

**XXXX XXXX,** \* **BEFORE DEBORAH S. RICHARDSON,**  
**THE STUDENT** \* **AN ADMINISTRATIVE LAW JUDGE**  
v. \* **OF THE MARYLAND OFFICE**  
**MONTGOMERY COUNTY** \* **OF ADMINISTRATIVE HEARINGS**  
**PUBLIC SCHOOLS** \* **OAH No.: MSDE-MONT-OT-17-12269**

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## **DECISION**

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

### **STATEMENT OF THE CASE**

On April 24, 2017, XXXX (Father) and XXXX (Mother) XXXX (Parents), on behalf of their son, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).<sup>1</sup> That same day, OAH forwarded the Complaint to MCPS. On May 4, 2017, MCPS filed with OAH a response to the Complaint. On May 24, 2017, the parties informed OAH that they had agreed, in writing, to waive a resolution meeting.

I held a telephone pre-hearing conference on June 12, 2017. Paula Rosenstock, Esquire, represented the Parents<sup>2</sup> and Jeffrey Krew, Esquire, represented MCPS. Based on the availability

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<sup>1</sup> U.S.C.A. is an abbreviation for United States Code Annotated.

<sup>2</sup> Ms. Rosenstock explained that Michael Eig, Esquire, would be representing the Parents at the hearing.

of the parties and their witnesses, I scheduled the hearing for five consecutive days to begin on September 11, 2017.<sup>3</sup>

On August 14, 2017, Manisha Kavadi entered her appearance on behalf of MCPS and on August 16, 2017, Mr. Krew withdrew his appearance. On August 24, 2017, Ms. Kavadi filed a Motion for Continuance requesting a two-week postponement of the hearing to allow her additional time to prepare. Mr. Eig file an Opposition to Respondent's Motion for Continuance, explaining that because of his schedule, any postponement would result in this case being scheduled at the earliest in November. I held a second telephone pre-hearing conference on August 30, 2017. At that time I denied the Motion for Continuance, ruling that MCPS had enough time to prepare for this hearing.

I held the hearing on September 11 through 15, 2017 at MCPS' offices in Rockville, Maryland as scheduled. Mr. Eig represented the Parents and Ms. Kavadi represented MCPS.

In accordance with federal regulations, the decision in this case would normally be due on Friday, July 7, 2017, which was forty-five (45) days from the date on which the parties waived the resolution session. 34 C.F.R. § 300.510(c)(1) (2016).<sup>4</sup> However, the hearing dates requested by the parties fell more than forty-five days after the triggering events described in the federal regulations. The Parties requested a specific extension of the timeframe so that a decision would be issued within thirty days of the close of the record. 34 C.F.R. 300.515; Md. Code Ann., Educ. § 8-413(h) (Supp. 2017). I granted this specific extension and agreed to issue my decision on or before October 13, 2017, which is twenty-eight (28) days from the conclusion of the hearing and the close of the record.<sup>5</sup>

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<sup>3</sup> I issued a Pre-Hearing Conference Report and Order on June 15, 2017 which details the scheduling conflicts up until September 11, 2017.

<sup>4</sup> C.F.R. is an abbreviation for Code of Federal Regulations. All citations are to the 2016 volume.

<sup>5</sup> I agreed to an extension of thirty days, but thirty days from September 15, 2017 is Sunday, October 15, 2017; therefore I will issue and mail this decision no later than Friday October 13, 2017.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2017); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 13A.05.01.15C; COMAR 28.02.01.

## **ISSUES**

The issues are:

1. Was the Individualized Education Program (IEP) developed for the Student for the 2015-2016 school year, which included placement at the XXXX Center at [School 1] ([School 1]), reasonably calculated to provide the Student with a free appropriate public education (FAPE)?
2. If MCPS denied the Student a FAPE for the 2015-2016 school year, is tuition reimbursement for the 2015-2016 school year at the [School 2] ([SCHOOL 2]), the Parents' unilaterally chosen non-public school placement, appropriate?
3. Was the IEP developed for the Student for the 2016-2017 school year, which included placement at [School 1], reasonably calculated to provide the Student with a FAPE?
4. If MCPS denied the Student a FAPE for the 2016-2017 school year, is tuition reimbursement for the 2016-2017 school year at [SCHOOL 2], the Parents' unilaterally chosen non-public school placement, appropriate?
5. Should the Student be placed at [SCHOOL 2] for the 2017-2018 school year?<sup>6</sup>

## **SUMMARY OF THE EVIDENCE**

### **Exhibits**

I admitted the following exhibits on behalf of the Parents:

Parents Ex. 1 - Request for Due Process, 4/24/17

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<sup>6</sup> The Parents filed their Due Process Complaint in April 2017, after the 2017-2018 IEP was completed, but before the school year began. The hearing was completed after the school year began, and the Parents have unilaterally placed the Student at [SCHOOL 2] for the 2017-2018 school year.

- Parents Ex. 2 - Pediatric Communication Evaluation and Audiological Evaluation, 9/1/11 and 9/20/11
- Parents Ex. 3 - Developmental and Behavioral Report by Dr. XXXX XXXX, 12/28/11
- Parents Ex. 4 - Montgomery County Infants and Toddlers Program Transition Assessment Report, 8/22/12
- Parents Ex. 5 - MCPS IEP Cover Page, Services, LRE, and Addendum, 12/6/12
- Parents Ex. 6 - XXXX Institute Center for Autism Initial Evaluation, 2/20/13
- Parents Ex. 7 - XXXX Institute Center for Autism Speech-Language Evaluation, 4/ 13/13
- Parents Ex. 8 - XXXX Medical Center Genetics Consultation, 7/17/13
- Parents Ex. 9 - XXXX Speech Language Summer Program Report, 8/2/13
- Parents Ex. 10 - XXXX Behavioral Services Preliminary Treatment Plan, 10/17/13
- Parents Ex. 11 - MCPS IEP Cover Page, Services, LRE, and Addendum, 11/22/13
- Parents Ex. 12 - MCPS Teacher Questionnaire for Dr. XXXX XXXX, 11/27/13
- Parents Ex. 13 - Developmental Assessment by Dr. XXXX XXXX, 5/15/14
- Parents Ex. 14 - Developmental and Behavioral Report by Dr. XXXX XXXX, Summer 2014
- Parents Ex. 15 - XXXX Speech Language Summer Program Report, 8/1/14
- Parents Ex. 16 - MCPS Team Consideration of External Report and IEP Cover Page, Services, LRE, and Addendum, 10/6/14
- Parents Ex. 17 - XXXX Behavioral Services Treatment Plan, 10/7/14
- Parents Ex. 18 - XXXX Behavioral Services School Observation Notes, 10/21/14
- Parents Ex. 19 - MCPS Physical Disabilities Program Progress Note, November 2014
- Parents Ex. 20 - MCPS Preschool Education Program (PEP) Developmental Profile Report, 11/25/14
- Parents Ex. 21 - MCPS Psychological Re-Evaluation Report, 12/11/14

- Parents Ex. 22 - Early Intervention Therapists Occupational Therapy Progress Report, December 2014
- Parents Ex. 23 - MCPS IEP Cover Page and Addendum, 12/22/14
- Parents Ex. 24 - MCPS Teacher Evaluation Form for [SCHOOL 2] Application
- Parents Ex. 25 - XXXX Behavioral Services Treatment Plan, 1/20/15
- Parents Ex. 26 - [Center] Report, 1/22/15
- Parents Ex. 27 - Observation Report by the XXXX Group, 1/30/15
- Parents Ex. 28 - Neuropsychological Consultation Report by Dr. XXXX XXXX, March 2015
- Parents Ex. 29 - Observation Report of [School 1] by the XXXX Group, 3/23/15
- Parents Ex. 30 - [SCHOOL 2] Letter of Acceptance, 5/7/15
- Parents Ex. 31 - Emails between the Parents and XXXX XXXX, 6/10/15
- Parents Ex. 32 - MCPS Team Consideration of External Report, 6/11/15
- Parents Ex. 33 - MCPS IEP, 6/11/15
- Parents Ex. 34 - [SCHOOL 2] File Notes, 9/9/15
- Parents Ex. 35 - [SCHOOL 2] Sensory Diet and Behavior Plan, October 2015
- Parents Ex. 36 - [SCHOOL 2] Diagnostic Prescriptive Goals (DPG), 11/13/15, with February 2016, April 2016, May 2016, and July 2016 progress annotations
- Parents Ex. 37 - [SCHOOL 2] DPG Meeting Notes, 11/13/15
- Parents Ex. 38 - [SCHOOL 2] Incident Reports, September to December 2015
- Parents Ex. 39 - XXXX Center Physical Therapy Initial Evaluation, 12/28/15
- Parents Ex. 40 - Letters to XXXX XXXX and XXXX XXXX from Michael J. Eig, Esq., 2/17/16, 3/7/16, 4/11/16, and 4/28/16
- Parents Ex. 41 - not offered
- Parents Ex. 42 - [SCHOOL 2] 2015-16 School Year Report Card
- Parents Ex. 43 - MCPS IEP, 7/28/16

- Parents Ex. 44 - Letters between Mr. Eig and XXXX XXXX, Esq., 8/5/16 and 8/9/16
- Parents Ex. 45 - Letters between Mr. Eig and Ms. XXXX, 8/9/16 and 8/15/16
- Parents Ex. 46 - [SCHOOL 2] DPG, 11/9/16, with January 2017, March 2017, June 2017, and July 2017 progress annotations
- Parents Ex. 47 - [SCHOOL 2] DPG Meeting Notes, 11/9/16
- Parents Ex. 48 - Educational Report by XXXX XXXX, 11/15/16
- Parents Ex. 49 - Email from XXXX XXXX to Zvi Greismann, Esq., 1/17/17
- Parents Ex. 50 - Email from XXXX XXXX to the Parents, 2/16/17
- Parents Ex. 51 - Observation Report by XXXX XXXX, 2/21/17
- Parents Ex. 52 - MCPS IEP, 3/31/17
- Parents Ex. 53 - XXXX Centers Augmentative and Alternative Communication Evaluation, 4/9/17
- Parents Ex. 54 - XXXX Centers Speech-Language Evaluation, 4/13/17
- Parents Ex. 55 - [SCHOOL 2] 2016-17 School Year Report Card
- Parents Ex. 56 - [SCHOOL 2] Behavioral Data, 8/1/16 to 7/31/17
- Parents Ex. 57 - Letters from Mr. Eig to Mr. Greismann, 8/7/17 and to Ms. XXXX, 8/30/17
- Parents Ex. 58 - Résumé of XXXX XXXX
- Parents Ex. 59 - Résumé of XXXX XXXX
- Parents Ex. 60 - Résumé of Dr. XXXX XXXX
- Parents Ex. 61 - Résumé of XXXX XXXX
- Parents Ex. 62 - not offered
- Parents Ex. 63 - not offered
- Parents Ex. 64 - not offered
- Parents Ex. 65 - not offered

I admitted the following exhibits on behalf of MCPS:

- MCPS Ex. 1 - IEP Meeting Invitation, 10/15/2013
- MCPS Ex. 2 - IEP, 11/22/2013
- MCPS Ex. 3 - Teacher Questionnaire Responses to XXXX XXXX, 11/27/2013
- MCPS Ex. 4 - XXXX XXXX, M.D. Report, Summer 2014
- MCPS Ex. 5 - IEP Meeting Invitation, 9/11/2014
- MCPS Ex. 6 - IEP, 10/6/2014
- MCPS Ex. 7 - IEP Amendment, 12/22/2014
- MCPS Ex. 8 - PEP Developmental Profile, 11/25/14
- MCPS Ex. 9 - MCPS School Psychological Report, 12/11/2014
- MCPS Ex. 10 - IEP Meeting Invitation, 4/20/2015
- MCPS Ex. 11 - IEP Meeting Invitation, 6/8/2015
- MCPS Ex. 12 - IEP, 6/11/2015
- MCPS Ex. 13 - Neuropsychological Evaluation, by XXXX XXXX, 3/22/2015
- MCPS Ex. 14 - MCPS Consideration of External XXXX report, 6/11/2015
- MCPS Ex. 15 - Letter from Mr. Eig to Ms. XXXX, 3/7/2016
- MCPS Ex. 16 - not offered
- MCPS Ex. 17 - [SCHOOL 2] Behavior Plan
- MCPS Ex. 18 - not offered
- MCPS Ex. 19 - not offered
- MCPS Ex. 20 - IEP Meeting Invitation, 3/16/2016
- MCPS Ex. 21 - Letter from Mr. Eig to XXXX XXXX, 4/11/6
- MCPS Ex. 22 - IEP Meeting Invitation, 4/22/2016
- MCPS Ex. 23 - Letter from Mr. Eig to Ms. XXXX, 4/28/16

- MCPS Ex. 24 - Email correspondence between XXXX XXXX and Ms. XXXX, 4/28/2016-4/29/2016
- MCPS Ex. 25 - Email correspondence between Ms. XXXX and Ms. XXXX, 4/28/2016-5/2/2016
- MCPS Ex. 26 - Email correspondence between Ms. XXXX and Ms. XXXX, 4/28/2016-5/10/2016
- MCPS Ex. 27 - IEP Meeting Invitation, 5/13/2016
- MCPS Ex. 28 - IEP Meeting Invitation, 5/17/2016
- MCPS Ex. 29 - Email correspondence between Ms. XXXX and Ms. XXXX, 5/20/2016
- MCPS Ex. 30 - Email correspondence between Ms. XXXX and Ms. XXXX, 5/23/2016
- MCPS Ex. 31 - Letter from Mr. Eig to Ms. XXXX, MCPS, 5/26/2016
- MCPS Ex. 32 - Letter from Ms. XXXX to Mr. Eig, 5/26/2016
- MCPS Ex. 33 - IEP, 5/27/2016
- MCPS Ex. 34 - Letter from Mr. Eig to Ms. XXXX, 6/9/2016
- MCPS Ex. 35 - Letter from Ms. XXXX to Mr. Eig, 6/14/2016
- MCPS Ex. 36 - Letter from Mr. Eig to Ms. XXXX, 6/24/2016
- MCPS Ex. 37 - Letter from Ms. XXXX to Mr. Eig, 6/28/2016
- MCPS Ex. 38 - Letter from Mr. Eig to Ms. XXXX, 6/30/2016
- MCPS Ex. 39 - IEP Meeting Invitation, 7/5/2016
- MCPS Ex. 40 - Letter from Mr. Eig to Ms. XXXX, 7/7/2016
- MCPS Ex. 41 - Letter from Ms. XXXX to Mr. Eig, 7/8/2016
- MCPS Ex. 42 - IEP Meeting Invitation, 7/19/2016
- MCPS Ex. 43 - IEP, 7/28/2016 (2016-2017 school year)
- MCPS Ex. 44 - Letter from Mr. Eig to Ms. XXXX, 8/5/2016
- MCPS Ex. 45 - Letter from Ms. XXXX to Parents, 8/9/2016

