

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

BEFORE JENNIFER A. NAPPIER,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH NO.: MSDE-MONT-OT-22-15852

DECISION

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ORDER

STATEMENT OF THE CASE

On July 5, 2022, ██████████ (Father) and ██████████ (Mother), (collectively, the Parents), on behalf of their child, ██████████ (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH), requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA).^{1,2,3,4} On August 26, 2022, the Parents filed an Amended Due Process Complaint (Complaint).

¹ 20 U.S.C.A. § 1415(f)(1)(A) (2017). “U.S.C.A.” is an abbreviation for the United States Code Annotated. Unless otherwise noted, all citations herein to the U.S.C.A. are to the 2017 bound volume.

² 34 C.F.R. § 300.511(a) (2021). “C.F.R.” is an abbreviation for the Code of Federal Regulations. Unless otherwise noted, all citations herein to the C.F.R. are to the 2021 bound volume.

³ Md. Code Ann., Educ. § 8-413(d)(1) (2022). Unless otherwise noted, all citations herein to the Education Article are to the 2022 Replacement Volume of the Maryland Annotated Code.

⁴ Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

On September 7, 2022, I conducted a video prehearing conference (Conference) in the above-captioned matter.⁵ Michael J. Eig, Esquire, on behalf of the Student, and Craig Meuser, Esquire, on behalf of MCPS, participated in the Conference. Given scheduling constraints due to counsels' prior commitments to other legal matters, as well my unavailability due to other matters specially set before me and the projected length of the hearing on the merits, I scheduled this matter for seven non-consecutive days of hearing which would conclude on October 31, 2022.

Under the applicable law, a decision in this case would have normally been due by November 9, 2022, forty-five days after the September 25, 2022 expiration of the thirty-day resolution period.^{6,7} In light of the shortened timeframe for issuing a decision after the conclusion of the hearing, which was the result to the parties' unavailability for earlier hearing dates, at the Conference, Mr. Eig requested that I extend the decisional timeframe and issue a decision within thirty days of the close of the hearing. Mr. Meuser joined in that request. I found good cause to grant the parties' request, as an extension of the decisional timeframe would allow adequate time for a thorough examination of the evidence presented during the multiday hearing.⁸

I held the hearing on October 12, 14, 25, 26, 27, and 31, 2022 via Webex.^{9,10} Mr. Eig represented the Parents and Student. Mr. Meuser represented MCPS.

⁵ Prior to my assignment to this case, Administrative Law Judge Leigh Walder held prehearing conferences in this matter on August 18 and September 1, 2022.

⁶ 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Educ. § 8-413(h); *see* COMAR 13A.05.01.15C(14).

⁷ The parties elected not to participate in a resolution session, but did not notify the OAH in writing that they agreed to waive the resolution session. 34 C.F.R. § 300.510(b), (c)(1).

⁸ 34 C.F.R. § 300.515(c); Educ. § 8-413(h).

⁹ COMAR 28.02.01.20B(1)(b).

¹⁰ October 17, 2022 was originally scheduled as the second day of hearing. However, on September 30, 2022, Mr. Eig notified the OAH that the Parents had no witnesses available that day and requested that the October 17, 2022 hearing date be cancelled. Mr. Eig also indicated that he believed the Parents would be able to present their case in two days and that an additional day would not need to be added to the hearing schedule if the October 17th hearing date was cancelled. MCPS did not object to cancellation of the October 17th hearing date and I granted the Parents' request to eliminate October 17th from the hearing schedule.

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.¹¹

ISSUES

Did the challenged actions by MCPS fail to meet the requirements of the law?

Specifically:

1. Did MCPS fail to make a free appropriate public education (FAPE) available to the Student for the 2020-2021 school year by failing to develop an individualized education program (IEP) and placement appropriate to meet the unique needs of the Student?
2. If MCPS did not make a FAPE available to the Student for the 2020-2021 school year with an appropriate IEP and placement, was the Parents' placement of the Student at [REDACTED] ([REDACTED]) proper/appropriate?
3. If the placement by the Parents of the Student at [REDACTED] is determined to be proper/appropriate for the 2020-2021 school year, should MCPS reimburse the Parents for tuition and related expenses associated with the placement of the Student at [REDACTED] for the 2020-2021 school year?
4. Did MCPS fail to make a FAPE available to the Student for the 2021-2022 school year by failing to develop an IEP and placement appropriate to meet the unique needs of the Student?
5. If MCPS did not make a FAPE available to the Student for the 2021-2022 school year with an appropriate IEP and placement, was the Parents' placement of the Student at [REDACTED] proper/appropriate?
6. If the placement by the Parents of the Student at [REDACTED] is determined to be proper/appropriate for the 2021-2022 school year, should MCPS reimburse the Parents for tuition and related expenses associated with the placement of the Student at [REDACTED] for the 2021-2022 school year?
7. Did MCPS fail to make a FAPE available to the Student for the 2022-2023 school year by failing to develop an IEP and placement appropriate to meet the unique needs of the Student?

¹¹ Educ. § 8-413(e)(1); Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 13A.05.01.15C; COMAR 28.02.01.

8. If MCPS did not make a FAPE available to the Student for the 2022-2023 school year with an appropriate IEP and placement, is the Parents' placement of the Student at [REDACTED] proper/appropriate?
9. If the placement by the Parents of the Student at [REDACTED] is determined to be proper/appropriate for the 2022-2023 school year, should MCPS fund the Student's tuition and related expenses associated with the placement of the Student at [REDACTED] for the 2022-2023 school year?

SUMMARY OF THE EVIDENCE

Exhibits

I have attached a complete Exhibit List as an Appendix.

Testimony

The Student presented the following witnesses:

1. [REDACTED], Executive Director, [REDACTED], accepted as an expert in special education;
2. [REDACTED], PhD., accepted as an expert in school neuropsychology; and
3. [REDACTED] (Mother).

MCPS presented the following witnesses:

1. [REDACTED], MCPS Classroom Teacher, accepted as an expert in kindergarten to sixth grade general education;
2. [REDACTED], MCPS Classroom Teacher, accepted as an expert in middle school general education and English instruction at the secondary level;
3. [REDACTED], MCPS Classroom Teacher, accepted as an expert in special education;
4. [REDACTED], MCPS Special Education Instructional Specialist, accepted as an expert in special education, reading instruction, and educational assessments; and
5. [REDACTED], MCPS Resource Teacher for Special Education, accepted as an expert in special education.

FINDINGS OF FACT

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

The Student - Background

1. The Student is fourteen years old (date of birth [REDACTED] 2008) and is currently in the ninth grade at [REDACTED].
2. The Student's current diagnoses include a specific learning disorder (SLD) (specific reading disorder (SRD) or dyslexia); attention-deficit/hyperactivity disorder (ADHD), combined type; and anxiety disorder, unspecified.
3. The Student attended kindergarten through fifth grade at [REDACTED] ([REDACTED]), a public school in MCPS.
4. On June 14, 2016, MCPS conducted an initial evaluation of the Student to determine whether she qualified for special education services. Based on the results of the evaluation, the IEP team agreed that the Student was eligible for special education services as a student with an SLD.
5. The Parents consented to the implementation of an IEP for the Student.
6. The Student's first IEP was developed for her third grade 2016-2017 school year.
7. During the Student's fifth grade year, she received reading support using the Orton-Gillingham method. By then end of the year, she was reading at a mid-fifth grade level.

The 2019-2020 School Year IEP (Sixth Grade)

8. In May of 2019, the Student was approaching the end of her fifth-grade year at [REDACTED].

9. On May 2, 2019, the IEP team at [REDACTED], including the Parents, convened to review and revise the Student's IEP. The Parents were informed of their *Procedural Safeguards and Parental Rights* under IDEA.

10. At the IEP meeting, the IEP team reviewed evaluative data, including classroom data, the Student's progress on her last IEP goals, intervention data, Measures of Academic Progress (MAP) scores, and the results of a private psychoeducational evaluation conducted on August 31, 2018, before revising the Student's IEP.

11. The May 2, 2019 IEP¹² reflected that the Student was eligible for special education services with a primary disability of SLD and that the areas affected by the Student's SLD were encoding, reading comprehension, reading fluency, reading phonics, written language expression, math problem solving, and attention/executive functioning. The IEP also reflected that the Student had weaknesses in applying word recognition and decoding strategies.

12. The May 2, 2019 IEP indicated that the Student's strengths were participating in class discussions, socializing at appropriate times, and working collaboratively with her peers. The team noted that she was a persistent and motivated student. The team also noted that despite the Student's diagnosis of ADHD, her attention had improved significantly during the school year and was no longer having an impact on her class participation and task completion.

13. The IEP team determined that the Student would attend [REDACTED] ([REDACTED]) for sixth grade, which is the school she would have attended if she were not disabled (i.e., her neighborhood school).

¹² Parents' Exhibit 20A and MCPS Exhibit 19 are the same eleven-page IEP that indicates that the May 2, 2019 IEP was amended on January 13, 2020. That IEP includes only the Student Information and Goals sections of the IEP. It appears that it may have been amended to indicate that the Student was now in the sixth grade at [REDACTED], rather in the fifth grade at [REDACTED]. The Goals section also includes progress reports through June 15, 2020.

14. The Student's sixth grade services included 3 hours and 45 minutes per day inside the general education setting and 45 minutes per day outside the general education setting. The 45 minutes per day of instruction outside the general education setting was to take place in a self-contained resource class.

15. Additionally, the Student would also participate with non-disabled peers in non-academic and extracurricular activities.

16. The May 2, 2019 IEP reflected that the Student would receive co-taught/supported instruction for math, science, English, social studies, and reading intervention on a daily basis. The IEP team determined that the Student would benefit from co-taught classes in middle school to provide additional support in areas of need.

17. The May 2, 2019, IEP contained numerous testing and instructional accommodations, use of assistive technology devices and supplementary aids and services to help the Student achieve the goals on the IEP.

18. The Student's sixth grade goals included¹³:

- Written language expression: Given use of graphic organizers, models of expected outcome, use of a word processor with spelling and grammar check, breaking down of task, and fading adult support, the Student will produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience.¹⁴
- Reading Phonics: Given instructional level texts, repetition and clarification of instruction, and fading adult support, the Student will apply learned phonics and word analysis skills to efficiently decode words in context and in isolation.
- Reading Fluency: Given access to instructional level texts, repeated readings, and fading adult support, the Student will read with sufficient accuracy and fluency to support understanding.

¹³ P. Ex. 18.

¹⁴ The Student's goal in the area of encoding was embedded into the objectives of the written expression goal. P. Ex. 14, p. 1.

- Reading Comprehension: Given instructional level text, breaking down of task, opportunities to reread, and fading adult support, the Student will read closely to determine what a text says explicitly and to make logical inferences from it.
- Math Problem Solving: Given breaking down of task, models of expected outcomes, opportunities for repeated practice, and fading adult support, the Student will apply and extend previous understandings of whole and partial numbers, algebraic expressions, geometry, and ratio concepts to solve math problems.

19. Each goal in the May 2, 2019 IEP included short-term subject-specific objectives for the student.

The 2019-2020 School Year (Sixth Grade)

20. During the 2019-2020 school year, the Student was in the sixth grade [REDACTED]

[REDACTED] ([REDACTED]) program.

21. The Student was enrolled in co-taught classes for her academic classes, which included MS Academic Literacy, Grade 6 Advanced English (GT),¹⁵ Historical Inquiry into Global Humanities 6 (GT), C2.0 Mathematics 6, and Investigations in Science 6. Additionally, the Student participated in the reading intervention class, and attended a resource class.

22. During the fall 2019 semester, the Student experienced at least two instances of bullying at school. On October 29, 2019, while on the school bus, another student teased the Student and a male friend for sitting together on the bus. After the incident came to the attention of school staff, the issue was resolved through the use of a “restorative circle” among the students, with an apology from the student that teased the Student.

23. Another instance of bullying during the fall 2019 semester occurred in the school hallway. A group of sixth grade boys approached the Student and one boy made an “inappropriate” comment. After the incident came to the attention of school staff, the parents of all of the students who were involved were informed of the situation. The issue was resolved

¹⁵ Gifted and talented.

through the use of a restorative circle among the students who were involved before the students returned to class.

24. The Student also experienced other instances of bullying during the spring 2020 semester. On February 11, 2020, a male student told the Student that if she did not share a topic that she and some friends were laughing about and discussing, he would remind other students of an incident that happened when they were in elementary school. After the Student reported the incident, a counselor and administrator spoke with the Student and the boy about what had occurred. After the conversation, the boy did not want to be friends with the Student but stated that he understood he needed to leave her alone.

25. The other instance of bullying occurred on March 7, 2020, at a park in [REDACTED], Maryland where the Student was participating in sports activities through a non-profit organization and was coached by an MCPS employee. During this event, a boy called the Student “a mean name.” The Father reported the incident to school staff and stated that there was a man that seemed to accompany the boy and whom he believed was another coach. An administrator called the sports program about the incident, but they had no record of the boy or the man in their records.

26. The Parents filed bullying complaints with the school for each of the aforementioned incidents and worked closely with the [REDACTED] assistant principal to address the complaints.

27. The Student never missed school as a result of any of these bullying incidents.

28. In mid-March of 2020, MCPS implemented a systemwide emergency school closure, halting in-person learning due to the health and safety concerns associated with the COVID-19 pandemic. For approximately two weeks, MCPS only provided asynchronous

instruction to its students. Subsequently, instruction took place remotely by distance learning for the remainder of the school year.

