

█¹,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE JENNIFER A. NAPPIER,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH NO.: MSDE-MONT-OT-20-15904

DECISION

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STATEMENT OF THE CASE

On August 3, 2020, █¹ (Parent or Father), on behalf of his child, █ (Student), filed a Due Process Complaint (Complaint) against Montgomery County Public Schools (MCPS) with the Office of Administrative Hearings (OAH), requesting a hearing to review the provision of a free appropriate public education (FAPE) to the Student under the Individuals with Disabilities Education Act (IDEA or Act). 20 U.S.C.A. §§ 1415(b)(6)(A), 1415(f)(1)(A) (2017);² 34 C.F.R.

¹ █ is the Student's father and identified himself on the record. In this decision, I will use Parent and Father interchangeably to refer to █. The use of "Parents" shall refer to the Student's Mother (█) and Father, collectively.

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.

§§ 300.507(a)(1), 34 C.F.R. § 300.511(a) (2019);³ Md. Code Ann., Educ. § 8-413(d)(1) (2018);⁴ Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

The Complaint alleges that MCPS failed to provide the Student with a FAPE during the 2019-2020 school year, the Summer 2020 Extended School Year (ESY), and the 2020-2021 school year, by (1) failing to provide the Student with a 1:1 aide in his home during MCPS's suspension of in-person classroom instruction due to the COVID-19 pandemic; and (2) failing to provide the Student speech and occupational therapy, as provided for in the Student's individualized education program (IEP), for the 2019-2020 school year, the Summer 2020 ESY, and the 2020-2021 school year.

After the parties participated in an unsuccessful mediation session on September 24, 2020, I conducted a telephone pre-hearing conference (Conference) that afternoon. The Parent participated on behalf of the Student. Stacy Reid Swain, Esquire, participated on behalf of MCPS.

On October 1, 2020, I issued a Pre-Hearing Conference Report and Order, which set forth the matters discussed during the Conference. By agreement of the parties, the hearing on the merits was scheduled to span four days and be held on October 20 through October 23, 2020.

I held the hearing on October 20 through 23, October 29, November 13, and November 16, 2020.⁵ The Parent represented the Student. Stacy Reid Swain, Esquire, and Leslie Turner Percival, Esquire, represented MCPS.

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.

⁴ Unless otherwise noted, all citations to the Education Article of the Maryland Annotated Code are to the 2018 Replacement Volume.

⁵ On the original last scheduled day of hearing, October 23, 2020, the Parent had not yet completed the presentation of his case-in-chief. At that time MCPS requested that the matter be continued to allow both parties a fair opportunity to present their respective cases. After considering my schedule, as well as the schedule of counsel, the Parent, and necessary witnesses, I scheduled five additional days of hearing, including October 29 and November 13, 16, 20, and 23, 2020. However, the matter concluded on November 16, 2020.

In this matter, the mediation session was held outside of the thirty-day resolution period, which ended on September 2, 2020. Under the applicable law, a decision in this case normally would be due on Friday, November 6, 2020, which is the last business day within forty-five days of the September 24, 2020 mediation. 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Md. Code Ann., Educ. § 8-413(h); *see* COMAR 13A.05.01.15C(14). However, MCPS requested that the timelines for the hearing and the issuance of the decision be extended beyond the forty-five days set forth in 34 C.F.R. § 300.510, based upon Ms. Swain’s scheduling conflict and other scheduling considerations discussed during the Conference, which I will discuss further. 34 C.F.R. § 300.515(c); Md. Code Ann., Educ. § 8-413(h). The Parent did not object to MCPS’s request.

Taking into consideration COMAR 28.02.01.14, which requires that, to the extent practicable, requests for subpoenas for witnesses shall be filed with the OAH at least fifteen calendar days prior to the first day of the hearing, the earliest reasonably practicable date for OAH to commence the hearing was October 13, 2020.⁶ However, from October 13, 2020 through October 19, 2020, Ms. Swain was responsible for monitoring outside counsel representing MCPS in a previously-scheduled special education administrative hearing before the OAH. Therefore, the earliest reasonably practicable date for the OAH and the parties to commence the hearing in this matter was October 20, 2020.

Additionally, MCPS requested to extend the timeline for issuance of a decision to forty-five days after the close of the record and the Parent requested to extend the timeline for the issuance of the decision to thirty days after the close of the record. I determined that it was in the

⁶ Although I considered shortening the timeframe for the parties to request subpoenas from the OAH, I decided not to do so, in light of the delays that many people were experiencing in receiving mail delivered via the United States Postal Service.

best interest of the Student to grant the Parent's request for an extension of the IDEA timeline, allowing the decision to be issued within thirty days from the close of record (December 16, 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. 2020); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

Did the challenged actions by MCPS fail to meet the requirements of the law?

Specifically:

1. Whether MCPS failed to provide the Student a FAPE by failing to provide him with a 1:1 aide in his home during MCPS's suspension of in-person classroom instruction due to the COVID-19 pandemic, during the 2019-2020 school year, the Summer 2020 ESY, and the 2020-2021 school year.
2. Whether MCPS failed to provide the Student a FAPE by failing to provide the Student speech and occupational therapy, as provided for in the IEP, during MCPS's suspension of in-person classroom instruction due to the COVID-19 pandemic, during the 2019-2020 school year, the Summer 2020 ESY, and the 2020-2021 school year.
3. If the student was denied a FAPE, is he entitled to the relief sought in the Complaint or other appropriate relief?

SUMMARY OF THE EVIDENCE

Exhibits

An index of exhibits is attached to this decision as an Appendix.

Testimony⁷

The Parent presented the following witnesses:

- [REDACTED], Mother
- [REDACTED], [REDACTED] Elementary Special Education Teacher, admitted as an expert in Special Education
- [REDACTED], MCPS Speech-Language Pathologist, admitted as an expert in Speech Language Pathology
- [REDACTED], MCPS Itinerant Occupational Therapist, admitted as an expert in Occupational Therapy
- [REDACTED], Director II of the MCPS Department of Special Education Services, admitted as an expert in Special Education and Educational Administration (kindergarten through 12th grade)
- [REDACTED], [REDACTED] Elementary School Principal, admitted as an expert in Education and Administration

MCPS presented the following witnesses:

- [REDACTED], Mother
- [REDACTED], [REDACTED] Elementary Special Education Teacher, admitted as an expert in Special Education
- [REDACTED], MCPS Speech Language Pathologist, admitted as an expert in Speech Language Pathology

⁷ All expert witnesses were accepted either upon stipulation of the parties as to the witness' expertise in his or her respective field of study or qualified upon a satisfactory examination of the witness' education, credentialing, and experience. *See, e.g., Univ. of Md. Med. Sys. Corp. v. Waldt*, 411 Md. 207, 237 (2009) (determination whether proposed expert has sufficient training, knowledge or skill to render expert opinion is committed to the sound discretion of the judge); *Massie v. State*, 349 Md. 834, 850-51 (1998) (citations omitted) (A judge may determine that a witness is sufficiently familiar with the subject matter to render an expert opinion based on "the witness's formal education, professional training, personal observations, and actual experience.").

- [REDACTED], MCPS Itinerant Occupational Therapist, admitted as an expert in Occupational Therapy
- [REDACTED], Director II of the MCPS Department of Special Education Services, admitted as an expert in Special Education and Educational Administration (kindergarten through 12th grade)
- [REDACTED], [REDACTED] Elementary School Principal, admitted as an expert in Education and Administration
- [REDACTED], MCPS Autism Program Specialist, admitted as an expert in Autism Spectrum Disorder, Instructional and Behavioral Strategies related to students identified with a disability of autism, and Special Education
- [REDACTED], [REDACTED] Elementary Special Education Teacher, admitted as an expert in Special Education
- [REDACTED], Ed.D., Supervisor of the MCPS Department of Special Education Services, admitted as an expert in Special Education and Instructional and Curriculum Development

FINDINGS OF FACT

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

The Student

1. The Student is a ten-year-old boy who was diagnosed with Autism Spectrum Disorder at the age of three.
2. The Student's Autism Spectrum Disorder is in the moderate to severe category.
3. The Student's cognitive ability is below that of his same-aged peers. He has difficulty with receptive, expressive, and pragmatic language, including concept development, vocabulary, and use of language for various communicative functions. He also has difficulty with attention, reading, math, written language, social skills, adaptive behavior, fine motor skills, and self-help skills.

4. The Student benefits from a highly structured classroom that is language enriched with clear expectations.

5. Within the school setting, the Student requires a great deal of support in order to help with his attention, understanding of task demands, attentional/behavioral regulation and frustration tolerance.

6. The Student needs 1:1 adult support throughout the school day to follow the daily classroom routine. He has difficulty initiating and sustaining attention, which makes it more difficult for him to focus on instruction and resist distractions, and needs significant support throughout the school day to help address his academic needs, adaptive skills, and behavior.

7. The Student's ability to focus is much better in the home environment.

8. The Student requires reduced distractions in order to keep him engaged and on task. He benefits from frequent breaks to help maintain his attention and motivation during instruction.

9. The Student benefits from significant adaptations and modifications to the curriculum, as well as behavioral, self-help, and social support.

10. The Student responds very well to praise and encouragement.

11. The Student requires adult support for breaking down instruction, assisting with task engagement, and redirecting him back to the task. He also requires adult facilitation to model appropriate interactions with peers, to keep him in his assigned area, and to provide him with a high level of reinforcement.

12. The Student's behavior impacts his ability to access and engage in instruction.

His problem behaviors include vocalization,⁸ eloping,⁹ touching others, and tantrums lasting for more than three to five minutes.

13. The Student's most recent functional behavioral assessment (FBA) was completed in March of 2020. As a result of that FBA, the following replacement behaviors were developed for the Student:

- For vocalization, the Student will verbalize, and/or use picture symbols or a voice output device (VOD) to request a sensory movement break, item or activity, protest by saying "no thank you," or request help from adults without touching or grabbing.
- For eloping, the Student will appropriately make a request by verbalizing and/or using picture symbols or a VOD to request a sensory movement break, item, or activity, or ask an adult for help before leaving the immediate area.
- For touching others and tantrums, the Student will verbalize, and/or use picture symbols or a VOD to request a sensory movement break, item or activity, and protest by saying "no thank you," or request help from adults.

14. The FBA set forth the following strategies for preventing the Student's problem behaviors:

- Providing access to NCR¹⁰ when engaging in alternative behaviors such as following directions and/or familiar routines
- Frequent and specific verbal praise
- Use of a visual schedule
- Use of a choice board/tangibles on the back of the visual schedule
- Use of visual cues, such as a break card
- Sensory breaks at least two times per day
- Planned ignoring of low level behaviors (such as placing hands in other people's faces)

⁸ Yelling and screaming. MCPS Ex. 5 at p. 2.

⁹ Leaving the area without adult permission. MCPS Ex. 5 at p. 31.

¹⁰ Non-contingent reinforcement.

15. The FBA set forth the following strategies to teach/increase replacement

behaviors:

- Providing tangible positive reinforcement paired with specific verbal praise, which consists of allowing the Student to choose a preferred activity/reward/tangible; during instruction, providing reinforcement paired with positive statement (i.e. “I like how you’re sitting quietly”) when the Student is showing desirable behavior.
- Increasing opportunities for requesting and refusing things using pictures, words, and/or a VOD for two thirty-minute sessions per day (a.m. and p.m.).
- Providing regular access to visual cues such as break cards, choice boards/reinforcement, rule reminders, and schedules.
- Increasing sensory input schedule (recommended minimum two times per day).

16. The FBA sets forth the following responses to be used by MCPS staff when the

Student engages in problem behaviors:

- When the Student engages in vocalizations, prompt him to be quiet by saying “quiet” while five second counting and immediately ask him “what do you want?” allowing him to make requests using his choice board or words. Only accept the request when the Student has been calm for five seconds. Deliver the item, if appropriate.
- When the Student elopes, offer him a break every five minutes and prompt a request for break by having the Student point to break card and say “break.” Offer brief sensory activity (music movement, walk, etc.).
- When the Student engages in touching or attempts to touch, ignore the behavior by refraining from saying his name, providing eye contact, or saying anything about the behavior. Redirect the Student back to the task. After he engages in an attempted work-related response, then ask him “what do you want?” Provide him with the desired request if appropriate. Use first/then statements if the request is delayed.
- When the Student has a tantrum, ask him one time “what do you want?” with the choice board in front of him. If the tantrum continues, redirect him using the compliance protocol, by saying “do this” in a neutral tone of voice while demonstrating each of the following actions: touching your head, clapping your hands, and touch your nose. If the Student becomes calm, present the token board and ask “what do you want?” If he makes a request, deliver the item with a verbal model and then praise (i.e., I want an eraser. Great job telling me you want an eraser.) If the tantrum continues, continue with the compliance protocol until he demonstrates calm behavior and makes a request.

The 2019-2020 School Year (3rd Grade)

17. During the 2019-2020 school year, the Student was a third-grade student at [REDACTED] Elementary School (School) in Montgomery County, Maryland. He was enrolled in the School's [REDACTED], a special education program primarily for students with autism.

18. The Student received related services to help him meet his educational goals, including occupational therapy and speech therapy.

19. During in-person instruction, the Student received thirty minutes of occupational therapy, six times per month. His occupational therapy goals addressed educational needs in the area of improving fine motor/visual perceptual skills and the use of sensory strategies for improving participation. The Student's 1:1 aide attended occupational therapy with the Student, but remained outside of the room, unless needed, to encourage the Student's independence.

