

XXXX XXXX,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

*** BEFORE JOHN J. LEIDIG,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH NO.: MSDE-MONT-OT-17-14090**

*** * * * ***

DECISION ON REMAND

STATEMENT OF THE CASE
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DISCUSSION
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ORDER

STATEMENT OF THE CASE

On March 7, 2016, XXXX and XXXX XXXX (Parents) filed a Due Process Complaint with the Office of Administrative Hearings (the OAH), requesting a hearing to review the identification, evaluation, or placement of their daughter, XXXX (the Student), by the Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (the IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).¹

I held a telephonic prehearing conference on March 21, 2016. Based on the availability of the parties and their witnesses, I scheduled the hearing for May 16, 17, 18, 19, 20 and 27, 2016. Prior to agreeing to this schedule, the attorneys and I thoroughly reviewed the calendar to determine if there were any available days prior to May 16; we concluded there were none. I convened the hearing as scheduled. During the course of the hearing, additional hearing days were added to the hearing schedule to accommodate witness schedules and the length of witness

¹ Unless otherwise indicated, all references to 20 U.S.C.A. are to the 2017 volume.

testimony. The hearing continued on May 31, June 3, 14 and 16, 2016. Michael J. Eig, Esquire and Meghan Probert, Esquire, represented the Student. Jeffrey Krew, Esquire, represented MCPS. On June 16, 2016, counsel submitted memorandums in support of their respective positions.

On July 14, 2016, I issued a Decision ordering that the Parents' request for placement and reimbursement for tuition and expenses at [School 1] for the 2014-2015, 2015-2016, and 2016-2017 school years was denied. The Decision was issued within the time limit set forth in 34 C.F.R. § 300.515 (2016).²

The Parents appealed the Decision to the United States District Court for the District of Maryland. On May 8, 2017, the District Court remanded the case and directed me to consider the effect on that Decision, if any, of the United States Supreme Court's decision in the case of *Andrew F. ex re. Joseph F. v. Douglas County School District RE-1*, -- U.S. ---, 137 S. Ct. 988 (2017).³

On May 15, 2017, I conducted a telephonic prehearing conference with respect to the District Court's remand, and on May 24 2017, I issued a Prehearing Conference Report and Order (PCO) establishing a schedule for the remand proceeding. The parties thereafter submitted briefs and on July 20, 2017, I heard legal argument at the OAH in Hunt Valley, Maryland in accordance with the PCO. Mr. Eig and Ms. Probert appeared on behalf of the Student, and Mr. Krew appeared on behalf of MCPS.

A special education hearing decision is normally due within forty-five days of the date the parties notified the OAH that they waived an otherwise mandatory resolution meeting.

34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c). The time for issuing the decision,

² Unless otherwise indicated, all references to 34 C.F.R. are to the 2016 volume.

³ On August 2, 2017, the United States Court of Appeals for the Tenth Circuit remanded the *Andrew F.* case to the United States District Court for the District of Colorado for further proceedings consistent with the Supreme Court's decision.

therefore, had passed by the time the remand hearing concluded. The parties requested an extension of the 45-day limitation and I granted an extension for a specific period of time based on the parties' request that I issue a written decision within thirty days of the hearing, July 20, 2017. 34 C.F.R. 300, 515(c). Md. Code Ann., Educ. § 8-413(h) (2014).

The legal authority for the hearing is IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2014); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); and Code of Maryland Regulations (COMAR) 13A.05.01.15C. Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; the Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 and Supp. 2016); COMAR 13A.05.01.15C, 28.02.01.

ISSUES

1. Was the Individualized Education Program (IEP) and placement developed by MCPS for the 2014-2015 school year reasonably calculated to provide the Student with a free appropriate public education (FAPE)?
2. If there was a denial of a FAPE for the 2014-2015 school year, is the Student's placement at [School 1] ([School 1]) at the expense of MCPS appropriate?
3. Was the IEP and placement developed by MCPS for the 2015-2016 school year reasonably calculated to provide the Student with a FAPE?
4. If there was a denial of a FAPE for the 2015-2016 school year, is the Student's placement at [School 1] at the expense of MCPS appropriate?
5. Is the Student's placement at [School 1] for the 2016-2017 school year appropriate?

SUMMARY OF THE EVIDENCE⁴

Testimony

For the Student:

1. XXXX XXXX, an educational consultant with XXXX Group , LLC, whom I accepted as an expert in special education with a focus on reading instruction
2. XXXX XXXX, a speech/language pathologist at [School 1], whom I accepted as an expert in speech and language pathology
3. XXXX XXXX, Director of Occupational Therapy at [School 1], whom I accepted as an expert in occupational therapy
4. Dr. XXXX XXXX, Curriculum and Technology Coordinator at [School 1], whom I accepted as an expert in special education, including instruction of children with learning disabilities
5. XXXX XXXX, the Student's mother

For MCPS:

1. XXXX XXXX, a speech/language pathologist currently working at [School 2], formerly at [School 3] ([School 3]), whom I accepted as an expert in speech and language pathology
2. XXXX XXXX, an instruction specialist in the MCPS Department of Physical Disabilities and Special Education, whom I accepted as an expert in occupational therapy
3. XXXX XXXX, the Student's teacher in the XXXX immersion Program, whom I accepted as an expert in elementary education, including XXXX immersion
4. XXXX XXXX, a reading specialist at [School 3], whom I accepted as an expert in reading instruction at the elementary level
5. XXXX XXXX, a XXXX immersion Program teacher at [School 3], whom I accepted as an expert in elementary education, including XXXX immersion
6. XXXX XXXX, a reading-initiative teacher assigned to both the XXXX immersion Program and XXXX (English) Program at [School 3], whom I accepted as an expert in teaching XXXX reading to English-speaking students
7. XXXX XXXX, the Coordinator at the [School 4]XXXX Center, whom I accepted as an expert in special education

⁴ No additional testimony or exhibits were offered or admitted as part of the remand. The witnesses and exhibits listed are those who testified and were admitted, respectively, at the hearing conducted in May and June 2016.

Exhibits*For the Student:*

Exhibit Number	Date	Description
XX 1	3/7/16	Due Process Hearing Request
XX 2	11/17/09	Report of Speech-Language Assessment by XXXX XXXX, CCC-SLP
XX 3	9/30/11	Interim progress report
XX 4	12/15/11	Psycho-educational Evaluation by XXXX XXXX, Ph.D.
XX 5	2/9/12	Report of School Psychologist, XXXX XXXX, D. Ed. (MCPS)
XX 6	2/28/12	Educational Assessment Report by XXXX XXXX, Ed.S. (MCPS)
XX 7	3/7/12	IEP
XX 7-A	3/7/12	IEP with progress notations
XX 8	1/25/12	First grade report card
XX 9	November 2012	Elementary Teacher Report for quarterly progress
XX 10	1/30/13	Elementary Teacher Report for quarterly progress
XX 11	2/20/13	IEP
XX 11-A	2/20/13	Progress notations for IEP goals and objectives
XX 12	4/25/13	Neuro-developmental evaluation by Drs. XXXX and XXXX, XXXX (XXXX)
XX 13	5/21/13	Elementary Teacher Report for quarterly progress
XX 14	6/3/13	Speech-Language Status Report by XXXX XXXX (MCPS)
XX 15	6/12/13	IEP
XX 15-A	6/12/13	Progress notations for IEP goals and objectives
XX 16	6/13/13	Letter from the Parents to [School 5]
XX 17	6/19/13	Request for Change of School Assignment
XX 18	6/27/13	E-mail from XXXX XXXX to MCPS
XX 19	2012-2013 school year	Second grade report card
XX 20	7/19/13	Request for Change of School Assignment
XX 21	9/9/13 – 9/10/13	E-mail exchange between XXXX XXXX and XXXX XXXX
XX 22	10/15/13 – 10/17/13	E-mail exchange between XXXX XXXX and XXXX XXXX
XX 22-A	11/4/13	Observation Report by XXXX XXXX
XX 23	11/25/13	Psychological Evaluation by XXXX XXXX, Ph.D. (XXXX)
XX 24	12/5/13	FastMath Student Status Report
XX 25	2/3/14	Team Consideration of External Report, prepared by XXXX XXXX (MCPS)
XX 26	1/15/14	E-mail to XXXX XXXX from XXXX XXXX

XX 27	January 2014	Elementary Teacher Report of quarterly progress
XX 28	1/15/14	Reading Report by XXXX XXXX (MCPS)
XX 29	1/15/14	Parent Report for 1/15/14 IEP meeting
XX 30	1/15/14	XXXX XXXX's notes of IEP meeting
XX 31	1/27/14 – 1/28/14	E-mail exchange between XXXX XXXX, XXXX XXXX, and XXXX XXXX
XX 32	1/30/14	Letter to XXXX XXXX from Meghan Probert
XX 33	1/31/14	Speech-Language Status Report by XXXX XXXX, MS, CCC-SLP
XX 34	2/2/14	E-mail exchange between XXXX XXXX and XXXX XXXX
XX 35	1/15/14	Feedback on IEP
XX 36	1/15/14 and 2/3/14	IEP
XX 36-A	2/3/14	Progress notations for IEP goals and objectives
XX 37	2/3/14	XXXX XXXX's notes of IEP meeting
XX 38	2/4/14	E-mail exchange between XXXX XXXX and XXXX XXXX
XX 39	2/20/14	FastMath Student Fact Grid
XX 40	3/14/14	Letter to the Parents from [School 1]
XX 41	n/a	This exhibit was withdrawn.
XX 42	February 2014	Elementary Teacher Report of quarterly progress
XX 43	Spring 2014	MSA Home Report
XX 44	4/7/14	Observation Report of XXXX XXXX
XX 45	5/2/14	Student Information Profile completed by the Parents
XX 46	5/2/14	Letter to XXXX XXXX from Meghan Probert
XX 47	5/13/14	Letter to Meghan Probert from XXXX XXXX
XX 48	5/30/14	Elementary Teacher Report of quarterly progress
XX 49	May 2014	Reading test
XX 50	2013-2014 school year	Sight word recognition list
XX 51	6/2/14	IEP
XX 52	6/2/14	XXXX XXXX's notes of IEP meeting
XX 53	6/2/14	Comparison of present levels of performance from 6/12/13 to 6/2/14
XX 54	6/2/14	NWEA Student Progress Report for math and reading
XX 55	6/2/14	Phonics for reading placement test
XX 56	June 2014	Grade 3 report card
XX 57	6/6/14	MAP-R score report
XX 58	June 2014	Reading test
XX 59	6/30/14	Letter to XXXX XXXX from Meghan Probert
XX 60	7/18/14	Letter to Meghan Probert from XXXX XXXX
XX 61	7/25/14	Reading assessment of XXXX XXXX
XX 62	9/23/14	Letter to the Parents from [School 1]
XX 63	9/19/14 – 10/3/14	Comprehensive Speech-Language Assessment by XXXX XXXX, M.A., CCC-SLP ([School 1])
XX 64	10/28/14	[School 1] IEP

