

XXXX XXXX,

STUDENT

v.

ANNE ARUNDEL COUNTY

PUBLIC SCHOOLS

*** BEFORE LAURIE BENNETT,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH No.: MSDE-AARU-OT-17-18091**

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DECISION

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STATEMENT OF THE CASE

On June 13, 2017, XXXX XXXX and XXXX XXXX (Father and Mother individually, and Parents collectively) filed a Due Process Complaint for their son, XXXX XXXX (Student), with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Anne Arundel County Public Schools (AACPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).

I held a telephone prehearing conference on July 31, 2017, following the parties' unsuccessful mediation session. Paula A. Rosenstock, Esquire represented the Student. Tyson Bennett, Esquire, represented AACPS. Based on the availability of the parties, their witnesses and the Administrative Law Judge, a hearing was scheduled for September 1, 5, 7, and 8, 2017. I convened the hearing as scheduled, at which time Michael J. Eig and Ms. Rosenstock represented the Parents, and Mr. Bennett represented AACPS.

I held the record open for the parties to file post hearing briefs as follows: the Parents shall file no later than September 15, 2017; AACPS shall file no later than September 22, 2017; and the Parents shall file a reply no later than September 27, 2017. On September 21, 2017, AACPS asked to extend its due date to September 27, 2017, and as a result the Parents asked to extend their reply date to October 2, 2017, which requests I granted without objection from the parties. On receipt of the Parents' timely reply, I closed the record.

The hearing dates fell more than forty-five days after the triggering events described in the federal regulations. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2016). Because I could therefore not issue my decision within forty-five days, the parties requested and I granted a specific extension of time until thirty days from the filing of the Parents' reply brief as originally scheduled, on September 27, 2017; the parties did not request a specific extension from the new reply date. Thus, the decision is due October 27, 2017. 34 C.F.R. 300.515 (2016); Md. Code Ann., Educ. § 8-413(h) (Supp. 2017). The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R. § 300.511(a) (2016); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2017); 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; Maryland State Department of Education's procedural regulations; and the OAH's Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

The issues are whether the AACPS offered the Student an individualized education program (IEP) reasonably calculated to provide a free appropriate public education in light of the Student's circumstances for the 2016-2017 and 2017-2018 school years and, if not, whether it shall reimburse the Parents for the cost of his education at a private school for the 2016-2017

school year and pay for the cost of his education at the private school for the 2017-2018 school year.

SUMMARY OF THE EVIDENCE

Exhibits

As required by IDEA, the parties disclosed exhibits they expected to file at hearing (with the exception of rebuttal documents) at least five days before the hearing.¹ At hearing, they stipulated to the admissibility of the documents. I ruled that I would only consider those documents referred to at the hearing, as follows:

For the Parents:

- 2 [School 1] Oral Language Evaluation, 06/15/10 and 06/21/10
- 3 Phono-Graphix Screening Results & Treatment Summary, 08/10/12
- 4 AACPS Psychological Assessment Report, 04/27/13
- 5 AACPS Academic Assessment Report, 04/27/13
- 6 AACPS Communication Assessment Report, 04/27/13
- 7 AACPS Comprehensive Evaluation Review, 04/27/13
- 9 AACPS IEP, 05/06/14
- 10 AACPS 2014-2015 Fourth Marking Period Report Card, printed 06/22/15
- 11 Student's work sample, 09/2015 to 11/2015
- 12 Letter to Parents from AACPS, 02/08/16
- 13 Neuropsychological Evaluation, 02/24/16 and 03/04/16
- 18 IEP, 04/21/16
- 23 IEP, 05/23/16
- 25 Email to Parents from XXXX XXXX, 06/08/16

¹ See 34 C.F.R. § 300.512 (2016).

- 27 AACPS Wilson Reading System progress report, 01/23/15
- 28 Email between Parents and AACPS staff, 02/09/16, with attached writing sample
- 29 Letter from [School 2] to Parents, 07/12/16
- 33 Maryland State Department of Education Mathematics and English Language Arts/Literacy Assessment Reports, printed 08/2016
- 34 [School 2] Individual Student Report, 09/2016
- 35 AACPS IEP Team Meeting Report and Prior Written Notice, 09/22/16
- 37 [School 2] IEP, 11/29/16
- 39 Observation Report by XXXX XXXX, 01/31/17
- 40 Reactions to AACPS Draft IEP by XXXX XXXX, 02/08/17
- 45 AACPS IEP, 03/30/17
- 49 Test Score Comparison, 2013 vs. 2016
- 50 Side by Side Comparison of Student Evaluation Scores, [School 2] – 6th Grade, 08/23/17
- 51 [School 2] IEP, 06/09/17
- 52 Student's work samples from his private school
- 54 Letter from XXXX XXXX, M.D. To Whom It May Concern, 08/24/17
- 55 Resume for XXXX XXXX
- 56 Resume for XXXX XXXX, Psy.D.
- 57 Resume for XXXX XXXX
- 58 Resume for XXXX XXXX
- 59 Video of Student
- 60 [School 2] Report Card, 2016-2017 school year, 06/16/2017

For AACPS:

- 1a Resume for XXXX XXXX
- 1b Resume for XXXX XXXX
- 1d Resume for XXXX XXXX
- 1e Resume for XXXX XXXX
- 1f Resume for XXXX XXXX
- 14 IEP Team Meeting Report, 02/09/16
- 17 IEP 04/21/16

Testimony

For the Parents:

- XXXX XXXX, the Mother
- XXXX XXXX, [School 2], Co-Head, accepted as an expert in special education
- XXXX XXXX, [School 2], Director of Education, accepted as an expert in special education and administration
- XXXX XXXX, Executive Director of XXXX Group, accepted as an expert in special education with focus on twice exceptional learners (*i.e.*, students who are gifted and disabled).²
- XXXX XXXX, Psy.D., accepted as an expert in neuropsychology³

² AACPS suggested Mr. XXXX is biased because he considers himself an “advocate.” I disagree with AACPS. Mr. XXXX described his XXXX Group as a group of special education consultants, psychologists, a neuropsychologist, occupational therapists, speech therapists, behavioral intervention specialists, etc., who help parents determine what their children’s strengths and needs are, what the appropriate school placement is, and what services they need in school. He and others in his practice sometimes attend IEP meetings. Mr. XXXX testified he does not always advocate for private education. Although Mr. XXXX advocates for students and in this case he is advocating for the Student’s placement at [School 2], I did not find him one-sided or biased in favor of private education. Thus, I have not discounted his opinions.

³ Ms. XXXX is a licensed clinical psychologist with a subspecialty in neuropsychology. She explained neuropsychology is a subspecialty of psychology that “is concerned with understanding the relationship between the brain and behavior and thinking skills and using neuroscience to understand a person’s pattern of strengths and weaknesses that then help us to understand certain neurocircuitry that may need evidence-based intervention to facilitate intervention of things like learning disabilities, developmental disabilities, acquired brain injuries, and an array of social/emotional behavior disorders.” Tr. 106.

For AACPS:

- XXXX XXXX, AACPS Resource Teacher, accepted as an expert in special education⁴
- XXXX XXXX, AACPS Principal, [School 3], accepted as an expert in education and education administration
- XXXX XXXX, AACPS IEP facilitator,⁵ accepted as an expert in special education
- XXXX XXXX, accepted as an expert in school psychology
- XXXX XXXX, AACPS general education teacher for the Student's fifth grade reading and writing classes, [School 3], accepted as an expert in elementary education

FINDINGS OF FACT

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

1. The Student was born in XXXX 2005. At all relevant times, he has lived with his parents and siblings in Anne Arundel County, Maryland.
2. The Parents first noticed the Student had learning difficulties before kindergarten. He had trouble learning the letters of the alphabet and counting; he did not always use the correct word, despite having an excellent vocabulary; he confused similarly sounding words; he incorrectly used pronouns; and he could not rhyme, despite exposure to rhyming words.⁶
3. In 2010, prior to his kindergarten year, the Student underwent an oral language evaluation by AACPS. Results were consistent with a speech articulation and phonological disorder and expressive language disorder. He was identified as at risk for academic difficulties in decoding and fine motor skills.

⁴ Ms. XXXX also has ten years of experience as a special education teacher in self-contained, co-taught classes.

⁵ As a facilitator, Ms. XXXX is responsible for IEP compliance at two middle schools, including the one proposed for the Student.

⁶ The Parents' observations are described in greater detail in XXXX XXXX's June 2010 Oral Language Evaluation. Parents' Ex. 2.

4. The Student was referred to “child find”⁷ at age four due to concerns about his speech articulation, slow oral response, inattention, and fine motor delays. He was not found eligible for services. On receipt of the child find results, [School 3] ([School 3]) gave the Parents some worksheets to use with the Student to improve his skills.

