

[REDACTED]

STUDENT

v.

PRINCE GEORGE'S COUNTY

PUBLIC SCHOOLS

* BEFORE SYEETAH HAMPTON-EL,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-PGEO-OT-19-06751

* * * * *

DECISION

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STATEMENT OF THE CASE

On March 1, 2019, [REDACTED] (Parent), on behalf of her child, [REDACTED] (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 Prince George's County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).¹

I held a telephone prehearing conference on March 27, 2019. Kimm Massey, Esquire represented the Parent who was not in attendance. Jeffrey Krew, Esquire, represented the PGCPS. The parties requested that the timeframes be strictly adhered to. Therefore, the hearing was held and the decision issued on or before May 3, 2019, which is forty-five days after March 19, 2019, the date the parties notified the OAH that the resolution session was held, but the dispute was not resolved. . *Id.* §§ 300.510(c), 300.515(a).

¹ U.S.C.A. is an abbreviation for United States Code Annotated.

By agreement of the parties, the hearing was initially scheduled for two days, April 11, 2019 and April 12, 2019. Before the hearing, the Parent's counsel and the counsel for PGCPs filed multiple motions, which I ruled on at the start of the hearing on the record. PGCPs filed a motion to compel and motion for sanctions, both of which I denied. The Parent filed a motion for a protective order, which I denied.

I held the hearing on April 11-13, 2019. Monday, April 13, 2019 was added due to the number of witnesses and multiple motions filed by each side. Kimm Massey, Esquire, represented the Parent and Student. Jeffrey Krew, Esquire, represented the PGCPs.

On April 25, 2019, twelve days after the hearing concluded on April 13, 2019, PGCPs filed a motion to reopen the record. On April 25, 2019, Parent's counsel responded in opposition to the motion filed by PGCPs. On April 26, 2019, PGCPs responded to the opposition motion filed by Parent's counsel on April 25, 2019. I have reviewed the motions and the responses. After three days of testimony, five witnesses, and over 100 pages of evidence, the record closed on April 13, 2019. OAH Rules of Procedure provide:

A. A judge shall:

- (1) Conduct a full, fair, and impartial hearing;
- (2) Take action to avoid unnecessary delay in the disposition of the proceedings
- ...

B. A judge has the power to regulate the course of the hearing and the conduct of the parties and authorized representatives, including the power to:

- (2) Issue subpoenas for witnesses and the production of evidence;
- (3) Rule upon offers of proof and receive relevant and material evidence;
- (4) Consider and rule upon motions in accordance with this chapter;...

COMAR 28.02.01.11 (A), (B)

During the hearing, I ruled on the admissibility of evidence and determined credibility based on the testimony and evidence presented. I find the motion filed by PGCPs, twelve days

after the close of the record, is untimely and will create an unnecessary delay; therefore, I am denying the request to reopen the record.² COMAR 28.02.01.11B(11) & (12).

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) (2018); Md. Code Ann., Educ. § 8-413(e)(1) (2018); 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 the Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

The issues as agreed by the parties are:

1. Did the PGCPS fail to comply with IDEA's disciplinary procedures?
2. Did the PGCPS fail to review and revise the Individualized Education Program (IEP) as appropriate?
3. Did the PGCPS fail to sufficiently address the Student's behavior with positive behavior interventions and supports?
4. Did the PGCPS fail to provide Independent Educational Evaluations (IEEs)?
5. Did the PGCPS fail to provide an appropriate IEP?
6. Did the PGCPS fail to provide an appropriate placement?
7. Did the PGCSP fail to provide quarterly progress reports?

² The documents attached to the Motion filed by PGCPS were not considered in my credibility finding for the named witness. My determinations were solely based on the testimony and exhibits provided during the three day due process hearing.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parent:

- Parent Ex. A - State, County and School Assessment Data, undated
- Parent Ex. B - March 20, 2018 Individual Education Plan (Not Admitted)
- Parent Ex. C- September 11, 2018 Amended IEP
- Parent Ex. D - Math Work Samples, undated
- Parent Ex. E - March 27, 2019 Draft IEP
- Parent Ex. F - Behavior Intervention Plan, dated March 20, 2018
- Parent Ex. G- Manifestation Determination, dated March 14, 2019
- Parent Ex. H - Family Education Rights and Privacy Act (FERPA) Request to Amend Records, dated April 4, 2019
- Parent Ex. I - [REDACTED] Grades, undated
- Parent Ex. J - Emails (Not Admitted)
- Parent Ex. K - IEE Functional Behavior Assessment Report, dated October 23, 2018
- Parent Ex. L - Independent Behavior Treatment Plan (Not Admitted)
- Parent Ex. M - Notices of IEP Team Meeting, dated March 4, 2019
- Parent Ex. N- Progress Report on the IEP Goals
- Parent Ex. O - PGCPS IEE Letter, dated July 3, 2018
- Parent Ex. P- IEE Speech and Language Evaluation, dated December 17, 2018
- Parent Ex. Q- Notifications of Student's Disciplinary Removals
- Parent Ex. R - Settlement Agreement, dated October 29, 2018
- Parent Ex. S - Resumes (admitted pages 4 - 6 only), undated

I admitted the following exhibits on behalf of PGCPS³:

- PGCPS Ex. 1 - Functional Behavioral Assessment (FBA)/Behavioral Intervention Plan (BIP), dated January 28, 2017
- PGCPS Ex. 2 - OAH Decision, Issued November 22, 2017 (unredacted).
- PGCPS Ex. 3 - Psychological Evaluation, undated
- PGCPS Ex. 4 - Evaluation Report and Determination of Initial Eligibility, dated January 25, 2018
- PGCPS Ex. 5 - PGCPS Educational Assessment, dated February 23, 2018
- PGCPS Ex. 6 - PGCPS Occupational Therapy Assessment Report, dated February 15, 2018
- PGCPS Ex. 7 - Speech/Language Assessment, dated February 26, 2018
- PGCPS Ex. 8 - Prior Written Notice (PWN), dated February 27, 2018
- PGCPS Ex. 9 - IEP, dated March 20, 2018
- PGCPS Ex. 10 - FBA/BIP, dated March 20, 2018
- PGCPS Ex. 11 - Request for Mediation, dated May 1, 2018
- PGCPS Ex. 18 - PWN, dated June 15, 2018
- PGCPS Ex. 22 - Email between [REDACTED] and [REDACTED] dated July 25, 2018
- PGCPS Ex. 26 - Letter to the Parent from PGCPS with IEE Guidelines, dated July 3, 2018
 - PGCPS IEE Guidelines
 - MSDE Technical Assistance Bulletin 7, dated September 2007
- PGCPS Ex. 28 - Letter to the Parent from PGCPS, dated July 5, 2018
- PGCPS Ex. 30 - PWN, dated September 11, 2018
- PGCPS Ex. 31 - Request for Due Process Hearing, dated October 11, 2018
- PGCPS Ex. 32 - Email from [REDACTED] to the Parent, dated October 7, 2018-October 12, 2018
- PGCPS Ex. 33 - IEE FBA and BIP from [REDACTED] dated October 23, 2018⁴

³ PGCPS Exhibits 12-17, 19-21, 23-25, 27, 35-36, 39, 41-42, 46-48, 52, 64, 69, and 70 were not admitted into evidence. PGCPS Exhibits 58-59, 62, 68, and 71 were marked for identification only.

⁴ PGCPS Exhibits 4-7, 8, 10, and 33 and Parent's Exhibit K were admitted via stipulation of the Parent and PGCPS.

- PGCPS Ex. 34 - Review of [REDACTED] FBA and BIP, dated November 12, 2018
- PGCPS Ex. 37 - Emails regarding IEE reviews, dated November 5, 2018 – January 28, 2019
- PGCPS Ex. 38 - Letter to the Parent from PGCPS, dated November 12, 2018
- PGCPS Ex. 40 - IEE [REDACTED] LLC ([REDACTED]) Speech and Language Evaluation dated December 17, 2018
- PGCPS Ex. 43 - Emails between [REDACTED] and PGCPS, dated January 8, 2019- January 10, 2019
- PGCPS Ex. 44 - Email from [REDACTED] dated January 10, 2019
- PGCPS Ex. 45 - Due Process Hearing Request, dated March 1, 2019
- PGCPS Ex. 49 - IEP Progress Report, dated June 15, 2018, October 29, 2018, February 11, 2019, and March 13, 2019
- PGCPS Ex. 50 - Emails between the Parent and PGCPS, dated March 13, 2019 – March 25, 2019
- PGCPS Ex. 51 - IEP and IEP sign-in sheet, MDR, and PWN, dated March 14, 2019
- PGCPS Ex. 52 - Notice and Consent for Assessment, dated March 14, 2019
- PGCPS Ex. 53 - Manifestation Determination Review (MDR), dated March 14, 2019
- PGCPS Ex. 54 - Notice of April 3, 2019 IEP Meeting, dated March 15, 2019
- PGCPS Ex. 55 - PGCPS Speech Language observation – Draft Report, dated March 19, 2019
- PGCPS Ex. 56 - Email to the Parent from Ms. [REDACTED] dated March 20, 2019
- PGCPS Ex. 57 - Proposed Revised BIP, dated March 20, 2019
- PGCPS Ex. 61 - Draft IEP, dated March 27, 2019
- PGCPS Ex. 63 - Student Report Card (2018 and 2019 School Year)
- PGCPS Ex. 65- Procedural Safeguards Notice and Guide to Habilitative Services, revised March 2019
- PGCPS Ex. 66 - Resumes (admitted only pages 3-4)

PGCPS Ex. 72 - PWN, dated April 4, 2019

PGCPS Ex. 73 – [REDACTED] Contract between [REDACTED] and the Parent, signed July 1, 2018

Testimony

The Parent testified and presented the following witnesses:

- [REDACTED] admitted as an expert in the Creation and Implementation of IDEA programming.⁵

The PGCPS presented the following witnesses:

- [REDACTED] admitted as an expert in Special Education
- [REDACTED] admitted as an expert in Special Education with an emphasis in the preparation of functional behavior assessments and behavior intervention plans
- [REDACTED] admitted as an expert in Speech Language Pathology

FINDINGS OF FACT

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

1. Since 2017, the Student has had an IEP with annual goals, objectives and accommodations to address deficits with math, social emotional behavior and social intervention skills. Before attending [REDACTED] Elementary School Transition Program ([REDACTED] ES), the Student attended [REDACTED] Elementary School ([REDACTED]). The PGCPS Centralized IEP Team (CIEP) recommended the transition from [REDACTED] to [REDACTED] ES to meet the educational and behavioral needs of the Student. The Parent was in attendance and ultimately agreed to the change in location.

