

[REDACTED]

STUDENT

v.

ALLEGANY COUNTY

PUBLIC SCHOOLS

* BEFORE RICHARD O'CONNOR,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-ALLG-OT-19-10116

* * * * *

DECISION

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STATEMENT OF THE CASE

On March 28, 2019, [REDACTED] and [REDACTED] (the Parents) filed a Due Process Complaint on behalf of their son, [REDACTED] (the Student) with the Office of Administrative Hearings (OAH).

The parties attended a mediation session on April 23, 2019 but did not resolve their dispute.

In the complaint, the Parents allege that the Allegany County Public Schools (ACPS) has violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415(f)(1)(A) (2017),¹ by denying the Student a free appropriate public education for the 2015-2016, 2016-2017, 2017-2018 and 2018-2019 school years by placing the Student in the general education classroom at [REDACTED] Elementary School and by failing to provide the services and supports called for in his individualized education programs. The Parents request compensatory education, reimbursement for private therapeutic services and transportation, and placement at a private special education day school at public expense for the 2018-2019 and 2019-2020 school years.

¹ U.S.C.A. is an abbreviation for United States Code Annotated. All references to the IDEA are to the 2017 volume.

On April 23, 2019, I conducted a telephone pre-hearing conference. Rochelle Eisenberg, Esquire, of PK Law, 10500 Little Patuxent Parkway, Columbia, MD 21044, represented the ACPS. Mark B. Martin, Esquire, 1 N. Charles Street, Suite 1215, Baltimore, MD 21201, represented the Parents. At the request of the parties, I scheduled the hearing for June 5 through June 11, 2019.

I held the hearing on the scheduled dates in Cumberland, Maryland. Mr. Martin represented the Parents, who were present every day. Ms. Eisenberg represented the ACPS.

The hearing dates requested by the parties fell more than forty-five days after the triggering events described in the federal regulations, which is the date my decision is due. 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a), (c) (2018).² In this case, forty-five days after the unsuccessful mediation on April 23, 2019 was June 7, 2019, and the decision normally would have been due on that date. The attorneys for both parties requested an extension of time to accommodate hearing dates of June 5 through 11, 2019 because their respective calendars contained many due process hearings and mediations before those dates, making the attorneys unavailable for this hearing. June 5 was the first date that both counsel were free to commence the hearing.

On the original due date of June 7, 2019, the hearing was ongoing. When it ended on June 11, 2019 as scheduled, the parties requested an extension of time until July 11, 2019 for me to issue a decision. 34 C.F.R. § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2018). I granted the request.

² C.F.R. is an abbreviation for Code of Federal Regulations. Unless otherwise noted, all references are to the 2018 edition.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1) (2018); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

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

ISSUES

The issues are whether the ACPS denied the Student a free appropriate public education for the 2015-2016, 2016-2017, 2017-2018 and 2018-2019 school years, whether the Student's Individualized Education Program (IEP) for those school years provided a free appropriate public education, whether the services and supports called for in the IEPs were provided, and whether the Student's proposed placement at a private special education day school provides an appropriate education.

SUMMARY OF THE EVIDENCE

Exhibits

The Parents presented two binders of exhibits marked 1 through 109, plus a thumb drive containing exhibits 110, 111, and 112. Of those exhibits, the following were admitted into evidence:

1. ACPS Confidential Psychological Report, May 2, 2013.
7. Psychological Report, August 12, 2014.
8. IEP, September 16, 2014.
19. ACPS Psychological Assessment Report, February 12, 2016.

21. Emails between the Student's mother and [REDACTED] April 5 to May 2, 2016.
23. Prior Written Notice, October 17, 2016.
24. Email from the Student's mother to [REDACTED] November 9, 2016.
27. ACPS Alternate Assessments Eligibility Tool, March 13, 2017.
33. Prior Written Notice, April 23, 2017.
42. IEP, December 4, 2017.
43. Perfect Attendance Award, January 2017.
44. Emails from the Student's mother to [REDACTED] with attachments, March 18, 2018; email from [REDACTED] to [REDACTED] and [REDACTED] March 19, 2018; emails between [REDACTED] and the Student's mother, March 21, 2019 to April 16, 2019.
53. ACPS Assessment Report for Speech and Language, October 25, 2018.
56. IEP of December 4, 2017, with progress notes through November 12, 2018.
57. Emails between [REDACTED] and the Student's mother, November 18 and 19, 2018.
58. Informal Behavior Plan, November 27, 2018.
59. Communication Observation Form, November 28, 2018.
60. ACPS Psychological Assessment Report, November 28, 2018.
61. ACPS Educational Evaluation Report, December 3, 2018.
64. IEP, December 10, 2018.
66. Prior Written Notice, December 10, 2018.
79. The Student's mother's notes from a meeting with [REDACTED] January 7, 2019.
80. Imagine Math score sheet, January 8, 2019.
83. ACPS Reading Inventory, March 1, 2019.
84. The Student's mother's notes about classroom observations and the Student's actions and statements, January 21 to February 8, 2019.

- 86. School Observation Report, March 25, 2019.
- 88. Student Progress Report – Read Theory, April 2, 2019.
- 90. Progress Report on IEP Goals, April 17, 2019.
- 91. Letter from Mr. [REDACTED] to ACPS, May 2, 2019.
- 92. School Observation Report, May 24, 2019.
- 93. Student Progress Report – Phonics Inventory, May 28, 2019.
- 101. Information from [REDACTED] website: article about [REDACTED]
[REDACTED] from the [REDACTED] 2012.
- 103. *Curriculum Vitae*, [REDACTED] PhD, BCBA-D.
- 106. *Curriculum Vitae*, [REDACTED]
- 108. Samples of the Student's work from [REDACTED]³
- 109. Academic Progress Report, June 3, 2019.
- 110. Video of the Student reading, April 2019.
- 111. Video of the Student calculating money April 2019.
- 112. Video of the Student performing mathematics calculations, April 2019.

ACPS presented two binders of exhibits marked 46 through 147.⁴ Of those exhibits, the following were admitted into evidence:

- 87. Occupational Therapy Evaluation, November 12, 2018.
- 91. Physical Therapy Evaluation, November 28, 2018.
- 93. IEP of December 4, 2017 with progress reports through November 12, 2018.
- 97. Dr. [REDACTED]'s notes of an observation of the Student, March 6, 2019.
- 100. Letter from [REDACTED] Elementary School to the Parents, March 21, 2019.

³ The last page of this exhibit was not admitted.

⁴ ACPS explained that exhibits 1 through 45 had been removed prior to the hearing because they were duplicative or irrelevant.

101. Letter from [REDACTED] Elementary School to the Parents, March 28, 2019.
104. Student Support Worksheet, fifth grade.
105. Messages between ACPS and the Student's mother, April 30, 2017 to March 13, 2019.
106. Notes between ACPS and the Student's mother, August 31, 2018 to May 13, 2019.
108. Examples of the Student's work in phonics, October 16, 2018 to January 23, 2019.
109. Photograph of the Student's classroom implements and belongings.
110. "I need a break" card.
111. The Student's daily schedule for the 2018-2019 school year.
112. *Curriculum Vitae*, [REDACTED]
113. *Curriculum Vitae*, [REDACTED]
114. *Curriculum Vitae*, [REDACTED]
116. *Curriculum Vitae*, [REDACTED]
117. *Curriculum Vitae*, [REDACTED]
120. *Curriculum Vitae*, [REDACTED]
121. *Curriculum Vitae*, Dr. [REDACTED]
124. *Curriculum Vitae*, [REDACTED]
127. *Curriculum Vitae*, [REDACTED]
128. Examples of the Student's work in reading and writing; explanation of the [REDACTED] program.
130. Examples of the Student's work in mathematics, September 13, 2018 to April 4, 2019.
133. Samples of the Student's writing and other work, most undated, a few dated January and February 2019.