20. The Student participated in a structured movement program two times per day and responded well to vestibular and proprioceptive input for calming and organizing. He also needed the use of a compression vest.

21. The Student required the assistance a 1:1 aide throughout the day, including during classroom instruction, lunch, recess, and school transitions, and to provide behavioral support.

22. The Student's most recent occupational therapy evaluation was completed on March 5, 2020 by MCPS occupational therapist, [REDACTED]. At that time, the Student needed 1:1 adult support to follow his daily classroom routine. His ability to stay in his seat had improved, such that he remained in the designated space for the duration of his fine-motor and visual-motor activities in both individual and large group sessions.

23. As of March 2020, the Student had demonstrated improved ability to use tools such as pencils, crayons, and scissors. The Student was also able to form all upper and lowercase letters and numbers in a legible manner, could copy sentences, and spaced letters well.

24. As of March 2020, given verbal cues, the Student was able to log into the computer and access documents, apps, or extensions. He was also able to find letters and numbers to type and type three to four sentences, but needed cues to use both index fingers when typing. Additionally, when provided with a word bank, the Student could build a sentence using a mouse in a functional manner.

25. As of March 2020, the Student needed writing prompts, sentence starters, word banks, and adult support to engage in the writing process (i.e. generate ideas, put ideas on paper, and attend to the mechanics of writing).

26. In the March 5, 2020 occupational therapy evaluation, Ms [REDACTED] concluded that the Student would benefit from continued occupational therapy services to focus on sensory strategies for calming and organizing, and to focus on the ability to complete written work, either by writing or using technological tools. She recommended that the Student continue occupational services to focus on improving fine and visual motor skills with the goal of improving tool grasp and control for classroom activities and to improve his ability to complete written assignments. She also found that he would benefit from sensory strategies to improve participation in classroom activities and routines.

27. During in-person instruction, the Student received thirty minutes of speech therapy six times per month. The speech therapy was directed towards improving basic conversation skills, producing completed three to five-word sentences, and answering “who,” “what,” “where,” and “when” questions (WH questions) about stories and personal information.

28. The Student's most recent speech-language evaluation was completed on March 9, 2020 by speech-language pathologist [REDACTED]. At that time the Student was making slow, inconsistent progress towards achieving his goals. However, the Student was using the following strategies to work successfully toward achieving his goals: visuals displaying rules/expected behavior, reviewed frequently throughout the session; verbal cues and reminders to follow displayed rules; frequent reward opportunities/breaks during the thirty-minute therapy sessions; and support of a 1:1 aide to manage his behavior.

29. As of March 2020, the Student could functionally communicate his needs in a classroom environment.

30. As of March 2020, the Student continued to require significant modeling, prompting, cueing, and redirection back to current tasks. He also required frequent, structured, modeled language lessons to demonstrate understanding or appropriate production of language. The Student's use of grammatically correct sentences appeared to be dependent on modeling and frequent opportunities to practice.

31. As of March 2020, the student's ability to answer simple, repeated-exposure WH questions also required direct modeling of answers.

32. In the March 9, 2020 Speech-Language Status Report, Ms. [REDACTED] noted that the Student's pragmatic skills had emerged over the past IEP year, but they also continued to require moderate to significant modeling, prompting, and cueing in order for the Student to use them appropriately. Ms. [REDACTED] recommended that the Student continue speech therapy to address goals in the areas of expressive, receptive, and pragmatic language.

The Spring 2020 Semester

33. On March 12, 2020, the Maryland State Superintendent of Schools announced the temporary closure of Maryland public schools from Monday, March 16, 2020 through Friday, March 27, 2020, as a result of the COVID-19 pandemic. During this time, no classes were held at any MCPS school.

34. On March 13, 2020, [REDACTED], the [REDACTED] Coordinator, emailed the Parents to let them know that the school would be in touch to reschedule the Student's re-evaluation meeting as soon as possible. She asked that the Parents let her know if they had any questions.

35. On March 25, 2020, the State Superintendent of Schools announced that school buildings would remain closed through at least April 24, 2020 and MSDE directed Maryland's local school systems to develop "Continuity of Learning Plans" to provide alternative forms of education for students during the extended school closure through distance learning.

36. On March 31, 2020, the Father emailed the following individuals to inquire about the Student's Continuity of Learning Plan: Ms. [REDACTED]; School Principal, [REDACTED]; MCPS Autism Program Specialist, [REDACTED]; and the Student's third-grade classroom teacher, [REDACTED].

37. Ms. [REDACTED] emailed the Parents on April 1, 2020. She notified the Parents that the first virtual class meeting would be held on April 2, 2020 at 10:30 a.m., using the Zoom videoconferencing platform and provided a link and information necessary to access the Zoom class meeting. In addition, Ms. [REDACTED] provided the Parents the Student's MYMCPS/Google classroom login information, which could be used to access lessons. Ms. [REDACTED] also informed the Parents that during the week, she would be offering "virtual office hours" to answer questions related to the Student's lessons and follow-up on the Student's individual needs. The

virtual office hours were Monday, Wednesday, and Friday from 9:30 a.m. to 10:30 a.m., and Tuesday and Thursday from 3:00 p.m. to 4:00 p.m. Ms. [REDACTED] invited the Parents to contact her with any questions and provided a link to a website containing a variety of parent supports and additional student resources. She explicitly stated that the site was only intended as a resource and was not “an expectation for instruction.” She also said that MCPS staff would be contacting the Parents regularly throughout the weeks to come, and would be available to communicate via phone, Google Chat, email, or videoconferencing platforms. She added that the school would let them know guidance about the rescheduling of IEP meetings, assessments, etc., as soon as the guidance was made clear.

38. On April 1, 2020, the Parents responded to Ms. [REDACTED]’s email, stating that the information provided was too general and that they had a lot of questions, including questions about how Ms. [REDACTED] was going to facilitate the children’s attention in the virtual classroom. The Parents also asked if they would receive any printed materials to work with. They also copied Mr. [REDACTED] and Ms. [REDACTED] on the email.

39. On April 1, 2020, Ms. [REDACTED] emailed the Parents to schedule a phone call for April 8, 2020 to speak about the plan for addressing the Student’s ability to access learning materials during the Continuity of Learning. That day the Mother agreed to the suggested time for the call.

40. On April 2, 2020, Ms. [REDACTED] responded to the Parents’ April 1, 2020 email, explaining that the goal for teachers was to contact parents on April 1st with the time of their class meeting on April 2nd. She also indicated she wanted to schedule a phone call with the Parents on April 2nd and encouraged the Parents to sign up for a time during office hours to receive more information about the Student’s lessons.

41. Ms. [REDACTED] sent the Parents a second email on April 2, 2020, to update the instructions for logging into the Zoom class meeting.

42. After school resumed on April 2, 2020, the Student only attended eight virtual learning classes during the remainder of the 2019-2020 school year because the Parents did not make alternative arrangements to make the Student available for distance learning when his classes conflicted with their schedules. The Student did not attend virtual class on April 2, 3, 20, 22, 23, 30, and May 4 and 7, 2020.

43. During the first week of distance learning, the Student participated in at least one virtual class meeting, during which he participated and answered questions.

44. On April 7, 2020, Ms. [REDACTED] emailed the Parents to ask how the Student's communication had been going at home. She also asked if she could participate in the April 8, 2020 call with Ms. [REDACTED], so she could talk about the ways she felt she could best support the Student and his family during distance learning.

45. On April 8, 2020, Ms. [REDACTED] and Ms. [REDACTED] spoke with the Mother to discuss the options available to them as related service providers to continue providing the Student services. During that phone conversation, the Mother indicated that the Zoom sessions were not working and, instead, she preferred to receive the related services through biweekly email communication which would contain materials that would continue to support the Student's language and communications.

46. During the April 8, 2020 telephone conference, the Mother and Ms. [REDACTED] agreed that Ms. [REDACTED] would send the Parents biweekly emails related to practice strategies for fine/visual motor skills as well as sensory strategies for calming at home to support current IEP goals for classroom tool use and participation.

47. From April 21, 2020 through June 11, 2020, Ms. [REDACTED] sent the Mother regular biweekly emails to support the current OT goal for written output, bilateral coordination, and self-regulation needs.

48. During the April 8, 2020 telephone conference, the Mother and Ms. [REDACTED] agreed that Ms. [REDACTED] would send the Parents biweekly emails to related to communication strategies, as well as visual supports for home.

49. Ms. [REDACTED] and Ms. [REDACTED] attended the Zoom classroom sessions for Ms. [REDACTED]'s class on at least a weekly basis, so that they could provide speech therapy and occupational therapy for students in the class.

50. On April 14, 2020, Ms. [REDACTED], who was also the case manager for the Student's IEP, emailed the Parents regarding the development of an individualized distance learning plan (IDLDP) for the Student, which would reflect how the Student would be provided the special education and related services identified in the IEP to the maximum extent appropriate to access the new curriculum through distance learning. She asked to schedule a date and time to discuss the IDLP with the Parents and stated that she would send a copy of a proposed IDLP for the Student. She explained that the proposed IDLP would include the goals, services, accommodations, and supplementary aids and services from the Student's IEP that would be provided.

51. On April 17, 2020 Ms. [REDACTED] spoke with the Parents regarding the development of the IDLP. They reviewed the Student's current needs with regard to how his IEP would be implemented consistent with the need to protect the health and safety of students with disabilities. The Parents agreed that the Student's reading comprehension and math problem solving goals would be implemented during distance learning, with the Student receiving math

instruction three times per week and reading instruction twice per week. In addition, the Student would have a weekly morning meeting. It was agreed that the Student's frequent breaks and extended time accommodations would be implemented during this time; and that the Student's supplementary aids and services would be implemented through the following means during distance learning: checking for understanding; frequent and/or immediate feedback; visual cues; repetition of directions; alternative ways to demonstrate learning; comprehension checks after reading each page of a book; having the Student repeat directions to support comprehension; opportunities to use technology for written output; encouraging/reinforcing appropriate behavior in academic and non-academic settings; modeling; the use of sentence starters/visual support for sentence formulation; written comprehension questions; wait time; breaking down assignments into smaller units; and the use of social stories. Additionally, the Parents agreed that if the Student needed behavior management, consultation and coaching for the Parents would occur during virtual office hours.

52. During Ms. [REDACTED]'s April 17, 2020 teleconference with the Parents, the Parents expressed that they did not know how often the Student could get online because of their busy schedules and requested a modified packet of materials to complete with the Student. MCPS responded with modified work online that supports the online continuation of learning and support during live meetings from a paraeducator and breakout rooms, when possible.

53. On April 17, 2020, Ms. [REDACTED] sent the Parents an email, asking for an update on the Student's progress at home. She attached to her email some materials for the Student to use at home for his speech, including a "snack mat" to help him make requests and two Core Vocab Boards to support his communication and help the Parents converse with him. The Student was familiar with the Core Vocab Boards, as he had used them with Ms. [REDACTED] during their speech

therapy sessions. She also provided the Parents an Earth Day scavenger hunt activity the Student could do outside to have fun and talk about nature, as well as reading comprehension stories, with the instruction to read each one at least two to three times before attempting the questions, and a suggestion to focus on one story per week. Ms. [REDACTED] asked that the Parents let her know how the materials worked and she said she would send more or different ones as she found more that were appropriate for the Student.

54. The Student attended class via Zoom on April 20, 2020. That day, Ms. [REDACTED] observed the Student while he participated in class.

55. On April 20, 2020, the Mother responded to Ms. [REDACTED]'s April 17, 2020 email, saying that the schedule was working okay and they were getting things done. She also said that the Student's spontaneous speech was "coming along."

56. On April 20, 2020, the Father emailed Ms. [REDACTED], thanking her for the materials. He said that the reading comprehension was very helpful and requested more reading comprehension materials.

57. On April 21, 2020, Ms. [REDACTED] responded to the Father's April 20, 2020 email and said she would include more reading comprehension materials in the Student's weekly upload of resources and materials.

58. On April 21, 2020, Ms. [REDACTED] emailed the Mother resources and informed her that he had access to the typing club app on his student account, and he could use it to practice typing.

59. On April 24, 2020, Ms. [REDACTED] emailed the Parents to see how they felt the week went for the Student and confirm they were in agreement with the IDLP. She attached a copy of the IDLP for their review.

60. On April 27, 2020, the Parents received prior written notice (PWN) related to their April 17, 2020 conversation with Ms. [REDACTED] and the IDLP. It states that the “Parents want a modified packet to complete with [the Student]. MCPS responded with modified work online that supports the online continuation of learning and support during live meetings with a para[educator] and breakout rooms when possible.”

61. On April 30, 2020, Ms. [REDACTED] emailed the Mother and reminded her that she joined Ms. [REDACTED]’s virtual classroom on Tuesday mornings.

62. Ms. [REDACTED] began maternity leave in late-April 2020 and was temporarily replaced by speech pathologist [REDACTED].

63. On May 6, 2020, Mr. [REDACTED] sent a mass email to the parents and guardians of the [REDACTED] students, to inform them that Ms. [REDACTED] would be serving as the speech-language pathologist for the [REDACTED] during Ms. [REDACTED]’s maternity leave. He also provided them Ms. [REDACTED]’s email address.