5. In June 2010, XXXX XXXX, Executive Director of XXXX Group, and an expert in special education with a focus on twice exceptional learners (*i.e.*, gifted and disabled), performed an oral language evaluation on the Student. The Student’s strengths were vocabulary knowledge and language comprehension. His weaknesses were in phonological and morphological components of language development, which would impede his ability to develop reading decoding and spelling skills, and rapid naming and word retrieval, which might compromise the development of reading fluency. Also, the Student exhibited a mild speech production disorder (*i.e.*, speech articulation), a mild expressive language disorder, a mild to moderate phonological processing disorder, and difficulty with fine motor tasks. The Student was at risk for difficulties with reading, spelling, written language, and handwriting. Mr. XXXX made various recommendations to address these problems within the public school system.

6. In September 2011, during the Student’s first grade school year, he underwent screening to assess his phonological processing skills. He was identified as having phonological errors in segmenting, sound blending, and manipulating; difficulties in sound-symbol correspondences,

⁷ Under IDEA’s “child find” provision, local school agencies are charged with a duty to identify, locate, and evaluate children who have a disability or who are suspected to have a disability. *See Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (“State educational authorities must identify and evaluate disabled children[.]”); 20 U.S.C.A. § 1412(a)(3); 34 C.F.R. § 300.111. The IDEA requires school systems to have a child find system or plan to ensure that all children who are in need of special education services are located, identified and referred appropriately. A school system’s child find duties are triggered if the system has reason to suspect a disability and to suspect that special education services may be needed. “When these suspicions exist, the [school] district must conduct an evaluation of the student to determine whether the student qualifies for special education services.” Local school systems may face liability for their failure to identify, locate, or evaluate a potentially disabled child, as that would essentially constitute a denial of FAPE. *See, e.g., El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918 (W.D. Tex. 2008) (in reviewing school district’s compliance with the IDEA, the court considers: (1) whether the district had reason to suspect that a student had a disability, and that special education services might be needed to address that disability, and (2) whether the school district evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability).

reading fluency, and speech sound production; and deficient sequencing skills. He received speech language therapy.

7. In the first grade, during the 2011-2012 school year, the Student participated in the Wilson Foundation reading intervention program. He made little progress in decoding and comprehension. He continued to exhibit poor phonemic awareness and fluency, and he scored below average on reading benchmarks. He had significant difficulty sitting still, although he would not be diagnosed in this regard for several years.

8. In September 2011, when the Student was seven years, [months] old, a speech-language pathologist assessed the Student's phonological processing skills. The Student had fair blending skills and poor segmenting and manipulating skills, and he was in the low to moderate range in code knowledge (*e.g.*, he was shown a list of fifty letters or sets of letters and correctly identified only 50% of the sounds). Speech-language services were recommended.

9. The phonological assessment was re-administered in 2012. The Student showed some gains in sound segmenting, blending and manipulating, code knowledge, and speech production, but he still required speech-language services.

10. During the 2012-2013 school year, while the Student was in the second grade, he continued to show difficulty with reading and writing skills.

11. During the 2013-2014 school year, while the Student was in the third grade, AACPS identified the Student as having a learning disability for IDEA purposes. He attended [School 3], a general education school, where he attended the general education classroom and received push-in and pull-out services.

12. By the spring of 2013, the Student was still showing difficulty with decoding, written expression, inattention, finding words and remembering what he meant to say. He displayed high cognitive ability.

13. In April 2013, [School 3] referred the Student for a comprehensive evaluation, including:⁸
- a. An academic assessment to determine his present levels of performance in reading and written language: the Student showed below average reading; average written expression; below average phonological awareness (*i.e.*, the ability to put two sounds together to make a word); below average oral reading; and high verbal aptitude.
 - b. A communication assessment to determine his present levels of performance in receptive and expressive language: the Student had above average scores in core language, receptive language, expressive language, language content, and language structure; his overall language skills in the area of vocabulary, syntax/morphology, auditory integration, and verbal reasoning were in the above average range; he was in the above average range in overall language skills; and his articulation skills were in the average range.
 - c. A psychological assessment to determine his present levels of performance in intellectual/cognitive functioning, and his ability to maintain necessary levels of attention for task completion: his cognitive abilities were in the average to superior range; he had an average score on verbal comprehension, a superior range score for perceptual reasoning, an average score on working memory, and a superior score for processing speed; his strengths were in non-verbal reasoning. His weakness was in working memory; his full scale standard intelligence score was 119, but his strengths and weakness were significant; he showed sign of hyperactivity/impulsivity; he had significant difficulty maintaining appropriate activity levels; and he met the diagnostic criteria for attention deficit hyperactivity disorder (ADHD, a neurobiological disorder), primarily hyperactive/impulsive type, due to inattention and self-regulation

⁸ My intention here and elsewhere in these Findings of Fact is not to recite every score but, rather, to highlight the Student's deficits.

difficulties across settings. Recommendations were made to address his disability because ADHD was negatively affecting his ability to stay attentive in school.⁹

14. The comprehensive evaluation showed the Student had a specific learning disability, with affected areas in reading (also known as dyslexia), written expression, and requisite learning skills, and he had attention deficit hyperactivity disorder – primary hyperactive/impulsive type.

15. As a result of the comprehensive evaluation, AACPS developed an IEP. Because the Student also has gifted capabilities (*e.g.*, in 2013, he was in the superior range for perceptual reasoning¹⁰ and processing speed, and his full scale IQ is in the superior range), he is considered a twice exceptional student. AACPS implemented the IEP in the Student’s fourth grade school year at [School 3].

16. The Student’s strength is in oral content. Thus, he does better if someone reads an assignment or test to him than if he has to read the material himself.

17. The Student attended a general education classroom at [School 3] for the fourth grade during the 2014-2015 school year.

18. The Student’s fourth grade IEP called for five hours, forty-five minutes weekly of special education services in the areas of reading, written expression and requisite learning (*i.e.*, skills that support learning, such as executive function – organization, attention to task, ability to self-monitor). The service was provided in the general educational classroom. He also received three hours, forty-five minutes of pull-out services in reading.

19. During the fourth grade, AACPS used the Wilson Reading System (Wilson) for the Student. Wilson is a twelve-step, “research-based program [that] provides direct, explicit, and

⁹ A list of recommendations appears at Parents’ Ex. 4, p. 5.

¹⁰ More recent testing in 2015 shows his perceptual reasoning at the twenty-third percentile. Mr. XXXX explained the decrease: as students age, the perceptual reasoning test has more executive functioning demands that are difficult for someone like the Student who has significant executive functioning challenges. Mr. XXXX testified the Student’s anxiety may also play a role in the reduced score. He observed it is reasonable to trust a high score on assessments because students cannot score higher than their capability, but they can score lower because, for example, they are not exerting effort or they are having a bad day.

systematic instruction in phonemic awareness, phonics, fluency, and spelling.” Parents’ Ex. 27, p. 1. Wilson supports students who have a lack of knowledge of the phonological components of language. Any special education or general education teacher trained in Wilson can instruct with it. Wilson’s steps do not correlate with a school grade. Thus, step six means a student is halfway through the program, not at the sixth grade level.

20. The Student received Wilson as a pull-out service that was in addition to instruction provided to him in the classroom. The Student completed Step 3 by December 2014. In February 2015, the Student was at Step 6.

21. In fourth grade, the Student was absent twenty-three days in fourth grade, partly due to illness.

22. Although the Student received As and Bs in his course work, his reading was below grade level during fourth grade.¹¹

23. The Student matriculated to the fifth grade and, again, AACPS developed an IEP to address his specific learning disability. The Student attended [School 3].

24. The Student attended fifth grade in a general education classroom at [School 3] in the 2015-2016 school year.

25. His IEP called for nine hours, thirty minutes of special education.

26. In September 2016, the Student was assessed using the Wilson Assessment of Decoding and Encoding (WADE). He read twenty-three percent of nonsense words correctly.

27. The Student continuing receiving Wilson instruction on a pull-out basis with his special educator, Ms. XXXX, in the fifth grade during the 2015-2016 school year. By the end of fifth grade, in April 2016, the Student was still at Step 6 (where he was fourteen months earlier, in February 2015).

¹¹ Mr. XXXX explained the discrepancy: “He’s doing what [is] expected of him by his teacher and by the school system at his level, but again, he is not closing the gap to even work on grade level, and he is a student who’s capable of above grade level.” Tr. 38-39.

28. In fifth grade, XXXX XXXX was the Student's general educator in reading and math, and the Student was pulled out for two hours, thirty minutes per week for Wilson with Ms. XXXX.