29. On April 2, 2022, Ms. [REDACTED] had a conversation with the Mother and/or the Father, regarding the development of an Individualized Special Education Distance Learning Plan (DLP) to address MCPS' implementation of its Continuity Learning Plan and how the Student's IEP would be implemented consistent with the need to protect the health and safety of students with disabilities.¹⁶ They developed a DLP that included proposed goals, supplementary aids, services and supports, and accommodations to be implemented in the least restrictive environment to the maximum extent appropriate to provide the Student with FAPE.

30. When developing the DLP, Ms. [REDACTED] and the Parent(s)¹⁷ considered the Student's present levels of achievement and functional performance, the then-current IEP, guidance from MSDE and the United States Department of Education, the MCPS Continuity of Learning Curriculum and parental input. They agreed that the following goals would be implemented while the student was participating in distance learning: reading comprehension, written language expression, and math problem solving. The DLP provided that during this time, the Student would use assistive technology, including a calculator and word processor and listed numerous supplementary aids and services that would be implemented. The services included weekly office hours with the academic teachers and weekly one-on-one check-ins with the Student's IEP case manager, [REDACTED].

¹⁶ In May of 2020, the MSDE issued Technical Bulletin # 20-03: Providing Continuity of Learning to Students with Disabilities during COVID-19 (revised May 2020). Under the direction of Maryland's Superintendent of schools, each local school system was required to develop a systemwide Continuity of Learning Plan to address the continued education of students during the emergency school closure. Technical Bulletin # 30-03 can be found at https://marylandpublicschools.org/programs/Documents/Special-Ed/TAB/20-03-Continuity_of_Learning_for_SWD.pdf (last visited November 29, 2022).

¹⁷ It is unclear whether one or both Parents participated in the development of the DLP.

31. On April 10, 2020, Ms. [REDACTED] emailed the Parents a copy of the DLP and stated “Please respond to me by Friday April 10th if you do not agree with the attached plan. Let me know if you have any questions or concerns.” The Parents did not respond to that email.

32. A “formal” copy of the DLP was sent to the Parents on April 15, 2020.

33. Ms. [REDACTED] updated the objectives on the Student’s IEP and the percent of mastery using samples of the Student’s work as the baseline for the present levels of academic progress. A draft IEP was sent to the Parents on April 21, 2020. An additional draft was sent home on April 27, 2020 with attention data based on the teacher reports from the end of the marking period. Another draft was sent to the Parents with some updates that were based on suggestions made by Mr. [REDACTED], along with the *Parental Rights and Safeguards* and an extended school year (ESY) brochure.

34. On April 28, 2020, the Parents sent the school-based members of the IEP team a letter from the Student’s psychiatrist, stating that the Student was being treated for ADHD, combined type; anxiety disorder, unspecified; an unspecified eating disorder, dyslexia, and an adjustment disorder.

35. The Student’s sixth grade teachers never observed or reported any concerns about anxiety or adjustment.

36. Although the Student’s sixth grade teachers had a few small concerns regarding the Student’s attention, with supplementary aides her attention was managed and her teachers reported that she successfully maintained attention in their respective classes.

37. On May 11, 2020, the Parents gave the school-based members of the IEP team a letter from the Student’s psychologist, stating that the Student has anxiety and that she had difficulty with social interactions with peers and teachers.

38. The Student had mainly positive relationships with teachers; seemed comfortable with both peers and teachers; took a “helping role” with peers; eagerly participated in class; and worked collaboratively with multiple peers. The Student had peers, who appeared to be her friends, that she gravitated to in the classroom, hallways, and lunchroom.

39. None of the Student’s sixth grade teachers either reported or observed that the Student had trouble with social interactions with either peers or teachers.

40. Throughout the period of distance learning, Ms. [REDACTED] sent weekly emails to the Parents with information such as major updates and upcoming assessments. The Parents did not voice any academic or other concerns in response to those emails throughout the year or initiate other contact with Ms. [REDACTED].

41. As of May 11, 2022, the Student had not attended any office hours for math, English, or science. She did, however, attend all of the office hours for her reading intervention class where they went over the week’s assignments/slides, and then played Quizlet Live, which was related to the reading materials. She also attended one small group global humanities support office hours with her global humanities co-teacher.

42. By May 12, 2020, the Student had not attended any office hours with Ms. [REDACTED] during distance learning. However, she signed up for and attended four out of six weekly case manager check-ins with Ms. [REDACTED].

43. As of May 12, 2020, the Student was earning all As and Bs, showing an understanding of the curriculum, and making academic progress.

44. As a result of the unexpected pivot to distance learning, MCPS graded students on a pass/fail basis for the fourth quarter of the 2019-2020 school year. During the fourth quarter, MCPS did not grade students on either participation or assignment completion.

45. The Student earned C's in Grade 6 Advanced English during the first two quarters. During the third quarter, she brought her grade up to a B and she earned a passing grade during the fourth quarter.

46. Throughout the sixth grade, 2019-2020 school year, the Student's marking period average (MPA) was 3.42 for the first and second quarters and 3.54 for the third quarter. No MPA was calculated for either the fourth quarter or the final cumulative grades.

47. The Student's consistently completed her assignments in each class for the first, second, and third quarters of the 2019-2020 school year was graded as "consistent."¹⁸

48. The Student's consistently participated in the following classes during the first, second, and third quarters of the 2019-2020 school year: MS Academic Literacy, Advanced English, Historical Inquiry into Global Humanities, Resource, Health, and Physical Education.¹⁹

49. The Student's participated consistently in C2.0 Mathematics during the first and second quarter of the 2019-2020 school year. During the third quarter of the school year, she participated a bit less, but often.

50. The Student often participated in her Investigations in Science class during the first, second, and third quarters of the 2019-2020 school year.

The May 12, 2020 Comprehensive Psychological Evaluation of the Student

51. On May 12, 2020, [REDACTED], Psy.D. conducted a private psychological evaluation of the Student to assess the Student's cognitive and academic functioning, as well as her attention and executive functioning abilities, and social/emotional functioning.

¹⁸ No assignment completion grade was given for the fourth quarter of the 2019-2020 school year.

¹⁹ The Student only took Health during the first quarter of the 2019-2020 school year and took Physical Education during the second, third, and fourth quarters of that school year.

52. Dr. ■■■ used the following methods of assessment when performing her evaluation of the Student:

- Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) to assess the Student's cognitive skills and intellectual functioning with regard to verbal comprehension, visual spatial, fluid reasoning, working memory, and processing speed abilities, as well as her full scale IQ;
- Wechsler Individual Achievement Test, Third Edition (WIAT-III) Essay Composition subtest to assess the Student's written language achievement at the essay level;
- Feifer Assessment of Reading (FAR)—Orthographical Processing subtest;
- Test of Variables of Attention, 8th Edition (TOVA-8), a computerized test of sustained visual attention, used to assess response time variability (inconsistency), response time (speed), commission errors (impulsivity), D Prime²⁰ (vigilance), and attention;
- Rey Complex Figure Test (RCFT)—Copy phase, to observe the Student's executive functioning;
- Wide Range Assessment of Memory and Learning, Second Edition (WRAML 2)—Story Memory subtest, to assess the Student's verbal memory and her ability to encode, store, retrieve and recognize verbal information in context;
- Delis-Kaplan Executive Function Systems (DKEFS)—Color Word Interference and Verbal Fluency subtests, to assess the Student's ability to process information efficiently, shift attention, inhibit responses, and display cognitive flexibility.
- Test of Auditory Processing Skills, Fourth Edition (TAPS-4)—Processing Oral Directions subtest, to assess the Student's receptive language abilities;
- Conners Comprehensive Rating Scale, Teacher Version, a behavioral rating scale, to assess attentional, academic, behavioral, social, emotional, and executive functioning;
- Conners Comprehensive Rating Scale, Parent Version, to assess attentional, academic, behavioral, social, emotional, and executive functioning;
- Behavior Ratings Inventory of Executive Functions, Second Edition (BRIEF-2)—Teacher Version, to assess symptoms and behaviors consistent with impaired executive functioning, including difficulties with cognitive regulation, emotional regulation, and behavioral regulation;

²⁰ “The D Prime score reflects an individual's success at continuing to respond to the target, and to not respond to the non-target, over the length of the task.” P. Ex. 20-16; MCPS Ex. 18-61.

- Behavior Ratings Inventory of Executive Functions, Second Edition (BRIEF-2)—Parent Version, to assess symptoms and behaviors consistent with impaired executive functioning, including difficulties with cognitive regulation, emotional regulation, and behavioral regulation;
- Multidimensional Anxiety Scale for Children, 2nd Edition (MASC-2)—Self Report, to assess the range and severity of anxiety symptoms in children;
- Clinical interview with the Parents;
- Clinical interview with the Student;
- Review of records provided by the Parents; and
- Behavioral Observations

The test results reported as standardized scores, meaning that they quantify her performance compared to other children her age.

53. The evaluative data collected during Dr. [REDACTED]'s evaluation of the Student, indicated that²¹:

- The Student met diagnostic criteria for ADHD, combined type; SRD or dyslexia; and anxiety disorder, unspecified;
- The Student's Global Ability Index IQ score was 105, which falls into the average range of performance at the 63rd percentile;
- The Student's cognitive strengths included visual spatial construction abilities, fluid reasoning, and processing speed;
- The Student's relative cognitive weaknesses included verbal comprehension, and fine motor precision and visual motor integration;
- The Student demonstrated clear inattention and distractibility, both of which impacted her performance on academic tasks during the evaluation. She particularly had difficulty maintaining consistent attention regardless of how stimulating the task is;
- The Student's reading skills had declined since her last evaluation in 2017 and the Student was reading well below grade level;
- The Student had difficulty with orthographic processing and decoding. She had limited sight word reading and struggled with reading and decoding fluently and accurately. As a result, the Student had difficulty understanding what she read;
- The Student had some difficulties in writing. She made errors related to organization and structure;

²¹ See P. Exhibit 20, pp. 27-30 (Dr. [REDACTED]'s evaluation report, "Summary and Recommendation").

- The Student's ADHD, Dyslexia, and Anxiety Disorder had a negative impact on her ability to learn, think, concentrate, read, write, perform math, and take tests.

54. Based upon her observation of the Student during the evaluation, Dr. [REDACTED] determined that the results of the evaluation were a valid indicator of the Student's functioning at that time.

55. In order to optimize the likelihood that the results of the evaluation would be an accurate representation of the Student's potential, Dr. [REDACTED] created a testing environment that was highly structured, one-on-one, and generally free of distractions. Additionally, the testing was paced to meet the Student's needs and Dr. [REDACTED] provided the Student with breaks.

56. Based upon her evaluation of the Student, Dr. [REDACTED] recommended that the Student and her mother meet with the school professionals at [REDACTED] to update her IEP and discuss changes to her programming. She also made the following school-based recommendations²²:

General

- Small classes with a low student-to-teacher ratio for all subjects.
- Accommodations, including: no penalty for spelling/mechanical errors (unless on spelling tests), extended time for class work, homework, projects, and all tests (including the PSAT, SSAT, etc.), preferential seating in the front of the classroom, breaks during instructional time, being allowed to do written work on a computer whenever possible, use of laptop/tablet to take notes, copies of lecture notes/presentation slides, etc., use of assistive technology for reading and written expression, being allowed to respond to test items in the test booklet, no more than one test administered per day, and opportunities to correct mistakes without penalty.
- An academic support and study skills class where, ideally, the Student would do the bulk of her homework.

Reading Recommendations

- Intensive, systematic reading instruction for no less than 30 minutes daily, specifically, instruction in orthographic processing, decoding, fluency, sight word reading, reading comprehension, and spelling.
- Individualized instruction to support the Student's skill development in written expression.

²² See P. Ex. 20, pp. 30-35.

- Language arts taught by a special educator/reading specialist in a small class environment (a co-taught class or ‘push in’ services will not provide adequate intensity as shown by her current rate and level of progress).
- The Student should be excused from foreign language in middle school, so she can take a resource class where she can receive support for her executive functioning skills.
- Systematic Phonics Instruction, including daily intensive reading instruction with an evidence-based method that addresses her deficits.
- Practicing skills to increase automaticity using software.
- Assessing the Student’s progress regularly and systematically via curriculum-based measurements on at least a weekly basis, to determine her response to interventions.
- Strategic Reading.
- Listening to an audio recording of the text as she reads and/or reading aloud to herself as she reads. (multisensory input)

Written Expression

- Strategy based instruction, such as Self-Regulated Strategy Development (SRSD).
- Teaching the Student the POWER strategy. And the Sentence/Paragraph Writing Strategy of the University of Kansas Center for Research on Learning.
- The use of technology to improve the quality of the Student’s spelling skills.
- Instruction in penmanship.
- Use of a computer for daily classwork/notetaking.
- Word prediction software.
- Supporting organization in written expression using outlines and graphic organizers.
- Teaching the Student to type.

ADHD/Executive Functioning Recommendations

- 50% extended time on tests, and instruction on how to utilize the extra time to check and edit her work.
- Testing in a separate room.
- Work breaks during tests and other long assignments.
- Use of a laptop or word processor for notetaking and for all reading and writing assignments.

Standardized or Midterm/Final Test taking Recommendations

- 50% extended time.
- Work breaks.
- Taking tests while sitting in a study carrel or similar desk, if possible.
- Allowing the Student to write her answers directly in the test booklet for Scantron tests.
- Use of a laptop for the writing or essay portions of all tests.

