

██████████ AND ██████████ ON  
BEHALF OF ██████████,  
PETITIONERS

v.

MONTGOMERY COUNTY PUBLIC  
SCHOOLS,  
RESPONDENT

BEFORE STEVEN V. ADLER,  
ADMINISTRATIVE LAW JUDGE  
OF THE MARYLAND OFFICE  
OF ADMINISTRATIVE HEARINGS  
OAH No.: MSDE-MONT-OT-19-30259

### DECISION

STATEMENT OF THE CASE  
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DISCUSSION  
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ORDER

### STATEMENT OF THE CASE

On September 26, 2019, Michael J. Eig, Esquire, Paula A. Rosenstock, Esquire, and Michael J. Eig and Associates, P.C., acting on behalf of ██████████ and ██████████ (Parents) and ██████████ (Student<sup>1</sup>), 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 or Act). 20 U.S.C.A. § 1415(f)(1)(A) (2017);<sup>2</sup> 34 C.F.R.

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<sup>1</sup> When I use the term “Student” in this Decision, I am referring to both the Student himself and the Student as a party to the case, which, unless otherwise provided, I intend expansively to include his Parents as well.

<sup>2</sup> U.S.C.A. is the abbreviation for the United States Code Annotated. Unless there is a change in the substantive law that was in effect at the time of the events at issue in this case, all citations herein to the U.S.C.A. are to the current 2017 volume.

§ 300.511(a) (2019);<sup>3</sup> Md. Code Ann., Educ. § 8-413(d)(1) (2018);<sup>4</sup> Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

On October 29, 2019, I convened a telephone pre-hearing conference (Conference) at the OAH in Hunt Valley, Maryland. The parties were represented by counsel at the Conference: Manisha S. Kavadi, Esquire, of Carney, Kelehan, Bresler, Bennett, and Scherr, LLP, appeared on behalf of the Montgomery County Public Schools (MCPS), and Paula A. Rosenstock, Esquire, of the Law Offices of Michael J. Eig and Associates, P.C., appeared on behalf of the Student.

On November 1, 2019, I issued a Pre-Hearing Conference Report and Order, which set forth the matters discussed during the Conference. By agreement of the parties, the hearing on the merits would span seven days and be held on January 8 through January 16, 2020.

At the Conference, I advised the parties of the time requirements for issuing a decision, pursuant to the controlling federal and State regulations.

34 C.F.R. § 300.515 provides the following, in pertinent part:

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

34 .F.R § 300.510 provides the following, in pertinent part:

- (b) Resolution period.
  - (1) If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

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<sup>3</sup> The federal regulations that apply to the IDEA are found in Title 34 of the Code of Federal Regulations (C.F.R.). Unless there is a change in the substantive law that was in effect at the time of the events at issue in this case, all citations herein to the C.F.R. are to the current 2019 volume.

<sup>4</sup> Unless there is a change in the substantive law that was in effect at the time of the events at issue in this case, all citations herein to the Education Article of the Maryland Annotated Code are to the 2018 Replacement Volume.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period.

...

- (c) Adjustments to 30-day resolution period.  
The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

...

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible[.]

The controlling State regulations similarly provide, in pertinent part:

[t]he 45 day time line for a due process hearing decision begins after one of the following events occurs . . . [b]oth parties agree in writing that no agreement is possible after either the mediation or resolution meeting starts but before the end of the 30 day resolution period[.]

COMAR 13A.05.01.15C(14)(b).

Therefore, in accordance with these regulations, the decision in this matter ordinarily would be issued on or before December 3, 2019, which is forty-five days after October 19, 2019, the day after the parties agreed in writing that impasse was reached and no agreement was possible. 34 C.F.R. §§ 300.510(b), (c), 300.515(a); COMAR 13A.05.01.15C(14)(b). After a thorough review of the parties' calendars, schedules and available dates for hearing, the parties were unable to identify hearing dates on which they, counsel, and all their essential witnesses would be available that would allow me to hold and complete the seven-day hearing and issue a decision within forty-five days from the day after the parties agreed in writing that impasse was

reached and no agreement was possible.<sup>5</sup> As a result, the parties selected the first available dates for the merits hearing, as noted above, and jointly requested that I issue the decision thirty days after the close of the record. Md. Code Ann., Educ. § 8-413(h); 34 C.F.R. §§ 300.510(b), (c), 300.515(a); COMAR 13A.05.01.15C. I granted this request.

The hearing was convened as scheduled on January 8, 2020, and the Petitioners began their case presentation. However, a number of witnesses were unable to complete their testimony during the time originally scheduled and had to carry over their testimony to alternate days. As a result, by the end of the day on January 14, 2020, the Petitioners had completed testimony from all but two witnesses. These witnesses were not available on January 15 or 16 to complete their testimony.

The parties mutually agreed to add additional hearing dates of February 3, 4, 19, 20 and 21, 2020 to complete the proceeding. After closely and thoroughly reviewing the parties' litigation schedules and calendars and witness availability, these were the first mutually available hearing dates. Counsel for the Petitioners and the Respondent were scheduled to be in another due process hearing in Montgomery County on January 21 through 24, 2020. Counsel for the Petitioners was scheduled to be in a due process hearing January 27 through 31, 2020 in Arlington, Virginia. Counsel for the Petitioners was also scheduled to be in two due process hearings in the District of Columbia occurring on February 6, 10, 11, and 12, 2020, and had numerous other client and IEP meetings scheduled on the other days in the month.

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<sup>5</sup> During the month of November 2019, Mr. Eig was attending an IEP meeting for another client on November 14 and was in trial in unrelated matters on November 15, 18, and 19-22. During the period of November 2019 through December 2019, Ms. Kavadi had client meetings on November 12; was attending an all-day training on November 14; had a medical appointment on November 15; was in trial in unrelated matters on November 18, and 21-22; and was traveling out of State through December 2. During the period of December 2019 through January 2020, Mr. Eig was in trial in an unrelated matter on December 2 through 3; was attending an IEP meeting for another client in Arlington, Virginia on December 4; was in trial in unrelated matters on December 5, 9, 10-13, 16, 17, 18, and 19; and was traveling out of State between December 23 and January 3. During the period of December 2019 through January 2020, Ms. Kavadi had client meetings from December 4 through 6; was travelling out of State on December 9; had a client meeting and a medical appointment on December 11; was in trial in an unrelated matter on December 12, 13, 16, 17, 18, and 19; MCPS was closed for winter break and all of its witnesses were unavailable on December 20 and from December 23 through 30; and Ms. Kavadi had reserved January 2 through 3, and 7, 2020, to reschedule a trial then currently in progress.

The due process hearing reconvened on February 3, 2020, as scheduled. The Petitioners completed the presentation of their case on February 4, 2020, and the Respondent began presenting its witnesses on February 19, 2020. However, at the end of the day on February 21, 2020, the Respondent still had two additional witnesses to present in its case-in-chief, and the Petitioners had rebuttal evidence to present, requiring two additional hearing dates.

The first mutually available hearing dates, based on a thorough review of parties' litigation schedules and calendars, were March 5 and 11, 2020. Counsel for the Respondent had scheduled client meetings on February 27 and 28, 2020; on March 9, 2020, had a scheduled conference with the U.S. District Court for the District of Maryland; and was out of State on March 2, 3, 12, and 13, 2020. Counsel for the Petitioners was scheduled to be in a due process hearing in the District of Columbia on February 24 and 25, 2020. On March 2, 2020, counsel for the Petitioners was scheduled to be in a special education mediation in Frederick County. On March 3, 4, and 10, 2020, counsel for the Petitioners was scheduled to be in a due process hearing in the District of Columbia.

March 11, 2020 was selected as the final day of hearing for the Petitioners' rebuttal case because, in addition to counsel's schedules set forth above, one of the Petitioners' witnesses was out of the country until the weekend of March 7 through 8, 2020, and thus unavailable to testify in rebuttal until after that time. Finally, while all parties, and the tribunal, agree that the delay in scheduling is unfortunate, counsel for the Petitioners represent that the Student is placed in an appropriate program where his Parents believe he should be, and thus has not been harmed by the scheduling delays.

Accordingly, I held a due process hearing on the merits of the Complaint on January 8 through January 14, 2020; February 3, 4, 19, 20, and 21, 2020; and March 5 and 11, 2020 at the offices of the Montgomery County Public Schools in Rockville, Maryland. Mr. Eig represented

the Student.<sup>6</sup> Ms. Kavadi represented the MCPS. On March 27, 2020, counsel for the parties simultaneously submitted written closing memoranda, which I considered in reaching my Decision, and have made a part of the official case record. COMAR 28.02.01.22B(1).

The legal authority for the due process hearing is governed by provisions set forth at 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1); COMAR 13A.05.01.15C.

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., Educ. § 8-413(e)(1); State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES**

- 1) Are the Student's Individualized Education Programs (IEPs) for the 2018-2019 and 2019-2020 school years reasonably calculated to provide the Student with a free, appropriate, public education (FAPE)?
- 2) If it is not, what remedy is available to the Student?

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<sup>6</sup> Mr. Eig was assisted at the trial table by Meghan Probert, who is a licensed attorney in the District of Columbia, but not of the bar of this State, as of the date of the hearing.

## SUMMARY OF THE EVIDENCE

### Exhibits

Unless otherwise provided, I admitted the following exhibits in evidence, offered by the Student<sup>7</sup>:

- P – 1 Request for Due Process, 9-26-19
- P – 2 MCPS ██████████ Transition Assessment Report, 6-12-14
- P – 3 Developmental Assessment by Dr. ██████████ May 2015
- P – 3A ██████████ Consultation Report, 8-31-15
- P – 4 Not Offered for Admission in Evidence
- P – 5 Developmental Vision Evaluation Report, 1-28-16
- P – 6 Review of Private Speech/Language Evaluation/Progress Report, 4-3-16
- P – 7 Neuropsychological Evaluation by Dr. ██████████, 12-2-16
- P – 8 Observation Reports by ██████████ and MCPS at ██████████ Elementary, 5-10-17
- P – 9 MCPS Educational Assessment, 5-10-17
- P – 10 MCPS Speech/Language Re-Assessment, May 2017
- P – 11 MCPS IEP, 5-15-17
- P – 12 MCPS Elementary Teacher Report, 2-6-18
- P – 13 Observation Report by ██████████ 2-20-18
- P – 14 MCPS IEP and Prior Written Notice, 3-8-18
- P – 14A Woodcock Johnson IV Score Report, 4-2-18
- P – 15 Speech/Language Progress Reports by ██████████, April 2016 to May 2018
- P – 16 Occupational Therapy Progress Report by ██████████, 5-9-18
- P – 17 ██████████ End of Year Progress Report, 6-11-18
- P – 18 MCPS Elementary Teacher Report, 6-12-18
- P – 19 MCPS IEP Progress Reports, 4-9-18 and 6-12-18
- P – 20 MCPS IEP and Prior Written Notice, 6-18-18
- P – 21 Letter to MCPS serving notice and MCPS response letter, 8-7-18
- P – 22 ██████████ IEP, 10-25-18
- P – 23 Teacher Questionnaire for Dr. ██████████ by ██████████ staff, 11-29-18
- P – 24 Orofacial Myofunctional Plan of Care, 12-4-18

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<sup>7</sup> Student's (P) Exhibits marked with an asterisk were objected to by the MCPS; I reserved ruling and permitted the parties to address their objections on the record and in their closing memoranda. After considering the parties' positions and the relevant case law, I admit the documents as they are relevant evidence for the purpose of determining the appropriateness of the Student's request for reimbursement of his private placement or were proper evidence offered in the Student's rebuttal case. Hr'g Tr. at 971-73, 990-91, 1004-05. For reasons explained later in the Decision, I do not find these disputed exhibits dispositive of the central question before me—the appropriateness of the IEPs at issue—which I decide on other grounds.

