

████████████████████,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE MARY R. CRAIG,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

CASE No.: MSDE-MONT-OT-21-13125

**DECISION**

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

**STATEMENT OF THE CASE**

On June 10, 2021, Michael J. Eig, Esquire, on behalf of ██████████ and ██████████ (Parents), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) on behalf of their son, ██████████ (Student), requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);<sup>1</sup> 34 C.F.R. § 300.511(a) (2019);<sup>2</sup> Md. Code Ann., Educ. § 8-413(d)(1) (2018); Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

The Parents did not request mediation. On July 14, 2021, Mr. Eig informed the OAH that the matter was not resolved at a resolution session conducted on June 23, 2021.

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<sup>1</sup> 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.

<sup>2</sup> C.F.R. is an abbreviation for Code of Federal Regulations. Unless otherwise noted, all citations of 34 C.F.R. hereinafter refer to the 2019 volume.

On July 22, 2021, I convened a telephone prehearing conference (TPHC) in the above-captioned matter. Mr. Eig represented the Parents. Leslie Turner Percival, Esquire, and Craig Meuser, Esquire, represented the MCPS. I scheduled the hearing to be held in person. However, after the prehearing conference I converted the hearings to a remote format in light of the increased community transmission of COVID-19. COMAR 28.01.02.20B(1)(b).

Unless an extension is requested by the parties, the due process hearing must be held and a decision issued within forty-five days of July 14, 2021, the triggering event for the timeframe for a due process decision. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2014). The decision was due pursuant to the relevant regulations on August 27, 2021.<sup>3</sup> The parties explained that due to: (a) medical procedure previously planned by counsel; (b) my previously scheduled vacation; and (c) hearings on the calendars of the attorneys and myself, the following were the earliest dates when all parties could participate in the hearings: August 31, September 1, 10, 24 and 29, 2021. Due to these circumstances, the parties jointly requested that I extend the timelines for conducting a due process hearing and issuing a final decision and that I would issue the final decision within thirty days of the close of the record. Finding good cause, I granted that request.

I conducted the hearing on August 31, September 1, 10, 24 and 29, 2021. Mr. Eig and Mr. Meuser represented their clients.

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-

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<sup>3</sup> Forty-five days from July 14, 2021 is Saturday, August 28, 2021, so by OAH policy, with deference to MSDE guidance, the decision was due the prior business day.

413(e)(1) (2018); State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2021); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES**

1. Did MCPS offer an Individual Education Program (IEP)<sup>4</sup> reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances?
2. If not, is the Student entitled to be placed at the [REDACTED] at the expense of MCPS for the 2021-2022 school year?

### **SUMMARY OF THE EVIDENCE**

#### Exhibits

I attached an Exhibit List to this Decision.<sup>5</sup>

#### Testimony

The Parents testified and presented the following witnesses:

- [REDACTED], Ph.D., Educational Consultant, accepted as an expert in Special Education<sup>6</sup>
- [REDACTED], Ph.D., Program Coordinator for [REDACTED] ([REDACTED]) at [REDACTED], accepted as an expert in Applied Behavior Analysis (ABA) and behavioral instruction of children with a diagnosis of Autism Spectrum Disorder (Autism)
- [REDACTED], Program Services Director, [REDACTED] Autism Program, accepted as an expert in Special Education and ABA.

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<sup>4</sup> The proposed May 13, 2021 IEP at Parents exhibit 24 and MCPS exhibit 41 are identical. I will refer to it as "the May IEP."

<sup>5</sup> There is duplication in the Parents' and MCPS's exhibits. Reference to one of the duplicate exhibits rather than the other has no significance.

<sup>6</sup> Dr. [REDACTED] was also referred to as the Parents' Educational Advocate.

The MCPS presented the following witnesses:

- [REDACTED], Supervisor, MCPS [REDACTED] Program, accepted as an expert in Special Education, Autism and ABA.<sup>7</sup>
- [REDACTED], Program Specialist, MCPS [REDACTED] Program, accepted as an expert in Special Education and ABA
- [REDACTED], Special Education Program Specialist, MCPS Autism Program, accepted as an expert in Special Education and Autism
- [REDACTED], Behavior Support Teacher, MCPS [REDACTED] Program, accepted as an expert in Special Education and ABA
- [REDACTED] MCPS Instructional Specialist, accepted as an expert in Special Education
- [REDACTED], Elementary Program Specialist, [REDACTED] [REDACTED] [REDACTED]

**FINDINGS OF FACT**

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

**Background information about the Student, his early childhood, and the 2019 IEP process**

1. The Student is a kindergarten eligible child who was born on [REDACTED] 2016 outside the State of Maryland. He moved to Maryland in 2019.
2. The Student is pursuing a high school diploma.
3. The Student has the primary disability of Autism, with additional diagnoses of Global Development Delay and PICA (ingesting inedible items).<sup>8</sup>

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<sup>7</sup> Tr. 377.

<sup>8</sup> MCPS Ex. 10, p. 2.

4. The Student attended [REDACTED] at the [REDACTED]
5. On September 12, 2019, the Student was referred to Developmental Evaluation Services for Children (DESC) at MCPS by the Montgomery County Child Find Office.<sup>9</sup>
6. Upon receipt of the referral, on September 12, 2019, MCPS held an IEP screening meeting by telephone in which Mrs. [REDACTED] participated.<sup>10</sup> The screening team considered the information provided by the Parents and formulated a plan to gather information about the Student. The team reviewed the Student's records from his prior assessments and treatment.
7. The IEP team evaluated the Student using accepted tools. School system personnel, including a speech-language pathologist, school psychologist, special educator, and occupational therapist conducted an observation of the Student and prepared a report.
8. MCPS conducted an IEP team meeting on October 17, 2019 attended by the Parents and all required participants.<sup>11</sup> MCPS found the Student eligible for special education services under IDEA and identified him as having a primary disability of Autism. The IEP programmed for PICA but did not identify PICA or Global Development Delay as disabilities. The team developed and proposed an IEP for the Student to be implemented in a public school setting, outside the general education classroom 23.5 hours a week and inside the general education setting five hours a week.<sup>12</sup> The IEP provided that the Student receive related services of occupational therapy and speech language therapy.<sup>13</sup> The Parents declined the proposed IEP, choosing to keep the Student at [REDACTED].<sup>14</sup>

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<sup>9</sup> MCPS Ex. 3.

<sup>10</sup> *Id.*

<sup>11</sup> MCPS Ex. 6.

<sup>12</sup> MCPS Ex. 4.

<sup>13</sup> MCPS Ex. 4, p. 27.

<sup>14</sup> MSPC Ex. 6.

**The Student's treatment at [REDACTED]**

9. For a total of about eighteen months, from August 2019 until the Spring of 2021 (except for six months from March to August 2020 when in person services were suspended due to Covid-19), the Student received services at [REDACTED], a non-public early childhood clinic for disabled children.

10. [REDACTED] is not a school<sup>15</sup> and as such is not subject to the requirements of the IDEA.<sup>16</sup>

11. [REDACTED] operates on a medical model. It provides therapy administered by staff certified to the degree necessary for reimbursement by insurance companies.

12. [REDACTED] uses treatment plans to identify and monitor the services delivered to children; it does not use IEPs.

13. The Student aged out of [REDACTED] in the Summer of 2021.<sup>17</sup>

14. While participating in [REDACTED] the Student received the following services and supports:

- a. Thirty hours per week of direct therapy using the ABA method;
- b. Three hours per week of case supervision by a board-certified behavioral analyst (BCBA);
- c. Two to four hours per month of in-home parent training; and
- d. Follow-up assessment.

15. The Student made progress toward some of his treatment goals at [REDACTED] but he has few skills necessary for school readiness.<sup>18</sup>

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<sup>15</sup> Tr. 240.

<sup>16</sup> Tr. 171, 240.

<sup>17</sup> Tr. 62.

<sup>18</sup> P. Ex. 30, p. 8.

**The 2021 IEP process**

16. In February 2021, the Parents enrolled the Student for kindergarten with MCPS and requested MCPS to hold an IEP team meeting concerning the Student's kindergarten program and services.

17. All of the Student's IEP meetings were attended by the Parents and their educational consultant, Dr. [REDACTED].

18. On March 11, 2021, MCPS convened an IEP Kindergarten Intake Meeting at which the following information was considered:

- a. Input from Parents and Dr. [REDACTED];
- b. Report of observation dated September 25, 2019;
- c. Educational assessment dated September 25, 2019;
- d. Occupational Therapy Assessment dated September 5, 2019;
- e. [REDACTED] progress report; and
- f. 2019 DESC assessment.

19. As the Student has a complex profile, a multidisciplinary team of Instructional Specialists attended the March IEP meeting: Dr. [REDACTED] (Program Coordinator, [REDACTED]), [REDACTED] (Special Education Teacher), [REDACTED] (Speech-Language Pathologist),<sup>19</sup> [REDACTED] (Instructional Specialist), [REDACTED] (Principal and Chair of the meeting), [REDACTED] (Instructional Specialist), [REDACTED] (General Education Teacher), [REDACTED] (Psychologist) and [REDACTED] (Instructional Specialist).<sup>20</sup>

20. The attendees agreed:

- a. The Student has a significant cognitive disability;
- b. The Student requires extensive, direct, repeated, and individualized instruction

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<sup>19</sup> Ms. [REDACTED] presented information about the observation to the IEP meeting. MCPS Ex. 25.

<sup>20</sup> MCPS Exs. 23 & 24.

and substantial supports to achieve measurable gains in the grade and age-appropriate curriculum; and

c. Additional information was necessary to formulate an IEP.

21. The group decided to seek input about the Student's treatment at [REDACTED].

22. The IEP team did not reject any placement options at the initial meeting.<sup>21</sup>

23. On March 23, 2021, the following virtually observed the Student at [REDACTED] (due to COVID-19 protocols): Dr. [REDACTED], Dr. [REDACTED], Ms. [REDACTED], Ms. [REDACTED] and Ms. [REDACTED].<sup>22</sup>

24. During the observation, the Student received benefit from prompting by his one-to-one (or 1:1).<sup>23</sup> One-to-one refers to a staff member of the school or clinic assigned to stay within arm's length of the Student at all times. He exhibited significant problems with listening comprehension, oral expression, attention, organization, activity level, social interaction, work habits, task completion, motivation, and speech.<sup>24</sup>

25. On March 30, 2021, MCPS circulated a draft IEP.<sup>25</sup> The Parents submitted comments incorporating Dr. [REDACTED]'s views to the IEP team.<sup>26</sup>

26. Throughout the development of the IEP, the Parents requested MCPS to provide the Student with ABA therapy because they felt he benefited from it at [REDACTED].

27. MCPS issued a prior written notice (PWN) after the March meeting (and each of the subsequent meetings) summarizing the information considered at the meeting and outlining the next steps.<sup>27</sup>

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<sup>21</sup> MCPS Ex. 24, p. 1.

<sup>22</sup> See MCPS Ex. 26, p. 1 (Dr. [REDACTED] notes).

<sup>23</sup> P. Ex. 16.

<sup>24</sup> MCPS Ex. 25, p. 2 (Report of Observation by [REDACTED], MCPS Speech-Language Pathologist); see also MCPS Ex. 26 (Dr. [REDACTED]'s notes of observation).

<sup>25</sup> MCPS Ex. 27.

<sup>26</sup> MCPS Ex. 29.

<sup>27</sup> MCPS Ex. 24.

28. The IEP team held an IEP Development/Placement meeting on April 8, 2021 and discussed the draft kindergarten IEP. In attendance were the Parents, Dr. [REDACTED], Dr. [REDACTED], Ms. [REDACTED] (Principal of [REDACTED]), Ms. [REDACTED], Dr [REDACTED], Ms. [REDACTED], Ms. [REDACTED], Ms. [REDACTED] (Instructional Specialist), Ms. [REDACTED] (General Education Kindergarten Teacher), Mr. [REDACTED] and Ms. [REDACTED].<sup>28</sup>

29. Prior to the April meeting, the IEP team requested updated information from [REDACTED] and Dr. [REDACTED] later provided information in an April 12, 2021 progress report.<sup>29</sup>

30. The team also considered the reports from the March [REDACTED] observation as well as the Parents' questionnaire answers, and listened to their concerns about the Student's safety. The Parents told those attending the meeting that the Student had been "running away" more frequently upon arrival at [REDACTED].<sup>30</sup>

31. The team considered graphical information from [REDACTED] documenting the observations recorded by [REDACTED]' staff of the Student's ongoing aggression, elopement attempts, PICA, and incidents of self-injury at [REDACTED] from January 8, 2021 to March 25, 2021.<sup>31</sup> [REDACTED] documented significant aggression from late February until late March 2021, the period covered by the graphs. The graphs also recorded regular incidents of elopement and self-injury. The record of PICA shows that incidents of that behavior were declining.

32. The team unanimously agreed the Student requires one-to-one support to keep him safe from ingesting non-food items, self-injury and elopement.<sup>32</sup> Aggression toward others

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<sup>28</sup> MCPS Ex. 34.

<sup>29</sup> MCPS Ex. 33. The team considered this information at the May IEP meeting.

<sup>30</sup> MCPS Ex. 34, p. 1. The PWN for the April IEP meeting noted that the team discussed the Parents' information that the Student was "running away." It was unclear whether this meant he actually succeeded in leaving the drop-off area at [REDACTED] or attempted to do so. This information indicates that the Student needs designated one-to-one support from arrival until dismissal from school to protect him from being lost or injured.

<sup>31</sup> MCPS Ex. 30.

<sup>32</sup> "Elopement" was used in this case to mean several things. Some referred to the Student moving away from an assigned classroom area as elopement. As used in the context of the Parents' concerns about the Student's safety, elopement means running away from adult supervision, e.g., at the [REDACTED] arrival area.

was discussed, but there was disagreement among team members whether this was an ongoing behavior.

33. The team discussed the options for implementing the IEP (placement), from least to most restrictive: [REDACTED],<sup>33</sup> the MCPS Autism Program, and [REDACTED].<sup>34</sup> Dr. [REDACTED] requested that the team consider [REDACTED].

34. The team heard a presentation from a representative of the MCPS Autism Program and discussed the program, but ultimately rejected it as inappropriate for the Student because it lacks the one-to-one support the Student needs.<sup>35</sup>

35. The team discussed the [REDACTED] program. It was decided that the team would investigate the program to see if it could serve the Student's needs.<sup>36</sup>

36. The Parents submitted comments to the IEP team before and after the April IEP meeting.<sup>37</sup> The Parents suggested specific goals and objectives and requested that the IEP specify that the Student requires dedicated one-to-one support in all areas. The Parents told the IEP team that the Student's safety was their paramount concern.

37. The IEP team considered the Parents' comments at the IEP meetings. Many of their suggested goals and objectives were included in the proposed IEP.

38. Mr. [REDACTED] observed [REDACTED] on April 22, 2021 along with Dr. [REDACTED], Dr. [REDACTED] and [REDACTED].<sup>38</sup>

39. A draft IEP was issued to the IEP team for review on April 29, 2021.<sup>39</sup>

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<sup>33</sup> [REDACTED] is the school the Student would attend if he did not have special needs, or his "home school."

