

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

BEFORE NICOLAS ORECHWA,
ADMINISTRATIVE LAW JUDGE
THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-21-12801

DECISION

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STATEMENT OF THE CASE

On June 4, 2021, ██████████ (the Student’s mother) and ██████████ (the Student’s father) (collectively “the Parents”), on behalf of their child, ██████████ (the Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);¹ 34 C.F.R. § 300.511(a) (2019);² Md. Code Ann., Educ. § 8-413(d)(1) (2018); Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

I held a telephone prehearing conference on July 16, 2021. The Student’s mother was present and represented by Harold G. Belkowitz, Esquire. Stacy Reid Swain, Esquire, represented the MCPS. On July 20, 2021, I issued my prehearing conference report.

¹ 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.

² 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.

Previously, on June 22, 2021, the parties participated in a resolution meeting. On that same date, they agreed in writing no resolution was possible. Accordingly, under the applicable law, a decision in this case would normally be due forty-five days after the parties agreed no resolution was possible (i.e., August 6, 2021). 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Md. Code Ann., Educ. § 8-413(h) (2018); COMAR 13A.05.01.15C(14).

A variety of conflicts, mostly previously scheduled OAH Special Education Due Process hearings and staffing constraints by the MCPS, prevented the parties from agreeing to a date earlier than August 6, 2021, as the first day of the hearing.³ The last day of the hearing was Thursday, October 21, 2021. This gave me zero days to write and issue my decision under the statutory time frames. However, I may grant specific extensions of time at the request of either party. *Id.* § 300.515(c). At the prehearing conference, Counsel for the Student requested that the time for me to write my decision be extended to fourteen days from the close of the record.⁴ Counsel for the MCPS agreed to the Student's request. Finding good cause based upon the asserted calendar constraints and the resulting absence of any time to write a decision, I granted the request. If the due date does not fall on a business day, I must issue my decision on the last business day prior to the due date. 34 C.F.R. § 300.515(c); Educ. § 8-413(h).

I held the hearing as scheduled on October 5, October 6, October 7, October 19, October 20, and October 21, 2021, via the Webex online platform. COMAR 28.02.01.20B. Harold G. Belkowitz, Esquire, represented the Parents both of whom appeared. William Fields, Esquire, represented the MCPS. At the close of the Parents' case, MCPS made a motion for judgment

³ Counsel for the MCPS identified September 30, 2021, as the first day she would be available for the hearing. While I did not request counsel to identify all her conflicts on the record, I requested she provide documentation of them to the OAH no later than ten days from the date of the conference. On July 26, 2021, the OAH received a sworn affidavit from Counsel for MCPS setting forth the specific dates of unavailability in August and September for its witnesses and Counsel as well as the reasons for their unavailability. I included Counsel's affidavit in the OAH file.

⁴ In other words, as the hearing ended on the sixth day, I have fourteen days from October 21, 2021, to issue my decision. At the conference, the parties agreed Thursday, November 4, 2021, was fourteen days from October 21, 2021.

(motion). I heard argument from both parties on the motion, reserved my ruling, and then heard the merits of MCPS’s case. COMAR 28.02.01.12E(2)(b). Given my decision in this matter, it is unnecessary to address MCPS’s motion. *See Mathis v. Hargrove*, 166 Md. App. 286, 306 (2005) (“The trial court is not only vested with the discretion to reserve ruling or *forego* ruling on the motion entirely, but that discretion exists even where a party meets all the technical requirements for . . . judgment.” (Emphasis added)).

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 (2021); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

- 1) Whether MCPS failed in its Child Find obligation to timely identify the Student as disabled;
- 2) Whether when requested by the Parents, MCPS failed to timely evaluate the Student for a disability and upon determining the Student disabled, did not timely convene an IEP meeting;
- 3) Whether the April 5, 2021 IEP proposing placement in the [REDACTED] [REDACTED] ([REDACTED]) program was reasonably calculated provide the Student with FAPE in light of his unique circumstances for the 2019-2020 and 2020-2021 school years, and whether placement is proper at [REDACTED] and [REDACTED].

SUMMARY OF THE EVIDENCE

Exhibits

A list of the exhibits offered into evidence is attached to this Decision as an Appendix.

Testimony

The Parents presented the following witnesses:

- The Student's mother;
- [REDACTED], who I admitted as an expert in Adolescent Therapy and

Counseling;

- [REDACTED];
- [REDACTED], who I admitted as an expert in Special Education;
- [REDACTED];
- [REDACTED], who I admitted as an expert in the Therapeutic Treatment of

Children and Adolescents;

- Dr. [REDACTED], Psy.D, who I admitted as an expert in the Psychology of Children and Adolescents and the performance of Psychological and Neurological Testing.

The MCPS presented the following witnesses:

- [REDACTED], who I admitted as an expert in School Psychology;
- Dr. [REDACTED], Ed.D, who I admitted as an expert in Public School

Administration;

- [REDACTED], who I admitted as an expert in Special Education;
- [REDACTED], who I admitted as an expert in Special Education.

FINDINGS OF FACT

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

1. Commencing in kindergarten, the Parents enrolled the Student in MCPS. In 2015, during his fifth-grade year, the Student began to lose focus in class.

2. Dr. [REDACTED], Psy.D. (Dr. [REDACTED]) performed psychological testing on the Student in August 2015 just prior to his sixth-grade year. The testing revealed the Student had high verbal abilities, strong oral language and deductive reasoning skills and above average reading and writing skills.

3. The testing also revealed the Student had poor impulse control, visual processing speed and math skills. Dr. [REDACTED] concluded the Student suffered from Attention Deficit Hyperactivity Disorder (ADHD) and a Math Disability. He suggested the Student would benefit from a 504 Plan. On or about August 28, 2015, Dr. [REDACTED] issued a report setting forth these findings (the [REDACTED] report).

4. The Parents provided the [REDACTED] report to MCPS at the beginning of the Student's sixth grade year. MCPS convened a 504 team and considered the Parent's input and the [REDACTED] report's findings and conclusions.

5. On October 15, 2015, the 504 team developed a 504 plan (October 2015 504 plan) which set forth the following accommodations for all classes and all teachers for the Student's sixth grade year:

- Graphic Organizer;
- Mathematics Tools and Calculations Devices on tests;
- Respond on test booklet;
- Preferential Seating in front of the class toward the perimeter;

- Monitor the Student’s plan book and sign it daily, even if no assignments;
- Use “stickies” to mark homework papers;
- Copy of notes;
- Extended time on tests;
- Resource class;
- Movement breaks
- Frequent evening attention.

6. The Student received all As and Bs as his final grades for sixth grade including a B in Math.

7. On February 22, 2017, MCPS issued an updated 504 plan for the Student (the 2017 504 Plan) covering the Student’s seventh grade year. The Parents participated in the drafting of the 2017 504 Plan.

8. The 2017 504 Plan contained the same accommodations as the 2015 504 Plan. However, it removed the need for the following:

- Graphic Organizer;
- Mathematics Tools and Calculations Devices on tests;
- Respond on test booklet.

9. For seventh grade the Student received all A’s and B’s with the exception of C’s in Math and World Studies.

10. On February 23, 2018, the 504 team issued an updated 504 Plan (the February 2018 504 Plan) for the Student’s eight grade year. The February 2018 504 Plan contained the same accommodations as the 2017 504 Plan. The Student’s Mother participated in the drafting of the February 2018 504 Plan.

11. On April 5, 2018, the 504 team issued another updated 504 Plan (the April 2018 504 Plan). The April 2018 504 Plan removed the resource class from the list of the Student's accommodations. The Student's Mother participated in the drafting of the April 2018 504 Plan.
12. The Student received all A's and B's for his grades in eighth grade, including a B in Math.
13. During eighth grade the Student performed on level in math and could grasp math concepts. The resource class helped the Student with his math performance.
14. The Student began to exhibit increased class avoidance during eighth grade. At times he also became disengaged especially during testing.
15. The Student transitioned to ██████████ High School (██████████) for ninth grade. The April 2018 504 Plan remained in effect.
16. During his ninth grade year at ██████████ the Student's class avoidance and disengagement increased. The Student's disengagement manifested itself, in part, from his use of his phone in class. The Student's class avoidance and disengagement significantly contributed to his below level performance in Math. In Spring of 2019, MCPS recommended the Student's access to a phone and other electronic devices during class be limited.
17. The Student exhibited a high level of interest and talent in acting. During his ninth grade year at ██████████, he won a role in a theater performance outside of school. The performance took place during the school day requiring the Student to miss lunch and an hour of class a couple times a week. The Parents sanctioned the Student's participation in the performance during school.
18. On March 13, 2019, the 504 team at ██████████ convened and determined the Student's continuing eligibility for a 504 plan due to his ADHD diagnosis. The Student's Mother participated in this 504 plan meeting.

19. That same day the 504 team issued a 504 plan for the Student (the 2019 504 plan). The 2019 504 plan included the same accommodations as the April 2018 504 Plan with the inclusion of a calculation device for Math. The 2019 504 plan did not include a resource class as an accommodation. The Student's Mother participated in the drafting of the 2019 504 plan.

20. The Student received a combination of A's, B's, C's and D's for final grades of his ninth grade year. The Student received D's in Algebra and United States History.

21. In January of 2019, during the Student's ninth grade year, the Parents advised MCPS of their consideration of private school for the Student. The Parents provided no reason for their consideration of private school.

22. Although he missed some classes and received some detentions, the Student did not exhibit significant behavioral issues at MCPS. MCPS never expelled or suspended the Student.

23. At the same time, the Student began to exhibit significant behavioral problems at home. MCPS did not know the extent of the Student's behavioral issues at home.

24. The Parents placed the Student in the [REDACTED] ([REDACTED]) for his tenth grade high school year (2019-2020). [REDACTED], located in the [REDACTED] metro area, focuses on arts related classes with smaller class sizes. The Student's problems with class avoidance and lack of focus continued at [REDACTED]. His behavioral issues at home continued. He began to exhibit detrimental and obsessive relations with female peers. This included dating more than one female peer at once.

25. During this time, neither [REDACTED] nor the Parents requested MCPS evaluate the Student for a disability.

26. The Student's behavior concerned the Parents to such a degree he went on a "leave of absence" and did not officially complete his tenth grade year at [REDACTED]. On June 8, 2020, the Parents enrolled the Student in [REDACTED] ([REDACTED]) in [REDACTED]

27. At [REDACTED] the Student hiked and set up camp with other students in the mountains of [REDACTED]. He saw a therapist and took six classes. The Student received A's in all his classes for simply appearing and completing the work. The Student took no math classes while at [REDACTED].

28. [REDACTED] does not provide special education services.

29. On July 21, 2020, Dr. [REDACTED], PsyD. (Dr. [REDACTED]) tested the Student during his time at [REDACTED]. Pandemic restrictions required Dr. [REDACTED] to perform the testing remotely via Zoom. Dr. [REDACTED] adequately modified the testing arrangements to allow for proper remote, as opposed to in person, testing.

