

██████████,

STUDENT

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

BEFORE MARY R. CRAIG,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-BCNY-OT-23-00391

DECISION

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STATEMENT OF THE CASE

On January 5, 2023, ██████ and ██████ (Parents), on behalf of their child, ██████ (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 Baltimore County Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);¹ 34 C.F.R. § 300.511(a) (2021);² Md. Code Ann., Educ. § 8-413(d)(1) (2022);³ Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

I held a telephone prehearing conference on January 24, 2023. The Parents participated and were represented by Holly Parker, Esquire. Pamela Foresman, Esquire, represented BCPS.

¹ “U.S.C.A.” is an abbreviation for the United States Code Annotated. Unless otherwise noted, all citations herein to the U.S.C.A. are to the 2017 bound volume.

² “C.F.R.” is an abbreviation for the Code of Federal Regulations. Unless otherwise noted, all citations herein to the C.F.R. are to the 2021 bound volume.

³ Unless otherwise noted, all citations herein to the Education Article are to the 2022 Replacement Volume of the Maryland Annotated Code.

I held the merits hearing on March 13-15, 2023 at the OAH's Hunt Valley office. Holly Parker, Esquire, represented the Parents, who attended with the Student. Pamela Foresman, Esquire, represented BCPS.

The federal regulations require that a due process hearing be held, and a decision be issued, within forty-five days of certain triggering events. 34 C.F.R. §§ 300.510(b)-(c), 300.515(a).⁴ The applicable regulations state the following, in part:

- (a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c) –
 - (1) A final decision is reached in the hearing; and
 - (2) A copy of the decision is mailed to each of the parties.

34 C.F.R. § 300.515. In turn, as referenced, section 300.510 provides:

- (a) Resolution meeting.
 - (1) Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under §300.511, the LEA must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that—
 - (i) Includes a representative of the public agency who has decision-making authority on behalf of that agency; and
 - (ii) May not include an attorney of the LEA unless the parent is accompanied by an attorney.
 - (2) The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.
 - (3) The meeting described in paragraph (a)(1) and (2) of this section need not be held if—
 - (i) The parent and the LEA agree in writing to waive the meeting; or
 - (ii) The parent and the LEA agree to use the mediation process described in §300.506.

...

- (b) Resolution period.

⁴ See Md. Code Ann. EDUC. § 8-413(d), (h) (hearing within time periods established by federal law); COMAR 13A.05.01.15C(11)(d)-(f), (14) (timeframe).

- 1) If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.
 - (2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period.
 - (3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.
- ...
- (c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:
- (1) Both parties agree in writing to waive the resolution meeting;
 - (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;
 - (3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

34 C.F.R. § 300.510.

The Parents filed the Due Process Complaint on January 5, 2023. Ordinarily, the thirty-day resolution period expired on Friday, February 3, 2023.⁵ Here, the Parents agreed in writing on the hearing request form to waive resolution and participate in mediation. While the parties did not resolve the dispute at the January 24, 2023 mediation, the parties also did not agree in writing that no agreement was possible. *See* 34 C.F.R. § 300.510(c)(1).⁶ Accordingly, the timeframe for issuing a decision in this matter would expire forty-five days from January 25, 2023, which is Friday, March 10, 2023. 34 C.F.R. § 300.515(a).⁷

The regulations authorize me to grant a specific extension of time at the request of either party. *Id.* § 300.515(c). As the Parents and BCPS each intended to file a request for production of documents, I noted that discovery requests must be filed at least thirty days before a hearing.

⁵ The thirty-day resolution period expired on Saturday, February 4, 2023, so the expiration date is the prior business day.

⁶ The parties stated on the record at the prehearing conference that no resolution was possible.

⁷ The decision would ordinarily be due on March 11, 2023, but that is a Saturday, so it would be due on Friday, March 10, 2023.

COMAR 28.02.01.13A. The recipient has fifteen days to respond to the request. *Id.* Assuming that the requests for production were filed promptly after the prehearing conference, the hearing could have begun at the earliest on March 10, 2023.

The Parents requested that I extend the timeframe due to the need to request production of documents and to review the documents produced by BCPS in order to adequately prepare for the hearing. Finding good cause, I granted this request. After further discussion with the parties, they agreed that this extension would include issuing my decision thirty days after the close of the record, in order to allow sufficient time for me to consider the evidence and arguments and draft a decision. The hearing record closed on March 15, 2023, so my decision is due on April 14, 2023.

Procedure is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Educ. § 8-413(e)(1); Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Is BCPS required to pay for the Student's education at a nonpublic school during the pendency of this case under the requirements of stay-put?
2. Is the IEP developed for the 2022-2023 school year, including placement, reasonably calculated to enable the Student to receive some educational benefit?

SUMMARY OF THE EVIDENCE

Exhibits

I attached an Exhibit List to this Decision.

Testimony

The Parents and the Student testified and presented the following witnesses:

- [REDACTED], BCPS Special Educator
- [REDACTED], BCPS School Psychologist.

BCPS presented the following witnesses:

- [REDACTED], accepted as an expert in Special Education⁸
- [REDACTED], accepted as an expert in School Psychology
- [REDACTED], accepted as an expert in General Education, Special Education and Reading Education
- [REDACTED], accepted as an expert in Special Education and School Administration.

FINDINGS OF FACT

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

1. The Student is a twelve year old (date of birth: [REDACTED] 2010) resident of Baltimore County enrolled in the seventh grade at the [REDACTED], a nonpublic school offering specialized instruction for students with special needs.
2. The Student lives with his Parents, [REDACTED] and [REDACTED], his twin sister and younger brother.
3. The Student attended Baltimore County Public School in his neighborhood school, [REDACTED] Elementary School ([REDACTED] ES), from kindergarten through fifth grade (2020-

⁸ The parties presented the evidence in support of their positions while admirably cooperating on logistical matters throughout the hearing. The Parents and BCPS called some of the same witnesses. I allowed counsel to present direct and cross-examinations of the duplicate witnesses regardless of which party called the witnesses so that the witnesses could be excused after completing their testimony.

2021 school year),⁹ receiving special education and related services under the IDEA as Other Health Impaired (OHI) based on his diagnosis of attention deficit hyperactivity disorder (ADHD).¹⁰

4. The Student attended sixth grade at ██████████ for the 2021-2022 school year. He remains at ██████████ in the seventh grade 2022-2023 school year.

5. The Student received small group specialized reading instruction at BCPS in first and second grades using the Wilson Foundations program. He received specialized reading instruction in the third through fifth grades using the Orton Gillingham reading method, with individualized education plan (IEP) accommodations and modifications in the classroom.¹¹

6. When the Student was in the fifth grade, the Parents retained ██████████, Ph.D., a Licensed Psychologist and Certified School Psychologist with the ██████████ ██████████, who performed a comprehensive psychosocial evaluation of the Student in the Fall of 2020.¹²

7. Dr. ██████████ based her report on the following: Woodcock Johnson Tests of Cognitive Abilities and Achievement; Behavioral Assessment System for Children; Behavioral Rating Inventory of Executive Function; an observation of the Student during remote learning at the ██████████ office, an interview with the Student's BCPS fourth grade teacher, and records review.

8. Dr. ██████████ prepared a comprehensive report dated December 17, 2020 and provided the report of her findings to the Parents.¹³

9. The Parents provided BCPS with a copy of the report.

⁹ The Student had an IEP at least as early as fifth grade and received services under the OHI category (ADHD).

