

██████████,
STUDENT
v.
MONTGOMERY COUNTY
PUBLIC SCHOOLS

BEFORE LORRAINE E. FRASER,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-20-25740

DECISION ON REMAND

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

STATEMENT OF THE CASE

Background

On September 23, 2016, ██████████ (Parent) on behalf of his son, ██████████ (Student), mailed a Due Process Complaint (Complaint) to the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). The request for hearing was received by the OAH and MCPS on September 26, 2016. The Parent waived the resolution session and mediation. The Parent had previously filed a complaint related to this case with the Maryland State Department of Education (MSDE) on May 5, 2016. On July 1, 2016, MSDE found that MCPS acknowledged that the Student did not receive special education instruction in math in a separate special education classroom. MSDE further found that the Student received special education instruction in reading in a separate special education classroom.

In the Complaint, the Parent alleged that the Student did not receive special education instruction in math in a separate special education classroom from May 5, 2015 through May 5, 2016, as stated in the Student's Individualized Education Program (IEP). The Parent's requested remedy was compensatory services of 270 hours of outside math tutoring and reimbursement for neuropsychological/achievement testing.

I held a telephone prehearing conference on October 13, 2016. The Parent represented himself. Zvi Greismann, Esquire, represented MCPS. By agreement of the parties, the hearing was scheduled for November 2 and 3, 2016.

I held the hearing on November 2 and 3, 2016. The Parent represented himself. Mr. Greismann represented MCPS. The hearing dates requested by the parties were within the forty-five day period after the triggering events described in the federal regulations. As a result, my decision was due, and issued, on the forty-fifth day: November 10, 2016. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2016).

The legal authority for the hearing was as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2016); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case was governed by the contested case provisions of the Administrative Procedure Act; MSDE procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

On November 10, 2016, I issued a decision in this case dismissing the September 2016 due process complaint filed by the Parent. I concluded that MCPS had provided the Student with a free appropriate public education (FAPE) and MCPS was not required to provide the Student compensatory services in math.

Remand Order

On August 19, 2019, the United States District Court for the District of Maryland remanded this case to the OAH. However, the OAH was not notified of the remand until the Parent called the OAH on November 9, 2020 inquiring about the status of the case. Specifically, the court ordered that I “reweigh the evidence under the *Andrew F.* standard.” [REDACTED] v. *Montgomery County Public Schools*, No. [REDACTED] slip op. at 5 (D. Md. Aug. 19, 2019) (citing *Andrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017)).

On November 24, 2020, I conducted a telephone pre-hearing conference in the captioned matter. The Parent participated on behalf of the Student. Leslie Turner Percival, Esquire, participated on behalf of MCPS.

During the prehearing conference, the parties agreed that I should base my decision on the original record and that additional evidence was not needed. I explained that I would need copies of the transcripts of the hearing held on November 2 and 3, 2016 and of all the exhibits. I proposed, and the parties agreed, to issue a decision thirty days after I received the complete record.

On December 18, 2020, OAH received the administrative record from MSDE. Thirty days from that date is Sunday, January 17, 2021. Monday January 18, 2021 is the Martin Luther King holiday. Thus, my decision is due the next business day, Tuesday January 19, 2021.

ISSUES

The issues are whether the Student was denied FAPE requiring compensatory services in math, and if so, how many hours; and whether MCPS is required to reimburse the Parent for the cost of the neuropsychological/achievement testing.

SUMMARY OF THE EVIDENCE

Exhibits¹

I admitted the following exhibits on behalf of the Parent, except as noted:

- Parent 1 Résumé for [REDACTED], PsyD., [REDACTED]
- Parent 2 Special Education State Complaint Form, 5/1/16
- Parent 3 Letter to the Parent from Lindsay E. Brecher, Acting Supervisor, Resolution and Compliance Unit, MCPS, 5/10/16
- Parent 4 Letter to the Parent from Dori Wilson, Chief, Family Support and Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE, 5/17/16
- Parent 5 Neuropsychological Evaluation, Dr. [REDACTED], 4/28/16-6/2/16
- Parent 6 Letter to Ms. Wilson, MSDE, from Chrisandra A. Richardson, Associate Superintendent, MCPS, 6/23/16
- Parent 7 MSDE investigation results, 7/1/16
- Parent 8 Letter to the Parent from Tracee N. Hackett, Supervisor, Resolution and Compliance Unit, MCPS, 7/29/16
- Parent 9 Email to Anca Grindeanu, Administrative Legal Assistant, Michael J. Eig and Associates, P.C., from [REDACTED], Principal, [REDACTED] Elementary School ([REDACTED]), 8/12/16; with attached letter to Ms. [REDACTED] from Mr. Eig, 8/12/16
- Parent 10 Letter to Mr. Greismann from Mr. Eig, 8/24/16
- Parent 11 Letter to Mr. Eig from Mr. Greismann, 8/31/16
- Parent 12 Not admitted
- Parent 13 Due Process Complaint, 9/22/16
- Parent 14 Email to the Parent and his wife from Ms. [REDACTED] 9/27/16
- Parent 15 Letter to the Parent from Ms. Hackett, 9/27/16
- Parent 16 Letter to OAH from Mr. Greismann, 9/28/16
- Parent 17 Letter to the Parent and his wife from Ms. [REDACTED] 9/30/16

¹ The Parent and MCPS prenumbered their exhibits; I have retained their numbering. Some exhibits are duplicative of the other party's exhibits. Please note, not all exhibits were offered and/or admitted into evidence.

