APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 18-1780

[Filed March 25, 2019]

R.F., a minor child, by and through her PARENTS and next friends, E.F. and H.F.; E.F.; H.F., on their own behalves,	)
Plaintiffs – Appellants,	)
v.	)
CECIL COUNTY PUBLIC SCHOOLS,	)
Defendant – Appellee,	)
and	)
D'ETTE W. DEVINE, Superintendent (officially); SARAH FARR, Director of Special Education (officially),	)
Defendants.	)

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.; DISABILITY RIGHTS MARYLAND; NATIONAL DISABILITY RIGHTS NETWORK; THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW,

Amici Supporting Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Albert David Copperthite, Magistrate Judge. (1:17-cv-02203-ADC)

Argued: January 29, 2019 Decided: March 25, 2019

Before AGEE and HARRIS, Circuit Judges, and DUNCAN, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Duncan wrote the opinion, in which Judge Agee and Judge Harris joined.

ARGUED: Wayne Darryl Steedman, STEEDMAN LAW GROUP, Lutherville, Maryland, for Appellants. David Andrew Burkhouse, PESSIN KATZ LAW, P.A., Columbia, Maryland, for Appellee. Peter J. Anthony, DENTONS US LLP, Washington, D.C., for Amici Curiae. **ON BRIEF:** Cheryl A. Steele Steedman,

STEEDMAN LAW GROUP, Lutherville, Maryland; Kevin Golembiewski, BERNEY & SANG, Philadelphia, Pennsylvania, for Appellants. Adam E. Konstas, Towson, Maryland, Rochelle S. Eisenberg, PESSIN KATZ LAW, P.A., Columbia, Maryland, for Appellee. Ira A. Burnim, Lewis Bossing, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, Washington, D.C.; Richard D. Salgado, Dallas, Texas, A. David Mayhall, DENTONS US LLP, Washington, D.C., for Amicus The Judge David L. Bazelon Center for Mental Health Law. Selene Almazan-Altobelli, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., Towson, Maryland, for Amicus Council of Parent Attorneys and Advocates, Inc., National Disability Rights Network, and Disability Rights of Maryland.

DUNCAN, Senior Circuit Judge:

R.F., an elementary school student with a disability, and her parents (collectively "Appellants") challenge the district court's decision to affirm the determination of a Maryland Administrative Law Judge (an "ALJ") that Cecil County Public Schools ("CCPS") provided R.F. with a free appropriate public education (a "FAPE") under the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. § 1400 *et seq.* Appellants contend that CCPS violated the IDEA by (1) failing to educate R.F. in the least restrictive environment (the "LRE"), (2) failing to implement R.F.'s Individualized Education Program (her "IEP"), (3) denying R.F.'s parents the opportunity to participate in her educational decisionmaking, and (4) providing an IEP that was inappropriate for R.F.'s

needs. The ALJ found, and the district court agreed, that while CCPS violated certain procedural requirements of the IDEA, those violations did not substantively deny R.F. a FAPE in violation of the IDEA. For the reasons that follow, we affirm.

I.

R.F., who was seven years old when these proceedings began, is a CCPS student with a disability who is entitled to special education and related services under the IDEA.[1] R.F. and her parents contend that CCPS failed to comply with the IDEA in several respects and that, in so doing, CCPS denied R.F. a FAPE in violation of the IDEA. Before addressing these arguments, we first provide a brief overview of the applicable regulatory framework and the facts and procedural history of this case.

A.

The IDEA provides funds for states to educate children with disabilities, subject to conditions imposing substantive requirements on the education that is provided. 20 U.S.C. § 1412. The statute was enacted to ensure that children with disabilities have access to an education that meets their unique needs, to protect the rights of these children and their parents, and to prevent the unnecessary exclusion of

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[1] All facts are taken from the ALJ's findings of fact, J.A. 23–51, except where otherwise indicated. The parties agree that there are no genuine issues of material fact with these findings aside from the finding that R.F.'s behavior intervention plan (the "BIP") is "appropriate to address [her] problem behaviors." J.A. 28. We address the appropriateness of the BIP *infra*.

these children "from the public school system and from being educated with their peers."[2] *Id.* § 1400.

To that end, the IDEA requires that participating states provide a FAPE to children with disabilities. *Id.* § 1412(a)(1). The mechanism by which a state provides a FAPE is an IEP--a document that describes the child's unique needs and the state's plan for meeting those needs. *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) ("The IEP is the centerpiece of the [IDEA's] education delivery system for disabled children.") (citation and internal quotation marks omitted). The IDEA requires participating states to "develop[], review[], and revise[]" an IEP for each child with a disability. 20 U.S.C. § 1412(a)(4). An IEP must contain an assessment of the child's "present levels of academic achievement and functional performance," measurable annual goals that are designed to "meet the child's needs that result from the child's disability" along with a statement of how progress toward those goals will be measured, a description of "the special education and related services and supplementary aids and services" that the school will provide for the child, and an "explanation of the extent[] . . . to which the child will not participate with nondisabled children in the regular class." *Id.* § 1414(d)(1)(A)(i). The IEP team--a group comprised mainly of school staff and a child's parents--should

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[2] The IDEA is an updated version of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version at 20 U.S.C. § 1400 *et seq.*), under which some of the caselaw setting out IDEA requirements was initially developed.

revise the IEP "as appropriate" to address various circumstances, including a "lack of expected progress towards the annual goals"; "the results of any reevaluation"; "information about the child provided to, or by, the parents"; "the child's anticipated needs"; or "other matters." *Id.* § 1414(d)(4)(A). The IDEA requires that a child's parents be included in the IEP decisionmaking process as members of the IEP team. *Id.* § 1414(d)(1)(B).

B.

R.F. has been diagnosed with severe autism spectrum disorder and a rare genetic disorder.[3] She generally communicates without using words, and she "exhibits complex, challenging, disruptive behaviors" such as hyperactivity and aggression. J.A. 24. Her aggressive behaviors, which include "grabbing people, pulling hair, biting, and placing her mouth on others," often manifest during transitions in the school day. *Id.* R.F. also exhibits physical limitations--for instance, she has significant neuromuscular deficits, so she sometimes needs assistance sitting up straight and being aware of her body's position when navigating steps and curbs. R.F. "requires adult supervision and assistance at all times." *Id.* She also has a short attention span and has difficulty processing information quickly.

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[3] R.F. was one of only two people in the world diagnosed with this disorder when she received that diagnosis. The long-term consequences of this disorder, including its impact on R.F.'s educational potential, are unknown.

CCPS first identified R.F. as a student qualifying for special education and related services when she was two years old. It developed IEPs for R.F. for half-day kindergarten in the 2014–2015 school year and for full-day kindergarten in the 2015–2016 school year.

Before R.F. entered first grade, CCPS took steps to address R.F.'s behavioral issues. CCPS hired a consultant from the Kennedy Krieger Institute to instruct its staff on conducting functional behavior assessments ("FBAs") for students with significant disabilities and autism. CCPS staff conducted an FBA for R.F. in April 2016 and created a behavior intervention plan (a "BIP") for her that focused on biting as her primary interfering behavior.

The BIP set out actions for CCPS staff to take to reduce R.F.'s unwanted biting and to intervene when she began to bite. Steps to reduce R.F.'s biting included ensuring that R.F.'s NovaChat (a device that allows R.F. to press pictures on a screen to communicate) was accessible to her at all times, maintaining a "clear and consistent daily routine" and a visual schedule to ease transitions during the day, reminding R.F. of appropriate behaviors by presenting social stories to her throughout the day, providing R.F. with "short verbal instructions with visual supports," and using a token reinforcement system. J.A. 29. Steps to intervene when R.F. began to bite included redirecting R.F. to her NovaChat, to appropriate oral stimulation items, or to vibration tools meant to calm R.F., followed by reviewing social stories to remind R.F. why biting is inappropriate.

As relevant to the dispute on appeal, R.F.'s IEP team--comprised primarily of CCPS staff and R.F.'s parents--met in May 2016 to revise her IEP for the 2016–2017 first grade school year (the "May 2016 IEP"). The May 2016 IEP incorporated R.F.'s BIP. It also included thirteen goals to address R.F.'s academic, behavioral, physical, and speech and language needs. The IEP team determined that to make progress on these goals, R.F. would require sixteen hours and fifty-five minutes outside the general education setting and fourteen hours and thirty-five minutes inside the general education setting each week.

R.F.'s mother attended this meeting and objected to the May 2016 IEP. She did not think that R.F. should be included in classes with nondisabled peers and requested that CCPS pay for R.F.'s tuition at the Benedictine School, a private school. The other members of R.F.'s IEP team disagreed and noted that CCPS was developing an intensive communication support classroom (an "ICSC") for children with communicative difficulties. The IEP team again met in June 2016 to evaluate R.F.'s progress on her IEP goals before the start of the 2016–2017 school year. Appellants' arguments on appeal focus solely on the 2016–2017 school year.[4]

At the start of the 2016–2017 school year, CCPS provided most of R.F.'s special education services in the ICSC. Although CCPS anticipated the participation of

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[4] Appellants initially asserted claims arising from the 2014–2015 and 2015–2016 school years, but these claims were disposed of by the ALJ below, and Appellants do not pursue them on appeal.

other students in the ICSC, those students did not attend in the fall of 2016 due to unexpected circumstances. Consequently, R.F. was the only student in the ICSC. R.F. joined the general education classroom for "specials" (e.g. gym, art, music), recess, field trips, and occasional reading and math classes.

Mr. K., a special education teacher, provided R.F. with special education services in the ICSC. CCPS also assigned a paraprofessional to support R.F. throughout the day. In the ICSC and throughout R.F.'s day, CCPS offered R.F. a number of specialized services, including individualized supervision and instruction, and supports. These supports included objects meant to help R.F. transition to new activities and locations, a visual schedule with verbal cues, and low lighting and reduced noise. CCPS "implemented the BIP regularly, but not perfectly." J.A. 44. For instance, while Mr. K. used the behavior reduction and intervention steps in the BIP, he did not always follow them in order. To monitor R.F.'s progress toward her IEP goals, Mr. K. collected data on R.F.'s behavior and performance every other week and incorporated that data into quarterly progress reports. He destroyed his raw data after writing the quarterly reports, even though CCPS requires teachers to maintain data for two years.

In August 2016, approximately three weeks after the start of school, Mr. K. began to notice that R.F. struggled when she joined her nondisabled peers in the general education setting. She had difficulty walking between classrooms and staying seated and quiet in the general education classroom. She also often failed to

finish her lunch in the school lunchroom because she became distracted.

In response to these difficulties, Mr. K. gradually began providing more instruction to R.F. in the ICSC instead of the general education classroom. For instance, while R.F.'s schedule placed her in the general education classroom for reading comprehension, Mr. K. would sometimes remove her from that class and take her back to the ICSC. This decision varied daily and, according to Mr. K., was "responsive to her needs depending on her success in the class." S.A. 3.[5] On some days, Mr. K. was unable to take R.F. to the general education classroom "if she was exhibiting really aggressive behaviors or if she was having a really difficult time walking or with mobility." S.A. 4. As a result of these adjustments, R.F.'s hours in the ICSC exceeded the number specified in the May 2016 IEP.

In December 2016, R.F.'s IEP team met again to revise her IEP (the "December 2016 IEP"). The team decided to reduce the number of hours that R.F. spent in the general education setting so that she would only attend specials with nondisabled peers. Accordingly, the December 2016 IEP increased R.F.'s weekly time outside the general education setting from sixteen hours and fifty-five minutes to twenty-nine hours.

R.F.'s parents attended the meeting and opposed CCPS's approach. R.F.'s mother again expressed opposition to placing R.F. in a general education

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[5] Citations to the "S.A." refer to the Supplemental Appendix filed by CCPS in this appeal.

setting "at all during the school day." J.A. 45. R.F.'s parents also presented a report by Lisa Frank, an education consultant, who recommended placement in a "full-day evidence-based program for children with autism" like the Benedictine School. *Id.* The other members of the IEP team disagreed with this proposed placement and determined that the ICSC was the best placement for R.F.

C.

Shortly after R.F.'s IEP team compiled the December 2016 IEP, R.F.'s parents initiated this action, alleging that CCPS violated the IDEA and seeking to have R.F. placed at the Benedictine School or another private school at CCPS's expense. As required under the IDEA, they first filed a due process complaint with Maryland's Office of Administrative Hearings, resulting in a hearing before an ALJ. *See* 20 U.S.C. § 1415(f). The hearing before the ALJ addressed whether CCPS denied R.F. a FAPE or failed to offer her an IEP that would provide her with a FAPE during the 2016–2017 school year.

Mr. K testified at the hearing. As relevant to one of Appellants' principal claims concerning CCPS's procedural violations of the statute, Mr. K. stated that he was unaware that CCPS required teachers to maintain raw data for two years. The ALJ concluded that he had violated CCPS's retention policy but "did not do so for any nefarious purpose," and she declined to draw any negative inferences from his testimony. J.A. 71.

The ALJ also heard evidence regarding how CCPS calculates special education hours for the purposes of preparing IEPs and recording services provided. She found that, while Maryland requires schools to define special education hours in terms of the number of hours a child spends outside the general education classroom, CCPS defines them in terms of the number of hours of instruction focused on a child's IEP goals. Therefore, the ALJ concluded that experts who testified that R.F.'s IEP contained an inadequate number of special education hours did so based on a misunderstanding of how CCPS calculates those hours.

Based on the testimony and data presented at the hearing, the ALJ evaluated R.F.'s progress on her IEP goals. She found that R.F. had made progress toward some of her physical goals as well as some of her speech and language goals. She also found that R.F. did not make progress toward her behavioral or academic goals. She concluded that, overall, R.F. had "made incremental progress on some, but not all of her goals" and that this was appropriate for R.F. "given her unique circumstances." J.A. 86.

The ALJ issued a decision holding that CCPS procedurally violated the IDEA by changing R.F.'s placement in August 2016 by gradually increasing her hours in the ICSC without notifying her parents or revising her IEP. She also concluded, however, that this violation did not deny R.F. a FAPE, crediting Mr. K.'s testimony that R.F. was having difficulty in the general education setting and benefitted from additional time in the ICSC. Overall, the ALJ concluded that "CCPS offered [R.F.] 'an IEP reasonably

calculated to [enable her to] make progress appropriate in light of the child's circumstances.'" J.A. 87 (quoting *Endrew F.*, 137 S. Ct. at 999).

Appellants challenged the ALJ's decision in federal district court, naming as defendants CCPS, its superintendent, and its director of special education, in their official capacities.[6] The district court granted CCPS's motion for summary judgment for reasons similar to those stated in the ALJ's decision.[7] This appeal followed.

II.

In IDEA cases, we conduct a modified de novo review, "giving 'due weight' to the underlying administrative proceedings." *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 323 (4th Cir. 2009) (citation omitted). Under our precedent, whether an educational program offered by the state is appropriate for purposes of the FAPE analysis is a question of fact.[8] We consider an ALJ's factual findings to be "*prima facie* correct." *Doyle v. Arlington Cty. Sch. Bd.*, 953 F.2d

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[6] Throughout this opinion, we refer to these defendants collectively as "CCPS."

[7] The district judge referred the case to a federal magistrate judge for all proceedings and the entry of judgment by consent of the parties, in accordance with 28 U.S.C. § 636(c).

[8] We note, however, that several other circuits treat the issue of whether the school district has provided a FAPE as a mixed question of fact and law. *See, e.g.*, *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804 (8th Cir. 2011) ("Whether a child has received a FAPE is a mixed question of law and fact.").

100, 105 (4th Cir. 1991). However, the "ultimate decision as to whether the state has complied with the IDEA" is an independent decision made by the district court. *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011). In making this independent decision, courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982).

III.

Appellants contend that CCPS violated the IDEA in several respects. Whether a state has violated the IDEA has procedural and substantive components. Procedurally, the state must comply with the stated requirements of the IDEA. *Id.* at 206–07. Substantively, the state must offer the child a FAPE, which requires a targeted educational program setting reasonably calculated goals for a child's progress in light of the child's particular circumstances. *Endrew F.*, 137 S. Ct. at 999.

We first reexamine our precedent in light of the Supreme Court's recent decision in *Endrew F.*, 137 S. Ct. 988, clarifying the FAPE standard. We then address Appellants' specific contentions regarding CCPS's compliance with the IDEA.

A.

To meet the substantive requirements of the IDEA, a school must provide a child with a FAPE. *M.L. ex rel. Leiman v. Smith*, 867 F.3d 487, 499 (4th Cir. 2017). The Supreme Court recently held in *Endrew F.* that to

satisfy the FAPE requirement, "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.

In establishing this standard, the Court rejected the Tenth Circuit's approach, which held that the education and services provided to children with disabilities "must be calculated to confer *some* educational benefit" to meet the FAPE requirement and that a child's IEP "is adequate as long as it is calculated to confer an educational benefit that is merely more than *de minimis*" (the "*de minimis* standard"). *Id.* at 997 (alterations, citation, and internal quotation marks omitted). Before *Endrew F.*, we required schools to provide "some educational benefit" to a child to meet their substantive obligation to provide the child with a FAPE. *See O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 358 (4th Cir. 2015) (quoting *Rowley*, 458 U.S. at 200) (collecting cases). This prior standard is similar to the Tenth Circuit's *de minimis* standard, and we clarify again that it is no longer good law. *See M.L.*, 867 F.3d at 496 (acknowledging that "[o]ur prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by *Endrew F.*").

Instead, we follow the Court's standard as articulated in *Endrew F.* and hold that "[t]o 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."[9] *Endrew F.*, 137 S. Ct. at 999. This standard is framed in terms of each child's unique circumstances because "[a] focus on the particular child is at the core of the IDEA." *Id.* Consequently, "the benefits obtainable by children at one end of the spectrum [of disability] will differ dramatically from those obtainable by children at the other end, with infinite variations in between." *Id.* (quoting *Rowley*, 458 U.S. at 202). Our analysis is therefore grounded in each particular child's circumstances.

B.

Having established the relevant standard for the FAPE requirement, we turn to the issues on appeal in this case. In sum, we hold that CCPS did violate certain procedural requirements of the IDEA, most notably by changing R.F.'s placement without notifying her parents or modifying her IEP. However, any procedural violations did not deny R.F. a FAPE.

Appellants contend that CCPS violated the IDEA in four respects: (1) by failing to educate R.F. in the LRE, (2) by failing to implement the classroom placement in

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[9] Indeed, we implicitly did so in *T.B., Jr. ex rel. T.B., Sr. v. Prince George's County Board of Education*, 897 F.3d 566 (4th Cir. 2018). In that case, we held that a school board procedurally violated the IDEA by failing to promptly evaluate a child for special education. *Id.* at 573. We concluded, however, that the school did not substantively violate the IDEA because its failure did not deny the child a FAPE. *Id.* at 575. In doing so, we quoted *Endrew F.*'s standard to explain the substantive requirement of the IDEA, but it was not central to our holding because the case did not turn on whether the child's IEP was reasonably calculated to provide the child with a FAPE. *See id.* at 571.

R.F.'s IEP when Mr. K. increased her hours in the ICSC, (3) by denying R.F.'s parents the right to participate in her education, and (4) by failing to provide an IEP appropriate for R.F.'s needs. We address each issue in turn.

1.

Appellants contend that CCPS failed to educate R.F. in the LRE because it provided her most of her instruction in the ICSC, where R.F. was the only student. They seek an order placing R.F. at a private school where she would be educated among peers with disabilities. We reject this contention.

The IDEA requires participating states to educate children with disabilities in the LRE--that is, alongside children who are not disabled "[t]o the maximum extent appropriate." 20 U.S.C. § 1412(a)(5). It permits states to remove a child with disabilities from the "regular educational environment . . . only when the nature or severity of the disability of a child is such that education in regular classes [with appropriate supports] cannot be achieved satisfactorily." *Id.* We have acknowledged that this statutory language "obviously indicates a strong congressional preference for mainstreaming" students into the general education classroom but that "[m]ainstreaming . . . is not appropriate for every [child with a disability]." *DeVries ex rel. DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). Instead, "[t]he proper inquiry is whether a proposed placement is appropriate under the [IDEA]"--in other words, whether a child's placement--the setting where the child learns--provides the child with a FAPE. *Id.* (citation omitted).

Here, placement in the ICSC was "reasonably calculated to enable [R.F.] to make progress appropriate in light of [her] circumstances." *Endrew F.*, 137 S. Ct. at 999. The ALJ's analysis here is instructive; she noted that "CCPS was not hiding [R.F.] from her peers; [R.F.] was afforded opportunities to interact with other first graders, albeit not to the degree CCPS would have preferred." J.A. 73–74. Indeed, while R.F. received most of her instruction in the ICSC, CCPS gave her multiple daily opportunities to interact with her nondisabled peers. For instance, she attended specials with the general education population and walked around the school each day to practice greeting other students. These opportunities, combined with R.F.'s instructional time in the ICSC, did not deny R.F. a FAPE, particularly where Mr. K. noted that R.F. had trouble concentrating and accessing material in the general education population. R.F. had opportunities to interact with her peers "[t]o the maximum extent appropriate," given R.F.'s unique circumstances and academic and behavioral needs. 20 U.S.C. § 1412(a)(5).

Appellants argue that the conclusions of the ALJ and the district court regarding R.F.'s placement improperly conflate the LRE and FAPE requirements. However, as they themselves recognize, the statutory obligation requires placement in the least restrictive environment *appropriate for the child's education*. *See Devries*, 882 F.2d at 880. As in *DeVries*, that required an environment where R.F. could benefit from "a structured program" and the opportunity for "one-to-one instruction." *Id.* at 879.

Appellants argue that they are not urging CCPS to increase the number of hours that R.F. spends with her peers who are not disabled; instead, they contend that the LRE for R.F. would include more time among peers with disabilities, and they seek placement in a private school to achieve that outcome. This argument miscomprehends the LRE requirement, which is defined in terms of the extent to which children with disabilities "are educated with children who are *not* disabled." *Id.* at 878 (emphasis added). But even under Appellants' standard, CCPS did not violate the LRE requirement. Instead, the ALJ correctly noted that "CCPS thought there would be other students in the [ICSC], but it did not turn out that way" due to unforeseen circumstances. J.A. 73. CCPS cannot be said to have denied R.F. a FAPE merely because fewer students with disabilities enrolled at R.F.'s school than CCPS anticipated. Accordingly, we agree with the ALJ and the district court that CCPS did not violate the LRE requirement.

2.

Next, Appellants contend that CCPS violated the IDEA by failing to follow R.F.'s IEP. Specifically, they argue that CCPS failed to implement R.F.'s IEP when Mr. K. changed R.F.'s placement and began providing her with more instruction hours in the ICSC than her IEP called for. While this was a procedural violation of the IDEA, we hold that it was not a substantive violation because R.F. was not denied a FAPE as a result.

A school must follow procedures specified in the IDEA before changing the child's placement as

identified in her IEP. *See* 20 U.S.C. § 1415(b)(3) (requiring written prior notice to the child's parents before the local education agency may change a child's educational placement). Here, CCPS did not follow these procedures before changing R.F.'s placement. Instead, Mr. K. increased her hours in the ICSC beyond those specified in her IEP without giving notice to R.F.'s parents. This constitutes a procedural violation.

However, as we have noted, not all procedural violations of the IDEA result in the denial of a FAPE. *T.B., Jr.*, 897 F.3d at 573. Indeed, Mr. K.'s decision to provide R.F. with more instruction in the ICSC than her IEP specified was "reasonably calculated to enable [R.F.] to make progress appropriate in light of [her] circumstances." *Endrew F.*, 137 S. Ct. at 999. Mr. K. recognized that R.F. was struggling in the general education classroom, and he determined that she would make more progress with more one-on-one instruction in the ICSC. He did so on a gradual and individualized basis, based on close attention to R.F.'s performance in a general education setting and in the ICSC. We conclude that R.F. received a FAPE when CCPS changed her placement, even though it failed to follow the IDEA's procedural requirements.

3.

Appellants also contend that CCPS violated the IDEA by taking certain actions that impeded her parents from participating in decisions about her education. The IDEA and its regulations grant the parents of a child with a disability certain procedural rights, including the right to "examine all records" relating to that child and to "participate in meetings

with respect to the identification, evaluation, and educational placement" of the child. 20 U.S.C. § 1415(b); *see* 34 C.F.R. § 300.322 (setting out parent participation regulations for IEP development). The IDEA also "grants parents independent, enforceable rights" that are not limited to procedural matters, including "the entitlement to a [FAPE] for the parents' child." *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 533 (2007). We first clarify the grounds on which an ALJ may determine that a violation of parents' rights under the IDEA resulted in the denial of a FAPE to a child before turning to Appellants' contentions here.

a.

Parents who seek to enforce their rights or the rights of their child under the IDEA first seek review through a due process hearing before an ALJ. 20 U.S.C. § 1415(f). In general, the ALJ must determine whether a school violated the IDEA by deciding "on substantive grounds . . . whether the child received a [FAPE]." *Id.* § 1415(f)(3)(E)(i). However, "[i]n matters alleging a procedural violation, an ALJ "may find that a child did not receive a [FAPE]" if the ALJ determines that a procedural right was violated and that the violation "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child." *Id.* § 1415(f)(3)(E)(ii)(II).

Under § 1415(f)(3)(E)(ii)(II), an ALJ must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA:

(1) whether the plaintiffs "alleg[ed] a procedural violation," (2) whether that violation "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child," and (3) whether the child "did not receive a [FAPE]" as a result. *Id.* § 1415(f)(3)(E). Unless an ALJ determines that a given procedural violation denied the child a FAPE, she may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief, such as private placement or compensatory education. *See Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 754 n.6 (2017) ("Without finding the denial of a FAPE, a hearing officer may do nothing more than order a school district to comply with the [IDEA's] various procedural requirements.").

b.

Our analysis here starts and ends with the second prong of this standard: whether a violation of parents' procedural rights under the IDEA "significantly impeded" their opportunity to participate in decisionmaking regarding their child's education. Appellants contend that CCPS violated their parental participation rights under the IDEA by changing R.F.'s placement without involving them in an IEP meeting and by destroying data relating to R.F.'s progress on her IEP goals. We hold that neither constitutes a significant impediment to parental participation on these facts.

With respect to changing R.F.'s placement, the parties agree that "Mr. K.'s unilateral determination to alter the environment in which some of R.F.'s IEP

services were offered . . . constituted a procedural violation of [the parental rights provisions of] the IDEA." Appellees' Br. at 17; *see* 20 U.S.C. § 1415(b)(3).

However, R.F.'s parents' opportunity to participate in decisionmaking regarding R.F.'s education was not "significantly impeded" when CCPS changed R.F.'s placement for four months without involving her parents. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). As discussed above, in changing R.F.'s placement, CCPS provided her more special education services, not fewer, in the ICSC, consistent with her parents' objection that her IEP contained too many hours in the general education classroom. CCPS did not significantly impede R.F.'s parents' participation rights when it failed to inform them that it was gradually changing R.F.'s placement in line with their expressed wishes.

Additionally, R.F.'s parents did eventually have an opportunity to participate in decisions about R.F.'s placement when her mother attended the December 2016 IEP meeting. *See D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010) (holding that a school district did not violate the IDEA when it ignored parents' letters for months but included the parents in their child's IEP meeting because "they ultimately had an opportunity to participate meaningfully in the creation of an IEP" for their child). Therefore, the only form of relief that Appellants seek--private placement for R.F.--"cannot reasonably be traced" to CCPS's failure to include R.F.'s parents in decisions regarding her placement in August 2016. *Id.* at 566. We cannot agree with Appellants that CCPS's procedural violation of R.F.'s parents' right to participate in decisions about

her placement rises to the level of a substantive IDEA violation that could be cured by private placement.

Appellants also contend that CCPS violated their parental rights under the IDEA when Mr. K. destroyed the raw data that he collected on R.F.'s progress before her parents could review it. However, as the ALJ noted, "the IDEA does not specify how often a school system should collect data or how long it should be maintained." J.A. 72. Instead, it only requires that the IEP describe how the child's progress toward her goals will be measured. 20 U.S.C. § 1414(d)(1)(A)(i)(III). The ALJ found that while Mr. K. violated *CCPS*'s records retention policy, which required him to preserve the data for two years, he did not violate the IDEA when he destroyed R.F.'s raw data after making his quarterly reports. We agree that this was not a procedural violation of the IDEA.

Regardless of whether the data destruction was a procedural violation of the IDEA, R.F.'s parents could still view summaries of the data in Mr. K.'s quarterly reports. Therefore, their ability to "participate in the decisionmaking process" regarding R.F.'s education was not "significantly impeded." 20 U.S.C. § 1415(f)(3)(E)(ii)(II).

We in no way minimize the necessity of compliance with the procedural requirements of the IDEA, including those pertaining to parental participation. *See DiBuo ex rel. DiBuo v. Bd. of Educ.*, 309 F.3d 184, 191 (4th Cir. 2002) (explaining, in a case before § 1415(f)(3)(E)(ii)(II) was enacted, that "[w]e have no doubt that a procedural violation of the IDEA . . . that causes interference with the parents' ability to

participate in the development of their child's IEP will often actually interfere with the provision of a FAPE to that child"). But here, we cannot find that CCPS significantly impeded R.F.'s parents' participation rights when it changed R.F.'s placement and destroyed raw data on R.F.'s progress. Accordingly, we affirm that CCPS did not violate R.F.'s parents' rights under the IDEA.

4.

Finally, Appellants contend that CCPS violated the IDEA because it failed to provide R.F. with an IEP that was sufficient to meet her needs, thus denying her a FAPE. Specifically, they contend that R.F.'s BIP was insufficient because it primarily focused on biting while ignoring R.F.'s other behaviors, that R.F.'s IEP was inadequate because it lacked a social skills goal, and that R.F.'s IEP contained an insufficient number of hours of special education instruction to meet her needs. We disagree.

As we have discussed, "[t]o 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." *Endrew F.*, 137 S. Ct. at 999. Courts conduct this analysis with an understanding that "crafting an appropriate program of education requires a prospective judgment by school officials." *Id.*

First, with respect to the BIP, Appellants contend that it rendered R.F.'s IEP inadequate because it

should have addressed behaviors other than biting.[10] However, the ALJ found that, at the time the May 2016 IEP was created, biting was R.F.'s primary problem behavior. She also deferred to testimony by Sarah Farr, CCPS's director of special education, that "[t]he skills set forth in the BIP for the primary behavior [here, biting] can be generalized to other behaviors." J.A. 68–69. Therefore, the behavior strategies in the May 2016 IEP were "reasonably calculated" in light of R.F.'s circumstances at the time that IEP was created, and CCPS did not deny her a FAPE. *Endrew F.*, 137 S. Ct. at 999.

Appellants contend that the December 2016 IEP was inadequate because it incorporated the BIP without revising it to include interventions for R.F.'s other interfering behaviors. However, Appellants present no evidence that by the time the IEP team met to revise R.F.'s IEP in December, CCPS was aware that biting was not R.F.'s only interfering behavior. While it is true that Mr. K. testified in March 2017 that if he were to develop a new BIP for R.F., it would include biting, hair pulling, grabbing, hitting, kicking, and scratching, this says nothing about what CCPS knew in December 2016. Without other evidence indicating that CCPS knew in December 2016 that R.F. needed interventions for behaviors other than biting, we cannot say that CCPS procedurally violated the IDEA by failing to account for those behaviors in her IEP.

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[10] Although the BIP itself is defined by Maryland regulations, *see* Md. Code Regs. § 13a.08.04.02(B)(1), its incorporation by reference into R.F.'s IEP gives rise to review under the IDEA framework governing the adequacy of IEPs.

Regardless, any error in failing to update the BIP did not deny R.F. a FAPE because CCPS took steps that were "reasonably calculated" to address R.F.'s behavioral needs "in light of [her] circumstances." *Id.* For instance, Farr testified that R.F.'s existing BIP was sufficient to address R.F.'s behaviors. Farr explained that R.F.'s other interfering behaviors did not need to be included in a new BIP because "they're being addressed in a very appropriate way. [CCPS is] altering the environment to change those behaviors." S.A. 24. Farr emphasized that R.F.'s interfering behaviors, including biting, have decreased because CCPS is taking steps to reduce those behaviors. Therefore, CCPS did not violate the IDEA and deny R.F. a FAPE by failing to address behaviors other than biting in the BIP that was incorporated in her May 2016 and December 2016 IEPs.

Second, with respect to whether R.F.'s IEP was inadequate because it lacked a social skills goal, the ALJ found that "[R.F.] could benefit if her IEP contained a measurable socialization goal" but noted that "an IEP is not required to contain every goal from which a student might benefit." J.A. 70. She concluded that "[t]aking the IEP as a whole," R.F. "was not denied a FAPE due to the lack of a social skills goal in her IEP." *Id.* We agree and note that the IEP did build in opportunities for R.F. to practice her social skills. For instance, R.F.'s BIP included the use of social stories to remind R.F. of appropriate social interactions, and her schedule included regular walks around the building to greet students.

Finally, with respect to whether R.F.'s IEP contained inadequate hours of special education, the ALJ correctly noted that, because IEPs are prospective, Appellants cannot rely on the fact that R.F.'s hours of special education were increased in the December 2016 IEP as evidence that the May 2016 IEP was defective when created. *See* J.A. 74 ("The appropriateness of the May 2016 IEP must be judged as of the time it was adopted, not in December 2016."). The ALJ also found that Appellants' experts who testified that the May 2016 IEP contained an inadequate number of special education hours did so under an incorrect understanding of the way CCPS calculates and records special education hours. Appellants offered no other evidence that the May 2016 IEP contained an inadequate number of special education hours to enable R.F. to "make progress appropriate in light of the [her] circumstances." *Endrew F.*, 137 S. Ct. at 999. Therefore, we affirm and conclude that the content of R.F.'s IEP was sufficient to provide her with a FAPE.

5.

In sum, although CCPS violated the IDEA in some procedural respects, we affirm because it did not deny R.F. a FAPE. The education that R.F. actually received during the 2016–2017 school year reinforces our decision that CCPS provided her with a FAPE. The May 2016 IEP set out thirteen goals addressing "all of R.[F.]'s identified special needs." J.A. 35. These goals "focus[ed] on the particular child." *Endrew F.*, 137 S. Ct. at 999. The IEP's use of the ICSC, with its specialized supports to target R.F.'s issues with focus and stress, "aim[ed] to enable [her] to make progress,"

while its efforts to include R.F. in a general educational setting for specials aimed to avoid unduly isolating her from her peers at school. *Id.*

Under this IEP, as the ALJ found, R.F. did make "progress toward achieving some of the goals on her IEP during the 2016/2017 school year," although not all of them. J.A. 46. To facilitate her progress, Mr. K. and a paraprofessional worked closely and constructively with R.F. throughout the year to determine how to best enable her to make progress towards these goals. Such efforts include an ongoing assessment of whether R.F. was able to make progress in general educational settings.

The IEP did not aim for grade-level advancement through the general curriculum or for standard letter grades because these were not considered "a reasonable prospect" for R.F. *Endrew F.*, 137 S. Ct. at 1000. But this does not indicate a failure to set "challenging objectives" for R.F. *Id.* The IEP team also revised the IEP in December 2016 to account for the progress that R.F. had made to date.

This combination of reasonably ambitious goals that were focused on R.F.'s particular circumstances and that were pursued through the careful and attentive instruction of specialized professionals provided the education that R.F. is entitled to under the statute. We therefore conclude that CCPS provided R.F. with a FAPE despite its procedural violations of the IDEA.

IV.

Although CCPS procedurally violated the IDEA in certain technical respects, it did not substantively

violate the IDEA because it did not deny R.F. a FAPE. We therefore

AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. ADC-17-2203

[Filed June 21, 2018]

R.F., *et al.*,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
CECIL COUNTY PUBLIC SCHOOLS,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION

Defendant, Cecil County Public Schools ("Defendant"), moves this Court for summary judgment in its favor and against Plaintiffs, R.F., a minor child, and her parents (collectively, "Plaintiffs"),[1] ("Defendant's Motion") (ECF No. 30). Defendant seeks a ruling from the Court that Plaintiffs cannot prevail on their claims for deprivation of a free appropriate public education ("FAPE") under the Individuals with

[1] R.'s parents filed this suit on her behalf.

Disabilities Education Act ("IDEA") and disability discrimination under § 504 of the Rehabilitation Act of 1973 ("§ 504"). Plaintiffs filed an opposition to Defendant's Motion and cross-motion for summary judgment ("Plaintiffs' Cross-Motion) (ECF No. 31).

