

<b>XXXX XXXX, STUDENT</b>	<b>* BEFORE ROBERT F. BARRY,</b>
<b>AND</b>	<b>* AN ADMINISTRATIVE LAW JUDGE</b>
<b>XXXX XXXX AND XXXX XXXX,</b>	<b>* OF THE MARYLAND OFFICE</b>
<b>PARENTS</b>	<b>* OF ADMINISTRATIVE HEARINGS</b>
<b>v.</b>	<b>* OAH No.: MSDE-MONT-OT-16-29848</b>
<b>MONTGOMERY COUNTY</b>	<b>*</b>
<b>PUBLIC SCHOOLS</b>	<b>*</b>
<b>* * * * *</b>	<b>* * * * *</b>

**DECISION**

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

**STATEMENT OF THE CASE**

On September 28, 2016, XXXX XXXX, M.D., Ph.D., and XXXX XXXX, M.D., (Parents), filed a due process complaint with the Office of Administrative Hearings (OAH) on behalf of their son, XXXX XXXX (Student), and themselves, requesting a hearing to review the identification, evaluation, or placement of the Student by the Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). On October 5, 2016, the OAH received notice that the Parents had waived a resolution session, although the Parents did not sign a waiver form until a prehearing conference on October 17, 2016.

On October 17, 2016, I conducted a prehearing conference with the Parents and Zvi Greismann, Associate General Counsel, on behalf of the MCPS. I scheduled a hearing for November 20, 21, and 28, 2016. The parties were aware of the time requirements for issuing a

decision and that forty-five days from October 5, 2016, the date that the parties notified the OAH of the outcome of the resolution session, was November 18, 2016, a date that would pass before the hearing began. (The actual forty-fifth day was Saturday, November 19, 2016, but pursuant to Maryland State Department of Education (MSDE) policy, the due date is the last school day before the actual forty-fifth day when that date is a weekend or school holiday.) The parties expressly agreed to a decision due date beyond the forty-five day timeframe. *See* 34 C.F.R. §§ 300.510(b) and (c), 300.515(a) and (c) (2016); Md. Code Ann., Educ. § 8-413(h) (Supp. 2016); Code of Maryland Regulations (COMAR) 13A.05.01.15C(11)-(14).

On November 21, 2016, the first day of hearing, I granted the MCPS's request to postpone the hearing date of November 28, 2016 due to Mr. Greismann's medical issue.

On November 28, 2016, I conducted a telephone conference with the Parents and Mr. Greismann and scheduled additional days of hearing on December 5, 6, and 14, 2016. The parties agreed that my written decision would be due within thirty days of the completion of the hearing (no later than January 13, 2017).

I held a hearing on November 21 and 22, 2016 and December 5, 6, and 14, 2016, at the MCPS, 850 Hungerford Road, Rockville, Maryland. The Parents represented the Student and themselves. Mr. Greismann represented the MCPS. During the prehearing conference and the five days of hearing, but not during the telephone conference, a XXXX-language interpreter assisted the Student's mother.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2016); Md. Code Ann., Educ. § 8-413 (Supp. 2016); and COMAR 13A.05.01.15C.

The contested case provisions of the Administrative Procedure Act; MSDE procedural regulations; and the Rules of Procedure of the OAH, govern procedure. Md. Code Ann., State

Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES**

The issues as presented in the due process complaint are:

(1) whether the Central Individualized Education Plan (CIEP) team's determination that the Student's educational placement should be at [School 1] ([School 1]), a separate public special education day school, rather than in a Learning For Independence (LFI) program within a comprehensive public school, violated the Student's right to a free, appropriate, public education (FAPE) in the least restrictive environment (LRE);

(2) whether the educational placement at [School 1] would prevent the Student from receiving appropriate vocational training;

(3) whether the Individualized Education Program (IEP) team at [School 2] ([School 2]) made up evidence to support its recommendation to change the Student's educational placement to [School 1]; and

(4) whether the IEP team at [School 2] significantly impeded the Parents' opportunity to participate in the IEP decision-making process by: (a) refusing to consider the Parents' reasonable suggestions; (b) not providing the Parents copies of IEP documents after meetings; and (c) not obtaining the Parents' consent before conducting functional behavioral assessments (FBAs).

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

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

#1 - IEP, March 24, 2014

#2 - IEP, June 2, 2014

- #3 - IEP, August 26, 2014
- #4 - Functional Behavioral Assessment (FBA) and Behavioral Intervention Plan (BIP), June 5, 2014
- #5 - (not admitted )
- #6 - United States Department of Education, IDEA 2004: FBA – Fact Sheet
- #7 - E-mails from the Parents to [School 2]: September 5, 2014 and August 31, 2015, with a letter from XXXX XXXX, D.O., XXXX, Center for Autism Spectrum Disorders, Children’s National Medical Center
- #8 - Central IEP (CIEP), November 17, 2014
- #9 - IEP, June 12, 2015
- #10 - IEP, November 10, 2015 and December 8, 2015
- #11 - Notes of Behaviors, September 16, 2015 to October 23, 2015
- #12 - Curriculum Vitae, the Student’s father
- #13 - (not admitted)
- #14 - Dictionary definition of elopement; ABC Data Sheet, November 16, 2015; Behavioral Data Collection, April 29, 2016
- #15 - Email from [School 2] to the Parents, September 1, 2015; Behaviors Chart, June 2, 2015
- #16 - FBA and BIP, May 14, 2015 and December 8, 2015
- #17 - Secondary Teacher Reports: English and Math, March and June 2015, with work samples
- #18 - Secondary Teacher Reports: English, Math, and Life Skills, November 2015, January and April 2016
- #19 - Secondary Teacher Report: Adapted Physical Education, November 2015
- #20 - Report of a Student Incident, XXXX XXXX, September 5, 2014
- #21 - (not admitted)
- #22 - Student Assignment Scores, November and December 2015
- #23 - Alternate Maryland School Assessment, December 11, 2015

- #24 - Report, XXXX XXXX, Instructional Specialist, Services for Students with Autism Spectrum Disorders, March 13, 2015; Report, XXXX XXXX, Program Specialist, Extensions Program, May 19, 2015
- #25 - IEP, April 22, 2016
- #26 - CIEP, May 25, 2016
- #27 - Goals, IEP, June 12, 2015, with Progress Notes
- #28 - Goals, IEP, April 22, 2016, with Progress Notes
- #29 - Work Samples, September 2015 to January 2016
- #30 - Work Sample, March 15, 2016
- #31 - Work Sample – XXXX, November 2015 to February 2016
- #32 - Work Samples, December 2014 to January 2016
- #33 - [School 1] Course Offerings - 2012-2013
- #34 - Demographic Information: [School 2] and [School 3]
- #35 - (not admitted)
- #36 - E-mails between the MCPS and the Parents, October 2014
- #37 - E-mails between the MCPS and the Parents, May 2015
- #38 - Authorization for Assessment (blank form)
- #39 - IEP, March 20, 2015
- #40 - The Student's Weekly School Schedules at [School 2]
- #41 - Jobsite Reflection Sheet, September 16, 2015; Behaviors of Concern: September 21, 22, and 24, 2015
- #42 - 2015-2016 Monthly Jobsite Evaluation, September to December 2015
- #43 - 2015-2016 Monthly Jobsite Evaluation, January and April 2016
- #44 - (not admitted)
- #45 - IEP Goals, June 12, 2015, with Progress Notes

- #46 - Reports to Parents on Student Progress, June 23, 2016 and November 9, 2016
- #47 - Statement from XXXX XXXX
- #48 - Memorandum, Office of the Superintendent of Schools, MCPS, May 12, 2015
- #49 - Story Map - Teacher's Example (XXXX)
- #50 - Reports to Parents on Student Progress, June 14, 2012, June 20, 2013, and June 24, 2014; Alt-MSA Assessment 2014; IEP Goals, March 24, 2014
- #51 - Information on CIEP Team, MCPS
- #52 - "Determining Placement; Referrals for More Intensive Services; Home and Hospital Teaching," Special Education Procedures, MCPS
- #53 - "Anxiety Disorders: Obsessive-Compulsive Disorder," Psychiatry, Third Edition (2008)
- #54 - "Obsessive-compulsive disorder in children and adolescents," Symposium: Psychiatry, Pediatrics and Child Health 26:12 (2016)
- #55 - Behavioral Data Collection, April to June 2016
- #56 - (not admitted)
- #57 - IEP Goals, March 20, 2015, with Progress Notes
- #58 - Work Sample, undated

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

- MCPS #1 - Behavior Charts and Graphs, January 21, 2015 - March 11, 2015; Communication Log, October 1, 2014 - February 27, 2015
- MCPS #2 - Secondary Teacher Reports: Community/On the Job Training; English and Math; and Adaptive Physical Education, March 11, 2015
- MCPS #3 - Work Samples, April 1, 2015
- MCPS #4 - Work Samples, May 6 and 12, 2015 and undated
- MCPS #5 - IEP, June 12, 2015
- MCPS #6 - Daily Teacher Reporting on Behavior, September 16, 2015 - October 23, 2015

- MCPS #7 - Data Collection for Behaviors of Concern, September 22, 2015 - November 3, 2015; Daily Teacher Reporting on Behavior, September 16, 2015 - October 23, 2015
- MCPS #8 - Behavior Chart and Reporting, October 19, 2015 - October 28, 2015
- MCPS #9 - Jobsite Reflection Sheets, October 28 and 29, 2015 and November 3, 2015
- MCPS #10 - ABC Data Sheets, November 16, 17, and 18, 2015
- MCPS #11 - ABC Data Sheets, November 19, 20, 23, 24, 25, and 30, 2015 and December 1 and 2, 2015
- MCPS #12 - ABC Data Sheet, December 3 and 4, 2015; Data Collection for Behaviors of Concern, September 22, 2015 - November 3, 2015
- MCPS #13 - Jobsite Reflection Sheets, February 3, 17, and 24, 2016 and March 2 and 9, 2016;  
ABC Data Sheets, February 4, 5, 8-12, 17-19, 23-26, and 29, 2016 and March 1-4, 7-11, and 14, 2016
- MCPS #14 - ABC Data Sheets, March 15-18, 21-23 and April 4-8 and 11, 2016; Jobsite Reflection Sheets, March 16, 2016 and April 6, 2016
- MCPS #15 - Secondary Teacher Reports for Quarterly Progress: Life Skills Leisure; On the Job Training; and English, Math, and Life Skills
- MCPS #16 - Maryland Guidance to IEP Teams on Participation Decisions for the Alternative Assessments
- MCPS #17 - IEP, May 20, 2016
- MCPS #18 - IEP, May 25, 2016
- MCPS #19 - [School 1] Brochure Notice of IEP Team Meeting, October 31, 2013
- MCPS #20 - Résumé of XXXX XXXX
- MCPS #21 - Résumé of XXXX XXXX
- MCPS #22 - Résumé of XXXX XXXX
- MCPS #23 - Résumé of XXXX XXXX
- MCPS #24 - Résumé of XXXX XXXX
- MCPS #25 - Résumé of XXXX XXXX

