

██████████,
STUDENT,
v.
MONTGOMERY COUNTY
PUBLIC SCHOOLS

BEFORE DEBORAH S. RICHARDSON,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-20-02036

MONTGOMERY COUNTY
PUBLIC SCHOOLS
v.

BEFORE DEBORAH S. RICHARDSON,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-20-02038

██████████,
STUDENT

DECISION

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

STATEMENT OF THE CASE

On April 26, 2019, ██████ (Mother) and ██████ (Father) ██████ (collectively the Parents) 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), then a minor,¹ by Montgomery County Public Schools (MCPS) under the

¹ The Student was eighteen years old at the time of this hearing, and nineteen at the time this Decision is being issued.

Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);² 34 C.F.R. § 300.511(a) (2019);³ Md. Code Ann., Educ. § 8-413(d)(1) (2018); Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

Administrative Law Judge (ALJ) [REDACTED] held a hearing on August 21, 23, 26, and 29, 2019. Michael Eig, Esquire, represented the Student. Manisha Kavadi, Esquire, represented MCPS. Both counsel have continued in their representation throughout these proceedings. On September 27, 2019, ALJ [REDACTED] issued a written decision in which she concluded that MCPS had denied the Student a free and appropriate public education (FAPE) for the 2019/2020 school year. She ordered that MCPS “refer the Student to the [REDACTED] ([REDACTED]) and the [REDACTED] ([REDACTED]) for placement in their diploma program and, if the Student is accepted, the [MCPS] shall fund his placement at one of those schools, at the Parents’ option.”

MCPS sent both referrals as ordered. Both schools rejected the Student’s applications to their diploma programs. MCPS has appealed ALJ [REDACTED]’s decision to the United States District Court for the District of Maryland. That case is still pending.

Sometime prior to January 17, 2020, the Parents filed a due process complaint alleging MCPS has denied the Student a FAPE by failing to also make a referral to [REDACTED] ([REDACTED]) which the Parents believe he is entitled to by virtue of ALJ [REDACTED]’s decision. MCPS filed its own due process complaint seeking an order to allow it to provide a FAPE by enrolling the Student in an alternative education program that does not issue or provide credits toward a Maryland high school diploma, and identifying him for the alternative education assessments aligned with the State’s alternative curriculum. Both parties withdrew those complaints without prejudice before the matters were scheduled for hearing.

² U.S.C.A. is an abbreviation for United States Code Annotated. Unless otherwise noted, all citations of 20 U.S.C.A. hereinafter refer to the 2017 bound volume.

³ C.F.R. is an abbreviation for Code of Federal Regulations. Unless otherwise noted, all citations of 34 C.F.R. hereinafter refer to the 2019 volume.

On January 17, 2020, the Parents filed a due process complaint, which was similar to their prior filing but added that the Student had been accepted to [REDACTED] in [REDACTED]. On January 22, 2020, MCPS filed a duplicate of the due process complaint it had previously filed. Both due process complaints were assigned to me in the ordinary rotation of judges at the OAH. The Parents filed a motion asking that the cases be assigned to ALJ [REDACTED], which counsel for MCPS opposed. I held a hearing on the motion and on February 12, 2020, I issued a written decision denying the motion and scheduled these cases for a pre-hearing conference.

On February 18, 2020, I held a telephone pre-hearing conference. MCPS informed me it intended to file a Motion to Dismiss and I ordered that all motions be filed by February 28, 2020 and all oppositions be filed by March 6, 2020. This case could not be scheduled during the last week of February to allow the parties time for discovery. It could also not be scheduled before I received the anticipated motion to dismiss and opposition expected by March 6, 2020. Mr. Eig had only scattered availability up until March 20, 2020. Based on my availability and that of the parties, the hearing was scheduled for March 20, 24, 25, and 26, 2020.

I advised the parties of the time requirements for issuing a decision. The applicable regulations state the following in part:

- (a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c) -
 - (1) A final decision is reached in the hearing; and
 - (2) A copy of the decision is mailed to each of the parties.

34 C.F.R. §300.515 (2018).

Section 300.510 explains the resolution period on a due process proceeding as follows:

- (b) Resolution period.
 - (1) If the [Local Educational Agency] has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

...

(c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

(1) Both parties agree in writing to waive the resolution meeting;

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;

(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

Id. §300.510.

The Parents filed their due process complaint on January 17, 2020. The thirty-day resolution period ended for that case on February 18, 2020. Under the applicable law, a decision in this case normally would be due by April 3, 2020, forty-five days after the resolution period ended. 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Md. Code Ann., Educ. § 8-413(h) (2018); COMAR 13A.05.01.15C(14).

MCPS filed its due process complaint on January 22, 2020. A resolution meeting is not required in a due process complaint filed by MCPS, thus, the forty-five-day time period is triggered by the due process filing, making a decision due by March 6, 2020.

MCPS requested that I extend the timeline to thirty days after the close of evidence to allow the cases to be heard on the selected dates and to allow sufficient time for me to consider the evidence, evaluate legal arguments, and draft a decision. *Id.* §300.515(c). The Parents took

no position, and I granted the request to extend the timeframe within which to issue a decision until thirty days after the completion of the merits hearing.

Due to the COVID-19 pandemic, Maryland public schools, including MCPS, closed on March 16, 2020 and the OAH postponed all hearings scheduled outside of Hunt Valley, like this hearing, for two weeks. On March 17, 2020, I held a telephone conference with counsel, and at that time, anticipating that schools and the OAH may re-open fairly quickly, I rescheduled the hearing to April 20, 24, 29 and 30, 2020.

On April 6, 2020, I held a telephone conference with counsel. At that time, the closure of public schools in Maryland had been extended through April 24, 2020 and OAH had cancelled all non-emergency hearings through May 1, 2020. Moreover, at that time, OAH was not able to conduct a multi-party video hearing. MCPS moved to postpone and reschedule the hearing, and requested I extend the timeline for issuance of a decision, that had already previously been extended. The Parents objected to the motion, arguing that the Student was entitled to a timely hearing and that the difficulties caused by the pandemic did not change his due process rights. I granted the motion for a postponement, finding good cause based on the COVID-19 pandemic, the closure of Maryland public schools, and the partial closure of the OAH. 34 C.F.R. § 300.515(c). For the same reasons, I also granted the request to extend the decision timeframe.

Anticipating that the school closures and workplace social distancing mandates may be extended even further, I thought it prudent to schedule the hearing toward the end of May, to increase the chances of schools being re-opened and the OAH establishing a video hearing protocol. While the Parents objected to the postponement, after I had granted it, there were no objections to scheduling the hearing at the end of May. Therefore, I scheduled the hearing for May 26, 27, 28 & 29, 2020. On May 6, 2020, I held a video pre-hearing conference with counsel and informed them the merits hearing would be held utilizing the Google Meet video platform.

On May 20, 2020, I received an emergency request for a postponement from Ms. Kavadi due to her father having been hospitalized in Houston, Texas. The Parents had no objection and I granted the request.

On June 11, 2020, I rescheduled this hearing to August 12, 13, 17, and 20, 2020.⁴ On August 6, 2020, I received an emergency joint request for a postponement based on the parties desire to have their expert witnesses meet during the week of August 12 to engage in settlement discussions, and to allow Ms. Kavadi additional time to grieve and prepare for the hearing after both her uncle and father passed away. I granted the motion and rescheduled the hearing to August 17, 20, 25, and September 2, 2020. I held the hearing on those dates via the Google Meet platform.

At the hearing, the parties renewed their request to extend the decision timeframe, and I granted that request, stating that I would issue my decision within thirty days of the close of the record, which was September 2, 2020.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., Educ. § 8-413(e)(1) (2018); State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); COMAR 13A.05.01.15C; COMAR 28.02.01.

⁴ I spent considerable effort to find an earlier set of dates, to no avail. Ms. Kavadi was not available the following dates: June 22, 23, 24, 25, 26 (due process hearing); June 29 (Individualized Education Program (IEP) meetings); July 2 (IEP meeting); July 3 (July 4th holiday); July 13-16, 22, 23, 29 (due process hearing); and July 30, August 3, 7 (witnesses unavailable). Mr. Eig was not available the following dates: June 30 (IEP meetings); July 1 (IEP meetings); July 6, 7, 9 (due process hearing); July 13-17, 22, 23, 29 (due process hearing); July 20, 21 (due process hearing); July 24 (federal court motions hearing); July 27, 28 (due process hearing); and August 3-10 (witness unavailable).

ISSUES

1. Can MCPS provide FAPE to the Student by enrolling him in an alternative education program that does not issue or provide credits toward a Maryland high school diploma, and identify him for the alternative education assessments aligned with the State's alternative curriculum, which will override the Parents' refusal to give consent to MCPS under section 8-405(f)(3) of the Education Article of the Maryland Code?
2. Should the Parents' complaint be dismissed based on principles of *res judicata*?
3. Is MCPS required to refer the Student to [REDACTED] in [REDACTED] in order to provide him a FAPE?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibit into evidence as an ALJ exhibit:

ALJ Ex. 1: Transcripts from [REDACTED] v. MCPS,
MSDE-MONT-OT-19-13236

I admitted the following exhibits on behalf of MCPS:

- MCPS Ex. 1: Alternate Assessments Eligibility Decision Form, August, 2016
- MCPS Ex. 2: Individualized Education Program (IEP) report, 4/27/2017 with 6/8/2017 Amendment pages
- MCPS Ex. 3: Withdrawal from [REDACTED] High School, 8/8/2017; New Student Information for [REDACTED] High School Enrollment, 8/17/2017
- MCPS Ex. 4: Alternative Education Consent Form, 8/9/2017
- MCPS Ex. 5: Alternative Education Consent Form, 10/20/2017
- MCPS Ex. 6: Five Day Advance Documents for 11/20/2017 IEP meeting—Secondary Transition High School Interview, 11/1/2017; Report Card, 11/10/2017
- MCPS Ex. 7: IEP Team Meeting Report and Documents/Prior Written Notice, for 11/20/2017 IEP meeting

- MCPS Ex. 8: IEP Amendment Changes, 11/20/2017
- MCPS Ex. 9: IEP Team Meeting Report and Documents/Prior Written Notice, for 4/11/2018 IEP meeting; Notice and Consent for Assessment, 4/11/2018
- MCPS Ex. 10: IEP Team Meeting Report and Documents/Prior Written Notice, 7/9/2018; Alternative Education Consent Form, 7/9/2018
- MCPS Ex. 11: Amended IEP, 7/9/2018 with Meeting Notes and Decisions
- MCPS Ex. 12: MCPS Request for Mediation, 10/25/2018
- MCPS Ex. 13: IEP Team Meeting Report and Documents/Prior Written Notice, for 1/8/2019 IEP meeting
- MCPS Ex. 14: Psychological Assessment Report, Dr. [REDACTED], 12/14/2018
- MCPS Ex. 15: MCPS Team Consideration of External Psychological Report, 1/8/2019
- MCPS Ex. 16: Alternate Assessments Eligibility Decision Form, January, 2019
- MCPS Ex. 17: Amended IEP, 4/11/2019 (of 1/8/2019 IEP)
- MCPS Ex. 18: CIEP Referral Form, 2/22/2019
- MCPS Ex. 19: Emails between MCPS and Parent Counsel re: CIEP scheduling, 3/12/2019-4/3/2019
- MCPS Ex. 20: IEP Team Meeting Report and Documents/Prior Written Notice, for 4/11/2019 IEP meeting
- MCPS Ex. 21: MCPS Educational Assessment Report, 6/18/2018
- MCPS Ex. 22: MCPS Psychological Assessment Report, 7/9/2018
- MCPS Ex. 23: MCPS Speech-Language Assessment Report, 6/18/2018
- MCPS Ex. 24: MCPS Educational Assessment Report, 11/11/2015
- MCPS Ex. 25: MCPS Psychological Assessment Report, 10/24/2012
- MCPS Ex. 26: MCPS Psychological Assessment Report, 11/17/2015
- MCPS Ex. 27: Autism Resource Services Diploma 4 year and 5 year plan

- MCPS Ex. 28: MCPS Graduation Requirements for Diploma
- MCPS Ex. 29: PARCC Algebra I Test Booklet Practice Test
- MCPS Ex. 30: PARCC English Language Arts/Literacy Test Booklet Practice Test
- MCPS Ex. 31: HSA Government Assessment Practice Test
- MCPS Ex. 32: HSA Integrated Science Assessment Practice Test
- MCPS Ex. 33: Student Transcript
- MCPS Ex. 34: MAP Scores, 2017-2018, 2018-2019; Evidence of Learning Data; Reading Student Status Norms Chart
- MCPS Ex. 35: Curriculum 2.0 Algebra I Standards with Student's Algebra I Work Samples
- MCPS Ex. 36: Curriculum Science Standards with Student's Science Work Samples
- MCPS Ex. 37: Curriculum English 9A Writing and Language Standards with Student's Work Samples
- MCPS Ex. 38: Curriculum Grade 9 U.S. History and Common Core Social Studies Standards with Student's Work Samples
- MCPS Ex. 39: Qualitative Reading Inventory, 2017-2018 school year
- MCPS Ex. 40: Teacher Reports, 2016-2017 School Year, [REDACTED] Program
- MCPS Ex. 41: Progress Reports, 2016-2017 School Year, [REDACTED] Program
- MCPS Ex. 42: Student's Work Samples, 2016-2017 School Year, [REDACTED] Program
- MCPS Ex. 43: Secondary Transition High School Interview, 10/17/2016, [REDACTED] Program
- MCPS Ex. 44: Teacher Reports, 1/3/2019, [REDACTED] Program
- MCPS Ex. 45: Progress Reports, 2017-2018 School Year, [REDACTED] Program
- MCPS Ex. 46: Progress Reports, 2018-2019 School Year, [REDACTED] Program
- MCPS Ex. 47: MSDE Complaint Letter of Findings, 1/12/2017

