

██████████,

STUDENT

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

BEFORE MARC NACHMAN,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-BCNY-OT-23-03421

DECISION

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STATEMENT OF THE CASE

██████████ (Student) is a ten-year-old student with the following: a Specific Learning Disability, Dyslexia, with areas affected by the disability such as reading phonics, reading fluency, reading comprehension, written language expression, math calculation, and math problem solving; and Developmental Coordination Disorder.

The Student's parents, ██████ and ██████████ (Parents), are seeking special education services on the Student's behalf under the Individuals with Disabilities Education Act (IDEA) and applicable Maryland State law, and particularly placement and funding for the Student at the ██████████, including reimbursement to the Parents for portions of the Student's tuition they already paid for the 2022-2023 school year. The Parents allege that the Baltimore County Public Schools (BCPS) has failed to develop an appropriate Individualized Educational Program (IEP), denying the Student a free appropriate public education (FAPE).

The Parents further allege that the Student is making progress in her present school program, and they are requesting the Student's placement at the [REDACTED] and funding to continue that placement. They are also requesting compensatory education services.

On February 5, 2023, the Parents, on behalf of the Student, filed a Due Process Complaint (Complaint) with the BCPS, which was transmitted to the Office of Administrative Hearings (OAH) on the following day, February 6, 2023. The Complaint sought mediation and a hearing to review the identification, evaluation, or placement of the Student by the BCPS under the IDEA. 20 U.S.C.A. § 1415(f)(1)(A) (2017);¹ 34 C.F.R. § 300.511(a) (2021);² Md. Code Ann., Educ. § 8-413(d)(1) (2022);³ Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

On March 7, 2023, I conducted a pre-hearing conference (Conference) in this matter via Webex. COMAR 28.02.01.20B(1)(b). Attorney Holly L. Parker represented the Student and the Parents, who did not participate in the Conference. Attorney Pamela Foresman represented the BCPS.

During the Conference, I advised the parties of the federal forty-five-day timeline for issuing a decision:

The public agency must ensure that no later than 45 days after the expiration of the [30-day resolution] period under § 300.510(b), or the adjusted [resolution] time periods described in § 300.510(c)—

- (1) A final decision is reached in the hearing; and
- (2) A copy of the decision is mailed to each of the parties.

¹ "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 "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 Unless otherwise noted, all citations herein to the Education Article are to the 2022 Replacement Volume of the Maryland Annotated Code.

34 C.F.R. § 300.515(a). As indicated, the forty-five-day timeline ordinarily begins to run at the end of a thirty-day resolution period triggered by the filing of a due process complaint. *Id.* § 300.510(b)(2).

Under the regulatory timeline, the decision in this case normally would be due on Friday, April 21, 2023, which is forty-five days after the expiration of the 30-day resolution period. *Id.* §300.515(a). However, the regulations authorize me to grant a specific extension of time at the request of either party. *Id.* § 300.515(c).

At the Conference, we reviewed counsels' and this ALJ's daily calendars to identify the earliest days on which the hearing could take place. Due to the day-by-day review of our respective calendars at the Conference to identify legitimately conflicting dates (the March, April and May 2023 calendars charted in the Conference report identifying those conflicts is incorporated by reference herein),⁴ the filing of the BCPS answer on March 7, 2023 (which counsel for the Parents wanted time to review and consider) and allowing sufficient time to exchange documents in conformity with the five-day disclosure rule, the decision would be due before the hearing could be started, heard, or concluded. Therefore, the parties requested that I extend the time that the decision would be due to 30 days after the conclusion of the hearing to allow the case to be heard on the selected dates and to allow sufficient time for me to consider the evidence, evaluate legal arguments, and issue a decision. *Id.* § 300.515(c). For all of these reasons, I granted the parties' request for an extension of time, so that the decision would be issued within 30 days after the conclusion of the hearing. I have issued this decision within that period.

⁴ The calendars extend over several pages of the Conference report, so it would not be efficient to reproduce the calendar in this decision. Accordingly, the Conference report is incorporated by reference.

I held the hearing on May 25, 26, 30, 31, 2023, and June 1, 2023 at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland, as scheduled. Holly M. Parker, Esquire, represented the Parents. Pamela Foresman, Esquire, represented the BCPS.

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. 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.

ISSUES

The issues are as follows:

1. Whether the BCPS failed to recommend appropriate services and placement for the Student for the 2021-22 and 2022-23 school years as well as summer 2022;
2. Whether the BCPS failed to develop an appropriate IEP for the Student for the 2021-2022 and 2022-2023 school years as well as summer 2022;
3. Whether the BCPS failed to fully and adequately diagnose the Student in all areas of her disability; and
4. Whether the BCPS failed to provide a FAPE to the Student for the 2021-2022 and 2022-2023 school years; and
5. If the BCPS did not provide a FAPE to the Student, whether placement at the [REDACTED] [REDACTED] was appropriate?⁵

⁵ This issue was not listed in the Conference order but is added here as it is one of the issues presented.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parents:⁶

- Parents Ex. 1 IEP, dated November 8, 2021
- Parents Ex. 2 IEP, dated November 8, 2021
- Parents Ex. 6 Letter from Parents' attorney to the BCPS attorney, dated November 18, 2021
- Parents Ex. 7 Measure of Academic Performance (MAP) student score sheet, November 18, 2021
- Parents Ex. 9 Letter from the BCPS attorney to the Parents' attorney, dated December 6, 2021
- Parents Ex. 10 Letter from the Parents' attorney to the BCPS attorney, dated December 6, 2021
- Parents Ex. 13 Classroom Observation, dated January 6, 2022
- Parents Ex. 23 Pages from the MSDE website, accessed January 26, 2023
- Parents Ex. A [REDACTED] Resumé
- Parents Ex. B. Dr. [REDACTED] Resumé

I admitted the following exhibits on behalf of the BCPS:

- BCPS Ex. 1 IEP Team Summary, dated March 9, 2021
- BCPS Ex. 2 Extended School Year Request ("ESY") for School Year 2020-2021, dated March 9, 2021
- BCPS Ex. 3 Receipt of Procedural Safeguards Parental Rights Document, signed on October 20, 2021
- BCPS Ex. 4 Parent Notification of IEP Team Meeting, dated October 20, 2021
- BCPS Ex. 5 MAP Student Progress Report, Fall School Year 2021-2022
- BCPS Ex. 6 Compensatory Education/Recovery Services Case Manager Notes/Worksheet
- BCPS Ex. 7 Compensatory Education/Recovery Services Prior Written Notice, dated October 26, 2021

⁶ Those exhibits not included in the Parents' exhibit list were either not moved or admitted into evidence.

- BCPS Ex. 8 IEP, dated November 8, 2021
- BCPS Ex. 9 IEP Team Summary, dated November 8, 2021
- BCPS Ex. 10 Notice of Documents, dated November 9, 2021
- BCPS Ex. 11 Parent Notification of IEP Team Meeting, dated November 16, 2021
- BCPS Ex. 12 BCPS Consent for Release of Student Records, signed on November 18, 2021
- BCPS Ex. 13 3rd Grade Teacher Report for IEP Team, dated November 22, 2021
- BCPS Ex. 14 Cognitive Abilities Test, dated December 2021
- BCPS Ex. 15 Email to Parent from [REDACTED], dated December 12, 2021
- BCPS Ex. 16 Parent Permission for Assessment, dated November 15, 2021
- BCPS Ex. 17 BCPS Consent for Release of Student Records, signed on January 14, 2022
- BCPS Ex. 18 BCPS Speech and Language Assessment, dated January 4, 2022
- BCPS Ex. 19 Private Psychoeducational Evaluation, dated January 8, 2022
- BCPS Ex. 20 Notice of Documents, dated January 21, 2022
- BCPS Ex. 21 Parent Notification of IEP Team Meeting, dated January 26, 2022, February 1, 2022, and February 8, 2022
- BCPS Ex. 22 Notice of Documents, dated February 10, 2022
- BCPS Ex. 23 Receipt of Procedural Safeguards Parental Rights Document, signed on February 17, 2022
- BCPS Ex. 24 IEP Team Summary, dated February 17, 2022
- BCPS Ex. 25 Parent Notification of IEP Team Meeting, dated March 8, 2022
- BCPS Ex. 26 Case Manager Report for IEP Team, dated March 15, 2022
- BCPS Ex. 27 Notices of Documents, dated March 15, 2022, and March 16, 2022
- BCPS Ex. 28 IEP Team Participant Signature Page, dated March 23, 2022
- BCPS Ex. 29 Receipt of Procedural Safeguards Parental Rights Document, signed on March 23, 2022
- BCPS Ex. 30 IEP, dated March 23, 2022

- BCPS Ex. 31 Parent Permission for Assessment with Parents, Written Note dated March 23, 2022
- BCPS Ex. 32 IEP Team Summary, dated March 23, 2022
- BCPS Ex. 33 Parent Notification of IEP Team Meeting, dated May 11, 2022
- BCPS Ex. 34 Notice of Documents, dated May 16, 2022
- BCPS Ex. 35 3rd Grade Teacher Report for IEP Team, dated May 16, 2022
- BCPS Ex. 36 IEP, dated May 23, 2022
- BCPS Ex. 37 IEP Team Summary, dated May 23, 2022
- BCPS Ex. 38 First through Third Grade Data Sheets
- BCPS Ex. 39 Beginning and Advanced Decoding Surveys; Words Their Way Primary Spelling Inventory; QRI 3/2022
- BCPS Ex. 40 Math Student Work
- BCPS Ex. 41 English Language Arts (ELA) Student Work
- BCPS Ex. 42 School Emails
- BCPS Ex. 43 [REDACTED] Program Description
- BCPS Ex. 44 [REDACTED] Tutoring Report, January 2023
- BCPS Ex. 45 [REDACTED] Trimester Report Card, April 2023
- BCPS Ex. 46a [REDACTED] Resumé
- BCPS Ex. 46b [REDACTED] Resumé
- BCPS Ex. 46c [REDACTED] Resumé
- BCPS Ex. 46d [REDACTED] Resumé

Testimony

The Parents testified and presented the following witnesses:

- [REDACTED], who was accepted as an expert in general education and special education⁷
- [REDACTED], who was accepted as an expert in special education
- [REDACTED], who was accepted as an expert in special education
- [REDACTED], Ph.D., who was accepted as an expert in psychology, and
- The Parents.

The BCPS presented the following witnesses:

- [REDACTED], who was accepted as an expert in general and special education
- [REDACTED], who was accepted as an expert in special education
- [REDACTED], who was accepted as an expert in school administration
- [REDACTED], who was accepted as an expert in school psychology

FINDINGS OF FACT

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

1. The Student is currently ten⁸ years old.
2. The Student lives with the Parents.
3. The Student has been diagnosed with Dyslexia, a Specific Learning Disability (SLD), and Developmental Coordination Disorder.

⁷ Both Ms. [REDACTED] and Ms. [REDACTED] were initially examined by the Parents in their case-in-chief as fact witnesses. Before leaving the witness stand, they were both presented by the BCPS in its case-in-chief. When presented by the BCPS, the witnesses were both qualified and admitted as experts in their designated fields. I will consider these witnesses to have testified as experts in each case.

⁸ According to the *Bluebook* rules, (R6.2), numbers up to and including ninety-nine should be written out in words. In this decision, I am bypassing this convention to make it easier to read and compare numbered data in this decision, i.e. “five hours” becomes “5 hours” and except for ages and named grade level (“first grade,” etc.) I’ll use the ordinal number “1st,” “2nd,” “3rd” etc.

4. Areas affected by her disability are reading phonics, reading fluency, reading comprehension, written language expression, math calculation, and math problem solving.
5. Through the end of the 2021-2022 school year, the Student had been enrolled at the [REDACTED] Elementary School ([REDACTED]), a BCPS school in Baltimore County.
 - a. In school year 2018-2019, the Student was a kindergarten student at [REDACTED].
 - b. In school year 2019-2020, the Student was a first grade student at [REDACTED].
 - c. In school year 2020-2021, the Student was a second grade student at [REDACTED].
 - d. In school year 2021-2022, the Student was a third grade student at [REDACTED].
 - e. If the Student were still enrolled at [REDACTED], in school year 2022-2023, she would have been a fourth grade student.
6. In school year 2022-2023, the Parents disenrolled the student at [REDACTED] and enrolled her at the [REDACTED], a private school, in a unilateral placement.
7. At [REDACTED], the Student is enrolled as a third grade student.
8. At [REDACTED], prior to the 2021-2022 school year, the Student had an IEP in place.

November 2021 IEP team meeting.

9. The IEP team met on November 8, 2021 to review the Student's progress under the prior IEP and to seek evaluations.
10. The BCPS satisfied all procedural safeguards.
11. The meeting was attended by the Parents, their educational advocate [REDACTED], the Student's teachers, [REDACTED], her general educator, and [REDACTED], her special educator, school psychologist [REDACTED], and [REDACTED], who was the administrator/designee and who scribed and conducted the meeting.

12. At that meeting, the IEP team reviewed the Student's overall educational progress (through the teacher's report, the Parent's report, the Student's report card, county/statewide tests, attendance, etc.).
13. In reading, the Student was performing at the first to beginning of second grade level. She was, however, able to comprehend grade level tests that were read aloud to her.
14. Ms. [REDACTED] was the Student's special educator since first grade at [REDACTED]. She was very familiar with the Student.
15. Ms. [REDACTED] taught the Student reading with the Wilson reading intervention in the first half of first grade.
16. From the second half of first grade through third grade, Ms. [REDACTED] taught the Student reading using the Orton-Gillingham (OG) reading program.
17. OG is a science based, multi-sensory sequential reading intervention used to teach reading skills.
18. Ms. [REDACTED] taught the Student outside of the general education classroom; she also supported the Student in the general education classroom.
19. In OG, once skills were mastered, the Student would move to the next sequential lesson.
20. By the end of the second grade (the 2020-2021 school year), the Student was progressing in her OG studies.
21. The Student had been approved for ESY programs between the 2020-2021 and 2021-2022 school years but did not attend either.
22. After the summer 2021 break, when the Student returned to school for the 2021-2022 school year, she had regressed. She had lost some of the skills that she acquired and had to be retaught those skills.

23. By the November 2021 IEP team meeting, the Student had regained many of the skills that she lost over the summer.
24. Although the Student had problems with reading fluency, she was able to comprehend grade level texts which were read to her. The Student also benefited from multiple exposures to the text, which were provided to her. In this way, the Student was able to access grade level content.
25. In writing, the Student's skills were progressing and she used a word bank when writing. She was able to write legibly and in full sentences, using a sentence starter to begin her writing. The Student had adult prompting to correctly capitalize letters at the beginning of a sentence, insert spacing between words and sentences, and use proper punctuation at the end of sentences. The Student was able to write at least three sentence paragraphs.
26. In math, the Student was performing on a first grade level.
27. Math was also taught outside the general education classroom using the Tier 2 math facts fluency intervention.
28. The Student was able to perform simple, single digit addition and subtraction problems with accommodations and aids (e.g., a hundreds chart or number line and manipulatives). With the support of an adult and the accommodations and aids, the Student was able to add and subtract 2 and 3 digit numbers,
29. The Student had been provided the following considerations and accommodations.
30. The Student was given frequent breaks and reduced distractions to maintain focus. She was provided a "calculating device" for math and extended time to complete tasks.
31. The Student was given instructional support (verbal redirection and frequent check-ins) to keep her on track on her assignments. She was also provided a word bank and a visual task checklist to organize her work.

32. Subjects, like math, were pre-taught. The Student was provided manipulatives, such as counters, a number line, place value charts, 100's charts, multiplication charts, and tens frames.
33. For writing, the Student was provided a proofreading checklist and a highlighter to identify important written texts or key terms in math problems. If writing required more than one paragraph, she was provided speech to text support or a human scribe.
34. The Student's work was "chunked," so that it would be divided into smaller units. Homework was modified to ask fewer questions and require shorter responses, and the Student was provided homework on only one or two new skills to practice at a time.
35. The Student was provided social/behavioral supports in general education classes to promote participation and to help her keep track during reading tasks.
36. The Student was allowed to use a study carrel, preferential seating and adult support to help her maintain focus.
37. The IEP team established goals and objectives for the Student. The yearly goal was to be met by November 2022 a quarter into the following school year, and objectives to meet those goals were established for each earlier quarter.
38. The IEP team established goals for: reading-phonics; reading –sight word fluency; reading fluency and comprehension; written-expression – encoding; and mathematics.⁹ The Student's accomplishment towards those goals and objectives are discussed below.
39. To accomplish those goals and the objectives in the IEP, in a thirty-two and a half hour per week program, the Student would attend general education for 22 hours and 30 minutes and special education services outside the general classroom for 10 hours weekly:

⁹ Those goals and objectives are detailed on page 58, below.

- a. 3 hours and 20 minutes, or 5 sessions of 40 minutes, in the general education classroom (with her non-disabled peers) with the supports listed above;
 - b. 3 hours and 45 minutes, or 5 sessions of 45 minutes, outside general education, with a special educator, to address her needs in phonics, encoding and fluency; and
 - c. 6 hours and 15 minutes,¹⁰ or 5 sessions of 1 hour and 15 minutes, outside general education taught by a special educator to address her needs in mathematics.
40. The IEP team also recommended ESY services for 15 hours a week for her phonics, encoding and math goal.

Dr. [REDACTED]'s testing

41. In order to further meet the Student's needs and improve the then-current IEP, the team sought the following assessments: speech and language assessment, classroom assessment by the school counselor, education assessment to be completed by the special educator and reading specialist, and a psychological assessment to be performed by the school psychologist. The BCPS staff was ready to perform those assessments but required the Parent's consent.
42. The Parents agreed to the speech and language assessment and classroom assessment by the school counselor or other BCPS staff members. However, the Parents rejected the education assessment to be completed by the special educator and reading specialist and the psychological assessment to be performed by the school psychologist.
43. Instead of accepting the BCPS assessments, the Parents wanted the education and psychological assessments to be performed by Dr. [REDACTED], a licensed psychologist, who had previous evaluated the Student while she was in kindergarten.

¹⁰ The IEP software required these services to be divided into two blocks: 3 hours 45 minutes and 2 hours 30 minutes, totaling 6 hours 15 minutes. Divided by 5 days per week, the instruction is given for an hour and 15 minutes daily.

44. Dr. [REDACTED] did not conduct his evaluations until January 8, 2022, and did not furnish his report to the IEP team until February, 2022.

45. The delay in testing the Student and sending the report to the IEP team delayed the IEP team from considering the assessments and modifying the IEP for several months.

46. Dr. [REDACTED] administered the following tests to determine the Student's current cognitive, academic, attentional, executive, and emotional functioning:

- Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V)
- Test of Auditory Processing Skills, Third Edition (TAPS-111)
- Children's Memory Scale (CMS)
- Beery - Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (VMI)
- Kaufman Test of Educational Achievement, Third Edition (KTEA-III)
- Test of Variables of Attention (TOVA)
- Behavior Assessment System for Children, Third Edition (BASC-III)
- Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-11)

47. All of the tests were conducted in a single session.

48. In verbal functioning, Dr. [REDACTED]'s evaluation found that the Student:¹¹

- a. Had no attention issues;
- b. Had some anxiety issues;
- c. In verbal functioning, functioned appropriately;
- d. Was able to retain shorter amounts of factual information in sentences;
- e. Had appropriate short term and working memory;
- f. Could retain larger quantities of factual information; and
- g. Could successfully recall that information at a later time if that information were repeated to her.

¹¹ More detailed evaluation data is found between pages 39 and 46, below.

49. In nonverbal functioning (related to academic functioning), Dr. [REDACTED]'s evaluation found that the Student:

- a. Had increased difficulty with visual-spatial reasoning and organizing;
- b. Had weaker motor integration abilities than most of her peers, meaning that writing tasks may take more time and effort for the Student than for many of her peers.
- c. Was able to understand and apply rules of reasoning and able to identify rules in visual reasoning so she could apply those rules in problem solving;
- d. Had visual working memory abilities comparable to her peers;
- e. Processed general verbal information and formulates responses to that information at a rate that is slower than the rate of most peers.

50. In cognitive functioning, Dr. [REDACTED]'s evaluation found that the Student:

- a. Had overall verbal reasoning abilities which were stronger than her overall visual-spatial reasoning abilities;
- b. Had abstract verbal reasoning, expressive vocabulary, and recall of previously acquired information comparable to the similar abilities of her peers;
- c. Had visual reasoning and organizing abilities weaker than the abilities of most peers;
- d. Was able to identify rules in reasoning;
- e. Had short-term and working memory in the "overall lower end" of the average performance, but still comparable to the memory abilities of her peers;
- f. Processed information and formulated responses at a rate slightly slower than the rate of most peers.

51. Dr. [REDACTED] performed tests to determine the Student's academic functioning. It was unclear whether these tests were administered after the battery of tests that were listed in the prior findings of fact.

52. In academic functioning, Dr. [REDACTED]'s evaluation found that the Student:

- a. Had an ongoing weakness in academic skills, that her performance in skills related to mathematics calculations, and written expression fell in the low average to below average ranges;

- b. Was able to blend words, segment words, and rhyme words, but she experienced increased difficulty in the areas of matching sounds in words and isolating phonemes, requiring ongoing work in the area of phonological processing. Dr. [REDACTED] assessed the Student's grade level as kindergarten to the 1st month of first grade;
- c. Had successfully identified words that were reported to be familiar, but experienced increased difficulty with the decoding of larger, unfamiliar words. Dr. [REDACTED] assessed her grade level in reading skills to be on a first grade level, which is below the average range;
- d. Experienced increased difficulty with reading multiple-syllable nonsense words, so that reading longer and unfamiliar text was challenging. Dr. [REDACTED] assessed her grade level in phonological processing skills to be below the first grade level, which is below the average range;
- e. Had deficiencies in reading efficiency, recognizing the time-intensive nature of her performance in identifying and decoding words. Dr. [REDACTED] assessed her at the lowest level;
- f. Read and comprehended shorter text at a rate that is weaker than the rate of her peers. Dr. [REDACTED] assessed her grade level as the 1st month of first grade;
- g. Had slower reading efficiency and weaker phonological processing which made comprehension increasingly challenging for her. Dr. [REDACTED] assessed her grade level as the 9th month of kindergarten;
- h. Had spelling skills that were weaker than the skills of most peers. Dr. [REDACTED] assessed her grade level as the 1st month of first grade;
- i. Had mathematics computation skills that were weaker than the computation skills of her peers. Dr. [REDACTED] assessed her grade level as the 8th month of first grade;
- j. Had mathematics reasoning skills that were below the average range. Dr. [REDACTED] assessed her grade level as the 10th month of kindergarten;
- k. Computed simple mathematics calculations at a rate that is slower than the rate of most of her peers. Dr. [REDACTED] assessed her grade level as the 1st month of first grade;
- l. Wrote with errors in the writing rules of capitalization and punctuation. Dr. [REDACTED] assessed her grade level as the 4th month of first grade;
- m. Produced short written responses at a rate that is comparable to the rate of her peers. Dr. [REDACTED] assessed her grade level as the 5th month of third grade.