29. In fifth grade, the Student was verbally expressive, creative, and curious; he was interested in science, history, video games, and movies; and he needed structure, accommodations and modifications, such as using rubrics, check lists, chunking (*i.e.*, breaking assignments into smaller tasks), restating directions, someone checking in with him to make sure he understands what he is doing, time-out breaks, and fidgets/squeeze toys to distract him from his anxiety. The Student used graphic organizers, and if he was absent a few days, the teacher accommodated him by using the Kurzweil speech-to-text technology. He felt defeated when he made a mistake and would think he had to start over. He sometimes had a scribe and he had access to a computer where he edited more easily using cut and paste functions.

30. During the fifth grade, the Student showed great frustration with school. When it came time to do homework, he would curl up in a ball and growl. He was frustrated by the increasingly difficult work and the many transitions. He called himself stupid. He had difficulty stating what he knows. iReady is a computer-based learning program that the Student used in fifth grade.

31. The Student's IEP team added a speech-to-text pen as an accommodation in the May 2016 IEP (which would be implemented in the sixth grade during the 2016-2017 school year) to help him with writing and he would have a computer assigned to him to take from class to class.

32. AACPS uses several "data points" throughout the year to measure the Student's progress in math and reading, including Fountas and Pinnell (*i.e.*, a widely-used reading program that the Student finished at the end of fifth grade), iReady, Maryland statewide assessments, and PARCC (*i.e.*, standardized assessment in math and reading for all Maryland diploma-bound students).

33. PARCC “measure[s] how well students have learned grade-level material in English language arts/literacy and mathematics. Students who meet or exceed expectations are on track for the next grade or course and, ultimately, for college and careers. The tests include questions that measure ... [a student’s] fundamental skills and knowledge, and require students to think critically, solve problems, and support or explain their answers.” Parents’ Ex. 33, p. 2. In the fifth grade, the Student scored 673 overall which is Level 1 and means he did not meet expectations. Level 1 refers to a score between 650 and 700. Thirteen percent of students in Maryland score at Level 1. In reading, the Student scored twenty on a scale of ten to ninety where fifty is meets expectations. In writing, he scored ten on a scale of ten to sixty where thirty-five is meets expectations.

34. The Student can meet the demands of grade-level curriculum and advance from grade to grade if he has appropriate special education and related services to address his disabilities.

35. In February and March, 2016, during the Student’s fifth grade, he underwent a neuropsychological evaluation at the Parents’ initiation and expense.¹² His verbal comprehension was in the high average range at the eighty-first percentile, meaning he is able to express his verbal reasoning and verbal knowledge better than eighty-one out of 100 boys his age. He was diagnosed with a specific learning disorder with impairment in reading (*i.e.*, dyslexia, a hereditary brain disorder) and written language; attention-deficit/hyperactivity disorder – combined presentation; developmental coordination disorder with dysgraphia; anxiety disorder; and adjustment disorder with mixed anxiety and depressed mood. The Student’s

¹² The evaluator, XXXX XXXX (the Parents’ witness) explained the evaluation:

So it’s very important in a neuropsychological evaluation to conduct a multi-method, multi-source assessment where we’re relying on multiple modalities of assessing this individual. So certainly, we had him perform hours of performance-based testing over two separate days, and we also wanted to obtain information from his parents through a thorough developmental history and interview that was a couple hours long with his mother, reviewing school records, previous evaluation reports, obtaining parent and teacher reports and rating scales to understand what’s going on at home and at school as well.”

Tr. 113.

dyslexia is characterized by deficits in numerous areas, such as phonological processing, decoding, reading fluency, rapid naming, and orthography.¹³ The Student was struggling in all areas measuring reading skills. The Student's "specific learning disability in the area of reading and written expression cause[d] him to have difficulty reading grade level texts. His decoding weaknesses as well as his fluency weakness also impact[ed] his academic success in reading and writing. [The Student's] weakness in written expression affects his written mechanics, written organization, and spelling. [The Student's] attention also inhibits him from performing to the best of his ability." Parents' Ex. 23, p. 27.

36. He was administered a battery of tests, including:¹⁴

- a. The Woodcock-Johnson IV Tests of Achievement where, in the passage comprehension subtest, he scored an eighty-two which is the eleventh percentile, which is the low-average range¹⁵ and which shows he has trouble comprehending what he reads despite his high cognitive ability. The Student scored in the second percentile in letter-word identification, which is the borderline range. He scored eighty-one in oral reading and sentence reading fluency, in the ninth and tenth percentile respectively, both in the low average range. Although he scored in the average range on certain subtests, his low average and borderline scores evidence a discrepancy between his cognitive abilities and his actual performance. His cluster scores were: reading, seventy-three, fourth percentile; broad reading, seventy-four, fourth percentile; basic reading skills, seventy-five, fifth percentile; and reading

¹³ Ms. XXXX testified the Student had every hallmark of dyslexia growing up. For example, he had difficulty with sequencing; and he was slower to acquire sequencing, like learning the days of the week and the alphabet.

¹⁴ The complete list of tests is found at Parents' Ex 13.

¹⁵ Low-average reflects a deficit in an area.

- fluency, seventy-eight, seventh percentile. The Student was well below functional literacy as a fifth grade student, notwithstanding his high cognitive ability.¹⁶
- b. The Gray Oral Reading Test (GORT), where he received an Oral Reading Quotient score of eighty-one, placing him the lower end of the low-average range, which is below expectations given his overall cognitive aptitude. His fluency scores were consistently at the ninth percentile and reflected a decline over the 2013 academic assessment. His oral comprehension was stronger, in the average range, at the thirty-seventh percentile. He guessed frequently during oral reading and made decoding errors. His scores in accuracy, fluency and oral reading index decreased from the 2013 test; his rate score improved; and his comprehension score stayed the same.
 - c. On a comprehensive test of phonological memory (*i.e.*, the ability to hold sounds of words in mind long enough to make sense of them), he had a scaled score of eighty-five, putting him in the low-average range. His phonological awareness score of seventy-seven was in the borderline range (which is just below low-average) at the sixth percentile. His phonological awareness score decreased from the 2013 test and his phonological memory score improved.
 - d. On the Test of Written Language, the Student had an average range score on spontaneous story writing, but he had low-average contextual language skills.
 - e. On the Children’s Manifest Anxiety Scale, the Student showed above-average physiological anxiety with a score of 110 and his “total anxiety” score of 109 was just

¹⁶ Mr. XXXX compared the Student’s 2013 and 2016 standardized test scores. In some instances, the Student was administered the same test in both years. The exception is that he was administered the Woodcock-Johnson in 2016 and the Wescheler Individual Achievement Test in 2013. He opined that because the Student “was not tested using the same measure... [he could not make] a one-to-one comparison. However, the tests are evaluating similar skills, and it is worth noting the declines,” in broad reading, basic reading, reading fluency, and written expression. Parents’ Ex. 49, p. 2.

one point below above-average (where the average range is 90-110). The Student was at risk for serious problems.

- f. On the Children's Depression Inventory, the Student had a 135 on negative self-esteem and 130 on negative mood-physical symptoms, both clinically significant scores indicating intervention is necessary.

37. Standardized testing was administered to the Student orally, because he has difficulty with reading comprehension.

38. The school psychologist at [School 4] ([School 4]) deals with students who have anxiety. (Stipulation of the parties.)

39. School attendance and school work can contribute to a student's anxiety. Anxiety can have physical manifestations.

40. The Student was absent about forty-nine days in the fifth grade.

41. The Student started seeing a psychiatrist, about June 2016. The Student had suicidal thoughts. In the spring of 2016, after the neuropsychological evaluation, the Student started taking medication for anxiety.

42. AACPS convened an IEP meeting on May 3, 2016 to consider the Student's IEP for the sixth grade in the 2016-2017 school year. The Parents attended. Two outspoken members of the team were a Ms. XXXX, from AACPS' central office, and a Ms. XXXX, who stated the Student did not have a reading comprehension problem on the basis of a recent standardized test score, not understanding, however, the test was read aloud to the Student. Based on Ms. XXXX's and/or Ms. XXXX's misunderstanding, the team deleted the reading comprehension goal from the IEP. AACPS proposed eight hours, thirty-six minutes per week of special education services in the general educational classroom and proposed providing all of those services in the general education classroom at [School 4]. Those hours includes: six hours, thirty-six minutes in

language arts, one hour, thirty minutes in social studies and science, and forty-five minutes in requisite learning, including math. This was a decrease in the total number of service hours from elementary school and would require zero pull-out hours and zero Resource Room hours. The decrease in total special education hours was the result of an AACPS policy change under which Wilson hours would not be considered special education time because it is a general education reading intervention. The IEP included a long list of supplementary aids, services, program modifications and supports, such as assistive technology in the form of a text-to-speech technology. The IEP included a reading fluency goal of 105 words per minute, which is the third grade level, over objection from the Parents, who wanted 155 words per minute. The team declined to approve pull-out Wilson services as the Student had been receiving because Wilson is only taught in the general education environment at [School 4].¹⁷ The IEP team included a goal addressing the Student's social/emotional skills to manage his anxiety; the goal would be implemented in the regular education classroom by the teacher. The Student would have access to a psychologist for consultation if needed; the psychologist would not provide direct psychological services to the Student. The Parents rejected the IEP and unilaterally enrolled the Student at [School 2] ([School 2]) for the 2016-2017 school year.