XX 65	9/30/14 – 12/10/14	Comprehensive OT Evaluation by XXXX XXXX, MA, OTR ([School 1])
XX 66	January and May 2015	Progress notations on 10/28/14[School 1] IEP
XX 67	3/3/15	E-mail from XXXX XXXX to XXXX XXXX and Meghan Probert
XX 68	March 2015	Annual Speech-Language Progress Summary
XX 69	4/7/15	WJ-IV (Achievement) Score Report
XX 70	April 2015	OT Annual Progress Report
XX 71	4/10/15	Observation Report by XXXX XXXX
XX 72	4/21/15	NWEA Student Progress Report
XX 73	5/4/15	[School 1] IEP
XX 74	5/4/15	XXXX XXXX's notes of [School 1] IEP meeting
XX 75	May 2015	Vocabulary and sight word testing
XX 76	May 2015	Reading and sight word testing
XX 77	5/27/15	Letter to XXXX XXXX from XXXX XXXX
XX 78	6/3/15	Letter to Zvi Greismann from Michael Eig
XX 79	6/4/15	Letter to Zvi Greismann from Michael Eig
XX 80	6/18/15	Letter to XXXX XXXX from Michael Eig (withdrawal)
XX 81	6/18/15	Letter to XXXX XXXX from Michael Eig
XX 82	7/31/15	[School 1] end of year progress report
XX 83	7/27/15	Input for Present Levels of Performance
XX 84	7/31/15	IEP
XX 85	7/8/15 and 7/31/15	XXXX XXXX's notes of IEP meeting
XX 86	8/5/15	Letter to Zvi Greismann from Meghan Probert
XX 87	8/6/15	E-mail exchange between XXXX XXXX and XXXX XXXX
XX 88	8/11/15	Letter to Meghan Probert from Zvi Greismann
XX 89	9/24/15	E-mail to Meghan Probert from XXXX XXXX
XX 90	Undated	[School 1] Academic Program for 2015-2016
XX 91	10/5/15	Benchmark Assessor Live Student Details 2015-2016
XX 92	10/21/15	Assistive Technology Considerations
XX 93	10/21/15	OT observation by XXXX XXXX, MS, OTR/L (MCPS)
XX 94	3/7/16	Letter to XXXX XXXX from Michael Eig
XX 95	n/a	This exhibit was not offered or admitted.
XX 96	11/5/15 – 4/28/16	OT Progress Notes ([School 1])
XX 97	5/4/16	Observation Report by XXXX XXXX
XX 98	Undated	Graph comparing WJ-III scores
XX 99	Undated	[School 3] work samples
XX 100	Undated	[School 1] work samples
XX 101	Various dates	Parents' payments to [School 1]
XX 102	Undated	Curriculum vitae (CV) for XXXX XXXX
XX 103	Undated	CV for Dr. XXXX XXXX
XX 104	Undated	CV for XXXX XXXX
XX 105	Undated	CV for XXXX XXXX

XX 106	Undated	CV for XXXX XXXX
XX 107	Undated	[School 1] IEP
XX 108	2015-2016 school year	Academic Program for [Student]
XX 109	2010	Principles of Professional Ethics from the National Association of School Psychologists
XX 110	5/10/16	Printout of the Model Code of Ethics for Educators from www.nasdtec.net
XX 111	Undated	“XXXX,” a pamphlet
XX 112	Undated	Reading Targets—Text Level Chart: K-5
XX 113	2013-2014 school year	Samples in a Marble Cover notebook
XX 114	1/23/14	Teacher Evaluation of Student Strengths and Needs ([School 1] form) completed by XXXX XXXX
XX 115	2015	Preamble to the Occupational Therapy Code of Ethics
XX 116	2016	ASHA’s Literacy Gateway (Reading and Writing) from the American Speech-Language Hearing Association
XX 117	Undated	“The Ants,” a take-home book
XX 118	Undated	Third Grade Word Wall List
XX 119	11/16/10	Elementary Teacher Report
XX 120	5/31/16	Printout of information about the XXXX immersion Program from www.montgomeryschoolsmd.org
XX 121	Undated	Profile of [School 4]

For MCPS:

Exhibit Number	Date	Description
MCPS 1	6/15/11	Kindergarten report card for mathematics
MCPS 2	12/15/11	Psycho-educational evaluation by XXXX XXXX, Ph.D.
MCPS 3	12/21/11	Reading progress report by XXXX XXXX
MCPS 4	2/9/12	Report of School psychologist, XXXX XXXX, D. Ed., NCPS (MCPS)
MCPS 5	2/28/12	Educational Assessment Report by XXXX XXXX, Ed.S. (MCPS)
MCPS 6	4/25/13	Neuro-developmental evaluation by Drs. XXXX and XXXX, XXXX (XXXX)
MCPS 7	6/3/13	Speech-language status report by XXXX XXXX (MCPS)
MCPS 8	2012-2013 school year	Work samples
MCPS 9	10/1/13 – 10/3/13	E-mail exchange between XXXX XXXX and XXXX XXXX
MCPS 10	10/10/13	E-mail to XXXX XXXX from XXXX XXXX

MCPS 11	First Quarter 2013-2014 school year	Elementary teacher report of quarterly progress by XXXX XXXX
MCPS 12	11/25/13	Psychological evaluation by XXXX XXXX, Ph.D. (XXXX)
MCPS 13	January 2014	Elementary teacher report of quarterly progress by XXXX XXXX
MCPS 14	1/23/14	Request from [School 1] for MCPS school records
MCPS 15	n/a	This exhibit was not offered or admitted.
MCPS 16	1/30/14	[School 1] Application for 2014-2015 school year
MCPS 17	n/a	This exhibit was not offered or admitted.
MCPS 18	2/3/14	Reading report by XXXX XXXX
MCPS 19	2/3/14	Notes of XXXX XXXX
MCPS 20	February 2014	Elementary Teacher Report of quarterly progress
MCPS 21	2/3/14	Team Consideration of External Report, prepared by XXXX XXXX (MCPS)
MCPS 22	1/15/14 and 2/3/14	IEP
MCPS 23	3/11/14	E-mail from XXXX XXXX to [School 1]
MCPS 24	3/14/14	Letter to the Parents from [School 1]
MCPS 25	n/a	This exhibit was not offered or admitted.
MCPS 26	3/19/14	Accessible Technology Assessment by XXXX XXXX (MCPS)
MCPS 27	4/3/14	Accessible Technology Trial Period Plan
MCPS 28	4/17/14	[School 1] 2014-2015 Enrollment Contract
MCPS 29	5/12/14	[School 1] Invoice for 2014-2015
MCPS 30	n/a	This exhibit was not offered or admitted.
MCPS 31	May 2014	Reading Assessment Data
MCPS 32	2013-2014 school year	Reading materials used by XXXX XXXX (MCPS)
MCPS 33	6/2/14	Comparison of present levels of performance from 6/12/13 to 6/2/14
MCPS 34	6/2/14	IEP
MCPS 35	June 2014	Grade 3 report card (MCPS)
MCPS 36	2013-2014 school year	Work samples
MCPS 37	7/18/14	Letter to Meghan Probert from XXXX XXXX
MCPS 38	10/28/14	[School 1] IEP
MCPS 39	2/21/15	[School 1] 2015-2016 Enrollment Contract
MCPS 40	4/7/15	Woodcock-Johnson IV Score Report
MCPS 41	4/21/15	NWEA Student progress report ([School 1])
MCPS 42	January and May 2015	Progress notations on 10/28/14 [School 1] IEP
MCPS 43	5/4/15	[School 1] IEP
MCPS 44	5/27/15	Due Process Hearing Request (subsequently withdrawn)
MCPS 45	6/3/15	Letter to Zvi Greismann from Michael Eig
MCPS 46	6/18/15	Letter to XXXX XXXX from Michael Eig

MCPS 47	7/8/15	IEP meeting notes
MCPS 48	7/8/15 and 7/31/15	IEP meeting notes
MCPS 49	8/6/15	E-mail exchange between XXXX XXXX and XXXX XXXX
MCPS 50	8/11/15	Letter to Meghan Probert from Zvi Greismann
MCPS 51	Undated	Academic Program 2015-2016 (at [School 1])
MCPS 52	10/5/15	Benchmark Assessor Live Student Details 2015-2016 ([School 1])
MCPS 53	10/21/15	OT observation by XXXX XXXX, MS, OTR/L
MCPS 54	n/a	This exhibit was not offered or admitted
MCPS 55	2/4/16	E-mail from XXXX XXXX to XXXX XXXX
MCPS 56	2/9/16	Invoice from [School 1] to the Parents
MCPS 57	n/a	This exhibit was not offered or admitted
MCPS 58	3/7/16	Due Process Hearing Request
MCPS 59	3/17/16	Letter to Michael Eig from Jeffrey Krew (response)
MCPS 60	Undated	CV of XXXX XXXX
MCPS 61	Undated	CV of XXXX XXXX
MCPS 62	Undated	CV of XXXX XXXX
MCPS 63	Undated	CV of XXXX XXXX
MCPS 64	Undated	CV of XXXX XXXX
MCPS 65	Undated	CV of XXXX XXXX
MCPS 66	Undated	CV of XXXX XXXX
MCPS 67	Undated	CV of XXXX XXXX
MCPS 68	Undated	CV of XXXX XXXX
MCPS 69	Undated	CV of XXXX XXXX
MCPS 70	Undated	CV of XXXX XXXX, Jr.
MCPS 71	Undated	CV of XXXX XXXX
MCPS 72	Undated	CV of XXXX XXXX
MCPS 73	Undated	CV of XXXX XXXX
MCPS 74	Undated	CV of XXXX XXXX
MCPS 75	May 2013 to April 2016	Time reports from XXXX Group , LLC
MCPS 76	August 2009	Joint Statement—Learning Disabilities, Dyslexia, and Vision from the American Academy of Pediatrics
MCPS 77	September 1, 2001	Complementary Therapy Assessment: Vision Therapy for Learning Disabilities
MCPS 78	June 1984	“Reading Disability: Do the Eyes Have It?,” a Commentary in Pediatrics, Vol. 73, No. 6 (a publication of the American Academy of Pediatrics)
MCPS 79	1999	“Visual Training and Reading,” by Creig S. Hoyt, M.D.
MCPS 80	6/2/16	Printouts of [School 1] website screenshots regarding payment of tuition and the tuition refund plan (through XXXX)

FINDINGS OF FACT

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

Background

1. The Student was born in XXXX 2005. She lives with her parents in Montgomery County and has two older brothers.
2. As a toddler, the Student's speech was difficult to understand. Following testing through Child Find, the Student began receiving speech and language therapy at four years old.
3. The Student attended kindergarten through third grade at [School 3], an MCPS school. For kindergarten, first grade, and second grade, she was enrolled in the XXXX immersion Program, in which students are instructed primarily in XXXX.
4. During first grade, the Student began receiving special education services based on a diagnosis of Specific Learning Disability (SLD).
5. The Parents decided to remove the Student from the XXXX immersion Program for third grade. MCPS approved a Request for Change of School Assignment submitted by the Parents, and the Parents thereafter enrolled the Student in XXXX at [School 3], a public school that provides English-based instruction. The XXXX immersion Program and XXXX share the same campus at [School 3].
6. On October 5, 2013, the Parents engaged XXXX Group, LLC (XXG) to provide educational consulting and advocacy services on behalf of the Student. XXXX XXXX, an educational consultant, provided most of the services performed by XXG for the Parents.
7. During third grade, the Student received special education instruction from XXXX XXXX, a special educator with MCPS. In addition, Reading Specialist XXXX XXXX worked

with the Student three to four times per week for 30 minutes each time. The Student also received related services in speech/language twice a week.