⁵ On April 11, 2019, this witness filed a Motion to Quash a subpoena issued by PGCPS. The Motion was heard on the record on April 12, 2019. The Motion was granted in part and denied in part as it related to documents deemed irrelevant to the matter involving the Student and the Parent.

2. Since October 2018, the Student has attended [REDACTED] ES, located in Prince George's County, Maryland.

3. [REDACTED] ES is described as a transition school with the PGCPSS that provides smaller class sizes with a minimum of two adults. [REDACTED] ES provides behavioral supports, individual and group therapy with a school psychologist, crisis intervention room staffed by two crisis intervention teachers, mental health partnership with the [REDACTED] and a behavior management system with the use of a daily point sheet to earn prizes.

4. Disabled and nondisabled students attend the school.

5. The Student has a disability under IDEA. He is diagnosed with an Emotional Disability (ED). He is in the fifth grade and is working toward a Maryland High School Diploma.

6. The Student interacts with non-disabled students during specials, lunch, and recess. While in school, he has engaged in fighting, eloping, the use of profanity, and other acts of aggression.

7. As of the third progress period, during the 2018-2019 school year, the Student's grades have improved in Math, Social Skills, and Science.

8. From January 2019 until March 22, 2019, the Student had a long-term substitute teacher, Ms. [REDACTED]. Ms. [REDACTED] was not a Certified Special Education teacher but she received support from Ms. [REDACTED] and other teachers in the areas of Reading and Mathematics.

9. On March 22, 2019, Ms. [REDACTED] a Certified Special Education teacher, joined the class. Ms. [REDACTED] remained in the classroom working with the students.

10. Since beginning at [REDACTED] ES in October 2018, the Student has earned points via the daily point sheet and earned [REDACTED] bucks. The daily point sheet is utilized to track the Student's daily behavior.

11. Since beginning at [REDACTED] ES in October 2018, the Student utilized the crisis intervention room nineteen times as a result of engaging in problematic behaviors. The Student's IEP lists crisis intervention as a social/behavioral support to be used as needed and provided by the social worker, psychologist, guidance counselor, or school based mental health professional.

12. The Student has been disciplinarily removed, both in and out of school, for sixteen days. The disciplinary removals range from October 10, 2018 through April 2, 2019.

13. An IEP dated, September 11, 2018 was in effect while the Student attended [REDACTED] and upon his transition to [REDACTED] ES in October 2018.

14. On February 26, 2018, PGCPS conducted a Speech Language assessment of the Student and found no problems in the areas of speech articulation and speech fluency.

15. On February 27, 2018, PGCPS completed a FBA and a BIP was revised to be implemented beginning March 20, 2018, to address the Student's problematic behaviors. The March 2018 BIP was revised to update the previous BIP dated January 28, 2017.

16. On October 23, 2018, [REDACTED] MS, RBT⁶, of [REDACTED] completed an FBA of the Student.

17. On October 29, 2018, PGCPS and the Parent entered into a resolution agreement in which PGCPS agreed to fund IEEs (within PGCPS guidelines) and to provide 72 hours of Compensatory Education to the Student.

⁶ Registered Behavior Technician

18. In November 2018, [REDACTED] began as the Wing Coordinator at [REDACTED] ES. Her duties include conducting teacher observations, assisting teachers, and scheduling mediations and other related meetings.

19. Ms. [REDACTED] also updated the Student's progress reports and provided reports to the Parent. Ms. [REDACTED] updated the progress notes on February 11, 2019 and March 13, 2019 but not the progress note on the October 29, 2018 as the date predated her tenure at [REDACTED] ES.

20. On December 17, 2018, [REDACTED] MS, CCC-SLP⁷, is an independent contractor hired by [REDACTED] LLC ([REDACTED]). She completed a speech and language evaluation of the Student. [REDACTED] is also a Speech Language contractor paid by the PGCPS.

21. The Parent signed a contract with [REDACTED] of [REDACTED] [REDACTED] LLC to provide advocacy services including; attending IEP meetings, and representing the Parent during phone or email conversations with MSDE and PGCPS.

22. Ms. [REDACTED] scheduled the annual IEP meeting for March 14, 2019. Ms. [REDACTED] sent the IEP meeting notice to the Parent via email, mail, and home with the Student. After the meeting, Ms. [REDACTED] emailed the Parent the IEP, MDR, PWN, FBA consent form, April 3, 2019 IEP meeting notice, and procedural safeguards.

23. On March 14, 2019, the IEP team held an annual IEP meeting to revise the Student's IEP and measurable goals. The Parent did not attend, although she received a written invitation for the meeting. The previous IEP was revised to include: updated academic information such as standardized testing scores from the Fall, behavioral updates, crisis room visits, disciplinary removal information, updated measurable goals, and reviewed the IEEs previously provided by the Parent.

⁷ Certificate of Clinical Competence – Speech Language Pathologist

24. [REDACTED] and [REDACTED] are members of the IEP team and ultimately determined the IEEs provided by the Parent had no value.

25. Ms. [REDACTED] determined the speech and language evaluation had no value as it used an outdated version of the Comprehensive Assessment of Spoken Language (CASL) test to assess the Student. Ms. [REDACTED] recommended the IEP team complete a new Speech and Language assessment and offered to complete the assessment.

26. Ms. [REDACTED] determined the FBA lacked value because the assessor failed to adequately observe the Student in multiple settings to develop an appropriate BIP.

27. Ms. [REDACTED] compared the three available BIPs and determined the Student's behavior has improved as the frequency of incidents has decreased.

28. On March 14, 2019, the IEP team held a manifestation determination review (MDR) to determine if the Student's behavior was a manifestation of the Student's disability. The IEP team determined the behavior was a manifestation of his disability. The IEP team determined the number of removals constituted a change in placement. The IEP team considered twelve disciplinary removals. The team determined the Student should receive compensatory services to address the denial of FAPE as a result of the disciplinary removals. The services included one session for thirty minutes of counseling services and two sessions for thirty minutes each of math instruction to occur at [REDACTED] ES. The team also sought consent from the Parent to conduct a new FBA and create a new BIP.

29. On March 20, 2019, Ms. [REDACTED] administered the Comprehensive Evaluation of Language Fundamentals-5th Edition (CELF), Pragmatic Profile to Ms. [REDACTED] Ms. [REDACTED] conducted a record review and observed the Student in the classroom for one hour. The Student was observed playing games with peers, taking a test, asking clarifying questions, and

performing conversational turn-taking with the teacher. Ms. [REDACTED] determined the Student did not display signs of a pragmatic impairment and displayed age appropriate development and pragmatic skills.

30. On April 3, 2019, the IEP team met and held another IEP meeting to discuss the Student's IEP. The team discussed a revised BIP presented during the meeting. The team revised the IEP goals in the areas of Math and Behavioral and Social/Emotional Interaction. The Parent and the Parent's advocate, [REDACTED] attended the meeting.

31. On April 3, 2019, the IEP team performed a second MDR. The team learned the Student served an in-school disciplinary removal on April 2, 2019 and was previously disciplinarily removed on December 17, 2018 for five days. The team determined the Student's behavior was a manifestation of his disability and the Student should receive compensatory services to address the denial of FAPE as a result of the disciplinary removals. The team revised the Student's IEP to include four 30 minute sessions for academic support (mathematics and IEP goals support) and two 30 minute sessions for counseling support (social/emotional and behavioral support).

32. The IEP teams consists of the Parent, the Parent's advocate, the Parent's attorney, Special Education Coordinator, Assistant Principal, three Instructional Specialist, Behavior Specialist, General Education Teacher, and Psychologist.

DISCUSSION

The identification, evaluation, 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 (2018) ; Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01. The IDEA requires "that all children with disabilities have available to them a FAPE that emphasizes special education and related services

designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); see also Educ. § 8-403.

In an administrative hearing challenging an IEP, the Student bears the burden of proof by a preponderance of the evidence. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, (2005). To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). For the reasons set forth, I find the Parent has met her burden in the following areas: PGCPS failed to implement the Student’s IEP in the area of behavioral supports during the time of the long-term substitute teacher, January 2019 through March 22, 2019. In addition, PGCPS conducted manifestation determination reviews, in an untimely manner and disciplinarily removed the Student in excess of ten school days, without providing services, even though the behavior that precipitated the removal, was a manifestation of the Student’s disability.