<sup>34</sup> The IDEA requires schools to educate children with disabilities with children who are not disabled, "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5); 34 C.F.R. §300.114(a)(2). The least restrictive placement within the context of the IDEA is in a class with nondisabled peers at a home school. The placement becomes more restrictive to the degree that a student is excluded from interacting with nondisabled peers.

<sup>35</sup> Tr. 306.

<sup>36</sup> MCPS Exs. 34 & 35.

<sup>37</sup> P. Ex. 18.

<sup>38</sup> See MCPS Ex. 36, Dr. [REDACTED]'s notes of the observation.

<sup>39</sup> MCPS Ex. 39.

40. A third IEP team meeting was held on May 6, 2021 attended by the Parents, Dr. [REDACTED], Dr. [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and others.<sup>40</sup> At that time the team discussed the [REDACTED] April 12, 2021 report of the Student's progress in the first quarter: he mastered three of ten overall treatment goals, was making progress toward four goals, and emerging progress toward the other three goals.<sup>41</sup>

41. From January through April 2021, the Student's behavioral goals at [REDACTED] included:
- a. No more than an average of one instance of aggression (any attempt or success at hitting, scratching, or pinching another person on any part of the body with an open or closed fist) per hour;
  - b. No more than one instance or attempt at PICA (placing or attempting to place inedible objects (e.g., drywall, dirt) past the plane of the lips) per day; and
  - c. No more than one instance of self-injury (act or attempt to hit, scratch, or bite any part of the body). Must occur with another precursor or behavior (whining, covering eyes, stomping/kicking foot on floor) per hour.<sup>42</sup>

42. MCPS proposed an IEP with 31.5 hours of specially designed instruction weekly outside of the general education setting and one hour weekly of related services. The May IEP did not propose that the Student interact with the non-disabled students enrolled at [REDACTED], although that was left open as a possibility for the future.

43. If the Student attends [REDACTED] he would walk through the halls of [REDACTED] with nondisabled students from the drop-off area and back to the pick-up area, always accompanied by dedicated one-to-one staff.

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<sup>40</sup> MCPS Ex. 42. The PWN does not list the attendees.

<sup>41</sup> MCPS Ex. 33; P. Ex. 17.

<sup>42</sup> MCPS Ex. 33, pp. 5-6. The Student had a goal to decrease [REDACTED], but all parties agreed that he met this goal and it was not included in the May IEP.

44. The IEP team considered implementing the IEP at the Student's home school, the MCPS Autism Program, [REDACTED] and [REDACTED]. The representatives from the MCPS Autism Program and [REDACTED] expressed their views that their programs could not serve the Student due to the high level of supports he required.<sup>43</sup> The IEP team rejected all placements other than [REDACTED] because those programs do not offer the services necessary to implement the goals of the IEP, including the dedicated one-to-one support necessary to keep him safe.

45. After considering all less restrictive alternatives, MCPS proposed implementing the IEP at [REDACTED] because the extremely low student-to-teacher ratio providing one-to-one support in the classroom is necessary to protect the Student and provide engagement as well as learning.

46. The team proposed implementing the May IEP at [REDACTED] because that program is capable of implementing it, uses evidence-based instructional practices, addresses social-emotional needs, and provides the intensive educational programming listed in the IEP.

47. Based on current data from [REDACTED] and information shared at the IEP meetings, the IEP team considered and rejected the Parents' request that behavior goals be deleted from the IEP, rejecting the Parents' assertion that the Student has no significant behaviors that prevent him or anyone else from learning.<sup>44</sup>

48. The IEP team considered the Parents' input that [REDACTED] was inappropriate for the Student because his behavior is inconsistent with the students in the program who have more significant behavioral needs. After considering the Parents' input, the IEP team rejected concerns that the behavior of the other [REDACTED] students would prevent implementation of the Student's IEP.

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<sup>43</sup> Tr. 306-7.

<sup>44</sup> See Parents' April 19, 2021 comments on draft IEP (proposing edits to the IEP). MCPS Ex. 35, p.3.

49. MCPS refused to make a referral to the MCPS Central Panel for consideration of a nonpublic placement because it concluded [REDACTED] could implement the Student's IEP.

50. In creation of the May IEP, the IEP team considered all available relevant information.

### **Contents of May IEP**

51. The IEP team considered the Parents' concerns that the Student be kept safe during the school day and continue to build life skills.<sup>45</sup>

52. The IEP identifies all of the areas in which the Student's disabilities impact his learning:

a. Academic:

- i. Speech and expressive language;
- ii. Speech and language pragmatics (nonverbal communication, e.g., orienting body toward speaker, eye contact, returning greeting, sitting in a circle, and tolerating sound from other); and
- iii. Speech and receptive language.

b. Behavioral:

- i. Self-management;
- ii. Social/emotional behavioral; and
- iii. Social interaction skills.

c. Early Learning Skills:

- i. Language and literacy;
- ii. Mathematics; and
- iii. Social foundations.

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<sup>45</sup> IEP, p. 14.

53. The IEP team adopted the Parents' request that the Student continue to receive ABA therapy by including ABA strategies in the May IEP including prompt hierarchy, frequent and immediate feedback during instruction, praise and constant reinforcement, functional communication training, and one-to-one reinforcement of alternate behaviors.

54. The May IEP accurately lists the present levels of performance of the Student:

- a. Early learning skills – Social Foundations-below age expectations
  - i. Able to select items from an array, pick up items and place in container, imitate block formations, sustain play for 2-5 minutes;
  - ii. Unable to stay on carpet for morning songs;
  - iii. Does not make eye contact with peers; and
  - iv. Flaps hands, jumps repeatedly, spins.
- b. Early learning skills – Language and Literacy – below age expectations
  - i. On track to master traveling with his speech generating device (SGD);<sup>46</sup>
  - ii. Matches and sorts items using SGD; and
  - iii. Uses SGD to make demands and answer questions.
- c. Academic – Speech and Language Receptive Language – below age appropriate
  - i. Working on identifying pronouns receptively;
  - ii. When asked what an item is finds correct item on SGD; and
  - iii. Can identify his name, mom's name and dad's name.

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<sup>46</sup> The Student uses a SGD to point to pictures to communicate his preferences and needs and to interact with others.

- d. Academic – Speech and Language Expressive Language – below age appropriate
  - i. Uses SGD to communicate;
  - ii. Asks for preferred activities with SGD; and
  - iii. No verbal expressive skills.
- e. Academic – Speech and Language Pragmatics – outside typical limits
  - i. Gains listener’s attention with his SGD;
  - ii. Responds to average of three instructions; and
  - iii. Sustains play for average of 2-5 minutes.
- f. Behavioral – Social/Emotional Behaviors – below age expectations
  - i. From data collected at [REDACTED], episodes of PICA, self-injury, aggression and dangerous acts were charted;
  - ii. Attention span of two to three minutes;
  - iii. Improving ability to select another activity when access to preferred activity denied; and
  - iv. Often leaves class activity area when he chooses to perform another activity.
- g. Behavioral – Social Interaction Skills – below typical limits
  - i. No social interaction with peers; and
  - ii. Uses sign language and SGD to communicate with teacher.
- h. Behavioral – Self-management – below age expectations
  - i. Sits in small group for at least one minute;
  - ii. Responds to average of three instructions;

- iii. Does not engage in group or follow group instructions; and
- iv. Covers his ears when loud noises.

55. The IEP team considered that the Student had engaged in the following behaviors that impact his ability to engage in kindergarten learning and school activities:

- a. self-injurious behavior directed toward his head, e.g., touching his head, banging his head into the floor;
- b. aggression;
- c. elopement; and
- d. PICA.<sup>47</sup>

56. The Student does not have the skills necessary for learning in a general education environment.<sup>48</sup>

57. The Student requires the support of a dedicated one-to-one adult professional within arm's length at all times during the school day, including but not limited to drop off and pick up at the curb, assistance with bathroom activities, and escort within the school premises.

58. Without that support the Student would be in danger due to his severe problem behaviors, specifically, aggression, self-injury, mouthing and ingesting non-food items such as sand and play-doh (PICA), and elopement from the school building or moving from the desired setting in the classroom.<sup>49</sup>

59. The Student does not always respond to safety commands such as “stop,” “come here” and “no.”

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<sup>47</sup> The [REDACTED] charts for the period of January 6, 2021 to March 25, 2021 document the instances of these behaviors. MCPS Ex. 30.

<sup>48</sup> P. Ex. 30, p. 7.

<sup>49</sup> See MCPS Ex. 33, pages 5-6, [REDACTED] April 12, 2021 Progress Report, for the definitions of aggression, PICA and self-injury used to record behavior data at [REDACTED]. There is a chart depicting incidents of elopement, but no definition of the term.

60. The IEP requires MCPS school staff to develop a behavior intervention plan (BIP) to address the Student's behaviors that impede his access to learning or that of others. The BIP would be created by a school-based team using ABA strategies with which the Student is familiar. Those strategies include functional communications training, teaching inhibitory control and tolerance to demands, and differential reinforcement of alternative behavior.<sup>50</sup>

61. At the May 5, 2021 IEP meeting, the team removed some portions of the draft IEP based on updated information. For example, the team removed reference to [REDACTED] because the information presented to the team showed that the Student had stopped exhibiting that behavior.

62. The May IEP provided placement at [REDACTED] with the following program, services, strategies and supports for the Student:

- a. Special education classroom teacher;
- b. One-to-one support person;
- c. A human reader to aid in comprehension;
- d. Frequent breaks due to behavioral and attentional needs;
- e. An instructional area with reduced distractions for individual and group instruction;
- f. Augmentative communication strategies to support his expressive language;
- g. Extended time to respond to requests and allow for ABA strategies;
- h. Frequent praise and consistent reinforcement alongside instruction;
- i. Frequent and immediate feedback;
- j. Differential reinforcement of alternate behavior;
- k. Multimodal strategies to enhance communication;

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<sup>50</sup> IEP, p. 16.

- l. Prompt hierarchy;
  - m. Timed bathroom schedule;
  - n. Assistance when bowel or bladder stains clothing;
  - o. Daily two-way communication with Parents on his school day including progress on goals and skills and suggestions for strategies to implement at home;
  - p. Functional communication training to express wants and comments;
  - q. Monitoring for ingestion of non-food substances;
  - r. Frequent changes in activities; and
  - s. Established routines and structure.
63. The May IEP contains a comprehensive set of seventeen goals, each with supporting objectives, to meet the Student's needs and assist him in making progress toward his goals:
- a. Early Learning Skills – Language and Literacy Goal – Given systematic instruction, real and contrived situations, prompt hierarchy and reinforcement, the Student will mand<sup>51</sup> request for twenty items and discriminate when to gain a listener's attention and when to find a listener with 80% accuracy across two days and two adults.<sup>52</sup>
  - b. Early Learning Skills – Language and Literacy – Given systematic instruction, reinforcement, visuals, SGD, the Student will demonstrate comprehension of pictures by expressively identifying twenty actions, emotions and functions using his SGD functions, features and attributes.<sup>53</sup>
  - c. Early Learning Skills – Language and Literacy – Given systematic instruction,

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<sup>51</sup> "Mand" means a request for something.

<sup>52</sup> IEP p. 28.

<sup>53</sup> IEP pp. 28-29.

SGD, visual supports and reinforcement, the Student will complete ten different fill-in-the blank phrases of any types (song fill-ins, social games, and fun fill-ins or object sounds) using his SGD with 80% accuracy across two days and two adults.<sup>54</sup>

- d. Early Learning Skills – Mathematics – Given structured activities, systematic instruction with prompt hierarchy, and strategies to maintain attention, the Student will demonstrate sorting skills by sorting non-identical pictures in two categories for ten months.<sup>55</sup>
- e. Early Learning Skills – Mathematics – Given structured activities, systematic instruction with prompt hierarchy, and strategies to maintain attention, the Student will demonstrate math concepts of big/small and more/less by more/less and big/small across five targets.<sup>56</sup>
- f. Early Learning Skills – Social Foundations – Given systemic instruction, real and contrived situations, prompt hierarchy, reinforcement, the Student will demonstrate imitation skills by imitating longer functional sequences.<sup>57</sup>
- g. Early Learning Skills – Social Foundations – Given systematic instruction, play activities, prompt hierarchy, reinforcement, visual supports, the Student will demonstrate social play skills by independently playing for five minutes across five different play activities in 80% of opportunities across two days and two adults.<sup>58</sup>
- h. Academic – Speech and Language Pragmatics – The Student will use nonverbal

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<sup>54</sup> IEP, p. 29.

<sup>55</sup> IEP, pp. 29-30.

<sup>56</sup> IEP, p. 30.

<sup>57</sup> IEP, p. 31.

<sup>58</sup> *Id.*

communication to demonstrate acknowledgement and response to the speaker given one visual or verbal prompt.<sup>59</sup>

- i. Academic – Speech and Language Expressive Language – The Student will use multimodal communication (SGD, gestures, vocalizations) to label, request, fill-in-the-blanks, and answer “wh” questions (What, where) using 1-4 words given one verbal or visual prompt.<sup>60</sup>
- j. Academic – Speech and Language Receptive Language – The Student will demonstrate understanding and follow orally presented noun-verb directions, including prepositions and pronouns, related to functional classroom routines and safety.<sup>61</sup>
- k. Behavioral – Self-management – Given systematic instruction, visual cues, the Student will attend (i.e., orient body towards adult and direct eye gaze to relevant materials/adults) to a leader during small group instruction (e.g., teacher reading story during story time, gym teacher providing instruction, teacher leading craft, etc.) and respond to 50% of directions for ten minutes across two days and two adults.<sup>62</sup>
- l. Behavioral – Social Emotional/Behavioral – Given systematic instruction, SGD, visual cues, the Student will tolerate denied access to specific mands (e.g., “I want to watch iPad) and will engage in an alternate activity (child and adult directed) for up to five minutes in the absence of problem behavior with 80% accuracy across three days and two adults.<sup>63</sup>

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<sup>59</sup> IEP pp. 31-2.

<sup>60</sup> IEP pp. 32-3.

<sup>61</sup> IEP, p. 33.

<sup>62</sup> IEP p. 34.

<sup>63</sup> IEP pp. 34-5.

- m. Behavioral- Social Emotional Behavioral – Given systematic instruction, positive behavior supports, visual cues, reinforcement, the Student will demonstrate appropriate school behaviors by maintaining low aggression rates (hitting, scratching, or pinching another person on any part of the body with an open or closed fist) no more than an average of one instance of aggression per hour across one month.<sup>64</sup>
- n. Behavioral – Social Emotional/Behavioral – Given systematic instruction, positive behavior supports, visual cues, the Student will demonstrate appropriate behavior by engaging in no more than an average of one instance of self-injury (act or attempt to hit, scratch, or bite any part of the body; must occur with another precursor behavior: whining, covering eyes, stomping/kicking foot on floor) per hour across one month.<sup>65</sup>
- o. Behavioral – Social Emotional/Behavioral – Given systematic instruction, positive behavior supports, reinforcement, visual cues, the Student will demonstrate appropriate behaviors by maintaining low rates of PICA (placing or attempting to place inedible objects, (e.g., drywall, dirt) that pass the plane of lips) across three months.<sup>66</sup>
- p. Behavioral – Social Emotional/Behavioral – Given systematic instruction, positive behavior supports, reinforcement, visual cues, the Student will demonstrate appropriate behavior by remaining in the area (absence of elopement/out of area) with no more than one incident in a ten minute period.<sup>67</sup>

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<sup>64</sup> IEP p. 35.

