 2017, Mr. and Mrs. XXXX. (Parents), on behalf of their daughter ([STUDENT] or 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 Cecil County Public Schools (CCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).² The parties attended a resolution session on February 7, 2017, and notified the OAH the same day that they did not resolve their dispute. The parties did not participate in mediation.

I held a telephone prehearing conference on February 20, 2017. The Parents were represented by Wayne D. Steedman, Esquire. Rochelle S. Eisenberg, Esquire, represented CCPS. During the prehearing conference, I advised the parties of the time requirements for issuing a decision in this case under the IDEA. Pursuant to the governing regulations, a decision would

¹ The Student’s and other names have been masked in the Decision to protect the Student’s privacy and facilitate eventual publication of the decision.

² Unless otherwise indicated, references to Title 20 of the U.S.C.A. hereinafter cite the 2010 volume.

normally be due forty-five days after certain triggering events, or by March 24, 2017. 34 Code of Federal Regulations (C.F.R.) § 300.510(b)(2), (c)(2) (2016).³ The parties and I engaged in a lengthy discussion in an attempt to schedule the necessary hearing dates in a manner that would enable issuance of a decision by that date. Based upon the complexity of the hearing and a detailed review of the attorneys' and my schedule, sufficient hearing dates could not be identified prior to March 24, 2017. Accordingly, the parties requested that the hearing be scheduled for March 10, 14, 22, 28, 29 and April 4, 2017. I held the hearing on March 10, 22, 28, 29 and April 4, 2017.⁴ Mr. Steedman represented the Parents, and Ms. Eisenberg represented CCPS.

Because the hearing dates requested by the parties fell outside the forty-five-day regulatory timeframe, I granted the request of the parties and extended the time for issuance of the decision until May 4, 2017. 34 C.F.R. § 300.515(c) (2016); Md. Code Ann., Educ. § 8-413(h) (Supp. 2016). The conflicts which prevented the hearings from being held within the timeframe are documented in greater detail in the letters from counsel in the file and recited in the Prehearing Conference Report.

The legal authority for the hearing is codified in the IDEA and under Maryland law. 20 U.S.C.A. § 1415(f)(1)(A); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Maryland State Department of Education (MSDE) procedural regulations, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

³ Unless otherwise indicated, references to Title 34 of the C.F.R. hereinafter cite the 2016 volume.

⁴ The hearing could not be conducted on March 14, 2017 as the State offices and CCPS were closed due to inclement weather.

ISSUES

The issues are as follows:

1. Whether CCPS denied the Student a free appropriate public education (FAPE) as defined by the IDEA during the 2015/2016 and 2016/2017 school years;
2. Whether CCPS failed to offer the Student an individualized education program (IEP) for the 2016/2017 school year that would provide her with a FAPE; and
3. What, if any, relief is appropriate.

SUMMARY OF THE EVIDENCE

Exhibits

I have attached an Exhibit List as an Appendix to this Decision.

Testimony

The Student's mother testified, and the Parents presented the following witnesses:

- Mr. XXXX, the Student's current special education teacher;⁵
- XXXX XXXX, Ph.D., accepted as an expert in Autism, Special Education, and

Behavior Analysis; and

- XXXX XXXX, M.Ed., accepted as an expert in Special Education, including

functional behavioral assessments and behavior improvement plans.

CCPS presented the following witnesses:

- XXXX XXXX, PT, accepted as an expert in Physical Therapy;
- XXXX XXXX, OT, accepted as an expert in Occupational Therapy;
- XXXX XXXX, accepted as an expert in Speech/Language Pathology;
- XXXX XXXX, CCPS Program Facilitator for Special Education;

⁵ The Student's special education teacher has not been identified because for several months in 2016 the Student was the only student in his class, and identification of the teacher might lead to identification of the Student when the Decision is released for publication.

- Mr. XXXX, accepted as an expert in Special Education;
- XXXX XXXXX, Ed.D., accepted as an expert in Special Education, Severe Disabilities, Inclusive Education, and Behavioral Intervention; and
- XXXXX XXXX, accepted as an expert in Special Education and Special Education Administration.

FINDINGS OF FACT

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

Background

1. [STUDENT] is a seven-year-old girl with the diagnosis of severe autism spectrum disorder who is nonverbal. (P. Ex. 17.)⁶ In March 2016, [STUDENT] was diagnosed with autism spectrum disorder, level 3, one of the most intensive levels of the disorder. (Tr. 240; P. Ex. 41.)

2. [STUDENT] also has the diagnosis of a genetic disorder related to mutation in the XXXX gene. (P. Ex. 16.) The XXXX genetic disorder is an extremely rare condition with unknown long-term consequences. (Tr. 232.) [STUDENT] was diagnosed in 2013, and at that time was only the XXXX person in the world with the diagnosis. Since then, there have been about a XXXX others diagnosed with XXXX. Very little research has been published about the condition. (Tr. 233.) The potential for an individual with an XXXX genetic defect to learn to perform activities of daily living (such as toileting), to process information, to understand language, and to express language is not well understood. (Tr. 232-33.)

3. [STUDENT] receives medical services at the XXXX (XXXX) of the XXXX Medical System. One of her physicians is XXXX, M.D. (Dr. XXXX), of the XXXX Department of Neurology and Developmental Medicine.

⁶ References to exhibits and the transcripts are for the convenience of the reader. They do not represent the sole basis for any finding of fact. The findings of fact are based on all of the evidence in the record.

4. [STUDENT] has an intellectual disability; her IQ has not been able to be measured.
5. [STUDENT] exhibits complex, challenging, disruptive behaviors including hyperactivity and impulsivity which are difficult to control even with medication. (P. Ex. 16.) At times, [STUDENT] becomes aggressive throughout the day and during transitions (e.g., from the classroom to the gym) by grabbing people, pulling hair, biting, and placing her mouth on others. [STUDENT] bit two people at school during the 2016/2017 school year and put her mouth on people without biting down innumerable times.
6. [STUDENT] has significant neuromuscular deficits, including hypotonia (low muscle tone). (P. Ex. 16.) She exhibits reduced muscle strength at school, sometimes leaning on school staff when seated. [STUDENT] is able to sit (in a chair with arms and a straight back), stand and walk. She walks with a slightly stooped gait, i.e., she crouches slightly and shuffles her feet. [STUDENT] does not have a good awareness of where her body is in space when she is ascending and descending steps and curbs.
7. [STUDENT] intermittently displays extreme lethargy at school, especially in the mornings. Her lethargy makes her less available to attend to her education.
8. [STUDENT] has displayed loss of previously displayed skills when ill. She generally regains lost skills several weeks after her minor illness, such as a cold or sore throat, has passed. (P. Ex. 40.)
9. [STUDENT] wears XXXX and requires adult assistance with toileting, hand washing, and managing her clothing.
10. [STUDENT] seeks oral stimulation by licking and touching objects and people.
11. [STUDENT] requires adult supervision and assistance at all times.

12. [STUDENT] regularly expresses no recognizable speech other than the word “Mommy,” which she sometimes uses toward her mother at home. In the past, [STUDENT] had some words, e.g., “iPAD,” which she used appropriately. She used “iPAD” in school recently, but she does not regularly use words to communicate.

13. [STUDENT] has a short attention span; she is often distracted or uninterested in academic activities.

14. [STUDENT] has difficulty processing information and requires extended wait time to respond to information.

School History and Identification of [STUDENT] as a Student with a Disability under IDEA

15. [STUDENT] was identified as a student qualifying for special education and related services and began receiving services through the MSDE Infants and Toddlers program when she was two years old.⁷

16. [STUDENT] attended half-day kindergarten in the 2014/2015 school year, full-day kindergarten in the 2015/2016 school year, and first grade in the 2016/2017 school year, all in CCPS.

17. The first IEP developed by CCPS for [STUDENT] was dated June 4, 2014. (P. Ex. 1, at 1, referred to as an amendment to an IEP dated June 4, 2014.)⁸

18. In the 2014/2015 school year, CCPS provided [STUDENT] speech and language therapy, occupational therapy, and physical therapy. (P. Ex. 3, at 3.)

19. CCPS provided [STUDENT] extended school year (ESY) services in the summer of 2015.

⁷ See COMAR 13A.13.

⁸ The 2014/2015 IEP was not offered into evidence.

The IEP for Kindergarten 2015/2016

20. In May of 2015, [STUDENT]'s IEP was approved after a duly-constituted IEP team meeting. (P. Ex. 3.)

21. The IEP team considered all available assessments in the following areas: Early LAP,⁹ Gross Motor, Fine Motor, Cognition, Language, Self-Help, Social-Emotional, Carolina Curriculum, Speech/Language, Rosetti-Infant-Toddler Language Scale, Physical Therapy, Peabody Development Gross Motor Scales-2, and Peabody Development Fine Motor Scale II. (P. Ex. 3, at 3.)

22. The May 2015 IEP identified [STUDENT] as a student with the primary disability of developmental delay, and identified the areas affected by her disability as Early Math Literacy, Reading Comprehension, Speech and Language Expressive and Receptive Language, Behavioral (sensory), and Physical (endurance and gross motor). (P. Ex. 3, at 1.)

23. The IEP contained an accurate statement of [STUDENT]'s present levels of academic performance (P. Ex. 3, at 7-10), and an appropriate statement of the special considerations and accommodations required for [STUDENT] (P. Ex. 3, at 12-20.)

24. The May 2015 IEP contained appropriate goals and objectives in the following areas: Academic – Reading Comprehension, Speech and Language Receptive and Expressive Language, Early Math Literacy, Physical – Gross and Fine Motor, and Endurance. (P. Ex. 3, at 21-24.)

25. [STUDENT]'s IEP was reviewed and revised on July 30, 2015, after a duly-constituted IEP team meeting to discuss the results of [STUDENT]'s ESY services and the status of her progress since her May IEP was formed. (P. Ex. 5.) The IEP team agreed that the placement for [STUDENT] in kindergarten for the 2015/2016 school year was in the regular

⁹ No explanation was offered at the hearing for this assessment.

early childhood education program with the majority of her special education services provided outside of the general education classroom because [STUDENT]'s special education, speech language therapy, occupational therapy, and physical therapy could not be provided in the regular classroom with supplementary aids, services, program modifications, and supports. (P. Ex. 5, at 33.)

26. The IEP provided that [STUDENT] would receive educational services outside of the general education classroom for 2.5 hours a week and the rest of the week (29 hours) she would receive services in the general education setting. (P. Ex. 5, at 33.)

27. During the 2015/2016 school year, [STUDENT] was in a class of twenty-one students with her own paraprofessional (para) who accompanied her at all times. (P. Ex. 17, at 2.) [STUDENT] received special education services and related services in the areas of speech language therapy, occupational therapy, and physical therapy from CCPS pursuant to her IEP. (P. Ex. 5, at 29-30.)

28. [STUDENT]'s IEP was revised February 9, 2016, at a duly-constituted IEP team meeting. (P. Ex. 7.) The IEP team reviewed and discussed [STUDENT]'s achievements and performance in all affected areas.

29. The July 30, 2015, IEP Speech and Receptive Language goal provided that “[g]iven objects, pictures, and a communication device, [STUDENT] will respond to commands with 80% accuracy in order to confirm understanding of language in 4 out of 5 trials as measured by data collection.” (P. Ex. 7, at 23.)

30. On February 9, 2016, a duly-constituted IEP team meeting was held, attended by [Mother] (P. Ex. 7.) The Student's mother (Mrs. XXXX) told the IEP team that she saw progress from [STUDENT] that school year, and hoped to see more consistency “as she tends to do what she wants to do rather than what is asked of her.” (P. Ex. 7, at 11.) The physical therapist,

occupational therapist, speech language pathologist, and special education teacher all reported that [STUDENT] was making progress toward the annual goals. (P. Ex. 7, at 3.)

31. The July 30, 2015, IEP Speech and Receptive Language goal was revised on February 9, 2016, to lower the goal from 80% to 70% accuracy in order to confirm that [STUDENT] would seek to reflect her understanding of language in 4 out of 5 trials as measured by data collection. (P. Ex. 7, at 23.)

Evaluations and Assessments conducted by CCPS before First Grade

32. In the Spring of 2016, CCPS ordered the following assessments: Reading, Mathematics, Written Language, Intellectual/Cognitive Functioning, Speech and Language, Functional/Adaptive Performance, Fine and Gross Motor Skills, and Emotional/Social/Behavioral Development.

33. CCPS retained a psychologist from XXXX with expertise with students with significant disabilities and autism to create a model functional behavior assessment (FBA) and train CCPS staff to conduct FBAs. After [STUDENT] displayed significant behavior difficulties in kindergarten, in April 2016 CCPS staff conducted a FBA for [STUDENT] and created a behavior intervention plan (BIP) for [STUDENT] in consultation with staff from [STUDENT]'s kindergarten school. (Tr. 840; P. Ex. 14.) The BIP is appropriate to address [STUDENT]'s problem behaviors.

34. The FBA written on April 13, 2016, identified the primary interfering behavior as biting. (P. Ex. 14.) The biting occurred when [STUDENT] was unhappy or frustrated, was told "no," was denied access to a preferred activity, was asked to start a non-preferred activity, was ill or fatigued, or when there was a change in schedule or caregiver or she was seeking oral sensory stimulation. (P. Ex. 14.)

35. The FBA was shared with the Parents and discussed at the May 2016, IEP team meeting. (P. Ex. 23, at 3.)

36. The BIP listed specific steps that school personnel, including the classroom teacher, should take to prevent unwanted behaviors:

a. [STUDENT]'s assistive technology device (XXXX) must be accessible to her at all times throughout the day;¹⁰

b. Staff must maintain a clear and consistent daily routine, providing [STUDENT] with a visual schedule so that she knows what to expect;

c. Social stories will be presented and reviewed throughout the school day to remind [STUDENT] of appropriate behaviors (e.g., safe mouth behaviors);

d. Staff should provide [STUDENT] with structured daily breaks;

e. Staff should provide short verbal instructions with visual supports;

f. Staff should provide transition warnings to help [STUDENT] to prepare for changes in place or activity; and

g. A token reinforcement system should be used. (P. Ex. 20.)

37. The BIP described a structured prompt hierarchy to be used if [STUDENT] became unsettled as evidenced by fussing or crying, pushing or throwing materials, hitting or kicking, or other attempts to delay or terminate activities. (P. Ex. 20, at 2.)

38. The BIP provided specific steps for behavior intervention, including: removal of all reinforcing items/activities; redirection to her communication device; if biting continues, redirection to oral stimulation item (XXXX)¹¹ and/or access to vibration tools, e.g., vibrating

¹⁰ The XXXX device contains a screen with several pictures on it. By pressing a picture, the user can access another screen with more pictures like the one touched on the first screen. Through sequential selection of pictures, the user is able to communicate more detailed information with others.

