

██████████,

STUDENT

v.

MONTGOMERY COUNTY PUBLIC

SCHOOLS

BEFORE PATRICIA M. DEMAIO,

ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-22-23653

**CORRECTED DECISION<sup>1</sup>**

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

**STATEMENT OF THE CASE**

On September 29, 2022, Michael J. Eig, Esquire and Paula A. Rosenstock, Esquire, on behalf of ██████████ and ██████████ (Parents) and ██████████ (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 Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A.

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<sup>1</sup> COMAR 28.02.01.27(A)(2)(b) provides that a judge may take the initiative to correct a clerical mistake in a final decision. The Decision issued on April 26, 2023 incorrectly stated: “I held the due process hearing remotely utilizing the Webex videoconferencing platform on February 9-10, 2022 ....” The correct dates are February 9-10, 2023. In FN 8, it incorrectly states “Mr. Eig advised that his witnesses were not available on December 22, 2022 – January 3, 2022 ....” The correct dates are December 22, 2022 – January 3, 2023. This decision corrects those clerical mistakes. No other changes were made to this decision.

§ 1415(f)(1)(A) (2017);<sup>2</sup> 34 C.F.R. § 300.511(a) (2021);<sup>3</sup> Md. Code Ann., Educ. § 8-413(d)(1) (2022);<sup>4</sup> Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

On December 5 and December 9, 2022, I conducted a remote pre-hearing conference in the above-captioned matter utilizing the Webex videoconferencing platform (Webex). COMAR 28.02.01.20B. The Parents were not present, but were represented by Mr. Eig. Manisha S. Kavadi, Esquire, represented the MCPS.

I held the due process hearing remotely utilizing the Webex videoconferencing platform on February 9-10, 2023; February 13-17, 2023; March 6-8, 2023; and March 27, 2023.<sup>5, 6, 7</sup> Mr. Eig and Paula A. Rosenstock, Esquire, represented the Parents. Ms. Kavadi represented the MCPS.

Under the applicable law, a decision in this case normally would be due by December 13, 2022, which is forty-five days after October 29, 2022, the day after the parties agreed in writing that no agreement was possible.<sup>8</sup> 34 C.F.R. §§ 300.510(b)(2), (c)(2), 300.515(a); Md. Code Ann., Educ. § 8-413(h); COMAR 13A.05.01.15C(14)(b).

After a thorough review of my calendar, the parties' calendars, and available hearing dates, the parties were unable to identify hearing dates on which counsel and their essential witnesses

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<sup>2</sup> U.S.C.A." is an abbreviation for the United States Code Annotated. All citations herein to the U.S.C.A. are to the 2017 bound volume.

<sup>3</sup> C.F.R. is an abbreviation for Code of Federal Regulations. All citations of 34 C.F.R. hereinafter refer to the 2021 volume.

<sup>4</sup> All citations to the Education Article are to the 2022 volume.

<sup>5</sup> On January 27, 2023, at approximately 9:30 a.m., I attempted to convene the hearing as scheduled. Ms. Kavadi had a technical issue that prevented her from accessing Webex from her remote location and appeared, with Mr. Eig's assistance, by telephone. At the request of the parties, no testimony was taken, and the matter was continued to February 9, 2023, the next scheduled hearing date. Mr. Eig affirmed that the Student would not be prejudiced by concluding the matter for the day and beginning the hearing on the next previously scheduled hearing date.

<sup>6</sup> On March 8, 2023, the Parents' request to add March 27, 2023, as an additional hearing date to present a rebuttal witness was granted. By agreement of the parties, March 28, 2023, was also added as an additional hearing date. However, the matter was concluded the previous day, and the March 28, 2023 hearing date was subsequently cancelled.

<sup>7</sup> On March 8, 2023, after approximately two hours of witness testimony, Ms. Kavadi requested a postponement to attend to an emergent personal medical issue. The Parents did not object. I found good cause to continue the matter to March 27, 2023, the next scheduled hearing date.

<sup>8</sup> On October 18, 2022, a resolution meeting was held. On October 28, 2022, the parties forwarded to the OAH written documentation confirming their inability to reach a resolution. 34 C.F.R. § 300.510(c)(2).

would be available that would allow me to hold and complete the hearing and issue a decision by December 13, 2022.<sup>9</sup>

The mutually agreed upon hearing dates were January 27;<sup>10</sup> February 9-10, 13-17; and March 6-8, 2023.

At the prehearing conference, the Parents made a motion to extend the 45-day timeline to accommodate the scheduling conflicts and to allow me adequate time to thoroughly examine the evidence presented during the hearing and render a decision. 34 C.F.R § 300.515(c); Md. Code Ann., Educ. § 8-413(h). The MCPS did not object.

For those reasons and by request of the Parents, I found good cause to extend the regulatory timeframe and schedule the hearing on the hearing dates selected by the parties; I agreed to issue my decision no later than thirty days after the conclusion of the hearing, which in this case would have been April 7, 2023. 34 C.F.R. § 300.515(c). Subsequently, an additional hearing date was added to the schedule which changed the decision due date to April 26, 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. Md. Code Ann., State Gov't §§ 10-201

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<sup>9</sup> Mr. Eig advised that his witnesses were not available on December 22, 2022 – January 3, 2023; Mr. Eig had due process hearings in Washington, District of Columbia (D.C.) on January 4 – 6, 2023 and January 9 – 11, 2023; Mr. Eig had due process hearings scheduled in Virginia on January 12, 13 and 17, 2023; Mr. Eig had previously scheduled vacation on January 18 – 20, 2023; Mr. Eig had a due process hearing scheduled in Virginia on January 23 – 26, 2023; Mr. Eig had an afternoon Individualized Education Program (IEP) meeting on January 27, 2023; Mr. Eig had a due process hearing scheduled in Washington, D.C. on January 30 – February 2, 2023; Mr. Eig had a previously scheduled appointment on February 6, 2023; Mr. Eig had a due process hearing in Washington, D.C. on February 8, 2023; and Mr. Eig was lecturing at a national convention on February 20 – 24, 2023. On behalf of the MCPS, Ms. Kavadi advised that December 20, 2022 – January 3, 2023, she had prescheduled leave, and the MCPS' staff were on leave from December 23, 2022 – January 3, 2023; the MCPS' witnesses had previously scheduled meetings on January 4 – 6, 9 and 12, 2023; Ms. Kavadi was unavailable on January 20, 2023; Ms. Kavadi had previously scheduled meetings on January 23, 2023; and Ms. Kavadi was unavailable due to a previously scheduled due process hearing on January 30, 2023 - February 8, 2023. Further, the OAH was closed December 23 and 26, 2022 in observance of the Christmas holiday; I had pre-scheduled vacation from December 27 – 30, 2022; the OAH was closed January 2, 2023 in observance of the New Year's Day holiday; I had previously scheduled hearings that were specially set on January 12 and 19, 2023; the OAH was closed on January 16, 2023 in observance of the Martin Luther King, Jr. holiday; and the OAH was closed February 20, 2023 in observance of the Presidents' Day holiday.

<sup>10</sup> Based on Mr. Eig's availability, January 27, 2023 was scheduled for a half day from 9:30 a. m. to 12:30 p. m.

through 10-226 (2021); Md. Code Ann., Educ. § 8-413(e)(1); COMAR 13A.05.01.15C; COMAR 28.02.01.

### ISSUES<sup>11</sup>

Whether the MCPS failed to provide a free appropriate public education (FAPE) for the 2022-2023 school year, by failing to propose an appropriate individualized education program (IEP) and placement for the 2022-2023 school year, specifically whether:

- The Student requires fulltime special education services outside of the general education setting;
- The Student requires fulltime placement in small, structured classes with integrated related services;
- The Student requires regularly scheduled psychotherapy as a related service;
- The Student requires an Orton Gillingham reading intervention to be provided with fidelity;
- The MCPS' proposal of larger general education classes/settings in "specials,"<sup>12</sup> lunch, and recess is inappropriate;
- The MCPS' counseling proposal is inappropriate;
- The Student's pervasive anxiety would not be appropriately addressed through the MCPS' IEP or placement at ██████████ Elementary School (██████████);
- Moving the Student from the ██████████ (██████████) to ██████████, in the fifth grade, would be inappropriate since the Student would only be able to attend ██████████ for one year and then have to move to a different school with a different delivery model for the sixth grade;
- MCPS' refusal to refer the IEP/placement to the Central IEP team was inappropriate; and

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<sup>11</sup> At the conclusion of Mr. Eig's closing argument, I asked whether any of the issues previously identified at the pre-hearing conference were being abandoned. Mr. Eig reviewed the Pre-Hearing Conference Report and Order and advised me that the Parents would not be pursuing the following issues: (1) whether the Student requires an IEP goal in reading comprehension; and (2) whether the Student requires an IEP goal in executive functioning. (Hr'g Tr. at 2274-2275.) Accordingly, those issues are not being substantively addressed in this decision.

<sup>12</sup> Specials are electives such as art, music, gym, and media.

- MCPS' IEP process did not conclude until the school year was underway, thereby preventing the Parents and their consultant from being able to observe the proposed program/placement in order to make a fully informed decision until that time.

### SUMMARY OF THE EVIDENCE

#### Exhibits<sup>13</sup>

The list of exhibits offered into evidence is attached to this Decision as an Appendix.

