

**XXXX XXXX,**

**STUDENT**

**v.**

**MONTGOMERY COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE LOUIS N. HURWITZ,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: MSDE-MONT-OT-17-22806**

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**DECISION**

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

**STATEMENT OF THE CASE**

On July 24, 2017, XXXX XXXX (Mother) and XXXX XXXX (collectively Parents) filed a Due Process Complaint (Complaint) on behalf of XXXX XXXX (Student) against the Montgomery County Public Schools (MCPS) with the Office of Administrative Hearings (OAH). In their Complaint, the Parents indicated they did not want to participate in mediation. On August 25, 2017, the Parents and the MCPS participated in a resolution meeting and agreed in writing the same day that they were unable to resolve their dispute.

The Complaint alleges the MCPS violated the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A.<sup>1</sup> §§ 1400-1419 (2017). Specifically, the Parents allege the MCPS violated the IDEA by denying the Student a free appropriate public education (FAPE) for the 2016-2017 and 2017-2018 school years. *Id.* § 1415(f)(1)(A). The Parents seek reimbursement from the

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<sup>1</sup> "U.S.C.A." is an abbreviation for the United States Code Annotated. All citations to Title 20 of the U.S.C.A. are to the 2017 volume.

MCPS for the unilateral non-public/private placement of the Student at [School 1] ([School 1]) for both school years.

The timeframe for holding the hearing and issuing a decision in this case expired on October 6, 2017,<sup>2</sup> forty-five days after the parties held the resolution meeting and agreed in writing that no agreement was possible. *See* 34 C.F.R. § 300.515(a).<sup>3</sup> During the telephone prehearing conference on September 19, 2017, I reviewed the calendars of the parties and their counsel and confirmed no dates were available for hearing prior to November 20, 2017.<sup>4</sup> The parties jointly requested I grant a specific extension to hold the hearing on November 20, 21, 28, 29, and 30, 2017, the first available dates, and that I issue a decision in this case on or before December 29, 2017. *See id.* § 300.515(c). In light of the schedules of the parties and their counsel, I granted the request.

The hearing took place at the Montgomery County Board of Education in Rockville, Maryland. Michael Eig, Esquire, and Audrey Lavors, Esquire, appeared on behalf of the Parents. Manisha Kavadi, Esquire, appeared on behalf of the MCPS.

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<sup>2</sup> The forty-five day due date was October 9, 2017, a State holiday. The last business day before October 9, 2017 was Friday, October 6, 2017.

<sup>3</sup> “C.F.R.” is an abbreviation for the Code of Federal Regulations. All citations to 34 C.F.R. are to the 2017 volume.

<sup>4</sup> During the telephone prehearing conference, Ms. Kavadi, Mr. Eig, and I went through the calendar and it was deemed the parties, their counsel, or I were unavailable for hearing as follows:

- October 2-5, Mr. Eig had a previously scheduled hearing before Administrative Law Judge (ALJ) XXXX
- October 4-6, Ms. Kavadi was attending a professional conference
- October 10-11, I attended a professional conference (October 9 was a State holiday)
- October 12, Mr. Eig had a previously scheduled Due Process hearing in Virginia
- October 16-19, Mr. Eig had a previously scheduled Due Process hearing in Virginia
- October 18-20, Ms. Kavadi was observing a religious holiday
- October 23-24, Mr. Eig had oral argument in the United States Court of Appeals for the 4<sup>th</sup> Circuit in Richmond, Virginia
- October 30-November 3, Mr. Eig had previously scheduled hearings in the District of Columbia
- November 6, 9, and 10, Ms. Kavadi was on vacation
- November 7-8 and November 15-17, Mr. Eig and Ms. Kavadi had a Due Process hearing before ALJ XXXX
- November 13-14, Mr. Eig had a previously scheduled hearing in the District of Columbia.

As the hearing progressed, the parties requested an additional two hearing days to conclude the hearing. Based upon the availability of the participants, two additional hearing days were scheduled for December 11 and 20, 2017. The hearing proceeded on those days, concluding on December 20, 2017.

On the last hearing day, the parties each requested an opportunity to submit a sworn statement from a witness who had testified in support of their respective cases. I granted the requests and held the record open for submission of the additional statements. Also, in light of the number of witnesses, the length of the hearing and the issues involved, I requested written closing argument from the parties. At the parties' request, I set a due date of January 19, 2018 for the additional witness statements and closing argument.<sup>5</sup>

The hearing dates fell more than forty-five days after the triggering events described in the federal regulations. 34 C.F.R. § 300.510(b) and (c); *id.* § 300.515(a) and (c). The parties jointly requested and I granted a specific extension of time until thirty days from the filing of the supplemental statements and closing argument as the deadline for issuing my decision, that is, February 18, 2018.<sup>6</sup> Given that February 18, 2018 is a Sunday, the actual due date for the decision is February 16, 2018, the Friday before Sunday, February 18, 2018. *Id.* § 300.515; Md. Code Ann., Educ. § 8-413(h) (Supp. 2017).

On January 5, 2018, I received a request from Ms. Kavadi to extend the due date for the post-hearing submissions to January 22, 2018 to allow her time to recover from a medical procedure. Mr. Eig did not object to the extension. Despite the three-day post-hearing submission extension, I did not extend the decision due date beyond the February 16, 2018 date

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<sup>5</sup> In order to provide the parties with sufficient time, as requested, I recognized the MCPS holiday schedule and the parties' work schedules in setting January 19, 2018 as the due date for the post-hearing submissions. I also considered that Ms. Kavadi was scheduled to be out-of-town from January 8-12, 2018 regarding a federal matter and January 15, 2018 was a State holiday.

<sup>6</sup> Mr. Eig stated on the record that there is no urgency in the Parents receiving a decision, noting that the Student will continue to attend [School 1], where his Parents want him to be. The only question to be answered is whether the MCPS will be required to fund the Student's attendance there for the 2016-2017 and 2017-2018 school years.

already established. The parties filed their additional witness statements and closing argument on January 22, 2018, thus closing the record. The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

The contested case provisions of the Administrative Procedure Act, the Maryland State Department of Education procedural regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES**

The issues are whether the MCPS offered the Student an individualized education program (IEP) reasonably calculated to provide a free appropriate public education in light of the Student's circumstances for the 2016-2017 and 2017-2018 school years and, if not, whether the MCPS shall reimburse the Parents for the cost of his education at a non-public school for the 2016-2017 school year and pay for the cost of his education at the non-public school for the 2017-2018 school year.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

A complete exhibit list is attached as an appendix.

#### **Testimony**

The Parents presented the following witnesses:

- XXXX XXXX, M.S., Associate Director of the XXXX Group, LLC, whom I accepted as an expert in Special Education
- XXXX XXXX, M.Ed., Director and Owner, XXXX, LLC, Academic Therapist, whom I accepted as an expert in Special Education

- XXXX XXXX, Ph.D., Clinical Psychologist, whom I accepted as an expert in Clinical Psychology
- XXXX XXXX, M.A., Speech and Language Pathologist, [School 1], whom I accepted as an expert in Speech and Language Pathology
- XXXX XXXX, M. Ed., Intermediate Division Head, [School 1], whom I accepted as an expert in Special Education and Special Education administration
- The Mother
- XXXX XXXX, M.S., OTR/L, Director of Occupational Therapy, [School 1], whom I accepted as an expert in Occupational Therapy.

The MCPS presented the following witnesses:

- XXXX XXXX, Ed.D., Instructional Specialist, MCPS, whom I accepted as an expert in Special Education
- XXXX XXXX, M.S. OTL/R, Instructional Specialist, MCPS, whom I accepted as an expert in Occupational Therapy
- XXXX XXXX, M.S., Fourth Grade Teacher, [School 2], MCPS, whom I accepted as an expert in Elementary Education, Curriculum, and Instruction
- XXXX XXXX, M.A., Speech-Language Pathologist, MCPS, whom I accepted as an expert in Speech-Language Pathology

### **FINDINGS OF FACT**

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

#### **Background**

1. The Student was born in XXXX, [State] in XXXX 2005.
2. At all relevant times, the Student has lived with his Parents and sibling.
3. The Parents first noticed the Student always seemed uncomfortable and was unable to sit still, even before he began attending the [School 3] ([School 3]) in XXXX, [State] from January 2007 through June 2011.

4. While the Student attended [School 3], the Parents made the decision not to send him to kindergarten with his age cohorts and had him remain at [School 3] for a year of transitional kindergarten in the 2010-2011 academic year.

5. Before the end of the 2010-2011 school year, the Student's teacher reported to his Parents that he could not remember his letters and could not write.

6. In June 2011, when the Student was completing transitional kindergarten,<sup>7</sup> he underwent a psychological-educational evaluation. His parents were concerned about his hyperactivity, inattention, and mood lability. He had difficulty remembering steps of instruction to complete daily tasks and was unable to focus on things for longer than several minutes. At times he became overly emotional and was difficult to soothe.<sup>8</sup>

7. As a result of psychological-educational testing in 2011, the Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Combined Type, and Developmental Dyslexia.<sup>9</sup>

8. Following the above-referenced evaluation, the Student received tutoring support with an Orton-Gillingham<sup>10</sup> trained tutor as well as counseling support. Both of these supports were provided by private entities, as arranged by the Parents.

9. The Student was six and one-half years old when he entered kindergarten for the 2011-2012 school year at [School 4] in XXXX, [State].

10. In June 2012, the Student moved with his family to Montgomery County, Maryland, where he attended school and began receiving special education and related services.

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<sup>7</sup> The Parents did not enroll the Student in kindergarten at the age of five. He attended transitional kindergarten because his parents considered him to be socially and emotionally not ready for kindergarten.

<sup>8</sup> The Parents' observations are described in greater detail in Child & Family Development's June 2011 Psychological-Educational Evaluation. (*Parents' Exs. 2-1 to 2-16.*)

<sup>9</sup> Dyslexia is a neurological-based specific learning disability that is characterized by weak phonological processing skills that cause difficulties in word decoding, fluent word recognition, and spelling. (*Parents' Ex. 02-12.*)

<sup>10</sup> A specific approach to reading instruction for Students with dyslexia.

## **The MCPS' Involvement During the Period Relevant to the Parents' Due Process Complaint**

### 2015-2016 School Year

11. The Student attended fourth grade at [School 2] ([School 2]) for the 2015-2016 school year. He started the school year receiving supplementary aids in the general education setting in the form of five thirty-minute sessions per week of in-class support for written expression goals, math problem solving goals, attention/task completion, and organization goals. He also received 1.5 hours per week in pull-out special education to work on written language. The Student received his special education services from XXXX XXXX, a general education teacher, and XXXX XXXX, an instructional aide assigned to the class. (*MCPS Ex. 4.31*).

12. The Student also received the following supplemental aids and services and instructional/testing accommodations:

- a. Provide visual cues (to regain the Student's attention to task)
- b. Monitor test responses
- c. Provide graphic organizers
- d. Provide visual organizers (a tracker for reading)
- e. Allow extended time
- f. Provide multiple or frequent breaks
- g. Reduce distractions to the Student and to other students
- h. Allow use of highlighters during instruction and assignments
- i. Allow use of organizational aids
- j. Monitor independent work
- k. Provide assistance with organization
- l. Repeat directions
- m. Provide alternate ways for Student to demonstrate proficiency

- n. Student will paraphrase teacher directions
- o. Provide scribe, as needed
- p. Break down assignments into smaller units
- q. Provide quiet work space
- r. Student and teacher will meet and identify “must-dos” and “may-dos”
- s. Provide preferential seating

13. Except for the Student’s pull-out instructional time, he was in a general education classroom with his nondisabled peers. He participated in classroom activities, lunch, recess, specials (electives such as music, art, etc.), and other school activities with his nondisabled peers.

14. In September 2015, the Parents hired XXXX XXXX, an academic therapist who is specially trained in the Orton-Gillingham reading intervention program for language-based learning disabilities, to work with the Student during the fourth grade, primarily using the Orton-Gillingham methodology. On September 2, 2015, Ms. XXXX conducted the Phonological Awareness Test-2, an untimed assessment, to determine a current level of reading function and starting level of intervention.

