No. 18-

IN THE

Supreme Court of the United States

T.B., JR., BY AND THROUGH HIS PARENTS,
T.B., SR. AND F.B.,

Petitioner,

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION; PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS; DR. KEVIN M. MAXWELL, IN HIS OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER OF PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under this Court's decision in *Forest Grove School Dist. v. T.A.*, 557 U.S. 230 (2009), may a disabled student who was, for a period of years, deprived entirely of an appropriate education as guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"), be left entirely without any remedy?

2. May an undisputed and "inexcusable" violation of IDEA's Child Find requirement be entirely without remedy based on the lower court's finding that the student's precipitous educational decline and failure was solely attributable to the student himself, where the student was, for years, and despite 16 parental requests for an evaluation and special education, not evaluated and not identified as an eligible disabled student under IDEA, and not provided any appropriate special education supports to address his disabilities?

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PRELIMINARY STATEMENT

Petitioner T.B., Jr. ("T.B."), while attending Respondent Prince George's County Public Schools ("PGCPS"), underwent a highly visible and precipitous educational decline. His parents, witnessing that decline, repeatedly, and for years, *pleaded* with PGCPS (16 times) to evaluate T.B. and provide him with special education supports and services as required by IDEA. Their pleas, tragically, fell on entirely deaf ears. PGCPS, again and again and again, refused to evaluate T.B., and he was *never* provided the educational supports he so clearly required, resulting in continuing and severe educational decline and harm. A Maryland Administrative Law Judge found PGCPS's violations of IDEA to be "inexcusable," and this finding was later upheld by the Fourth Circuit. Nevertheless, at all levels, including the Fourth Circuit, PGCPS's documented statutory violations were found to be "harmless error" on the profoundly troubling basis that T.B. was, in essence, a hopeless case who, due to his perceived personal faults, never would have made educational progress even if PGCPS had complied with IDEA and timely provided T.B. the supports he clearly required.

IDEA does not allow such a result, and even requires that incarcerated students receive a Free Appropriate Public Education ("FAPE"). IDEA's remedial purpose unequivocally mandates that a student should *never* be deprived of educational relief for a school district's failure to comply with IDEA based on speculation that, even if the school district had provided the student timely, appropriate educational supports required by IDEA, he still would have failed educationally. The Fourth Circuit's decision is contrary to both the clear requirements and

the express purpose of IDEA, as well as established Supreme Court precedent. Certiorari should be granted to provide clear guidance to the lower courts that the Court of Appeals' reasoning and result is impermissible under IDEA.

PETITION FOR A WRIT OF CERTIORARI

Petitioner T.B., by and through his parents, T.B., Sr. and F.B., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a) is published at 89 F.3d 566. The opinion of the United States District Court for the District of Maryland (Pet. App. 33a) is unpublished but is available at 2016 WL 7235661. The written decision of David Hofstetter, an administrative law judge of the Maryland Office of Administrative Hearings (Pet. App. 67a) is published at the Maryland Department of Education's website at http://archives.marylandpublicschools.org/MSDE/divisions /earlyinterv/complaint_investigation/hearing_decisions/2016/docs/15-H-PGEO-01496.pdf.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 26, 2018. Pet. App. 1a. Petitioner's request for panel rehearing and rehearing *en banc* was denied, with Chief Judge Gregory

dissenting, on September 24, 2018. Pet. App. 135a. This Court has jurisdiction under 28 U.S.C. § 1254(a).

RELEVANT STATUTES AND REGULATIONS

The statutes and regulations that are most relevant to this petition are as follows. The full text of the noted authorities is reproduced in the Appendix at 137a.

The requirement that school districts must properly identify all eligible children and provide them with appropriate services is known as Child Find and is expressly mandated under IDEA. 20 U.S.C. § 1412(a)(3)(A), (B); 34 C.F.R. §§ 300.111, 300.323(a).

A school district is deemed to have knowledge that a child may have a disability where the parents of the child have either "expressed concerns" that the child is in need of special education or related services, or requested an evaluation. 20 U.S.C. § 1415(k)(5)(B). IDEA explicitly permits parents to be the party to "initiate a request for an initial evaluation to determine if the child is a child with a disability," 34 C.F.R. § 300.301(b).

The Child Find statute and regulation states that educational systems are required to identify "[c]hildren who are *suspected* of being a child with a disability under Sec. 300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.111 (emphasis added).

The IDEA regulations require that for "initial evaluations," "each public agency must conduct a full and individual initial evaluation," 34 C.F.R. § 300.301(a),

and "the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall *not* be considered to be an evaluation for eligibility for special education and related services." 34 C.F.R. § 300.302 (emphasis added).

IDEA mandates that a FAPE "must be available to all children residing in the state between the ages of 3 and 21" and each state "must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade and is advancing from grade to grade." 34 C.F.R. § 300.101(a), (c)(1).

IDEA further requires that at the beginning of every school year, each school district must have in effect, for each child with a disability within its jurisdiction, an Individualized Educational Program ("IEP"). 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).

STATEMENT OF THE CASE

A. Introductory Statement.

T.B.'s story is one of pervasive and documented educational decline over a period of years, with his parents repeatedly (at least 16 time) *begging* PGCPS to evaluate their son and provide special education, to no avail. In the face of well-documented and precipitous educational decline (84 F's and D's), PGCPS repeatedly and inexcusably refused to evaluate T.B. or provide him with the educational supports he desperately needed, in direct and clear violation of IDEA and the decisions of this Court.

T.B., in elementary school, performed well academically, achieving mostly A's and B's. By seventh grade, however, when his class sizes significantly increased and individual support and attention substantially decreased, T.B. began to struggle educationally and he experienced serious increasing academic failure. By early ninth grade, his parents began to repeatedly request that PGCPS evaluate T.B. and provide him with education supports. Over the next several years, T.B.'s parents made *at least* 15 additional specific requests for testing or special education services, in writing, for a total of at least 16 requests for testing/services. PGCPS, in response, failed to evaluate T.B., and failed to provide him with any special education supports through an IEP. As a result, T.B.'s profound educational decline continued unabated and intensified, with T.B. ultimately experiencing increasing absenteeism. T.B. was eventually privately evaluated, and then evaluated by PGCPS, and *both* evaluations found T.B. to be disabled under IDEA and eligible for an IEP.

Despite T.B.'s documented disabilities, and PGCPS's failure to evaluate and provide services to T.B. for years, both the district court and the Court of Appeals found that, while PGCPS committed an egregious and "inexcusable" violation of IDEA by failing to timely evaluate him, T.B. was not entitled to any relief for that violation based on the pure speculation that, had he been timely and properly evaluated, he would not have benefitted from special education because T.B. simply would not "try" and might not have attended school – despite PGCPS's own documentary evidence that T.B. attended school over 90% of the time during most of the period in question.

The decision of the Court of Appeals is directly contrary to this Court's decision in *Forest Grove School Dist. v. T.A.*, 557 U.S. 230 (2009), as well as decisions in other circuits, in that it entirely deprives T.B. of any educational remedy for PGCPS's undisputed, serious, and extended violations of IDEA.

It is also completely antithetical to the fundamental purpose of IDEA. The Court of Appeals found that T.B. would not have benefitted from being provided timely, appropriate special education supports, due to the court's view of T.B.'s perceived personal failings and lack of motivation. IDEA, which conclusively presumes that a child with a disability who is provided the timely, appropriate, educational supports mandated by IDEA will benefit from those supports, does not permit such a skewed and troubling analysis.

Certiorari should be granted to provide clear guidance to the lower courts that disabled students who have never been provided with appropriate Special Education supports may not be denied mandated services and "written off" by concluding that such students would inevitably fail even if provided timely, appropriate services as expressly and unequivocally mandated for *every* disabled child by IDEA.

B. Legal Background

This Court has emphatically stated:

> A reading of [IDEA] that *left parents without an adequate remedy* when a school district unreasonably failed to identify a child with

> disabilities would not comport with Congress' acknowledgment of the *paramount importance of properly identifying each child eligible for services*.

Forest Grove School Dist. v. T.A., 557 U.S. 230, 245 (2009) (emphasis added). The Court of Appeals' analysis leaves T.B. and his parents "without an adequate remedy" – indeed, without *any* remedy whatsoever – for PGCPS's unequivocal, pervasive, and destructive failures to comply with IDEA's Child Find requirements.

This determination – that a disabled child can be deprived *entirely* of any special education services – is not only contrary to the Court's express mandate in *Forest Grove*, but also ignores precedents of this Court and the fundamental requirements of IDEA that *all* children with disabilities receive a FAPE, 20 U.S.C. § 1414(d)(2)(A); and that every child reasonably *suspected* of being disabled be promptly evaluated and provided an IEP. *No* decision of this Court even remotely supports the decision below to excuse such a failure as seen in this case. *See*:

- *Endrew F. v. Douglas Cnty. School Dist. RE-1*, 137 S. Ct. 988, 993, 999, 1000 (2017) (the responsible agency "must provide a free appropriate public education – a FAPE, for short – to all eligible children" and "[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" because "*every* child should have the chance to meet challenging objectives") (emphasis added);

- *Forest Grove*, 557 U.S. at 246 ("In accepting IDEA funding, States expressly agree to provide a FAPE to *all* children with disabilities") (emphasis added);

- *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524 (2007) ("IDEA requires school districts to develop an IEP for each child with a disability");

- *Cedar Rapids Comm. School Dist. v. Garrett*, 526 U.S. 66, 78 (1999) (through IDEA, "Congress intended to open the door of public education to *all* qualified children and require[d] participating States to educate handicapped children with nonhandicapped children whenever possible.") (quoting *Board of Educ. of the Hendrick Hudson Cent. School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 192, 202 (1982)) (emphasis added, internal quotations omitted);

- *Florence Cnty. School Dist. Four v. Carter*, 510 U.S. 7, 13 (1993) (affirming availability of equitable remedy of private school tuition reimbursement for denial of FAPE; "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free; to read [IDEA] to bar reimbursement in the circumstances of this case would defeat this statutory purpose.");

- *Honig v. Doe*, 484 U.S. 305, 324 (1988) (In IDEA's predecessor statute, Congress "required participating States to educate *all* children, regardless of the severity of their disabilities," and further "provided for meaningful parental participation in all aspects of a child's educational placement") (emphasis in original);

- *School Comm. of Town of Burlington v. Department of Educ. of Commonwealth of Mass.*, 471 U.S. 359, 370 (1985) (if private school tuition reimbursement is not an available remedy under IDEA, "the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete");

- *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883, 889 (1984) ("States receiving funds under the Act are obliged to satisfy certain conditions. A primary condition is that the state implement a policy 'that assures *all* handicapped children the right to a free appropriate public education.'") (citation omitted, emphasis added);

- *Rowley*, 458 U.S. at 181 (IDEA's predecessor statute "assures *all* handicapped children the right to a free appropriate public education") (emphasis added).

And even beyond the express and unequivocal mandate of IDEA and the repeated recognition of this Court that every disabled child is entitled to an IEP, the decision below also ignores the seminal and fundamental admonition of this Court some 64 years ago that:

> Today, education is perhaps the most important function of state and local governments.... It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship [and] ... it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

IDEA and its regulations establish a comprehensive format by which a child with a disability must be evaluated, his classification determined, and an appropriate IEP providing Special Education and Related Services be developed and implemented. The IEP must be reasonably calculated to afford a FAPE that provides *every* disabled child the opportunity to receive meaningful educational benefit that is commensurate with the child's individual circumstances and potential. *Endrew F.*, 137 S. Ct. at 999-1001.

It is abundantly well-settled that "education" extends beyond discrete academic skills, and also includes social, emotional, behavioral, and physical progress to move the child toward independence and self-sufficiency consistent with the child's cognitive potential. *Id.*; *Honig,* 484 U.S. at 324; *Rowley*, 458 U.S. at 201-04; *M.L. v. Smith,* 867 F.3d 487, 406 (4th Cir. 2017); *M.C. v. Central Reg'l School Dist.*, 81 F.3d 389, 393-394 (3d Cir. 1996); *Kruelle v. New Castle Cnty School Dist.*, 642 F.2d 687, 693 (3d Cir. 1981). Thus, for an IEP to be appropriate, it must offer a child the opportunity to make progress in all relevant domains under the IDEA, including academic, behavioral, social, and emotional. *See id.*; *M.C.*, 81 F.3d at 394. A child's *lack* of progress in his educational program is an obvious and significant factor in determining whether a student has been provided a FAPE. *Endrew F.*, 137 S. Ct. at 1000 n.2; *Rowley*, 458 U.S. at 203 n.25; *M.S. v. Fairfax Cnty. Bd. of Educ.*, 553 F.3d 315, 326-27 (4th Cir. 2009).

The requirement that school districts must properly identify all eligible children is known as Child Find and

is expressly mandated under IDEA. 20 U.S.C. § 1412(a)(3)(A), (B); 34 C.F.R. § 300.111. Under these statutes and their regulations, school districts have a continuing obligation to properly evaluate and accurately identify *all* students who are reasonably suspected of having a disability under IDEA, and to offer a FAPE to every disabled student; further, every disabled child *must* have an IEP in place at the beginning of each school year. 34 C.F.R. § 300.323(a); *Endrew F.*, 137 S. Ct. at 998-1000; *Forest Grove*, 557 U.S. at 239; *Winkelman*, 127 S. Ct. at 2000; *Carter*, 510 U.S. at 13; *Honig*, 484 U.S. at 597-98; *Burlington*, 471 U.S. at 367-68; *Tatro*, 468 U.S. at 889; *Rowley*, 458 U.S. at 181-82; *Gadsby v. Grasmick*, 109 F.3d 940, 950 (4th Cir. 1997).

A school district is deemed to have knowledge that a child may have a disability where the parents of the child have either "expressed concerns" that the child is in need of Special Education or Related Services, or requested an evaluation. 20 U.S.C. § 1415(k)(5)(B). To establish a Child Find violation, school officials need only fail to initiate an evaluation within a "reasonable time" after they are put on notice that a student's educational struggles give reason to suspect a disability and that Special Education supports may be necessary to address that disability. *Krawietz v. Galveston Indep. School Dist.*, 900 Fed.3d 673, 676 (5th Cir. 2018); *Mr. P. v. West Hartford Bd. of Educ.*, 885 F.3d 735, 750 (2d Cir. 2018). It is the *nondelegable* responsibility of the district to timely evaluate and identify those children in need of protection under IDEA. *M.C.*, 813 F.3d at 397 ("[I]t is the responsibility of the child's teachers, therapists, and administrators – and of the multi-disciplinary team that annually evaluates the student's progress – to ascertain

the child's educational needs, respond to deficiencies, and place him or her accordingly."); *Draper v. Atlanta Indep. School System*, 518 F.3d 1275, 1288 (11th Cir. 2008); *Jana K. v. Annville-Cleona School Dist.*, 39 F. Supp.3d 584, 602 (M.D. Pa. 2014) (it was the school district's "nondelegable" duty to propose an evaluation in light of its knowledge of student's educational struggles).

The language of IDEA is abundantly clear and emphatic that *all* children with disabilities must be identified in a timely manner, and sets the lowest legal bar possible to initiate a comprehensive evaluation of a child to determine whether he is disabled. The Child Find regulation requires that educational systems identify "[c]hildren who are *suspected* of being a child with a disability under Section 300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.111 (emphasis added). No exceptions are identified in IDEA or its regulations regarding the Child Find obligation or the requirement that *every* child with a disability have an IEP at the beginning of each school year.

The well-established evaluation process to determine if a child is suspected of having a disability requires a thorough and comprehensive evaluation. The IDEA regulations require that for "initial evaluations," "each public agency must conduct a full and individual initial evaluation," 34 C.F.R. § 300.301(a), and "the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall *not* be considered to be an evaluation for eligibility for special education and related services." 34 C.F.R. § 300.302 (emphasis supplied).

IDEA explicitly permits parents to be the party to "initiate a request for an initial evaluation to determine if the child is a child with a disability," 34 C.F.R. §300.301(b), and Maryland law expressly agrees and requires the public agency to promptly process such a parental request. COMAR 13A.05.01.04A. Maryland's state standards are, of course, incorporated into the IDEA entitlement. 20 U.S.C. §§ 1401(9)(b), 1412(a)(15)(A); *Hartmann v. Loudon County Bd. of Educ.*, 118 F.3d 996, 1004 (4th Cir. 1997) (IDEA expressly incorporates state educational standards).

C. Factual Background

Throughout elementary school while enrolled at PGCPS, T.B. performed below grade level in reading and math, but nonetheless was able to obtain passing, and often excellent, grades through small class size (15-20 students), individualized instruction/support and the nurturing environment of his elementary school.

At the end of 6th Grade, although T.B. remained somewhat below grade level in both reading and math, his grades continued to be uniformly solid with the smaller class size and individualized supports found in his elementary school.

In 7th Grade (the 2010-2011 school year), T.B. moved to PGCPS's Gourdine Middle School, where class sizes substantially increased (up to 35 students), individualized attention decreased, higher expectations of independence increased, and the curriculum became harder. In this far less supportive environment, T.B. *immediately* suffered serious and pervasive academic failures. T.B. suffered an

even greater academic disintegration in 8th Grade, T.B.'s 2011-2012 school year. Over the course of the year, T.B. received 18 failures or D grades for the quarter marking periods, failed Health for the year, and received final grades of Ds in United States History and Math Fluency.

In 9th Grade (T.B.'s 2012-2013 school year), T.B. moved to Friendly High School, where his academic decline intensified. On October 10, 2012, T.B.'s father wrote to his guidance counselor, Desirae Dent, under the subject "Having my son get tested" and informed Ms. Dent that T.B. is "having trouble remembering things" and "he is struggling to process the information in class." Mr. B. further asked whether "there is a program or some kind of test he could take [as] I want to help my son he need before it is too late and he fall behind."

This was T.B.'s parents' initial request for an evaluation. Over the next several years, T.B.'s parents made at least fifteen (15) additional unfulfilled requests for testing or Special Education services, for a total of at least 16 requests for testing/services.

In response to the Family's October 10 entreaty, PGCPS unilaterally scheduled a meeting for November 7, 2012, to discuss T.B. Contrary to IDEA's requirement that such meetings be scheduled at times to permit parent participation, PGCPS denied a request to schedule the meeting at a time that T.B.'s father could attend. 34 C.F.R. § 300.322, COMAR 13A.05.01.07D. At the meeting, PGCPS incredibly told Mrs. B. that, despite his pervasive educational struggles, T.B. was "proficient," with utterly *no* basis for such a statement. PGCPS told the Family that T.B. would not be tested or considered for a Special

Education program. No additional supports were offered or provided for T.B. following that meeting, even though T.B. experienced escalating and pervasive academic failures.

On January 4, 2013, Mr. B. *again* wrote to Ms. Dent begging for help: "I wanted to see if there is any programs that can help him in school or after school. He is struggling very badly [and] he is getting discourage because if he don't understand the concept and it is not being explained then he will be lost .... We are trying to work with him at home. He understand then but when in class it's something different. *I'm trying to save my son before he give up.*" (emphasis added).

On January 10, 2013, Mr. B. again wrote to Ms. Dent, further *pleading* for testing and Special Education services for his son:

> Is there a way we can move [T.B.] to a smaller class? He may need to be moved from a regular class to smaller group. *He is having trouble keeping up in the classroom*, a lot of his teachers are agreeing with me about my son. *He don't understand the work, and he may need to be put in special classroom. Mrs. Dent I wrote a while back about getting my son tested, because he was having trouble remembering things and keeping up.* When my wife came to the meeting on November 7th, they didn't know what to do. They looked at his transcripts and said he was proficient, and they was suppose to reschedule the meeting. Nothing happened and he didn't get tested or we haven't heard anything else.

> If he have to go to special education classes I look for a solutions? Do Friendly have smaller classes where he can be changed to? I was told to come to you as far as helping my son.

(emphasis added). Ms. Dent emailed Mr. B. the next day, again inexplicably stating that "[T.B.]'s records did not indicate a need for special education testing [and] we cannot legally change his classes to smaller special education classes [as] he is appropriately placed in regular education classes."

By the end of his 9th Grade (2012-2013) year, T.B. *failed* four subjects for the year and he received a D in United States History. His final Report Card reflected 21 *failing* quarterly grades or final grades. The comments to the Report Cards included "Missing/incomplete assignments," "Poor test/quiz grades," and "Excessive absences/tardiness."

T.B.'s 10th Grade year (2013-2014) was his worst school year yet, but PGCPS continued to ignore his increasingly desperate and obvious needs. T.B. *failed* seven courses that year and by May 2014 was entirely unable to attend school due to his emerging emotional disability. His grades plummeted during the course of the year, and resulted in him *failing 10th grade and being retained* in 10th Grade for the following school year. Yet, again, PGCPS did not initiate an evaluation despite, by this point, an array of 84 F's and D's, and multiple parental requests for an evaluation.

During the course of the 10th Grade school year, Mr. B. continued to plead with PGCPS staff for help, but,

again, to no avail. For instance, On November 20, 2013, Mr. B. wrote to a teacher and asked: "Is there anything I can do to help my son improve in your class, I see he struggling. I think he may have trouble comprehending with the procedure on how to do what is asked of him. Please let me know if this is the case, also I have tried to contact you in the pass but no response I am trying to help my son."

On February 10, 2014, Mr. B. emailed yet another teacher that "This year has been very trying for [T.B.] and we are trying to do our best to help him focus in all your classes." On the same day, Mr. B. wrote to a teacher and stated: "We sent [T.B.] to the doctor on January 20, to see his pediatrician.... *[T]hey said he need be tested first by the school.* No one is trying to set this up for us. I am willing to go as far as I have to so I will keep you informed." (emphasis added). Still, PGCPS failed to initiate an evaluation.

On March 6, 2014, Mr. B. wrote to yet another of T.B.'s teachers and stated that "For your FYI we are trying to get my son additional help with his learning, because we believe he has a learning disability. No one wants to test him to see, I am working on this matter and I am willing to take it as far as I can to get him the help he need."

On March 18, 2014, Mr. B. wrote the following desperate plea for help to the Administration at Friendly High School:

> I writing this in concern for my son, he is currently attending Friendly High School. My wife and I has seen some changes in my [son's]

> learning ability and we have requested for him to be tested at Friendly. *This request has been ignored and my son is falling behind because he don't understand what he is doing. He writes certain letters backwards, he has a hard time remembering things which causes him to get frustrated. All I heard from Friendly that he is proficient, they are missing the signs. We took him to his Pediatrician and he said the school needed to test him.* Teachers in Friendly has labeled my son as not wanting to do anything, but not realizing he is in trouble. This has went on for 2 years now.....
>
> I would like to ask for a special transfer to a school where he can be properly tested and to get the attention he need to better himself. To take him out of this negative environment before something happens to him.

(emphasis added). PGCPS took no action in response to this email, or any of the previous requests for help, and never initiated testing of T.B. for the entire school year.

Because PGCPS continued to fail to test T.B., in May 2014 T.B.'s parents pursued an Independent Educational Evaluation ("IEE") from the Basics Group, which conducted psychological testing and in August 2014 generated a psychological report. In late August 2014, Mr. B. delivered the Basics Group's IEE and Individualized Treatment Plan to T.B.'s guidance counselor. The Basics Report diagnosed T.B. for educational purposes with a Specific Learning Disorder, a Depressive Disorder, and Attention Deficit Hyperactivity Disorder ("ADHD").

The report clearly identified T.B. as being eligible for Special Education under IDEA and made multiple specific educational recommendations, including a small, highly-structured classroom; modified curriculum; testing accommodations; explicit step-by-step instructions; repetition and rehearsal of material; frequent cuing/reminders; and extra time to respond to tasks and classroom demands. It was also recommended that a program be put in place for T.B.'s emerging emotional difficulties. *Even with the receipt of these unequivocal professional findings that identified multiple disabilities, PGCPS did nothing to initiate an evaluation of T.B. or provide services.*

Because the B. family moved residences, T.B. was required to enroll at Central High School for his repeat (because he had failed the previous year) 10th grade (2014-2015) school year. In September 2014, Mr. B. again requested of the guidance counselor that T.B. be tested by PGCPS and asked whether Central High School had "any plans to move him to a smaller classroom where he can get the required assistance that he need[.]" The guidance counselor responded to Mr. B. that his previous written requests for testing were somehow inadequate under PGCPS's unique procedures.

PGCPS received yet another email from Mr. B. on October 6, 2014 stating that T.B. had been unable to attend school due to anxiety attacks, and that the family had returned him to therapy in an effort to "keep him calm and to get him the help he needs [as] the classroom size was too much for him so I saw the anger started to flare up because he was getting frustrated all over again. " Mr. B. also indicated that T.B. never received any work from

any of his teachers while he was out of school. PGCPS again failed to initiate testing.