57. In an earlier draft version of Dr. [REDACTED]'s report, Dr. [REDACTED] did not recommend that the Student be placed in small classes for all subjects. Instead, she opined that the least restrictive environment and most appropriate middle school program for the Student was a [REDACTED] program or a school specifically designed to teach students with learning disabilities, with small group instruction for reading.²³ That draft also noted that the Student could take co-taught classes for content area subjects, if desired, though she would require accommodations and direct special educator support on a daily basis. This recommendation was also removed from the final version of the report. Dr. [REDACTED] revised her report on or about June 5, 2020, after the Parent's educational consultant, [REDACTED], expressed his concern that she recommended an [REDACTED] program and that he hoped she would consider recommending small supportive classes throughout the day.²⁴

58. After a June 5, 2020 call with Mr. [REDACTED] and the Parents, Dr. [REDACTED] made changes to her report based on their discussion, then emailed the revised document to Mr. [REDACTED] and the Parents, stating "Please feel free to make any edits using the "Review" function in Word and send back to me for the final review. Then I will send the finalized PDF version back to you."²⁵

59. On the afternoon of June 5, 2020, Mr. [REDACTED] replied to Dr. [REDACTED]'s email and attached a file titled "[REDACTED]—Draft—[REDACTED] and parent edits.pdf." He stated in the email "I reordered the sentence in the initial reading/writing recommendation and added some language about resource room period. I question the recommendation about handwriting, I believe at this time in her academic career we should give up on handwriting and focus on utilizing the computer. I didn't take it out, though. I'll leave that up to all of you."²⁶

²³ MCPS Ex. 18, p. 30.

²⁴ See MCPS Ex. 17.

²⁵ MCPS Ex. 17, p. 10.

²⁶ MCPS Ex. 17, p. 12.

60. Approximately forty minutes later, Dr. [REDACTED] emailed Mr. [REDACTED] and the Parents the final version of her report, stating “I finalized all of the changes and added tutor [REDACTED] [REDACTED]’ Connors and BRIEF feedback. I’ve attached a final version to this email.”²⁷

IEP Development for the 2020-2021 School Year (Seventh Grade) & the Student’s Enrollment at [REDACTED]

61. MCPS proposed holding a reevaluation IEP meeting on April 20, April 27, April 29, May 19, and June 17, 2020. The original April 20th meeting date was rescheduled to April 27th due to a change in the school schedule. The April 27th meeting was subsequently rescheduled for April 29th, but later rescheduled to May 19th to accommodate the Parents’ request that MCPS staff member [REDACTED] attend the meeting. After the Mother confirmed that meeting, the Parents later refused to attend the May 19th meeting because they wanted to hold the meeting after the Student was privately evaluated.

62. On June 26, 2020, the Father signed an enrollment contract for the Student to attend [REDACTED] for the 2020-2021 school year. [REDACTED] is a non-public school in Montgomery County, Maryland.

63. On July 22, 2020, the IEP team convened, including the Parents. The Student’s Parents were informed of the *Procedural Safeguards and Parental Rights* under IDEA. Additionally, Mr. [REDACTED] participated in the meeting.

64. At the July 22, 2020 IEP team meeting, the IEP team reviewed the Student’s educational record, including samples of the Student’s work, teacher reports, grade reports, Map R and M data, classroom-based assessments, parental input, and the results of the private psychological evaluation conducted by Dr. [REDACTED].

²⁷ MCPS Ex. 17, p. 13.

65. The review of the Student's educational record included the IEP progress reports. As of April 17, 2020, the Student's progress report toward achieving the annual goals on the IEP indicated the Student was making sufficient progress to meet her goals for written language expression, reading phonics, reading fluency, reading comprehension, and math problem solving. As of June 15, 2020, the Student's progress report toward achieving the annual goals on the IEP indicated that she was making sufficient progress to meet her goals for written language expression and reading comprehension.²⁸

66. As a result of the COVID-related emergency school closure and remote learning environment, MCPS began to gauge present levels of its students' performance to a much lesser extent during the third and fourth quarters of the 2019-2020 school year. Additionally, due to the distance learning format, MCPS was unable to implement certain portions of students' IEPs (particularly items that required in-person observation and/or interaction). As of June 15, 2020, the goals for reading phonics, reading fluency and math problem solving had not been introduced to the Student for the fourth quarter of the 2019-2020 school year.²⁹

67. The school-based members of the IEP team reviewed the results of Dr. [REDACTED]'s May 12, 2020 psychological evaluation of the Student. The report was accepted by the school-based members of the IEP team and the results of the evaluative data were included in ascertaining the Student's present levels of performance when developing her IEP for the 2020-2021 school year.

68. The school-based members of the IEP team determined that the Student's primary disability remained SLD and drafted the IEP identifying SLD as her primary disability. The

²⁸ Due to the COVID-19 emergency school closure, these goals were implemented during distance learning and the progress report was based off of the data collected between April 20 and June 11, 2022.

²⁹ The reading phonics and reading fluency goals had not been introduced for the fourth quarter of the 2019-2020 school year because as part of the Individualized DLP developed by agreement from the Parents, it was determined these goals could not be addressed during distance learning because the Student needed to be in the classroom environment to demonstrate the skill. Due to the COVID-19 emergency school closure, the math curriculum did not cover surface area or volume and the math objectives were not addressed during the fourth quarter.

Parents proposed that the Student's primary disabilities were both SLD and other health impairment (OHI). The school-based members of the IEP team disagreed because the teacher reports did not support the severity of the impact of the Student's ADHD on her educational performance, so they did not feel that a code of multiple disabilities was warranted at that time.

69. The IEP team, including the Parents, noted that the Student had been identified as having and SRD or dyslexia. The IEP team agreed to update the eligibility page of the IEP to include the Student's additional diagnoses of ADHD, combined type, and anxiety disorder, unspecified. The team determined that the areas affected by the Student's SLD were reading comprehension, reading fluency, reading phonemic awareness, written language expression, written language mechanics, math problem solving, and attention/executive functioning, social interaction skills, and attention/executive functioning.

70. Based upon the IEP team's review of the evaluative data, the IEP team determined that the Student's strengths were that she was responsible, hardworking, and friendly. The student also seemed to enjoy positive attention from teachers and made some new friends. The team noted that the Student had weaknesses in applying word recognition and decoding strategies, reading fluency, reading comprehension, the organization or written expression and spelling, and math problem solving.

71. The IEP team determined that despite the Student's diagnosis of ADHD, her attention was not currently impacting her academics and her attention was supported through accommodations and supplementary aides.

72. Although the Student has an anxiety disorder, school staff did not observe any signs, behaviors, or impact of anxiety.

Levels of Academic Achievement and Functional Performance

73. The IEP team, including the Parents, agreed to add present levels of performance to the IEP for reading phonemic awareness, written language mechanics, and social skills.

74. Based upon Dr. [REDACTED]'s evaluation and a teacher report, the IEP team determined that the Student's present level of instructional grade level performance for reading phonemic awareness was below grade level expectations/second grade.

75. Based upon Dr. [REDACTED]'s evaluation, the Student's work samples, teacher reports, and report card grades, the IEP determined the Student's present level of instructional grade level performance for reading fluency was below grade level expectations/mid-second to mid-third grade.

76. Based upon Dr. [REDACTED]'s evaluation, MAP data, the Student's work samples, teacher reports, and report card grades, the IEP team determined that the Student's present level of instructional grade level performance for reading comprehension was at the fourth/fifth grade level. The IEP team note that the Student's reading comprehension during fifth grade was on a fifth-grade level, but that her most recent MAP-R scores indicated that the Student was closer to a fourth-grade level. However, the IEP team drafted the IEP to state that the Student was at the fourth/fifth grade level because the Student's work samples showed a variation in levels of achievement.

77. Based upon Dr. [REDACTED]'s evaluation, the Student's work samples, teacher reports, and report card grades, the IEP team determined that the Student's present level of instructional grade level performance for written language mechanics was below grade level expectations.

78. Based upon Dr. [REDACTED]'s evaluation, MAP data, the Student's work samples, teacher reports, and report card grades, the IEP team determined that the Student's present level of instructional grade level performance for math problem solving was at the fourth/fifth grade level.

79. Based upon Dr. [REDACTED]'s evaluation, teacher reports, bullying reports and the results from the Conners' Ratings Scales completed by the Student's tutor and the Parents, the IEP determined that the Student's present level of performance for social interaction skills was below grade level expectations.

80. Based upon teacher reports and classroom observations, the IEP team determined that the Student's present level of performance for attention/executive functioning was below grade level expectations.

81. During IEP meeting, the Parents reported that their biggest concern was the Student's reading abilities and the fact that her reading level had significantly dropped during the 2019-2020 school year.

Special Considerations and Accommodations

82. The July 22, 2020 IEP contained the following supplemental supports:

- Tools for spelling/spell check
- Strategies/tools for organizing ideas for writing
- Pre-writing strategies including outlines and graphic organizers
- Pair auditory with visual directions and instruction
- Word prediction software
- No penalty for spelling errors unless on spelling tests
- Provide access to spelling resources, such as spell check tools
- Provide proofreading checklist/rubric
- Provide Student with copy of student/teacher notes
- Repetition of directions
- Monitor independent work
- Strategic seating away from distracting peers and/or next to positive role models
- Opportunities to deconstruct social situations with a trusted adult

83. With regard to communication, the IEP team determined that the Student does not have special communication needs.

84. The IEP team considered whether the student required assistive technology devices and/or services. The team determined that the Student needs assistive technology devices in the

form of a word processor to help with writing assignments and a calculator for certain math assignments, but does not need any other assistive technology services.

85. The IEP team considered the Student's instructional and assessment accessibility needs. The team determined that the following aides, services, modifications, and supports were appropriate for the Student to access learning:

- Graphic organizers to support written output;
- Spell and grammar check to support spelling and grammar in her written output;
- Small group testing in a separate location within the school;
- Reduced distractions to self;
- Frequent breaks and 50% extended time;
- Text-to-speech for English/language arts (ELA) to address the Student's needs in reading (decoding, fluency, and comprehension);
- A calculation device on non-calculation sections of math assessments to support accuracy and speed in problem solving;
- Monitored test response;
- Answers recorded in the test booklet, as needed or appropriate;
- General administration directions read aloud and repeated as needed for Maryland Comprehensive Assessment Program (MCAP) assessments;
- Answer masking and elimination of an answer choice on MCAP assessments; and
- Text-to-speech for the math, science, and government MCAP assessments.

86. The IEP team considered the Student's needs regarding supplementary aids, services, program modifications and supports. After deliberating about her needs, the team determined the Student required:

- Instructional support: tools for spelling/spell check on a daily basis, across all academic classes.
- Instructional support: strategies/tools for organizing ideas for writing on a daily basis, across all academic areas for extended writing or graded assignments.
- Instructional support: prewriting strategies, including outlines and graphic organizers, periodically across all academic areas.
- Instructional support: pairing auditory with visual direction and instructions on a daily basis, across all academic classes.
- Instructional support: word prediction software on a daily basis, across all academic classes.
- Instructional support: modeling expected outcomes, periodically, across all academic areas as appropriate to specific tasks.
- Instructional support: no penalty for spelling errors unless on spelling tests, periodically across all academic classes.

- Instructional support: provide access to spelling resources such as spell check tools, periodically across all academic classes for extended writing or graded assignments.
- Instructional support: visual and/or verbal cueing for known letter-sound relationships on a daily basis, when encoding in her written output across all academic areas.
- Instructional support: provide proofreading checklist/rubric, periodically for written assignments across all academic areas.
- Instructional support: Provide student with a copy of student/teacher notes on a daily basis, for all academic classes, when appropriate and available
- Instructional support: check for understanding on a daily basis, during independent and instructional time throughout the academic day.
- Instructional support: preview novel or content specific vocabulary, when possible and appropriate, across all academic classes.
- Instructional support: use of a word bank to reinforce vocabulary and/or when extended writing is required, periodically for written output across all academic classes.
- Instructional support: repetition of directions on a daily basis, during independent and instructional times throughout the academic day.
- Instructional support: monitor independent work on a daily basis, during independent times throughout the academic day.
- Program modifications: altered/modified assignments, periodically across all academic classes.
- Program modifications: modified teacher-made assessments, as needed, when available and appropriate across academic areas.
- Program modifications: break down assignments into smaller units on a daily basis, whenever possible and across all academic areas.
- Social/behavioral supports: opportunities to deconstruct social situations with a trusted adult on a daily basis, throughout the school day.
- Social/behavioral supports: strategic seating away from distracting peers and/or next to positive role models on a daily basis, across all academic classes.
- Social/behavioral supports: strategies to initiate and sustain attention on a daily basis, during independent and instructional times throughout the academic day.
- Physical/environmental support: preferential seating near the source of instruction and positive peers, on a daily basis to support attention during independent and instructional times throughout the academic day.

Goals

87. The IEP team set the following goals for the Student:

- Written language mechanics: Given an editing checklist and rubric for an assigned paragraph or essay, word processor, and small group support, the Student will edit and change her work to demonstrate command of the conventions of the English grammar and usage when writing or speaking.

