

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

BEFORE DANIA AYOUBI,  
AN ADMINISTRATIVE LAW JUDGE  
OF THE MARYLAND OFFICE  
OF ADMINISTRATIVE HEARINGS  
OAH No.: MSDE-MONT-OT-22-08380

**DECISION**

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

**STATEMENT OF THE CASE**

On April 13, 2022, ██████████ and ██████████ (Parents), on behalf of their child, ██████████ (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the 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) (2021);<sup>2</sup> Md. Code Ann., Educ. § 8-413(d)(1) (2018);<sup>3</sup> Code of Maryland Regulations (COMAR) 13A.05.01.15C(1). On May 11, 2022, the parties attended a resolution

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<sup>1</sup> “U.S.C.A.” is an abbreviation for the United States Code Annotated, published by Thomson Reuters, and contains the general and permanent laws of the United States, as classified in the official United States Code prepared by the Office of the Law Revision Counsel of the House of Representatives. All citations herein to the U.S.C.A. are to the 2017 bound volume.

<sup>2</sup> “C.F.R.” is an abbreviation for the Code of Federal Regulations. All citations herein to the C.F.R. are to the 2021 bound volume.

<sup>3</sup> All citations herein to the Education Article are to the 2018 Replacement Volume of the Maryland Annotated Code.

session. On May 16, 2022, the parties agreed in writing that no agreement was possible and MCPS notified the Maryland State Department of Education (MSDE) that no agreement had been reached.<sup>4</sup>

On June 3, 2022, I held a remote prehearing conference. The Parents and Student did not participate in the prehearing conference and were represented by Michael Eig, Esquire. Zvi Greismann, Esquire, represented MCPS.

Under the applicable law, a decision in this case normally would be due by June 27, 2022, forty-five days after the thirty-day resolution period expired on May 13, 2022.<sup>5</sup> 34 C.F.R. §§ 300.510(b)(2), 300.515(a); Educ. § 8-413(h); COMAR 13A.05.01.15C(14). However, due to their unavailability, as discussed further below, the parties requested hearing dates outside of that timeframe. 34 C.F.R. § 300.515(c); Educ. § 8-413(h).

At the prehearing conference on June 3, 2022, accounting for the five-business-day required disclosures, I inquired regarding the parties' availability for a hearing beginning on June 13, 2022, and prior to June 24, 2022. The parties indicated that they would be unavailable for a hearing prior to June 24, 2022 due to various scheduling constraints by both counsel for the Parents and MCPS as well as a federal holiday. Counsel indicated that they had discussed their availability prior to the prehearing conference and, accounting for additional unavailability by counsel due to travel, prior scheduling commitments, witness unavailability by some of MCPS's witnesses due to the summer calendar, and another federal holiday, the parties mutually agreed to reserve the week of July 11, 2022 for five days of hearing in this matter.<sup>6</sup>

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<sup>4</sup> Upon request, the OAH received a copy of this notification from MCPS on June 7, 2022.

<sup>5</sup> The parties did not reach an agreement at the conclusion of their May 11, 2022 resolution meeting; however, their written agreement that no resolution was possible was not entered into until May 16, 2022. *See* 34 C.F.R. § 300.510(c)(2) (shortening thirty-day resolution period if after the resolution meeting starts but before the end of the thirty-day period, the parties agree in writing that no agreement is possible). Therefore, I calculated the forty-five-day decision requirement from the expiration of the thirty-day resolution period on May 13, 2022.

<sup>6</sup> Counsel provided me with their specific calendar availability on June 7, 2022.

Based on their schedules, the parties requested that I grant an extension of the timeline to allow the case to be heard on the mutually selected dates and to allow sufficient time for me to consider the evidence, evaluate legal arguments, and prepare a written decision. 34 C.F.R. § 300.515(c). I may grant specific extensions of time at the request of either party. *Id.* Accordingly, based on the documented scheduling conflicts, I found good cause to extend the regulatory timeframe as requested by the parties. *Id.* The parties jointly requested that I issue a decision within thirty days of the close of the record, and I agreed to do so.

I held a remote hearing by the Webex videoconferencing platform on July 11 through July 15 and July 26, 2022.<sup>7</sup> Mr. Eig represented the Parents and Student. Manisha Kavadi, Esquire, represented MCPS.

Procedure is governed by the contested case provisions of the Education Article; the Administrative Procedure Act; the MSDE's procedural regulations; and the Rules of Procedure of the OAH. Educ. § 8-413(e)(1); State Gov't §§ 10-201 through 10-226 (2021); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES**

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

Specifically:

1. Did MCPS predetermine the Student's placement prior to a January 13, 2022 Individualized Education Program (IEP) team meeting to finalize the Student's IEP? If so, did this procedural error interfere with the provision of a free appropriate public education (FAPE) to the Student?

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<sup>7</sup> By agreement of the parties, the hearing originally was scheduled to conclude on July 15, 2022. On July 15, 2022, the parties requested that I continue the hearing for an additional day to hear closing arguments and conclude on July 26, 2022, the next day that the parties were mutually available. I granted their request.

2. Did MCPS deny the Student a FAPE for the 2021-2022 school year when it proposed placement in the [REDACTED] ([REDACTED]) program at [REDACTED] High School ([REDACTED]) pursuant to the January 13, 2022 IEP?
3. If MCPS denied the Student a FAPE, are the Parents entitled to tuition reimbursement for the 2021-2022 school year?

### SUMMARY OF THE EVIDENCE

#### Exhibits

A complete exhibit list is attached as an appendix.

#### Testimony

The Parents testified and presented the following witness:

- [REDACTED], accepted as an expert in special education.

MCPS presented the following witnesses:

- [REDACTED], accepted as an expert in special education with an emphasis on the education of gifted and talented and twice exceptional students.
- Dr. [REDACTED], Ed.D.,<sup>8</sup> accepted as an expert in school psychology.
- [REDACTED], accepted as an expert in special education.
- [REDACTED], MS, OTR/L,<sup>9</sup> accepted as an expert in occupational therapy.

### STIPULATIONS

By agreement of the parties, the following facts are not in dispute:

1. The Parents do not challenge the educational coding, the present levels of performance, the instructional and testing accommodations, the supplemental aids and supports,

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<sup>8</sup> Doctorate in Education.

<sup>9</sup> Occupational Therapist Registered/Licensed.

or the goals and objectives on the August 31, 2021 and January 13, 2022 IEPs proposed by MCPS for the 2021-2022 school year.

2. The Parents do not challenge the amount of related services of occupational therapy, speech language therapy, and counseling on the August 31, 2021 and January 13, 2022 IEPs proposed by MCPS for the 2021-2022 school year.

3. The Parents do not challenge the ability and resources of [REDACTED] to implement the August 31, 2021 and January 13, 2022 IEPs proposed by MCPS for the 2021-2022 school year.

4. The last IEP in effect when the Parents approached MCPS in March 2021 was the May 20, 2020 IEP. MCPS Exhibit 3 delineates the services on the May 20, 2020 IEP.

### **FINDINGS OF FACT**

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

1. The Student was born in 2006 and is sixteen years old.
2. The Student is considered “twice exceptional”—he is an academically gifted student with a learning disability.
3. The Student will be in the eleventh grade for the upcoming 2022-2023 school year.
4. Prior to living in Maryland, the Student resided in [REDACTED] with his biological family.
5. As a young child, the Student was [REDACTED] and severely neglected and, as a result, was placed in the foster care system at the age of five with no possibility of reunification with his biological family.

6. In December 2016, at the age of ten, the Student moved to Maryland to live with his Parents, who adopted him and his biological sister one year later in December 2017.

7. The Student enrolled in MCPS as a fifth grader (2016-2017 school year) and began attending [REDACTED] Elementary School in January 2017. At the time he enrolled in MCPS, the Student was not receiving special education and related services under the IDEA.

8. The Student attended [REDACTED] Middle School for sixth grade (2017-2018 school year). The Student struggled academically and socially. MCPS determined that the Student was eligible to receive a 504 Plan under Section 504 of the Rehabilitation Act of 1973 to provide accommodations for the Student's prior diagnosis of attention deficit hyperactivity disorder (ADHD).

9. In March 2018, the Parents obtained a private psychoeducational evaluation of the Student. Dr. [REDACTED] conducted the evaluation.

**Dr. [REDACTED]'s 2018 Report**

10. Among a number of tests, Dr. [REDACTED] administered the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) to assess the Student's overall intellectual functioning.

11. The WISC-V assesses cognitive functioning in five cognitive areas: 1) verbal comprehension, which assesses the ability to verbalize meaningful concepts and reason with language-based information; 2) visual spatial, which measures the ability to evaluate visual details, visualize spatial relationships, and reason with spatial information; 3) fluid reasoning, which measures the ability to detect the underlying conceptual relationship among visual objects and use reasoning to identify and apply rules; 4) working memory, which measures the ability to remember and manipulate auditory and visual information in immediate awareness; and 5)

processing speed, which measures visual-motor and perceptual speed and accuracy. An “average” score ranges from ninety to 109.

12. The Student’s 2018 WISC-V composite score results and percentile ranks in the five cognitive areas were as follows:

<b>Index</b>	<b>Student’s Composite Score</b>	<b>Student’s Percentile Rank</b>	<b>Qualitative Description</b>
Verbal Comprehension	116	86th	Above Average
Visual Spatial	126	96th	Superior
Fluid Reasoning	121	92nd	Superior
Working Memory	125	95th	Superior
Processing Speed	86	18th	Below Average

13. The Student’s full scale intelligence quotient or “IQ” was found to be 118, which ranked in the eighty-eighth percentile.

14. Dr. [REDACTED] found:

Highly significant discrepancies of 40, 39 and 35 points . . . between [the Student’s] below average summary Composite score on measures of Processing Speed . . . compared with his Superior scores on measures of visual spatial, fluid reasoning and working memory. The magnitude of these discrepancies are clinically significant and rare (i.e., only found in 1-3% of the population). Furthermore, a statistically significant discrepancy of 30 points was found between [his] above average Verbal Comprehension score . . . in comparison to his below average Processing Speed score . . . .”

(Parents Ex. 3-5; MCPS Ex. 28-5) (emphasis in original).

15. To more fully assess the Student’s cognitive skills, Dr. [REDACTED] also administered several selected subtests of the Woodcock-Johnson – Fourth Edition (WJ-IV) Tests of Achievement, which measures a student’s academic performance in relation to their peer group based on age. An “average” score ranges from ninety to 109.

16. The Student’s 2018 standard scores, grade equivalent scores, and percentile ranks when using age-based norms on various WJ-IV subtests, in relevant part, were as follows:

<b>Subtest</b>	<b>Student’s Standard Score</b>	<b>Student’s Grade Equivalent Score</b>	<b>Student’s Percentile Rank</b>
Word Identification	96	5.5	41st
Word Attack	116	13.0	85th
Passage Comprehension	90	4.3	25th
Oral Reading	88	4.0	21st
Applied Problems	103	7.0	57th
Calculation	94	5.3	34th
Math Facts Fluency	75	3.0	5th
Spelling	87	4.3	20th
Writing Samples	87	3.3	19th
Sentence Writing Fluency	79	3.3	8th

17. In the spring of 2018, MCPS first identified the Student as a student with a specific learning disability (SLD) under the IDEA who was eligible to receive special education services. An IEP was developed and the Student was to receive special education supports for the 2018-2019 school year.

18. The Student attended [REDACTED] Middle School for seventh grade (2018-2019 school year).

**2020 Due Process Hearing**

19. During the spring and summer of 2019, in anticipation of the Student beginning eighth grade (2019-2020 school year), IEP meetings were held. The IEP team recommended that the Student be placed in the [REDACTED] ([REDACTED]) program at [REDACTED] Middle School.



20. In the fall of 2019, the Parents notified MCPS that the Student would attend eighth grade at [REDACTED] ([REDACTED]). [REDACTED] is a private, full-day school exclusively for students with learning disabilities.

21. In the spring of 2020, the Parents requested that MCPS develop an IEP for the Student for ninth grade (2020-2021 school year). On May 20, 2020, an IEP was approved, which recommended the Student's placement in the [REDACTED] program at [REDACTED].

22. The Student remained at [REDACTED] for ninth grade.

23. In October and November 2020, the Parents proceeded to a due process hearing to challenge the IEPs that MCPS developed in connection with the Student's eighth grade (2019-2020 school year) and ninth grade (2020-2021 school year) proposed placements, requesting that MCPS reimburse the Parents for the Student's tuition at [REDACTED] for those two school years.

24. On December 22, 2020, Administrative Law Judge Jerome Woods, II found that the IEP developed in connection with the Student's 2019-2020 school year and the IEP developed in connection with the Student's 2020-2021 school year—which was approved on May 20, 2020 and recommended the Student's placement in the [REDACTED] program at [REDACTED]—were both reasonably calculated to meet the unique needs of the Student and to provide the Student a FAPE in the least restrictive environment (LRE) (2020 hearing decision).

25. The Parents appealed that decision to the United States District Court for the District of Maryland, which on May 26, 2022, dismissed both the Parents' complaint and motion for summary judgment and determined that the 2020 hearing decision was supported by record evidence.<sup>10</sup>

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<sup>10</sup> The parties indicated that the case for the 2019-2020 and 2020-2021 school years is currently pending on appeal before the United States Court of Appeals for the Fourth Circuit.

### **2021-2022 School Year**

26. In March 2021, the Parents requested that MCPS develop an IEP for the Student for tenth grade (2021-2022 school year).

27. On March 14, 2021, [REDACTED], a special education resource teacher at [REDACTED] and the chairperson of the Student's IEP team, informed the Parents that the Student was due for his triennial evaluation, which is required every three years to redetermine a student's needs and eligibility and had last been conducted for the Student in 2018. Ms. [REDACTED] explained that the triennial evaluation meeting and requested IEP meeting would be consolidated. The meeting was scheduled for April 27, 2021.

28. On April 22, 2021, five days prior to the scheduled meeting, Ms. [REDACTED] provided the Parents with the required information along with a draft IEP, a copy of an IEP from [REDACTED], and the approved MCPS IEP dated May 20, 2020.

### **April 27, 2021 IEP Team Meeting**

29. On April 27, 2021, the IEP team remotely convened an initial meeting, which included the school-based team members; the Parents; [REDACTED], whom the Parents had hired as an educational consultant to assist their family through the IEP process; and staff from [REDACTED].

30. At the meeting, the IEP team discussed the need to determine the Student's present levels of academic achievement and developmental needs to appropriately consider the Student's need for special education and related services.

31. [REDACTED], an MCPS occupational therapist, reviewed the Student's present levels and previous reports provided by [REDACTED] and determined that no additional information regarding the Student's occupational therapy was needed at that time.

32. The IEP team observed that the Student's last educational assessment had been three years ago. Accordingly, MCPS requested the Parents' consent for the Student to submit to an educational assessment, to be performed by Ms. [REDACTED], to determine the Student's academic performance, and a psychological evaluation, to be performed by an MCPS school psychologist, to determine the Student's intellectual/cognitive functioning and emotional/social/behavioral development. The team agreed that the assessment would include an observation of the Student in a virtual class. The team also agreed to expedite the testing.

33. The Parents requested to meet the psychologist who would perform the Student's psychological evaluation, given that the school psychologist in attendance at the IEP meeting would not be the psychologist who would conduct the Student's evaluation.

34. On May 7, 2021, the Parents and Ms. [REDACTED] followed up with Ms. [REDACTED] regarding providing parental consent to the requested evaluations and to obtain information regarding who would perform the Student's psychological evaluation.

35. On May 17, 2021, the Parents consented to the Student's educational assessment and psychological evaluation.

**Ms. [REDACTED]'s Report**

36. In June 2021, Ms. [REDACTED] performed an educational assessment of the Student and administered the WJ-IV. Ms. [REDACTED] reported the results of the Student's performance on July 1, 2021, including various recommendations.

37. The Student’s 2021 standard scores, grade equivalent scores, and percentile ranks when using age based norms on various WJ-IV subtests, in relevant part, were as follows:

<b>Subtest</b>	<b>Student’s Standard Score</b>	<b>Qualitative Description</b>
Word Identification	92	Average
Word Attack	90	Average
Passage Comprehension	82	Low Average
Oral Reading	93	Average
Applied Problems	97	Average
Calculation	77	Low
Math Facts Fluency	66	Very Low
Spelling	83	Low Average
Writing Samples	95	Average
Sentence Writing Fluency	72	Low

38. Without considering the confidence interval<sup>11</sup> of plus or minus approximately three-and-a-half points, the Student’s 2021 performance on the same ten WJ-IV subtests administered in 2018 declined on eight subtests. The Student’s performance on two subtests, namely oral reading and writing samples, improved. A comparison of the Student’s 2018 and 2021 performance on the ten WJ-IV subtests indicates the following changes:

<b>Subtest</b>	<b>Student’s 2018 Standard Score</b>	<b>Student’s 2021 Standard Score</b>	<b>Change</b>
Word Identification	96	92	-4
Word Attack	116	90	-26
Passage Comprehension	90	82	-8
Oral Reading	88	93	+5
Applied Problems	103	97	-6
Calculation	94	77	-17

<sup>11</sup> A confidence interval is a measure of certainty and represents how likely it would be to receive the same result if the test were repeated.