<sup>65</sup> IEP pp. 35-36.

<sup>66</sup> IEP p. 36.

<sup>67</sup> IEP pp. 36-7.

- q. Behavioral – Social Interaction Skills – Given systematic instruction, speech-generating device, visual support, and reinforcement, the Student will demonstrate comprehension of oral personal information questions for three personal questions using his SGD (e.g., What is your name? What is mom’s name? etc.)<sup>68</sup>

64. Each of the behavioral goals includes objectives to be used to measure the Student’s progress toward his goals.

**MCPS** [REDACTED]

65. [REDACTED] is an evidence-based program using ABA strategies and protocols daily.<sup>69</sup>

66. The [REDACTED] program applies the principles of ABA therapy including prompt hierarchy. The staff use the least number of prompts to each student based on the student’s individual needs. The most amount of prompt (hand-over-hand or physical prompting) is applied if the student requires it. Prompts are faded systematically to partial physical prompting, e.g., touching an elbow, toward gestures such as pointing, then to verbal prompts and ultimately no prompts as the student progresses. Throughout the prompt hierarchy [REDACTED] staff take data on all the steps of the process.<sup>70</sup>

67. [REDACTED] collects data daily on every student’s problem behaviors. Academic data is recorded using discrete trial instruction for most of the students. Data is collected on each target and is analyzed weekly to make sure the students are making progress and support changes if a student is not progressing on any target.<sup>71</sup> The data is analyzed by the classroom teacher, the Behavior Support Teacher, and the Program Specialist.<sup>72</sup>

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<sup>68</sup> IEP p. 37.

<sup>69</sup> Tr. 493.

<sup>70</sup> Tr. 491.

<sup>71</sup> Tr. 500-501.

<sup>72</sup> Tr. 496.

68. ██████ uses the ABA strategy of discrete trial instruction. Every morning a staff member sits down with each student and probes every skill that the student is working on, collecting data on the student's progress at every step toward his specialized goal. If the student performs the skill, that would be recorded. If the student did not demonstrate the skill, the staff would use the prompt hierarchy and support them to get it right and reinforce the behavior which increases the likelihood that the student will do that the next time.<sup>73</sup>

69. ██████ employs the ABA strategy of errorless teaching in which a student receives reinforcement when he performs a task correctly.<sup>74</sup>

70. ██████ provides the students functional communications training to, for example, teach how to ask for a break without engaging in problem behavior.<sup>75</sup> MCPS has a team called ██████ that supports students who use a SGD.<sup>76</sup>

71. ██████ applies the ABA strategy of differential reinforcement of alternate behaviors by reinforcing a behavior that is a replacement for an interfering behavior.<sup>77</sup>

72. ██████ has a one-to-one ratio of student to staff.<sup>78</sup>

73. Ms. ██████, an expert in special education and ABA, supervises and supports the special education teachers and para educators in the ██████ program.

74. In response to questions about whether ██████ was "appropriate" for the Student, Mr. ██████ responded that the program could accommodate him, specifically by employing ABA strategies.<sup>79</sup>

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<sup>73</sup> Tr. 502.

<sup>74</sup> Tr. 503-4.

<sup>75</sup> Tr. 506-7.

<sup>76</sup> *Id.*

<sup>77</sup> Tr. 509.

<sup>78</sup> Tr. 492.

<sup>79</sup> Tr. 309-10, 312.

## **Applied Behavioral Analysis**

75. There are no generally accepted criteria for what constitutes an ABA program.

76. ABA is a collection of evidence-based theories, therapies, strategies or approaches (collectively “strategies”) aimed at decreasing behaviors that interfere with a child’s access to learning and developing behaviors that support access to learning.

77. There are a variety of ABA strategies proven to help children with a diagnosis of Autism and other developmental disabilities improve specific behaviors, such as social skills, communication, reading, and academics, as well as adaptive learning skills.

78. Some of the ABA strategies proven useful for children with Autism include:

- a. Discrete trial training;<sup>80</sup>
- b. Prompt hierarchy;<sup>81</sup>
- c. Data collection and analysis;<sup>82</sup>
- d. Frequent and immediate feedback;
- e. Praise and reinforcement of positive behaviors; and
- f. Functional communication training.

79. ██████ uses ABA strategies to support the goals and objectives of students’ IEPs.

## **Safety at ██████**

80. Dr. ██████ and Mr. ██████ virtually visited ██████ on May 21, 2021.

██████ was present at ██████ and operated the laptop streaming the visit.<sup>83</sup> Ms.

██████ showed Dr. ██████ a power point and a video about ██████ during the observation,

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<sup>80</sup> Discrete trial training is a method of working with a student one-to-one on a very small portion of a skill that needs to be enhanced and recording data on all of the trials. Tr. 595.

<sup>81</sup> Tr. 595.

<sup>82</sup> Tr. 604.

<sup>83</sup> Tr. 526.

gave them an opportunity to ask questions, and then took a virtual tour of the classroom.<sup>84</sup> The video displayed various strategies used in the classroom, including discrete trial instruction.<sup>85</sup>

81. There was a window in the classroom open about three inches. The windows in [REDACTED] (a new school) do not open more than three inches. It is impossible for a student to fall out of the window. The window opens onto a fenced playground. The classroom where the Student would be placed is on the first floor of the building with windows about 2.5 feet off the ground outside.<sup>86</sup> There is an enclosed courtyard outside the window.

82. On the day of the observation there was a student lying on the windowsill in front of the open window. His BIP (with his parents' consent) calls for that behavior to be ignored so that it will decrease. There was a staff member by the student's feet within reach at all times.<sup>87</sup>

83. Also on that day, a second student was spitting and a third placed his mouth on the skin of a staff members. A fourth student entered a room and placed his face near that of an unmasked staff member. Face masks are available at [REDACTED] and staff are supposed to wear them in school. Students with maladaptive behaviors do not receive attention for the interfering behaviors, e.g., direction to stop, because the attention would likely reinforce the behavior and lead to an increase in the unwanted activity.

## **DISCUSSION**

### **Burden of Proof**

The standard of proof in this case is a preponderance of the evidence. *See* 20 U.S.C.A. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3). To prove an assertion or a claim by a

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<sup>84</sup> Tr. 526-27.

<sup>85</sup> Tr. 525-26.

<sup>86</sup> Tr. 529-30.

<sup>87</sup> Tr. 528-9.

preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). The burden of proof rests on the party seeking relief. *Schaffer Ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); COMAR 28.02.01.21K(1), (2)(b). In this case, the Parents are seeking relief and bear the burden of proof to show that MCPS failed to offer the Student a free and appropriate public education (FAPE) for the 2021-2022 school year and that they are entitled to placement of the Student at the nonpublic [REDACTED] during the 2021-2022 school year at MCPS’s expense.

### Legal Framework

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.

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) of the U.S.C.A. and the applicable federal regulations.

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

the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-07.

The *Rowley* Court found, because special education and related services must meet the state's educational standards, that 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. *Rowley*, 458 U.S. at 204; 20 U.S.C.A. § 1401(9).

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

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 a 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. A 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).

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

Thirty-five years after *Rowley*, the Supreme Court was invited to go further than it did in *Rowley* and set forth a bright line test for measuring whether a disabled student had attained sufficient educational benefit. The framework for the decision was the Tenth Circuit's

interpretation of the meaning of “some educational benefit,” which construed the level of benefit as “merely . . . ‘more than *de minimis*.’” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

The Supreme Court set forth a “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 influenced 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 instruction offered must be “*specially designed*” to meet a child’s “*unique needs*” through an “[*i*]ndividualized education program.” *Andrew F.*, 137 S. Ct. at 998-99 (citations omitted). 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 *Andrew F.* court instructs that the “absence of a bright-line rule . . . should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those

of the school authorities which they review.” *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.” 137 S.Ct. at 1002.

Ultimately, a disabled student’s “educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* at 1000. Moreover, the IEP must be reasonably calculated to allow the student 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 FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. 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. COMAR 13A.05.01.10A(2). Parents may be entitled to place a student at a private school at public expense if the school system failed to comply with its statutory duties and the private school can provide an appropriate education. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985); *Florence Cty. School District Four v. Carter*, 510 U.S. 7 (1993). Parents may recover the cost of private education only if (1) the school system failed to provide a FAPE;

(2) the private education services sought by the parent were appropriate to the child’s needs; and  
(3) overall, equity favors reimbursement. *See Id.* at 12-13. “[T]he ultimate issue in cases where parents seek reimbursement for unilaterally enrolling their child in a private school is whether the public school district has developed an IEP that would provide the student with a FAPE—not whether the private school is more or equally appropriate for the student.” *D.F. v. Smith*, 2019 WL 1427800, \*5 (D. Md., 2019).

### The Undisputed Issues

Before discussing the issues to be decided, I note the scope of the dispute. First, there was no procedural violation of the IDEA alleged in the Due Process Complaint. The Parents did not assert any procedural violation at the prehearing conference. Therefore, no alleged procedural violation is before me. 20 U.S.C. § 1415(f)(3)(B) (party requesting due process hearing “shall not be allowed to raise issues at the due process hearing that were not raised in the [due process complaint] notice ... unless the other party agrees.”)

The following matters are undisputed:

1. The Student is a “child with a disability” as set forth in section 1401(3) of the U.S.C.A. and the applicable federal regulations;
2. MCPS complied with the procedural requirements in developing the May IEP;
3. The Student requires the support of a one-to-one qualified, dedicated person throughout the school day to provide safety and prevent the ingestion of non-food items; and
4. An educational program provided in a setting in which the Student is placed in a classroom with other disabled peers without meaningful exposure to nondisabled peers is the least restrictive environment for the Student, considering his needs. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117.

## The Arguments of the Parties

### *The Parents' Arguments*

The Parents argue that I should give greater weight to their witnesses because they have more experience with the Student. The Student has never attended a Montgomery County Public School, so the only personal experience came from the Parents, Dr. [REDACTED], and Dr. [REDACTED], as well as historical assessments collected in connection with a proposed 2019 IEP, [REDACTED] reports, and a current observation of the Student at [REDACTED].

The Parents stress that they know their son the best. Further, they argue, Dr. [REDACTED] knows the Student better than any of the MCPS witnesses. They point out that Dr. [REDACTED] worked with the Student at [REDACTED]. They argue that the MCPS witnesses do not know the Student at all, while acknowledging that MCPS used [REDACTED] reports along with a brief virtual observation of him in the program (due to COVID).

The Parents' objections to the proposed IEP fall into two categories. The Parents argue that the Student requires "intensive ABA" to obtain educational benefit. The Parents acknowledge that the IEP requires the implementation of many ABA strategies, but they complain that those strategies fail to add up to the intensive ABA program the Student requires. The Parents' other objections to the IEP include the lack of BCBA's at [REDACTED], the inadequate training of the one-to-ones at [REDACTED] in data collection, the lack of a requirement that data be analyzed and the program adjusted daily, and the absence of family training.

Second, the Parents object to the proposed placement at [REDACTED]. The Parents argue that there is no proof that [REDACTED] works for Autistic students who require ABA. The Parents argue that [REDACTED] is inappropriate because it is an [REDACTED] ([REDACTED]) program and the Student is pursuing a diploma. The Parents argue that [REDACTED] is for students with severe, acting out behaviors, which they contend the Student does not exhibit.

### *The School System's Arguments*

MCPS presents the issues differently. In its view, the terms of the IEP were agreed to by the Parents; the dispute lies in whether the IEP can be implemented at [REDACTED]

The school system points out that the Parents rely heavily at closing argument on the testimony of Dr. [REDACTED] on the issue of ABA, an area in which she was not offered or accepted as an expert. She was the only parent expert witness who testified [REDACTED] cannot meet his needs.

MCPS asserts that the IEP contains many ABA strategies, which is what the Parents said during the IEP process had proven effective for the Student. During the IEP meetings and in subsequent feedback, the Parents never told MCPS the Student requires an intensive ABA program. Furthermore, MCPS argues, even if the Parents requested an ABA program, [REDACTED] applies ABA principles to students who require it.

MCPS argues that the Parents' concerns about risks in the halls are speculative.

Finally, MCPS argues that [REDACTED] is a more restrictive environment than [REDACTED].

### Summary of the Evidence and Credibility of the Witnesses

As the Parents have the burden of proving that MCPS denied the Student a FAPE, I will first examine the evidence produced by the Parents.

#### *Diagnostic Reports and Assessments*

The Parents have been very proactive in seeking assessments of the Student from an early age, so there is a lot of information available from his early childhood to the present. A review of the early childhood documents together with the current reports from [REDACTED] provides a clear profile of the Student entering kindergarten.

████████████████████ *Speech Language and Audiological Evaluation*<sup>88</sup>

The Student was assessed for speech/language and audiology on February 19, 2018 when he was two years old at the ██████████'s Developmental Services Agency. As to his language skills, the assessment showed that the Student had “severe receptive and expressive language skills deficits” consistent with a diagnosis of mixed receptive-expressive language disorder.<sup>89</sup> The study was conducted by a certified speech-language pathologist and the findings were not disputed by MCPS. I accept the diagnosis as reliable.

████████████████████ *Childrens Developmental Services Behavioral/Diagnostic Assessment*<sup>90</sup>

The Student was assessed by a qualified psychologist and social worker in 2018 when he was two years old. The assessor observed the Student and administered recognized diagnostic tools. The Student was diagnosed with Autism Spectrum Disorder. The assessment was thorough, performed by qualified individuals, and explained in detail. MCPS accepts the diagnosis. I conclude that the report is reliable, and I have accepted its conclusions.

████████████████████ *Department of Health and Human Services Individualized Family Service Plan*<sup>91</sup>

The purpose for this report is unclear, and portions of it are illegible. I have given it no weight in reaching my decision.

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<sup>88</sup> The evaluation was admitted into evidence as Parents’ exhibit 1A. The author of the report did not testify and none of the witness directly referred to it.

<sup>89</sup> P. Ex. 1A, p. 3. The audiology evaluation revealed normal hearing. *Id.* at p. 4.

<sup>90</sup> P. Ex. 2.

<sup>91</sup> P. Ex. 2A.



vocalizations noted per hour).<sup>96</sup> Ms. [REDACTED] completed a comprehensive report dated May 1, 2019 recommending that the Student receive intensive ABA treatment composed of:

- a. Direct therapy from a registered behavioral therapist (RBT) thirty hours per week;
- b. Case supervision from a BCBA three hours per week;
- c. Parent training from a BCBA two hours per month; and
- d. Follow up assessment from a BCBA five hours per insurance authorization period.<sup>97</sup>

Based on the results of this evaluation, the Parents' insurer approved the Student for treatment at [REDACTED], and he entered the clinic program in August 2019. Ms. [REDACTED] did not testify. I have considered this report as it shows the baseline of where the Student started when he enrolled at [REDACTED]. Due to the age of the report, I have not given it any weight in assessing the Student's current levels of performance in an educational setting and his needs in the development of the May IEP.