Hearing nothing from PGCPS regarding his multiple requests for testing, Mr. B. wrote again to PGCPS on October 18, 2014 and stated that "I [T.B.] Sr., would like to have my son [T.B.], Jr. considered for placement in your special education program" and further provided a Psychologist's Verification of the need for "Home and Hospital" services to obtain alternate instruction for T.B. due to his inability emotionally to attend regular classes. The certification of Dr. Ricardo LaGrange noted that T.B. suffered from Attention Deficit Disorder, Learning Disorder, and Adjustment Disorder with Mixed Disturbance and Emotions, and was being seen in therapy for depression, frustration in school, coping skills, and anger management. Despite this document, PGCPS *again* took *no* action to evaluate T.B. or to provide any alternate services to him.

In January 2015, since T.B.'s parents had attempted for over two years to obtain testing and Special Education services from PGCPS without any result, and T.B. had experienced profound academic failure for 4 1/2 years, T.B.'s parents initiated a due process proceeding under IDEA. The due process complaint sought identification of T.B. for Special Education and Related Services, compensatory education for PGCPS's Child Find violations since 2010, and reimbursement for the Basics Group IEE. At this point, over four months had elapsed since PGCPS received an IEE report and an Individualized Treatment Plan with multiple diagnoses of disabilities which plainly affected T.B.'s education and well-being.

Two weeks later, i.e., after T.B.'s parents had initiated legal proceedings, on January 26, 2015, PGCPS *for the first time* initiated testing of T.B. In late February, 2015, PGCPS generated a Confidential Psychological Report authored by PGCPS psychologist Vincent Tepe that established T.B.'s eligibility for Special Education and documented T.B.'s severe problems with anxiety, which prevented T.B. from attending school. Mr. Tepe's testing showed that, despite having average intellectual abilities, T.B. was four to seven years behind his chronological age/grade level peers in reading, math, and writing. *Mr. Tepe later testified that T.B. had been disabled for almost a year prior to his testing.*

On March 12, 2015, an IEP meeting was convened, and PGCPS's IEP team determined that T.B. was an eligible student under IDEA's disability classification of Emotional Disability. A Prior Written Notice was generated, which stated: "[T.B.] has strong negative feelings regarding himself and his abilities in school. He is very anxious and has a sense of inadequacy towards school and his teacher. His attention/focus is very low. He is often depressed and frustrated with his abilities. He measured AT RISK in the areas of self reliance, test anxiety and mania..... *Due to [T.B.'s] anxiety, he has had difficulty attending school....*" (capitalization in original, italics added).

After this meeting, an IEP was, for the first time, offered due to T.B.'s Emotional Disability. The IEP further reinforced that T.B.'s Emotional Disability prevented him from attending school: "His anxiety has significantly impacted his ability to attend school daily and therefore significantly impacts his academic performance. He has not currently attended Central HS with any regularity

this school year. [T.B.] experiences anxiety and frustration when he does not meet with academic success which feeds upon itself to the point where he experiences the anxiety before he can even enter the building at this time." That same IEP later documented that: "[T.B.'s] severe anxiety coupled with his clinical risk for depression, anger, aggression, autism spectrum disorders and a learning disability further supports this decision [to find T.B. IDEA-eligible with an Emotional Disability]."

D. Proceedings Below.

The hearing in this matter took place over six hearing days before Maryland Administrative Law Judge ("ALJ") David Hofstetter. ALJ Hofstetter issued his Decision (Pet. App. 67a) denying relief to Petitioner on September 16, 2015. In his decision, the ALJ expressly found that PGCPS committed an "inexcusable" violation of IDEA by failing to timely evaluate T.B. for IDEA eligibility despite multiple requests for testing by his parents. *Id* at 104a-105a. Nevertheless, the ALJ limited the time period for potential relief and found that T.B. was not entitled to relief for PGCPS's violation based on his speculation that T.B. would not have attended school even if provided appropriate educational supports, *id*., this despite the clear evidence from PGCPS's own attendance records that T.B., in fact regularly attended school during the relevant period. The ALJ further denied Petitioner's request for reimbursement for the Basics Group IEE. *Id.* at 111a.

The Family thereafter filed a federal complaint in the District of Maryland under 28 U.S.C. § 1331 (federal question jurisdiction), and 20 U.S.C. § 1415(i)(2)(A) (providing for right to bring civil action to review

administrative decision under IDEA) seeking reversal of the ALJ's Decision.

Following the submission of cross-motions for summary judgment on the administrative record, Judge George Jarrod Hazel issued his December 13, 2016 Memorandum Opinion and Order (Pet. App. 33a), which found in favor of Petitioners regarding the statute of limitations, but denied compensatory education to T.B., and remanded the matter to the ALJ for further proceedings on the IEE issue. Notably, Judge Hazel affirmed the ALJ's finding that PGCPS violated IDEA by failing to timely evaluate T.B. despite numerous parental requests. *Id.* at 56a, 58a. However, he denied relief to T.B. on the same basis as did the ALJ – by speculating that T.B. was not substantively harmed by PGCPS's violation because he supposedly would not have attended school even if provided appropriate and timely educational supports. *Id.* at 58a-61a.

On remand, the ALJ reversed his prior decision and granted reimbursement to the Family for the Basics Group IEE. Upon return of the matter to the District Court, Judge Hazel issued a July 5, 2017 Order, which affirmed the ALJ's decision on the IEE issue. Appellants filed a timely Notice of Appeal.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 26, 2019. Pet. App. 1a. The Court of Appeals, as had the ALJ, found that PGCPS committed an "inexcusable" procedural violation of IDEA by failing to timely evaluate T.B. Pet. App. 11a-12a. The Court of Appeals, however, denied relief on the unprecedented basis that PGCPS's failure supposedly

did not cause T.B. educational harm, in that "T.B. himself was the cause" of his educational failure, and PGCPS's violation was therefore "harmless." *Id.* at 23a, 13a-14a.

Petitioner's timely petition for panel rehearing and rehearing *en banc* was denied, with Chief Judge Gregory dissenting, on September 24, 2018. *Id.* at 135a.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals' decision is directly contrary to this Court's decision in *Forest Grove*, conflicts with decisions in other Circuits, and undermines IDEA and precedent of this Court by allowing a school district to escape all liability for years of "inexcusable" failure to provide a disabled student with an appropriate education.

This Court has unequivocally stated that any "reading of the [IDEA] that *left parents without an adequate remedy* when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' *acknowledgment* of the *paramount importance of properly identifying each child eligible for services*." *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 245 (2009) (emphasis added). Thus, this Court has clearly held that families of students who are deprived of the appropriate education guaranteed by IDEA are entitled to "an adequate remedy" for the violation.

Yet this is precisely the result of the Court of Appeals' Opinion, which found that PGCPS committed an "inexcusable" violation of IDEA by failing to evaluate or provide special education to T.B. despite being begged to do so on at least 16 occasions by T.B.'s parents over a period

of several years. Pet. App. 11a-12a. The Fourth Circuit in fact *excused* this "inexcusable" violation by incredibly identifying it as a mere "procedural" matter and by failing to award any compensatory education or other relief for that serious statutory violation. The Court of Appeals' decision is thus directly violative of this Court's decision in *Forest Grove*, as well as the Supreme Court cases cited above, which have consistently held for decades that *all* children with disabilities must be offered an appropriate IEP every year.

This Court in *Forest Grove* made clear that a school district's failures to timely evaluate and "altogether" provide appropriate services to a student is an "egregious" violation of IDEA. 557 U.S. at 245. PGCPS, for a period of years, "altogether" denied educational services to T.B., who, when he eventually was evaluated both privately and by PGCPS, was found to be an IDEA-eligible student and entitled to Special Education services and supports through an IEP, which he had never been provided. Pet. App. 11a. (in August 2014 private evaluation, T.B. was found to have "qualifying disabilities" under IDEA); *id.* at 5a (in March 2015, following PGCPS evaluation, "the IEP team concluded ... that T.B. was eligible for special education services on the basis of an emotional disability, namely, anxiety that prevented him from regularly attending school."). The fact that T.B., when evaluated, including by PGCPS, was *twice* found to be an eligible student with a disability under IDEA, entirely undermines the Court of Appeals' conclusion that T.B. "had no disability that special education would have remedied." *Id.* at 20a. Yet, the Court of Appeals' decision leaves T.B. entirely "without relief" in this "inexcusable" (*id.* at 11a) and "egregious" (Concurrence, *id.* at 24a) situation.

Indeed, the Court of Appeals' decision incredibly denies relief to T.B. *even for a period when PGCPS admitted that T.B. was disabled under IDEA and yet was not offered an IEP.* PGCPS school psychologist Vincent Tepe testified that, as of "Spring of 2014," *i.e.*, well before PGCPS performed its own evaluation, T.B. was an eligible student under IDEA under the disability category Emotional Disability. Based on this admission alone, PGCPS violated its Child Find duty to initiate an evaluation of T.B. based on a suspected disability as of Spring 2014 *at the latest*, and yet the Court of Appeals did not find that T.B. was entitled to *any* relief for this admitted violation.

The lower federal courts have routinely held – contrary to the Fourth Circuit's decision – that the denial of a free appropriate public education to a child eligible for services under the IDEA constitutes irreparable harm. *See N.D. v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 1112-13 (9th Cir. 2010) (behavioral regression resulting from deprivation of educational services constitutes irreparable harm); *John T. v. Delaware Cnty. Intermediate Unit*, 2000 WL 558582 at *8 (E.D. Pa. May 8, 2000) ("Compensation in money can never atone for deprivation of a meaningful education in an appropriate manner at the appropriate time"); *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 2004 WL 633222 at *25 (E.D.N.Y. Mar. 30, 2004) (failure to provide special education services to class members in a timely manner satisfies the irreparable harm standard); *Cosgrove v. Board of Educ. of Niskayuna Cent. School Dist.*, 175 F. Supp. 2d 375, 392-93 (N.D.N.Y. 2001) (holding that it is "almost beyond dispute" that the denial of FAPE constitutes irreparable harm); *Borough of Palmyra Bd. of Educ. v. F.C. ex rel. R.C.*, 2 F. Supp. 2d 637, 645 (D.N.J.

1998) (loss of FAPE constitutes irreparable harm); *Paul Y. v. Singletary*, 979 F. Supp. 1422, 1427 (S.D. Fla. 1997) ("irreparable injury will be and has been suffered, since [plaintiff] has been deprived of, and continues to be deprived of, the education he and his parents allegedly desire for him."); *J.B. v. Killingly Bd. of Educ.*, 990 F. Supp. 57, 72 (D. Conn. 1997) (prolonged denial of FAPE constitutes irreparable harm); *Howard S. v. Friendswood Indep. School Dist.*, 454 F. Supp.634, 641 (S.D. Tex. 1978) (continued denial of FAPE will cause irreparable harm).

PGCPS's failure to timely evaluate and provide educational supports to T.B. clearly deprived him of a FAPE for years, causing him not only harm, but *irreparable* harm. Yet the Court of Appeals failed to award *any* relief to T.B. for this clear substantive harm.

The Court of Appeals' failure to award relief for PGCPS's proven violations of IDEA's Child Find requirements is directly contrary to this Court's admonition in *Forest Grove* that students and parents are entitled to relief for a school district's Child Find violations. Certiorari should be granted to clearly instruct the lower courts that no disabled child may be denied the educational opportunity granted by IDEA, and that the Fourth Circuit's misguided reasoning and result are not permissible under IDEA and *Forest Grove*.

B. Certiorari should be granted to address the important public question of whether a school district that "inexcusably" violates IDEA's fundamental Child Find requirements can entirely escape liability by blaming a disabled student for the student's educational decline.

IDEA has existed in various forms since it was originally enacted as the Education for All Handicapped Children Act of 1975. It has been in place since that time, and been strengthened by congressional amendments on four occasions, because *it works*. Time and experience have proven that, when all students with disabilities are promptly evaluated, and provided with appropriate supports and services through an IEP, they *achieve positive educational outcomes*. 20 U.S.C. § 1400 (preamble to IDEA) ("Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities."); *see also Thirty-five Years of Progress in Education Children With Disabilities Through IDEA* (United States Department of Education 2010) (available at https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf).

This Court's recent decision in *Endrew F. v. Douglas Cnty. School Dist. RE-1*, 137 S. Ct. 988 (2017), which adopts a more vigorous standard of educational progress than was previously applied in certain circuits, including the Fourth Circuit, is entirely premised on the *efficacy* of IDEA and the essential procedural and substantive protections it contains. *Id.* at 1001 ("The IDEA demands

more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.").

The Court of Appeals in this case found precisely the opposite – that, as to T.B., whose parents (as set forth in Chief Judge Gregory's concurring opinion) (Pet. App. 24a-30a) repeatedly, and with no result, *begged* PGCPS for help for their son, IDEA would *not* have worked. The Court of Appeals attempts to paint T.B. as somehow unique in his negative attitude toward school and learning; that he is somehow especially, among all other students, unable to learn and is unworthy of the "resources" of PGCPS (*id.* at 23a); and that he is therefore not deserving of the protections of IDEA.

But T.B. is hardly unique. He is but one example of the great many students who, if their increasing academic and emotional struggles are not timely and appropriately addressed, will gradually, but inexorably, disengage from the learning process through decreasing work completion, increasing absenteeism, school anxiety, and even behavioral problems, as they struggle within a system that ignores their needs with the rationalization that they are just "bad kids" who require a "better attitude," and must simply "apply themselves," *but without the specialized instruction and supports that their disability requires*. *Rowley*, some 36 years ago, specifically stated that federal special education law is expressly designed to prevent disabled students from "sitting idly in regular education classrooms awaiting the time when they were old enough to drop out." 458 U.S. at 179. The Court of Appeals' reasoning wrongly transforms T.B. from a student with unaddressed disabilities who, with *no* supports through

an evaluation and IEP, over a period of years predictably, and mightily, struggled educationally and gradually disengaged from school, into someone unrecognized by IDEA – a student who inevitably, without question, would have performed just as badly even if his needs had been timely and appropriately addressed as required by federal law.

This reasoning is particularly disturbing when one considers that IDEA requires *incarcerated* students with disabilities to be properly served pursuant to an IEP. 20 U.S.C. §§ 1412(a)(1)(B)(ii), 1414(d)(7); 34 C.F.R. §§ 2(b)(1)(iv), 324(d). T.B. has never even been arrested, much less incarcerated, and yet he failed to receive the education accorded to such incarcerated students, with absolutely no remedy being provided by the lower courts.

IDEA simply does not permit a court to deprive a student of a legal remedy for a school district's failure to evaluate him and provide necessary educational services on the basis that, as the Court of Appeals found, the student's educational failure was somehow preordained and inevitable due to the student's purported personal flaws. The Court of Appeals in its decision *does not cite a single case* that excuses a school district's Child Find violation by speculating – as the court did – that the child inevitably would have failed educationally even if appropriate supports had been timely (i.e., years before) and consistently provided. Indeed, this reasoning and result is entirely antithetical to the fundamental remedial purpose of IDEA, which, as noted, conclusively presumes that all students with disabilities who are timely evaluated and receive appropriate supports will make educational progress commensurate with the students' abilities and

potential. *Forest Grove*, 557 U.S. at 244-48 (discussing remedial purpose of IDEA generally and its Child Find mandate specifically); *Endrew F.*, 137 S. Ct. at 99, 1001.

The Court of Appeals' decision gives PGCPS a free pass for its "inexcusable" (Pet. App. 11a) failure to evaluate or provide services to T.B. for a period of years despite numerous parental requests, and despite T.B.'s clear educational decline over that period. The court does not assert, as have other courts, that the student was not substantively harmed because the student did *well* educationally despite the school district's technical procedural statutory violations. Instead, the Court of Appeals adopts a truly unique, unwarranted, and, indeed, offensive reasoning – that there was no "scenario in which special education would have been of any assistance to T.B." on the asserted basis that T.B. "was simply unwilling to take his education seriously" (*Id.* at 16a, 20a). Despite the fact that when T.B. was eventually evaluated by both a private evaluator and PGCPS, he *was* found to be an eligible disabled student under IDEA, and yet was *never* provided *any* educational supports pursuant to an IEP as required by IDEA, the Court of Appeals placed the *entire* fault for T.B.'s educational decline not on PGCPS, but on T.B. himself: "The fault does not lie with the school district....T.B. himself was the cause [for his educational difficulties]." (*Id.* at 23a).

The Court of Appeals' "blame the student justification" for this denial of relief is entirely without legal basis, and should be strongly rejected by this Court. The Court of Appeals based its refusal to award relief to T.B. on cases that have held that a technical procedural violation of IDEA may not entitle a student to relief where the

violation did not result in educational harm to the student. *Id.* at 13a-16a. However, *all* such cases found that a school district's statutory violation may be excused only where the student was provided an *appropriate, effective IEP* despite the procedural violation. *See DiBuo v. Board of Educ. of Worcester Cnty.*, 309 F.3d 184, 191-92 (4th Cir. 2002) (student *with IEP* may not be entitled to relief for school district's failure to provide summer educational services if the child *made appropriate educational progress* without such services); *Tice v. Botetourt Cnty. School Dist.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (school district's procedural failure to provide psychiatric services did not result in substantive violation of IDEA where student's IEP addressed student's needs and he experienced "great [educational] improvement"); *M.M. v. School Dist. of Greenberg Cnty.*, 303 F.3d 523, 535 (4th Cir. 2002) (school district's procedural violation in not having complete IEP in place at beginning of school year did not result in substantive violation where the belated IEP provided the child an appropriate program).[1]

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1. *See also Alvin Indep. School Dist. v. A.D.*, 503 F.3d 378, 384 (5th Cir. 2007) (student did not require special education services in light of his educational *success*, i.e., his "academic, behavioral, and social progress"); *Lesesne v. District of Columbia*, 447 F.3d 832, 834 (D.D.C. 2006) (student was not entitled to relief due to school district's procedural failure to meet deadline for creation of IEP where, *inter alia*, the school district completed an IEP that provided student with an appropriate program and placement); *C.M. v. Board of Educ. of Union Cnty. Reg'l High School Dist.*, 128 Fed. Appx. 876, 881-82 (3d Cir. 2005) (procedural violation in failing to remove certain records from student's file was not a substantive violation of IDEA in absence of evidence that violations caused student educational harm); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 626 (6th Cir. 1990) (purported procedural violations in development of IEP did not cause substantive harm

None of the cases upon which the Court of Appeals relied, however, found that a serious, fundamental statutory violation of IDEA – here, the failure to evaluate T.B. and provide him with an appropriate program for years – may be excused on the basis that the resulting substantive educational damage was somehow inevitable and, in effect, "harmless," because of speculation that the student would not have benefitted from a timely, appropriate IEP due to his own purported personal failings. The result in all of these cases was premised on the student's doing *well* educationally despite the procedural violation of IDEA. The Court of Appeals – without precedent – flips these cases – and *Forest Grove* – on their heads by holding that a school district's violation of IDEA may be excused on the basis that the student was doing very *poorly* educationally, but then speculating that the student would have performed *just* as poorly even if he had been evaluated and provided timely and appropriate supports as required by IDEA. The Court of Appeals' decision requires a finding that, even if T.B. had been evaluated in his 2012-2013 school year, when his parents first requested an evaluation, and thereafter provided appropriate supports (such as emotional counseling, smaller classrooms, and more individualized instruction), the educational result would have been *exactly the same*. Nothing in the evidence – or logic – supports such a finding, nor would such a finding ever be justified under IDEA and *Forest Grove*, and 35 years of this Court's decisions stating that all disabled children *must* be provided an IEP.

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where IEP provided student with appropriate program and placement); *Roland M. v. Concord School Comm.*, 910 F.2d 983, 994-95 (1st Cir. 1990) (alleged technical procedural violations in development of IEP did not warrant relief where violations did not result in development of inappropriate program).

The Court of Appeals' decision posits that there are disabled students who *inevitably* will fail to benefit *at all* from being timely evaluated and provided appropriate educational supports as required by IDEA. The Court of Appeals holds that it is permissible for school districts to "inexcusabl[y]" fail to comply with IDEA, and yet find that the "fault" for a student's subsequent educational decline "does not lie with the school district" (Pet. App. at 23a), but instead lies *entirely* with the disabled student – even where the student was never evaluated and provided appropriate educational services pursuant to an IEP. It allows a school district to ignore repeated and sincere parental pleas for testing and services from a student's parents and when the student fails educationally, find that the *entire* cause of that failure is due, not to the school district's failure to respond to those numerous and timely pleas, but to supposed character flaws in the disabled student (*id.*) ("T.B. himself was the cause....").

Nothing in IDEA or the precedent of this Court allows for such an indefensible "blame the student" reasoning and outcome. Certiorari is warranted to clarify that the reasoning employed by the Court of Appeals is impermissible under IDEA.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 26, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1877

T.B., JR., BY AND THROUGH HIS PARENTS,
T.B., SR. AND F.B.,

Plaintiff - Appellant,

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION; PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS; DR. KEVIN M. MAXWELL, IN HIS OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER OF PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS,

Defendants - Appellees.

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES; DISABILITY RIGHTS MARYLAND,

Amici Supporting Appellant.

Appendix A

Appeal from the United States District Court for the District of Maryland, at Greenbelt. (8:15-cv-03935-GJH). George Jarrod Hazel, District Judge.

March 20, 2018, Argued
July 26, 2018, Decided

Before GREGORY, Chief Judge, and WILKINSON and AGEE, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Agee joined. Chief Judge Gregory wrote an opinion concurring in the judgment only.

WILKINSON, Circuit Judge:

T.B., a former student of Prince George's County Public Schools (PGCPS), alleges that the school district failed to provide him a free appropriate public education in violation of the Individuals with Disabilities Education Act (IDEA). While we agree with the administrative law judge and district court that the school district committed a procedural violation of the IDEA, we also agree with them, that on these facts, the violation did not actually deprive T.B. of a free appropriate public education. We thus affirm the district court's grant of summary judgment to PGCPS.

I.

T.B. began attending PGCPS schools in elementary school. As an elementary schooler, he received mostly As and Bs, although his performance in reading and math

was below grade level. T.B.'s grades took a turn for the worse in middle school. In seventh grade, he received two Cs and four Ds. The following year, he received five Cs, two Ds, and one failing grade (E). His middle school teachers noted that T.B. did "not follow instructions," did "not participate in class," had "[m]issing/incomplete assignments," and received "[p]oor test/quiz grades." J.A. 1900, 1904.

Things did not improve when T.B. began at Friendly High School in 2012. T.B.'s grades, for the most part, continued to decline. He finished ninth grade with two Ds and four Es. He did, however, receive an A in Personal Fitness and a B in Naval Science. In tenth grade, T.B. failed every class except Algebra, in which he received a B. T.B. accordingly failed the tenth grade as a whole and was not able to advance to eleventh grade.

These declining grades reflected, in part, T.B.'s declining attendance. In his two years at Friendly, T.B. recorded a total of 68.5 days of absence. More than 90% of these absences were unexcused. Near the end of T.B.'s tenth grade year, he stopped attending school entirely. On the days that T.B. did attend school, he regularly skipped class or was tardy. In class, T.B. was often disruptive. He would ignore instructions, use his cell phone, and talk to other students during class time. Even in classes he went on to fail, though, T.B. generally performed adequately when he attended class and completed assignments.

T.B.'s academic issues during this time did not go unnoticed. In October 2012, shortly after T.B. started

ninth grade, T.B.'s father emailed the guidance counselor at Friendly to request that T.B. be tested for a disability or provided special education services. PGCPS held an Individualized Education Program (IEP) meeting the following month. The IEP team concluded that T.B.'s difficulties were not the result of any learning or other disability. It therefore determined further assessment to be unnecessary, and scheduled a parent-teacher conference for the following January. At the conference, T.B. and his parents met with his teachers and other PGCPS staff to discuss his academic progress and strategies to get him back on track.

When T.B.'s academic performance did not improve, T.B.'s parents continued to request testing or special education services. Because the school district maintained that no testing was necessary, T.B.'s parents retained Basics Group Practice, LLC, to perform an Independent Educational Evaluation (IEE). Basics tested T.B. in May 2014 and diagnosed him with moderate Attention Deficit Hyperactivity Disorder (ADHD), Specific Learning Disorder with impairment in written expression, and unspecified depressive disorder. T.B.'s father provided the Basics report to PGCPS shortly after receiving it in August 2014.

T.B. transferred from Friendly to Central High School for his second year in tenth grade. T.B.'s career at Central, however, was short-lived. He attended the school for only the first few days of the fall semester before halting his attendance altogether. His parents offered various explanations, among them noise in the school, asthma, and panic attacks.