Math Facts Fluency	75	66	-9
Spelling	87	83	-4
Writing Samples	87	95	+8
Sentence Writing Fluency	79	72	-7

39. On August 2, 2021, the Parents, through counsel, notified MCPS that the Student would remain at [REDACTED] for tenth grade (2021-2022 school year). The Parents stated that MCPS had not identified or offered an appropriate special education program for the Student's 2021-2022 school year and requested that MCPS therefore place and fund the Student at [REDACTED].

40. On August 19, 2021, MCPS responded to the Parents, through counsel, that an IEP had not yet been proposed for the 2021-2022 school year and, therefore, the Parents' request that MCPS place and fund the Student at [REDACTED] for the school year was premature.

41. At the end of July or early August 2021, Dr. [REDACTED], the school psychologist who had been assigned to [REDACTED] on July 1, 2021, reached out to the Parents to introduce himself. On August 16, 2021, Dr. [REDACTED] emailed Mr. [REDACTED] to schedule the Student's psychological evaluation. Mr. [REDACTED] replied that day and offered the Student's availability beginning at the end of August.

42. On August 16, 2021, the Parents were notified of the next IEP meeting to occur on August 31, 2021.

43. On August 30, 2021, Dr. [REDACTED] conducted a psychological evaluation of the Student at [REDACTED]. Dr. [REDACTED] administered the Differential Ability Scales – Second Edition (DAS-II) to the Student. The DAS-II assesses cognitive abilities.

### **August 31, 2021 IEP Team Meeting**

44. On August 31, 2021, the IEP team remotely convened a second meeting, attended by the school-based team members along with the Parents and Ms. [REDACTED]. The purpose of the meeting was to develop the Student's IEP and consider postsecondary goals and transition services. In anticipation of the meeting, a draft IEP was shared.

45. At the August 31, 2021 IEP team meeting, Dr. [REDACTED] indicated that he had begun his testing of the Student and was awaiting the receipt of information from the Parents and the Student's [REDACTED] teachers regarding the Student's social emotional scales.

46. Ms. [REDACTED] and Ms. [REDACTED] both indicated that they had received information regarding the Student from [REDACTED] and were updating the draft IEP to reflect that information.

47. [REDACTED], an MCPS speech language pathologist, indicated that she needed information from the Student's speech language pathologist at [REDACTED]. Ms. [REDACTED] had reached out to the speech language pathologist at [REDACTED] but had not received a reply before the meeting. The Parents offered to make the connection.

48. The Parents were asked to share their input regarding the Student's educational program and progress. The Parents shared that, despite his deficiencies, the Student was growing and excelling at [REDACTED]. Ms. [REDACTED] shared that he had responded well to small class sizes and that he was making friends and excelling socially. She also explained that she had seen an improvement in the Student's confidence along with his grades, which she attributed to the Student's environment.

49. The team reviewed the IEP. The school-based members of the team proposed that the Student receive the following services: a daily [REDACTED] resource class, outside of general

education; a daily reading intervention class, outside of general education; English and Science general education classes supported by a [REDACTED] teacher; and Math and Social Studies general education classes supported by a paraeducator.

50. The Parents asked questions regarding the difference between “on-level” and honors general education classes as well as the size of those classes. [REDACTED], a school-based member of the IEP team and a twice exceptional instruction specialist in MCPS’s Office of Curriculum and Instruction focused on serving academically gifted students with learning disabilities,<sup>12</sup> explained that in honors English, more intensive writing would be required. She explained that instead of writing four to five paragraphs, students would be expected to write two to three pages.

51. The team agreed to defer the discussion of extended school year services.

52. On August 31, 2021, an IEP was approved, which incorporated the proposed services the team had discussed as well as updated information from [REDACTED] (with the exception of speech language). Instructional accommodations were unchanged from the Student’s May 20, 2020 IEP. Supplemental aids and services were also unchanged from the Student’s May 20, 2020 IEP, with the exception of sensory supports added at Ms. [REDACTED]’s suggestion. The IEP recommended the Student’s placement in the [REDACTED] program at [REDACTED]. Services would begin on September 1, 2021.

53. The school-based team members considered the proposal appropriate to meet the Student’s educational needs.

54. The Parents did not agree with the Student’s placement in the [REDACTED] program at [REDACTED]

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<sup>12</sup> Ms [REDACTED] previously served as the chairperson for the IEP team that developed the Student’s IEP for the 2020-2021 school year.

55. The IEP team agreed to reconvene a meeting to review and revise the IEP once additional information had been provided from the [REDACTED] and once the results of the MCPS educational assessment and psychological evaluation were available for the team to discuss.

56. On September 14, 2021 and throughout October 2021, Ms. [REDACTED] communicated with [REDACTED], the Student's speech language pathologist at the [REDACTED], and received information regarding the Student's speech language interventions and progress.

57. After analyzing the Student's divergent performance on the DAS-II as compared to the Student's 2018 performance on the WISC-V administered by Dr. [REDACTED], Dr. [REDACTED] discussed the results with the Parents and requested to administer the WISC-V to the Student. The Parents agreed. On September 15, 2021, Dr. [REDACTED] administered the WISC-V to the Student.

58. Through the rest of September and early October 2021, Dr. [REDACTED] received assessments under the Conners Behavior Rating Scale (CBRS) and the Children's Depression Inventory – Second Edition (CDI-2) that were completed by [REDACTED] staff and the Parents to assist Dr. [REDACTED] in his psychological evaluation of the Student.

#### **Dr. [REDACTED]' Report**

59. On October 5, 2021, Dr. [REDACTED] completed his report containing the results of the Student's psychological evaluation. In preparing his report, Dr. [REDACTED] reviewed and relied on Dr. [REDACTED] 2018 report. Dr. [REDACTED] also considered his assessments and interview of the Student along with information pertaining to the Student provided by his Parents and teachers at the [REDACTED].



60. Dr. [REDACTED] did not review the Student’s file detailing his history of childhood abuse, though he was aware of that history from his review of Dr. [REDACTED]’s report and based on information that the Parents had disclosed to him.

61. In explaining his rationale for first administering the DAS-II and then the WISC-V, Dr. [REDACTED] offered, “As a result of the significant variance of standard scores reported [in Dr. [REDACTED]’s 2018 report] and the DAS-II, the examiner administered the WISC-V . . . .” (Parents Ex. 11-7; MCPS Ex. 18-7).

62. The DAS-II provides a composite score reflecting conceptual and reasoning abilities, cluster scores measuring more specific ability areas, and individual subtest scores representing a range of diverse abilities. A composite score below seventy is “very low”; a composite score ranging from seventy to seventy-nine is “low”; a composite score ranging from eighty to eighty-nine is “below average”; a composite score ranging from ninety to 109 is “average”; a composite score ranging from 110 to 119 is “above average”; a composite score ranging from 120 to 129 is “high”; and a composite score ranging from 130 to 145 is “very high.”

63. The Student’s DAS-II composite score results and percentile ranks were as follows:

<b>Index</b>	<b>Student’s Composite Score</b>	<b>Student’s Percentile Rank</b>	<b>90 percent Confidence Interval</b>	<b>Qualitative Description</b>
Verbal	109	73rd	101 to 115	Average
Nonverbal Reasoning	111	77th	104 to 116	Above Average
Spatial	104	61st	99 to 109	Average
Working Memory	105	63rd	100 to 110	Average
Processing Speed	65	1st	61 to 76	Very Low

64. The Student’s general conceptual ability, which reflects conceptual and reasoning abilities, was 109, which ranked in the seventy-third percentile, with a confidence interval of 104 to 113 and a qualitative description of “average.”

65. With respect to the Student’s “very low” processing speed index, Dr. [REDACTED] explained, “The Processing Speed Index measures the ability to perform cognitive tasks fluently and automatically, especially when under pressure to maintain focused attention and concentration. Speed of information processing is related to the activation of information in short-term memory during memory span tasks but not working memory tasks. This suggests that a significant amount of wait time is needed for output.” (Parents Ex. 11-9; MCPS Ex. 18-9).

66. The Student’s 2021 WISC-V composite score results and percentile ranks were as follows:

<b>Index</b>	<b>Student’s Composite Score</b>	<b>Student’s Percentile Rank</b>	<b>Confidence Interval</b>	<b>Qualitative Description</b>
Verbal Comprehension	100	50th	94 to 106	Average to Average
Visual Spatial	114	82nd	106 to 119	Average to High Average
Fluid Reasoning	121	92nd	113 to 126	High Average to Very High
Working Memory	107	68th	100 to 113	Average to High Average
Processing Speed	69	2nd	65 to 80	Extremely Low to Low Average

67. The Student’s cognitive proficiency index, which summarizes performance on the working memory and processing speed indexes in a single standard score, was found to be eighty-four, which ranked in the fourteenth percentile, with a confidence interval of seventy-eight to ninety-two and a qualitative description of “low average to average.”

68. The Student's general intellectual ability, referred to as the General Ability Index (GAI), which reduces emphasis on working memory and processing speed, was found to be 111, which ranked in the seventy-seventh percentile, with a confidence interval of 105 to 116 and a qualitative description of "average to high average." Noting the "significant discrepancies amongst the [processing speed index] and other indexes," Dr. [REDACTED] determined that the GAI was the best estimate of the Student's intellectual ability at the time. (Parents Ex. 11-13; MCPS Ex. 18-13).

69. With respect to the Student's "extremely low to low average" processing speed, Dr. [REDACTED] explained:

[The Student] demonstrated below expected levels of processing speed, with significant variance in his performance across task demands. [The Student]'s performance on the subtests for the Processing Speed Index were significantly lower than his mean performance on the core cognitive subtests. The Processing Speed Index noted relative weakness in the following areas: visual processing, visual discrimination, and short-term visual memory.

(Parents Ex. 11-11; MCPS Ex. 18-11).

70. The Student's 2021 performance on the WISC-V compared to his 2018 performance demonstrated clinically significant declines in four out of five indexes including verbal comprehension, visual spatial, working memory, and processing speed. The Student's performance on the fluid reasoning index indicated no change. Without considering the confidence interval, a comparison of the Student's 2018 and 2021 performance on the WISC-V indicates the following changes:

<b>Index</b>	<b>Student's 2018 Composite Score</b>	<b>Student's 2021 Composite Score</b>	<b>Change</b>
Verbal Comprehension	116	100	-16
Visual Spatial	126	114	-12
Fluid Reasoning	121	121	0
Working Memory	125	107	-18
Processing Speed	86	69	-17

71. Dr. [REDACTED] also administered the CBRS and the CDI-2.

72. The CBRS assesses childhood disorder and problem behaviors across thirteen areas. A score of “average” or “high average” in an area is not considered problematic. A score of “elevated” or “very elevated” in an area is considered problematic.

73. Based on the CBRS received from Ms. [REDACTED], Ms. [REDACTED] (the Student's [REDACTED] [REDACTED] classroom teacher), the Parents, and the Student, the Student's CBRS results indicated the following six problematic areas: 1) language, indicating problems with reading, writing, and/or language skills; 2) physical symptoms, indicating may complain about aches, pains, or feeling sick and may have sleep, appetite, or weight issues; 3) separation fears, indicating fears of being separated from parents/caregivers; 4) academic difficulties, indicating problems with learning and/or understanding academic material and poor academic performance; 5) math, indicating problems with math; and 6) social problems, indicating socially awkward, may be shy, may have difficulty with friendships, poor social connections, limited conversational skills, and may have poor social reciprocity.

74. The CDI-2 assesses the presence and severity of depressive symptoms in children. A score of “average” in an area is not considered problematic. A score of “elevated” or “very elevated” in an area is considered problematic.

75. Based on the CDI-2 results received from Ms. [REDACTED], Ms. [REDACTED], the Parents, and the Student, the Student's CDI-2 results indicated no emotional or functional problems.

76. The Student has no emotional disability or clinical diagnosis.

77. Based on the results of the Student's psychological evaluation, Dr. [REDACTED] made a number of recommendations to the IEP team, including:

- “[P]rovide extended time on tests, quizzes, and assignments,” including “[g]ive extra wait time to process information and to respond”
- “Written and oral directions should be repeated, especially during examinations and with new material”
- “[P]rovide preferential seating away from distractions”
- “Teachers should check for understanding before presenting new directions or materials by asking [the Student] to repeat the instructions or summarize the information”
- “Teachers should provide periodic breaks . . . throughout the academic day”
- “Teachers should provide copies of teachers notes and outlines”
- “Teachers should provide Graphic Organizers to assist with writing assignments, reading comprehension, and note-taking and outlining”
- “Teachers should provide a process note-book to outline steps for mathematical equations and scientific formulas”
- The Student “should take exams in a quiet setting, where there are limited distractions and testing is monitored by an adult”

- The Student “is encouraged to complete homework in an area where there are few auditory/visual distractions when concentration is required to complete the task”
- “It is recommended that teachers break assignments into a series of smaller units”

(Parents Exs. 11-22 and 11-23; MCPS Exs. 18-22 and 18-23).

78. After sharing his October 5, 2021 report, Dr. [REDACTED] discussed the Student’s performance on the psychological evaluation with the Parents and Ms. [REDACTED]. To understand the decline in the Student’s testing results, Dr. [REDACTED] inquired whether the Student had experienced a traumatic brain injury or concussion or had a neurological condition that the school-based team members were unaware of. The Parents indicated that the Student had not sustained an injury and had no neurological conditions.

#### **October 27, 2021 IEP Team Meeting**

79. On October 27, 2021, the IEP team remotely convened a third meeting for approximately two hours, attended by the school-based team members along with the Parents and Ms. [REDACTED].

80. The purpose of the meeting was to review the results of Ms. [REDACTED]’s educational assessment and Dr. [REDACTED]’ psychological evaluation, and to review and revise the Student’s IEP based on that new information.

81. Throughout the meeting, the school-based team members heard and considered input from the Parents and Ms. [REDACTED].

82. During the meeting, Ms [REDACTED] indicated that the day prior, she had received information from Ms. [REDACTED] and would be incorporating the Student’s speech language information from [REDACTED] into the IEP.

83. The team discussed the Student's performance on the educational assessment and psychological evaluation. The team determined that the Student continued to qualify as a student with a SLD with dysgraphia and slow processing speed as well as ADHD and executive functioning difficulties.<sup>13</sup>

84. Dr. [REDACTED] discussed the Student's performance on the DAS-II and the WISC-V and his decline as compared to his 2018 performance. Ms. [REDACTED] asked why Dr. [REDACTED] was referring to Dr. [REDACTED]'s report and he explained that the Student's decline as compared to his 2018 performance was concerning. The Parents indicated that they had no neurological concerns related to the Student and wanted to know the impact of the Student's early childhood trauma.

85. Ms. [REDACTED] reminded the team that the Student had experienced extreme abuse.

86. The Parents shared information regarding the Student's then-recent anxiety over the fear of losing his Parents and his participation in an [REDACTED] group at [REDACTED]. Ms. [REDACTED] shared that the Student had developed the skills to be able to talk about his past.

87. Ms. [REDACTED] reviewed the Student's performance on the WJ-IV.

88. Ms. [REDACTED] asked the Parents to share their input regarding the Student's performance so far that school year. They explained that the Student was doing very well at [REDACTED], that his performance had improved, and they saw him taking academic and social risks and excelling.

89. Ms. [REDACTED] inquired regarding recommended placement under the IEP and Ms. [REDACTED] explained that without more information to update the IEP's goals, present levels of

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<sup>13</sup> Executive functioning refers to how the brain organizes information and performs tasks, including planning, organization, and goal setting.

performance, and special education service hours, the team could not make a recommendation regarding the Student's placement at that time.

90. Ms. [REDACTED] then asked the Parents to share their thoughts and they explained that they believed the Student needed the small class sizes and emotional supports available at [REDACTED]. The Parents also reminded the team that the Student had a history of significant trauma and abuse.

91. Ms. [REDACTED] asked the school-based team members if they read the report that laid out the Student's history of abuse. Dr. [REDACTED] and Ms. [REDACTED] said they had not read it. Ms. [REDACTED] said she had read it and would make sure that the rest of the school-based team members would as well.

92. The Parents then expressed their frustration with MCPS not accounting for the Student's history of trauma in considering his social emotional needs and explained that was the primary component they had advocated for since the Student began at MCPS. Mr. [REDACTED] apologized for getting upset and Ms. [REDACTED] stated that during the Student's prior tenure at MCPS, his teachers were aware of his social emotional issues and offered no support.

93. At the request of the Parents and Ms. [REDACTED] the school-based team members indicated that they would become more familiar with the Student's file detailing his history of trauma and abuse. The Parents expressed their concern that removing the Student from [REDACTED] would further hurt him, which Ms. [REDACTED] suggested would "add to his trauma and separation fear." (Parents Ex. 12-4).

94. The school-based team members, including Ms. [REDACTED], requested more information regarding the adoption affinity group available to the Student at [REDACTED]. The Student's February 3, 2021 [REDACTED] IEP that had been shared with the school-based team



members did not reflect his participation in that group and did not include social emotional goals or objectives, present levels of performance for social emotional functioning, or social emotional services.