15. While collecting baseline data on the Student in September and October 2015, the Student’s attention and distractibility issues required Ms. XXXX to frequently redirect the Student and to repeat directions.

16. During the data collection, the Student had word retrieval challenges and experienced cognitive fatigue after working with Ms. XXXX for about forty-five minutes, at which time his performance declined.

17. There is a relationship between cognitive fatigue, anxiety, and feeling bad about one’s self, all of which the Student experiences.



18. At the base of the language pyramid is phonological awareness, with fundamentals such as sound-to-symbol correspondence, decoding (reading), and encoding (spelling) making up the balance of the essential elements of language. (*T. XXXX, at 269*).

19. The Student experiences confusion over the sound a vowel makes and lacks automaticity and accuracy in recognizing certain words.

20. Ms. XXXX's work with the Student on reading continued through the end of the 2015-2016 school year and into the summer of 2016.

21. Ms. XXXX has not observed the Student in the classroom setting.

22. On October 22, 2015, the MCPS convened an IEP Team reevaluation planning meeting at [School 2] to discuss reevaluation planning. XXXX XXXX, an educational consultant with the XXXX Group, participated in that meeting at the request of the Parents.

23. At the IEP meeting, Ms. XXXX asked the Team to consider a change in the Student's coding from Other Health Impaired.

24. Ms. XXXX had the opportunity to respond to the MCPS' draft IEP, dated November 10, 2015. Ms. XXXX requested that, among other modifications to the IEP, goals be added for self-regulation/self-monitoring, and reading (competency and fluency).

25. On November 12, 2015, the MCPS convened an Annual Review IEP Team meeting at [School 2], attended by the Parents, Ms. XXXX and Ms. XXXX, and MCPS representatives. The IEP listed the Student's primary disability as Other Health Impaired, listing the following areas affected by his disability: written expression, organization, attention, task completion, and math problem solving.

26. The November 12, 2015 IEP identified goals in the following areas:

- a. Written language (3)
- b. Mathematics

- c. Organization
- d. Attention/task completion

27. The IEP provided for two forty-five-minute pull-out sessions of special education classroom instruction per week to address the Student's writing goals. The IEP also provided for five thirty-minute sessions in the general education setting to address his written expression goals, math problem solving goals, attention/task completion, and organization goals. The five thirty-minute sessions were to be provided by the special education teacher, paraeducator, and/or general education teacher.

28. The Student received the following supplemental aids and services and instructional/testing accommodations during the 2015-2016 school year:

- a. Provide visual cues
- b. Monitor test responses
- c. Provide graphic organizers
- d. Provide visual organizers
- e. Allow extended time
- f. Provide multiple or frequent breaks
- g. Reduce distractions to the Student and to other students
- h. Allow use of highlighters during instruction and assignments
- i. Allow use of organizational aids; monitor independent work
- j. Provide assistance with organization
- k. Repeat directions
- l. Provide alternate ways for the Student to demonstrate proficiency
- m. Have the Student paraphrase teacher directions
- n. Provide a scribe, as needed

- o. Break down assignments into smaller units
- p. Provide a quiet work space
- q. Provide for teacher and the Student to meet and select “must-dos” and “may-dos”
- r. Provide preferential seating

(MCPS 4.12- 4.21).

29. Except for the special education pull-out sessions, the Student was in a general education classroom with his nondisabled, same-aged peers. (T. XXXX). He participated in classroom activities, lunch, recess, specials (electives such as music, art, etc.), and other school activities with his nondisabled peers. (Id.).

30. The Student’s oral comprehension was not impacted by his fluency.

31. The Parents disagreed with the Other Health Impaired primary disability coding and communicated their opinion that the Student was falling further behind, with continuing anxiety, and was refusing to do any work at home. The Parents also described the Student’s anxiety at home. The Parents registered their view that the Student’s current programming is not addressing his needs.

32. The Parents informed the MCPS that they did not see any evidence that the Student had made any notable academic or social progress.

33. In the fall of 2015, XXXX XXXX, Ph.D., conducted a psychological evaluation of the Student. (Parents’ 25-1 to 25-43). The Student’s Parents expressed concerns about his learning, especially reading and writing. They also had questions about his processing, attention, and executive functioning.

34. Dr. XXXX considered the issues addressed in the psychological evaluation conducted in [State] in 2011, such as the Student’s hyperactivity and his ability to process information.

35. During the evaluation, Dr. XXXX noted the Student's cooperation and determination to do the work. She also noticed the difficulty he had sitting still without fidgeting.

36. Dr. XXXX administered numerous standardized tests, including the WISC-V,<sup>11</sup> Gray Oral Reading Tests- Fifth Edition, the Test of Word Reading Efficiency-Second Edition, and the Woodcock-Johnson IV Tests of Achievement and Tests of Cognitive Ability (WJ).

37. The WISC-V data reveal that the Student is a child of high average intellectual ability whose verbal intellectual ability falls at least in the Average range, and whose visual perceptual reasoning intellectual ability falls in the Superior range. He has very significant weaknesses in working memory and in processing speed. (*Parents' Ex. 25-7*).

38. There were significant discrepancies between each of the index scores (Verbal Comprehension Index (VCI), Visual Spatial Index, and Fluid Reasoning Index) and his Working Memory Index (WMI)<sup>12</sup> and Processing Speed Index. The largest discrepancy was between the Student's Visual Spatial Index (VSI)<sup>13</sup> score and his Processing Speed Index (PSI)<sup>14</sup> score, with a 53-point difference.

39. The WISC-V results show the Student has an excellent fund of knowledge and very strong crystallized intelligence. His VCI performance was diminished by his language-based learning difficulties. He demonstrated difficulty with language processing and with integrating the information to provide an answer.

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<sup>11</sup> The WISC-V is a standardized test of intellectual abilities. It measures verbal reasoning, visual spatial reasoning, visual motor abilities, working memory, and processing speed. The WISC-V index scores and the Full Scale IQ score have a mean of 100 and a standard deviation of 15. The scaled scores have a mean of 10 and a standard deviation of 3 (the scaled scores range from 1 to 19). (*Parents' Ex. 25-7*).

<sup>12</sup> WMI measures a child's ability to apprehend, hold, and transform information in immediate awareness and then use it within a few seconds. (*Parents' Ex. 25-9*).

<sup>13</sup> VSI is a measure of a child's visual perceptual and nonverbal reasoning ability.

<sup>14</sup> PSI is a measure of a child's ability to perform simple paper and pencil tasks quickly.

40. Anxiety for the Student is secondary to his learning disabilities and ADHD. His anxiety is associated with his ability to do work and do it well. He is well aware of his abilities and his difficulties.

41. Dr. XXXX recommended that the Student continue to work with his private educational tutor or a curriculum-based speech and language pathologist to help him develop written language skills, strategies for writing, decoding strategies, reading fluency strategies, reading comprehension skills, skills regarding making inferences, strategies for doing homework on his own, and executive functioning skills. Dr. XXXX further recommended the Student have a consultation with a sensory-integration occupational therapist to see if there are any supports and/or tools that might benefit him when he has to do a writing assignment.

42. In light of the Student's reading disability, written language disability, ADHD, executive dysfunction, and processing deficits, Dr. XXXX made numerous recommendations about accommodations in school.

43. In her report, dated November 23, 2015, Dr. XXXX's recommendations included a significant increase in focused and individualized instruction; increased academic accommodations; appropriate academic adaptations; more support for his processing, attention, learning, and executive functioning deficits; and behavioral support for his activity level and sensory processing needs.

44. A comparison of the standardized testing, the Wechsler Individual Achievement Test-Third Edition (WIAT-III) administered in [State] in 2012 and the Woodcock-Johnson IV administered by Dr. XXXX in 2015, shows growth and progress across topics of measurement. The Student made educational progress in reading comprehension, decoding, spelling, math problem solving, and calculation between the two test administrations. The standard deviation is

fifteen on these tests, so if a student receives the same standard score or falls within fifteen points, the student has made progress. (*Tr. 1255-1259*).

45. In November 2015, the Parents applied for the Student's admission to [School 1] and were notified of his acceptance in March 2016.

46. On December 8, 2015, Ms. XXXX generated a report after observing the Student in his fourth grade class that day at [School 2] while reading was being taught. Ms. XXXX made many recommendations, including adding the following goals to the Student's IEP:

- a. Math Fluency
- b. Reading Decoding and Fluency
- c. Reading Comprehension
- d. Self-monitoring

47. During the spring of fourth grade, the Student was taking medication to help him transition, concentrate, and lessen some of his sensory sensitivity.

48. In April 2016, the MCPS reviewed Dr. XXXX's report. Both Dr. XXXX and Ms. XXXX attended the MCPS IEP Team meeting on April 14, 2016. Dr. XXXX was able to speak to the Team about her report.

49. The Parents asked the IEP Team to change the Student's coding to Specific Learning Disability. In addition to the primary coding of Other Health Impaired, the Team determined that the Student met the criteria for Specific Learning Disability in reading fluency, math problem solving, and written expression. (*MCPS Ex. 13.1*).

50. At the April 14, 2016 IEP Team meeting, the MCPS again listed the Student's primary disability as Other Health Impaired, listing the following areas affected by his disability: written expression, organization, attention, task completion, and math problem solving. (*Parents' Ex. 31-1*).

51. The April 14, 2016 IEP identified goals for the Student in the following areas:

- a. Written language (2)
- b. Mathematics
- c. Organization
- d. Attention/task completion

52. The IEP provided for two forty-five-minute pull-out sessions of special education classroom instruction per week to address the Student's writing goals. The IEP also provided for five thirty-minute sessions in the general education setting to address his written expression goals, math problem solving goals, attention/task completion, and organization goals, and three thirty-minute sessions per week, to be provided by the special education teacher, paraeducator, and/or general education teacher, to address the fluency goal. Two additional twenty-minute sessions per month were provided for counseling to address the Student's anxiety. (*MCPS Ex. 20.37*).

53. The April 14, 2016 IEP provided the following supplemental aids, services, program modifications, supports, and accommodations:

- a. Provide visual cues (to regain the Student's attention to task)
- b. Monitor test responses
- c. Provide graphic organizers
- d. Provide visual organizers (a tracker for reading)
- e. Allow extended time
- f. Provide multiple or frequent breaks
- g. Reduce distractions to the Student and to other students
- h. Allow use of highlighters during instruction and assignments
- i. Allow use of organizational aids
- j. Monitor independent work

- k. Provide assistance with organization
- l. Provide repetition of directions
- m. Provide alternate ways for the Student to demonstrate proficiency
- n. The Student will paraphrase teacher directions
- o. Provide scribe, as needed
- p. Break down assignments into smaller units
- q. Provide quiet work space
- r. The Student and teacher will meet and identify “must-dos” and “may-dos”
- s. Identify best location for the Student in a given lesson

54. The IEP Team determined that the least restrictive environment to implement the IEP was the Student’s home school, [School 2].

55. On June 6 and 8, 2016, XXXX XXXX, Speech-Language Pathologist at [School 1], conducted an Intermediate Speech and Language Assessment of the Student. The Student’s reading and writing skills were not reassessed in the diagnostic sessions. In order to achieve educational benefit, the Student does not need a specialized setting where his linguistic weaknesses and strengths are recognized and accommodated in every subject area.

56. The Student does not have spoken language issues. Oral communication is an area of strength for the Student. (*MCPS Exs. 47.1, 48.1, and 49.1 and T. XXXX*).

57. The MCPS convened another IEP Team meeting on June 9, 2016 to continue its discussion and finalize plans for the Student during the 2016-2017 school year (fifth grade).

58. The MCPS listed the Student’s primary disability as Other Health Impaired, listing the following areas affected by disability: written expression, organization, attention, task completion, math problem solving, reading fluency, and anxiety. (*Parents’ Ex. 36-1*).