- Parent 18 Not admitted
- Parent 19 Not admitted
- Parent 20 Not admitted
- Parent 21 The Student's weekly class schedule, 2016-2017 school year
- Parent 22 The Student's weekly class schedule, 2015-2016 school year
- Parent 23 IEP, 3/24/15
- Parent 24 Notice of IEP meeting, 12/15/15
- Parent 25 Letter to the Parent and his wife from Ms. [REDACTED], 2/26/16; IEP, 3/22/16
- Parent 26 Mathematics Assessment Report, 2015-2016
- Parent 27 Measures of Academic Progress in Reading (MAP-R) results, 6/9/16
- Parent 28 Measures of Academic Progress in Primary Math (MAP-P) results, Winter 2014-2015
- Parent 29 Instructional recommendations for math and reading, 6/1/15
- Parent 30 The Student's report cards, 2014-2015 school year, 2015-2016 school year, 1st quarter 2016-2017 school year

I admitted the following exhibits on behalf of MCPS:

- MCPS 2 IEP, 3/24/15
- MCPS 4 IEP, 3/22/16
- MCPS 6 MAP Data for the Student 2012-2016; MAP Normative Data 2011; MAP Normative Data 2015
- MCPS 7 The Student's third grade Report Card, 6/16; Academic Student Profile, 10/25/16; A Parent's Guide to the Curriculum for Kindergarten, First Grade, Second Grade, Third Grade, Fourth Grade
- MCPS 8 The Student's weekly class schedule, 2015-2016 school year
- MCPS 13 MSDE investigation results, 7/1/16
- MCPS 14 Letter to Ms. Wilson, MSDE, from Ms. Richardson, MCPS, 9/1/16

MCPS 15 Email to Ms. Hackett, Patricia Grundy, and Maria Bloom from Nancy Birenbaum, Compliance Specialist, Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE, 9/2/16

MCPS 17 Résumé for [REDACTED]

MCPS 20 Résumé for [REDACTED]

MCPS 23 Résumé for [REDACTED]

Testimony

The Parent testified and presented the following witnesses:

- [REDACTED], Principal, [REDACTED] Elementary School (formerly Assistant Principal at [REDACTED] [REDACTED] during the 2014-2015 school year);
- [REDACTED], Principal, [REDACTED] Elementary School (formerly Principal Intern at [REDACTED] during the 2015-2016 school year);
- [REDACTED], Third Grade Teacher, [REDACTED] accepted as an expert in elementary school instruction;
- [REDACTED], PsyD., [REDACTED], accepted as an expert in developmental neuropsychology with a specialization in autism;
- [REDACTED], Special Education Teacher, [REDACTED], accepted as an expert in special education.

MCPS presented the following witnesses:

- [REDACTED], Third Grade Teacher, [REDACTED], accepted as an expert in elementary school instruction;
- [REDACTED], Special Education Teacher, [REDACTED], accepted as an expert in special education;
- [REDACTED], Instructional Specialist, MCPS, accepted as an expert in special education with an emphasis in instructional math and reading.

FINDINGS OF FACT

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

1. In November 2016, the Student was a nine year old boy with autism, attention deficit hyperactivity disorder (ADHD), and anxiety. He was high functioning and capable of learning on grade level. His disabilities affected his communication, social skills, organization, attention, self-help skills, and reading, math, and writing skills. His anxiety increased during testing and with changes in routine.

2. During the 2014-2015 school year, the Student was in the second grade at [REDACTED]. During the 2015-2016 school year, he was in the third grade at [REDACTED]. In November 2016, he was in the fourth grade at [REDACTED].

3. Throughout the Student's education in MCPS he has had an IEP.

4. As of March 2015, the Student was performing on the first/second grade level in math, which was below grade level.

5. The Student's March 24, 2015 IEP contained the following goal and objectives in math. Goal: the Student "will analyze number relations, compute, and apply knowledge to whole numbers and place value using a variety of strategies." MCPS 2. Objective 1: "Recognize when it is necessary to compose or decompose a ten or hundred in an addition or subtraction problem." *Id.* Objective 2: "Add and subtract three digit whole numbers using a variety of strategies." *Id.* Objective 3: "Identify the place value of a digit in whole numbers to 999, and apply knowledge of place value to compare numbers to 999 using $<$, $>$, and $=$." *Id.* Objective 4: "Solve addition and subtraction word problems." *Id.*

6. The Student's March 24, 2015 IEP provided that the Student would receive ten hours per week of special education instruction outside the general education classroom in

reading and math. The IEP did not specify how many hours were to be in reading and how many hours were to be in math.

7. From the end of March 2015 through the 2015-2016 school year, the Student received six and one half hours per week of special education instruction outside the general education classroom in reading (known as pull out services).