95. Ms. [REDACTED] also requested more information regarding the Student's math course at [REDACTED].

96. The team agreed to schedule another meeting to complete reviewing and revising the IEP and to discuss services and placement.

97. An IEP meeting was initially scheduled for November and then December 2021. The meetings were rescheduled at MCPS's request.

98. On December 17, 2021, the Parents were notified of the next IEP meeting to be held on January 13, 2022.

#### **January 13, 2022 IEP Team Meeting**

99. On January 13, 2022, the IEP team remotely convened a fourth and final meeting for approximately two hours, attended by the school-based team members along with the Parents, Ms. [REDACTED], and two [REDACTED] staff members, Ms. [REDACTED] and [REDACTED], Assistant Director of [REDACTED] high school.

100. The objectives of the meeting were to discuss services and placement recommendations and finalize the Student's IEP.

101. Throughout the meeting, the school-based team members heard and considered input from the Parents, Ms. [REDACTED] Ms. [REDACTED], and Mr. [REDACTED]

102. Ms. [REDACTED] began the meeting by requesting to review the IEP changes discussed at the October 27, 2021 meeting. Among those changes, Dr. [REDACTED] agreed to include ADHD as a primary disability on the Student's IEP.

103. Ms. [REDACTED] shared that she had received updates from Ms. [REDACTED] but that no adjustment to the Student's speech language goals was necessary.

104. Ms. [REDACTED] shared that to address the Student's need for social emotional support and in light of the [REDACTED] group that the Student participated in at [REDACTED], Dr. [REDACTED] recommended that the Student receive thirty minutes of individual psychological counseling per week.

105. Mr. [REDACTED] shared that the Student was still doing well and showing progress.

106. The team then discussed the proposed services for the Student, including a discussion by Ms. [REDACTED] regarding providing thirty minutes of occupational therapy per month and a discussion by Ms. [REDACTED] regarding providing forty-five minutes of speech language therapy twice a week. Ms. [REDACTED] and Ms. [REDACTED] discussed the integration of the Student's speech language therapy into his reading class.

107. Ms. [REDACTED] discussed the recommended daily classes for the Student, including: a [REDACTED] resource class, outside of general education, that would focus on addressing the Student's executive functioning needs; a reading intervention class, outside of general education; honors Algebra 2, honors Chemistry, honors Modern World History, and on-level English 11 general education classes co-taught/supported by a general education teacher and a special education teacher or supported by a special education teacher; and a supported elective general education class or "program completer" of the Student's choice. Ms. [REDACTED] explained that a program completer course would count towards the Student's diploma.

108. The Parents shared their concern with the Student being in large size classes, with at least twenty-eight students, given that at [REDACTED] his classes were no more than ten students. The Parents also asked whether the Student would be with the same cohort of peers.

Ms. [REDACTED] explained that he would not, but that he would be with some of the same students in other classes and that all students in the [REDACTED] resource class are “hand scheduled.”

109. Ms. [REDACTED] asked questions regarding the honors class schedule and what would happen if the Student was struggling. Ms. [REDACTED] offered that the special education teacher works with students individually and can offer other supports to the Student.

110. Ms. [REDACTED] inquired how speech language services would be delivered in a large classroom setting and Ms. [REDACTED] explained that the reading intervention class is a smaller class of twelve students.

111. Ms. [REDACTED] asked that the team’s discussion of recommended services be connected to their discussion from the October meeting, when the Parents expressed their concerns related to the Student’s history of trauma.

112. Ms. [REDACTED] and Dr. [REDACTED] explained that because the Student’s cognitive scores showed a decline, the Student was no longer eligible for the [REDACTED] program.<sup>14</sup>

113. Ms. [REDACTED] stated that she and the Parents believed that the Student should be placed at [REDACTED].

114. Ms. [REDACTED] stated that the school-based team members were recommending [REDACTED]’s [REDACTED] program.

115. The Parents inquired regarding the impact of trauma on the Student’s processing speed. Dr. [REDACTED] explained that the individual psychological counseling he recommended would be to address the Student’s coping skills and strategies and help him to identify triggers. Ms. [REDACTED] asked how that would be monitored in the general education classroom. As further support for the Student, Ms. [REDACTED] and Dr. [REDACTED] then suggested offering the Student a “flash

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<sup>14</sup> Although the Student was no longer eligible for the [REDACTED] program, the school-based members of the IEP team continued to recommend his participation in the [REDACTED] resource class to assist him with his executive functioning needs.

pass,” which would allow him to leave the classroom at any time to go to a designated space and speak with a trusted adult.

116. The Parents inquired about their assigned neighborhood high school, ██████████ High School (██████████), but Ms. ██████████ explained, based on her familiarity and experience with the program available at ██████████, that ██████████ would be unable to support the Student’s recommended services because it did not offer an appropriate ██████████ resource classroom or reading intervention class, nor provide special education support for honors level classes. Mr. ██████████ asked about transportation to ██████████ and Ms. ██████████ offered that transportation would be provided.

117. Ms. ██████████ requested that Ms. ██████████ and Mr. ██████████ offer their input regarding the Student’s social and emotional skills. Ms. ██████████ offered that the Student was thriving and appeared to be comfortable in his setting at ██████████. Mr. ██████████ offered that he believed the Student benefitted from the small class sizes.

118. Ms. ██████████ then reiterated the Student’s need for academic and emotional supports, including the ██████████ group and trauma support, which she suggested were lacking in the school-based team members’ recommendation.

119. Ms. ██████████ explained that ██████████ supports children with trauma and that the school-based team members continued to recommend the ██████████ program at ██████████.

120. Ms. ██████████, the Parents, and Ms. ██████████ disagreed with the school-based team members’ placement recommendation.

121. Ms. ██████████ and Ms. ██████████ shared their disappointment that the school-based team members “decided” on ██████████’s ██████████ program “without hearing from [the Parents] or ██████████.” (Parents Ex. 16-5). Ms. ██████████ suggested that the Student was not adequately

supported when previously enrolled in MCPS schools. Mr. [REDACTED] also shared his frustration with the recommendation, which he believed was not appropriate in part based on the Student's history of trauma.

122. Ms. [REDACTED] explained that the recommendation by the school-based team members failed to offer the supports the Student had at [REDACTED], namely the adoption affinity group; smaller class sizes; and integrated occupational therapy, speech language therapy, and executive functioning supports. Ms. [REDACTED] requested a referral to the MCPS central IEP team for consideration of another placement, a request with which Ms. [REDACTED] stated the school-based team members did not agree. No referral to the central IEP team was made.

#### **January 13, 2022 IEP**

123. Following the January 13, 2022 meeting, the Student's IEP was approved. The IEP recommended the Student's placement in the [REDACTED] program at [REDACTED] for the 2021-2022 school year.

124. The school-based team members considered the IEP appropriate to meet the Student's educational needs.

125. The IEP identified the Student's primary disability as a SLD with dysgraphia, particularly in reading and written expression. The IEP recognized that the Student's SLD impacts him in the areas of math calculation, math problem solving, reading comprehension, reading fluency, reading phonics, written language content, written language mechanics, attention, executive functioning, social emotional/behavior, expressive language, pragmatics, and visual motor skills.

126. The IEP permitted the Student to participate in all grade appropriate assessments with accommodations.

127. The IEP's discussion of then-present levels of academic achievement and functional performance incorporated information from the Student's performance and behavior at [REDACTED], his performance on the educational assessment administered by Ms. [REDACTED], his performance on the psychological evaluation administered by Dr. [REDACTED], and input from the Parents.

128. The IEP captured the Student's then-present levels of academic achievement and functional performance in reading phonics, reading fluency, reading comprehension, math calculation, math problem solving, written language content, written language mechanics, speech and language expressive language, speech and language pragmatics, cognitive performance, attention, social emotional/behavioral performance, executive functioning, and visual motor performance.

129. The Student's then-present levels of academic achievement and functional performance in social emotional/behavioral and executive functioning were below age level expectations. In the attention category, his instructional grade level performance was significantly below age level expectation.

130. The IEP identified the Student's needs in the social emotional/behavioral category as demonstrating or verbalizing knowledge of his own strengths or needs; taking responsibility for his own behavior; self-advocacy; monitoring his own personal space or the space of others; and recognizing and reading environmental cues from teachers or classmates.

131. The IEP identified the Student's needs in the executive functioning category as attending to classroom instruction or teacher directions; organizing his work space; working independently; checking for clarity of understanding; returning completed homework as expected; planning study schedule or procedures for completing assignments; following through

with study schedule or procedures; self-advocating for assistance and clarification; and understanding or taking the perspective of others.

132. To specifically address the Student's executive functioning needs, the IEP provided for eight instructional and assessment accessibility features and accommodations, including:

- General administration directions clarified;
- General administration directions read aloud and repeated as needed;
- Student redirection to a task, including instruction, assignments, and assessments, by an adult;
- Copies of notes and outlines for courses and instruction;
- Monitoring test response;
- Recording answers in the test book when presented with a paper copy and the opportunity to record responses verbally using a device or software for instruction;
- Use of assistive technology; and
- One-hundred percent extended time to specifically address the Student's processing speed needs.

133. To address the Student's executive functioning and social emotional/behavioral needs, the IEP provided for five instructional and assessment accessibility features and accommodations, including:

- Reduced distractions of the Student to himself;
- Reduced distractions of the Student to others;
- Small groups;

- Frequent breaks; and
- A separate or alternate location for testing.

134. The IEP provided the Student twenty-eight supplementary aids, services, program modifications, and supports designed to allow the Student to access the general education curriculum, including:

- A multi-sensory approach to learning/instruction when possible to increase the Student's attention and engagement in all academic settings;
- Use of a word processor or computer in all settings;
- Specified comprehension check-ins during reading in all classes where extended reading is required;
- Check for understanding in all settings;
- Previewing course material, vocabulary, or information as needed in all academic settings to assist with understanding, application, and retention;
- Models or exemplars of written work in all classes where lengthy writing is required;
- Oral rehearsal prior to writing in all classes where lengthy writing is required;
- Wait time for oral responses in all classes;
- Administration of tests over multiple days without exceeding total time and within test parameters;
- Administration of tests at best time of day for Student when pre-arranged with approval;
- Repetition of directions in all classes;



- Paraphrasing/simplification of oral and written directions in all classes;
- Advance notice of tests in all classes;
- Encouraging use of speech-to-text, text-to-speech, and other technology tools in all classes where extensive writing or note-taking is required and to assist with reading online text;
- Limit amount to be copied from board in all classes where extensive note-taking is required;
- Allow use of manipulatives primarily in math but as appropriate in all content classes;
- Provide proofreading checklist in all classes where writing tasks are required;
- Frequent and/or immediate feedback in all classes and non-academic settings;
- Visual supports across all settings as needed;
- Break down assignments into smaller units in all classes that require larger or long-term assignments or projects;
- Use of positive/concrete reinforcers, including a homework reward system setup by the Student's special education case manager and reinforced daily with teachers;
- Encourage the Student to ask for assistance when needed across all settings;

- Social skills training, including in academic and non-academic settings, coaching and/or encouragement to use social skills strategies by counselor or special education teacher;
- Verbal and non-verbal cues across all academic and non-academic settings;
- Monitor use of agenda book and/or progress report in all classes to make sure assignments are recorded;
- Strategies to initiate and sustain attention, including fidgets, mind mapping, movement breaks, and tracking the teacher;
- Training to provide professional recommendations on the use of sensory supports for attention to academics consisting of a monthly consult by occupational therapist with staff and the Student to try, identify, and implement sensory strategies to support the Student's attention to academics; and
- Preferential seating in all classes.

135. The IEP identified several goals, including in the areas of executive functioning and social emotional/behavioral. Each goal includes several objectives.

136. The Student's three goals in the area of executive functioning were to:

- Independently organize his physical workspace while working in class in four of five attempts;
- Use strategies to support his attention in class in four of five attempts; and
- Initiate, sustain attention to, and accurately and thoroughly complete a task in three of five attempts.

137. The Student's four goals in the area of social emotional/behavior were to:

- Display age-appropriate self-discipline in the classroom in four of five situations;
- Demonstrate appropriate conduct with peers and adults in eighty percent of opportunities as demonstrated through successful achievement of objectives across all settings;
- Apply strategies to effectively navigate the problem-solving process; and
- Independently determine his need for assistance and seek support and clarification from teachers when needed.

138. The IEP provided both special education services and related services.

139. The IEP's special education services consisted of two "self-contained" classes<sup>15</sup>—one reading intervention class and one [REDACTED] resource class focused on addressing the Student's executive functioning needs. Each class proposed consisted of forty-five minutes per day for a total of one-and-a-half hours daily in special education.

140. The IEP proposed that the Student would spend the balance of his daily class time, three hours and forty-five minutes, in the following five co-taught or supported general education classes<sup>16</sup>:

- On-level English 11;
- Honors Algebra 2;
- Honors Chemistry;

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<sup>15</sup> A self-contained class is outside of general education, generally comprised of all special education students, and is taught by a special education teacher.

<sup>16</sup> A co-taught or supported class is in general education and co-taught by a general education teacher and a special education teacher or supported by a special education teacher.

- Honors Modern World History; and
- An elective course.

141. At [REDACTED], a co-taught or supported honors class with two teachers ranges from twenty-eight to thirty-two students.

142. The IEP's related services consisted of:

- Forty-five minutes of speech language therapy twice per week;
- Thirty minutes of psychological counseling per week;
- Thirty minutes of occupational therapy per month; and
- Transportation.<sup>17</sup>

143. The January 13, 2022 IEP was amended on January 24, 2022 to reflect the addition of the flash pass as a supplementary aid available to the Student.

**Parents' February 2022 Visit to [REDACTED]**

144. In February 2022, the Parents visited [REDACTED] for approximately one hour to observe the school.

145. During their visit, they observed two classrooms—honors English (grade 9) and the proposed [REDACTED] resource class.

146. The Parents visited the [REDACTED] resource class for approximately two to three minutes where they observed approximately fifteen to eighteen students working independently and one teacher, with whom the students had little interaction.

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<sup>17</sup> Although the IEP team agreed to related services consisting of forty-five minutes of speech language therapy twice per week, thirty minutes of psychological counseling per week, and thirty minutes of occupational therapy per month, only occupational therapy and transportation are reflected as related services on the Student's January 13, 2022 IEP. These additional related services are, however, captured on the prior written notice that corresponds to the January 13, 2022 IEP team meeting. (MCPS Ex. 24). The Parents do not challenge these related services.

## DISCUSSION

### Burden of Proof

The standard of proof in this case is a preponderance of the evidence. COMAR 28.02.01.21K(1). To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. 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). The Parents are seeking relief and therefore bear the burden of proof to show that the challenged actions by MCPS did not meet the requirements of the law.

### Analysis

The Parents argued that MCPS denied the Student a FAPE for the 2021-2022 school year on two bases, one procedural and one substantive. I consider each below in turn.

#### **I) Procedural Denial of FAPE**

I first begin by addressing what the Parents characterized as the more significant denial of a FAPE to the Student, and that is their argument that MCPS predetermined the Student’s placement for the 2021-2022 school year prior to the January 13, 2022 IEP team meeting. For the reasons that follow, I conclude that MCPS did not predetermine the Student’s placement for the 2021-2022 school year prior to the January 13, 2022 IEP team meeting.

#### *Parents’ Position*

Primarily, the Parents argued that MCPS predetermined the Student’s placement prior to the January 13, 2022 IEP team meeting, that they were denied their right to meaningful participation in an openminded IEP meeting, and that MCPS abused the IEP process in contravention of the IDEA. The Parents argued that based on this procedural error, the Student’s substantive right to a FAPE was denied. *See* 20 U.S.C.A. § 1415(f)(3)(E)(ii)(II); 34 C.F.R.

§ 300.513(a)(2)(ii). The Parents argued that predetermination occurs when a school system makes a placement decision without involving parents or others outside of the school system. They characterized this procedural argument, which they described as “the cardinal violation of the entire IDEA,” as the more significant denial of a FAPE to the Student by MCPS. The Parents argued that considering the timing, i.e., that MCPS developed an IEP and made a placement decision in the middle of the school year without their participation, MCPS’s predetermination violation was even more egregious.<sup>18</sup>

The Parents explained that Ms. [REDACTED] stated twice during the January 13, 2022 IEP team meeting that the Student’s placement decision had already been made. The Parents argued that the school-based IEP team “walked” into the January 13, 2022 IEP meeting knowing that the [REDACTED] program at [REDACTED] was the placement because there is no other way to understand Ms. [REDACTED]’s notes, which indicate that the discussion of services was describing [REDACTED] Ms. [REDACTED]’s notes show that no one from the school-based team spoke at the January 13, 2022 meeting other than Ms. [REDACTED]. The Parents recognized that Ms. [REDACTED]’s notes were not verbatim and may have omitted some points but argued that her notes offer the best available record of what transpired. The Parents do not dispute that they were actively involved in the January 13, 2022 IEP meeting but argued that there was no discussion once they understood that the school-based team members had been describing a program and a placement that they had already decided.