- MCPS Ex. 46 - Letter from Mr. Eig to Ms. XXXX, 8/9/2016
- MCPS Ex. 47 - Letter from XXXX XXXX, MCPS to Mr. Eig, 8/15/2016
- MCPS Ex. 48 - IEP Meeting Invitation, 3/3/2017
- MCPS Ex. 49 - IEP, 3/31/2017 (2017-2018 school year)
- MCPS Ex. 50 - Letter from Mr. Eig to Mr. Greismann, 8/17/2017
- MCPS Ex. 51 - Letter from Ms. XXXX to Mr. Eig, 8/30/2017
- MCPS Ex. 52 - Montgomery County Infants and Toddlers Transition Assessment Report, 8/22/2012
- MCPS Ex. 53 - not offered
- MCPS Ex. 54 - MCPS Occupational Therapy Records, 2013-2014 school year
- MCPS Ex. 55 - MCPS Occupational Therapy Records, 2014-2015 school year
- MCPS Ex. 56 - MCPS Cutting paper sample, 2015
- MCPS Ex. 57 - MCPS Occupational Therapy
- MCPS Ex. 58 - MCPS Occupational Therapy Writing sample, 1/2015
- MCPS Ex. 59 - MCPS Coloring samples, 3/2014 and 2/2015
- MCPS Ex. 60 - MCPS Occupational Therapy Progress Report, October 2014
- MCPS Ex. 61 - MCPS Occupational Therapy Progress Note, November 2014
- MCPS Ex. 62 - MCPS Occupational Therapy Progress Report, December 2014
- MCPS Ex. 63 - MCPS Occupational Therapy Progress Report, January 2015
- MCPS Ex. 64 - MCPS Occupational Therapy Progress Report, February 2015
- MCPS Ex. 65 - MCPS Occupational Therapy Progress Report, March 2015
- MCPS Ex. 66 - Note from MCPS Occupational Therapist, 10/29/2014
- MCPS Ex. 67 - Note from MCPS Occupational Therapist, 11/5/2014
- MCPS Ex. 68 - MCPS Student Learning Objective, November 2014-February 2015; MCPS Math/Sorting 2015; MCPS Student Learning Objective, November 2014-February 2015; Reading/Writing 2015;

MCPS Work Sample, 9/15/2014- 2/25/2015; MCPS Math Assessment, 10/8/14

- MCPS Ex. 69 - IEP Progress Reports, 1/20/2015 and 5/14/2015
- MCPS Ex. 70 - MCPS Speech-Language Records (2013-2014 school year)
- MCPS Ex. 71 - MCPS Speech-Language Records (2014-2015 school year)
- MCPS Ex. 72 - Speech-Language progress note, November 1, 2014, by XXXX XXXX
- MCPS Ex. 73 - not offered
- MCPS Ex. 74 - XXXX Group, Client Intake Questionnaire, 12/22/14
- MCPS Ex. 75 - XXXX Consultation Agreement, 12/23/14
- MCPS Ex. 76 - XXXX Release of Information, 1/13/2015
- MCPS Ex. 77 - not offered
- MCPS Ex. 78 - [SCHOOL 2] Application for Admission, 1/21/2015
- MCPS Ex. 79 - [SCHOOL 2] Parent Evaluation Form, 1/21/2015
- MCPS Ex. 80 - MCPS Teacher Evaluation Form to [SCHOOL 2], undated
- MCPS Ex. 81 - [SCHOOL 2] Acceptance Letter in XXXX program, 5/7/2015
- MCPS Ex. 82 - not offered
- MCPS Ex. 83 - Email from XXXX XXXX to the Parents, 2/16/2017
- MCPS Ex. 84 - not offered
- MCPS Ex. 85 - Résumé of XXXX XXXX
- MCPS Ex. 86 - Résumé of XXXX XXXX
- MCPS Ex. 87 - not offered
- MCPS Ex. 88 - Résumé of XXXX XXXX
- MCPS Ex. 89 - Résumé of XXXX XXXX
- MCPS Ex. 90 - not offered

MCPS Ex. 91 - not offered

MCPS Ex. 92 - not offered

MCPS Ex. 93 - not offered

MCPS Ex. 94 - 10 Day Response Letter by Mr. Krew, MCPS to Due Process Appeal

### Testimony

The Parents testified and presented the following witnesses:

- Dr. XXXX XXXX, Clinical Psychologist, admitted as an expert in developmental neuropsychology;
- XXXX XXXX, Educational Consultant, admitted as an expert in special education;
- XXXX XXXX, Speech Language Pathologist, admitted as an expert in speech language pathology with a focus on early childhood autistic students; and
- XXXX XXXX, Senior Speech Language Pathologist/Early Childhood Coordinator, [SCHOOL 2], admitted as an expert in speech language pathology with a focus in early childhood development.

MCPS presented the following witnesses:

- XXXX XXXX, Autism Program Specialist, MCPS, admitted as an expert in special education with a focus in autism;
- XXXX XXXX, previously MCPS Preschool Education Program Coordinator, admitted as an expert in speech language pathology with a focus on early childhood disabilities and autism;
- XXXX XXXX, Speech Language Pathologist, [School 3], MCPS, admitted as an expert in speech language pathology with a focus on early childhood education and autism; and
- XXXX XXXX, Occupational Therapist, MCPS, admitted as an expert in occupational therapy with a focus on preschool early childhood education and autism.

### **FINDINGS OF FACT**

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

1. The Student was born in XXXX 2009.
2. In September 2011, when he was XXXX months old, the Student was evaluated by a speech-language pathologist in [State], where the family was then living. At that time the Student had significant expressive language deficits, characterized by skills markedly below his chronological age.

3. In December 2011, when he was XXXX years old, the Student was seen by a developmental behavioral pediatrician. At that time, the Student had no words in his vocabulary but did use gestures to communicate. He was able to follow directions. His eye contact was variable. He was obsessed with CDs and DVDs. The pediatrician diagnosed the Student with pervasive development disorder and global developmental delays.

4. Montgomery County Infants and Toddlers Program (MCITP) conducted a home visit and testing with the Student in January 2012 after the family moved to Montgomery County, Maryland. The testing revealed needs in the areas of problem solving, receptive language, and expressive language and the Student began receiving services from MCITP in February 2012. Services included special instruction two times monthly, speech-language therapy four times monthly, occupational therapy four times monthly, and physical therapy two times monthly.

5. MCITP conducted assessments of the Student on June 19, 2012, July 5, 2012, and July 30, 2012 in order to determine the Student's eligibility for special education services. The MCITP assessment team prepared a Transition Assessment Report dated August 22, 2012. As of that date, the Student exhibited the following levels of development:

**Levels of Performance Before MCPS Preschool Education Program (PEP)**

6. Gross Motor: The Student was inconsistent in performing gross motor skills. He would lose his balance and not always use his vision to assist himself to move throughout his

environment. His lack of body awareness caused him to trip and fall and move unsafely on stairs, playground equipment, and uneven surfaces.

7. Cognitive/Academic: The Student demonstrated the ability to count with one-to-one correspondence through pointing, but would not use signs or gestures to count. He gave the examiner one item upon request, but did not give one more or two items upon request. He understood the concepts of “one” and “all.” He recognized and matched colors by pointing to pictures of items with stated colors. He was able to label “blue” verbally. He was able to identify, spontaneously name, and match objects to pictures. He used objects in pretend play and set aside toys when given a new toy. He was able to stack and nest blocks and cups of graduated sizes.

8. Pre-writing/Written Language: The Student was able to maintain a writing utensil between his thumb and index finger most of the time and was beginning to imitate horizontal and vertical strokes. He required physical and verbal prompts to utilize his left hand as a stabilizer. He scribbled spontaneously and explored a variety of drawing, writing, and painting materials. He was not able to label his written representations. He was also not able to “pretend” to write a letter by scribbling on a paper and “reading” it out loud.

9. Fine Motor: The Student took blocks out of a container and put them in using a grasp that was easy and automatic. He was able to pour the blocks out of the container. He used both hands to build a ten-block tower. He was not able to copy a vertical line, horizontal line, circle, or cross.

10. Receptive Language: The Student identified basic body parts, engaged in symbolic play, recognized action in pictures, and understood object use. He became distracted when asked to identify things you wear and follow directions involving pronouns. He did not follow directions without gestural cues or involving spatial and qualitative (one, some, all) concepts.

11. Expressive Language: He used gestures (sign approximations) paired with vocalizations and demonstrated joint attention.<sup>7</sup> In addition, he named eight photographs using consonants and neutral vowels as follows: buh (ball), buh (bird), buh (balloon), ah (apple), buh (baby), k k (cookie), duh (dog), and boo (spoon). He did not use words more often than gestures or vocalizations to communicate; nor did he use words for a variety of pragmatic functions. He was not yet combining words.

12. Pragmatic Language: The Student would not consistently greet the providers, but he would more consistently wave goodbye. His eye contact was fleeting during unstructured activities. His eye contact was more consistent when he was engaged in a motivating activity.

13. Articulation: The Student's overall speech intelligibility was poor due to decreased verbal expression and consonant-vowel productions.

14. Play: The Student would push toys or trains between locations, but did not elaborate on the play scheme. He would build with blocks and could be engaged in a turn-taking exchange with an adult to build a tower and knock it down. The Student chose to participate in form-board puzzle activities, especially when they included letters. He would participate in "clean-up" between various play activities with adult prompts and encouragement.

15. Daily Living/Self-Help: The Student was able to drink from a cup with both hands and return it to the table after drinking. He was able to use an upright spoon with moderate spillage. He could remove shoes and pants but was not able to put on clothing. He could turn a doorknob, perform simple errands and watch television for twenty minutes or more.

16. The IEP team met on December 6, 2012 to develop an IEP for the remainder of the 2012-2013 school year. The Student qualified for school services under a developmental delay coding.

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<sup>7</sup> The shared focus of two individuals on an object.

17. The IEP for 2012-2013 provided special education services in a PEP class five days per week for three hours a day, at [School 4], with sixty minutes of speech-language therapy and forty-five minutes of occupational therapy integrated into the program. The IEP also provided two home community consults per month of forty-five minutes by the special educator.

18. The PEP program serves children aged three to five with the students ranging from mild needs in pre-academic literacy to those significantly cognitively impaired. The majority of PEP students are somewhere on the autism spectrum.

19. A PEP classroom has nine students, with one teacher and two para-educators.

20. On February 20, 2013, the Student was evaluated by Dr. XXXX XXXX, a developmental pediatrician, at the XXXX Institute, Center for Autism and Related Disorders. Dr. XXXX diagnosed the Student as a child with significant issues with encephalopathy as marked by autism, sensory processing issues, hypotonia, and significant receptive/expressive language delay with dyspraxia of language.

21. On November 22, 2013, the IEP team met to develop the Student's IEP for the 2013-2014 school year. The team agreed to an IEP which listed the Student's primary disability coding as developmental delay. The areas affected by the disability were communication, pre-academics, attention/behavior, social/emotional, self-help, and fine motor.

22. The 2013-2014 IEP reported the Student's present level of academic achievement and functional performance. As of November 2013, the Student's levels of academic achievement and functional performance were as follows:

#### **Levels of Performance November 2013**

23. Oral language: The Student had improved in verbal imitation with motivating tasks; he imitated some two-word combinations when given a model (i.e. my turn, cookie please, go car) and three-word combinations using a voice output device; he participated in hands-on

activities such as cooking; and he produced most target sounds in isolation and in the initial position of single syllable words.

24. Written language: The Student was imitating simple line drawings with markers, crayons, chalk, and paint.

25. Math: The Student was able to sort items by category and by color; he was able to count to ten and identify the numbers out of order; he knew some colors and shapes; and he was able to match a picture to an item.

26. Reading: The Student was able to name the letters of the alphabet out of order, look at books independently, and point to some simple named pictures in books. He was able to match several items to their corresponding sounds, such as “apple” for “A.”

27. Social/Play: The Student most often chose to play with letters, or, if he could not find letters, he would go to an adult and request letters by saying “aa – apple.” He would search in bins of various sensory items, such as rice, beans, or corn, to get the letters. With adult assistance, he would play a turn-taking game.

28. Self-Help: The Student handled his belongings when given verbal directions to do so; he was able to take off his shoes and socks independently; he was able to go through the toilet routine with adult assistance; he requested food items he wanted for snack; and he was able to drink from a cup.

29. Classroom Behavior/Attention: The Student followed the classroom routines and rules with adult assistance. He would hang up his coat and backpack when given the direction to do so. The Student demonstrated attention when working on the promethean board,<sup>8</sup> throughout free-play and for center activities that involved ABCs and/or 123s.

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<sup>8</sup> A promethean board is an interactive white board that can project images from a computer. One can interact with the board using touch or specialized pens.

30. Fine Motor: The Student was right-hand dominant. He was able to turn the pages of a book one at a time, open a glue stick, and imitate vertical and horizontal lines.

31. On November 27, 2013, the Student was only interested in playing with ABCs, 123s, a smart board, and the ipad. He did not show a preference for any adults or peers in the classroom and had a difficult time sharing and taking turns. He would get very upset if another student tried to play with his letters or numbers. He required adult assistance to complete tabletop tasks and to transition between activities. He had low muscle tone, making coloring and drawing difficult.

32. The 2013-2014 IEP provided special education services in a PEP class at [School 3] ([School 3]) five days per week for three hours per day with speech-language therapy (sixty minutes in a group and fifteen minutes pulled out of the classroom) and occupational therapy (sixty minutes) integrated into the program. An hour-and-a-half of home community consult per month was provided by the special educator.

33. The IEP for the 2013-2014 school year contained numerous goals and objectives to be completed within the school year. The Student's progress towards those goals and objectives was recorded two times during the 2013-2014 school year. There are four progress codes on each page of goals and objectives: achieved; making sufficient progress to meet goal; not making sufficient progress to meet the goal; and not yet introduced.

34. The Student made the following progress on goals from his 2013-2014 IEP:

#### **Progress Under the 2013-2014 IEP at [School 3] PEP**

35. The Student's written language goal was that, given opportunities for repetition and practice, voice output devices and/or pictures, during small and large group instruction, the Student would demonstrate improved written language skills. There were three objectives written under this goal. Objective one: The Student will imitate "letter-like" markings. Objective two:

The Student will copy simple shape drawings. Objective three: The Student will make scribbles or markings without a demonstration and indicate what he has drawn by using word approximations, pictures boards, and/or voice output devices. By January 24, 2014 and June 6, 2014, the Student was making sufficient progress to meet his goal.

36. The Student's goal in the area of social and emotional development was that given adult and peer modeling, picture communication systems, and multi-sensory cues during free play and small group instruction, the Student would demonstrate improved social skills. There were four objectives written under this goal. Objective one: The Student will offer one or more toys and/or objects to a peer. Objective two: The Student will choose a toy or activity (other than ABCs and 123s), when given a choice of at least two and stay with his chosen activity for at least five minutes. Objective three: The Student will imitate and/or create a play scheme of at least three steps (e.g., put a train track together, put people in the train, put train on the track, and make it go). Objective four: The Student will use pictures and/or voice output devices to practice the names of everyone in his classroom. By January 24, 2014 and June 3, 2014, the Student was making sufficient progress to meet his goal.