The Fourth Grade IEP proposed by MCPS

8. On January 15, 2014, MCPS convened an IEP meeting. The meeting did not conclude on January 15, 2014, so the IEP team reconvened on February 3, 2014. During both meetings, the team reviewed the Student's progress toward achieving her annual IEP goals and objectives. The team also discussed the Student's present levels of performance as ascertained from teacher reports in reading, written language, and math; observations in reading, oral language and written language; recent evaluations in reading and math; therapy logs and data collection in oral language; work samples in written language; classroom assessments in math; and scores on the Measures of Academic Progress in Math (MAP-M). The IEP team also considered anecdotal information shared by the Parents and teachers regarding the Student's academic and speech/language needs.

9. The Student's mother attended both IEP meetings with Ms. XXXX.

10. As of January 15, 2014, the Student was reading at a kindergarten level. She was making progress in phonics and starting to sound out the beginnings of words on her own.

11. As of January 15, 2014, the Student was able to decode a Level 3 (on the Fountas and Pinnell Benchmark Assessment System) passage with 100% accuracy, with one self-correction and good fluency; she was also reading independently at Level 3. In addition, the Student could decode a Level 4 passage with 82% accuracy without any miscues. She was on Level 4 reading at an instructional level with support and assistance.

12. Previously, on November 25, 2013, Dr. XXXX XXXX of XXXX prepared a psychological evaluation of the Student at the Parents' request. Her evaluation showed that the Student was very stable behaviorally and emotionally, and her self-esteem and anxiety level fell

within normal limits for a girl her age. The IEP team reviewed and considered Dr. XXXX's evaluation.

13. As part of her evaluation, Dr. XXXX administered the Wechsler Intelligence Scale for Children IV (WISC-IV). The Student's WISC-IV scores were average in all areas tested, except for perceptual reasoning for which the Student's score was below average.

14. The Student's performance on the Woodcock Johnson—3rd Edition test of academic abilities demonstrated that the Student had difficulties in reading and writing.

15. The Student showed some signs of inattention, but the only diagnoses made by Dr. XXXX were SLD and Adjustment Disorder with anxiety. Despite these diagnoses, Dr. XXXX noted that the Student was behaviorally and emotionally stable based on both Parent and teacher reports.

16. Dr. XXXX did not diagnose the Student as having attention deficit hyperactivity disorder (ADHD).

17. At school, the Student got along well with her peers and managed classroom transitions well.

18. Dr. XXXX recommended that the Student receive direct, intensive special education instruction in the areas of reading and written expression, including explicit phonics-based reading instruction with a reading specialist or qualified special educator. Dr. XXXX also noted that the Student's fine motor skills should continue to be monitored, and stated that an occupational therapy (OT) consult "can be pursued if concerns for her graphomotor or other functional fine motor skills warrant."

19. During the initial IEP meeting on January 15, 2014, the Student's mother raised concerns about the Student's behavioral and emotional needs.

20. As of January 15, 2014, there had been no information reported to MCPS to indicate that the Student was experiencing any emotional or behavioral problems at [School 3].

21. As of February 3, 2014, the Student's draft IEP for fourth grade provided for sixteen hours and thirty minutes of special education, consisting of:

- thirteen hours a week of direct special education in a general education setting; plus
- three hours and thirty minutes a week of special education outside the general education setting

The IEP also provided for one hour and thirty minutes a week in related services for speech and language with a speech/language pathologist, as well as twenty hours a week of Extended School Year (ESY) services.

22. As of February 3, 2014, the Parents agreed with all aspects of the IEP, except that they wanted the special education hours to be split differently, as follows:

- ten hours a week of direct special education in a general education setting; plus
- six hours and thirty minutes a week of special education outside the general education setting

23. Sometime in April 2014, the Parents requested a consult from the High-Incident Assistive Technology (HIAT) office at MCPS to determine if there were additional resources available to meet the Student's educational needs.

24. On June 2, 2014, MCPS convened an IEP meeting to review the results of the HIAT consult. As a result of that meeting, the IEP was amended to increase the hours of special education outside the general education setting to 4.75 hours per week (from 3.5 hours per week).

25. At the June 2, 2014 meeting, the IEP goals were revised to read as follows:

- Reading-fluency: Given small group instruction in evidence-based phonics instruction, reduced distractions, visual and verbal cues, visual and verbal models, pictures to support reading passages whenever possible, high interest/low readability text for content areas, extended time, and opportunities for repeated practice, the Student will read with sufficient accuracy and fluency to support comprehension

- Speech and language: the Student will produce /th/, prevocalic and vocalic /r/ in all positions of words in sentences
- Written language: given small group instruction in the writing process, teacher modelling, visual and verbal cues, access to word processing software, extended time, word banks, sentence starters, graphic organizers, breaking assignments into smaller parts, teacher models, and grade level exemplars, the Student will compose opinion, explanatory, informational, and/or narrative texts
- Mathematics: given small group instruction for math skills and vocabulary, manipulatives or math tools, reduces visual clutter for math task, concepts presented one step at a time, visual or teacher models, and opportunities for repeated facilitated and independent practice, the Student will analyze number relations and complete computations using addition, subtraction, multiplication, and division to solve problems involving whole numbers
- Mathematics: given visuals and manipulatives, concepts broken down and presented one at a time, extended time, grade level exemplars, teacher modelling, visual and verbal cues, increased white space/reduced visual clutter and opportunities for repeated practice, the Student will solve math problems, including word problems, using the four operations.
- Reading-decoding: given small group instruction in evidence-based phonics instruction, visual and verbal prompts and cues, teacher modelling, opportunities for repeated practice, and reduced distractions, the Student will know and apply level 16/J (corresponding with the end of the first grade/beginning of the second grade) phonics and word analysis skills in decoding words
- Reading-comprehension: given read to accommodations, small group instruction, visual and verbal cues and models, pictures to support reading when possible, and access to text to speech software, the Student will listen to grade level literary texts and demonstrate comprehension by referring to details and examples in order to summarize, draw inferences, determine theme, and describe story events

26. The IEP developed by the team identified the following areas affected by the Student's SLD: Reading: decoding, fluency, and comprehension; math: problem solving; written language; speech/language: articulation.

27. The IEP also contained the following instructional and testing accommodations, services, supplementary aids and supports:

- human reader or audio recording for verbatim reading
- text to speech software
- visual cues
- notes and outlines

- a scribe
- electronic word processors
- monitoring of test responses
- visual organizers
- graphic organizers
- extended time
- multiple or frequent breaks
- reduction in distractions
- use of manipulatives
- limit amount to be copied from board
- provide alternate ways for the Student to demonstrate learning
- use of word bank to reinforce vocabulary or when extended writing is required
- increase white space/less visual clutter
- provide visual models
- math tools and calculation devices
- spelling and grammar devices
- provide grade level exemplars
- sentence starters
- break down assignments into smaller units
- use pictures to support reading passages, whenever possible
- use of high-interest, low readability books for content areas
- reduce amount of writing required for written assignments
- preferential seating
- provide task completion checklists that utilize visuals
- directions repeated orally and visually
- provide editing checklists for punctuation, grammar and spelling
- present concepts one at a time for math
- opportunities for repeated practice

28. On June 7, 2014, MCPS provided the Parents notice of Procedural Safeguards and Parental Rights with respect to the IEP.

29. The Student made academic progress during third grade in XXXX Program at [School 3], but she remained behind grade level in all academic areas.

30. As of the end of third grade, the Student could fully dress and undress herself; could use a knife, fork and spoon without difficulty or awkwardness; could shower and brush her teeth independently; had no behavioral issues whatsoever; was social; had friends; played XXXX; and participated in XXXX as an extracurricular activity.

31. On June 30, 2014, the Parents' counsel sent a letter notifying MCPS of the Parents' "rejection of the IEP proposed for ... the 2014-15 school year" and their "intent to place [the Student] at [School 1] for the 2014-15 school year and to seek public funding for that placement."

32. By letter dated July 18, 2014, MCPS rejected the Parents' request for placement and public funding at [School 1] and informed the Parents that MCPS remained ready and willing to implement the June 2, 2014 IEP.

33. The Student did not participate in any ESY classes during 2014, even though MCPS offered, and remained willing to provide, twenty hours of ESY services per week in the IEP.

[School 1]

34. On January 23, 2014, approximately one week after MCPS convened the initial IEP meeting for the Student's fourth grade IEP, the Student's third grade teacher, XXXX XXXX, filled out an evaluation of the Student at the request of the Parents. The evaluation was submitted as part of the Parents' application for the Student to attend [School 1].

35. Ms. XXXX wrote that the Student was unable to read or write independently, does best with one-on-one and hands-on instruction, has a continuously happy demeanor, takes many bathroom and water breaks that seem to indicate work avoidance, and was beginning to lose

confidence. Ms. XXXX also wrote that she had to modify most assignments to accommodate the Student's difficulties.

36. On January 30, 2014, the Parents submitted an application to [School 1] for the 2014-2015 school year. In the application, the Parents wrote that the Student "is a beast on the XXXX field and will start XXXX in the spring" and that the Student "makes friends easily and keeps them. ... They do not make fun of her yet and have been very supportive."

37. On April 17, 2014, the Parents signed an enrollment contract for the Student to attend [School 1] for fourth grade.

38. In September 2014, the Student began fourth grade at [School 1].

39. [School 1] is a private, separate day school in XXXX for children in first through twelfth grade with specific learning disabilities and/or ADHD.

40. [School 1] has approximately 340 students, all with specialized learning needs. There are no general education students at [School 1].

41. There are approximately ninety elementary school students at [School 1] on a campus that is separated from the intermediate and high school campus. For the 2014-2015 school year, the Student attended fourth grade at the elementary school. For the 2015-2016 school year, she attended fifth grade at the intermediate school.

42. The Student's homeroom class at [School 1] for the most recent school year (fifth grade) had ten students and two teachers. For academic instruction, her classes ranged in size from one to ten students. Larger classes generally had more than one teacher present.

43. [School 1] has related service providers on staff, including a speech/language pathologist, a psychiatrist, a psychologist, social workers, and occupational therapists.

44. Between September 19 and October 3, 2014, Ms. XXXX XXXX, a speech/language pathologist at [School 1], prepared a Comprehensive Speech Language Assessment of the Student.

45. The Student had average composite scores for auditory processing, core language, the receptive language index, and the expressive language index, but she scored in the low range for the language content index.

46. In addition, the Student scored above average in word discrimination, but below average in phonological segmentation and phonological blending.

