

[REDACTED]

STUDENT

v.

HARFORD COUNTY

PUBLIC SCHOOLS

* BEFORE MICHAEL D. CARLIS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-HARF-OT-19-02778

* * * * *

DECISION

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STATEMENT OF THE CASE

On January 25, 2019, [REDACTED] and [REDACTED] (Parents¹), on behalf of their child, [REDACTED] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Harford County Public Schools (HCPS or School) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).²

On February 24, 2019, I held a telephone prehearing conference with the parties. Wayne D. and Cheryl A. Steedman, Esquires, represented the Parents. Andrew W. Nussbaum, Esquire, represented the HCPS. By agreement of the parties, the due process hearing was scheduled for April 23, 24, 26, 29, and 30, 2019, and May 1 and 3, 2019. After these hearing dates were set, the May 3, 2019, date became unavailable, and the parties agreed to May 8, 2019, as an alternative date.

¹ I refer to Mr. [REDACTED] as Mr. [REDACTED] throughout this decision to reduce the need for redaction.

² U.S.C.A. is an abbreviation for United States Code Annotated.

The parties requested hearing dates fell more than forty-five days outside the triggering events described in the federal regulations for when a decision on a due process complaint is due. 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a), (c) (2018).³ At the prehearing conference, the parties agreed that the hearing dates were the earliest available dates on their calendars. They also agreed that my decision would be issued on or before thirty days from the conclusion of the hearing. 34 C.F.R. § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2018). Based on the request of the parties, and their detailed explanations of their availability for the hearing, especially from the Student's counsel, I found good cause to extend the timeframe for the hearing and the issuance of my decision.

This matter was heard on the dates listed above. The Steedmans represented the Parents, and Mr. Nussbaum represented the HCPS. The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R. § 300.511(a) (2018); Md. Code Ann., Educ. § 8-413(e)(1) (2018); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

The contested case provisions of the Administrative Procedure Act, Maryland State Department of Education (Department) procedural regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 13A.05.01.15C; and COMAR 28.02.01.

ISSUES

The issues are:

1. Whether the HCPS failed to offer the Student a free appropriate public education (FAPE) for the 2016-2017, 2017-2018, and 2018-2019 school years;
2. Whether the [REDACTED] School offered the Student an appropriate education; and
3. If the answer to any part of Issue 1 is "yes," what is the proper relief or remedy?

³ C.F.R. is an abbreviation for Code of Federal Regulations.

SUMMARY OF THE EVIDENCE

Exhibits

The following exhibits offered by the Student were admitted, except as indicated:

- Student Ex. 1: Initial Speech and Language Pathology Evaluation Note from [REDACTED] dated February 3, 2015;
- Student Ex. 2: Developmental Evaluation Date from Harford County Infants and Toddlers Program (HCITP), dated March 16, 2015;
- Student Ex. 3: Occupational Therapy Evaluation from HCITP, dated March 25, 2015;
- Student Ex. 4: Transition Assessment Report-Physical Therapy from the HCITP, dated March 2015;
- Student Ex. 5: Speech-Language Evaluation from the HCITP, dated April 1, 2015;
- Student Ex. 6: Evaluation Report and Determination of Initial Eligibility from the HCPS, dated May 19, 2015;
- Student Ex. 7: Progress Report on individualized education program (IEP) Goals, dated June 13, 2016;
- Student Ex. 8: IEP/Draft, dated September 28, 2016;
- Student Ex. 9: Prior Written Report/HCPS, dated September 28, 2016;
- Student Ex. 10: Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) Report/Language Milestones and Barriers Assessment, dated May 10, 2017;
- Student Ex. 11: VB-MAPP Master Scoring Form, dated from April 28, 2017, to September 20, 2017;
- Student Ex. 12: IEP/Amended, dated May 11, 2017;
- Student Ex. 13: Prior Written Notice (Written Notice)⁴/HCPS, dated May 31, 2017;
- Student Ex. 14: Referral for CIEP Team Review, undated;
- Student Ex. 15: Progress Report on IEP Goals, last entry dated August 10, 2017;
- Student Ex. 16: Written Notice/HCPS, dated September 25, 2017;
- Student Ex. 17: VB-MAPP, dated September 21, 2017;

⁴ A Written Notice is a school drafted summary of what occurs at an IEP team meeting.

Student Ex. 18: VB-MAPP and EESA Assessment/General Information, dated October 5, 2017;

Student Ex. 19: IEP/Approved, dated October 11, 2017;

Student Ex. 20: Written Notice/HCPS, dated October 11, 2017;

Student Ex. 21: Health Suite Visit-Parent Report/HCPS, dated November 14, 2017;

Student Ex. 21A: Email from [REDACTED] to Mr. [REDACTED] dated November 16, 2017;

Student Ex. 22: Written Notice/HCPS, dated November 27, 2017;

Student Ex. 23: Written Notice/HCPS, dated December 5, 2017;

Student Ex. 24: Health Suite Visit-Parent Report/HCPS, dated December 19, 2017;

Student Ex. 25: Letter from [REDACTED] to Parents, dated December 19, 2017;

Student Ex. 26: Functional Behavior Assessment (FBA)/Behavioral Intervention Plan (BIP),
meeting date January 2, 2017;

Student Ex. 27: Written Notice/HCPS, dated January 2, 2018;

Student Ex. 28: Progress Report on IEP Goals, last entry dated February 2, 2018;

Student Ex. 29: FBA/BIP/FBA, meeting dated February 5, 2018;

Student Ex. 30: IEP/Amended, dated February 5, 2018;

Student Ex. 31: Written Notice/HCPS, dated February 5, 2018;

Student Ex. 32: School Observation Report, dated March 20, 2018;

Student Ex. 33: IEP/Amended, dated March 27, 2018;

Student Ex. 34: Written Notice/HCPS, dated March 27, 2018;

Student Ex. 35: Treatment Plan/Occupational Therapy/the [REDACTED] School ([REDACTED]), dated April 3,
2018;

Student Ex. 36: [REDACTED] Educational Treatment Plan (ETP),⁵ dated April 5, 2018;

Student Ex. 37: BIP [REDACTED], dated April 6, 2018;

Student Ex. 38: School Observation Report, dated May 15, 2018;

⁵ [REDACTED] calls its educational program for a privately placed student an ETP. It is very similar to an IEP.

Student Ex. 39: 2017-2018 Report Card – Period 5/ [REDACTED] dated April 23, 2018, to June 28, 2018;

Student Ex. 40: Neuropsychological Evaluation, dated July 6, 2018;

Student Ex. 41: Occupational Therapy Sensory Processing Evaluation Report/[REDACTED] dated September 25, 2018;

Student Ex. 42: Educational Assessment Report, dated September 26, 2018;

Student Ex. 43: Progress Report/Speech-Language Therapy, dated September 26, 2018;

Student Ex. 44: Written Notice/HCPs, dated October 11, 2018;

Student Ex. 45: BIP, dated as revised November 7, 2018;

Student Ex. 46: IEP/Approved, dated November 7, 2018;

Student Ex. 47: Written Notice, dated November 7, 2018;

Student Ex. 48: A Parent Guide to Understanding the VB-MAPP Score Sheet, with an attachment, last dated March 11, 2019: not offered or admitted;

Student Ex. 49: Music Therapy Assessment Report/[REDACTED] dated March 4, 2019: not offered or admitted;

Student Ex. 50: Occupational Therapy Services/Sensory Diet, dated as reviewed March 14, 2019;⁶

Student Ex. 51: OT Close Out/[REDACTED] undated: not offered or admitted;

Student Ex. 52: Attendance record/[REDACTED] July 2017 through June 2018;

Student Ex. 53: [REDACTED] ETP, dated as revised October 22, 2018; not offered or admitted;

Student Ex. 54: BIP/[REDACTED] dated March 15, 2019: not offered or admitted;

Student Ex. 55: [REDACTED] ETP, dated as initiated April 2, 2019;⁷

Student Ex. 56: Curriculum Vitae (CV) for [REDACTED]

Student Ex. 57: CV for [REDACTED]

Student Ex. 58: CV for [REDACTED];

⁶ This exhibit was admitted only for the purpose of the appropriateness of [REDACTED]'s educational program.

⁷ This exhibit was admitted only for the purpose of the appropriateness of [REDACTED]'s educational program.

Student Ex. 59: CV for [REDACTED]

Student Ex. 60: CV for [REDACTED]

Student Ex. 61: CV for [REDACTED]

Student Ex. 62: CV for [REDACTED]

Student Ex. 63: Photographs;

Student Ex. 64: Maryland Statewide IEP Process Guide, dated October 1, 2018;

Student Ex. 65: Transcript from IEP Meeting on February 5, 2018;

Student Ex. 65A: Flash drive of the February 5, 2018, IEP Meeting;

Student Ex. 66: Transcript from IEP Meeting on August 16, 2018;

Student Ex. 66A: Flash drive from IEP Meeting on August 16, 2018;

Student Ex. 67: Transcript from IEP Meeting on October 4, 2018;

Student Ex. 67A: Flash drive from IEP Meeting on October 4, 2018;

Student Ex. 68: Transcript from IEP Meeting on November 7, 2018;

Student Ex. 68A: Flash drive from IEP Meeting on November 7, 2018; and

Student Ex. 69: Video of the Student.

The following exhibits offered by the School were admitted:

School Ex. 1: Written Notice/HCPS, dated May 19, 2015;

School Ex. 2: Written Notice/HCPS, dated October 28, 2015;

School Ex. 3: Written Notice/HCPS, dated September 28, 2016;

School Ex. 4: Written Notice/HCPS, dated April 7, 2017;

School Ex. 5: Written Notice /HCPS, dated May 31, 2017;

School Ex. 6: Written Notice, dated September 24, 2017;

School Ex. 7: Written Notice, dated October 11, 2017;

School Ex. 8: Written Notice/HCPS, dated November 27, 2017;

School Ex. 9: Written Notice, dated December 5, 2017;

School Ex. 10: Written Notice, dated January 2, 2018;

School Ex. 11: Written Notice, dated February 5, 2018;

School Ex. 12: Written Notice, dated March 27, 2018;

School Ex. 13: Written Notice, dated August 16, 2018;

School Ex. 14: Written Notice, dated October 11, 2018;

School Ex. 15: Written Notice, dated November 7, 2018;

School Ex. 16: Neuropsychological Evaluation, dated July 6, 2017;

School Ex. 17: FBA/BIP/FBA/HCPS, dated February 5, 2018;

School Ex. 18: Progress Report/Speech-Language Therapy, dated September 26, 2018;

School Ex. 19: Psychological Report, dated September 25, 2018;

School Ex. 20: Educational Assessment Report, dated September 26, 2018;

School Ex. 21: Physical Therapy Evaluation Report, dated September 27, 2018;

School Ex. 22: Occupational Therapy Sensory Processing Evaluation Report, dated September 25, 2018;

School Ex. 23: Adapted Physical Education Ecological Assessment, dated September 12, 2014;

School Ex. 24: Sensory Diet, dated November 8, 2018;

School Ex. 25: FBA/BIP/FBA/HCPS, dated January 2, 2018;

School Ex. 26: VB-MAPP Report/Language Milestones and Barriers Assessment, dated May 10, 2017;

School Ex. 27: IEP/Approved/HCPS, dated November 7, 2018;

School Ex. 28: IEP/Amended/HCPS, dated September 28, 2016;

School Ex. 29: IEP Amendment Changes/HCPS, hand-dated as closed January 5, 2018

School Ex. 30: IEP Amendment Changes/HCPS, hand-dated as closed February 2, 2018;

School Ex. 31: IEP Amendment Changes/HCPS, hand-dated as closed October 11, 2017;

School Ex. 32: IEP/Service Plan/Amended, dated October 11, 2017;

School Ex. 33: Student Attendance Profile/HCPs, dated September 2017, through February 6, 2018;

School Ex. 34: Health Suite Visit-Parent Report/HCPs, dated November 14, 2017;

School Ex. 35: Email from [REDACTED] to Mr. [REDACTED] dated November 16, 2017;

School Ex. 36: Room 4 Behavior Supports, undated;

School Ex. 37: Letter from [REDACTED] to the Parents, dated December 19, 2017;

School Ex. 38: Email from [REDACTED] to Mr. [REDACTED] dated December 27, 2017;

School Ex. 39: VB-MAPP Milestone, updated on February 10, 2019;

School Ex. 40: CV for [REDACTED];

School Ex. 41: CV for [REDACTED];

School Ex. 42: CV for [REDACTED];

School Ex. 43: CV for [REDACTED];

School Ex. 44: CV for [REDACTED];

School Ex. 45: CV for [REDACTED];

School Ex. 46: CV for [REDACTED];

School Ex. 47: CV for [REDACTED];

School Ex. 48: CV for [REDACTED] and [REDACTED];

School Ex. 49-49.25: FBA/BIP/FBA/HCPs, meeting date December 5, 2017.

Testimony

The following individuals testified for the Student:

- [REDACTED] Ph.D., employed at [REDACTED] Associates, accepted as an expert in neuropsychology and school psychology;
- [REDACTED] Principal at [REDACTED] School ([REDACTED]);⁸

⁸ Mr. [REDACTED] was accepted as an expert in special education during the School's cross-examination.

- [REDACTED] Education Director at [REDACTED] accepted as an expert in special education and autism;
- [REDACTED] paternal grandmother of the Student;
- [REDACTED] Ph.D., private practice, accepted as an expert in special education, autism, and applied behavioral analysis (ABA);
- [REDACTED] [REDACTED] Services, Inc.,⁹ accepted as an expert in occupational therapy and autism;
- [REDACTED] special educator at [REDACTED] accepted as an expert in autism and special education;
- [REDACTED] Speech and Language Pathologist at [REDACTED] accepted as an expert in speech and language therapy and autism; and
- Mr. [REDACTED] the Student's father.

The following individuals testified for the School:

- [REDACTED] Adapted Physical Education Teacher at [REDACTED] accepted as an expert in adaptive physical education and autism;
- [REDACTED] Occupational Therapist at [REDACTED] accepted as an expert in occupational therapy and autism;
- [REDACTED] (nee [REDACTED]), Speech and Language Pathologist at [REDACTED] accepted as an expert in speech pathology and autism;
- [REDACTED] School Psychologist at [REDACTED] accepted as an expert in school psychology and autism;
- [REDACTED] Coordinator of Special Education at [REDACTED] accepted as an expert in special education and autism, and
- [REDACTED] Director of Children Services at [REDACTED] Corporation, accepted as an expert in special education and autism.

⁹ [REDACTED] Services, Inc., appears to be the parent company of [REDACTED]

FINDINGS OF FACT

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

[REDACTED] [REDACTED]

1. On or about May 19, 2015, an IEP team met to determine whether the Student was eligible to begin special education services under an IEP. It was decided at this meeting that the Student would continue early intervention services at the HCPS under an individualized family service plan as a child with developmental delays. She had also received a diagnosis of autism spectrum disorder.

2. On September 28, 2016, an IEP team met and adopted an IEP for the Student to attend the early learners class at [REDACTED] Elementary School ([REDACTED]) for four one-half days per week as a child with developmental delays. At the time, the Student had significant delays in the areas of early mathematics, language and literacy skills, physical well-being, and motor development.

3. The Student's September 2016 IEP placed her in a separate special education classroom; she received no educational services with non-disabled children. The Student received services in the areas of: (1) Social Foundation Skills, (2) Language and Literacy, (3) Mathematics, and (4) Physical Well-Being and Motor Development. The Student's IEP indicated there were no significant behaviors that interfered with her access to the learning environment.

4. The Student's IEP contained two goals and seven objectives in the area of Social Foundations, two goals and six objectives in the area of Language and Literacy, one goal and five objectives in the area of Mathematics, and two goals and nine objectives in the area of Physical Well-Being and Motor Development.

5. The Student's IEP provided for twenty-four hours per month of special education services and one hour per month of occupational therapy. The IEP provided for additional special consideration and accommodations to be provided by the special education teacher, instructional assistant, and others on a daily basis and for consultation by a Speech and Language Therapist and Program Specialist as needed.

6. The Student's IEP also provided for extended school year (ESY) services for six weeks beginning on June 26, 2017, and ending on August 11, 2017. The services were in the areas (1) Social Foundation Skills, (2) Language and Literacy, (3) Physical Well-Being and Motor Development, and (4) Speech and Language Therapy for two hours per day. The Student attended ten days of the ESY program.

7. The Parents approved the IEP.

8. On April 7, 2017, an IEP team meeting was held to discuss the Student's progress. It was noted at this meeting that the Student's behavioral needs interfered with satisfactory growth or progress on her IEP goals and objectives. The problem behaviors were chronic noncompliance and throwing things. The Student's mother mentioned self-hitting at home. The IEP team agreed an FBA was appropriate.

9. On May 31, 2017, a CIEP team meeting was held to address the Student's placement for kindergarten. At that time data related to the frequency and duration of self-hitting, throwing behaviors, and off-task behaviors had been obtained, and a BIP was to be added to the IEP. The data showed self-hitting occurred three to ten times per day for five to twenty seconds, throwing behaviors occurred one to fifteen times per day and was "ongoing," and off-task behaviors were "constant" when not receiving intensive instruction.

10. Dr. [REDACTED] observed the Student at [REDACTED] on June 1, 2017. She observed the Student in a play area engaged in unstructured activity. She also observed the Student during an

instructional lesson and believed the teacher used an ineffective method of instruction. She also observed the Student in a different area where she was non-responsive to the instructor's attempts to engage her. The teacher told Dr. [REDACTED] that was typical of the Student's behavior at school.

11. At [REDACTED] the Student achieved two of seven goals on her IEP, one each in the areas of Social Foundation and Mathematics, and twenty of her twenty-seven objectives.

[REDACTED]

12. The Student's IEP team agreed the appropriate placement to implement the Student's educational program for kindergarten was at [REDACTED]

13. [REDACTED] is a small, separate special education school that exclusively provides education to children with IEPs. No non-disabled children attend [REDACTED]. The Student was enrolled in the [REDACTED] program at [REDACTED]. This program serves autistic children with profiles similar to the Student. The Student was taught in a classroom with between two and three other children. The instructor to student ratio was one-to-one.

14. On September 20, 2017, the Student's teacher performed a VB-MAPP assessment, including an assessment of barriers that might impede her language and skill acquisition. The results showed a number of barriers that required further analysis.

15. The initial IEP team meeting at [REDACTED] took place on September 25, 2017. During this meeting, the Parents expressed their concerns about the Student's self-hitting. No decision was made at this meeting to proceed with a FBA.

16. On October 11, 2017, the IEP team reconvened to complete the annual review of the Student's IEP. At this meeting, the Parents approved a revised IEP. In addition, [REDACTED] obtained authorization to perform a FBA and develop a BIP.

17. The Student's IEPs contained eight goals and thirty-six objectives in the areas of: (1) Social Foundation Skills, (2) Language and Literacy, (3) Mathematics, and (4) Physical Well-Being and Motor Development. The Student's October 2017 IEP provided thirteen hours and twenty minutes per week of special education services and three hours per month of related services. The Student's revised 2018 IEP provided special education services for fifteen hours per week and related services by a speech pathologist and an occupational therapist for a total of three hours per month. The IEPs also provided supplemental services on a daily basis by the special education teacher, instructional assistants, and other service providers. The IEPs included ESY services from July 2, 2017, to August 10, 2017, in the areas of (1) Social Foundation Skills, (2) Language and Literacy, (3) Physical Well-Being and Motor Development, and (4) Speech and Language Therapy for three hours and twenty minutes per week.

18. In regard to the FBA that was initiated on October 11, 2017, [REDACTED] collected data on the Student's self-hitting (also referred to as self-injurious behavior (SIB)) and vocal stereotypy from October 11, 2017, to November 14, 2017. The self-hitting was described as "hitting herself in the forehead or side of her head utilizing her arm or closed fist." Vocal stereotypy was described as "nonfunctional communication."

19. The results from the FBA showed the Student self-hit an average of seventeen times per day for one to thirty seconds. The results showed the Student engaged in vocal stereotypy twelve times every ten minutes for one to five seconds.

20. On November 14, 2017, one of the Student's classmates grabbed her and scratched her forehead. The Parents were very alarmed by that aggression and removed the Student from [REDACTED] until [REDACTED] developed a written plan to provide for the Student's safety. At this time, the Parents also learned that the same classmate had made several prior attempts to grab or hit the Student. The Student returned to [REDACTED] on December 12, 2017.

21. On December 19, 2017, the same classmate grabbed the back of the Student's neck. The staff immediately intervened. The Student was not injured. The Student's classmate was moved into a different classroom.

22. On January 2, 2018, the IEP team met to review the results of the FBA and BIP and to revise the IEP. At this meeting, Mr. [REDACTED] expressed his concern about the Student's progress and changes in her behavior. Mr. [REDACTED] was concerned about the Student's "cowering," tantrums, and isolation from family members. Also, at this meeting, concerns about the Student's behaviors of self-stimulation and "aggression" toward staff were discussed. It was decided to perform another FBA on those behaviors. [REDACTED] implemented the BIP for the self-hitting and vocal stereotypy on January 3, 2018.

23. [REDACTED] collected data on the new behaviors from January 3 to January 26, 2018. Aggression was described as using her hands to strike or push staff members or hair pulling. Hair pulling referred to the Student pulling, or attempting to pull, the hair of staff when they intervened to stop her self-hitting. Self-stimulation was described as the Student rocking and/or rubbing her genital area against her diaper.