37. The Student's goal in the area of mathematics was that, given opportunities for repetition and practice, voice output devices and/or pictures, during small and large group instruction, the Student would demonstrate improved math skills. There were four objectives under this goal. Objective one: The Student will recognize and continue an ABAB and an ABCABC pattern using pictures and/or objects. Objective two: The Student will sort pictures and/or objects by at least two different attributes. Objective three: The Student will count items with one-to-one correspondence to ten. Objective four: The Student will make sets of objects and/or toys up to five. By January 24, 2014 and June 6, 2014, the Student was making sufficient progress to meet his goal.

38. The Student's occupational therapy goal was that, given sensory input, adult prompts, and therapeutic interventions, the Student would improve fine motor skills for classroom activities. There were four objectives under this goal. Objective one: Increase ability to move through obstacle course with accuracy. Objective two: Using functional grip on short chalk/crayon, color pictures with 75% filled in with less prompts from base line sample. Objective three: Imitate simple combinations of lines and circles. Objective four: Explore use of regular and adapted scissors with snipping paper. By January 17, 2014, March 24, 2014, and June 13, 2014, the Student was making sufficient progress to meet his goal.

39. The Student's reading goal was that, given opportunities for repetition and practice, voice output devices and/or pictures, during small and large group instruction, the Student would demonstrate improved pre-literacy skills. There were three objectives under this goal. Objective one: The Student will demonstrate knowledge of the front and back of a book and point to a picture and a word in a book. Objective two: The Student will point to at least two pictures to demonstrate knowledge of beginning sounds. Objective three: The Student will select two or more toys and/or objects to demonstrate knowledge of beginning sounds. By June 6, 2014, the Student was making sufficient progress to meet his goal.

40. One of the Student's speech-language goals was to demonstrate improved functional use of language given multimodal communication strategies. There were three objectives under this goal. Objective one: The Student will use any combination of gestural, verbal, visual, and/or augmentative/alternative communication methods to express responses to greet, request, or protest with no more than one prompt. Objective two: The Student will produce two-word combinations using multimodal communication to request, protest, and comment with no more than one prompt. Objective three: The Student will utilize multimodal communication strategies to use two to four words to communicate needs and wants to peers and adults during

classroom activities. By January 24, 2014 and June 3, 2014, the Student was making sufficient progress to meet this goal.

41. Another of the Student's speech-language goals was to improve receptive language skills given multimodal communication strategies. There were four objectives under this goal.

Objective one: The Student will demonstrate understanding of action words given picture choices. Objective two: The Student will demonstrate understanding of spatial concepts given objects or pictures. Objective three: The Student will demonstrate understanding of WHO, WHAT, and WHERE questions about story events and characters or about his school day.

Objective four: The Student will follow one-to-two-step novel directions given an initial model.

By June 30, 2014, the Student was making sufficient progress to meet this goal.

42. Another of the Student's speech-language goals was to demonstrate improved speech intelligibility given visual, tactile, and auditory cues. There were three objectives under this goal. Objective one: The Student will articulate the following final sounds in single syllable words /t,d,k,g,p,b,m,n,w/ given pictures or objects. Objective two: The Student will imitate the above target sounds in the medial position of single words. Objective three: The Student will produce the above target sounds in all positions of single words. By January 22, 2014 and June 30, 2014, the Student was making sufficient progress to meet his goal.

43. The Student's goal in the area of self-help was that, given opportunities for repetition and practice, voice output devices, and/or pictures and multi-sensory strategies, the Student would demonstrate improved bathroom and eating skills. There were two objectives under this goal. Objective one: The Student will follow the toilet routine with fading adult assistance. Objective two: The Student will attempt several new food items. By January 24, 2014 and June 6, 2014, the Student was making sufficient progress to meet his goal.

44. The Student's goal in the area of classroom behavior and attention was that, given adult and peer modeling, picture communication systems, and multi-sensory strategies during large and small group instruction, the Student would demonstrate improved focus and participation. There were three objectives under this goal. Objective one: The Student will attend to adult-directed activity, observe model, and take his turn when his name is called with fading adult assistance. Objective two: The Student will attend to activity and follow directions to complete task with fading adult support. Objective three: The Student will participate in physical education, music, and group classroom activities with fading adult support. By January 24, 2014 and June 6, 2014, the Student was making sufficient progress to meet his goal.

45. The Student had some tantrums during the beginning of his time in PEP. The tantrums had subsided by the end of his first year at [School 3].

46. The Student exhibited very little aggressive behavior during his time in PEP.

47. In summer 2014, Dr. XXXX XXXX, a developmental and behavioral pediatrician, observed and assessed the Student. He diagnosed the Student with "Global Developmental Delays, including severe Mixed Expressive-Receptive Language Disorder, Developmental Coordination, Disorder, Uneven Sensory Profile, and Executive Dysfunction with possible ADHD (including difficulties initiating, sustaining, inhibiting, and shifting plus poor time awareness). The Student's difficulties with peer interaction and perseveration are, to a degree, *secondary* to these other developmental delays. Consequently, progress across other domains should also lead to improvement in social function. However, for now it is best to assume that he has a *primary* Disorder of Social Communication (that is, Autism) *coexisting* – and in dynamic interplay with – impairments across these other streams of development (that is, language, attention, motor, sensory)." (Parents Ex. 14)

48. The IEP team met on October 6, 2014 to develop an IEP for the 2014-2015 school year. The primary disability listed on the 2014-2015 IEP was developmental delay and the areas affected by the Student's disability were communication, pre-academics, social skills, adaptive skills, and fine motor skills.

49. The IEP team considered Dr. XXXX's comprehensive evaluation and report prepared on August 1, 2014.

50. By October 6, 2014, the Student had shown improvement following directions, dressing and undressing, eating more foods, speaking more, and using the toilet. The Student was staying with activities longer, reading words and some books, and writing some letters. He had more spontaneous speech, he spoke with less prompting than previously needed, and he was engaging and sharing with other children.

51. The IEP for the 2014-2015 school year provided specialized instruction five days per week for three hours per day in a PEP class at [School 3]. The Student received speech-language services for seventy-five minutes per week (some individual and some within his group setting) and forty-five minutes of occupational therapy services. The Student also received two forty-five-minute sessions of home/community consult services per month.

52. On November 25, 2014, XXXX XXXX, the Student's special education PEP teacher, and XXXX XXXX, the Student's PEP speech-language pathologist, prepared a comprehensive developmental profile of the Student to confirm whether he was educationally disabled and eligible for special education services. The report included the results of assessments performed on September 23, 2014 and November 14, 2014.

53. On December 11, 2014, XXXX XXXX, Ed.S., NCSP, completed a Report of School Psychologist regarding the Student to determine whether he met the criteria for a student with autism and to help determine his cognitive, adaptive, and social/emotional/behavioral

strengths and needs. Ms. XXXX considered evaluations she conducted of the Student on October 16 and November 3, 5, 24 and 25, 2014. She prepared a comprehensive report and ultimately determined the Student met the profile of a student with autism.

54. On December 22, 2014, the IEP team met and changed the Student's primary disability coding to autism. The IEP team considered the November 25, 2014 Developmental Profile prepared by Ms. XXXX and Ms. XXXX and the December 11, 2014 Report of School Psychologist prepared by Ms. XXXX.

55. The IEP for the 2014-2015 school year contained numerous goals and objectives to be completed in the school year. The Student's progress towards those goals and objectives was recorded two times during the 2014-2015 school year.

56. The Student made the following progress on goals from his 2014-2015 IEP:<sup>9</sup>

#### **Progress Under the 2014-2015 IEP at [School 3] PEP**

57. One of the Student's speech-language goals was to demonstrate improved functional use of language given multimodal communication strategies. There were four objectives under this goal. Objective one: The Student will respond to greetings and simple social questions (e.g. What's your name? Do you have a brother? How do you feel today? You want to play ball?). Objective two: The Student will appropriately request items or activities from peer or adults targeting specific pragmatic phrases (e.g., "Give it to me please" "Can I see?" "It's my turn." "Please stop." "I don't like that." "I want to play with \_\_\_\_." "No thank you." and "I like."). Objective three: The Student will participate in simple turn-taking games with a peer and adult support that requires attending to a peer and asking questions (e.g., "Can I have \_\_," "Do you have \_\_?" and answering questions (e.g., "Yes, I have a \_\_")) for games such as Go Fish and Secret Squares. Objective four: The Student will imitate two-to-four-word

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<sup>9</sup> Some of the goals do not include a progress report in the exhibit provided. (MCPS Ex. 69).

phrases using “who, what, where” to seek information throughout his day. By January 16, 2015 and May 15, 2015, the Student was making sufficient progress to meet this goal.

58. Another of the Student’s speech-language goals was to demonstrate improved receptive and expressive language skills given multimodal communication strategies. There were four objectives under this goal. Objective one: The Student will express three-to-five-word phrases/sentences using the auxiliary verb “is” and “are” to describe an action or event (e.g., a person/pronoun and an action word and an object – “Daddy is throwing a ball” or “They are eating pizza.”) Objective two: The Student will express prepositional phrases to describe where an item is in pictures or in the classroom (e.g., “It’s under the computer”). Objective three: The Student will respond to who, what doing, and where questions about stories or events and people in his school environment. Objective four: The Student will use patterned phrases and sentences to describe common objects or pictures (e.g., “The car is blue” or “The apple is red.”). By January 16, 2015 and May 15, 2015, the Student was making sufficient progress to meet this goal.

59. Another of the Student’s speech-language goals was to demonstrate improved speech intelligibility given multimodal communications strategies. There were four objectives under this goal. Objective one: The Student will articulate final /t/ and /n/ at the single word level. Objective two: The Student will articulate /ch/ in the initial and final position of words. Objective three: The Student will articulate /s/ blends at the single word level. Objective four: The Student will articulate three-word phrases/sentences with at least 80% intelligibility. By January 16, 2015 and May 15, 2015, the Student was making sufficient progress to meet this goal.

60. The Student’s goal in the area of social/emotional/play was that given opportunities for practice, adult modeling during free play and small group settings, the Student would demonstrate improved social skills. There were three objectives under this goal. Objective one: The Student will go through at least three steps of a play scheme. Objective two: The Student

will use pictures and/or written names to learn the people in his classroom. Objective three: The Student will use mirrors, books, pictures and/or words to match emotions. By January 20, 2015 and May 14, 2015, the Student was making sufficient progress to meet this goal.

61. The Student's goal in the area of classroom behavior and attention was that, given adult support, peer modeling, picture communication systems, and multi-sensory strategies during free play, group activities and specials, the Student would demonstrate improved attention to task, participation, and behavior. There were three objectives under this goal. Objective one: The Student will use sensory strategies to stay focused throughout adult-directed activities. Objective two: The Student will join in group movement activities. Objective three: The Student will use picture cues, words, and adult modeling to demonstrate appropriate peer interactions. By January 20, 2015 and May 14, 2015, the Student was making sufficient progress to meet this goal.

62. The Student's written language goal was that, given opportunities for repetition and practice in large and small group settings, the Student would demonstrate improved written language skills. There were two objectives under this goal. Objective one: The Student will make letter-like marks, scribbles and/or letters to write or pretend to write. Objective two: The Student will independently create a representational drawing (e.g., Make markings on a surface and call it "dog"). By January 20, 2015 and May 14, 2015, the Student was making sufficient progress to meet his goal.

63. The Student's goal in mathematics was that, given opportunities for repetition and practice in large and small group settings, the Student would demonstrate improved math skills. There were two objectives under this goal. Objective one: The Student will use mathematical terms to describe objects. Objective two: The Student will sort the same set of items by at least two different attributes. By January 20, 2015, the Student was making sufficient progress to meet this goal. By May 14, 2015, the Student had achieved his goal.

64. During the 2013-2014 and 2014-2015 school years, the Student received private 1:1 Applied Behavior Analysis (ABA)<sup>10</sup> therapy, speech-language therapy and occupational therapy for twelve to fifteen hours every week.

### **2015-2016 IEP**

65. Dr. XXXX XXXX, a developmental neuropsychologist, evaluated the Student on March 22, 23, and 27, 2015. She wrote a comprehensive report and wrote multiple recommendations about the Student's education. Dr. XXXX recommended a specialized program in which speech-language therapy, occupational therapy, physical therapy, and social relating interventions are integrated throughout his school day with specialized 1:1 support.

66. On March 23, 2015, XXXX XXXX, the Parents' educational consultant, observed the XXXX Center at [School 1]. [School 1] is a full day special education program housed within a comprehensive elementary school.

67. Mr. XXXX wrote a positive report of his observation at [School 1]. He reported in detail about the student population and their level of function compared to those in other autism programs in the county, his observations of a small group working on math, motivational tools, reinforcements, transitions, lunch, staffing, and the sensory motor room. He wrote that "[m]any supports built into the program as a whole [] are indicative of best practices for students with autism." He wrote of the challenges: "The program relies primarily on small group[s] and would not provide a high level of individualized support particularly if the program was at capacity or above." (Parents Ex. 29).

68. Sometime in 2015, the Parents observed [School 1].

69. On May 7, 2015, the Student was accepted into the XXXX (XXXX) program for the 2015-2016 school year at the [SCHOOL 2]. The program was to provide sixty minutes per

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<sup>10</sup> ABA is a teaching methodology commonly used for children with autism which utilizes the applied use of behavioral principles to increase or decrease targeted behaviors, including social skills, communication, and academics.

week of speech-language therapy, sixty minutes per week of occupational therapy, and sixty minutes per week of counseling. [SCHOOL 2] indicated its intention to schedule a meeting with the Parents forty-five to sixty days after the Student's entry into the program to develop and discuss the goals and related services and stated those may be changed if the team determined that additional support was needed.

70. On June 11, 2015, the IEP team met to prepare the Student's 2015-2016 IEP. In attendance at the meeting were: XXXX XXXX, special education teacher; XXXX XXXX, PEP coordinator; the Parents; XXXX XXXX, general educator; XXXX XXXX, psychologist; XXXX XXXX, speech-language therapist; XXXX XXXX, at the time an MCPS Itinerant Resource Teacher; XXXX XXXX, occupational therapist; XXXX XXXX, [School 5] representative; Dr. XXXX XXXX, psychologist; and XXXX XXXX, educational advocate.

71. The Student's primary disability on the 2015-2016 IEP was autism and the areas affected by the Student's disability were expressive and receptive communication skills, social skills, adaptive skills, attention, classroom behavior, pre-literacy skills, written language skills, and fine motor skills.

72. The 2015-2016 IEP included the following timing and scheduling accommodations: extended time for processing information and frequent movement breaks between structured activities. The IEP provided that the Student required a setting with as few distractions as possible during instruction time and during testing situations to increase his ability to focus on teachers and task.

73. The 2015-2016 IEP provided the following instructional support services throughout the entire school day: visual cues; gaining eye contact to give direction; wait time; prompt hierarchy; and use of an eye gaze box to gain attention.

74. The 2015-2016 IEP provided the following social/behavioral support services on a daily basis to help the Student prepare for and focus on instruction during small and large group instruction: adult support; frequent eye contact/proximity control; frequent changes in activities or opportunities for movement; manipulatives and/or sensory activities to promote listening and focusing skills; and strategies to initiate and sustain attention.