43. The Student requires a highly structured, self-contained classroom staffed by appropriately trained special educators using a science-based reading program through his school day.

44. During the summer between the Student's fifth and sixth grades he attended the [School 1] ([School 1]) for instruction in reading and math. [School 1] is an AACPS school offering services for students with disabilities. The Student received intensive reading support using Wilson services, where he progressed from Step 6 to Step 9.

¹⁷ This is an important change because the Student has no entitlement to a particular service that is not on his IEP, even though AACPS agrees that Wilson is an essential component of his instruction.

45. On completion of his time at [School 1], the Parents unilaterally placed the Student at [School 2] for sixth grade during the 2016-2017 school year. [School 2] is a private educational facility approved by the Maryland State Department of Education for students with learning-based disabilities. [School 2] does not accept non-disabled students and it does not provide its students with opportunities to learn with non-disabled students. [School 2] teachers are able to “differentiate,” meaning to teach students who are functioning at a higher level and are capable of more rigorous work and teach students who need intervention for disabilities, such as reading, writing, math, executive functioning, social skills and social emotional challenges.

46. [School 2] creates its version of an IEP for privately funded students, just as it would implement a publicly-prepared IEP for publicly funded students.

47. [School 2]’s core teachers are certified in special education en route to certification.¹⁸

48. [School 2] serves students in grades five through twelve, with sixty-three students in all.

49. [School 2]’s students are all diploma bound.

50. Some [School 2] students remain enrolled through graduation and others transition from [School 2] to a public program. Most students eventually go to a two or four-year college and some go to a vocational technical college.

51. A Resource Teacher supports students, teachers, parents, and schools in matters related to special education. A teacher may observe a class and provide teachers with strategies and supports, attend IEP meetings, work with instructional staff, etc. [School 2] has a Resource Teacher.

52. For the sixth grade, the Student achieved As, Bs and, as applicable, passing grades.

53. During the sixth grade, the Student missed sixteen days of school, sometimes due to illness and sometimes due to non-health reasons, including two days that [School 2] considers

¹⁸ XXXX XXXX, Co-head of [School 2], testified this is the Maryland State Department of Education’s requirement, and [School 2] is in compliance.

optional for student attendance. Also, his attendance increased because his school anxiety was reduced.

54. At [School 2], the Student's anxiety about school in general and homework in particular is reduced. The Student does not feel dumb and he likes going to school. For the first time, he read a book for the sheer enjoyment of it.

55. In the sixth grade, the Student attended a reading tutorial. Additionally, he took math, language arts, science, social studies, social skills, health, introduction to television production, physical education, middle division Spanish, digital photography, middle division ceramics, art, and "advisory."

56. At the end of sixth grade, the Student was at Wilson Step 10.1.

57. His language arts and other classes had eight or fewer students and followed the common core standards.

58. The Student's reading class had three students.

59. He made progress in his classes.

60. The Student is able to make progress because his classes have few students, he attends the weekly tutorial, and he uses Wilson.

61. The Parents again enrolled the Student at [School 2] for the 2017-2018 school year.

62. In the seventh grade, the Student is in a math class with one other student, an eighth grader, and he is studying pre-algebra.

63. The Student was administered the GORT, the Comprehensive Test of Phonological Processing (CTOPP), and the WADE in May 2017, and the Woodcock-Johnson in March 2017. The Student improved in almost all areas.¹⁹ For example, on the WADE he increased his ability to correctly read nonsense words from 23% to 55%. Compared to the 2016 Woodcock-Johnson,

¹⁹ Parents' Ex.50 is a side-by-side comparison of the specific results.

his broad reading increased from 2.4 to 3.5, which represents an entire year of growth; in math, he increased from 4.4 to 5.3, almost one year of improvement; and in broad written language, he increased from 3.5 to 4.4, a one-year growth.

64. The Student's scores on twelve of the Woodcock-Johnson tests stayed the same or went down. (Stipulation of the Parties)

65. The Student is capable of advancing from grade to grade, with appropriate special education and related services.

66. AACPS prepared an IEP for the Student for his seventh grade. The IEP proposes ten hours, thirty minutes per week of special education services (*i.e.*, one hour, thirty minutes for co-taught math; four hours for co-taught language class; two hours, thirty minutes for co-taught social studies; and two hours, thirty minutes for co-taught science.) The IEP also called for two thirty-minute sessions per month of counseling. AACPS proposed implementing the IEP at [School 4] in the general education classroom.

67. The Student's schedule for the 2017-2018 school year at [School 2] includes a reading tutorial, social skills, art, physical education, language arts (in a class with fewer than eight students), and reading (in a class with two other students).

DISCUSSION

Burden of Proof

The Parents are seeking reimbursement for their unilateral placement of the Student at [School 2] for the 2016-2017 school year and placement of the Student at [School 2] for the 2017-2018 school year. Because the Parents are the party seeking relief on behalf of the Student, 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."). The burden of proof is by a preponderance of the evidence. Md.

Code Ann., State Gov't § 10-217 (2014). For the reasons that follow, I find the Parents have met their burden of proof.

Legal Framework

IDEA governs the identification, assessment and placement of students in special education. 20 U.S.C.A. §§ 1400-1482 (2017); 34 C.F.R. pt. 300 (2016); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2017); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a free appropriate public education (FAPE) which “emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]” 20 U.S.C.A. § 1400(d)(1)(A).

Thirty-five years ago, the Supreme Court addressed the FAPE requirement in *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court held that FAPE is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Rowley*, 458 U.S. at 201 (footnote omitted). To this end the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide FAPE: first, whether there has been compliance with the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-07. *See also A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004) (“A FAPE requires the school district to provide instruction that suits the child's needs as well as related services to ensure that the child receives some educational benefit from instruction.”).

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

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

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

20 U.S.C.A. § 1414(d)(3). Among other things, the IEP depicts a student's current educational performance, explains how the student's disability affects the student's involvement and progress in the general curriculum, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular educational programs. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A. IEP teams must consider the students' evolving needs when developing their educational programs. The student's IEP must include "[a] statement of the child's present levels of academic achievement and functional performance, including . . . [h]ow the child's disability affects the child's involvement and progress in the general education curriculum (*i.e.*, the same curriculum as for non-disabled children)." 34 C.F.R. § 300.320(a)(1)(i). If a child's behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, the use of positive behavioral interventions, strategies and supports to address that behavior. 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)(1) (2017).

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.A. § 1414(d)(1)(A)(i)(II), (IV), (VI).

In *Rowley*, the United States Supreme Court first addressed the FAPE requirement as follows:

Implicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of [FAPE], in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200-01 (footnote omitted). The Court explained that FAPE entitles a student to an IEP that is "reasonably calculated to enable the child to receive educational benefits" and that this requires that "the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200, 207.

Absent more definitive direction regarding the standard to be employed to determine "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act," courts applied various interpretations of the level of benefit that is required. *Id.* at 202. The Fourth Circuit, taking its lead from the Tenth Circuit, formulated the test as whether the school system adopted an IEP calculated to confer "some" educational benefit on the student, "meaning a benefit that is more than minimal or trivial, from special instruction and services." *O.S. ex rel. Michael S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015)

(“In this circuit, the standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.”).

Thirty-five years after *Rowley*, the parties in *Andrew F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988 (2017), asked the Supreme Court to go further than it did in *Rowley* and set forth a test for measuring whether a disabled student had attained sufficient educational benefit. The framework for the decision was the Tenth Circuit’s interpretation of the meaning of “some educational benefit,” which construed the level of benefit as “merely . . . ‘more than *de minimis*.’” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

The Supreme Court set forth the following “general approach” to determining whether a school has met its obligation under the IDEA:

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

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

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *See* §§ 1414(d)(1)(A)(i)(I)-(IV). This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.”’ *Rowley*, 458 U.S., at 179, 102 S. Ct. 3034 (*quoting* H.R. Rep. No. 94-332, p. 2 (1975)). A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially designed*" to meet a child's "*unique needs*" through an "*[i]ndividualized education program.*" §§ 1401(29), (14) (emphasis added).

Endrew F., 137 S. Ct. at 998-99. The Court expressly rejected the Tenth Circuit's interpretation of what constitutes "some benefit":

When all is said and done, a student offered an educational program providing "merely more than *de minimis*" progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to "sitting idly . . . awaiting the time when they were old enough to 'drop out.'" *Rowley*, 458 U.S., at 179[.] The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

Id. at 1001.