24. During the FBA in January 2018, data was collected on aggression and self-stimulation and also, again, on self-hitting and vocal stereotypy. The results showed self-hitting for an average of eighty-nine times per day for one to two seconds (the number of incidents in a day ranged from two to 395), vocal stereotypy an average of eighteen times every ten minutes for one to fifteen seconds, aggression an average of nine times per day for one to three seconds, and self-stimulation an average of six times per day for five seconds to five minutes.

25. [REDACTED] used different methods to count the Student's self-hitting during the two FBAs. During data collection for the first FBA, the self-hitting was counted by episodes, meaning a number of incidents could have been counted as one. During the data collection for the second

FBA, the self-hitting was counted by the incident, meaning each time the Student hit herself was counted. These different methods of counting the behavior were not explained to the IEP team.

26. On February 5, 2018, the IEP team met to review the results from the second FBA. At this meeting, Mr. [REDACTED] said the ESY program contained in the IEP was inadequate and the Parents wanted a year's long education program for the Student. He also complained that the Student had not regained any skills that she had lost during last summer. Mr. [REDACTED] also requested the IEP provide for three hours of a board certified behavior analyst (BCBA) consultation inside the Student's classroom.

27. The HCPS refused these requests because current date did not support the need for a twelve month program. IT indicated the ESY matter could be revisited if additional data became available. The HCPS rejected the request for BCBA consultation, but agreed to increase the consultation time of the program specialist from two times per month to one time per week.

28. At the February 2019 IEP team meeting, the Parents informed the HCPS that they planned to withdraw the Student from the HCPS, enroll her at [REDACTED] and request tuition reimbursement from the HCPS.

29. The Student's last day at [REDACTED] was February 6, 2018. Shortly thereafter, the Parents enrolled the Student at [REDACTED]

30. At the time the Student withdrew from the HCPS, she had not achieved any of the eight goals in her IEP. She made progress on fourteen of her twenty objectives.

DISCUSSION

General Legal Framework

The identification, evaluation, and placement of students in special education are governed by the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. §§ 1400-1482 (2017); 34 C.F.R. pt. 300 (2018); Md. Code Ann., Educ. §§ 8-401 through 8-417(2018); and

COMAR 13A.05.01. The IDEA requires “that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); *see also* Educ. § 8-403.

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

(A) In General

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

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

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

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), holding that a FAPE is satisfied when a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* at 201 (footnote omitted). The Court set out a two-part inquiry to analyze whether a local education agency satisfied its obligation to provide a FAPE: first, whether there has been compliance with the procedures set forth in the IDEA,¹⁰ 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.)

¹⁰ The Student did not raise any procedural challenges in her due process request.

More recently, the Supreme Court addressed the standard to be used to determine whether a public school has provided a disabled student with a FAPE. In *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017), the court set forth the following “general approach” to determining compliance 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); *see also R.F. v. Cecil Cty. Pub. Schs.*, 919 F.3d 237, 245-246 (2019) (abandoning the “some educational benefit test and adopting the “reasonably calculated to enable a child to make progress in light of the child’s circumstances”

test). The *Andrew F.* Court explained its rejection of the “some benefit” or “merely more than *de minimis*” standard:

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.

Andrew F., 137 S.Ct. at 1001 (citation omitted).

Moreover, in directly adopting language from *Rowley*, and stating it was not “attempt[ing] to elaborate on what ‘appropriate’ progress will look like from case to case,” the *Andrew F.* court instructed 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 *Andrew 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.

For a disabled child who cannot be fully educated in the regular classroom and cannot achieve on grade level, his or her IEP “need not aim for grade-level advancement . . . [b]ut 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.

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 burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, in this matter the Parents have the burden of proving that the School failed to provide the Student with a FAPE and their entitlement to reimbursement for their unilateral placement of the Student at [REDACTED]

Summary of the Student's Witnesses' Testimony

[REDACTED] Ph.D., is in private practice, providing neuropsychological evaluations and consultation services for children with special education needs. He testified as an expert in neuropsychology and school psychology. In May 2018, when the Student was five years and [REDACTED] months old, Dr. [REDACTED] evaluated her, using a "multi-source" methodology, including obtaining information from the Parents, doing neuropsychological testing, and meeting with the Student on May 10 and 31, 2018.

Dr. [REDACTED] diagnosed the Student as follows: "Autism Spectrum Disorder, with the accompanying intellectual and language impairments and co-occurring Attention Deficit/Hyperactivity Disorder, Developmental Coordination Disorder, and Unspecified Anxiety Disorder." Student Ex. 40. The report includes a summary and recommendation sections; which is partially reproduced below:

[The Student's] current presentation indicates that she requires very substantial support.

... [redacted] s neurodevelopmental problems are substantial and complex. Currently, the severity of her autistic conditions requires intensive special education interventions for her to make academic progress. With appropriate supports and services in place, she is capable of making progress. In view of these findings, the following recommendations are offered:

1. ... [the Parents] review these findings with her IEP team.
2. ... [the Student] receive intensive supports and services through the IEP for autism. Her responses to interventions clearly demonstrate that she is capable of learning new material despite the severity of her current disabilities. In school, [the Student] requires the following:

- educational interventions provided in a one-to-one instructional environment
- evidence-based educational strategies designed for students with autism spectrum disorders, including ABA and VB [Verbal Behavior]
- participation in a full time, full year program
- a sensory-rich learning environment
- teachers and specialists with training and experience in educating students with autism spectrum disorders
- data-driven instruction
- speech/language therapy services
- occupational therapy services
- systematic positive reinforcement interventions using appropriate ratios
- daily communication between teachers and parents
- home training for new procedures to support generalization to other settings.

Id.

Dr. [redacted] testified the Student requires a “very substantial level of support.” He recommended “she be in school full time during each day, every day of the week, throughout the school year.” He is “familiar” with ESY, describing it as “services . . . approved to help a student maintain gains that they’ve made, or not to lose gains or regress, during that—during those summer months.” Dr. [redacted] opined that ESY is **not** “an appropriate intervention for [the Student]” and not his “recommendation” because ESY is “less intense in terms of the number of hours that are provided” and “there can be variability in staff.” Dr. [redacted] went on to explain the Student has “some emotional needs” and “difficulty with transitions” which “can make it

difficult for her to maintain the gains that she would have made in regular school,” if the providers in ESY are different from her providers during the regular school term.

Dr. [REDACTED] also testified about the Student’s significant behavioral changes when he observed her for two hours at [REDACTED] in April 2019 from when he saw her about a year earlier in his office. He acknowledged there was a difference between the unfamiliarity of his office and the familiarity she had development with [REDACTED] and its staff.

Dr. [REDACTED] described the Student as “very happy” in April 2019, and “engaged with educators,” “interacting at some level with peers,”¹¹ “more attentive,” and making distress-free transitions. He described that as a “dramatic difference in her overall demeanor, her engagement, her attention to social interactions, her ability to follow directions and comply[.]” With direct prompting from counsel, Dr. [REDACTED] also testified he observed some functional verbal behavior, including two-word responses to a teacher’s question, which he did not observe during his evaluation.

[REDACTED] is the Principal at [REDACTED]. He described [REDACTED] as a “separate public day school” exclusively for children with IEPs. He testified [REDACTED] has twenty classrooms; each one is staffed by a special education teacher. [REDACTED] also has special area teachers and support professionals, including a speech and language therapist, physical therapist, occupational therapist, adaptive physical education instructor, and “vision, speech, hearing,” as well as access to a psychologist and a BCBA. According to Mr. [REDACTED] enrolls about 100 special education students, excluding special education students between nineteen and twenty-one years old.

Mr. [REDACTED] knew a “little about [the Student’s] progress [in the early learning program] at [REDACTED].” He confirmed that the Written Notice for the last IEP meeting at [REDACTED] (April 7, 2017) indicated (1) the Student made progress in toileting and (2) the Parents said they had seen

¹¹ Dr. [REDACTED] testified he saw the Student make eye contact and have some verbalization with peers.

“growth” during the last six months. The same Written Notice contains the following: “ [REDACTED] proposes that a FBA and BIP will be completed to gain additional information on how to best support [the Student] in the Early Learner classroom setting with supports of a [BIP].” School Ex. 14. This recommendation was made because “[the Student] has not demonstrated satisfactory growth /progress on IEP goals and objectives [at [REDACTED] due to her increased behavior needs,” and specifically referenced “chronic . . . non-compliance and throwing objects[.]” . . . making her “unavailable for instruction[.]” *Id.* Mr. [REDACTED] testified that the HCPS requires an FBA be completed within sixty days.

Mr. [REDACTED] addressed the (CIEP) Team Review form. He testified from a review of the form that (1) four to twelve weeks of specific interventions had not been “effective” and (2) the development of a BIP was in process.¹² The form lists that the following would need to be changed for success in a “comprehensive school”: (1) the self-injurious behavior (hitting her head with her forearm), occurring three to ten times per day for five to twenty seconds, (2) throwing things occurring one to fifteen times per day with an “ongoing” duration, and (3) disengagement or off-task behaviors, occurring constantly when not engaged in intensive instruction with an “ongoing” duration. Student Ex. 14.

Mr. [REDACTED] was the IEP chairperson for the initial IEP team meeting at [REDACTED] on September 25, 2017. Mr. [REDACTED] reviewed the Written Notice related to that meeting. He agreed an FBA was discussed, and the Written Notice indicated the Parents were to consult with Dr. [REDACTED] to decide whether it “was warranted.” After two hours, the meeting was adjourned without consummating a final IEP.

Mr. [REDACTED] agreed an FBA was approved at the next IEP team meeting on October 11, 2017. The Written Notice states: “[An] [FBA] was approved, the team will reconvene within 60

¹² The CIEP form indicates a BIP was being developed. It is unclear on which Mr. [REDACTED] based his testimony that intervention had been ineffective.

days to review the results.” Student Ex. 20; School Ex. 7. Mr. [REDACTED] testified this meant “that the [REDACTED] IEP team or staff had the responsibility of completing that FBA[.]” At this IEP team meeting, the Parents addressed their concerns about the Student’s self-injurious behavior—“hitting her head with a closed fist”—and the classroom teacher acknowledged seeing the behavior. The October 2017 IEP also addressed (1) disruptions by throwing things and (2) “dropping” by falling to the floor. *Id.*

Mr. [REDACTED] testified about the ESY services included in the October 2017 IEP. It shows the following for a six-week period:

Social Foundations: Social Behavior and Play and Group Behavior Skills	minimum of three twenty-minute sessions per week
Language and Literacy: Literacy, Receptive, and Expressive Language Skills	minimum of three twenty-minute sessions per week
Physical Well-Being and Motor Development: Toileting and Self-Care Skills	minimum of three twenty minute sessions per week
Special Education: Speech/Language Therapy	one twenty-minute session
Total Hours Per Week:	minimum of three hours and twenty minutes per week

Mr. [REDACTED] also addressed the special education and related services contained in the October 2017 IEP. The IEP shows the following:

Social Foundations: Social Behavior and Play and Group Behavior Skills	a minimum of ten twenty-minute sessions per week
Language and Literacy: Literacy, Receptive, and Expressive Skills	a minimum of ten twenty-minute sessions per week
Mathematics	a minimum of ten twenty-minute sessions per week
Physical Well-Being and Motor Development Development: Toileting and Self-Care Skills (Toileting and Self-Care Skills)	a minimum of ten twenty-minute sessions per week

Total Special Education	thirteen hours and twenty minutes per week
Occupational Therapy	three twenty-minute sessions per month
Speech and Language Therapy	six twenty-minute sessions per month
Total Special Education Services and Related Services	minimum of fourteen hours and five minutes per week ¹³

Mr. [REDACTED] testified the thirteen hours and twenty minutes per week of specialized instruction is “[a]ccording to the IEP.” He also testified the Student “benefits from instruction throughout the day” and further explained:

[W] are – I mean, we’re a separate public day school. So all of our classroom instruction are special education teachers. And so this would be the minimum amount. And we – we take into consideration scenarios in which – to make sure that we fulfil the requirements of the IEP. We build – we help – we factor into scenarios such as days off school, absences, school closures, and whatnot to make sure to ensure that we remain in compliance for students according to how their IEP is written. So, you know, [the Student], whereas, it reads she may have been getting four hours a day of specialized instruction from [REDACTED] School staff. I mean, she’s – the reality is – they’re here all day. And she’s benefiting from that instruction all day.

Mr. [REDACTED] testified about an incident at [REDACTED] on November 14, 2017, which was addressed at an IEP team meeting on November 27, 2017. He described the incident as a classmate “grab[bing] her [the Student] around her head,” startling the Student, but causing no injury. The Student was seen by the school nurse on the same day. She diagnosed an abrasion and commented: “Student scratched by another student on forehead. Skin not open. Area cleaned. Left open to air.” Student Ex. 21. At the November IEP meeting, [REDACTED] acknowledged the same

¹³ Mr. [REDACTED] testified the school day at [REDACTED] is from 9:00 a.m. to 3 p.m., or thirty hours per week.

student had aggressively reached for the Student on October 30, 2017, and November 2 and 8, 2017;¹⁴ those aggressions were “successfully blocked by staff” before contact. Student Ex. 8; School Ex. 22.

Mr. [REDACTED] also testified [REDACTED] took steps to prevent a further occurrence of the November 14th incident; however, he acknowledged the same student attempted to grab the Student on December 19, 2017. On that occasion, the classmate made some contact “to the back of [the Student’s] head and hair line.” School Ex. 25. The school nurse saw the Student the same day reported: “Another student grabbed the back of her [the Student’s] neck – no visible signs of injury.” School Ex. 24.

Mr. [REDACTED] reviewed the Amended IEP from February 2018. He testified the only change was to add five additional twenty-minute sessions per week “to address [the Student’s] social/emotional behavioral goal.” Student Ex. 30. This brought the total special service time listed in the IEP to fifteen hours per week.

The change to the service hours was to address the results from two FBAs done at [REDACTED] one dated December 5, 2017, the other dated February 5, 2018. Mr. [REDACTED] acknowledged the frequency and duration of the Student’s self-hitting went from seventeen times per day, lasting from one to thirty seconds, to eighty-nine times per day, lasting from one to two seconds. The Student’s stereotypy went from twelve times per ten minutes, lasting from one to five seconds, to eighteen times per ten minutes, lasting from one to fifteen seconds. Mr. [REDACTED] could not explain this increase but speculated:

I think there’s a variety of things. I think you have to look at the -- [the Student] was at [REDACTED] for a little over, I believe, in attendance a little over, I believe 70 school days. And so that’s a very short window. And I think during that time, to establish rapport, to establish trust, to effectively program for a student, you’re still building rapport and – and establishing that relationship. And so during that time, that increase, it could have been through the first couple months where

¹⁴ The Student’s attendance record from [REDACTED] shows she was not in school on November 2, 2017. School Ex. 33.1.

we're working through – a phase of connecting with the student on a very low stress manner that eventually you get to a point where you place demands and you – and you certainly try to engage the student in learning. And it's not uncommon when you do that for behavior to manifest as a result.

Counsel pointed out to Mr. [REDACTED] that FBAs show the frequency of the Student's self-hitting and stereotypy increased and aggression and self-stimulation were added as concerns while the Student was at [REDACTED]. Mr. [REDACTED] was asked: "What does that tell you about how [the Student] was doing in school at that time?" He responded:

I think that's a – that – a difficult question to answer. Again, I think you have to look at the programming and what was attempting – how – how [the Student] was being engaged in her educational program at the time. Obviously, the numbers state an increase in those behaviors. But I would say that during that time we are continuing to get to know [the Student], to unlock [the Student]. And as we get closer to the – the two, three months time of her being at – tenure at [REDACTED] more demands, more educational demands, are being placed upon her and it's not uncommon for our friends¹⁵ with autism, or quite frankly, with – with a variety of disabilities, when you engage them in learning, and they may be resistant to that. Behaviors manifest – a variety of behaviors could manifest as a result of that. I also think that there has been – her attendance during that time, I think was impacted as well. I think it was a little inconsistent. And I think there's a variety of reasons that potentially could have created the increase or help to create the increase in those behaviors of self-injury.

Mr. [REDACTED] testified the behaviors addressed in the FBAs "pretty significant[ly]" interfered with the Student's access to the educational environment.

Mr. [REDACTED] was asked to address the Written Notice from the IEP team meeting on February 5, 2018. The Written Notice indicates the School rejected the following requests from the Parents: (1) a twelve month educational program and (2) BCBA consultation three times per week. The Written Notice explains the rejection of a twelve month educational program:

Mr. [REDACTED] indicated that [the Student] requires a twelve month program in order to demonstrate progress. He indicated the ESY services during the summer 2017 were insufficient and that [the Student] has not regained any skills lost as a result of the summer break. Although the team concurs that [the Student] is at risk for regression as the result of breaks in institutional services, there is insufficient data to support that she requires a twelve month program in order to demonstrate mean-

¹⁵ Mr. [REDACTED] frequently referred to students at [REDACTED] as "friends."

ingful progress during the regular school year. [ESY] Services were previously recommended as part of her IEP in order to interrupt anticipated regression. These services were calculated to insure that [the Student] maintains the skills acquired during the regular school year over the summer break. It was noted that [the Student's] prior regression could also be attributed to the impact of her needing to adjust to a new instructional program and pair with her new staff, as well as attendance irregularities once school was back in session due to illness related absences, unexcused absences, winter break, and inclement school closures.¹⁶

School Ex. 11.

When asked what data [redacted] needed to approve a twelve-month program, Mr. [redacted]

testified:

I would suggest more time. I mean, we – we had, as I said, I think a major – a major aspect of our school is to – is to unlock abilities. Students that attend [redacted] score quite complex in their nature of disability. And through the first quarter of [the Student's] education, there were some scenarios that presented itself where she was inconsistent in attending school, and we were getting to know her, and to get to know her better, to continue to program effectively for her.

[redacted] also rejected the Parents' request to increase BCBA consultation to three times per week based on insufficient data. Mr. [redacted] read directly from the Written

Notice to explain the reason for that:

It was reported that [the Student's] teacher, Ms. [redacted] has received consultation from an [HCPS]¹⁷ contracted BCBA twice, and a program specialist weekly since January 2, 2018. Although [the Student] has evidenced a recent improvement in her behavior, this progress cannot be directly associated with the level of consultation from the BCBA, or the teacher specialist, as other factors, including the initiation of a [BIP] and increased consistency in school attendance also occurred during the same period.

Mr. [redacted] agreed that Mr. [redacted] announced at the February 2018 IEP meeting that he intended to remove the Student from the HCPS, enroll her at [redacted] and request public reimbursement for tuition because he was dissatisfied with [redacted]'s rejection of a twelve-month

¹⁶ Mr. [redacted] testified he thought it was "accurate" that had the Student attended the ESY program as provided for in her IEP at [redacted] she would not have received any instruction during the about five to six-week period that includes two to three weeks after school ended and before ESY began and three weeks between the end of ESY and the beginning of the next school year.

¹⁷ The transcript incorrectly records this as "ACPS."

educational program and BCBA consultation three times per week, as well as concerns about the Student's safety at [REDACTED] and the regression in her behaviors.

During cross-examination, Mr. [REDACTED] agreed the HCPS's IEP drafted in November 2018 provided the Student with fourteen hours and forty-five minutes per week of special education instruction. He testified that [REDACTED] offers a full-time special education environment. He agreed with the characterization of counsel that if the Student was not receiving "specialized instruction full day, all day long," that educational program would "interfere with her receiving a free and appropriate public education."

Mr. [REDACTED] was directed to the following entry in Written Notice for the IEP team meeting on September 25, 2017:

Through conversation during the meeting, [the Parents] shared some concerns with regards to self-injurious behavior by [the Student] such as hitting herself in the forehead or side of head with fist. The team discussed the possibility of moving forward with a "determine the need to assess" meeting specifically regarding [an FBA]. [The Parents] will continue to talk to Dr. [REDACTED] Behavior Analyst and Educational Consultant, and inform the team if they would like the meeting to be scheduled in the near future or a bit later as part of the reevaluation process that will begin in the spring of 2018 at the latest. [REDACTED] School will invite the school psychologist in attendance at the meeting.

Student Ex. 16.

Mr. [REDACTED] agreed that entry indicated the Parents did not request an FBA during that IEP meeting. He testified the IEP team agreed to proceed with a FBA at the next IEP meeting in October 2017. Mr. [REDACTED] also testified he did not recall the Parents objected to any part of the IEP at those meetings.

Mr. [REDACTED] described the Student's program at [REDACTED] as follows:

[The Student] was, as we know, in the early – was in what we identify as a [REDACTED] program, which is a specific program that uses aspects of, it's under the principle of ABA, but also incorporates verbal behavior pedagogy to address support behaviors, through opportunities to increase improved communication. It's a pretty rigid program. There are, what's identified as IST and NET sessions, which is – it stands for

intention¹⁸ structure teaching and NET is natural environment teaching, which Ms. [REDACTED] . . . kind of coordinates, supervises, manages those programs throughout the county. She is our resident agent that we cater to and she helps provide professional development to our staff within that room. Within the program that [the Student] was accessing their education, it's identified as one to one. So which means that for every student, there's one adult and all of the individuals, there's one teacher, one special education teacher in that classroom, but they all are heavily trained, and it's a very complex program. There's a lot to do it, but they're trained, they receive a lot of professional development, to continue to grow their ability to teach under the principles that I mentioned before. And within the IEP schedule that, I believe, there for 20 minute sessions of that per day and then there are 20 minute NET sessions per day. In addition to that, there is whole group instruction. But we're constantly encouraging and expecting our staff to find opportunities throughout the day to constantly reinforce abilities for students to communicate, whether it is in bathroom, whether it is during lunch, whether it is transitions.

