

██████████,

STUDENT

v.

CHARLES COUNTY

PUBLIC SCHOOLS

BEFORE DANIEL ANDREWS,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-CHAS-OT-20-04755

DECISION

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STATEMENT OF THE CASE

On February 18, 2020, ██████████ (Parent),¹ on behalf of his daughter, ██████████ (Student), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Charles County Public Schools (CCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017),² 34 C.F.R. § 300.511(a) (2019);³ Md. Code Ann., Educ. § 8-413(d)(1) (2018);⁴ Code of Maryland Regulations (COMAR) 13A.05.01.15C(1). On March 6, 2020, the parties participated in mediation but were unable to resolve the Complaint.

¹ The Student’s mother, ██████████, also participated in the hearing. Her name was not on the Complaint. Any reference to “Parent” is to Mr. ██████████, individually. For confidentiality purposes, Mrs. ██████████ is referred to as the “Student’s mother.”

² U.S.C.A. is an abbreviation for United States Code Annotated.

³ The federal regulations that apply to the IDEA are found in Title 34 of the Code of Federal Regulations (C.F.R.). Unless there is a change in the substantive law that was in effect at the time of the events at issue in this case, all citations herein to the C.F.R. are to the current 2019 volume.

⁴ All future references to the Maryland Annotated Code, Education Article shall be to the 2018 Replacement volume.

On March 12, 2020, I held a telephone pre-hearing conference during which the parties defined the legal issues to be addressed at a hearing, agreed to hearing dates, and discussed the federal regulatory timeline within which a decision on the Complaint must be issued. By agreement of the parties, the hearing was scheduled to begin on April 17, 2020 and continue to April 24, 2020 and, if needed, May 1, 2020.

When a due process complaint is filed, federal regulations establish a forty-five-day timeline to issue a final decision, which provides:

The public agency must ensure that not later than 45 days after the expiration of the [30-day resolution] period under § 300.510(b), or the adjusted [resolution] time periods described in § 300.510(c):

- (1) A final decision is reached in the hearing; and
- (2) A copy of the decision is mailed to each of the parties.

34 C.F.R. § 300.515(a). As indicated, the forty-five-day timeline ordinarily begins to run at the end of a thirty-day resolution period triggered by the filing of a due process complaint.

34 C.F.R. § 300.510(b)(2). However, the timeline may begin to run after certain other events occur:

The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

- (1) Both parties agree in writing to waive the resolution meeting;
- (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; [or]
- (3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

34 C.F.R. § 300.510(c).

Under the regulatory timeline, the decision in this case normally would be due on Monday, April 20, 2020, which is forty-five days after the unsuccessful March 6, 2020 mediation. 34 C.F.R. §§ 300.510(c)(2), 300.515(a). However, the regulations authorize me to

grant a specific extension of time at the request of either party. 34 C.F.R. § 300.515(c). In this case, the parties made such a request and stated their reasons on the record in the pre-hearing conference. The reasons for extending the timelines include the Parent's work schedule prevented his attendance on Tuesdays, Wednesdays, and Thursdays of any week in March and April; and, previously scheduled matters for the attorney representing CCPS. At the pre-hearing conference and with the agreement of the parties, I granted an extension of the timeline and scheduled hearing dates outside of the 45-day timeline.

Due to the world-wide Coronavirus crisis, resulting in several executive orders by Maryland's governor, beginning March 23, 2020, proceedings scheduled by the OAH were suspended, requiring those proceedings to be rescheduled. As a result, the originally scheduled hearing dates were postponed.

On April 7, 2020, I held a video conference to reschedule the hearing.⁵ Again, the parties agreed to several hearing dates beginning May 15, 2020, continuing to May 22, 2020 and, if needed, May 29, 2020. The parties and I again discussed the regulatory timeframe for issuing a decision. The parties agreed to a hearing schedule to begin as soon as practical after the Coronavirus crisis allowed the OAH and CCPS to schedule hearings. As before, the Parent's work schedule precluded scheduling a hearing on Tuesdays, Wednesdays, and Thursdays of any week. For these reasons, I granted the parties' second request to extend the timeline and scheduled hearing dates outside of the 45-day timeline. 34 C.F.R. § 300.515(c). I also agreed to issue a decision no later than thirty days after the last day of the hearing.

⁵ See COMAR 28.02.01.20B (Unless there is good cause in opposition to a hearing being conducted by telephone or other similar audio-electronic means, an Administrative Law Judge may conduct a hearing by video conferencing or other similar audiovisual electronic means, as long as each party has an opportunity to participate in and hear the entire proceeding). The hearing was conducted via the Google Meet platform.

On May 15, 2020, I convened the hearing as scheduled, which was continued to May 22, May 29, June 4, June 12, June 18, and June 29, 2020.⁶ The Parent represented himself. CCPS was represented by David Burkhouse, Esquire.

At the end of the Parent's case on May 29, 2020, CCPS raised a Motion for Judgment (Motion) on all issues in the case. *See* COMAR 28.02.01.12E(1). I granted the Motion as to the Student's discipline under the IDEA (Issue No. 1) but declined to render judgment on the remaining issues until the close of all the evidence. *Id.* I shall discuss the Motion later in this Decision.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., Educ. § 8-413(e)(1); State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES⁷

1. Did CCPS violate the IDEA when the Student was suspended from school for behavioral issues in October 2019?

2. Did CCPS violate any of the Parent's procedural due process protections related to the development of the Student's proposed January 13, 2020 Individualized Educational Program (IEP)?

3. Does the proposed educational placement by CCPS that the Student attend the

██████████ Elementary School ██████████ (ES), ██████████ (██████████)

⁶ All hearing dates proceeded by a video conference using the Google Meet platform. *See* COMAR 28.02.01.20B.

⁷ Without substantive changes, I restated the issues originally defined by the parties during the telephone pre-hearing conference.

██) program, provide the Student with a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE)?

SUMMARY OF THE EVIDENCE

Exhibits

Attached to this Decision is an Addendum, which fully describes both parties' proposed exhibits and the exhibits which were admitted into evidence during the hearing.

Testimony

The Parent testified on his own behalf and presented the testimony of the following witnesses:

- 1) Student's mother
- 2) ██████████, Speech Pathologist, ██████████ Medical Center
- 3) ██████████, family friend
- 4) ██████████, family friend

CCPS offered the testimony of the following witnesses:

- 1) ██████████, Director of Special Education Compliance, CCPS. Ms. ██████████ was accepted as an expert in special education.
- 2) ██████████, Third Grade General Education Teacher, ██████████ Elementary School (██████████ ES), CCPS. Ms. ██████████ was accepted as an expert in elementary education.
- 3) ██████████, Special Education Instructional Specialist, CCPS. Ms. ██████████ was accepted as an expert in special education.
- 4) ██████████, School Psychologist, CCPS. Ms. ██████████ was accepted as an expert in school psychology.
- 5) ██████████, Coordinator of Autism Services, CCPS. Ms. ██████████ was accepted as an expert in special education and autism.

FINDINGS OF FACT

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

Student's Academic History Prior to 2019-2020

1. In February 2015, the Student was four years old. She was enrolled in CCPS and attended pre-school at [REDACTED] Elementary School ([REDACTED] ES). The Student had an IEP.
2. The Student's primary educational disability was developmental delay.
3. The Student was referred for special education services for behavior, including non-compliance, limited play with other children, perseverance on certain activities, putting non-food items in her mouth, and repetitive speech. The Student wandered around the room, had significant difficulty staying focused or attending activities, sometimes had tantrums, and had shown aggressive behavior on occasion.
4. On June 5, 2015, a Developmental Neuropsychological Evaluation of the Student was conducted by [REDACTED], Psy.D., at [REDACTED] Medical Center
5. Dr. [REDACTED] diagnosed the Student as having Autism-Mild.
6. Dr. [REDACTED] recommended that the Student be placed in a specialized pre-school, two to three hours daily with a small group setting facilitated by educators and therapists with specific training in autism. Dr. [REDACTED] recommended the Student be provided (a) speech language and occupational therapy, (b) extra support for new situations and routines, and (c) simplified instructions and directions, with verbal prompts that transitions were about to occur.
7. On August 11, 2015, during an IEP meeting, the IEP team discussed the option to provide specialized instruction to the Student under the diagnosis of developmental delay versus autism and agreed to change the Student's primary diagnosis to Autism.

8. On October 13, 2016, CCPS and the Parent created the final draft of the Student's IEP. The Student's primary educational disability was Autism.

9. After developing the Student's present levels of academic achievement and behavioral performance, the IEP team determined the Student needed special consideration and accommodations for behavioral intervention, including a Functional Behavioral Assessment (FBA) with a Behavioral Intervention Plan (BIP) to address behaviors, including: elopement, tantrums, non-compliance, misuse of property, and mouthing items.

10. The Student required instructional and testing accommodation including multiple or frequent breaks and reduced distractions. These accommodations were due to deficits in the Student's attention and focus requiring multiple breaks throughout instruction and assessment. The Student typically could only work for five minutes or less before requiring a movement break.

11. The IEP team, including the Parent and the Student's mother, agreed that the Student's IEP should be implemented in a small class, regionalized program outside of the Student's home school, such as [REDACTED] ([REDACTED]), which offers special education services for children with autism.

12. On December 2, 2016, the Parent withdrew the Student from CCPS. CCPS Ex. 3 (0061).

13. Between December 2016 and September 2019, the Student was not enrolled in CCPS. She was home schooled by the Parent.

The 2019-2020 School Year

14. For the 2019-2020 school year, the Parent enrolled the Student in CCPS for the third grade.

15. Tuesday, September 9, 2019, was the Student's first day to attend school, the Student's mother took the Student to [REDACTED] Elementary School ([REDACTED] ES), which is the Student's home school and is a general education setting. At the time, the Student did not have an IEP.

16. On September 10, 2019, the Student was assigned a one-to-one aide, [REDACTED]. Ms. [REDACTED] was responsible to be with the Student from beginning of the school day and until dismissal at the end of the school day. Ms. [REDACTED] helped the Student to manage her behaviors and sensory needs so the Student could access the daily academic curriculum. Ms. [REDACTED] was given a break each day during the Student's lunch period, during which time the Student was supervised by other school officials, like the Student's home room teacher, [REDACTED].

17. On September 10, 2019, the Principal of [REDACTED] ES told the Student's mother that the Student should be attending [REDACTED].

18. On September 11, 2019, the Principal again told the Student's mother that the Student should be attending [REDACTED].

19. On September 12, 2019, the Parent went to the Principal's office and spoke to him. During this meeting, the Principal called [REDACTED], Director of Special Education Compliance, CCPS, who told the Parent that the Student should be attending [REDACTED].