¹⁰ There is no IEP in evidence prior to June 2022.

¹¹ P. Ex. 13, p. 2.

¹² *Id.*

¹³ *Id.* Dr. ██████████ did not testify to explain her report.

10. Dr. [REDACTED] recommended that the Student met the definition of a child with dyslexia, a specific learning disability (SLD) under the IDEA, in the areas of reading rate or fluency¹⁴ and written expression, with moderate severity.¹⁵

11. Dyslexia refers to a “a pattern of learning difficulties characterized by problems with accurate or fluid word recognition, poor decoding, and poor spelling abilities.”¹⁶

12. On February 4, 2021, based on a referral from the BCPS Office of Psychological Services and with parental consent, [REDACTED], BCPS School Psychologist, conducted a psychological assessment of the Student requested by the Student’s IEP team to assess the Student’s reading and written expression skills, as well as underlying cognitive skills that might impact those academic areas.

13. Mrs. [REDACTED] shared information with Ms. [REDACTED], including the Student’s educational activities at home during virtual learning, and her concerns with the Student’s reading fluency. Mrs. [REDACTED] informed Ms. [REDACTED] that an educational software program used at home showed that the Student was at moderate risk of dyslexia because he exhibited deficits in the areas of rapid naming of words, phonological awareness, phonological memory, and visual sequential memory.¹⁷

14. Ms. [REDACTED] assessed the Student using: the Feifer Assessment of Reading (FAR); the Test of Written Language (TOWL-4); Mrs. [REDACTED]’ interview; test observations; and a review of his records.¹⁸

¹⁴ Reading fluency means reading at “an appropriate rate compared to other students his age as well as being able to decode irregular words as well as being able to spell words.” Tr. 262, l. 1-6.

¹⁵ *Id.*, p. 12.

¹⁶ P. Ex. 13, p. 12.

¹⁷ BCPS Ex. 1, p. 3.

¹⁸ *Id.*

15. The FAR is a standardized and nationally normed test of reading in which the Student's reading skills are evaluated in areas of phonological processing, fluency and comprehension.

16. The Student's scores on the FAR are a reliable measure of his reading strengths and weaknesses.

17. The Student's scores on the FAR were as follows: Phonological Index – average; Phonemic Awareness – above average; Nonsense Word Decoding – average; Isolated Word Reading Fluency – moderately below average; Oral Reading Fluency – below average; Positioning Sounds – above average; Fluency Index – average; Rapid Automatic Naming – below average; Verbal Fluency – above average; Visual Perception – moderately below average; Irregular Word Reading Fluency – below average; Orthographical Processing – average; Comprehension Index – average; Semantic Concepts – average; Word Recall – below average; Morphological Processing – average; Silent Reading Fluency Comprehension – above average; and Silent Reading Fluency Rate – below average.

18. The Student's Total Index Score on the FAR fell within the average range when compared with his grade level peers.

19. The Student measured average in the categories of Phonological Processing and Fluency with a mixed score in the average range (94 and 94 respectively where the 90% confidence interval is 88-97%).

20. Some components of the FAR indicated that the Student's areas of greatest weakness were Isolated Word Reading Fluency (70) and Visual Perception (75).

21. He also displayed difficulty in Rapid Automatic Naming (88), Word Recall (86) and Oral Reading Fluency (83).

22. The TOWL-4 is a norm-referenced, reliable, and valid test of written language.

23. Based on the results of the TOWL-4, the Student demonstrated average ability to compose a story, average ability in spontaneous writing, but below average ability in spelling and his ability to edit sentences.¹⁹

24. The results on the TOWL-4 indicated weakness in the areas of spelling, logical sentences and sentence combining.

25. Ms. [REDACTED] recommended the IEP team consider whether the Student met the criteria for SLD in reading, specifically dyslexia.²⁰

26. Ms. [REDACTED] submitted her February 11, 2021 report to the IEP team. The Parents received a copy.²¹

27. Prior to the Due Process complaint that is the subject of this proceeding, the Parents previously filed a Due Process complaint on behalf of the Student alleging that BCPS denied him a FAPE for the 2019-2020 and 2020-2021 school years. The parties settled the earlier complaint with a written agreement on April 28, 2021 (Settlement Agreement).²² In exchange for BCPS's agreement to pay for the Student to attend [REDACTED] for the 2021-2022 school year, the Parents agreed in relevant part as follows:

- a. The parties would collaborate and schedule an IEP team meeting by the end of January 2022 to create an IEP for the Student's 2022-2023 school year;²³
- b. BCPS would finalize an IEP and placement for the 2022-2023 school year;

¹⁹ Tr. 264-265.

²⁰ Absent any evidence of an IEP prior to June 2022 I cannot determine whether the IEP team met to consider Ms. [REDACTED]'s report. *See* finding of fact 26(d).

²¹ BCPS Ex. 1. The record does not explain what, if any, IEP activity occurred between the [REDACTED] report and the February 8, 2022 IEP team meeting.

²² BCPS Ex. 2.

²³ The IEP meeting was originally scheduled for January but was postponed with the consent of the parties due to schedule conflicts.

- c. The Parents waived the right to claim that the [REDACTED] constituted stay-put under the IDEA;
- d. The Parents waived the right to claim any relief for alleged violations of FAPE or the IDEA regarding the 2021-2022 school year and all prior years;²⁴
- e. The Parents retained the right to file a Due Process complaint if they disagreed with the IEP offered for the 2022-2023 school year or the Student's placement; and
- f. The Parents waived the right to seek additional compensatory services for violations of FAPE or IDEA regarding the 2021-2022 school year as well as all prior school years.²⁵

28. On January 10, 2022, the IEP team invited the Parents to participate in an IEP team meeting to discuss the Student's educational program and conduct re-evaluation planning under the IDEA.²⁶ The meeting was rescheduled for February 8, 2022. A revised notice was emailed to Mrs. [REDACTED] prior to the meeting.

29. The Parents were informed of their *Procedural Safeguards and Parental Rights* under the IDEA by email prior to the meeting.²⁷ The Parents received all required notifications under the IDEA.

30. The IEP team met on February 8, 2022.

31. [REDACTED], BCPS Administrator, chaired the meeting.

32. The meeting was attended by Mrs. [REDACTED] and the following BCPS staff in addition to Ms. [REDACTED]: [REDACTED], general educator; [REDACTED], guidance, secondary; [REDACTED], school psychologist; and [REDACTED], special educator.

²⁴ BCPC Ex. 2.

²⁵ *Id.*, p. 2.

²⁶ BCPS Ex. 5.

²⁷ *Id.*

33. Mrs. [REDACTED] shared with the team that the Student was making progress at [REDACTED], getting straight A's, and did not need help with anything academically.²⁸

34. The IEP team recommended educational assessments to better understand the Student's current reading and writing strengths and needs. Mrs. [REDACTED] gave consent for the assessments.

35. The team also recommended a classroom observation of the Student at [REDACTED]. That school was not permitting in-person observation at that time due to the COVID-19 pandemic, but Mrs. [REDACTED] agreed to request [REDACTED] to complete the BCPS classroom observation form and return it to the team.

36. Mrs. [REDACTED] explained the Student's program at [REDACTED], including 45 minutes of tutoring daily, expressed her view that he was doing well there, and requested that he continue to attend [REDACTED] at public expense.

37. Mrs. [REDACTED] offered to provide the team with informal assessments from [REDACTED], and the team agreed to consider them.