After considering the motions and responses thereto (ECF Nos. 32 & 35), the Court finds that no hearing is necessary. *See* Loc.R. 105.6 (D.Md. 2016). In addition, having reviewed the pleadings of record and all competent and admissible evidence submitted by the parties, the Court finds that there is no genuine issue of material fact as to the claims asserted and that there is insufficient evidence from which a jury could find in Plaintiffs' favor on the deprivation of a FAPE and disability discrimination claims. Accordingly, the Court will GRANT Defendant's Motion (ECF No. 30) and DENY Plaintiffs' Cross-Motion (ECF No. 31).

FACTUAL BACKGROUND

This lawsuit arises out of Plaintiffs' allegations that Defendant failed to offer R. a FAPE under IDEA for the 2016-2017 school year and discriminated against R. based on her disability in violation of § 504. Plaintiffs further asserted that the Administrative Law Judge ("ALJ") who presided over R.'s due process hearing erroneously applied the law, erred in her factual findings, and erred in determining that Defendant had offered R. a FAPE for the 2016-2017 school year. The facts are viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (citation omitted). Here, both parties rely upon the factual findings laid out in the administrative decision issued

on May 3, 2017, except to the extent that such factual findings state or incorporate legal findings. *See* ECF Nos. 30-1 at 5 & 31-1 at 12.

R. was born on June 15, 2009 and, thus, at the time of the administrative decision, R. was a seven-year-old girl. ECF No. 30-2 at 4; *see* ECF No. 31 at 1. In 2013, R. was diagnosed with a genetic disorder related to mutation in the HIVEP2 gene, an extremely rare condition with unknown long-term consequences, including those related to learning to perform activities of daily living, processing information, and understanding and expressing language. ECF No. 30-2 at 4. In March 2016, R. was diagnosed with severe autism spectrum disorder at one of the most intensive levels. *Id.* R. has also been diagnosed with several other disorders, including, *inter alia,* global developmental delay and an intellectual disability. *Id.* She exhibits complex, challenging, disruptive behaviors, including hyperactivity and impulsivity which are difficult to control even with medication as well as grabbing people, pulling hair, biting and placing her mouth on others without biting down. *Id.* at 5. R. is nonverbal in that she does not regularly use words to communicate and expresses no recognizable speech other than "Mommy," which she sometimes uses toward her mother. *Id.* at 4-6. R. also has significant neuromuscular deficits, including hypotonia. *Id.* at 5. R. requires adult supervision and assistance at all times, including when toileting, washing her hands, and managing her clothes. *Id.*

R. was identified as a student qualifying for special education and related services and began receiving

services through the Maryland State Department of Education's ("MSDE") Infants and Toddlers program when she was two years old under the primary disability of "developmental delay." *Id.* at 6-7. From 2012 to 2013, R. attended a part-day preschool. ECF No. 31-1 at 8.

Defendant developed R.'s first individualized education program ("IEP") on June 4, 2014. ECF No. 30-2 at 6. During the 2014-2015 school year, R. attended half-day kindergarten and Defendant provided her with speech and language, occupational, and physical therapy. *Id.* The majority of R.'s educational program was in general education classes. Defendant further provided R. with extended school year ("ESY") services during the summer of 2015. *Id.*

In May 2015, R.'s IEP was approved after an IEP team meeting. *Id.* The May 2015 IEP identified R. as a student with the primary disability of developmental delay and identified the areas affected by her disability as "Early Math Literacy, Reading Comprehension, Speech and Language Expressive and Receptive Language, Behavioral (sensory), and Physical (endurance and gross motor)." *Id.* at 7. The May 2015 IEP contained goals and objectives in academic, speech and language, physical, and endurance areas. *Id.*

R.'s IEP was reviewed and revised on July 30, 2015 in order to discuss R's ESY services and the status of her progress since her May 2015 IEP. *Id.* The IEP team agreed that during the 2015-2016 school year, R. should be placed in the regular early childhood education program of full-day kindergarten with the majority of her special education services provided

outside of the general education classroom because they could not be provided in the regular classroom. *Id.* at 7-8. Accordingly, the IEP provided that R. would receive educational services outside of the general education classroom for two and a half hours per week and the rest of the week—twenty-nine hours—she would receive services in the general education setting.[2] *Id.* at 8.

During the 2015-2016 school year, R. had class with twenty-one students and a paraprofessional accompanied her at all times. *Id.* She received special education and related services pursuant to her IEP. *Id.* On February 9, 2016, R.'s IEP was revised at an IEP team meeting, which included Mrs. F., R.'s mother, to reduce R.'s IEP Speech and Receptive Language goal. *Id.* at 8. Also during this meeting, Mrs. F., as well as R's physical therapist, occupational therapist, speech language pathologist, and special education teacher, said that R. was making progress toward her annual goals. *Id.*

In the spring of 2016, Defendant ordered multiple assessments, which revealed, *inter alia*, that R. performed at an extremely low level and demonstrated clinically significant behaviors in the school setting, including hyperactivity and aggression. *Id.* at 9, 11. Based on these assessments, the IEP team concluded that R. met the criteria for autism spectrum disorder. *Id.* at 11. Defendant also retained a psychologist with expertise in students with significant disability and

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[2] The school week for Defendant's elementary schools consists of a total of 31 hours and 30 minutes. ECF No. 30-2 at 16.

autism to create a model functional behavior assessment ("FBA") and train Defendant's staff to conduct FBAs. *Id.* at 9. Because R. displayed significant behavior difficulties, Defendant's staff conducted a FBA of R., which indicated that the primary interfering behavior was biting, and, on April 13, 2016, Defendant's staff created a behavior intervention plan ("BIP") which listed specific steps that school personnel should take to prevent unwanted behaviors as well as steps for behavior intervention. *Id.* at 9-10.

Defendant shared and discussed the FBA with Mrs. F. at the IEP team meeting on May 25, 2016. *Id.* at 9, 12. In addition to a medical report dated March 16, 2016, the IEP team considered input from Mrs. F. observations, and the results of several tests and assessments in revising R.'s IEP. *Id.* at 12. Revisions to R.'s IEP included changing her primary disability from developmental delay to multiple disabilities, including autism, and modifying the academic, behavioral, early learning skills, and physical sections of the IEP. *Id.* at 12-13. The IEP team also reevaluated R. in the areas of academics, expressive and receptive language, fine motor, gross motor, behavior, and functional behavior. *Id.* at 13. After reviewing and documenting R.'s present level of academic achievement and behavioral and functional performance, the IEP team included supplementary aids and accommodations in the IEP to enable R. to communicate and access her education, including using a NovaChat device, an assistive technology device for communication, and receiving simple verbal communication, highly engaging visuals, and hands-on tasks and activities from Defendant's

staff. *Id.* at 13-14. In the area of behavior intervention, specifically relating to R.'s biting, hair pulling, lying on the floor, and kicking, the IEP team decided that R.'s BIP would be implemented. *Id.* at 14. Furthermore, the IEP team concluded that R. did not achieve the goals on her kindergarten IEP. *Id.* at 15.

Based on the IEP team's discussion and review of the assessments, the team created a fifty-one page IEP containing thirteen goals, each with supporting objectives designed to meet R.'s complex needs as well as specified evaluation methods and a targeted accuracy rate, to address all of R.'s identified special needs. *Id.* at 16. No social skills, however, were included. *Id.* The IEP team agreed that, in order to work on her IEP goals, R. would spend three hours and forty-five minutes per week outside the general education setting, five hours per week in the general education setting, thirty minutes twice per week doing occupational therapy, thirty minutes twice a week doing physical therapy, and twenty minutes five times per week doing speech or language therapy. *Id.* Overall, the IEP team decided that R. would spend a total of fourteen hours and thirty-five minutes per week in the general education setting and sixteen hours and fifty-five minutes per week outside of general education. *Id.* Mrs. F. disagreed with the goals and objectives and the decision to place R. in one of Defendant's schools and she advocated against including R. in classes with her nondisabled peers. *Id.* at 17. Instead, Mrs. F. requested that Defendant place R. at The Benedictine School, a private day school, at Defendant's expense. *Id.* The IEP team disagreed and wanted R. to participate in a new program Defendant

was developing for an intensive communication classroom at a yet-determined location with a yet-determined class size. *Id.*

Defendant provided ESY services for R. over the summer of 2016. *Id.* at 16. On July 7, 2016, the IEP team met to review R.'s progress since the May IEP meeting, including Defendant's latest assessment of R.'s abilities. *Id.* at 17-21. At that time, Defendant identified R.'s service placement at one of Defendant's elementary schools in an Intensive Communication Support Classroom ("ICSC") with a special program emphasizing communication goals for the 2016-2017 school year. *Id.* at 17, 22.

For the 2016-2017 school year, Defendant hired Mr. K to provide special education services in the ICSC, which had low lights and calming music to focus R. and promoted a "teach model" of consistent routine instruction in established locations around the classroom, and generalized support services throughout the school day. ECF Nos. 30-1 at 14 & 30-2 at 22. R. was also provided with her own paraprofessional who stayed with her throughout the day to assist as needed. ECF No. 30-2 at 22. From August 2016 until October 2016, R. was the only student in the ICSC, and after October 2016, another student came into the ICSC for a portion of the afternoon. *Id.* Defendant did not plan for R. to be the only child in the ICSC, but the other children who were expected to participate did not attend during the fall of 2016 for reasons beyond Defendant's control. *Id.* Starting in February 2017, one other student attended the ICSC with R. *Id.* Throughout the 2016-2017 school year, however R. did

have access to her nondisabled peers when she walked to specials (*e.g.,* gym, art, and music class), attended recess, went on field trips, attended some reading and math classes, walked around the building every day, and was occasionally joined by a first grade classmate during lunch.[3] *Id.* at 22- 23.

Moreover, at the beginning of the 2016-2017 school year, R. had difficulty staying seated and quiet in the general education classroom for academic subjects and walking to the classroom. *Id.* at 23. About three weeks after school started, Mr. K began providing R. with more instruction in the ICSC classroom so that she did not have to walk to the general education classroom and because she could focus and remain attentive for longer periods of time in the ICSC classroom. *Id.* Thus, from this time until a December 2016 IEP meeting, R. received more than eight hours and forty-five minutes of specially designed instruction to work on her IEP goals every day and she spent more hours in the special education classroom and fewer hours in the general education setting than specified in the Placement section of her IEP. *Id.* No IEP meeting occurred to discuss these changes with R.'s parents.

Also during the fall of 2016, Defendant implemented R.'s BIP regularly, but sometimes R.'s NovaChat was not within her reach. *Id.* at 25.

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[3] From the beginning of the school year until about mid-October, R. ate lunch with nondisabled students in the lunchroom, but then she started eating in the ICSC classroom to encourage her to consume her whole lunch and not get distracted from eating. *Id.* at 23.

Moreover, at times, Mr. K did not follow the specific steps in the BIP for behavior intervention. *Id.*

On December 16, 2016, the IEP team held an IEP team meeting also attended by Mrs. F, an expert in special education, and Mrs. F.'s attorney. *Id.* The IEP team considered R.'s significant delays and deficits in academic and communication skills and determined that she required specially-designed instruction outside of the general education setting because of her distractibility and the need to focus her attention, but that she still needed some of her academic services inside general education to provide modeling of language and to facilitate generalization of skills. *Id.* The IEP team also determined that R. required occupational and physical therapy outside of general education. *Id.* Mrs. F. again disagreed with the IEP goals and objectives and R.'s placement, requesting instead that R. not be included in the general education setting at all during the school day. *Id.* at 26. Mrs. F. expressed concern that R. was not with disabled peers most of the day when she was outside of the general education setting. *Id.* Mrs. F. also presented a consultant's report which recommended that R. attend a full-day program for children with autism at The Benedictine School at public expense with full-day ESY services. *Id.*

Defendant proposed reducing R.'s time in general education so that she would only attend specials with nondisabled peers and not attend general education sessions in the general education classroom in the afternoon. *Id*. R.'s parents disapproved of Defendant's proposal. *Id.* After further discussion, R.'s IEP was

revised such that (1) the Services section was changed to reduce the hours spent working on R.'s goals within the general education setting from five hours to two hours and thirty minutes and to increase the time spent outside of the general education setting from three hours and forty-five minutes to six hours and fifteen minutes per week;[4] and (2) the Placement section was changed to increase the hours R. spent in the ICSC special education setting from sixteen hours and fifty-five minutes to twenty-nine hours per week. *Id.* at 26-27.

During the 2016-2017 school year, Mr. K collected bimonthly data in class regarding R.'s progress toward her goals. *Id.* at 27. Contrary to Defendant's policies requiring teachers to collect data twice per quarter and maintain data for two years, Mr. K did not keep his notes. *Id.* Instead. he destroyed them once he wrote R.'s quarterly progress reports, which were prepared in lieu of letter or numeric grades. *Id.* R. made progress toward achieving some of her IEP goals during the 2016-2017 school year. including several physical and speech and language areas, but not toward achieving her behavior and academic goals. *Id.* at 27-30.

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[4] Unlike ocher school systems which record service hours as the entire time a student is with a special education teacher in a special education program, Defendant's recorded hours are the amount of instruction that focuses on meeting the student's IEP goals. ECF No. 30-1 at 12-13. To calculate the number of service hours, Defendant uses the amount of specially designed instruction that the IEP team feels is required for that student to make progress on his or her IEP goals. *Id.* at 12.

PROCEDURAL BACKGROUND

On January 17, 2017, Plaintiffs filed a Due Process Complaint with the Maryland Office of Administrative Hearings, requesting a hearing to review the identification, evaluation, and placement of R. by Defendant under IDEA during the 2015-2016 and 2016-2017 school years. ECF No. 30-2 at 1. After a fruitless resolution session, the parties attended an administrative hearing held before an ALJ on March 10, 22, 28, 29 and April 4, 2017. *Id.* at 1-2. On May 3, 2017, the ALJ issued a decision (ECF No. 30-2), summarizing the evidence and finding that Defendant procedurally violated IDEA by altering the location in which some of R.'s services were provided without first notifying her parents, but that despite that violation, Defendant had not deprived R. a FAPE because the IEP and placement created and implemented for R. by Defendant was reasonably calculated to offer R. a FAPE. *Id.* at 69. Thus, the ALJ denied Plaintiffs' request to have R. placed at The Benedictine School or another private day school at public expense. *Id.*

On August 4, 2017, Plaintiffs filed suit in this Court against Defendant and two individuals in their official capacity (collectively, "Defendants"), alleging violations of IDEA, § 504, and 42 U.S.C. § 1983. ECF No. 1 ("Complaint"). Specifically, Plaintiffs alleged that the adverse decision by the ALJ "was not regularly made" and contained erroneous legal findings, chat Defendants intentionally discriminated against students with disabilities, specifically students like R., and that Defendants violated R.'s rights under 42 U.S.C. § 1983. *Id.* at 10-12. The Complaint sought

declaratory and injunctive relief plus damages. *Id.* at 13-14.

On August 30, 2017, Defendants moved for partial dismissal, asking that (1) the IDEA and § 504 claims be dismissed as to the individual defendants sued in their official capacity because these statutes do not provide a cause of action against individuals and (2) the § 1983 claim be dismissed as to all Defendants because county school boards are state agencies and state agencies, as well as state officials acting in their official capacity, cannot be sued under § 1983. ECF No. 10-1 at 4-7. Plaintiffs replied to Defendants' motion to dismiss, stating that they did not oppose the dismissal of the individual parties or the § 1983 claim. ECF No. 13 at 2. Accordingly, on October 13, 2017, this Court granted Defendants' partial motion to dismiss, dismissing the two individual parties and Plaintiffs' § 1983 claim. ECF No. 15 at 2. Subsequently. Defendants filed an answer (ECF No. 14) and discovery commenced.

On March 9, 2018, Defendant filed Defendant's Motion (ECF No. 30), seeking summary judgment against Plaintiffs for depriving R. a FAPE under IDEA and discriminating against her based on her disability in violation of § 504.[5] On April 6, 2018, Plaintiffs filed their opposition and Plaintiffs' Cross-Motion (ECF No. 31) seeking summary judgment in their favor. Plaintiffs filed a reply and opposition (ECF No. 32) on

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[5] On November 7, 2017, in accordance with 28 U.S.C. § 636 and Local Rules 301 and 302 of the United States Court for the District of Maryland and upon consent of the parties, this case was transferred to United States Magistrate Judge A. David Copperthite for all proceedings. ECF No. 19.

April 26, 2018, and Defendant filed a reply (ECF No. 35) on May 21, 2018. This matter is now fully briefed and the Court has reviewed each party's cross-motion for summary judgment. For the foregoing reasons and pursuant to Federal Rule of Civil Procedure 56(a), Defendant's Motion (ECF No. 30) is granted and Plaintiffs' Cross-Motion (ECF No. 31) is denied.

STANDARD OF REVIEW

A. IDEA Claim

In considering cross-motions for summary judgment in an IDEA case, the "reviewing court is obliged to conduct a modified *de novo* review of the administrative record, giving due weight to the underlying administrative proceedings." *M.L. ex rel. Leiman v. Starr,* 121 F.Supp.3d 466, 474 (D.Md. 2015) (internal quotation marks omitted) (quoting *M.C. v. Starr,* No. DKC-13-3617, 2014 WL 7404576, at *6 (D.Md. Dec. 29, 2014)), *aff'd,* 867 F.3d 487 (4th Cir. 2017). This standard means that a reviewing court must consider an ALJ's findings of fact *'prima facie* correct" when they are made "in a regular manner and with evidentiary support." *Doyle v. Arlington Cty. Sch. Bd.,* 953 F.2d 100, 105 (4th Cir. 1991). "In determining whether such tactual findings were 'regularly made,' a reviewing court 'should examine the way in which the state administrative authorities have arrived at their administrative decisions and the methods employed.'" *E.P. ex rel. J.P. v. Howard Cty. Pub. Sch Sys.,* ELH-15-3725, 2017 WL 3608180, at *6-7 (D.Md Aug. 21, 2017) (citation omitted), *appeal docketed,* No. 17-2094 (2017). "Factual findings are not regularly made if they are reached through a process that is far from me accepted

norm of a fact-finding process." *J.P. ex rel. Peterson v. Cty. Sch. Bd. of Hanover, Cty., Va.,* 516 F.3d 254, 259 (4th Cir. 2008) (quoting *Cty. Sch. Bd. of Henrico Cty., Va. v. Z.P. ex rel. R.P.,* 399 F.3d 298, 305 (4th Cir. 2005)). If a district court "is not going to follow the [ALJ's findings], [it] is required to explain why it does not." *Doyle,* 953 F.2d at 105.

Once the reviewing court has given the administrative fact-findings due weight, "[t]he Court then reaches its decision based on the preponderance of the evidence." *M.L.,* 121 F.Supp.3d at 474 (citing *Bd of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 192, 207 (1982)). "A district court may, for example, 'believe that the evidence considered as a whole points to a different legal conclusion,'" despite accepting the factual findings of the ALJ. *E.P.,* 2017 WL 3608180, at *7 (citation omitted). "In making its determination, however, districts courts should not 'substitute their own notions of sound educational policy for those of the school authorities which they review.'" *Id.* Thus, the reviewing court must make an "independent determination" regarding whether the school complied with IDEA. *M.L.,* 121 F.Supp.3d at 493 (citation omitted); *see Doyle*, 953 F.2d at 103 ("Generally, in reviewing state administrative decisions in IDEA cases, courts are required to make an independent decision based on a preponderance of the evidence, while giving due weight to state administrative proceedings." (citation omitted)). Moreover, in IDEA cases such as this one, in which the plaintiffs are appealing the administrative decision below, the plaintiffs "face an uphill battle for several reasons," not only because they must bear the burden

of proof with respect to the evidence both in the administrative hearing and on appeal, but also because of the degree of deference owed to the administrative proceedings. *Wagner v. Bd. of Educ. of Montgomery Cty., Md.,* 340 F.Supp.2d 603, 611 (D.Md. 2004).

Importantly, this standard of review "works in tandem with the general standard of review for summary judgment, which also applies in IDEA cases." *M.L.,* 121 F.Supp.3d at 475 (quoting *M.C.,* 2014 WL 7404576, at *7). Summary judgment is therefore warranted when the moving party demonstrates, through reference to materials in the record, that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see also M.L.,* 121 F.Supp.3d at 475 (discussing Rule 56(a) in the context of summary judgment in IDEA cases). "If the party seeking summary judgment demonstrates that there is no evidence to support the nonmoving party's case, the burden shifts to the nonmoving party to identify evidence that shows that a genuine dispute exists as to material facts." *M.L.,* 121 F.Supp.3d. at 475. In the case of cross-motions for summary judgment, the court views each motion "in a light most favorable to the non-movant." *Id.* (quoting *Linzer v. Sebelius,* No. AW-07-597, 2009 WL 2778269, at *4 (D.Md. Aug. 28. 2009)).

B. Disability Discrimination Claim

Pursuant to Rule 56, a movant is entitled to summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Fed.R.Civ.P.

56(a); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The party seeking summary judgment bears the initial burden of either establishing that no genuine issue of material fact exists or that a material fact essential to the non-movant's claim is absent. *Celotex Corp.,* 477 U.S. at 322-24. Once the movant has met its burden, the onus is on the non-movant to establish that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co.,* 475 U.S. at 586. In order to meet this burden, the non-movant "may not rest upon the mere allegations or denials of [its] pleadings," but must instead "set forth specific facts showing that there is a genuine issue for trial." *Bouchat v. Balt. Ravens Football Club, Inc.,* 346 F.3d 514, 522 (4th Cir. 2003) (quoting Fed.R.Civ.P. 56(e)).

Here, both parties moved for summary judgment. "When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law," and in considering each motion "the court must take care to resolve all factual disputes and any competing, rational inferences in the light most favorable to the party opposing that motion." *Rossignol v. Voorhaar,* 316 F.3d 516, 523 (4th Cir. 2003) (citations and internal quotation marks omitted); *see also United States v. Diebold Inc.,* 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."). At the same time, the court also must abide by the "affirmative obligation of the trial judge to prevent factually unsupported claims

and defenses from proceeding to trial." *Bouchar,* 346 F.3d at 526 (quoting *Drewitt v. Pratt,* 999 F.2d 774, 778-79 (4th Cir. 1993)). The fact that both sides moved for summary judgment "neither establish[es] the propriety of deciding a case on summary judgment, nor establish[es] that there is no issue of fact requiring that summary judgment be granted to one side or another." *Cont'l Airlines, Inc. v. United Airlines. Inc.,* 277 F.3d 499, 511 n.7 (4th Cir. 2002) (internal citations and quotation marks omitted). "The court must deny both motions if it finds there is a genuine dispute of material fact, 'but if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment.'" *Rashid v. Wash. Metro. Area Transit Auth.,* No. DKC 17-0726, 2018 WL 1425978, at *4 (D.Md. Mar. 22, 2018) (citation omitted).

DISCUSSION

This Count has succinctly summarized the two statutes at issue in this case as follows:

> Congress has enacted two statutes that focus, in some measure, on ensuring that students with disabilities have access to a free public education equal to that of non-disabled students. The first is the [IDEA], 20 U.S.C. §§ 1400 *et seq*. (2012). The IDEA requires, among other things, that states accepting federal funds provide a [FAPE] to students with disabilities. § 1412(a)(1). A "[FAPE]" entails special education and related services that are provided to the student without charge, but also meet state educational standards and conform to an [IEP] developed specifically for that student. § 1401(9). As a

> baseline, the education provided to the student under the IDEA must confer some educational benefit. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley,* 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).
>
> The second such statute is [§] 504. Unlike the IDEA. [§] 504 is an antidiscrimination statute. Section 504 prohibits federally funded programs from discriminating against an otherwise qualified individual solely on the basis of her disability. 29 U.S.C. § 794(a)[.] As part of this requirement, federal regulations implementing [§] 504 mandate that schools provide a [FAPE] to students with disabilities. 34 C.F.R. § 104.33. To meet the [FAPE] requirement under [§] 504, schools must provide, at no cost, regular or special education and related aids and services designed to meet the needs of the student. §§ 104.33(b), (c). Like the IDEA, this is achieved through an accommodations plan, § 104.35, but the [FAPE] requirement differs from the IDEA in that the measure of whether the education conferred under [§] 504 is sufficient is that it must meet the student's needs "as adequately" as the needs of a non-disabled student[,] §§ 104.33(b), (c). *See Mark H. v. Lemahieu,* 513 F.3d 922, 933 (9th Cir. 2008).

K.D. ex rel. J.D. v. Starr, 55 F.Supp.3d 782, 783-84 (D.Md. 2014) (footnote omitted). In this case, Defendant argues that it is entitled to summary judgment because Plaintiffs cannot establish their

claims under either of the statues because Defendant did not violate IDEA and no reasonable fact finder could make a finding of gross misjudgment or bad faith regarding Plaintiffs' IDEA claim, which Plaintiffs "repackag[ed]" for their § 504 claim. ECF No. 30-1 at 17-26. Plaintiffs, on the other hand, argue that they are entitled to summary judgment because the ALJ erred in finding that Defendant did not deny R. a FAPE and they have established that Defendant discriminated against R. in violation of § 504 by isolating her from her peers for much of the school year. ECF No. 31-1 at 19-40. For the reasons below, the Court will grant Defendant's Motion and deny Plaintiffs' Cross-Motion.

A. Defendant, Not Plaintiffs, Is Entitled To Summary Judgment On The IDEA Claim.

In Count I of their Complaint, Plaintiffs contend that during the 2016-2017 school year, R. was deprived a FAPE under the IDEA. ECF No. 1. Congress enacted the IDEA. in part, "to ensure 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) (West 2018); *see also E.P.,* 2017 WL 3608180, at *2 ("Congress enacted IDEA in 1970 to ensure that all children with disabilities are provided 'a [FAPE] which emphasizes special education and related services designed to meet their unique needs and to assure that the rights of such children and their parents or guardians are protected.'" (quoting *Forest Grove Sch. Dist. v. T.A.,* 557 U.S. 230, 239 (2009))). Accordingly, the IDEA requires all states

receiving federal funds for education to provide disabled schoolchildren with a FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (West 2018). A FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Rowley,* 458 U.S. at 188-89. The appropriate education required, by the IDEA, however, should not be confused

> with the best possible education. And once a FAPE is offered, the school district need not offer additional educational services. That is, while a state must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child, the Act does not require the furnishing of every special service necessary to maximize each handicapped child's potential.

MM ex rel. DM v. Sch. Dist. of Greenville Cty., 303 F.3d 523, 526-27 (4th Cir. 2002) (citations, internal quotation marks, and alterations omitted). Although the IDEA does not require that a state provide the best education possible, "Congress did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance Cty. Bd. of Educ.,* 774 F.2d 629, 636 (4th Cir. 1985).

In *Rowley,* the Supreme Court set out a two-part test to determine if a local educational agency had satisfied its obligation under the IDEA to provide a FAPE to a student with a disability. 458 U.S. at 206-

07. The court must determine, first, whether the State complied with IDEA procedures, and, second, whether the IEP developed through proper procedures is "reasonably calculated to enable the child to receive educational benefits." *Id; see also In re Conklin,* 946 F.2d 306, 313 (4th Cir. 1991). "A school provides a FAPE by developing an [IEP] for each disabled child." *Z.P.,* 399 F.3d at 300; *see* 20 U.S.C.A. § 1401(9)(D) (West 2018) (defining FAPE as "special education and related services that are provided in conformity with the [IEP]"). An IEP is developed "only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *E.P.,* 2017 WL 3608180, at *3 (quoting *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1,* 137 S.Ct. 988, 999 (2017)). IEPs "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to he provided, and establish objective criteria for evaluating the child's progress." *MM,* 303 F.3d at 527 (citing 20 U.S.C. § 1414(d)(1)(A)). An IEP is sufficient if it is "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. at 207. Moreover, "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *E.P.,* 2017 WL 3608180, at *3 (quoting *Endrew F.,* 137 S. Ct. at 1001).

Defendant contends that the ALJ's decision was regularly made and that the ALJ did not err as a matter of law in finding that Defendant provided R. a FAPE for the 2016-2017 school year. ECF No. 30-1 at 17-24. Plaintiffs disagree, arguing that Defendant procedurally violated IDEA by unilaterally changing

R.'s IEP, failing to follow the State guidelines for recording hours of instruction on the IEP, and denying R.'s parents the ability to participate in the decisionmaking process through a teacher's destruction of the data used to measure R.'s progress. ECF No. 31-1 at 20-24. Moreover, Plaintiffs argue that the ALJ erred as a matter of law in finding that the BIP was appropriate and that the IEP was substantively appropriate. *Id.* at 24-40. These alleged errors will be addressed below.

1. Despite committing procedural errors, Defendant provided R. with a FAPE.

"Procedural violations committed by the hearing officer at a due process hearing only violate the IDEA if they 'result in the loss of educational opportunity.'" *E.P.,* 2017 WL 3608180, at *8 (quoting *B.G. ex rel. J.A.G. v. City of Chi. Sch. Dist. 299,* No. 15 C 6372, 2017 WL 1049466, at *11l (N.D.Ill. Mar., 20, 2017)); *see also Gray ex rel. Gray v. O'Rourke,* 48 F.App'x 899*,* 901 & n.6 (4th Cir. 2002) (per curiam); *Burke Cty. Bd. of Educ. v. Denton ex rel. Denton*, 895 F.2d 973, 982 (4th Cir. 1990). As the Fourth Circuit explained in *DiBuo ex rel. DiBuo v. Board of Education of Worcester County,* "to the extent that the procedural violations did not actually interfere with the provision of a [FAPE], these violations are not sufficient to support a finding that an agency failed to provide a [FAPE]." 309 F.3d 184, 190 (4th Cir. 2002) (quoting *Gadsby ex rel. Gadsby v. Grasmick,* 109 F.3d 940, 956 (4th Cir. 1997)). The court also reiterated that "under our circuit precedent, a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually

interfere with the provision of a FAPE before the child and/or his parents would be entitled to reimbursement relief," even where the procedural violation "causes interference with the parents' ability to participate in the development of their child's IEP." *Id.* at 190-91; *see also A.K. ex rel. J.K. v. Alexandria City Sch. Bd.,* 484 F.3d 672, 679 n.7 (4th Cir. 2007) (noting that procedural violations are subject to "harmlessness analysis," while substantive violations of the IDEA are not).

Here, the ALJ heard five days of testimony from eight expert witnesses and two non-expert witnesses, reviewed numerous exhibits, and issued a comprehensive 69-page opinion detailing her factual findings and conclusions of law. *See* ECF No. 30-2: *see also E.P.,* 2017 WL 3608180, at *8 (noting that "the ALJ heard three days of testimony from three expert witnesses, reviewed numerous exhibits, and issued a comprehensive 56-page opinion detailing his factual findings and conclusions of law'"); *Sch. Bd. of the City of Suffolk v. Rose*, 133 F.Supp.3d 803, 821-25 (E.D.Va. 2015) (finding that hearing officer's findings of fact were entitled to due weight where hearing officer "heard evidence from witnesses on direct, cross, and re-direct examination; admitted documentary evidence; ruled on objections; . . . and rendered a written final decision."); *T.B. ex rel. T.B. v. Prince George's Cty. Bd. of Educ.,* GJH-15-03935, 2016 WL 7235661, at *6 (D.Md. Dec. 13, 2016), *appeal dismissed sub nom. T.B., Jr. v. Prince George's Cty.* (2017), *and appeal docketed,* No. 17-1877 (2017). Nevertheless, Plaintiffs argue that Defendant committed procedural violations of the IDEA by not recording R.'s hours of specialized

instruction consistent with State guidelines, destroying notes on R.'s progress, and making changes to the IEP and R.'s placement without holding an IEP meeting. Defendant counters that there were no procedural violations and to the extent that there was such a violation, any procedural violation was harmless. The Court agrees with Defendant.

a. The ALJ correctly determined that Defendant did not procedurally violate IDEA by recording hours of specialized instruction on the IEP in a manner which differed from the MSDE's guide.

Defendant contends that Mr. K controverted his testimony about the listing of special education hours in R.'s IEP and the ALJ properly addressed the issue in her decision. ECF No. 30-1 at 17-18. Plaintiffs argue that Defendant's decision to not follow the MSDE Statewide Individualized Education Program Process Guide "significantly impeded the Parents' right to participate in the decision-making process because it provided an inaccurate description of the instructional hours R.F. was to receive as well as the location of where her special education instruction would be delivered." ECF No. 31-1 at 22. The Court agrees with Defendant.

Here, the December 2016 IEP identifies eight hours and forty-five minutes of specialized instruction per week. ECF No. 30-2 at 23. Plaintiffs are correct that Mr. K testified that R.'s special education, service hours in her IEP were inadequate and the result of a clerical error, but Mr. K later testified that Defendant calculated its hours unlike many other school systems

and that he recanted his testimony. *See id.* at 57. In determining the adequacy of R.'s special education service hours, the ALJ first examined the MSDE's guide, as directed by Plaintiffs, and considered the requirements of the guide compared to the Code of Maryland Regulations ("COMAR"), which Defendant argues it adheres to with its calculation method of service hours. *Id.* at 55-57. The ALJ then weighed Mr. K's unfamiliarity with Defendant's calculation method at the beginning of the school year when he was new with what another special education teacher later told him and how Mr. K "recanted his earlier testimony about the hours being erroneous," concluding as follows:

> This change in Mr. K's testimony showed that he was ill informed about the way [Defendant] records service hours on the IEP. My conclusion from observing all of Mr. K's testimony is that he was truthful on both days. He testified honestly and the first time that there must be an error on the IEP, which couldn't help [Defendant's] presentation in this case. If Mr. K was going to lie under oath, I do not think he would do so in a manner that harmed his employer's case. I did not sense any reticence or rehearsed language in Mr. K's subsequent testimony, so I conclude that he made an honest mistake in his initial testimony.

Id. at 57. The ALJ proceeded to weigh the testimony of Plaintiffs' two experts who testified that the total number of service hours on R.'s IEP was inadequate, discounting both opinions because their testimony "was

based on an incorrect understanding of the way [Defendant] records service hours." *Id.* The ALJ further credited the testimony of Defendant's expert who testified that Defendant "follows COMAR, not the guide, which is not a regulation," and has never been told that the way Defendant records special education service hours is wrong or violates the law by the MSDE during any of its yearly audits. *Id.* at 57-58. Therefore, the ALJ "conclude[d] that [Plaintiffs] failed to show that [Defendant] improperly recorded the number of special education service hours on R.'s IEP. *Id.* at 58. Based on the foregoing, the ALJ properly addressed the conflicting testimony, finding Mr. K credible and explaining her reasons for finding Plaintiffs' witnesses not credible on this issue a determination that is due deference. *See* ECF No. 30-2 at 40-42 (discussing the ALJ's credibility determinations of all witnesses); *see also M.C.,* 2014 WL 7404576, at *16 (rejecting a challenge to the ALJ's credibility determinations concerning witnesses where the plaintiffs had "not presented any evidence that the ALJ's credibility determinations were anything other than regularly made—he took testimony from the witnesses; reviewed their credentials, reports, and other evidence presented; and then determined based on these factors which testimony was most persuasive"). "[I]n according 'due weight' to the findings of the ALJ, this court owes deference to the ALJ's determinations of the credibility of witnesses." *E.P.*, 2017 WL 3608180, at *8 (quoting *Wagner,* 340 F.Supp.2d at 611).

Plaintiffs also argue that Defendant's manner of recording R.'s service hours on her IEP was so unclear and confusing that it denied them the ability to

participate in the IEP process. ECF No. 31-1 at 32. To support their position, Plaintiffs point out that even Mr. K and Plaintiffs' experts were confused about the recording methodology before it was explained to them. *Id.* Plaintiffs argue that the ALJ's finding that Defendant was not required to follow the MSDE guide "ignored the well-established rule that courts should look to the agency's interpretation of its own regulations when determining whether there has been compliance with the regulatory requirements." *Id.* at 33. The ALJ, however, determined that the IEP was sufficient based on the fact that the number of hours of services for R. was increased in the revised December 2016 IEP and that such a change is not "proof of any defect in the May 2016 IEP" because the May 2016 IEP must be judged as of the time it was adopted. ECF No. 30-2 at 55. After a thorough review of the evidence, the Court cannot conclude, as Plaintiffs do, that there was no evidentiary support for the ALJ's conclusions.