- P – 25 Special Education Consultation Report, 12-17-18
- P – 26 ██████████ IEP Progress Codes, January 2019
- P – 27 ██████████ Progress Report, 2-12-19
- P – 28 Letters enclosing and withdrawing Request for Due Process, 2-12-19 and 3-12-19
- P – 29 ██████████ Occupational Therapy Test Score Summary, 2-28-19
- P – 30 Not Offered for Admission in Evidence
- P – 31 MCPS Observation Report by ██████████, 3-18-19
- P – 32 MCPS Observation Report by ██████████, 4-2-19
- P – 33 Emails between ██████████ and ██████████, Esq. enclosing documents, 3-25-19 and 4-12-19
- P – 34 Parent and ██████████ Feedback on MCPS Draft IEP, 4-10-19
- P – 35 ██████████ Occupational Therapy Progress Update, April 2019
- P – 36 MCPS Summary Review of Non-MCPS Occupational Therapy Report, 4-29-19
- P – 37 Emails between ██████████ Meghan M. Probert, Esq. and ██████████, Esq., 4-23-19 to 5-10-19
- P – 38\* ██████████ Speech/Language Progress Report, May 2019
- P – 39 ██████████ Academic Data, 2018-19 School Year
- P – 40 Parental Feedback on MCPS Draft IEP, 5-17-19
- P – 41 Reactions to MCPS Draft IEP by ██████████, 5-20-19
- P – 42 MCPS IEP and Prior Written Notice, 5-22-19 and 5-29-19
- P – 43 Observation Report of ██████████ Center by ██████████, 6-3-19
- P – 44 Observation Report of ██████████ Center by parents, 6-3-19
- P – 45\* ██████████ IEP, 6-4-19
- P – 46 Teacher Questionnaire for Dr. ██████████ by ██████████ staff, 6-5-19
- P – 47\* ██████████ Occupational Therapy Annual Report, 6-11-19
- P – 48\* Orofacial Myology/Speech Evaluation by ██████████, 6-11-19
- P – 49 Not Offered for Admission in Evidence
- P – 50 Not Offered for Admission in Evidence
- P – 51 Letter to MCPS serving notice and MCPS response letter, 6-17-19 and 6-28-19
- P – 52\* ██████████ Elementary End of Year Progress Report, June 2019
- P – 53 ██████████ Physical Therapy Re-Evaluation, 7-8-19
- P – 54\* ██████████ Occupational Therapy Summer Report, July 2019
- P – 55\* ██████████ Assessment Summary, Work Samples, and Student Schedule, Fall 2019
- P – 56\* ██████████ IEP Progress Report, October 2019
- P – 57 Observation Report by ██████████, 10-1-19
- P – 58 Not Offered for Admission in Evidence
- P – 59 Not Offered for Admission in Evidence
- P – 60 Not Offered for Admission in Evidence
- P – 60A\* ██████████ Work Samples, November and December 2019
- P – 61 Résumé of ██████████
- P – 62 Résumé of ██████████



- P – 63 Résumé of [REDACTED]
- P – 64 Résumé of [REDACTED]
- P – 65 Résumé of [REDACTED]
- P – 66 Résumé of Dr. [REDACTED]
- P – 67\* Progress Report by [REDACTED], Speech-Language Pathologist & Orofacial Myologist Therapist, 12-10-2019
- P – 68 IEP Service Comparison Chart by [REDACTED] (Not Admitted)
- P – 69 Memorandum to MCPS Elementary School Principals regarding Orton-Gillingham Methodologies, 9-20-18 (Not Admitted)
- P – 70 MCPS Memorandum on Orton-Gillingham Methodologies with accompanying documents, 9-20-18 (Not Admitted)
- P – 71 Comparison of [REDACTED] Levels of Certification (Not Admitted)
- P – 72 Comparison of [REDACTED] Levels of Membership and Certification (Not Admitted)
- P – 73 Orton-Gillingham Classroom Educator (OCGE Level) Web Page (Not Admitted)
- P – 74 Select pages from Early Interventions in Reading, Teacher’s Edition A (Not Admitted)
- P – 75 Federal Register, Volume 64, No. 48, Rules and Regulations, 3-12-99 (Not Admitted)
- P – 76 Withdrawn
- P – 77\* [REDACTED] Reading Assessment Data and Key, Winter 2020
- P – 78\* [REDACTED] Math Assessment Data and Work Sample, 2-10-20
- P – 79\* [REDACTED] Writing Assessment Data and Work Sample, 1-28-20

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

MCPS:

- MCPS – 1 Preschool File Transfer Form from [REDACTED] ES, 6-15-2017
- MCPS – 2 Not Offered for Admission in Evidence
- MCPS – 2A Not Offered for Admission in Evidence
- MCPS – 3 MCPS Occupational Therapy Status Report, 5-8-2017
- MCPS – 4 MCPS Educational Assessment, 5-10-2017
- MCPS – 5 MCPS Observation Report, [REDACTED], [REDACTED], 5-10-17
- MCPS – 6 Prior Written Notice, 1-29-2018
- MCPS – 7 Parent Consent for Release of Information by [REDACTED] to MCPS, 1-25-2018
- MCPS – 8 Teacher Referral completed by [REDACTED], 2-6-2018
- MCPS – 9 [REDACTED] Teacher Report, [REDACTED], [REDACTED] 2-6-2018
- MCPS – 10 Observation at [REDACTED], [REDACTED] ([REDACTED]), 2-20-2018
- MCPS – 11 IEP Meeting Invitation, 2-23-2018, for 3-8-2018 IEP Meeting
- MCPS – 12 Prior Written Notice, 3-8-2018
- MCPS – 13 Service Plan, 3-8-2018

MCPS – 14 MCPS Speech Attendance Log/Progress Notes, 3-14-2018 – 6-13-2018

MCPS – 15 IEP Progress Report, 4-9-2018 and 6-12-2018

MCPS – 16 MCPS Telephone Conference with [REDACTED] Teachers [REDACTED], 6-1-2018

MCPS – 17 [REDACTED] Teacher Report, [REDACTED], 6-4-2018

MCPS – 18 Observation at [REDACTED], [REDACTED] ([REDACTED]), 2-20-2018

MCPS – 19 Prior Written Notice, 6-18-2018

MCPS – 20 IEP, 6-18-2018 (with cover letter)

MCPS – 21 Not Offered for Admission in Evidence

MCPS – 22 Settlement Agreement, 3-6-2019 between parties

MCPS – 23 MCPS Classroom Observation of Student at [REDACTED] by [REDACTED], 3-18-2019

MCPS – 24 Not Offered for Admission in Evidence

MCPS – 25 MCPS Classroom Observation at [REDACTED] by [REDACTED], 4-2-2019

MCPS – 26 [REDACTED] Assessment, 2-12-2019

MCPS – 27 IEP, [REDACTED] 10-25-2018

MCPS – 28 Special Education Consultant Report, [REDACTED], [REDACTED], 12-27-2018

MCPS – 29 Not Offered for Admission in Evidence

MCPS – 30 Five-Day Disclosure Notice of Documents Provided to Parent/Guardian for Review at an IEP Meeting, 4-3-2019, with Authorization for Assessment (signed on 4-10-2019)

MCPS – 31 IEP Feedback from Parents, 4-10-2019

MCPS – 32 [REDACTED] Work Samples (provided after April 2019 IEP meeting)

MCPS – 33 Orofacial Myofunctional Plan of Care, [REDACTED] [REDACTED], 12-4-2018

MCPS – 34 [REDACTED], Achievement Test Results, 4-2-2018 (provided after April 2019 IEP meeting)

MCPS – 35 [REDACTED] Student Records

MCPS – 36 MCPS, Summary Review of Non-MCPS Occupational Therapy Report, 4-29-2019

MCPS – 37 [REDACTED], Occupational Therapy Test Score Summary, 9-11-2018 – 2-28-2019

MCPS – 38 Private Occupational Therapy Progress Report, [REDACTED] [REDACTED] 5-9-2018

MCPS – 39 [REDACTED], Occupational Therapy Progress Updates, 4-2019

MCPS – 40 Not Offered for Admission in Evidence

MCPS – 41 Not Offered for Admission in Evidence

MCPS – 42 Reactions to MCPS Draft IEP, [REDACTED], [REDACTED] [REDACTED], 5-20-2019

MCPS – 43 Prior Written Notice, 5-22-2019

MCPS – 44 MCPS Multidisciplinary Evaluation Report, 5-22-2019

MCPS – 45 Parent Consent for Assessment, 5-22-2019

MCPS – 46 IEP, 5-22-2019  
 MCPS – 47 Prior Written Notice, 11-15-2019  
 MCPS – 48 MCPS Physical Disabilities Program, Physical Therapy Evaluation, 6-13-2019  
 MCPS – 49 MCPS Team Consideration of External Report (Physical Therapy Re-Evaluation), 11-15-2019  
 MCPS – 50 [REDACTED], Private Physical Therapy Re-Evaluation, 7-8-2019  
 MCPS – 51 MCPS, Adapted Physical Education Evaluation, 6-13-2019  
 MCPS – 52 MCPS Team Consideration of External Report, Progress Report from [REDACTED], 11-15-2019  
 MCPS – 53 [REDACTED], Progress Report, 11-11-2019  
 MCPS – 54 Parent Consent for Release of Teacher Report/Student Information from [REDACTED] to MCPS 11-12-2019  
 MCPS – 55 MCPS Physical Therapy Summary of Telephone Conference, with [REDACTED] 11-15-2019  
 MCPS – 56 MCPS Physical Therapy Summary of Telephone Conference with [REDACTED], PT, [REDACTED], 11-22-2019  
 MCPS – 57 MCPS Physical Education Summary of Observation, [REDACTED], 12-13-2019  
 MCPS – 58 MCPS Infants and Toddlers Observation Form of Student at [REDACTED] 11-17-2015  
 MCPS – 59 MCPS Team Consideration of External Report ([REDACTED] 2016), 6-4-2016  
 MCPS – 60 Speech and Language Report, [REDACTED], 4-3-2016  
 MCPS – 61 [REDACTED] Neuropsychological Evaluation, Summary Report, 11-2016  
 MCPS – 62 [REDACTED] Neuropsychological Evaluation, 11-2016  
 MCPS – 63 MCPS Telephone Conference Summary with [REDACTED] [REDACTED] 2-21-2017  
 MCPS – 64 Therapy Status Report, [REDACTED], 11-1-2017  
 MCPS – 65 Therapy Status Report, [REDACTED], 3-31-2018  
 MCPS – 66 Not Offered for Admission in Evidence  
 MCPS – 67 Résumé of [REDACTED]  
 MCPS – 68 Résumé of [REDACTED]  
 MCPS – 69 Résumé [REDACTED]  
 MCPS – 70 Résumé of [REDACTED]  
 MCPS – 71 Résumé [REDACTED]  
 MCPS – 72 Not Offered for Admission in Evidence  
 MCPS – 73 Not Offered for Admission in Evidence  
 MCPS – 74 Résumé of [REDACTED]

There were no other exhibits offered or admitted.

Testimony<sup>8</sup>

The Student presented the following expert and fact witnesses:

<b>Name</b>	<b>Title</b>	<b>Fact</b>	<b>Expert</b>
██████████, M.Ed.	Special Education Consultant	Yes	Yes
██████████, Ph.D.	Neuropsychologist	Yes	Yes
██████████, M.S., OTR/L	Associate Head of the Elementary Division, ██████████	Yes	Yes
██████████, M.S., OTR/L	Director of Occupational Therapy, ██████████	Yes	Yes
██████████, M.S., CCC-SLP	Speech-Language Pathologist and Co-Teacher, ██████████	Yes	Yes
██████████, M.Ed.	Special Education Teacher, MCPS, and Student's Parent	Yes	Yes

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<sup>8</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 by the tribunal. *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.")).

The MCPS presented the following expert and fact witnesses:

<b>Name</b>	<b>Title</b>	<b>Fact</b>	<b>Expert</b>
██████████ M.S./Ed.	General Education Teacher and former Special Education Teacher, MCPS	Yes	Yes
██████████ M.S., CCC-SLP	Speech-Language Pathologist and former General Education Teacher, MCPS	Yes	Yes
██████████, M.S.	Special Education Coordinator, MCPS	Yes	Yes
██████████, M.S., OTR/L	Instructional Specialist and Occupational Therapy/Physical Therapy Assessment Team Coordinator, MCPS	Yes	Yes
██████████, PT	Physical Therapist, MCPS	Yes	Yes
██████████, M.A.	PreK-12 Content Specialist, Adapted Physical Education, MCPS	Yes	Yes

## FINDINGS OF FACT<sup>9</sup>

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

1. As of the date of the hearing, the Student is eight years old and attends the [REDACTED] [REDACTED] ([REDACTED]), by private placement, as he did for the 2018-19 school year. P – 21, 51.; Hr’g Tr. at 1273.
2. The Student has been diagnosed with an Expressive Language Disorder, a Phonological Disorder, a Specific Disorder of Motor Function, and Attention Deficit Hyperactivity Disorder-Predominately Inattentive Presentation. Hr’g Tr. at 179-185, 1353; P – 7.
3. At all times relevant to the proceeding, the complex constellation of the Student’s disabilities have had a “significant impact” on his functionality, his ability to communicate, and his ability to access the educational curriculum. *E.g.*, Hr’g Tr. at 1201.
4. The Student’s Phonological Disorder caused a deficit in phonological awareness and rapid naming, which has resulted in him performing “significantly below where most kids his age are” in reading and the scientific literature observes this is the “main thing that contributes to reading problems” for children as they age. *Id.* at 1143-47, 1151, 1153; *see also id.* at 1213, 1307. These deficits have resulted in “really significant language and academic problems [for the Student].” *Id.* at 1153.

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<sup>9</sup> Any citations to the record are for illustrative purposes only; my findings, analysis, and legal conclusions are based on consideration of the credible evidence of record *in toto*. All testimonial and documentary evidence was considered and given the weight it was due, regardless if recited, cited, referenced, or expressly set forth in the Decision. *See, e.g., Walker v. Sec’y of Health & Human Servs.*, 884 F.2d 241, 245 (6th Cir. 1989) (an administrative law judge need not address every piece of evidence in the record); *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”).

5. The Student suffers from a developmental delay, particularly relating to expressive language and articulation; the Student suffers from childhood apraxia of speech. Hr’g Tr. at 1192-93, 1213, 1219. The Student did not utter his first words until approximately twenty-eight months old and did not begin speaking until age three-and-a-half. Hr’g Tr. at 845, 998.