- MCPS Ex. 48: Transition Authorization of Release of Information to DDA/SMRO, 8/23/2018
- MCPS Ex. 49: Transition Developmental Disabilities Administration Application for Eligibility, 8/23/2018
- MCPS Ex. 50: Secondary Transition High School Interview, 11/1/2017, 10/18/2018
- MCPS Ex. 51: Student's In-School Work Tasks, [REDACTED] High School
- MCPS Ex. 52: Resume – [REDACTED]
- MCPS Ex. 53: Resume – [REDACTED]
- MCPS Ex. 54: Resume – [REDACTED]
- MCPS Ex. 55: Resume – [REDACTED]
- MCPS Ex. 56: Resume – [REDACTED]
- MCPS Ex. 57: Resume – [REDACTED]
- MCPS Ex. 58: Resume – [REDACTED]
- MCPS Ex. 59: Resume – [REDACTED]
- MCPS Ex. 60: Resume – [REDACTED]
- MCPS Ex. 61: Resume – [REDACTED]
- MCPS Ex. 62: Resume – [REDACTED]
- MCPS Ex. 63: Resume – [REDACTED]
- MCPS Ex. 64: Emails between MCPS and Parent, 12/4/2019 -12/19/2019
re: IEP meeting scheduling
- MCPS Ex. 65: Emails between MCPS and Parent Attorney, 12/18/2019 – 12/22/2019 re: IEP meeting scheduling
- MCPS Ex. 66: Email from MCPS to Parent, 1/3/2020 re: invitation for 1/15/2020 IEP meeting
- MCPS Ex. 67: Emails between MCPS and Parent Attorney, 1/3/2020 – 1/8/2020 re: IEP meeting scheduling

- MCPS Ex. 68: Emails between MCPS and Parent Attorney, 1/3/2020 – 1/10/2020 re: IEP meeting scheduling
- MCPS Ex. 69: Letter from MCPS to Parent Attorney, 1/10/2020, encl. notices of invitation
- MCPS Ex. 70: Email from MCPS to Parent Attorney, 2/19/2020 re: 2/24/20 IPE meeting
- MCPS Ex. 71: Prior Written Notice for 2/24/20 IEP meeting
- MCPS Ex. 72: Alternate Appendix A—Participation and Checklist, 2/24/20
- MCPS Ex. 73: IEP, 2/24/20
- MCPS Ex. 74: Transcript
- MCPS Ex. 75: MCPS Secondary Transition High School Interview, 12/13/2019
- MCPS Ex. 76: Student’s In-School Work Tasks, [REDACTED] High School, 2019-2020 school year
- MCPS Ex. 77: MAP scores, ILT Grade Assessment (2019-2020), [REDACTED] (3/9/2020)
- MCPS Ex. 78: English 10 Work Samples, 2019-2020 school year
- MCPS Ex. 79: Algebra Work Samples, 2019-2020 school year
- MCPS Ex. 80: OJT Work Samples, 2019-2020 school year
- MCPS Ex. 81: Foundations of Technology Work Samples, 2019-2020 school year
- MCPS Ex. 82: IEP Progress Report, 2/7/2020
- MCPS Ex. 83: SAT Score Report
- MCPS Ex. 84: [REDACTED] Psychological Evaluation, 1/28/2004, 2/15/2004
- MCPS Ex. 85: [REDACTED] Psychological Evaluation, 1/7/2009
- MCPS Ex. 86: MCPS Psychological Evaluation Report, 10/24/2012
- MCPS Ex. 87: MCPS Psychological Evaluation Report, 11/16/2015

- MCPS Ex. 88: ██████████ Psychological Report, 8/9/2016
- MCPS Ex. 89: MCPS Psychological Re-evaluation Report, 7/9/2018
- MCPS Ex. 90: ██████████ Psychological Report, 12/14/2018
- MCPS Ex. 91: MCPS Educational Assessment, 11/9/2012
- MCPS Ex. 92: MCPS Educational Assessment, 11/11/2015
- MCPS Ex. 93: MCPS Educational Assessment, 6/18/2018
- MCPS Ex. 94: MCPS Speech and Language Report, 11/5/2015
- MCPS Ex. 95: MCPS Speech and Language Report, 6/18/2018
- MCPS EX. 96: Maryland Guidance for IEP Teams on Participation Decisions for the Alternate Assessments, July 1, 2017
- MCPS Ex. 97: Maryland Guidance for IEP Teams on Participation Decisions for the Alternate Assessments, April 1, 2019
- MCPS Ex. 98: Letter from ██████████ to MCPS, 9/28/2019
- MCPS Ex. 99: Letter from ██████████ to MCPS, 11/1/2019
- MCPS Ex. 100: Emails between Parent and ██████████, 1/17/2020
- MCPS Ex. 101: Emails from MCPS to Parent, 7/19/2018 – 11/6/2018
- MCPS Ex. 102: IEP Progress Notes, 4/29/2020
- MCPS Ex. 103: Transcript

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

- Parents Ex. 1: Request for Due Process, 1/17/20
- Parents Ex. 2: Observation Report by ██████████, 6/14/16
- Parents Ex. 3: Comprehensive Psychological Assessment Report by Dr. ██████████, 8/9/16
- Parents Ex. 4: Observation Report by ██████████, 11/16/16
- Parents Ex. 5: Reactions to Draft MCPS IEP by ██████████, 3/11/17
- Parents Ex. 6: Observation Report by ██████████, 11/8/17

- Parents Ex. 7: Psychological Assessment Report by Dr. [REDACTED], 12/14/18
- Parents Ex. 8: Administrative Law Judge Decision, 9/27/19
- Parents Ex. 9: Letter to Michael J. Eig, Esq. from Emily B. Rachlin, Esq. regarding referrals to the [REDACTED] and the [REDACTED], 10/23/19
- Parents Ex. 10: Letter to Michael J. Eig, Esq. from Emily B. Rachlin, Esq. refusing to make referral to [REDACTED], 11/15/19
- Parents Ex. 11: MCPS Secondary Transition High School Interview and Student Transcript, 12/13/19
- Parents Ex. 12: MCPS Secondary Teacher Reports, December 2019
- Parents Ex. 13: Letter to Michael J. Eig, Esq. from Emily B. Rachlin, Esq. regarding IEP meeting, 1/10/20
- Parents Ex. 14: Letter of Acceptance to [REDACTED] 1/17/20
- Parents Ex. 15: MCPS IEP Progress Reports, 1/25/19 to 1/24/20
- Parents Ex. 16: MCPS IEP, 2/24/20
- Parents Ex. 17: MCPS Alternate Appendix A: Participation Criteria and Checklist, 2/24/20
- Parents Ex. 18: MCPS Prior Written Notice, 2/26/20
- Parents Ex. 19: [REDACTED] School Information
- Parents Ex. 20: [REDACTED] School 2018 Graduate Outcome Survey
- Parents Ex. 21: Resume of [REDACTED]
- Parents Ex. 22: Resume of Dr. [REDACTED]
- Parents Ex. 23: MCPS IEP Progress Report on Goals, 5/5/20
- Parents Ex. 24: Email from parent enclosing MCPS final report card, 6/22/20
- Parents Ex. 25: [REDACTED] Student Transcript, June 2020
- Parents Ex. 26: Notes regarding conversation with [REDACTED] by [REDACTED] [REDACTED] 6/26/20
- Parents Ex. 27: Email from parent enclosing Student work samples, 7/14/20

Parents Ex. 28: Student Videos of Speech/Language Session and Science, 7/30/20 (NOT ADMITTED)

- a. [REDACTED]
- b. [REDACTED]
[REDACTED]
- c. [REDACTED]
[REDACTED]

Parents Ex. 29: MCPS Report Card, June 2020

Testimony⁵

MCPS presented the following witnesses:

- [REDACTED], School Psychologist with MCPS, admitted as an expert in psychology and school psychology;
- [REDACTED], Assistant Principal at [REDACTED] High School, admitted as an expert in special education;
- [REDACTED], Transition Support Teacher at [REDACTED] High School, admitted as an expert in special education and transitioning of special education students to post-K-12 life; and
- [REDACTED], Assistant School Administrator at [REDACTED] High School, admitted as an expert in special education and high school curriculum

The Parents presented the following witnesses:

- [REDACTED] [REDACTED], admitted as an expert in special education;
- [REDACTED], Executive Director of [REDACTED], admitted as an expert in special education; and
- [REDACTED], the Student's father.

⁵ The parties asked, and I agreed, to consider all of the evidence presented at the hearing before ALJ [REDACTED].

FINDINGS OF FACT⁶

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

1. The Student was born in [REDACTED] 2001 and was almost nineteen years old at the time of this hearing.
2. The Student lives with the Parents and a younger sister.
3. The Student has an autism spectrum disorder. The Student's autism impacts him in the areas of written language, mathematical problem solving, reading comprehension, speech and language, self-management, problem solving, study skills, and social skills.
4. Some individuals with autism do not have any cognitive impairment, but the Student's autism affects his cognitive functioning. His autism negatively affects his ability to reason, problem solve as well as his adaptive functioning (adaptive behavior is a collection of skills needed for safe daily living, including communication skills and self-care). The Student's autism also causes problems with flexibility and rigidity, in particular giving him difficulty with flexible thinking.
5. At all relevant times, the Student has been enrolled with MCPS, where he is eligible for and has received special education and related services under the IDEA pursuant to an Individualized Education Program (IEP).
6. In October 2012, the Student submitted to a neuropsychological assessment, the result of which determined the Student's full-scale IQ at 49, in the first percentile of children the same age.

⁶ Many of these Findings of Fact are repeated verbatim from ALJ [REDACTED]'s September 27, 2019 decision. I have read all of the transcripts from that hearing (ALJ Ex. 1) and I do not merely repeat these findings, I have independently made my own Findings of Fact.

7. In November 2015, a psychological assessment reported there were “significant concerns” regarding the Student’s abilities in independent functioning in the areas of health and safety, self-direction, communication and leisure skills. The Student’s adaptive behavior was measured with the Adaptive Behavior Assessment System – Third Edition, on which the Parent rated the Student with a General Ability Composite of 85 and the Teacher rated him a 68.

8. While the Student has significant difficulty with expressive and receptive language skills, he is verbal, can read, and can understand and respond to spoken directions.

9. On August 9, 2016, Dr. [REDACTED] licensed psychologist, evaluated the Student pursuant to an Independent Educational Evaluation (IEE) authorized by MCPS. Dr. [REDACTED] administered the Comprehensive Test of Nonverbal Intelligence, Second Edition (CTONI-2) in order to obtain a measure of the Student’s nonverbal intellectual functioning that would not be impacted by any receptive or expressive language difficulties. The test is designed to be administered to individuals unable to understand spoken directions, read, or speak to respond.

10. Borderline is the cutoff below which an IQ score is considered to indicate an intellectual disability, which is a specifically diagnosed disorder; therefore, it is the border between intellectually disabled and not intellectually disabled.

11. The Student’s full-scale IQ on the CTONI-2 was 78, which is in the 7th percentile and is described as borderline. Dr. [REDACTED] opined that the full-scale IQ from the CTONI-2 is not a valid, unified measure of the Student’s intelligence due to the discrepancies among his performance across subtests.

12. The CTONI-2 includes a pictorial scale and a geometric scale. The Student’s performance across the three subtests that comprise the geometric scale was consistent and therefore the score of 76, in the borderline range, is considered a valid unified measure.

13. The Student's low average score on the pictorial scale is not a valid unified measure due to discrepancies among his subtest scores. On the three subtests in this scale, the Student received a scaled score of 6 (low average) in pictorial analogies, 11 (average) pictorial categories, and 6 (low average) in pictorial sequences.

14. Dr [REDACTED] administered the Kaufman Test of Education Achievement, Third Edition, to assess the Student's present levels of academic achievement. The Student tested as high average in nonsense word decoding, average in spelling, low average in letter and word recognition, and silent reading fluency, borderline in math fluency and math computation, and impaired in reading comprehension, writing fluency, written expression and math concepts and application.

15. Dr [REDACTED] opined that given his mostly low average cognitive abilities as measured by the CTONI-2, the Student should be placed in a diploma-bound program.