- Written language expression: Given use of graphic organizers, models of expected outcome, use of a word processor with spelling and grammar check, breaking down of task, and fading adult support, the Student will write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence.
- Reading Fluency: Given access to instructional level texts, daily evidence-based intervention with fidelity, reread readings, and fading adult supports, the Student will read with sufficient accuracy and fluency to support understanding.
- Reading Fluency: Given instructional level texts, breaking down of task, class discussion when appropriate, opportunities to reread a daily evidence-based intervention with fidelity, and fading adult support, the Student will read with sufficient accuracy and fluency to support understanding.
- Reading Phonemic Awareness: Given a reading passage at her reading level, a daily evidence-based reading intervention with fidelity and reminders of reading/decoding strategies, the Student will use knowledge of consonants, consonant blends, and common vowel patterns to decode unfamiliar words.
- Math Problem Solving: Given breaking down of task, models of expected outcomes, opportunities for repeated practice, and fading adult support, the Student will apply and extend previous understandings of arithmetic to solve real world algebraic expressions and equations.

88. Each goal in the IEP included subject-specific objectives for the Student during each academic quarter.

Least Restrictive Environment

89. The July 22, 2020 IEP provided that the Student would receive instruction in the general education setting for math, reading intervention, English, social studies, and science classes. The Student would also participate in electives and lunch with her non-disabled peers. Additionally, the Student would receive specialized instructions in a self-contained resource class, as the IEP team determined that the Student benefits from specialized instruction to address her executive functioning needs.

90. Reading intervention at [REDACTED] is taught by a general education teacher in a class of approximately twelve or fewer students. It is not a special education service.

The 2020-2021 School Year (Seventh Grade)

91. On August 23, 2020, the Parents, through counsel, notified MCPS that the Student would attend ██████ for the 2020-2021 school year in order to provide her with FAPE, as they did not believe that an appropriate special education program had been identified or offered by MCPS for the 2020-2021 school year. They requested that MCPS place and fund the Student at ██████.

92. On September 9, 2020, MCPS responded to the Parents, through counsel, and declined to place and fund the student at ██████ for the 2020-2021 school year.

93. During the 2020-2021 school year, the Student attended ██████.

94. ██████ has a college preparatory model, which places an emphasis on small classes and “differentiated instruction.”³⁰

95. The Student made the honor roll for the first quarter of the 2020-2021 school year.

96. On April 8, 2021, Mr. ██████ observed the Student in her English, literature, and math classes at ██████. During his visit to ██████, Mr. ██████ also spoke to the Student’s teachers and reading specialist.

97. As of April 8, 2021 observation the Student’s strengths included:

- Responding to teacher direction, prompting and instruction in supportive small class environment.
- Able to progress academically with teacher supports in specialized classes.
- Progressing with academic skills of reading, writing and math with specialized instruction and interventions.
- Seems calm and confident when in the school building

Additionally, the Student face challenges in the following areas:

- Reading decoding, reading fluency, and reading comprehension, which he noted as being considerably below grade level.
- Written composition, grammar, punctuation, and spelling.

³⁰ MCPS Ex. 1, p. 1.

- Conceptual understanding of math, which he noted as being a little below current grade level.
- Limited online participation and early exits from virtual class seem to be related to anxiety.
- Progress on social skills had been limited by virtual education.

98. On April 13, 2021, the Student was given the GORT-5,³¹ to assess the Student's oral reading skills. The Student's oral reading skills were below average.

99. On June 4, 2021, Mr. [REDACTED] had a conference with four of the Student's teachers at [REDACTED].

100. As of June 4, 2021, the Student had the following strengths:

- Progressing in her academic skills (reading, writing and math).
- Participating in most classes.
- Having friends and demonstrating appropriate social skills with peers.

The Student also faced challenges in the following areas:

- Reading comprehension.
- Written mechanics and elaboration of ideas.
- Math word problems.
- Making excuses to attempt to avoid work.
- Not completing all assignments on time.
- May appear oppositional at times with some staff.

The 2021-2022 School Year (Eighth Grade)

101. On August 24, 2021, the Parents, through counsel, notified MCPS that the Student would remain at [REDACTED] for the 2021-2022 school year and requested that MCPS place and fund the Student at [REDACTED].

102. On August 24, 2021, MCPS, through counsel, sent Parent's counsel a letter, requesting that the Parents attend an IEP meeting so that MCPS could review the Student's progress during the 2020-2021 school year and develop an IEP for the 2021-2022 school year

³¹ Gray Oral Reading Test, fifth edition.

103. On August 27, 2021, MCPS responded to the Parents, through counsel, that an IEP had not yet been proposed for the 2021-2022 school year and, therefore, the Parents' request that MCPS place and fund the Student at [REDACTED] for the school year was premature. MCPS indicated that the Parents would be receiving an invitation letter for the IEP meeting.

104. The Student attended [REDACTED] for her entire eighth-grade year.

105. At the beginning of the school year, [REDACTED] conducted a MAZE (comprehension) assessment, ORF (fluency) assessment, and CORE (phonics) assessment of the Student. The results were as follows:

- MAZE - meets benchmark
- ORF - below benchmark
- CORE – below benchmark

106. The [REDACTED] Secondary Teacher Reports from October 2021 indicate the Student's progress in each of her classes. The Student's progress is assessed using three criteria: strength, satisfactory, and concern. The Student's progress was as follows:

- History:
 - Reading:*
Satisfactory: reads accurately and understands class readings.
 - Written Language:*
Satisfactory: in written assessments.
 - Oral Communication:*
Strength: speaks clearly.
Satisfactory: understands information presented orally, understands class readings, and speaks in complete sentences to express ideas.
 - Organization:*
Satisfactory: notebook organization, assignments completed by due date, and arrives with necessary materials.
 - Participation:*
Strength: contributes during class discussions.
Satisfactory: focuses on instruction/activity and works collaboratively with team members.

Concern: socializes at appropriate times and requests accommodations.

Social/Emotional:

Strength: interactions with students

Satisfactory: interactions with staff and problem solves when stressed.

Concern: raises hand/waits to be called on.

- Physical Science:

Reading:

Satisfactory: reads accurately and understands class readings.

Concern: is able to interpret lengthy text and is able to keep up with longer readings.

Oral Communication:

Strength: understands information presented orally and speaks clearly.

Satisfactory: understands class readings and speaks in complete sentences to express ideas.

Organization:

Satisfactory: notebook organization and arrives with necessary materials.

Concern: assignments completed by due date.

Participation:

Strength: contributes during class discussions and works collaboratively with team members.

Satisfactory: socializes at appropriate times, requests accommodations, and focuses on instruction/activity.

Social/Emotional:

Strength: interactions with staff and raises hand/waits to be called on.

Satisfactory: interactions with students and problem solves when stressed.

- English:

Written Language:

Satisfactory: ideas & development and organization.

Concern: voice, sentence fluency, and conventions.

Oral Communication:

Satisfactory: understands class readings and information presented orally, and speaks clearly and in complete sentences to express ideas.

Organization:

Strength: assignments completed by due date and arrives with necessary materials.

Satisfactory: notebook organization.

Participation:

Strength: contributes during class discussions.

Satisfactory: socializes at appropriate times, requests accommodations, focuses on instruction/activity, and works collaboratively with team members.

Social/Emotional:

Satisfactory: interactions with staff and students, problem solves when stressed, and raises hand/waits to be called on.

- English:
(Written Expression)

*Written language*³²:

Concern: ideas & development, voice, in written assessments, sentence fluency, and conventions.

Oral Communication:

Satisfactory: understands class readings, and speaks clearly and in complete sentences to express ideas.

Concern: understands information presented orally.

Organization:

Strength: assignments completed by due date and arrives with necessary materials.

Participation:

Strength: contributes during class discussions, socializes at appropriate times, and works collaboratively with team members.

Satisfactory: requests accommodations and focuses on instruction/activity.

Social/Emotional:

Strength: interactions with staff and students.

Satisfactory: problem solves when stressed and raises hand/waits to be called on.

- Literature:

Reading:

Satisfactory: understands class readings and is able to interpret lengthy text.

Concern: reads accurately and fluently, and is able to keep up with longer readings.

³² The “organization” category under written language is marked both as satisfactory and concern. Presumably this is a clerical error.

Written language:

Satisfactory: Voice.

Concern: ideas & development, organization, in written assessments, sentence fluency, and conventions.

Oral Communication:

Satisfactory: understands class readings and information presented orally, and speaks clearly and in complete sentences to express ideas.

Organization:

Strength: notebook organization and arrives with necessary materials.

Concern: assignments completed by due date.

Participation:

Strength: contributes during class discussions, socializes at appropriate times, requests accommodations, focuses on instruction/activity, and works collaboratively with team members.

Social/Emotional:

Strength: interactions with staff and students, and raises hand/waits to be called on.

Satisfactory: problem solves when stressed.

- Math 7:

Math:

Strength: math concepts and math application.

Satisfactory: basic operations.

Oral Communication:

Strength: speaks clearly and in complete sentences to express ideas.

Satisfactory: understands information presented orally.

Organization:

Strength: arrives with necessary materials.

Satisfactory: assignments completed by due date.

Participation:

Strength: contributes during class discussions and socializes at appropriate times.

Satisfactory: requests accommodations, focuses on instruction/activity, and works collaboratively with team members.

Social/Emotional:

Strength: interactions with students.

Satisfactory: interactions with staff, problem solves when stressed, and raises hand/waits to be called on.

- Pre-Algebra:

Reading:

Satisfactory: reads accurately and fluently.

Written language:

Satisfactory: organization and in written assignments.

Math:

Strength: basic operations.

Satisfactory: math concepts.

Concern: math application.

Oral Communication:

Satisfactory: understands class readings and information presented orally, and speaks clearly and in complete sentences to express ideas.

Organization:

Satisfactory: notebook organization and arrives with necessary materials.

Concern: assignments completed by due date.

Participation:

Strength: contributes during class discussions and socializes at appropriate times.

Satisfactory: focuses on instruction/activity and works collaboratively with team members.

Concern: requests accommodations.

Social/Emotional:

Strength: interactions with staff and students, and raises hand/waits to be called on.

Satisfactory: problem solves when stressed.

107. On October 28, 2021, Mr. [REDACTED], on behalf of the Parents, conducted an observation of the Student in her English and History classes at [REDACTED]. After the observations, Mr. [REDACTED] also spoke with the Student's English and History teachers, as well as her Reading and Pre-Algebra teachers, and the program administrator.

108. As of October 28, 2021, the Student's strengths were as follows:

- Motivated, optimistic, and cheerful
- Good sense of humor
- Receives feedback well and implements suggested strategies
- She was an enthusiastic involved learner in class.
- Basic math operations
- Interactions with staff and students
- Contributes during discussions
- Focuses on instruction/activity
- Works collaboratively
- Notebook organization
- Typically completes assignment on time
- Speaks clearly and in complete sentences
- Understands information presented orally
- Progressing in all areas of reading

109. Additionally, the Student faced the following challenges:

- Reading rate, accuracy, fluency, and comprehension were noted as all below grade level
- Following step-by-step directions
- Higher level reading comprehension and written expression
- Higher level math application
- Spelling, vocabulary, grammar, and syntax
- Written expression (ideas/development, voice, sentence fluency)
- Requesting accommodations when necessary
- Raising her hand to speak
- Completing homework assignments

110. The Student's grades for the 2021-2022 school year generally ranged from A to B, with the occasional B- or C.

IEP Development for the 2021-2022 School Year (Eighth Grade)

111. The IEP team, including the Parents, attended a meeting on October 13, 2021, which continued on November 3, 2021. The Parents were informed of the *Procedural Safeguards and Parental Rights* under IDEA. Mr. [REDACTED] and the Parents' attorney also attended the meeting. No one from [REDACTED] attended either meeting.

112. Prior to the October 13, 2021 meeting, MCPS requested data from the Parents and their attorney, including a middle school transition interview, starting in August 2021. However, by the time of the meeting, MCPS had only received the final seventh grade report card and one

teacher report. As a result, MCPS did not have enough data to develop an IEP. The Parents agreed to reconvene the meeting after additional data was obtained from the [REDACTED]. The Parents also agreed to provide Mr. [REDACTED]'s observation reports and any documentation that they had from [REDACTED], and to make the Student available to a transition interview over the phone. In turn, MCPS would send the Parents a revised draft IEP based on the data that was provided.

113. During the October 13, 2021 meeting, the Parents shared their personal summary of the Student's good progress at [REDACTED].

114. At the November 3, 2021 IEP meetings, the Parents noted that the Student's fluency was two years below her comprehension, as measured by the March 2020 GORT-5 assessment.

115. After receiving additional data from the Parents and [REDACTED], the school-based IEP team drafted an IEP. In drafting the IEP, the team considered the evaluative data, including the Student's educational record, including 2020-2021 and Fall 2021 teacher reports from [REDACTED], classroom-based assessments, the June 2021 final report card from [REDACTED], reports of observations conducted by Mr. [REDACTED] on April 8, 2021 and October 28, 2021, Dr. [REDACTED]'s Comprehensive Psychological Evaluation Report, and parental input.

116. Based upon the school-based IEP team's review of the evaluative data and revisions to the Student's present levels of academic achievement and functional performance, the school-based team proposed to make the following revisions to the IEP:

- To add present levels of performance to the IEP for anxiety to the IEP.
- To add an additional supplemental support of frequent check-ins to prompt self-advocacy and prompt the use of coping skills.
- To clarify the delivery of the supplemental support of providing opportunities for the Student to deconstruct social situations with a trusted adult throughout the day, by adding that this would occur individually or in small groups.
- To add to the discussion of impact the statement that anxiety does not appear to impact the Student's learning in her current educational setting.
- That the Student requires ESY services for the Summer of 2022.