38. The team discussed doing an updated psychological assessment and determined it was not necessary re-evaluate his cognitive skills (which remain fairly constant over time) or to assess his social-emotional functioning, based on information the team received that his symptoms of ADHD were under control with medication.²⁹

39. None of the participants raised social or emotional concerns at that meeting.³⁰

40. On March 15, 2022, Ms. [REDACTED] assessed the Student at the request of the IEP team using the Phonological Awareness Test 2 (PAT), the Brigance Word Recognition assessment, the DIBELS 8th Edition Maze Passages assessment, and the Qualitative Reading Inventory (QRI).

²⁸ BCPS Ex. 6, p. 3.

²⁹ Tr. 275.

³⁰ Tr. 275, l. 18-25.

Copies of her reports³¹ were provided to the IEP team, including the Student's Parents, prior to the April 25, 2022 IEP team meeting.

41. The PAT assessment is used to assess a student's decoding skills and phonologic processing.³²

42. The PAT breaks down the specific skills a student needs to decode a word, i.e., take the sounds each letter makes and put them together to form a word.³³

43. The categories within the PAT provide information about the different skills needed to decode a word so that the educator may know the student's strengths and weaknesses and design a program to work on the weak areas.³⁴

44. The Student scored 96% on the PAT, 100% on the rhyming subtest, 96% on the segmentation subtest, 100% on the isolation subtest, 95% on the deletion subtest, 100% on the blending subtest, 96% on the graphemes subtest, 100% on the graphemes subtest, and 93% on the decoding subtest.³⁵

45. The Brigance assessment is used to assess a student's ability to decode words. The Student was able to read 9/10 words on the seventh grade level.³⁶

³¹ BCPS Ex. 11 & 12.

³² The American Speech-Language-Hearing Association defines phonologic processing as "the use of the sounds of one's language (i.e., phonemes) to process spoken and written language. (Wagner & Torgesen, 1987). The broad category of phonological processing includes *phonological awareness*, *phonological working memory*, and *phonological retrieval*." (emphasis in original).

<https://www.asha.org/practice-portal/clinical-topics/written-language-disorders/phonological-processing/#:~:text=Phonological%20processing%20is%20the%20use,working%20memory%2C%20and%20phonological%20retrieval.>

³³ Tr. 102.

³⁴ Tr. 103.

³⁵ BCPS Ex. 11.

³⁶ BCPS Ex. 12.

46. The DIBELS is an informal assessment measuring reading comprehension. The assessment indicated that the Student understood what he was reading, but was reading at a slower pace than expected for a student his age.³⁷

47. The QRI measures a student's reading accuracy and reading fluency. When given a 6th grade level passage to read, the Student was reading at an independent level, given the ability to refer to the text at times to answer question about what he read.³⁸

48. The Student was excited to be at ██████ ES for the testing with Ms. ██████ and worked hard without any apparent anxiety.³⁹

49. On April 25, 2022, the IEP team convened to discuss the results of the assessments conducted by Ms. ██████ and all of the information received from ██████.⁴⁰ Mrs. ██████ attended along with Ms. ██████ (the meeting Chair), ██████, a general educator, and ██████, a school psychologist.

50. Mrs. ██████ shared with the team that the Student's dyslexia is orthographic dyslexia.⁴¹

51. Mrs. ██████ provided the IEP team the following informal assessments from ██████:

- a. Report card with comments showing successful transition to new school;
- b. Tutoring Report from ██████ providing an informal assessment of the Student's goals and his progress toward the goals in a setting of one tutor, the Student, and one other student at ██████; and

³⁷ *Id.*

³⁸ *Id.*

³⁹ Tr. 113-114.

⁴⁰ BCPS Ex. 14.

⁴¹ BCPS Ex. 14, p. 2. 2

- c. [REDACTED] report cards showing the Student earned A's in all of the graded categories: Language (95.26%); Math (95.11%); Social Studies (94.5%); and Science (92.42%).⁴² In the Language Skills category, the Student received a score of "S" indicating that he needed some assistance in writing using Empower (the reading program used at [REDACTED]), and in the application of grammar, proofreading and editing.

52. Mrs. [REDACTED] provided the IEP team a classroom observation report of the Student conducted on February 25, 2022 at [REDACTED] by [REDACTED] staff showing that:

- a. The Student was in a group with ten other students and one educator;
- b. The Student had some problems in the areas of basic reading skills, written expression and attention; and
- c. His areas of strength were listening comprehension, oral expression, work habits, task completion, motivation/participation, and speech.⁴³

53. The team reviewed all of the assessments with Mrs. [REDACTED], discussed all information, including parental input, and decided that an impairment exists and the Student needs special education and related services as a student with a SLD (dyslexia and dysgraphia).

54. The team considered the Student's achievement relative to his age or to meeting state-approved grade level standards and determined that he did not achieve adequately in the areas of basic reading skills, reading fluency skills and written expression.

55. Based upon the data gleaned from Ms. [REDACTED]'s evaluation conducted in March 2022, the [REDACTED] records, the [REDACTED] classroom observation, the Student's academic performance, and information shared by the Student's mother and teachers, the IEP team

⁴² *Id.*

⁴³ BCPS Ex. 9.

determined the Student was eligible for special education under IDEA as OHI (ADHD) and SLD (dyslexia and dysgraphia).

56. The IEP team agreed that the Student required special education and related services.⁴⁴

57. Dyslexia is a type of specific learning disability characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities.

58. Orthographic dyslexia is a variation of dyslexia in which a student cannot recognize words by sight.

59. Dysgraphia is a type of specific learning disability characterized by difficulties with spelling and composition of written responses.

60. The IEP team met on June 8, 2022 and discussed an IEP for the Student. Mrs. [REDACTED] participated in the meeting and was informed of the Parents' *Procedural Safeguards and Parental Rights* under the IDEA.⁴⁵

61. The IEP team assessed the Student's present levels of academic achievement and functional performance, based on the assessments and other data showing that he was then reading with fluency on a fifth grade reading level and writing on an average level in vocabulary, punctuation, spontaneous writing, contrived writing, and overall writing, but below average level in written spelling, logical sentences and sentence combining.⁴⁶

62. The IEP team determined that the Student required additional annual goals and objectives to address his SLD.

63. The team developed three IEP goals, each with supporting objectives.

64. The goals and objectives address all of the Student's deficits identified by the

⁴⁴ BCPS Ex. 14, p. 3.

⁴⁵ BCPS Ex. 16.

⁴⁶ BCPS Ex. 19, pp. 9-11.

evaluative data, and the Student's academic performance and anecdotal information shared from the Parents and teachers regarding the Student's performance while at [REDACTED]. The team determined that the information provided by [REDACTED] was not sufficiently objective to be relied on in forming IEP goals.

65. The IEP team recognized that the Student's reading fluency was not at a sixth grade level, but his comprehension and accuracy were at grade level. The IEP provides that the Student gets added time to make sure he is getting the time he needs to process and understand texts.⁴⁷

66. The IEP team recognized reading vocabulary, spelling and writing as areas of weakness.

67. The annual goals developed on June 8, 2022 IEP reflect the areas of deficits identified in the assessments and other reliable information provided to the team. The proposed IEP contains the following goals, each of which has supporting measurable objectives:

- a. Reading Vocabulary;
- b. Written Language Expression; and
- c. Written Language Spelling.⁴⁸

68. The IEP proposed supplemental aids, services, program modifications, and supports including: additional time to complete assignments; breaking down assignments into smaller units; using sentence starters; grading for content; chunking text; no penalization for spelling errors; giving opportunities to complete assignments through alternate response methods, such as verbal responses, videos, dioramas, or drawings; using a proofreading checklist and graphic organizer; repeating information; using a word bank; access to word processing

⁴⁷ Tr. 120-121.