Mr. [REDACTED] testified students in the [REDACTED] program receive ABA interventions throughout the day. He described the interventions as "constantly reinforcing, rewarding compliant on task behavior, ignoring behavior that may be non-compliant in terms of disruption or follow through. Those are the principles but ultimately they're trying to – students are consistently trying to increase communication abilities, are offering communication abilities to our students."

In regard to the November 2017 incident when a classmate scratched the Student, Mr. [REDACTED] testified he could not recall the Parents indicating they thought [REDACTED] was an inappropriate placement for her. Mr. [REDACTED] also testified he moved that classmate to a different classroom after the second incident in December 2017. Mr. [REDACTED] testified he had not received any reports from staff that the Student began to "cower" at school after the incident.

Mr. [REDACTED] also amplified his earlier testimony about the Student's increase in problem behaviors while at [REDACTED] being a possible response to greater instructional demands. He testified about the first month or two that a student begins at [REDACTED]

[w]e are trying to engage and develop a rapport and the level of trust with students. We're trying to allow them space to get to know us. And as well we get to know

¹⁸ This was either a misstatement or an error in transcription because IST is "intensive structured teaching."

them. So and we specifically – the classroom teacher and staff, so that they are able to identify likes, dislikes, ultimately, that we can use as reinforce[rs] to when we are ready to. Once we go thru that phase, which – which I believe is called the pairing stage. Once we go thru that, we can then once that rapport, that trust is established, we can then start in a very small scale in trying to instruct students and if they're compliant, they're rewarded, and it's very regimented according to our [REDACTED] protocol.

Mr. [REDACTED] testified [REDACTED] saw “marked” and “huge” improvement in the Student’s problem behaviors during the “last weeks” before the February 2018 IEP team meeting. A transcript from the February 5th IEP team meeting indicates the Student’s teacher reported a reduction in the Student’s self-hitting during the last two weeks and the self-stimulation had hardly occurred during that period. Mr. [REDACTED] was unaware of any data that showed this decrease.

Mr. [REDACTED] opined that [REDACTED] was and is an appropriate placement for the Student because:

We have I believe that our program is from would make would make a difference. And she would respond and meet with success and make progress. And I recall when Mr. [REDACTED] and I first were were talking about he, the conversation with Mr. [REDACTED] has always been extremely, of course, are respectful, friendly and honest. And Mr. [REDACTED] told me that he was questioning whether or not that we were the we were appropriate for his daughter. He was very concerned, loves his daughter very much. And I remember looking at him and I still maintain with my heart that we are the right educational environment for [the Student]. With that said, [i]f I ever got to a point where I didn't think that we could meet her needs, by all means, I would 100 percent of his share that with him, with the IEP team because I care about her. She's a wonderful little girl and I want her to progress. And – and that's, that's the same quite honestly, with any student that we have. You know, just kind of [lead] with your heart and go from there.

[REDACTED] testified as an expert in special education and autism. She is a BCBA. At the time of her testimony, she was the Director of Education at [REDACTED]. She testified ABA¹⁹ is “research proven” to effectively teach children with autism.

Ms. [REDACTED] described [REDACTED] as a non-public school for students with autism from ages three to sixteen, which has been “approved” by the Maryland State Department of Education.

¹⁹ Ms. [REDACTED] described ABA as: “[T]he science of learning, taking skills, mapping, taking them back, teaching targets, using reinforcement to really identify a skill, breaking it down and using reinforcement to teach those targeted skills.”

She further described [REDACTED] as follows:

Within our educational philosophy we use applied behavioral analysis and verbal behavior to teach foundational skills in the areas of daily living, academics, communication, play, social. We also are, the center of our program is a child led teacher directed approach where we are capturing motivation throughout the day in order to, you know, really use all 30 hours of instruction that she's currently getting as a teachable moment. Within our programs, students are engaged in a variety of different types of groups, natural environment teaching, which is teaching a skill which would naturally occur, so for our younger kids, it would look like maybe teaching a skill within a play date's activity, where within our students the natural environment might look like cooking or doing a school-wide job. So they're involved in natural environment teaching. They're also involved in one-to-one intensive teaching time, and that is basically a table activity, and then also group instruction. And all of that is tailored to our individual learners, those percentages and how much time is spent in all of those things, based on their grade and developmental level.

Ms. [REDACTED] explained a classroom at [REDACTED] has a special education teacher and instructional aides who provide one-on-one instruction to students. The instructional aides receive eighty hours of training by [REDACTED]'s "professional development staff" before they begin working with students and ongoing in-house professional development, observation, and evaluation. At the time of the hearing, [REDACTED] employed three BCBA's.

Ms. [REDACTED] testified she supervises the teacher in the Student's classroom. According to Ms. [REDACTED] the Student receives thirty hours of special education and related services per week. Ms. [REDACTED] opined that the Student needs that amount of service "[b]ased on my observations of her over the last year, meeting with the team consistently, including the parents, and just, my experience with autism and where she is developmentally and her current age, that she requires, that it's developmentally appropriate to have thirty hours instruction."

Ms. [REDACTED] also testified that [REDACTED] implements the Student's "full IEP" throughout the entire year with the same service providers, because employees at [REDACTED] are twelve-month employees. [REDACTED] has one week in July and one week in August when there is no instruction.

Ms. [REDACTED] opined as follows when asked whether a traditional ESY program would be appropriate for the Student: "I think she requires a twelve-month program. I don't think shortened days and hours are beneficial to her. I think she requires consistency with her programming, the staff, and the environment, to make appropriate progress." She explained the basis for that opinion this way: "When she first started at [REDACTED] seeing how much time it took for her to acclimate to a new environment really spoke volumes that she isn't the type of learner that can deal with a lot of changes, she does need that consistency and routine."

[REDACTED] drafted the Student's first ETP on April 5, 2018. That amount of time before a student's first ETP is drafted [about two months] is "pretty standard practice." The pre-ETP period allowed the Student to adjust to her new environment and then be evaluated using observation and testing to establish a "baseline" for the educational program. Ms. [REDACTED] testified [REDACTED] uses the VB-MAPP²⁰ and the Brigance to establish a baseline.²¹

Ms. [REDACTED] testified the Student's second ETP, drafted in April 2019, includes reports that she made "great gains" in the area of social interaction, "a lot of progress" in the area of language and literacy, and "amazing" progress in the area of toileting. Ms. [REDACTED] also addressed the Student's self-hitting and self-hair pulling.²² She acknowledged that the frequency of the SIBs at [REDACTED] increased from their recorded frequency at [REDACTED] but Ms. [REDACTED] testified, since then, the high intensity SIBs have "steadily gone down," and she believed the low intensity SIBs had decreased and "stabilized."

²⁰ Ms. [REDACTED] described this test as assessing language skills, such as requesting, labeling, and listener response.

²¹ Ms. [REDACTED] described this test as an educational assessment of skills "aligned with the Common Core" that provides "an idea of where she's functioning in terms of those skills."

²² [REDACTED] categorized these as "low intensity" and "high intensity" SIBs. She described the high intensity SIB as something that can cause harm, such as the Student forcibly striking her head or grabbing her hair and forcibly pulling down. Ms. [REDACTED] described low intensity SIBs, that is, tapping her head when denied something she wants, as happening "all the time" and "automatic."

When asked to describe the Student's overall progress at [REDACTED] Ms. [REDACTED] testified:

I know we talked a lot about her progress. She has definitely made notable gains in all the areas that we talked about, but some of the things that come to mind the most when I think about [the Student] is just – I'm going to try not to get emotional, but just her ability to be able to access the learning environment, just her health, her happiness. I know those things don't translate well on paper but they're notable, they should be mentioned. Just her ability to go into a new environment and accept that and be near peers and adults without having problem behavior is a huge thing for her. The fact that she is toilet trained or on a schedule, I know those were huge concerns for the family. That she's now eating and drinking in the school environment, her hair is growing back. These are all things that we've noted anecdotally that are just really important too.

Ms. [REDACTED] testified she attended the IEP meeting at [REDACTED] in November 2018. She disagreed with the statement in the Written Notice that "[t]he team was in agreement with the IEP at the end of the IEP meeting[.]" Ms. [REDACTED] testified Mr. [REDACTED] Dr. [REDACTED] and the [REDACTED] IEP team members "disagreed with how the services were outlined on the services page." When directed to the "Services" section of the IEP, Ms. [REDACTED] explained as follows:

We disagreed with breaking it, so the goal, it's broken down based on goals and how much time is targeted for each goal, and I disagreed with being able to put a number on that, just based on what she requires and the flexibility in her instruction constantly having to evaluate what needs she, you know, is currently presenting, and being able to change and modify the instruction she needs on a daily basis, that to put a number such as 40, especially when she's only sitting at a table right now for 15 minutes. So we just didn't think that it was an accurate representation of what she needed, and it only identified 15-ish hours of instruction.

Ms. [REDACTED] opined the hours of special education and related services in the Student's October 2018 IEP were not adequate for the Student to make appropriate educational progress. She described "appropriate progress" as "slow incremental progress."

Ms. [REDACTED] also opined that the amount and duration of ESY services in the October 2018 IEP were "not enough time for her to maintain the skills she's gained over the course of the year." Furthermore, she opined that the manner in which those services were to be provided would result in "significant regression in her skills" because:

When she first started at [REDACTED] I was looking at how long it does take to pair²³ with the new environment, that going into a situation where it was less hours, potentially different staff, it would take time to pair, and then she could potentially lose skills. Also, I was looking at the different documents where it's you know, breaking out her progress in Harford County and [REDACTED] and I noticed in the one outline it notes that within September and October, that she spent a majority of her time recouping skills she had lost.²⁴

Ms. [REDACTED] also opined the weeks of no school before ESY begins and no school after ESY ends and before school resumes would be "detrimental" and inappropriate for the Student. Ms. [REDACTED] summarized by opining: "I truly believe [the Student] needs a year-round 12-month program in order to make appropriate progress, so I think even a ten-month program with ESY wouldn't be sufficient. Ms. [REDACTED] testified [REDACTED] approved of the HCPS's November 2018 IEP, except for the ESY and service-hour components.

During cross-examination, Ms. [REDACTED] acknowledged students at [REDACTED] can be aggressive toward their peers. She testified, when that occurs, "[w]e block, we remove the student, we console the student, and then parents are notified." Ms. [REDACTED] also testified the Student was unintentionally struck by an "object" another student threw at [REDACTED] Ms. [REDACTED] admitted the Student regressed at [REDACTED] in the area of aggression. She also testified the aggression has been "stagnant," explaining it may have increased because the numbers at Harford County were only added to the [REDACTED] ETP because the "previous focus was on her self-harming." She testified that [REDACTED]'s FBA was completed six or seven months after the Student began her education there.

Ms. [REDACTED] also testified as a rebuttal witness. She testified she spoke to Ms. [REDACTED] after her observation of the Student at [REDACTED] According to Ms. [REDACTED] Ms. [REDACTED] thanked

²³ Ms. [REDACTED] described "pairing" this way: "[P]airing is just making sure we are pairing ourselves with reinforcement. The environment, reinforcing the people she works with, is reinforcing. So just essentially that she likes being at school, that it's a, she sees it as a better set of conditions."

²⁴ These documents were not offered into the record.

her for the observation opportunity, said the Student was doing really well, and observed she saw behaviors that were typical of the Student's behavior at [REDACTED]

Dr. [REDACTED] Ph.D., is the paternal grandmother of the Student. She saw the Student frequently after her birth due to medical complications and currently sees the Student at least once every two weeks.

Dr. [REDACTED] described the Student's experience at [REDACTED] as "certainly a reasonable experience," although the teacher's satisfaction with how the Student "was doing in school" was "sort of different than what we experiencing when she was at home[.]" Dr. [REDACTED] testified she had "nothing negative to say about the school [REDACTED] or her experiences," except to mention an incident when she wandered away from the school and was found by a parent in the parking lot.

Dr. [REDACTED] testified she saw the Student weekly while she attended [REDACTED]. She described the Student as having sleep and eating problems at home during this "very difficult time." She provided a "very distressing" example:

[S]he would yell and she would come – outside of my room there's a nice big rug on the floor, and she would come from her area over and get on that and she would bang her head and punch herself, you know, punch and cry and yell, and this would go on for hours. It was very distressing for her parents, they couldn't soothe her, there was nothing you could do to soothe this child.

Dr. [REDACTED] also testified the Student's eating was "really out of control" at home. "Her choices of food are very limited, and it takes hours to get her fed. So that was a huge problem, along with the sleep deprivation and the striking of her head, they were huge problems during that period."

Dr. [REDACTED] testified about a family vacation in August 2018. The Student behaved like "a typical child at Disney World," in part explaining she was feeding herself during meals. Dr. [REDACTED]

describe the Student “exactly like her sister, her typical sister”²⁵ at a restaurant two weeks before the due process hearing. When asked to compare the Student now to how she was while at [REDACTED]

Dr. [REDACTED] testified:

She’s a happy child, and I know that I can’t describe happy, but I will say to you that I have never seen her sing and dance and yes, she does, and she twirls in her little chiffon skirt just like her sister does, she just got a pair of ballerina slippers. She’s a happy child, she looks different and the most wonderful thing of all is her engagement. I would go months before I could even get near [the Student]. She, after she had this horrible experience with another child grabbing her, she would have nothing to do with anybody, and it broke my heart. This little baby, she wanted nothing. If I would get near her she would grabbed for my hair, she would strike out, you couldn’t get near her. She was terrified of her sister and her sister was terrified of her. It was a very difficult situation because they didn’t understand, and that has changed so much. She just a couple of weeks ago, she reached out for me and she held me and kissed me. . . . [s]he engages with people, she did not do that. They had a whole crowd at Easter, and she engaged with people and enjoyed it, and that’s all been wonderful.

In addition, Dr. [REDACTED] testified the Child had lost six pounds at [REDACTED] and was “very pale, very very thin, and circles under her eyes, and never smiled[.]” By contrast, Dr. [REDACTED] testified the Student weighed fifty-one pounds in February 2019 and her hair has grown back since she has been at [REDACTED]

On cross-examination, Dr. [REDACTED] did not contest the statement in the Written Notice from the IEP meeting in May 2017 that states the Student has been sleeping through the night “over the past two month.” After Dr. [REDACTED] was directed to another statement in the same Written Notice that the Student was picking up food with her fingers at [REDACTED] she did not contest that report.

[REDACTED], Ph.D., is self-employed as a consultant and clinician; she testified as an expert in special education, autism, and ABA. Dr. [REDACTED] began working with the Student’s family in May 2017 and since then, has participated in or conducted about eighteen observations, IEP team meetings, and conversations with the Parents.

²⁵ The Student has a twin sister.

Dr. [REDACTED] testified Mr. [REDACTED] contacted her with these concerns: (1) the Student had wandered away from [REDACTED] without the staff's notice, (2) the Student engaged in a high level of SIB; (3) the Student had sleep and eating problems at home; and (4) the progress the teachers reported at school was not being seen at home.

Dr. [REDACTED] testified she observed the Student at [REDACTED] on June 1, 2017. She testified the Student was in a play area with toys but was not engaged; she held two small objects in her hands and wandered around, despite the teacher's attempt to engage her. Dr. [REDACTED] also observed the Student transition to a different area where the teacher held up picture cards, and the Student identified some objects, such as "shoe" or "ball." Dr. [REDACTED] criticized what she saw as not teaching vocabulary, but as merely creating an association between a particular card and a word. Dr. [REDACTED] observed a second transition to a different area where the Student was non-responsive to the teacher's efforts to engage her. According to Dr. [REDACTED] the Student's teacher described the Student's behavior during the observation as "typical." Dr. [REDACTED] opined the education the Student received during her observation "was [not] appropriate for her [] developmental level."

Dr. [REDACTED] reviewed the VB-MAPP completed at [REDACTED] in May 2017 from data collected the previous month. She testified the results from the assessment were "inconsistent" with her observation in June 2017. Dr. [REDACTED] explained that the VB-MAPP is designed to measure acquired skills and not to record what had been observed one time.

In further testifying about the [REDACTED] VB-MAPP, Dr. [REDACTED] said the Student's "barriers" score of seventy-eight indicated a "significant number of barriers to [the Student's] learning across the board."²⁶ In regard to the results on "tacting,"²⁷ Dr. [REDACTED] testified the Student's score was "incongruent with my observations" because the narrative indicated the

²⁶ Dr. [REDACTED] described barriers as impediments to an individual's learning.

²⁷ "Tacting" means the labeling or naming of an object or thing; it is part of expressive language.

Student was able “to tact 139 items or pictures tested.” That did not “seem accurate” to Dr.

Dr. [REDACTED] explained “just because she could tell you ball, horse, apple didn’t mean she knew what those things were.” In regard to the score in “manding,”²⁸ Dr. [REDACTED] thought, “without having given the assessment myself but just talking to [the teacher] and what I observed . . . this would be an overrepresentation of [the Student’s] manding skills.” Dr.

[REDACTED] opined that the Student’s scores on the VB-MAPP “over-represents her skills” and are “not reliable.”

Dr. [REDACTED] also addressed the VB-MAPP that was completed at [REDACTED] from data collected on September 20, 2017. Dr. [REDACTED] opined that the results were not reliable, based on her observations, conversations with the teacher, and review of the Student’s progress reports.

Dr. [REDACTED] testified she first observed the Student at [REDACTED] on December 6, 2017, for about two hours. She observed (1) “structured teaching” of manding “where you specifically create or try to create opportunities for [the Student] to ask for things that she wants” and (2) a session where the Student was in a “gym” space with balls for twenty to thirty minutes. Dr.

[REDACTED] testified the Student “very much just wandered around the gym,” despite instructional efforts to structure the activity for her. Dr. [REDACTED] testified the [REDACTED] staff who was with her during the observation agreed the Student would have benefited from more oversight. Dr. [REDACTED] also testified she saw a teaching mistake during the classroom observation. She testified about correctly responding to the Student’s errors to decrease them.

[The Student] really needs a, we use a term called tight, like a very tight program but I have to describe what that is. So a program where, you know, that errors are highly minimized, reinforcement is used just at the right time, just at the right frequency so that she can make progress. And I think when you don’t do an error correction procedure appropriately,

²⁸ Dr. [REDACTED] described manding as “asking or protesting.”

you have the likelihood of reinforcing some error, and [the Student's] learning can't tolerate that, she needs very precise instruction.

Dr. [REDACTED] addressed the results from a VB-MAPP done at [REDACTED] Services from data collected on September 21, 2017. She testified the scores in manding and tacting are "significantly lower" than on the VB-MAPP done a day before at [REDACTED]. Dr. [REDACTED] testified the [REDACTED] Services's VB-Mapp is more consistent with her other observation of the Student at [REDACTED] in December 2017.

Dr. [REDACTED] addressed a chart of the Student's scores on the VB-MAPP from February 2015 through October 3, 2018. Her testimony focused on results from April 2017 (at [REDACTED]), September 2017 (at [REDACTED]), and May and October 2018 (at [REDACTED]). The comparison scores are charted below:

<u>Operant</u>	<u>4-28-2017</u>	<u>9-20-2017</u>	<u>4-5-2018</u>	<u>10-3-2018</u>
Vocal	5	5	2	3.5
Mand	5	5	1.5	4
Tact	7	7	5.5	5
LR	3	3	.5	2
VP-MTS	5.5	5.5	5	6
Play	6	6.5	4.5	4.5
Social	3.5	3.5	3.5	3.5
Imitation	3	3	4	5
Echoics	1	3	0	5.5

School Ex. 39.

Dr. [REDACTED] testified that the scores from [REDACTED] and [REDACTED] over-represent the Student's actual skills. She opined about the scores from [REDACTED]

Pretty much that the VB-MAPP done by [the teacher] on 4/28/17 over reported skills, and that those scores clearly were, even if they were there, they did not transferred to another environment, they were not durable skills that she could take into different areas of her life, including actually a pretty highly specialized place like [REDACTED] that would know how to elicit them if they were there.

In addition, Dr. [REDACTED] pointed out that the scores from [REDACTED] to [REDACTED] “do not indicate growth.” Dr. [REDACTED] opined that the progress reports for the Student at [REDACTED] “showed approximately 68 percent of the objectives [on which] she did not progress on, meaning they were identical in progress [from the first to second quarter], or she regressed, or the skills had not been introduced.” Dr. [REDACTED] also testified that the progress reports do not support the VB-MAPP results the area of motor imitation (MI) found in the chart at School Ex. 39.6.

Dr. [REDACTED] testified that [REDACTED]’s narrative in the report related to the Student’s SIB (self-hitting) does not support the IEP goal to reduce that behavior by seventy-five percent or show she was making sufficient progress. Dr. [REDACTED] explained:

In particular, if you look under objective one, it says that the average rate of [the Student’s] injurious behavior during this data period was 108 times a day, which is an increase from her baseline of 17 times a day. So the objective, that particular objective was being measure by a decrease of self-injurious behavior 50 percent and so that’s going in the wrong direction, it’s increasing as reported in that narrative where the objective was for a decrease.

Dr. [REDACTED] testified the Student did not make progress in reducing stereotypy because stereotypy increased from twelve to eighteen times per day.

Dr. [REDACTED] attended the initial IEP team meeting at [REDACTED] on September 25, 2017. She remembered that she urged [REDACTED] not to wait to complete an FBA. She recalled [REDACTED] wanted their psychologist present and “something” related to a notice to be completed before beginning the FBA. At the October 11, 2017, IEP team meeting the FBA was approved:

Dr. [REDACTED] reviewed and compared [REDACTED]’s FBAs from December 2017 and February 2018. She opined the BIP “was ineffective because the frequency of the behaviors for the vocal stereotypy and SIB were increasing, as well as the two additional behaviors developed, and that was aggression and self-stimulation.”