136. Copies of photographs of the Student in class, undated.
137. Report on the Student's progress by Ms. [REDACTED] April 2, 2019; examples of the Student's work.
140. Emails between the Student's mother and Mr. [REDACTED] December 12 and 13, 2018 and January 2, 2019;⁵ email from [REDACTED] to the Student's mother, January 8, 2019; emails between the Student's mother, [REDACTED] and [REDACTED] April 17, 2019.
141. Video of the Student in class, May 16, 2019.
143. Draft IEP, May 2019.
144. Copies of two photographs of the Student and one photograph of the Student's work, May 16, 2019.
147. Emails among the Student's mother, [REDACTED] [REDACTED] and [REDACTED] March 19, 2018.

Testimony

The Parents presented the following witnesses:

1. [REDACTED] the Student's special education teacher, called as an adverse witness;
2. [REDACTED] PhD, accepted as an expert in autism, special education, inclusion practices, and behavior;
3. [REDACTED] the Student's grandmother;
4. [REDACTED] the Student's mother; and
5. [REDACTED] Principal of [REDACTED] accepted as an expert in special education.

The ACPS presented the following witnesses:

1. [REDACTED] the Student's mathematics teacher, accepted as an expert in teaching mathematics;
2. [REDACTED] ACPS School Counselor, accepted as an expert in school counseling;
3. [REDACTED] Occupational Therapist, accepted as an expert in occupational therapy.
4. [REDACTED] Physical Therapist, accepted as an expert in physical therapy;

⁵ ACPS Ex. 140 is over fifty pages of emails among a large number of senders and recipients spanning 2017 to 2019. The pages are not numbered or Bates-stamped. Only those emails specified in the exhibit list were admitted into evidence.

5. [REDACTED] D.Ed., Assistant Principal of [REDACTED] Elementary School, accepted as an expert in education.
6. [REDACTED] ACPS School Psychologist, accepted as an expert in school psychology;
7. [REDACTED] recalled and accepted as an expert in special education;
8. [REDACTED] the Student's regular education classroom teacher, accepted as an expert in special education and general education; and
9. [REDACTED] ACPS Supervisor of Special Education, accepted as an expert in special education.

FINDINGS OF FACT

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

1. The Student is a ten-year-old boy with autism spectrum disorder and attention deficit hyperactivity disorder (ADHD).
2. The Student has a full-scale intelligence quotient (IQ) of about sixty and a verbal IQ of about seventy.
3. Since second grade, i.e., the 2015-2016 school year, the Student has attended [REDACTED] Elementary School ([REDACTED] ES), a facility of ACPS.
4. The Student has had an IEP every year at [REDACTED] ES that called for placement in a general education classroom with special education services, accommodations, and supports.
5. The Student is not on the diploma track.
6. The Student has advanced from grade to grade every year at [REDACTED] ES. For the 2018-2019 school year his placement was in a fifth grade general education classroom.
7. Most of the Student's fourth grade school year (2017-2018) was governed by an IEP developed on December 4, 2017, which placed the Student in a fourth grade general education classroom.

8. The December 4, 2017 IEP called for the Student to receive three hours of special education services daily in the general education classroom from a special education classroom teacher and instructional assistants (IA).

9. The IEP called for the Student to receive one thirty-minute session of occupational therapy (OT) weekly in the general education classroom and one thirty-minute session of OT monthly outside the general education classroom.

10. The IEP called for the Student to receive one thirty-minute session of physical therapy (PT) weekly outside the general education classroom and one fifteen-minute session of PT monthly in the general education classroom.

11. The IEP called for the Student to receive six thirty-minute sessions of speech/language therapy monthly in an individual or small group setting outside the general education classroom.

12. The IEP provided the Student with extended school year (ESY) services for the summer of 2018.

13. In the Present Level of Academic Achievement and Functional Performance section, the IEP described the Student as “below grade level” in every academic area, rather than stating a grade level under the heading “Instructional Grade Level Performance.”

14. The IEP provided assistive technology for the Student, including visuals, touchpoints, a screen reader, audiobooks, graphic organizers, a calculator, and adapted high contrast paper.

15. The IEP recognized that the Student could access the general education curriculum only in a very limited way and provided that grade level material would be read to him verbatim.

16. The IEP called for other modifications of the curriculum and instructional supports for the Student, including a personal schedule; a word bank; breaking down assignments and directions into smaller units; modified assignments in reading, mathematics, and spelling; reduced choices on tests and assignments; reduced assignments and tests; frequent breaks; and increased one-to-one or small group instruction.

17. The IEP provided social skills training for the Student from the school guidance counselor in the classroom setting, as well as individual lessons from the special education teacher, the general education teacher, and an IA.

18. The Student's special education instruction in fourth grade included a reading intervention program called [REDACTED] which an IA worked on with the Student for about thirty minutes daily.

19. The IEP of December 4, 2017 remained in effect through fourth grade and into the 2018-2019 school year.

20. The IEP of December 4, 2017 included a reading phonics goal as follows: "Given review of letter patterns and sounds, [the Student] will read multi syllable words with welded sounds (ing, and, ung, ink, ank, onk, unk) and vowel teams (ee, ea, ai, ay, oa, ow) in isolation and connected text in 4 out of 5 trials by 12/4/18." Parents Ex. 42. This goal was broken down into two objectives.

21. The Student did not meet the reading phonics goal in the IEP. In each of four progress reports during the year of this IEP, the Student was described as "Making sufficient progress to meet goal." His final progress report on November 12, 2018 stated: "[The Student] will continue to read connected welded sounds in connected text." ACPS Ex. 93.

22. The IEP of December 4, 2017 included a reading comprehension goal as follows: "Given material read to him, visual aides [sic] discussion and choices as needed, [the Student] will summarize literary text or informational text by identifying (orally) the characters and the main events in a story or by identifying (orally) the main idea in 4 out of 5 trials by 12-4-18." This goal included four objectives, each of which began, "Given material read to him, discussion and choices as needed . . ." Parents Ex. 42.

23. The reading comprehension goal and objectives did not include having the Student read anything.

24. The Student did not meet the reading comprehension goal in the IEP. In each of five progress reports during the year of this IEP, the Student was described as "Making sufficient progress to meet goal." His final progress report on November 12, 2018 stated: "When [the Student] has reading material read to him, participates in discussion and choices as needed, he is able to make inferences from a text with 70% accuracy." ACPS Ex. 93.

25. The IEP of December 4, 2017 included a mathematics⁶ calculation goal as follows: "Given number charts, visual cues[,] manipulatives and a calculation device, [the Student] will add, subtract, multiply and divide numbers (without remainders) within 1000 from a list of 10 with 80% accuracy by 12/4/18." The goal included four objectives, the last of which related to counting money: "Given coins, visual aides [sic] and adult prompting, [the Student] will add/or count money up to \$1.00 by 10-1-18." Parents Ex. 42.