6. After he began speaking, when he would attempt to say words even with which he was particularly familiar, such as his brother [REDACTED] name, he would say “[REDACTED],” for his sister [REDACTED] he would say “[REDACTED],” and “[REDACTED]” when he attempted say his brother [REDACTED]’s name. *Id.* at 845-46, 997-1000.

7. At age five, he could speak in only two- or three-word sentences. *Id.* at 1073.

8. As of the date of the hearing, even persons in daily and intimate contact with him, such as his mother, are unable to uniformly understand his speech. *Id.* at 843, 882-83.

9. The Student began receiving services through the Montgomery County [REDACTED] [REDACTED] at five months old to develop his motoric skills—rolling over, sitting up, and strengthening his core. *Id.* at 844-45; P – 2. At eighteen months old, the Student began receiving outpatient occupational therapy (OT) services. Hr’g Tr. at 845.

10. In September 2014, the Student began receiving private outpatient speech and language therapy (SLT), which continued through 2019. *Id.* at 846. P – 15.

11. From September through December 2014, the Student attended the [REDACTED] [REDACTED] a private [REDACTED] preschool. Hr’g Tr. at 846-48. There were fifteen students and two teachers in his class. *Id.* at 847.

12. The Student’s Parents withdrew him from [REDACTED] after three months of attendance because he was unable to communicate with his teachers and classmates and, as a result, “would spend the day crying.” *Id.* at 847, 996-97, 1125-26.

13. The Student began attending the [REDACTED] ([REDACTED]) for pre-Kindergarten during the 2014-15 school year. *Id.* at 847-48. He remained there through the 2017-18 school year. *Id.* at 865.

14. [REDACTED] is a small, private special education school (although not certified by the MSDE), providing significant support to its students. *Id.* at 64, 67. The students who attend [REDACTED] have a variety of educational needs. *Id.* at 67.

15. During the 2016-17 school year, the Student attended [REDACTED] part of the time and also attended a program at [REDACTED] Elementary School ([REDACTED]), a public school, two days per week. *Id.* at 849; P – 8; MCPS – 1.

16. In November and December 2016, the Student underwent a neuropsychological evaluation with [REDACTED], Ph.D. Hr’g Tr. 854-55; P – 7. Dr. [REDACTED] has a unique longitudinal relationship with the Student’s family, having evaluated the Student’s mother and father when they were children and the Student’s elder brother. Hr’g Tr. at 855.

17. After completing his evaluation, diagnosing the Student with the conditions set forth in finding two, above, Dr. [REDACTED] recommended the Student continue to attend a school with a small class size, an emphasis on phonological skill development, and integrated SLT and OT. Based on the severity of the Student’s conditions and their impact on his ability to access the curriculum, Dr. [REDACTED] recommended the Student continue attending [REDACTED] or transition to [REDACTED] should learning disabilities manifest. Hr’g Tr. at 855-56; P – 7.

18. In April 2018, Dr. [REDACTED]’s office conducted a follow-up evaluation to assess the Student’s academic functioning. P – 14A.



19. The results of the Student's 2016 and 2018 evaluations were shared with, and considered by, the Student's IEP team<sup>10</sup> in formulating the Student's 2018-19 IEP. P – 20; MCPS – 20.

20. The Student's Parents re-enrolled him at ██████████ for Kindergarten during the 2017-18 school year, but as the year progressed they became concerned about the school's lack of formal assessments or testing, that it does not develop IEPs for its students, and by some of the behaviors being exhibited by other students. Hr'g Tr. at 865, 948-50.

21. In February 2018, ██████████, an educational consultant in private practice, and a former MCPS special educator and administrator, observed the Student at ██████████, at the Parents' request, to assist with educational programming decisions for the Student. Hr'g Tr. at 866; P – 13.

22. The results of Mr. ██████████'s February 2018 observation of the Student at ██████████ were shared with, and considered by, the Student's IEP team in formulating the Student's 2018-19 IEP. P – 20; MCPS – 20.

23. On June 11, 2018, ██████████ issued a thirteen-page report of the Student's progress, strengths, and needs across a number of domains and subject areas—social/emotional skills,

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<sup>10</sup> The term IEP team is expressly defined in the Act:

'IEP Team' means a group of individuals composed of— (i) the parents of a child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child; (iv) a representative of the local educational agency who— (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency; (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi); (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability."

reading and language arts, mathematics, science, social studies, motor skills and sensory processing, and communication—comparing his mid-year performance to his end-of-year performance, for the 2017-18 school year. P – 17.

24. Within each of these domains are categories and within each category are individual measures that are rated not meeting expectations, developing skill, proficient skill, or an advanced skill. *Id.* Each of these skill development ratings are defined in the report. *Id.*

25. In its End-of-Year Progress Report, ██████ reported that the Student had proficient skill, defined in the report as “demonstrate[ing] skill at appropriate age and developmental level,” in: ten of twelve measures within social interaction and play skills (a category within the domain of social and emotional skills); four of four attending behavior skills (a category within the domain of social and emotional skills); in five of eight emotional regulation measures (a category within the domain of social and emotional skills); in two of two skills in transitions and flexibility (a category within the domain of social and emotional skills); in seven of seven school behavior measures (a category within the domain of social and emotional skills); in five of five concepts of print skills (a category within the domain of reading and language arts); in eight of ten reading comprehension and engagement measures (a category within the domain of reading and language arts); in thirty of thirty-two mathematics measures including measurement and geometry, patterns, sequencing and seriation, numeration and counting, number recognition and writing, understanding sets, time and calendar concepts, and computation and problem solving; in ten of eleven science measures; in thirteen of fourteen social studies measures; twenty-three of thirty-six motor skills measures; and in twenty-three of twenty-six communication measures including social language, and receptive and expressive language. *Id.* (emphasis added for ease of reading).

26. In the domain of reading and language arts, ██████ reported the Student had developing skills, defined as “demonstrate[ing] progress in this skill with support,” in sight word recognition and written language, and areas of phonemic awareness/phonics. *Id.*

27. The results of ██████’s End-of-Year Progress Report were shared with, and considered by, the Student’s IEP team in formulating the Student’s 2018-19 IEP. P – 20; MCPS – 20.

28. While not contending it inaccurate, in whole or part, the Student’s Parents had some question and disagreement with ██████’s End-of-Year Report, how the conclusions contained in it were obtained, upon what source they were formed, and the report’s comprehensiveness because ██████ does not conduct formal assessments of its students and instead relies upon informal measures, such as teacher observations, for its conclusions of a student’s progress, strengths, and needs. Hr’g Tr. at 869-71, 951, 953-57, 986.

29. In preparation for the development of the Student’s 2018-19 IEP, the MCPS did not conduct its own formal testing or assessment of the Student’s academic functioning and OT and SLT needs, relying instead on the reports provided by the Student’s Parents, but did conduct its own classroom observations of the Student, which were considered by the Student’s IEP team, and used in formulating the Student’s 2018-19 IEP.<sup>11</sup> *Id.* at 884, 903-04, 1623-24; P – 20; MCPS – 20.

30. The Parents did not request the MCPS independently evaluate or assess the Student. Hr’g Tr. at 1003-04.

31. On June 18, 2018, the MCPS convened an IEP meeting to develop an IEP for the Student’s 2018-19 school year. P – 20; MCPS – 20. In addition to the MCPS’s IEP team

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<sup>11</sup> The parties agree that the Student was assessed by the MCPS in May 2017 in education, speech and language, and occupational therapy needs and that his triennial testing, under the Act, would not be required until May 2020. The parties also agree there is no suggestion of a procedural violation of the Act for a failure to test.

members, Ms. [REDACTED] and Mr. [REDACTED] participated in the meeting in-person and [REDACTED], M.Ed., Director of [REDACTED] participated by phone. Hr’g Tr. at 872, 944.

32. The Student’s 2018-19 IEP provided two hours and thirty minutes of specialized instruction outside the general education setting, and thirteen hours and forty-five minutes of specialized instruction inside the general education setting. P – 20; MCPS – 20. The IEP also provided one hour and thirty minutes per week of SLT, thirty minutes per week of OT, and one hour and thirty minutes of social skills services. *Id.* The MCPS’s IEP team members proposed that the Student’s IEP be implemented at [REDACTED] Elementary School ([REDACTED]). *Id.*

33. After observing at [REDACTED], the Parents and Mr. [REDACTED] did not believe the IEP and placement to be appropriate for the Student. The Parents placed the Student at [REDACTED] for the 2018-19 school year at their own expense. P – 21.

34. During the 2018-19 school year at [REDACTED] the Student was co-taught reading and writing by a special education teacher, [REDACTED], and a speech language pathologist, Ms. [REDACTED].<sup>12</sup> Hr’g Tr. at 1177, 1183-5, 1189, 1195. The Student has remained in this co-taught model with Ms. [REDACTED] and Ms [REDACTED] for the 2019-20 school year as well. *Id.*

35. Ms. [REDACTED] has been providing direct SLT to the Student since he was three years old attending a four-week summer program at [REDACTED]. *Id.* at 879, 1184, 1190-1. She played an integral role in helping the Student learn to speak. *Id.* at 879.

36. In preparation for the development of the Student’s 2019-20 IEP, the MCPS did not conduct its own formal testing or assessment of the Student, relying on the reports provided by the Student’s Parents, but did conduct its own classroom observations of the Student, which

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<sup>12</sup> Ms. [REDACTED] also supports Ms. [REDACTED] in teaching mathematics to the Student’s class (although not presently to the Student himself). Hr’g Tr. at 1296-98.

were considered by the Student's IEP team and used in formulating the Student's 2019-20 IEP. Hr'g Tr. at 893-94, 966-67, 992, 1623-24; P – 31, 32; MCPS – 41.

37. On May 22, 2019, the MCPS convened an IEP meeting to develop an IEP for the Student's 2019-20 school year. P – 42; MCPS – 46. In addition to the MCPS's IEP team members, Ms. [REDACTED] and Mr. [REDACTED] participated in the meeting in-person and the Student's teachers, therapists, and other representatives from [REDACTED] participated by phone. *E.g.*, Hr'g Tr. at 895-96, 1005, 1238; P – 42; MCPS – 46.

38. At the time of the May 2019 IEP team meeting, [REDACTED] had completed its end-of-year evaluations of the Student and was in process of completing written reporting documenting the results of its end-of-year assessments. Hr'g Tr. at 971, 1004-05. For this reason, the Student's Parents requested the meeting be postponed and rescheduled, a request the MCPS declined, without explanation. Hr'g Tr. at 1004-05; P – 37. The representatives from [REDACTED] shared the results of the assessments and other available data with the Student's IEP team verbally during the May 22, 2019 meeting. Hr'g Tr. at 971-73, 990-91, 1004-05, 1328.

39. At the May 2019 IEP team meeting, Ms. [REDACTED] provided her opinion, based on her experience providing direct SLT to the Student, teaching him reading and writing, and interacting with him on a daily basis, of the Student's educational needs and the instructional delivery he requires to access the curriculum. Ms. [REDACTED] further opined that the Student, despite progress at [REDACTED] continues to require an all-day special education program in order to be able to make educational progress. *See, e.g.*, Hr'g Tr. at 1239, 1327-28, 2401-03, 2404-06.

40. No one present at the meeting, including the MCPS IEP team members, voiced any disagreement with Ms. [REDACTED]'s assessments and opinions regarding the Student's educational needs. *See, e.g., id.* at 1383.

41. The Student's 2019-20 IEP provided seven hours, fifty-five minutes per week of specialized instruction in a general education setting, twenty-two hours and thirty minutes per week of specialized instruction outside of the general education setting, thirty minutes per week of OT, and ninety minutes per week of speech/language services. P – 42; MCPS – 46. The MCPS's IEP team members proposed that the Student's IEP be implemented at the [REDACTED] [REDACTED] at [REDACTED] Elementary School [REDACTED]). *Id.*

42. After observing at [REDACTED], the Student's Parents and Mr. [REDACTED] did not believe the proposed IEP and placement to be appropriate for the Student. Hr'g Tr. at 134-140, 1008-11; P – 43, 44. The Parents placed the Student at [REDACTED] for the 2018-19 school year at their own expense, reserving the right to seek reimbursement from the MCPS through a due process hearing. P – 51.

43. [REDACTED] provides reading instruction, and the delivery of education in other subject areas, in small group settings for the majority of the school day, but does not standardize reading instruction in a ratio of one teacher to two students; this number varies based on the individual teacher's discretion and the specific skill being taught; at [REDACTED] a small group setting is considered anything less than fifteen students. Hr'g Tr. at 1971, 2027-29.

44. The MCPS's IEP team members and testifying witnesses have collectively spent a total of approximately twelve hours<sup>13</sup> providing direct services, assessing the Student, or observing the Student in a classroom setting; several of which (such as Ms. [REDACTED]'s and Ms.