¹¹ XXXX is an item that [STUDENT] wears around her neck and places in her mouth for oral stimulation and redirection from interfering behaviors.

star; and, once [STUDENT] is calm, staff will review [STUDENT]'s social story with her prior to resuming instruction. (P. Ex. 20, at 2.)

39. The BIP described reinforcement of replacement behaviors, including immediately responding to [STUDENT]'s requests through her communication devices. (P. Ex. 20, at 2-3.)

40. CCPS attempted to conduct the Stanford Binet test, but it could not be completed due to [STUDENT]'s communication deficits. (P. Ex. 22, at 2.)

41. CCPS tested [STUDENT] using the Adaptive Behavior Assessment System (ABAS-3), which disclosed that [STUDENT] performed at an extremely low level across all settings in the areas of Conceptual (communication, functional academics, self-direction), Social (leisure, social), and Practical (community use, home living and school living, health and safety and self-care). (P. Ex. 22, at 2.)

42. CCPS completed the Behavioral Assessment System for Children (BASC-3), which disclosed that [STUDENT] was demonstrating clinically significant behaviors in the school setting, including hyperactivity and aggression. (P. Ex. 22, at 2.)

43. CCPS conducted the Conners 3 test of [STUDENT], which showed very elevated scores indicating concern for hyperactivity and conduct. (P. Ex. 22, at 2.)

44. The speech language therapy report discussed at the May 2016 IEP team meeting indicated that [STUDENT]'s auditory comprehension was on a 0-7 month level, and her expressive communication was on a 0-5 month level. (P. Ex. 22, at 4.)

45. The IEP team considered the XXXX assessment dated March 16, 2016, which was shared by the Parents, and concluded that [STUDENT]'s behavior during the assessment met the criteria for the classification of autism spectrum disorder. [STUDENT]'s speech and

language was assessed by XXXX as equivalent to a child aged two years and eight months old. (P. Ex. 22, at 4; P. Ex. 41.)

46. School personnel completed an informal assessment of [STUDENT]'s current levels of achievement and functional performance which indicated [STUDENT]'s level of achievement was as follows: Personal-Social (Self-regulations and Responsibility) (21-24 months); Interpersonal Skills (12-15 months); Self-Concept (scattered skills up to 24-30 months); and Self-Help (15-18 months). (P. Ex. 22, at 8.)

47. School personnel completed the ND Early Childhood Outcomes Process-Age Expectation Assessment of [STUDENT], which showed that [STUDENT] possessed scattered skills in the assessed areas up to the equivalent of a 24-month-old child. (P. Ex. 22, at 8-9.)

48. In kindergarten, [STUDENT] was excited about her XXXX but when presented with the device and not assisted by an adult, [STUDENT] did not demonstrate any understanding of the function or purpose for the device. (P. Ex. 22, at 10.)

First Grade IEP 2016/2017

49. A properly-constituted IEP team meeting was held on May 25, 2016, attended by [STUDENT]'s mother and appropriate CCPS staff. (P. Ex. 22.)

50. In addition to the XXXX report dated March 16, 2016 (P. Ex. 41; P. Ex. 22, at 4), the IEP team considered input from [Mother], observations, and the results of the following tests and assessments:

- a. School Psychology Report;
- b. ABAS-3;
- c. BASC-3;
- d. Conners 3;
- e. FBA;

- f. Physical therapy Assessment;
- g. Occupational therapy Assessment;
- h. Speech language therapy Assessment;
- i. Autism Diagnostic Observation Schedule; and
- j. Oral and Written Language Scales. (P. Ex. 22, at 2-4.)

51. After discussion among the team members, including a review of all of the recent assessments and tests, the Student’s IEP was revised in pertinent part as follows:

- a. The Student’s primary disability was changed from developmental delay to multiple disabilities: autism and other health impaired;¹² and
- b. The areas affected by the Student’s disability were modified:
 - i. Academic – *cognitive, reading comprehension*, speech and language expressive and *receptive* language;
 - ii. Behavioral – sensory;
 - iii. *Early learning skills – social foundations; and*
 - iv. Physical – *fine motor*, gross motor, *independent community living, toileting*. (P. Ex. 22, at 1.)¹³

52. At the May 2016 meeting the IEP team re-evaluated [STUDENT] in the areas of Academics (Math, Reading and Writing), Expressive and Receptive Language, Fine Motor, Gross Motor, Behavior and Functional Behavior. (P. Ex. 22, at 2.)

¹² The IDEA regulations define “other health impairment” as follows:

Other health impairment means 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).

¹³ The italics indicate revisions to her IEP. Compare P. Ex. 7 with P. Ex. 22.

53. The IEP team considered the results of all available information and the tests and reports obtained by CCPS. (P. Ex. 22, at 2-4.)

54. The IEP team discussed and documented [STUDENT]'s present level of academic achievement, behavioral and functional performance in all relevant areas. (P. Ex. 22, at 8-20.)

55. Based on the information considered by the IEP team and the team's assessment of [STUDENT]'s needs, the IEP team included in the IEP all of the supplementary aids and accommodations needed by [STUDENT] to communicate and access her education.

56. In the areas of Communication and Assistive Technology, the IEP team concluded that [STUDENT] has significant speech/language delays and requires the use of total communication (vocalizations, basic signs, gestures, pictures, voice output device) to assist her communication. The team also concluded that [STUDENT] requires the use of assistive technology (XXXX device) throughout her day. (P. Ex. 22, at 21.) When [STUDENT] uses her device, immediate reinforcement in the form of granting her request must occur. (P. Ex. 22, at 27.)

57. The IEP team provided that the CCPS assistive technology specialist will meet with the speech pathologist and special education teacher at least quarterly to support school personnel with technology needs. (P. Ex. 22, at 31.)

58. When the XXXX is broken it must be sent out for repair. The device has been broken several times when [STUDENT] has thrown it or knocked it off a table. [STUDENT] is permitted to take the device home with her, where her parents keep it in the kitchen so they can prevent damage while still making it available for [STUDENT] to use to communicate. The Parents and school staff work collaboratively and continue to try various methods, e.g., straps, to enable [STUDENT] to keep the XXXX near her but protect it from damage. (Tr. 480.)

59. In the area of behavior intervention, the IEP team decided that [STUDENT]'s BIP would be implemented. (P. Ex. 22, at 21-22.) Behaviors discussed during the May 25, 2016, IEP team meeting included biting, hair pulling, lying on the floor, and kicking. (P. Ex. 22, at 33.) The IEP team concluded that the school psychologist will consult with [STUDENT]'s educational team once per marking period to review her BIP and her progress on the plan and determine if changes need to be made. (P. Ex. 22, at 30.)

60. [STUDENT] is a non-reader and requires texts to be read aloud and visual cues to support her staying on task. (P. Ex. 22, at 22.)

61. The IEP team decided that because [STUDENT] has an extremely short attention span and a processing disorder she requires large tasks to be chunked, with frequent breaks and extended time to complete tasks. (P. Ex. 22, at 23, 26.)

62. The IEP team provided that due to [STUDENT]'s receptive/expressive language delays, key symbols should be paired with verbal communication using the XXXX, core language, and topic boards. Staff should respond to any communication from [STUDENT] and use simple sentences. [STUDENT] should be presented with highly engaging visuals and hands-on tasks and activities. (P. Ex. 22, at 24-25).

63. The IEP team decided that because [STUDENT] is performing significantly lower than her peers she will receive narrative grades instead of traditional letter grades. [STUDENT] requires extensive, repeated, individualized instruction and support as well as significant modifications to materials in order to access the general curriculum. (P. Ex. 22, at 26.) The IEP team further concluded that [STUDENT] will be provided with one-to-one support. (P. Ex. 22, at 28.)

64. The IEP team decided that staff should use a visual picture schedule to alleviate anxiety and so [STUDENT] knows what comes next. (P. E. 22, at 29.)

65. The IEP team decided that [STUDENT]'s difference in sensory processing requires frequent redirection and repetition of instructions, as well as sensory strategies to support her attention and participation. (P. Ex. 22, at 30.) The team concluded that [STUDENT] should be provided with sensory strategies, including use of XXXX and a vibrating z-vibe, i.e., a toy that provides sensory stimulation through vibrating, and use of the sensory room. (P. Ex. 22, at 21-31.)

66. The IEP team decided that physical therapy and occupational therapy consultation will occur at stated intervals. (P. Ex. 22, at 31.)

67. The IEP team concluded that [STUDENT] did not achieve the goals on her kindergarten IEP. (P. Ex. 22, at 32.)

68. CCPS provided [STUDENT] with ESY services during the summer of 2016.

69. The team created a comprehensive, fifty-one page IEP containing thirteen goals, each with supporting objectives designed to meet [STUDENT]'s complex needs. Each goal has a specified evaluation method and a targeted accuracy rate. The goals address all of [STUDENT]'s identified special needs, except social skills, which was not included. (P. Ex. 22, at 36-43.)

70. The school week for CCPS elementary schools consists of a total of 31 hours and 30 minutes a week.

71. CCPS calculates services hours and records them on IEPs based on the amount of specially-designed instruction that the IEP team decides is required for each student to make progress on the IEP goals. (Tr. 549.)

72. The IEP team agreed that [STUDENT] would receive the specially-designed instruction to work on her IEP goals with the following frequency:

- a. 3 hours and 45 minutes a week outside the general education setting;
- b. 5 hours a week in the general education setting;

- c. 30 minutes twice a week of occupational therapy outside the general education setting;
- d. 30 minutes twice a week of physical therapy; and
- e. 20 minutes five times a week of speech/language therapy. (P. Ex. 22, at 44-45.)

73. The IEP team decided that [STUDENT] would be placed in the general education setting for a total of 14 hours and 35 minutes a week and outside of general education a total of 16 hours and 55 minutes a week. (P. 22, at 49.)

74. At the May 25, 2016, IEP team meeting, [Mother] disagreed with the goals and objectives and the decision to place [STUDENT] in a CCPS school. (Tr. 255.)¹⁴ [Mother] advocated against including [STUDENT] in classes with her nondisabled peers. (P. Ex. 22, at 20). [Mother] requested that CCPS place [STUDENT] at [School 1], a private separate day school, at CCPS' expense. (Tr. 256.) The team disagreed, and stated that they wanted [STUDENT] to be part of a new program they were developing for an intensive communication classroom at a location to be determined with a class size to be determined. (*Id.*; P. Ex 23, at 2.)

75. The IEP team met on July 7, 2016, to review [STUDENT]'s progress since the May IEP meeting.

76. [Mother] attended the July 7, 2016, IEP meeting. At that time, CCPS identified [STUDENT]'s service placement as a CCPS elementary school.¹⁵ (P. Ex. 24, at 1; Tr. 256.)

77. The IEP team reviewed the following observations, progress notes, and information collected in June and July 2016, which formed the basis for CCPS' latest assessment of [STUDENT]'s abilities prior to the start of the 2016/2017 school year:

¹⁴ [Mother] did not explain during her testimony the precise nature of the disagreement she expressed at the meeting. (Tr. 255, line 18 to Tr. 256, line 1 (leading questions and yes/no answers).)

¹⁵ I have not identified the school because, as [STUDENT] was the only child in the classroom for some time, doing so might identify [STUDENT]

a. Goal: Early Learning Skills: “Given a book, the teacher reading aloud and supplemental activities related to the text, [STUDENT] will sustain attention to the text and activities for 10 minutes with no more than 5 gestural or verbal prompts with 100% accuracy, for 4 consecutive trials, as measured by data collection procedures.” (P. Ex. 24, at 37.)

Progress notes: Based on two observations (June 1, 2016 and June 5, 2016), [STUDENT] sat and listened to the teacher reading for four and five minutes, respectively, with minimal prompting. [STUDENT] chose zero of four and two of four pictures accurately. (P. Ex. 24, at 37.)

Based on five ESY sessions, [STUDENT] was able to sustain attention to the text and activities for 10 minutes with no more than five gestural or verbal prompts with 80% accuracy on June 20, 2016, 0% accuracy on June 27, 2016, 100% accuracy on July 8, 2016, 50% accuracy on July 11, 2016, and 100% accuracy on July 17, 2016. (P. Ex. 24, at 37-38.)

b. Goal: Early Learning Skills – Social Foundations: “Given 5 verbal directions and modeling of 5 specific behaviors ... [STUDENT] will imitate one step actions independently, with 80% accuracy for 4 consecutive trials, as measured by data collection procedures.” (P. Ex. 24, at 38.)

Progress notes: Based on one observation, [STUDENT] imitated the teacher’s hand clapping three times on two of five occasions. *Id.*

c. Goal: Academic – Reading Comprehension: “When read a text, [STUDENT] will be able to use a communication device to respond to questions about ‘the characters’ and ‘what happened’ in the text with 70% accuracy on 3 out of 4 trials as measured by data collection.” (P. Ex. 24, at 39.)

Progress notes: Based on observations during five ESY sessions, [STUDENT] attempted to answer questions about the story by touching icons on the XXXX with 0% accuracy. *Id.*

d. Goal: Academic – Speech and Language Expressive Language: “Given a speech generating device (XXXX) and a structured therapy task, [STUDENT] will use vocabulary related to the task to indicate her choices within the activity with gestural prompts with 80% accuracy for 5 consecutive trials, as measured by data collection procedures.” (P. Ex. 24, at 40.)

Progress notes: In one observation, [STUDENT] was able to make a choice on her XXXX. In four observations, [STUDENT] was able to make selections on the XXXX, with some guidance from her therapist. *Id.*

e. Goal: Academic – Speech and Language Expressive Language: “Given a speech generating device (XXXX) and an instructional task, [STUDENT] will select the ‘Break’ icon to indicate her need for a break independently, with 100% accuracy for 5 consecutive trials, as measured by data collection procedures.” (*Id.*).

Progress notes: [STUDENT] was observed to press the “Break” button often but without meaning. (P. Ex. 24, at 41.)

f. Goals: Academic – Cognitive:

(Goal 1) “Given a simple, one step verbal direction, [STUDENT] will follow the direction independently, with 100% accuracy for 4 consecutive trials, as measured by data collection procedures.” (P. Ex. 24, at 41.)

Progress notes: Based on observations in four ESY sessions, [STUDENT] followed the directions one time with 20% accuracy and three times with zero accuracy. (P. Ex. 24, at 42.)

(Goal 2) “Given a communication device (XXXX), a preferred item or activity, and two multiple choice picture supported vocabulary words, [STUDENT] will select the icon that identifies the name of the preferred item or activity in order to request the item/activity, with 100% accuracy for 5 consecutive trials, as measured by data collection procedures.” (P. Ex. 24, at 42.)