8. From March 2015 through the 2015-2016 school year, the Student received special education instruction in the general education classroom in math (known as plug in services). He did not receive the three and one half hours per week in special education instruction in math outside the general education classroom as required by his IEP.

9. During third grade (2015-2016 school year), the Student received math instruction on grade level in small groups with preferential seating, extended time, hands on manipulatives, and the math vocabulary posted on the wall. He received additional support and practice to develop his understanding of math concepts. The small groups generally had two to three students but never more than six students.

10. The Student had a 1:1 paraeducator, [REDACTED], who assisted him in math. Ms. [REDACTED] was a student in the process of getting her degree in special education. Her assistance included helping the Student with self-regulation, anxiety, controlling the volume of his voice, and listening to him read word problems aloud.

11. During third grade, the Student's general education teacher, Ms. [REDACTED], consulted regularly with his special education teacher, Ms. [REDACTED]. Ms. [REDACTED] also observed the Student's math instruction in the classroom.

12. During a December 2015 IEP meeting, the IEP team, including the Parent, discussed the Student's math instruction in the general education classroom and the progress he was making.

13. During the third grade, the Student made progress on his math goal. He met objectives one, two, and three. The Student needed additional support in the area of word problems (objective four). Sometimes the Student could solve the word problems on his own; other times he would need support from Ms. [REDACTED] or Ms. [REDACTED]. He performed on grade level on many assessments throughout the year.

14. The Student benefited from participating with typically developing peers during math instruction. The Student was exposed to the reasoning language the other students used. Also, the Student had socialization goals on his IEP and he had developed friendships in his class.

15. As of March 22, 2016, the Student was performing on grade level in math with support, based on testing, assessments, and teacher observations. His March 22, 2016 IEP had two new math goals, one for word problems and one for fractions. The IEP provided that he would receive math instruction in the general education classroom with the ability to pull him out for additional reteaching of math concepts if needed.

16. At the end of third grade, the Student was rated proficient overall in math. He was rated proficient in measurement and data, number and operations in base ten, and number and operations – fractions. He was rated in progress in geometry and operations and algebraic thinking.

17. Standardized testing alone shows the Student has consistently progressed each year; however, he has consistently performed below grade level on such tests.

18. From the fall of 2014 to the spring of 2015, during second grade, the Student's overall score on the MAP-P (primary math) increased fourteen points. The growth norm for second grade children was an increase of 13.1 points. Thus, the Student's growth was .9 points

more than the norm. In the fall, he was performing on the kindergarten/first grade level. In the spring, he was performing on the first to second grade level.

19. From the fall of 2015 to the spring of 2016, during third grade, the Student's overall score on the MAP-M² increased fourteen points. The growth norm for third grade children was an increase of thirteen points. Thus, the Student's growth was one point more than the norm. In the fall, he was performing on the first grade level. In the spring, he was performing on the first to second grade level.

20. Dr. [REDACTED] assessed the Student's intellect, achievement, memory function, language ability, visual-motor skills, social/adaptive functioning, and emotional/behavioral functioning on the following dates: April 28, 2016, May 5, 17, 19, and 20, 2016, and June 2, 2016.

21. On the Wechsler Intelligence Test for Children – Fifth Edition (WISC-V), an intellectual assessment, the Student's standard score in arithmetic was seven, placing him in the sixteenth percentile. His full scale IQ was ninety-two, placing him in the thirtieth percentile.

22. On the Wechsler Individual Achievement Test – III (WIAT-III), an achievement assessment, the Student's standard score in math problem solving was eighty-one, placing him in the tenth percentile at a 2.2 grade equivalent.

DISCUSSION

The Parties' Arguments

The Parent alleges that the Student did not receive special education instruction in math in a separate special education classroom from May 5, 2015 through May 5, 2016, as stated in the Student's IEP. The Parent's requested remedy is compensatory services of 270 hours of

² Measures of Academic Progress in Math.

outside math tutoring and reimbursement for neuropsychological/achievement testing. The Parent argues that the Student did not receive pull out instruction in math for 3.75 hours per week. The Parent asserts that the Student's general education teacher was unaware that the Student was supposed to be pulled out for math and that his special education teacher was aware but chose not to do so. The Parent contends that the neuropsychological testing showed the Student was performing on a 2.2 grade level at the end of third grade, 1.8 grade levels behind. The Parent maintains that the Student needs thirty minutes of outside math tutoring per day in addition to daily small group instruction and one hour of 1:1 check in a week. The Parent maintains further that Dr. [REDACTED] should reevaluate the Student in six months and twelve months. The Parent argues that MCPS's failure to implement the Student's IEP was a "concealed" violation and denial of FAPE. The Parent asserts that MCPS has an obligation to implement the IEP as written.