26. The Student did not meet the math calculation goal in the IEP. In each of four progress reports during the year of this IEP, the Student was described as "Making sufficient progress to meet goal." His final progress report on November 12, 2018 stated: "When given

⁶ The IEPs, all the other documents in evidence, and the testimony of all the witnesses refer to mathematics as "math." I shall follow that convention henceforth.

number charts, visual aides [sic], manipulatives, and a calculation device, [the Student] is able to add, subtract, multiply and divide numbers within 1000 with 80% accuracy. He is making sufficient progress in adding/counting money up to \$1.00." ACPS Ex. 93.

27. The IEP of December 4, 2017 included a written language mechanics goal as follows: "Given review of sentence structure, discussion about a given topic, visual cues and sentence starter or writing prompt, [the Student] will write 3-4 sentences on topic with appropriate beginning capitalization and end punctuation 9 on 8 out of 10 [sic] trials by 12-4-18." Parents Ex. 42. This goal was broken into three objectives.

28. The Student did not meet the written language mechanics goal in the IEP. In each of four progress reports during the year of this IEP, the Student was described as "Making sufficient progress to meet goal." His final progress report on November 12, 2018 stated: "[The Student] continues to make sufficient progress in the sentence structure of his writing. He currently is able to use visual aides [sic], sentence starters, a word bank, and adult support to create one complete sentence on topic with appropriate beginning capitalization and end punctuation with 80% accuracy." ACPS Ex. 93.

29. The IEP of December 4, 2017 included a communication goal as follows: "By 12/3/18, when given verbal prompts, [the Student] will tell a story or recount an experience in an organized manner with relevant, descriptive details while speaking clearly when completing various curriculum based language activities with 80% accuracy as measured by data collection on speech session logs." Parents Ex. 42. This goal included ten objectives.

30. The Student did not meet the communication goal in the IEP. In each of six progress reports during the year of this IEP, the Student was described as "Making sufficient progress to meet goal." His final progress report on November 16, 2018 stated: "[The Student]

describes household items with 80% accuracy. It takes several prompts and questions. He answers questions about verbally presented problems with 74% accuracy. [The Student] produces sh in words with 90% accuracy and th in conversation with 95% accuracy. He names and explains informational signs with 80% accuracy and correctly answers questions about verbally presented problems with 80% accuracy.” ACPS Ex. 93.

31. The IEP of December 4, 2017 included a social interaction skills goal as follows: “Given direct instruction through role play, discussions, social stories and prompting, [the Student] will demonstrate an understanding of the relationship between his verbalizations and actions [sic] effects on others by giving an appropriate response in 4 out of 5 opportunities to do so across all school settings by 12/4/18 as measured by observations and checklists.” Parents Ex. 42. This goal included four objectives.

32. The Student achieved the social interaction skills goal by November 12, 2018.

33. The IEP included a physical – gross motor goal as follows: “[The Student’s] range of motion, strength, balance, coordination and motor planning will improve him to move around his school environment with stability and confidence with 100% accuracy on 3 consecutive trial days by 12/3/18.” Parents Ex. 42. This goal included eight objectives related to strength, balance, coordination, and taking turns.

34. The Student did not meet the physical – gross motor goal in the IEP. In each of four progress reports during the year of this IEP, the Student was described as “Making sufficient progress to meet goal.” ACPS Ex. 93.

35. The IEP of December 4, 2017 included an occupational therapy goal, as follows: “By December 2018, [the Student] will develop his fine motor and handwriting skills so that he

can be successful in classroom activities.” Parents Ex. 42. Four objectives were associated with this goal, one of which was drawing a human figure with twelve recognizable parts.

36. The Student did not meet the occupational therapy goal in the IEP. In each of four progress reports during the year of this IEP, the Student was described as “Making sufficient progress to meet goal.” ACPS Ex. 93. By November 14, 2018, he could draw a human figure with up to ten parts after verbal reminders.

37. In accordance with the December 4, 2017 IEP, the Student started fifth grade in the general education classroom.

38. The Student’s IEP team developed the Student’s next IEP on December 10, 2018 to cover the rest of the 2018-2019 school year.

39. The December 10, 2018 IEP placed the Student in a general education classroom at [REDACTED] ES.

40. The December 10, 2018 IEP called for the Student to receive three hours of special education services daily in the general education classroom from a special education classroom teacher and an IA.

41. The IEP called for the Student to receive one thirty-minute session of OT weekly outside the general education classroom.

42. The IEP called for the Student to receive one thirty-minute session of PT weekly outside the general education classroom and one fifteen-minute session of PT monthly in the general education classroom.

43. The IEP called for the Student to receive six thirty-minute sessions of speech/language therapy monthly in an individual or small group setting outside the general education classroom.

44. The IEP provided the Student with ESY services for the summer of 2019.

45. In the Present Level of Academic Achievement and Functional Performance section, the IEP described the Student as “below grade level” in every academic area, rather than stating a grade level under the heading “Instructional Grade Level Performance.”

46. The IEP provided assistive technology for the Student, including visuals, touchpoints, a screen reader, audiobooks, graphic organizers, a calculator, adapted high contrast paper, and a laptop computer in the classroom.

47. The IEP called for other modifications of the curriculum and instructional supports for the Student, including a highlight tool; redirection as needed; breaking down assignments and directions into smaller units; modified assignments in reading, mathematics, and spelling; reduced choices on tests and assignments; reduced assignments and tests; frequent breaks; and increased one-to-one or small group instruction.

48. The Student was placed in Ms. [REDACTED]'s fifth grade general education classroom for the 2018-2019 school year.

49. The Student's fifth grade class size was twenty-two pupils.

50. Ms. [REDACTED] is certified as both a special education teacher and a general education elementary teacher.

51. The IEP did not call for Ms. [REDACTED] to provide special education services for the Student.

52. The Student's daily schedule during fifth grade was as follows:

8:35 to 9:00 – arrival, breakfast, announcements;
9:00 to 11:30 – English language arts (ELA), science, social studies;⁷
11:30 to 12:00 – recess;
12:00 to 12:30 – lunch;
12:30 to 2:00 – math;

⁷ The entire block of time is considered ELA, during which topics in science and social studies are introduced.

2:00 to 2:20 – reading intervention;
2:25 to 3:10 – resource, including media, guidance, music, physical education and art on different days;
3:15 to 3:45 – dismissal.

53. Except for reading intervention, all fifth grade students have the same schedule.

54. Ms. [REDACTED] was the Student's special education teacher in fifth grade. She was the only teacher at [REDACTED] ES who provided special education instruction, and she had twenty-four to twenty-eight students in her caseload.

55. Ms. [REDACTED] supervised two special education IAs, Ms. [REDACTED] and Ms. [REDACTED]. The IAs cannot teach original material to students; they are limited to reviewing material that teachers have presented.

56. Mr. [REDACTED] was the Student's math teacher in fifth grade.

57. Ms. [REDACTED] the school counselor, regularly ate breakfast with the Student and one other student. Ms. [REDACTED] also gave Ms. [REDACTED] s fifth grade a class a lesson in social interaction for about forty-five minutes once a week.

58. Ms. [REDACTED] provided thirty minutes a day of direct special education instruction to the Student in the fifth grade classroom every day during ELA, usually between 9:30 and 10:30 a.m.

59. One of the IAs often worked with the Student from about 11:00 to 11:30 a.m.

60. Ms. [REDACTED] regularly ate lunch with the fifth graders, including the Student, but was not providing services or instruction during those times.