The Parent argued the inaction of PGCPS denied the Student a FAPE. Specifically, the Parent argued PGCPS failed to follow the IDEA disciplinary procedures and hold timely manifestation determination reviews as the Student was disciplinarily removed from his educational setting for more than ten school days. In addition, the Parent argued PGCPS failed to comply with applicable regulations regarding the implementation of the Student’s IEP, including appropriate review and revision, and providing timely quarterly progress reports. The Parent also argued PGCPS failed to provide IEEs or timely review the IEEs provided by the Parent. The Parent also argued PGCPS failed to provide an appropriate placement for the Student at [REDACTED] ES. In addition, PGCPS failed to follow the Student’s IEP and provide appropriate

positive behavior supports. Lastly, the Parent argued PGCPs committed multiple procedural violations which together are substantive violations; therefore, denying the Student a FAPE.

PGCPs argued the violations as alleged are at best only procedural violations that do not amount to a FAPE denial. Further, PGCPs argued OAH does not have jurisdiction to enforce the previous IEE settlement agreement as the OAH is not a Court of competent jurisdiction.

Parent's Case

The Parent testified she ultimately agreed with CIEP team to transition her son, the Student, to ■■■■■ ES due to all the services offered. She testified since her son transitioned to ■■■■■ ES in October 2018 the IEP team had failed to meet to review or revise the IEP. As a result of the failure to review or revise the IEP, the Parent testified the Student was not receiving proper supports to achieve the IEP goals in the areas of mathematics and behavioral concerns. As a result, the Parent testified the Student was reading below grade level. She testified she can track his progress via the online grade system, ■■■■■. She testified ■■■■■ proved her son had declining grades in several subjects. To assist the Parent with advocacy for the Student, the Parent hired ■■■■■ of ■■■■■ LLC (■■■■■).

In addition, the Parent testified once at ■■■■■ ES the IEP team never met and only started reviewing and revising the IEP after the Due Process Complaint was filed on March 1, 2019. The Parent testified she received IEP progress reports from Ms. ■■■■■ on March 13, 2019. The progress reports covered October 29, 2018, February 11, 2019, and March 13, 2019.

The Parent testified she is a member of the IEP team and she regularly attends the IEP team meetings. She admitted to not attending the March 14, 2019 meeting due to a work scheduling issue and no receiving timely notice. However, this was challenged on cross-examination and she admitted she did not list the work reason in an email to PGCPs IEP team

member. The Parent attended the April 3, 2019 meeting and learned the teachers were not aware of the BIP in place for her son. She testified that during the meeting she questioned whether her son signed the behavior contract or if the school implemented other BIP steps such as calming methods. At the meeting, the Parent learned the BIP was not being implemented to help her son's behavior improve. The Parent testified the BIP did not include multiple disciplinary removals when her son's behavior is displayed.

Regarding the number of disciplinary removals and other disciplinary matters, the Parent testified PGCPS failed to conduct a timely manifestation determination review (MDR) to determine if her son's behavior was the manifestation of his disability. The Parent testified this meeting was held during the March 14, 2019 IEP team meeting. Although she did not attend, the Parent testified she was aware of what was discussed as she received the MDR via email from PGCPSS. The Parent noticed the number of disciplinary removals listed on the MDR did not match the disciplinary removal notices she received. The Parent testified she learned PGCPSS determined the behavior was a manifestation of her son's disability. In addition, PGCPSS determined the behavior is not related to the failure of PGCPSS to implement the IEP. The Parent testified she disagrees with this assessment of PGCPSS. She testified PGCPSS failed to implement her son's BIP, the IEP goals were not achieved, and from January 2019 to March 22, 2019 her son was in a class with a long-term substitute teacher.

The Parent testified she agreed to allow her son to attend [REDACTED] ES because the school offered behavior supports and other behavior modification programs to help her son and his behavior. However, she testified she also learned her son was sent to the crisis intervention room on nineteen occasions. The Parent testified she provided PGCPSS with two IEEs, FBA/BIP from [REDACTED] and a speech evaluation from [REDACTED] but PGCPSS never reviewed or considered

the IEEs. On cross-examination, the Parent testified the IEEs were conducted in October 2018 but she couldn't recall when she provided the IEEs to PGCPs. She further testified she was not aware of PGCPs policy, "All test must be submitted to the Department of Special Education, in ninety calendar days for review." (PGCPs Exhibit 26). The Parent also could not recall receiving a letter dated, July 3, 2018 regarding the IEEs and the PGCPs IEE Guidelines.

While the Parent testified she was displeased with the actions of PGCPs. On cross-examination she could not recall what steps if any PGCPs took to address her concerns. The Parent was reluctant to admit PGCPs offered math tutoring services via [REDACTED] until she was shown the emails between her and a [REDACTED] representative. The Parent could not recall if the Student actually used the math tutoring services offered by PGCPs. Although the MDR was held on March 14, 2019, the Parent did not recall also receiving a consent form to all PGCPs to perform a new FBA and BIP developed. The Parent declined she refused to sign the consent form because she could not recall receiving the form. The Parent also could not recall PGCPs awarding compensatory services to the Student in the MDR dated March 14, 2019. While previously acknowledging the April 3, 2019 IEP team meeting, the Parent was reluctant to acknowledge the meeting details including the second MDR held regarding the Student's additional disciplinary removals. The Parent also refused to acknowledge improvement in the Student's grades from quarter two to progress three. The Parent focused on the grades not being finalized and therefore she is unable to say the grades have improved although in Math the Student's quarter two final grade was an E and the progress three grade is a C.

[REDACTED] the Parent's advocate and owner of [REDACTED] was admitted as an expert in the creation and implementation of IDEA programming. She testified she was familiar with the Student but mostly interacted with the Parent. Ms. [REDACTED] testified she was hired as an

educational advocate for the Parent and to protect the Student's rights. As an advocate, part of her job is to attend all IEP meetings with the Parent, help the Parent find resources, and assist the Parent with navigating the IDEA process. Her services also include locating evaluators, assessors, and tutors for her clients. Ms. [REDACTED] testified she does not and has never taught, tutored, or tested a child.

Ms. [REDACTED] testified primarily about the disciplinary removal process and what schools must do when a student has been disciplinarily removed from the educational setting in excess of ten consecutive school days or ten school days cumulatively. Ms. [REDACTED] explained the IEP team must conduct a manifestation determination review within ten days of the student's removal from the classroom. She indicated this review is to determine whether the behavior is a manifestation of the student's disability or as a result of the school system's failure to implement the IEP. Ms. [REDACTED] also testified she's aware of the MDR conducted in this case and believes it was untimely as the Student was already disciplinarily removed for over ten school days. But she also agreed the Student warranted compensatory services, but she does not believe the services offered by PGCPs were enough.

Ms. [REDACTED] also testified regarding the IEP and explained reasons the IEP should be revised or reviewed. Broadly she explained the IEP team will review and revise an IEP based on the progress or lack of progress made by a student. In this case, Ms. [REDACTED] testified she attended the September 11, 2018 IEP meeting in which PGCPs offered to move the Student from [REDACTED] to [REDACTED] ES. She testified [REDACTED] ES offered behavioral supports, mental health and clinical staff, and other trained staff.

She also attended the April 3, 2019 IEP meeting in which she questioned PGCPs staff regarding implementation of the IEP for the Student. Ms. [REDACTED] testified based on her

questions she learned PGCPSS was not implementing the BIP. Ms. [REDACTED] testified the [REDACTED] ES teacher seemed unfamiliar with the behavior contract but said she offers incentives like jolly ranchers to the Student for doing well. Based on the April 3, 2019 IEP meeting, Ms. [REDACTED] testified she did not believe PGCPSS was implementing the Student's IEP as the Student had a long-term substitute teacher from December 2018 to March 22, 2019, when the new Certified Special Education teacher started. In addition, she stated the Student had not achieved his IEP goals. Ms. [REDACTED] provided limited testimony regarding the IDEA term appropriate placement. She stated an appropriate placement is a regular education comprehensive school, close to the student's home.

Ms. [REDACTED] testified an IEP team must review and consider the IEEs provided by the Parent of the Student. When a local education agency performs an evaluation of a student, the student's parents have the right to seek an IEE as a procedural safeguard. 20 U.S.C.A. §1415(b)(1). However, the right to obtain an IEE at public expense is qualified. 34 C.F.R. §300.502 states the following in pertinent part:

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a

hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

Although, Ms. [REDACTED] testified she had the PGCPS guidelines, she was not aware of the PGCPS IEE guideline requiring all IEEs to be submitted to PGCPS for review within ninety days. In this case, Ms. [REDACTED] adamantly believed the IEP team relied on the IEEs obtained by the Parent to determine IEP goals and the need to complete new evaluations and assessments. Ms. [REDACTED] believed the [REDACTED] FBA was the "current data" listed in the IEP and therefore was being considered. Even after reviewing the evaluation of the [REDACTED] FBA by [REDACTED] Ms. [REDACTED] refused to acknowledge the IEP team rejected the FBA from [REDACTED] Ms. [REDACTED] offered limited testimony regarding the speech and language evaluation by [REDACTED] an independent contractor for both, [REDACTED] and PGCPS. Ms. [REDACTED] testified [REDACTED] is an independent contractor not an employee of [REDACTED] and that is why the evaluation is on [REDACTED] letterhead.

PGCPS Case

[REDACTED]⁸ is the [REDACTED] ES Wing Coordinator and was admitted an expert in Special Education. She testified she started as the Wing Coordinator in November 2018. Her duties include teacher observations, addressing behavior issues, scheduling mediations, and will serve as the administrator on duty if the Principal and Assistant Principal are out of the office.