47. On the Test of Word Reading Efficiency-Second Edition and the Phonological Awareness Test 2, the Student's scores demonstrated needs in the areas of sight word efficiency, phonemic decoding efficiency, total word reading efficiency, consonants, long and short vowels, consonant digraphs, and R-controlled vowels.

48. On the Goldman Fristoe Test of Articulation-2, the Student displayed difficulties and inconsistencies producing various /r/ sounds, and she also showed a mild distortion of the /s/ and /z/ sounds.

49. Based on her testing, Ms. XXXX recommended two 45-minute speech pathology sessions per week, as well as "a nurturing atmosphere where her linguistic weaknesses and strengths are recognized and accommodated in every subject area, including science, math, and the arts."

50. On October 28, 2014, [School 1] prepared an IEP that included goals and objectives in reading, written language and math.

51. Based on a request by the Parents, the Student underwent an occupational therapy evaluation between September 30 and December 10, 2014. The evaluation was conducted by XXXX XXXX, an employee of [School 1]. The test results demonstrated that the Student had

subtle, but not significant or pervasive, difficulties in the areas of fine motor precision, dexterity and crossing the midline of her body to complete motor actions with ease and fluid control.

52. On October 28, 2014, [School 1] prepared a revised IEP that expanded some of the prior goals and objectives, and also added goals and objectives in academic behavior/executive functioning and speech/language as follows:

- Academic behavior/executive functioning: the Student will verbally be able to identify three ways to self-advocate within the classroom setting on 4 out of 5 opportunities; given a need to self-advocate, the Student will successfully use at least one self-advocacy strategy on at least 3 out of 5 opportunities; given a problem or unexpected situation, the Student will demonstrate flexible thinking by being able to select and employ at least one solution independently on 3 out of 5 opportunities
- Speech/language: the Student will improve sound-symbol code knowledge by identifying corresponding sound(s) for given letter/letter combinations, with 80% accuracy, across three out of four trials; the Student will sequence sounds in single-syllable words while reading and/or spelling, with 80% accuracy, across three out of four trials

53. [School 1] employs a multi-sensory approach to learning in many of its classes.

This is aimed at assisting students with problems in reading, auditory processing, and other areas. Many classes at [School 1] also emphasize experiential learning, and de-emphasize direct reading or writing.

54. The Student made progress in fourth grade at [School 1] in academics, but she remained below grade level in all academic areas.

55. On February 10, 2015, the Parents signed a contract for the Student to attend [School 1] in 2015-2016.

The Fifth Grade IEP proposed by MCPS

56. On July 8, 2015, MCPS convened an IEP meeting. An IEP was not finalized on July 8, 2015, so the IEP team reconvened on July 31, 2015.

57. The resulting IEP identifies reading decoding, reading comprehension, math calculation, math problem-solving, oral language, written language and articulations as areas affected by the Student's SLD.

58. In formulating the IEP, the MCPS IEP team considered materials provided by [School 1], including the Student's results on multiple administrations of the Woodcock-Johnson (WJ) tests, [School 1] IEP, the Student's scores on the Measures of Academic Progress in Reading and MAP-M tests from April 2015, the July 2015 sight words list, scores from the Spring 2015 Qualitative Reading Inventory, progress reports from [School 1] teachers, the OT evaluation prepared at [School 1] from December 2014, and the OT and academic reports from October 2014.

59. The IEP proposed by MCPS for the 2015-2016 school year provided for the following accommodations, supplementary aids and services:

- human reader or audio recording for verbatim reading
- screen reading software
- visual cues
- notes and outlines
- electronic word processors
- ability to respond on test booklet
- monitoring of test responses
- math tools and calculation devices
- visual organizers
- graphic organizers
- extended time
- multiple or frequent breaks
- reduction in distractions
- use of highlighters
- use of manipulatives
- use of organizational aids

- check for understanding
- provide alternate ways for students to demonstrate learning
- repetition of directions
- dictation
- writing tools
- oral rehearsals
- periodic summarizing after paragraph of text
- preteach content vocabulary
- allow use of consistent organizational system for classroom work
- self-editing checklist for writing
- use of visual tracker while reading
- determine if the Student's answer is reasonable based on activity
- use of a word bank with graphics
- break down assignments into smaller units
- limit amount of required reading
- simplified sentence structure, vocabulary, and graphics on assignments and assessments
- reduce amount of information on paper
- provide appropriately lined writing paper
- provide preferential seating

60. The IEP contained goals in reading, written language, speech and language, and math that were appropriate based on the Student's performance during the prior year at [School 1].

61. On July 31, 2015, MCPS provided the Parents notice of Procedural Safeguards and Parental Rights with respect to the IEP.

62. MCPS proposed that the 2015-2016 IEP would be implemented at the XXXX Center at the [School 4] ([School 4]). This placement was proposed based on the Student's academic needs, not because of any emotional or behavioral concerns.

63. The 2015-2016 IEP proposed by MCPS provided for twenty hours per week of special education: seventeen hours thirty minutes outside the general education setting, and two hours thirty minutes inside the general education setting. It also provided for two 45-minute sessions each week for related services in speech/language.

64. MCPS operates approximately ten XXXX Centers throughout Montgomery County to serve students who are significantly below grade level in academics, but who are nevertheless diploma bound. In general, [School 4] XXXX Center does not admit students with emotional or intellectual disabilities, or those who cannot be independent. It is designed for students who can make progress in a general education setting for at least a portion of the school day.

65. [School 4] has approximately 700 students, 70 of whom are taught in the XXXX Center. The extent of interaction between XXXX Center and non-XXXX Center students differs by student based on the terms of each student's IEP; it ranges from fully self-contained to fully included in the general education setting.

66. MCPS proposed a primarily self-contained setting for the Student for 2015-2016.

67. Had the Student attended the [School 4] XXXX Center in 2015-2016, her homeroom class would have had fourteen students, with three adults present (and sometimes a fourth). Her teacher would have been XXXX XXXX, who has a Master's degree in Elementary One Education.

68. There are six special education teachers at the [School 4] XXXX Center, all of whom have Master's degrees and all of whom are certified in special education.

69. Approximately 20% of XXXX Center students have some form of autism, but none have severe autism.

70. The Student would have been in small classes of fourteen students or less for most academic subjects had she attended the [School 4] XXXX Center in 2015-2016. For lunch, recess, social studies, and science, she would be in a general education setting with up to thirty students in a class. Recess usually includes approximately 100 students and four to five adults, but there are times when recess includes up to 200 students.

71. The Student did not show any behavioral or emotional issues that would prevent her from attending the [School 4] XXXX Center.

72. XXXX Center classrooms are situated throughout the school at [School 4]; they are not physically segregated from general education classrooms.

73. [School 4] XXXX Center has staff available to conduct reading interventions in phonics, and there are reading specialists on staff to assist students throughout the school day.

74. [School 4] XXXX Center is equipped to provide an appropriate level of services, supports and accommodations to the Student.

75. The Parents rejected the IEP proposed by MCPS for the 2015-2016 school year, and they unilaterally placed the Student at [School 1] for fifth grade.

76. The Student made progress at [School 1] in fifth grade, but she remained below grade level in all academic areas.

77. The Student did not need occupational therapy as part of her IEP in fourth or fifth grade.

78. The Student has never had any social or emotional needs that require her to be separated from non-disabled peers during the regular school day.

79. The IEPs proposed by MCPS for the 2014-2015 and 2015-2016 school years contained sufficient services, accommodations, supplementary aids and supports for the Student

to have made meaningful academic progress had her Parents accepted the placements indicated in the IEPs.

80. The Student did not require a placement at [School 1] for the 2014-2015 or 2015-2016 school years.

DISCUSSION

I. Burden of Proof

The Parents are seeking reimbursement for their unilateral placement of the Student at [School 1] for the 2014-2015 and 2015-2016 school years.⁵ Because the Parents are the party seeking relief, they bear the burden of proof. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005) (“The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.”).

In *Endrew F.*, the Supreme Court considered the extent to which courts should accord deference to educational programming decisions made by public school officials. The Court wrote that “deference is based on the application of expertise and the exercise of judgment by school authorities. . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make educational progress appropriate in light of his circumstances.” 137 S. Ct. at 1001-02. While the *Endrew F.* decision clarified that it is appropriate for courts to accord deference to school official decisions that are supported by a cogent and responsive explanation, the Supreme Court did not expressly state that it intended to alter the burden of proof as established in *Weast*. Had the Supreme Court intended to change a

⁵ In the memorandum filed on June 16, 2016, the Parents also requested a ruling that placement at [School 1] for the 2016-2017 school year is proper. As explained in Section V, below, I decline to rule on this claim because it was not raised in the Complaint and I was not provided sufficient evidence regarding the IEP proposed by MCPS for the 2016-2017 school year.

matter so significant as the burden of proof, it would have explicitly expressed that intention in its written decision.

The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014).

II. The Statute of Limitations bars some of the Parents' claims.

MCPS argued that some of the claims raised by the Parents are barred by the statute of limitations.⁶ There was no dispute that the Due Process Complaint in this case was filed on March 7, 2016. Accordingly, MCPS contends that any claim that the Parents knew or should have known of as of March 7, 2014 is barred by the statute of limitations.

The relevant statutory provisions are as follows:

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

20 U.S.C.A. § 1415(f)(3)(C)-(D).

⁶ At many points throughout the hearing, MCPS objected to the admission of evidence predating March 7, 2014, i.e., two years prior to the filing of the current due process appeal. I allowed the admission of such evidence, but only as background. I reserved ruling on the issue of the statute of limitations.

Based on the plain language of the IDEA, I conclude that the statute of limitations bars any claim that the Parents knew or should have known of as of March 7, 2014, which was approximately the end of the third quarter of the Student's third grade year at XXX at [School 3]. At that point, the IEP team had already met twice to develop an IEP for the upcoming fourth grade school year (2014-2015).

At the hearing, the Parents presented a considerable amount of testimony and documentation relating to events prior to March 7, 2014. The following are just some of the examples referenced in the Parents' Closing Memorandum:

- “the XXXX immersion Program ... was a total failure [where] the Student did not learn to read [,] to write.” Clos. Mem. at 1.
- [School 3] had “an overtly stupid and illegal ... policy of never telling parents of children in the XXXX immersion Program that their child's needs are not being met and they should go elsewhere.” *Id.* at 2.
- “by the end of second grade, the Student still could not read or write or do math.” *Id.* at 2.
- “math was not added as an area of need to the IEP until February of second grade.” *Id.* at 6.
- the Student's second grade teacher, Mr. XXXX, “described how she would sometimes shut down when she could not do the work in his class.” *Id.* at 20.
- “[School 3]'s complete failure to communicate with the parents about the inappropriateness of the Student's placement in the XXXX immersion Program, thus preventing them from meaningful participation, is consistent throughout the record and in testimony.” *Id.* at 29.
- at the end of second grade, “Mrs. XXXX [sic] did not recommend an increase in the Student's special education hours for a logical but entirely illegal reason—the special educators in the building did not speak XXXX.” *Id.* at 35.