53. Dr. [REDACTED] did not diagnose the Student with any attention or impulsivity issues. He did note, however, that the Student's rate of response to attentionally demanding information was slower than the rate of her peers, but that her attention was constant across a task.
54. Based on the report from the Student's mother, Dr. [REDACTED] did not find that the Student had executive functioning issues.
55. Dr. [REDACTED] noted that the Student expressed anxiety about school. That data came from the Parents' report.
56. As a result of those evaluations, Dr. [REDACTED] made the following DSM-5 diagnoses:
- Specific Learning Disorder with Impairment in Reading (315.00), with a Dyslexic profile, based on the Student's identified weaknesses in phonological processing and reading comprehension;
 - Specific Learning Disorder with Impairment in Mathematics (315.1), based on the Student's weaknesses in math reasoning and calculation fluency;
 - Specific Learning Disorder with Impairment in Written Expression (315.2), based on the Student's weakness in written expression; and
 - Developmental Coordination Disorder (315.4), given the Student's ongoing weakness in visual-motor integration.
57. Those diagnoses were adopted at the February 17, 2022 IEP team meeting, however members of the IEP team expressed concern over the administration of all these tests in a single session (several team members expressed that they would have spread the tests out over one or more sessions due to concerns about the Student's known fatigue factors).
58. Similarly, the IEP team members were concerned that if the academic testing was performed after the functional and cognitive tests, the Student might have been fatigued.
59. Dr. [REDACTED] also administered older versions of tests rather than the revised versions. In one instance, the Test of Auditory Processing Skills, Third Edition, that Dr. [REDACTED] used was published in 2005; a later edition of that test was published in 2018.

60. Ms. [REDACTED], the school psychologist, also questioned Dr. [REDACTED]'s choice of tests for visual memory, to help assess the reason for the Student's regression. Dr. [REDACTED] did not perform any such test, and the Parents did not sign a consent for the school staff to perform this test.

61. Dr. [REDACTED] made the following recommendations, which are relevant to the provisions of the IEP:¹²

1) Given her identified areas of weakness, Dr. [REDACTED] recommended that the Student continue to have an IEP, with her continued goals in place. In addition, goals and objectives should be incorporated for mathematics computations and calculation fluency.

2) Continued accommodations should be implemented in the academic environment for the Student. In addition to the accommodations listed, the Student should have all material read to her, including the information on all examinations.

3) In addition to the accommodations listed in the Student's IEP, she would benefit from ongoing intervention to assist in strengthening her academic skills.

4) Given the Student's weakness in visual-motor integration, the copying of larger quantities of information may be challenging. Therefore, the Student should be supplied copies of teacher notes.

5) If keeping math calculations aligned becomes an issue for the Student, Dr. [REDACTED] recommended that she be allowed to use graph paper for math calculations.

....¹³

7) The summer months are also good times for more intensive reading instruction. Schools such as [REDACTED] also offer summer camps to work on strengthening reading skills.

8) Practice will continue to help the Student with reading acquisition. She would benefit from completing 15 minutes a day of independent reading, with an additional fifteen minutes of oral reading. It will be important to work with the Student to ensure that she is reading on a regular basis, and to allow her some

¹² Dr. [REDACTED] made other recommendations that were not school related, as they were more appropriate for the Student at home, relating to homework, games that the Student could play at home, and how she could handle anxiety. For simplicity, the school related suggestions are made findings of fact, with their original numbering remaining intact.

¹³ This recommendation was school related, but it recommended enrollment at the [REDACTED], a suggestion that the BCPS opposed.

control in what she reads, which may even be short related to topics in which she is interested.

....

12) The Student would also benefit from working on her typing skills, as writing on a computer allows for easier editing performance....

62. The IEP team adopted all of Dr. [REDACTED]'s above-listed school-based suggestions, save for those related to placement at the [REDACTED].

IEPs

63. The IEP team created a succession of two IEPs for the Student that incorporated Dr. [REDACTED]'s suggestions.

IEP of March 23, 2022.

64. The IEP team met on March 23, 2022, to review the Student's progress under the prior IEP and to consider the assessments (including Dr. [REDACTED]'s assessments) and modify the IEP based on the Student's performance since the last IEP meeting in November 2021.

65. The BCPS satisfied all procedural safeguards.

66. The meeting was attended by the Parents, their educational advocate [REDACTED], their attorney Holly Parker, the Student's teachers ([REDACTED], her general educator, and [REDACTED], her special educator), Towanda Santiago from the BCPS Office of Law, and [REDACTED], who was the administrator/designee and who scribed and conducted the meeting.

67. At that meeting, the IEP team again reviewed the Student's overall educational progress through the teacher's report, the Parent's report, the Student's report card, and the assessments.

68. Because Dr. [REDACTED]'s assessments were recent, and there were no other assessments permitted by the Parents, Dr. [REDACTED]'s grade level assessments were adopted.

69. At the meeting, the Parents, their counsel and educational advocate requested placement at the [REDACTED], a non-public placement, as they believed that the Student was not making progress and should not be in a general education classroom.
70. The Parents reiterated their decision not to allow the BCPS to administer any further assessments. The Parents did not submit any further assessments by Dr. [REDACTED].
71. The March 23, 2022 IEP included all of the statements related to academic achievement and functional performance in the prior IEP, but added additional considerations based on Dr. [REDACTED]'s report. Specifically, the additional supports and modifications the IEP made for the Student to access the general education curriculum as well as receive special education outside of the general education classroom (and provide math education by a special educator outside of general education).
72. The March 23, 2022 IEP called for all of the accommodations in the November 2021 IEP, but, adopting Dr. [REDACTED]'s suggestions, added:
- a. a human reader when text-to-speech was not available;
 - b. a human reader for all ELA (English Language Arts) and literacy assessments;
 - c. frequent breaks and reduced distractions in order for the Student to maintain focus for testing and extended tasks;
 - d. a human reader for all mathematics, science and government assessments, with the assessments being given in a small group setting;
 - e. 50% more time to complete tasks; and
 - f. to reduce anxiety:
 - i. a visual schedule to help reduce the Student's anxiety anticipating the next class change;

- ii. visual timers to allow the Student to see how much time elapses before a transition or how much longer she has to complete an assignment;
- iii. a list on the board for the Student to see what the class will be doing when she returns from her special education pull-outs;
- iv. a copy of her teachers' notes to minimize copying and giving her information about what information is covered in class; and
- v. a notebook with anchor charts kept at her desk for easy reference to key concepts and priority information.

73. These modifications incorporated Dr. [REDACTED]'s school based suggestions.

74. The reading-phonics, reading-sight goal fluency and reading fluency comprehension goals remained the same as in the November 2021 IEP, as well as the written expression-encoding and writing-conventions.

75. The Math – Problem Solving goal was divided into multiple goals – Math Problem Solving, Math Calculation, Math Fact Fluency, and Math – Place Value. Its goal and objectives were adjusted to recognize the newly divided goals.

76. To accomplish those goals and the objectives in the March 23, 2022 IEP, in a thirty-two and a half hour per week program, the Student would attend general education for 22 hours and 30 minutes and special education services outside the general classroom for 10 hours weekly:

- a. 3 hours and 20 minutes, or 5 sessions of 40 minutes, in the general education classroom (her non-disabled peers) with the supports listed above;
- b. 4 hours and 10 minutes (up from 3 hours and 45 minute) in 5 sessions of 50 minutes outside general education, with a special educator, to address her needs in phonics, encoding and fluency, an increase of 5 minutes per day; and

- c. 6 hours and 15 minutes, or 5 sessions of 1 hour and 15 minutes, outside general education, which remains unchanged, taught by a special educator to address her needs in mathematics. The instruction would be in math fact fluency, beginning with fluency in addition facts, then subtraction facts, then multiplication and division facts. She requires pre teaching of mathematics vocabulary and foundational skills to repair for those tasks. If necessary, the Student would be retaught grade level skills in which she was not consistently demonstrating proficiency.

77. The IEP team continued to recommend ESY services for 15 hours a week for her phonics, encoding and math goals. Summer programming was one of Dr. [REDACTED]'s suggestions which was once more adopted in the IEP but declined by the Parents.

IEP of May 23, 2022

78. The IEP team met on May 23, 2022, to review the Student's progress under the prior IEP and to consider the assessments (including Dr. [REDACTED]'s assessments) and modify the IEP based on the Student's performance since the last IEP meeting on March 23, 2022.

79. The BCPS satisfied all procedural safeguards.

80. Ms. [REDACTED] attempted to schedule this meeting around the Parents' and their counsel's schedules, but they declined to attend, asking instead that a copy of any revised IEP be sent to them.

81. The meeting was attended by the Student's teachers ([REDACTED], her general educator, and [REDACTED], her special educator) and Ms. [REDACTED], who was the administrator/designee and who scribed and conducted the meeting.

82. At that meeting, the IEP team again reviewed Student's overall educational progress through the teacher's report, the Student's report card, and the assessments.

83. The Parents did not consent to any further assessments and did not provide any updated assessments from Dr. [REDACTED] or from any other source to be considered at that meeting. The Parents retained a tutor for the Student, but the Parents would not consent to the BCPS staff communicating with the tutor.
84. The May 23, 2022 IEP included all of the statements related to academic achievement and functional performance in the March 23, 2022 IEP. The Special Considerations and Accommodations remained unchanged from the March 23, 2022 IEP.
85. To accomplish those goals and the objectives in the May 23, 2022 IEP, in a thirty two and a half hour per week program, the Student would attend general education for 20 hours and 40 minutes, down from 22 hours and 30 minutes, and special education services outside the general classroom for 11 hours and 40 minutes, up from 10 hours and 25 minutes weekly:
- a. 2 hours and 30 minutes (5 sessions of 30 minutes), down from 3 hours and 20 minutes, or 5 sessions of 40 minutes, in the general education classroom (with her non-disabled peers) with continuing supports; 10 minutes of the service would still address the Student's sight word goal.
 - b. In addition to the 4 hours and 10 minutes (up from 3 hours and 45 minute) in 5 sessions of 50 minutes, outside general education, with a special educator, to address her needs in phonics, encoding and fluency, the Student would be provided an additional 1 hour and 15 minutes in 5 sessions of 15 minutes per week to work on her reading fluency.
 - c. 6 hours and 15 minutes, or 5 sessions of 1 hour and 15 minutes, outside general education, which remains unchanged, taught by a special educator to address her needs in mathematics. The instruction would still be in math fact fluency, beginning with fluency in addition facts, then subtraction facts, then

multiplication and division facts. She requires pre-teaching of mathematics vocabulary and foundational skills to repair for those tasks. If necessary, the Student would be retaught grade level skills in which she was not consistently demonstrating proficiency.

86. The IEP team continued to recommend ESY services for 15 hours a week for her phonics, encoding and math goals. Summer programming was one of Dr. [REDACTED]'s suggestions which was once more adopted in the IEP but declined by the Parents.

Academic progress

87. The IEPs contained the following goals and objectives, and progress towards the goals and objectives are noted:

- a. A phonics goal¹⁴ was introduced after the first quarter at the November 8, 2021 IEP meeting:
 - i. The goal was to be met by November 2022 (at the beginning of the 2022-2023 school year).
 - ii. In the 2nd quarter (ending 1/31/2022), the Student achieved objective 1.
 - iii. In the 3rd quarter (ending 4/19/2022), the Student achieved objective 2.
 - iv. In the 4th quarter (ending 6/16/2022), the Student achieved objective 3.
 - v. For objective 1, given a list of teacher-selected one and two syllable words containing *short vowels and vowel consonant e sound/spelling patterns*, the Student was able to correctly decode 8/10 words for 3 out of 4 word lists. (Emphasis added).
 - vi. For objective 3, when given a list of teacher-selected one syllable words containing *diphthongs and common vowel teams*, the Student was able to correctly decode 8/10 words for 3 out of 4 word lists. (Emphasis added).
 - vii. The Student made meaningful progress towards this goal.

¹⁴ Instead of copying the goals already detailed in the Discussion part of this decision, I have incorporated them by reference by stating in footnotes the location in this decision where the goals can be found. This goal is found on page 58, below.

- b. A Sight Word Fluency Goal¹⁵ was introduced after the first quarter at the November 8, 2021 IEP meeting:
- i. In the 2nd quarter (ending 1/31/2022), the Student achieved objective 1.
 - ii. In the 3rd quarter (ending 4/19/2022), the Student achieved objectives 1, 2 and 3.
 - iii. In the 4th quarter (ending 6/16/2022), the Student achieved the goal.
 - iv. For objective 1, when given a list of 41 *First grade* Dolch Sight words, the Student was able to read at least 80% of the words with automaticity during 2 out of 3 trials. (Emphasis added).
 - v. For objective 3, when given a list of 20 *third grade* Dolch Sight words, the Student was able to read at least 80% of the words with automaticity during 2 out of 3 trials.
 - vi. The Student made meaningful progress and accomplished this goal.
- c. A Reading Fluency Goal¹⁶ was introduced after the first quarter at the November 8, 2021 IEP meeting:
- i. In the 2nd quarter (ending 1/31/2022), the Student made progress (partially achieved objective 1) but did not fully achieve objective 1.
 - ii. In the 3rd quarter (ending 4/19/2022), the Student achieved objective 1 but did not fully achieve objective 2.
 - iii. In the 4th quarter (ending 6/16/2022), the Student achieved objectives 2 and 3.
 - iv. For objective 1 (in the original objective, before the Comprehension Goal was separated out), when given an instructional level decodable text containing previously mastered linkages and sight words from her phonics program, the Student was able to read the text with teacher support at a rate of *50 words per minute with at least 90% accuracy (45 WCPM)*. (Emphasis added).
 - v. For objective 3, when given an instructional level decodable text containing previously mastered linkages and sight words from her phonics program, the Student was able to read the text with teacher support at a rate of *60 words per minute with at least 90% accuracy (54 WCPM)* 3 out of 4 trials. (Emphasis added).
 - vi. The Student made meaningful progress towards this goal.

¹⁵ The goal is found on page 58, below.

¹⁶ The goal is found on page 59, below.

- d. A Reading Comprehension Goal¹⁷ was introduced after the 3rd quarter at the May 17, 2022 IEP meeting:
- i. In the 4th quarter (ending 6/16/2022), the Student made sufficient progress on objective 1.
 - ii. This was the only quarter in which this goal was attempted, so there was only one data point.
- e. A Written Expression - Encoding Goal¹⁸ was introduced after the 1st quarter at the November 8, 2021 IEP meeting:
- i. In the 2nd quarter (ending 1/31/2022), the Student achieved objective 1.
 - ii. In the 3rd quarter (ending 4/19/2022), the Student achieved objectives 1 and 2.
 - iii. In the 4th quarter (6/16/2022), the Student achieved objective 3.
 - iv. For objective 1, when given a list of teacher-selected one and two syllable words containing *short vowels and vowel consonant e sound/spelling patterns*, the Student was able to correctly decode 8 /10 words for 3 out of 4 word lists. (Emphasis added),
 - v. For objective 3, when dictated a list of teacher-selected one syllable words containing *diphthongs or common vowel teams*, the Student was able to correctly spell 8/10 words for 3 out of 4 lists. (Emphasis added).
 - vi. The Student made meaningful progress towards this goal.
- f. A Writing - Conventions Goal¹⁹ was introduced after the first quarter at the November 8, 2021 IEP meeting (BCPS Ex. 36, pp. 46-47):
- i. In the 2nd quarter (ending 1/31/2022), the Student achieved objective 1.
 - ii. In the 3rd quarter (ending 4/19/2022), the Student achieved objective 1 and 2.
 - iii. In the 4th quarter (ending 6/16/2022), the Student achieved objective 3.
 - iv. For objective 1, when given a prompt or question about a grade level text, a word bank, an anchor chart, and a sentence starter, the Student was able to *write a complete sentence* to respond to the prompt or question using correct capitalization, spacing between words, and ending punctuation with 80% accuracy as measured by a teacher created rubric for 2 out of 3 writing prompts. (Emphasis added).

¹⁷ The goal is found on page 83, below.

¹⁸ The goal is found on page 83, below.

¹⁹ This goal is found on page 83, below.

- v. For objective 3, when given a prompt or question about a grade level text, a word bank, an anchor chart, and a sentence starter, a paragraph frame with prefilled sentence starters, and the graphic organizer, the Student was able to *write a short paragraph of at least 5 sentences (opening, 3 details, and the closing sentence)* to answer the prompt or question and correct capitalization at the beginning of the sentence and for proper nouns, correct ending punctuation, spacing between words, and spacing between sentences with 80 percent accuracy as measured by the teacher created rubric for 2 out of 3 writing prompts. Rubric will include a total of 10 points for conventions. (Emphasis added).
 - vi. The Student made meaningful progress towards this goal.
- g. A Mathematics – Problem Solving Goal²⁰ was introduced after the first quarter at the November 8, 2021 IEP meeting (BCPS Ex. 36, pp. 48-49):
- i. In the 2nd quarter (ending 1/31/2022), the Student achieved objective 1.
 - ii. In the 3rd quarter (ending 4/19/2022), the Student achieved objective 1 and 2.
 - iii. In the 4th quarter (ending 6/16/2022), the Student achieved objective 3.
 - iv. For objective 1, when given 5 single digit *multiplication* problems, an anchor chart and manipulatives, hundreds chart, or a number line and with teacher support, the Student was able to select the strategy and correctly solve 4 out of 5 problems for 2 out of 3 problem sets. (Emphasis added).
 - v. For objective 3, when given 5 single digit *division* problems, an anchor chart and manipulatives, hundreds chart, or a number line, and with teacher support, the Student was able to select the strategy and correctly solve 3 out of 4 problems for 2 out of 3 problem sets. (Emphasis added).
 - vi. The Student made meaningful progress towards this goal.
- h. A Mathematics - Calculation Goal²¹ was introduced in the 3rd quarter at the March 23, 2023 IEP meeting (BCPS Ex. 36, pp. 50-51):
- i. In the 3rd quarter (ending 4/19/2022), no reported progress was made as the goal had just been introduced.
 - ii. In the 4th quarter (ending 6/16/2022), the Student achieved objective 1.
 - iii. This was the only quarter in which an objective was accomplished, so there only one data point for comparison.

²⁰ This goal is found on page 85, below.

²¹ This goal is found on page 85, below.

- i. A Mathematics – Fact Fluency Goal²² was introduced in the 3rd quarter at the March 23, 2023 IEP meeting (BCPS Ex. 36, pp. 52-53):
 - i. In the 3rd quarter (ending 4/04/2022), no progress was reported as the goal had just been introduced.
 - ii. In the 4th quarter (ending 6/16/2022), the Student achieved objectives 1 and 2.
 - iii. For objective 1, when given 20 single digit *addition* facts, the Student was able to answer at least 16/20 facts correctly (80%) in 2 minutes during 3 out of 4 trials. (Emphasis added).
 - iv. For objective 2, when given 20 single digit *subtraction* facts, the Student was able to answer at least 16/20 facts correctly (80%) in 2 minutes during 3 out of 4 trials. (Emphasis added).
 - v. The Student made meaningful progress towards this goal.
- j. A Mathematics - Calculation Goal²³ was introduced in the 3rd quarter at the March 23, 2023 IEP meeting (BCPS Ex. 36, pp. 52-53):
 - i. In the 3rd quarter (ending 4/04/2022), no progress was reported as the goal had just been introduced.
 - ii. In the 4th quarter (ending 6/16/2022), the Student achieved objective 1 of this newly introduced goal.
 - iii. This was the only quarter in which an objective was accomplished, so there only one data point for comparison.
- k. A Mathematics – Place Value Goal²⁴ was introduced in the 3rd quarter at the March 23, 2023 IEP meeting (BCPS Ex. 36, pp. 54-55):
 - i. In the 3rd quarter (ending 4/04/2022), no progress was reported as the goal had just been introduced.
 - ii. In the 4th quarter (ending 6/16/2022), the Student achieved objective 1 of this newly introduced goal.
 - iii. This was the only quarter in which an objective was accomplished, so there only one data point for comparison.

²² This goal is found on page 86, below.

²³ This goal is found on page 85, below.

²⁴ This goal is found on page 86, below.

Compensatory Education/Recovery Services

88. During the Covid epidemic, the Student received her education online through June 2021.
89. The BCPS was offering “Compensatory Education/Recovery Services” to students who failed to get appropriate education services during Covid, based on their performance.
90. Through June 2021, the Student was making progress toward her goals as the IEP was being fully implemented and the Student was provided with all services, except for times of her absence.
91. The Student’s mother advised Ms. [REDACTED] that she was satisfied with the educational services provided during Covid and had no questions or concerns about the implementation of the Student’s IEP during that time.
92. The Parents’ advocate first raised this issue during the November 8, 2021 IEP team meeting she attended, but despite the BCPS’ attempts to schedule a meeting to discuss that issue, the Parents did not make themselves available to discuss that issue until the February 17, 2022 IEP team meeting.

The Student’s unilateral placement at the [REDACTED]

93. On February 5, 2023, the Parents filed a Due Process Complaint alleging that the BCPS has failed to develop an appropriate IEP, and that it denied the Student a FAPE.
94. The Student began attending the [REDACTED] at the beginning of the 2022-2023 school year.
95. The Parents further alleged in their complaint that the Student is making progress the [REDACTED], her present school program, and they are requesting the Student’s placement at the [REDACTED] and funding to continue that placement.