Ms. [REDACTED] explained the [REDACTED] ES transition program is designed for students in need of behavioral supports, therapy, and close assistance from paraprofessionals, and those experiencing disabilities such as emotional disability (ED), autism, and other health impairments. She testified all the students require extra supports to help with behaviors such as fighting, using

⁸ Ms. [REDACTED]'s testimony was taken on Friday evening and she was not available on Monday, April 15, 2019 due to Spring Break, which was from April 15-19, 2019. In the interest of time, both the Parent's attorney and the attorney for the PGCPS were limited to direct and cross-examination without redirect or recross.

profanity, elopement, throwing of furniture, self-harm, and tantrums. She explained [REDACTED] ES has small classes with a minimum of two adults. She testified the smallest class has three students and the largest class has ten students. Ms. [REDACTED] explained all the students are completing grade level work and are working toward a Maryland High School Diploma.

She testified [REDACTED] ES also provides behavioral supports to all students including individual and group counseling with a school psychologist, crisis intervention area with two crisis intervention teachers, rewards systems using a daily point sheet. Ms. [REDACTED] testified students maintain a daily points sheet and based on the number of points can earn [REDACTED] bucks to buy items or get rewards. She testified the Student's class earned a chick-fil-a party. Ms. [REDACTED] testified she believes the teachers are Certified in Special Education, but she was unsure. She further explained the students in the crisis intervention room are not completing school work unless using a behavior strategy such as journaling or drawing. On cross-examination, Ms. [REDACTED] stated she would need more information to determine if nineteen crisis interventions were excessive, such as length of stay and time of day. However, she testified nineteen is a low number compared to other students who go every day. Regarding disciplinary removals, Ms. [REDACTED] testified seventeen days is unacceptable for [REDACTED] ES students in need of behavior supports. She also stated she was not aware of the number of disciplinary removals as many occurred before her arrival. She stated she would have scheduled a MDR earlier if asked. Ms. [REDACTED] was present for the MDR held on March 14, 2019. In her expert opinion, the compensatory services offered were to compensate for one day.

Specifically relating to the Student, Ms. [REDACTED] testified she personally observes the Student on a regular basis since his classroom is next door to her office. Ms. [REDACTED] described the Student as child without physical disabilities and who is taller than his peers. She

⁹ [REDACTED] is the school mascot.

observed the Student's ability to communicate his wants and needs and therefore she has not observed any evidence of issues with pragmatic speech.

She also testified she observed the Student fight, use profanity, issues with elopement, and assaultive behavior. She testified the Student's class has eight students and two adults for a ratio of one to four. She agreed at least one of the adults in the classroom should be Certified in Special Education. Currently, the two adults in the classroom include the former long-term substitute teacher, Ms. [REDACTED] and the new Certified Special Education teacher, Ms. [REDACTED].

Ms. [REDACTED] also testified about the implementation of the Student's IEP. On cross-examination, she admitted the IEP was likely not being fully implemented while the long-term substitute teacher was present without the new Certified Special Education teacher or other supports. (Transcript page 743, lines 19-25 and page 744, lines 1-3). The long-term substitute teacher was the only teacher in the Student's class from January 2019 to March 22, 2019. She testified the long-term substitute teacher received support from math and reading teachers. Ms. [REDACTED] is also a Certified Special Education teacher also offered support, but she admitted all of these supports were not enough to fully implement the Student's IEP. (Transcript page 751, lines 8-17). Ms. [REDACTED] testified she was not aware of the Parent's allegation of the Student reading below grade level. Ms. [REDACTED] stated she did not see this in the initial IEP.

Courts that have considered the question of IEP implementation, as contrasted with IEP formulation, have found that not every flaw in implementation rises to the level of a denial of FAPE. In *Van Dyne v. Baker School District 5J*, 503 F.3d 811, 820-822 (9th Cir. 2007), the Court undertook a survey of statutory background and extant case law: The core of Van Duyn's case is his allegation that the District failed to implement his IEP. As it relates to the

implementation of the IEP the Court held, “[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Id.*

The *Van Duyn* analysis is logical and persuasive, and I adopt it. I find PGCPS failed to fully implement the Student’s IEP relating to the behavioral supports and this failure was material. For the following reasons, I find it was a material because PGCPS was aware of the Student’s IEP and the reason the Student was transferred from ██████ to ██████ ES, which was primarily for the behavioral supports. The Student’s behavioral goals were significant to the IEP as they supported the CIEP team’s determination to move the Student during the 2018 school year from ██████ to ██████ ES. The Student’s IEP lists specific IEP behavioral goals including the use of the behavior contract and use of the crisis intervention room as needed. Further, the IEP does not include multiple disciplinary removals which prevent the Student from accessing the counseling services provided by PGCPS. The Student was removed from ██████ ES for sixteen days and unable to access the counseling services. PGCPS acknowledged this substantive violation by awarding the Student compensatory services for counseling and mathematics. In addition, the testimony was clear the Student was in a class with a long-term substitute teacher for three months and the teacher was not aware of the Student’s BIP. In fact, Ms. ██████ acknowledged it was likely the Student’s IEP was not being fully implemented during the time of the long-term substitute teacher. In addition, the Parent testified the teacher lacked knowledge of the Student’s behavior contract, which is part of the BIP. Finally, PGCPS failed to conduct timely MDRs, therefore failing to implement the Student’s IEP regarding behavioral supports.

Based on the testimony of the Parent and the acknowledgement of Ms. [REDACTED] of the PGCCPS, the Student's behavioral supports as outlined within the IEP were not being implemented.

Regarding the stated IEP goals, Ms. [REDACTED] further testified she did not expect the Student to achieve the IEP goals within one calendar year. She testified the Student began attending [REDACTED] ES in October, which is after school started, therefore she expected the Student to make progress toward his goals. Ms. [REDACTED] testified she wrote progress notes and sent them to the Parent, typically with the Student's report card. She testified she did not update the note on October 29, 2018 as the date predated the date she began at [REDACTED] ES. Ms. [REDACTED] testified she updated the progress notes beginning on February 11, 2018. She testified the February note was updated with the assistance of the long-term substitute teacher and after reviewing the Student's classwork and county assessment data.

Ms. [REDACTED] testified the accommodations mentioned in the Student's IEP are offered on a daily basis, social skills are addressed weekly, the behavior management system is implemented daily using the point sheet, and crisis response intervention as needed.

Ms. [REDACTED] testified about the scheduling and occurrence of the March 14, 2019 IEP team meeting. She testified she scheduled the annual review meeting on March 14, 2019 and sent notices via the mail, email, and sent home with the Student. Ms. [REDACTED] never knew if the Parent was attending the meeting or any information regarding the reason the Parent did not attend the meeting. Ms. [REDACTED] testified the IEP team reviewed and considered the IEE from [REDACTED] but it was rejected as it did not have sufficient observations of the Student. She testified the IEE was not considered during the MDR or in the development of IEP goals. As for the second IEE from [REDACTED] Ms. [REDACTED] testified the IEP team reviewed the IEE but

determined problems existed in the area of observations. Specifically, Ms. [REDACTED] recalled Ms. [REDACTED] stated the IEE did not indicate the Student was observed using pragmatic language to make a true assessment. In addition, the observations were described as informal and incomplete.

Ms. [REDACTED] testified the IEP team determined a new FBA was needed and the team needed the Parent's permission to complete. Ms. [REDACTED] recalled sending the consent form and prior written notice (PWN) via email to the Parent, but not getting a response.

On April 3, 2019, Ms. [REDACTED] attended the Student's IEP meeting and did not recall the new teacher, Ms. [REDACTED] stating supports were not being provided. In addition, Ms. [REDACTED] testified the team discussed the change in IEP goals on March 14, 2019 and the revision based on the April 3, 2019 IEP team meeting. During the April 3, 2019 meeting, the IEP goals were to be added to the Student's daily point sheet. She explained the Student spends time in a self-contained class with other disabled students and interacts with non-disabled students during specials, lunch, and recess. Based on her expertise, Ms. [REDACTED] opined the IEP goals are appropriate for the Student and are being implemented on a daily basis. However, she acknowledged the IEP was not being fully implemented during the time of the long-time substitute teacher from January 2019 until March 22, 2019, when the new teacher started.

[REDACTED] is a Speech Language Instructional Specialist and Speech Language Pathologist. She testified as an expert in Speech Language Pathology. She explained the initials CCC behind her name indicate she received the Certificate of Clinical Competence. She testified this recognition is denoted after passing a national exam and is the highest certification level a Speech Language Pathologist may earn. Ms. [REDACTED] testified she is responsible for over 165

Speech Language Pathologists and provides service to 208 PGCPs schools. In addition, she annually provides six presentations to staff.

Ms. [REDACTED] testified she became involved with this Student on March 14, 2019 and she was unaware of the Due Process Complaint. Before the meeting and in preparation for the IEP meeting, Ms. [REDACTED] testified she conducted a record review. Ms. [REDACTED] testified she reviewed the Speech and Language assessment from February 26, 2018 conducted by PGCPs. Although a year old, she stated the data was valuable and useable. Ms. [REDACTED] did not recommend using data older than one year to assess articulation and speech fluency. In her review, Ms. [REDACTED] did not see any concern regarding the Student's speech articulation or speech fluency. Ms. [REDACTED] testified the Student scored within the average range.