The Parents' claims relating to every one of these allegations are barred by the statute of limitations because the Parents knew or should have known of those claims on or before March 7, 2014. Moreover, any claim relating to whether the IEPs proposed or the services provided by MCPS on or before March 7, 2014 is barred, including claims relating to whether it was appropriate for the Student to participate in the XXXX immersion Program. The Supreme

Court's decision in *Andrew F.* does not alter, or even mention, the statute of limitations. Furthermore, the Parents do not qualify under the exception to the 2-year statute of limitations stated in 20 U.S.C.A. § 1415(f)(3)(D) because the alleged "secret policy" cited by the Parents from the XXXX immersion Program pamphlet (that teachers are not to recommend removal from the Program to any parents) does not amount to a "specific misrepresentation" relating to resolution of the dispute and there was no evidence to prove that MCPS was legally required to disclose the pamphlet or any other information related to the XXXX immersion Program. In addition, the Parents' contention that the Student's educational experience at [School 3] was "an unending record of continuing violations starting four or five years ago" (*Id.* at fn1, p.6) is not supported by the factual record or legal authority. The allegations cited above relate to specific events that the Parents could have alleged earlier but chose not to.

The evidence indisputably shows that the Parents were free to remove the Student from the XXXX immersion Program at any time, and that the Parents were well aware of the Student's continuing struggles in reading and speech/language from kindergarten all the way through third grade. Finally, it bears noting that the Parents do not dispute that they made the decision to remove the Student from the XXXX immersion Program in June 2013—more than two years prior to the filing of their due process complaint in this case.

III. The Legal Framework for the Remaining IDEA Claims

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487, 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 and Supp. 2016), 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).

FAPE is statutorily defined as "special education and related services" that are provided "in conformity with the individualized education program required under section 1414(d)" of the

IDEA. 20 U.S.C. § 1401(9).⁷ In 2017, the United States Supreme Court ruled that FAPE “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S.Ct. at 1001. Rejecting the “merely more than *de minimis*’ test applied by the Tenth Circuit (*Id.* at 1000.), the Court reiterated and clarified principles originally set forth in *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

In *Rowley*, the child was a hearing-impaired first-grader who had “minimal residual hearing and is an excellent lip reader.” *Id.* at 184. The school offered an IEP under which the child would receive instruction in the regular classroom and spend time each week with a special tutor and a speech therapist. *Id.* The parents claimed that the IEP proposed by the school denied the child FAPE by refusing to furnish a qualified sign-language interpreter in all the child’s classes. Previously, the school agreed that the child’s classroom teacher would speak into a wireless transmitter and that the child could use an FM hearing aid designed to amplify her teacher’s words. *Id.* at 184-5. The Supreme Court in *Rowley* held that the FAPE requirement is satisfied if the child’s IEP sets out an educational program that is “reasonably calculated to enable the child to receive educational benefits.” *Rowley* at 207; *Endrew F.* at 995-6. For a child in a general education setting, this generally requires an IEP “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Rowley* at 204.⁸

Regarding the FAPE requirement, the *Endrew F.* Court wrote:

While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer

⁷ In *Endrew F.*, the Court observed that it remains “[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided.” *Id.*, comparing 20 U.S.C. § 1401(18) (1976 ed.) with 20 U.S.C. § 1401(9) (2012 ed.).

⁸ The practical effect of the *Rowley* decision was that the school was not required to provide a qualified sign-language interpreter in all of the child’s classes in order to comply with the IDEA’s FAPE mandate.

an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

...

Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.

...

As we observed in *Rowley*, the IDEA “requires participating States to educate a wide spectrum of handicapped children,” and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”

Rowley sheds light on what appropriate progress will look like in many cases. ... And access to an “education” is what the IDEA promises.

...

It is through the IEP that “the ‘free appropriate public education’ required by the Act is tailored to the unique needs of” a particular child.

...

Rowley had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

Andrew F., 137 S.Ct. at 998-1000 (internal citations omitted), citing *Rowley*, 458 U.S. at 181, 202-203, 206-7.

Directly adopting language from *Rowley*, and expressly stating that it is not making any “attempt to elaborate on what ‘appropriate’ progress will look like from case to case,” the *Andrew F.* Court instructs that the “absence of a bright-line rule ... should not be mistaken for ‘an

invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Id.* at 1001, citing *Rowley*, 458 U.S. at 206. At the same time, the *Endrew F.* Court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, “a reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.* at 1002.

In addition to mandating a FAPE, the IDEA directs that children be placed in the “least restrictive environment” to achieve a FAPE, meaning that children with disabilities must be educated with children without disabilities in the regular education environment to the maximum extent appropriate; separate schooling or other removal from the regular educational environment should occur only when the nature or severity of the child’s disability prevents satisfactory education in regular classes with the use of supplementary aids and services. 20 U.S.C.A. § 1412(a)(5)(A); *see also*, 34 C.F.R. § 300.114(a)(2)(i) and 300.117.

The IDEA has always expressed a statutory preference for educating children with learning disabilities in the least restrictive environment with their non-disabled peers, concerning which the IDEA provides at 20 U.S.C. 1412(a)(5)(A) as follows:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

At a minimum, the IDEA calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). To this end, the IDEA requires public agencies like MCPS to offer a continuum of alternative placements that

meet the needs of children with disabilities for special education and related services. 34 C.F.R. §§ 300.114-16. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. 34 C.F.R. §§ 300.114- 116, 300.38; COMAR 13A.05.01.10B.

Although the IDEA requires specialized and individualized instruction for a learning or educationally disabled child, it also mandates that “to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities,” must be “educated with children who are not disabled[.]” 20 U.S.C.A. § 1412(a)(5)(A). “Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.” 34 C.F.R. §§ 300.116(b). “In selecting the [least restrictive environment], consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.” 34 C.F.R. §§ 300.116(d). “A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.” 34 C.F.R. § 300.116(e).

The IDEA further mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. *Honig v. Doe*, 484 U.S. 305 (1988); *Hartmann v. Loudon County Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997). 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. 34 C.F.R. § 300.114(a)(2)(ii). In some instances, a FAPE might require placement of a child in a private school setting that would be fully funded by the child’s public school district. *School Committee of the Town of Burlington*

v. *Department of Education*, 471 U.S. 359, 369 (1985).

The Fourth Circuit in *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989), followed the Sixth Circuit's mainstreaming standard, stating as follows:

The [IDEA]'s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child. As the Sixth Circuit Court of Appeals stated:

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.

DeVries at 878-79, quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), *cert. denied*, 464 U.S. 864.

In *Hartmann v. Loudon County Bd. of Educ.*, 118 F. 3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998), the Fourth Circuit reconfirmed the mainstreaming standards set forth above, noting that the IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate. Nevertheless, both *DeVries* and *Hartmann* mandate that school systems mainstream all disabled children unless one of following situations exist:

- The disabled child cannot receive educational benefit from a general education class;
- Any marginal benefit from including a student in general education is significantly outweighed by benefits that feasibly could be obtained only in a separate instructional setting; or
- The disabled child is a disruptive force in the general education environment.

Endrew F. did not alter these principles. Moreover, *Endrew F.* and *Rowley* expressly recognize that 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. *Endrew F.*, 137 S. Ct. at 996; *Rowley*, 458 U.S. at 202.

An IEP is the “primary vehicle” through which a public agency provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax County School Bd.*, 553 F. 3d 315, 319 (4th Cir. 2009).

To comply with the IDEA an IEP must, among other things, allow a disabled child to advance toward measurable annual academic and functional goals that meet the needs resulting from the child’s disability or disabilities, by providing appropriate special education and related services, supplementary aids, program modifications, supports, and accommodations. 20 U.S.C.S.

§ 1414(d)(1)(A)(i)(II), (IV), (VI). The child’s disability or disabilities and resulting needs are determined by using a variety of relevant functional, developmental, and academic information, including assessments and other evaluative materials. 20 U.S.C.S. § 1414 (a)(1)(C)(i), (b)(2)-(3).

In addition, an educational program offered to a student must be tailored to the particular needs of a child with disabilities through the development and implementation of an IEP, taking into account:

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

20 U.S.C.A. § 1414(d)(3).

An IEP shall include “[a] statement of the child's present levels of academic achievement and functional performance, including” and, specifically, “[h]ow the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children).” 34 C.F.R. § 300.320(1). If a child’s behavior impedes his or her

learning or that of others, the IEP team, in developing the child's IEP, must consider, if appropriate, development of strategies, including positive behavioral interventions, strategies and supports to address that behavior, consistent with 34 C.F.R. § 300.324(a)(2)(i). A public agency is responsible for ensuring that the IEP is reviewed at least annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision. 34 C.F.R. § 300.324(b).

In *Burlington*, the Supreme Court held that parents may be entitled to retroactive reimbursement from the state for tuition and expenses for a child unilaterally placed in a private school if it is later determined that the school system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. at 370. The issue of reimbursement for unilateral placement was expanded in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Parents may recover the cost of private education only if (1) the school system failed to provide a FAPE; (2) the private education services obtained by the parent were appropriate to the child's needs; and (3) overall, equity favors reimbursement. *Carter*, 510 U.S. at 12; *M.M. ex rel. D.M.*, 303 F.3d at 533-34. The private education services need not be provided in the least restrictive environment. *See, e.g., M.S. v. Fairfax County School Bd.*, 553 F3d 315, 327 (4th Cir. 2009).

In this case, there is no allegation that the IDEA's procedural safeguards were violated. Therefore, the threshold issue is whether the Student's IEPs and placements for the 2014-2015 and 2015-2016 school years were reasonably calculated to enable her to make progress appropriate in light of her circumstances. *Andrew F.*, 137 S. Ct. at 1002.

IV. The IEPs proposed by MCPS for the 2014-2015 and 2015-2016 school years were tailored to the Student’s unique needs and reasonably calculated to enable her to make progress appropriate in light of her circumstances in the least restrictive environment.

The Parents contend that the fourth and fifth grade IEPs proposed for the Student by MCPS were inappropriate for several reasons, including inadequate specialized education and related services. MCPS concedes that the Student has needs that must be addressed in an IEP, but contends that the IEPs developed for the 2014-2015 and 2015-2016 school years were appropriate and could have been implemented at [School 3] and the [School 4] XXXX Center as the least restrictive environments, respectively. For the reasons explained below, I conclude that the Parents have failed to meet their burden of proving that that IEPs proposed by MCPS for 2014-2015 and 2015-2016 were not reasonably calculated to enable her to make progress appropriate in light of her circumstances.

A. The 2014-2015 and 2015-2016 IEPs contain adequate specialized instruction.

According to the Parents, the 2014-2015 IEP was “inappropriate primarily due to the obvious lack of specialized instruction.” Clos. Mem. at 37. In support, the Parents cite Ms. XXXX’s testimony that as of June 2014, she “agreed with the Parents” that the Student needed a full-time special education setting. Tr. 191. Ms. XXXX also testified that she thought the nineteen hours of special education proposed for 2014-2015 was too low.