64. On May 11, 2020, the IEP team, including the Parents, participated in an IEP meeting.

65. On May 19, 2020, the Father emailed Mr [REDACTED], stating that the Parents did not feel comfortable having Ms. [REDACTED] provide the Student instruction for the remainder of the school year or the 2020-2021 school year, due to the school psychologist’s statement in a March 9, 2020 Psychological Evaluation Report that the Student appeared “extremely frustrated, stressed, and rather unhappy within the classroom.”

66. On May 19, 2020, Mr. [REDACTED] responded to the Father’s email, explaining that the School does not accept requests for certain teachers to instruct or not instruct a student because the School cannot grant that type of request. He further stated that the School ensures

that all teachers meet the six performance standards set forth in the MCPS Teacher Professional Growth System.

67. On May 20, 2020, the Parent replied to Mr. [REDACTED]'s email, renewing the Parents' request for a change in teacher and asking for information for appealing the decision not to consider the Parents' request for a change in teacher.

68. On May 29, 2020, the Mother responded to Ms. [REDACTED]'s biweekly emails and reported that the Student had been doing better with his handwriting and was doing great with spelling. She attached a photo of his handwriting.

69. On June 10, 2020, Ms. [REDACTED] emailed the Parents to inform them that she was back from maternity leave. Ms. [REDACTED] also attached a new set of speech-language materials for the Student and asked for an update on the Student's progress.

70. On June 11, 2020, Ms. [REDACTED] emailed the Mother to check to see if she needed any additional resources to support the Student's occupational therapy needs during summer or if there were questions about the resources she had sent. She asked that the Parents continue to work on letter and number formation, writing, and typing sentences with the Student. She also stated that the Student would benefit from heavy work activities for calming and organizing.

The May 11, 2020 IEP

71. On May 11, 2020, the IEP team, including the Parents, met virtually to develop the Student's IEP for the 2020-2021 School Year.

72. The IEP team determined that the Student's primary disability remained autism, which affected the areas of math calculation, math problem solving, reading comprehension, speech and language expressive language, speech and language pragmatics, speech and language receptive language, written language expression, self-help, self-management, social interaction skills, and fine/visual motor skills.

73. The May 11, 2020 IEP contains annual goals and objectives to address the Student's academic deficits, including deficits in communication, reading, math, written language and behavior, which are goals related to critical life skills. The Student's annual goals and objectives also address his communication skills and fine/visual motor skills.

74. The May 11, 2020 IEP contains accommodations to assist the Student in obtaining his goals and address his difficulty attending to and staying on task. His accommodations include a human reader and scribe, frequent breaks, use of a calculation device/mathematics tools, monitored responses and extended time.

75. The IEP noted that the Student has behaviors that interfere with his accessing instruction. His most recent FBA and Behavioral Intervention Plan were attached to the IEP.

76. The IEP provides that the occupational therapist will consult with school staff about strategies/accommodations to support written output, such as adapted materials (graph paper, smaller writing utensils, etc.).

77. The IEP provided that the Student was to attend lunch and recess with close adult supervision.

78. The IEP provided for six thirty-minute sessions of occupational therapy per month.

79. The IEP provided for six thirty-minute sessions of speech/language therapy per month.

80. The May 11, 2020 IEP noted that there is a likely chance of substantial regression in critical life skills caused by the normal school break and a failure to recover those lost skills in a reasonable time. However, it also noted that no regression had occurred over school breaks and long weekends.

81. The IEP team determined that the Student was eligible for ESY services due to his goals related to critical life skills.

82. The IEP provided for one thirty-minute session of speech therapy per week from July 8, 2020 through July 31, 2020 (the Summer 2020 ESY).

83. The IEP did not provide for occupational therapy during the Summer 2020 ESY.

84. The IEP team also recommended that the Student participate in an alternative learning outcomes (ALO), but the parents disagreed with the recommendation and refused to sign consent for an ALO. As a result, the May 11, 2020 IEP did not include an ALO.

The Summer 2020 ESY

85. The purpose of ESY services is to provide eligible students with services to address specific areas of the IEP during extended periods of time that school is not in session, such as the summer months, in an attempt to ensure these students maintain the skills they achieved during the regular school years.

86. On June 1, 2020, Mr. [REDACTED] sent an email to the parents/guardians of students in the [REDACTED], informing them that the school needed to collect information for the ESY

to be sure that everyone who was qualified was enrolled. He asked that the parents/guardians contact Ms. [REDACTED] regarding the requested information, including a statement of whether the parent/guardian would be accepting or declining Summer 2020 ESY services.

87. On June 11, 2020, Mr. [REDACTED] sent another email to the parents/guardians of students in the [REDACTED], asking that they take a survey to assist the school in tailoring learning opportunities to meet the parents'/guardians' needs.

88. The Summer 2020 ESY program was held from July 13, 2020 through August 7, 2020 and was only offered through distance learning, as a result of the ongoing COVID-19 pandemic and the continued closure of MCPS's buildings.

89. On June 30, 2020, [REDACTED] the supervisor of MCPS's Resolution and Compliance Unit, emailed the Parents information regarding the Summer 2020 ESY. She informed them of the dates for the ESY session and that daily instruction would take place from 9:30 a.m. to 12:30 p.m. She also included a proposed schedule in her email.

90. On July 10, 2020, Ms. [REDACTED] sent the Parents an email with the Student's proposed IDLP for the Summer 2020 ESY, the ESY schedule, and the link for the class. She also requested that the Parents inform her if they did not agree with the IDLP and if so, that they provide her with two dates and times that they are available to discuss the IDLP.

91. On July 13, 2020, [REDACTED], Director II of the MCPS Department of Special Education Services, emailed the Father to inform him that in light of the Parents' request for a change in the Student's assigned ESY classroom teacher, the Student would be serviced in the ESY Program's fifth grade classroom, which was taught by [REDACTED].

92. In a follow-up email to the Parents on July 14, 2020, Mr. [REDACTED] explained that placing the Student in Ms. [REDACTED]' class was the only way the School was able to accommodate

the Parents’ request for a different ESY teacher. He further stated that the Student’s instruction would be modified to meet the goals described on the IEP.

93. On July 14, 2020, Mrs. [REDACTED] emailed the Parents to introduce herself. She provided them with the ESY class schedule, the link to her Zoom class meeting, and the proposed IDLP. Mrs. [REDACTED] asked that they let her know if they agreed to the proposed plan.

94. On July 14, 2020, the Father responded that the Parents disagreed with the proposed IDLP for ESY because some of the proposed supplementary aids and services to be implemented could not be implemented in the Zoom class environment and the accommodations that were usually provided by an aide were not discussed in the proposed plan. He also asked for an explanation of how the Student would access third-grade instruction in the fifth-grade class.

95. The Parents enrolled the Student in the 2020 ESY program on July 15, 2020.

96. The ESY schedule was Monday through Friday, from 9:30 a.m. to 12:45 pm, as follows:

	Monday	Tuesday	Wednesday	Thursday	Friday
9:30 a.m. - 9:50 a.m.	Morning Meeting	Morning Meeting	Morning Meeting	Morning Meeting	Morning Meeting
10:00 a.m. - 10:20 a.m.	Read-Aloud	Read-Aloud	Social-Emotional learning	Read-Aloud	Read-Aloud
10:30 a.m. - 10:50 a.m.	Small Group 1 (Focus Skill Comprehension)	Small Group 1 (Focus Skill Comprehension)	Office Hours	Small Group 1 (Focus Skill Word Problems)	Small Group 1 (Focus Skill Word Problems)
11:00 a.m. - 11:20 a.m.	Small Group 2 (Focus Skill Text Features)	Small Group 2 (Focus Skill Text Features)	Office Hours	Small Group 2 (Focus Skill Money)	Small Group 2 (Focus Skill Money/Decimals)
11:30 a.m. - 11:50 a.m.	Small Group 3 (Focus Skill Sequencing)	Small Group 3 (Focus Skill Word Work)	Office Hours	Small Group 3 (Focus Skill Sorting Objects)	Small Group 3 (Focus Skill Graphs)
12:00 p.m. - 12:45 p.m.	Planning	Planning	Planning	Planning	Planning

97. A speech pathologist, [REDACTED], was available during Mrs. [REDACTED]'s class to provide students speech therapy in a separate breakout room.

98. On July 15, 2020, Ms. [REDACTED] emailed the Parents and provided them with the speech therapy Zoom links.

99. On July 16, 2020, Ms. [REDACTED] emailed the Father to remind him of the July 17th speech therapy session.

100. On July 17, 2020, after the Student missed that morning's speech therapy session, Ms. [REDACTED] attempted to call the Mother, but was unable to reach her. She then called the Father who answered the phone. After Ms. [REDACTED] introduced herself, the Father began yelling at her for contacting him, stated "we need to communicate better" and that the person who assigned the Student to her knows the Student's situation. When Ms. [REDACTED] told the Father she was calling to see if they could schedule another time for the Student's speech therapy sessions, the Father started yelling again and told Ms. [REDACTED] that she should not be calling him and should speak to the person that knows the situation. When she asked who she needed to speak with, he responded that she should speak to Mrs. [REDACTED] and the coordinator. Ms. [REDACTED] tried to explain that she had emailed the Father twice about the July 17th speech therapy session, but the Father continued to yell and said that the Student was not attending ESY, he had spoken to Mr. [REDACTED], and there was a meeting scheduled about certain issues. The Father instructed Ms. [REDACTED] not to contact him and hung up her.

101. On July 30, 2020, Ms. [REDACTED] emailed the Father to send a new email reminder with the Zoom link for the July 31, 2020 speech therapy session.

102. The Student never attended the virtual ESY classes.

103. Had the Student attended the 2020 Summer ESY, MCPS was prepared to offer the Student virtual speech therapy sessions on July 17, 24, and 31, and August 7, 2020.

The July 23, 2020 IEP Meeting

104. On July 15, 2020, the Parents emailed a letter to Mr. [REDACTED], stating that they had serious concerns about the proposed IDLP that they wished to have addressed. The Parents asserted that (1) the Student does not understand distance learning and does not respond well to it; (2) he is not able to access the online instruction by himself because he had an adult support at all times during in-person learning; (3) the time of the online instruction conflicted with the Parents' work schedule; and (4) the Student had not received speech or occupational therapy over the past three months to help him access instruction. The Parents stated that the Student was giving up on school and himself. They further stated that if MCPS could not send a 1:1 aide to the Parents' home to support the child due to the COVID-19 pandemic, they could hire an aide to assist the Student in their home, at MCPS's expense.

105. In response to the Parents' July 15, 2020 letter, an IEP meeting was scheduled for July 23, 2020.

106. On July 23, 2020, the IEP team, including the Parents, participated in a virtual IEP meeting.

107. During the IEP meeting the IEP team reviewed the hours for the ESY IDLP, reviewed the Student's reading comprehension and math problem solving goals, and the concerns outlined in the Parents' July 15, 2020 letter.

108. The Parents did not express disagreement with the ESY IDLP and the reading comprehension and math problem solving goals.

109. During the IEP meeting, the Parents stated that the Student is unable to access online instruction without 1:1 support. They also explained that the ESY schedule conflicted with their work schedules. They requested that MCPS pay for an aide to come to their home to assist the Student during the school day.

110. MCPS staff on the IEP team informed the Parents that students were able to access recorded instruction at a later time when they were unable to participate in live classes.

111. MCPS refused the Parent's request for an aide in their home due to the national health crisis and pandemic that caused all MCPS's class instruction to be provided virtually to all of its students.

112. The Parents abruptly exited the virtual meeting without allowing MCPS to explain how the 1:1 aide would be provided virtually.

113. On July 27, 2020, the Parents were given PWN, stating that the IDLP would remain in place during the Continuity of Learning and that the IEP would be implemented when schools reopen.

114. ESY services during distance learning were to include math instruction twice per week, reading instruction twice per week, a weekly morning meeting, and office hours available to the students and parents. The Parents did not express disagreement.

115. The Parents were given self-paced instruction that the Student could complete when he was unable to attend the live Zoom class meetings.

2020-2021 School Year (4th Grade)

116. The 2020-2021 school year commenced on August 31, 2020. As a result of the COVID-19 pandemic, MCPS has not yet reopened its schools and continues to only offer distance learning.

117. The Student was assigned to Mrs. [REDACTED], combined fourth and fifth grade class for the 2020-2021 school year.

118. On September 11, 2020, Mrs. [REDACTED] emailed the Parents the Student's class schedule. His classes are held Monday through Friday, from 8:45 a.m. to 4:00 p.m., on the following schedule:

	Monday	Tuesday	Wednesday	Thursday	Friday
8:45 a.m. - 9:00 a.m.	Log on and gather materials	Log on and gather materials	Log on and gather materials	Log on and gather materials	Log on and gather materials
9:00 a.m. - 9:10 a.m.	Morning Meeting/SEL	Morning Meeting/SEL	Morning Meeting/SEL	Music 9:00-9:45	Morning Meeting/SEL
9:10 a.m. - 10:40 a.m.	Math	Math	Math and OT (9:10 a.m. - 10:20 a.m.)	9:45-10 Break 10:00 Math	Math
10:40 a.m. - 11:30 a.m.	Reading	Reading	Reading & Speech (10:20 a.m.- 11:30 a.m.)	Math	Reading
11:30 a.m. - 1:00 p.m.	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH
1:00 p.m. - 1:45 p.m.	PE	Reading	FLEX TIME	Reading *OT	Art
1:45 p.m. - 2:00 p.m.	Break	Break		Break	Break
2:00 p.m. - 2:30 p.m.	Reading & *Speech	Science/Social Studies		Reading	Reading
2:30 p.m. - 3:10 p.m.	FLEX TIME	FLEX TIME		Science/ Social Studies	FLEX TIME
3:10 p.m. - 4:00 p.m.				FLEX TIME	

119. As of November 16, 2020, the Student had not attended any of the virtual learning classes for the 2020–2021 school year.