Ms. [REDACTED] testified the Parent previously expressed concerns regarding the Student's pragmatic speech. Ms. [REDACTED] explained the analysis of pragmatic speech involves assessing the Student's ability to manage a conversation, the ability to switch between listeners, and purposeful use of speech for requests. She also testified pragmatic analysis requires student observations in multiple settings. Ms. [REDACTED] did not observe the pragmatic concerns raised by the Parent.

She testified her review also included reviewing the IEE from [REDACTED] Ms. [REDACTED] expressed concerns regarding [REDACTED] conducting an independent speech language evaluation of a PGCPs student while being employed by PGCPs. In addition, Ms. [REDACTED] found [REDACTED] administered an outdated version of the Comprehensive Assessment of Spoken Language (CASL), failed to conduct a classroom observation, and failed to observe the Student in conversations on more than one day. Ms. [REDACTED] testified best practices require a Speech Language Pathologist to look at multiple data points and to observe the student. Based

on her expertise, Ms. [REDACTED] opined the IEE by [REDACTED] could not be used because the assessment did not meet PGCPS IEE guidelines.

On cross-examination, Ms. [REDACTED] continued to express her concerns regarding [REDACTED] [REDACTED]. Namely, Ms. [REDACTED] did not begin with PGCPS until after February 2018 and therefore likely missed the professional development about potential conflicts. She also testified she was not aware of COMAR requiring an IEE review within thirty days of receipt.

On cross-examination, Ms. [REDACTED] admitted she reviewed the IEE by [REDACTED] and stated "assessment looks good, except that she does not have a classroom observation" in an email dated January 10, 2019. (PGCPS Exhibit 44). Ms. [REDACTED] also admitted at the time of the email she did not realize [REDACTED] used an outdated version of the CASL. Ms. [REDACTED] admitted [REDACTED] has the same CCC and credentials. But Ms. [REDACTED] maintained her concern regarding [REDACTED]'s evaluation of the Student due to a possible conflict.

Ms. [REDACTED] testified she participated in the March 14, 2019 IEP meeting by telephone. She recommended the IEP team conduct a new speech language assessment which included interviewing the Student's teacher and conducting a classroom observation. Ms. [REDACTED] offered to conduct the new assessment. Ms. [REDACTED] testified she conducted another record review, classroom observation of the Student, and administered a ratings profile to the Student's teacher. Ms. [REDACTED] administered the Comprehensive Evaluation of Language Fundamentals (CELF), fifth edition, which is a pragmatic profile checklist administered to the teacher not the student. Ms. [REDACTED] stated she met with the teacher and who provided ratings based on the knowledge of the Student. Ms. [REDACTED] testified the Parent's consent was not needed as the ratings profile was administered to the teacher not the Student. Ms. [REDACTED] drafted a report of her findings. Ms.

██████████ testified her findings were shared with the IEP team at the April 3, 2019 meeting and documented in the PWN, dated April 4, 2019.

On cross-examination, Ms. ██████████ testified the final report was provided to the Parent and maintained at the school on April 3, 2019. She seemed unsure why PGCPs Exhibit 55 was a draft version of her report, but indicated the final version only added PGCPs letterhead and did not contain substantive changes.

Ms. ██████████ further explained the rating profile and her findings. Based on her expertise, she determined the data from the Student's teacher was valid data. Ms. ██████████ explained her significant findings based on her Student observations. First, she stated the Student has typical or cultural conversation and she observed appropriate turn-taking during conversation.

Secondly, she observed the Student maintained eye contact. Next, she observed the Student reading non-verbal tones, messages, and facial cues. Finally, she observed the Student ask for help. Ms. ██████████ determined the Student displayed age appropriate development and pragmatic skills.

Ms. ██████████ testified her student observations included seeing the Student playing Jenga and UNO. She observed the Student ask clarifying questions; offer to help another student, and appropriate conversational turn-taking from a peer to the teacher. Based on her observations, Ms. ██████████ did not recommend the Student receive services for a student with a pragmatic impairment.

██████████ is a Special Education Instructional Specialist (SEIS) and admitted as an expert in Special Education with an emphasis in FBA and BIP. Ms. ██████████ has a Master's in Education focusing on Emotional Disability and is not certified in BCBA¹⁰. She testified when she was in school, a BCBA was not available. As an SEIS, MS. ██████████ testified her

¹⁰ Board Certified Behavior Analyst

duties included visiting classrooms once a week. While her current caseload does not include [REDACTED] ES, in 2018, Ms. [REDACTED] testified her caseload included [REDACTED] ES. Ms. [REDACTED] testified [REDACTED] ES is now assigned to [REDACTED]. Ms. [REDACTED] testified [REDACTED] ES offers multiple behavior supports inside and outside the classroom. The supports include: small class size, rewards and point sheet, behavior goals, crisis intervention rooms, school psychologist, and other on-site mental health providers. On cross-examination, Ms. [REDACTED] admitted the mental health providers are offered in partnership with the [REDACTED] and are not available everyday. In addition, she testified she visited [REDACTED] ES five times during March 2019 in preparation for the hearing.

Ms. [REDACTED] explained the crisis intervention rooms are used as a time out for students or exclusion with the goal of stopping the crisis from occurring. Ms. [REDACTED] testified the crisis intervention rooms are not designed to be punitive in nature. In addition, she stated students can request to go to the room or be directed to the room by a teacher. She further testified PGCPS is prohibited from using seclusion rooms. On cross-examination, Ms. [REDACTED] testified it was incorrect to describe the crisis intervention room as a place in which work is not assigned or completed. However, she agreed the students within the crisis intervention room do not receive IEP instruction. Ms. [REDACTED] further testified nineteen visits to the crisis intervention is not high and in order to make any further determination she would need to know the length of time the Student spent in the crisis intervention room. Further, she testified she did not cross reference the number of disciplinary removals with crisis intervention room visits.

Ms. [REDACTED] testified she reviewed the IEE conducted by [REDACTED] and [REDACTED] of [REDACTED]. She testified she reviewed the IEE using the MSDE Technical Assistance Bulletin Number 7 and the PGCPS IEE Guidelines. While record review, interviews,

and observations are valid methods to collect data, Ms. [REDACTED] testified the IEE provided incomplete data and limited observation of the Student. She explained limited observation is one or two observations but for an FBA more observations are required due to the referenced behaviors. On cross-examination, Ms. [REDACTED] testified the Student was observed for ninety minutes in class and in the hallway. In this case, the targeted behaviors include elopement, non-compliance, property destruction and physical aggression, and yelling, which were not accounted for within the IEE. The IEE provided by the Parent only displayed one behavior, non-compliance. Although not required, Ms. [REDACTED] also noted the IEE did not use the MSDE format. Ms. [REDACTED] also testified the IEE did not contain adequate data from the one behavior observation to draw any conclusions or to develop the recommended BIP. She also testified the IEE did not mention the Student's cognitive capabilities. In addition, Ms. [REDACTED] testified the IEE failed to address the Student's ability for success, to address alternative behaviors, or reflect external supports.

Ms. [REDACTED] testified she attended the March 14, 2019 IEP team meeting. Ms. [REDACTED] testified the team reviewed the IEE but it had no value and therefore was not used by the team. Ms. [REDACTED] proposed a new FBA and BIP and requested the Parent's consent. Ms. [REDACTED] testified the team requires the Parent's consent and without it, the team can only revise present levels in the Student's IEP. Ms. [REDACTED] proposed revisions to the Student's BIP dated March 20, 2018, specifically Part three entitled Prevention Strategies and Part four entitled Teaching Strategies.

Ms. [REDACTED] also testified she attended the April 3, 2019 IEP team meeting. During this meeting the team discussed the proposed revisions to Part three and Part four of the March 20, 2018 BIP. The team decided Part four should also reflect the replacement behavior and list

teaching strategies with reinforcers. During the April meeting, the team also discussed proposed revisions to Part seven entitled Implementation. Ms. [REDACTED] testified the updated BIP would also list the parties responsible for implementation. Ms. [REDACTED] testified the Parent provided good information to include in the section regarding parental involvement.

As a member of the Student's IEP team, Ms. [REDACTED] testified she reviewed the Student's IEP. During the April 3, 2019 IEP meeting the team discussed changes to the Student's IEP including identifying clear measurable goals unlike the Student's previous IEP. Ms. [REDACTED] also reviewed and participated in the MDR and the ultimate determination and recommendation. Ms. [REDACTED] testified she believed the compensatory services awarded were reasonable in light of the number of school days missed by the Student. Ms. [REDACTED] testified she was present for the testimony from the Parent and the Parent's advocate regarding number of disciplinary removals. Ms. [REDACTED] stated the first disciplinary removal was assigned on October 9, 2018 and was to be served in-school on October 10, 2018; therefore the number of disciplinary removals days is one not two days. On cross-examination, Ms. [REDACTED] agreed ten disciplinary removal days may be deemed a change in placement and therefore requires a MDR to be held within ten days. She also agreed the compensatory services awarded on March 13, 2019 while sufficient for eleven days missed, were not enough for sixteen or seventeen days.

Ms. [REDACTED] provided detailed testimony regarding the Student's placement and whether [REDACTED] ES is an appropriate placement for the Student. Under the IDEA, the Student must be placed in the Least Restrictive Environment (LRE) to achieve a FAPE. Pursuant to federal statute, disabled and nondisabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5). Yet, placing disabled children into regular school programs may not be appropriate for every disabled student. If a public school setting has a self-contained special

education program that allows the child to access the curriculum and receive educational benefit, then IDEA's requirement that a disabled child be educated in the least restrictive environment would be accomplished by placement in the public school program. To the maximum extent appropriate, children with disabilities "are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aid and services cannot be achieved satisfactorily." 20 U.S.C. §1412(a)(5)(A);

In her expertise, Ms. [REDACTED] opined [REDACTED] ES is an appropriate placement as the Student's behavior has improved. She further testified she believes [REDACTED] ES is the Least Restrictive Environment (LRE). She made this determination based on her record review, observations, knowledge of placement options, although not participating in the September 11, 2018 where the change was discussed, and her previous teaching history in non-public schools. Ms. [REDACTED] determined the student has access to non-disabled peers at [REDACTED] ES unlike at a private placement.