Directly adopting language from *Rowley*, and expressly stating that it was not making any "attempt to elaborate on what 'appropriate' progress will look like from case to case," the *Endrew 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.'" *Endrew F.*, 137 S.Ct. 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." *Endrew F.*, 137 S.Ct. at 1002.

Ultimately, a disabled student's "educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the

chance to meet challenging objectives.” *Andrew F.*, 137 S. Ct. at 1000. Moreover, the IEP must be reasonably calculated to allow him to advance from grade to grade, if that is a “reasonable prospect.” *Id.*

Notwithstanding the holding of *Andrew F.*, providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy” or all the services necessary to maximize educational benefits. *Hessler v. State Bd. of Educ. of Md.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. at 176). FAPE does not require “the best possible education that a school system could provide if given access to unlimited funds.” *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). It does, however, require the State to provide personalized instruction with sufficient support services to permit the handicapped child to benefit educationally.

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the “least restrictive environment” to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5) (2017); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). At a minimum, the statute 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). Placing disabled children into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved.

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like AACPS to offer a continuum of alternative placements that meet the needs of children with disabilities. 34 C.F.R. § 300.115. 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. § 300.115(b); COMAR 13A.05.01.10B(1). Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. COMAR 13A.05.01.10A(2). In such a case, 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.

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. *School Comm. v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). The issue of reimbursement for unilateral placement was expanded in *Florence County School Dist. Four v. Carter ex rel. 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 12-13. The private education services need not be provided in the least restrictive environment. *See, e.g., M.S.*, 553 F.3d at 327.

Analysis

The parties agree the Student has a specific learning disability and an anxiety disorder, among other disabilities. AACPS proposed an educational program that fully integrated the Student in the regular educational classroom, with eight hours, thirty-six minutes of special education for the sixth grade and ten hours, thirty minutes of special education for the seventh grade. The Parents assert the Student needs a small, highly structured special education class, like what is offered at [School 2], where his disabilities are addressed throughout the school day to permit him to make educational progress. Both the Student's anxiety and learning disability greatly impact his ability to make educational progress.

The Student's anxiety affects his ability to make progress in the general education classroom

The Student was diagnosed with an anxiety disorder and an adjustment disorder with mixed anxiety and depressed mood. Mr. XXXX testified that in hindsight, the Student's behavior was attributable to anxiety long before the Student received that diagnosis. The Mother offered valuable history about the Student's educational experience and in particular, his anxiety. She first noticed learning problems when he was in kindergarten. A referral to child find led to [School 3] giving her some worksheets to use with the Student. In the third grade, he was identified with a learn disability and received some pull-out services with a special educator and he used the Wilson reading program in the general classroom. By the fourth grade, he showed frustration with his homework. At the prospect of homework, he would curl up in a ball and growl. He was absent twenty-three days, in part due to physical illness. He was having trouble with the increasingly difficult workload and with transition. He would sometimes call himself stupid.

In fifth grade, the Student became increasingly resistant to homework, and his sister told him to punch the couch not the table so he would not hurt himself in expressing his frustration.

He was so frustrated with school, he asked his parents to homeschool him.²⁰ He was absent forty-nine times. At first the Parents thought his illness was related to four or so bouts of strep throat and he was out for ten days due to a tonsillectomy, but the Student also complained of stomach aches, gastrointestinal distress, and headaches. The Mother revealed that while the Student suffered diagnosable physical ailments that kept him out of school, these other symptoms persisted after the Student should have been well enough to return to school. She viewed the other symptoms as school-avoidance behaviors related to his anxiety. Ms. XXXX agreed the Student was exhibiting physical manifestations of stress and anxiety related to school. AACPS did not present evidence to the contrary.

At home during the fifth grade, the Student was increasingly resistant to homework. He said he felt dumb and once said he wanted to die. Writing and reading assignments were a true struggle for him. On the other hand, the Parents observed his thirst for knowledge when he watched educational television programs. His teachers also observed his thirst for knowledge, noting, in fact, a wealth of knowledge which, they said, he enjoyed sharing with his peers.

The Mother surreptitiously made two videos of the Student in the fifth grade while she was trying to get him to do his homework. She took the videos because she attended a series of IEP meetings where she explained how frustrated the Student was with homework and the Mother believed the IEP team was dismissive of her. At home, the Student would do chores unrelated to school work but he would melt down over homework and she wanted the IEP team to see what he went through. In the videos, the Student is on the floor crying and is obviously emotionally distraught. He was talking to the Mother about his work with iReady and math and

²⁰ The Mother testified she remained in constant contact with [School 3] about the Student's absences. She was therefore surprised to receive a February 8, 2016 letter from the assistant principal stating the Student had already been absent thirty-one times and requesting medical documentation for future absences. The assistant principal's letter may be *pro forma* and the Mother may have overacted when she expressed her dismay in reply. Substantively, the assistant principal's letter states that the absences are "excessive" and "result in missed instruction." The assistant principal's reaction to the absences is immaterial to the issue of FAPE.

said he felt dumb and stupid and nothing could help him, his teachers do not understand him, he is not supposed to ask for help, teachers yell at him, he cannot understand the work, he gets mad at school but keeps his feelings to himself because no one can do anything to make it better, home is the only place he does not feel stupid, they make him do math things that do not make sense, math is sometimes confusing, nothing makes it easier to understand, math is worse than reading but easier than writing, and the hardest part of school is writing. The Student exclaimed iReady “makes no stupid sense” and math is sometimes confusing to him and nothing makes it easier to understand. When the Mother told the Student they would have to make up some work because the Student had been out of school sick, the Student replied, “kill me.” The mother asked if iReady makes you want to die, and the Student said, “yes.”

I have no reason to believe the Student was exaggerating how he feels; he did not know his mother was taping him or that his feelings and mental health would eventually be factors in his parents’ decision to seek private education. While I respect his feelings and perceptions, the record does support how others have reacted to him and stands in contrast to many of his statements. For example, I have no reason to believe that the Student’s teachers actually yelled at him or that he was not permitted to ask for help. To the contrary, Ms. XXXX, for example, presented as sincerely devoted to the Student’s well-being and academic needs and she was moved to tears by the notion that the Student was in emotional agony and that anyone might believe she does not deeply care about him. Nevertheless, the Student’s mental health, and in particular his anxiety about school and homework, is evident and its effect on his ability to access education and make progress is inescapable.

The record does not show how many days the Student was absent due to diagnosable somatic conditions versus manifestations of his anxiety or other reasons. That said, AACPS does not seriously challenge that the Student has anxiety and his anxiety makes him resistant to

attending school. Indeed, the Student's anxiety manifested at school also. At the April 21, 2016 IEP meeting, AACPS teachers reported significantly elevated somatic complaints, slightly elevated difficulties with withdrawal and depression, and average to slightly elevated difficulties with anxiety and depression. (The Parents reported at the meeting more severe problems, including significantly elevated symptom for anxiety/depression, somatic complaints, and social problems.) At a May 23, 2016 IEP meeting, Ms. XXXX reported the Student would become very anxious if he was asked to read aloud in class; the Student would look at her with pleading eyes as if to beg her not to make him read aloud; and he was becoming resistant to writing lengthy assignments. In fact, Ms. XXXX was worried about how the Student would fare in middle school because of the writing and reading demands.

In addition to an anxiety disorder, the Student is diagnosed with an anxiety disorder and an adjustment disorder with mixed anxiety and depressed mood. Ms. XXXX explained the adjustment disorder:

... [The Student] does have a long-standing history of some difficulties with new situations, taking more time maybe than some of his peers to warm up to a new situation, being a bit of a worrier at times, biting his nails, some symptoms of anxiety that would not necessarily be directly related to a stressor he's experiencing, but part of his brain makeup that he just tends to be a worrier at times. However, during the fifth grade year in particular, there was a clear sort of temporally related increase in his level of distress, his anxiety level, his self-confidence and self-esteem, his avoidance behaviors that are often related to anxiety, his negative self-deprecating statements, and also physical manifestations. When we are stressed, and we've [sic] perhaps aren't dealing with it through talking about it or other coping skills, it comes out physically through headaches and stomachaches as real physical symptoms as manifestations of stress, and that became significantly increased and was concomitant with his increased learning difficulties in first grade[.]

Tr. 136.

Ms. XXXX testified the Student self-reported his depressive symptoms when she administered the Manifest Anxiety Scale as part of her comprehensive neurological evaluation in

the Student's fifth grade. The Student reported significant symptoms of low self-esteem, physical symptoms, and negative mood symptoms.