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<sup>13</sup> Ms. [REDACTED] has seen the Student a total of four times—one observation at [REDACTED] during a Pre-K language class and during three resource sessions delivering reading and writing instruction at [REDACTED] in the spring of 2018. Hr'g Tr. at 1488, 1608-1610; P – 8; MCPS – 5, 13, 15. Her total time observing and delivering services to the Student was approximately two-and-a-half to three hours. Hr'g Tr. at 1487-88, 1611. Ms. [REDACTED] provided SLT to the Student for ten forty-five-minute sessions from March to May 2018, a total of approximately seven-and-a-half hours. *Id.* at 1789, 1867, 1870. Ms. [REDACTED] has never seen the Student nor has she spoken with anyone who ever taught or evaluated Student, nor did she participate in development of either of the IEPs at issue in the case. *Id.* at 1955-56, 1997-98. Ms. [REDACTED] observed the Student at [REDACTED] for approximately an hour and had limited contact with him. *Id.* at 2192. Ms. [REDACTED] and Ms. [REDACTED] evaluated the Student and observed him in PE and music for approximately an hour. *Id.* at 2321, 2331.

█'s assessments) occurred after the formulation of the IEPs at issue and none have delivered reading instruction or any other education in a classroom setting to the Student.

45. Ms. █ delivers reading instruction to the Student on a daily basis and direct SLT twice weekly, as she has done since he first began attending █ in the fall of 2018. Hr'g Tr. at 1183-5, 1189. Ms. █ is the singular witness of record with the greatest knowledge of the Student's instructional needs. *Id.* at 2409.

46. The Student is unable to access the educational curriculum without intensive supports, with immediate teacher feedback, and only in small group settings; the Student requires numerous trials—extensive practice—to acquire and generalize a skill. *E.g.*, Hr'g Tr. at 1200, 1240-41, 2401-03, 2404-06, 2412.

47. The Student has significant limitations in utilizing and understanding nonverbal communication and does not peer model; he requires explicit teacher instruction and direction. *Id.* at 1220, 1427, 2414, 2422, 2427.

48. The Student requires a ratio of two students to one teacher to access the educational curriculum for reading, to receive an educational benefit, and to make educational progress. *E.g.*, *id.* at 1196-97, 2401-03; 2412-16.

49. The Student's 2019-20 IEP, with implementation at █ does not provide for reading instruction in a ratio of two students to one teacher. P – 42; MCPS – 46; *see* Hr'g Tr. at 2028-29.

50. The Student's 2019-20 IEP is not appropriate as it not reasonably calculated to allow him to gain an educational benefit and make educational progress.<sup>14</sup> P – 42; MCPS – 46; Hr'g Tr. at 2401-03; 2412-16.

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<sup>14</sup> “[I]n this circuit the determination of whether an IEP is appropriate is a question of fact.” *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 327 (4th Cir. 2004) (citations omitted).

51. The Student is making progress at [REDACTED] and it is a proper placement for him for the 2019-20 school year. Hr’g Tr. at 755, 885-86, 898, 903-04, 1245, 1249-51; P – 22, 26, 27, 35, 38, 39, 45, 47, 55, 56, 60A, 77, 78, 79.

## **DISCUSSION**

### ***I***

#### ***Governing Law***

##### ***The IDEA’s Requirement for a FAPE in the LRE***

The identification, assessment, and placement of students in special education is governed by the IDEA.<sup>15</sup> 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-419; COMAR 13A.05.01. “Congress enacted IDEA in 1970 to ensure that all children with disabilities are provided a free appropriate public education which emphasizes special education and related services designed to meet their unique needs and to assure that the rights of such children and their parents or guardians are protected.” *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (internal quotation marks, brackets, and footnote omitted).

The IDEA requires “that all children with disabilities have available to them a free appropriate public education 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). The IDEA provides federal assistance to state and local education agencies for the education of disabled students, provided that states comply with the extensive goals and procedures of the IDEA. *Id.* §§ 1412-1414; 34 C.F.R. § 300.2; *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Additionally, to the

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<sup>15</sup> Maryland’s special education law is a creature of State statute, based on the IDEA, and is found beginning at section 8-401 of the Education Article. The Maryland regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.



maximum extent possible, the IDEA seeks to mainstream, or include, the child into regular public schools; at a minimum, the statute calls for school systems to place children in the “least restrictive environment” (LRE) consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A).

The nature of the LRE necessarily differs for each child but could range from a regular public school to a residential school where twenty-four-hour supervision is provided. COMAR 13A.05.01.10B. The IDEA requires specialized and individualized instruction for a learning or educationally-disabled child. Nonetheless, “[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities,” must be “educated with children who are not disabled . . . .” 20 U.S.C.A. § 1412(a)(5)(A). It follows that the State and federal regulations that have been promulgated to implement the requirements of the IDEA also require such inclusion. 34 C.F.R. §§ 300.114 through 300.120; COMAR 13A.05.01.10A(1).

The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. 20 U.S.C.A. § 1412(a)(5)(A); *Rowley*, 458 U.S. at 181 n.4; *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997); *see also Honig v. Doe*, 484 U.S. 305 (1988).

## II

### *Burden of Proof*

As the party seeking relief, the Student bears the burden of proof,<sup>16</sup> by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014); *Schaffer*, 546 U.S. at 56-58, 62;<sup>17</sup> cf. 20 U.S.C.A. § 1415(i)(2)(C)(iii); *Rowley*, 458 U.S. at 206; 34 C.F.R. § 300.516(c)(3) (establishing preponderance of the evidence as the standard for judicial review of a state's final administrative decision under the IDEA). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)); see also *Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

"In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your mind [ ] a belief that it is more likely true than not true." *Coleman*, 369 Md. at 125 n.16. Under this standard, if the supporting and opposing evidence is evenly balanced<sup>18</sup> on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.*; see *Schaffer*, 546 U.S. at 56-58.

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<sup>16</sup> "[H]istorically, the concept encompassed two distinct burdens: the "burden of persuasion," *i.e.*, which party loses if the evidence is closely balanced, and the "burden of production," *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005); accord *Bd. of Trustees, Cmty. College of Balt. Cty. v. Patient First Corp.*, 444 Md. 452, 469 (2015) ("The phrase 'burden of proof' encompasses two distinct burdens: the burden of production and the burden of persuasion.").

<sup>17</sup> In assigning the burden of persuasion to the Parents and Student, the *Shaffer* Court observed "Congress appears to have presumed instead that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances." 546 U.S. at 60.

<sup>18</sup> This is a rare outcome in a case under the IDEA, as Justice O'Connor observes for the Court. "In truth . . . very few cases will be in evidentiary equipoise." *Schaffer*, 546 U.S. at 58.

For the reasons set forth below, I find the Student has met his burden to prove the MCPS failed to provide him with a FAPE for the 2019-20 school year, in violation of the Act, and is entitled to reimbursement for placement at [REDACTED] for the 2019-20 school year, but failed to meet his burden to prove the denial of a FAPE for the 2018-19 school year.

### ***III***

#### ***Positions of the Parties***

The Student contends 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 crafted IEPs for the 2018-19 and 2019-20 school years that called for inclusion in general education, an insufficient number of hours of special education and related services, and in class sizes too large for him to access the curriculum. For these reasons and as a remedy for its failure to provide him a FAPE, the Student seeks reimbursement for his private placement at [REDACTED] for the 2018-19 and 2019-20 school years and his IEP amended to reflect [REDACTED] as the appropriate placement moving forward.

The MCPS contends its educators, relying on the data available to them, and in collaboration with the Student's Parents, his private school teachers, and educational advocate, made a reasoned exercise of educational judgment in proposing IEPs with appropriate goals, objectives, and service hours, that properly balanced the student's educational needs with the IDEA's mandate to educate disabled children in the LRE. Because the MCPS committed no procedural violations of the IDEA in formulating its IEPs for the relevant period, and giving deference to opinions of the MCPS's educators, this tribunal should not disturb its decision.

## IV

### *Analysis*

#### *A. The provision of a FAPE*

A school system's obligation under the IDEA is to provide all children with disabilities a FAPE. 20 U.S.C.A. § 1400(d)(1)(A); 34 C.F.R. § 300.101(a).

A FAPE is defined in the IDEA 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, 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); *accord* 34 C.F.R. § 300.17.<sup>19</sup>

In *Rowley*, the Supreme Court described a FAPE as follows:

Implicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200-01. The Court held that a FAPE “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” *Id.* at 188-89. However,

[a]s noted by the Third Circuit, “*Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a ‘mainstreamed’ classroom.” Since Amy Rowley was

receiving passing grades and otherwise succeeding in school, the only question

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<sup>19</sup> A FAPE is defined in COMAR 13A.05.01.03B(27) as “special education and related services” that:

- (a) Are provided at public expense, under public supervision and direction;
- (b) Meet the standards of the Department, including the requirements of 34 CFR §§ 300.8, 300.101, 300.102, and 300.530(d) and this chapter;
- (c) Include preschool, elementary, or secondary education; and
- (d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

before the Court was whether the school was required to give Amy sufficient assistance to allow her to receive the same educational benefit as her non-disabled peers. The *Rowley* Court did not have occasion to consider the question of what level of educational benefit the school district would have been required to provide Amy Rowley had she not been progressing successfully through school in a regular education classroom.

*Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 863 (6th Cir. 2004) (citation omitted).<sup>20</sup>

After *Rowley*, a split in the circuits of the United States Courts of Appeal developed over precisely what “some educational benefit” meant. Some circuits, notably the Fourth and Tenth, understood it to mean “some” benefit more than a “*de minimis*,” “minimal,” or “trivial” benefit; while others, such as the First, Third, and Ninth Circuits interpreted the standard to mean a “meaningful” benefit. Compare *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015), and *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338-41 (10th Cir. 2015), with *D.B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012), and *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008), and *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988).

The Supreme Court resolved the split in the circuits by granting *certiorari* to review the Tenth Circuit’s opinion in *Andrew F.* The Supreme Court held a FAPE must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances” and finding that “[t]he IDEA demands more” than “an educational program providing merely

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<sup>20</sup> The *Rowley* Court expressly acknowledges this in its opinion, observing:

It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

*Rowley*, 458 U.S. at 202.

more than *de minimis* progress from year to year.” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 1001 (2017) (internal quotation marks omitted).<sup>21</sup>

### ***B. The Modus Operandi of the IDEA—the IEP***

To provide a FAPE, the educational program offered to a student must be tailored to the particular needs of the disabled child by the development and implementation of an IEP, taking 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); *see also Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 368 (1985) (“The *modus operandi* of the Act is the already mentioned individualized educational program.” (internal quotation marks omitted)).

The IEP depicts the student’s current educational performance, 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, 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); *accord* 34 C.F.R. § 300.22; Md. Code Ann., Educ. § 8-405(a)(4).

As the “centerpiece” of the IDEA’s “education delivery system” for disabled students, an IEP is a “comprehensive plan” for the “academic and functional advancement” for the student. *Andrew F.*, 137 S. Ct. at 994, 999. It must be tailored to the student’s “unique needs” with “careful consideration” of the student’s present levels of achievement, disability, and potential for growth.

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<sup>21</sup> The Fourth Circuit has acknowledged that “[o]ur prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by *Andrew F.*” *M.L. ex rel. Leiman v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 752 (2018). For these reasons, any opinions of the Fourth Circuit or any circuit that adopted a no more than “*de minimis*” standard and any district court within those circuits that are cited or discussed below are not relied upon for their definition of a FAPE, but for other legal principles for which they remain the state of the law in this circuit and controlling precedent or persuasive authority.

*Id.*; see also 20 U.S.C.A. § 1401(29). The IEP must be “appropriately ambitious,” *Andrew F.*, 137 S. Ct. at 1000, and it must provide for “specially designed instruction” that is “reasonably calculated to enable the child to receive educational benefits” and to “make progress appropriate in light of the student’s circumstances.” *Id.* at 996, 999 (quoting *Rowley*, 458 U.S. at 207). The amount of progress anticipated for the student should be “markedly more demanding than the merely more than *de minimis* test” applied in the past by many lower courts. *Id.* at 1000 (internal quotation marks omitted).

The test for whether an IEP is “appropriately ambitious,” *id.*, and “reasonably calculated to enable the student to receive educational benefits,” *id.* at 996, is different for each student; there is no bright-line rule or formula to determine whether an IEP provides a FAPE.<sup>22</sup> *Id.* at 1000-01. For a student who is fully integrated in the regular classroom, a FAPE would generally require an IEP to be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.* at 996, 999 (citing *Rowley*, 458 U.S. at 203-04). However, for a student who is not fully integrated and/or cannot be reasonably expected to achieve grade-level advancement, the “educational program must be appropriately ambitious in light of [the student’s] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *Id.* at 1000. Regardless, “every child should have the chance to meet challenging objectives.” *Id.*

When assessing whether a student was offered, given, or denied a FAPE, a judge must “afford great deference to the judgment of education professionals . . . .” *O.S.*, 804 F.3d at 360 (quoting *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)). A judge should not substitute his or her own “notions of sound educational policy for those of the school authorities which they review.” *Andrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at

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<sup>22</sup> In *Rowley*, the Supreme Court also held that a FAPE may be found to have been denied a student when a school fails to comply with the procedures set forth in the IDEA. 458 U.S. at 206; see also *Bd. of Educ. v. I.S. ex rel. Summers*, 325 F. Supp. 2d 565, 580 (D. Md. 2004).