MCPS #26 - Résumé of XXXX XXXX

MCPS #27 - Résumé of XXXX XXXX

### Testimony<sup>1</sup>

The Parents and the MCPS each presented testimony on direct from the following seven witnesses:

1. XXXX XXXX, Resource Teacher for Special Education (RTSE), [School 2], who was qualified (on direct examination by the MCPS) as an expert witness in special education;
2. XXXX XXXX, RTSE, [School 2], who was qualified (on direct examination by the MCPS) as an expert witness in physical education, with an emphasis on adaptive physical education for children with disabilities;
3. XXXX XXXX, Transition Support Teacher, [School 2], who was qualified (on direct examination by the MCPS) as an expert witness in special education, with emphases on students with cognitive disabilities and transition services;
4. XXXX XXXX, Special Education Teacher, [School 2], who was qualified (on direct examination by the MCPS) as an expert witness in special education;
5. XXXX XXXX, Special Education Teacher and Case Manager, [School 2], who was qualified (on direct examination by the MCPS) as an expert witness in special education;
6. XXXX XXXX, Assistant Principal, [School 2], who was qualified (on direct examination by the MCPS) as an expert in administration of public schools, with an emphasis on the administration of special education;
7. XXXX XXXX, Principal, [School 1], who was qualified (on direct examination by the MCPS) as an expert witness in special education, with an emphasis on serving special education students in upper grades (through age twenty-one).

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<sup>1</sup> The Parents submitted a witness list containing fifteen witnesses, seven of whom were also on the MCPS's witness list. To expedite the hearing, I allowed the MCPS to present testimony on direct from the seven common witnesses even though technically I was still hearing the Parents' case-in-chief. After the first day of the hearing, when we were able to complete testimony from only two witnesses, I imposed time limits on the questioning of witnesses – forty-five minutes for any witness on a party's witness list and thirty minutes for any witness not on a party's witness list. At the parties' request, I extended the time limit to one hour for each party to question XXXX XXXX, the Student's case manager at [School 2]. I gave the Parents two hours to testify with one hour of cross-examination by the MCPS.



The Parents each testified and they presented additional testimony on direct from the following eight witnesses:

1. XXXX XXXX, RTSE, [School 3] ([School 3]) (who was the Supervisor of the Special Education Department when the Student attended that school);
2. XXXX XXXX, Special Education Supervisor, MCPS, for four clusters: [four schools], who was qualified (on cross examination by the MCPS) as an expert witness in special education;
3. XXXX XXXX, paraeducator, [School 4] (who was the Student's assigned paraeducator at [School 2]);
4. XXXX XXXX, Speech Pathologist, [School 2];
5. XXXX XXXX, Speech Pathologist, [School 1] (formerly an assistive technology and augmentative communications specialist with the MCPS), who was qualified (on cross examination by the MCPS) as an expert witness in speech and language pathology, assistive technology, and augmentative communication;
6. XXXX XXXX, Special Education Teacher, [School 2], who was qualified (on cross examination by the MCPS) as an expert witness in special education;
7. XXXX XXXX, Instructional Specialist, Autism Unit, MCPS, who was qualified (on cross examination by the MCPS) as an expert witness in special education, with emphases in applied behavioral analysis and children with autism spectrum disorders;
8. XXXX XXXX, Extension Program Coordinator and Instructional Specialist, who was qualified (on cross examination by the MCPS) as an expert witness in special education, with an emphasis on serving children with moderate, severe, and profound disabilities.

The MCPS presented additional testimony on direct from one witness:

1. XXXX XXXX, Transition Services Supervisor, MCPS, who was qualified (on direct examination by the MCPS) as an expert witness in special education and secondary transition services.

### **FINDINGS OF FACT**

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

1. The Student is a sixteen-year-old boy who lives with the Parents in XXXX.

2. Both Parents are XXXX; the Student's father also has a doctorate degree in XXXX and is employed as a XXXX. (Parents #12).
3. The Student has autism,<sup>2</sup> which significantly affects his cognition; his ability to express thoughts and to understand what others say to him (expressive and receptive communication); his academic and daily living skills; and his ability to function in the community. (MCPS #18).
4. The Student also has an intellectual disability.
5. The Student is non-verbal (he uses some verbal approximations, including "bah" for bathroom). (T. 211, 319). He also communicates with some simple hand gestures, including gestures for bathroom, yes, and no. (T. 319, 360-61).
6. The Student engages in behaviors towards himself and others that significantly affect his ability to learn inside and outside of the classroom. (MCPS #18). He rocks from front to back, flaps his hands, and makes sounds. (Parents #1). He eats inedible objects (pica), picks at his skin, commits aggressive acts (hand squeezing, pushing, hitting, hair-pulling, head-butting, and kicking), and engages in inappropriate bathroom behaviors, including an obsessive need to be in the bathroom, repetitive flushing and pushing of the soap dispenser or air dryer, drinking from the faucet, toilet, or urinal, and licking the floor or picking up objects from the floor and eating them. (MCPS #10, MCPS #11, and MCPS #12).
7. Due to his cognitive, social, and emotional development, the Student will require supported employment and supports with daily living after completing high school. (Parents #1).

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<sup>2</sup> The federal regulations issued by the Secretary of Education pursuant to the IDEA provide: "*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." 34 C.F.R. § 300.8(c)(1)(i) (2016); *see also* COMAR 13A.05.01.03B(8).

8. The Student, who has received special education services from the MCPS as a child with a disability pursuant to an IEP in a LFI program within a comprehensive school since kindergarten, is working toward a Certificate of Program Completion. His projected exit date from secondary education is June 2021, at the end of the school year during which he turns twenty-one. (MCPS #18). The Student participates in the Alternate Maryland State Assessment. (*Id.*; T. 250-51).

9. A LFI program is a self-contained special education program focusing on functional life skills for students with intellectual disabilities, autism, and multiple disabilities. (T. 212-13).

10. The MCPS has a specific curriculum for its LFI programs, but classroom teachers modify (or diversify) the curriculum according to a student's IEP. (T. 216-18; 686-87).

11. The Student attended [School 3] for sixth, seventh, and eighth grades, but he made minimal academic progress there. (Parents #1).

12. At a March 24, 2014 IEP annual review, the Student's teachers reported that his reading and math skills were at a kindergarten level. (*Id.*).

13. The Student's March 24, 2014 IEP contained the following goals and objectives for reading comprehension, mathematics, mathematics-functional, written language, and speech and language:

Goal: Reading Comprehension – Given verbal prompts, human or text-to-speech reader fo[r] the entire text, 1:1 instruction, and answer choices, [Student] will answer questions about pictures, picture stories, or text paired with pictures, or written text.

Objectives: [Student] will: (1) identify characters, settings, and major events in a story; (2) describe the relationship between illustrations and the text in which they appear; and (3) follow words from left to right, top to bottom, when being read to.

Goal: Mathematics – Given prompts, teacher modeling, manipulatives, answer choices and/or 1:1 instruction, [Student] will increase his knowledge of basic math facts.

Objectives: [Student] will: (1) add objects and/or numbers with addends between 0 & 20; (2) multiply single digit numbers where the product is 20 or less; and (3) illustrate division problems by sorting objects into two or three equal groups.

Goal: Mathematics Functional – Given prompts, manipulatives, teacher modeling and 1:1 instruction, [Student] will identify coins by name and value.

Objectives: [Student] will: (1) identify the name and value of a penny; (2) identify the name and value of a nickel; (3) identify the name and value of a dime; and (4) identify the name and value of a quarter.

Goal: Written Language – Given verbal prompts, pictures, word banks, teacher modeling, a reader and 1:1 instruction, [Student] will construct sentences.

Objectives: (1) Given a picture and word bank (on note cards or of an interactive nature), [Student] will construct a 3-5 word sentence describing the picture; (2) Given a picture and word bank (on note cards or of an interactive nature) with no distractors, [Student] will construct a 3-5 word sentence describing an activity in which he participated; (3) Given a word bank, [Student] will construct a sentence in the format “I am \_\_\_\_.” or “I want to \_\_\_\_.” to convey his feelings or needs; (4) Given a word bank, [Student] will accurately construct a sentence in the format “Today is \_\_\_\_.”

Goal: Speech and Language – [Student] will make use of multiple modes of communication to answer questions, comment, express preferences and interact.

Objectives: (1) Given cues and models [Student] will respond to a situation such as a greeting by looking and waving; (2) Given models and very consistent use by all staff working with him, [Student] will continue to make use of simple whole hand signs (thank you, please, book, bathroom) and vocal approximations (bathroom, OK); (3) Given a sentence word bank or visual board, [Student] will answer questions and express preferences; (4) Given fading models, cues and scaffolding, [Student] will get the correct board or device, or if using a dynamic screen, navigate to a high interest board.

(*Id.*).

14. The Student's IEP goals and objectives for reading comprehension, mathematics, mathematics-functional, written language, and speech/language did not change until an April 22, 2016 IEP. (Parents #2; Parents #3; Parents #8; and Parents #9).

15. The Student's March 24, 2014 IEP also contained goals and objectives for daily functional/life skills, life skills, adaptive physical education, handwriting, and occupational therapy. (Parents #1).

16. The Student's objectives for daily functional/life skills included his refraining from: (1) placing non-edible materials in his mouth; (2) attempting to drink water from the bathroom faucet; and (3) placing his hands inside his pants. (*Id.*).

17. The Student's March 24, 2014 IEP included transition goals of a vocational training program with supports and part-time employment in the community with supports. (*Id.*).

18. At [School 3] and during his enrollment at [School 2], the Student has had full-time, one-to-one, adult support from a paraeducator. (Parents #3; Parents #9).

19. During a June 2, 2014 IEP periodic review at the end of the Student's last year in middle school, the Parents expressed their belief (based on their observations of the Student at home and a purported opinion from a private tutor) that the Student could perform at a higher academic level than indicated in his IEP, specifically, at sixth-or-seventh-grade level for math and science and fourth-grade level for reading. (Parents #2).