20. On or about September 16, 2019, the Parent sent an email to [REDACTED] ES requesting the Student be assessed to receive special education services.

IEP Meeting September 24, 2019

21. On September 16, 2019, CCPS sent the Parent a "Notice of IEP Team Meeting," which was scheduled for September 24, 2019. The purpose of the meeting was to review existing information, determine the need for additional data, and to consider the Parent's request for assessments.

22. On September 24, 2019, CCPS held an IEP meeting with the following IEP team members present:

- Parent
- Student's mother
- [REDACTED], family friend
- [REDACTED], the Student's godmother
- [REDACTED], family friend
- [REDACTED] IEP facilitator
- [REDACTED], regular educator
- [REDACTED], special educator
- [REDACTED], school psychologist
- [REDACTED], speech pathologist
- [REDACTED], instructional specialist for speech language
- [REDACTED], school counselor
- [REDACTED], special educator at [REDACTED]
- [REDACTED], instructional specialist for special education
- [REDACTED], instructional specialist
- [REDACTED], Director of Compliance

23. During the IEP meeting, the Parent provided written consent to perform several assessments of the Student in the areas of: academic performance (reading, mathematics, and written language), communication (expressive/receptive language and pragmatics), functional/adaptive performance, intellectual/cognitive functioning, emotional/social/behavioral development, observation, occupational therapy (fine motor/sensory), and update a FBA/BIP.

24. The IEP team discussed the Student's behaviors while attending [REDACTED] ES, including: walking out of the bathroom with pants down, hitting a teacher, hitting and grabbing students daily, throwing items, eating rocks, work refusal, elopement, inappropriate language, refusing to return to classroom from break time, tantrums, rolling on floor or kicking floor, difficulty with eye contact, and violating personal space and boundaries.

25. The IEP team also reviewed data gathered by team members at [REDACTED] ES and the Student's 2016 IEP, the last IEP for the Student prior to her withdrawal from CCPS.

26. Based on the information presented and discussed, CCPS proposed that the Student attend [REDACTED] as an interim diagnostic placement during the evaluation process and agreed to schedule an opportunity for the Parent and Student to visit [REDACTED].
27. CCPS rejected continued placement at [REDACTED] ES because of the severity of the Student's behaviors, which presented a safety issue for the Student as well as others.
28. The Parent expressed concern about the recommended placement because the Student had been through a lot, that it was his desire for the Student to attend [REDACTED] ES, and a concern for regression of her behaviors. The Parent agreed to take a tour of [REDACTED] on September 26, 2019 at 1:00 p.m. with the intent of the Student attending [REDACTED] on September 30, 2019.
29. On September 26, 2019, at approximately 10:00 a.m., the Student's mother and the Student went to [REDACTED]. The Student's mother knew she was arriving early to tour [REDACTED] but requested the tour anyway.
30. The Student's mother met with the Principal of [REDACTED] who informed her that she could not tour the program earlier than 1:00 p.m. due to confidentiality issues, because students were present in the building. The Student's mother replied that the Student was not going to attend [REDACTED].
31. On September 27, 2019, the Parent was provided a Prior Written Notice (PWN) regarding the IEP meeting held on September 24, 2019.
32. On September 27, 2019, [REDACTED], Director of Special Education Compliance, CCPS, notified the Parent in writing that it was upholding the IEP team's recommendation for a diagnostic placement during the assessment process at [REDACTED].
33. Ms. [REDACTED] informed the Parent that the Student is to attend [REDACTED] beginning September 30, 2019. She also informed the Parent that if the Parent does not comply with the

recommendation to attend ██████ to implement the prior IEP for the Student, CCPS will file a due process complaint. Ultimately, CCPS did not file a due process complaint.

Student Discipline

34. On October 7, 2019, while on the playground at ██████ ES, the Student refused to go inside the school after recess. The Student was with her one-to-one aid, Ms. ██████. ██████ ██████, the principal for ██████ ES, was attempting to persuade the Student to go back into the school building. The Student looked at the principal and tried to grab his arm. After Mr. ██████ pulled his arm away, the Student swung her open hand and struck the principal on his leg.

35. The Student was suspended from school for one day, beginning October 8, 2019.

36. The Parent appealed the Student's suspension.⁸

37. On October 9 and 10, 2019, the Student did not return to school. She returned to school on October 11, 2019.

38. On October 11, 2019, ██████, vice principal at ██████ ES, was in the ██████ ES lunchroom speaking with a teacher who was on lunch duty. While speaking with the teacher, the Student came up from behind the vice principal and hit him on the arm and kicked his shin. This conduct was unprovoked and without any prior verbal contact with the Student.

39. Shortly afterward, the Student left the school building and was headed towards ██████ Middle School (████████ MS), a school located across the street from ██████ ES. The street between the two schools often has vehicular traffic. Mr. ██████ responded to the area and observed the Student headed toward the playground. At the time, there were first grade students on the playground. The Student got on playground equipment with the other students. Mr. ██████ requested the Student to climb off the playground equipment, but she refused. The

⁸ On October 24, 2019, ██████, Executive Director of Schools, upheld the Student's suspension for the incident on October 7, 2019.

Student's mother, who was at school or had responded to the school, went to the playground and with some minor encouragement was able to get the Student off the playground equipment.

40. The Student was suspended for one day, beginning October 11, 2019.

41. The Parent did not appeal the October 11, 2019 suspension.

42. The Student did not return to school after October 11, 2019. The Parent kept the Student out of school for alleged safety reasons.

43. From September 9 through October 11, 2019, the Student attended twenty-two days of school.

44. Thereafter, the Student was home schooled by her parents.

IEP Meeting December 18, 2019

45. On November 25, 2019, through a Notice of IEP Team Meeting, CCPS notified the Parent that an IEP meeting was scheduled for December 18, 2019. The purpose of the meeting was to review written referral and/or existing data and information, and, if appropriate, determine eligibility, for special education services.

46. Prior to the December 18, 2019 IEP meeting CCPS conducted Occupational Therapy, Speech Language, Psychological, Educational assessments of the Student, which were provided to the Parent prior to the IEP meeting.

47. On December 18, 2019, CCPS held an IEP meeting with following attendees:

- Parent
- Student's mother
- [REDACTED], Educational Consultant for the Parent
- [REDACTED], family friend
- [REDACTED], neighbor
- [REDACTED], regular educator
- [REDACTED], special educator
- [REDACTED], school psychologist
- [REDACTED], speech language pathologist
- [REDACTED], occupational therapist
- [REDACTED], instructional therapist

- [REDACTED], behavioral specialist
- [REDACTED], Director of Special Education Compliance

48. During the IEP meeting, Mr. [REDACTED], a behavioral specialist, explained that there was a plan to develop data for the FBA with observations of the Student in the school setting scheduled for October 7, 2019, however, because the Student had not been in school due to behavioral issues and subsequent suspensions, data could not be collected and the FBA was not completed. Mr. [REDACTED] recommended that after the Student achieved a ninety percent attendance for four weeks an FBA can be performed.

49. The IEP team discussed the Student's eligibility for special education based on an educational disability of Autism or other health impairment (OHI). To do so, the team considered the Student's performance on assessments and available historical data.

50. In determining the Student's educational disability, the IEP team completed checklists for Autism Spectrum Disorder and OHI.

51. After considering all available information as well as the results from the checklists, the IEP team determined that the Student met the criteria for a primary educational disability of autism and was eligible for special education and related services through an IEP. OHI was determined to be a secondary educational disability.

52. The Parent expressed concern about the Student being found eligible for special education because of autism. He explained that the Student was only diagnosed with mild autism and wanted that information contained in the IEP. He also expressed a concern that if the Student is categorized as having autism and is placed with children with severe autism that her behaviors will increase.

53. The school-based IEP team⁹ determined that the Student's primary educational disability would be autism, but agreed to incorporate the Parent's concern in the development of the IEP.

⁹ Representatives from CCPS are identified as the school-based team.

54. On December 18, 2019, through a Notice of IEP Team Meeting, the Parent was informed of an IEP meeting to be held on January 13, 2020. The purpose of the IEP meeting was to develop the IEP.

IEP Meeting January 13, 2019

55. On January 6, 2020, CCPS sent the Parent a draft IEP¹⁰ to review before the IEP meeting scheduled for January 13, 2020.

56. The draft IEP did not contain any information regarding the educational services the Student would receive or the educational setting (the physical location where the IEP would be implemented). The draft IEP contained information considered at prior IEP meetings and determinations related to eligibility for special education services as well as descriptions of the Student's present levels of academic achievement and functional performance, supplementary aids, services, program modifications, and supports. It also contained and goals and objectives in academic areas of speech language and behavior, and math, reading comprehension, and written language.

57. On January 13, 2020, an IEP meeting occurred with following attendees:

- Parent
- Student's mother
- Student¹¹
- [REDACTED], Educational Consultant for the Parent
- [REDACTED], family friend
- [REDACTED], neighbor
- [REDACTED], regular educator
- [REDACTED], special educator
- [REDACTED], school psychologist
- [REDACTED], speech language pathologist
- [REDACTED], occupational therapist
- [REDACTED], instructional therapist
- [REDACTED], Coordinator of Autism Services
- [REDACTED], Director of Special Education Compliance

¹⁰ The draft IEP was not offered into evidence by either party.

¹¹ The Student's name was not included on the attendance list.

58. The IEP team reviewed the draft IEP. The Parent and his educational consultant were able to offer information, concerns, and opinions regarding all areas of the draft IEP.
59. All areas of the draft IEP were open to revision based on the input of the IEP team.
60. The Parent raised concerns about the Student's educational diagnosis and he wanted the Student's disability to be described as mild or with the language describing the Student as having "features or characteristics" of autism. The Parent also wanted the Student's educational disability to be Speech Language Delay.
61. The school-based IEP team found that the supporting assessments and prior medical and educational history supported the Student's primary educational disability as being autism and declined the Parent's request.
62. The Parent requested that any language in the IEP that the Student was aggressive, as well as any data about the Student's behavior, be removed from the IEP.
63. The data the Parent wanted removed from the IEP is contained in the section of the proposed IEP which describes the Student's present levels of academic and functional performance. In a section which describes the Student's social and emotional behavior, the proposed IEP included:
- Based on classroom observation and data charts from September 9 through October 7, 2019, areas of difficulty included work refusal, tantrums, eloping from classroom, attempting to hit or kick adults and peers, putting objects in her mouth, and entering space of peers and adults without permission to grab or pinch.
 - When the Student was in school, she: refused to work 58.4% of the time, had tantrums 28.8% of the time, eloped from her area 5.5% of the time, attempted to hit or kick 4.1% of the time, put objects in her mouth 4.1% of the time, entered personal space of peers or adults 2.7% of the time.
 - Based on the data collected the antecedent to the Student's behaviors include being presented with instruction or demands 52.5% of the time, presence of a stimulating or aversive environment 23.7% of the time, occurrence of a transition 11.9% of the time, and the presence of a preferred activity or other request being removed or denied 5.1% of the time.