96. On January 14, 2022, the Parents signed a BCPS consent form to release the Student's records to the [REDACTED].

DISCUSSION

Burden of Proof

The standard of proof in this case is a preponderance of the evidence. COMAR 28.02.01.21K(1). To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

The burden of proof in an administrative hearing under the IDEA rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). The Parents in this case are seeking relief and bear the burden of proof to show that the November 8, 2021, March 23, 2022 and May 17, 2022 IEPs offered by the BCPS and the services provided failed to provide the Student with a FAPE, and for other relief. For the reasons discussed below, I find in favor of the BCPS.

Applicable law

The identification, assessment and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1)(A).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined FAPE as follows:

Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is

provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to give educational benefit to the handicapped child.

Rowley, 458 U.S. at 200-201 (footnote omitted). In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-207. See also *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004). An IEP is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the applicable law, detailed below. 20 U.S.C.A. § 1414(d)(1)(A).

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

Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or received passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational

benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991) (finding that a student’s passing grades and advancement does not resolve the inquiry as to whether a FAPE has been afforded to the student). Similarly, a finding that a student is not progressing at the same speed as his or her peers does not shed light on whether a student has failed to gain educational benefit.

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

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

In *Andrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386 (2017), the Court upheld the standard it established in *Rowley*, specifically that “a child has received a FAPE, if the child’s IEP sets out an educational program that is ‘reasonably calculated to enable the child to receive educational benefits.’” 580 U.S. at 394 (quoting *Rowley*, 458 U.S. at 207).

The Court explained, “For children receiving instruction in the regular classroom, this would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” *Id.* at 394 (quoting *Rowley*, 458 U.S. at 204).²⁵ The Court noted that the student in *Rowley* was making excellent progress in the regular education classroom with the wireless transmitter and hearing aid provided by the school but it declined to order a sign-language interpreter. *Id.* at 392. The Court found the IDEA “guarantees a substantively adequate program of education to all eligible children.” *Id.* at 394.

The Court in *Andrew F.* explicitly rejected the Tenth Circuit’s diluted interpretation of *Rowley* that had found “a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely . . . more than de minimis.’” *Andrew F.*, 580 U.S. at 397 (quoting the 10th Circuit in *Andrew F.*, 798 F.3d 1329, 1338). The Court held, “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate *in light of the child’s circumstances.*” *Andrew F.*, 580 U.S. at 399. The Court declined to define what appropriate progress would be in a given case, noting that courts should not “‘substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Id.* at 404 (quoting *Rowley* 458 U.S. at 206). Moreover, under *Rowley*, appropriate progress will look different depending on the Student’s capabilities. *Andrew F.*, 580 U.S. at 400.

Positions of the parties

The Parents assert that the BCPS did not provide the Student with a FAPE, and that she did not progress, claiming that the BCPS tried multiple different intervention strategies over the four years that the Student was at [REDACTED], but she has not progressed satisfactorily. The Parents question the development of the IEP and the BCPS diagnosis of the Student’s disability, and they

²⁵ The Student is not being fully educated in a “regular education classroom” but partially in a that type of classroom and out of that classroom for “pull-out” special education services.

further assert that the present IEP is not reasonably designed for the Student to make educational progress and is “more of the same” considering her lack of progress and periodic and specific regressions. The Parents are concerned about the widening “educational gap” because the Student is not progressing. They claim that the Student requires a full time placement at the [REDACTED] where the Student is enrolled, and where she can get intensive supports and specialized programming for students with Dyslexia and other language learning differences. The Parents also raised the issue of compensatory education.²⁶

The BCBS asserts that it fully and adequately diagnosed the Student in all areas of her disability, recommended appropriate services and placement, and developed an appropriate IEP for the Student for the 2021-2022 school year (the third-grade year) and the 2022-2023 school year (the current fourth-grade year) as well as summer 2022. The BCPS claims that it appropriately revised the Student’s IEP as necessary, properly identifying goals and objectives for the Student. It further claims that it followed the IEP with fidelity, and the Student made progress, meeting her goals. The BCPS maintains that compensatory education was not indicated for the Student, and placement at the [REDACTED] is not appropriate.

Analysis

Background

The Student is currently 10 years of age and is attending the [REDACTED], a private school that is approved by the MSDE. Prior to her enrollment at [REDACTED], she was a student at the [REDACTED] Elementary School for the following years and grades:

School year	Grade level
2018-2019	Kindergarten

²⁶ Although “comp ed” was not listed in the issues in this case, I will consider it to be part of a FAPE and will consider it accordingly.

2019-2020	First Grade
2020-2021	Second Grade
2021-2022	Third Grade

The Student’s enrollment at █████ ended in June 2022. She had an IEP that changed over time. The Student was approved to attend ESY for 15 hours per week for four weeks each in the summers of 2021 and 2022, but the Student did not attend that program. Had the Student enrolled at █████ for the 2022-2023 school year, she would have been enrolled in fourth grade.

The Student was being educated in both general and special education settings. The number of hours in each program are tracked in the IEPs. BCPS Exs. 8, 30 and 36. Ms. █████, the Student’s third grade general education teacher, and Ms. █████, the Student’s special education teacher for more than two years, confirmed those assignments. Both worked together to collaborate in assuring that the IEP was being followed and that the “curriculum is modified or altered, tailored to the student’s individualized education program or the IEP” and to make sure that the supplemental aids necessary to education the Student in both the general and special education classrooms were being provided. TR. V1, Pages 64:17 to 65:11.

Ms. █████ explained that at the start of the school year, she familiarized herself with the Student’s IEP to understand the Student’s “present levels of [the Student’s] academic achievement and performance, the services that she receives, information about the student, the accommodations that she needs, the supplementary aides that she needs and her current progress outlines by her goals and objectives” so that she could collaborate with Ms. █████, the Student’s special educator while the Student was in general ed. TR. V.1, Page 71:2 to 71:22.

In terms of determining what works and what does not work, both teachers used objective testing methods and scores to gauge the Student's progress and areas of need. Progress and accomplishment in some areas do not portend success in all areas and objectively tracking the Student in all areas drives the course of her education. Ms. [REDACTED] explained:

... You could be a student that decodes, has phonics skills at a very high level but be bad at comprehending. So all of those — breaking those out is important to know where to target and what skills we need to target. Do we need to hit the comprehension? Do we need to hit reading fluency? Do we need to have more reading phonics? So breaking that out gives us information to say, “Okay, these are the areas where we need to hit hard.” For her, all of those areas were at a significant deficit.

TR. V1, Page 188:11 to 188:23.

In group sessions, in which the class size was approximately 27 students, Ms. [REDACTED] “would sit with [the Student] and provide her accommodations and supplementary aides during the lessons so that way she could complete the work independently.” TR. V. 1, Pages 35:25 to 36:8. In subjects like social studies, science and health, Ms. [REDACTED] would read the Student the grade level content when she could not read it, so she could access the grade level content for those subjects. TR. V.1, Page 37:4 to 37:15. Much of the instruction was in small groups, however, which Ms. [REDACTED] assigned using popsicle sticks. Although the assignment appeared to be random to the students, she knew how to group the students according to their needs, but the students did not know the basis of those assignments so that they would not feel stigmatized by being assigned to a particular, needier group. TR. V1, Pages 94:20 to 97:7.

The IEP is the roadmap. *Andrew F.* recounts the requirements for a FAPE and provides a roadmap to what needs to be considered in assessing an IEP:

The IDEA requires that every IEP include “a statement of the child’s present levels of academic achievement and functional performance,” describe “how the child’s disability affects the child’s involvement and progress in the general education curriculum,” and set out “measurable annual goals, including academic

and functional goals,” along with a “description of how the child’s progress toward meeting” those goals will be gauged. §§ 1414(d)(1)(A)(i)(I)-(III). The IEP must also describe the “special education and related services ... that will be provided” so that the child may “advance appropriately toward attaining the annual goals” and, when possible, “be involved in and make progress in the general education curriculum.” § 1414(d)(1)(A)(i)(IV).

Endrew F., 580 U.S. at 391. All parties agree that the Student is a very bright child, but has an SLD diagnosed as Dyslexia, which affects her ability to access the general curriculum due to deficits in reading and math.

To analyze the school’s IEP, I will look at the Student’s diagnoses, evaluations, goals, the Student’s progress towards those goals, the services (including related services) provided and whether the Student is advancing towards attaining those goals. In that way, I can determine whether the Student was receiving a FAPE.

Diagnoses – Dr. [REDACTED]

The Parents retained Dr. [REDACTED], a psychologist, who was accepted as an expert in psychology at the hearing. Dr. [REDACTED] testified on behalf of the Parents consistently with his report (BCPS Ex. 19).

During the November 8, 2021 IEP team meeting, the team recognized the Student’s “challenges with retaining skills, task completion, and attention during instruction” so it determined that a re-evaluation should be conducted. BCPS Ex. 9. The IEP team determined that it required psychological, education, and language assessments and classroom observation that could be conducted by school staff in the school setting. The Parents declined the offer in favor of retaining Dr. [REDACTED] to perform the psychological and educational tests in his office.

Two months later, on January 8, 2022, Dr. [REDACTED] examined the Student in his office. At the time of the evaluation, the Student was eight years and ten months old, and was a third grade student at [REDACTED]. Dr. [REDACTED]’s evaluation was intended to determine the Student’s current cognitive, academic, attentional, executive, and emotional functioning. Dr. [REDACTED] had

previously examined the Student in July 2018 when she was a kindergarten student.²⁷ The prior evaluation was not submitted into evidence, but according to his present report, it evidenced weakness in the areas of visual-spatial reasoning and visual-motor integration. Dr. [REDACTED] made the following DSM-5 diagnoses:

- Specific Learning Disorder with Impairment in Reading (315.00), with a Dyslexic profile, based on [the Student's] identified weakness in phonological processing and reading comprehension.
- Specific Learning Disorder with Impairment in Mathematics (315.1), based on [the Student's] weakness in math reasoning and calculation fluency.
- Specific Learning Disorder with Impairment in Written Expression (315.2), based on [the Student's] weakness in written expression.
- Developmental Coordination Disorder (315.4), given [the Student's] ongoing weakness in visual-motor integration.

BCPS Ex. 19, p. 10. None of the witnesses questioned these diagnoses, which were incorporated into the IEPs following the submission of this report.

Dr. [REDACTED] reported on the following tests that he administered to the Student:

- Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V);
- Test of Auditory Processing Skills, Third Edition (TAPS-111);
- Children's Memory Scale (CMS);
- Beery - Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (VMI);
- Kaufman Test of Educational Achievement, Third Edition (KTEA-III);
- Test of Variables of Attention (TOVA);
- Behavior Assessment System for Children, Third Edition (BASC-III); and
- Behavior Rating Inventory of Executive Function, Second Edition (BRIEF -11)

²⁷ No record of that evaluation was presented into evidence and it was unclear whether the Parents provided that report to the school staff or the IEP team.

All of the tests were administered in a single session.

The tests showed the following, paraphrased below (BCPS Ex. 19).

Attention

- The Student demonstrated “overall sustained attention, consistently in attention and impulse control,” however some anxiety symptoms were noted.

Nonverbal Functioning

- On the Weschler Intelligence Scale for Children (Fifth Edition) the Student’s scores in verbal functioning were “appropriate,” as her performance in those subsets fell in the average range.
- The Student’s scores were in the average range in the Auditory Comprehension and Auditory Reasoning subtests of the Test of Auditory Processing Skills, Third Edition (TAPS-111) which assessed her language processing abilities, suggesting that her ability to retain shorter amounts of factual information in sentences is appropriate.
- On the WISC-V subtest of Digit Span, the Student’s performance fell in the average range, a finding comparable to her general verbal abilities, suggesting that her short-term and working memory abilities are comparable to one another, and are comparable to the similar memory abilities of her peers. The Letter-Number Sequencing subtest of the WISC-V also suggested the same for working memory.
- In the Stories - Immediate subtest of the Children’s Memory Scale (CMS), her score was within the average range, testing her cumulative memory, or memory for longer groups of meaningful information, suggesting that the Student’s retention of larger quantities of factual information remains appropriate.
- In the WordPairs - Learning subtest of the CMS, the Student scored in the lower end of the average range, but her retention of information grew with each successive repetition during the task, suggesting that her retention is aided by repetition. She also scored in the average range on the Information subtest of the WISC-V, suggesting that once the Student has retained information, she can successfully recall that information at a later time.

Verbal Functioning

- On the WISC-V Block design task, the Student scored below the average range, indicating her increased difficulty with visual-spatial reasoning and organizing. This result was comparable to her prior testing, impacting tasks such as far-point copying and keeping items aligned.
- On the Beery-Buktenica Developmental Test of Visual-Motor Integration. Fifth Edition (VMI), the Student’s score fell in the low average range, suggesting that her visual-motor integration abilities continue to be weaker than abilities of most peers

and that writing tasks may take more time and effort for the Student than for many of her peers.

- On the Matrix Reasoning and Figure Weights subtests of the WISC-V, her score on the Matrix Reasoning and Figure Weights subtests assessed [the Student's] fluid visual reasoning, or the ability to understand and apply rules of reasoning, suggesting that the Student is able to identify rules in visual reasoning and apply those rules in problem solving.
- On the Picture Span subtest of the WISC- V, the Student's visual working memory was assessed. The Student's average range performance was in the lower end of the average range, suggesting that the Student's verbal working memory is comparable to her visual working memory ability, and comparable to the visual working memory abilities of her peers.
- The WISC-V subtests of Symbol Search and Coding (resulting in two separate scores) examined the Student's processing speed. The Student's performance fell in the lower end of the average range, with her overall performance falling in the low average range. These results suggests that the Student processes general verbal information and formulates responses to that information at a rate that is slower than the rate of most peers.

Cognitive Functioning

- The WISC-V suggests overall functioning within the average range when compared with same-aged peers in the population at-large. Dr. [REDACTED] wrote that the overall discrepancy of 14 points between the Student's Verbal Comprehension Index Score of 98 (Average Range) and her Visual Spatial Index Score of 84 (Low Average Range) was significant, suggesting that her overall verbal reasoning abilities continue to be stronger than her overall visual-spatial reasoning abilities. However, due to the discrepancy, he cautioned that the Student's Full Scale Index Score should be interpreted with caution, as it may not be a reliable estimate of her ability in all areas. Instead, the various Indices should be examined for areas of strength and weakness.
- On the Verbal Comprehension subtests of the WISC-V, the Student's scores fell "solidly in the average range," suggesting that the Student's abstract verbal reasoning, expressive vocabulary, and recall of previously acquired information continue to be comparable to the similar abilities of her peers.
- On the Visual Spatial subtests, the Student's overall performance fell in the low average range, suggesting that her visual reasoning and organizing abilities continue to be weaker than the abilities of most peers.
- In the area of Fluid Reasoning, the Student's overall performance fell in the average range, suggesting that her ability to identify rules in reasoning is appropriate.
- The Student's short-term and working memory ability were scored in the "overall lower end" of the average performance. The Student's short-term and working verbal

memory abilities were comparable to one another, which were comparable to the memory abilities of the Student's peers.

- The Student's "overall score" in processing speed fell in the low average range, suggesting that she is able to process information and formulate responses at a rate that is slightly slower than the rate of most peers.

Academic Functioning

- The Student's performance on standardized achievement testing suggests an ongoing weakness in her academic skills. Her performance on tasks of reading, mathematics calculations, and written expression fell in the low average to below average ranges.
- In the Phonological Processing subtest of the Kaufman Test of Educational Achievement—Third Edition (KTEA-111), used to assess the Student's phonological processing skills, her "Standard Score of 83" indicated a grade equivalent of "k. 11," which was in the lower end of the low average range. The Student was able to blend words, segment words, and rhyme words, but she experienced increased difficulty in the areas of matching sounds in words and isolating phonemes, suggesting that the Student requires ongoing work in the area of phonological processing.
- In the Letter and Word Recognition subtest of the KTEA-III used to assess the Student's word reading skills, her "Standard Score of 71" indicated a grade equivalent of "1.0," which is below the average range. The Student successfully identified words that were reported to be familiar, but experienced increased difficulty with the decoding of larger, unfamiliar words. Dr. [REDACTED] found this result consistent with the Student's weaker phoneme isolating performance.
- In the Nonsense Word Decoding subtest of the KTEA-III used to further assess her phonological processing skills, her Standard Score of 80 indicated a grade equivalent below 1.0, which fell in the lower end of the low average range. The Student experienced increased difficulty with the reading of multiple-syllable nonsense words, suggesting that the reading of longer and unfamiliar text continues to be challenging.
- In the subtests of the KTEA-III assessing the Student's reading efficiency (recognizing her weaker phonological processing skills), her Word Recognition Fluency subtest produced a Standard Score of 74, indicating a grade equivalent of 1.0. On the Decoding Fluency subtest, her Standard Score of 77 indicated a grade equivalent less than 3.0²⁸ both of which fell below the average range, suggesting that the Student's performance in identifying and decoding words when reading is "truly" a time-intensive task.
- On the Silent Reading Fluency subtest of the KTEA-III, used to assess the Student's rate of comprehending shorter amounts of text, she had a Standard Score of 85, indicating a grade equivalent of 1.10, which was below the average range, and

²⁸ Dr. [REDACTED] explained that this is the lowest grade equivalency for this test.

suggesting that she reads and comprehends shorter text at a rate that is weaker than the rate of her peers.

- On the Reading Comprehension subtest of the KTEA III, used to assess the Student’s reading comprehension, her Standard Score of 70 indicated a grade equivalent of k.9, which fell below the average range, suggesting that her slower reading efficiency and weaker phonological processing makes comprehension increasingly challenging for her.
- On the Spelling subtest of the KTEA-III, used to assess the Student’s spelling skills, her standard score of 72 fell below the average range, indicating a grade equivalent of 1.1, suggesting that her spelling skills are also weaker than the skills of most peers.²⁹
- On the Math Computation subtest of the KTEA-III, used to assess mathematics computation skills, the Student’s Standard Score of 77 indicated a grade equivalent of 1.8, which fell below the average range, suggesting that her mathematics computation skills are weaker than the computation skills of her peers.³⁰
- On the Math Concepts and Applications subtest of the KTEA-III, used to assess her mathematics reasoning skills, the Student’s Standard Score of 70 indicated a grade equivalent of “k. 10” falling below the average range.³¹
- On the Math Fluency subtest of the KTEA-III, which assessed the Student’s rate of simple mathematics calculations, the Student’s Standard Score of 75 indicated a grade equivalent of 1.1, which fell below the average range. This suggests that she computes simple mathematics calculations at a rate that is slower the rate of most of her peers.³²
- On the Written Expression subtest of the KTEA-III, the Student’s Standard Score of 77 indicated a grade equivalent of 1.4, which fell below the average range. Comparing the Student’s “solid verbal abilities,” her writing samples “involved a decreased expansion of thought,” with errors noted in the writing rules of capitalization and punctuation.
- On the Writing Fluency subtest of the KTEA-III, the Student’s standard score of 99 indicated a grade equivalent of 3.6, and her speed of writing fell in the average range, suggesting that she produces short written responses at a rate that is comparable to the rate of her peers.

²⁹ Dr. ██████ noted that the Student “misspelled pet as pat, was as woz, home as hom, farm as fom, open as oping, what as wut, and phone as fon.” The significance of these misspellings was not fully addressed.

³⁰ Dr. ██████ noted that this this test score is “[c]onsistent with [the Student’s] need for special mathematics instruction....”

³¹ Dr. ██████ noted that the “decoding of increasingly complex word problems was found to be more challenging to [the Student], suggesting that work on understanding the ‘language’ of math word problems will be necessary....”

³² Dr. ██████ noted that the Student “resorted to finger counting to solve many of the tasks, suggesting that she has not established automaticity of her early math calculations.”

Attentional Functioning

- The computerized Test of Variables of Attention (TOVA) was used to assess the Student's current attentional functioning (attention, impulsivity, response time, and attentional variability). Two parts of the test assessed "attention difficulty," and the second part of the test assessed "impulse control difficulty."
- Her performance yielded an overall "Omission Total Standard Score" of 99 for the attention subtest, falling in the average range, suggesting the Student's ability to sustain attention is appropriate.
- Her overall impulse control yielded a "Commissions Total Standard Score" of 101 which was also in the average range, suggesting that she is not overly impulsive in approaching tasks.
- In the area of Response Time, the Student's overall performance fell in the low average range with a "Response Time Total Standard Score" of 84. Dr. [REDACTED] assessed her performance in the lower end of the average to low average range, suggesting that the Student's rate of response to attentionally demanding information is slower than the rate of her peers.
- In the area of Response Time Variability, the Student's overall performance fell in the average range with a "Response Time Variability Total Standard Score" of 96, suggesting that her attention is consistent across a task.

Academically, the Student's reading, writing, and mathematics calculation skills fell in the low average to below average ranges. Dr. [REDACTED] determined that the Student fits the profile of an individual with ongoing scatter in her abilities, writing, "While [the Student's] verbal reasoning, fluid visual reasoning, and working memory abilities fell in the average range, low average performance was noted in the areas of visual-perceptual reasoning, visual-motor integration, and processing speed."

Behavioral/Emotional Functioning

On the Parent Form of the Behavior Assessment System for Children, Third Edition (BASC-III), used to examine the Student's behavioral and emotional functioning, her mother completed the instrument, showing an elevation in the area of Anxiety, other areas³³ falling in the average range. Dr. [REDACTED] analyzed that the Student "often worries about things that cannot

³³ Those "other areas" were not described.

be changed, is almost always nervous, often worries about making mistakes, and is often easily stressed.”

Executive Functioning

On the Parent Form of the Behavior Rating Inventory of Executive Functioning, Second Edition (BRIEF-II), used to assess the Student’s executive functioning, the Student’s mother completed the instrument, showing no elevations, suggesting that the Student’s mother does not presently see significant issues with executive functioning.

Anxiety

The Parents reported to Dr. [REDACTED] that the Student expressed anxiety about her school and the ability to complete her work, expressing concerns to her parents about being late for school and missing work.

