

**XXXX XXXX,**

**STUDENT**

**v.**

**MONTGOMERY COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE LATONYA B. DARGAN,**

**\* AN ADMINISTRATIVE LAW JUDGE**

**\* OF THE MARYLAND OFFICE**

**\* OF ADMINISTRATIVE HEARINGS**

**\* OAH No.: MSDE-MONT-OT-17-12208**

**\* \* \* \* \***

**DECISION**

STATEMENT OF THE CASE  
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SUMMARY OF THE EVIDENCE  
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DISCUSSION  
CONCLUSIONS OF LAW  
ORDER

**STATEMENT OF THE CASE**

On April 24, 2017, XXXX and XXXX XXXX (collectively, Parents) on behalf of their son, XXXX XXXX ([Student] or Student), filed a Due Process Complaint (Complaint) against Montgomery County Public Schools (MCPS) with the Office of Administrative Hearings (OAH).<sup>1</sup> The parties waived their obligation to attend a resolution session on May 23, 2017 and they advised the OAH of the waiver on that same date.

In the Complaint, the Parents allege MCPS has violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A.<sup>2</sup> § 1415(f)(1)(A) (2017),<sup>3</sup> by denying the Student a free, appropriate, public education (FAPE). As relief for MCPS’ alleged violations under the IDEA, the Parents seek the following: (1) Reimbursement for the unilateral placement of the Student at [School 1] ([SCHOOL 1]) for the 2015-2016 and 2016-2017 school years (SYs); and (2) a

<sup>1</sup> The Parents filed an Amended Complaint and Request for Hearing on May 9, 2017. (P. Ex. 1.)

<sup>2</sup> U.S.C.A. is an abbreviation for United States Code Annotated.

<sup>3</sup> Unless otherwise noted, all references to the IDEA and its provisions are to the 2017 replacement volume of Title 20 of the U.S.C.A.

determination that the appropriate educational placement for the Student for the 2017-2018 SY is [SCHOOL 1].

I conducted a telephone pre-hearing conference (TPHC) in the matter on June 2, 2017.

Michael J. Eig, Esquire, represented the Student and Parents. Jeffrey Krew, Esquire, represented MCPS. During the TPHC, I advised the parties of the time requirements for issuing a decision.

The applicable regulations state the following, in part:

(a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c) –

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

34 Code of Federal Regulations (C.F.R.) § 300.515 (2017).<sup>4</sup>

(b) Resolution period.

(1) If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30–day period.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

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(c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

- (1) Both parties agree in writing to waive the resolution meeting;
- (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;
- (3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

34 C.F.R § 300.510.

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<sup>4</sup> Unless otherwise noted, all references to Title 34 of the C.F.R. are to the 2017 replacement volume.

In accordance with these regulations, the decision in this case would normally be due on Friday, July 7, 2017, which is forty-five (45) days from the date on which the parties waived the resolution session. 34 C.F.R § 300.510(c)(1). However, pursuant to 34 C.F.R. § 300.515(c), the parties requested an adjustment to the timeline for the following reasons:

- Mr. Eig was not available for the period from June 18, 2017 through June 30, 2017 due to a previously-scheduled family vacation
- Mr. Eig and Mr. Krew were scheduled to appear for a contested case hearing before Administrative Law Judge (ALJ) XXXX XXXX on July 11, 12, 13, 14 and 19, 2017
- I was on vacation from July 17, 2017 through July 21, 2017
- Mr. Eig and Mr. Krew were scheduled to appear for oral argument before ALJ XXXX XXXX on July 20, 2017 at 10:00 a.m.
- Mr. Eig and Mr. Krew were scheduled to appear for oral argument before ALJ XXXX XXXX on July 20, 2017 at 2:00 p.m.
- Mr. Eig and Mr. Krew were scheduled to appear for a contested case hearing before ALJ XXXX XXXX on July 25-26, 2017 and August 7-8, 2017
- Mr. Krew was not available for the period from July 31, 2017 through August 4, 2017 due to a previously-scheduled family vacation
- Three of MCPS' witnesses were not available during the week of August 7, 2017
- The Student's witnesses from [SCHOOL 1] were not available on the originally-chosen hearing dates of August 21 and 22, 2017 because of orientation activities at [SCHOOL 1]; they are also unavailable for the remaining original hearing dates of August 28, 29 and 30, 2017 because of the start of classes
- Mr. Krew was scheduled to appear for a contested case hearing before ALJ XXXX XXXX on September 6, 7 and 8, 2017