Regarding the behavior improvement, Ms. [REDACTED] reviewed and compared the Student's BIPs from January 28, 2017, March 20, 2018, and the revised BIP from April 3, 2019 as they all address the same behavior. Ms. [REDACTED] testified the Student attended [REDACTED] during the BIPs from January 28, 2017 and March 20, 2018. The Student transitioned to [REDACTED] ES in October 2018. She described the first BIP as the Student's baseline before receiving an IEP. The second BIP was created after the Student received an IEP and showed a decrease in behavior issues. The final BIP shows the Student decreased hitting his peers to once per month from the baseline of ten to fifteen times per day. Ms. [REDACTED] testified the data is based on the Student's

disciplinary records, crisis room log, and daily point sheet. She described the Student's improvement as significant and therefore he should continue attending [REDACTED] ES.

Analysis

In this case, the Parent has the burden and based on the evidence presented I find the Parent has met her burden regarding the issues of IEP implementation of behavioral supports, timeliness of the MDR, and appropriate compensatory services. The Parent and the Parent's expert provided conclusive testimony that PGCPs made two substantive errors which denied the Student a FAPE. I find the Parent failed to meet her burden regarding the other enumerated issues.

Motion to Dismiss Issue Four:

The Parent alleged PGCPs failed to provide IEEs. PGCPs must show why the IEE did not meet PGCPs criteria. The Parent alleged PGCPs failed to review the IEEs submitted by [REDACTED] and [REDACTED]. PGCPs alleged the IEEs offered by the Parent did not comply with PGCPs guidelines. The Parent also alleged PGCPs failed to comply with a prior agreement in which PGCPs agreed to provide and pay for IEEs. PGCPs moved to dismiss issue four of the Due Process Complainant, which alleged this issue regarding payment and a prior settlement agreement. The Parent argued the issue is not about payment of the IEE but instead a denial of FAPE to the Student. I allowed testimony regarding this issue and decided to rule within the written decision.

After listening to the testimony, I agree with PGCPs that I lack jurisdiction to enforce the prior agreement for PGCPs to pay for IEEs. However, I agree with the Parent that I may consider the IEEs as they relate to an allegation of the denial of FAPE.

(d) Written settlement agreement. If a resolution to the dispute is reached at the meeting described in paragraphs (a)(1) and (2) of this section, the parties must execute a legally binding agreement that is—

(1) Signed by both the parent and a representative of the agency who has the authority to bind the agency; and

(2) Enforceable in any State court of competent jurisdiction or in a district court of the United States, or, by the SEA, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements, pursuant to § 300.537.

34 CFR §300.510(d)

In this case, the Parent and PGCPS entered into an agreement in which PGCPS agreed to provide compensatory education services. The agreement is binding and can only be enforced by a State court of competent jurisdiction such as a Circuit Court of the State of Maryland or a federal district court. The OAH is not a State court of competent jurisdiction.

However, I have the ability to determine if the actions of PGCPS denied a FAPE to the Student. First, I find PGCPS reviewed the IEEs provided by the Parent and based on the testimony and evidence found the IEEs to have no value. Ms. [REDACTED] and Ms. [REDACTED] both testified as experts in their respective fields. On behalf of PGCPS, they each reviewed the IEEs provided by the Parent and determined the IEEs did not meet PGCPS guidelines. The Parent did not dispute a letter from PGCPS with the IEE guidelines was addressed to her and dated on July 3, 2018. Ms. [REDACTED] testified PGCPS must review and consider the IEEs, but Ms. [REDACTED] seemed to confuse review with accept. Further, Ms. [REDACTED] was not aware of the PGCPS guidelines namely the guideline requiring the use of a current assessment and submission of the IEE for review within ninety days. The PGCPS witnesses provided clear and credible testimony regarding the basis to reject the IEEs after careful review. Ms. [REDACTED] testified she

reviewed Speech and Language IEE on January 10, 2019 and via email indicated the “assessment looks good.” However, when Ms. [REDACTED] closely reviewed the IEE she discovered [REDACTED] used an outdated version of the CASL, which is against PGCPs IEE guidelines. Ms. [REDACTED] testified the FBA and BIP were both reviewed and rejected because the IEE lacked sufficient observations and data points to determine an appropriate BIP for the Student. Ms. [REDACTED] provided expert testimony considering the PGCPs guidelines and the MSDE FBA and BIP Technical Assistance Bulletin, which explains how to conduct a proper FBA and draft a proper BIP.

Disciplinary Procedures:

First, the Parent alleges PGCPs failed to comply with IDEA’s disciplinary procedures. The testimony and the evidence presented by PGCPs is clear proof the Student was disciplinarily removed for over ten school days, PGCPs did not provide services when the Student was removed and PGCPs untimely held MDRs on March 14, 2019 and April 3, 2019. PGCPs determined the Student’s behavior was a manifestation of his disability and the number of removals constituted a change in placement. Under 34 C.F.R. § 300.530, “[a]fter a [student] with a disability has been removed from his or her current placement for ten school days in the same school year, during any subsequent days of removal the public agency must provide services” *See also* 20 U.S.C.A § 1415(k)(1)(B). “Within ten school days of any decision to change the placement of a [student] with a disability because of a violation of a code of student conduct . . . the [student’s] IEP team . . . must review all relevant information in the student’s file . . . to determine if the conduct in question was caused by . . . the child’s disability . . . or the conduct in question was the direct result of the LEA’s failure to implement the IEP.” 34 C.F.R. § 300.530(e); 20 U.S.C.A § 1415(k)(1)(E). A change in placement occurs when the student has

been subjected to a series of removals that constitute a pattern of exclusion from his educational setting. 20 U.S.C.A. §1415 (k);34 C.F.R. § 300.536. To compensate for the number of removal days past the tenth day, PGCPs awarded compensatory services in the areas of Mathematics and Behavioral skills. After the first MDR on March 14, 2019, PGCPs awarded the Student compensatory services: one session of Counseling for thirty minutes and two sessions of Mathematics Instruction for thirty minutes. After the second MDR on April 3, 2019, PGCPs awarded the Student compensatory services: four thirty minute sessions for academic support and two thirty minute sessions of counseling support. During the IEP team meeting on April 3, 2019, the IEP team was unaware of the April 2, 2019 in-school disciplinary removal and the previous December 17, 2018 disciplinary removal for five days.

The Parent is correct PGCPs held the MDRs late and disciplinarily removed the Student without providing services, even though the behavior was a manifestation of the disability. As a result I find the procedural disciplinary removals constitute substantive violations that were remedied by the Student receiving compensatory services. The Parent did not deny PGCPs offered compensatory services to compensate for the time the Student was out of school as a result of disciplinary removals. However, the Parent and the Parent's expert believed more compensatory services were warranted, but they failed to provide a basis for their determination. The Parent and the Parent's expert were unclear as to the number of actual disciplinary removal days the Student was out of the classroom. There was quite a bit of testimony regarding the number of disciplinary removal days on day one of testimony the Parent testified the Student was suspended for sixteen days, in which the Parent counted the first disciplinary removal day as two days, counting the date the disciplinary removal day was assigned and the date the in-school disciplinary removal was imposed. On cross-examination, the Parent decreased the number of

days to fifteen days as she stopped counting the first disciplinary removal day as two days. Clearly, the Parent is unsure of the number of disciplinary removal days and therefore unsure of when the MDR should have been conducted and the appropriate amount of compensatory services. Ms. [REDACTED] the Parent's expert in the implementation and creation of IDEA programming failed to show how many additional hours the Student should be awarded as a result of PGCPS holding the untimely MDRs. Unfortunately for the Parent, Ms. [REDACTED] spent more time answering the questions she wanted to answer on direct and cross-examination, instead of providing relevant testimony regarding the MDR and compensatory services.

In this case, PGCPS did not dispute this clear substantive error and to correct the error, PGCPS awarded the student compensatory services as a part of the MDRs held on March 14, 2019 and April 3, 2019.

However, I do not find a procedural error regarding the Student's removal to the crisis intervention room as this support is specifically identified on the Student's IEP. The PGCPS witnesses testified the Student may have had class assignments which the Student took to the crisis intervention room, but they would need to review the data to determine time of day and length of time the Student was in the crisis intervention room. But the PGCPS witnesses agreed the crisis intervention teachers did not provide assignments to the Student. It was clear, once the Student arrived to the crisis intervention room the Student was likely not provided with classwork but may have met with the school psychologist, provided drawing or another behavior modification activity, which would be in compliance with the Student's IEP. In addition, the Student's IEP lists crisis intervention as a social/behavioral support to be used as needed and provided by the social worker, psychologist, guidance counselor, or school based mental health professional.

The Student requires crisis intervention as needed to prevent crisis, understand when it occurs, and de-escalate and re-enter the instructional setting. The Student requires opportunities to recognize and regulate feelings and to develop strategies for calming and coping. The Student requires a separate space, outside of the classroom to receive support when in crisis. Staff may direct a student whose behavior is disrupting the classroom learning environment to a separate student support room in order for the student to regain control. The Student may also request quiet time in the support room. While in the support room, students are monitored by staff while completing class work or engaging in the problem solving process.