[REDACTED] *Child Development Center IEP Progress Report*<sup>98</sup>

I infer that this report was prepared when the Student left [REDACTED] and the program he attended there before relocation to Maryland. The report was prepared with information gathered until May 6, 2019, two years before the Student's MCPS IEP was proposed. I accept the report as background information. Due to the date of the report, I gave it no weight as an indication of the Student's May 2021 present levels of performance or his needs in an educational setting.

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<sup>96</sup> P. Ex. 4, p. 9.

<sup>97</sup> *Id.* at p. 12.

<sup>98</sup> P. Ex. 5A.



describes significant skills regression displayed when the Student was home and not receiving therapy. I conclude that the Student received benefit from the [REDACTED] program while he was in attendance and lost some of what he had achieved when the services were discontinued. Otherwise, the discussion of the Student's status after a mere three weeks back in the intensive program is not helpful to my decision about the appropriateness of the May IEP.

[REDACTED] *Assessment and Treatment Recommendations*<sup>104</sup>

This January 25, 2021 report prepared to demonstrate medical necessity for continued treatment for insurance reimbursement summarizes the Student's history and provides updated information. A portion of the report discusses the results of the VB-MAPP. It describes the results as shown in colors on the accompanying charts.<sup>105</sup>

According to the narrative, the Student is "significantly delayed as he does not yet exhibit clinical Level 1 skills and many Level 2 and 3 skills."<sup>106</sup> Placing this in context, the report notes that "Level 1 skills are typically observed in children ages 0-18 months."<sup>107</sup>

Problem behaviors were noted to persist, including PICA, elopement, aggression, self-injury, and lack of safety awareness, requiring the Student to be closely monitored at all times by dedicated staff. The report prescribes ABA therapy as the best program to deal with the Student's problem behaviors and keep him safe.

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<sup>104</sup> P. Ex. 12.

<sup>105</sup> See MCPS Ex. 10 is the color version of the report.

<sup>106</sup> P. Ex. 12, p. 11.

<sup>107</sup> *Id.*

██████████ April 12, 2021 Mid-Authorization Progress Report<sup>108</sup>

This report describes the Student's progress in treatment for the first quarter of 2021. As such, it is a valuable record of his needs when the IEP was developed from March until May 2021. It was considered at the May 6, 2021 meeting.<sup>109</sup>

Dr. ██████████ testified that the Student made "fantastic progress" in his behavior goals at ██████████.<sup>110</sup> However, the report notes that the Student continues to engage in aggression, defined as "any attempt at hitting, scratching or pinching another person on any part of the body with an open or closed fist."<sup>111</sup> It recommends continuing the Student's goal of low aggression, i.e., no more than an average of one instance of aggression *per hour*.<sup>112</sup>

The report recommends a goal to address the Student's incidents of PICA at ██████████.<sup>113</sup> The goal is followed by a graph entitled "Elopement Summary-Dangerous Acts." I assume PICA and elopement were graphed together. The goal appears directed toward reducing instances of PICA; it does not specifically discuss elopement.<sup>114</sup>

Reduction of self-injury was noted to be a continuing need for the Student. The chart at page six of the report details the daily instances of self-injury in the prior three months. As with the aggression goal, the self-injury goal of no more than one instance *per hour* indicates this continuing need.

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<sup>108</sup> P. Ex. 17. MCPS Ex. 33 is the same document.

<sup>109</sup> IEP, p. 7 (notes April 2021 ██████████ report as part of the information considered by the team.

<sup>110</sup> Tr. 190-91.

<sup>111</sup> P. Ex. 12, p. 15.

<sup>112</sup> This report mentions ██████████, a problem the Student experienced in the past. The IEP team discussed this problem and, after receiving input from the Parents, decided that the Student did not require a goal to address this behavior, which declined substantially in the Spring of 2021.

<sup>113</sup> *Id.* at p. 6. Dr. ██████████ authored the report. Dr. ██████████ acknowledged there might be an error in the report about elopement.

<sup>114</sup> There seems to be a typo in the narrative at page 6 of the report as it states the measurement of success toward the PICA goal as "1 or instances or attempts at PICA per day." *Id.*

██████████ *August 2021 Assessment and Treatment Discharge Current Levels*<sup>115</sup>

I admitted Parents' exhibit 30, the ██████████ report dated August 2021 over the objection of MCPS. This document discusses the Student's levels of performance when he was discharged from ██████████. I have considered it to the extent that it provides information about the Students' time at ██████████, much of which is already in the record. I have not given any weight to information contained in the report about matters that occurred after the May IEP was proposed because the report was not available in May 2021 and could not have been considered in the creation of the IEP. This is comparable to the situation where the Parents place a Student in a private school after rejecting an IEP and attempt to show the Student's subsequent progress as evidence that the proposed IEP was deficient. Subsequent event evidence should be used cautiously in determining if a proposed IEP offered a student a FAPE.

While *Andrew F.* notes that the student in that case made "a degree of academic progress that had eluded him in public school" after enrolling in a private school, 137 S. Ct. at 996, it does not prescribe a new rule requiring reviewing courts to consider evidence of post-IEP private school performance to determine whether the IEP provides a FAPE. Instead, *Andrew F.* refines a standard first elucidated in *Rowley*, to the effect that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" in order for a school to "meet its substantive obligation under the IDEA." *Id.* at 999. The Supreme Court expressly refused to establish a "bright-line rule" as to what would constitute " 'appropriate' progress," deferring instead to "the application of expertise and the exercise of judgment by school authorities" that were 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 1001-02. Thus, *Andrew F.* establishes a broad standard for determining whether an IEP provides a FAPE, reasserting the significant deference due to school officials' expertise. It does not require that school officials, let alone a reviewing administrative hearing officer, consider a student's subsequent performance in a private school when forming an IEP. In situations where a student and his or her parents have rejected a proposed IEP, subsequent evidence of that student's performance in private school should not necessarily "retroactively reflect on the propriety of that IEP." *Foose*, 165 F. Supp. 3d at 380 (citing *Schaffer v. Weast*, 554 F. 3d 470, 476 (4<sup>th</sup> Cir. 2009)).

*D.F. v. Smith*, 2019 WL 1427800, \*8 (footnotes omitted).

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<sup>115</sup> P. Ex. 3

To the extent that the report summarizes information presented or available to the IEP team prior to the drafting of the May 2021, I considered that evidence.

I note some inconsistency between the report and the information available to the IEP team. The team removed a goal to address [REDACTED] because the information presented to the team as of early May 2021 indicated that this behavior had ceased. However, the later [REDACTED] report cites [REDACTED] as a problem.<sup>116</sup> I conclude that the report was based on out-of-date data regarding [REDACTED]. The behaviors of PICA and self-injurious behaviors were reported to be “severe barriers to learning.”<sup>117</sup> These behaviors along with elopement were parental priorities for the Student’s program, and the IEP addresses them by requiring dedicated support to the Student outside the general education environment. This protection is available at [REDACTED]

*The Parents’ Witnesses*

[REDACTED]

Mr. [REDACTED] introduced the Student through his testimony. Mr. [REDACTED] is clearly a loving, supportive parent. Mr. [REDACTED] stressed the Parents’ desire that the Student be kept safe at school and be given all available services to allow him to achieve his full potential, develop functional living skills, and become as independent as possible.

Mr. [REDACTED] testified that the Student benefitted from an ABA program in [REDACTED] [REDACTED] and at [REDACTED]. When [REDACTED] closed due to the pandemic, the Student lost some of the progress he made, especially in his behaviors.<sup>118</sup> According to Mr. [REDACTED], the Parents asked MCPS to provide an ABA program for the Student during the IEP process, but

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<sup>116</sup> P. Ex. 30, p. 6.

<sup>117</sup> *Id.*

<sup>118</sup> Tr. 304.

MCPS neither offered the requested program nor explained why it was proposing an IEP without ABA.<sup>119</sup>

Mr. [REDACTED] observed the [REDACTED] classroom virtually. Mr. [REDACTED] was in the classroom operating the laptop used to stream the visit. Mr. [REDACTED] rejected the program in part because he was told the [REDACTED] program is not “an ABA program.”<sup>120</sup> He was dissatisfied when he was told during the observation that [REDACTED] incorporates ABA strategies.<sup>121</sup> Mr. [REDACTED] disliked what he was told about the degree of data taken in [REDACTED] the level of staff training in ABA, and the absence of parent training.<sup>122 123</sup> Mr. [REDACTED] was concerned about the following things he saw during the tour:

- a. a student lying on a window sill next to an open window who appeared to be unattended by staff; and
- b. a student spitting at others.<sup>124</sup>

Mr. [REDACTED] believes firmly that the Student needs an intensive ABA program to meet his needs. He rejects the May IEP and the proposed implementation at [REDACTED] because he does not think it could deliver the program the Student requires.

Mrs. [REDACTED]

Mrs. [REDACTED] testified briefly that, during the May 2021 observation at [REDACTED], she asked Mr. [REDACTED] what led him to think [REDACTED] was an appropriate fit for the Student. She testified that, in response, he stated, “[I] never said it was an appropriate fit, but that

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<sup>119</sup> Tr. 303.

<sup>120</sup> Tr. 317.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Mr. [REDACTED] testified that he understood that the Student would be walking the halls, eating lunch, and taking recess with non-disabled peers. Tr. 318. The May IEP proposed that the Student would not be with nondisabled peers for any portion of the day. *See* IEP, page 38, proposing that the Student receive classroom instruction entirely outside the general education environment. This issue was not developed as a potential FAPE violation, so I will not discuss it further.

<sup>124</sup> Tr. 316.

[REDACTED] would be able to accommodate [the Student].”<sup>125</sup> This comment is discussed in the following portion of this decision after I have reviewed all the evidence.

[REDACTED], *Ph.D.*

Dr. [REDACTED] obtained a doctorate from the [REDACTED] in 1982 and a Master’s degree in Special Education from [REDACTED] in 1970.<sup>126</sup> Dr. [REDACTED] has certification from MSDE in Generic Special Education (infant through grade three) and Generic Special Education (grades one through eight).<sup>127</sup> She last taught school in 1994 and has worked as an educational consultant since her retirement from teaching.<sup>128</sup> Dr. [REDACTED] was accepted as an expert in Special Education, and she is qualified to express an opinion on special education issues. She is not an expert in ABA.

Dr. [REDACTED] thoroughly prepared for her testimony. She observed the Student on March 12, 2020 at [REDACTED],<sup>129</sup> met and spoke with the Parents, and attended all three IEP meetings. In addition, Dr. [REDACTED] read the historical reports (February 2018 to May 2019) about the Student’s diagnosis and treatment.<sup>130</sup>

Dr. [REDACTED] testified that she has worked with other proposed IEPs to be implemented at [REDACTED] over many years, including other grade school students (but not kindergarten).<sup>131</sup> In her experience, [REDACTED] is a program for students with significant needs, primarily, students with “acting out” behaviors that disrupt classes.<sup>132</sup> She opined that [REDACTED] is not appropriate

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<sup>125</sup> Tr. 357.

<sup>126</sup> P. Ex. 31.

<sup>127</sup> *Id.*

<sup>128</sup> Dr. [REDACTED] worked at the OAH as a Hearing Officer from [REDACTED] until [REDACTED]. *Id.*, p.2. She was not accepted as an expert in IDEA.

<sup>129</sup> Dr. [REDACTED]’s brief personal notes about the observation were not helpful. P. Ex. 7.

<sup>130</sup> P. Exs. 1A – 6.

<sup>131</sup> Tr. 86-87.

<sup>132</sup> Tr. 86-87.

for the Student as it is not an ABA program; [REDACTED] is a program for students who are not on the diploma track.<sup>133</sup>

Dr. [REDACTED] visited the [REDACTED] program and completed a written report dated May 21, 2021.<sup>134</sup> During her testimony Dr. [REDACTED] emphasized aspects of [REDACTED] which might shock a listener. She referred to a “padded” room at [REDACTED] where an out-of-control student can be held safely. She also forgot facts which might be helpful to MCPS and work against her position that the IEP did not provide the Student needed ABA with fidelity. For example, Dr. [REDACTED] testified that the IEP did not refer to ABA by name. There is a reference to ABA in the “Discussion to Support Decision” section.<sup>135</sup> The IEP refers to ABA in the Behavioral Intervention section:

The school-based team will initiate the development of an FBA/BIP due to [the Student’s] significant behavioral concerns. To make his transition to MCPS smoother, the team will use ABA strategies with which he is familiar, collect data, and make recommendations to the IEP team as part of a process.<sup>136</sup>

Dr. [REDACTED]’s recall of the IEP contents is faulty.

Dr. [REDACTED] voiced strong objections to [REDACTED]’ ability to keep the Student safe. She described seeing a student lying on a bookcase by an open window on the second floor of the building, a second student spitting, a third student whose mouth was continually touching the skin of the instructor, and a fourth student leaning over an instructor who was not wearing a mask.<sup>137</sup>

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<sup>133</sup> Tr. 88. Students who are seeking a certificate are in the [REDACTED] track, which requires parental consent. The Parents agree that the Student meets the criteria for [REDACTED], but they did not consent to having him placed in that track, preferring to wait until they see how much he is able to achieve.

<sup>134</sup> P. Ex. 27. This report was not considered in creating the IEP as it was prepared after the IEP was proposed.

<sup>135</sup> IEP, p. 3.

<sup>136</sup> IEP, p. 16.

<sup>137</sup> Tr. 89-91.

Dr. [REDACTED] reviewed all of the reports from the [REDACTED] program and prepared a chart showing the Student's progress as of August 2021.<sup>138</sup> She testified that the Student made "tremendous progress" at [REDACTED] and he should be placed at [REDACTED] to continue that progress in their Autism program.<sup>139</sup>

Dr. [REDACTED] testified that, based on the information she gathered, the Student's current needs are in the following areas: (1) limited attention span; (2) lacking social interaction skills; and (3) deficits in receptive, expressive and pragmatic language.<sup>140</sup> In addition, Dr. [REDACTED] testified that the Student's behaviors present serious safety concerns. He elopes (runs away) from the designated classroom area and may try to leave the school building unattended.<sup>141</sup> The Student exhibits PICA by mouthing and attempting to ingest inedible substances which could cause sickness or choking.<sup>142</sup> He is incompletely toilet trained so he needs a toileting schedule and assistance changing soiled clothing.<sup>143</sup> The Student lacks stranger awareness and safety in the environment, e.g., he cannot safely cross a street. In her opinion, the Student must be closely monitored to prevent self-injurious behaviors, ingestion of inedibles, and elopement.<sup>144</sup>

Dr. [REDACTED] ardently advocated for an intensive ABA program for the Student. In answer to Mr. Eig's open-ended question, she testified:

Q. And so when you were assisting the parents in coming to Montgomery County for Child Find what were --what was your opinion as to the kind of program, not the name of a program, but the kind of educational program [REDACTED] should have for this year?

A. It goes without saying that he needed a program that was ABA-based.

Q. Hold on. Let me interrupt you please. Why?

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<sup>138</sup> P. Ex. 34; Tr. 97-98; See discussion of post-May 2021 information at pages 138-9 above. .

<sup>139</sup> Tr. 98.

<sup>140</sup> Tr. 51-52.

<sup>141</sup> Tr. 53.

<sup>142</sup> Tr. 53.

<sup>143</sup> Tr. 54.

<sup>144</sup> Tr. 53-54.