⁴⁸ BCPS Ex. 20, pp. 20-25.

software; previewing and pre-teaching of vocabulary for new units/topics; frequent staff check-ins with feedback on his progress; adding services to address the Student's reading vocabulary goal outside the general education setting for one one-hour session of specialized instruction daily delivered by a special educator; adding services to address the Student's written expression goal to be delivered outside of the general education session for one forty-five-minute session of specialized instruction daily; and adding services to address the Student's spelling goal outside general education setting for one fifteen-minute session of specialized instruction daily delivered by a special educator.⁴⁹

69. The IEP provided that the Student receive an assistive technology device to access word processing software when typing written responses.

70. The IEP team proposed that the Student's placement within the general education setting at ██████ Middle School (████ MS), his home school, with supports provided by the general educator and special educator was the Student's least restrictive environment with explicit, differentiated specially designed instruction to address goals in reading vocabulary and written language (expression and spelling) delivered outside the general education setting with a special educator.⁵⁰

71. The IEP provides that the student receive:

- a. One hour of classroom instruction daily provided by a special education teacher outside of the general education classroom to support his reading vocabulary;⁵¹
- b. Fifteen minutes of classroom instruction daily provided by a special education classroom teacher to support his written language spelling goal;⁵² and

⁴⁹ BCPS Ex. 20, pp. 18-19.

⁵⁰ BCPS Ex. 20, pp. 28-29.

⁵¹ BCPS Ex. 20, p. 27; Tr. 143.

⁵² BCPS Ex. 20, p. 27; Tr. 145.

- c. One forty-five minute session daily outside of the general education setting by a special education teacher to support the Student's written language expression goal.⁵³

72. With regard to the least restrictive environment in which to implement the Student's IEP, the team considered all of the continuum options of placement. The team determined that the Student would receive twenty-two hours and thirty minutes of classroom instruction in the general education classroom per week and ten hours per week outside of general education setting in the resource classroom. The special education teacher and general education classroom teacher would implement the IEP at ■ MS.⁵⁴

73. The Parents objected to the IEP and placement at ■ MS and requested continued placement at ■■■■■ at public expense.

74. The IEP team discussed the Parents' objections and concluded that the recommended IEP was appropriate based on current and updated information and data regarding the Student's performance and in consideration of the Student's least restrictive environment.

75. The IEP team approved the IEP as proposed.⁵⁵

76. The IEP can be implemented at ■ MS by special educators highly trained in addressing the needs of students with dyslexia and dysgraphia.⁵⁶ There are staff members at ■ MS trained in programs such as Orton Gillingham, Wilson, and Just Words that would address the Student's needs.⁵⁷

⁵³ BCPS Ex. 20, p. 27.

⁵⁴ BCPS Ex. 20, p. 28.

⁵⁵ BCPS Ex. 20.

⁵⁶ Tr. 389, l.1-7; Tr. 393, l. 5-14. The Parents did not challenge the adequacy of the IEP with respect to the Student's ADHD.

⁵⁷ BCPS Ex. 18, p. 5.

77. The IEP and placement are reasonably calculated to meet the unique needs of the Student and to provide a FAPE in the least restrictive environment for the 2022-2023 school year.

DISCUSSION

Burden of Proof

The standard of proof in this case is a preponderance of the evidence. COMAR 28.02.01.21K(1). To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). In this case, the Parents are seeking relief, and bear the burden of proving that: they are entitled to reimbursement of the costs of ██████ during the pendency of this case; BCPS failed to offer the Student a FAPE for the 2022-2023 school year; and they are entitled to relief in the form of payment by BCPS for the costs of the Student’s attendance at ██████. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); COMAR 28.02.01.21K(1), (2)(a).

For the reasons that follow, I find that the Parents have not met their burden as to the 2022-2023 IEP, and conclude that the Parents waived their right to claim reimbursement under stay-put. BCPS offered the Student a FAPE for the 2022-2023 school year with an IEP that was reasonably calculated to meet his unique needs. Therefore, the Parents are not entitled to reimbursement for the costs of ██████ pending the outcome of this case or for their unilateral placement of the Student at ██████ for the 2022-2023 school year.

The Legal Framework

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-

417; 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. It is undisputed that the Student qualifies as a child with a disability who needs special education 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). Prior to June 2022, the Student was identified as a Student with ADHD in the OHI IDEA category. In June 2022, the June 2022 IEP added the identification of the Student in the SLD category with diagnoses of dyslexia and dysgraphia. The Parents agree with his identification in those categories.⁵⁸

Once the local education agency has conducted the appropriate and relevant assessments and identified a student as eligible for special education and related services, an IEP team must convene and develop an IEP designed to address the student’s identified disability, including goals and objectives and services and accommodations designed for the student to make meaningful educational progress.

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 if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* at 201 (footnote omitted). 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; and second, whether the IEP, as developed through the

⁵⁸ The Parents are dissatisfied that BCPS did not identify the Student as having a SLD prior to June 2022. As explained below, the Parents waived all IDEA claims against BCPS for school years prior to the 2022/2023 term.

required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-07. Only the second issue is disputed in this case.

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

The Supreme Court recently revisited the meaning of a FAPE, holding that for an educational agency to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017). Consideration of the student's particular circumstances is key to this analysis; the Court emphasized in *Endrew F.* that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.* at 1001.

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

- (i) the strengths of the child;
- (ii) the concerns of the Parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child; and
- (iv) the academic, developmental, and functional needs of the child.

20 U.S.C.A. § 1414(d)(3)(A).

Among other things, the IEP must depict a student's current educational performance, explain how the student's disability affects a student's involvement and progress in the general curriculum, set forth annual goals and short-term objectives for improvements in that performance, describe the specifically-designed instruction and services that will assist the student in meeting those objectives, describe program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicate the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A.

IEP teams must consider the student's evolving needs when developing their educational programs. The student's IEP must include "[a] statement of the child's present levels of academic achievement and functional performance, including . . . [h]ow the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for non-disabled children). . . ." 34 C.F.R. § 300.320(a)(1)(i). The Parents do not challenge the IEP on this point.

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

In *Andrew F. v. Douglas Cty. Sch. Dist.*, the Supreme Court set forth a "general approach" to determining whether a school has met its obligation under the IDEA. 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 influenced not only by the expertise of school officials, but also by the input of the child’s Parents or guardians.⁵⁹ Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether it is ideal.

The IEP must aim to enable the child to make progress. The instruction offered must be “*specially designed*” to meet a child’s “*unique needs*” through an “[*i*]ndividualized education program.” *Andrew F.*, 137 S. Ct. at 998-99 (citations omitted)(emphasis added). The IDEA requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Id.* at 1001 (citation omitted).

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the “least restrictive environment” to achieve a FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989).

The Contentions of the Parties

As a preliminary matter, the Parents argue that, regardless of the outcome of this case, the BCPS is obligated to pay for the cost of the Student’s current placement at ██████████ during the pendency of this case under the provisions of stay-put. BCPS contends that the Settlement Agreement specifically provides that ██████████ does not constitute stay-put.