59. The June 9, 2016 IEP identified goals for the Student in the following areas:



- a. Written language (3)
- b. Mathematics
- c. Reading
- d. Attention/task completion

60. The IEP provided for two forty-five-minute pull-out sessions of special education classroom instruction per week to address the Student's writing goals. The IEP also provided for five weekly thirty-minute sessions in the general education setting to address his written expression goals, math problem solving goals, attention/task completion, and organization goals, and three thirty-minute sessions per week to address the fluency goal. The eight thirty-minute sessions were to be provided by the special education teacher, paraeducator, and/or general education teacher. The IEP included two twenty-minute sessions per month for counseling to address the Student's anxiety.

61. In addition to the above, the June 9, 2016 IEP provided the following supplemental aids, services, program modifications, supports, and accommodations:

- a. Provide editing checklist
- b. Provide speech to text assistance
- c. Provide sensory breaks
- d. Provide daily schedule
- e. Provide menu of coping strategies
- f. Allow use of sensory tools

62. The Parents found the IEP developed on June 9, 2016 to be insufficient to meet the Student's needs and enrolled the Student at [School 1] for the 2016-2017 school year (sixth grade). The Parents believed there was a need for a reading comprehension goal. The Parents requested small group instruction in all content areas and more services. (*Parents' Ex. 36-48*).

63. The Student's report card from the 2015-2016 school year at the MCPS shows that he was accessing the general education curriculum and demonstrating proficiency in his subjects during the 2015-2016 school year. (*Parents' Ex. 37*).

64. The Student received "P" grades (Proficient) in most of his subject areas, with a few "I" (In Progress) grades. *Id.* In some subjects, like music, engineering and technology, he received "ES" (Exceed the Standard). *Id.* Additionally, he was Demonstrating or Making Progress in his Learning Skills. (*Id.*).

65. During the fourth grade, the Student's instructional reading level progressed two levels, from Level R to Level T. Levels S and T make up the reading level targets for MCPS fourth graders. His reading level at the end of the 2015-2016 year met his benchmarks. (*MCPS 43.*) By the end of the 2015-2016 school year, the Student's Level T reading level was at the end of fourth/beginning of fifth grade reading level, which means he met his reading target. (*Id.*; *see also T. XXXX, XXXX*).

66. The Student made educational progress between 2012 and 2015 in reading comprehension, decoding, and spelling, and math problem solving and calculation. His standard scores increased or stayed within the standard deviation, which means when compared to his age peers, he was making progress.

67. The Student's tests and teacher reports show that the Student was making progress toward his goals and was able to access the general education curriculum with the supports and services in place for the 2015-2016 school year.

### 2016-2017 School Year

68. The Student's Parents unilaterally placed him at [School 1], which he attended for the 2016-2017 school year (fifth grade). [School 1] is a private, separate day school in XXXX for children in first through twelfth grades with specific learning disabilities and/or ADHD.

69. There are no general education students at [School 1].

70. [School 1] has related service providers on staff, including a speech-language pathologist, a psychiatrist, a psychologist, social workers, and occupational therapists.

71. The Student has shown that he is quite able and likes to work with his hands. In wood workshop at [School 1], he uses power tools, hammers, and saws. He uses pencils, charcoal, paint brushes, and sketches. The Student cooks and builds small remote cars. He has shown that his fine motor skills allow him to access his environment.

72. With respect to gross motor skills, the Student thrives at sports and is a good athlete in [sports]. The Student does not require motor accommodations to participate in such activities. At [School 1], the speech therapist noted he went on an outdoor adventure course and enjoyed it. (*Tr.* 558). From a gross motor standpoint, the Student has shown ability to access his environment.

### 2017-2018 School Year IEP

73. In November 2016, the Parents sent to the MCPS the following [School 1] documents: [School 1] Speech-Language Assessment, [School 1] OT assessment, and a reading/math assessment. The Parents subsequently sent the MCPS [School 1]'s IEP for the 2017-2018 school year.

74. While an MCPS IEP Team meeting was pending, the MCPS staff observed the Student at [School 1].

75. On April 26, 2017, the MCPS convened an IEP Team meeting for the 2017-2018 school year (sixth grade) in Montgomery County, Maryland. The Team reviewed [School 1] reports, the MCPS' observations and reports by XXXX XXXX, (Occupational Therapist), XXXX XXXX (Speech Therapist), and XXXX XXXX (Special Educator) and proposed an IEP for the balance of the 2016-2017 school year (fifth grade) and the 2017-2018 school year (sixth grade).

76. The MCPS listed the Student's primary disability as Other Health Impaired, listing the following areas affected by disability: written expression, organization, attention, task completion, math problem solving, reading fluency, and anxiety related to school performance. (*Parents' Ex. 47-1*).

77. The April 26, 2017 IEP identified goals for the Student in the following areas:

- a. Written language (3)
- b. Mathematics
- c. Organization
- d. Task completion
- e. Behavior

78. The IEP provided for: two forty-five-minute sessions per week outside the general education setting for written instruction; seven thirty-minute sessions of classroom support in the general education setting for written expression, math, attention, and task completion; three thirty-minute sessions in the special education setting for reading fluency; and two twenty-minute sessions per month for counseling outside the general education. (*Parents' Ex. 47-44*).

79. The April 26, 2017 IEP provided the following supplemental aids, services, program modifications, and supports:

- a. Allow use of highlighters during instruction and assignments
- b. Allow use of organizational aid
- c. Monitor independent work
- d. Provide assistance with organization
- e. Provide frequent check-ins for homework
- f. Provide alternative ways
- g. Have the Student paraphrase teacher directions
- h. Edit checklist
- i. Use color-coded graphic organizers
- j. Modify homework when it is assigned
- k. Break down assignments into smaller units
- l. Enlarge print
- m. Provide quiet work space
- n. Provide advance notice of tests
- o. Teacher and the Student will determine “must-dos” and “may-dos”
- p. Provide sensory breaks
- q. Provide a daily schedule
- r. Provide menu of coping strategies
- s. Allow use of sensory tools
- t. Provide preferential seating

80. The MCPS denied the Parents’ request that the Student be found eligible for speech-language services and that he have an expressive language goal on his IEP.

81. The MCPS denied the Parents' request that the Student be placed in special education throughout the school day in a full-time, self-contained setting. The MCPS also denied the Parents' request to place and fund the Student at [School 1] for the 2017-2018 school year. (*MCPS Ex. 39-60*).

82. The least restrictive environment in which to implement the IEP for the remainder of the 2017-2018 school year was [School 5] ([School 5]), the Student's home school. The IEP Team considered the Student's home school as the placement where the Student's educational program could be delivered. The IEP team considered the Student's present levels of performance, goals, supplementary aids and services, and then determined placement.

83. On June 12, 2017, the MCPS revised the April 26, 2017 IEP to provide the paperwork for what was a split IEP covering the remainder of the 2016-2017 school year (fifth grade) at [School 2] and the 2017-2018 school year (sixth grade) at [School 5]. No IEP meeting was held on June 12, 2017. The MCPS had informed the Parents at the April 26, 2017 IEP Team meeting that it was going to issue a revised service delivery page delineating the middle school service hours discussed at the April 26, 2017 meeting.

84. The June 12, 2017 document added a reading goal and revised the service page of the IEP to reflect the following services proposed for the Student at [School 5] during the 2017-2018 school year: five forty-seven-minute daily sessions inside the general education setting for digital literacy, English, math, science, and social studies; one forty-seven-minute special education session daily outside the general education setting; and twenty minutes per month for counseling. (*MCPS Ex. 39.43*).

85. Ms. XXXX worked with the Student in the summer of 2017 on reading.

86. One of the speech-language pathologists employed by Ms. XXXX worked with the Student during the summer of 2017. As of the end of the summer of 2017, the Student did not have any decoding (reading) needs, but he had fluency and reading comprehension needs.

87. The least restrictive environment in which to implement the IEP for the 2017-2018 school year (sixth grade) is [School 5], the Student's home school.

88. The Student is attending [School 1] for the 2017-2018 school year.

89. Ms. XXXX worked with the Student during the 2017-2018 school year in the area of executive functioning,<sup>15</sup> but not in reading.

90. Currently, the Student is taking medication for his attention deficit issues and his anxiety.

## **DISCUSSION**

### ***Burden of Proof***

The Parents are seeking reimbursement for their unilateral placement of the Student at [School 1] for the 2016-2017 and 2017-2018 school years. Because the Parents are the party seeking relief on behalf of the Student, they bear the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 56-58, 62 (2005) ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.") The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). For the reasons that follow, I find the Parents have not met their burden of proof.

### ***Legal Framework***

The IDEA governs the identification, assessment and placement of students in special education. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2017); and COMAR 13A.05.01. The IDEA provides that all

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<sup>15</sup> Executive functioning, as explained by Ms. XXXX, includes task initiation training, prioritizing, planning, and time management.

children with disabilities have the right to a FAPE which “emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . .” 20 U.S.C.A. § 1400(d)(1)(A).

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

The *Rowley* Court found, because special education and related services must meet the state’s educational standards, the scope of the benefit required by the Act is an IEP reasonably calculated to permit the student to meet the state’s educational standards; that is, generally, to pass from grade-to-grade on grade level. *Rowley*, 458 U.S. at 204; 20 U.S.C.A. § 1401(9).

The Supreme Court refined the meaning of a FAPE in a recent case, holding that for an educational agency to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student’s circumstances. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017).

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

- (i) the strengths of the child;
- (ii) the concerns of the parents for enhancing the education of their child;



- (iii) the results of the initial evaluation or most recent evaluation of the child; and
- (iv) the academic, developmental, and functional needs of the child.

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

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

Thirty-five years after *Rowley*, the parties in *Andrew F.*, *supra*, asked the Supreme Court to go further than it did in *Rowley* and set forth a test for measuring whether a disabled student had attained sufficient educational benefit. The framework for the decision was the Tenth Circuit’s interpretation of the meaning of “some educational benefit,” which construed the level of benefit as “merely . . . ‘more than *de minimis*.’” *Andrew F. v. Douglas Cty. Sch. Dist. RE-I*, 798 F.3d 1329, 1338 (10<sup>th</sup> Cir. 2015).

The Supreme Court set forth the following “general approach” to determining whether a school has met its obligation under the IDEA:

While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

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

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.”’ A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child’s circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be “*specially* designed” to meet a child’s “*unique* needs” through an “[i]ndividualized education program.” . . .

*Endrew F.*, 137 S. Ct. at 998-99 (citations omitted). The Court expressly rejected the Tenth Circuit’s interpretation of what constitutes “some benefit”:

When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to ‘drop out.’” 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.

*Id.* at 1001 (citation omitted).

Directly adopting language from *Rowley*, and expressly stating that it was not making any “attempt to elaborate on what ‘appropriate’ progress will look like from case to case,” the *Endrew F.* court instructs that the “absence of a bright-line rule . . . should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Id.* (quoting *Rowley*, 458 U.S. at 206). At the same time, the *Endrew F.* court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, “[a] reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” (*Id.* at 1002.).

Ultimately, a disabled student’s “educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” (*Id.* at 1000.). Moreover, the IEP must be reasonably calculated to allow him to advance from grade to grade, if that is a “reasonable prospect.” (*Id.*).

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the “least restrictive environment” to achieve FAPE, meaning that,

ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989). At a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). Placing disabled children into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved.

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like the MCPS to offer a continuum of alternative placements that meet the needs of children with disabilities. 34 C.F.R. § 300.115. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services (such as Resource Room or itinerant instruction) to be provided in conjunction with regular class placement. *Id.* § 300.115(b); COMAR 13A.05.01.10B(1). 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. COMAR 13A.05.01.10A(2). In such a case, a FAPE might require placement of a child in a private school setting that would be fully funded by the child’s public school district.

