

██████████,

STUDENT

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

BEFORE JENNIFER L. GRESOCK,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-BCNY-OT-22-23373

### DECISION

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#### STATEMENT OF THE CASE

On September 27, 2022, ██████████ and ██████████ (Parents), on behalf of their child, ██████████ (Student), filed a due process complaint (Complaint II), simultaneous with a Motion to Amend Due Process Complaint or In the Alternative Consolidate and Supporting Memorandum (Motion to Amend) with the Office of Administrative Hearings (OAH). The Motion to Amend sought to amend a pending due process Complaint (Complaint I) filed on August 31, 2022, requesting a hearing to review the identification, evaluation, or placement of the Student by the Baltimore County Public Schools (BCPS) 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) (2022);<sup>3</sup> Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

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<sup>1</sup> “U.S.C.A.” is an abbreviation for the United States Code Annotated. Unless otherwise noted, 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. Unless otherwise noted, all citations herein to the C.F.R. are to the 2021 bound volume.

<sup>3</sup> Unless otherwise noted, all citations herein to the Education Article are to the 2022 Replacement Volume of the Maryland Annotated Code.

Complaint I pertained to the Student's speech and language instruction and transportation for the 2022 – 2023 school year.<sup>4</sup> The Parents sought to amend the complaint, or file a new complaint for consolidation with the first, by adding the additional issue of math instruction for the 2022 – 2023 school year. Complaint II addresses only the issue of math instruction.

I held a scheduling conference on September 29, 2022, regarding Complaint II and the Motion to Amend. The Parents were represented by Mark B. Martin, Esquire. William H. Fields, Esquire, represented the BCPS. At that telephone conference, the parties agreed to hold a resolution session on October 6, 2022, and that if the issue raised by Complaint II was not resolved, Complaint I may be amended to include it.<sup>5</sup> Subsequently, I held an October 11, 2022 telephone conference, at which the parties confirmed that the October 6, 2022 resolution session took place but that none of the issues in either Complaint I or Complaint II had been resolved. Accordingly, I granted the Motion to Amend. 34 C.F.R §300.508(d)(3)(ii).

On October 14, 2022, I convened the hearing.<sup>6</sup> Mr. Martin represented the Parents. Mr. Fields represented the BCPS. At the start of the hearing, the parties informed me that the issues in Complaint I had been nearly resolved, and that they expected that a fully executed settlement agreement, including that withdrawal of the due process hearing request in Complaint I, was imminent. The parties agreed that the hearing should go forward on Complaint II only. On October 26, 2022, I convened the second day of hearing.<sup>7</sup>

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<sup>4</sup> The issues in Complaint I are set out in a Pre-hearing Conference Report and Order issued on September 21, 2022, following a September 12, 2022 telephone pre-hearing conference. Pamela Foresman, Esquire, represented the BCPS at the September 12, 2022 telephone pre-hearing conference.

<sup>5</sup> The two-day hearing on Complaint I had been scheduled to begin on October 11, 2022. This hearing date was cancelled to allow the resolution session to take place.

<sup>6</sup> At the September 12, 2022 pre-hearing conference, I disclosed to the parties that my sister is a BCPS teacher and is employed at [REDACTED]. I answered Mr. Martin's questions regarding whether I discuss my sister's job with her (I do not) and I noted that I have no contact with any other staff at [REDACTED]. Neither party requested that I disqualify myself. See COMAR 28.02.01.11C(2).

<sup>7</sup> Mr. Martin confirmed in writing that the parties settled Complaint I and the Parents withdrew that complaint on November 10, 2022.

Under the applicable law, a decision in this case is due by December 9, 2022, forty-five days<sup>8</sup> after the end of the thirty-day resolution period triggered by Complaint II. 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Educ. § 8-413(h); COMAR 13A.05.01.15C(14).<sup>9,10</sup> Because agreed-upon hearing dates for Complaint I were already scheduled at the time Complaint II was filed, and the parties had limited availability for rescheduling the hearing, both parties agreed, through counsel, to keep the October 14, 2022 hearing date and schedule the second date for October 26, 2022, even though both of these hearing dates were within the thirty-day resolution period for Complaint II, rather than after its expiration. This hearing schedule allowed me to issue a decision by November 18, 2022, and thus within the promised forty-five day period following the October 6, 2022 resolution meeting.

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

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<sup>8</sup> The actual forty-fifth day is Sunday, December 11, 2022. To meet this deadline, the decision must be issued on the Friday prior.

<sup>9</sup> Under 34 C.F.R. § 300.508(d)(4), an amended due process complaint restarts the timeline for the resolution meeting under 34 C.F.R. § 300.510(a) and the time period to resolve in 34 C.F.R. § 300.510(b). The resolution period is 30 days (34 C.F.R. § 300.510(b)(1)) but is adjusted when a resolution meeting is held, and the matter does not resolve (with confirmation in writing). 34 C.F.R. § 300.510(c). In my October 12, 2022 Amended Pre-Hearing Conference Report and Order, I indicated that the decision would be issued by November 21, 2022, based on my understanding that the parties had agreed on October 6, 2022, that no resolution was possible. (I note that November 21, 2022 is actually the 46<sup>th</sup> day, and that a decision would need to be issued by Friday, November 18, 2022, if the October 6, 2022 resolution meeting was the triggering event.) However, in the absence of written confirmation that the parties had agreed no agreement was possible, the 30-day resolution period cannot be shortened, and the day after its conclusion begins the 45-day period for the due process hearing and issuance of a decision.

<sup>10</sup> Both Complaint I and Complaint II were filed as expedited hearing requests. At the October 11, 2022 pre-hearing conference, I discussed the basis for an expedited hearing with the parties. The parties agreed that the Student was enrolled and was at least partially attending school. *See* COMAR 13A.05.01.15. Accordingly, I found no basis for an expedited hearing, as noted in my October 12, 2022 Pre-hearing Conference Report and Order.

## ISSUE

Whether the BCPS denied the Student a free appropriate public education (FAPE) for the 2022 – 2023 school year by failing to provide math instruction, in accordance with the January 23, 2020 Individualized Education Program (IEP) (amended on June 19, 2020).