Appendix A

Finding the school district insufficiently responsive to their requests for special education, T.B.'s parents filed a Due Process Complaint with the Maryland Office of Administrative Hearings on January 13, 2015. The complaint alleged that T.B. had been denied a free appropriate public education and requested both compensatory education and reimbursement for the Basics IEE.

While proceedings based on that complaint were ongoing, T.B.'s family and PGCPS continued to negotiate appropriate education for T.B. At a January 26, 2015, IEP meeting, T.B.'s parents explained that T.B.'s anxiety had prevented him from attending school in the fall. Following that meeting, the IEP team determined that T.B. should receive additional testing to determine his eligibility for special education.

A PGCPS school psychologist conducted the testing and concluded in late February that T.B. had severe problems with anxiety and was eligible for special education. Following this recommendation, an IEP team concluded in March that T.B. was eligible for special education services on the basis of an emotional disability—namely, anxiety that prevented him from regularly attending school. The team also agreed to offer T.B.'s parents five fee-waived credit recovery courses as compensatory services. In April 2015, following additional IEP meetings, an IEP team recommended a specialized program at Dr. Henry A. Wise, Jr. High School. T.B. never attended the Wise program.

Meanwhile, T.B.'s Due Process Complaint progressed. The matter was assigned to a Maryland administrative law judge (ALJ), who conducted a 6-day hearing that involved 21 witnesses and 95 exhibits. The ALJ ultimately found that PGCPS had committed a procedural violation of the IDEA in failing to conduct testing in response to T.B.'s parents' requests, but that this violation "did not actually interfere with the provision of a free appropriate public education." J.A. 31 (quoting *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cty.*, 309 F.3d 184, 190 (4th Cir. 2002)). Specifically, the ALJ concluded that "no evidence supports the view that, had testing been promptly provided, the Student would have regularly attended school." J.A. 31. Instead, T.B. "simply [did] not want to go to school. This is the case regardless of the school, the teachers, the courses, the programs, the placement, the accommodations, the class size, or the compensatory services offered." J.A. 31. The ALJ therefore found that T.B. was "not entitled to compensatory education at public expense." J.A. 52. The ALJ also found that T.B. was not entitled to reimbursement for the Basics IEE.

T.B.'s parents filed a complaint in district court under 20 U.S.C. § 1415(i)(2) seeking reversal of the ALJ's decision, an award of compensatory education, and reimbursement for the Basics IEE. While T.B. ultimately prevailed on the IEE reimbursement question, the district court otherwise affirmed the ALJ's decision and granted summary judgment to the school district. It agreed that the "finding that T.B. would not have attended school even if he had been tested" supported the "conclusion that the procedural failure to respond to [T.B.'s parents']

request for an evaluation did not actually interfere with the provision of" a free appropriate public education. J.A. 168. The district court accordingly affirmed the ALJ's denial of compensatory education. T.B. now appeals to this court.[1]

II.

A.

The IDEA was enacted "to throw open the doors of public education and heed the needs" of students with disabilities who had for too long been "either completely ignored or improperly serviced by American public schools." *In re Conklin*, 946 F.2d 306, 307 (4th Cir. 1991).[2] It operates by way of a simple exchange: the federal government provides funding to the states, who must in return have "in effect policies and procedures to ensure" that every child with a disability has the opportunity to receive a "free appropriate public education" (FAPE). 20 U.S.C. § 1412(a).

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1. The ALJ and district court also both addressed the statute of limitations in this case. Because no party has appealed the district court's decision on that issue, we do not consider the statute of limitations arguments made by amici.

2. Early cases refer to the Act by its original title: the "Education of the Handicapped Act." Its title was changed to the "Individuals with Disabilities Education Act" in 1990. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1), 104 Stat. 1103, 1141-42 (codified as amended at 20 U.S.C. § 1400(a)). For simplicity, we refer to the Act by its contemporary title throughout.

Appendix A

Under the IDEA, a FAPE is defined to include "special education and related services" that are provided "without charge" to the child's family and that "meet the standards of the State educational agency." *Id.* § 1401(9). A FAPE will also involve an "individualized education program" (IEP) for each eligible child. *Id.* The Supreme Court has described the IEP as "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). It must include "a statement of the child's present levels of academic achievement and functional performance," "a statement of measurable annual goals," and "a statement of the special education and related services and supplementary aids and services . . . to be provided to the child." 20 U.S.C. § 1414(d)(1)(A)(i). To meet the IDEA's "substantive obligation," the school must offer an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017).

In addition to providing an IEP for all students known to have disabilities, states receiving IDEA funding have an ongoing obligation to ensure that "[a]ll children with disabilities . . . who are in need of special education and related services[] are identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A). This obligation, known as Child Find, extends to all "[c]hildren who are suspected of being a child with a disability . . . and in need of special education." 34 C.F.R. § 300.111(c). Failure to meet this obligation "may constitute a procedural violation of the IDEA." *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249

(3d Cir. 2012). But such a procedural violation "will be 'actionable' only 'if [it] affected the student's substantive rights.'" *Leggett v. District of Columbia*, 793 F.3d 59, 67, 417 U.S. App. D.C. 59 (D.C. Cir. 2015) (quoting *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 832, 834, 371 U.S. App. D.C. 53 (D.C. Cir. 2006)).

B.

The IDEA rightly "recogni[zes] that federal courts cannot run local schools." *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). Complaints under the IDEA thus do not begin their journey in the federal courts. Instead, parents who disagree with a school district's educational plan for their child first have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child," as well as an "opportunity for mediation" with the school district. 20 U.S.C. § 1415(b). If the parents remain unsatisfied, they are entitled to "an impartial due process hearing, which shall be conducted by the State [or local] educational agency." *Id.* § 1415(f)(1)(A).

In light of the IDEA's manifest preference for local control of schools, we apply a "modified de novo review" to a state ALJ's decision in an IDEA case, "giving due weight to the underlying administrative proceedings." *M.L. by Leiman v. Smith*, 867 F.3d 487, 493 (4th Cir. 2017) (quoting *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015)). We determine independently whether the school district violated the IDEA but consider the ALJ's factual findings to be "prima facie correct." *O.S.*, 804 F.3d

at 360 (quoting *Lorsson v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)).

Performed correctly, this sort of review ensures that courts do 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, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). Indeed, ALJs within state and local educational agencies are themselves expected to "give appropriate deference to the decisions of professional educators." *M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 533 (4th Cir. 2002). The IDEA thus serves to set standards for the education of children with disabilities without displacing the traditional notion that primary responsibility for education belongs to state and local school boards, educators, parents, and students themselves.

III.

We first consider whether PGCPS violated the IDEA in this case. Both the ALJ and district court concluded that PGCPS committed a procedural IDEA violation, and we agree. While our concurring friend suggests that the ALJ and majority place all the blame in this case on T.B. and his parents and absolve PGCPS of all responsibility, Concurring Op. at 28, that is simply incorrect.

The ALJ ultimately concluded that PGCPS had violated the IDEA by "failing to respond to the Parents' requests and conduct a timely evaluation" of whether

T.B. was eligible for special education or related services. J.A. 31. The ALJ found that T.B.'s parents had made and PGCPS had ignored "repeated requests for evaluation" throughout T.B.'s ninth- and tenth-grade years. J.A. 30. Indeed, in October of T.B.'s ninth grade year, his father wrote an e-mail to a PGCPS guidance counselor with the subject line: "Having my son get tested." J.A. 1899. E-mails to teachers also demonstrated that T.B.'s father wanted him to get tested, noting that he was "willing to take it as far as [he] can to get [T.B.] the help he need[s]." J.A. 1864. As the ALJ concluded, "[n]ot all of the requests . . . were clear, articulate requests for testing, but some were." J.A. 30.

Both the IDEA itself and the implementing Maryland laws permit parents to refer their children for a special education assessment. *See* 20 U.S.C. § 1414(a)(1)(B); Md. Code Regs. 13A.05.01.04(A)(2)(a). When such a referral is made, these state and federal laws dictate that certain procedures must be followed. In this case, the school district provided no testing in response to T.B.'s parents' requests for an evaluation until after they had filed a formal complaint. The school district declined to test even after T.B.'s parents supplied it with the results of the Basics IEE, which diagnosed T.B. with qualifying disabilities. As the ALJ found, "the failure of PGCPS to timely respond to the Parents' requests for evaluation is inexcusable." J.A. 31.

This is not to say, however, that T.B. was neglected throughout his time at PGCPS. The ALJ found that, on multiple occasions, T.B.'s teachers had been in touch

with his parents regarding his academic shortcomings, but that such attempts at a dialogue were often rebuffed. Ms. Eller, T.B.'s tenth-grade English teacher, testified that she had "made contact with" T.B.'s parents and "had also requested a face-to-face meeting." J.A. 1142. But that meeting never happened. Ms. Deskin, T.B.'s tenth-grade Art teacher, testified that she wrote T.B.'s father to "inform him that this student was in danger of failing that quarter." J.A. 1117. But she received no response. Ms. Wilkinson, T.B.'s ninth-grade English teacher, testified that she "sent letters home by [T.B.] for his parents regarding his work." J.A. 1084. But instead of responding to her concerns, T.B.'s parents accused her of "picking on him." *Id.*

Individual educators in this case attempted to promote T.B.'s academic progress. But the ALJ's finding that the school district as a whole failed to timely respond to T.B.'s parents' requests for an evaluation is based on a 6-day hearing and extensive evidence. We, like the district court, see no reason to disturb it.

IV.

The fact of a procedural IDEA violation does not necessarily entitle T.B. to relief, however. To obtain the compensatory education he seeks, T.B. must show that this defect in the process envisioned by the IDEA had an adverse effect on his education.

Appendix A

A.

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." *M.M.*, 303 F.3d at 533. A "'mere technical contravention of the IDEA'" that did not "actually interfere with the provision of a FAPE" is not enough. *DiBuo*, 309 F.3d at 190 (quoting *M.M.*, 303 F.3d at 533). 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. *See Burke Cty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (concluding that a student was not entitled to compensatory education where "the procedural faults committed by the [school district] . . . did not cause [the student] to lose any educational opportunity"); *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (denying reimbursement for special education services where there was no allegation that "violations of the evaluation time limits had any detrimental effect on the substance of th[e] IEP"). We have also found that a school district's failure to properly finalize a student's IEP was harmless because the parents had refused to cooperate with the school and the student suffered no educational harm. *M.M.*, 303 F.3d at 535 (agreeing with the district court that "it would be improper to hold [the] School

District liable for the procedural violation of failing to have the IEP completed and signed, when that failure was the result of [the parents'] lack of cooperation" (alterations in original)). We have also explained that "refusal to consider . . . private evaluations" of a student is a harmless procedural violation if the student was not actually entitled to additional services. *DiBuo*, 309 F.3d at 191.

Other courts have taken a similar approach to causation and harmlessness. *See, e.g., Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 384 (5th Cir. 2007) (declining to address potential procedural violations after concluding that the student was ineligible for special education services in any event); *Lesesne*, 447 F.3d at 834 ("[A]n IDEA claim is viable only if th[e] procedural violations affected the student's *substantive* rights."); *C.M. v. Bd. of Educ. of Union Cty. Reg'l High Sch. Dist.*, 128 F. App'x 876, 881-82 (3d Cir. 2005) (per curiam); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990), *superseded by regulation on other grounds*, 34 C.F.R. § 300.116; *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994-95 (1st Cir. 1990).

Of course, the question of causation is not always an easy one. The premise of the IDEA is that struggling students sometimes owe their difficulties to a disability that special education services could remedy. But not always. Not every student who falters academically owes his difficulties to a disability. Academic challenges may reflect "personal losses," "family stressors," or "unwilling[ness] to accept responsibility" on the part of the student. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F.

App'x 887, 892 (5th Cir. 2012) (per curiam). They might simply reflect that a child is "going through a difficult time in her life." *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 663 (S.D.N.Y. 2011). Therefore, schools are not required "to designate every child who is having any academic difficulties as a special education student." *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 225 (D. Conn. 2008), *aff'd*, 370 F. App'x 202 (2d Cir. 2010).

These alternative explanations for academic difficulties make it imperative to identify those students whom "special education and related services" would assist and those whom they would not. Because academic struggles may arise from such a vast array of circumstances, determining whether intervention would help a student achieve a FAPE, and what type and degree of intervention would do so, is necessarily a "fact-intensive exercise." *Endrew F.*, 137 S. Ct. at 999.

It is axiomatic in this sort of inquiry that deference is due to the trier of fact. *See Doyle v. Arlington Cty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991) ("[F]indings of fact by the hearing officers in cases such as these are entitled to be considered *prima facie* correct."). Faced with thorny counterfactuals, it is the duty of the fact-finder to carefully weigh the evidence to discern whether a procedural violation has in fact adversely affected a student's education. Giving due deference to such determinations recognizes that "the primary responsibility for developing IEPs belongs to state and local agencies in cooperation with the parents, not the

courts." *Spielberg v. Henrico Cty. Pub. Sch.*, 853 F.2d 256, 258 (4th Cir. 1988). It also recognizes that ALJs are typically "in a far superior position to evaluate . . . witness testimony" than are reviewing courts. *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 329 n.9 (4th Cir. 2004). Such evaluations almost inevitably rely on "various cues that . . . are lost on an appellate court later sifting through a paper record." *Cooper v. Harris*, 137 S. Ct. 1455, 1474, 197 L. Ed. 2d 837 (2017). This is in part why, throughout the federal system, "deference to the original finder of fact" is "the rule, not the exception." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

All of this, of course, assumes that the trier of fact did a conscientious job with the case. And as shown below, the ALJ's review here was anything but cursory. Indeed, he went out of his way to exhaustively determine whether there was any scenario in which special education would have been of any assistance to T.B. within the ambit of the IDEA.

B.

The ALJ in this case concluded that "PGCPS['s] failure to promptly schedule testing in this case did not establish a failure to provide [a] FAPE" and that therefore T.B. could not recover under the IDEA. J.A. 31. The ALJ described his reasoning as "simple": "the entirety of the record before me establishes that the Student simply does not want to go to school. This is the case regardless of the school, the teachers, the courses, the programs, the placement, the accommodations, the class size, or the

compensatory services offered." *Id.* In other words, no type or amount of special education services would have helped T.B. achieve a FAPE. This conclusion was reached following a 6-day, 21-witness, 95-exhibit hearing, and represents the culmination of 67 specific factual findings.

After reviewing the extensive record in this case, the ALJ found "no evidence support[ing] the view that, had testing been promptly provided, the Student would have regularly attended school." *Id.* All of the testimony—that marshalled by the defendant and that marshalled by the plaintiff—pointed to one thing: that T.B.'s problems were rooted in his refusal to go to class or attend school.

This view was vindicated when T.B. failed even to attend the transition program at Wise recommended by his IEP team. That program "is a self-contained program within the Wise building for students with emotional disabilities." J.A. 21. Classes "typically have 8-12 students" and are capped at 12 students. *Id.* The ALJ found that this program "would provide the Student with a FAPE." J.A. 22. At the meeting where this program was recommended, T.B.'s parents participated and "were provided with all required procedural safeguards and documentation." J.A. 21. T.B. was, albeit belatedly, offered the academic services he sought, yet he chose not to take advantage of them. T.B. "has never attended the Transition Program at Wise," and his parents "have never told PGCPS why" this is the case. *Id.* As the ALJ reasoned, all this therefore "tends to corroborate the view that either the Student, or his Parents, or both, are not interested in the Student receiving academic services from PGCPS." J.A. 49.

It was apparent that T.B. had in the past gotten—and was capable of again earning—decent grades if he applied himself. For example, at the January 2013 parent-teacher conference, T.B.'s teachers explained that T.B. did well enough on his completed assignments, but that the real difficulty was getting him to turn in the assignments. When asked why he was not doing his assignments, T.B. "just said he wasn't trying." J.A. 968-69.

T.B.'s widely variable grades, even within single courses, also reflect that he often failed to perform in settings where he was capable of performing well. The fluctuation is remarkable: In ninth-grade U.S. History, T.B. received a grade of 43 in the first quarter but 74 in the third quarter. J.A. 1873. In his ninth-grade Integrating the Sciences course, he received a high of 81 in the first quarter and a low of 45 in the fourth quarter. *Id.* Variation over the course of T.B.'s tenth-grade year was even more extreme: T.B.'s first quarter English grades were 83 and 79, slipping to 17 and 29 by third quarter, and all the way to 0 and 0 by fourth quarter. J.A. 1834.

Consistent with this evidence, "[v]irtually every teacher . . . testified that the Student was capable of performing satisfactory work but that his frequent absences and failure to do assignments necessarily led to poor or failing grades." J.A. 36. Indeed, the teachers' testimony speaks for itself:

- T.B.'s guidance counselor testified that when T.B. "chose to work, he could perform. When he chose not to work, he didn't perform." J.A. 1312.

- T.B.'s tenth-grade Foundations of Technology teacher testified that T.B. "was capable of doing the work required of him" and, in fact, "did well on a number of tests." J.A. 38. The problem was that T.B. "simply didn't do homework and showed little effort or motivation." *Id.*

- T.B.'s ninth-grade English teacher testified that when T.B. "wanted to do work, his work was satisfactory." *Id.* She also testified that he "failed every quarter because he simply did not do the work." *Id.*

- T.B.'s tenth-grade Spanish teacher testified that a student cannot pass his class "if he doesn't do homework, has irregular attendance, doesn't pay attention in class, and/or does not show any motivation or desire to learn." J.A. 37.

- T.B.'s tenth-grade Art teacher testified that T.B. "was capable" and that "the work [he] did turn in was satisfactory." J.A. 38-39, 1123. She also testified that "she gave [T.B.] an opportunity to turn in work late when he was absent, but that he never did so." J.A. 39.

- T.B.'s tenth-grade English teacher testified that T.B. "was capable of doing the work required of the course" but that he "made little or no effort" and was "absent . . . a total of 46 times and was also tardy on numerous occasions." *Id.*

These teachers were intimately familiar with T.B. and his work product. They had interacted with him in class, observed his work habits, and evaluated the assignments he submitted. Yet they almost universally testified that "there was no reason to suspect that the Student suffered from a learning disability or any other condition mandating special education services." J.A. 36-37. This is true of not only the teachers the school district called but also the teachers T.B. called. Most, if not all, of the teachers who testified had recommended other students for special education evaluation in other cases. But in T.B.'s case, their professional judgment and experience led them to the opposite conclusion. Like the ALJ, this court is rightfully "reluctant to second-guess" the educational decisions of professionals with first-hand experience not only with the student in this case, but with a wide variety of other students. *M.M.*, 303 F.3d at 532; *see also Cty. Sch. Bd. of Henrico Cty. v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005) ("[A]t all levels of an IDEA proceeding, the opinions of the professional educators are entitled to respect.").

The educational professionals who interacted with T.B. were nearly unanimous in their conclusion: T.B. had no disability that special education would have remedied; he was simply unwilling to take his education seriously. And routinely, this disinterest manifested itself in outright contempt. T.B.'s teachers reported that he would talk, text, play cell phone games, and otherwise cause disruptions during class. Ms. Eller testified that T.B. "need[ed] to be told multiple times per day to do his work and to stop talking with other students" and "routinely ha[d] to be

told to put his phone away." J.A. 1136. Ms. Wilkinson testified that T.B. simply "wouldn't follow the rules." J.A. 1090. These behaviors detracted not only from his own education but also from the education of his classmates, and required frequent intervention from teachers. When not actively disruptive, T.B. would occasionally sleep through class. J.A. 1336.

Perhaps most tellingly, his disdain for schooling at times ventured into pure meanness: T.B. ridiculed his tenth-grade English teacher, who was a transgender woman. He would refer to her as "Mr.," "sir," "he," and "him," even after she pleaded with him to respect her gender preference. J.A. 1139.

In contrast to the consistent refrain from T.B.'s teachers that his academic challenges stemmed from his lack of effort, the contrary testimony T.B.'s father offered "was frequently shifting or contradicted by other testimony and documentary evidence." J.A. 41. The ALJ therefore discounted his testimony as "unreliable." *Id.* This type of credibility determination by the fact-finder is the type of conclusion to which we afford the greatest deference, and it is amply supported by the record here.

The ALJ found much of the plaintiff's other evidence similarly inconsistent or incredible. The Basics report was unpersuasive because "the qualifications and training (and, indeed, the identi[t]y) of the person administering the test [were] uncertain," because "the author or authors of the report were not present to testify and therefore were not subject to cross-examination," and because the

"Basics documents contradict each other" with respect to T.B.'s diagnosis. J.A. 42, 47. Finally, the ALJ noted that the authors of the Basics report "had no contact with any of [T.B.'s] teachers or other PGCPS educators." J.A. 43.

The plaintiff's expert opinions, too, were "in a jumble." J.A. 47. In contrast to T.B.'s teachers, each expert had very limited contact with T.B., and they offered differing diagnoses. One expert concluded that "T.B. suffers from situational depression and anxiety" rather than a learning disability. J.A. 47-48. Another "adopt[ed] the views of the Basics author" without making clear which of the contradictory Basics documents she agreed with. *Id.*

In the face of such a consistent conclusion from the educational professionals who best knew T.B. and such an inconsistent message from the plaintiff's evidence, it is no wonder the ALJ concluded that "the overwhelming evidence . . . establishes that the Student was capable of doing satisfactory work when he wanted to and that his poor performance was due to the fact that he failed to attend an almost preposterous number of classes and rarely did either homework or class work." J.A. 36. Testimony from teachers, testimony from parents, and testimony from experts can all be effective to demonstrate a substantive violation of the IDEA. Yet many of the witnesses T.B. ultimately called turned out to be effective witnesses for PGCPS.

T.B. has given us no reason to disturb the well-reasoned conclusions of the ALJ and the district court. It is unfortunate that T.B. did not do better in PGCPS. But

the fault does not lie with the school district. Teachers tried repeatedly to get T.B. to take even a modest interest in his education, and their efforts just as repeatedly came up short. Holding the school district liable for regrettable results in every case would simply deplete its resources without improving outcomes for anyone, a result Congress could not have intended.

V.

School systems have obligations under the IDEA, and PGCPS in this case defaulted in failing to promptly evaluate T.B. On the other hand, the IDEA is focused precisely and humanely on ensuring that students with disabilities are not left behind by their schools. In this case, as the ALJ found, the record is devoid of any credible evidence that an unaddressed disability caused T.B.'s educational difficulties and replete with credible evidence that T.B. himself was the cause.

Every child possesses a gift within, something unique that he or she can contribute to society. Many times special education is needed to nurture that gift. But there are times too when students need to assist educators in developing their own inner capabilities. Poor motivation and poor performance do not always and invariably lie at the feet of teachers and schools. Students themselves also have to try.

Based on the foregoing, the judgment of the district court is

AFFIRMED.

GREGORY, Chief Judge, concurring in the judgment only:

Although I join the Court's judgment, I do so solely on the grounds that the plaintiffs failed to present sufficient evidence at the due process hearing to establish that T.B. was denied FAPE. I write separately to express my view that I cannot agree with the majority's characterization in its opinion of either T.B. and his parents or PGCPS and its employees. While I am constrained to conclude that the plaintiffs have failed to demonstrate that the school division's egregious child find violations actually interfered with the provision of FAPE, I cannot agree that the blame lies with T.B. and his parents, and that PGCPS should bear little or no responsibility for a student in its care or for the unfortunate outcome of this case. Accordingly, I concur in the judgment only.

I.

T.B. first showed signs of academic difficulty in elementary school, where he was already performing below grade level in both reading and math. By middle school, his challenges were evident, as his grades had fallen to Cs and Ds and he failed a class for the year. T.B.'s father sounded the alarm in October of his freshman year of high school, where T.B.'s grades had continued their steady decline. He informed T.B.'s guidance counselor that T.B. was "having trouble remembering things" and was "struggling to process the information in class." He asked whether "there is a program or some kind of test

he could take. I want to help my son [sic] he need before it is too late and he fall behind."[1] J.A. 1899.

PGCPS unilaterally scheduled an IEP meeting on a date when only T.B.'s mother could attend, despite the requirement that the meeting be scheduled at "a mutually agreed on time and place." 34 C.F.R. § 300.322(a)(2). *See also* Md. Code Regs. 13A.05.01.07(D)(1). PGCPS also failed to include, as required by 34 C.F.R. § 300.321(a)(2) and Reg. 13A.05.01.07(A)(1)(b), any regular education teachers at the meeting even though he was receiving full-time regular education instruction.[2] Not surprisingly, the IEP team concluded, without testing T.B., that he was "proficient" and did not have a disability, and that no further assessment was necessary. No other academic supports were offered or provided.