DISCUSSION¹¹

BURDEN OF PROOF

As the party seeking relief, the Student bears the burden of proof to show by a preponderance of the evidence that the challenged actions by MCPS did not meet the requirements of the law. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); 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). “In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your mind [] a belief that it is more likely true than not true.” *Coleman*, 369 Md. at 125 n.16. Under this standard, if the supporting and opposing evidence is evenly balanced¹² on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.*; see *Schaffer*, 546 U.S. at 56-58.

For the reasons set forth below, I find the Student has failed to meet his burden.

LEGAL FRAMEWORK

The IDEA governs the identification, assessment, and placement of students in special education. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., Educ. §§ 8-401

¹¹ My findings, analysis, and legal conclusions are based upon consideration of all of the parties’ arguments and the credible evidence of record. All testimonial and documentary evidence was considered and given the weight it was due, regardless of whether it has been recited, cited, referenced, or expressly set forth in the Decision. See, e.g., *Walker v. Sec’y of Health & Human Servs.*, 884 F.2d 241, 245 (6th Cir. 1989) (an administrative law judge need not address every piece of evidence in the record); *Mid-Atl. Power Supply Ass’n v. Md. Pub. Serv. Comm’n*, 143 Md. App. 419, 442 (2002) (emphasizing that “[t]he Commission was free to accept or reject any witness’s testimony” and “the mere failure of the Commission to mention a witness’s testimony” does not mean that the Commission “did not consider that witness’s testimony”).

¹² This is a rare outcome in a case under the IDEA, as Justice O’Connor observed for the Court. “In truth . . . very few cases will be in evidentiary equipoise.” *Schaffer*, 546 U.S. at 58.

through 8-417; and COMAR 13A.05.01. The IDEA requires “that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); *see also* Md. Code Ann., Educ. § 8-403; 34 C.F.R. § 300.101(a).

To be eligible for special education and related services under the IDEA, a student must meet the definition of a “child with a disability” as set forth in section 1401(3) and the applicable federal regulations. The statute provides as follows:

(A) In General

The term “child with a disability” means a child –

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8; Educ. § 8-401(a)(2); COMAR 13A.05.01.03B(78).

A FAPE is defined in the IDEA as special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A § 1401(9); *accord* 34 C.F.R. § 300.17.¹³

¹³ A FAPE is defined in COMAR 13A.05.01.03B(27) as “special education and related services” that:

- (a) Are provided at public expense, under public supervision and direction;
- (b) Meet the standards of the Department, including the requirements of 34 CFR §§ 300.8, 300.101, 300.102, and 300.530(d) and this chapter;
- (c) Include preschool, elementary, or secondary education; and
- (d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

The United States Supreme Court addressed the requirement of a FAPE in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), holding that the requirement is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* at 201 (footnote omitted). The Court set out a two-part inquiry to analyze whether a local education agency satisfied its obligation: 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.

The *Rowley* Court found, because special education and related services must meet the state’s educational standards, the scope of the benefit required by the IDEA is an IEP reasonably calculated to permit the student to meet the state’s educational standards; that is, generally, to pass from grade to grade on grade level. *Id.* at 204; 20 U.S.C.A. § 1401(9).

In 2017, the Supreme Court revisited the meaning of a FAPE, holding that for an educational agency to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student’s circumstances. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). Consideration of the student’s particular circumstances is key to this analysis; the Court emphasized in *Endrew F.* that the “adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Id.* at 1001. 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.

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)(A). IEP teams must consider the student’s evolving needs when developing their educational programs. The student’s IEP must include “[a] statement of the child’s present levels of academic achievement and functional performance, including . . . [h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for non-disabled children) . . .” 34 C.F.R. § 300.320(a)(1)(i).

To comply with the IDEA, an IEP must, among other things, allow a student with a disability 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 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 a free appropriate public education, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117.

When assessing whether a student was offered, given, or denied a FAPE, a judge must “afford great deference to the judgment of education professionals” *O.S.*, 804 F.3d at 360 (quoting *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)). A judge should not substitute his or her own “notions of sound educational policy for those of the school authorities which they review.” *Andrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 206). Additionally, a judge “should be reluctant . . . to second-guess the judgment of education professionals.” *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). A judge should be mindful that local educators deserve latitude in determining the IEP most appropriate for a disabled child, and that the IDEA does not deprive these educators of the right to apply their professional judgment. *See Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). Additionally, a judge must be careful to avoid imposing his or her view of preferable educational methods upon a school district. *Rowley*, 458 U.S. at 207.

This respect and deference, while unquestionably a well-settled principle of review under the IDEA, both within and without this circuit, is not limitless, however. *See Cty. Sch. Bd. of Henrico Cty. v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the [judge] of the obligation to determine as a factual matter whether a given IEP is appropriate.”).

“[T]he fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate.” *Id.*; *see Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993) (“Indeed, if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary.”).

“To give deference only to the decision of the School Board would render meaningless the entire process of administrative review.” *Sch. Bd. of Prince William Cty., Va. v. Malone*, 762 F.2d 1210, 1217 (4th Cir. 1985) (citation omitted). A reviewing judge may fairly expect the school system’s professionals “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 or her] circumstances.” *Andrew F.*, 137 S. Ct. at 1002.

The *Andrew F.* Court confirmed that a FAPE does not promise an “ideal” education. *Id.* at 999. Nor does it promise that a student with a disability will be provided with “opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.” *Id.* at 1001. A reviewing court must determine whether the IEP is “reasonable.” *Id.* at 999. It is also important to remember that the IDEA does not require “the best possible education that a school could provide if given access to unlimited funds.” *Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). Nor does it require the “furnishing of every special service necessary to maximize each handicapped child’s potential.” *Hartmann*, 118 F.3d at 1001.

THE PROVISION OF FAPE DURING THE COVID-19 PANDEMIC

In March 2020, Maryland was struck with the COVID-19 pandemic, which has become an ongoing global health crisis. As a result of the pandemic, MCPS buildings have been closed since March 16, 2020, to protect the health and safety of students and staff. Following a two-week school closure, MCPS launched its Continuity of Learning program, which provides distance learning for all MCPS students. As of the date of this decision, MCPS continues to offer only distance learning opportunities to its students.

The federal and State guidance is clear that the COVID-19 pandemic does not abridge the rights of students with disabilities to a FAPE and equal opportunity to educational services as their non-disabled peers, as required under the IDEA. The United State Department of Education’s (USDOE) Office of Special Education and Resource Services (OSERS) has issued guidance providing that during the COVID-19 pandemic, school districts must provide a FAPE “consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students.” MCPS Ex. 80 at p. 1.¹⁴ A local education agency “must make every effort to provide special education and related services to the [student] in accordance with the [student’s IEP]” and “ensure that students with disabilities ... have equal access to the same opportunities [as their non-disabled peers], including the provision of FAPE.” MCPS Ex. 79 at p. 2.¹⁵ Further, the local education agency must “ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under [the] IDEA....” *Id.* Recognizing that the exceptional circumstances presented by the COVID-19 pandemic may affect how all educational and related services and supports are provided, OSERS has explicitly stated that “the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically[,]” noting that “schools may not be able to provide all service in the same manner they are typically provided.” MCPS Ex. 80 at pp. 1-2. OSERS also noted that “[m]any disability-related modifications and services may be effectively provided online ... [including] extensions of time for assignments, videos with accurate captioning or

¹⁴ U.S. DEPT. OF EDUC., OSERS, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities (March 21, 2020).

¹⁵ U.S. DEPT. OF EDUC., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, (March 12, 2020).

embedded sign language interpreting, accessible reading materials, and many speech or language services through video conferencing.” *Id.* OSERS has acknowledged that, although federal law requires distance learning to be accessible to students with disabilities, the law does not require local education agencies to use specific methodologies to delivery instruction and services. *Id.* “Where technology itself imposes a barrier to access or where educational materials simply are not available in an accessible format, educators may still meet their legal obligations by providing [students] with disabilities equally effective alternate access to the curriculum or services provided to other students.” *Id.*

MSDE has issued guidance which echoes the guidance issued by the USDOE. *See* MCPS Ex. 83;¹⁶ MCPS Ex. 86;¹⁷ MCPS Ex. 94.¹⁸ MSDE guidance states that during the COVID-19 pandemic, “decisions about the provision of education services must be based on consideration of the health, safety, and well-being of students and school staff.” MCPS Ex. 83 at p. 2. MSDE noted that students are still entitled to related services under their IEP and schools should consider how these services, such as speech therapy, may be provided virtually. *Id.* at p. 2. MSDE also finds that many disability-related modifications and services may be effectively provided through alternative delivery options, such as “distance technology” while keeping students and staff safe. *Id.* at p. 2. MSDE’s guidance further addresses equitable access to instruction for students with disabilities, stating that equitable access requires “appropriate modifications and accommodations based on each student’s needs and the differences created by the change in modality of instruction. *Id.* at p. 3. The school must consider how current accommodations and modifications are provided in an in-person setting and what this would

¹⁶ MSDE, *Serving Children with Disabilities Under IDEA During School Closures Due to the COVID-19 Pandemic* (Revised July 2, 2020).

¹⁷ MSDE, *Providing Continuity of Learning to Students with Disabilities during COVID-19* (May 2020).

¹⁸ MSDE, *A Parents’ Guide: Navigating Special Education during the COVID-19 Pandemic* (April 2020).

look like in a virtual environment, to ensure that each student receives educational benefit. MSDE guidance states that in many cases, “accommodations may be met in an online environment by providing additional supports, such as individualized telephone or video conferencing.” *Id.* at p. 3. During distance learning, a range and combination of remote learning methods may employed, including the use of “no-tech, low-tech, high-tech tools and modalities[,]” to facilitate specially designed instruction. MSDE provides the following examples of remote learning methods:

Printed Materials

- The team may post copies of documents on the commonly used remote learning site used by the [local school system/public agency] (e.g., Schoology). They may also send home hard copy materials for students who cannot access the documents visually through various storage options (e.g., Google platform, MS Office, or Schoology).
- For students who cannot access printed materials in either hard copy or online, alternative ways to deliver the content may be developed, such as speech-to-text.
- Paraprofessionals may be given explicit direction on how to modify printed materials to make them accessible for a student, considering the unique impact of that student’s disability. Color code virtual folders for “to do,” “in process,” and “completed” tasks.
- Design a schedule to be sent by mail or email to the family to help them with home tasks as well as school tasks and routines.
- Develop a behavioral regulation and feedback system that includes online reminders and affirmations of accomplishments.

Recorded Lessons

- Teachers may record lessons for students to access so that [specially designed instruction] is provided on IEP goals with directions for activities that may support learning, practice, or natural applications of an academic or functional skill.
- If teachers assign particular recordings such as webinars, podcasts, and read-alouds created and made available by subscriptions or to the general public, they will need to pay attention to accessibility, especially for students who may have significant cognitive disabilities, are blind or have low vision, are deaf/hard of hearing, or have significant reading needs.

- Record a verbal response to a question on an assignment or on an assessment that would ordinarily require a written response.
- Annotate tutorials, directions, or steps to complete tasks.

Teacher Check-ins/Tutorials

- Conferences, video, and traditional telephone calls may be used for teachers to explain directions, teach lessons, or provide individualized supports to students as determined by their IEP.
- Teachers can email accessible materials to families and students and share strategies and resources.
- Many teachers are offering “office hours” for students to access their teacher for additional assistance or to answer questions related to assignments.

MCPS Ex. 86 at p. 8 (footnote omitted).

MSDE Guidance for providing Continuity of Learning during the COVID-19 pandemic states that “[t]ransitioning from a face-to-face instructional model in school to a virtual and/or distance learning model in the home involves a recursive cycle of development, implementation, and evaluation.” *Id.* at p. 4. The guidance further explains:

As Maryland Schools implement their Continuity of Learning Plans, school staff collaborate with the family to determine how the general education instruction offered to all students can be adapted for the student with an IEP, and how special education and related services can be provided consistent with each student’s IEP. This requires reviewing the components of the student’s current IEP to identify the services that can be delivered in the virtual and/or distance learning environment and redesigning services, modifications and/or accommodations, as needed, to continue providing FAPE to the student with a disability. Through this collaborative process, educators identify/develop strategies to provide instruction so that the student can **make progress** on their IEP goals and the general education curriculum grade-level standards and to **prevent regression** in learning, to the greatest extent possible, during this unprecedented time.

...

The process of development, implementation, and evaluation is cyclical. Once the plan is developed, it is implemented; data is collected to evaluate and inform educators, related service providers, and parents, and the team uses information about the effectiveness of the IEP to make revisions and develop new goals or revised services. Using the new data obtained in the virtual and/or distance learning environment, the team will revisit the IEP and begin the cycle again.

Id. at p. 4.

Schools have three options for determining what services will be provided to special education students during the extended school closure:

- (1) implement the IEP as written through virtual instruction,
- (2) amend the IEP with parent agreement (outside of the IEP Team meeting) to supplement student's current IEP, or
- (3) revise the IEP if the parent is not in agreement to the amended IEP (through the IEP Team meeting process).