30. Dr. [REDACTED]'s testing revealed the Student exhibited the same strengths as reflected in the [REDACTED] report as well as the same weaknesses in Math. Dr. [REDACTED]'s testing also revealed the Student exhibited difficulties in executive functioning. The testing concluded the Student suffered from ADHD, Bipolar II disorder, Attachment, Generalized Anxiety Disorder and a Math Disorder. Dr. [REDACTED] reduced her findings to a report she issued on August 4, 2020 (the [REDACTED] report).

31. Both Dr. [REDACTED] and [REDACTED] recommended that the parents enroll the Student in a residential therapeutic boarding school. In making this recommendation, neither [REDACTED] nor Dr. [REDACTED] considered any specific less restrictive programs offered by MCPS to address the Student's challenges.

32. The Parents identified the [REDACTED] in [REDACTED] as an appropriate residential therapeutic boarding school for the Student. The Student arrived at the [REDACTED] on September 14, 2020, and has continuously received educational services there since.

33. The [REDACTED] provides the Student with attention twenty four hours a day, seven days a week. The Student has a dedicated treatment team consisting of an advisor, an academic case manager, a therapist, a psychiatrist, and the Parents.

34. The [REDACTED] works predominantly with high school students many of whom suffer emotional difficulties. Students participate in two individual therapy sessions and one group therapy session a week. A psychiatrist oversees the students' medication management.

35. In addition, the [REDACTED] provides the Student with the opportunity to participate in weekend and evening study hall should he fall behind in his studies. The Student has needed to utilize these services while at the [REDACTED]

36. The [REDACTED] utilizes a level system whereby it awards the Student more freedom as his behavior improves. The Student has exhibited negligible progress on the level system since his arrival at the [REDACTED].

37. The [REDACTED] does not provide the Student with access to his non-disabled peers.

38. On September 17, 2020, for the first time, the Parents formally requested MCPS evaluate the Student for special education services. The Parents sent their request, through counsel, via email, in the evening after regular business hours.

39. MCPS timely evaluated the Student on December 17, 2020. The Parents and two staff members from the [REDACTED] familiar with the Student participated in the meeting and provided input. The evaluation team considered, among other things, the [REDACTED] report. The

team determined the Student suffers from an emotional disability rendering him eligible for special education services.

40. MCPS scheduled an IEP team meeting on January 13, 2021, to discuss development of the Student's IEP. Due to a staff member's unavailability MCPS cancelled the January 13, 2021 date, but suggested January 15, 2021, as an alternate date. The Parents did not agree to the January 15, 2021 date.

41. Counsel for the Parents later followed up with MCPS by email to schedule a new IEP meeting date. Counsel for MCPS ignored at least two of the Parent's counsel's follow up emails.

42. The IEP team finally convened on April 5, 2021 and drafted an IEP plan. At all times between December 17, 2020 and April 5, 2021, the Student was enrolled at the [REDACTED] and receiving the services the Parent's desired.

43. The Parents and two staff members from the [REDACTED] familiar with the Student participated in, and provided input at, the April 5, 2021 IEP meeting. The IEP team adopted the findings of the [REDACTED] report at the meeting. The IEP team did not question Dr. [REDACTED]'s test taking methodology or the underlying soundness of the [REDACTED] report.

44. The IEP team considered the [REDACTED] ([REDACTED]) but concluded it was inappropriate for the Student's unique needs. The IEP team concluded the [REDACTED] program at [REDACTED] to be the least restrictive environment to provide the Student with FAPE. The [REDACTED] program provides the Student with a variety of the same accommodations the [REDACTED] provides.

45. The [REDACTED] program provides the Student with access to his non-disabled peers at his home school ([REDACTED]). It supports students whose emotional problems impede their ability to access an education.

46. The [REDACTED] program individualizes resource classes for Students and coordinates them with a Student's case manager. The Students receive supports geared toward their particular needs. A clinical social worker will monitor a student's emotional needs, coordinate with outside service providers and provide feedback on the use of emotional supports. A psychologist focuses on academics, testing and diagnostics but also sometimes provides counseling services based upon a student's needs. Classes have teachers with paraeducators who support the teachers.

47. The Parents rejected the [REDACTED] program on April 16, 2021, and requested the Student remain at the [REDACTED] at public expense. The Parents proposed no other placement options.

DISCUSSION

Positions of the Parties

The Parent's Case

The Student began attending MCPS in kindergarten. He last attended MCPS during his freshman high school year at [REDACTED] (the 2018-2019 school year). While artistic and athletic, the Student lacks focus, organization and has mood swings. He craves the attention of other peers and struggles with peer relationships. The Student's mother testified his school problems began around the fifth grade. Those problems included, but were not limited to, obsessively drawing in class and lacking focus. Oftentimes he either lost assignments or failed to complete them. After evaluating the Student in 2005, Dr. [REDACTED] suggested the Student have a 504 plan.

That same year, the Parents shared the [REDACTED] report with MCPS. After reviewing the [REDACTED] report, MCPS found the Student eligible for a 504 Plan (the 2015 504 Plan). MCPS neither performed its own psychological testing nor advised it could perform such testing at no

cost to the Parents. The 2015 504 Plan considered the ██████████ report and concluded the Student suffered from ADHD and exhibited impaired organizational skills. It suggested a variety of accommodations to assist the Student in class such as extended testing time and frequent breaks. In 2017, MCPS drafted another 504 plan during the Student's seventh grade year (the 2017 504 plan). The 2017 504 plan included similar accommodations as the 2015 504 plan.

In eighth grade the Student started exhibiting glaring problems. The Student's class absences increased. The Student's mother testified he would sometimes go to school, "but not really [attend] school." The Parents contacted MCPS and raised these concerns. MCPS proposed no evaluations or assessments to address these issues. MCPS did convene the 504 team, but only the Student's mother and his counselor attended the meeting. MCPS made no changes to the Student's accommodations as a result of the meeting.

On April 5, 2018, MCPS developed a new 504 plan (April 2018 504 plan). However, the Student's absences continued. This deeply concerned the Parents due to the Student's imminent transition to High School. However, MCPS proposed no further testing or evaluation of the Student. Further, according to the Student's teachers the Student did not use all his accommodations per the 504 plans. Parents Ex. 14. The Student continued to miss assignments and fail to stay in class.

The Student began ninth grade at ██████████ High School (██████████) in the fall of 2018. The Student was "enthusiastic initially" and "liked the idea of going to a different school." However, within three weeks the Student's mother noticed the Student failed to keep up with his assignments. ██████████ never contacted the Student's mother about these issues. However, ██████████ did inform the Student's mother when the Student began to skip classes. He exhibited other behavior detrimental to his academic success. For example, he would submit late

assignments or arrive late to class. In short, at ██████████, the Student's educationally detrimental behavior failed to improve and may have worsened.

██████████ assigned ██████████ (██████████) as the Student's counselor. Although at ██████████, ██████████ attended the Student's final eighth grade 504 plan meeting. The Student's mother contacted ██████████ to discuss the Student's lack of progress and overall poor performance. When asked if ██████████ seemed interested in addressing the Student's needs, the Student's mother testified "not really, no." During the summer of 2018, the Student's mother asked ██████████ for a list of possible tutors for the Student. When ██████████ finally responded, approximately five weeks later, the Student's mother had already identified a tutor on her own. ██████████ did suggest a "peer to peer" tutor process which the Student tried without success. ██████████ never suggested the Student's mother explore the IEP eligibility process.

During his freshmen year, ██████████ held two staffing meetings to discuss the Student's performance and progress. The Student attended the meetings. The Student's teachers discussed the issues the Student encountered in the classes. The Student would respond and then all present discussed proposed solutions for each class. While the parties acknowledged the Student's ADHD diagnosis, they only proposed the "peer to peer" tutoring as an available service to address the Student's deficits. The Student did participate in a professional production which required him to perform two shows per week for four weeks. The Student would attend the performances during lunch hour and one hour of class. The Parents coordinated with school to arrange for receipt of the Student's homework.

The Student's problems increased over the course of his freshman year at ██████████. His resistance to attending school increased. His absences from class during the school day increased. He had difficulty with interpersonal relationships and failed to maintain friendships. For the first time, the Student began to incur disciplinary infractions. He received detentions for

cutting classes during the school day and requiring school security to locate him. [REDACTED] notified the Student's mother of the absences by mail. Therefore, she usually learned about them five to seven days after the fact.

The Parents finally reached their breaking point during the second semester of the Student's freshman year at [REDACTED] (spring 2019). The Student's lack of progress, coupled with what the Parents viewed as MCPS's anemic response, prompted them to consider placing the Student in a private school. The parents advised MCPS of their consideration of private schools as early as January 2019. Eventually they identified the [REDACTED] ([REDACTED]) in northern [REDACTED]. The Parents enrolled the Student in [REDACTED] for his sophomore year of High School (the 2019-2020 school year).

The Parents chose [REDACTED] because of its small size and small classes with individualized attention to students. Further, [REDACTED] had a strong performing arts component which played to the Student's strengths such as his interest and talent in theater. The Parents hoped these aspects of [REDACTED] would serve as catalysts to motivate the Student's interest in school.

The Student had a "good" first couple of months at [REDACTED]. He enjoyed the artistic component of the school. However, by December of 2019 he began to exhibit social and emotional difficulties worse than those he experienced at [REDACTED]. These difficulties manifested themselves through difficulty keeping friends, jealousy, anxiety and spending time alone in class avoiding other students. Eventually he even avoided the arts classes and by February of March of 2020, the Student became "very solitary at school." At no time did the Parents or [REDACTED] request MCPS test the Student or notify MCPS that they suspected the Student had a disability.

The Student's academic performance at [REDACTED] also suffered. The Student failed to complete assignments, failed to appear at classes prepared and missed classes. At times the Student even refused to leave his room at home in order to avoid school. When the pandemic hit

and ██████ began conducting classes online, the Student would rarely sign on to online class sessions. At the same time, the Student began seeing a psychiatrist for anxiety and depression. These sessions started in January of 2020 after the Student disappeared briefly during a school trip in ██████. The Student's behavior at home deteriorated. He became angry, uncontrollable and at times refused emerge from his room for sustenance.

The Parents discussed the Student's behavior with his psychiatrist and an educational consultant. Both recommended the Parents send the Student to a wilderness program. The Parents chose ██████ in ██████ because, among other things, he could receive school credits, have a therapist and would be relatively close to home.⁵ On June 8, 2020, the Student enrolled in ██████.

The Student spent three months at ██████. While there, he took a variety of classes including English, health education and experiential science but no math. About halfway through the Student's stay, the Parents began to explore the Student's post ██████ placement options. Around his eighth week at ██████, Dr. ██████ performed her psychological evaluation of the Student and issued her report recommending the Student enroll in a full time residential therapeutic boarding school. The Parents discussed the Student's placement options with ██████ ██████ (████████) at ██████ and their educational consultant. They concluded the ██████ in ██████ was the best placement option.

The Parents found the ██████ appropriate because it provided twenty-four hour, seven day a week attention allowing the Student to adequately access his education. In addition, the ██████ had high academic standards, small class sizes, individual attention and a level system⁶ to motivate the Student.