## SUMMARY OF THE EVIDENCE

### Exhibits<sup>11</sup>

I admitted the following exhibits on behalf of the Parents, except where noted:

- Parents Ex. 1 Independent Educational Evaluation, [REDACTED], based on data from October and November 2018<sup>12</sup>
- Parents Ex. 3 IEP, amended June 19, 2020
- Parents Ex. 14 Student’s Schedule, undated
- Parents Ex. 15 “Meeting My [REDACTED] Teachers for the 2022 – 2023 School Year” Social Story, undated
- Parents Ex. 17 Letter of Agreement, dated August 26, 2022
- Parents Ex. 19 Emails exchanged between the parties between August 26, 2022 and August 30, 2022
- Parents Ex. 21 Email exchange between the Parents and [REDACTED], August 31, 2022
- Parents Ex. 23 Email exchange between the parties between September 8, 2022, and September 9, 2022
- Parents Ex. 26 Email exchange between the parties between September 14, 2022 and September 22, 2022
- Parents Ex. 32 Email from the Parents to [REDACTED], dated September 22, 2022

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<sup>11</sup> Prior to the hearing, the Parents submitted a binder of forty-five premarked exhibits, and the BCPS submitted a binder of thirty premarked exhibits. However, because Complaint I resolved just prior to the hearing, the parties did not request the admission of all exhibits. I have retained the premarked exhibit numbers for simplicity; all exhibits offered for admission are noted in this decision. *See* COMAR 28.02.01.22C (“All exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall be retained for purposes of judicial review.”). Exhibits that were not offered are not included.

<sup>12</sup> The report itself is undated.

- Parents Ex. 33 Email from the Parents to the BCPS staff, dated September 23, 2022
- Parents Ex. 34 NOT ADMITTED
- Parents Ex. 35 Email exchange between the Parents and Mr. [REDACTED] between September 26, 2022 and September 29, 2022
- Parents Ex. 41 Email exchange between the parties on September 29, 2022
- Parents Ex. 42 Email from the Parents to the BCPS staff, dated September 29, 2022
- Parents Ex. 44 Resume of [REDACTED], undated

I admitted the following exhibits on behalf of the BCPS:

- BCPS Ex. 1 IEP, amended June 19, 2020
- BCPS Ex. 4 IEP Team Summary, mailing date April 5, 2022
- BCPS Ex. 7 Memorandum from [REDACTED] [REDACTED]<sup>13</sup> to Members of the State Board of Education Re: Maryland's Teacher Workforce: Supply, Demand, and Diversity, dated July 26, 2022
- BCPS Ex. 9 [REDACTED]<sup>14</sup> Online News Article, dated [REDACTED], 2022
- BCPS Ex. 20 Student's IEP Data Collection, dated October 7, 2022
- BCPS Ex. 28 Resume of [REDACTED], undated
- BCPS Ex. 29 Resume of [REDACTED], undated

### Testimony

The Parents presented the following witnesses:

- [REDACTED], the Student's mother;
- [REDACTED], math tutor, [REDACTED].;
- [REDACTED], admitted as an expert in special education and the development and implementation of IEPs.<sup>15</sup>

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<sup>13</sup> Mr. [REDACTED] is the State Superintendent for the State of Maryland.

<sup>14</sup> [REDACTED] is a television station in Baltimore, Maryland.

<sup>15</sup> Ms. [REDACTED] testified in the Parents' case-in-chief and on rebuttal.

The BCPS presented the following witnesses:

- ██████████, admitted as an expert in special education, including special education compliance;
- ██████████,<sup>16</sup> admitted as an expert in special education.

### **FINDINGS OF FACT**

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

1. The Student is eighteen-years old and in 11<sup>th</sup> grade. His primary disability is autism.
2. The Student's most recent IEP was approved on January 23, 2020, and amended on June 19, 2020. (Parents Ex. 3; BCPS Ex. 1.)
3. The Student's disability affects the following math-related areas: math calculation and math problem solving. It also affects his behavior, communication, sensory regulation, and executive functioning.
4. As of June 19, 2020, the Student's level of academic achievement and functional performance was "below grade level expectations" in math calculations and fourth-grade level in math problem solving.
5. As of June 19, 2020, the Student had acquired and could apply, via memory, addition, subtraction, and multiplication facts. He demonstrated an understanding of measurement and calculating fractions with common denominators. He could also solve calculations involving single, double, and triple digits, including addition and subtraction with and without regrouping, without a calculator. Using a calculator, he was able to calculate

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<sup>16</sup> Ms. ██████████ was sometimes referred to as "Ms. █" during the hearing.

multiple digit addition, subtraction, multiplication, and division problems. He was unable to calculate money (though he could identify and count currency), tell time, or calculate elapsed time.

6. As of June 19, 2020, the Student could solve one- to two-step word problems accurately up to a fourth-grade level. He could solve one-step word problems involving addition and subtraction without manipulatives and could solve two-step word problems using manipulatives. He could highlight operation words in six out of nine word problems. For most word problems, he required that the problem be read out loud to him and prompting questions in order to complete the second or third step of a problem.

7. Based on the needs identified by the IEP team, the IEP team agreed on the following math problem solving goal, as of June 19, 2020: “By January 2021, when given 5 two-step word problems involving integers, decimals to the hundredths, fractions, or time measured in hours or minute answers that require the use of any of the four operations (i.e.  $\div$ ,  $\times$ ,  $+$ ,  $-$ ), a highlighter, manipulatives, a graphic organizer with guided questioning and a calculator, [the Student] will identify and highlight the appropriate operation word and numerical information necessary to solve the problem, show written work demonstrating at least 2 intermediate calculation steps and determine the correct final answer for 9 out of 15 problems.”

8. The criteria for mastery and retention was 60% accuracy for two of three math problem sets, evaluated using five problems per set.

9. The IEP team agreed on four objectives related to the Student’s math problem solving goal:

- a. That given a two-step word problem with a highlighter, concrete manipulatives, and a graphic organizer with guided questioning, the Student will identify what is being asked and the numerical information necessary to solve the problem and

input the information into the graphic organizer, for 12 of 15 problems (by April 2020);

- b. That given a two-step word problem with a highlighter, concrete manipulatives, and a graphic organizer with guided questioning, the Student will write out the equations, including values and operations, necessary to solve the problem and input the information into the graphic organizer for 9 of 15 problems, by June 2020;
- c. That given a two-step word problem with a highlighter, concrete manipulatives, and a graphic organizer with guided questioning, the Student will determine the solution for 9 out of 15 problems, by November 2020; and
- d. That given a one-step word problem of the form  $px = q$ , and a corresponding graphic organizer with visual prompts, the Student will identify key information from the problem (e.g. unit rate, variable, total), then fill in missing information to complete and solve a one-step algebraic equation for 9 of 15 problems, by January 2021.