⁵⁹ The evidence shows that the Parents participated fully in the IEP process and, although the IEP team did not adopt all of the Parents’ suggestions, their input was considered.

As to the merits of the case, the Parents argue that BCPS does not have the programs in place, the small class sizes, and the staff with the skills necessary to provide the Student a FAPE given his dyslexia and dysgraphia. The Parents approach the case through the prism of their deeply held dissatisfaction that BCPS failed to recognize the Student's dyslexia and dysgraphia prior to the independent evaluation which the Parents obtained at their own expense on December 17, 2020. The Parents believe that the reading program offered at [REDACTED], the Empower program, serves his special needs, and they object to the refusal of BCPS to specify the Empower program in his IEP. The Parents find value in the small class sizes at [REDACTED] and contend that the class sizes at [REDACTED] MS are too large to enable the Student to benefit from the services he requires. In general, the Parents distrust that BCPS will provide the Student the evidence-based intensive early intervention he needs for what they perceive to be his severe disability in the areas of reading and writing. The Parents feel that the Student's progress would be hampered due to anxiety if he were required to attend [REDACTED] MS with nondisabled peers.

BCPS counters that all the procedural requirements of the IDEA were followed and the IEP proposed in June 2022 is reasonably calculated to offer the Student a FAPE. BCPS argues that the IEP would confer the Student educational benefit and allow him to make appropriate progress. As to the [REDACTED] records, BCPS witnesses testified that [REDACTED] did not explain the baseline for its reports and no quantifiable measures of the Student's performance were documented. BCPS argues that the IDEA requires that it use objective, measurable data of the Student's progress so that it can be monitored and the services and supports adjusted, if necessary. According to BCPS, [REDACTED] provided no objective data. BCPS conducted assessments of the Student using well recognized standards and shared the results with the Parents. BCPS considered the Parents' input in forming the IEP, which BCPS contends is

tailored to the Student’s needs and offered to allow him to make appropriate educational progress. BCPS argues that the Parents did not provide evidentiary support for their fear that moving the Student from ██████ to ██████ MS would harm him emotionally.

Analysis of the issues

Stay-put

The right to stay-put was created in federal law which provides that, except as otherwise provided in the IDEA, “during the pendency of any proceedings, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child....” 20 U.S.C. § 1415(j).⁶⁰ See 34 C.F.R. §300.518(a); see also COMAR 13A.05.01.15C(19)(using the term “present educational placement”).⁶¹ “Then-current educational placement” is not defined in the statute or regulations. The legislative history of the IDEA provides no guidance as to Congressional intent. The Fourth Circuit discussed the fluid interpretation given the phrase by other Circuit Courts and focused on Supreme Court discussion to explain the stay-put requirement:

The Supreme Court, however, has indirectly provided insight into the definition of “educational placement” through its discussions of the proper application of the “stay-put” provision. In discussing precursors to the current “stay-put” provision, the Court has twice indicated that its purpose was to “prevent school officials from removing a child from the regular public school classroom over the parents’ objection pending completion of the review proceedings.” *Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 373 (1985); see also *Honig*, 484 U.S. at 323, 108 S.Ct. 592 (noting the “stay-put” provision was intended “to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school” (second emphasis added)).

⁶⁰“Maintenance of Current Educational Placement. Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceeding have been completed.” 20 U.S.C. § 1415(j).

⁶¹ “Student’s Status During Proceedings. Unless the parent and the public agency agree on an alternative placement, the student shall remain in the present educational placement during the pendency of an administrative or judicial proceeding in accordance with 20 U.S.C. §1415(j) and 34 CFR §300.518.”

A.W. v. Fairfax County Sch. Bd., 372 F.3d 674, 680 (4th Cir. 2004)(emphasis added).

The Parents argue that, under the Settlement Agreement,⁶² [REDACTED] was the Student's educational placement when they filed the instant Due Process complaint. It is clear that BCPS agreed to reimburse the full cost of the Student's placement at [REDACTED] for the 2021-2022 school year. In exchange, the Parents agreed to fully release BCPS from its allegations in the prior complaints and to fully cooperate with BCPS in the formation of an IEP and proposed placement of the Student for the 2022-2023 school year.

The Parents' argument ignores the statutory provision that a student is not entitled to stay-put if the parents and a school system agree that the placement is not stay-put. It is clear from the Settlement Agreement that the parties agreed that [REDACTED] was not stay-put. The Settlement Agreement provides unambiguously in paragraph 6:

*Parents waive the right to stay-put, attorneys fees, transportation costs, educational consultant fees, tutoring costs, any expert fees, and the right to seek additional compensatory services for any violations of FAPE or IDEA complaints regarding the 2021-2022 school year as well as prior school years. (emphasis (bolding) added).*⁶³

I conclude that the Parents are not entitled to an order enforcing the educational placement of the Student at [REDACTED] and reimbursement of the costs therefor during the pendency of this case because they waived the right to stay-put under the unequivocal terms of the Settlement Agreement.

I comment additionally about another provision in the Settlement Agreement. Mrs. [REDACTED] testified that she mistrusts the ability of BCPS to provide the Student a FAPE now because, in her opinion, it failed to do so previously. While I accept her sincere view, I cannot

⁶² BCPS Ex. 2.

⁶³ BCPS Ex. 2, p. 2.

consider it because there is no evidence in this record about prior IEPs and the Student's performance under them from which to do so.

The record does not contain any IEPs for the Student prior to June 2022. There must have been an IEP prior to that time because the Student was identified as having ADHD, an OHI under the IDEA before June 2022. Without any evidence of the Student's progress or lack thereof under prior IEPs, I cannot make any comment about whether the Student was previously receiving a FAPE or if the June 2022 IEP better serves the Student's needs. Furthermore, the Parents are precluded from raising this issue because they waived the right to claim denial of a FAPE for 2021/2022 and all prior years under the Settlement Agreement.

The Alleged Denial of a FAPE in 2022/2023

For the following reasons, I conclude that the IEP is reasonably calculated to enable the Student to receive some educational benefit in the 2022-2023 school year. The path to amending the Student's IEP to add the SLP designation began when the Parents provided the IEP team with the results of their independent psychosocial evaluation indicating the Student requires services as a student with dyslexia. The IEP team met on February 8, 2022 and ordered assessments. Ms. ██████ conducted extensive testing using well recognized assessments: Phonological Awareness Test 2:NU Diagnostic Decoding Survey,⁶⁴ Brigance,⁶⁵ DIBELS⁶⁶ and Qualitative Reading Inventory.⁶⁷ Ms. ██████ is qualified to conduct those assessments, and she explained them in great detail at the hearing. The Parents did not contest the appropriateness of the assessments, their methodologies or Ms. ██████'s qualifications. I found Ms. ██████'s testimony and the results of the assessments she performed highly persuasive, and I relied on them in my decision.

⁶⁴ BCPS Ex. 11.

⁶⁵ BCPS Ex. 12.

⁶⁶ *Id.*

⁶⁷ *Id.*

The Parents believe that ██████ is greatly superior to the BCPS program and services described in the IEP. The IEP team did not ignore this perspective. The team requested documents from ██████ and the opportunity to observe the Student there. Perhaps due to COVID-19 restrictions, ██████ did not permit outside observations at that time, but it forwarded a written classroom observation to the Parents, who shared it with the IEP team.⁶⁸ The Parents also shared ██████ Interim Reports, Tutoring Reports and Report Cards, and attached narratives.⁶⁹ The Parents think that the Student has made progress at ██████.