A. Because his needs are intensive, but they are intensive enough that that is the only type of intervention that is going to be appropriate for him. He is a youngster who needs to have that type of data-driven analysis and programming to be successful. He cannot operate for instance in a program where he is working with an adult and a second child. He is not able to work with two people at one time. He is not able to have a large portion of his programming done as you would in a traditional classroom where it is small group and large group. He needs that kind of specificity.<sup>145</sup>

On direct examination, Dr. ██████ acknowledged that the May IEP contained some ABA strategies, but she insisted that it did not require implementing ABA “with fidelity” which, in her opinion, is necessary to offer the Student a FAPE.<sup>146</sup> She strongly believes that the May IEP does not offer the Student a FAPE because he requires an ABA program and the program at ██████ is not ABA-based.<sup>147</sup>

On cross-examination, Mr. Meuser probed Dr. ██████ about ABA. He started by asking the witness whether there were any techniques or services “that are approved by any national bodies or state bodies that fall under the umbrella of an ABA approach[.]”<sup>148</sup> Dr. ██████ gave him an evasive answer that “there are various organizations that state that they can approve ABA services.”<sup>149</sup> Dr. ██████ avoided answering the question. Dr. ██████ worked in the field of special education and counseled parents to advocate for their children for decades, so I would have expected her to be able to list one or two accrediting bodies, if any are well recognized. She did not do so. Based on all the evidence, I conclude that the field of ABA allows competent professionals to choose evidence-based strategies most suited to a student’s needs from a menu of available strategies. There is no meaningful definition of “an ABA program.”.

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<sup>145</sup> Tr. 62-63.

<sup>146</sup> Tr. 75.

<sup>147</sup> *Id.*

<sup>148</sup> Tr. 108-9.

<sup>149</sup> *Id.*

Mr. Meuser followed up with a question asking Dr. [REDACTED] to identify “any specific services that fall under the umbrella of ABA approach[.]”<sup>150</sup> Dr. [REDACTED] disingenuously refused to give a direct answer, replying that she did not understand the question, adding “ABA is an approach which utilizes many approaches within it.”<sup>151</sup> This left the impression that there is no objective standard for identifying ABA services or approaches. Clarifying, Dr. [REDACTED] listed *some* of the ABA approaches used for *some* students as: maintenance of a database shared with the student’s parents; one-to-one discrete trial; frequent and immediate feedback during instruction; praise and consistent reinforcement; and functional communication training.<sup>152</sup> I conclude that, like many disciplines, ABA requires the selection of the strategies that serve individual student’s needs. There is no cookie cutter “ABA program” capable of being included in an IEP.

Mr. Meuser followed up by asking if various ABA style approaches were included in the Student’s IEP. Dr. [REDACTED] testified that the services or approaches of differential reinforcement of alternative behavior, functional communication training, prompt hierarchy, praise and consistent reinforcement alongside instruction, were included in the May IEP, but those things are not all ABA, in her opinion.<sup>153</sup>

Some of Dr. [REDACTED]’s testimony about the placement proposed at [REDACTED] was not supported by other evidence in the record. Dr. [REDACTED] testified that she was not shown a PowerPoint presentation or a video about [REDACTED] by Ms. [REDACTED] on the day of her observation. Ms. [REDACTED] testified that she always shows the PowerPoint and video and takes questions from observers when she hosts an observation. Ms. [REDACTED] testified that the video

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<sup>150</sup> Tr. 109.

<sup>151</sup> *Id.*

<sup>152</sup> Tr. 109-111.

<sup>153</sup> Tr. 111-12.

shows her working with an [REDACTED] student using ABA techniques. I conclude that Dr. [REDACTED]'s testimony on this point was not reliable.

My overall impression of Dr. [REDACTED] is that she believes that the Student has received benefit from the clinical program at [REDACTED], so she wants him to graduate to the [REDACTED] Autism Program. She believes that [REDACTED] has the best program for the Student. In advocating for that result, Dr. [REDACTED] refused to fairly assess the comprehensive services and supports described in the IEP. It is difficult to understand why Dr. [REDACTED] would not acknowledge the IEP's exhaustive description of the Student's needs, the multiple goals and supporting objectives serving the Student's specific needs with individually targeted strategies (even those which she conceded are evidence-based and used in ABA programs), other than to advance her desired goal of placement at [REDACTED].

In summary, while Dr. [REDACTED] expressed her opinion that the May IEP did not offer the Student a FAPE because it did not specify ABA with fidelity, she failed to provide reliable evidence of the yardstick against which she measured the IEP for compliance with her understanding of an ABA program. Dr. [REDACTED] did not fairly evaluate the proposed IEP using the proper measurement, i.e., whether the IEP is reasonably calculated to offer the Student a FAPE as required by the IDEA.

Dr. [REDACTED] was overzealous in her advocacy for the Student. One example occurred when Dr. [REDACTED] contributed to the Parents' detailed comments submitted to the IEP team after the April meeting. She advocated for IEP goals directed toward elopement and PICA, but objected to mentions of self-injury and aggression. She wrote, "[The Student] has no significant behaviors that prevent him from learning or hurt anyone else."<sup>154</sup> This puzzling comment appears inaccurate as to self-injury and questionable as to aggression toward others.

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<sup>154</sup> MCPS Ex. 35, p. 3.

There is overwhelming documentation from ██████████, the program that Dr. ██████████ thoroughly praises, that the Student's behaviors currently impact his access to learning. As recently as April 2021, the ██████████ first quarter report indicates that, although the Student was making progress toward some of the goals in his treatment plan, his behaviors of aggression and self-injury persisted.<sup>155</sup> Dr. ██████████ and Mr. ██████████ testified that aggression toward others has never been a problem for the Student, but Dr. ██████████ failed to explain why the ██████████ goal for aggression specifically refers to aggression toward others.<sup>156</sup> The aggression goal is set at a very basic level: "[The Student] will maintain low aggress rates (i.e., no more than an average of 1 instance of aggression per hour) across one month."<sup>157</sup> The aggression and self-injury goals were not removed from the ██████████ treatment plan. Furthermore, Dr. ██████████ testified that the Student was at times distracting other students and refusing to work even when prompted.<sup>158</sup>

One of the Parents' primary concerns with ██████████ is that it is a program for students with "acting out" behaviors. Their child has significant behavioral needs, but they prefer that he not be placed in a class with others with behavioral needs, relying in part on Dr. ██████████'s advice that the Student does not fit the profile of the typical ██████████ student.<sup>159</sup> Dr. ██████████ falsely minimized the Student's own interfering behaviors to support the Parents' preference that the Student continue at ██████████ at public expense rather than enroll in MCPS. I have given her testimony little weight.

██████████, *Ph.D., Program Coordinator for* ██████████

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<sup>155</sup> See ██████████ April 2021 progress report, MCPS Ex. 33, pp. 5-6.

<sup>156</sup> MCPS Ex. 33, p. 5.

<sup>157</sup> MCPS Ex. 33, p. 5.

<sup>158</sup> Tr. 213-14.

<sup>159</sup> The PWN for the May IEP meeting confirms this:

MCPS considered the parental input that the ██████████ program is not an acceptable program for [the Student] because his needs are not consistent with the typical profile of a student at the ██████████ program, who has more significant and impactful behavioral needs.  
MCPS Ex. 42, p. 1.

Dr. [REDACTED] the Program Coordinator for [REDACTED], was accepted as an expert in ABA. She achieved a Master's degree and doctorate in Behavior Analysis. Dr. [REDACTED]'s experience is clinical. She has been the Program Coordinator at the [REDACTED] clinic for two years, and before that she was a consultant and a clinician.<sup>160</sup> Dr. [REDACTED] has experience teaching at the college level, but she has never worked with students in a school. [REDACTED] is not a school; it is a clinic operating on a health insurance model. Dr. [REDACTED]'s experience is clinical. She has never implemented a student's IEP in a school. I have discounted her testimony for that reason.

Dr. [REDACTED] is a board-certified behavioral analyst, certification she received from the ACB.<sup>161</sup> Dr. [REDACTED] described ABA as "the application of behavioral principles to socially significant behaviors."<sup>162</sup> Dr. [REDACTED] is qualified by training, board certification and experience to express an opinion about ABA. I have given her testimony about ABA some weight.

Endeavors provides intensive ABA therapy which Dr. [REDACTED] defined as thirty hours a week.<sup>163</sup> Dr. [REDACTED] explained the essentials of a scientifically-based ABA program:

1. assessment and analysis to evaluate the effectiveness of praise;
2. measuring praise against targeted behaviors;
3. monitoring data to see if praise is what is producing the outcome sought; and
4. treatments based on assessments and analysis.<sup>164</sup>

Dr. [REDACTED] explained that in ABA it is very important to take data and review it.<sup>165</sup> The registered behavior technicians who work with the children in [REDACTED] take data throughout

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<sup>160</sup> P. Ex. 32.

<sup>161</sup> Tr. 174, 176. The full name of this body was not placed in the record.

<sup>162</sup> Tr. 164.

<sup>163</sup> Tr. 172.

<sup>164</sup> Tr. 175-76.

<sup>165</sup> Tr. 165.

the day which is evaluated daily to measure progress and adjust the program.<sup>166</sup> In her opinion, the Student needs data recorded and analyzed every school day.<sup>167</sup> I reject the analysis portion of this statement because students have good and bad days at school. A program should not be adjusted based on one day's behaviors.

I detected bias in Dr. [REDACTED]'s testimony. Dr. [REDACTED] wrote the April 2021 [REDACTED] report for the IEP meetings to show the team the Student's progress at [REDACTED].<sup>168</sup> Addressing the Student's behavioral needs, she testified that aggression toward others was never a "major concern" or a "significant issue" for the Student at [REDACTED].<sup>169</sup> When Mr. Eig asked Dr. [REDACTED] about the Student's aggression, she deflected, responding that self-injury was the most concerning behavior.<sup>170</sup> This testimony is inconsistent with her April 2021 [REDACTED] report, which on page five contains a graph showing that the Student engaged in aggression on many days in the first quarter of 2021.<sup>171</sup> Aggression is specifically defined as an attempt or success at hitting, etc. **another person**. I reject this portion of Dr. [REDACTED]'s testimony for two reasons: 1) aggression toward others was a targeted behavior in the treatment plan; and 2) the [REDACTED] report is more reliable than her testimony as the report is based on data collected at [REDACTED]. Furthermore, Dr. [REDACTED] testified on cross-examination that the Student regularly engaged in aggression.<sup>172</sup>

In Dr. [REDACTED]'s opinion, the Student needs an intensive behavioral treatment plan and a skills-based program. "He does not work without intensive ABA instruction involving one to one instruction, with errorless teaching, repeated trials, prompt fading and specific differential

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<sup>166</sup> Tr. 177-78.

<sup>167</sup> Tr. 185.

<sup>168</sup> P. Ex. 17.

<sup>169</sup> Tr. 190-91.

<sup>170</sup> Tr. 192.

<sup>171</sup> P. Ex. 17, p. 5.

<sup>172</sup> She testified that in late March 2021, the Student engaged in nine acts of aggression in one day. Tr. 217.

reinforcement.”<sup>173</sup> I reject this testimony because Dr. [REDACTED] did not explain the basis for her opinion. In order to opine that nothing else works for the Student, Dr. [REDACTED] would have to provide her basis for comparison of other methods of instruction. She did not.

Dr. [REDACTED] visited [REDACTED] virtually along with Dr. [REDACTED] and Mr. [REDACTED]. Based on her thirty-minute observation, she believes [REDACTED] is not an intensive ABA program. On cross-examination, Dr. [REDACTED] testified that an ABA program means a program “applying the principles of applied behavior analysis to a child’s detailed IEP goals or objectives....”<sup>174</sup> She added that the program should apply the principles of behavioral analysis to observe the Student’s behavior and analyze it.

Mr. Meuser probed Dr. [REDACTED]’s answers about ABA. Dr. [REDACTED] explained that an ABA program is one that applies principles of ABA to socially significant behaviors.<sup>175</sup> She explained that behaviors must be observed, documented and analyzed.<sup>176</sup> The Student needs to have dedicated staff within arms reach at all times to prevent problem behaviors.<sup>177</sup>

With respect to analyzing data, on cross-examination Dr. [REDACTED] testified that the behavior graphs in MCPS exhibit 30 are not “great graphs.”<sup>178</sup> They present the incidents of the behaviors being tracked as the number per day, not per hour. Dr. [REDACTED] testified that [REDACTED] was aware that the Student could be in danger if he eloped, but did not track elopement because it was not one of the Student’s behavior goals.<sup>179</sup>

In summary, Dr. [REDACTED] testified that the Student made progress toward his goals in the [REDACTED] program, and she opined that he requires an ABA program to continue to meet his

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<sup>173</sup> Tr. 231.

<sup>174</sup> Tr. 206-7.

<sup>175</sup> Tr. 206-207.

<sup>176</sup> Tr. 207.

<sup>177</sup> Tr. 215.

<sup>178</sup> Tr. 217.

<sup>179</sup> Tr. 209-10. This testimony is confusing because Dr. [REDACTED] also testified that the Student engaged in nine acts of elopement on one day in March 2021 and six on another day. Tr. 217-18. Elopement in that context might mean walking away from an activity. It is unclear if the Student tried to leave the classroom.

academic and behavioral goals. Dr. [REDACTED] testified that the Student requires an intensive behavioral treatment plan<sup>180</sup> and ABA to address emerging skills.<sup>181</sup> Dr. [REDACTED] testified that as of May 2021, the Student had a history of engaging in “high rates of behavior that pose a risk to himself,” and the Student would not remain safe in any environment other than with a highly trained adult to monitor him from a very close distance at all times.<sup>182</sup>

I accept Dr. [REDACTED]’s testimony that the Student made progress toward the goals in his treatment plan at [REDACTED] and that he requires constant adult supervision to protect him from elopement and PICA. I reject her testimony that no program other than one replicating [REDACTED] will provide him an appropriate education for the reasons stated above.

[REDACTED], *Program Services Director*, [REDACTED] *Autism Program*

Ms. [REDACTED] has a Master’s degree in special education with a focus on severe disabilities and ABA. She is a board-certified behavior analyst. Ms. [REDACTED] was accepted as an expert in Special Education and ABA. As the Program Services Director of another [REDACTED] program, Ms. [REDACTED] provided limited evidence about the Student.<sup>183</sup> She testified that it was “really hard” for her to opine whether the Student needs the level of data collected and analyzed at [REDACTED] as he moves into kindergarten.<sup>184</sup> She did not attend any IEP meetings or offer any testimony about [REDACTED]. She testified primarily about the [REDACTED] Autism Program, the Parents’ requested nonpublic placement. As I have concluded that the May IEP can be implemented at [REDACTED], I will not discuss her testimony further.

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<sup>180</sup> The May IEP calls for the development of a BIP at page 16.

<sup>181</sup> Tr. 205.

<sup>182</sup> Tr. 218-18, 231-32.

<sup>183</sup> Tr. 263.

<sup>184</sup> *Id.*

*MCPS' Witnesses*

Having discussed the Parents' evidence, I will turn to the MCPS evidence. Comparing the Parents' evidence overall with the school system's evidence leads me to several conclusions. The Parents did not discuss the IEP process in their presentation whereas MCPS provided evidence about the collaborative process followed to create the IEP. There were three IEP meetings. The IEP team built upon all of the work performed in 2019 when the first IEP was created. The IEP team recognized the Student's intensive needs early in the process and reached out to a multidisciplinary group of professionals for input.

