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**PER CURIAM OPINION, U.S. COURT OF
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(NOVEMBER 3, 2023)**

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID HOWARD PLOTKIN,

Plaintiff-Appellant,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS,

Defendant-Appellee.

No. 22-2073

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Theodore D. Chuang, District Judge.
(8:17-cv-00571-TDC)

Before: KING and THACKER, Circuit Judges,
and FLOYD, Senior Circuit Judge.

PER CURIAM:

David Plotkin appeals the district court's order granting judgment on the pleadings to Montgomery County Public Schools ("MCPS") and concluding that Plotkin's son, O.P., received a free appropriate public education ("FAPE") in mathematics during the third

grade. On appeal, Plotkin argues that because MCPS did not fully implement O.P.'s Individualized Education Plan ("IEP"), O.P. was necessarily deprived of a FAPE. For the following reasons, we affirm.

The Individuals with Disabilities Act ("IDEA") offers federal money to states in exchange for a commitment to provide a FAPE to all children with certain disabilities. *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 158 (2017). "A FAPE means special education and related services that are (1) without charge, (2) meet the standards of the state educational agency, (3) include the appropriate level of education in the state involved and (4) are provided in conformity with an [IEP] as required by the IDEA." *K.I. v. Durham Pub. Schs. Bd. of Educ.*, 54 F.4th 779, 784-85 (4th Cir. 2022) (internal quotation marks omitted). The IEP is "the primary vehicle for ensuring the student receives a FAPE." *Id.* at 785.

"In IDEA cases, we conduct a modified de novo review, giving due weight to the underlying administrative proceedings." *R.F. ex rel. E.F. v. Cecil Cnty. Pub. Schs.*, 919 F.3d 237, 244 (4th Cir. 2019) (internal quotation marks omitted). Giving "due weight" means that "findings of fact made in administrative proceedings are considered to be prima facie correct, and if a reviewing court fails to adhere to them, it is obliged to explain why." *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 531 (4th Cir. 2002). If the administrative findings of fact are not regularly made, however, they are not entitled to deference. *Cnty. Sch. Bd. of Henrico Cnty. v. Z.P. ex rel. R.P.*, 399 F.3d 298, 305 (4th Cir. 2005). "Factual findings are not regularly made if they are reached through a process that is far from the accepted norm of a fact-finding process." *Id.*

(internal quotation marks omitted). In all cases, however, “the ultimate decision as to whether the state has complied with the IDEA is an independent decision made by the district court.” *R.F.*, 919 F.3d at 245 (internal quotation marks omitted). Even so, when “making this independent decision, courts should not substitute their own notions of sound educational policy for those of the school authorities which they review.” *Id.* (internal quotation marks omitted).

“Whether a state has violated the IDEA has procedural and substantive components. Procedurally, the state must comply with the stated requirements of the IDEA. Substantively, the state must offer the child a FAPE.” *Id.* (internal citation omitted). “A procedural violation of the IDEA may not serve as the basis for recovery unless it resulted in the loss of an educational opportunity for the disabled child.” *TB., Jr. ex rel. TB., Sr. v. Prince George’s Cnty. Bd. of Educ.*, 897 F.3d 566, 573 (4th Cir. 2018) (internal quotation marks omitted). A procedural violation “that did not actually interfere with the provision of a FAPE is not enough. Rather, the procedural violation must have caused substantive harm. Specifically, the prospect of recovery for a procedural violation of the IDEA depends on whether the student’s disability resulted in the loss of a FAPE.” *Id.* (internal citation and internal quotation marks omitted). At base, the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 580 U.S. at 403.

First, we conclude that the administrative law judge’s (“ALJ”) findings were regularly made. Therefore, we consider the ALJ’s findings to be *prima facie* correct. We further agree with the district court that MCPS’

failure to adhere to the IEP constitutes a procedural violation of the IDEA.

Plotkin argues that O.P. was denied a FAPE because his IEP was not properly implemented. However, the record shows that O.P. received satisfactory marks in the classroom, that O.P.'s test scores improved more than the average student's scores, and that O.P.'s overall test scores were negatively impacted by his anxiety during testing. On this record, we conclude that the district court did not err in holding that O.P. was not denied a FAPE.

Accordingly, we affirm the district court's decision. 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

**MEMORANDUM OPINION, U.S. DISTRICT
COURT FOR THE DISTRICT OF MARYLAND
(SEPTEMBER 15, 2022)**

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

DAVID HOWARD PLOTKIN,

Plaintiff,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS,

Defendant.

Civil Action No. TDC-17-0571

Before: Theodore D. CHUANG,
United States District Judge.

MEMORANDUM OPINION

Plaintiff David Howard Plotkin, who is self-represented, filed suit in this Court under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-82 (2018), against Defendant Montgomery County Public Schools ("MCPS") asserting that from May 5, 2015 to May 5, 2016, his son O.P. did not receive one-on-one math instruction outside the general education classroom, known as "pull-out instruction," as required by O.P.'s Individualized Education Program ("IEP"). Plotkin seeks review of the decision on remand

in *Plotkin v. Montgomery County Public Schools*, OAH No.: MSDE-MONT-OT-20-25740 (Jan. 15, 2021) (the “Decision on Remand”), in which an Administrative Law Judge of the Maryland Office of Administrative Hearings denied his IDEA due process claim against MCPS. Pending before the Court are Plotkin’s Motion for Judgment on the Administrative Record and MCPS’s Cross Motion for Judgment on the Administrative Record. ECF Nos. 67, 68. Having reviewed the submitted materials, the Court finds no hearing necessary. See D. Md. Local R. 105.6. For the reasons set forth below, Plotkin’s Motion will be DENIED, and MCPS’s Motion will be GRANTED.

BACKGROUND

I. Factual History

O.P. is a student with disabilities, specifically high-functioning autism, who was eligible for special education under the IDEA and had an IEP for the 2015-2016 school year during which he was in third grade. During that school year, O.P. attended Wood Acres Elementary School (“Wood Acres”) in Bethesda, Maryland and was taught primarily in a general education classroom. Under O.P.’s 2015-16 IEP (the “IEP”), MCPS was supposed to provide O.P. with 10 hours of pull-out instruction each week, consisting of instruction outside of his regular classroom. Over the course of the 2015-16 school year, O.P. received 6.5 of those weekly hours for reading instruction, but he did not receive the remaining 3.5 hours, which were supposed to be used for math instruction.

Instead of pull-out math instruction, O.P. received all of his third-grade math instruction in the general

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education classroom. O.P.'s teacher, Catherine Kashatus, typically began O.P.'s math class with a mini-lesson and warm-up with the whole class, after which the class was broken up into four groups. The groups varied from day to day, and placement in a particular group was based on Kashatus's daily assessments of student performance. The first group worked on basic math skills such as addition and subtraction or, later in the year, multiplication and division. A second group worked on whatever math concept had been introduced in the mini-lesson. The third group worked with hands-on manipulatives or played interactive games to reinforce mathematical concepts. The final group consisted of students who needed individualized support or enrichment. O.P. was "consistently" placed in the individualized instruction group and, according to Kashatus, "needed a lot of support and additional practice in order to develop his conceptual understanding." Joint Record ("J.R.") at 36, ECF No. 57-1. The instruction provided was at the third-grade level, and O.P. received an overall grade of "proficient" in math at the end of the year. *See* J.R. 138, 144.

Consistent with his IEP, O.P. was given preferred seating at the front of the room for the mini-lesson and then was seated close to Kashatus for the small-group work. Math vocabulary was placed on the wall, he was given additional time for testing and certain other activities, and he was given hands-on manipulatives to help him with his conceptual understanding. O.P. also had a one-to-one paraeducator, Portia Davis, who assisted him in the classroom. Davis was expected to help O.P. with the math lesson as well as with issues of self-regulation and self-control.

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At the start of third grade, O.P.'s test score on the math portion of the Measure of Academic Progress ("MAP") state standardized test was 169, placing him at the first-grade level. By the end of the year, his score had increased to 183, placing him somewhere between the first-grade and second-grade levels. His knowledge growth was thus 14.0 points, slightly above the average increase for third graders of 13.0. O.P.'s MAP score at the beginning of the year placed him in the 5th percentile. By the end of the year he was in the 11th percentile.