⁵ The Student's mother testified that many wilderness programs are located in the western United States.

⁶ I shall discuss the ██████'s level system in further detail below.

The Student began attending the [REDACTED] on September 8, 2020. Later that month, the Parents,⁷ contacted MCPS about the Student's enrollment in the [REDACTED]. They wanted the Student to eventually return to Maryland and found the 504 plans MCPS had previously implemented inadequate. On September 17, 2020, the Parents requested MCPS initiate the special education eligibility process for the Student.

On December 17, 2020, the Parents attended a meeting with MCPS to discuss the Student's eligibility for special education services. The principal and the Student's counselor at the [REDACTED] also attended the meeting. The Parents provided MCPS with a copy of Dr. [REDACTED]'s report. MCPS did not propose to perform any of its own testing or observations of the Student. MCPS determined the Student eligible for special education services. It then issued a notice of no assessment needed after reviewing the documents the Parents provided including the [REDACTED] report.

The parties originally discussed setting the IEP meeting for January 13, 2021, but MCPS cancelled when one of its employees could not attend. MCPS suggested January 15, 2021, but the Parents' counsel could not attend. Despite following up a couple times, the Parents did not hear back from MCPS until March or April of 2021. The IEP team eventually met on April 5, 2021. The IEP team considered a variety of documents and information including the [REDACTED] report, the [REDACTED] report and input from [REDACTED] staff.

The IEP team identified accommodations for the Student as well as goals and short term objectives. The Parents did not object to the accommodations or goals and objectives of the IEP. However, the IEP team proposed to place the Student in the [REDACTED] program at [REDACTED]. The Parents objected to this placement because according to the Student's mother, "Many elements

⁷ Most, if not all, the communications the Parents had with MCPS from this point forward went through their attorney. However, for the sake of simplicity I will simply refer to the Parents as contacting MCPS.

of it were tried before and were not effective... including resource class...and some of the accommodations required enormous amounts of monitoring on [the Parents] part and not really applied by [MCPS] very consistently.” The Parents felt resource class failed during the Student’s middle school years and would fail at [REDACTED]. The Parents felt the IEP did not address the issue of the Student requiring support after school. The Student has major difficulty motivating himself after school. Because the [REDACTED] has evening and weekend supervision, the [REDACTED] can address that aspect of the Student’s disability. In addition, the Parents did not feel the IEP went far enough to address the Student’s social and emotional problems.

The IEP team considered the recommendations of the [REDACTED], [REDACTED] and MCPS. The IEP team did not discuss private residential placement or placement within its system outside of [REDACTED]. The Parents rejected placement in the [REDACTED] program believing the Student required a residential placement. One concern involved the possibility of the Student regressing over the summer. MCPS proposed extended school year (ESY) services at [REDACTED]. The Parents believed ESY services should be at the [REDACTED].

[REDACTED] is a licensed mental health counselor, course leader and primary therapist for the students at [REDACTED]. [REDACTED] functions as a licensed residential treatment center and an independent school in [REDACTED]. [REDACTED] more specifically characterized [REDACTED] as “[helping struggling] families chart a course toward a different type of future.” However, [REDACTED] is not a special education school and [REDACTED] is not a special educator.

Students live in the deep woods of [REDACTED] “in a clinically sophisticated structure.” [REDACTED] does individual therapy, group therapy and helps parents understand [REDACTED]’s process. Students typically stay at [REDACTED] only eight to twelve weeks and do not earn credits toward High School graduation.

██████████ worked with the Student from June 8, 2020, until September 2, 2020. Upon arrival the Student engaged in “experiential work” which included outdoor living skills and living amongst peers. ██████████ clinically assessed the Student’s social, emotional and behavioral needs as well as family dynamics.

The Student presented as a “pleaser” upon arrival. He told people what they liked to hear, mirrored behavior, focused on the problems of others instead of his own and “really, really, wanted to be liked by everybody.” The Student would struggle to look within himself to feel good and would instead look to other people. ██████████ opined that seeking validation from others to enhance self-worth lacks sustainability. ██████████ sought to have the Student find other ways to feel good about himself. In addition, the Student avoided anything he perceived as difficult (e.g., school work). Thus, ██████████ sought to instill confidence in the Student when facing difficult tasks.

██████████ felt the Student required a structured residential setting to deal with managing emotions and maladaptive behaviors. Without the structure, ██████████ feared the Student would regress to old behaviors. ██████████ believes the ██████████ is an appropriate placement as it fits all the Student’s needs.

██████████ (██████████)⁸ serves as the associate executive director of the ██████████ and is the Student’s advisor. ██████████ never obtained a license to teach and never trained as a special educator. He never wrote an IEP. The ██████████ is a therapeutic boarding school which works predominantly with high school students many of whom arrive after a diagnosis of “emotional difficulties.” Students participate in two individual therapy sessions and one group therapy session a week. A psychiatrist oversees the students’ medication management. The ██████████ has some students placed by their local school system through an IEP.

⁸ At the end of ██████████’ testimony, counsel for the Parents moved that I qualify him as an expert in student advising and management of residential therapeutic programs. MCPS objected and I sustained the objection. During his testimony however, ██████████ testified to a variety of opinions without objection from MCPS.

As the Student's advisor, [REDACTED] functions as "the hub" of the Student's program. [REDACTED] serves as the main source of communication between the Student, the Parents and other [REDACTED] staff including the Student's therapist. The Student has a treatment team consisting of his advisor, academic case manager, therapist, psychiatrist, and the Parents.

[REDACTED] identified the Student's needs as improving emotion regulation, improving relationships, navigating romantic relationships and improving academic functioning, coping skills and motivation. The treatment team meets weekly on Wednesdays. However, [REDACTED] communicates with various members of the treatment team as well as teachers and dorm staff on a daily basis.

The [REDACTED] documents the Student's progress in academic, residential, clinical activities and develops a comprehensive service plan for the Student. The Comprehensive Service Plan contains goals and objectives for academic, social emotional and clinical areas. The treatment team develops the goals and objectives. The [REDACTED] also has a level program known as a check in system. A student begins at the level of "supervision." This requires staff accompaniment and prohibits a student's independent movement around campus. If compliant with rules, Students can advance to fifteen minute check ins. This means they can move unsupervised for fifteen minutes without checking in with staff. These check ins graduate to thirty minutes, forty-five minutes, an hour and eventually to a level where a student can venture into town unsupervised. If students run astray, staff can reduce their levels.

The Student exhibited a variety of issues during his initial time at the [REDACTED]. He interacted poorly with a female peer and made bad decisions. For example, the Student would make "petty commentary" to other students and "stir things up." [REDACTED] opined such behavior rendered a residential placement appropriate for the Student. Thus, when the Student encountered peer conflict, staff could help the Student "process it out."

The [REDACTED] places students on weekend study hall if they demonstrate academic issues. Teachers have intermittently placed the Student on weekend study hall. The Student does the least amount required and lies about completing work. However due to the residential nature of the [REDACTED], staff can monitor the Student's work completion in real time. The Student utilizes evening in class supervised study hall. This program focuses the Student and therefore benefits him.

The Student avoided classes during his first six months at the [REDACTED]. He would hide in the bathroom for thirty or forty minutes or go to the health center. The Student required much "coaching and counseling" to address these problems. However being in a residential setting restricted the Student's ability to skip or avoid class. The Student can be manipulative and try to talk his way out of trouble. However the residential setting allows consistency in correction and redirection for the Student.

[REDACTED] participated in the April 5, 2021 IEP meeting. The Student's check ins on the level system fluctuated between supervision and fifteens at that time. The [REDACTED] staff projected he should have reached thirty or forty-five minute levels by then. Peer relationship issues and poor decisions continued to hold the Student back. Thus, [REDACTED] felt the [REDACTED] and a residential setting were the appropriate placement for the student at the time of the April 5, 2021 IEP meeting.

[REDACTED] (Principal [REDACTED]) is the Principal of the [REDACTED]. He runs the day to day operation of the academic program and regularly meets with school districts to review the IEPs of Student's placed at the [REDACTED]. The [REDACTED] does not develop IEPs but develops a Comprehensive Service Plan (CSP) which consists of three components: an advisory report, a learning profile, and a clinical profile. The [REDACTED] performs the clinical profile

twice per year and performs the balance of the profiles quarterly. Principal ██████ interacts with the Student daily, although that might be limited to simply saying “hi” in a hallway.

The Student presented at the ██████ as motivated, but with a history of social and emotional issues (school avoidance and peer relationships executive functioning and work completion). An admissions team does an intake and writes a CSP based upon a student’s progress in the first month or so. In this case, the admissions team used the ██████ report as part of intake. The admissions team found residential placement appropriate for the Student. Although Principal ██████ played no role in that process, he agreed with that conclusion. Due to the Student’s history of starting school strong and then decompensating, admissions determined the Student required twenty-four hour wrap around services. In addition, the ██████ would utilize “scaffolding” where teachers provide supports around a student’s deficit and then slowly remove those supports. Testifying as an expert in special education, Principal ██████ knew of a school’s Child Find obligation and knew if the ██████ believed a Student to have a disability it should refer the Student to the local school system. The ██████ never referred the Student to the local ██████ school system or notified MCPS that the Parents enrolled the Student at the ██████.

██████ (██████) the ██████ Director of Admissions also served as the Student’s therapist from Sept 2020 through August 2021. Thus, she served on the Student’s treatment team during that period. As an expert in the therapeutic treatment of children and adolescents she reviewed the ██████ report. ██████ found the diagnosis in ██████ report consistent with the Student’s presentation at the ██████, but marked bi-polar II as a “rule

out” because the Student did not present in the full hypomania required for a bi-polar II diagnosis.⁹

██████ testified the Student presents as being “lost in his own internal process” and “so in his head.” Sometimes the Student will say “hi” and sometimes be so lost in own thoughts he will not respond to a “hello.” Thus, she focused redirecting the Student into the “headspace” to concentrate on academic work. ██████ explored the Student’s goals with regard to friendships to assist him in finding focus in relationships. Sometimes the Student hyper focuses on perceived negative cues from peers. This distraction renders classroom focus difficult and impairs the Student’s ability to access an education. ADHD compounds this condition by making the Student disorganized and forgetful. Strategies to help this situation include developing checklists and other prompting mechanisms.

The ██████ provides ideal wrap around services in a residential setting to combat the Student’s ADHD and executive functioning issues. The ██████ staff can constantly redirect the Student and monitor him. The Student’s therapist regularly communicates with teachers and dorm staff in order to share concerns about the Student. The therapist develops a treatment plan which he or she recommends to the treatment team. The treatment plan references various treatment goals, the method of addressing them and the Student’s response.