Parents may be entitled to retroactive reimbursement from the state for tuition and expenses for a child unilaterally placed in a private school if it is later determined that the school

system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). The issue of reimbursement for unilateral placement was expanded in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Parents may recover the cost of private education only if (1) the school system failed to provide a FAPE; (2) the private education services obtained by the parent were appropriate to the child's needs; and (3) overall, equity favors reimbursement. *See id.* at 12-13. The private education services need not be provided in the least restrictive environment. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

### ***Scope of Parents' Claim***

In the narrative accompanying the Parents' Due Process complaint, filed on July 24, 2017, the Parents provided background information about the Student dating back to his infancy, his preschool experience in [State], his attendance in kindergarten there during the 2011-2012 school year, through the time the family moved to Montgomery County, Maryland in 2012, and continuing with the Student's experience attending the MCPS schools through the 2015-2016 school year. The Parents also addressed their enrollment of the Student at [School 1] for 2016-2017, rather than "subject[ing] him to another year at an inappropriate educational placement . . . " (*Parents' Ex. 1-6*). The Parents also stated in their filing that the MCPS has continually and repeatedly denied the Student a FAPE and they are requesting reimbursement for the costs of placing the Student at [School 1] for the 2016-2017 school year and that the MCPS place and fund him there for the 2017-2018 school year.

I note in the Parents' closing argument they request reimbursement for the Student's placement at [School 1] for the 2015-2016 and 2016-2017 school years, with all related fees and

costs, and that the Student be placed at [School 1] for the 2017-2018 school year, and that [School 1] be determined to be his current educational placement. The Parents' reference to their dissatisfaction with the Student's program and placement for the 2015-2016 school year is consistent with the contents of their Due Process complaint, but there is no reimbursement issue for 2015-2016 because the Student attended the MCPS that school year. The remedy the Parents request in their Due Process complaint is limited to reimbursement for [School 1] for the 2016-2017 and 2017-2018 school years. However, given that the Student's achievement during the 2015-2016 school year played a part in the 2016-2017 IEP's development, I have considered what transpired that year.

Furthermore, at the telephone prehearing conference conducted on September 19, 2017, the Parents specifically requested reimbursement at [School 1] for the 2016-2017 school year and placement at [School 1] for the 2017-2018 school year. Accordingly, I issued a Prehearing Conference Report and Order, dated September 29, 2017, identifying the issues as involving the MCPS' alleged denial of a FAPE for the 2016-2017 and 2017-2018 school years, the reimbursement for the Student at [School 1] for the 2016-2017 school year and the funding of his education there for the 2017-2018 school year. After I issued the Prehearing Conference Report and Order, neither party sought to modify the issues addressed in that document.

The Parents allege that the MCPS did not fully understand the Student's needs because it never took the time to conduct a comprehensive evaluation of him nor did it fully consider the copious amounts of outside information and intervention provided by the Parents. The Parents claim that the MCPS either ignored the Parents' input or "cherry-picked" data to justify offering the Student an educational program with minimal services out of line with his actual needs. The Parents stated that, and after years of trying in vain to work with the school system to develop an

IEP appropriate for their child, they made the difficult decision to unilaterally place him in a private, special-education day school, [School 1].

The Parents further maintain that only after the Student attended [School 1] for almost an entire year did the MCPS offer a program that even began to approach what was appropriate. They allege that the only reason the Student's special education service hours more than tripled between the fifth and sixth grades was not because the school system finally accepted he needed the intervention, but because that is just how his home middle school operated. The Parents contend that the MCPS never considered the Student's individual circumstances nor did it consider which school would best be able to meet his needs. Instead, the school system decided ahead of time that he would stay at his home school and take what they could give. Such predetermination is in direct violation of the IDEA, they say.

The Parents claim that the MCPS' failure to program for the Student's individual needs constitutes a denial of a FAPE, to which the Student is entitled under the IDEA, as specifically interpreted in the recent *Andrew F.* ruling. In addition to the predetermination assertion, the Parents seek to establish that the proposed IEPs are inappropriate because they provide an inappropriate instruction method and insufficient amount of specialized instruction. The Parents pointed to the Student's alleged failure to make appropriate progress under the *Andrew F.* standard while in the MCPS and the MCPS' failure to apply its expertise to developing the Student's IEP, which they argue mandates my giving great weight to the experts presented by the Parents.

### ***The MCPS' Response***

The MCPS points out that parents are always free to place their child in a private school. However, they cannot expect public funding of their private school choice if the school system has proposed an appropriate educational program. The MCPS maintains that the Parents have

not met their burden to show that the MCPS denied the Student a FAPE. The MCPS referred to my Prehearing Conference Report and Order, which addresses the issue as whether the MCPS denied the Student a FAPE for the 2016-2017 school year, and, if so, whether the Parents should be reimbursed for [School 1] costs for the 2016-2017 school year and whether the Student's education there should be funded for the 2017-2018 school year. The Student attended the MCPS from the 2012-2013 school year (first grade) through the 2015-2016 school year (fourth grade). The MCPS' response to the various sub-issues raised by the Parents is noted here as follows. As appropriate, more detailed treatment of the sub-issues will be addressed in the Analysis section of this Decision.

A. Parents' Reference to the Student Being Gifted

In its response to the Parents' case, the MCPS challenges the Parents' reference to the Student as "gifted." There are no test scores to support such a finding. This is relevant, as a finder of fact analyzes what program and placement is appropriate in light of the Student's individual circumstances.

B. Coding

The MCPS counters the Parents' assertion that the MCPS did not code the Student for Specific Learning Disability, noting that Other Health Impaired was the primary coding to establish IDEA eligibility. The MCPS pointed out there is no dispute that the Student has attention, organization, and task completion needs which impact written expression output as well. The MCPS argued that those needs, as well as his needs in reading fluency, math problem solving, and written expression are being addressed in his IEP.

C. Reading

The MCPS also takes issue with the Parents' assertion that reading fluency, decoding, and comprehension were not identified as areas of disability for the Student. The MCPS pointed



out that it included reading fluency in its reevaluation of the Specific Learning Disability analysis and added an appropriate reading fluency goal to the IEP back in December 2015 and June 2016. (*MCPS Exs. 13.1 and 20.34*).

D. Impact of Attention and Fatigue, and Their Effect on the Student's Performance on Timed Testing

The MCPS notes that the crux of the Parents' case focuses on test scores in isolation. The MCPS pointed out that attention and fatigue impact the Student's performance and depress his scores. When timed, he rushes through his work. The Student has anxiety on timed tests, which is why extended time is an instructional and testing accommodation on his IEP. (*Tr. 1479*).

E. Social and Emotional Needs

The MCPS maintains that the depressed and even suicidal child the Parents allege the Student was during the 2015-2016 school year is not the student his fourth-grade teacher, Ms. XXXX, saw on a daily basis. It said Ms. XXXX's opinion is corroborated by the Student's demeanor and testing. The MCPS maintained that the most accurate picture of the Student is his Behavior Assessment System for Children, Second Edition (BASC-2) testing results, which indicated that the Student is not struggling in the social or emotional areas at school and not presenting with externalizing or acting out behavior in school. (*Parents' Ex. 25-29*).

F. Mainstreaming Strengths

The MCPS noted the legal requirement that it must propose an IEP in the least restrictive environment. It asserted there is no reason why the Student cannot be educated with his nondisabled peers, or why he cannot participate in his electives, lunch, recess, and physical education with his nondisabled peers. Both IEPs address his individualized learning needs. The Student has shown that he flourishes in such an environment with his nondisabled peers. [School 1] is a one hundred percent disabled population. The MCPS argued the Parents have not met

their burden in showing that he needs such a restrictive environment as [School 1]. As Dr. XXXX testified, the Student's modelling abilities, as noted by his mother, mean he should be with his nondisabled peers and that he should have the opportunity to model those peers in the academic, social, and behavioral realms. (*Tr. 1023-1025, 1072-1073*).

The MCPS recommended a delivery model for 2016-2017 that called for the Student to be in a general education class, with two forty-five-minute pull-out sessions of special education classroom instruction per week to address the Student's writing goals. The IEP provided for five weekly thirty-minute sessions in the general education setting to address his written expression goals, math problem solving goals, attention/task completion, and organization goals, and three thirty-minute sessions per week in the general education setting to address the fluency goal. The eight thirty-minute sessions were to be provided by the special education teacher, paraeducator, and/or general education teacher. The IEP included two twenty-minute sessions per month for counseling to address the Student's anxiety. Except for the Student's pull-out instructional time, he was in a general education classroom with his nondisabled peers. He participated in classroom activities, lunch, recess, specials (electives such as music, art, etc.), and other school activities with his nondisabled peers.

The MCPS argued the Student had shown progress and it was reasonable for this progress to inform MCPS' judgment in programming for the 2016-2017 and 2017-2018 school years. [School 2] and [School 5] had the resources and the ability to implement the Student's IEPs in the least restrictive environment.

#### G. The MCPS Addressing the Student's Deficits

Dr. XXXX testified in detail as to how the IEPs address attention, impulsivity, distractibility, working memory, executive function, processing speed, word retrieval, fluency (*Tr. 1026*), and other need areas by means of goals and objectives, instructional and testing

accommodations, and supplemental aids and services. (*See Tr. 998-1009, 1105-1108, 1038-1041*). She and Ms. XXXX also described how the general education teacher and the special education teacher collaborate. (*Tr. 1028*). Ms. XXXX and Dr. XXXX explained how the general education curriculum inherently addresses reading comprehension. (*Tr. 1027*).

The MCPS asserted that the Student made progress at [School 2]. The Student's mother even admitted that [School 5] was a good program and added that the special education program coordinator and data collection were "very impressive." (*T. Fisher*).

#### H. Split IEP for the 2017-2018 School Year at [School 5]

The MCPS responded to the Parents' questioning the 2017 split IEP. The IEP was developed in April 2017. The Mother and Ms. XXXX admitted that the MCPS explained what the middle school day and courses look like and how the hours would be allocated. (*Tr. 792, 868-870, 875-87*). They knew about [School 5] and as proof of being informed by the MCPS at the April meeting, the Student's mother and Ms. XXXX subsequently toured [School 5].

Dr. XXXX described the discussion at the April 2017 IEP meeting. The least restrictive environment (LRE) for the remainder of the 2016-2017 fifth grade school year was discussed – [School 2] was the home school for elementary school. Accordingly, [School 2] was the LRE and had the resources to implement the IEP. The IEP would continue into sixth grade, and therefore, [School 5] was considered because it was the Student's home school for middle school. [School 5] was the LRE and had the resources to implement the IEP.

Dr. XXXX further explained: "Students entering middle school have 7 teachers, they have 7 classes. Each class is independent of another class. The block, instructional blocks are different in time." (*Tr. at 1047*). This is different from elementary school, which is taught primarily by one teacher. (*Tr. 1238, 1240, 1275-1282*). For example, in the various forty-seven minute blocks, different courses may work on written expression, so during that instruction and

based on the Student's written expression goals, the special education service would apply then. If it is not an area that needs to be addressed on his IEP, the rest of the class period would not require the special education teacher to work with the Student. This accounts for the difference in how hours are reported in the split IEPs.

The MCPS contended that there is no predetermination here, and the difference between elementary school and middle school is due to the number of classes, number of teachers, and how the service is distributed across the day. (*Id.*).

#### I. Occupational Therapy

The MCPS offered an explanation as to why it did not propose occupational therapy (OT) for the Student. It referred to [School 1]'s testing after the fourth grade school year (2015-2016), and focused on [School 1]'s approach to occupational therapy from a clinical model. [School 1]'s clinical approach removes students from the classroom setting to receive intensive individual therapy.

The MCPS asserted that, under its guidelines, school-based OT is designed so that a student can obtain the motor skills to access the educational environment. The MCPS further noted, from a fine motor and gross motor perspective, there has been no showing that the Student cannot access his learning environment.

#### J. Speech Therapy

The MCPS offered an explanation as to why Ms. XXXX, their speech-language expert with twenty-seven years in the field, did not recommend speech services for the Student. It offered an explanation about how the various areas [School 1] is working on are either addressed through the supplemental aids or services identified in the IEP, or within the purview of the teachers. The Parents took issue with why the speech therapist would not work on reading and writing. To sum up the MCPS' argument in this area, reading and writing are appropriately

taught by teachers in the MCPS, and the Student made progress. The MCPS pointed out how each goal was either addressed through supplemental aids, could be addressed by educators, or was not really a speech goal. (*See T. XXXX*).