I granted the parties' request for an extension of the deadline for the issuance of the decision. With the agreement of the parties, the hearing was scheduled to convene on September 18, 20, 25, 26 and 27, 2017. I held the hearing, commencing on September 18, 2017. Mr. Eig represented the Student and Parents. Leslie Turner Percival, Esquire, represented MCPS. On the fourth day of hearing, it was clear additional dates were necessary, and the parties agreed to

convene on October 25 and 26, 2017 to complete the hearing. The parties agreed my decision was due on Wednesday, November 22, 2017.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2017); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

The contested case provisions of the Administrative Procedure Act, Maryland State Department of Education (MSDE) procedural regulations, and the Rules of Procedure of the OAH govern 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**

1. Are the Parents entitled to reimbursement for their unilateral placement of the Student at [SCHOOL 1] for the 2015-2016 and 2016-2017 SYs because: (a) the placement proposed by MCPS for those SYs was not reasonably calculated to provide Student with FAPE, and (b) the private unilateral placement is appropriate; and
2. Should the Student be placed at [SCHOOL 1] for the 2017-2018 SY?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

A complete exhibit list is attached as an Appendix.

#### **Testimony**

The Student presented the following witnesses:

- XXXX XXXX, Ph.D., Curriculum & Technology Coordinator, [SCHOOL 1], whom I accepted as an expert in Special Education
- XXXX XXXX, OTR,<sup>5</sup> whom I accepted as an expert in Occupational Therapy

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<sup>5</sup> The designation "OTR" stands for "Occupational Therapist Registered".

- [Mother], M. Ed., Ed. S., Parent, whom I accepted as an expert in Special Education
- XXXX XXXX, M. Ed., Executive Director, XXXX Group, whom I accepted as an expert in Special Education
- XXXX XXXX, Ph. D., whom I accepted as an expert in Neuropsychology
- XXXX XXXX, M.S., CCC<sup>6</sup>-Speech-Language Pathologist, [SCHOOL 1], whom I accepted as an expert in Speech-Language Pathology

MCPS presented the following witnesses:

- XXXX XXXX, M. Ed., Special Education Teacher, [School 2], MCPS, whom I accepted as an expert in Special Education
- XXXX XXXX, M.A., CCC-Speech-Language Pathologist, MCPS, whom I accepted as an expert in Special Education
- XXXX XXXX, OTR, whom I accepted as an expert in Occupational Therapy
- XXXX XXXX, Ph. D., whom I accepted as an expert in Psychology and School Psychology
- XXXX XXXX, M. Ed., Instructional Specialist, MCPS, whom I accepted as an expert in Special Education

### **FINDINGS OF FACT**

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

#### **Student Background**

1. [Student], who was born in XXXX 2006, is currently eleven years old. He has the following current diagnoses: attention deficit hyperactivity disorder, combined type (ADHD); developmental coordination disorder; mixed receptive-expressive language disorder; sensory integration disorder; and a specific learning disorder under IDEA with

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<sup>6</sup> The designation “CCC” indicates an individual has received a Certificate of Clinical Competence from the American Speech, Language and Hearing Association. (Testimony, XXXX.)

impairment in Reading, Math, and Written Language. [Student] had a prior diagnosis of pervasive developmental disorder, not otherwise specified.<sup>7</sup> (P. Ex. 2; P. Ex. 17.)

2. [Student] is currently on the Maryland high school diploma track. (P. Ex. 18.)
3. Approximately four months after [Student] was born, the Parents became concerned that he displayed difficulty with feeding, continual crying, and what appeared to be delayed motor development. They contacted Child Find and [Student] subsequently received occupational therapy (OT), physical therapy, speech/language services, and specialized instruction through Montgomery County's Infants and Toddlers Program (ITP), beginning in approximately May 2006. (P. Ex. 2.; T.<sup>8</sup> XXXX.)
4. When [Student] was approximately eighteen months old, his parents noticed he displayed marked difficulty maintaining focus. He was evaluated at XXXX University Hospital, at which time he was identified as having generalized hypotonia,<sup>9</sup> delayed motor coordination and communication skills, and mild, left-side hemiplegia.<sup>10</sup> (P. Ex. 2.)
5. Additionally, as the result of a psychological evaluation conducted when [Student] was approximately two-and-a-half years old, he was determined to have significant language delay, and motor and self-regulatory difficulties. (P. Ex. 2.) [Student] continued to receive services through the ITP until he graduated to Montgomery County's Pre-School Education Program (PEP)-Classic. Through PEP, [Student] received a half-day of special education services, four days per week, prior to kindergarten. (T. XXXX.)

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<sup>7</sup> "Not otherwise specified" is the term used by health professionals when a subject presents with some of the symptoms of a particular disorder, but there is some question as to whether the diagnosis is accurately applied in light of other factors in the subject's history. (Testimony, XXXX.)