Dr. [REDACTED] also opined that thirteen hours and twenty minutes of special education provided for the Student in the October 2017 IEP at [REDACTED] was “highly inappropriate for her to make progress” based on “my knowledge of [the Student], having observed her, having reviewed the records, and having worked with a lot of children with autism.”

Dr. [REDACTED] testified she observed the Student a second time at [REDACTED] on February 1, 2018, including in two instructional sessions. At the first session, Dr. [REDACTED] testified that the Student “[sat] at a table a little bit more [than during the first observation in December 2017].” During this manding session, the Student was “throwing [the materials] a little bit further away than just swiping them to the ground [as before],” and she played with an iPad while engaged in self-stimulation, without anyone removing the reinforcing. The second session was a “little mini-manding session” during which the Student did not show interest intended to elicit “asking for things.” In between these formal teaching sessions, Dr. [REDACTED] observed the Student in a sensory room where she “just bounced from activity to activity” and “the staff would try to get her engage . . . to be in the bean bag or in the rocking, and she would just kind of kept walking away.” Dr. [REDACTED] opined that this “unstructured” time had “no instructional intent or you know, access.”

Dr. [REDACTED] testified the teacher said the Student’s behavior during the observation was typical for her at School. According to Dr. [REDACTED] the HCPS employee who was with her during the observation intervened to instruct staff on how to better implement the educational program five or six times.

Dr. [REDACTED] testified she saw “very little” progress during her observations of the Student between June 2017 (at [REDACTED] and December 2017. She testified she saw an increase in SIB and no difference in skill development.

Dr. [REDACTED] testified she expressed her “concern” at the September or October 2017 IEP team meeting that the goals in the IEP were “too low.” She testified [REDACTED] responded by saying if she reaches the goals “we’ll just write a new IEP” and they would “look bad” if the goals were not achieved.

Dr. [REDACTED] testified about the ESY service contained in the [REDACTED] IEP. Dr. [REDACTED] called it “highly inappropriate” and opined the five-week period when the Student would not receive any services during the summer “would have a highly adverse effect on her performance.” Dr. [REDACTED] opined that the proposed ESY services would not enable her to receive a FAPE, emphasizing the following:

I think at some point, you know, [the Student] had five mands, five different requests, which means during ESY they would only continue to work on those specific requests, they would not introduce any new material. And for the [Student] to go the entire summer, from June to September without an introduction of any new material, will highly impact her ability to make progress, as well as to, the potential for her to close the gap. Her peers just continue to keep going, you know, up and up, and if she doesn’t continuously, I think year round, work on new skills, she will not make progress, and not end up being able to access her education.

Dr. [REDACTED] also opined it was “highly inappropriate” to exclude functional communication from the Student’s ESY goals because this area “is looking at her ability to request basic wants and needs.”

Dr. [REDACTED] attended the February 2018 IEP team meeting at [REDACTED] where changes to the IEP were discussed. She testified that the Parents requested the IEP be amended to include in-classroom consultation from a BCBA three times per week. [REDACTED] rejected that request, but agreed to add an additional hour per week of consultation by an instructional specialist.

Dr. [REDACTED] testified she disagreed with the statement in the Written Notice that there was insufficient data to support the BCBA consultation time. She testified the following data supported the Parents’ request: (1) an increase in “challenging behavior,” (2) the actual lack of

progress shown in the progress reports at [REDACTED] (3) the new problem behaviors that were added to the BIP in February, and (4) the fact that a specialist had already been in the classroom room one or two times per week and [REDACTED] claimed the BIP had begun to show results during that time.

Dr. [REDACTED] also testified that she disagreed with the School's explanation that data did not support the Parents' request for a twelve month program. Dr. [REDACTED] testified reasons (1)-(4) listed above and her opinion that the Student "really, really truly cannot go the entire summer without learning new skills" supported the Parents' request.

Dr. [REDACTED] opined that the fifteen hours per week of special education services, three hours per month of related services, and four hours and twenty minutes per week of ESY services for six weeks were not reasonably calculated to enable the Student to make appropriate progress in light of her circumstances based on her "observations, the data provided in the progress report, as well as discussions and stuff, as well as the school personnel." Dr.

[REDACTED] acknowledged the Student made progress at [REDACTED] in tacting, but opined it was not progress appropriate for the Student.

Dr. [REDACTED] testified she observed the Student at [REDACTED] five times, beginning on March 20, 2018. She contrasted what she during her initial observation in March 2018 with what she had seen at [REDACTED]. Dr. [REDACTED] testified the items in the Student's learning environment at [REDACTED]

looked "much more purposeful" in that they related to interests and activities that "excited" the Student. In addition, the teaching at [REDACTED] was continuously "intentional" in that it was structured with "intentional reinforcement" and "pairing." Dr. [REDACTED] next visited [REDACTED]

on April 19, 2018. She testified she observed "intentional" and "structured" teaching.

Based on Dr. [REDACTED]'s observation of the Student on August 15, 2018, she testified the Student doing "great" with an increase in sitting time at a table. She gave the following example of great progress:

She climbed on a table in the classroom. . . . what she was doing is . . . [she] looks at every students desk in the classroom to see what good things were on their desks because she wants to know where she is going next, so she stood on her desk, literally scan the room, got down, and tried to run over to somebody else's desk that had bubbles. So I think . . . her awareness of so many things in her environment and wanting them, and wanting to interact with them, is tremendous growth for [the Student], and really makes her availability that much greater, to be able to increase the things that she can talk about or that she can request and be motivated by.

Dr. [REDACTED] testified that she last observed the Student on April 5, 2019. She testified the Student had put on weight; her skin color was "amazing"; the bags under her eyes had disappeared; and her hair looked "thick and strong." Dr. [REDACTED] testified that the Student "answere[d] questions from her teacher about items," such as a ball, made eye contact with her instructor, and scanned the room.

Dr. [REDACTED] testified the teachers at [REDACTED] have told her the Student is making progress in all areas. She also testified the Parents reported the Student is doing a lot more "requesting" at home, "using words," engaging in items and activities for longer periods of time, and decreasing "challenging" behaviors. Dr. [REDACTED] opined that the generalization of skills from school to home is a result of [REDACTED]'s "planned intentional opportunities for generalization."

Dr. [REDACTED] opined that [REDACTED] has provided, and will continue to provide, an appropriate education for the Student, based on her observations, review of the ETPs for 2018 and 2019, conversations with teachers and Parents, and a review of the Student's educational records at [REDACTED]. Dr. [REDACTED] also opined that the BIP used at [REDACTED] was appropriate and effective in reducing problem behaviors that interfere with the Student's access to the learning environment.

Dr. [REDACTED] testified she attended the November 7, 2018, IEP team meeting with the HCPS. She testified the comment in the Written Notice that the team was in agreement with the IEP is incorrect. She testified that she and the Parents disagreed with the total time of direct

services, the failure to include a twelve-month program as part of the plan, and the number of times per week a BCBA would consult in the classroom. Dr. [REDACTED] specifically opined that the fourteen hours and fifty-five minutes of direct special service and four hours and forty-five minutes of ESY services were not appropriate for the Student. Dr. [REDACTED] provided the following basis for her opinions related to appropriateness:

[I]t doesn't provide the year round services that I truly believe that she needs, as opposed to ten-month and ESY. The level of special education hours are just insufficient. She needs 30 hours per week of special instruction. She also, she needs access to regular BCBA support when her program needs it, which really is at this point, she is a very complex learner and that is multiple times per week. I think that that is just a critical component to her behavior and her learning, is to really be able to constantly assess her presentations so you can provide items that are motivating to her, so that she can learn.

During cross examination, Dr. [REDACTED] agreed the Parents said at the May 2017, CIEP team meeting that the Student had begun to sleep through the night during the past two months. She acknowledged she decided the scores on the VB-Mapp at [REDACTED] were not reliable based on a single one hour observation of the Student on June 1, 2017. Dr. [REDACTED] also testified that she told the [REDACTED] IEP team at the September 25, 2017, meeting that she thought the [REDACTED] VB-MAPP over-represented the Student's skill, and the Student's teacher agreed, saying she had difficulty getting the Student to display the skills reported on that VB-MAPP.²⁹ Dr. [REDACTED] also acknowledged she did not share the results of the VB-MAPP that was completed by [REDACTED] Services at any IEP meeting.³⁰

Dr. [REDACTED] agreed the Parents had been concerned with the Student's SIB "for several years" before October 2017.

²⁹ The Written Notice of this IEP meeting does not contain any reference to Dr. [REDACTED] telling the team that the VB-MAPP over-represented the Student's skills.

³⁰ The [REDACTED] Services's IEP was completed on September 28, 2017. The next IEP team meeting was October 11, 2017. Dr. [REDACTED] did not "recall" why she did not share the report with the team, but she testified she did not know whether she had received the VB-MAPP by that date. Dr. [REDACTED] testified she thought the next IEP team meeting she attended was in January 2018. That is incorrect. She attended an IEP team meeting in December 2017. The Written Notice from that meeting makes no reference to the [REDACTED] Services's VB-MAPP.

Dr. [REDACTED] testified that she agreed an FBA for aggression and self-stimulation should be completed at the January 2018 IEP team meeting. She also agreed [REDACTED] implemented the BIP for the SIB and stereotypy in January 2018.

Dr. [REDACTED] recalled the Parents gave lack of progress, the Student's safety, the refusal to provide a year-long education program, and insufficient BCBA consultation as the reasons for their decision to remove the Student from [REDACTED] at the February 2018 IEP team meeting.³¹ Dr. [REDACTED] agreed she said the following at that meeting: "I don't doubt that she has made progress [related to the BIP] this past couple of weeks . . . she [the Student] looks a little bit better over the past three weeks because she had a significant dip in her challenging behaviors and her lack of communication." Student Ex. 65. As an explanation of that comment, Dr. [REDACTED] testified her statement was an attempt "to work with the school system" in response the teacher having said recent progress had been made. Dr. [REDACTED] also testified no data was offered to support that progress and the Student's progress reports show an increase in the targeted behaviors.

Dr. [REDACTED] testified she learned that the BCBA and a program specialist had increased their time in the classroom at the February 2018 meeting. Dr. [REDACTED] testified that was a reason the Parents' request for BCBA consultation should have been accepted. She explained the reason this way:

[I]mplementing [BIPs] and IEPs, you know, particularly for [the Student], she is a complex little girl and the level of intricacies that it takes to know when to change things, you know, when to change her reinforcement, when to do another preference assessment, and the balance of all that really for [the Student] is truly needed in that highly specialized fashion and it – I mean it [the request for more BCBA consultation] was also based off the fact of during

³¹ There was some inconsistency in Dr. [REDACTED]'s three responses to inquiries about the Parents' expressed reasons for removing the Student from [REDACTED]. At first her response was: (1) dissatisfaction with progress, (2) the Student's safety, (3) absence of year-round schooling, and (4) BCBA hours. In her second response, Dr. [REDACTED] seemed to agree the only reasons were (1) year-round instruction and (2) the BCBA hours. Dr. [REDACTED]'s final response was: (1) lack of progress on the IEP, including the maladaptive behaviors, (2) the absence of year-round schooling, and (3) too few BCBA hours.

the observations, you know, I had observed errors in [the teacher], the teacher's teaching that were corrected.

Dr. [REDACTED] testified [REDACTED] implemented a BIP for the Student in March 2018 that addressed the SIBs of self-hitting, pulling her hair, and aggression. Dr. [REDACTED] also acknowledged that the [REDACTED] first completed an ETP for the Student almost two months after she had enrolled. She acknowledged that ETP did not list any service hours. Dr. [REDACTED] agreed [REDACTED]'s most recent ETP lists twenty-six service hours per week, not thirty hours.

Dr. [REDACTED] testified in rebuttal. She testified it is "very typical" for her to observe students as part of her consultation services. She testified she always asks whether what she observed is typical for the child "to understand if it's a valid representation of the student to be able to have a full discussion with the team and the parents just based on what I saw."

Dr. [REDACTED] also testified the following data supported the Parents' request for increased BCBA consultation to three days per week: (1) an increase in challenging and interfering behaviors, (2) lack of skill development on the progress report, (3) the team discussion that the teacher specialist had increased her time in the classroom to between one and one half hours to two hours per week "and that still wasn't making an impact."

[REDACTED] is the Director of Outpatient Services at [REDACTED] Services, Inc., which she described as the parent company under which [REDACTED] operates, and Supervisor of occupational therapy (OT) at [REDACTED]. She was accepted as an expert in OT and autism.

Ms. [REDACTED] first became acquainted with the Student in February 2018, when she enrolled at [REDACTED] and became the Student's direct OT provider in August 2018. Ms. [REDACTED] provides OT services to the Student for two thirty-minute sessions per week. She works on the Student's fine motor needs, for example, grasping a pencil and imitating use of the pencil; self-care skills, for example, drinking from a straw and hand-washing; and gross motor skills.

Ms. [REDACTED] testified that she communicates with the Student's other service providers through personal contact when needed and monthly team meetings. She testified that one of the Student's classroom instructors is also present during her OT sessions to advance continuity of service throughout the Student's educational plan. Ms. [REDACTED] testified that the Student "absolutely" made progress in OT by, for example, going from holding a sticker, to peeling the sticker away from the paper on which it is adhered, to placing the sticker on another surface, with prompts. In addition, Ms. [REDACTED] described it as a "huge gain," when the Student's attention went from "fleeting" to two minutes.

Ms. [REDACTED] testified that the PT who works with the Student told her the Student was able to better walk down stairs with assistance and is "climbing on more structures on the playground[.]" Ms. [REDACTED] reviewed the OT goals, objectives, and services in the Student's most recent ETP. She acknowledged that in some areas, the Student had not met her goals or all her objectives, but testified she was making definite progress.

Ms. [REDACTED] testified that the Student has shown significant improvement from when she first started at [REDACTED] as follows:

She certainly seems happier. She's engaging in a lot less high magnitude, self-injurious behavior. And her vocal or stimulatory behavior. I know – I don't hear—I don't hear her doing it as much, so I would say that I see a decrease in that as well. So, she just – she seems happier during the day. Not doing the hair pulling or the loud vocalizations. She's definitely more available for learning and participating in activities and to be around peers. Her attention span has gone from fleeting, if at all, attending to activities to some meaningful engagement. So, I – yeah, I think she – from what I see, I feel like she's in a good place in her environment and – and with everything she's engaging in.

Ms. [REDACTED] also testified that the Student's educational plan is the same in the summer. She opined that the Student needs a twelve-month education program "[i]n order for her to continue making progress at this same rate [and] I think that consistency of those services is

extremely important.” Ms. [REDACTED] believed “a length of time where [the Student] wasn’t receiving those services . . . would impact her progress.”

Ms. [REDACTED] also opined that the amount of OT services contained in the HCPS’s November IEP for ESY would not be appropriate for the Student because “[s]he needs the consistency” of OT services two times per week. Ms. [REDACTED] opined that the Student would “lack progress” and “possibly” lose acquired skills, if she did not receive OT services during weeks in the summer not covered by ESY services.

During cross-examination, Ms. [REDACTED] agreed that her OT evaluation of the Student in September 2018 indicated the Student engaged in verbal stereotypy. Her evaluation also indicated that the Student’s teacher reported the Student can only occasionally manage her frustration without outburst or aggression, never enters play with peers without disrupting the activity, and never willingly plays with peers; it also indicated that Mr. [REDACTED] reported the Student never plays cooperatively with peers or interacts or converses at lunchtime, and only occasionally shares and participates in family outings.³²

[REDACTED] testified as an expert in the areas of speech and language therapy and autism. She sees the Student daily at [REDACTED] and supervises the Student’s speech and language pathologist.

Ms. [REDACTED] testified the Student did not meet one of her two goals in “speech-language” from April 2018 to April 2019 because she required more prompting than identified in the goal for “protesting.”³³ Ms. [REDACTED] testified the Student showed “significant growth” by increasing the time she appropriately plays with toys and “enjoy[ing] attention” while engaged in song. Ms. [REDACTED] opined the Student “made significant progress” in speech and language, and the goals and services in that area for the current school year are appropriate.

³² The data from which these comments came was collected on August 28, 2018.

³³ In this context, “protesting” is a mand that signals the Student is “all done with something.”

Ms. [REDACTED] attended the November 2018 IEP team meeting. She testified that the statement in the Written Notice for that meeting indicating the team was in agreement with the IEP pending minor changes was not correct because the Parents, Dr. [REDACTED] and the [REDACTED] staff attendees were not in agreement with the proposed service hours. Ms. [REDACTED] opined the Student “would . . . very likely . . . not maintain the skills [related to speech and language] at the current level and possibly also regress” if she were not to be in school for five weeks in the summer of 2019 and given only one thirty-minute speech session per week for six weeks during the summer.

[REDACTED] testified as an expert in special education and autism. Ms. [REDACTED] has taught the Student at [REDACTED] since July 2018. She testified there are eight students in her classroom and eight instructors. The students have a twenty-five minute lunch period.

Ms. [REDACTED] testified the Student’s high intensity SIBs have significantly decreased in intensity, frequency, and duration since July 2018. In regard to self-hair pulling and aggression, which Ms. [REDACTED] described as the Student raising her hand and “swatting” toward another, and anxiety, Ms. [REDACTED] testified they have decreased or no longer are a problem.

Ms. [REDACTED] testified she did not see the Student’s “anxiety” in February 2018, but was told and read about it. She testified the anxiety manifested as “cowering at her peers, not wanting to go into new places . . . not trying new things,” and “she had a hard time in engaging in activities.” Ms. [REDACTED] described the Student as “happy” at [REDACTED] and able to acknowledge the presence of others.

Ms. [REDACTED] submitted a written assessment of the Student to the [REDACTED] OT to use to complete the September 2018 OT Sensory Processing Evaluation Report. Ms. [REDACTED] described the assessment as “very subjective,” requiring her to use a scale of “never,” “sometimes,” and “always,” to rate certain behaviors. When asked on the form how she would

describe the Student's handling of frustration, she indicated "a little bit more" and "handle[s] it better." In regard to the OT report indicating Ms. [REDACTED]'s assessment said the Student "never enters play with peers without disrupting the ongoing activity," Ms. [REDACTED] testified she considered the "disrupting the ongoing activity" phrase to mean entering play independently, which never or rarely happens. Ms. [REDACTED] testified she presently would assess the Student as "frequently" entering play with peers without disruption, although with "adult support." Ms. [REDACTED] testified that the Student has been able to play in the same area where peers are playing and described a time when the Student was playing with a ball nearby a peer, who was doing the same, and the Student handed the ball to the peer.

Ms. [REDACTED] testified the Student's verbal stereotypy does not interfere with her learning. She testified the stereotypy usually occurs when the Student is engaged with a reinforcing activity, such as using an iPad, or at lunch.

Ms. [REDACTED] reviewed the Student's progress at [REDACTED] from April 2018 through April 2019 in her "goal areas." In "social interaction/play," the Student achieved four of five objectives and both goals. Ms. [REDACTED] described that as "a lot of progress." She testified the Student is "looking towards her peers" and motivated "to even be around her peers[.]"

In the area of "communication," Ms. [REDACTED] testified the Student achieved four out of five objectives, but neither of her two goals. Ms. [REDACTED] testified one goal was for the Student to learn twenty mands, from a starting point of three mands. The Student learned eighteen mands with the ability to generalize those requests to different individuals. Ms. [REDACTED] testified the Student's communication "[came] a long way." In regard to the second goal, Ms. [REDACTED] testified the Student was able to label sixty-two items, generalize thirty-six labels across two exemplars, and twelve across three exemplars. Ms. [REDACTED] testified that was "a great job."

Ms. [REDACTED] testified the Student achieved her goals in “language and literacy.” She testified the Student “made a lot of progress in the ability to follow directions” and “really excelled” at showing attentiveness to challenging directions.

In “early literacy,” Ms. [REDACTED] testified the Student achieved one of two objectives, but not her goal. Ms. [REDACTED] testified the goal was for the Student to be able to label all the letters of her first name. Despite not achieving the objective or goal, Ms. [REDACTED] testified the Student made “great progress.”

According to Ms. [REDACTED] the Student achieved five of six objectives and one of two goals in “early math literacy.” Ms. [REDACTED] testified the Student was able “to match, identify, and label number 1 through 10” and identify shapes and colors, but she was not able independently to do “rope counting.”

Ms. [REDACTED] testified the Student achieved three of four objectives and met her goal in “toileting.” Ms. [REDACTED] testified that the Student failed to achieve the objective of continuously sitting on the toilet for first three to five minutes. The Student was “able to consistently void on the toilet at least once a day for 44 consecutive days.” Ms. [REDACTED] testified that when the Student arrived at [REDACTED] in February 2018, she “wasn’t voiding. She would either have accidents or she would hold it.”

In “social/emotional/behavior,” Ms. [REDACTED] testified the Student achieved her goal to decrease SIB by thirty percent.

The Student’s ETP at [REDACTED] for April 2018 indicates that she “is able to label [tact] 13 different common objects or animals[.]”³⁴ Student Ex. 36. The VB-MAPP administered at HW in April 2017 showed the Student “was able to tact 139 items or pictures tested.” Student Ex. 10.

³⁴ The ETP incorrectly lists “April 2017” as the date of this statement. The correct date is April 2018.

When asked to explain that discrepancy, Ms. [REDACTED] testified:

The lack of generalization. So, when we work on labeling things again, we work on her labelling things across different exemplars, different people. So, the generalization of skills is something that we focus on, so the transition between, you know, her coming from [REDACTED] to [REDACTED] that's where we could have seen that discrepancy. In the materials that we used, they could have been very different.