Dr. [REDACTED]’s recommendations

At the conclusion of his report, analyzing the data he collected, Dr. [REDACTED] made the following recommendations:³⁴

- 1) Given her identified areas of weakness, it is recommended that [the Student] continue to have an IEP, with her continued goals in place. In addition, goals and objectives should be incorporated for mathematics computations and calculation fluency.
- 2) Continued accommodations should be implemented in the academic environment for [the Student]. In addition to the accommodations listed, [the Student] should have all material read to her, including the information on all examinations.
- 3) In addition to the accommodations listed in [the Student’s] IEP, she will benefit from ongoing intervention to assist in strengthening her academic skills.
- 4) Given [the Student’s] weakness in visual-motor integration, the copying of larger quantities of information may be challenging. Therefore, [the Student] should be supplied copies of teacher notes.

³⁴ These are repeated here almost verbatim.

- 5) If keeping math calculations aligned becomes an issue for [the Student], it is recommended that she be allowed to use graph paper for math calculations.
- 6) Given that [the Student] has made minimal “catch-up” progress, it is recommended that instruction to strengthen skills be incorporated in all classroom instruction during the day. To help accomplish this, [the Student] and her parents are encouraged to look into a school such as [REDACTED], which provides instruction to cognitively capable children with identified learning differences.
- 7) The summer months are also good times for more intensive reading instruction. Schools such as [REDACTED] also offer summer camps to work on strengthening reading skills.
- 8) Practice will continue to help [the Student] with reading acquisition. She would benefit from completing 15 minutes a day of independent reading, with an additional fifteen minutes of oral reading. It will be important to work with [the Student] to ensure that she is reading on a regular basis, and to allow her some control in what she reads, which may even be short articles related to topics in which she is interested.
- 9) Word games, such as Scrabble Jr. and Boggle Jr., are also fun ways to increase reading and word efficiency.
- 10) The use of recorded text might also be helpful for [the Student], given her weakness in reading decoding and reading comprehension. Programs such as Bookshare (bookshare.org) and Learning Ally (learningally.org) offer recorded books to qualified students.
- 11) To assist in strengthening her math skills, apps and games geared towards math will be beneficial. *Smath* is a good game aimed at strengthening math skills.
- 12) [The Student] would also benefit from working on her typing skills, as writing on a computer allows for easier editing performance.
- 13) When completing homework on a nightly basis, [the Student] would benefit from completing the most challenging tasks first, while saving the easier tasks for last, as attention may decline as homework tasks wear on.
- 15) Given the report of anxiety in [the Student], the implementation of problem-solving strategies may help to reduce worry. By having [the Student] ask the following questions, those working with [the Student] can help her learn to approach problems with greater control:
- What is my problem? This allows [the Student] to identify the source of her anxious feelings.
 - How can I solve it? This allows [the Student] to identify strategies to decrease her anxiety and increase control. It is important in this phase for [the Student]

to identify as many possible solutions to the problem as she can, from serious to silly. The purpose of this step is to teach [the Student] that there are numerous ways to solve problems, and to think of alternative solutions to problems as opposed to overreacting.

- What is my best plan? The purpose of this step is to have [the Student] evaluate each of her options and decide on an appropriate and effective plan.
- How did I do? This allows [the Student] to evaluate her performance during the situation and decide if she chose an appropriate and effective problem-solving strategy.

BCPS Ex. 19.

The IEP Team's concerns about Dr. [REDACTED]'s Academic testing results.

Several of the witnesses raised questions about the validity of Dr. [REDACTED]'s results. Ms. [REDACTED] and Ms. [REDACTED] questioned the efficacy of administering all of these tests in one session, rather than spreading the test administration over one or more sessions. Their concern was the Student's fatigue and the impact of so many tests, being administered in a single session. Their concern was based on their experience with the Student who routinely got tired after a period of extended tasks.

Ms. [REDACTED] succinctly expressed this concern:

Q. So, the aggregate of things that you told us that you used to develop this IEP, was there anything in there that suggested to you that Dr. [REDACTED]'s scores weren't accurate and that, somehow, she was reading on a second or a third or a fourth-grade level? Is there any doubt that -- did anybody say that's not valid scores?

A. We couldn't say that they weren't valid, but we definitely had concerns because she was tested over -- I guess you said it was a 3-hour time span one day. There was (sic) a lot of assessments in one day. We do know that she tires easily. I've known her since kindergarten. She needs a lot of breaks.

TR. V2, Page 457:9 to 457:20. Ms. [REDACTED] echoed this concern:

Q. And you were familiar with the student, so how – what can you tell us about the student’s endurance or stamina in the classroom and working on assignments?

A. Well, she was a student who did tire easily. We did have frequent breaks on her IEP as an accommodation for a reason. Because she required those frequent breaks in order to maintain her focus and attention to the tasks.

TR. V2, Page 294:14 to 294:21. Ms. [REDACTED] remembered the discussion at the February 17, 2022 IEP team meeting when Dr. [REDACTED]’s test results were discussed:

Q. Tell me why the IEP team explained that. What was in the explanation?

A. The explanation was that we would’ve spread out -- I’ll just speak on the educational assessment because that’s my area of expertise. So, when I’m assessing a student using a formal assessment such as the Woodcock Johnson or any other formal assessment, I never do that assessment for longer than a 30-minute sitting. I tend to not assess more than an hour a day. So, like 30 minutes in the morning, 30 minutes in the afternoon. And that’s with all students. And that’s even more important for a student like [the Student] who has struggles, who tires, who we know gets fatigued. Ms. [REDACTED] would see it. I would see it. Teachers in years past would see it. She required -- like, she -- those formal assessments are very, very mentally taxing. It’s much different than doing a math worksheet. They require a lot of perseverance. They require a lot of thought.

TR. V2, Page 465:7 to 465:24.

Dovetailing into this concern was that Dr. [REDACTED] did not specify the order in which the tests were administered, just that they were administered in one session. In his report, Dr. [REDACTED] discussed and listed the Student’s intellectual abilities first. These results were quite favorable to the Student, showing her to be capable of processing information presented to her (“Verbal Functioning” testing results). Addressing the results of the “Academic Functioning” test results, Dr. [REDACTED] wrote in his report that the Student’s “performance on tasks of reading,

mathematics calculations, and written expression fell in the low average to below average ranges.” BCPS Ex. 19, p. 6. The Student’s teachers and school psychologist were concerned about the effect of the Student’s fatigue on her performance on the academic tests if those academic tests were administered towards the end of the testing session. Ms. [REDACTED] testified that had she administered the tests, they would be done in several sessions when the Student had not been already fatigued after being presented with tasks that required her thought process. Ms. [REDACTED] echoed Ms. [REDACTED]’s concern about fatigue in relation to the academic testing:

Q. And do you believe, based on what you read here and what that concern is, that the results would be any different?

A. It could be. Ms. [REDACTED] talked about the fatigue after a long period of time. And the last couple of things that [the Student] did could’ve been impacted by that. I wouldn’t know unless I had something to compare it to.

TR. V4, Page 829:8 to 829:14.

This expressed concern also leads me to question the academic functioning tests’ validity. This concern was first referenced in the “Documentation of Disagreement” section of the IEP team summary on February 17, 2022 . BCPS Ex. 24, p 14/22.

As Ms. [REDACTED] pointed out, this was only one snapshot in time, so not only did she not have “something to compare it to” but there was no evidence presented on what progress was made after implementation of the IEP. (For the reasons expressed below, that deficit falls squarely on the Parents for denying further BCPS assessments or providing further assessments from Dr. [REDACTED] for the IEP team to consider).

Ms. [REDACTED] also questioned the particular testing instruments that Dr. [REDACTED] administered. One test, the Test of Auditory Processing Skills, Third Edition, that he used was published in 2005, almost twenty years ago, as she pointed out. In Ms. [REDACTED]’s opinion, that version of the test was superseded by more recent testing instruments - the Fourth Edition

published in 2018, that were more recently normed, giving more accurate test results. TR. V4, Pages 853:22 to 854:12 and TR. V4, Page 856:16 to 856:24:

Another reason that the assessments are updated is norms. There's something called the Flynn effect that is the -- that our skills as a human race change over time. And so the norms have to be updated every 15 or 20 years to reflect that. And if we use an old assessment and a new assessment for the same person, there will be a difference in those scores. So using the norms, then we're comparing the student to scores from the research sample from 20 years ago, rather than from 5 years ago.³⁵

Ms. [REDACTED] also questioned the choice of tests Dr. [REDACTED] administered, as he did not administer the Children's Memory Scale. TR. V4, Page 857:1 to 857:2. That test might have helped determine why the Student regressed after mastering skills.

The Parents refused subsequent testing, which was requested at the February 17, 2022 IEP team meeting. The implication of this refusal is discussed below in the section of this decision concerning Parental Choices. The witnesses have presented sufficient reasons to question the validity of those latter academic functioning results which could have shed light on the reasons that the Student was not retaining the information she was being taught and on her current level of academic achievement after interventions were put in place. Ms. [REDACTED] testified:

...After the team reviewed the assessments at the February 2022 IEP team meeting], they wanted to order new -- they wanted to order additional assessments.

A. Right.

Q. And why?

³⁵ Ms. [REDACTED] gave an example of the danger in using outdated, superseded test instruments:

There are a number of reasons why an assessment would be updated. So one reason is that the components of the questions need to be updated to reflect cultural norms and technology. So for example, I have a vintage IQ test in my basement that has a picture of a rotary phone. And I would definitely not be able -- it wouldn't be fair.

A. I was still really interested in the memory component. Like I was saying, that there's visual and verbal memory and there's immediate and delayed, and then the delayed recognition. And the pieces that Dr. [REDACTED] addressed, she seemed to have done fine on in that her scores on the working memory subtest digit span was a 9, where average is 8 to 12. Picture span was an 8. Letter number sequencing was a 9. Story memory was a 9. And word pairs learning was an 8.

So the memory components that he did looked fine, but that doesn't really match up with our concern about the regression. So I wanted to look deeper into the visual memory and that delayed component and see if I could figure out where that is a hang-up for her.

TR. V4, Pages 858:12 to 859:5.

The witnesses have presented sufficient reasons to question the validity of those latter academic functioning results. The BCPS witnesses' concerns about the order of testing is compelling, so the validity of the academic skill test results are questionable.

Ms. [REDACTED] and Ms. [REDACTED] relied on Dr. [REDACTED]'s January 2022 test results to assess the Student's present academic function on the serial IEPs because they place a high value on academic test results in gauging the level of academic achievement. However, this presents only one factor used to assess the present level of academic achievement in the IEP.

The IEPs

Under the IDEA, an IEP is defined as follows:³⁶

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--

(I) a statement of the child's present levels of academic achievement and functional performance, including--

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

...

³⁶ Inapplicable provisions such as those involving pre-school and transitional students, have been omitted.

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to--

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

...

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications....

U.S.C.A. § 1414(d)(1)(A). The school must “offer an IEP reasonably calculated to enable a child to make progress appropriate *in light of the child's circumstances.*” *Endrew F.*, 580 U.S. at 399).

Specific features of the IEP for November 2021

II. Present level of academic Achievement and Functional Performance (November 2021)³⁷ IEP dated November 8, 2021 (BCPS Ex. 8)

In scheduling the IEP team meeting, the BCPS sent the Parent a Notification of IEP Team Meeting, dated October 20, 2021. BCPS Ex. 4. The Parents signed the Receipt of Procedural Safeguards Parental Rights Document on October 20, 2021. BCPS Ex. 3. The IEP Team Summary is BCPS Ex. 9. The following individuals attended the meeting:

- [REDACTED], Administrator/Designee,
- [REDACTED], General Educator
- The Student's Parents
- [REDACTED], School Psychologist
- [REDACTED], advocate for the family, and
- [REDACTED], Special Educator.

After a review of the Student's overall educational progress (through the teacher's report,³⁸ the Parent's report, the Student's report card, county/statewide tests, attendance, etc.), Ms. [REDACTED] the Student's general education teacher, reported that the Student had adjusted to class procedures and was interacting appropriately with her peers both in class and during recess. The Student was able to comprehend grade level texts that were read aloud to her, but her math grades were inconsistent in the first quarter. Math is taught in small groups with reteaching instruction, but she was unable to independently recall recently taught strategies and skills. The Student benefitted from non-verbal cues to remain on task but tended to distract herself; with reminders, she is redirectable back to the work.

Ms. [REDACTED] acknowledged that the Student's overall achievement was below grade level expectations but noted that she works hard. Ms. [REDACTED] reported that her special interventions

³⁷ Section "I" of the IEP contains largely biographical, procedural and and classification data.

³⁸ I reviewed the teacher's progress reports prepared in anticipation and for use at the IEP team meetings: BCPS Ex. 13 – Third Grade Teacher Report for IEP Team, dated November 22, 2021; BCPS Ex. 26 - Case Manager Report for IEP Team, dated March 15, 2022; and BCPS Ex. 35 - Third Grade Teacher Report for IEP Team, dated May 16, 2022. It is too lengthy to repeat all of this data here, but I have reviewed these reports and they are faithful sources of the information contained both in the IEP team summaries and reflected in the IEP themselves.

were OG and math fact fluency. She reported that the Student gets along well with her peers. She indicated that the Student was working with the OG phonics intervention for one and a half school years (all of second grade and the second half of the first grade), when she had used the Wilson Reading System Intervention in the first half of first grade.

Reading (BCPS Ex. 8 , pp. 9-10)

As stated in the IEP, the Student was performing at the first to the beginning of second grade level, and her performance trend was the kindergarten grade level for school years 2019 through 2020, and the end of kindergarten to the first grade level for the 2020-2021 school year. The Student was receiving OG reading intervention and was doing well through the end of second grade before the summer break. However, when she returned to the school at the beginning of the 2021-2022 school year, she had not been enrolled in the recommended ESY services and regressed.³⁹ She had one sight word error, 3 sounds that were added or omitted, 2 final consonant errors, 10 short vowel errors, 2 digraph/QU errors and one consonant blend error. For the second grade Dolch sight words, the Student was able to read 31/46 of those Dolch sight words with automaticity. The benchmark for a third grade student was 48 out of 50 words.

Although the Student showed problem with reading fluency, she was able to comprehend grade level texts read to her aloud. She was able to demonstrate comprehension after multiple exposures to the text. She was able to acquire and use new vocabulary words in both speech and writing with the use of a word bank.

The Student's strengths were in letter naming, letter sound knowledge, blending phonemes, reading and spelling instructional level words, and pre primer, primer and first grade sight word knowledge. She still needed to attain the skills to decode second and third grade sight words.

³⁹ This regression was also noted after breaks and even weekends.

As stated in the IEP, the Student was performing at end of the first to the beginning of second grade level, and her performance trend was the kindergarten grade level for school years 2019 through 2020, and the end of kindergarten to the first grade level for the 2020-2021 school year.

The Student's writing was legible and she was able to write full sentences. She could spell previously learned instructional level words as a result of her phonics program and her knowledge of sight words. She needed a sentence starter to begin her writing, and visual and prompting from an adult to use capital letters at the beginning of the sentence and end the sentence with punctuation. She also needed verbal and visual prompting to put spaces between words and sentences. She could write short paragraphs of at least three sentences if provided the sentence starter. She copied well.

The Student's writing regression corresponded with her phonic regression, as indicated above. Her strengths were copying from the board, copying from book or paper, handwriting and spelling known sight words. Her needs were using correct conventions to write a sentence and spelling of instructional level words. Both of these needs were addressed through the goals and services section of the IEP.

Academics: Mathematics (BCPS Ex. 8, p.11-12)

As stated in the IEP, the Student was performing at a first grade level, and her performance trend was the kindergarten grade level for school years 2019 through 2020, and to the beginning of first grade level for the 2020-2021 school year.

The Student could independently perform simple addition and subtraction of one digit numbers when using a hundreds chart or number line, as well as manipulatives. She was participating in a Tier 2 math fact fluency intervention outside of general education to increase her abilities to fluently add and subtract. She could add and subtract 2 and 3 digit numbers with

support from an adult and use of manipulatives, number lines and place value charts. She was learning multiplication but required the use of multiplication charts. She worked well when questions were read to her and when given supplemental aids.

The Student's strengths were her problem solving, place values, simple addition and subtraction with use of supports. Her needs were pre-teaching math vocabulary and supporting skills needed for upcoming content, which were addressed through the supplementary aids and services section of the IEP.

General – Present level of academic achievement and functional performance (BCPS Ex. 8, p.13)

The Student's father expressed concerned that the Student performed below grade level. He said that she gets frustrated when reading and completing math homework. He also indicated that she was experiencing anxiety towards the beginning of the school year, but that has improved. He pointed out that the Student had good comprehension when she was read to, but not when she read independently. She also complained to her father that she did not have enough time in school to complete her math assignments.

This section of the IEP also recounted the Student's strengths, interest areas, significant personal attributes, and personal accomplishments. She enjoyed playing [REDACTED], arts and crafts, and drawing. She was a well-rounded individual, and got along well with peers, family and the family pet.⁴⁰

III. Special Considerations and Accommodations (November 2021)
Accommodations (November 2021)

Due to the Student's SLD in reading, she was provided text-to-speech assistance. She was also to be provided frequent breaks and reduced distractions in order for her to maintain

⁴⁰ At the hearing, the Student's mother commented that her daughter was being referred to as "The Student" and not by her given name. Although it was explained that the record needs to be as sanitized as possible, I do not lose track of the fact "the Student" is an individual, a daughter, a sibling, a student, and should not be reduced to a list of criteria. However, in this context, I must rely on the objective rather than subjective data, keeping in mind her unique individuality.

focus for testing and extended tasks. BCPS Ex 8, p.16. She also was provided a “calculation device” for math assessments due to her SLD in math and processing speed deficits affecting her math fact fluency. The Student was also given extended time (time plus 50%) to complete tasks “due to decoding needs, encoding needs and processing speed.” BCPS Ex. 8, p. 17.

Supplemental aids, services, program modifications and supports (November 2021)

For instructional support, the Student was to be provided verbal directions and frequent check-ins, asking her to restate the directions to make sure she understands how to complete the task. She was allowed the use of a word bank and was given a visual task checklist to help her organize her work. “Pre-teaching” of subjects was also to be provided. The Student’s math instruction and performance would be aided by manipulatives, such as counters, number line, place value charts, 100’s charts, multiplication charts, and tens frames. She would also have a proofreading checklist for sentence writing to remind her to use capitals, punctuation and place spaces between words and sentences. She could also use highlighters to identify important information in the text or key terms in math problems. The Student would also be provided speech-to-text or a human scribe for classroom assignments that are longer than one paragraph because of her written expression and encoding needs. BCPS Ex. 8, p. 21.

For program modifications, “chunking” (dividing into smaller units) would be provided for multiple step assignments and texts. Assignments, including homework, would be modified to reduce the number of questions which would require shorter responses, which would be aided by sentence starters, highlights or underlining key terms. Homework would also be modified to reduce and identify one to two skill review problems and one to two problems to practice new skills. BCPS Ex. 8, p. 22

For social/behavioral supports, visual prompts and gestures would be used to encourage the Student to ask questions during whole group instruction, and she would have a visual tracking tool or covered overlays to help her track during reading tasks. BCPS Ex. 8, p. 22.

For physical/environmental supports, to reduce distractions, the Student would be able to use a study carrel and have preferential seating putting her in close proximity to the instructions so she could get the prompts and adult support she needed to maintain focus. BCPS Ex. 8, p. 22.

IV. Goals and objectives (November 2021) (BCPS Ex. 8, pp. 25-35)⁴¹

The IEP team established goals and objectives for the Student.⁴² BCPS Ex. 8, pp. 25-35. Ms. [REDACTED] explained that the “goals ...were designed to meet instructional-level skills, and ...designed to meet grade-level skills” and were “sufficiently ambitious” to challenge her, but give her some successes, too. TR. V3, Page 626:1 to 626:15.

Each goal (i.e., the long term target to be reached by the following November 2022) had three sets of objectives which were to be met by January 2022 (the 2nd quarter), April 2022 (the 3rd quarter) and June 2022 (the 4th quarter):

- Reading – phonics⁴³
 - By November 2022, when given a list of 10 teacher-selected one and two syllable words containing vowel teams and diphthongs, [the Student] will be able to correctly decode 8/10 words for 3 out of 4 word lists.
- Reading – sight word fluency
 - By November 2022, when given a list of 41 Third Grade Dolch Sight words, [the Student] will be able to read at least 80% of the words with automaticity during 2 out of 3 trials.

⁴¹ There was scant evidence that any IEP team member, including the Parents, their attorney and educational consultant disagreed with the goals and objectives that were set.

⁴² It is more efficient to address the progress of each of those objectives by the progress expressed in the subsequent IEP team meeting in March 2022 (BCPS Ex. 36).

⁴³ This goal was marked as an ESY goal as well. BCPS Ex. 8, p. 25.

- Reading – fluency and comprehension⁴⁴
 - By November 2022, when given an instructional level decodable text containing previously mastered linkages and sight words from her phonics program, [the Student] will be able to read the text with teacher support at a rate of 90 words per minute to at least 90% accuracy (81 WCPM) and correctly answer 4/5 “wh” questions about the text verbally during 3 out of 4 trials.
- Written Expression – Encoding⁴⁵
 - By November 2022, when dictated a list of 10 teachers-selected one and two syllable words containing vowel teams and diphthongs, [the Student] will be able to correctly spell 8/10 words for 3 out of 4 word lists.
- Mathematics⁴⁶
 - By November 2022, when given 5 single digit, one step multiplication and division word problems with solutions up to 100 that include a visual, read independently or with teacher support and the use of a word problem organizer and manipulatives, 100 chart, or a number line, [the Student] will solve 4 out of 5 problems correctly for 2 out of 3 problem sets.

V. Services (November 2021)

The IEP team established a thirty two and a half hour per week program with the Student attending general education for 22 hours and 30 minutes and special education services outside the general classroom for 10 hours weekly. Even in the general education classroom, however, the Student would have support from her special educator and a paraeducator.

Reading and written language expression (BCPS Ex. 30, p. 51)

Weekly, the Student would receive 3 hours and 20 minutes in 5 sessions of 40 minutes in general education (i.e., the regular classroom with her peers) to address her needs in reading and written language expression. The services would be provided by a general education teacher, a special education teacher or an instructional assistant. She would be supported with an adult’s verbal and visual prompts, asking the Student to repeat or paraphrase information to check for understanding, assisting her with highlighting key information, reading text and or directions

⁴⁴ This goal was subsequently divided into two goals.

⁴⁵ This goal was also marked as an ESY goal as well. BCPS Ex. 8, p. 30.