<sup>8</sup> The abbreviation "T" stands for testimony.

<sup>9</sup> "Hypotonia" is the term used to describe decreased muscle tone. Hypotonia Information Page, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE, <https://www.ninds.nih.gov/Disorders/All-Disorders/Hypotonia-Information-Page> (last visited November 17, 2017).

<sup>10</sup> "Hemiplegia" is the term used to describe recurrent episodes of paralysis on one or both sides of the body. Alternating Hemiplegia Information Page, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE, <https://www.ninds.nih.gov/Disorders/All-Disorders/Alternating-Hemiplegia-Information-Page> (last visited November 17, 2017).

6. [Student]'s MCPS home school, i.e., the public school geographically closest to his residence, is [School 2] ([SCHOOL 2]). (T. XXXX.)
7. [Student] began attending school at the age of three, when he was enrolled at [School 3] ([SCHOOL 3]) for the 2009-2010 SY. [SCHOOL 3] is a private school which serves students with developmental and learning disabilities, and who face other significant challenges which have an impact on their ability to successfully access their educational curriculum. (T. XXXX.) Enrollment at [SCHOOL 3] runs from pre-kindergarten through second grade. (P. Ex. 2; T. XXXX.)
8. [Student] participated in MCPS' PEP-Classic at [School 4] sometime in 2009 and transitioned to PEP-Pilot, at [School 5], sometime in 2010. He remained in PEP-Pilot until approximately June 2011, when he aged out of the program. While attending the PEP programs, [Student] spent a portion of his days at [SCHOOL 3]. (T. XXXX; P. Ex. 3.)
9. During [Student]'s enrollment at [SCHOOL 3], the Parents and his teachers observed him display the following behaviors which suggested he struggled with maintaining attention and focus:
  - easy distractibility
  - vulnerability to making careless errors
  - difficulty remembering all steps in a multiple-step direction or problem
  - difficulty independently starting and completing tasks
  - disorganization in managing and maintaining his personal belongings
  - tendency to misplace his personal belongings

(P. Ex. 2.)

10. During [Student]'s enrollment at [SCHOOL 3], the Parents and his teachers also observed him display hyperactive and impulsive behaviors, such as:

- physical restlessness, including inability to remain still throughout a meal
- speaking out of turn during class
- speaking too loudly and too quickly
- rushing to complete one task and start another

*(Id.)*

11. During [Student]'s enrollment at [SCHOOL 3], he also displayed difficulty with following verbal directions, understanding questions, comprehending complexly-worded sentences, and telling stories in a well-sequenced manner. *(Id.)*

12. When interacting with other children, either during the school day or on play dates at his home, [Student] frequently displayed the following behaviors:

- avoidance of eye contact
- difficulty in taking turns
- difficulty interpreting other children's body language and tone of voice
- difficulty understanding figurative or metaphorical speech
- difficulty in noticing and understanding the effects of his behavior on others

As a result of the behaviors [Student] displayed while interacting with other children, the Parents were concerned he might have autism spectrum disorder. *(Id.)*

13. At some point in 2011, [Student] became receiving speech-language (SL) services from XXXX XXXX, M.S., CCC. [Student] participated in both individual therapy sessions with Ms. XXXX, as well as several social skills groups. (P. Ex. 4; T. XXXX.)

14. During her time working with [Student], Ms. XXXX observed that he had difficulty breaking tasks down to their component parts and understanding questions if they were

lengthy or complex. Ms. XXXX also noticed [Student] was frequently impulsive in his behaviors and performed best when given clear structure and redirection. During his sessions with her, they worked on goals related to articulation of speech, auditory processing, comprehension of question forms, and organization of expression language for description. (P. Ex. 4.)

15. When [Student] was seven years old, he underwent a number of evaluations and assessments in preparation for his eventual transition from [SCHOOL 3] to another educational setting. (T. XXXX.)

16. In May 2013, [Student] was in kindergarten at [SCHOOL 3]. (P. Ex. 3.)

17. On May 6 and 13, 2013, [Student] underwent a speech-language re-assessment,<sup>11</sup> performed by XXXX XXXX, M.A., a certified speech-language pathologist (SLP) with MCPS. As part of the assessment, Ms. XXXX administered the following test instruments to [Student]: Peabody Picture Vocabulary Test-4<sup>th</sup> Edition (PPVT-4); Expressive Vocabulary Test-2 (EVT-2), Form A; and Clinical Evaluation of Language Fundamentals-4<sup>th</sup> Edition (CELF-4). (*Id.*)

18. The PPVT-4 measures a student's ability, when presented with four pictures, to select the one picture which best represents a word spoken by the examiner. The EVT-2, which measures the ability to express an idea with a single word, tasks the student with naming a picture or stating a synonym when presented with a stimulus word and accompanying picture. The CELF-4 is comprised of several subtests designed to measure a child's abilities and skills in several areas of spoken and written language, including expressive vocabulary, recalling sentences, sentence and word structures, and understanding concepts and following directions. (*Id.*)

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<sup>11</sup> [Student]'s first speech-language assessment occurred in August 2008, when he was approximately two years old. On the testing instruments administered to him at the time, he scored at below average levels in the areas of auditory comprehension, articulation, and expressive communication. (P. Ex. 3.)