75. The 2015-2016 IEP provided that small groups were to be no more than three students and large groups were to be no more than nine students.

76. The 2015-2016 IEP determined the Student was eligible for extended school year services.

77. The 2015-2016 IEP included goals and objectives for the 2015-2016 school year.

78. One of the 2015-2016 speech-language goals was to demonstrate improved pragmatic use of language given multimodal communication strategies (e.g., modeling, picture cues, adapted materials). There were two objectives under this goal. Objective one: The Student will respond to greetings using a person's name (e.g., "Hello, Heather") and initiate a greeting to his peers and teachers. Objective two: The Student will appropriately request items or activities from peers or adults targeting specific pragmatic phrases (e.g., "Give it to me please." "Can I see?" "Stop." and "Please help me."). Objective three: The Student will participate in simple turn-taking games with a peer and adult modeling that requires him to ask and answer questions (e.g., Go Fish – "Do you have a \_\_\_?" "Yes I do." "No I don't.").

79. Another speech-language goal in the 2015-2016 IEP was to demonstrate improved receptive language skills given multimodal communication strategies. There were three objectives under this goal. Objective one: The Student will respond to comprehension questions about stories given visual cues and verbal choices as needed. Objective two: The Student will follow directions containing descriptors (e.g., "Give me the little white dog") and then repeat the

sentence (e.g., “It is a little white dog.”). Objective three: The Student will demonstrate understanding of spatial concepts using manipulatives (e.g., in, on, over, under, through).

80. Another speech-language goal in the 2015-2016 IEP was for the Student to demonstrate improved speech intelligibility given auditory and visual cues. There were three objectives under this goal. Objective one: The Student will imitate four-to-five-word sentences using clear speech. Objective two: The Student will spontaneously produce three phrases or sentences of four words that can be understood. Objective three: The Student will use clear speech to describe a picture using three to five words.

81. Another speech-language goal in the 2015-2016 IEP was for the Student to demonstrate improved expressive language skills given multimodal communication strategies. There were two objectives under this goal. Objective one: The Student will express four-to-six-word phrases/sentences using appropriate pronoun usage and the auxiliary verbs “is” and “are” to describe actions or events (e.g., “She is eating.” “He is running.” “They are swimming.”). Objective two: The Student will express prepositional phrases to describe where an item is in the classroom or in pictures (e.g., “The car is on the bridge.” “The fish is in the pond.”).

82. Another speech-language goal in the 2015-2016 IEP was for the Student to demonstrate improved functional use of language given multimodal communication strategies. There were three objectives under this goal. Objective one: The Student will imitate two-to-four-word phrases using who, what, where, what doing and can I questions to seek information throughout the school day. Objective two: The Student will spontaneously ask simple questions (e.g., “Where is \_\_\_?” “What’s inside box?” “Can I have \_\_\_?”). Objective three: The Student will use two to four words to communicate needs and wants to peers and adults during classroom activities.

83. The Student's reading goal for 2015-2016 was that, given opportunities for practice and repetition with fading modeling and prompting, the Student would demonstrate improved reading comprehension over baseline. There were three objectives under this goal. Objective one: The Student will point to and/or label parts of the book (the front of the book, the title of the book, a picture, and a word). Objective two: The Student will answer questions about a book that has just been read (e.g. "Who was the main character?" "Where were they?" (setting) and/or "What happened?"). Objective three: The Student will be reading at level four (the kindergarten benchmark).

84. The Student's goal for written language during the 2015-2016 school year was that, given opportunities for practice and repetition in small (no more than three) and large (no more than nine) group settings, the Student would demonstrate improved written language skills over baseline. There were two objectives under this goal. Objective one: The Student will independently create a representational drawing and give it a label (e.g., after playing with or listening to stories about bugs, the Student will draw or paint and say, "It's a caterpillar."). Objective two: The Student will participate in a shared writing experience (e.g., he will wait until it is his turn, when his name is called he will provide his contribution – either verbally or manually fill in the blank on a promethean board or paper and then help discuss or read the final "group" product).

85. The Student's occupational therapy goal for 2015-2016 was that, given visual and fading prompts, the Student would increase independence with putting on his jacket and zipping it up. The one objective under this goal was that the Student would be able to independently put on his jacket and zip it up.

86. Another occupational therapy goal for 2015-2016 for the Student was that, given multisensory cues, the Student would improve fine motor skills for classroom activities. There

were four objectives under this goal. Objective one: Increase pencil/crayon pressure on paper and accuracy of strokes with firm functional grip above baseline samples during writing/coloring/drawing activities. Objective two: Imitate/copy all upper and lower case letters and numbers that are at least one inch in size. Draw legible pictures with increased detail and accuracy over baseline samples. Objective three: Using thumbs up position, cut out a circle and a square (with corners) within  $\frac{1}{4}$  inch of the line using standard scissors. Objective four: Use left hand to stabilize the paper while coloring within given areas of picture using multiple crayons.

87. The Student's self-help and adaptive goal for 2015-2016 was that, given opportunities for practice, modeling, and fading adult assistance, the Student would demonstrate improved classroom adaptive skills over baseline. There were two objectives under this goal. Objective one: The Student will handle his belongings appropriately and in a timely manner (hang up coat and backpack before he begins a classroom activity and get coat and backpack on when given the cue to do so). Objective two: The Student will clean up his snack and/or lunch appropriately (place trash in the trash can and non-trash items in their proper place and wipe up crumbs and spillage) when given a verbal direction.

88. The Student's goal in 2015-2016 for social, emotional, and play was that given opportunities for practice, modeling, and fading adult assistance, the Student would demonstrate improved social interactions. There were two objectives under this goal. Objective one: The Student will participate in and appropriately play a game (wait his turn, take his turn, and follow the rules of the game) with at least one other peer. Objective two: The Student will verbally address familiar peers and adults (using their name and/or eye contact) to gain attention, make a request, or respond to a social encounter.

89. The Student's classroom behavior and attention goal for the 2015-2016 school year was that given opportunities for sensory input preparation, modeling, and fading adult

prompting, the Student would demonstrate improved attention. There were three objectives under this goal. Objective one: The Student will follow verbal familiar directions with less supports to independence in a timely manner (or with the rest of his class). Objective two: The Student will follow unfamiliar direction with less supports. Objective three: The Student will attend to speaker and classroom task for non-preferred activities (at this time those are: listening to stories, turn-taking games, and play centers).

90. The 2015-2016 IEP provided specialized instruction five days per week for six hours per day at [School 1].

91. As part of his instructional program, the Student would receive seventy-five minutes of speech-language therapy per week and sixty minutes of occupational therapy per week. Therapies were to be provided in increments of time that best matched the Student's ability to attend and participate and the skills being targeted.

92. The IEP team considered Dr. XXXX's report at the June 11, 2015 meeting.

93. At the June 11, 2015 IEP meeting, the Parents expressed their concern that the Student had not mastered most of the goals from his 2012 IEP from [School 4].

94. At the June 11, 2015 IEP meeting, the Parents, Mr. XXXX, and Dr. XXXX all stated their opinions that the Student required 1:1 support throughout the school day. The Parents requested a 1:1 para-educator for the Student. Mr. XXXX requested that the goals be written within "in a 1:1 setting."

95. The rest of the IEP team did not agree to these requests. The team opined that the Student had made progress and could follow directions in a group of nine students with three adults. The team also stated that staff working with the Student would use smaller group instruction when necessary to ensure his needs were being met within the classroom. The team said that it would schedule a periodic review for November 2015 to discuss the Student's

adjustment to a new class and a longer day. At that time the team would address the Student's transition into the kindergarten classroom and his need for more small group and individualized support. MCPS corrected the Parents' misunderstanding that [School 1] would not be able to accommodate additional staffing for the Student if it were required.

96. The Parents expressed no dissatisfaction with the 2015-2016 IEP other than the ratio.

97. At the end of the IEP meeting, the Parents informed MCPS the Student had been accepted into the XXXX program at [SCHOOL 2] but that he had not been accepted into the regular program at [SCHOOL 2]. The Parents informed MCPS that they would consider MCPS' IEP proposal and would let them know what school the Student would be attending the following Fall.

98. The Parents never informed MCPS in writing that they intended to reject the 2015-2016 IEP.

99. The Student attended [SCHOOL 2] for kindergarten during the 2015-2016 school year.

### **Progress During the 2015-2016 School Year at [SCHOOL 2]**

100. Diagnostic and Prescriptive Goals (DPG) is a document similar to an IEP created for privately funded students at [SCHOOL 2]. [SCHOOL 2] records progress under the DPG several times throughout the school year.

101. The Student was "progressing" under the vast majority of his DPG goals by the end of the 2015-2016 school year, as opposed to "achieved."

102. [SCHOOL 2] utilizes an achievement grading system: 5 – demonstrates outstanding performance; 4 – consistently meets; 3 – satisfactorily meets; 2 – marginally meets; 1 – does not meet.

103. During the 2015-2016 school year, the Student earned a 3 – satisfactorily meets – in foundational reading skills, vocabulary, comprehension, writing process, usage/grammar/punctuation/capitalization, math, social studies, science, physical education, art, and drama. He earned a 2 – marginally meets – in music.

104. Learning skills at [SCHOOL 2] are assessed as follows: IN – independently; LP – with limited prompting (less than 50%); FP – with frequent prompting (greater than 50%); and R – rarely.

105. In all four quarters of the 2015-2016 school year, the Student earned an FP in the following categories: returns completed homework; completes class work; organizes self/materials to be prepared to learn; engages in individual learning tasks; engages in group learning; uses feedback to improve learning; cooperates and engages with others in academic tasks; and follows oral and written directions. In all four quarters of the year, the Student earned an R in the following categories: cooperates and plays with others during social opportunities and exercises self-control.

106. During the 2015-2016 school year at [SCHOOL 2], the Student had thirty-one major and twenty-three minor behavioral incidents with a peer.

### **2016-2017 IEP**

107. On March 7, 2016, counsel for the Parents asked MCPS to convene an IEP meeting to consider how the Student had done at [SCHOOL 2] and to update his MCPS IEP for the 2016-2017 school year.

108. Due to a scheduling dispute, the IEP team met without the Parents on May 27, 2016 to develop an IEP for the 2016-2017 school year.

109. After the scheduling dispute was resolved, the IEP team met again on July 28, 2016 to review the Student's 2016-2017 IEP. The following people were in attendance at the meeting:

the Parents; XXXX XXXX, Principal or designee; XXXX XXXX, general educator; XXXX XXXX, special educator; XXXX XXXX, school psychologist; XXXX XXXX, speech-language pathologist; XXXX XXXX, program specialist; XXXX XXXX, occupational therapist; XXXX XXXX, [SCHOOL 2] Early Childhood Coordinator; XXXX XXXX, MCPS attorney; and counsel for the Parents.

110. The primary disability coding for the 2016-2017 IEP was autism and the areas affected by the Student's disability were sustained attention, reading, decoding and comprehension, math fluency and problem solving, written language, expressive and receptive language, fine motor skills, social skills, and behavior.

111. The 2016-2017 IEP provided the following instructional and testing accommodations: visual cues; scribe; graphic organizers, visual organizers; extended time; multiple or frequent breaks; and reduction of distractions.

112. The 2016-2017 IEP provided the following instructional support services on a daily basis: allowing the use of manipulatives; checking for understanding; frequent and/or immediate feedback; picture schedule; providing alternate ways for the Student to demonstrate learning; repetition of directions; small group instruction; simplification of directions; wait time for responses; and adult support.

113. The 2016-2017 IEP provided that all instruction was to be in a dyad or smaller.

114. The term "dyad" means a ratio of two students to one adult and "smaller" means a ratio of 1:1.<sup>11</sup>

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<sup>11</sup> The parties stipulated to this fact at the hearing. The term "dyad" is confusing, because the dictionary definition of "dyad" is "two individuals maintaining a sociologically significant relationship." <https://www.merriam-webster.com/dictionary/dyad>. Under this definition, one student and one teacher could constitute a dyad. Likewise, there was testimony that at one point in time, the Student was working in a dyad, but with two students and two adults. Because of the confusion inherent in this term, and the parties' stipulation that "dyad" within the IEP meant a ratio of two students to one adult and that "smaller" in the IEP meant 1:1, I will use these ratio terms throughout this decision and avoid "dyad."

115. The 2016-2017 IEP provided the following program modifications on a daily basis: altered/modified assignments; assignments broken down into smaller units; simplified sentence structure, vocabulary and graphics on assignments and assessments; and reduction of the amount of material on a page.

116. The 2016-2017 IEP provided the following social and behavioral supports on a daily basis: encouraging the Student to ask for assistance when needed; encouraging appropriate behavior in academic and non-academic settings; providing frequent changes in activities and opportunities for movement; providing manipulatives and sensory activities to promote listening and focus; reinforcing positive behavior through non-verbal and verbal communication; social skills training; strategies to initiate and sustain attention; use of positive reinforcers; use of a first/then board; use of a feelings chart; and use of transition cues.

117. The 2016-2017 IEP provided the following physical and environmental support services on a daily basis: preferential seating; sensory diet; weighted pencil; and a slant board.

118. The 2016-2017 IEP provided that the Student was eligible for extended school year services.

119. The 2016-2017 IEP provided specialized instruction thirty hours per week at [School 1]. As part of his instructional program, the Student would receive seventy-five minutes of speech-language therapy per week and sixty minutes of occupational therapy per week.

120. The 2016-2017 IEP included present level of academic achievement and functional performance as reported by [SCHOOL 2].

121. The 2016-2017 IEP provided broad goals and detailed objectives in the areas of written language, mathematics, classroom behavior, speech-language (including pragmatic language, expressive language, receptive language, speech intelligibility, and functional use of

language), social interactions and communication, reading, self-regulation and availability to learn, attention, self-care, reading comprehension, and fine and visual motor skills.

122. The Parents expressed no dissatisfaction with the 2016-2017 IEP other than with the placement.

123. On August 5, 2016, counsel for the Parents informed MCPS in writing that they did not believe MCPS had proposed an appropriate IEP for the 2016-2017 school year which would provide the Student with a FAPE. The letter informed MCPS that the Student would attend [SCHOOL 2] for the 2016-2017 school year and requested MCPS fund that placement.

124. By letter dated August 9, 2016, counsel for MCPS informed the Parents that it declined to place and fund the Student at [SCHOOL 2] for the 2016-2017 school year, asserting it had developed an IEP that provided a FAPE at [School 1].

#### **Progress During the 2016-2017 School Year at [SCHOOL 2]**

125. During the 2016-2017 school year, the Student earned a 3 – satisfactorily meets – in foundational reading skills, vocabulary, math, social studies, science, physical education, and music. He earned a 2 – marginally meets – in comprehension, writing process, usage, grammar, punctuation, capitalization, and art.

126. In all four quarters of the 2016-2017 school year, the Student earned an FP (with frequent prompting) in the following categories: returns completed homework; completes class work; organizes self/materials to be prepared to learn; engages in individual learning tasks; engages in group learning; uses feedback to improve learning; cooperates and engages with others in academic tasks; and follows oral and written directions. In the summer and the first quarter of the year, the Student earned an R (rarely) in cooperates and plays with others during social opportunities and received an FP in the final three quarters of the year in that area. In the

summer, the Student earned an R in exercises self-control but earned an FP in the four quarters of the year in that area.