16. On or about August 26, 2016, an IEP team decided the Student should progress toward a Maryland Certificate of Program Completion (certificate) rather than a diploma for the 2016/2017 school year. The Parents were not in agreement with the team's decision, but they did not challenge it at a due process hearing. MCPS implemented the Student's 2016/2017 IEP at [REDACTED] High School in its [REDACTED] program ([REDACTED]).

17. A certificate program includes some academics but primarily focuses on the acquisition of life skills that prepare a student for life after school. Earning a certificate does not require passage of academic courses, proficiency in any subject, or passage of the statewide assessments. A student may receive a certificate at the conclusion of his high school experience.

18. When a student is on a diploma track, MCPS can modify the manner in which the Student is instructed in the general education curriculum; however MCPS is not permitted to

modify the curriculum itself. Therefore, in a diploma program, teachers must teach the students at grade level, regardless of their true instructional level.

19. In the [REDACTED] program, the teachers are allowed to teach at an appropriate instructional level for a student.

20. The Student performed similarly to his peers in the [REDACTED] program. He was neither at the bottom nor the top of his class.

21. While in the [REDACTED] program, the Student had difficulty with higher level academic concepts.

22. The Student did well at the [REDACTED]; he received As in his courses. The Parents believed the Student was not sufficiently challenged and that the work was easy for him. They wanted him to pursue a diploma.

23. During the 2016/2017 school year, the Student did not attempt or receive any credits towards graduation other than one half credit he received for Physical Education, one half credit for Digital Art, and one credit for Piano.

24. Effective July 1, 2017, Maryland law gave parents of students with disabilities the right to refuse their child's assignment to a certificate program. A local agency, like MCPS, may challenge the parents' objection by pursuing due process as provided under the IDEA. At a due process hearing, the ALJ would rule whether the student should pursue a certificate or a diploma. If the parents do not express disagreement, the local education agency may place the student in a certificate program. If the parents object to a certificate program and the local education agency does not pursue due process, the student shall pursue a diploma.

25. The Parents exercised their rights under the new law and objected to the Student's continued placement in a certificate program. On August 8, 2017, the Mother withdrew the Student from the [REDACTED] at [REDACTED]

26. On August 9, 2017, an IEP team proposed that the Student pursue a certificate and the alternative education assessments aligned with the MSDE's alternative curriculum. In accordance with the new law, MCPS gave the Parents fifteen days to provide written consent or refusal. The Father signed a written refusal that day.

27. On August 10, 2017, MCPS issued Prior Written Notice to the Parents that it had recommended the Student's placement in a certificate program and the Parents had declined.

28. On August 17, 2017, the Mother authorized the Student's enrollment at [REDACTED] High School [REDACTED]) where he would pursue a diploma.

29. For the 2017/2018 school year, an MCPS IEP team developed and agreed on an IEP that was geared toward the Student receiving a diploma. As with all IEP meetings for the Student, one or both of the Parents participated. MCPS recommended the Parents move the Student to a certificate program because MCPS personnel believed the Student lacked higher level thinking that is necessary to achieve a diploma and he would be better served by focusing on life skills to benefit him after high school. The Parents did not relent.

30. MCPS implemented the Student's IEP in the 2017/2018 school year at [REDACTED] in the [REDACTED] program ([REDACTED]).

31. The Student's IEP was amended three times during the 2017/2018 school year because the Student was not making sufficient progress towards his IEP goals and objectives.

32. At the [REDACTED], the Student received some instruction in fundamental life skills while he pursued academics in the general education curriculum. Had he been in a certificate program, he would have spent more time learning life skills and would have pursued some academics.

33. The [REDACTED] provides classes for special education students in a self-contained classroom, with an average of eight students per class, with one teacher and one or two paraeducators. Students in [REDACTED] take electives in general education classrooms, but often with a

special education paraeducator accompanying them to class.

34. On October 20, 2017, an IEP team proposed that the Student pursue a certificate and the alternative education assessments aligned with the MSDE's alternative curriculum. In accordance with the new law, MCPS gave the Parents fifteen days to provide written consent or refusal. The Father signed a written refusal that day.

35. The Student made minimal progress in the 2017/2018 school year. He did not master any academic goals on his IEP.

36. During the 2017/2018 school year, the Student failed English 9, Algebra, MAPB (math), Biology and Developmental Reading. He received one credit for Band.

37. On May 24, 2018, [REDACTED], then a resource teacher for special education, administered an educational assessment of the Student to determine his current academic achievement levels. The Student scored as follows: applied problems – very low; calculation – low; math facts fluency – average; number matrices – low; writing samples – low; sentence writing fluency – average. The Student exhibited strong basic reading skills doing very well with decoding. However, he struggled to retell information from a passage, struggled to answer questions about the main idea, could answer explicit questions correctly but struggled to answer implicit questions. He exhibited a strength in writing simple sentences that answer “who” “what” and “where” but struggled to provide details when asked “how” or “why.” In math, the Student had a strength in answering rote “drill and practice” math problems with single digit addends, could complete mathematical calculation problems at the third/fourth grade level using standard algorithms, but struggled to answer applied problems beyond the semi-concrete level.

38. The Student was re-assessed in speech-language on June 18, 2018. On the Clinical Evaluation of Language Fundamental – 5th Edition, each subtest has a mean score of 10,

with a standard deviation of 3. The Student scored as follows: word classes – 4; formulated sentences – 2; recalling sentences – 4; understanding spoken paragraphs – 1; sentence assembly – 8; semantic relationships – 2. All of these scores placed him below the expectancy range for his age except sentence assembly, which was in the average range, and semantic relationships, which was below average. On the Peabody Picture Vocabulary Test – 4th Edition, the Student scored a 54 on a test in which the mean was 100 and the standard deviation was 15. On the Expressive Vocabulary Test -2, the Student scored a 73, which was below expectancy.

39. In July 2018, Mrs. [REDACTED] completed a psychological re-evaluation report of the student. As reported by his Mother, the Student's Vineland Adaptive Behavior Scale score was as follows: communication: 83 (below average); daily living skills – 92 (average); socialization – 88 (below average); and adaptive behavior composite – 84 (below average).

40. As reported by his teacher, the Student's Vineland Adaptive Behavior Scale score was as follows: communication – 43 (low – moderate deficit); daily living skills – 30 (low, severe deficit); socialization – 20 (low, severe deficit); and adaptive behavior composite – 36 (low, severe deficit).

41. In July 2018, an IEP team met to consider the Student's IEP for the 2018/2019 school year. As with all IEP meetings for the Student, one or both of the Parents participated. MCPS recommended to the Parents moving the Student to the [REDACTED] certificate program at [REDACTED] because MCPS personnel believed the Student lacks higher level thinking that is necessary to achieve a diploma and he would be better served by focusing on life skills to benefit him after high school. The Parents did not relent.

42. Because the Parents did not consent to a certificate program, the IEP team developed and agreed on an IEP that was geared toward the Student receiving a diploma. MCPS implemented the Student's IEP in the 2018/2019 school year at [REDACTED] in the [REDACTED].

43. In July 2018, the Father submitted an application for eligibility to the Maryland Department of Health's Developmental Disabilities Administration (DDA) on behalf of the Student. The application for DDA eligibility was signed under penalty of perjury.

44. The application stated the Student had been diagnosed with autism, behavioral problems, intellectual disability, speech/language impairment, and mental illness. The boxes were checked for "I need substantial daily assistance. 8 hours or more per day" and for "I need continuous 24 hours per day assistance."

45. The application indicated the Student is completely independent with respect to eating and transfers in and out of bed. The application indicated the Student needs assistance with respect to dressing, bathing, toileting, grooming, and using the telephone. The application indicated the Student is completely dependent with respect to preparing simple food, completing household tasks, using public transportation, and knowing what to do in an emergency.

46. The DDA sent a representative to the student's house to interview the Student and verify the information on the application.

47. The DDA approved the Student for lifelong funding to commence at age twenty-one which will pay for vocational training, community and domestic skills, and would pay for a group home, if necessary.

48. At the hearing before ALJ [REDACTED] the Father testified there were several inaccuracies in the DDA application and that it far overstated the Student's challenges.

49. As of the date of this hearing, the Father had not amended the DDA application.

50. On October 25, 2018, MCPS filed a request for mediation to consider whether the Student should pursue a certificate. The Parents declined to participate in mediation. MCPS did not request a due process hearing.

51. On October 26, 2018, the Parents filed a due process complaint requesting that MCPS develop an education program suitable to the Student's needs. The parties reached a settlement in which the Student would submit to an IEE at public expense.

52. MCPS retained Dr. [REDACTED] to perform the IEE to assess the Student's cognitive abilities.

53. In December 2018, Dr. [REDACTED] evaluated the Student to assess his cognitive abilities pursuant to the IEE.

54. Dr. [REDACTED] administered the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV). The Student had a full-scale IQ of 72, placing him in the third percentile and in the borderline range. The Student's General Ability Index, which is another composite summary score that is less sensitive to the influence of working memory and processing speed was 74, in the fourth percentile and also in the borderline range.

55. There are four indexes used within the WAIS-IV. On these, the Student scored as follows: verbal comprehension – third percentile, borderline range; working memory – sixth percentile, borderline range; processing speed – eighth percentile, borderline range; and perceptual reasoning – tenth percentile, low average range.

56. Due to significant variability among the three subtest scores in the perceptual reasoning index, this score cannot be considered a valid, unified measure of the Student's overall perceptual reasoning abilities. The subtests in this index measure nonverbal fluid reasoning and using visual spatial reasoning to solve problems. The Student scored borderline on the block

design subtest, average on the matrix reasoning subtest, and borderline on the visual puzzles subtest.

57. Dr. [REDACTED] also administered the Wechsler Nonverbal Scale of Ability (WNV) on which the Student scored a 79 full-scale IQ, in the eighth percentile. The subtests were as follows: matrices – average; coding – low average; spatial span – low average; and picture arrangement – low average.

58. Dr. [REDACTED] opined that an appropriate educational placement for the Student would be one that addresses his academic needs, as well as his behavioral, social, and adaptive functioning needs. She recommended a program such as [REDACTED]'s [REDACTED] Program or a school like [REDACTED]

59. On January 8, 2019, an IEP team met to consider Dr. [REDACTED]'s IEE results and recommendation. The Parents requested nonpublic placement; MCPS refused. The Parents filed a due process complaint. The parties settled for a referral to MCPS' Central IEP (CIEP) team, which would consider a more intensive program than the Student was receiving at the [REDACTED]. The CIEP team rejected the Parents' request for nonpublic placement.

60. On January 28, 2019, MCPS issued written notice to the Parents that it had reviewed Dr. [REDACTED]'s report. MCPS again proposed that the Student pursue a certificate. The Parents declined.

61. On April 11, 2019, MCPS convened a CIEP team meeting to consider the Student's future education program. The Parents, one or both of whom were present, requested nonpublic placement at [REDACTED], in its [REDACTED] program, or [REDACTED]. The team could not reach consensus. Mr. [REDACTED], as the IEP chair, decided to return the Student to the [REDACTED], where, as the Parents wanted, he would pursue a diploma.

62. On April 17, 2019, MCPS issued Prior Written Notice to the Parents that it had denied the Parents' request for a referral to nonpublic placement; it had previously recommended the Student's placement in a certificate program and the Parents had declined, thus prompting MCPS to propose implementing the Student's 2019/2020 IEP in the [REDACTED] at [REDACTED].

63. The Student made minimal progress during the 2018/2019 school year. During the 2018/2019 school year, the Student received a D grade and one math credit for MAPS A & B, he received a C grade and one credit for US History, one credit for Band, one credit for "Int. Cultur CUI,"⁷ and he received an A and one credit for Resource Program. The Student failed English 9.

64. During the 2018/2019 and 2019/2020 school years, the Student took a non-credit class called On The Job Training where students learn and perform real world work tasks in an effort to learn soft-skills and problem-solving skills. The tasks included rolling and sorting silverware, sorting condiments, filling sugar caddies, assembling magnets into a pre-determined set, assembling office kits, assembling cardboard pizza boxes, and computer data entry. The classroom teachers would teach the tasks with fading prompts. Over time, the teachers would intentionally sabotage the project in order to teach the students problem solving skills. The teachers would also abandon a task, and reintroduce it many weeks later to see if students have retained the knowledge he or she had learned.

65. The Student performed commensurately with his peers in the On The Job Training class. It took him many months to learn to roll silverware in a napkin like you may find in a restaurant. The Student could perform tasks when they were modeled for him, but he struggled when he encountered a problem. It took longer than some of his peers for the teachers to be able to fade prompts, and he had difficulty when they left the task for a few weeks.

⁷ There was no testimony about this class but it is listed under "CTE/Technology" on the Student's transcript.

66. At the time of the August 2019 hearing, MCPS had not sought an ALJ's order on whether the Student should pursue a certificate because MCPS did not want to force the decision on the Parents.

67. On September 27, 2019 ALJ [REDACTED] issued her decision concluding that MCPS had denied the Student a FAPE for the 2019/2020 school year and ordered MCPS to make referrals to [REDACTED] and [REDACTED] for placement in either of their diploma programs.