The Parents argued that MCPS never disputed or denied the Parents’ multiple, clear complaints of predetermination, not in the January 13, 2022 IEP meeting or thereafter, and ignored the Parents’ claim of predetermination in MCPS’s prior written notice and meeting

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<sup>18</sup> The Parents made clear that they were not alleging that any delays by MCPS in developing the January 13, 2022 IEP constituted a standalone procedural violation that resulted in the denial of a FAPE to the Student but that the alleged predetermination was exacerbated by delays.

notes, which they described as the “smoking gun” for their omission of the Parents’ claim. The Parents argued that MCPS tried to “cover up” and hide that they prevented consideration of the Parents’ input in the IEP process.

*MCPS’s Position*

With respect to predetermination, MCPS argued that there was no interference whatsoever with the Parents’ ability to participate in, contribute to, attend, speak at, give their feedback, and share their documentation at the IEP team meetings, and that the Parents did not deny that. Further, MCPS argued, there was no actual interference with the Student’s education or provision of a FAPE because the Student remained placed at [REDACTED] and the Parents wanted [REDACTED] placement all along. MCPS argued that, by looking in isolation at the January 13, 2022 IEP team meeting, the Parents disregard what occurred at the October 27, 2021 IEP team meeting. The two meetings cumulatively amounted to four hours focused on revising the IEP based on the new information that was then made available to the team.

MCPS refuted the Parents’ claim that the discussion of available special education services took place before the January 13, 2022 IEP meeting because Ms. [REDACTED], as the head of MCPS’s twice exceptional and gifted and talented program and a member of the IEP team who regularly participated in the meetings, was aware of the resources available at various MCPS schools and was able to speak to those services and resources during the meeting. MCPS argued that at the January 13, 2022 IEP meeting, by the time transportation was raised, the [REDACTED] placement had been discussed and the Parents knew and expressed their disagreement with that proposed placement. MCPS argued that during the January meeting, the Parents repeated the same arguments, and it became a circular discussion. At some point, the school-based team members had to “agree to disagree” as a matter of conflict management. MCPS argued that a

parent's disagreement with a proposed placement does not equate to predetermination. Further, a parent's disagreement does not require a referral to the central IEP team; instead, a parent's remedy is to pursue due process rights under the IDEA.

MCPS argued that if it had predetermined the Student's placement, then it would not have "tabled" the October 27, 2021 IEP meeting to respond to the Parents' feedback and gather more information regarding the Student's history of trauma. MCPS argued that the October 27, 2021 meeting was "tabled" to allow the school-based team members to consider more information about the education the Student received and his performance at [REDACTED] and, based on information shared by the Parents, to consider social emotional supports and services for the Student. MCPS explained that there had been a disconnect between the Parents' social emotional concerns for the Student and the February 3, 2021 [REDACTED] IEP, which did not include any social emotional goals or objectives, present levels of performance for social emotional functioning, or social emotional services.

Addressing the allegation of delays, MCPS argued that the Parents withheld their consent for the Student's psychological evaluation until they knew who would administer the evaluation and were then on vacation at the end of June and for most of August 2021. MCPS argued that Dr. [REDACTED] expeditiously completed his testing within two weeks, a process that can normally take two months, and awaited submission of the social emotional scales from [REDACTED] staff. MCPS argued that even if there were any delays in the production of Dr. [REDACTED]' report, such delays had no impact because there was no dispute regarding whether the Student was eligible for services under the IDEA or the IEP's coding, goals and objectives, social emotional supports, or proposed counseling services.



With respect to the time between the October 27, 2021 and January 13, 2022 IEP team meetings, MCPS argued that it was awaiting information from [REDACTED] and, in the meantime, the approved August 31, 2021 IEP (which the Parents do not challenge) was in place. Therefore, MCPS argued, any delay did not actually interfere with the provision of a FAPE to the Student. Further, the Parents did not want to remove the Student from [REDACTED]. MCPS argued that throughout all four IEP team meetings, and in October especially, the Parents repeated that they wanted [REDACTED]. MCPS suggested that any interest by the Parents in pursuing a placement within MCPS for the 2021-2022 school year is belied by their desire for [REDACTED] since 2019, including their then-concurrent appeal of the 2020 hearing decision pending before the United States District Court for the District of Maryland. MCPS suggested that the Parents' present procedural claim was a red herring and brought after receiving an unfavorable decision in 2020.

#### *Applicable Legal Framework*

The IDEA affords parents equally important procedural and substantive rights in ensuring that their child receives a FAPE under the statute as required. Emphasizing the importance of the procedural safeguards embodied in title 20, section 1415 of the United States Code, the Supreme Court, in *Board of Education of Hendrick Hudson Central School District v. Rowley*, explained:

When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act,<sup>[19]</sup> we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did

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<sup>19</sup> The Supreme Court in *Rowley* interpreted what was titled the Education for All Handicapped Children Act (EHA), the predecessor to the IDEA.

upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

458 U.S. 176, 205–06 (1982) (citation omitted). As this passage explains, the essence of the procedural safeguards afforded under the IDEA is to ensure full and meaningful participation of “concerned parties,” including the parents of a child, throughout the IEP development process.

With *Rowley*’s emphasis on procedural compliance, therefore, it is unsurprising that the IDEA was amended in 2004 to provide that certain procedural violations may result in a finding that a child was denied a FAPE. In relevant part, the IDEA states the following:

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education *only if* the procedural inadequacies—

- (I) impeded the child’s right to a free appropriate public education;
- (II) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or
- (III) caused a deprivation of educational benefits.

20 U.S.C.A. § 1415(f)(3)(E)(ii) (emphasis added); *see also* 34 C.F.R. § 300.513(a)(2).

There are, of course, other procedural violations that are considered more technical in nature that do not amount to a denial of a child’s right to a FAPE absent a showing of harm. As the Fourth Circuit set forth in *DiBuo ex rel. DiBuo v. Board of Education of Worcester County*, “a procedural violation of the IDEA can[not] support a finding that a school district failed to provide a disabled child with a FAPE when the procedural violation *did not actually interfere* with the provision of a FAPE to that child.” 309 F.3d 184, 190 (4th Cir. 2002) (emphasis in original); *see also M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 533 (4th Cir. 2002) (“When such a procedural defect exists, we are obliged to assess whether it

resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA.” (citing *Gadsby ex rel. Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997))).

Predetermination is a type of procedural violation that, under the IDEA, consists of deciding a student’s placement before developing an IEP. *See* 34 C.F.R. § 300.116(b)(2) (“In determining the educational placement of a child with a disability . . . each public agency must ensure that . . . [t]he child’s placement . . . [i]s based on the child’s IEP . . .”). “A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement.” *K.D. ex rel. C.L. v. Dep’t of Educ.*, 665 F.3d 1110, 1123 (9th Cir. 2011). “Predetermination violates the IDEA because the [IDEA] requires that the placement be based on the IEP, and not vice versa.” *Id.* (citing *Spielberg ex rel. Spielberg v. Henrico Cnty. Pub. Schs.*, 853 F.2d 256, 259 (4th Cir. 1988)).

In *Spielberg*, the school system decided to change the student’s placement from a residential facility to a local public school before developing a new IEP to support the change. More specifically, the school system had written a series of letters regarding the change of the student’s placement prior to the scheduled IEP meeting. The Fourth Circuit held that the decision to place the student before developing an IEP violated the EHA’s implementing regulation and “violate[d] the spirit and intent of the EHA, which emphasizes parental involvement. After the fact involvement is not enough.” *Spielberg*, 853 F.2d at 259.

In *Deal ex rel. Deal v. Hamilton County Board of Education*, based on an unofficial policy, school system representatives “pre-decided not to offer [the student] intensive [applied behavioral analysis] services regardless of any evidence concerning [the student’s] individual needs and the effectiveness of his private program.” 392 F.3d 840, 857 (6th Cir. 2004). The

school system representatives “did not have open minds and were not willing to consider the provision of such a program.” *Id.* at 858. The Administrative Law Judge found that the parents were not even permitted to ask questions during an IEP meeting. *Id.* at 855. The Sixth Circuit held that “[t]his predetermination amounted to a procedural violation of the IDEA,” and “[b]ecause it effectively deprived [the student’s] parents of meaningful participation in the IEP process, the predetermination caused substantive harm and therefore deprived [the student] of a FAPE.” *Id.* at 857.

As both *Spielberg* and *Deal* demonstrate, the IDEA’s emphasis on meaningful parental participation and involvement is a core tenet of the statute. The IDEA requires that parents have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child . . . .” 20 U.S.C.A. § 1415(b)(1); *see also id.* § 1414(e) (“Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.”); 34 C.F.R. § 300.501(c)(1). Therefore, the procedural offense of predetermination stems from the mandate under the IDEA that the parents be entitled to the opportunity to meaningfully participate and engage in the development of an IEP for their child. *See id.* § 300.322 (providing public agency’s responsibility to afford opportunity for parental participation); *see also* 20 U.S.C.A. § 1414(d)(1)(B)(i). If a school system has decided a student’s placement before developing an IEP, a process in which the IDEA mandates that parents be entitled to meaningfully participate and engage, by definition the school system has denied the parents their right to meaningful participation.

Equally important to the parents’ ability to provide input is the receptiveness of school staff to consider that parental feedback, without which parental participation would not be

considered meaningful and would simply fall on deaf ears. Thus, “[a] school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003), *superseded by statute on other grounds*, 20 U.S.C.A. § 1414(d)(1)(B), *as recognized in G.M. ex rel. Marchese v. Dry Creek Joint Elementary Sch. Dist.*, 595 F. App’x 698, 699 (9th Cir. 2014).

Courts have declined to find predetermination even where school staff come to IEP meetings with a proposal in mind, as long as they remain open to input from the parents and their experts. Discussing *Spielberg*, the United States District Court for the District of Maryland explained that “while a school system must not finalize its placement decision before an IEP meeting, it can and should have given some thought to that placement.” *Hanson ex rel. Hanson v. Smith*, 212 F. Supp. 2d 474, 486 (D. Md. 2002). The court also discussed *Doyle v. Arlington County School Board*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *aff’d*, 39 F.3d 1176 (4th Cir. 1994), and stated “if the school system has already *fully* made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input.” *Hanson*, 212 F. Supp. 2d at 486 (emphasis added). Citing *Doyle*’s discussion of *Spielberg*, the court continued, “*Spielberg* required the school board to come to the table with an ‘open mind,’ but did not require them to come to the IEP table with a ‘blank mind.’” *Id.* (quoting *Doyle*, 806 F. Supp. at 1262). The court in *Hanson* ultimately held that the student’s placement was not predetermined because the school staff came to the IEP meetings with an open mind and discussed and considered several options before the final recommendation was made. *Id.*

As the Sixth Circuit succinctly offered, “predetermination is not synonymous with preparation.” *Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006).

“[S]chool evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions.” *Id.* (quoting *N.L. ex rel. Ms. C. v. Knox Cnty. Schs.*, 315 F.3d 688, 694 (6th Cir. 2003)); *see also G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947–48 (1st Cir. 1991) (finding no predetermination when school district came to team meeting with draft IEP and approved at subsequent meeting); *K.D.*, 665 F.3d at 1123 (finding no predetermination where district had a placement in mind before meeting but considered other options and reasonably rejected them).

Meaningful parental participation has not been interpreted by courts to mean that school staff cannot disagree with parental input. “To avoid a finding of predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents’ opinions and support for the IEP provisions they believe are necessary for their child.” *R.L. ex rel. O.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014). “A state can make this showing by, for example, evidence that it ‘was receptive and responsive at all stages’ to the parents’ position, even if it was ultimately rejected.” *Id.* (quoting *Doyle*, 806 F. Supp. at 1262).

In *Nack*, three separate IEP meetings were held concerning the student’s IEP where the parent, who “was always able to be a significant part of the discussions,” actively participated in each of these meetings. 454 F.3d at 610. Prior to and during these meetings, the parent “repeatedly made school officials aware” of her disapproval of her son’s participation in a special education classroom and her desire for him to remain in the general regular education setting. *Id.* “While there clearly had been ongoing discussions concerning [the student] and certain portions of the IEP had been drafted in advance,” the court explained in finding no

predetermination, “[the parent] was given many opportunities to comment on the IEP and, by every indication, [the school system] took her suggestions seriously.” *Id.* at 611.

Ultimately, in light of such disagreement between school staff and parents, the United States Department of Education’s Office of Special Education and Rehabilitative Services has provided guidance stating, “If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency’s proposals or refusals, or both, regarding the child’s educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.” Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12406, 12473–74 (Mar. 12, 1999) (providing answer to question number nine in section II of the Appendix); *see* 34 C.F.R. § 300.148(b) (“Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures . . .”).

*MCPS Did Not Predetermine the Student’s Placement for the 2021-2022 School Year Prior to the January 13, 2022 IEP Team Meeting*

Turning now to the facts of this case, the record is clear that the Parents were afforded and took advantage of the opportunity to meaningfully and fully participate in the process to develop the Student’s January 13, 2022 IEP. At every juncture, particularly the October 27, 2021 and January 13, 2022 IEP team meetings, MCPS received and seriously considered the feedback and information provided by the Parents, their educational consultant, Ms. [REDACTED], and [REDACTED] staff, who were all active participants throughout the IEP team meetings. MCPS did not decide the Student’s placement before developing the January 13, 2022 IEP, maintained

an open mind, and permitted the Parents a full opportunity for meaningful participation. This record does not support a finding of predetermination and for the reasons stated below, I conclude that the Parents have failed to meet their burden.

During the hearing, much was made of Ms. ██████'s IEP team meeting notes, particularly those that she captured during the January 13, 2022 meeting. Although Ms. ██████'s notes offer an outline of the team's discussions, the parties agreed that they do not constitute a transcript of the meetings. The Parents conceded that her notes were not verbatim and may have omitted some points. MCPS argued that Ms. ██████'s IEP meeting notes are not "gospel" but instead are her characterization of conversation and not comprehensive as to who said what. The notes can be taken out of context and in one instance failed to reflect Ms. ██████'s attendance. Ms. ██████ disagreed with the way Ms. ██████'s notes characterized some of the meeting discussions. Ms. ██████ also testified that "I think that the way that some of this is characterized is not how I remember the discussion," (Tr. vol. 4, at 755), but that she would not have expected Ms. ██████'s notes to capture everything that was said. Ms. ██████ testified that she typed her notes "in real time," (Tr. vol. 1, at 67), during the meetings and, as reflected in those notes, she spoke often during team meetings. It would be an arduous task to comprehensively capture the conversation between several people for nearly two hours at a time while speaking regularly. Therefore, although Ms. ██████'s notes are a helpful reference, they are not, nor do I consider them to be, the authority on the discussions that transpired during the team's meetings.

Accordingly, I consider Ms. ██████'s notes in conjunction with the MCPS meeting notes compiled from handwritten notes taken by Ms. ██████ and typed notes taken by Ms. ██████, the prior written notices, and all the witness testimony offered to understand the team's discussions



during those meetings.<sup>20</sup> Although each of the witnesses (except for the Parents) was accepted as an expert witness, none of them is owed any special deference on the factual question of what transpired during the IEP meetings, including the January 13, 2022 meeting. The Parents argued that I should afford a very high degree of credibility to the testimony of Ms. [REDACTED] because her real-time meeting notes captured the predetermination by MCPS. The Parents also argued that her testimony was credible because it was consistent with her notes. As laid out above, predetermination is a legal conclusion and one that Ms. [REDACTED] was unqualified to make. Additionally, suggesting that Ms. [REDACTED]'s testimony was consistent with the notes that she authored, that are in evidence, and that she was directed to review during her testimony is not particularly probative on the question of credibility.

The process of developing an IEP for the Student's 2021-2022 school year began in March 2021, with the IEP team convening a total of four meetings over the course of nearly ten months to develop and approve two IEPs for the Student, consider the Student's updated testing results, and, most importantly to this case, hear input from and consider information provided by the Parents, Ms. [REDACTED], and [REDACTED] staff members.

Beginning with the April 27, 2021 consolidated triennial evaluation and IEP meeting, which was convened at the Parents' request, the Parents, Ms. [REDACTED], and [REDACTED] staff attended along with the school-based IEP team members. Their discussion centered around the need for updated testing, including an educational assessment and psychological evaluation, which the team agreed to expedite. Understandably, the Parents sought additional information regarding who would perform those tests and received that information following the meeting. Though Ms. [REDACTED] was able to complete the Student's educational assessment in June 2021, the

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<sup>20</sup> Although I have highlighted various relevant portions of testimony from multiple witnesses throughout this decision, my analysis is not based solely on any quoted passages, as I have considered all the testimony and evidence presented by the parties in reaching my conclusions.

psychological evaluation required additional time to coordinate largely due to MCPS staffing, as Dr. [REDACTED] explained that he was not assigned to [REDACTED] until July 1, 2021.