The MAP score is further broken down into four topic areas: (1) number and operations, (2) measurement and data, (3) operations and algebraic thinking, and (4) geometry. O.P.'s most significant improvement was in number and operations, in which his MAP score increased from 165 to 191, for an increase of 26.0, which took him from between the kindergarten and first-grade levels to between the first-and second-grade levels. In measurement and data, his score went from 175 to 182, for an increase of 7.0, with both scores placing O.P. between the first-and second-grade levels. In operations and algebraic thinking, O.P.'s score over the course of the year went from 159 to 173, for an increase of 14.0, with both scores between the kindergarten and first-grade levels. In geometry, however, O.P.'s score went from 176 to 186, with an increase of 10.0, which meant that while his score started at the second-grade level, it dropped to between the first-and second-grade levels over the course of the year. Throughout third grade, O.P. received weekly private math tutoring at his parents' expense.

From April to June 2016, O.P. underwent a series of tests as part of an independent neuropsychological

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evaluation conducted by Dr. Patricia Gates Ulanet, a developmental neuropsychologist. As to general cognitive ability, Dr. Ulanet administered the Wechsler Intelligence Test for Children, Fifth Edition ("WISC-V") IQ test. O.P.'s overall score placed him in the Average range. On math skills in particular, she administered the Wechsler Individual Achievement Test-III ("WIAT-III") Math Problem Solving test, on which O.P. scored in the 10th percentile, placing him at a 2.2 grade level. On the WISC-V Arithmetic test, which Dr. Ulanet also administered, O.P. scored in the 16th percentile. Due to anxiety and dysregulation problems, O.P. was unable to complete a third test, the WIAT-III Numerical Operations test. Although O.P. scored below grade level on the math tests, Dr. Ulanet believed that based on O.P.'s cognitive ability, he had the potential to learn at grade level.

While O.P.'s standardized test results placed him at no higher than a second-grade level in math, at the end of third grade, O.P. had earned a mix of Ps and Is on his formative "exit card" assessments, corresponding to "proficient" and "in process," and received Ns, corresponding to "not yet" proficient, or not proficient, only "very rarely[.]" J.R. 43. According to Kashatus, these grades reflected that, with support, O.P. was performing at grade level in math. In Kashatus's opinion, O.P. also benefited from instruction in a classroom with his peers, who helped him develop his understanding of the relevant math language and his socialization skills. According to Brenda Browne, an MCPS Instructional Specialist, the discrepancy between the grade level of O.P.'s math skills as reflected in his test scores and Kashatus's assessment that his math skills were at grade level could be accounted for by O.P.'s

test anxiety. This assessment was somewhat contradicted by Dr. Ulanet, who testified that the time constraints of standardized tests were not necessarily anxiety provoking for O.P.; rather, what caused him to become dysregulated was being confronted with something he did not understand.

II. Procedural History

On September 22, 2016, following O.P.'s completion of third grade, Plotkin filed a due process complaint on behalf of O.P. with Maryland's Office of Administrative Hearings. In his due process complaint, Plotkin claimed that MCPS had denied O.P. a free appropriate public education ("FAPE") in violation of the IDEA by failing to provide "special education instruction in math, in a separate special education classroom from May 5, 2015 to May 5, 2016 as required by the [IEP]." J.R. 347. As a remedy, Plotkin sought 270 hours of compensatory outside math tutoring services and reimbursement for neuropsychological testing.

Following the filing of Plotkin's due process complaint, an administrative hearing was held over the course of two days from November 2, 2016 to November 3, 2016 before Administrative Law Judge Lorraine E. Fraser ("the ALJ"). The ALJ admitted a total of 37 exhibits from both parties. During the hearing, Plotkin presented direct testimony from five witnesses, including: (1) Travis Wiebe, the former Assistant Principal of Wood Acres; (2) Patrick Scott, the former Principal Intern at Wood Acres; (3) Catherine Kashatus, O.P.'s third grade teacher at Wood Acres, who was accepted as an expert in elementary school instruction; (4) Dr. Patricia Gates Ulanet, who was accepted as an expert in developmental neuropsychology with a specialization

in autism; and (5) Rori Brown, O.P.'s special education case manager at Wood Acres, who was accepted as an expert in special education. MCPS presented testimony from three witnesses, consisting of (1) Kashatus; (2) Brown; and (3) Brenda Browne, an MCPS Instructional Specialist, who was accepted as an expert in special education with an emphasis in instructional math and reading.

In a 20-page opinion issued on November 10, 2016, the ALJ found that O.P. had made academic progress and had received "some educational benefit" from the instruction he had received in third grade and thus concluded that despite the failure of MCPS to provide the pull-out instruction specified in O.P.'s IEP, O.P. had received a FAPE. J.R. 20. The ALJ rendered this decision pursuant to the standard articulated in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), in which the United States Supreme Court equated a FAPE to an education "sufficient to confer some educational benefit[.]" *Id* at 200.

In response to the ALJ's decision, Plotkin filed suit in this Court on February 27, 2017, again asserting that MCPS violated the IDEA by failing to provide O.P. with special education math instruction required by his IEP. Shortly after the filing of the Complaint, however, the Supreme Court decided *Endrew F. ex rel. Joseph F. v. Douglas County School District*, 137 S. Ct. 988 (2017), in which it revised the definition of FAPE to the more demanding standard of an "educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001. Because the ALJ's initial determination was made without the benefit of the

Supreme Court's guidance in *Endrew F.*, this Court denied dispositive motions filed by both sides, remanded the case to the ALJ to reweigh the evidence under the *Endrew F.* standard, and stayed the present case. In its remand order, the Court advised that the ALJ should evaluate the impact of various pieces of evidence on the overall assessment of O.P.'s progress and account for O.P.'s topic-specific performance on the MAP test. The Court further advised that the ALJ should account for Plotkin's testimony that, while in the third grade, O.P. received weekly private tutoring in math and consider what the evidence shows about the impact that the tutoring may have had on O.P.'s progress that would not be attributable to his in-school instruction. Finally, the Court requested an explanation of why the ALJ chose to credit certain witnesses and not others and to address how she reconciled Dr. Ulanet's assertion that O.P. has the cognitive ability to perform at grade level in math with O.P.'s test results and the testimony of his MCPS teachers.

On January 15, 2021, the ALJ issued the Decision on Remand, again finding that MCPS had provided O.P. with a FAPE and declining to award compensatory services in math or reimbursement for his neuropsychological evaluation. In particular, the ALJ credited testimony that O.P. exhibited anxiety during testing and found that such anxiety "would cause him to not demonstrate his full capabilities on tests" such that "the truer measure of [his] abilities in math was his actual performance on third grade level work in the classroom." Decision on Remand at 25, ECF No. 67-2. Where Kashatus and Brown had observed him in class while Plaintiff's expert, Dr. Ulanet, based her

opinion of O.P.'s ability in math on his testing performance alone, the ALJ found the testimony of Kashatus and Brown to be "more credible and more compelling as to [O.P.'s] performance in math on the third grade level." *Id.* For the same reasons, the ALJ found that O.P.'s topic-specific performance on the MAP test was "not a full measure of the [his] abilities in math." *Id.* The ALJ characterized MCPS's deviation from O.P.'s IEP as an "error" but concluded that where O.P. had nevertheless "made progress in third grade math appropriate to his circumstances" without pull-out instruction, he had received a FAPE as required by the IDEA. *Id.* at 22-23, 26.

Plotkin again seeks review of the ALJ's denial of his due process complaint and appeals the ALJ's Decision on Remand pursuant to 20 U.S.C. § 1415(i)(2).

DISCUSSION

In the pending cross Motions for Judgment on the Administrative Record, the parties both seek judgment in their favor. Plotkin argues that "[b]y failing to implement portions of the IEP, MCPS changed the I[E]P without notifying the parents in advance," and that this failure constitutes [a] violation of the IDEA's procedural requirements" that entitles him to relief "even if it cannot be directly established that O.P. was deprived of educational benefits or a [FAPE]." Pl.'s Mot. at 16-17, ECF No. 67. Plotkin therefore claims that the ALJ erred by failing to hold MCPS in violation of the IDEA for its failure to provide pull-out instruction in math during third grade, and he disputes the ALJ's conclusion that O.P. made progress appropriate to his circumstances during the relevant time period. For its part, MCPS acknowledges that it

deviated from O.P.'s IEP by providing him only with supported math instruction in a general education classroom, without pull-out instruction. Nevertheless, MCPS argues that the ALJ's decision should be affirmed because the math instruction O.P. received in the general education classroom was provided in the least restrictive environment and was reasonably calculated to enable him to make appropriate progress in light of his circumstances, such that any procedural violation of the IDEA did not deny O.P. access to a FAPE.