68. On October 17, 2019, MCPS complied with the Decision and sent both referrals.

69. Both [REDACTED] and [REDACTED] denied the Student's applications for admission to their diploma programs.

70. On November 3, 2019, the Parents requested MCPS make a referral to [REDACTED]

71. On November 15, 2019, MCPS informed the Parents it would not make any other referrals to nonpublic schools including [REDACTED].

72. As of December 2019, the Student struggled with basic comprehension of plot and characterization even after having been given text that is read aloud, chunked and with frequent checks for understanding and visual supports. He was unable to sequence what has happened in the beginning, middle and end of text he has read. He struggled to make predictions or inferences and to identify the author's purpose. He struggled to make personal connections to the text or connections to prior learned knowledge. He was unable to write a sentence utilizing new vocabulary words after direct instruction on those words and scaffolded instruction and models of what is expected. His written responses to text based on creative writing type prompts tended to ramble on about a topic that only has a vague connection to the prompt or the topic at hand.

73. As of December 2019, the Student either did not complete or completed work in a way that does not reflect any understanding of the concepts being measured in Algebra. When

left to work independently, the Student was unable to demonstrate an understanding of the material, even with prompting and re-instruction.

74. On January 14, 15 and 16, the Student visited [REDACTED] in [REDACTED].

75. On January 17, 2020, [REDACTED] accepted the Student into its eleven-month high school program. At [REDACTED] the Student would have the opportunity to attempt coursework, which if completed would earn credits toward a high school diploma. [REDACTED] does not admit students as either diploma bound or certificate program students. Instead, [REDACTED] admits a student, and will not determine until one semester before graduation or completion whether the Student will earn a diploma or a certificate. [REDACTED] did not opine that the Student is capable of earning a high school diploma.

76. The Parents asked MCPS to refer the Student to [REDACTED] but MCPS refused.

77. As of January 2020, the Student's instructional grade level performance for reading comprehension was 2.6. Even with text read aloud, frequent check-ins, visual supports, and graphic organizers, the Student was unable to follow basic plot structure and sequencing. He was unable to make predictions or inferences and even with teacher guidance he was unable to connect new concepts to previously learned skills.

78. As of January 2020, the Student's instructional grade level performance for math problem solving for applied problems was K-1st and classroom-based assessments were 3rd-4th. Given individual instructions, he could perform the most basic math functions on a calculator, but could not apply those skills to a real-world situation as evidenced in word problems. He could perform some algebraic functions if working one-on-one with an adult and following the adult's direct modeling of the problem, but could not work independently and could not repeat the skill just taught. His in-class work often showed answers that do not make sense.

79. In January 2020, the Student’s instructional grade level performance in written language content was grade 1–2. When given written language tasks, the Student was provided with graphic organizers segmented by paragraph, sentence frames and starters, and relevant text chunked into manageable sections prior to writing. Reading passages that are used as evidence for analytical writing were read aloud together, with in class annotations. Even with supplemental aids and supports, the Student was unable to state a clear claim and demonstrated weak thinking. His writing demonstrates ineffective style, including simplistic or incorrect language and sentence structure. At times, his sentences would start clear and well-developed, but then become lost in his own writing and ramble off topic.

80. In January 2020, the Student’s instructional grade level performance in written language expression was 1–2 grade level.

81. On February 24, 2020, an MCPS IEP team recommended the Student participate in an alternate educational framework not earning a Maryland High School diploma and in alternate assessments based on alternate academic achievement standards based on his learning profile and the state requirements for graduations with a diploma.

82. The MSDE and MCPS mandate that an IEP team utilize *Maryland Guidance for IEP Teams on Participation Decisions for the Alternate Assessments*, April 1, 2019, and Alternate Appendix A: Participation Criteria and Checklist when determining eligibility for students with a “significant cognitive disability” for participation in the alternate assessments and/or alternate instructional standards. The Criteria include: 1. The student has an IEP that includes specially designed instruction comprised of accommodations, evidence-based practices, program modifications, personnel support, and evidence the student cannot access the general education standards despite ongoing interventions. 2. The student has a significant cognitive disability that impacts intellectual functioning and adaptive behavior. A significant cognitive

disability is pervasive and affects learning across all content areas, independent functional, community living, leisure, and vocational activities. 3. The student is learning content derived from the MCCRS in English/language arts and Mathematics and the Next Generation Science Standards with grade-level curriculum significantly modified in order for the student to access knowledge and skills that allow the student to make progress. 4. The student requires extensive, direct, repeated, and individualized instruction and substantial supports to achieve measurable gains in the grade and age-appropriate curriculum. This instruction is not temporary or transient in nature. The student uses substantially modified materials and individualized methods of accessing information in alternative ways to acquire, maintain, demonstrate, and transfer skills across academic content.

83. The February 24, 2020 IEP team utilized this document and conducted a comprehensive evaluation of the Student in making its recommendation.

84. The February 24, 2020 IEP team used the following to review the Student's cognitive/adaptive abilities: results of cognitive ability test (December 19, 2018 cognitive assessment performed by Dr. [REDACTED]; June 18, 2018 educational assessment performed by [REDACTED] [REDACTED]); results of adaptive behavior skills assessment (Adaptive skills assessment performed by [REDACTED] from 2015); results of individual and group administered achievement tests; results of informal assessments; and results of individual English Language Arts, Science, and Mathematics assessments..

85. The Parents did not consent to the proposal to move the Student to a certificate program.

86. On February 26, 2020, MCPS issued Prior Written Notice that MCPS had proposed the Student attend [REDACTED] after utilizing the *Maryland Guidance for IEP Teams on Participation Decisions for the Alternate Assessments*, that the Parents had refused to consent,

and that as a result, MCPS proposed to implement the February 24, 2020 IEP at the [REDACTED] at [REDACTED].

87. In March 2020, when the COVID-19 pandemic hit, MCPS closed school buildings and students engaged in online continuity of learning. During the continuity of learning, MCPS modified its grading policies. To earn a passing grade in a class, a student needed to satisfy two of four of the following criteria. 1. Assignment completion (if a student completed 50% of an assignment, he or she would receive a 10 out of 10; the accuracy of the content was not graded); 2. Understanding content or skills (typical grading criteria for student to show he or she met or exceeded expectations – graded on content); 3. Engagement (met by attending Zoom class sessions, Zoom teacher office hours, responding to emails); and 4. Teacher professional judgment (if a teacher thought a student was doing all he or she could do, the teacher had discretion to check this box). The Student had the opportunity to choose a grade of Pass or a letter grade. If the Student chose a letter grade, it would be one grade higher than he or she received the prior quarter.

88. During the 2019/2020 school year at [REDACTED], the Student failed Algebra 1A, English 10A, and College Prep Literature 3. He received a passing grade and one half credit for Algebra 1B and for English 10B; he received an A grade and one credit for PE; he received a B grade and one credit for Foundations of Technology, received a passing grade and one half credit for College Prep Literature 4, and received one credit for Resource Program.

89. The Student received a passing grade in all of his courses during the fourth quarter continuity of learning module. As a result of those passing grades, the Student earned a total of three credits for the second semester of the 2019/2020 school year. For three of those classes, College Prep literature 4, English 10B, and Algebra 1B, the Student had failed the third quarter, and received a passing grade for the semester only because of the continuity of learning

grading criteria. The other credit and a half were for Foundations of Technology B, Resource Program B, and Advisory, all electives that do not satisfy the seventeen and a half credits required for graduation.

90. To graduate from a Maryland high school, students must earn twenty-two credits, including seventeen and a half credits for required courses (e.g., four credits in mathematics, four credits in English, three credits in science, three credits in social studies including U.S. history, world history, and U.S., state, and local government, one credit in PE, one half credit in health, one credit in fine arts, and one credit in technology education); pass State assessments in mathematics, English, science, and government, or receive a certain cumulative total score on the assessments, or receive a waiver of the assessment requirement, or participate in the [REDACTED] [REDACTED] in lieu of a passing score on an assessment; and complete service hours.

91. As of the end of the 2019/2020 school year, the Student had a total of eleven and a half credits of the twenty-two credits required to graduate. However, of the required seventeen and a half credits, the Student only had six credits. Of those six credits, one and a half of them were earned only because of the COVID-19 continuity of learning grading changes. The Student has additional credits in some mandatory areas, for example he has one and a half credits for PE, but when only one credit is required, the additional half credit counts as an elective.

92. The [REDACTED] allows students who cannot pass a state-wide assessment for graduation to complete a project on the subject to [REDACTED] the gap to graduation requirements. Before a student may begin a [REDACTED] project, the student must first receive a passing grade in the pre-requisite course for an assessment (*i.e.*, Government, English, Algebra and Science), and fail the corresponding assessment. The Student must then try to pass the assessment a second time [REDACTED] projects are challenging. A [REDACTED] project may take as much as forty-five clock hours to complete. If, for example, the student's assessment score is 720

out of 725, the student will do a small project; the lower the score, the bigger the [REDACTED] project. MCPS has granted 12,000 [REDACTED] plans, including several hundred at [REDACTED]

93. During the summer of 2020, the Student has been enrolled in and participating in [REDACTED] an online high school program.

94. The Parents plan to seek legal guardianship of the Student.

DISCUSSION

Burden of Proof

The standard of proof in this case is a preponderance of the evidence. *See* 20 U.S.C.A. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3). 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 the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). The burden of proof rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). In this case, MCPS seeks to provide FAPE by enrolling the Student in an alternative education program, overriding the Parents’ refusal to give consent to MCPS, and bears the burden of proof on that issue. *Id.* The Parents argued MCPS is required to refer the Student to [REDACTED] in [REDACTED] in order to provide him a FAPE and bear the burden of proof on that issue. *Id.*

Legal Framework

The identification, assessment and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2017); 34 C.F.R. pt. 300 (2016); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2017); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE which “emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]” 20 U.S.C.A. § 1400(d)(1)(A).

Thirty-five years ago, the Supreme Court addressed the FAPE requirement in *Board of Education v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court held that FAPE is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Rowley*, 458 U.S. at 201 (footnote omitted). To this end the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide FAPE: first, whether there has been compliance with the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-07.

An IEP is the “primary vehicle” through which a public agency provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax Cty. Sch. Bd.*, 553 F. 3d 315, 319 (4th Cir. 2009).

COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of the student and the special education and related services to be provided to meet those needs. The IEP must take into account:

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

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

educational programs. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A. IEP teams must consider the students' evolving needs when developing their educational programs. The development of an IEP is a prospective process. *See Andrew F.*, 137 S. Ct. at 999. The test of the appropriateness of the IEP is *ex ante* and not *post hoc*. *Adams v. State*, 195 F.3d 1141, 1149 (9th Cir.1999); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993).

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

In *Rowley*, the United States Supreme Court first addressed the FAPE requirement as follows:

Implicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of [FAPE], in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

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

Absent more definitive direction regarding the standard to be employed to determine "when handicapped children are receiving sufficient educational benefits to satisfy the

requirements of the Act,” courts applied various interpretations of the level of benefit that is required. *Id.* at 202. The Fourth Circuit, taking its lead from the Tenth Circuit, formulated the test as whether the school system adopted an IEP calculated to confer “some” educational benefit on the student, “meaning a benefit that is more than minimal or trivial, from special instruction and services.” *O.S. ex rel. Michael S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (“In this circuit, the standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.”).

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

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

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

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

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *See* §§ 1414(d)(1)(A)(i)(I)-(IV). This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.”’ *Rowley*, 458 U.S., at 179, 102 S. Ct. 3034 (*quoting* H.R. Rep. No. 94-332, p. 2 (1975)). A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

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

Andrew F., 137 S. Ct. at 998-99. The Court expressly rejected the Tenth Circuit’s interpretation of what constitutes “some benefit”:

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

Id. at 1001.

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

enable the child to make progress appropriate in light of his circumstances.” *Andrew F.*, 137 S.Ct. at 1002.

Ultimately, a disabled student’s “educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* at 1000. Moreover, the IEP must be reasonably calculated to allow a child to advance from grade to grade, *if that is a “reasonable prospect.”* *Id.* (emphasis added).

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

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the “least restrictive environment” to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5) (2017); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. 20 U.S.C.A. § 1412(a)(5)(A); *Rowley*, 458 U.S. at 181 n.4; *Hartmann v.*

Loudoun Cty. Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997); *see also Honig v. Doe*, 484 U.S. 305 (1988).

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like MCPS to offer a continuum of alternative placements that meet the needs of children with disabilities. 34 C.F.R. § 300.115. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. *Id.* § 300.115(b); COMAR 13A.05.01.10B(1). Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. COMAR 13A.05.01.10A(2).

ALJ ██████'s Decision

During the 2016/2017 school year, the Student participated in the ██████ program, a certificate program. Although MCPS continued to recommend the Student be enrolled in a certificate program, the law changed in 2017 and the Parents utilized that change in law and refused to consent to the Student's continued placement in a certificate program. The Student thereafter participated in the ██████ program, a diploma program, during the 2017/2018 and 2018/2019 school years. The Parents alleged the proposed 2019/2020 IEP, which again recommended a certificate program but placed the Student in ██████ after the Parents refused consent, denied the Student a FAPE. After a four-day hearing, on September 27, 2019, ALJ ██████ issued her decision on the due process complaint filed by the Parents. As ALJ ██████ pointed out in her decision, prior to that four-day hearing, MCPS had not filed its own due process complaint to override the Parent's refusal.