Moreover, "failure to perfectly execute an IEP does not necessarily amount to the denial of a [FAPE]." *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH,* 642 F.3d 478, 484 (4th Cir. 2011). However, a material failure to implement an IEP or a failure to implement a material portion of an IEP can amount to a violation of the IDEA. *Id.* The Fourth Circuit has held that failing to provide the hours of therapy required by an IEP did not mean that the school district failed to properly implement a material portion of the IEP and deny the student a FAPE. *Id.* at 485-86. Here, Defendant provided R. with more hours of special education services than required by the IEP, and thus,

the ALJ did not err in determining that R. received a FAPE.

b. The ALJ correctly determined that the destruction of the notes on R.'s progress did not deny R.'s parents the ability to participate in the IEP decision-making process.

Plaintiffs argue that they were "denied participation in the decision-making process by [Mr. K.]'s destruction of the data used to measure [R.'s] progress." ECF No. 31-1 at 23. Specifically, Plaintiffs contend that "[t]he ALJ's decision was not regularly made as she failed to recognize and address this serious procedural violation." *Id.* at 24. The Court disagrees.

Contrary to Plaintiffs' argument, the ALJ's decision discussed Mr. K's notes in great detail, stating as follows:

> The Parents attacked Mr. K.'s credibility and argued that I should give his testimony no weight. The IEP provides that progress on the goals and objectives is to be measured by data collected by school staff. [Plaintiffs' attorney] accused Mr. K. of destroying his progress notes in order to prevent the Parents from obtaining evidence for use in this proceeding. He argued that the destruction of the progress notes renders Mr. K. a wholly unreliable witness. I disagree.
>
> [Defendant] has a policy of requiring all special educators to take notes twice a quarter and to maintain their notes of a student's

progress for two years. Mr. K. testified that he did not know that was the policy and, as he has never kept his notes after writing progress reports for a student's IEP, he did not keep his notes on R.'s progress once he wrote her quarterly reports. Mr. K. explained that was his practice in his prior employment. Now he knows that the practice did not comport with the record retention policies of [Defendant].

I conclude that Mr. K. violated the retention policy, but I further conclude that he did not do so for any nefarious purpose. Ms. Mastrilli[, Defendant's Program Facilitator for Special Education,) testified that she came to the classroom and observed Mr. K. taking notes on R.'s progress, and she reviewed his notes from time to time as part of her supervisory responsibilities. Mr. K. would know that Ms. Mastrilli was checking his notes because she did so in his classroom. It would not serve Mr. K.'s purposes or support him in his role as a subordinate to Ms. Mastrilli to intentionally destroy notes in violation of a policy. There is no evidence that Ms. Mastrilli was a party to intentional destruction of evidence or covering up the same. While it is understandable that the Parents are frustrated and suspicious of the missing raw data, which they hoped would support their position on behalf of R., I conclude that the raw data was innocently discarded, and I decline to take a negative inference.

[One of Plaintiffs' experts] was critical of the data collection methods used by [Defendant] as insufficiently planned and consistent. In her

> opinion, data should be collected throughout the school day every day. [Plaintiffs' other expert] also criticized [Defendant's] data collection procedures, opining that R. needs daily data collection to help the Parents know how she is performing in relation to her goals and objectives. The IDEA does not specify how often a school system should collect data or how long it should be maintained. [Defendant] has a duty to adopt policies and procedures which are necessary and sufficient to enable it to implement the IDEA. While more data is obviously better than less data, I conclude that [Defendant's] data collection procedures were reasonable, and that [Defendant] did not falsify the Student's progress reports. I will therefore defer to the judgment of the school administration regarding the frequency of the data required to be collected regarding students with IEPs.

ECF No. 30-2 at 52-53 (internal record citations omitted).

"Parents and guardians play a significant role in the IEP process." *Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49, 53 (2005). Accordingly, "IDEA provides a panoply of procedural rights to parents to ensure their involvement in decisions about their disabled child's education." *Sellers ex rel. Sellers v. Sch. Bd. of City of Mannassas, Va.,* 141 F.3d 524, 527 (4th Cir. 1998). Through these procedures, IDEA "guarantees parents both an opportunity for meaningful input into all decisions affecting their child's education and the right

to seek review of any decisions they think inappropriate." *AW ex rel. Wilson v. Fairfax Cty. Sch. Bd.,* 372 F.3d 674, 678 (4th Cir. 2004) (quoting *Honig v. Doe,* 484 U.S. 305, 311-2 (1988)); *see also Endrew F.,* 137 S.Ct. at 994 ("These procedures [for drafting an IEP] emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances." (citing 20 U.S.C. § 1414)). "This includes the 'opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child." *AW*, 372 F.3d at 678 (emphasis omitted) (quoting 20 U.S.C. § 1415(b)(6)). "However, to the extent that the procedural violations did not actually interfere with the provision of a [FAPE], these violations are not sufficient to support a finding that an agency failed to provide a [FAPE]." *Gadsby,* 109 F.3d at 956.

Of note, in *L.M.H. v. Arizona Department of Education*, the court distinguished a minor violation where the school failed to comply with a request for records before an IEP meeting from another case where "the school withheld vital information about a student's autism for over a year and lied about test results, likely severely setting back the child's development." No. CV-14-2212-PHX-JJT, 2016 WL 3910940, at *7 (D.Ariz. July 19, 2016) (citing *Amanda J. ex rel. Annette J. v. Clark Cty. Sch. Dist.,* 267 F.3d 877, 893 (9th Cir. 2001)). In that case, like in this case, the student's mother attended the IEP meeting and contributed significantly to the discussion about creating the IEP. *Id.* Accordingly, the court determined that the school committed a procedural error by not providing the

requested records before the IEP meeting, but that error did not rise to the level required to seriously infringe on the parents' participation. *Id.* The same is true in this case, making Defendant's failure to provide reports a harmless error.

c. The ALJ correctly found that although, Defendant procedurally violated IDEA by unilaterally making changes to R.'s IEP and placement without holding an IEP meeting, such changes did not substantively deny R. a FAPE.

Defendant argues that the ALJ correctly determined that although Defendant procedurally violated IDEA by not holding an IEP meeting before making changes to R.'s IEP and placement, such violation did not substantively deprive R. a FAPE. ECF No. 30-1 at 21. Plaintiffs disagree. ECF No. 31-1 at 20-22. Here, the ALJ found as follows:

> I conclude that [Defendant] violated the IDEA by changing the location where R.'s services were provided from the third week of the school year until the December 2016 IEP revision by removing her from receiving academic instruction in the general education classroom. [Defendant] failed to provide the Parents with prior notice of this change as required by IDEA[.]
>
> . . . .
>
> Having concluded that [Defendant] violated the procedural requirements of IDEA in this manner, I must determine whether this

violation denied R. an educational opportunity or if it was a technical violation of the IDEA. The law in this Circuit on this issue is clear:

> If a disabled child received (or was offered) a FAPE in spite of technical violation of the IDEA, the school district has fulfilled its statutory obligations.

I conclude that providing more special education services in the ICSC did not interfere with the provision of a FAPE to the Student. Mr. K testified credibly that R. was having difficulty spending time in the general education setting. In his view, she got more out of the time in the ICSC. Mr. K should have requested, and [Defendant] should have scheduled, an IEP team meeting to amend the service hours and placement sections of R.'s IEP. However, the failure to do so under the circumstances of this case—particularly where the Parents contend that a separate day school for disabled children is the proper placement—amounts to a technical violation of the IDEA, not a denial of a FAPE.

ECF No. 30-2 at 58-59 (internal citations omitted).

Plaintiffs, who carry the burden of proof, have failed to demonstrate that Defendant's failure to convene an IEP meeting with Plaintiffs denied R. a FAPE. As discussed above, "[p]arents and guardians play a significant role in the IEP process." *Schaffer,* 546 U.S. at 53. However, "[i]f a disabled child received (or was offered) a FAPE in spite of a technical violation of the

IDEA, the school district has fulfilled its statutory obligations." *Snyder ex rel. Snyder v. Montgomery Cty. Pub. Sch.,* No. DKC 2008-1757, 2009 WL 3246579, at *8 (D.Md. Sept. 29, 2009) (quoting *MM,* 303 F.3d at 534). Because Defendant's failure to hold an IEP meeting had no impact on whether the 2016-2017 IEP assured R. of a FAPE,[6] the Court agrees with the ALJ that the procedural violations at issue are insufficient to support a finding that Defendant failed to provide R. a FAPE. *See Bd. of Educ. of Frederick Cty. v. I.S. ex rel. Summers,* 325 F.Supp.2d 565, 580 (D.Md. 2004); *see also DiBuo,* 309 F.3d at 191 (rejecting the plaintiffs' "propose[d] broad legal rule to the effect that a procedural violation of the IDEA (or one of its implementing regulations) that causes interference with the parents' ability to participate in the IDEA process *per se* constitutes a denial of a FAPE to the disabled child at issue").

2. The ALJ correctly determined that R.'s IEP was substantively adequate.

As discussed above, the Supreme Court has held that an IEP as proposed by a local education agency must be "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. at 207. As this Court further explained in *King v. Board of Education of Allegany County,* "[t]he lynchpin of the IDEA is its requirement that disabled children be provided with a [FAPE]." 999 F.Supp. 750, 766 (D.Md. 1998) (citation and internal quotation marks omitted).

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[6] As discussed below, the ALJ properly found that the ICSC was an appropriate placement as part of R's IEP and offered R. a FAPE.

Interpreting Fourth Circuit precedent, *King* held that "there is no requirement that the state provide the child with the best education—public or private—that money can buy, nor is the state required to maximize the potential of the student. All that is required is that the disabled child benefit educationally from the program." *Id.* (internal citations omitted). "In other words, the IDEA does not mandate that every possible special service be offered to a disabled student . . . . " *M.C.E. ex rel. T.Q.A. v. Bd. of Educ. of Frederick Cty.,* No. RDB-09-3365, 2011 WL 2709196, at *11 (D.Md. July 11, 2011) (emphasis omitted) (citing *Hartmann v. Loudoun Cty. Bd of Educ.,* 118 F.3d 996 (4th Cir. 1997)). "[O]nce a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second guess the judgment of education professionals." *A.B. ex rel. D.B. v. Lawson,* 354 F.3d 315, 325-26 (4th Cir. 2004) (quoting *Tice ex rel. Tice v. Botetourt Cty. Sch. Bd.,* 908 F.2d 1200, 1207-08 (4th Cir. (1990)).

Defendant argues that Plaintiffs have failed to present evidence to demonstrate that it denied R. a FAPE by failing to properly implement her IEP. ECF No. 30-1 at 22. On the other hand, Plaintiffs argue that the IEP was not properly implemented and that R. did not receive an educational benefit; therefore, she was not receiving a FAPE. ECF No. 31-1 at 27-37. Specifically, Plaintiffs contend that the IEP was substantively deficient because Defendant' s staff failed to follow the BIP requirement, R.'s placement was improper, the IEP contained inadequate hours of special education instruction, and the IEP goals and R.'s progress during the 2016-2017 school year were

inadequate. *Id.* at 28-37. The ALJ addressed each of Plaintiffs' concerns in her decision, finding that the IEP was appropriate and reasonably calculated to provide educational benefits to R. ECF No. 30-2 at 68.

As discussed above, this court "must make an independent decision based on a preponderance of the evidence, while giving due weight to the state administrative proceedings." *Sanger v. Montgomery Cty. Bd. of Educ.,* 916 F.Supp. 518, 520 (D.Md. 1996). Further, the ALJ's findings are to be considered *prima facie* correct when made in the course of the normal fact-finding process. *See Doyle,* 953 F.2d at 105. The determination of whether an IEP is adequate "is itself a question of fact." *M.L.,* 867 F.3d at 493. Applying these standards to this case, the Court finds that the ALJ's findings are well-documented and, thus, entitled to *prima facie* correctness, and that Plaintiffs have not rebutted this presumption.

First, the ALJ determined that despite issues with the implementation of R.'s BIP requirement, principally the use of the NovaChat, Defendant provided R. a FAPE, concluding that the NovaChat "was reasonably available to and used by R." ECF No. 30-2 at 60. Defendant argues that the ALJ properly addressed R.'s access to and use of her NovaChat and determined that the failure to make the NovaChat available at all times did not deprive R. a FAPE. ECF No. 30-1 at 22-23. Plaintiffs counter that the ALJ erred in finding the BIP appropriate because the BIP only addressed R.'s biting and not her other interfering

behaviors during the 2016-2017 school year.[7] ECF No. 31-1 at 24-26.

The ALJ thoroughly explained her conclusion that the BIP was appropriate over several pages of her decision. ECF No. 30-2 at 59-65. The ALJ first acknowledged the IEP's requirement that R. have the NovaChat in order to learn how to communicate and to enable her to participate in classroom activities and that Mrs. F. and her expert witness credibly testified about their classroom observations where R. mostly had access to the NovaChat. *Id.* at 59-60. Specifically, R. mostly had the NovaChat or was given the NovaChat by Mr. K in order to communicate about her requests for food, drink, and breaks, but sometimes, such as in music class, the NovaChat was not near where R. could easily access it. *Id.* at 60-61. When a challenging behavior arose in music class, however, the NovaChat would be brought to R. *Id.* at 61. Nonetheless, the ALJ concluded that the NovaChat "was reasonably available to and used by R" and that there are practical reasons for some of the times when

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[7] Plaintiffs also argue that the ALJ erred procedurally by mistakenly believing that an independent psychologist from Kennedy Krieger Institute conducted an FBA and developed a BIP for R. when it was actually conducted by a psychologist who had previously worked for Kennedy Krieger and now worked with Defendant ECF No. 31-1 at 25. However, looking at all of the evidence, the ALJ did not seem swayed by the mere fact that the FBA was created by a psychologist, but rather focused on the fact that the IEP team had the FBA report and considered it in creating R.'s IEP. Plaintiffs offer no evidence to suggest that the report was insufficient and no other FBA was requested or conducted.

the NovaChat was not available," including the times when the NovaChat was broken and when R. attended her physical therapy sessions. *Id.* at 60-62. The ALJ reasoned that R. had other communication methods available to her during these times, such as her body language, facial expressions, and picture cards to initiate activities, and that her BIP employed other communication strategies, such as designated transition objects, a consistent daily routine, and social stories, which were properly implemented. *Id.* at 62-63. Thus, "[t]aking all of this, evidence into consideration, [the ALJ] conclude[d] that the NovaChat [wa]s being used appropriate and as often as possible under the unique circumstances presented by R., and therefore in accordance with the IEP." *Id.* at 62. Furthermore, "[e]ven if the NovaChat was not accessible to R. at all times as required by the *BIP,* that does not prove a denial of FAPE" as "[t]he periodic absence of the NovaChat was a de minimis failure to implement her IEP." *Id.* at 63. Based on the record presented to the ALJ, the "*de minimis*" deviation from the BIP requirement regarding R.'s access to and use of the NovaChat does not constitute a failure to provide a FAPE.

In addition, while Plaintiffs are correct that the BIP only addressed R.'s biting, Plaintiffs fail to offer any theory for the inclusion in the 2016-2017 school year's BIP of other behaviors which R. exhibited during the 2016-2017 when the BIP was created before the 2016-2017 school year. The IEP team cannot be faulted for their inability to foresee that R. might develop additional interfering behaviors. *See* ECF No. 30-2 at 45 ("Many courts have emphasized that the IEP is a

forward looking document, a plan for the student's future. The IEP team gathers all relevant information available and documents a student's present levels of academic achievement and functional performance, and then proceeds to define a program to meet the student's need *in the coming school year*.'" (emphasis in original)); *Schaffer ex rel. Schaffer v. Weast,* 554 F.3d 470, 477 (4th Cir. 2009) ("Judicial review of IEPs under the IDEA is meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" (citations omitted)). The presence of additional interfering behaviors during the 2016-2017 school year could not be considered in April 2016, when the IEP was created to afford educational benefits to R., but rather would be considered for a subsequent BIP. The ALJ properly articulated this conclusion in her decision, noting that "[a] student's behavior may and often does change over time," but "[t]he law does not require a public school system to write a FBA or a BIP every time a new interfering behavior is observed." *Id.* at 47-48. As the ALJ properly noted, Plaintiffs presented nothing to indicate that the FBA and BIP were inappropriate at the time they were created in April 2016. *Id.* at 49. Accordingly, the ALJ properly considered the evidence in the record and did not err in concluding that the BIP was appropriate for R.

Second, regarding R.'s access to other students, Congress has a preference towards mainstreaming disabled children with their nondisabled peers to the highest extent possible. *S.A. v. Weast,* 898 F.Supp.2d

869, 882 (D.Md. 2012). Thus, IDEA requires that the educational benefit of the IEP must be provided in the least restrictive environment and that the student must participate to the "maximum extent appropriate" in the same activities as her nondisabled peers. 20 U.S.C.A. § 1412(a)(5)(A) (West 2018); *see. e.g., De Vries ex rel. DeBlany v. Fairfax Cty. Sch. Bd.,* 882 F.2d 876, 878 (4th Cir. 1989) (holding that "[m]ainstreaming 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 Act"). However, "the preference for mainstreaming does not outweigh the need to provide a child with an appropriate education." *Taylor ex rel. Dolch v. Sandusky,* No. CCB-04-301, 2005 WL 524586, at *4 (D.Md. Mar. 4, 2005) (citing *Carter ex rel. Carter v. Florence Cty. Sch. Dist. Four,* 950 F.2d 156, 160 (4th Cir. 1991), *aff'd,* 510 U.S. 7 (1993)). Moreover, "failure to perfectly execute an IEP does not necessarily amount to the denial of a [FAPE]." *Heffernan,* 642 F.3d at 484. A material failure to implement an IEP or a failure to implement a material portion of an IEP, however, can amount to a violation of the IDEA. *Id.*

Here, the ALJ found as follows:

> I conclude based on all the evidence that [Defendant] acted in good faith in creating the ICSC in 2016 and in assigning R. to it. [Defendant] thought there would be other students in the class, but it did not turn out that way. [Defendant] was not hiding R. from her peers; R. was afforded opportunities to interact

> with other first graders, albeit not to the degree [Defendant] would have preferred.

ECF No. 30-2 at 54-55. As the ALJ notes, during the beginning of the 2016-2017 school year, R. was the only student in the ICSC for several months before another student began attending the ICSC. *Id.* at 54. R.'s IEP provided that she would spend fourteen hours and thirty-five minutes with her nondisabled peers in a general education classroom and that for the remainder of the week, she would receive services outside of the general education classroom, specifically in the ICSC. *Id.* at 16. Plaintiffs do not indicate how much time R. would spend with her disabled or nondisabled peers at The Benedictine School, except that there would be four other disabled students in R.'s class at The Benedictine School. ECF No. 31-1 at 31. The ALJ determined that R's placement in the ICSC provided her with an appropriate education because it enabled her to remain focused and attentive. *See* ECF No. 30-2 at 23. Furthermore, while R. was in the ICSC, she received the services contained in her IEP and still interacted with her peers during the day, although less frequently than in a general education classroom. Under these circumstances, the Court determines that the evidence was sufficient to support the ALJ's conclusion. *See Heffernan,* 642 F.3d at 488-89 (finding that a home placement was appropriate where the student was taken to parks and into the community for social interactions on a daily basis); *I.S.,* 325 F.Supp.2d at 580-81 (determining that the child's behavior and distractibility in the general education setting during the beginning of the school year, including spitting and hitting peers and refusing teachers' directions,

demonstrated the inappropriateness of an inclusive placement for the school year). Therefore, the ALJ did not err by determining that R.'s placement was reasonably calculated to enable her to receive educational benefits. The court's independent review of the record confirms that there was an evidentiary basis for the ALJ's conclusion that R.'s placement was reasonably calculated to afford her a FAPE, which is all that the IDEA mandates. *See Y.B. v. Bd. of Educ. of Prince George's Cty.,* 895 F.Supp.2d 689, 706 (D.Md. 2012) (citing *Rowley*, 458 U.S. at 201).

Third, regarding the listing of special education hours in R.'s IEP, Plaintiffs argue that the specified hours—eight hours and forty-five minutes—are insufficient to provide R. a FAPE. ECF No. 31-1 at 30. Plaintiffs distinguish the adequacy of the hours in the IEP from the separate issue of the way that Defendant determines service hours, which is discussed above. IDEA requires an IEP to provide a "basic floor of opportunity that access to special education and related services provides." *S.A.,* 898 F.Supp.2d at 881 (quoting *Tice,* 908 F.2d at 1207). Plaintiffs advocate for a maximizing education for R. in a private education program, and though the IEP does not guarantee as many hours of instruction as R. received, the IEP is reasonably calculated to provide a "basic floor of opportunity" to enable R. to receive educational benefits with respect to her goals and objectives. Additionally, as discussed above, the ALJ properly weighed the conflicting testimony regarding the adequacy of R.'s service hours, found Mr. K credible and that he was mistaken, but honest with his initial testimony, and thoroughly explained her reasons for

finding Plaintiffs' witnesses not credible on this issue, determinations that are due deference. *See* ECF No. 30-2 at 40-42 (discussing the ALJ's credibility determinations of all witnesses); *see also M.C.,* 2014 WL 7404576, at *16 (rejecting a challenge to the ALJ's credibility determinations concerning witnesses where the plaintiffs had "not presented any evidence that the ALJ's credibility determinations were anything other than regularly made—he took testimony from the witnesses; reviewed their credentials, reports, and other evidence presented; and then determined based on these factors which testimony was most persuasive"). Therefore, the Court holds that the ALJ did not err in determining that the IEP provided R. with a FAPE as required by IDEA.

Finally, regarding R.'s IEP goals and progress during the 2016-2017 school year, the administrative record supports the ALJ's finding that the IEP goals were appropriate and that the services provided to R. were sufficient to address those goals. Defendant points to the ALJ's reasoning regarding R.'s incremental progress on some, but not all of her goals, and disagrees with Plaintiffs that R.'s IEP is inappropriate because R did not show progress on all of her goals and the IEP did not specify a social goal. *See* ECF No. 31-1 at 35.

The Fourth Circuit acknowledged that in assessing an IEP's appropriateness, "the courts should endeavor to rely upon objective factors, such as actual educational progress." *S.A.*, 898 F.Supp.2d at 879 (quoting *MM,* 303 F.3d at 532). In *Endrew F.,* the Supreme Court recently held that, "[t]o meet its

substantive obligation under the IDEA, a school must after an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S.Ct. at 999. Thus, an "IEP need not aim for grade-level advancement" if such a goal "is not a reasonable prospect for a child." *Id.* at 1000. Moreover, in the recent case of *M.L.*, the Fourth Circuit characterized *Rowley,* 458 U.S. 176 (1982), as the "leading IDEA case." *M.L.*, 867 F.3d at 494. Explaining *Rowley,* the Fourth Circuit said that a FAPE "did not mandate 'equality' or any requirement that schools provide the same education to students with disabilities as that provided to students without disabilities." *Id.* at 495 (quoting *Rowley,* 458 U.S. at 198). Rather, "a school is required only to provide 'equal access.'" *Id.* (quoting *Rowley,* 458 U.S. at 200) (emphasis omitted).

Here, the IEP was "reasonably calculated to enable [R.] to receive educational benefits." *Rowley,* 458 U.S. at 207. "Neither the district court nor this court should disturb an IEP simply because we disagree with its content. Rather, we must defer to educators' decisions as long as an IEP provided the child 'the basic floor of opportunity that access to special education and related services provides.'" *Tice,* 908 F.2d at 1207 (quoting *Rowley,* 458 U.S. at 201); *see MM,* 303 F.3d at 526 ("The IDEA does not . . . require a school district to provide a disabled child with the best possible education." (citing *Rowley,* 458 U.S. at 192)). In this case, the ALJ determined that "[t]he goals and their objectives set forth targets for R. to perform," making them definite enough for progress reports. ECF No. 30-2 at 52. The Court agrees with the ALJ that the IEP

goals were measurable because one of Plaintiffs' experts was able to discuss the progress reports for those goals and did not explain how she would have written the goals differently. *See* ECF No. 30-2 at 51-52. In the absence of an alternative method, the ALJ properly deferred to the educators' decisions regarding the IEP.

The ALJ further considered the rarity of R.'s genetic disease and the resulting uncertainty about her cognitive and educational potential as well as R.'s parents' inability to provide any evidence that they requested that Defendant perform a study of R.'s levels of performance and that Defendant refused. ECF No. 30-2 at 66. The ALJ noted that R.'s "IEP goals and objectives at this point are educated judgments about future events," but that she has made progress since kindergarten, which "is appropriate given her unique circumstances." *Id.* at 67. The ALJ further explained R.'s progress, stating that R. "can be unpredictable, and sometimes she shows signs of progress but at other times there is regression." *Id.* at 66. Regarding the goals which had not shown progress, the ALJ stated that "[t]hese goals may have to be carried over in [R.'s] next IEP . . . [;] [h]owever, at this time, the goals remain appropriate." *Id.* at 67. For these reasons, the ALJ's findings of fact and conclusions of law in reference to R.'s progress were detailed, supported by the record, and entitled to deference.

Regarding the lack of a social goal in the IEP, the ALJ acknowledged that while "the IEP [wa]s not perfect," it nonetheless was reasonable. ECF No. 30-2 at 50-51. In particular, the ALJ considered the IEP as

a whole and how the IEP gives R. opportunities to socialize with other students, custodians, and staff, despite the lack of an explicit social goal. *Id.* As the ALJ stated in her decision, "an IEP is not required to contain every goal from which a student might benefit." *Id.* at 51; *see also Rowley,* 458 U.S. at 199. Thus, Defendant did not commit a substantive violation by concluding that the IEP was reasonably calculated to provide educational benefits to R. with respect to her goals and objectives.

B. Plaintiffs Cannot Establish That Defendant Discriminated Against R. Solely Based On Her Disability.

Federal regulations have interpreted § 504, which prohibits discrimination against people with disabilities, 29 U.S.C. § 794(a), to require public schools to provide children with disabilities a FAPE, 34 C.F.R. § 104.33. To establish a violation of § 504 and its implementing regulations, Plaintiffs must show that R. was discriminated against solely on the basis of her disability. *Sellers,* 141 F.3d at 528; *Doe v. Univ. of Md. Med. Sys. Corp.,* 50 F.3d 1261, 1265 (4th Cir. 1995). In *Sellers,* the United States Court of Appeals for the Fourth Circuit held that, in the specific context of a claim that a school system has not provided a free appropriate education to a child with a disability, a finding of discrimination based on disability requires a showing of bad faith or gross misjudgment by the school system. *Sellers,* 141 F.3d at 529; *see also Monahan v. Nebraska,* 687 F.2d 1164, 1171 (8th Cir. 1982) ("[E]ither bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at

least in the context of education of handicapped children.").

Here. R.'s disability is undisputed and no dispute has been raised as to whether R., as a public school student, was eligible for public education in Cecil County. Thus, the only dispute arises from whether R. either was excluded from participation in or denied public education or was otherwise discriminated against on the basis of her disability. All parties assert no genuine dispute of material fact exists on this third element.

First, considering Defendant's Motion, Defendant argues that Plaintiffs cannot establish that Defendant engaged in intentional discrimination against R. and acted with bad faith or gross misjudgment. ECF No. 30-1 at 26-28. The Court agrees. Plaintiffs offer no proof that Defendant intentionally discriminated against R. or denied her services because of her disability. *See McGraw v. Bd. of Educ. of Montgomery Cty.,* 952 F .Supp. 248, 254 (D.Md. 1997). Instead, the record shows that Defendant intended to provide R. as well as two other students with instruction in the ICSC during the 2016-2017 school year. ECF No. 30-2 at 22. However, for reasons outside of Defendant's control, the other students who were expected to join R. in the ICSC did not attend, and as a result, R. was the only student in the ICSC until February 2017. *Id.* Whenever Defendant knew that the other two students would not be attending the ICSC with R., it was not then necessary for Defendant to refer R. to a private school, as Plaintiffs argue. *See* ECF No. 35 at 15. Instead, Defendant had the obligation to provide R. with a

FAPE, which it determined could be achieved with R. in the ISCS. Besides, despite being alone in the ICSC for her instruction throughout the 2016-2017 school year, R. did have access to her nondisabled peers when she walked to specials, such as gym, art, and music class, attended recess, went on field trips, attended some reading and math classes, walked around the building every day, and was occasionally joined by a first grade classmate during lunch. *Id.* at 22-23.

Moreover, at best, isolating R. from her peers for much of the school year could only provide some support for denial of FAPE and does not establish discrimination.[8] *See N.T. v. Balt. City Bd. of Sch. Comm'rs*, No. JKB-11-356, 2012 WL 3028371, at *5-6 (D.Md. July 24, 2012) (determining that procedural violations of a disabilities services plan could provide support for denial of FAPE, but not discrimination); *N.T. v. Balt. City Bd. of Sch. Comm'rs*, No. JKB-11-356, 2011 WL 3747751, at *6-8 (D.Md. Aug. 23, 2011) ("Without evidence that the [school board's] important decisions [to suspend a student with a disability for fighting while, among other deficiencies, failing to implement significant portions of the student's 504 plan in high school and altering the plan without the parents' knowledge or involvement] were based upon reason, one could infer that [the student] has been denied educational benefits solely based on his disability."); *Doe v. Arlington Cty. Sch. Bd.*, 41 F.Supp.2d 599, 602, 605-06, 609 (E.D.Va. 1999) (finding no bad faith or gross misjudgment were a school board

[8] As discussed above, however, Defendant provided R. with a FAPE in this case.

could support its decision to isolate a student with a developmental disability from nondisabled students for two-thirds of the school week), *aff'd*, 210 F.3d 361 (4th Cir. 2000). Accordingly, Defendant has shown no genuine dispute of material fact exists on Plaintiff's claims of discrimination under § 504 and that, because Plaintiffs cannot establish that Defendant engaged in intentional discrimination against R. with bad faith or gross misjudgment, Defendant is entitled to judgment as a matter of law with respect to this claim. Accordingly, Defendant's Motion will be granted.

Next, considering Plaintiffs' Cross-Motion, Plaintiffs argue that R.'s isolation in her special education class from her peers, particularly "developmentally similar peers," during a portion of the 2016-2017 school year constituted disability discrimination. ECF No. 31-1 at 37-40. Defendant incorrectly responds that Plaintiffs cannot establish a § 504 claim where their only evidence is the ALJ's decision because the ALJ never considered Plaintiffs' § 504 claim, which was outside of the ALJ's jurisdiction. ECF No. 32 at 27- 28; *see J.S. III ex rel. J.S. Jr. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 984 (11th Cir. 2017) (per curiam). Defendant, however, is correct that it did not intentionally isolate R. from her peers.

Plaintiffs rely on two cases which have considered student isolation in the context of a § 504 claim for disability discrimination. ECF No. 31-1 at 38-39. In the first case, *K.M. ex rel. D.G. v. Hyde Park Central School District*, the court considered a student's isolation at lunch. 381 F.Supp.2d 343, 360 (S.D.N.Y. 2005). In that case, the court considered that "unjustified

institutional isolation of persons with disabilities is a form, of discrimination" and held that "[e]ating lunch with other students could be considered an integral part of the public school experience, one in which [the student] would be entitled to participate if a reasonable accommodation for his disability would make it possible." *Id.* The court in the second case, *J.S. III, ex rel. J.S. Jr. v. Houston County Board of Education*, found that a student's somewhat frequent exclusion and isolation from his classroom and peers on the basis of his disability implicated "further, intangible consequences of discrimination . . . that could result from isolation, such as stigmatization and deprivation of opportunities for enriching interaction with fellow students." 877 F.3d at 986-87.

The Court does not find these cases persuasive. Of note, *K.M.* and *J.S., III* both primarily dealt with peer-to-peer harassment or bullying and the school's decision to isolate the disabled student as an inadequate method of ending the harassment. Furthermore, unlike in this case, where Plaintiffs request that the Court grant summary judgment in their favor, in both *K.M.* and *J.S., III*, the court denied a motion for summary judgment filed by the defendant because the isolation could give rise to discrimination based on disability. As discussed above, however, Plaintiffs cannot establish that Defendant deprived R. of the interaction with her peers because she had the opportunity to interact with her peers, such as during specials, lunch, recess, and walking the hall, encompassing the times and places for students to have the most social interactions. Thus, Plaintiffs' Cross-Motion will be denied.

CONCLUSION

For the reasons set forth in this Memorandum Opinion, the Court finds that, in the light most favorable to Plaintiffs, Plaintiffs have not shown that "the public school system failed to provide a [FAPE]" and discriminated against R. based on her disability. *See Carter*, 950 F.2d at 161. Therefore, Defendant's Motion (ECF No. 30) is GRANTED and Plaintiffs' Cross-Motion (ECF No. 31) is DENIED.

A separate order will follow.

Date: 21 June 2018

/s/A. David Copperthite
A. David Copperthite
United States Magistrate Judge

APPENDIX C

**BEFORE MARY R. CRAIG,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS**

OAH No.: MSDE-CECL-OT-17-01881

[Filed May 3, 2017]

R.F.,[1]	)
	)
STUDENT	)
	)
v.	)
	)
CECIL COUNTY	)
PUBLIC SCHOOLS	)
	)

DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION

[1] The Student's and other names have been masked in the Decision to protect the Student's privacy and facilitate eventual publication of the decision.

CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On January 17, 2017, Mr. and Mrs. F. (Parents), on behalf of their daughter (R. or 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 Cecil County Public Schools (CCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).[2] The parties attended a resolution session on February 7, 2017, and notified the OAH the same day that they did not resolve their dispute. The parties did not participate in mediation.

I held a telephone prehearing conference on February 20, 2017. The Parents were represented by Wayne D. Steedman, Esquire. Rochelle S. Eisenberg, Esquire, represented CCPS. During the prehearing conference, I advised the parties of the time requirements for issuing a decision in this case under the IDEA. Pursuant to the governing regulations, a decision would normally be due forty-five days after certain triggering events, or by March 24, 2017. 34 Code of Federal Regulations (C.F.R.) § 300.510(b)(2), (c)(2) (2016).[3] The parties and I engaged in a lengthy discussion in an attempt to schedule the necessary

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[2] Unless otherwise indicated, references to Title 20 of the U.S.C.A. hereinafter cite the 2010 volume.

[3] Unless otherwise indicated, references to Title 34 of the C.F.R. hereinafter cite the 2016 volume.

hearing dates in a manner that would enable issuance of a decision by that date. Based upon the complexity of the hearing and a detailed review of the attorneys' and my schedule, sufficient hearing dates could not be identified prior to March 24, 2017. Accordingly, the parties requested that the hearing be scheduled for March 10, 14, 22, 28, 29 and April 4, 2017. I held the hearing on March 10, 22, 28, 29 and April 4, 2017.[4] Mr. Steedman represented the Parents, and Ms. Eisenberg represented CCPS.

Because the hearing dates requested by the parties fell outside the forty-five-day regulatory timeframe, I granted the request of the parties and extended the time for issuance of the decision until May 4, 2017. 34 C.F.R. § 300.515(c) (2016); Md. Code Ann., Educ. § 8-413(h) (Supp. 2016). The conflicts which prevented the hearings from being held within the timeframe are documented in greater detail in the letters from counsel in the file and recited in the Prehearing Conference Report.

The legal authority for the hearing is codified in the IDEA and under Maryland law. 20 U.S.C.A. § 1415(f)(1)(A); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Maryland State Department of Education (MSDE) procedural regulations, and the Rules of Procedure of

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[4] The hearing could not be conducted on March 14, 2017 as the State offices and CCPS were closed due to inclement weather.

the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

The issues are as follows:

1. Whether CCPS denied the Student a free appropriate public education (FAPE) as defined by the IDEA during the 2015/2016 and 2016/2017 school years;

2. Whether CCPS failed to offer the Student an individualized education program (IEP) for the 2016/2017 school year that would provide her with a FAPE; and

3. What, if any, relief is appropriate.

SUMMARY OF THE EVIDENCE

Exhibits

I have attached an Exhibit List as an Appendix to this Decision.

Testimony

The Student's mother testified, and the Parents presented the following witnesses:

• Mr. K., the Student's current special education teacher;[5]

[5] The Student's special education teacher has not been identified because for several months in 2016 the Student was the only student in his class, and identification of the teacher might lead to

• Constance Annie McLaughlin, Ph.D., accepted as an expert in Autism, Special Education, and Behavior Analysis; and

• Lisa C. Frank, M.Ed., accepted as an expert in Special Education, including functional behavioral assessments and behavior improvement plans.