MCPS admits that it did not provide the Student with three and one half hours per week in special education instruction in math outside the general education classroom as required by his March 24, 2015 IEP. Rather, MCPS asserts that it provided the Student with special education instruction in the general education classroom in math which appropriately addressed his needs. MCPS notes that this same issue was the subject of a complaint the Parent filed with MSDE, that MCPS admitted its error and offered thirty-six hours of tutoring in math as compensation, and that MSDE found the error caused minimal educational impact and was resolved by the offered thirty-six hours of tutoring. MCPS contends that the issue before me is whether it provided the Student with FAPE when it provided him with special education instruction in the general education classroom. MCPS maintains that the Student received educational benefit and made significant progress in math. MCPS notes that the Student received what Dr. [REDACTED] recommended in her report – small group instruction with 1:1 support – and that Dr. [REDACTED] did

not recommend pull out instruction for math. MCPS notes further that Dr. [REDACTED] stressed the importance of the Student receiving instruction with typically developing peers. MCPS maintains that Dr. [REDACTED]'s recommendation at the hearing that the Student should be pulled out for so many hours was unsupported by the evidence. MCPS argues that the Student was not denied FAPE, did not lose educational opportunity, and is not entitled to compensatory services.

Legal Framework

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). Accordingly, the Parent has the burden of proving it is more likely than not that MCPS failed to provide the Student FAPE when it provided the Student's specialized instruction in the general education classroom rather than a separate classroom. For the reasons discussed below, I find in favor of MCPS.

The identification, assessment and placement of students in special education are governed by IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2016); 34 C.F.R. pt. 300 (2015); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2016); and COMAR 13A.05.01. IDEA provides that all children with disabilities have the right to FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (2010). The requirement to provide FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined FAPE as follows:

Implicit in the congressional purpose of providing access to a "free appropriate public education" 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 give educational benefit to the handicapped child.

Rowley, 458 U.S. at 200-201 (footnote omitted). In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-207. See also *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. at 176. Instead, FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive some educational benefit. The United States Court of Appeals for the Fourth Circuit declined to interpret IDEA to require “meaningful” benefit, rather than “some” benefit, reiterating that “a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.” *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015).

Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or received passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. See *In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991) (finding that a student’s passing grades and advancement does not resolve the inquiry as to whether FAPE has been afforded to the student). Similarly, a finding that a student is not progressing at the same speed as his or her peers does not shed light on whether a student has failed to gain educational benefit. As

discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically from those obtained by another student, depending on the needs that are present in each student. *Rowley*, 458 U.S. at 202.

In addition to IDEA's requirement that a child with a disability receive some educational benefit, the child must be placed in the "least restrictive environment" to the maximum extent appropriate, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i) (2014). Indeed, instructing children with disabilities with non-disabled peers is generally preferred, if the student with disabilities can achieve educational benefit in the general education program. *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). Placing children with disabilities into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. Nonetheless, the issue is not whether another placement is better for the student but whether the school district has offered FAPE.

Andrew F.

Subsequent to the issuance of my decision in the case on November 10, 2016, the U.S. Supreme Court issued its ruling in *Andrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017). In its remand order in this case, the U.S. District Court directed me to reconsider the evidence in light of the Court's ruling in *Andrew F.*

In *Andrew F.*, the Court upheld the standard it established in *Rowley*, specifically that "a child has received a FAPE, if the child's IEP sets out an educational program that is 'reasonably calculated to enable the child to receive educational benefits.'" 137 S.Ct. at 995-996 (quoting *Rowley*, 458 US at 207). The Court explained: "For children receiving instruction in the regular

classroom, this would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” *Id.* at 996 (quoting *Rowley*, 458 U.S. at 204). The Court noted that the student in *Rowley* was making excellent progress in the regular education classroom with the wireless transmitter and hearing aid provided by the school and declined to order a sign-language interpreter. *Id.* at 994-995. The Court found IDEA “guarantees a substantively adequate program of education to all eligible children.” *Id.* at 995.

The Court in *Andrew F.* explicitly rejected the Tenth Circuit’s diluted interpretation of *Rowley* that had found “a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely . . . more than de minimis.’” 137 S.Ct. at 991 (quoting the 10th Circuit in *Andrew F.*, 798 F.3d 1329, 1338). The Court held: “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S.Ct. at 999. The Court declined to define what appropriate progress would be in a given case, noting that courts should not “substitute their own notions of sound educational policy for those of the school authorities which they review.” *Id.* at 1001 (quoting *Rowley* 458 U.S. at 206). The Court did not rule on the appropriateness of the IEP in *Andrew F.*, but remanded the case for further proceedings. *Id.* at 1002.

MCPS Provided the Student FAPE

The issue in this case is not the same as the issue presented in *Andrew F.* The issue in this case is not whether the Student’s IEP was appropriate. Rather, the Parent is contending that MCPS failed to implement the Student’s IEP as written. The Student’s IEP provided that he would receive ten hours total per week of special education instruction outside the general education classroom in reading and math, but did not specify how many hours of each subject. The Student received six and one half hours per week of pull out services in reading, but did not receive any pull out services in math. Instead, the Student received specialized instruction in

math in the general education classroom, *i.e.*, plug in services. Thus, the issue is whether MCPS's failure to follow the IEP as written and instruct the Student in math outside the general education classroom denied him FAPE. As discussed below, the evidence shows that the Student's IEP should have been amended from pull out services in math to plug in services in math. The Student was making progress in math with plug in services; thus, pull out services were overly restrictive for the Student and not the least restrictive environment. Further, the evidence shows that the Student was provided FAPE because he made progress in math appropriate to his circumstances.