10. The IEP was amended on June 19, 2020, to reflect a 5<sup>th</sup> grade level of performance for objectives one, two, and three, and a 6<sup>th</sup> grade level of performance for objective four.

11. The Student's June 19, 2020 IEP required the BCPS to provide instruction in math, reading, language arts, and resource outside of the general education environment via 45-minute sessions (per subject), five days a week (a total of twenty, forty-five minute sessions per week for all four subjects).



12. The June 19, 2020 IEP identifies a special education classroom teacher as the primary “provider” of special education services outside the general education classroom, and an instructional assistant as the “other” provider.

13. On August 26, 2022, the parties entered into a settlement agreement (Letter of Agreement) providing that the Student would attend [REDACTED] for two hours each day, and then attend the [REDACTED] ([REDACTED]) for an externship for the remainder of each school day. (Parents Ex. 17.)

14. With regard to math instruction, the Letter of Agreement provides that the “BCPS agrees to provide sixty (60) minutes of math instruction daily (or 300 minutes weekly) to the Student,” and that the math instruction would be “in accordance with his IEP.”

15. The first day of school for the BCPS for the 2022 – 2022 school year was August 29, 2022.

16. The Student attends [REDACTED] from 7:30 a.m. to 9:30 a.m. each school day, with academic instruction beginning at 7:45 a.m.

17. The Student receives daily instruction in math totaling more than 300 minutes per week. On Wednesdays, he receives only math instruction for the two-hour period he attends [REDACTED].

18. The Student is accompanied by an aide from the [REDACTED] while attending [REDACTED].

19. For the week of August 29, 2022 – September 2, 2022, [REDACTED] was assigned to instruct the Student one-on-one in math, in a classroom where the Student is the only student, from 7:45 a.m. to 8:45 a.m. each day.

20. Ms. [REDACTED] is a certified special education teacher.

21. Beginning on September 6, 2022, [REDACTED] was assigned to provide math instruction to the Student.

22. Mr. [REDACTED] is employed by [REDACTED] he is not a BCPS employee, nor is he an employee of [REDACTED].

23. Mr. [REDACTED] is a high-school graduate who does not hold a college degree and is not certified as a teacher, including as a special education teacher.

24. When Mr. [REDACTED] began working with the Student, Ms. [REDACTED] explained to Mr. [REDACTED] how to use the Jamboard, a digital interactive whiteboard, and provided guidance as to how the Student was to be instructed.

25. Ms. [REDACTED] provided instruction along with Mr. [REDACTED] on September 6, 2022, for the 60-minute math lesson.

26. The Jamboard provides the daily assignments for the Student. Mr. [REDACTED] does not develop or draft the assignments provided by the Jamboard, but provides instruction and assistance based almost entirely on the Jamboard.

27. Mr. [REDACTED] works with the Student one-on-one, in a classroom where the Student is the only student. The Student's [REDACTED] aide is also present but does not instruct the Student.

28. Beginning on September 29, 2022, [REDACTED] was assigned to supervise the instruction provided to the Student by Mr. [REDACTED].

29. Ms. [REDACTED] is a certified special educator.

30. Ms. [REDACTED] is present during the Student's math instruction two days a week, on Wednesdays and one other day. She facilitates lesson planning by reviewing the material with Mr. [REDACTED], provides him with manipulatives and other tools (such as online resources), and collects data on the Student's progress.

31. Under Ms. [REDACTED]'s supervision, Mr. [REDACTED] provides virtually all direct instruction to the Student.

32. As of October 7, 2022, the Student demonstrated the ability to highlight and identify what is being asked and the numerical information (objective 1) with 100% accuracy (7 of 7 problems); write out equations (including variables and operations) (objective 2) with 75% accuracy (6 of 8 problems); and determine solutions (objective 3) with 91% accuracy 10 of 11 problems).

## **DISCUSSION**

### **LEGAL FRAMEWORK**

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

To be eligible for special education and related services under the IDEA, a student must meet the definition of a “child with a disability” as set forth in 20 U.S.C.A. section 1401(3)(A) and the applicable federal regulations. The statute provides as follows:

(A) In General

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

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

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

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

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

More recently, the Supreme Court revisited the meaning of a FAPE, holding that for an educational agency to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student’s circumstances. *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017). Consideration of the student’s particular circumstances is key to this analysis; the Court emphasized in *Endrew F.* that the “adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Id.* at 1001. Ultimately, a disabled student’s “educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* at 1000. Moreover, the

IEP must be reasonably calculated to allow a student to advance from grade to grade, if that is a “reasonable prospect.” *Id.*

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

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

20 U.S.C.A. § 1414(d)(3)(A). Among other things, the IEP depicts a student’s current educational performance, explains how the student’s disability affects the student’s involvement and progress in the general curriculum, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular educational programs. *Id.* § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A. IEP teams must consider the student’s evolving needs when developing the student’s IEP. The student’s IEP must include “[a] statement of the child’s present levels of academic achievement and functional performance, including . . . [h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for non-disabled children) . . . .” 34 C.F.R. § 300.320(a)(1)(i). If a child’s behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, the use of positive behavioral interventions and strategies and supports to address that behavior. *Id.* § 300.324(a)(2)(i). A public agency is responsible for ensuring that the IEP is

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

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

In addition to the substantive FAPE analysis in *Andrew F.*, a student may be denied a FAPE based upon a procedural issue in certain circumstances. Specifically, the IDEA provides that:

- (ii) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--
  - (I) Impeded the child’s right to a FAPE;
  - (II) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or
  - (III) Caused a deprivation of educational benefit.

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20 U.S.C. § 1415(f)(3)(E); *see also* 34 C.F.R. §300.513.

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the “least restrictive environment” to achieve a FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989). At a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational

needs. 20 U.S.C.A. § 1412(a)(5)(A). Placing disabled children into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved. *Id.*

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like the BCPS to offer a continuum of alternative placements that meet the needs of children with disabilities.

34 C.F.R. § 300.115. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services to be provided in conjunction with regular classroom placement. *Id.* § 300.115(b); COMAR 13A.05.01.10B(1); COMAR 13A.05.01.03B(71).

Additionally, public agencies must ensure that the child’s IEP is accessible to all of the child’s teachers and service providers. 34 C.F.R. 300.323(d).