- To implement the IEP developed on November 3, 2021 with the following services: a reading intervention for 45 minutes per day, inside general education (small group instruction using systematic intervention); a resource class for 45 minutes daily, outside general education; and English, math, science and social studies inclusion classes for 45 minutes per day each, inside general education.

Levels of Academic Achievement and Functional Performance

117. The school-based IEP team determined that the Student's present level of instructional grade level performance for reading phonemic awareness was scattered skills at approximately the second to fourth grade level.

118. The school-based IEP team determined the Student's present level of instructional grade level performance for reading fluency was scattered skills at approximately the mid-third to fourth grade level.

119. The school-based IEP team determined that the Student's present level of instructional grade level performance for reading comprehension was scattered skills approximately mid-fifth to eighth grade level.

120. The school-based IEP team determined that the Student's present level of instructional grade level performance for written language mechanics was seventh/eighth grade, with supports.

121. The school-based IEP team determined that the Student's present instructional grade level of performance for written language expression was fifth to seventh grade, with supports.

122. The school-based IEP team determined that the Student's present level of instructional grade level of performance for math problem solving was at the seventh-grade level, with supports.

123. The school-based IEP determined that the Student's present level of performance for social interaction skills was below grade level expectations.

124. The school-based IEP determined that the Student's present level of performance for anxiety was at age expectancy.

125. The school-based IEP team determined that the Student's present level of performance for attention/executive functioning was below grade level expectations.

Special Considerations and Accommodations

126. The November 3, 2021 IEP contained the following supplemental supports which were included in the previous IEP:

- Tools for spelling/spell check
- Strategies/tools for organizing ideas for writing
- Pre-writing strategies including outlines and graphic organizers
- Pair auditory with visual directions and instruction
- Word prediction software
- No penalty for spelling errors unless on spelling tests
- Provide access to spelling resources, such as spell check tools
- Provide proofreading checklist/rubric
- Provide Student with copy of student/teacher notes
- Repetition of directions
- Monitor independent work
- Strategic seating away from distracting peers and/or next to positive role models
- Opportunities to deconstruct social situations with a trusted adult

127. The school-based IEP team did not determine that the Student had developed any special communication needs.

128. No changes were proposed to the IEP with regard to the Student's need for assistive technology devices in the form of a word processor and calculator.

129. The school-based IEP team considered the Student's instructional and assessment accessibility needs. The team did not make any changes to the aides, services, modifications, and supports that were set forth in the prior IEP, but they did add the following support:

- Reminders to slow down with math work and check work for correct accuracy and correct number/decimal placement or operation, on daily basis in math on independent assignments.

130. Additionally, the school-based team noted that that the following accommodations could not be implemented virtually: frequent breaks, reduced distractions to self, changing locations within the school, monitoring test responses and recording answers in the test booklet.

Goals

131. The school-based IEP team proposed the following goals for the Student:

- Written language mechanics: Given models, an editing checklist and rubric for an assigned paragraph or essay, word processor, and small group support, the Student will edit and change her work to demonstrate command of the conventions of standard English grammar and usage when writing with 80% accuracy over four out of five trials by November 2022.
- Written language expression: Given graphic organizers, models of expected outcome when appropriate, use of a word processor with spelling and grammar check, breaking down of task, and fading adult support, the Student will write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence with 80% accuracy in four out of five trials by November 2022.
- Reading Fluency: Given graphic organizers, models of expected outcome when appropriate, use of a word processor with spelling and grammar check, breaking down of task, and fading adult support, the Student will write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence with 80% accuracy in four out of five trials by November 2022.
- Reading Comprehension: Given instructional level text, breaking down of task, class discussion when appropriate, opportunities to reread, a daily evidence-based intervention with fidelity, and fading adult support, the Student will read closely to determine what a text says explicitly and to make logical inferences from it with 80% accuracy in four out of five trials by November 2022.
- Reading Phonemic Awareness: Given a reading passage at her reading level, a daily evidence-based reading intervention with fidelity and reminders of reading/decoding strategies, the Student will use knowledge of consonants, consonant blends, and common vowel patterns to decode unfamiliar words.
- Math Problem Solving: Given breaking down of task, models of expected outcomes, opportunities for repeated practice, and fading adult support, the Student will apply and extend previous understandings of arithmetic to solve real

world algebraic expressions and equations with 80% accuracy in four out of five trials by November 2022.

- Attention/Executive Functioning: Given fading adult support, opportunities for practice, agenda/organizational tool, homework binder system, visual/verbal reminders, and frequent check-ins, the Student will increase her ability to organize assignments and complete her work fully by the due dates by November 2022.

Least Restrictive Environment

132. The school-based IEP team drafted an IEP to include all of its proposals, including that the least restrictive environment portion of the IEP in accordance with its proposal that that the Student would receive a reading intervention for 45 minutes per day, inside general education (small group instruction using systematic intervention); a resource class for 45 minutes daily, outside general education; and English, math, science and social studies inclusion classes for 45 minutes per day each, inside general education at [REDACTED].

IEP Development for the 2022-2023 School Year (Ninth Grade)

133. On February 18, 2022, MCPS invited the Parents to an IEP meeting scheduled for March 10, 2022, to review the existing records to determine if there was a need for additional data. A copy of the *Procedural Safeguards and Parental Rights* was enclosed with the notice.

134. On March 10, 2022, the IEP team convened via a virtual meeting, including the Parents. Mr. [REDACTED] and the Parents' attorney also attended.

135. The IEP team determined that additional data was required to determine the Student's present level of academic achievement and developmental needs. The IEP team proposed to conduct certain psychological and educational assessments, an AT assessment and classroom observation. The Parents agreed with this proposal.

The May 3, 2022 Psychological Evaluation

136. On May 3, 2022, school psychologist [REDACTED], Ph.D. conducted a reevaluation of the Student.

137. Dr. [REDACTED] was present at the March 10, 2022 IEP meeting. She reviewed Dr. [REDACTED]'s May 2020 report, including the history of the Student's prior assessments which was contained in the report. Dr. [REDACTED] also conducted a behavioral observation and interview of the Student, as well as a joint interview with the Student and the Mother.

138. Dr. [REDACTED] administered the following assessments to the Student:

- Behavior Assessment System for Children: Third Edition (BASC3), Self-Report of Personality, completed by the student
- BRIEF-2
- MASC-2

139. Based upon her review of the past assessments and her own evaluation of the Student, Dr. [REDACTED] noted that the Student was not actively reporting symptoms of anxiety on either of the self-measures and that the current teacher and parent ratings did not result in clinically significant levels of anxiety on the rating scales.

Dr. [REDACTED]'s June 2022 Educational Assessment Report³³

140. Dr. [REDACTED] conducted educational assessments of the Student over the course of three weeks—on April 25, May 2, May 9, and May 18, 2022. The purpose of the assessment was to determine whether the Student was educationally disabled and eligible for special education services and confirm the current learning behaviors that were negatively affecting her progress in the areas of reading phonemic awareness, reading phonics, reading fluency, reading comprehension, spelling, written language mechanics, written language expression, written language content, math calculation, and math problem solving.

³³ The report was revised on July 21, 2022.

141. On April 27, 2022, Dr. [REDACTED] observed the Student in her reading, pre-algebra, and English classes.

142. During her evaluation of the Student, Dr. [REDACTED] used the Woodcock-Johnson Tests of Achievement-IV (WJ-IV), an individually administered achievement test that measures a student's academic performance in relation to their peer group based on age. Each cluster is composed of tests that provide diagnostic information and give insight into a student's strengths and weaknesses in reading, mathematics, writing and related skills.

143. Dr. [REDACTED] also conducted the following informal assessments:

- Institute for Multisensory Education (IMSE) Rapid Automatic Naming Assessment, which assists in determining if a student is at risk for phonological awareness issues.
- Core Phonological Segmentation Test, which assesses a student's ability to break a word into component phonemes.
- CORE Phoneme Deletion Test, which assesses a student's ability to delete the initial sound of a word, the final sound of a word, as well as the ability to delete the initial phoneme in blends and the embedded phoneme in blends.
- Core Phonics Survey to assess phonics and phonics related skills that have a high rate of application in beginning reading.
- Alphabet Skills and Letter Sounds.
- Fountas and Pinnell 100 High-Frequency Words Assessment .
- Fountas and Pinnell Word Features Test to see which word features could or could not read.
- Fountas and Pinnell Running Reading Record, assessing components of the Student's reading skills.
- Universal Protocol for Accommodations in Reading (uPAR), a formative protocol tool intended to help educators make informed decisions about reading accommodations.

144. Dr. [REDACTED] also reviewed reading information from the MCPS's master reading coordinator, regarding the Student and other school-based data.

145. Throughout the testing sessions, the Student required the following:

- An agenda for each session
- Clear directions for each assessment
- Opportunities to ask clarifying questions, when allowable by the test directions
- Breaks
- Repeated/restated directions when allowable by the test directions

- Verbal prompts to wait for all of the directions to be read
- Pre-teaching/exemplars of expected work when allowable by the test directions
- Opportunities for self-talk and/or verbal rehearsal
- Blank scratch paper

146. Dr. [REDACTED]'s overall evaluation revealed the Student had the following strengths/relative strengths:

- Self-advocacy
- Oral language
- Relationship with peers and adults
- Effort, motivation, and persistence
- Phonological/phonemic awareness
- Writing at the single sentence level
- High frequency words
- Listening comprehension
- Written language mechanics
- Math calculation
- Math problem solving
- Math fact automaticity

Additionally, the Student also had the following weaknesses/relative weaknesses:

- Reading phonics
- Reading fluency
- Reading comprehension
- Written language expression
- Attention

147. Based on the results of her evaluation of the Student, Dr. [REDACTED] made the following recommendations:

- Ongoing multisensory instruction in reading phonics
- Ongoing multisensory instruction in reading fluency
- Ongoing multisensory in reading comprehension
- Ongoing multisensory instruction in spelling/encoding
- Verbal prompts
- Repeated/restated directions
- Calculation devices
- Exemplars of grade level proficient work
- Writer's checklist
- Graphic organizers

- Math problem solving checklist
- Opportunities for oral rehearsal
- Use of text to speech to support reading comprehension
- Teacher modelling
- Small group instruction
- Blank scratch paper
- An agenda/assignment list

The August 22, 2022 IEP Meeting

148. The IEP team, including the Parents reconvened on August 22, 2022 to revise/review the Student's IEP. Mr. [REDACTED] and the Parent's attorney also attended the meeting.

149. During the meeting, the IEP team considered all of the evaluative data, including the recent psychological and educational assessments of the Student. Based on their review of all the relevant data, the team developed an IEP for the 2022-2023 school year.

Levels of Academic Achievement and Functional Performance

150. The school-based IEP team determined that the Student's present level of instructional grade level performance for reading phonemic awareness was mastered, within grade level expectations

151. The school-based IEP team determined that the Student's present level of instructional grade level performance for reading phonics was scattered skills at approximately the third to fifth grade level.

152. The school-based IEP team determined the Student's present level of instructional grade level performance for reading fluency was approximately fourth grade level, with scattered skills between the third to sixth grade.

153. The school-based IEP team determined that the Student's present level of instructional grade level performance for reading comprehension was scattered skills at

approximately fifth grade level, independently, and sixth grade level, instructional (when reading independently).

154. The school-based IEP team determined that the Student's present level of instructional grade level performance for written language mechanics was scattered skills at approximately the fifth to eighth grade level.

155. The school-based IEP team determined that the Student's present instructional grade level of performance for written language expression was fifth to seventh grade, with supports.

156. The school-based IEP team determined that the Student's present level of instructional grade level of performance for math problem solving was scattered skills, approximately eighth grade.

157. The school-based IEP determined that the Student's present level of performance for social emotional/behavioral skills was at age expectancy.

158. The school-based IEP team determined that the Student's present level of performance for social interaction skills met age-level expectations.

159. The school-based IEP team determined that the Student's present level of performance for attention/executive functioning was below grade level expectations.

Special Considerations and Accommodations

160. The IEP team added blank scratch paper to the Student's existing accommodations.

161. The IEP team added the following supports to those listed in the previous IEP:

- Opportunities to read aloud for math problem solving
- Math problem solving checklist
- Opportunities for oral rehearsal of written assignments
- Opportunities to ask clarify questions
- Monitor use of agenda book and/or progress report

Goals

162. The IEP team set the following goals for the Student:

- Written language mechanics: Given models, an editing checklist and rubric for an assigned paragraph or essay, word processor, and small group support, the Student will edit and change her work to demonstrate command of the conventions of standard English grammar and usage when writing with 80% accuracy over four out of five trials by November 2022.
- Written language expression: Given graphic organizers, models of expected outcome when appropriate, use of a word processor with spelling and grammar check, breaking down of task, and fading adult support, the Student will write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence with 80% accuracy in four out of five trials by November 2022.
- Reading Fluency: Given graphic organizers, models of expected outcome when appropriate, use of a word processor with spelling and grammar check, breaking down of task, and fading adult support, the Student will write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence with 80% accuracy in four out of five trials by November 2022.
- Reading Comprehension: Given instructional level text, breaking down of task, class discussion when appropriate, opportunities to reread, a daily evidence-based intervention with fidelity, and fading adult support, the Student will read closely to determine what a text says explicitly and to make logical inferences from it with 80% accuracy in four out of five trials by November 2022.
- Reading Phonemic Awareness: Given text at her reading level, an evidence based reading intervention with fidelity, and reminders of reading/decoding strategies, the Student will use knowledge of consonants, consonant blends, and common vowel patterns to decode unfamiliar words with 20% increase over a baseline assessment by November 2022.
- Math Problem Solving: Given breaking down of task, models of expected outcomes, opportunities for repeated practice, and fading adult support, the Student will apply and extend previous understandings of arithmetic to solve real world algebraic expressions and equations.
- Attention/Executive Functioning: Given fading adult support, opportunities for practice, agenda/organizational tool, homework binder system, visual/verbal reminders, and frequent check-ins, the Student will increase her ability to organize assignments and complete her work fully by the due dates by November 2022.