Ms. [REDACTED] was the Student's third grade general education teacher. Ms. [REDACTED] was the Student's special education teacher during third grade. Ms. [REDACTED] said that she consulted regularly with Ms. [REDACTED] regarding the Student's math instruction. Ms. [REDACTED] testified that she instructed the Student in math on the third grade level in small groups with preferential seating, extended time, hands on manipulatives, and the math vocabulary posted on the wall. She stated he needed a lot of support and additional practice and repetition to develop his understanding of math concepts. She noted that at the end of his second grade year he was performing some skills on the first grade level and some skills on the second grade level. She said that he performed on the third grade level on many assessments throughout the third grade year. She testified that during math the class was broken into four groups and that the Student worked in small groups that generally had two to three students but never more than six students. She stated the Student had a 1:1 paraeducator, [REDACTED], who assisted him in math, including helping the Student with self-regulation, anxiety, controlling the volume of his voice, and listening to him read word problems aloud. She said Ms. [REDACTED] was a student in the process of getting her degree in special education. She testified that the Student met three of his four math objectives. She explained that he needed additional support to solve word problems (the fourth

objective); sometimes he could do them on his own but other times he needed support from her or Ms. [REDACTED]. She testified that the Student definitely made progress on his math goal and objectives. She stated that she used strategies for the Student and other students during his math instruction. She identified the various tools she used to assess the Student's progress, including the MAP-M, exit cards, and in-class assessments and observations.

Ms. [REDACTED] stated that she used the Student's MAP-M scores, summative assessments, formative assessments, and teacher observations and found that he was making progress in the third grade math curriculum. She explained that in the fall of third grade the Student scored in the fifth percentile on the MAP-M and by winter he scored in the eleventh percentile, which showed progress. She explained further that she conducted formative assessments on a very frequent basis, where the Student would demonstrate his understanding of a concept that they had been working on that day or for several days. She said the Student was proficient on some skills and was in the process of learning other skills. She said very rarely would the Student not understand the concept at all. She testified that the Student made significant progress in her third grade class based on all the indicators. She explained that the MAP-M scores were just one data point, they did show progress, but she also considered his MAP-M scores in light of his anxiety during testing.

Ms. [REDACTED] testified further that the Student benefited from being in the math class with his peers. She explained that he was exposed to reasoning language the other students were using and there were many strong students who consistently modeled appropriate skills. She explained further that interacting with the other students in math helped develop his understanding and helped give him the math language that he needed to use. She noted the Student had socialization goals on his IEP. She said the other students modeled appropriate behavior and were very understanding of the Student's behavior, which helped him to be

successful in the classroom. She described the students in the class as very compassionate toward the Student and said he developed friendships in class. She stated the classroom was a very good setting for him. In addition, she noted that the Student sometimes displayed anxious, disruptive behaviors when he was pulled out of the classroom for specialized instruction and she and his reading teacher discussed calming strategies to help him with the transition. She testified that she believed the Student was getting the best possible experience in her third grade classroom.

Ms. [REDACTED] explained that before the Student started third grade, she discussed the Student's needs and the services he was receiving with his second grade teacher. She said the March 24, 2015 IEP was developed before he was her student. In the second grade, the Student was instructed in math in the general education classroom with a 1:1 aide. She stated the Student was meeting his goals and objectives in third grade math, earned Ps (for proficient) or Is (for in progress) on his report card, and showed progress on his MAP-M scores. She explained that she did not pull him out of the general classroom for math because she and Ms. [REDACTED] did not see a need to pull him out of the regular classroom for math and it would not have been appropriate. She explained further that if the Student did not understand a concept, she would have pulled him out of the general classroom for reteaching, including modeling and independent practice to ensure he was keeping up with the curriculum. She testified that she did pull out the Student daily for reading instruction for a total of six and one half hours per week. In addition, the Student was pulled out of the general classroom for speech therapy and for occupational therapy. She said the Student was instructed in the general classroom in small groups with a 1:1 aide and follow up with Ms. [REDACTED]. She said the classroom was not loud or chaotic at all and was the perfect setting for the Student. She stated the Student responded well to structure, enjoyed being part of the classroom, and wanted to do well. She testified that during the December 2015 IEP

meeting the IEP team discussed that the Student was not being pulled out of the general classroom for math. She offered to pull the Student out, evaluate him, and see if he qualified for pull out services. She apologized for the paperwork error, explaining that it was a “carry over mistake” from the second grade. She stated that she did not know why the Student’s IEP was not updated earlier to show that he did not need pull out services for math. She testified that she collaborated frequently with Ms. [REDACTED] and Ms. [REDACTED]. She said that small groups were the optimal setting for the Student and he did very well in math, including receiving proficient and in progress ratings, that his MAP-M scores increased, and that he met his IEP goals and objectives. She stated that Ms. [REDACTED] is one of the best teachers she has worked with, she has great classroom management skills, runs her class smoothly and efficiently, and she has a lot of experience. She described Ms. [REDACTED]’s class as very quiet, not loud and chaotic. She stated that Dr. [REDACTED] observed the Student during his pull-out reading instruction with her but did not observe him in his math class with Ms. [REDACTED]. She said that Dr. [REDACTED] also observed the Student when he returned to his general classroom for the last ten minutes of the Literacy Reading and Writing Workshop before lunch and recess. She stated that the Student missed work during the pull-out sessions and liked to use that time before lunch to complete his assignments.