It is undisputed that the IEP team included the Parents, their consultant, and all available, relevant records in every step of the process toward creating the IEP. MCPS wrote an IEP containing an explanation of the Student's complicated needs. It would be difficult to convince me otherwise when the outcome of the process was a forty-three page IEP with seventeen goals and supporting objectives for a kindergarten student.

MCPS presented six witnesses to support its position that the May IEP offered the Student a FAPE, three of whom were accepted as experts in ABA.

*██████████, Program Specialist, MCPS ██████████ Program, accepted as an expert in Special Education and ABA*

Ms. ██████████ has a Master's degree in ABA with an emphasis in Autism, is a board certified behavioral analyst and a licensed behavior analyst.<sup>185</sup> She is also certified to teach special education. Her primary focus is educational, but she brings clinical experience as well from her work as a behavioral analyst in her second job performing in-home therapy.

Ms. ██████████ is very familiar with ██████████. She is assigned to the program half of the time in her full-time position with MCPS.<sup>186</sup> Ms. ██████████ described ██████████ as an evidence-

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<sup>185</sup> MCPS Ex. 50.

<sup>186</sup> Mr. ██████████ serves as the Program Specialist at ██████████ part-time as well.

based program.<sup>187</sup> She testified that ABA strategies are evidence-based, so MCPS uses them daily at [REDACTED]. Asked to define ABA, Ms. [REDACTED] testified that ABA is “an ideology that is based on the relationship between behavior in the environment...”<sup>188</sup> She offered that “there are lots of protocols and strategies that have been research-based and proven effective, and therefore, implemented regularly in ABA programs or therapy.”<sup>189</sup> This testimony confirms my conclusion that the definition of “an ABA program” is imprecise.

Ms. [REDACTED] testified that part of her role at [REDACTED] is to make certain that the school staff are properly trained and that they collect data on the Students’ behaviors as well as on the progress toward the students’ IEP goals.<sup>190</sup> She also helps the [REDACTED] teachers learn how to analyze the data and make decisions about changing interventions such as fading prompts based on the data.<sup>191</sup> Ms. [REDACTED] described prompt hierarchy and other practices which the Parents’ witnesses described as necessary components of an ABA program. She identified many of the practices employed in the [REDACTED] program which had been highlighted in the Parents’ case as specific to an ABA program, and explained how the staff at [REDACTED] applies those principles.<sup>192</sup> She testified that the practices of data collection, prompt hierarchy, reinforcement, multi-model strategies, differential reinforcement and functional communication training are ABA strategies, but they are all best practices found in most well-rounded special education programs.<sup>193</sup> These practices are mentioned in the IEP and would be implemented if the Student enrolled at [REDACTED].

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<sup>187</sup> Tr. 493.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Tr. 490.

<sup>191</sup> *Id.*

<sup>192</sup> Tr. 490-91.

<sup>193</sup> Tr. 515-6.

I found Ms. [REDACTED] to be unbiased, thoughtful and experienced with educating students with a diagnosis of Autism. Her knowledge of the [REDACTED] program was extensive and her testimony about the ABA strategies used in the program was reliable.

[REDACTED], *Behavior Support Teacher, MCPS [REDACTED] Program, accepted as an expert in Special Education and ABA*

Mr. [REDACTED] was also accepted as an expert in Special Education and ABA. He has a Master of Education in Severe Disabilities degree and a certificate in ABA (December 2019). Mr. [REDACTED] has been employed as a Behavior Support Teacher for MCPS since August 2013. He worked at [REDACTED] for twelve years. He testified that ABA is “a scientific approach to understanding behavior, which focuses on how the environment affects that behavior and how you can utilize changes in the environment to change behavior.”<sup>194</sup> Mr. [REDACTED] testified that there is no standard definition of implementing ABA with fidelity. He testified that a title like “an ABA program” is meaningless.<sup>195</sup> Mr. [REDACTED] offered his own definition of an ABA program applied with fidelity:

[A]s programs are developed based on strategies that have been shown to be effective for her-that student or similar students or individuals, that are applied in a consistent manner. That data is collected, and the data drives the decision making. So obviously, the data is collected accurately.<sup>196</sup>

Mr. [REDACTED] testified that, as a Behavior Support Teacher at Extensions, he applies ABA with fidelity.<sup>197</sup> He described the evidence-based methods used at [REDACTED]. His testimony covered many of the same subjects as Ms. [REDACTED]'s. There were no inconsistencies between the testimony of the two MCPS ABA expert witnesses. I did not discern any bias in Mr. [REDACTED]'s testimony. During cross-examination he refused to speculate or answer questions

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<sup>194</sup> Tr. 640.

<sup>195</sup> Tr. 648.

<sup>196</sup> Tr. 641.

<sup>197</sup> *Id.*

based on facts which he did not know to be accurate. I found him to be a knowledgeable professional who testified without exaggeration or evasion. Mr. [REDACTED] is well qualified to express his opinion that the [REDACTED] program can support the Student, implement his IEP as written, and meet his needs.<sup>198</sup>

[REDACTED], *Supervisor, MCPS [REDACTED] Program, accepted as an Expert in ABA, Special Education and Autism*

Ms. [REDACTED] has a Master's degree in special education, a certificate in ABA and is certified by MSDE in teaching Students with Severe and Profound Disabilities and Special Education. She is the Supervisor for MCPS [REDACTED] Programs and Services. The [REDACTED] program is under her supervision.

Ms. [REDACTED] testified that ABA is the application of evidence-based principles of behavior analysis to correct socially concerning behaviors. ABA examines the functional relationship between behaviors and the environment. [REDACTED] uses ABA techniques including discreet trial instruction, errorless teaching, prompt hierarchy, data collection and analysis as well as time delay.<sup>199</sup> Time delay as used at [REDACTED] is a technique that uses a time delay instead of a prompt to change behaviors.

Ms. [REDACTED] testified that to her knowledge there is no standard for what constitutes an ABA program.<sup>200</sup> As to the issue of applying ABA with fidelity, Ms. [REDACTED] testified that the [REDACTED] program engages in fidelity checks, meaning that the behavior support teachers and program specialists use methods to check that staff are following behavior intervention plans correctly including, for example, having two people take data at the same time and comparing the results. She testified to the ABA strategies used at [REDACTED] including functional

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<sup>198</sup> Tr. 685.

<sup>199</sup> Tr. 379.

<sup>200</sup> Tr. 380.

communication training, differential reinforcement of alternate behavior, data collection, modeling and prompt hierarchy.

Ms. [REDACTED] described the behaviors of the [REDACTED] students as wide-ranging. Some of the students exhibit aggression and/or self-harm. After lengthy testimony about the Student, his IEP, and the services offered at [REDACTED], Ms. [REDACTED] opined that the Student can be served at [REDACTED].<sup>201</sup> She testified that the staff at [REDACTED] is capable of providing the Student all the ABA services and techniques described in the IEP and implementing ABA with fidelity.<sup>202</sup> She believes that the Student would make appropriate educational progress at [REDACTED].<sup>203</sup>

Ms. [REDACTED]'s testimony was particularly helpful to my decision because she has broad and specific knowledge of the [REDACTED] program over a period of time. She has never met or taught the Student. Her knowledge of his needs gained through attendance at meetings and review of documents was sufficient to support her opinions. I accept her testimony and have given it weight as to the ability of [REDACTED] to implement the IEP, based on the exhaustive description of the Student's needs set forth in the IEP.

[REDACTED], *MCPS Instructional Specialist, accepted as an expert in Special Education*

[REDACTED] is an itinerant resource teacher supporting a group of schools, including the Student's home school, [REDACTED]. She was asked to comment on the following statement in the Parents' April 19, 2021 input regarding the PWN for the April IEP meeting: "[The Student] has no significant behaviors that prevent him from learning or hurt anyone else."<sup>204</sup> The Parents testified that Dr. [REDACTED] assisted them in formulating these comments.

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<sup>201</sup> Tr. 427.

<sup>202</sup> Tr. 428.

<sup>203</sup> Tr. 429.

<sup>204</sup> Tr. 733 (Witness was reading from page three of MCPS Ex. 35).

Ms. [REDACTED] testified that she was surprised to read this comment because the draft IEP had many behavioral goals, including interfering behaviors such as self-injurious and aggressive behaviors, and the information about that came from [REDACTED].<sup>205</sup> She testified that this issue was discussed at the April IEP meeting and she shared her surprise at that time. The Parents expressed concern for the Student's safety at school during the April IEP meeting. The team discussed the inclusion of ABA strategies including prompt hierarchy, differential reinforcement, functional communication training, discreet trial instruction, and the need for direct one-to-one instructions as the pillars of an appropriate IEP. Those items were included in the IEP that was ultimately proposed. I accept Ms. [REDACTED]'s testimony as reliable.

[REDACTED] *Special Education Program Specialist, MCPS Autism Program, accepted as an expert in Special Education and Autism Spectrum Disorder*

Ms. [REDACTED] has a Master of Education degree and has worked for MCPS as a Special Education Program Specialist for MCPS Services for Students with Autism Spectrum Disorder from 2001 to the present. Ms. [REDACTED] observed the Student at [REDACTED] and attended the IEP team meetings. She confirmed testimony offered by other witnesses about some of the ABA terms contained in the IEP, e.g., discrete trial strategies.<sup>206</sup> Ms. [REDACTED] added that she shared with the IEP team her concerns about the ability of the MCPS Autism program to meet the Student's needs in the areas of one-to-one support to attend to instruction and for his safety.

Ms. [REDACTED] testified that in her opinion the proposed IEP addresses the Student's known deficits, would provide him the opportunity to make appropriate educational progress and keep him safe.<sup>207</sup> She did not offer an opinion about [REDACTED].

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<sup>205</sup> Tr. 734.

<sup>206</sup> Tr. 595.

<sup>207</sup> Tr. 615-6.

██████████, *Elementary Program Specialist*, ██████████

Ms. ██████████ testified for MCPS as a fact witness. She is the Program Specialist at ██████████ a MCPS separate special education day school. She attended the May IEP team meeting and was asked if ██████████ could serve the Student's needs. She shared her view that it could not, based on the discussion among the team members that the Parents requested an intensive ABA program, which ██████████ does not offer. In addition, ██████████ programs for one adult to three students, and the IEP team agreed that the Student required one-to-one staffing. There was no dispute that the Student requires one-to-one staffing.

Ms. ██████████ testified that she spoke with Dr. ██████████ on the telephone before the May IEP meeting, and Dr. ██████████ expressed strong disagreement with the placement of the Student at ██████████. Ms. ██████████ testified that Dr. ██████████ said she would finance the Parents' due process complaint if the IEP team proposed placement at ██████████.

There is no doubt about Dr. ██████████'s role in this matter. Dr. ██████████ is the Parents' advocate, and she serves that function by making her views known whenever she chooses. If Dr. ██████████ chooses to contribute financially to the Parents' litigation, that does not affect my decision in this case.

#### Synthesis of the evidence and application to the law

##### *Bias arising from pecuniary interest*

As a general comment about the credibility of the witnesses, I was asked to consider the witnesses' bias due to pecuniary interest. I decline to do so. The Parents are motivated because they believe ██████████ can best serve their child's needs. Each of the other witnesses is employed by one of the parties that theoretically could benefit from a decision in the party's favor. The Parents and ██████████ would gain if MCPS were ordered to pay the cost of nonpublic school. MCPS might gain financially if I were to rule in its favor, assuming the cost of ██████████

exceeds the expense of implementing the IEP at [REDACTED]. That information is not in the record. I did not discern that type of bias on the part of any of the witnesses. Because it was raised at closing argument, I make this observation here and will not repeat it as to each witness.

*Personal familiarity of the witnesses with the Student*

The Parents argued in closing that a primary focus of my decision should be: who knows the Student best? This was not a determinative factor in my decision. Obviously, the Parents know the Student better than anyone, and they ably advocated for what they sincerely perceive to be in his best interest. The Student has made progress at [REDACTED], so it is understandable that the Parents wish him to continue enrollment at [REDACTED] in the next phase of his education.

The Parents' experience was greatly influenced by the progress the Student made at [REDACTED]; they want that model of service delivery replicated in kindergarten. [REDACTED] is a clinic; it is not a school. Services are delivered differently in the two venues, and some services available in a clinic may not be possible in a school, and vice versa. The Parents requested continued at-home parent training, which they received through the clinic. That is a medical service not covered by IDEA under these circumstances.

At the IEP team meeting, the Parents requested two-way reports (presumably telephone calls) from school every day about the Student's progress. This may be part of a medical model of service delivery, but it is most assuredly not an educational service. It seems unreasonable to expect a teacher to attend to teaching students with complex needs if she were to be required to call every student's parents twice a day and engage in a conversation about their child. The IEP provides for once daily contact with the Parents.

The Student's [REDACTED] teachers who know him best in an educational setting did not testify. Dr. [REDACTED] worked with the Student at times in [REDACTED]. Ms. [REDACTED] has directly

worked with the Student at [REDACTED] for part of some days. She supports the staff who work more closely with the Student. I explained above the weight I gave Dr. [REDACTED]'s testimony.

Dr. [REDACTED] and Ms. [REDACTED] have shared experiences with the Student from interacting with him at [REDACTED], which cannot be said of any of the MCPS witnesses. This personal experience is worth considering, but it does not carry much weight in a case like this. The Student has many complex needs, which can only be fully understood by evaluating all the data. He is moving from a medical to an educational setting. It would be a mistake to give undue weight to intermittent personal interactions in a clinical setting over the cumulative data presented in this record.

#### *The ABA controversy*

The primary dispute in this case is whether the IEP is deficient because it does not provide what the Parents contend the Student requires - ABA applied with fidelity. MCPS argues that the IEP contains ABA principles, where appropriate, but MCPS rejects the assertion that an ABA program implemented with fidelity has an accepted meaning and, in any event, argues that the proposed IEP offers the Student a FAPE.

The Parents drew the parameters of the dispute starting with Mr. Eig's opening statement in which he argued that the May IEP did not offer the Student a FAPE because it does not propose that he receive an ABA program implemented "with fidelity."<sup>208</sup> The difficulty with that argument is that the witnesses who qualified as experts in ABA disagreed about the definition of an ABA program, much less ABA applied with fidelity. Mr. Meuser asked Dr. [REDACTED] if there are any organizations that certify what constitutes ABA, and she answered vaguely.<sup>209</sup> Dr. [REDACTED] was not offered as an expert in ABA, but as an educational consultant

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<sup>208</sup> Tr. 18.

<sup>209</sup> Tr. 108-9.

with decades of experience in the field of special education. It was curious that she did not point out even one recognized organization. It seemed that Dr. [REDACTED]'s opinion is that she knows an ABA program when she sees one, and [REDACTED] does not qualify.

Ms. [REDACTED] was asked about the definition of an ABA program by Mr. Meuser.

Q. Attorney Eig asked you some questions about what is an ABA program. With your background, is there any actual national definition or a State of Maryland definition of an ABA program?

A. There is not to my knowledge an official structure or, you know, set of standards for an ABA program.<sup>210</sup>

To put a finer point on the ABA controversy, Mr. Eig framed the question as whether the IEP would offer the Student an ABA program implemented “with fidelity.” In seeking an explanation for that phrase, I searched the record to see what the witnesses said about it.