Ms. XXXX demonstrated considerable knowledge in the areas of special education and reading instruction. In assessing her testimony, I considered that she was hired by the Parents as an educational consultant and advocate in October 2013, just three months prior to the first IEP meeting was convened for the 2014-2015 school year. In addition, I also considered that Ms. XXXX never taught the Student, and there were some witnesses who had considerably more

direct contact with her. Ms. XXXX's contact with the Student consisted of four observations over a two year period (none of them particularly long), one assessment session, and two social "bump-ins" involving the Student and her Parents.

Most tellingly, Ms. XXXX testified that as of February 3, 2014, the Parents had no disagreement in the number of special education hours in the Student's draft IEP, only as to how those hours were split. Tr. at 483-88. She conceded that the Parents had agreed upon the goals, objectives, and placement stated in the draft IEP (even though some goals were later fine-tuned). *Id.* In light of her agreement to the February 3, 2014 draft IEP, Ms. XXXX never adequately explained why her opinion would have changed by June 2014 when the IEP for 2014-2015 was finalized. For purposes of the *Andrew F.* analysis, the fact that the Parents and MCPS were in agreement on the hours of special education, the objectives, the goals and the placement is significant in demonstrating that the IEP was reasonably calculated to enable the Student to make progress appropriate in light of her circumstances. *See Andrew F.*, 137 S. Ct. at 1000.

Ms. XXXX's testimony that the Student's self-esteem was decreasing, (and the implication that this rendered the IEP proposed for 2014-2015 inappropriate) was not adequately supported by evidence in the record and was outside her area of expertise. Ms. XXXX testified that the Student created an imaginary friend named "XXXX" who could read and write, wore glasses she did not need to appear smart, would place big "chapter books" in front of her as a ruse that she could read, and took long bathroom breaks as a way of avoiding her academic struggles in the classroom (which had been referenced in XXXX XXXX's evaluation of the Student for [School 1]). Yet, Ms. XXXX did not testify at the hearing to explain her observations, her report was not contemporaneously provided to MCPS staff, and there was no other credible evidence of any emotional or anxiety-related problems surfacing at [School 3] prior to the

finalization of the 2014-2015 IEP.⁹

Moreover, the psychological assessment reviewed by the IEP team in developing the 2014-2015 IEP shows that the Student did not have behavioral or emotional issues that needed to be addressed in a full-time special education setting. Dr. XXXX reported in November 2013 that the testing she conducted

really did not indicate any clinically significant features of inattention in the classroom. The Student's self-regulation is impressive for her age. . . . By both parent and teacher report, the Student is very stable behaviorally and emotionally.

XX Ex. 23 at 11. Thus, the Student's circumstances are factually distinguishable from *Andrew F.* There, the child was diagnosed with autism at age two. *Andrew F.* at 996. In fourth grade, his teachers reported that he had a "sweet disposition" but exhibited "multiple behaviors that inhibited his ability to access learning in the classroom" including screaming in class, climbing over furniture and other students, and occasionally running away from school. *Id.* He also "was afflicted by severe fears of commonplace things like flies, spills, and public restrooms." *Id.*

The Parents also cited testimony of Dr. XXXX XXXX in support of their contention that the 2014-2015 IEP and the 2015-2016 IEP were inappropriate. Dr. XXXX opined that the Student needed the fully-contained environment of [School 1] to get an appropriate education in both of those school years. Tr. at 1165, 1171.

Dr. XXXX displayed an impressive breadth of knowledge in her field of expertise. However, her opinion was not adequately supported. She opined that the Student needs to be segregated from non-disabled peers "because she needs a full time special education placement, and this is what I had testified to earlier. We can't afford not to have her in a full time special ed placement." Tr. at 1262. This opinion is conclusory insofar as it merely paraphrases the Parents'

⁹ Based on personal observation of the Student several times a week, XXXX XXXX testified that she did not notice the Student having any social or emotional problems during third grade. Tr. at 1725.

contention that the IEPs proposed by MCPS had inadequate hours of special education.

In addition, Dr. XXXX did not provide a reasonable explanation as to why the Student's needs for foundational skills in reading and speech/language could not be addressed in a less restrictive setting than [School 1]. In fact, she testified that there was nothing about the Student's "social and emotional presentation" that would indicate that she should be segregated from non-disabled peers. Tr. at 1263. Dr. XXXX further testified that social skills are an area of strength for the Student; and that the Student even "emerged as a leader" and exhibited "a high level of understanding of fairness and making sure that everybody is [included]." Tr. at 1122. She did not know why the Parents were asking for social/emotional goals at the July 31, 2015 IEP team meeting. Tr. at 1261. In addition, Dr. XXXX could not offer any logical reason that the Student could not participate in lunch and recess with non-disabled peers. Tr. at 1165-66, 1262-63.

Dr. XXXX admitted she does not know anything about the [School 3] home school model, and she did not have sufficient information to determine if [School 3] was appropriate for the Student in the fourth grade. Tr. at 1190-91. Moreover, Dr. XXXX freely admitted that she had no knowledge whatsoever of [School 4] to determine whether the proposed placement there was appropriate for the Student for the fifth grade. Tr. at 1257-58. Nevertheless, she testified that [School 1] was the least restrictive environment for the Student "given her learning profile and the challenges she's facing." I found this analysis to be conclusory and self-contradictory.

In addition, Dr. XXXX's testimony made it clear that she spends more time on administrative matters relating to curriculum than contact with individual students, has no direct contact with students as part of her job description, has never been the Student's teacher, never tested the Student, never tutored her, and never spoke to any of the staff responsible for her education during her years at [School 3] except during the IEP meeting in which she participated by telephone. Tr. at 1188-89. For all of these reasons, I gave her testimony very limited weight.

Neither Ms. XXXX nor Dr. XXXX sufficiently addressed the specific accommodations contained in the IEPs proposed by MCPS for fourth and fifth grade and why those accommodations, many of which were included at the suggestion of Ms. XXXX, were insufficient to address the Student's issues with organization and executive functioning.

B. The goals and objectives proposed by MCPS were appropriately ambitious and challenging in light of the Student's circumstances, and the related services offered were reasonably calculated to enable the Student to make appropriate progress.

The Parents assert that the Student was unsuccessful at [School 3] in large part because school staff did not timely identify her needs and provide appropriate levels of instruction and supplementary aids and accommodations. In particular, the Parents contend that MCPS failed to identify and address the Student's needs in OT, reading, and speech/language.¹⁰

1. The Student did not need Occupational Therapy as part of her IEPs.

The Student received occupational therapy at [School 1] during both fourth and fifth grade. XXXX XXXX was the Student's occupational therapist during the 2014-2015 school year at [School 1], and Ms. XXXX provided the Student OT services one time a week during the 2015-2016 school year. Neither of them testified at the hearing. Ms. XXXX, who did testify at the hearing, worked with the Student only one time. Tr. at 818. She testified that OT was recommended by Ms. XXXX even though the testing conducted by Ms. XXXX showed only subtle difficulties in the Student's functionality, including ocular motor, delays in focusing between near and far points, and weak distal strength. Tr. at 820, 822.

Because she had such limited experience with the Student, Ms. XXXX was careful to testify that the Student "might struggle" with handwriting or picking up small objects, not that she

¹⁰ The Parents' Closing Memorandum did not detail any complaints about math-related goals, objectives and needs, except for an alleged decline in the Student's Woodcock-Johnson math scores that continued well after the Student was enrolled at [School 1]. See Clos. Mem. at 20, fn.5. Their remand brief raises math-related concerns that, to the extent not barred by the statute of limitations, were adequately addressed in the IEPs developed by MCPS.

“did” struggle with such tasks. *Id.* at 823. In fact, Ms. XXXX admitted that the Student’s elevated scores in the areas of balance and motion are “something that many children experience” and she further testified that was the only area the Student scored in the elevated range. Tr. at 821. Ms. XXXX also agreed that the Student’s gross motor skills were average. *Id.* The OT evaluation showed that the Student did have some subtle difficulty in crossing the body midline, but there was no indication that this interfered with the Student’s functionality in the classroom.

Looking back to the data that MCPS had when it developed the 2014-2015 IEP for the Student, Dr. XXXX noted in his November 2013 report that “the Student’s fine motor skills should continue to be monitored, and an O.T. consult can be pursued if concerns for her graphomotor or other functional motor skills warrant.” MCPS 12. In addition, Ms. XXXX testified that the Student “seemed as coordinated as the other third-grade students, so I didn’t notice anything out of the ordinary.” Tr. at 1744. Otherwise, the results of the OT testing conducted by [School 1] personnel did not warrant OT services being required as a part of the Student’s IEP. In short, the evidence demonstrates that the Student’s difficulties were neither pronounced nor pervasive during the third grade, and there is inadequate support in the record for Ms. XXXX’s opinion that the Student’s difficulties significantly impacted her functionality in the classroom or somehow became “pervasive” during fourth grade. Tr. at 835.¹¹

¹¹ I disagree with the Parents’ suggestion that IDEA jurisprudence prior to *Endrew F.* did not address a child’s functional and behavioral needs in assessing whether the child has received a FAPE. *See* Parents’ Remand Brief at 3 (“Therefore, a key teaching of *Endrew F.* is to emphasize that progress solely in academic subjects, without growth in functional life skills, is insufficient.”). Determining whether a school has adequately identified and addressed a child’s functional and behavioral concerns was already a part of the FAPE analysis prior to *Endrew F.*, and the functional and behavioral needs are explicitly mentioned in numerous sections of the IDEA statute and regulations that predate the decision in *Endrew F.* (*see* Section III, above). Functional and behavioral considerations were of particular importance in the *Endrew F.* case because the parents had specifically complained about the inadequacy of the behavioral aspects of the proposed IEP, and also due to the child’s unique behavioral and functional needs stemming from autism. *See Endrew F.*, 137 S.Ct. at 997 (The private school where Endrew had been unilaterally enrolled by his parents had “developed a ‘behavior intervention plan’ that identified Endrew’s most problematic behaviors and set out particular strategies for addressing them.” When presented with a proposed IEP from public school officials, Endrew’s parents “were particularly concerned that the stated plan for addressing Endrew’s behavior did not differ meaningfully from the plan in his fourth grade IEP, despite the fact that his experience at [the private school] suggested that he would benefit from a different approach.”)

Moreover, Dr. XXXX acknowledged that [School 1] did not require the Student to participate in OT, but that it was the Parent's prerogative to arrange for OT services. *See* Tr. at 1165-66. Dr. XXXX's testimony supports MCPS's conclusion that the Student did not have any OT needs. She stated that she "know[s] that the Student likes to participate in physical activities ... [and] played on the XXXX team last year when she was with us." Tr. at 1196. Dr. XXXX also acknowledged that the Student likes to ride horses, has an XXXX, and sewed Halloween costumes with the help of her grandmother. Tr. at 1195-7. She further acknowledged that the Student did not have difficulty with large motor skills. Tr. at 1242.