19. Based on his performance on the PPVT-4, [Student]'s single word receptive vocabulary was in the average range when compared to same-aged peers. Based on his performance on the EVT-2, his single word expressive vocabulary was in the average range when compared to same-aged peers. He displayed some difficulty on questions which required him to identify synonyms for words and with understanding the directions, even when they were repeated to him. (*Id.*)

20. [Student]'s scores on the various subtests of the CELF-4 were all in the below average range, with the exception of his scores on the Expressive Vocabulary subtest, which were in the low average range. He displayed the following responses, based on the subtest:

- **Concepts and Following Directions:** difficulty following directions of increasing length and complexity
- **Recalling Sentences:** trouble using appropriate grammatical rules and syntax during repetition as sentences became longer and more complex
- **Formulated Sentences:** difficulty formulating complete, semantically and grammatically-correct spoken sentences of increasing length and complexity
- **Word Classes-Receptive and Expressive:** difficulty with following the directions, which tasked him with naming the two words which were most compatible with each other when given a list of three words (for example: foot, hand, belt); he could often correctly identify the two related words, but he would explain their relationship to one another first and then identify the words, when the instructions called for the receptive answer first (identifying the words) and then the expressive answer (explaining why the words were related)
- **Sentence Structure:** difficulty with pointing to pictures which best described sentences read aloud by Ms. XXXX

(*Id.*)

21. Based on [Student]'s performance during the assessment, Ms. XXXX identified the following areas of weakness for him: expressive language, following directions, formulating sentences, language content, language structure, receptive language, repeating sentences, and working memory. She recommended his individualized

education program (IEP) team consider the continuation of speech-language intervention when he transferred to another school from [SCHOOL 3]. (*Id.*)

22. [Student] also underwent a comprehensive neuropsychological evaluation performed by XXXX XXXX, Ph.D. (T. XXXX, XXXX.) The evaluation took place on May 14, 16 and 22, 2013. (P. Ex. 2.)
23. During the neuropsychological evaluation, Dr. XXXX administered a battery of tests to [Student] to assess his cognitive, language, memory, and motor-visual skills, as well as his emotional and social functioning skills. The evaluation took place at Dr. XXXX's offices and included his observations made of [Student] while in the waiting room before the formal testing commenced. (P. Ex. 2.)
24. As part of the evaluation, Dr. XXXX also tasked the Parents and two of [Student]'s teachers from [SCHOOL 3] with providing responses on a pair of behavior rating instruments, the Child Behavior Checklist and the Behavioral Rating Inventory of Executive Functioning. (*Id.*)
25. As a result of [Student]'s performance on various testing instruments, Dr. XXXX determined he possessed average to above average cognitive skills in verbal and nonverbal cognitive functioning, and above average intellectual potential. [Student]'s performance indicated he had a solidly age-appropriate vocabulary, and his long-term retention for narrative material was at an average level compared to peers of the same age. (*Id.*)
26. With respect to the components of the evaluation which tested [Student]'s non-verbal skills, he displayed strong right-handed manual dexterity and speed, and average visual-spatial ability. He performed at age-appropriate levels on tests of pattern recognition and logical problem solving. (*Id.*)

27. Although the testing revealed areas of cognitive strength for [Student], it also revealed cognitive weaknesses in the following areas:

- attention and executive functioning (including working memory and processing speed)
- receptive and expressive language
- phonological processing<sup>12</sup> (including phonological memory and naming speed<sup>13</sup>)
- visual-motor integration

(*Id.*)

28. During the evaluation, Dr. XXXX noted [Student] was often physically restless, easily distracted, and he displayed a tendency to respond impulsively. He also displayed a slower-than-average processing speed and difficulty maintaining visual and auditory attention. (*Id.*)

29. With respect to receptive and expressive language, [Student]'s performance on the testing instruments indicated he was easily confused by grammatically-complex language, he quickly forgot details in language he heard, and it was hard for him to follow spoken directions. He further displayed difficulty in retrieving desired words to explain himself, formulating sentences, and coherently organizing oral expression. (*Id.*)

30. Based on the neuropsychological evaluation, Dr. XXXX concluded [Student] had the following diagnoses as of May 2013: ADHD; anxiety disorder – not otherwise specified; developmental coordination disorder; mixed receptive-expressive language disorder; learning disorders in Reading, Math, and Written language; and pervasive developmental disorder – not otherwise specified.