#### Testimony<sup>14</sup>

The Student presented the following witnesses:

- [REDACTED], Ph.D, Director of Psychology Services of the [REDACTED], [REDACTED], accepted as an expert in Child and Adolescent Clinical Psychology;
- [REDACTED], Director of Jurisdictional Services, [REDACTED], [REDACTED], accepted as an expert in Special Education;
- [REDACTED], M.S. Occupational Therapist, Director of Occupational Therapy, [REDACTED], accepted as an expert in Occupational Therapy;
- [REDACTED], M.S., CCC-SLP, Director of Speech and Language, [REDACTED], [REDACTED], accepted as an expert in Speech Language Pathology;
- [REDACTED], Executive Director, [REDACTED] ([REDACTED]), accepted as an expert in Special Education;
- [REDACTED], M.Ed., Special Education Teacher, MCPS, accepted as an expert in Special Education, and Student's mother; and
- [REDACTED], MS, CC-SLP, SLDI, Head of Middle School, [REDACTED], [REDACTED], accepted as an expert in Speech Language Pathology and Reading Instruction.

The MCPS presented the following witnesses:

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<sup>13</sup> The Parties did not submit joint exhibits. The parties submitted an index of their respective exhibits. I relied on the indexes when listing the exhibits herein. Where appropriate, the formatting was changed for ease of reading. Because this was a remote hearing, the exhibits were pre-marked and submitted to the OAH before the hearing began. Pursuant to COMAR 28.02.01.22C all pre-marked exhibits will be retained for the record.

<sup>14</sup> All expert witnesses were accepted either upon stipulation of the parties as to the witnesses' expertise in his or her respective field of study or qualified upon a satisfactory examination of the witnesses' education, credentialing, and experience. See COMAR 28.02.01.21D; See, e.g., *Univ. of Md. Med. Sys. Corp. v. Waldt*, 411 Md. 207, 237 (2009) (determination whether proposed expert has sufficient training, knowledge or skill to render expert opinion is committed to the sound discretion of the judge); *Massie v. State*, 349 Md. 834, 850-51 (1998) (citations omitted) (A judge may determine that a witness is sufficiently familiar with the subject matter to render an expert opinion based on "the witness's formal education, professional training, personal observations, and actual experience.").

- [REDACTED], Twice-Exceptional Instructional Specialist, MCPS, accepted as an expert in Special Education with an emphasis on Gifted and Talented and Twice Exceptional Students;
- [REDACTED], M.Ed, Content Specialist, Department of Special Education Services, MCPS, accepted as an expert in Special Education and Reading Instruction;
- [REDACTED], M.A., Ed.S., School Psychologist, MCPS, accepted as an expert in School Psychology;
- [REDACTED], M.S., Occupational Therapist, MCPS, accepted as an expert in Occupational Therapy including clinical and school based occupational therapy; and
- [REDACTED], M.A., CCC-SLP, Speech Language Pathologist, MCPS, accepted as an expert in Speech Language Pathology.

### FINDINGS OF FACT<sup>15</sup>

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

#### Background

1. The Student attended preschool (2014-2015; 2015-2016; 2016-2017) and kindergarten (2017-2018) at the [REDACTED] ([REDACTED]), a private school in Maryland. (P. Ex. 4, p.2.)
2. From April 2012 through August 2016, the Student received services through the Montgomery County Infant and Toddlers Program. (*Id.*)
3. For the 2016-2017 school year, while attending [REDACTED], the Student also attended the MCPS's Pre-Kindergarten program two days per week at [REDACTED] Elementary School ([REDACTED]). (*Id.*)

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<sup>15</sup> The record in this matter is extensive. The hearing included eleven days of testimony and argument. Any citations to the record are for illustrative purposes only. My findings, analysis, and legal conclusions are based on consideration of all of the parties' arguments and the credible evidence in the record. All admissible testimonial and documentary evidence was considered and given the weight it was due, regardless of whether it has been recited, cited, referenced, or expressly set forth in the Decision. *See, e.g., Mid-Atl. Power Supply Ass'n v. Md. Pub. Serv. Comm'n*, 143 Md. App. 419, 442 (2002) (emphasizing that "[t]he Commission was free to accept or reject any witness's testimony" and "the mere failure of the Commission to mention a witness's testimony" does not mean that the Commission "did not consider that witness's testimony").

4. During the 2017-2018 school year, while attending [REDACTED], the Student accessed speech, language, and educational services at [REDACTED] Elementary School ([REDACTED]). (*Id.*)

5. In June 2018, the MCPS's IEP team developed an IEP for the Student's 2018-2019 school year. The Parents rejected the 2018-2019 IEP and unilaterally placed the Student at the [REDACTED] for the 2018-2019 school year. (*Id.*, p. 3.)

6. In May 2019, the MCPS's IEP team developed an IEP for the Student's 2019-2020 school year. The Parents rejected the 2019-2020 IEP and continued the Student's placement at the [REDACTED] for the 2019-2020 school year. (*Id.*, p. 3-4.)

7. On September 26, 2019, the Student and his Parents filed a request for a due process hearing challenging the 2018-2019 and 2019-2020 IEPs.

8. After a due process hearing, on April 10, 2020, Administrative Law Judge Steven Adler issued a decision finding:

- The Student had not proven that the MCPS violated the IDEA by failing to provide him a FAPE for the 2018-2019 school year;
- The Student had proven that the MCPS violated the IDEA by failing to provide him a FAPE for the 2019-2020 school year;
- The MCPS was required to provide tuition reimbursement for the unilateral placement of the Student at the [REDACTED] for the 2019-2020 school year;<sup>16</sup> and
- The directives of the IDEA would be best effectuated through amendment and revision to the Student's IEP, rather than prospective private placement beyond the 2019-2020 school year.

9. The parties appealed to the United States District Court for the District of Maryland. By a decision issued on March 30, 2022, Judge Adler's decision was affirmed, and the case was dismissed. (P. Ex 4, p. 20-21.)

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<sup>16</sup> The proposed MCPS placement for the 2019-2020 School year was [REDACTED] Elementary School. (Hr'g Tr. at 745.)

10. Between April 2020 and March 30, 2022, while litigation was pending, the Student attended the [REDACTED] and his tuition was funded by the MCPS pursuant to the “stay put” provisions of the IDEA. (Hr’g Tr. at 848.)

***Procedural History and Development of the IEP for the 2022-2023 School Year***

11. As of the date of the hearing, the Student is eleven years old and attends the [REDACTED], by private placement. The Student has attended the [REDACTED] since first grade and is currently in the fifth grade. (Hr’g Tr. at 54.)

12. The Student has the profile of a twice exceptional learner who is gifted and talented and learning disabled (GT/LD).<sup>17</sup> The Student has a verbal comprehension score of 130 which is in the 98<sup>th</sup> percentile. (Hr’g Tr. at 747-748; 966-967; 1114; 1154.)

13. The Student has anxiety which is secondary to his attention deficit hyperactivity disorder (ADHD) and his language based learning differences. (Hr’g Tr. at 489.)

14. The [REDACTED] is an independent school in [REDACTED] that serves students in first through twelfth grade with language-based learning disabilities.<sup>18</sup> The [REDACTED] has three divisions: lower school (first through fourth grade), middle school (fifth through eighth grade), and upper school (ninth through twelfth grade). The [REDACTED] is approved by the MSDE for special education placements and conducts its own annual IEP meeting and drafts an annual IEP for the Student. (Hr’g Tr. at 49.)

15. There are no nondisabled students at the [REDACTED].

16. In May 2022, the Student was approaching the end of his fourth-grade year at the [REDACTED].

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<sup>17</sup> “A gifted person is somebody who has developed cognitive skills that are in the superior range of intelligence scales . . . who are in the 90<sup>th</sup> percentile of their particular age group or higher . . . [A] twice exceptional person is somebody who meets that definition of giftedness, but also has one or more disabilities which impact their ability to reach their cognitive potential.” (Hr’g Tr. at 966-967.)

<sup>18</sup> At the time of the hearing, the [REDACTED] had approximately three hundred eighty students enrolled in the school. (Hr’g Tr. at 50.)



17. On May 5, 2022, the MCPS emailed the Parents' attorney<sup>19</sup> an authorization for release/exchange of confidential information. The Student's mother signed the document and it was emailed to MCPS by the Parents' attorney on May 6, 2022. (Hr'g Tr. at 848 – 849, 990-994, 1291-1300; MCPS Ex. 13.)<sup>20</sup>

18. On May 12, 2022, the MCPS emailed the Parents' attorney to schedule the Student's IEP meeting. The MCPS offered three dates: June 8, June 9, and June 10, 2022. (Hr'g Tr. at 995-996; MCPS Ex. 14.)

19. On May 13, 2022, the Parents' attorney chose June 10, 2022, at 1:30 p.m. to hold the IEP meeting. On May 19, 2022, the Parent's attorney advised the MCPS that the June 10, 2022 IEP meeting date would not work and proposed June 9, 2022, at 2:30 p.m. which was a different time than previously offered by the MCPS. (Hr'g Tr. at 996-997; MCPS Ex. 15.)

20. On May 20, 2022, the Parents' attorney emailed the MCPS to confirm whether the proposed IEP meeting date was acceptable. The same day, the MCPS confirmed the June 9, 2022 IEP meeting date and time proposed by counsel. (Hr'g Tr. at 998; MCPS Ex. 15.)