Id. at 1039. Any changes to the IEP may be documented in one of two ways:

- *Parent agreement to the amendment of the IEP.* School staff can propose changes to the IEP outside of the formal IEP team process. If the parent agrees, this will be documented as an IEP amendment. The IEP amendment must be provided to the parent and staff responsible for implementing the plan and uploaded to the Maryland Online IEP or [local school system] IEP platform.
- *Revision of the IEP through an IEP Team meeting.* The IEP may be revised during an IEP team meeting. If the parent does not agree to an amendment of the IEP, then the [local school system] or Public Agency will need to hold an IEP meeting to discuss necessary changes. The revised IEP can only be implemented after the parent has received [PWN].
 - If the parent is unable to participate in the IEP Team meeting, then no meeting shall be held; and only those services currently on the IEP that can be reasonably provided virtually, in a manner that does not change the program or placement, may be provided.

MCPS Ex. 86 at p. 6 (footnote omitted); *see* 34 C.F.R. 300.324 (Development, review, and revision of IEP).

THE PARENT'S POSITION

The Mother's Testimony

The Mother testified that the Student was diagnosed with Autism Spectrum Disorder at the age of three. She said that the Student is her youngest child and his diagnosis changed her family's life. Since his diagnosis, the Parents have worked tirelessly to help the Student and he

has improved substantially. Although he is still on the spectrum and has some delay the Student's functioning has improved significantly over the last seven years. The Mother explained that the Student used to be nonverbal, made no eye contact, had constant temper tantrums, and was not able to sit still for even thirty seconds. The Mother said that although the Student is still delayed, he is now verbal, barely has tantrums, and can sit for longer periods of time. She also testified that his eye contact is almost 100% better. She went on to describe the Student as a social boy who is always happy and smiling, loves people, and has an outgoing personality for a child with Autism Spectrum Disorder.

The Mother expressed frustration with the way MCPS handled things after schools closed due to the pandemic. She testified that when the pandemic started, she was lost and did not know who to contact or what to do with the Student at home. Following the statewide school closure that began on Monday, March 16, 2020, it took MCPS staff approximately two weeks to contact the Parents to discuss how education would proceed because MCPS employees were not working during the closure. The Mother alleged that during the April 8, 2020 teleconference with Ms. [REDACTED] and Ms. [REDACTED], the therapists unilaterally decided that they would only email speech and occupational therapy resources to the Parents to work on with the Student at home, rather than provide the Student the speech and occupational therapy sessions required by the Student's IEP. She further alleged that she could not recall the April 17, 2020 teleconference during which she and Ms. [REDACTED] discussed the Student's IDLP. And when shown the April 27, 2020 PWN that was emailed to her, the Mother stated that she did not recall it and explained that she cannot recall all of the emails she receives.

In addition, the Mother explained that due to the Parents' work schedules, they are unable to be home to sit with the Student during his virtual classes. She said that when the Student

participated in distance learning during the 2019-2020 school year, the Parents sat with him for four hours every day to help him access his lessons. The Mother asserts that the Student needs an in-home 1:1 aide for support while the Parents work during the school day. She said that after MCPS sent the Parents notification that the Summer 2020 ESY was going to start, the Parents sent their July 15, 2020 letter to Mr [REDACTED] explaining their circumstances and requesting an in-home 1:1 aide. She was very concerned that the Student had not participated in the ESY this year and stated that when the Student goes without instruction for an extended period, he regresses and loses skills. She said that this summer was the first time in six years that the Student has not attended ESY. She asserted that he has “regressed so much” with regard to all of the skills he has been working on over the past seven years. According to the Mother, the Student’s behavior now escalates because he does not understand why he does not have a teacher and is not receiving instruction. However, when asked by counsel for MCPS if she had any data to show that the Student has regressed since March 2020, the Mother responded that she does not have to provide any data.

The Parents had hoped MCPS would provide the Student an in-home 1:1 aide for the 2020-2021 school year, even though MCPS denied their request for an in-home aide for the ESY. The Mother testified that the Student has been at home without educational instruction since the 2020-2021 school year began because of MCPS’s refusal to provide the in-home 1:1 aide which the Parents assert is necessary for the Student to access learning. The Mother stated that the Student has had a 1:1 aide for at least the last two years and the IEP still says that he requires that adult support. Because the Parents understand that MCPS might not want to hire an aide to work with the Student in their home due to the possibility that MCPS could be found

liable if the aide contracted COVID-19 in their home, the Parents are willing to hire an aide and assume that liability, provided that MCPS pays for the aide's services.

The Parents are extremely concerned about the Student's lack of instruction. The Mother testified that she would like MCPS to pay for compensatory services to help the Student regain the skills he has lost. She also expressed her belief that MCPS lacks the ability to provide the Student a FAPE and opined that MCPS should "let somebody else do it" and pay for the Student's tuition at a private school. She further stated that MCPS has failed the Student, caused much emotional stress for her family, and harmed the Student emotionally and physically.

The Parent's Argument

The Parent contends that MCPS has failed to provide the Student a FAPE by failing to provide him with a 1:1 aide in his home during MCPS's suspension of in-person classroom instruction as a result of the COVID-19 pandemic, during the 2019-2020 school year, the Summer 2020 ESY, and the 2020-2021 school year. He also contends that MCPS failed to provide the Student a FAPE because it did not provide him speech and occupational therapy, as provided for in the IEP, during the same time period.

The Parent argues that because the May 11, 2020 IEP was written while MCPS students were already engaged in distance learning, the IEP must be implemented during distance learning, instead of the IDLP. He further argues that MCPS may not provide services based upon the Student's IDLP because it did not revise the IEP to include the contents of the IDLP. The Parent also alleges that the IDLP is not an amendment to the IEP and was never approved by the Parents. He further asserts that MCPS refused the Parents' request to provide the Student an in-home 1:1 aide without providing an alternative solution.

Additionally, the Parent asserts that the Parents made the Student available for eight distance learning classes during the Spring of 2020, when the classes did not conflict with their work schedules. According to the Parent, due to the Parents' unavailability during the school day, the Student is only able to access distance learning with the assistance of a 1:1 aide in the home to provide assistance to the Student throughout the entire school day, including helping the Student log into class, maintain attention, and to provide behavioral support. He maintains that it is inappropriate for MCPS to ask that parents assist students with logging into Zoom for participation in distance learning classes and asserts that due to the Student's lack of independence, without a 1:1 aide the Parents would have to sit with the Student for the entire class session. Furthermore, he argues that as the result of refusal to provide the Student with an in-home 1:1 aide during distance learning, the Student has been deprived of educational instruction and his related services during the majority of the time distance learning has been in place. He argues that this amounts to a failure to implement the Student's IEP and is a substantial violation of the IDEA. As a result, the Parent asserts the Student has regressed and has not received a FAPE under the IDEA.

The Parent expressed that he understands that MCPS may not want to directly hire a 1:1 aide for the Student due to the possibility that the school system could be held liable should an aide be exposed to and contract COVID-19 while in the Parents' home. However, the Parent contends that if the Parents hire the 1:1 aide, with MCPS paying the costs, this will shield the school system from any potential liability. The Parent asks that I determine that MCPS has failed to provide a FAPE to the Student and order that the Student be placed in a nonpublic school at MCPS's expense and award the Student compensatory services.

MCPS's Position

MCPS contends that it has presented extensive evidence, data, and testimony from various experts (including several educational professionals who have provided direct instruction, services, and supports to the Student), demonstrating that MCPS offered the Student a FAPE sufficient to enable him to make progress. MCPS contends that the April 2020 IDLP and the ESY IDLP, which were amendments to the Student's IEP, were reasonably calculated to provide the Student a FAPE in the least restrictive environment, while taking into consideration the health and safety of the Student and school staff during the global pandemic. The school system asserts that the IDEA does not require a program that would maximize the Student's potential, but instead, it simply requires that the IEP be appropriate. It argues that the IDLP recommended by the IEP team is appropriate for the Student and can be accommodated in the virtual setting.

MCPS further argues that the Parents did not make the Student available to participate in the distance learning plan developed specifically for the Student based on his IEP and due to the Student's lack of participation, the Parents are unaware of how the Student could benefit and make progress. The school system contends that at this point, the Student's case is based upon mere speculation and the Parent provided no evidence or data to establish that there has been a denial of a FAPE. MCPS asserts that it has adhered to the IDEA, as well as State, county, and federal guidance during the school closure. MCPS asks that I deny the Parent's request and find that MCPS offered a FAPE to the Student in the least restrictive environment during the 2019-2020 school year, the 2020 Summer ESY, and the 2020-2021 school year.

THE STUDENT'S IEP AND IDLP

While MCPS school buildings remain closed to protect the health and safety of students and school staff during the COVID-19 pandemic, MCPS uses an IDLP to document special education students' services during distance learning. MCPS Ex. 76 at p. 21.¹⁹ The IDLP is aligned with the Student's IEP and describes the delivery of special education services in the distance learning format. *Id.*

Neither party offered into evidence the IEP that was in effect in March 2020 when the school closure began. However, it is undisputed the Student's IEP required that he receive six thirty-minute occupational therapy sessions per month and six thirty-minute speech therapy session per month, outside of general education, during both the 2019-2020 and the 2020-2021 school year.²⁰ It is also undisputed that the Student's IEP required that the school provide a 1:1 aide for support throughout the school day during the 2019-2020 and 2020-2021 school years, as well as during the Summer 2020 ESY.²¹

The April 27, 2020 PWN (MCPS Ex. 26) documented the April 17, 2020 teleconference between the Student's third-grade teacher, Ms. [REDACTED], and the Parents. During that teleconference, they developed an individualized determination regarding how the Student's IEP would be implemented during MCPS' implementation of the Continuity of Learning Plan, while protecting the health and safety of students with disabilities and school staff. Taking into account the Student's current needs, his present levels of academic achievement and functional performance, the current IEP, the MSDE and USDOE guidance, the MCPS Continuity of

¹⁹ MCPS, Recovery of Education Guide, What to Expect: Special Education (August 4, 2020).

²⁰ MCPS submitted the May 18, 2020 Prior Written Notice (MCPS Ex. 27) which was given to the Parents as a result of the May 11, 2020 virtual IEP meeting, as well as the Student's May 11, 2020 IEP (MCPS Ex. 18). That Prior Written Notice states that "[a]ll goals, [supplementary aids and services,] and [a]ccommodations remain from [the Student's] Annual IEP on December 19, 2019." Thus, it follows that the May 11, 2020 IEP reflects the goals, supplementary aids and services, and accommodations that were in place in March 2020.

²¹ The Student's 1:1 aide was a paraeducator.

Learning curriculum, and parental input, Ms. [REDACTED] and the Parents developed an IDLP, which included proposed goals, supplementary aids, services and supports, and accommodations to be implemented in the least restrictive environment to the maximum extent appropriate to provide the student a FAPE. The PWN states “[i]f behavior management is needed consultation and coaching to parents will occur during office hours.” It also specifies that the Student would receive his related services while participating in distance learning. Furthermore, the PWN says that the Parents requested a modified packet of materials that they could complete with the Student and that MCPS responded with modified work online that supports the online continuation of learning, as well as support during live meetings using a paraeducator and breakout rooms, when possible. However, the neither the IDLP, nor the PWN specifies the method for delivery of the Student’s services.

The PWN notes that the determinations set forth in the document were made without an IEP meeting, by agreement of a parent. It also explains that the PWN serves as the official documentation of the services to be provided through the duration of distance learning instruction and that the Parents would not receive a separate IEP amendment. Instead, a copy of the current IEP and the PWN was sent to the Parent and all MCPS staff responsible for the implementation of the Student’s IEP. There is no evidence in the record that the Parents ever requested a revised IEP from the school. The PWN further states that the Parents “understand[] that when schools reopen, the special education and/or related services in the attached existing IEP will become effective again.” Despite the Parent’s argument to the contrary, there is no evidence in the record that the Parents disagreed with the IDLP at that time or complained that the PWN was inaccurate.

A revised IEP was developed during a May 11, 2020 virtual IEP meeting. As previously noted, the goals, supplementary aids and services, and accommodations documented in the Student's annual IEP on December 19, 2019 remained unchanged in the May 11, 2020 IEP (MCPS Ex. 18). Additionally, the May 11, 2020 IEP states the Student is eligible for ESY due to his need to maintain the Student's critical life skills. During Summer 2020 ESY, the Student was to receive one thirty-minute session of speech therapy per week. The May 11, 2020 IEP did not provide for occupational therapy during the Summer 2020 ESY.

The May 18, 2020 PWN (MPCS Ex. 27) documenting the May 11, 2020 IEP meeting states that the IDLP would remain in place during the Continuity of Learning and the IEP developed will be implemented when schools reopen. Again, there is no evidence in the record that the Parents disagreed with the IDLP at that time or complained that the Prior Written Notice was inaccurate.

The evidence in the record indicates that July 15, 2020 was the first time the Parents expressed disagreement with the IDLP. On that date, the Father sent Mr. [REDACTED] an email stating "[a]ttached please find the letter with our concerns for the proposed ESY [I]DLP for our son...." In the attached letter, the Parents asserted that (1) the Student does not understand distance learning and does not respond well to it; (2) he is not able to access the online instruction by himself because he had an adult support at all times during in-person learning; (3) the time of the online instruction conflicted with the Parents' work schedule; and (4) the Student had not received speech or occupational therapy over the past three months to help him access instruction. The Parents stated that the Student was giving up on school and himself. They further stated that if MCPS could not send a 1:1 aide to the Parents' home to support the child due to the COVID-19 pandemic, they could hire an aide to assist the Student in their home, at

MCPS's expense. As a result of the July 15, 2020 letter, another IEP meeting was held on July 23, 2020.