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<sup>12</sup> “Phonological processing” relates to the ability to recognize the individual sounds in words and to remember them. (P. Ex. 2.)

<sup>13</sup> “Naming speed” refers to the speed with which an individual can retrieve the names or verbal labels for visual stimuli (for example, the ability to identify several objects in a row based solely on pictures of the objects). (*Id.*)

31. Based on his findings and impressions, Dr. XXXX made the following recommendations for [Student]’s educational, emotional, physical, and social development:

- Placement in a small, supportive special education program which provides intensive intervention for his multiple areas of need
- Possible pharmacological intervention to address the symptoms associated with ADHD
- Utilization of cognitive behavior therapy techniques to address/reduce his anxiety and moodiness related to social challenges and stressors
- Academic accommodations such as modified assignments, adjusted workload, extended time for tests and other in-class assignments, written directions, preferential seating and, where appropriate assistive technology such as portable word processors as he gets older
- Tutoring in sight word recognition, reading fluency, reading comprehension, written language skills (including transcription and composition), and math
- Social skills training, including small group and role-playing activities which focus on the ability to understand and label feelings

*(Id.)*

32. On September 18, 2014, [Mother] contacted XXXX XXXX<sup>14</sup> of MCPS and formally requested the initiation of IEP proceedings to prepare for [Student]’s transition from [SCHOOL 3] to another educational setting for the 2015-2016 SY. (P. Ex. 5.)

33. Dr. XXXX conducted a subsequent psycho-educational evaluation of [Student] on September 23, 2014. As part of the evaluation, Dr. XXXX administered the following tests to [Student]: Gates-MacGinite Reading Test; Wechsler Intelligence Scale for Children-4<sup>th</sup> Edition (WISC-IV); Woodcock-Johnson Tests of Achievement-3<sup>rd</sup> Edition (WJ-III); and the Social Responsiveness Scale-2<sup>nd</sup> Edition (SRS-2). (P. Ex. 6.)

34. During the administration of the testing instruments, Dr. XXXX observed that while [Student] was cooperative and highly motivated to perform well, he nevertheless

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<sup>14</sup> Ms. XXXX is referenced throughout the exhibits as “XXXX XXXX,” which is her pre-marital name.

displayed trouble sometimes remembering the directions of the task on which he was working. He also lost focus when test items were too challenging for him. (*Id.*)

35. [Student]'s overall score on the subtests of the WISC-IV demonstrated he continued to possess average to above average skills in both verbal and non-verbal intellectual functioning, although he displayed significantly weaker skills in working memory and processing speed. (*Id.*)

36. On the perceptual reasoning subtest of the WISC-IV, Dr. XXXX observed that with multiple choice questions, [Student] often did not take sufficient time to study the possible response options before selecting his answer. With questions which required him to match abstract geometric designs on the page with colored blocks, [Student] often did not take sufficient time to study the designs and double-check his block constructions to ensure they matched the models. (*Id.*)

37. On the subtests of the WISC-IV which measured working memory and processing speed skills, [Student] scored in the below average ranges. (*Id.*)

38. The WJ-III also consists of subtests designed to measure a subject's performance in the areas of Math, Reading, and Written Language skills. [Student]'s performance on the Reading subtests demonstrated the following with respect to his abilities:

- A near average ability to sound out unfamiliar words and to decode nonsense words (for example: zoop, lish, rox)
- A below average sight-word recognition ability
- Significant difficulty identifying missing words when given a short passage to read, a task designed to demonstrate his comprehension skills

(*Id.*)

39. On the Math subtests of the WJ-III, [Student] struggled with untimed pencil-and-paper tests of computational skills and math applications. He misread the operation sign on a

number of items (for example, mistaking the minus sign for a plus a sign), displayed difficulty performing simple calculations involving money, and demonstrated below average speed while completing single-digit addition and subtraction problems. (*Id.*)

40. [Student]'s performance on the Written Language subtests of the WJ-III placed him at the low end of the average range on a measure of sentence-level written expression. He was required to write one or two words to complete short sentences. He generally omitted capitalization, did not use punctuation, and made numerous spelling errors of simple words. He scored below average on a test of spelling ability. (*Id.*)