This case involves only the implementation of the Student’s IEP, and not whether the BCPS has offered an IEP reasonably calculated to enable the Student to make progress appropriate in light of his circumstances.

#### **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 bear the burden of establishing that the BCPS failed to provide math instruction in accordance with the Student’s IEP during the 2022 – 2023 school year.

## **ARGUMENTS OF THE PARTIES**

As noted above, the issue before me is extremely narrow. The Parents contend that under the Student's IEP, he is entitled to a special education-certified teacher as his primary instructor for math at [REDACTED], which he receives five days per week, for a total of 300 minutes weekly. The Parents maintain that instead of providing such an instructor, the BCPS has provided a math tutor, who is not certified as a teacher, is not employed by the BCPS, and has only a high school diploma. While the math tutor may initially have received some guidance from a teacher certified in special education when he began working with the Student, for most of September 2022, he did not even work under the supervision of a certified special education teacher. Further, the Parents argue that mere supervision by a special education teacher would not be sufficient regardless, as the primary provider specified in an IEP must be the individual who provides direct, daily instruction. The Parents maintain that the subpar math instruction has not been inconsequential, as the Student has not made progress.

The BCPS does not, for the most part, dispute the material facts underlying the Parents' arguments. However, the BCPS contends that the August 26, 2022 Letter of Agreement supersedes the Student's IEP, and that, as enforcement of the Letter of Agreement is a matter of contract law, the Parents' claims regarding math instruction are not properly before the OAH and the OAH lacks jurisdiction. The BCPS emphasizes that because the IEP was written when the Student was in an all-day educational program at [REDACTED], the IEP cannot possibly apply to the 2022 – 2023 school year, as he is now present for only two hours of instruction by the BCPS daily. The BCPS maintains that the Parents cannot claim that some provisions of the IEP apply while others do not. The BCPS further argues that if I were to conclude that the IEP is in effect, and that the BCPS has failed to implement it by assigning a math tutor to provide direct instruction, the Parents' claim must still fail, as they have not shown



that what the BCPS characterizes as a procedural violation has caused substantial harm. The BCPS notes that any evaluation of harm is governed not by a standard based on mastery of a skill, but rather the Student's progress towards his math goal.

## **ANALYSIS**

### **THE PARENTS' CLAIM IS WITHIN THE OAH'S JURISDICTION**

As noted above, the BCPS is obligated to ensure that the Student's IEP is revised annually. 20 U.S.C.A. § 1414(d)(4). The parties fully agree that this did not occur. However, they also agree that the failure to revise the most recent IEP – approved in January 2020 and amended in June 2020 – and the reasons for that failure are not issues before me.<sup>17</sup> An IEP does not expire; it remains in effect until a new IEP is finalized or the child no longer needs specialized instruction or related services. Thus, the IEP as amended in June 2020 is the applicable IEP.

However, the BCPS contends that this is not so, arguing instead that when the parties entered into a settlement agreement on August 26, 2022, that agreement, which references the IEP, fully replaced the IEP. Accordingly, the BCPS maintains that the Parents are seeking enforcement of the settlement agreement, and that the OAH does not have jurisdiction over a contractual dispute.

In response, the Parents cite 20 U.S.C.A. §1415(j),<sup>18</sup> which requires that “during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current

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<sup>17</sup> The parties agreed that the issue before me is strictly limited to the implementation of the math instructional services of the IEP; the appropriateness of the IEP as developed and written is not at issue.

<sup>18</sup> The Parents also cited to 34 C.F.R. 300.518: “[D]uring the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.”

educational placement of the child . . . .”<sup>19</sup> Specifically, the Parents contend that the Letter of Agreement represents the Parents and the BCPS “otherwise agree[ing]” to the Student’s educational placement. However, this OAH proceeding was initiated on September 27, 2022, so it was not pending at the time of the agreement (and nor was the companion case, filed August 31, 2022). Additionally, the “stay put” provision is not directly relevant to whether this matter arises under a settlement agreement, rendering it outside of the OAH’s jurisdiction.

Accordingly, I find this provision inapplicable.

This Letter of Agreement states the following, with regard to math:

While the Student attends ██████████ for an externship during the 2022-2023 school year, [the] BCPS agrees to provide sixty (60) minutes of math instruction daily (or 300 minutes weekly) to the Student. [The Student] will attend ██████████ during the first two hours of each school day. [The Student] will receive his Math instruction in accordance with his IEP within the first two hours of his academic day and then [the] BCPS will transport [the Student] to ██████████

(Parents Ex. 17.)

I agree that when an IDEA claim results in a settlement agreement, that agreement is a contract for purposes of enforcement and a school district’s alleged failure to comply with the terms of a settlement agreement does not constitute a procedural violation which may be addressed at a due process hearing convened under IDEA. The interpretation and enforcement of a settlement agreement involves principles of contract law,<sup>20</sup> and is not among those issues that may be addressed in this forum. Rather, the IDEA contemplates that settlement agreements resolving a due process complaint are to be enforced “in any State court of competent jurisdiction or in a district court of the United States.” 20 U.S.C.A § 1415(e)(2)(F)(iii).

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<sup>19</sup> This provision is commonly referred to as “stay put.”

<sup>20</sup> *MET Labs., Inc. v. Reich*, 875 F. Supp. 304, 306 (D. Md. 1995) (“[T]he meaning of the settlement agreement must be discerned, as with any contract, first by looking within the four corners of the document.”); *Bernstein v. Kapneck*, 290 Md. 452, 459-60 (1981) (“[S]ettlement agreements, as all other contracts scrutinized under the law of this State, are subject to interpretation in light of the settled and oft-repeated principles of objective construction.”).

Absent specific authority, the OAH may not compel a school district to comply with the terms of a settlement agreement. The powers of the OAH and its administrative law judges are measured by the granting statute. *See Boyd v. Supervisor of Assessments*, 57 Md. App. 603, 608 (1984). An administrative law judge cannot enlarge that grant of jurisdiction, nor may subject matter jurisdiction be conferred upon the agency by the courts or the parties before the OAH. *Id.* at 608. In short, the OAH is without jurisdiction to enforce settlement agreements under the IDEA.