21. On a date not specified in the record, MCPS scheduled an observation of the Student at the [REDACTED] for June 6, 2022.

22. On June 1, 2022, the MCPS requested that the IEP meeting be rescheduled. The same day, the Parents' attorney proposed June 23, 2022 between 9:30 a.m. and 5:00 p.m.

23. On June 6, 2022, [REDACTED], MCPS Twice-Exceptional Instructional Specialist, conducted an in-person observation of the Student at the [REDACTED]. She observed the Student at the end of his art class where there were approximately six students and one teacher. After art class, Ms. [REDACTED] followed the Student as he traveled unassisted to his

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<sup>19</sup> Unless otherwise stated, the "Parents' attorney" includes Mr. Eig or members of his staff, acting on his behalf.

<sup>20</sup> The document is dated April 21, 2022. The Parent signed the document and incorrectly dated it May 4, 2022. The correct date that the Parent signed the document is May 6, 2022.

reading class where there were three students. Ms. [REDACTED] continued to observe the Student during his reading class. (P. Ex. 16; MCPS Ex. 24.)

24. Based on her observation, Ms. [REDACTED] rated the Student in several categories. Ms. [REDACTED] noted that the Student had no problem with listening and comprehension; basic reading skills; visual motor coordination; attention; social interaction; work habits; task completion; and motivation. The Student was rated as having some problems with oral expression; written expression; organization and speech. The Student was not rated in the areas of reading comprehension, math calculation, math reasoning, and visual/auditory memory as these behaviors were not observed. (*Id.*)

25. After conducting the observation, Ms. [REDACTED] exchanged emails with the [REDACTED] staff confirming the documents that were outstanding based on her prior request and requested copies of additional documents viewed during her observation:

- Current education plan;
- All progress notes from 2020-2021 and 2021-2022;
- All formal & informal assessments 2021-2022.
- Four writing samples (1/quarter) with graphic organizers, rubrics and feedback;
- Two math classwork samples;
- Two math assessment samples (1/semester);
- Running Reading Records;
- Four Reading Comprehension Responses (1/quarter);
- Teacher Reports;
- Example of handwritten classwork;
- Example of dictated/typed classwork; and
- Report Cards

(MCPS Ex. 22.)

26. On June 6, 2022, the Parents' attorney sent a follow-up email to the MCPS to determine whether the IEP meeting could be scheduled for June 23, 2022. The same day, the MCPS scheduled the IEP meeting for June 23, 2022, at 10:00 a.m. (Hr'g Tr. at 999; MCPS Ex. 15, 16.)

27. On June 7, 2022, [REDACTED], educational consultant on behalf of the Parents, conducted an in-person observation of the Student at the [REDACTED]. Mr. [REDACTED] observed the Student during his Occupational Therapy (OT) session and reading class. (Hr’g Tr. at 647-648; P. Ex. 17.)

28. Based on his observation, Mr. [REDACTED] noted that the Student has the following strengths: positive attitude; responds very well to prompts; on task a majority of the time; very enthusiastic; good sense of humor; works well with staff; tries hard; improving reading, decoding, and comprehension; articulation has improved; improving peer relations (from teacher feedback); demonstrates confidence; advocates for himself at times. (P. Ex. 17.)

29. Mr. [REDACTED] noted that the Student had the following challenges: impulsivity causes some problems with following classroom directions and with peer interactions; anxiety (from records); reading decoding, encoding, and fluency; finding answers to comprehension questions within a story without prompting; handwriting within a uniform way; motor and spatial challenges; sometimes rushes and makes mistakes; telling time using an analog clock; and needs reminders and prompts for organization. (*Id.*)

30. On June 7, 2022, at 2:35 p.m., the MCPS sent a virtual IEP meeting link to the Parents’ attorney. At 3:00 p.m., the MCPS emailed the meeting invitation to the Parents.<sup>21</sup> At 4:13 p.m., the Parents’ attorney emailed the MCPS and advised that the [REDACTED] OT and Speech Language Pathologist (SLP) were not available for the June 23, 2022 IEP meeting. The Parents requested that the IEP meeting be rescheduled to accommodate the [REDACTED] OT and SLP and advised that new proposed IEP meeting dates would be sent over the summer. (Hr’g Tr. at 999, 1004-1005, 1313; MCPS Exs. 15, 16, 17.)

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<sup>21</sup> Attached to the email were the Maryland Procedural Safeguards, ESY (Extended School Year) Brochure, Parent’s Guide to the IEP, Parent Report Form 336-39. (MCPS Ex. 18.)

31. On June 8, 2022, the Parents' attorney emailed the MCPS and proposed rescheduling the IEP meeting for the morning of July 20, 25, 26, 27, 28, or 29, 2022. (MCPS Ex. 17.)

32. On June 9, 2022, the MCPS emailed the Parents' attorney confirming availability for an IEP meeting on July 20, 2022, at 10:00 a.m. That same day, Ms. [REDACTED] emailed the Parents a Notice of IEP Team Meeting. (Hr'g Tr. at 1005-1006; MCPS Ex. 17, 18.)

33. The same day, the [REDACTED] sent Ms. [REDACTED] the Student's 2021-2022 assessments, [REDACTED] IEP learning plan, as well as work samples and documents from the 2020-2021 school year. (Hr'g Tr. at 1013; MCPS Ex. 22.)

34. On June 24, 2022, Ms. [REDACTED] emailed the [REDACTED] to determine whether there were end of year progress notes that she had not received. The [REDACTED] provided the end of year progress notes that same day. (Hr'g Tr. at 1014-1016; MCPS Ex. 22.)

35. On June 26, 2022, the [REDACTED] emailed Ms. [REDACTED] the Student's end of year psychotherapy progress note from Dr. [REDACTED]. The next day, the [REDACTED] notified Ms. [REDACTED] that the report had the incorrect date and provided an updated version. (*Id.*)

36. Dr. [REDACTED] recommended that the Student's psychotherapy be increased from a weekly forty-five minute individual psychotherapy session to a weekly forty-five minute group psychotherapy session, and two thirty-minute individual psychotherapy sessions a month for the 2022-2023 school year. The goal was to address the Student's anxiety and feelings connected to his peer interactions which can frustrate and sometimes upset the Student thereby making him "less available" in the educational curriculum. (P. Ex. 19.)

37. On July 13, 2022, Ms. [REDACTED] emailed the Parents a draft of the Student's 2022-2023 IEP along with the IEP invitation letter, procedural safeguards, and the five-day disclosure notice. (MCPS Ex. 21.)

38. On July 18, 2022, Ms. [REDACTED] emailed the Parents' attorney a copy of the report from the June 6, 2022 Student observation and goal updates drafted by the School-based IEP team. (Hr'g Tr. at 1016; MCPS Ex. 23A.)

39. On July 19, 2022, the Parents' attorney emailed the MCPS feedback from the [REDACTED] regarding the OT proposed in the Student's IEP. The next day, the Parents' attorney emailed the MCPS feedback from the [REDACTED] regarding the speech/language goals proposed in the Student's draft IEP. (Hr'g Tr. at 1308-1309; MCPS Ex. 23A.)

40. On July 20, 2022, an IEP meeting was conducted. At the IEP meeting, the IEP team reviewed all available data, evaluations, observations, family input, information from the Student's current teachers and related service providers, and held a robust team discussion.

41. After more than two hours, the parties hadn't completely reviewed all of the information contained in the IEP and the MCPS had several additional questions and requested additional information from the [REDACTED]. Because the [REDACTED] was on summer break, all of the questions could not be immediately answered. The IEP team determined that a second meeting was necessary to review a new version of the draft before finalizing the Student's 2022-2023 IEP. (Hr'g Tr. at 852, 1049 – 1057.)

42. The MCPS requested additional objective data regarding the Student's work in individual and group therapy; the meaning of the phrase "prompt hierarchy for social interaction;" more information about the "redirection of group plan" noted on the [REDACTED] IEP; a non-assessment writing sample from the Student; additional information regarding the Student's math calculation and math fluency; whether he was able to complete math problems with a calculator; and data regarding the Student's peer pragmatic interactions. (P. Ex. 22.)

43. On a date not specified in the record, the [REDACTED]'s OT reviewed the July 20, 2022 draft IEP and determined that the goals were appropriate for the Student. The OT

requested that an objective related to increasing core strength when completing desk-top activities be included noting that it impacts his strength and endurance for written tasks. The OT also requested that an objective for motor planning (i.e., the Student's body be in the correct position prior to starting a desk-top task) be added as well as objectives directly related to keyboarding. (Hr'g Tr. at 276-77; P. Ex. 23.)

44. The [REDACTED]'s OT noted that functional independence goals are found in a different section of the MCPS IEP but indicated that the IEP should have the following functional independence objectives for the Student: time management (using timers), organizing his space, following multi-step directions, and using recommended strategies and accommodations. (P. Ex. 23.)

45. On July 27, 2022, the MCPS emailed the Parents' attorney and proposed August 15, 2022, at 1:30 p.m. or August 17, 2022 at 12:00 p.m., as potential dates to conclude the IEP meeting. The same date, the Parents' attorney advised the MCPS that Mr. [REDACTED] was "out of town" that week and that the MCPS should propose new dates. (Hr'g Tr. at 811-812, 1058; MCPS Ex. 35.)