The ██████ provides the Student the environment he requires because “all [██████ staff] is talking following up closing the loop and calling [the Student] out, those are all things that are only able to happen in [the ██████] environment.” ██████ opined that a residential therapeutic school is the appropriate placement for the Student. The Student is currently on a path which is “productive and exciting to him.” Were the Student removed from the ██████ ██████ “[imagines] that [the Student] might struggle with his mood in a more profound

⁹ ██████ testified her training does not rise to the level of Dr. ██████’s in terms of testing and arriving at a diagnosis based upon test results. However, she does have other training in identifying diagnosis such as bi-polar II disorder and consulted with a ██████ psychiatrist on the issue.

way which would presumably look like increased avoidance behaviors and refusal to follow through on his obligations.”

Dr. [REDACTED] is a psychologist in private practice who focuses primarily on psychological evaluations of adolescents and young adults. In that capacity, she performs IQ testing, academic testing, neuropsychological testing and personality testing to determine the type and level of intervention required for the testing subject. While she bases her practice out of an office, she tests adolescents and young adults in other settings including wilderness programs and therapeutic residential programs. Prior to starting private practice, Dr. [REDACTED] worked at [REDACTED].

Dr. [REDACTED] evaluated the Student on July 21, 2020, during his time at [REDACTED].¹⁰ The pandemic prevented her from evaluating the Student in person, thus she used the Zoom online platform (Zoom). Although a new testing format, Dr. [REDACTED] found utilizing Zoom provided valid test results consistent with an individual’s prior in person testing. In preparation for the evaluation, Dr. [REDACTED] reviewed old testing material, the [REDACTED] application and interviewed the Parents and the Student’s psychiatrist among others.

The Student cooperated with, and engaged in, the testing process. The Student had the testing materials in front of him and Dr. [REDACTED] watched him test via Zoom. Dr. [REDACTED] performed tests which measured the Student’s intellectual functioning, neuropsychological and executive functioning, and emotional functioning. Intellectually the Student tested as “bright” with high language, listening and nonverbal reasoning scores. However, the Student scored low in math and, in particular, scored low in math fluency, the speed at which one processes math problems. The Student’s math testing scores indicated a need for academic support in math.

¹⁰ Dr. [REDACTED] evaluated the Student after she left [REDACTED] and started her own practice.

The Student faces challenges in executive functioning, impulse control and maintaining focus. These issues serve as impediments to the Student's ability to timely complete necessary tasks such as homework. The testing also revealed challenges the Student faced with regard to his emotional functioning. He is diagnosed bi-polar and has inattention and attachment issues. These issues appear in the form of unstable dating relationships (e.g., multiple dating partners at the same time) which negatively impact his social life. Additionally, if in a manic state, he might engage in an inordinate amount of online shopping. This all results in disengagement from his schoolwork.

To adequately address these issues, Dr. [REDACTED] recommended the Student attend a residential therapeutic school to manage his poor self-control. She worried that a day school would prevent him from managing himself well. This would cause him to regress and his school performance to suffer.

Additionally, the Student would not benefit from outpatient therapy. The Student has low insight into his problems and tends to minimize them. Dr. [REDACTED] opined that such individuals make outpatient therapy "pretty tricky because someone would sit in the office and say, they're fine when they're engaging in problematic behaviors, you know, online dating all day, and they can't effectively manage their mood..." Dr. [REDACTED] felt "[the Student] needed a lot of containment to stay stable in school."

MCPS's Case

[REDACTED] ([REDACTED]) is a nationally certified school psychologist with MCPS. She lacks qualifications to perform clinical practice and may only practice outside a school setting with a licensed psychologist's supervision. She cannot diagnose but can identify educational disabilities. [REDACTED] has conducted assessments of students and used the same Pearson published tests Dr. [REDACTED] used. Dr. [REDACTED] did not interview the teachers

educating the Student at the time of the testing. Testifying as an expert in school psychology, ██████ opined Dr. ██████ should have interviewed those teachers because the tests evaluate educational disability and the impact on schooling. Many of the rating scales, such as the BRIEF which Dr. ██████ used have a teacher rating scale.

██████ opined that psychologist administer assessments utilizing standardized protocol. Not following that protocol can compromise the validity of the testing. ██████ performed no virtual assessments in 2020, but Pearson (the publisher of some of the tests Dr. ██████ utilized) issued a guiding document establishing protocol for performing virtual assessments during the pandemic. The protocol included documenting the testing environment in the report. Dr. ██████ did not include this in her report. However, even if present, ██████ believed the IEP team would still recommend the Student's placement in the ██████ program.

Although she had no previous experience with the Student, ██████ participated in the IEP meeting and determination of placement. ██████ worked with the ██████ program at ██████. MCPS designed the ██████ program for students with social emotional behavioral needs who can receive supports as set forth in an IEP. The ██████ program includes small classes, close adult supervision, an assigned psychologist and social worker and counseling. ██████ felt the ██████ program was appropriate because it represented the least restrictive environment to provide the Student FAPE.

The Parents rejected the ██████ program and requested the ██████ without suggesting any alternative placements. The Parents thought the Student needed the full time supervision the ██████ provided. However, the ██████ program provides structure as well. This includes check ins, individual therapy, group therapy and wrap around services if the Student requires additional support outside of the school day. ██████ opined the Student does not require full time supports because he exhibited no behaviors requiring complete removal

from school. MCPS did not consider the [REDACTED] since it functions as a placement for children with more serious problems than the Student exhibits and is a more restrictive setting.

[REDACTED] (Dr. [REDACTED]) is [REDACTED]'s principal. He shares supervision of special education with an assistant principal. He chairs IEP meetings and oversees the implementation of special education services at [REDACTED]. He takes a "fairly hands on" approach to behavioral issues and approves all disciplinary matters in accordance with the MCPS code of conduct.

Dr. [REDACTED] had no interaction with the Student at [REDACTED] during his 2018-2019 freshman high school year. In the fall of 2018, Dr. [REDACTED] met with the Student's mother who requested the meeting. Dr. [REDACTED] recalled the meeting took place on an autumn morning but could not recall the exact date. He characterized it as a "nice" meeting and "positive in a lot of ways." The Student's mother advised Dr. [REDACTED] about the Student's talent in the arts; his outside involvement in shows and their inevitable impact on the Student's school attendance. The Student's mother wanted to know how the Student could perform in the shows and still attend [REDACTED]. Dr. [REDACTED] remembered mostly discussing the viability of the Student availing himself of opportunities which might conflict with school attendance and advised the Student's mother MCPS had limited flexibility due to Maryland's compulsory school attendance laws. Dr. [REDACTED] recalled some discussion concerning the Student's behavior but testified that discussion was "very tough for me to remember" and did not represent the discussion's main topic.

[REDACTED] did not evaluate the Student for special education services during the 2018-2019 school year due to the implementation of the then current 504 plan. [REDACTED] did consider the Student's ADHD and math deficiency diagnosis. However, Dr. [REDACTED] opined that freshman year was a transitional year which sometimes causes a student's grades to fluctuate. The grades the Student did receive, while mediocre, would not necessarily trigger a special

education evaluation. Dr. [REDACTED] acknowledged that some of the Student's teachers thought the 504 accommodations might not be working. However, he said different teachers view the accommodations differently.

In April MCPS held the IEP meeting in which Dr. [REDACTED] participated. The Parents requested the [REDACTED] and suggested no alternative placement. MCPS recommended the [REDACTED] program based upon the Student's overall social emotional support needs. The Parents requested the [REDACTED] as placement because of its ability to provide the Student support outside the regular school day. However, Dr. [REDACTED] noted the [REDACTED] program has a People Personnel Worker (PPW) to work with the Student and the Parents with issues such as school avoidance.

[REDACTED] ([REDACTED]) serves as an intervention specialist for the [REDACTED] program. [REDACTED] attends placement meetings for students under consideration for the program and provides consultation supports to schools when children present with emotional difficulties. She also liaisons with various programs to help with instructional supports. The [REDACTED] program supports students whose emotional problems impede their ability to access an education. Various MCPS schools have [REDACTED] programs including [REDACTED]. Students in the [REDACTED] program take classes at grade level or above and have supports for academic needs. The amount of time spent in special education versus general education classes depends on the individual student's needs. The [REDACTED] program has resource classes and "human behavior" enhanced resource classes to deal with issues such as getting to school.

The [REDACTED] program individualizes resource classes for the Student and coordinates them with the Student's case manager. The Student receives supports geared toward their particular needs. A clinical social worker will monitor a student's emotional needs, coordinate with outside service providers and provide feedback on the use of emotional supports. A psychologist focuses

on academics, testing and diagnostics but also sometimes provides counseling services based upon a student's needs. Classes have teachers with paraeducators who support the teachers.

██████ never met the Student. She attended the IEP meeting due to the IEP team's consideration of the ██████ program. The IEP team factored accountability heavily due to the Student's historic lack of honesty and task avoidance (not completing homework). To address this ██████ program staff meet with families and attempt to connect the Student with a trusted adult in the program. The ██████ program would work with the Student when troubling peer interactions occur and use them as teachable moments to teach social skills, problem solving and conflict resolution. The ██████ program takes a "community approach" to ensuring the Student's accountability, thus the Student, family, teachers and community work together. The program can refer families to the Montgomery County collaboration counsel to obtain mental health and other supports in the community.

██████ (████) is an itinerant resource teacher with the special education program at MCPS including at ██████. ██████ supports the services, development and implementation of IEPs. ██████ never met the Student but attended his IEP meeting in April 2021. The IEP team considered teacher reports from the ██████, outside assessments which the team used as grounds for eligibility, input from ██████ staff at the IEP meeting and the Parents' input. The IEP team agreed to the Student's accommodations, goals and objectives. The team considered the ██████ program but found it inappropriate. It then considered the ██████ program which it considered most appropriate. MCPS considered the Parent's request that MCPS place the Student at the ██████. However, MCPS determined the ██████ program to be the least restrictive environment. Accordingly, because the ██████ program could provide the necessary supports, the IEP team did not need to consider more restrictive placements.

Analysis

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter the Parents have the burden of proving that 1) MCPS failed in its Child Find obligation to timely identify the Student as disabled; 2) that when requested, MCPS did not timely evaluate the Student for a disability and upon determining the Student disabled, did not timely convene an IEP meeting; and 3) that MCPS did not develop an IEP reasonably calculated provide the Student with FAPE in light of his unique circumstances for the 2019-2020 and 2020-2021 school years, and that placement is proper at the [REDACTED] and [REDACTED]. For the following reasons I find the Parents failed to meet their burden with regard to all these contentions.

Child Find

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01. The IDEA requires “that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); *see also* Educ. § 8-403.

The IDEA requires a school system to ensure the availability of a FAPE to all children suspected to be disabled residing in its jurisdiction, even without a request for evaluation from the child’s parents. 20 U.S.C.A. § 1412(a)(3)(A); 34 C.F.R. §§ 300.111(a), 300.111(c)(1). The regulations identify this obligation as “Child Find” and apply it to all “[c]hildren who are suspected of being a child with a disability.” *Id.* at 300.111(c), “A parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action forms the basis of the complaint...” 20 U.S.C.A.