When T.B.'s academic performance did not improve, and after more desperate pleas by T.B.'s parents for testing and special education services for their son,[3]

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1. This was T.B.'s parents' first request for an evaluation. Over the next few years, they made over a dozen additional requests, in writing, for testing or special education services. J.A. 1805-11, 1816, 1818, 1822, 1827, 1833, 1864, 1871, 1881, 1887, 1899, 2110, 2119.

2. Unfortunately, this violation was not raised in the due process complaint, thus it was not considered by the ALJ or the district court, J.A. 16, and is not before this Court for consideration on appeal.

3. T.B.'s father wrote his son's guidance counselor on January 4, 2013:

> I wanted to see if there is [sic] any programs that can help him in school or after school. He is struggling very

T.B.'s guidance counselor responded that T.B.'s records did not indicate a need for special education testing,

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> badly and I asked him to go to his teacher after class to get further assistance. . . . He is getting discourage, [sic] because if he don't [sic] understand the concept and it [sic] not being explained then he will be lost . . . . I am open to any suggestions that you can recommend for my son, we are trying to work with him at home. He understands then but when in class it's something different. *I'm trying to save my son before he give* [sic] *up*. (emphasis added).

J.A. 1887.

Just six days later, he wrote again:

> Is there way we can move [T.B.] to a smaller class? He may need to be moved from a regular class to [a] smaller group. He is having trouble keeping up in the classroom, a lot of his teachers are agreeing with me about my son. He don't [sic] understand the work and he may need to be put in [a] special classroom. Mrs. Dent, I wrote a while back about getting my son tested because he was having trouble remembering things and keeping up. When [my] wife came to the meeting on November 7th, they didn't know what to do. They looked at his transcripts and said he was proficient, and they was [sic] suppose [sic] to reschedule the meeting. Nothing happened [and] he didn't get tested or we haven't heard anything else.
>
> If we have to go to special education classes I looking [sic] for a solutions [sic]? Do [sic] Friendly have smaller classes where he can be changed too [sic]? I was told to come to you as far as helping my son.

J.A. 1881.

and that he could not be reassigned to smaller special education classes as he was appropriately placed in regular education classes. By the end of ninth grade, T.B. failed four core subjects for the year and received a D in History. J.A. 1873. T.B. was promoted to, and then repeated the tenth grade, but his attendance was poor due to his academic and emotional difficulties. Even after T.B.'s parents provided PGCPS a copy of an IEE indicating that T.B. had a learning disability, PGCPS did nothing. It was only after his parents filed a due process complaint that PGCPS convened an IEP meeting to consider the IEE it had received at the beginning of the school year, and to pursue testing of T.B. PGCPS's testing found that T.B. had average intellectual abilities, but was from four to seven years behind his chronological age/grade level in several academic areas. Yet the IEP team found him eligible for special education services only in the category of emotional disability. PGCPS placed T.B. in a self-contained program for students with emotional disabilities, but T.B. never attended the program and his parents never informed the school district why he did not.

II.

I must take issue with the majority's attempt to place blame on T.B.'s parents for the regrettable outcome of his educational experience in PGCPS. The majority, in stating that the teachers' "attempts at a dialogue were often rebuffed," Maj. Op. 11, strongly suggests that T.B.'s parents displayed only a halfhearted interest in T.B.'s education, and ignored teachers' concerns about T.B.'s performance. A review of the entire record does not

support such a suggestion. T.B., Sr. was a father desperate to help his son. He understood that his son stood at an academic crossroads where frustration and anxiety could cause him to give up on his education. Despite PGCPS's determination in October 2012 that T.B. was "proficient," and thus no testing was necessary, T.B., Sr. continued to advocate for his son. He regularly advised teachers, counselors and PGCPS administrators *for over two years* that he was aware of T.B.'s struggles, describing in detail problems with comprehension and focus that he believed were the result of a learning disability. He both initiated and responded to communications from teachers about absences, missed assignments, and makeup work. He also repeatedly asked for advice about available programs and strategies to help T.B. with his learning challenges.[4] T.B., Sr. continued to seek testing and T.B.'s placement

4. On November 20, 2013, T.B., Sr. emailed, "[I]s there anything I can do to help my son improve in your class, I see he [sic] struggling. I think he may have trouble comprehending with the procedure on how to do what is asked of him." J.A. 2110. On the same date, he wrote another teacher asking the same question, but adding, "I have tried to contact you in the pass [sic] but no response I am trying to help my son." J.A. 1871.

He emailed yet another teacher on February 10, 2014, "This year has been very trying for [T.B] and we are trying to do our best to help him focus in all of your classes." J.A. 1868. On the same date, he emailed a teacher a second time, stating that they "sent T.B. to the doctor on January 20 to see his pediatrician. They wouldn't do a KAT [sic] Scan on him they said he need to be tested first by the school. No one is trying to set this up for us. I am willing to go as far as I have to so I will keep you informed." J.A. 1867.

in a classroom setting conducive to his educational needs and learning style, but his pleas fell on deaf ears.[5] By the time PGCPS offered T.B. any type of IEP, he was several years behind academically.

On March 6, 2014, T.B., Sr. wrote another teacher. "For your FYI we are trying to get my son additional help with his learning, because we believe he has a learning disability. No one wants to test him to see, I am working on this matter and I am willing to take it as far as I can to get him the help he need. I will go over what assignments he has missed and try my best to get it to you." J.A. 1864.

5. On March 10, 2014, T.B., Sr. contacted the school division's administrative offices:

> I writing this in concern for my son . . . . My wife and I has [sic] seen some changes in my [son's] learning ability and we have requested for him to be tested . . . . This request has been ignored and my son is falling behind because he don't [sic] understand what he is doing. He writes certain letters backwards, he has a hard time remembering things which causes him to get frustrated. All I heard . . . [is] that he is proficient, they are missing the signs. We took him to his Pediatrician and he said the school needed to test him. Teachers . . . has [sic] labeled my son as not wanting to do anything, but not realizing he is in trouble. This has [sic] went on for 2 years now . . . .
>
> I would like to ask for special transfer to a school where he can be properly tested and to get the attention he need [sic] to better himself. To take him out of this negative environment before something happens to him.

J.A. 2119.

I submit that it was PGCPS and its employees, not T.B.'s parents, that displayed a lackadaisical attitude toward T.B.'s education. The school division and its administrators seemingly had inadequate concern for his academic success. Based on a determination made at a procedurally deficient IEP meeting, PGCPS refused to test T.B., even after it was presented with conflicting IEE testing results. PGCPS failed to offer, or even to suggest, to T.B. and his parents educational resources typically offered to regular education students to help them succeed in the classroom. Sadly, the majority places blame on T.B. and his parents, and absolves PGCPS of responsibility.

III.

While these facts clearly demonstrate the abysmal failure of PGCPS to meet its child find obligations, this Court's holding in *DiBuo ex rel. DiBuo v. Board of Education of Worcester County*, 309 F.3d 184 (4th Cir. 2002), requires that plaintiffs demonstrate that the violation "actually interfere[d] with the provision of a free appropriate public education." *Id.* at 190. The ALJ concluded, as the majority does here, that "[n]o type or amount of special education services would have helped T.B. to achieve a FAPE" because his problems were "rooted in his refusal to go to class or attend school." Maj. Op. 16. The easy explanation for T.B.'s educational demise is that he did not attend school regularly, and when he did, he did not put forth his best effort. The unfortunate reality of this case, however, is that the evidence presented at the due process hearing fails to answer the obvious question: "Why?" In the special education context, the answer is

rarely that a student "simply does not want to go to school." J.A. 31. While one could certainly argue that the ALJ's conclusion that T.B. would not have come to school even with an appropriate IEP was speculative, the plaintiffs' evidence offered nothing to counter it.

The evidence presented by the plaintiffs failed to establish that T.B. was denied FAPE. Educational experts who could have supported the IEE's finding that T.B. had a previously undiagnosed learning disability, and established a link between the long-term denial of special education services and T.B.'s failure to attend school due to frustration and anxiety, either failed to provide helpful testimony or did not testify at all. No witness challenged in any meaningful way PGCPS's self-serving conclusion that its failures had no impact on T.B.'s lack of academic progress. No evidence effectively refuted the conclusion that T.B. did not have a learning disability, or demonstrated that T.B.'s frustration at school led to his emotional problems and school avoidance. No one testified as to why T.B. did not attend the self-contained program or otherwise accept the much delayed compensatory services offered to him. Based on the record here, I must concur with the judgment.

I reach this conclusion solely on the basis of the insufficiency of legal proof in support of the claim presented to and considered by the ALJ. It is in no wise based upon blaming T.B. or his parents. The proof of T.B.'s parents' love, support, and advocacy for him is clearly demonstrated in this record. His father repeatedly made clarion cries seeking help for his son. The majority,

however, concludes that the blame lies at T.B.'s feet. T.B., Sr. only wanted the school district's help to save his son before he gave up. Carl Hasen, former Superintendent of Schools in Washington, D.C., said "[e]ducation is a difficult enough process under any condition because educational effort is primarily an expression of hope on the part of the student." Sometimes a student "is asked to have faith and confidence which at the moment he is in school seems unreasonable and unjustifiable." T.B. has been denied a reason to have hope.

APPENDIX B — ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION, FILED DECEMBER 13, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Case No.: GJH-15-03935

T.B., JR. *ex rel.* T.B., SR. AND F.B.,

Plaintiffs,

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION, *et al.*,

Defendants.

December 13, 2016, Decided
December 13, 2016, Filed

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ordered by the United States District Court for the District of Maryland that:

1. Defendants' Cross Motion for Summary Judgment, ECF No. 28, is granted, in part, and denied, in part. Specifically, Defendants'

Motion is granted with respect to the ALJ's application of the statute of limitations and denial of compensatory education, and those portions of the ALJ's decision are affirmed.

2. Plaintiffs' Motion for Summary Judgment, ECF No. 27, is granted, in part, and denied, in part. Specifically, Plaintiffs' Motion is granted with respect to the ALJ's denial of reimbursement for the Independent Education Evaluation, and the ALJ's decision on this issue is remanded for further proceedings or clarification; and

3. The Clerk shall close the case.

Date: December 13, 2016 /s/ George J. Hazel
George J. Hazel
United States District Judge

Appendix B

MEMORANDUM OPINION

Plaintiffs appeal the decision in *T.B., Jr. v. Prince George's County Public Schools*, OAH No.: MSDE-PGEO-OT-15-01496 (2015)[1] by David Hofstetter, an Administrative Law Judge of the Maryland Office of Administrative Hearings ("the ALJ") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 *et seq.*[2] Presently pending before the Court is Plaintiffs' Motion for Summary Judgment on the Administrative Record, ECF No. 27, and Defendants' Cross Motion for Summary Judgment, ECF No. 28. A hearing on the motions was held on October 17, 2016. Local Rule 105.6 (D. Md. 2016). For the following reasons, Plaintiffs' Motion for Summary Judgment is now denied, in part, and granted, in part, and Defendants' Cross Motion for Summary Judgment is granted, in part, and denied, in part. The ALJ's Decision is thus affirmed, in part, and reversed, in part. Defendants shall reimburse Plaintiffs for the cost of the Independent Education Evaluation.

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1. The Administrative Law Judge's Decision is cited herein as "ALJ."

2. Congress first enacted the Individuals with Disabilities Education Act ("IDEA") in 1970, then called the Education of the Handicapped Act, "to ensure that all children with disabilities are provided a free appropriate public education 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." *Forest Grove Sch. Dist. v. TA.*, 557 U.S. 230, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009) (internal citations omitted).

Appendix B

I. BACKGROUND

A. Factual History[3]

T.B.[4] was born on July 25, 1998. T.B. began attending Prince George's County Public Schools ("PGCPS") in elementary school. ALJ at 8. Although T.B. consistently performed below grade level in Reading and Math throughout his elementary school career,[5] T.B. was never diagnosed with a disability or placed in special education during this time. In 5th Grade, T.B. received "mostly As and Bs, except for Cs in Reading and Writing." ALJ at 9. In 6th Grade, T.B. received three As, two Bs, and one C. *Id.* When T.B. reached seventh grade at Gourdine Middle School, however, his grades began to decline. ALJ at 9; ECF No. 1 at 8-9. T.B. received numerous Ds and failing grades throughout seventh and eighth grades. ALJ at 9; ECF No. 1 at 8-9. His teachers commented that T.B. "[did] not follow instructions" and had "[m]issing/incomplete assignments" and "[p]oor test/quiz grades." ECF No. 1 at 9.

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3. All facts herein are taken from the ALJ's Findings of Facts, *Terrence Barton, Jr. v. Prince George's County Public Schools*, OAH No.: MSDE-PGEO-OT-15-01496 (2015), or Plaintiffs' Complaint, ECF No. 1, where noted.

4. Although T.B. has reached the age of majority since the filing of the Complaint, the Court will continue to refer to him by his initials to mirror the pleadings.

5. Annual standardized testing from 1st through 6th Grade indicated that T.B. was performing below grade level ("Basic" rather than "Proficient") in both Reading and Math. ECF No. 1 at 8.

Appendix B

In the Fall of 2012, T.B. entered high school at Friendly High School. ALJ at 9. According to Plaintiffs' Complaint, T.B.'s academic decline "continued and intensified." ECF No. 1 at 10. On October 12, 2012, T.B.'s father, Mr. Barton, emailed the school Guidance Counselor, Desirae Dent, under the subject heading, "Having my son get tested." *Id.* On November 7, 2012, the school held an IEP meeting[6] concerning T.B. ALJ at 9; ECF No. 1 at 10. T.B.'s mother, Mrs. Barton, and several PGCPS staff were present; however, none of T.B.'s classroom teachers attended the meeting. ALJ at 10. While the IEP team did not conduct formal testing of T.B., the team concluded on "all available information" that his difficulties were not the result of a learning disability or any condition requiring special education services, and did not order further assessments. ALJ at 10. At the meeting, the IEP team gave T.B.'s mother the Maryland State Department of Education document

6. An individualized education program or "IEP" is a written statement for a child with a disability that sets forth, among other things, the child's present levels of academic achievement and functional performance, measurable annual goals, a description of how the child's progress toward meeting the annual goals will be measured, the services and supplementary aids to be provided to the child, and anticipated frequency and duration of services. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.22. The IEP is developed by an "IEP Team," a group consisting of the child's parents or guardians, at least one regular education teacher of the child, at least one special education teacher of the child, a representative of the local educational agency (LEA), and an individual who can interpret evaluation results, often a school psychologist. *See* 20 U.S.C. 1414(d)(1)(B). Once the IEP is developed, the program or plan is reviewed "periodically, but not less frequently than annually." § 1414(d)(4)(A).

"Parental Rights — Maryland Procedural Safeguards," which provides information on how to file a due process complaint and the applicable statute of limitations. *Id.* at 9.[7] The team agreed to schedule a parent-teacher conference for January 2013. *Id.* at 10.

As T.B. progressed through ninth grade, he continued to struggle in school and miss class. ALJ at 9-10. Mr. Barton again emailed Ms. Dent on the 4th and 10th of January 2013, asking about possible programs and smaller classes for T.B. ALJ at 9. Friendly High School held parent-teacher conferences on January 16, 2013. ALJ at 10. Mr. and Mrs. Barton attended and discussed T.B.'s lack of motivation and failure to come to class with some of his teachers, the principal, and other PGCPS staff. *Id.* At the meeting, T.B. stated that "he simply wasn't trying." *Id.* Throughout the rest of T.B.'s ninth grade year and his tenth grade year, T.B.'s absences became increasingly frequent, and he failed many of his classes. ALJ at 12. His parents did not inform PGCPS why T.B. was not attending school, nor did they mention anxiety or depression. *Id.* Mr. Barton emailed teachers and administrators at Friendly on the 6th and 8th of March 2014, asking for T.B. to be "tested for learning disabilities." ALJ at 13. Despite these requests, PGCPS did not test T.B. *Id.* At the end of

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7. What actually occurred at the Nov. 7, 2012 meeting was a factual issue litigated at-length at the administrative law hearing. The ALJ found, after hearing testimony and reviewing exhibits on the matter, that the IEP team "reviewed all available information and discussed whether certain specific testing was appropriate." ALJ at 10. The ALJ also found that Ms. Barton was provided with the procedural safeguards document at that meeting. *Id.* at 9.

school year 2013-2014, T.B. failed the tenth grade. ECF No. 1 at 17.

In the Summer of 2014, the Bartons took their son to the Basics Group Practice, LLC ("Basics Group" or "Basics") to be tested for special education. ALJ at 13. The Basics Group evaluated T.B. on May 6, 8, and 13, 2014. *Id.* On August 29, 2014, Basics concluded that T.B. had attention-deficit hyperactivity disorder (ADHD), a specific learning disability (SLD) with impairment in written expression,[8] and an unspecified depressive disorder. ALJ at 13; ECF No. 1 at 20. Over the Summer of 2014, the Bartons changed residences, and T.B. re-started his tenth grade year at Central High School in the Fall. ECF

8. The IDEA covers certain categories of disabilities that adversely impact education. *See* 34 C.F.R. § 300.1 *et seq.* Among these disabilities are attention deficit hyperactivity disorder (ADHD) and specific learning disability (SLD). ADHD falls under "other health impairment" or "OHI." 34 C.F.R. § 300.8(c)(9). 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 . . . attention deficit disorder or attention deficit hyperactivity disorder . . . and (ii) Adversely affects a child's educational performance." *Id.* Specific learning disability means "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." 34 C.F.R. § 300.8(c)(10).

No. 1 at 20. T.B. only attended Central for a few days in September 2014, with his last day of attendance being on or about September 22, 2014. ALJ at 13. Mr. Barton sent emails to PGCPS, "making conflicting claims" as to why T.B. was not attending school. *Id.* "The emails variously claimed that the Student was not attending due to noise in the school, asthma, or to panic attacks." *Id.*

On January 13, 2015, the Bartons filed a due process complaint against Prince George's County Public Schools. ECF No. 1 at 22; Due Process Compl. An IEP team meeting was convened on January 26, 2015, at which point PGCPS agreed to conduct further academic and social/emotional evaluations with T.B. ALJ at 14. School Psychologist Vincent Tepe performed the evaluations. *Id.* Mr. Tepe found that T.B. was eligible for special education under the category of Emotional Disability.[9] *Id.* Mr. Tepe also found that T.B. was six years below grade level in mathematics, five years below grade level in reading, and four years below grade level in writing. ECF No. 1 at 23. On March 12, 2015 and again on April 4, 2015, the IEP

9. Emotional disability or "emotional disturbance" means "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems." 34 C.F.R. § 300.8 (c)(4)(i).

team met and determined that compensatory services for one calendar year in the form of five fee-waived credit recovery courses would be offered to T.B., and that the Transition Program at Wise High School ("Transition Program") would be an appropriate placement. ALJ at 15.

B. Procedural History

Following the filing of the Bartons' due process complaint, an administrative hearing was held at the Maryland Office of Administrative Hearings over six separate days in the Summer of 2015 (June 12, 15, 16, and 17; July 27; and August 17) before Administrative Law Judge David Hofstetter. ALJ at 2. The issues for decision were:

(1) What is the appropriate statute of limitations to this matter?

(2) Whether the Student was denied a free and appropriate public education (FAPE)[10]

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10. Free and appropriate public education or "FAPE" means "special education and related services that -- (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of [20 U.S.C. § 1400 *et seq.*]." 20 U.S.C. § 1401(9). In matters asserting procedural violations, a child is "deprived of a free appropriate public education" only if "the school system has violated the IDEA's procedural requirements

> during the parts of the 2013-2014 and 2014-2015 school years, which fall within the applicable statute of limitations and; if so, what, if any compensatory education should be provided to the Student to remedy that denial.
>
> (3) Whether the Parents are entitled to reimbursement for an Independent Educational Evaluation (IEE) of the Student conducted in May 2014.

ALJ at 3. The ALJ admitted a total of 97 exhibits from both parties — including student attendance information, progress reports, performance data, and correspondence dating back to 2003. ALJ at 3-7. He heard testimony from 21 witnesses, including 12 of T.B.'s teachers from middle school and high school, T.B.'s parents, and PGCPS guidance counselors and school psychologists. *Id.* at 7-8. The ALJ made 67 factual findings by a preponderance of evidence. *Id.* at 8-16. The ALJ rendered his 46-page decision on September 16, 2015.

With respect to the first issue, the ALJ found that a two-year statute of limitations applied, dating back two years from January 13, 2015, the date the Parents filed their due process complaint. He therefore limited Parents'

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to such an extent that the violations are serious and detrimentally impact upon the child's right to a free public education" or if the IEP is "not reasonably calculated to enable the child to receive educational benefits." *Gerstmyer v. Howard Cty. Pub. Schs.*, 850 F. Supp. 361, 364-65 (D. Md. 1994).

"claims of violations" to the period between January 13, 2013 and January 13, 2015. The ALJ found that no misrepresentation or withholding of information occurred that would "toll or extend the statute of limitations." ALJ at 22-23.[11]

As to the second issue, the ALJ found that "it is clear that the Parent made, within the statute of limitations period, repeated requests for evaluation of the Student." ALJ at 24. He further found that "PGCPS erred in failing to respond to the Parents' requests and conduct a timely evaluation." *Id.* at 25. However, he concluded, based on the "entirety of the record," that "these procedural violations did not 'actually interfere' with the provision of a free and appropriate public education." *Id.* (citing *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cty.*, 309 F.3d 184, 190 (4th Cir. 2002)) (quotations marks added). The ALJ explained, "[m]y reasoning is simple: the entirety of the record before me establishes that the Student simply does not want to go to school." *Id.* Effectively, the ALJ concluded that even if T.B. had received special education services and supports, he would not have gone to school, or the supports would not have had a significant impact.

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11. 20 U.S.C. § 1415(f)(3)(D) adds two exceptions that would toll the two-year statute of limitations set forth under 20 U.S.C. § 1415(f)(3)(C). These are that "the parent was prevented from requesting the hearing due to (i) specific misrepresentations by the loaal educational agency that it had resolved the problem forming the basis of the complaint, or (ii) the local educational agency's withholding of information from the parent that was required . . . to be provided to the parent." *Id.*

In reaching this conclusion, the ALJ did not credit Plaintiffs' experts and noted that T.B.'s diagnosis conflicted not only between the PGCPS expert and Plaintiffs' experts, but between Plaintiffs' own experts. Indeed, PGCPS School Psychologist Vincent Tepe found that T.B.'s diagnosis was "Emotional ALJ at 13; the Basics Group concluded that T.B.'s diagnosis was "Attention Deficit Hyperactivity Disorder, combined presentation, moderate; Specific Learning Disorder with impairment in written expression; and unspecified depressive disorder," ALJ at 14; and Dr. Stephan Silverman, who testified for Plaintiffs, concluded that T.B.'s diagnosis was "situational anxiety and depression," ALJ at 38. The ALJ noted the conflicting diagnoses of Plaintiffs' experts, stating that it "lead[s] me to question the credibility of both." *Id.* at 40. Additionally, the ALJ afforded little weight to Dr. Silverman 's testimony, as Dr. Silverman "met with the Student only once and only briefly," "did not perform any testing on the Student," "did not engage in any therapy with the Student," and "did not have the Student perform any academic activity for him." *Id.* at 39. The ALJ found the same deficiencies to be true with Plaintiffs' other expert, Dr. McLaughlin. ALJ at 40-41.

Additionally, the ALJ found that the reasons that Parents gave PGCPS to explain T.B.'s absences varied and were often unexplained." *Id.* at 35. ("Student's absences from 8th grade onward were due to asthma, nose bleeds, and an injury when he fell on some icy steps . . . however . . . the vast majority of his many, many absences were unexcused and unexplained."). *Id.* The ALJ did not credit T.B.'s father, as "the Father's testimony on almost every

factual matter was unreliable and subject to frequent revision." ALJ at 35. For example, Mr. Barton testified at the hearing that T.B. stopped attending Central because of bullying. *Id.* But later Mr. Barton said bullying was not an issue at Central. *Id.* Thus, the ALJ found that Plaintiffs' claims did not establish a "denial of FAPE." *Id.* at 36.

Regarding the third issue, the ALJ found that the Parents were not entitled to reimbursement for the Independent Educational Evaluation (IEE). *Id.* The ALJ reviewed the report from the Basics Group and found that the document did not establish that the evaluation of T.B. was conducted by "trained and knowledgeable personnel." *Id.* at 28. He noted that the examiner, Whitney Hobson, was a doctoral psychology intern and not a licensed psychologist. *Id.* He further noted that the *curriculum vitae* of the Basics personnel, Hobson and Dr. Ricardo Lagrange, were not entered into evidence, and that the Basics personnel did not testify at the hearing. *Id.* at 28-29. Therefore, the ALJ concluded that the agency "'demonstrated' a failure to show that the IEE meets 'agency criteria,'" and thus the Parents were not entitled to reimbursement. *Id.* at 29.