Ms. [REDACTED] testified that testing is anxiety provoking for the Student. She stated that his MAP-P and MAP-M scores show the Student’s growth from year to year. She said that the Student made progress during third grade and that he was instructed and assessed on grade level. She stated that it was beneficial for the Student to be in the general education classroom interacting with his peers and that he demonstrated progress in this setting. She testified that “rehab,” as suggested by Dr. [REDACTED] is not an educational term and that MCPS is charged with instructing students in the least restrictive environment. She said the Student received

specialized instruction and support, which ensured he understood what he read and the math concepts. She stated MCPS tries to close achievement gaps but that there is no guarantee. She agreed what is written on the IEP should be implemented. She stated that the Student does not need compensatory services. She explained that his in-class performance is higher than testing alone shows because he becomes very anxious during testing.

Dr. [REDACTED] testified that the Student has autism and is high functioning. She stated his ADHD is really an inability to regulate himself and his attention. She said executive functioning is a weak area for him. She said that he is capable of learning on grade level but needs significant support. She stated that his cognitive scores had a lot of variability but were all within the average range. She noted he had a twenty-nine point split between his lowest and highest cognitive scores, which occurs in less than two percent of the population. She noted further that his sequential processing score was in the third percentile, significantly below average, and that math computation was heavily reliant on sequential processing. She stated that his weakness in sequential processing would make math more challenging for him. She said the Student mastered the 2.2 grade level in math on the WIAT-III. She noted the MAP-M is academically based and agreed that the Student made progress on the Common Core third grade curriculum. She described the Student as happy, immature, enthusiastic, earnest, and wanting to please. She said he has difficulty sustaining conversation and following social cues. She described him as extremely anxious and said that his anxiety feeds his dysregulation, which then increases his anxiety, and the more anxious he becomes, the more difficult it is for him to maintain his attention. She said that as the degree of challenge increased during her testing of the Student, he became more anxious and dysregulated. She stated he was easily over-stimulated and over-activated, even in a one on one testing situation. She said he thrives with structure and routine and is more comfortable when he knows what is going to happen. She stated during

testing the Student was interested, willing, and in constant motion. She said as the work became more challenging, he became more anxious and dysregulated and that she had to use all of her “tricks” to get him to complete the assessments. She testified that she observed the Student in the resource room and that he was on task ninety percent of the time but as the tasks got harder, he became more unsettled, getting up, tapping on the desk, and dropping things on the floor. She said she also observed the Student in his general education class working on his animal habitat project. She said the teacher gave the Student 1:1 assistance with the computer and that it took him a long time to get on task; he was more interested in going to lunch and recess. In her report and at the hearing, she recommended a supportive environment, that all of the Student’s academic instruction be in small groups of six to eight students, and that he be reevaluated in six months. At the hearing, she testified that the Student had an educational gap in math and recommended that he receive intense compensatory services in math for a year to see how quickly he could close the gap. She recommended four thirty-minute individual or small group sessions a week and an additional one hour small group session per week for one year as “rehab.” This recommendation was not in her report. She said the goal would be for the Student to be in the regular education classroom and work in a small group setting.

On cross examination, Dr. [REDACTED] said that she looked at the Student’s IEP but did not know which one. She stated that she did not recall if math was an area of need on his IEP. She admitted that she did not observe the Student in his math class. She said that she was not aware that the Student had a 1:1 paraeducator and did not see the aide with him during the general education class, lunch, or recess. She agreed that he benefited from exposure to typically developing peers. She said instructing the Student in small groups of six to eight students was appropriate if the environment was calm and quiet and his dysregulation was managed. She

stated that in a chaotic, loud environment, six to eight students would be challenging and the teacher should follow up with episodes of 1:1 support.

I find Dr. [REDACTED]'s recommendation for one year of compensatory services is unsupported by the evidence before me. Ms. [REDACTED] and Ms. [REDACTED] testified that the Student was instructed in the third grade math curriculum and made progress on his goals and objectives in math with specialized supports, including small group instruction, in the general education setting. Ms. [REDACTED] said the Student was performing on the third grade level with support and was proficient in third grade math. Dr. [REDACTED] agreed the Student made progress in the third grade math curriculum. Dr. [REDACTED] acknowledged that the Student was anxious during her testing. Moreover, Dr. [REDACTED] did not observe the Student during math instruction, and only observed him in the general education classroom for the last ten minutes of class before lunch and recess. The majority of Dr. [REDACTED]'s classroom observation was of the pull out services for reading. Ms. [REDACTED] explained that the Student's anxiety during testing would cause his test scores to be lower than his actual classroom performance. Dr. [REDACTED] agreed the Student was anxious during her testing. The Student received small group instruction in math with supports, which is what Dr. [REDACTED] recommended in her report. Based on the Student's progress in math, I conclude that the Student received educational benefit from the specialized instruction he received in math in the general education classroom. In addition, I find that math instruction in the general education classroom was the least restrictive environment for the Student.