BCPS did not rely on the ██████ records in forming the IEP because they are entirely subjective. Ms. ██████ testified that ██████ did not provide “quantitative data.”⁷⁰ She described the data she would use to evaluate a student’s progress toward the goals in his IEP as “targeted trials with percentage of accuracy and specific sounds that [the Student] struggled with.”⁷¹ Responding on cross-examination about why the ██████ records describing the Student’s progress at ██████ in Spelling are not reliable, Ms. ██████ gave an explanation:

From a measurable objective – quantitative standpoint it does not tell [BCPS] how he is doing on these words percentage wise. Should we focus on O-Y more or should we focus on A-L more? You want to make sure that you’re addressing the biggest concern first and scaffolding down through the different skills that the student needs to work on until he has mastered all of them. You want to address all of them, but there are going to be certain ones that are going to be a bigger red flag that you want to focus on over others.⁷²

The IDEA regulations at 34 C.F.R. § 300.320(a)(2) require that each IEP contain “a statement of *measurable* annual goals....” (emphasis added). The IEP spelling goal provides an example of the type of measurable goals and supporting objectives required by the law: “By June

⁶⁸ BCPS Ex. 9.

⁶⁹ BCPS Ex. 7, 21-23.

⁷⁰ Tr. 177, l. 13-16; *see also* Tr. 125, l. 10-13.

⁷¹ Tr. 177, l. 17-18.

⁷² Tr. 170, l. 15-24.

2023, given a list of 20 multi-syllable words that contain a variety of vowel teams (e.g., ai, io, oa, etc.), [the Student] will correctly spell-encode each phoneme and blend to spell 18 out of 20 words (90% accuracy) on 3 out of 4 trials.”⁷³ The objectives require the Student’s progress to be recorded in November, January and March of the school year, with increasing mastery targets of 75%, 80% and 85% respectively. Ms. █████ explained that by collecting the quantitative data on the Student’s performance in the specific, identified areas of need, the IEP team can determine if the Student is making progress toward his goals. The IEP team will have data to adjust goals, if necessary to meet his needs.

BCPS properly refused to rely on the █████ records in forming the IEP. The █████ records are replete with narratives containing statements about the Student’s congeniality, effort, and positive attitude – in effect, his good effort. The █████ report cards award the Student specific letter grades (with numerical equivalents), all of which were A’s (on a presumably A to F grade range). As the witnesses for BCPS explained, this type of information did not provide the IEP team with the quantitative data necessary to craft specific, measurable goals from which the Student’s progress could be measured. BCPS convinced me that the █████ records did not provide a basis for drafting the specific IEP goals with supporting objectives that the law requires. The █████ records do not support the Parents’ position that the Student was making progress in the █████ program.

The results of the BCPS assessments were shared with the Parents. The Parents did not attack the assessments on their methodologies or suitability to measure the Student’s needs. The Student’s IEP contained numerous testing and instructional accommodations, use of assistive technology devices and supplementary aids and services to help him achieve the annual goals on the IEP. The goals and objectives on the IEP were developed after the IEP team reviewed the

⁷³ BCPS Ex. 20, p. 24.

assessments in accordance with the applicable law and regulations. The Parents did not dispute the developed goals when the IEP was discussed on June 8, 2022. This is very important because the annual goals are what determine the Student's program and placement.

In addition to measuring the IEP against the services they believe ██████ is providing, the Parents take aim at the IEP and the proposed placement at ██████ MS for additional reasons. I will discuss these reasons and explain why I am convinced that the IEP and the proposed placement offer the Student a FAPE.

First, the Parents contend that BCPS teachers are not trained on best practices for dyslexic and dysgraphic learners. Starting with Ms. ██████, who participated in the IEP process as a Special Education Case Manager, the record shows that she has training in providing special education services to students with dyslexia and dysgraphia.⁷⁴ Ms. ██████, who has a B.S. degree in elementary and secondary special education, testified that "training for special education is training for students with all types of disabilities."⁷⁵ The Parents did not provide competent evidence to challenge her expert opinion. I accept Ms. ██████'s testimony as a reliable basis for my decision about areas of education which require expert testimony.

The Parents failed to provide proof that BCPS does not have the staff to provide the Student with the services and supports listed in his IEP. Ms. ██████ testified that the Student would be taught at ██████ MS by teachers with extensive training in special education and in teaching students with dyslexia.⁷⁶ There are teachers at ██████ MS certified in special education and teachers certified in various reading interventions.⁷⁷ The Parents' arguments to the contrary are unsupported by credible, reliable evidence.

⁷⁴ Tr. 97, l. 9-23.

⁷⁵ Tr. 98, l. 11-12.

⁷⁶ Tr. 393, l. 11-14.

⁷⁷ Tr. 393, l. 24 – Tr. 394, l. 4

Second, the Parents argue that the IEP does not offer the Student the opportunity to take high level courses. The Parents did not explain exactly what they meant by “high level courses,” except to testify that the student excels in math. I understand that the Parents are concerned that, because the Student will have time built into his weekly schedule for special education services and supports in the areas of reading and writing, his schedule would not allow him to take some accelerated studies such as math.

Ms. [REDACTED] testified that [REDACTED] MS can accommodate students with dyslexia and dysgraphia in high level classes, the advanced or gifted and talented courses.⁷⁸ Ms. [REDACTED] testified that she met with Mr. [REDACTED] at [REDACTED] MS and gave him a potential schedule the Student would receive if he were enrolled at BCPS.⁷⁹ She discussed the possibility for the Student to enroll in either algebra I or an advanced placement math.⁸⁰ The Parents produced no evidence to the contrary.

Third, the Parents contend that the Student’s IEP would require him to miss core classes. Ms. [REDACTED] testified in depth about the proposed [REDACTED] MS schedule and effectively refuted this contention. She also pointed out that the proposed schedule would allow the Student to enroll in Art and Music while still receiving the special education services and supports listed in his IEP. Again, the Parents did not produce competent evidence to the contrary.

Fourth, the Parents argue that, in every subject, the Student should be taking part in a writing program designed specifically for dysgraphia. Ms. [REDACTED] testified that at [REDACTED] MS the Student would receive specialized instruction to address his needs regarding dysgraphia taught by a teacher certified in special education in every subject.⁸¹ The Parents did not offer competent evidence to refute this testimony.

⁷⁸ Tr. 394, l. 5-12.

⁷⁹ BCPS Ex. 24.

⁸⁰ Tr. 398, l. 8-25.

⁸¹ Tr. 394, l. 19-44 – Tr. 395, l. 1-13.

Fifth, the Parents argue that the Student requires the Empower reading program he is using at █████ because they believe he has made progress with it. The █████ Interim Report indicates that the Student was using Empower with success. As explained above, █████ did not provide any measurable, quantitative data about the Student's progress. Dr. █████ did not specify the reading program best suited to the Student's needs. Ms. █████ testified that there is no one trained in Empower at █████ MS.⁸² As to the use of Empower at BCPS, Ms. █████ explained the reasons why BCPS does not specify a reading program in any student's IEP:

We need to not put in a specific intervention because it forces us to only be able to provide that and in order for us to address if that intervention is not working it would require us to come together as a team again before something new could be put in place rather than being able to on the spot discuss with the team when a new strategy or intervention needs to be used to better meet the student's needs.⁸³

The school along with the IEP team for each student employs a reading intervention which, in the opinion of the qualified special educators, best suits the student's individual needs.⁸⁴ Other than the Student's perceived progress at █████ using Empower, the Parents provided no evidence that Empower is the only program that meets the Student's needs.