64. The school-based IEP team agreed that the Student was not an aggressive or violent child but declined to remove language from the draft IEP which described the Student's behavior that led to discipline or other data of her behaviors. The school-based IEP team found this information was required to be in the IEP because the Student's school discipline was in her educational record and cannot be removed. The school-based IEP team also declined to remove any other data of the Student's behavior because that data was necessary to fully describe the Student's behavioral issues which would then inform the IEP team as to how to best develop an appropriate IEP, with an adequate program of modifications and supports, to allow her to access the academic curriculum.

65. The IEP team, including the Parent and the Student's mother, agreed that that the Student requires the following instructional supports and program modifications on a daily, weekly, or as needed basis:

- Repetition of directions
- Structured work system
- Alternative means for the Student to demonstrate learning
- Use of manipulatives
- Use of daily schedule and task list
- Use of visuals
- Multi-modality instruction
- Breakdown of assignments into smaller units or chunks
- Altered or modified assignments

66. The IEP team, including the Parent and the Student's mother, agreed that the Student required the following social and behavioral support on a daily, weekly, or as needed basis:

- Use of timer
- Social skills training
- Use of token economy
- Use of positive and concrete reinforcers
- Frequent reminders of rules
- Intensive case management
- Daily Home-School communication system
- Toileting routine and support

- Adult Support
- Monthly Speech Language Pathologist consultation
- Bi-monthly Occupational Therapy consultations

67. The IEP team, including the Parent and the Student's mother, agreed to the Student's academic and behavioral goals and objectives in the areas of speech language (expressive, receptive, and pragmatic), social and emotional behavior, math problem solving, reading comprehension, and written language content.

68. The IEP team, including the Parent and the Student's mother, agreed to the amount of educational and related services that the Student would receive in both general education and special education settings.

69. In the educational setting, the Student was to receive classroom instruction and the related service of speech language for a total of twenty-one hours and ten minutes each week.

70. In the general education setting, the Student was to receive a total of ten hours and fifty minutes for reading, math, speech language, lunch, recess, and specials.¹²

71. The IEP team next discussed the educational setting (*i.e.*, the physical location) where the IEP would be implemented. This discussion occurred at the end of the IEP meeting and after the school-based IEP team indicated that the assigned meeting time was running short due to another scheduled IEP meeting.

72. The IEP team discussed the ability to implement the Student's IEP in the general education setting without supports (referring to the supports described in Findings of Facts 65 and 66). There was agreement among the IEP team, including the Parent and the Student's mother, that this option was inappropriate.

¹² During the hearing, "specials" were described as including physical education or art classes.

73. The next two options discussed included implementing the Student's IEP in the general education setting with supports or in a separate special education setting with supports. The latter would be offered at [REDACTED] ES, through the [REDACTED] program.
74. The Parent requested that the IEP be implemented in the general education setting at the Student's home school, [REDACTED] ES, with supports.
75. [REDACTED], [REDACTED] Program Director, described the [REDACTED] program as providing academic and behavioral support, access to general education peers, a diploma bound program, extra adult support, a lower student to teacher ratio, and support to enable the student to become independent.
76. The school-based IEP team offered the Student's IEP to be implemented at [REDACTED] ES, [REDACTED] program.
77. The school-based IEP team offered the Parent an opportunity to tour the [REDACTED] program, with the condition that the Parent provide consent to the implementation of the IEP. By providing consent to the IEP, the Parent would be allowed to tour the [REDACTED] program while other students were attending the program. Without consent to the IEP, the Parent would be able to tour the program but only during times when no other students were attending the program.
78. The Parent declined to provide consent to the IEP until he or the Student's mother toured the [REDACTED] program and until he reviewed the final proposed IEP.
79. On January 13, 2020, the Student and her mother went to [REDACTED] ES to tour the [REDACTED] program. They were met by Ms. [REDACTED] and the school's principal. They were able to observe a classroom but with no students present and the playground areas of the school. The Student's mother was able to ask about the number of students attending the program, and the grade levels for the program.
80. On January 27, 2020, the Parent received the proposed final draft of the IEP.

81. On January 28, 2020, the Parent signed the proposed IEP, without consenting to the IEP, writing:

We do not believe visiting and touring ██████ ES without any students in the building, after school, allow[ed] us [the Parent and the Student's mother] to be equal partners and [to] properly evaluate the placement[']s appropriateness. For this reason, we will not be accepting the ██████ program at ██████ [ES].

We, the Parents want [the Student] to attend her neighborhood school [at] ██████ [ES] with her nondisabled peers, which is in close proximity to her home with and IEP in place that identifies her needs.

CCPS Ex. 42.

82. On February 8, 2020, the Parent signed and consented to the proposed IEP; however, he wrote:

We the Parents of [the Student] reject the ██████ program, we the Parents of [the Student] reject the emotional behavioral section of the IEP because the IEP still contains wrong, inappropriate and disputed data.

We, the Parents of [the Student], consent to the rest of the IEP, [with] the exception of the ██████ program and the emotional behavioral section of the IEP.

CCPS Ex. 42.

DISCUSSION

General Applicable Law

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01. The IDEA requires “that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); *see also* Md. Code Ann., Educ. § 8-403.

The Supreme Court addressed the FAPE requirement in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), holding that FAPE is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* at 201 (footnote omitted).

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

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the “least restrictive environment” to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989). At a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). Placing disabled children into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved. COMAR 13A.05.01.10A(2).

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like CCPS to offer a continuum of alternative placements that meet the needs of children with disabilities. 34 C.F.R. § 300.115. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services to be provided in conjunction with regular class placement. *Id.* § 300.115(b); COMAR 13A.05.01.10B(1).

As the party seeking relief, the Student, through the Parent, bears the burden of proof, by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

“In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your mind [] a belief that it is more likely true than not true.” *Coleman*, 369 Md. at 125 n.16. Under this standard, if the supporting and opposing evidence is evenly balanced¹³ on an issue, the finding on that issue must be against the party who bears the burden of proof. *See Schaffer*, 546 U.S. at 56-58.

For the reasons set forth below, I find the Student, through the Parent, has not met her burden to prove that CCPS violated the IDEA as it pertains to any discipline imposed, any due

¹³ This is a rare outcome in a case under the IDEA, as Justice O’Connor observes for the Court. “In truth . . . very few cases will be in evidentiary equipoise.” *Schaffer*, 546 U.S. at 58.

process procedural protections, or by an educational placement in a LRE. In the Analysis which follows, I will provide additional applicable law as needed.

Analysis

Discipline under the IDEA and CCPS' Motion for Judgment

School personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536). 34 C.F.R. § 300.530(b)(1), *See* COMAR 13A.08.03.03.

For disciplinary changes in placement that would exceed ten consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of § 300.530, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section. 34 C.F.R. § 300.530(c), *See* COMAR 13A.08.03.03.

When a child with a disability is removed from the child's current placement, federal regulation provides:

(d) Services.

(1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must:

(i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education

curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under § 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

34 C.F.R. § 300.530(d)(1).

A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of § 300.534) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 34 C.F.R. § 300.534(a), COMAR 13A.08.03.10A.

A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to §§300.300 through 300.311; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

34 C.F.R. § 300.534(b), COMAR 13A.08.03.10B.

In Maryland, in accordance with the rules and regulations of the county board, each principal of a public school may suspend for cause, for not more than ten school days, any student in the school who is under the direction of the principal. Md. Code Ann., Educ. § 7-305(a), COMAR 13A.08.01.11 The discipline of a child with a disability, including the suspension, expulsion, or interim alternative placement of the child for disciplinary reasons, shall be conducted in conformance with the requirements of the “IDEA”. Md. Code Ann., Educ. § 7-305(g).

Each local board of education has both the responsibility and authority to adopt policies designed to create safe schools. COMAR 13A.08.01.11A. The policies and regulations at minimum shall:

- (1) Reflect a discipline philosophy based on the goals of fostering, teaching, and acknowledging positive behavior;
- (2) Be designed to keep students connected to school so that they may graduate college and career ready;
- (3) Describe the conduct that may lead to in-school and out-of-school suspension or expulsion; and
- (4) Allow for discretion in imposing discipline.

Id.

CCPS requires all students, with or without disabilities, to comply with a code of student conduct, which has an associated level of response for violations of the code of student conduct. *See* Student Ex. 5 (0054). For a physical attack, which includes physically pushing, hitting, or otherwise attacking another individual (student or staff member or other adult), the associated level of response ranges from a level 2 to level 4 response. Student Ex. 5 (0059). Examples of a

level 2 to level 4 response include but are not limited to: temporary removal from class; referral to school counselor; parent/student conferences (level 2); in-school suspension; in-school intervention; referral to school psychologist (level 3); and short-term out of school suspension (1 to 3 days) (level 4).¹⁴ Student Ex. 5 (0054).

In 2015, the Student was enrolled in CCPS and was found eligible to receive special education as a student with an educational diagnosis of developmental delay. For the 2016-2017 school year, the Student was in kindergarten and her educational diagnosis was changed to autism. After an IEP team created an IEP for the Student, which recommended an educational placement at [REDACTED] a special education program which was not her home school, the Student was removed from CCPS by the Parent. From 2016 and until 2019, the Student was home schooled by the Parent.

For the 2019-2020 school year, the Student was enrolled in CCPS for the third grade. On September 9, 2019, the Student attended school at [REDACTED] ES, a general education school. At the time, the Student did not have a current IEP. On September 24, 2019, the Parent provided written authorization to CCPS to begin educational assessments of the Student to create a current IEP for the Student.

On October 7, 2019, the Student was on the playground at [REDACTED] ES and was refusing to go back into the school building. At the time, the Student was with her one-to-one dedicated aide, Ms. [REDACTED] who was provided by CCPS to assist the Student throughout the school day. After several failed attempts to get the Student to return to the school building, the school principal, Mr. [REDACTED], came onto the playground to persuade the Student to reenter the school. During the process, the Student attempted to grab the principal's arm and struck him on

¹⁴ There is also a level 5 response, which involves suspensions for longer time periods. This level of response is not relevant to the facts of this case.

his leg with her open hand. For this behavior, the Student was suspended for one day, beginning October 8, 2019. The Student did not return to school until October 11, 2019.