### *Analysis*

**A. Scope of hearing/Due Process Complaint/ references to the MCPS failing to address the Student’s needs beginning in the 2012-2013 school year through the 2015-2016 school year.**

The Parents allege that evidence at the hearing shows that each of the IEPs proposed by the MCPS were inappropriate to meet the Student’s needs under *Andrew F.* The Parents expressed particular concern regarding those IEPs proposed for the 2015-2016, 2016-2017, and 2017-2018 school years, but they also assert that the IEPs prior to 2015 failed to provide the Student with the level of special education support he required to make progress. The Parents claim that, since 2012, they have tried repeatedly, but in vain, to work with the MCPS and address the Student’s particular needs. Noting the years-long disagreement between the MCPS and the Parents, the Parents found it necessary to place the Student at [School 1] starting August 2016.

The focus on IEPs for the school years prior to 2016-2017 is at odds with the Supreme Court’s recognition in *Andrew F.* that “crafting an appropriate program of education requires a prospective judgment by school officials.” 137 S. Ct. at 999. By retaining *Rowley*’s “‘reasonably calculated’ qualification,” *id.*, the *Andrew F.* decision reinforces the principle that courts must be mindful that they are reviewing the forward-looking decisions of school authorities.

In recognizing that any claims arising from events on or before July 24, 2015 being barred by the statute of limitations, I have also noted above that the Parents’ Due Process complaint seeks reimbursement for their unilateral placement of the Student at [School 1] in

2016-2017 and placement of the Student at the same school for the 2017-2018 school year because of the MCPS' alleged failure to offer an IEP that provided him with a FAPE in the LRE during each of those school years. Nevertheless, I allowed evidence from prior school years to allow the Parents to establish the Student's background in [State] through the 2011-2012 school year and, after that, when he attended the MCPS. I am not making findings with regard to the alleged denial of a FAPE for the Student prior to the 2016-2017 school year. As noted above, I am considering what transpired during the 2015-2016 school year (fourth grade), as it impacted the development of the Student's IEP for 2016-2017. I have considered the Student's report cards and grades, reading levels, standardized testing results, and IEP progress notes as I consider the issues regarding the 2016-2017 and 2017-2018 school years.

I do not find that the MCPS' alleged continuing pattern of failing to provide the level of special education support the Student required to make progress through the 2014-2015 school year has relevance when the reimbursement and placement for the 2016-2017 and 2017-2018 school years are at issue and the Parents' complaint is subject to a two-year statute of limitations. I am not evaluating whether the MCPS, between 2012 and 2015, engaged in or continued a pattern of failing to provide a level of instruction that was reasonably calculated to permit his advancement through the general curriculum. Even if it had denied the Student FAPE for the years prior to 2015-2016, the Parents still have the burden of independently establishing that the MCPS has denied the Student a FAPE in the LRE as it proposed IEPs for him with respect to the 2016-2017 and 2017-2018 school years.

The Parents introduced the Student's report card from the 2015-2016 school year. (*Parents' Ex. 37*). The Student received "P" grades (Proficient) in most of his subject areas, with a few "I" (In Progress) grades. (*Id.*). In some subjects, like music, engineering and technology, he received "ES" (Exceed the Standard). (*Id.*). Additionally, he was Demonstrating (DEM) or

Making Progress (PRG) in his Learning Skills. (*Id.*). Hence, he was not only accessing the general education curriculum, but also demonstrating proficiency in his subjects. Under *Andrew F.*, his IEP was “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Andrew F.*, 137 S. Ct. at 992 (quoting *Rowley*, 458 U.S. at 204).

During the fourth grade, the Student’s instructional reading level progressed two levels, from Level R to Level T. Levels S and T make up the reading level targets for the MCPS fourth graders. His reading level at the end of the 2015-2016 year met his benchmarks. (*MCPS Ex. 43*). By the end of the 2015-2016 school year, the Student’s Level T reading level was at the end of fourth/beginning of fifth grade reading level, so he met his reading target. (*Id.*; *see also T. XXXX, XXXX*). The data show that the Student was not only accessing the general education curriculum, but he was also demonstrating proficiency in his subjects in the fourth grade.

Similarly, the standardized testing (WIAT-III) administered in [State] in 2012 and the Woodcock-Johnson IV administered by Dr. XXXX in 2015 show growth and progress across topics of measurement. Dr. XXXX, who has extensive experience in both instruments, testified to the comparability of the various subtests. (*Tr. 1098-1105*). First, she explained that the standard deviation is fifteen on these tests, so if a student receives the same standard score or within fifteen points, the student has made progress. (*Tr. 1255-1259*).<sup>16</sup>

These standardized tests show that the Student made educational progress between 2012 and 2015 in reading comprehension, decoding, and spelling, and math problem solving and calculation. His standard scores increased or stayed within the standard deviation, which means when compared to his age peers, he was making progress.

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<sup>16</sup> Parents’ Ex. 72 provides a research study showing the comparability of the standard scores.

**B. The 2016-2017 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances in the LRE.**

During the 2015-2016 school year, the Student was in Ms. XXXX's fourth grade class, and received his special education services from Ms. XXXX, Ms. XXXX XXXX (special education teacher), and an instructional aide assigned to the class. (*T. XXXX; MCPS Ex. 4.31*). He was a student identified with a disability under an Other Health Impaired coding. (*MCPS Ex. 4*). His IEP called for two forty-five-minute pull-out sessions per week by the special education teacher to work on his writing goals, and five thirty-minute sessions per week of in-class support for written expression goals, math problem solving goals, attention/task completion, and organization goals provided by the special education teacher, paraeducator, and/or the general education teacher. (*MCPS Ex. 4.31*).

The Student's IEP provided for the following supplemental aids and services and instructional/testing accommodations: visual cues; monitor test responses; graphic organizers; visual organizers; extended time; multiple or frequent breaks; reduce distractions to the Student; reduce distractions to other students; allow use of highlighters during instruction and assignments; allow use of organizational aids; monitor independent work; provide assistance with organization; repetition of directions; provide alternative ways for the Student to demonstrate proficiency; have the Student paraphrase teacher directions; scribe; break down assignments into smaller units; quiet work space; teacher and the Student will meet and select "must-dos" and "may-dos;" preferential seating. (*MCPS Exs. 4.12- 4.21*).

Aside from his instructional time pursuant to his IEP, the Student was in a general education classroom with his nondisabled, age peers. (*T. XXXX*). He participated in classroom activities, lunch, recess, specials (electives such as music, art, etc.), and other school activities with his nondisabled peers. (*Id.*).



On October 22, 2015, the IEP team met for Reevaluation planning. (*MCPS Ex. 3*). The team recommended the following assessment: school psychologist classroom observation. (*MCPS Exs. 3.3-3.4*). The Parents provided consent and indicated that they would be obtaining outside testing which they would later provide to the MCPS. (*MCPS Ex. 3*).

On December 8, 2015, the Parents submitted a psychological evaluation from Dr. XXXX XXXX. On December 17 and 21, 2015, the MCPS' XXXX XXXX, school psychologist, performed her classroom observation. (*MCPS Ex. 8*). The IEP team met on three dates April 4, 2016, April 14, 2016, and on June 9, 2016 to determine reevaluation eligibility, to review the reports and the Student's performance, and to develop the IEP for the 2017-2017 school year. (*MCPS Exs. 12, 13; see also T. XXXX*).

On April 4, 2016, the IEP team reviewed Dr. XXXX's report, and determined that in addition to the primary coding of Other Health Impaired, the Student met the criteria for Specific Learning Disability in reading fluency, mathematics problem solving, and written expression. (*MCPS Ex. 13.1*).

On April 14, 2016 and June 9, 2016, the IEP team continued its discussion and developed the IEP. (*MCPS Ex. 20*). The MCPS proposed the following: two forty-five-minute pull-out sessions per week provided by the special education teacher to work on writing goals; five thirty-minute sessions of classroom support per week to address written expression goals, math problem solving goals, attention/task completion, and organization goals; and three thirty-minute sessions of classroom support per week to address the fluency goal provided by the special education teacher, paraeducator, and/or general education teacher; and two twenty-minute sessions per month for counseling to address anxiety. (*MCPS Ex.20.37*).

The IEP team considered the assessment findings, teacher information, and update from the Parents and added to the specialized instruction as a result. Goals regarding writing fluency,

math problem solving, and anxiety were also included. Ms. XXXX had advocated on behalf of the Student for an anxiety goal. She also expressed her view that additional reading goals, including one in reading comprehension, were in order. Dr. XXXX stated that reading goals were not established in the areas of reading comprehension or decoding because they were not areas of weakness for the Student. I agree that there was an insufficient basis for establishing such a goal.

In addition, the June 9, 2016 IEP recommended the following supplemental aids and services and instructional/testing accommodations: provide visual cues; monitor test responses; provide graphic organizers; provide visual organizers; allow extended time; provide multiple or frequent breaks; reduce distractions to the student; reduce distractions to other students; allow use of highlighters during instruction and assignments; allow use of organizational aids; monitor independent work; provide assistance with organization; repeat directions; provide alternative ways for student to demonstrate proficiency; have student paraphrase teacher directions; provide editing checklists; provide speech to text software; provide a scribe, when needed; break down assignments into smaller units; provide quiet work space; provide for teacher and student to meet and select “must-dos” and “may-dos;” allow sensory breaks; provide daily schedule; provide menu of coping strategies; allow the use of sensory tools; and provide preferential seating.

*(MCPS Exs. 20.12 - 20.22).*

XXXX XXXX, M.S., an educational consultant, was accepted as an expert in Special Education. Ms. XXXX attended IEP meetings as the Student’s 2016-2017 school year IEP was being developed and provided feedback on the draft IEP. She also had the opportunity to observe the Student in the classroom. Ms. XXXX believed that the Student’s needs were not being fully met. She also asserted that the Student had only achieved three of his goals over the previous four years, indicating the need for an increase in his hours of service. Although she

noted that she struggled with the concept, Ms. XXXX rendered the opinion that the Student needed a full-time special education program like [School 1]. She stated her view that the benefits of a self-contained special education school outweighed what the MCPS was offering. Ms. XXXX testified that her opinion also applies to the 2017-2018 school year.

XXXX XXXX, M.Ed., Academic Therapist, was accepted as an expert in Special Education. Ms. XXXX worked with the Student in reading through the end of the 2015-2016 school year and into the summer of 2016. The Parents sought out Ms. XXXX because she uses the Orton-Gillingham method of reading instruction. Ms. XXXX also participated in the IEP development process for the 2016-2017 school year. She recommended the Student to be seen by a specially trained special educator or speech-language pathologist in a multi-sensory small group setting, where there is more intensive instruction, with only one other peer of similar ability, at least one hour every school day. Ms. XXXX also opined that the Orton-Gillingham reading instruction methodology is the only appropriate method for teaching children with dyslexia.

XXXX XXXX, Ph.D., a Clinical Psychologist, was accepted as an expert in clinical psychology. Dr. XXXX referred to the extensive assessments she conducted of the Student in the fall of 2015. She tested the Student in the following areas: intellectual, functional, achievement, processing, and social/emotional capabilities. Dr. XXXX opined that the Student's frustration and anxiety are secondary to his learning disability and ADHD. She diagnosed the Student with adjustment disorder and anxiety, and she attributed his lower test scores to processing problems, not anxiety.

Dr. XXXX's view is that the Student will be more successful with a significant increase in focused and individual instruction, increased accommodations, appropriate academic adaptations, more support for his processing, attention, learning and executive functioning

deficits, and behavioral support for his activity level and sensory processing needs. (*Parents' Ex. 25-3*).

The Student's Mother testified in detail about her son's abilities and challenges, referencing both his educational needs and home experience as only a parent can. The information the Mother shared about the Student's frustrations at school and home during the 2015-2016 school year (fourth grade) played a major role in the Parents seeking outside assistance for their child and obtaining professional assessments. I considered the Mother's heartfelt observations and experience with the Student. It is clear that the Parents and the professionals they retained had significant opportunities to offer input during the IEP process despite the fact their recommendations were not always accepted by the MCPS.