61. In the afternoon, the Student went with his class to Mr. [REDACTED] s classroom for math.

62. One of the IAs was usually in the classroom from 1:00 to 2:00 p.m. She would sometimes provide individual instruction to the Student.

63. In addition, Mr. [REDACTED] regularly worked with the Student one-to-one for fifteen or twenty minutes while the other pupils were working independently.

64. At about 2:00 p.m., the Student would be pulled out of the classroom for his reading intervention, which was again [REDACTED]

65. An IA supervised the [REDACTED] session, which lasted twenty to thirty minutes in an area outside the media center.

66. The IEP of December 10, 2018 included a reading phonics goal as follows:
“Given review of letter patterns and sounds, [the Student] will read diagraphs and blends words in isolation and connected text in 4 out of 5 trials by 12/10/19.” Parents Ex. 64. This goal was broken down into two objectives, both of which referred to the Student’s reading intervention program ([REDACTED]).

67. The Student achieved the reading phonics goal by April 15, 2019.

68. The IEP of December 10, 2018 included a reading comprehension goal as follows:
“Given material read to him, visual aides [sic] discussion and choices as needed, [the Student] will summarize literary text or informational text by identifying (orally) the characters and the main events in a story or by identifying (orally) the main idea in 4 out of 5 trials by 12-10-19.” This goal included four objectives, each of which began, “Given material read to him, discussion and choices as needed . . .” Parents Ex. 64.

69. This IEP goal was exactly the same as the reading comprehension goal in the IEP of December 4, 2017, and did not require the Student to read anything.

70. The Student achieved the reading comprehension goal by April 15, 2019.

71. The IEP of December 10, 2018 included a math calculation goal as follows:
“Given number charts, visual cues, manipulatives, and a calculation device, [the Student] will

add, subtract, multiply, and divide money amounts (dollars and coin amounts) as well as numbers with decimals within 1000 with 80% accuracy by 12/10/19.” Parents Ex. 64. This goal included four objectives, two relating to money and two relating to numbers with decimals.

72. The Student achieved the math calculation goal by April 15, 2019.

73. The IEP of December 10, 2018 included a written language mechanics goal as follows: “Given review of sentence structure, discussion about a given topic, visual cues and sentence starter or writing prompt, [the Student] will write 3-4 sentences on topic with appropriate beginning capitalization and end punctuation on 8 out of 10 trials by 12-10-19.” Parents Ex. 64. This goal was broken into three objectives.

74. This IEP goal was exactly the same as the written language mechanics goal in the IEP of December 4, 2017.

75. The Student achieved the written language mechanics goal by April 15, 2019.

76. The IEP of December 10, 2018 included a communication goal as follows: “By 12/9/19, when given verbal prompts, [the Student] will tell a story or recount an experience in an organized manner with relevant, descriptive details while speaking clearly when completing various curriculum based language activities with 80% accuracy as measured by data collection on speech session logs.” Parents Ex. 64. This goal included nine objectives.

77. Except for having nine instead of ten objectives, this goal was exactly the same as the communication goal in the IEP of December 4, 2017.

78. The Student did not meet the communication goal in the IEP. In each of two progress reports through April 15, 2019, the Student was described as “Making sufficient progress to meet goal.” Parents Ex. 90.

79. The IEP of December 10, 2018 included a social interaction skills goal as follows: “Given direct instruction through role play, discussions, social stories and prompting, [the Student] will demonstrate an understanding of the relationship between his verbalizations and actions [sic] effects on others by giving an appropriate response in 4 out of 5 opportunities to do so across all school settings by 12/10/19 as measured by observations and checklists.” Parents Ex. 64. This goal included two objectives.

80. Except for having two fewer objectives, this goal was exactly the same as the social interaction skills goal in the IEP of December 4, 2017.

81. The Student achieved the social interaction skills goal by April 15, 2019.

82. The IEP of December 10, 2018 included a physical – gross motor goal as follows: “[The Student’s] range of motion, strength, balance, coordination and motor planning will improve him to move around his school environment with stability and confidence with 100% accuracy on 3 consecutive trial days by 12/9/19.” Parents Ex. 64. This goal included six objectives related to strength, balance, coordination, range of motion, and motor planning.

83. Except for having two fewer objectives, this goal was exactly the same as the physical – gross motor goal in the IEP of December 4, 2017.

84. The Student did not meet the physical – gross motor goal in the IEP. In each of two progress reports through April 10, 2019, the Student was described as “Making sufficient progress to meet goal.” Parents Ex. 90.

85. The IEP of December 10, 2018 included an OT goal as follows: “To increase his accuracy and independence in completing fine motor school tasks, [the Student] will improve strength, finger mobility and visual spatial skills demonstrating 80% success over 3 consecutive trials, by December 2019.” Parents Ex. 64.

86. The Student did not meet the OT goal in the IEP. In the only progress report in the record, dated February 1, 2019, the Student was described as "Making sufficient progress to meet goal." Parents Ex. 90.

87. The Student was in the band at [REDACTED] ES.

88. The Student typically ate lunch with several other non-disabled peers and interacted with them.

89. The Student is verbal and does not hesitate to speak in class. He volunteers to read aloud and answers when called on.

90. The Student does not typically experience behavioral problems, although he did have several behavioral incidents during fifth grade, including telling an IA that his mother was a "fucking bitch," grabbing Ms. [REDACTED]'s finger and bending it back, and chasing girls on the playground.

91. The ACPS prepared an informal behavior plan for the Student in November 2018, but did not institute a functional behavior assessment or a behavior intervention plan (BIP).

92. The Parents, after proper notice to ACPS, removed the Student from [REDACTED] ES in May 2019 and enrolled him in [REDACTED].

93. The Student's last day at [REDACTED] ES was May 16, 2019.

94. [REDACTED] part of the [REDACTED] is an all-special-education school and is the only such school in [REDACTED] County.

95. [REDACTED]'s students are in the categories of emotionally disturbed or autism spectrum disorder.

96. A majority of [REDACTED]'s students have been placed there by ACPS.

97. ACPS places students at [REDACTED] only when ACPS is unable to manage their behavior.

98. At [REDACTED] the Student is in a classroom with five other autistic students, a special education teacher, an IA, a behavior support specialist, and a therapeutic behavior aide assigned to a specific student.

99. The Student is the highest functioning child in his classroom.

100. Two of the students are non-verbal and two others use communication devices.

101. One member of the Student's class (the one with the behavior aide) sometimes behaves aggressively by biting, punching, or throwing things.

102. Other members of the class sometimes display distracting behavior such as clapping, non-compliance, or loud verbalizations.

103. The other five students in the class all have BIPs.

104. There is no band at [REDACTED]

105. The Student does not receive OT or PT services at [REDACTED] but would receive them if he were placed there by ACPS.

106. At the time he left [REDACTED] ES, the Student was a beginning reader who was making progress in phonics. His reading skills were mostly at first grade level or below, but occasionally he demonstrated abilities at about a second grade level.

107. At the time he left [REDACTED] ES, the Student had little or no reading comprehension ability.

108. At the time he left [REDACTED] ES, the Student could articulate sentences and make his needs and desires known. He could write three or four sentences about a topic.

109. At the time he left [REDACTED] ES, the Student was performing at a first or second grade level in math. He could add and subtract two-digit numbers without a calculator and could multiply and divide with a calculator. The Student was reasonably adept at counting coins but had difficulty understanding the values of bills. He could tell time using an analog clock.