127. During the 2016-2017 school year at [SCHOOL 2], the Student had five major and six minor behavioral incidents with a peer.

128. XXXX XXXX, the Parents' educational consultant, observed the Student at [SCHOOL 2] on October 13, 2016.

129. The Parents and XXXX XXXX observed [School 1] on October 18, 2016.

130. XXXX XXXX, MCPS Autism Program Specialist, observed the Student at [SCHOOL 2] on February 1, 2017.

### **2017-2018 IEP**

131. On March 31, 2017, the IEP team met to develop the Student's IEP for the 2017-2018 school year. In attendance were: the Parents; XXXX XXXX, Principal/designee; XXXX XXXX, general educator; XXXX XXXX, special educator; XXXX XXXX, speech-language pathologist; XXXX XXXX, educational consultant; XXXX XXXX, Early Childhood Coordinator [SCHOOL 2]; XXXX XXXX, MCPS occupational therapist; XXXX XXXX, MCPS Autism Program Specialist; and counsel for MCPS and the Parents.

132. The Student's primary disability for the 2017-2018 IEP was autism with the areas affected by his disability listed as sustained attention, reading decoding and comprehension, math fluency and problem solving, written language, expressive and receptive language, fine motor skills, social skills, and behavior.

133. The 2017-2018 IEP included present levels of academic achievement and functional performance as reported by [SCHOOL 2].

134. The 2017-2018 IEP included the same instructional and testing accommodations, instructional support services, program modifications, social and behavioral support services, and physical and environmental support services that were included in the 2016-2017 IEP.

135. The 2017-2018 IEP included that all instruction was to be provided in a 2:1 ratio or smaller.

136. The 2017-2018 IEP included broad goals and detailed objectives for the Student in the areas of written language, mathematics, social interactions and communication, self-care, reading comprehension, speech and language, fine and visual motor, self-regulation/availability to learn/attention, reading-decoding, classroom behavior, and attention.

137. Due to the nature of the Student's disability, he will continue to have goals in his IEPs in the areas of expressive language, receptive language, and pragmatic language as he continues with his education.<sup>12</sup>

138. The 2017-2018 IEP team considered XXXX XXXX's presentation and written report of her observation of the Student and of [School 1].

139. At the meeting, the Parents and their attorney disagreed with the recommendation to place the Student at [School 1].

140. The Parents expressed no dissatisfaction with the 2017-2018 IEP other than with the placement.

141. On August 17, 2017, the Parents, through counsel, informed MCPS in writing that the Student would attend [SCHOOL 2] for the 2017-2018 school year. They expressed their view that MCPS had failed to develop an IEP that would provide the Student with a FAPE and requested MCPS place and fund the Student at [SCHOOL 2] for the 2017-2018 school year.

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<sup>12</sup> The Parties stipulated to this fact at the hearing.

142. On August 30, 2017, MCPS, by counsel, informed the Parents that it would not fund and place the Student at [SCHOOL 2] for the 2017-2018 school year.

## **DISCUSSION**

### **Burden of Proof**

The Parents are seeking reimbursement for their unilateral placement of the Student at [SCHOOL 2] for the 2015-2016 and 2016-2017 school years and placement of the Student at [SCHOOL 2] for the 2017-2018 school year. Because the Parents are the party seeking relief on behalf of the Student, they bear the burden to prove that MCPS failed to provide the Student with a FAPE in the least restrictive environment during the 2015-2016 and 2016-2017 school years and failed to develop an IEP that would provide a FAPE for the 2017-2018 school year. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005) (“The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.”). The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014). For the reasons that follow, I find the Parents have failed to meet that burden.

### **Legal Framework**

The identification, assessment and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2017); 34 C.F.R. pt. 300 (2016); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2017); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE which “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).

Thirty-five years ago, the Supreme Court addressed the FAPE requirement in *Board of Education v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court held that FAPE is satisfied if a school district provides “specialized instruction and related services which are

individually designed to provide educational benefit to the handicapped child.” *Rowley*, 458 U.S. at 201 (footnote omitted). To this end the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide FAPE: first, whether there has been compliance with the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-07. *See also A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004) (“A FAPE requires the school district to provide instruction that suits the child's needs as well as related services to ensure that the child receives some educational benefit from instruction.”).

An IEP is the “primary vehicle” through which a public agency provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax Cty. Sch. Bd.*, 553 F. 3d 315, 319 (4<sup>th</sup> Cir. 2009). COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of the student and the special education and related services to be provided to meet those needs. The IEP must take into account:

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

20 U.S.C.A. § 1414(d)(3). Among other things, the IEP depicts a student’s current educational performance, explains how the student’s disability affects the student’s involvement and progress in the general curriculum, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular

educational programs. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A. IEP teams must consider the students' evolving needs when developing their educational programs.

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

In *Rowley*, the United States Supreme Court first addressed the FAPE requirement 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. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of [FAPE], in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." § 1401(17) (emphasis added). 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.

458 U.S. at 200-01 (footnote omitted). The Court explained that FAPE entitles a student to an IEP that is "reasonably calculated to enable the child to receive educational benefits" and that this requires that "the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200, 207.

Absent more definitive direction regarding the standard to be employed to determine "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act," courts applied various interpretations of the level of benefit that is required. *Id.* at 202. The Fourth Circuit, taking its lead from the Tenth Circuit, formulated the test as whether the school system adopted an IEP calculated to confer "some" educational benefit

on the student, “meaning a benefit that is more than minimal or trivial, from special instruction and services.” *O.S. ex rel. Michael S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (“In this circuit, the standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.”).

Thirty-five years later, the parties in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017) asked the Supreme Court to go further than it did in *Rowley* and set forth a test for measuring whether a disabled student had attained sufficient educational benefit. The framework for the decision was the Tenth Circuit’s interpretation of the meaning of “some educational benefit,” which construed the level of benefit as “merely . . . ‘more than *de minimis*.’” *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

The Supreme Court set forth the following “general approach” to determining whether a school has met its obligation under the IDEA:

While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.*, at 207, 102 S. Ct. 3034. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. *Id.*, at 208-209, S. Ct. 3034. Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.*, at 206-207, 102 S. Ct. 3034.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. See §§ 1414(d)(1)(A)(i)(I)-(IV). This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.”’ *Rowley*,

458 U.S., at 179, 102 S. Ct. 3034 (*quoting* H.R. Rep. No. 94-332, p. 2 (1975)). A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be "*specially designed*" to meet a child's "*unique* needs" through an "*[i]ndividualized* education program." §§ 1401(29), (14) (emphasis added).

*Endrew F.*, 137 S. Ct. at 998-99. The Court expressly rejected the Tenth Circuit's interpretation of what constitutes "some benefit":

When all is said and done, a student offered an educational program providing "merely more than *de minimis*" progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to "sitting idly . . . awaiting the time when they were old enough to 'drop out.'" *Rowley*, 458 U.S., at 179[.] The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

*Id.* at 1001.

Directly adopting language from *Rowley*, and expressly stating that it was not making any "attempt to elaborate on what 'appropriate' progress will look like from case to case," the *Endrew F.* court instructs that the "absence of a bright-line rule . . . should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" *Endrew F.*, 137 S.Ct. at 1001 (citing *Rowley*, 458 U.S. at 206). At the same time, the *Endrew F.* court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, "a reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Endrew F.*, 137 S.Ct. at 1002.

Notwithstanding the new language in *Endrew F.*, providing a student with access to

specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy” or all the services necessary to maximize educational benefits. *Hessler v. State Bd. of Educ. of Md.*, 700 F.2d 134, 139 (4th Cir. 1983) (*citing Rowley*, 458 U.S. at 176). FAPE does not require “the best possible education that a school system could provide if given access to unlimited funds.” *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). It does, however, require the State to provide personalized instruction with sufficient support services to permit the handicapped child to benefit educationally.

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the “least restrictive environment” to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5) (2017); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with nondisabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). At a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). Placing disabled children into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved.

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like MCPS to offer a continuum of alternative placements that meet the needs of children with disabilities. 34 C.F.R. § 300.115. The continuum must include instruction in regular classes, special classes,

special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. 34 C.F.R. § 300.115(b); COMAR 13A.05.01.10B(1). Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. COMAR 13A.05.01.10A(2). In such a case, a FAPE might require placement of a child in a private school setting that would be fully funded by the child's public school district.

In this case, the Parents alleged MCPS denied the Student a FAPE and as a consequence, they unilaterally placed the Student in a private school. The ultimate issue is not whether another school is better or even as appropriate as the school offered by the school district but whether the school district has offered a FAPE. The Supreme Court has upheld the right of parents to unilaterally place a learning disabled child in a private school and to recover reimbursement from the local educational agency (LEA) when the educational program offered by school authorities is not reasonably calculated to provide a FAPE. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985). However, the IDEA does not require a LEA to pay for the cost of private education if the agency has made a FAPE available to the child and the parents have nevertheless elected to place the child in a private school. 34 C.F.R. § 300.148(a). Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (*citing Burlington*, 471 U.S. at 373-74). Parents may recover the cost of private education only if they satisfy a two-pronged test: (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parent were appropriate to the child's needs. *Burlington*, 471 U.S. at 370.

Both parties agree that the Student requires a full time, self-contained special education program. There were no issues raised with respect to the IEPs' goals and objectives, present levels of performance, and accommodations. The parties go their separate ways on the student-to-adult ratio. For the 2015-2016 school year, MCPS proposed a 3:1 ratio at [School 1]. The Parents wanted a 1:1 ratio for the Student and claim that MCPS' failure to provide FAPE requires it to pay for the Student's placement at [SCHOOL 2]. During the 2016-2017 and the 2017-2018 school years, MCPS proposed that all instruction occur in a 2:1 ratio at [School 1]. Again, the Parents wanted the Student placed and funded at [SCHOOL 2] under a 1:1 ratio in its XXXX program.

### **The Parents' Case**

The Parents argue that the Student has repeatedly been denied a FAPE by MCPS because he requires a 1:1 ratio during all academic instruction. Specifically, the Parents argue the Student made insufficient progress during his years in MCPS PEP under an IEP, relying on their expert witnesses, who testified that the Student requires a 1:1 ratio in order to access his education. Furthermore, the Parents argue [School 1] is not equipped to provide the ratio the Student requires (both the 1:1 demanded by the Parents and the 2:1 offered by MCPS) as they observed [School 1] teaching in a 3:1 and 4:1 ratio. Finally, the Parents argue that [School 1] is a chaotic program inappropriate for any special needs child.<sup>13</sup> On this issue, the Parents and their educational consultant provided detailed testimony about the visual distractions in the [School 1] classroom and that the occupational therapy room was unsafe. They also testified about the inability of teachers to handle a special needs child in their care and a situation in which children were left alone unsupervised.

As to the 2016-2017 and the 2017-2018 school years, it is somewhat unclear whether the

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<sup>13</sup> The Parents alleged during opening statements that [School 1] does not provide the integration of related services in the manner [SCHOOL 2] does and which the Student requires. The uncontradicted testimony from MCPS witnesses was that [School 1] does provide the integration of related services, such as occupational therapy and speech-language therapy, throughout the academic day. The Parents did not pursue this argument at closing and I consider it abandoned, and in any event, entirely unproven.

Parents were arguing that the 2:1 ratio offered by MCPS was a failure to provide a FAPE, or whether the 2:1 ratio was appropriate, but could not and should not be implemented at [School 1]. The testimony from the Parents and the Parents' expert witnesses was that the Student required 1:1 academic instruction, implying they were dissatisfied with the 2:1 offered in the IEPs.

The IEPs from these two school years do mention that the Parents want more individual instruction for the Student, however nowhere do the documents state the Parents requested a 1:1, as it did in the prior written notice that is part of the 2015-2016 IEP. Further, the due process complaint itself mentions that during the 2016-2017 IEP meeting, the "parents and [SCHOOL 2] teacher emphasized [the Student's] need for two-to-one support during the school day and the team finally agreed to add it to his IEP in the supplementary aids, services, program modifications and support section." (Parents Ex. 1). With respect to the 2017-2018 IEP meeting, the complaint reads: "after hearing presentations from the parents, Ms. XXXX, and staff from [SCHOOL 2] all attesting to [the Student's] need for very intensive staffing, environmental controls, and supports, and after hearing that the parents and Ms. XXXX did not see such supports or intensity in their observations at [School 1], MCPS simply re-iterated its previous placement proposal at [School 1]." (Parents Ex. 1). This suggests the Parents were satisfied with the 2:1 ratio and were complaining only about placement. *See* 34 C.F.R. § 300.511(d) ("the party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint, . . . unless the other party agrees otherwise."). Regardless of whether I construe the Parents' complaint concerning the 2016-2017 and the 2017-2018 school years to be about both placement and ratio, or merely placement, for the reasons addressed below, I find that both the placement and ratio offered by MCPS did not deny the Student a FAPE.

The Parents presented testimony from Dr. XXXX XXXX, who testified as an expert in

developmental neuropsychology and has evaluated approximately sixty students with autism in her years of experience doing neuropsychological and educational evaluations. Dr. XXXX evaluated the Student on three dates in March 2015, prepared a comprehensive document entitled Neuropsychological Consultation (which she called “consultation” as opposed to “evaluation” because the Student’s autism symptoms were in some cases so severe he was not amenable to standardized testing), attended his June 11, 2015 IEP meeting, and observed the Student at [SCHOOL 2] about a month before the hearing. Dr. XXXX conducted two of the evaluation sessions 1:1 with the Student and during the third she attended his private ABA therapy session with his ABA therapist. She also reviewed reports from the Student’s PEP program and private therapies. Based on her evaluation of the Student in March 2015, Dr. XXXX testified that the Student’s restricted interest, impairment in social relating, very uneven attention, and very uneven development were all consistent with the autism spectrum. She testified that autism can present in degrees and in the Student’s case it had a significant impact on him.

Dr. XXXX utilized a variety of formal test materials, informal assessments and observations. Dr. XXXX noted the Student’s ability to attend, follow directions, play, verbalize by mimicking and his level of spontaneous speech, and conducted formal tests to assess his cognitive skills. Dr. XXXX noted some strong learning for many kindergarten level skills and strengths with educational based computer games. She also noted difficulties with communications and social skills. Based on her observations, Dr. XXXX recommended a specialized program in which speech-language, occupational therapy, physical therapy, and social relating interventions are integrated throughout the Student’s school day. She said that he required a specialized 1:1 learning ratio at school from a trained professional to access the curriculum and to engage at the level needed for appropriate progress, which she defined as the progress he is capable of making. She testified that because of his autism, the Student needs a lot of support to attend, understand,

respond, and participate in learning. Therefore, he needs a specialized 1:1 approach which makes him available for learning, and without it, he is not available.

Dr. XXXX noted in her consultation that the Student has been able to learn well through modeling, when an adult cues him to do what the adult does and he receives positive feedback for his success. Dr. XXXX also noted “it can take several tries and extra time before [the Student] can succeed in modeling the correct language or behavior; and it can take several tries for him to respond with what he knows. So it is important that he have enough individual attention at school so that he can benefit from modeling and prompting, and have successes.” (Parents Ex. 28) (emphasis altered).