41. [Student]'s overall performance on the tests administered by Dr. XXXX demonstrated he had average to above average ability to understand and apply verbal concepts, a solidly average fund of general knowledge, and age-appropriate visual-spatial skills. He displayed weaknesses in fluency with respect to the decoding and spelling of words, in reading comprehension, and in mastery of computational procedures and ability to solve word problems. (*Id.*)

42. Based on his observations of [Student] during the September 2014 evaluation, as well as [Student]'s performance on the various testing instruments, Dr. XXXX identified the following diagnoses: ADHD-Combined Type; developmental coordination disorder; language disorder; and specific learning disorder, with impairment in Math, Reading, and Written Language. Dr. XXXX also recommended a follow-up assessment in approximately one year's time to determine whether an autism spectrum disorder diagnosis might also apply to [Student]. (*Id.*)

43. Based on his findings and impressions, Dr. XXXX made the following recommendations for [Student]'s educational placement and supports:

- Placement in a school program with a low student/teacher ratio and the ability to provide intensive intervention to remediate his language-based learning disabilities
- Highly individualized instruction in all academic areas, provided in individual and small-group settings
- On-site speech-language therapy, with his language therapy goals addressed throughout the school day
- Extensive academic accommodations, such as modified assignments, adjusted workloads, extended time for in-class assignments and tests, preferential seating, and a word processor for writing

*(Id.)*

44. In October 2014, [Student] was in 2<sup>nd</sup> grade at [SCHOOL 3].<sup>15</sup> His classroom at [SCHOOL 3] included two teachers, a floater, and an OT and an SLP who came in and out of the classroom throughout the school day. (P. Ex. 9.)

45. For the core academic subjects of Math and Reading, students at [SCHOOL 3] are taught in small groups of three to five students, which rotate between the two subjects during the period of 10:00 a.m. to 11:30 a.m. each day. *(Id.)*

46. At [SCHOOL 3], [Student]'s teachers used the following accommodations and adaptations to assist in him accessing the curriculum: adjusted workload; individually-adapted materials; assistive technology; counselor consultations; and remedial academic supports. He also required significant repetition of directions. *(Id.)*

47. On October 7, 2014, XXXX XXXX, Ed.S., an educational consultant working with the Parents, observed [Student] at [SCHOOL 3]. Ms. XXXX observed [Student] for

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<sup>15</sup> The 2014-2015 SY at [SCHOOL 3] ended on June 1, 2015. (P. Ex. 16.)

approximately eighty minutes in six different groups. During the observation, she noted the following:

- In preparing for transition of group rotations, [Student] had difficulty gathering his materials and required assistance from one of the teachers
- In the Reading Comprehension group, [Student] struggled to read the words in the assigned passage, resulting in intervention and assistance from the teacher
- The teacher stayed close to [Student] to ensure he remained on task
- During the Math rotation, [Student] transposed the number “12”, which he copied from the number chart, as “21” and had to be prompted by the teacher to double-check his answer
- [Student] did not seem to understand the directions for the math problem, as the teacher checked with him more than once to determine if he had read the directions based on his work product
- Given three-step directions from the teacher and a demonstration of the task, [Student] was able to complete a task as expected in the Word Work group

(P. Ex. 7.)

48. Based on the classroom observation and input from [Student]’s teachers, Ms. XXXX noted that [Student] had difficulty with following multi-step directions if he had to read them, and he required regular check-ins by the teacher to ensure he was on target with a given assignment. He often would not seek clarification if he did not understand the directions and required teacher intervention to notice if he did something incorrectly. He responded well to structure and he put in good effort to perform tasks. (*Id.*)

49. Ms. XXXX recommended [Student] have preferential seating during classroom sessions and that he practice reading directions, especially multi-step directions, to ensure he reads all parts of the directions. (*Id.*)

50. On October 27, 2014, the Parents, along with representatives of MCPS and a representative of [SCHOOL 3], met to develop a service plan<sup>16</sup> for [Student]. (T. XXXX.) At the time of the service plan meeting, [Student]'s primary disability was coded as Other Health Impairment. The areas identified as affected by the disability were Receptive and Expressive Language. (P. Ex. 9.)
51. During the service plan meeting, XXXX XXXX, the representative for [SCHOOL 3], reported to the team about [Student]'s performance in the academic areas of Math, Reading, Oral Language, and Written Language. Ms. XXXX advised the team that when working in Math, multiple-step problems were the most difficult for [Student] to manage. His instructional level of performance (ILP) in Math was beginning of 2<sup>nd</sup> grade. His teachers at [SCHOOL 3] noted that his knowledge in the areas of basic applications, concepts, and operations was a source of concern. (*Id.*)
52. For Written Language skills, Ms. XXXX reported [Student]'s teachers at [SCHOOL 3] were concerned about his performance with respect to the organization of sentences, word choice, sentence fluency, and sentence conventions. He also displayed difficulty with copying, and with formulating and developing ideas. His ILP was below grade level. [SCHOOL 3] teachers also observed he had difficulty maintaining attention while performing writing assignments, and he experienced anxiety when engaging in journaling activities. As interventions when [Student] struggled with writing assignments, his teachers would sometimes take him into a smaller room, or bring him to a desk separate from the other students to provide further instruction. (*Id.*)
53. In Reading, [Student]'s independent ILP was at middle 1<sup>st</sup> grade, although he worked on 2<sup>nd</sup> grade materials during class time. His teachers noted he expended a lot of energy