With respect to the IEP for 2015-2016, XXXX XXXX provided credible support for MCPS's position that the Student did not require OT services. Although he observed the Student for only short periods of time, he was only asked to address a limited range of issues in his testimony concerning the Student's functionality and need for OT services in a classroom setting. He testified that the Student could hold a pencil and direct it, could open a binder with ease, and was able to sit up straight at a desk. It was his opinion that the Student's fine motor skills were not an underlying barrier to her performance in the classroom, and she did not need services from an OT in the areas of sensory processing, ocular motor, or fine motor skills. He also stated that she did not need OT services to improve her grip strength or her handwriting. Tr. at 925-26, 938-39, 941. He also stated that in a school setting, it is generally the educator who works on organization and time management skills, not an OT. Tr. at 948, 953, 956-970.

I conclude that the Parents presented insufficient evidence to substantiate any need for the Student to receive OT services as part of her IEPs. MCPS gave due consideration to the report of XXXX XXXX. It also obtained additional information through Mr. XXXX. The evidence showed that the Student has cognitive ability that is slightly below average. Statements that she had difficulty using utensils, tying her shoes, holding a pencil, and crossing her midline appeared

exaggerated to me, particularly in light of other evidence—in many cases from the Parents’ own witnesses, indicating the Student was fully functional in the [School 3] general education environment. For example, in [School 1] Application for 2014-2015, the Parents wrote that the Student “is a beast on the XXXX field and will start XXXX in the spring.” MCPS 16.

For these reasons, I conclude that the Parents failed to meet their burden of proving that MCPS failed to adequately identify and address any OT needs. In sum, the Student did not have any OT needs that were required to be addressed in the IEPs for 2014-2015 or 2015-2016 to render them appropriate.

2. The IEPs proposed by MCPS contained appropriate reading and speech/language goals, objectives and related services.

The Parents presented testimony from XXXX XXXX, a speech pathologist employed by [School 1], to support their claim that MCPS “never developed goals or provided speech/language services to address [the Student’s] phonology.” Clos. Mem. at 10. Having considered his testimony, I conclude that the foundational skills that Mr. XXXX described as being needed by the Student would have been addressed by a reading specialist, a special educator and/or a speech pathologist pursuant to the IEPs proposed by MCPS for 2014-2015 and 2015-2016. In particular, Mr. XXXX’s testimony indicates that the Student needed to work on phonology goals, and that phonology involves the ability to recognize, segment, and blend the sounds corresponding to letter symbols, and then using those skills to

decode words that are multisyllabic ... [to] go through that word sound by sound or syllable by syllable when you get to the point where you’re teaching about syllables, but you still have to hold it in memory and blend the rest of it together and then blend it all together. And so that’s still a phonology goal and so you need to continue to work on those underpinnings for literacy when you go to spell out multisyllabic words.

Tr. at 649-650; Clos. Mem. at 9-10.

MCPS presented testimony from XXXX XXXX and XXXX XXXX regarding the scope

of MCPS's services and resources in reading and speech pathology. Ms. XXXX is a speech pathologist with MCPS who reviewed the goals and objectives stated in the IEPs prepared by [School 1] for the 2014-2015 and 2015-2016 school years. It was her opinion that all of these goals and objectives would have been adequately addressed had the Parents accepted the IEPs proposed by MCPS for the same years. She explained the various services, aids and accommodations that would have been provided by special educators, general educators, reading specialists and speech pathologists. Tr. 758-760. I found her testimony to be credible, in part because both parties accepted her as an expert in her field and she was willing to admit that she was unfamiliar with some of the testing that had been administered in determining the Student's needs.

Ms. XXXX is a reading specialist at [School 3] who worked directly with the Student during third grade for three to four times a week. Ms. XXXX testified that she coaches teachers in literacy, consults with them on specific students, attends team meetings to make sure that reading planning is appropriate and rigorous, and incorporates strategies into individualized programs for students, including the Student. Tr. at 1713. She is not part of the special education department, but does provide interventions for students who are struggling in reading. Tr. at 1714.

Ms. XXXX testified that [School 3] uses the Read Naturally program for reading fluency; Fountas and Pinnell for reading interventions and teaching decoding and comprehension; Read About, a computer-based intervention for comprehension; portions of the Wilson reading program for phonics; and Words Their Way as a word-study phonics program. She stated that they have all been proven to work with struggling readers. Tr. at 1715.

Having considered Ms. XXXX's testimony and the record as a whole, I conclude that instruction in the "phonology" skills described by Mr. XXXX would have been provided to the

Student under the 2014-2015 and 2015-2016 IEPs proposed by MCPS. The testimony offered by MCPS through Ms. XXXX and Ms. XXXX was a cogent and responsive explanation as to how the IEPs were reasonably calculated to enable the Student to make appropriate progress on the reading and speech/language goals, including those discussed by Mr. XXXX. *See Andrew F.*, 137 S.Ct. at 1001.

Further to this point, Dr. XXXX stated that she was unable to opine on whether the Student's speech/language needs could be met by a MCPS reading specialist. Tr. at 1235. The IEPs proposed by MCPS for 2014-2015 and 2015-2016 contain explicit, measurable goals in reading and speech/language. While it is true that some reading and speech/language goals in prior IEPs proposed by MCPS had not been accomplished by the Student, the testimony of Ms. XXXX and Ms. XXXX (who agreed with the goals espoused by Mr. XXXX) showed that the reading and speech/language goals in the 2014-2015 and the 2015-2016 IEPs were appropriately ambitious and challenging.

The IEPS also contain appropriate hours, services, and supplementary aids in the areas of reading and speech/language, even if not all of the services are provided by a licensed speech pathologist. In support of their position, the Parents point to Ms. XXXX's testimony that she agreed with a position paper published by the American Speech-Language Hearing Association (ASHA) addressing the "critical" role that speech/language pathologists play in early literacy. Clos. Mem. at 10. Nevertheless, I conclude that the ASHA position paper is merely a recommendation and the final decision on which services are provided, and how they are provided, remains a matter for the school system to decide under the IDEA. *See Andrew F.*, 137 S.Ct. at 999, citing *Rowley*, 458 U.S. at 206-207 (role of court review is to determine "whether the IEP is *reasonable*, not whether the court regards it as ideal").

For all of these reasons, I conclude that there is no merit to the Parents contention that

MCPS failed to identify or adequately address the Student's needs in the areas of reading and speech/language. For the same reasons, I conclude that the reading and speech/language goals and objectives developed by MCPS for 2014-2015 and 2015-2016 were appropriately ambitious and challenging. *Andrew F.*, 137 S.Ct. at 1002. And even though she performed consistently below grade level in reading and speech/language skills, the record is undisputed that the Student was progressing from grade to grade.

C. The 2014-2015 IEP was reasonably calculated to enable the Student to make progress appropriate in light of her circumstances in the least restrictive environment.

The Parents contend that the IEP developed by MCPS for 2014-2015 was deficient. The Parents do not dispute that MCPS held extensive meetings, starting in January 2014, to develop the Student's fourth grade IEP. There is also no genuine dispute that the parties reached a critical juncture in the development of the IEP on February 3, 2014. As of that date, the Parents were in agreement with all aspects of the draft IEP except for the way that the hours of special education were broken up between the general education and special education settings. Ms. XXXX's testimony was clear on this point. Tr. at 483-88. This agreement was the result of an open, deliberative process in which the Parents and their representatives participated.

Much of the Parents' argument in its Closing Memorandum and remand briefs focuses on the Student's alleged lack of progress prior to the 2014-2015 school year. As explained above, claims arising from events on or before March 7, 2014 are barred by the statute of limitations. Moreover, these arguments are at odds with the Supreme Court's recognition in *Andrew F.* that "crafting an appropriate program of education requires a prospective judgment by school officials." *Andrew F.*, 137 S. Ct. at 999. By retaining *Rowley*'s "'reasonably calculated' qualification,'" the *Andrew F.* decision reinforces the principle that courts must be mindful that they are reviewing the forward-looking decisions of school authorities. *Id.* Here, in addition to

the Student's Parents, Ms. XXXX participated in the development of the IEPs. *See id.* at 1001 (“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.”). Applying these principles, I conclude that the IEP for the 2014-2015 school year was reasonably calculated to enable the Student to make progress appropriate in light of her circumstances. *Andrew F.*, 137 S.Ct. at 999,

In support of their contention that the IEP was not reasonably calculated to enable the Student to make appropriate progress,¹² the Parents presented evidence regarding the Student's reading level when she entered [School 1]. Dr. XXXX testified that the Student was reading at a pre-primer 2 level when she entered [School 1] in September 2014. Tr. at 1077. She remarked that the Student showed very little, if any, sound/symbol relationship in her writing and could not write independently. Tr. at 1105, 1121. To rebut this, MCPS presented persuasive evidence that at least part of the reason for the Student's reported levels of performance upon entering [School 1] was a “summer slide” in her reading and other academic abilities due to the Parents' decision not to take advantage of the summer ESY services proposed by MCPS. In fact, Dr. XXXX admitted that the summer slide could have been eliminated or at least significantly ameliorated had the Parents taken advantage of the ESY offering made by [School 3] for summer of 2014. Tr. at 1224. This was corroborated by Ms. XXXX, who testified that she “would have expected regression had she not had explicit instruction over the summer.” Tr. at 1759. In addition, Dr. XXXX acknowledged that the Student had developed useable skills in sight word efficiency and phonemic decoding before coming to [School 1]. See Tr. 1127.

Although Ms. XXXX testified that the Student had not met any of her third grade IEP goals, that same testimony overlooked the notes showing progress toward those goals throughout

¹² On remand, the Parents argue that the IEP fails to satisfy the *Andrew F.* standard. Previously, the Parents used the phrase “meaningful benefit” and “meaningful progress.” Parents' Clos. Mem. at 4, 12, 17.

the third grade. XX 15-A; XX 36-A.¹³ It also contrasts with Ms. XXXX's testimony that the [School 3] staff she worked with are "excellent" and that she "worked collaboratively" with them.

D. The 2015-2016 IEP was reasonably calculated to enable the Student to make progress appropriate in light of her circumstances in the least restrictive environment.

For purposes of the Student's 2015-2016 IEP, MCPS considered the Student's experiences at [School 1] and recommended a different approach by proposing a placement at the [School 4] XXXX Center. *Compare Endrew F.*, 137 S.Ct. at 997 (The parents' complaint was that the IEP's "stated plan for addressing Endrew's behavior did not differ meaningfully from the plan in his fourth grade IEP, despite the fact that his experience at [a private school specializing in the treatment of autism] suggested that he would benefit from a different approach.") (Emphasis added). According to the Parents' witness Ms. XXXX, the [School 4] XXXX Center is inappropriate for the Student because "the majority of students in those classes have multiple needs or more-intense needs than—than the Student did." Tr. 273. She opined generally that [School 4] would not be an appropriate placement for the Student because

the students in the -- in [School 4] XXXX Center have significant social-skill deficits or behavioral -- more behavioral needs, they need more help with organizational needs, executive functioning needs, they have students -- many students on the spectrum.

Tr. at 276. Ms. XXXX "still felt [the Student] needed to be self-contained for science and social studies, it was -- because the model at [School 1] was working so successfully for her." Tr. at 268.