During the hearing, the Parents presented evidence that the Student made minimal progress in the diploma-bound program, failed most of his classes, and did not master any of his IEP academic goals. In its case, MCPS argued that it was inappropriate to place the Student in a diploma-bound program, and had been recommending a certificate program since 2016, but given the constraints of the Parents' refusal to allow the Student in a certificate program, MCPS was providing a FAPE in the [REDACTED]. MCPS argued that although the Student did not master any of his IEP goals, that was because he was being inappropriately taught on grade-level, as is required in a diploma-bound program, rather than his instructional-level, which was inappropriate given his cognitive limitations. MCPS argued that he did make some progress under his IEP goals and that provided him with a FAPE.

The issue of whether the Student could earn a diploma was not before ALJ [REDACTED] because MCPS did not file its own due process complaint to override the Parents' refusal to enroll the Student in a certificate program. ALJ [REDACTED] found that "[t]he MCPS abdicated its entitlement to deference when it decided not to challenge the Parents on their decision to have the Student pursue a diploma." (Parents Ex. 8, p. 22). Moreover, she found that "[i]t is disingenuous for MCPS to say the Student can make meaningful progress when he has not met the goals on his [REDACTED] IEPs and MCPS does not believe the Student can earn a diploma." (Parents Ex. 8, p. 24). ALJ [REDACTED] found, that given the constraints of the Student being enrolled in a diploma program, the "Student proved the IEP for the 2019/2020 school year is not designed for his circumstances and, thus, denies him FAPE, at least unless and until MCPS successfully challenges the Parents' diploma decision." (Parents Ex. 8, p. 24). ALJ [REDACTED] ordered MCPS to make the two referrals the Parents had requested to [REDACTED] and [REDACTED].

MCPS Due Process Complaint to Override Parents' Refusal to Consent to Certificate Program

Today I am called upon to decide the very issue that was not before ALJ [REDACTED] – that is, whether MCPS may provide a FAPE to the Student by enrolling him in a certificate program, thereby overriding the Parents' refusal to consent to that placement pursuant to Md. Code Ann., Educ. § 8-405(f)(3). The decision whether to place a student on a certificate or a diploma track is a placement decision. 34 C.F.R. § 300.102(a)(3)(iii) (“Graduation from high school with a regular high school diploma constitutes a change in placement[.]”); *Middleton v. District of Columbia*, 312 F.Supp.3d 113, 131 (2018). As with any placement decision, I shall not “substitute [my] own notions of sound educational policy for those of the school authorities which [I] review.” *Endrew F.*, 137 S.Ct. at 1001 (citing *Rowley*, 458 U.S. at 206). And I “may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Endrew F.*, 137 S.Ct. at 1002. MCPS has done so here.

In Maryland, the MSDE has provided explicit guidance to local school districts on how to make this type of placement decision. (MCPS Ex. 97 *Guidance for IEP Teams: Participation Decisions for the Alternate Assessments and Instruction Using Alternate Standards*, April 1, 2019 (MSDE Guidance)). The MSDE Guidance establishes four criteria, all of which must be met, in order to place a student in a certificate program. Those four criteria, discussed in detail below, are 1) that the student has a current IEP, 2) the student has a significant cognitive disability, 3) the student is learning content with grade-level curriculum significantly modified in order for the student to access knowledge and make progress, and 4) the student requires extensive, direct, repeated, and individualized instruction to achieve measurable gains in the grade and age-appropriate curriculum. (MCPS Ex. 97, p. 14-15). The MSDE Guidance also

includes an Appendix listing the Participation Criteria and Checklist, which has space to allow the IEP team to check off and list the evidence used to support each of the criteria.

MCPS used the MSDE Guidance precisely, making a detailed and thoughtful placement decision about the Student. MCPS witnesses all testified thoroughly and convincingly that the Student, while pleasant and eager to please, does not have the cognitive capability necessary for higher level thinking essential to earn a high school diploma. The Student excels at certain rote skills, but cannot make inferences and problem-solve to master high school curriculum, which is expansive and challenging. Despite extremely small class sizes, and supplemental aids and services, the Student is unable to access grade-level curriculum with or without modifications.

While the Student has had consistently low average to borderline IQ scores over the years, the Parents' witnesses focused on the highest splinter IQ subtest scores and looked at the scores in a vacuum. The Parents' witnesses spoke in terms of the Student having the "opportunity" and the "right" to pursue a diploma. MCPS witnesses testified that the Student, when viewed holistically, has had that opportunity and is not capable of earning a diploma. They did this in a manner prescribed by the Guidance, looking at his test results over years, adaptive behavior scores, observed classroom behaviors, observed one-on-one interactions, and mountains of work product. And finally, the placement decision made by MCPS is not simply to deny the Student a diploma, it is to teach him what he needs to learn – functional life skills. MCPS witnesses testified passionately about all of the life skills they need hours a day to teach the Student for him to be successful given his unique circumstances and skill set.

1. The Student Has a Current IEP

This precise criterion is listed in the MSDE Guidance as "The student has a current Individualized Education Program (IEP) that includes specially designed instruction comprised of accommodations, evidence-based practices, program modifications, personnel support, and

evidence the student cannot access the general education standards despite ongoing interventions.” (MCPS Ex. 97, p. 14). The participation checklist used by the February 24, 2020 IEP team is in the record as MCPS Ex. 72. The evidence referenced is the Student’s IEP, the current version of which is in the record as MCPS Ex. 73. Other than the recommended placement in the IEP, into a certificate program, there was no dispute amongst the parties that the IEP includes a comprehensive list of current levels of performance with respect to academics and behavior, includes the detailed supplementary aids, services, program modifications and supports, transition plans and goals, and goals and objectives for academics and behavior.

2. The Student Has a Significant Cognitive Disability

The precise criterion is listed in the MSDE Guidance as “The student has a significant cognitive disability that impacts intellectual functioning and adaptive behavior. A significant cognitive disability is pervasive and affects learning across all content areas, independent functioning, community living, leisure, and vocational activities.” (MCPS Ex. 97, p. 14). The Parents’ take issue with this criterion having been met. In fact, the Parents’ expert, [REDACTED], testified that because this criterion is not met, the remainder of the form is irrelevant.

Dr [REDACTED], who twice performed cognitive testing on the Student pursuant to an IEE, and Mr. [REDACTED] both testified about the Student’s IQ testing. When Dr. [REDACTED] evaluated the Student in 2016, when he was fourteen years old, he scored overall borderline, but because of discrepancies in the subtest scores, she felt that the CTONI-2 full-scale borderline IQ of 78 did not represent a valid unified measure. Of the two scales making up the full-scale score, pictorial and geometric, the pictorial scale had varying subtests. On those subtests, all were low average, except pictorial categories, which was average. When she evaluated the Student in 2018 at the age of seventeen, on the WAIS-IV test, the student scored borderline on the full-scale IQ and general ability index. She felt the full-scale IQ was not a valid unified measure. On the subtests,

five were borderline, four were low average, and one subtest, matrix reasoning, was average. On the Wechsler nonverbal scale of ability, three subtests were low average and one, matrices, was average. Based on these scores, Dr. [REDACTED] recommended [REDACTED] or [REDACTED] t for a diploma-bound placement.

Mr. [REDACTED] opined the Student did not have a significant cognitive disability, explaining that the Student's IQ has consistently been measured as at least borderline, and when language is taken out of the equation he has tested below average to average. Mr. [REDACTED] testified he would expect to see IQ scores below the 70s, in the cognitively impaired range, to make a finding that the Student suffered a significant cognitive disability. He also testified that even if the Student has a significant cognitive disability, it is not affecting the student across all content areas. While it does affect his reading comprehension, some aspects of writing, and some aspects of math reasoning, it has not affected him in band and ceramics, nor in elective classes in which he has consistently passed and earned credits. Moreover, according to Mr. [REDACTED] he has an incredible strength in technology education. He testified that during this pandemic, the Student has taken apart and put together several computers.

Dr. [REDACTED] was qualified as an expert in clinical psychology. I have no reason to doubt her expertise, and her performance of the IQ testing at issue here, but she does not have the expertise in school psychology, the high school curriculum, and with this Student that MCPS witnesses have. Mr. [REDACTED] admitted as an expert in special education, has credentials that are undoubtedly impressive, having been in education for forty-six years, thirty years with MCPS, having worked as a special education teacher, instructional specialist, program administrator, and having run conferences, trainings, and written books on special education. But in this particular circumstance, I am far more convinced by the testimony of [REDACTED], who was qualified as an expert in both psychology and school psychology, and of the other MCPS expert witnesses,

discussed below, who have far more experience with this Student on a day-to-day basis and are better able to evaluate the implications of these raw IQ scores on this Student's academics.

Mr [REDACTED]'s conclusions that the Student does not have a significant cognitive disability and Dr [REDACTED]'s recommendation of a diploma bound program, are based primarily on the Student's IQ scores. Yet the MSDE Guidance is quite clear that this determination is not "by just an IQ score, but rather a holistic understanding of a student." The MSDE Guidance provides a detailed participation description on this factor as follows:

The student has a "significant cognitive disability." A review of student records indicates a disability or multiple disabilities that significantly impact cognitive functioning and adaptive behavior. Adaptive behavior is defined as a collection of behaviors, including conceptual, social, interpersonal, and practical skills, essential for someone to live independently and to function safely in daily life. A significant cognitive disability is pervasive and affects learning across all content areas, independent functioning, community living leisure, and vocational activities.

Having a significant cognitive disability is not determined by just an IQ score, but rather a holistic understanding of a student. The term "significant cognitive disability" is a designation given to a small number of Maryland students with disabilities for purposes of their participation in the statewide assessment program and instruction. Students eligible to be assessed and/or instructed based on alternate academic achievement standards may be from any of the disability categories listed in the IDEA. 34 CFR 200.1(f)(2).

When IEP teams are making a decision as to whether a student is a student with a "significant cognitive disability" for participation in the alternate assessment and/or alternate instructional standards, IEP teams must review and discuss multiple sources of information for evidence of a significant cognitive disability including for example, psychological assessments, assessments of adaptive skills, classroom observations, and formal and informal assessment data. The IEP team must also document why the general curriculum and assessments are inappropriate even with accommodations; how the student will be assessed; and why the alternate assessments and/or instructional standards are appropriate. COMAR 13A.05.01.09A(1)(g).

(MCPS Ex. 97).

a. Cognitive Functioning

While Mr. [REDACTED] has read and developed hundreds if not thousands of IEPs, and regularly reads cognitive and psychological reports, Ms. [REDACTED] is trained in school psychology, having received specialized training in how psychology and education intersect and affect one another. Ms. [REDACTED] explained that intellectual disability, which is a specific diagnosis characterized by significant subaverage intellectual functioning and significant deficits in adaptive behavior, is one type of cognitive disability. Autism is a different type of cognitive disability. While any disability might cause a student to have a significant cognitive disability, which is an educational rather than a medical term, intellectual disability and autism are the major branches found. Students who have a significant cognitive disability will have cognitive impairments, but do not need to qualify for a diagnosis of intellectual disability.

Ms. [REDACTED] explained that intelligence refers to an individual's ability to acquire knowledge and engage in reasoning and problem solving. Ms. [REDACTED] gave a painstakingly comprehensive explanation of the Weschler scales, which includes verbal reasoning, perceptual reasoning, working memory, and processing speed. She also explained how you need strengths in each of these areas of intelligence to be able to access high school curriculum. Ms. [REDACTED] went through all of the Student's cognitive evaluations over the years and has shown that the student consistently showed stronger visual reasoning skills than verbal reasoning skills and has consistently scored overall in the borderline to low average range. As early as preschool, the Student's IQ was scored at borderline, which is significantly below average and two to three standard deviations below the mean. (MCPS Ex. 85). In 2001, the Student was given a psychological assessment which showed a full-scale IQ of 49 and all sub-scores were significantly below average and two to three standard deviations below the mean. (MCPS Ex. 86).

With respect to Dr. [REDACTED]'s testimony, Ms. [REDACTED] acknowledged that the Student had a single subtest, matrix reasoning, where he did very well. Matrix reasoning, which is a measure of inductive and deductive reasoning without the influence of language, is a subtest in perceptual reasoning. Perceptual reasoning has three subtests, block design, visual puzzles and matrix reasoning. The Student scored borderline in both block design and visual puzzles, but he scored very well on matrix reasoning and this raised his perceptual reasoning score. Ms. [REDACTED] testified it is inappropriate to rely on a single score like that to determine that someone could earn a high school diploma, especially when that score is an outlier and not in line with the other scores.

Ms. [REDACTED] explained that the areas in which the Student scored higher on Dr. [REDACTED]'s examination, such as nonsense word decoding, are rote skills, all based off of previously learned skills and do not require higher ordered thinking. She highlighted that the scores in areas that require reasoning and problem solving were all significantly impaired. (MCPS Ex. 88).