(Parent's Exhibit C, page 15)

The Parent and Ms. [REDACTED] testified the PGCPs failed to follow the FBA and BIP, and therefore failed to implement the Student's IEP regarding behavioral supports. I find PGCPs failed to implement the Student's IEP regarding behavioral supports. Both the Parent and Ms. [REDACTED] seemed to focus on the IEE FBA and BIP as the "current data" to be used by PGCPs, although the IEE was found to have no value. Both the Parent and Ms. [REDACTED] testified the Student was in a class with a long-term substitute teacher who was not a Certified Special Education teacher and lacked knowledge of the Student's FBA and BIP. This testimony was confirmed by Ms. [REDACTED] who testified the long-term substitute was in the classroom from January 2019 to March 22, 2019, when the new Certified Special Education teacher started. The testimony was unclear what she knew regarding the FBA and BIP. Ms. [REDACTED] testified the FBA and BIP were discussed at April 3, 2019 meeting and the new teacher did not have the old FBA and BIP, but the new teacher received the revised FBA and BIP. Based on the testimony, it is clear the long-term substitute teacher did not fully implement the Student's IEP as she was not aware of the behavior contract or other behavior supports identified in the IEP. While, Ms. [REDACTED] was clear the teachers were aware of the FBA and BIP because the teacher used positive rewards such as jolly ranchers and the daily point sheet. Ms. [REDACTED] also testified the Student's IEP was likely not being fully implemented during the time the long-term substitute

teacher was alone from January 2019 through March 22, 2019. Ms. [REDACTED] further testified the daily point sheet is the behavior management system referenced on the Student's IEP. Ultimately, the IEP team reviewed the FBA and BIP from March 20, 2018 and determined the Student required an updated FBA and BIP and sought consent from the Parent.

IEP:

-Review and Revise:

Next, the Parent alleges the PGCPs failed to review and revise the Student's IEP and failed to provide an appropriate IEP. I do not find the PGCPs failed to review and revise the Student's IEP. I do not find the PGCPs failed to provide an appropriate IEP. The evidence is clear the Student's IEP was reviewed and revised on September 11, 2018 as he was recommended to transition to [REDACTED] ES. The September 11, 2018 IEP clearly states "The receiving school team may amend the IEP without a meeting to indicate school name and total school hours on the LRE page upon the Student's enrollment." (Parent's Exhibit C). The Parent and Ms. [REDACTED] participated and agreed with the recommendation of the CIEP team. Further, the CIEP team members knew the Student would transition to [REDACTED] ES in October 2018. In addition, the PGCPs with the input from the IEP Team completed a new draft IEP on March 27, 2019. This draft IEP was completed based on the March 14, 2019 annual IEP meeting, which the Parent missed. The applicable regulations require IEP review periodically, but not less than annually to determine whether the annual goals were being achieved. 34 CFR §300.324(b)(1)(i). In this case, the Student's annual goals started on September 11, 2018 with an end date of March 20, 2019. The PGCPs held an IEP meeting on March 14, 2019 before the end date of March 20, 2019 as established in the September 2018 IEP.

The Parent testified she did not attend the meeting due to a work obligation not because PGCPs failed to provide notice. The Parent complained of receiving the notice via her son's backpack, which was consistent with the testimony of Ms. [REDACTED] who testified she sent the IEP meeting notice to the Parent three ways; mail on March 4, 2019, via the Student on March 5, 2019, and email on March 8, 2019 and March 12, 2019. The reason for the Parent's failure to attend the March 14, 2019 IEP meeting changed from March 13, 2019 to when she testified at the hearing. On March 13, 2019 at 4:30 p.m., the Parent sent an email to PGCPs which stated, "I will be unable to attend the IEP meeting, as it was scheduled AFTER my counsel filed the due process complaint. Due to this, any meetings to be held should have been scheduled through my counsel and/or my advocate." (PGCPs Exhibit 50).

While it is true, the Parent is a central member of the IEP team, there's no statute or regulation which requires the IEP team to halt the meeting if the Parent cannot participate in person. Instead 34 CFR §300.322 (c) and 34 CFR §300.328 regulation require the IEP team to attempt to convince the Parent to participate either in person, video conferences or conference calls. On March 14, 2019 at 7:06 a.m., PGCPs replied to the Parent's email and explained why the meeting could not be rescheduled the day before and offered the Parent the ability to participate by telephone. Based on the evidence, the Parent failed to reply to the email or participate in the March 14, 2019 IEP meeting although provided an alternate means to participate.

Appropriate IEP:

The Parent also alleges the PGCPs failed to provide an appropriate IEP but fails to prove how the PGCPs failed to do this beyond an allegation regarding quarterly progress reports. The evidence shows PGCPs provided the Parent with an appropriate IEP on September 11, 2018 and

March 27, 2019 which addressed the Student's needs, provided support information, and outlined measurable goals. The Parent did not deny PGCPs provided an IEP on September 11, 2018 or on March 27, 2019. In addition, the Parent did not dispute the Student's IEP provided appropriate behavioral supports and the transition from [REDACTED] to [REDACTED] ES was based on an appropriate IEP. Federal regulations define an IEP as:

- (a) General. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324, and that must include—
 - (1) A statement of the child's present levels of academic achievement and functional performance, including—
 - (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
 - (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
 - (2)(i) A statement of measurable annual goals, including academic and functional goals designed to—
 - (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
 - (B) Meet each of the child's other educational needs that result from the child's disability;
 - (ii) For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, a description of benchmarks or short-term objectives;
- (3) A description of—
 - (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
 - (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and

- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
- (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
- (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
- (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—
 - (A) The child cannot participate in the regular assessment; and
 - (B) The particular alternate assessment selected is appropriate for the child; and
- (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

...

34 CFR §300.320

The Parent did not dispute the PGCPs provided an IEP with measurable goals. Instead the Parent alleged the Student did not reach the goals outlined in the September 11, 2018 IEP. The Parent argued she could not participate in the Student's progress because PGCPs failed to provide quarterly progress reports. However, the Parent did not dispute she received progress reports for each of the Student's behavioral and academic goals on June 15, 2018, October 29, 2018, February 11, 2019, and March 13, 2019. Further, the progress reports indicated the Student was "making sufficient progress to accomplish his goal." (PGCPs Exhibit 49). The progress note indicated the Student was improving in some areas such as behavioral social skills, math calculation – addition, and math – problem solving. However, in March the Student made minimal progress in math – division because the skill was not introduced in October 29, 2018. PGCPs provided math tutoring via [REDACTED] however, the Parent did not utilize the services. The evidence showed the Parent communicated with [REDACTED] via email in October 2018, but a decision

was not made to use the services to assist the Student with his challenges in math. The Parent agreed the Student's progress grades improved but progress grades are not finalized grades.

Appropriate Placement:

The Parent testified she believed the Student's behavior would improve while he attended [REDACTED] ES. This testimony was contrary to the testimony of Ms. [REDACTED] who I believe provided more credible testimony regarding the expected improvement of the Student. Ms. [REDACTED] similar to the other PGCPs witnesses relied on their expertise and answered the questions as asked without a hidden agenda. Ms. [REDACTED] is a Certified Special Education teacher and testified she did not believe the Student would make progress in one calendar year with a transition from one school to a new school. Ms. [REDACTED] instead expected the Student to make progress, which based on the evidence the Student was making progress.

The Parent did not dispute her participation in the CIEP team meeting in which [REDACTED] ES was selected and the basis for the selection. Even the Parent's expert witness agreed the CIEP selected [REDACTED] ES because it provided behavioral support and trained clinical and mental health staff. The testimony offered by PGCPs witnesses regarding [REDACTED] ES was undisputed regarding the behavioral supports offered at [REDACTED] ES. Ms. [REDACTED] provided credible testimony based on her knowledge of LREs, FBA, and BIPs which support my finding the Student's placement at [REDACTED] ES as appropriate.

While the Parent's testimony was generally credible, it was clear she received misinformation from her advocate and expert, Ms. [REDACTED]. The Parent's testimony was more forthcoming on direct examination and less forthcoming when asked questions on

cross-examination to confirm her previous direct examination testimony. The Parent cares for and loves her son and appears to be an active participant in the education of the Student. However, the decision to not attend the March 14, 2019 IEP meeting in person or by telephone is troubling. When the Parent testified, she appeared genuine about missing the meeting due to work. But the email shows the Parent did not attend the meeting because it was scheduled "AFTER" the Due Process Complaint was filed. The applicable statutes and regulations do not stop a school system from moving forward with an IEP meeting if a parent can't attend. The applicable statutes offer an alternative such as video conference or conference calls to which the Parent did not choose to utilize. Based on the email, it is clear the Parent relied on poor advice from Ms. [REDACTED] and the Parent relied on this information to not participate in the March 14, 2019 IEP meeting.

Positive Behavior Supports:

The Parent also alleged PGCPs failed to sufficiently address the Student's behavior with positive supports. I do not find PGCPs failed to sufficiently address the Student's behavior. In this case, the testimony and evidence were clear regarding the positive behavioral supports offered at [REDACTED] ES to all students including the Student in question. Ms. [REDACTED] and Ms. [REDACTED] provided credible testimony regarding the supports offered. Ms. [REDACTED] testified in great detail the positive behavioral supports offered including the daily point sheet and ability to earn [REDACTED] Bucks, to which the Student has earned. The Parent's testimony primarily focused on what PGCPs allegedly failed to do but the memory was not as good when addressing what PGCPs did provide.