The IEP team did not wait for the results of that evaluation, however, to convene its next meeting. Accordingly, the IEP team convened a second meeting on August 31, 2021, which the Parents and Ms. [REDACTED] attended along with the school-based team members. During that meeting, discussions centered around developing the Student's IEP. Ms. [REDACTED] and Ms. [REDACTED] had received information regarding the Student from [REDACTED] and updated the draft IEP to reflect that information. Ms. [REDACTED] explained she was still awaiting information from her counterpart at [REDACTED]. The Parents were asked to and shared their input regarding the Student's educational program and progress. The Parents also asked questions about the difference between "on-level" and honors general education classes and class sizes, which Ms. [REDACTED] addressed. Though additional information for the team's consideration was anticipated, namely the educational assessment and psychological evaluation results, the team finalized an IEP that day that recommended the Student's placement in the [REDACTED] program at [REDACTED].

Though the Parents have not raised an issue with respect to their participation in the development of the August 31, 2021 IEP, the April 27 and August 31, 2021 IEP team meetings are relevant to give context to the relationship between the school-based team members and the Parents, Ms. [REDACTED], and [REDACTED] staff. During those meetings, the team discussions were collaborative and allowed for an exchange of information. The Parents asked questions and received answers, for example, related to the more intensive writing curriculum in honors English. Similarly, the Parents offered information regarding how the Student was performing at [REDACTED]. As is demonstrated by the discussion below of the October 27, 2021 and

January 13, 2022 meetings, that collaboration carried through to the development of the January 13, 2022 IEP.

Once the team had Dr. [REDACTED] report, a third meeting was convened on October 27, 2021 for nearly two hours to discuss those results along with the results of Ms. [REDACTED]'s assessment. That meeting was again attended by the Parents, Ms. [REDACTED], and the school-based team members. Ms. [REDACTED] had recently received information from Ms. [REDACTED] and was incorporating the Student's speech language information from [REDACTED] into the IEP. Central to that meeting was the discussion of the Student's performance on the DAS-II, WISC-V, and WJ-IV and his concerning decline as compared to his 2018 results. Dr. [REDACTED] described the discussion as very collaborative during which the Parents asked appropriate questions and he provided answers. The Parents and Ms. [REDACTED] focused on the Student's history of trauma, with the Parents sharing information regarding the Student's anxiety over the fear of losing his Parents and his participation in an [REDACTED] group at [REDACTED]. Ms. [REDACTED] asked the Parents to share their input regarding the Student's performance so far that school year, and they explained that the Student was doing very well at [REDACTED], that his performance had improved, and they saw him taking academic and social risks and excelling. Ms. [REDACTED] also invited the Parents to share their thoughts and they explained that they believed the Student needed the small class sizes and emotional supports that he was receiving at [REDACTED].

During the October meeting, Ms. [REDACTED] and the Parents reminded the team that the Student had a history of significant trauma and abuse. When it became apparent to the Parents that some of the school-based team members, including Ms. [REDACTED] and Dr. [REDACTED], had not read the report detailing the Student's history of abuse, they grew frustrated and upset, explaining that MCPS all along had failed to account for the Student's history of trauma in considering his social

emotional needs, a point which is reflected in both Ms. ██████'s and MCPS's meeting notes. (Parents Ex. 12-4; MCPS Ex. 21-3). Ms. ██████, who had read the report, said she would make sure that the rest of the school-based team members would read it as well.

Ms. ██████ testified that at that point, she called the meeting to a close. She had some unanswered questions about the Student's math course at ██████ and wanted more information regarding the Student's present levels of performance, a point that is corroborated by Ms. ██████'s testimony. (Tr. vol. 1, at 167). However, more importantly, Ms. ██████ stopped the meeting to receive more information regarding the ██████ group available to the Student at ██████ because it was something that the school-based team members were unaware of, given it had not been included in ██████ IEP. Ms. ██████ testified:

Then the parents had mentioned the ██████ . . . and it wasn't something that we had been aware of. It's not on ██████ IEP . . . but the parents were telling us about this access that he had during the school day. So we wanted to learn more about it, and I was actually the person who stopped the meeting, because I didn't feel comfortable making decisions about the counseling services without having more information about what that was that the parents were talking about.

(Tr. vol. 3, at 586). Dr. ██████ also testified that he needed more time to compare the counseling supports that the Student was receiving at ██████ but that had not been reflected in ██████'s IEP in order to make an appropriate recommendation. (Tr. vol. 4, at 916-17).

Given the Parents' and Ms. ██████'s emphasis on the Student's history of trauma and the Parents' frustration based on their belief that MCPS had never adequately addressed that history, it was reasonable for Ms. ██████ to call the October meeting to a close, in part to afford the school-based team members an opportunity to review the report detailing the childhood abuse as the Parents had directly requested they do. This demonstrates that the school-based team members were receptive to the information being provided to them by the Parents and Ms.

██████████ and maintained an open mind, especially regarding the trauma issue that the Parents were most focused on. The school-based team members wanted to fully consider and address those concerns. Therefore, the team agreed to reconvene another meeting to complete reviewing and revising the IEP and to discuss services and placement with the benefit of being fully informed regarding the Student's history of trauma. An IEP meeting was initially scheduled for November and then December 2021. The meetings were rescheduled at MCPS's request.

A fourth and final meeting was convened on January 13, 2022, attended by the Parents, Ms. ██████████, ██████████ staff, and the school-based team members. Ms. ██████████ began by reviewing the changes to the IEP discussed at the last meeting and Ms. ██████████ reported that she had received updates from Ms. ██████████. Picking up on the team's October 27, 2021 discussion related to trauma, Ms. ██████████ shared that to address the Student's need for social emotional support and in light of the adoption affinity group that the Student participated in at ██████████ ██████████ Dr. ██████████ recommended that the Student receive thirty minutes of individual psychological counseling per week.

After a discussion of proposed services for occupational therapy by Ms. ██████████ and for speech language therapy by Ms. ██████████, Mr. ██████████ shared an update regarding the Student's progress. Then Ms. ██████████ began describing the recommended classes for the Student. Ms. ██████████ described this discussion in the meeting as a very open and honest discussion between all the parties and testified that the team made changes to the draft IEP during the meeting. The Parents shared their concern with the Student being in large size classes and asked about a cohort of peers, which Ms. ██████████ addressed. Ms. ██████████ raised questions regarding what supports would be available if the Student were struggling in the proposed honors classes, which Ms.

█████ addressed. Ms. █████ asked how speech language services would be delivered in a large classroom setting, which Ms. █████ answered.

Ms. █████ then asked that the team's discussion of recommended services be connected to their discussion from the October meeting, when the Parents had expressed their concerns related to the Student's history of trauma. Ms. █████ and Dr. █████ explained that because the Student's cognitive scores showed a decline, the Student was no longer eligible for the █████ program. Ms. █████ stated that the school-based team members were recommending █████'s █████ program. Ms. █████ testified:

We were given the [occupational therapy], speech language and course work services. We asked some questions. We started connecting back the recommendation to the previous conversations and the evaluation results. And then in that conversation, we named what placement we believed was needed. I did that. And then Ms. █████ shared what MCPS was recommending.

(Tr. vol. 1, at 84).

The Parents home in on this point in the meeting, when Ms. █████ stated that the school-based team members were recommending █████'s █████ program, as constituting the predetermination. However, according to Ms. █████ she first "named what placement we believed was needed," i.e., █████, to which Ms. █████ responded with the school-based team's recommendation. The discussion of placement began when Ms. █████ initiated it, just as she had initiated a discussion regarding placement in the October meeting when Ms. █████ responded that the school-based team members needed more information and were not ready to discuss placement.

The school-based team members did not decide the Student's placement before developing the IEP. By the point in the meeting when Ms. █████ stated that the school-based team members were recommending █████'s █████ program, the IEP had been developed

with full and meaningful parental participation based on the October 27, 2021 meeting and what had transpired until that point in the January 13, 2022 meeting. *Cf. Spielberg*, 853 F.2d at 259 (finding predetermination where school system decided to place the student before developing an IEP). Here, as in *Doyle*, “the IEP goals and objectives were drafted, and the IEP was in all material respects completed, before any specific placements were discussed.” *Doyle*, 806 F. Supp. at 1262. There were no components of the Student’s IEP left to develop. Ms. [REDACTED] testified that, “at that point in the meeting, we had already gone through the services. We had gone through the courses. We’d gone through essentially everything.” (Tr. vol. 3, at 629). The team had worked together to develop the Student’s present levels of academic achievement and functional performance; instructional and assessment accommodations; supplemental aids, services, and program modifications and supports; academic and behavioral goals; and special education and related services. Therefore, the final item to discuss was placement.

“Predetermination occurs when the state makes educational decisions *too early* in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team.” *R.L.*, 757 F.3d at 1188 (emphasis added). When Ms. [REDACTED] stated that the school-based team members were recommending [REDACTED]’s [REDACTED] program, by that point in the January meeting, it was not too early for the team to offer its placement recommendation; the issue of placement had been raised by Ms. [REDACTED] and was ripe for discussion.

The Parents also pointed to a line in Ms. [REDACTED]’s meeting notes that states “Ms. [REDACTED] confirms that they did make the decision,” (Parents Ex. 16-5), to suggest that Ms. [REDACTED] “doubled down” and to demonstrate further evidence of predetermination by the school-based team members. As I explained above, I do not consider Ms. [REDACTED]’s notes the authority on

statements made during the IEP team meetings. Ms. [REDACTED] testified that, “[Ms. [REDACTED]] said, just to be clear, you’ve decided the placement before this meeting, and Ms. [REDACTED] confirmed it, and said yes, we’ve already made a decision.” (Tr. vol. 2, at 419). Mr. [REDACTED] testified that “Ms. [REDACTED] followed up with a question of just to confirm, ‘You’ve made the decision prior to the meeting and without input from the parents and [REDACTED]?’ and she said yes.” (Tr. vol. 3, at 505). On cross-examination, however, Ms. [REDACTED] clarified her testimony and offered the following explanation for this line from her notes attributed to Ms. [REDACTED]:

A. My testimony is that Ms. [REDACTED] said that they determined it before the meeting.

Q. She doesn’t say that before the meeting. Even in your own notes. In your notes you don’t say she said that before the meeting.

A. Right. I said MCPS has already decided. [Ms. [REDACTED]] confirmed that they did make the decision. Since nobody else spoke in that meeting, it must have been before the meeting happened.

(Tr. vol. 1, at 206).

Therefore, Ms. [REDACTED] explained that she based her conclusion that the school team “made the decision” before the January meeting on the fact that “nobody else spoke in that meeting.” However, as the summary of the meeting above makes clear, prior to Ms. [REDACTED] stating that the school-based team members were recommending [REDACTED]’s [REDACTED] program, Dr. [REDACTED] spoke regarding the addition of ADHD as a primary disability on the IEP and regarding the Student’s decline in test scores and ineligibly for the [REDACTED] program; Ms. [REDACTED] spoke to answer the Parents’ questions about the cohort of peers; Ms. [REDACTED] spoke regarding the provision of occupational therapy services; and Ms. [REDACTED] spoke regarding the speech language therapy services and engaged in a conversation about integration with Ms. [REDACTED]. And after Ms. [REDACTED] stated that the school-based team members were recommending



██████████'s ██████████ program, Ms. ██████████'s own notes demonstrate much conversation ensued, including a discussion with Dr. ██████████ about the impact of trauma on processing speed and the suggestion of the flash pass; a discussion about ██████████ and transportation to ██████████; a discussion about the Student's social and emotional skills by Ms. ██████████ and Mr. ██████████; and a discussion about the Student's need for trauma support by Ms. ██████████ (Parents Exs. 16-4 and 16-5).

The Parents argued that Ms. ██████████ primarily did the talking on behalf of the school-based team members, again suggesting that the school-based team members must have decided the Student's placement before coming to the January 13, 2022 meeting. Ms. ██████████ served as the chairperson of the IEP team. Ms. ██████████ acknowledged that Ms. ██████████ "spoke more than the rest of us probably." (Tr. vol. 4, at 824). Ms. ██████████ explained that she wanted to be respectful of Ms. ██████████'s role and that she did not voice disagreement with Ms. ██████████ because she agreed with the proposal to place the Student at ██████████'s ██████████ program. Ms. ██████████ testified:

Ms. ██████████ is the chair of the meeting. It is her job to speak primarily on behalf of the school system because she's the IEP Chair . . . . We had all spoken . . . She's summarizing and reinforcing what it is that we've all already said. I know if I had disagreed with her, I would have spoken up. No one has ever accused me of not speaking before, but I mean, she's the chair of the meeting. So it's her job to kind of all bring it all back together and speak on behalf of the team . . . . So when that was proposed, I didn't disagree with it, because I agreed with the proposal.

(Tr. vol. 3, at 629, 633).

Ms. ██████████ testified that she also did not express disagreement with Ms. ██████████'s proposal because she considered it an appropriate placement for the Student. She stated:

As the IEP chair, you know, [Ms. ██████'s] job is to take all information that has been discussed about the present levels, the accommodations, the goals, the services and to make the recommendation. It certainly is a team discussion at that point in time. If any of us had been in disagreement with the recommendation we certainly would have spoken up but based on what the services are able to be provided at [████████] and based on all the information we had [about the Student], I know I personally didn't speak up because I felt like it really met his needs. I can't think of a better placement for him than that recommendation.

(Tr. vol. 5, at 1166-67). Ms. ██████ testified that when later asked in the meeting whether the rest of the school team agreed with the recommendation, "I agreed . . . I [s]hook my head," and that Ms. ██████ stated that she agreed. (*Id.* at 1170).

The Parents do not dispute that they were actively involved in the January 13, 2022 IEP meeting but argued that there was no discussion once they understood that the school-based team members had been describing a program and a placement that they had already decided.<sup>21</sup> However, this argument suggests that the Parents were involved until they disagreed with the school team's recommendation. Ms. ██████ testified that "[o]ur team, even if the parents disagree with us, it is our job to make a placement decision and we did that at this meeting." (*Id.* at 1089). There is a distinction to be made between the Parents disagreeing with or disliking the school-based team members' recommendation and the Parents being denied the opportunity to meaningfully participate in the development of the Student's IEP. To suggest otherwise would ignore the reality that parents and school-based team members are permitted to (and do, as they did in this case) disagree under the IDEA. *See* 34 C.F.R. § 300.148(b); 64 Fed. Reg. at 12473–74. But absent a showing that the school-based team members denied the Parents their right to an opportunity to meaningfully and fully participate in the development of the IEP, that disagreement does not equate to predetermination in violation of the statute. *See Nack*, 454 F.3d

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<sup>21</sup> As to the Parents' claim that there was no discussion after Ms. ██████ stated that the school-based team members were recommending ██████'s ██████ program, as summarized above, that is simply unsupported by the record.

at 610. “The right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such.” *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003).

This was not a situation where the school-based team members independently developed the IEP and then simply presented it to the Parents for ratification. *See Vashon Island Sch. Dist.*, 337 F.3d at 1131. At both the October 27, 2021 and January 13, 2022 meetings, the school-based team members heard and considered input from the Parents and Ms. [REDACTED], with contributions by Ms. [REDACTED] and Mr. [REDACTED] at the January meeting. As the court did in *Nack*, 454 F.3d at 610, where it considered three separate IEP meetings to develop a student’s IEP for the same school year, here, I find it is appropriate to consider the October meeting in conjunction with the January meeting, given both meetings were convened to review and revise the same IEP, and the January meeting was held to follow up on the team’s trauma-related discussions from October. And as in *Nack*, here, the Parents were given every opportunity to comment on and contribute to the IEP personally, through their educational consultant, Ms. [REDACTED], the [REDACTED] staff’s written feedback to the IEP team, and the attendance of Mr. [REDACTED] and Ms. [REDACTED] at the January meeting.

The Parents acknowledged that they were fully and freely permitted to share information, as did Ms. [REDACTED].<sup>22</sup> On cross-examination, Ms. [REDACTED] acknowledged the Parents’ meaningful participation in the meetings as well as the collaboration among the team:

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<sup>22</sup> On redirect examination of Ms. [REDACTED]:

**Q.** Did Montgomery County ever say in any of these IEP meetings that you know, well, yeah, you have a right to talk but you know, we’re the experts and you know – what you think, parents, isn’t important? Did they say anything like that ever?

**A.** No.

(Tr. vol. 1, at 223).

**Q.** Ms. [REDACTED], during the course of these IEP meetings that took place from April of 2021 to January of 2022, did MCPS ever prevent you from bringing anyone that you wanted to come to the IEP meetings?

**A.** No.

**Q.** Did they say you can't, you know, you can't bring anyone from [REDACTED] or anyone from your lawyer's office or Ms. [REDACTED] . . . at any point did MCPS say, you know, say you can't bring someone that you wanted to have there[?]

**A.** No, no.

**Q.** Did they ever tell you or [Mr. [REDACTED]] that you could not attend the meetings?

**A.** No.

**Q.** Did they ever prevent you from speaking at the meetings?

**A.** No.

**Q.** Did they ever prevent you from providing information to the team?

**A.** No.

**Q.** Did they ever deny you an IEP meeting when you requested one?

**A.** Deny, no. Postpone and delay, yes.

**Q.** Okay, but you're not happy with the timing of the IEP, but in terms of participation in the IEP meetings, do they ever say if you ask for an IEP meeting, they say we're not going to hold an IEP meeting?