I address some of the opinions offered by the Parents' witnesses from [School 1] (XXXX XXXX, XXXX XXXX, and XXXX XXXX) later in this Decision. As discussed elsewhere, I fully considered the many assessments, expert opinions, and other information in the record. I made note of the vast IEP programming experience of Dr. XXXX at the MCPS. I am convinced that the MCPS IEP for the 2016-2017 school year offered the Student a FAPE in the LRE. It may very well be that additional services, aids, and accommodations the Parents' experts recommended would have been better for the Student or would have allowed him to maximize his potential. Those are not the standards by which I must determine whether the Parents have met their burden. Accordingly, I am finding that the Student's 2016-2017 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances in the LRE. The IEP team appropriately determined that the least restrictive environment to implement the IEP was the Student's home school, [School 2]. (*MCPS Ex. 20.39*).

**C. The 2017-2018 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his circumstances in the LRE.**

The Student attended [School 1] for the 2016-2017 school year, his fifth grade school year, by unilateral parental placement. On November 21, 2016, the Parents sent to the MCPS the following documents: [School 1] Speech-Language assessment, [School 1] Occupational Therapy assessment, and a Reading/Math assessment. (*MCPS Exs. 23, 24, 25, 26*). On December 8, 2016, the MCPS clarified that the Parents were seeking an IEP meeting, and the Parents were offered an IEP meeting on January 5, 2017. (*MCPS Exs. 27, 29*). Two days prior to the scheduled IEP meeting, on January 3, 2017, the Parents sent to the MCPS [School 1] IEP, dated December 5, 2016. (*MCPS Ex. 30*). The IEP meeting was rescheduled to allow time to review the documents, and allow time for the MCPS staff to observe the student at [School 1]. (*MCPS Exs. 31, 32*).

The IEP team met on April 26, 2017. (*MCPS Ex. 37*). At this meeting, [School 1] documents were reviewed; the MCPS' observations and reports by XXXX XXXX (OT), XXXX XXXX (Speech Therapist), and XXXX XXXX (Special Educator) were reviewed; and the IEP team proposed an IEP for the end of the 2016-2017 school year (fifth grade year), and the 2017-2018 school year (sixth grade year). (*Id*). Dr. XXXX noted there was no disagreement regarding the supplemental aid and services that were added, as noted below, to the earlier IEP draft.

For the remainder of the 2016-2017 school year (April 26, 2017 to June 11, 2017), the IEP called for the following: two forty-five-minute sessions per week outside the general education setting for writing instruction; seven thirty-minute sessions per week of classroom support in the general education setting for written expression, math, attention, task completion; three thirty-minute sessions outside the general education setting for reading fluency; and two twenty-minute sessions per month for counseling outside the general education setting.

The IEP also called for the following supplemental aids and services and instructional/testing accommodations: visual cues; notes and outlines; electronic word processors; monitor test responses; graphic organizers; spelling and grammar devices; extended time; multiple or frequent breaks; reduce distractions to the Student; reduce distractions to other students; allow use of highlighters during instruction and assignments; allow use of organizational aids; monitor independent work; provide assistance with organization; repetition of directions; provide frequent check-ins for homework; provide alternative ways for the Student to demonstrate proficiency; have the Student paraphrase teacher directions; editing checklists; color coded graphic organizers; modify homework; break down assignments into smaller units; enlarge print; quiet work space; advance notice of tests; teacher and the Student will meet and select “must-dos” and “may-dos;” sensory breaks; daily schedule; menu of coping strategies; allow the use of sensory tools; preferential seating. (*MCPS Exs.37.17 - 37.29*). The LRE to implement the IEP for the remainder of the 2016-2017 school year was [School 2], the student’s home school. (*T. Dr. XXXX*).

As this was a split IEP, i.e., the IEP would continue into sixth grade and middle school, the MCPS explained at the IEP meeting what the service hours would be at the start of the 2017-2018 school year. (*Id.*). Dr. XXXX also testified that the MCPS told the Parents at the April 26, 2017 IEP meeting that the MCPS would send a revised service delivery page on June 12, 2017, that would delineate the middle school service hours that were explained at the April 26, 2017 meeting. (*Id.*). Ms. XXXX corroborated this testimony.

The June 12, 2017 service page for middle school provides for: five forty-seven minute sessions daily inside the general education setting for digital literacy, English, math, science, and social studies; one forty-seven minute special education session daily outside the general education setting; and twenty minutes per month for counseling. (*MCPS Ex. 39.43; see also T.*

XXXX). The IEP, as it anticipated the Student's needs for the 2017-2018 school year, considered numerous assessments, school-based data, teacher reports, and information from the Parents.

The MCPS described the increase in services as based on the following; the Student was functioning one and one-half to two years below grade level in the areas of written expression and reading fluency. The Student required specialized instruction to address weaknesses in the organization, fluency, and conventions related to writing. He had significant needs related to behavior regulation, metacognition and executive functioning.

**D. FAPE (2016-2017 and 2017-2018)**

The MCPS' two IEPs (for the 2016-2017 and 2017-2018 school years) afforded the Student a free appropriate public education. During the fifth grade (2015-2016), the Student was integrated into the general education classroom and made educational progress. As *Andrew F.* states:

Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."

...

... When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum.

... [The] educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom."

137 S. Ct. at 999-1000. The Student made "passing marks" and "advance[d] from grade to grade." *Id.* at 999. The "level of instruction" he was provided during the 2015-2016 school year was "reasonably calculated to permit . . . [his] advancement through the general curriculum." *Id.* at 1000. Based on the Student's performance in fourth grade, the IEP team was reasonable in building on this progress and proposing a program where he would continue to be integrated into the general education environment with special education supports. As the Supreme Court

noted, the Student falls into the category of children where “advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” (*Id.*).

Based on the progress the Student made, his educational program is also “appropriately ambitious in light of his circumstance.” Across a variety of domains, the evidence in this case showed that the Student made progress. In addition to matters already discussed above, I have addressed the following areas to further explain why I am finding that the Student’s educational program is appropriately ambitious in light of his circumstances.

Reading Levels/Ability Being Addressed by the MCPS

The crux of the Parents’ case is their assertion that reading fluency, decoding, and comprehension were not identified as areas of disability for the Student. As already discussed, the MCPS included reading fluency in its reevaluation of its Specific Learning Disability analysis, and also added a reading fluency goal to the IEP. (*MCPS Ex. 13.1; MCPS Ex. 20.34*). With respect to the reading fluency goal on the MCPS IEP, the Parents’ witness, XXXX XXXX, testified that it was appropriate. (*Tr. 263*).

On the Woodcock-Johnson IV (WJ-IV), administered by Dr. XXXX, the Student received the following scores which all fell in the average range:

Letter Word Identification	98
Passage Comprehension	93
Word Attack	95
Spelling	101
Writing Samples	90

As the MCPS’ expert, Dr. XXXX, testified the Student could not have achieved these scores if he had not achieved these skill sets. (*Tr. 1110, 1112*). Further, as discussed *supra*, the Student’s



performance on these skill sets showed progress from 2012 to 2015. Ms. XXXX also testified about the various reading assessments used by the MCPS to determine reading levels—Fountas and Pinnell/Developmental Reading Assessment (DRA) guided reading, running records, Measures of Academic Progress-Reading, and Dynamic Indicators of Basic Early Literacy Skills. (*Tr. 1433-1442, 1471-1476*). Ms. XXXX testified that the “DRA measures comprehension[;] it measures decoding and accuracy[;] it measures fluency.” (*Tr. 1441-1442*). As Ms. XXXX’s notes state, in October, 2015, the Student’s DRA showed that he was on grade level and his decoding accuracy was ninety-nine percent. (*Parents’ Ex. 18-1*). The Student’s instructional level in reading also showed that he was on grade level, and by the end of the 2015-2016 (fourth grade) school year, he was at a Level T on the Fountas and Pinnell, which was end of fourth/beginning fifth grade level. (*MCPS Ex. 43.3; Tr. 1471*). Ms. XXXX’s background and expertise in reading is extensive, as seen by her resume and her thorough testimony regarding various reading assessment and methodologies. (*T. XXXX; MCPS Ex. 65*). As Ms. XXXX and Dr. XXXX testified, the Student was working at or above grade level reading instruction and curriculum, and was making progress in reading comprehension and decoding. (*Id.; see also Tr. 1271*).

In contrast, the contradictions among the Parents’ witnesses regarding the Student’s reading abilities and deficits undercut the Parents’ argument. Relying on Dr. XXXX’s testing, Ms. XXXX and Dr. XXXX asserted that the Student has such severe deficits in decoding that are rarely seen in children. Ms. XXXX also testified that the Student’s decoding deficits were so severe that without these skills, the Student could not be proficient on higher level reading skills such as comprehension. However, the Student’s performance on the WJ-IV, Ms. XXXX’s testing, and [School 1]’s testing all support the MCPS’ position regarding the Student’s abilities in decoding.

First, on the WJ-IV subtests that address decoding, the Student received a ninety-eight on Letter Word Identification. On Word Attack, he received a ninety-five, which placed him in the average range. He also received a one hundred one in spelling, which involves encoding. Contrary to Dr. XXXX, Ms. XXXX, and Ms. XXXX's position, this cannot be characterized as a severe deficit. The Student's scores are commensurate with his age peers.

Second, Ms. XXXX testified that phonological awareness is the underpinning of decoding. However, in her testing, the Student scored 100% in many of the areas of phonological awareness - rhyming discrimination and production, initial phoneme isolation, compound/syllables, syllable and phoneme blending, decoding closed syllables in isolation. (*Parents' Ex.21-3*).

In contrast, [School 1]'s witness, XXXX XXXX, testified that the Student had strong decoding skills. When he was tested by [School 1] in the fall of 2016, he received almost all 17/17 scores for real words, and 10/10 scores for nonsense words on their Criterion Referenced Test of Decoding. (*Parents' Exs. 52.1-52.2*).

Ms. XXXX admitted that there was no need for her to work on decoding with the Student in the summer of 2016. Ms. XXXX further testified there was no need for Ms. XXXX's outside tutoring in decoding or in executive functioning, as Ms. XXXX stated this is the area she now works on.

Ms. XXXX and Dr. XXXX failed to explain how the Student's decoding deficits were erased and no longer an issue by the summer of 2016. The MCPS' assessment of the Student is correct; he does not have decoding deficits. The MCPS' position was corroborated by [School 1] itself. The reason the Student could do so well on the grade-level reading curriculum is because he had decoding and other reading abilities.

Ms. XXXX also asserted that the Orton-Gillingham methodology was the only method to address the Student's reading needs. However, [School 1]'s Ms. XXXX testified that the school does not use Orton-Gillingham, but rather uses Read Naturally, which is the methodology the MCPS uses.

With respect to comprehension, on the Qualitative Reading Inventory given by [School 1], when tested in the Fall of 2016, the Student was on fifth grade or grade level for expository reading comprehension. (*Parents' Ex. 52-4*). [School 1]'s XXXX XXXX, who was accepted as an expert in Speech-Language Pathology, also testified that the Student had strong semantics and vocabulary scores. (*T. 544*). She noted that "the stronger a student's vocabulary is, the more it can help with comprehension." (*Id.*). She further explained that the Student is "flexible with language" and that can help him with comprehension. (*Tr. 550*).

The contradiction of testimony among the Parents' witnesses not only reveals that the MCPS had a correct understanding of the Student, but also undermines the credibility of Ms. XXXX's, Dr. XXXX's, and Ms. XXXX's adamant claims regarding the Student's reading deficits.

Dr. XXXX and Ms. XXXX were correct. The Student would not have made progress on standardized testing and reading levels if he could not decode and comprehend. (*Tr. 1110, 1112*).

***E. Sub-issues***

IEP Progress Notes

During the hearing, the Parents challenged the MCPS's claim of "mastery" of goals on the Student's 2015-2016 IEP. First, as Dr. XXXX explained, IEP goals and objectives need to be read together, as objectives are the "building blocks" to the goal. (*Tr. 1011, 1080-1084, 1086-1087, 1261-1265*). The Parents argued that for some of the goals, the language did not

change between certain years. Accordingly, with higher curriculum demands, the Student will still have written language requirements such as planning, editing, and/or revising. What changes is the higher level grade curriculum and the skills expected under the objectives.