⁴⁶ This goal was also marked as an ESY goal as well. BCPS Ex. 8, p. 32.

aloud, and assisting her with spacing words and sentences during writing tasks, as well as helping her use an editing checklist. Ten minutes of the service would address the Student's sight word goal.

Weekly, the Student would receive 3 hours and 45 minutes (5 sessions of 45 minutes) outside general education, (i.e., special education services provided by a special educator outside the classroom) to address her needs in phonics, encoding and fluency. Some of these services would be provided by a special educator using OG, who had been trained in that intervention.

Mathematics (BCPS Ex. 8, pp. 36-37)

Weekly, the Student would receive 6 hours and 15 minutes⁴⁷ (5 sessions of one hour and 15 minutes) outside general education (i.e., special education services provided by a special educator outside the classroom) to address her needs in mathematics. This education would be solely taught by a special educator, exclusive of the general classroom, towards the achievement of third grade level standards. She would have instruction in math fact fluency, beginning with fluency in addition facts, then subtraction facts, then multiplication and division facts. She required pre-teaching of mathematics vocabulary and foundational skills to prepare for those tasks. If necessary, she would be retaught grade level skills in which she was not demonstrating proficiency.

ESY Services (BCPS Ex. 8, p. 37)

The team recommended ESY services for 15 hours a week for her phonics, encoding and math goal.

⁴⁷ The IEP software required these services to be divided into two blocks: 3 hours 45 minutes and 2 hours 30 minutes, totaling 6 hours 15 minutes. Divided by 5 days per week, the instruction is given for an hour and 15 minutes daily.

V. Placement (BCPS Ex. 8, p. 38)

The team determined that educating the Student in a general education classroom with supports and outside the general education classroom with intervention services would provide the least restrictive environment for her to be educated.

Assessments

On November 15, 2021, the IEP team sought assessments and evaluations of the Student to assist in modifying the Student's IEP in light of those tests. Following the meeting, the Parents signed consent for the speech and language assessment and classroom assessment by the school counselor or other BCPS staff members but rejected the education assessment to be completed by the special educator and reading specialist, and the psychological assessment to be performed by the school psychologist. In a handwritten note and an email, the Student's mother wrote that the "other assessments" would be conducted by Dr. [REDACTED]. BCPS Ex. 16.

IEP Team Meeting, February 17, 2022 (BCPS Ex. 24)

The subsequent team meeting was held on February 17, 2022 to review the speech language evaluation and classroom observation sent to the parents on January 21, 2022. BCPS Ex. 30. The BCPS still had not received Dr. [REDACTED]'s report which was completed in January 2022. The BCPS sent the Parents notices of the meeting dated January 26, 2022 (for a meeting to be held on February 3, 2022) on February 1, 2022 (for a meeting on February 17, 2022), and February 8, 2022 (again confirming the February 17, 2022 meeting, adding Ms. Parker and Ms. [REDACTED] to the meeting attendees). BCPS Ex. 21.⁴⁸

The IEP team meeting took place on February 17, 2022 as scheduled. BCPS Ex. 24. The following individuals were present for the meeting:

- [REDACTED], Administrator/Designee
- [REDACTED], General Educator

⁴⁸ The Parents received the procedural safeguard documentation. BCPS Ex. 23

- The Parents
- Ms. [REDACTED], School Psychologist
- [REDACTED], Speech-Language Pathologist
- [REDACTED], Special Educator
- [REDACTED], advocate for the family
- Pamela Foresman, BCPS Office of Law
- Towanda Santiago, BCPS Office of Law
- Holly Parker, attorney for the family
- Dr. [REDACTED], Licensed Psychologist (who participated by video)
- [REDACTED], Guidance--Elementary

The prior accomplishments were reviewed. Regarding the Student's progress towards her current IEP Goals and objectives –

Reading goals and progress

- | |
|---|
| <ul style="list-style-type: none"> • Goal - by November 2021, when given a list of 10 teacher-selected one and two syllable words containing digraphs, consonant blends, consonant trigraphs, welded sounds, and vowel-consonant-e patterns, [the Student] was to correctly decode 8/10 words for 3 out of 4 word lists. • Progress – The Student achieved that goal. |
| <ul style="list-style-type: none"> • Goal - By November 2021, when given a list of 41 First Grade Dolch Sight words, the Student was to correctly read 80% of the words correctly. • Progress –The Student had shown regression with her ability to read first grade sight words with automaticity (of the 41 first grade Dolch sight words, the Student was able to correctly read 23/41 words correctly, for a 56% accuracy rate) |

Writing goals and progress -

- | |
|---|
| <ul style="list-style-type: none"> • Goal – “By November 2021, when given a writing prompt about an event that includes a visual, [the Student] was to be able to write 3 complete sentences using transition or temporal words to write about the event and use correct capitalization and punctuation with 75% accuracy for 3 out of 4 writing prompts.” • Progress – “[The Student] achieved objective number 2 this quarter but was able to write 2 complete sentences and use correct capitalization and punctuation with 75% accuracy for 3 out of 4 prompts, with minimal prompting and the use of sentence starter choices. However, [the Student] was not using correct capitalization and punctuation with 75% accuracy, needing adult prompting to use correct capitalization and punctuation in her writing. [The Student] does not consistently leave adequate space between words and sentences. [The Student] is able to write 3 complete sentences but requires sentences |
|---|

starters or verbal. [The Student] can write 3 sentences with prompting from an adult to begin her thoughts and the use of a word bank for transition words.”

Math goals and progress

- Goal –“By November 2021, when given 4 addition and/or subtraction single step word problems with solutions up to 100 read independently or with teacher support and use of manipulatives and hundreds chart, [the Student] was to solve 3 out of 4 problems correctly for 2 out of 3 problem sets.”
- Progress – The Student achieved her math goal.

Reading comprehension goal

- Goal: “By November 2021, when given an instructional level text read independently or aloud, [the Student] was to answer ‘wh’ questions in writing or verbally about a text with 80 % accuracy.”
- Progress: “[The Student] has achieved her reading comprehension goal.”

Ms. [REDACTED] also stated that the Student was not consistently retaining previously learned skills. She had to reteach and review OG lessons that the Student had previously mastered at the end of her second grade year.

The Parents added that the Student became frustrated at home with reading and math, and her progress was not “where [the Parents] would like her to be.” They stated that the Student “puts forth great effort to decode what she is reading at home” adversely affecting her comprehension of what she read. BCPS Ex. 24. The Parents also noted the Student’s statement that “math is hard for her” and that she does not feel that she has sufficient time to complete her work.

The IEP team determined that the Student was eligible for ESY services in 2022. The Parents agreed that the Student would ride BCPS transportation to and from the ESY site.

In the assessment portion of the November 8, 2021 IEP, Ms. [REDACTED] reiterated the regression in reading (i.e., regressing over the summer months in OG steps, from 94 down to 52, requiring reteaching those skills). The Student was, however, able to decode CVC words, and

one and two syllable words containing digraphs, consonant blends, vowel-consonant-e syllables, some silent letters. Although Ms. [REDACTED] did determine that the Student experienced some difficulties, she was making progress. TR.V2, Page 431:4 to 431:10.

Review of evaluations and assessments

The Parents continued to express their concern that the Student was not making progress. They also stated that the Student had recently expressed anxiety regarding school and task completion. To those ends, the Parents presented the report from Dr. [REDACTED], who participated by video. Dr. [REDACTED]'s report was reviewed at the meeting, and a summary of that report (described in detail above as BCPS Ex. 19) was included in the meeting minutes.

The report was accepted, and the Team considered his findings:

- While the Student's verbal reasoning, fluid visual reasoning, and working memory abilities fell in the average range, she had low average performance in the areas of visual-perceptual reasoning, visual motor integration, and processing speed.
- Consistent with her previous evaluation, she has ongoing weakness with academic functioning - her overall performance on tasks of reading, mathematics, and written expression fell in the low average to below average ranges.
- The Student demonstrated overall appropriate sustained attention, consistency in attention, and impulse control, while a low average range rate of response was noted.
- The Student's mother completed a questionnaire that suggested that the Student was experiencing current symptoms of anxiety.

The IEP team then went over the test battery in greater detail, reviewing diagnoses and recommendations, which are consistent with my analysis of Dr. [REDACTED]'s report, discussed above. Neither party pointed out any glaring incongruities in his report.

The team also reviewed Ms. [REDACTED]'s language assessment, finding no impairment due to language issues. Other subtests were unremarkable, placing her in the average range for most measures. Her pragmatics were present, but she articulated with a "mild interdental lisp, which

does not adversely affect her words, sentences or conversations. Fluency and voice were also within normal limits as well.

Ms. [REDACTED] conducted her observation with Ms. [REDACTED] in a one-to-one setting providing the Student OG phonics intervention training, writing and math. Ms. [REDACTED] wrote that the Student's work habits and motivation/participation were observed as strengths for the Student, and no problems were observed in listening comprehension, oral expression, discrimination (visual/auditory), visual motor coordination, attention, activity level, task completion, and speech, although she did note problems in the area of math calculation (operation) and math reasoning. Basic reading was determined to present "[s]ignificant problems."⁴⁹

As a result of the review of the evaluations, the IEP team determined that:

- No language services were recommended.
- Math computation, math fact fluency, and place value goals should be added to the IEP.
- Teachers should continue the recommendation of verbatim reading of grade level text (the prior IEP called for this accommodation as well).
- Reading intervention would be continued, but Ms. [REDACTED], the special educator, recommended increasing the instructional time outside general education for reading as [the Student] had not made sufficient progress toward the comprehension and fluency goal (by January 2022, the Student was expected to read 45 words per minute but was only reading 40). Ms. [REDACTED] would address fluency during the additional 5 minutes each session.

⁴⁹ The Parents challenged this observation as it was not done in the general education classroom. It is apparent, based on the resulting IEP, that observing the Student in the one-on-one setting, where she is getting the bulk of her education out of general education instruction, is appropriate.

- The Student was showing progress in the MAP evaluations for math and reading.⁵⁰ BCPS Ex. 5.
- The IEP team wanted additional evaluations that could be conducted at the school over several days, instead of one day, including an occupational therapy assessment for keyboarding, which Dr. ██████ endorsed, to address the Dr. ██████'s diagnosis of the Student's Developmental Coordination Disorder. The team also sought a psychological assessment which would include rating scales to assess for characteristics of anxiety. The Parents declined this recommendation and withheld consents for this testing, stating that the Student "has already participated in too much testing." The Parents stated that they would not provide consent for school-based assessments, preferring that any further testing be done by Dr. ██████. No such testing was presented.⁵¹
- The IEP team also wanted the school social worker to work with the Student to address her possible anxiety. The Parents declined, stating that the Student "was getting better with anxiety."⁵² BCPS Ex. 24, p. 14/22.

The Parents challenged the IEP team's determination that the Student was progressing, and that the present and proposed programs were producing adequate progress. They claimed that she would not "catch up" due to the loss of "early intervention time." The Parents therefore requested placement and funding at the ██████, which would provide the Student with

⁵⁰ Although the Parents questioned the rate of growth analyzing the handwritten "percentile growth" calculations, progress was still present. Although I agree that the percentile calculation of progress was not adequately explained, the Parents did not effectively challenge the evidence of progress over time that the scores show:

Term/Year	Grade	Math scores	Reading scores
Winter 2019	K	137	140
Spring 2019	K	141	158
Fall 2019	1	129	159
Winter 2020	1	136	152
Fall 2021	3	155	152
Spring 2022	3	165	187

The scores may not show that the Student is achieving on grade level, but it does show that in most years, and certainly in the last year tested, the Student did increase her year over year scores, showing improvement for this test. Additionally, as expressed in the IEP, the stagnation in the math score may be attributable to the second grade test being read to all students through text to speech, but the third grade math test was not read through text to speech. Regardless, growth was noted. BCPS Ex. 8, p. 11.

⁵¹ These declinations occurred after January 14, 2022, when the Parents signed a consent to allow the BCPS to send the Student Record to the ██████ BCPS Ex. 17.

⁵² In their closing argument, the Parents reversed their position, stating that the Student experienced anxiety due to being pulled out of general education and not being able to "keep up with her peers." Nevertheless, there was no expert testimony about the Student's anxiety other than Dr. ██████'s assessment halfway through the school year before the Parents stated that the Student's anxiety was lessening. The Student never had a social worker assessment at ██████ and treatment outside of school was not shown to have occurred, diminishing the strength of this contention.

“a special education program all day long in groups of four to six” with “peers of similar disabilities and learning styles” that would lessen her anxiety.

The Parents also advised that they had retained a tutor to come to their home one hour per week to support the Student (working on sight words, decoding, and reading fluency), but that the tutor was not making progress. The Parents were asked to sign a consent so that the [REDACTED] educators could communicate with the tutor to collaborate on the skills being developed. The Parents declined to sign a consent for this communication.

The school team members summarized the Student’s goals and objectives related to phonological processing, reading fluency, reading comprehension, written expression spelling and conventions, and mathematics word problems.

The Student’s list of accommodations included the use of a word bank, proofreading, repetition and paraphrasing of information, use of manipulatives, use of a proofreading checklist, use of highlighters, clarification of information, chunking of assignments, altered/modified assignments, chunking of text, encouragement to ask for assistance, preferential seating, calculation devices, extended time, text to speech technology, and reduced distractions.

IEP dated March 23, 2022 (BCPS Ex. 30)

In scheduling the IEP team meeting, the BCPS sent the Parent a Notification of IEP Team Meeting, dated March 8, 2022. BCPS Ex. 25. The Parents signed the Receipt of Procedural Safeguards Parental Rights Document on March 23, 2022. BCPS Ex. 29. The IEP Team Summary is BCPS Ex. 32. In anticipation of the meeting, the BCPS sent the parents the Draft IEP, Teacher Reports, and Case Manager report.⁵³

The following individuals attended the meeting:

- [REDACTED], Administrator/Designee,
- [REDACTED], General Educator

⁵³ Subsequent to that notice, the BCPS sent the parents a “corrected draft IEP w/guidance consult.” BCPS Ex. 27

- [REDACTED], Special Educator.
- The Parents⁵⁴
- Holly Parker, attorney for the Parents, and
- [REDACTED], advocate for the family

School Counselor [REDACTED] was notified of the meeting but was unable to attend. She did submit information to Ms. [REDACTED] which she shared with the team.

After a review of the Student's overall educational progress (through the teacher's report, the Parent's report, the Student's report card, county/statewide tests, attendance, etc.), Ms. [REDACTED], the Student's general education teacher, reported that the Student "continues to make progress" and was interacting appropriately with her peers; the Parents, their attorney and their advocate, disagreed.⁵⁵

The Parents and their guests also disagreed that the Student's regression after the summer break and slower progress was the result of the Student not attending ESY programming. BCPS Ex. 32, p. 17.

The participants went over the goals and objectives and the Student's progress in attaining them (described below). Ms. [REDACTED] reiterated the regression in the Student's progress in OG skills that she observed after the prior summer's break as well as after school breaks and even weekends. She also discussed the Student's progress as well as the IEP revisions coming from the meeting of February 17, 2022.

Ms. [REDACTED] addressed the Student's progress towards her goals and objectives.

The Parents, their attorney and their advocate disagreed that the Student was making the progress that was noted. Specifically, The Parents disagreed that she was making progress in reading grade 1 and 2 sight words. They also disagreed that the IEP team recommended ESY

⁵⁴ Fifteen minutes into the meeting, the summary reports that the Student's mother "began yelling, banging on the table, folding her file, and stating the meeting should end." After Ms. [REDACTED] and Ms. [REDACTED] requested a break to consult, the Student's mother did not return to the meeting, as she left the school building. BCPS Ex. 32, p. 17.

⁵⁵ Much of this information was garnered from (and therefore cited to) the IEP Team Summary. BCPS Ex. 32. Although the information in the IEP matches the information in this document, BCPS Ex. 32 is a more concise and organized description of the meeting.

during the November 2021 team meeting; it did. The Parents also contended that dysgraphia should be part of the eligibility page because they asserted that Dr. [REDACTED] included it his diagnoses expressed in his report; he didn't.⁵⁶

The Parents, their attorney and their advocate also disagreed with the service providers on the services page of the IEP, declaring that the Student should not be in a general education classroom, and that the Student should be placed at a non-public specialized school so that she was instructed in a small group by a special educator all day. BCPS Ex. 32, p. 16.

The Parents were again asked about the assessments requested by the BCPS, and through their attorney, they reiterated that “consent would not be provided because Dr. [REDACTED] completed all testing and there was no rational reasoning for [the Student] to be assessed by school based personnel.” BCPS Ex. 32, p. 18. They then repeated their intention to request unilateral placement and funding for the [REDACTED].

Specific features of the IEP for March 2022

II. Present level of academic Achievement and Functional Performance (March 23 2022)⁵⁷

As stated in the IEP, the Student was performing at various levels of performance from kindergarten to first grade. As Ms. [REDACTED] explained, the assessment of the grade levels in this section was driven by Dr. [REDACTED]'s evaluation of academic performance – the existing test results weighed more heavily in the level of performance declaration. However, as there were no academic assessments performed after the IEP interventions were put in place, these stated levels of performance may be outdated. The IEP team asked the Parents to allow the school to complete further assessments, but the Parents refused to give consent, so the present level of academic performance remains – accurate or not. Otherwise, this section contains performance data that I reviewed and find that it supports the Goals and Objectives progress, below.

⁵⁶ I was not able find support for either of these assertions. BCPS Exs. 8, 9 and 19. The IEP of November 8, 2021, specifically included ESY in the Student's program. BCPS Ex. 8, p. 37; BCPS Ex. 9, p. 5/9.

⁵⁷ Section “I” of the IEP contains largely biographical, procedural and classification data.

General - Present level of academic achievement and functional performance (BCPS Ex. 30, p.21)

The parental input and strengths, interest (etc.) portion of this section carried over from the prior IEP of November 2021. A further statement, however, addresses how the Student's disability would affect her involvement in the general education curriculum, reading as follows:

Due to [the Student's] specific learning disability, she requires supports and modifications to access the general education curriculum as well as special education outside of the general education classroom. [The Student's] diagnosis of [D]yslexia causes her to struggle with decoding, and requires a multisensory, systemic, sequential, research based phonics intervention to bring her decoding skills up to grade level. [The Student's] disability causes her to struggle with attention if she does not understand the concept. [The Student] requires math instruction outside of the general education classroom with a special educator to address her needs in mathematics. [The Student's] diagnosis of [d]yslexia inhibits her ability to comprehend text and read fluently.

As Ms. [REDACTED] explained, the educational program for the Student is twofold – one to access the core curriculum expected of the grade level student, and the other to “close the gap” in the deficit skills:

Q. All right. So, can you comment on the distinction between accessing the curriculum and completing the skills you need versus those underlying skills that may not necessarily have been demonstrated yet by her?

A. So, when she is working in the general education classroom as you just stated -- that she is accessing the third-grade curriculum by gaining exposure to the current tasks that the general education classroom is currently completing in order to learn the new information. While she's working [with] the special educator or instructional assistant, she is focused on those skills and then those gaps in knowledge. And the way that the special educator and I collaborate, we can progress track her assessments and what she's doing in order to close the gap.

TR. V2, Pages 350:14 to 351:4.

A. So, the whole thing is covered under one track where she's accessing the general education third-grade curriculum in the classroom and then focusing on

the areas of deficit in a small group instruction or one-on-one with a special educator.

TR. V2, Pages 351:24 to 352:3.

III. Special Considerations and Accommodations (March 2022)
Accommodations (March 2022) (BCPS Ex. 30, pp. 22-33)

Due to the Student's SLD in reading, she was still being provided text-to-speech support for math, science and government assessments as well as ELA due to her decoding needs; added to the accommodations was the need for a human reader when text-to-speech was not available. Also added to accommodations was the use of a human reader on all ELA and Literacy assessments. She was also to be provided frequent breaks and reduced distractions in order for her to maintain focus for testing and extended tasks. Added to those accommodations was a human reader for all mathematics, science and government assessments, with the assessments being given in a small group setting. The Student was still to be provided a "calculation device" for math assessments due to her SLD in math and processing speed deficits affecting her math fact fluency. The Student was also given extended time (time plus 50%) to complete tasks "due to decoding needs, encoding needs and processing speed."

Added to those accommodations were the following:

[The Student] requires the use of a visual schedule to help reduce anxiety about what is coming up next in her schedule. [The Student] requires the use of visual timers so that she can see how much longer she has left until a transition time or how much longer she has to work on an assignment. When transitioning back to the general education classroom [the Student] should be provided with a list on the board of what the class will be doing next. [The Student] should be provided with a copy of teacher notes to minimize copying and have a personal reference for information covered in class. [The Student] requires a notebook with anchor charts to keep at her desk for easy reference of key concepts and high priority information.

The balance of the supplemental aids, services, program modifications and supports remained unchanged from the prior IEP.

IV. Goals and objectives (March 2022) (BCPS Ex. 30, pp. 34-50)

The IEP team established goals and objectives for the Student.⁵⁸ Each goal (i.e., long term target to be reached by the following November 2022) had three sets of objectives which were to be met by January, April and June 2022.⁵⁹ None of the IEP team participants, including the Parents or their attorney and advocate, objected to the goals and objectives,

Reading – phonics (BCPS Ex. 30, pp. 34-35)

The goal remained the same: “By November 2022, when given a list of 10 teacher-selected one and two syllable words containing vowel teams and diphthongs, [the Student] will be able to correctly decode 8/10 words for 3 out of 4 word lists.”

⁵⁸ Ms. [REDACTED] explained the relation between goals and objectives:

Q. In your reporting you mentioned objectives. So I guess with each goal there's an objective one, two, and three. Can you explain how objectives work with goals?

A. So the overall goal is to be worked on throughout the whole year, so it's designed to take you from the beginning of the IEP one year forward to the annual review. Sometimes students achieve the overall goal early, sometimes they achieve it on time, sometimes they don't achieve it. It all depends on the individual student. But that's a yearly -- it's a long term -- the goal was long term for a year.

Objectives are shorter with many goals, essentially. So they're usually mapped out for a quarter of the school year. Sometimes it can be for more like a half. Some goals have three objectives, some have two. It kind of all depends on the student and their needs and how many objectives you feel they can meet to put to step stone them to the main goal. But objectives are just maps, they're steppingstones that break down that goal to little chunks to make it more manageable. Because we can't ask a student to, you know, just oh, here's this goal. Just do it. We have to design little steps to get them there, and that's what the objectives are.