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<sup>16</sup> The parties stipulated that a "service plan" is developed when a child is privately placed by the parents but it is understood the child requires educational supports and services and the school system will provide supports and services even in the absence of an IEP.

decoding words, and his reading fluency was described as “choppy.” Word recall was also an area of difficulty for him, partly because he would spend a great deal of time trying to decode words. Other areas of concern noted by his teachers were his ability to orally demonstrate his comprehension of written passages, and his ability to read accurately and fluently. Ms. XXXX reported [Student] worked in small groups two times per day to target his reading skills. (*Id.*)

54. In Oral Language, Ms. XXXX reported [Student] continued to display difficulty following multiple-step directions. His ILP for Oral Language was below age-level expectations. While he could satisfactorily answer factual questions, he had more trouble drawing inferences based on things written or said to him. His teachers noted his ability to speak in complete sentences and to speak clearly were areas of concern. As interventions to target his weaker areas, [Student] participated in a social skills group and a visualizing-verbalizing program. He also received in-class speech-language services with the SLP, designed to strengthen his ability to draw inferences, his auditory comprehension and his social skills. (*Id.*)

55. Ms. XXXX also provided the service plan team with information about [Student]’s behavioral, emotional, and social performance while at [SCHOOL 3]. His teachers observed he frequently became anxious when working alone, particularly during journal time, and he required reassurances from his teacher to continue working. His performance in writing was often affected by his inability to consistently maintain attention and his anxiety about the assignment. His attentional issues were observed by his teachers during unstructured time, group lessons, and reading tasks. He was most attentive when there was more structure to the class assignment, he was engaged in hands-on, experiential learning, and he was in small groups. [Student] never displayed

disrespectful behavior in class, he did not repeat disruptive behavior once admonished about it, and he never refused to perform assignments, even when they were challenging for him. (*Id.*)

56. After reviewing the information presented by [SCHOOL 3] and additional information provided by [Mother], the service plan team determined [Student]’s disability had an impact on his language skills, resulting in his difficulty in producing grammatically-correct sentences, following directions, and answering questions. The team further determined [Student]’s attentional issues and his anxiety had an impact on his involvement in the general education curriculum. (*Id.*)

57. The developed Service Plan identified [Student] as a student with special communications needs, and identified the following supplementary aids, services, program modifications and supports he needed to increase his access to the curriculum:

- Use of organizational aids
- Frequent check-ins to ensure his understanding of the assignment and related concepts
- Repetition of directions
- Additional wait time for him to provide responses
- Modeling of slow, clear speech
- Breaking down of assignments into smaller units<sup>17</sup>
- Short breaks while working on assignments

The identified supports and services were to be provided to [Student] on a daily basis by the SLP and within the speech-language (SL) therapy sessions for a period of approximately thirty-six weeks, from October 27, 2014 through May 1, 2015. (*Id.*)

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<sup>17</sup> This practice is frequently referred to in educational parlance as “chunking.” (T. XXXX.)

58. Under the Service Plan, [Student] was to receive SL therapy with the SLP once per week for forty-five minutes, outside of the general education setting. (*Id.*)
59. The Service Plan also identified goals and objectives for [Student] in the area of Speech and Language. The first goal was for him to produce grammatically and syntactically correct sentences and questions of six to eight words in length. The second goal was for him to demonstrate understanding of complex sentences, i.e., sentences which included directions, statements, and questions. Under the Service Plan, [Student]’s progress on the goals and related objectives was to be measured through informal procedures and observation records, and his teachers were to provide quarterly, written progress reports. (*Id.*)
60. On October 29, 2014, XXXX XXXX, Learning and Curriculum Specialist with [SCHOOL 3], conducted a forty-minute, in-class observation of [Student] at [SCHOOL 3] in the subject areas of Math and Occupational Therapy.<sup>18</sup> During the Math portion of the observation, Ms. XXXX noted [Student] to be anxious and fidgety in his seat when he had to wait for access to one of the tools used to perform math problems. Once he performed some of the assigned equations, his teacher checked over his work, which contained numerous errors. When asked how he should correct the errors, [Student] requested permission to do so using building blocks and he was able to fix the errors using the blocks. During the OT portion of the observation, [Student] performed a handwriting assignment. He reversed certain letters while writing and the teacher referred him to an alphabet chart to assist him in seeing his errors. He also fidgeted in his seat, at which time he asked the OT for a movement break. After taking a two-minute