During the July 23, 2020 IEP meeting, which was held virtually, the IEP team, including the Parents, discussed the issues raised in the Parents' July 15, 2020 letter. After a review of the IDLP, it was determined that ESY services during distance learning would include math instruction twice per week, reading instruction twice per week, a weekly morning meeting, and office hours available to the students and parents. The Parents did not express disagreement with the proposed ESY services. However, MCPS refused the Parents' request to either send a 1:1 aide to their home or to pay for an aide hired by the Parents. The July 27, 2020 PWN (MCPS Ex. 29) documenting the July 23, 2020 IEP meeting explains that MCPS refused the Parents' request for an in-home aide "due to the national health crisis and pandemic that has [caused] all MCPS learning to be virtual." The PWN also stated that the IDLP would remain in place during the Continuity of Learning and the IEP developed will be implemented when schools reopen. Subsequently, the Parent filed the August 3, 2020 Complaint, restating the concerns outlined in the Parents' July 15, 2020 letter. The Complaint does not allege that the July 23, 2020 PWN is inaccurate.

In light of the foregoing, the credible evidence in the record reflects that the Parents participated in the development of the IDLP, which was an amendment to the Student's IEP, during a teleconference held on April 17, 2020 and IEP team meetings held on May 18, and July 27, 2020. *See* MCPS Ex. 26, 27, & 29. As previously discussed, the Parent asserts that the IDLP is not an amendment to the IEP. This assertion is incorrect.

Section 300.324(a) of Title 34 of the C.F.R., which sets forth the requirements for making changes and amendments to an IEP, makes clear that the IDLP is a proper amendment to

the IEP, incorporated by reference in the April 27, 2020 PWN. The regulation provides as follows, in relevant part:

(4) Agreement.

(i) In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.

(ii) If changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes.

...

(6) Amendments. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. *Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.*

34 C.F.R. § 300.324(a)(4), (6) (emphasis added).

The April 27, 2020 PWN establishes that the IDLP was initially developed during the Mother's April 17, 2020 teleconference with Ms. [REDACTED] and that the Mother agreed to make changes to the IEP without an IEP team meeting. The PWN indicates that it is the "official documentation of the services to be provided through the duration of distance instruction" and that the Parents would not receive a separate IEP amendment. The Parent does not allege that the Parents requested a revised copy of the IEP with the amendments incorporated. Thus, the PWN serves as the amendment document. Since the PWN states that the IDLP will be implemented during distance learning, I find that the IDLP is incorporated by reference into the amendment document (the PWN). The subsequent PWN issued on June 17 and July 23, 2020 each state that the IDLP is to remain in place until schools reopen. However, given that the IDLP provides that the Student will receive the services set forth in his IEP, whether or not the IDLP is an amendment to the IEP is a distinction without a difference.

THE AVAILABILITY OF A 1:1 AIDE

MCPS established that since distance learning began in April 2020, the school system has attempted to provide the Student 1:1 adult support to the greatest extent possible and within reason, while keeping staff and students safe during the devastating pandemic that has threatened the health and safety of people around the world. [REDACTED], Director II of the MCPS Department of Special Education Services, testified as an expert in Special Education and Educational Administration. Mr. [REDACTED] explained that MCPS is not currently providing instructional services either in school or in private homes, due to the public health emergency in Maryland. He testified that MCPS has offered the Student a 1:1 aide, in addition to other supports, through the virtual learning environment because the State and County health metrics have not reached a place where MCPS can consider it safe to send an employee into a family's home. He explained that MCPS does not require parents to sit with Students throughout the school day, but said that it is reasonable to ask that parents make the student available and get them situated for learning, much in the same way parents might pack the student a lunch before school or take the student to the bus stop during in-person learning. Once the student is logged into the class, MCPS staff is available on Zoom to provide the Student support and services are delivered virtually. Mr. [REDACTED] added that if there are challenges with helping a student access virtual learning, MCPS offers support through parent workshops and resources on the website. This in addition to the parent coaching offered by teachers and service providers. Mr. [REDACTED] further testified that over time, MCPS staff has been successful increasing the time in which students are available for learning and able to access instruction by employing strategies to help them change their behaviors. Also, parents have different options for their children to access learning when the student is unable to access live virtual learning. Students may access recorded

lessons some or part of the time, or use printed materials in lieu of some of the online learning. Although the recorded lessons are only available for seventy-two hours, if a parent made a request to have access to recorded lessons beyond that timeframe, MCPS could work to accommodate that request.

Mr. [REDACTED] said that in his expert opinion, the IEP team appropriately followed federal and State guidance in a timely fashion when they developed the Student's IDLP. He opined that MCPS attempted to deliver the Student instruction and services in the distance learning environment to the greatest extent possible and, recognizing there were challenges, offered the Student alternative methods for the Student to access learning and receive services, including the support of a 1:1 aide. The School principal, [REDACTED] who was accepted as an expert in Education and Administration, concurred with Mr. [REDACTED]'s opinion. Mr. [REDACTED] also added that in his expert opinion, had the Parents participated in parent coaching and made the Student available, the Student would have made progress on his IEP goals. Mr. [REDACTED]'s opinion is based on his observation that students with profiles similar to the Student are currently making progress in MCPS's virtual environment.

The Student's third-grade teacher, [REDACTED], testified as an expert in special education. Ms [REDACTED] explained the role of the Student's 1:1 aide prior to the school closures. She testified that when MCPS was still open for in-person learning, the 1:1 aide helped get the Student off the bus, walk him to the classroom, pack and unpack his belongings, navigate the building, and take him to his movement breaks. She further explained that the Student needs further physical support to get from one point to another in the building. She also said the Student needed a 1:1 aide to help focus his attention. The 1:1 aide also supported the Student by giving him his sensory guide and providing reinforcement during class. As the Student's case

manager, Ms. [REDACTED] wrote and implemented the Student's IEP. She reported that the Student requires close supervision throughout the school day, in both a self-contained classroom and general education setting. She acknowledged that the Student's autism impacts his ability to access and engage in virtual instruction, but also testified that she has seen him log in with his username and password independently and navigate to his preferred websites. However, Ms. [REDACTED] also testified that she has not observed him find content on his own, click links, or log into Zoom. Ms. [REDACTED] was also unsure of whether the Student is able to access Zoom class meetings without adult support. Ms. [REDACTED] further testified that she believes the Student requires 1:1 support to meet his unique needs and access virtual learning.

With regard to virtual classes held during the 2019-2020 school year, Ms. [REDACTED] testified that the Parents told the staff that they had scheduling conflicts that would prevent the Student from participating in distance learning on a consistent basis, but stated that she was still available to provide virtual instruction to the Student. The Student's instruction was modified for distance learning through the IDLP and Ms. [REDACTED] created lesson plans for him every day. Ms. [REDACTED] further testified that coaching was available to all families, but the Parents never signed up or contacted her for coaching sessions like other families did.

In Ms. [REDACTED]'s expert opinion, the Student benefitted from participating in eight virtual classes he attended because he had the opportunity have breakout sessions with his 1:1, who he had a great relationship with, and got to see his friends. She added that the virtual classes gave students an opportunity to ask each other how they were feeling and practice the social interaction that they had not been able to get in person. Ms. [REDACTED] described the Student as responsive and happy during virtual classes, but admitted that he was distracted by everything around him.

██████████, who was the Student's assigned teacher for the Summer 2020 ESY and is currently his teacher for the 2020-2021 school year, testified as an expert in special education and general education. Although Mrs. ██████████ has seen and observed the Student in the learning center, she has not yet had an opportunity to teach the Student because he never attended the ESY and at the time of the hearing he had not attended any of the Zoom classes in the 2020-2021 school year. However, she is familiar with the Student's IEP and IDLP, as she has reviewed them in order to prepare individualized instruction for the Student during both the 2020 Summer ESY and the 2020-2021 school year. Mrs. ██████████ has also met with staff in the ██████████ ██████████ who have provided the Student instruction to review the all of the Student's data, including testing, classroom observations and anecdotal notes.

Mrs. ██████████ explained that in her virtual classes, she teaches in "whole group" sessions, and then small mini groups. She utilizes the Nearpod platform, which allows her to observe the Students complete educational activities on their computers in real time. If a Student has problems using the computer to complete an activity, the Mrs. ██████████ shares her screen and logs in on the student's account so that the Student can tell her what answers to pick on their behalf. She said that she also offered parent coaching sessions to support families' specific needs. Mrs. ██████████ discussed several different methods of learning that she has used with various students and indicated that she chooses different methodologies when working with different students. With regard to students' ability to access the virtual environment, Mrs. ██████████ testified that at the beginning of distance learning, MCPS staff started students out slowly and provided instruction that required less use of the computer once the students were logged into the Zoom class session. As time went on, they added more components and increased the students' capacity to use the computer. For students with problems attending,

MCPS staff also implemented certain strategies to increase and sustain their attention, based on the individual student's IEP, FBA and behavioral intervention plan. Additionally, Mrs. [REDACTED] explained that currently, MCPS does not hold a virtual lunch session and that lunch provides Students time away from the computer screen. However, she said that if it was for some reason necessary for the Student to have support during lunch, MCPS staff could accommodate this and perhaps create a virtual lunch session.

Mrs. [REDACTED] further testified that she has received recommendations from the speech and occupational therapists for using certain strategies to help individual students to understand the lessons and increase their availability for learning. She confirmed that all the supports the Student requires—the 1:1 aide, speech-language therapist, and occupational therapist—have been available in her virtual classroom. She also discussed ways in which a 1:1 aide and therapist are able to provide the Student support virtually, including using visual cues, various websites and program that allow Students to manipulate items on the screen, and verbally instructing the Students how to use various resources and tools that the service providers have selected specifically for him. Where appropriate, this support could be provided in an individual session, using a breakout room.

Ms. [REDACTED] opined that parents who have participated in the parent coaching session and made their children available for virtual instruction have a better understanding of what distance learning looks like for the ESY and the 2020-2021 school year. In her expert opinion, for families that have participated in coaching and virtual learning, MCPS has had a better partnership with those families and they have been able to help students succeed as best they can in the virtual setting.

Given the serious health and safety risks posed by individuals having close contact with others who do not live in their home during the ongoing catastrophic global pandemic, I find that MCPS is reasonable in not providing the Student an in-home 1:1 aide. Neither the IEP nor the IDLP provide that a 1:1 aide must be *physically present* to provide the Student services. Although the Parent contends that allowing the Parents to hire an aide directly, with MCPS paying the expense, would shield MCPS from potential liability if an aide were to contract COVID-19 while working in their home, he did not offer any legal basis for his assertion. It is unclear whether MCPS could be held liable in such a situation, and at the very least, MCPS could be placed in the position of defending a lawsuit, whether or not the action had merit or was ultimately successful.

I further find that it is not at all unreasonable for MCPS to ask that parents assist their children with logging on to the computer and accessing the Zoom class session. Clearly, while the Student is at home, the Parents must arrange for him to have some form of adult supervision, whether or not the Student is engaged in distance learning. Presumably that adult would have the ability to get the Student situated at the start of the school day before the 1:1 aide and other MCPS staff take over during the school day. As Mr. [REDACTED] pointed out, parents are responsible for making their children available for learning. Assisting a student with logging into a computer and clicking the link to his or her Zoom class session is no more burdensome than transporting a student to the bus stop to catch the bus so that he may attend live classes. Furthermore, although it is not the Parents' (or other caretaker's) job to provide the 1:1 adult support required by the Student's IEP, I find that it not unreasonable to ask that a parent or caretaker assist in guiding the Student back to his learning area in the case that he elopes, so that the 1:1 may then employ the strategies contained in the FBA for eloping.

The overwhelming evidence in the record indicates that MCPS has made a 1:1 aide available to the Student and that the aide has the ability to provide the Student the support that he needs, albeit in an unconventional manner. I note that all of the strategies for addressing the Student's problem behaviors, as outlined in the March 2020 FBA, can be implemented in the virtual environment, as they largely consist of the use of verbal interaction and the use of visual resources. With regard to the use of sensory breaks, an aide or other staff would have the ability to verbally guide the Student through movement activities, such as jumping jacks. MCPS offered the Student the necessary support, but the Parents did not make him available to participate in virtual learning. Unfortunately, due to the Student's minimal participation in virtual learning, there is no evidence that the Student would not respond favorably and make sufficient progress once he has consistently been exposed to virtual learning and the individualized instruction and support that has been planned for the Student. On the other hand, MCPS has provided the opinion of several experts who have opined that the Student would have received educational benefit had he participated in virtual learning and the planned individualized instruction, not unlike other students with profiles similar to that of the Student. I therefore find that the Parent, on behalf of the Student, has failed to demonstrate that MCPS's refusal to provide the Student a 1:1 aide in his home during MCPS's suspension of in-person classroom instruction during the 2019-2020 school year, the Summer 2020 ESY, and the 2020-2021 school year amounts to a denial of a FAPE.

SPEECH AND OCCUPATIONAL THERAPY

The Student's speech-language pathologist, [REDACTED] testified and the parties stipulated to her expertise in the field of speech language pathology. Ms. [REDACTED] has a Bachelor

of Science degree in speech pathology and audiology, and a master's degree in speech-language pathology. She also holds a State of Maryland Department of Health Speech Pathologist license.