Dr. XXXX testified that the program at [SCHOOL 2] was consistent with her recommendations, and she observed that the Student’s attention at school wandered regularly. He may be engaged for half a minute before wandering but he responded well when the staff redirected him with movement breaks, or when they put their hands on his shoulders or redirected his attention to the task at hand. Dr. XXXX acknowledged that she observed the Student at [SCHOOL 2] in a class with other children while he had 1:1 support, and that she has never observed him learn in a ratio of 3:1, which he had at his preschool.

Dr. XXXX also acknowledged that the Student made good progress while in the PEP program, but believes that it was a combination of PEP and his private therapies that caused this progress. Her recommendations for 1:1 came from her observations of him with his ABA therapist, and seeing how difficult it was for him to engage even within a 1:1 ratio.

XXXX XXXX is an educational consultant engaged by the Parents who testified as an expert in special education. Ms. XXXX never met with the Student but observed him in his [SCHOOL 2] class on October 13, 2016 and February 1, 2017. She observed [School 1] on October 18, 2016 with the Parents and attended the March 2017 IEP meeting. She wrote a

detailed report of her [School 1] observation as well as both [SCHOOL 2] observations.

As to [School 1], Ms. XXXX first observed that the Student's IEP at the time of the observation called for his instruction to occur in a 2:1 setting, but the class they observed had the students in a 3:1 and 4:1 setting, making it inappropriate for the Student. She observed a small group math instruction and believes the Student would have had problems because he would have been expected to wait his turn. Based on her observations of the Student, she believes he would have gotten up to leave rather than wait his turn. Moreover, the problem was compounded in that the classroom door appeared open without a child-proof lock, which [SCHOOL 2] had put on the Student's classroom doors to prevent him eloping, which he attempts to do with some frequency.

Ms. XXXX testified that during instruction, one of the students had a behavioral incident and all of the teachers left the room with the student having the problem, leaving the other students entirely unsupervised for several minutes. She also testified that she witnessed two adults attempting to deal with the student having a behavioral problem. One of the adults said "I don't know what I'm doing with this student."

Ms. XXXX testified that the classroom itself was too stimulating for the Student, with open shelves and items on the shelves. She noted that at [SCHOOL 2], the Student accessed shelves he was not supposed to even when they were covered up. She also said that while the school was warm and inviting, it was very noisy and was not appropriate for the Student. She thought the school itself was too large and the lunchroom too stimulating. Ms. XXXX testified that she believed the occupational therapy room used for sensory breaks was unsafe as it was crowded and there were small trampolines around a desk with metal legs. She felt that if a student were to fall, he or she could injure themselves. Ms. XXXX testified that some of the training the teachers at [School 1] receive is for older students who are higher functioning,

making it inappropriate for the Student.

Ms. XXXX testified that the Student needs the very high level of staffing at [SCHOOL 2] because he is making progress under this model. Moreover, she testified that she was told by [SCHOOL 2] that they tried to integrate the Student into another classroom with more students, and to increase the ratio in two academic areas, and that attempt was not successful. At [SCHOOL 2], an adult in a 1:1 setting is constantly redirecting the Student's attention, because he goes off task after five or ten seconds. The adult with the Student provides sensory input, movement breaks, a reinforcement system, and hand-over-hand guidance depending on the level of prompting he needs for the task at hand.

Ms. XXXX acknowledged that Mr. XXXX, the Parents' prior educational advocate, made a very positive report of [School 1] in March 2015, including the integration of speech-language therapy, motivational tools, reinforcements, and transitions. He gave a positive review of lunch and noted no concerns in the sensory motor room. He wrote that many supports built into the program were indicative of best practices for students with autism. Mr. XXXX's only concern was the student-teacher ratio at [School 1] and whether that was sufficient for the Student's educational needs.

The Father testified that after his first observation of [School 1] in 2015, he would have loved the Student to have attended there, but all of their providers felt the Student would have gotten lost there because of the number of students. Mr. XXXX went to see [School 1], and thought it was a good program but that the number of students and the ratio would negatively affect the Student. The Parents switched advocates only because of the cost. The Father testified that before their second observation of [School 1], had MCPS offered [School 1] with a 1:1 ratio, he would have tried it.

The Father reiterated Ms. XXXX's and Dr. XXXX's testimony about how well-suited

[SCHOOL 2] is for the Student's educational placement. He spoke about how distractible the Student is and how the [SCHOOL 2] ratio allows someone to constantly re-direct him and make him available to learn.

The Father also reiterated Ms. XXXX's observations at [School 1] and how inappropriate it was for the Student's educational placement. He testified that during the observation, a child had a tantrum, both teachers left the classroom and the remaining children were left unsupervised after they took the child having a tantrum to an empty classroom with a trampoline, where one woman said "I don't know what to do with this kid, I don't work with him." He said that no one was able to soothe this child. He did not believe the adults knew how to engage this child, how to stop his tantrum, or how to teach him.

The Father testified that he saw no instruction in a 1:1 or 2:1 ratio. He believes that all of the students at [School 1] were higher functioning than his son. Moreover, the Father testified that he was told at the March 31, 2017 IEP meeting that all of the children at [School 1] are toilet trained, while his son continues to have both urinary and bowel accidents.

The Father testified that he shared his observations about [School 1] with MCPS at the March 31, 2017 IEP meeting. He testified no one from MCPS addressed their concerns about the [School 1] program. Instead, MCPS simply continued to insist on placement there. He was never told this was an unusual or a bad day at [School 1].

The Father said that since attending [SCHOOL 2], the Student's biggest improvements are in following directions – they can now ask him to do simple tasks and he will do them consistently. The Student also responds more to his name and interacts more with his brother and the dog. The Student's speech is also improving – he has more spontaneous speech and is not simply repeating words that he hears. The Student is doing better with the toilet and in interactions with adults. The Father does not believe the Student would have made this progress

without [SCHOOL 2].

On cross-examination, the Father acknowledged that the Student made progress while at PEP. He also pointed out that he received many private therapies at home and together with PEP he believes that helped him progress. The Father testified that overall, as the Student went through PEP, in many ways he got worse. However, the Father was also quick to point out that on that issue, he did not blame PEP, he blamed autism.

XXXX XXXX, who testified as an expert in speech-language pathology with a focus on early childhood autistic students, has worked with the Student two hours per week 1:1 since June 2015. She spoke about the deficits in the Student's communication due to autism and spoke of the progress he has made with her in the last two years, specifically in the areas of joint attention, verbalizations, participation in a cooperative activity, and spontaneous speech. She testified that she has always worked 1:1 with the Student because his communication deficits are so severe he is not ready to deal with a peer who is not a skilled relator. She testified that she will keep the Student within twenty-four inches of her because of his impulsivity, lack of attention, and wandering. She opined that he requires the [SCHOOL 2] services for his safety and education. Ms. XXXX acknowledged that she has never seen the Student with children other than with his brother in the waiting room of her therapy room.

XXXX XXXX, who testified as an expert in speech-language pathology with a focus in early childhood development, is the senior speech-language pathologist and early childhood coordinator at [SCHOOL 2]. She sees the Student every day. [SCHOOL 2] is a school of around one hundred and fifty preschool through twelfth grade students that services children with language and learning disabilities, health impairments, and autism. [SCHOOL 2] provides integrated and direct services in speech-language, occupational therapy, physical therapy, and counseling. It is approved by MSDE for placement under IDEA.

A standard classroom at [SCHOOL 2] has ten to twelve students with one teacher and a teaching assistant. XXXX is a much more intensive program – the students in it have very significant needs in communication, engagement, and sensory processing and will not yet be successful in a standard classroom. The ratio in a XXXX classroom is usually 2:1 but the Student has 1:1. The goal of XXXX is to solidify foundational skills and get the students into a standard classroom. Ms. XXXX testified that XXXX is the right program for the Student because he needs more supports than [SCHOOL 2]’s standard program can provide.

Ms. XXXX testified that in the Fall of 2015, as far as the Student’s communication was concerned, his language was needs based and labeling based. He was also regularly imitating. He had very limited engagement in non-preferred activities. Ms. XXXX testified that the foundations for language are attention and engagement, which is why the Student needed so much individual attention to work on his language skills. [SCHOOL 2] is able to teach the Student academically in a 1:1 setting in a room with minimal distractions. She testified that the Student wanders, elopes from classrooms, and is quick and quiet because his attention is so fleeting. [SCHOOL 2] had to put child-proof locks on the Student’s classroom doors and have an aide stand by the gate on the playground to prevent him from eloping.

Ms. XXXX testified they have seen progress from when the Student started until now. One of the biggest changes [SCHOOL 2] has seen in the Student has been since the beginning of the 2017-2018 school year, in which he is now using an Accent 800, which is a high-tech voice output augmentative alternative communication (AAC) device. [SCHOOL 2] introduced the device because the Student still was not using language socially or pragmatically (using language socially to interact with your environment) and the Student has apraxia, which makes it difficult for him to physically form words. This device has been very meaningful and motivating for the Student. Ms. XXXX testified research shows that AAC devices do not slow the development of

language but instead assist.

Ms. XXXX said the Student has struggled with the ability to socialize. [SCHOOL 2] has seen progress in this regard in that he is now able to be in a room with more children and remain regulated, meaning he does not flee from the room, hit, bite, or scratch. Ms. XXXX said that [SCHOOL 2] is working towards getting the Student in a 2:1 setting, both socially and academically, but it is a struggle. Overall, she said that his progress is slow, but steady, with no major regressions.

The Mother testified that the Student made progress during his time in PEP, and acknowledged that he started in PEP able to make very few sounds. But she made clear that the Student was receiving private speech-language therapy, occupational therapy, physical therapy, and ABA therapy at the same time. She testified that there were medical reports when the Student was aged two indicating he would speak around age three or four and they were hoping for more progress and hoping he would be much more communicative and be more aware of the world around him.

The Mother acknowledged that no one ever told her the progress they were seeing was the result of any one particular therapy. She also acknowledged that there was some amount of spontaneous speech in 2015, but it was not meaningful and with eye contact, which is what she had been looking for. In PEP, the Student was speaking when he was prompted and the Parents did not think that was adequate – they were looking for meaningful conversation to know what is going on in his head.

The Mother testified that at the end of his time in PEP, the Student had no play skills at home. He would only play with letters and play ritualistic games such as throwing a letter down the slide. It was exhausting to engage with him. After two years in [SCHOOL 2], the Student is now starting to spontaneously ask for things. For example, he will pull the freezer open and say

“hungry,” or he will ask for a movie with no visual prompts. He can now follow instructions, such as “go turn the light off, close the door and get into bed.” He can also dress himself. The Mother described the Student’s recent progress as miraculous and said she was very happy with it.

The Mother reiterated the testimony from her husband and Ms. XXXX that no one from MCPS ever told them that their observations at [School 1] had been atypical.

### **MCPS’ Case**

MCPS contends that the IEP team correctly determined that the Student would have been provided a FAPE in the least restrictive environment at [School 1]. It maintains that the IEP team was required to consider public options before moving on to private options because a public school is less restrictive than a non-public school, and therefore is a preferred placement under the IDEA. It also contends that the IEP was reasonably calculated for the Student to achieve meaningful educational progress at [School 1]. MCPS argues that the Student made progress during his years in the PEP program. Based on this progress, in a 3:1 ratio, it was reasonable for them to propose that the Student continue in a 3:1 ratio at [School 1] in the 2015-2016 school year.

As such, MCPS asserts that the analysis ends on the first test under the two-prong analysis of *Burlington* and *Carter*. However, if the second prong of the analysis needs to be considered, MCPS contends that [SCHOOL 2] is not appropriate to meet the Student’s needs. In addition, MCPS argues the Parents failed to give proper notice in writing that the Student would not be attending MCPS in 2015-2016. *See* 34 C.F.R. § 300.148(d).

After the 2015-2016 school year, Ms. XXXX from [SCHOOL 2] came to the Student’s July 28, 2016 IEP meeting and provided additional information about how distractible the Student was, and that he required an even smaller teaching ratio than the 3:1 that had been proposed the prior year. Based on this information, MCPS agreed to teach the Student in a 2:1

ratio, but believed that program could be implemented at [School 1].

At the March 31, 2017 IEP team meeting, Ms. XXXX from [SCHOOL 2] gave a detailed report about the Student's learning needs and Ms. XXXX gave her observations of the [School 1] program. MCPS again agreed to teach the Student in a 2:1 ratio, but said that the IEP could be implemented at [School 1]. MCPS acknowledges that the [School 1] class observed by the Parents was not teaching in a 2:1 ratio, but it asserts it was not required to do so until the Student was a student there, when they would be required to implement his IEP, which, it alleges, it was prepared to do.

As to the negative report of [School 1], MCPS points to the review of [School 1] provided by the Parents' own prior educational consultant. Moreover, MCPS' expert witness, Ms. XXXX, who supervises the [School 1] program, testified that [School 1] is an example of best practices for education in autism. MCPS argued that [School 1] would have worked with the family to make accommodations for the Student to limit distractions and keep him safe.

XXXX XXXX testified as an expert in speech-language pathology with a focus on early childhood disabilities and autism. She observed the Student in PEP during 2014-2015, when he was in a classroom she supervised as the PEP coordinator. The PEP program the Student participated in was five days per week, three hours per day, nine children in a classroom, with one teacher and two para-educators, and related services such as occupational therapy, speech-language therapy, and physical therapy. Ms. XXXX spoke to the Student's providers during his PEP years, participated in formulating the 2015-2016 IEP and attended the June 11, 2015 IEP meeting. She testified that the parties agreed upon everything in the IEP except the amount of adult support during small and large group instruction. Mr. XXXX asked for a 1:1 ratio for every goal and objective in the IEP. The IEP team other than the Parents and Mr. XXXX felt that based on the progress the Student had made in his PEP classroom with a 3:1 ratio, a 1:1 was not

necessary for the Student's kindergarten year. However, Ms. XXXX said they wanted to identify how the Student was able to progress, so they wrote into the IEP the group size in which he had been successful previously – small groups no larger than three and large groups no larger than nine.

Ms. XXXX testified that an IEP is a fluid document and the team could have made changes throughout the year had it become apparent it was necessary or if the Student's needs changed over time. She pointed out that the 2015-2016 IEP says the team would review whether additional adult support was needed, within eight to nine weeks after the start of school, or earlier if requested.

Ms. XXXX testified that the IEP team considered the full continuum of services within MCPS and the least restrictive environment and felt it was important that the Student be in a classroom similar to PEP and in a comprehensive school, giving him opportunities to be with typical peers. She testified that kids respond to kids, and believes that children should be exposed to typical peers who model behavior. They considered and rejected more restrictive self-contained school buildings, believing there was no need for anything more restrictive as the Student was making progress, even in groupings.

Ms. XXXX opined that the Student would have fit in appropriately at [School 1]. She acknowledged that she did not see the program in person until she prepared for this hearing, but testified she was very familiar with the program and had been part of its development. She also relied heavily on Ms. XXXX' knowledge and opinion of the [School 1] program.