On October 11, 2019, the Student was in the school cafeteria. Mr. [REDACTED], a vice principal at [REDACTED] ES, went to the cafeteria to speak with a teacher who was on lunch duty. While speaking to the teacher, the Student struck Mr. [REDACTED] on the arm and kicked his shin. Shortly afterwards, the Student also eloped from the school building and was running toward [REDACTED] MS but then made a turn to go onto the playground. Several teachers or administrators responded to the playground to prompt the Student to return to the school building, but the Student was uncooperative. Eventually, after the Student's mother arrived and with some further prompting, the Student returned to the school building. Due to her behavior in striking the vice principal and for eloping from the school building, the Student was suspended for one day, effective October 11, 2019. After October 11, 2019, the Parent did not permit the Student to return to school for alleged safety reasons.

The Parent appealed the Student's suspension for the October 7, 2019 incident. The Parent did not appeal the suspension for October 11, 2019. On October 24, 2019, [REDACTED] [REDACTED], the Executive Director for Schools, upheld the Student's suspension from early October.

At the close of the Parent's evidence, CCPS raised a Motion for Judgement on all the issues presented in this case. COMAR 28.02.01.12E provides:

(1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.

(2) When a party moves for judgment at the close of the evidence offered by an opposing party, the judge may:

(a) Proceed to determine the facts and to render judgment against an opposing party; or

(b) Decline to render judgment until the close of all evidence.

(3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

A motion for judgment under COMAR 28.02.01.12E is analogous to motion for judgment under Maryland Rule 2-519. In *Driggs Corp. v. Maryland Aviation Administration*, 348 Md. 389 (1998), the Maryland Court of Appeals explained how a motion for judgment under Rule 2-519 is considered, which is instructive on how to consider a motion made under COMAR 28.02.01.12E. The *Driggs* Court explained:

In Maryland court proceedings, such a motion is now termed a motion for judgment (Md. Rule 2–519); formerly, it was known as a motion to dismiss, if made in a non-jury case, or a motion for directed verdict, if made in a jury case. The purpose of such a motion, whatever its denomination, is to allow a party to test the legal sufficiency of his opponent’s evidence before submitting evidence of his own. The issue traditionally presented by such a motion is a purely legal one: whether, as a matter of law, the evidence produced during A’s case, viewed in a light most favorable to A, is legally sufficient to permit a trier of fact to find that the elements required to be proved by A in order to recover have been established by whatever standard of proof is applicable. To frame the legal issue, the court must accept the evidence, and all inferences fairly deducible from that evidence, in a light most favorable to A; it is not permitted to make credibility determinations, to weigh evidence that is in dispute, or to resolve conflicts in the evidence. It has always been understood and recognized, however, that a party who makes and loses such a motion has an option. The party (B) may proceed to present additional evidence in an effort to controvert, or further controvert, the evidence produced in A’s case, in which event B effectively withdraws the motion for judgment.

Id. at 402-403.

After considering the evidence at the close of the Parent's case, I granted the motion as to whether CCPS violated the IDEA when the Student was suspended in October 2019. I, however, declined to render judgment on the remaining issues until the close of all the evidence.

Without any dispute and as established by a preponderance of the evidence presented during the Parent's case, the Student was suspended on October 7 and 11, 2019, which totaled two days. The reasons for which the Student was suspended were for violations of the code of student conduct by hitting adult school personnel. For violating the code of student conduct, the Student was suspended for less than ten days. Even though the Student did not have a current IEP at the time and had yet been determined eligible for special education services under the IDEA, based on the Student's educational history with CCPS in 2015 and 2016, CCPS clearly knew the Student was a child with an educational disability and was or would be eligible for services under the IDEA. *See* 34 C.F.R. § 300.534(b), COMAR 13A.08.03.10B. For this reason, to the extent CCPS was required to provide the Student with any protections or services under the IDEA, CCPS was required to provide those protections or services.

Nevertheless, the Student was suspended for less than ten days for violating the code of student conduct. As a result, the Student was properly suspended in accordance with applicable federal and Maryland regulations. 34 C.F.R. § 300.530(b)(1), *See* COMAR 13A.08.03.03. Since the Student was not suspended for more than ten days, CCPS was under no obligation imposed by the IDEA to determine if the Student's conduct leading to the suspension was a manifestation of the child's disability. *See* 34 C.F.R. § 300.530(c), COMAR 13A.08.03.03. Additionally, because the Student was not suspended for more than ten days, CCPS was not required to provide educational services, conduct a functional behavioral assessment or provide a behavioral intervention plan, or any other educational services in another education setting as required by the IDEA. *See* 34 C.F.R. § 300.530(d)(1). In sum, there was no violation of the IDEA.

The Parent argued that CCPS violated its own policy by not providing progressive discipline to the Student. However, that issue was resolved through the Parent's appeal and through the applicable law and regulations pertaining to student discipline for all students in the CCPS system. On October 24, 2019, the Student's suspension for the incident on October 7, 2019 was upheld by the Executive Director for Schools. The Parent did not appeal the Student's suspension for the incident on October 11, 2019. Any alleged failure of CCPS to apply progressive discipline to the Student for violating the Student Code of Conduct is not a legally relevant issue under the IDEA.

For all these reasons, I granted CCPS' Motion for Judgment and found that CCPS did not violate the IDEA when the Student was suspended for a total of less than ten days in October 2019. After I declined to render judgment on the remaining issues, CCPS presented evidence on those issues. As result, CCPS withdrew the motion as to the two remaining issues. *See* COMAR 28.02.01.12E(3). I now turn to address those remaining issues.

Procedural Violations

To meet its substantive obligation under the IDEA, a school system must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F.* at 999. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* 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. *Id.*

An IEP is the centerpiece of a FAPE and is a collaboratively developed plan for a disabled child's education. *Hanson v. Bd. of Educ., Anne Arundel Cty.*, 212 F. Supp. 2d 474, 481 (2002). Every IEP begins by describing a child's present level of achievement, including

explaining “how the child’s disability affects the child’s involvement and progress in the general education curriculum.” *Andrew F.* at 1000. It then sets out “a statement of measurable annual goals ... designed to ... enable the child to be involved in and make progress in the general education curriculum,” along with a description of specialized instruction and services that the child will receive. *Id.*

Generally, the IDEA provides parents and students with procedural protections. A procedural protection for parents includes “an opportunity for the parents of a child with a disability to examine all records relating to such child and *to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child*, and to obtain an independent educational evaluation of the child.” 20 U.S.C.A. § 1415(b) (emphasis provided). In matters alleging a procedural violation, an Administrative Law Judge (ALJ) may find that a child did not receive a FAPE if the ALJ determines that a procedural right was violated and that the violation significantly impeded the parents opportunity to participate in the decision making process regarding the provision of a FAPE to the parents’ child. *R.F v. Cecil Cty. Public Sch.*, 919 F. 3d 237, 248 (2019). Under 20 U.S.C.A. § 1415(f)(3)(E)(ii)(II), an ALJ must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs alleged a procedural violation, (2) whether that violation significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to the parents’ child, and (3) whether the child did not receive a FAPE as a result. *Id.* § 1415(f)(3)(E). Unless an ALJ determines that a given procedural violation denied the child a FAPE, he or she may only order compliance with the IDEA’s procedural requirements and cannot grant other forms of relief, such as private placement or compensatory education.

During the hearing, the Parent argued several procedural protection violations occurred during the development of the Student's IEP. Those violations included: 1) failure to perform a FBA, 2) preventing the Parent from being an "equal partner" in the development of the IEP, 3) predetermining the Student's educational placement at ██████ ES, ██████ program, and 4) sending the proposed IEP dated January 13, 2020 to the Parent beyond five days.¹⁵

(1) Failure to Perform an FBA

The Parent complains that CCPS failed to perform an FBA. He asserts that CCPS was able to collect data regarding the Student during the time she attended ██████ ES, which was demonstrated by CCPS' ability to describe her behavior in the Student's present level of functional performance related to her social, emotional, and behavioral issues. *See* CCPS Ex. 42 (0222), CCPS Ex. 49 (0286-0358).

CCPS described the data that the Parent referred to as informal anecdotal data collected by school personnel, including the Student's home room teacher, Ms. ██████ and the Student's one-to-one aide at ██████ ES, Ms. ██████. According to CCPS, this data was collected to prepare for an anticipated IEP meeting to discuss what assessments would need to be performed to develop and IEP. CCPS acknowledged that the Student requires an FBA so an appropriate BIP can be developed for the Student. However, CCPS also explained that the Parent did not provide written consent to perform assessments, including an FBA, until the first IEP meeting on September 24, 2019. *See* CCPS Ex. 6 (0068).

After the September 24, 2019 IEP meeting but before an FBA could be performed, CCPS explained that the Student was only in the school setting for a short period of time, before she was suspended on October 7, 2019. Additionally, the Student did not return to ██████ ES until October 11, 2019, at which time she was suspended again. After October 11, 2019, the Parent

¹⁵ COMAR 13A.05.01.07D(3)(b) provides that the completed IEP not later than five business days after a scheduled IEP or other multidisciplinary team meeting.

did not return the Student to [REDACTED] ES and, for this reason, the Student was not available in a school setting so an FBA could be performed. In essence, CCPS asserts that it was ready and willing to perform an FBA but the Student was not sufficiently in the school setting to perform the test. As support for this position, CCPS asserts that during the IEP meeting on December 18, 2019, during which CCPS reviewed the Student's assessments that were performed, the IEP team discussed a report regarding the FBA, prepared by [REDACTED], a behavioral specialist for CCPS. CCPS Ex. 37 (0196). This report was provided to the Parent prior to the meeting and explained that direct data collection for the Student's behavior in the school setting, obtained by the Behavioral Specialist, to determine interval and frequency of behaviors could not be completed. *Id.* Mr. [REDACTED] further explained that due to a deficit of data sources of all types which prevented a determination of a pattern and function for the Student's behavior in the school setting, a formal FBA with recommendations for a BIP could not be completed until the Student achieved a ninety percent attendance rate for a four-week period. *Id.*

The failure to conduct an FBA is a procedural violation, but it does not rise to the level of a denial of a FAPE if the IEP adequately identifies the problem behavior and prescribes ways to manage it. *R.E. v. New York Dep't of Ed.*, 694 F.3d 167, 190 (2nd Cir. 2012). The entire purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors. *Id.*

In this case, the IEP team developed the Student's present levels of functional performance on a draft IEP which provided to the Parent prior to the January 13, 2020 IEP meeting. The Student's present level of functional performance relies on informal anecdotal data developed by CCPS when the Student was attending [REDACTED] ES. This data describes the Student's behaviors which interfered with her ability to access the educational curriculum. As noted earlier and will be explained more fully later, the Parent objected to this information and wanted

it removed from the IEP. Nevertheless, the data explains in detail the Student's behaviors which interfered with her ability to access the educational curriculum and includes: work refusal; tantrums; eloping from classroom; attempting to hit or kick adults and peers; putting objects in her mouth; and, entering personal space of peers and adults without permission to grab or pinch. The Student's present level of functional performance also explained antecedent conditions that caused the Student's behaviors including being presented with instruction or demands, presence of a stimulating or aversive environment, occurrence of a transition, and the presence of a preferred activity or other request being removed.