Progress notes: Based on observations during four sessions of ESY, [STUDENT] was able to identify the icon for the preferred item or activity with 0%, 60%, 20% and 0% accuracy. (P. Ex. 24, at 43.)

(Goal 3) “Given a set of objects and the verbal direction paired with the number symbol to ‘Give me one or two,’ [STUDENT] will demonstrate her understanding of number concepts by giving the teacher one or two of the objects independently, with 100% accuracy for 5 consecutive trials, as measured by data collection procedures.” (P. Ex. 24, at 43.)

Progress notes: Based on observations during four sessions of ESY, [STUDENT] was able to give the teacher the requested number of objects with 0%, 20%, 20% and 0% accuracy. (P. Ex. 24, at 44.)

g. Goal: Behavioral – Sensory: “Given minimal visual/verbal cues, [STUDENT] will participate in classroom/therapy activity for 10 minutes, following appropriate sensory strategies to calm her body, in 3 out of 4 trials as measured by data collection procedures.” (P. Ex. 24, at 44.)

Progress notes: Based on observation on July 12, 2016, [STUDENT] was able to attend to task for five minutes following lotion and deep pressure massage and for three minutes before becoming distracted by peers or demonstrating aversive behaviors of

kicking, and grabbing therapist's clothes and hair. Interfering behaviors occurred in half the ESY sessions. (P. Ex. 24, at 45.)

h. Goal: Physical – Fine Motor: “Given moderate visual/verbal/tactile cues and activities within her classroom/school routines, [STUDENT] will engage in purposeful grasp and release of items in 3/4 trials as measured by data collection.” (P. Ex. 24, at 46.)

Progress notes: Based on observations during four ESY sessions, [STUDENT] purposefully grasped and released an object 20% of the trials in one session, was able to grasp and release to pull things out of boxes and bags, but did not purposefully grasp to place things in a specific location or to put a book in a bag. [STUDENT] was unable to place paper towels in a trashcan. (*Id.*)

i. Goals: Physical – Gross Motor

(Goal 1 – Steps) “Given a handrail, verbal cues for technique, and contact guard [i.e., therapist's hands] for safety, [STUDENT] will demonstrate the ability to descend 4-5 steps with an alternate step pattern for 3 out of 5 trials.” (P. Ex. 24, at 47.)

Progress notes: Based on physical therapy visits on May 31, 2016 and June 2, 2016, [STUDENT] was able to ascend and descend a set of five steps with an alternate step pattern going up and down with verbal reminders and contact guard assistance in two of three trials. *Id.*

(Goal 2 – Reciprocal Ball Play) “With moderate verbal cues and minimal physical assistance for technique, [STUDENT] will be able to participate in reciprocal ball play by tapping a balloon with her hand, when tossed to her from 3 feet away without verbal cues for attention 2 out of 4 trials.” (P. Ex. 24, at 48.)

Progress notes: Based on observation on June 2, 2016, [STUDENT] was not demonstrating purposeful activity with the ball. She was demonstrating more attention and tracking of balloons and bubbles. *Id.*

j. Goal: Physical – Independent Community Living – Toileting: “Given maximal tactile assist and verbal cues, [STUDENT] will pull down/up her pants for toileting in 3 out of 4 trials as measured by data collection.” (P. Ex. 24, at 48.)

Progress notes: [STUDENT] was unable to pull her skirt/pants up or down with maximum assistance. (P. Ex. 24, at 49.)

Implementation of [STUDENT]’s IEP in 2016/2017 School Year and [STUDENT]’s Performance in School

78. CCPS created the XXXX (XXXX) and implemented a special program emphasizing communication goals for the 2016/2017 school year.

79. Mr. XXXX was hired by CCPS to provide special education services in the XXXX and generalized support services throughout the students’ school day.

80. [STUDENT] was provided with her own para, who stayed with her throughout the day and assisted [STUDENT] and Mr. XXXX as needed.

81. [STUDENT] was the only student in the XXXX from August 2016 until October, when one other student came into the XXXX for a portion of the afternoon. (Tr. 638-39.) CCPS did not plan for [STUDENT] to be the only child in the XXXX, but the other children who were expected did not attend during the Fall of 2016 for reasons beyond the control of CCPS. (Tr. 637-38, 822.) From February 2017 on, one other student attended the XXXX with [STUDENT] (Tr. 639.)

82. CCPS provided [STUDENT] with access to her nondisabled peers in the 2016/2017 school year as follows:

- a. When it is time for specials, i.e., Music, Integrated Art, etc., [STUDENT] walks to the first grade classroom and walks to the special with her peers (Tr. 619);
- b. [STUDENT] attends recess with the first grade, *id.*;
- c. [STUDENT] goes on field trips with the first grade, *id.*;
- d. [STUDENT] attends Reading and Math with the first grade when she is able to do so, *id.*;
- e. After speech language therapy every day, [STUDENT] takes a walk around the building, and other students plus school staff verbally greet her (“Hi walk”) (Tr. 649-50); and
- f. Sometimes a first grade classmate will come to the XXXX to have lunch with [STUDENT] (Tr. 651-52.)

83. CCPS provided [STUDENT] with all of the services, accommodations and supports required by her IEP in the 2016/2017 school year.

84. At the beginning of the school year in August 2016, [STUDENT] had difficulty staying seated and quiet in the general education classroom for academic subjects. [STUDENT] also had difficulty walking to the classroom. She would often drop to her knees on the floor in the hallway and refuse to stand up without significant encouragement and assistance from Mr. XXXX and her para. This took time away from [STUDENT]’s time in the general education classroom. About three weeks after school started, Mr. XXXX began providing [STUDENT] more instruction in the XXXX so she did not have to walk to the general education classroom and because she was better able to focus and remain attentive for longer periods in the XXXX classroom. (P. Ex. 24, at 49.) Mr. XXXX attempted to take [STUDENT] to the general education classroom as often as possible. [STUDENT] joined the nondisabled first graders for portions of Gym, Integrated Art and Music (specials).

85. From the beginning of school until the December 2016 IEP meeting, [STUDENT] received more than eight hours and forty-five minutes of specially designed instruction to work on her IEP goals every day. As to placement, within three weeks of the start of school, [STUDENT] was in the special education classroom for more hours and out of the general education setting for more hours than specified in the Placement section of her IEP. (Tr. 618.)

86. From the beginning of the school year until about mid-October, [STUDENT] ate lunch with non-disabled peers in the lunchroom. In mid-October she started eating in the XXXX classroom to encourage [STUDENT] to consume her whole lunch because the school lunchroom was too noisy and distracted her from eating her lunch.

87. In addition to occupational therapy, physical therapy, and speech language therapy, CCPS provided [STUDENT] with a specialized program suited to meet her unique needs: (a) [STUDENT] is presented with special transition objects¹⁶ to enable her to transition from the XXXX classroom to other places at school and to reinforce the use of the objects daily; (b) Picture Exchange Communication System (PECS) is used daily;¹⁷ (c) the teacher cues [STUDENT] to check the master schedule of pictures on the wall in the XXXX in between each activity to assist her to transition; (d) breakfast is used as an opportunity for [STUDENT] to practice communication by making requests with switches for different parts of breakfast and signaling when she is finished; (e) the food and drink [STUDENT] is offered at breakfast are labeled verbally by the teacher to reinforce language; (f) sometimes Mr. XXXX offers [STUDENT] a food she doesn't like to encourage her to communicate that she does not want to eat it; (g) language is modeled for [STUDENT] by the teacher and para often speaking words

¹⁶ [STUDENT] has a specific transition object for each destination, e.g., she has one transition item she always carries to walk to the classroom from the arrival area outside, a different object to walk to physical education/gym class, another for music, and so on. (Tr. 600.) Transition items help to ground [STUDENT] and give her cues to what is coming next in her day.

¹⁷ PECS are symbols attached to items in [STUDENT]'s day used to help [STUDENT] associate the symbol with the place or thing.

about what is shown, pointing and using slow, exaggerated speech; (h) Mr. XXXX speaks with Ms. XXXX about three times a week to obtain information about [STUDENT]'s behavior and [STUDENT]'s current favorite activities; (i) Mr. XXXX uses the input from Ms. XXXX to introduce language into [STUDENT]'s day—e.g., if [STUDENT] likes bubbles with Ms. XXXX, Mr. XXXX will use bubbles and other “B” words like Barbie with [STUDENT] that day; (j) Mr. XXXX cuts pictures of the main characters out of an extra copy of the first grade Reading books and uses them with [STUDENT] to make vocabulary available to [STUDENT]; (k) the XXXX is set up using the Teach model and [STUDENT] is delivered consistent routine instructions in set locations—e.g., the group table;(l) Mr. XXXX uses a clear, direct voice with [STUDENT]; (m) the XXXX has low lighting and reduced noise; (n) several social stories are used with [STUDENT], including a story about biting; (o) [STUDENT] has various objects used for her needs—e.g., a bean bag chair; and (p) the XXXX is available for [STUDENT]'s use, except when she is moving around or trying to throw it. (Test. Mr. XXXX)

88. CCPS implemented the BIP regularly, but not perfectly. School personnel, including the classroom teacher, made [STUDENT]'s XXXX accessible to her throughout the day, although at times it was not within [STUDENT]'s reach. Staff maintained a clear and consistent daily routine. Mr. XXXX posted in the XXXX and reinforced with PECS a visual schedule. Mr. XXXX presented many social stories to [STUDENT] to remind [STUDENT] of safe mouth behaviors. [STUDENT] was allowed structured daily breaks and other breaks when she requested them with the XXXX. Staff provided [STUDENT] short verbal instructions with visual supports. Mr. XXXX provided transition warnings throughout the day to help [STUDENT] to prepare for changes in place or activity.

89. At times, Mr. XXXX did not follow the specific steps in the BIP for behavior intervention. He read [STUDENT] the biting social story before redirecting her to the XXXX and her oral stimulation items and vibration tools.

December 2016 IEP Team Meeting

90. A duly-constituted IEP team meeting was held on December 16, 2016, attended by [STUDENT]'s mother, Mr. Steedman, and XXXX XXXX on behalf of the Parents. (CCPS Ex. 45.)

91. The IEP team considered the Student's significant delays and deficits in academic and communication skills, and determined that she required specially-designed instruction for academics and communication outside the general education setting due to her distractibility and the need to focus her attention on communication and joint attention for instructional activities. The team determined that the Student requires some of her academic services inside general education to provide modeling of language and to facilitate generalization of skills. The IEP team considered the Student's fine motor, gross motor, and sensory needs and determined that occupational and physical therapy were required outside general education to provide the necessary setting/activities. (P. Ex. 30, at 67.)

92. [Mother] again disagreed with [STUDENT]'s goals and objectives and her placement. (Tr. 286.) The Parents proposed that [STUDENT] not be included in the general education setting at all during the school day. [Mother] expressed concern that [STUDENT] was not with peers most of the day when outside of the general education setting.

93. The Parents presented the report of XXXX XXXX, a consultant from XXXX, which recommended that [STUDENT] attend a full-day evidence-based program for children with autism, with a board certified behavior analyst (BCBA) on staff and all staff highly trained

in working with students with autism. The Parents requested that [STUDENT] be placed at [School 1] at public expense with full day ESY services.

94. CCPS proposed that the amount of time [STUDENT] was included in the general education be reduced. (CCPS Ex. 45, at 1.)

95. The IEP team decided that “[m]ost of [the Student’s] academic services will be provided outside general education to support her instruction and to provide opportunities to provide the appropriate environment for success. Generalization will be supported through instruction inside general education.” (P. Ex. 30, at 67.)

96. The team determined that [STUDENT] would not attend general education sessions in the general education classroom in the afternoons; she would only attend specials with nondisabled peers. (Tr. 286.) The Parents disagreed with the school-based members of the team.

97. After discussion among the team members, including a review of all of the observations, assessments and tests, including the Assessment Report of Ms. XXXX dated November 11, 2016, and the Parent’s school observations of October 2016 and December 12, 2016, the Student’s IEP was revised as follows:

a. The Services section of the IEP was changed to reduce the hours spent working on [STUDENT]’s goals within the general education setting from 5 hours to 2 hours and 30 minutes, and to increase the hours spent working on [STUDENT]’s goals outside the general education setting from 3 hours and 45 minutes to 6 hours and 15 minutes a week; and

b. The Placement section of the IEP was changed to increase the hours [STUDENT] receives instruction and services in the XXXX special education setting

from 16 hours and 55 minutes a week to 29 hours a week.¹⁸ (CCPS Ex. 45, at 2; *compare* P. Ex. 22, at 44 and 49, *with* P. Ex. 30, at 63 and 68.)

98. The IEP team did not consider the Parents' request for ESY services as [STUDENT]'s current IEP extends through May 24, 2017. (CCPS Ex. 45, at 2.)

Data Collection and Observations to Monitor Progress Toward IEP Goals and Objectives During the 2016/2017 School Year

99. CCPS has policies requiring teachers to collect data twice every quarter and to maintain data for two years.

100. Mr. XXXX collected data in class regarding [STUDENT]'s progress toward her goals every other week. He did not keep his notes (raw data) for two years as required by CCPS policy. He destroyed the raw data once he wrote the quarterly progress reports.

101. [Mother] observed the Student in school on October 20, 2016, and December 12, 2016. (P. Ex. 26, 29.)

102. CCPS staff completed quarterly progress reports which were provided to the Parents instead of letter or numeric grades.