Mr. Eig asked Ms. [REDACTED] to explain:

Q: So if I refer to ABA with fidelity, does that mean anything to you? What would you know to mean?

A: To me, I would -- that would mean that it's kind of -- I know Dr. [REDACTED] [sic] talks about the seven dimensions of applied behavior analysis yesterday. So that it is analytic. It's conceptionally systematic, which to us -- and technological means consistent with the methodologies used and defined across applied behavior analysis and that it is specific, but I would say that we do ABA with fidelity. I don't know that there is -- just like anything, can be done really well or not as well. So it's hard to define exactly what that is.<sup>211</sup>

This explanation is confusing and unhelpful.

On direct examination, Dr. [REDACTED] was asked what “ABA with fidelity” means. She responded that it is “analytic,” conceptually systematic.” In summary, Dr. [REDACTED] testified that the [REDACTED] Autism program uses ABA with fidelity. However, I was unable to understand her measure of the term.

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<sup>210</sup> Tr. 374.

<sup>211</sup> Tr. 251.

The Parents argued that the Student's needs could not be served under the IEP because, although it requires some ABA methods, it does not require an ABA program. Well settled IDEA law requires deference to the MCPS professionals absent proof of a procedural violation:

As the Court made clear in *Rowley*, once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals. 458 U.S. at 207-208, 102 S. Ct. at 3051-52. Neither the district court nor this court should disturb an IEP simply because we disagree with its content. Rather, we must defer to educators' decisions as long as an IEP provided the child "the basic floor of opportunity that access to special education and related services provides." *Id.* at 201, 102 S. Ct. at 3048.

*Tice v. Botecourt Sch. Bd.*, 908 F. 2d 1200, 1207 (4<sup>th</sup> Cir. 1990). "The 'basic floor,' according to the Supreme Court, 'consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.'" *Cone v. Randolph School Bd. of Educ.*, 657 F. Supp. 2d 667, 679 (2009) citing *Rowley*, 458 U.S. at 201-02.

The fact finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate... The IDEA gives parents the right to challenge the appropriateness of a proposed IEP, and courts hearing IDEA challenges are required to determine independently whether a proposed IEP is "reasonably calculated to enable the child to receive educational benefits."

*Cnty. Sch. Bd. of Henrico County, Virginia v. Z.P.*, 399 F. 3d 298, 307 (4<sup>th</sup> Cir. 2005) (quoting *Rowley*, 458 U.S. at 207, 102 S. Ct. 3034).

I will not attempt to explain what an ABA program with fidelity means, as I am unconvinced that there is a sole, universal, generally accepted definition of the phrase within the educational profession. Instead, in analyzing the issues in this case, I will adhere to the statute and regulations governing my decision.

COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP.

### *The strengths of the Student*

The May IEP satisfies this requirement. The IEP contains a wealth of information considering that the Student has not yet started his school career. The Student is applying for a kindergarten IEP; therefore, his relevant strengths may be expected to be undeveloped due to his young age. Further, this Student has limited school readiness strengths due to his severe disabilities. The IEP reviewed all the available data collected through the IEP process, including ample information from the clinical provider and professionals who assessed the Student. On each data point, the Student was assessed as having levels of educational and functional performance below age expectation. The strengths articulated by the Parents include the Student's engaging personality and his love of physical play. The IEP does not specifically identify the Student's strengths. It may be that in fashioning an IEP for kindergarten, strengths are not listed because children at that age have not demonstrated strengths pertinent to learning. The Parents did not pose any objection to the sufficiency of the IEP on this point.

### *The concerns of the Parents*

Next, the IEP included the concerns of the Parents. The Parents expressed a desire for an ABA program because they believe that the Student progressed at [REDACTED], where intensive ABA therapy was applied. The IEP clearly specifies measures to meet the Parents' repeated expression of concern for the Student's safety in the form of a self-contained classroom and a dedicated staff member to accompany the Student from the curb in the morning, throughout the school day and back to the curb at dismissal.

Further, although the Parents are dissatisfied that the IEP does not call for implementation of ABA with fidelity, the IEP reflects the Parents' input that the Student receives benefit from ABA approaches. The IEP requires systematic instruction, positive behavior supports, and reinforcement in the implementation of most of the seventeen goals. Prompt

hierarchy is required in the IEP goals for Language and Literacy, Mathematics, Social Foundations. Differential reinforcement of alternate behaviors, functional communications training, prompt hierarchy, praise and reinforcement, and frequent and immediate feedback are all ABA strategies.

*The results of evaluations*

The IEP contains the results of the Student's most recent evaluations. There was a thorough review of the evaluations including: an early learning evaluation; fine motor skills assessment; recent reports from [REDACTED] (January, March and April 2021); report from [REDACTED] observing the Student at [REDACTED] on March 23, 2021; and Dr. [REDACTED]'s report of an observation at [REDACTED] (February 2021).

*Description of the academic, developmental and functional needs of the Student*

Finally, the IEP contains a detailed description of the academic, developmental, and functional needs of the Student. As set forth in the Findings of Fact, the IEP contained goals and objectives in all the areas affecting the Student's ability to access instruction. The Parents argued that the IEP goals and objectives were deficient because they did not require the application of ABA with fidelity. Other than criticizing the method MCPS chose to serve the Student's needs, the Parents did not criticize the identification of those needs.

*Goals and objectives*

The IEP complies with the requirement that it set 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 Student 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. The IEP contains a comprehensive set of goals and objectives. The Parents asked that some of the behavioral goals be removed, but other than arguing about whether the IEP specified that ABA be implemented with fidelity, the Parents did not criticize the IEP on this point.

#### *Behaviors*

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). The Student's behaviors were the subject of much of the IEP meetings and comprise seven behavioral goals (with supporting objectives). The interventions, strategies and supports to meet those goals are clearly spelled out in the IEP.

#### *Strategies and supports targeted to goals*

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

Important to addressing the Parents' concerns about ABA strategies, the IEP provides the following instructional supports applied in ABA programs: praise and consistent reinforcement alongside instruction; frequent and immediate feedback; prompt hierarchy; and daily functional communication training.<sup>212</sup>

The IEP provides that the Student will receive extended time to complete tasks and to allow for ABA strategies. The IEP requires that the Student receive assistive technology (AT)

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<sup>212</sup> IEP, pp. 19-24.

and AT services as he is currently non-verbal. The IEP requires the school-based team to develop a BIP to address the Student's interfering behaviors. A human reader is required by the IEP to aid the Student's comprehension of instruction and assessment tasks and a scribe to record the responses he indicates on his SGD. The IEP also provides for frequent breaks, and changes in the schedule of tasks due to his behavioral and attention needs. The IEP requires an instructional area with reduced distractions. Again, the Parents did not take issue with any of these accommodations and supports during the hearing, other than to characterize some of them as not ABA with fidelity.

I have considered whether the May IEP was reasonably calculated to enable the Student to receive educational benefit "in light of the [the Student's] circumstances." *Andrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 999 (2017). The IEP was the result of extensive study and input from many data sources. The Parents and their advocate were involved throughout the process. Historical and recent professional reports and observations were included and considered. There were three IEP meetings with PWNs shared in between each. The Parents submitted comments on the drafts with input from Dr. [REDACTED]. The program at [REDACTED] was observed and Ms. [REDACTED] showed the Parents a power point and video about the program, allowing them to ask questions. It cannot be seriously argued that the IEP failed to consider all relevant information.

The IEP identifies the Student's complex needs. As he is kindergarten aged, his relevant strengths were sparse. The Student's needs were specified in every aspect of his comprehensive IEP, resulting in a forty-three page document with seventeen goals, each with supporting objectives. This is a remarkably complete IEP.

The MCPS educational professionals who contributed to the May IEP and testified in support of it are well qualified to exercise judgment about the methods suited to meet the

Student's needs. Ms. [REDACTED] displayed mastery of the program a [REDACTED] and explained the strategies that are employed there. Many of those strategies are evidence-based, as is ABA. Ms. [REDACTED] explained each of the strategies that would benefit the Student and increase the likelihood that he would progress toward the goals in his IEP. In Ms. [REDACTED]'s opinion, the Student's needs can be served at [REDACTED]:

The [REDACTED] Program can provide that one on one supervision and support that he needs as well as the ABA strategies, and so our ability to fully implement this IEP, keep [the Student] safe, and help him make progress toward his academic and behavioral goals is something that is completely possible and likely in our program.<sup>213</sup>

Based on her training, certifications, experience in Special Education working in the [REDACTED] program, I gave Ms. [REDACTED]'s testimony great weight. She listened to each question carefully and answered the questions directly. I note that she did not evade any question, quarrel with the questions during cross-examination, or otherwise impair my ability to receive information from her. On several occasions when she was unable to answer a question posed by MCPS counsel, she said so.

Despite the disagreement expressed by the Parents and their advocate as well as the [REDACTED] recommendations, MCPS was not obliged to "[adopt] the worldview of the [Parents'] experts and their perspectives on proper educational policy." *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 327 (4<sup>th</sup> Cir. 2004).

The May IEP does not contain what the Parents asked for (and honestly believe their son requires), but it clearly provides the Student "the basic floor of opportunity that access to special education and related services provides." *Rowley*, 458 U.S. at 207, 208, 102 S. Ct. at 3051-52.

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<sup>213</sup> Tr. 540.

The IEP calls for the Student to receive services in a self-contained classroom within a public elementary school. The Parents argued that the Student required a more restrictive environment in a nonpublic school serving only students with special needs. They agree with MCPS' conclusion that the Student requires the self-contained classroom and a dedicated one-to-one support person throughout the day.

*Implementation of the IEP at* [REDACTED]

Three MCPS experts testified that the IEP can be implemented at [REDACTED]

The following testimony by Ms. [REDACTED] is crucial:

Q. What is -- what is a foundational for instructional purposes in the [REDACTED] Program?

A. We are an evidence-based program. And so ABA, Applied Behavior Analysis, those strategies and protocols that are part of ABA are evidence-based, and therefore, used daily in the [REDACTED] Program.

Q. You just used two words about following ABA. ABA strategies and ABA protocols. Are they different terms or do they have the same meaning?

A. They can differentiate a little bit between them, but generally we are talking about the same set of -- I don't know what word is preferred, but strategies -- it is really -- ABA is really an ideology that is based on the relationship between behavior in the environment, and so from there, there are lots of protocols and strategies that have been research-based and proven effective, and therefore, implemented regularly in ABA programs or therapy.

Q. How about the phrase ABA instruction? Is that different from ABA strategy?

A. I am not sure what the difference would be honestly. A lot of this is -- a lot just like semantics and ABA is sort of just a guiding umbrella.<sup>214</sup>

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<sup>214</sup> Tr. 493-4.

With that preface and a detailed explanation of the [REDACTED] program, Ms. [REDACTED] testified that [REDACTED] can implement the IEP as written.<sup>215</sup> Ms. [REDACTED] and Mr. [REDACTED] concurred, each with detailed explanations.<sup>216</sup>

The Parents argued that the IEP cannot be implemented because [REDACTED] does not record and analyze data daily. (See Testimony of Ms. [REDACTED] regarding data collection at [REDACTED] at Tr. P. 261). Ms. [REDACTED] opined that data is taken daily but analyzed weekly or more to see trends and assess whether modifications are necessary.<sup>217</sup> She testified that “kids have off days,” so you cannot base changes on daily data.<sup>218</sup> This is a reasonable approach.

Next, the Parents argued that [REDACTED] cannot implement the IEP because their staff is not as qualified as the staff at [REDACTED]. Again, [REDACTED] is a medical program, and insurance companies require that the individuals providing care possess the certifications set by the insurers.<sup>219</sup> Ms. [REDACTED] testified to the hiring, training and periodic updated training she and Mr. [REDACTED] provide the [REDACTED] staff. Just because the staff at [REDACTED] is not certified by an outside body does not prove that [REDACTED] is incapable of implementing the IEP.

The Parents take support for their arguments from a comment or comments allegedly made by Mr. [REDACTED]. Mrs. [REDACTED] testified that at the May observation of [REDACTED] she asked Mr. [REDACTED] what about the Student made him think [REDACTED] was the most appropriate program for him. According to Ms. [REDACTED], Mr. [REDACTED] said he never said [REDACTED] was an appropriate fit, but they would be able to accommodate the Student.<sup>220</sup> Dr. [REDACTED] testified that at the May 6, 2021 IEP meeting Mr. [REDACTED] said that [REDACTED] could serve the Student’s needs. Later during her testimony Dr. [REDACTED] testified that, during a parental

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<sup>215</sup> Tr. 429 ([REDACTED]).

<sup>216</sup> Tr. 540 ([REDACTED]); Tr. 685 [REDACTED].

<sup>217</sup> Tr. 514.

<sup>218</sup> *Id.*

<sup>219</sup> Tr. 379.

<sup>220</sup> Tr. 356-7.

virtual visit at [REDACTED], Mr. [REDACTED] was asked if [REDACTED] is an “appropriate” program for the Student, and he responded that he never said it was appropriate; he said the program could serve the Student.<sup>221</sup> There was testimony that at the May IEP meeting the Parents repeatedly asked Mr. [REDACTED] if he felt [REDACTED] was appropriate for the Student, and Mr. [REDACTED] answered that he felt [REDACTED] could accommodate him.<sup>222</sup>

Mr. [REDACTED] remembers the conversations differently. Even assuming Mr. [REDACTED] said what the Parents claim, his responses were ambiguous. I disagree with the Parents that his statements, if made as the Parents allege, are admissions against the school system’s interest.

With everything occurring in the Spring of 2021 regarding the IEP and placement, it is surprising that a parent would repeatedly pose questions to a special educator in the exact phrase used in the law to describe the requirements of a FAPE (a free and **appropriate** public education) and later remember precisely how they posed the questions. Aside from that, Mr. [REDACTED]’s response did not concede that [REDACTED] is inappropriate. A program is “appropriate” if it meets a student’s needs as set forth in a properly written IEP. Therefore, even if Mr. [REDACTED] replied to the Parents’ questions by stating that he did not say the placement was “appropriate,” he did not concede error by MCPS. The record is clear that Mr. [REDACTED] has at all times felt that [REDACTED] can implement the Student’s IEP.

*The [REDACTED] issue*

The Parents argued that Extensions is not appropriate for the Student because it is an [REDACTED] program and the Student cannot be placed into an [REDACTED] track without their consent. Md. Code Ann., Educ. § 8-405(g)(1)(i) (Supp. 2021).

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<sup>221</sup> Tr. 93.

<sup>222</sup> Tr. 309-10.

First, this alleged error was not raised in the due process complaint. Nor was it mentioned at the prehearing conference. The statute provides that a due process complaint may only be amended if the opposing party consents or the hearing officer permits it no later than five days before the due process hearing occurs. 20 U.S.C. § 1415(c)(2)(E); 34 CFR § 300.508(d)(3). Neither occurred in this case, so I will not consider the issue.<sup>223</sup>

If the issue were properly before me, I conclude that there was no violation of the IDEA by the proposed placement at [REDACTED]. Dr. [REDACTED] testified and wrote in her observation report of May 21, 2021 that [REDACTED] is an [REDACTED] program. It is undisputed that many of the students in that program are on the [REDACTED] track. It is immaterial which track the other students are on, but if it were a factor in my decision, I note that Ms. [REDACTED] testified that two-thirds of the students at the [REDACTED] Autism program are on the [REDACTED] track.