Based on the Student's present level of functional performance, the proposed January 13, 2020 IEP contains goals and objectives to address the Student's social and behavioral issues. The Parent was able to participate in developing these goals and objectives and agrees with this part of the Student's IEP.

The Student's January 13, 2020 IEP contains several instructional and behavioral supports and program modifications, which will be provided on a daily, weekly, or as needed basis including: repetition of directions; structured work system; alternative means for Student to demonstrate learning, use of manipulatives; use of daily schedule and task list; use of visuals; multi-modality instruction; breakdown of assignments into smaller units or chunks; altered or modified assignments; use of timer; social skills training; use of token economy; use of positive and concrete reinforcers; frequent reminders of rules; intensive case management; a daily Home-School communication system; toileting routine and support; and, adult support. Again, the Parent is in agreement with this part of the Student's IEP.

In summary, the proposed January 13, 2020 IEP describes the Student's present levels of functional performance in the areas of social, emotional, and behavioral development, which are the Student's behaviors which interfere with her ability to access the educational curriculum.

The IEP also contains program modifications and supports to address those behaviors and contains goals and objectives to assist the Student with improving in her social, emotional, and behavioral development. I conclude that the proposed January 13, 2020 IEP adequately addresses the Student's behaviors and provides appropriate supports to allow the Student to make meaningful educational progress. For these reasons, I conclude that CCPS' failure to conduct an FBA did not violate the IDEA. Importantly, the Parent agreed with the proposed January 13, 2020 IEP except for the part which addresses the LRE for the Student and certain language regarding the Student's behaviors. In other words, the Parent agrees that the proposed IEP as written provides the Student with a FAPE and he presented no argument or evidence to the contrary.

(2) Preventing the Parent a meaningful opportunity to participate in the IEP's development

The Parent complains that CCPS deprived him of a meaningful opportunity to participate in the Student's proposed January 13, 2020 IEP. He complains that CCPS refused to consider his request that the Student's educational disability be described as "mild" or as having "features or characteristics" of autism. Additionally, the Parent complains that CCPS did not consider his request that the Student's educational disability be speech language impairment, instead of autism. The Parent complains that CCPS failed to provide any of the behavioral data of the Student upon which CCPS relied upon to determine the Student's present level of functional performance related to her social, emotional, and behavioral issues. *See* CCPS Ex. 42 (0222), CCPS Ex. 49 (0286-0358). The Parent complains that CCPS applied pressure on him to provide consent to the proposed January 13, 2020 IEP in order to tour the [REDACTED] ES, [REDACTED] program with students present and attending the program. Instead, the only opportunity he or the Student's mother had to tour the program was without students present because he did not

provide consent to the IEP. In doing so, the Parent was only allowed to see an empty classroom and playground. Although the Parent did not specifically argue so, under these circumstances, the Parent complains that he could not participate in the decision that the [REDACTED] program was an appropriate education setting for the Student.

The evidence demonstrates that there were three IEP meetings to develop the Student's proposed January 13, 2020 IEP. The first IEP meeting was September 24, 2019. During this meeting, the IEP team, including the Parent and the Student's mother, reviewed existing information regarding the Student, determined the need for additional data, and considered the Parent's request for assessments. At the meeting, the Student's behaviors while attending [REDACTED] ES beginning September 9, 2019 were discussed. The behaviors discussed included: walking out of the bathroom with pants down; hitting or grabbing students and adults; throwing items; eating rocks; work refusal; elopement; inappropriate language; refusing to return to classroom from break time; tantrums; rolling on floor or kicking floor; difficulty with eye contact; and, violating personal space and boundaries. The IEP team also discussed the Student's prior IEP dated October 13, 2016, which included a primary educational disability of autism and an education placement at [REDACTED] and described the Student's behavioral and educational challenges. The Parent explained that he requested assessments because of a concern about the Student's speech, social, and sensory needs. The Parent's expressed that, at home, the Student is not sitting still and will not listen to prompts and that she demonstrates sensory seeking behaviors.

During the September 24, 2019 meeting the IEP team recommended several assessments of the Student in the areas of academic performance, speech language, functional adaptive performance (behavior), occupational therapy, and an FBA. The Parent provided written consent to those assessments. Additionally, the school-based IEP team recommended an interim diagnostic placement at [REDACTED], which was the Student's last educational placement according to

the 2016 IEP. The Parent explained that he wanted the Student to attend [REDACTED] ES but agreed to tour [REDACTED]. Ultimately, the Parent declined to send the Student to [REDACTED]

The next IEP meeting was December 18, 2019. The purpose of this meeting was to review existing data and information and determine the Student's eligibility for special education services. Prior to this meeting, the Parent received the assessments which were authorized during the prior IEP meeting. During this meeting, the Parent and the Student's mother were present. Also present with the Parent was [REDACTED], an educational consultant, who was able to participate in the meeting. The IEP team discussed the inability to perform an FBA. The IEP team also discussed the Student's eligibility for special education services with a primary educational disability of autism. The Parent expressed a desire that the Student's disability be described as "mild", which is the manner Dr. [REDACTED] from [REDACTED], described the Student's medical diagnosis of autism in 2015. Alternatively, the Parent wanted the Student's educational disability be described as having "features or characteristics" of autism, which the way the individuals who conducted the Student's assessments described the Student. Ultimately, CCPS determined that it would not provide any modifying descriptions of the Student's educational disability but provided in the body of the proposed January 13, 2020 IEP the language requested by the Parent. CCPS explained that it would provide the Parent opportunity for input in the IEP to provide further context of the Student's educational disability. Under the circumstances just explained, the Parent had a meaningful opportunity to participate in the decision regarding the Student's educational disability. CCPS considered his request for the language he requested and agreed to place the language in the body of the IEP to provide further context of the Student's educational disability. CCPS also appropriately decided against further

modifying the Student's educational disability. Under the IDEA's applicable federal regulations, the educational disability of autism is defined as:

(c) Definitions of disability terms. The terms used in this definition of a child with a disability are defined as follows:

(1)(i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.

(iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.

34 C.F.R § 300.8(c)(1).

Although a student's medical diagnosis may permit descriptive modifiers to a diagnosis, the federal definition of autism contains no such modifiers. The point of determining the Student's educational disability is to determine her eligibility for special education services and, if eligible, the unique circumstances of the child's disability will be addressed through other aspects of the IEP. A child's location on the spectrum of autism, from mild to severe, is a unique circumstance which will be addressed in the IEP's present levels of performance, goals and objectives, program modifications and supports, and services.

The Parent also requested that the Student's educational disability be speech language impairment, instead of autism. Again, CCPS declined the Parent's request by explaining that other areas of the Student's educational disability would also be recognized in the IEP to develop a complete understanding of the Student and to develop an appropriate IEP which addresses all areas of the Student's needs. In other words, CCPS indicated that the IEP will address the unique circumstances of the Student to develop an appropriate IEP which provides FAPE to the

Student. Based on the evidence presented, the Parent was able to discuss the Student's educational and behavioral issues, had an educational advocate to support him, was able to offer his opinion, and received explanations from CCPS as why it decided not to accept his requests. Although CCPS again disagreed with the Parent's position, that fact does not mean the Parent's input was not considered nor does it demonstrate he was not given a meaningful opportunity to participate in the determination of the Student's eligibility for special education. The Parent raises another claim about the Student's educational disability of autism, which will be discussed later.

A third IEP meeting was held on January 13, 2020. The Parent and Student's mother attended this meeting and were again assisted by Ms. [REDACTED], the educational consultant. During this meeting, the IEP team developed the Student's present level of functional performance related to her social, emotional, and behavioral issues. The Parent disagreed with the language in the proposed IEP which referred to the Student as aggressive (referring to her school discipline in October 2019). The Parent disagrees with any language that the Student was aggressive as described by her disciplinary record because the Parent had an opportunity to view a video of both incidents, October 7 and October 11, 2019, and did not see the Student hit another adult.

The Parent also disagrees with the data the school-based IEP team relied upon to describe her behaviors in school and which is contained in Student's Present Level of Functional Performance in the proposed January 13, 2020 IEP. *See Findings of Fact 63, see also CCPS Ex. 42 (0222), CCPS Ex. 49 (0286-0358).* The Parent asserts that this data was never provided to him prior to or during the IEP meeting.

During the IEP meeting as well as the hearing, CCPS explained that the Student's discipline history was a part of the Student's educational history and must be considered and remain a part of her IEP. CCPS acknowledged that Student's was not aggressive, but

descriptions of her behaviors were important to provide a clear understanding of the Student's circumstances and needs to develop an appropriate IEP for the Student.

CCPS explained that the behavioral data discussed during the IEP meeting was anecdotal data, collected by the Student's homeroom teacher, Ms. [REDACTED], and the Student's one-to-one aide, Ms. [REDACTED], during the time period the Student was attending [REDACTED] ES. CCPS acknowledged that the actual data was not provided to the Parent.

After an opportunity to listen to the Parent and understanding his position regarding the Student and her entire educational history with CCPS, I sense a distrust by the Parent. He believes that CCPS is not giving his child a fair opportunity to learn in the environment that he prefers for his child. Failure to provide the actual data to the Parent serves to deepen the Parent's distrust. Nevertheless, the failure to provide such data did not prevent the Parent a meaningful opportunity to participate in the development of the Student's present levels of behavioral functional performance or the IEP.