However, I find the BCPS's jurisdictional contention inapplicable here. The Parents rely on a specific, discrete provision drawn from the IEP: the identification of the primary provider of math services.<sup>21</sup> In effect, the BCPS asserts the Letter of Agreement as an affirmative defense. But the BCPS is not pointing to any contractual provision that conflicts with the IEP language cited by the Parents or claiming there is such a contradictory provision. In other words, it is not addressing *enforcement* of the settlement agreement per se. Instead, it claims the settlement agreement fully replaces the IEP. To find in favor of the BCPS on this point would mean that the Student has no IEP in effect at all; as written, the Letter of Agreement incorporates the math instruction from the previous IEP and cannot be read as a stand-alone document. The BCPS cited

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<sup>21</sup> The BCPS repeatedly pointed to the unworkability of numerous aspects of the IEP as evidence that it cannot be implemented. None of those provisions was at issue in this case, and I find any alleged unworkability of the IEP irrelevant to the case before me, and an unpersuasive basis, absent authority to the contrary, for concluding that the entire IEP should be disregarded in favor of the settlement agreement.

no authority to support its contention that an IEP could be simply and fully replaced by a settlement agreement.<sup>22</sup>

Instead, there is, in this case, both an IEP and a settlement agreement. Again, the Parents' claim is clearly and explicitly rooted in the IEP; it requires no reliance on the settlement agreement at all. The Second Circuit<sup>23</sup> provides relevant guidance for considering the distinction between claims drawn from an IEP versus claims drawn from a settlement agreement: "In this case, plaintiff seeks to enforce only those provisions of the May 19, 2006 settlement agreement that required defendants to supply [the student] with a table, chair, computer, software, and certain computer accessories, within six weeks of the date of the agreement," which the Court described as an "enforcement dispute" amounting to "purely a matter of determining defendant's obligation under the settlement agreement." The Court concluded that because the dispute was "purely" a settlement agreement matter, a due process hearing "was not the proper vehicle to enforce the settlement agreement." *H.C.* at 690.

The claim before me is similarly "pure," though unlike the provision considered by the Second Circuit, it is solely from the IEP, rather than solely from the settlement agreement. But the principle is the same: the source of the language giving rise to the claim is key. The subject matters that may be addressed by a due process complaint are set forth in 34 C.F.R. § 300.507 and consist of issues "relating to the identification, evaluation or educational placement of a

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<sup>22</sup> The BCPS cited to *Woods ex rel. T.W. v. Northport Pub. Sch.*, 2011 WL 1230813, at 27 (W.D. Mich. March 31, 2011), *aff'd in part, vacated in part sub nom. Woods v. Northport Pub. Sch.*, 487 F. App'x 968 (6<sup>th</sup> Cir. 2012), where the court considered a Michigan state law breach of contract claim arising from a settlement agreement that "incorporated by reference" the child's IEP. The claim was based on services detailed in the settlement agreement but that were "not considered to be an amendment to or part of the . . . IEP." *Id.* at 28 (citations omitted). The court determined that it had subject-matter jurisdiction over the claim based on "supplemental jurisdiction," since the claim was "'so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.'" 28 U.S.C. § 1367." *Id.* at 27. I do not find support in the district court's analysis for the notion that because the parents were able to have their state-law based contract claim heard in that forum, language in a settlement agreement "incorporating" a child's IEP "by reference" should be understood to mean that an IEP is superseded by a settlement agreement.

<sup>23</sup> *H.C. v. Colton-Pierrepoint Central Sch. Dist.*, 341 Fed. App'x 687, 689-90 (2d Cir. 2009).

child with a disability, or the provision of FAPE to the child.” 34 C.F.R. § 300.507(a)(1). The provider of math instruction clearly falls within the provision of FAPE.<sup>24</sup>

#### MATH INSTRUCTION PROVIDED BY THE BCPS DID NOT FULLY COMPLY WITH THE IEP

The Student’s IEP indicates that math instruction is to be delivered in a special education setting (“outside general education”), and that the “primary” provider is to be a “special ed classroom teacher,” with an “instructional assistant” as the “other” provider; this is not in dispute. (Parents Ex. 3; BCPS Ex. 1.) It is also not in dispute that for the first six school days of the 2022 – 2023 school year (August 29 to September 2, 2022), the Student received (or the BCPS was prepared to provide<sup>25</sup>) math instruction from ██████████, a certified special education teacher.<sup>26</sup> The parties also agree that beginning on September 6, 2022, ██████████, who is not a certified teacher,<sup>27</sup> was assigned to provide math instruction to the Student, and that on that first date, Ms. ██████ was also present in the classroom. Finally, there is no dispute that on September 28, 2022, ██████████ became involved in the Student’s math instruction. Each of these three time periods requires a different analysis.

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<sup>24</sup> Alternatively, the Letter of Agreement could reasonably be considered an amendment to the IEP. Section 300.324(a)(4) allows the public agency and the parents to “agree not to convene an IEP Team meeting for the purposes of making . . . changes, and instead may develop a written document to amend or modify the child’s current IEP.” See also 34 C.F.R. §300.324(a)(6). In light of the BCPS’s obligation to have an IEP in effect for each child with a disability at “the beginning of each school year” (34 C.F.R. § 300.323), and the annual requirement to develop an IEP under 34 C.F.R §300.324(b), there is sufficient basis to treat the Letter of Agreement as a mutually-agreed upon amendment to the IEP.

<sup>25</sup> The Student has had multiple absences during the 2022 – 2023 school year, including missing the first several days of school. However, neither party submitted a complete record of the Student’s attendance, and whether the Student actually attended on any particular day is not relevant to my analysis.

<sup>26</sup> Ms. ██████’s credentials are not in the record, and she did not testify. However, ██████████ testified that Ms. ██████ is a certified special education teacher who was temporarily deployed to ██████████ to meet staffing needs. The Parents did not dispute Ms. ██████’s credentials and there is no evidence to contradict Ms. ██████’s assertions. Accordingly, I conclude that Ms. ██████ is certified.

<sup>27</sup>At the hearing, the BCPS did not dispute that Mr. ██████████ is not a certified teacher. However, I acknowledge Ms. ██████████’s testimony that, prior to the hearing date, it took her enormous effort to discern Mr. ██████████’s identity, status as a non-BCPS employee, and credentials, as the BCPS was not especially forthcoming and then provided her with inaccurate information stating that he was a special educator. (Parents Ex. 21, 26, 32, 35, and 41.) Ms. ██████████ understandably expressed both frustration and distrust with the BCPS’s handling of her questions about Mr. ██████████. However, I note that there was no evidence that the BCPS was acting in bad faith and conclude that the BCPS’s inaccurate communications with Ms. ██████████ are irrelevant and have no bearing on my decision.