163. Each goal in the IEP included subject-specific objectives for the Student during each academic quarter.

Least Restrictive Environment

164. The school-based members of the IEP team determined that the Student would receive special education services inside general education for inclusion, 45 minutes per day each for English, science, social studies, and math. Additionally, the Student would receive special education services in a self-contained classroom for resource and reading intervention, 45 minutes per day each.

165. The 2022-2023 IEP would be implemented at [REDACTED].

The 2022-2023 School Year (Ninth Grade)

166. The Student did not return to MCPS for the 2022-2023 school year as the Parents elected to keep her enrolled at [REDACTED].

DISCUSSION³⁴

BURDEN OF PROOF

The standard of proof in this case is a preponderance of the evidence.³⁵ To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered.³⁶ The burden of proof rests on the party seeking relief.³⁷ The Parents are seeking relief on the Student’s behalf and bear the burden of proof to show that MCPS failed to offer the Student a FAPE for the 2020-2021, 2021-2022, and 2022-2023 school years, and that they are entitled to reimbursement for their unilateral placement of the Student at [REDACTED].

³⁴ My findings, analysis, and legal conclusions are based upon consideration of all of the parties’ arguments and the credible evidence of record. All testimonial and documentary evidence was considered and given the weight it was due, regardless of whether it has been recited, cited, referenced, or expressly set forth in the Decision. *See, e.g., 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”).

³⁵ COMAR 28.02.01.21K(1); *see* 20 U.S.C.A. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).

³⁶ *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

³⁷ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005).

For the reasons that follow, I find the Parents have not met this burden, and conclude that MCPS offered the Student a FAPE for the 2020-2021, 2021-2022, and 2022-2023 school years, with an IEP that was reasonably calculated to meet her unique needs and that the Parents are therefore not entitled to reimbursement for their unilateral placement of the Student at [REDACTED].

APPLICABLE LAW

The identification, evaluation, and placement of students in special education are governed by the IDEA.³⁸ The IDEA requires “that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.”³⁹

To be eligible for special education and related services under the IDEA, a student must meet the definition of a “child with a disability” as set forth in section 1401(3) of the U.S.C.A. and the applicable federal regulations. The statute provides as follows:

(A) In General

The term “child with a disability” means a child –

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.^[40]

The Supreme Court addressed the FAPE requirement in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), holding that FAPE is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”⁴¹ The Court set out a two-part inquiry to analyze whether a local education agency satisfied its obligation to

³⁸ 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01.

³⁹ 20 U.S.C.A. § 1400(d)(1)(A); *see also* Educ. § 8-403.

⁴⁰ 20 U.S.C.A. § 1401(3)(A); *see also* Educ. § 8-401(a)(2); 34 C.F.R. § 300.8; and COMAR 13A.05.01.03B(78).

⁴¹ *Rowley*, 458 U.S. at 201 (footnote omitted).

provide FAPE: first, whether there has been compliance with the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit.⁴²

The *Rowley* Court found, because special education and related services must meet the state's educational standards, that the scope of the benefit required by the IDEA is an IEP reasonably calculated to permit the student to meet the state's educational standards; that is, generally, to pass from grade to grade on grade level.⁴³

The Supreme Court recently revisited the meaning of a FAPE, holding that for an educational agency to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances.⁴⁴ Consideration of the student's particular circumstances is key to this analysis; the Court emphasized in *Endrew F.* that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created."⁴⁵

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

- (i) the strengths of the child;
- (ii) the concerns of the Parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child; and
- (iv) the academic, developmental, and functional needs of the child.⁴⁶

Among other things, the IEP depicts a student's current educational performance, explains how the student's disability affects a student's involvement and progress in the general

⁴² *Id.* at 206-07.

⁴³ *Rowley*, 458 U.S. at 204; 20 U.S.C.A. § 1401(9).

⁴⁴ *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017).

⁴⁵ *Id.* at 1001.

⁴⁶ 20 U.S.C.A. § 1414(d)(3)(A).

curriculum, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular educational programs.⁴⁷

IEP teams must consider the student’s evolving needs when developing their educational programs. The student’s IEP must include “[a] statement of the child’s present levels of academic achievement and functional performance, including . . . [h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for non-disabled children) . . .”⁴⁸ If a child’s behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, the use of positive behavioral interventions, strategies and supports to address that behavior.⁴⁹ A public agency is responsible for ensuring that the IEP is reviewed at least annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision.⁵⁰ However, a “school district is only required to continue developing IEPs for a disabled child no longer attending its schools when a prior year’s IEP for the child is under administrative or judicial review.”⁵¹

To comply with the IDEA, an IEP must, among other things, allow a disabled child to advance toward measurable annual academic and functional goals that meet the needs resulting

⁴⁷ 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A.

⁴⁸ 34 C.F.R. § 300.320(a)(1)(i).

⁴⁹ *Id.* § 300.324(a)(2)(i).

⁵⁰ *Id.* § 300.324(b)(1).

⁵¹ *M.M. v. Sch. Dist. of Greenville Cty.* 303 F.3d 523, 536 (4th Cir. 2002).

from the child’s disability or disabilities, by providing appropriate special education and related services, supplementary aids, program modifications, supports, and accommodations.⁵²

Thirty-five years after *Rowley*, the parties in *Andrew F.* asked the Supreme Court to go further than it did in *Rowley*, and set forth a test for measuring whether a disabled student had attained sufficient educational benefit. The framework for the decision was the Tenth Circuit’s interpretation of the meaning of “some educational benefit,” which construed the level of benefit as “merely . . . ‘more than *de minimis*.’”⁵³

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

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

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to

⁵² 20 U.S.C.A. § 1414(d)(1)(A)(i)(II), (IV), (VI).

⁵³ *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

Congress' perception that a majority of disabled children in the United States “were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.””⁵⁴ A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be “*pecially* designed” to meet a child's “*unique* needs” through an “[*i*]ndividualized education program.”⁵⁵ The Court expressly rejected the Tenth Circuit's interpretation of what constitutes “some benefit”: When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to ‘drop out.’” The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.⁵⁶

Directly adopting language from *Rowley*, and expressly stating that it was not making any “attempt to elaborate on what ‘appropriate’ progress will look like from case to case,” the *Andrew F.* court instructs that the “absence of a bright-line rule . . . should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’”⁵⁷ At the same time, the *Andrew F.* court wrote that in determining the extent to which deference should be accorded to educational

⁵⁴ *Andrew F.*, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 179).

⁵⁵ *Andrew F.*, 137 S. Ct. at 998-99 (citations omitted).

⁵⁶ *Id.* at 1001 (citation omitted).

⁵⁷ *Id.* (quoting *Rowley*, 458 U.S. at 206).

programming decisions made by public school authorities, “[a] reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”⁵⁸

Ultimately, a disabled student’s “educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.”⁵⁹ Moreover, the IEP must be reasonably calculated to allow him to advance from grade to grade, if that is a “reasonable prospect.” *Id.*

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the “least restrictive environment” to achieve a FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom.⁶⁰ Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program.⁶¹ At a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs.⁶² Placing disabled children into regular school programs may not be appropriate for every disabled child, and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved.

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like MCPS to

⁵⁸ *Id.* at 1002.

⁵⁹ *Id.* at 1000.

⁶⁰ 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117.

⁶¹ *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989).

⁶² 20 U.S.C.A. § 1412(a)(5)(A).

offer a continuum of alternative placements that meet the needs of children with disabilities.⁶³

The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services to be provided in conjunction with regular class placement.⁶⁴

Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved.⁶⁵ In such a case, a FAPE might require placement of a child in a nonpublic school setting that would be fully funded by the child's public school district.

Parents may be entitled to retroactive reimbursement from the state for tuition and expenses for a child unilaterally placed in a private school if it is later determined that the school system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education.⁶⁶ The issue of reimbursement for unilateral placement was expanded in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Parents may recover the cost of private education only if (1) the school system failed to provide a FAPE; (2) the private education services obtained by the parent were appropriate to the child's needs; and (3) overall, equity favors reimbursement.⁶⁷ The nonpublic education services need not be provided in the least restrictive environment.⁶⁸

In order to assist IEP teams with evaluation of students, the MSDE issued a Technical Assistance Bulletin to provide a brief overview of the relevant evaluation procedures, as well as

⁶³ 34 C.F.R. § 300.115.

⁶⁴ *Id.* § 300.115(b); COMAR 13A.05.01.10B(1).

⁶⁵ COMAR 13A.05.01.10A(2).

⁶⁶ *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985).

⁶⁷ *See Id.* at 12-13.

⁶⁸ *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

illustrative examples of academic difficulties that may form the basis of a SLD determination if a student meets all other criteria under the IDEA and requires the provision of specially designed instruction. The following are the relevant excerpts from the Technical Assistance Bulletin issued November 7, 2016:

By definition, specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, consistent with Maryland State Department of Education (MSDE) criteria. A full explanation of the criteria to be used for a SLD determination is contained in *A Tiered Instructional Approach to Support Achievement for All Students: Maryland's Response to Intervention Framework* (June 2008).

SLD includes, but is not limited to, conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Given that this is not an exhaustive list, other conditions may also form the basis for a SLD determination if all other criteria under the IDEA are met and the student requires the provision of specially designed instruction. With regard to one item that is on the list, brain injury, please note that “traumatic brain injury” is a distinct disability category under the IDEA. Lastly, the definition of SLD does not include learning problems, which are primarily the result of visual, hearing, or motor impairments, intellectual disability, emotional disability, or environmental, cultural, or economic disadvantage.

Authority: 34 CFR § 300.8; COMAR 13A.05.01.03B(73).

The IEP team determines whether a student has a SLD by completing the evaluation process and carefully considering the eligibility criteria under the IDEA, with input from all members of the team. As is the case with any other disability determination, the IEP team consists of various school personnel, the student's parent or guardian, and, as appropriate, the student. When compiling the members of the IEP team, it is important to consider the areas of suspected disability so the team is knowledgeable about the student's needs. Certain qualified professionals are expressly required in order for the IEP team to make a SLD determination. For the purposes of a SLD determination, the IEP team must include:

- 1) the student's general education teacher;
- 2) if the student does not have a general education teacher, a general education classroom teacher qualified to teach a student of that age; or
- 3) for a child of less than school age, an individual qualified by the MSDE to teach a child of that age. In addition, the IEP team must include at least one person qualified to conduct individual diagnostic examinations of students, such as a school psychologist, speech-language pathologist, or reading teacher. The same person may conduct multiple diagnostics, provided he or she is qualified to conduct each. *Authority:* 34 CFR § 300.308; COMAR 13A.05.01.06D(7).

The IEP team may determine that a student has a SLD if the student does not achieve adequately for the student's age or meet State-approved grade level standards when provided with learning experiences appropriate for the student's age and ability levels in one or more of the following areas:

- 1) oral expression;
- 2) listening comprehension;
- 3) basic reading skills;
- 4) reading fluency skills;
- 5) reading comprehension;
- 6) written expression;
- 7) mathematics calculation; or
- 8) mathematics problem solving.

In short, the IEP team is looking for inadequate achievement, despite appropriate instruction, in listening, speaking, reading, writing, and math.

Authority: 34 CFR § 300.309; COMAR 13A.05.01.06D(2)(a).

Maryland has adopted two processes through which an IEP team can determine that a student's achievement is inadequate and forms the basis for a SLD. The IEP team may consider evaluative data and appropriate assessments to determine whether the student:

- 1) does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the 8 academic areas when using a process based on the student's response to evidence-based intervention; or
- 2) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development.

The IDEA allows for alternative research-based procedures to identify a SLD, but the MSDE has not identified any such alternatives at this time. Thus, response to intervention (RTI) or a pattern of strengths and weaknesses are the two options that are available in Maryland.

The IEP team may, in conjunction with one of the two options above, also look for a severe discrepancy between intellectual ability and achievement. Severe discrepancy became disfavored during adoption of the 2004 IDEA amendments, in part because it delays intervention until a student's achievement is sufficiently low for a discrepancy to be identified, unlike RTI, which is actively linked to instruction. While a local school system (LSS) may not be required to use a severe discrepancy, it remains available, and may be useful for identifying gifted (twice exceptional) students and/or older students with a SLD.

A fuller explanation of the processes above and how they fit into an integrated tiered system of supports is contained in *A Tiered Instructional Approach to Support Achievement for All Students: Maryland's Response to Intervention Framework* (June 2008). *Authority:* 34 CFR § 300.307; 34 CFR § 300.309; COMAR 13A.05.01.06D(1); COMAR 13A.05.01.06D(3).