TR. V3, Pages 510:3 to 511:1.

⁵⁹ Goals and objectives introduced later do not have the earlier completion dates.

The following objectives and progress were noted:⁶⁰

“Objective 1: By January 2022 given a list of teacher-selected one and two syllable words containing short vowels and vowel consonant e sound/spelling patterns [the Student] will be able to correctly decode 8 /10 words for 3 out of 4 word lists.”

“Progress: [The Student] is making sufficient progress towards meeting her phonics goal. [The Student] has achieved objective 1 this quarter. When given a list of teachers selected one and 2 syllable words containing short vowels and vowel consonant E sound slash spelling patterns [the Student] is able to correctly decode at least 8/10 words correctly for 3 out of 4 word lists.”

Reading – sight word fluency (BCPS Ex. 30, pp. 36-37)

The goal remained the same: “By November 2022, when given a list of 41 Third Grade Dolch Sight words, [the Student] will be able to read at least 80% of the words with automaticity during 2 out of 3 trials.”

“Objective 1: By January 2022, when given a list of 41 First grade Dolch Sight words, [the Student] will be able to read at least 80% of the words with automaticity during 2 out of 3 trials.”

“Description of Progress: [The Student] is making sufficient progress towards achieving her sight word goal. [The Student] has achieved objective one this quarter. When given a list of 41 First grade Dolch Sight words, [the Student] is able to read at least 80% of the words with automaticity during 2 out of 3 trials. [The Student] should continue to practice the words again, may, and some.”

...

“[The Student] continues to work towards mastering objective number 2. By April 2022, when given a list of 46 second grade Dolch Sight words, [the Student] will be able to read at least 80% of the words with automaticity during 2 out of 3 trials.” [The Student] was progressing towards the second objective, accomplishing two trials with 93 and 98% accuracy.]

Reading fluency and comprehension (BCPS Ex. 30, pp. 38-39)

The goal remained the same: “By November 2022, when given an instructional level decodable text containing previously mastered linkages and sight words from her phonics program, [the Student] will be able to read the text with teacher support at a rate of 90 words per

⁶⁰ The trials were not recorded here, but I verified them to support the assertion of progress. Furthermore, the Parents argued in their closing that “[t]he evidence did not provide for the numbers of prompts the trials took, did not include the fact that the final trial was taken on or about the last day of school and what supports were provided to [the Student] during the trials.” The teachers testified in great detail how much they allowed the Student to try independent work before giving their assistance. It would have been incumbent on the Parents to prove that the trials were improperly administered – the Parents did not successfully refute the evidence presented by the BCPS supporting the Student’s successes.

minute to at least 90% accuracy (81 WCPM) and correctly answer 4/5 'wh' questions about the text verbally during 3 out of 4 trials.”

“Objective 1: By January 2022, when given an instructional level decodable text containing previously mastered linkages and sight words from her phonics program, [the Student] will be able to read the text with teacher support at a rate of 50 words per minute with at least 90% accuracy (45 WCPM) and correctly answer 4/5 'wh' questions about the text verbally.”

“Progress towards goal: not making sufficient progress to meet the goal (IEP the team needs to meet to address insufficient progress).”

“Description of Progress: [The Student] is not making sufficient progress towards achieving her reading fluency goal. [The Student] has partially achieved objective one. When given an instructional level decodable text containing previously mastered linkages and sight words from her phonics program, [the Student] is able to read the text with teacher support at reset rate of 32 words per minute with at least 90% accuracy (29 WCPM) and correctly answer 4/ 5 'wh' questions about the text verbally during 3 out of 4 trials.”

....

“[The Student] associated the accuracy and comprehension portion of objective number one. [The Student] continues to work on increasing her fluency rate to achieve 45 WCPM.”

Written expression - encoding (BCPS Ex. 30, pp. 40-41)

The goal remained the same: “By November 2022, when dictated a list of 10 teachers-selected one and two syllable words containing vowel teams and diphthongs, [the Student] will be able to correctly spell 8/10 words for 3 out of 4 word lists.”

“Objective 1: By January 2022, when dictated a list of teacher-selected one and two syllable words containing short vowels and vowel consonant sounds/spelling patterns, [the Student] will be able to correctly spell 8/10 words for 3 out of 4 lists.”

“Description of Progress: [The Student] is making sufficient progress to meet her encoding goal. [The Student] has achieved objective number 2⁶¹ this quarter. When dictated list of teacher-selected one and 2 syllable words containing short vowels and vowel consonant e sound/spelling patterns, student is able to correctly spell at least /10 words for 3 out of 4 lists.”

Writing – Conventions (BCPS Ex. 30, pp. 42-43)

The goal remains the same: “By November 2022, when given a prompt or question about a grade level text, a paragraph graphic organizer, a word bank, an anchor chart, and sentence starter options, [the Student] will be able to write a short paragraph of at least 5 sentences

⁶¹ This objective is actually “Objective 1,” and not 2, which addresses writing “one syllable words containing common vowel teams....”

(opening sentence, 3 detail sentences, and closing sentence) to answer the prompt or question and use correct capitalization at the beginning of a sentence and for proper nouns, correct ending punctuation, spacing between the words, and spacing between sentences with 80% accuracy as measured by a teacher created rubric for 2 out of 3 writing prompts. Rubric will include a total of 10 points for conventions.”

“Objective 1:By January 2022, when given a prompt or question about a grade level text, a word bank, an anchor chart, and a sentence starter, [the Student] will be able to write a complete sentence to respond to the prompt or question using correct capitalization, spacing between words, and ending punctuation with 80% accuracy as measured by a teacher created rubric for 2 out of 3 writing prompts.”

“Description of Progress: [The Student] is making sufficient progress towards achieving her writing conventions goal. [The Student] has achieved objective number 1 this quarter. When given a prompt or question about a grade level text, a word bank, an anchor chart, and a sentence starter, [the Student] is able to write a complete sentence to respond to the prompt or question using correct capitalization, spacing between words, and ending punctuation with 80% accuracy as measured by teacher created rubric for 2 out of 3 writing prompts.”

Mathematics -Problem Solving (BCPS Ex. 30, pp. 44-45)

The previous Math goal was divided into multiple goals – Math Problem Solving, Math Calculation, Math Fact Fluency, and Math – Place Value. This goal is the first of the stated goals, which was restated as the skills were separated.

The Problem Solving goal is the following: “By November 2022, when given 5 single digit, one step multiplication and division word problems with solutions up to 100 that include a visual, read independently or with teacher support and the use of a word problem organizer and manipulatives, hundreds chart, or a number line, [the Student] will solve 4 out of 5 problems correctly for 2 out of 3 problem sets.”

“Objective 1: By January 2022, when given 5 single digit multiplication problems, an anchor chart and manipulatives, hundreds chart, or a number line and with teacher support, [the Student] will select the strategy and correctly solve 4 out of 5 problems for 2 out of 3 problem sets.”

“Description of Progress: [The Student] is making sufficient progress towards meeting her math goal. [The Student] has achieved objective number 1 this quarter. When given 5 single digit multiplication problems, an anchor chart, and manipulatives, a hundreds chart, or a number line

and with teacher support, [the Student] is able to select a strategy and correctly solve at least 4 out of 5 problems for 2 out of 3 problem sets. [The Student] is very proficient and using both a multiplication chart and hundreds chart to solve single digit multiplication facts with automaticity.”

Mathematics - Calculation (BCPS Ex. 30, pp. 46-47)

This goal is the **second** of the stated goals, which was created as the skills were separated.

The Math-Calculation goal is the following: “By November 2022, when given 5 math calculation addition and subtraction problems with 2 numbers up to 1000, [the Student] will select the preferred strategy, use a hundreds chart, place value chart, teacher prompting, and manipulatives (if needed, ex. base 10 blocks) to solve with 80% accuracy (4/5 problems correct) in 2 out of 3 problem sets.”

This was a newly introduced goal, so there was no progress previously reported. However, by the fourth report, the Student had already met objective 1.⁶²

“Objective 1: By June 2022, when given 5 math calculation addition and subtraction problems with 2 numbers up to 100, [the Student] will select a preferred strategy, using hundreds chart, place value chart, teacher prompting and manipulatives (if needed, ex. base 10 blocks) to solve with 80% accuracy (4/5 problems correct) in 2 out of 3 problem sets.”

There was no progress reported as “[t]his is a newly introduced goal and progress is not yet measurable at this time.”

Mathematics -Fact Fluency (BCPS Ex. 30, p. 48)

This goal is the **third** of the stated goals, which was restated as the skills were separated.

The Math-Fact Fluency goal is the following: “By November 2022, when given 30 single digit addition and 30 single digit subtraction facts, [the Student] will be able to answer at least 24/30 facts correctly (80%) in 2 minutes during 3 out of 4 trials.”

⁶² The objectives were numbered differently than the others, with objective 1 due by June 2022, and objective 2 by November 2022. However, the progress towards the objectives appear to be misnumbered. I tracked these objectives not by their numbers, but by what progress was expected in each objective. The progress reported for objective 2 was really objective 1, and objective 3 in the description of progress was really objective 2, and not the objectives 2 and 3, as the IEP states – there is no objective 3.

“Objective 1: By June 2022, when given 20 single digit addition facts, [the Student] will be able to answer at least 16/20 facts correctly (80%) in 2 minutes during 3 out of 4 trials.”

There was no progress reported as “[t]his is a newly introduced goal and progress is not yet measurable at this time.”

Mathematics -Place Value (BCPS Ex. 30, p. 49)

The previous Math goal was divided into multiple goals. This goal is the **fourth** and final of the stated goals, which was restated as the skills were separated.

The Math-Place Value goal is the following: “By November 2022, when given a set of 5 numbers up to 4 digits (thousands place), a place value chart, base 10 blocks, and rounding charts, [the Student] will be able to write the number, placing each digit in the correct place value column and represent the numbers with base 10 blocks with 80% accuracy (4/5 problems correct[]) for 2 out of 3 problem sets.”

“Objective 1: By June 2022, when given a set of 5 numbers up to 3 digits (hundreds place), a place value chart, base 10 blocks, and rounding charts, [the Student] will be able to write the number, placing each digit in the correct place value column and represent the numbers with base 10 blocks with 80% accuracy (4/5 problems correct[]) for 2 out of 3 problem sets.”

There was no progress reported as “[t]his is a newly introduced goal and progress is not yet measurable at this time.”

V. Services (March 2022)

The IEP team established a thirty-two and a half hour per week program with the Student attending general education for 22 hours and 30 minutes and special education services outside the general classroom of 10 hours 25 minutes weekly, up from 10 hours. Even in the general education classroom, however, the Student would have support from her special educator and her assistant.

Reading and written language expression (BCPS Ex. 30, pp. 51-52)

The Student would continue to receive 3 hours and 20 minutes (5 sessions of 40 minutes) in general education (i.e., the regular classroom with her peers) to address her needs in reading

and written language expression. The services would be provided by a general education teacher, a special education teacher or an instructional assistant, in a small group. She would still be supported with an adult's verbal and visual prompts, asking the Student to repeat or paraphrase information to check for understanding, assisting her with highlighting key information, reading text and or directions aloud, and assisting her with spacing words and sentences during writing tasks, as well as helping her use an editing checklist. Ten minutes of the service would still address the Students sight word goal.

The Student would receive 4 hours and 10 minutes (up from 3 hours and 45 minute) in 5 sessions of 50 minutes outside general education (i.e., special education services provided by a special educator outside the classroom) to address her needs in phonics, encoding and fluency. Some of these services will be provided by a special educator using OG, who had been trained in that intervention. This an increase of five minutes per day.

Mathematics (BCPS Ex.30, p. 51)

The Student would continue to receive 6 hours and 15 minutes⁶³ (5 sessions of one hour and 15 minutes) outside general education (i.e., special education services provided by a special educator outside the classroom) to address her needs in mathematics. This education is to be solely taught by a special educator, exclusive of the general classroom, towards the achievement of third grade level standards. She would have instruction in math fact fluency, beginning with fluency in addition facts, then subtraction facts, then multiplication and division facts. She requires pre-teaching of mathematics vocabulary and foundational skills to prepare for those tasks. If necessary, she would be retaught grade level skills in which she is not consistently demonstrating proficiency.

⁶³ Apparently, the IEP software no longer required these services to divided into two blocks.

ESY Services (BCPS Ex. 30, p. 52)

The team again recommended ESY services for 15 hours a week for her phonics, encoding and math goal.

VI. Placement (BCPS Ex. 30, p. 53)

The team again determined that educating the Student in a general education classroom with supports and outside the general education classroom with intervention services would provide the least restrictive environment for the child to be educated.

IEP dated May 23, 2022 (BCPS Ex. 36)

In scheduling the IEP team meeting, the BCPS sent the Parent a Notification of IEP Team Meeting, dated May 11, 2022. BCPS Ex. 34. Ms. [REDACTED], the IEP Chair, provided four dates/times for the review and revise meeting. Nether the Parents nor their advocate responded to the email request for the meeting. Ms. Parker advised Ms. [REDACTED] that the Parents were not available for the meeting, but to send whatever documents would be generated. Therefore, May 23, 2022 at 2:00 pm was selected for the meeting, which took place at that time.

The IEP Team Summary is BCPS Ex. 37. The following individuals attended the meeting:

- [REDACTED], Administrator/Designee,
- [REDACTED], General Educator, and
- [REDACTED], Special Educator.

The purpose of the IEP team meeting was to review and revise the IEP because the Student was not making sufficient progress on her reading fluency goal at the end of the third quarter. After a review of the Student's overall educational progress (through the teacher's report, the Parent's report, the Student's report card, county/statewide tests, attendance, etc.), Ms. [REDACTED] the Student's general education teacher, reported that the Student "continues to make progress" and was receiving one-to-one instruction with the special educator, including when she

was participating in pull out services. She did well with countywide assessments and her grades were “Progressing in ELA and Math, and “Consistently Displaying” in Health and Science (“P” and “CD” respectively). The participants went over the Student’s goals and objectives and her progress towards attaining them. (described below).

Specific features of the IEP for May 2022 (BCPS Ex. 36)

II. Present level of academic Achievement and Functional Performance (May 2022)⁶⁴

See the note under the Present Level of Academic Achievement and Functional Performance in the March 2022 IEP. The statement of the “General - Present level of academic achievement and functional performance” carried over verbatim from the March 2022 IEP BCPS Ex. 30, p. 21.

III. Special Considerations and Accommodations (May 2022)

Accommodations (May 2022) (BCPS Ex. 36, pp. 23-34/60)

The special considerations and accommodations remained unchanged from the March 2022 IEP (MCPS Ex. 30, pp. 22-33). No special considerations or accommodations were removed from the program.

IV. Goals and objectives (May 2022) (BCPS Ex. 36, pp. 35-55/60)

The IEP team established goals and objectives for the Student. Each goal (i.e., long term target to be reached by the following November 2022) had three sets of objectives which were to be met by January, April and June 2022.⁶⁵

Reading – phonics (BCPS Ex. 36, pp. 35-36/60)

The goal remained the same: “By November 2022, when given a list of 10 teacher-selected one and two syllable words containing vowel teams and diphthongs, [the Student] will be able to correctly decode 8/10 words for 3 out of 4 word lists.”

⁶⁴ Section “I” of the IEP contains largely biographical, procedural and classification data.

⁶⁵ Due to the goals being introduced later in the school year, they do not have the earlier objective completion schedule.

Objective 1 had already been met.

“Objective 2: By April 2022, when given a list of teacher-selected one syllable words containing common vowel teams, [the Student] will be able to correctly decode 8/10 words for 3 out of 4 word lists.”

“Progress: [The Student] is making sufficient progress towards meeting her phonics goal. [The Student] has achieved objective 2 this quarter. When given a list of teacher selected one syllable words containing common vowel teams, [the Student] is able to correctly decode at least 8 /10 words correctly for 3 out of 4 word lists.”

Fourth quarter progress was also noted.⁶⁶

“Objective 3: By June 2022, when given a list of teacher-selected one syllable words containing diphthongs and common vowel teams, [the Student] will be able to correctly decode 8/10 words for 3 out of 4 word lists.”

“Progress: [The Student] is making sufficient progress towards meeting her phonics goal. [The Student] has achieved objective 2 this quarter. When given a list of teachers selected one syllable words containing diphthongs and common vowel teams, [the Student] is able to correctly decode at least 8 /10 words correctly for 3 out of 4 word lists.”

Reading – sight word fluency (BCPS Ex. 36, pp. 37-39/60)⁶⁷

The goal remained the same: “By November 2022, when given a list of 41 Third Grade Dolch Sight words, [the Student] will be able to read at least 80% of the words with automaticity during 2 out of 3 trials.”

Objective 1 had already been met.

“Objective 2: by April 2022, when given a list of 46 second grade Dolch Sight words, t[he Student] will be able to read at least 80% of the words with automaticity during 2 out of 3 trials.”

“Description of Progress: [The Student] is making sufficient progress towards achieving her sight word goal. [The Student] has achieved objective 1 and 2.

⁶⁶ As Ms. [REDACTED] testified, IEP documents are always subject to revision. This is why the later objective results may have been included in this instrument, which was dated July 7, 2022, well after the IEP team meeting and document.

⁶⁷ In their closing, the Parents questioned the “final trial ...taken on or about the last day of school.” The goal was supposed to be met by the end of the fourth quarter, or June 16, 2022. The date for this set of trials for the Third Grade Dolch Sight reading words was after the last IEP team meeting on May 23, 2022, and was taken to determine the Student’s progress in the fourth quarter. There were three trials in June after the May IEP team meeting – on June 8, June 9 and June 14, 2022, and the Student scored 80%, 93% and 95%, respectively. Prior to those trials, the last trial took place in April 2022, before the last IEP team meeting. In the two trials in the previous quarter (April 7 and April 12, 2022) both scored 80%, which met the Student’s objectives. BCPS Ex. 38, p. 6.

She also achieved objective 3 mastering third grade Dolch Sight words. BCPS Ex. 38.

“Objective 3: by June 2022, when given a list of 20 third grade Dolch Sight words, [the Student] will be able to read at least 80% of the words with automaticity during 2 out of 3 trials.”

“Description of Progress: [The Student] has achieved her sight word fluency goal! [The Student] has achieved her goal, objective one, objective 2, and objective 3 this quarter.

Reading fluency⁶⁸ (BCPS Ex. 36, pp.40-41/60)

This goal was revised as a result of the March 2022 IEP when the fluency and comprehension goal was separated into discrete goals. The revised, separated fluency goal is as follows: “By November 2022, when given an instructional level decodable text containing previously mastered linkages and sight words from her phonics program, [the Student] will be able to read the text with teacher support at a rate of 75 words per minute to at least 90% accuracy (66 WCPM) during 3 out of 4 trials.”

Objective 3⁶⁹ - “By June 2022, when given an instructional level decodable text containing previously mastered linkages and sight words from her phonics program, [the Student] will be able to read the text with teacher support at a rate of 60 words per minute with at least 90% accuracy (54 WCPM) 3 out of 4 trials.”

“Description of Progress: [As of June 2022] [The Student] is making sufficient progress towards her reading fluency goal. [The Student] has achieved objective number 3 this quarter.”

Reading comprehension (BCPS Ex. 36, pp. 42-43/60)

This goal was revised as a result of the March 2022 IEP when the fluency and comprehension goal was separated into discrete goals. The revised, separated comprehension goal is as follows: “By November 2022, when given a grade level text that is read aloud, and with teacher prompting, [the Student] will be able to correctly answer 4/5 multiple choice comprehension questions read aloud correctly during 2 out of 3 trials.”

⁶⁸ This goal was formerly “Fluency and Comprehension,” but it was divided into two goals.

⁶⁹ Objectives 1 and 2 were under the previous goal when both fluency and comprehension were a single goal. Accordingly, I will not address them under this goal, as it is not dispositive of her progress under this goal.

Objective 1: “By June 2022, when given the grade level text that is read aloud, and the teacher support, [the Student] will be able to highlight 4/5 details from the text that support teacher prompted questions about the text for 2 out of 3 [trials].”

“Description of Progress: [The Student] is making sufficient progress towards her reading comprehension goal. The student has achieved objective number 1 this quarter. When given a grade level text that is read aloud, that and teacher support, [the Student] is able to highlight at least 4/5 details from the text that support teacher prompted questions about the text for 2 out of 3 [trials].”

Written expression - encoding (BCPS Ex. 36, pp. 44-45/60)

The goal remained the same: “By November 2022, when dictated a list of 10 teachers-selected one and two syllable words containing vowel teams and diphthongs, [the Student] will be able to correctly spell 8/10 words for 3 out of 4 word lists.”

The Student had already met objectives 1 and 2.

“Objective 3 - By June 2022, when dictated a list of teacher-selected one syllable words containing diphthongs or common vowel teams, [the Student] will be able to correctly spell 8/10 words for 3 out of 4 lists.”

“Description of Progress: [The Student] is making sufficient progress to meet her encoding goal. [The Student] has achieved objective number 3 this quarter. When dictated list of teacher-selected one syllable words containing diphthongs of common vowel teams, [the Student] is able to correctly spell 8/10 words for 3 out of 4 lists.”

Writing – Conventions (BCPS Ex. 36, pp. 46-47/60)

The goal remains the same: “By November 2022, when given a prompt or question about a grade level text, a paragraph graphic organizer, a word bank, an anchor chart, and sentence starter options, [the Student] will be able to write a short paragraph of at least 5 sentences (opening sentence, 3 detail sentences, and closing sentence) to answer the prompt or question and use correct capitalization at the beginning of a sentence and for proper nouns, correct ending punctuation, spacing between the words, and spacing between sentences with 80% accuracy as measured by a teacher created rubric for 2 out of 3 writing prompts. Rubric will include a total of 10 points for conventions.”

The Student already met the objectives 1 and 2.⁷⁰

“Objective 3: By June 2022, when given a prompt or question about a grade level text, a word bank, an anchor chart, and a sentence starter a paragraph frame with prefilled sentence starters, and the graphic organizer, [the Student] will be able to write a short paragraph of a[t] least 5 sentences (opening, 3 details, and the closing sentence) to answer the prompt of question and correct capitalization at the beginning of the sentence and for proper nouns, correct ending punctuation, spacing between words, and spacing between sentences with 80 percent accuracy as measured by the teacher created rubric for 2 out of 3 writing prompts. Rubric will include a total of 10 points for conventions.”