August 29, 2022 – September 2, 2022

As noted, Ms. [REDACTED] provided math instruction during the first week of school in a special education setting. The Student was the only pupil in the classroom. As she is a certified special educator, the BCPS was clearly in compliance during this time period with the provision in the Student's IEP stating that services "outside of general education" will be provided by a special education classroom teacher. (Parents Ex. 3, BCPS Ex. 1).

September 6 – September 27, 2022

Ms. [REDACTED] testified that on September 6, 2022, Ms. [REDACTED] "co-taught" a sixty-minute lesson to the Student with [REDACTED], apparently to assist with his transition into the role. Mr. [REDACTED] described his interaction with Ms. [REDACTED] a bit differently, saying that he "worked with" her at first, and that she provided him with the Jamboard and explained how the Student's instruction was to be given.

Mr. [REDACTED] further testified that after September 6, 2022, he was the only individual providing direct math instruction to the Student, and that no other educator was involved until September 28, 2022. Mr. [REDACTED] described the kinds of math problems he worked on with the Student and estimated the Student's accuracy on the assignments (characterizing the Student's understanding of the material as "one hundred percent," but his skill in "operations" at 75%). Mr. [REDACTED] explained that he does not know the grade level of the assignments he is provided with, but just works through the material that he's been given. He described himself as working towards the Student's math goal, but that he has not drafted any goals or made decisions about the implementation of the Student's math goal. He also noted that he does not measure the Student's progress.

Mr. [REDACTED] stated that the Student's aide is always present to assist in managing the

Student's behaviors and to keep the Student focused. He noted that the Student has some behavioral challenges, which he and the aide both address, as needed, but that only he provides math instruction. Mr. ██████ acknowledged that he is a high school graduate who has not attended college and is not certified to be a teacher or qualified as a paraeducator. Instead, he describes himself as a "math tutor" who is "very proficient" in math. By all accounts, the Student likes Mr. ██████ and works well with him.

It is clear that after September 6, 2022, and through September 27, 2022, Mr. ██████ was the only person providing math instruction to the Student. While Mr. ██████ was using materials and assignments that may have been provided to him by a special educator (i.e., Ms. ██████), there was no "special education classroom teacher" providing instruction, as directed by the Student's IEP.<sup>28</sup> Accordingly, the BCPS did not provide educational services in conformance with the Student's IEP during this time period.<sup>29</sup>

#### September 28, 2022 to the Present

On September 28, 2022, Ms. ██████, a certified special education teacher, began working with Mr. ██████. Mr. ██████ described her in testimony as "providing support" in the classroom. Both Ms. ██████ and Mr. ██████ said that Ms. ██████ was in the classroom at least once per week, and typically twice each week. However, even with Ms. ██████ present, Mr. ██████ said he provides the direct instruction.

This is consistent with Ms. ██████'s testimony, as she explained that Ms. ██████ "oversees and supervises" Mr. ██████. Ms. ██████ used this same language in her own

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<sup>28</sup> A State agency is obligated to ensure that it has "established and maintains qualifications to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities." 20 U.S.C.A. § 1412(a)(14)(A). These qualifications "include qualifications for related services personnel and paraprofessionals that . . . allow paraprofessionals and assistants who are appropriately trained and supervised . . . to be used to assist in the provision of special education and related services . . ." 20 U.S.C.A. § 1412(a)(14)(B). *See also* 34 C.F.R. § 300.156.

<sup>29</sup> I agree with the Parents that any shortage of available teachers certified in special education does not change the BCPS's obligation to provide instructional services consistent with the Student's IEP. Memorandum to State Dir. of Special Educ., Off. of Special Educ. Programs, OSEP 22-01, 122 LRP 39264 (October 4, 2022).

testimony, though she also added that she “co-teaches” and “co-facilitates” lessons with Mr. [REDACTED]. In addition to these tasks, Ms. [REDACTED] testified that she facilitates planning lessons, collects data, and ensures that the instructional model meets the Student’s needs. Consistent with Mr. [REDACTED]’s testimony, Ms. [REDACTED] explained that she is usually present twice each week, with one of those days being Wednesdays, when the Student’s entire time at [REDACTED] is dedicated to math instruction (from about 7:45 a.m. to 9:30 a.m.).

The Parents argued that Ms. [REDACTED]’s characterization that she “co-teaches” or “co-facilitates” lessons with Mr. [REDACTED] is troubling, as Mr. [REDACTED] is not a teacher. I agree. As Ms. [REDACTED] conceded on cross examination, the “instructional assistant” indicated on the Student’s IEP (as the “other” instructor) would typically be understood to be an individual who assists a student in practicing skills initially taught by the primary provider – here, a special education classroom teacher, according to the IEP. There is no evidence that Ms. [REDACTED] has acted as the primary instructor, and in fact there is evidence to the contrary: Mr. [REDACTED]’s unequivocal testimony that he provides all direct instruction, and Ms. [REDACTED]’s concession that the most active role she takes in the classroom is on the same footing as Mr. [REDACTED] even though he is not a teacher. For this reason, I find that BCPS failed to provide math instruction compliant with the IEP from September 28, 2022 to the date of hearing.

#### THE STUDENT WAS NOT DENIED A FAPE

That the BCPS did not implement the IEP exactly as written does not necessarily mean that the Student was denied a FAPE. The Fourth Circuit Court of Appeals has repeatedly and clearly concluded that “the failure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate education.”<sup>30</sup> Rather, it is the “failure to implement a material or significant portion of the IEP” that “can amount to a denial of FAPE.” *Id.* “Can” is a key word;

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<sup>30</sup> *Sumter Cnty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4<sup>th</sup> Cir. 2011).



despite the Parents’ contention to the contrary, even failing to implement a material portion of an IEP – and thus violating the IDEA – does not establish a per se denial of FAPE. As the Court in *Sumter* makes clear, when implementation is lacking, the deficiency must pertain to a “essential element of the IEP that was necessary for the child to receive an educational benefit.” *Id.*, quoting *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8<sup>th</sup> Cir. 2003).<sup>31</sup>