46. On August 5, 2022, MCPS offered August 29, 31, September 7, and September 8, 2022 for potential IEP meeting dates. (Hr'g Tr. at 1059; MCPS Ex. 36.)

47. The MCPS sent a follow up email on August 8, 2022, requesting a response to the August 5, 2022 email. The same day, the Parents' attorney notified MCPS that although it had not been confirmed by the [REDACTED], September 8, 2022, at 9:30 a.m., appeared to be the best time to hold the follow-up IEP meeting. (Hr'g Tr. at 1059-1060; MCPS Ex. 36.)

48. On August 8, 2022, through counsel, the Parents notified the MCPS that the Student would attend the [REDACTED] for the 2022-2023 school year. The Parents requested that the MCPS place and fund the Student at the [REDACTED] and noted that they were not seeking

equitable services under the IDEA, but were seeking the provision of a FAPE including an IEP and placement. (Hr'g Tr. at 853; P. Ex. 24.)

49. On August 12, 2022, the MCPS sent the Parents' a Notice of IEP Team Meeting. (Hr'g Tr. at 1060-1063; MCPS Ex. 37.)

50. On August 31, 2022, Ms. [REDACTED] emailed the [REDACTED] to determine whether there was data on the following:

- The Student's reading versus listening comprehension; and
- The Student's use of text-to-speech and/or use of a human scribe in the classroom or testing settings.

(MCPS Ex. 38.)

51. On September 1, 2022, on behalf of the [REDACTED], [REDACTED] provided additional information to the IEP team based on various emails she received. Ms. [REDACTED] noted that the Student accurately answers explicit questions that begin with what, where or who; requires teacher support to answer implicit questions as well as those that begin with how or why; demonstrates difficulty with prompts that ask him to describe or reference multiple areas of text; does not independently rephrase the question in his answers; fatigues when reading more than four to five pages which directly impacts his application of his decoding skills, comprehension, and expression. Ms. [REDACTED] also provided the following information:

- As of May 10, 2022, the student read 74 words correct per minute on a beginning 5<sup>th</sup> grade passage. When not using a tracker or his finger, the Student makes more errors and skips ending as well as internal punctuation;
- Due to the low student-teacher ratios and individualized instruction, the Student used speech to text in his classes rather than a human scribe;
- In the spring, the [REDACTED] students are given the WIST assessment. On the WIST assessment, the Student scored in the 61<sup>st</sup> percentile rank for word identification; 30<sup>th</sup> percentile rank for spelling; and 61<sup>st</sup> percentile rank for sound-symbol knowledge;
- Based on the [REDACTED]'s teaching model, students are assessed via the Leveled Reading Assessment to determine instructional level and not independent level;

and

- The Student was at the end of third grade/beginning of fourth grade phonics/decoding level based on the concepts identified as target areas.

(Hr'g Tr. at 1063-1066; P. Ex. 25; MCPS Ex. 38.)

52. The same date, the MCPS emailed the Parents-based IEP team a copy of the updated draft IEP for the 2022-2023 school year and an updated meeting invitation.

53. On September 3, 2022, Mr. [REDACTED] emailed Ms. [REDACTED] notifying her that the updated IEP was missing a reading comprehension goal and an executive functioning goal that had previously been requested by the Parents-based IEP team. (MCPS Ex. 40.)

54. On September 7, 2022, Ms. [REDACTED] emailed Mr. [REDACTED] and advised that the exclusions were an oversight, added the two goals and emailed an updated draft. (*Id.*)

55. The September 8, 2022, IEP reflected that the Student was eligible for special education services with a primary disability of Multiple Disabilities<sup>22</sup> including specific learning disability, speech and language impairment, and other health impairment. (P. Ex. 27; MCPS Ex. 43.)

56. The areas affected by the Student's multiple disabilities are math calculation, math problem solving, reading comprehension, reading fluency, reading phonics, speech and language articulation, speech and language expressive language, speech and language pragmatics, speech and language receptive language, written language expression, written language mechanics, executive functioning, social emotional behavioral, and physical-fine motor coordination. (P. Ex. 27; MCPS Ex. 43.)

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<sup>22</sup> "Multiple disabilities means concomitant impairments (such as intellectual disability-blindness or intellectual disability-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness." 34 C.F.R. § 300.8(c)(7).



57. The September 8, 2022 IEP contained numerous testing and instructional accommodations, use of assistive technology devices and supplementary aids and services to help the Student achieve the goals on the IEP.

58. At the September 8, 2022 IEP meeting, after a review of all available documents and data, family input, information from the Student's teachers and related service providers at the [REDACTED], the IEP team proposed the [REDACTED] program at [REDACTED]. The Student's reading, mathematics, English language arts, science and social studies classes would be in a self-contained special education environment with a maximum number of students at seven.

59. At the time of the hearing, there were five students in the fifth grade [REDACTED] program at [REDACTED]. The social emotional learning class has five students to two adults, science/social studies has five students to two adults, math has between three and five students to two adults, the literacy block (integrated reading and writing) has five students to two adults. (Hr'g Tr. at 1129-1132.)

60. As part of the IEP, the Student would also participate with non-disabled peers in the general education setting one hour a day in lunch/recess, and forty-five minutes, four days a week in "specials." (Hr'g Tr. at 1134.)

61. Paraeducators support the [REDACTED] students during lunch/recess and the general education classes.

62. At [REDACTED], the Student would be allowed to choose where he would like to eat lunch. The student would be offered an opportunity to participate in structured lunch groups known as "lunch bunches" where students can eat lunch in a smaller room across the hall from the cafeteria. The room is available for all students, but the [REDACTED] students often prefer the quieter, smaller section and have priority to use the room for lunch. The staff at [REDACTED] would offer support and assist the Student in formulating his "lunch bunch." (Hr'g Tr. at 1106-1107.)

63. The Parents agreed to all the elements of the IEP except services and placement. The Parents' requested that the Student be placed at the [REDACTED] was denied by the IEP team. The IEP team also denied the Parents' request to refer the issue of the Student's IEP/placement to Central IEP. (Hr'g Tr. at 853, 907.)

64. At the September 8, 2022 IEP meeting, the Parents requested an opportunity to tour the [REDACTED] program at [REDACTED] but elected to wait "for the school year to be underway before they requested a tour." (P. Ex. 28.)

65. On September 14, 2022, the Parents submitted a typed statement detailing their concerns regarding the 2022-2023 IEP. (Hr'g Tr. at 1336-1338.)

66. On September 20, 2022, the MCPS issued the Prior Written Notice which provided a cogent and responsive explanation regarding why the IEP team proposed the [REDACTED] Program at [REDACTED] (Hr'g Tr. at 1338.)

67. [REDACTED] is the only elementary school in Montgomery County with a [REDACTED] program. The [REDACTED] elementary school program is a three-year program for third, fourth and fifth grade students. As of the date of the hearing, there are ten students in the program with five of them being in the fifth grade. (Hr'g Tr. at 1286-1287.)

68. On September 27, 2022, the MCPS notified the Parents, through counsel, that beginning October 1, 2022, the MCPS would no longer continue to fund the Student at the [REDACTED] [REDACTED] for the 2022-2023 school year.

69. On September 29, 2022, the Parents filed a Due Process Complaint.

70. On October 14, 2022, the Student's mother visited the [REDACTED] program at [REDACTED]. She observed the [REDACTED] English Language Arts class. (P. Ex. 30)

71. On November 3, 2022, Mr. [REDACTED] visited [REDACTED] where he observed lunch and an art class. The art class consisted of twenty-one students including two from the [REDACTED]

program. In addition to the art instructor, there was a paraeducator supporting the [REDACTED] students in the class. He noted that the art class was well structured and managed. He felt that the art class would be too large for the Student due to his ADHD and challenges with social interactions. (P. Ex. 31)

72. In his observation of the cafeteria, Mr. [REDACTED] noted that the noise level was not unusual for the number of students, it would likely be overstimulating for the Student and not appropriate due to his challenges with social interaction. (*Id.*)

73. As of the date of this hearing, at the [REDACTED], there are approximately one hundred seventy-eight to one hundred eighty students in the middle school. The middle school is housed in one building and the students have access to other parts of the campus. There are fourteen students in the Student's homeroom class with two teachers. There are five students in the Student's Science class with one teacher. There are thirteen students in the Student's theatre class and one teacher.<sup>23</sup> There are nine students in the Student's math class with two teachers. There are five students and one teacher in the Student's authors and illustrators class. The Student's English Language Arts class is separated into two blocks; reading and writing where there are eight students with two teachers. There are nineteen students in the Student's physical education class which is co-taught by a physical education coach and a certified occupational therapy assistant (COTA). (Hr'g Tr. at 53; 58-64, 159-167.)

74. At the [REDACTED], the Student has lunch with the entire fifth grade class in an area called the commons which is supervised by a rotating schedule of staff. At the time of the hearing there were 43 students in the fifth-grade class. (Hr'g Tr. at 60-61.)

75. At the [REDACTED], the Student transitions between classes without assistance unless he has to go outside to get to the next class. The Student's OT is on the first floor and his

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<sup>23</sup> Theatre is one of the Student's larger classes "in order to be able to have a play." (Hr'g Tr. at 58-59.)

classes are on the second floor. The student transitions from OT to his next class without an escort. (Hr'g Tr. at 329-330, 349-352.)