The error in this case was with the IEP written while the Student was in the second grade, which stated that he should be pulled out for reading and math instruction for ten hours per week without specifying how many hours for each subject. A child should be educated in the least restrictive environment. In this case, pulling the Student out of the general education classroom

for math instruction would have been too restrictive. The Student was able to make academic progress in the general education classroom with specialized instruction and supports.

I am sympathetic to the Parent's concerns. The Student's IEP said that he should be pulled out for reading and math instruction ten hours per week. The Student was pulled out of the general education classroom for six and a half hours per week for reading instruction. It was reasonable to conclude that the Student should have been pulled out for math three and one half hours per week. Thus, it is understandable that the Parent is upset that the Student did not receive the instruction that the Parent thought he would receive. The Parent appropriately addressed his concerns to MSDE and he received a response in his favor. While the Parent is dissatisfied with that response, MSDE's complaint resolution is not before me.

I also understand the Parent's concern that the Student tested below grade level. However, all the evidence shows that the Student's testing performance does not fully and accurately describe his academic ability. The Student's anxiety during testing impacts his performance on tests. According to teacher observations and in-class assessments, the Student was able to perform on grade level with specialized instruction and supports; thus, he received educational benefit. IDEA is designed to offer children with disabilities educational benefit appropriate to their circumstances. IDEA does not guarantee that a child's education will be maximized or that a child will perform or test on grade level.

The standard I must apply in this case is whether the Student was provided FAPE. The evidence before me shows that the Student made academic progress and received educational benefit appropriate to his circumstances. I find that the Student was provided FAPE; therefore, he does not require compensatory services. Thus, MCPS is not required to provide the Student with 270 hours of outside math tutoring and is not required to reimburse the Parent for neuropsychological/achievement testing.

Remand

In the remand order, the U.S. District Court wrote:

On remand, the ALJ should more specifically evaluate the impact of various pieces of evidence on the overall assessment of [the Student's] progress. For example, in reaching a determination, the ALJ should account for [the Student's] topic-specific performance on the MAP-M test, which suggests that, while his overall rate of progress might be slightly higher than his peers, his rate of progress on three of the four subjects tested lags demonstrably behind. The ALJ's determination should also account for [the Parent's] testimony that, while in the third grade, [the Student] received weekly private tutoring in math, and what impact that tutoring may have had on [the Student's] progress that would not be attributable to his in-school instruction.

In particular, the ALJ should explain why, in instances of contradictory testimony relating to assessments of [the Student's] progress, she has chosen to credit certain witnesses and not others, such as her apparent crediting of [redacted]'s testimony as to the reasons for [the Student's] testing anxiety over that of Dr. [redacted]. The ALJ should also address how she reconciles Dr. [redacted]'s assertion the [the Student] has the cognitive ability to be performing at grade level in math with [the Student's] test results and the testimony of his MCPS teachers.

[redacted] v. *Montgomery County Public Schools*, No. [redacted] slip op. at 6 (D. Md. Aug. 19, 2019).

I did not find the testimony of Ms. [redacted], Ms. [redacted], Ms. [redacted], and Dr. [redacted] regarding the Student's cognitive ability or test anxiety to be contradictory. All four witnesses agreed that the Student was capable of performing on grade level in math. Ms. [redacted], Ms. [redacted], and Ms. [redacted] testified that the Student was performing on grade level in math. All four witnesses agreed the Student was anxious during testing. Dr. [redacted] in particular noted that as the test questions became more challenging the Student became more anxious and dysregulated. Dr. [redacted] did not observe the Student in his math class, nor did she review any of his in-class performance or work. Thus, Dr. [redacted]'s opinion of the Student's ability in math is limited to his testing performance.

The conclusion I drew from all the evidence was that testing was not the best measure of the Student's performance. All the evidence showed that the Student's anxiety during testing

would cause him to not demonstrate his full capabilities on tests. Rather, the truer measure of the Student's abilities in math was his actual performance on third grade level work in the classroom. Thus, I found the testimony of the Student's teachers – Ms. [REDACTED] and Ms. [REDACTED] – the people who actually observed him perform in math on a daily basis, to be more credible and more compelling as to the Student's performance in math on the third grade level. For these same reasons, the Student's topic-specific performance on the MAP-M was also not a full measure of the Student's abilities in math. All of the evidence shows that the Student performed best when he was in the familiar setting of his classroom following his familiar routines. Therefore, I found the Student's performance in the classroom on third grade level math to be the most accurate measure of his performance. As a result, I found that the specialized instruction provided to the Student in the general education classroom allowed him to perform on grade level and provided him with FAPE.

Finally, I am at a loss to answer the request that I “account for [the Parent's] testimony that, while in the third grade, [the Student] received weekly private tutoring in math, and what impact that tutoring may have had on [the Student's] progress that would not be attributable to his in-school instruction.” No educator or other witness could or did identify what portion of the Student's progress was attributable to the instruction he received in school versus the instruction he received from tutoring. Dr. [REDACTED] did not provide any such testimony. Ms. [REDACTED] was the only witness questioned on this point. In response to a question from the Parent, Ms. [REDACTED] stated that she could not determine what portion of the Student's progress came from his instruction in school versus his after-school program. She testified that she did not know what the after-school program entailed, but even if she did, she could not definitively say what portion of his progress could be attributable to his after-school program. She said she could only testify as to how the Student's instruction in school benefitted him.