Sixth, the Parents contend that the Student requires a very low student to teacher ratio, no more than two students to one educator, in order to make progress toward his goals. Dr. █████, who prepared a detailed psychosocial evaluation of the Student, explained at length her recommendations to best meet the Student's needs.⁸⁵ Dr. █████ recommended that the Student work with a school learning specialist or resource teacher to receive specialized reading instruction, but she did not specify a student to teacher ratio.

⁸² Tr. 34.

⁸³ Tr. 157.

⁸⁴ Tr. 70, 157-158.

⁸⁵ P. Ex. 13.

Ms. [REDACTED] testified that under the IEP when the Student was in the general education setting he would be in a class with 20 to 30 students.⁸⁶ The class would be considered an inclusion class so there would be a teacher and one additional adult, “either a para-educator or a special educator to help with supporting for specially designed instruction.”⁸⁷ The Student’s schedule would also have time for him to receive small group help in the Resource Room.

The resource room at [REDACTED] MS would have no more than ten students with one educator. If there were more than ten students in the resource classroom, another educator or para-educator would be present.⁸⁸

Under the heading “Instructional and Assessment Accessibility Features,” the IEP provides that the Student receive small group instruction, frequent breaks, and reduced distractions during testing.⁸⁹ Furthermore, Ms. [REDACTED] testified that, under the proposed IEP, the Student would receive specialized instruction outside the general education classroom with a special educator.⁹⁰ Ms. [REDACTED] could not say what the ratio of students to teacher would be when the Student joined the class. I conclude that the Parents failed to prove that the Student requires extremely close attention to achieve his IEP goals.

Finally, the Parents testified that the IEP team failed to consider that, as the Student testified, he is comfortable at [REDACTED] and would be anxious if he were required to change schools. The Student testified that he felt more comfortable at [REDACTED] with other students like himself and he feared going back to [REDACTED] MS to attend class with peers who are not like him.

⁸⁶ Tr. 64, l. 19-22.

⁸⁷ Tr. 65, l. 2-11.

⁸⁸ Tr. 63, l. 7-13.

⁸⁹ BCPS Ex. 20, pp. 15-16.

⁹⁰ Tr. 353 – 354.

The [REDACTED] Interim Report has comments from numerous teachers about the Student's successful transition to that school from BCPS.⁹¹ The [REDACTED] Classroom Observations reported no problems with social interaction.⁹² The [REDACTED] Interim Trimester Report Card does not indicate that the Student exhibited any emotional or social problems.⁹³ The Student exhibited no anxiety during the assessments conducted by Ms. [REDACTED] at [REDACTED] ES.⁹⁴ Dr. [REDACTED] reported that during her interview before the Student enrolled at [REDACTED], he expressed self-confidence and reported good relationships with his peers and teachers at [REDACTED] ES.⁹⁵ The Student does not have a diagnosis of an emotional disorder.

Mrs. [REDACTED] told the IEP team that the Student would be anxious if forced to change schools because he might feel different around the other students at [REDACTED] MS.⁹⁶ Ms. [REDACTED] testified that the Parent mentioned anxiety but there was "no documentation specifically given on that."⁹⁷ The IEP team did not recommend updating the psychological assessment of the Student. Absent any reference to the Student's unease in any educational or assessment setting and absent the Parents' documentation of any emotional difficulty, I conclude based on all the evidence, that the IEP team did not err in failing to consider anxiety as a possible factor in the Student's ability to achieve a FAPE.

Having discussed all of the Parents' specific contentions, I will also address a general issue regarding the Parents' ability to meet their burden of proof. The Parents pointed out in closing that the witnesses for BCPS were paid salaries for the performance of their duties, including testifying at the hearing, but the Parents lacked the means to pay for their own experts.

⁹¹ BCPS Ex. 7.

⁹² BCPS Ex. 9.

⁹³ BCPS Ex. 7.

⁹⁴ *Id.*, p. 3.

⁹⁵ P. Ex. 13, p. 9. Dr. [REDACTED] observed the Student engaging in asynchronous schoolwork with his mother at her office. P. Ex. 13, p. 2.

⁹⁶ Tr. 59, l. 3-16.

⁹⁷ Tr. 59, l. 12-16.

The inequity of the parties in this respect cannot be denied. However, Congress has not seen fit to remedy this imbalance, which persists in many cases brought by parents under the IDEA, by providing a source of funds for the payment of parents' experts in IDEA cases. I must apply the law as written. The law places the burden of proof on the Parents in this case, which means that failure to present evidence that the IEP does not offer a FAPE inures to the Parents' detriment.

The Parents' testimony convinced me of their genuine interest in the Student's educational and overall wellbeing. The Parents were involved in the creation of the IEP, and the Student's mother attended all IEP team meetings, along with counsel. The Student's mother and father are very knowledgeable about all aspects of the Student's health and education.

Additionally, it is overwhelmingly clear from the testimony and tangible evidence that both Parents love their son very much and fervently guard his chance to maximize his potential. The Parents were very clear in their testimony regarding the Student's strengths and needs, and how they perceive that the Student's deficits impact his ability to progress in the general curriculum. Despite their appropriate passion and understandable zeal in favor of the Student receiving special education services under the IDEA at [REDACTED], the Student simply does not require that the IEP services and supports be provided in a restrictive placement. The Student must be placed in the least restrictive environment to achieve a FAPE. 20 U.S.C.A. § 1412(a)(5). The Student's deficits are such that his program can be implemented in a comprehensive school, and he does not require a more restrictive environment given that supplementary aids and services can assist the Student to receive a FAPE in the least restrictive environment.

After considering all the evidence in the record, I am convinced that BCPS prepared an appropriate program for the Student for the 2022-2023 school year. The June 2022 IEP provides that the Student's IEP could be implemented in a comprehensive school. As indicated above, in

determining the educational placement of a student with a disability, the public agency must ensure that the placement decision is made by the IEP team in conformity with the least restrictive environment provisions, determined at least annually, be based on the student's IEP, and be as close as possible to the student's home. 34 C.F.R. §300.116(a) and (b). In selecting the least restrictive environment, the public agency must consider any potential harmful effect on the student or on the quality of services that the student needs. 34 C.F.R. §300.116(d). This is exactly what the IEP team did. Specifically, the team determined that the Student could receive his services in a typical school with support.

In this case, it is clear from the evidence that, other than the Parents, none of the IEP team members believed on June 8, 2022 that the Student required his program to be implemented in a separate day school. Consequently, the evidence indicates that a more restrictive change in placement with regard to the least restrictive environment was simply not necessary. BCPS staff provided a detailed analysis of the Student's performance, strengths and deficits. The school-based members of the IEP team believe that the Student's IEP could be effectively implemented at a typical school with specialized instruction. The judgment of educational professionals such as these is ordinarily entitled to deference. *G. v. Ft. Bragg Dependent Schools*, 343 F.3d 295, 307 (4th Cir. 2003); *M.M. v. School District of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002). Where appropriate, I have given deference to BCPS staff, because the assertions concerning what the Student requires are supported by concrete evaluative data regarding the Student's needs, ascertained from a variety of sources as detailed in the facts set out above.