CCPS presented the following witnesses:

• Diana Shaffer, PT, accepted as an expert in Physical Therapy;

• Alice D. O'Mullane, OT, accepted as an expert in Occupational Therapy;

• Mary H. Stokes, accepted as an expert in Speech/Language Pathology;

• Joyce Mastrilli, CCPS Program Facilitator for Special Education;

• Mr. K., accepted as an expert in Special Education;

• Carol Quirk, Ed.D., accepted as an expert in Special Education, Severe Disabilities, Inclusive Education, and Behavioral Intervention; and

• Sarah J. Farr, accepted as an expert in Special Education and Special Education Administration.

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identification of the Student when the Decision is released for publication.

FINDINGS OF FACT

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

Background

1. R. is a seven-year-old girl with the diagnosis of severe autism spectrum disorder who is nonverbal. (P. Ex. 17.)[6] In March 2016, R. was diagnosed with autism spectrum disorder, level 3, one of the most intensive levels of the disorder. (Tr. 240; P. Ex. 41.)

2. R. also has the diagnosis of a genetic disorder related to mutation in the HIVEP2 gene. (P. Ex. 16.) The HIVEP2 genetic disorder is an extremely rare condition with unknown long-term consequences. (Tr. 232.) R. was diagnosed in 2013, and at that time was only the second person in the world with the diagnosis. Since then, there have been about a dozen others diagnosed with HIVEP2. Very little research has been published about the condition. (Tr. 233.) The potential for an individual with an HIVEP2 genetic defect to learn to perform activities of daily living (such as toileting), to process information, to understand language, and to express language is not well understood. (Tr. 232-33.)

3. R. receives medical services at the Kennedy Krieger Institute (KKI) of the Johns Hopkins Medical System. One of her physicians is Siddharth Srivastava,

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[6] References to exhibits and the transcripts are for the convenience of the reader. They do not represent the sole basis for any finding of fact. The findings of fact are based on all of the evidence in the record.

M.D. (Dr. Sid), of the KKI Department of Neurology and Developmental Medicine.

4. R. has an intellectual disability; her IQ has not been able to be measured.

5. R. exhibits complex, challenging, disruptive behaviors including hyperactivity and impulsivity which are difficult to control even with medication. (P. Ex. 16.) At times, R. becomes aggressive throughout the day and during transitions (e.g., from the classroom to the gym) by grabbing people, pulling hair, biting, and placing her mouth on others. R. bit two people at school during the 2016/2017 school year and put her mouth on people without biting down innumerable times.

6. R. has significant neuromuscular deficits, including hypotonia (low muscle tone). (P. Ex. 16.) She exhibits reduced muscle strength at school, sometimes leaning on school staff when seated. R. is able to sit (in a chair with arms and a straight back), stand and walk. She walks with a slightly stooped gait, i.e., she crouches slightly and shuffles her feet. R. does not have a good awareness of where her body is in space when she is ascending and descending steps and curbs.

7. R. intermittently displays extreme lethargy at school, especially in the mornings. Her lethargy makes her less available to attend to her education.

8. R. has displayed loss of previously displayed skills when ill. She generally regains lost skills several weeks after her minor illness, such as a cold or sore throat, has passed. (P. Ex. 40.)

9. R. wears pull-up diapers and requires adult assistance with toileting, hand washing, and managing her clothing.

10. R. seeks oral stimulation by licking and touching objects and people.

11. R. requires adult supervision and assistance at all times.

12. R. regularly expresses no recognizable speech other than the word "Mommy," which she sometimes uses toward her mother at home. In the past, R. had some words, e.g., "iPAD," which she used appropriately. She used "iP AD" in school recently, but she does not regularly use words to communicate.

13. R. has a short attention span; she is often distracted or uninterested in academic activities.

14. R. has difficulty processing information and requires extended wait time to respond to information.

School History and Identification of R. as a Student with a Disability under IDEA

15. R. was identified as a student qualifying for special education and related services and began receiving services through the MSDE Infants and Toddlers program when she was two years old.[7]

16. R. attended half-day kindergarten in the 2014/2015 school year, full-day kindergarten in the

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[7] *See* COMAR 13A.13.

2015/2016 school year, and first grade in the 2016/2017 school year, all in CCPS.

17. The first IEP developed by CCPS for R. was dated June 4, 2014. (P. Ex. 1, at 1, referred to as an amendment to an IEP dated June 4, 2014.)[8]

18. In the 2014/2015 school year, CCPS provided R. speech and language therapy, occupational therapy, and physical therapy. (P. Ex. 3, at 3.)

19. CCPS provided R. extended school year (ESY) services in the summer of 2015.

The IEP for Kindergarten 2015/2016

20. In May of 2015, R.'s IEP was approved after a duly-constituted IEP team meeting. (P. Ex. 3.)

21. The IEP team considered all available assessments in the following areas: Early LAP,[9] Gross Motor, Fine Motor, Cognition, Language, Self-Help, Social-Emotional, Carolina Curriculum, Speech/Language, Rosetti-Infant-Toddler Language Scale, Physical Therapy, Peabody Development Gross Motor Scales-2, and Peabody Development Fine Motor Scale II. (P. Ex. 3, at 3.)

22. The May 2015 IEP identified R. as a student with the primary disability of developmental delay, and identified the areas affected by her disability as Early Math Literacy, Reading Comprehension, Speech and

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[8] The 2014/2015 IEP was not offered into evidence.

[9] No explanation was offered at the hearing for this assessment.

Language Expressive and Receptive Language, Behavioral (sensory), and Physical (endurance and gross motor). (P. Ex. 3, at 1.)

23. The IEP contained an accurate statement of R.'s present levels of academic performance (P. Ex. 3, at 7-10), and an appropriate statement of the special considerations and accommodations required for R. (P. Ex. 3, at 12-20.)

24. The May 2015 IEP contained appropriate goals and objectives in the following areas: Academic – Reading Comprehension, Speech and Language Receptive and Expressive Language, Early Math Literacy, Physical – Gross and Fine Motor, and Endurance. (P. Ex. 3, at 21-24.)

25. R.'s IEP was reviewed and revised on July 30, 2015, after a duly-constituted IEP team meeting to discuss the results of R's ESY services and the status of her progress since her May IEP was formed. (P. Ex. 5.) The IEP team agreed that the placement for R. in kindergarten for the 2015/2016 school year was in the regular early childhood education program with the majority of her special education services provided outside of the general education classroom because R.'s special education, speech language therapy, occupational therapy, and physical therapy could not be provided in the regular classroom with supplementary aids, services, program modifications, and supports. (P. Ex. 5, at 33.)

26. The IEP provided that R. would receive educational services outside of the general education classroom for 2.5 hours a week and the rest of the week

(29 hours) she would receive services in the general education setting. (P. Ex. 5, at 33.)

27. During the 2015/2016 school year, R. was in a class of twenty-one students with her own paraprofessional (para) who accompanied her at all times. (P. Ex. 17, at 2.) R. received special education services and related services in the areas of speech language therapy, occupational therapy, and physical therapy from CCPS pursuant to her IEP. (P. Ex. 5, at 29-30.)

28. R.'s IEP was revised February 9, 2016, at a duly-constituted IEP team meeting. (P. Ex. 7.) The IEP team reviewed and discussed R.'s achievements and performance in all affected areas.

29. The July 30, 2015, IEP Speech and Receptive Language goal provided that "[g]iven objects, pictures, and a communication device, R. will respond to commands with 80% accuracy in order to confirm understanding of language in 4 out of 5 trials as measured by data collection." (P. Ex. 7, at 23.)

30. On February 9, 2016, a duly-constituted IEP team meeting was held, attended by Mrs. F. (P. Ex. 7.) The Student's mother (Mrs. F) told the IEP team that she saw progress from R. that school year, and hoped to see more consistency "as she tends to do what she wants to do rather than what is asked of her." (P. Ex. 7, at 11.) The physical therapist, occupational therapist, speech language pathologist, and special education teacher all reported that R. was making progress toward the annual goals. (P. Ex. 7, at 3.)

31. The July 30, 2015, IEP Speech and Receptive Language goal was revised on February 9, 2016, to lower the goal from 80% to 70% accuracy in order to confirm that R. would seek to reflect her understanding of language in 4 out of 5 trials as measured by data collection. (P. Ex. 7, at 23.)

Evaluations and Assessments conducted by CCPS before First Grade

32. In the Spring of 2016, CCPS ordered the following assessments: Reading, Mathematics, Written Language, Intellectual/Cognitive Functioning, Speech and Language, Functional/ Adaptive Performance, Fine and Gross Motor Skills, and Emotional/Social/ Behavioral Development.

33. CCPS retained a psychologist from KKI with expertise with students with significant disabilities and autism to create a model functional behavior assessment (FBA) and train CCPS staff to conduct FBAs. After R. displayed significant behavior difficulties in kindergarten, in April 2016 CCPS staff conducted a FBA for R. and created a behavior intervention plan (BIP) for R. in consultation with staff from R.'s kindergarten school. (Tr. 840; P. Ex. 14.) The BIP is appropriate to address R.'s problem behaviors.

34. The FBA written on April 13, 2016, identified the primary interfering behavior as biting. (P. Ex. 14.) The biting occurred when R. was unhappy or frustrated, was told "no," was denied access to a preferred activity, was asked to start a non-preferred activity, was ill or fatigued, or when there was a

change in schedule or caregiver or she was seeking oral sensory stimulation. (P. Ex. 14.)

35. The FBA was shared with the Parents and discussed at the May 2016, IEP team meeting. (P. Ex. 23, at 3.)

36. The BIP listed specific steps that school personnel, including the classroom teacher, should take to prevent unwanted behaviors:

a. R.'s assistive technology device (NovaChat) must be accessible to her at all times throughout the day;[10]

b. Staff must maintain a clear and consistent daily routine, providing R. with a visual schedule so that she knows what to expect;

c. Social stories will be presented and reviewed throughout the school day to remind R. of appropriate behaviors (e.g., safe mouth behaviors);

d. Staff should provide R. with structured daily breaks;

e. Staff should provide short verbal instructions with visual supports;

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[10] The NovaChat device contains a screen with several pictures on it. By pressing a picture, the user can access another screen with more pictures like the one touched on the first screen. Through sequential selection of pictures, the user is able to communicate more detailed information with others.

f. Staff should provide transition warnings to help R. to prepare for changes in place or activity; and

g. A token reinforcement system should be used. (P. Ex. 20.)

37. The BIP described a structured prompt hierarchy to be used if R. became unsettled as evidenced by fussing or crying, pushing or throwing materials, hitting or kicking, or other attempts to delay or terminate activities. (P. Ex. 20, at 2.)

38. The BIP provided specific steps for behavior intervention, including: removal of all reinforcing items/activities; redirection to her communication device; if biting continues, redirection to oral stimulation item (chewelry)[11] and/or access to vibration tools, e.g., vibrating star; and, once R. is calm, staff will review R.'s social story with her prior to resuming instruction. (P. Ex. 20, at 2.)

39. The BIP described reinforcement of replacement behaviors, including immediately responding to R.'s requests through her communication devices. (P. Ex. 20, at 2-3.)

40. CCPS attempted to conduct the Stanford Binet test, but it could not be completed due to R.'s communication deficits. (P. Ex. 22, at 2.)

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[11] Chewelry is an item that R. wears around her neck and places in her mouth for oral stimulation and redirection from interfering behaviors.

41. CCPS tested R. using the Adaptive Behavior Assessment System (ABAS-3), which disclosed that R. performed at an extremely low level across all settings in the areas of Conceptual (communication, functional academics, self-direction), Social (leisure, social), and Practical (community use, home living and school living, health and safety and self-care). (P. Ex. 22, at 2.)

42. CCPS completed the Behavioral Assessment System for Children (BASC-3), which disclosed that R. was demonstrating clinically significant behaviors in the school setting, including hyperactivity and aggression. (P. Ex. 22, at 2.)

43. CCPS conducted the Conners 3 test of R., which showed very elevated scores indicating concern for hyperactivity and conduct. (P. Ex. 22, at 2.)

44. The speech language therapy report discussed at the May 2016 IEP team meeting indicated that R.'s auditory comprehension was on a 0-7 month level, and her expressive communication was on a 0-5 month level. (P. Ex. 22, at 4.)

45. The IEP team considered the KKI assessment dated March 16, 2016, which was shared by the Parents, and concluded that R.'s behavior during the assessment met the criteria for the classification of autism spectrum disorder. R.'s speech and language was assessed by KKI as equivalent to a child aged two years and eight months old. (P. Ex. 22, at 4; P. Ex. 41.)

46. School personnel completed an informal assessment of R.'s current levels of achievement and functional performance which indicated R.'s level of achievement was as follows: Personal-Social (Self-

regulations and Responsibility) (21-24 months); Interpersonal Skills (12-15 months); Self-Concept (scattered skills up to 24-30 months); and Self-Help (15-18 months). (P. Ex. 22, at 8.)

47. School personnel completed the ND Early Childhood Outcomes Process-Age Expectation Assessment of R., which showed that R. possessed scattered skills in the assessed areas up to the equivalent of a 24-month-old child. (P. Ex. 22, at 8-9.)

48. In kindergarten, R. was excited about her NovaChat but when presented with the device and not assisted by an adult, R. did not demonstrate any understanding of the function or purpose for the device. (P. Ex. 22, at 10.)

First Grade IEP 2016/2017

49. A properly-constituted IEP team meeting was held on May 25, 2016, attended by R.'s mother and appropriate CCPS staff. (P. Ex. 22.)

50. In addition to the KKI report dated March 16, 2016 (P. Ex. 41; P. Ex. 22, at 4), the IEP team considered input from Mrs. F., observations, and the results of the following tests and assessments:

a. School Psychology Report;

b. ABAS-3;

c. BASC-3;

d. Conners 3;

e. FBA;

f. Physical therapy Assessment;

g. Occupational therapy Assessment;

h. Speech language therapy Assessment;

i. Autism Diagnostic Observation Schedule; and

j. Oral and Written Language Scales. (P. Ex. 22, at 2-4.)

51. After discussion among the team members, including a review of all of the recent assessments and tests, the Student's IEP was revised in pertinent part as follows:

a. The Student's primary disability was changed from developmental delay to multiple disabilities: autism and other health impaired;[12] and

b. The areas affected by the Student's disability were modified:

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[12] The IDEA regulations define "other health impairment" as follows:

> Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—
>
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
>
> (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.8(c)(9).

> i. Academic – *cognitive, reading comprehension,* speech and language expressive and *receptive* language;
>
> ii. Behavioral – sensory;
>
> iii. *Early learning skills – social foundations; and*
>
> iv. Physical – *fine motor,* gross motor, *independent community living, toileting.* (P. Ex. 22, at 1.)[13]

52. At the May 2016 meeting the IEP team re-evaluated R. in the areas of Academics (Math, Reading and Writing), Expressive and Receptive Language, Fine Motor, Gross Motor, Behavior and Functional Behavior. (P. Ex. 22, at 2.)

53. The IEP team considered the results of all available information and the tests and reports obtained by CCPS. (P. Ex. 22, at 2-4.)

54. The IEP team discussed and documented R.'s present level of academic achievement, behavioral and functional performance in all relevant areas. (P. Ex. 22, at 8-20.)

55. Based on the information considered by the IEP team and the team's assessment of R.'s needs, the IEP team included in the IEP all of the supplementary aids and accommodations needed by R. to communicate and access her education.

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[13] The italics indicate revisions to her IEP. *Compare* P. Ex. 7 *with* P. Ex. 22.

56. In the areas of Communication and Assistive Technology, the IEP team concluded that R. has significant speech/language delays and requires the use of total communication (vocalizations, basic signs, gestures, pictures, voice output device) to assist her communication. The team also concluded that R. requires the use of assistive technology (NovaChat device) throughout her day. (P. Ex. 22,at 21.) When R. uses her device, immediate reinforcement in the form of granting her request must occur. (P. Ex. 22, at 27.)

57. The IEP team provided that the CCPS assistive technology specialist will meet with the speech pathologist and special education teacher at least quarterly to support school personnel with technology needs. (P. Ex. 22, at 31.)

58. When the NovaChat is broken it must be sent out for repair. The device has been broken several times when R. has thrown it or knocked it off a table. R. is permitted to take the device home with her, where her parents keep it in the kitchen so they can prevent damage while still making it available for R. to use to communicate. The Parents and school staff work collaboratively and continue to try various methods, e.g., straps, to enable R. to keep the NovaChat near her but protect it from damage. (Tr. 480.)

59. In the area of behavior intervention, the IEP team decided that R.'s BIP would be implemented. (P. Ex. 22, at 21-22.) Behaviors discussed during the May 25, 2016, IEP team meeting included biting, hair pulling, lying on the floor, and kicking. (P. Ex. 22, at 33.) The IEP team concluded that the school psychologist will consult with R.'s educational team

once per marking period to review her BIP and her progress on the plan and determine if changes need to be made. (P. Ex. 22, at 30.)

60. R. is a non-reader and requires texts to be read aloud and visual cues to support her staying on task. (P. Ex. 22, at 22.)

61. The IEP team decided that because R. has an extremely short attention span and a processing disorder she requires large tasks to be chunked, with frequent breaks and extended time to complete tasks. (P. Ex. 22, at 23, 26.)

62. The IEP team provided that due to R.'s receptive/expressive language delays, key symbols should be paired with verbal communication using the NovaChat, core language, and topic boards. Staff should respond to any communication from R. and use simple sentences. R. should be presented with highly engaging visuals and hands-on tasks and activities. (P. Ex. 22, at 24-25).

63. The IEP team decided that because R. is performing significantly lower than her peers she will receive narrative grades instead of traditional letter grades. R. requires extensive, repeated, individualized instruction and support as well as significant modifications to materials in order to access the general curriculum. (P. Ex. 22, at 26.) The IEP team further concluded that R. will be provided with one-to-one support. (P. Ex. 22, at 28.)

64. The IEP team decided that staff should use a visual picture schedule to alleviate anxiety and so R. knows what comes next. (P. E. 22, at 29.)

65. The IEP team decided that R's difference in sensory processing requires frequent redirection and repetition of instructions, as well as sensory strategies to support her attention and participation. (P. Ex. 22, at 30.) The team concluded that R. should be provided with sensory strategies, including use of chewelry and a vibrating z-vibe, i.e., a toy that provides sensory stimulation through vibrating, and use of the sensory room. (P. Ex. 22, at 21-31.)

66. The IEP team decided that physical therapy and occupational therapy consultation will occur at stated intervals. (P. Ex. 22, at 31.)

67. The IEP team concluded that R. did not achieve the goals on her kindergarten IEP. (P. Ex. 22, at 32.)

68. CCPS provided R. with ESY services during the summer of 2016.

69. The team created a comprehensive, fifty-one page IEP containing thirteen goals, each with supporting objectives designed to meet R.'s complex needs. Each goal has a specified evaluation method and a targeted accuracy rate. The goals address all of R.'s identified special needs, except social skills, which was not included. (P. Ex. 22, at 36-43.)

70. The school week for CCPS elementary schools consists of a total of 31 hours and 30 minutes a week.

71. CCPS calculates services hours and records them on IEPs based on the amount of specially-designed instruction that the IEP team decides is

required for each student to make progress on the IEP goals. (Tr. 549.)

72. The IEP team agreed that R. would receive the specially-designed instruction to work on her IEP goals with the following frequency:

a. 3 hours and 45 minutes a week outside the general education setting;

b. 5 hours a week in the general education setting;

c. 30 minutes twice a week of occupational therapy outside the general education setting;

d. 30 minutes twice a week of physical therapy; and

e. 20 minutes five times a week of speech/language therapy. (P. Ex. 22, at 44-45.)

73. The IEP team decided that R. would be placed in the general education setting for a total of 14 hours and 35 minutes a week and outside of general education a total of 16 hours and 55 minutes a week. (P. 22, at 49.)

74. At the May 25, 2016, IEP team meeting, Mrs. F. disagreed with the goals and objectives and the decision to place R. in a CCPS school. (Tr. 255.)[14] Mrs. F. advocated against including R. in classes with her nondisabled peers. (P. Ex. 22, at 20). Mrs. F. requested

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[14] Mrs. F. did not explain during her testimony the precise nature of the disagreement she expressed at the meeting. (Tr. 255, line 18 to Tr. 256, line 1 (leading questions and yes/no answers).)

that CCPS place R. at The Benedictine School, a private separate day school, at CCPS' expense. (Tr. 256.) The team disagreed, and stated that they wanted R. to be part of a new program they were developing for an intensive communication classroom at a location to be determined with a class size to be determined. (*Id.*; P. Ex 23, at 2.)

75. The IEP team met on July 7, 2016, to review R.'s progress since the May IEP meeting.

76. Mrs. F. attended the July 7, 2016, IEP meeting. At that time, CCPS identified R.'s service placement as a CCPS elementary school.[15] (P. Ex. 24, at 1; Tr. 256.)

77. The IEP team reviewed the following observations, progress notes, and information collected in June and July 2016, which formed the basis for CCPS' latest assessment of R.'s abilities prior to the start of the 2016/2017 school year:

> a. Goal: Early Learning Skills: "Given a book, the teacher reading aloud and supplemental activities related to the text, R. will sustain attention to the text and activities for 10 minutes with no more than 5 gestural or verbal prompts with 100% accuracy, for 4 consecutive trials, as measured by data collection procedures." (P. Ex. 24, at 37.)

[15] I have not identified the school because, as R. was the only child in the classroom for some time, doing so might identify R.

Progress notes: Based on two observations (June 1, 2016 and June 5, 2016), R. sat and listened to the teacher reading for four and five minutes, respectively, with minimal prompting. R. chose zero of four and two of four pictures accurately. (P. Ex. 24, at 37.)

Based on five ESY sessions, R. was able to sustain attention to the text and activities for 10 minutes with no more than five gestural or verbal prompts with 80% accuracy on June 20, 2016, 0% accuracy on June 27, 2016, 100% accuracy on July 8, 2016, 50% accuracy on July 11, 2016, and 100% accuracy on July 17, 2016. (P. Ex. 24, at 37-38.)

b. Goal: Early Learning Skills – Social Foundations: "Given 5 verbal directions and modeling of 5 specific behaviors ... R. will imitate one step actions independently, with 80% accuracy for 4 consecutive trials, as measured by data collection procedures." (P. Ex. 24, at 38.)

Progress notes: Based on one observation, R. imitated the teacher's hand clapping three times on two of five occasions. *Id.*

c. Goal: Academic – Reading Comprehension: "When read a text, R. will be able to use a communication device to respond to questions about 'the characters' and 'what happened' in the text with 70% accuracy on 3 out of 4 trials as measured by data collection." (P. Ex. 24, at 39.)

Progress notes: Based on observations during five ESY sessions, R. attempted to answer questions

about the story by touching icons on the NovaChat with 0% accuracy. *Id.*

d. Goal: Academic – Speech and Language Expressive Language: "Given a speech generating device (NovaChat) and a structured therapy task, R. will use vocabulary related to the task to indicate her choices within the activity with gestural prompts with 80% accuracy for 5 consecutive trials, as measured by data collection procedures." (P. Ex. 24, at 40.)

Progress notes: In one observation, R. was able to make a choice on her NovaChat. In four observations, R. was able to make selections on the NovaChat, with some guidance from her therapist. *Id.*

e. Goal: Academic – Speech and Language Expressive Language: "Given a speech generating device (NovaChat) and an instructional task, R. will select the 'Break' icon to indicate her need for a break independently, with 100% accuracy for 5 consecutive trials, as measured by data collection procedures." (*Id.*).

Progress notes: R. was observed to press the "Break" button often but without meaning. (P. Ex. 24, at 41.)

f. Goals: Academic – Cognitive:

(Goal I) "Given a simple, one step verbal direction, R. will follow the direction independently, with 100% accuracy for 4 consecutive trials, as

measured by data collection procedures." (P. Ex. 24, at 41.)

Progress notes: Based on observations in four ESY sessions, R. followed the directions one time with 20% accuracy and three times with zero accuracy. (P. Ex. 24, at 42.)

(Goal 2) "Given a communication device (NovaChat), a preferred item or activity, and two multiple choice picture supported vocabulary words, R. will select the icon that identifies the name of the preferred item or activity in order to request the item/activity, with 100% accuracy for 5 consecutive trials, as measured by data collection procedures." (P. Ex. 24, at 42.)

Progress notes: Based on observations during four sessions of ESY, R. was able to identify the icon for the preferred item or activity with 0%, 60%, 20% and 0% accuracy. (P. Ex. 24, at 43.)

(Goal 3) "Given a set of objects and the verbal direction paired with the number symbol to 'Give me one or two,' R. will demonstrate her understanding of number concepts by giving the teacher one or two of the objects independently, with 100% accuracy for 5 consecutive trials, as measured by data collection procedures." (P. Ex. 24, at 43.)

Progress notes: Based on observations during four sessions of ESY, R. was able to give the teacher the requested number of objects with 0%, 20%, 20% and 0% accuracy. (P. Ex. 24, at 44.)

g. Goal: Behavioral – Sensory: "Given minimal visual/verbal cues, R. will participate in classroom/therapy activity for 10 minutes, following appropriate sensory strategies to calm her body, in 3 out of 4 trials as measured by data collection procedures." (P. Ex. 24, at 44.)

Progress notes: Based on observation on July 12, 2016, R. was able to attend to task for five minutes following lotion and deep pressure massage and for three minutes before becoming distracted by peers or demonstrating aversive behaviors of kicking, and grabbing therapist's clothes and hair. Interfering behaviors occurred in half the ESY sessions. (P. Ex. 24, at 45.)

h. Goal: Physical – Fine Motor: "Given moderate visual/verbal/tactile cues and activities within her classroom/school routines, R. will engage in purposeful grasp and release of items in 3/4 trials as measured by data collection." (P. Ex. 24, at 46.)

Progress notes: Based on observations during four ESY sessions, R. purposefully grasped and released an object 20% of the trials in one session, was able to grasp and release to pull things out of boxes and bags, but did not purposefully grasp to place things in a specific location or to put a book in a bag. R. was unable to place paper towels in a trashcan. (*Id.*)

i. Goals: Physical – Gross Motor

(Goal 1 – Steps) "Given a handrail, verbal cues for technique, and contact guard [i.e., therapist's hands] for safety, R. will demonstrate

the ability to descend 4-5 steps with an alternate step pattern for 3 out of 5 trials." (P. Ex. 24, at 47.)

Progress notes: Based on physical therapy visits on May 31, 2016 and June 2, 2016, R. was able to ascend and descend a set of five steps with an alternate step pattern going up and down with verbal reminders and contact guard assistance in two of three trials. *Id.*

(Goal 2 – Reciprocal Ball Play) "With moderate verbal cues and minimal physical assistance for technique, R. will be able to participate in reciprocal ball play by tapping a balloon with her hand, when tossed to her from 3 feet away without verbal cues for attention 2 out of 4 trials." (P. Ex. 24, at 48.)

Progress notes: Based on observation on June 2, 2016, R. was not demonstrating purposeful activity with the ball. She was demonstrating more attention and tracking of balloons and bubbles. *Id.*

j. Goal: Physical – Independent Community Living – Toileting: "Given maximal tactile assist and verbal cues, R. will pull down/up her pants for toileting in 3 out of 4 trials as measured by data collection." (P. Ex. 24, at 48.)

Progress notes: R. was unable to pull her skirt/pants up or down with maximum assistance. (P. Ex. 24, at 49.)

Implementation of R.'s IEP in 2016/2017 School Year and R.'s Performance in School

78. CCPS created the Intensive Communication Support Classroom (ICSC) and implemented a special program emphasizing communication goals for the 2016/2017 school year.

79. Mr. K. was hired by CCPS to provide special education services in the ICSC and generalized support services throughout the students' school day.

80. R. was provided with her own para, who stayed with her throughout the day and assisted R. and Mr. K. as needed.

81. R. was the only student in the ICSC from August 2016 until October, when one other student came into the ICSC for a portion of the afternoon. (Tr. 638-39.) CCPS did not plan for R. to be the only child in the ICSC, but the other children who were expected did not attend during the Fall of 2016 for reasons beyond the control of CCPS. (Tr. 637-38, 822.) From February 2017 on, one other student attended the ICSC with R. (Tr. 639.)

82. CCPS provided R. with access to her nondisabled peers in the 2016/2017 school year as follows:

a. When it is time for specials, i.e., Music, Integrated Art, etc., R. walks to the first grade classroom and walks to the special with her peers (Tr. 619);

b. R. attends recess with the first grade, *id.;*

c. R. goes on field trips with the first grade, *id.;*

d. R. attends Reading and Math with the first grade when she is able to do so, *id.;*

e. After speech language therapy every day, R. takes a walk around the building, and other students plus school staff verbally greet her ("Hi walk") (Tr. 649-50); and

f. Sometimes a first grade classmate will come to the ICSC to have lunch with R. (Tr. 651-52.)

83. CCPS provided R. with all of the services, accommodations and supports required by her IEP in the 2016/2017 school year.

84. At the beginning of the school year in August 2016, R. had difficulty staying seated and quiet in the general education classroom for academic subjects. R. also had difficulty walking to the classroom. She would often drop to her knees on the floor in the hallway and refuse to stand up without significant encouragement and assistance from Mr. K. and her para. This took time away from R.'s time in the general education classroom. About three weeks after school started, Mr. K. began providing R. more instruction in the ICSC so she did not have to walk to the general education classroom and because she was better able to focus and remain attentive for longer periods in the ICSC classroom. (P. Ex. 24, at 49.) Mr. K. attempted to take R. to the general education classroom as often as possible. R. joined the nondisabled first graders for portions of Gym, Integrated Art and Music (specials).

85. From the beginning of school until the December 2016 IEP meeting, R. received more than eight hours and forty-five minutes of specially designed instruction to work on her IEP goals every day. As to placement, within three weeks of the start of school, R. was in the special education classroom for more hours and out of the general education setting for more hours than specified in the Placement section of her IEP. (Tr. 618.)

86. From the beginning of the school year until about mid-October, R. ate lunch with non-disabled peers in the lunchroom. In mid-October she started eating in the ICSC classroom to encourage R. to consume her whole lunch because the school lunchroom was too noisy and distracted her from eating her lunch.

87. In addition to occupational therapy, physical therapy, and speech language therapy, CCPS provided R. with a specialized program suited to meet her unique needs: (a) R. is presented with special transition objects[16] to enable her to transition from the ICSC classroom to other places at school and to reinforce the use of the objects daily; (b) Picture Exchange Communication System (PECS) is used daily;[17] (c) the

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[16] R. has a specific transition object for each destination, e.g., she has one transition item she always carries to walk to the classroom from the arrival area outside, a different object to walk to physical education/gym class, another for music, and so on. (Tr. 600.) Transition items help to ground R. and give her cues to what is coming next in her day.

[17] PECS are symbols attached to items in R.'s day used to help R. associate the symbol with the place or thing.

teacher cues R. to check the master schedule of pictures on the wall in the ICSC in between each activity to assist her to transition; (d) breakfast is used as an opportunity for R. to practice communication by making requests with switches for different parts of breakfast and signaling when she is finished; (e) the food and drink R. is offered at breakfast are labeled verbally by the teacher to reinforce language; (f) sometimes Mr. K. offers R. a food she doesn't like to encourage her to communicate that she does not want to eat it; (g) language is modeled for R. by the teacher and para often speaking words about what is shown, pointing and using slow, exaggerated speech; (h) Mr. K. speaks with Ms. Stokes about three times a week to obtain information about R.'s behavior and R.'s current favorite activities; (i) Mr. K. uses the input from Ms. Stokes to introduce language into R.'s day—e.g., if R. likes bubbles with Ms. Stokes, Mr. K. will use bubbles and other "B" words like Barbie with R. that day; (j) Mr. K. cuts pictures of the main characters out of an extra copy of the first grade Reading books and uses them with R. to make vocabulary available to R; (k) the ICSC is set up using the Teach model and R. is delivered consistent routine instructions in set locations—e.g., the group table; (l) Mr. K. uses a clear, direct voice with R.; (m) the ICSC has low lighting and reduced noise; (n) several social stories are used with R., including a story about biting; (o) R. has various objects used for her needs—e.g., a bean bag chair; and (p) the NovaChat is available for R.'s use, except when she is moving around or trying to throw it. (Test. Mr. K.)

88. CCPS implemented the BIP regularly, but not perfectly. School personnel, including the classroom teacher, made R.'s NovaChat accessible to her throughout the day, although at times it was not within R.'s reach. Staff maintained a clear and consistent daily routine. Mr. K. posted in the ICSC and reinforced with PECS a visual schedule. Mr. K. presented many social stories to R. to remind R. of safe mouth behaviors. R. was allowed structured daily breaks and other breaks when she requested them with the NovaChat. Staff provided R. short verbal instructions with visual supports. Mr. K. provided transition warnings throughout the day to help R. to prepare for changes in place or activity.

89. At times, Mr. K. did not follow the specific steps in the BIP for behavior intervention. He read R. the biting social story before redirecting her to the NovaChat and her oral stimulation items and vibration tools.

December 2016 IEP Team Meeting

90. A duly-constituted IEP team meeting was held on December 16, 2016, attended by R.'s mother, Mr. Steedman, and Lisa Frank on behalf of the Parents. (CCPS Ex. 45.)

91. The IEP team considered the Student's significant delays and deficits in academic and communication skills, and determined that she required specially-designed instruction for academics and communication outside the general education setting due to her distractibility and the need to focus her attention on communication and joint attention for

instructional activities. The team determined that the Student requires some of her academic services inside general education to provide modeling of language and to facilitate generalization of skills. The IEP team considered the Student's fine motor, gross motor, and sensory needs and determined that occupational and physical therapy were required outside general education to provide the necessary setting/activities. (P. Ex. 30, at 67.)

92. Mrs. F. again disagreed with R.'s goals and objectives and her placement. (Tr. 286.) The Parents proposed that R. not be included in the general education setting at all during the school day. Mrs. F. expressed concern that R. was not with peers most of the day when outside of the general education setting.

93. The Parents presented the report of Lisa Frank, a consultant from The Special Kids Company, which recommended that R. attend a full-day evidence-based program for children with autism, with a board certified behavior analyst (BCBA) on staff and all staff highly trained in working with students with autism. The Parents requested that R. be placed at the Benedictine School at public expense with full day ESY services.

94. CCPS proposed that the amount of time R. was included in the general education be reduced. (CCPS Ex. 45, at 1.)

95. The IEP team decided that "[m]ost of [the Student's] academic services will be provided outside general education to support her instruction and to provide opportunities to provide the appropriate

environment for success. Generalization will be supported through instruction inside general education." (P. Ex. 30, at 67.)

96. The team determined that R. would not attend general education sessions in the general education classroom in the afternoons; she would only attend specials with nondisabled peers. (Tr. 286.) The Parents disagreed with the school-based members of the team.

97. After discussion among the team members, including a review of all of the observations, assessments and tests, including the Assessment Report of Ms. Frank dated November 11, 2016, and the Parent's school observations of October 2016 and December 12, 2016, the Student's IEP was revised as follows:

> a. The Services section of the IEP was changed to reduce the hours spent working on R.'s goals within the general education setting from 5 hours to 2 hours and 30 minutes, and to increase the hours spent working on R.'s goals outside the general education setting from 3 hours and 45 minutes to 6 hours and 15 minutes a week; and
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> b. The Placement section of the IEP was changed to increase the hours R. receives instruction and services in the ICSC special education setting from 16 hours and 55 minutes a week to 29 hours a week.[18] (CCPS Ex. 45, at 2;

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[18] Page 68 of the IEP contains a typographical error which incorrectly indicates that R. will *not* participate with non-disabled

compare P. Ex. 22, at 44 and 49, *with* P. Ex. 30, at 63 and 68.)

98. The IEP team did not consider the Parents' request for ESY services as R.'s current IEP extends through May 24, 2017. (CCPS Ex. 45, at 2.)

Data Collection and Observations to Monitor Progress Toward IEP Goals and Objectives During the 2016/2017 School Year

99. CCPS has policies requiring teachers to collect data twice every quarter and to maintain data for two years.

100. Mr. K collected data in class regarding R.'s progress toward her goals every other week. He did not keep his notes (raw data) for two years as required by CCPS policy. He destroyed the raw data once he wrote the quarterly progress reports.