I. Legal Standard

The IDEA "provides funds for states to educate children with disabilities, subject to conditions imposing substantive requirements on the education that is provided." *R.F. ex rel. E.F. v. Cecil Cnty. Pub. Schs.*, 919 F.3d 237, 241 (4th Cir. 2019). Specifically, it requires that recipient states provide a FAPE to children with disabilities. 20 U.S.C. § 1412(a)(1)(A). A FAPE includes "special education," consisting of "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability," and "related services . . . as may be required to assist a child with a disability to benefit from special education[.]" *Id.* §§ 1401(9), 1401(26), 1401(29). Under the IDEA, children receiving special education must be educated in the "least restrictive environment . . . with children who are not disabled" to "the maximum extent appropriate[.]" *Id.* § 1412(a)(5).

Parents seeking to enforce their children's rights under the IDEA must begin by filing a due process complaint. *See* 20 U.S.C. §§ 1415(b)(6), (f). The relevant state or local educational agency must then hold an

“impartial due process hearing” addressing the claims. *Id.* § 1415(f). At the conclusion of the administrative process, the parents may assert the same rights asserted in the due process complaint in a civil action in either state court or federal district court. *Id.* § 1415(i)(2). A district court reviewing a decision of the educational agency “(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” *Id.* § 1415(i)(2)(C).

In reviewing the decision of the ALJ in an IDEA case, a district court must apply a “modified de novo review; ‘giving due weight to the underlying administrative proceedings.’” *R.F.*, 919 F.3d at 244-45 (quoting *MS. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 323 (4th Cir. 2009)); *see also* *Rowley*, 458 U.S. at 206. In the evaluation of the administrative record, findings of fact which are “made in a regular manner and with evidentiary support” are considered “*prima facie*” correct, and a reviewing court that does not adhere to the factual findings must explain its deviation. *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). To determine whether an ALJ’s findings were “regularly made,” a district court “should examine the way in which the state administrative authorities have arrived at their administrative decision and the methods employed.” *Id.*; *see J.P. ex rel. Peterson v. Cnty Sch. Bd. of Hanover Cnty.*, 516 F.3d 254, 259 (4th Cir. 2008) (“When determining whether a hearing officer’s findings were regularly made, our cases have typically focused on the process through which the findings were made.”). Findings of fact are

not “regularly made” and are therefore “entitled to no weight” if an administrative officer departs “so far from the accepted norm of a fact-finding process designed to discover truth[.]” *Doyle*, 953 F.2d at 104. Even if the district court determines that an ALJ’s regularly made findings of fact are entitled to deference, the district court must make “an independent decision based on its view of the preponderance of the evidence” and decide “whether the state has complied with the IDEA[.]” *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484 (4th Cir. 2011); see 20 U.S.C. § 1415(i)(2)(C)(iii). 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.’” *R.F.*, 919 F.3d at 245 (quoting *Rowley*, 458 U.S. at 206). The party challenging the administrative decision bears the burden of proof to establish an IDEA violation. *Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991).

Here, the ALJ heard two days of testimony from six witnesses on direct and cross examination, admitted 37 exhibits, and issued two opinions detailing her factual findings and conclusions of law. On the basis of this record, the Court concludes that the ALJ’s factual findings were “made in a regular manner[.]” *Doyle*, 953 F.2d at 105; see also *Sch. Bd. of the City of Suffolk v. Rose*, 133 F.Supp.3d 803, 821 (E.D. Va. 2015) (finding that the hearing officer’s findings of fact were entitled to due weight where the 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”). As discussed below, the ALJ’s factual findings are also supported by the evidence and are

therefore presumed to be *prima facie* correct. *See Doyle*, 953 F.2d at 105.

II. Pull-Out Instruction

Plotkin argues that MCPS violated the IDEA during O.P.'s third grade year by failing to provide O.P. with the 3.5 hours of weekly pullout math instruction specified in his IEP, while MCPS argues that this deviation constitutes only a procedural violation of the IDEA, which must actually interfere with the provision of a FAPE in order for Plotkin to obtain relief. Where O.P. made progress in math during this time period, MCPS argues that he received a FAPE as required by the statute.

The determination of whether a state has violated the IDEA has procedural and substantive components. "Procedurally, the state must comply with the stated requirements of the IDEA. 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." *R.F.*, 919 F.3d at 245 (internal citation omitted).

A. Procedural Violation

To ensure delivery of a FAPE, the IDEA requires a school district to provide an appropriate IEP for each child determined to have a disability requiring special education and related services. *See* 20 U.S.C. §§ 1412 (a)(4), 1414(d)(1)(A). Under the IDEA, a school must ensure that a child's IEP team "revises the IEP as appropriate to address . . . the child's anticipated needs . . . or other matters." 20 U.S.C. § 1414(d)(4)(A). However, a school must follow certain procedures

before changing a child's placement as identified in the IEP, including providing written prior notice to the child's parents before the local education agency changes a child's educational placement. *See* 20 U.S.C. §§ 1415(b)(3), (c)(1). The United States Court of Appeals for the Fourth Circuit has held that deviation from a student's IEP without such notice constitutes a procedural violation of the IDEA. *See, e.g., R.F.*, 919 F.3d at 247-48 (holding that a school's change to the number of hours of pull-out instruction specified in an IEP without notifying the student's parents "constitutes a procedural violation"). Here, as in *R.F.*, the record supports the finding that MCPS deviated from the IEP by changing the number of hours of pull-out instruction provided to O.P. between May 5, 2015 and May 5, 2016. Where MCPS concedes that O.P.'s parents were not notified of the change, as required by 20 U.S.C. § 1415(b)(3), until December 2015, and Plotkin testified that he was not informed until March 2016, MCPS's failure to implement the pull-out instruction portions of O.P.'s IEP constitutes a procedural violation of the IDEA.

B. Substantive Violation

Plotkin argues that MCPS's failure to adhere strictly to O.P.'s IEP by itself constitutes a violation of the IDEA entitling him to relief, regardless of the educational impact. Plotkin relies on *Van Duyn v. Baker School District 5J*, 502 F.3d 811 (9th Cir. 2007), in which the United States Court of Appeals for the Ninth Circuit held that a "material failure to implement an IEP violates the IDEA" and defined a "material failure" as occurring when "there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the

child's IEP." *Id.* at 822. This standard "does not require that the child suffer demonstrable educational harm in order to prevail." *Id.* In the Fourth Circuit, however, a procedural violation of the IDEA does not entitle a plaintiff to the type of compensatory relief sought by Plotkin unless it "actually interfere[s] with the provision of a FAPE." See *TB. v. Prince George's Cnty. Bd. of Educ.*, 897 F.3d 566, 573 (4th Cir. 2018). As the court held in *TB.*:

A procedural violation of the IDEA may not serve as the basis for recovery unless it resulted in the loss of an educational opportunity for the disabled child. A mere technical contravention of the IDEA that did not actually interfere with the provision of a FAPE is not enough. Rather, the procedural violation must have caused substantive harm. Specifically, the prospect of recovery for a procedural violation of the IDEA depends on whether the student's disability resulted in the loss of a FAPE. Thus, this court has held procedural violations to be harmless where the student nonetheless received an IEP and achieved reasonable educational progress.

Id. at 573 (internal citations omitted).

The Fourth Circuit reiterated this principle in *R.F.*, in which it stated 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 . . . compensatory education." *R.F.*, 919 F.3d at 248. In *R.F.*, the parents of a student with severe autism argued that the school district violated the IDEA by providing the student with

more instruction hours in a segregated intensive communication support classroom ("ICSC"), and fewer hours in a general education setting, than specified in her IEP. *See id.* at 242, 247-48. Although R.F.'s IEP called for 14 hours and 35 minutes of general education classroom instruction per week, *id.* at 242, her special education teacher later "determined that she would make more progress" by spending more time in the ICSC and adjusted her ICSC hours accordingly. *Id.* at 248. Notably, R.F. was the only student in the ICSC during much of this time, and the plaintiffs argued that the increased pull-out instruction thus also violated the least restrictive environment requirement of the IDEA. *See id.* at 246-47; 20 U.S.C. § 1412(a)(5). Nevertheless, the Fourth Circuit held that the deviation from R.F.'s IEP did not amount to a substantive violation of the IDEA because the "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.'" *R.F.*, 919 F.3d at 248 (quoting *Endrew F.*, 137 S. Ct. at 999). The Court must apply the standards set forth in *T.B.* and *R.F.*, which are controlling authority, rather than the standard set forth in *Van Duyn*, which is not.