In sum, the ALJ concluded "as a matter of law Parents have not established by a preponderance of evidence that the Student was denied a free and appropriate public education during the portion of the 2012-2013, 2013-2014, and 2014-2015 school years which fall within the statute of limitations." ALJ at 46. The ALJ therefore found that "the Student is not entitled to compensatory education at public expense." *Id.* Finally, the ALJ denied

reimbursement for the IEE. *Id.* The Bartons timely filed the instant Complaint in this Court on December 23, 2015 and appeal the ALJ's Decision pursuant to 20 U.S.C. § 1415(i)(2). ECF No. 1.

II. STANDARD OF REVIEW

Under the IDEA, any party aggrieved by a decision reached at a due process hearing of the state educational agency may bring a civil action in a district court of the United States. 20 U.S.C. § 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 appropriate," § 1415(i)(2)(C).

A court reviewing an administrative decision under the IDEA conducts a "modified de novo review, giving 'due weight' to the underlying administrative proceedings." *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 530-31 (4th Cir. 2002); *Wagner v. Bd. of Educ. of Montgomery Cty.*, 340 F. Supp. 2d 603, 611 (D. Md. 2004). In evaluating the administrative findings, findings of fact which are "made in a regular manner and have 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 Cty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). In determining whether such factual 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." *Id.* Courts should be particularly hesitant to disturb the "ALJ's determinations of the credibility of witnesses" as "the fact-finder, who has the advantage of hearing the witnesses, is in the best position to assess credibility." *Wagner*, 340 F. Supp. 2d at 611 (quoting *Justin G. v. Bd of Educ.*, 148 F. Supp. 2d 576. 588 (D. Md. 2001)); *see also Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 600 (M.D. Pa. 2014) ("[a]bsent non-testimonial, extrinsic evidence to the contrary, the court must accept the Hearing Officer's credibility determinations.") (citing *Carlisle Area Sch. v. Scott P. ex rel. Bess P.*, 62 F.3d 520, 529 (3d. Cir. 1995)).

Once the reviewing court has given the administrative fact-findings due weight, it is then "free to decide the case on the preponderance of the evidence." *Doyle*, 953 F.2d at 105. A district court may, for example, "believe[] that the evidence considered as a whole point[s] to a different legal conclusion," despite accepting the factual findings of the officer below. *See Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. T.H.*, 642 F.3d 478. 485 (4th Cir. 2011). 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." *Hartmann ex rel. Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1000 (4th Cir. 1997) (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)). Pure questions of law are reviewed de novo. *See E.L. ex rel. Lorsson v. Chapel Hill-Carrboro*

Bd. of Educ., 773 F.3d 509, 514 (4th Cir. 2014) (discussing exhaustion of administrative remedies as "pure question of law"); *Damarcus S. v. District of Columbia*, Civil Action No. 15-851 (ESH), 190 F. Supp. 3d 35, 2016 U.S. Dist. LEXIS 67178, 2016 WL 2993158, at *3 (D.D.C. May 23, 2016) (discussing the proper statutory construction of IDEA as a "pure question of law"); *Jana K.*, 39 F. Supp. 3d at 595 (M.D. Pa. 2014) ("[t]he district court's review of the hearing officer's application of legal standards and conclusions of law . . . is subject to plenary review.").

Finally, "just as Plaintiffs were required to carry the burden of proof in the administrative hearing" *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *aff'd*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005), Plaintiffs must also carry that burden in this court, as they are the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005); *see also Wagner*, 340 F. Supp. 2d at 611 (describing Plaintiffs in IDEA cases as facing an "uphill battle").

III. ANALYSIS

The ALJ heard six days of testimony from 21 witnesses, reviewed 35 exhibits, and drafted a 46-page opinion detailing his factual findings and conclusions of law. From this Court's review of the record, it is clear 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 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."). As will be discussed in more detail below, the ALJ's factual findings are also supported by the evidence and are therefore presumed to be prima facie correct. The Court will now address the three issues raised below, in turn.

A. Statute of Limitations

In 2003, the Fourth Circuit held that "[a]n IDEA claim accrues when the parents of the disabled child knew or should have known of the injury or the event that is the basis for their claims. The injury in an IDEA case—the injury that allows a parent to bring suit—is an allegedly faulty IEP or a disagreement over the educational choices that a school system has made for a student." *R.R. ex rel. R.R. v. Fairfax Cty. Sch. Bd.*, 338 F.3d 325, 332 (4th Cir. 2003) (internal citations omitted). But until 2004, the IDEA did not have a specified statute of limitations. *See G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 608 (3d Cir. 2015). Since that time, amendments to the IDEA have added two provisions, 20 U.S.C. §§ 1415(f)(3)(C) and 1415(b)(6)(B), both seeming to address the applicable statute of limitations but with differing language, which has caused confusion. *Id.* at 609.

Section 1415(f)(3)(C) sets forth what appears to be the statute of limitations principle known as the discovery rule: "A parent or agency shall request an impartial due process hearing *within 2 years of the date the parent or agency knew or should have known about the alleged*

action that forms the basis of the complaint . . ." 20 U.S.C. § 1415(f)(3)(C) (emphasis added). Thus, under this provision, IDEA plaintiffs clearly have two years from the date they knew or should have known of the defendants' violation to file their due process complaint.[12]

The language of Section 1415(b)(6)(B) is less clear. That subsection provides for "[a]n opportunity for any party to present a complaint-- with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and which *sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint*, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows . . ." § 1415(b)(6)(B) (emphasis added). Thus, the plain language of Section 1415(b)(6)(B) would suggest looking backward in time from the knew-or-should-have-known ("KOSHK") date. This has led to questions and confusion about whether (b)(6)(B) is an awkward re-statement of (f)(3)(C), a remedy

12. Section 1415(f)(3)(D) also provides two exceptions that toll this two-year statute of limitations: "The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to-- (1) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent." § 1415(f)(3)(D).

cap of two years prior to the KOSHK date, or a hybrid "2+2" approach creating a four-year statute of limitations (two years prior and two years post KOSHK). *G.L.*, 802 F.3d at 610 (discussing inconsistent conclusions reached by district courts).

The Third Circuit in *G.L.* thoroughly analyzed the text and legislative history of the two subsections at issue. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 611-26 (3d Cir. 2015). The Court will not repeat that analysis in its entirety here, but finds it persuasive and adopts the reasoning. At the end of its discussion, the Third Circuit explained that:

> [A]bsent one of the two statutory exceptions found in § 1415(f)(3)(D), parents have two years from the date they knew or should have known of the violation to request a due process hearing through the filing of an administrative complaint and that, assuming parents timely file that complaint and liability is proven, Congress did not abrogate our longstanding precedent that "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem."

G.L., 802 F.3d at 626 (quoting *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d. Cir. 1996)). In so holding, the *G.L.* court made clear that "the limitations period [in § 1415] functions in a traditional way, that is,

as a filing deadline that runs from the date of reasonable discovery and not as a cap on a child's remedy for timely-filed claims that happen to date back more than two years before the complaint is filed." *Id.* at 616. Thus, the first step in a statute of limitations analysis for an IDEA claim is to establish what the "KOSHK" date is for the violation at issue, and look forward two years to determine whether the complaint was timely filed.

At first blush, the ALJ in the present case seems to have taken a different approach, instead starting with the date the complaint was filed and looking backward in time. Whether this is an appropriate approach depends on whether the Court views Defendants' actions as a single violation or a series of individual violations. If viewed as a single violation, the entire claim was time barred when the Complaint was not filed by November 7, 2014, two years after the first KOSHK date.[13] However, properly viewing this case as a series of violations,[14] the ALJ's approach

13. The ALJ found that "as of November 7, 2012 (the date of the IEP team meeting), as well as by January 13, 2013 (the last date before prior claims would be barred by the statute of limitations), the evidence is overwhelming that the Parents knew or should have known all the facts supporting any alleged violation of the Student's rights under the IDEA prior to that date." ALJ at 24.

14. In the Court's view, the "alleged action that forms the basis of the complaint" is best viewed as an aggregate of separate, related violations. Namely, "PGCPS has repeatedly failed to identify and evaluate Terrence, including ignoring specific requests by Terrence's family that PGCPS evaluate him." Due Process Compl. at 4. In the Due Process Complaint, Plaintiffs lay out multiple dates beginning in October 2012 and lasting through

of starting with the date the complaint was filed, looking backward two years, and including any violations within that two year period, is nothing more than a functional, efficient device to determine which claims are time-barred. All claims within those two years would have been deemed timely-filed had they been analyzed individually looking forward. Claims occurring outside of that two-year window would not be. Additionally, the ALJ considered extensively the potential applicability of the two statutory tolling exceptions under Section 1415(f)(3)(D), and properly found that neither exception applied, which would have allowed the Plaintiffs to include additional alleged violations. ALJ at 20-22 ("I therefore conclude that no misrepresentation or withholding of information occurred . . . and therefore there is no basis to extend the statute of limitations on that basis."). Thus, the determination and application of the statute of limitations was accurate.

However, while the ALJ properly found that only violations occurring after January 13, 2013 could be used to state a claim, the ALJ improperly found that only relief for injury suffered during that period would be recoverable. Pursuant to *G.L.*, decided after the ALJ's ruling but adopted herein, "a disabled child is entitled to compensatory education for a period equal to the period of deprivation." 802 F.3d at 626 (assuming liability is proven, "a disabled child is entitled to compensatory education for a period equal to the period of deprivation,

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September 2014, where the Parents sent emails and contacted the school, requesting for T.B. to be evaluated and receive additional support in his classes. *Id.* Accordingly, the alleged action is not a single, overarching violation, but rather a series of violations.

but excluding the time reasonably required for the school district to rectify the problem."); *see also Draper v. Alt. Indep. Sch. Sys.*, 518 F.3d 1275, 1286-90 (11th Cir. 2008) (rejecting a school district's argument that a child's long-undiscovered injury was time-barred and upholding an award of approximately five years of compensatory education). Thus, had a claim for denial of FAPE during the limitations period been established, damages for harm occurring before January 13, 2013, two years prior to the filing of the due process complaint, would have been available. This error is made harmless, however, by the ALJ's determination, which this Court affirms, that there was no actual interference with the provision of FAPE.

Plaintiff additionally complains that the ALJ erred in using the limitations date as an evidentiary exclusion rule. ECF No. 27-1 at 31. That argument mischaracterizes the ALJ's ruling. The ALJ explicitly stated, "I have determined that the Parents' claims concerning events occurring before January 13, 2013 are barred by the statute of limitations. For historical and background purposes, however, I have nevertheless included in these findings of fact some information concerning events occurring before that date." ALJ at 9 n.7. Specifically, the ALJ included an email sent October 10, 2012 by T.B.'s father and the November 7, 2012 IEP meeting. Thus, the ALJ did not exclude that information cited to by Plaintiffs, but rather included information from that time period which he felt was relevant for historical and background purposes. Accordingly, the Court does not disturb the ALJ's decision as to the statute of limitations issue.

Appendix B

B. Child Find

IDEA "imposes an affirmative obligation on any state receiving federal assistance to identify and evaluate all children suffering from disabilities who may be in need of special education and related services." *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 941 (E.D. Va. 2010); *see* 34 C.F.R. § 300.111(a). This duty is known as "child find." *Id.* The child find obligation extends to "children who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c). Failure to comply with "child find" may constitute a "procedural violation" of the IDEA. *Brown*, 769 F. Supp. 2d at 942 (citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009)).

Although child find does not "impose a specific deadline by which time children suspected of having a qualifying disability must be identified and evaluated, evaluation should take place within a 'reasonable time' after school officials are put on notice that behavior is likely to indicate a disability." *Brown*, 769 F. Supp. 2d at 942 (citing *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995)). Hence, the child find obligation is "triggered where the state has reason to suspect that the child may have a disability and that special education services may be necessary to address that disability." *Id.* A local educational agency is "deemed to have knowledge that the child may suffer from a disability" where:

i. the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

ii. the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B); or

iii. the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency. 20 U.S.C. § 1415(k)(5)(B).

20 U.S.C. § 1415(k)(5)(B).

Here, the ALJ found that Mr. Barton made repeated requests for evaluation in the two-year period prior to the filing of the due process claim, and thus, "PGCPS erred in failing to respond to Parents' requests and conduct a timely evaluation." ALJ at 25. But even if the school's error in failing to identify or evaluate constituted a procedural violation, "procedural violations of IDEA are subject to harmlessness analysis." *Snyder ex rel. Snyder v. Montgomery Cty. Pub. Schs.*, Civil Action No. DKC 2008-1757, 2009 U.S. Dist. LEXIS 89697, 2009 WL 3246579 at *6 (D. Md. Sept. 29, 2009). Thus, "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" *Id.* (emphasis added). A child is "deprived of a free appropriate public education" only if "the school system has violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free public education," or if the IEP is "not reasonably calculated to enable the child to receive educational benefits." *Gerstmyer v. Howard Cty. Pub. Schs.*, 850 F. Supp. 361, 364-65 (D. Md. 1994); *see also Sch. Bd of the City of Suffolk v. Rose*, 133 F. Supp. 3d 803, 819 (E.D. Va. 2015) (equating denial of FAPE with "loss of an educational opportunity for the disabled child" as opposed to "mere technical contravention of the IDEA"); *Jana K. ex rel. Tim K. v. Annville-Cleona Sch. Dist.*, 39 F. Supp. 3d 584, 603 (M.D. Pa. 2014) ("a school district is not obligated to conduct a formal evaluation of every struggling student and it may be prudent to offer other interventions before rushing to a special education identification.").

Plaintiffs argue that the ALJ "grievously erred," after making a finding that Defendants erred in failing to evaluate T.B., by concluding, in Plaintiffs' words, "that T.B. was essentially, beyond help — that, even if T.B. had been promptly evaluated and had been given the proper supports, T.B. would not 'have regularly attended school." ECF No. 27-1 at 34. Certainly, the Court is concerned about the notion that any child could be considered "beyond help" and, without context, would be troubled by the ALJ's conclusion that "the Student simply does not want to go to school," and that "whether with or without an IEP, and even with an IEP providing a small,

self-contained special education classroom setting with only 8-12 students in the class, the Student will not go to school." ALJ at 25. In a vacuum, it is not difficult to imagine that if a child receives help in middle school, such help could lessen discouragement and the child's later reluctance to go to school. But this Court is not reviewing this matter in a vacuum and cannot discard the informed opinions of T.B.'s educators and the credibility findings of the ALJ, who had the advantage of hearing the testimony. *See Wagner v. Bd. of Educ. of Montgomery Cty.*, 340 F. Supp. 2d 603, 611 (D. Md. 2004) ("in according 'due weight' to the findings of the ALJ, this court owes deference to the ALJ's determinations of the credibility of witnesses.").

Upon considering the entirety of the record before him, the ALJ concluded that PGCPS's failure to evaluate T.B. amounted to harmless procedural error, because, despite T.B.'s difficulties, T.B. was a student of normal intelligence who was capable of doing the work when he chose to do so. The ALJ heard testimony from no fewer than 11 of T.B.'s teachers, most of whom indicated T.B. was able to produce satisfactory work, but refused to come to class or do homework. Linda Wilkinson, who taught T.B. for ninth grade English, testified that he "failed every quarter because he simply did not do the work." ALJ at 32. Ms. Wilkinson further stated that "when he wanted to do the work, his work was satisfactory and he achieved some good grades on assignments he completed." *Id.* Sam Kamara, who taught T.B. for tenth grade Foundations of Technology, testified that "he was capable of doing the work required of him" but "the Student simply didn't do homework and showed little effort or motivation." *Id.*

Even teachers who attempted to accommodate T.B. fared no better. T.B.'s tenth grade Art teacher, Anna Guiles Deskin, testified that "she gave the Student an opportunity to turn in work later when he was absent, but that he never did so." Ms. Deskin testified that T.B. "showed poor motivation and rarely did homework or classwork" but that "the work that the Student did turn in was satisfactory." ALJ at 32. Jennifer Eller, T.B.'s tenth grade English teacher, testified that when T.B. did come to class, "he was disruptive, talk[ed] with other students out of turn, used his cell phone, refused to follow directions and made insulting statements to Ms. Eller." ALJ at 33. Several teachers also testified that they notified T.B.'s Parents about his poor performance and requested a meeting, but that the Parents never responded. *Id.* The ALI found that "[m]ost if not all of the witnesses testified that they had referred students for special education in the past or that they were prepared to do so, but that there was no reason to suspect that the Student suffered from a learning disability or any other condition mandating special education services." ALJ at 30-31.

Additionally, Leatriz Covington, principal at Gourdine Middle School, testified that the rigors of middle school are much greater than those in elementary school. Hrg. Tr. vol. 1, 147-148. Ms Covington testified that it is not at all unusual for a student who is successful with As and Bs in elementary school to come to middle school and wind up with Ds and Es. *Id.* at 149. School Psychologist Vincent Tepe agreed, after evaluating T.B., that he was affected by an emotional disability; however, Mr. Tepe testified that "I didn't see any evidence of an emotional disability prior to

Spring of 2014 in any of the records anywhere." Hrg. Tr. vol. 6, 1385. In sum, the Court cannot say that the school overlooked clear signs of either a learning disability or an emotional disability, particularly in light of T.B.'s frequent absences, conflicting explanations by the Parents, and the increased rigor of middle school and high school. *See Richard S. v. Wissahickon Sch. Dist.*, 334 F. App'x 508, 511 (3d. Cir. 2009) (affirming no Child Find violation where extensive evidence in the record showed that middle school student was "perceived by professional educators to be an average student making meaningful progress, but whose increasing difficulty in school was attributable to low motivation, frequent absences, and failure to complete homework."). Hence, the record is replete with evidence supporting the ALJ's findings.

In determining when a procedural violation of IDEA interfered with the provision of a FAPE, the Fourth Circuit's decision in *DiBuo* offers a helpful illustration. *See DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cty.*, 309 F.3d 184, 191 (4th Cir. 2002)). In that case, the ALJ found that a child with a speech-and-language disability was not entitled to "Extended School Year" ("ESY") services during the summer; and thus, the school's earlier refusal to consider the parents' independently-obtained private evaluations recommending ESY services for the child, while a procedural error, did not "actually interfere" with the provision of FAPE. *Id.* at 191. Parents appealed the decision of the ALJ, and the district court granted summary judgment for the parents, holding that such refusal by the school "seriously infringed the parents' opportunity to participate in the IEP formulation

process." *Id.* at 188. On appeal, the Fourth Circuit stated that if "a presumably correct finding is made" that a child with a disability does not need a specific special education service, support, or other accommodation to receive a FAPE — such as ESY services — the procedural failure to consider parents' private evaluations stating the contrary "cannot be said to have actually interfered with the provision of FAPE to that child." *Id.* Hence. if the ALJ in *DiBuo* was correct in finding that the child was not entitled to ESY services, the ALJ was also correct in finding no denial of FAPE. Similarly here, the ALI made a finding that T.B. would not have attended school even if he had been tested, and this finding was regularly made and supported by evidence. Giving due weight to the underlying proceedings, this Court affirms the ALJ's conclusion that the procedural failure to respond to the Bartons' request for an evaluation did not actually interfere with the provision of FAPE.

C. Reimbursement for the Independent Educational Evaluation

The ALJ next determined that the Bartons were not entitled to reimbursement for the privately-procured Independent Educational Evaluation because the agency PGCPS, "'demonstrated' a failure to show that the IEE meets 'agency criteria.'" ALJ at 29. In addition to contending that the ALJ was correct in reaching this conclusion, Defendants also posit a second, alternative basis for upholding the ALJ's decision — namely that the regulation requires that the parent disagree with an evaluation obtained by the public agency, and here there

was no evaluation performed with which the parents could disagree. ECF No. 28-1 at 42. Both issues turn on the interpretation of provisions of 34 C.F.R. § 300.502(b). The regulation reads as follows:

> b) Parent right to evaluation at public expense.
>
> 1. 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, subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> 2. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either —
>
> i. File a due process complaint to request a hearing to show that its evaluation is appropriate; or
>
> ii. Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

34 C.F.R. § 300.502(b). Plaintiffs argue that, in contravention of (b)(2)(ii), the ALJ improperly shifted the burden to the parents to demonstrate that the independent evaluation from the Basics Group "met agency criteria."

ECF No. 27-1 at 56. Plaintiffs are correct. In reaching his conclusion, the ALJ noted that Defendants had put forth testimony at the hearing criticizing the conclusions of the report. *See* ALJ at 28; 34 C.F.R. § 300.502(b)(2)(ii). But the ALJ then stated, "[w]ith one important exception, however, *Mr. Tepe and PGCPS did not clearly establish that the report failed to meet 'agency criteria*.'" ALJ at 28 (emphasis added). Specifically, the ALJ found that PGCPS did not establish that the Basics assessment was not "administered by trained and knowledgeable personnel," which is one of the established criteria. 34 C.F.R. § 300.304(c)(1)(iv).

Given that (b)(2)(ii) requires the agency to demonstrate at a hearing that the evaluation did not meet agency criteria, if the ALJ's conclusion is that the agency did not meet this burden, that should end the matter. Nonetheless, the ALJ determined that "[i]f the school district were required to 'prove' that the evaluator was *not* trained and knowledgeable, it would allow virtually anyone to conduct an IEE for a parent and make it exceedingly difficult for the school district to 'prove a negative,'" ALJ at 29 (emphasis in original). But, as the ALJ acknowledges, the authors of the report could have been subpoenaed to testify at the hearing, and this Court is aware of no reason why that would have been difficult or burdensome to accomplish. ALJ at 29 n.12. Thus, the absurd outcome the ALJ was apparently seeking to avoid does not exist here, and there is no reason to believe that the drafters of the regulation did not mean what they said when they crafted language placing the burden on the agency to demonstrate that the IEE did not meet agency criteria. The Court

is, however, unclear if the ALJ's qualifying statement, "with one exception," was intended as a conclusion that PGCPS did establish that the additional criteria, beyond the knowledge and training of the personnel, had not been met.[15] Thus, the Court will vacate and remand the decision on this issue for a determination or clarification of whether the agency met its burden of establishing that the report failed to meet agency criteria.

The Court will, however, also address Defendants' alternative argument that, because the regulation states that the right to an independent educational evaluation at public expense arises "if the parent disagrees with an evaluation obtained by the public agency," the public agency's evaluation of the child is a necessary condition precedent to the parents' right to the evaluation at public expense. ECF 28-1 at 43. The Court disagrees.

The record is clear, and the ALJ found, that the Parents made repeated requests for T.B. to be evaluated by the school over the course of at least two years, to no avail. ALJ at 24. It would make little sense to force Parents to wait for their child to be evaluated by the school, if the school was entirely, and improperly, unresponsive to a series of requests for an evaluation. *Cf. Learning Disabilities Ass'n of Maryland, Inc. v. Bd.*

15. For example, to the extent that there is a list of specific criteria, if the ALJ found that the agency established that some of the criteria had not been met, it would seem that the agency did carry its burden of establishing the report did not meet agency criteria; but it is unclear if that is what the ALJ intended in his ruling.

of Educ. of Baltimore Cty., 837 F. Supp. 717, 722-23 (D. Md. 1993) ("Exhaustion may be deemed futile 'where the state agency itself prevented administrative remedies from being exhausted"); *Warren G. v. Cumberland Cty. Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999) (observing that requiring parents to notify school district before obtaining an IEE would "render the regulation pointless because the object of parents' obtaining their own evaluation is to determine whether grounds exist to challenge the District's.").

The ALJ determined that "PGCPS erred in failing to respond to the Parents' requests and conduct a timely evaluation." ALJ at 25. To hold that the parents could not, in this circumstance, obtain a publicly-funded evaluation would defeat the purpose of 34 C.F.R. § 300.502(b)(1), which is to provide parents with the ability to effectively challenge the decision of the school. *See Warren G.*, 190 F.3d at 87. Indeed, this case provides the example for why such a holding is necessary. Although the report was ultimately unpersuasive to the ALJ, without it, the Parents would have been entirely unable to challenge the decision Defendants did make, which was that T.B. should not even be evaluated. In essence, PGCPS had simply made an informal evaluation that T.B. was not disabled. In a circumstance such as this one, where the ALJ has found that the refusal to conduct a formal evaluation was improper, reimbursement for a private evaluation is appropriate. Defendants' citation to *G.J. v. Muscogee Cty. Sch. Dist.*, 668 F.3d 1258, 1266 (11th Cir. 2012) does not persuade this Court to reach a different conclusion. While it is true that the Sixth Circuit in *G.J.* held that

"[t]he right to a publicly funded independent educational evaluation does not obtain until there is a [evaluation or] reevaluation with which the parents disagree," *id.* at 1266, in that case, the reevaluation did not occur because the parents refused to consent to the reevaluation. Here, it is the Defendant's failure, not the parents', that led to the lack of evaluation.