110. At the time he left [REDACTED] ES, the Student required prompts, cues, or supervision for most of his work. However, he did sometimes undertake a task on his own initiative and liked to type on his computer.

111. As of the date of the hearing, the Parents had incurred \$8,000.00 in costs for the Student's enrollment at [REDACTED]

DISCUSSION

Statute of Limitations

The time period in which to request a Due Process hearing with the OAH is controlled by the limitations period under Maryland law enacted to comply with the IDEA. *See* 20 U.S.C.A. § 1415(f)(3)(C). The applicable statute of limitations provides that the Due Process complaint must be filed within two years of the date the Parents knew or should have known of the action that formed the basis for the complaint. Md. Code Ann., Educ. § 8-413(d)(3) (2018); *see also* COMAR 13A.05.01.15C(1); 34 C.F.R. §§ 300.507(a)(2), 300.511(e). The IDEA requires that the school district inform parents of the two-year limitations period applicable to the request for a Due Process hearing. 20 U.S.C.A. § 1415(d)(2)(E)(i).

The Parents filed the complaint in this case on March 28, 2019, alleging that ACPS denied the Student a free appropriate public education for the 2015-2016, 2016-2017, 2017-2018

and 2018-2019 school years. When the hearing began, ACPS moved to limit the complaint to two years prior to the date of filing, which would exclude the 2015-2016 and most of the 2016-2017 school years from consideration.

I did not rule on the ACPS's motion at that time because there was no proffer of when the Parents discovered the alleged violation of the IDEA. I told the parties that if the Parents attempted to present evidence of anything that happened before March 28, 2016, ACPS could object and I would rule on the objection. As the hearing progressed, the Parents referred to a few exhibits dated prior to March 28, 2016, but presented essentially no evidence alleging denial of a free appropriate public education during that earlier time period. ACPS did not object to any of the Parents' evidence on the ground that it was outside the statute of limitations. Therefore, I do not consider the 2015-2016 and 2016-2017 school years to be at issue and shall not address them in this decision.

The General Legal Framework

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01. The IDEA requires "that all children with disabilities have available to them a FAPE⁸ that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C.A. § 1400(d)(1)(A); *see also* Educ. § 8-403.

⁸ "FAPE" is an acronym meaning free appropriate public education.

To be eligible for special education and related services under the IDEA, a student must meet the definition of a "child with a disability" as set forth in section 1401(3) and 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* Educ. § 8-401(a)(2); 34 C.F.R. § 300.8; and COMAR 13A.05.01.03B(78).

The Supreme Court addressed the requirement of a free appropriate public education in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), holding that the requirement 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: 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).

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

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

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

20 U.S.C.A. § 1414(d)(3)(A). Among other things, the IEP depicts a student's current educational performance, explains how the student's disability affects the student's involvement and progress in the general curriculum, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A. IEP teams must consider the student's evolving needs when developing their educational programs. The student's IEP must include "[a] statement of the child's present levels of academic achievement and functional performance, including . . . [h]ow the child's

disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for non-disabled children) . . . ” 34 C.F.R. § 300.320(a)(1)(i). If a child's behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, the use of positive behavioral interventions, strategies and supports to address that behavior. *Id.* § 300.324(a)(2)(i). A public agency is responsible for ensuring that the IEP is reviewed at least annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision. *Id.* § 300.324(b)(1).

To comply with the IDEA, an IEP must, among other things, allow a 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 *Endrew 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*.’” *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

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

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

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

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

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

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

When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to ‘drop out.’” The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

Id. at 1001 (citation omitted).

Directly adopting language from *Rowley*, and expressly stating that it was not making any “attempt to elaborate on what ‘appropriate’ progress will look like from case to case,” the *Endrew F.* court instructs that the “absence of a bright-line rule . . . should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Id.* (quoting *Rowley*, 458 U.S. at 206). At the same

time, the *Endrew F.* court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, “[a] reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.* at 1002.

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

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

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like ACPS 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 free appropriate public education might require placement of a child in a private school setting that would be fully funded by the child's public school district.

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

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter the Parents have the burden of proving that ACPS failed to provide the Student with a free appropriate public education for the 2017-2018 and 2018-2019 school years, and that they are entitled to reimbursement for their unilateral placement of the Student at [REDACTED]

An Overview of the Student's Education

The Student spent first grade in a self-contained special education classroom at [REDACTED] Elementary School, an ACPS facility. After that school year, and up to the present day, the placement called for in his annual IEPs has been in general education classrooms at [REDACTED] ES. The practical effect of this placement is that every year the Student has become less able to access the grade-level curriculum being presented in his classroom.

For fourth and fifth grade, the Student was in general education classrooms taught by general education teachers, with class sizes of twenty or more pupils. Neither party presented much evidence concerning the Student's academic performance or progress toward achieving the annual goals during his fourth grade year. Ms. [REDACTED] the special education teacher, was not at [REDACTED] ES then, and no fourth grade teacher testified. Also unknown, based on the evidence presented, is whether the Student received the special education services, accommodations, and supports stated in the IEP of December 4, 2017, including three hours of special education instruction daily from the special education teacher and IA. The Parents did not present evidence contending that ACPS did not provide the services stated in the IEP, so I shall reasonably conclude that ACPS complied with the IEP for the Student's fourth grade year.

The IEP of December 4, 2017 recognized that the Student was unable to access the fourth-grade curriculum as it was being presented to the non-disabled pupils, and required that

grade-level material be read individually to the Student verbatim. The Student was described as “below grade level” in every area, but the IEP nowhere stated what his instructional grade level was. Except for social interaction skills, the Student met none of the goals of the December 4, 2017 IEP.

Most of the evidence presented at the hearing concerned the Student’s fifth-grade year, 2018 to 2019. The first three months of that year fell under the December 4, 2017 IEP, and a new IEP was developed on December 10, 2018. The latter IEP provided essentially the same amount of special education instruction, OT, PT, and speech/language services as did the prior IEP. The IEP once again recognized that the Student was largely unable to access the fifth-grade curriculum or understand it as it was presented to the non-disabled students in the class. He was once again described as “below grade level” with no instructional grade level noted. The IEP called for the use of assistive technology for the Student, including visuals, touchpoints, a screen reader, audiobooks, graphic organizers, a calculator, adapted high contrast paper, and a laptop computer in the classroom, as well as modifications of the curriculum and instructional supports for the Student, including a highlight tool, redirection as needed, breaking down assignments and directions into smaller units, modified assignments, reduced choices on tests and assignments, reduced assignments and tests, frequent breaks, and increased one-to-one or small group instruction.

In reading comprehension, written language mechanics, communication, social interaction skills, and physical – gross motor, the goals in the December 10, 2018 IEP were the same as those in the December 4, 2017, although a few objectives were slightly modified or omitted. In phonics and math, the language of the goals had changed somewhat but still focused on the same results. The OT goal was different in that it did not mention handwriting.

The Student spent most of his time in the fifth grade general education classroom, either in Ms. [REDACTED]'s class in the morning for ELA, or Mr. [REDACTED]'s math class in the afternoon. The only regular exception was a pull-out session at 2:00 p.m. every day for the reading intervention [REDACTED] lesson with an IA.