206). Additionally, a judge “should be reluctant . . . to second-guess the judgment of education professionals.” *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). A judge should be mindful that local educators deserve latitude in determining the IEP most appropriate for a disabled child, and that the IDEA does not deprive these educators of the right to apply their professional judgment. *See Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). Additionally, a judge must be careful to avoid imposing his or her view of preferable educational methods upon a school district. *Rowley*, 458 U.S. at 207; *A.B.*, 354 F.3d at 325.

This respect and deference, while unquestionably a well-settled principle of review under the Act, both within and without this circuit, is not limitless, however. *See Cty. Sch. Bd. of Henrico Cty. v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the [judge] of the obligation to determine as a factual matter whether a given IEP is appropriate.”).

“[T]he fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate.” *Id.*; *see Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993) (“Indeed, if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary.”).

“To give deference only to the decision of the School Board would render meaningless the entire process of administrative review.” *Sch. Bd. of Prince William Cty., Va. v. Malone*, 762 F.2d 1210, 1217 (4th Cir. 1985) (citation omitted). A reviewing judge may fairly expect the school system’s professionals “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 or her] circumstances.” *Andrew F.*, 137 S. Ct. at 1002.

The *Andrew F.* Court confirmed that a FAPE does not promise an “ideal” education. *Id.*



at 999. Nor does it promise that a student with a disability will be provided with “opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.” *Id.* at 1001. A reviewing court must determine whether the IEP is “reasonable.” *Id.* at 999. It is also important to remember that the IDEA does not require “the best possible education that a school could provide if given access to unlimited funds.” *Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). Nor does it require the “furnishing of every special service necessary to maximize each handicapped child’s potential.” *Hartmann*, 118 F.3d at 1001.

The development of an IEP is a prospective process. *Andrew F.*, 137 S. Ct. at 998-99. Other circuits and district courts have held the test of the appropriateness of the IEP is *ex ante* and not *post hoc*. *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 524 (D.C. Cir. 2018); *Adams v. State*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993); *J.P. ex rel. Popson v. W. Clark Cmty. Sch.*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002) (“[T]he measure of appropriateness for an IEP does not lie in the outcomes achieved. While outcomes may shed some light on appropriateness, the proper question is whether the IEP was objectively reasonable at the time it was drafted.” (citation omitted)). 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 and make appropriate progress. An IEP is essentially a “snapshot” in time and “cannot be judged exclusively in hindsight.” *See Z.B.*, 888 F.3d at 524; *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).

Fourth Circuit case law, however, eschews such a bright line rule as its sister circuits and has “concluded that, in some situations, evidence of *actual progress* may be relevant to a determination of whether a challenged IEP was reasonably calculated to confer some educational

benefit.” *M.S. ex rel. Simchick v. Fairfax County Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009) (emphasis in original) (citing *M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002)). Actual progress is not dispositive, however, although important, it is but one factor used to determine the appropriateness of the IEP at issue. *M.S.*, 535 F.3d at 327.

The Supreme Court in *Rowley* similarly observed that a student’s achievement of passing marks and advancement from grade to grade is an important factor in determining if a student received educational benefit. *Rowley*, 458 U.S. at 207 n.28.

Addressing the appropriate weight to be given to evidence of a student’s progress taken by the district court after the close of the administrative record, the Fourth Circuit cautioned of the danger and lack of fairness to the school system inherent in giving significant weight to such evidence and courts engaging in a hindsight review. *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009). Explaining that evidence of educational progress must be treated cautiously, the *Schaffer* Court concluded that “[j]udicial review of IEPs under the IDEA is meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was reasonably calculated to enable the child to receive educational benefits.” *Id.* (citations and quotation omitted).

### *C. Appropriateness and Adequacy of the Student's IEPs*

#### *i. 2018-19 School Year*

Guided by this legal framework, I turn to the facts of this case. There is little question 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. He has medical and educational records stretching back from his earliest youth objectively documenting these conditions and their constellation of limitations. Due to the frequency, intensity, and extent of the SLT and OT interventions and his own intrepid nature,<sup>23</sup> the Student has made improvements in developing the skills and abilities to overcome the deficits caused by his disabilities, as he has advanced in age. These are established facts on the record before me and are not in dispute.

What is in dispute and at issue before me is: the extent to which, during the relevant times, these disabilities impacted the Student's ability to access the curriculum; and the instructional delivery he needs to be able to receive an educational benefit and make appropriate progress, which in turn informs my inquiry into the appropriateness of the IEP; a factual question squarely before me whose resolution is dispositive of the case. *Z.P.*, 399 F.3d at 307; *A.B.*, 354 F.3d at 327. To answer these questions I must determine, amongst the witnesses of record offering conflicting opinions, to whom I should accord more weight.<sup>24</sup>

In weighing the conflicting opinions, I give great deference and respect to the opinions of the MCPS's educators who formed the IEP, while not abdicating my role as the factual determiner of the appropriateness of the IEPs at issue. *Andrew F.*, 137 S. Ct. at 1001; *Rowley*,

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<sup>23</sup> The Student was uniformly described by the parties and witnesses as having a cheerful disposition, an indomitable spirit, and being highly motivated to learn. *See, e.g.*, Hr'g Tr. at 839, 919, 1071.

<sup>24</sup> "In any case . . . to meet the test of legal sufficiency, evidence (if believed) must show directly or support a rational inference of, the fact to be proved." *Mathis*, 166 Md. App. at 310 n.5 (internal citation omitted).

458 U.S. at 206-07; *O.S.*, 804 F.3d at 360; *Z.P.*, 399 F.3d at 307; *A.B.*, 354 F.3d at 325-29; *M.M.*, 303 F.3d at 532-33; *Hartmann*, 118 F.3d at 1000-01; *Tice*, 908 F.2d at 1207; *Malone*, 762 F.2d at 1217.

I turn first to the 2018-19 IEP. The IEP team met on June 18, 2018 to develop the Student's IEP for the 2018-19 school year. The Student's Parents and Mr. [REDACTED] participated in the meeting in-person. [REDACTED] provided the MCPS with all its educational data—its teacher reports, teacher referral, end-of-year report—and its director participated by phone. MCPS – 9, 16, 17; P – 17. Mr. [REDACTED] provided the MCPS with his observation summary from his February 20, 2018 observation at [REDACTED]. MCPS – 10; P – 13; Hr'g Tr. at 866. The MCPS also relied on its own observations of the Student while he received services at [REDACTED] as well as when he was at [REDACTED]. MCPS – 14, 15. Based on this information, the IEP team developed an IEP with the input of the MCPS's educators, the Parents, Mr. [REDACTED] and [REDACTED]. MCPS Ex. 20; Test [REDACTED]; Test [REDACTED]. Based on the goals and objectives and the service hours set forth in findings of fact, above, the MCPS's IEP team members proposed the Student's IEP be implemented at [REDACTED]. MCPS – 20; P – 20. The Student's Parents and Mr. [REDACTED] objected to the service hours and placement, expressing their opinion to the MCPS's IEP team members that the Student required placement in a full-time special education program, a position the MCPS declined to adopt. Hr'g Tr. at 80-81.

In evaluating the Student's present levels of performance, which are used to form the Student's IEP's goals and objectives, which drive the service hours, and in turn the placement, the MCPS IEP team gave great weight to [REDACTED]'s End-of-Year Progress Report, which assessed the Student as having proficient skills in a wide range of educational domains. P – 17.

The MCPS IEP team members could have found Ms. [REDACTED], the Student's Parent and an MCPS special educator with appreciable experience in the field; Mr. [REDACTED], an educational

consultant and former MCPS special educator and administrator with four decades of special education experience, and the reporting of the Student's neuropsychologist who holds a doctoral degree in school psychology and was himself a special educator; his developmental pediatrician who had a longitudinal treating relationship with the Student; and his speech language pathologist who also had a longitudinal treating relationship with the Student more persuasive than its own observations and the results of ██████'s educational data and reporting, but it did not.

The question before me is whether in so doing the MCPS violated the IDEA. In the cases set forth above, interpreting the Act, the Supreme Court and Fourth Circuit make plain that my right of review does not extend to substituting my judgment for those of the local educators. Instead "[t]he key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP it offered was reasonably calculated to enable the specific student's progress." *Z.B.*, 888 F.3d at 524;<sup>25</sup> *see Schaffer*, 554 F.3d at 477.

On the record before me, I am unpersuaded—in a state of honest doubt—that the Student has proven the MCPS developed an IEP that was not reasonably calculated to enable the Student to make appropriate progress in light of his circumstances—his learning profile, needs, and strengths. *Andrew F.*, 137 S. Ct. at 998-99.

The MCPS relied on the data available to it when developing the IEP, finding more

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<sup>25</sup> *Z.B.* is an opinion of the D.C. Circuit, cited to and quoted in the Student's Closing Memorandum. As a substantive test of an IEP's adequacy I find it persuasive authority and to provide guidance in my analysis, as it focuses the judicial (and my administrative) inquiry on the prospective nature of an IEP, as does the Supreme Court in *Andrew F.* 137 S. Ct. at 998 and the Fourth Circuit in *Schaffer*. 554 F.3d at 477. The Student asks that I consider and give weight to his educational progress at ██████ as substantive evidence of the inadequacy of his 2018-19 and 2019-20 IEPs. Student's Closing Memorandum at 24-27. I observe that none of the controlling case law from the Supreme Court (*Rowley*, 458 U.S. at 207 n.28) or the Fourth Circuit (*M.S.*, 535 F.3d at 327; *Schaffer*, 554 F.3d at 478; *M.M.*, 303 F.3d at 532) on the issue have countenanced the consideration of such evidence when the IEPs at issue were not implemented. I have, nevertheless, for the sake of argument and complete record development, considered it as a factor in evaluating the appropriateness of the Student's IEP for the 2018-19 school year and, for the reasons set forth below, it does not change the results of my analysis (the other factors outweigh). For the reasons discussed below, I do not need to reach this consideration or weigh this factor for resolution of the question of the appropriateness of the Student's 2019-20 IEP.

probative of the Student's strengths and needs the assessment and opinions of the special educators who most recently delivered instruction to the Student than the opinions of those who, although learned and intimately familiar with the Student, have not delivered instruction to him, and relied upon its educators' judgment to determine the goals, objectives, service hours, and implementation of the Student's program. *See* MCPS Closing Memorandum at 31.

This accords with the MCPS's requirements under the IDEA, as interpreted by the Court in *Andrew F.*, to provide the Student with a FAPE in the LRE that is appropriate to his educational needs and reasonably calculated to confer an educational benefit and allow him to "make progress appropriate in light of [his] circumstances." 137 S. Ct. at 996, 999.

***ii. 2019-20 School Year***

Despite its protestations to the contrary, the persuasive evidence of record supports a finding the MCPS did not do the same, however, when it developed the Student's 2019-20 IEP. At the time of the May 2019 IEP team meeting, the MCPS's IEP team members were verbally provided with the results of ■■■'s end-of-year evaluations and assessments of the Student, as well as any written reporting available, including ■■■'s IEPs and mid-year assessments, and the Student's work samples, demonstrating the extent of the Student's disabilities and their impact on his ability to access the curriculum. *E.g.*, MCPS – 26, 27, 32, 35, 37, 39; P – 34; Hr'g Tr. at 971-73, 990-91, 1004-05, 1327-28.

Ms. ■■■ provided her opinion as to the Student's needs to access the educational curriculum for reading and writing and supported her opinion with her own direct observations of the Student's needs having delivered SLT to the Student since 2015 and having delivered reading instruction as his reading and writing co-teacher throughout the year. *See, e.g.*, Hr'g Tr. at 1239, 1327-28, 1839-40, 2401-03, 2404-06.

In its closing memorandum, the MCPS, in addressing the Student's position that the feedback from his private school provider should be relied upon by the IEP team, expressly

acknowledged that along its own observations and evaluations of the Student, it “relied on [REDACTED] data and feedback when it developed its 2019-2020 IEP” just as it “relied on [REDACTED] data and feedback when it developed its 2018-2019 IEP.” MCPS Closing Memorandum at 31.

Having relied on the [REDACTED] data and feedback, as it represents it did, it did not then provide “a cogent and responsive explanation for their decisions” for rejecting the opinion of Ms.

[REDACTED] (a significant source of [REDACTED] data and feedback as the Student’s classroom co-teacher with a longitudinal educational and SLT treating relationship) as to the Student’s needs to access the reading curriculum “that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [his or her] circumstances.” *Endrew F.*, 137 S. Ct. at 1002.