Ms. XXXX acknowledged that the Student did not "achieve" any of his goals but one under his PEP IEPs. However, she pointed out that "achieved" is not an option on the IEP with respect to objectives, the more specific items delineated under broader goals. Had that been an option, she opined the Student would have achieved several of those objectives, as that progress

was described in detail on the IEP progress notes twice yearly. It was clear to Ms. XXXX that the Student had made appropriate progress on his objectives, given his strengths and weaknesses.

Ms. XXXX testified that it is difficult to assess whether students are actually toilet trained in the context of PEP because they are only there three hours every day. She also said while she is unsure whether the Students at [School 1] are all fully toilet trained, it is not unusual for autistic children to have accidents.

XXXX XXXX, who testified as an expert in speech-language pathology with a focus on early childhood education and autism, worked with the Student for two years while he was in PEP and in XXXX, a summer program focusing on speech and language skills. She saw the Student twice a week in PEP while she provided speech-language therapy both inside and outside of class. She participated in creating the 2015-2016 IEP.

When Ms. XXXX first met the Student, he could not say the name of any of the other students and would not say hello to them. She was looking for him to make progress with spontaneous language because he was very echolalic. She wanted him to be able to follow complex and novel directions, understand new vocabulary and not need as much prompting and modeling. By the end of his time in PEP, he was able to do this, with prompting, and made other progress as well. He was using language to make connections; he was able to use pattern sentences such as “I want,” and “I need.” When the class was engaged in a cooking activity during his second PEP year, the Student was able to say “[the Student’s] turn,” “I want to stir,” and “I want to peel.” She testified that in the past in an activity like this, the Student would have just gotten frustrated and walked away and she saw this as real progress. When the Student left PEP, he was able to make eye contact and take turns, name other students and answer questions about whose turn it was by saying, for example, “Austin’s turn.” He could say a sentence such as “I want a cookie please.” He also improved his tolerance of other children sitting near him.

While she saw dips on days here and there, overall Ms. XXXX saw an upward trend. Ms. XXXX said that when she was with the Student, he needed movement, motivation, and adult redirection to access learning. How dynamic one was with him would affect his ability to learn. When she saw the Student, he was with eight other children in a circle, and with one or two other children at centers, with one adult. Ms. XXXX did not believe he required a 1:1 to learn. Ms. XXXX acknowledged that the Student did not achieve any of his speech-language goals during his two PEP years, but focused on the progress he did make on the specific objectives. Ms. XXXX testified that she observed [School 1] and thought that the Student would fit in well there. She thought it provided a good opportunity to have a small peer group, it had limited visual distractions, and she noted positively that they provide a visual schedule. She acknowledged that she did not view [School 1] until just prior to the hearing.

Ms. XXXX addressed the issue of AAC. She testified that they requested a consult with the group at MCPS that provides AAC devices and at one time the Student tried out a voice output technology. However, at the time the 2015-2016 IEP was put in place, the team decided the Student was starting to verbalize more, and they wanted to push his verbal communication and decided he did not need a high tech AAC device at that time. The team believed at that time the Student was making good progress with the low-tech devices he had been given.

XXXX XXXX, who testified as an expert in occupational therapy with a focus on preschool early childhood education and autism, worked with the Student from September 2013 to June 2015 while he attended [School 3] PEP. She provided occupational therapy services to him inside and outside of the classroom and worked with his other teachers, aides and providers. She was in his classroom approximately three times per week.

Ms. XXXX described the Student in 2013 as a little boy with low tone. His muscles and core were not strong and that challenged his ability to hold his body upright. He could not sit for

long periods in a chair, would prefer to sit on floor, would often lay his head on the table, and his acknowledgment of things in his environment was at a low level. The Student had a difficult time on the playground, was not able to play on the equipment, and at times played with mulch instead. At that time, Ms. XXXX provided a lot of hand-over-hand guidance to teach him how to move his body on playground equipment.

When the Student left at the end of the 2014-2015 school year, he was able to go over a bridge on the playground by himself, which Ms. XXXX described as significant progress. He was independent on the playground. With respect to his fine motor skills, at the beginning of 2013-2014, the Student could not hold scissors, and pencils and crayons would fall out of his hands. He used extremely light pressure with chalk on a chalkboard or a crayon on paper. By the end of 2014-2015, the Student was using a weighted pencil, was able to much more firmly write on paper the alphabet and numbers, could use chalk on a chalkboard, had stronger ability to follow vertical and horizontal lines, and got better coloring pictures, which she described as significant progress. He also made significant progress with scissors, and by February 2015, after lots of practice and repetition, the Student was able to cut, very close to a line, on a thick paper notecard.

Ms. XXXX testified that while she did see resistance with being asked to participate in non-preferred activities, she never saw the Student elope and did not see him overwhelmed by other children. The staff was able to manage his attention by sitting him on a teacher's lap, providing a bounce, pushing on his shoulders gently, or giving him a weighted stuffed animal. If he wandered off, someone would go get him and redirect him.

Ms. XXXX went to view the [School 1] program before this hearing. She testified that it was appropriate for the Student from how she had observed him over two years in PEP. She did not believe he needed a 1:1 at the time the 2015-2016 IEP was developed. Ms. XXXX testified

that she highly regarded the [School 1] occupational therapy room. She said that it was neat, organized, and safe and was similar to the room at [School 3]. She believes the room had all of the items the Student would need to help him with sensory and occupational therapy service. The occupational therapy room is right across from the classroom, making an easy, safe transition from one room to another.

XXXX XXXX testified as an expert in special education with a focus in autism. Ms. XXXX supports nine different MCPS autism programs, including [School 1], providing training, feedback, review of behavioral intervention plans, academic and social progress and needs, and supports the schools through a number of domains. She was contacted by the IEP team when the Student was in PEP at [School 3] for a placement consult. She observed him during the 2014-2015 school year in PEP. She also talked to his teacher, XXXX XXXX, and Ms. XXXX, to get more information about the Student and to understand what type of learner he was. She attended all three IEP team meetings at issue.

Ms. XXXX explained the structure of [School 1] and why she recommended it for the Student's placement. There is a coordinator on site at [School 1], and Ms. XXXX is the supervisor of the program in addition to her other responsibilities. There are twelve XXXX Centers in MCPS, but [School 1], which opened in 2012, was chosen as the center to develop best practices for students with autism and to train other XXXX Centers on how to deal with students with autism. [School 1] received consultations from nationally renowned XXXX Institute and a well-regarded professor at the [University] on best practices in autism. [School 1] has a low teacher-student ratio and uses strategies like TEACCH (Treatment and Education of Autistic and Communication related handicapped Children), which is a teaching methodology used to educate students with autism focusing on their strengths as visual, concrete learners who learn routines very well. [School 1] teachers were sent to TEACCH training. [School 1] is

housed within a comprehensive elementary school, giving the special education students opportunities to relate to general education students at school-wide assemblies and when the student patrols escort special education students throughout the building. Ms. XXXX explained that these interactions are important because the general education students model appropriate language and behavior. MCPS has other autism programs, some of which are more restrictive than [School 1].

[School 1] has a speech-language therapist and occupational therapist services exclusively for the XXXX Center special education students. There is a physical therapist who splits her time between [School 1] and another school. [School 1] has a reading specialist for general education and special education students. A guidance counselor and psychologist split their time between [School 1] and another school and are resources available to the special education students. The ratio is nine students in a class with one teacher, two para-educators and one additional para-educator who floats among the three special education classrooms. When providers come into the classroom, it is in addition to the staff already there and not in replacement of them.

Ms. XXXX testified that while there were children at [School 1] who were more verbal than the Student, the population at [School 1] includes children with language and motor and sensory deficits similar to the Student's in 2015-2016. She testified it was an appropriate placement and would have conferred educational benefit.

Ms. XXXX observed the Student at [SCHOOL 2] on May 26, 2016. Due to a scheduling disagreement with the Parents, the Parents did not attend an IEP meeting on May 27, 2016. In any event, the team reconvened and met on July 28, 2016, at which time both Ms. XXXX and the Parents attended. Ms. XXXX shared her observations of the Student at [SCHOOL 2]. Ms. XXXX spoke with XXXX XXXX, both during her observation at [SCHOOL 2] and at the July

28, 2016 IEP meeting. Ms. XXXX shared that she observed that the Student's attention was fleeting and the adult with him had to redirect him. She saw him in a small room within a room, working on reading, with only one other student there in another location. Ms. XXXX spoke with Ms. XXXX, who explained that it had been a typical day for the Student, other than the entry, during which the Student had some sort of behavioral incident that delayed Ms. XXXX beginning her observation. Ms. XXXX explained to Ms. XXXX that the Student has difficult days from time to time and needs sensory input on arrival. Ms. XXXX discussed with Ms. XXXX the Student's attention problems and his need for integrated supports.

Ms. XXXX testified that the 2016-2017 IEP was based on how the Student was functioning at [SCHOOL 2]. There was no disagreement about anything in the IEP other than the ratio and the placement. Based on the information from [SCHOOL 2], and from Ms. XXXX about the Student's needs as a learner, who, she explained, would not pay attention in a larger group, MCPS agreed that all instruction would be in groups of 2:1 or smaller. Thus, the 2016-2017 IEP offered placement in a class of nine students, with three adults and a floating para-educator, with related services coming into the classroom throughout the day, with all instruction to occur in a ratio of 2:1 or smaller. Ms. XXXX testified that to satisfy the 2:1 ratio, she would have to look at the schedule and strategically place her staff and the floating para-educator.

Ms. XXXX said she was not at [School 1] on the day the Parents and Ms. XXXX observed. She heard from Ms. XXXX, the coordinator of the program at the time who has since retired, who was there during the observation. Ms. XXXX said the students were not left alone. As to the other critiques of the program, Ms. XXXX testified that was not representative of their program, it does not match her observations, but to the extent they were accurate, she will use them as training points. She acknowledged that there was nothing in writing responding to the Parent's allegation that students were left alone and she had no explanation why Ms. XXXX

never responded to the Parents.

Ms. XXXX again observed the Student during the 2016-2017 school year at [SCHOOL 2]. She testified that she saw a student familiar with the routines, who participated in circle time, and likes the visual promethean board. He got up a couple of times going to something in the corner and then went back to his seat. She observed the Student during a math class and Ms. XXXX noted he was more engaged than during her first observation of him. There were only five students and the Student was participating with adult support. Ms. XXXX told Ms. XXXX that the Student was still not ready for a larger ratio because of his attention.

At the 2017-2018 IEP meeting the only issues raised by the Parents were the placement and that the Student needed the support he gets at [SCHOOL 2]. Ms. XXXX testified that based on her observation, the Student looked like he would fit in appropriately at [School 1]. Ms. XXXX explained that in last year's class at [School 1], most of the students are fairly verbal but some really struggle with spontaneous language, not unlike the Student. Ms. XXXX testified that there are children at [School 1] who have difficulty with toileting. She said that their students are schedule trained, which is not the same thing as being truly toilet trained. She explained that if you take the [School 1] students off schedule, you will start to see accidents. Ms. XXXX acknowledged that at the 2017-2018 IEP meeting, Ms. XXXX said that [School 1] had no students who were non-verbal and none who were not toilet trained. Ms. XXXX said this was not accurate but was not able to explain why Ms. XXXX said it.

### **Evaluation of Witness Testimony**

This case presents a classic problem of opposing expert witnesses. The Parents' case rests on their own testimony, as well as several expert witnesses who all testified that the Student's attention is so fleeting he requires a 1:1 ratio in order to access his education, [School 1] cannot implement this required ratio, and [School 1] is otherwise inappropriate. MCPS relies on several

experts who testified that the IEPs developed for the Student were reasonably calculated to allow the Student to make progress in light of his unique circumstances, based on their knowledge of the Student, his progress while in MCPS, and their knowledge of [School 1]. For a variety of reasons, I afford less weight to the Parents' witnesses than those from MCPS.

The Parents themselves testified as to the lack of sufficient progress they perceived while the Student was in PEP, the progress he has made at [SCHOOL 2], and their belief that [School 1] was an inappropriate placement. I believe that the Parents believe everything they testified to, they were truthful and sincere, but that does not necessarily mean that their beliefs, which are opinions, are correct. While the Parents obviously know the Student better than anyone else, the Parents do not have the years of experience in special education, particularly in the special education of autistic students, that the witnesses from MCPS have. The Parents' experience is very deep with respect to one autistic student, as opposed to the many students the MCPS witnesses have seen.

While I accepted Dr. XXXX as an expert in the field of developmental neuropsychology, and she has an impressive background in the field, her exposure to the Student is limited. She conducted three partial days of testing and observation in March 2015 and observed the Student again just a month before this hearing. Although she opined that the Student requires a 1:1 ratio, she never observed him in his PEP classroom and has never observed him in a setting other than with a 1:1 ratio. Moreover, her testimony that [SCHOOL 2] was an appropriate educational placement for the Student does not necessarily mean that the IEPs proposed by MCPS were therefore inappropriate, the threshold issue in this case.

The exposure of Ms. XXXX, an expert in special education, to the Student is even more limited – she has never interacted with him. Ms. XXXX observed the Student twice at [SCHOOL 2] and viewed [School 1] on one occasion together with the Parents. Moreover, while

she has extensive experience as a special education advocate, her experience in the classroom, particularly with students with autism, is much more limited.

Ms. XXXX, an expert in speech-language pathology with a focus on early childhood autistic students, has worked with the Student for two years, and unequivocally stated her belief that he requires a 1:1 ratio. But again, she has never observed the Student in anything other than a 1:1 ratio. In fact, the only time she has ever seen the Student near another child was with his brother in the waiting room.

Ms. XXXX was the most persuasive of the witnesses for the Parents. While she has a very deep background in speech-language pathology as it relates to young students on the autism spectrum, and she sees the Student every day at school, that experience did not outweigh the MCPS witnesses who testified they had seen the Student progress for two years in a 3:1 ratio at PEP. Ms. XXXX never saw the Student before the 2015-2016 IEP was implemented. As the IEP is a prospective document, judged on its reasonableness at the time it was created in light of the circumstances known then, Ms. XXXX's contributions in this regard are limited. Moreover, Ms. XXXX has never seen [School 1]. And, as with the Parents' other witnesses, her testimony that [SCHOOL 2] was appropriate does not necessarily mean that [School 1] is not appropriate.

In comparison to the Parents' witnesses, I found the testimony from MCPS' witnesses to be much more persuasive. The reasonableness of the 2015-2016 IEP is based on information known to MCPS at the time of the IEP's development and was based on the Student's progress in the PEP program. Therefore I placed great weight on the testimony of Ms. XXXX, Ms. XXXX, and Ms. XXXX, who all saw the Student regularly in the classroom and saw his progress over a two-year period. Their testimony was buttressed by the detailed documentary record indicating progress in speech-language, occupational therapy, and academic skills over two years.

Ms. XXXX was the most impressive witness for MCPS. She observed the Student when he was still in PEP, and spoke to the Student's teacher and to Ms. XXXX about the Student's needs and learning style in anticipation of the 2015-2016 IEP. Ms. XXXX was intimately familiar with [School 1], supervising the program and regularly visiting it. She also saw the Student at [SCHOOL 2] and spoke at length to Ms. XXXX who explained in detail the Student's current level of performance, strengths, and weaknesses.