For all of the above reasons, I found that the Student made progress in third grade math appropriate to his circumstances. Therefore, I found MCPS provided FAPE to the Student.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student was provided FAPE; therefore, he does not require compensatory services in math. 20 U.S.C.A. § 1412(a)(1)(A), (a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i) (2014).

Andrew F. v. Douglas County School District, 137 S.Ct. 988 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015); *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004); *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983).

ORDER

I **ORDER** that the September 26, 2016 Due Process Complaint filed by the Parent on behalf of the Student is hereby **DISMISSED**.

January 15, 2021
Date Decision Mailed

Lorraine E. Fraser
Administrative Law Judge

LEF/dlm
#189841

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2020). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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

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

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

████████████████████,
STUDENT
v.
MONTGOMERY COUNTY
PUBLIC SCHOOLS

BEFORE LORRAINE E. FRASER,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-16-29351

FILE EXHIBIT LIST¹

I admitted the following exhibits on behalf of the Parent, except as noted:

- Parent 1 Résumé for ██████████, PsyD., ██████████
- Parent 2 Special Education State Complaint Form, 5/1/16
- Parent 3 Letter to the Parent from Lindsay E. Brecher, Acting Supervisor, Resolution and Compliance Unit, MCPS, 5/10/16
- Parent 4 Letter to the Parent from Dori Wilson, Chief, Family Support and Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE, 5/17/16
- Parent 5 Neuropsychological Evaluation, Dr. ██████t, 4/28/16-6/2/16
- Parent 6 Letter to Ms. Wilson, MSDE, from Chrisandra A. Richardson, Associate Superintendent, MCPS, 6/23/16
- Parent 7 MSDE investigation results, 7/1/16
- Parent 8 Letter to the Parent from Tracee N. Hackett, Supervisor, Resolution and Compliance Unit, MCPS, 7/29/16
- Parent 9 Email to Anca Grindeanu, Administrative Legal Assistant, Michael J. Eig and Associates, P.C., from ██████████ Principal ██████████ Elementary School, 8/12/16; with attached letter to Ms ██████████ from Mr. Eig, 8/12/16
- Parent 10 Letter to Mr. Greismann from Mr. Eig, 8/24/16
- Parent 11 Letter to Mr. Eig from Mr. Greismann, 8/31/16

¹ The Parent and MCPS prenumbered their exhibits; I have retained their numbering. Some exhibits are duplicative of the other party's exhibits. Please note, not all exhibits were offered and/or admitted into evidence.

- Parent 12 Not admitted
- Parent 13 Due Process Complaint, 9/22/16
- Parent 14 Email to the Parent and his wife from Ms. [REDACTED], 9/27/16
- Parent 15 Letter to the Parent from Ms. Hackett, 9/27/16
- Parent 16 Letter to OAH from Mr. Greismann, 9/28/16
- Parent 17 Letter to the Parent and his wife from Ms. [REDACTED], 9/30/16
- Parent 18 Not admitted
- Parent 19 Not admitted
- Parent 20 Not admitted
- Parent 21 The Student's weekly class schedule, 2016-2017 school year
- Parent 22 The Student's weekly class schedule, 2015-2016 school year
- Parent 23 IEP, 3/24/15
- Parent 24 Notice of IEP meeting, 12/15/15
- Parent 25 Letter to the Parent and his wife from Ms. [REDACTED] 2/26/16; IEP, 3/22/16
- Parent 26 Mathematics Assessment Report, 2015-2016
- Parent 27 Measures of Academic Progress in Reading (MAP-R) results, 6/9/16
- Parent 28 Measures of Academic Progress in Primary Math (MAP-P) results, Winter 2014-2015
- Parent 29 Instructional recommendations for math and reading, 6/1/15
- Parent 30 The Student's report cards, 2014-2015 school year, 2015-2016 school year, 1st quarter 2016-2017 school year

I admitted the following exhibits on behalf of MCPS:

- MCPS 2 IEP, 3/24/15
- MCPS 4 IEP, 3/22/16
- MCPS 6 MAP Data for the Student 2012-2016; MAP Normative Data 2011; MAP Normative Data 2015

- MCPS 7 The Student's third grade Report Card, 6/16; Academic Student Profile, 10/25/16; A Parent's Guide to the Curriculum for Kindergarten, First Grade, Second Grade, Third Grade, Fourth Grade
- MCPS 8 The Student's weekly class schedule, 2015-2016 school year
- MCPS 13 MSDE investigation results, 7/1/16
- MCPS 14 Letter to Ms. Wilson, MSDE, from Ms. Richardson, MCPS, 9/1/16
- MCPS 15 Email to Ms. Hackett, Patricia Grundy, and Maria Bloom from Nancy Birenbaum, Compliance Specialist, Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE, 9/2/16
- MCPS 17 Résumé for [REDACTED]
- MCPS 20 Résumé for [REDACTED]
- MCPS 23 Résumé for [REDACTED]