Under *R.F.*, the determination of whether a procedural violation entitles a plaintiff to compensatory relief consists of an assessment of whether the school's deviation from the IEP resulted in a violation of the substantive requirements of the IDEA, specifically, a denial of a FAPE under the standard set forth in *Endrew F.* Under *Endrew F.*, "No 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. For example, for a child fully integrated into the regular classroom, an IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* Ensuring that an IEP is "reasonably calculated" to meet a student's needs "requires a prospective judgment by school officials," and "[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.* "[W]hether or not a program is appropriate is a matter of fact." *Doyle*, 953 F.2d at 105. The IDEA "requires great deference to the views of the school system rather than those of even the most well-meaning parent." *A.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004).

The IDEA also requires that a student with an IEP be placed in the least restrictive, appropriate environment:

To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A); see *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989) (stating that "Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non-

handicapped children is not only a laudable goal but is also a requirement of the Act"); *MM. v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 526 (4th Cir. 2002) (holding that special education services "must be provided to a disabled child in the least restrictive and appropriate environment, with the child participating, to the extent possible, in the same activities as non-disabled children"). The Court therefore must consider whether the failure to provide the pull-out math instruction resulted in the denial of a FAPE to O.P.

Based on its findings of fact, the ALJ concluded that although MCPS deviated from the IEP by failing to provide pull-out math instruction to supplement O.P.'s instruction in a general education classroom with paraeducator support, it still met its substantive obligation to provide O.P. with a FAPE. The ALJ reached this conclusion based on the observations and analysis of the MCPS teachers and educational experts relating to O.P.'s classroom performance, O.P.'s grades, and O.P.'s test results.

1. Classroom Performance

The ALJ's finding that O.P. did in fact receive educational benefit that enabled him to make appropriate progress in math during third grade was based in significant part on the testimony of the MCPS educators who had firsthand observations of his development during the 2015-2016 school year. Rori Brown, O.P.'s third grade special education case manager and an expert in special education, testified that she had decided that even though Wood Acres had the ability to conduct the pull-out instruction sessions, it would be better for O.P. to instead receive small group math instruction within Kashatus's general education

classroom. Brown reached this conclusion after receiving input from other IEP team members, who informed her that O.P. was "progressing well" and "didn't require additional reteaching aside from what reteaching was already given to him in the [general education] classroom setting." J.R. 70. Brown further testified that based on her personal observations of O.P.'s class, O.P. "was doing quite well in the current [general classroom] setting," which was both "best . . . and . . . very appropriate for him" due to the fact that "Kashatus has great classroom management skills" and "worked with [O.P.] daily in small group" alongside "a one-on-one paraeducator." J.R. 64. Moreover, Kashatus testified that it was "more difficult sometimes" for O.P. to transition between the general education classroom and the special education classroom where he received pull-out instruction because "he would leave during science or social studies, and we always did group activities and he enjoyed being part of our class during that time," thus demonstrating an educational cost associated with removing O.P. from the classroom for pull-out instruction that could be avoided if such instruction was not necessary for O.P. to make progress. J.R. 46. In light of this evidence, Brown concluded that supported math instruction in a general education classroom "was the perfect setting" for O.P. J.R. 64. Thus, the decision to forgo the pull-out instruction was a conscious decision made by MCPS based on an individualized assessment of O.P.'s performance and the benefits he would receive in Kashatus's general education classroom.

As for O.P.'s performance in this setting, Kashatus testified that O.P. "receiv[ed] instruction on grade level" and "did perform on grade level in many of the

assessments" he received during third grade. J.R. 36. She also testified that he "absolutely" benefited from being in a general education classroom because he was "exposed to the reasoning language that the other students were using" in her general education classroom, which "helped to give him the math language that he needed to use," and that O.P. "really benefited from that in the main classroom, as opposed to a pull-out classroom because there were many strong students who consistently modeled that kind of language through discussion." J.R. 42. Plotkin's expert witness, Dr. Ulanet, agreed that O.P. benefited from positive role modeling by the other students in Kashatus's classroom. As Kashatus testified, the math instruction within her classroom also advanced O.P.'s separate "Social Skills" IEP goal of "maintain[ing] appropriate interactions with peers." J.R. 42, 218.

Similarly, Brenda Browne, the MCPS instructional specialist and special education expert, testified that by the end of third grade, O.P.'s "overall mathematics grade was proficient" and that he was "found to be proficient overall in third-grade math." J.R. 138. Kashatus confirmed that O.P. had earned a mix of Ps and Is on his formative assessment "exit cards," corresponding to "proficient" and "in process," and received Ns, corresponding to "not yet" proficient, only "very rarely[.]" J.R. 43. More specifically, Kashatus also testified that O.P. made progress on the math goals of his IEP, achieving objectives 1, 2, and 3, and making progress toward objective 4 by solving word problems on his own occasionally and at other times with support. Thus, the testimony by the MCPS educators, including O.P.'s own teacher, supports the conclusion that MCPS's decision to focus O.P.'s math instruction

within the general education classroom was “reasonably calculated” to enable him to “achieve passing marks and advance from grade to grade” as required by the IDEA. *Endrew F.*, 137 S. Ct. at 999. Where courts are not to “substitute their own notions of sound educational policy for those of the school authorities which they review” in light of the “expertise and the exercise of judgment by school authorities,” the Court credits the determinations made by the MCPS educators. *Id.* at 1001; *see also Wagner v. Bd. of Educ. of Montgomery Cnty.*, 340 F.Supp.2d 603, 611 (D. Md. 2004) (noting that “this court owes generous deference (as did the ALJ) to the educators on [the] IEP Team”).

In opposing this conclusion, Plotkin relies on the testimony of his expert witness, Dr. Ulanet, who asserted the opinion that O.P. needed both the general education classroom instruction and the separate pull-out instruction in math. J.R. 61. However, in the Decision on Remand, the ALJ specifically stated that she found the testimony of Kashatus and Brown to be “more credible and more compelling as to [O.P.’s] performance in math on the third grade level” because they had observed O.P.’s classroom performance while Dr. Ulanet based her opinion of O.P.’s performance in math on only the test results. Decision on Remand at 25. Indeed, in her hearing testimony, Dr. Ulanet admitted that she never actually observed O.P. during math instruction in Kashatus’s class and “was not aware” that O.P. was receiving one-on-one paraeducator support for math throughout the school day. J.R. 60. Likewise, Brown testified that Dr. Ulanet had observed O.P. in the general education classroom setting for only “approximately ten minutes” while students “were getting back from reading, transitioning to lunch and

recess.” J.R. 112. Where the ALJ’s findings relating to Dr. Ulanet’s testimony were “made in a regular manner and with evidentiary support,” the Court will credit the ALJ’s credibility determinations on this issue and likewise accepts the MCPS experts’ opinions as more credible because they are based on extensive observations of O.P. as well as test results. *Doyle*, 953 F.2d at 105; *Wagner*, 340 F.Supp.2d at 611 (stating that “in according due weight to the findings of the ALJ, this court owes deference to the ALJ’s determinations of the credibility of witnesses”).

Notably, the actual educational environment provided to O.P. had many of the characteristics recommended by Dr. Ulanet. Dr. Ulanet testified that for O.P. to make appropriate progress in math, “a small group of 6 to 8 would be appropriate if the environment is managed and calm and quiet,” and he should have “regular follow-up episodes of one-to-one support.” J.R. 61. Here, the math instruction provided to O.P. in Kashatus’s classroom included “daily . . . small group” instruction in groups “as small as two or three, but . . . never larger than six”; a “one-on-one paraeducator” to support him, particularly during times when was supposed to work at his seat; and an environment that was “very quiet” and “not loud and chaotic . . . at all.” J.R. 39, 64, 112. Under these circumstances, The Court does not find that Dr. Ulanet’s opinions warrant a determination that the pull-out instruction was necessary to provide O.P. with a FAPE.