(*T. XXXX; Tr. 1135*).

Second, Dr. XXXX explained, when noting quarterly progress on the goal, if a particular objective did not meet the full mastery criteria while the other objectives were achieved, the notation would be “Making sufficient progress to meet goal.” This is important because many of the objectives were achieved or were close to being achieved.

This issue was addressed by the District Court of Maryland. In *Cavanagh v. Grasmick*, the Court addressed the same argument raised by the Parents:

Finally, examining the evidence presented by the Cavanaghs through Dr. Solom[o]n [their expert witness] on the issue of Matthew’s progress at Kettering, and accepting for the moment that Dr. Solom[o]n’s opinion that Matthew had not *mastered* any of his goals and objectives was sound as an empirical matter, the unfortunate fact yet remains that Dr. Solom[o]n’s opinion did not respond to the more refined and critical issue of whether Matthew had made *progress* at his placement at Kettering. . .

Dr. Solom[o]n’s opinion— expert, objective, or otherwise—that Matthew had not achieved educational mastery in effect was a statement that Matthew had failed to achieve his summit.

75 F. Supp. 2d 446, 475-76 (D. Md. 1999) (emphasis in original).

It is clear that during the 2015-2016 school year, the Student made progress on all of his goals. (*MCPS Exs. 44.7-44.20*). Each goal had a notation of “Making sufficient progress to meet goal.” (*Id.*).

The extensive evidence and testimony presented by the MCPS, not only with respect to the Student’s progress on his goals and objectives, but also with respect to progress across various other indicators of performance, shows that the MCPS’ reliance on his progress to inform its judgments on programming was appropriate. Dr. XXXX testified that a student’s

progress informs the judgment of the team when developing an IEP. The team considers a student's progress to determine what is working and what should be built upon. (*Tr. 1105, 1265*). During the 2015-2016 school year, the Student was integrated into the general education classroom with special education services, support and accommodations. He performed on grade level using grade level curriculum and therefore, he was making progress. *See Andrew F. discussion supra.*

Ms. XXXX also testified in detail regarding the Student's progress across all domains during the 2015-2016 school year. (*See T. XXXX*). He was in a classroom of approximately twenty-five students and made progress. (*Id.*).

For the 2016-2017 IEP, the MCPS added two goals, reading fluency and anxiety, increasing the special education classroom instruction from five to eight thirty-minute sessions. The MCPS also included two twenty-minute counseling sessions per month. As noted below, the MCPS significantly increased the services proposed for the Student at MCPS for the 2017-2018 school year.

#### Coding

The Parents argue that the Other Health Impaired code resulted in an IEP that failed to properly address the Student's needs in reading fluency, math problem solving, as well as written expression. I find the Parents' argument lacks merit. For the two years in question, the MCPS recognized the Student met the criteria for a Specific Learning Disability. As indicated in MCPS Ex. 13.1-13.2 (the Multidisciplinary Evaluation Report), the IEP team found that the Student met the criteria for Specific Learning Disability in Reading Fluency, Mathematics Problem Solving, and Written Expression. As Dr. XXXX testified, the primary coding of Other Health Impaired would continue, and it is undisputed that the student has attention, organization, and task completion needs which impact written expression output as well. (*Tr. 994*). She added

that the state requires designation of primary coding to get through the door of IDEA eligibility. (*Id.*). However, the Student's needs in reading fluency, math problem solving, as well as written expression were addressed by the IEP. (*Id.*; *see also, MCPS Ex. 20*).

#### Social and Emotional Needs

Many of the witnesses described the Student as a social, happy, outgoing child with a great sense of humor; he has a good group of friends who seek him out. (*See also Parents' Ex. 25-6*). Ms. XXXX's summary of strengths indicated the Student is a class participant, other students seek him out, and he is social. (*Parents' Ex. 26-7*). On Dr. XXXX's testing, specifically the BASC-2, she found no issues with aggression, conduct, depression, somatization, withdrawal, atypicality, social skills, or leadership. The only area of "significant difficulty" was hyperactivity and attention, but other clinical scales are "within normal limits." (*Parents' Ex. 25-29*). Ms. XXXX states in her report: "the BASC-2 data indicate that [the Student] is not struggling in the social or emotional areas at school. He is not presenting with externalizing or acting out behavior in school either." (*Parents' Ex. 25-30*). Similarly, on the Conners test, she writes that the Student "falls within normal limits and the results do not suggest that the Student presents with difficulties in the social, emotional, or behavioral spheres." (*Parents' Ex. 25-29*).

There is no indication the Student's emotional condition was so severe that he was unable to function in school. He had no disciplinary or behavioral issues at school that needed to be addressed when the 2016-2017 and 2017-2018 IEPs were being developed.

#### Mainstreaming Strengths

On the Visual Spatial Index of the WISC, the Student scored a 122, a superior score, in the 93<sup>rd</sup> percentile. Dr. XXXX explained that this would help him with math and geometry. (*T. Solomon*). On the Fluid Reasoning subtest, he received a 100, an average score, in the 50<sup>th</sup> percentile, which would help him with math, science, and social studies. The Student has an

excellent general fund of knowledge, and he has strong vocabulary. (*Parents' Ex. 25-8*).

[School 1] witnesses testified that the Student is strong in math, science, social studies, art, workshop, and physical education. He made progress in the general education curriculum, and these abilities allow him to be in general education academic classes.

The Student also enjoys physical activities, art, and music. (*T. Mother, XXXX XXXX, report cards, XXXX XXXX, XXXX XXXX, XXXX XXXX*). According to Dr. XXXX, he “likes to go outside, play football, and go on bicycle rides.” (*Parents' Ex. 25-30*). Ms. XXXX described the Student’s proficiency in art, workshop, music, and P.E. She also explained that he can handle a lot of vocabulary and content in his Social Studies “academic club.” In P.E. at [School 1], there are twenty children in the class, and the Student has no issues interacting with other students; instead, he flourishes.

Ms. XXXX and Ms. XXXX testified that the Student can be easily redirected and prompted. He follows classroom rules. (*Parents' Exs. 26-6-26-7; see also T. XXXX*). The MCPS’ school psychologist, XXXX XXXX’ observed the same. (*MCPS Ex. 8*). Even when the Student appears inattentive in class, he answers correctly when called upon. (*Id.*).

As discussed above, the MCPS must propose an IEP in the LRE. The Parents’ witnesses failed to provide a sufficient reason why the Student cannot be educated with his nondisabled peers, or why he cannot participate in electives, lunch, recess, and P.E. with his nondisabled peers. The Student has shown a proficiency in the general education classroom. Dr. XXXX addressed the value of being with non-disabled peers, such as increasing one’s expectations, peer modeling, and building one’s academic identity. [School 1] is a one hundred percent disabled population. As Dr. XXXX testified, the Student’s modeling abilities, as noted by his mother as well, are a great benefit to him as he regularly interacts with his nondisabled peers in

the academic, social, and behavioral realms. (*Tr. 1023-1025, 1072-1073*). The Parents have not met their burden of showing that the Student requires such a restrictive environment as [School 1].

Dr. XXXX testified in support of a learning environment like [School 1] because, she said, the program offered by the MCPS is not close to being appropriate for the Student. She stated that he needs a full-time special education environment to meet his educational needs. Ms. XXXX, who works at [School 1], was accepted as an expert in Speech-Language Pathology. She based her recommendation of a specialized setting for the Student, with a nurturing atmosphere where his linguistic weaknesses and strengths are recognized and accommodated in every subject area. While there is every indication that [School 1] offers such a nurturing and attentive environment, all indications from the evidence is that the MCPS' proposed educational program is appropriately ambitious in the LRE in light of the Student's circumstances.

The MCPS recommended a delivery model in which the Student had shown progress. It was reasonable for the MCPS to rely on the Student's demonstrated progress when developing the 2016-2017 and 2017-2018 IEPs. The MCPS established that [School 2] and [School 5] had the resources and the ability to implement the Student's IEPs, which offered the Student a FAPE in the LRE.

The MCPS Addressing the Student's Deficits (2016-2017 IEP)

Dr. XXXX testified in detail as to how the IEPs address attention, impulsivity, distractibility, working memory, executive function, processing speed, word retrieval, fluency (*Tr. 1026*), and other need areas by means of goals and objectives, instructional and testing accommodations, and supplemental aids and services. (*See Tr. 998-1009, 1105-1108, 1038-1041*).



The Parents also requested a reading comprehension goal. For the 2015-2016 school year, the MCPS provided special education support in the area of writing, which addressed all content areas. The Student made progress towards his writing goals and objectives during that year. The IEP team added thirty minutes of services for 2016-2017 to address the reading fluency goal and added counseling services to address anxiety (two twenty-minute sessions monthly). The school-based team's data supports that he is was making progress and was able to access the general education curriculum with the supports and services in place for 2016-2017.

Dr. XXXX described the collaborative teaching model at [School 2]. As a fifth grader at [School 2] during the 2016-2017 school year, the Student would have continued with one general education teacher of record for his core academic subjects (English, language arts, math, science, and social studies), a teacher for each elective and another teacher for P.E. The arrangement included paraeducator support and a special education case manager, and a special educator whom the Student would be seeing both in and out of the general education classroom. Also, the Student's anxiety goal was supported by a pull-out session with the counselor.

The Student had lunch in the cafeteria with the whole grade or more than one grade and had no problems socializing with his peers. There were no concerns about his ability to participate in electives.

The Student made progress at [School 2] during the 2015-2016 school year. Dr. XXXX spoke to the Student's teachers from the 2015-2016 school year as the MCPS prepared the IEP for the 2016-2017 school year).

#### Split IEP/Predetermination (2017-2018 School Year)

I am in agreement with the MCPS' position and reasoning on the split IEP issue, as set forth above in its response to the issue raised by the Parents on this subject. There is no need to restate its position here.

On the allegation by the Parents that the Student's placement was predetermined, I note that the MCPS offered succinct response. The Parents argued that a Student's IEP drives the placement choice, not the other way around. Dr. XXXX testified that [School 2] was the Student's home school and was the LRE and had the resources to implement the IEP for the fifth grade (2016-2017). The IEP would continue into sixth grade, and the Parents allege that the MCPS only considered [School 5], the home school for middle school.

I have considered the Mother's and Dr. XXXX's testimony about what was said by the MCPS personnel during the April 2017 IEP meeting about the Student's program, services, and placement and am not convinced that predetermination occurred. I do not find inadequacies in the process that impeded the Parents' opportunity to participate in the decision-making process. I also do not find that the Student was deprived educational benefit by the manner in which the Student's educational program and placement were considered. Also, [School 5] is not the placement; general education is the placement. [School 5] is simply the location where the Student would have been educated. The IEP team began its analysis with the present levels of performance – the Student's progress in general education, the evaluations, reports, etc. – and added to the goals and services, deciding the IEP could be implemented in the general education classroom with pull-out services and accommodations, then recommended the Student's home school as the location. [School 5] was the LRE and had the resources to implement the 2017-2018 IEP. The special education program proposed by the MCPS for 2017-2018 (sixth grade) is an ambitious and challenging educational program consistent with the Student's individual circumstances, that will increase his functional and academic capabilities in the LRE. Ms. XXXX even admitted that [School 5] was a good program and added that the special education program coordinator and data collection were "very impressive." (T. XXXX).

### Occupational Therapy

It is also noteworthy that at the April 2017 IEP meeting, Parents' counsel stated that the Student did not require OT services and that [School 1] would be discontinuing it. (*MCPS Ex. 37.59*). I find it helpful to address the matter briefly.

XXXX XXXX, M.S., OTL/R, qualified as an expert in occupational therapy, explained why the MCPS did not propose OT school-based services. First, the Student did not require school-based OT during fourth grade and there was insufficient new information to suggest he might require school-based OT. [School 1]'s testing took place during the summer of 2016, after the fourth grade year. Second, it is clear that [School 1] approaches OT from a clinical model. This distinction has been addressed by the federal District Court of Maryland. In *Kugler v. Vance*, 30 IDELR 749 (D. Md. 1999), the Court was faced with this educational versus clinical model issue, specifically with respect to XXXXXXXXXXX. The Court stated, "It is clear that XXXXXXXXXXX and the MCPS have very different philosophies in terms of providing related services. XXXXXXXX employs a clinical approach in which the students are removed from the classroom setting to receive intensive individual therapy." (*Id.* at 751.).