Ms. [REDACTED] testified that the Student's inability to tact at the same level when she first arrived at [REDACTED] one year later meant she had not mastered labeling that many objects.

Ms. [REDACTED] addressed the following chart that she described as depicting the Student's acquired skills as measured by the VB-MAPP at [REDACTED]

<u>Score</u>	<u>Date</u>
29	4/5/18
44.00	10/3/18
53.50	03/11/19

Student Ex. 48. Ms. [REDACTED] testified the numerical jump from twenty-nine to fifty-three and one-half is "significant progress."

Ms. [REDACTED] testified the following chart illustrates "barriers," or interfering behaviors, to the Student's learning:

<u>Score</u>	<u>Date</u>
42.00	5/4/18
28.00	10/3/18
25.00	3/11/19

Id. Ms. [REDACTED] testified the decreasing numbers illustrate the Student went from bruising herself to not bruising herself and from having "hair that was balding" to using a barrette on her bangs.

Ms. [REDACTED] opined the Student is "making great progress" at [REDACTED] specifically mentioning thriving communication, incredible interaction with peers, increased attentiveness,

and an overall change in demeanor. "I've only been working with her since July [2018], but it's just incredible to see the progress."

Ms. [REDACTED] opined that fifteen hours per week of specialized instruction would be "insufficient" for the Student based on:

Just in order to meet all of her needs, on her IEP, her goals, her objectives, to maintain those, that we're not seeing any of that regression and that we're continuing to see progress and development. You know 15 hours isn't enough to make sure that we're targeting all of these types of skills.

Ms. [REDACTED] opined the following when asked whether ESY services for four hours per week for six weeks during the summer in 2018 would be appropriate for the Student:

There would definitely be regression in her skills. Maintenance is a huge part of our program. So, making sure we are maintaining these types of skills, children with autism are known to make regressions if they're not being maintained – I'm sorry, yes, they see regressions when skills aren't being maintained. So, if there's only four hours of instruction being delivered, there's bound to be regression in those skills, because they're not having enough time to one, you know, continue – continue that progress. She's also not increasing the progress she's making.

Ms. [REDACTED] also opined that fourteen hours and fifty-five minutes per week of specialized instruction for the Student contained in the HCPS November 2018 IEP "isn't enough time to, again, work on the skills needed and to address the areas needed for her -- for [the Student] to make progress and maintain goals at the same time."

Ms. [REDACTED] also opined that four hours and forty-five minutes per week for six weeks during the summer of 2019 "is not appropriate for her. Again, with four hours of instruction, we're – you're not going to see progress in her goals. There could be a potential reduction – regression in those skills, just because there's not enough time to meet all of her needs." When opining about what to expect if "communication" were not addressed during ESY, Ms. [REDACTED] said there would be an "increase in self injurious behavior" because insufficient communication

skills led to the self-injurious behaviors and because communication skills are the foundation for the acquisition of “higher level skills.”

On cross-examination, Ms. [REDACTED] testified that the Student continues to exhibit high intensity SIB, although rarely. She testified that when the Student first arrived at [REDACTED] she was pulling out her hair and causing bruises when hitting her head. According to Ms. [REDACTED] the Student stopped pulling out her hair and bruising herself by at least July 2018. According to Ms. [REDACTED] low intensity hitting, described as placing one hand on her forehead and “tap[ping]” that hand with the other hand, still occurs. Ms. [REDACTED] also testified the Student continues to engage in vocal stereotypy and aggression, that is, attempting to make forceful contact with another, including staff. In addition, the Student continues to engage in verbal stereotypy at [REDACTED]

Mr. [REDACTED] testified that ESY was discussed at the September 2016 IEP team meeting. The September 2016 IEP indicates the Student demonstrated some regression during normal breaks in the school schedule that require “structured re-teaching.” Student Ex. 12. The IEP included four hours and fifty minutes of special and related services per week for “six-week”³⁵ from July 4, 2017, through August 10, 2017, in social foundation skills, language and literacy, physical well-being and motor development, and speech and language therapy. Mr. [REDACTED] testified that the Student resisted attending the ESY program.

Mr. [REDACTED] testified that he learned the Student “was actually exhibiting behaviors that were limiting her progress,” including self-hitting and walking away from classroom instructors, at [REDACTED] during the IEP team meeting on April 7, 2017. Mr. [REDACTED] also testified that the Student threw things, was unresponsive, and frequently walked away from her Parents at home. An FBA and

³⁵ The actual duration is five weeks and one day.

BIP were proposed at the April 2017 IEP team meeting. The Written Notice from that meeting includes the following:

█ proposes this action [FBA and BIP] in order to gather additional information regarding [the Student's] behavior and how to best support her behavioral needs. [The Student] has not demonstrated satisfactory growth/progress on IEP goals and objectives due to her increased behavioral needs. [The Student] continues to exhibit chronic issues with non-compliance and throwing objects within the classroom. [The Student] is often unavailable for instruction due to behavioral issues/needs.

School Ex. 4. The notes also indicate the Student "bangs" her head with the back of her hand when she becomes frustrated, her teeth grinding had diminished, and she had increased eye contact in the past few weeks. Mr. █ testified the team considered it "very important" for the FBA to be done. He testified he gave his consent.

Mr. █ testified the Parents were in regular contact with the Student's teacher at █ who, he testified, was upbeat and positive about the Student. He testified the April 7th IEP team meeting was "out of left field" and "not expected."

Mr. █ testified he contacted Dr. █ after the April 2017 IEP meeting for assistance and to attend a CIEP team meeting where there was to be a discussion of the Student's placement for the upcoming 2017-2018 school year. The referral document for that meeting lists the following behaviors that needed to change for the Student "to Be Successful in the Comprehensive School: (1) self-injury, (2) throwing, (3) disengagement and off-task behaviors, and (4) impaired social skills."³⁶

The CIEP meeting was held on May 31, 2017. The Written Notice from that meeting makes reference to an "elopement." Mr. █ testified the Student left the classroom, ended up in

³⁶ The referral form listed the following frequencies for the behaviors: Self injury: three to ten times per day with a five to twenty-second duration; throwing: one to fifteen times per day with an "ongoing" duration; disengagement and off-task behaviors: constant unless engaged in intensive instruction with an "ongoing" duration; and impaired social skills: daily with an "ongoing" duration.

the parking lot, and a stranger returned her to the school. Mr. [REDACTED] "second-guess[ed]" his confidence in [REDACTED]'s ability to keep the Student safe.

Mr. [REDACTED] testified the Student's teacher at [REDACTED] completed a VB-MAPP. He talked to the teacher about administering the assessment and "very clearly" remembered the following about that conversation:

[S]he told me it was late and that wasn't accidental, that she wanted to wait as long as possible, there was a way she was working and I can't remember exactly what it was, but she would get momentum going and would show her in a certain order and a certain list, she was very concerned, and expressed to me several times she was concerned [the Student] was not going to be seen as having potential and would be pigeonholed as such, and so she was trying to absolutely find a way to maximize the score to represent that, and I remember that very clearly.

Mr. [REDACTED] testified the statement on the Written Notice that the Student "has made progress with toilet training" was not accurate. He testified that the May 2017 progress report related to the toileting said the Student was not making sufficient progress to meet the goal. Mr. [REDACTED] also denied the Parents made the statement contained in the Written Notice from the CIEP team meeting that said they "shared that they have seen growth with [the Student] over the past 6 months." He testified he was in the Student's classroom seven or eight times and did not "remember seeing her demonstrate what was being said that was demonstrated."

Mr. [REDACTED] testified that the team agreed that the [REDACTED] program at [REDACTED] was an appropriate placement for the Student at the CIEP team meeting. He testified about the initial IEP team meeting at [REDACTED] on September 25, 2017. He recalled that he and Dr. [REDACTED] pushed for more challenging goals, "for achievement to be higher." Mr. [REDACTED] also testified that the FBA discussion from the prior year "didn't seem to be a carryover" into the September meeting. He testified, "I certainly felt it was necessary that we revisit that [the FBA], but it didn't carry forward [from

[REDACTED]" The Written Notice for this meeting states:

[The Parents] shared some concerns with regards to self-injurious behaviors by [the Student] such as hitting herself in the forehead or side of the head with her fist. The team discussed the possibility of moving forward with a “determine the need to assess” meeting specifically regarding [an FBA]. [The Parents] will continue to talk with Ms. [sic] [REDACTED] and inform the team if they would like the meeting to be scheduled in the near future or a bit later as part of the reevaluation process that will begin in the spring of 2018 at the latest. [REDACTED] School will invite the school psychologist in attendance at that meeting.”

The next IEP team meeting was on October 11, 2017.³⁸ Mr. [REDACTED] testified that he was surprised the proposed IEP included thirteen hours and twenty minutes of “classroom instruction.” He testified Dr. [REDACTED] took the position that the listed hours of instruction were insufficient for “what [the Student] needs.” Mr. [REDACTED] testified “during the entire time”³⁹ the Student’s behavior “became much more intense,” describing as “very scary” her isolation at home, testifying she was crying for hours while lying on a rug, hitting herself in the head when the Parents tried to console her, cowering when her two sisters approached her, and “pulling away” from him.

Mr. [REDACTED] testified his wife at [REDACTED] on November 14, 2017, and saw a classmate “attacking” the Student for what seemed like “at least fifteen minutes,” causing a scratch on her forehead. He described the incident as a “targeted aggression that took the efforts of a room full of adults to stop.”⁴⁰ Mr. [REDACTED] also testified [REDACTED] told his wife that the classmate had “made similar [past] attempts.” Mr. [REDACTED] testified his wife did not want to return the Student to [REDACTED] after this incident. Mr. [REDACTED] requested [REDACTED] move the classmate or the Student to a different classroom.⁴¹

³⁷ No school-based psychologist attended this September 25th IEP team meeting. This meeting lasted for about two hours before it was adjourned without finalization of the IEP. As addressed above, the next IEP team meeting occurred seventeen days later.

³⁸ The school psychologist attended this meeting.

³⁹ In the context of this testimony, it seems “during the entire time” meant the entire time she was at [REDACTED], although he was responding to a question about “the next four weeks” after October 11, 2017.

⁴⁰ The incident occurred during American Education Week.

⁴¹ In an email to Mr. [REDACTED] Mr. [REDACTED] said the Student was “cowering in fear” in response to the approach of her siblings. He described the cowering as a new behavior over the past month. He also told Mr. [REDACTED] that the Student would not return to [REDACTED] until it developed a written plan to keep the Student safe.

The IEP team met on November 27, 2017, to address the Parents' concerns about the "attack." At this meeting, the Parents learned the same classmate had made "three previous attempts at aggression toward [the Student]" in late October and early November 2017. Based on the Written Notice from this meeting, the School proposed the following to prevent a recurrence: (1) consultation with certain staff to discuss "best practices to address student behaviors; (2) assign "familiar staff," not substitutes, "to support students exhibiting escalating behaviors"; (3) ensure safe distances between students, and (4) use blocking and "ignoring aggressive behaviors" so as not to reinforce them. In addition, the IEP team indicated its "concern" that the Student's "cowering" and "social avoidance" was "associated with this behavior incident and prior aggressive attempts by this student." Student Ex. 22; School Ex. 8.

Mr. [REDACTED] testified he "convinced" his wife to give [REDACTED] "another chance." The Student returned to [REDACTED] on November 28, 2018. On December 19, 2017, the same classmate "grabbed the back of [the Student's] neck." Mr. [REDACTED] testified the Student reacted at home by withdrawing from the family.

On January 2, 2018, the IEP team met to review a BIP for the Student. The BIP targeted self-hitting (SIB), seventeen times per day, and vocal stereotypy, an average of twelve times every ten minutes. Based on the Written Notice from this meeting, Mr. [REDACTED] discussed an increase in the Student's aggressive and tantrum behavior at home; school personnel commented the Student hits staff when they "blocks" her SIB; and Ms. [REDACTED] indicated she had observed the self-stimulatory behavior—rubbing her genitals against her diaper. The IEP team decided to complete an FBA on these behaviors, aggression and self-stimulation. Ms. [REDACTED] conducted the FBA from January 3 to January 26, 2018. She also collected additional data on the self-hitting and vocal stereotypy, which showed the self-hitting occurred an average of eighty-nine times per day and stereotypy occurred an average of eighteen times every ten minutes.

On February 5, 2018, an IEP team meeting convened to discuss the results from the second FBA. Mr. [REDACTED] was “concerned” by the increase in self-hitting and vocal stereotypy. He recalled [REDACTED] indicating at the meeting that those behaviors had recently improved with an increase in BCBA consultation in the classroom. Mr. [REDACTED] testified he raised concerns about the Student’s safety, her lack of progress, that her problem behaviors had “regressed quite a bit,” and the need for twelve months of educational programming. Mr. [REDACTED] testified [REDACTED] rejected the Parents’ request to include additional BCBA consultation time and a twelve-month education program in the Student’s IEP.

At the February 2018 IEP team meeting, the Parents informed [REDACTED] they intended to remove the Student from the HCPS, enroll her at [REDACTED] and expected the HCPS “to fund that placement.” Mr. [REDACTED] explained the Parents’ reasons this way:

[I]t felt like we were losing our daughter. And I said that . . . every day [the Student] was pulling away into her own little world, she wouldn’t let us physically nearby to interact with her, this was on a continual basis, and this was a fairly sudden shift, because it was not that way before [We] had a close relationship with her physically, we were . . . able to make progress with her at home. I mean, we certainly had play time with her, we certainly had routines, and this was, these were all gone. I thought she was, I was afraid we were going to lose her.

Mr. [REDACTED] testified he has seen a big difference in the Student since her enrollment at [REDACTED]. He testified it took only about three weeks for the Student to appear happy at school. He recalled an incident, after the Student had been at [REDACTED] for about five weeks, when the Student was physically affectionate with him. Mr. [REDACTED] also testified that the Student has gained weight and is healthier; her hair has grown back; she interacts and plays with her siblings; and she no longer wears diapers, except “pull-ups” at night.

On cross-examination, Mr. [REDACTED] agreed that the program at [REDACTED] was an early learners program for four half days per week. He testified that the Student’s SIB began in about April

2017 and the hair-pulling and intense “lack of engagement” began in the fall of 2017. He also testified the Student’s teacher at [REDACTED] told him hair pulling was occurring there.

In regard to the discussion he had with the teacher at [REDACTED] about the VB-MAPP, Mr. [REDACTED] agreed with how counsel summarized his testimony: “[Y]ou said she was waiting until the end of the year so that she could give [the Student] an assessment and [the Student] would score well on it[.]” He agreed that the teacher did not say the results would not be reliable or valid.

Mr. [REDACTED] testified that he read every document the School sent to his home. He agreed that had he noticed a mistake in a document he would have contacted the School. In regard to the statement in the Written Notice from the IEP team meeting on May 31, 2017, that says “[The Parents] shared that they have seen growth with [the Student] over the past 6 months,” Mr. [REDACTED] testified he could not remember making that statement “but I’m sure I did. If that’s what it says I said, I’m sure I did.” He agreed he and his wife said that. He testified “I’m sure it is,” when asked whether the statement in the Written Notice that the Student had begun to interact more with her sister over the last six months was true. Mr. [REDACTED] also testified he was sure the statement that the Student was recently sleeping through the night was true.⁴²

In regard to [REDACTED] Mr. [REDACTED] testified that he assumed the Student would receive ABA and special education services “all day long at [REDACTED]” Mr. [REDACTED] also testified that, after the Parents had returned the Student to [REDACTED] in January 2018, after the second “attack” by the classmate in December 2017, the classmate had been moved to a different classroom. Mr. [REDACTED] also acknowledged that at the February 2018 IEP team meeting where the school members said there

⁴² On cross-examination, Mr. [REDACTED] acknowledged the progress report from [REDACTED] showed that the Student was making progress in her educational program. On re-direct examination, he testified the Parents did not see the progress at home. Mr. [REDACTED] also testified he recalled some Written Reports contained information that he considered not to be true. As examples, he testified that he had talked about his concerns regarding the Student’s safety at [REDACTED] during the February 5, 2018, IEP meeting, but the Written Notice from that meeting mentions nothing about that. He also pointed out the Written Notice from the November 27, 2017, IEP team meeting lists November 2, 2017, as one of the three dates that the Student’s classmate attempted to grab her, but [REDACTED]’s attendance records show that she was not in school that day.

was not enough data to support a twelve month program, they also said that ESY could be revisited if in the next few months there was supportive data.

Mr. [REDACTED] testified as a rebuttal witness. He testified that he told [REDACTED] about the squirt bottle because the Student loves water and her mother uses a squirt bottle to wet the Student's hair and she loved the fans at Disney that mist water. Mr. [REDACTED] testified [REDACTED] used the bottle to mist the Student at school. He testified he also uses it during bedtime.

Mr. [REDACTED] also testified he did not recall getting any emails from Ms. [REDACTED] related to Written Notices. He testified he received some from a different person, but those did not mention what to do if he disagreed with their content. He also testified he could not imagine anyone spending time with the Student and not noticing she was missing hair. He presented a video he said his wife recorded in February 10, 2018. It shows a bald spot on the front right side of the Student's scalp. Mr. [REDACTED] testified he did not know how much of the bald spot was attributable to hair pulling at home versus at [REDACTED]

Summary of the School's Witnesses' Testimony

[REDACTED] testified as an expert in adapted physical education and autism. She works full time for the HCPS but spends three days per week at [REDACTED]. She taught the Student for forty-five minutes each of two days until the end of December, when she went on maternity leave. Ms. [REDACTED] uses the county's physical education curriculum, but "significantly modifie[s]" it to fit the needs of the students at [REDACTED]. When she teaches, there is "adult support" in the class and "not just physical education is happening, there's a lot of interventions that are going on at the same time."

Ms. [REDACTED] described the Student as "a very engaging kindergartner" and "somewhat verbal," meaning "scripting [was] going on," but not "a lot of it was purposeful to our

curriculum.” In regard to changes the Student made while at [REDACTED] Ms. [REDACTED] testified: “There were certainly some behavioral changes, but I would not say there was whole child changes, kind of.”

Ms. [REDACTED] also testified it appeared that the Student initially could “scan” her “teaching space.” Developing the Student’s social interactive skills was “a piece [Ms. [REDACTED]] wanted to “expand[.]” She testified the Student made progress in that area. Increasing communication was also an area of need. Ms. [REDACTED] testified the Student was unable to express preferences for items. Ms. [REDACTED] testified the Student learned to choose what movement she wanted to watch from an array of exercise options on an iPad. Ms. [REDACTED] also testified the Student showed “increased compliance with a lot of things” and a decrease in the use of prompts.

Ms. [REDACTED] testified that she did not see the Student pull her hair at [REDACTED] or see a bald spot. She testified she saw the Student hit her head, which increased over time in response to the use of blocking to stop the self-hitting. Ms. [REDACTED] clarified the hitting was “tapping” her head, but with “various levels of intensity.” She testified that “around November . . . there was a pretty clear guidance” that we were going to start blocking that [the self-hitting], and as soon as we saw blocking techniques come into place, we saw the intensity [and frequency] . . . increase[.]”

Ms. [REDACTED] testified about an Adapted Physical Education Ecological Assessment she completed on the Student at [REDACTED] in September 2018. To collect data, Ms. [REDACTED] observed the Student in a physical education class for about an hour and forty-five minutes. She described the Student as “having a difficult time in physical education that day, which impacted . . . the observation that I got.” She saw the Student exhibit significant interfering behaviors, including “difficulty entering the gym,” running toward the door when verbal instruction began, requiring

“continuous adult support to engage in any of the activities,” dropping to her knees in response to instructional demands, hair pulling, screaming, and crying.⁴³

Ms. [REDACTED] also testified the physical education she observed at [REDACTED] was not modified or individualized to the Student, explaining there was nothing she “could access independently,” “seemed to enjoy doing,” or that “she was able to use any kind of communication.” She contrasted this with the adapted physical education at [REDACTED] as follows:

[O]nce we saw that she was having barriers that, she would express preference that was not necessarily physical education derived, so sometime you would say hi, [the Student’s name], and she would say Mickey Mouse,⁴⁴ like she possibly was requesting, but it was not necessarily appropriate to what we were doing. Then we were looking to really narrow and offer her something that was visually engaging that she would be able to interact with, and that was preferential for her. We also had really talked about when was a good time to really use reinforcement and when was a good time to offer her a break. Now the classroom is doing verbal behavior, so they also have a variable schedule and each child is individual, but we did have a conversation with the classroom staff in terms of okay, here’s kind of the natural pauses and the natural breaks, and when can we offer her rewards and reinforcers that are not going to break our flow and are going to offer her the least amount of interruption to the presentation that we’re doing while also being reinforcing to her.

Based on her experience working with the Student, working with other students with similar profiles, and her knowledge of [REDACTED] Ms. [REDACTED] opined that the Student made, and can make, appropriate progress at [REDACTED] “in light of her circumstances.”

During cross-examination, Ms. [REDACTED] acknowledged she has no formal training in ABA. She acknowledged the Student’s IEP at [REDACTED] contained no adapted physical education goals or objectives. She also acknowledged she did not collect any data or write any reports about the Student’s progress.

[REDACTED] testified as an expert in OT and autism. She is the only OT assigned to [REDACTED]

Ms. [REDACTED] testified she provided direct OT services to the Student. She worked on the Student’s fine and visual motor skills and consulted in the classroom. Ms. [REDACTED] testified that one

⁴³ Ms. [REDACTED] contrasted the hair pulling, screaming, crying, and the non-compliant dropping to her knees unfavorably to what she observed of the Student at [REDACTED]

⁴⁴ Anything Mickey Mouse was a reinforcer for the Student.

of the Student's instructional aides would be present during the OT sessions to allow for "carryover and implement any behavior protocol she might have and I could also give feedback on what I'm doing."