§ 1415(f)(C). A school system in Maryland shall complete an initial evaluation of a student suspected of having a disability within ninety days of receipt of a request for an evaluation. COMAR 13A.05.01.06A(1)(b). “A [school system] shall ensure that an IEP team meets to develop an IEP for a student with a disability within 30 days of the evaluation.” COMAR 13A.05.01.08A(1). Failure of a school system to follow these statutes “may constitute a procedural violation of the IDEA.” *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). However, procedural violations “will be ‘actionable’ only ‘if [they affect] the student’s substantive rights.’ ” *Leggett v. District of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015) (quoting *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 832, 834 (D.C. Cir. 2006)).

The Parents argued that MCPS failed to meet its Child Find obligation by not identifying the Child as disabled during his 2018-2019 freshman year at ██████████. In particular, they point to the escalation in the Student’s behavioral and emotional problems as well as the deterioration of his grades, notably the “D” he received in Algebra. In closing, the Parents argued that because MCPS knew the Student had a math disability through the ██████████ report, the Student’s “D” in math should have triggered its Child Find obligations. They further argued that they raised these issues with MCPS at various points including advising MCPS in January 2019 that they were contemplating placing the Student in a private school. Thus, they argued that MCPS’s violations began prior to June 4, 2019,¹¹ or in other words, beyond the two-year limitations. 20 U.S.C.A. § 1415(f)(C). MCPS countered that it acted appropriately utilizing the knowledge of the Student at its disposal. Moreover, if the Parents knew the Student exhibited behavior warranting a disability evaluation under the IDEA, the Parents did not request an evaluation until September of 2020.

¹¹ As noted above, the Parents filed their Due Process Complaint on June 4, 2021.

I find MCPS met its Child Find obligations. Even if I found otherwise, I would find the Parents failed to timely file their Complaint to cover MCPS's alleged violations during the Student's 2018-2019 freshman year at [REDACTED]. First, while the Student's academic performance did falter during his freshman year compared to middle school, the Parents presented no concrete evidence, either in the form of expert testimony or otherwise, that the regression of the Student's academic performance warranted MCPS's commencement of the special education evaluation process.¹² Certainly the Student received a D in Algebra and certainly MCPS knew of the Student's math disability. However, the [REDACTED] report recommended a 504 plan to address the math disability. MCPS followed the [REDACTED] report's recommendation and subjected the Student to a 504 plan from his sixth grade year onward.¹³ During his freshman year at [REDACTED], MCPS again convened a 504 team to develop a plan to provide the Student with accommodations to address his struggles with Math. Parents Ex. 23. MCPS received no other evaluations or reports to suggest the Student required a special education evaluation as a result of his math disability. Neither [REDACTED], nor [REDACTED], nor the [REDACTED] requested MCPS evaluate the Student for a disability under the IDEA.

The Student did exhibit concerning behavior during his freshman year. The Student's Mother testified that the Student received a few detentions during his freshman year and that MCPS reported he either skipped or avoided class. Parents Ex. 100. The [REDACTED] report however, reflected the following:

More recently, [the Student] has become obsessive over relationships, especially with girls, and has had romantic relationships that tend to fall apart abruptly and dramatically. He has fabricated stories to potential girlfriends and friends, which

¹² "Of course, the question of causation is not always an easy one. The premise of the IDEA is that struggling students sometimes owe their difficulties to a disability that special education services could remedy. But not always. Not every student who falters academically owes his difficulties to a disability. Academic challenges may reflect "personal losses," "family stressors," or "unwilling[ness] to accept responsibility" on the part of the student." *T.B. Jr. by and through T.B., Sr. v. Prince George's Cty. Bd. of Educ.*, 897 F. 3d. 566, 574 (2018)

¹³ The record contains no indication the Parents ever objected to or even questioned the [REDACTED] Report's recommendation that MCPS develop a 504 Plan for the Student.

has cost him relationships. [The Student] has engaged in risky behavior with girls, such as speaking to strangers online, and on a few occasions meeting up with strangers to have sex and requesting naked pictures. [The Student] was discovered trying to date multiple women at the same time, which also created negative social consequences. He was discharged from a █████ █████¹⁴ when it was discovered that he was texting with a girl in the program. Before attending █████¹⁵, [the Student's] mother said he has been socially withdrawn because he was ashamed of his past behavior and did not believe he could reconnect with his previous friends.

[The Student's] mother said that he experiences frequent mood swings, switching from energetic and unfocused one minute to low energy and introverted the next. His mother stated that these mood swings typically have an identifiable trigger. [The Student] has taken money from his parents' wallets and shopped online with their credit cards without permission. He can easily become dysregulated with his sleeping and eating habits. [The Student] has expressed suicidal ideation on occasion but has not expressed that he has made a plan. He has angry outbursts toward his parents and a few incidents of physical aggression towards them as well. There is no known evidence that [the Student] has used alcohol or substances.

Parents Ex. 43 at pg. 4.

The record contains no evidence MCPS knew the Student engaged in any of these serious behaviors prior to its receipt of the █████ report in late 2020. Dr. █████ did not speak to MCPS staff during her evaluation and received this information from the Student's mother. The record contains no evidence MCPS either punished the Student or notified his Parents of his engagement in anti-social behavior such as theft, physical aggression or sexual improprieties. The record contains no evidence MCPS knew the Student harbored suicidal ideations. The record contains no evidence MCPS suspended or expelled the Student for disciplinary actions.

In April of 2019, MCPS emailed the Student's mother to discuss concerns the Student possibly suffers from depression. Parents Ex. 99. The Student's mother acknowledged the email and stated the Student has experienced "serious issues" but did not elaborate. She concluded that she hopes "spring break can help recharge some batteries." Id. In an email on January 31, 2019,

¹⁴ Dr. █████ did not define this acronym.

¹⁵ █████.

the Student's mother casually mentions the Student is visiting a private school to explore "other options." However, she reveals no actual intent to place the Student in a private school nor did she indicate that the Student's educational challenges caused her to schedule this visit. I find nothing in the email exchange which would trigger MCPS's Child Find obligations.

Further, the record paints an unclear picture of the extent to which the Student's participation in an outside theater production during regular school hours impacted his academic performance. The Parents downplayed this at the hearing. The Student's mother kept mum on the subject during direct examination. However, on cross examination she conceded the Student participated in an outside theater production during school hours while at [REDACTED]. However, she dismissed the possibility of its effect on the Student's academic performance stating "The show was usually during his lunch hour and one other hour of class. So he was not gone. It was very close to the school, but yes, he was performing."

Dr. [REDACTED]'s testimony however revealed the outside theater production represented a source concern for the Student's mother. Dr. [REDACTED] testified that the vast majority of their fall 2018 meeting gravitated around the subject of the outside theater production. Reports from the Student's freshman year Algebra teacher indicate his participation in the outside theater production may have negatively impacted his performance in Algebra class. She writes "...[The Student] [p]laces other matters, i.e. theater outside school, in a higher priority than math, which is very concerning given his grades." Parents Ex. 20 Pg. 1. Further, it is unknown to what extent the disruption to the Student's routine (leaving and coming back to school during the day) affected his academics. The Student participated in the outside theater production with the Parents' blessing. If that affected the Student's academic performance, one cannot lay the blame with MCPS.

The Parents withdrew the Student from MCPS and enrolled him in ██████ in the fall of 2019 for his sophomore year of High School. From that point until the Parents' September 17, 2020 evaluation request, MCPS lacked knowledge of the Student's circumstances. Accordingly, in light of the above, I find MCPS appropriately implemented its Child Find obligations with regard to the Student.

I further find the Parents knew or should have known of all these alleged failures on behalf of MCPS during the Student's enrollment at MCPS. Indeed, the Student's mother testified that within weeks of his arrival at ██████ in the fall of 2018 he began to struggle. The serious behavioral issues in the home and the depression all occurred during the school year 2018-2019. He struggled in Algebra the 2018-2019 school year as well as 2019 summer school. The Parents did not allege MCPS misrepresented that it solved the problem forming the basis of their complaint.¹⁶ The Parents did not allege MCPS withheld information which the statute required it provide to the Parents.¹⁷ Accordingly, I find the Parents' June 4, 2021 due process complaint limited to events occurring no earlier than two years prior (i.e., June 4, 2019) 20 U.S.C.A. § 1415(f)(C).

The timeliness of the evaluation and IEP meeting

The Parents contended MCPS violated the IDEA by not timely evaluating the Student within ninety days of their September 17, 2020 request. As noted above, COMAR requires MCPS complete the evaluation within ninety days.¹⁸ MCPS completed the evaluation on December 17, 2020 – ninety-one days from the date of the Parent's request. However, the Parents, through counsel, sent their request at 6:39 p.m. on September 17, 2020. Parents Ex. 71 Pg. 4. The regulations provide no guidance on what constitutes a "timely" request. The timing of

¹⁶ 20 U.S.C.A. § 1415(f)(D)(i).

¹⁷ *Id.* § 1415(f)(D)(ii).

¹⁸ "'Day' means a calendar day unless otherwise indicated as a school day or business day." COMAR 13A.05.01.03B(16).

the Parent's request, well after business hours on September 17, 2020, afforded MCPS no opportunity to take any meaningful action on September 17, 2020. I find the timing of its filing the functional equivalent of a filing the morning of September 18, 2020. Accordingly, I find MCPS evaluated the Student within the requisite ninety days and thus find MCPS committed no procedural violation.¹⁹

The Parents next contend that upon determining the Student eligible for special education services, MCPS failed to convene a meeting to develop an IEP within thirty days as required. For the following reasons, on this issue, I find MCPS committed a procedural violation but not a substantive violation.

MCPS evaluated the Student and determined him disabled on December 17, 2020. Thirty days from December 17, 2020 is January 16, 2021. MCPS originally proposed January 13, 2021, as the IEP meeting date, but cancelled due to the unavailability of an IEP team member. Parents Ex. 83. MCPS then proposed January 15, 2021, however counsel for the Parents was unavailable. Parents Ex. 84. I find MCPS tried in good faith to timely schedule the IEP meeting.

However, thereafter MCPS acted, if not in bad faith, unprofessionally. In an attempt to schedule the IEP meeting, counsel for the Parents sent two emails to MCPS counsel Stacey Reid Swain (Reid Swain) following up – one on January 19, 2021 (Parents Ex. 86) and one on January 26, 2021 (Parents Ex. 87). Reid Swain replied to neither email. At the hearing, MCPS advanced a halfhearted argument attributing the transition to in person learning as the reason for the delay. MCPS provided no reason why Reid Swain afforded neither the Parents, nor their

¹⁹ Contrast this with a circumstance where an individual has a deadline to file something on September 17, 2020. In that instance, in the absence of a required time of day by which to file, the Parent's filing would be timely. However, the Parents have no such deadline. Instead, their filing triggers a clock for MCPS to act on the evaluation request. If the ninety days includes the day of the filing, I find the regulation contemplates MCPS has that day to act. The Parents' submission of the request after business hours took from MCPS one of the ninety days to which the regulation entitles it. Therefore, the Parents' counsel's argument in closing that "MCPS took every single one of those ninety days and in fact did it on the ninety first or ninety second day" fails to persuade me.

counsel, the professional courtesy of a response. The parties did not convene the IEP meeting until April 5, 2021. I find that delay constitutes a procedural violation by MCPS.