In her rebuttal testimony, Ms. [REDACTED] explained that the Student requires a two students to one teacher ratio in order to be accessible for learning reading because: he needs explicit feedback when developing a new skill; he typically needs twice as much practice than other students with language based learning disabilities (often as many as forty trials before he can internalize and generalize a skill) when learning a new skill; groups larger than two prevent the Student from completing the required amount of practice to acquire and generalize the skill; he displays inappropriate behaviors when required to wait for his teacher’s attention and these emotional outbursts frequently make him unavailable to receive education for as many as thirty minutes at a time before he has sufficiently calmed down that he can be again available for learning; and he cannot be left to work independently and remain on-task without interfering with other students learning or getting up and walking away. Hr’g Tr. at 2401-03, 2416-18; *see also* Hr’g Tr. at 2412 (Student requires more intensive supports than typical for other [REDACTED] students with similar language-based learning disabilities).

The MCPS’s IEP team members did not dispute Ms. [REDACTED] observations, assessments, and conclusions of the Student and his educational needs at the IEP meeting, but,

nevertheless, did not adopt them. *See, e.g., Hr’g Tr. at 1383.* Giving great deference and respect to the decision of the MCPS’s educators and being loathe to disturb it, I am, nevertheless, persuaded, more likely so than not so, based on the information known or that should have been known to the IEP team about the Student’s reading needs to be able to access the curriculum at the time it proposed the 2019-20 IEP, the Student has proven the MCPS developed an IEP that was not “reasonably calculated to enable [his] progress.” *Z.B., 888 F.3d at 524; see Schaffer, 554 F.3d at 477.*

By proposing placement at [REDACTED] where the Student’s reading instruction would be delivered in a small group setting, but where the teacher to student ratio is not standardized at two to one and may vary widely based on factors including class size, the specific skill being taught, the individual teacher’s discretion, and where the definition of small group may be interpreted expansively (*see Hr’g Tr. at 2027-29*), the MCPS’s educators developed an IEP that was not specially designed and individualized to the Student’s needs and could not provide a FAPE because it lacked the very lynchpin of the IEP—making the Student accessible for learning. *Rowley, 458 U.S. at 200–01.*

In her direct examination, Ms. [REDACTED] explained [REDACTED]’s approach to small group instruction thusly:

I don't think that it matters whether it is two students, whether it is seven students, whether it is -- when you're getting into larger groups of, I would say, 15 students is [sic] I would consider that a larger group. But at the end of the day, the teacher has to be -- has to teach explicitly a skill. So all of the students within that group need to be engaged the entire time, and so you have to provide those supports so

that the students are engaged. And I don't necessarily know that the number in that small group is what makes a child learn the skill or not learn the skill. If the students are engaged the entire time and they are practicing what the skill is that you are working on and they are -- and the teacher is providing appropriate supports and all of the supports that those students need, then the number of students in that smaller group can vary.

Hrg. Tr. at 2027-29.

Ms. [REDACTED]’s opinion as to the most successful method for inculcating a particular



skill—resting on the continuous engagement of the student receiving the instruction and proper practice of the skill—speaks directly to the basis of Ms. [REDACTED]’s opinion that the Student requires a two to one ratio to learn reading. In a setting with a ratio larger than two students to one teacher, due to his attentional, learning, expressive language, and other needs, the Student would not be engaged in reading instruction at all, let alone “engaged the entire time.”

This is not because there is something inherently educationally significant about the ratio of two students to one teacher for reading instruction writ large or in all circumstances, but, as Ms. [REDACTED] explained, that number allows the requisite teacher attention and supervision of the Student that he specifically needs to remain on-task and allows for the amount of practice necessary, in her experience working with the Student on a daily basis instructing him in reading, for him to acquire and generalize a reading skill. Hr’g Tr. at 2401-03, 2416-18.

Ms. [REDACTED] testified that [REDACTED], much like [REDACTED], employs flexible groupings for different subject areas, skills, and tasks, and that the Student is able to be in larger groups for other instruction, and be available for learning, in subject areas such as mathematics where he is a group of four students to one teacher or writing where he is in a similar grouping ratio. *Id.* at 1298-99.

In making this factual finding of the inappropriateness of the Student's 2019-20 IEP, I give greater weight to Ms. [REDACTED]'s opinion than to Ms. [REDACTED]'s and to Ms. [REDACTED]'s.<sup>26</sup> *Z.P.*, 399 F.3d at 307. I do not do so lightly, nor do I do so without first giving the proper deference to the local educators—Ms. [REDACTED]'s and Ms. [REDACTED]'s—opinions. After affording the greatest deference to Ms. [REDACTED]'s and Ms. [REDACTED]'s opinion, I, nevertheless, assign greater weight to Ms. [REDACTED]'s opinion for several reasons.

Most significantly, Ms. [REDACTED]'s opinion is based on her actual knowledge of the Student derived from her daily interactions delivering reading instruction and twice weekly interaction delivering direct SLT to the Student. As of the date of the hearing, Ms. [REDACTED] has been the Student's co-teacher for nearly two full school years, spending countless hours observing, interacting, and delivering reading instruction to the Student. Hr'g Tr. at 2408-09.

By contrast, Ms. [REDACTED] has spent a total of approximately three hours observing and delivering services to the Student, having seen him a total of four times—one thirty-five to forty minute observation at [REDACTED] during a Pre-K language class on May 10, 2017, and during three forty to fifty minute resource sessions delivering reading and writing instruction at [REDACTED] [REDACTED] in the spring of 2018 and has not had contact with him since that time. Hr'g Tr. at 1488, 1608-1610; P – 8; MCPS – 5, 13, 15. Similarly, Ms. [REDACTED] spent a total of approximately seven-and-a-half hours delivering SLT to the Student between March 14, 2018 and May 30, 2018, and has not had contact with him since that three-month period. Although Ms. [REDACTED] has served as a general education teacher in the MCPS for three years and Ms. [REDACTED] has served as a both a special and general education teacher, neither has ever been the Student's teacher and neither

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<sup>26</sup> As discussed in footnote 9, above, although not expressly set forth within its four corners, in this Decision I have carefully considered all expert opinions and factual testimony of record, along with the documentary evidence, and the parties closing memoranda. I expressly set forth my analysis weighing Ms. [REDACTED] and Ms. [REDACTED] opinions against Ms. [REDACTED] because these are the conflicting opinions that are relevant to the dispositive issue; that is, in light of the Student's circumstances, is a failure to provide reading instruction in a two students to one teacher ratio in the IEP developed for the Student in the 2019-20 school year a denial of a FAPE. I do not expressly recite the analysis for all witnesses of record for judicial economy and efficiency because those opinions (such as the opinions relating to OT, PT, and Adapted PE, for example) do not squarely address the dispositive issue. See n. 9.

have delivered reading instruction to the Student in a classroom setting.

Put differently and more simply, the well of longitudinal data from which Ms. [REDACTED] draws on to form her opinion is deeper and fuller than the respective wells from which Ms. [REDACTED] and Ms. [REDACTED] draw on to form theirs. Hr’g Tr. at 1488, 1608-1610, 2408-09; P – 8; MCPS – 5, 13, 15.

It is the opinion of the MCPS’s IEP team members that the Student’s needs increased significantly from the 2018-19 school year, which is information that was known to the IEP team at the time the 2019-20 IEP was developed and proposed. *E.g.*, Test [REDACTED] (Hr’g Tr. at 1565). This impacts my ability to consider its reliance on Ms. [REDACTED] and Ms. [REDACTED]’s opinions, over Ms. [REDACTED]’s, which are based, at least in part, on their own first-hand observations of the Student now one year prior, in 2018, and more remote in time, and the strengths and needs he displayed at that time, a reasoned exercise of sound educational judgment. *E.g.*, Test. [REDACTED] Test. [REDACTED]

When asked on cross-examination why Ms. [REDACTED] did not find Ms. [REDACTED]’s opinion persuasive, Ms. [REDACTED] replied that she has seen other students with a similar profile to the Student in larger class sizes than Ms. [REDACTED] opines the Student requires for reading who have progressed well. Anecdotal experiences of how students with profiles similar to the Student have performed is not a facially unreasonable basis from which to form an opinion of how this particular Student would perform, assuming without deciding Ms. [REDACTED] sample size is sufficient to draw conclusions. But as a reasonable calculation of this Student’s performance—the individualized standard required under the IDEA—an opinion formed based on daily direct observation of what the Student needs to access the curriculum over a two-year period with longitudinal observational data of his speech and language strengths and needs beginning when was three years old, and continuing through the end of the 2019-20 school year, is of greater

predictive quality and greater evidentiary value in my decision-making calculus. *See, e.g.*, Hr’g Tr. at 2408-09.

At the hearing, both Ms. [REDACTED] and Ms. [REDACTED] opined that a larger group setting than the two students to one teacher ratio would provide a benefit to the Student because he could learn from peer models. Ms. [REDACTED] who was not present during either Ms. [REDACTED]’s or Ms. [REDACTED]’s testimony, explained in her testimony—in both the Student’s case-in-chief and in rebuttal—that, as a factual matter, the Student does not learn from peer models, must be explicitly told how to do things, does not get immediate feedback from another’s body language, lacks nonverbal communications skills, and does not look at a person or hold eye contact, but instead typically looks up and to the right when interacting with them. Hr’g Tr. at 1220, 1427, 2414, 2422, 2427. Ms. [REDACTED] offered her basis for these assessments having observed the Student interact with eleven other students in his homeroom class and with sixty-nine other students during recess on a daily basis. *Id.* at 2414-16. Ms. [REDACTED]’s observations are also in accord with those independently made by Dr. [REDACTED] when he evaluated the Student in 2016, when the Student was five years old. *Id.* at 1079, 1081.

Finally, I have considered that Ms. [REDACTED] has appreciably more experience as a speech language pathologist than Ms. [REDACTED], has served as a classroom co-teacher as long or slightly longer than Ms. [REDACTED] has and slightly less than Ms. [REDACTED]y has, and has served as an adjunct professor at [REDACTED] in [REDACTED] teaching graduate students how to teach reading to special education students. P – 64; Hr’g Tr. at 1186, 1189, 1281.

For these reasons, the weight and probative force of Ms. [REDACTED]’s opinion and factual testimony overcomes the deference and respect I accord Ms. [REDACTED]’s and Ms. [REDACTED]’s opinions, exercising my role as an independent finder of fact and adjudicator of the evidence.

*Z.P.*, 399 F.3d at 307; *Jackson*, 4 F.3d at 1476; *Malone*, 762 F.2d at 1217.

Accordingly, I find the Student is unable to access the curriculum without the instructional delivery of reading in a ratio of two students to one teacher. I further find the Student's 2019-20 IEP does not provide for delivery of reading instruction in this ratio. P – 42; MCPS – 46. Based on the weight of the credible evidence of record, I am persuaded, and find as fact, the MCPS violated the IDEA by proposing an IEP for the Student for the 2019-20 school year that was inappropriate for the Student because it was not reasonably calculated to confer an educational benefit on the Student and allow him to make appropriate educational progress in light of his disabilities and their impact on his ability to access the educational curriculum. 20 U.S.C.A. § 1400(d)(1)(A); *Andrew F.*, 137 S. Ct. at 996, 999, 1002; *Z.B.*, 888 F.3d at 524; *Schaffer*, 554 F.3d at 477; *A.B.*, 354 F.3d at 327.

I do not sit as a super-educator, seeking to supplant the reasoned decisions of public school officials with my caprice; I do, however, sit as a fair and impartial arbiter of the facts and the law and cannot, without abdicating that role, ignore the weight of persuasive evidence before me and uphold the determination of the school system in an elevation of deference over independent fact-finding, without making a mockery of the very name due process that precedes the hearing I spent twelve days presiding over, the very Act itself, and the settled precedent of the Supreme Court and this circuit. In ruling as I do in this matter, I am put in mind of the *Rowley* Court's apt observation that "[i]t would do little good for Congress to spend millions of dollars in providing access to a public education only to have the [a student] receive no benefit from that education." 458 U.S. at 200–01.

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

### ***i. Tuition Reimbursement***

Having found a violation of the IDEA, I now turn to the Student's request for reimbursement for his private placement at [REDACTED] for the 2018-19 and 2019-20 school years and request for placement at [REDACTED] moving forward.

A remedy for a violation of the IDEA is discretionary, sounds in equity, and is governed by statutory and regulatory requirements. 20 U.S.C.A. § 1412(a)(10)(C)(ii)-(iii); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Burlington*, 471 U.S. at 367, 369, 374; 34 C.F.R. § 300.148(c)-(d).

In *Burlington*, the seminal case on reimbursement for private placement under the IDEA, the Supreme Court held that:

In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

471 U.S. at 370.

Observing the "ponderous" and lengthy nature of the administrative and judicial review process under the Act, the *Burlington* Court squarely addressed the propriety of retroactive reimbursement after a finding of a violation of the IDEA, holding "that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." *Id.*

The IDEA furnishes a broad grant of authority to fashion an appropriate remedy for a failure to provide a FAPE that is flexible and uniquely tailored to the facts of the case. This remains true even if the student is an adult or otherwise no longer attends public school, or when the parents do not object to the hours of service at the time of the IEP's proposal or implementation. *See Burlington*, 471 U.S. at 369 (The IDEA grants "broad discretion" to the

Court to fashion appropriate grants of relief.); *G. ex rel R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003) (holding that a grant of compensatory education is proper in the Fourth Circuit; reviewing with approval opinions from sister circuits granting compensatory education to students who are adults or are no longer in public schools; and distinguishing its precedent in “*Combs [v. Sch. Bd. of Rockingham Cty.]*, 15 F.3d 357, 363 (4th Cir. 1994), which] referred only to liability of the school district where its actions were in compliance with the IDEA, and is inapplicable here”); *Lopez–Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 57 (D.D.C. 2016) (noting that the judge “has broad discretion to fashion a remedy where he finds that a school district has denied a child a FAPE[, s]itting in equity, [a judge’s] authority is flexible and case-specific” (citations omitted)).