The data not provided to the Parent was representative of the same behaviors that the Parent made aware of during the discussions of the September 24, 2019 IEP meeting. Those behaviors were consistent with behaviors described in the Student's October 2016 IEP. Additionally, those behaviors were consistent with the behaviors described by Dr. [REDACTED] in 2015. Since the Student's behavioral issues was information was already known by the Parent or provided to him, the Parent had the ability and the opportunity to participate in the development of the Student's IEP. Additionally, despite not being given the data, the Parent presented no evidence that the Student's IEP as proposed on January 13, 2019, failed to provide the Student with a FAPE. Under these circumstances, I am not persuaded that CCPS's failure to remove language of aggressiveness or to provide the Parent with the data upon which it relied to develop

the proposed January 13, 2010 IEP's present levels of behavioral functional performance deprived him of a meaningful opportunity to participate in the IEP's development.

Lastly, the Parent complains that CCPS prevented him from fully participating in discussing the Student's educational setting, the physical location, that the Student's IEP would be implemented.

Without dispute, CCPS recommended the Student attend the [REDACTED] ES, [REDACTED] program. Also undisputed, CCPS required the Parent to provide consent to the proposed January 13, 2020 IEP if wanted an opportunity to observe the program while students were attending. The Parent declined that request. As a result, the Parent was only permitted to observe the [REDACTED] program without students in attendance. The Student's mother had the opportunity to tour the program but only saw an empty classroom and playground.

During the January 13, 2020 IEP meeting, CCPS explained that due to confidentiality for the students currently attending the program, it could not permit tours of the program to parents without children enrolled in the program. During the IEP meeting, CCPS had [REDACTED], the Director of the [REDACTED] program in attendance. During the meeting, Ms. [REDACTED] explained that nature of the program and the services it offers. She discussed the small class, and the small student to teacher ratio that the program provided. She explained the staff were specially trained to teach children with autism and to assist the student's productively manager behaviors. She explained that the program has reduced distractions throughout the school environment and has sensory rooms to assist a student in satisfying sensory needs. Ms. [REDACTED] further explained that [REDACTED] ES also offers an opportunity for the Student engage with her non-disabled peers during the times the Student's proposed IEP offers her services in the general education setting, including school periods for lunch, recess, and specials.

As discussed earlier, a parent enjoys a procedural right to participate in meetings with respect to the educational placement of the child with a disability. *See* 20 U.S.C.A. § 1415(b). In *R.E.*, the Court discussed a practice by the New York City Department of Education to provide general placement information in the IEP, such as the staffing ratio and related services, and then convey to the parents a final notice of recommendation to identify a specific school at a later date. The parents are then able to visit the placement before deciding whether to accept it. The parents complained that this practice was a procedural violation. The *R.E.* Court explained that:

the term “educational placement” refers only to the general type of educational program in which a child is placed. The requirement that an IEP specify the “location” does not mean that the IEP must specify a specific school site. The Department may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP.

R.E. at 191-192.

In this case, the Parent was told of the specific school setting where the Student’s IEP would be implemented. The Parent was also given information about the school and the available supports and services it can provide to implement the IEP. The Parent was also given an opportunity to tour the [REDACTED] program. I understand the Parent’s desire to see the [REDACTED] program in action to better assess its appropriateness for the Student. However, one end of the legal spectrum held by *R.E.*, a school system can select a specific school with the advice of the parent. On the other end of the spectrum, a school system can provide full access to a recommended school setting to a parent before agreeing to the recommendation. The Parent and CCPS are in between these two points on the spectrum. After considering the Parents were provided information about the [REDACTED] program, and had a limited ability to tour the program, I am not persuaded that CCPS prevented the Parent from a meaningful opportunity be involved in the decision of where the Student’s IEP would be implemented.

(3) Predetermination

The Parent alleges that CCPS predetermined the Student's educational placement at [REDACTED] ES, [REDACTED] program. To establish this allegation, the Parent and the Student's mother testified that since September 10, 2019, the second day of school attendance for the Student, CCPS was pressuring the Parent to remove the Student from her neighborhood school, [REDACTED] ES, a general education environment, and send her to [REDACTED] which is a program for children with autism and is very similar to the [REDACTED] program. He also alleges that CCPS continued to place this pressure on the Parent when CCPS recommended [REDACTED] as an interim diagnostic placement. Additionally, the Parent alleges that CCPS continued to apply this pressure by threatening to file its own Due Process complaint if the Parent did not place the Student at [REDACTED]. Next, the Parent contends that CCPS forced him to accept the Student's educational disability to be autism, so CCPS could then recommend the [REDACTED] program.

A local school system commits a procedural violation when the school system predetermines the educational placement a child with a disability and then develops an IEP to carry out its decision. *See Hanson* at 485-486. If the school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input. *Id.* at 486. The school board is required to come to the table with an "open mind," but is not required to come to the IEP table with a "blank mind." *Id.* Thus, while a school system must not finalize its placement decision before an IEP meeting, it can and should have given some thought to that placement. *Id.*

The Parent and the Student's mother testified that since September 10, 2019, the second day of school attendance for the Student, CCPS was pressuring the Parent to remove the Student from her neighborhood school, [REDACTED] ES, a general education environment, and to send her to [REDACTED], which is a program for children with autism and is very similar to the [REDACTED] program.

He also alleges that CCPS continued to place this pressure on the Parent when CCPS recommended [REDACTED] as an interim diagnostic placement. Additionally, the Parent alleges that CCPS continued to apply this pressure by threatening to file its own Due Process complaint, if the Parent did not place the Student at [REDACTED]. Next, the Parent contends that CCPS forced him to accept the Student's educational disability to be autism, so CCPS could then recommend the [REDACTED] program, which is a program for students with autism.

A local school system commits a procedural violation when the school system predetermines the educational placement a child with a disability and then develops an IEP to carry out its decision. *See Hanson*, 212 F. Supp. 2nd at 485-486. If the school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input. *Id.* at 486. The school board is required to come to the table with an "open mind," but is not required to come to the IEP table with a "blank mind." *Id.* Thus, while a school system must not finalize its placement decision before an IEP meeting, it can and should have given some thought to that placement. *Id.*

The Parent testified that CCPS has predetermined the Student's educational placement, [REDACTED] ES, [REDACTED] program, where the Student's IEP would be implemented. He supports this position with the pressure CCPS placed on him by requesting that the Student attend [REDACTED] since the Student's second day of school on September 10, 2019 and by requesting that [REDACTED] be the student's interim diagnostic placement during the IEP assessments. In essence, the Parent contends that [REDACTED] was a pretext to placing the Student in the [REDACTED] program.

CCPS provided the testimony of [REDACTED], the Director of Special Education Services to explain the reasons for CCPS requesting the Parent permit the Student to attend [REDACTED]. She testified that [REDACTED] was the Student's last educational placement according to the October 2016 IEP. *See* CCPS Ex. 2. Further, Ms [REDACTED] explained that Student's behavior in

school created a safety issue not only for the Student but for others at [REDACTED] ES and prevented the Student from accessing the educational curriculum. She further explained that [REDACTED] ES is a general education program and without teachers specially trained to respond properly to the Student's behaviors which could subject the Student to discipline issues. She also explained that she did not want the Student to elope from the school or place objects in her mouth. For all these reasons, CCPS was recommending [REDACTED] as the interim diagnostic placement during the assessment process and during an IEP meeting the appropriate placement for the Student could be discussed.

Ms. [REDACTED], the Student's homeroom teacher also testified about the Student's behaviors. She explained that the Student had issues with transition points during the school day and would drop to the ground instead of getting into line. The Student would yell out loud many times per day, one day thirty-eight times, which often interrupted the instruction for class and the Student. The Student would often refuse to do work. On October 1, 2020, Ms [REDACTED] explained that the Student refused to work thirty-eight times. She also explained these behaviors occurred even though the Student had a dedicated one-to-one adult aid to providing direct support for the Student throughout the school day and environment.

Even though the Parent considered CCPS' request to place the Student at [REDACTED] as pressure to get his agreement to that placement, even as diagnostic placement, which was a pretext to recommending the [REDACTED] program, I am not persuaded by his argument. I find credible and reasonable that the CCPS was recognizing that the Student had a prior IEP in 2016 which placed the Student at [REDACTED], which at the time offered her the best opportunity to access the educational curriculum. I am also persuaded that in 2019, the Student continued to demonstrate behaviors which interfered her ability to access the curriculum and that offering [REDACTED] as a interim diagnostic bases was appropriate.

The Parent declined to accept [REDACTED] as an interim diagnostic placement for the Student. In response, CCPS, through Ms. [REDACTED] informed the Parent that it would file its own due process complaint if the Parent continued to refuse to accept [REDACTED] as the interim educational placement. Ultimately, CCPS never filed a complaint. The Parent argues this is another tactic demonstrating CCPS predetermined the Student's educational placement either at [REDACTED] or at [REDACTED], [REDACTED] program. Again, I disagree. The IDEA provides that any part, including CPCS, may present a "complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C.A § 1415(b)(6)(A). Arguably, Ms. [REDACTED] was considering this option. Nevertheless, ultimately CCPS did not file a complaint. I find no credible evidence that CCPS' action to exercise its right under the IDEA was an act of predetermination of the Student's recommended placement in the [REDACTED] program.

Next, the Parent testified that CCPS determined that the Student's primary educational disability of autism was another act of predetermination so CCPS could place the Student in the [REDACTED] program, which is for children with autism. CCPS provided testimony from Ms. [REDACTED] to explain the process of determining the Student's eligibility for special education services. She testified that on December 18, 2019, the IEP team, including the Parent and the Student's mother reviewed all the available data developed through the Student's assessments. One of those assessments was a psychological assessment conducted by [REDACTED], a School Psychologist. *See* CCPS Ex. 32 (0146-0170). The assessment considered the Student's prior medical diagnosis of Autism-Mild by Dr. [REDACTED]. The assessment also involved several standardized tests which were performed by the Student including: the Differential Ability Scales, 2nd Edition; Stanford-Binet Intelligence Scales, 5th Edition; Adaptive Behavior Assessment System, 3rd Edition; Autism Spectrum Rating Scales, Social Responsiveness Scale,

2nd Edition; and the Autism Diagnostic Observation Schedule, 2nd Edition. After these assessments, Ms. [REDACTED] concluded that the Student demonstrated many characteristics typically associated with Autism.

Ms. [REDACTED] also explained that the IEP completed a criteria checklist for autism which aligns with the IDEA criteria for autism to determine the Student's educational disability. *See* CCPS Ex. 36. The Autism checklist determined the following:

The Student has documentation of delays with onset generally prior to age three in at least social interaction and language used for social communication. Documentation for this information is from the Student's educational history and 2014 evaluation.

The Student has an impairment in social interaction with a marked impairment in the use of non-verbal behavior (e.g. eyes gaze, facial expressions, body postures, gestures, etc.), failure to develop peer relationships appropriate for her developmental level (e.g., giving items, pointing, showing), and lack of social and emotional reciprocity. Documentation for this information is from data collected during Student's 2019 psychological assessment and historical information from her educational file.