However, because the Court is unclear as to whether the ALJ found the agency met its burden of establishing that the report did not meet agency criteria, the Court remands this part of the decision to provide the ALJ the opportunity to clarify his ruling in light of the Court's holding.

IV. CONCLUSION

For the reasons stated above, Defendants' Cross Motion for Summary Judgment is granted with respect to the application of the statute of limitations and denial of compensatory education, and the ALJ's decisions on these issues are therefore affirmed. Plaintiffs' Motion for Summary Judgment is granted, in part, with respect to the denial of reimbursement for the independent educational evaluation, and the ALJ's decision on this issue is remanded for further proceedings or clarification. A separate Order shall issue.

Date: December 13, 2016 /s/ George J. Hazel
George J. Hazel
United States District Judge

APPENDIX C — DECISION OF THE MARYLAND OFFICE OF ADMINISTRATIVE HEARINGS, DATED SEPTEMBER 16, 2015

BEFORE DAVID HOFSTETTER,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS

OAH NO.: MSDE-PGEO-OT-15-01496

[T.B., JR.],

v.

PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS.

DECISION

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

Appendix C

STATEMENT OF THE CASE

On January 13, 2015, [T.B.], Sr. (Parent[1]), on behalf of his child, [T.B.], Jr. (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the Prince George's County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

On March 19, 2015, the Parent notified OAH that the parties had participated in a resolution meeting on January 26, 2015 and that they did not reach an agreement.[2] As a result, on April 17, 2015, I conducted a telephone pre-hearing conference (TPHC) in the captioned matter. The parents were represented by Dennis C. McAndrews, Esquire, on behalf of the Student. Jeffrey Krew, Esquire, appeared on behalf of PGCPS.

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1. The Due Process Complaint was filed in the name of [T.B.], Sr. only. However, at the hearing both Mr. [B.], Sr. and his wife, [F.B.], were present. Both testified and the parties clearly understood them to be acting as a unit for the purposes of this litigation and commonly referred to them as "the Parents." I will adopt this convention throughout; when necessary for clarity, I will refer to Mr. [B.], Sr. as "the Father" and [F.B.] as "the Mother."

2. At the TPHC, neither party informed the OAH as to why it was not notified until March 19, 2015 of the outcome of the January 26, 2015 resolution meeting. See, COMAR 13A.05.01.15.C.11(e) and (f); 34 C.F.R. § 300.510.

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By agreement of the parties at the TPHC, the hearing was scheduled for June 12, 15, 16, and 17, 2015. The hearing dates requested by the parties fell more than 45 days after the triggering events described in the federal regulations, which is the date my decision would be due. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2014). The Parties requested an extension of time until thirty days after the close of the hearing (that is, until July 17, 2015) for me to issue a decision. 34 C.F.R. 300.515 (2014); Md. Code Ann., Educ.§ 8-413(h) (2014). At the TPHC, the parties waived on the record the time requirements set forth above.

I conducted the hearing on June 12, 15, 16, and 17, 2015. On June 17, 2015, it became apparent that two additional days of hearing would be required to complete the testimony of all witnesses. Due to litigation and summer vacation schedules of both counsel and the Administrative Law Judge (ALJ), as well as the vacation schedule of the remaining witnesses, the earliest dates available for additional days of hearing were July 27, 2015 and August 17, 2015. On June 17, 2015, the parties agreed to additional days of hearing on July 27, 2015 and August 17, 2015. The parties again agreed to an extension of time until thirty days after the close of the hearing (that is, until September 16, 2015) for me to issue a decision. The parties again, on the record waived the time requirements set forth above.

On each day of the hearing, the Parent was represented by Mr. McAndrews[3] and PGCPS was represented by Mr. Krew.

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) (2014); Md. Code Ann., Educ. § 8-413(e)(1) (2014); 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; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

The issues are:

1. What is the appropriate statute of limitations applicable to this matter?

2. Whether the Student was denied a free appropriate public education (FAPE) during the parts of the 2013-2014 and 2014-2015 school years which fall within the applicable statute of limitations and; if so, what, if any compensatory education should be provided to the Student to remedy that denial.

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3. Mr. McAndrews, a member of the Pennsylvania Bar, was admitted *pro hac vice* for the purpose of appearing in this matter by order of the Circuit Court for Prince George's County, MISC-721, April 28, 2015.

3. Whether the Parents are entitled to reimbursement for an Independent Educational Evaluation (IEE) of the Student conducted in May 2014.

SUMMARY OF THE EVIDENCE

Exhibits[4]

I admitted the following exhibits on behalf of the Parent:[5]

1	4/2/15	IEP
2	4/7 /15	Prior Written Notice of PGCPS
3	3/12/15	Prior Written Notice of PGCPS
4	2/20/15	Confidential Psychological Report of PGCPS
5	2/10/15, 2/9/15	Emails re Home and Hospital Teaching (HHT) Program to/from Parent and PGCPS
6	2/2/15	Psychologist's Verification (3 forms) for HHT Program
7	1/27/15	Authorization of Parent to Request for Information by PGCPS

4. Exhibits are numbered as presented by the parties. Parent exhibits are designated as "P-#."

5. PGCPS exhibits are designated as "PGCPS-#."

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8	1/26/15	Form letter re: HHT Program
9	1/26/15	Initial Contact and Referral Form - HHT Program
10	1/26/15	Prior Written Notice of PGCPS
11	1/26/15	Notice and Consent for Assessment/Initial Evaluation of PGCPS
12	1/13/15	Request for Mediation and Notice of Due Process Complaint
13	1/13/15	Fax cover sheet to OAH
14	1/13/15	Due Process Complaint letter of Caitlin McAndrews, Esquire
15	1/13/15	Release of Records or Other Information signed by Parent
16	1/13/15	Email to McAndrews Law Office reflecting fax to PGCPS successfully transmitted
17	10/23/14	Psychologist's Verification for HHT
18	10/18/14	Letter of Parent to PGCPS
19	10/6/14	Email from Parent to PGCPS
20	9/16/14	Emails to/from Parent and PGCPS

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21	9/11/14	Emails to/from Parent and PGCPS
22	9/5/14	Email from PGCPS to Parent
23	9/5/14	Withdrawal/Transfer Record
24	9/5/14	Publicity Release of PGCPS signed by Parent
25	9/5/14	Central High School form regarding education services
26	9/5/14	Personal Information Form of PGCPS regarding Student
27	8/28/14	Email from Parent to PGCPS regarding testing
28	8/30/14	Individual Treatment Plan (ITP) date 5/21/14, signed as received 8/30/14 by the Student's family
29	8/26/14	School Attendance Information
30	8/26/14	Email from Parent to PGCPS regarding testing, special education program request
31	6/26/14	2013-2014 Report Card, Grade 10
32	8/29/14	Independent Psychological Evaluation of Basics Group Practice

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33	3/6/14	Emails between Parent and Ms. Guiles of PGCPS
34	2/10/14	Emails to Parent from PGCPS staff re testing, homework, injury
35	12/17/14	Emails to Parent from PGCPS staff re failing grade, poor classwork, poor homework
36	11/21/13	Emails to/from Parent to PGCPS staff re comprehension problems, absence, homework
37	6/17/13 to 7/31/13	2012-2013 Report Card, Grade 9
38	6/2013	Summer High School registration and grade report for English course
39	3/5/13	Email from Parent to Robin Pope-Brown re: discipline issue
40	1/4/13 to 1/11/13	Emails to/from Parent and Desiree Dent requesting testing, smaller class, scheduling
41	2010-2012	Test Information - State Mandated Testing for Grades 7, 8, 9
42	11/7 /12	IEP Team Meeting sign-in sheet

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43	10/10/12 to 10/31/12	Emails to/from Parent and PGCPS staff requesting testing, alternate program, meeting
44	6/20/12	2011-2012 Report Card, Grade 8
45	2012	Annual School Performance Data Summary, Grades 5 to 8 from 9/08 to 6/12
46	2011	Attendance Information
47	6/2011	2010-2011 Report Card, Grade 7
48	2010	Performance Data Summary, Grades K-6, through 6/10 (Grade 6) and Beginning With 2003-04 School Year (Kindergarten)
49	6/2009	2008-2009 Report Card, Grade 5
50	2008	Test Information, State Mandated Testing Grade 4
51	2007/2008	Progress Report, Grade 4 (2007-2008)
52	10/07-10/08	Reading, Writing Strategies for Fourth Grade
53	2006/2007	Performance Data Summary, Grades K-3
54	2006/2007	Attendance Information, Grades K-3
55	2006/2007	Progress Report, Grade 3 (2006-2007)

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56	3/27/2007	Letter to Parents regarding Otis Lennon School Ability Test, Grade 3
57	2005-2007	Standardized Test Information from 4/05 and 4/06 with National Percentiles and 2007 MSA Basic Scores (Grades 1 and 2)
58	2004/2005	Progress Report, Grade 1 (2004-2005)
59	2003/2004	K-1 Comprehensive Reading/LA Data Sheet
60	9/03	Emergent Reading Behaviors Inventory
61	No date	School Readiness Initiative
62	04/28/15	Order Granting *Pro Hae Vice*
63	04/8/15	Lindamood Bell Testing Summary
64	No date	*Vita* of Dr. Stephen Silverman
65	No date	*Vita* of Dr. Annie McLaughlin
66	2013-2014	Grades from Foundations of Technology (10th grade)
67		Dr. Annie McLaughlin list of exhibits (marked for identification)
68	11/7/12	11/7/12 Meeting Notes of Jessica Sammons

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I admitted the following exhibits on behalf of PGCPS:

A	6/4/15	Letter to Jeffrey Krew from Dennis McAndrews
B	6/5/15	Letter to Dennis McAndrews from Jeffrey Krew
C	5/12/15	Letter to Parties from ALJ Hofstetter
D	6/4/15	Letter to Dennis McAndrews from Jeffrey Krew
E	5/20/15 - June 2015	Emails between Dennis McAndrews and Jeffrey Krew
2	11/7/12	IEP Team Meeting
3	12-13 School Year (SY)	Student's Attendance History for 2012-2013 SY.
4	13-14 SY	Student's Attendance History for 2013-2014 SY
6	10/24/14	Initial Contact & Referral, Office of HHT
7	1/13/15	Due Process Complaint
8	1/26/15	Prior Written Notice & Notice and Consent for Assessment

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12	2/20/15	Psychological Report - Vincent Tepe, School Psychologist, PGCPS
13	3/12/15	Prior Written Notice
15	4/2/15	Draft IEP and Prior Written Notice
16	4/17/15	Letter to Caitlin McAndrews from Jeffrey Krew
19	6/1/15	Text of Chat during virtual live English 10 class
20		Vincent Tepe *Curriculum Vitae*
21		Desirae Dent *Curriculum Vitae*
23		Debra Cartwright *Curriculum Vitae*
25		Meghann Kaplun *Curriculum Vitae*
29		Jessica Sammons *Curriculum Vitae*
30	January 2010	Parental Rights -Maryland Procedural Safeguards Notice, Maryland State Department of Education
31	12-13 S.Y.	Gradebook
32	13-14 S.Y.	Emails from Parents to Friendly High School staff

33	6/10/15	BASICS Group Practice Statement of Account
34	7/5/14	Kaiser Permanente Billing Detail
35	12/1/14	Letter to Parents from Daryl Kennedy, Central High School

Testimony

The Parent presented the following witnesses:[6]

- John Fain, Spanish teacher, Friendly High School
- Kathleen John, Math teacher, Friendly High School
- Evangeline Sy, Science Teacher, Friendly High School
- Leatriz Covington, Principal, Issac Gourdine Middle School
- Justin Conte, Physical Education teacher, Issac Gourdine Middle School
- Lue Manning, Social Studies teacher, Friendly High School

6. Subpoenas issued by the Parents to the following persons were either withdrawn on the first day of hearing or quashed by the ALJ: Raynah Adams, Chinwe Aldridge, Billy Lanier, Jerrold Lattimore, Gwendolyn King, and Linda Wilkinson. (Ms. Wilkinson testified as a witness called by PGCPS.)

- Rebecca Castle, World Cultures teacher, Issac Gourdine Middle School

- Luke Williams, HHT teacher

- Sam Kamara, Foundations of Technology teacher, Friendly High School

- Stephan Silverman, Ph.D., admitted as an expert in psychology and school psychology

- Constance "Annie" McLaughlin, Ph.D., admitted as an expert in special education

- Parent, father of the Student

- Parent, mother of the Student

PGCPS presented the following witnesses:

- Linda Wilkinson, English teacher, PGCPS

- Anna Guiles Deskin, Art teacher, Friendly High School

- Jennifer Eller, English teacher, Friendly High School

- Debra Cartwright, Special Education Department Chairperson, Friendly High School, admitted as an expert in special education

- Jessica Sammons, PGCPS school psychologist, admitted as an expert in school psychology

- Desirae Dent, PGCPS guidance counselor, admitted as an expert in high school guidance counseling

- Meghann Kaplan, PGCPS guidance counselor, admitted as an expert in high school guidance counseling

- Vincent Tepe, PGCPS school psychologist, admitted as an expert in school psychology

FINDINGS OF FACT

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

1. The Student is currently 17 years old, born on July 25, 1998.

2. The Student began attending PGCPS in elementary school.

3. In 5th Grade, the Student received mostly As and Bs, except for Cs in Reading and Writing. P-49.

4. In 6th Grade, the Student received three As, two Bs and one C. He was considered to be below grade level in Reading and Math. P-48.

5. In 7th Grade, the 2010-2011 SY, the Student began at the Gourdine Middle School (Gourdine) in PGCPS.[7]

6. In 2011-2012 SY, the Student attended 8th Grade at Gourdine. During 8th Grade, the Student received numerous Ds and failed Health.

7. For 9th grade, the 2012-2013 SY, the Student attended Friendly High School.

8. On October 10, 2012, the Student's father emailed the Student's guidance counselor, Desirae Dent, under the subject heading, "Having my son get tested" and stated that the Student was "having trouble remembering things" and "is struggling to process the information in class." He asked whether "there is a program or some kind of test he could take [as] I want to help my son he need before it is too late and he fall behind." P-43 at 10.

9. On November 7, 2012, an IEP meeting was held at Friendly concerning the Student.

10. The Father was unable to attend, however the Student's Mother attended, along with various PGCPS staff.

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7. As set forth in the Discussion portion of this decision, I have determined that the Parents' claims concerning events occurring before January 13, 2013 are barred by the statute of limitations. For historical and background purposes, however, I have nevertheless included in these findings of fact some information concerning events occurring before that date.

11. At the November 7, 2012 IEP meeting, the Mother was provided with the MSDE document "Parental Rights - Maryland Procedural Safeguards Notice." PGCPS-30. Page 19 of that document provides information to the Parent regarding the time to file a complaint and the applicable statute of limitations. *Id.*

12. None of the Student's classroom teachers attended the November 7, 2012 IEP meeting.

13. The PGCPS members of the IEP team reviewed all available information and discussed whether certain specific testing was appropriate. After reviewing the Student's academic history, and receiving information from the Student's mother and the PGCPS members of the IEP team, the IEP team concluded that concluded that the Student's difficulties were not the result of a learning disability or any condition requiring special education services and that further assessments were not at that time warranted.

14. At the IEP meeting of November 7, 2013, the participants agreed that a parent-teacher conference with the Parents would be scheduled for January 2013. A further IEP meeting was not scheduled.

15. On January 16, 2013, a parent-teacher conference was conducted at Friendly with the Parents, some of the Student's teachers, the principal, other PGCPS staff, and the Student.

16. Among the topics discussed at the January 16, 2013 parent-teacher conference were the Student's apparent lack of motivation, failure to come to class and to do work. The Student was asked if he could explain these problems and he stated that he simply wasn't trying.

17. The Parents did not raise in their due process complaint any issue concerning the lack of a classroom teacher at the IEP of November 7, 2012.

18. During 9th Grade, SY 2012-2013, and 10th Grade, SY 2013-2014, the Student was repeatedly absent from school. On days when he came to school, he skipped certain classes.

19. At times, the Father would send emails to PGCPS staff concerning the Student's absences. The absences were attributed to illness, family illness, or funerals, but never to anxiety or any other emotional condition. P-43.

20. In 9th Grade, SY 2012-2013, the Student was absent from Integrated Sciences 17 times and was tardy four times. PGCPS-3.

21. In 9th Grade, SY 2012-2013, the Student was absent from Personal Fitness nine times and tardy once. PGCPS-3.

22. In 9th Grade, SY 2012-2013, the Student was absent from Algebra I on 37 occasions.

23. In 9th Grade, SY 2012-2013, the Student was absent from Naval Science 10 times.

24. In 9th Grade, SY 2012-2013, the Student was absent from U.S. History 13 times.

25. In 9th Grade, SY 2012-2013, the Student's English teacher was Linda Wilkinson.

26. The Student was absent from English class 16 times during 9th grade and generally failed to do either class work or homework. PGCPS-3; Tr.[8] IV-903-904. On those occasions when the Student did his assigned work, he performed satisfactorily and received some good grades. Tr. IV-915-917.

27. Ms. Wilkinson contacted the Parents in an effort to get the Student to perform his work and the Parents accused her of "picking on" the Student and telling the Student that if a student was not on the honor roll, "they didn't have a brain." Tr. IV-904-908.

28. The Student failed every quarter of English in 9th Grade because he did not consistently attend class or do assigned work.

29. In every class in 9th grade, the Student's poor grades were a direct result of his failure to attend class and/or to do classwork and homework.

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8. "Tr." refers to the volume and page of the hearing transcript.

30. In 10th Grade, SY 2013-2014, the Student was absent from his Government class 29 times and was tardy five times. PGCPS-4.

31. In 10th Grade, SY 2013-2014, the Student was absent from his Algebra class 28 times. PGCPS-4.

32. In 10th Grade, SY 2013-2014, the Student was absent from his Biology class 20 times. PGCPS-4.

33. In 10th Grade, SY 2013-2014, the Student was absent from his Spanish class 25 times. PGCPS-4.

34. In 10th Grade, SY 2013-2014, the Student was absent from his Art class 35 times and tardy six times. PGCPS-4.

35. In 10th Grade, SY 2013-2014, the Student was absent from his Foundations of Technology class 35 times. PGCPS-4.

36. In 10th Grade, SY 2013-2014, the Student's English teacher was Jennifer Eller.

37. During 10th Grade, the Student was absent from English class a total of 46 times and was also tardy on numerous occasions. Tr. IV-956.

38. In the first weeks of 10th grade English, the Student completed most of his work and had a solid "B" grade. The Student was capable of doing the work required of the course. Tr. IV-969-971.

39. When the Student did attend English class in 10th grade he was disruptive, talking with other students out of turn, using his cell phone, refusing to follow directions and making insulting statements to Ms. Eller. Tr. IV-957-960. As a result, Ms. Eller requested the Parents to come in and meet with her to discuss the Student's performance, but they would not do so. Tr. IV- 963-965.

40. In every class in 10th grade, the Student's poor grades were a direct result of his failure to attend class and/or to do classwork and homework.

41. More than 90% of the Student's absences in 9th and 10th grade were unexcused. PGCPS-3 and 4.

42. Sometime in the beginning of April 2014 (10th Grade, SY 2013-2014) the Student simply stopped going to school at all. The Parents did not inform PGCPS of a reason for the Student's failure to attend. Tr.-IV-854-855.

43. The Parents did not provide PGCPS with a reason why the Student stopped coming to school. They did not claim that his failure to attend school was due to anxiety, depression, or any other reason.

44. On various dates, including March 6, 2014, March 18, 2014, August 26, 2014, and September 11, 2014, the Father emailed PGCPS teachers or administrators asking that the Student be tested for learning disabilities. PGCPS did not test the Student until after the testing conducted by Mr. Tepe in March 2015.

45. In May 2014, the Parents retained Basics Group Practice, LLC, (Basics) to perform an IEE. Basics performed testing and assessments of the Student on May 6, 8, and 13, 2014 and a report was delivered on August 29, 2014. Basics also conducted interviews with the Student's Parents.

46. The Basics report concluded that the following diagnoses applied to the Student: Attention Deficit Hyperactivity Disorder, combined presentation, moderate; Specific Learning Disorder with impairment in written expression; and unspecified depressive disorder. P-32 at 23.

47. The Student was scheduled to begin classes at Central High School in September 2014.

48. The Student attended Central for only a few days in September 2014, with his last day of attendance being on or about September 22, 2014.

49. In September and October 2014, the Father sent emails to PGCPS personnel making conflicting claims as to why the Student was not attending school. The emails variously claimed that the Student was not attending due to noise in the school, to asthma, or to panic attacks.

50. The Parents did not raise in their due process complaint any issue concerning an obligation for PGCPS to conduct testing due to alleged head injuries the Student suffered as a young child.

51. In October 2014, the Parents requested HHT services for the Student due to "psychological problems."

52. On January 26, 2015, subsequent to the filing of the due process request in this case, an IEP team meeting was convened. The meeting was attended by the Parents and their attorney and various PGCPS staff. PGCPS-8.

53. After reviewing all relevant information, including the Student's academic history, the IEE from Basics and input from the team members including the Parents, the team determined that additional academic and social/emotional testing was appropriate to determine eligibility for special education services. The Parents consented to the testing. PGCPS-8.

54. The Parents received all appropriate procedural safeguards and notices concerning the January 26, 2015 IBP meeting.

55. At the January 26, 2015 IEP the Parents stated that they had kept the Student out of school due to anxiety he suffered at the beginning of the 2014-2015 SY.

56. Shortly after, January 26, 2015, the Student began receiving HHT services either at his home or by live computer connection.

57. On February 19 and 23, 2015, Vincent Tepe, a PGCPS school psychologist, conducted social/emotional and academic testing of the Student.

58. On March 12, 2015, a further IBP meeting was convened. Both parents participated. After reviewing all relevant information, the including the Student's academic performance while in HHT, input from the parents and PGCPS staff, and review of the additional testing performed by Mr. Tepe, the team found that the student was eligible for special education services under the category of Emotional Disability due to anxiety which prevented him from regularly attending school. PGCPS-13; Tr. IV-1344-1352.

59. The March 12, 2015 IEP team also agreed that compensatory services for one calendar year in the form of five fee-waived credit recovery courses would be offered to so as to permit the Student to recover any lost instructional opportunity. The March 12, 2015 IEP also provided for one-on-one tutoring by a PGCPS-approved tutor at PGCPS expense. PGCPS-13. At the IEP meeting, the Parents stated that they were pleased with this offer and believed that it would motivate the Student to obtain his high school diploma. *Id.*

60. The March 12, 2015 IEP team determined that the matter would be referred to a Central IEP (CIEP) team to determine an appropriate placement for the Student.

61. In the interim, the Student would continue to receive HHT services, but the services would be provided at Central High School, rather than at his home, to assist the Student with a transition to a school environment.

62. The Parents were provided with all required procedural safeguards and documentation regarding the March 4, 2015 IEP meeting.

63. On April 4, 2015, a CIEP meeting was convened. Both Parents participated, as well as PGCPS staff. The IEP team recommended the Transition Program, housed at Dr. Henry A. Wise, Jr. High School (Wise)[9]. The Parents were provided with all required procedural safeguards and documentation regarding the April 4, 2015 CIEP meeting.

64. The Transition Program is a self-contained program within the Wise building for students with emotional disabilities. Class size in the Transition program is limited to 12 students and classes typically have 8-12 students. Tr. VI-1354, 1361.

65. The Student has never attended the Transition Program at Wise. The Parents have never told PGCPS why the Student has not attended the Transition Program at Wise.

66. Despite the Parents expressed enthusiasm for the services offered at the March 4, 2015 IEP meeting, the Student has never attended school at PGCPS in 2015, other than instruction received in the HHT program.

67. The Transition Program at Wise would provide the Student with a FAPE.

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9. The "Junior" refers to Dr. Wise, not to the school. The school is a high school.

Appendix C

DISCUSSION

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

In *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176 (1982), the United States Supreme Court described FAPE as follows:

> Implicit in the congressional purpose of providing access to [FAPE] 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 of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200-01 (emphasis added). *See also In Re Conklin,* 946 F.2d 306, 313 (4th Cir. 1991).