In *Burlington*, the Court approved of the consideration of equitable factors to determine appropriate reimbursement under the Act. 471 U.S. at 374; see *Carter*, 510 U.S. at 16. The First Circuit, whose opinion was before the Court in *Burlington* on *certiorari* identified the equitable factors it considered relevant to weigh, discussing the IDEA’s preference for a cooperative IEP process and changes in placement by agreement, the First Circuit cognized a distinction “between a unilateral parental transfer made after consultation with the school system, yet still an action without the system’s agreement, and transfers made truly unilaterally, bereft of any attempt to achieve a negotiated compromise and agreement on a private placement.” *Town of Burlington v. Dep’t of Educ. for Mass.*, 736 F.2d 773, 799 (1st Cir. 1984), *aff’d sub nom. Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359 (1985).

The Court had occasion to revisit the question of reimbursement under the IDEA some eight years later in *Carter* and explained that “once a court holds that the public placement violated IDEA, it is authorized to grant such relief as the court determines is appropriate.”

510 U.S. at 15-16 (internal quotation marks omitted). This remedy is available without regard to whether the student “previously received special education or related services through the public school.” *T.A.*, 557 U.S. at 247. From these cases and their holdings, I conclude that reimbursement is appropriate relief under the Act if the public placement was inappropriate and the private placement is proper.

My inquiry now turns to whether the parties in the instant matter acted in accord with the First Circuit’s equitable factors—with the IDEA’s preference for a cooperative IEP process and whether the Parents’ private placement decision was made only after discussion and consultation with the MCPS and not truly “unliterally”—and in accord with notice requirements set forth in the law and controlling regulations. 20 U.S.C.A. § 1412(a)(10)(C)(iii); *Carter*, 510 U.S. at 16; *Burlington*, 471 U.S. at 374; 34 C.F.R. § 300.148(d).

Despite the differences of educational opinion as to the appropriate placement for the Student, the parties and witnesses uniformly describe both the Student’s 2018-19 and 2019-20 IEP team meetings and the IEP development process as collaborative and collegial. *E.g.*, Hr’g Tr. at 966, 1004. Evidence of a genuine desire to reach a negotiated compromise and a mutually satisfactory resolution to their dispute can be found in the actions of the Parents and Student in February 2019. On February 12, 2019, the Parents, through counsel, filed a due process complaint challenging the appropriateness of the MCPS’s proposed IEP and placement for the Student, but agreed to withdraw their complaint on March 12, 2019, for further discussion and negotiation with the MCPS and the Student’s IEP team. P – 28; MCPS – 22; Hr’g Tr. at 960, 963-64. Further, the Parents signed consent for the MCPS to observe the Student at [REDACTED] in March 2019 and for ongoing consultation with the Student’s private service providers. MCPS Ex. 54; Hr’g Tr. at 885, 974-75, 1004. The Parents also shared progress reports and the results of testing from [REDACTED] and observation reports from Mr. [REDACTED] with the MCPS. P – 33.

After the Student’s IEP team met on May 22, 2019 and proposed placement at [REDACTED]



despite their belief that [REDACTED] was an appropriate placement, the Parents and Mr. [REDACTED] observed the proposed placement, and documented their concerns about its appropriateness for the Student. P – 43, 44; Hr’g Tr. at 134-140, 976-78, 983-84, 1008-11.

On June 17, 2019, the Parents, through counsel, notified the MCPS that after visiting the proposed placement at [REDACTED], they believed the proposed program and placement would not provide the Student with a FAPE and reserved their right, under the IDEA, to seek public funding for the private placement. P – 51. The notice further provided, that should the MCPS wish to reconsider its decision on program and placement for the Student, the Parents “will continue to cooperate with the school system in such efforts.” *Id.*

I am persuaded the equitable factors contemplated by the First Circuit in *Burlington* and the Supreme Court in *Carter* and *T.A.* are met by the actions of the Parents who attempted consultation and agreement with the MCPS on the question of the private placement before taking unilateral action. Further, the Parents complied with the statutory and regulatory notice requirements governing reimbursement before placing the Student at [REDACTED] for the 2019-20 school year. Finally, I find [REDACTED] is a proper placement for the Student, based upon the credible evidence of record from which I find the education it provided to the Student was reasonably calculated to enable the Student to receive an educational benefit. 20 U.S.C.A. § 1412(a)(10)(C)(ii)-(iii); *T.A.*, 557 U.S. at 243; *Carter*, 510 U.S. at 16; *Burlington*, 471 U.S. at 374; *Carter v. Florence Cty. Sch. Dist. Four*, 950 F.2d 156, 163 (4th Cir. 1991), *aff’d*, 510 U.S. 7 (1993); *Tice*, 908 F.2d at 1208; 34 C.F.R. § 300.148(c)-(d); Hr’g Tr. at 755, 885-86, 898, 903-04, 1245, 1249-51; P – 22, 26, 27, 35, 38, 39, 45, 47, 55, 56, 60A, 77, 78, 79.

Finally, in his closing memorandum, the Student represents that [REDACTED] is approved for funding by the MSDE. Student’s Closing Memorandum at 28. There is no evidence to the contrary in the record. I am satisfied this addresses the equitable factor of reasonable cost. *See Carter*, U.S. at 16 (“Total reimbursement will not be appropriate if the court determines that the

cost of the private education was unreasonable.”).

Under these facts, I conclude retroactive reimbursement here would not offend the IDEA’s preference for a cooperative and negotiated IEP process, is a reasonable cost, and is appropriate relief under the Act. *Carter*, 510 U.S. at 15-16; *Burlington*, 471 U.S. at 370, 374; *Carter*, 950 F.2d at 163.

Applying the settled precedent of the Supreme Court and after balancing the equities, I am persuaded this is an appropriate and equitable remedy for the MCPS’s violation of the IDEA, for the 2019-20 school year, but finding no violation of the Act for the 2018-19 school year, I decline to order any relief for that period. 471 U.S. at 370, 374.

***ii. Amendment of the IEP for Placement at [REDACTED] beyond the 2019-20 School Year***

In the Student’s closing memoranda, he requests, in addition to reimbursement for the Student’s private placement, that I “order [the Student’s] placement at the [REDACTED] [REDACTED] moving forward” “and that [REDACTED] should be declared [the Student’s] current educational placement.” Student’s Closing Memorandum at 2, 28-29. The latter is inherent in my above ruling finding [REDACTED] a proper placement for the Student for the 2019-20 school year and made expressly so by my Order, below.

I am uncertain, however, if the request for placement at [REDACTED] “moving forward” is merely a restatement of the request “that [REDACTED] should be declared [the Student’s] current educational placement” employing different words to express the same meaning or if the former is a request for an order from this tribunal that [REDACTED] be the Student’s placement beyond the 2019-20 school year. To the extent placement at [REDACTED] beyond the 2019-20 school year is the Student’s

requested relief, I will address that request for purposes of ensuring complete development of the administrative record for the parties and for judicial review.

Illustrative of the broad grant of remedial authority and relevant here, courts have held that a “finding that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school” is not improper on its face. *Adams v. Dist. of Columbia*, 285 F. Supp. 3d 381, 393 (D.D.C. 2018). “[T]his remedy was a reasonable reflection of the issues before the Hearing Officer and the administrative record. It appears, moreover, that such relief is not unusual in IDEA cases, including those in which the plaintiff requests private-school placement.” *Id.* (citing *Pinto v. Dist. of Columbia*, 938 F. Supp. 2d 25, 28 (D.D.C. 2013) (noting that Hearing Officer determined that [school system] had developed an inappropriate IEP, but declined to grant placement at private school and instead ordered District to “convene a meeting to revise [the] IEP as appropriate within 30 days of a written request by Plaintiffs”); *Struble v. Fallbrook Union High Sch. Dist.*, 2011 WL 291217, at \*7–8 (S.D. Cal. Jan. 27, 2011) (rejecting argument that ALJ erred by “ordering the parties to meet again and develop a new IEP . . . rather than ordering a placement”)). The *Adams* Court further explains:

Even when a Hearing Officer finds “an actionable violation of the IDEA,” courts have therefore upheld an HOD ordering the parties to “convene an . . . IEP meeting within ten days of [the decision]” so that prospective placement would “not be addressed by this Court, but instead, by the IEP team, as soon as practicable.” . . . Such relief comports with the collaborative, team-based process envisioned under IDEA as the best way of pursuing the “fact-intensive exercise” of “crafting an appropriate program of education” for students with disabilities.

*Id.* at 397 (citation omitted).

Guided by this case law, in accord with this circuit’s deference to role of local educators, the legal principle that the Act does not give judges the authority to make educational policy for

the states, and remaining mindful of the evolving nature of the Student's strengths and needs (see, e.g., Hr'g Tr. at 2404-06), to the extent the Student asks that I reach this question, I conclude the most appropriate body to determine the Student's placement beyond the 2019-20 school year is the Student's IEP team, rather this tribunal, which lacks the relevant 2019-20 end-of-year school assessments and other educational data factually necessary to competently make such a determination.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Student has not proven that the Montgomery County Public Schools violated the Individuals with Disabilities Education Act by failing to provide the Student with a free appropriate public education for the 2018-19 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); *Z.B. v. Dist. of Columbia*, 888 F.3d 515 (D.C. Cir. 2018); *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009); 34 C.F.R. § 300.101(a) (2019).

I further conclude, as a matter of law, that the Student has proven that the Montgomery County Public Schools violated the Individuals with Disabilities Education Act by failing to provide the Student with a free appropriate public education for the 2019-20 school year by proposing an Individualized Education Program not reasonably calculated to confer an educational benefit and allow the Student to make appropriate educational progress. 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*, 546 U.S. 49 (2005); *Z.B. v. Dist. of Columbia*, 888 F.3d 515 (D.C. Cir. 2018); *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009); *Cty. Sch. Bd. of Henrico Cty. v.*

*Z.P.*, 399 F.3d 298 (4th Cir. 2005); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467 (9th Cir. 1993); *Sch. Bd. of Prince William Cty., Va. v. Malone*, 762 F.2d 1210 (4th Cir. 1985); 34 C.F.R. § 300.101(a) (2019).

I further conclude, as a matter of law, that as appropriate equitable relief for its violation of the Individuals with Disabilities Education Act, Montgomery County Public Schools is required to provide tuition reimbursement for the Parents' unilateral placement of the Student at the [REDACTED] a proper placement for the Student, for 2019-20 school year. 20 U.S.C.A. § 1412(a)(10)(C)(ii) (2017); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ of Mass.*, 471 U.S. 359 (1985); *Carter v. Florence Cty. Sch. Dist. Four*, 950 F.2d 156 (4th Cir. 1991), *aff'd*, 510 U.S. 7 (1993); *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990); 34 C.F.R. § 300.148(c) (2019).

I finally conclude, as a matter of law, that the directives of the Individuals with Disabilities Education Act would be best effectuated through amendment and revision to the Student's Individualized Education Program, in light of this Decision, rather than prospective private placement beyond the 2019-20 school year.<sup>27</sup> 20 U.S.C.A. § 1400 *et seq.* (2017); *Adams v. Dist. of Columbia*, 285 F. Supp. 3d 381 (D.D.C. 2018).

### **ORDER**

I hereby **ORDER** that:

1) The Montgomery County Public Schools shall, within thirty days of the date of this Decision, provide reimbursement to the Parents for the cost of the Student's private placement at the [REDACTED] for the 2019-20 school year;

2) The Montgomery County Public Schools shall within thirty days of the date of this Decision, or as soon as practicable,<sup>28</sup> convene an Individualized Education Program team

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<sup>27</sup> To the extent the Student has requested this relief. See section IV.D.ii. of the Discussion, above.

<sup>28</sup> As of the date of this Decision, public schools in Montgomery County, Maryland are closed due to the COVID-19 pandemic.

meeting to amend the Student's current Individualized Education Program to reflect placement at the [REDACTED] for the 2019-20 school year; and

3) The Montgomery County Public Schools shall, within thirty days of the date of this Decision, provide proof of compliance with this Order to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, Maryland State Department of Education.

April 10, 2020  
Date Decision Issued

Steven V. Adler  
Administrative Law Judge

SVA/emh  
#185477

### **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) (2018). 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, Maryland 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]

[REDACTED]

██████████ AND ██████████ ON  
BEHALF OF ██████████,  
PETITIONERS

v.