Progress Toward IEP Goals and Objectives

103. [STUDENT] made progress toward achieving some of the goals on her IEP during the 2016/2017 school year:

a. Goal: Physical – Independent Community Living - Toileting –

[STUDENT] received occupational therapy services for 30 minutes twice a week from XXXX XXXX, a highly experienced, licensed occupational therapist.

i. [STUDENT] made very little functional progress toward the toileting goal of pulling her pants up and pushing them down. (P. Ex. 30, at 60.) One

¹⁸ Page 68 of the IEP contains a typographical error which incorrectly indicates that [STUDENT] will *not* participate with non-disabled peers for 19 hours per week. (P. Ex. 30, at 68 (last sentence).) The IEP team decided that [STUDENT] will not participate with non-disabled peers for 29 hours per week.

of her goals is to pull/push her pants up and down for toileting in three out of four trials given maximum tactile support¹⁹ and verbal cues. *Id.*

At the beginning of the school year, [STUDENT] was not doing anything with her clothes when toileting, even with maximum support. (P. Ex. 30, at 60 (July 17, 2016 report); Tr. 427.) Mr. XXXX and Ms. XXXX worked with [STUDENT] on a hula hoop and a tutu to approximate the grasping and pulling/pushing motion, but [STUDENT] made minimal progress toward this goal. As of March 2017, [STUDENT] was grasping a hula hoop and pushing it down in order to crawl away from it to reach a favored toy. This approximates the motion of pulling her pants down, a skill that [STUDENT] has not achieved.

ii. Other objectives are, given maximum tactile support, to wash her hands after soap is placed on them and pat her hands dry after a towel has been given. (P. Ex. 30, at 60.) [STUDENT] is sometimes able to wash her hands once soap is placed on them, as she prefers water activities. She will grab paper towels and hold them but has not shown the ability to pat her hands dry. [STUDENT] will release paper towels into the bathroom trash can.

b. Goal: Physical – Gross Motor - [STUDENT] received physical therapy services for thirty minutes twice a week from XXXX XXXX, a highly experienced, licensed physical therapist. Although [STUDENT]'s performance in the physical therapy sessions is inconsistent, [STUDENT] has progressed in meeting her IEP goals in that she is more stable in her walking, is better able to navigate changes in surface, has more endurance in walking, and changes position more easily. (Tr. 382-83.)

¹⁹ Maximum tactile support means hand-over-hand assistance: the staff member places the student's hands, and then grasps the object over top of the student's hands, in effect moving the grasped object for the student. (Tr. 94, l. 5-7.)

i. One of [STUDENT]'s gross motor objectives in her IEP involves reciprocal ball play. (P. Ex. 30, at 58.)²⁰ At the start of the school year, [STUDENT] was not able to show consistent purposeful performance with ball skills. *Id.* (Progress report dated June 9, 2016.) [STUDENT] would touch a ball but not do anything to catch or throw the ball. [STUDENT]'s performance in PT in using the ball is very inconsistent, but she has shown that she can catch a suspended ball up to 12 out of 14 tries. (Tr. 384.)

ii. [STUDENT]'s other gross motor goal in her IEP involves going up and down the stairs with an alternate step pattern, i.e., using alternate feet on each step. (P. Ex. 30, at 57-58.) At the end of kindergarten, [STUDENT] needed contact guarding or moderate assistance to go down stairs. (Tr. 386.)²¹ In March 2017, [STUDENT]'s performance was inconsistent. She needed a contact guard for safety and verbal prompting to hold a handrail. [STUDENT] can descend stairs without moderate assistance using a handrail. (Tr. 387.) [STUDENT] requires close supervision because she does not always show that she is aware of where her body is in space. [STUDENT] has not attempted the objective of walking on a wide beam.

c. Goal: Physical – Fine Motor – [STUDENT] has a fine-motor goal involving grasping and releasing tissues/paper towels in a trash can. (P. Ex. 30., at 55.) This is one of the skills necessary for washing hands. At the beginning of the year, [STUDENT] needed total assistance to wash her hands. She has improved so that she will grasp and pull a paper towel that has been partially pulled from the dispenser and will usually drop it into the trash can with modeling and verbal cues. (Tr. 432; CCPS Ex. 10.)

²⁰ [STUDENT]'s gross- and fine-motor goals did not change from the May 25, 2016 IEP. *Compare* P. Ex. 22 with P. Ex. 30.

²¹ Contact guarding means that the therapist has to have a hand on the student's body, e.g., holding her hand. (Tr. 385.) Moderate assistance refers to physically providing the student with some help, e.g., touching her foot. *Id.*

d. Goals: Speech and Language – [STUDENT] received speech therapy services in the XXXX for 20 minutes every school day from XXXX XXXX, a highly experienced speech therapist. (Tr. 466.) [STUDENT] has two goals, both involving the XXXX.

i. At the start of first grade, [STUDENT] pressed the break button on the XXXX without seeming to know what it meant. (P. Ex. 25, at 41.)

ii. During the 2016/2017 school year, [STUDENT] has learned to use the XXXX independently in different settings to tell people when she wants food, drink, or a break, and to indicate what type of food she wants or how she wants to use her breaks by touching icons on the screen. (Tr. 468.) [STUDENT] is still a novice with the XXXX. (Tr. 530.)

iii. [STUDENT] received the benefits of strategies in the XXXX to improve her ability to communicate, including a predictable routine; pictures representing her schedule; lots of sensory objects; calm music; low-level light; use of single buttons; and transition objects to help [STUDENT] predict what comes next.

e. Goal: Behavior – [STUDENT] did not make progress toward achieving her behavior IEP goals during the 2016/2017 school year. [STUDENT]’s inappropriate behaviors continue to interfere with her access to learning.

f. Goal: Academics – [STUDENT] did not make progress toward her academic goals during the 2016/2017 school year.

Credentials of Experts

104. Mr. XXXX is a highly trained and very experienced special educator. He holds a B.S. in education and a M.Ed. in Elementary and Special Education. Mr. XXXX has worked as a special educator in CCPS since August 2016, as a special education team leader for Baltimore

County Public Schools for six years, for XXXX, Maryland as XXXX for three years and principal for another three years, for Harford County Public Schools as an inclusion teacher for one year, as a teacher at the XXXX in a residential setting for over three years, and as a teacher of special needs students in [City] for two years.

105. XXXX XXXX has a doctorate in Education/Special Education, a master's degree in Teaching, and a bachelor's degree in Biology. Dr. XXXX holds a license as a Behavior Analyst in Maryland. Dr. XXXX has taught education at various colleges and universities from 2011 until 2016. She has worked in the field of behavior analysis since 2007, working with a public school system and families with children with disabilities. Dr. XXXX was a special education classroom teacher from 2005 until 2007. Dr. XXXX has served as an expert witness in special education due process hearings. (P. Ex. 37.)

106. XXXX XXXX, M.Ed. is a certified special education teacher and reading specialist with over nine years of varied experience in teaching students with disabilities. She has a Master's degree in Education and a Bachelor's of Science degree with a concentration in special education. She has worked since 2000 performing FBAs and behavior intervention plans for a variety of clients, including Baltimore City Public Schools and Baltimore County Public Schools. (Tr. 314-15.) Ms. XXXX has been employed since January 2002 as an educational and behavioral consultant with XXXX, Inc. (P. Ex. 38.)

107. XXXX XXXX is a physical therapist employed by CCPS. She is licensed to practice physical therapy in Maryland and other states. Ms. XXXX has worked as a physical therapist for forty years, thirty-nine of which were in pediatrics and thirty-six years in schools. (CCPS Ex. 11.)

108. XXXX XXXX is a licensed occupational therapist with over thirty years of experience in school and private-practice settings. (CCPS Ex. 8.)

109. XXXX XXXX has more than thirty-five years of experience as a speech language therapist working in schools. She has worked for CCPS since 2011 as a Supervisor and Speech Pathologist. (CCPS Ex. 6.)

110. XXXX XXXX has worked for CCPS as the Director of Special Education for seven years and has three years of prior relevant experience. (Tr. 817-18.)

111. XXXX XXXXX, Ed. D., is the Executive Director of the XXXX. (CCPS Ex. 18.) She holds a B.A. in Psychology, a M.A. in Educational Psychology, and a doctorate in Severe Disabilities and Communication Disorders.

DISCUSSION

Legal Principles

During the pendency of this case, the Supreme Court issued an important decision explaining the legal principles controlling my analysis. *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988 (2017) (*Endrew F.*).²² Explaining the statutory and regulatory framework of the IDEA, the Court noted that in exchange for federal funds a State must, among other things, provide a FAPE to all eligible children. 20 U.S.C.A. § 1412(a)(1). The Supreme Court set forth the parameters of the IDEA, which guide the decision in this case:

A FAPE, as the [IDEA] defines it, includes both “special education” and “related services.” §1401(9). “Special education” is “specially designed instruction ... to meet the unique needs of a child with a disability”; “related services” are the support services “required to assist a child ... to benefit from” that instruction. §§ 1401(26), (29). A State covered by the IDEA must provide a disabled child with such special education and related services “in conformity with the [child’s] individualized education program,” or IEP. § 1401(9)(D).²³

The IEP is “the centerpiece of the statute’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311 (1988). A comprehensive plan prepared by a child’s “IEP Team” (which includes teachers, school officials, and the child’s parents), an IEP must be drafted in compliance with a detailed set

²² The parties did not address the question of whether *Endrew F.* applies to this case which involved events occurring prior to the Court’s decision. I conclude that *Endrew F.* governs the decision in this case. *See Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 89 (1993).

²³ Maryland has adopted regulations in accordance with the IDEA. COMAR Tit. 13A.

of procedures. § 1414(d)(1)(B) (internal quotations marks omitted). These procedures emphasize collaboration among parents and educators and require careful consideration of the child’s individual circumstances. § 1414. The IEP is the means by which special education and related services are “tailored to the unique needs” of a particular child. [*Board of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)].

The IDEA requires that every IEP include “a statement of the child’s present levels of academic achievement and functional performance,” describe “how the child’s disability affects the child’s involvement and progress in the general education curriculum,” and set out “measurable annual goals, including academic and functional goals,” along with a “description of how the child’s progress toward meeting” those goals will be gauged. §§ 1414(d)(1)(A)(i)(I)-(III). The IEP must also describe the “special education and related services ... that will be provided” so that the child may “advance appropriately toward attaining the annual goals” and, when possible, “be involved in and make progress in the general education curriculum.” § 1414(d)(1)(A)(i)(IV).

Endrew F., 137 S. Ct. at 994 (parallel citations omitted).

The *Endrew F.* Court was asked to expand upon its decision in *Rowley*, a seminal IDEA decision. *Rowley* held that the IDEA establishes a substantive right to a FAPE for certain children with disabilities. The Court acknowledged that *Rowley* did not endorse a single standard for determining “when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the [IDEA],” leading the federal circuits to apply different standards for the attainment of educational benefit under the IDEA. 137 S. Ct. at 993 (citing *Rowley*, 458 U.S. at 202). Instead, *Rowley* held that the IDEA standard is satisfied, and a child has received a FAPE, “if the child’s IEP sets out an educational program that is ‘reasonably calculated to enable the child to receive educational benefits,’” *Id.* at 995-96 (citing 458 U.S. at 207). *Rowley* recognized that the law requires the States to educate all children with disabilities and that “the benefits attainable by children at one end of the [disability] spectrum will differ dramatically from those obtainable by children at the other end,” but “declined ‘to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.’” *Id.* at 996 (quoting 458 U.S. at 202).

Thirty-five years later, the parties in *Andrew F.* asked the Court to go further and set forth a binding test for measuring whether a disabled student attained sufficient educational benefit.²⁴

The framework for the decision was the Tenth’s Circuit’s interpretation of *Rowley*’s “some educational benefit” language, (citing 458 U.S. at 200), as an “educational benefit [that is] merely ... ‘more than *de minimis*.’” *Andrew F. ex rel. Joseph F. v. Douglas Cty. School Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).²⁵

The Supreme Court set forth the following “general approach” to determining whether a school has met its obligation under the IDEA: “a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 999. “[T]he degree of progress contemplated by the IEP must be appropriate in light of the child’s circumstances....” *Id.* at 992. Further, the Court instructed that “[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Id.*

The *Andrew F.* Court explained that a challenged IEP must be examined to determine if it describes the child’s present level of performance, including explaining “how the child’s disability affects the child’s involvement and progress in the general education curriculum.” *Id.* at 994 (citing 20 U.S.C.A. § 1414(d)(1)(A)(i)(1)(aa)). The IEP also must “set out ‘measurable annual goals, including academic and functional goals,’ along with a ‘description of how the child’s progress toward meeting’ those goals will be gauged,” *id.* (citing § 1414(d)(1)(A)(i)(I)-

²⁴ In the interim various formulations of the test for “educational benefit” under *Rowley* were adopted in the federal circuits, including the Fourth Circuit. See generally *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 Educ. L. Rep. 1, *9-10 (2009).

²⁵ The *de minimis* standard was adopted by the Tenth Circuit and several others. The Fourth Circuit formulated the test as whether the school system adopted an IEP calculated to confer some educational benefit on the student, not to maximize each disabled child’s potential. See *O.S. ex rel. Michael S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (“In this circuit, the standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.”) The Fourth Circuit cases recognize that what constitutes educational benefit is different for every child and may change for a child over time. See *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315 (4th Cir. 2009); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004); *Hall by Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985).

(III), and “describe the ‘special education and related services ... that will be provided’ so that the child may ‘advance appropriately toward attaining the annual goals’ and, when possible, ‘be involved in and make progress in the general education curriculum.’” *Id.* (citing § 1414(d)(1)(A)(i)(IV)).

The *Endrew F.* Court made it clear that, for a student who is fully integrated into the regular classroom, the IEP should provide a level of instruction reasonably calculated to meet the unique needs of a student that result from the disability and to permit a student to advance through the general curriculum. However, when a student is not fully integrated into the regular classroom and is not able to achieve on grade level, the “educational program must be appropriately ambitious in light of [the student’s] circumstances....” 137 S. Ct. at 1000.²⁶ “The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* Summarizing its holding, the Court said: “[The IDEA] requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 1001.

Endrew F. explained that this decision is fact-specific: appropriate progress is different in every case, depending on the student’s unique circumstances. The Court explained its reasoning as follows:

We will not attempt to elaborate on what “appropriate” progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Rowley*, 458 U.S. at 206.

At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child.

²⁶ The student in *Endrew F.* was diagnosed in autism and was exhibiting behaviors that interfered with his educational progress.

The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable a child to make progress appropriate in light of [the child's] circumstances.

137 S. Ct. at 1001-02 (some citations and parallel citations omitted).

With the language of the IDEA, the Maryland regulations, and the decision in *Andrew F.* as guides, I will review the evidence in this case.

The Contentions of the Parties

The Parents filed a comprehensive eighteen-page Complaint on behalf of the Student and themselves. I shall only describe the issues argued at the hearing, which centered on [STUDENT]'s communication, behaviors and placement. Any other contentions were implicitly waived for failure to advance them at the hearing since the Parents have the burden of proof.²⁷ *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005).

In the Complaint, the Parents contend that CCPS denied the Student a FAPE by placing her in the general education classroom in the 2014/2015 and 2015/2016 school years when [STUDENT] attended kindergarten in CCPS. The Complaint describes areas of dissatisfaction occurring more than two years before the Complaint was filed on January 17, 2017. Complaint 16 ("CCPS has failed to provide a FAPE to [STUDENT] for many years in violation of the IDEA...."). Any claim arising prior to January 17, 2015 is untimely: "The due process complaint must allege a violation that occurred not more than two years before the date the parent ... should have known about the alleged action that forms the basis of the due process complaint..." 34

²⁷ The Complaint refers to section 504 of the Rehabilitation Act of 1973. At the prehearing conference, I informed the parties that the OAH does not have a delegation of authority to hearing section 504 complaints in this county. Mr. Steedman indicated that he understood and would seek other avenues for recourse of the 504 claim.