20. The Student's June 2, 2014 IEP indicated that his educational placement for the 2014-2015 school year would be in an LFI program at [School 2]. (*Id.*).

21. The IEP team held a planning meeting on June 2, 2014 and agreed to conduct a reevaluation of the Student's present levels of academic achievement and related development needs to determine whether the Student needed additions or modifications to his special

education and related services and to address the Parents' assertion about the Student's academic ability. (*Id.*).

22. The Parents authorized the MCPS to conduct educational, speech/language, and psychological assessments. (*Id.*).

23. On June 5, 2014, the MCPS, by XXXX XXXX, the Student's special education teacher and case manager; XXXX XXXX, a speech/language pathologist; and XXXX XXXX (whose job title is not included in the record) conducted an FBA of the Student and created a BIP for him. (*Id.*; Parents #4).

24. The MCPS did not obtain consent from the Parents to conduct an FBA.

25. The FBA, based upon unspecified observations, teacher input, and data charts, addressed three specific behaviors of concern: eating inedible objects, inappropriate bathroom use, and picking at self and causing bleeding. (Parents #4).

26. The FBA indicated that the Student's inappropriate bathroom use was likely due to his wanting to play in water, and noted that interventions of scheduled bathroom breaks and a male escort for the group bathroom had been effective ninety percent of the time at [School 3]. (*Id.*).

27. The LFI program at [School 3] had its own dedicated bathroom and either a male or female escort could take the Student to that bathroom. (*Id.*; T. 125).

28. On July 11, 2014, XXXX "XXXX" XXXX, a school psychologist; XXXX XXXX, a speech pathologist and augmentative communication specialist; XXXX XXXX, the Student's special education teacher and case manager; and the Student's mother evaluated the Student using the CIBS-R, an educational diagnostic assessment. (Parents #3; T. 882).

29. On the CIBS-R Reading Comprehension subtest, the Student reached his ceiling (three incorrect answers in a row) at third-grade level. On a Word Recognition subtest, he identified three out of ten pre-kindergarten sight words. (Parents #3).

30. On the CIBS-R Recognizes Numbers subtest, the Student correctly identified first-grade numbers, but incorrectly identified pre-kindergarten numbers. On a Computational Skills Placement subtest, he reached his ceiling at second-grade level. (*Id.*).

31. At a CIEP team meeting on August 26, 2014, the CIEP team reported the Student's present level of performance for reading as pre-kindergarten to third grade, and the Student's present level of performance for mathematics as kindergarten-first-grade, with splinter skills to third grade. The Parents disagreed with the results of the educational assessment and again asserted that at home with a tutor the Student could perform higher-level academic work, including sixth-grade-level mathematics. (*Id.*).

32. The CIEP considered educational placements for the Student, including [School 1], a separate public special education day school of approximately eighty-five students from middle school through upper school (ages eighteen to twenty-one). (MCPS #19; T. 486-87).

33. The MCPS teaches students at [School 1] according to the LFI curriculum, but in smaller classes with more adult support, including a full-time psychologist and social worker, than in an LFI program within a comprehensive high school. (T. 926-27).

34. The CIEP team determined that the Student's educational placement for the 2014-2015 school year would be the LFI program at [School 2]. The CIEP team at that time did not consider [School 1] to be the LRE for the Student, but scheduled a periodic review for late October or early November 2014 to review the Student's progress at [School 2]. (Parents #3).

35. From the outset of his enrollment at [School 2], the Student displayed significant interfering behaviors, including picking at his skin, eating inedible objects, and perseveration

regarding his bathroom use. The Student insisted on entering group bathrooms rather than one designated for his use. Once he was in the bathroom, he repetitively flushed toilets, turned on faucets, tried to drink out of the sink and, occasionally, the toilet or urinal. In his art class, the Student attempted to eat art supplies, and when he was outside, he picked up leaves and sticks and put them in his mouth. (Parents #8; MCPS #1). The Student bit and destroyed fidget items provided to him. (Parents #36).

36. The Student squeezed the fingers of MCPS staff, including his paraeducator, XXXX XXXX. When she or other MCPS staff made a fist to prevent the squeezing, the Student attempted to pry the person's fist apart so he could squeeze the person's fingers. (Parents #8).

37. On September 5, 2014, the Student head-butted Ms. XXXX "pretty hard." (Parents #20; T. 465).

38. During a community outing to a store in October 2014, the Student attempted to grab the arm of a female student and later successfully grabbed the arm of a male customer. (Parents #36).

39. On October 16, 2014, the Student grabbed Ms. XXXX on several occasions and grabbed the arms of another LFI student and a general education student. (*Id.*).

40. During the 2014-2015 school year, a male paraeducator, XXXX XXXX, was assigned to the Student. (T. 121).

41. At [School 2], the Student's learning activities were significantly modified beyond that of typical LFI students. (T. 684).

42. As of November 17, 2014, the Student was making sufficient progress on only one of his IEP goals. (Parents #8).

43. At a CIEP team periodic review on November 17, 2014, the CIEP team discussed the intensity of the Student's interfering behaviors. (*Id.*).



44. Mr. XXXX, the chair of the CIEP team, proposed an educational placement at [School 1], and the CIEP team, except for the Parents, concurred that [School 1] was the LRE for the Student. (*Id.*).

45. After the Parents filed a due process complaint concerning the placement at [School 1], the Parents and the MCPS participated in a resolution session and reached an agreement whereby the Student would remain at [School 2]. (T. 965).

46. On December 23, 2014, while he was in the bathroom, the Student bit Mr. XXXX on his right index finger, drawing blood, when Mr. XXXX attempted to turn off a water faucet. (MCPS #1).

47. Between January 21, 2015 and March 11, 2015, [School 2] staff noted 150 incidents of inappropriate bathroom use, which was defined as:

Requesting to go to the bathroom immediately upon returning from the bathroom. When in the bathroom, after urinating, flushing all toilets repeatedly, using his hands to wipe the floor and urinal area and then licking his hands, picking pieces of toilet paper from the urinal and bathroom floor and eating them, picking hairs off of the bathroom floor and eating them, repeatedly washing hands and drinking from the sink area.

(*Id.*).

48. Between January 21, 2015 and March 11, 2015, [School 2] staff noted thirty-four incidents of grabbing others, which was defined, in part, as “[g]rabbing with all fingers and thumbs around a person’s arm or hand.” (*Id.*).

49. On February 19, 2015, the Student attempted to grab Mr. XXXX around the neck. (*Id.*).

50. On February 24, 2015, the Student grabbed several students and his paraeducator. (*Id.*).

51. On February 27, 2015, the Student attempted to grab a female student, attempted to head-butt Ms. XXXX, and attempted to hit Mr. XXXX. (*Id.*).

52. In March 2015, XXXX XXXX, Ph.D., an autism instructional specialist with the MCPS, observed the Student and provided recommendations to [School 2] staff for addressing the Student's sensory preferences and managing his interfering behaviors. She suggested the use of positive reinforcers and forms of non-verbal communication to direct the Student. (Parents #24).

53. At Dr. XXXX's suggestion, [School 2] staff created a sensory room to address the Student's behaviors. The Student would go there and listen to music and engage in activities to address his sensory needs. The Student enjoyed the sensory room, but eventually it became problematic because the Student would want to stay in the sensory room, rather than go to class. (T. 276-78).

54. At an IEP team annual review on March 20, 2015, the IEP team noted that the Student's inappropriate bathroom behaviors, which were actually increasing, were increasing the Student's unavailability for learning. (Parents #39).

55. The Student's March 20, 2015 IEP noted that the IEP team "is currently working on redoing the current FBA/BIP." (*Id.*).

56. On April 30, 2015, the Student's father came to [School 2] to demonstrate techniques that he used with the Student at home concerning his bathroom behaviors. These techniques included blocking the Student from the sink or other fixtures and physically moving the Student when he was non-compliant. (Parents #9; MCPS #5; Parents #16).

57. According to MCPS policy, MCPS staff cannot use physical force on a student unless the student or someone else is at risk of imminent harm. (T. 840).

58. In late April or May 2015, the Student defecated in his pants, used his hand to remove the feces, and smelled or ate the feces. (T. 502-04; Parents #37).

59. [School 2] staff had some limited success (for approximately two weeks) controlling the Student's bathroom behaviors after incorporating the techniques, other than physical force, demonstrated by the Student's father. (Parents #9).

60. On May 14, 2015, the IEP team completed an FBA and a BIP for the Student. [School 2] staff documented 390 incidences of inappropriate bathroom behavior and 50 incidences of grabbing others. The Student demonstrated more inappropriate behaviors during mathematics and English classes than during community activities. The authors of the FBA, which included a school psychologist, XXXX XXXX, and an autism specialist, Dr. XXXX, concluded that the Student used the bathroom to avoid work and to gain sensory stimulation. (Parents #16).

61. The MCPS did not obtain consent from the Parents to conduct an FBA.

62. The Student's June 12, 2015 IEP contained additional goals for independent work and behavior and slight changes to the Student's goals for occupational therapy and daily functional/life skills. (Parents #9; MCPS#5).

63. As of June 12, 2015, the Student was not making sufficient progress on any of his IEP goals except in occupational therapy. (Parents #9; MCPS#5).

64. During the June 12, 2015 IEP team meeting, the Parents asserted that the Student worked independently at home and asked that [School 2] consider placing him in at least one inclusion (general education) class. (Parents #9; MCPS#5).

65. The Student received Extended School Year (ESY) services in Summer 2015. (Parents #27). ESY services are delivered in a half-day program for approximately one month. (T. 826). The Student made sufficient progress on his IEP goals for life skills, mathematics

(practicing multiplication), mathematics functional (identifying coins), handwriting (writing the letters of his name with adult support), daily functional/life skills, and reading comprehension (answering yes or no questions about a text). (Parents #27).

66. In August 2015, the Parents provided the MCPS a letter from XXXX XXXX, D.O., a psychiatrist at the Center for Autism Spectrum Disorders and Children's National Medical Center. Dr. XXXX indicated that she was managing the Student for autism spectrum disorder and obsessive compulsive disorder (OCD). She summarized the Parents' assertions about [School 2]'s management of the Student's bathroom behaviors and encouraged MCPS staff to create a behavior plan for the Student. Dr. XXXX did not address the Student's pica or aggressive behaviors. (Parents #7).