**A.** No.

**Q.** Okay. Did they ever deny you the ability to speak up at the meetings?

**A.** In what years are you referring to?

**Q.** I'm just talking about this past school year.

**A.** No.

Q. Okay. Did they ever deny Ms. [REDACTED] the opportunity to speak up at the meetings?

A. No.

Q. Or [REDACTED]?

A. No.

Q. Did they ever not accept documents that you provided?

A. No, I don't believe so.

Q. So, you were allowed to participate in the meeting, would you agree with me?

A. Which meeting are you referring to?

Q. The meetings that took place in developing – I'm talking from April 2021 that are the subject of this hearing, through January.

A. Yes. We were what is the question? Did we participate, or were we present?

Q. You participated in the meetings, right?

A. Yes.

Q. And there was a lot of collaboration in terms of, you know, accommodations, what should we add, what should we take out, things of that nature, there's a lot of collaboration in those meetings, right?

A. Yes.

(Tr. vol. 2, at 429-31).

The January 13, 2022 IEP itself demonstrates the high level of collaboration, incorporating significant input from the Parents and [REDACTED]. (Parents Ex. 15; MCPS Ex. 26).

Even if the school-based team members had come to the January 13, 2022 with a proposal in mind, they were not prohibited under the IDEA from doing so. *See Hanson*, 212 F.

Supp. 2d at 486; *Nack*, 454 F.3d at 610. In this case, the school-based team members remained open to input from the Parents and Ms. [REDACTED]. As demonstrated by Ms. [REDACTED]'s explanation for stopping the October meeting, the school-based team members took the Parents' feedback and suggestions seriously and evinced an open mind. Ms. [REDACTED] testified:

I mean, if we had already made the decision, then we wouldn't have stopped the meeting in October, because we were already at the services point in October. We stopped the meeting because we [had] questions about services and questions about what [the Student] still needed, and we wanted to view all of that and come back to the table again. You know, the [P]arents asked the whole team to read all the other reports, and we wanted to do that before we made our recommendation. So if we were pre-deciding, we wouldn't have come back for another two-hour meeting. You know, we came here. We listened.

(Tr. vol. 3, at 632). Ms. [REDACTED] went on to explain that the process was collaborative and the school-based team members made changes based on the feedback received from the Parents, including changing the Student's proposed English class from honors to on-level given the Parents' concerns related to the more intensive writing expectations in the honors class. Also instructive from this portion of Ms. [REDACTED]'s testimony, she stated, "*we came . . . . We listened.*" (*Id.*) (emphasis added). This demonstrates that the school-based team members came to the IEP table with an open mind and were "*willing to listen to the parents.*" *Nack*, 454 F.3d at 610 (emphasis added) (quoting *Knox Cnty. Schs.*, 315 F.3d at 694).

The Parents also argued that the ability of the school-based team members to speak to what the program at [REDACTED] offered during the January 13, 2022 meeting suggested that the school-based team members decided the Student's placement before that meeting. However, Ms. [REDACTED] testified that she knew that [REDACTED] would be unable to support the Student's recommended services because it did not offer an appropriate [REDACTED] resource classroom or reading intervention class, or provide special education support for honors level classes. Ms.

█████ explained that she had that “pre-knowledge,” (Tr. vol. 3, at 632), and was familiar with the program available at █████ and other MCPS high schools based on her experience in her role as a twice exceptional instruction specialist for MCPS’s Office of Curriculum and Instruction. However, even if the school-based team members had spoken with █████ staff prior to the January meeting to understand what was offered there, on these facts, that would have constituted preparation by the team, not predetermination.

The Parents argued that the school-based team members did not respond in the January meeting to the statements by Ms. █████ and Ms. █████ that the school-based team members decided on █████’s █████ program without hearing from the Parents or █████, suggesting perhaps a guilty conscience that the school-based team members had predetermined the Student’s placement. On this point, Ms. █████ testified that she did not believe those statements by Ms. █████ and Ms. █████ were literal, but hyperbole. Ms. █████ stated:

I took some of it to be kind of hyperbolic, because to say that we hadn’t heard from the parents or █████, we’re almost at four hours in this meeting, you know, over two different days. Most of our data comes from parents and the █████. We’ve heard from them the whole time. They’ve been a part of the discussion. They have been sharing the discussion, you know. They’ve participated fully, and so, when she said, you know, “MCPS has already decided,” well, we had made our proposal.

(*Id.* at 630). Ms. █████ also testified that at some point, it became a circular discussion and she did not respond because, “I felt that [the Parents] were upset and responding in any way would be rude or misconstrued and so I did not respond.” (Tr. vol. 4, at 783). Ms. █████’s explanation for why she declined to respond is in no way indicative of a refusal by MCPS to consider the Parents’ input. Instead, because their input had been previously considered and the discussion became circular, she declined to respond further.

Dr. [REDACTED] testified that he took the statements by Ms. [REDACTED] and Ms. [REDACTED] that the school-based team members decided on [REDACTED] s [REDACTED] program without hearing from the Parents or [REDACTED] to be their opinion, “and we disagreed with their opinion.” (Tr. vol. 5, at 1032-33). He also explained:

[A]t that point [the Parents] were really upset and they were giving their strong opinion that they didn’t agree with our opinion and it wasn’t extended. It was a long meeting so at that point I felt that less was best to say because the meeting was going to end and [the] [P]arents had their opinion, we had based on hearing everyone giving what our proposal was and there was a disagreement. I felt that it would just be a good practice to be silent and to agree to disagree.

(*Id.* at 1070).

Ms. [REDACTED] testified that “at that time, I didn’t speak up. I kind of felt like we were getting to the point in the meeting where we were saying all those same things over and over again.”

(*Id.* at 1154). Ms. [REDACTED] also testified that she “thought it would be more antagonizing” to respond at that point and that she “thought it was time to move forward.” (*Id.* at 1167).

I also cannot ignore the circumstances under which the January 13, 2022 meeting was conducted. The Parents had been at a due process hearing in late 2020 with Ms. [REDACTED] and Ms. [REDACTED] testifying as MCPS witnesses, the Parents had appealed the unfavorable decision, and that case was pending on appeal before the United States District Court for the District of Maryland at the time. It is reasonable to consider that those circumstances may have had a chilling effect.

The Parents argued that MCPS never disputed or denied the Parents’ multiple, clear complaints of predetermination. The Parents also argued that MCPS ignored their claim of predetermination by omitting that claim from MCPS’s prior written notice and meeting notes, which they described as the “smoking gun.” The Parents argued that MCPS tried to “cover up” and hide that they prevented consideration of the Parents’ input in the IEP process. MCPS



explained that its meeting notes and prior written notices are not required to be a transcript but a summary of what transpired and did capture the Parents' disappointment. *See* 20 U.S.C.A. § 1415(c)(1); *see also* 34 C.F.R. § 300.503(b) (prior written notice content requirements).

MCPS's notes from the January 13, 2022 meeting stated, "Mr. ██████ said that he and Ms. ██████ disagree with the placement decision for the ██████ program at ██████ High School and are very disappointed in this recommendation." (MCPS Ex. 25-4). And the prior written notice following the same meeting stated, "[The Parents] disagree with the recommendations made by the ██████ High School IEP Team and feel that their son's needs are being me[t] at ██████. [The Student]'s [P]arents would like to have [his] case referred for consideration of another placement through the Central IEP Process in MCPS." (MCPS Ex. 24-1). Although MCPS's notes and the prior written notice do not reference the statements by Ms. ██████ or Ms. ██████ that the school-based team members "decided" on ██████'s ██████ program without hearing from the Parents or ██████, they certainly capture the disagreement by and disappointment of the Parents and cannot be said to constitute a "cover up" or an admission by omission.

Additionally, Ms. ██████, who contributed to the MCPS meeting notes, explained that she did not understand that the Parents had alleged in the January meeting that the school-based team members had predetermined the Student's placement. Ms. ██████ testified:

I didn't realize that [predetermination] was what the actual accusation they were making. I genuinely . . . thought that they were being, they were speaking over the top to define hyperbole. That they were upset because of everything that we had talked about and gone through and they were unhappy and that's why they had said that we made a decision without hearing from them.

(Tr. vol. 4, at 759-60). Similarly, Ms. ██████ testified that during the January meeting, she did not understand that the Parents were accusing the school-based team members of

predetermination. And Ms. [REDACTED] testified that, during the meeting, she did not recall the term “predetermination” being used by the Parents or Ms. [REDACTED].

Ms. [REDACTED] testified that once she received Ms. [REDACTED]’s written response to the prior written notice following the January meeting, which stated that “The [P]arents did not get to hear input on placement from the [REDACTED] team, and instead were told by Ms. [REDACTED] that she could ‘speak for the team’ and shared that they had decided services and a placement prior to the IEP meeting,” (Parents Ex. 19), she did not respond because “I knew that in my opinion [predetermination] wasn’t done and I—you know, I knew the parents weren’t going to place [the Student] at [REDACTED]. They disagreed with it and would probably exercise their due process rights.” (Tr. vol. 5, at 1117).

The Parents made clear that they were not alleging that any delays by MCPS in developing the IEP constituted a standalone procedural violation that resulted in the denial of a FAPE to the Student but argued that the delays exacerbated the predetermination violation. Given that I find no predetermination in this case, as explained above, I find no merit to this argument. With respect to any delays in the process, particularly the time it took over the summer to coordinate the psychological evaluation with Dr. [REDACTED] and the time it took between the October 2021 and January 2022 meetings, the Parents failed to offer evidence to demonstrate that the timeline was unreasonable under the circumstances. *See Gregory R. ex rel. Gregory R. v. Penn Delco Sch. Dist.*, 262 F. Supp. 2d 488, 491 (E.D. Pa. 2003) (finding school system’s “dilatory carelessness” unreasonably delayed the initiation of review proceedings by issuing an IEP approximately one year after the parents made their written request); *see also Kitchelt ex rel. Kitchelt v. Weast*, 341 F. Supp. 2d 553, 557 (D. Md. 2004) (exercising “equitable discretion” in considering approximately seven-week delay “when the MCPS had no contact with the

[parents]” in awarding parents tuition reimbursement for one-half of student’s annual private school tuition).

For the reasons stated above, the Parents have failed to meet their burden to demonstrate that MCPS predetermined the Student’s placement prior to the January 13, 2022 IEP team meeting. I conclude that MCPS did not decide the Student’s placement before developing an IEP and provided the Parents the opportunity for meaningful and full participation as required under the IDEA. As no procedural violation occurred, the Parents were not impeded from the opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student. Therefore, the Student was not denied a FAPE. *See* 20 U.S.C.A. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).

## **II) Substantive Denial of FAPE**

Next, I turn to what the Parents consider their substantive argument regarding a denial of a FAPE to the Student. For the reasons that follow, I conclude that the January 13, 2022 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances in the LRE. Accordingly, MCPS did not deny the Student a FAPE for the 2021-2022 school year when it proposed placement in the [REDACTED] program at [REDACTED].

### *Parents’ Position*

The Parents argued that MCPS further denied the Student a FAPE when it proposed placement in the [REDACTED] program at [REDACTED] pursuant to the January 13, 2022 IEP, which they believe is inappropriate. Specifically, the Parents challenge [REDACTED]’s large class sizes based on the Student’s need for attention and monitoring, the proposed amount of special education service hours, and [REDACTED]’s inability to address the Student’s history of trauma, including the lack of an [REDACTED] group. The Parents argued that the proposed related services at

██████████, including the individual psychological counseling and flash pass, are insufficient to address the Student's history of trauma. The Parents argued that without understanding the Student's history of trauma, MCPS could not have understood the Student and his needs. Specifically, the Parents point to Dr. ██████████' psychological report, which does not discuss the Student's history of trauma and abuse, as evidence that MCPS's approach to the Student's trauma was inadequate.

The Parents explained that during their February 2022 visit to ██████████, Ms. ██████████ stated that, had the lawyers not been involved, she would have sent the Student's case to the central IEP team for it to consider the Parents' request for private placement. The Parents argued that this statement indicates that Ms. ██████████ thought that the Student's placement at ██████████ should have been considered.

The Parents argued that they participated in the process in good faith and had a right under the IDEA to request that MCPS go through the IEP process and though they were "mostly committed" to private school, they were not "absolutely committed."

The Parents argued that the Student has received significant benefit at ██████████ and that MCPS did not controvert that evidence. As a remedy, the Parents argued that the Student should be placed at ██████████ and that they should therefore receive tuition reimbursement for the 2021-2022 school year.

#### *MCPS's Position*

MCPS argued that the IEP it proposed for the 2021-2022 school year is appropriate and confers upon the Student a FAPE in the LRE. MCPS argued that although the Parents are only disputing the January 13, 2022 IEP's special education service hours and placement, those IEP elements cannot be considered in isolation. MCPS argued that the IEP must be considered in its

totality and that the twenty-eight supplemental aids and services and twenty-seven instructional accommodations, which the Parents do not challenge, were large components of the Student's IEP. MCPS described the January 13, 2022 IEP as "highly intensive" with a lot of supports throughout the school day to address all the Student's executive functioning, attention, social emotional, and processing speed needs. MCPS argued that considering the Student's twice exceptional profile, MCPS's proposed program was tailored to meet his needs.<sup>23</sup>

To address the Parents' concerns regarding large class sizes and the Student's processing speed, MCPS argued that the IEP proposed small groupings, monitoring through the [REDACTED] resource class, co-taught classes, pre-teaching, flexible groupings, extended time, breaks, chunking, advance notes, and pacing of curriculum. And to address the trauma, though MCPS points to the fact that the Student has no emotional disability or clinical diagnosis, MCPS proposed counseling and a flash pass, which would also grant the Student access to [REDACTED]'s onsite wellness center. MCPS argued that the [REDACTED] group available to the Student at [REDACTED] is not an IEP service but an extracurricular group.

MCPS argued that [REDACTED] is the LRE and that the Student has the ability to be with nondisabled peers based on his participation in sports groups outside of [REDACTED]. MCPS argued that [REDACTED] is more restrictive than the program proposed by MCPS. MCPS argued that the Student does not require the restrictiveness of [REDACTED], which does not offer exposure to nondisabled peers.

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<sup>23</sup> MCPS argued that the Parents' concerns related to [REDACTED]'s large class sizes and the Student's processing speed and trauma were all addressed at the 2020 due process hearing with respect to a similar program at [REDACTED], the [REDACTED] program, and that the 2020 hearing decision determined that a FAPE had been provided to the Student. Although the 2020 hearing decision is in evidence and I may consider it, it has no binding value or precedential effect here. Further, the 2020 hearing decision was specific to that case and considered the Student's 2019-2020 and 2020-2021 school years. Although the issues raised here are similar, they are distinct and apply to since-occurring events for the Student's 2021-2022 school year. Accordingly, herein, I make findings of fact and draw conclusions independent of the 2020 hearing decision.

MCPS argued that though a comparison is not required, the program it proposed better meets the Student's needs than [REDACTED]. MCPS argued that given that the Student had been at [REDACTED] in small classes for two years by the time he submitted to the educational assessment and psychological evaluation in 2021, a greater increase in his testing scores was expected. MCPS pointed to the Student's drop in eight out of ten subtests on the WJ-IV and cognitive scores to suggest that the Student was not performing. MCPS argued that his decline suggested that there was a lack of challenge at [REDACTED] and showed that he had not been receiving the stimulation and cognitive enrichment that he requires. MCPS argued that [REDACTED] is not an appropriate placement because it does not provide the twice exceptional rigor in curriculum and knowledge base and the honors high school curriculum that the Student needs, does not provide the cognitive peer group that the Student needs, and does not permit exposure to nondisabled neurotypical peers.<sup>24</sup>

With respect to the Parents' visit to [REDACTED], MCPS argued that the Parents' allegations against Ms. [REDACTED] are disingenuous and that Ms. [REDACTED] never said that she would have referred the Student's case to the central IEP team but for the involvement of the lawyers.

MCPS argued that no matter what placement it proposed, the Parents were wedded to [REDACTED], and their desire for [REDACTED] and bias against MCPS were evident throughout the process.

MCPS argued that the Student would benefit from the program it proposed, that MCPS offered the Student a FAPE in the LRE, and that the Parents are therefore not entitled to receive tuition reimbursement for the 2021-2022 school year.

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<sup>24</sup> Because I conclude that MCPS made a FAPE available to the Student for the 2021-2022 school year when it proposed placement in the [REDACTED] program at [REDACTED], I do not consider whether the Student received any educational benefits at [REDACTED].

### *Applicable Legal Framework*

Among Congress’s stated purposes in enacting the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education 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). A FAPE includes both “special education” and “related services.” *Id.* § 1401(9), (26), (29). A State must provide a disabled child with special education and related services in conformity with the child’s IEP. *Id.* § 1401(9)(D).