Even the CTONI-2, the test of intellectual functioning using a non-verbal examination, yielded a full-scale score of borderline. Dr. [REDACTED] opined that the full-scale score was not a valid, unified measure because of the discrepancies between the subtest scores. But on the subtests, five of them were low average except one, pictorial categories, on which the Student scored average. Ms. [REDACTED] opined that even these scores show a significant deficit in reasoning skills.

The MSDE Guidance states that a significant cognitive disability is not determined by an IQ score alone. Yet Dr. [REDACTED] opined the Student's IQ scores qualified him to be a diploma-bound student. Mr. [REDACTED] testified he would expect to see IQ scores in the low 70s to determine a Student had a significant cognitive disability. Ms. [REDACTED], however, looked at the Student's borderline to low average IQ scores over his lifetime and looked at those scores in the context of the holistic Student, as espoused by the MSDE Guidance. Ms. [REDACTED] explained that Dr. [REDACTED], who never observed the Student in a classroom, seemed to be reporting on the Student's scores

from a more clinical perspective, taking the strongest score and relying on that. On the other hand, Ms. [REDACTED] considered the educational implications of the *totality* of the Student's score. As for Mr. [REDACTED], while he testified that he is an advocate for the Student, not the Parents, he could not recall the last time he spoke to the Student. He conceded that most of his conversations have been with the Parents. He observed the Student in 2015, 2016 and 2017, but he has never taught the Student, tutored the Student, or engaged with him instructionally. What I heard time and time again from all of MCPS witnesses is that the Student does fairly well with rote skills, but does not have the capacity for higher ordered thinking. For example, he can read aloud quite well, but he cannot answer inferential questions about the text.

Ms. [REDACTED] explained that in the early years of education, you are taught very basic rote skills. As students age, they are no longer learning basic skills and they are required to *apply* skills. High school is a huge shift. The high school curriculum is heavily dependent on verbal skills and higher order reasoning skills in both verbal and non-verbal areas. To succeed in high school, the Student also needs to be able to manage himself and keep things in memory, which are both areas of difficulty for this Student.

The Student's educational assessment conducted in 2015, when the Student was fourteen, is consistent with the Student's learning profile. (MCPS Ex. 92). The Student performed well on rote skills, such as letter word identification, oral reading, and spelling, but did poorly in passage comprehension, applied problems, and math facts fluency. An educational assessment conducted two years later showed very low scores in applied problems. (MCPS Ex. 93).

Ms. [REDACTED] looked at all of the data, current and old, and observed the Student to see how he was performing in the school setting. Ms. [REDACTED] observed the Student in English class, where he did a good job following directions. The teacher had a chart up on the board, and the students were supposed to research some information. The Student's answers were a copy of the

examples the teacher had given the prior day. The teacher then walked the Student through the process and again provided him with examples. He could pick one of the teacher's examples, but he could not independently choose a topic and research on his own. The teacher told Ms. [REDACTED] this was a pretty consistent demonstration by the Student of his skill set. He has skills to follow along but not the application skills to look up things and reason and problem solve by himself.

In addition to satisfying his learning needs, Ms. [REDACTED] testified that a certificate track is consistent with the Student's social, emotional and behavioral needs. Ms. [REDACTED] testified the Student shows a behavioral pattern exhibiting stress and anxiety in school. He engages in self-soothing repetitive behaviors when under additional stress. Ms. [REDACTED] opined that you do not see as many of these behaviors when you have a match between cognitive abilities and curriculum level. This is consistent with the testimony of [REDACTED], who knows the Student from his year in [REDACTED] at [REDACTED] and recently observed him at [REDACTED] at [REDACTED]. Ms. [REDACTED] testified the Student was in the middle of the class at [REDACTED] and similarly situated to peers. She testified she saw many more perseverative behaviors from the Student while at [REDACTED]. Ms. [REDACTED]'s opinion, that the Student's profile puts him on a certificate track, that he will require life-long supports, is a good candidate for a job coach to learn job skills, and does not have sufficient language skills or flexible thinking skills to get high school diploma, is compelling and supported by the data.

b. Adaptive Behavior

A finding of significant cognitive disability requires a disability that significant impacts cognitive functioning, discussed above, as well as adaptive behavior. Adaptive behavior is a collection of skills needed for daily living, including basic functional communication and self-care.

A psychological report from 2015, when the Student was fourteen years old, addresses the Student's adaptive functioning. The teacher was reporting "areas of significant concern for independent functioning in the areas of functional academics, health & safety, self-direction, and leisure activities." (MCPS Ex. 87). While the Parent scores were higher than the teacher scores, the Parents' reports suggest "significant concerns of independent functioning in the areas of communication, social skills, and leisure skills." The teacher score of 68 was significantly below average, while the Parent's rating was higher than the teacher's, at 85.⁸

In 2018, when the Student was sixteen years old, he submitted to a psychological reevaluation regarding his adaptive behavior. (MCPS Ex. 89). Again, the teacher continued to report significant deficits in all areas of adaptive functioning while the Parents reported higher functioning at home. The teacher report on the Vineland Adaptive Behavior Scale was 36, indicating a low to severe deficit on a scale where the mean is 100 and the standard deviation is 15. The Parent adaptive behavior composite was 84, indicating below average. The psychologist who authored the report wrote: "While there is some difference expected across rating scales as the two do not directly measure the exact same skills, the amount of difference between these two raters is cause for the reader to caution in interpreting either report." (MCPS Ex. 89, p. 6).

Anecdotal evidence of the Student's adaptive functioning also widely differs. [REDACTED] and [REDACTED] both testified about an incident in which a water bottle fell over in or near the Student's backpack and water was leaking all over the Student's items. Mr. [REDACTED] described how the Student simply froze, and was surrounded by water, unable to help himself, until they talked him through the steps of getting towels from the bathroom, wiping up the water, and drying the items in his backpack. Ms. [REDACTED] testified the Student gave no indication he could have problem-solved that situation on his own. Ms. [REDACTED] also testified the Student has told her

⁸ No testimony was provided on the mean and standard deviations for these scores.

he is afraid to take public transportation on his own. All parties agree that being able to use public transportation is an important metric of adaptive functioning.

On the other hand, Mr. [REDACTED] testified that the Student is very independent in running errands, has a black belt in karate, and has very strong technical skills as he is adept at putting together computers. However, Mr. [REDACTED] acknowledged that he could not remember the last time he spoke with the Student, that it likely had not been for several years, and that he obtained all of this information from the Student's Parents.

The Father testified that at home the Student is fairly independent, takes care of the family dog, walks by himself to Petsmart and Target, could take public transportation by himself once taught, and seeks help when he needs it. The Student does not have a driver's license. He said that other than being bothered by sounds, for example by the lawn mower, the Student is just like any of us. He testified the Student has earned a black belt in karate, read a 700-page computer manual, and can take apart and put together computers.

Of course, one explanation for the variations in scores and reports is that the Student actually performs differently at home than at school. One MCPS witness suggested that overloading the Student with academics he could not handle was taxing his adaptive behavior abilities. In essence, she was suggesting that lightening the cognitive demands of his course load may help him perform better with respect to his adaptive behavior at school. Another explanation for the differentiation in scores is that the Parent and teacher have different expectations and perceptions of the Student's performance at home and at school. The discrepancies require further investigation and, ultimately, I find the Student's disability significantly impacts his adaptive behavior.

While the Father testified the Student takes computers apart and puts them back together, this testimony is simply unbelievable in light of the Student's cognitive capabilities, detailed

above. While I believe the Student may have “read” a 700-page computer manual, I do not believe he was capable of comprehending it. There was much testimony about whether the Student could or could not take public transportation on his own, and what he would do if his travel plans were derailed, but it is unclear to me whether all of that testimony was hypothetical or whether the Student has actually been travel trained. As to the Student’s accomplishment in having earned a black belt in karate, I simply do not have enough evidence about the requirements of that specific accomplishment to make inferences about the Student’s adaptive behavior.

What I do have evidence of, is the DDA application filled out by the Father, under penalty of perjury. The application had boxes checked for “I need substantial daily assistance. 8 hours or more per day.” And for “I need continuous 24 hours per day assistance.” The application indicated the Student is completely independent with respect to eating and transfers in and out of bed. The application indicated the Student needs assistance with respect to dressing, bathing, toileting, grooming, and using the telephone. The application indicates the Student is completely dependent with respect to preparing simple food, completing household tasks, using public transportation, and knowing what to do in an emergency. The Father testified at the hearing before ALJ [REDACTED] that there were numerous inaccuracies on that application, but at the time of the hearing before me, many months later, he still had done nothing to correct those inaccuracies with the DDA, which approved the Student for lifelong funding because of his severe deficits. Moreover, the items on the application were all confirmed by a DDA representative who went to the Student’s house to interview the Student and verify the information on the application. That the Parents intend to seek legal guardianship of the Student corroborates the information on the DDA application and a finding the Student has significant deficits in adaptive behavior.

██████'s testimony was also compelling. I found it extremely persuasive as to the Student's adaptive behavior functioning, given that she met the Student in 2017 when he first started in █████, has spoken with him every year regarding his interests and transition planning, has observed him once or twice a week in the classroom and pre-vocational room, and has worked with his family to secure DDA and DORS (short term job training) funding.

Ms. █████ helps the teachers set up exercises in the pre-vocational classroom for the class taken by the Student called On The Job Training. She was fully familiar with the work done in that room and the Student's performance. She described in great detail some of the activities the students engage in, including silverware/napkin sorting and folding, office kit assembly, magnet assembly, arranging items in a sugar caddy, assembling pizza boxes, and spreadsheet data entry. With respect to a spreadsheet, the Student can and very much enjoys entering data into a spreadsheet, but he cannot create a spreadsheet. With respect to assembling an office kit, if he were given a picture and a word card of items to go in a box, such as three paper clips, two pieces of paper, etc., he can follow instructions. However, if the instructions become multi-step or require inferential thinking, he struggles. If he were asked to create his own list, he struggles.

The Student can follow direct instructions when prompted, but struggles if there is a problem. For example, it is common for the teachers to "sabotage" a project to help the students learn problem-solving. With respect to the napkin/silverware sorting, after the Student had mastered the task, after several months, the teachers sabotaged the project by putting the wrong type of spoons in the tray. The Student recognized there was something wrong, but rather than take any steps to solve it, i.e. talk to a teacher about what to do, he simply froze. According to Ms. █████, this is common for the Student. In another circumstance, he was sent to the computer data entry station. When he discovered there was no chair at the station, rather than problem-solve, he eventually left the station and went elsewhere. Moreover, even tasks he becomes independent in,

such as the napkin folding, when the class takes a break from that activity and returns to it after a while, he needs to be re-taught the skill.

The class has both certificate and diploma bound students. Most of the autism students need visual prompts, but Ms. [REDACTED] testified the Student requires verbal and gestural prompts for longer than most students and takes longer than most students to be successful with fading prompts. Ms. [REDACTED] testified the Student's adaptive behavior was moderately to severely impaired. She also testified that the impairments listed on the DDA application were completed by the Student's father, and that they accurately reflect the level of impairment she sees in the Student at school.

MCPS witnesses all testified after reviewing mountains of the Student's records, after having spent many hours in the school with him, observing him, talking to him, and reviewing his school work. They, unlike Mr. [REDACTED], are not advocates paid by the Parents. Thus, I found their testimony persuasive and backed by data. For these reasons, I find the Student suffers a significant cognitive disability.

3. The Student is Learning Content With Grade-Level Curriculum Significantly Modified in Order for the Student to Make Progress

The precise criterion in the MSDE Guidance is: "The student is learning content derived from the MCCRS in English/language arts and the Next Generation Science Standards with grade-level curriculum significantly modified in order for the student to access knowledge and skills that allow the student to make progress." (MSDE Ex. 97. P. 15). MCPS witnesses all testified consistently that the Student cannot access grade-level curriculum even with significant modification.

The Parents attempted to show the Student is capable of much more when in a structured low-distraction setting such as the distance learning that was implemented during the COVID-19 pandemic. The Parents introduced the Student's grades from the fourth quarter,

which took place all online, and included numerous grades of “A” and resulted in all passing and A grades for the fourth quarter of the 2019/2020 school year.

Ms. ██████ explained that during the fourth quarter of the school year, when MCPS implemented the continuity of learning online program, because it was so new and unlike anything it had ever done before, MCPS drastically modified its grading system. In order to receive a passing grade, the Student needed to meet two of four criteria. The Student was able to meet these criteria by completing assignments, which were not graded for content, and by engagement, measured by attending Zoom class meetings or logging on to classroom online office hours. Ms. ██████ spoke to the Student’s teachers, and all indicated the Student did not master the substance of any content in the fourth quarter. Thus, although he earned As under that particular model, he did not perform at what one would ordinarily consider an A level. In sum, the Student’s fourth quarter grades showed that he logged on and turned things in, but not that he learned anything. It is unfortunate that MCPS was required to pivot so dramatically to this learning and grading model, and it certainly did no favors for the Student. Of the three credits the Student earned in the second half of the 2019/2020 school year, one and a half credits, for English 10B, Algebra 1B, and College Prep Literature, were all passing grades only because of the COVID-19 pandemic. The other one and a half credits earned were in electives that do not go toward the required classes for graduation.