However, the presence of a procedural violation does not beget the presence of a substantive one. *T.B. Jr. by and through T.B., Sr. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d. 566, 573 (2018) (holding “The fact of a procedural IDEA violation does not necessarily entitle [the Student] to relief, however. To obtain the compensatory education he seeks, [the Student] must show that this defect in the process envisioned by the IDEA had an adverse effect on his education.”) I find the Parents presented no evidence of any such adverse effect. Indeed, the Student remained actively enrolled at the ██████████ from December 17, 2020 until April 5, 2021. Not only was this the Parents’ desired placement,²⁰ the Parents presented no evidence the Student lost educational opportunities while enrolled at the ██████████ during this time. Although not the least restrictive placement, the ██████████ still provided most, if not all, the same or similar accommodations set forth in the April 5, 2021 IEP. Accordingly, I find MCPS committed no substantive violation as a result of its delay.

Whether the April 5, 2021 IEP provides FAPE

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 As shall be discussed below, when the IEP meeting did take place on April 5, 2021, the Parents suggested no other placements other than the ██████████. They rejected the IEP when MCPS did not agree to the ██████████ as a placement.

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

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). Among other things, the IEP depicts a student's current educational performance, explains how the student's disability affects the student's involvement and progress in the general curriculum, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A. 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). If a child's behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, the use of positive behavioral interventions, strategies and supports to address that behavior. *Id.* § 300.324(a)(2)(i). A public agency is responsible for ensuring that the IEP is reviewed at least

annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision. *Id.* § 300.324(b)(1).

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).

The Supreme Court addressed the requirement of a free appropriate public education 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).

Thirty-five years after *Rowley*, the parties in *Andrew F.* asked the Supreme Court to go further than it did in *Rowley* and set forth a test for measuring whether a disabled student had attained sufficient educational benefit. The framework for the decision was the Tenth Circuit’s interpretation of the meaning of *Rowley*’s “some educational benefit,” which construed the level

of benefit as “merely . . . ‘more than *de minimis*.’” *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

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

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

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

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.”’ A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

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

Endrew F., 137 S. Ct. at 998-99 (citations omitted; emphasis in original). The court expressly rejected the Tenth Circuit’s interpretation of what constitutes “some benefit”:

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

Id. at 1001 (citation omitted).

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

The April 5, 2021 IEP relied, in large part, on the ██████████ report. Much of the hearing concerned debate over the ██████████ report’s reliability and the methodology Dr. ██████████ employed when testing the Student. In particular, MCPS contended Dr. ██████████ failed to utilize proper testing methodology, may have conducted the testing beyond the scope of her license and may have been biased toward the Parents’ position in this matter. These arguments fail to persuade me of the ██████████ report’s unreliability

The parties agreed that psychologists traditionally conduct testing in person. This allows the psychologist to, among other things, observe the subject’s demeanor and ensure the minimization of distractions in the testing area. The psychologist then documents these observations in his or her report and the interested reader may factor them into their assessment of the report’s reliability. In 2020, the pandemic upended in person testing. Dr. ██████████ tested the Student on July 21, 2020, during the height of the pandemic and prior to the development and

approval of any vaccines. This circumstance constrained her to administering the tests using the Zoom online platform.

MCPS contended that unlike the [REDACTED] report, the [REDACTED] report lacked a “Validity of Test Results and Rule-Out of Confounding Factors” section. That section concerned the Student’s general demeanor at the time of testing. The [REDACTED] report did lack that specific section. However, the [REDACTED] report contains a section entitled “Behavioral Observations/Clinical Interview with [the Student].” Parents Ex. 43 pg. 5-6. In this section, Dr. [REDACTED] thoroughly describes her reasoning for using Zoom and the Student’s demeanor during the testing. While the [REDACTED] report lacks information on whether the room where the Student sat contained distractions, I find no evidence of distractions in either the report or Dr. [REDACTED]’s testimony. I find this based upon Dr. [REDACTED]’s detailed report of the Student’s demeanor during the testing.

However, Dr. [REDACTED] fumbled through her testimony with regard to whether she utilized the proper pandemic testing protocols. When asked if she used guidance on how to administer the testing via tele practice, she responded she “[could not] really speak to that.” When asked if she used the test maker’s guidelines she testified “I really would have to think about it.” When pressed, Dr. [REDACTED] became defensive and sharply testified she would have researched the COVID testing protocols at the time prior to commencing the testing.

Taking into account all of Dr. [REDACTED]’s testimony as well the report’s content, I find the methods she used to test the Student reliable. While Dr. [REDACTED] provided no specific rendition of the COVID testing protocols in her report, she detailed the online protocol she utilized and provided excellent detail on the Student’s demeanor during testing. I found her testimony and the reasoning underpinning her conclusions sound. For example, on direct, she testified in detail how she administers tests via Zoom and how she reviews the materials with the

test subjects. She further testified, based on her own experience, test results via Zoom tend to be consistent with prior in person test results. An important conclusion she reached concerned the Student's need for therapy in a full time residential program as opposed to outpatient therapy. She provided specific examples from the Student's behavior (obsessive online dating) and test results (poor ability to manage mood – propensity to revert to a manic state) as to why she did not recommend outpatient therapy.

MCPS called no psychologist with Dr. [REDACTED]'s qualifications to rebut her methodology or conclusions. I find MCPS's other critiques of Dr. [REDACTED]'s report weak. Dr. [REDACTED] is licensed in the State of [REDACTED] and tested the Student from [REDACTED]. The Student underwent the testing at [REDACTED] in [REDACTED]. Dr. [REDACTED] is not licensed in [REDACTED] but has a [REDACTED] reciprocity number. I found the testimony as to what privileges that number affords Dr. [REDACTED] in [REDACTED] unclear. However, I also found the argument irrelevant to the issue before me. To the extent Dr. [REDACTED] may have performed testing unauthorized by the State of [REDACTED] I find that constitutes a possible professional liability issue for her. MCPS presented no evidence it compromises the validity of her conclusions or test results.

MCPS also noted Dr. [REDACTED] formerly worked at [REDACTED] and accepts referrals (including the Student) from [REDACTED]. Dr. [REDACTED] testified she did accept occasional referrals from [REDACTED]. Other than the fact Dr. [REDACTED] receives the referrals, MCPS provided no reason to conclude their presence taints her findings and conclusions with regard to the Student.

Accordingly, I find the overall findings and conclusions of the [REDACTED] report reliable. However, that finding does not mean the April 5, 2021 IEP did not provide the Student with FAPE. As noted above, the burden in this matter rests upon the Parents. Their case on this issue consisted of the following: testimony from the Student's mother, testimony from staff at [REDACTED]

██████, testimony from staff at the ██████████ and testimony from Dr. ██████████ as well as exhibits supporting that testimony. Of all these witnesses, only the testimony of the Student's mother concerned any detail of the IEP's content.

The Student's mother did not object to the IEP's accommodations, goals or objectives. She did however, object to the Student's placement in the ██████████ program at ██████████. She reasoned as follows:

There were many elements of [the ██████████ program] that had been tried before and were not effective in the MCPS system including resource class, which for four years was rather ineffective. And, you know, had required -- some of the accommodations [the Student] required enormous amounts of sort of monitoring on my part and were not really applied by the school very consistently. I was concerned -- I only seen it once that in the second iteration they would also not be applied very consistently and would require a lot of monitoring and perhaps just ineffective. But resource class was one of the examples that they used as something that would be effective for [the Student], but we had already tried that.

I found this testimony vague and unconvincing. The Student's mother provided no concrete examples of how "some" of the accommodations required "enormous amounts" of monitoring and how MCPS failed to apply them "very consistently." The evidence in the record does not necessarily support her conclusions concerning the resource class's effectiveness. The resource class appeared as an accommodation on the Student 504 plans for sixth, seventh and eighth grade. With the exception of two C's, the Student received all A's and B's. I find no evidence the Student exhibited any serious behavioral problems during those years. The ██████████ 504 team removed the resource class. The Student's performance also deteriorated. Whether one can tie that deterioration to the resource class's removal is unclear. However, the objective evidence of the Student's performance with the resource class in place fails to reveal its ineffectiveness.

The Student's mother testified as follows on cross examination:

Q. Now, it intensified about your objections to Montgomery County IEP placement of the [REDACTED] Program at [REDACTED]. You said that would require a lot of monitoring by you; is that correct?

A. Or somebody.

Q. Well, I mean during -- did that surprise you?

A. It was just our experience had been that the 504 accommodations were not applied with any consistency and that --

Q. Right. Okay. When you say monitoring, I'm sorry, maybe I am misunderstanding. When you say monitoring, are you referring to when he is at home or are you referring to when he is in school?

A. No, at school.

Q. Okay. So you can handle the monitoring when he is at home?

A. I mean it is difficult, but, you know, to date, he was not, you know, willing at home to do work or at school.

The Student's mother provides an odd critique of the [REDACTED] program. She criticizes the program for requiring "monitoring." However, the placement she requests, the [REDACTED], provides monitoring twenty-four hours a day seven days a week. In addition, although she characterized it as "difficult" she did not deny she could monitor the Student at home.

None of the witnesses from either [REDACTED] nor the [REDACTED] specifically testified or provided opinions as to proposed placement in the April 5, 2021 IEP. Instead, they testified that, as a general proposition, the Student required a full time residential therapeutic environment. None of them provided any specific opinion as to why the [REDACTED] program could not provide FAPE.

Other than the Student's mother, only two of the Parents' witnesses participated in the April 5, 2021 IEP meeting: [REDACTED] and Principal [REDACTED]. Of those two, only Principal [REDACTED]

qualified as an expert in special education. When it came to his opinion as to the best placement for the Student, Principal ██████ testified as follows:

Q. And if we could turn to -- at some point do you recall participating in an IEP meeting for ██████?

A. Yes.

Q. Is it approximately April of this year?

A. Yes, springtime of this past year. Yes.

Q. And did anyone else, from your recollection, at ██████ participate in that IEP meeting?

A. I recall ██████ being present on the conference calls.

Q. And at the time of that meeting, did you have an opinion regarding what you believe was the appropriate school placement for educational placement for ██████?

A. Yeah. I made the recommendation along with ██████ that ██████ was an appropriate placement for ██████.

Q. Do you still believe that that was the appropriate placement as of April of 2021?

A. Yes.

Principal ██████'s testimony underscores a fundamental problem with the Parents' case. He clearly believes the ██████ is an "appropriate" placement for the Student both now and at the time of the April 5, 2021 IEP meeting. However, he fails to address the more important question: why? In particular, why does the ██████ provide the Student FAPE but the ██████ program does not? The Parent's case contains much testimony about what they consider to be the merits of the ██████, but nothing in terms of why the ██████ program does not provide FAPE. While I understand, the Parents' position that the Student requires a full time residential placement, they provided no evidence as to why the ██████ program would fail to serve as an appropriate placement and provide FAPE. They offered no tangible evidence to conclude the ██████ program more likely than not fails to provide FAPE. I heard no testimony

from the Student's teachers at the [REDACTED] on the issue. Dr. [REDACTED] provided no opinion as to the alleged shortcomings of the [REDACTED] program.