76. The [REDACTED] uses the Orton Gillingham (OG) methodology to provide reading instruction to the Student. (Hr'g Tr. at 86, 178-179.)

77. For reading instruction, the Student's 2022-2023 IEP proposed a systematic approach and multisensory strategies such as those provided by OG in a 2:1 ratio. (MCPS Ex. 42.)

78. The Student has childhood apraxia of speech. At the [REDACTED], the Student uses the Rapid Syllable Transition Treatment (ReST) program for speech therapy. The ReST program is designed specifically for childhood apraxia of speech, it emphasizes production of accurate sounds, prosody, and syllables in multi-syllabic nonsense words. (Hr'g Tr. at 534-535.)

79. The Student's 2022-2023 IEP provides for the ReST program to be used for speech therapy. (MCPS Ex. 43.)

80. Outside of the [REDACTED] setting, the Student attends [REDACTED], summer camp, and a theatre group with his nondisabled peers. (Hr'g Tr. at 799-801.)

81. The Student attends [REDACTED] weekly where he is "learning a foreign language, learning the symbols, learning the sounds they make, being able to blend those sounds together to do that visually and then be able to say them." (Hr'g Tr. at 801.)

82. In the Student's theatre group, he memorizes written materials to participate in theatrical productions. (Hr'g Tr. at 801.)

83. The Student is transported to summer camp by bus. The Student boards and disembarks without assistance.

## DISCUSSION<sup>24</sup>

### **BURDEN OF PROOF**

The standard of proof in this case is a preponderance of the evidence. *See* 20 U.S.C.A. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); 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).

The burden of proof rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). In this case, the Parents are seeking relief on the Student’s behalf and bear the burden of proof to show that MCPS failed to offer the Student a FAPE for the 2022-2023 school year, and that they are entitled to reimbursement for their unilateral placement of the Student at the [REDACTED].

For the reasons that follow, I find that the Parents have not met this burden, and conclude that MCPS offered the Student a FAPE for the 2022-2023 school year, with an IEP that was reasonably calculated to meet his unique needs, and that the Parents are therefore not entitled to reimbursement for their unilateral placement of the Student at the [REDACTED].

### **APPLICABLE LAW**<sup>25</sup>

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; Md. Code Ann., Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01. The IDEA requires “that all children with

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<sup>24</sup> During closing arguments, the Parents asserted that based on the “passage of time” since the request for a due process hearing was filed, I no longer have jurisdiction to decide this matter. The Parents aver that since the Student has almost completed the 2022-2023 school year, any decision I enter would be an advisory opinion only. If I affirmed the Parents’ argument, it would essentially mean that anytime a due process complaint is filed in an IDEA matter, and due to various scheduling issues the hearing is concluded near the end of the school year at issue, the presiding ALJ would lose subject matter jurisdiction and the local education agency (LEA) would be forced to pay the expense of a unilateral private placement even in instances where they have not violated the IDEA. I do not find the Parent’s argument persuasive.

<sup>25</sup> At the parties’ request, to supplement their closing arguments, I allowed each party to submit a memorandum of points and authorities.

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* Md. Code Ann., Educ. § 8-403.

The IDEA defines a FAPE as special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9); *see also* Md. Code Ann., Educ. § 8-401(a)(3).

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) of Title 20 of the U.S.C.A and the 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* 34 C.F.R. § 300.8; Md Code Ann., Educ. § 8-401(a)(2); and COMAR 13A.05.01.03B(78). In this matter, 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* 34 C.F.R. § 300.8; Md. Code Ann., Educ. § 8-401(a)(2); 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 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 FAPE: first, whether there has been compliance with the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-07.

The *Rowley* Court found, because special education and related services must meet the state’s educational standards, the scope of the benefit required by the 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. *Id.* at 204; 20 U.S.C.A. § 1401(9). Further the Court found “if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a ‘free appropriate public education’ as defined by the [IDEA].” *Rowley*, 458 U.S. at 189.

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 Cnty. 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.

An IEP is the “primary vehicle” through which a public agency provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

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

An IEP team 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).

To comply with the IDEA, an IEP must, among other things, allow a student with a disability to advance toward measurable annual academic and functional goals that meet the needs resulting from the child's disability or disabilities, by providing appropriate special



education and related services, supplementary aids, program modifications, supports, and accommodations. 20 U.S.C.A. § 1414(d)(1)(A)(i)(II), (IV), (VI).

Thirty-five years after *Rowley*, the parties in *Andrew F.* asked the Supreme Court to go further than it did in *Rowley* and set forth a test for measuring whether a disabled student had attained sufficient educational benefit. The framework for the decision was the Tenth Circuit’s interpretation of the meaning of *Rowley*’s “some educational benefit,” which construed the level of benefit as “merely . . . ‘more than *de minimis*.’” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

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

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The IDEA 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. 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 disabled 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.” *Endrew F.*, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 179). 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 “*pecially* designed” to meet a child’s “*unique* needs” through an “[i]ndividualized education program.” *Endrew F.*, 137 S. Ct. at 998-99 (citations omitted). The Court expressly rejected the Tenth Circuit’s interpretation of what constitutes “some benefit”: When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to ‘drop out.’” The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Id.* at 1001 (citation omitted).

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

explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.* at 1002.

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

The development of an IEP “requires a prospective judgment by school officials.” *See Andrew F.*, 137 S. Ct. at 999. An IEP is essentially a “snapshot” in time and “cannot be judged exclusively in hindsight.” *See K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d. 795, 818 (8th Cir. 2011); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). Thus, a judge in a due process hearing must look to what the IEP team knew when it developed the IEP, and whether that IEP, as designed, was reasonably calculated to enable the child to receive educational benefit. The proper question is whether the IEP was objectively reasonable at the time it was drafted.” *J.P. ex rel. Popson v. W. Clark Cmty. Sch.*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002) (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 Cnty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989). At a minimum, the

IDEA calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). Placing disabled children into regular school programs may not be appropriate for every disabled child, and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved.

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

Parents may be entitled to retroactive reimbursement from the State for tuition and expenses for a child unilaterally placed in a private school if it is later determined that the school system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985). The issue of reimbursement for unilateral placement was expanded in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Parents may recover the cost of private education only if (1) the school system failed to provide a FAPE; (2) the

private education services obtained by the parent were appropriate to the child's needs; and (3) overall, equity favors reimbursement. *See Id.* at 12-13. The nonpublic education services need not be provided in the least restrictive environment (LRE). *Simchick*, 553 F.3d at 319.

At the beginning of each school year, each local education agency is required to have in effect an IEP for each child with a disability in the agency's jurisdiction. 20 U.S.C.A. § 1414(d)(2)(A). At least annually, the IEP team is required to review a child's IEP to determine whether the goals are being met. *Id.* § 1414(d)(4)(A)(i); 34 C.F.R. § 300.324(b)(1).

### **POSITIONS OF THE PARTIES**

The Parents' attorney filed a detailed due process complaint on behalf of the Student and the Parents. The Parents complained and subsequently argued that the MCPS committed a procedural violation of the IDEA, by not having an IEP in place before the 2022-2023 school year began. Additionally, the Parents contend that the MCPS disregarded the opinions of the persons best suited to know what is reasonably likely to confer an educational benefit on the Student and help him progress academically when it created the IEP for the 2022-2023 school year that called for implementation in the [REDACTED] program at [REDACTED] with inclusion in the general education setting for lunch, recess, and "specials." As a result, the Parents maintain that it was necessary for them to unilaterally place the Student at the [REDACTED] in order for him to benefit from an educational program that could meet his needs. For these reasons, and as a remedy for its failure to provide the Student a FAPE, the Parents seek funding for the Student's placement at the [REDACTED] for the 2022-2023 school year.

The MCPS contends its educators, which relied on independent observations, as well as available data and evaluations, and in collaboration with the Parents, educators from the [REDACTED], and the Parents' educational advocate, made a reasoned exercise of educational judgment in proposing an IEP with appropriate goals, objectives, and services, that properly

balanced the Student's educational needs with the IDEA's mandate to educate disabled children in the LRE. The MCPS avers that it did not commit any procedural violations of the IDEA in formulating the Student's IEP for the 2022-2023 school year. Thus, giving deference to opinions of the MCPS's educators, the MCPS argued that the Parents' due process complaint should be denied and dismissed.

After reviewing all of the evidence in this case, for the reasons that follow, I conclude that the MCPS developed an IEP that was reasonably calculated to meet the unique needs of the Student for the 2022-2023 school year, and although the Student's 2022-2023 IEP was not completed until after the 2022-2023 school year began, there was no disruption to the educational services that the Student received and, therefore, the Student continuously received a FAPE.

## **ANALYSIS**

### ***Procedural Requirements***

It is well settled that if a procedural violation does not interfere with the provision of a FAPE, the violation does not support a finding that a school district failed to provide a FAPE. *See T.B., v. Prince George's Cnty. Bd. of Educ.*, 897 F.3d 566, 572 (4th Cir. 2018); *see also D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012); *see also Tice v. Botetourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (no reimbursement for private placement where violation of IDEA notice requirement did not affect development of child's IEP or provision of a FAPE).