C.F.R. § 300.507(a)(2). I interpret the information provided at the hearing regarding the pre-January 17, 2015, time as background information, placing the later events in historical context.

The Complaint alleges that CCPS failed to provide [STUDENT] a FAPE in the 2015/2016 and 2016/2017 school years. Complaint 17. However, at the hearing and in the closing argument the Parents focused on the May 2016 IEP, which was prepared for the 2016/2017 school year, and the events from that date through the date of the hearing. The Parents withdrew their request for compensatory education at the hearing and did not specify any finding they were requesting for the 2015/2016 school year. Therefore, any allegations in the Complaint about the 2015/2016 school year are deemed waived.

The Parents challenge the first grade IEP as inadequate and flawed. They further contend that [STUDENT] failed to make meaningful educational progress. The Parents argue that [STUDENT] has regressed academically, still struggles with communication, and her aggressive behaviors and emotional outbursts have increased. The Parents argue that due to the complexity and severity of her needs, [STUDENT] requires a highly specialized program. They request an order that CCPS make a referral to [School 1] (Day Program), a separate nonpublic day school, or an appropriate nonpublic placement agreed upon by the Parents, and that CCPS pay for tuition, related services, and transportation for the 2016/2017 school year.²⁸

CCPS denies that it violated the IDEA. It contends that the Parents have “cherry picked” items in the IEP not to their liking without examining the IEP as a whole. CCPS argues that the IEP is more than its goals and objectives; it includes specific accommodations, supports and services tailored to [STUDENT]’s unique needs. CCPS argues that it provided [STUDENT] a FAPE. She spends her entire day with a trained special educator and always has her own para with her. The assistive technology and communication supports are available all day, including

²⁸ The Parents also indicate their intention to seek reimbursement for the attorneys’ fees and expenses incurred in filing the Due Process Complaint. That is an issue for another venue.

the XXXX, iPad, and other forms of communication. [STUDENT] has access to nondisabled peers who model appropriate behaviors for her. [STUDENT] has made progress in some but not all areas of her IEP. CCPS seeks an order stating that it complied with the IDEA.

Credibility of the Witnesses

[Mother] was a strong witness for [STUDENT]. She testified calmly, openly and honestly, answering every question to the best of her ability. She introduced [STUDENT] as a seven-year-old who loves music, movement, and has favorite television programs. [STUDENT] is sweet and loving when she is happy, but she displays aggressive behaviors when she is frustrated, including kicking, biting, hair pulling and throwing herself to the ground. (Tr. 232.) [STUDENT]'s frustrations increase when she is in large groups of people, so she does not attend gatherings like birthday parties. *Id.* [STUDENT] likes electronics, and has learned to unlock [Mother]'s cell phone to use the camera to look at the world. (Tr. 245.)

[STUDENT]'s mother is very knowledgeable about all aspects of her daughter's health and education. In addition, [Mother] has been very involved with CCPS while [STUDENT] has been enrolled, attending every IEP team meeting and visiting the classroom.²⁹ [Mother] keeps in touch with Mr. XXXX face-to-face and through email. [Mother] is obviously a loving mother who cares deeply for [STUDENT] and wants to maximize [STUDENT]'s potential. Together with [Father], [Mother] has enormous responsibilities for her daughter, and she diligently attends to them.

XXXX XXXX testified that she was contacted to testify for the Parents by Mr. Steedman.³⁰ Ms. XXXX is experienced with special education services in the public schools, and she had much to offer about [STUDENT].

²⁹ The IEP team is a "group of individuals described in §300.321 that is responsible for developing, reviewing, or revising an IEP for a child with a disability." 34 C.F.R. § 300.23.

³⁰ There is nothing wrong with this, indeed competent counsel for parents in a due process case has a duty to retain qualified experts when necessary to support the claims in a due process complaint.

I detected some bias in favor of Ms. XXXX's economic interest when Ms. Eisenberg cross-examined her about a statement on her company's website stating that she had obtained private placement for parents ninety-five percent of the time.³¹ Ms. XXXX denied that the statement was on her website, then explained that the statement was not currently on the website, which she says has been completely redesigned. (Tr. 360-361.)

On redirect, Ms. XXXX readily answered questions from Mr. Steedman about how she calculated the ninety-five percent, so she clearly knew to what Ms. Eisenberg had been referring, indicating to me that she attempted to avoid answering Ms. Eisenberg's question. I detected some defensiveness in Ms. XXXXs' colloquy with Ms. Eisenberg. Although careful selection of clients might increase a consulting expert's chances of participating in a case achieving results desired by parents, touting win/loss percentage may not be the best way to explain this to prospective clients, especially parents of special needs children.

On another issue, on cross-examination, Ms. XXXX was asked if she ever stated to Mr. XXXX in the presence of Ms. XXXX, that if only the Baltimore County parents could see the XXXX, they would love it. (Tr. 361, l. 119 to 362, l. 8.) Ms. XXXX testified that she did not remember saying it or referring to Baltimore County parents.³² Both Mr. XXXX and Ms. XXXX testified credibly that Ms. XXXX made this remark on November 11, 2016, after observing [STUDENT] in the XXXX and while speaking with Mr. XXXX in Ms. XXXX's presence. (Tr. 664, ls. 19-23; Tr. 560, l. 17 to 561, l. 5.) I conclude that Ms. XXXX was not truthful in her testimony, and that Mr. XXXX and Ms. XXXX were credible. I conclude that Ms. XXXX was impressed with the XXXX and the program offered to [STUDENT], and she honestly complimented CCPS during her visit in November 2016. When it came time for her to testify for

³¹ The question from Ms. Eisenberg and Ms. XXXX's answer was as follows:

Q: And isn't it true that you hold yourself out, Ms. XXXX, as a person who has a record of 95 percent success in securing nonpublic placement? Isn't that how you advertise yourself?

A: No. (Tr. 359, l. 9-13.)

³² Ms. XXXX consults on a lot of issues involving students in the Baltimore County Public Schools.

the Parents, Ms. XXXX evaded the questions by feigning lack of memory because an honest answer would harm the Parents' case.

Taken altogether, this evidence provides some indication that Ms. XXXX was predisposed to render an opinion favorable to the Parents' quest for private school at public expense, and that she was unfairly critical of the program offered to [STUDENT] by the CCPS during her testimony. I have not given her testimony much weight.

Dr. XXXX testified for the Parents. Dr. XXXX has attained a doctorate degree and is very knowledgeable. I considered her testimony carefully and gave it weight when it was rendered within the realm of her expertise.

Several of the Student's treating physicians wrote in their reports that [STUDENT] was misplaced in the public school system and required placement at [School 1]. For example, Dr. XXXX of XXXX, who evaluated [STUDENT] and diagnosed her with autism spectrum disorder, level 3, in March of 2016, wrote: "She is obviously misplaced in a full inclusion elementary school class with an IEP and access to a one-to-one aide and academic assistant, and this situation causes her to be very overstimulated." (P. Ex. 41, at 1.)

[Mother] was asked on direct examination about the source of Dr. XXXX's knowledge and she replied:

[Dr. XXXX] was relying on the conversation that he had with [[STUDENT]'s] father ... and I, regarding what her setting was, and his observations of [[STUDENT]] during his clinical observation. (Tr. 240-41.)

None of the treating physicians testified; hence their opinions were not supported by any explanation of whether the opinions were rendered within the scope of their expertise. With respect to Dr. XXXX, all he knew about the CCPS program came from the Parents, who were critical of the kindergarten program. It does not appear that Dr. XXXX ever saw the Student's IEPs or spoke with any CCPS staff.

As they did not submit to cross-examination, I was unable to gauge the weight to be given these hearsay opinions. I have no doubt that the opinions were rendered, but I am unable to give them any weight for these reasons.

I gave the testimony of XXXX XXXX great weight. Ms. XXXX has worked as a physical therapist for many years and has extensive experience working with disabled children. She is an expert in her field and very knowledgeable about [STUDENT], her strengths and weakness. I listened carefully to her testimony on direct and cross-examination, and I detected no bias or evasion.

I also gave the testimony of XXXX XXXX great weight. Again, Ms. XXXX is very experienced in OT and extremely experienced in the school setting. I was very impressed with the many examples of personal attention to [STUDENT]'s needs that Ms. XXXX described. For example, [STUDENT] needs to learn to pull her pants up and down for toileting. Ms. XXXX explained how she uses a hula hoop with [STUDENT] to approximate the strong grip [STUDENT] needs to accomplish this task. Equally impressive was Ms. XXXX's testimony about the sensory boxes she uses with [STUDENT] to strengthen her grasp and release of objects. Ms. XXXX knows which objects [STUDENT] enjoys, and she incorporates them into her work with [STUDENT] Ms. XXXX was a very important witness, because she explained with meaningful examples the way [STUDENT] learns new things: [STUDENT] needs tasks broken down into small segments, repetition, and very slow introduction of new elements of a larger task.

The testimony of XXXX XXXX was also very helpful to my analysis. She outlined the reasons why the XXXX might not be available to [STUDENT] sometimes in school. Ms. XXXX also explained how she comes to the total communication classroom for speech language therapy

and works with [STUDENT], which also gives her an opportunity to check in with Mr. XXXX and see what he is doing with [STUDENT]

Ms. XXXX described how she works with [STUDENT] on underlying skills and how her work relates to that of other CCPS staff members. For example, in physical therapy, [STUDENT] is working on reciprocal ball skills, i.e., the therapist pushes the ball to [STUDENT] who hopefully catches it and pushes it back to the therapist. Ms. XXXX explained that this is similar to conversation: you say something then wait for the other person to say something back and so on. (Tr. 488.) According to Ms. XXXX, [STUDENT] has improved the amount of eye contact she makes. For example, [STUDENT] makes a selection on the XXXX and then looks to Ms. XXXX to see if she got it. Ms. XXXX testified that this is progress for [STUDENT] because it shows that she understands that “communication goes to a partner.” (Tr. 490.)

Ms. XXXX explained that she “presumes competence” of [STUDENT]. They work on an underlying skill but present some higher level skills by, for example, using written words with pictures. (Tr. 488-89.) She testified that there is some evidence that nonverbal adults with autism are able to type words of which they never previously showed any comprehension. She presumes that when a child with autism sees words, the child may understand what the words mean, particularly if the word is paired with a picture.

We’ve seen – the last thing with [STUDENT] is sometimes she’ll look at words, like upside down, she’ll sometimes turn. So I don’t know what’s going in but the presumed competence would say, let’s not eliminate the written word because she’s not reading and writing yet. But to present some [of] that in the hopes that something goes in and that’s what we can get back out. (Tr. 489.)

I discuss my evaluation of Mr. XXXX’s credibility later in the Decision. As explained further in the following discussion, I have not discussed the credibility of the witnesses’ testimony about the suitability of [School 1] as a placement for the Student.

Analysis

Was the Student's IEP Reasonably Calculated to Enable her to Make Progress Appropriate in Light of her Circumstances?

The Parents argued in closing that the Student's December 16, 2016, IEP was "woefully inadequate and substantively flawed." (Tr. 919-20, referring to P. Ex. 30.)³³ CCPS argued that the IEP complied with *Andrew F.*, which held that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 999. CCPS argued that the Student's IEP is appropriate to her circumstances as one of only XXXX known patients diagnosed with a defect of the XXXX gene and as a nonverbal child in the severely-impaired range of the autism spectrum. Autism is "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, . . . that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(1)(i) . Characteristics often associated with autism include "engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." *Id.*³⁴

I am mindful that the *Andrew F.* Court reiterated the meaning of the *Rowley* "reasonably calculated" requirement:

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The [IDEA] contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

137 S. Ct. at 999 (citations omitted).

³³ Mr. Steedman did not directly argue in closing that the May 2016 IEP failed to offer the Student a FAPE. I have addressed this issue, however, because so much of the evidence presented by the Parents dealt with the Fall of 2016, before the December 2016 IEP.

³⁴ A child with autism qualifies as a "[c]hild with a disability" under IDEA. 20 U.S.C.A. § 1401(3)(A)(i) (Supp. 2016).

Several matters influenced my decision in this case. Imprecise language used at the hearing created confusion in the record. I found the references throughout the hearing to “the IEP” confusing because there are three first grade IEPs in the record: May 25, 2016, July 7, 2016, and December 16, 2016. (P. Exs. 22, 24, 30.) The IEP grew from fifty-one pages in May 2016 to seventy-one pages in December 2016, and it is impossible without conducting a line by line comparison to understand what was added or what, if anything, was deleted.

In response to my statement about the confusing IEPs, counsel for CCPS pointed out that the Prior Written Notice provided to the Parents on December 21, 2016, summarized the matters discussed and the changes made as a result of the December 2016 meeting. The IEP was revised to reduce the time the Student spends in the general education setting. (CCPS Ex. 45.) I have, therefore, not attempted to compare every page of all three IEPs. I conclude that the only changes from the May 2016 IEP to the July 2016 IEP were the result of adding observations of the Student’s progress in June and July 2016. I further conclude that the only changes from the July 2016 IEP to the December 2016 IEP involved the number of special education hours and the place(s) where the services were provided.

I also observe that many of the witnesses were asked leading questions on direct by both counsel. While the rules of evidence do not apply to hearings before OAH, I have considered the leading nature of the questions asked in determining the weight to be given the witnesses’ testimony. Leading questions suggest the answer for the witness. The more leading the question, in general, the less weight I gave to the answer.

An example of testimony that I found particularly helpful was Mr. XXXX’s narration of the videos. (CCPS Ex. 50.) Mr. XXXX testified in his own words about how the XXXX suited the needs of a student with sensory and communication disabilities. He walked through the classroom, showing video of all the areas used in teaching [STUDENT] there, with explanations

– in his own words – what [STUDENT]’s typical day in school entailed. This testimony was very persuasive on the issues of whether the IEP was specifically tailored to meet [STUDENT]’s needs and how CCPS implemented the IEP.

The Creation of the IEP

The starting point for the discussion of the IDEA issues is the IEP. Many courts have emphasized that the IEP is a forward looking document, a plan for the student’s future. The IEP team gathers all relevant information available and documents a student’s present levels of academic achievement and functional performance, and then proceeds to define a program to meet the student’s need *in the coming school year*.