The Student has an impairment communication with a marked impairment in the ability to initiate and sustain conversation with others and a lack of varied, spontaneous make-believe play or social imitative play appropriate for her developmental level. Documentation for this information is from the Student's 2019 psychological assessment and speech and language assessment.

The Student has an impairment in behavior/restricted repertoire of activities and interest in or focus on unusual responses to environmental change. Documentation for this information is from the Student's 2019 psychological assessment and occupational assessment.

Id.

Based on all this information CCPS determined that the Student's primary educational disability was autism. I find that CCPS reasonably relied upon the Student's prior medical diagnosis, and its current assessments, which employed a series of standardized tests, to objectively and without a prior motive determine the Student's educational disability. At this point in the Student's IEP development, the School had yet to even discuss the Student's

placement options. The Parent's unsupported suppositions does not persuade me that CCPS used the eligibility process to predetermine her educational setting at the [REDACTED] program.

Finally, during the hearing each school witness testified that at no time was there a discussion to conduct tests or make recommendations to remove the Student from [REDACTED] ES and to place the Student at [REDACTED] or the [REDACTED] program. Each school witness described her role during the IEP development process and the way the IEP was developed. The testimony and documentary evidence demonstrated that the IEP was developed in several stages first by determining the appropriate assessments and conducting those assessments. Next, the IEP discussed the Student's eligibility for special education. Then, the IEP team developed the Student's present levels of performance, program modifications and supports, goals and objectives, and the amount of services and related services the Student would receive. Each school witness explained that at no time during the development of these parts of the IEP was there a discussion of the [REDACTED] program. However, I believe it would be naive to believe that based on all the available information considered by the school-based IEP team before the Student's educational setting was discussed, also referred to as the LRE, that the school-based IEP team had not considered or opined that the Student would need an educational setting like the [REDACTED] program. Nevertheless, as discussed earlier, a school system is required to come to the table with an "open mind," but is not required to come to the IEP table with a "blank mind." *Hanson* at 486. Thus, while a school system must not finalize its placement decision before an IEP meeting, it can and should have given some thought to that placement. *Id.*

Again, I understand the Parent's concern about the manner the in which the Student's educational placement was discussed. It was at the end of a meeting and there was an apparent time pressure due to another scheduled meeting. The IEP team discussed three options for the location where the Student's IEP would be implemented. The IEP team agreed that the IEP

could not be implemented in the general education environment without support. The Parent requested the next option of [REDACTED] ES, a general education program, with supports. CCPS recommended [REDACTED] ES, [REDACTED] program. Although, the discussion on these last two options appears to have been minimal and in the end there was a disagreement on the location. However, there is simply no credible evidence to indicate that CCPS came to the January 13, 2020 IEP meeting with a predetermined mind that the [REDACTED] program was going to be the Student's educational placement. For this reason, I find that the Parent has not established a procedural violation based on predetermination.

(4) Delay in sending the proposed January 13, 2020 IEP

The Parent asserts that the Student's proposed January 13, 2020 IEP was not received by the Parent until January 27, 2020. He complains that CCPS was required to provide to the Parent the proposed IEP developed on January 13, 2020 not more than five days after the January 13, 2020 IEP meeting. To the extent that delivery of the proposed IEP not more than five days after the IEP meeting is a procedural protection for the Parent, it is a Maryland created procedural protection. Under Maryland statutory and regulatory law, "not later than five business days after a scheduled meeting of the [IEP] team or other multidisciplinary team for a child with a disability, appropriate school personnel shall provide the parents of the child with a copy of the completed individualized education program. Md. Code Ann., Educ. § 8-405(e)(1), COMAR 13A.05.01.07D(3)(b).

But the Parent does not explain how the CCPS's failure to provide him with the proposed IEP within five days of January 13, 2020 prevented his ability to participate in the development of that IEP nor does he explain how it prevented the Student from receiving a FAPE. In fact, under Maryland law, the "failure to comply with [section 8-405] does not constitute a substantive

violation of the requirement to provide a student with a [FAPE].” Md. Code Ann., Educ. § 8-405(h). For this reason, the Parent’s complaint on this issue must fail.

LRE

To meet the substantive requirements of the IDEA, a school must provide a child with a FAPE. *R.F. v. Cecil County Pub. Schools*, 919 F.3d 237 (2019) (citing *M.L. ex rel. Leiman v. Smith*, 867 F.3d 487, 499 (4th Cir. 2017)). The Supreme Court recently held in *Endrew F.* that to satisfy the FAPE requirement, “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.

This standard is framed in terms of each child’s unique circumstances because “[a] focus on the particular child is at the core of the IDEA.” *Id.* Consequently, “the benefits obtainable by children at one end of the spectrum [of disability] will differ dramatically from those obtainable by children at the other end, with infinite variations in between.” *Id.* (quoting *Rowley*, 458 U.S. at 202, 102 S.Ct. 3034).

In *DeVries v. Fairfax County School Board*, 882 F.2d 876 (4th Cir.1989), the Court held that mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or, (3) the disabled child is a disruptive force in a regular classroom setting. *Id.* at 879.

The Parent testified and argues that the Student’s IEP should be implemented in the general education setting, at ██████ ES, with the January 13, 2020 IEP. The reason he wants this educational setting is because it will provide the Student with opportunities to be with non-disabled peers. He contends that she will be able to make educational progress because the Student’s has strengths in certain areas, like math. He also points out that during

assessments, the Student was able to be redirected and complete work, without significant interfering behaviors. The Parent also believes the Student has an acceptable level of independence, which the Occupational Therapy assessment indicated the Student demonstrated when using the bathroom.

CCPS contends that the LRE for the Student is ██████ ES, through the ██████ program. To support this position, Ms. ██████, the Director of Special Education, testified that the Student was not successfully accessing the educational curriculum at ██████ ES, even with a one-to-one aide providing direct adult support throughout the school day. She explained that the Student was only able to access the curriculum fifty percent of the time and during those times, the Student's work was incomplete. Ms. ██████ opined that the Student requires small group, small class instruction, with a small teacher to student ratio, including direct adult support, offered by staff who are specifically trained to educate and respond to the specific needs of the Student and her diagnosis of Autism. Ms. ██████ added that ██████ ES does not offer this type of program and CCPS will not be able to provide the Student with a FAPE at ██████ ES.

Ms. ██████, the Student's homeroom teacher at ██████ ES testified that the Student's interfering behaviors prevent her from accessing the curriculum and began on the first day of school attendance. She explained that the Student would yell out loudly, drop to the ground during transitions, and refuse to do work. She added that at ██████ ES, the Student was on task for no more than three minutes before requiring a break and getting back to work, but that the Student would then begin to refuse to do work. Ms. ██████ also opined that the Student needs small class instructions with adult support provided by instructors who are trained in Autism.

Ms. ██████ a School Psychologist, testified the Student experiences distractibility with a very short attention span. She explained that she is familiar with the ██████ program, which

offers a highly structured setting to encourage routine and focus. The [REDACTED] program is a visually oriented program which also helps a person like the Student to stay on task. At the same time, Ms. [REDACTED] explained the [REDACTED] program is designed to minimize distractions throughout the educational setting which would also benefit the Student. Ms. [REDACTED] added that the [REDACTED] program provides staff who are specifically trained to de-escalate the Student's behaviors which will ensure the Student's safety.

[REDACTED], the Coordinator of Autism Services, testified that the [REDACTED] program offers the Student the ability to improve her social skills through contrived communications opportunities, geared toward improving social independence. The [REDACTED] program will provide the Student access to the educational curriculum with a focus on grade level gaps to address deficit areas, identified in the Student's IEP, through a multi-level system of constant reinforcement, like the use of a token economy. Ms. [REDACTED] opined that the Student's IEP can be implemented to provide her a FAPE through the [REDACTED] program because the program is designed to address the intensity of the Student's needs. She also opined that the Student's IEP cannot be implemented at [REDACTED] ES because that general education setting does not provide staff who are trained to address the Student's needs nor does it offer the amount of services and supports that the Student requires in order to achieve a FAPE.

I find that the overwhelming evidence supports a finding that the [REDACTED] program offered at [REDACTED] ES is the LRE for the Student. I found the Parent's testimony to be unpersuasive. The Parent focused on small aspects of the Student's abilities or strengths in an isolated academic area, like math, or independence in using a bathroom, and overlooks the complexity of the Student's academic and behavioral issues. I am more persuaded that the marginal benefit the Student would have by attending [REDACTED] ES would be far outweighed by the Student's inability to gain any educational benefit in that program. I also found that the opinions offered by the CCPS

expert testimony persuasive and supports a finding that the [REDACTED] program is the LRE for the Student.

The credible evidence indicated that the Student presents with host of interfering behaviors which prevented her from accessing the educational curriculum. The Student's proposed January 13, 2020 IEP describes her present levels of behavioral performance. *See* Findings of Fact No. 63. Other evidence in the record corroborated the Student's behavioral performance. On October 11, 2019, the Student's one-to-one aide, Ms. [REDACTED], reported that the Student was having a difficult morning. CCPS Ex. 20. Ms. [REDACTED] further explained that the Student did not want to stay in class, did not want to comply with directions, was jumping over a couch to lay down, and was yelling out loud. *Id.* Ultimately, based on the Student's behavior later that day, the Student was suspended from school. I found Ms. [REDACTED]'s description of the Student's behavior important because it represents a snap-shot of the Student's daily struggle to attend the academic curriculum at [REDACTED] ES.

The Student's behavioral functional performance and the required supports to manage those behaviors were also reflected in the Student's assessments. Importantly, these assessments were conducted in a very small setting, the assessor, the Student, and at times the Student's one-to-one aide. The assessments were also provided in an environment with reduced distractions for the Student.