Every member of the IEP team agreed that the Student met the criteria for [REDACTED]. A student whose parents consent to [REDACTED] receives a modified curriculum resulting in a certificate of completion, not a high school diploma. The Parents chose not to consent to [REDACTED] at the time of the 2021 IEP, which is their absolute right.<sup>224</sup> The decision about [REDACTED] need not be made until later in a student's school career and may be changed anytime.

Ms. [REDACTED] explained that [REDACTED] means that the Maryland State Curriculum is modified and adapted to a student's needs.<sup>225</sup> As an illustration, she noted that when the Parents observed the class in session at [REDACTED] the students were engaging in a word of the week group lesson. The word was presented to the group and then the students moved to individual tables to work with the lesson. She explained that the [REDACTED] students have the right to be exposed to the curriculum. "[REDACTED] is not a separate curriculum. It is the adaptation of

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<sup>223</sup> This is an odd argument because Ms. [REDACTED] testified that about two-thirds of the students in the Parents' preferred program, the [REDACTED] Autism program, are in the [REDACTED] track. Tr. 277.

<sup>224</sup> Md. Code Ann., Educ. § 8-405(g)(1)(i) (Supp. 2021).

<sup>225</sup> Tr. 545.

the Maryland State curriculum....”<sup>226</sup> She testified that “A student who stays on the [REDACTED] track for the entirety of their educational career would graduate with a certificate of completion, but that decision is made every year.”<sup>227</sup> A student does not start getting credits toward a diploma until high school.<sup>228</sup>

Ms. [REDACTED] testified that [REDACTED] has many students on the [REDACTED] track. Regardless of whether a student’s parent consented to [REDACTED], all kindergarten students in [REDACTED] are not going to receive the entire kindergarten curriculum that would permit them to progress to the first grade. The MCPS kindergarten curriculum is substantially modified for the students at [REDACTED]. The teacher and staff are required to present as much of the kindergarten curriculum to the students as the students are able to receive.

For these reasons, I conclude that, if a violation was properly alleged, there was no violation of Maryland law by the proposed implementation of the IEP at [REDACTED] in a class with students on the [REDACTED] track.

*Potential exposure of the Student to the interfering behaviors of others at [REDACTED]*

The Parents additionally object to the Student’s placement at [REDACTED] based on information they received from Dr. [REDACTED] and their virtual observation of a class. They were told by Dr. [REDACTED] that MCPS has a record of allowing students to elope from school, a fact that is unsupported in the record. She also told them that MCPS locks students in closets, a fact that was denied by MCPS and for which there is no support other than Dr. [REDACTED]’s testimony, which I do not believe.

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<sup>226</sup> Tr. 536-7.

<sup>227</sup> Tr. 546.

<sup>228</sup> Tr. 547.

In addition, the Parents observed a student lying on a windowsill in the classroom and Dr. [REDACTED] told them the student could fall out of the window. This is false, since [REDACTED] is a new school and the windows have a safety feature which prevents them from opening more than three inches. Furthermore, the classroom where kindergarten students are placed is on the first floor so if a child were able to fall out she would only drop two-and-a half feet to the ground and land in a play area surrounded by a high fence. I conclude that the Parents' worry about the Student becoming lost or hurt at [REDACTED] due to falling from an open window, while honestly held, is based on incorrect information.

As to the student who was seen spitting, Ms. [REDACTED] testified that he has a BIP calling for staff to ignore negative attention seeking behaviors.<sup>229</sup> She testified that she was impressed with the staff's response to the behavior, but she reminded them to wear personal protective equipment.<sup>230</sup> She testified that the student's spitting was more frequent in March when the school reopened after the COVID shutdown, but it has significantly decreased since then due to the implementation of his BIP.

It is true that the other students at [REDACTED] exhibit problem behaviors, including some occurring during the observation. As each student's BIP is confidential, it can be very concerning for a parent to observe behaviors from other students in their child's classroom without understanding how the staff is working to reduce the behaviors. The Parents do not want their son exposed to this. However, each student in the [REDACTED] class has a dedicated support staff and a BIP, and the staff are following individualized BIPs designed by qualified professionals and approved by each student's parent. The Student will have a BIP developed and tailored to his needs if he enrolls. The Student may engage in problem behaviors if he joins the

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<sup>229</sup> Tr. 531.

<sup>230</sup> *Id.*

██████████ class, and his behaviors may affect the other students' access to learning. It is part of a process of potential improvement which can be difficult at times.

The Student would not avoid this problem if he were to enroll in the ██████████ Autism program. Ms. ██████████ an expert for the Parents with experience at ██████████, testified:

[M]any times the reason we get referral files seems to be that there are behavioral needs that the school districts feel like they can't support anymore and so certainly we have students in every classroom who engage in behaviors that are dangerous to others and toward themselves.

We have universal programming to support that, and all of our teachers are very, very carefully trained not only in the universal programming, but on each individual student.<sup>231</sup>

The Parents did not suggest a solution to this dilemma, and the only one that I can imagine is home schooling, which the Parents did not seek. In sum, I conclude that MCPS offered the Student an IEP reasonably calculated to meet the Student's unique needs that result from his disability and that will enable the Student to make progress appropriate in light of his circumstances, and that the MCPS provided rational and responsive explanations for its decisions.<sup>232</sup>

**Claim for Placement at the ██████████ at the Expense of MCPS**

Under *County School District Four v. Carter*, 510 U.S. 7 (1993), and *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985), whether a parent's requested private placement is proper is analyzed only if the IEP proposed by the local education agency results in the denial of a FAPE. I have concluded in this case for the reasons set forth above that the IEP and placement offered by the MCPS provide the Student a FAPE. Therefore, under *Carter* and *Burlington* the issue of whether the Student's placement at the ██████████ is proper is not

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<sup>231</sup> Tr. 265.

<sup>232</sup> The least restrictive environment of the IDEA is not an issue in this case. The Parents seek placement of the Student in an environment more restrictive than ██████████

required to be addressed further in this decision. As the MCPS has made a FAPE available to the Student, the Parents' claim for placement at [REDACTED] at public expense is denied.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the MCPS made a free appropriate public education available to the Student and provided him with an appropriate individualized education program and placement for the 2021-2022 school year. I further conclude as a matter of law that the Parents failed to prove that they are entitled to placement of the Student at public expense at [REDACTED] 2021-2022 school year. 20 U.S.C.A. § 1414 (2017); 34 C.F.R. §§ 300.148; *Andrew F. v. Douglas Cty. School Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence Cty. Sch. District Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985).

### **ORDER**

I **ORDER** that the Parents' request for placement at [REDACTED] and reimbursement for tuition, costs and expenses at [REDACTED] for the 2021-2022 school years is **DENIED**.

October 27, 2021  
Date Order Mailed

Mary R. Craig  
Administrative Law Judge

MRC/cj  
#194511

**Copies Mailed To:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

████████████████████,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE MARY R. CRAIG,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

CASE No.: MSDE-MONT-OT-21-13125

**FILE EXHIBIT LIST**

I admitted the following Exhibits on behalf of the Parents:

- P. Ex. 1 - Request for Due Process Hearing, 6/9/21
- P. Ex. 1A - ██████████ Speech Language and Audiological Evaluation, 2/19/18
- P. Ex. 2 - ██████████ Behavioral/Diagnostic Assessment Report, 4/2/18
- P. Ex. 2A - ██████████ DHHS Individualized Family Service Plan, April 2017 to April 2018
- P. Ex. 2B - ██████████ Physical Therapy Evaluation, 4/24/18
- P. Ex. 3 - Speech/language Evaluation by ██████████ 1/25/19
- P. Ex. 4 - Speech/language Consultation with ██████████ 1/31/19
- P. Ex. 5 - ██████████ Initial Assessment and Treatment Recommendations, 5/1/19
- P. Ex. 5A - ██████████ IEP Progress Report, 5/6/19
- P. Ex. 6 - Speech/language Consultation with ██████████, 5/16/19
- P. Ex. 7 - Observation Report of Student at ██████████ by Dr. ██████████, 3/12/20
- P. Ex. 8 - ██████████ Assessment and Treatment Recommendations, 7/28/20
- P. Ex. 9 - Emails between Parents and Dr. ██████████ enclosing ADL list, August 2020
- P. Ex. 10 - Letter by Dr. ██████████, September 2020
- P. Ex. 11 - Letter by Dr. ██████████, 10/8/20
- P. Ex. 12 - ██████████ Assessment and Treatment Recommendations, 1/25/21
- P. Ex. 13 - MCPS Preschool Child Find Questionnaire, 2/4/21
- P. Ex. 14 - MCPS Appendix A Form, 3/11/21

- P. Ex. 15 - MCPS Classroom Observation, 3/23/21
- P. Ex. 16 - Observation Report of Student by Dr. [REDACTED], 3/23/21
- P. Ex. 16 - Observation Report of Student by Dr. [REDACTED], 3/2/21
- P. Ex. 17 - [REDACTED] Early Childhood Clinic Mid-Authorization Progress Report, 4/21/21
- P. Ex. 18 - Emails between parents and MCPS regarding IEP feedback from Dr. [REDACTED]
- P. Ex. 19 - MCPS PWN, 4/15/21
- P. Ex. 20 - Emails between Parents and MCPS regarding changes to PWN, 4/19/21
- P. Ex. 21 - MCPS Revised PWN, 4/15/21
- P. Ex. 22 - Observation Report of Student by Dr. [REDACTED], 4/22/21
- P. Ex. 23 - MCPS PWN, 5/10/21
- P. Ex. 24 - MCPS draft IEP, 5/13/21
- P. Ex. 25 - Email from [REDACTED] regarding Student's acceptance, 5/13/21
- P. Ex. 26 - Emails between Parents and MCPS regarding observation of [REDACTED] program, 5/7/21 to 5/17/21
- P. Ex. 27 - Observation Report of [REDACTED] Program by Dr. [REDACTED], 5/21/21
- P. Ex. 28 - Photo of Student's Written Work at [REDACTED], 7/26/21
- P. Ex. 29 - Letter to MCPS serving notice, 8/3/21
- P. Ex. 30 - [REDACTED] Assessment and Treatment Discharge Current Levels, August 2021
- P. Ex. 31 - Resume of Dr. [REDACTED]
- P. Ex. 32 - Resume of Dr. [REDACTED] r
- P. Ex. 33 - Resume of [REDACTED]
- P. Ex. 34 - Student Progress Chart, August 2021

I admitted the following Exhibits on behalf of MCPS:

- MCPS Ex. 1 - [REDACTED] Assessment Report and Treatment Recommendations, 5/1/2019
- MCPS Ex. 2 - Child Find Referral, 9/12/2019
- MCPS Ex. 3 - Developmental Evaluation Report by MCPS, 10/9/2019
- MCPS Ex. 4 - IEP Team Meeting Document, 10/7/2019

MCPS Ex. 5 - PWN, 10/7/2019

MCPS Ex. 6 - Parent email re: proposed 2019-2020 IEP, 10/25/2019

MCPS Ex. 7 - [REDACTED] Application for Admission, 8/12/2020

MCPS Ex. 8 - DRAFT [REDACTED] Assessment Report and Treatment Recommendations, 1/25/2021

MCPS Ex. 9 - Email communication re: revision of [REDACTED] t Report, January-February 2021

MCPS Ex. 10 -FINAL [REDACTED] Assessment Report and Treatment Recommendations, 2/1/2021

MCPS Ex. 11 -Parent email re: IEP Process, 2/1/2021

MCPS Ex. 12 -Preschool Child Find Questionnaire, 2/4/2021

MCPS Ex. 13 -Eligibility Screening / Parent Interview, 2/4/2021

MCPS Ex. 14 -Private School Student Referral – Parent, 2/4/2021

MCPS Ex. 15 -Parent email to [REDACTED] re: registration & Student needs, 2/12/2021

MCPS Ex. 16 - [REDACTED] - Dr. [REDACTED] Classroom Observation Report, 2/16/2021

MCPS Ex. 17 -Documentation of [REDACTED], 2/16/2021

MCPS Ex. 18 [REDACTED] Summary of Skills and Performance Levels, 2/16/2021

MCPS Ex. 19 -Email communication re: PWN from 3/11/21 IEP Team meeting, 2/16/2021

MCPS Ex. 20-Parent email to [REDACTED] re: telephone call, 2/18/2021

MCPS Ex. 21 -Signed Notice for 3/11/2021 IEP Meeting, 2/26/2021

MCPS Ex. 22 -IEP Meeting Notes, 3/11/2021

MCPS Ex. 23 -Alternate Appendix A Participation Checklist, 3/11/2021

MCPS Ex. 24 -PWN, 3/11/2021 IEP Meeting, 3/15/2021

MCPS Ex. 25 -MCPS Observation at [REDACTED], 3/23/2021

MCPS Ex. 26 -Dr. [REDACTED] Observation at [REDACTED], 3/23/2021

MCPS Ex. 27 -DRAFT IEP for review, 3/26/2021

MCPS Ex. 28 -Notice for IEP Meeting, 3/26/2021

MCPS Ex. 29 -Parents' email re: DRAFT IEP document, 4/3/2021

MCPS Ex. 30 -Behavior graphs from [REDACTED] (Jan. to April), 4/8/2021

MCPS Ex. 31 -Dr. [REDACTED]'s comments on proposed IEP goals/objectives, 4/8/2021

MCPS Ex. 32 -Draft IEP For Review, 4/8/2021

MCPS Ex. 33-[REDACTED] Mid-Authorization Progress Report, 4/12/2021

MCPS Ex. 34-PWN for April 8th meeting, 4/15/2021

MCPS Ex. 35-Parents' proposed edits to April 8, 2021 PWN, 4/19/2021

MCPS Ex. 36-Dr. [REDACTED] Observation at [REDACTED], 4/22/2021

MCPS Ex. 37-Notice for 5.16.2021 IEP Meeting, 4/22/2021

MCPS Ex. 38-Parent Email re: Attendance at 5.6.21 IEP Meeting, 4/23/2021

MCPS Ex. 39-DRAFT IEP for review, 4/29/2021

MCPS Ex. 40- Notice of Documents Provided to Parents after IEP Meeting, 5/13/2021

MCPS Ex. 41-IEP from 5.6.21 IEP Meeting, 5/10/2021

MCPS Ex. 42-PWN from 5.6.21 IEP Meeting, 5/10/2021

MCPS Ex. 43-[REDACTED] email re: [REDACTED]'s candidacy for Autism Program, 5/13/2021

MCPS Ex. 44- Parents/Advocate's Observation Notes Extensions, 5/21/2021

MCPS Ex. 45- 10-day Notice Letter MCPS to Attorney Eig, 7/23/2021

MCPS Ex. 46-[REDACTED] Resume

MCPS Ex. 47-[REDACTED] Resume

MCPS Ex. 48-[REDACTED] Resume

MCPS Ex. 49-[REDACTED] Resume

MCPS Ex. 50-[REDACTED] Resume

MCPS Ex. 51-[REDACTED] Resume

MCPS Ex 52-[REDACTED] Resume