67. XXXX XXXX was assigned to be the Student's paraeducator for the 2015-2016 school year. (T. 315).

68. On September 1, 2015, the Student hit his special education teacher, Ms. XXXX, in the chest and stomach, and banged her with his head. Then, when Ms. XXXX, the RTSE, took the Student to the bathroom, the Student struck her in the chest and stomach. (Parents #15).

69. As of September 16, 2015, [School 2] staff began to document the Student's interfering behaviors in school and at community activities, including his job site at XXXX, starting with three specific behaviors of concern: picking skin, eating inedible objects, and inappropriate bathroom use. (MCPS #6).

70. Between September 16, 2015 and November 3, 2015, MCPS staff, usually Ms. XXXX, documented the Student's behaviors of concern by tallying the incidences of the behaviors that occurred and making notes on the specific incidences. Someone typed Ms. XXXX's handwritten notes about the Student's behaviors of concern into a word processing program. (MCPS #7; MCPS #8; MCPS #9; Parents #11).

71. The Student engaged in interfering behaviors essentially on a daily basis between September 16, 2015 and November 3, 2015. He constantly pushed, hit, and kicked Ms. XXXX; he pulled her hair and he put his hands around her neck. (T. 323-24). He hit other [School 2] staff. He constantly engaged in his inappropriate bathroom behaviors. He occasionally ate inedible objects, parts of a pencil, rocks, and things he picked up off the floor. He urinated in public during a community activity on September 28, 2015. He exposed himself at school on October 19, 2015. He often put his hands in his pants and then in his mouth. (MCPS #7; MCPS #8; MCPS #9; Parents #11).

72. As of October 30, 2015, the Student was not making sufficient progress to meet his IEP goals in reading comprehension. He was consistently unable to identify basic story elements, central ideas and characters even with significant accommodations and modifications, including one-to-one support, reduced field of choices, multiple rounds of choice presentation, and extensive prompting. (Parents #45).

73. On November 16, 2015, [School 2] staff changed its method of documenting the Student's interfering behaviors by using ABC Data Sheets, which attempted to document the antecedent, behavior, and consequence of the Student's interfering behaviors. (MCPS #13).

74. The ABC Data Sheets charted the following interfering behaviors:

Aggression – any pinch, spit, hit, lick, kick, punch, grab, hair pull, scratch, bite, choke, squeeze, pulling other people's bodies or clothing, head butting;

Elopement – leaving the assigned area/task;

Pica – putting non-food items in his mouth, licking surfaces, drinking toilet water, and/or eating/drinking items from the trash can;

Food Stealing – taking another person's food or drink without permission with or without consuming it;

Self-Injury – scratching body, picking skin/fingernail beds until they bleed, self-biting;

Inappropriate bathroom Behavior – entering the bathroom and licking the floor/drinking water [from] toilet/sink, crawling around the toilet/sink, repetitive flushing, washing, pushing of soap dispenser, or dry[er].

(MCPS #10).

75. The Student engaged in interfering behaviors essentially on a daily basis between November 19, 2015 and December 4, 2015, including elopement, aggressive behaviors, and inappropriate bathroom behaviors. (MCPS #11; MCPS #12).

76. On December 8, 2015, the IEP team met to conclude an IEP periodic review that had started on November 10, 2015. (Parents #10).

77. The IEP team noted its intention to conduct an FBA to create a BIP for the Student based upon his interfering behaviors. (*Id.*).

78. The MCPS did not obtain consent from the Parents to conduct an FBA.

79. On December 8, 2015, the IEP team, over the Parents' objection, recommended that the Student be referred to a CIEP team. (*Id.*). The Student, however, continued to attend [School 2] and staff there continued to document the Student's interfering behaviors.

80. As of January 22, 2016, the Student was making sufficient progress on his IEP goals for occupational therapy, independent work, speech and language (but typically unable to work more than fifteen minutes), reading comprehension, behavior, life skills, behavior-transition/compliance, adaptive physical education, and handwriting. He was not making sufficient progress on his IEP goals for mathematics, written language, mathematics functional, and daily functional/life skills. (T. 410-11; Parents #10).

81. The Student engaged in interfering behaviors essentially on a daily basis between February 4, 2016 and April 8, 2016, including elopement, aggressive behaviors, self-injurious behaviors, pica, and inappropriate bathroom behaviors. He often hit Ms. XXXX and occasionally would not comply with direction at his community vocational site. (MCPS #13; MCPS #14).

82. As of April 8, 2016, the Student was making sufficient progress on his IEP goals for occupational therapy, speech and language (but typically unable to work more than fifteen minutes), life skills, adaptive physical education, and handwriting. He was not making sufficient progress on any of his other IEP goals. (Parents #10).

83. The IEP team held an annual review on April 22, 2016. (Parents #25).

84. The Student's April 22, 2016 IEP contained the following goals for reading, written language, speech and language, mathematics, and career/tech. ed./transition:

Goal: Reading – Given AT, real objects, and/or pictures/picture supports, [Student] will analyze and interpret a variety of adapted grade level texts by selecting a response from a field of 2-3 choices (pictures, objects, or ipad) using his hands, with no more than 3 rounds of choice presentations and given appropriate prompts (supported by appropriate communication behaviors, i.e. vocalizations, facial expressions, gestures).

Goal: Written Language – Given AT, real objects, and/or picture supports, graphic organizers, and teacher-made writing templates, [Student] will demonstrate the ability to compose in a variety of modes by selecting a response from a field of 2-3 choices (pictures, objects, or ipad) using his hands, with no more than 3 rounds of choice presentations and given appropriate prompts (supported by appropriate communication behaviors, i.e. vocalizations, facial expressions, gestures).

Goal: Speech and Language – Given models, cues, word bank, and scaffolding, [Student] will make use of multiple modes of communication to answer questions, comment, express preferences and interact.

Goal: Mathematics – Given AT, picture supports, real objects/manipulatives, graphic organizers, calculation devices as appropriate for the task, and fading adult assistance, [Student] will solve a variety of math problems with clear real-world applications by selecting a response from a field of 2-3 choices (pictures, objects, or ipad) using his hands, with [no] more than 3 rounds of choice presentations and given appropriate prompts (supported by appropriate communication behaviors, i.e. vocalizations, facial expressions, gestures).

Goal: Career/Tech. Ed/Transition – Given AT, picture/object supports, information, and adult assistance, [Student] will increase his knowledge and skills needed to be successful in real world situations by selecting a response from a field of 2-3 choices (pictures, objects, or ipad) using his hands, with [no] more than 3 rounds of choice presentations and given appropriate prompts (supported by appropriate communication behaviors, i.e. vocalizations, facial expressions, gestures).

(MCPS#17).

85. The Student's reading goal had the following four objectives:

(1) Student will make predictions, identify the purpose for reading, and/or identify what he knows about the topic to help connect prior knowledge to aid in comprehension prior to reading an adapted grade-level text, portion of text, or functional document.

(2) During reading, [Student] will answer general comprehension questions to check for understanding of adapted texts, portions of texts, or functional documents.

(3) [Student] will answer questions to identify story elements, make personal connections, identify central ideas/themes, or summarize/paraphrase after reading an adapted grade-level text, portion of text, or functional document.

(4) [Student] will identify the correct definition of new vocabulary relevant to selected adapted texts or functional documents and use that vocabulary correctly in a sentence.

(Parents #25).

86. The Student's mathematics goal had the following four objectives:

(1) [Student] will answer questions to analyze information that is organized in a table or graph.

(2) [Student] will apply his knowledge of number sense to solve math problems using rational numbers (whole numbers, fractions, and decimals) utilizing the four basic operations.

(3) Given a word problem related to a real-world scenario, [Student] will analyze the problem to determine which operation is needed, and solve the problem.

(4) [Student] will explore different functional concepts in math related to money by answering questions about mixed currency, estimation, "next dollar up," and simple percentages.

(Id.).

87. The IEP team, over the Parents' objection, referred the Student to the CIEP team.

(Id.).



88. On May 25, 2016, the CIEP team considered placements for the Student along the LRE continuum, including self-contained special education programs within a comprehensive high school and a public separate special education day school ([School 1]). (MCPS #18).

89. The CIEP team explained that the Student was being removed from the general education environment (a comprehensive high school) to access a self-contained special education setting with modified content and grading adapted to his instructional levels and behavioral needs. The CIEP team also explained that the Student's behavioral, functional, and academic needs required the supports of a modified curriculum and smaller class size. (*Id.*).

90. The curriculum at [School 1] is based upon students remaining in high school for three additional grades, through the school year in which they turn twenty-one. The class sizes are smaller than those in a LFI program, with as few as five students in a class, and there is more adult support per student. (T. 889, 914-15).

91. At [School 2], the Student participated in in-school vocational training two days per week and community vocational training one day per week. On Tuesdays and Thursdays, he participated in in-class vocational activities. On Wednesdays, he went to a job site at the XXXX, a working XXXX that employs individuals with intellectual disabilities. (T. 519-22; 777-82).

92. The Student needed a lot of adult supervision at XXXX and was often not interested in performing his assigned tasks. The management at the farm did not want the Student to return there after the 2015-2016 school year. (T. 781-82).

93. At [School 1], students in grades nine through twelve receive pre-vocational training through in-school vocational activities. Students in the upper grades receive vocational training in the community. (T. 887, 889).

94. The Student received ESY services in Summer 2016. He made sufficient progress on his IEP goals for reading (pointing to choices after others read aloud), speech and language

(but unable to focus for more than ten minutes), behavior, occupational therapy, and personal management. He did not make sufficient progress on his IEP goals for mathematics. (Parents #28).

95. During a speech and language session with Mr. XXXX in Summer 2016, the Student scratched Mr. XXXX on the back of his hand, leaving a scar. (T. 416, 426).

### DISCUSSION

The IDEA governs the identification, assessment, and educational placement of students in special education. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2016); 34 C.F.R. pt. 300 (2016); Md. Code Ann., Educ. §§ 8-401 to -408, -410 to -417 (2014 & Supp. 2016); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a “free appropriate public education” (FAPE). 20 U.S.C.A. § 1412(a)(1)(A) (2010).

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court described a FAPE as follows:

Implicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child. . . . We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

*Id.* at 200-01 (emphasis added) (footnote omitted). The IDEA contains the following, similar definition of FAPE:

special education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge . . . [and that have been] provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9) (2010); *see also* Educ. § 8-401(a)(3) (2014); COMAR

13A.05.01.03B(27). A school provides a FAPE so long as a child with a disability receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special

instruction and services. *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *see also Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338-41 (10th Cir. 2015), *cert. granted*, 137 S. Ct. 29 (2016).