### **Reasonableness of Proposed IEPs**

While I do find the witnesses from MCPS more persuasive, that is not to say the Parents' witnesses are wrong – reasonable minds can differ. Much of the testimony from the Parents' witnesses was about the [SCHOOL 2] program. But in determining whether MCPS denied the Student a FAPE, I am not required to compare the programs at [SCHOOL 2] and [School 1] to determine which best serves the needs of the Student. *See Hessler*, 700 F.2d at 139 (citing *Rowley*, 458 U.S. at 176) (stating that providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy”). Even if I were to find that [SCHOOL 2] is a better program than [School 1], I could not order that the placement be changed on that basis. The question is whether placement at [School 1] provides the Student a FAPE in the least restrictive environment.

Not only am I not required to compare the two programs to determine which is “better,” I am also not required to determine what would be the “ideal” for the Student. *Endrew F.*, 137 S. Ct. at 999 (citing *Rowley*, 458 U.S. at 206-207). The Student is entitled to an IEP that is reasonably calculated to ensure he makes progress in light of his unique circumstances. I am aware that *Endrew F.* rejected the standard of “merely more than *de minimis*.” Even allowing that the standard is significantly higher than “merely more than *de minimis*,” and encompasses

the ideas of appropriate progress, significant progress, and reasonable progress, the Student is not guaranteed under the law an IEP that gives the very “best.” I believe, and I do not fault them in the slightest, that this is what the Parents are seeking. The Father testified that he could not look back one day and say that he “didn’t do everything” and he did not want to ever say “what if we had done that?” He said that he was “looking for what is best for [his] son” and wanted to find the “best possible situation for him as long as he is alive.” The Mother testified that she and her husband “thought we have to throw everything at this kid” and they could not look back and “say we didn’t do enough.” These thoughts are understandable, they are admirable, but they are not the standard to which the IDEA holds a school district.

The standard is whether the IEPs proposed by MCPS were reasonably calculated to ensure appropriate progress based on the unique circumstances of this Student. In making this determination, I was persuaded by the MCPS witnesses. Much of the testimony regarding [SCHOOL 2], from Ms. XXXX, Ms. XXXX, and the Parents, is irrelevant unless I find that MCPS denied the Student a FAPE and I get to the analysis required by *Burlington* and *Carter*. The fact that the Student is progressing in a 1:1 setting is not proof positive to me that a 3:1 and then a 2:1 setting was not appropriate or an IEP reasonably calculated to ensure progress. To the extent the Parents argue that not only is [SCHOOL 2] providing educational benefit, but that it was the only way to provide benefit and therefore MCPS’ IEP proposals were a denial of FAPE, I do not find the Parents met their burden of proof.

The Supreme Court in *Endrew F.* made clear it would not attempt to state what appropriate progress in each unique case would look like. It also made clear that the “absence of a bright-line rule … should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’”

*Endrew F.*, 137 S. Ct. at 1001 (citing *Rowley*, 458 U.S. at 206). At the same time, the *Endrew F.*

Court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, “a reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Endrew F.*, 137 S. Ct. at 1002. While I am not a “reviewing court,” I am the first level fact finder in this case. I do not conclude that the IEPs were reasonable because the MCPS witnesses said they were; instead, I see how MCPS has matched the services provided in the IEPs to the Student’s unique educational deficits. MCPS has provided a cogent and responsive explanation for its placement decisions.

### **Reasonableness of IEPs Based on Progress in PEP**

MCPS argued that the 3:1 ratio initially offered at [School 1] was reasonable given the progress the Student made in PEP under the same ratio. The Parents, in turn, argued that the IEPs were not reasonably calculated to provide the Student a FAPE given that the Student’s progress during his time in PEP was inadequate and not meaningful.

There was an enormous amount of testimony and documentation concerning the progress the Student made during PEP. There were detailed progress notes on the goals and objectives under the IEPs; there were progress notes from XXXX, a speech-language summer program the Student twice attended, progress reports from the Student’s private therapy providers, and the Parents’ reports to doctors and on the application for [SCHOOL 2]. The Parents took issue with their reports of progress on the [SCHOOL 2] application as they say it was written in the most positive light in order to help their son gain admission to a school. With respect to XXXX, the Father testified that those reports were not accurate; he testified quite sincerely he wished the Student’s language skills were as good as those reported in those documents. Accordingly, I did not rely heavily on those reports. Instead I relied most heavily on the progress contained in the

IEPs. The Parents never took issue, at IEP meetings or at the hearing, with these progress reports.

The Parents complain that the Student never “achieved” any, but one, of his PEP IEP goals. Moreover, they assert that that MCPS carried over the same goals and objectives for the Student from year to year. As to the latter complaint, that is simply incorrect. As laid out in great detail in the findings of fact above, the Student had appropriately ambitious goals and objectives every year, which become more and more challenging. As to the former complaint, it is true the Student did not “achieve” the vast majority of his goals. But there is nothing in the IDEA or federal or Maryland regulations that requires a guarantee that the Student achieve his IEP goals. An IEP is “a statement of measurable annual goals, including academic and functional goals, designed to . . . meet the child’s needs that result from the child’s disability to enable the child . . . to make progress.” 34 C.F.R. § 300.320. Maryland’s regulations provide that IEP goals are “measurable, academic and functional,” “annual,” and achievable “within [one academic] year.” COMAR 13A.05.01.09. Also, the school system must “address any lack of expected progress in the annual goals.” COMAR 13A.05.01.08. The regulations mandate that a school system “shall make a good faith effort to achieve the goals of a student’s IEP.” COMAR 13A.05.01.09.

MCPS made a good faith effort to achieve the goals in the Student’s IEPs. It was difficult for MCPS to perfectly craft goals for such a young child whose capabilities and limitations were not yet apparent. As the Father himself said, during his time in PEP, some of the Student’s symptoms of autism got worse. The school system was tasked with crafting an IEP for a very young child whose symptoms were in some cases still emerging – an enormous undertaking. And yet, the IEPs were reasonable, and appropriately ambitious, and the Student made progress. Every single MCPS witness, along with the Parents, testified the Student made progress while he was in PEP. Every single objective on the IEPs was recorded as “making sufficient progress to meet goal.” There was no testimony whatsoever about a quantitative valuation that could be

assigned to this statement; therefore I must take it exactly as it reads: “making sufficient progress.”

I also take into account the fact that the Student, like many autistic students, is inconsistent. He did not necessarily regress but he may have failed to generalize a skill. That is, he learned a skill at home that he does not apply at school, or vice versa. The nature of autism makes the Student an inconsistent learner, both in the same setting and across settings. For example, the Student was able to perform certain tasks in his ABA therapy but not in his PEP classroom. Likewise, the Student was able to perform other tasks in his PEP classroom but not at home. The Student’s progress, unfortunately, is also slow. The Father testified that the Student’s progress, even now while he has been at [SCHOOL 2], is extremely slow. The DPG progress reports from [SCHOOL 2], where he has received 1:1 instruction for the past two years, also indicate that he is “progressing” as opposed to “achieved” in the vast majority of his goals. The Student’s [SCHOOL 2] report cards confirm the slow but steady progress.

The Parents also argued that the Student had private services, up to fifteen hours per week of ABA therapy, speech-language therapy, occupational therapy, and physical therapy during the time he was in PEP, and that the Student’s progress while in PEP was a result of a combination of PEP and these private services. I agree that the Student made progress because of a combination of these efforts. It is simply an impossible task to unravel the progress the Student made as a result of his private therapies, many of which were 1:1, and evaluate the progress he made in PEP alone. Fortunately, I am not required to undertake this task. Again, the ultimate question is whether the IEPs proposed by MCPS were reasonably calculated to allow the Student to make progress appropriate in light of his unique circumstances. When MCPS crafted the 2015-2016 IEP, it was aware the Student had been receiving private therapies and took that into account in making its proposal. To the extent the private therapies were relevant going forward,

it was reasonable for MCPS to consider that the Student's three-hour-per-day preschool was going to be replaced with a full day kindergarten, providing the Student with over twice the number of school hours per day, coming much closer to the amount of services the Student was receiving as a combination of PEP and private therapies.

### **Ability of [School 1] to Implement IEPs**

When I asked counsel for the Parents during closing argument whether he was arguing the 2:1 IEPs for the 2016-2017 and 2017-2018 school years were inappropriate or only that [School 1] was inappropriate, he responded that it ultimately did not matter, as [School 1] was inappropriate under any circumstances. The Parents and Ms. XXXX observed at [School 1] and observed groups of 3:1 and 4:1. They then argued this ratio was inappropriate for the Student, given that his IEP provided for 2:1 instruction. Just because they were not teaching in a 2:1 ratio at the time of the observation, does not mean [School 1] did not have the ability to implement the IEP. The IEP is a prospective document promising services and accommodations in the future. Ms. XXXX testified unequivocally that MCPS was prepared to implement the IEP that was offered. She explained that she would have to strategically place her staff, including her therapists who enter the room regularly and the floating para-educator, in order to ensure that academic instruction for the Student occurred in a 2:1 setting. MCPS was not required to have that accommodation in place for an observation that took place while the Student was not attending that school.

There was also a significant amount of testimony about the Student wandering, eloping and exhibiting aggressive behavior at [SCHOOL 2]. The MCPS witnesses all stated that they had not seen this type of behavior. They were surprised to hear that the Student was not able to attend in a group setting, regularly attempted to flee group situations, and was exhibiting tantrums and aggressive behavior. There was some argument by MCPS that the Student was regressing in his

current placement. I disagree. First, children, all children, have problems and behaviors manifest at different times. Just because the Student developed some of these behaviors after starting at [SCHOOL 2] does not mean that [SCHOOL 2] is to blame for their emergence. Second, as the Mother explained, the older the Student got, and the more progress he made, the more he became aware of the world around him. As he became more aware of the world around him, and was not living exclusively within his own head, as she described him when he was a toddler, he became more frightened of the world, frustrated by his lack of language and inability to communicate with the world, and negative behaviors emerged.

There is no reason to believe MCPS would not have been able to handle these behaviors. Ms. XXXX testified that had it been required, MCPS would have conducted a functional behavioral assessment of the Student and put into place a behavioral intervention plan to address aggressive behaviors and eloping.

There was also a significant amount of argument regarding the Student's recent use of an AAC at [SCHOOL 2]. He began using his high tech voice output device at the beginning of the 2017-2018 school year. Again MCPS argued that the Student was regressing in his placement at [SCHOOL 2]. As I find that MCPS offered a reasonable IEP placement, it is not necessary for me to evaluate this issue. To the extent the testimony on this issue was aimed at whether [School 1] would have given the Student an AAC, it was never asked for during the IEP process. Given the expert testimony that an AAC can assist rather than hinder language development, and the fact that MCPS has a department devoted to AAC, there is no reason to believe that had the issue arisen while the Student was attending MCPS that they would not have considered it for him.

Finally, the Parents and Ms. XXXX testified in great detail that [School 1] was a chaotic program unfit to meet the needs of any special education student. But I note that Mr. XXXX, the Parents' prior educational advocate, had an extremely positive opinion of [School 1] in 2015.

The Father too said that had MCPS offered [School 1] in 2015 with a 1:1 teaching ratio, they would have tried it. Moreover, the Parents rejected MCPS' 2016-2017 IEP, in which MCPS had offered to change the Student's ratio from 3:1 to 2:1, on August 9, 2016, before they had observed [School 1] a second time on October 18, 2016. Thus, I do not find convincing any argument that their October 18, 2016 observation of [School 1] was relevant to the Parents' rejection of the 2015-2016 and 2016-2017 IEPs.

I will address the October 18, 2016 observation and how it related to the Parents' rejection of the 2017-2018 IEP. While Ms. XXXX's list of inappropriate items was extensive, I do not find they establish an inappropriate placement. There was testimony that there were no child proof locks on the door. However the testimony also established that [SCHOOL 2] put its locks on especially for the Student, given his tendency to elope. There is no reason to believe [School 1] would not have done the same. There was testimony that the room was filled with visual distractions. [School 1] is a special education school designed for students with autism. It is familiar with students who are extremely distractible. Had the Student started there, and become distracted, the school and teachers would have worked to modify the visual and auditory distractions. That is what [SCHOOL 2] had to do for the Student and there is no reason to believe [School 1] would not have done the same. There was testimony from Ms. XXXX that the sensory motor room appeared unsafe. I find this testimony outweighed by the report from Mr. XXXX in 2015 and the testimony of Ms. XXXX from 2017 that the room was appropriate and safe.

There was also testimony that on the day of the observation, a student had a tantrum, two adults left the room with the student having a tantrum, leaving the remaining students unsupervised. Furthermore, the adults working with the student having a tantrum did not seem to know the child or how to soothe him. This testimony is difficult to evaluate. While Ms. XXXX

testified to the students being left alone, it was not in her written report. Ms. XXXX reported that Ms. XXXX, the then [School 1] coordinator, said it did not happen. The Parents testified that it did happen. However, they also testified that when the student was removed from the classroom to the sensory motor room, they left the classroom observation and moved on to observe the sensory motor room to observe the teachers working with the student having the tantrum. I am at a loss to understand how the Parents observed the student in the sensory motor room but also knew that the students had been left alone in the other classroom. Assuming, without deciding, that the incident occurred as reported – that students were left alone unsupervised for several minutes – I do not find on this fact alone that [School 1] was an inappropriate placement for the Student. Ms. XXXX, on whose testimony I heavily relied, explained that [School 1] is an example in MCPS of best practices in autism. She explained that the observations made by the Parents and Ms. XXXX were inconsistent with her observations of that program, which she sees weekly. She explained that they would use the negative feedback to improve their program. Given the overwhelming evidence about the [School 1] program, I believe the Parents' observation of [School 1] was an anomaly. It is not fair to judge this program on this one aberrant example. The program had the ability to implement the Student's IEP for all three years at issue and was an appropriate placement.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the IEPs and placement proposed by MCPS for the 2015-2016, 2016-2017 and 2017-2018 school years were reasonably calculated to offer the Student a FAPE in the least restrictive environment. 20 U.S.C.A. §§ 1412(a)(5), 1414 (2017); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117 (2016). *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

As I have concluded that the Student would have been provided a FAPE in the least restrictive environment at [School 1], I further conclude that the Parents are not entitled to receive reimbursement as a result of their unilateral placement of the Student at the [School 2] for the 2015-2016 and 2016-2017 school years. 34 C.F.R. § 300.148 (2016).

As I have concluded that the Student would have been provided a FAPE in the least restrictive environment at [School 1], I further conclude that the Parents are not entitled to placement of the Student at [SCHOOL 2] for the 2017-2018 school year. 20 U.S.C.A. §§ 1412(a)(5), 1414 (2017); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117 (2016). *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

### **ORDER**

I **ORDER** that the April 24, 2017 Due Process Complaint filed by the Parents is hereby **DENIED**.

October 13, 2017  
Date Decision Issued

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Deborah S. Richardson  
Administrative Law Judge

DSR/cmg

### **REVIEW RIGHTS**

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2017). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings

case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

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