Therefore, the Parents must prove that by failing to have an IEP finalized before the Student began the 2022-2023 school year, MCPS' procedural violation resulted in a loss of a FAPE to the Student. The Parents have not provided any evidence to support a finding that the MCPS's failure to finalize an IEP prior to the start of the 2022-2023 school year deprived the

Student of an educational benefit or a denial of FAPE. To the contrary, based upon the record before me, the Student received consistent educational services at the [REDACTED] at the expense of the MCPS until the IEP was finalized. (P. Ex. 29). The Parents do not challenge the [REDACTED] [REDACTED]'s ability to provide the Student with an appropriate education. Further, there was no evidence of any disruption to the educational services that the Student received. The mere fact that the IEP was finalized after the 2022-2023 school year began does not by itself support a finding that the MCPS failed to provide the Student with a FAPE.

Further, the Parents argue that because the IEP was not completed until after the 2022-2023 school year began, the Parents were not able to observe the proposed placement thereby preventing them from being able make a fully informed decision about placement. I find that argument meritless in light of the evidence contained in the record. Notably, prior to the start of the 2022-2023 school year, the Parents made it clear that they intended to continue the Student's enrollment at the [REDACTED] and reject any alternative placement proposed by the MCPS.

Similarly, the Parents and their educational consult were at the September 8, 2022 IEP meeting. At that meeting, the [REDACTED] program at [REDACTED] was proposed. The Parents elected to wait to observe the program at a later date. Finally, the Student's mother testified clearly and repeatedly that had the [REDACTED] Program at [REDACTED] been proposed in the spring of 2022, the Parents would have rejected it.

### ***Appropriateness and Adequacy of the Student's IEP***

Once the 2022-2023 IEP was finalized, the Parents agreed with all of the elements of the IEP except for services and placement. The Student's IEP was developed on September 8, 2022 and required that the Student receive special education services under the IDEA as a student with multiple disabilities who is twice exceptional. At the September 8, 2022 IEP team meeting, the IEP team determined that the Student continued to require specialized instruction and related

services as a result of deficits attributed to his multiple disabilities, including: reading phonics, reading fluency, reading comprehension, math problem solving, written language mechanics and expression, speech and language articulation, receptive language, expressive language, pragmatics, social/emotional behavioral, executive functioning, and physical/fine motor coordination. The Student is also impacted by ADHD and anxiety.

When developing the September 8, 2022 IEP, the IEP team reviewed and considered observations, the evaluative data available at the time, family input, information from [REDACTED] teachers and related service providers, and the team's discussions before finalizing the Student's 2022-2023 IEP. A review of the September 8, 2022 IEP and the September 20, 2022 Prior Written Notice, as well as the testimony of Ms. [REDACTED], who served at the IEP Case Manager, [REDACTED], [REDACTED], and [REDACTED] who all participated in both IEP meetings, makes it abundantly clear that the IEP was developed in accordance with the applicable law and regulations.

The school-based members of the IEP team gave thoughtful consideration to the Student's strengths and weaknesses, the Parent's concerns, Dr. [REDACTED]'s evaluation, the reports and opinion of the [REDACTED] staff, the opinion of the Parent's educational consultant Mr. [REDACTED], and the academic, developmental and functional needs of the Student, as required by the IDEA. The September 8, 2022 IEP sets forth all of these considerations in great detail and documented the Student's present levels of academic achievement or functional performance in the areas which were identified as having been affected by his disability.

Further, the IEP team also developed annual goals and objectives for the Student. The evidence contained in the record supports the fact that the annual goals address the Student's deficits and the IEP is reasonably calculated to meet the Student's unique individual needs as a student who is both gifted and talented and learning disabled. The goals were created to directly



address the Student's areas of deficits and the IEP indicates how progress on the goals will be measured. 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 in accordance with the applicable law and regulations. Further, it is evident that the IEP team gave careful consideration to the recommendations made by Mr. [REDACTED], the [REDACTED] staff, and the Parents, as throughout the hearing, the Parents' witnesses repeatedly admitted that their input was considered and, in most instances, fully adopted.

By the end of the IEP process, the Parents did not dispute the goals and objectives that were developed in the September 8, 2022 IEP. This is crucial because the annual goals are the basis for the Student's program placement.

### ***OG Methodology***

The Parent's contend that based on the Student's disability, the student requires the OG methodology for reading intervention. Currently, the [REDACTED] uses the OG methodology to provide reading instruction to the Student. While the Student has shown improvement with the implementation of this methodology, there is no credible evidence in the record that OG is the only appropriate intervention for the Student.

Further, as evidenced in the Prior Written Notice, during the September 8, 2022 IEP meeting, the school-based IEP team members discussed methodologies related to reading, decoding, encoding, and fluency, and recommended that a systematic approach, and multisensory strategies such as those provided by OG be implemented. Accordingly, I find that the reading intervention as proposed in the IEP is reasonably calculated to enable the Student to receive an educational benefit.

### *Counseling Services*

The Parents maintain that the proposed counseling services in the IEP are inappropriate and that the Student specifically requires psychotherapy. During the 2021-2022 school year, once a week, the Student had a forty-five minute individual psychotherapy session with Dr. [REDACTED]. In June 2022, Dr. [REDACTED] recommended that the Student's psychotherapy be increased to one forty-five minute group psychotherapy session weekly, and two thirty minute individual psychotherapy sessions each month for the 2022-2023 school year to address his anxiety and issues with peer engagement.

The Student's 2022-2023 IEP provides that he will receive one forty-five minute group counseling session weekly, and two thirty minute individual counseling sessions monthly for the 2022-2023 school year. Ms. [REDACTED] testified that psychotherapy is a clinical model that is not provided in the MCPS. (Hrg. Tr. at 1542.) [REDACTED], MCPS school psychologist, further explained that a clinical psychologist and a school psychologist are both trained in the theories and foundations of psychology which is the study of the mind and behavior. (Hrg T. 1567-1568.) However, a school psychologist focuses on providing school related support to students, has expertise within the educational setting, and is trained in curriculum and academic supports.

All things considered, I found Dr. [REDACTED]'s testimony very enlightening. Dr. [REDACTED] explained that the [REDACTED] has a policy that department heads testify at due process hearings instead of the actual clinician. (Hr'g Tr. at 385.) Dr. [REDACTED] stated that in January 2023, she was asked to testify in this hearing and may have met with Ms. [REDACTED] about "the goal of the hearing and kind of where we were, just to kind of confirm that [she] was the one that should be attending this, rather than Dr. [REDACTED]." (Hr'g Tr. at 386.) At the time of the hearing, Dr. [REDACTED] had been the Director of Psychology Services at the [REDACTED] for approximately six months. (Hr'g Tr. At 364.) Prior to being asked to testify, Dr. [REDACTED] had minimal conversation with Dr. [REDACTED]

about the Student's specific goals, had not conducted any observations of the Student, and had not spoken with any of his teachers. (Hr'g Tr. at 428-429.) Clearly, Dr. [REDACTED]'s experience with the Student was minimal as she testified that she had seen him in the hallways as he traveled to Dr. [REDACTED]'s office. (Hr'g Tr. at 429.) While Dr. [REDACTED] testified in support of Dr. [REDACTED]'s recommendation for increased services, the record again is void of any testimony or evidence that would support a finding that the Student requires psychotherapy specifically and that the counseling services proposed in the 2022-2023 IEP are inappropriate, especially where they provide for the same type and number of sessions as proposed by Dr. [REDACTED]. Further, in light of the evidence contained in the record, I give little weight to Dr. [REDACTED]'s opinion regarding placement.

*Placement In the [REDACTED] Program at [REDACTED]*

While the Parents, Mr. [REDACTED], and the [REDACTED] staff agree with almost every aspect of the Students' 2022-2023 IEP, the Parents vehemently disagree with the Student's proposed placement in the [REDACTED] program at [REDACTED], the proposed hours the Student would spend in general education, and transitioning the Student to [REDACTED] in the fifth grade. More specifically, the Parents disagree that the [REDACTED] program at [REDACTED] is the LRE to achieve a FAPE based on the Student's anxiety. Mr. [REDACTED] and the Student's mother, who herself is a special education teacher in the MCPS and was accepted as an expert in special education, opined that the Student's needs would best be met in a small classroom setting at a fulltime self-contained program, in this instance at the [REDACTED].

Without question, the Student's mother is knowledgeable about all aspects of the Students' education including his strengths and challenges as a student with multiple disabilities. It is clear from the testimony and tangible evidence that the Parents love their son and want him to maximize his potential in his educational environment. I appreciate the Parents' trepidation

about removing the Student from the self-contained educational environment provided at the [REDACTED]. However, the objective evidence contained in the record establishes that the Student no longer requires his program to be implemented at the [REDACTED] which is one of the more restrictive placements on the continuum of placement options.

Mr. [REDACTED] is highly recognized and very successful as a special education consultant. Mr. [REDACTED] has consulted with the Student's family for several years. Among other things, he has reviewed reports, evaluations, attended IEP meetings and conducted observations of the Student. However, other than his June 7, 2022 observation that was conducted in preparation for participating in the Student's IEP meeting, Mr. [REDACTED] could not remember the last time he observed the Student. Mr. [REDACTED] opined that because the Student has multiple disabilities with a very significant learning disability, speech and language impairment, other health impairment, significant anxiety, significant motor planning as well as fine gross motor challenges, to move him in his last year of elementary school when he's progressing in his current environment would cause the Student to regress. (Hr'g Tr. at 663-664.)