Pursuant to the FAPE requirement, a school must create an IEP for a student eligible for special education services. The IEP shall include a statement of the child's present levels of academic achievement and functional performance; a statement of measurable annual goals, including academic and functional goals; a description of how and when the child's progress toward meeting the annual goals will be measured; a statement of the special education and related services and supplementary aids and services and modifications to be provided to the child; an explanation of the extent that the child will not participate with nondisabled children; a statement of why the child cannot participate in regular State assessments; the projected date for the beginning of services and the frequency, location, and duration of those services; and, beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter, appropriate measurable postsecondary goals and transition services needed to assist the child in reaching those goals. 20 U.S.C.A. § 1414(d)(1)(A)(i) (2010); 34 C.F.R. § 300.320(a)-(b). The Student's IEPs, including the April 22, 2016 IEP and the May 25, 2016 CIEP comply with the procedural requirements of the IDEA.<sup>3</sup>

The IDEA also requires that each disabled student receive instruction in the LRE possible to achieve a FAPE, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom or educational environment. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i) & 300.117; *AW ex rel. Wilson v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 681 (4th Cir. 2004). The removal of a child from a regular educational environment, however, may be necessary when the nature or severity of a child's disability is such that

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<sup>3</sup> The Parents did not challenge the procedural correctness of any of the Student's IEPs. They did argue that the IEP team made the goals in the Student's April 22, 2016 too difficult for the Student. I will address that argument in the section of my decision concerning the Parents' allegations against MCPS staff.

education in a regular educational environment cannot be achieved. 34 C.F.R.

§ 300.114(a)(2)(ii).

This case primarily concerns the IDEA's LRE requirement. The Parents vehemently objected to the CIEP team's determination that the Student required an educational placement at [School 1], a separate public special education day school. The Parents, as the party seeking relief in this administrative hearing under the IDEA, bear the burden of persuasion to establish (in addition to their other issues) that [School 1] is not the LRE for the Student. *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005). In this rather bizarre hearing, in which the Parents presented fifteen witnesses, none of whom agreed with the Parents' position, and in which the Parents alleged extraordinary educational malpractice and malfeasance by the MCPS, the Parents unwittingly and overwhelmingly proved that [School 1] is indeed the LRE for their severely disabled teenage son.

The Parents' objection to [School 1] and their allegations concerning MCPS staff are simply irrational. The Parents grossly overestimate the Student's academic and functional performance and grossly underestimate the significance of his interfering behaviors. The Parents' case seemed to be based purely on emotion, rather than their son's educational needs. The Student's mother testified that the Student would be destroyed if he had to attend [School 1]. But twelve educators testified that [School 1] constituted the Student's best chance before he ages out of public school to obtain basic social and prevocational skills that might enable him to receive adult services, probably from the Developmental Disabilities Administration (DDA). In stark contrast to the Parents' testimony, which was replete with misstatements of fact and unfounded accusations against MCPS staff, the witnesses from the MCPS were very professional, testifying convincingly that they accurately assessed the Student's academic and behavioral needs and developed an IEP reasonably calculated to provide the Student a FAPE in the LRE. Frankly, this

case does not involve any subtle analysis of competing expert opinions or good faith disagreements between the parties. The Parents presented no experts, and the expert opinions of the MCPS's witnesses were not only unimpeached, they were particularly convincing because they comported with basic common sense as to the Student's educational and vocational needs.

**1. The CIEP team's determination that the Student's educational placement should be [School 1], a separate public special education day school, rather than in an LFI program within a comprehensive public school, did not violate the Student's right to a FAPE in the LRE.**

On May 25, 2016, near the end of the 2015-2016 school year, the CIEP team met and, over the Parents' objection, determined that the Student's educational placement for the 2016-2017 school year would be [School 1], a separate public special education day school. The CIEP team determined that this very restrictive educational placement was necessary because "[the Student] requires a small, separate special education setting due to interfering behaviors which are due to his being overwhelmed in the larger school setting." (MCPS #18). The CIEP team noted that the Student was not making the appropriate rate of progress in a program located in a comprehensive school setting. The CIEP team explained that the Student's behavioral, functional, and academic needs required the supports of a modified curriculum and smaller class size. The evidence in the record overwhelmingly supports the CIEP team's educational placement determination and the rationale for its determination.

Every single witness asked to provide an expert opinion concerning the Student's educational placement testified that [School 1] would be an appropriate educational placement for the Student. These thirteen witnesses included the Student's classroom teachers: Ms. XXXX, Ms. XXXX, Ms. XXXX, and Mr. XXXX; [School 2] special education supervisors: Ms. XXXX and Ms. XXXX; an assistant principal and a principal: Mr. XXXX and Ms. XXXX; MCPS

instructional specialists: Dr. XXXX and Ms. XXXX; and MCPS administrators: Ms. XXXX, Mr. XXXX, and Ms. XXXX. An administrative law judge hearing a special education matter is required to give great deference to the opinions of educators. *A.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004). In this case, that great deference is due not just because of an evidentiary rule, but also because of the extraordinary credentials and depth and breadth of educational experience of the educators involved. Moreover, I shall consider the experiences of eight of these witnesses, those based at [School 2] and Ms. XXXX, who are very familiar with the Student, having either directly taught him or provided services to him.

#### The Special Education Teachers

Ms. XXXX has a Master's equivalent in special education, holds certifications in elementary and special education, and has taught special education students for approximately twenty years. (T. 638-41). She taught the Student mathematics and English during the 2014-2015 school year and science during the 2015-2016 school year. (T. 615, 662). She explained that the Student was often unavailable for learning due to his behaviors and always required intensive one-on-one support and made very little progress on his IEP goals. (T. 646-47; 650-53). Ms. XXXX testified that an educational placement at [School 1] would be helpful to the Student because there would be less distractions and more staffing to support his needs. (T. 666).

Ms. XXXX has a Master's degree in special education, holds a certification in special education, and has been teaching special education students within the MCPS for six years. (T. 711-13). She taught the Student mathematics and English during the 2015-2016 school year. (T. 675). She explained that for the Student she diversified the LFI curriculum to his level, such as using manipulatives for mathematics, using pictures to teach reading, and giving the Student choices for answers in both of his classes. (T. 684-86, 688, 705). She indicated that the Student

did not make sufficient progress toward his IEP goals and had many interfering behaviors, including eloping from the classroom. (T. 691-92, 720-22, 725-26). Ms. XXXX testified that the Student would benefit from an educational placement at [School 1] because he tended to participate more and be more engaged in a smaller classroom. (T. 726-27).

Ms. XXXX has a Master's degree in special education, holds an advanced professional certificate, and has been teaching students with significant cognitive or physical disabilities or behaviors within the MCPS for fourteen years. (T. 771-74). She was the Student's case manager for the 2015-2016 school year and taught him vocational training and community instruction. (T. 776-77). Ms. XXXX testified that an educational placement at [School 1] would be appropriate for the Student because it was a smaller setting with less sensory overload, more supports built into the program, and a stronger emphasis on vocational training. (T. 792-93). To emphasize the Student's need for prevocational skills, she noted that the management at XXXX, the site for the Student's community vocational training, did not want the Student to return there after the 2015-2016 school year because of his behaviors. (T. 781-82).

Mr. XXXX has a Master's from XXXX College in exercise administration, holds a certification in health, which includes adaptive physical education, and has taught in or supervised physical education programs within the MCPS for sixteen years. (T. 385-86; MCPS #25). He taught the Student adaptive physical education during the 2015-2016 school year. (T. 387). Mr. XXXX testified that although he was not too familiar with [School 1], he believed that the Student would benefit from a smaller learning environment with fewer distractions. (398-99).

#### The Special Education Supervisors

Ms. XXXX has a Master's degree in special education from [University 1], holds a certification in special education, and has taught in or supervised special education programs within the MCPS for nine years. (T. 205-06). She has been the RTSE at [School 2] during the

Student's enrollment there. (T. 206-07). Ms. XXXX testified that the Student would benefit from the smaller educational environment at [School 1]. She emphasized that the Student would receive more vocational training at [School 1], which is crucial for his post-high-school prospects. (T. 282-85).

Ms. XXXX has a Master's degree in special education from [University 2], holds a certification in special education, and has been teaching special education students within the MCPS for eleven years. (T. 522-26). She taught the Student and served as his case manager during the 2014-2015 school year and supervised his transition services during the 2015-2016 school year. (T. 501; 541-42). Ms. XXXX testified that the Student would benefit from [School 1] because there he would have less sensory distraction than in a comprehensive high school. She also emphasized the need for the Student to manage his interfering behaviors to prepare for adult services. (T. 545-46).

#### The Principals

Mr. XXXX has a Master's degree from XXXX College in curriculum and instruction, holds advanced professional and administrator II certifications, and has taught or supervised in public schools for more than ten years. (T. 860-62). He has been an assistant principal at [School 2] since the Student enrolled there in August 2014. (T. 863). Mr. XXXX testified that at [School 1] the Student would be involved in vocational "training for a far more substantial time than if he were to remain at [School 2]." (T. 873-75).

Ms. XXXX has a Master's degree in special education and has taught in or administered special education programs in MCPS for more than twenty years (T. 910-15; MCPS #24). She described the program at [School 1], explained its emphasis on prevocational training, and testified that [School 1] would be an appropriate educational placement for the Student. Ms.



XXXX specifically cited [School 1]’s smaller program size and class sizes, its greater environmental supports, and its lesser sensory distractions. (T. 918-27).

### The Instructional Specialists

Dr. XXXX has a doctorate degree in special education, applied behavioral analysis, and autism spectrum disorder. (T. 579-80). She has taught special education and consulted for special education and autism for thirty-five years. (T. 580-82). She has consulted with the [School 2] IEP team and the CIEP team for the Student since August 2014 and observed him in school. (T. 584). She testified that [School 1] would be an appropriate educational placement for the Student because the Student would have more opportunities to access instruction because of [School 1]’s smaller educational environment and its greater amount of staff to deal with the Student’s interfering behaviors. (T. 594-95).

Ms. XXXX has Master’s degrees in speech pathology and audiology, holds a clinical competence certification from the American Speech and Hearing Association, and is licensed by the State in speech pathology and augmentative and assistive communication. (T. 470-71). She worked with the Student in middle school, consulted concerning the Student in high school, and observed him in both his home and school environment. She was the only witness who corroborated the Parents’ assertion that the Student could read and write (with a keyboard or a communication device) above a very basic pre-kindergarten or kindergarten level. (T. 458-61). She testified that [School 1] would benefit the Student because there he would be in a smaller, safer setting with access to a full-time psychologist and social worker to manage his interfering behaviors.<sup>4</sup> (T. 486-88).