The Parents argued the Student has been learning grade-level curriculum this summer in an online learning program called ██████. While Mr. ██████ testified that ██████ is recognized by the Middle States of America, of which Maryland is a part, I was presented with no testimony whatsoever about how ██████ lines up with MSDE curriculum. I also was presented with no testimony about how the instruction is delivered or how knowledge is assessed. I also have no proof that the Student has completed any of these courses on his own.

Overall, the vague references to his participation in ██████████ do nothing to dispute the many MCPS witnesses who testified the Student is unable to access grade-level curriculum even with substantial modifications.

The Parents also point to the Student's acceptance into ██████████ as proof that he is capable of accessing grade-level curriculum and earning a high school diploma. Dr. ██████████ the executive director of ██████████ testified that the Student has been accepted into ██████████. ██████████ has both diploma and certificate students. Dr. ██████████ made clear that ██████████ did not make a determination that the Student is capable of earning a high school diploma. To the contrary, Dr. ██████████ testified explicitly that they do not track a student in order to keep all of their options available to them. The application was not made by MCPS, which might have asked if ██████████ thought the Student capable of earning a diploma. Instead the application was made privately, meaning only that ██████████ welcomed the Student to study there, regardless of whether he might ultimately earn a diploma.

██████████ provides an impressive program for special education students. But nothing about the Student's acceptance there provides evidence the Student is capable of earning a diploma. He was accepted, and they offer a diploma. One does not necessarily prove the other. Moreover, it is worth noting that the Father testified one of the things the Student liked most about ██████████ after visiting for three days was the radio station and the vocational programs they offered. This is exactly the type of programming MCPS intends to offer more of to the Student when he is enrolled in ██████████ which is the appropriate method to provide the Student with a FAPE.

4. The Student Requires Extensive, Direct, Repeated, and Individualized Instruction and Substantial Supports to Achieve Measurable Gains

The MSDE Guidance for this criterion is as follows: "The student requires extensive, direct, individualized, and repeated instruction and substantial supports to achieve measurable gains in adapted and modified curriculum aligned with grade level content standards. The

student's needs for extensive, individualized, repeated, and direct instruction is not temporary or transient. His or her need for substantial adaptations and supports in order to access and achieve linked grade and age-appropriate standards requires substantially adapted materials and customized methods of accessing information in alternative ways to acquire, maintain, generalize, demonstrate, and transfer skills across multiple settings.” (MCPS Ex. 97, p. 4).

MCPS witnesses provided compelling evidence that this criterion has been met.

██████████, now the Assistant Principal at ██████████, has known the Student since the 2014/2015 school year at ██████████ Middle School. She was transferred to ██████████ at the same time the Student went there to start the ██████████. She has assessed him twice, has been at every IEP team meeting since seventh grade, and sees the Student regularly as part of her prior job as department chair which was to observe students and teachers.

Ms. ██████████ described the ██████████ at ██████████, where the Student has been receiving instruction for several years. She described the small student/teacher ratio, and the individualized support and guidance provided to students. As to the Student in particular, Ms. ██████████ explained that with respect to the rote, functional skills on his IEP, the Student has made progress. However, he has made little progress on grade-level objectives. He can handle “who” and “what” questions but has significant difficulties with “why” and “how” questions.

Ms. ██████████ summarized the Student's present levels of academic performance, all of which she attributes to his limited cognitive abilities. The Student scored a 1.5 grade level for reading comprehension level on the MAP R nationwide assessment. (MCPS Ex. 73). On the Eyelet, his reading intervention program is grade level 2.6. According to his curriculum-based assessment, he was unable to identify the beginning, middle, and end of a story. (MCPS Ex. 73). His math skills were at a 3.5 to 4th grade level. (MCPS Ex. 73).

Ms. [REDACTED] testified about the Student's lack of progress on grade-level curriculum when the content is not significantly modified. MCPS provided many examples of the Student's work product in a variety of classes. MCPS provided an example of the Student's work where the assignment was to write a memoir, after having read from a memoir. The Student simply copied from the book that was to be used as a model. (MCPS Ex. 78).

In math, the Student is able to graph $y=2x$, which is a prealgebra, rote skill. But when he was asked to look at four examples and select an inequality from the choices and explain his reasoning, the Student did not select an inequality but simply made attempts to solve the inequality with random numbers. (MCPS Ex. 79). Ms. [REDACTED] testified that rather than merely graphing this inequality, in algebra, requiring higher-level thinking skills, the Student is given a scenario and asked to come up with an inequality of their own and solve it. This is where the Student struggles.

In his Foundation of Technology class, the class was assigned to brainstorm ideas about a documentary they would create. When asked "what is the message I want to get across?" the Student googled the term "get across" and copied and pasted that definition into the worksheet. Although he picked Kobe Bryant as the topic of the documentary, he continued to complete the assignment by simply pasting in definitions of terms and including nothing about Kobe Bryant. (MCPS Ex. 81). These are just a few of the many work product examples MCPS brought to my attention.

The Parents brought to my attention the competency-based curriculum at [REDACTED] and explained how that might be a better fit for the Student. MCPS has proven the Student is incapable of earning a high school diploma, so I do engage in an analysis of what high school diploma would best suit the Student.

Mr. Eig attempted to discredit MCPS' witnesses by pointing out that they had testified in the hearing before ALJ [REDACTED] that [REDACTED] was appropriate for the Student and that the Student was making progress in [REDACTED]. The decision for MCPS to not file a due process complaint previously to override the Parents' refusal to consent to a certificate program was a legal one, and must not be imputed to MCPS' witnesses. It is also clear that their testimony that [REDACTED] was appropriate and that the Student made progress in [REDACTED] was in the context of the Parents insisting the Student be enrolled in a diploma program. All witnesses made clear at the hearing before me that the Student was most appropriately taught in a certificate program, was incapable of earning a high school diploma, and that he could make much more meaningful progress towards appropriately ambitious IEP goals if he were in [REDACTED].

Conclusion

The decision whether to place a student on a certificate or a diploma track is a placement decision. 34 C.F.R. § 300.102(a)(3)(iii) ("Graduation from high school with a regular high school diploma constitutes a change in placement[.]"; *Middleton v. District of Columbia*, 312 F.Supp.3d 113, 131 (2018)). "Although an equivalency diploma or other alternative credential may differ in some respects from a regular high school diploma, it does not follow that educational services which help students attain an equivalency diploma are not 'public education.' Education is the process by which students attain academic competency, not the document memorializing that process." *K.L. v. Rhode Island Board of Ed.*, 907 F.3d 639, 647 (1st Cir. 2018).

The Parents refused to consent to MCPS' placement of the Student in a certificate program pursuant to Md. Code Ann., Educ. § 8-405(f)(3). MCPS has shown, by more than a preponderance of the evidence, that it followed precisely, thoughtfully, and comprehensively the

MSDE Guidance on making this placement decision. The Student meets all of the criteria necessary to be moved to a certificate program.

The Student will attain academic competency by learning the functional life skills he needs and has the ability to learn. Rather than spend time on Algebra classes he will repeatedly take and fail, he will learn math in real world situations, learning to handle cash in a business. Rather than spend time trying to write a memoir, the Student will focus on language and writing by learning to fill out a job application, or a health questionnaire for a doctor's office. Rather than struggle to learn and retain anything in a history class, he can learn to ride the bus independently.

The Parents' witnesses spoke in terms of the Student having an opportunity to earn a diploma. He had that opportunity. That was not an appropriate placement for him, and that is why he is now being appropriately placed in [REDACTED]. The Parents also seem to argue that there is no harm in letting him try [REDACTED]. The harm is that a diploma program is not a proper placement for the Student. Not only has the Student not learned in order to obtain a high school diploma, but for every hour he spends in a diploma program, he is deprived of the proper placement for him. The services MCPS has available for this particular special education population are impressive. There is no doubt the Student will make great strides in [REDACTED].

Parents' Due Process Complaint Seeking Referral to [REDACTED] to Provide FAPE for the 2020/2021 School Year

ALJ [REDACTED]'s decision found a denial of FAPE for the 2019/2020 school year and ordered MCPS to send referrals to the two schools specifically requested by the Parents – [REDACTED] and [REDACTED]. When both schools denied the Student admission, and MCPS refused to make any further referrals, the Parents independently sought and secured the Student's admission at a third school [REDACTED]. The Parents filed their due process complaint on January 17, 2020, asking for a referral to [REDACTED], relying on ALJ [REDACTED]'s finding of a denial of FAPE for the 2019/2020

school year. By the time this case was heard, the 2019/2020 school year had passed, and we have now begun the 2020/2021 school year. The Parents explained at the hearing that as the IEP for the 2020/2021 school year again recommended the Student's placement in [REDACTED] and as the Parents refused to give consent, the IEP again proposed the [REDACTED] [REDACTED]. As this was the exact program ALJ [REDACTED] found denied the Student a FAPE in the prior school year, the Parents argued he is again being denied a FAPE in the 2020/2021 school year and is entitled to referral to [REDACTED]

ALJ [REDACTED]'s finding that there was a denial of FAPE in the 2019/2020 school year was based on placement in the [REDACTED], a diploma program. Given that MCPS had now sought to place the Student in [REDACTED] and I have decided MCPS may provide a FAPE to the student in a certificate program, thereby overriding the Parents' refusal to give consent, it follows that there is no longer a plan to return the Student to [REDACTED] and no denial of a FAPE for the Student in the 2020/2021 school year on those grounds. Thus, the Parents' due process complaint is moot.

MCPS' Motion to Dismiss the Parents' Complaint Based on Res Judicata

The hearing before ALJ [REDACTED] was also about FAPE for the 2019/2020 school year and the Parents sought referrals to two particular private schools. The Parents' Due Process complaint here alleged a violation of FAPE for the 2019/2020 school year and sought a referral to [REDACTED] a school not originally requested in the due process hearing held before ALJ [REDACTED]. Arguing that the doctrine of *res judicata* applies to all issues that were or could have been raised in the proceeding before ALJ [REDACTED], and arguing that the Parents could have requested referral to [REDACTED] in the hearing before ALJ [REDACTED], MCPS filed a Motion to Dismiss the Parents' due process complaint.

The 2019/2020 school year has now passed and the possibility of a referral to [REDACTED] for that year is now moot. With respect to the 2020/2021 school year, I have already decided that

MCPS may provide a FAPE by enrolling the Student in a non-diploma bound program.

Accordingly, MCPS will no longer enroll the Student in [REDACTED], and enrolling in the [REDACTED] program will not deny the Student a FAPE for this 2020/2021 school year. I will not order MCPS to refer to any private school, as it has a program to implement the proposed certificate program for the Student. Therefore, MCPS' Motion to Dismiss is moot.

CONCLUSIONS OF LAW

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

1. MCPS may provide FAPE to the Student by enrolling him in an alternative education program that does not issue or provide credits toward a Maryland high school diploma, and identify him for the alternative education assessments aligned with the State's alternative curriculum, which will override the Parents' refusal to give consent to MCPS regarding the same. Md. Code Ann., Educ. § 8-405(f)(3); 34 C.F.R. § 300.102(a)(3)(iii); COMAR 13A.05.01.09A(1)(g); *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Maryland Guidance for IEP Teams on Participation Decisions for the Alternate Assessments*, April 1, 2019; and
2. MCPS is not required to refer the Student to [REDACTED] in [REDACTED] in order to provide him a FAPE for the 2020/2021 school year because MCPS will provide FAPE in an alternative education program that does not issue or provide credits toward a Maryland high school diploma. Md. Code Ann., Educ. § 8-405(f)(3); 34 C.F.R. § 300.102(a)(3)(iii); COMAR 13A.05.01.09A(1)(g); *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Maryland Guidance for IEP Teams on Participation Decisions for the Alternate Assessments*, April 1, 2019; and
3. MCPS's Motion to Dismiss based on *res judicata* is MOOT.

ORDER

I **ORDER** that:

1. MCPS **MAY** provide FAPE to the Student by enrolling him in an alternative education program that does not issue or provide credits toward a Maryland high school diploma, and identify him for the alternative education assessments aligned with the State's alternative curriculum, which will override the Parents' refusal to give consent to MCPS under section 8-405(f)(3) of the Education Article of the Maryland Code; and
2. MCPS is **NOT** required to refer the Student to [REDACTED] in [REDACTED] in order to provide him a FAPE; and
3. The Motion to Dismiss based on *res judicata* filed by MCPS is **DENIED AS MOOT**; and
4. MCPS shall, within thirty [30] days of the date of this decision, provide proof of compliance with this Order to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, Maryland State Department of Education.

October 1, 2020
Date Decision Issued

Deborah S. Richardson
Administrative Law Judge

DSR/dlm
#187677

REVIEW RIGHTS

A party aggrieved by this final decision may file an appeal within 120 days of the issuance of this decision with the Circuit Court for Baltimore City, if the Student resides in Baltimore City; with the circuit court for the county where the Student resides; or with the United States District Court for the District of Maryland. 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.

A party appealing this decision 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 appeal. The written notification must include the case name, docket number, and date of this decision, and the court case name and docket number of the appeal.