Even after considering the Student's mother's testimony and the Parents' experts, I am persuaded that the MCPS prepared an appropriate IEP for the 2022-2023 school year and that Ms. [REDACTED] and the faculty and staff at [REDACTED] are equipped to assist the Student with a successful transition to the [REDACTED] program. With Ms. [REDACTED]'s testimony, I did not detect any bias. Neither did I detect any partiality in the testimony of the other MCPS witnesses. Ms. [REDACTED]'s testimony was clear, direct, focused on the strengths and weaknesses of the Student and she exhibited a true desire to meet the Student's unique needs as a twice-exceptional student.

Ms. [REDACTED] conscientiously testified about the Student's unique needs as a twice-exceptional student. In an effort to ensure that the Student received instruction in the LRE, the school-based IEP team determined that the Student's needs could be met by the [REDACTED] program

at [REDACTED] Ms. [REDACTED] explained that the [REDACTED] program would allow the Student to be educated with other students who share his twice exceptional profile while also providing the Student an opportunity to be included in the general education setting for gym, art, music, media, lunch and recess.

As explained by both Mr. [REDACTED] and Ms. [REDACTED], the [REDACTED] program at [REDACTED] is a unique program designed to build on the Student's strengths as a gifted learner and also address his needs as a learning disabled student. Based on my clarifying question, Mr. [REDACTED] explained that the [REDACTED] program at [REDACTED] is more "intensive" than other twice exceptional programming across the country. (Hr'g Tr. at 817-818.) He further explained that by "intensive" he meant "small class program throughout the day, except the specials, lunch, recess that both addresses the gifted needs and the disability needs of the students that it serves." (Hr'g Tr. at 819.)

Mr. [REDACTED] and Ms. [REDACTED] also agree that because of the Student's gifted profile, he needs a rigorous education. As Mr. [REDACTED] stated, it should be "in line with [the Student's] superior verbal comprehension abilities that are in the 98<sup>th</sup> percentile." (Hr'g Tr. at 787.) As described by Mr. [REDACTED], the Student has a good general fund of knowledge, is inquisitive, and likes to learn new ideas. (Hr'g Tr. at 793.) Ms. [REDACTED] emphasized that in the [REDACTED] program at [REDACTED], the Student would be taught by teachers with extensive training in special education and in teaching students with a twice-exceptional profile.

As evidenced in the record, not all classes at the [REDACTED] are small. In fact, the student to teacher ratio in the [REDACTED] program at [REDACTED] is similar to if not smaller in certain instances. For example, at the [REDACTED], the Student's gym class has nineteen students and is co-taught by a gym teacher and a COTA. The specials at [REDACTED] have a maximum class size of

twenty-four students. A paraeducator assists the [REDACTED] students while in the general education environment.

While the Student has attended the [REDACTED] since fifth grade, as Dr. [REDACTED] stated, the [REDACTED] has determined that department heads will attend and testify as experts in due process hearings. As such, after giving their opinions on direct examination, it was quickly revealed that in most instances, the witness had no real experience with the Student and lacked sufficient knowledge to opine on the adequacy of the [REDACTED] program at [REDACTED].

Ms. [REDACTED] testified that the student had trouble transitioning to the middle school program at [REDACTED] for the 2022-2023 school year. In support she stated that the Student would cry in gym class if he wasn't paired with his friend. There were no other concrete examples given of actual instances where the Student exhibited difficulties with transitioning.

Instead, the objective evidence contained in the record shows something different. For example, the Student's end of year writing sample shows a student who was excited to experience new things. The Student wrote:

I've five hopes for school next year. I'm excited for choosing classes so I could be in the [REDACTED] class. Next year I'm excited to be on a sports team because I love [REDACTED]. Next year I'm excited to be on the upper campus because it's a big campus. I'm excited to be in p.e. [g]ym in the morning because the playground is sometimes wet and I don't like wet equipment. I don't have to take the bus to the lower campus in the morning and I don't like that because it's annoying! I'm really excited for my hopes next year.

(P. Ex. 12.)

The Student's mother testified that the Student participates in school assemblies where "he's able to raise his hand and comment or ask questions." (Hr'g Tr. at 834.) She explained that [REDACTED] staff have informed her that the Student will "confidently stand up and ask questions or comment on things that are going on in that school assembly." Of note, there are approximately one hundred and eighty children that attend the middle school program at the [REDACTED]

██████ The Student’s mother testified that while at the ██████, the Student’s teachers have noted that he’s “improved in all areas reading, writing, math and he’s a lot more confident.” (Hr’g Tr. at 816-817.)

It is undisputed that the Student suffers from multiple disabilities, which taken together, have a significant impact on his ability to access the educational curriculum and impact his functioning generally. What is also abundantly clear is that the MCPS has the necessary staff to provide the Student with the services and supports listed in his IEP at ██████. I appreciate that the Parents may believe that the ██████ is better for the Student; however, the test is whether the IEP is reasonably calculated to enable the Student to receive some educational benefit based on the Student’s unique circumstances.

Further, Ms. ██████ testified that in proposing the placement, the MCPS considered the impact the change would have on the Student. Ms. ██████ explained that it is not uncommon to have students move into the ██████ program during the course of a school year. (Hr’g Tr. at 1195.) Ms. ██████ stated that once a parent accepts the program, a transition plan designed to support the student’s unique needs is developed. Ms. ██████ stated that to prevent students from becoming overly anxious regarding a possible change, the general practice is not to tour students at a proposed new placement until after the IEP is finalized. (Hr’g Tr. at 1196.) Ms. ██████ emphasized that the student’s and parent’s comfort level determines how slow or fast the transition occurs.

For the reasons previously stated, I find that the Parents have failed to establish that small structured classes across all areas, academic and non-academic, are required in order for the Student to make academic progress access the curriculum with the supports, aids and services set forth in the IEP. Further, I find that the Parents have failed to prove that it would be inappropriate to transition the Student to ██████ after the 2022-2023 school year began.

***The MCPS was not obligated to refer the IEP/Placement to Central IEP***

I find that the Parents have not sustained their burden to prove that the MCPS' refusal to refer the IEP/Placement to the Central IEP team was inappropriate. During the hearing, Ms. [REDACTED] explained that the school-based IEP team would only make a referral to Central IEP if the school-based IEP team thought that they could not meet the Students' needs anywhere in a MCPS school based program. (Hr'g Tr. at 1108.) Ms. [REDACTED] emphasized that the school-based IEP team believed they could meet the Student's needs in the [REDACTED] program at [REDACTED], and appropriately declined the Parent's request. (Hr'g Tr. at 1108.) I find Ms. [REDACTED]'s testimony credible and uncontroverted. I find that the IEP team's decision not to refer the IEP/placement to Central IEP was appropriate based on the record before me.

Based on the foregoing, I find that the IEP developed for the 2022-2023 school year was reasonably calculated to provide the Student a FAPE in the LRE.

***Is There a Remedy under the IDEA Available to the Student?***

Under *Carter* and *Burlington*, whether a parent's private placement choice is appropriate is analyzed only if the IEP proposed by the local education agency results in the denial of a FAPE. *County School District Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985).

The issue of reimbursement for unilateral placement was expanded upon in *Carter*, 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.

I have concluded in this case, for the reasons set forth above, that the IEP and placement offered by the MCPS would have provided the Student a FAPE. Therefore, under *Carter* and



*Burlington* the issue of whether the Student's placement at the [REDACTED] is proper is not required to be addressed further in this decision. As the MCPS did not deny the Student a FAPE for the 2022-2023 school year, the Parents' request for placement and funding for the [REDACTED], is respectfully denied.

### CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the MCPS provided the Student with a free appropriate public education and provided him with an appropriate individualized education program and placement for the 2022-2023 school year. I further conclude, as a matter of law, that the Parents failed to prove that they are entitled to reimbursement/funding for tuition and related expenses at the [REDACTED] for the 2022-2023 school year. 20 U.S.C.A. § 1400(d)(1)(A) (2017); *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009); 34 C.F.R. § 300.101(a) (2021).

### ORDER

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

April 28, 2023  
Date Decision Issued

Patricia M. DeMaio  
Administrative Law Judge

PMD/cj  
#204816

**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]	[REDACTED]
[REDACTED]	[REDACTED]

██████████,

STUDENT

v.