What the Student Actually Received

Ms. [REDACTED] the special education teacher, testified that she had a caseload of twenty-four to twenty-eight special education students in 2018-2019. She testified that she provided thirty minutes of direct special education instruction to the Student every school day, usually from 9:30 to 10:00 a.m. in the back of Ms. [REDACTED]'s classroom. This half hour of instruction was the only instruction the Student received directly from a special education teacher.

Ms. [REDACTED] also testified that she oversees two special education IAs, Ms. [REDACTED] and Ms. [REDACTED] neither of whom is assigned solely to the Student. Neither party called an IA to testify, so their interactions with the Student must be gleaned from the teachers' testimony. The IAs could review and reinforce lessons for the Student but were not permitted to introduce original content. Ms. [REDACTED] stated that one of the IAs usually worked with the Student in Ms. [REDACTED]'s classroom from 11:00 to 11:30 a.m.

The Student had lunch and recess with the general fifth grade population, then at 12:30 p.m. went to Mr. [REDACTED]'s classroom for math. Ms. [REDACTED] did not go into the math classroom, but an IA usually was present from about 1:00 p.m. on. That IA was not there only for the Student's benefit.

Mr. [REDACTED] testified that he gave a whole-group lesson for about forty-five minutes, then provided small group instruction. He said he always went to the Student's group first and spent about twenty minutes with the Student. Then Ms. [REDACTED] came in and reviewed the lesson one-to-

one with the Student for about thirty minutes. At 1:50 p.m. it was time for the Student to go to his reading intervention lesson, also with Ms. [REDACTED]

Ms. [REDACTED] testified that the [REDACTED] sessions were given in the IA's area outside the media center. She at first stated that it lasted twenty minutes, as noted in the Student's schedule. She quickly expanded the time frame to thirty minutes, but finally settled on twenty to thirty minutes of instruction.

The Student's IEPs called for three hours of special education instruction daily, a total of fifteen hours per week. Further, the IEPs stated that this instruction would be given by the special education teacher or IAs. Ms. [REDACTED] emphasized that Ms. [REDACTED] the Student's ELA classroom teacher, is also certified as a special education teacher. However, Ms. [REDACTED] was not assigned as a special education teacher during the Student's fifth grade year, so her instruction would not be part of the three daily hours of special education instruction. Also, Mr. [REDACTED]'s small group or one-to-one interactions with the Student were not special education instruction. That instruction comprised the following:

- thirty minutes with Ms. [REDACTED] every morning in Ms. [REDACTED]'s classroom;
- thirty minutes with an IA every morning in Ms. [REDACTED]'s classroom;
- thirty minutes with an IA every afternoon in Mr. [REDACTED]'s classroom; and
- twenty to thirty minutes with an IA for reading intervention every afternoon.

At the most, therefore, the Student received two hours daily of direct specialized instruction from a special education teacher or IAs, rather than the three hours called for in the IEP of December 10, 2018. Of that two-hour maximum, ninety minutes was provided by IAs. Of course, both Mr. [REDACTED] and Ms. [REDACTED] devoted a good deal of individual attention to the Student as they implemented his IEP, but their instruction does not fulfill the IEP's requirement.

ACPS's Special Education Continuum

Ms. [REDACTED] ACPS's supervisor of special education, testified that, if a special education student's placement in a general education classroom is unsuccessful, the student could be placed in a self-contained classroom. If that placement did not meet the student's needs, he or she could be placed at [REDACTED]. She further stated that ACPS's inability to handle a Student's behavior is the only reason that a student would be placed at [REDACTED].

Ms. [REDACTED]'s principal, agreed that ACPS students are placed at [REDACTED] for behavior issues.

Ms. [REDACTED] mentioned self-contained classrooms once briefly in her testimony. The Student's mother testified that the Student was in a self-contained classroom for first grade. Otherwise, no witness, from either party, presented evidence that any possibilities for the Student exist except the general education classroom or [REDACTED]. Perhaps ACPS offers the continuum of possible placements required by 34 C.F.R. § 300.115(b), but the school system has not proposed or, apparently, considered any placement outside the general education classroom. The evidence suggests that, if a special education student is not placed at [REDACTED] for behavior issues, he or she is placed in a general education classroom.

ACPS prepared a draft IEP in May 2019 that provides the same placement and services as the previous IEPs. Clearly, ACPS believes that placement in the general education classroom is proper for the Student. Similarly, the Parents are adamant that [REDACTED] is appropriate because "they specialize in autism," as the Student's mother testified. The evidence reveals significant problems with both placements.

Were the IEPs Reasonably Calculated to Enable the Student to Make Progress Appropriate for His Circumstances?

The facts in this case are similar to those in *Endrew F.*, which the Supreme Court summarized as follows:

Endrew attended school in respondent Douglas County School District from preschool through fourth grade. Each year, his IEP Team drafted an IEP addressed to his educational and functional needs. By Endrew's fourth grade year, however, his parents had become dissatisfied with his progress. Although Endrew displayed a number of strengths—his teachers described him as a humorous child with a “sweet disposition” who “show[ed] concern[] for friends”—he still “exhibited multiple behaviors that inhibited his ability to access learning in the classroom.” Supp. App. 182a; 798 F.3d 1329, 1336 (C.A.10 2015). Endrew would scream in class, climb over furniture and other students, and occasionally run away from school. *Id.*, at 1336. He was afflicted by severe fears of commonplace things like flies, spills, and public restrooms. As Endrew's parents saw it, his academic and functional progress had essentially stalled: Endrew's IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims. His parents believed that only a thorough overhaul of the school district's approach to Endrew's behavioral problems could reverse the trend. But in April 2010, the school district presented Endrew's parents with a proposed fifth grade IEP that was, in their view, pretty much the same as his past ones. So his parents removed Endrew from public school and enrolled him at Firefly Autism House, a private school that specializes in educating children with autism.

Endrew did much better at Firefly. The school developed a “behavioral intervention plan” that identified Endrew's most problematic behaviors and set out particular strategies for addressing them. See Supp. App. 198a–201a. Firefly also added heft to Endrew's academic goals. Within months, Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school.

In November 2010, some six months after Endrew started classes at Firefly, his parents again met with representatives of the Douglas County School District. The district presented a new IEP. Endrew's parents considered the IEP no more adequate than the one proposed in April, and rejected it. They were particularly concerned that the stated plan for addressing Endrew's behavior did not differ meaningfully from the plan in his fourth grade IEP, despite the fact that his experience at Firefly suggested that he would benefit from a different approach.

Endrew F., 137 S. Ct. at 996-97.

Although the Student in this case had a few minor behavioral issues, unlike *Endrew F.* his behavior did not prevent him from making academic progress in the general education curriculum. The Student was described by all who know him as friendly, talkative, compliant, and generally well-behaved. His ability to learn is hampered by autism, ADHD, and an IQ that is well below normal.

In rejecting the Tenth Circuit's holding that an IEP need offer only *de minimis* progress, the *Endrew F.* court held:

Rowley had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his 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.

Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the "merely more than *de minimis*" test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.

Id. at 1000-01.

The IEPs at issue here do not propose that the Student advance from grade to grade on grade level. All concerned recognize that the Student's disability makes such progress impossible. But the Student's IEP for fifth grade essentially duplicated that for fourth grade, a sign, according to *Endrew F.*, "indicating that he was failing to make meaningful progress toward his aims." *Id.* at 996.