Ms. [REDACTED] "mostly" saw the Student individually and, at times, worked with the Student in the classroom to model instruction that would facilitate OT objectives. According to Ms. [REDACTED] the goal of the consultation was to suggest ways to improve the Student's "self-regulation and ability to attend and focus throughout the day" by modifying the environment.

Ms. [REDACTED] described the Student's progress in OT as follows:

[S]he did make progress in her ability to attend and focus during adult directed fine motor activities, which is something you certainly need to do, it's a foundational skill needed to then improve off that skill. She would participate through my sessions, she would come and she would find her motivator for that day. We would play with that for a while and then I would incorporate it into the demand task and then she would work on her skills at the same time.

Ms. [REDACTED] testified the Student had made progress in her OT goals and objectives while at [REDACTED]

Ms. [REDACTED] testified that she reviewed [REDACTED]'s Occupational Therapy Sensory Processing Evaluation Report from September 2018. The report recommended the Student receive one hour of OT services per week. Ms. [REDACTED] testified that [REDACTED]'s October 2018 IEP included that amount of OT service.

In November 2018, Ms. [REDACTED] prepared a Sensory Diet for the Student, which she described as follows:

[A] means of providing proactive sensory input to help a student regulate their sensory processing to, in [the Student's case] maintain an optimal level of arousal, alertness, increase attention, and tolerate sensations and situations that might be challenging, so that she can transition without a lot of stress and/or help decrease some behaviors that might manifest because of those issues, sensory issues.

Ms. [REDACTED] opined the Student would have made progress if she had remained at [REDACTED] for the entirety of the school year and would have achieved her OT goals. She opined the proposed ESY services at [REDACTED] were appropriate and sufficient to prevent regression in the area OT.⁴⁵

On cross-examination, Ms. [REDACTED] testified that the narrative describing progress on two consecutive quarterly reports related to toileting compared to the general statement on the report of “making sufficient progress to meet goal” looked to her as if the Student “did not maintain [progress] and [there was] a regression from earlier attainment on all the objectives.” Ms. [REDACTED] seemed to testify the general language of progress was a function of the computer program used to generate the report. Similarly, Ms. [REDACTED] agreed the narrative related reducing the Student’s SIB from January to February “sound[ed]” like there was a significant regression because the narrative indicates an increase from seventeen to 108 times daily, despite the general description that the Student was making sufficient progress to meet the goal. She also agreed that was also true in the area of vocal stereotypy.

[REDACTED] testified as an expert in speech and language pathology and autism. She testified communication competence is the school-wide goal at [REDACTED]. She described communication as the “ability to be able to express your wants, your needs, to be able to comment, to be able to ask questions, answer questions, follow simple verbal directions.”

Ms. [REDACTED] provided six twenty-minute speech and language sessions per month to the Student and consulted twice weekly with the classroom teacher about the Student’s communication needs. Ms. [REDACTED] also testified she works in the ESY program at [REDACTED].

Ms. [REDACTED] testified she provided services to the Student at a small table in a group of three to four students. Ms. [REDACTED] testified a teacher and instructional aide were with her during the sessions to provide “one-on-one support.” According to Ms. [REDACTED]’s testimony, the Student

⁴⁵ The October 2017 IEP did not include OT services as part of the ESY program for the summer of 2018.

took “a couple of weeks” to establish a routine. She described the Student as “willingly” sitting next to her and “very attentive.” Ms. [REDACTED] testified she used reinforcement, modeling, and pictures to work on “greetings,” following “simple” directions, labeling things, and making requests. “It was pretty easy for me to keep her engaged.” In regard to social awareness, Ms. [REDACTED] testified the Student initially did not engage, but she described the following that occurred maybe in January 2018, and it surprised her:

[I]t was a small group, with just her and another little boy, and they were holding hands. And she was looking at him – now, it wasn’t – I’m not going to say that it was a long period of time. But I probably had a minute or two where they were playing with each other’s hands and engaging with each other.

Ms. [REDACTED] testified that she never saw the Student cower, withdraw, or isolate from others during her sessions or in the classroom. She testified she never saw her pull her hair or see a bald spot. She testified she never heard the teacher or anyone, except maybe the Parents at an IEP meeting, comment that the Student was pulling her hair. Early in the school year, she saw the Student lightly “tapping” the back of her hand to her forehead, but that subsided in the sessions “once she realized who I was.”

Ms. [REDACTED] testified the Student made progress on her speech and language goals. She reviewed the progress notes on communication pointed out the Student made regular progress on each of her objectives. Ms. [REDACTED] testified the Student made progress at [REDACTED] because she was engaging more and increasing her ability to label and follow instructions with less assistance. She opined that the Student would have achieved her communication goal had she remained at [REDACTED] for the full year. Ms. [REDACTED] also testified that she would have provided the Student ESY services during the summer of 2018. She opined that the ESY services would have been sufficient to prevent the regression of skills.

Ms. [REDACTED] reviewed the speech and language progress report from September 2018 at [REDACTED]. She agreed it was “consistent” with what she observed from the Student at [REDACTED]. Ms. [REDACTED] opined that [REDACTED] was an appropriate placement for the Student because “she was making progress”; “it was appropriate to meet her needs”; and “the supports were in place.”

Ms. [REDACTED] also reviewed the Student’s present levels of functioning related to communication in the October 2017 IEP. She compared those levels to the Student’s level of functioning when she left [REDACTED] in February 2018. She testified there was progress because the Student was able to request specific items that she wanted (versus not communicating in a functional way), experienced an iPad as a reinforcer (versus not finding an iPad “consistently works for her”), and interacted with classmates.⁴⁶

On cross-examination, Ms. [REDACTED] agreed that she had no baseline data on the Student’s level of performance related to communication. She testified: “For me she was new [at the start of [REDACTED]]. So I had her at zero percent.” Ms. [REDACTED] testified she treated the November 2017 progress report like a baseline and relied on her “clinical opinion” and the Student’s previous IEP to establish the percentage of success contained in the goal.⁴⁷

Ms. [REDACTED] describe the Student’s starting communication skills at [REDACTED] as verbal to the extent that she could request a preferred object using a one word label, but most of her communication was stereotypy and scripting from videos she liked to watch, and she needed cues and extra assistance to follow directions. Ms. [REDACTED] testified that when the Student left [REDACTED] in February 2018, “she didn’t see as much growth in verbalizations as much as I did her ability to attend and sit for longer periods of time and stay engaged.”

⁴⁶ On re-cross-examination, Ms. [REDACTED] acknowledged a May 2017 report of progress in language and literacy from an amended September 2016 IEP reported the Student was able to request fourteen items or activities, demonstrating functional behavior. The same progress note indicated she could “tact” 141 people, objects, or pictures.

⁴⁷ The single communication goal sets eighty percent achievement in greeting others, imitating words and phrases, demonstrating understanding of linguistic concepts, and consistently making requests for preferred items or actions, using a variety of methodologies.

Ms. [REDACTED] testified she continued to provide services to the Student and the classmate who “attacked” her at the same table after the first incident in November 2017, although they sat at different ends of the small table.⁴⁸

Ms. [REDACTED] testified the notation on the October 2017 IEP, where it states “no” communication goals during the ESY, was a clerical error.

Ms. [REDACTED] acknowledged that the transcript from the February 5, 2018, IEP meeting shows the [REDACTED] psychologist and the teacher briefly mentioned hair pulling.⁴⁹

[REDACTED] testified as an expert in school psychology and autism for the HCPS.⁵⁰ She testified she observed the Student at [REDACTED] “at least ten times.” During the observations, she did not see any cowering nor did anyone from [REDACTED] report it to her.

Ms. [REDACTED] testified she attended the October 2017 IEP team meeting because the Student’s teacher had reported some concerning behavior. She testified the team members addressed two behaviors: (1) hitting or tapping her head with the back of her hand and (2) vocal stereotypy.⁵¹

Ms. [REDACTED] testified she completed an FBA⁵² of the targeted behaviors by using classroom observation, data collection, and using questionnaires. She testified that the staff in the [REDACTED] program at [REDACTED] “typically collect episodic data” on a targeted behavior, meaning an episode can include a number of rapidly occurring behaviors. The duration refers to the length of time the student engages in a targeted behavior but the behaviors within that time are one episode. Ms. [REDACTED] testified that when the staff blocked or redirected the Student during

⁴⁸ On redirect examination, Ms. [REDACTED] testified the Student did not cower while at the table and appeared unaware that he was there.

⁴⁹ The teacher said it was seen “a few times” and “it hasn’t been very active,” and the psychologist said “[w]e’ve also started to see some hair pulling.” School Ex. 65.

⁵⁰ The transcript incorrectly spells Ms. [REDACTED]’s name as [REDACTED].

⁵¹ Ms. [REDACTED] described stereotypy as “vocal noises or words that are not functional in nature.”

⁵² Ms. [REDACTED] described an FBA as an analysis of a student’s behavior to identify its antecedents to determine its function. She testified the Parents gave consent to perform the FBA in October. She testified an FBA is required to be completed within sixty days and any subsequent BIP must be completed within thirty days.

self-hitting that could result in the Student's crying or mild "aggressive" behavior toward the staff. Ms. [REDACTED] determined the principal function of the Student's self-hitting was "to escape task demands," which is negatively reinforcing.

Ms. [REDACTED] also testified the data showed that the Student's targeted behaviors increased after she had not been in school for some time, and she "performed best" when "she was in school multiple days in a row and had that consistent exposure to the routines and strategies within her classroom."

Ms. [REDACTED] testified that vocal stereotypy is a frequently occurring behavior and "intrinsically motivating." The data on this behavior was collected using "time sampling," designating a time period and recording the occurrences. Ms. [REDACTED] described the impact of this behavior on the Student's learning: "[I]t was interfering with the flow of her instructional settings due to the fact that I think she was still attending. She didn't need the prompts to be repeated. But it would create a delay between the prompt and her response, yes."

There were two FBAs done at [REDACTED] Ms. [REDACTED] the results from the first FBA, which addressed self-hitting and stereotypy, were discussed at the IEP team meeting in January 2018. The BIP for those behaviors was implemented on January 3, 2018.⁵³ At that meeting, the IEP team discussed concerns about two additional behaviors: aggression toward staff and self-stimulation. [REDACTED] conducted an expedited FBA of those behaviors. The results from this FBA were discussed at the IEP team meeting in February 2018. The data for the second FBA was collected from January 3 to January 26, 2018. Ms. [REDACTED] testified data related to the original targeted behaviors was also collected during the second FBA.

Ms. [REDACTED] testified she never saw the Student pull her own hair at [REDACTED] She was directed to her statement in the transcript from the February 2018 IEP meeting saying "[w]e've

⁵³ Ms. [REDACTED] testified that before the implementation of the BIP in January 2018, the Student received behavioral supports in the classroom.

also started seeing some hair pulling.” Ms. [REDACTED] testified that reference was to the Student attempting to pull the hair of staff.

Ms. [REDACTED] testified that the Student’s aggression was first observed at [REDACTED] in the beginning of the school year and not considered a problem, but it increased after the implementation of the original BIP. Ms. [REDACTED] described the phenomenon of a problematic behavior increasing after a BIP is implemented as common:

So, actually, that’s pretty typical, that when we put forth a [BIP], we often see what we kind of call a burst in behaviors. So – the reason for that is because we are trying to – we are no longer re-enforcing those behaviors that had previously been reinforced. So, just for an example, if a student would scream to get attention and we’re no longer giving them attention for screaming, they might scream longer, louder. Because, previously, that behavior used to get the reinforcement, which – that they wanted, which in that case would be attention. So, if they weren’t getting it, they might demonstrate either other behaviors to get attention or just an increase in the variability or intensity of – of the behavior that we’re trying to decrease.

The second FBA showed the following related to self-hitting:

<u>Frequency of Behavior</u>	<u>Duration of Behavior</u>	<u>Other</u>
Average 89 times/day	1-2 seconds	Range: 2-395 times/day ⁵⁴

Ms. [REDACTED] testified the staff used “clickers” to count each occurrence of the self-hitting (called frequency counting) rather than count by episodes, which was the method used to collect the data during the original FBA.

The second FBA showed the following related to vocal stereotypy:

<u>Frequency of Behavior</u>	<u>Duration of Behavior</u>	<u>Other</u>
Average 18 times/10 Min. (118 times/hour)	1-15 seconds	Blank

⁵⁴ Ms. [REDACTED] testified the range indicated the number of times the behavior occurred during a day.

This FBA also included the following data for aggression:

<u>Frequency of Behavior</u>	<u>Duration of Behavior</u>	<u>Other</u>
Average 9 times/day	1-3 seconds	Range: 1-56 times/day

This FBA/BIP included the following data for self-stimulation:⁵⁵

<u>Frequency of Behavior</u>	<u>Duration of Behavior</u>	<u>Other</u>
Average 6 times/day	five seconds-5 minutes	Blank

Ms. [REDACTED] testified the initial BIP had been used for “about twelve days” before the Parents withdrew the Student from the HCPS. The revised BIP was never implemented.

Ms. [REDACTED] testified the frequency of self-injury and vocal stereotypy during the use of the BIP was inconsistent, meaning there were high rates on some days and low rates on others. There was initially a “slight increase.” “I think there was a spike in her behavior, but I observed that [the Student] was beginning to respond to the interventions that were in place.”

Ms. [REDACTED] testified that she attended the November 2018 IEP team meeting. Ms. [REDACTED] recalled the [REDACTED] staff reporting vocal stereotypy was occurring at [REDACTED] but not interfering with instruction, and self-stimulation was “rare.” Ms. [REDACTED] testified that what [REDACTED] reported in its BIP was “pretty similar” to what [REDACTED] had seen.

Ms. [REDACTED] opined that [REDACTED] was, and would be, an appropriate placement for the Student.

On cross-examination, Ms. [REDACTED] testified that she is the only psychologist assigned to [REDACTED] and spends three days per week there. Ms. [REDACTED] reviewed exhibits from an IEP team meeting in April 2017 and a CIEP team meeting in May 2017, and agreed that if the Parents had consented to a FBA and it was in development “somewhere between April 7 and May 31,” it should have been completed within ninety days. She also explained:

⁵⁵ Ms. [REDACTED] testified this behavior was targeted because it was considered socially inappropriate.

And, typically, there's oftentimes when student come in with [an FBA] or [BIP] from a different setting that we would re-do it in our setting, due to the fact that it is a different setting. And in this situation, a different school day, a different environment, behaviors might be different. For example, we weren't seeing as much of the throwing and the non-compliance. But we definitely were seeing the self-injury.

In comparing the data on self-injury collected at [REDACTED] in May 2017 with the data on self-injury collected at [REDACTED] between October 11 and November 14, 2017, Ms. [REDACTED] agreed the Student's self-injury increased from an average of three to ten times per day in May 2017 to an average of seventeen times per day between October and November 2017. However, Ms. [REDACTED] pointed out that the school day at [REDACTED] was two and one-half hours long, and the school day at [REDACTED] was six hours.

Ms. [REDACTED] testified the data on self-hitting collected during the second FBA was collected by the incident, not by the episode. She agreed the document does not directly explain that change to the method of collecting data, but she testified the listed duration—from one to two seconds—substantiates the change. She agreed how data is collected during an FBA is important information for parents to have.⁵⁶ She testified that the Student's teacher knew the data collection during the second FBA was by frequency.

Ms. [REDACTED] testified that during the data collection from January 3 to 26, 2018, for the second FBA, the Student's behavior in self-hitting and vocal stereotypy began to improve. She explained that the expected spike in those behaviors occurred, but after that there were days of relatively few instances. Because the total count is an average score, she explained the days on which there was a very large number of incidents substantially increased the average

⁵⁶ Ms. [REDACTED] was directed to the transcript of the February 5, 2018, IEP team meeting, and noted she stated data collection for the second FBA, at least in the context of the discussion of stereotypy: "We are going to be more like episodic data in the future."

occurrence.⁵⁷ She testified the averaging of the total score ended up masking the observable improvement.

██████████ "oversee[s]" several ██████████ programs, including at ██████████. She testified as an expert in special education and autism.

Ms. ██████████ described ██████████'s ██████████ program as "our ABA based program for students who require training in functional communication and have deficiencies in their communication." She testified ABA uses a unique language to describe aspects of functional communication, such as "mand" and "tact." She testified most students in ██████████ programs have autism.

According to Ms. ██████████ ██████████ at ██████████ began in 2016. She testified the process of developing the program was multidimensional, with staff hiring and development "a huge piece of it." The ██████████ program employs "teacher specialists," described by Ms. ██████████ as "very similar to a mentor teacher," who understand verbal behavior and ABA. The ██████████ ██████████ program has two teacher specialists, one BCBA, and a consultant BCBA.

Ms. ██████████ testified ██████████ is a separate day school exclusively for students with disabilities.

It is for students who have not shown any desire to interact with their general education peers or their peers or have not shown any way of taking anything from modeling of peers. And our students at ██████████ tend to progress at a slower rate than our students in the ██████████ program in a comprehensive school.

Ms. ██████████ described the ██████████ program at ██████████

The primary classroom is for our students in kindergarten, first, and second grade. And . . . [i]n that program, it is a one-to-one setting. So, one teacher and as many para-educators are needed to make sure that it is a one-to-one setting. . . . the students are expected to participate in four IST's which stands for intensive structured teaching which is target on those IEP goals and verbal behavior.⁵⁸ In

⁵⁷ For example, the average related to self-hitting was based on a range of two to 395 incidents per day. Student Ex. 29

⁵⁸ Ms. ██████████ described that the students in the ██████████ program have a "probe sheet" that lists the skills that are being addressed in that week. The instruction begins with a "cold probe" to assess the student's ability independently to demonstrate skills. That is done each day because if a student independently exhibits a skill for three consecutive days, it is considered "mastered."

addition to the IST's, we have two NET sessions which stands for natural environment teaching.⁵⁹ And that is [to] support the students a mastery of skills and goals learned in IST to help them generalize. Our students also have access and visit the sensory room. They participate in music. They participate in art. And they participate in PE [physical education] and media.

Ms. [REDACTED] testified that ABA is a "focus" at [REDACTED] and it is "incorporated throughout the whole day by anyone who is there."⁶⁰ Ms. [REDACTED] testified that students generally arrive between 8:45 and 8:50 a.m., and the students begin their "unpacking routine and toileting scheduling and all that." This time is "extremely structured" and "[i]t's very broken down, very discrete types of skills broken down throughout that morning so that students learn[] [t]he independence of coming into school in order to become an independent learner."

Ms. [REDACTED] attended the Student's CIEP in May 2017. She testified the Student attended the ESY program in the summer before enrolling at [REDACTED]. Ms. [REDACTED] testified the ESY program ran for seventeen school days of which the Student was present for ten.

Ms. [REDACTED] testified she attended the IEP meeting for the Student on October 11, 2017. The purpose was "to complete the annual review . . . and develop a new IEP . . . and to approve the FBA." Ms. [REDACTED] did not recall that the Parents or Dr. [REDACTED] objected to any part of the IEP. She testified the services in the IEP are related to the Student's goals. Ms. [REDACTED] also testified the Special Consideration and Accommodations section of the IEP includes supplemental services provided to the Student on a daily basis. Ms. [REDACTED] testified the October 2017 IEP provides for ESY services. She testified the ESY program could "absolutely" be revisited if a student's needs changed over time.⁶¹

In regard to the Student's progress at [REDACTED], Ms. [REDACTED] addressed the phrase "making sufficient progress to meet goal" that frequently appears on the evaluation part of the IEPs. Ms.

⁵⁹ Ms. [REDACTED] described NET as "taking skills that are mastered in IST and generalizing those into play-type of settings or within the environment in the school."

⁶⁰ Ms. [REDACTED] described the early learner program at [REDACTED] as a "baby" [REDACTED] program.

⁶¹ Ms. [REDACTED] testified that eighty-five percent of the staff at [REDACTED] so teachers in the ESY program.

█████ explained the computer program provides four options: (1) achieved, (2) making sufficient progress but not achieved, (3) not making sufficient progress, or (4) skill not introduced.

Ms. █████ testified the Student was making “adequate” progress at █████. She was asked to explain the entries from November 2017 and February 2018 on toileting training. The November entry says the Student pulled down her pants for toileting two times per session on **three** out of five consecutive trials, with specific prompts. The February entry says the Student pulled down her pants for toileting two times per session on **two** out of five consecutive trials, with the same prompts. Ms. █████ testified that does not indicate regression because

the way the progress reports are written, they’re based on the base-line data and not the previous progress report. And so, we’re not comparing the previous progress report. It’s the base-line data. And so, according to the teacher, she was making adequate progress . . . based on her baseline data.

Ms. █████ testified this decline could be attributed to an interfering event, such as the Student not having reported to school on time and missing the “morning routine” and causing a “break in training.” Ms. █████ testified a downward trajectory in skill from one report period to the next does “not at all” indicate a regression because it is measured against the baseline. She testified the decline would mean the student was not demonstrating the skill as frequently “but we still have time [one year] for her to demonstrate that independently.”

Ms. █████ testified she remembered the Parents gave two reasons they decided to remove the Student from the HCPS and enroll her at █████ (1) the IEP did not provide a twelve-month program and (2) they wanted BCBA consultation three times per week. Ms. █████ testified the HCPS offered additional support one time per week by a “teacher specialist in consultation with the BCBA.” She opined that was appropriate. In regard to the twelve-month program, Ms. █████ testified she told the Parents that the HCPS needed “to see data to

support” that request “especially given the fact that [the Student] had not attended all of her ESY sessions the year before.”