In March of 2020, before the school closure Ms. [REDACTED] completed a speech language status report. She testified that at that time, the Student always worked hard, but he required a lot of modeling,²² and repetition of activities to help him complete them accurately. The Student also required visual supports, in the form of pictures and videos to support his understanding of the speech therapy lessons. She said the Student required the use of very specific language in order to understand what they were working on. For this reason, Ms. [REDACTED] used the same language directions and activities during every session, so the Student would understand what she wanted him to work on. They had a visual of what they would work on and the Student understood what the visuals meant and what expected in each session.

Ms. [REDACTED] explained that she tried to provide the Student speech-language services after the March 13, 2020 school closure and said that she attended his virtual classes with Ms. [REDACTED]. From April 2020 through the end of the 2019-2020 school year, Ms. [REDACTED] saw the Student twice in the virtual classroom. She described the Student to be happy and excited during class and said she was also really excited because the Student was answering questions using phrases. She also said that the Student occasionally needed some modeling and prompting.²³ Ms. [REDACTED] stated that the Student's body was oriented toward the computer and he seemed engaged while she was there and seemed to enjoy the virtual class. During those two virtual class sessions, she was able to converse with the Student and the Student demonstrated comprehension and understanding through his answers.

²² Modeling is when an adult says what she wants the student to say, so that he may repeat it.

²³ Prompting is repetition of directions.

Ms. [REDACTED] testified that during her teleconference with Ms. [REDACTED] and the Mother, they discussed the options that were available for continuation of the Student's related services during virtual learning. Ms. [REDACTED] and Ms. [REDACTED] also used the phone call as an opportunity to check in and see how the Student and his family had been. They then discussed and explained the transition to the Continuity of Learning Plan, which is how the Student's goals and objectives would be targeted and supported during virtual learning. They also discussed what had been working and what had not been working at home with regard to both the Student's communication and occupational therapy needs. Specifically, Ms. [REDACTED] spoke to the Mother about how the Student's language had been and the Mother made a positive report with regard to how his communication. The Mother also expressed that the family was having problems with the Student going into the kitchen and getting food without asking. In response, Ms. [REDACTED] sent a "picture map" to the parents, which is a piece of paper that is used to help students with language disorders and difficulties to communicate their needs by pointing to a picture or having a picture to support their oral production of the word. The Mother agreed that it might be helpful to get the Student to ask for what he wanted, as opposed to just going into the kitchen and getting it himself and said the picture map would be helpful. Ms. [REDACTED] told the Mother that if she wanted to have more phone conferences or live video meetings, they would be able to schedule those. During that conversation, the Mother stated that the virtual classes were not successful and at that point she felt they were stressful, so she felt that moving forward with email support, email communications and materials would be better for her. When Ms. [REDACTED] asked if the Mother had any concerns, she said that she did not. In addition, Ms. [REDACTED] and Ms. [REDACTED] said they would check in with the family and offer coaching.

Ms. [REDACTED] further testified that the Student's family was not the only one who opted for email communication only. She said that her students were receiving biweekly or weekly emails, and some of them were not receiving anything, at the parent's request. Other students were receiving support from her within their Zoom classroom sessions. Ms. [REDACTED] stated that she continued to make continuity of learning plans for the Student. However, in light of the Mother's request for emails only, the Student's plan consisted of biweekly emails sent to both parents. Those emails contained specific materials related to the Student's speech and language goals and individualized for the Student, to continue to support and facilitate the Student's language. Ms. [REDACTED] and the Parents would discuss the materials and manage any questions or difficulties through the emails. Ms. [REDACTED] went on to provide the agreed upon biweekly emails and resources for the student, such as the food mat, sentence comprehension materials and core language boards. She explained that the core language boards are printed board with commonly used words to support language expression. There are words to match the pictures and they are organized by color. It was a resource that Ms. [REDACTED] had used with the Student in the live setting, so he was familiar with it and it was used to continue to support his communications at home. Ms. [REDACTED] said that she provided instructions for working with the materials and the Parents never contacted her to say that they did not understand the instructions. Ms. [REDACTED] continued to make herself available to the Student until she began her maternity leave. [REDACTED] offered speech therapy to the students in the [REDACTED] in Ms. [REDACTED]'s absence.

Although Ms. [REDACTED] offered parent coaching, the Parents never participated. She testified, however, that the Parents did request more materials from her on one occasion, but did make any other requests. After the Student stopped attending the virtual classes, Ms. [REDACTED]

continued to make prepare lessons for the Student and remained available to work with the him via Zoom.

Ms. [REDACTED] explained that the primary difference between the IEP and the Continuity of Learning Plan and IDLP was the setting (in-person at the school versus remotely) and what Ms. [REDACTED] was capable of doing with the Student during through remote learning. In the virtual learning setting, Ms. [REDACTED] assisted the students and their teacher in the virtual classroom so that the teacher would understand how to deliver instruction for students who required speech language services and how to differentiate their language based on the individual student's needs. She worked to help the teacher to understand how to modify the visual presentation of those students' coursework and the language used to instruct them.

Ms. [REDACTED] was not the Student's speech language pathologist for the 2020 ESY because it is not part of her ten-month contract. However, Ms. [REDACTED] testified that she is aware that MCPS did provide speech and language services to students during the ESY. As of November 16, 2020 (the last date of the hearing), Ms. [REDACTED] had not had the opportunity to provide speech language services to the Student during the 2020-2021 school year because he did not attend any of the classes. However, Ms. [REDACTED] was available and prepared to provide the Student lessons upon his return to the virtual classroom. She described the support that she would offer him and said that she would be able to work with everything that she had in the live setting by showing him things through the computer. Ms. [REDACTED] has made accommodations in her schedule to allow her to provide the Student with two individual sessions per week, along with supporting him during the whole group instruction. During whole group instruction, if it appeared the Student was not understanding the teacher's instruction, Ms. [REDACTED] would be there to break the

language down, facilitate language understanding, and educate the Student, teacher, and the Student's support staff on the best way to speak to the Student to help him understating.

Ms. [REDACTED] shared that she has provided speech language services for other students this year, in a variety of ways, according to the student's individual needs. She said that she pulls students into breakout rooms for individual sessions and also works in groups. Ms. [REDACTED] is able to pull students into the breakout rooms with 1:1 aides during the individual sessions so the aide is there to assist the student, if needed. However, she strives to allow the students to exercise independence in their sessions. In Ms. [REDACTED]'s expert opinion, the Student benefited from participating in virtual instruction with regard to speech language services.

[REDACTED] is an occupational therapist who has been working with the Student since May 2019. The parties stipulated to her expertise in the field of occupational therapy. She holds Bachelor and Master of Science degrees in occupational therapy. When Ms [REDACTED] started working with the Student, he had intensive sensory needs. To address these needs, Ms [REDACTED] put a lot of sensory strategies in place. After getting to know him, she developed a visual motor break menu for him so that he could learn to follow the schedule. She explained that this helped the Student to understand "this is first, then it comes next." She also trained all of the aides that worked with the Student to use the motor break manual. After training the aides were able to get the Student seated for a little bit longer and to attend to activities. She said that the initial goal was to teach learning behaviors. To accomplish the Student's goals, Ms. [REDACTED] works with the whole team. She provides a "wrap around service" and helps teachers, aides, other staff, and parents to learn how to work with the child. She picks the strategy and shows them how to implement the strategy and carry it over through the school day. For the parent, part of her job is

parent coaching education, as there are lot of the resources are specific to the student and can be worked on at home

Ms. [REDACTED] testified that during in-person learning, she observed the Student in the classroom and would make observations about things such as, whether he needed a different kind of chair, if the desk was the right height, and if he had the correct sized paper and type of writing utensils. She started “compression rest” to help him be calm throughout the day and used visual supports. Ms. [REDACTED] also said that when the Student started coming into the OT room, his participation improved so that he could stay in the seat ten to fifteen minutes without taking a break. This allowed him to participate in fine motor, small hand activities which would help him with using pencils, scissors, markers, glue, and other things of that nature. The Student also worked on letter formation, forming numbers, and the ability to copy sentences. Ms. [REDACTED] also focused on the Student’s handwriting, which was difficult for him. The Student could produce written output using a variety of technological tools and Ms. [REDACTED] explored that as an option for putting out written language so that it was much easier for him. Her occupational therapy sessions with the Student were held in pull out sessions, as well with the whole class. Prior to the school closure, the Student showed improvement in his fine motor and visual skills.

Ms. [REDACTED] also testified that during in-person instruction, the Students had desktop computers and access to Chromebooks computers loaded with various programs. The Student was able to use a program called Clicker to select words to construct sentences. He was able to do this without picture support, though that support was available. He was able to appropriately manipulate the mouse to click on the words and. Ms. [REDACTED] had set up many models for the Student in his student account, so he could assess the same resources in the classroom to practice and build his independence towards written language and classroom independence. The Student

enjoyed typing and typed sentences better and faster than writing by hand because typing was more functional and easier for him. He also responded very well to visual support, including a small individual visual schedule.

When the Student came into the pullout occupational therapy sessions, he and Ms. [REDACTED] focused on sensory strategies and she would observe how he responded to different sensory interventions and determine which strategies provided calming input. The concept here was that the Student's body was ready so he could sit and learn. This was the reason that the Student always started with a motor break in the morning, even before going to the classroom to unpack. The 1:1 aide usually accompanied the Student Ms. [REDACTED] could demonstrate strategies for the aide and teach him to implement them well and safely, so that the Student would get the most out of the exercise.

With regard to distance learning, Ms. [REDACTED] testified that she made plans for the Student's occupational therapy during the COVID closure. She indicated that she returned to work from the school closure on March 31, 2020 and emailed the Mother on April 1, 2020 to schedule a time to talk. Ms. [REDACTED] also testified regarding the April 8, 2020 teleconference and said that she and Ms. [REDACTED] spoke at length with the Mother about how things were going. At that time, the Mother stated she preferred biweekly emails from the therapists. During the teleconference, Ms. [REDACTED] also informed the Mother that she only attended Ms. [REDACTED]'s class on certain days. Ms. [REDACTED] said that she complied with the Mother's request and provided biweekly emails instead of occupational therapy sessions.

In the course of the biweekly emails, Ms. [REDACTED] informed the Mother of which days she would be in Ms. [REDACTED]'s virtual classroom so that she could observe the Student in class. She said that if the Mother had reached out to her and made a request, she would have tried to

change her schedule to be in Ms. [REDACTED]'s class at a different time. Ms. [REDACTED] offered to send the motor break menu but the Mother said it was unnecessary because the home was not as structured as school and he could move about. Ms. [REDACTED] sent the Parents a handout on "heavy work activities" explaining that it is very calming and describing activities the Student could do at home, such as help with the groceries, lifting things, setting the table, and vacuuming. They discussed handwriting and using a handwriting checklist to organize the writing, spacing between the words, putting letters on the line, making sure the letters are the right size, and that is his writing is legible, etc. Ms. [REDACTED] thought it would really benefit the Student to do some independent work and something he was good at, so they also had him use the Typing Club extension on the Chromebook. Ms. [REDACTED] also sent the Parents resources for visual motor activities, including resources on the correct way to form letters and how letters should be formed. Ms. [REDACTED] said that she had one or two opportunities to observe the Student and she discussed her observations with the Mother. When describing the Student during the virtual classes, Ms. [REDACTED] said that he was "just so happy" to see everyone on the screen.

Part of the reason Ms. [REDACTED] observed the virtual classroom was so that she could provide strategies to the parents, as well as the teachers, to improve the students' participation. For instance, Ms. [REDACTED] would evaluate whether the students needed any different tools to participate in class, such as a menu of exercises to do before they sit down so that they can sit still and participate during class. Ms. [REDACTED] is a part-time MCPS employee and was available to provide the Student occupational therapy four days a week. She also added the resources that she emailed the Mother to the MCPS online classroom, where she had a module for occupational therapy.

Ms. [REDACTED] explained that the Student was not eligible for occupational therapy for the Summer 2020 ESY because she did not determine that he would regress as a result of not receiving occupational therapy services during the ESY. She said that the Student was doing well with writing and he could access technology. According to Ms. [REDACTED], the Student could log in by himself, type, and use the mouse, but needed help staying on task. Ms. [REDACTED] did not think it would make a significant difference for the Student to receive occupational therapy during the ESY. She added that the whole IEP team agreed to this decision.

Ms. [REDACTED] has provided other students occupational therapy during virtual learning, many of them participated on a regular basis. She said there was a whole range of things that they did during distance learning and self-regulation became the big piece of Ms. [REDACTED]'s lessons, setting up sensory strategies for the students. If the students need anything like fidget devices, Ms. [REDACTED] makes the recommendation so that parents can use them to enable the students to participate in the class. As a result, Ms. [REDACTED]'s students have been able to do a fair number of things, even learning virtually.

Ms. [REDACTED] confirmed that coaching was available to all parents, including the Student's family. She described parent coaching as meeting with parents to talk about any difficulties they might be having at home and how to address them. She could then put a program together for the parents, as well as a schedule and resources. Ms. [REDACTED] shared that after intensive coaching sessions with one parent, she was able to get a student to sit for two hours using certain breaks and behavior management techniques, allowing him to participate in virtual learning without any major behaviors.