MONTGOMERY COUNTY PUBLIC

SCHOOLS

BEFORE PATRICIA M. DEMAIIO,

ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-22-23653

**FILE EXHIBIT LIST**

Unless otherwise provided, I admitted the following exhibits in evidence, offered by the

Parents:

- Parents Ex. 1            Request for Due Process Hearing, September 29, 2022
- Parents Ex. 2            Administrative Law Judge Decision, April 10, 2020
- Parents Ex. 3            Neuropsychological Evaluation, Dr. ██████████,  
December 10 & December 14, 2020
- Parents Ex. 4            Memorandum Opinion and Order in the United States District Court for  
the District of Maryland, March 30, 2022
- Parents Ex. 5            ██████████ End-of-Year Assessment, Mathematics, April 2022
- Parents Ex. 6            NOT OFFERED
- Parents Ex. 7            ██████████ IEP Progress Codes, April 2022
- Parents Ex. 8            ██████████ Occupational Therapy Annual Report, May 4, 2022
- Parents Ex. 9            ██████████ Word Identification and Spelling Test, May 11, 2022
- Parents Ex. 10           ██████████ Assessment Summary, May 3, 2022
- Parents Ex. 11           ██████████ IEP, May 17, 2022
- Parents Ex. 12           ██████████ End-of-Year Writing Assignment, May 17, 2022
- Parents Ex. 13           ██████████ Speech Language Progress Summary, May 2022
- Parents Ex. 14           ██████████ Comprehensive Vision Screening Report, May 26, 2022

Parents Ex. 15 ██████████ MAP Score Report, May 27, 2022

Parents Ex. 16 MCPS Classroom Observation Report, June 6, 2022

Parents Ex. 17 Observation Report, ██████████, June 7, 2022

Parents Ex. 18 ██████████ IEP Progress Report, June 2022

Parents Ex. 19 ██████████ Psychotherapy Progress Note, June 2022

Parents Ex. 20 NOT OFFERED

Parents Ex. 21 NOT OFFERED

Parents Ex. 22 ██████████ Clarification Notes for MCPS, July 2022

Parents Ex. 23 ██████████ Notes on MCPS Occupational Therapy goals, July 2022

Parents Ex. 24 Letter to MCPS serving notice, August 8, 2022

Parents Ex. 25 Emails between the MCPS and the ██████████, August 31, 2022 – October 1, 2022

Parents Ex. 26 Reactions to the MCPS draft IEPs, ██████████, July 16, 2022; July 20, 2022; September 3, 2022

Parents Ex. 27 MCPS approved IEP, September 8, 2022

Parents Ex. 28 MCPS Prior Written Notice, September 20, 2022

Parents Ex. 29 Letter from MCPS regarding stopping tuition payments to ██████████ September 27, 2022<sup>26</sup>

Parents Ex. 29A ██████████ Assessment Summary, September 2022

Parents Ex. 30 Observation Report of MCPS proposed placement by Parents, October 14, 2022

Parents Ex. 31 Observation Report of MCPS proposed placement by ██████████, November 3, 2022

Parents Ex. 32 ██████████ Student Schedule, 2022-2023 School Year

Parents Ex. 32A Updated ██████████ Student Schedule, 2022-2023 School Year

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<sup>26</sup> During the hearing, Parents' Exhibit 29 was offered by the MCPS while cross-examining a witness in the Parents' case in chief. The Parents did not object, so it was admitted. (Hr'g Tr. at 893.)

Parents Ex. 33 [REDACTED] Math Calculations Data, October 20, 2022

Parents Ex. 34 [REDACTED] IEP Progress Report, November 17, 2022

Parents Ex. 34A NOT OFFERED

Parents Ex. 35 [REDACTED] Attendance Report, January 12, 2023

Parents Ex. 36 Resume, [REDACTED]

Parents Ex. 37 Resume, [REDACTED]

Parents Ex. 38 Resume, [REDACTED]

Parents Ex. 39 Resume, [REDACTED]

Parents Ex. 40 Resume, [REDACTED]

Parents Ex. 41 Resume, Dr. [REDACTED]

Parents Ex. 42 [REDACTED] Math Student Work Samples, December 2022

Parents Ex. 43 [REDACTED] Spelling and Writing Student Work Samples, December 2022

Parents Ex. 44 Observation Report, [REDACTED], January 5, 2023

Parents Ex. 45 [REDACTED] IEP Progress Report, January 20, 2023

Parents Ex. 46 NOT OFFERED

Parents Ex. 47 Resume, [REDACTED]

Unless otherwise provided, I admitted the following exhibits in evidence, offered by the MCPS:

MCPS Ex. 1 NOT OFFERED

MCPS Ex. 2 Classroom Observation report, [REDACTED], May 17, 2021

MCPS Ex. 3 Classroom Observation report, [REDACTED], May 17, 2021

MCPS Ex. 4 Classroom Observation report, [REDACTED], May 20, 2021

MCPS Ex. 5 Classroom Observation report, [REDACTED], May 17, 2021

MCPS Ex. 6 Classroom Observation report, [REDACTED], May 17, 2021

MCPS Ex. 7	NOT OFFERED
MCPS Ex. 8	NOT OFFERED
MCPS Ex. 9	██████████ 2020-2021 Elementary Mid-Year Report, February 5, 2021
MCPS Ex. 10	Prior Written Notice, June 16, 2021
MCPS Ex. 11	Prior Written Notice, June 24, 2021
MCPS Ex. 12	IEP, June 15, 2021
MCPS Ex. 13	Authorization for Release/Exchange of Confidential Information, April 21, 2022 <sup>27</sup>
MCPS Ex. 14	Email from MCPS to Parent's counsel, May 12, 2022
MCPS Ex. 15	Emails between MCPS and Parent's counsel, May 12, 2022 – June 6, 2022
MCPS Ex. 16	Email from MCPS to Parent, June 6, 2022 and Notice of IEP Team Meeting
MCPS Ex. 17	Emails between MCPS and Parent's Counsel, May 12, 2022 – June 9, 2022
MCPS Ex. 18	Emails between MCPS and Parent, June 7, 2022 – June 9, 2022
MCPS Ex. 19	Email from MCPS to Parent, July 14, 2022
MCPS Ex. 20	Email between ██████████ and MCPS, June 6, 2022
MCPS Ex. 21	Emails between MCPS and Parent, June 6, 2022 – July 14, 2022
MCPS Ex. 22	Emails between MCPS, Parent's Counsel, Parent, and ██████████ June 6, 2022 – June 27, 2022
MCPS Ex. 23	Emails between MCPS, Parent's Counsel, and ██████████ July 18, 2022 – July 20, 2022
MCPS Ex. 23A	Reordered pages of MCPS 23
MCPS Ex. 24	Classroom Observation report, ██████████, June 6, 2022
MCPS Ex. 25	██████████ IEP, May 17, 2022

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<sup>27</sup> The original exhibit list submitted by MCPS noted the date of the document as May 4, 2023. During the hearing, the MCPS requested that the Exhibit List be corrected to properly show that the document is dated April 21, 2022. (Hr'g Tr. at 990-994.)

- MCPS Ex. 26 [REDACTED] IEP; Progress Report, June 2022
- MCPS Ex. 27 [REDACTED] Assessment Summary 2021-2022
- MCPS Ex. 28 Word Identification and Spelling Test (WIST), May 11, 2022  
DERMA Morphology, May 11, 2022  
Teacher Copy: Assessment for Independent Reading Levels: Levels L-Z+ (Fiction/Narrative), May 10, 2022
- MCPS Ex. 29 [REDACTED] End-of-Year Assessment, Mathematics, 2021-2022
- MCPS Ex. 30 [REDACTED] Unit 6 Assessment, Mathematics, April 5, 2022
- MCPS Ex. 31 Writing Samples, May 2022
- MCPS Ex. 32 Writing Samples, May 2021
- MCPS Ex. 33 Sentence Correction Writing Sample, May 16, 2021
- MCPS Ex. 34 Paragraph Writing Samples, May 18, 2021
- MCPS Ex. 35 Emails between MCPS Counsel and Parent's Counsel, July 27, 2022
- MCPS Ex. 36 Emails between MCPS Counsel and Parent's Counsel, August 5, 2022 – August 15, 2022
- MCPS Ex. 37 Notice of IEP Meeting, August 12, 2022
- MCPS Ex. 38 Emails between the MCPS and the [REDACTED], August 31, 2022 – September 1, 2022
- MCPS Ex. 39 Emails between the MCPS and the [REDACTED], July 20, 2022 – September 1, 2022
- MCPS Ex. 40 Emails between the MCPS and [REDACTED], September 3, 2022 – September 7, 2022
- MCPS Ex. 41 Emails between the MCPS, the Student's mother, and [REDACTED], September 3, 2022 – September 8, 2022
- MCPS Ex. 42 Prior Written Notice, September 20, 2022
- MCPS Ex. 43 IEP, September 8, 2022
- MCPS Ex. 44 NOT OFFERED
- MCPS Ex. 45 NOT OFFERED

MCPS Ex. 46 NOT OFFERED

MCPS Ex. 47 NOT OFFERED

MCPS Ex. 48 NOT OFFERED

MCPS Ex. 49 NOT OFFERED

MCPS Ex. 50 [REDACTED] at the [REDACTED] Speech-Language Progress Summary, May 2022

MCPS Ex. 51 MCPS Summary Review of Non-MCPS Occupational Therapy Report, April 29, 2019

MCPS Ex. 52 [REDACTED] Occupational Therapy Annual Report, May 15, 2020

MCPS Ex. 53 [REDACTED] Occupational Therapy 2020-2021 Annual Report, March 15, 2021

MCPS Ex. 54 MCPS Occupational Therapy Observation report, May 21, 2021

MCPS Ex. 55 MCPS Adapted Physical Education Evaluation, June 13, 2019

MCPS Ex. 56 MCPS Physical Therapy Summary of Telephone Conference, November 15, 2019

MCPS Ex. 57 MCPS Physical Therapy Summary of Observation, December 13, 2019

MCPS Ex. 58 MCPS Physical Education Summary of Observation, December 13, 2019

MCPS Ex. 59 NOT OFFERED

MCPS Ex. 60 Resume, [REDACTED]

MCPS Ex. 61 Resume, [REDACTED]

MCPS Ex. 62 Resume, [REDACTED]

MCPS Ex. 63 Resume, [REDACTED]

MCPS Ex. 64 Resume, [REDACTED]

MCPS Ex. 65 MCPS Response to Hearing Appeal, October 10, 2022