While AACPS does not dispute the Student's diagnoses, it does disagree with the Parents about the need for intervention. Ms. XXXX characterized as "clinically significant" the Student's scores on the Children's Depression Inventory, where he had a 135 on negative self-esteem and 130 on negative mood-physical symptoms. She stated when scores are clinically significant, intervention is necessary. She opined, and Mr. XXXX agrees, the Student needs a highly structured, small classroom where his anxiety can be address throughout the day and the setting itself reduces the potential for anxiety.

Ms. XXXX testified the Student showed above average physiological anxiety with a score of 110 and his "total anxiety" score of 109 was just one point below "above average" (where the average range is 90-110). She opined the scores were not clinically significant, meaning the Student was experiencing roughly the same level anxiety as other children his age experience. Ms. XXXX concedes, however, the Student is "at risk" and his behavior on the videos is "extremely concerning."

Ms. XXXX testified that toward the end of fifth grade, she saw the videos the Mother made of the Student and, as a result, her team continued to discuss how to help him. She, or perhaps the team, thought the Student should have goals to help him not feel so different. She acknowledged the Student was frustrated with his reading and writing (as he expressed in the videos). That said, Ms. XXXX testified she did not see in class the distraught child in the videos. She conceded she saw "behaviors" every now and then and she saw some school-avoidance behavior, and the Student would "shut down." She further conceded some of his absences were because he did not want to go to school and on returning from absences he would feel

overwhelmed by work he had to make up. In her classroom, the Student sometimes needed what she called “brain breaks” where she would allow him to change chairs or send him on an errand.

Ms. XXXX testified the Mother told him about the Student’s anxiety when [School 3] reached out to her in fifth grade about his absences, and teachers also expressed concern about the Student’s anxiety in the classroom. She testified the school had strategies for dealing with anxiety, including a counselor on staff who would check-in with students and a school psychologist if the student needs more attention. The school also has strategies for directly dealing with anxiety in the classroom, including opportunities for time-outs, giving students fidgets (small toys, or manipulatives as school personnel calls them) to distract them from their anxiety. If a student’s anxiety is disruptive (*i.e.*, the student is crying, curling up in a ball, or tossing furniture), the student may be removed from the classroom. With respect to the Student, [School 3] gave him time-outs and fidgets, for example.

It seems unwise to debate whether the Student is more anxious than his peers just because his total anxiety score is one point below the above average range. Even his teachers see his anxiety in school, although not to the very real extent the Mother sees at home. If the Student is at risk for anxiety-related problems and his behavior on the videos is “extremely concerning,” I must conclude the Student’s IEP should address these issues for him to engage in school (and homework) to make progress. To this end, at the end of fifth grade, the IEP team added a social emotional goal to address his anxiety. Ms. XXXX opined the goal does not render the IEP adequate. Rather, he needs an educational setting where his anxiety is addressed throughout the day and where the setting itself reduces his anxiety. The primary problem with [School 4], according to Ms. XXXX and Mr. XXXX, is that the Student’s struggles with reading and writing in the general education classroom contribute greatly to his anxiety and that could not be alleviated with a single anxiety-related goal, limited counseling service or access to psychological

consultation at the middle school. Indeed, the evidence shows the Student is doing so well in the type of classroom Ms. XXXX and Mr. XXXX recommend that his anxiety is rarely evident and probably would not rise to the level of a diagnosable disorder today.

It is true the Student started taking psychiatric medication in the sixth grade because he was having suicidal ideation. There is no evidence about the effect the medication has had on his anxiety, other than the Mother's testimony the medication has allowed the Student to sleep better. Thus, I cannot conclude medication allowed the Student to make progress at [School 2].

The other factor related to the Student's anxiety is his absentee rate. Ms. XXXX and Ms. XXXX testified when the Student is absent from school, he is anxious about having to catch up. Ms. XXXX testified if the Student is not attending school, he is not receiving instruction and that makes a big impact on his progress; he would have to make up assignments just as any other student would; and all students have a difficult time making up work after a lengthy absence. Making up assignments in turn increased his anxiety. The Student had medically diagnosed illnesses in fifth grade that caused him to miss a lot of school. That is no one's fault. On the other hand, even he acknowledged on the video having to make up assignments is frustrating. That said, the Student's physical manifestations of his anxiety prolonged his absences.

The Student did not make adequate progress in reading and writing and his specific learning disability cannot be remediated in the general education classroom

The Parents argue the Student requires a small, highly structured classroom for him to remediate his learning disabilities. They argue he did not make progress in the general education classroom in fifth grade, he did not "close the gap" in reading and writing with same-age peers in the fifth grade, and there is no reason to believe he will have more opportunity for progress in the general education classroom for sixth or seventh grade. AACPS responds the Student in fact made progress.

The Parents hired Mr. XXXX as an educational consultant for the Student five years ago when the Student was in the second grade at [School 3] and the Parents wanted to know if he was getting appropriate services and, if not, to advocate for him. Mr. XXXX has observed the Student in elementary school and at [School 2], and he has observed AACPS' proposed middle school two times. He attended the Student's IEP meetings in fourth and fifth grade. He reviewed the records that were available for hearing. Thus, Mr. XXXX has sufficient expertise and knowledge about the Student to render a valuable opinion.

Mr. XXXX opined that [School 2] will offer the Student a "FAPE." AACPS was critical of the opinion and questioned him about whether [School 2] is in fact free or public, as the acronym suggests, and Mr. XXXX agreed it is neither. I did not take his use of the acronym FAPE in that way. Rather, I took it as shorthand way of saying [School 2] is an appropriate school for the Student. Thus, I do not discredit his opinions just because he arguably misused a term of art.

Mr. XXXX opined that by the end of fourth grade, the Student was "not making great strides," although he made some progress by the end of the school year; still, he was doing what was expected, but he was not closing the gap to work on grade level. Mr. XXXX further opined, and AACPS does not disagree, that the Student is intellectually capable of working above grade level. Thus, with appropriate services, he is capable of closing the gap.

During the summer of the Student's fifth grade school year, the Student submitted to an independent neuropsychological evaluation because the Parents wanted an evaluation from someone who not involved with the Student. At the time, he knew the Student was struggling, but no one knew the seriousness of his mental health problems.

As part of the neuropsychological evaluation, the Student submitted to various tests, including the Woodcock-Johnson, a nationally normed test in reading, math, written language,

overall fluency, and overall skill academic application which Mr. XXXX characterized as the foremost test of ability. AACPS uses several “data points” throughout the year to measure the Student’s progress in math and reading, including the Woodcock-Johnson and also Fountas and Pinnell (a widely-used reading program that the Student finished at the end of fifth grade), iReady, Maryland statewide assessments, and PARCC. Looking at the various data points, it is apparent the Student lags behind his peers and his own capabilities, and that he did not progress in the fifth grade.

For example, PARCC measures how well students have learned fundamental, grade-level material in English language, arts/literacy and mathematics. Students who meet or exceed expectations are on track for the next grade or course and, ultimately, for college and careers. In the fifth grade, the Student scored 673 overall, which is Level 1 and which means he did not meet expectations. Only thirteen percent of students in Maryland score at Level 1. In reading, the Student scored twenty on a scale of ten to ninety where fifty is meets expectations. On writing, he scored ten, on a scale of ten to sixty where thirty is meets expectations. AACPS argues PARCC is an unreliable measurement because the county curriculum is not aligned with what PARCC measures. AACPS did not elaborate. Maryland State Department of Education recognizes PARCC as a reliable measure. I cannot simply discount the score without more evidence of its unreliability.

The battery of tests the Student took in fifth grade as part of the comprehension evaluation highlights his deficits, as follows:

- a. The Woodcock-Johnson IV Tests of Achievement where, in the passage comprehension subtest, he scored an eighty-two, which is the eleventh percentile, which is the low-average range and which shows he has trouble comprehending what he reads despite his high cognitive ability. The Student scored in the second

- percentile in letter-word identification, which is the borderline range. He scored eighty-one in oral reading and sentence reading fluency, in the ninth and tenth percentile respectively, both in the low-average range. Although he scored in the average range on certain subtests, his low-average and borderline scores evidence a discrepancy between his cognitive abilities and his actual performance. His cluster scores were: reading, seventy-three, fourth percentile; in broad reading, seventy-four, fourth percentile; basic reading skills, seventy-five, fifth percentile; and reading fluency, seventy-eight, seventh percentile. The Student was well below functional literacy as a fifth grade student, notwithstanding his high cognitive ability.
- b. The GORT where he received an Oral Reading Quotient score of eight-one, placing him in the lower end of the low-average range, which is below expectations given his overall cognitive aptitude. His fluency scores were consistently at the ninth percentile and reflect a decline over the 2013 academic assessment. His oral comprehension was stronger, in the average range at the thirty-seventh percentile. He guessed frequently during oral reading and made decoding errors. His scores in accuracy, fluency and oral reading index decreased from the 2013 test; his rate score improved; and his comprehension score stayed the same.
- c. A comprehensive test of phonological memory (*i.e.*, the ability to hold sounds of words in mind long enough to make sense of them), where he had a scaled score of eight-five, putting him in the low-average range. His phonological awareness score of seventy-seven was in the borderline range (which is just below low-average) at the sixth percentile. His phonological awareness score decreased from the 2013 test and his phonological memory score improved.