The IDEA contains the following, similar definition of FAPE:

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> [S]pecial education and related services that ... have been provided at public expense, under public supervision and direction, and without charge ... [and that have been] provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9) (2010). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (2014); COMAR 13A.05.01.03B(27).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to "[t]he 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. of Maryland.* 700 F.2d 134, 139 (4th Cir. 1983), *citing Rowley.* Instead, FAPE entitles a student to an IEP that is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 177. "Educational benefit" requires that "the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child." *Rowley,* 458 U.S. at 200 (emphasis added). *See also MM ex rel. DM v. School Dist. of Greenville County,* 303 F.3d 523, 526 (4th Cir. 2002), *citing Rowley,* 458 U.S. at 192; *see also A.B. v. Lawson,* 354 F.3d 315 (4th Cir. 2004). Thus, the IDEA requires an IEP to provide a "basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt,* 908 F.2d 1200, 1207 (4th Cir. 1990). Yet, the benefit conferred by an IEP and placement must be "meaningful" and not merely "trivial" or *"de minimis." Polk v. Central Susquehanna,* 853 F.2d 171, 182 (3rd Cir. 1988).

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In addition to the IDEA's requirement that a disabled child receive some educational benefit, the child must be placed in the "least restrictive environment" to achieve FAPE, 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) & 300.117 (2014). However, placing disabled children into regular school programs may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. *Id.*

The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer v. Weast,* 546 U.S. 49 (2005). In this case, the burden is on the Parent.

Statute of Limitations and PGCPS's Motion *in Limine*

The Parents' hearing request was filed on January 13, 2015. PGCPS argues that any claims in this matter are limited to a two-year statute of limitations. In support of its view, prior to hearing, PGCPS filed a Motion *in Limine,* seeking to limit evidence to events occurring within two years of the filing of the due process complaint on January 13, 2015. I heard argument on the Motion *in Limine* at the commencement of the first day of hearing. After argument, I deferred a ruling on the Motion *in Limine* and allowed evidence to be presented by both sides concerning events prior to January 13, 2013. For the reasons set forth below, I now grant the PGCPS Motion *in Limine.*

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The Parents argue that the statute of limitations should be construed to be a period of time longer than two years. A statute of limitations is a legislative expression of policy that prohibits litigants from bringing claims after a period of time, which destroys any right and remedy of the potential claimant. When the IDEA was amended extensively in 2004, a statutory limitation was added for the first time. The relevant provisions currently are codified as follows:(C) Timeline for requesting hearing

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the time line

> The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--
>
> (i) *specific misrepresentations* by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local educational agency's *withholding of information* from the parent that was

> required under this subchapter to be provided to the parent .....

20 U.S.C.A. § 1415(t)(3)(C)-(D)(2010). Emphasis supplied. Along with the other 2004 amendments, this limitations provision became effective on July 1, 2005.

The Maryland statute is substantially identical. Md. Educ. Art. §8-413(d)(3) provides:

> Except as provided in paragraph (4) of this subsection, the complaining party shall file a due process complaint within 2 years of the date the party knew or should have known about the action that forms the basis of the due process complain.

Under the PGCPS view, the Parents, therefore, would be limited to claims of violations (both procedural and substantive) which the Parents knew or should have known about and which occurred no earlier than January 13, 2013, two years before the filing of the due process request.

The Parents assert that, PGCPS misrepresented or withheld certain information around the time of the November 7, 2012 IEP team meeting, which should extend the period of the statute of limitations. 20 U.S.C.A section 1415(f)(3)(D)(i) and (ii). As discussed below, I find this that the evidence does not support the Parents' argument in this regard.

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The Parents, in their hearing complaint and at hearing, argued for a four year statute of limitations based on a single case from the United States District Court for the Middle District of Pennsylvania that has not been adopted by any other court. *Jana K. v. Annville-Cleoba School District,* 39 F. Supp. 3d 584 (M.D. Pa. 2014)[10] In any event, 20 U.S.C.A. § 1415(f)(3)(C) provides that the federal statute of limitations does *not* apply where state law provides its own, different, statute of limitations. It is clear beyond cavil, that Maryland has adopted the federal two-year statute of limitations. Md. Educ. Art. §8-413(d)(3). Finally, even if the Third Circuit were to uphold the view that a four-year statute of limitations was proper given certain provisions of Pennsylvania law, that decision would not be binding on the Fourth Circuit, and, indeed, would be highly unlikely to be adopted by it given the language of the Maryland statute.

The gravamen of the Parents' remaining argument regarding the statute of limitations thus turns on their argument that they were deceived or mislead regarding the November 7, 2013 IEP team meeting. Unfortunately very little documentation still exists of this meeting. Indeed, the only apparent existing written record of the meeting is the sign-in sheet. PGCPS Ex. 2. It is unclear why no further record of the meeting exists (either in the possession of the Parents or PGCPS), however neither party has presented evidence of any nefarious reason for the lack of documentation.

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10. Based on representations from counsel at bearing, the case is currently on appeal in the Third Circuit, but oral argument has not yet occurred.

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The Parents assert that, at the November 7, 2012 IEP meeting, PGCPS failed to provide the Mother with the Parental Rights-Procedural Safeguards notice, thereby committing a procedural violation that rises to the level of denying the Student a FAPE. I find that the overwhelming weight of the evidence is that the Parents received all required and appropriate procedural notices and rights concerning the November 7, 2012 IEP team meeting. Specifically, the PGCPS witnesses who were present at the November 2012 IEP team meeting testified unanimously as follows on the question of whether the Mother was provided with the Parental Rights-Maryland Procedural Safeguards Notice.

Deborah Cartwright, the Chair of the Special Education department at Friendly, who was accepted as an expert in special education, testified that the Parental Rights document was provided to the Mother at the beginning of the IEP meeting. Although Ms. Cartwright did not have a specific memory of the event, she testified that it is provided at every IEP team meeting as a matter of routine and that, in her 36 years as a special educator, she has never been previously accused of failing to provide a Parental Rights document. Ms. Cartwright testified that on a scale of 1-10, her certainty that the Mother was provided with a copy was a "10." Tr. IV-982-986.

Also present at the November 7, 2012 IEP team meeting was Jessica Sammons, who testified and was accepted as an expert in school psychology. Like Ms. Cartwright, she testified that she did not have a specific memory regarding the meeting and the Parental Rights

document but testified that it is invariably provided to the parent at every IBP team meeting. She further testified that, if for some reason in a hypothetical case, Ms. Cartwright forgot to provide the document, "I would have reminded her. I would have, I know where they were located in the room, I would have grabbed them, [inaudible] stop the meeting at that time and reminded her." Tr. V-1020-1021. She also testified that her level of certainty that the Mother was provided with the document was a "10." Tr. V-1021.

Finally, Desirae Dent, who was accepted as an expert in guidance counseling, also testified that she was absolutely certain that the Mother was provided a copy of the Parental Rights document. Tr. V-1126-1127.

In contrast to the recollections of the witnesses noted above, the Mother testified that she was certain that she was not given the Parental Rights document at the November 7, 2012 IBP meeting. Tr. IV-872. She further testified that her husband is the person who primarily keeps the Student's school records and documents. Tr. IV-873. On cross-examination, however, the Mother testified that since November 7, 2012 the family has lived at four different addresses and experienced three different floods. In response to the question, "And the point you make is that your records are incomplete because of all that, right?", the Mother responded, "Yes, sir." Tr. IV-876-877.

I find the unanimous testimony of the PGCPS witnesses to be more credible than that of the Mother on

this issue of whether the Mother was provided with the Parental rights form at the November 7, 2012 IBP team meeting. I find the PGCPS witnesses to be credible based on their demeanor, their long experience with the practices followed at IBP team meetings in the PGCPS, and the unanimity and certainty of their testimony. I find the Mother to be less credible on this issue and her testimony on this issue would be worthy of little weight based on her acknowledgement that, because of frequent moves and repeated floods, her records were incomplete. I therefore conclude that no misrepresentation or withholding of information occurred concerning the duty of PGCPS to provide the Mother with the Parental Rights document at the November 7, 2012, and therefore there is no basis to extend the statute of limitations on that basis. 20 U.S.C.A. § 1415(f)(3)(C)-(D)(i) and (ii) (2010).

As a separate matter, the Parents argue that the statute of limitations should be extended because the PGCPS members of the November 7, 2012 IEP team told her that the IBP meeting would re-convene in January 2013 to further consider the need for special education services. No such IEP meeting occurred, and therefore, the Parents argue, they were victims of misrepresentations justifying the extension of the statute of limitations period. *Id.*

Despite the Parents' claim that the IBP team meeting would be re-convened in January 2013, Ms. Sammons, the school psychologist at the November 7, 2012 IEP team meeting, testified that the meeting was not held open or rescheduled to a later date, but that it was complete as of November 7. Tr. IV-1052-1054. Similarly, Ms. Dent, the

guidance counselor had a specific memory that the IBP meeting was complete on November 7, 2012, "that we were finished with the IBP team meetings, that there was no need for further assessment and we could continue outside of the IBP team to look at any other interventions for him. But no special education or testing was warranted at that time." Tr. V-1141. When asked if there was a decision to re-convene the IBP team meeting, she responded: "That wasn't the case. The team decided that we would do a parent-teacher conference so that we could get all parties in the same room to discuss ways to support and assist [the Student] in getting on track." *Id.* Indeed, such a parent-teacher conference was held on January 16, 2013. Tr. V-1154-1155, 1175, 1222.

In contrast to the testimony of Ms. Sammons and Ms. Dent, Ms. Cartwright testified that she believed that the IBP meeting of November 7, 2012 was indeed suspended to re-convene in January 2013 and that the subsequent IEP team meeting was not held. Tr. IV-991.

I note that the Mother was not asked during her testimony as to whether she was told at the IEP team meeting of November 7, 2012 if the meeting would be re-convened at a later date. Tr. IV-869-879. The Father was not present at the meeting. The fact that the Mother was not asked, and did not testify about this important fact, provides a further basis for my conclusion that it is more likely than not that no further IEP team meeting or "re-convening" of the IBP team meeting was agreed to on November 7, 2012. In addition, the Father did not testify that his wife told him that a further IEP team meeting

would be convened in January 2013. The Father was asked on direct examination, "What did [your wife] tell you about this meeting when she came home?" He responded, "... she called me at work and she told me that they said that they – he's proficient and there is nothing that they will be able to do for him." Tr. III-606. At no point in his testimony did the Father state that his wife, or anyone else, had told him that a further IEP team meeting would be held in January 2013.

Although Ms. Cartwright testified that she believed there was a plan to re-convene the IEP team meeting in January 2013, I conclude that she was simply mistaken. Based on the clear testimony of Ms. Sammons and Ms. Dent, the lack of testimony on the subject from the Parents (that is, the proponents of the argument) and the passage of time, I find that the weight of the evidence is that no such agreement or decision to re-convene in January 2013 was made and that the IEP team meeting was complete as of its conclusion on November 7, 2012.[11] I therefore conclude that no procedural errors such as would toll or extend the statute of limitations in this case occurred relating to the November 7, 2012 IEP team meeting.

Accordingly, I find that that, as of November 7, 2012 (the date of the IEP team meeting), as well as by January 13, 2013 (the last date before prior claims would be barred by the statute of limitations), the evidence is overwhelming

11. The Parents also argued at the hearing that the November 7, 2012 IEP team was defective in that it did not include a classroom teacher. This issue was not raised in the due process complaint, PGCPS Ex. 8, and I therefore consider it waived.

that the Parents knew or should have known all the facts supporting any alleged violation of the Student's rights under the IDEA prior to that date and that there is no justification to extend the two-year statute of limitations. PGCPS' Motion *in Limine* is granted.

Therefore any alleged failures on the part of the PGCPS as set forth in the Findings of Fact above, or presented or argued at the hearing, including the alleged failure to test in response to the Father's emails of October 10, 2012 and January 4, 2013, January 10, 2013 and following the IEP team meeting of November 7, 2012, are outside the statute of limitations and not before me.

The Parents' requests for testing

Pursuant to COMAR 13A.05.01.04A, a student's parent may make an initial "referral" to the school district, requesting an evaluation. COMAR 13A.05.01.06(1) provides that "an IEP team shall complete an initial evaluation of a student" within 60 days of parental consent for assessments. A substantially identical requirement appears in 20 U.S.C.A. § 1414.

In this case, it is clear that the Parents made, within the statute of limitations period, repeated requests for evaluation of the Student. Not all of the requests (mostly by email) were clear, articulate requests for testing, but some were. For example, on March 6, 2014, the Father wrote to one of the Student's teachers, Anna Guiles Deskin, and stated, "For your FYI we are trying to get my son additional help with his learning because we believe

he has a learning disability. No one wants to test him to see, I am working on this matter and I am willing to take it as far as I can to get him the help he need [sic]." P-33 at 2. Similarly, on March 18, 2014, the Father emailed the administration at Friendly discussing the Student's academic difficulties and stating, "we have asked for him to be tested at Friendly ... this request has been ignored and my son is falling behind ..." PGCPS-32 at 28. A similar email was sent to Ms. Dent on August 26, 2014. P-30. Another was sent to Ms. Kaplun on September 11, 2014. P-21 at 3. In sum, then, the Parent made repeated requests during the applicable period for testing.

In this case, PGCPS erred in failing to respond to the Parents' requests and conduct a timely evaluation. However, not every procedural violation of a procedural requirement under the IDEA is sufficient grounds for relief. *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cnty,* 309 F.3d 184, 190 (4th Cir. 2002). "[T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide [FAPE]." *Id.,* (quoting *Gadsby v. Grasmick,* 109 F.3d 940, 956 (4th Cir. 1997)); *see also MM ex rel. DM v. Sch. Dist. Of Greenville Cnty,* 303 F.3d 523, 534 (4th Cir. 2002); *Wagner v. Bd. of Educ. of Montgomery Cnty,* 340 F. Supp. 2d 603, 617 (D. Md. 2004).

I conclude that the PGCPS failure to promptly schedule testing in this case did not establish a failure to provide FAPE. My reasoning is simple: the entirety of the record before me establishes that the Student simply

does not want to go to school. This is the case regardless of the school, the teachers, the courses, the programs, the placement, the accommodations, the class size, or the compensatory services offered to him. As discussed below, whether with or without an IEP, and even with an IEP providing a small, self-contained special education classroom setting with only 8-12 students in the class, the Student will not go to school. While the failure of PGCPS to timely respond to the Parents' requests for evaluation is inexcusable, no evidence supports the view that, had testing been promptly provided, the Student would have regularly attended school.

Reimbursement for An IEE

The Parents argue that they are entitled to reimbursement for the IEE conducted by Basics in August 2014. PGCPS argues that the criteria for reimbursement have not been met.

When a local education agency performs an evaluation of a student, the student's parents have the right to seek an IEE as a procedural safeguard. 20 U.S.C.A. § 1415(b)(1) (2010). However, the right to obtain an IEE at public expense is qualified. The federal regulations provide the following, in pertinent part:

> (b) Parent right to evaluation at public expense.
>
> (1) 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, subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—
>
> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
>
> (ii) Ensure that an independent educational evaluation is provided at public expense, *unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.*
>
> (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

34 C.F.R. § 300.502(b). Emphasis supplied.

The regulations provide guidance in determining whether an assessment is appropriate. The regulations, at 34 C.F.R. §300.304, require that certain standards be met when evaluating a child:

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(b) Conduct of evaluation. In conducting the evaluation, the public agency must –

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child ...

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) Other evaluation procedures. Each pubic agency must ensure that —

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and

in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) *Are administered by trained and knowledgeable personnel;* and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's

impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Emphasis supplied.

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As set forth above, at hearing, the public agency must "demonstrate" that the IEE did not meet agency criteria. 34 C.F.R. § 300.502(b)(2)(ii). Those criteria are contained in 34 C.F.R. § 300.304(b), as set forth above. In Mr. Tepe's testimony, he severely criticized the methodology and conclusions of the Basics report. With one important exception, however, Mr. Tepe and PGCPS did not clearly establish that the report failed to meet "agency criteria." That exception concerns 34 C.F.R. § 300.304(c)(1)(iv) which provides that any evaluation or assessment must be administered by "trained and knowledgeable personnel." In this case, the Basics document itself states that the "examiner" was "Whitney Hobson, M.A., P.A., Doctoral Psychology Intern." P-32 at 1. It also states that the supervisor for Hobson (no honorific is used because it is not clear if Hobson is male or female), is Ricardo Lagrange, PhD., Licensed Psychologist." *Id.* The document is signed on the last page by "Whitney C. Hobson, M.A., P.A., Psychology Associate/Evaluator" and "Ricardo Lagrange, Ph.D., Licensed Psychologist/Supervisor." P-32 at 28. The document does not state whether it was actually written by Hobson or by Dr. Lagrange, or by both of them in collaboration. No *curriculum vitae* is in evidence for either Hobson or Dr. Lagrange. I conclude that Hobson is not a licensed psychologist, given the designation of "intern" and given the fact that Dr. Lagrange is identified as licensed but Hobson is not. Neither Hobson nor Dr. Lagrange testified. These facts were noted repeatedly by various PGCPS witnesses, including Mr. Tepe.

It is true that 34 C.F.R. § 300.502(b)(2)(ii) provides that the IEE must be at public expense unless the agency "demonstrates ... that the evaluation obtained by the parent did not meet agency criteria." I do not take that to mean, however, that in these circumstances, PGCPS must affirmatively prove that Hobson was not "trained and knowledgeable" to administer the evaluations performed. Rather, I understand it to mean that establishing that the examiner is "trained and knowledgeable" is part of "agency criteria" and that where the agency itself would be required to make such a showing, and where the very report of the IEE itself leaves that question unanswered and subject to serious doubt, the agency has "demonstrated" a failure to show that the IEE meets "agency criteria."[12] If the school district were required to "prove" that the evaluator was *not* trained and knowledgeable, it would allow virtually anyone to conduct an IEE for a parent and make it exceedingly difficult for the school district to "prove a negative." I do not believe this is the intent or meaning of the statute. For this reason, I conclude that the Parents are not entitled to reimbursement for the Basics IEE.

12. While it is true that PGCPS could have subpoenaed Hobson and Dr. Lagrange, I conclude that it was not required to do so in order to "demonstrate" a failure to meet "agency criteria" given that the document itself fails to provide any information as to the qualifications and training of Hobson other than the bare facts of degrees granted and "intern" status.

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Issues properly raised at the hearing are limited to those identified in the due process complaint

As provided in 20 U.S.C. § 1415(f)(3)(B), "The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the [due process hearing complain] ..." Similarly, 300 C.F.R. 300.511(d) provides, "The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b) unless the other party agrees otherwise." No such agreement exists in this case. Despite this requirement, the Parents raised numerous issues not addressed in the due process complaint. Those issues include the claim that no regular educator was present at the November 7, 2012 IEP meeting and that no parental rights statement was provided to the Mother at that meeting.[13] In addition, there was a substantial amount of discussion at the hearing about head injuries that the Student may have sustained as a result of falls as a child at the ages of two, nine, and eleven. He received no medical treatment for any of the alleged injuries at or near the time of their occurrence or any time since. Tr. III- 690-720. The Parents argued at the hearing that these head injuries may be partly responsible for any learning problems the Student has. The head injuries and the supposed responsibility of PGCPS to test based on such injuries was not set forth in the due process request, and is therefore not before me.

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13. These issues were outside the applicable limitations period as discussed above.

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The Merits

In this case, there is no question that the Student performed poorly in school in the period from January 13, 2013 to January 13, 2015 (the period within the statute of limitations.) However, the overwhelming evidence before me establishes that the Student was capable of doing satisfactory work when he wanted to and that his poor performance was due to the fact that he failed to attend an almost preposterous number of classes and rarely did either homework or class work. Eventually, in April 2014, he just stopped coming to school at all. This failure to attend class and to do assigned work began well before the period at issue here *(i.e.,* the period within the statute of limitations) and continued and worsened during the period at issue. Virtually every teacher (regardless of by whom they were called) testified that the Student was capable of performing satisfactory work but that his frequent absences and failure to do assignments necessarily led to poor or failing grades. Most if not all of the witnesses testified that they had referred students for special education services in the past or that they were prepared to do so, but that there was no reason to suspect that the Student suffered from a learning disability or any other condition mandating special education services. A summary of the testimony of the Students' teachers' concerning bis attendance, completion of assignments and ability to do required work during the relevant period follows[14]:

14. This summary does not purport to be comprehensive but is a fair condensation of the testimony of the teachers who testified on this issue.

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John Fain

John Fain, called as a witness by the Parents, was the Student's Spanish teacher at Friendly in 10th Grade. He testified that that a student cannot pass his class if he doesn't do homework, has irregular attendance, doesn't pay attention in class, and/or does not show any motivation or desire to learn. Tr. I-84-86.

Kathie John

Kathie John, called as a witness by the Parents, was the Student's Algebra 1 teacher in 9th Grade. She testified that approximately 14% of her students fail Algebra 1 in an average year and the fact that they fail does not imply that all or any of them should therefore be receiving special education services. She testified that a student cannot pass if he doesn't do homework, pay attention, study, or is absent for an inordinate number of days. Tr. J-103-105

Evangeline Sy

Evangeline Sy, called as a witness by the Parents, was the Student's Integrated Science teacher for 9th Grade, SY 2012-2013. Ms. Sy testified that the Student received an 81 during the first semester of the course, showing that he was capable of performing the work. Tr. I-120-121. She also testified that, although Integrated Science is not a rigorous class, a student cannot pass if he doesn't do homework or pay attention in class. *Id.* She also testified that about 10% of students fail her class, and that there are various reasons other than a need for special education services why they fail. Tr. I-121-122.

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Lue Manning

Lue Manning, called as a witness by the Parents, was the Student's History teacher in 9th Grade, SY 2012-2013. She testified that the Student's grades improved in the third and fourth quarters of the course, indicating that the Student was capable of performing the work when he wished to do so. Tr. I-193-194.

Sam Kamara

Sam Kamara, called as a witness by the Parents, was the Student's Foundations of Technology in 10th Grade, SY 2013-2014. He testified that the Student did well on a number of tests, showing that he was capable of doing the work required of him. Tr. II-305, 309. He also testified that the Student simply didn't do homework and showed little effort or motivation. Tr. II-314-315.

Linda Wilkinson

Linda Wilkinson, called as a witness by PGCPS, taught the Student English in 9th Grade, SY 2012-2013. She testified that the Student was absent at least 16 times that year and refused to do classwork or homework. Tr. IV-903-904. She testified that the Student failed every quarter because he simply did not do the work. She noted that when he wanted to do work, his work was satisfactory and the achieved some good grades on assignments he completed. Tr. IV- 915-917.[15]

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15. Ms. Wilkinson also testified that she contacted the Parents concerning the Students failing work and she was accused

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Anna Guiles Deskin

Anna Guiles Deskin, called as a witness by PGCPS, was the Student's Art teacher in 10th grade, SY 2013-2014. She testified that the Student showed poor motivation and rarely did homework or classwork. Tr. IV-936-937. She testified that the work that the Student did turn in was satisfactory. She also testified that she gave the Student an opportunity to turn in work late when he was absent, but that he never did so. Tr. IV-940-944. She also testified that she notified the Parents about the Student's poor performance and that he was in danger of failing, but they did not respond. Tr. IV-938-939.

Jennifer Eller

During 10th Grade in Ms. Eller's English class, the Student was absent from English class a total of 46 times and was also tardy on numerous occasions. Tr. IV-956. In the first weeks of 10th grade English, the Student completed most of his work and had a solid "B" grade. The Student was capable of doing the work required of the course. Tr. IV-969-971. When the Student did attend English class in 10th grade he was disruptive, talking with other students out of turn, used his cell phone, refused to

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of "picking on" him. The Parents alleged that she told the Student that any student who did not make the honor roll "did not have a brain." In her testimony she denied the statement. I find her to be credible witness based on her demeanor and the consistency of her testimony. The issue is relevant only to the extent that it supports the view that the Student failed due to absenteeism and failure to do assigned work, and that his failure was not due to any animus on the part of his teacher.

follow directions and made insulting statements to Ms. Eller. Tr. IV-957-960. As a result, Ms. Eller requested the Parents come in and meet with her to discuss the Student's performance, but they would not do so. Tr. IV-963-965. Ms. Eller also testified th.at she made an official written report (known as a "PS 74") of the Student's disorderly and disruptive behavior in class. PGCPS-32 at 12; Tr. IV-957-959. This behavior included talking out of turn and using his cell phone to play games or send text messages. *Id.* The Student also intentionally ridiculed Ms. Eller, who is transgender (a fact known to her students and the school community in general), by referring to her as "him" or "he." Tr. IV-959-60. The Student persisted in this clearly intentional conduct, even after being corrected by Ms. Eller and told to desist. *Id.* Ms. Eller testified that the student made little or no effort and that she saw nothing that indicated he had a learning disability or should otherwise be considered for special education services.