Ms. XXXX detailed in her testimony that under Maryland State Department of Education guidelines, school-based OT is designed so that the Student, from a motor skills perspective, can access the educational environment. Regarding his fine motor and gross motor skills, there has been no showing that the Student cannot access his learning environment. In fact, he has shown that he is quite able and likes to work with his hands. In wood workshop at [School 1], he uses power tools, hammers, and saws. He is very artistic – he uses pencils, charcoal, paint brushes, sketches. His Mother reported that the Student cooks and builds small remote cars. (*Tr.* 836-838). He has shown that his fine motor skills allow him to access his environment. With respect to gross motor skills, he thrives at sports and is a good athlete in [sports]. The Student does not

require motor accommodations to participate in such activities. The speech therapist noted that at [School 1], he went on an outdoor adventure course and enjoyed it. (*Tr.* 558). Hence, from a gross motor standpoint, the Student has shown ability to access his environment.

Ms. XXXX went on to address the testing done by [School 1] during the summer of 2016. As her attached affidavit, Ex. A, explains, [School 1]’s testing was done in isolation, and those results were used to develop [School 1]’s IEP. However, the testing did not take into account classroom and learning environment impact, thus, negating the findings. As Ms. XXXX testified, the Student did not have motor skill difficulties at [School 2]. That is the key question when determining the need for OT services.

XXXX XXXX, MOT, OTR/L, c-SIPT, conducted an OT evaluation of the Student for [School 1] in July 2016. XXXX XXXX, M.S., OTR/L, who was accepted as an expert in OT, testified about Ms. XXXX’s testing and the OT recommendations made by [School 1]. Ms. XXXX recommended school-based OT for the Student to appropriately benefit from his educational program. The recommendation included OT services of forty-five minutes twice weekly, provided by a registered occupational therapist knowledgeable in school-based therapy and sensory processing techniques. Ms. XXXX also suggested OT goals and numerous testing accommodations for the Student.

The following are OT goals [School 1] recommended in Ms. XXXX’s July 2016 report:

- a. Improve self-regulation and sensory processing
- b. Improve balance with eyes closed/vestibular processing, dynamic balance
- c. Improve kinesthetic body/finger awareness
- d. Improve motor sequencing and planning
- e. Improve shoulder stability
- f. Improve hand development (right tip pinch strength, finger isolation, one-handed pencil rotation, fine motor coordination, efficient grasps during dexterity tasks)
- g. Improve fine motor coordination
- h. Improve recognition of reversals and decrease directionality confusion
- i. Improve visual spatial organization, targeting pencil/paper tasks, and whole-to-part perception
- j. Improve handwriting (spatial organization, pencil pressure, investigate cursive

- acquisition)
- k. Develop kinesthetic keyboarding skills (touch-typing)
  - l. Improve ocular motor skills (gaze shifting, scanning)
  - m. Monitor for any potential sensory defensiveness in the classroom setting

The Parents introduced a letter from the Student's sports trainer. (*Parents' Ex. 66*). Once again, this reveals their perspective is from a clinical, sports trainer model, and not a school-based OT model. (*See T. XXXX, supra*). [School 1] also suggests that the OT should work on executive functioning and organization. However, as Ms. XXXX explained, teachers work on these skills in the MCPS.

Ms. XXXX, M.S., OT/L, OTR/L, has been employed by the MCPS since 1999 as an occupational therapist. In addition to her extensive experience and continuing education in the field of OT, she is a member of the Maryland State Steering Committee for OT/Physical Therapy school-based programs. She presented a cogent and reasoned explanation of her decision not to recommend OT service. (*See T. XXXX*). Ms. XXXX referred to [School 1]'s July 2016 OT evaluation and noted that most of the Student's scores were within the average range, noting that only the Student's balance was listed as below average. Ms. XXXX noted that the battery of sensory profile tests given to the Student were designed for students up to age ten and the Student was eleven years and five months old at the time of [School 1]'s testing. Additionally, I note that [School 1]'s OT evaluation did not include any data from classroom observation, thus causing me to give less weight to the results for that reason as well. The Student did not have OT included in his fourth grade IEP and he was able to manage successfully and perform the tasks necessary for him to access the educational program. For these reasons, I have given greater weight to Ms. XXXX's expert opinion on the need for OT in the school setting. I agree with Ms. XXXX's statement that [School 1]'s OT goals align with difficulties with administered test items, not with actual motor deficits related to classroom performance tasks.

## Speech Therapy

XXXX XXXX, who has twenty-seven years experience in the field of speech-language therapy, was accepted as an expert in speech-language pathology. Ms. XXXX testified in detail as to why she did not recommend speech service for the Student. She explained how the various areas, noted below, that [School 1] is working on are either addressed in the MCPS' supplemental aids or services, or are within the purview of the teachers. The Parents took issue with why the speech therapist would not work on reading and writing, and tried to use American Speech-Language-Hearing Association (ASHA) guidelines to support their claim. Ms. XXXX, accepted as an expert in Speech-Language Pathology, testified that there is a strong correlation between oral language and deficits in reading and writing. (*Parents' Ex.71*). However, the ASHA guidelines clearly state that the expertise of the teachers and other staff must be taken into consideration when assigning the task of working on reading and written language. (*Parents' Ex. 71-1*). The guidelines add that "the exact roles assumed by [speech-language pathologists] vary across settings, depending on the policies and administrative structures of the region, agency, and mix of other professionals (e.g., special education teachers, including reading specialists)." (*Parents' Ex. 71-4*).

Further, the ASHA document references spoken language disorders for work on reading and writing. (*Parents' Ex. 71-2 (top left column)*). As Ms. XXXX noted, the Student does not have spoken language issues. His prior teachers all reported that oral communication was an area of strength for him. (*MCPS Exs. 47.1, 48.1, 49.1*). Ms. XXXX also reported that the Student did not have spoken language issues. (*T. XXXX*). Ms. XXXX's observation of the Student corroborated what his [School 2] teachers had reported across his years there. (*MCPS Ex. 56*).

When reviewing [School 1] speech testing, Ms. XXXX also explained that the Student fell

in the average, above average, and high average range in all areas, but one – following directions. (MCPS Ex. 24.5; T. XXXX). These average-to-above-average scores follow previous MCPS speech assessments. (T. XXXX). However, Ms. XXXX did not see this as an issue during her observation in class, and her testimony is corroborated by Ms. XXXX when she notes that he “followed all classroom rules.” (Parents’ Ex. 26-6). The MCPS IEP also provides for supplemental aids-monitor independent work, repetition of directions, paraphrasing teacher directions which would address any issues with following directions. (MCPS Exs. 37.23-37.24). As far as the goal of following multi-step directions containing embedded concepts, the Student did not have difficulty following directions in the classroom. Another goal dealt with utilizing word retrieval skills and strategies, but Ms. XXXX did not observe the Student having word retrieval issues. Likewise, Ms. XXXX did not see a need for a goal for the Student to demonstrate formulation skills.

The Student demonstrates strength in higher level language – his meta-pragmatics, meta-semantics, idioms, multiple meanings, making inferences, and meta-linguistics index were described as such by [School 1]’s Ms. XXXX. The Student did well on higher level skill sets on the Clinical Evaluation of Language Fundamentals (CELF), which obviates the need for a goal of demonstrating semantic skills. Ms. XXXX, too, admitted that reading and executive functioning and writing could be addressed by classroom teachers, as did Ms. XXXX. Ms. XXXX explained the Student’s strong vocabulary skills speak to his strengths in the broad expression of oral language. (Tr. 541-542).

[School 1] demonstrated how it approaches what it includes in IEPs when Ms. XXXX explained the Student had strong scores in pragmatics. Ms. XXXX noted the Student received a high average score on Conversation Skills on the CELF-5. (MCPS Ex. 24.6). Yet, on [School 1]’s IEP, it is listed as an area of need. Ms. XXXX failed to explain why. (Parents’ Ex. 40-4).

[School 1]' speech-language goals do not address areas of need. [School 1]'s inclusion of skills that are strengths furthers the MCPS' argument that the school uses more of a clinical than educational model. Further, I compared Ms. XXXX's extensive experience teaching reading and written language to Ms. XXXX's two-week course in Orton-Gillingham. I considered whether Ms. XXXX's experience is sufficient to teach reading and gave greater weight to Ms. XXXX's opinion in matters of reading instruction. The comparison amply proves Ms. XXXX's point – reading and writing are appropriately taught by teachers in the MCPS.

Ms. XXXX detailed how each goal contained in the IEPs was either addressed in supplemental aids that could be implemented by educators, or was not really a speech goal. (*See T. XXXX*). She provided a cogent and reasoned explanation, and I accept her expert opinion over the Parents' witness. The Parents failed to prove that the absence of speech services in the 2016-2017 and 2017-2018 IEPs deprived the Student of a FAPE.

#### **F. Summary**

As I have discussed, the IEPs proposed by the MCPS for the 2016-2017 and the 2017-2018 school years were reasonably calculated to enable the Student to make progress appropriate in light of his circumstances. *Andrew F.*, 137 S. Ct. at 999. The program offered by the MCPS was appropriately designed to provide the Student a FAPE in the least restrictive environment.

In further support of their argument that the sixth grade IEP proposed by the MCPS was deficient, the Parents cited the increased hours offered by the MCPS in the sixth grade IEP (2017-2018 school year). Having reviewed the arguments of the parties, I conclude that there is no merit to this contention. I do not share the Parents' view that the increase in special education services offered for the 2017-2018 school year is an improvement, but an example of too little, too late. The IEP Team properly considered testing, reports, assessments, and other available information to arrive at an accurate statement of the Student's present levels of performance.



The MCPS also specifically considered assessments submitted by the Parents, including those generated by [School 1]. As a result of the new information they considered each year, the MCPS amended the IEPs and, in 2017-2018, increased services significantly. Because they relied on new reports and reports from previous years to determine what worked and what did not, the new IEPs cannot prove the MCPS failed to provide a FAPE in previous years.

The evidence presented by the Parents did not persuade me that the MCPS acted improperly when it decided to substantially increase the Student's outside special education hours for sixth grade. In reaching this conclusion, I considered evidence of the Student's academic performance at the MCPS during the 2015-2016 school year and his standardized test performance over his years of attendance from 2012-2016. The testimony of Dr. XXXX, in particular, demonstrated that the 2016-2017 and 2017-2018 IEPs were tailored to the Student's particularized needs. *See Andrew F.*, 137 S. Ct. at 1001 ("The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.").

Pursuant to *Carter*, a parent's private placement choice is analyzed only if the IEP proposed by the local education agency results in a denial of a FAPE. 510 U.S. 7; *Burlington*, 471 U.S. 359. In this matter, I have concluded that the IEP and placement offered by the MCPS for the 2016-2017 and 2017-2018 school years offer the Student a FAPE. Further analysis pursuant to *Burlington* and *Carter* is inapplicable and the issue of whether [School 1] or any private educational setting is proper does not need to be addressed in this decision.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parents failed to prove that the Montgomery County Public Schools did not offer the Student a free appropriate public education for the 2016-2017 and 2017-2018 school years. I further conclude as a matter of law that the parents failed to prove that they are entitled to

reimbursement for tuition and expenses at [School 1] for those years. 20 U.S.C.A. § 1414; 34 C.F.R. §§ 300.148; *Andrew F. v. Douglas Cty. School Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence Cty. Sch. District Four v. Carter*, 510 U.S. 7 (1993).

### **ORDER**

I **ORDER** that the Parents' request for placement and reimbursement for tuition and expenses at [School 1] for the 2016-2017 and 2017-2018 school years is **DENIED**.

February 15, 2018  
Date Decision Issued

\_\_\_\_\_  
Louis N. Hurwitz  
Administrative Law Judge

LNH/dlm

### **REVIEW RIGHTS**

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2017). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

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