2. Standardized Tests

Although Plotkin has argued that O.P.’s MAP standardized test results demonstrate a lack of appropriate progress, and even “showed regression in overall

mathematics performance,” see Pl.’s Reply at 8, ECF No. 69, a review of those results reveals evidence that is consistent with the ALJ’s conclusion. O.P.’s results on the MAP tests show substantial overall gains in math proficiency during the 2015-2016 school year, with his overall Rausch Unit (“RIT”) score rising from 169 in Fall 2015 to 183 in Spring 2016, for a total of 14 points of growth during his time in Kashatus’s class. See J.R. 300. Significantly, this 14-point increase was higher than the average of 13 points of growth for a child in third grade. Compare J.R. 30.0 with J.R. 305. Likewise, the data shows that while O.P.’s MAP score at the beginning of the school year placed him in the 5th percentile, by the end of the year he had risen to the 11th percentile. Thus, as both Kashatus and Browne testified, O.P.’s standardized test scores showed progress in math. Even Dr. Ulanet conceded that “[O.P.] made progress based on the Common Core principles that were assessed on the MAP, and those were based on curriculum.” J.R. 54.

In attempting to demonstrate an overall regression in math proficiency during third grade, Plotkin compares O.P.’s MAP scores from the end of second grade in Spring 2015 to his MAP results from the end of third grade in Spring 2016, which does not account for learning loss over the summer that cannot be fairly attributed to MCPS’s instruction in third grade. Notably, while the record contains “student growth norms” for Fall 2015 to Spring 2016 MAP test performance, thereby allowing the Court to compare O.P.’s school-year growth to that of his peers, it lacks comparable data to permit a comparison of O.P.’s performance from the end of second grade to the end of third grade. See J.R. 305. Regardless, even when compared to his

test scores in Spring 2015, at the end of second grade, O.P.'s test scores increased in every category.

Plotkin correctly notes that at the end of second grade, O.P.'s test scores corresponded to proficiency somewhere between first-and second-grade levels but closer to the second-grade level, but at the end of third grade, even with the passage of a full school year, O.P.'s test scores corresponded to the same "Grade 1/2" level, but closer to the first-grade level. J.R. 300. The ALJ, however, crediting the testimony of Kashatus and Browne, concluded that O.P. suffered from test anxiety that "would cause him to not demonstrate his full capabilities on tests" such that "the truer measure of [his] abilities in math was his actual performance on third grade level work in the classroom." Decision on Remand at 24-25.

In particular, Browne testified that based on O.P.'s in-class performance, she believed that O.P. was actually performing at a higher level than reflected by the tests results, and that the lower test scores were in part the result of O.P.'s anxiety with taking tests. Although Dr. Ulanet testified that the time constraints of standardized tests were not necessarily anxiety provoking for O.P. and that what caused him to become dysregulated was being confronted with something he did not understand, the ALJ generally credited the testimony of the MCPS experts over that of Dr. Ulanet. Moreover, Dr. Ulanet also acknowledged O.P.'s test anxiety when she stated that "[O.P.] became more anxious and more dysregulated" over the course of a "one-on-one testing situation," J.R. 50, and noted in her report that O.P. was unable to complete the WIAT-III Numerical Operations test due

to his anxiety and dysregulation during the testing session. J.R. 323.

Where O.P.'s test results show that he progressed at a faster than average rate in math during his time in Kashatus's class, and the evidence supports the conclusion that test anxiety prevented O.P.'s test results from fully reflecting his progress in math, the Court finds that the test results are consistent with the conclusion that O.P. made progress appropriate to his circumstances during third grade even without the pull-out instruction.

3. Private Tutoring

Lastly, Plotkin argues that the ALJ "failed . . . to explain" Browne's testimony that "it was impossible to know" whether O.P.'s math improvement during third grade was "a result of after school mathematics tutoring . . . or third grade mathematics instruction in the general education classroom by his teacher Ms. Kashatus." Pl.'s Mot. at 22. Arguably, if O.P.'s progress was the result of the private tutoring arranged by his parents, MCPS's instruction may have been insufficient to provide him with a FAPE. However, as the party challenging the administrative decision, Plotkin, not MCPS, bears the burden of proof to establish an IDEA violation. *See Barnett*, 927 F.2d at 152. As the ALJ stated in the Decision on Remand, no educator or other witness identified what impact the tutoring may have had on O.P.'s progress, and Browne specifically testified that it was not possible to determine what portion of O.P.'s progress was due to tutoring alone. At the same time, Kashatus, Brown, and Browne testified about how the classroom instruction contributed to his academic progress in math. On this record,

Plotkin has not shown that tutoring, rather than classroom education, was responsible for O.P.'s progress in math during the period in question.

4. FAPE

By failing to follow the IDEA's procedures when changing the number of hours of pull-out instruction provided to O.P., MCPS committed a procedural violation of the statute. *See supra* part II.A. However, for Plotkin to receive compensatory relief, that violation must have resulted in the denial of a FAPE to O.P. *See R.F.*, 919 F.3d at 248. Notably, the IDEA does not require an "ideal" education but only one that, based on "a prospective judgment by school officials," is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999. It does "not 'guarantee any particular level of education' nor 'promise any particular [educational] outcome.'" *Id.* at 998 (quoting *Rowley*, 458 U.S. at 192). The IDEA also requires that a student be educated in the least restrictive environment. *See* 20 U.S.C. § 1412(a)(5)(A); *MM*, 303 F.3d at 526.

Under these standards and on this record, the Court concludes that MCPS's decision to deviate from O.P.'s IEP by not providing the pull-out math instruction did not cause O.P. to be deprived of a FAPE. In particular, the Court relies on the testimony of Kashatus, Brown, and Brown, specifically credited by the ALJ over that of Dr. Ulanet, that the math instruction provided in a general education classroom with para-educator support met O.P.'s needs and allowed O.P. to make appropriate progress to the point that he was learning at grade level at the end of third grade, and

that his test anxiety may have negatively influenced his standardized test results. The Court also relies on the fact that the test results themselves showed academic progress during the course of third grade comparable to if not greater than that of the average student. Accordingly, where MCPS's procedural violation of the JDEA did not substantively deny O.P. a FAPE, the Court will affirm the decision of the ALJ. *See R.F.*, 919 F.3d at 247-48.

CONCLUSION

For the foregoing reasons, Plotkin's Motion for Judgment on the Administrative Record, ECF No. 67, will be DENIED, and MCPS's Cross Motion for Judgment on the Administrative Record, ECF No. 68, will be GRANTED. A separate Order shall issue.

/s/ Theodore D. Chuang
United States District Judge

Date: September 15, 2022

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**ORDER, U.S. COURT OF APPEALS FOR
THE FOURTH CIRCUIT DENYING
PETITION FOR REHEARING
(DECEMBER 28, 2023)**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID HOWARD PLOTKIN,

Plaintiff-Appellant,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS,

Defendant-Appellee.

No. 22-2073
(8:17-cv-00571-TDC)

Before: KING and THACKER, Circuit Judges,
and FLOYD, Senior Circuit Judge.

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge King,
Judge Thacker, and Senior Judge Floyd.

For the Court

/s/ Nwamaka Anowi
Clerk

**DECISION OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
(SEPTEMBER 26, 2016)**

**MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS**

O.P.,

Student,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS.

OAH No.: MSDE-MONT-OT-16-29351

**Before: Lorraine E. FRASER, an Administrative
Law Judge of the Maryland Office
of Administrative Hearings.**

STATEMENT OF THE CASE

On September 23, 2016, David Plotkin (Parent) on behalf of his son, Oliver Elliot Plotkin (Student), mailed a Due Process Complaint (Complaint) to the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415 (f)(1)(A) (2010).¹ The request for hearing was received

¹ U.S.C.A. is an abbreviation for United States Code Annotated.

by the OAH and MCPS on September 26, 2016. The Parent waived the resolution session and mediation. The Parent had previously filed a complaint related to this case with the Maryland State Department of Education (MSDE) on May 5, 2016. On July 1, 2016, MSDE found that MCPS acknowledged that the Student did not receive special education instruction in math in a separate special education classroom. MSDE further found that the Student received special education instruction in reading in a separate special education classroom.

In the Complaint, the Parent alleges that the Student did not receive special education instruction in math in a separate special education classroom from May 5, 2015 through May 5, 2016, as stated in the Student's Individualized Education Program (IEP). The Parent's requested remedy is compensatory services of 270 hours of outside math-tutoring and reimbursement for neuropsychological/achievement testing.