The IEP team is required to consider both:

- 1) data demonstrating that prior to, or as part of, the referral process, the student was provided appropriate instruction in general education settings, delivered by qualified personnel; and
- 2) data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, that was provided to the student's parent. In other words, the IEP team must review the student's general education record with regard to both instruction and assessment in the areas of reading, math, and written expression.

One important consideration when evaluating data is that a timely evaluation must not be delayed or denied on the basis that a LSS is implementing a RTI strategy. Additional guidance on this topic is contained in *Memorandum 11-07*, issued by the United States Department of Education, Office of Special Education and Rehabilitative Services (OSERS). *Authority*: 34 CFR § 300.309; COMAR 13A.05.01.06D(4).

The IEP team must ensure that the student has been observed in the student's learning environment (including the general education classroom setting) to document academic performance and behavior in the areas of difficulty. The IEP team may:

- 1) use information from an observation *before* the student was referred for an evaluation; or
- 2) have at least one member of the IEP team, other than the student's general education teacher, conduct an observation *after* the referral was made.

In the case of a child of less than school age or out of school, an IEP team member must observe the child in an environment appropriate for a child of that age. *Authority*: 34 CFR § 300.310; COMAR 13A.05.01.05B(5).

The IEP team shall not determine a student has a SLD if the student's lack of achievement is primarily the result of:

- 1) a visual, hearing, or motor impairment;
- 2) intellectual disability;
- 3) emotional disability;
- 4) cultural factors;
- 5) environmental, cultural, or economic disadvantage; or
- 6) limited English proficiency.

While the first three items in this list may indicate eligibility under a disability category other than SLD, the IEP team must be particularly careful when considering the last three items. Failure to distinguish a disability from other factors that may impact a student's achievement can lead to inappropriate over identification by race and ethnicity, and may result in a finding of disproportionality under 34 CFR § 300.646. *Authority*: 34 CFR § 300.309; COMAR 13A.05.01.06D(2)(b).

When a student is suspected of having a SLD, the IEP team must prepare a written report that includes:

- 1) A statement of whether the student has a SLD;
- 2) The basis for making the determination;
- 3) The relevant behaviors, if any, noted during the observation of the student;
- 4) The relationship of the behaviors to the student's academic functioning;
- 5) The educationally relevant medical findings, if any;
- 6) The determination of the IEP team concerning the effects of visual, hearing, or motor disability, intellectual disability, emotional disability, cultural factors, environmental or economic disadvantage, or limited English proficiency on the student's achievement level; and
- 7) The written certification of each IEP team member as to whether the written report reflects the member's conclusion. If the written report does not reflect an IEP team member's conclusion, the team member must submit a separate statement presenting the team member's conclusions. If the student participated in a process to assess the student's response to evidence-based intervention, the written report must also include:

- 1) The instructional strategies used and the student-centered data collected;
- 2) Documentation that the student's parents were notified of the MSDE's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;
- 3) Strategies for increasing the student's rate of learning; and
- 4) The parents' right to request an evaluation. *Authority:* 34 CFR § 300.311; COMAR 13A.05.01.06D(5) & (6).

The IEP team must determine what special education and related services, supplementary aids and services, modifications, and accommodations are appropriate based on the individual student's needs. A SLD, regardless of the underlying condition (e.g. perceptual disability, brain injury, minimal brain dysfunction, dyslexia, or developmental aphasia), may manifest itself in a number of ways, with varying degrees of severity. Therefore, the IEP team must rely upon multiple sources of information and data, and plan for specially designed instruction that targets the identified needs of the student. A determination that a student fits into a particular disability category – SLD or otherwise – does not dictate a particular placement, nor does it guarantee a particular set of services. No single measure or assessment can be used as the sole criterion for determining an appropriate educational program for a student. *Authority:* 34 CFR § 300.304; COMAR 13A.05.01.05B(3).

ANALYSIS

The Parents' attorney filed a detailed complaint on behalf of the Student and the Parents.

The Parents argue that MCPS denied the Student a FAPE by failing to provide her with an appropriate IEP and placement for the 2020-2021, 2021-2022, and 2022-2023 school years. As a

result, the Parents maintain it was necessary for them to unilaterally place the Student at ██████ in order for her to benefit from an educational program that could meet her needs. The Parents seek reimbursement for tuition and related expenses for the Student's enrollment at ██████ for all three school years (including funding for the remainder of the current 2022-2023 school year) on the theory that MCPS proposed IEPs were not developed to provide a FAPE and that the program at ██████ meets the Student's needs.

After reviewing all of the evidence in this case, I conclude that MCPS developed an IEP that was reasonably calculated to meet the unique needs of the Student for the 2020-2021, 2021-2022, and 2022-2023 school years. I have assessed the witnesses and documentary evidence, and explain below why I have determined the IEP team was correct in developing the Student's program for all three years.

The IEP is reasonably calculated to provide the Student with a FAPE for the 2020-2021, 2021-2022, and 2022-2023 school years

The 2020-2021 School Year (Seventh Grade)

The Student is identified as a student whose primary disability has been identified as an SLD under IDEA. The IEP developed for the 2020-2021 school year required that the Student receive special education services under IDEA as a student with an SLD. The Student also has a diagnosis of ADHD which also impacts her academic performance and attention/executive functioning.

The IEP for the 2020-2021 school year was developed on July 22, 2020.⁶⁹ At the July 22, 2020 IEP team meeting, the team determined that the Student continued to require specialized instruction and related services as a result of deficits attributed to her SLD and/or ADHD, including encoding, reading comprehension, reading fluency, reading phonics, written

⁶⁹ P. Ex. 21.

language expression, math problem solving, and attention/executive functioning. The Student also experienced inattention which could impact her academic performance in the absence of the proper supports and supplementary aids.

The IEP team reviewed all of the evaluative data available. A review of the July 22, 2020 IEP and July 28, 2020 Prior Written Notice, as well as the testimony of the IEP case manager (Ms. [REDACTED]) and IEP Chair ([REDACTED]) who participated in the IEP meeting, make clear that in developing the IEP, the school-based members of the IEP team gave thoughtful consideration to the Student's strengths and weaknesses, the concerns of the Parents, Dr. [REDACTED]'s recent May 12, 2020 evaluation, and the academic, developmental and functional needs of the Student, as required by the IDEA. The July 22, 2020 IEP sets forth all of these considerations in great detail and documented the Student's present levels of academic achievement or functional performance in each of the areas which were identified as having been affected by her disability. The IEP team also developed annual goals and objectives for the Student.

The evidence supports the fact that all of the annual goals address the Student's deficits and the IEP is reasonably calculated to meet the Student's unique individualized needs. The goals were designed to directly address the Student's areas of deficits and the IEP indicates how progress on the goals will be measured. Further, having clearly given careful consideration to the recommendations made in Dr. [REDACTED]'s evaluation report, the IEP team included numerous testing and instructional accommodations, and provided for assistive technology devices and supplementary aids and services to assist the Student in achieving the annual goals on the IEP. These supports and supplementary aids incorporated the vast majority of Dr. [REDACTED]'s

recommendations. The goals and objectives on the IEP were developed in accordance with the applicable law and regulations and the Parents did not dispute the developed goals when the IEP was revised on July 22, 2020.

The Parents did, however, disagree with how MCPS addressed the Student's anxiety/coping skills, executive functioning, and social skills; the Parents maintained that the IEP should have provided separate goals in these areas. The school-based members of the IEP, having scrutinized and weighted *all of* the evaluative data, reasonably found that there was insufficient data to warrant goals in each of these areas. For example, although Dr. [REDACTED] determined through testing that the Student had an anxiety disorder, and opined that it had a negative impact on her ability to learn, think, concentrate, read, write, perform math and take tests, the record is clear that none of the Student's fifth or sixth grade teachers had ever observed the Student experiencing any level of anxiety in the school setting.⁷⁰ This is significant because the annual goals are what determine the Student's program and placement. In the areas of executive functioning and coping skills, the IEP addressed those needs with supplemental supports; additionally, the IEP team acknowledged the Parents' concerns and proposed that if in-person learning was available for the Fall 2020 semester, they would collect data in those areas to determine the degree of educational impact and whether separate goals in those areas was warranted.

Most significantly, the Parents disagreed with the Student's proposed placement because they felt that the Student's needs would best be met in a small classroom setting for all

⁷⁰ Incidentally, during the 2020-2021 school year, the Student's teachers at [REDACTED] also observed no significant levels of anxiety.

academics, as recommended by Dr. [REDACTED]. The school team, in an effort to ensure that the Student received instruction in the least restrictive environment, determined that the Student's needs could be met in the small, resource classroom to address her executive functioning needs, while otherwise including her in the general education setting in co-taught classes for the remainder of her courses along with providing her an evidence-based reading intervention.

The Parents have failed to offer sufficient evidence to establish that the Student is unable to make progress and access learning outside of a small classroom environment. Although the Student appears to be doing well at [REDACTED] where there are small class sizes, this is not evidence that small classes are *necessary* for her to make academic progress. By all accounts, the Student performed well during her fifth-grade year at [REDACTED] when she received virtually all of her instruction in the general education setting. Moreover, I question the validity of Dr. [REDACTED]'s recommendation because in the first draft of her report, Dr. [REDACTED] opined that it was appropriate for the Student to be in co-taught classes for the content area subjects, provided she had accommodations and direct special educator support. Dr. [REDACTED] changed her recommendation after Mr. [REDACTED] reviewed a draft of the report and suggested that she consider recommending small supportive classes throughout the day. She not only changed the recommendation without any new data to support the change but she also invited Mr. [REDACTED] and the parents to "make any edits" and send it back to her for the final review.

Dr. [REDACTED] did not testify at the hearing. Mr. [REDACTED] testified about how the revision of that recommendation came about and asserted that he merely checked with Dr. [REDACTED] to make sure she understood that the Student was current in a [REDACTED] program and that Dr. [REDACTED] indicated that she believed the [REDACTED] programs were small class programs. I find the contemporaneous emails in the record between Dr. [REDACTED], Mr. [REDACTED], and the Parents more persuasive than Mr.

██████'s testimony. In the email, Dr. █████ invited Mr. █████ to make "edits," not suggestions. Although Mr. █████'s reordering of sentences and language about the resource room are in the nature of suggestions, the substantive change from co-taught classes in the █████ program versus small special education classes throughout the school day, without offering any foundation for such a major edit, detracts from weight I can give to Dr. █████'s opinion.

Instead, the email reveals that Dr. █████'s recommendations, once reviewed by Mr. █████ and the Parents in light of a potential due process hearing, was changed to support the Parents' position that the Student could only achieve educational benefit in a school setting such as █████.⁷¹ As such, I give more weight to the Student's having previously thrived in an average class size in the general education setting than to the recommendations of Dr. █████, who was not present to testify at the hearing.

Quite understandably, the Parents were distressed to find that the Student had regressed in some areas between fifth grade and the sixth grade. They appear to believe that the programming for the Student's sixth grade IEP was the main or sole cause of the Student's regression and that since the 2020-2021 and subsequent IEPs are somewhat similar to the sixth grade IEP, those IEPs could not possibly be reasonably calculated to provide the Student FAPE. However, it is important to note that the last few months of the Student's sixth grade year occurred during the emergency school closure and the introduction of distance learning. During this time, it was not feasible to address some of the goals in the IEP and consequently, a DLP was developed in collaboration with the Parents, to address which goals could be addressed during distance learning. Further, the Mother testified this time was extremely stressful for the Student, as she experienced the deaths of several loved ones, including grandparents. More

⁷¹ MCPS Ex. 17, p. 12

likely than not, this substantial loss, coupled with the upheaval caused by the emergence of the COVID-19 pandemic, had some level of impact on the Student's educational progress. I also note that during this time, the Student did not participate in all of the office hours to meet with teachers for assistance that were made available to her. While I do not suggest that this was by any means the sole cause of her regression, if she had taken advantage of office hours, it may have helped her to maintain her previous gains in performance from the fifth grade.

It would have also provided valuable information to her teachers to know where she was struggling so that her program could have been adjusted. In any case, I do not find that the implementation of the 2020-2021 IEP would have been substantially the same as the implementation of the DLP.

Further, the progress reports contained in the goals section of the sixth grade IEP indicate that the Student consistently made sufficient progress to meet her goals and she earned primarily As and Bs in all of her classes, with the exception of English. Although the Student received Cs during the first two quarters of English, she then improved her grade to a B for the final two quarters

In sum, the parents maintain that the IEPs proposed for the 2020-21 school year, and the subsequent school years, do not provide FAPE because the Student regressed during her sixth grade year; however, the Student's sixth grade year and IEP (2019-20) is outside of the scope of this hearing. Similarly, the 2020 DLP is not before me. Based on the foregoing, I find that the IEP developed for the 2020-2021 school year was reasonably calculated to provide the Student a FAPE in the least restrictive environment.

The 2021-2022 and 2022-2023 School Years (Eighth and Ninth Grade)

I find that MCPS also developed IEPs for the 2021-2022 and 2022-2023 school year that were reasonably calculated to provide the Student FAPE and meet her unique needs. As the IEP

team did when calculating the 2020-2021 IEP, the team met to review all of the evaluative data and consider revisions to the IEP. When developing each of these IEPs, the school-based members of the IEP team requested further data and/or evaluation of the Student, to ensure that it considered all of the relevant data and had a complete understanding of the Student's strengths, weaknesses, and needs.