On November 6, 2019, [REDACTED], an Occupational Therapist, issued an Occupational Therapy Assessment. CCPS Ex. 31. Ms. [REDACTED] reported that factors influencing the assessment results included the Student attending assessment in an environment with minimized distractions, the attendance of the Student's one-to-one aide, provision of multiple breaks to play with Playdoh, and required verbal prompts to remain focused. *Id.*

On December 6, 2019, [REDACTED], Speech Language Pathologist, issued a Speech Language Report. CCPS Ex. 30. She explained that factors which influenced the assessment included provision of breaks every fifteen minutes, use of token reinforcement system and visual schedule, some distractibility but the Student was redirectable when given verbal reminders and a reward to complete task. *Id.*

On December 11, 2019, [REDACTED], Special Education Specialist, issued an Educational Report. CCPS Ex. 33. Ms. [REDACTED] reported that the assessment was influenced by the Student's: use of a token economy and a work choice system to encourage the Student to complete short tasks, during the first session the Student displayed some attention difficulties but was easily redirected, in the second session the Student exhibited more behaviors such as throwing objects or tearing down a curtain. *Id.*

In conclusion, the Parent was unable to demonstrate either by the testimony he presented or through any expert testimony, that the Student's IEP could be implemented at [REDACTED] ES. By contrast, I am persuaded by the evidence presented by CCPS that any marginal benefit the Student may receive from being in the general education setting at [REDACTED] ES is significantly outweighed by the benefits she would receive in the special education setting at [REDACTED] ES, [REDACTED] program. For this reason, I find that the [REDACTED] program is the Student's LRE.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that CCPS did not violate the IDEA when the Student was suspended from school for behavioral issues in October 2019. 34 C.F.R. § 300.530, *See also* Md. Code Ann. § 8-405, COMAR 13A.08.03.10.

I further conclude that CCPS did not violate any of the Parent's procedural due process protections related to the development of the Student's proposed January 13, 2020 IEP. 20 U.S.C.A. § 1415, *R.F v. Cecil Cty. Public Sch.*, 919 F. 3d 237 (2019), *R.E. v. New York Dep't of Ed.*, 694 F.3d 167 (2nd Cir. 2012), *Hanson v. Bd. of Educ., Anne Arundel Cty.*, 212 F. Supp. 2d 474 (2002), *see also* Md. Code Ann. § 8-405, COMAR 13A.05.01.07.

I further conclude that the proposed educational placement at [REDACTED] ES, [REDACTED] program is the Least Restrictive Environment for the Student. 20 U.S.C.A. § 1412, *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir.1989), *see also* COMAR 13A.05.01.10.

ORDER

I ORDER that the Due Process Complaint filed by the Parent on February 6, 2020 is **DENIED.**

July 29, 2020
Date Decision Mailed

Daniel Andrews
Administrative Law Judge

DA/kdp
#186257

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) (2018). 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.

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

██████████,

STUDENT

v.

CHARLES COUNTY

PUBLIC SCHOOLS

BEFORE DANIEL ANDREWS,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-CHAS-OT-20-04755

ADDENDUM

Exhibits¹⁶

The Parent presented fifteen proposed exhibits. During the hearing, I admitted into evidence the following exhibits:

- Student 1 IEP, February 9, 2015 (0008-0030)
- Student 2 Prior Written Notice related to IEP Meeting, August 22, 2016 (0031-0032)
- Student 3 Logs of related services (Speech/Occupational Therapy, August 2015 through June 2016 (0033-0042) (Not Admitted)¹⁷
- Student 4 Developmental Neuropsychological Evaluation, ██████████, June 5, 2015 (0043-0046)
- Student 5 Parent letter to CCPS to appeal Student Suspension, October 11, 2019 with attachments (0047-0061)
- Student 6 CCPS Educational Assessment Report, December 11, 2019, with attached Woodcock Johnson IV Score Report, October 25, 2019 (0062-0069) (Not Offered)
- Student 7 CCPS Psychological Assessment, December 9, 2019 (0070-0095) (Not Offered)
- Student 8 CCPS Occupational Therapy Assessment, November 6, 2019 (0096-0113) (Not Offered)
- Student 9 CCPS Receptive, Expressive, Pragmatic Language Assessment, December 6, 2019 (0112-0114) (Not Offered)

¹⁶ Parenthetical references for each exhibit are to Bates stamp page numbers.

¹⁷ The Parent offered this exhibit into evidence. I sustained an objection raised by CCPS and did not admit the exhibit because the information it contained was not relevant to any issue presented in this case.

- Student 10 Email to Parent from [REDACTED], January 23 and 25, 2020 (0112)
- Student 11 Email to CCPS ([REDACTED]) from Parent, NO DATE (0115-0116)
- Student 12 Emails between CCPS (Superintendent) and Chas Co. Board of Ed from Parent, February 6, 2020, January 15, 2020 and Letter from [REDACTED] (Girl Scout Troop Leader), undated (0117-0120)
- Student 13 Prior Written Notice (partial printout), January 27, 2020, IEP Draft, January 13, 2020 (0121-0122) (Not Offered)
- Student 14 Parent handwritten rejection of IEP, February 8, 2020 (0123-0157) (Not Offered)
- Student 15 Audio compact disk of IEP meetings held on November 25, 2019 and January 13, 2020 (no bate stamp) (Not Offered/Admitted)¹⁸

CCPS presented fifty-four proposed exhibits with an Index (0001-0004). Unless otherwise noted, I admitted into evidence the following exhibits:

- CCPS 1 Developmental Neuropsychological Evaluation, [REDACTED], Psy.D, [REDACTED], June 5, 2015 (0005-0007)
- CCPS 2 IEP, October 13, 2016 (0002-0059)
- CCPS 3 Request for Withdraw from School, December 21, 2016 (0060-0061)
- CCPS 4 Notice of IEP Meeting, September 16, 2019 (0062-0064)
- CCPS 5 Receipt of Parental Rights Document, September 17, 2019 (0065-0066)
- CCPS 6 Notice and Consent to Assessment, September 24, 2019 (0067-0068)
- CCPS 7 IEP Meeting Attendance Sheet, September 24, 2019 (0069-0071)
- CCPS 8 Prior Written Notice, September 27, 2019 (0072-0076)
- CCPS 9 CCPS letter to Parents, September 27, 2019 (0077-0079)
- CCPS 10 Disciplinary Action Form, October 7, 2019 (0080-0081)

¹⁸ The Parent failed to offer this exhibit into evidence. After several references by the Parent that certain things he testified about or that CCPS witness testified about and that he disagreed with, the Parent would state that I should check the "recording." Ultimately, even if the exhibit were offered into evidence, I would have declined to admit the exhibit because the exhibit contained several hours of IEP meeting discussions much of which would have be irrelevant or duplicitous of the written record. Other parts of this exhibit may have established the points the Parent sought to establish but many of those points were already presented by the testimony or other exhibits already admitted into evidence. For all these reasons, I declined to admit this exhibit into evidence.

- CCPS 11 Notice of Out-of-School Suspension, October 7, 2019 (0082-0084)
- CCPS 12 Statement of [REDACTED], October 7, 2019 (0085-0086)
- CCPS 13 Statement of [REDACTED] October 7, 2019 (0087-0088)
- CCPS 14 Statement of [REDACTED], October 7, 2019 (0089-0090)
- CCPS 15 Disciplinary Action Form, October 11, 2019 (0091-0093)
- CCPS 16 Notice of Out-of-School Suspension, October 11, 2019 (0094-0096)
- CCPS 17 Letter from Parent, October 11, 2019 (0097-0099) (Not Offered)
- CCPS 18 Statement of [REDACTED], October 11, 2019 (0100-0101)
- CCPS 19 Statement of [REDACTED], October 11, 2019 (0102-0104)
- CCPS 20 Statement of [REDACTED], October 14, 2019 (0105-0106)
- CCPS 21 Statement of [REDACTED] October 11, 2019 (0107-0108)
- CCPS 22 Statement of [REDACTED] October 14 (0109-0110) (Not Offered)
- CCPS 23 Statement of [REDACTED], October 11, 2019 (0111-0113)
- CCPS 24 Email between Parent and [REDACTED] Superintendent, CCPS, October 18, 2019 (0114-0118) (Not Offered)
- CCPS 25 Notice of Documents to be Reviewed at IEP Meeting, October 21, 2019 (0118-01190) (Not Offered)
- CCPS 26 Letter from [REDACTED], Executive Director, CCPS to Parent regarding Suspension Appeal, October 24, 2019 (0120-0122) (Not Offered)
- CCPS 27 Notice of Documents to be Reviewed at IEP Meeting, November 11, 2019 (0123-0142) (Not Offered)
- CCPS 28 Notice of IEP Meeting, November 25, 2019 (0125-0127) (Not Offered)
- CCPS 29 Notice of Documents to be Reviewed at IEP Meeting, December 6, 2019 (0128-0129) (Not Offered)
- CCPS 30 Speech Language Assessment by [REDACTED], December 6, 2019 (01130-0136)
- CCPS 31 Occupational Therapy Assessment by [REDACTED], November 6, 2019 (0137-0144)

- CCPS 32 Psychological Assessment by [REDACTED] (0145-0170), December 9, 2019
 CCPS 33 Educational Assessment by [REDACTED] December 11, 2019 (0171-0181)
- CCPS 34 [REDACTED], [REDACTED] Medical Center,
 Speech Language Evaluation, June 5, 2019 (0182-0189) (Not Offered)
- CCPS 35 Other Health Impairment Eligibility Check List, December 18, 2019 (0190-0191)
- CCPS 36 Autism Eligibility Checklist, December 18, 2019 (0192-0194)
- CCPS 37 FBA, December 13, 2019 (0195-0196)
- CCPS 38 Notice of IEP Meeting, December 18, 2019(0197-0199) (Not Offered)
- CCPS 39 Receipt of Parental Rights Document, December 18, 2019 (0200-0201)
- CCPS 40 IEP Meeting Attendance Sheet, December 18, 2019 (0202-0204)
- CCPS 41 Prior Written Notice, December 19, 2019 (0205-0209)
- CCPS 42 IEP, January 13, 2020 (0210-0246)
- CCPS 43 Prior Written Notice, January 13, 2020 (0247-0250)
- CCPS 44 Receipt of Parental Rights Document, January 13, 2020 (0251-0252)
- CCPS 45 IEP Meeting Attendance Sheet, January 13, 2020 (0253-0254)
- CCPS 46 Request for Mediation and Due Process Hearing, February 19, 2020 (0255-0269)
 (Not Offered)
- CCPS 47 Response to Complaint, March 2, 2020 (0270-0276) (Not Offered)
- CCPS 48 Daily Attendance Profile, February 21, 2020 (0277-0285)
- CCPS 49 Observation reports and behavior data of Student including handwritten logs of
 behaviors, beginning September 9 through October 11, 2019 (0286-0356)
- CCPS 50 CV-[REDACTED] (0359-0363)
- CCPS 51 CV-[REDACTED] (0364-0366)
- CCPS 52 CV-[REDACTED] (0367-0370)
- CCPS 53 CV-[REDACTED] (0371-0372)

CCPS 54 CV [REDACTED] (0373-0375)

CCPS 55 Email between [REDACTED] and [REDACTED], September 24 and 26, 2019
(without a Bate stamped page numbers)