101. Mrs. F. observed the Student in school on October 20, 2016, and December 12, 2016. (P. Ex. 26, 29.)

102. CCPS staff completed quarterly progress reports which were provided to the Parents instead of letter or numeric grades.

Progress Toward IEP Goals and Objectives

103. R. made progress toward achieving some of the goals on her IEP during the 2016/2017 school year:

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peers for 19 hours per week. (P. Ex. 30, at 68 (last sentence).) The IEP team decided that R. will not participate with non-disabled peers for 29 hours per week.

a. Goal: Physical – Independent Community Living – Toileting – R. received occupational therapy services for 30 minutes twice a week from Alice O'Mullane, a highly experienced, licensed occupational therapist.

i. R. made very little functional progress toward the toileting goal of pulling her pants up and pushing them down. (P. Ex. 30, at 60.) One of her goals is to pull/push her pants up and down for toileting in three out of four trials given maximum tactile support[19] and verbal cues. *Id.*

At the beginning of the school year, R. was not doing anything with her clothes when toileting, even with maximum support. (P. Ex. 30, at 60 (July 17, 2016 report); Tr. 427.) Mr. K. and Ms. O'Mullane worked with R. on a hula hoop and a tutu to approximate the grasping and pulling/pushing motion, but R. made minimal progress toward this goal. As of March 2017, R. was grasping a hula hoop and pushing it down in order to crawl away from it to reach a favored toy. This approximates the motion of pulling her pants down, a skill that R. has not achieved.

ii. Other objectives are, given maximum tactile support, to wash her hands after soap is placed on them and pat her hands dry after a towel has been given. (P. Ex. 30, at 60.) R. is sometimes

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[19] Maximum tactile support means hand-over-hand assistance: the staff member places the student's hands, and then grasps the object over top of the student's hands, in effect moving the grasped object for the student. (Tr. 94, l. 5-7.)

able to wash her hands once soap is placed on them, as she prefers water activities. She will grab paper towels and hold them but has not shown the ability to pat her hands dry. R. will release paper towels into the bathroom trash can.

b. Goal: Physical – Gross Motor – R. received physical therapy services for thirty minutes twice a week from Dianna Shaffer, a highly experienced, licensed physical therapist. Although R.'s performance in the physical therapy sessions is inconsistent, R. has progressed in meeting her IEP goals in that she is more stable in her walking, is better able to navigate changes in surface, has more endurance in walking, and changes position more easily. (Tr. 382-83.)

i. One of R.'s gross motor objectives in her IEP involves reciprocal ball play. (P. Ex. 30, at 58.)[20] At the start of the school year, R was not able to show consistent purposeful performance with ball skills. *Id.* (Progress report dated June 9, 2016.) R would touch a ball but not do anything to catch or throw the ball. R's performance in PT in using the ball is very inconsistent, but she has shown that she can catch a suspended ball up to 12 out of 14 tries. (Tr. 384.)

ii. R's other gross motor goal in her IEP involves going up and down the stairs with an alternate step pattern, i.e., using alternate feet on each step. (P. Ex. 30, at 57-58.) At the end of

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[20] R.'s gross- and fine-motor goals did not change from the May 25, 2016 IEP. *Compare* P. Ex. 22 *with* P. Ex. 30.

kindergarten, R. needed contact guarding or moderate assistance to go down stairs. (Tr. 386.)[21] In March 2017, R's performance was inconsistent. She needed a contact guard for safety and verbal prompting to hold a handrail. R. can descend stairs without moderate assistance using a handrail. (Tr. 387.) R. requires close supervision because she does not always show that she is aware of where her body is in space. R. has not attempted the objective of walking on a wide beam.

c. Goal: Physical – Fine Motor – R. has a fine-motor goal involving grasping and releasing tissues/paper towels in a trash can. (P. Ex. 30., at 55.) This is one of the skills necessary for washing hands. At the beginning of the year, R. needed total assistance to wash her hands. She has improved so that she will grasp and pull a paper towel that has been partially pulled from the dispenser and will usually drop it into the trash can with modeling and verbal cues. (Tr. 432; CCPS Ex. 10.)

d. Goals: Speech and Language – R. received speech therapy services in the ICSC for 20 minutes every school day from Mary Stokes, a highly experienced speech therapist. (Tr. 466.) R. has two goals, both involving the NovaChat.

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[21] Contact guarding means that the therapist has to have a hand on the student's body, e.g., holding her hand. (Tr. 385.) Moderate assistance refers to physically providing the student with some help, e.g., touching her foot. *Id.*

i. At the start of first grade, R. pressed the break button on the NovaChat without seeming to know what it meant. (P. Ex. 25, at 41.)

ii. During the 2016/2017 school year, R. has learned to use the NovaChat independently in different settings to tell people when she wants food, drink, or a break, and to indicate what type of food she wants or how she wants to use her breaks by touching icons on the screen. (Tr. 468.) R. is still a novice with the NovaChat. (Tr. 530.)

iii. R. received the benefits of strategies in the ICSC to improve her ability to communicate, including a predictable routine; pictures representing her schedule; lots of sensory objects; calm music; low-level light; use of single buttons; and transition objects to help R. predict what comes next.

e. Goal: Behavior – R. did not make progress toward achieving her behavior IEP goals during the 2016/2017 school year. R.'s inappropriate behaviors continue to interfere with her access to learning.

f. Goal: Academics – R. did not make progress toward her academic goals during the 2016/2017 school year.

Credentials of Experts

104. Mr. K. is a highly trained and very experienced special educator. He holds a B.S. in education and a M.Ed. in Elementary and Special Education. Mr. K. has worked as a special educator in CCPS since August 2016, as a special education team

leader for Baltimore County Public Schools for six years, for The Children's Guild, Maryland as Administrative Head for three years and principal for another three years, for Harford County Public Schools as an inclusion teacher for one year, as a teacher at the Maryland School for the Blind in a residential setting for over three years, and as a teacher of special needs students in Philadelphia for two years.

105. Constance Annie McLaughlin has a doctorate in Education/Special Education, a master's degree in Teaching, and a bachelor's degree in Biology. Dr. McLaughlin holds a license as a Behavior Analyst in Maryland. Dr. McLaughlin has taught education at various colleges and universities from 2011 until 2016. She has worked in the field of behavior analysis since 2007, working with a public school system and families with children with disabilities. Dr. McLaughlin was a special education classroom teacher from 2005 until 2007. Dr. McLaughlin has served as an expert witness in special education due process hearings. (P. Ex. 37.)

106. Lisa C. Frank, M.Ed. is a certified special education teacher and reading specialist with over nine years of varied experience in teaching students with disabilities. She has a Master's degree in Education and a Bachelor's of Science degree with a concentration in special education. She has worked since 2000 performing FBAs and behavior intervention plans for a variety of clients, including Baltimore City Public Schools and Baltimore County Public Schools. (Tr. 314-15.) Ms. Frank has been employed since January 2002 as an educational and behavioral consultant with The Special Kids Company, Inc. (P. Ex. 38.)

107. Dianna Shaffer is a physical therapist employed by CCPS. She is licensed to practice physical therapy in Maryland and other states. Ms. Shaffer has worked as a physical therapist for forty years, thirty-nine of which were in pediatrics and thirty-six years in schools. (CCPS Ex. 11.)

108. Alice O'Mullane is a licensed occupational therapist with over thirty years of experience in school and private-practice settings. (CCPS Ex. 8.)

109. Mary Stokes has more than thirty-five years of experience as a speech language therapist working in schools. She has worked for CCPS since 2011 as a Supervisor and Speech Pathologist. (CCPS Ex. 6.)

110. Sarah J. Farr has worked for CCPS as the Director of Special Education for seven years and has three years of prior relevant experience. (Tr. 817-18.)

111. Carol Quirk, Ed. D., is the Executive Director of the Maryland Coalition for Inclusive Education. (CCPS Ex. 18.) She holds a B.A. in Psychology, a M.A. in Educational Psychology, and a doctorate in Severe Disabilities and Communication Disorders.

DISCUSSION

Legal Principles

During the pendency of this case, the Supreme Court issued an important decision explaining the legal principles controlling my analysis. *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1,* 137 S.

Ct. 988 (2017) (*Endrew F.*).[22] Explaining the statutory and regulatory framework of the IDEA, the Court noted that in exchange for federal funds a State must, among other things, provide a FAPE to all eligible children. 20 U.S.C.A. § 1412(a)(1). The Supreme Court set forth the parameters of the IDEA, which guide the decision in this case:

> A FAPE, as the [IDEA] defines it, includes both "special education" and "related services." § 1401 (9). "Special education" is "specially designed instruction ... to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child ... to benefit from" that instruction. §§ 1401(26), (29). A State covered by the IDEA must provide a disabled child with such special education and related services "in conformity with the [child's] individualized education program," or IEP. § 1401(9)(D).[23]
>
> The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe,* 484 U.S. 305, 311 (1988). A comprehensive plan prepared by a child's "IEP Team" (which includes teachers, school officials,

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[22] The parties did not address the question of whether *Endrew F.* applies to this case which involved events occurring prior to the Court's decision. I conclude that *Endrew F.* governs the decision in this case. *See Harper v. Va. Dep't of Taxation,* 509 U.S. 86, 89 (1993).

[23] Maryland has adopted regulations in accordance with the IDEA. COMAR Tit. 13A.

> and the child's parents), an IEP must be drafted in compliance with a detailed set of procedures. § 1414(d)(1)(B) (internal quotations marks omitted). These procedures emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. § 1414. The IEP is the means by which special education and related services are "tailored to the unique needs" of a particular child. [*Board of Ed. v. Rowley,* 458 U.S. 176, 181 (1982)].
>
> The IDEA requires that every IEP include "a statement of the child's present levels of academic achievement and functional performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals," along with a "description of how the child's progress toward meeting" those goals will be gauged. §§ 1414(d)(1)(A)(i)(I)-(III). The IEP must also describe the "special education and related services ... that will be provided" so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum." § 1414(d)(1)(A)(i)(IV).

Endrew F., 137 S. Ct. at 994 (parallel citations omitted).

The *Endrew F.* Court was asked to expand upon its decision in *Rowley,* a seminal IDEA decision. *Rowley*

held that the IDEA establishes a substantive right to a FAPE for certain children with disabilities. The Court acknowledged that *Rowley* did not endorse a single standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the [IDEA]," leading the federal circuits to apply different standards for the attainment of educational benefit under the IDEA. 137 S. Ct. at 993 (citing *Rowley,* 458 U.S. at 202). Instead, *Rowley* held that the IDEA standard is satisfied, and a child has received a FAPE, "if the child's IEP sets out an educational program that is 'reasonably calculated to enable the child to receive educational benefits,'" *Id.* at 995-96 (citing 458 U.S. at 207). *Rowley* recognized that the law requires the States to educate all children with disabilities and that "the benefits attainable by children at one end of the [disability] spectrum will differ dramatically from those obtainable by children at the other end," but "declined 'to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.'" *Id.* at 996 (quoting 458 U.S. at 202).

Thirty-five years later, the parties in *Endrew F.* asked the Court to go further and set forth a binding test for measuring whether a disabled student attained sufficient educational benefit.[24] The framework for the decision was the Tenth's Circuit's interpretation of

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[24] In the interim various formulations of the test for "educational benefit" under *Rowley* were adopted in the federal circuits, including the Fourth Circuit. *See generally The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted,* 247 Educ. L. Rep. 1, *9-10 (2009).

Rowley's "some educational benefit" language, (citing 458 U.S. at 200), as an "educational benefit [that is] merely ... 'more than *de minimis*.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. School Dist. RE-1,* 798 F.3d 1329, 1338 (10th Cir. 2015).[25]

The Supreme Court set forth the following "general approach" to determining whether a school has met its 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." *Endrew F.,* 137 S. Ct. at 999. "[T]he degree of progress contemplated by the IEP must be appropriate in light of the child's circumstances ...." *Id.* at 992. Further, the Court instructed that "[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.*

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[25] The *de minimis* standard was adopted by the Tenth Circuit and several others. The Fourth Circuit formulated the test as whether the school system adopted an IEP calculated to confer some educational benefit on the student, not to maximize each disabled child's potential. *See O.S. ex rel. Michael* S. *v. Fairfax Cty. Sch. Bd.,* 804 F.3d 354, 360 (4th Cir. 2015) ("In this circuit, the standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.") The Fourth Circuit cases recognize that what constitutes educational benefit is different for every child and may change for a child over time. *See M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.,* 553 F.3d 315 (4th Cir. 2009); *A.B.ex rel. D.B. v. Lawson,* 354 F.3d 315 (4th Cir. 2004); *Hall by Hall v. Vance Cty. Bd. of Educ.,* 774 F.2d 629 (4th Cir. 1985).

The *Endrew F.* Court explained that a challenged IEP must be examined to determine if it describes the child's present level of performance, including explaining "how the child's disability affects the child's involvement and progress in the general education curriculum." *Id.* at 994 (citing 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)(aa)). The IEP also must "set out 'measurable annual goals, including academic and functional goals,' along with a 'description of how the child's progress toward meeting' those goals will be gauged," *id.* (citing § 1414(d)(1)(A)(i)(I)-(III)), and "describe the 'special education and related services ... that will be provided' so that the child may 'advance appropriately toward attaining the annual goals' and, when possible, 'be involved in and make progress in the general education curriculum.'" *Id.* (citing § 1414(d)(1)(A)(i)(IV)).

The *Endrew F.* Court made it clear that, for a student who is fully integrated into the regular classroom, the IEP should provide a level of instruction reasonably calculated to meet the unique needs of a student that result from the disability and to permit a student to advance through the general curriculum. However, when a student is not fully integrated into the regular classroom and is not able to achieve on grade level, the "educational program must be appropriately ambitious in light of [the student's] circumstances...." 137 S. Ct. at 1000.[26] "The goals may differ, but every child should have the chance to meet challenging objectives." *Id.* Summarizing its holding,

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[26] The student in *Endrew F.* was diagnosed in autism and was exhibiting behaviors that interfered with his educational progress.

the Court said: "[The IDEA] requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001.

Endrew F. explained that this decision is fact-specific: appropriate progress is different in every case, depending on the student's unique circumstances. The Court explained its reasoning as follows:

> We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley,* 458 U.S. at 206.
>
> At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. By the time any dispute reaches court, school authorities will have had a

> complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable a child to make progress appropriate in light of [the child's] circumstances.

137 S. Ct. at 1001-02 (some citations and parallel citations omitted).

With the language of the IDEA, the Maryland regulations, and the decision in *Endrew F.* as guides, I will review the evidence in this case.

The Contentions of the Parties

The Parents filed a comprehensive eighteen-page Complaint on behalf of the Student and themselves. I shall only describe the issues argued at the hearing, which centered on R.' s communication, behaviors and placement. Any other contentions were implicitly waived for failure to advance them at the hearing since the Parents have the burden of proof.[27] *See Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49, 57-58 (2005).

In the Complaint, the Parents contend that CCPS denied the Student a FAPE by placing her in the

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[27] The Complaint refers to section 504 of the Rehabilitation Act of 1973. At the prehearing conference, I informed the parties that the OAH does not have a delegation of authority to hearing section 504 complaints in this county. Mr. Steedman indicated that he understood and would seek other avenues for recourse of the 504 claim.

general education classroom in the 2014/2015 and 2015/2016 school years when R. attended kindergarten in CCPS. The Complaint describes areas of dissatisfaction occurring more than two years before the Complaint was filed on January 17, 2017. Complaint 16 ("CCPS has failed to provide a FAPE to R. for many years in violation of the IDEA .... "). Any claim arising prior to January 17, 2015 is untimely: "The due process complaint must allege a violation that occurred not more than two years before the date the parent ... should have known about the alleged action that forms the basis of the due process complaint...." 34 C.F.R. § 300.507(a)(2). I interpret the information provided at the hearing regarding the pre-January 17, 2015, time as background information, placing the later events in historical context.

The Complaint alleges that CCPS failed to provide R. a FAPE in the 2015/2016 and 2016/2017 school years. Complaint 17. However, at the hearing and in the closing argument the Parents focused on the May 2016 IEP, which was prepared for the 2016/2017 school year, and the events from that date through the date of the hearing. The Parents withdrew their request for compensatory education at the hearing and did not specify any finding they were requesting for the 2015/2016 school year. Therefore, any allegations in the Complaint about the 2015/2016 school year are deemed waived.

The Parents challenge the first grade IEP as inadequate and flawed. They further contend that R. failed to make meaningful educational progress. The Parents argue that R. has regressed academically, still

struggles with communication, and her aggressive behaviors and emotional outbursts have increased. The Parents argue that due to the complexity and severity of her needs, R. requires a highly specialized program. They request an order that CCPS make a referral to the Benedictine School (Day Program), a separate nonpublic day school, or an appropriate nonpublic placement agreed upon by the Parents, and that CCPS pay for tuition, related services, and transportation for the 2016/2017 school year.[28]

CCPS denies that it violated the IDEA. It contends that the Parents have "cherry picked" items in the IEP not to their liking without examining the IEP as a whole. CCPS argues that the IEP is more than its goals and objectives; it includes specific accommodations, supports and services tailored to R.'s unique needs. CCPS argues that it provided R. a FAPE. She spends her entire day with a trained special educator and always has her own para with her. The assistive technology and communication supports are available all day, including the NovaChat, iPAD, and other forms of communication. R. has access to nondisabled peers who model appropriate behaviors for her. R. has made progress in some but not all areas of her IEP. CCPS seeks an order stating that it complied with the IDEA.

Credibility of the Witnesses

Mrs. F. was a strong witness for R. She testified calmly, openly and honestly, answering every question

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[28] The Parents also indicate their intention to seek reimbursement for the attorneys' fees and expenses incurred in filing the Due Process Complaint. That is an issue for another venue.

to the best of her ability. She introduced R. as a seven-year-old who loves music, movement, and has favorite television programs. R. is sweet and loving when she is happy, but she displays aggressive behaviors when she is frustrated, including kicking, biting, hair pulling and throwing herself to the ground. (Tr. 232.) R's frustrations increase when she is in large groups of people, so she does not attend gatherings like birthday parties. *Id.* R. likes electronics, and has learned to unlock Mrs. F.'s cell phone to use the camera to look at the world. (Tr. 245.)

R.'s mother is very knowledgeable about all aspects of her daughter's health and education. In addition, Mrs. F. has been very involved with CCPS while R. has been enrolled, attending every IEP team meeting and visiting the classroom.[29] Mrs. F. keeps in touch with Mr. K. face-to-face and through email. Mrs. F. is obviously a loving mother who cares deeply for R. and wants to maximize R.'s potential. Together with Mr. F., Mrs. F. has enormous responsibilities for her daughter, and she diligently attends to them.

Lisa Frank testified that she was contacted to testify for the Parents by Mr. Steedman.[30] Ms. Frank is experienced with special educations services in the public schools, and she had much to offer about R.

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[29] The IEP team is a "group of individuals described in §300.321 that is responsible for developing, reviewing, or revising an IEP for a child with a disability." 34 C.F.R. § 300.23.

[30] There is nothing wrong with this, indeed competent counsel for parents in a due process case has a duty to retain qualified experts when necessary to support the claims in a due process complaint.

I detected some bias in favor of Ms. Frank's economic interest when Ms. Eisenberg cross-examined her about a statement on her company's website stating that she had obtained private placement for parents ninety-five percent of the time.[31] Ms. Frank denied that the statement was on her website, then explained that the statement was not currently on the website, which she says has been completely redesigned. (Tr. 360-361.)

On redirect, Ms. Frank readily answered questions from Mr. Steedman about how she calculated the ninety-five percent, so she clearly knew to what Ms. Eisenberg had been referring, indicating to me that she attempted to avoid answering Ms. Eisenberg's question. I detected some defensiveness in Ms. Franks' colloquy with Ms. Eisenberg. Although careful selection of clients might increase a consulting expert's chances of participating in a case achieving results desired by parents, touting win/loss percentage may not be the best way to explain this to prospective clients, especially parents of special needs children.

On another issue, on cross-examination, Ms. Frank was asked if she ever stated to Mr. K. in the presence of Ms. Mastrilli, that if only the Baltimore County parents could see the ICSC, they would love it. (Tr. 361, l. 119 to 362, l. 8.) Ms. Frank testified that she did

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[31] The question from Ms. Eisenberg and Ms. Frank's answer was as follows:

> Q: And isn't it true that you hold yourself out, Ms. Frank, as a person who has a record of 95 percent success in securing nonpublic placement? Isn't that how you advertise yourself?
> A: No. (Tr. 359, l. 9-13.)

not remember saying it or referring to Baltimore County parents.[32] Both Mr. K. and Ms. Mastrilli testified credibly that Ms. Frank made this remark on November 11, 2016, after observing R. in the ICSC and while speaking with Mr. K. in Ms. Mastrilli's presence. (Tr. 664, ls. 19-23; Tr. 560, l. 17 to 561, l. 5.) I conclude that Ms. Frank was not truthful in her testimony, and that Mr. K. and Ms. Mastrilli were credible. I conclude that Ms. Frank was impressed with the ICSC and the program offered to R., and she honestly complimented CCPS during her visit in November 2016. When it came time for her to testify for the Parents, Ms. Frank evaded the questions by feigning lack of memory because an honest answer would harm the Parents' case.

Taken altogether, this evidence provides some indication that Ms. Frank was predisposed to render an opinion favorable to the Parents' quest for private school at public expense, and that she was unfairly critical of the program offered to R. by the CCPS during her testimony. I have not given her testimony much weight.

Dr. McLaughlin testified for the Parents. Dr. McLaughlin has attained a doctorate degree and is very knowledgeable. I considered her testimony carefully and gave it weight when it was rendered within the realm of her expertise.

Several of the Student's treating physicians wrote in their reports that R. was misplaced in the public

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[32] Ms. Frank consults on a lot of issues involving students in the Baltimore County Public Schools.

school system and required placement at the Benedictine School. For example, Dr. Bernstein of KKI, who evaluated R. and diagnosed her with autism spectrum disorder, level 3, in March of 2016, wrote: "She is obviously misplaced in a full inclusion elementary school class with an IEP and access to a one-to-one aide and academic assistant, and this situation causes her to be very overstimulated." (P. Ex. 41, at 1.)

Mrs. F. was asked on direct examination about the source of Dr. Rubenstein's knowledge and she replied:

> [Dr. Rubenstein] was relying on the conversation that he had with [R.'s] father ... and I, regarding what her setting was, and his observations of [R.] during his clinical observation. (Tr. 240-41.)

None of the treating physicians testified; hence their opinions were not supported by any explanation of whether the opinions were rendered within the scope of their expertise. With respect to Dr. Rubenstein, all he knew about the CCPS program came from the Parents, who were critical of the kindergarten program. It does not appear that Dr. Rubenstein ever saw the Student's IEPs or spoke with any CCPS staff.

As they did not submit to cross-examination, I was unable to gauge the weight to be given these hearsay opinions. I have no doubt that the opinions were rendered, but I am unable to give them any weight for these reasons.

I gave the testimony of Dianna Shaffer great weight. Ms. Shaffer has worked as a physical therapist for many years and has extensive experience working

with disabled children. She is an expert in her field and very knowledgeable about R., her strengths and weakness. I listened carefully to her testimony on direct and cross-examination, and I detected no bias or evasion.

I also gave the testimony of Alice O'Mullane great weight. Again, Ms. O'Mullane is very experienced in OT and extremely experienced in the school setting. I was very impressed with the many examples of personal attention to R.'s needs that Ms. O'Mullane described. For example, R. needs to learn to pull her pants up and down for toileting. Ms. O'Mullane explained how she uses a hula hoop with R. to approximate the strong grip R. needs to accomplish this task. Equally impressive was Ms. O'Mullane's testimony about the sensory boxes she uses with R. to strengthen her grasp and release of objects. Ms. O'Mullane knows which objects R. enjoys, and she incorporates them into her work with R. Ms. O'Mullane was a very important witness, because she explained with meaningful examples the way R. learns new things: R. needs tasks broken down into small segments, repetition, and very slow introduction of new elements of a larger task.

The testimony of Mary Stokes was also very helpful to my analysis. She outlined the reasons why the NovaChat might not be available to R. sometimes in school. Ms. Stokes also explained how she comes to the total communication classroom for speech language therapy and works with R., which also gives her an opportunity to check in with Mr. K. and see what he is doing with R.

Ms. Stokes described how she works with R. on underlying skills and how her work relates to that of other CCPS staff members. For example, in physical therapy, R. is working on reciprocal ball skills, i.e., the therapist pushes the ball to R. who hopefully catches it and pushes it back to the therapist. Ms. Stokes explained that this is similar to conversation: you say something then wait for the other person to say something back and so on. (Tr. 488.) According to Ms. Stokes, R. has improved the amount of eye contact she makes. For example, R. makes a selection on the NovaChat and then looks to Ms. Stokes to see if she got it. Ms. Stokes testified that this is progress for R. because it shows that she understands that "communication goes to a partner." (Tr. 490.)

Ms. Stokes explained that she "presumes competence" of R. They work on an underlying skill but present some higher level skills by, for example, using written words with pictures. (Tr. 488-89.) She testified that there is some evidence that nonverbal adults with autism are able to type words of which they never previously showed any comprehension. She presumes that when a child with autism sees words, the child may understand what the words mean, particularly if the word is paired with a picture.

> We've seen – the last thing with R. is sometimes she'll look at words, like upside down, she'll sometimes turn. So I don't know what's going in but the presumed competence would say, let's not eliminate the written word because she's not reading and writing yet. But to present some [of]

> that in the hopes that something goes in and that's what we can get back out. (Tr. 489.)

I discuss my evaluation of Mr. K.'s credibility later in the Decision. As explained further in the following discussion, I have not discussed the credibility of the witnesses' testimony about the suitability of The Benedictine School as a placement for the Student.

Analysis

Was the Student's IEP Reasonably Calculated to Enable her to Make Progress Appropriate in Light of her Circumstances?

The Parents argued in closing that the Student's December 16, 2016, IEP was "woefully inadequate and substantively flawed." (Tr. 919-20, referring to P. Ex. 30.)[33] CCPS argued that the IEP complied with *Endrew F.,* which held that "[t]o 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. CCPS argued that the Student's IEP is appropriate to her circumstances as one of only fifteen known patients diagnosed with a defect of the HIVEP2 gene and as a nonverbal child in the severely-impaired range of the autism spectrum. Autism is "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, ...

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[33] Mr. Steedman did not directly argue in closing that the May 2016 IEP failed to offer the Student a FAPE. I have addressed this issue, however, because so much of the evidence presented by the Parents dealt with the Fall of 2016, before the December 2016 IEP.

that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(1)(i). Characteristics often associated with autism include "engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." *Id.*[34]

I am mindful that the *Endrew F.* Court reiterated the meaning of the *Rowley* "reasonably calculated" requirement:

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

137 S. Ct. at 999 (citations omitted).

Several matters influenced my decision in this case. Imprecise language used at the hearing created confusion in the record. I found the references throughout the hearing to "the IEP" confusing because there are three first grade IEPs in the record: May 25, 2016, July 7, 2016, and December 16, 2016. (P. Exs. 22,

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[34] A child with autism qualifies as a "[c]hild with a disability" under IDEA. 20 U.S.C.A. § 1401(3)(A)(i) (Supp. 2016).

24, 30.) The IEP grew from fifty-one pages in May 2016 to seventy-one pages in December 2016, and it is impossible without conducting a line by line comparison to understand what was added or what, if anything, was deleted.

In response to my statement about the confusing IEPs, counsel for CCPS pointed out that the Prior Written Notice provided to the Parents on December 21, 2016, summarized the matters discussed and the changes made as a result of the December 2016 meeting. The IEP was revised to reduce the time the Student spends in the general education setting. (CCPS Ex. 45.) I have, therefore, not attempted to compare every page of all three IEPs. I conclude that the only changes from the May 2016 IEP to the July 2016 IEP were the result of adding observations of the Student's progress in June and July 2016. I further conclude that the only changes from the July 2016 IEP to the December 2016 IEP involved the number of special education hours and the place(s) where the services were provided.

I also observe that many of the witnesses were asked leading questions on direct by both counsel. While the rules of evidence do not apply to hearings before OAH, I have considered the leading nature of the questions asked in determining the weight to be given the witnesses' testimony. Leading questions suggest the answer for the witness. The more leading the question, in general, the less weight I gave to the answer.

An example of testimony that I found particularly helpful was Mr. K.'s narration of the videos. (CCPS Ex.

50.) Mr. K. testified in his own words about how the ICSC suited the needs of a student with sensory and communication disabilities. He walked through the classroom, showing video of all the areas used in teaching R. there, with explanations – in his own words – what R.'s typical day in school entailed. This testimony was very persuasive on the issues of whether the IEP was specifically tailored to meet R.'s needs and how CCPS implemented the IEP.

The Creation of the IEP

The starting point for the discussion of the IDEA issues is the IEP. Many courts have emphasized that the IEP is a forward looking document, a plan for the student's future. The IEP team gathers all relevant information available and documents a student's present levels of academic achievement and functional performance, and then proceeds to define a program to meet the student's need *in the coming school year*.

In order to evaluate the Parents' claims, it is necessary to begin with the May 2016 IEP, which was created based on the Student's performance in kindergarten and all of the reports available to the team, as well as the Student's mother's input. The December 2016 IEP meeting reduced the number of hours the Student spent in the general education classroom based on information obtained by CCPS during the Fall of 2016. The December 2016 IEP preceded the filing of the Due Process Complaint by one month and the start of the OAH hearing by about three months. The parties offered evidence about the Student's school experience from the beginning of the 2016/2017 school year, which started in August 2016,

up to the end of the hearing, which concluded in early April 2017. I have evaluated testimony about events that occurred after January 17, 2017 carefully to determine if the evidence was influenced by the anticipated hearing.

To evaluate the Parents' argument that the Student's IEP did not provide her with a FAPE, I will begin by explaining the reliable evidence about the creation of the May 2016 IEP, which formed the basis for the Student's program in first grade, until the December 2016 revision.

The First Grade IEP was Tailored to Meet R.'s Unique Needs

The Student's May 2016 IEP was "specially designed" to meet her "unique needs" through an "individualized education program." 20 U.S.C.A. § 1401(14), (29). By the time R.'s May 2016 IEP was drafted, R. had been enrolled in CCPS for one school year of half-day kindergarten and another school year of full-day kindergarten. The May 2016 IEP was written "only after careful consideration of the [Student's] present levels of achievement, disability, and potential for growth." *Endrew F.,* 137 S. Ct. at 999 (citing *id.* § 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv)).

Before the May 2015 IEP was created, CCPS performed a multitude of tests and reviewed the results of reports from many sources about R.'s unique needs. These are described thoroughly on three pages of the IEP, and cover all areas of R.'s wide spectrum of disabilities: psychological, academic, behavioral, speech, and motor skills. (P. Ex. 22, at 2-4.) CCPS met

with Mrs. F., received her input about R., and assessed R.'s level of academic achievement and functional performance, the record of which is set forth on thirteen pages of the IEP. (P. Ex. 22, at 8-20.) *See* 20 U.S.C.A. § 1414(d)(1)(A)(i)(I) (The IEP must contain "a statement of the child's present levels of academic achievement and functional performance ...."). The Parents presented no evidence that the Student's levels of academic achievement and functional performance were inadequately assessed in the May 2016 IEP.

The IEP must also state "how the child's disability affects the child's involvement and progress in the general education curriculum[.]" *Id.* § 1414(d)(1)(A)(i)(I)(aa). Again, the Parents presented no evidence that the May 2016 IEP failed to satisfy this requirement of the IDEA. Throughout the twelve-page section of the IEP describing R.'s present level of academic achievement and functional performance, the IEP explains how R.'s disability affects her involvement and progress in the general education curriculum.

The Parents did not address whether the IEP properly assessed R.'s present level of academic and functional performance or explained how her disability affects her performance or progress in the general curriculum. I conclude that the IEP satisfied these requirements of the IDEA.

Next the IDEA requires that the IEP team create an IEP tailored to R.'s unique needs that contains:

> a statement of measurable annual goals, including academic and functional goals, designed to –

> **(aa)** meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
>
> **(bb)** meet each of the child's other educational needs that result from the child's disability....

Id. § 1414(d)(l)(A)(II).

R.'s behavior was a main focus of the hearing, and her behavior goals were discussed at length. The Parents argued that the Student's behavior goal was substantively insufficient. R. displayed some interfering behaviors in kindergarten. In May 2016, the IEP team considered a FBA conducted for R. by a consultant from KKI which focused on the primary behavior of biting or attempting to bite others. (P. Ex. 22, at 3, 21-22.) At the time the May 2016 IEP was created, biting was the primary problem behavior brought to the attention of the IEP team.[35] The BIP was created by the KKI consultant to address this behavior on May 2, 2016. (P. Ex. 20; Ex. 22, at 22.)

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[35] The information about R.'s behavior reflected in the May 2016 IEP was as follows:

> When R. is unhappy or frustrated as a result of: being told "no", being denied access to a preferred item/activity, being asked to start a non-preferred activity, she will bite others (or attempt to bite) in her personal space. In this way, she expresses frustration with current work activities, demands, terminates or delays non-preferred activities. A BIP needs to be put into place in order for her [to] teach appropriate behaviors when faced with these situations." (P. Ex. 22, at 22.)

The Parents argued at the hearing that the IEP was insufficient because R. was also grabbing, kicking and pulling the hair of others. Mr. Steedman argued that Mr. K. testified that the FBA was not accurate because it did not address all of R.'s challenging behaviors, citing his testimony at pages 104-106 of the transcript. This argument proceeds from the imprecise language and hindsight analysis that sowed much confusion in the record. The following excerpt from Mr. Steedman's questioning of Mr. K. on March 10, 2017, illustrates the point:

> Q: So, *if you were writing a functional behavior assessment for her today,* what would you include in that functional behavior assessment?
>
> A: Biting, hair pulling, grabbing. I'm not sure about flopping on the floor because sometimes I think that's motoric. I don't think that's always a functional behavior. (Tr. 106, l. at 2-8) (emphasis added).

This testimony is not helpful to my decision because Mr. K. testified on March 10, 2017. It is almost time for R.'s IEP to be re-evaluated in May 2017. The FBA and BIP were created in the Spring of 2016 for the 2016/2017 school year.[36] A student's behavior may and

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[36] CCPS satisfied the IDEA requirement that the IEP be in place before the start of the 2016/2017 school year. 20 U.S.C.A. § 1414(d)(2)(A). CCPS met the requirement of the IDEA that in developing an IEP for "a child whose behavior impedes the child's learning or that of others," the IEP team must "consider the use of

often does change over time. The law does not require a public school system to rewrite a FBA or a BIP every time a new interfering behavior is observed. R. is due for an annual IEP review in May 2017. 20 U.S.C.A. § 1414(d)(4)(i) ("The local education agency shall ensure that ... the IEP Team [r]eviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved ...."). The Parents did not present me with any legal authority to support their contention that CCPS was required to convene an IEP meeting to revise the Student's IEP to discuss her other troubling behaviors.[37]

Dr. McLaughlin opined that the Student's FBA and BIP were inappropriate. Dr. McLaughlin read the Student's school records and observed the Student twice in school (on January 9, 2017, and March 3, 2017), and once at home on March 3, 2017. (Tr. 133.) Dr. McLaughlin testified about the behaviors she observed, and opined that given the severity of the Student's behaviors the FBA was "very elementary" and "lacking." (Tr. 180.) Dr. McLaughlin also opined that the type of BIP in use with R. is typically used for students with less challenging behaviors. She admitted that the BIP contains some useful strategies, but, in her opinion, there is not as much detail in it as R.

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positive behavioral interventions and supports, and other strategies, to address that behavior ...." *Id.* § 1414(d)(3)(B)(i).

[37] There are specific references to the FBA and behavioral intervention services in the IDEA law governing discipline, which is not implicated in this case. *See id.* § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).

requires, and the BIP only addresses biting. (Tr. 181-84.)

Ms. Frank opined that the Student's FBA and BIP were inappropriate. Ms. Frank observed R. in school on November 11, 2016, and she described the problem behaviors she observed. (P. Ex. 27.) Ms. Frank testified that the FBA and BIP are incomplete because they do not address the behaviors of dropping to the floor, pushing, pulling hair and pushing her chair away from instruction at a table. (Tr. 336-37.)