- d. On the Test of Written Language, the Student had an average range score on spontaneous story writing, but he had low-average contextual language skills.

After more than one year at [School 2], the Student was administered the GORT, CTOPP, and the WADE in May 2017, and the Woodcock-Johnson in March 2017. Although his scores on twelve of the Woodcock-Johnson subtests stayed the same or went down (by just one point in some cases), the Student improved in almost all areas. For example, on the WADE he increased his ability to correctly read nonsense words from 23% to 55%. Compared to the 2016 Woodcock-Johnson, his broad reading increased from 2.4 to 3.5, which represents an entire year of growth; in math, he increased from 4.4 to 5.3, again, almost one year of improvement; and in broad written language, he increased from 3.5 to 4.4, a one-year growth.

Another important data point for measuring the Student's progress in the general education setting is his progress on Wilson, the twelve-step reading program. In February of fourth grade, the Student was at Step 6, meaning he was halfway through the program. Fourteen months later, in April 2015, when he was nearly finished the fifth grade, the Student was still at Step 6. The logical question is whether remaining at Step 6 for so long indicates a lack of progress. The Parents assert AACPS's own witness, XXXX XXXX, testified the lack of movement from Step 6 is tantamount to a lack of progress. Ms. XXXX's testimony was more complicated than that. She testified a student could stay at any given step for a long time and Step 6 is "large" and contains "many components" and students "spiral," meaning instructors are always going back to assess what the students has learned. The record does not show whether this spiraling means the Student moved back and forth and, if so, why. Ms. XXXX testified that it is necessary to look at his IEP and progress notes to say whether he made progress and relying just on the fact he remained at Step 6 is insufficient proof. The problem with Ms. XXXX's testimony is that she did not account for the fact the Student attended an AACPS intensive

summer reading program after fifth grade at which AACPS asserts he completed Level 9. If the Student could advance three levels over the summer with intensive services, why did he need to remain at Level 6 for fourteen months?

[School 2] started the Student at Level 10 but then placed him back down when it realized he lacked some skills. If [School 2] is correct the Student had not actually finished Level 9 over the summer, the evidence would be that he made even less progress on Wilson than AACPS asserts. Also, Ms. XXXX, AACPS witness, testified she could not point to any document showing the Student made progress on the Wilson in the fourth or fifth grade.

Another data point is the Fountas and Pinnell. Ms. XXXX testified the Student was on Level O in the third grade, where Level T is grade level and Level S is independent reading. Ms. XXXX testified the Student progressed from O to T at the end of the fifth grade, meaning he ended on grade level. A preponderance of the evidence shows the Student was not an independent reader at the end of fifth grade. Reading was a struggle for him and he had tests read to him because he was not an independent reader.²¹

The issue of the Student's absences is relevant to his reading and writing progress. It is surely true that when a student misses any school day, he misses instruction. For the Student, the question is whether missing twenty-seven percent of a 180-day school year²² is the reason he did not make progress in fifth grade. The evidence is scant on this point. The record does not include expert testimony that the results of the standardized testing and the PARCC, and the

²¹ Mr. XXXX attended the IEP meeting(s) in which the team discussed the Student's seventh grade. Mr. XXXX testified the meeting was attended by XXXX XXXX, the Assistive Technology Specialist; XXXX XXXX, the Special Education Resource Teacher; Ms. XXXX, his special education teacher; Ms. XXXX, his general educator; and of course the Parents. The IEP shows others in attendance: XXXX XXXX, an Administrator; and XXXX XXXX, the Special Education Department Chair. Mr. XXXX testified that certain AACPS attendees asserted the Student was progressing in reading and he did not have a reading comprehension problem. Ms. XXXX and Ms. XXXX reminded the group that the Student's standardized tests are read aloud to him (as were other assignments), suggesting that perhaps the team as a whole did not have a true understanding of the Student's strengths and weaknesses.

²² With some exceptions not applicable here, Maryland requires schools to "be open for pupil attendance for at least 180 actual school days and a minimum of 1,080 school hours during a 10-month period in each school year." Md. Code Ann., Educ. § 7-103(a)(1) (2016).

Student's progress (or lack of progress) on the Wilson are inherently unreliable because the Student was absent a lot. While forty-nine days seems like a lot, I cannot infer that it was so much he could not have made progress or that it, in fact, caused him to not make progress. In fact, AACPS argues that the Student *did* make adequate progress in fifth grade, so I infer that it finds little effect from his absentee rate.

AACPS surely made efforts to accommodate the Student. In the fifth grade, the Student had 45 minutes of pull-out services for Wilson and a special educator in his class. The May 23, 2016, IEP team acknowledged the Student's

specific learning disability in the area of reading and written expression cause him to have difficulty reading grade level texts. His decoding weakness as well as his fluency weakness also impacts his academic success in reading and writing. The Student's weakness in written expression affect[s] his written mechanics, written organization, and spelling. The Student's attention also inhibits him from performing to the best of his ability."

Parents' Ex. 2, p. 8. As a result, if he had to write a lengthy essay, and in other activities, he had help in the classroom. He had "movement breaks" (*i.e.*, an opportunity to get up and move around) due to ADHD. In fifth grade, he started needing "brain breaks" (*i.e.*, time out from activity), at his teacher's recommendation. Ms. XXXX testified the Student practiced fluency in class every few days, they chunked texts, and they previewed text ahead of time. The Student would put a "hotspot," or post it, next a word he did not know. He increased how often he could see and correct his own mistakes, which she said is an important tool in seeing where you have left out ideas and it is empowering for the Student.

Ms. XXXX further testified that as part of the May 2016 IEP, the team added a text-to-speech pen to help him with writing. She opined that he was "holding his own academically," although she worried about his absentee rate. She concurs the Student has problems with reading fluency and decoding and written comprehension problems, albeit when the text is "longer."

Also, the Student used graphic organizers, and if he was absent a few days, she accommodated

him by using the Kurzweil speech-to-text technology. He felt defeated when he made a mistake and would think he had to start over. He could edit and cut and paste using the computer and had accommodations and modifications (*e.g.*, using rubrics, check lists, chunking, restating directions, someone checking in with him to make sure he understands what he is doing, time-out breaks, fidgets/squeeze toys to distract him from his anxiety.) Despite her best efforts, even Ms. XXXX was worried about how the Student would fare in middle school because of the writing and reading demands.²³

Ms. XXXX, an AACPS school psychologist, cautioned not to take Ms. XXXX's concerns about middle school out of context and what Ms. XXXX said was she thought if he had access to technology, he would manage well. That is not my understanding of Ms. XXXX's concern. It is true, though, Ms. XXXX testified the IEP team added assistive technology to the Student's sixth grade IEP and she hoped that because he loves technology, he would have an incentive to go to school. However, the Student had access to technology in the fifth grade. Ms. XXXX testified he used Kurzweil; it did not prove to be the incentive the Student needed.

Rather, Ms. XXXX testified the Student requires more specialized services to address all of his needs and in particular his learning disability:

We know that a child with a moderately severe dyslexia who has co-occurring executive dysfunction, graphomotor dysfunction, anxiety needs evidence-based interventions, needs structures – needs a structures, small setting, needs an environment where they can be provided with individualized supports by people who are well trained provided those individualized supports and evidenced-based services. A child who becomes distracted very easily, who has difficulties organizing themselves and their materials, who has difficulties getting started on

²³ The Parents suggested Ms. XXXX's assertion the Student made progress is inconsistent with her post on the Mother's Facebook page. Ms. XXXX testified she was happy to read on Facebook the Student was happy and was doing well at [School 2], so she posted, "I'm so happy he found his place." I do not take this message to mean Ms. XXXX was dissatisfied with the Student's public school performance or the proposed placement at [School 4]. Ms. XXXX obviously has a genuine fondness for the Student and she wants the best for him and she was simply expressing in a casual setting her joy for him. Ms. XXXX was not offering an educational opinion on Facebook.

tasks and persisting on challenging tasks needs structure and individualized support that can only be provided in a structured classroom setting.

Tr. 141. She further explained the Student needs reading supports throughout the day, whether he is in art class, if art requires any level of reading, or a core curriculum class. Thus, she opined AACPS's proposal to give the Student just ten hours, thirty minutes per week of special education instruction in the seventh grade is woefully inadequate. Ms. XXXX therefore opined the Student needs a self-contained special education school, like [School 2], where he can receive services throughout the day.