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<sup>4</sup> The Parents’ treatment at the hearing of Ms. XXXX illustrated their general tendency to make unwarranted accusations toward MCPS staff. After initially proffering that Ms. XXXX was more honest than other MCPS personnel, the Parents then accused her of having a conflict of interest in recommending that the Student be placed at [School 1] because she now worked there part-time and would be interested in having the Student’s funding follow him to [School 1]. (T. 493).

## The Administrators

Ms. XXXX has a Master's degree in educational administration, holds advanced professional and administrator certifications, and taught in or supervised general and special education programs for twenty years. (T. 92-93). She has been the supervisor for special education in the cluster that includes [School 3] and [School 2] while the Student attended those schools. Ms. XXXX testified that [School 1] would be an appropriate educational placement for the Student because he requires a lot of individualized support to address the behaviors that interfere with his academic performance. (T. 95-97).

Mr. XXXX has a Master's degree from [University 2] in severe and profound handicapping conditions, holds advanced professional and administrator certifications, and has taught in or administered special education programs in nonpublic schools and public schools for twenty-two years. (T. 821-25). He supervises the XXXX Program, which provides special education services to students with behavioral issues within five comprehensive schools. (T. 836-37). He testified that [School 1] was an appropriate educational placement for the Student because it is a much more supported and unified approach to working with students who have not succeeded in a less restrictive educational environment. (T. 830-31).

Ms. XXXX has a Master's degree in secondary transition special education, holds administrator certifications, and has taught in or supervised special education and transition services programs for seventeen years. (T. 1043-46; MCPS #27). She testified that [School 1] was an appropriate educational placement for the Student because he would benefit from a smaller educational environment, and, most significantly, from [School 1]'s emphasis on vocational skills. Ms. XXXX emphasized that the MCPS had a duty to ensure that the Student received a FAPE and could not leave him in an educational setting where he has not made progress. (T. 1055-62; 1080).

As noted above, the 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 educational environment cannot be achieved. 34 C.F.R. § 300.114(a)(2)(ii). Based on the unanimous opinions of thirteen qualified, experienced educators, it is obvious that the removal of the Student from a regular educational environment (a LFI program within a comprehensive public high school) is necessary for him to have any chance at receiving a FAPE, especially one designed to provide him with very basic vocational skills. The Student's academic and functional performance is somewhere between a kindergarten and third grade level, probably closer to kindergarten,<sup>5</sup> and he has severe behaviors that interfere with his education. The Parents have consistently overestimated the Student's academic and functional abilities – asserting, for example, that he could perform sixth-and-seventh-grade-level mathematics at home with a tutor, and purportedly asserting that he could do calculus and physics – and minimized the seriousness of his interfering behaviors. The evidence of the appropriateness of the educational placement at [School 1] is so overwhelming that it is difficult for me to understand the Parents' opposition to their son attending [School 1]. At the hearing, as discussed below, the Parents leveled a vicious and unfounded attack on the competency and integrity of MCPS staff. The Parents' presentation convinced me that their opposition to [School 1] is not based on special education principles and is without merit.

**(2) An educational placement at [School 1] would not prevent the Student from receiving appropriate vocational training.**

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<sup>5</sup> There is sparse evidence in the record concerning the Student's innate intellectual ability. The CIBS-R assessment done in July 2014, appears to be a measure of the Student's achievement, rather than his ability. I find that assessment, which determined that the Student had some second-and-third-grade-level reading and mathematics skills, problematic for two reasons. First, the assessors were not always certain what answer the Student was giving to a question. (Parents #3). Second, the Student's mother was one of the assessors, and the Student is suggestible and his answers can be influenced by the person testing him. (T. 672-73).

The Parents argued that a placement at [School 1] would prevent the Student from receiving appropriate vocational training because students at [School 1] do not participate in community vocational training until upper school (age eighteen) while students in the LFI program at [School 2] participate in community vocational training in ninth through twelfth grade. The evidence in this record, however, indicates that the Student’s best chance for receiving meaningful vocational training to prepare him for supported employment as an adult is through the vocational training program at [School 1].

One of the purposes of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education 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) (2010). Moreover, Congress has found that “providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.” *Id.* § 1400(c)(14). Accordingly, an IEP for a child with a disability must include:

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter –

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals . . . .

*Id.* § 1414(d)(1)(A)(i)(VIII)(aa)-(bb). The term “transition services” means a coordinated set of activities for a child with a disability that –

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

*Id.* § 1401(34); *see also* 34 C.F.R. § 300.43; COMAR 13A.05.01.03B(80).

Post-secondary education and independent living are unrealistic post-high-school plans for the Student. All of the Student's IEPs recognize that due to his cognitive and social/emotional development, he will require supported employment and supports with daily living even as an adult. His IEPs since March 24, 2014 have indicated that the Student's post-secondary goal is vocational training and part-time employment in the community with supports. (Parents #1). The Student's IEPs, including the May 25, 2016 IEP, indicate that after completing high school, the Student "will participate in a self-directed or agency-based program designed to provide habilitative and vocational supports," (MCPS #18), which describes services provided by the DDA. *See* The Maryland Development Disabilities Law, which is codified in Title 7 of the Health General Article. Several witnesses emphasized that the Student has no guarantee of receiving services once he is no longer an eligible child under the IDEA. Those witnesses also emphasized the crucial need for the Student to learn and to practice basic vocational skills before he exits high school. Ms. XXXX testified that although vocational training is a relative strength for the Student, he still exhibits interfering behaviors during both in-school and community vocational training. She explained: "[W]e don't have a lot of time left with him until he turns twenty-one, and he is going to have to transition into these adult services. If he doesn't get these interfering behaviors managed, then it's going to be very difficult for him to find an adult placement." (T. 542-46). Similarly, Mr. XXXX testified that the Student needs some degree of

independence before adult service providers will accept him in what Mr. XXXX described as a “meritocracy.” (T. 870-71).

Ms. XXXX, the principal at [School 1], testified that the vocational training program at [School 1] is premised upon students remaining in high school for three additional years. Students in grades nine through twelve receive pre-vocational training through in-school vocational electives. Students in upper school (ages eighteen to twenty-one) participate in vocational training at community job sites four days per week. She explained that students enrolled at [School 1] often have complex behavioral, emotional, or sensory needs that have to be addressed and managed through in-school vocational training before the students are ready to succeed in the community. (T. 906-07).

The Parents, despite overwhelming evidence to the contrary, simply do not believe that their son fits Ms. XXXX’s profile of a [School 1] student. The Student has severe interfering behaviors that make him unprepared for any significant community vocational training: among other things, he requires extensive adult support on a job site; he often does not comply with instructions; he becomes aggressive toward MCPS staff; and, on occasion, exposes himself in public. The Student’s interfering behaviors are directly related to his autism and his sensory needs. The Parents spent most of the hearing debating minor points in the Student’s records, minimizing the impact of the Student’s autism (asserting, as discussed below, that his behaviors were due to OCD), and expressing a view of their son’s academic and functional performance that does not comport with reality. They utterly failed to acknowledge the Student’s very limited functional performance and the limited time left for him to benefit from services under the IDEA to improve his functional performance. At [School 1], the Student, who is already sixteen years old and halfway through eleventh grade, would participate in in-school vocational electives for the remainder of eleventh grade and twelfth grade and then participate in vocational training at

community job sites four days per week, not just one or two days per week as at [School 2]. The Student needs the in-school vocational training to practice basic vocational skills and to have any chance of successfully participating in community vocational training and transitioning to adult services.

As noted by Ms. XXXX, the MCPS has a duty to make sure that the Student receives a FAPE, which includes transition services to prepare the Student for his post-high-school life. The MCPS cannot simply accede to the Parents' wishes for their son; it has to provide the Student with proper transition services, and it is obvious on this record that [School 1] is the appropriate educational placement for the Student to receive appropriate transition services.

**(3) The IEP team at [School 2] did not make up evidence to support its recommendation to change the Student's placement to [School 1].**

The Parents argued throughout their due process complaint, opening statement, testimony, and closing argument that the IEP team at [School 2] made up evidence to support its recommendation to change the Student's placement to [School 1]. When asked why [School 2] staff would act in such an unprofessional, horrific manner, the Student's father could only suggest that they did not want to teach the Student. As noted by the MCPS in closing argument, the Parents' argument actually extends beyond [School 2] staff to other MCPS personnel, ultimately involving an allegation that for two-and-one-half-years, the MCPS has conspired to have the Student inappropriately placed at [School 1]. The Parents' argument concerning the MCPS is implausible and unsupported by any rational analysis of the record.

The IDEA contemplates a collaborative relationship between a school system and the parents of a child with a disability. As in this case, the reality often is that the relationship is extremely adversarial. In *Winkelman v. Parma City School District*, 550 U.S. 516 (2007), the Supreme Court held that the IDEA grants parents independent, enforceable rights, which parents

can litigate *pro se* in federal court, but recognized the problems inherent in legal proceedings “unconstrained by attorneys trained in the law and the rules of ethics.” *Id.* at 534. This hearing suffered from the Parents’ lack of legal (and educational) training and their ignorance of basic legal ethics. The Parents presented testimony from fifteen witnesses from the MCPS, none of whom supported any of the Parents’ arguments. The Parents, as noted above, accused MCPS staff of serious and intentional acts of professional misconduct, without offering any substantial evidence to support the accusations. The Parents’ accusations typically were founded upon misstatements or mischaracterizations of facts or educational principles and often were very personal and mean-spirited. The Student’s mother constantly interrupted testimony to declare some statement untrue or some witness a liar. The Student’s father falsely accused [School 2] staff of claiming that the Student was violent, and argued that of the Parents’ fifteen witnesses only Mr. XXXX, Mr. XXXX, and Mr. XXXX testified truthfully (although I note that these three witnesses did not help the Parents’ case). (T. 1126). For the sake of thoroughness, I will attempt to address each of the Parents’ frivolous allegations of misconduct by MCPS staff.