There was nothing in Dr. McLaughlin's or Ms. Frank's testimony to indicate that the FBA or the BIP were inappropriate at the time they were created in the Spring of 2016. Furthermore, the BIP describes a structured prompt hierarchy to be used if R. becomes unsettled as evidenced by fussing, crying, pushing or throwing materials, hitting or kicking, or other attempts to delay or terminate activities. (P. Ex. 20, at 3.)

Ms. Farr testified for CCPS about the FBA and the BIP. Ms. Farr disagreed with Dr. McLaughlin's criticism of the FBA. (Tr. 833, l. at 3-4.) She explained that in 2010 CCPS adopted a prevent, teach, and reinforce (PTR) model for conducting FBAs. (Tr. 833, l. at 6-7.) Ms. Farr testified that "PTR is a research based evidence model for conducting FBAs and BIPs." (Tr. 834, l. at 3-4.) Ms. Farr testified that the PTR method used by CCPS in creating R.'s FBA and BIP is appropriate for students with significant disabilities and students with autism like R. (Tr. 833-34).

Ms. Farr further testified that, in creating a BIP, the PTR model tells CCPS to select a primary interfering behavior and defines strategies to use to prevent, eliminate, or reduce the behavior. The skills set forth in the BIP for the primary behavior can be generalized to other behaviors. In her opinion, the IEP team decided in May 2016 that biting was the most significant behavior, and the BIP appropriately focused on biting. (Tr. 834, l. 16 to 835, l. 3.) She testified that the BIP is adequate because the strategies in the BIP can be used by school staff to address R.'s other problematic behaviors that may interfere with her ability to access her program.

CCPS has adopted a recognized method for conducting behavioral assessments and designing behavior improvement strategies. The basis for the methods and strategies is a reasonable choice among many available in the literature. It may not be the method preferred by Dr. McLaughlin or Ms. Frank, but I conclude that the testimony and evidence provided by CCPS explained the school system's choice of methodology. Deference is due to the choices the qualified professionals at CCPS made about educational policy, which as sufficiently explained by Ms. Farr, are specific to R.'s unique circumstances. *Rowley,* 458 U.S. at 206.

Turning to the next area addressed by the Parents, social foundations, the IEP notes that R. "has not developed the necessary skills to play alongside other children without modeling or prompting." (P. Ex. 22, at 8.) Also, the IEP notes that "R. struggles with vocalizing in response to vocalizations and speech

produced by an adult and initiating familiar turn-taking routine." (*Id.* at 9.) R. "does not recognize appropriate social behaviors and needs to learn how to imitate one step actions." (*Id.*)

The IEP does not contain a social skills goal. Ms. Quirk, one of the CCPS' expert witnesses, candidly agreed with the Parents that R.'s IEP should contain a social skills goal. (Tr. 801-2.) In this respect, the IEP is not perfect.

Ms. Farr did not deny that the IEP lacks a socialization goal, but she testified that R.'s "entire program includes socialization." (Tr. 831.) The teacher and para talk to R. all the time. Peers are invited into the classroom to socialize with R. Although R. does not respond verbally, Ms. Farr testified that R. is happy to engage like that. R. is taken on walks around the building by Mr. K., and given opportunities to socialize with others, including students, custodians and staff. (Tr. 832.)

R. could benefit if her IEP contained a measurable socialization goal because her inability to socialize effectively results from her disability, and progress toward that goal is necessary to enable her to be involved in and make progress in the general education curriculum. 20 U.S.C.A. §1414(d)(1)(A)(i)(II)(aa). However, an IEP is not required to contain every goal from which a student might benefit. *See Rowley,* 458 U.S. at 199 (FAPE does not require "the furnishing of every special service necessary to maximize each handicapped child's potential"). The IEP must be reasonable; it is not required to be perfect. Taking the

IEP as a whole, I conclude that R. was not denied a FAPE due to the lack of a social skills goal in her IEP.

The Parents argued that the IEP was deficient because the goals were not specific or measurable.[38] In closing, Mr. Steedman argued that Mr. K. testified that he would not write the goals as they are stated in the IEP. Mr. Steedman argued that Mr. K. said the toileting goal was meaningless. (Tr. 94.) He argued that the Parents' experts, Dr. McLaughlin and Ms. Frank, testified that the goals were not sufficiently specific or measurable, and further argued that none of CCPS witnesses testified to the contrary.

Mr. K. testified that some of the goals are not written the way he would write them, and the toileting goal is rather meaningless because it calls for an adult to assist R. by placing their hands over hers and basically pulling her pants up or down for her. (Tr. 94.) Dr. McLaughlin testified openly that she agreed with Mr. K., and that some of the goals seem to address the areas on which R. needs to focus but they are worded in confusing language. In her opinion, the goals are "not necessarily written very clearly or in a very measurable way." (Tr. 186, l. at 8-9.)

However, Dr. McLaughlin went on to discuss the progress reports, without explaining how she would have written the goals. Dr. McLaughlin questioned the progress reports, saying that she did not see R. performing to the level reporting on the day of her

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[38] The IDEA requires "measurable annual goals, including academic and functional goals," that are tailored to meet a student's unique needs. 20 U.S.C.A. § 1414(d)(1)(A)(i)(II).

observation. The goals and their objectives set forth targets for R. to perform, e.g., the percentage of times R. is to be able to complete a task. Based on this evidence, I decline to find a violation of FAPE due to the way CCPS crafted R.'s goals.

The Parents attacked Mr. K.'s credibility and argued that I should give his testimony no weight. The IEP provides that progress on the goals and objectives is to be measured by data collected by school staff. Mr. Steedman accused Mr. K. of destroying his progress notes in order to prevent the Parents from obtaining evidence for use in this proceeding. He argued that the destruction of the progress notes renders Mr. K. a wholly unreliable witness. I disagree.

CCPS has a policy of requiring all special educators to take notes twice a quarter and to maintain their notes of a student's progress for two years. (Tr. 554.) Mr. K. testified that he did not know that was the policy and, as he has never kept his notes after writing progress reports for a student's IEP, he did not keep his notes on R.'s progress once he wrote her quarterly reports. Mr. K. explained that was his practice in his prior employment. Now he knows that the practice did not comport with the record retention policies of CCPS.

I conclude that Mr. K. violated the retention policy, but I further conclude that he did not do so for any nefarious purpose. Ms. Mastrilli testified that she came to the classroom and observed Mr. K. taking notes on R.'s progress, and she reviewed his notes from time to time as part of her supervisory responsibilities. (Tr. 555, l. at 9-14.) Mr. K. would know that Ms. Mastrilli was checking his notes because she did so in his

classroom. It would not serve Mr. K.'s purposes or support him in his role as a subordinate to Ms. Mastrilli to intentionally destroy notes in violation of a policy. There is no evidence that Ms. Mastrilli was a party to intentional destruction of evidence or covering up the same. While it is understandable that the Parents are frustrated and suspicious of the missing raw data, which they hoped would support their position on behalf of R., I conclude that the raw data was innocently discarded, and I decline to take a negative inference.

Dr. McLaughlin was critical of the data collection methods used by CCPS as insufficiently planned and consistent. In her opinion, data should be collected throughout the school day every day. (Tr. 208-09.) Ms. Frank also criticized the CCPS' data collection procedures, opining that R. needs daily data collection to help the Parents know how she is performing in relation to her goals and objectives. (Tr. 342-43.) The IDEA does not specify how often a school system should collect data or how long it should be maintained. CCPS has a duty to adopt policies and procedures which are necessary and sufficient to enable it to implement the IDEA. While more data is obviously better than less data, I conclude that CCPS' data collection procedures were reasonable, and that CCPS did not falsify the Student's progress reports. I will therefore defer to the judgment of the school administration regarding the frequency of the data required to be collected regarding students with IEPs.

Restriction of R. from Contact with her Nondisabled Peers

The Parents argue that the Student should not be in the general education setting at all because she receives no educational benefit from being with her nondisabled peers. (Tr. 145, at 166.) Educational benefit must be provided in the least restrictive environment appropriate to the child's needs ("LRE"), with the disabled child participating to the "maximum extent appropriate" in the same activities as his or her non-disabled peers. 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2). The Parents did not specifically address the IDEA LRE requirement or discuss how removing R. from access to nondisabled peers comports with the requirements of the law, but Mrs. F. testified that R. should not be in the ICSC alone with Mr. K. and the para away from her disabled peers.[39]

CCPS implicitly agreed that it would have preferred for R. to have exposure to peers in the ICSC, if students enrolled in CCPS were assigned to the program. Other students were referred to the program, and CCPS planned to have others in the class with R. For reasons outside the control of the school system, R. was basically the only student in the ICSC for most of the school year until February 2017.

The Maryland regulations governing IEPs provide that "[a] public agency shall make a good faith effort to achieve the goals of a student's IEP ...." COMAR

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[39] It is undisputed that R. had access to nondisabled peers in specials and during walks through the school during which staff and nondisabled peers verbally addressed her.

13A.05.01.09B(3). CCPS intended to create an intensive communication program for R. and other students who require the special services available in the ICSC. The regulation does not contain a definition of "good faith," and there is no reference to good faith in the IDEA. I shall use the common notion of good faith and explain a case from the Court of Appeals of Maryland that I found helpful, but not dispositive. First, good faith means the absence of bad faith. Bad faith in this context might mean that a school system did not provide all the necessary services because it did not want to spend the money necessary to do so. Or bad faith might be retaliation against a child for something the parents did that upset the school system or caused it public humiliation. There is no credible evidence of bad faith in this case.

Good faith in ordinary language means to act honestly and with a proper motive. *See Rite Aid Corp. v. Hagley,* 374 Md. 665, 680-81 (2003). I conclude based on all the evidence that CCPS acted in good faith in creating the ICSC in 2016 and in assigning R. to it. CCPS thought there would be other students in the class, but it did not turn out that way. CCPS was not hiding R. from her peers; R. was afforded opportunities to interact with other first graders, albeit not to the degree CCPS would have preferred.

The Accuracy of the Description of the Service Hours on the IEP

The Parents contend that the hours of special education services in R.'s May 2016 IEP were insufficient to offer her a FAPE. They argue that the December 2016 amendment to the IEP reflects the

correctness of their view that R. should not be educated with nondisabled peers. In December 2016, the IEP was revised to increase the number of hours R. spends in the special education setting and correspondingly decrease the number she spends in the general education setting.

I do not consider the change in the location of the delivery of R's services as proof of any defect in the May 2016 IEP. The appropriateness of the May 2016 IEP must be judged as of the time it was adopted, not in December 2016.

> If a later IEP could constitute evidence that an earlier IEP was inadequate, school districts would incur liability for failure to provide a FAPE *every time* a student's services were increased between IEPs. For this reason, courts should evaluate the appropriateness of an IEP as of the time it was created, not on the basis of services provided in subsequent IEPs. *See R.E. v. New York City Dep't of Educ.,* 694 F.3d 167, 195 (2d Cir. 2012) ("[C]ourts must evaluate the adequacy of an IEP prospectively as of the time of the parents' placement decision and may not consider 'retrospective testimony' regarding services not listed in the IEP."); *F.O. v. New York City Dep't. of Educ.,* 976 F. Supp. 2d 499, 513 (S.D.N.Y. 2013) (declining to consider a 2011-2012 IEP in determining whether a 2010-2011 IEP was appropriate).

M.K. v. Starr, 185 F. Supp. 3d 679, 694 (D. Md. 2016).

The Parents also contend that CCPS did not correctly report the service hours on R.'s IEPs. They argue that the method used by CCPS violated the Statewide Individualized Education Program Process Guide published on the MSDE website. Mr. Steedman described this document as a controlling guide published by MSDE which public schools in Maryland must use to record service hours on every student's IEP. CCPS argued that the guide was not binding on them; they contended that the guide conflicted with COMAR, which CCPS says it follows.

After the hearing concluded, I searched for "IEP Process Guide" on the MSDE website and found the document to which Mr. Steedman referred.[40] The material Mr. Steedman referred to is found at pages 153-55 under the heading "Least Restrictive Environment (LRE) Decision Making & Placement Summary." The Parents refer to the following portion of the Process Guide to support their argument:

> **Total Time in General Education**
>
> Indicate the total hours and minutes in a school week the student is in general education settings.
>
> **NOTE:**
> The total amount of time in a school week is based on the actual hours and minutes of the school day. The time of the school day may vary.

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[40] http://olms.cte.jhu.edu//olms2/data/ck/sites/2698/files/Maryland%20IEP%20Process%20Guide%207_1_16. pdf. (last visited May 1, 2017).

> The calculation of hours is based on the time outside the general education classroom versus inside the general education classroom. Subtract the total time outside of general education based on the services listed on the Services pages of the IEP. This should indicate the total time in general education. You are subtracting from the total time in the school week.[41]
>
> Ms. Mastrilli testified about CCPS's method of reporting service hours on IEPs:
>
> Q: How are service hours calculated in the Cecil County Public Schools?
>
> A: Cecil County Public Schools calculates service hours based on the amount of specially designed instruction that the team feels are [sic] required for that student to make progress on the IEP goals. And the discussion box underneath the classroom instruction or the related service would specify what goals would be addressed through that service time. That is different from many school systems in Maryland who record service hours as the entire time a student is with a special education teacher in a special education program.
>
> But we record just the amount of instruction that focuses on those IEP goals. (Tr. 549, ls. 10-24.)

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[41] *Id.* at 155 (163/185).

Mr. K., who is new to CCPS this year, testified as one of the Parents' witnesses that the service hours on the IEP were wrong. Apparently, no one shared the CCPS method of reporting service hours with him before the school year started or even before the hearing began. When Mr. K. testified for CCPS, he explained that after his initial testimony another special education teacher explained the CCPS method, and he recanted his earlier testimony about the hours being erroneous. This change in Mr. K.'s testimony showed that he was ill informed about the way CCPS records service hours on the IEP. My conclusion from observing all of Mr. K.'s testimony is that he was truthful on both days. He testified honestly the first time that there must be an error on the IEP, which couldn't help CCPS' presentation in this case. If Mr. K. was going to lie under oath, I do not think he would do so in a manner that harmed his employer's case. I did not sense any reticence or rehearsed language in Mr. K.'s subsequent testimony, so I conclude that he made an honest mistake in his initial testimony.

Dr. McLaughlin and Ms. Frank testified that the total number of service hours on R.'s IEP are inadequate to meet her special needs. I do not accept this testimony because it was based on an incorrect understanding of the way CCPS records service hours. Apparently Ms. Frank and Dr. McLaughlin have never worked with a student in a school district in Maryland that uses the method chosen by CCPS to record service hours.

Ms. Farr testified that she agreed with Ms. Mastrilli's testimony. Further, Ms. Farr testified that

CCPS is not the only school district to use this method. When questioned by Mr. Steedman about the IEP Process Guide, Ms. Farr responded that CCPS follows COMAR, not the guide, which is not a regulation. *See Evans v. State,* 396 Md. 256, 344-46 (2006) (death penalty protocol not promulgated is invalid under Administrative Procedures Act). Furthermore, Ms. Farr testified, CCPS has been audited by MSDE every year for compliance with the law and regulations. MSDE has never told her that the way CCPS records special education service hours is wrong or in violation of the law. For these reasons, I conclude that the Parents failed to show that CCPS improperly recorded the number of special education service hours on R.'s IEP.

Did CCPS Properly Implement the IEP?

a. The Hours of Special Education Services in the May 2016 and July 2016 IEPs

The Parents argued that CCPS violated the IDEA because, before the IEP was revised in December 2016, Mr. K. ignored the service hours of special education and provided services outside of the general education setting for more hours than were called for by the May 2016 and July 2016 IEPs because he thought it was in R.'s best interest. The Parents argued that CCPS should have given the Parents notice and conducted an IEP team meeting before the location where the

services were delivered was changed.[42] CCPS argued that any error was de minimis.

I conclude that CCPS violated the IDEA by changing the location where R.'s services were provided from the third week of the school year until the December 2016 IEP revision by removing her from receiving academic instruction in the general education classroom. CCPS failed to provide the Parents with prior notice of this change as required by IDEA:

> The IDEA provides a series of procedural safeguards "designed to ensure that the parents or guardian of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 527 (4th Cir. 2002) (internal citations and quotation marks omitted); *see also* 20 U.S.C. § 1415. Among those safeguards, a parent must be provided prior written notice of a decision to propose or change the educational placement of a student. Md. Code Regs. Tit. 13A, § 05.01.13(B). A parent may also request a meeting at any time to review

[42] The Parents do not argue that CCPS violated the LRE requirement by decreasing R.'s hours in the general education classroom. 20 U.S.C.A. § 1412(a)(5)(A). In fact, the Parents take the position that R. receives no benefit from being with her nondisabled peers, and they seek placement in a school that accepts only students with special needs.

> and, as appropriate, revise the student's IEP. Md.Code Regs. Tit. 13A, § 05.01.08(B)(3).

M.C. v. Starr, 2014 WL 7404576 at *2 (D. Md. 2014).

Having concluded that CCPS violated the procedural requirements of IDEA in this manner, I must determine whether this violation denied R. an educational opportunity or if it was a technical violation of the IDEA. *Gadsby ex rel. Gadsby v. Grasmick,* 109 F.3d 940, 956 (4th Cir. 1997) ("[T]o the extent that the procedural violations did not actually interfere with the provision of a FAPE, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education."). The law in this Circuit on the issue is clear:

> If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations. *Burke Cty. Bd. of Educ. v. Denton,* 895 F.2d 973, 982 (4th Cir.1990) ("[The child] has benefitted educationally from the instruction provided under the Board's IEP. Federal law requires no more.").

MM ex rel. DM v. Sch. Dist., 303 F.3d 523, 534 (4th Cir. 2002).

I conclude that providing more special education services in the ICSC did not interfere with the provision of a FAPE to the Student. Mr. K. testified credibly that R. was having difficulty spending time in the general education setting. In his view, she got more out of the time in the ICSC. Mr. K. should have requested, and CCPS should have scheduled, an IEP

team meeting to amend the service hours and placement sections of R.'s IEP. However, the failure to do so under the circumstances of this case—particularly where the Parents contend that a separate day school for disabled children is the proper placement—amounts to a technical violation of the IDEA, not a denial of a FAPE.

b. The BIP and Assistive Technology

i. Use and Availability of the NovaChat

The Parents contend that CCPS failed to properly implement the IEP because school staff did not follow the BIP requirement that R.'s NovaChat be available for her use at all times. The IEP states that R. will be provided with an assistive technology device to learn how to communicate and to enable her to participate in classroom activities. (P. Ex. 22, at 21.) Mrs. F. and Dr. McLaughlin testified that the NovaChat was not always available to R. at school during their observations. The evidence showed this to be the case. Nevertheless, I conclude that the device was reasonably available to and used by R.

Mrs. F.'s classroom observations provided the following credible evidence about the NovaChat. During breakfast, R. used buttons rather than the NovaChat to indicate her needs. (Tr. 262, ls. 12-14.) The NovaChat was used during R.'s speech therapy and to request breaks. (Tr. 278, ls. 9-11, 22-25; Tr. 282, ls. 7-18.) When R. grabbed another student's hair, the NovaChat was on a table behind her. (Tr. 281.) The NovaChat was not with R. on her Hi walk. (Tr. 281.) When R. requested a break and the guitar on the

NovaChat, her requests were immediately honored. (Tr. 282, ls. 13-16; Tr. 283, ls. 17-21.) R. used the NovaChat to request a drink and a snack. (Tr. 284.)

Dr. McLaughlin's classroom observations produced the following credible evidence about the NovaChat. R. went to reach for an item and the staff put the NovaChat in front of her so she could touch the cell and request her item. (Tr. 137.) With assistance from Mr. K. to get to the food page, R. requested Teddy Grahams cookies, a drink, peanut butter and jelly and a banana. (Tr. 138.) Dr. McLaughlin testified, "she was using the NovaChat as her voice at that point." (Tr. 140, ls. 11-12.) Mr. K. did a correspondence check by holding two items out to R. and checking to see if she used the NovaChat to request the items she desired. (Tr. 140-41.) According to Dr. McLaughlin, "that was good to see that she was using the NovaChat appropriately during that time." (Tr. 141, ls. 2-4.)

During an activity where R. was choosing different items on an interactive board, R. used her NovaChat to ask for a drink and staff immediately gave her one. (Tr. 170-71.) At one point, R. used the NovaChat to say she was finished with the activity, but then she returned to it in such a way that it was unclear if R. really meant what she indicated on the NovaChat.

In Music, the NovaChat was not always where R. could easily access it, but when she had a challenging behavior the device was brought over to her so she could communicate her desires. (Tr. 172.)

Dr. McLaughlin expressed the opinion that the NovaChat is not always available to R., so the BIP is

not being properly implemented. (Tr. 183.) This increases the likelihood that R.'s challenging behaviors will occur. (Tr. 184.)

This testimony raised valid questions about the NovaChat and whether the BIP was implemented faithfully. However, there are practical reasons for some of the times when the NovaChat was not available. For example, it has been broken several times. The Parents and school staff are constantly trying new ways to protect the device and enhance its availability to R. This is a work in progress. Ms. Stokes summarized the situation:

> So, I thought about what the answer to that is. I thought about like a cross body bag or something. The device is big. I don't know what the answer is.
>
> In fact to be honest I was a little concerned when the one time it came in with a strap, because she had thrown the device and acted out. What's going to happen if she throws it? Is it going to come back and hit her? I wasn't sure, you know – but I will say the strap saved me because she started to swipe it off [the table] and I was able to catch it with the strap. So it had an advantage but I think that's something we're all working on: finding a way for that device to be completely portable for her and still indestructible. (Tr. 481.)

The Parents did not offer any evidence that the concerns expressed by Ms. Stokes were unfounded or that the CCPS staff was ignoring the value of the

device to assist R.'s communication. I accept Ms. Stokes' assessment of the situation that the Parents and school staff were working continuously, collaboratively, and creatively to find solutions.

Ms. Shaffer testified that when Dr. McLaughlin observed R. in her physical therapy session, the para had the device. (Tr. 394.) In physical therapy sessions R. is moving almost the entire time. *Id.* The NovaChat is not used all the time, but Ms. Shaffer gives R. other opportunities to communicate choices. (Tr. 395, 422.) Ms. Shaffer lets R. chose her favorite ball. She also uses facial expressions, body language, and picture cards to initiate activities with R. (Tr. 394-95, 406.) Ms. Stokes testified that R. uses the NovaChat independently across a variety of setting. (Tr. 468.)

Taking all of this evidence into consideration, I conclude that the NovaChat is being used appropriately and as often as possible under the unique circumstances presented by R., and therefore in accordance with the IEP. The Parents are at a disadvantage given that their opportunity to observe R. and to have their experts conduct classroom observations are much more limited than the opportunities presented to CCPS staff. However, the evidence shows that, while the NovaChat is not always used, CCPS allows R. to use the NovaChat many times and in a variety of settings. I accept Ms. Stokes' testimony that R. has shown progress with the NovaChat, which could only result from consistent use of the device over a period of time.

Furthermore, the Student uses various other ways to communicate. Ms. O'Mullane and Ms. Stokes

testified that R. communicates through facial expressions and body language. Admittedly, these are not as precise as the NovaChat, which shows a picture of the desired activity or object, leaving no room for interpretation – if R. uses the device correctly, which is not always the case. But I infer that the Parents also use all available methods for communicating with R. away from school, especially because they keep the device in the kitchen so it won't break.

ii. Other Communication Strategies

The NovaChat is not the only communication method described in the BIP. All of the other steps outlined in the BIP are employed with R. (P. Ex. 20.) Mr. K. uses transition objects as outlined in the BIP to alert R. to changes. She knows to pick one out of the basket by the door, and she carries the designated transition object with her to her specials. This is a form of alerting R. to the changes involved in her day at school, aimed at reducing her confusion and frustration. (P. Ex. 20, at 1.)

Mr. K. also uses a clear and consistent daily routine with R. as described in the BIP. He has a scheduled mounted on the wall with a PECS symbol for each activity. R. is taken to the wall, Mr. K. says the name of the next activity, points to the PECS symbol, pulls it off the wall and takes it to the area where the activity occurs. (P. Ex. 20, at 1.)

Mr. K. presents social stories to R. throughout the day to remind her of appropriate behaviors. *Id.* R. is allowed structured breaks and is allowed to engage in sensory activities. Ms. Stokes described how lotion is

used for sensory stimulation with R. Ms. O'Mullane testified that R. enjoins pressure and joint compression. Mr. K. testified that he uses joint compression at the suggestion of Ms. O'Mullane. Mr. K. uses short verbal directions paired with visual supports as suggested in the BIP. I conclude that CCPS followed the BIP in many ways; there was nothing about the use of the Nova Chat with R. that changes my view. Even if the NovaChat was not accessible to R. at all times as required by the BIP, that does not prove a denial of FAPE.

> [F]ailure to perfectly execute an IEP does not necessarily amount to the denial of a free, appropriate public education. However, as other courts have recognized, the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE.

Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH, 642 F.3d 478,484 (4th Cir. 2011).

When the NovaChat was not available to R. she was engaged in a physical activity or she had ample other means of communication available to her. The periodic absence of the NovaChat was a de minimis failure to implement her IEP. *See Houston Indep. Sch. Dist. v. Bobby R.,* 200 F.3d 341, 349 (5th Cir. 2000) ("[A] party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."), cited with approval by the Fourth Circuit in *Sumter, id.*

iii. Behavior Modification Strategies

The Parents' operating hypothesis is that R.'s inappropriate behaviors are caused by her inability to communicate by using language. The Parents theorize that R. bites, hits, pulls hair, and does other negative things to communicate that she is frustrated and either wants something that is not offered or does not want to complete an activity. They believe that CCPS is not appropriately allowing R. to communicate her choices. In addition, the Parents argue that, when R. does communicate a desire, staff is not reinforcing her positive behavior by immediately honoring her choice.

R.'s behaviors are immensely disconcerting to everyone involved: the Parents, CCPS staff, and most importantly, R. However, the solution is unclear, partly because R.'s diagnosis of autism spectrum disorder is compounded by the genetic defect. R. is one of the very few diagnosed with the HICEP2 genetic defect, and there are only two known scholarly articles discussing her condition. R. has been evaluated by preeminent doctors at the world famous KKI, but they cannot have a broad frame of reference for R.'s treatment absent others with the same disorder or more extensive research. The novelty and complexity of R.'s disabilities must be a factor in determining if CCPS offered R. a FAPE. There is a higher degree of trial and error in the process of developing an appropriate IEP for a very young child such as R. with complex disabilities and limited ability to convey her thoughts and desires.

Ms. Shaffer testified that Dr. McLaughlin misunderstood the physical therapy session that she observed. The para had R.'s NovaChat in the therapy

session, but R. cannot use it while she is practicing throwing and catching a ball or going up and down the steps. Ms. Shaffer explained that she uses R.'s facial expressions and body language to communicate with her, and that is sufficient for the purpose of PT. (Tr. 395.) In terms of communicating preferred items, Ms. Shaffer has a bin of various colored balls, and she permits R. to choose her favorite. Ms. Shaffer gets that ball out and immediately begins to use it with R. in therapy. (Tr. 394.) This is a form of communication appropriate for R.

Regarding R.'s behavior, Dr. McLaughlin testified that R.'s behaviors were so interfering during the physical therapy session that she observed that the therapist had to put up a barrier to keep R. from biting her. Ms. Shaffer disputed that was the purpose for the barrier. She testified that R. was too close to her during an activity with a suspended ball, so the wooden barrier, which is waist high on R., was placed between R. and Ms. Shaffer so R. would have time to see the ball swinging toward her and react to it with a catching motion of her hands. (Tr. 393.)

I conclude that, under the circumstances presented by R.'s unique needs, CCPS employed appropriate behavior modification strategies.

Progress

The parties offered a lot of evidence and argument about the progress the Student made under the IEP. Progress has been used in some cases as a measure of whether the student actually achieved educational benefit. If so, the argument goes, the IEP must have

been reasonably calculated to allow educational benefit. The *Rowley* Court stated in a footnote: "When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." 458 U.S. at 207 n.28. The Fourth Circuit has held that a District Court erred by failing to note the actual progress a student made under an IEP and substituting its judgment for the judgment of the educational professionals. *M.M. ex rel. DM v. Sch. Dist.,* 303 F.3d 525, 531-32 (4th Cir. 2002).

The Student is not receiving numeric or letter grades, but her progress is noted in narrative progress reports issued to her Parents when report cards are released to other parents. There are reported decisions in which the courts discuss a non-graded student's progress or lack thereof with life skills as evidence of whether the IEP was reasonably calculated to offer the student a FAPE. *See, e.g., A.G. ex rel. S.G. v. Wissahickon Sch. Dist.,* 374 Fed. Appx. 330, 335 (3rd Cir. 2010) (finding meaningful education benefit under an IEP to be evidenced by advances in life skills such as toileting, eating and navigating the school).

For a student such as R., using progress or the lack thereof to measure the efficacy of an IEP may not be appropriate. CCPS conducted many assessments and evaluations of the Student prior to writing the May 2016 IEP. The assessments showed that R. has cognitive challenges that make her potential in academic studies such as reading and math unknown. Furthermore, the medical evidence shared by the

Parents describe the current symptoms of R.'s genetic defect, but they do not shed any light on her educational potential.

The Parents were an integral part of the information gathering process for the May 2016 IEP. The Parents did not provide me with any evidence that they asked the school system to perform any study of R.'s levels of performance which CCPS refused to conduct. The IEP was the best document that could be prepared based on all available information.

I accept as reliable the testimony of Parents' witnesses who testified that, on some days, R. does not show progress. I also accept the testimony of CCPS' witnesses that R. can be unpredictable, and sometimes she shows signs of progress but at other times there is regression. There is a reference to regression in a KKI report. (P. Ex. 40.) Mrs. F. denied that R. showed regression, explaining that she briefly lost skills sometimes when sick, but regained them when her cold or virus abated. (Tr. 241, l. 5.) However, Ms. Stokes testified that when she had R. as a three year old, R. said "Hi" and "iPAD." (Tr. 486, l. at 13-17.) She has not heard R. use "iPAD" or "Hi" this year, and was very excited when Ms. O'Mullane reported hearing R. say "iPAD." (Tr. 486, ls. 16-17.)[43]

The evidence shows that R. is a very young child with an extremely rare genetic defect who has a severe form of autism and is nonverbal. IEP goals and objectives at this point are educated judgments about

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[43] Ms. O'Mullane testified that she heard R. say "IPAD" several weeks before March 28, 2017. (Tr. 451, l. 19 to 452, l. 2.)

future events. R.'s progress must be judged by her unique circumstances. Viewed in this context, R. has made progress since kindergarten. The Findings of Fact set forth above include specific findings based on the July 2016 IEP to show where R. started this school year. A comparison of that baseline with the testimony of all of the witnesses shows that R. has made incremental progress on some, but not all of her goals. For R., this is appropriate given her unique circumstances.

Before school started this year, R. did not understand the function of the NovaChat. Finding of Fact 77. Now, she uses it purposely, albeit as a novice, in a variety of situations. R. has made negligible progress toward pulling her pants up and down for toileting, but she has shown that she can pull a towel down from a dispenser, grasp it, and release it into the trash. R. cannot wash her hands, but she can attempt to reach for the dispenser and move soap around on her hands. At the end of kindergarten, R. did not engage in purposeful ball play. (P. Ex. 24, at 48.) Now she is inconsistent, but she is able to watch and catch a suspended ball. (Tr. 384.) R.'s ability to walk up and down steps and curbs has also improved.

There are other goals in the IEP where R. has shown no progress. These goals may have to be carried over in her next IEP, and additional evaluations may be warranted. However, at this time, the goals remain appropriate. I also reject the Parents' witnesses' testimony that R. has not achieved progress because, based on the number of months left in the school year and the percentage of times she has completed a task,

she is not likely to achieve the goals by the end of the year. The goals are measurable to give the Parents an objective measure of R.'s progress. The IEP is not a report card for R. or CCPS. Failure to meet the percentage of times, for example, that R. is able to "sustain attention for five minutes" does not mean that R. or CCPS failed. (P. Ex. 30, at 37.) At the end of the year R. may not achieve any of the percentages stated on her objectives. That would not mean that she failed to make progress. As Ms. Farr explained, many of the skills R. is working on are "scaffolding" needed for R. to progress to other skills. Considering R.'s needs and her functional abilities before the start of first grade, R. made progress. (P. Ex. 24; Finding of Fact 74 (Progress notes on July 2016 IEP).)

I conclude that, given all of the preparation for the IEP, the accommodations, services and supports provided, the IEP was reasonably calculated to provide R. with educational benefit. The law recognizes that "once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals." *Tice ex rel. Tice v. Botetourt Cty. Sch. Bd.,* 908 F. 2d 1200, 1207 (4th Cir. 1990). Therefore, absent any evidence to persuasively dispute the well-reasoned judgment of CCPS witnesses, I agree with CCPS that the IEP and placement developed by the school system is appropriate and reasonably calculated to meet the individual needs of the Student.

R. required a wide array of services. CCPS identified her needs and provided the services through a group of highly skilled professionals. R. made some

progress toward very basic goals and very little progress toward others, but I conclude that CCPS offered R. "an IEP reasonably calculated to make progress appropriate in light of the child's circumstances." *Endrew F.* at 10. CCPS made an error by failing to hold an IEP meeting in late September or October to discuss R.'s placement and the need to increase her hours outside of the general education classroom. However, CCPS fulfilled its obligation to R. to offer her a FAPE. As I conclude that the Parents did not prove a denial of FAPE, it is unnecessary for me to reach the issue of whether the Benedictine School is an appropriate private placement for R. *See Burlington School Committee v. Dept. of Educ.,* 471 U.S. 359 (1985).

CONCLUSIONS OF LAW

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

1. By changing the location where some of the Student's special services were provided in the Fall of 2016 without notifying the Parents as required by the law, the Cecil County Public Schools committed a procedural violation of the IDEA, 20 U.S.C. § 1415(b)(3)-(4), (c) (2010);

2. Despite the procedural violation, the Cecil County Public Schools offered the Student a FAPE. *Gadsby ex rel. Gadsby v. Grasmick,* 109 F.3d 940, 956 (4th Cir. 1997); and

3. The IEP and placement created and implemented for the Student by the Cecil County Public Schools for the 2016-2017 school

year was reasonably calculated to offer the Student a free and appropriate public education appropriate to her circumstances. 20 U.S.C.A. §§ 1400 - 1487 (2010 & Supp. 2016); *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1,* 137 S. Ct. 988 (2017).

ORDER

I **ORDER** that the Parent's request to have the Student placed at the Benedictine School or another separate nonpublic day school at public expense is **DENIED.**

May 3, 2017
Date Decision Issued

/s/
Mary R. Craig
Administrative Law Judge

MRC/emh
#167377

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2016). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party 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 court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

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

* * *

**BEFORE MARY R. CRAIG,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS**

OAH No.: MSDE-CECL-OT-17-01881

R.F.,	)
	)
STUDENT	)
	)
v.	)
	)
CECIL COUNTY PUBLIC SCHOOLS	)
	)

APPENDIX: EXHIBIT LIST

I admitted the following pre-marked documents on behalf of the Parents:[1]

P. Ex.1	Revised IEP, January 20, 2015
P. Ex.2	Revised IEP, March 17, 2015
P. Ex. 3	Approved IEP May 13, 2015
P. Ex. 5	Revised IEP, July 30, 2015
P. Ex. 7	Revised IEP, February 9, 2016
P. Ex. 14	Functional Behavior Assessment Summary Table, April 13, 2016

[1] Exhibits not listed were not offered.