Ms. [REDACTED] testified the IEP meeting in November 2018 was to develop a new IEP based on recently performed assessments of the Student. Ms. [REDACTED] testified the Parents and Dr. [REDACTED] were in agreement with the IEP—“pending updated phonological awareness goals and objectives as well as PT [physical therapy] additions”— except for the lack of BCBA support, a twelve-month program, and placement at [REDACTED].⁶²

Ms. [REDACTED] opined, based on her expertise and knowledge of the Student and [REDACTED], that the IEP for the 2017-2018 school year was appropriate because

We have the program in place that she requires. She requires an ABA program. She requires specially designed instruction in those specific areas outlined in her IEP. She requires the most at least prompt hierarchy, the errorless teaching procedures. She requires a program with a staff that who have the knowledge and understanding of applied behavior analysis and shaping of behaviors and that collection piece in reviewing her program. We have the supports in place with in the [REDACTED] program at [REDACTED] school. The education is there for our staff.

Ms. [REDACTED] also opined, based on her expertise and knowledge of the Student and [REDACTED] that the IEPs developed for the 2018-2018 school year is appropriate for the Student given her circumstances because:

of the methodology that we use. That would have given her time to come in and be comfortable with the environment. Within her IEP, it does talk about how she struggles with transitions. And so, once she’s comfortable with her environment, then she would’ve demonstrated the skill. And she would have - - she would’ve made significant gains. From her history in the Early Learners, [the teacher] . . . had explained that when her attendance was more regular in the Early Learner program that she made steady gains in the Early Learner program. And we saw the same for [the Student].

⁶² The State slightly revised the approved IEP form in July 2018. There was a small change to the least restrictive environment section. The November 2018 IEP uses the revised form; lists zero enrollment in general education for the thirty-minute per week of total school time, which she would receive outside of general education.

On cross-examination, Ms. [REDACTED] testified that the section that says "Student in Crisis" on the referral form to a CIEP meeting appears that way on every such referral for students who age out of the Early Learner's program or for some other reason.

When asked what the Student's "baseline" was for the goal related to toileting at [REDACTED] Ms. [REDACTED] reviewed the section related to the Student's prior level of performance in toileting. The section states in pertinent part:

She requires full prompting to pull her pants down and up for toileting. [The Student's mother] reports that she will assist minimally with dressing. [The Student] is able to wash her hands with assistance. [The Student] stays dry for two hours at a time and is generally compliant with diaper changing but has shown few signs of being ready to use the bathroom. She has voided in the toilet twice while at school [REDACTED], and has voided in the toilet, on occasion, at home, prior to a bath, but does not appear to demonstrate awareness or consistency with using the toilet. She does not seem to be uncomfortable when she is soiled.

Student Ex. 30.

When asked how many times the Student was pulling up her pants after toileting, Ms. [REDACTED] testified she was not doing that because the narrative said she needed full prompting. When how often the Student independently walked into the bathroom, Ms. [REDACTED] testified the narrative "just says 'generally compliant with diaper changing.'" She agreed there was nothing specific about independently walking to the bathroom. Ms. [REDACTED] testified that when a specific number of times is not listed for a behavior, "we would assume its zero."⁶³

Ms. [REDACTED] testified about the difference between an IEP and a service plan: "The IEP is a full – it offers full services and IEP goals and objective to be implemented at the school. A service plan would not be at the [public] school. A service plan would be at a different placement [for example, [REDACTED]]. And it would only be related services."⁶⁴

⁶³ Ms. [REDACTED] testified working on toileting skills occurs throughout the day.

⁶⁴ Ms. [REDACTED] volunteer she was not sure about the requirements of a service plan.

Ms. [REDACTED] acknowledged that at the November 2018 IEP meeting, she said an IEP would be drafted and if the Student remained at [REDACTED] the IEP would be converted to a service plan. She also acknowledged two staff from [REDACTED] criticized how the service hours were recorded on the IEP: one because she thought they did not meet the Student's needs; and the other because it did not "paint an accurate picture of [the Student]."

Ms. [REDACTED] agreed the Written Notice for the November 2018 IEP team meeting "should include . . . the main points[.]" Ms. [REDACTED] testified she considered the statements from the [REDACTED] staff "a very significant part of the meeting." Ms. [REDACTED] testified when she sent Written Notices to the Parents, they were instructed to read them and contact the school if something important was missing.

Ms. [REDACTED] was asked how the service hours are determined on an IEP. She was asked, as an example, how it was determined that the Student would receive ten twenty minute sessions in the area of "social foundations." She answered it is based on professional judgment. "If it is an instructional goal, the teacher is looking at how long [the Student] can sit for and maintain attention, and how long to target that specific goal for. So, it's professional judgment."

[REDACTED] is employee of [REDACTED] Corporation. She provides twelve to sixteen contract BCBA services per week to the HCPS. She was accepted as an expert in applied behavioral analysis, special education, and autism. She helped develop the [REDACTED] program at [REDACTED] and provides consultation to that program. She consulted one time per month for four hours when the Student attended [REDACTED]. Ms. [REDACTED] testified the teaching method used at [REDACTED] and [REDACTED] is similar.

Ms. [REDACTED] described the [REDACTED] program at [REDACTED] as having small, self-contained classrooms with five to six children in the classrooms and:

within the classroom, they engage in different types of teaching strategies that you've heard already. But I will – we have to have four, what they call,

IST, intensive structured teaching situations which is a table-top intensive instruction where they do very specific intensive-type training where we use multiple exemplars of getting – of teaching those language skills or other important skills for learning. So, there are four of those, and then we have two natural environment, NET, trainings within the classroom outside. So, with those natural environment teaching situations, we take what we've learned in in that really intensive setting. So, if we're trying to teach a child to be able to tact or label a picture of a shoe we might go into the natural environment . . . like, the housekeeping corner and we might have a baby doll with all their clothes. And we might say to the child, "Okay, find the shoe." So, we're taking them – learning the picture of a shoe and then making it more natural, like "shoe," and "What is this?" So, being able to kind of take those skills that we learn in the intensive setting and doing them in a more natural way. The [REDACTED] classrooms also have what we call MAND sessions. And the MAND depending on the need of the child, there could be one or two MAND sessions throughout the day. And in those MAND sessions, we kind of set up a situation in which we kind of control things that we know the children are interested in having and we teach them how to request for those items in a very structured way, but trying to make it so that they learn how to be able to ask for the things that they want later.

Ms. [REDACTED] also explained "errorless teaching," which [REDACTED] uses:

[A] teaching strategy in which it uses the principles of applied behavioral analysis to systematically teach a skill. . . . its purpose is to reduce the probability that the child is going to get something wrong, so reduce errors. So, we use the prompt hierarchy . . . where we used most to least prompting. So, we provide a prompt. When it's a novel new skill, we provide a pretty intensive prompt and then we systematically fade that prompt out so that the child learns to be able to respond to the stimuli by – independently without the need for prompting. But it's a very systematic procedure.

Ms. [REDACTED] testified that teaching goes on all day at [REDACTED]. When asked how teaching occurs at unstructured or other times of the day, Ms. [REDACTED] testified that she trains staff to use the strategies at every opportunity. She explained that at lunch time, manding can be taught by asking the student to request the items they want to eat for lunch and can encourage social interaction and get the student to label things in their environment.

Ms. [REDACTED] testified that when she consults, she addresses the staff's "fidelity" to the program by observing the teachers to ensure their compliance with the ABA principles and by teaching the teachers and others how to do fidelity checks in the classroom. Ms. [REDACTED] testified

that she helped develop “very structured formats” for staff to monitor fidelity with the ABA principles of the educational program at [REDACTED]

Ms. [REDACTED] testified that she had observed the Student five or six times at [REDACTED] and consulted with the teacher on how to help the Student be successful. Ms. [REDACTED] testified she was present with Dr. [REDACTED] during her observations at [REDACTED]

Based on her knowledge of [REDACTED] and the Student, Ms. [REDACTED] opined that [REDACTED] was an appropriate placement for the Student, given her circumstances, because “[REDACTED] has the technologies and training and procedures that are appropriate to her level of need as a child with autism.” Ms. [REDACTED] opined it is not necessary for a BCBA to be in the [REDACTED] classroom more often because “the staff has the proper training necessary to implement the procedures because the staff goes in and does the fidelity checks to make sure that the things are being done properly. And I feel that it’s not necessary.”

In addition, Ms. [REDACTED] opined that [REDACTED] would have been an appropriate placement for the Student during the 2018-2019 school year, based on her expertise, knowledge of [REDACTED] and the Student.

During cross-examination, Ms. [REDACTED] agreed the substance of Dr. [REDACTED]’s criticisms of what she saw during her observations at [REDACTED] was correct. Ms. [REDACTED] testified that during the two observations with Dr. [REDACTED] at [REDACTED] there were times when the instructional program was not being implemented with fidelity. Ms. [REDACTED] opined, however, that overall the [REDACTED] program was being implemented with fidelity due partly to the fidelity checklists the staff regularly used to monitor proper instruction.

Ms. [REDACTED] agreed that vocal stereotypy twelve times per ten minutes impacted the Student’s educational opportunities. She also agreed vocal stereotypy had a greater impact on the Student’s education and represented a regression.

Ms. [REDACTED] testified she consulted with the teacher [REDACTED] to help figure out ways to reinforce the Student because “they were having a difficult time getting instructional control with [the Student],” in getting her to come to the table for instruction and to engage in tasks when she was at the table. “They definitely were not finding the right motivators for her.” Ms. [REDACTED] also agreed that a program, regardless of how well it is structured or the staff is trained, is only as good as the fidelity with which the program is implemented.

The Parents' Arguments

The Parents argued that the Student not only failed to make progress at [REDACTED] during the 2016-2017 school year, but she regressed because she went from having no behavioral problems at the beginning of school to having significant behavioral problems toward the end of school. In regard to progress, the Parents pointed out that, despite [REDACTED]'s reports of progress during the first three quarters of school, including on March 31, 2017, just seven days later, [REDACTED] acknowledged at an IEP team meeting on April 7, 2017, that the Student was not making progress on her IEP goals and objectives because she was often unavailable for instruction due to self-hitting, non-compliance, throwing things, and wandering, which made her unavailable for instruction.

The Parents sought to buttress that argument by referring to the progress report on May 31, 2017, and notes from a CIEP team meeting on the same date. They argued that the May 31st report indicated the Student did not make sufficient progress on four of her seven goals. They noted that the CIEP referral form indicated that the Student was in crisis and exhibiting high rates of self-hitting, throwing things, off-task behavior, and impaired social skills, and a BIP was being developed.

The Parents argued that things at [REDACTED] went from bad to worse during the 2017-2018 school year. The Parents pointed to the VB-MAPP, completed on September 20, 2017, that

addressed problematic behaviors and recommended an FBA. From this, the Parents argued that [REDACTED] "completely dropped the ball," because at the first IEP meeting on September 25, 2017, no one from [REDACTED] knew anything about an FBA or the BIP. The Parents also claimed that they and Dr. [REDACTED] requested an FBA at this meeting, but [REDACTED] said it would have to wait because the school psychologist was not at the meeting.

During their closing argument, the Parents also mentioned that a classmate at [REDACTED] twice grabbed the Student. The first incident was on November 14, 2017, described by Mr. [REDACTED] as an "attack," when a classmate scratched the Student. The Parents also mentioned that after this incident, [REDACTED] acknowledged the same classmate had attempted to grab the Student three times in the recent past. The Parents argued that experience caused the Student to "cower" from family members at home, and at [REDACTED] at least according to the Student's teacher. The Parents argued [REDACTED] continued to allow the same classmate to sit at a table with the Student and, despite [REDACTED]'s safety plan to protect the Student, that same classmate grabbed her again about three weeks later.

The Parents also argued that the two FBAs done at [REDACTED] established a disturbing trend related to problematic behaviors that interfered with the Student's learning. The Parents noted that the first FBA collected data from October 11 to November 14, 2017, that showed the Student engaged in self-hitting seventeen times per day and vocal stereotypy twelve times every ten minutes. The second FBA collected data from January 2 to 26, 2018, that showed the Student engaged in self-hitting an average of eighty-nine times per day and the vocal stereotypy an average of eighteen times per ten minutes. This second FBA also assessed the additional behaviors of aggression toward staff nine times per day and self-stimulation six times per day. From this, the Parents argued that, despite some of the School's witnesses' testimony that there had been improvement in the Student's self-hitting and verbal stereotypy during the past couple of weeks before February 5, 2018, her interfering behaviors had become worse at [REDACTED]

The Parents argued that an educational program is only as good as “the fidelity with which it is implemented.” They pointed to Dr. [REDACTED]’s observations of the Student at [REDACTED] with Ms. [REDACTED]. During those observations, the Student wandered purposelessly, without any instruction; staff failed to act when the Student’s self-stimulation was inadvertently being reinforced; and an instruction session was being incorrectly taught.

The Parents also criticized the IEP service hours for the 2016-2017, 2017-2018, and 2018-2019 school years. They noted that the [REDACTED] 2016-2017 IEP listed twenty-one hours per month of classroom instruction; the [REDACTED] October 2017 IEP listed thirteen hours and twenty minutes per week of classroom hours; the amended [REDACTED] 2017 IEP listed fifteen hours per week of classroom instruction; and the HCPS November 2018 IEP listed fourteen hours and fifty-five minutes per week of classroom hours. The Parents relied on Fourth and Six Circuit case law for the proposition that the IEP determines whether a FAPE has been offered. The Parents noted their experts had opined the Student needs special education instruction all day. The Parents argued that even Mr. [REDACTED] testified that the Student needs specialized instruction during the entire school day. The Parents argued that because only the special education service hours in the IEPs determine whether a student receives a FAPE, the HCPS has denied the Student a FAPE for all the school years identified above because the Student requires all-day special education and the IEPs account for far less than that.

The Parents argued that even if I were to find the IEPs were correctly written and contained more instructional time than actually listed in them, the Student still did not receive a FAPE because case law allows a school to reduce or eliminate any service time not provided in the IEP without notification to the Parents. The Parents relied on *M.C. v. Antelope Valley Union High Sch. Dist.* 858 F.3d 1189 (2017) for that proposition. The Parents summarized this argument as follows: “The IEP is supposed to specify what the child services are, the parents

should know what their child is receiving, and they don't, they wouldn't with IEPs that are developed by Harford County Schools.”

The Parents also argued that the HCPS's failure to provide a FAPE to the Student is evident from its refusal to provide a twelve-month program that includes full summertime services for the Student for the years 2016, 2017, and 2018. The Parents argued that the short period of ESY services and the amount of service hours provided in the ESY programs are inappropriate for the Student. The Parents also pointed out that the ESY program provided no service for about five weeks, two weeks before ESY starts at the end of the school years and three weeks after ESY ends and before the next school year begins. The Parents argued that Drs. [REDACTED] and [REDACTED] opined that the ESY services offered to the Student are completely inadequate for her because she needs a full year program. They also argued the testimony that the ESY services could be revised to include more time at a later date violates the legal principle that what is contained in the IEP controls the resolution of the legal issue.

Finally, the Parents argued that the HCPS unlawfully predetermined the outcome of the IEP meeting on November 2018, pointing to Ms. [REDACTED]'s testimony if the Parents rejected that IEP, it would be converted into a service plan. The Parents cited to *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1998) as support for this argument.

Analysis of the Issues

The 2016-2017 [REDACTED] School Year

The Student was four years old when she entered [REDACTED]. She was eligible for special education services as a student with significant delays across all developmental areas. The Student also was a child with an autism spectrum disorder. Dr. [REDACTED] described that disorder as follows: “The essential features . . . are persistent impairment in reciprocal social communication and social interaction, and restricted, repetitive patterns of behaviors, interests,

or activities. [The Student] has symptoms in both domains that severely impair her everyday functioning.” Student Ex. 40.

The issue before me is whether the [REDACTED] IEPs were reasonably calculated to enable the Student to make progress appropriate in light of her circumstances. The primary focus of the parents’ argument is that the Student did not make appropriate progress at [REDACTED] because she developed problem behaviors that both indicated a regression of skills and interfered with her achievement the goals and objectives in her IEP. For the following reasons, I am not persuaded.

Dr. [REDACTED] observed the Student at [REDACTED] on June 1, 2017. She observed that the Student was not engaged in instruction and her teacher did not utilize an effective instruction. Dr. [REDACTED] also testified the teacher described the Student’s behavior during the observation as typical. Interestingly, Dr. [REDACTED] did not say she saw any of the problem behaviors that I will discuss below. Dr. [REDACTED] opined that the Student had not received appropriate education during her observation.

Dr. [REDACTED]’s opinion was limited to a single day’s observation. I do not find such a limited sample representative of anything about the reasonableness of the Student’s IEP. The teacher’s statements that the Student’s behavior—dropping to the floor and pushing instructional items materials away—were “pervasive” and “typical” do not make Dr. [REDACTED]’s observation any more a criticism of the Student’s IEPs or any more representative of how [REDACTED] implemented the IEP during the 2016-2017 school year. The teacher’s “typical” statement was too vague to have any probative value. It is unclear whether the teacher was addressing just the Student’s behavior or whether she was addressing teaching methods. Regardless, a single observation is not an accurate representation of the Student’s IEP or what goes on regularly during classroom instruction.

The Parents also rely on certain exhibits to argue the Student's problem behaviors first emerged at [REDACTED] as proof that she regressed while at [REDACTED]. The ESY section of the Student's October 2016 IEP does state "[t]here are no significant behaviors noted at the time." The quarterly progress reports in the IEP through March 31, 2017, do state that the Student was making sufficient progress toward reaching her goals. The Written Notice for the April 7th IEP team meeting does recommend an FBA and BIP because "the Student has not demonstrated satisfactory growth/progress on IEP goals and objectives due to her increased behavior needs. [The Student] continues to exhibit chronic issues with non-compliance and throwing objects within the classroom. [The Student] is often unavailable for instruction due to behavioral issues/needs." The CIEP referral form from May 31, 2017, does list problem behaviors of self-hitting, throwing behaviors, and disengagement or off-task behavior and notes that a BIP was "[t]o be added to the Student's educational program."

However, this evidence does not establish that [REDACTED]'s educational program for the Student caused her to develop problem behaviors. The Written Notice from the April 2017 IEP team meeting described the problem behaviors as "chronic." The language in the IEPs says problem behaviors were not "significant" in October and November 2016. From this, it is more likely that problem behaviors existed before April 2017 but were not considered at that time to be significant obstacles to the Student's progress under the IEP. Mr. [REDACTED] said at the April IEP meeting that the Student throws things and hits herself at home. Again, regardless of when or why or where those problem behaviors first emerged, the HCPS responded properly by identifying them as possible barriers to educational progress and taking appropriate action to have them assessed. Moreover, an IEP is a prospective document. There is no evidence that the [REDACTED] IEP team was aware of significant barriers to the Student's learning before drafting the IEP and did nothing to

address them in the IEP. If there were such proof that would be relevant to whether the IEP was reasonably calculated to enable the Student to make appropriate progress.

Moreover, the record establishes that the Student made good progress at [REDACTED]. Her IEP contains goals and objectives in the following areas: (1) Social Foundations (two goals and seven objectives), (2) Language and Literacy (two goals and six objectives), (3) Mathematics (one goal and five objectives), and (4) Physical Well-Being and Motor Development (two goals and eight objectives). The Parents approved those goals and objectives.

By the end of the school year, the Student achieved two of the seven goals (Social Foundations and Mathematics) and twenty of the twenty-six objectives. A review of the narrations related to progress satisfies me the Student made appropriate progress while at [REDACTED].

Accordingly, I find the Parents have not met their burden to prove the Student's IEPs at [REDACTED] for the 2016-2017 school year were not reasonably calculated to enable her to make progress appropriate in light of her circumstance. The Student achieved two of her IEP goals and made significant progress toward the achievement of the remaining goals. Mr. [REDACTED] agreed he said he "saw growth" in the Student at [REDACTED]. A student's educational program is not inappropriate when he or she does not achieve all the goals and objectives on his or her IEP. *See O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360-61 (4th Cir. 2015).

The 2017-2018 School Year at [REDACTED]

The Parents argue the HCPS failed to provide a FAPE to the Student at [REDACTED] for several reasons, which I address separately below, some in more detail than others.

WAS A FAPE DENIED TO THE STUDENT BECAUSE HER IEP FAILED TO LIST ADEQUATE SPECIAL EDUCATION SERVICES?⁶⁵

The Parents argue that the IEPs from October 2017 and February 2018 contain insufficient special education hours for the Student to make appropriate progress. The Parents

⁶⁵ My decision on this issue here also applies the IEPs for the 2016-2017 and 2018-2019 school years.

point out the Services section of the IEPs provided thirteen hours and twenty minutes per week of special education in the October 2017 IEP and fifteen hours per week of special education provides in the February 2018 IEP. The Parents argue: "So this is not a question of whether the [redacted] program . . . was . . . or is appropriate for [the Student], the question is whether the special education instructional time identified in the IEP was appropriate for [the Student]."

The HCPS responded by arguing "the IEPs are crystal clear about the fact that [the Student] will be in special education every day, all day" and insisting "[n]o one can look at this IEP[s] and say that [it/they] called for anything less than [a] full day of special education." The HCPS identified sections in the IEP where the IEP team "very clearly" determined the Student could not be educated in the general population because she needed "structured teaching and intensive language based programs in a small class size."