This year, the school has scheduled independent times for the Student's occupational therapy session. Ms. [REDACTED] has scheduled one session in the morning and one in the afternoon

so that she can see the Student at different times of day, because the time affects the students' performance. She said that had the Student participated in more virtual learning, she would have reassessed the Student's needs as time passed, because sometimes kids grow and "need more"

Ms. [REDACTED] has observed all of the fourth and fifth grade classrooms and finds that the students are learning, listening, and making progress. Given her knowledge of the Student, in her expert opinion, the Student would have benefitted from participating in virtual occupational therapy services during the 2019-2020 and the 2020-2021 school years.

Both Ms. [REDACTED] and Ms. [REDACTED] have provided considerable testimony which establishes that MCPS made speech and occupational therapy available to the Student during distance learning, as required by his IEP. Additionally, the availability of speech and occupational therapy has been corroborated by multiple other MCPS witnesses. With regard to the 2019-2020 school year, I do not find credible the Mother's assertion that Ms. [REDACTED] and Ms. [REDACTED] unilaterally decided that they would provide services to the Student though biweekly communication only. The documentary evidence, including the PWNs, various emails, and the Parent Contact Log, further corroborates Ms. [REDACTED] and Ms. [REDACTED]'s testimony that they were available to provide the Student speech and occupational therapy, respectively. It also is not logical that Ms. [REDACTED] and Ms. [REDACTED] would continue to provide services to other students in Ms. [REDACTED]'s class, but refuse to do so for the Student. In addition, an email in the record (MCPS Ex. 59) establishes that the Parents were notified that [REDACTED] was available to provide speech therapy to the Student during Ms. [REDACTED]'s absence. I therefore find that the Student did not receive speech and occupational therapy during the 2019-2020 school year because the Parents did not make him available for virtual learning during the days and times the speech and occupational therapists were scheduled to provide service and the Parents did not

request that either therapist make an accommodation in her schedule. Each therapist provided what service she could through the biweekly email communications, emailed coaching, and speech/occupational therapy resources, per the Mother's April 8, 2020 request.

Likewise, the record is clear that speech therapy was also available to the Student during the Summer 2020 ESY and is currently available during the 2020-2021 school year. Further, while the Student's IEP did not provide for occupational therapy during the Summer 2020 ESY, it was and continues to be available to him during the current 2020-2021 school year. The Student has not received these services only because he has not been present during virtual learning to participate in therapy.

Again, due to the Student's minimal participation in virtual learning, there is no evidence the Student would not respond favorably and make sufficient progress towards his speech-language-related and fine/visual motor goals if he were to participate in speech and occupational therapy during virtual learning. Based upon their experience providing virtual services in their respective fields since April 2020, and their personal knowledge of the Student, Ms. [REDACTED] and Ms. [REDACTED] have opined that in each of their expert opinions, the Student would benefit from participating in virtual speech therapy and occupational therapy, respectively.

The record is clear that MCPS has offered, and continues to offer, the Student both speech and occupational therapy, as required by the IEP, but simply has not been provided the opportunity to do so. I find that MCPS's inability to provide speech and occupational therapy services is not the result of any action taken by MCPS and therefore does not amount to a failure to provide a FAPE.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that MCPS did not fail to provide the Student a FAPE by refusing to provide him an in-home 1:1 aide and, instead, providing access to a 1:1 aide through virtual means during MCPS's suspension of in-person classroom instruction due to the COVID-19 pandemic, during the 2019-2020 school year, the Summer 2020 ESY, and the 2020-2021 school year. I further conclude that MCPS did not fail to provide speech and occupational therapy to the Student as provided for in the IEP, during MCPS's suspension of in-person classroom instruction due to the COVID-19 pandemic, during the 2019-2020 school year, the Summer 2020 ESY, and the 2020-2021 school year. 20 U.S.C.A. § 1400(d)(1)(A) (2017); *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009); 34 C.F.R. § 300.101(a) (2019).

ORDER

I **ORDER** that the Due Process Complaint filed by the Parent on August 3, 2020 is **DENIED** and **DISMISSED**.

December 16, 2020
Date Decision Issued

Jennifer A. Nappier
Administrative Law Judge

JAN/emh
#189552

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]

■■■■

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE JENNIFER A. NAPPIER,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH NO.: MSDE-MONT-OT-20-15904

APPENDIX: EXHIBIT LIST¹

Unless otherwise noted, I admitted the following pre-marked exhibits into evidence on behalf of the Student:

- Student Ex. 1 Emails from Parent to ■■■■, dated 07/15/20
- Student Ex. 2 Email from ■■■■ to the Parents, dated 06/10/20
- Student Ex. 3 Letter from Parents to ■■■■, dated 07/15/20
- Student Ex. 4 Prior Written Notice and IEP Meeting Summary, dated 07/23/20
- Student Ex. 5 Prior Written Notice, dated 07/27/20
- Student Ex. 6 OFFERED BUT NOT ADMITTED
- Student Ex. 7 Emails to/from ■■■■ and the Parents, dated 07/15/20
- Student Ex. 8 IEP, dated 05/11/20
- Student Ex. 9 Speech-Language Status Report, ■■■■, Speech-Language Pathologist, dated 03/09/20
- Student Ex.10 Occupational Therapy Re-Evaluation Report, ■■■■ MCPS Occupational Therapist, dated 03/05/20

¹ MCPS Exhibits 41, 42, 94, and 103 were admitted by stipulation of the parties.

Unless otherwise noted, I admitted the following pre-marked exhibits into evidence on behalf of MCPS:

- MCPS Ex. 1 Occupational Therapy Re-Evaluation Report, [REDACTED] MCPS Occupational Therapist, dated 03/05/20
- MCPS Ex. 2 NOT OFFERED
- MCPS Ex. 3 Psychological Re-Evaluation Report, [REDACTED], MCPS School Psychologist, dated 03/09/20
- MCPS Ex. 4 Speech-Language Status Report, [REDACTED], Speech-Language Pathologist, dated 03/19/20
- MCPS Ex. 5 Functional Behavioral Assessment and Behavior Intervention Plan, updated 03/19/20
- MCPS Ex. 6 NOT OFFERED
- MCPS Ex. 7 Progress Report on IEP Goals, dated 08/07/20
- MCPS Ex. 8 NOT OFFERED
- MCPS Ex. 9 NOT OFFERED
- MCPS Ex. 10 NOT OFFERED
- MCPS Ex. 11 NOT OFFERED
- MCPS Ex. 12 NOT OFFERED
- MCPS Ex. 13 NOT OFFERED
- MCPS Ex. 14 NOT OFFERED
- MCPS Ex. 15 NOT OFFERED
- MCPS Ex. 16 NOT OFFERED
- MCPS Ex. 17 NOT OFFERED
- MCPS Ex. 18 IEP, dated 05/11/20

MCPS Ex. 19	IEP Amended, dated 06/16/20
MCPS Ex. 20	NOT OFFERED
MCPS Ex. 21	NOT OFFERED
MCPS Ex. 22	NOT OFFERED
MCPS Ex. 23	NOT OFFERED
MCPS Ex. 24	NOT OFFERED
MCPS Ex. 25	NOT OFFERED
MCPS Ex. 26	Prior Written Notice, Individualized Distance Learning Plan, dated 04/27/20
MCPS Ex. 27	Prior Written Notice, dated 05/18/20
MCPS Ex. 28	NOT OFFERED
MCPS Ex. 29	Prior Written Notice, dated 07/27/20
MCPS Ex. 30	Prior Written Notice and IEP Meeting Summary, dated 07/23/20
MCPS Ex. 31	NOT OFFERED
MCPS Ex. 32	NOT OFFERED
MCPS Ex. 33	NOT OFFERED
MCPS Ex. 34	NOT OFFERED
MCPS Ex. 35	NOT OFFERED
MCPS Ex. 36	NOT OFFERED
MCPS Ex. 37	NOT OFFERED
MCPS Ex. 38	NOT OFFERED
MCPS Ex. 39	ESY Daily Attendance Profile, dated 07/15/20 to 08/07/20
MCPS Ex. 40	Student Access Report, myMCPS and Daily Attendance Profile, provided

- by [REDACTED], dated 08/31/20 to 10/12/20
- MCPS Ex. 41 ESY Daily Schedule, dated 07/14/20
- MCPS Ex. 42 Class Schedule, from [REDACTED] to Parent, dated 09/11/20
- MCPS Ex. 43 NOT OFFERED
- MCPS Ex. 44 Email to Parent from [REDACTED], [REDACTED] Coordinator, dated 03/13/20
- MCPS Ex. 45 Email from Parent to [REDACTED], Principal, dated 03/31/20
- MCPS Ex. 46 Email to/from Parent and [REDACTED], dated 04/02/20
- MCPS Ex. 47 Emails to/from Parent, [REDACTED], and [REDACTED] dated 04/01/20 to 04/02/20
- MCPS Ex. 48 NOT OFFERED
- MCPS Ex. 49 NOT OFFERED
- MCPS Ex. 50 Email to Parent from [REDACTED], Speech-Language Pathologist, dated 04/07/20
- MCPS Ex. 51 Email to Parent from [REDACTED], dated 04/14/20
- MCPS Ex. 52 Emails to/from Parent and [REDACTED], dated 04/17/20 to 04/21/20
- MCPS Ex. 53 Email to Parent from [REDACTED], regarding Distance Learning Plan, dated 04/24/20
- MCPS Ex. 54 NOT OFFERED
- MCPS Ex. 55 Email to Special Education Parents from [REDACTED], dated 05/06/20
- MCPS Ex. 56 NOT OFFERED
- MCPS Ex. 57 NOT OFFERED
- MCPS Ex. 58 NOT OFFERED
- MCPS Ex. 59 Email to Special Education Parents from [REDACTED], dated 06/01/20

MCPS Ex. 60 Email to Parent from [REDACTED], dated 06/04/20

MCPS Ex. 61 NOT OFFERED

MCPS Ex. 62 NOT OFFERED

MCPS Ex. 63 Email to Special Education Parents from [REDACTED], dated 06/11/20

MCPS Ex. 64 Email to Parent from [REDACTED], dated 05/29/20 to 06/11/20

MCPS Ex. 65 Email to/from Parent and [REDACTED], Supervisor, Resolution and Compliance Unit, dated 06/30/20

MCPS Ex. 66 Emails to/from [REDACTED], Parent, and [REDACTED], Director, Department of Special Education Services, regarding ESY Assignment, dated 07/10/20 to 07/14/20

MCPS Ex. 67 Email from [REDACTED] to Parent, regarding ESY Schedule and IDLP, dated 07/14/20

MCPS Ex. 68 Emails from Parent to [REDACTED], dated 07/15/20

MCPS Ex. 69 NOT OFFERED

MCPS Ex. 70 Emails to/from Parent, [REDACTED], and [REDACTED], dated 08/07/20 to 08/24/20

MCPS Ex. 71 NOT OFFERED

MCPS Ex. 72 Letter and Email from [REDACTED] to Parent, regarding Individualized Distance Learning Plan, dated 09/10/20

MCPS Ex. 73 Parent Contact Log, dated 04/08/20 to 07/30/20

MCPS Ex. 74 Montgomery County Public Schools Coronavirus Update, dated 03/11/20

MCPS Ex. 75 Montgomery County Public Schools Coronavirus Update, dated 03/25/20

MCPS Ex. 76 Montgomery County Public Schools Recovery Plan, Special Education, pages 21-23, dated 08/04/20

MCPS Ex. 77 Montgomery County Public Schools Recovery Plan, Special Education, Pages 25-27, dated 08/25/20

MCPS Ex. 78	Sample Morning and Afternoon Schedule, Special Education
MCPS Ex. 79	Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease Outbreak, dated 03/20
MCPS Ex. 80	Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, dated 03/21/20
MCPS Ex. 81	NOT OFFERED
MCPS Ex. 82	NOT OFFERED
MCPS Ex. 83	20-01 - Serving Children with Disabilities under IDEA during School Closures due to the Covid-19 Pandemic
MCPS Ex. 84	NOT OFFERED
MCPS Ex. 85	NOT OFFERED
MCPS Ex. 86	20-03 - Providing Continuity of Learning to Students with Disabilities during COVID-19
MCPS Ex. 87	NOT OFFERED
MCPS Ex. 88	NOT OFFERED
MCPS Ex. 89	NOT OFFERED
MCPS Ex. 90	NOT OFFERED
MCPS Ex. 91	NOT OFFERED
MCPS Ex. 92	NOT OFFERED
MCPS Ex. 93	Extended School Year (ESY) Services during the COVID-19 Pandemic
MCPS Ex. 94	A Parents' Guide: Navigating Special Education during the COVID-19 Pandemic
MCPS Ex. 95	Resume of [REDACTED], 3rd Grade Teacher, [REDACTED] Elementary School, Montgomery County Public Schools
MCPS Ex. 96	Resume of [REDACTED], 3rd/4th Grade Teacher, [REDACTED]

Elementary School, Montgomery County Public Schools

- MCPS Ex. 97 Resume of [REDACTED], Autism Program Specialist, Montgomery County Public Schools
- MCPS Ex. 98 Resume of [REDACTED], Itinerant Occupational Therapist, Montgomery County Public Schools
- MCPS Ex. 99 Resume of [REDACTED], Supervisor, Department of Special Education Services, Montgomery County Public Schools
- MCPS Ex. 100 Resume of [REDACTED], Speech-Language Pathologist, Montgomery County Public Schools
- MCPS Ex. 101 Resume of [REDACTED], Principal, [REDACTED] Elementary School, Montgomery County Public Schools
- MCPS Ex. 102 NOT OFFERED
- MCPS Ex. 103 Resume of [REDACTED], Director, Department of Special Education Services, Montgomery County Public Schools