“Description of Progress: [The Student] is making sufficient progress towards achieving her writing conventions goal. [The Student] has achieved objective number 3 this quarter. When given a prompt or question about a grade level text, a word bank, an anchor chart, and a sentence starter a paragraph frame with prefilled sentence starters, and the graphic organizer, [the Student] was be able to write a short paragraph of a[t] least 5 sentences (opening, 3 details, and the closing sentence) to answer the prompt of question and correct capitalization at the beginning of the sentence and for proper nouns, correct ending punctuation, spacing between words, and spacing between sentences with 80 percent accuracy as measured by the teacher created rubric for 2 out of 3 writing prompts. Rubric will include a total of 10 points for conventions.”

Mathematics -Problem Solving (BCPS Ex. 36, pp. 48-49/60)

The previous Math goal had already been divided into multiple goals. This goal is the **first** of the restated goals.

The Math Problem Solving goal remains as follows: “By November 2022, when given 5 single digit, one step multiplication and division word problems with solutions up to 100 that include a visual, read independently or with teacher support and the use of a word problem organizer and manipulatives, hundreds chart, or a number line, [the Student] will solve 4 out of 5 problems correctly for 2 out of 3 problem sets.”

This was a newly redesigned goal, so there was no progress previously reported.

However, by the fourth report, the Student already met objectives 1 and 2.

“Objective 3: By November 2022, when given 5 single digit division problems, an anchor chart and manipulatives, hundreds chart, or a number line, and with teacher support, [the Student] will select the strategy and correctly solve 3 out of 4 problems for 2 out of 3 problem sets.”

⁷⁰ Objective 2 was reached this quarter, but I have detailed objective 3, which is an indication of more advanced progress.

“Description of Progress: [The Student] is making sufficient progress towards achieving her math problem solving goal. [The Student] has achieved objective number 3 this quarter. When given 5 single digit division problems, an anchor chart and manipulatives, hundreds chart, or a number line, and with teacher support, [the Student] is able to select the strategy and correctly solve 3 out of 4 problems for 2 out of 3 problem sets.”

Mathematics - Calculation (BCPS Ex. 36, pp. 50-51/60)

The previous Math goal had already been divided into multiple goals. This goal is the **second** of the restated goals.

The Math Calculation goal is the following: “By November 2022, when given 5 math calculation addition and subtraction problems with 2 numbers up to 1000, [the Student] will select a preferred strategy, use a 100s chart, place value chart, teacher prompting, and manipulatives (if needed, ex. base 10 blocks) to solve with 80% accuracy (4/5 problems correct) in 2 out of 3 problem sets.”

“Objective 1 - by June 2022, when given 5 math calculation addition and subtraction problems with 2 numbers up to 100, [the Student] will select a preferred strategy, using a 100s chart, place value chart, teacher prompting and manipulatives (if needed, ex. base 10 blocks) to solve with 80% accuracy (4/5 problems) correct in 2 out of 3 problem sets.”

“Description of Progress: [The Student] is making sufficient progress towards meeting her math calculation goal. [The Student] achieved objective number 1 this quarter. When given 5 math calculation addition and subtraction problems with 2 numbers up to 100, [the Student] is able to select a preferred strategy, using hundreds chart, place value chart, teacher prompting and manipulatives (if needed, ex. base 10 blocks) to solve with 80% accuracy (4/5 problems correct) in 2 out of 3 problem sets.”

Mathematics -Fact Fluency (BCPS Ex. 36, p. 52-53/60)

The previous Math goal was divided into multiple goals. This goal is the **third** of the restated goals.

The Math-Fact Fluency goal is the following: “By November 2022, when given 30 single digit addition and 30 single digit subtraction facts, [the Student] will be able to answer at least 24/30 facts correctly (80%) in 2 minutes during 3 out of 4 trials.”

The Student achieved objective 1 in the fourth quarter.

“Objective 2: By June 2022, when given 20 single digit subtraction facts, [the Student] will be able to answer at least 16/20 facts correctly (80%) in 2 minutes during 3 out of 4 trials.”

‘Description of Progress: [The Student] is making sufficient progress towards meeting her math facts fluency goal period [the Student] achieved objective number 1 and 2 this quarter. When given 20 single digit subtraction facts, [the Student] is be able to answer at least 16/20 facts correctly (80%) in 2 minutes during 3 out of 4 trials.’

Mathematics -Place Value (BCPS Ex. 36, p. 54-55/60)

The previous Math goal was divided into multiple goals. This goal is the **fourth** and final of the stated goals, which was restated as the skills were separated.

The Math- Place Value goal is the following: “By November 2022, when given a set of 5 numbers up to 4 digits (thousands place). a place value chart, base 10 blocks, and rounding charts, [the Student] will be able to write the number, placing each digit in the correct place value column and represent the numbers with base 10 blocks with 80% accuracy (4/5 problems correct[]) for 2 out of 3 problem sets.”

“Objective 1: By June 2022, when given a set of 5 numbers up to 3 digits (hundreds place), a place value chart, base 10 blocks, and rounding charts, [the Student] will be able to write the number, placing each digit in the correct place value column and represent the numbers with base 10 blocks with 80% accuracy (4/5 problems correct[]) for 2 out of 3 problem sets.”

“Description of Progress: [The Student] is making sufficient progress towards meeting her place value goal. When given a set of 5 numbers up to 3 digits (hundreds place), a place value chart, base 10 blocks, and rounding charts, [the Student] is be able to write the number, placing each digit in the correct place value column and represent the numbers with base 10 blocks with 80% accuracy (4/5 problems correct[]) for 2 out of 3 problem sets.”

V. Services (May 2022)(BCPS Ex. 56-57/60)

The IEP team established a thirty-two and a half hour per week program with the Student attending general education for 20 hours and 49 minutes and special education services outside the general classroom of 11 hours and 40 minutes weekly, up from 10 hours and 25 minutes. Even in the general education classroom, however, the Student would have support from her special educator and her assistant.

Reading and written language expression (BCPS Ex. 36, pp. 56 and⁷¹ 57/60)

The Student will now receive 2 hours and 30 minutes (5 sessions of 30 minutes) (down from 3 hours and 20 minutes or 5 sessions of 40 minutes) in general education (i.e., the regular classroom with her peers) to address her needs in reading and written language expression. The services would be provided by a general education teacher, a special education teacher or an instructional assistant, in a small group. She will still be supported with an adult's verbal and visual prompts, asking the Student to repeat or paraphrase information to check for understanding, assist her with highlighting key information, reading text and or directions aloud, and assisting her with spacing words and sentences during writing tasks, as well as helping her use an editing checklist. Ten minutes of the service would still address the Student's sight word goal.

In addition to the 4 hours and 10 minutes already allocated for phonics, encoding and fluency, the Student will now receive an additional 1 hours and 15 minutes in 5 sessions of 15 minutes (for a total of 11 hours and forty minutes) outside general education (i.e., special education services provided by a special educator outside the classroom) to address her needs in oral reading fluency, to work on her reading fluency goal. Some of these services will be provided by a special educator supported by an assistant.

Mathematics (BCPS Ex.36, pp. 56/60)

The Student will continue to receive 6 hours and 15 minutes (5 sessions of one hour and 15 minutes outside general education (i.e., special education services provided by a special educator outside the classroom) to address her needs in mathematics. This education is to be solely taught by a special educator, exclusive of the general classroom, towards the achievement of third grade level standards. She will have instruction in math fact fluency, beginning with fluency in

⁷¹ These additional hours were on a subsequent page after the discussion of the mathematics instructions on page 56/60.

addition facts, then subtraction facts, then multiplication and division facts. She requires pre-teaching of mathematics vocabulary and foundational skills to repair for those tasks. If necessary, she will be retaught grade level skills in which she is not consistently demonstrating proficiency.

ESY Services (BCPS Ex. 36, p. 57/60)

The team again recommended ESY services for 15 hours a week for her phonics, encoding and math goal.

VI. Placement (BCPS Ex. 36, p. 58-59)

The team again determined that educating the Student in a general education classroom with supports and outside the general education classroom with intervention services would provide the least restrictive environment for the Student to be educated.

Failure to implement

In *L.J. v. School Board of Broward County*, 927 F.3d 1203 (11th Cir. 2019), the Eleventh Circuit Court of Appeals articulated the standard for claimants to prevail in a “failure-to-implement case.” The court concluded that “a material deviation from the plan violates the [IDEA].” *L.J.*, 927 F.3d at 1206.

Challenging the BCPS implementation of the IEP, to prevail in a failure-to-implement case, a plaintiff must demonstrate that the school has materially failed to implement a child’s IEP. To prevail on this issue, the Parents must prove more than a minor or technical gap between the plan and reality; *de minimis* shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child’s IEP. *L.J.*, 927 F.3d at 1211 (cited in *Hillsborough County School Board Florida State Educational Agency* 22-3347E March 30, 2023, 123 LRP 13731).

I find that the teachers charged with implementing the Student's IEP did so with great fidelity and care. As demonstrated by the copious data submitted into evidence and testified to at the hearing, the teachers provided thoughtful, caring and complete services to the Student, and she progressed. The IEP team developed a plan, and Ms. [REDACTED] and Ms. [REDACTED] faithfully and with fidelity followed that plan.

Compensatory Recovery Services (Comp Ed).

At the end of the November 8, 2021 IEP team meeting, Ms. [REDACTED] voiced her disagreement with the decision that the Student was not entitled to receive Compensatory Education services. Because this objection was raised at the end of the meeting, there was no time to discuss it at that meeting. Therefore, a subsequent meeting was set up for November 17, 2021 to discuss that issue. BCPS Ex. 9, p. 9/9.

A follow up IEP Team meeting was rescheduled for November 22, 2021; but the Parents cancelled this meeting. BCPS Ex. 11. After some attempts to schedule this meeting, on February 1, 2022, Ms. Parker requested that the IEP Team meet on February 17, 2022, at 2:00 pm, which it did with the Parents and advocate present. The team mutually agreed to meet on February 17 at 2:00 p.m. to review Dr. [REDACTED]'s and Ms. [REDACTED]'s language assessments and Ms. [REDACTED]'s observation, and to discuss Compensatory Education/Recovery Services.

At the February 17, 2022 IEP team meeting, the Parents shared that they disagreed that the Student was not eligible for Compensatory Education/Recovery Services as she had regressed in progress at the start of the school year. BCPS Ex. 24, p. 20/22. The IEP Team explained that the Compensatory Education/Recovery Services determination was based upon progress through June 30, 2021, and at that time, the Student was making progress toward her goals as the IEP was being fully implemented and the Student was provided all services, except for times when she was absent.

As case manager for the Student, Ms. [REDACTED] was required to complete the “BCPS Compensatory Education/Recovery Services Prior Written Notice” regarding the Student’s education during Covid through June 2021. BCPS Ex. 7. Responding to an email from Ms. [REDACTED] regarding her satisfaction with the Covid video and hybrid education, which would possibly make the Student eligible for Compensatory Education/Recovery Services, the Student’s mother responded via email on October 26, 2021 that, “There were no questions or concerns with the implementation of the IEP. She retained more information and her ability to recall sight words and read more fluently was observed. No questions or concerns.” BCPS Ex. 42, p. 53.

The BCPS assertion was also backed up by data provided in the Student’s Term 4 Grade 2 Report Card (June 17, 2021) which stated that the Student was “Progressing” in all academic areas including math, reading, science, social studies, and health. Special area subjects include codes of Consistently Demonstrating and Progressing as well. BCPS Ex. 24, pp. 15 and 16/22.

This documented progress was discussed at the February 17, 2022 IEP meeting when the team considered whether Compensatory Education services were required as a result of the Covid pandemic. (BCPS Ex. 24, pp. 14-16; 20-22). As the team found that the Student demonstrated progress on her goals throughout the time schools were impacted by Covid, the team determined that compensatory education services were not warranted. Compensatory education is an equitable remedy, awarded to a student who had a previously inadequate program. The Student’s mother expressed her satisfaction with the Covid online and hybrid learning, which makes the issue moot.

Even if it were not moot, the Parents did not provide probative evidence to show that Compensatory Education was awardable.

Parental choices

In *Endrew F.*, a school must “offer an IEP reasonably calculated to enable a child to make progress appropriate *in light of the child’s circumstances.*” 580 U.S. at 399. In addition to the Student’s diagnoses and abilities and the program offered and implemented by the BCPS, the actions of the Parents also affect and define the Student’s “circumstances.”

ESY

Ms. [REDACTED] explained the purpose of ESY programming:

Q. What is the point of -- what is extended school year services?

A. So extended school year is, essentially, summer school. It's designed to maintain progress that was accomplished throughout the current school year. It is to help to try to prevent regression of skills and maintain the skills that were learned during the school year.

TRR. V3, Page 500:17 to 500:24.

The IEP team consistently recommended that the Student attend the ESY program. Ms. [REDACTED] testified that the Student had a tendency to regress without continued reinforcement of the skills that she had learned. She described having to retrace steps 52 through 94 at the beginning of the 2021-2022 school year, which the Student had mastered at the end of the previous school year; this used time that could have been used to make additional progress.

During the March 2021 IEP Meeting (BCPS Ex. 1), the IEP Team recognized the Student’s anticipated regression and determined her to be eligible for 2021 ESY services.⁷² The ESY services were described in BCPS Ex. 2:

- 5 days per week
- 3 hours per day
- for 4 weeks

⁷² Although “all students, with or without disabilities, may regress to some extent during lengthy breaks from school,” this Student had a history of regression that the school was attempting to address. *Dibuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 189-90 (4th Cir. 2002) (citing *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002)).

- outside of general education
- with a special education classroom teacher and an instructional assistant
- with school transportation provided to the Student's home
- totaling 15 hours per week.

During that meeting, the Parents stated that the Student would not attend ESY 2021, "as they would work with her at home to prevent regression." BCPS Ex. 1, p. 2. The Student's mother signed the ESY Request, declining those services. BCPS Ex. 2.

At the November 8, 2021 IEP team meeting, the team determined that the Student was eligible for ESY services in 2022. BCPS Ex. 8, pp. 23-24. The Parents initially agreed and the Student would ride BCPS transportation to and from the ESY site. BCPS Ex. 9, p. 9/9. The Parents also agreed to those services during the IEP team meeting of February 17, 2022. BCPS Ex. 24, p. 19/22. However, the Parents again reversed that position and the Student did not attend ESY. Ms. [REDACTED] testified that the Student's mother told her that "they wanted her to be a kid in summer." TR. Page 31:14 to 31:20.

Even Dr. [REDACTED] recommended that the Student attend a summer program to continuing to practice what she learned in the school year:

Q. You recommended, I believe, that [the Student] requires intensive reading instruction or reading intervention over the summer months.

A. I believe I made a recommendation of that in 2022, yes. I believe I said, if I can look back here, I think I said, "The summer months are also good times for more intensive reading instruction." Meaning that she would certainly benefit from (sic)⁷³ there's some good summer camps around the area where students still continue to get that.

TR. V1, Pages 225:21 to 226:5. Although Dr. [REDACTED] specifically recommended the [REDACTED] summer program, when asked about the specificity of his recommendation, he backtracked on that

⁷³ The transcribed testimony appears to be missing a word or more. The gist of Dr. [REDACTED]'s testimony was that the Student would benefit from summer programming and that there were "good summer camps" to provide that support.

specific recommendation, testifying that, “I cited the [REDACTED] as one such camp, yes.” TR. V. 1, Page 226:6 to 226:9. The Parents’ Complaint alleged that “the BCPS failed to recommend appropriate services and placement for the Student for the 2021-22 and 2022-23 school years as *well as summer 2022.*” (Emphasis added). Such services and placement were recommended, but the Parents rejected them.

The IEP team request for additional testing

The IEP team sought additional testing. Each school district must obtain informed parental consent prior to conducting any reevaluation of a student with a disability. “Consent” for purposes of a reevaluation means:

- (a) the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication;
- (b) the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- (c)(1) the parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

34 C.F.R. § 300.9.

As indicated above in the comments regarding the BCPS concerns regarding Dr. [REDACTED]’s testing, the BCPS sought permission to administer additional testing to the Student, but the Parents refused to give consent for any further tests. The Parents stated that they would not provide consent for school-based assessments as they felt the Student “has been over tested and Dr. [REDACTED] can complete any assessments the school based staff would need.” BCPS Ex 24, p. 16/22.

In correspondence to the Parents after the February 17, 2022 IEP team meeting, Ms. [REDACTED] asked the Parents to permit the BCPS to perform assessments: “Your child was referred by the IEP team on 02/17/2022 for assessment(s) which will assist the school in determining eligibility and/or

developing an appropriate education program.” BCPS Ex. 31. These assessments were to be completed no later than May 17, 2022:

	Assessor		Specific Purpose
	Name	Title	
Educational	BCPS Staff	Special Educator	To obtain current levels of academic performance
Psychological	BCPS Staff	School Psychologist	To assess cognitive processing, phonological processing, and/or memory, rating scales
Occupational Therapy	Ms. [REDACTED] and/or representative	Occupational Therapist	<input type="radio"/> Observation/Consultation <input checked="" type="radio"/> Assessment

To all of these assessment requests, the Parents wrote the following: “The Parents and Guardian of [the Student] Disagree and Do Not Want any Staff @ [REDACTED] Conducting any Assessments listed Above or any Assessments w/o prior written consent.” BCPS Ex. 31.

The Parent’s refusal to allow these assessments is disingenuous for several reasons.⁷⁴

With regard to the first request for an assessment to obtain the current levels of the Student’s academic performance, the Parents’ decision to withhold consent for this testing prevented the school from presenting evidence of what it maintains is academic progress, the lynchpin of a FAPE analysis. The major purpose of my consideration is constrained – whether the Student made “*progress* appropriate in light of the child’s circumstances.” *Andrew F.*, 580 U.S. at 399 (emphasis added) – since the Parents did not allow academic performance or achievement to be tested after the IEPs had been modified and implemented after considering Dr. [REDACTED]’s report and the adoption of his suggestions,⁷⁵ and after the increase in special education services. The Parents have the burden of proof. By withholding their consent for further testing

⁷⁴ I do not mean to suggest that the Parents sought to harm their child; quite the opposite. By bringing this action, the Parents expressed their desire to have their daughter enrolled in what they believe is the best possible circumstances for her – at the [REDACTED]. By thwarting the BCPS efforts, in the short term, the school is hamstrung. However, in the long run, if they were able to prove that the BCPS could not provide a FAPE for their daughter, they might perhaps succeed in having her placed at the [REDACTED].

⁷⁵ Ms. [REDACTED] testified extensively on how Dr. [REDACTED]’s recommendations were incorporated into the Student’s IEP. TR - V4 , starting at Page 862.

(and not having Dr. ██████ retest the Student, although they indicated this to be their preference), they have effectively prevented the collection and presentation of the data necessary to make this decision. By not allowing evidence of how the Student made (or did not make) academic progress after the change in the BCPS program, they have “stacked the deck” in their favor but lost a chance to meet their burden. The Parents questioned each witness about the level of academic achievement (e.g., kindergarten, first grade, etc.) in each successive IEP, which was unchanged from Dr. ██████’s evaluation.⁷⁶ Of course, changes in academic levels cannot be measured if there are no further tests to evaluate the changes, which requires at least two data points. The Parents allowed no such mechanism for evaluating this change.

Regarding her reasons for requesting further assessment, Ms. ██████ testified that to get to an explanation for the Student’s delay in reading on grade level, she would administer the “Feifer” assessment of reading. “And maybe if we had those results, there might have been a different direction” in terms of the interventions chosen. TR. V4, Page 845:21 to 845:23. Ms. ██████ also questioned Dr. ██████’s reliance on the Word Pairs test, which tested immediate memory. The Delayed Memory testing, that Ms. ██████ explained would address long term memory loss, may have explained the regression issues. TR. V4, Pages 804:6 to 805:7. If such tests were administered, the school program could be redesigned accordingly; without this

⁷⁶ For example, Ms. ██████ supported her position that there was no academic progress because the Student had the same unchanged level of academic achievement in the March and May 2022 IEPs. TR. V. 1, Pages 129:12 to 130:3 (March 2022) and TR. VI, Pages 129:12 to 130:3 (May 2022).

information, no further program could be designed.⁷⁷ And as the Parents had already indicated their preference for a private placement by January 14, 2022, (which was also endorsed by Dr. ██████ in his then-recent report), they had little incentive to allow for this additional testing to allow the IEP team to produce a program to raise these levels, giving the school an additional chance to demonstrate greater progress. BCPS Ex. 17.⁷⁸

Moreover, the Parents did not want the school to perform an anxiety assessment or collect data by way of rating scales. This intention was evident by their stated desire to have Dr. ██████ perform such testing; he never did.

The IEP team also wanted an occupational therapist to assess the Student for keyboarding, which was also suggested in Dr. ██████'s report. Even if they wanted Dr. ██████ to do the other evaluations, he is not an occupational therapist and this resource and chance for accommodation was lost.

⁷⁷ Ms. ██████ explained her preference for and use of a school-based assessment:

...When I'm writing an assessment report, I'm providing that information because I know that I need that information later on to drive my class, which drives my goals. Class meaning the present levels of academic and functional performance. So, it's really important to me as [the Student's] teacher that I get that information. So, ideally, I would like to be the one doing the assessment because it's so valuable having a student that you know so well and that you've been pouring your heart and soul into for years sitting there being able to assess that student and see what her strengths are, what her areas of need are, and being able to get all that information to be able to use that to put into the document to drive her instruction.

TR. V2, Pages 437:18 to 438:6.

⁷⁸ That form was signed by the Parents, indicating their intentions. But Ms., Parker telegraphed the Parents' intention as early as November 18, 2021. In her letter to Ms. Foresman, Ms. Parker wrote:

At this time, the parents are exploring alternative school placement for [the Student]. Should an appropriate program be determined will (sic) request placement and funding of said placement by BCPS.

Parents. Ex. 6.

BCPS request to communicate with the Student’s outside tutor.