Based upon the evidence and testimony I found the IEP provides FAPE. As noted above 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.²¹

I find the IEP considers all these factors, much of which come from the [REDACTED] report. First, as noted earlier, the [REDACTED] report provided the IEP team with detailed information concerning the Student's strengths by way of the testing results (e.g. verbal reasoning, general word knowledge, perceptual reasoning etc.). The IEP team also considered reports from the Student's teachers at the [REDACTED]. If the Student exhibited strengths in an area, the teacher reported that strength. For example, in Civics, the [REDACTED] teacher reported "reading accurately and fluently is a strength; satisfactory in interpreting lengthy text and keeping with longer readings; no concerns in the area of reading." Parents Ex. 94 Pg. 6. In a progress report from January to February 2021 (shortly before the IEP meeting), [REDACTED] reports with regard to Physical Education "[The Student] is well behaved in class and is seen as a leader amongst his peers. He follows directions and uses equipment appropriately. He is a very active student and is respectful to his peers and teachers, is a pleasure to have in class." Id. at Pg. 10.

Second, I find the IEP accounted for the concerns of the Parents for enhancing the education of their child. The IEP provides the comments and input of the Parents and the counsel for the Parents. This includes the Parents' concerns about the Student's "acute levels of anxiety" and the need for "24/7 monitoring for his academics and behavioral needs. [The Student] needs

²¹ 20 U.S.C.A. § 1414(d)(3)(A).

prompts and reminders and adult support after school to make sure he completes assignments.”
Id. at Pg. 13.²² Third, the IEP clearly considers the Student’s most recent evaluation since it considers the [REDACTED] report.²³ Fourth, the IEPs goals and objectives consider the Student’s academic, developmental and functional needs. Id. at pp. 32-47. For these reasons, I find MCPS considered the Student’s unique circumstances and find the IEP is reasonably calculated to enable the student to make progress in light of those circumstances. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017). I further find that the satisfaction of these four factors provides a cogent and responsive explanation for the decisions of the IEP team.

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

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. Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989).

²² At the hearing the Parents, through counsel, suggested that MCPS surreptitiously disparaged the Parents and their concerns by consigning the summary of their remarks to a few sentences on page thirteen of the IEP. In other words, the apparent lack of attention indicates MCPS did not really consider the Parents’ input. I find this argument without merit. The IEP contains multiple references to the [REDACTED] report, the comments of [REDACTED] staff and teachers and previous struggles at [REDACTED] and [REDACTED]. More importantly, MCPS addresses these concerns (e.g., struggles with math and problems with focus) as part of the IEP’s accommodations, goals and objectives (to which the Student’s mother testified she agreed). Because MCPS did not agree to place the Student at the [REDACTED] as a means of achieving those goals and objectives does not mean it ignored the Parents’ concerns.

²³ The IEP references the [REDACTED] report as part of its “Discussion to support decision” (Pg. 2). References to the [REDACTED] reports findings occur throughout the IEP.

At a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). Placing disabled children into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved.

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

I find the Parents failed to meet their burden that MCPS’s improperly placed the Student in the ██████ program and that placement at the ██████ represents the least restrictive environment for the Student to receive FAPE. The Parents did not object to the accommodations, goals and objectives in the IEP. This would be the Student’s first involvement in the ██████ program. Thus, it is untested and no one knows how he would progress. As noted above, I found many of the Parents’ arguments on this issue either vague or conclusory (e.g. the testimony of the Student’s mother and Principal ██████).

██████████, the Student's therapist for most of his time at the ██████████, testified she did not confer with Dr. ██████████, with MCPS, ██████████, the Student's treating therapist and psychiatrist in Maryland, or his therapist at ██████████. She did not review the ██████████ report. She testified the Student requires wrap around services, but conceded she does not know what public schools can offer in that regard. When asked whether the Student could make progress in a non-residential school environment, she testified she "can't know for sure but there is certainly the potential he could." While ██████████ opined the Student's issues with peer conflict rendered a residential placement appropriate since staff could help the Student "process it out" he provided no opinion as to why staff with the ██████████ program could not perform that same function.

Dr. ██████████ came closest to providing concrete reasoning for the Parents' position on this issue. In response to the question "What kind of structure is appropriate for [the Student]? You identified residential settings. Is there a structure?" She answered:

Well, I mean, just a therapeutic residential setting that where there's a certain level of containment, meaning, the people are tracking what he's doing, like his internet use is regulated. People are, you know, an adult, is typically around and observing the social relationships, so that he can't engage. You know, he really should not date right now until he's a little bit more stable. And so, the people are monitoring his social relationships where there's, you know, 24/7 adult supervision and therapeutic intervention and academic support. But mainly where there's a certain level of kind of observation and so that he can stay stable because for him to attend school, his mood has to be stable. And in order for his mood to be stable, his relationships needed to be monitored, quite frankly, and his internet behaviors as well.

However, as mentioned above, Dr. ██████████'s failed to address any shortcomings in the ██████████ program. Why couldn't the Parents monitor the Student's internet use at home? Why couldn't MCPS monitor his internet use at school? Why could he not have adult supervision at home? With the safeguards of the ██████████ program in place, why couldn't the Student receive therapy and psychiatric care in the community as before? The Parents' case answered none of these questions. The Parents provided no rebuttal that the ██████████ program's PPW could not

work with the Student and the Parents to help Student. MCPS appears to have identified the Student's phone use as problematic. During the second semester of his freshman year, the Student's teachers and MCPS staff mention the use of a phone and chrome book as distractions to the Student. Parents Ex. 21. It is unclear if the Parents agreed to MCPS's suggestion to curtail the Student's use of electronic devices.²⁴

Further, the Parents offered no viable less restrictive alternatives to the [REDACTED]. For example, they suggested no therapeutic residential schools in or near Montgomery County. They suggested no programs other than full time residential therapeutic schooling to address the Student's needs. The testimony of the Student's mother indicates they may have not even considered these: When asked on cross examination whether she considered the regional school for children and adolescents, the Student's mother replied "I believe at the time I looked it up online, but I, you know, as an option, but I don't know it well, no." When asked if that program might interest her, she replied "I would have to review it. I guess I would be open to it, but I would have to look at it."

I find MCPS satisfied its obligation of proposing the least restrictive environment for the Student to receive FAPE. They first considered a less restrictive program, the LAD program, but determined the Student's diagnosis disqualified him. The next more restrictive program they considered, the [REDACTED] program provides all the accommodations, goals and objectives the parties agree the Student requires to receive FAPE. While the [REDACTED] may do the same, the [REDACTED] program is at his home school and does not segregate the Student from his general education peers. Moreover, I do not find the Parents met their burden with regard to the Student's placement at [REDACTED] during the summer of 2020. [REDACTED] is not a special education school and [REDACTED] did not provide the Student with special education classes while

²⁴ MCPS convened a 504 plan meeting on March 13, 2019. The Student's mother was present at this meeting and signed the 504 plan. Parents Ex. 23. The 2019 504 plan contains no mention of limiting the Student's use of electronic devices despite MCPS's clear recommendation to do so.

there. The classes the Student did take only required he appear and complete the work. He took no math classes. In addition, [REDACTED] status as a therapeutic, residential wilderness program for students with emotional disturbance, renders it a much more restrictive environment than the [REDACTED] program.

CONCLUSIONS OF LAW

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

- 1) MCPS met its Child Find obligations with regard to the Student. 20 U.S.C.A. § 1412(a)(3)(A); 34 C.F.R. §§ 300.111(a), 300.111(c)(1).
- 2) MCPS timely convened the IEP evaluation after the Parents' request but committed a procedural violation by not convening an IEP meeting within thirty days of determining the Student eligible for special education services, however MCPS did not commit a substantive violation because the Student received services from the [REDACTED] consistent with his April 5, 2021 IEP between December 17, 2020 and the IEP meeting. COMAR 13A.05.01.06A(1)(b); COMAR 13A.05.01.08A(1); *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012); *T.B. Jr. by and through T.B., Sr. v. Prince George's Cty. Bd. of Educ.*, 897 F. 3d. 566, 573 (2018).
- 3) The IEP developed at the April 5, 2021 IEP meeting contained accommodations, goals and objectives based upon the Student's unique needs reasonable calculated to provide the Student FAPE and placed the Student in the "least restrictive environment" consistent with his educational needs. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017); 20 U.S.C.A. § 1412(a)(5)(A).

ORDER

I **ORDER** that:

1. That the Parents June 4, 2021 Due Process Hearing Request be and the same is hereby **DENIED**.

November 2, 2021
Date Decision Mailed

Nicolas Orechwa
Administrative Law Judge

NO/at
#194639

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.

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

BEFORE NICOLAS ORECHWA,
ADMINISTRATIVE LAW JUDGE
THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-21-12801

APPENDIX: FILE EXHIBIT LIST

Exhibits

I admitted the following exhibits on behalf of the Parents:

- Parents Ex. 1 – Request for Mediation and Due Process Complaint, June 4, 2021;
- Parents Ex. 2 – Section 504 Evaluation, October 15, 2015;
- Parents Ex. 3 – Section 504 Plan, October 15, 2016;
- Parents Ex. 4 – Section 504 Testing Accommodations, October 15, 2015;
- Parents Ex. 5 – Report of Dr. ████████████████████, Ph.D., undated;¹
- Parents Ex. 6 – Emails between the Student’s mother and ████████████████████, various dates;
- Parents Ex. 7 – The Student’s Grade six report card, June 23, 2016;
- Parents Ex. 8 – Emails between MCPS staff, January 31, 2019;
- Parents Ex. 9 – Section 504 Plan, February 22, 2017;
- Parents Ex. 10 – The Student’s Grade seven report card, June 19, 2017;
- Parents Ex. 11 – Email from MCPS to the Student’s mother with attached report cards, January 16, 2018;
- Parents Ex. 12 – Section 504 Plan, March 7, 2018;
- Parents Ex. 13 – Section 504 Plan, April 11, 2018;

¹ The report concerns evaluation dates of August 26, 2015 and August 28, 2015.