The Parents asserted that Ms. XXXX, intent to have the Student placed at [School 1] for ninth grade (the 2014-2015 school year), tricked them into agreeing to have the Student reevaluated in Summer 2014. The Parents asserted that the reevaluations were a pretext because the Student had made “big progress” through eighth grade and did not need to be reevaluated. At the Student’s annual review IEP team meeting on March 2014, however, the Parents indicated that they had seen minimal progress and asked that the Student be retained in middle school. (Parents #1). According to the IEP team meeting notes, the Student’s mother believed that the Student understood more in sixth grade and had not progressed. (Parents #3). Moreover, at a June 2, 2014 periodic review the Parents expressed their belief (based on a report from a private tutor) that the Student could perform at a higher academic level than indicated in his IEP,



specifically, at sixth-or-seventh-grade level for math and science and fourth-grade level for reading. These contemporaneous records demonstrate that the Student made minimal progress in middle school and that the MCPS requested reevaluations not due to trickery but because of the discrepancy between what the Parents said the Student could do at home with his tutor and what he was capable of doing in school, which was kindergarten-level mathematics and reading.

The Parents also asserted that [School 2] staff exaggerated the Student's interfering behaviors, citing, in part, their assertion that the Student presented very limited behavioral issues in middle school, primarily related to drinking too much water and then urinating in his pants, which were managed by paraeducators. Ms. XXXX, however, testified that by eighth grade, the Student was exhibiting significant interfering behaviors, including the bathroom behaviors and pica that the school was not always able to manage. (T. 38-39).

The Parents initially asserted that Ms. XXXX, after purportedly initiating a reevaluation of the Student, personally overrode the educational recommendation of the [School 3] IEP team and referred (or had the IEP team refer) the Student to the CIEP for possible placement at [School 1] in August 2014. (T. 956, 1088-89, 1131-32). The Parents next asserted that after the CIEP team decided to keep the Student at [School 2], Ms. XXXX continued her efforts to have the Student placed at [School 1]. Ms. XXXX testified that in her administrative role as supervisor of special education clusters, she attended the Student's IEP team meetings and often spoke to summarize the consensus of the IEP team. (T. 68-69). The Parents' allegations of impropriety by Ms. XXXX are baseless. As a witness, Ms. XXXX did not display the warmest personality, but I certainly found credible her explanation that in regards to the Student she was just performing her professional duty. She may well have suspected early on that [School 1] would be an appropriate educational placement for the Student, but there is no evidence that she

did anything improper in regards to the CIEP team's ultimate decision in May 2016 concerning the Student's placement at [School 1].

The Parents made additional allegations that [School 2] staff exaggerated the seriousness of the Student's aggressive behaviors. In their oddest argument, the Parents accused Ms. XXXX of intentionally creating one of the Student's initial aggressive behaviors – the squeezing of a person's four fingers. According to the Parents, when the Student began ninth grade at [School 2], Ms. XXXX instructed the Student's paraeducator, Ms. XXXX, to allow the Student to squeeze her hand, presumably for sensory purposes, because Ms. XXXX knew that this behavior, which was painful for the person whose hand was being squeezed, would become problematic. Ms. XXXX, as part of the conspiracy to have the Student placed at [School 1], could then cite the squeezing as evidence of the Student's aggressive behavior. (T. 956; 1089). Ms. XXXX directly denied having created the hand squeezing when the Parents first made that allegation, noting that it was a behavior that [School 2] staff observed when the Student started ninth grade. (Parents #36). Ms. XXXX, who testified at the hearing and who was present as the MCPS's representative for all five days of the hearing, has taught special education for many years. She did not strike me as someone evil enough to hatch such a diabolical plot against a child with a disability, especially one that she had just recently met. The Parents' other assertions that [School 2] staff exaggerated the seriousness of the Student's aggressive behaviors were also irrational.

The Parents focused much of their wrath on Ms. XXXX, the Student's paraeducator for the 2015-2016 school year, who they disparagingly referred to as an "old lady" and "nanny," (T. 439, 998), and accused of fabricating or exaggerating the Student's aggressive behaviors in her tallying and notes of the Student's behaviors. These tallies and notes, contained in exhibits presented by the Parents and the MCPS, contain Ms. XXXX's period-by-period observations of

the Student's behaviors, including his elopements, aggressive behaviors, self-injurious behaviors, pica, and inappropriate bathroom behaviors. They also include observations of when the Student was behaving appropriately, especially at his community vocational site. I have no reason to doubt the accuracy of Ms. XXXX's observations or her testimony that the Student hit her and hurt her. (T. 337).

The Parents also argued that the typewritten version of Ms. XXXX's notes, (Parents #11; MCPS #6) was a "fake document," containing presumably fabricated evidence of the Student's behaviors. The Parents argued that the document was fake because it apparently had two authors and because there were no handwritten notes by Ms. XXXX in evidence that corresponded to typewritten notes for September 16, 17, and 21, 2015. (T. 974). The document is primarily written in the first person (from Ms. XXXX's viewpoint), but also contains some passages written in the third person. I find it rather obvious that whoever typed Ms. XXXX's notes used an inconsistent voice in summarizing the notes, and I see no evidence of fabrication. As to there being no handwritten notes by Ms. XXXX in evidence that correspond to typewritten notes for September 16, 17, and 21, 2015, I note that the Parents themselves introduced into evidence notes for September 21, 2015. (Parents #41). I also note the irony in the Parents questioning the validity of one document based upon a lack of evidence of other documents that they claim were fabricated. Again, there is a logical explanation besides fraud for there being no handwritten notes by Ms. XXXX for September 16, 17, and 21, 2015 in the MCPS's evidence binder: whoever prepared the MCPS's evidence forgot to put those handwritten notes in MCPS's evidence binder.

While Ms. XXXX, as the Student's assigned paraeducator, may have taken the brunt of the Student's aggression, the record is replete with corroborating evidence, much of which was presented by the Parents, that others besides Ms. XXXX experienced or observed the Student's

aggressive conduct. Mr. XXXX observed the Student head-butt Ms. XXXX and pull her hair in the Student's adaptive physical education class. (T. 375). On September 5, 2014, the Student head-butted Ms. XXXX. (Parents #20; T. 465). During a community outing to a store in October 2014, the Student attempted to grab the arm of a female student and later successfully grabbed the arm of a male customer. On October 16, 2014, the Student grabbed Ms. XXXX on several occasions and grabbed the arms of another LFI student and a general education student. On December 23, 2014, while he was in the bathroom, the Student bit Mr. XXXX on his right index finger, drawing blood, when Mr. XXXX attempted turn off a water faucet. On February 19, 2015, the Student attempted to grab Mr. XXXX around the neck. On February 24, 2015, the Student grabbed several students and his paraeducator. On February 27, 2015, the Student attempted to grab a female student, attempted to head-butt Ms. XXXX, and attempted to hit Mr. XXXX. During an ESY session in Summer 2016, the Student scratched the back of Mr. XXXX's hand, leaving a scar. On September 1, 2015, the Student hit Ms. XXXX in the stomach and hit Ms. XXXX in the chest and stomach. Based on the amount and consistency of the MCPS's evidence concerning the Student's aggressive behaviors, I have no doubt of the accuracy of Ms. XXXX's testimony that "[e]verything we documented was exactly what occurred." (T. 290).

The Parents, despite all of this evidence of the Student's aggressive behaviors, asserted that the Student did not have the physical coordination to punch or kick anyone. They presented no evidence to support this assertion. During his testimony and closing argument, the Student's father became overwrought, accusing [School 2] staff of characterizing the Student's aggressive conduct as violent behavior. He argued that by saying that the Student attempted to choke someone or to grab someone's neck, as Ms. XXXX observed, [School 2] staff were necessarily saying that the Student intended to kill someone, like a soldier or police officer trained in hand-to-hand fighting. (T. 978-80). No one from the MCPS even remotely suggested that the Student

was intentionally violent; they simply described the Student's aggressive conduct towards MCPS staff, with the clear implication that his aggressive conduct was a manifestation of his autism, not of a violent nature. The Parents claimed that at home the Student is gentle and never aggressive, but the issue in this case is his behavior in a LFI program within a comprehensive high school.

The Parents also vehemently disputed testimony that the Student consumed feces, conceding that the Student defecated in his pants and used his hand to remove the feces, but insisting that he only put it up to his nose to smell it. (T. 502-04, 971; Parents #37). My sense is that the Student did not often defecate in his pants or place feces near his mouth, but it did happen, and it makes little sense now to dwell on whether the Student ate his feces or simply smelled it. Either act is inappropriate for a teenager who will soon have to transition to adult services.

The Parents asserted that [School 2] staff sabotaged the Student's chances of meeting his IEP goals by not teaching the Student pursuant to his IEP goals and objectives. (T. 983). The Student's father, who conceded several times that neither he nor his wife have knowledge of special education, nevertheless accused [School 2] staff of teaching the Student at a higher level than the goals in his IEPs before April 22, 2016. He also accused [School 2] staff of increasing the difficulty of the Student's goals and objectives for mathematics and reading comprehension in the April 22, 2016 IEP so that the goals and objectives would match what the Student had been taught up to that point and to ensure that the Student could not make progress on his IEP goals. The supposed motive for all of this educational malpractice was to create evidence to support the Student's educational placement at [School 1]. Several witnesses, including Ms. XXXX, Ms. XXXX, and Mr. XXXX, explained that the Parents' argument was based upon a misunderstanding of the difference between the LFI curriculum and the Student's IEP goals and objectives.

Mr. XXXX testified that an IEP is designed to provide a child with a disability access to a curriculum, in the Student's case, the LFI curriculum. (T. 870). [School 2] staff could not spend all of the Student's time in class strictly teaching him according to his IEP goals and objectives. Several witnesses testified that the Student's IEP contained many accommodations, especially repetition, limited choices, and one-to-one adult support, designed to modify or differentiate the way that [School 2] staff presented the LFI curriculum to the Student. (T. 766-69 ). Ms. XXXX testified that she always significantly modified or differentiated the LFI curriculum for the Student. (T. 679-90, 699, 705). As to the Student's April 22, 2016 IEP goals and objectives for mathematics and reading comprehension, Ms. XXXX testified that these goals and objectives, when considered along with the significant modifications listed in the goals, were not more complex than his prior IEP goals and objectives for those subjects. She explained that the Student's new goals and objectives, consistent with someone needing to prepare for life after high school, were more functional and real-life oriented. (T. 181-82, 193).

The Student's April 22, 2016 IEP goals and objectives for mathematics and reading comprehension might appear to a layperson to be more difficult than his earlier goals and objectives for those subjects. But if you factor in the significant teaching modifications listed in the goals, it is obvious that the Student is still being taught at a very low, basic level, not unlike in his first two years at [School 2]. I am required to give deference to the educators on matters relating to teaching theory and practice, such as whether the Student's IEP goals and objectives are appropriate. The Parents presented nothing more than their own thoughts on how their son should be taught to refute the testimony from the MCPS's witnesses concerning the Student's IEP goals and objectives. Therefore, the Parents failed to prove any impropriety as to those IEP goals and objectives.