In order to evaluate the Parents’ claims, it is necessary to begin with the May 2016 IEP, which was created based on the Student’s performance in kindergarten and all of the reports available to the team, as well as the Student’s mother’s input. The December 2016 IEP meeting reduced the number of hours the Student spent in the general education classroom based on information obtained by CCPS during the Fall of 2016. The December 2016 IEP preceded the filing of the Due Process Complaint by one month and the start of the OAH hearing by about three months. The parties offered evidence about the Student’s school experience from the beginning of the 2016/2017 school year, which started in August 2016, up to the end of the hearing, which concluded in early April 2017. I have evaluated testimony about events that occurred after January 17, 2017 carefully to determine if the evidence was influenced by the anticipated hearing.

To evaluate the Parents’ argument that the Student’s IEP did not provide her with a FAPE, I will begin by explaining the reliable evidence about the creation of the May 2016 IEP, which formed the basis for the Student’s program in first grade, until the December 2016 revision.

The First Grade IEP was Tailored to Meet [STUDENT]’s Unique Needs

The Student’s May 2016 IEP was “specially designed” to meet her “unique needs” through an “individualized education program.” 20 U.S.C.A. § 1401(14), (29). By the time [STUDENT]’s May 2016 IEP was drafted, [STUDENT] had been enrolled in CCPS for one school year of half-day kindergarten and another school year of full-day kindergarten. The May 2016 IEP was written “only after careful consideration of the [Student’s] present levels of achievement, disability, and potential for growth.” *Endrew F.*, 137 S. Ct. at 999 (citing *id.* § 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv)).

Before the May 2015 IEP was created, CCPS performed a multitude of tests and reviewed the results of reports from many sources about [STUDENT]’s unique needs. These are described thoroughly on three pages of the IEP, and cover all areas of [STUDENT]’s wide spectrum of disabilities: psychological, academic, behavioral, speech, and motor skills. (P. Ex. 22, at 2-4.) CCPS met with [Mother], received her input about [STUDENT], and assessed [STUDENT]’s level of academic achievement and functional performance, the record of which is set forth on thirteen pages of the IEP. (P. Ex. 22, at 8-20.) *See* 20 U.S.C.A. § 1414(d)(1)(A)(i)(I) (The IEP must contain “a statement of the child’s present levels of academic achievement and functional performance”). The Parents presented no evidence that the Student’s levels of academic achievement and functional performance were inadequately assessed in the May 2016 IEP.

The IEP must also state “how the child’s disability affects the child’s involvement and progress in the general education curriculum[.]” *Id.* § 1414(d)(1)(A)(i)(I)(aa). Again, the Parents presented no evidence that the May 2016 IEP failed to satisfy this requirement of the IDEA. Throughout the twelve-page section of the IEP describing [STUDENT]’s present level of

academic achievement and functional performance, the IEP explains how [STUDENT]'s disability affects her involvement and progress in the general education curriculum.

The Parents did not address whether the IEP properly assessed [STUDENT]'s present level of academic and functional performance or explained how her disability affects her performance or progress in the general curriculum. I conclude that the IEP satisfied these requirements of the IDEA.

Next the IDEA requires that the IEP team create an IEP tailored to [STUDENT]'s unique needs that contains:

a statement of measurable annual goals, including academic and functional goals, designed to –

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability. . . .

Id. § 1414(d)(1)(A)(II).

[STUDENT]'s behavior was a main focus of the hearing, and her behavior goals were discussed at length. The Parents argued that the Student's behavior goal was substantively insufficient. [STUDENT] displayed some interfering behaviors in kindergarten. In May 2016, the IEP team considered a FBA conducted for [STUDENT] by a consultant from XXXX which focused on the primary behavior of biting or attempting to bite others. (P. Ex. 22, at 3, 21-22.) At the time the May 2016 IEP was created, biting was the primary problem behavior brought to the attention of the IEP team.³⁵ The BIP was created by the XXXX consultant to address this behavior on May 2, 2016. (P. Ex. 20; Ex. 22, at 22.)

³⁵ The information about [STUDENT]'s behavior reflected in the May 2016 IEP was as follows:

When [STUDENT] is unhappy or frustrated as a result of: being told "no", being denied access to a preferred item/activity, being asked to start a non-preferred activity, she will bite others (or attempt to bite) in her personal space. In this way, she expresses frustration with current work activities, demands, terminates or delays non-preferred activities. A BIP needs to be put into place in order for her [to] teach appropriate behaviors when faced with these situations." (P. Ex. 22, at

The Parents argued at the hearing that the IEP was insufficient because [STUDENT] was also grabbing, kicking and pulling the hair of others. Mr. Steedman argued that Mr. XXXX testified that the FBA was not accurate because it did not address all of [STUDENT]'s challenging behaviors, citing his testimony at pages 104-106 of the transcript. This argument proceeds from the imprecise language and hindsight analysis that sowed much confusion in the record. The following excerpt from Mr. Steedman's questioning of Mr. XXXX on March 10, 2017, illustrates the point:

Q: So, *if you were writing a functional behavior assessment for her today*, what would you include in that functional behavior assessment?

A: Biting, hair pulling, grabbing. I'm not sure about flopping on the floor because sometimes I think that's motoric. I don't think that's always a functional behavior. (Tr. 106, l. at 2-8) (emphasis added).

This testimony is not helpful to my decision because Mr. XXXX testified on March 10, 2017. It is almost time for [STUDENT]'s IEP to be re-evaluated in May 2017. The FBA and BIP were created in the Spring of 2016 for the 2016/2017 school year.³⁶ A student's behavior may and often does change over time. The law does not require a public school system to rewrite a FBA or a BIP every time a new interfering behavior is observed. [STUDENT] is due for an annual IEP review in May 2017. 20 U.S.C.A. § 1414(d)(4)(i) ("The local education agency shall ensure that . . . the IEP Team [r]eviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved . . ."). The Parents did not present me with any legal authority to support their contention that CCPS was

22.)

³⁶ CCPS satisfied the IDEA requirement that the IEP be in place before the start of the 2016/2017 school year. 20 U.S.C.A. § 1414(d)(2)(A). CCPS met the requirement of the IDEA that in developing an IEP for "a child whose behavior impedes the child's learning or that of others," the IEP team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior . . ." *Id.* § 1414(d)(3)(B)(i).

required to convene an IEP meeting to revise the Student's IEP to discuss her other troubling behaviors.³⁷

Dr. XXXX opined that the Student's FBA and BIP were inappropriate. Dr. XXXX read the Student's school records and observed the Student twice in school (on January 9, 2017, and March 3, 2017), and once at home on March 3, 2017. (Tr. 133.) Dr. XXXX testified about the behaviors she observed, and opined that given the severity of the Student's behaviors the FBA was "very elementary" and "lacking." (Tr. 180.) Dr. XXXX also opined that the type of BIP in use with [STUDENT] is typically used for students with less challenging behaviors. She admitted that the BIP contains some useful strategies, but, in her opinion, there is not as much detail in it as [STUDENT] requires, and the BIP only addresses biting. (Tr. 181-84.)

Ms. XXXX opined that the Student's FBA and BIP were inappropriate. Ms. XXXX observed [STUDENT] in school on November 11, 2016, and she described the problem behaviors she observed. (P. Ex. 27.) Ms. XXXX testified that the FBA and BIP are incomplete because they do not address the behaviors of dropping to the floor, pushing, pulling hair and pushing her chair away from instruction at a table. (Tr. 336-37.)

There was nothing in Dr. XXXX's or Ms. XXXX's testimony to indicate that the FBA or the BIP were inappropriate at the time they were created in the Spring of 2016. Furthermore, the BIP describes a structured prompt hierarchy to be used if [STUDENT] becomes unsettled as evidenced by fussing, crying, pushing or throwing materials, hitting or kicking, or other attempts to delay or terminate activities. (P. Ex. 20, at 3.)

Ms. XXXX testified for CCPS about the FBA and the BIP. Ms. XXXX disagreed with Dr. XXXX's criticism of the FBA. (Tr. 833, l. at 3-4.) She explained that in 2010 CCPS adopted a prevent, teach, and reinforce (PTR) model for conducting FBAs. (Tr. 833, l. at 6-7.) Ms.

³⁷ There are specific references to the FBA and behavioral intervention services in the IDEA law governing discipline, which is not implicated in this case. *See id.* § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).

XXXX testified that “PTR is a research based evidence model for conducting FBAs and BIPs.” (Tr. 834, l. at 3-4.) Ms. XXXX testified that the PTR method used by CCPS in creating [STUDENT]’s FBA and BIP is appropriate for students with significant disabilities and students with autism like [STUDENT]. (Tr. 833-34).

Ms. XXXX further testified that, in creating a BIP, the PTR model tells CCPS to select a primary interfering behavior and defines strategies to use to prevent, eliminate, or reduce the behavior. The skills set forth in the BIP for the primary behavior can be generalized to other behaviors. In her opinion, the IEP team decided in May 2016 that biting was the most significant behavior, and the BIP appropriately focused on biting. (Tr. 834, l. 16 to 835, l. 3.) She testified that the BIP is adequate because the strategies in the BIP can be used by school staff to address [STUDENT]’s other problematic behaviors that may interfere with her ability to access her program.

CCPS has adopted a recognized method for conducting behavioral assessments and designing behavior improvement strategies. The basis for the methods and strategies is a reasonable choice among many available in the literature. It may not be the method preferred by Dr. XXXX or Ms. XXXX, but I conclude that the testimony and evidence provided by CCPS explained the school system’s choice of methodology. Deference is due to the choices the qualified professionals at CCPS made about educational policy, which as sufficiently explained by Ms. XXXX, are specific to [STUDENT]’s unique circumstances. *Rowley*, 458 U.S. at 206.

Turning to the next area addressed by the Parents, social foundations, the IEP notes that [STUDENT] “has not developed the necessary skills to play alongside other children without modeling or prompting.” (P. Ex. 22, at 8.) Also, the IEP notes that “[STUDENT] struggles with vocalizing in response to vocalizations and speech produced by an adult and initiating familiar

turn-taking routine.” (*Id.* at 9.) [STUDENT] “does not recognize appropriate social behaviors and needs to learn how to imitate one step actions.” (*Id.*)

The IEP does not contain a social skills goal. Ms. XXXXX, one of the CCPS’ expert witnesses, candidly agreed with the Parents that [STUDENT]’s IEP should contain a social skills goal. (Tr. 801-2.) In this respect, the IEP is not perfect.

Ms. XXXX did not deny that the IEP lacks a socialization goal, but she testified that [STUDENT]’s “entire program includes socialization.” (Tr. 831.) The teacher and para talk to [STUDENT] all the time. Peers are invited into the classroom to socialize with [STUDENT] Although [STUDENT] does not respond verbally, Ms. XXXX testified that [STUDENT] is happy to engage like that. [STUDENT] is taken on walks around the building by Mr. XXXX, and given opportunities to socialize with others, including students, custodians and staff. (Tr. 832.)

[STUDENT] could benefit if her IEP contained a measurable socialization goal because her inability to socialize effectively results from her disability, and progress toward that goal is necessary to enable her to be involved in and make progress in the general education curriculum. 20 U.S.C.A. §1414(d)(1)(A)(i)(II)(aa). However, an IEP is not required to contain every goal from which a student might benefit. *See Rowley*, 458 U.S. at 199 (FAPE does not require “the furnishing of every special service necessary to maximize each handicapped child’s potential”). The IEP must be reasonable; it is not required to be perfect. Taking the IEP as a whole, I conclude that [STUDENT] was not denied a FAPE due to the lack of a social skills goal in her IEP.

The Parents argued that the IEP was deficient because the goals were not specific or measurable.³⁸ In closing, Mr. Steedman argued that Mr. XXXX testified that he would not write

³⁸ The IDEA requires “measurable annual goals, including academic and functional goals,” that are tailored to meet

the goals as they are stated in the IEP. Mr. Steedman argued that Mr. XXXX said the toileting goal was meaningless. (Tr. 94.) He argued that the Parents' experts, Dr. XXXX and Ms. XXXX, testified that the goals were not sufficiently specific or measurable, and further argued that none of CCPS witnesses testified to the contrary.

Mr. XXXX testified that some of the goals are not written the way he would write them, and the toileting goal is rather meaningless because it calls for an adult to assist [STUDENT] by placing their hands over hers and basically pulling her pants up or down for her. (Tr. 94.) Dr. XXXX testified openly that she agreed with Mr. XXXX, and that some of the goals seem to address the areas on which [STUDENT] needs to focus but they are worded in confusing language. In her opinion, the goals are "not necessarily written very clearly or in a very measurable way." (Tr. 186, l. at 8-9.)

However, Dr. XXXX went on to discuss the progress reports, without explaining how she would have written the goals. Dr. XXXX questioned the progress reports, saying that she did not see [STUDENT] performing to the level reporting on the day of her observation. The goals and their objectives set forth targets for [STUDENT] to perform, e.g., the percentage of times [STUDENT] is to be able to complete a task. Based on this evidence, I decline to find a violation of FAPE due to the way CCPS crafted [STUDENT]'s goals.

The Parents attacked Mr. XXXX's credibility and argued that I should give his testimony no weight. The IEP provides that progress on the goals and objectives is to be measured by data collected by school staff. Mr. Steedman accused Mr. XXXX of destroying his progress notes in order to prevent the Parents from obtaining evidence for use in this proceeding. He argued that the destruction of the progress notes renders Mr. XXXX a wholly unreliable witness. I disagree.

CCPS has a policy of requiring all special educators to take notes twice a quarter and to maintain their notes of a student's progress for two years. (Tr. 554.) Mr. XXXX testified that he did not know that was the policy and, as he has never kept his notes after writing progress reports for a student's IEP, he did not keep his notes on [STUDENT]'s progress once he wrote her quarterly reports. Mr. XXXX explained that was his practice in his prior employment. Now he knows that the practice did not comport with the record retention policies of CCPS.

I conclude that Mr. XXXX violated the retention policy, but I further conclude that he did not do so for any nefarious purpose. Ms. XXXX testified that she came to the classroom and observed Mr. XXXX taking notes on [STUDENT]'s progress, and she reviewed his notes from time to time as part of her supervisory responsibilities. (Tr. 555, l. at 9-14.) Mr. XXXX would know that Ms. XXXX was checking his notes because she did so in his classroom. It would not serve Mr. XXXX's purposes or support him in his role as a subordinate to Ms. XXXX to intentionally destroy notes in violation of a policy. There is no evidence that Ms. XXXX was a party to intentional destruction of evidence or covering up the same. While it is understandable that the Parents are frustrated and suspicious of the missing raw data, which they hoped would support their position on behalf of [STUDENT], I conclude that the raw data was innocently discarded, and I decline to take a negative inference.