Procedural vs. Substantive Errors:

The final argument of the Parent is the multiple procedural errors committed by PGCPs are sufficient to constitute a denial of a FAPE to the Student. Based on the evidence and case law, I find PGCPs committed multiple substantive errors and as a result the Student was denied a FAPE. Parent's counsel cited *L.O. v. NYCDOE*, 822, F.3d 95, (2016), as an example of when multiple procedural violations are sufficient as a denial of a FAPE. In *L.O.* the Court held multiple procedural violations were sufficient to equal denial of FAPE. In the case before the Court, the school system failed to provide a FBA and BIP, speech and language services, evaluate materials, set IEP goals to address the behavior, and failed to provide training for parents of an autistic student.

While the present case is not as egregious as the *L.O.* case, I find PGCPs committed violations as PGCPs provided late MDRs after the Student was disciplinarily removed for more than ten days. However as stated above, the team determined the Student required compensatory education to address the violations in order to ensure the Student received FAPE. The Parent agreed with the compensatory education. Compensatory education is an equitable remedy that the court may award in crafting appropriate relief. *See Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F. 3d 1489, 1497 (9th Cir. 1994). It is available to remedy an educational deficit created by a school system's failure to provide a student with a FAPE over a given period of time. *G v. Fort Bragg Independent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). I believe the remedy adequately addresses the violation because the Student's IEP primarily focuses on behavior supports such as the counseling and provides academic supports in the area of

mathematics. The awarded compensatory services will provide the needed supports in the appropriate setting of his current school with teachers and tutors.

PGCPS did not fail to provide a FBA or BIP; in fact PGCPS requested consent from the Parent to revise the Student's FBA and BIP. In addition, PGCPS reviewed and revised the Student's IEP at the annual IEP meeting held on March 14, 2019. As a result of the March 14, 2019 meeting, the IEP team also decided the IEE by [REDACTED] was insufficient and Ms. [REDACTED] decided to conduct a new assessment with student observations to address the concern regarding pragmatic speech.

In *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (2018), the Court held the decision of the IEP team to hold a meeting without providing the parent with PWN was a denial of FAPE. In addition, the Court focused on the failure of the school to develop adequate and appropriate goals for the student.

In this case, the Parent testified she was notified of the March 14, 2019 IEP meeting and was unable to attend the meeting. Ms. [REDACTED] testified the PWN was sent via mail, email, and with the Student. The Parent testified she received the PWN and this was also confirmed by the email sent from the Parent to PGCPS providing the reason she would not attend the meeting. The Parent failed to attend the meeting or participate in the meeting via video conference call or conference call not for lack of information. In addition, the IEP team reviewed the Student's goals as established during the September 11, 2018, which the Parent attended, and decided to make changes to make the goals more measurable. Unlike the *L.O.* case and the *Middleton* case, in the present case the Student was not denied a FAPE due to the in action of the school system. In fact, it is the opposite of *L.O.* and *Middleton* as the PGCPS held the annual IEP meeting

to address goals, the FBA, BIP, and the Speech and Language concerns of the Parent. As a result of the March 14, 2019 IEP meeting, PGCPs requested permission to conduct a new FBA. After the March 14, 2019 IEP meeting, the IEP team drafted a new IEP on March 27, 2019 and held a new IEP meeting on April 3, 2019. At the April 3, 2019 IEP meeting, the team discussed the pragmatic speech concerns of the Parent and held another MDR to provide FAPE services for the additional disciplinary removal days.

After determining the procedural violations, I must next decide if the violations were substantive and to denied the Student a FAPE. In *Andrew F. ex. Rel. Joseph F. v. Douglas County School District*, 137 S. Ct. 988, (2017), the Court held “the school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.* provides significant guidance when reviewing an IEP and when determining if the actions or lack thereof denied a FAPE to the Student.

In the present case, the Student’s IEP provides appropriate goals to address educational and behavioral concerns. The Student was moved from [REDACTED] to [REDACTED] ES as the CIEP team determined [REDACTED] ES was the appropriate placement to provide the increased behavioral supports needed by the Student. Contrary to the Parent’s argument, the Student is making more than minimal progress or “de minimis progress.” *Id.* The Student’s IEP provides the crisis intervention room as an appropriate behavioral support to assist with problem-solving and other behavior matters. The Student’s grades show improvement in Math, Social Skills, and Science. In addition, the Student’s IEP goals were reviewed and revised with the approval of the Parent to address the concerns in Math calculation with whole numbers, decimals, and fractions. The IEP team also

reviewed the Student's behavior goals and requested consent to conduct a new FBA.

Based on the evidence, I do not find the Student was denied a FAPE.

Lastly, regarding the number of disciplinary removal days, the IEP team conducted two late MDRs to address and provide compensatory services to the Student based on the number of days missed. Further, the long-term substitute teacher in place from January 2019 through March 22, 2019 was not aware of and did not implement the Student's IEP relating to behavioral supports. The Student was in the class for three months without IEP implementation of behavioral supports such as the behavior contract or other BIP components. Based on these substantive violations, I find the Student was denied FAPE.

In this case, the Student was disciplinarily removed for sixteen school days and PGCPs failed to hold a MDR after the Student accumulated ten days out of class (in-school or out of school disciplinary removal). The tenth disciplinary day occurred after the Student was removed for five days on February 7, 2019. Per 34 CFR§300.530(e), PGCPs should have held the MDR within ten days of the decision to change the Student's placement, in this case by way of the disciplinary removals.; therefore, PGCPs should have held the MDR within ten days of February 15, 2019. Instead PGCPs held a late MDR on March 14, 2019, in which PGCPs determined the Student's behavior was the manifestation of his disability. PGCPs also determined the number of removals constituted a change in placement. PGCPs determined the Student should be provided additional instruction in the area of Mathematics and receive additional counseling to address the substantive violation.

In addition, PGCPS held a second MDR on April 3, 2019 to address the five day disciplinary removal from December 17, 2018, which were previously not accounted for, and for a recent in-school disciplinary removal on April 2, 2019. Relating to the December 17, 2018 five day disciplinary removal, PGCPS should have held the MDR within ten days after the Student returned, which was January 2, 2019. Instead, PGCPS held the MDR on April 3, 2019, which was three months later. During this period of time, the Student was denied FAPE because he did not receive the services he required to progress in the general curriculum. As a result of the PGCPS failure to conduct timely MDRs, the Student was denied FAPE.

The final disciplinary removal on April 2, 2019 was in-school and the MDR was timely held within the ten days after the Student returned to school, which was April 3, 2019.

CONCLUSIONS OF LAW

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

1. The PGCPS failed to comply with the disciplinary protections of IDEA by failing to conduct timely manifestation determination reviews which resulted in a denial of FAPE to the Student. As a result of the violations, PGCPS provided additional counseling and mathematics instruction to address the denial of FAPE for the period of time the Student should have received services but was disciplinarily removed. On March 14, 2019, PGCPS awarded the Student compensatory services, one session for thirty minutes of counseling services and two sessions for thirty minutes each of math instruction to occur at [REDACTED] ES. On April 3, 2019, PGCPS awarded the Student compensatory services, four

thirty minute sessions for academic support (mathematics and IEP goals support) and two thirty minute sessions for counseling support (social/emotional and behavioral support).
34 CFR §300.530(e).

2. The PGCPS did not fail to review and revise the Student's IEP. 34 CFR §300.324(b).
3. The PGCPS did not fail to revise or develop a functional behavioral assessment and behavioral intervention plan. 34 CFR §300.530 (f).
4. The PGCPS did not fail to address the Student's behavior with positive behavior intervention supports. 34 CFR §300.324(2)(i).
5. The PGCPS did not fail to hold an IEP meeting to review the IEE's provided by the Parent. 34 CFR §300.502 (c), (e).
6. The PGCPS did not fail to provide an appropriate placement. 34 CFR §300.114
7. The PGCPS did not fail to provide quarterly progress reports. 34 CFR §300.320
8. The PGCPS failed to implement the Student's IEP, behavioral supports for the following time period: January 2019 through March 22, 2019. §1414(d)(3)(F)

ORDER

As discussed above, I am persuaded that the failure to conduct a timely manifestation determination review amounted to a denial of a FAPE because the Student did not receive services when he should have as a result of being disciplinarily removed for sixteen days between the dates of October 10, 2018 through April 2, 2019. The IEP team determined the compensatory services on both March 14, 2019 and April 3, 2019, during the MDRs, were required to address the FAPE denial. I do not order any additional compensatory services as I find PGCPS awarded sufficient compensatory services based on the deficits outlined in the Student's IEP. However, I conclude an additional appropriate remedy under the IDEA is

necessary to address the approximately three months from January 2019 through March 22, 2019 that the behavioral protocols within the Student's IEP were not implemented, and I order, compensatory services for the Student equivalent to an additional thirty minutes of counseling, with a mental health professional trained in counseling children, per week for the 2019-2020 school year for three months. These services shall be offered at [REDACTED] ES similar to the compensatory services previously provided by PGCPs. See *Burlington*, 471 U.S. at 369; *Fort Bragg Dependent Sch.*, 343 F.3d at 309; *Lopez-Young*, 211 F. Supp. 3d at 57.

If corrective action is required by this decision, the local education agency shall, within 30 days of the date of this decision, provide proof of compliance to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, the Maryland State Department of Education.

May 1, 2019
Date Decision Issued

Signature Appears on Original
[REDACTED]
Syeetah Hampton-EL
Administrative Law Judge

SAH/cj
#179360

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2018). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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

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

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]