The Parents relied on two cases to support this argument. They cited to *A.K. v. Alexandria City School Board*, 484 F.3d 672 (4th Cir. 2007), *cert. denied*, 552 U.S. 1170 (2008), and *Knable v. Bexley City School District*, 238 F.3d 755 (6th Cir. 2000) for the proposition that the IEP, not a school's program, determines whether a FAPE has been provided. I disagree that the holdings in those cases control the outcome here. The court in *A.K.* held "a court **generally** must limit its consideration to the terms of the IEP itself" in evaluating whether a FAPE has been offered. *A.K.*, 484 F.3d at 682 (emphasis supplied). But, the decision in *A.K.* was largely based on the federal statutory provision that requires an IEP to state the anticipated **location** where the program will be implemented. The school in *A.K.* agreed to a private placement for the student, but it did not identify the location of a specific private school where the student would receive educational services. The court applied the general rule that limits consideration of whether a FAPE has been provided to the IEP because "the parents had tried in vain to find a local private

school that could meet A.K.'s specialized needs, the offer of an unspecified 'private day school' was essentially no school at all." *Id.*

The facts in *A.K.* are inapposite to the case before me. Here, the IEP is not silent on a required component of a proper IEP. There was no argument about that. The argument here is that the only place I can look to in the IEP to find how much special education the Student will receive is in subsection "Services" in the Section entitled "Special Education." That section lists special education and related services, and another part of the IEP lists special services that are listed as provided "daily." This case is unlike *A.K.*

Knable also addressed a different situation from the case before me because *Knable* dealt with a **draft** IEP that had not at all, or hardly had, addressed most of the content areas required in a proper IEP. The court called the draft IEP "a generalized proposal of behavioral and educational goals . . . with minimum details describing how the . . . program would help . . . meet such goals." In that context, the court stated it "must limit our evaluation of the [schools] proposed IEP to the terms of the document itself[.]" *Knable*, 238 F.3d at 769. The facts in *Knable* are completely inapposite to those here.

In regard to the Student's IEPs at [REDACTED] I agree with the HCPS's argument that it is unimaginable anyone could look at the IEPs and think that they provided the Student with anything less than full-day of specialized services in the [REDACTED] program at [REDACTED]. The Parents certainly knew that because they agreed at the CIEP meeting in May 2017 that the Student needed a full day special education program and agreed [REDACTED] provided such a program. Nowhere in any of the Written Notices from the many IEP team meetings at [REDACTED] is there even a hint that the Parents thought the Student was receiving anything different from full-day special education services. The IEP repeatedly states the Student receives **daily** instructional supports from a special education teacher and instructional assistants each week throughout the year. The IEP

makes it abundantly clear that **none of the Student's school time is in general education.** Mr.

testified he assumed the Student would receive ABA and special instruction all day at

is a small school that serves only students with IEPs. The program is a very small program within that provides one-on-one instruction to students in two classrooms of not more than five students, all, or most, of whom are diagnosed with autism spectrum disorder. This argument fails because it ignores the obvious about the Student's educational program.

The Parents' additional argument that without all day services specifically listed in the Services section of the IEP, the Parents are without any legal recourse if the HCPS were to just ignore the Student for fifteen hours or so per week is simply not true, because the IEP placed the Student in the program at for all-day specialized instruction. The IEP does not provide for the Student to participate in instruction or any other activity non-disabled students. For these reasons, I am not persuaded by the Parent's argument that the Student was denied a FAPE, as a matter of law, because the IEP did not specify in the Services section of the IEP that he would receive special education and related services for thirty hours per week.

WAS A FAPE DENIED TO THE STUDENT BECAUSE THE HCPS DID NOT PROVIDE ADEQUATE BCBA CONSULTATION TIME, DID NOT PROVIDE FULL SCHOOL YEAR SERVICES, INEXPEDITIOUSLY DEVELOPED A BIP, FAILED TO IMPLEMENT THE STUDENT'S EDUCATIONAL PROGRAM WITH FIDELITY, AND THE STUDENT'S PROGRESS WAS NOT APPROPRIATE TO HER CIRCUMSTANCES?

ESY

The Parents withdrew the Student from the HCPS on February 5, 2018. At the IEP team meeting on that date, the Parents requested BCBA consultation three days per week and a full summer program added to the Student's IEP. rejected those requests.

Both the original and revised IEPs at and contain ESY services. The ESY program at begins on July 2, 2018, and ends on August 10, 2018. The ESY providers include a special education teacher, an instructional assistant, and a speech and language pathologist.

The special education and related services include three twenty-minute sessions per week in the areas of (1) Social Foundations, (2) Language and Literacy, and Physical Well-Being and Motor Development, and one twenty minute per week Speech and Language Therapy session.

The IDEA does not expressly require ESY services. 71 Fed. Reg. 46540, 46582 (Aug. 14, 2006). The concept of ESY services derives from a “long-standing interpretation of the Act” by the courts and the federal Department of Education that some disabled children may require services outside the normal school year in order to receive a FAPE.

Maryland regulations define ESY services as “the individualized extension of specific special education and related services” that:

- (a) Are provided to a student with a disability beyond the normal school year of the public agency or nonpublic school the student attends, in accordance with the student's IEP;
- (b) Are provided at no cost to the parents of the student; and
- (c) Meet the standards of the [Maryland State Department of Education].

COMAR 13A.05.01.03B(26). IEP teams must “consider, on at least an annual basis,” whether each disabled child requires ESY services in order to receive a FAPE, Md. Code Ann., Educ. § 8-405(c) (2018), COMAR 13A.05.01.08B(2)(a), and make a decision “early enough in the school year to provide the parent [an] opportunity to request mediation or file a due process complaint” if he or she disagrees with the team’s determination. COMAR 13A.05.01.07B(2).

When deciding whether a child requires ESY services, an IEP team must address the following:

- (i) Whether the student's IEP includes annual goals related to critical life skills;⁶⁶
- (ii) Whether there is a likelihood of substantial regression of critical life skills caused by the normal school break in the regular school year and a failure to recover those lost skills in a reasonable time;
- (iii) The student's degree of progress toward mastery of IEP goals related to critical life skills;

⁶⁶ “‘Critical life skill’ means a skill determined by the individualized education program (IEP) team to be critical to the student's overall educational progress.” COMAR § 13A.05.01.03B(15).

- (iv) The presence of emerging skills or breakthrough opportunities;
- (v) Interfering behaviors;
- (vi) The nature and severity of the disability; and
- (vii) Special circumstances.

COMAR 13A.05.01.08(2)(b).

The Parents principally rely on the Drs. [REDACTED]'s and [REDACTED]'s expert opinions that the Student needs full summer services.⁶⁷ Dr. [REDACTED] evaluated the Student in May 2018 and recommended "participation in a full-time, full-year program." He opined that ESY is **not** "an appropriate intervention for [the Student]" because it is "less intense in terms of the number of hours that are provided" and "there can be variability in staff." He went on to explain the Student has "some emotional needs" and "difficulty with transitions" which "can make it difficult for her to maintain the gains that she would have made in regular school," if the providers in ESY are different from her providers during the regular school term.

Dr. [REDACTED] opined that the five weeks the Student would not be in school after school ends and before ESY begins and after ESY ends and before school resumes would be "highly inappropriate" and would "have a highly adverse effect" on the Student's performance. She also opined that the Student's current ESY program would not provide a FAPE because she would only be addressing the very modest skills she had acquired and would lose an opportunity over the summer to make additional progress. Finally, Dr. [REDACTED] opined the omission of the area of Communication from the ESY program was "highly inappropriate" because it is a foundational area.

The HCPS, through the testimony of Ms. [REDACTED] explained that [REDACTED] rejected the request for increased ESY services at the IEP meeting in February 2018 because there was insufficient data to support the request, noting the Student had failed to participate in the full ESY program

⁶⁷ The expert witnesses from [REDACTED] also opined that the Student requires a full time school program, and the expert witnesses from [REDACTED] opined that the proposed ESY services were appropriate. I have considered those opinions also in reaching my decision.

in the summer of 2017. Ms. [REDACTED] testified that if relevant data were to be obtained the IEP team could “revisit” the ESY issue.

For the following reasons, I do not find Dr. [REDACTED]’s or Dr. [REDACTED]’s opinion, or the testimony of the other Parent witnesses, persuasive on this issue.

Dr. [REDACTED]’s opinion was based in part on his belief that ESY services are provided by unfamiliar service providers. The record supports the opposite of that at [REDACTED]. Ms. [REDACTED] testified that eighty-five percent of the staff at [REDACTED] also teaches in the ESY program at [REDACTED]. Ms. [REDACTED] testified she works in the ESY program.

Dr. [REDACTED] did not offer an opinion as to whether the ESY program at [REDACTED] would have been appropriate for the Student if familiar [REDACTED] staff taught in the program. Moreover, although Dr. [REDACTED] testified ESY services are “less intense,” he did not opine that the currently proposed ESY program would not “prevent substantial regression of critical life skills.” COMAR 13A.05.01.08(2)(b)(ii). For these reasons, Dr. [REDACTED]’s opinion does not persuade me that the proposed ESY program is a denial of A FAPE.

Dr. [REDACTED] based her opinion on what she believed would have been the current level of skill attained by the Student at the end of the 2017-2018 school year at [REDACTED]. The problem with that basis is that the Student was removed from [REDACTED] in the beginning of February 2018, months before the school year had ended. At the time of the hearing, Dr. [REDACTED] had no idea what level of skill the Student would have attained at [REDACTED]. In addition, Dr. [REDACTED] did not explain the basis for her opinion that the weeks in the summer when the Student would have had no educational service “would have a highly adverse effect on her performance.” Without a basis for why that would have been the likely outcome, I cannot assess the reasonableness of her opinion. Moreover, Dr. [REDACTED] emphasized the need to provide the Student with more learning opportunities in the summer to make progress and “close the gap” as a basis for her

opinion. ESY services do not serve that purpose. For these reasons, I am not persuaded by Dr. [REDACTED]'s opinion that the Student's IEPs that contain ESY services deny the Student a FAPE. Moreover, I find Ms. [REDACTED]'s explanation at the IEP meeting that the HCPS would reopen the ESY issue if new data warranted further discussion to have been reasonable.

The BCBA and related matters

The Parents' argument that the IEP should have been modified to include three hours per week of BCBA consultation in the Student's classroom involves issues matters related to the FBAs, educational progress, and the fidelity with which [REDACTED] implemented the Student's educational program.

In regard to the FBAs, at the HCPS CIEP meeting on May 31, 2017, certain of the Student's behaviors that were thought to be possible barriers to learning opportunities were discussed, some information about the nature of those behaviors had been obtained, and a BIP was "in progress."

On September 20, 2017, shortly after the Student started at [REDACTED] [REDACTED] completed a VB-MAPP. That assessment identified problem behaviors that were barriers to the Student's education. The teacher who completed the VB-MAPP recommended further analysis.

At the first IEP meeting on September 25, 2017, no one from the HCPS seemed to know anything about a BIP. The IEP team had some discussion about the Student's problem behaviors, but a decision to begin an FBA was deferred to the next IEP meeting. At the next IEP meeting on October 11, 2017, it was decided to conduct an FBA on self-hitting and vocal stereotypy. The assessment of those behaviors occurred from October 11, 2017, to November 14, 2017, and a BIP was drafted.

At an IEP meeting on January 2, 2018, the team discussed the FBA and BIP, and the BIP was implemented on January 3, 2018. Also at the January 2018 meeting, the team agreed to

conduct a second FBA on the behaviors of the Student's aggression toward school staff and self-stimulation. [REDACTED] collected data on those behaviors from January 3 to January 26, 2018. At the same time, [REDACTED] also collected another set of data on self-hitting and vocal stereotypy. At the next IEP team meeting on February 5, 2018, the Parents withdrew the Student from the HCPS.

The FBAs showed that the Student's self-hitting went from three to ten times per day in May 2017, to an average of seventeen times per day between October and November 2017, to an average of eighty-nine times per day in January 2018. Her vocal stereotypy went from an average of twelve times every ten minutes in October 2017 to an average of eighteen times every ten minutes in January 2018. The Parents argued that data is proof that the Student was regressing at [REDACTED]. It also seemed part of the Parents' reason for requesting the three hours per week of in-classroom consultation from a BCBA.

In addition, when Dr. [REDACTED] observed the Student at [REDACTED] on December 6, 2017, she saw the Student aimlessly wandering around an activity room. She also saw ineffective and incorrect teaching. When Dr. [REDACTED] observed the Student a second time on February 1, 2018, she observed the Student at a table without any engagement in any activity. She also saw the Student engage in self-stimulation that was being inadvertently reinforced because at the same time, she was playing with an iPad. In addition, Dr. [REDACTED] observed the Student purposelessly moving from place to place while an instructor ineffectively tried to engage her in some meaningful activity.

The Parents seemed to argue that the increasing frequency of the Student's problem behaviors, the development of additional problem behaviors, and Dr. [REDACTED]'s observations demonstrated the ineffectiveness of the Student's educational program and the need for BCBA consultation hours. For the following reasons, I am not persuaded.

In regard to the problem behaviors, I agree the record does not explain what happened to the BIP that was being developed in May 2017 at [REDACTED]. But that has no import on the issue of the adequacy of the Student's IEP. Ms. [REDACTED] explained that for a proper BIP to be developed, an FBA must be conducted to assess the behavior in the a student's present environment. That makes sense because a tenet of ABA is the behaviors are learned and maintained by the reinforcers that operate in a person's environment.

In regard to why the FBA was not authorized at the first IEP team meeting in September 2017, the record contains conflicting evidence. However, regardless of which evidence is to be believed, an FBA was immediately begun after the second IEP team meeting less than two weeks later. It was completed and a BIP was developed and discussed at the IEP team meeting on January 2, 2018. Doing a thorough and accurate behavioral assessment takes time. The Parents did not raise any issue related to the time it took to complete the assessment. Ms. [REDACTED] testified it was completed within compliance with time frames.

The Parents argued that the data on self-hitting and stereotypy showed that the Student regressed over time. It is clear that the self-hitting and vocal stereotypy increased. It is not clear by how much the self-hitting increased. The frequency of self-hitting seemed to have increased from May 2017, because the CIEP form records the frequency at three to ten times per day. However, the record contains no evidence relevant to how that the behavior was counted or by whom. Nonetheless, there was an increase. In regard to the how the self-hitting was counted at [REDACTED] Ms. [REDACTED] testified two different methods were used. During the first FBA in October and November 2017, the self-hitting was counted by episodes. An episode might contain many incidents of self-injury. By that count, the Student's self-hitting averaged seventeen times per day. During the FBA in January 2018, Ms. [REDACTED] testified self-hitting was counted by incidents. Many incidents can occur during an episode. I credit Ms. [REDACTED]'s testimony

about this in part because the data on the duration (one to two seconds) supports it.⁶⁸ By that count, the Student's self-hitting was estimated as an average of eighty-nine times per day. There was an increase in hitting to be sure, but the amount of the increase between the first and second FBAs is uncertain. Also, the January 2018 count, being an average, was heavily skewed by the number of incidents in any one day. The FBA shows a range from two to 395.

I do not find that this increase in problematic behaviors is proof that the Students IEPs at [REDACTED] were not reasonably calculated to provide educational progress appropriate to the Student. Ms. [REDACTED] testified "a burst in behavior" is common after a BIP is implemented. The BIP was implemented on January 3, 2018. The counting of the self-hitting and vocal stereotypy during the second FBA was done in that month. The "burst in behavior" may very well account for the increase. The HCPS witnesses indicated at the February 2018 IEP meeting, the Student's self-hitting was improving. Although HCPS offered no data to support that testimony, I find the witnesses believable in part because it fits the "burst in behavior" phenomenon. As noted above, during January 2018, the Student's self-hitting ranged from just two times to 395 times per day. Based on the "burst in behavior" phenomenon, one would expect a steep rise in the behavior upon the implementation of the BIP and a steady decline as the BIP continued.

Although the HCPS had reason to know that the Student had problem behaviors that could be significant barriers to learning when she entered [REDACTED] based on the records from the CIEP meeting, a formal development of a BIP and subsequent modification the IEP had to wait for the completion of the FBA. [REDACTED] initiated that assessment in October 2017, and the IEP team met in January 2018 to discuss the results and implement the BIP. Although the Student's problem behaviors may have been increasing, I can find no fault on the part of [REDACTED] that would

⁶⁸ It was clear from the record that no one at the February 2018 IEP team meeting other than Ms. [REDACTED] knew about the different counting methods.

render the IEPs an unreasonable calculated not to enable the Student to make appropriate progress in light of her circumstances.

The Parents also seemed to suggest that [REDACTED]'s refusal to amend the IEP to include BCBA consultation hours was a denial of FAPE because [REDACTED]'s contention that the Student's behavior was improving during a time the teacher was receiving an increase in consultation support proved to necessity of including the BCBA hours in the IEP. I am not persuaded by this argument. The Student attended school for only fifteen days between the time the BIP was implemented and the time the Parents withdrew the Student from the HCPS. During even that time, [REDACTED] had seen an improvement in the self-hitting. I find that fifteen days is too short a period of time to make any reasonable determination that an increase in BCBA consultation was necessary for the BIP to be effective. I also find the record does not support a finding that the then-current educational plan, with the BIP, was unable to effectively address the student's problem behaviors.

The Parents' argument that [REDACTED] was not implementing its educational program with fidelity was based in part on Dr. [REDACTED]'s observations at [REDACTED] in December 2017 and February 2018. During those observations, she saw that the Student was not provided with educational opportunity that was consistent with ABA principles and the staff did not correctly apply ABA principles. I do not question Dr. [REDACTED]'s testimony about what she observed; however, for the same reasons I have discussed above related to her observation at [REDACTED] I am unpersuaded that her observations are a valid representation of how [REDACTED] was implement the Student's education program day in and day out over the course of many months.

Dr. [REDACTED]'s observations depict a very small fraction of a months' long daily application of the Student's educational program. She did not testify that any conversation with any staff at [REDACTED] indicated they were untrained in ABA principles or not capable of the correct

application of those principles. Ms. [REDACTED] testified about the “fidelity checks” [REDACTED] staff use to monitor their adherence to the ABA principles. I have no doubt that [REDACTED] does not always apply those principles every minute of every school day. But the record does not contain a sufficient competent evidence to establish that [REDACTED] does not implement the Student’s educational program with fidelity.

Dr. [REDACTED] also testified about the level of progress the Student achieved at [REDACTED]. She testified the VB-MAPPs administered at [REDACTED] overrepresented the Student’s skill level. She testified that [REDACTED]’s progress reports show the Student had not made progress on about sixty-eight percent of her objectives. My review of the Student’s progress reports from November 2017 and February 2018 show that the Student had eight goals and thirty-one objectives. She achieved none of her goals and made progress on twelve of her objectives (about 38%) between the first and second quarterly progress reports at [REDACTED]. This shows she was making progress. This also confirms the testimony of all the HCPS witnesses (including Mr. [REDACTED]) that the Student made progress at [REDACTED]. The measure of progress at [REDACTED] however, is not a fair indicator of whether the Student’s IEP was reasonably calculated to enable the student to make appropriate progress appropriate to her circumstance.

The IEP goals set as a measure of educational attainment over the term of the IEP. Progress toward those goals does not always travel in a straight ascending line. Every witness agreed that the Student is a complex learner with many problems and challenges. The record cannot establish a complete measure of the Student’s progress at [REDACTED]. The Student was enrolled at [REDACTED] for eighty-nine school days. She was absent twenty-two days and tardy sixty-six days. Almost every witness who testified said consistency of programming and instruction are critical for students with autism spectrum disorder. The Student’s attendance exacerbated those challenges. The amount of progress the Student could have achieved at [REDACTED] it is simply

unknowable based on her attendance record and early exit from the [REDACTED] program. This is especially true here where the BIP had only recently been implemented. Based on all the reasons discussed above, I am not persuaded that the Student's IEPs at [REDACTED] failed the test of reasonably calculated to enable the Student to make appropriate progress in light of her circumstances.

The 2018-2019 school year

The Student enrolled in [REDACTED] in early February 2018. On November 7, 2018, the HCPS, Mr. [REDACTED] employees, and others participated in an IEP meeting where an IEP was developed. The objections the Parents had to that IEP are the same objections they had the IEP at [REDACTED]. I have discussed and resolved those issues in the above discussion. The results from that discussion also apply here. The Parents have not persuaded me the IEP for the 2018-2019 school year at [REDACTED] was not reasonably calculated to enable the Student to make progress appropriate in light of her circumstances.⁶⁹

The appropriateness of [REDACTED]

There is no need for me to address this issue. It requires discussion only if I had determined the HCPS failed to provide a FAPE to the Student during the 2017-2018 or 2018-2019 school years. *See Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (citing *Burlington*, 471 U.S. at 373-74).⁷⁰

⁶⁹ I note here I agree with the HCPS that the Parent's argument that the HCPS predetermined the placement contained in the November 2018 IEP is not properly before me because it was not alleged in the due process complaint. 20 U.S.C.A. 1415(f)(3)(B) (2017).

⁷⁰ If I needed to rule on this issue, I would have found [REDACTED] provides the Student an appropriate educational program.

CONCLUSIONS OF LAW

I conclude the following:

1. The Parents did not prove that the Harford County Public Schools failed to offer the Student a free appropriate public education for the, 2016-2017, 2017-2018, and 2018-2019 school 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)

2. The Parents failed to prove that they are entitled to reimbursement for tuition and expenses at the [REDACTED] School. *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

ORDER

I **ORDER** that the Parents' request for placement and reimbursement for tuition and expenses at the [REDACTED] School is **DENIED**.

Signature Appears on Original
[REDACTED]

June 7, 2019
Date Decision Mailed

Michael D. Carlis
Administrative Law Judge

MDC/da
#179670

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) (2018). 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.

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]