I did not find this opinion persuasive. Ms. XXXX did not adequately explain how the Student's needs differed from those of other students at Montgomery County XXXX Centers generally. In fact, based on Ms. XXXX's own testimony, the Student fit the profile of a student

¹³ The progress indicated by these notes also distinguishes this case from *Board of Education of Frederick County v. I.S. ex rel. Summers*, 325 F. Supp. 2d 565. See Clos. Mem. at 13.

who would benefit from the XXXX Center environment:

A XXXX Center is a program for students that have low-average to below-average cognitive ability that need self-contained classes for the majority of their school day, it has a low student-to-teacher ratio, and students are included for their content classes, and for lunch, and recess with other students.

Moreover, Ms. XXXX's conclusions were not based on being a teacher at [School 1], but rather on very limited observations of their programs and touring the school and classrooms. Tr. at 270.

In particular, Ms. XXXX testified that "within the last two years I have been [at [School 1] but not necessarily when the Student was there] more than a handful of times." Tr. 271. Ms.

XXXX's observations of the Student in [School 1] setting were so limited that I have given them, and the conclusions she drew from them, little weight. Tr. at 272.

Furthermore, MCPS effectively rebutted Ms. XXXX's opinion with testimony from Ms. XXXX and Ms. XXXX XXXX. Ms. XXXX testified that the IEP team reviewed the Student's present levels and "adjusted the goals based on that." Tr. at 1800. Moreover, the IEP team carefully considered the Student's performance at [School 1] and the anecdotal evidence provided by the Parents and Ms. XXXX. See Tr. at 1816. Regarding the placement proposed, Ms. XXXX testified:

The XXXX Center has got a balance of what we were looking for as an IEP team in terms of giving her the right amount of support, most importantly giving her reduced class sizes, and that's something we didn't have at [School 3]. That the team wanted to make sure she had a lower student-to-teacher ratio, and that's available at [School 4], and the teachers in the XXXX Center are special educators who would be well-equipped to meet her needs.

Tr. at 1818. Ms. XXXX also opined that [School 4] constituted the Student's least-restrictive environment "because students are integrated to different degrees, some students spend more of their time in the inclusive classroom and maybe only go to lunch and recess with their general-education peers and some students who are more highly able would be able to integrate

for science, and social studies, or maybe math, depending on what their IEP goals and challenges were.” *Id.*

Ms. XXXX is the Coordinator at [School 4] XXXX Center and was accepted as an expert in special education. Tr. at 1913-14. She testified that the various XXXX Centers operated by MCPS are “designed for students who are functioning on the general education curriculum but are significantly below grade level or need significant supports to access the general education curriculum.” Tr. at 1915. According to Ms. XXXX, the XXXX Centers accept students with a range of cognitive abilities (there is no disqualifying cutoff) and there is no specific disability code that would dictate admission or rejection of a student. Tr. at 1916.

The XXXX Centers offer speech, OT, physical therapy, and interact (which is similar to HIAT) services to students. *Id.*

Ms. XXXX explained that, depending on a student’s IEP, the XXXX Center can tailor programs that run the range from self-contained in a special education setting for most of their academics, to students who are fully included in the general education setting. Tr. at 1918. During the 2015-2016 school year, there were no students with emotional, intellectual or multiple disabilities in the fifth grade class at [School 4] XXXX Center. Tr. at 1980.

Ms. XXXX further testified that there are no non-disabled students in the self-contained classes at the [School 4] XXXX Center. Tr. at 1919. A typical special education class contains ten to fourteen students, one teacher, and up to three paraeducators depending on the needs of the students in the class. Tr. at 1920. Students with special needs participate in lunch and recess with general education students, with paraeducators present depending on the level of needed support. Tr. at 1922. While approximately twenty percent of XXXX Center students have a disability code for autism, none of them are severely autistic.

While it is true that Ms. XXXX never met, taught or tested the Student, based on her

analysis of the testimony regarding the Student's educational history, Ms. XXXX opined that the Student is a student who "accesses the general [education curriculum] but really struggles with the reading piece to be able to do that independently." Tr. at 1926, 1966. She also testified that the [School 4] XXXX Center has students who meet the Student's profile, and that the XXXX Center is equipped with special educators and reading specialists on staff to meet the Student's needs. Tr. at 1926, 1929, 1930-33. According to Ms. XXXX, it is typical to have students with average levels of executive functioning, like the Student, at the XXXX Center. Tr. at 1937. She also stated that it is typical for students at the [School 4] XXXX Center to have an average presentation in behavioral categories but suffer from problems in the area of attention, and that the Student's expressive and receptive language needs could be met at the XXXX Center where there are speech pathologists on staff. Tr. at 1944. For specials, science, social studies, lunch and recess, the Student would have been in a general education setting with classes of approximately thirty students having two to three adults present. Tr. at 1958.

Ms. XXXX's testimony provided support for MCPS's position that the Student could have made appropriate academic and functional progress had she attended the [School 4] XXXX Center for the 2015-2016 school year. As recognized in *Andrew F.*, "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Andrew F.*, 137 S.Ct. at 999, citing *Rowley*, 458 U.S. at 206-207. Ms. XXXX's opinions concerned whether the Student's profile is within the range of students she typically sees at the [School 4] XXXX Center, and this led her to a reasoned, "prospective judgment" that the Student would be able to make appropriate progress if she enrolled there. See *Andrew F.*, 137 S.Ct. at 999, citing *Rowley*, 458 U.S. at 207. Ms. XXXX was present for most of the hearing and heard extensive testimony from both sides about the Student's educational background and issues.

Thus, there was an adequate foundation for her opinions regarding the Student's fit as a student at

the XXXX Center.

Further, Ms. XXXX's testimony convinced me that the tour of [School 4] that the Student's mother took in the summer of 2015 was not indicative of the atmosphere and instruction that the Student would have encountered at [School 4] had she attended for the 2015-2016 school year. The Student's mother visited when most teachers were gone for the summer, there were no students in the building, the floor was being replaced in the cafeteria, and there were a number of cleaning workers present. Tr. at 1952-53. A "screening room" previously used by a teacher was still in place during the mother's tour, and the mother was concerned that the screening room would be used as an inappropriate behavioral aid if the Student enrolled at the XXXX Center. However, Ms. XXXX's testimony convinced me that the screening room was no longer a part of any of the classrooms at the XXXX Center. Tr. at 1954.

The Parents argued that the XXXX Center was inappropriate because there were children with "various disability codes" and the IQs ranged from borderline to low average. Clos. Mem. at 39. The Parents further contended that there have been no studies to assess the effectiveness of the XXXX Center. *Id.* Both of these arguments are misplaced because the proper inquiry in a case where a party is seeking reimbursement for a unilateral placement is whether the IEP proposal made by the Local Education Agency (here, MCPS) is appropriate for the individual student—not whether other students with other profiles have or have not experienced success in the past in the same school. As both *Andrew F.* and *Rowley* make clear, the results of individual students to educational programming can vary greatly. *Andrew F.*, 137 S.Ct. at 999; quoting *Rowley*, 458 U.S. at 202 (the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between").

As part of their presentation to prove that the Student did not make appropriate progress while at [School 3], the Parents pointed to the Student's scores on successive administrations of the WJ test. Yet, the Parents' own expert in special education, Dr. XXXX, agreed that scores from serial administrations of the WJ should not be used to determine the presence or absence of academic progress. I agree, and have given very little weight to the evidence on WJ score comparisons presented by either party.

In further support of their argument that the fourth grade IEP proposed by MCPS was deficient, the Parents cited the increased hours offered by MCPS in the fifth grade IEP. Having reviewed the arguments of the parties, I conclude that there is not merit to this contention. Ms. XXXX testified that for the 2015-2016 school year, the IEP team recommended seventeen-and-a-half hours of direct special-education services outside general education and two hours, thirty minutes of special-education services in general education for the Student's fifth grade year. She explained the substantial increase in special education hours outside the general education setting (as compared to the 2014-2015 IEP) as follows:

So, as I said before, the first time when she just switched to English we were waiting to see if instruction in the regular classroom was appropriate and we needed to give her time to respond to that appropriate instruction to develop her hours. After a year at [School 1] in a special-education program we considered the input from [School 1] and from the Parents in determining what her—what the most appropriate placement would be and this would have been something that we would have—this is when we recommended her to go to a XXXX Center in Montgomery County.

Tr. at 1802-3. I find this explanation to be cogent and responsive. At the same time, I did not accord any deference to the opinions of Ms. XXXX, Ms. XXXX or other MCPS personnel in reaching my conclusions. The evidence presented by the Parents did not persuade me that MCPS acted improperly when it decided to substantially increase the Student's outside special education hours for fifth grade. In reaching this conclusion, I considered evidence of the Student's

academic performance in and after June 2014. See Clos. Mem. at 23-24. The testimony of Ms. XXXX and Ms. XXXX demonstrated that the 2015-2016 IEP was tailored to the Student's particularized needs. See *Endrew F.*, 137 S.Ct. at 1001 ("The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.")

E. The 2016-2017 School Year

In their due process complaint filed on March 7, 2016, the Parents requested that "MCPS reimburse them for the costs of placing the Student at [School 1] for the 2014-2015 school year and place and fund her there for the 2015-2016 school year." XX Ex. 1 at 16. In their Closing Memorandum, the Parents expanded this request and now seek "that the Student should be placed and funded at the [School 1] for 2016-2017." Clos. Mem at 45.

I decline to address this request because it was not set forth in the Parents' Due Process Complaint and further because I was not provided sufficient information about the annual IEP review process for the 2016-2017 school year. Moreover, the Parents provided no legal authority to support the expansion of their request for relief. Even if I have the discretion to make a prospective placement decision, it makes little sense to do so without the evaluation results. Rather, an IEP team needs to meet to make a placement decision for the 2016-2017 school year in the first instance.

Pursuant to *Carter*, a parent's private placement choice is analyzed only if the IEP proposed by the local education agency results in a denial of a FAPE. 510 U.S. 7; *Burlington*, 471 U.S. 359. In this matter, I have concluded that the IEP and placement offered by MCPS for the 2014-2015 and 2015-2016 school years do offer the Student a FAPE. Further analysis pursuant to *Burlington* and *Carter* is inapplicable and the issue of whether [School 1] or any private educational setting is proper does not need to be addressed in this decision.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parents failed to prove that the Montgomery County Public Schools did not offer the Student a free appropriate public education for the 2014-2015 and 2015-2016 school years and that they are entitled to reimbursement for tuition and expenses at [School 1] for those years. 20 U.S.C.A. § 1414 (2017); 34 C.F.R. §§ 300.148 (2016); *Andrew F. ex re. Joseph F. v. Douglas Cty. School Dist. RE-1*, --- U.S. ---, 137 S.Ct. 988 (2017); *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *School District Four v. Carter*, 510 U.S. 7 (1993).

I further conclude that the issue of the Student's placement and funding for the 2016-2017 school year was not raised in the Parents' due process complaint and is not ripe for consideration.

XX Ex. 1.

ORDER

I **ORDER** that the Parents' request for placement and reimbursement for tuition and expenses at [School 1] for the 2014-2015, 2015-2016, and 2016-2017 school years is **DENIED**.

August 14, 2017
Date Decision Issued

John J. Leidig
Administrative Law Judge

JJL/dlm

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2016). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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

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