P. Ex. 16	Kenney Krieger Institute Letter from S. Srivastava, M.D., April 13, 2016
P. Ex. 17	Speech and Language Pathology Initial Evaluation, April 14, 2016
P. Ex. 20	Behavior Intervention Plan, May 2, 2016
P. Ex. 22	Approved IEP, May 25, 2016
P. Ex. 23	Prior Written Notice, May 25, 2016
P. Ex. 24	Revised IEP, July 7, 2016
P. Ex. 25	Student's Daily Schedule, August 26, 2016
P. Ex. 26	Observation by Mrs. F., October 20, 2016
P. Ex. 27	Observation by Lisa Frank, M.Ed., November 11, 2016
P. Ex. 29	Observation by Mrs. F., December 12, 2016
P. Ex. 30	Revised IEP, December 16, 2016
P. Ex. 31	Student's Daily Schedule, January 2017
P. Ex. 33	Email from N. K. to Mrs. F., January 13, 2017
P. Ex. 34	Progress Report on IEP Goals, January 20, 2017

P. Ex. 35	Benedictine School Early Elementary Classroom Description, February 28, 2017
P. Ex. 35A	Email from Cindy Thornton to Mrs. F., June 3, 2016
P. Ex. 36	Letter from Cindy L. Thornton to Parents, February 20, 2017
P. Ex. 37	Resume of Annie McLaughlin, Ph.D., BCBA-D, LBA, February 28, 2017
P. Ex. 38	Resume Lisa Frank, M.Ed., February 28, 2017
P. Ex. 40	Kennedy Krieger Institute Report, February 26, 2013
P. Ex. 41	Kennedy Krieger Institute Report, February 26, 2013

I admitted the following pre-marked documents on behalf of the CCPS:

CCPS Ex. 6	Resume of Mary Stokes, SLP
CCPS Ex. 7	Progress Information-Speech Language
CCPS Ex. 8	Resume of Alice O'Mullane, MS OTR/L
CCPS Ex. 10	Progress Information-Fine Motor, Toileting, Sensory
CCPS Ex. 11	Resume of Diana Shaffer, PT

CCPS Ex. 13	Progress Information-Gross Motor
CCPS Ex. 18	Resume of Dr. Carol Quirk
CCPS Ex. 20	Resume of Nicholas K., Special Educator
CCPS Ex. 21	Progress-Social Foundations, Cognitive, Reading Comprehension
CCPS Ex. 26	Resume of Sarah Farr, Director, Special Education
CCPS Ex. 27	Resume of Joyce Mastrilli, Program Facilitator
CCPS Ex. 36	Prior Written Notice, January 20, 2015
CCPS Ex. 45	Prior Written Notice, December 16, 2016
CCPS Ex. 50	Flash Drive containing information and videos about ICSC

APPENDIX D

STATE OF NORTH CAROLINA
BEFORE A STATE HEARING REVIEW OFFICER
FOR THE STATE BOARD OF EDUCATION
PURSUANT TO G.S. 115C - 109.9

18 EDC 04980

[Filed May 25, 2019]

K.I., by and through her parent, J.I. Petitioners	)
v.	)
Durham Public Schools Board of Education, and N.C. State Board of Education Respondent	)

DECISION

This is an appeal of portions of the Final Decision and Order of Administrative Law Judge Stacey B. Bawtinhimer for the case, K.I. by and through parent, J.I. v. Durham Public Schools Board of Education and N.C. State Board of Education (18 EDC 04980). The Decision was issued on April 11, 2019. The Respondent appealed portions of the Decision on April 26 and the

undersigned Review Officer was appointed on April 29, 2019.

The records of the case received for review were contained on one (1) CD which contained: the ALJ's Final Decision and Order, an extensive file of documents pertaining to the case, and seven (7) numbered transcripts of the hearing. The file of documents was one (1) 4005 page PDF file containing numerous motions from both parties, decisions of the ALJ pertaining to those motions, many ALJ orders, correspondence during the case, exhibits entered during the hearing, and proposed decisions.

Appearances:

For Petitioner:	Stacey M. Gahagen; Gahagen Paradis, P.L.L.C., 3326 Durham Chapel Hill Boulevard, Suite 210-C, Durham, NC 27707
For Respondent DPS:	Stephen G. Rawson and Catherine Laney; Tharrington Smith, LLP, PO Box 1151, Raleigh, NC 27602-1151
For Respondent SBE:	Tiffany Lucas, Special Deputy Attorney General, North Carolina Department of Justice, PO Box 629, Raleigh, NC 27602-0629

For convenience and privacy, the following are used in this Decision to refer to the parties:

For the Student/Petitioner – K.I.
For Parent/Petitioner – J.I., mother
For Respondent - Respondent; Durham Public Schools; DPS

ISSUES

The ALJ determined the Issues to be decided were:

1. Whether Durham Public Schools evaluated K.I. in all suspected areas of disability, in particular, Autism and Specific Learning Disability (the "Suspected Disability Claim") and whether the evaluation process was appropriate (the "Evaluation Claim")?

2. Whether Durham Public Schools appropriately determined that K.I. was not eligible for special education and related services at the August 15, 2017 IEP meeting (the "Eligibility Claim")?

3. Whether Durham Public Schools' Limited Relationship Provision included in the IEE Contracts significantly impeded J.I.'s right to participate in the decision-making process regarding the provision of a FAPE to K.I. or otherwise violated Petitioners' procedural safeguards (the "IEE Contract Claim")?

4. Whether the North Carolina State Board of Education significantly impeded J.I.'s right to participate in the decision-making process regarding the provision of a FAPE to K.I. by

sanctioning Durham Public Schools' actions related to the IEE Contract or otherwise interfered with Petitioners' procedural safeguards (the "State Complaint Claim")?

WITNESSES

For Petitioners:

J.I., Petitioner and mother of K.I.
Kelly Anthony, Ph.D., Independent Psychologist
Jennifer Minnelli, M.S., CCC-SPL, Speech Pathologist
William Therrien, Ph.D., BCBA, Expert Witness
Robbi "Brittni" Winslow, M.S., OTR/L, Occupational Therapist
Brittany Ezawa, EC Teacher Central Park Charter School

For Respondent DPS:

Jennifer Siddle, M.D., Expert Witness
Wayde Johnson, Ph.D., Lead Psychologist DPS
Andrea Underwood Petifer, Assistant Principal Pearsontown Elementary
Sara Younce, EC Facilitator Rogers-Herr Middle School
Debra Ann Monnin, OTR/L, DPS Occupational Therapist
Ryanne J. Logan, School Counselor Rogers-Herr
Kristin Bell, Ed.D., EC Director DPS

For Respondent SBE:

Carol Ann Hudgens, NCDPI Section Chief Dispute Resolution

Leigh Mobley, NCDPI Consultant Dispute Resolution

EXHIBITS

The following exhibits were received into evidence during the course of the hearing. The page numbers referenced are the "Bates Stamped" numbers.

Stipulated Exhibits ("Stip. Ex."): 1-103.

Petitioners' Exhibits ("Pet. Ex"): 1, 8, 10 (p. 157), 13 (pp. 287, 295-299, 305, 311, 313-14, 320 21, 326-27, 329-30, 333-34, 341-42, 349, 359, 364) 16 (pp. 381, 382, 385-389), 17 (pp. 119-20), 34 & 35 (for illustrative purposes only), 36-38, 39 (copyrighted material under seal) 40; DPS Ex. 17 (pp. 119, 120, 157).

Respondent DPS Exhibits ("DPS Ex."): 1, 2 (pp. 17-40), 6-13, 15, 16 (pp. 88-89, 93), 17 (pp. 100-103, 105, 107, 108), 17 p. 379 admitted, but not for truth of matter asserted)

Respondent SBE Exhibits ("SBE Ex."): 1-10

THE APPEAL

North Carolina provides specific guidelines for the appeal of a decision rendered by an Administrative Law Judge in a special education due process case:

> N.C.G.S. § 115C-109.9. Review by review officer; appeals.
> (a) Any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision

by filing a written notice of appeal with the person designated by the State Board under G.S. 107.2(b)(9) to receive notices.

NC 1504-1.15 Finality of Decision; Appeal; Impartial Review
(a) Finality of hearing decision. A decision made in a hearing conducted pursuant NC 1504-1.8 through NC 1504-1.14 or NC 1504-2.1 through NC 1504-2.5 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and NC 1504-1.7.
(b) Appeal of decisions; impartial review.
(1) The hearing required by NC 1504-1.12 is conducted by the Office of Administrative Hearings. Any party aggrieved by the findings and decision in the hearing may appeal to the North Carolina Department of Public Instruction, Exceptional Children Division within 30 days of receipt of the written decision.

Following the issuance of the Administrative Law Judge's (ALJ) Decision, the Respondent filed a timely appeal. This will be the focus of the review. When reviewing an appeal of an ALJ's decision, the State Review Officer (SRO) may only review the specific issues complained of by the parties. *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 (M.D.N.C. 2013). Thus, the review is limited to those specific parts of the ALJ's Decision that were in the Respondents appeal dated April 26, 2019.

The Petitioners' did not file a timely appeal. The SRO was notified on May 14, 2019 by the person

designated by the State Board under G.S. 107.2(b)(9) to receive notices of appeal that a copy of an appeal from the Petitioners had been forwarded to her from the Office of Administrative Hearings (OAH). The Petitioner had evidently filed an electronic appeal with OAH, which is not authorized to accept filings on behalf of employees of the State Board. The Petitioner never filed an appeal in accordance with N.C.G.S. § 115C-109.9 and NC 1504-1.15. In an email exchange on May 14, 2019 the Petitioner admitted that the appeal had not been submitted to the person designated by the State Board. This was several days after the deadline set by N.C.G.S. § 115C-109.9 and NC 1504-1.15. The person designated by the State Board to receive notices of appeal chose not to take any action upon learning of the late appeal, instead forwarded the information to the already appointed SRO. This was a wise decision, for the State Board of Education is a party in this proceeding and employees of the State Board should not make decisions that could affect the outcome of the appeal process.

Although the SRO is sympathetic to the desire of the Petitioners to submit an appeal, an appeal must conform to the clear provisions of North Carolina law. There is no doubt that the Petitioners knew of the requirements in N.C.G.S. § 115C-109.9 and NC 1504-1.15. The intent of IDEA and state law and their implementing regulations is to expedite the process used to settle disagreements between local educational agencies and parents of identified children and specify how that process is to be followed. Restrictions regarding time limits to perform specific acts are throughout IDEA and N.C.G.S. § 115C – Article 9.

Time restrictions are clearly in those portions pertaining to procedural safeguards. Strict adherence to time restrictions to decide controversies is expected, even required.

This review is limited to the issues delineated in the Respondent's appeal. Though the Respondents appeal is not totally clear and somewhat confusing, the SRO determines that this review will focus on six (6) issues from the ALJ's Decision that could be interpreted to be in Respondent's Notice of Appeal:

1. Whether the DPS's IEE contract included impermissible terms and/or significantly impeded the parent's rights to participate in the IEP decision-making process.

2. Whether DPS committed various procedural violations. *(In the Appeal Notice, the alleged procedural violations were not listed. The ALJ found that procedural errors related to the eligibility determination did not deny FAPE. As the eligibility determination is not being appealed, these procedural violations are not interpreted to be a part of this appeal.)*

3. Whether the Petitioners earned prevailing party status on the IEE contract claim.

4. Whether the ALJ included findings and conclusions outside the statutory time period and/or that were previously settled and waived during a previous Section 504 grievance dispute.

5. Whether the ALJ properly denied the Respondent's Partial Motion to dismiss

regarding the application of Rule 41(a) to claims arising prior to August 14, 2017, and

6. Whether the ALJ failed to recognize the mootness of certain claims about the IEE contract.

STANDARD OF REVIEW

The State Review Officer must render an independent decision, giving "due weight" to the administrative proceedings before the administrative law judge. *Board of Education v. Rowley*, 458 U.S. 176 (1982). Findings of fact by hearing officers are entitled to be considered *prima facie* correct if they are regularly made. An ALJ's findings are regularly made if they "follow the accepted norm of fact-finding process designed to discover the truth." *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991). In *Doyle*, the court also noted, "By statute and regulation the reviewing officer is required to make an independent decision . . .." *Doyle*, 953 F.2d at 104

When reviewing an appeal of an ALJ's decision, the SRO may only review the specific issues being appealed by the parties. *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 (M.D.N.C. 2013)

This SRO finds that the ALJ's Findings of Fact in her Decision were regularly made and adopts and incorporates some of them in this Decision. The ALJ had a total of 838 enumerated facts and 285 conclusions, many of which were unnecessary for the ALJ to render her Final Decision. Most were unnecessary to review in order to reach a decision on the issues that were appealed. For the purpose of

brevity and a clearer understanding of the issues in this review, the SRO has chosen to significantly reduce the number of enumerated facts, consolidating and summarizing where applicable. References to the transcript and exhibits are not always included, for many of the following facts are summarizations from many sources in the record. Only facts necessary for reaching a decision regarding the appeal are included in this Decision.

To the extent the Findings of Fact contain conclusions of law or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.

FINDINGS OF FACT

History of the Case

1. The Petition for Contested Case Hearing at 18 EDC 4980 was filed in and accepted by the Office of Administrative Hearings ("OAH") on August 14, 2018. Previously Petitioners had filed two other contested case petitions: May 18, 2017 (17 EDC 3372) and June 6, 2018 (18 EDC 3427). Both were voluntarily dismissed without prejudice. The June 8, 2018 Petition was subsequently refiled and attached to the Petition for this case, 18 EDC 4980.

2. On August 29 and August 30, 2018, respectively. Respondents SBE and DPS filed motions to dismiss. DPS's motion was denied in its entirety. SBE's motion was denied in part, but dismissal was granted on the issues pertaining to the appeal and investigation process of the State Complaint.

3. Additional dispositive motions for summary judgment and cross motions were filed by all Parties on October 8, 2018. All were denied on October 23, 2018 except for the determination that there were no genuine issues of material fact regarding the claim that DPS unnecessarily delayed the provision of requested independent educational evaluations.

4. The hearing was conducted on October 26 – 31, 2019 by ALJ Stacey Bawtinhimer. At the hearing the Respondent made a Motion in *Limine* to exclude the testimony of witnesses from the charter school, which was granted in part. A Central Park Charter School teacher would be allowed to testify about K.I.'s academic and functional performance at the beginning of the 2017-18 school year and K.I.'s progress during the period she attended Central Park. Evidence regarding Central Park's eligibility determination and IEP documentation would not be allowed.

5. Following the Petitioners' case-in-chief, Respondent DPS moved for involuntary dismissal under Rule 41(b). The ALJ declined dismissal until the close of all evidence. Respondents DPS and SBE presented their cases and the hearing was adjourned on October 31, 2018.

6. The ALJ issued her Final Decision on April 11, 2019. The Final Decision stated:

> 1. Petitioners failed to meet their burden of proof regarding the Suspected Disability Claim. The IEP Team did not overlook clear signs of autism. Petitioners did meet their burden regarding the procedural

inappropriateness of the evaluations process in the Evaluation Claim, but failed to prove a substantive violation of a FAPE for K.I.

2. Petitioners failed to meet their burden of proof regarding the Eligibility Claim. The IEP Team appropriately determined that K.I. was not eligible for special education services and that her Section 504 Plan provided appropriate accommodations sufficient to provide her with a FAPE.

3. Petitioners met their burden of proof regarding the IEE Contract Claim. The Limited Relationship Provision in the IEE Contract and DPS' practice of not permitting independent evaluators to act as expert witnesses impeded J.I.'s meaningful participation in the IEP process and violated the other procedural safeguards under the IDEA with respect to due process. To their detriment, Petitioners were not allowed to use the independent evaluators as expert witnesses in their contested case.

4. With respect to the State Complaint Claim, Petitioners did not have standing to appeal NCDPI's Letter of Findings and Corrective Action. Moreover, even if they had, there was no mechanism in place to pursue an appeal and this Tribunal does not have jurisdiction to mandate the State Board to develop such procedures, although the Undersigned recommends that they do just that. Despite this, the State Board was required to "set

aside" the pending State Complaint because the same subject matter was contested in the due process Petition before this Tribunal. The Undersigned decided that DPS' Limited Relationship Provision (Contract Provision 3) and DPS' IEE practice (Practice 4) violated the IDEA. In light of this Final Decision and the evidence from this hearing, the State Board should reconsider its Letter of Findings and Corrective Action Plan. Even if the Petitioners did have standing to file a Petition against the State Board, the Petitioners have not met their burden, by a preponderance of the evidence, that the State Board's findings, regarding DPS' Contract Provision 3 and DPS Practice 4, denied K.I. a FAPE or J.I.'s meaningful participation in the IEP process.

IT IS HEREBY ORDERED THAT:

1. DPS is the prevailing Party on the Suspected Disability Claim;

2. Although, ultimately DPS prevailed on the Evaluation and Eligibility Claims, due to DPS' numerous procedural violations with respect to these claims, DPS is not granted prevailing party status on these claims, nor are Petitioners;

3. With respect to the IEE Contract Claim, DPS is prohibited from requiring an independent evaluator to sign a contract with the Limited Relationship Provision or any similar

language in the IEE Contract. The Limited Partnership Provision or similar language in any outstanding IEE contracts between DPS and independent evaluators are violative of the IDEA. DPS is to advise all independent evaluators, who have entered into IEE contracts with this prohibited language and the parents of disabled children being independently evaluated pursuant to these IEE Contracts, that the Limited Partnership Provision is to be severed from the contract and have been found not to be agency criteria and, instead, are conditions which violate the IDEA, federal regulations, State law, and the NC Policies;

4. The Petitioners are prevailing parties as to the IEE Contract Claim with respect to DPS;

5. With respect to the State Board Claim, in light of this Final Decision, the Undersigned respectively requests that the State Board reconsider its Letter of Findings and Corrective Action Plan in State Complaint No. 19-070;

6. The Undersigned makes no determination as to prevailing party status with respect to the State Complaint Claim except to note that Petitioners have exhausted their administrative remedies but failed to prove any substantive denial of FAPE to K.I. by the State Board; and,

7. All other of Petitioners' claims not otherwise dismissed are DISMISSED WITH PREJUDICE

7. The Respondent filed an appeal on April 26, 2019, appealing six (6) issues in the ALJ Decision:

a. Whether the DPS's IEE contract included impermissible terms and/or significantly impeded the parent's rights to participate in the IEP decision-making process.

b. Whether DPS committed various procedural violations. (In the Appeal Notice, the alleged procedural violations were not listed.)

c. Whether the Petitioners earned prevailing party status on the IEE contract claim.

d. Whether the ALJ included findings and conclusions outside the statutory time period and/or that were previously settled and waived during a previous Section 504 grievance dispute.

e. Whether the ALJ properly denied the Respondent's Partial Motion to dismiss regarding the application of Rule 41(a) to claims arising prior to August 14, 2017, and

f. Whether the ALJ failed to recognize the mootness of certain claims about the IEE contract.

8. The undersigned State Review Officer was appointed on April 29 and Written Arguments were requested from all parties on April 30, 2019.

9. At the time the Respondent submitted an appeal there was considerable time remaining in the period during which an appeal could be submitted. In an email communication the Petitioners stated the intention to do. The Petitioners, however, never filed an appeal that met the requirements of N.C.G.S. § 115C-109.9 and NC 1504-1.15.

10. Neither party submitted their arguments by the deadline imposed by the SRO. The Respondent submitted arguments past the deadline and moved for them to be considered. The SRO denied the motion.

11. Some ALJ Facts/Conclusions regarding Suspected Disability/Evaluation/Eligibility Claims are included in this Decision solely for a clearer understanding of case. (The ALJ Decision on these claims was not appealed.)

12. K.I. was twelve (12) years old at the time this Petition was filed. (Stip. Ex. 11). During the relevant time period, K.I. was domiciled, and is still domiciled within the boundaries of the Durham Public Schools in Durham County, North Carolina. (Stip. Exs. 12 & 13)

13. During the relevant time period, K.I. had been diagnosed with Anxiety Disorder, Attention Deficit Hyperactivity Disorder-Combined ("ADHD"), and Sensory Processing Disorder. (Stip. Ex. 2, p. 5) She was also on medication and was receiving therapeutic services from Dr. Valerie Sawyer-Smith.

14. In the second grade (December 2013) K.I. had an IEP for a specific learning disability in reading and she received small group instruction in reading (e.g. decoding and other phonic skills). She was later exited

in September 2014. (Stip. Ex. 41, p. 210) From that point forward while enrolled in DPS's schools, K.I. was a qualified individual with a disability that entitled her to a Section 504 Plan.

15. Following a referral and subsequent evaluation, an eligibility meeting was held on August 15, 2017. The IEP team did not find K.I. eligible for special education services. The J.I. disagreed with the decision of the IEP team. (Stip. Ex. 11)

16. The mother filed for a due process hearing. The ALJ, despite finding some procedural errors in the evaluation process, determined that K.I. did not qualify for special education services. (ALJ Decision, April 11, 2019)

The Independent Education Evaluation (IEE)

17. During the Eligibility meeting on August 15, 2017 J.I. requested an Independent Education Evaluation (IEE) because she disagreed with DPS's evaluations. (Stip. Ex. 13, p. 60) An IEE can be requested if the parent objects to the evaluations conducted by the school system. (34 C.F.R. § 300.502 (b)(1); NC 1504-1.3(b)(1)) The IEP team referred J.I. to Dr. Bell, DPS's EC Director, who has the responsibility to arrange for an IEE.

18. After discussions with Dr. Bell, J.I. followed up on September 6, 2017 with a written request for an IEE. (DPS Ex. 3) The evaluations specifically requested were: Neuropsychological Evaluation, Occupational Therapy Evaluation, and Speech-Language Evaluation.

19. In her referral request, J.I. also wanted the independent evaluators "to have the same opportunity to observe [K.I.] at school." (Stip. Ex. 57, p. 302) Dr. Bell initially refused to allow independent evaluators the same opportunity allowed DPS evaluators, but after legal counsel's intervention, the observations were approved. (Stip. Ex. 53) These in-school observations became an issue after the evaluation reports were completed, because one independent evaluator failed to observe in the school setting

20. Dr. Bell immediately initiated the process to have the IEE's performed, although there was some initial reluctance to agree to the Neuropsychological Evaluation. Dr. Bell's initial position was that DPS was not going to approve the Neuropsychological Evaluation, for DPS had only conducted a Psychological Evaluation. She relented, however, and initiated the process for an IEE to be performed that included all those requested by J.I.

21. J.I was provided a list of qualified evaluators in the community. J.I.'s choices were not limited to only the evaluators on the list. She was told if she wanted an evaluator not on the list, she was to contact Br. Bell so that DPS could confirm the evaluator's qualifications. (Stip. Ex. 59)

22. J.I. was not provided any additional criteria nor was she told about the IEE Contract and the contents of that Contract. The Contract contained DPS's agency criteria required for the qualification on IEE examiners and the process for conducting the IEE.

23. J.I first became aware of the existence of the IEE Contract was December 4, 2017, when Dr. Bell mentioned in an email to J.I. that she was sending the contracts to the private evaluators. (Stip. Ex. 66, p. 344) J.I. was not given a copy of the contract at that time nor made aware of any agency criteria in that contract. J.I. requested a copy of the IEE Contract on December 5, 2017 and was provided a copy on January 12, 2018. (Stip. Ex. 68, p. 346; Stip. Ex. 69; DPS Ex. 13)

24. On December 22, 2018, Dr. Bell notified J.I. that Tracy Vail, who had been chosen by J.I., had refused to sign the IEE Contract. (Stip. Ex. 64, pp. 333-341) Ms. Vail refused to conduct the IEE because of the contract terms. (Stip. Ex. 67) Ms. Vail wanted all four clauses of the Limited Relationship Provision removed from the IEE Contract but DPS refused. (DPS Ex. 1, p. 7) Unlike a previous IEE Contract signed by Ms. Vail (Stip. Ex. 87), the revised IEE Contract contained the Exhibit A – "Scope of Professional Services Agreement" with the "Limited Relationship Provision." (Stip. Ex. 86)

25. Dr. Bell testified that she did not have any concerns about Tracy Vail's qualifications to perform the speech/language evaluation. (Tr. vol. 7, p. 1334) She had been qualified to conduct IEEs in DPS prior to the inclusion of the Limited Relationship Provision.

26. The following IEE's were conducted and provided to both DPS and J.I.:

> a. An Occupational Therapy Evaluation, conducted by Brittni Winslow on February 12, 2018. (Stip. Ex. 39)

b. An Informal Dynamic Social Communication and Pragmatic Language Assessment and Recommendations conducted by Jennifer Minnelli on April 19, 2018. (Stip. Ex. 40)

c. An Outpatient Psychological Evaluation was conducted by Dr. Kelly Anthony during seven days between January 22 and April 30, 2018 and dated May 29, 2019. (Stip. Ex. 41) There was also an Outpatient Psychological Evaluation – Amended Report with an additional day of evaluation, June 8, 2019. This Amended report is undated. (Stip. Ex. 42)

27. The long time period in completion of the IEE's was an initial issue in this case but was dismissed by the ALJ as not being an untimely delay caused by DPS. (ALJ Order dated October 23, 2018) This was not a subject for the appeal.

28. The necessary IEE's were conducted and the results made available to the parent and DPS. The ALJ, however, found that the IEE Contract that was used to obtain the services of the outside providers significantly impeded J.I.'s right to participate in the decision-making process regarding the provision of FAPE to KI. The ALJ also determined that the Limited Relationship Provision in the IEE Contracts violated the Petitioners' procedural safeguards. This was the primary focus of the Respondent's appeal.

29. The Respondent never held an IEP meeting to consider the IEE's and revisit the eligibility decision that was made on August 15, 2017. An IEP Meeting scheduled for June 8, 2018, was rescheduled to July 13,

2018 because Dr. Bell wanted Dr. Anthony to meet with school personnel. (Tr. vol. 7, pp. 1253, 1308) Before this could be accomplished J.I. enrolled K.I. in the Central Park Charter School, another LEA which then took responsibility for the provision of FAPE to K.I. (Stip. Ex. 68)

30. An IEP team at Central Park Charter School used the data compiled by DPS along with the IEE information to determine that K.I. was eligible for special education services. (Tr. vol. 5, pp. 830-31)

The IEE Contract/Procedural Violations

31. DPS required all the independent evaluators to sign the IEE Contract. The Contract outlined DPS' agency criteria for an IEE The IEE Contract was labeled "Contract for Performing Independent Evaluation Services." (Stip. Exs. 83, 84, & 85)

32. The controversial provision of the IEE Contract is Exhibit A – "Scope of Professional Services Agreement." The final section of Exhibit A, the Limited Relationship with the Parties ("Limited Relationship Provision") is the portion of the contract that is relevant to this particular case and included in the Petition.

33. The Limited Relationship Provision stated:

> Provider agrees to perform the duties as described above and understands that the purpose of this IEE is to assist the IEP team in answering the questions identified in Paragraph 1 above. *To that end* [the IEE], Provider agrees that the scope of its involvement with this

student and his education with DPS is limited to the items identified in this Agreement [] and will not be further involved in this matter *without the express written consent of both the Parents and DPS*. This includes the following:

a) Beyond the scope of this agreement, Provider shall not serve as a consultant for either *party,* including any further relationship as a consultant, evaluator, or health care provider for K.I.

b) Provider will not agree to serve as a witness or expert witness in any future dispute between the *parties.*

c) Provider will not speak with any attorney, consultant, or third party regarding this student, without the express consent of both *parties.*

d) In the event Provider is subpoenaed for deposition or testimony, Provider agrees to communicate simultaneously with both *parties* and shall not speak substantively with either *party* in anticipation of Provider's deposition or testimony.
(Stip. Ex. 83, p. 471 ¶ 4) *(emphasis added)*

34. Though the Petitioners were not a party to the contract, the contract includes reference to parties other than the parties to the contract. Presumably, this would be the parents of a child being evaluated.

35. The definition of Agency criteria is found in IDEA Regulations:

> (1) If an independent education evaluation is at public expense, the criteria under which the evaluation is obtained including the location of the evaluation and the qualifications of the examiner must be the same criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent evaluation.
>
> (2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.
> (34 C.F.R. § 300.502I)

36. To some extent the term "agency criteria" is ambiguous. The Respondent has a very narrow view of "agency criteria;" the who, what, how, and when aspects of the evaluation and the delivery of the examination results. It does not encompass restrictions placed on the examiner with regard to relationships and other activities of the examiner subsequent to the delivery of the examination results. The Respondent maintained that those are of the nature of a business relationship not governed by IDEA.

37. The Petitioners, however, maintained that it includes conditions imposed on the examiner not only

with respect to the who, what, how, and when aspects of the examination, but also on restrictions imposed on relationships and other activities of the examiner subsequent to the delivery of the examination results.

38. Petitioners objected to the Limited Relationship Provision, which they assert impeded K.I.'s parents' ability to meaningfully participate in the decision-making process by limiting their ability to work with the evaluators. The Petitioners also maintain that it allowed DPS to manipulate the evaluation process. (Stip. Exs. 83, 84, 85)

39. Petitioners also contended that this contract provision was purposefully designed to impede parents' participation in the IEP process as well as their ability to advocate for their children's needs in a due process hearing and have access to an expert witness.

40. The Petitioners assert that through these provisions, DPS imposed agency criteria upon the independent evaluators that differed from the criteria DPS used when its own evaluators evaluated students.

41. DPS argued that the Limited Relationship Provision served several purposes. It provided clarity and transparency for the evaluator. (Tr. vol. 7, p. 1239) The provisions limiting the evaluator's activities after the evaluation were intended to keep the process independent from influence unrelated to the student's current educational needs. (Tr. vol. 7, p. 1243) It also protected the evaluator from other considerations or influences "so they can focus on the core of the work that's being asked." The evaluator could complete the evaluation independently and not feel pressure,

influence to serve in any kind of advocate capacity for not just the parent, but for the district. They can truly enter and engage in this process focusing on evaluating independently, as an independent source. (Tr. vol. 7, p. 1244)

42. Dr. Bell testified to her concern that an evaluator may see the independent evaluation as an opportunity to drum up future business with the parent. Dr. Bell, however, confirmed there was no prohibition in the contract to prevent the independent evaluator from conducting future evaluations for the DPS for which the DPS "pay[s] them for their services." (Tr. vol. 7, pp. 1279–81)

43. Dr. Bell stated that she was not concerned that the prospect of a longstanding relationship with the DPS with the possibility of conducting multiple independent evaluations would skew the perspective of the evaluator, contents of the evaluations, or the recommendations given by the evaluator. Yet, she was concerned that having an additional relationship with the parent could skew the perspective of the evaluator, the contents of the evaluation, and the evaluator's recommendations. (Tr. vol. 7, pp. 1282–83) She did not attempt to explain this illogical view.

44. Dr. Bell explained that the "big reason" for the contract revisions that included the Limited Relationship Provisions was due to "litigation, attorney involvement, most specifically over the past several years, how that has really so significantly changed the landscape of our world and how we used to work together." (Tr. vol. 7, p. 1242)

45. The Limited Relationship Provisions were sufficiency daunting to Dr. Anthony and Ms. Minnelli that they felt compelled to hire legal counsel because of the IEE Contract.

46. As evidenced in the hearing for this case, the Limited Relationship Provisions accomplished the purpose for which they were placed in the IEE Contract. The provisions controlled the Petitioners' ability to access the independent evaluators to prepare for the hearing, had a "chilling" effect on the testimony of the IEE examiners, and interfered with the Petitioners' access to expert testimony.

47. Based on statements in the transcript by the ALJ during the hearing while obtaining testimony and later in her Final Decision, the Limited Relationship Provisions in the IEE Contract impacted the trier-of-fact's access to relevant expert testimony.

48. Following the completion of the IEE evaluations but before submission of the IEE reports, Dr. Bell used the Limited Relationship Provisions to control the "content" of the IEE's. Using the contract provisions Dr. Bell "forced" several of the evaluators to meet or talk with both her and specific DPS staff to get information for evaluations already completed. (Stip. 63, T. vol. 5, pp. 789-90) Some of these staff members were not directly involved with K.I.

49. In at least one instance Dr. Bell requested a change in the evaluation report. (Stip. 39, T. vol. 5, pp. 775-76) After speaking with Dr. Bell, Ms. Winslow issued a "revised" independent evaluation on March 29, 2018. (Stip. Ex. 39) In the revised evaluation report,

Ms. Winslow changed the word "recommendations" to "considerations." (*Compare* Stip. Ex. 38, p. 7 *to* Stip. Ex. 39, p. 7) DPS' staff evaluators, on the other hand, are allowed to make recommendations in their evaluation reports and not asked to label the recommendations as considerations.

50. Following the submission of Dr. Anthony's evaluation report, in which she diagnosed K.I. with Autism Spectrum Disorder (Stip. Ex. 41, p. 229), Dr. Bell requested for Dr. Anthony meet with some DPS staff so that Dr. Anthony could have "balanced" information for a revised evaluation report. Following this meeting, Dr. Anthony provided an amended evaluation report. She, however, did not change her diagnosis.

51. On at least one occasion, Dr. Bell destroyed rating scales that Dr. Anthony had provided for teacher input. The rating sheets had been given to J.I. to distribute. As J.I. had not chosen the teachers preferred by Dr. Bell, the rating scales were destroyed and new ones distributed to teachers chosen by DPS. (Pet. Ex. 13, pp. 346-48; Tr. 7, p. 1289)

52. Rather than allowing professional evaluators to determine how they were to conduct their evaluations and from whom they needed information, Dr. Bell attempted to use the Limited Relationship Provisions of the Contract to control the evaluations, including the evaluation reports. IEE's are supposed to be truly independent and free from influence of both parents and school officials.

53. On May 29, 2018, Dr. Bell notified J.I. that all of the IEE evaluations were completed. (Stip. Ex. 76, p. 431) Dr. Bell provided an Invitation to Conference for a meeting on June 8, 2018, "to review the IEE reports." (Stip. Exs. 14 & 76) J.I. confirmed that they would be able to attend the meeting. (Stip. Ex. 76, p. 431)

54. On June 5, 2018 Dr. Bell canceled the IEP meeting to provide for the school district to meet with the independent evaluators. (Stip. Ex. 78, p. 449) The reason given by Dr. Bell was that all components of the evaluation and IEE Contracts had not been completed. (Stip. Ex. 78, p. 443) All evaluators had previously submitted their final reports. Dr. Bell had previously deemed the final repots completed on May 29, 2018.

55. On June 5, 2018, Dr. Bell emailed Dr. Anthony:

> After full review of your report, I noticed that there is a good deal of information from the parent embedded throughout (which is great), but it does not appear that you spoke with select school staff in order to receive information regarding the student's performance at school and to obtain any other school-based information that may be helpful in the IEE. Since this is included in the contract for the IEE, I would like this information to be sought and included in your evaluation/report of the student.
> (Pet. Ex. 10)

56. Dr. Bell explained her rationale for canceling the IEP meeting that was scheduled for June 8. Agency

criteria for IEE's include in-school observations for some suspected disabilities, such as specific learning disabilities and autism. (NC 1503-2.5) Dr. Bell explained that she did not immediately review Dr. Anthony's lengthy report upon receipt, but shortly thereafter when meeting with Dr. Johnson she noticed that Dr. Anthony had not talked to school folks or observed in the school setting. (Tr. vol. 7, pp. 1254-55).

57. J.I. repeatedly asked Dr. Bell not to cancel the June 8 IEP meeting as the independent evaluators were already scheduled to attend the meeting and she had already arranged for childcare so she could attend. She reminded Dr. Bell that the process to obtain services for K.I. began almost a year earlier. (Stip. Ex. 78, pp. 437–48) She also informed Dr. Bell of her hope that the IEP Team would find K.I. eligible for an IEP and for Extended School Year services during the summer intermission. J.I. was understandably frustrated at the delay of the IEP Meeting.

58. On June 21, 2018, DPS invited K.I.'s parents to attend an IEP meeting to take place on July 13, 2018. (Stip. Ex. 66)

59. During the IEE process, in April/May 2018, J.I. began looking for alternative placements for K.I. On July 11, 2018, J.I. informed DPS that K.I. was enrolled in a public charter school and was no longer enrolled in DPS. (Stip. Ex. 67) J.I. cancelled the July 13, 2018 IEP Meeting.

60. Because of this cancellation, the IEP team did not have a chance to review the IEEs or to revisit its Eligibility Determination. After K.I.'s enrollment at the

Central Park, DPS was no longer responsible for providing her a FAPE. That responsibly shifted to Central Park.

61. The IEE Contract imposed conditions on the independent evaluators that were not imposed on DPS's evaluators. Sections (b) through (d) of Paragraph 4 of the Limited Relationship Provision would prohibit the independent evaluator from agreeing to serve as a witness or expert witness in any future dispute between the parties (DPS and K.I.'s parents); from speaking with any attorney, consultant, or third party regarding K.I. without the express consent of both parties; and require the independent evaluator to communicate simultaneously with both parties in the event the evaluator is subpoenaed for deposition or testimony and not speak substantively with either party in anticipation of the evaluator's deposition or testimony.

62. DPS does not restrict its own employees, who have evaluated a child with a disability, from further serving that child, conducting future evaluations of that child, communicating with attorneys, or serving as a witness.