Dr. XXXX was critical of the data collection methods used by CCPS as insufficiently planned and consistent. In her opinion, data should be collected throughout the school day every day. (Tr. 208-09.) Ms. XXXX also criticized the CCPS' data collection procedures, opining that [STUDENT] needs daily data collection to help the Parents know how she is performing in relation to her goals and objectives. (Tr. 342-43.) The IDEA does not specify how often a school system should collect data or how long it should be maintained. CCPS has a duty to adopt policies and procedures which are necessary and sufficient to enable it to implement the IDEA.

While more data is obviously better than less data, I conclude that CCPS' data collection procedures were reasonable, and that CCPS did not falsify the Student's progress reports. I will therefore defer to the judgment of the school administration regarding the frequency of the data required to be collected regarding students with IEPs.

Restriction of [STUDENT] from Contact with her Nondisabled Peers

The Parents argue that the Student should not be in the general education setting at all because she receives no educational benefit from being with her nondisabled peers. (Tr. 145, at 166.) Educational benefit must be provided in the least restrictive environment appropriate to the child's needs ("LRE"), with the disabled child participating to the "maximum extent appropriate" in the same activities as his or her non-disabled peers. 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2). The Parents did not specifically address the IDEA LRE requirement or discuss how removing [STUDENT] from access to nondisabled peers comports with the requirements of the law, but [Mother] testified that [STUDENT] should not be in the XXXX alone with Mr. XXXX and the para away from her disabled peers.³⁹

CCPS implicitly agreed that it would have preferred for [STUDENT] to have exposure to peers in the XXXX, if students enrolled in CCPS were assigned to the program. Other students were referred to the program, and CCPS planned to have others in the class with [STUDENT]. For reasons outside the control of the school system, [STUDENT] was basically the only student in the XXXX for most of the school year until February 2017.

The Maryland regulations governing IEPs provide that "[a] public agency shall make a good faith effort to achieve the goals of a student's IEP" COMAR 13A.05.01.09B(3). CCPS intended to create an intensive communication program for [STUDENT] and other students who require the special services available in the XXXX. The regulation does not contain a definition

³⁹ It is undisputed that [STUDENT] had access to nondisabled peers in specials and during walks through the school during which staff and nondisabled peers verbally addressed her.

of “good faith,” and there is no reference to good faith in the IDEA. I shall use the common notion of good faith and explain a case from the Court of Appeals of Maryland that I found helpful, but not dispositive. First, good faith means the absence of bad faith. Bad faith in this context might mean that a school system did not provide all the necessary services because it did not want to spend the money necessary to do so. Or bad faith might be retaliation against a child for something the parents did that upset the school system or caused it public humiliation. There is no credible evidence of bad faith in this case.

Good faith in ordinary language means to act honestly and with a proper motive. *See Rite Aid Corp. v. Hagley*, 374 Md. 665, 680-81 (2003). I conclude based on all the evidence that CCPS acted in good faith in creating the XXXX in 2016 and in assigning [STUDENT] to it. CCPS thought there would be other students in the class, but it did not turn out that way. CCPS was not hiding [STUDENT] from her peers; [STUDENT] was afforded opportunities to interact with other first graders, albeit not to the degree CCPS would have preferred.

The Accuracy of the Description of the Service Hours on the IEP

The Parents contend that the hours of special education services in [STUDENT]’s May 2016 IEP were insufficient to offer her a FAPE. They argue that the December 2016 amendment to the IEP reflects the correctness of their view that [STUDENT] should not be educated with nondisabled peers. In December 2016, the IEP was revised to increase the number of hours [STUDENT] spends in the special education setting and correspondingly decrease the number she spends in the general education setting.

I do not consider the change in the location of the delivery of [STUDENT]’s services as proof of any defect in the May 2016 IEP. The appropriateness of the May 2016 IEP must be judged as of the time it was adopted, not in December 2016.

If a later IEP could constitute evidence that an earlier IEP was inadequate, school districts would incur liability for failure to provide a FAPE *every time* a student’s

services were increased between IEPs. For this reason, courts should evaluate the appropriateness of an IEP as of the time it was created, not on the basis of services provided in subsequent IEPs. *See R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 195 (2d Cir. 2012) (“[C]ourts must evaluate the adequacy of an IEP prospectively as of the time of the parents' placement decision and may not consider ‘retrospective testimony’ regarding services not listed in the IEP.”); *F.O. v. New York City Dep't. of Educ.*, 976 F. Supp. 2d 499, 513 (S.D.N.Y. 2013) (declining to consider a 2011-2012 IEP in determining whether a 2010-2011 IEP was appropriate).

M.K. v. Starr, 185 F. Supp. 3d 679, 694 (D. Md. 2016).

The Parents also contend that CCPS did not correctly report the service hours on [STUDENT]’s IEPs. They argue that the method used by CCPS violated the Statewide Individualized Education Program Process Guide published on the MSDE website. Mr. Steedman described this document as a controlling guide published by MSDE which public schools in Maryland must use to record service hours on every student’s IEP. CCPS argued that the guide was not binding on them; they contended that the guide conflicted with COMAR, which CCPS says it follows.

After the hearing concluded, I searched for “IEP Process Guide” on the MSDE website and found the document to which Mr. Steedman referred.⁴⁰ The material Mr. Steedman referred to is found at pages 153-55 under the heading “Least Restrictive Environment (LRE) Decision Making & Placement Summary.” The Parents refer to the following portion of the Process Guide to support their argument:

Total Time in General Education

Indicate the total hours and minutes in a school week the student is in general education settings.

NOTE:

The total amount of time in a school week is based on the actual hours and minutes of the school day. The time of the school day may vary.

⁴⁰ http://olms.cte.jhu.edu/olms2/data/ck/sites/2698/files/Maryland%20IEP%20Process%20Guide%207_1_16.pdf. (last visited May 1, 2017).

The calculation of hours is based on the time outside the general education classroom versus inside the general education classroom. Subtract the total time outside of general education based on the services listed on the Services pages of the IEP. This should indicate the total time in general education. You are subtracting from the total time in the school week.⁴¹

Ms. XXXX testified about CCPS's method of reporting service hours on IEPs:

Q: How are service hours calculated in the Cecil County Public Schools?

A: Cecil County Public Schools calculates service hours based on the amount of specially designed instruction that the team feels are [sic] required for that student to make progress on the IEP goals. And the discussion box underneath the classroom instruction or the related service would specify what goals would be addressed through that service time. That is different from many school systems in Maryland who record service hours as the entire time a student is with a special education teacher in a special education program.

But we record just the amount of instruction that focuses on those IEP goals. (Tr. 549, ls. 10-24.)

Mr. XXXX, who is new to CCPS this year, testified as one of the Parents' witnesses that the service hours on the IEP were wrong. Apparently, no one shared the CCPS method of reporting service hours with him before the school year started or even before the hearing began. When Mr. XXXX testified for CCPS, he explained that after his initial testimony another special education teacher explained the CCPS method, and he recanted his earlier testimony about the hours being erroneous. This change in Mr. XXXX's testimony showed that he was ill informed about the way CCPS records service hours on the IEP. My conclusion from observing all of Mr. XXXX's testimony is that he was truthful on both days. He testified honestly the first time that there must be an error on the IEP, which couldn't help CCPS' presentation in this case. If Mr. XXXX was going to lie under oath, I do not think he would do so in a manner that harmed his employer's case. I did not sense any reticence or rehearsed language in Mr. XXXX's subsequent testimony, so I conclude that he made an honest mistake in his initial testimony.

⁴¹ *Id.* at 155 (163/185).

Dr. XXXX and Ms. XXXX testified that the total number of service hours on [STUDENT]'s IEP are inadequate to meet her special needs. I do not accept this testimony because it was based on an incorrect understanding of the way CCPS records service hours. Apparently Ms. XXXX and Dr. XXXX have never worked with a student in a school district in Maryland that uses the method chosen by CCPS to record service hours.

Ms. XXXX testified that she agreed with Ms. XXXX's testimony. Further, Ms. XXXX testified that CCPS is not the only school district to use this method. When questioned by Mr. Steedman about the IEP Process Guide, Ms. XXXX responded that CCPS follows COMAR, not the guide, which is not a regulation. *See Evans v. State*, 396 Md. 256, 344-46 (2006) (death penalty protocol not promulgated is invalid under Administrative Procedures Act). Furthermore, Ms. XXXX testified, CCPS has been audited by MSDE every year for compliance with the law and regulations. MSDE has never told her that the way CCPS records special education service hours is wrong or in violation of the law. For these reasons, I conclude that the Parents failed to show that CCPS improperly recorded the number of special education service hours on [STUDENT]'s IEP.

Did CCPS Properly Implement the IEP?

a. The Hours of Special Education Services in the May 2016 and July 2016 IEPs

The Parents argued that CCPS violated the IDEA because, before the IEP was revised in December 2016, Mr. XXXX ignored the service hours of special education and provided services outside of the general education setting for more hours than were called for by the May 2016 and July 2016 IEPs because he thought it was in [STUDENT]'s best interest. The Parents argued that CCPS should have given the Parents notice and conducted an IEP team meeting

before the location where the services were delivered was changed.⁴² CCPS argued that any error was de minimis.

I conclude that CCPS violated the IDEA by changing the location where [STUDENT]'s services were provided from the third week of the school year until the December 2016 IEP revision by removing her from receiving academic instruction in the general education classroom. CCPS failed to provide the Parents with prior notice of this change as required by IDEA:

The IDEA provides a series of procedural safeguards “designed to ensure that the parents or guardian of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions.” *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 527 (4th Cir. 2002) (internal citations and quotation marks omitted); *see also* 20 U.S.C. § 1415. Among those safeguards, a parent must be provided prior written notice of a decision to propose or change the educational placement of a student. Md. Code Regs. Tit. 13A, § 05.01.13(B). A parent may also request a meeting at any time to review and, as appropriate, revise the student's IEP. Md. Code Regs. Tit. 13A, § 05.01.08(B)(3).

M.C. v. Starr, 2014 WL 7404576 at *2 (D. Md. 2014).

Having concluded that CCPS violated the procedural requirements of IDEA in this manner, I must determine whether this violation denied [STUDENT] an educational opportunity or if it was a technical violation of the IDEA. *Gadsby ex rel. Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997) (“[T]o the extent that the procedural violations did not actually interfere with the provision of a FAPE, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.”). The law in this Circuit on the issue is clear:

If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations. *Burke Cty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th

⁴² The Parents do not argue that CCPS violated the LRE requirement by decreasing [STUDENT]'s hours in the general education classroom. 20 U.S.C.A. § 1412(a)(5)(A). In fact, the Parents take the position that [STUDENT] receives no benefit from being with her nondisabled peers, and they seek placement in a school that accepts only students with special needs.

Cir.1990) (“[The child] has benefitted educationally from the instruction provided under the Board's IEP. Federal law requires no more.”).

MM ex rel. DM v. Sch. Dist., 303 F.3d 523, 534 (4th Cir. 2002).

I conclude that providing more special education services in the XXXX did not interfere with the provision of a FAPE to the Student. Mr. XXXX testified credibly that [STUDENT] was having difficulty spending time in the general education setting. In his view, she got more out of the time in the XXXX. Mr. XXXX should have requested, and CCPS should have scheduled, an IEP team meeting to amend the service hours and placement sections of [STUDENT]’s IEP. However, the failure to do so under the circumstances of this case—particularly where the Parents contend that a separate day school for disabled children is the proper placement—amounts to a technical violation of the IDEA, not a denial of a FAPE.

b. The BIP and Assistive Technology

i. Use and Availability of the XXXX

The Parents contend that CCPS failed to properly implement the IEP because school staff did not follow the BIP requirement that [STUDENT]’s XXXX be available for her use at all times. The IEP states that [STUDENT] will be provided with an assistive technology device to learn how to communicate and to enable her to participate in classroom activities. (P. Ex. 22, at 21.) [Mother] and Dr. XXXX testified that the XXXX was not always available to [STUDENT] at school during their observations. The evidence showed this to be the case. Nevertheless, I conclude that the device was reasonably available to and used by [STUDENT]

[Mother]’s classroom observations provided the following credible evidence about the XXXX. During breakfast, [STUDENT] used buttons rather than the XXXX to indicate her needs. (Tr. 262, ls. 12-14.) The XXXX was used during [STUDENT]’s speech therapy and to request breaks. (Tr. 278, ls. 9-11, 22-25; Tr. 282, ls. 7-18.) When [STUDENT] grabbed another student’s hair, the XXXX was on a table behind her. (Tr. 281.) The XXXX was not with

[STUDENT] on her Hi walk. (Tr. 281.) When [STUDENT] requested a break and the guitar on the XXXX, her requests were immediately honored. (Tr. 282, ls. 13-16; Tr. 283, ls. 17-21.)

[STUDENT] used the XXXX to request a drink and a snack. (Tr. 284.)

Dr. XXXX's classroom observations produced the following credible evidence about the XXXX. [STUDENT] went to reach for an item and the staff put the XXXX in front of her so she could touch the cell and request her item. (Tr. 137.) With assistance from Mr. XXXX to get to the food page, [STUDENT] requested Teddy Grahams cookies, a drink, peanut butter and jelly and a banana. (Tr. 138.) Dr. XXXX testified, "she was using the XXXX as her voice at that point." (Tr. 140, ls. 11-12.) Mr. XXXX did a correspondence check by holding two items out to [STUDENT] and checking to see if she used the XXXX to request the items she desired. (Tr. 140-41.) According to Dr. XXXX, "that was good to see that she was using the XXXX appropriately during that time." (Tr. 141, ls. 2-4.)

During an activity where [STUDENT] was choosing different items on an interactive board, [STUDENT] used her XXXX to ask for a drink and staff immediately gave her one. (Tr. 170-71.) At one point, [STUDENT] used the XXXX to say she was finished with the activity, but then she returned to it in such a way that it was unclear if [STUDENT] really meant what she indicated on the XXXX.

In Music, the XXXX was not always where [STUDENT] could easily access it, but when she had a challenging behavior the device was brought over to her so she could communicate her desires. (Tr. 172.)

Dr. XXXX expressed the opinion that the XXXX is not always available to [STUDENT], so the BIP is not being properly implemented. (Tr. 183.) This increases the likelihood that [STUDENT]'s challenging behaviors will occur. (Tr. 184.)

This testimony raised valid questions about the XXXX and whether the BIP was implemented faithfully. However, there are practical reasons for some of the times when the XXXX was not available. For example, it has been broken several times. The Parents and school staff are constantly trying new ways to protect the device and enhance its availability to [STUDENT]. This is a work in progress. Ms. XXXX summarized the situation:

So, I thought about what the answer to that is. I thought about like a cross body bag or something. The device is big. I don't know what the answer is.