I held a telephone prehearing conference on October 13, 2016. The Parent represented himself. Zvi Greismann, Esquire, represented MCPS. By agreement of the parties, the hearing was scheduled for November 2 and 3, 2016.

I held the hearing on November 2 and 3, 2016. The Parent represented himself. Mr. Greismann represented MCPS. The hearing dates requested by the parties were within the forty-five day period after the triggering events described in the federal regulations, making my decision due on the forty-fifth day: November 10,

2016. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2016).²

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2016); 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; MSDE procedural regulations; and the Rules of Procedure of 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 whether the Student was denied free appropriate public education (FAPE) requiring compensatory services in math, and if so, how many hours; and whether MCPS is required to reimburse the Parent for the cost of the neuropsychological/achievement testing.

SUMMARY OF THE EVIDENCE

Exhibits³

I admitted the following exhibits on behalf of the Parent, except as noted:

² C.F.R. is an abbreviation for Code of Federal Regulations.

³ The Parent and MCPS prenumbered their exhibits; I have retained their numbering. Some exhibits are duplicative of the other party's exhibits. Please note, not all exhibits were offered and/or admitted into evidence.

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- Parent 1 Résumé for Patricia Gates Ulanet, PsyD.,
Center for Assessment and Treatment
- Parent 2 Special Education State Complaint Form,
5/1/16
- Parent 3 Letter to the Parent from Lindsay E.
Brecher, Acting Supervisor, Resolution and
Compliance Unit, MCPS, 5/10/16
- Parent 4 Letter to the Parent from Dori Wilson,
Chief, Family Support and Dispute Reso-
lution Branch, Division of Special Education/
Early Intervention Services, MSDE, 5/17/16
- Parent 5 Neuropsychological Evaluation, Dr. Ulanet,
4/28/16-6/2/16
- Parent 6 Letter to Ms. Wilson, MSDE, from
Chrisandra A. Richardson, Associate
Superintendent, MCPS, 6/23/16
- Parent 7 MSDE investigation results, 7/1/16
- Parent 8 Letter to the Parent from Tracee N. Hackett,
Supervisor, Resolution and Compliance
Unit, MCPS, 7/29/16
- Parent 9 Email to Anca Grindeanu, Administrative
Legal Assistant, Michael J. Eig and
Associates, P.C., from Marita Sherburne,
Principal, Wood Acres Elementary School
(Wood Acres), 8/12/16; with attached letter
to Ms. Sherburne from Mr. Eig, 8/12/16
- Parent 10 Letter to Mr. Greismann from Mr. Eig,
8/24/16
- Parent 11 Letter to Mr. Eig from Mr. Greismann,
8/31/16

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- Parent 12 Not admitted
- Parent 13 Due Process Complaint, 9/22/16
- Parent 14 Email to the Parent and his wife from Ms. Sherburne, 9/27/16
- Parent 15 Letter to the Parent from Ms. Hackett, 9/27/16
- Parent 16 Letter to OAH from Mr. Greismann, 9/28/16
- Parent 17 Letter to the Parent and his wife from Ms. Sherburne, 9/30/16
- Parent 18 Not admitted
- Parent 19 Not admitted
- Parent 20 Not admitted
- Parent 21 The Student's weekly class schedule, 2016-2017 school year
- Parent 22 The Student's weekly class schedule, 2015-2016 school year
- Parent 23 IEP, 3/24/15
- Parent 24 Notice of IEP meeting, 12/15/15
- Parent 25 Letter to the Parent and his wife from Ms. Sherburne, 2/26/16; IEP, 3/22/16
- Parent 26 Mathematics Assessment Report, 2015-2016
- Parent 27 Measures of Academic Progress in Reading (MAP-R) results, 6/9/16
- Parent 28 Measures of Academic Progress in Primary Math (MAP-P) results, Winter 2014-2015
- Parent 29 Instructional recommendations for math and reading, 6/1/15

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Parent 30 The Student's report cards, 2014-2015 school year, 2015-2016 school year, 1st quarter 2016-2017 school year

I admitted the following exhibits on behalf of MCPS:

- MCPS 2 IEP, 3/24/15
- MCPS 4 IEP, 3/22/16
- MCPS 6 MAP Data for the Student 2012-2016; MAP Normative Data 2011; MAP Normative Data 2015
- MCPS 7 The Student's third grade Report Card, 6/16; Academic Student Profile, 10/25/16; A Parent's Guide to the Curriculum for Kindergarten, First Grade, Second Grade, Third Grade, Fourth Grade
- MCPS 8 The Student's weekly class schedule, 2015-2016 school year
- MCPS 13 MSDE investigation results, 7/1/16
- MCPS 14 Letter to Ms. Wilson, MSDE, from Ms. Richardson, MCPS, 9/1/16
- MCPS 15 Email to Ms. Hackett, Patricia Grundy, and Maria Bloom from Nancy Birenbaum, Compliance Specialist, Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE, 9/2/16
- MCPS 17 Résumé for Catherine Kashatus
- MCPS 20 Résumé for Brenda B. Brown
- MCPS 23 Résumé for Rori Brown

Testimony

The Parent testified and presented the following witnesses:

- Travis Wiebe, Principal, Wyngate Elementary School (formerly Assistant Principal at Wood Acres during the 2014-2015 school year)
- Patrick Scott, Principal, Strawberry Knoll Elementary School (formerly Principal Intern at Wood Acres during the 2015-2016 school year)
- Catherine Kashatus, Third Grade Teacher, Wood Acres, accepted as an expert in elementary school instruction Patrick Scott, Principal, Strawberry Knoll Elementary School (formerly Principal Intern at Wood Acres during the 2015-2016 school year)
- Patricia Gates Ulanet, PsyD., Center for Assessment and Treatment, accepted as an expert in developmental neuropsychology with a specialization in autism
- Rori Brown, Special Education Teacher, Wood Acres, accepted as an expert in special education MCPS presented the following witnesses:
- Catherine Kashatus, Third Grade Teacher, Wood Acres, accepted as an expert in elementary school instruction
- Rori Brown, Special Education Teacher, Wood Acres, accepted as an expert in special education

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- Brenda B. Browne, Instructional Specialist, MCPS, accepted as an expert in special education with an emphasis in instructional math and reading

Findings of Fact

I find the following facts by a preponderance of the evidence:

1. The Student is a nine year old boy with autism, attention deficit hyperactivity disorder (ADHD), and anxiety. He is high functioning and capable of learning on grade level: His disabilities affect his communication, social skills, organization, attention, self-help skills, and reading, math, and writing skills. His anxiety increases during testing and with changes in routine.

2. During the 2014-2015 school year, the Student was in the second grade at Wood Acres. During the 2015-2016 school year, he was in the third grade at Wood Acres. He is currently in the fourth grade at Wood Acres.

3. Throughout the Student's education in MCPS he has had an IEP.

4. As of March 2015, the Student was performing on the first/second grade level in math, which was below grade level.

5. The Student's March 24, 2015 IEP contained the following goal and objectives in math. Goal: the Student "will analyze number relations, compute, and apply knowledge to whole numbers and place value using a variety of strategies." MCPS 2. Objective I:

"Recognize when it is necessary to compose

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or decompose a ten or hundred in an addition or subtraction problem.” *Id.* Objective 2: “Add and subtract three digit whole numbers using a variety of strategies.” *Id.* Objective 3: “Identify the place value of a digit in whole numbers to 999, and apply knowledge of place value to compare numbers to 999 using $<$, $>$, and $=$.” *Id.* Objective 4: “Solve addition and subtraction word problems.” *Id.*

6. The Student’s March 24, 2015 IEP provided that the Student would receive ten hours per week of special education instruction outside the general education classroom in reading and math. The IEP did not specify how many hours were to be in reading and how many hours were to be in math.

7. From the end of March 2015 through the 2015-2016 school year, the Student received six and one half hours per week of special education instruction outside the general education classroom in reading (known as pull out services).

8. From March 2015 through the 2015-2016 school year, the Student received special education instruction in the general education classroom in math (known as plug in services). He did not receive the three and one half hours per week in special education instruction in math outside the general education classroom as required by his IEP.

9. During third grade (2015-2016 school year), the Student received math instruction on grade level in small groups with preferential seating, extended time, hands on manipulatives, and the math vocabulary posted on the wall. He received additional support and practice to develop his understanding of math concepts.

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The small groups generally had two to three students but never more than six students.