As explored above, an IEP must be drafted in compliance with a detailed set of procedures and requires careful consideration of the child’s individual circumstances. *Id.* § 1414. The IEP is required to include several components, including a “statement of the child’s present levels of academic achievement and functional performance”; a “statement of measurable annual goals, including academic and functional goals”; a “description of how the child’s progress toward meeting the annual goals . . . will be measured”; and a “statement of the special education and related services and supplementary aids and services . . . to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child.” *Id.* § 1414(d)(1)(A)(i)(I)–(IV). “An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

In *Rowley*, the Supreme Court held that the IDEA establishes a substantive right to a FAPE for certain children with disabilities. In defining the contours of what the IDEA requires, the *Rowley* Court explained that if the IEP is “reasonably calculated to enable [a] child to receive

educational benefits,” the child has received a FAPE under the statute. 458 U.S. at 207. More recently, in *Andrew F.*, the Supreme Court expounded upon *Rowley*’s “reasonably calculated” standard. “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.” 137 S. Ct. at 999. The Court stated that “crafting an appropriate program of education requires a prospective judgment by school officials” that “contemplates . . . [a] fact-intensive exercise.” *Id.*

The Court explained that a child’s IEP “must be appropriately ambitious in light of his circumstances,” and afford “the chance to meet challenging objectives.” *Id.* at 1000. The Court offered guidance suggesting that meeting the unique needs of a child with a disability “typically means [] providing a level of instruction reasonably calculated to permit advancement through the general curriculum,” and that “advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *Id.* However, the Court explained, “the IDEA cannot and does not promise any particular educational outcome. No law could do that—for any child.” *Id.* at 998 (internal quotation marks omitted) (citation omitted). Ultimately, “[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Id.* at 999 (emphasis in original).

In addition to the IDEA’s requirement that a disabled child receive educational benefits and make appropriate progress, “[t]o the maximum extent appropriate,” the child must be placed in the “least restrictive environment.” 20 U.S.C.A. § 1412(a)(5)(A). The statute provides that children with disabilities be:

[E]ducated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs *only when* the nature or severity of the disability of a child is such that education in regular



classes with the use of supplementary aids and services cannot be achieved satisfactorily.

*Id.* (emphasis added); *see* 34 C.F.R. § 300.114 (setting forth LRE requirements).

As the Supreme Court explained, “[In *Rowley*], the Court recognized that the IDEA requires that children with disabilities receive education in the regular classroom whenever possible.” *Endrew F.*, 137 S. Ct. at 999 (internal quotation marks omitted); *see DeVries ex rel. DeBlaay v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989) (“Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the [IDEA].”).

However, because educating children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires school systems to “ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.115(a). The continuum must include “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions” and “[m]ake provision for supplementary services . . . to be provided in conjunction with regular class placement.” *Id.* § 300.115(b)(1), (2).

Consequently, removal of a child from a regular educational environment may be necessary when the “nature or severity” of the child’s disability is such that education in a regular classroom “cannot be achieved satisfactorily.” 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a). In such cases, a FAPE might require placement of the child in a private school setting that would be fully funded by the school system. *See Gadsby*, 109 F.3d at 950 (“IDEA contemplates the possibility that a child would be placed in a private school at public expense where a regular public school could not meet his needs.” (citing *Sch. Comm. of Burlington v.*

*Dep't of Educ.*, 471 U.S. 359, 370 (1985))). However, a school system is “not require[d] . . . to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility.” 34 C.F.R. § 300.148(a).

In instances where a school has failed to offer a child a FAPE, a court may “grant such relief as the court determines is appropriate.” 20 U.S.C.A. § 1415(i)(2)(C)(iii). In circumstances where parents disagree with an IEP proposed by the school system and unilaterally change their child’s placement pending review, if the court ultimately determines that the proposed IEP was inappropriate, such relief may include retroactive reimbursement. As the Supreme Court held in *Burlington*, “[B]y empowering the court to grant ‘appropriate’ relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.” 471 U.S. at 370. Subsequently, in *Florence County School District Four v. Carter ex rel. Carter*, the Supreme Court held that if a school district’s proposed IEP is found to be inappropriate under the IDEA, parents may be entitled to reimbursement for private school expenses in instances of unilateral placement even if that private school does not meet the IDEA’s FAPE requirements but as long as “the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” 510 U.S. 7, 11 (1993) (quoting *Rowley*, 458 U.S. at 207); see 34 C.F.R. § 300.148(d) (limiting reimbursement in some instances).

*The January 13, 2022 IEP Was Reasonably Calculated to Enable the Student to Make Progress Appropriate in Light of His Circumstances*

As set forth above, the Parents do not challenge the educational coding, the present levels of performance, the instructional and testing accommodations, the supplemental aids and supports, the goals and objectives, or the amount of related services (occupational therapy,

speech language therapy, and counseling) on the August 31, 2021 and January 13, 2022 IEPs proposed by MCPS for the 2021-2022 school year. Nor do the Parents challenge the ability and resources of ██████████ to implement the August 31, 2021 and January 13, 2022 IEPs.

Therefore, I consider the Student's January 13, 2022 IEP and focus my analysis on those three aspects that the Parents do challenge—██████████'s large class sizes based on the Student's need for attention and monitoring; the proposed amount of special education service hours; and Northwood's inability to address the Student's history of trauma, including the lack of an ██████████ group. As the Court explained in *Andrew F.*, "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created," and is necessarily a fact-intensive exercise. 137 S. Ct. at 1001. Accordingly, I consider each aspect separately in turn and conclude that the January 13, 2022 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances and in the LRE.

#### Class Size

First, the Parents challenge ██████████'s large class sizes based on the Student's need for attention and monitoring. The Parents argue that the Student's IEP does not appropriately account for the Student's executive functioning, processing speed, attention, and social emotional/behavioral needs in a medium to large classroom setting. For the reasons that follow, I conclude that it does.

At ██████████, a co-taught or supported honors class with two teachers ranges from twenty-eight to thirty-two students. The reading intervention and ██████████ resource classes are smaller. Ms. ██████████ recalled observing fifteen to eighteen students in a ██████████ resource class at the time of her visit, though Ms. ██████████ testified that a ██████████ resource class with one teacher is generally limited to eleven students.

The Parents argued that ██████'s class sizes are inappropriate given the Student's executive functioning, processing speed, attention, and social emotional/behavioral needs. The Parents expressed a preference for the small class sizes that the Student is accustomed to at ██████. However, the Parents did not offer evidence to support a finding that the Student requires small class sizes or that ██████'s class sizes are inappropriate in light of the Student's circumstances, especially considering the number of supports and accommodations that the IEP proposed to specifically address those needs.

MCPS argued that I accord the testimony of Ms. ██████ less deference because she never spoke with the Student, only observed him once, and had no knowledge of ██████ or other MCPS high schools, including the curriculum. Although Ms. ██████ was hired by the Parents to serve as their educational consultant, I found her testimony to be credible. She was familiar with the Student's performance at ██████, attended all the relevant IEP meetings, and understood the IEP development process based on her experience working with other families and their children.

In explaining why she did not believe that the Student's IEP or proposed placement at ██████ was appropriate, Ms. ██████ testified that the Student's "processing speed is really low and so we had major concerns about [MCPS] being able to provide him the level of support he would need in larger classrooms." (Tr. vol. 1, at 95-96). The parties do not dispute that, at the time of testing, the Student demonstrated a very low processing speed in the first or second percentile. Discussing ██████'s class sizes, Ms. ██████ testified that "given [the Student]'s ADHD executive functioning, that was a very high-level potential distractibility." (Tr. vol. 2, at 303). However, other than concerns related to the Student's processing speed and the potential

for distraction, the Parents failed to offer evidence to demonstrate that the proposed class sizes would not enable the Student to make appropriate progress in light of his circumstances.

Ms. [REDACTED] testified that the Student had been doing well in the small class sizes of under ten students at [REDACTED]. Ms. [REDACTED] testified that “[w]e believe he needed the support that was being offered at [REDACTED].” (*Id.* at 379). And Mr. [REDACTED] testified that the Student “is used to a lot smaller class sizes where he can get concentrated instruction.” (Tr. vol. 3, at 508). However, a suggestion that the Student was doing well in small class sizes at [REDACTED], which he had grown accustomed to, does not equate to a finding that the educational program proposed by MCPS was inappropriate because it offered larger class sizes. “Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Andrew F.*, 137 S. Ct. at 999 (emphasis in original). *See Doe ex rel. Doe v. Bd. of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 459 (6th Cir. 1993) (“The [IDEA] requires that the [school system] provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the [school system] provide a Cadillac solely for appellant’s use.”).

The January 13, 2022 IEP comprehensively considered the Student’s executive functioning, processing speed, attention, and social emotional/behavioral needs in developing an educational program that would appropriately account for and accommodate those needs while providing an appropriately ambitious curriculum in the LRE. To specifically address the Student’s executive functioning needs, the IEP provided for eight instructional and assessment accessibility features and accommodations, including, for example, reading aloud, clarifying, and repeating directions; redirecting by an adult; assistance with recording test answers; and one-hundred percent extended time, equating to double the normally allotted time, to specifically

address the Student's processing speed needs.<sup>25</sup> And to separately address the Student's executive functioning and social emotional/behavioral needs, the IEP provided for five additional instructional and assessment accessibility features and accommodations, including, for example, reduced distractions, small groups, and frequent breaks.<sup>26</sup> Additionally, the IEP provided the Student with twenty-eight supplementary aids, services, program modifications, and supports designed to allow the Student to access the general education curriculum, including, for example, pre-viewing course material, testing accommodations, and breaking down assignments into smaller units.<sup>27</sup>

Each of these extensive instructional and assessment accessibility features and accommodations and supplementary aids, services, program modifications, and supports was specifically designed to address the Student's executive functioning, processing speed, attention, and social emotional/behavioral needs. Although the Parents do not challenge these aspects of the IEP, they nevertheless are integral to consider in determining that MCPS offered an IEP reasonably calculated to enable the Student to make appropriate progress in a medium to large class size.

The Parents argued that I accord the testimony of MCPS's expert witnesses less deference because they did not know the Student. With respect to Ms. [REDACTED], although she had not personally worked with the Student, I found her testimony to be credible and reliable. She was extremely knowledgeable about the needs of twice exceptional students, very familiar with the [REDACTED] and [REDACTED] programs that MCPS offers at the high school level, particularly at

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<sup>25</sup> All eight instructional and assessment accessibility features and accommodations are listed above in Finding of Fact ¶ 132. (Parents Exs. 15-32 through 15-35; MCPS Exs. 26-32 through 26-35).

<sup>26</sup> All five instructional and assessment accessibility features and accommodations are listed above in Finding of Fact ¶ 133. (Parents Exs. 15-32 through 15-35; MCPS Exs. 26-32 through 26-35).

<sup>27</sup> All twenty-eight supplementary aids, services, program modifications, and supports are listed above in Finding of Fact ¶ 134. (Parents Exs. 15-36 through 15-44; MCPS Exs. 26-36 through 26-44).

██████████ where she once taught, has much experience working with MCPS's twice exceptional students and their families, and attended all the relevant IEP meetings.

Specifically discussing the small group accommodation proposed in the IEP, Ms. ██████████ testified that:

[The Student] would be eligible or available to be pulled for small-group instruction . . . our class sizes, they seem very large, but really, what we do is we break them down into smaller groups. So if we were looking to pull a small group, which we do frequently, we would call him with that small group. So, for example, when I was teaching in the English class, we might give general directions to the whole group, but then we would separate the students into smaller groups, based on what instruction they needed . . . .

(Tr. vol. 3, at 599-600). Ms. ██████████ also testified that the IEP team proposed that the Student would receive additional support through a ██████████ resource class, specifically designed to assist him with his executive functioning needs by including, for example, one-on-one coaching and support.

Additionally, although the Parents challenge ██████████'s class sizes, the IEP's proposed accommodations, supplementary aids and services, and program modifications all work together to allow the Student to remain in the general education setting "[t]o the maximum extent appropriate." 20 U.S.C.A. § 1412(a)(5)(A). As required under the IDEA, the use of these various supplementary aids and services satisfactorily achieves the Student's education in regular classes and in the LRE. *Id.*; 34 C.F.R. § 300.114(a)(2)(ii).

For the reasons stated above, the Parents have failed to meet their burden to demonstrate that ██████████'s class sizes do not enable the Student to make appropriate progress in light of his circumstances.

### Special Education Service Hours

Second, the Parents challenge the proposed amount of special education service hours. Specifically, the Parents argued that the Student requires full-time special education services and that MCPS's proposal to provide the Student special education services in co-taught general education classes is inappropriate.

The IEP proposed that the Student receive special education services consisting of two self-contained classes—one reading intervention class and one [REDACTED] resource class focused on addressing the Student's executive functioning needs. Each proposed class consists of forty-five minutes per day for a total of one-and-a-half hours daily in special education. The IEP proposed that the Student would spend the balance of his daily class time, three hours and forty-five minutes, in the following five co-taught or supported general education classes: on-level English 11; honors Algebra 2; honors Chemistry; honors Modern World History; and an elective course.

Here again, the Parents offered no evidence to support a finding that the Student requires full-time special education services and cannot be educated in the general education setting. Ms. [REDACTED] generally testified to what she called "integration" of the Student's special education services at [REDACTED] and offered that the Student has benefited from and continues to require those services. However, no evidence was offered to demonstrate that the IEP's proposed special education service hours were unreasonable and should be increased or made full-time.

MCPS's proposal would have afforded the Student integrated special education supports in the general education classroom. Ms. [REDACTED] discussed, at some length, the integration of special education services at MCPS. She testified that the level of integration is "not always apparent on the surface because part of an integrated model is giving those of us in the classroom



some of the skills we need to make the child successful.” (Tr. vol. 3, at 687). Ms. [REDACTED]

explained the training that general education teachers also receive:

[W]e also do training with our teachers. So our gen ed teachers who get our students, receive specialized instruction from my office in working with the twice-exceptional population. So they have that extra layer of twice-exceptional understanding, which helps with that integration of service, because they understand the profile of the kid that they’re getting the classroom.

(*Id.* at 687-88).

Ms. [REDACTED] explained that special education service hours are determined “based on what it is we believe the student needs to be successful and the goals that were proposed.” (*Id.* at 638). In describing how the IEP informs that judgment, Ms. [REDACTED] further explained:

What we’re looking for is how is the student actually performing in the classroom and how is that performance supported or guided by either the instruction they’re receiving or the people who are delivering the service, and how are they working their way through that, or how are they reacting to that, and then, how are they progressing, as well.

(*Id.* at 639).

Ms. [REDACTED] also testified regarding the Student’s twice exceptional profile and his need for the rigorous and challenging coursework offered through the proposed honors level classes “to be able to achieve to the maximum.” (*Id.*). In explaining why she considered the co-taught honors classes appropriate for the Student, Ms. [REDACTED] explained:

[W]hen we talk about twice-exceptional kids, we really want to look at rigor first and support and remediation second. We want to see them as gifted students with needs, rather than disabled students who might have some gifts. So for me, putting those honors courses first and that honors rigor and structure first and then backfilling with the supports necessary to be successful in that environment is the most important set up we can have for a twice-exceptional student.

(*Id.* at 641).

Given the Student's twice exceptional profile, the approach described by Ms. [REDACTED] meets the Supreme Court's approach in *Andrew F.* that a child's IEP "must be appropriately ambitious in light of his circumstances," and afford him "the chance to meet challenging objectives." 137 S. Ct. at 1000. Additionally, the proposed educational program described by Ms. [REDACTED] meets the IDEA's LRE requirement to educate the Student in the general education setting "[t]o the maximum extent appropriate." 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i).

For the reasons stated above, the Parents have failed to meet their burden to demonstrate that the IEP's proposed special education service hours were not reasonably calculated to enable the Student to make appropriate progress in light of his circumstances.

#### History of Trauma

Third, the Parents challenge MCPS's inability to address the Student's history of trauma, including the lack of an [REDACTED] group at [REDACTED]. The Parents argued that the IEP's proposed related services, including the individual psychological counseling and flash pass, are insufficient to address the Student's history of trauma. Yet again, here, the Parents offered no evidence to support a finding that the IEP was not reasonably calculated to enable the Student to make progress appropriate in light of his history of trauma.

The Parents argued that without understanding the Student's history of trauma, MCPS could not have understood the Student and his needs. Specifically, the Parents point to Dr. [REDACTED] psychological report, which does not discuss the Student's history of trauma and abuse, as evidence that MCPS's approach to the Student's trauma was inadequate. The Parents also argued that because Dr. [REDACTED] approach to understanding the Student's trauma was flawed, his testimony should not be accorded much weight. MCPS argued that Dr. [REDACTED] omission of the

Student's history of trauma from his report did not impact the recommendation for counseling, which the Parents do not challenge, and that his professional judgment was that it would have been inappropriate to include that information in a report that becomes part of a student's school record.

Dr. [REDACTED] testified that he was familiar with the Student's history of trauma based on the information that the Parents had shared with him along with his review of Dr. [REDACTED]'s report, which he explained included extensive information about the abuse. Dr. [REDACTED] explained that his report omitted the Student's history of trauma and abuse because he did not know the full details based on his conversations with the Parents and they had not given him permission to include that information in his report. Dr. [REDACTED] also explained, "These reports are passed by many eyes. And we are sensitive to the families and to the students who have experienced abuse. We don't go into exact details of what happened, the abuse, not in the school psychological reports." (Tr. vol. 4, at 991). Dr. [REDACTED] stated his report instead referenced the Student's confidential file for that reason.