At the IEP Team meeting on February 17, 2022, the IEP Team asked the Parents to consent for Ms. [REDACTED] and Ms. [REDACTED] to speak with the after-school tutor retained by the Parents so that they could collaborate with her on which of the Student’s skills were being developed. The Parents told the IEP team that they would not sign consent for the communication. BCPS Ex. 24, p 19/21. The Parents testified that the tutor was a former [REDACTED] teacher and she was not using the OG method. Ms. [REDACTED] testified that because she was teaching the Student using the OG method, and the tutor was not using this methodology, the Student could be frustrated due to a possible disconnect between the two educational programs. TR. V2, Pages 308:12 to 309:13 and TR. V3, Pages 532:23 to 533:23.

I agreed with the BCPS that that this lack of communication could possibly hurt the Student, causing the continued dissonance and obstructing her progress. The Parents gave no cogent reasoning for withholding their consent for this communication.

Analysis of the IEPs for the Student.

In its 2017 *Endrew F.* decision, the Supreme Court reiterated the standards for judging IEPs reiterating what it expressed in its 1982 *Rowley* decision:

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. [*Rowley*], at 207, 102 S.Ct. 3034. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. *Id.*, at 208–209, 102 S.Ct. 3034. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*, at 206–207, 102 S.Ct. 3034.

580 U.S. at 399 (emphasis added). The instruction offered must be “*specially designed*” to meet a child’s “*unique needs*” through an “[*i*]ndividualized education program.” §§ 1401(29), (14).

Endrew F., 580 U.S. at 400.

The Student's IEP was specially designed to meet the Student's unique needs. There is little question that the proposed IEP was not "off the shelf," but rather was specially designed for this Student – more than once. In each category of educational need, the IEP team listed the strengths and needs of the Student and addressed those needs with specific programming – both inside and outside the general education classroom. The statements of "needs" foreshadowed the upcoming changes in the IEP, so that it could address the needs that were identified. The BCPS personnel performed objective testing to track the Student's progress and difficulties. This close attention to the details of the Student's needs was a hallmark of the IEPs that were proposed.⁷⁹ When more attention was required in specific areas of need, the goals and objectives were adjusted accordingly. In reading, fluency was separated from comprehension so that they could have discrete goals and objectives to meet the Student's educational needs. In math, one goal was separated into four, with objectives tailored for each goal.

The IEPs set goals and the objectives under those goals were largely met. The teachers meticulously tracked the Student's progress towards the objectives, and some of the goals were even met earlier than the November 2022 the target date for reaching the goals. Because the Student was removed from ██████ at the end of the 2021-2022 school year, the IEP could no longer be implemented, and the goals and objectives could no longer be tracked.

⁷⁹ Ms. ██████ testified:

Q. And is this [phonics] goal tailored to the student?

A. This goal is individualized for [the Student]. It is based on the results that I obtained from the decoding survey where she started kind of like lacking in those skills. So, it's not addressing skills that she had mastered. It starts with addressing the skills that, you know, I identified as areas of need on that informal phonics assessment.

The Parents do not feel that the Student was making meaningful progress because she still could read on grade level and has math deficits that require special education, considerations and accommodations. The teachers' accommodations in the general education setting allowed the Student to access grade level material (e.g., science, social studies and health) despite these continuing deficits. The program may not be "ideal" in the Parents' eyes, but it is designed to afford the Student a FAPE and resulted in objective gains, which are meaningful.⁸⁰

The Parents provided a chart intending to show the Student's regression:

Present Levels of Performance	11-8-21 IEP Grade 3	5-23-22 IEP Grade 3
Reading Phonics	1 st to beginning 2nd grade	End of K-1st grade
Reading Fluency	1 st to beginning 2nd Grade	1 st grade
Reading Comprehension	1st to beginning to 2nd grade	End of K -1 grade
Written Language Expression	End of 1 st to beginning 2nd grade	1 st grade
Math Calculation	1 st grade level	End of K-1st grade
Math Problem Solving	1 st grade level	End of Kindergarten

⁸⁰ Not all students progress at the same rate, although faithfully following OG will eventually yield results. Ms. [REDACTED] explained:

A. Okay. So well, we never -- like I said before, we don't really know how long it's going to take any student to close a gap because it really depends on a lot of factors how quickly they move through their phonics program, so that program that's being used to remediate the skills. It is expected that with implementation of a program like Orton-Gillingham, which is the gold standard for dyslexia education, that a student will eventually, when that program is implemented with fidelity, close the gaps between their instructional level and their grade level. The amount of time it takes to do that is different for every student.

Q. So every student can have a different rate of progress in every --

A. Exactly.

The fallacy of this chart deals with the timing of the information and the Parents' refusal to allow for updated assessments. The second column, "11-8-21 IEP Grade 3" establishes grade level information before Dr. [REDACTED]'s evaluation was completed and prior to the February 17, 2022 IEP team meeting to discuss his academic achievement assessments. Even assuming that the grade level information in that column was correctly assessed (and this is questionable because of the IEP team's need for a proper assessment that was expressed during its team meeting on that date), the last column is Dr. [REDACTED]'s assessment *before* the March 2022 interventions were put in place. Because the Parents refused to consent to an updated assessment by May 17, 2022, the assessment of the Student's grade level is lacking, and makes the regression illusory – the last column actually represents the present level of performance in January 2022. There is no indication of what the Student's academic levels of performance would have been in May 2022 (the last column) because of the Parents refusal to consent to or provide further testing.

The Parents also contend that the BCPS did not perform any assessments prior to Dr. [REDACTED]'s to assess the Student. But the Parents commissioned an earlier assessment which they apparently did not share with the BCPS or present at the hearing. There is also no indication that the IEP team – of which the Parents were members – sought any evaluations or assessments. This argument, too, is illusory.

The Parents referenced and provided two prior OAH decisions for my consideration that were favorable to the parents. The first *caveat* is that prior OAH decisions have no precedential value in subsequent OAH decisions. But nevertheless, a review of those decisions indicates a lack of individualization and follow through on the school's part and a clear lack of progress. That is not present in this case. The Student sought instruction in a smaller setting; the Student's IEP and the execution of her IEP provided these services. The school followed up on and largely adopted Dr. [REDACTED]'s suggestions. The BCPS consistently and objectively monitored the Student's progress.

The Student in this case did make progress, which was evidenced by her meeting the objectives along the way – some even earlier than expected.

The Parents assert in their closing that BCPS “has tried multiple different intervention strategies throughout these 4 years to no avail.” But this is not the standard. The purpose of this hearing is to determine *prospectively* whether a proposed IEP is adequate as of the time it is offered to the Student. As for the prior IEPs, the efficacy of an IEP can only be determined after the relevant information (i.e., Dr. [REDACTED]’s evaluation and the other data drawn from putting in place suggestions made in his evaluation) is gathered. *Fuhrmann on Behalf of Fuhrmann v. E. Hanover Bd. Of Educ.*, 993 F. 2d 1031, 1039-40 (3d Cir. 1993); *Susan N. v. Wilson Sch. Dist.* 70 F. 3d 751, 762 (3d Cir. 1995). Each IEP must be judged by the information available at the time. The teachers developed data on the Student’s progress in order to fashion a program; the Parents refused to consent to the IEP team gathering the information that it needed to further the Student’s education (i.e., the assessments it requested after the February 17, 2022 meeting). This argument fails.

The Parents also question whether the BCPS can provide the “intensity of specialized instruction [the Student] needs throughout her entire school day” that she would receive at [REDACTED]. Least Restrictive Environment considerations aside, the Student has extensive pull out services with a special education teacher for intensive specialized instructions, as the IEP calls for.

There was no evidence that the time that the Student attended general education detracted from this intensive instruction, particularly as the Student still had supplemental supports from the special education teacher and instructional and paraeducator. This demand has been met under the IEP.

The Parents also wrote in their closing that:

You also heard that Baltimore County is now relying heavily on the Orton Gillingham reading intervention. You also heard that there was a 2021 peer reviewed study from the journal *Exceptional Students* that reviewed 24 studies on the OG method that found no statistically significant benefit for children with [D]yslexia.

There are (at least) two reasons that this argument cannot be considered. The first is that none of the referenced studies were placed in evidence. At the hearing, Ms. Parker tried to make this assertion, but without evidence of the studies being submitted into evidence, and after BCPS counsel interposed an objection that the statement lacked foundation, Ms. Parker withdrew it:

Q. And we have research that shows that Orton-Gillingham is not working for many children currently?

MS. FORESMAN: Objection.

JUDGE NACHMAN: Basis?

MS. FORESMAN: Foundation.

JUDGE NACHMAN: Well, Ms. Parker, I was wondering the first time you asked it.

MS. PARKER: I'll withdraw the question.

JUDGE NACHMAN: Okay.

TR. V3, Pages 489:18 to 490:2.

Secondly, the school personnel can use their professional judgment in determining the method of education. *See Bd. Of Educ. v. Rowley*, 458 U.S. 176, 207; *A.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004). When assessing whether a student was offered, given, or denied a FAPE, a judge must “afford great deference to the judgment of education professionals” *Andrew F.*, 580 U.S. at 1001 (quoting *Rowley*, 458 U.S. at 206). The teachers chose OG as a method. Although it is not material to this point, the method proved successful.

I agree with the Parents’ citation to *Andrew F.* that “[f]or children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly ... awaiting a time when they were old enough to ‘drop out.’” *Andrew F.*, 580 U.S. at 400. The IDEA demands more. But in this instance, the IEP team, and particularly the teachers, did not sit “idly,” but skillfully, considerately, and with great care and fidelity designed an individual program of education that was reasonably calculated to enable the Student to receive a

FAPE, “under [her] circumstances.” Even though the Student’s progress in reading and math are not as accelerated the Parents would want, the IEP provides the Student with a FAPE and the BCPS implemented it properly, as written. Ms. ██████ explained:

Q. Okay. In your opinion, do you think the goals, the supports and the services and the placement that were offered with the May 23, 2022, IEP, are they reasonably calculated to meet the student's needs and enable the student to make appropriate progress in the least restrictive environment?

A. Considering everything, all of the services, the goals, the objectives, supplementary aids and supports, testing accommodations, when we looked at this IEP in its entirety, yes, I do believe that it was, it was designed to allow [the Student] her best chance to make progress. The IEP was fully implemented, and I do believe that the ESY services to try to prevent regression, you know, that this would have carried forward being a good IEP for her for the beginning of fourth grade with the option of coming back to review, revise at the beginning of fourth grade. Yes, I mean, I think the data speaks for itself that she was making progress in all but one goal, and that goal was revised to help her make progress. And services were revisited and increased to help her make service -- sorry, to make progress, so yes, I do believe so.

TR. V3, Page 606:1 to 606:22.

Accordingly, I find that the BCPS did provide a FAPE in the most recent IEP, and all through the school year, as the IEPs were “reasonably calculated to enable the child to receive educational benefits.” *Endrew F.* 580 U.S. at 399.

Least Restrictive Environment

The FAPE is able to be provided in the least restrictive environment.

Ms. ██████, who was able to observe the Student interact with her non-disabled peers, thought it was important (and successfully done) for the Student to attend school with her non-disabled peers, so that she can “ can make friends, so that she can socialize, so that she is with a large number of people that, you know, she recognizes support her whether or not she has a

disability or not.” TR. V2, Page 304:11 to 304:19. She collaborated on an award-winning science project in her general education classroom. This is the Student’s community school.

Ms. [REDACTED] gave her expert opinion on this point, which I believe sums up the analysis:

Q. What is your opinion about the placement that is offered with this IEP? Do you think it’s appropriate and why do you think it is?

A. I think the IEP placement is appropriate because she has access to grade level standards with a rigorous curriculum that has high expectations for her, as well as the ability to interact with nondisabled peers and socialize in an environment like this.

TR. V2, Pages 324:24 to 325:6. See also TR. V2, Page 305:1 to 305:13 (addressing standards to check the Student’s progress).

“Burlington” analysis

The Parents unilaterally disenrolled the Student in BCPS and enrolled her at the [REDACTED] [REDACTED] at the end of the 2021-2022 school year. As I did not find that the BCPS failed to provide the Student a FAPE, the balance of this analysis is not material. Nevertheless, I feel the need to comment on the appropriateness of the [REDACTED] program for **this Student**.

There was sparse information provided on [REDACTED]’s educational progress and plan for the Student. There was little objective data – nearly all of the data provided was subjective and was of little use in demonstrating the Student’s progress. The school’s proposal for educating the Student had no benchmarks from which progress could be measured. Even Ms. [REDACTED], the Parent’s expert who supported the Student’s placement at [REDACTED], recognized its lack of objective data to track the Student’s progress in the [REDACTED] reports:

Q. Is it measurable? Is it meaningful?
Meaningful. So measurable would mean that it would have to be and should be quantitative data.

A. Yes. Usually.

Q. And would it also need to be objective data?

A. Sometimes.

Q. Is -- would you prefer objective data over subjective data?

A. I don't know. If you gave me something in relation to answer that with --

Q. So when you're talking about a student's progress, you said that with your certification of data collection that you look at data and breaking down data point[s]. So if data is measurable, would that also be objective data?

A. That is objective data.

Q. That is objective data. And so subjective data is not measurable.

A. Not usually. It's your opinion.

Q. It's your opinion.

A. Yep.

Q. And is it appropriate to base a student's progress on subjective data alone?

A. No.

Q. Why is that?

A. Because it would just be an opinion.

Q. Right. Does data help teacher[s] to determine how to adjust a student educational program?

A. I would hope, yes.

TR. V1, Pages 148:16 to 149:19. Ms. [REDACTED] agreed that the [REDACTED] report card (BCPS Ex. 44)

had no objective data to show any achievement:

Q. Does this report card give us any understanding or any information regarding progress that she's made with decoding, fluency or comprehension?

A. It says [the Student's] showing improvement with her decoding, fluency and comprehension.

Q. Is there any data there that helps us to know exactly what that is?

- A. Not in this report that I see.
- Q. Would you consider that a subjective comment?
- A. The way that it's written is subjective.

TR. V1, Page 176:4 to 176:13.

Ms. [REDACTED] reviewed the few documents that the Parents provided regarding the Student's program at [REDACTED]. Her concerns were about the rigor of their program as well as the accountability. In Ms. [REDACTED]'s opinion as a special educator, the examples of work assignments provided by language tutor [REDACTED] in her Tutoring Report (BCPS Ex. 43) were not rigorous and below the ability the Student demonstrated while at [REDACTED].

Q. Okay. Now, earlier you talked about your concerns with [REDACTED] and you mentioned rigor. Is there anything in this report that shows you or gives you any concern about the rigor?

A. Yes. Specifically, on page 5 --

Q. And, again -- let's see. Page 5 is --

A. It's the last page of the report.

Q. -- 007?

A. Yes.

Q. Bates stamp.

A. Yes.

Q. Thank you. Go ahead.

A. In that paragraph it says that she wrote the letter answering WH questions to improve sentence structure, which, you know, WH questions is a first-grade skill. So, that is significantly practicing expectations below her grade level equivalency in terms of her age. So, if -- I mean, just to have that as an assignment just doesn't seem very rigorous because she's not accessing any grade level standards.

TR. V2, Pages 315:23 to 316:17.

Ms. [REDACTED] worked with the Student for over two years. She knew that the work produced at [REDACTED] was less challenging than the work she already successfully completed at [REDACTED]:

Q. And then later on down we see that -- in that paragraph we see reference to picture books and wordless picture books. Do you have any concerns about rigor with that?

A. Yes.

Q. And, you know, just take a moment to look at what they were doing because --

A. Yeah.

Q. So that you can talk about that.

A. Right. So, I can see that she was reading wordless picture books in order to practice the skill of sequencing, which is a skill to put events of a text in the order that they happened. However, because we are looking at pictures and not with actual words, this isn't showing me very much because it's just showing that she understands some sort of illustration and the sequence of events in that illustration versus if she had an actual text in front of her, that would help improve her reading comprehension.

TR. V2, Page 317:2 to 317:20.

The Parents failed to provide adequate evidence to establish the appropriateness of the [REDACTED]. As such, the [REDACTED] program was not shown to be appropriate for this Student. *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985); 34 CFR 300.148 (c).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that :

1. The Parents did not prove that the BCPS failed to recommend appropriate services and placement for the Student for the 2021-22 and 2022-23 school years as well as summer 2022;
2. The Parents did not prove that the BCPS failed to develop an appropriate IEP for the Student for the 2021-2022 and 2022-2023 school years as well as summer 2022;

3. The Parents did not prove that the BCPS failed to fully and adequately diagnose the Student in all areas of her disability;
4. The Parents did not prove that the BCPS failed to provide a FAPE to the Student for the 2021-2022 and 2022-2023 school years; and
5. Even if the BCPS did not provide a FAPE to the Student, the [REDACTED] is not an appropriate placement for the Student.

ORDER

I **ORDER** that Parents' complaint is without merit and is hereby **DISMISSED**.

June 30, 2023
Date Decision Issued

Marc Nachman
Administrative Law Judge

MN/ja
#205505

REVIEW RIGHTS

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

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

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

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

████████████████████,

STUDENT

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

BEFORE MARC NACHMAN,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-BCNY-OT-23-03421

FILE EXHIBIT LIST

Exhibits

I admitted the following exhibits on behalf of the Parents:¹

- Parents Ex. 1 IEP, dated November 8, 2021
- Parents Ex. 2 IEP, dated November 8, 2021
- Parents Ex. 6 Letter from Parents' attorney to the BCPS attorney, dated November 18, 2021
- Parents Ex. 7 Measure of Academic Performance (MAP) student score sheet, November 18, 2021
- Parents Ex. 9 Letter from the BCPS attorney to the Parents' attorney, dated December 6, 2021
- Parents Ex. 10 Letter from the Parents' attorney to the BCPS attorney, dated December 6, 2021
- Parents Ex. 13 Classroom Observation, dated January 6, 2022
- Parents Ex. 23 Pages from the MSDE website, accessed January 26, 2023
- Parents Ex. A ██████████ Resumé
- Parents Ex. B. Dr. ██████████ Resumé

I admitted the following exhibits on behalf of the BCPS:

- BCPS Ex. 1 IEP Team Summary, dated March 9, 2021
- BCPS Ex. 2 Extended School Year Request ("ESY") for School Year 2020-2021, dated March 9, 2021

¹ Those exhibits not included in the Parents' exhibit list were either not moved or admitted into evidence.

- BCPS Ex. 3 Receipt of Procedural Safeguards Parental Rights Document, signed on October 20, 2021
- BCPS Ex. 4 Parent Notification of IEP Team Meeting, dated October 20, 2021
- BCPS Ex. 5 MAP Student Progress Report, Fall School Year 2021-2022
- BCPS Ex. 6 Compensatory Education/Recovery Services Case Manager Notes/Worksheet
- BCPS Ex. 7 Compensatory Education/Recovery Services Prior Written Notice, dated October 26, 2021
- BCPS Ex. 8 IEP, dated November 8, 2021
- BCPS Ex. 9 IEP Team Summary, dated November 8, 2021
- BCPS Ex. 10 Notice of Documents, dated November 9, 2021
- BCPS Ex. 11 Parent Notification of IEP Team Meeting, dated November 16, 2021
- BCPS Ex. 12 BCPS Consent for Release of Student Records, signed on November 18, 2021
- BCPS Ex. 13 3rd Grade Teacher Report for IEP Team, dated November 22, 2021
- BCPS Ex. 14 Cognitive Abilities Test, dated December 2021
- BCPS Ex. 15 Email to Parent from [REDACTED], dated December 12, 2021
- BCPS Ex. 16 Parent Permission for Assessment, dated November 15, 2021
- BCPS Ex. 17 BCPS Consent for Release of Student Records, signed on January 14, 2022
- BCPS Ex. 18 BCPS Speech and Language Assessment, dated January 4, 2022
- BCPS Ex. 19 Private Psychoeducational Evaluation, dated January 8, 2022
- BCPS Ex. 20 Notice of Documents, dated January 21, 2022
- BCPS Ex. 21 Parent Notification of IEP Team Meeting, dated January 26, 2022, February 1, 2022, and February 8, 2022
- BCPS Ex. 22 Notice of Documents, dated February 10, 2022
- BCPS Ex. 23 Receipt of Procedural Safeguards Parental Rights Document, signed on February 17, 2022
- BCPS Ex. 24 IEP Team Summary, dated February 17, 2022

- BCPS Ex. 25 Parent Notification of IEP Team Meeting, dated March 8, 2022
- BCPS Ex. 26 Case Manager Report for IEP Team, dated March 15, 2022
- BCPS Ex. 27 Notices of Documents, dated March 15, 2022, and March 16, 2022
- BCPS Ex. 28 IEP Team Participant Signature Page, dated March 23, 2022
- BCPS Ex. 29 Receipt of Procedural Safeguards Parental Rights Document, signed on March 23, 2022
- BCPS Ex. 30 IEP, dated March 23, 2022
- BCPS Ex. 31 Parent Permission for Assessment with Parents, Written Note dated March 23, 2022
- BCPS Ex. 32 IEP Team Summary, dated March 23, 2022
- BCPS Ex. 33 Parent Notification of IEP Team Meeting, dated May 11, 2022
- BCPS Ex. 34 Notice of Documents, dated May 16, 2022
- BCPS Ex. 35 3rd Grade Teacher Report for IEP Team, dated May 16, 2022
- BCPS Ex. 36 IEP, dated May 23, 2022
- BCPS Ex. 37 IEP Team Summary, dated May 23, 2022
- BCPS Ex. 38 First through Third Grade Data Sheets
- BCPS Ex. 39 Beginning and Advanced Decoding Surveys; Words Their Way Primary Spelling Inventory; QRI 3/2022
- BCPS Ex. 40 Math Student Work
- BCPS Ex. 41 English Language Arts (ELA) Student Work
- BCPS Ex. 42 School Emails
- BCPS Ex. 43 [REDACTED] Program Description
- BCPS Ex. 44 [REDACTED] Tutoring Report, January 2023
- BCPS Ex. 45 [REDACTED] Trimester Report Card, April 2023
- BCPS Ex. 46a [REDACTED] Resumé
- BCPS Ex. 46b [REDACTED] Resumé

BCPS Ex. 46c [REDACTED] Résumé

BCPS Ex. 46d [REDACTED] Résumé