10. The Student had a 1:1 paraeducator, Portia Davis, who assisted him in math. Ms. Davis was a student in the process of getting her degree in special education. Her assistance included helping the Student with self-regulation, anxiety, controlling the volume of his voice, and listening to him read word problems aloud.

11. During third grade, the Student's general education teacher, Ms. Kashatus, consulted regularly with his special education teacher, Ms. Brown. Ms. Brown also observed the Student's math instruction in the classroom.

12. During a December 2015 IEP meeting, the IEP team, including the Parent, discussed the Student's math instruction in the general education classroom and the progress he was making.

13. During the third grade, the Student made progress on his math goal. He met objectives one, two, and three. The Student needed additional support in the area of word problems (objective four). Sometimes the Student could solve the word problems on his own; other times he would need support from Ms. Kashatus or Ms. Davis. He performed on grade level on many assessments throughout the year.

14. The Student benefited from participating with typically developing peers during math instruction. The Student was exposed to the reasoning language the other students used. Also, the Student had socialization goals on his IEP and he had developed friendships in his class.

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15. As of March 22, 2016, the Student was performing on grade level in math with support, based on testing, assessments, and teacher observations. His March 22, 2016 IEP had two new math goals, one for word problems and one for fractions. The IEP provided that he would receive math instruction in the general education classroom with the ability to pull him out for additional reteaching of math concepts if needed.

16. At the end of third grade, the Student was rated proficient overall in math. He was rated proficient in measurement and data, number and operations in base ten, and number and operations—fractions. He was rated in progress in geometry and operations and algebraic thinking.

17. Standardized testing alone shows the Student has consistently progressed each year; however, he has consistently performed below grade level on such tests.

18. From the fall of 2014 to the spring of 2015, during second grade, the Student's overall score on the MAP-P (primary math) increased fourteen points. The growth norm for second grade children was an increase of 13.1 points. Thus, the Student's growth was .9 points more than the norm. In the fall, he was performing on the kindergarten/first grade level. In the spring, he was performing on the first to second grade level.

19. From the fall of 2015 to the spring of 2016, during third grade, the Student's overall score on the MAP-M⁴ increased fourteen points. The growth norm for third grade children was an increase of thirteen

⁴ Measures of Academic Progress in Math.

points. Thus, the Student's growth was one point more than the norm. In the fall, he was performing on the first grade level. In the spring, he was performing on the first to second grade level.

20. Dr. Ulanet assessed the Student's intellect, achievement, memory function, language ability, visual-motor skills, social/adaptive functioning, and emotional/behavioral functioning on the following dates: April 28, 2016, May 5, 17, 19, and 20, 2016, and June 2, 2016.

21. On the Wechsler Intelligence Test for Children-Fifth Edition (WISC-V), an intellectual assessment, the Student's standard score in arithmetic was seven, placing him in the sixteenth percentile. His full scale IQ was ninety-two, placing him in the thirtieth percentile.

22. On the Wechsler Individual Achievement Test-III (WIAT-III), an achievement assessment, the Student's standard score in math problem solving was eighty-one, placing him in the tenth percentile at a 2.2 grade equivalent.

DISCUSSION

The Parties' Arguments

The Parent alleges that the Student did not receive special education instruction in math in a separate special education classroom from May 5, 2015 through May 5, 2016, as stated in the Student's IEP. The Parent's requested remedy is compensatory services of 270 hours of outside math tutoring and reimbursement for neuropsychological/achievement testing. The Parent argues that the Student did not receive pull out instruction in math for 3.75 hours per week. The

Parent asserts that the Student's general education teacher was unaware that the Student was supposed to be pulled out for math and that his special education teacher was aware, but chose not to do so. The Parent contends that the neuropsychological testing showed the Student was performing on a 2.2 grade level at the end of third grade, 1.8 grade levels behind. The Parent maintains that the Student needs thirty minutes of outside math tutoring per day in addition to daily small group instruction and one hour of 1:1 check in a week. The Parent maintains further that Dr. Ulanet should reevaluate the Student in six months and twelve months. The Parent argues that MCPS's failure to implement the Student's IEP was a "concealed" violation and denial of FAPE. The Parent asserts that MCPS has an obligation to implement the IEP as written.

MCPS admits that it did not provide the Student with three and one half hours per week in special education instruction in math outside the general education classroom as required by his March 24, 2015 IEP. Rather, MCPS asserts that it provided the Student with special education instruction in the general education classroom in math which appropriately addressed his needs. MCPS notes that this same issue was the subject of a complaint the Parent filed with MSDE, that MCPS admitted its error and offered thirty-six hours of tutoring in math as compensation, and that MSDE found the error caused minimal educational impact and was resolved by the offered thirty-six hours of tutoring. MCPS contends that the issue before me is whether it provided the Student with FAPE when it provided him with special education instruction in the general education classroom. MCPS

maintains that the Student received educational benefit and made significant growth in math. MCPS notes that the Student received what Dr. Ulanet recommended in her report—small group instruction with 1:1 support—and that Dr. Ulanet did not recommend pull out instruction for math. MCPS notes further that Dr. Ulanet stressed the importance of the Student receiving instruction with typically developing peers. MCPS maintains that Dr. Ulanet's recommendation at the hearing that the Student should be pulled out for so many hours was unsupported by the evidence. MCPS argues that the Student' was not denied FAPE, did not lose educational opportunity, and is not entitled to compensatory services.

Legal Framework

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). Accordingly, the Parent has the burden of proving it is more likely than not that MCPS failed to provide the Student FAPE when it provided the Student's specialized instruction in the general education classroom rather than a separate classroom. For the reasons discussed below, I find in favor of MCPS.

The identification, assessment and placement of students in special education are governed by IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2016); 34 C.F.R. pt. 300 (2015); Md. Code Ann., Educ. § 8-401 through 8-417 (2014 & Supp. 2016); and COMAR 13A.05.01. IDEA provides that all children with disabilities have the right to FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (2010).

The requirement to provide FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined FAPE as follows:

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the basic floor opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to give educational benefit to the handicapped child.

Rowley, 458 U.S. at 200-201 (footnote omitted). In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-207. See also *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to "the best education, public or non-public, that money can buy" or "all the services necessary" to maximize educational benefits. *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983),

citing *Rowley*, 458 U.S. at 176. Instead, FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive some educational benefit. Recently, the United States Court of Appeals for the Fourth Circuit declined to interpret IDEA to require “meaningful” benefit, rather than “some” benefit, reiterating that “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.” *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015).

Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or received passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991) (finding that a student’s passing grades and advancement does not resolve the inquiry as to whether FAPE has been afforded to the student). Similarly, a finding that a student is not progressing at the same speed as his or her peers does not shed light on whether a student has failed to gain educational benefit. As discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically from those obtained by another student, depending on the needs that are present in each student. *Rowley*, 458 U.S. at 202.

In addition to IDEA’s requirement that a child with a disability receive some educational benefit, the child must be placed in the “least restrictive environment” to the maximum extent appropriate, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A.

§ 1412(a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i) (2014). Indeed, instructing children with disabilities with non-disabled peers is generally preferred, if the student with disabilities can achieve educational benefit in the general education program. *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). Placing children with disabilities into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. Nonetheless, the issue is not whether another placement is better for the student but whether the school district has offered FAPE.

MCPS Provided the Student FAPE

The issue in this case is limited to whether MCPS's failure to instruct the Student in math outside the general education classroom denied him FAPE. The evidence before me shows that the Student was provided FAPE.

Ms. Kashatus was the Student's third grade general education teacher. Ms. Ron Brown was the Student's special education teacher during third grade. Ms. Kashatus said that she consulted regularly with Ms. Brown regarding the Student's math instruction. Ms. Kashatus testified that she instructed the Student in math on grade level in small groups with preferential seating, extended time, hands on manipulatives, and the math vocabulary posted on the wall. She stated he needed a lot of support and additional practice and repetition to develop his understanding of math concepts. She noted that at the end of his second grade year he was performing some skills on the first grade

level and some skills on the second grade level. She said that he performed on grade level on many assessments throughout the third grade year. She testified that during math the class was broken into four groups and that the Student worked in small groups that generally had two to three students but never more than six students. She stated the Student had a 1:1 paraeducator, Portia Davis, who assisted him in math, including, helping the Student with self-regulation, anxiety, controlling the volume of his voice, and listening to him read word problems aloud. She said Ms. Davis was a student in the process of getting her degree in special education. She testified that the Student met three of his four math objectives. She explained that he needed additional support to solve word problems (the fourth objective); sometimes he could do them on his own but other times he needed support from her or Ms. Davis. She testified that the Student definitely made progress on his math goal and objectives. She stated that she used strategies for the Student and other students during his math instruction. She identified the various tools she used to assess the Student's progress, including the MAP-M, exit cards, and in-class assessments and observations.