Consistent with this standard, to be entitled to a remedy the Parents must show not only a violation, but “that [the] defect in the process envisioned by the IDEA had an adverse effect” on the Student’s education. *T.B. v. Prince George’s Cnty. Bd. of Educ.*, 897 F.3d 566, 573 (4<sup>th</sup> Cir. 2018). Accordingly, a “procedural violation of the IDEA may not serve as the basis for recovery unless it ‘resulted in the loss of an educational opportunity for the disabled child.’” *Id.* (citation omitted). “A ‘mere technical contravention of the IDEA’ that did not actually interfere with the provision of FAPE is not enough. Rather, the procedural violation must have caused substantive harm. Specifically, the prospect of recovery for a procedural violation of the IDEA depends on whether the student’s disability resulted in the loss of a FAPE.” *Id.* (citation omitted).<sup>32</sup>

The Parents contend that the qualifications of the individual providing instruction, pursuant to an IEP that specifies a “special education classroom teacher” as the primary provider,

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<sup>31</sup> See also *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (1990) (concluding there was no denial of FAPE where the child made progress); *DiBuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 190 (finding that a failure to provide a FAPE requires that the procedural violation “actually interfere with the provision of a FAPE to that child”) (emphasis in original); *Gadsby v. Grasmick*, 109 F.3d 940, 956 (1997) (“to the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education”); *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 532 (2002) (reversing the district court’s finding that the school district failed to provide a FAPE because the district court “failed to consider and accord weight to [the student’s] actual educational progress”).

<sup>32</sup> The Parents cite to *Manalansan v. Board of Education of Baltimore City*, 2001 WL 939699 at 14 (t. D. Md. 2001), where the district court agreed that it “must consider not only if a violation of the IDEA has occurred, but whether it has resulted in a loss of educational opportunity or whether the violation is merely technical.” Even though the student had made progress despite a technical violation of his IEP (a failure to provide him with an aide), key to the court’s reasoning that the student’s progress could not be used as a “shield” was that the aide was needed to allow the student to remain in the required least restrictive environment. In the case before me, there was no parallel basis for concluding that the credentials of the math instructor were essential to meeting the IDEA’s other requirements for a FAPE (such as LRE), and I do not find *Manalansan* persuasive on this point.

are a critical aspect of that IEP, and thus both significant and material. In response, the BCPS argues that even if it committed a technical violation by failing to assign a provider in conformance with the IEP, there has been no harm because the Parents have shown no loss of educational benefit or other harm.<sup>33</sup>

The Parents sharply disputed the BCPS's assertion that the failure to provide a certified special education teacher has had no negative impact on the Student's learning. Ms. [REDACTED] testified that the Student was unable to solve a two-step problem involving addition and subtraction that she worked on with him, even though she had understood from the BCPS staff that he had mastered his math goal (consisting of 5<sup>th</sup> and 6<sup>th</sup> grade skills), and the math problem was first-grade level.<sup>34</sup> She also stated that in speaking with Mr. [REDACTED], she was distressed to learn he was not familiar with the use of manipulatives in math instruction, or at least was unfamiliar with that terminology, and that he was unable to discuss learning strategies with her in a meaningful way. She noted that the Student's IEP specifies that manipulatives are to be used to instruct the Student and that this is an important part of learning for him.

The Parents also offered the testimony of [REDACTED], admitted as an expert in special education and the development and implementation of IEPs. Ms. [REDACTED] evaluated the Student in 2018, made recommendations, and was involved in the development of his IEP. (Parents Ex. 1 and 44.) She reviewed the math progress notes on the Student's IEP and described the Student's progress as all over the place and inconsistent. (Parents Ex. 3; BCPS Ex.

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<sup>33</sup> The BCPS also contended (separate from the contract argument discussed above, relating to enforceability, and from staff shortage considerations) that implementation of the IEP is impractical or impossible because it is out of date. The BCPS cited to *L.J. v. School Board of Broward County*, 927 F3d 1203, 1213 (11<sup>th</sup> Cir. 2019). However, the scope of this case is exceedingly narrow. While implementing some aspects of the Student's IEP, written when he was in the BCPS for a full school day, may be impractical or impossible now that he attends the BCPS for only two hours each day, there is insufficient evidentiary support to show that providing a special education certified classroom teacher for math instruction is either impractical or impossible, or that the BCPS was stymied in its efforts to do so. Certainly, it may be challenging, as the Student is the only pupil assigned to the self-contained special education classroom at the scheduled time of his class, and he is only at [REDACTED] for a short time each day, but this does not render it impractical or impossible, without evidence.

<sup>34</sup> She did not specify the date that this occurred, but it was during the 2022 – 2023 school year.

1.) For example, a note that he had achieved an objective would be followed by a note indicating he was making sufficient progress. Such inconsistent notations show that the Student had not mastered these skills, according to Ms. [REDACTED]. Ms. [REDACTED] also testified regarding her observation of the Student in October 2022. It was her opinion that Mr. [REDACTED], while a kind person who has a good rapport with the Student, lacks the expertise needed to instruct him and that the Student's instruction "jumps around" in a disorganized manner.

Ms. [REDACTED] also reviewed the October 7, 2022 progress data presented by the BCPS at the hearing, noting that the data collection chart provided no data regarding the Student's fourth objective. (BCPS Ex. 20.) She also opined that while the chart indicated other objectives had been met, it documented insufficient data under the terms of the IEP goal. Specifically, the Student's progress is to be measured using 2 – 3 sets, with 5 problems in each set, and accuracy of 60%, as specified by the IEP. The data collection sheet reflects that 7 problems were used to evaluate the first objective, 8 problems were used to evaluate the second objective, and 11 problems were used to evaluate the third objective. Because the data collection sheet, and its conclusion that the Student has met his goal, does not clearly state how many problem sets were used in evaluating him, Ms. [REDACTED] maintained that it did not show that the Student had either achieved or maintained meeting his math goal.

In her testimony, Ms. [REDACTED] acknowledged that the progress notes on the IEP document appear inconsistent and even contradictory at times but stated that there could be multiple reasons for this, including different levels of prompting and behavioral challenges on a particular day. She noted that the informal data from October 7, 2022 appears to reflect achievement of the Student's math goal. Ms. [REDACTED] also testified regarding the inconsistent progress notes on the IEP, noting that the Student appears to have maintained his skills, but that he is in need of an updated IEP with updated present levels and goals so that he can continue to progress.

I conclude that the Parents have failed to show that the Student has suffered any educational loss or harm due to the BCPS's failure to provide a special education classroom teacher as the primary instructor. I explain below.