I find Dr. [REDACTED]' explanation for not including the Student's history of trauma or abuse in his report reasonable based on his confidentiality concerns. It was clear from Dr. [REDACTED]' testimony that he was certainly aware of and considered the Student's history of trauma or abuse, even if a discussion of that history was omitted from his report. I also found his testimony credible and reliable. He twice met and evaluated the Student and was familiar with his history of abuse as relayed to him by the Parents and based on his review of Dr. [REDACTED]'s report. With the exception of the April 2021 meeting, which was prior to his assignment to [REDACTED], Dr. [REDACTED] attended the relevant IEP meetings. Dr. [REDACTED] was also familiar with the programs

available at [REDACTED] and previously worked with other students who have experienced trauma.

Dr. [REDACTED] explained that he recommended the addition of thirty minutes of weekly counseling as a related service in the Student's IEP in response to feedback from the Parents regarding the Student's involvement in an [REDACTED] group at [REDACTED]. Dr. [REDACTED] also explained that "trauma is something that is long standing in some instances. If it has not been addressed through counseling . . . in the school setting and in a new transition, in a new setting, I felt that [the Student] would [] need some emotional support." (*Id.* at 921). Although trauma can be long standing, Dr. [REDACTED] further explained that there are different stages of trauma. Dr. [REDACTED] described that in the initial stages of trauma beginning with the abuse, the Student would have been in an elevated state.

However, Dr. [REDACTED] testified, since the Student was adopted, "it seems like he is navigating more and a little bit less anxious and presenting less of those depressive and symptomatic characteristics of individuals that are experiencing elevated trauma."<sup>28</sup> (Tr. vol. 5, at 1038-39). Dr. [REDACTED] explained that the Student had no emotional disabilities or clinical diagnoses for any trauma or post-traumatic stress disorders and that "there has been some progression of [the Student] dealing with the trauma . . . . I think he is at a better place now." (*Id.* at 1039). Although I am sympathetic to the Parents' concern for their son and their belief that his history of childhood trauma continues to have an educational impact that would warrant additional special education services, the Parents offered no evidence to support that position. Nor did the Parents offer testimony, expert or otherwise, to controvert this testimony by Dr. [REDACTED], who was accepted as an expert in school psychology.

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<sup>28</sup> The results of the Student's CDI-2, which assesses the presence and severity of depressive symptoms in children, administered by Dr. [REDACTED] indicated no emotional or functional problems at the time of testing.

Ms. [REDACTED] also described the addition of the flash pass to the IEP as a supplementary aid that would allow the Student permission at any time to leave the classroom when he might need the extra support due to feeling stressed or overwhelmed and to seek out a trusted adult in the counseling department or special education office. Dr. [REDACTED] testified that the flash pass was designed to allow a student to discreetly signal to a teacher that they needed to seek social or emotional supports and that he suggested it be included as a supplemental aid available to the Student based on the Student's CBRS emotional indicator score.

Dr. [REDACTED] also testified about [REDACTED]'s onsite wellness center, which is made available through the county's department of social services. Dr. [REDACTED] explained that the wellness center could offer the Student wraparound services and assist the Student in finding additional resources such as an [REDACTED] group. That [REDACTED] does not offer the Student an [REDACTED] group like that at [REDACTED] may not be ideal but does not render the IEP unreasonable. *See Andrew F.*, 137 S. Ct. at 999; *Doe*, 9 F.3d at 459.

For these reasons, the Parents have failed to meet their burden to demonstrate that the IEP's proposed counseling services and flash pass were not reasonably calculated to enable the Student to make appropriate progress in light of his history of trauma.

For the reasons stated above, I conclude that the January 13, 2022 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances in the LRE. Accordingly, MCPS made a FAPE available to the Student for the 2021-2022 school year when it proposed placement in the [REDACTED] program at [REDACTED]

The Parents argued that they participated in the process in good faith and had a right under the IDEA to request that MCPS go through the IEP process and though they were "mostly committed" to private school, they were not "absolutely committed." MCPS argued that no

matter what placement it proposed, the Parents were wedded to [REDACTED] and their desire for [REDACTED] and bias against MCPS were evident throughout the process.

However, as the court observed in *Kitchelt*:

[Parents] may honestly believe from the beginning (and may ultimately be able to demonstrate) that the best education the public school system can give is not good enough, *i.e.* is not “appropriate” within the meaning of FAPE.

The fact that the parents may hold this view cannot *ipso facto* amount to an automatic disqualification, so long as they continue in good faith (*e.g.* no intentional delays, no obstructions) to participate in the development of an IEP and placement in the public school system. As always, the parents run the risk of being proved wrong about the school system’s ability to provide a FAPE, in which case they will be denied reimbursement for a unilateral placement.

341 F. Supp. 2d at 557 n.1.

Ms. [REDACTED] testified that “[i]f there was another option that had been presented to us, the[n] certainly we would’ve been open to hear it.” (Tr. vol. 2, at 270). Regarding her visit to [REDACTED] she testified that “we are open to suggestions, which is why we went to [REDACTED] after the meeting, but nothing had been presented that gave the level of services and support that he was receiving at [REDACTED].” (*Id.* at 310). So although the Parents expressed their strong and continued preference for [REDACTED], that ultimately has no bearing on whether the January 13, 2022 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances.

The Parents explained that during their February 2022 visit to [REDACTED], Ms. [REDACTED] stated that, had the lawyers not been involved, she would have sent the Student’s case to the central IEP team for it to consider the Parents’ request for private placement. The Parents argued this statement indicates that Ms. [REDACTED] thought that the Student’s placement at [REDACTED] should have been considered. With respect to the Parent’s visit to [REDACTED], MCPS argued

that the Parents' allegations against Ms. [REDACTED] are disingenuous and that Ms. [REDACTED] never said that she would have referred the Student's case to the central IEP team but for the involvement of the lawyers.

I decline to resolve the factual dispute regarding whether Ms. [REDACTED] made this statement. The Parents argued that Ms. [REDACTED]'s alleged statement indicates that she thought that the Student's placement at [REDACTED] should have been considered. Because I conclude that MCPS made a FAPE available to the Student for the 2021-2022 school year when it proposed placement in the [REDACTED] program at [REDACTED], I do not reach the question of whether [REDACTED] was appropriate. *See Burlington*, 471 U.S. at 369–70; *Carter*, 510 U.S. at 9–10. Even assuming arguendo that Ms. [REDACTED] had made that statement in her conversation with the Parents during their February 2022 visit to [REDACTED], that bears no relevance to my analysis and conclusion that the January 13, 2022 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances.

For the reasons stated above, I conclude that the January 13, 2022 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances and in the LRE. The Parents failed to meet their burden to demonstrate that MCPS failed to make a FAPE available to the Student for the 2021-2022 school year when it proposed placement in the [REDACTED] program at [REDACTED]. Accordingly, I do not consider any educational benefits that the Student has received at [REDACTED]. *See Burlington*, 471 U.S. at 369–70; *Carter*, 510 U.S. at 9–10. Further, because MCPS made a FAPE available to the Student for the 2021-2022 school year and the Parents elected to privately place the Student, MCPS is not required to pay for the cost of the Student's education, including special education and related services, at [REDACTED]. *See* 34 C.F.R. § 300.148(a).

## CONCLUSIONS OF LAW

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

1. MCPS did not predetermine the Student's placement before developing an IEP for the 2021-2022 school year and MCPS provided the Parents the opportunity for meaningful and full participation as required under the IDEA. *See Spielberg ex rel. Spielberg v. Henrico Cnty. Pub. Schs.*, 853 F.2d 256, 259 (4th Cir. 1988); *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2004); *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *aff'd*, 39 F.3d 1176 (4th Cir. 1994). As no procedural violation occurred, the Parents were not impeded from the opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student. Therefore, the Student was not denied a FAPE for the 2021-2022 school year. *See* 20 U.S.C.A. § 1415(f)(3)(E)(ii) (2017); 34 C.F.R. § 300.513(a)(2) (2021).
2. 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. *See* 20 U.S.C.A. §§ 1412(a)(5)(A), 1414 (2017); 34 C.F.R. § 300.148 (2021); *Andrew F. v. Douglas Cnty. School Dist. RE-1*, 137 S. Ct. 988 (2017); *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 11 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).



**ORDER**

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

August 25, 2022  
Date Decision Issued

Dania Ayoubi  
Administrative Law Judge

DLA/emh  
#199750

**REVIEW RIGHTS**

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

A party appealing this decision must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing of the filing of the appeal. The written notification must include the case name, docket number, and date of this decision, and the court case name and docket number of the appeal.

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

**Copies Emailed and Mailed To:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

██████████,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE DANIA AYOUBI,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-22-08380

### APPENDIX

I admitted the following exhibits on behalf of the Parents:

Parents Ex. 1 – Request for Due Process, April 13, 2022

Parents Ex. 2 – Student’s Personal and Confidential Social History from ██████████ County, date of presentation May 23, 2016

Parents Ex. 3<sup>1</sup> – Psychological Evaluation by Dr. ██████████, March 2018

Parents Ex. 4<sup>2</sup> – ██████████ IEP, February 3, 2021

Parents Ex. 5<sup>3</sup> – ██████████ MAP Score Report, Spring 2022

Parents Ex. 6 – Letter from ██████████ to MCPS regarding April 27, 2021 IEP meeting, May 7, 2021

Parents Ex. 7<sup>4</sup> – ██████████ Speech-Language Progress Summary, May 2021

Parents Ex. 8 – Not offered

Parents Ex. 9 – Letter from Michael Eig, Esq., to Emily Rachlin, Esq., MCPS, August 2, 2021,<sup>5</sup> with attachment:

- Letter from Emily Rachlin to Michael Eig, August 19, 2021<sup>6</sup>

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<sup>1</sup> Corresponds to MCPS Exhibit 28.

<sup>2</sup> Corresponds to MCPS Exhibit 32.

<sup>3</sup> The parties agreed to the admission of Parents Exhibit 5 for the limited purpose of determining whether ██████████ was an appropriate placement for the Student. Because I conclude that MCPS made a FAPE available to the Student for the 2021-2022 school year when it proposed placement in the ██████████ program at ██████████, I do not reach the question of whether the Student received any educational benefits at ██████████ and therefore do not consider or rely upon Parents Exhibit 5.

<sup>4</sup> Corresponds to MCPS Exhibit 17.

<sup>5</sup> Corresponds to MCPS Exhibit 8.

<sup>6</sup> Corresponds to MCPS Exhibit 9.

- Parents Ex. 10 – IEP Meeting Notes by [REDACTED], August 31, 2021
- Parents Ex. 11 – Psychological Evaluation by Dr. [REDACTED], MCPS, October 5, 2021,<sup>7</sup> with attachments:
- Appendix A, Standard Scores
  - MCPS Notice and Consent for Assessment, signed May 17, 2021<sup>8</sup>
- Parents Ex. 12 – IEP Meeting Notes by [REDACTED], October 27, 2021
- Parents Ex. 13 – Parents’ Response to MCPS Prior Written Notice, November 8, 2021
- Parents Ex. 14<sup>9</sup> – [REDACTED] IEP Progress Report, November 2021
- Parents Ex. 15<sup>10</sup> – MCPS Approved IEP, January 13, 2022
- Parents Ex. 16 – IEP Meeting Notes by [REDACTED], January 13, 2022
- Parents Ex. 17 – Not offered
- Parents Ex. 18<sup>11</sup> – MCPS Prior Written Notice for January 13, 2022 IEP Meeting, January 25, 2022
- Parents Ex. 19 – Parents’ Response to MCPS Prior Written Notice, undated
- Parents Ex. 20 – Email from [REDACTED] to [REDACTED], February 23, 2022, with attachment:
- Observation Notes, undated
- Parents Ex. 21 – Not offered
- Parents Ex. 22 – Not offered
- Parents Ex. 23 – Student’s Report Card, [REDACTED], 2021-2022
- Parents Ex. 24 – Resume of [REDACTED], undated
- Parents Ex. 25 – Not offered

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<sup>7</sup> Corresponds to MCPS Exhibit 18.

<sup>8</sup> Corresponds to MCPS Exhibit 7.

<sup>9</sup> Corresponds to MCPS Exhibits 22-3 through 22-16.

<sup>10</sup> Corresponds to MCPS Exhibit 26.

<sup>11</sup> Corresponds to MCPS Exhibit 24.

I admitted the following exhibits on behalf of MCPS:

- MCPS Ex. 1 – ██████ v. *Montgomery County Public Schools*, OAH No. MSDE-MONT-OT-20-11499 (December 22, 2022 hearing decision, A.L.J. Jerome Woods, II)
- MCPS Ex. 2 – ██████ v. ██████, C.A. ██████ (D. Md. ██████, 2022) decision
- MCPS Ex. 3 – MCPS Approved IEP, May 20, 2020
- MCPS Ex. 4 – MCPS Prior Written Notice, June 22, 2020
- MCPS Ex. 5 – Not offered
- MCPS Ex. 6 – MCPS Prior Written Notice, April 27, 2021
- MCPS Ex. 7<sup>1</sup> – MCPS Notice and Consent for Assessment, signed May 17, 2021
- MCPS Ex. 8<sup>2</sup> – Letter from Michael Eig to Emily Rachlin, August 2, 2021
- MCPS Ex. 9<sup>3</sup> – Letter from Emily Rachlin to Michael Eig, August 19, 2021
- MCPS Ex. 10 – Email correspondence between Dr. ██████ and ██████, August 16, 2021
- MCPS Ex. 11 – MCPS Notice of August 31, 2021 IEP Team Meeting, August 16, 2021
- MCPS Ex. 12 – MCPS Prior Written Notice, August 31, 2021
- MCPS Ex. 13 – MCPS IEP, August 31, 2021
- MCPS Ex. 14 – Five-Day Verification Notice of Documents Provided After an IEP Meeting, September 10, 2021
- MCPS Ex. 15 – Email correspondence between ██████, MCPS, and ██████, ██████, September 14, 2021, October 1, 2021, and October 4, 2021
- MCPS Ex. 16 – Email correspondence between ██████ and ██████, October 26 and 27, 2021; email correspondence from ██████, MCPS, to MCPS staff, October 27, 2021
- MCPS Ex. 17<sup>4</sup> – ██████ Speech-Language Progress Summary, May 2021

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<sup>1</sup> Corresponds to an attachment to Parents Exhibit 11.

<sup>2</sup> Corresponds to Parents Exhibit 9.

<sup>3</sup> Corresponds to Parents Exhibit 9.

<sup>4</sup> Corresponds to Parents Exhibit 7.

- MCPS Ex. 18<sup>5</sup> – Psychological Evaluation by Dr. [REDACTED], October 5, 2021
- MCPS Ex. 19 – [REDACTED] High School, Report of Education Assessment of Student by [REDACTED], July 1, 2021
- MCPS Ex. 20 – MCPS Prior Written Notice, October 27, 2021
- MCPS Ex. 21 – Five-Day Verification Notice of Documents Provided After an IEP Meeting, November 4, 2021, with attachment:
- MCPS Prior Written Notice, October 27, 2021
- MCPS Ex. 22 – Email correspondence from [REDACTED], [REDACTED], to [REDACTED], December 9, 2021, with attachments:
- [REDACTED] IEP Progress Report, November 2021<sup>6</sup>
  - Student's class schedule, undated
  - Trigonometry class syllabus
- MCPS Ex. 23 – MCPS Notice of January 13, 2022 IEP Team Meeting, December 17, 2021
- MCPS Ex. 24<sup>7</sup> – MCPS Prior Written Notice, January 13, 2022
- MCPS Ex. 25 – Five-Day Verification Notice of Documents Provided After an IEP Meeting, January 24, 2022, with attachment:
- MCPS Prior Written Notice, January 13, 2022
- MCPS Ex. 26<sup>8</sup> – MCPS Approved IEP, January 13, 2022
- MCPS Ex. 27 – MCPS January 13, 2022 IEP, amended January 24, 2022
- MCPS Ex. 28<sup>9</sup> – Psychological Evaluation by Dr. [REDACTED], March 2018
- MCPS Ex. 29 – Not offered
- MCPS Ex. 30 – Not offered
- MCPS Ex. 31 – Not offered
- MCPS Ex. 32<sup>10</sup> – [REDACTED] IEP, February 3, 2021
- MCPS Ex. 33 – Resume of [REDACTED], undated

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<sup>5</sup> Corresponds to Parents Exhibit 11.

<sup>6</sup> Corresponds to Parents Exhibit 14.

<sup>7</sup> Corresponds to Parents Exhibit 18.

<sup>8</sup> Corresponds to Parents Exhibit 15.

<sup>9</sup> Corresponds to Parents Exhibit 3.

<sup>10</sup> Corresponds to Parents Exhibit 4.

MCPS Ex. 34 – Resume of [REDACTED], undated

MCPS Ex. 35 – Resume of [REDACTED], undated

MCPS Ex. 36 – Resume of [REDACTED], undated