Ms. Kashatus testified further that the Student benefited from being in the math class with his peers. She explained that he was exposed to reasoning language the other students were using and there were many strong students who consistently modeled appropriate skills. She noted the Student had socialization goals on his IEP. She described the students in the class as very compassionate toward the Student and said he developed friendships in class.

Ms. Brown explained that before the Student started third grade, she discussed the Student's needs and the services he was receiving with his second grade teacher. She said the March 24, 2015 IEP was developed before he was her student. In the second grade, the Student was instructed in math in the general education classroom with a 1:1 aide. She stated the Student was meeting his goals and objectives in third grade math so she did not pull him out of the general classroom because it would not have been appropriate. She testified that she did pull out the Student daily for reading instruction for a total of six and one half hours per week. She said the Student was instructed in small groups with a 1:1 aide and follow up with Ms. Kashatus. She stated the Student responded well to structure, enjoyed being part of the classroom, and wanted to do well. She testified that during the December 2015 IEP meeting the IEP team discussed that the Student was not being pulled out of the general classroom for math. She offered to pull the Student out, evaluate him, and see if he qualified for pull out services. She apologized for the paperwork error, explaining that it was a "carryover mistake" from the second grade. She stated that she did not know why the Student's IEP was not updated earlier to show that he did not need pull out services for math. She testified that she collaborated frequently with Ms. Kashatus and Ms. Davis. She said that small groups were the optimal setting for the Student and he did very well in math, including proficient and in progress ratings, that his MAP-M scores increased, and that he met his goals and objectives. She stated that Ms. Kashatus is one of the best teachers she has worked with, she has great classroom management skills, runs her class smoothly and efficiently, and she has a lot of

experience. She described Ms. Kashatus' class as very quiet, not loud and chaotic. She stated that Dr. Ulanet observed the Student during his pull out reading instruction with her but did not observe him in his math class. She said that Dr. Ulanet also observed the Student when he returned to his general classroom for the last ten minutes of the Literacy Reading and Writing Workshop before lunch and recess. She stated that the Student missed work during the pull out sessions and liked to use that time to complete his assignments.

Ms. Brenda Browne testified that testing is anxiety provoking for the Student. She stated that his MAP-P and MAP-M scores show the Student's growth from year to year. She said that the Student made progress during third grade and that he was instructed and assessed on grade level. She stated that it was beneficial for the Student to be in the general education classroom interacting with his peers and that he demonstrated progress in this setting. She testified that "rehab," as suggested by Dr. Ulanet, is not an educational term and that MCPS is charged with instructing students in the least restrictive environment. She said the Student received specialized instruction and support, which ensured he understood what he read and the math concepts. She stated MCPS tries to close achievement gaps but that there is no guarantee. She agreed what is written on the IEP should be implemented. She stated that the Student does not need compensatory services. She explained that his in-class performance is higher than testing alone shows because he becomes very anxious during testing.

Dr. Ulanet testified that the Student has autism and is high functioning. She stated his ADHD is really an inability to regulate himself and his attention. She

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said executive functioning is a weak area for him. She said that he is capable of learning on grade level but needs significant support. She stated that his cognitive scores have a lot of variability but are all within the average range. She said the Student mastered the 2.2 grade level in math on the WIAT-III. She noted the MAP-M is academically based and agreed that the Student made progress on the Common Core curriculum. She described the Student as happy, immature, enthusiastic, earnest, and wanting to please. She said he has difficulty sustaining conversation and following social cues. She described him as extremely anxious and said that his anxiety feeds his dysregulation, which then increases his anxiety. She said he thrives with structure and routine and is more comfortable when he knows what is going to happen. She stated during testing the Student was interested, willing, and in constant motion. She said as the work became more challenging he became more anxious and dysregulated and that she had to use all of her "tricks" to get him to complete the assessments. She testified that she observed the Student in the resource room and that he was on task ninety percent of the time but as the tasks got harder he became more unsettled, getting up, tapping on the desk, and dropping things on the floor. She said she also observed the Student in his general education class working on his animal habitat project. She said the teacher gave the Student 1:1 assistance with the computer and that it took him a long time to get on task; he was more interested in going to lunch and recess. In her report and at the hearing, she recommended a supportive environment, that all of the Student's academic instruction be in small groups of six to eight students, and that he be

reevaluated in six months. At the hearing, she testified that the Student had an educational gap in math and recommended that he receive intense compensatory services in math for a year to see how quickly he can close the gap. She recommended four thirty minute individual or small group sessions a week and an additional one hour small group session per week for one year as "rehab." This recommendation was not in her report. She said the goal would be for the Student to be in the regular education classroom and work in a small group setting.

On cross examination, Dr. Ulanet said that she looked at the Student's IEP but did not know which one. She stated that she did not recall if math was an area of need. She admitted that she did not observe the Student in his math class. She said that she was not aware that the Student had a 1:1 paraeducator and did not see the aide with him during the general education class, lunch, or recess. She agreed that he benefited from exposure to typically developing peers. She said instructing the Student in small groups of six to eight students was appropriate if the environment was calm and quiet and his dysregulation was managed. She stated that in a chaotic, loud environment, six to eight students would be challenging and the teacher should follow up with episodes of 1:1 support.

I find Dr. Ulanet's recommendation for one year of compensatory services is unsupported by the evidence before me. Ms. Kashatus and Ms. Ron Brown testified that the Student made progress on his goals and objectives in math in the general education setting. Ms. Kashatus said the Student was performing on grade level with support and was proficient in third grade math. Dr. Ulanet agreed the Student made progress

in the curriculum. Dr. Ulanet acknowledged that the Student was anxious during her testing. Ms. Brenda Browne explained that the Student's anxiety during testing would cause his test scores to be lower than his actual classroom performance. The Student received small group instruction in math with supports, which is what Dr. Ulanet recommended in her report. Based on the Student's progress in math, I conclude that the Student received some educational benefit from the specialized instruction he received in the general education classroom. In addition, I find that math instruction in the general education classroom was the least restrictive environment for the Student.

The error in this case was with the IEP written while the Student was in the second grade, which stated that he should be pulled out for math instruction three and one half hours per week. A child should be educated in the least restrictive environment. In this case, pulling the Student out of the general education classroom for math instruction would have been too restrictive. The Student was able to make academic progress in the general education classroom with specialized instruction and supports.

I am sympathetic to the Parent's concerns. The Student's IEP said that he should be pulled out for math instruction three and one half hours per week. Thus, it is understandable that the Parent is upset that the Student did not receive the instruction that the Parent thought he would receive. The Parent appropriately addressed his concerns to MSDE and he received a response in his favor. While the Parent is dissatisfied with that response, MSDE's complaint resolution is not before me.

I also understand the Parent's concern that the Student tests below grade level. However, the evidence shows that the Student's testing performance does not fully and accurately describe his academic ability. The Student's anxiety during testing impacts his performance on tests. According to teacher observations and in-class assessments, the Student was able to perform on grade level with specialized instruction and supports; thus, he received educational benefit. IDEA is designed to offer children with disabilities some educational benefit. IDEA does not guarantee that a child's education will be maximized or that a child will perform or test on grade level.

The standard I must apply in this case is whether the Student was provided FAPE. The evidence before me shows that the Student made academic progress and received some educational benefit. I find that the Student was provided FAPE; therefore, he does not require compensatory services. Thus, MCPS is not required to provide the Student with 270 hours of outside math tutoring and is not required to reimburse the Parent for neuropsychological/achievement testing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student was provided FAPE; therefore, he does not require compensatory services in math. 20 U.S.C.A. § 1412(a)(1)(A), (a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i) (2014). *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *O.S. v. Fairfax Cty. Sch. Ed.*, 804 F.3d 354, 360 (4th Cir. 2015); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004); *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983).

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ORDER

I ORDER that that the September 26, 2016 Due Process Complaint filed by the Parent on behalf of the Student is hereby DISMISSED.

/s/ Lorraine E. Fraser
Administrative Law Judge

November 10, 2016
Date Decision Mailed



SUPREME COURT
PRESS