The Parents also cited the Student's progress during ESY sessions in Summer of 2015 and Summer 2016 as evidence that the [School 2] staff misrepresented the Student's progress at [School 2]. ESY sessions, however, are half-day sessions in small classes lasting approximately one-month. Mr. XXXX testified that it is not a fair comparison to equate a student's success during ESY sessions to success during the regular school year. (T. 833-34).

**(4) The IEP team at [School 2] and the CIEP team did not significantly impede the Parents' opportunity to participate in the IEP decision-making process by: (a) refusing to consider the Parents' reasonable suggestions; (b) not providing the Parents copies of IEP documents after meetings; and (c) not obtaining the Parents' consent before conducting FBAs.**

The Parents claimed that the MCPS committed several procedural errors. First, they asserted that the [School 2] IEP team and the CIEP team failed to consider the Parents' reasonable suggestions, such as assigning a male paraeducator for the Student, using physical force to manage the Student's bathroom behavior, and recognizing the role of the Student's OCD in his interfering behaviors. Second, the Parents asserted that the [School 2] IEP team did not provide them with a copy of the Student's December 8, 2015 IEP and that they only received this IEP fairly recently, and that neither the [School 2] IEP team nor the CIEP team discussed FBAs or BIPs during IEP or CIEP team meetings. Third, the Parents asserted that [School 2] staff violated their rights under the IDEA by not obtaining the Parents' consent before conducting FBAs. The Parents' first and second claims are without merit. Their third claim concerning the MCPS's failure to obtain parental consent for FBAs is true, but, under the applicable legal standard, amounts to harmless error.

The Code of Federal Regulations provides in pertinent part as follows:

§ 300.513 Hearing decisions.

(a) *Decision of hearing officer on the provision of FAPE.*

.....

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

(i) Impeded the child’s right to a FAPE;

(ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or

(iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a)(2); *see also* Md. Code Ann., Educ. § 8-413(g) (Supp. 2016).

In *DiBuo v. Board of Education of Worcester County*, the court stated that “to the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.” 309 F.3d 184, 190 (4th Cir. 2002) (quoting *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997)).

First, the [School 2] IEP team and the CIEP team considered the Parents’ suggestions concerning a male paraeducator for the Student, using physical force to manage the Student’s bathroom behavior, and the role of the Student’s OCD in his interfering behaviors. The MCPS rejected these suggestions for legitimate reasons.

The MCPS does not assign paraeducators or other school personnel based on gender. Moreover, contrary to the Parents’ assertion, a female paraeducator can enter a male group bathroom after announcing herself to other students in the bathroom. As to the use of physical force, according to MCPS policy, MCPS staff cannot use physical force on a student unless the student or someone else is at risk of imminent harm. The Parents suggested that the Student’s bathroom behavior put him at risk of imminent harm because he might drink so much water that he could develop a life-threatening medical condition caused by an electrolyte imbalance. There



is no evidence in the record that the Student ever was at risk of harm from drinking too much water. This argument is just another example of the Parents' willingness to exaggerate basic facts to support their case.

The Parents argued that MCPS staff could not manage the Student's interfering behaviors because they failed to recognize that most of the Student's behaviors were the result of his co-occurring OCD. The Parents presented a letter from XXXX XXXX, D.O., a psychiatrist at the Center for Autism Spectrum Disorders and Children's National Medical Center. Dr. XXXX indicated that she was managing the Student for autism spectrum disorder and OCD. She summarized the Parents' assertions about [School 2]'s management of the Student's bathroom behaviors and encouraged MCPS staff to create a behavior plan for the Student. Dr. XXXX did not address the Student's pica or aggressive behaviors. (Parents #7). Dr. XXXX's letter is a patient advocacy letter, rather than an objective medical report. She relied on information provided by the Parents, did not say that the Student's bathroom behaviors were the result of his OCD, and utterly failed to address the Student's other significant interfering behaviors. Dr. XXXX did not testify at the hearing, and she did not write her letter for the hearing. I doubt that as a professional she would endorse the Parents' use of her letter to prove that OCD is a better explanation for the Student's interfering behaviors than autism. At the hearing, the Student's father testified that he believes that the Student's bathroom behaviors are the result of the anxiety caused by the Student's obsession that he will become ill if he does not drink enough water. A study introduced into evidence by the Parents warns of the difficulty of inferring an internal state of a non-verbal, autistic child. (Parents #54). The Student's father nevertheless made such an inference, an inference that is not based on any objective evidence, and which fails to explain any of the Student's other interfering behaviors. The Student's long-standing diagnosis of autism, not a recent diagnosis of OCD, presents a better explanation for the Student's

inappropriate behaviors in school. In any event, the [School 2] IEP team and the CIEP team were aware of Dr. XXXX's letter and her diagnosis of OCD, considered it along with other information about the Student, and reasonably concluded that the Student's autism was the likely cause of his behaviors.

Second, the Parents asserted that the [School 2] IEP team did not provide them with a copy of the Student's December 8, 2015 IEP and that they only received this IEP fairly recently. The Parents conceded that they did not immediately request a copy of that IEP, and testified that they had family emergencies around that time that required them to travel to [Country]. (T. 1097-98). Ms. XXXX testified that she sent the Parents a copy of the December 8, 2015 IEP by placing it in the Student's backpack. (T. 757). On this record, I find it more likely than not that the [School 2] IEP team provided the Parents a copy of the Student's December 8, 2015 IEP and the Parents simply misplaced it. I reach this conclusion, in part, based upon the Parents' lack of credibility on this issue. The Parents asserted that the copy of the December 8, 2015 IEP that they eventually received was a fake document because it contained progress reports for January 22, 2016 and April 8, 2016. According to the Parents, this was proof that the December 8, 2015 IEP was not prepared until after April 8, 2016. Ms. XXXX testified that progress reports are added to an IEP's pages concerning a student's goals as the school year proceeds and the original pages are removed. This explains why the copy of the December 8, 2015 IEP that the Parents received in 2016 contained progress reports. The Parents' unfounded allegation of fabrication of the December 8, 2015 IEP makes me skeptical of their testimony about their receipt of that IEP.

The Parents also asserted that neither the [School 2] IEP team nor the CIEP team discussed FBAs or BIPs during IEP or CIEP team meetings. It is inconceivable to me that the IEP team did not discuss FBAs or BIPs at IEP team meetings, and it is clear from all of the Student's IEPs that the Student's interfering behaviors were the main topic of every IEP team

meeting. In any event, the Parents' own evidence refutes their claim – the Student's March 20, 2015 IEP states that the IEP “team is currently working on redoing the current FBA and BIP,” (Parents #39), and the Student's December 8, 2015 IEP states that the Student requires a BIP. (Parents #10).

Third, the Parents asserted that [School 2] staff violated their rights under the IDEA by not obtaining the Parents' consent before conducting FBAs. This is the Parents' only allegation against the MCPS with any merit. [School 2] staff was required to obtain the Parents' consent before conducting FBAs of the Student. 34 C.F.R. § 300.300; COMAR 13A.05.01.13A; 13A.05.01.03B(12); Letter from Alexa Posny, Dir., Office of Special Educ. Programs, U.S. Dep't of Educ., to Dr. Kris Christiansen, Assistant Superintendent of Special Educ. & Related Servs., Washoe Cty. Sch. Dist. (Feb. 9, 2007), *available at* [https://www2.ed.gov/policy/speced/guid/idea/letters/2007-1/christiansen020907\\_discipline1q2007.pdf](https://www2.ed.gov/policy/speced/guid/idea/letters/2007-1/christiansen020907_discipline1q2007.pdf). The Parents, however, failed to establish that this procedural inadequacy deprived the Student of a FAPE. The MCPS's failure to obtain the Parents' consent before conducting FBAs of the Student did not impede the Student's right to a FAPE or cause a deprivation of educational benefit for the Student. The FBAs actually furthered the Student's right to a FAPE and provided him educational benefit because the information obtained through the FBAs helped the [School 2] IEP team prepare a BIP to address the Student's interfering behaviors. 34 C.F.R. § 300.513(a)(2)(i), (iii); *see also* Educ. § 8-413(g) (Supp. 2016).

The MCPS's failure to obtain the Parents' consent before conducting the FBAs did not significantly impede the Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child. *See MM ex rel. DM v. School Dist. Of Greenville County*, 303 F.3d 523, 534-35 (4<sup>th</sup> Cir. (2002)). The Student's interfering behaviors were the subject of every IEP or CIEP team meeting since at least March 20, 2014. Contrary to

the Parents' assertion, the FBAs and BIPs are documented in the Student's March 20, 2015 IEP and December 8, 2015 IEP. The Parents knew that the MCPS was conducting FBAs and they could have objected to them at that time. The MCPS's procedural violation caused neither the Student nor the Parents any harm. 34 C.F.R. § 300.513(a)(2)(ii).

### **CONCLUSIONS OF LAW**

Based upon the Findings of Fact and Discussion, I conclude as follows:

(1) the CIEP team's determination that the Student's educational placement should be at [School 1], a separate public day school, rather than in a LFI program within a comprehensive public school, did not violate the Student's right to a FAPE in the LRE, 20 U.S.C.A.

§ 1412(a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i) & 300.117 (2016); *AW ex rel. Wilson v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 681 (4th Cir. 2004);

(2) the educational placement at [School 1] would not prevent the Student from receiving appropriate vocational training, 20 U.S.C.A. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb) (2010);

(3) the IEP team at [School 2] did not make up evidence to support its recommendation to change the Student's placement to [School 1]; and

(4) the IEP team at [School 2] did not significantly impede the Parents' opportunity to participate in the IEP decision-making process by refusing to consider the Parents' suggestions, not providing the Parents copies of IEP documents after meetings, and not obtaining the Parents' consent before conducting functional behavioral assessments. 34 C.F.R. § 300.513(a)(2) (2016); Md. Code Ann., Educ. § 8-413(g) (Supp. 2016); *DiBuo v. Bd. of Educ. of Worcester Cty.*, 309 F.3d 184, 190 (4th Cir. 2002).

**ORDER**

I **ORDER** that the Parents' due process complaint is denied in its entirety.

January 13, 2017  
Date Decision Mailed

\_\_\_\_\_  
Robert F. Barry  
Administrative Law Judge

RFB/sm

**REVIEW RIGHTS**

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

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

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