In fact to be honest I was a little concerned when the one time it came in with a strap, because she had thrown the device and acted out. What's going to happen if she throws it? Is it going to come back and hit her? I wasn't sure, you know – but I will say the strap saved me because she started to swipe it off [the table] and I was able to catch it with the strap. So it had an advantage but I think that's something we're all working on: finding a way for that device to be completely portable for her and still indestructible. (Tr. 481.)

The Parents did not offer any evidence that the concerns expressed by Ms. XXXX were unfounded or that the CCPS staff was ignoring the value of the device to assist [STUDENT]'s communication. I accept Ms. XXXX' assessment of the situation that the Parents and school staff were working continuously, collaboratively, and creatively to find solutions.

Ms. XXXX testified that when Dr. XXXX observed [STUDENT] in her physical therapy session, the para had the device. (Tr. 394.) In physical therapy sessions [STUDENT] is moving almost the entire time. *Id.* The XXXX is not used all the time, but Ms. XXXX gives [STUDENT] other opportunities to communicate choices. (Tr. 395, 422.) Ms. XXXX lets [STUDENT] chose her favorite ball. She also uses facial expressions, body language, and picture cards to initiate activities with [STUDENT] (Tr. 394-95, 406.) Ms. XXXX testified that [STUDENT] uses the XXXX independently across a variety of setting. (Tr. 468.)

Taking all of this evidence into consideration, I conclude that the XXXX is being used appropriately and as often as possible under the unique circumstances presented by [STUDENT], and therefore in accordance with the IEP. The Parents are at a disadvantage given that their

opportunity to observe [STUDENT] and to have their experts conduct classroom observations are much more limited than the opportunities presented to CCPS staff. However, the evidence shows that, while the XXXX is not always used, CCPS allows [STUDENT] to use the XXXX many times and in a variety of settings. I accept Ms. XXXX' testimony that [STUDENT] has shown progress with the XXXX, which could only result from consistent use of the device over a period of time.

Furthermore, the Student uses various other ways to communicate. Ms. XXXX and Ms. XXXX testified that [STUDENT] communicates through facial expressions and body language. Admittedly, these are not as precise as the XXXX, which shows a picture of the desired activity or object, leaving no room for interpretation – if [STUDENT] uses the device correctly, which is not always the case. But I infer that the Parents also use all available methods for communicating with [STUDENT] away from school, especially because they keep the device in the kitchen so it won't break.

ii. Other Communication Strategies

The XXXX is not the only communication method described in the BIP. All of the other steps outlined in the BIP are employed with [STUDENT] (P. Ex. 20.) Mr. XXXX uses transition objects as outlined in the BIP to alert [STUDENT] to changes. She knows to pick one out of the basket by the door, and she carries the designated transition object with her to her specials. This is a form of alerting [STUDENT] to the changes involved in her day at school, aimed at reducing her confusion and frustration. (P. Ex. 20, at 1.)

Mr. XXXX also uses a clear and consistent daily routine with [STUDENT] as described in the BIP. He has a schedule mounted on the wall with a PECS symbol for each activity. [STUDENT] is taken to the wall, Mr. XXXX says the name of the next activity, points to the

PECS symbol, pulls it off the wall and takes it to the area where the activity occurs. (P. Ex. 20, at 1.)

Mr. XXXX presents social stories to [STUDENT] throughout the day to remind her of appropriate behaviors. *Id.* [STUDENT] is allowed structured breaks and is allowed to engage in sensory activities. Ms. XXXX described how lotion is used for sensory stimulation with [STUDENT] Ms. XXXX testified that [STUDENT] enjoys pressure and joint compression. Mr. XXXX testified that he uses joint compression at the suggestion of Ms. XXXX. Mr. XXXX uses short verbal directions paired with visual supports as suggested in the BIP. I conclude that CCPS followed the BIP in many ways; there was nothing about the use of the XXXX with [STUDENT] that changes my view. Even if the XXXX was not accessible to [STUDENT] at all times as required by the BIP, that does not prove a denial of FAPE.

[F]ailure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However, as other courts have recognized, the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE.

Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH, 642 F.3d 478, 484 (4th Cir. 2011).

When the XXXX was not available to [STUDENT] she was engaged in a physical activity or she had ample other means of communication available to her. The periodic absence of the XXXX was a *de minimis* failure to implement her IEP. *See Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (“[A] party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.”), cited with approval by the Fourth Circuit in *Sumter, id.*

iii. *Behavior Modification Strategies*

The Parents' operating hypothesis is that [STUDENT]'s inappropriate behaviors are caused by her inability to communicate by using language. The Parents theorize that [STUDENT] bites, hits, pulls hair, and does other negative things to communicate that she is frustrated and either wants something that is not offered or does not want to complete an activity. They believe that CCPS is not appropriately allowing [STUDENT] to communicate her choices. In addition, the Parents argue that, when [STUDENT] does communicate a desire, staff is not reinforcing her positive behavior by immediately honoring her choice.

[STUDENT]'s behaviors are immensely disconcerting to everyone involved: the Parents, CCPS staff, and most importantly, [STUDENT]. However, the solution is unclear, partly because [STUDENT]'s diagnosis of autism spectrum disorder is compounded by the genetic defect. [STUDENT] is one of the very few diagnosed with the XXXX genetic defect, and there are only XXXX known scholarly articles discussing her condition. [STUDENT] has been evaluated by preeminent doctors at the world famous XXXX, but they cannot have a broad frame of reference for [STUDENT]'s treatment absent others with the same disorder or more extensive research. The novelty and complexity of [STUDENT]'s disabilities must be a factor in determining if CCPS offered [STUDENT] a FAPE. There is a higher degree of trial and error in the process of developing an appropriate IEP for a very young child such as [STUDENT] with complex disabilities and limited ability to convey her thoughts and desires.

Ms. XXXX testified that Dr. XXXX misunderstood the physical therapy session that she observed. The para had [STUDENT]'s XXXX in the therapy session, but [STUDENT] cannot use it while she is practicing throwing and catching a ball or going up and down the steps. Ms. XXXX explained that she uses [STUDENT]'s facial expressions and body language to communicate with her, and that is sufficient for the purpose of PT. (Tr. 395.) In terms of communicating preferred items, Ms. XXXX has a bin of various colored balls, and she permits

[STUDENT] to choose her favorite. Ms. XXXX gets that ball out and immediately begins to use it with [STUDENT] in therapy. (Tr. 394.) This is a form of communication appropriate for [STUDENT].

Regarding [STUDENT]'s behavior, Dr. XXXX testified that [STUDENT]'s behaviors were so interfering during the physical therapy session that she observed that the therapist had to put up a barrier to keep [STUDENT] from biting her. Ms. XXXX disputed that was the purpose for the barrier. She testified that [STUDENT] was too close to her during an activity with a suspended ball, so the wooden barrier, which is waist high on [STUDENT], was placed between [STUDENT] and Ms. XXXX so [STUDENT] would have time to see the ball swinging toward her and react to it with a catching motion of her hands. (Tr. 393.)

I conclude that, under the circumstances presented by [STUDENT]'s unique needs, CCPS employed appropriate behavior modification strategies.

Progress

The parties offered a lot of evidence and argument about the progress the Student made under the IEP. Progress has been used in some cases as a measure of whether the student actually achieved educational benefit. If so, the argument goes, the IEP must have been reasonably calculated to allow educational benefit. The *Rowley* Court stated in a footnote: "When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." 458 U.S. at 207 n.28. The Fourth Circuit has held that a District Court erred by failing to note the actual progress a student made under an IEP and substituting its judgment for the judgment of the educational professionals. *M.M. ex rel. DM v. Sch. Dist.*, 303 F.3d 525, 531-32 (4th Cir. 2002).

The Student is not receiving numeric or letter grades, but her progress is noted in narrative progress reports issued to her Parents when report cards are released to other parents. There are reported decisions in which the courts discuss a non-graded student's progress or lack thereof with life skills as evidence of whether the IEP was reasonably calculated to offer the student a FAPE. *See, e.g., A.G. ex rel. S.G. v. Wissahickon Sch. Dist.*, 374 Fed. Appx. 330, 335 (3rd Cir. 2010) (finding meaningful education benefit under an IEP to be evidenced by advances in life skills such as toileting, eating and navigating the school).

For a student such as [STUDENT], using progress or the lack thereof to measure the efficacy of an IEP may not be appropriate. CCPS conducted many assessments and evaluations of the Student prior to writing the May 2016 IEP. The assessments showed that [STUDENT] has cognitive challenges that make her potential in academic studies such as reading and math unknown. Furthermore, the medical evidence shared by the Parents describe the current symptoms of [STUDENT]'s genetic defect, but they do not shed any light on her educational potential.

The Parents were an integral part of the information gathering process for the May 2016 IEP. The Parents did not provide me with any evidence that they asked the school system to perform any study of [STUDENT]'s levels of performance which CCPS refused to conduct. The IEP was the best document that could be prepared based on all available information.

I accept as reliable the testimony of Parents' witnesses who testified that, on some days, [STUDENT] does not show progress. I also accept the testimony of CCPS' witnesses that [STUDENT] can be unpredictable, and sometimes she shows signs of progress but at other times there is regression. There is a reference to regression in a XXXX report. (P. Ex. 40.) [Mother] denied that [STUDENT] showed regression, explaining that she briefly lost skills sometimes when sick, but regained them when her cold or virus abated. (Tr. 241, l. 5.) However, Ms.

XXXX testified that when she had [STUDENT] as a three year old, [STUDENT] said “Hi” and “iPAD.” (Tr. 486, l. at13-17.) She has not heard [STUDENT] use “iPAD” or “Hi” this year, and was very excited when Ms. XXXX reported hearing [STUDENT] say “iPAD.” (Tr. 486, ls. 16-17.)⁴³

The evidence shows that [STUDENT] is a very young child with an extremely rare genetic defect who has a severe form of autism and is nonverbal. IEP goals and objectives at this point are educated judgments about future events. [STUDENT]’s progress must be judged by her unique circumstances. Viewed in this context, [STUDENT] has made progress since kindergarten. The Findings of Fact set forth above include specific findings based on the July 2016 IEP to show where [STUDENT] started this school year. A comparison of that baseline with the testimony of all of the witnesses shows that [STUDENT] has made incremental progress on some, but not all of her goals. For [STUDENT], this is appropriate given her unique circumstances.

Before school started this year, [STUDENT] did not understand the function of the XXXX. Finding of Fact 77. Now, she uses it purposely, albeit as a novice, in a variety of situations. [STUDENT] has made negligible progress toward pulling her pants up and down for toileting, but she has shown that she can pull a towel down from a dispenser, grasp it, and release it into the trash. [STUDENT] cannot wash her hands, but she can attempt to reach for the dispenser and move soap around on her hands. At the end of kindergarten, [STUDENT] did not engage in purposeful ball play. (P. Ex. 24, at 48.) Now she is inconsistent, but she is able to watch and catch a suspended ball. (Tr. 384.) [STUDENT]’s ability to walk up and down steps and curbs has also improved.

⁴³ Ms. XXXX testified that she heard [STUDENT] say “iPAD” several weeks before March 28, 2017. (Tr. 451, l. 19 to 452, l. 2.)

There are other goals in the IEP where [STUDENT] has shown no progress. These goals may have to be carried over in her next IEP, and additional evaluations may be warranted. However, at this time, the goals remain appropriate. I also reject the Parents' witnesses' testimony that [STUDENT] has not achieved progress because, based on the number of months left in the school year and the percentage of times she has completed a task, she is not likely to achieve the goals by the end of the year. The goals are measurable to give the Parents an objective measure of [STUDENT]'s progress. The IEP is not a report card for [STUDENT] or CCPS. Failure to meet the percentage of times, for example, that [STUDENT] is able to "sustain attention for five minutes" does not mean that [STUDENT] or CCPS failed. (P. Ex. 30, at 37.) At the end of the year [STUDENT] may not achieve any of the percentages stated on her objectives. That would not mean that she failed to make progress. As Ms. XXXX explained, many of the skills [STUDENT] is working on are "scaffolding" needed for [STUDENT] to progress to other skills. Considering [STUDENT]'s needs and her functional abilities before the start of first grade, [STUDENT] made progress. (P. Ex. 24; Finding of Fact 74 (Progress notes on July 2016 IEP).)

I conclude that, given all of the preparation for the IEP, the accommodations, services and supports provided, the IEP was reasonably calculated to provide [STUDENT] with educational benefit. The law recognizes that "once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals." *Tice ex rel. Tice v. Botetourt Cty. Sch. Bd.*, 908 F. 2d 1200, 1207 (4th Cir. 1990). Therefore, absent any evidence to persuasively dispute the well-reasoned judgment of CCPS witnesses, I agree with CCPS that the IEP and placement developed by the school system is appropriate and reasonably calculated to meet the individual needs of the Student.

[STUDENT] required a wide array of services. CCPS identified her needs and provided the services through a group of highly skilled professionals. [STUDENT] made some progress toward very basic goals and very little progress toward others, but I conclude that CCPS offered [STUDENT] “an IEP reasonably calculated to make progress appropriate in light of the child’s circumstances.” *Andrew F.* at 10. CCPS made an error by failing to hold an IEP meeting in late September or October to discuss [STUDENT]’s placement and the need to increase her hours outside of the general education classroom. However, CCPS fulfilled its obligation to [STUDENT] to offer her a FAPE. As I conclude that the Parents did not prove a denial of FAPE, it is unnecessary for me to reach the issue of whether [School 1] is an appropriate private placement for [STUDENT]. *See Burlington School Committee v. Dept. of Educ.*, 471 U.S. 359 (1985).

CONCLUSIONS OF LAW

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

1. By changing the location where some of the Student’s special services were provided in the Fall of 2016 without notifying the Parents as required by the law, the Cecil County Public Schools committed a procedural violation of the IDEA, 20 U.S.C. § 1415(b)(3)-(4), (c) (2010);
2. Despite the procedural violation, the Cecil County Public Schools offered the Student a FAPE. *Gadsby ex rel. Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); and
3. The IEP and placement created and implemented for the Student by the Cecil County Public Schools for the 2016-2017 school year was reasonably calculated to offer the Student a free and appropriate public education appropriate to her

circumstances. 20 U.S.C.A. §§ 1400 - 1487 (2010 & Supp. 2016); *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988 (2017).

ORDER

I **ORDER** that the Parent's request to have the Student placed at [School 1] or another separate nonpublic day school at public expense is **DENIED**.

May 3, 2017
Date Decision Issued

Mary R. Craig
Administrative Law Judge

MRC/emh

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2016). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

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