Jessica Sammons

Jessica Sammons, called by PGCPS and accepted as expert in school psychology, testified that lack of motivation is one of the most common reasons for failing grades and does not, in itself, present a reason to suspect a disability. Tr. V-1092-1093. She also states that when a student specifically states (as the Student did at the January 16, 2013 parent-teacher meeting) that his lack of motivation or effort is the cause of his poor performance, that provides a clear reason *not* to suspect a disability. Tr. V-1095-1096.[16]

16. Ms. Sammons also testified in great detail about the many factors the November 7, 2012 IEP team reviewed in reaching its

Appendix C

Desirae Dent

Desirae Dent, called by PGCPS and accepted as an expert in high school guidance counseling, testified that a review of the relevant grade books showed that the Student was able to do assignments when he wished to. She testified that his grades suffered from numerous zeroes as a result of not handing in assignments. Tr. V-1132-1133.

The conclusions of each of the PGCPS educator witnesses (including those called by the Parents), and not limited to those accepted as experts, is entitled to substantial deference. *MM ex rel. DM v. School Dist.*, 303 F.3d 523, 532-33 (4th Cir. 2002).

The Parents argue that the Student's long history of poor academic performance establishes that he should have been deemed eligible for special education services for many years prior to the filing of the due process complaint. As set forth above, I only consider that time period within the statute of limitations, that is, from January 13, 2013 to January 13, 2015. Even within that period, the Parents argue, the Student was denied a FAPE. In support of their claim, the Parents rely largely on the testimony of the Father (the Mother's testimony was short and dealt

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determination that further testing was not warranted at that time. She described in detail why each of approximately six tests were deemed to be inappropriate or unwarranted and why there was not a reasonable basis upon which to suspect a disability. I do not recount this testimony (or similar testimony of Desirae Dent) in detail as I have determined that the events of the November 7, 2012 IEP meeting are outside the statute of limitations in this case.

mainly with issues concerning the November 7, 2012 IEP); the Basics report, and the testimony of their experts. I will evaluate each of these sources in turn.

Testimony of the Father

The Father, as is the case with most parents, is of course not an educator or an expert in special education. However, as to the factual matters that he testified concerning, his testimony was frequently shifting or contradicted by other testimony and documentary evidence. For example, his claim that the Student had been continuously in therapy since March 2014 (Tr. III- 573) is contradicted by the Statement of Account at PGCPS-33. His claim that no teacher ever informed him about the Student's poor motivation or lack of effort (Tr. III-592-593) is contradicted by the repeated testimony of many teachers, including that of Ms. Eller. Tr. IV-963-965, PGCPS-32 at 12. Similarly, his reasons for the Student's absences also vary. He testified that the Student's absences from 8th grade onward were due to asthma, nose bleeds, and an injury when he fell on some icy steps. Tr. III-639-640. PGCPS-3 and 4, however, show that the vast majority of his many, many absences were unexcused and unexplained. On October 6, 2014, the Father sent an email to school personnel stating that the Student's absence at the beginning of the new year was due to anxiety attacks. P-15. But at the hearing he testified, first, that the Student stopped going to Central after the first week in September 2014 due to bullying. He then said that bullying was not an issue for the Student at Central. Tr. III-655-656. In sum, the Father's testimony

on almost every factual matter was unreliable and subject to frequent revision. I therefore give little weight to his testimony. The Father did confirm the testimony of other witnesses that at the January 16, 2013, parent-teacher meeting, the Student stated that he "just wasn't trying" and that was the reason for his academic difficulties. Tr. IV-832-833.

For these reasons, I conclude that the Father's testimony does not support the Parents' claim of a denial of FAPE.

The Basics Report

As set forth above, the Parents retained Basics in May 2014 and a report was delivered on August 29, 2014. After a series of testing and interviews with the Student and his parents, the author or authors of the report concluded that the following diagnoses applied to the Student: Attention Deficit Hyperactivity Disorder (ADHD), combined presentation, moderate; Specific Learning Disorder with impairment in written expression; and unspecified learning disorder. P- 32 at 23.

Basics concluded that the Student was eligible for services under IDEA and made various recommendations regarding services and accommodations it believed were appropriate and due the Student. *Id.* It also prepared a proposed IEP. P-28.

For the reasons that follow, I conclude that the Basics report is entitled to little weight. First, as noted above, the qualifications and training (and, indeed, the identity)

of the person administering the test is uncertain. In addition, the author or authors of the report were not present to testify and therefore were not subject to cross-examination. (According to its letterhead, Basics is a local company located in Forestville, Maryland. No reason was advanced as to why the author or authors of the report were not presented at the hearing.) The failure to permit PGCPS the opportunity to cross-examine on this critical piece of evidence figures strongly in my decision to accord the report little weight.

In addition, I note that the Basics report which found a diagnosis of a Specific Learning Disorder with impairment in written expression (P-32) is in conflict with the proposed IEP prepared by Basics. P-28. The proposed IEP in the "Diagnosis" section does *not* list a learning disorder at all, but rather notes ADHD and "adjustment disorder with mixed disturbance of emotions and conduct." P-28 at 1. In his testimony, Dr. Silverman noted this contradiction and agreed that it was an inconsistency. Tr. II-472. Moreover, the Basics report is in conflict with Dr. Silverman's opinion. Dr. Silverman did not find any learning disorder, but rather diagnosed the Student as having a diagnosis of "situational" anxiety and depression. Tr. II-453. Further, the Basics report's statement that the supposed learning disorder concerns *written* expression is apparently contradicted by Dr. Silverman's testimony that the Student has problems with abstract material "particularly in the *verbal* realm ...." Tr. II-355-356. Finally, all the relevant witnesses, including Dr. Silverman and Mr. Tepe agreed that the author or authors of the Basics report received virtually all of their

background "facts" from the Father and that they had no contact with any of the Student's teachers or other PGCPS educators. As a result, the Basics report is likely deficient in its consideration of factors such as lack of motivation or effort on the part of the Student. Dr. Silverman agreed that the better and accepted practice is for an evaluator to have information from a student's teachers. Tr. II-474.[17]

Finally, I note that Mr. Tepe testified comprehensively about what he considered to be various shortcomings or errors in the Basics report. Tr. VI-1293-1364. For the reasons set forth above concerning my view that the Basics report is entitled to little weight; I add the persuasive testimony of Mr. Tepe. In particular, I credit his opinion that Basics' finding of a specific learning disability in written language is based solely on a discrepancy model which is no longer in favor or generally relied upon exclusively. Tr. VI-1327. Mr. Tepe testified that multiple confirming data would be required to confirm such a diagnosis and that such an approach was not taken by Basics and was not supported by the data.[18] Tr. VI-1327-1328. I found Mr. Tepe to be a credible witness based on his education, training, experience, and expertise, as well

17. It is particularly unclear why no teacher input went into the Basics report given that the testing took place in early May 2014, but the report was not issued until August 29, 2014. This span of time would, presumably, allow sufficient time to solicit and receive information from at least some teachers. There was no evidence at the hearing that any teacher was contacted by Basics or that any teacher refused to talk with Basics.

18. Had any witness from Basics testified, this deficiency *might* have been explained.

as the clarity and consistency of his testimony, including on cross-examination.

Dr. Stephan Silverman

Dr. Silverman testified on behalf of the Parents and was admitted as an expert in psychology and school psychology. Dr. Silverman testified that he reviewed documents regarding the case (including the Basics report) provided to him by Parents' counsel, and met with the Student and his father on one occasion for a total of about an hour and fifteen minutes. (One hour of that time being with the Student and fifteen minutes being with the Father. Tr. II-449.) During part of that time the Student was interacting with his HHT instructor via computer. However, Dr. Silverman did not observe or participate in the session. Tr. II-352-353. Dr. Silverman testified that based on his one interview with the Student, the Student was a "well-behaved," "nice looking young man" with a "supportive family." Tr. II-353. He testified that the Student described his biggest problems as involving comprehension and memory and that he has panic attacks when he feels like he is being judged or evaluated. Tr. II-354. Dr. Silverman testified that the Student doesn't have "deep consistent depression" but that "[his depression] is very situationally related, so when he feels inadequate or has failed or cannot do the work." *Id.* Dr. Silverman testified that the Student has particular problems with abstract material, "particularly in the verbal realm" but that "he has a strength in visual perception that might apply to a technology class ...." Tr. II-355-356. As noted above, this opinion contradicts the Basics findings. Dr.

Silverman testified that his diagnosis of the Student is "situational" anxiety and depression. Tr. II-453.

Dr. Silverman further testified that the Student "has a cognitive impairment ... in terms of thinking and memory and it may be in, it's inside the brain, so it is it a learning disability is it the product of three head traumas, it manifests as a learning disability ... his processing, his memory, his pace and his understanding, particularly of verbal material, although it applies to other abstract material." Tr. II-357. Regardless of this rather unclear musing, Dr. Silverman did not testify that the Student has a learning disability. He did testify that PGCPS had reason to suspect a disability sometime during the 7th grade year based on poor academic performance and academic decline. Tr. II-363.

In general, I place little weight on Dr. Silverman's testimony and opinions. Specifically, I note the following. Dr. Silverman met with the Student only once and only briefly. Tr. II-418. He made no written report of his findings and opinion. Tr. II-405, 410. He did not perform an IEE regarding the Student. Tr. II-405-406. He did not perform any testing on the Student. Tr. II-409-410. He did not engage in any therapy with the Student. Tr. II-406. He did not attend any IEP team meetings concerning the Student, speak with any of his teachers, or observe the Student in an educational setting. Tr. II-406, 410-411. Other than a writing sample of a few sentences, Dr. Silverman did not have the Student perform any academic activity for him. Tr. II-413. Dr. Silverman met with the Student one time, for at most one hour, approximately two

weeks before Dr. Silverman testified in this matter. Tr. II-417-419. Dr. Silverman testified that his opinions were based in part on a review of documents, but was unable to identify precisely which documents he reviewed. Tr. II-419-438. He was unable to provide data to support his opinion that the Student needed a class of no more than 15 students. Tr. II-382-385. (This size class was being offered by PGCPS in any event.)

Dr. Silverman also agreed that no one other than he *(i.e.*, the Basics staff, Ms. McLaughlin, and school personnel) had made the diagnosis of "situational anxiety and depression," explaining that "sometimes I get stuff other people miss." Tr. II-453.

Taken as a whole, I find that Dr. Silverman's testimony and opinions were based on limited sources, very limited contact with the Student, and were largely conclusory. I therefore consider them entitled to little weight. In addition, I note that one of his key opinions conflicts with that of the Basics group (as to whether a diagnosis of a learning disability was correct), leading me to question the credibility of both.

Moreover, Dr. Silverman's testimony added little if anything to the question of what compensatory services might be due to the Student. Dr. Silverman was asked on direct, "'What would be the components of a compensatory education program for [the Student?]" Tr. II-398. His answer was vague and rambling and did not answer the question. Tr. Il-399. Specifically, he did not testify as to whether or not the most recent IEP including

compensatory services and the placement in a small class setting at Wise with one-to-one tutoring provided sufficient compensatory services. Even accepting, for the sake of argument, the remainder of Dr. Silverman's conclusions, without a specific statement that the services currently offered for the Student were inadequate or inappropriate, I am unable to conclude that his testimony supports the view that the Student is entitled to further services beyond those presently "on the table." The Parents specifically argue in this case that it is the ALJ's role to determine what appropriate compensatory services, if any, should be, but this expert was unable to provide a clear or fact-based opinion on the subject upon which an ALJ could base such a determination.

Dr. Constance McLaughlin

Dr. McLaughlin was admitted as an expert in the field of special education. She met with the Student one time for about 40 minutes and observed him in an online class for about another 20 minutes. In addition, she spoke briefly with the Parents during the same visit. Tr.II-534-537. She also reviewed documents concerning the case. Tr. II-527. She testified that she believed that the Student's absences were a result of his needs not being met by the school, but did not explain the basis of her statement. Tr. II-544. She also testified that she was unaware of misconduct the Student exhibited in school, including inappropriate and bullying statements he made to a transgender teacher. Tr. II-541-542. She testified that PGCPS should have suspected a disability in 7th Grade and he should be in a classroom of seven or fewer students. Tr. II-516-517.

Like Dr. Silverman, Dr. McLaughlin did not write a report concerning the Student or perform any testing on the Student. Tr. II-528-529. Nor did she speak with any of the Student's teachers or attend any IBP meetings concerning the Student, or observe him in a classroom setting. Tr. II-529-530. As was the case with Dr. Silverman, I find that Dr. McLaughlin's opinions were based on limited sources, very limited interaction with the Student, and were largely conclusory. I therefore give her testimony and opinions little weight. Indeed, she did not even initially offer a diagnosis of the Student, but when eventually asked whether she agreed with the Basics diagnoses, she responded that "that person's report makes sense to me." Tr. II- 515.

Dr. McLaughlin testified that the Student requires an Extended School Year (ESY) program of 4-5 weeks in the summer. She also testified that for each day of "lost instruction" he should receive four hours of compensatory education. She did not testify, however, as to how she arrived at these conclusions or what factors, data, or accepted professional body of knowledge she relied on in calculating her "four hours of compensatory instruction per 'lost day'" equation. Like Dr. Silverman, she did not testify substantively as to why she believed that the services offered by the current IBP were inadequate to provide any required compensatory services.

We thus have a situation where the opinions of the Parents' experts are in a jumble. The Basics documents contradict each other, one (P-32) stating that the Student has a specific learning disability and another (P-28) stating

that he does not.[19] Dr. Silverman does not believe the Student has a learning disability, but rather stands alone in the opinion that the Student suffers from situational depression and anxiety. And Dr. McLaughlin simply adopts the views of the Basics author or authors, although it is not perfectly clear from her testimony if those are the views in P-32 or those in P-28.

For all the reasons set forth above, I find that the opinions expressed in the Basics evaluation, as well as the testimony of Drs. Silverman and McLaughlin are entitled to little weight and do not establish that the Student was entitled to special education services during the time period at issue or that he did not receive a FAPE.

Matters occurring after the filing of the due process complaint are not before me

Just as events occurring prior to the filing of the due process complaint our limited by statute of limitations, events occurring *after* the filing are also excluded from consideration. While it is true that a PGCPS IEP team found the student eligible for special education services on March 12, 2015 (PGCPS Ex. 13), as a student with an emotional disability, this fact cannot be held to suggest that PGCPS should have found the Student eligible at an earlier date.[20]

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19. Specific learning disability is defined in COMAR 13A.05.01.03B(73).

20. The Parents' argument on this issue is uncertain and confused. While acknowledging that events occurring after the

As PGCPS aptly put it in its Closing Memorandum:

> Accordingly, events occurring subsequent to the January 13, 2015 filing of the Parent's hearing complaint [PGCP-7] are not properly before the ALJ. While the *unrefuted* testimony of the PGCPS witnesses was that the determinations of the [January, March, and April 2014] IEP teams were appropriate, the Parent raised no challenge to those decisions in his January 13, 2015 hearing complaint. And for good reason – those determinations had not been made as of the time of the filing of the hearing complaint. Incredibly, the Parent's attorney stipulated on the final day of the hearing that those decisions were not part of this case. Tr. at 1360.

Parent's Closing Memorandum at 35.

The fact that the PGCPS IEP team of March 12, 2015 found the Student eligible for special education services based on a designation of emotionally disturbed, simply provides no basis for a conclusion that he was eligible for special education services prior to that date. Indeed, the facts, testing, and opinions which led to the conclusion that the Student was eligible for special education services are neither relevant nor challenged. It is sufficient to say that, following additional testing by Mr. Tepe and a review of

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January 13, 2015 filing of the due process complaint were not issues in this case, counsel nevertheless argued that certain facts which came to light subsequent to January 13, 2015, could be considered. Tr.VI-1360.

the entire record, including input from the Parents, the IEP-made its determination.

While the Parents agree that the IBP meetings of January 26, 2015 and March 12, 2015, and the placement recommended following the determination of eligibility for special education services, is not before me, it is notable that the Student has not attended the proposed placement at Wise. Although occurring after the due process request, the failure to attend the Transitions Program at Wise is nonetheless analytically significant. It tends to corroborate the view that either the Student, or his Parents, or both, are not interested in the Student receiving academic services from PGCPS, whether in a general education or a special education setting. There is no argument (nor could there be one, given the date of the due process request) that the current IEP does not offer a FAPE. There is no claim before me that the recommended placement at Wise is appropriate and calculated to provide a FAPE. Certainly the Parents have not shown or even intimated that the recommended placement is not appropriate or calculated to give a FAPE. In addition, the only expert evidence on the issue came from Mr. Tepe who testified that the placement at Wise was indeed appropriate and would provide FAPE. Tr. VI-1361-1362. The Parents provided no testimony or other evidence as to why the Student is not attending the Transition Program at Wise and accepting the compensatory services provided in the current IEP. PGCPS-13.

Thus, this case presents an unusual confluence of events. Subsequent to the filing of the due process request,

PGCPS found the Student eligible for special education services and proposed a placement. The IBP also provided for compensatory services in the form of five credit recovery courses and one-on-one tutoring, all at PGCPS expense. PGCPS-13. The Student has never attended the placement at Wise which was found appropriate by the IEP team. The Parents have never explained why the Student has not attended. The Parents nevertheless claim that the Student is due compensatory services based on alleged procedural and substantive violations by PGCPS. The Parents have presented no evidence, however, as to why the latest IEP and the placement at Wise, including the compensatory and tutoring services offered, would not provide appropriate compensatory services for any alleged violations. It is in this limited sense that I consider the post-due process request IEP relevant. Compensatory services are "educational services ordered ... to be provided prospectively to compensate for a past deficient program." *G ex rel. RG v. Ft. Bragg Dependent Schools,* 343 F.3d 295, 308 (4th Cir. 2003). Based on my conclusion that the Parents have not met their burden to establish that the Student was denied FAPE during the portion of the 2012-2013, 2013-2014, and 2014-2015 school years which fall within the statute of limitations, I find the Parents have not demonstrated that an award of compensatory education is warranted. Moreover, PGCPS *has* offered compensatory services and the Parents have, by deed if not word, rejected them. Without some showing (beyond the conclusory statements of Dr. McLaughlin) of the inadequacy of these services, I will not presume or speculate that they are inappropriate.

Appendix C

The Parents' claims under Section 504 of the Rehabilitation Act

The Maryland State Department of Education has delegated to OAH the authority to hear cases under the IDEA and issue decisions on behalf of the Department. The Maryland State Department of Education, however, has not delegated OAH to conduct hearings under Section 504. Education Article§ 8-413(d). Parents did not address this lack of jurisdiction at the hearing or in its due process complaint. Because the OAH does not have jurisdiction to hear Section 504 cases, I must deny the Parents' claims arising under that statute.[21]

Issues concerning Child Find

The requirement that school districts identify all children eligible for special education services is known as Child Find and is mandated under both IDEA and Maryland law. U.S.C.A. § 1412(a)(3)(A) and (B); 34 C.F.R. § 300.111; C.F.R. §§ 104.32, 104.33, 104.35; COMAR 13A.05.02.13A. Under these provisions, school districts have a continuing obligation to properly evaluate and identify students who are reasonably suspected of having a disability and offering a FAPE to every disabled student. *Gadsby v. Grasmick,* 109 F.3d 940, 950 (4th Cir. 1997).

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21. In any event, the Parents have not established a violation of Section 504. In order to "establish a violation of Section 504 and its implementing regulations, plaintiffs must show that they were discriminated against solely on the basis of disability." *K.D. v. Starr,* 55 F.Supp.3d 782, 788 (D.Md. 2014), citing *Sellers v. School Board of Manassas, Virginia, 141 F.3d 524, 528 (41h Cir. 1998).* The Parents have failed to make such a showing.

Child Find does not obligate a school district to act based on remote or speculative reasons for suspecting a disability or simply because the student is struggling. This includes cases where a student's poor performance is a result of frequent absences, a lack of motivation, or a failure to do classwork or homework. In this case, the evidence is overwhelming that during the applicable period within the statute of limitations (and indeed even before), the Student's difficulties were indeed due to his utter lack of motivation and his repeated truancy. *See, D.K. v. Abingdon Sch. Dist.,* 696 F.3d 233, 249-251 (3rd Cir. 2012), and cases cited therein. (Child Find does not require evaluation of every struggling student or an evaluation to determine potential disability of any child having academic difficulties and frequent absences). I conclude that the Parents have not met their burden to establish a violation of any Child Find requirement.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law Parents have not established by a preponderance of the evidence that the Student was denied a free appropriate public education during the portion of the 2012-2013, 2013-2014, and 2014-2015 school years which fall within the statute of limitations. 20 U.S.C.A. §§ 1401(9), 1412(a)(1)(A) (2010); Md. Code Ann., Educ. § 8-401(a)(3) (2014); COMAR 13A.05.01.03B(27); COMAR 13A.05.01.06A; COMAR 13A.05.01 .09D. Therefore, the Student is not entitled to compensatory education at public expense. *G ex rel. RG v. Ft. Bragg Dependent Schools,* 343 F.3d 295, 308 (4th

Cir. 2003). I further find that the Parents are not entitled to reimbursement for an IEE conducted by Basics in May 2014. 34 C.F.R. § 300.502(b); 34 C.F.R. §300.304.

ORDER

I **ORDER** that the January 13, 2015, Due Process Complaint filed by the Parent on behalf of the Student is hereby **DISMISSED.**

September 16, 2015
Date Decision Issued

/s/_____
David Hofstetter
Administrative Law Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 24, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1877
(8:15-cv-03935-GJH)

T.B., JR., BY AND THROUGH HIS PARENTS,
T.B., SR. AND F.B.,

Plaintiff-Appellant,

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION; PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS; DR. KEVIN M. MAXWELL, IN HIS OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER OF PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS,

Defendants-Appellees,

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES; DISABILITY RIGHTS MARYLAND,

Amici Supporting Appellant.

Appendix D

FILED:
September 24, 2018

ORDER

Upon consideration of appellant's petition for rehearing or rehearing *en banc* and appellees' response, the court denies rehearing and rehearing *en banc*.

Judge Wilkinson and Judge Agee voted to deny panel rehearing, and Chief Judge Gregory voted to grant panel rehearing. No judge requested a poll on the petition for rehearing *en banc*.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E — STATUTES AND REGULATIONS

§ 1412. State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

...

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) Construction

> Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

20 U.S.C. § 1412(a)(3)(A), (B)

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

...

(d) Individualized education programs

...

(2) Requirement that program be in effect

(A) In general

> At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

Appendix E

...

20 U.S.C. § 1414(d)(2)(A)

§ 1415. Procedural safeguards

(k) Placement in alternative educational setting

(5) Protections for childen not yet eligible for special education and related services

...

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred–

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

> (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

20 U.S.C. § 1415(k)(5)(B).

§ 300.101 Free appropriate public education (FAPE).

(a) General. A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d).

(b) FAPE for children beginning at age 3.

(1) Each State must ensure that—

(i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and

(ii) An IEP or an IFSP is in effect for the child by that date, in accordance with § 300.323(b).

(2) If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP or IFSP will begin.

(c) Children advancing from grade to grade.

(1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

(2) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making eligibility determinations.

34 C.F.R. § 300.101

300.111 Child find.

(a) General

(1) The State must have in effect policies and procedures to ensure that—

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(b) Use of term developmental delay. The following provisions apply with respect to implementing the child find requirements of this section:

(1) A State that adopts a definition of developmental delay under § 300.8(b) determines whether the term applies to children aged three through nine, or to a subset of that age range (e.g., ages three through five).

(2) A State may not require an LEA to adopt and use the term developmental delay for any children within its jurisdiction.

(3) If an LEA uses the term developmental delay for children described in § 300.8(b), the LEA must conform to both the State's definition of that term and to the age range that has been adopted by the State.

(4) If a State does not adopt the term developmental delay, an LEA may not independently use that term as a basis for establishing a child's eligibility under this part.

(c) Other children in child find. Child find also must include—

(1) Children who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade; and

(2) Highly mobile children, including migrant children.

(d) Construction. Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in § 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

34 C.F.R. § 300.111

C.F.R. § 300.323 When IEPs must be in effect.

(a) General. At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320.

...

34 C.F.R. § 300.323(a)

§ 300.301 Initial evaluations.

(a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.304

through 300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) Request for initial evaluation. Consistent with the consent requirements in § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

...

34 C.F.R. § 300.301(a), (b)

300.302 Screening for instructional purposes is not evaluation.

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

34 C.F.R. § 300.302