The evidence is convincing that the major problem with the Student's 2017 and 2018 IEPs was his placement in general education classrooms. The goals and objectives in those

IEPs were reasonable, but the Student's placement interfered with his ability to achieve them. Essentially, the Student's situation was that for much of the school day he was bombarded with language and concepts that he did not understand because they were geared toward his non-disabled classmates. He was able to read little or none of the grade-level material. As several witnesses testified, that material had to be "back-mapped" for the Student, meaning that grade-level presentations would be modified to first or second grade level so the Student could grasp them. All this had to occur in small group or one-to-one sessions.

Dr. [REDACTED] the Parents' expert in autism, special education, inclusion practices, and behavior, reviewed the Student's academic records and assessments and observed him twice, on March 6, 2019 at [REDACTED] ES and on May 24, 2019 at [REDACTED]. Dr. [REDACTED] has helped [REDACTED] County, [REDACTED] set up a program for autistic students and has done the same in [REDACTED] County, Maryland. She has taught inclusion practices for autism spectrum disorders at [REDACTED] University and was the clinical supervisor of Applied Behavior Analysis (ABA) at the [REDACTED] in [REDACTED] and continues to provide ABA training to teachers, IAs, and other professionals. Dr. [REDACTED] has owned and operated her own educational consulting company since 2007.

I give Dr. [REDACTED] s testimony great weight for several reasons. First is her education and vast experience in the field of special education, with a strong emphasis on autism spectrum disorder and behavior. Second is her dispassionate and analytical method of presenting her testimony, stating facts from her observations and the Student's records. Dr. [REDACTED] s testimony was unbiased and focused strictly on the Student's needs and abilities, without attempting to denigrate the efforts of ACPS personnel. Third, when deftly cross-examined by ACPS's attorney in an attempt to characterize her as a "hired gun" expert, Dr. [REDACTED]

remained convincing that she was focused only on the welfare of the Student regardless of which side she was testifying for.

Dr. [REDACTED] pointed out several deficiencies with the 2017 and 2018 IEPs. Most glaring was the fact that neither contained a real reading comprehension goal, since both stated that goal as having someone read the material to the Student. This is listening comprehension, not reading comprehension, and demonstrates that the Student cannot independently read for comprehension. Also, according to Dr. [REDACTED] neither IEP includes a reading fluency goal, showing that the Student has not progressed beyond decoding (phonics) into fluency and, ultimately, comprehension.

Dr. [REDACTED] went on to state that the Student's abilities need not be defined by his IQ. If he were given increased special education instruction or increased intensity of instruction outside the general education classroom, the Student could make significant progress and probably eventually hold a job and have meaningful relationships. Dr. [REDACTED] emphasized that, being in the general education classroom nearly all day, the Student is unable to process the information being delivered. He may grasp a small part of the lesson, and even provide a correct answer when called upon, but most of what he is hearing has little meaning for him. The major fault of the IEPs, according to Dr. [REDACTED] is placement in general education, thus denying the Student the intense special education instruction he requires. Dr. [REDACTED] based her opinions on her observations of the Student and a review of the Student's work over the previous year. The latter showed a little progress in phonics and math since fourth grade, but no meaningful advances in the Student's abilities to read or calculate independently.

ACPS did not present a witness to effectively counter Dr. [REDACTED]'s testimony. Ms.

[REDACTED] the supervisor of special education, is a well-educated and dedicated professional, but

she does not have the depth of experience that Dr. [REDACTED] does. She testified that the Student has demonstrated progress, but acknowledged that the progress was not reflected in the present levels of performance recited in the IEPs. Ms. [REDACTED] maintained that the fact that the Student's hours of service have not changed means that he has made progress. Ms. [REDACTED] testifying about the lack of change on the Student's fourth and fifth grade phonics goals, testified: "He made progress. It's not stated, but he made progress." If the Student actually made progress, the IEP should reflect that, so I consider it questionable that the Student made appropriate progress under the 2017 IEP.

Considering all the evidence in the record, I find that the Student's IEPs of December 4, 2017 and December 10, 2018 were not reasonably calculated to meet his unique needs and to allow him to make appropriate progress in light of his circumstances. The major problem with these IEPs was placing the Student in the general education classroom, where he was academically lost for much of the day. ACPS probably gave the Student all the instruction and services that its resources allowed for a child in the general education population. With Ms. [REDACTED]'s heavy caseload and full classrooms, additional specialized instruction for the Student was just not available in that setting. The evidence shows that the Student required more intense special education instruction than the 2017 and 2018 IEPs provided.

The Student Did Not Receive a Free Appropriate Public Education

The IEPs of December 4, 2017 and December 10, 2018 were not adequate to meet the Student's educational needs in light of his disability. Also, as stated previously, the Student did not receive the special education instruction called for in the IEP of December 10, 2018, since ACPS provided, at most, only two hours of special education instruction daily. I also note that three-fourths of that instruction was under the tutelage of IAs, who do not have the same level of

education and experience as an actual special education teacher. Instruction by IAs is permitted under the IEP, but it is a disservice to the Student to have the majority of his special education so provided, since IAs can do more than review and reinforce previously-taught lessons. Although not stated explicitly, it is highly unlikely that Ms. [REDACTED] has been trained in the publisher's protocols for [REDACTED]

I come to the conclusion that the Student did not receive a free appropriate public education during the 2017-2018 and 2018-2019 school years for two reasons: 1) the IEPs in effect during those years were not reasonable calculated to provide the Student a free appropriate public education in light of his circumstances; and 2) during the 2018-2019 school year ACPS did not provide the instruction specified in the IEP.

I recognize that the Student made some educational progress, at least during the fifth grade year. The IEP progress reports of April 15, 2019 indicate that the Student met several goals by that date. The Parents cast doubt on those conclusions by arguing that the sudden progress resulted from ACPS's knowledge of Dr. [REDACTED]'s observation in March and the filing of this Due Process complaint on March 28, 2019. However, the Parents presented no evidence supporting this contention, and Ms. [REDACTED] testified that the Student seemed to have experienced a period of rapid growth, as sometimes happens with special education students. I accept the progress reports at face value.

Also, the Student's progress (or lack thereof) is exceedingly difficult to determine from the evidence. As stated previously, the Student's academic goals and objectives all call for him to receive various cues, prompts, and supports when reading, writing, and calculating. The evidence shows that the Student received some level of support for almost every assignment, and parsing out the level of support provided for any particular assignment is impossible. Again, I

accept the evidence that the Student made progress, but I cannot ascertain from that evidence the degree of progress.

However, the Student's progress in 2019 does not offset the inadequacy of the IEPs or the failure to deliver the instruction as stated in the 2018 IEP. I conclude that the Parents have proven that ACPS failed to provide a free appropriate public education to the Student for the 2017-2018 and 2018-2019 school years, thus meeting the first prong of the *Burlington* test. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).

Was the Parents' Placement of the Student at [REDACTED] Appropriate?

To obtain reimbursement for their placement of the Student at [REDACTED] the Parents must also prove that it is appropriate for the Student. Much of ACPS's testimony was geared toward the alleged inappropriateness of the Student attending [REDACTED]. [REDACTED] has privately-placed students, but most of its pupils come from ACPS. The only reason ACPS sends children to [REDACTED] is if ACPS cannot handle their behavior, and every student placed at [REDACTED] by ACPS has a BIP. During the hearing, ACPS had access to these BIPs and used them to cross-examine Ms. [REDACTED] the principal, about those pupils who are now the Student's schoolmates.⁹ The purpose of this exercise was to try to show that the Student, a generally well-behaved child, does not belong with the more problematic children who populate [REDACTED].