First, I do not find the IEP's progress notes relevant to the issue before me, which is limited to the math instruction and progress during the 2022 – 2023 school year. Since the IEP was amended in June 2020, the Student's education has been disrupted by COVID-19 and a period of virtual learning. While these challenges do not relieve the BCPS of its obligation to provide the Student a FAPE, they may be factors both in the Student's inconsistent performance and the reliability of data on that progress. But more significantly, again, the only period of time at issue before me is the 2022 – 2023 school year, and any impact attributable to the BCPS's failure to provide a special education classroom teacher. The IEP progress notes pre-date the issue before me, and their inconsistent nature means they do not provide a useful baseline for evaluating the Student's performance during the 2022 – 2023 school year.

Second, while the informal data gathered by the BCPS and summarized in the October 7, 2022 collection sheet is far from perfect or complete, it is the best evidence of performance available to me, and there is no reliable data to counter it. I acknowledge the shortcomings cited by Ms. [REDACTED]; it is true that the data sheet is not clear about the number of problem sets used to measure the Student's performance, and there is no data for the fourth objective.<sup>35</sup> However, the Student also clearly performed well on the problems used as the basis for the assessment of three of four of the Student's objectives. That the data has deficiencies that may cast doubt on

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<sup>35</sup> I note that while the data collection sheet shows no data for the Student's fourth objective, Ms. [REDACTED] testified that the Student is working on this objective and making some progress, in her expert opinion.

the conclusion that the Student has achieved his math goal does not render the data evidence of educational loss – the data reflects strong performance, whether or not the goal was achieved.

I acknowledge Ms. [REDACTED]'s expert opinion that, when she observed the Student in October 2022, he did not appear to have made progress, as compared to her previous observations of him (sometime in late 2021 or early 2022, as well as in the fall of 2018). However, in light of Ms. [REDACTED]'s very limited time in the Student's classroom (a single 60-minute math class) and the absence of any specific data collected by her, I give her opinion regarding progress relatively little weight. Additionally, Ms. [REDACTED]'s observation that the Student was unable to complete one individual math problem at home on a single occasion is not a sufficient basis to conclude that the failure of the BCPS to provide a special education classroom teacher for math instruction negatively impacted the Student's learning in math. In short, there is no evidence to support a finding of either educational loss or any negative impact derived from math instruction provided during the 2022 – 2023 school year. While the BCPS conceded that the Student may only be maintaining his skills at this point, rather than acquiring new skills, and the Parents raise legitimate questions about the Student's present level of performance in math, both of these concerns relate not to the credentials of the Student's math instructor, but to the elephant in the (hearing) room: the Student's IEP is woefully out of date, and the problematic absence of formal assessment data – both issues definitively outside of the scope of this decision.

### **CONCLUSION OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the BCPS did not deny the Student a FAPE for the 2022 – 2023 school year by failing to provide math instruction, in accordance with the January 23, 2020 IEP (amended on June 19,

2020). 20 U.S.C.A. §§ 1414(d), 1415(f)(3)(E)(III); Md. Code Ann., Educ. § 8-403; *Sumter Cnty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478 (4<sup>th</sup> Cir. 2011); *T.B. v. Prince George's Cnty. Bd. of Educ.*, 897 F.3d 566 (4<sup>th</sup> Cir. 2018).

**ORDER**

I **ORDER** that the September 27, 2022 Complaint is **DENIED** and **DISMISSED**.

November 16, 2022  
Date Decision Issued

Jennifer L. Gresock  
Administrative Law Judge

JLG/ds  
#201657

**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) (2022). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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

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

**Copies Mailed To:**

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██████████,  
STUDENT

v.

BALTIMORE COUNTY  
PUBLIC SCHOOLS

BEFORE JENNIFER L. GRESOCK,  
AN ADMINISTRATIVE LAW JUDGE  
OF THE MARYLAND OFFICE  
OF ADMINISTRATIVE HEARINGS  
OAH No.: MSDE-BCNY-OT-22-23373

**FILE EXHIBIT LIST**

I admitted the following exhibits on behalf of the Parents, except where noted:

- Parents Ex. 1 Independent Educational Evaluation, ██████████ based on data from October and November 2018<sup>1</sup>
- Parents Ex. 3 IEP, amended June 19, 2020
- Parents Ex. 14 Student's Schedule, undated
- Parents Ex. 15 "Meeting My ██████████ Teachers for the 2022 – 2023 School Year" Social Story, undated
- Parents Ex. 17 Letter of Agreement, dated August 26, 2022
- Parents Ex. 19 Emails exchanged between the parties between August 26, 2022 and August 30, 2022
- Parents Ex. 21 Email exchange between the Parents and ██████████, August 31, 2022
- Parents Ex. 23 Email exchange between the parties between September 8, 2022, and September 9, 2022
- Parents Ex. 26 Email exchange between the parties between September 14, 2022 and September 22, 2022
- Parents Ex. 32 Email from the Parents to ██████████, dated September 22, 2022
- Parents Ex. 33 Email from the Parents to the BCPS staff, dated September 23, 2022
- Parents Ex. 34 NOT ADMITTED

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<sup>1</sup> The report itself is undated.



- Parents Ex. 35 Email exchange between the Parents and Mr. [REDACTED] between September 26, 2022 and September 29, 2022
- Parents Ex. 41 Email exchange between the parties on September 29, 2022
- Parents Ex. 42 Email from the Parents to the BCPS staff, dated September 29, 2022
- Parents Ex. 44 Resume of [REDACTED], undated

I admitted the following exhibits on behalf of the BCPS:

- BCPS Ex. 1 IEP, amended June 19, 2020
- BCPS Ex. 4 IEP Team Summary, mailing date April 5, 2022
- BCPS Ex. 7 Memorandum from [REDACTED] [REDACTED]<sup>2</sup> to Members of the State Board of Education Re: Maryland's Teacher Workforce: Supply, Demand, and Diversity, dated July 26, 2022
- BCPS Ex. 9 [REDACTED]<sup>3</sup> Online News Article, dated [REDACTED] 2022
- BCPS Ex. 20 Student's IEP Data Collection, dated October 7, 2022
- BCPS Ex. 28 Resume of [REDACTED], undated
- BCPS Ex. 29 Resume of [REDACTED], undated

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<sup>2</sup> Mr. [REDACTED] is the State Superintendent for the State of Maryland.

<sup>3</sup> [REDACTED] is a television station in Baltimore, Maryland.