MONTGOMERY COUNTY PUBLIC  
SCHOOLS,

RESPONDENT

BEFORE STEVEN V. ADLER,  
ADMINISTRATIVE LAW JUDGE  
OF THE MARYLAND OFFICE  
OF ADMINISTRATIVE HEARINGS  
OAH No.: MSDE-MONT-OT-19-30259

**FILE EXHIBIT LIST**

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

Student:

- P – 1 Request for Due Process, 9-26-19
- P – 2 MCPS ██████████ Transition Assessment Report, 6-12-14
- P – 3 Developmental Assessment by Dr. ██████████, May 2015
- P – 3A ██████████ Genetics Consultation Report, 8-31-15
- P – 4 Not Offered for Admission in Evidence
- P – 5 Developmental Vision Evaluation Report, 1-28-16
- P – 6 Review of Private Speech/Language Evaluation/Progress Report, 4-3-16
- P – 7 Neuropsychological Evaluation by Dr. ██████████, 12-2-16
- P – 8 Observation Reports by ██████████ and MCPS at ██████████ Elementary, 5-10-17
- P – 9 MCPS Educational Assessment, 5-10-17
- P – 10 MCPS Speech/Language Re-Assessment, May 2017
- P – 11 MCPS IEP, 5-15-17
- P – 12 MCPS Elementary Teacher Report, 2-6-18
- P – 13 Observation Report by ██████████, 2-20-18
- P – 14 MCPS IEP and Prior Written Notice, 3-8-18
- P – 14A Woodcock Johnson IV Score Report, 4-2-18
- P – 15 Speech/Language Progress Reports by ██████████, April 2016 to May 2018
- P – 16 Occupational Therapy Progress Report by ██████████, 5-9-18
- P – 17 ██████████ End of Year Progress Report, 6-11-18
- P – 18 MCPS Elementary Teacher Report, 6-12-18
- P – 19 MCPS IEP Progress Reports, 4-9-18 and 6-12-18
- P – 20 MCPS IEP and Prior Written Notice, 6-18-18
- P – 21 Letter to MCPS serving notice and MCPS response letter, 8-7-18
- P – 22 ██████████ IEP, 10-25-18
- P – 23 Teacher Questionnaire for Dr. ██████████ by ██████████ staff,



- 11-29-18
- P – 24 Orofacial Myofunctional Plan of Care, 12-4-18
- P – 25 Special Education Consultation Report, 12-17-18
- P – 26 ██████████ IEP Progress Codes, January 2019
- P – 27 ██████████ l Progress Report, 2-12-19
- P – 28 Letters enclosing and withdrawing Request for Due Process, 2-12-19 and 3-12-19
- P – 29 ██████████ Occupational Therapy Test Score Summary, 2-28-19
- P – 30 Not Offered for Admission in Evidence
- P – 31 MCPS Observation Report by ██████████, 3-18-19
- P – 32 MCPS Observation Report by ██████████, 4-2-19
- P – 33 Emails between ██████████ and ██████████, Esq. enclosing documents, 3-25-19 and 4-12-19
- P – 34 Parent and ██████████ Feedback on MCPS Draft IEP, 4-10-19
- P – 35 ██████████ Occupational Therapy Progress Update, April 2019
- P – 36 MCPS Summary Review of Non-MCPS Occupational Therapy Report, 4-29-19
- P – 37 Emails between ██████████, Meghan M. Probert, Esq. and ██████████ Esq., 4-23-19 to 5-10-19
- P – 38\* ██████████ Speech/Language Progress Report, May 2019
- P – 39 ██████████ Academic Data, 2018-19 School Year
- P – 40 Parental Feedback on MCPS Draft IEP, 5-17-19
- P – 41 Reactions to MCPS Draft IEP by ██████████, 5-20-19
- P – 42 MCPS IEP and Prior Written Notice, 5-22-19 and 5-29-19
- P – 43 Observation Report of ██████████ by ██████████, 6-3-19
- P – 44 Observation Report of ██████████ by parents, 6-3-19
- P – 45\* ██████████ IEP, 6-4-19
- P – 46 Teacher Questionnaire for Dr. ██████████ by ██████████ staff, 6-5-19
- P – 47\* ██████████ Occupational Therapy Annual Report, 6-11-19
- P – 48\* Orofacial Myology/Speech Evaluation by ██████████, 6-11-19
- P – 49 Not Offered for Admission in Evidence
- P – 50 Not Offered for Admission in Evidence
- P – 51 Letter to MCPS serving notice and MCPS response letter, 6-17-19 and 6-28-19
- P – 52\* ██████████ Elementary End of Year Progress Report, June 2019
- P – 53 ██████████ Physical Therapy Re-Evaluation, 7-8-19
- P – 54\* ██████████ Occupational Therapy Summer Report, July 2019
- P – 55\* ██████████ Assessment Summary, Work Samples, and Student Schedule, Fall 2019
- P – 56\* ██████████ IEP Progress Report, October 2019
- P – 57 Observation Report by ██████████, 10-1-19
- P – 58 Not Offered for Admission in Evidence
- P – 59 Not Offered for Admission in Evidence
- P – 60 Not Offered for Admission in Evidence
- P – 60A\* ██████████ Work Samples, November and December 2019

- P – 61 Résumé of [REDACTED]
- P – 62 Résumé of [REDACTED]
- P – 63 Résumé of [REDACTED]
- P – 64 Résumé of [REDACTED]
- P – 65 Résumé of [REDACTED]
- P – 66 Résumé of Dr. [REDACTED]
- P – 67\* Progress Report by [REDACTED], Speech-Language Pathologist & Orofacial Myologist Therapist, 12-10-2019
- P – 68 IEP Service Comparison Chart by [REDACTED] (Not Admitted)
- P – 69 Memorandum to MCPS Elementary School Principals regarding Orton-Gillingham Methodologies, 9-20-18 (Not Admitted)
- P – 70 MCPS Memorandum on Orton-Gillingham Methodologies with accompanying documents, 9-20-18 (Not Admitted)
- P – 71 Comparison of [REDACTED] Levels of Certification (Not Admitted)
- P – 72 Comparison of [REDACTED] Levels of Membership and Certification (Not Admitted)
- P – 73 Orton-Gillingham Classroom Educator (OCGE Level) Web Page (Not Admitted)
- P – 74 Select pages from Early Interventions in Reading, Teacher’s Edition A (Not Admitted)
- P – 75 Federal Register, Volume 64, No. 48, Rules and Regulations, 3-12-99 (Not Admitted)
- P – 76 Withdrawn
- P – 77\* [REDACTED] Reading Assessment Data and Key, Winter 2020
- P – 78\* [REDACTED] Math Assessment Data and Work Sample, 2-10-20
- P – 79\* [REDACTED] Writing Assessment Data and Work Sample, 1-28-20

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

MCPS:

- MCPS – 1 Preschool File Transfer Form from [REDACTED] ES, 6-15-2017
- MCPS – 2 Not Offered for Admission in Evidence
- MCPS – 2A Not Offered for Admission in Evidence
- MCPS – 3 MCPS Occupational Therapy Status Report, 5-8-2017
- MCPS – 4 MCPS Educational Assessment, 5-10-2017
- MCPS – 5 MCPS Observation Report, [REDACTED], [REDACTED], 5-10-17
- MCPS – 6 Prior Written Notice, 1-29-2018
- MCPS – 7 Parent Consent for Release of Information by [REDACTED] to MCPS, 1-25-2018
- MCPS – 8 Teacher Referral completed by [REDACTED], 2-6-2018
- MCPS – 9 [REDACTED] Teacher Report, [REDACTED], [REDACTED] 2-6-2018
- MCPS – 10 Observation at [REDACTED], [REDACTED] [REDACTED], 2-20-2018
- MCPS – 11 IEP Meeting Invitation, 2-23-2018, for 3-8-2018 IEP Meeting
- MCPS – 12 Prior Written Notice, 3-8-2018

MCPS – 13 Service Plan, 3-8-2018  
 MCPS – 14 MCPS Speech Attendance Log/Progress Notes, 3-14-2018 – 6-13-2018  
 MCPS – 15 IEP Progress Report, 4-9-2018 and 6-12-2018  
 MCPS – 16 MCPS Telephone Conference with [REDACTED] ([REDACTED]), 6-1-2018  
 MCPS – 17 [REDACTED] Teacher Report, [REDACTED], 6-4-2018  
 MCPS – 18 Observation at [REDACTED] ([REDACTED]), 2-20-2018  
 MCPS – 19 Prior Written Notice, 6-18-2018  
 MCPS – 20 IEP, 6-18-2018 (with cover letter)  
 MCPS – 21 Not Offered for Admission in Evidence  
 MCPS – 22 Settlement Agreement, 3-6-2019 between parties  
 MCPS – 23 MCPS Classroom Observation of Student at [REDACTED] by [REDACTED], 3-18-2019  
 MCPS – 24 Not Offered for Admission in Evidence  
 MCPS – 25 MCPS Classroom Observation at [REDACTED] by [REDACTED] [REDACTED] 4-2-2019  
 MCPS – 26 [REDACTED] Assessment, 2-12-2019  
 MCPS – 27 IEP [REDACTED], 10-25-2018  
 MCPS – 28 Special Education Consultant Report, [REDACTED], [REDACTED], 12-27-2018  
 MCPS – 29 Not Offered for Admission in Evidence  
 MCPS – 30 Five-Day Disclosure Notice of Documents Provided to Parent/Guardian for Review at an IEP Meeting, 4-3-2019, with Authorization for Assessment (signed on 4-10-2019)  
 MCPS – 31 IEP Feedback from Parents, 4-10-2019  
 MCPS – 32 [REDACTED] Work Samples (provided after April 2019 IEP meeting)  
 MCPS – 33 Orofacial Myofunctional Plan of Care [REDACTED] [REDACTED], 12-4-2018  
 MCPS – 34 [REDACTED], Achievement Test Results, 4-2-2018 (provided after April 2019 IEP meeting)  
 MCPS – 35 [REDACTED] Student Records  
 MCPS – 36 MCPS, Summary Review of Non-MCPS Occupational Therapy Report, 4-29-2019  
 MCPS – 37 [REDACTED], Occupational Therapy Test Score Summary, 9-11-2018 – 2-28-2019  
 MCPS – 38 Private Occupational Therapy Progress Report [REDACTED] [REDACTED] 5-9-2018  
 MCPS – 39 [REDACTED] Occupational Therapy Progress Updates, 4-2019  
 MCPS – 40 Not Offered for Admission in Evidence  
 MCPS – 41 Not Offered for Admission in Evidence  
 MCPS – 42 Reactions to MCPS Draft IEP [REDACTED], [REDACTED] [REDACTED], 5-20-2019  
 MCPS – 43 Prior Written Notice, 5-22-2019  
 MCPS – 44 MCPS Multidisciplinary Evaluation Report, 5-22-2019

- MCPS – 45 Parent Consent for Assessment, 5-22-2019
- MCPS – 46 IEP, 5-22-2019
- MCPS – 47 Prior Written Notice, 11-15-2019
- MCPS – 48 MCPS Physical Disabilities Program, Physical Therapy Evaluation, 6-13-2019
- MCPS – 49 MCPS Team Consideration of External Report (Physical Therapy Re-Evaluation), 11-15-2019
- MCPS – 50 [REDACTED], Private Physical Therapy Re-Evaluation, 7-8-2019
- MCPS – 51 MCPS, Adapted Physical Education Evaluation, 6-13-2019
- MCPS – 52 MCPS Team Consideration of External Report, Progress Report from [REDACTED], 11-15-2019
- MCPS – 53 [REDACTED], Progress Report, 11-11-2019
- MCPS – 54 Parent Consent for Release of Teacher Report/Student Information from [REDACTED] to MCPS 11-12-2019
- MCPS – 55 MCPS Physical Therapy Summary of Telephone Conference, with [REDACTED], 11-15-2019
- MCPS – 56 MCPS Physical Therapy Summary of Telephone Conference with [REDACTED], PT, [REDACTED], 11-22-2019
- MCPS – 57 MCPS Physical Education Summary of Observation, [REDACTED] 12-13-2019
- MCPS – 58 MCPS Infants and Toddlers Observation Form of Student at [REDACTED], 11-17-2015
- MCPS – 59 MCPS Team Consideration of External Report ([REDACTED] 2016), 6-4-2016
- MCPS – 60 Speech and Language Report, [REDACTED], 4-3-2016
- MCPS – 61 [REDACTED] Neuropsychological Evaluation, Summary Report, 11-2016
- MCPS – 62 [REDACTED] Neuropsychological Evaluation, 11-2016
- MCPS – 63 MCPS Telephone Conference Summary with [REDACTED] [REDACTED], 2-21-2017
- MCPS – 64 Therapy Status Report, [REDACTED], 11-1-2017
- MCPS – 65 Therapy Status Report, [REDACTED], 3-31-2018
- MCPS – 66 Not Offered for Admission in Evidence
- MCPS – 67 Résumé of [REDACTED]
- MCPS – 68 Résumé of [REDACTED]
- MCPS – 69 Résumé [REDACTED]
- MCPS – 70 Résumé of [REDACTED]
- MCPS – 71 Résumé [REDACTED]
- MCPS – 72 Not Offered for Admission in Evidence
- MCPS – 73 Not Offered for Admission in Evidence
- MCPS – 74 Résumé of [REDACTED]

There were no other exhibits offered or admitted.