63. Dr. Bell admitted that DPS does not place restrictions on its own evaluators. (Tr. vol. 7, p. 1329) Further, DPS employees were allowed to speak with the school attorney without being subpoenaed. (Tr. vol. 7, p. 1330)

64. The Limited Relationship Provision of the IEE Contract had other negative consequences on the Petitioners' procedural safeguards by allowing DPS to

interfere with the parent's selection of the IEE evaluator. In this case, J.I. requested that the speech/language IEE be conducted by Tracy Vail. (Tr. vol. 2, p. 361) Though Ms. Vail was qualified, she was not allowed to perform the IEE because she rejected the restrictions in the Limited Relationship Provision and would not sign the contract. She had previously conducted an IEE for DPS in 2017, but the contract at that time did not have the Limited Relationship Provisions. J.I. was forced to find another evaluator. The parents were given the choice of having an independent evaluator subject to the Limited Relationship Provision or not having an IEE. (Tr. vol. 2, p. 361)

65. The IEE Contracts had a direct impact on the Petitioners in that their due process safeguards were clearly violated. DPS argued that, as evidenced by the hearing, the IEE Contract did not prevent the Petitioners from presenting expert witness testimony. That may be true, but the expert used had very limited knowledge about K.I. He merely interpreted test results, and did not deliver a very convincing opinion.

66. Dr. Anthony, on the other hand spent considerable time with K.I., administering many tests and observing. With regards to K.I.'s disability, Dr. Anthony probably had a better understanding of K.I.'s needs than anyone. She also had the education, experience and expertise to provide expert testimony to assist the ALJ. She, however, was effectively prevented from doing so because of the IEE Contract. The ALJ even noted that Dr. Anthony was very hesitant in

answering questions that needed her reliance on her expertise. She had consulted with her own attorney.

67. DPS's use of the IEE Contract Provisions very effectively eliminated the most important tool available to parents for challenging the LEA, witnesses testifying at the due process hearing. It also deprived the ALJ of very valuable expertise.

68. Because of the terms of the IEE Contract, none of the independent evaluators testified as expert witnesses. They were, however, subpoenaed to testify for Petitioners as fact witnesses. As noted by the ALJ in her Final Decision, the provisions in each of their IEE Contracts appeared to affect their testimony.

69. The North Carolina Rules of Evidence prevent "fact witnesses" from testifying as an "expert witness." Only a witness qualified as an expert by knowledge, skill experience, training, or education, may testify in the form of an opinion. N.C.G.S.§ 8C-1, Rule 702. Expert witnesses may also testify on an ultimate issue to be decided by the trier-of-fact, however, fact witnesses may not. (N.C.G.S. § 8C-1, Rule 704)

70. The impact of the Limited Relationship Provision of the IEE Contract was not an unforeseen consequence. It was a planned and well-executed violation of one of IDEA's most important procedural safeguards. The IEE Contract took away the parents' ability to effectively challenge DPS's evaluation.

71. Ultimately, the contract interfered with, not just J.I.'s meaningful participation, but also with her

ability to participate fully in the due process hearing regarding the denial of a FAPE to her daughter.

72. Based on the ALJ's own statement, the effects of the Limited Relationship Provision were chilling and obvious during the hearing. (ALJ Decision, p. 92, 225).

ALJ Findings Outside the Statutory Time Period

73. The ALJ Final Decision did include findings that were outside the statutory time period. Most were of a historical nature. Some, however, were allowed to be introduced by the Petitioners for the purpose of showing procedural violations committed by DPS regarding the eligibility of K.I. for special education services.

74. The ALJ found that these earlier procedural violations during the process of determining eligibility did not cause a denial of FAPE. As the ALJ's decision regarding eligibility is not on appeal, it is unnecessary to review those findings outside the normal statutory time period that were related solely to the eligibility determination. They are not relevant.

75. Findings related to the IEE Contract were within the normal statutory time period. Those were properly considered by the ALJ and are included in the previous section of this SRO Decision.

ALJ Determination that Petitioners were Prevailing Party on IEE Contract Claim

76. The ALJ did determine that the Petitioners were the prevailing party on the IEE Contract claim.

77. A prevailing party is one who wins in a contested case. The ALJ could declare this based on her findings.

78. The ALJ, however, was careful not to extend this to the point of awarding attorney fees, as this is often the outcome in IDEA cases. A parent who is a prevailing party can seek relief in a court for the award of attorney fees.

ALJ's Denial of Respondent's Partial Motion to Dismiss regarding application of Rule 41(a)

79. On August 30, 2018 the Respondent filed a Motion to Dismiss. The ALJ denied the Motion on September 28, 2018. There were two issues in the Motion. The Respondent is appealing only that portion of the denial that pertains to Rule 41(a) issue, specifically whether N.C.G.S. § 1A-1, Rule 41(a)(1) circumvents North Carolina's one-year statute of limitations for IDEA claims.

80. The application of Rule 41(a) is actually a non-issue. The Respondent made a good argument in the motion that Rule 41(a) is not available to circumvent the one-year statutory limitations in IDEA cases in North Carolina. That argument is one that this SRO normally accepts. The ALJ, in her order denying the motion, provided an extensive explanation why she believes that it does. This very long treatise was provided with this SRO in mind, as the ALJ was certain that her Final Decision would be appealed and there would be a possibility that this SRO could be appointed as State Review Officer.

81. As the case developed, there are two reasons why it is not necessary for the SRO to make any decision on the application of Rule 41(a) to this specific case on appeal. First, the parts of the ALJ Final Decision being appealed are related to the IEE. These have their origins well within the one-year statutory limitation in North Carolina. Second, the issue of K.I.'s eligibility was not appealed. It was the issues regarding K.I.'s identification and eligibility that required the application of Rule 41(a), for many of the facts the IEP team needed to determine eligibility had origins prior to normal time period established by North Carolina statue of limitations.

82. Also, assuming arguendo that the eligibility determination was appealed. It still would not necessitate the use of Rule 41(a) to enter those facts that have their origins in the identification process, even though they are outside the normal statue of limitations. The actions, evaluations and decisions made in the identification process are precursors to determining eligibility. Those would have been reviewed by the IEP team during the eligibility meeting on August 15, 2017 and of necessity would be included as relevant facts. That IEP meeting was covered by the petition, even though facts used by the team occurred slightly over a year prior to the filing of the petition.

83. The SRO finds that the application of Rule 41(a) is not relevant to this appeal.

CONCLUSIONS OF LAW

Jurisdictional and Legal Conclusions

1. The Office of Administrative Hearings and the State Review Officer have jurisdiction over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education ("FAPE") pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et seq. and implementing regulations, 34 C.F.R. Part 300 et seq. The provisions of 20 U.S.C. §1415 and N.C. G. S. § 115C- 109.6(a) control this review.

2. As the party seeking relief, the burden of proof for this action lies with Petitioners. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005).

3. IDEA is the federal statute governing the education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Part 300 *et seq*. The primary purpose of 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, and
>
> To ensure that the rights of children with disabilities and parents of such children are protected.
> IDEA, 20 U.S.C.§ 1400(d)(A)&(B).

4. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Part 300 *et seq.* (Stip. 4)

5. The controlling State law for students with disabilities is Chapter 115C, Article 9 of the North Carolina General Statutes. (Stip. 7) The State policies promulgated under Chapter 115C, Article 9 are the *Policies Governing Services for Children with Disabilities.*

6. K.I. and her mother were residents of Durham County, North Carolina during the period relevant to this controversy. K.I. was a child with "suspected" disabilities for the purposes of 20 U.S.C. § 1400 *et seq.* and N.C. G. S. § 115C-106 *et seq.*

7. J.I., the parent of K.I., was entitled to procedural safeguards available in IDEA and N.C.G. S. § 115C, Article 9. She also has the right to meaningful participation in the IEP process while K.I. was being evaluated for eligibility for specially designed instruction under the IDEA.

8. Durham Public Schools Board of Education ("DPS") is a local education agency ("LEA") receiving funds pursuant to the IDEA (Stip. 5) and is the LEA responsible for providing educational services in Durham County, North Carolina.

9. Durham Public Schools is subject to the provisions of applicable federal and State laws and regulations, specifically 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.*; N.C.G.S. 115C-106 *et seq.* and the *Policies Governing Services for Children with Disabilities.* These acts, regulations and policies

require DPS to provide FAPE for those children in need of special education residing within its jurisdiction

10. The professional judgment of teachers and other school staff is an important factor in evaluating an IEP. "Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartmann by Hartman v. Loudoun Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982) (stating that "courts must be careful to avoid imposing their view of preferable educational methods upon the States"). The "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parents." *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004).

11. ALJ's and SRO's may not substitute their "own notions of sound educational policy for those of the school authorities" whose decisions are under scrutiny. *Rowley*, 458 U.S. at 206.

12. In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1002 (2017), the Court held that in due process proceedings educators can be expected to offer "a cogent and responsive explanation" for their decisions. The ALJ and this SRO determines that not all educational decisions made by DPS's educators in this case meet this criterion.

13. Recipients of federal assistance must establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed the procedural safeguards with respect to the provision of a free and appropriate public education. 20 U.S.C. § 1415(a)

14. Congress appeared to have "presumed that if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances." Schaffer, 546 U.S. at 60-61.

15. In a due process proceeding, the Supreme Court held in *Rowley* that first there must be a determination of whether the LEA complied with the procedures set forth in the IDEA, and second, whether the IEP developed through those procedures is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. 207. It is the first inquiry that is relevant to this appeal.

16. The procedural requirements in IDEA are purposefully designed to ensure that parents can meaningfully participate in the process of developing an IEP for their child. "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 upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205–06.

17. A child is denied a FAPE when the IEP Team commits procedural violations that:

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decision making 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. § 1415(f)(3)(E)(ii).

18. In this appeal the issue is whether DPS committed procedural violations that significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child.

19. The procedural violations must "result in some loss of educational benefit or opportunity" and "cannot simply be a harmless error." *A.K. ex rel. J.K. v. Alexandria City Sch.*, 484 F.3d 672, 684 (4th Cir. 2007). Interference with parental participation rights is clearly a procedural violation. 20 U.S.C. § 1415(f)(3)(E)(ii); N.C.G.S. § 115C-109.8.

20. A substantive procedural violation is one that "seriously infringe[s] the parents' opportunity to participate in the IEP formulation process," *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) or causes the child to lose any educational opportunity, *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

21. Just prior to the ALJ's Final Decision in this case, the Fourth Circuit (citing USC §1415(f)(3)(E)(ii)(II)) held that a determination of a substantial violation requires an affirmative answer to all three of these questions:

a) whether the plaintiffs alleged a procedural violation;

b) whether the violation significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents child, and;

c) whether the child did not receive a FAPE as a result.
R.F. v. Cecil County Public Schools, F.3d ___, No. 18-1780, 74 IDELR 31(4th Cir. March 25, 2019)

22. While the *R.F.* case differs somewhat from that in other Circuits, it does provide clear guidance within the Fourth Circuit and for this particular case. For "Unless an ALJ determines a procedural violation denied the child a FAPE, the [ALJ/SRO] may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief." *Id.*

23. The ALJ in her Final Decision on April 11, 2019, found that DPS's eligibility determination did not deny FAPE to K.I., although DPS committed procedural violations. This portion of her Final Decision was not appealed and the SRO makes no

findings regarding it, but the decision in *R.F.* would indicate that no relief could be granted to Petitioners.

The IEE Contract Claim

24. As J.I. disagreed with DPS's evaluations, she was entitled to independent evaluations at public expense. 34 C.F.R. § 300.502 (b)(1); NC 1504-1.3(b)(1).

25. The IEE is defined as an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. 34 C.F.R. § 300.502(a)(3)(II).

26. Following a request for an IEE, an LEA must provide the parents the agency criteria applicable to IEE's. 34 C.F.R. § 300.502(a)(2). As DPS did not, this would be a procedural violation.

27. The IEE is one of those specific procedural safeguards that Congress included in IDEA to give parents an opportunity to participate in the decision-making regarding the provision of FAPE to their child. It is a procedural safeguard designed to protect the rights of K.I. and J.I., not DPS.

28. It is reasonable to expect an LEA to enter into a contract agreement with an IEE Provider. Some of the provisions of DPS"s IEE Contract and the application of those provisions are the focus of this complaint in the Petition.

29. The Petitioners, in their petition, were not contesting all the terms in the IEE Contract. They contested only the Limited Relationship Provision that

imposed on their right to have the independent evaluator conduct a truly independent IEE.

30. The purpose of the IEE Contract was to provide alternative independent evaluation information of K.I.'s educational needs which would have been used during the subsequent IEP meeting to review DPS' original eligibility determination.

31. The IEE Contract contained agency criteria and conditions that were directly related to Petitioners' participatory rights and procedural safeguards under the IDEA. The plain language of 34 C.F.R. § 300.502(c)(2) states that an LEA may not impose any conditions other that the agency criteria. The definition of agency criteria is ambiguous and there is no clear guidance on this specific issue in Federal Regulations, North Carolina Policies, OSEP interpretations, or case law.

32. The best guidance, though not directly on target for this issue, is that OSEP "has consistently affirmed the plain language of the regulations and reiterated that school districts may not impose conditions, timelines, or other limitations on parents' access to an IEE." *Gresham-Barlow Sch. Dist.* at 4 (*citing Letter to Thorne* (OSEP Feb. 5, 1990); *see, e.g.*, *Letter to Petska* (OSEP Sept. 10, 2001); *Letter to Anonymous* (OSEP Jan. 4, 2010).

33. Ambiguous statutes should be interpreted according to statutory purposes, *Rose v. Lundy,* 455 U.S. 509, 517(1982). There is no doubt that the purpose of 34 C.F.R. § 300.502 (b)(1) and NC 1504-1.3(b)(1) is to provide the opportunity for parents to have a truly

independent evaluation of their children with disabilities, and to have the opportunity to use that evaluation to challenge the appropriateness of the LEA's evaluation. These rights are ensured by 20 U.S.C. § 1400(d)(B).

34. When asked, DPS did provide the parents a copy of the contracts for each of the IEE providers. The record does not contain any evidence that DPS otherwise provided the parents with a copy of their agency criteria, as required by 34 C.F.R. § 300.502(a)(2).

35. The SRO favors the interpretation of the Petitioners. Agency criteria includes conditions imposed on the examiner not only with respect to the who, what, how, when aspects of the examination, but also on restrictions imposed on relationships and other activities of the examiner during the evaluation and subsequent to the delivery of the examination results.

36. It may be reasonable to restrict an independent evaluator's communication with attorneys and advocates during an evaluation, for such contact could interfere with the "independent" evaluation. It is not reasonable to have restrictions subsequent to the IEP meeting to review those evaluations. This would be inconsistent with the spirit and intent of IDEA if, through the use of those restrictions, the LEA somehow interferes with parental rights.

37. The Limited Relationship Provision extends well beyond the actual evaluation. Parents have legitimate interests in getting additional insights concerning their child at some time subsequent to the

IEP meeting during which the IEE evaluation was discussed. According to the Limited Relationship Provisions of the contract, there can be no further contact between the parents and the evaluator. IEP team meetings are often fast-paced, hectic, and confusing to parents. It could be days, weeks, or even months after an IEP meeting before parents can even ask intelligent questions about the evaluation results. Preventing access would certainly impede the capability of the parents to effectively participate in decision-making regarding their child's educational program.

38. An IEE must meet the same criteria used by the school district in its evaluation "to the extent those criteria are consistent with the parent's right to an independent educational evaluation." 34 C.F.R. § 300.502(e)(1). These criteria must be the same criteria the school district uses when it initiates an evaluation. The school district cannot impose other conditions on the independent evaluator. 34 C.F.R. § 300.502(e)(2).

39. The Limited Relationship Provision used by DPS in its IEE Contracts for K.I.'s independent evaluators did impose other conditions. Several of these had the effect of impeding parental participation and/or violating procedural safeguards guaranteed to parents. Such conditions are inconsistent with IDEA and are unrelated to an examiner's ability to conduct an IEE.

40. The specific restrictions in the Limited Relationship Provision are unrelated to the purpose of the IEE or an examiner's ability to conduct an IEE. If, in an overt or subtle fashion, they impede parental

participation or the rights of parents to challenge an LEA's evaluation, then those restrictions are an infringement of the parent's rights.

41. During the hearing for this case, it was telling when Dr. Bell responded to questions about the Limited Relationship Provision of DPS's Contract with IEE providers. Though she voiced be a supporter of having IEE's, she indicated that IEE's have become a mechanism for increasing litigation and advocacy. The subtle message underlying her comments is: Let us (school officials) do our job and quit questioning what we do.

84. The Limited Relationship Provision of the contract appears to be designed to inhibit advocacy and litigation. This was an egregious procedural violation, calculated to interfere with Petitioners' procedural safeguards.

42. In this particular case the IEE's were unduly influenced by DPS through the use of the Limited Relationship Provisions of the IEE contract. Rather that allowing the professional evaluators to independently conduct the IEE's, DPS attempted to control the process and even the content of several of the evaluations. This is a clear procedural violation of IDEA. The IEE is supposed to provide an evaluation of the child that is not influenced by either LEA or parents. The ethical guidelines for the professions and the professional judgments of qualified evaluators should regulate the IEE.

43. DPS's use of the Limited Relationship Provision to influence the content of evaluations had a

definite effect. The wording or contents of two of the IEE's were altered at the request of a DPS official. DPS may maintain that the evaluators were not required to change the content of the evaluations, but referencing the contract when the request is made indicates otherwise. This not only interferes with parental participation but also is a violation of procedural safeguards. IEE's are intended to give parents an opportunity to obtain evaluations that are not produced or influenced by the LEA. Although the changes requested by DPS in this instance were relatively minor, they are still procedural violations.

44. Denying the parents access to an evaluator could significantly impact the parents' ability to participate in an IEP meeting. The IEE evaluator certainly should be there when the evaluation is initially discussed in an IEP meeting. The Contract allows for this. The Contract, however, prevents parental access beyond this point. It is well understood that IEP meetings are confusing to many parents. They may have misunderstandings or questions about an evaluation subsequent to the evaluation being initially discussed in an IEP meeting. Using contractual terms to place restrictions on an evaluator, such that they cannot even respond to parental questions, is a significant impediment to the parents' right to participate effectively in the decision-making process for their child.

45. When disagreements arise between parents and schools over the provision of FAPE, "[b]y the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and

judgment to bear on areas of disagreement." *Endrew F.*, 137 S. Ct. at 993.

46. When the Supreme Court assigned parents the burden of proof, they also explained the significance of parents' right to an IEE as an essential procedural safeguard. Though this is probably *dicta*, it is persuasive:

> School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them.... [Parents] have the right to an independent educational evaluation of the[ir] child.... The regulations clarify this entitlement by providing that a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 CFR § 300.502(b)(1) (2005). IDEA thus ensures parents' access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.
>
> Schaffer *ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005)

47. Reading both the Supreme Court's decisions in *Schaffer* and *Endrew F.* together; by the time any

dispute reaches Court, the parents should also have a complete opportunity to use the expertise and judgment of independent evaluators regarding areas of disagreement. The IEE is designed to provide substantive information about the child's educational needs and assist the parent in meaningful participation in the IEP process and, if necessary, assist the parent in meaningful participation in due process. An IEE is a parent's primary tool to challenge the LEA's evaluation and decisions based on the results of the LEA's evaluation.

48. An IEE may also be necessary to assist the hearing officer to make meaningful decisions in a contested case hearing. Hearing officers have the authority to order an IEE at public expense during a hearing. 34 C.F.R. § 300.502(d).

49. Either party can introduce the IEE at the due process hearing. 34 C.F.R. § 300.502(c)(2).

50. The Limited Relationship Provision required both parties' consent to allow the independent evaluator to testify as an expert witness. DPS argued that exclusion of the independent evaluators from testifying as expert witnesses, without both party's consent, would guarantee impartiality of the evaluator. How one reaches this conclusion is unclear.

51. Pursuant to the terms of the IEE Contract, none of the independent evaluators testified as expert witnesses. They did, however, testify for Petitioners as fact witnesses.

52. The North Carolina Rules of Evidence prevent "fact witnesses" from testifying as an "expert

witness." Only a witness qualified as an expert by knowledge, skill experience, training, or education, may testify in the form of an opinion. N.C.G.S. § 8C-1, Rule 702. Expert witnesses may also testify on an ultimate issue to be decided by the trier-of-fact which "fact witnesses" may not. N.C.G.S. § 8C-1, Rule 704.

53. Hearing officers as the designated trier-of-fact are in the best position to determine whether expert testimony should be admitted and what weight, if any, should be accorded that expert testimony. State evidentiary standards govern whether the testimony is relevant, reliable, and based on sufficient facts and data. *Id*.

54. Because of the complicated nature of many disabilities, ALJ's often rely on the opinions of expert witnesses.

55. There is a possible fallacy in the arguments used by the Petitioners and accepted by the ALJ. The IEE Contract Provisions pertaining to being a future witness or expert witness state that they must agree not to be a witness or expert witness. It does not prevent their being subpoenaed. The ALJ during the hearing could determine if a subpoenaed witness is an expert witness, which for some reason did not happen in this case. The effectiveness of such an expert witness would be limited because the parents could not use that expertise in preparation for the hearing.

56. The parents were prevented from using the expertise of the IEE evaluators as expert witnesses in a due process hearing. While the Limited Relationship Provisions do not prevent evaluators from being

subpoenaed as fact witnesses, the parents would be prevented from requesting the evaluators to testify as either fact or expert witnesses. When questioned during a hearing, the attitude and possibly the credibility of the witness can be different depending on whether the individual is testifying voluntarily or being forced to testify through the use of a subpoena. Legal purists may insist that this is not the case, but reality is different. In North Carolina, this especially important, because only expert witnesses can give opinions during their testimony.

57. There are no Federal Regulations regarding exert witnesses. The U.S. Department of Education declined a request to regulate the testimony of experts at a due process hearing because "such determinations are made on a case by-case basis in light of the specific facts of each case." Federal Register vol. 71, No. 156, p. 46691. Hearing officers, as the designated trier-of-fact under the ACT, are in the best position to determine whether expert testimony should be admitted and what weight, if any, should be accorded that expert testimony. State evidentiary standards govern whether the testimony is relevant, reliable, and based on sufficient facts and data. *Id.*

58. The provisions in the contract directly contradicted the Supreme Court's decision in *Schaffer*, which explained the parents' right to an IEE "was to ensure parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion." *Schaffer*, 546 U.S. at 60–61.

59. The Eleventh Circuit's interpretation of *Schaffer* is helpful in this case: "the parental right to an IEE is not an end in itself; rather, it served the purpose of furnishing parents with the independent expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation." *T.P. ex rel. T.P. v. Bryan County School Dist.*, 792 F.3d 1284, 1293 (11th Cir. 2015).

60. DPS's Limited Relationship Provision was purposefully designed to control litigation and attorney involvement in special education matters, not to insure the impartiality of the independent evaluator. This contradicts DPS's obligation to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a FAPE.

61. The Limited Partnership Provision was improper and inconsistent with IDEA's ultimate goal of protecting the rights of disabled children and their parents. Those provisions imposed inappropriate conditions for an IEE. The purpose was to intentionally thwart the parents' ability to challenge DPS's decisions in due process.

62. Although DPS has failed to offer a cogent and responsive explanation for using the Limited Partnership Provision to violate K.I. and J.I.'s rights, the Petitioners have not met their burden of showing that FAPE was denied.

63. The Petitioners were unable to show that these procedural violations affected the provision of FAPE, primarily because K.I. was enrolled in another

LEA before the completion of the IEE's. This prevented an IEP team from receiving and considering those evaluations.

64. As there was no showing that DPS denied FAPE because of the procedural violations committed by DPS in the use of its Limited Partnership Provision in its IEE contract, the ruling of the Fourth Circuit in *R.F.* applies; "Unless an [ALJ/SRO] determines a procedural violation denied the child a FAPE, the [ALJ/SRO] may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief." *R.F. v. Cecil County Public Schools*, F.3d ___, No. 18-1780, 74 IDELR 31 (4th Cir. March 25, 2019)

65. Because K.I. is now being served by another LEA, several of the restrictions of the Limited Partnership Provision are possibly moot with regards to the relationship between DPS and the Petitioners. They, however, are still in effect regarding the provision of FAPE by another LEA, restricting parental involvement in decision-making and violating the parents' procedural safeguards. This latter issue, however, is not before the SRO.

66. Even if the procedural violation does not cause a denial of FAPE to the child, IDEA and state law state: "[n]othing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with the procedural requirements under this section." 20 U.S.C. § 1415(f)(3)(F); N.C.G.S. § 115C-109.8(b). Therefore, the ALJ and SRO do have authority to order DPS to comply with the IDEA but cannot grant other forms of relief.

67. N.C.G.S. § 115C-109.6, § 115C-109.9, NC 104-1.14, and NC 104-1.15 provides the authority of ALJ's and SRO's in North Carolina. That authority is limited to making decisions regarding a specific petition filed on behalf of a named child. Thus, any orders must be narrowly tailored and limited to the actions of an LEA relative to that child.

68. Though the authority of an ALJ's and SRO's is limited, there is nothing that prohibits an ALJ or SRO from notifying or advising DPS that continued use of a contract with provisions similar to the Limited Partnership Provisions used in this case would be a procedural violation of IDEA. Such contract provisions interfere with parents' participation in decision-making regarding their children and violate procedural safeguards.

Summary of Conclusions

69. The ALJ properly denied the Respondent's partial motion to dismiss of August 14, 2017.

70. The Respondent appealed the ALJ's inclusion of findings and conclusions outside the normal statutory time period. Those findings and conclusions pertained to the suspected disability and eligibility claims. As those portions of the ALJ's Final Decision were not appealed, there is no need for the SRO to address this part of the Respondent's appeal.

71. The use of the IEE contract with the Limited Relationship Provision allowed DPS to interfere with the parent's participation in the decision-making with regard to K.I. and to violate the procedural safeguards built into IDEA and state law. Specifically:

a. DPS did not provide J.I. a copy of the agency criteria applicable to IEE's.

b. The parent was prevented from choosing their preferred evaluator.

c. DPS staff caused evaluator reports to be changed, thus the evaluations were not truly independent.

d. Except for an initial review of results, the parents had no access to the evaluators, the individuals who probably had the most knowledge of K.I.'s unique needs. Consultations and/or future evaluations would be prohibited.

e. Going forward, the parents would be prohibited from inviting the evaluator to an IEP meeting, although IDEA clearly provides the right of a parent to invite any person they choose.

f. The parents, and their attorney, were prevented from accessing the evaluators to prepare for a due process hearing. Granted, there is nothing to prevent the parents from obtaining depositions from those evaluators and/or using subpoenas for them to serve as witnesses.

g. The parents were prevented from using the expertise of the evaluators as expert witnesses in a due process hearing.

72. The procedural violations committed by DPS did not deny FAPE.

73. With respect to the IEE Contract claim, the Petitioners are the prevailing party. They, however, are not entitled to any relief under the provisions of *R.F. v. Cecil County Public Schools,* F.3d ___, No. 18-1780, 74 IDELR 31 (4th Cir. March 25, 2019)

74. Under the provisions of 20 U.S.C. § 1415(f)(3)(F) and N.C.G.S. § 115C-109.8(b), the ALJ and SRO can still order DPS to comply with the IDEA and state law. No other forms of relief can be granted.

75. DPS is therefore ordered to comply with the requirement of IDEA and N.C.G.S. §115C, Article 9. As K.I. is now being served by another LEA and there is no longer a relationship between the Petitioners and DPS, no order can be implemented that grants any relief to Petitioners.

76. DPS is notified and advised that continued use of a contract with provisions similar to the one used in this case would be a procedural violation of IDEA. Such contract provisions interfere with parents' participation in decision-making regarding their children and violate procedural safeguards.

Based on the foregoing Findings of Facts and Conclusions of Law, the State Review Officer makes the following:

DECISION

The Final Decision and Order of Administrative Law Judge Stacey B. Bawtinhimer dated April 11, 2019 is upheld in part.

1. The Respondent committed procedural violations through the use of the IEE Contract with the Limited Relationship Provision. The Limited Relationship Provision allowed DPS to interfere with the parents' participation in decision-making with regard to K.I. and to violate the procedural safeguards of IDEA and state law.

2. Although the Petitioners met their burden in showing Respondent's procedural violations regarding the use of the Limited Relationship Provision, they are not entitled to any relief.

3. DPS is notified and advised that continued use of a contract with provisions similar to the one used in this case would be a procedural violation of IDEA. A contract with IEE providers cannot be used in a manner that interferes with the parents' participation in decision-making with regard to their children or violates the procedural safeguards of IDEA and state law. Following the receipt of a request for an IEE, the Respondent must provide parents with its agency criteria, to include restrictions placed on evaluators in the contracts with IEE providers.

4. Those ALJ Orders not pertaining to the petition for this specific case are reversed, for the authority of ALJ's and SRO's is limited to making decisions regarding a specific petition filed on behalf of a named child.

5. The State Review Officer makes no decision regarding those issues not appealed by the Respondent.

This the 25th day of May 2019

/s/Joe D. Walters
Joe D. Walters
State Review Officer

NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in N.C.G.S. § 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. § 1415.

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX E

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1977

[Filed May 24, 2019]

E.S., a minor by his parents and next friends, B.S. and M.S.; B.S.; M.S.,

Plaintiffs - Appellants,

v.

JACK R. SMITH, (officially as) Superintendent, Montgomery County Public Schools; MONTGOMERY COUNTY BOARD OF EDUCATION,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Paul W. Grimm, District Judge. (8:17-cv-03031-PWG)

Submitted: March 29, 2019 Decided: May 24, 2019

Before NIEMEYER, KEENAN, and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Michael J. Eig, Meghan M. Probert, Paula A. Rosenstock, MICHAEL J. EIG & ASSOCIATES, PC, Chevy Chase, Maryland, for Appellants. Joshua Civin, Zvi Greismann, Emily B. Rachlin, Office of the General Counsel, MONTGOMERY COUNTY PUBLIC SCHOOLS, Rockville, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

E.S., a minor by his parents and next friends, B.S. and M.S., appeal the district court's order granting summary judgment to Defendants and denying Plaintiffs' motion for summary judgment in Plaintiffs' action under the Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400 -1482 (2012) ("IDEA"). Finding no error, we affirm.

Plaintiffs contend the Montgomery County Public Schools ("MCPS") violated IDEA by denying E.S. a free and appropriate public education ("FAPE"). More specifically, Plaintiffs allege that E.S.'s parents were not included in planning meetings concerning E.S.'s Individualized Education Program ("IEP"). Instead,

Plaintiffs contend MCPS predetermined the IEP in violation of IDEA. They argue that this type of violation, after the 2004 amendments to the IDEA, cannot be harmless error and must result in the school system providing the requested relief because a FAPE cannot be provided when the parents are excluded from the process. The Appellants assert that a predetermination procedural error per se significantly impedes a parent's right to participate in the decisionmaking process and, therefore, the student could not have received a FAPE.

The district court agreed that MCPS had not complied with the IDEA. However, it found the noncompliance to be procedural and harmless.[*] It concluded the procedural errors did not deprive E.S. of a FAPE.

Plaintiffs' argument was addressed recently by this Court. We recently held that "[u]nless an ALJ determines that a given procedural violation denied the child a FAPE, she may only order compliance with the IDEA's procedural requirements and cannot grant other forms of relief, such as private placement or compensatory education." *R.F. v. Cecil Cty. Pub. Schs.*, ___ F.3d ___, ___ 2019 WL 1319830, at *8 (4th Cir. Mar. 25, 2019) (No. 18-1780). In *R.F.*, we stated a three-step inquiry to determine whether a procedural violation results in a substantive violation of the IDEA:

> Under § 1415(f)(3)(E)(ii)(II), an ALJ must answer each of the following in the affirmative

[*] The district court concluded that MCPS committed a procedural IDEA violation, and we agree.

> to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiffs 'alleg[ed] a procedural violation,' (2) whether that violation 'significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child,' and (3) whether the child 'did not receive a [FAPE] as a result.

R.F. 2019 WL 1319830, at *8, *citing* 20 U.S.C. § 1415(f)(3)(E). Applying this test, we find that the district court did not err. We have reviewed the extensive record in this case and find no reversible error. Although there may have been procedural violations of the IDEA, E.S. received a FAPE. Accordingly, in addition to relying on our recent test outlined in *R.F.*, we affirm for the reasons stated by the district court. *E.S. v. Smith*, No. 8:17-cv-03031-PWG (D. Md. July 23, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX F

[p.53]

Nicholas Krayger (Direct by Mr. Steedman)

Okay? I'm just rounding off here.

A. Right.

Q. Twenty-six hours, subtract another -- let's say this was three hours and 40, let's just round it up to four hours. So now, we're down to 18 hours -- no, 22 hours.

A. Yes.

Q. Twenty-two hours. Okay.

So, she needed to be outside of general ed -- well, she couldn't be in general ed 22 hours, correct?

A. Correct.

Q. She was nowhere near being able to handle being in a general education classroom 22 hours, correct?

A. In my opinion.

Q. That would have been completely inappropriate for her to be in a general education classroom 22 hours per week, correct?

A. Correct.

Q. Okay.

And when did you come to that conclusion?

A. Within the first few weeks of school.

Q. Okay.

So that would have been sometime in

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September?

A. Yes.

Q. Okay.

But there wasn't an IEP meeting until December?

A. Correct.

Q. So the IEP -- so you basically changed the IEP or at least your implementation of the IEP without an IEP meeting, correct?

A. Correct.

Q. You didn't consult with Mr. and Mrs. F. about that change before making it, did you?

A. Mrs. F. frequently visited the school and was aware of the amount of time R.F. spent in the regular classroom and encouraged time in the special classroom.

Q. Did you at any time sit down with Mr. and Mrs. F. and say look, here's what the IEP says but I'm going to do something different because this is inappropriate for her.

Did you ever say that to them?

A. I believe I had a conversation with Mrs. F. --

Q. Uh-huh.

A. -- stating that I did not believe that the

* * *

[p.60]

Q. I said before I want all the data. That was part of the subpoena and the response I received was that it's all in here. So where -- so -- but it's not in here.

A. The report of the raw data is in here.

Q. Right. And I asked for the data. Where is the data?

A. The data was collected, reported and destroyed.

Q. You destroyed the data?

A. Yes.

Q. Is that best practice in special education?

A. Because the raw data can be perceived in many ways, I believe so.

Q. So when you have an IEP -- and is that true of all the raw data that you had collected on R.F.? Have you destroyed all the raw data?

A. I have a data notebook. I believe that there's somewhere a narrative, and I've kept narrative information, So no, I don't believe that's accurate.

Q. So you have raw data?

A. I believe some.

Q. That you have not provided?

A. I believe it's in the binder.

Q. Can you show me where that is?

* * *

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Dr. Carol Quirk (Cross by Mr. Steedman)

and you left at 10:26. Does that sound right?

A. Yes.

Q. So you were there less than two hours?

A. Yes.

Q. About an hour and 48 minutes according to my calculation.

A. Yes.

Q. Part of that time was in the self-contained class, the intensive communication class, correct?

A. Yes.

Q. And then it looked like about -- according to your notes that I'm reading here, you went into the general education classroom -- R.F. went into the general education classroom at 10:00 a.m., does that sound right?

A. Yes.

Q. And stayed until 10:26, correct?

A. Yes.

Q. And that was a reading class, is that right?

A. It was first grade and they were reading.

Q. Okay.

And did anyone indicate one way or the other whether that was the normal schedule for her?

A. I believe that the teacher said that they did normally try to go into the first grade class and

[p.778]

sometimes it depended on, you know, R.F. herself and what she needed. So I don't know if it was something they did every single day.

Q. You put an entry in here at 10:21 it looks like, where it said the students asked if R.F. is in their class?

A. Yes.

Q. Would that indicate to you that that was not typical for her to be there when the students are wondering is she in their class?

A. No. Because they knew her. They knew who she was and they weren't at all surprised when she came in. It wasn't a big deal. There wasn't a big announcement. She just blended in.

And when a couple of students were asked if they would read with her, they did so without any apparent, you know, it wasn't a big deal for them.

The question had more do with them asking -- like, does she belong -- like, why wasn't she there longer? Does she belong with them? Like, is she a first grader. And that's when the teacher responded and said, well, she is part of our class. But she needs, sometimes her own instruction outside of the class.

Q. You didn't report that in your notes,

* * *