After carefully reviewing all of the evidence presented by the Parents and BCPS, I find that BCPS developed an appropriate IEP and placement for the 2022-2023 school year. The IEP

and placement are reasonably calculated to enable the Student to make appropriate progress in light of his unique needs as a student who has a learning disability and ADHD.

Claim for Reimbursement of [REDACTED] Tuition, Costs and Expenses

Under *County School District Four v. Carter*, 510 U.S. 7 (1993), and *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985), whether a parent's private placement choice is proper is analyzed only if the IEP proposed by the local education agency results in the denial of a FAPE. I have concluded in this case for the reasons set forth above that the IEP and placement offered by the BCPS provide the Student a FAPE. Therefore, under *Carter* and *Burlington*, the issue of whether the Student's placement at [REDACTED] is proper is not required to be addressed further in this decision. As BCPS did not deny the Student a FAPE, the Parents' claim for reimbursement of [REDACTED] tuition, costs, and expenses is denied.

CONCLUSIONS OF LAW

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

The Parents are not entitled to an order enforcing the educational placement of the Student at [REDACTED] and reimbursement of costs during the pendency of this case because they waived the right to stay-put when they entered into the April 29, 2021 settlement agreement with BCPS. 20 U.S.C. §1415(j); 34 C.F.R. §300.518; *also* COMAR 13A.05.01.15C(19); and

The Parents failed to prove that the June 2022 IEP and the proposed placement of the Student at [REDACTED] Middle School denied the Student the opportunity for a free and appropriate public education. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005); COMAR 28.02.01.21K(1), (2)(a); 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01.

ORDER

I **ORDER** that the Parents' request for placement at and reimbursement for tuition, costs and expenses at [REDACTED] for the 2022-2023 school year is **DENIED**.

April 10, 2023
Date Decision Issued

Mary R. Craig
Administrative Law Judge

MRC/cj
#204138

REVIEW RIGHTS

A party aggrieved by this final decision may file an appeal within 120 days of the issuance of this decision with the Circuit Court for Baltimore City, if the Student resides in Baltimore City; with the circuit court for the county where the Student resides; or with the United States District Court for the District of Maryland. Md. Code Ann., Educ. § 8-413(j) (2022). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence. A party appealing this decision 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 appeal. The written notification must include the case name, docket number, and date of this decision, and the court case name and docket number of the appeal. The Office of Administrative Hearings is not a party to any review process.

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

██████████,

STUDENT

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

BEFORE MARY R. CRAIG,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-BCNY-OT-23-00391

FILE EXHIBIT LIST

I admitted the following documents as Parents' Exhibits:

- P. Ex. 1 Parent Notification of IEP Meeting, 1/10/22
P. Ex. 2 Parent permission for assessment, 2/22/22¹
P. Ex. 3 Brigance and PAT assessments analysis, 3/31 & 4/8/22²
P. Ex. 4 ██████████ Classroom Observation of Student Performance, 2/25/22³
P. Ex. 5 Not offered
P. Ex. 6 IEP Team Summary, 4/25/22⁴
P. Ex. 7 Specific Learning Disability Team Report, 4/25/22⁵
P. Ex. 8 Parent copy of IEP (before parental input), 6/8/22⁶
P. Ex. 9 Spelling Goals, 6/8/22
P. Ex. 10 Not offered
P. Ex. 11 IEP Team Summary (without parental input), 6/8/22⁷
P. Ex. 12 Emails from BCPS (page 3 only), 5/10 & 11/21
P. Ex. 13 Comprehensive Psychosocial Evaluation, 12/17/20
P. Ex. 14 ██████████ School Documents:
 - Email, 12/7/21
 - Tutoring Report, 1/22
 - Email, 9/5/22
 - Tutoring Goals, 1/23
 - Receipt for Tuition and balance due, 2022-2023 School Year
 - Tutoring Goals, 10/22
 - Trimester Report Card, 11/22
 - Email, 1/15/21

¹ Included in BCPS Ex. 8.

² Included in BCSP Ex. 11 & 12.

³ Same as BCPS Ex. 9.

⁴ Same as BCPS Ex. 14.

⁵ Same as BCPS Ex. 15.

⁶ Same as BCPS Ex. 19.

⁷ Same as BCPS Ex. 18.

- Email, undated (appears that first page or top of this page was cut off during copying)
- Email, 1/22/21
- Dyslexia Screening, 1/26/21
- Reading and Spelling Report, 1/25/21 to 1/31/21

P. Ex. 15 Not offered
 P. Ex. 16 Not offered
 P. Ex. 17 Not admitted (Retained in the OAH file)
 P. Ex. A Not offered

I admitted the following documents as BCPS's Exhibits:

BCPS Ex. 1 BCPS Psychological Assessment, 2/11/21
 BCPS Ex. 2 BCPS Letter of Agreement, 4/28/21
 BCPS Ex. 3 BCPS Elementary Report Card, 2021-2022 School Year
 BCPS Ex. 4 [REDACTED] School Tutoring Report, 1/21
 BCPS Ex. 5 Parent Notification of IEP Team Meeting, 1/20/22; Maryland Procedural Safeguards Notice, 7/21
 BCPS Ex. 6 IEP Team Summary, 2/8/22
 BCPS Ex. 7 [REDACTED] Interim Trimester Report Card, 12/21 (forwarded to [REDACTED] 2/8/22)
 BCPS Ex. 8 Receipt of Procedural Safeguards Parental Rights Document, 2/8/22; Signed Parental Consent for Assessments, 2/22/22
 BCPS Ex. 9 [REDACTED] Classroom Observation of Student Performance, 2/25/22⁸
 BCPS Ex. 10 not offered
 BCPS Ex. 11 BCPS Educational Assessments: Phonological Awareness Test 2; NU and Pragmatic Decoding Survey, 3/31/22
 BCPS Ex. 12 BCPS Educational Assessments: Brigance, DIBELS & Qualitative Reading Inventory, 4/8/22
 BCPS Ex. 13 Notice of Documents and Parent Notification of IEP Team Meeting for April 25, 2022, IEP Team Meeting, signed by [REDACTED] and forwarded to [REDACTED] April 8, 2022
 BCPS Ex. 14 IEP Team Summary, 4/25/22
 BCPS Ex. 15 Specific Learning Disability Team Report, 4/25/22⁹
 BCPS Ex. 16 Parent Notification of IEP Team Meeting, 5/3/22
 BCPS Ex. 17 Notice of Documents, 5/17/22
 BCPS Ex. 18 IEP Team Summary, 6/8/22¹⁰
 BCPS Ex. 19 IEP, 6/8/22 (without parental input) and email from [REDACTED] to [REDACTED], 8/10/22
 BCPS Ex. 20 IEP, 6/8/22 (with parental input) and email from [REDACTED] to [REDACTED], 8/10/22
 BCPS Ex. 21 [REDACTED] Tutoring Report, 10/22
 BCPS Ex. 22 [REDACTED] Trimester Report Card, 11/22
 BCPS Ex. 23 Not offered
 BCPS Ex. 24 School Emails, various dates

⁸ Same as P. Ex. 6.

⁹ Same as P Ex. 7.

¹⁰ Same as P. Ex. 11.

BCPS Ex. 25a Resume –

BCPS Ex. 25b Resume –

BCPS Ex. 25c Resume –

BCPS Ex. 25d Resume –