The record makes clear that the IEP team thoroughly considered the Student's strengths and weaknesses, the Parents' concerns, recent evaluations and assessments, and the academic, developmental, and functional needs of the Student. The IEPs for both the 2021-2022 and the 2022-2023 school years again give a detailed account of all of these considerations. Each IEP also documented the Student's present levels of academic achievement or functional performance in each of the areas which were identified as having been affected by her disability. As described in the Findings of Fact, the IEP team also developed annual goals and objectives for the Student that continued to directly address the Student's deficits and indicate how the IEP progress was to be measured.

Having reviewed all of the relevant evaluative data available during the respective IEP meetings, the school-based IEP team revised present levels of performance, added goals, and supplemental supports, as appropriate. Each of the Prior Written Notices associated with the IEPs reflects that the IEP team gave careful consideration to the Parents' input. During the hearing, counsel for the Parents quipped that the Student's IEPs became longer and longer as the years went by. He is correct, and the lengthening of the IEP reflects the addition of new goals, supplemental supports and services, and present levels, when appropriate. In fact, at the November 3, 2021 IEP meeting for development of the IEP for the 2021-2022 school year, the Parents and their attorney stated that the school-based team did an excellent job on the present

levels, goals, and objectives in the IEP. The Parents' major disagreement with the IEPs developed for the 2021-2022 and 2022-2023 school years remains their desire for the Student to be educated in a small classroom environment.

For the reasons previously stated, I find that the Parents have failed to establish that small classes across all areas, academic and non-academic, are required in order for the Student to make academic progress and access the curriculum with the supports, aids and services set forth in the IEP.

Claim for Reimbursement and Funding of [REDACTED] Tuition and Related Expenses

Under *Carter* and *Burlington*, whether a parent's choice of private placement is proper is analyzed only if the IEP proposed by the local education agency results in the denial of a FAPE.⁷² I have concluded in this case for the reasons set forth above that the IEP and placement offered by the MCPS would have provided the Student a FAPE. Therefore, under *Carter* and *Burlington* the issue of whether the Student's placement at the [REDACTED] is proper is not required to be addressed further in this decision. As the MCPS did not deny the Student a FAPE, the Parents' claim for reimbursement of the [REDACTED] tuition and related expenses is denied.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the MCPS made a free appropriate public education available to the Student and provided her with an appropriate individualized education program and placement for the 2020-2021,

⁷² *County School District Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985)

2021-2022, and 2022-2023 school years. Therefore, I further conclude as a matter of law that the Parents failed to prove that they are entitled to reimbursement for tuition and expenses at [REDACTED] for the 2020-2021, 2021-2022, and 2022-2023 school years.⁷³

ORDER

I **ORDER** that the Parents' request for placement at and reimbursement/funding for tuition and related expenses at [REDACTED] for the 2020-2021, 2021-2022, and the 2022-2023 school years is **DENIED**.

November 30, 2022
Date Decision Issued

Jennifer A. Nappier
Administrative Law Judge

JAN/sh
#202143

REVIEW RIGHTS

A party aggrieved by this final decision may file an appeal within 120 days of the issuance of this decision with the Circuit Court for Baltimore City, if the Student resides in Baltimore City; with the circuit court for the county where the Student resides; or with the United States District Court for the District of Maryland. Md. Code Ann., Educ. § 8-413(j) (2022). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

A party appealing this decision must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing of the filing of the appeal. The written notification must include the case name, docket number, and date of this decision, and the court case name and docket number of the appeal.

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

⁷³ 20 U.S.C.A. §§ 1412(a)(5)(A), 1414 (2017); 34 C.F.R. § 300.148 (2021); *Endrew F. v. Douglas Cty. School Dist. RE-1*, 137 S. Ct. 988 (2017); *Florence Cty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

Copies Mailed and Emailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],
STUDENT

v.
MONTGOMERY COUNTY
PUBLIC SCHOOLS

BEFORE JENNIFER A. NAPPIER,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH NO.: MSDE-MONT-OT-22-15852

APPENDIX: EXHIBIT LIST

I admitted the following pre-marked exhibits into evidence on behalf of the Student and Parents¹:

- P-01 Amended Request for Due Process, August 26, 2022
- P-02 MCPS Educational Assessment, June 16, 2022
- P-03 MCPS Psychological Assessment, June 14, 2016
- P-04 Neuropsychological Evaluation by Dr. [REDACTED], February 28, 2017
- P-05 MCPS Team Consideration of External Report, March 16, 2017
- P-06 MCPS IEP, March 16, 2017
- P-07 MCPS Student Work Samples, May 18, 2017
- P-08 MCPS IEP, May 18, 2017
- P-09 MCPS IEP, May 10, 2018
- P-10 Academic Evaluation Report by [REDACTED], August 31, 2018
- P-11 MCPS Prior Written Notice and Amended IEP, September 17, 2018, and September 13, 2018
- P-12 MCPS Teacher Report for Quarterly Progress, January 18, 2019
- P-13 MCPS MAP Scores and IEP Progress Report, April 2019
- P-14 MCPS Prior Written Notice and IEP, May 3, 2019, and May 2, 2019

¹ Exhibits P-1 and P-9 through P-57 were admitted by stipulation of the parties.

- P-15 MCPS Student Work Samples, May, and June 2019
- P-16 MCPS IEP Progress Report, January, and April 2019
- P-17 Bullying Reports, 2019-20 School Year
- P-18 MCPS Amended IEP, January 13, 2020
- P-19 Reactions to MCPS Draft IEP by [REDACTED], April 21, 2020
- P-20 Psychological Evaluation by Dr. [REDACTED], May 18, 2020
- P-20A MCPS IEP Progress Report, November 18, 2019, to June 15, 2020
- P-21 MCPS Prior Written Notice and IEP, July 28, 2020, and July 22, 2020
- P-22 Letter serving notice and MCPS response letter, August 23, 2020, and September 9, 2020
- P-23 MCPS Interim Report Card, September 2020
- P-24 [REDACTED] Honor Roll Certificate, October 30, 2020
- P-25 Observation Report of Student by [REDACTED], April 8, 2021
- P-26 [REDACTED] GORT Score Report, April 13, 2021
- P-27 Teacher Conference Report by [REDACTED], June 4, 2021
- P-28 [REDACTED] Academic Objectives Progress Report, June 2021
- P-29 Letter serving notice and MCPS response letter, August 4, 2021, and August 27, 2021
- P-30 Letter from MCPS requesting IEP meeting with parents, August 24, 2021
- P-31 [REDACTED] Reading Assessment Data, September 2021
- P-32 [REDACTED] Student Work Samples (Literacy, Writing, and Math), October 13, 2021
- P-33 [REDACTED] Secondary Teacher Reports for MCPS, October 2021
- P-34 Observation Report of Student by [REDACTED], October 28, 2021

- P-35 Reactions to MCPS Draft IEP by [REDACTED], October 29, 2021
- P-36 MCPS Prior Written Notice and IEP, November 8, 2021, and November 3, 2021
- P-37 Reactions to MCPS Draft IEP by [REDACTED], November 17, 2021
- P-38 [REDACTED] Secondary Teacher Reports for MCPS, February 2022
- P-39 MCPS Prior Written Notice, March 10, 2022
- P-40 Updated Reactions to MCPS Draft IEP by [REDACTED], March 10, 2022
- P-41 Email to parents from [REDACTED] science teacher, April 15, 2022
- P-42 MCPS Psychological Evaluation, May 27, 2022
- P-43 MCPS Prior Written Notice, June 15, 2022
- P-44 [REDACTED] Report Card, June 2022
- P-45 [REDACTED] Academic Objectives Progress Report, June 2022
- P-45A [REDACTED] Final Report with Quarterly Comments, June 2022
- P-46 MCPS Prior Written Notice and Specific Learning Disability Team Report, July 20, 2022
- P-47 MCPS Revised Educational Evaluation, July 21, 2022
- P-48 MCPS Student Transition Interview, August 5, 2022
- P-49 Letter serving notice and MCPS response letter, August 8, 2022, and August 11, 2022
- P-50 Email to MCPS from [REDACTED] requesting change to Prior Written Notice, August 8, 2022
- P-51 Reactions to MCPS Draft IEP by [REDACTED], August 21, 2022
- P-52 MCPS Appendix D, August 22, 2022
- P-53 MCPS Proposed Executive Functioning Goal, August 22, 2022
- P-54 MCPS Prior Written Notice and IEP, August 22, 2022
- P-55 Resume of [REDACTED]

- P-56 Resume of Dr. [REDACTED]
- P-57 Resume of Dr. [REDACTED]
- P-58 [REDACTED] First Quarter Interim Progress Reports, September 30, 2022

I admitted the following pre-marked exhibits into evidence on behalf of MCPS²:

- MCPS-1 Report Cards, Grades 4 and 5, Undated
- MCPS-2 Fifth Grade Overview, [REDACTED], September 1, 2018
- MCPS-3 Prior Written Notice, September 7, 2018
- MCPS-4 Prior Written Notice, February 8, 2019
- MCPS-5 Elementary Teacher Report, [REDACTED], April 25, 2019
- MCPS-6 Read Naturally Live Data, Fifth Grade, April 8, 2019, and June 17, 2019
- MCPS-7 IEP Progress Report, Fourth Quarter, June 14, 2019
- MCPS-8 K-5 Text Level Reading Chart and Summer Reading Texts, Undated
- MCPS-9 MAP Scores, June 2019
- MCPS-10 [REDACTED] Admission Checklist and Timelines, Spring 2020
- MCPS-11 Prior Written Notice, Continuity of Learning Plan, April 15, 2020
- MCPS-12 E-mail messages re: private schools and new evaluation, April 21, 2020, to May 11, 2020
- MCPS-13 E-mail messages re: bullying complaints, April 28, 2020
- MCPS-14 E-mail messages re: [REDACTED] Application, May 7, 2020
- MCPS-15 Prior Written Notice re: Annual Review IEP Meeting, May 12, 2020
- MCPS-16 Notices for IEP Team Meetings, April 20, 2020, to July 22, 2020
- MCPS-17 E-mail Messages re: [REDACTED] Evaluation and Final Report, May 7, 2020, to June 8, 2020
- MCPS-18 NP Evaluation Reports, Dr. [REDACTED], June 3, 2020, to June 5, 2020

² All of MCPS's exhibits were admitted by stipulation of the parties.

MCPS-19 IEP Progress Reports, Sixth Grade, June 15, 2020

MCPS-20 Report Card, Sixth Grade, June 15, 2020

MCPS-21 Enrollment at [REDACTED] – Contract and Tuition Payments, June 22, 2020

MCPS-22 Appendix D form, July 22, 2020

MCPS-23 IEP Progress Report – ESY, August 7, 2020

MCPS-24 [REDACTED] Enrollment Contract and Tuition Expenses, February 8, 2021

MCPS-25 E-mail messages re: observation of student at [REDACTED], May 13, 2021

MCPS-26 Requests for student records, September 17, 2021, to October 14, 2021

MCPS-27 Draft Transition Pages, October 5, 2021

MCPS-28 Five Day Disclosure e-mail, October 6, 2021

MCPS-29 E-mail Message re: [REDACTED] evaluation, October 14, 2021

MCPS-30 Notice of Continued IEP Meeting, October 20, 2021

MCPS-31 Five Day Notice documentation, October 27, 2021

MCPS-32 Draft IEP, October 27, 2021

MCPS-33 [REDACTED] Teacher Reports, October 27, 2021

MCPS-34 Transition Interview, October 28, 2021

MCPS-35 Five Day Notice Documents after November 3, 2021, IEP Meeting, November 10, 2021

MCPS-36 [REDACTED] Enrollment Contract and Tuition Expenses, February 15, 2022

MCPS-37 IEP Meeting Notice, February 18, 2022

MCPS-38 Five Day Disclosure for March 10, 2022, IEP Meeting, March 3, 2022

MCPS-39 Draft IEP, March 3, 2022

MCPS-40 Updated Present Levels Document, March 9, 2022

MCPS-41 Signed consent for evaluations, March 18, 2022

- MCPS-42 Classroom Observations, [REDACTED], April 27, 2022
- MCPS-43 Notice of June 8, 2022, IEP Meeting, May 11, 2022
- MCPS-44 E-mail message re: [REDACTED] present levels of performance, June 17, 2022
- MCPS-45 Reading Level Correlation Charts, Undated
- MCPS-46 Lexile Scores, Literature Texts, Undated
- MCPS-47 Notice of IEP Meeting, July 13, 2022
- MCPS-48 Five Day Notice documentation after July 20, 2022, IEP Meeting
- MCPS-49 IEP Meeting Notice, E-mail Message re: IEP Meeting and waiver, August 5, 2022
- MCPS-50 Transition Interview, August 16, 2022
- MCPS-51 Five Day Notice documentation for August 22, 2022, IEP Meeting, August 15, 2022
- MCPS-52 Draft IEP and E-mail Message re: Draft IEP, August 16, 2022
- MCPS-53 Five Day Disclosure documentation after August 22, 2022, IEP meeting, August 29, 2022
- MCPS-54 Request for Production of Documents, August 19, 2022, to September 13, 2022
- MCPS-55 Resume of [REDACTED]
- MCPS-56 Resume of [REDACTED]
- MCPS-57 Resume of [REDACTED]
- MCPS-58 Resume of [REDACTED]
- MCPS-59 Resume of [REDACTED]
- MCPS-60 Resume of [REDACTED]
- MCPS-61 Grade Level Equivalent Scores, [REDACTED], [REDACTED], July 20, 2020, to July 22, 2020
- MCPS-62 DIBELS 8 Chart, 2020 and 2021