Ms. XXXX testified specifically about her definition of a "small, highly structured" school. To her, "highly structured" implies a small class, like at [School 2] and which is not available at XXXX. AACPS does not dispute [School 4] has large classes. In a small class, students would have more individualized support throughout the day, including prompting and repetition of instructions, and fewer distractions that are generally present in a large classroom.

Mr. XXXX agrees with Ms. XXXX about the Student's placement needs. He opined a general education classroom with only a few hours per week of special education services is inadequate to address the Student's lack of progress in reading and writing, his executive functioning challenges, and his anxiety and adjustment disorder. Rather, the Student needs

small classes taught by highly trained special education teachers, a setting that could both challenge him at a high level commensurate with his cognitive ability while also giving him evidence-based instruction in reading and writing, having the accommodations provided throughout the day and doing it in a setting where he felt safe and supported so that we could help him deal with this now very significant anxiety and growing depression.

TR. 45-46.

Ms. XXXX testified she saw the Student at [School 2] on August 23, 2017, one week before her testimony. They talked for about 90 minutes. She described the dramatic change in him:

...And I think the most overt striking difference was that he seemed happy and comfortable and confident. I think those would be the three big words that I would use that really presented themselves pretty quickly into our conversation.

I remember when I saw him last year, he had a difficult time making eye contact, he had a difficult time speaking up for himself and when you ask about what's your least favorite class or do you like school, like it was hard for him to answer those kinds of questions, be able to speak up about his strengths and weaknesses, and during this meeting last week, he was so forthcoming with loving [School 2], with feeling like they get him there, with providing example after example of the things that he's learning there and how he's learning there, talking about that the hands-on experiments and competition kind of game-like things, activities – things – are so fun for him. He used the word fun and interesting multiple times throughout our discussion. He was able to describe lessons in which he finally understood what an adverb was and that he remembered kind of hearing the word at XXXX, but never really got it. He's like, they just are able to teach me in a way that I get it and they don't yell at me. I mean, this is sort of what he's telling me, that they're not yelling at me for not understanding it. It was remarkable that he would say if he didn't understand something, he would go and ask the teacher and that they would help him, so he's self-advocating. He wants to be part of the school community.

...He doesn't feel sick anymore. He likes school. He wanted to – he tried out for XXXX. He wants to be part of the school community. ...

Tr. 145-146.

Ms. XXXX testified the Student's condition has so greatly improved at [School 2], she would change his diagnosis:

And that when I talked about the adjustment disorder with anxiety and depressed mood that he had at XXXX that was his reaction to the stressor of having difficulty learning, he no longer had any of that criteria of an adjustment disorder. I would no longer have provided – if I was to give diagnostic impressions at this point, he would no longer meet criteria for an adjustment disorder, and even the anxiety disorder. Because his anxiety around school has diminished so much, we're now seeing evidence – his mom is saying he goes to sleep away camps, and he's trying new foods, and he's going into new situations hesitant, a little nervous, but not to the extent of an anxiety disorder. So again, I would not have provided those emotional diagnoses at this time. And I think that that is temporally related and causally related to him being in a place that is effectively – that is an effective program, that's providing him with reasonable services and supports.

Tr. at 147.

Mr. XXXX also testified [School 2] is an appropriate placement. The Student has made good progress there. He took pre-algebra in sixth grade and is taking algebra in seventh. His writing skills have improved. He can read nonsense words, which Mr. XXXX said is essential for skillful decoding of words; the Student has a history of trouble with decoding. Mr. XXXX opined the bigger picture is the Student did not want to go to school and would continue to say he was ill when he should have been better. He hypothesized, based on reports from teachers and parents, the Student felt dumb and had a high level of frustration with the work in the general education classroom, and now that he is happy in school and is getting individualized attention, his frustration level is low and he wants to go to school. Mr. XXXX observed that twice exceptional students are more at risk for emotional problems because they are painfully aware of their discrepancies, and at [School 2] the discrepancies are not so apparent.

XXXX XXXX testified she observed the Student at [School 2] on October 4, 2016. She first observed the Student at lunch; he was sitting with another student talking appropriately. She then observed his social studies and reading tutorial classes. The social studies class was a lesson on Native American tribes. Seven students were in the class. Class started by having the students go through the table of contents, organizing their binders, and reading five different reading passages about tribes. The teacher would tell the students to highlight particular passages as a means of giving them the answers to different questions. Ms. XXXX said she was struck by students calling out comments rather than raising their hands to speak; and one student made a comment about needing a mental school and another responding they are already in one. Ms. XXXX found all of the activity surprising and she was dismayed the teacher was feeding the students answers to questions. In reading tutorial class, she observed the three students watch a “brain pop video,” and cutting out letters, which seemed like an immature activity for the Student.

It is impractical for a professional to observe a class many times to get a good sense about how it operates for anyone. [School 2] should not be judged so quickly any more than [School 4] should be judged by the Mother's observation several years ago that a Student had used the "f bomb" in class. It is perilous to judge a class based on limited observation. Moreover, the Mother explained what was happening that sheds some light on Ms. XXXX's observations. The Mother explained the students were cutting out words or word segments with a "wh" sound and pasting them on an envelope. The Student has a development coordination disorder (she said it still takes him five minutes to tie his shoes) and making cut outs is an intervention.

The Student is in the seventh grade. I would not expect his classroom to always be quiet, for the students to always raise their hands to speak, or for the children to never say anything inappropriate. While I have no reason to doubt what Ms. XXXX observed, I do not find her observations evidence [School 2] is an inappropriate placement.

Ms. XXXX observed the Student at [School 2] in the sixth grade. She testified the math lesson seemed too easy for him. In the seventh grade, however, the Student is taking pre-algebra, so apparently he has made good progress.

Ms. XXXX opined the Student's IEPs can be implemented in the regular education classroom at [School 4]. She testified AACPS can plan for his transition from elementary to middle school because those are very different environments. Transitioning would take into consideration his specific learning disability and anxiety; the team would support his social/emotional and behavioral needs. Ms. XXXX testified the Student is not different from many other students in terms of his transition needs. That may be the case, but whether AACPS could adequately plan for his transition to middle school is not at issue; the Parents have not alleged AACPS is unable to effectively transition their son.

In terms of programming at [School 4], Ms. XXXX testified he could have as many as twenty co-taught hours per week, although AACPS considers that many hours the most restrictive setting at the school, so the Student is unlikely to receive that. Ms. XXXX testified that [School 4] is capable of providing a more self-contained classroom for the Student. That may also be the case, but AACPS has proposed fully implementing the IEP in the general education classroom, not a more self-contained classroom. Ms. XXXX testified co-teaching is not wise for someone like the Student who has ADHD because there are too many distractions.

Finally, Ms. XXXX testified [School 2] is not appropriate for the Student because he would lose interaction with non-disabled peers. In her classroom, the Student interacted with children who were at a high reading level, and he could hear their ideas, see their work and collaborate, which Ms. XXXX believes benefited him. It is true the Student will lose this benefit, although surely at [School 2] he can hear his peers' ideas and collaborate with them. To lose daily contact with a more diverse student population is a tradeoff, *albeit* a necessary one for the Student.

In sum, a preponderance of the evidence shows the Student did not make progress in the fifth grade at [School 4]. The IEPs the AACPS IEP team developed for him for the sixth and seventh grades are not significantly different than what he had in the fifth grade, and implementing the IEPs in the general education setting at [School 4] would not enable the Student to make progress in light of his circumstances, as contemplated by the Supreme Court in *Andrew F.* [School 2] was an appropriate placement for the 2016-2017 school year and is the least restrictive environment in which to place him for the 2017-2018 school year so that he can make educational progress.

CONCLUSIONS OF LAW

I conclude as matter of law AACPS did not offer the Student an IEP reasonably calculated to provide him a free appropriate public education for the 2016-2017 and 2017-2018 school years in light of the Student's circumstances and, as a result, the Parents have proven entitlement to reimbursement for the Student's education at [School 2] for the 2016-2017 school year and payment at [School 2] for the 2017-2018 school year. *Andrew F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988 (2017); *Florence County School Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. § 1400(d)(1)(A).

ORDER

I **ORDER** that AACPS shall reimburse the Parents for the cost of the Student's education at [School 2] for the 2016-2017 school year and pay for the cost of his education at [School 2] for the 2017-2018 school year.

If corrective action is required by this decision, the local education agency shall, within thirty days of the date of this decision, provide proof of compliance to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, the Maryland State Department of Education.

October 26, 2017
Date Decision Issued

Laurie Bennett
Administrative Law Judge

LB/cmj

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. 2017). 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.