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

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],
STUDENT,
v.
MONTGOMERY COUNTY
PUBLIC SCHOOLS

BEFORE DEBORAH S. RICHARDSON,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-20-02036

MONTGOMERY COUNTY
PUBLIC SCHOOLS

v.

[REDACTED],
STUDENT

BEFORE DEBORAH S. RICHARDSON,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-20-02038

FILE EXHIBIT LIST

I admitted the following exhibit into evidence as an ALJ exhibit:

ALJ Ex. 1: Transcripts from **[REDACTED]** v. *MCPS*,
MSDE-MONT-OT-19-13236

I admitted the following exhibits on behalf of MCPS:

- MCPS Ex. 1: Alternate Assessments Eligibility Decision Form, August, 2016
- MCPS Ex. 2: Individualized Education Program (IEP) report, 4/27/2017 with 6/8/2017 Amendment pages
- MCPS Ex. 3: Withdrawal from **[REDACTED]** High School, 8/8/2017; New Student Information for **[REDACTED]** High School Enrollment, 8/17/2017
- MCPS Ex. 4: Alternative Education Consent Form, 8/9/2017
- MCPS Ex. 5: Alternative Education Consent Form, 10/20/2017

- MCPS Ex. 6: Five Day Advance Documents for 11/20/2017 IEP meeting—
Secondary Transition High School Interview, 11/1/2017;
Report Card, 11/10/2017
- MCPS Ex. 7: IEP Team Meeting Report and Documents/Prior Written
Notice, for 11/20/2017 IEP meeting
- MCPS Ex. 8: IEP Amendment Changes, 11/20/2017
- MCPS Ex. 9: IEP Team Meeting Report and Documents/Prior Written
Notice, for 4/11/2018 IEP meeting; Notice and Consent for
Assessment, 4/11/2018
- MCPS Ex. 10: IEP Team Meeting Report and Documents/Prior Written
Notice, 7/9/2018; Alternative Education Consent Form,
7/9/2018
- MCPS Ex. 11: Amended IEP, 7/9/2018 with Meeting Notes and Decisions
- MCPS Ex. 12: MCPS Request for Mediation, 10/25/2018
- MCPS Ex. 13: IEP Team Meeting Report and Documents/Prior Written
Notice, for 1/8/2019 IEP meeting
- MCPS Ex. 14: Psychological Assessment Report, Dr. [REDACTED], 12/14/2018
- MCPS Ex. 15: MCPS Team Consideration of External Psychological Report,
1/8/2019
- MCPS Ex. 16: Alternate Assessments Eligibility Decision Form, January, 2019
- MCPS Ex. 17: Amended IEP, 4/11/2019 (of 1/8/2019 IEP)
- MCPS Ex. 18: CIEP Referral Form, 2/22/2019
- MCPS Ex. 19: Emails between MCPS and Parent Counsel re: CIEP
scheduling, 3/12/2019-4/3/2019
- MCPS Ex. 20: IEP Team Meeting Report and Documents/Prior Written
Notice, for 4/11/2019 IEP meeting
- MCPS Ex. 21: MCPS Educational Assessment Report, 6/18/2018
- MCPS Ex. 22: MCPS Psychological Assessment Report, 7/9/2018
- MCPS Ex. 23: MCPS Speech-Language Assessment Report, 6/18/2018
- MCPS Ex. 24: MCPS Educational Assessment Report, 11/11/2015

- MCPS Ex. 25: MCPS Psychological Assessment Report, 10/24/2012
- MCPS Ex. 26: MCPS Psychological Assessment Report, 11/17/2015
- MCPS Ex. 27: Autism Resource Services Diploma 4 year and 5 year plan
- MCPS Ex. 28: MCPS Graduation Requirements for Diploma
- MCPS Ex. 29: PARCC Algebra I Test Booklet Practice Test
- MCPS Ex. 30: PARCC English Language Arts/Literacy Test Booklet Practice Test
- MCPS Ex. 31: HSA Government Assessment Practice Test
- MCPS Ex. 32: HSA Integrated Science Assessment Practice Test
- MCPS Ex. 33: Student Transcript
- MCPS Ex. 34: AP Scores, 2017-2018, 2018-2019; Evidence of Learning Data; Reading Student Status Norms Chart
- MCPS Ex. 35: Curriculum 2.0 Algebra I Standards with Student's Algebra I Work Samples
- MCPS Ex. 36: Curriculum Science Standards with Student's Science Work Samples
- MCPS Ex. 37: Curriculum English 9A Writing and Language Standards with Student's Work Samples
- MCPS Ex. 38: Curriculum Grade 9 U.S. History and Common Core Social Studies Standards with Student's Work Samples
- MCPS Ex. 39: Qualitative Reading Inventory, 2017-2018 school year
- MCPS Ex. 40: Teacher Reports, 2016-2017 School Year, [REDACTED] Program
- MCPS Ex. 41: Progress Reports, 2016-2017 School Year, [REDACTED] Program
- MCPS Ex. 42: Student's Work Samples, 2016-2017 School Year, [REDACTED] Program
- MCPS Ex. 43: Secondary Transition High School Interview, 10/17/2016, [REDACTED] Program
- MCPS Ex. 44: Teacher Reports, 1/3/2019, [REDACTED] Program

- MCPS Ex. 45: Progress Reports, 2017-2018 School Year, [REDACTED] Program
- MCPS Ex. 46: Progress Reports, 2018-2019 School Year, [REDACTED] Program
- MCPS Ex. 47: MSDE Complaint Letter of Findings, 1/12/2017
- MCPS Ex. 48: Transition Authorization of Release of Information to DDA/SMRO, 8/23/2018
- MCPS Ex. 49: Transition Developmental Disabilities Administration Application for Eligibility, 8/23/2018
- MCPS Ex. 50: Secondary Transition High School Interview, 11/1/2017, 10/18/2018
- MCPS Ex. 51: Student's In-School Work Tasks, [REDACTED] High School
- MCPS Ex. 52: Resume – [REDACTED]
- MCPS Ex. 53: Resume – [REDACTED]
- MCPS Ex. 54: Resume – [REDACTED]
- MCPS Ex. 55: Resume – [REDACTED]
- MCPS Ex. 56: Resume – [REDACTED]
- MCPS Ex. 57: Resume – [REDACTED]
- MCPS Ex. 58: Resume – [REDACTED]
- MCPS Ex. 59: Resume – [REDACTED]
- MCPS Ex. 60: Resume – [REDACTED]
- MCPS Ex. 61: Resume – [REDACTED]
- MCPS Ex. 62: Resume – [REDACTED]
- MCPS Ex. 63: Resume – [REDACTED]
- MCPS Ex. 64: Emails between MCPS and Parent, 12/4/2019 -12/19/2019 re: IEP meeting scheduling
- MCPS Ex. 65: Emails between MCPS and Parent Attorney, 12/18/2019 – 12/22/2019 re: IEP meeting scheduling

- MCPS Ex. 66: Email from MCPS to Parent, 1/3/2020 re: invitation for 1/15/2020 IEP meeting
- MCPS Ex. 67: Emails between MCPS and Parent Attorney, 1/3/2020 – 1/8/2020 re: IEP meeting scheduling
- MCPS Ex. 68: Emails between MCPS and Parent Attorney, 1/3/2020 – 1/10/2020 re: IEP meeting scheduling
- MCPS Ex. 69: Letter from MCPS to Parent Attorney, 1/10/2020, encl. notices of invitation
- MCPS Ex. 70: Email from MCPS to Parent Attorney, 2/19/2020 re: 2/24/20 IPE meeting
- MCPS Ex. 71: Prior Written Notice for 2/24/20 IEP meeting
- MCPS Ex. 72: Alternate Appendix A—Participation and Checklist, 2/24/20
- MCPS Ex. 73: IEP, 2/24/20
- MCPS Ex. 74: Transcript
- MCPS Ex. 75: MCPS Secondary Transition High School Interview, 12/13/2019
- MCPS Ex. 76: Student’s In-School Work Tasks, [REDACTED] High School, 2019-2020 school year
- MCPS Ex. 77: MAP scores, ILT Grade Assessment (2019-2020), IR Lexile (3/9/2020)
- MCPS Ex. 78: English 10 Work Samples, 2019-2020 school year
- MCPS Ex. 79: Algebra Work Samples, 2019-2020 school year
- MCPS Ex. 80: OJT Work Samples, 2019-2020 school year
- MCPS Ex. 81: Foundations of Technology Work Samples, 2019-2020 school year
- MCPS Ex. 82: IEP Progress Report, 2/7/2020
- MCPS Ex. 83: SAT Score Report
- MCPS Ex. 84: [REDACTED] Psychological Evaluation, 1/28/2004, 2/15/2004

- MCPS Ex. 85: ██████████ Psychological Evaluation, 1/7/2009
- MCPS Ex 86: MCPS Psychological Evaluation Report, 10/24/2012
- MCPS Ex. 87: MCPS Psychological Evaluation Report, 11/16/2015
- MCPS Ex. 88: ██████████ Psychological Report, 8/9/2016
- MCPS Ex. 89: MCPS Psychological Re-evaluation Report, 7/9/2018
- MCPS Ex. 90: ██████████ Psychological Report, 12/14/2018
- MCPS Ex. 91: MCPS Educational Assessment, 11/9/2012
- MCPS Ex. 92: MCPS Educational Assessment, 11/11/2015
- MCPS Ex. 93: MCPS Educational Assessment, 6/18/2018
- MCPS Ex. 94: MCPS Speech and Language Report, 11/5/2015
- MCPS Ex. 95: MCPS Speech and Language Report, 6/18/2018
- MCPS EX. 96: Maryland Guidance for IEP Teams on Participation Decisions for the Alternate Assessments, July 1, 2017
- MCPS Ex. 97: Maryland Guidance for IEP Teams on Participation Decisions for the Alternate Assessments, April 1, 2019
- MCPS Ex. 98: Letter from ██████████ to MCPS, 9/28/2019
- MCPS Ex. 99: Letter from ██████████ to MCPS, 11/1/2019
- MCPS Ex. 100: Emails between Parent and ██████████, 1/17/2020
- MCPS Ex. 101: Emails from MCPS to Parent, 7/19/2018 – 11/6/2018
- MCPS Ex. 102: IEP Progress Notes, 4/29/2020
- MCPS Ex. 103: Transcript

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

- Parents Ex. 1: Request for Due Process, 1/17/20
- Parents Ex. 2: Observation Report by ██████████, 6/14/16
- Parents Ex. 3: Comprehensive Psychological Assessment Report by Dr. ██████████ 8/9/16

- Parents Ex. 4: Observation Report by [REDACTED], 11/16/16
- Parents Ex. 5: Reactions to Draft MCPS IEP by [REDACTED], 3/11/17
- Parents Ex. 6: Observation Report by [REDACTED], 11/8/17
- Parents Ex. 7: Psychological Assessment Report by Dr. [REDACTED], 12/14/18
- Parents Ex. 8: Administrative Law Judge Decision, 9/27/19
- Parents Ex. 9: Letter to Michael J. Eig, Esq. from Emily B. Rachlin, Esq. regarding referrals to the [REDACTED] and the [REDACTED], 10/23/19
- Parents Ex. 10: Letter to Michael J. Eig, Esq. from Emily B. Rachlin, Esq. refusing to make referral to [REDACTED], 11/15/19
- Parents Ex. 11: MCPS Secondary Transition High School Interview and Student Transcript, 12/13/19
- Parents Ex. 12: MCPS Secondary Teacher Reports, December 2019
- Parents Ex. 13: Letter to Michael J. Eig, Esq. from Emily B. Rachlin, Esq. regarding IEP meeting, 1/10/20
- Parents Ex. 14: Letter of Acceptance to Harbour, 1/17/20
- Parents Ex. 15: MCPS IEP Progress Reports, 1/25/19 to 1/24/20
- Parents Ex. 16: MCPS IEP, 2/24/20
- Parents Ex. 17: MCPS Alternate Appendix A: Participation Criteria and Checklist, 2/24/20
- Parents Ex. 18: MCPS Prior Written Notice, 2/26/20
- Parents Ex. 19: [REDACTED] Information
- Parents Ex. 20: [REDACTED] 2018 Graduate Outcome Survey
- Parents Ex. 21: Resume of [REDACTED]
- Parents Ex. 22: Resume of Dr. [REDACTED]
- Parents Ex. 23: MCPS IEP Progress Report on Goals, 5/5/20
- Parents Ex. 24: Email from parent enclosing MCPS final report card, 6/22/20

Parents Ex. 25: [REDACTED] Student Transcript, June 2020

Parents Ex. 26: Notes regarding conversation with [REDACTED] by [REDACTED]
[REDACTED], 6/26/20

Parents Ex. 27: Email from parent enclosing Student work samples, 7/14/20

Parents Ex. 28: Student Videos of Speech/Language Session and Science,
7/30/20 (NOT ADMITTED)

a. [REDACTED]

b. [REDACTED]
[REDACTED]

c. [REDACTED]
[REDACTED]

Parents Ex. 29: MCPS Report Card, June 2020