Parents Ex. 14 – Section 504 Progress and Accommodation Review Worksheet, April 9, 2018;

Parents Ex. 15 – The Student’s Grade 8 report card, June 19, 2018;

Parents Ex. 16 – Emails between the Student’s mother and MCPS, various dates;

Parents Ex. 17 – Email between MCPS staff, June 8, 2018;

Parents Ex. 18 – Emails between the Student’s mother and MCPS, various dates;

Parents Ex. 19 – Emails between the Student’s mother and MCPS, various dates;

Parents Ex. 20 – Section 504 Progress and Accommodation Review Worksheet, March 6, 2019;

Parents Ex. 21 – Addendum to 504 Plan, March 13, 2019;

Parents Ex. 22 – Section 504 Eligibility, March 13, 2019;

Parents Ex. 23 – Section 504 Plan, March 13, 2019;

Parents Ex. 24 – The Student’s MCPS attendance record, December 10, 2020;

Parents Ex. 25 – The Student’s MCPS secondary transcript, December 10, 2020;

Parents Ex. 26 – NOT OFFERED;

Parents Ex. 27 – NOT OFFERED;

Parents Ex. 28 – NOT OFFERED;

Parents Ex. 29 – NOT OFFERED;

Parents Ex. 30 – NOT OFFERED;

Parents Ex. 31 – NOT OFFERED;

Parents Ex. 32 – NOT OFFERED;

Parents Ex. 33 – Resume of ██████████, M.A., LCMHC, CCTP-II;

Parents Ex. 34 – Information Brochure re: ██████████ (██████████);

Parents Ex. 35 – ██████████ Directory of Independent Schools etc., August 2021;

Parents Ex. 36 – NOT OFFERED;

Parents Ex. 37 – ██████████’s Initial Treatment Plan for the Student, June 16, 2020;

- Parents Ex. 38 – ██████████'s Final Report, September 21, 2020;
- Parents Ex. 39 – ██████████ Official Transcript, October 7, 2020;
- Parents Ex. 40 – ██████████ Statement of Account, September 28, 2020;
- Parents Ex. 41 – NOT OFFERED;
- Parents Ex. 42 – Disclosure Form of ██████████, Psy.D., undated;
- Parents Ex. 43 – Psychological Evaluation Report of ██████████, Psy.D., August 4, 2020;
- Parents Ex. 44 – Brochure re: the ██████████;
- Parents Ex. 45 – Confirmation of the ██████████ as an Approved Private Special Education Program;
- Parents Ex. 46 – ██████ ASC² Profile for the ██████████;
- Parents Ex. 47 – The Student's Medical and Demographic Summary [REDACTED], July 15, 2021;
- Parents Ex. 48 – The Student's Progress Report at the ██████████, October 23, 2020;
- Parents Ex. 49 – The Student's Comprehensive Service Plan at the ██████████, November 2020;
- Parents Ex. 50 – Advisory Report from the ██████████ re: the Student, November 2020 to November 2021;
- Parents Ex. 51 – The Student's Learning Profile from the ██████████, November 2020 to November 2021;
- Parents Ex. 52 – The Student's Clinical Report from the ██████████, December 2020;
- Parents Ex. 53 – The Student's First Trimester Report Card from the ██████████, December 18, 2020;
- Parents Ex. 54 – Second Advisory Report from the ██████████ re: the Student, November 2020 to November 2021;
- Parents Ex. 55 – The Student's Comprehensive Service Plan at the ██████████, February 2021;
- Parents Ex. 56 – The Student's Second Learning Profile from the ██████████, November 2020 to November 2021;

² Per the testimony of witness ██████████, this stands for ██████████ Association of Schools and Colleges.

- Parents Ex. 57 – The Student’s Trimester 2 Progress Report from the ██████████, February 24, 2021;
- Parents Ex. 58 – The Student’s Trimester 2 Report Card from the ██████████, April 30, 2021;
- Parents Ex. 59 – Third Advisory Report from the ██████████ re: the Student, November 2020 to November 2021;
- Parents Ex. 60 – The Student’s Comprehensive Service Plan from the ██████████, May 2021;
- Parents Ex. 61 – The Student’s Third Learning Profile from the ██████████, November 2020 to November 2021;
- Parents Ex. 62 – Clinical Report from the ██████████ re: the Student, June 2021;
- Parents Ex. 63 – The Student’s Trimester 3 Progress Report from the ██████████, June 17, 2021;
- Parents Ex. 64 – Tuition Statement from the ██████████ re: the Student, September 28, 2021;
- Parents Ex. 65 – 2020-2021 Residential Tuition Rates for the ██████████, July 1, 2020;
- Parents Ex. 66 – 2021-2022 Residential Tuition Rates for the ██████████, July 1, 2020;
- Parents Ex. 67 – Resume of ██████████;
- Parents Ex. 68 – Resume of ██████████;
- Parents Ex. 69 – Resume of ██████████;
- Parents Ex. 70 – NOT OFFERED;
- Parents Ex. 71 – Letter from Counsel for the Parents to ██████████, Principal, ██████████ ██████████ High School, September 17, 2020;
- Parents Ex. 72 – Email from ██████████, Principal, ██████████ High School to Counsel for the Parents, September 17, 2020;
- Parents Ex. 73 – Letter from Counsel for the Parents to ██████████, Associate Superintendent, Office of Special Education, MCPS, September 17, 2020;
- Parents Ex. 74 – Notice of Individualized Education Program (IEP) Team Meeting, December 9, 2020;
- Parents Ex. 75 – Corrected Notice of Individualized Education Program (IEP) Team Meeting, December 9, 2020;
- Parents Ex. 76 – Child Find Referral, December 17, 2020;

Parents Ex. 77 – IEP Meeting Notes, December 17, 2020;

Parents Ex. 78 – IEP Team Meeting Sign-in sheet, December 17, 2020;

Parents Ex. 79 – MCPS Evaluation Report and Determination of Initial Eligibility, December 17, 2020;

Parents Ex. 80 – MCPS Emotional Disability Multidisciplinary Evaluation Form, December 17, 2020;

Parents Ex. 81 – MCPS Notice of No Assessment Needed, December 17, 2020;

Parents Ex. 82 – MCPS Prior Written Notice, December 21, 2020;

Parents Ex. 83 – Emails between the Parents and MCPS, January 2021;

Parents Ex. 84 – Emails between Counsel for the Parents, the Parents and MCPS, January 2021;

Parents Ex. 85 – Emails between the Student’s Mother and MCPS, January 2021;

Parents Ex. 86 – Email from Counsel for the Parents to MCPS, January 19, 2021;

Parents Ex. 87 – Email from Counsel for the Parents to MCPS, January 26, 2021;

Parents Ex. 88 – Letter from Counsel for the Parents to MCPS, March 9, 2021;

Parents Ex. 89 – MCPS Secondary Teacher Report, Grade 11(1);

Parents Ex. 90 – MCPS Secondary Teacher Report, Grade11(2);

Parents Ex. 90a – MCPS Secondary Teacher Report Grade 11(3);

Parents Ex. 91 – MCPS Team Consideration of External Report, December 17, 2021;

Parents Ex. 92 – Draft IEP, April 5, 2021(1);

Parents Ex. 93 – Draft IEP, April 5, 2021(2);

Parents Ex. 94 - IEP, April 5, 2021, issued to the Parents;

Parents Ex. 95 – IEP Team Meeting Sign-in sheet, April 9, 2021;

Parents Ex. 96 – MCPS Prior Written Notice, April 13, 2021;

Parents Ex. 97 – Email from Counsel for the Parents to MCPS, April 16, 2021;

Parents Ex. 98 – NOT OFFERED;

Parents Ex. 99 – Emails between the Student’s mother and MCPS, April 2019;

Parents Ex. 100 – Emails between the Student’s mother and MCPS, various months 2019;

Parents Ex. 101 – MCPS 2020-2021 Traditional School Calendar.

I admitted the following exhibits on behalf of MCPS:

MCPS Ex. 1 – MCPS Response to the Parents Due Process Request, June 4, 2021, (MCPS0001 through MCPS0016);

MCPS Ex. 2 – Team Consideration of External Report, September 16, 2015, (MCPS0017);

MCPS Ex. 3 – Section 504 Evaluation, October 15, 2015, (MCPS0018 through MCPS0021);

MCPS Ex. 4 – Section 504 Plan, February 23, 2018, (MCPS0022 through MCPS0025);

MCPS Ex. 5 – Section 504 Eligibility Review, March 13, 2019, (MCPS0026 through MCPS0028);

MCPS Ex. 6 – Section 504 Plan, March 13, 2019, (MCPS0029 through MCPS0031);

MCPS Ex. 7 – Withdrawal of Student by Parent Email, July 31, 2019, (MCPS0032);

MCPS Ex. 8 – Report by Dr. [REDACTED], the [REDACTED], August 4, 2020, (MCPS0033 through MCPS0050);

MCPS Ex. 9 – Email from MCPS to Counsel for the Parents, September 18, 2020, (MCPS0051);

MCPS Ex. 10 – Email from MCPS to Counsel for the Parents, September 21, 2020, (MCPS0052 through MCPS0053);

MCPS Ex. 11 – MCPS Private School Referral for IEP Services, October 26, 2020, (MCPS0054 through MCPS0058);

MCPS Ex. 12 – NOT OFFERED;

MCPS Ex. 12a – Online Registration Forms submitted as of October 28, 2020, (MCPS0060);

MCPS Ex. 13 – Child Find Referral, December 17, 2020, (MCPS0061 through MCPS0063);

MCPS Ex. 14 – Emotional Disability Form, December 17, 2020, (MCPS0064 through MCPS0065);

MCPS Ex. 15 – Evaluation Report and Determination of Initial Eligibility Form, December 17, 2020, (MCPS0066 through MCPS0073);

MCPS Ex. 16 – Team Consideration of External Report Psychological Assessment, December 2020, (MCPS0074);

MCPS Ex. 17 – Meeting Information, December 17, 2020, (MCPS0075);

MCPS Ex. 18 – Notice of No Assessment Needed, December 17, 2020, (MCPS0076 through MCPS0077);

MCPS Ex. 19 – Trimester 1 [REDACTED] Report Card, December 18, 2020, (MCPS0078 through MCPS0084);

MCPS Ex. 20 – Prior Written Notice, December 21, 2020, (MCPS0085 through MCPS0086);

MCPS Ex. 21 – Authorization for Release/Exchange of Confidential Information, December 22, 2020, (MCPS0087);

MCPS Ex. 22 – The [REDACTED] Learning Profile, February 2021, (MCPS0088 through MCPS0090);

MCPS Ex. 23 – The [REDACTED] Education Office Progress Report, February 24, 2021, (MCPS0091 through MCPS0093);

MCPS Ex. 24 – Prior Written Notice – IEP Development, April 13, 2021, (MCPS0094 through MCPS0095);

MCPS Ex. 25 – NOT OFFERED;

MCPS Ex. 26 – Resume of [REDACTED], (MCPS0138 through MCPS0140);

MCPS Ex. 27 – NOT OFFERED;

MCPS Ex. 28 – Resume of [REDACTED], (MCPS0143 through MCPS0144);

MCPS Ex. 29 – NOT OFFERED;

MCPS Ex. 30 – Resume of [REDACTED], (MCPS0148 through MCPS0149);

MCPS Ex. 31 – NOT OFFERED;

MCPS Ex. 32 – OFFERED BUT NOT ADMITTED;

MCPS Ex. 33 – NOT OFFERED;

MCPS Ex. 34 – Resume of [REDACTED], (MCPS0213 through MCPS0216);

MCPS Ex. 35 – State of [REDACTED] Professional License Information for Dr. [REDACTED] (not bates stamped).