Two factors come into play in analyzing this question. The first is the differing perceptions of the Parents and ACPS about the Student's experiences and happiness at [REDACTED] ES. The second is the value of having the Student spend almost the entire school day with non-disabled peers.

⁹ The names of the pupils were not disclosed.

ACPS is adamantly opposed to the Student staying at [REDACTED] and all its witnesses testified that it is not a proper placement for him. The major reason, according to those witnesses, is that the Student is sociable, friendly, compliant, and not a behavior problem. They described the Student as constantly interacting with non-disabled peers and enjoying their company. Mr. [REDACTED] testified that the Student, after an initial period of staying by himself during recess, later joined his peers playing foursquare and monkey-in-the-middle. Ms. [REDACTED] testified that she ate lunch with the fifth-graders three times a week and observed the Student interacting with his tablemates. The consensus of all the ACPS's witnesses was that the Student enjoyed school at [REDACTED] ES, had friends, and was happy there.

The Student's mother told a different story. She testified that in fifth grade, the Student had no friends and was never invited to birthday parties. She said she expressed concerns to the school that the Student was being bullied, but did not provide any more details or state what prompted her concerns. The Student's mother testified that she visited the school approximately every other day, and every time she saw the Student outside of a classroom he was not in a group or interacting with any others. In November 2018, the Student's anxiety increased, his behavior deteriorated, and he had "meltdowns" in the morning to avoid going to school.

In contrast, according to the Student's mother's testimony, the Student is much happier at [REDACTED]. When he first went there after enrolling, he asked if the bullies would be in his class and was glad to hear that they would not. He said he made three new friends the first day of school and that the work is easier.

On this issue, I find the Student's mother's testimony more useful. The Student's family lives with him and observes him every day. His mother has become so involved with his education that she has apparently made herself somewhat of a nuisance at [REDACTED] ES. His mother's

behavior and allow him to remain in class, generally successfully. Some of the disruptive behaviors in the classroom are clapping or loud verbalizations; others are more serious, such as destruction of property. The teachers at [REDACTED] are trained in ABA and other techniques to enact the students' BIPs.

Ms. [REDACTED] testified that she observed the Student in class at [REDACTED] on June 3, 2019. She saw the special education teacher eliciting answers by holding up "yes" and "no" cards, which is below the Student's instructional level. The next activity, checking the weather, was also below his level. She noted that, unlike the Student, the other children in class do not have conversations, so the Student has no one to practice with.

On the issue of peer modeling, Ms. [REDACTED] testified that, on the Woodcock-Johnson test, scores of special education students in inclusive settings increased sixty percent, versus a thirteen-percent increase for those in self-contained classroom. She did not provide a reference for this research. Ms. [REDACTED] felt very strongly that [REDACTED] is not a proper placement for the Student because the Student's level of achievement is above that of the other pupils there, he would not interact with non-disabled peers, and the behavior of his classmates would interfere with his learning.

Dr. [REDACTED] also observed the Student in class at [REDACTED] on May 24, 2019, and thought that the classroom presentations matched the Student's needs. She saw the Student transition successfully, speak with other students and adults, and work with a peer. She noticed that one of the other pupils was clapping twice in class, and an aide held another's hand during transition to keep him from leaving.

On the issue of the importance of interactions with non-disabled peers, Dr. [REDACTED] testified that just having role models in a classroom does not make that interaction useful. Instead,

teaching and reinforcing desirable social actions are necessary for children like the Student. She did not cite any learned treatises or research to support this testimony.

[REDACTED] is a highly restrictive environment, but parental placements need not meet the least restrictive environment requirement of the IDEA, which exists to prevent school systems from segregating disabled students away from their non-disabled peers. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009). The Fourth Circuit's *Carter* decision said the following about the appropriateness of a parental placement.

Second, we do not believe that the Supreme Court, by requiring that the private school placement be "proper under the Act," intended to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state. Rather, when a public school system has defaulted on its obligations under the Act, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits," *Rowley*, 458 U.S. at 207, 102 S.Ct. at 3051—the same standard by which the appropriateness of a public school's IEP is assessed.

Carter By & Through Carter v. Florence Cty. Sch. Dist. Four, 950 F.2d 156, 163 (4th Cir. 1991), *aff'd*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993).

Taking into account the equitable considerations mentioned in *Burlington* and the Supreme Court's *Carter* decision, I find that the Parents' placement of the Student at [REDACTED] is reasonably calculated to enable the Student to receive educational benefits. Instruction at [REDACTED] is provided at a level the Student can understand in a classroom devoted to the needs of just six children, with one-to-one and small group assistance. The teachers are all special educators and much of the student population has the same disability as the Student. The school is certainly geared toward educating autistic children such as the Student.

Remedy

The Student's mother testified that, as of the date of the hearing, the family has spent \$8,000.00 in tuition and fees enrolling the Student at [REDACTED]. In addition to reimbursement of this sum, the Parents request that the Student be placed at [REDACTED] for the 2019-2020 school year at public expense.

ACPS has made it clear that it considers the general education classroom the Student's appropriate placement. The proposed IEP of May 2019 continued this placement and, if accepted, would have covered almost all of the Student's sixth grade year. That would be the Student's first year of middle school, when he would be in an even more challenging environment. For the reasons discussed previously, an IEP placing the Student in the middle school general education setting is not appropriate and denies the Student a free appropriate public education. I shall grant the Parent's request for placement at [REDACTED] at public expense for the 2019-2020 school year.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the ACPS's IEP of December 4, 2017 was not reasonably calculated to provide the Student with educational benefit and did not provide a free appropriate public education for the Student. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. § 1415(f)(1)(A) (2017).

I further conclude as a matter of law that ACPS's IEP of December 10, 2018 was not reasonably calculated to provide the Student with educational benefit and did not provide a free appropriate public education for the Student. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct.

988 (2017); *Board of Education of the Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. § 1415(f)(1)(A) (2017).

I further conclude as a matter of law that ACPS's proposed IEP of May 2019 was not reasonably calculated to provide the Student with educational benefit and did not provide a free appropriate public education for the Student. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Board of Education of the Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. § 1415(f)(1)(A) (2017).

I further conclude as a matter of law that the Parents' placement of the Student at [REDACTED] is reasonably calculated to enable the Student to receive educational benefits. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

I further conclude as a matter of law that the Parents are entitled to reimbursement of \$8,000.00 for their placement of the Student at [REDACTED] for the 2018-2019 school year. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

I further conclude as a matter of law that the Student's placement for the 2019-2020 school year should be at [REDACTED] at public expense. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

ORDER

I **ORDER** that the Allegany County Public Schools shall reimburse the Parents \$8,000.00 for their placement of the Student at [REDACTED] for the 2018-2019 school year; and I further

ORDER that the Student's placement for the 2019-2020 school year shall be at [REDACTED]

[REDACTED] at public expense; and I further

ORDER that the Allegany County Public Schools shall, within thirty days of the date of this decision, provide proof of compliance to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, the Maryland State Department of Education.

July 9, 2019
Date Decision Issued

Signature Appears on Original

[REDACTED]
Richard O'Connor
Administrative Law Judge

ROC/kdp
#180570

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2018). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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

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

Copies Mailed to:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]