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<sup>18</sup> There were four group sessions – Math, Reading, Occupational Therapy, and Speech – during the period of Ms. XXXX’s observation; these were the two subject areas into which [Student] rotated while she observed him.

break, he returned to his assignment and completed two pages of work before asking the occupational therapist to check his answers. (P. Ex. 10.)

61. As a result of the observation, Ms. XXXX noted motivation and social interaction as strengths for [Student]. He was willing to ask for and receive help, and he cooperated with and seemed to enjoy his classmates during team activities. Ms. XXXX noted the following areas as “significant” problems for [Student]:

- Basic reading skills
- Reading comprehension
- Written expression
- Math calculation
- Visual discrimination
- Visual motor coordination
- Attention
- Organization
- Activity level
- Work habits
- Task completion
- Speech

(*Id.*)

62. On March 9, 2015, Ms. XXXX, SLP for MCPS, conducted a forty-minute, in-class observation of [Student] at [SCHOOL 3], during the morning meeting of his entire class, which included working in their day planners, then splitting into smaller groups to engage in activities related to Math, Speech, and Spelling. [Student]’s class totaled fourteen students, two teachers, one floater teacher, and the SLP. (P. Ex. 14.)

63. During the observation, Ms. XXXX noted [Student] had some problem with correctly following directions to identify the time and the day of the week. When he was called on, he took a few extra seconds to begin speaking, which Ms. XXXX attributed to him having some difficulty with formulation. One of [Student]’s teachers reported to Ms. XXXX that when speaking, [Student] had difficulty with blended sounds, and he often reversed letters when writing. (*Id.*)
64. Ms. XXXX did not observe [Student] display any issues with attention either when the teachers were talking or giving instructions, or while he performed his assigned tasks. Based on the observation, Ms. XXXX noted [Student] had some problem in the areas of listening comprehension, oral and written expression, and speech. (*Id.*)
65. On May 11 and 18, 2015, Ms. XXXX conducted a speech-language re-assessment of [Student] to determine his current speech-language levels. During the assessment, Ms. XXXX administered the following instruments to [Student]: CELF-5<sup>th</sup> Edition (CELF-5); Goldman-Fristoe Test of Articulation – 2<sup>nd</sup> Edition (GFTA-2); Comprehensive Assessment of Language Fundamentals (CASL); and the EVT-2. (P. Ex. 15.)
66. The GFTA-2 evaluates the subject’s consonant production in all positions of words. The CASL measures expressive and receptive language and examines supralinguistic<sup>19</sup> aspects of language, syntax, semantics, and pragmatics. (*Id.*)
67. [Student]’s scores on the CELF-5 indicated below average ability in all subtests except for Formulated Sentences and Word Definitions, where his scores indicated average ability. He displayed the following responses, based on the subtest:
- **Word Classes:** When asked to identify relationships among words, [Student] displayed difficulty identifying relationships based on location, composition, and object function.

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<sup>19</sup> “Supralinguistic” skills refers to understanding non-literal language and the concept of drawing inferences. (MCPS Ex. 2.)

- **Following Directions:** The subtest asks the subject to follow multiple-step directions of increasing length and complexity. [Student] was able to consistently follow one- or two-step directions with little difficulty, but demonstrated significantly more difficulty when directions increased to three and then four steps. If the directions had more than one modifier, he also had difficulty following the direction.
- **Recalling Sentences:** When asked to repeat verbatim sentences of increasing length and complexity, [Student] demonstrated significant difficulty with subordinate and relative clauses, active interrogatives with negatives and passive interrogatives with negatives/coordination.
- **Understanding Spoken Paragraphs:** When asked to listen to paragraph-level material and then answer questions related to the main idea, details, sequences, inferences, and social context, [Student] had difficulty identifying main ideas, details, and sequences. He also demonstrated difficulty with drawing inferences.
- **Sentence Assembly:** In this subtest, which requires the subject to combine phrases in multiple ways to produce grammatical sentences with proper syntax, [Student] struggled using active declaratives with negatives and subordinate clauses, and using interrogatives with negatives.

*(Id.)*

68. [Student]’s CELF-5 scores for Expressive Language, Receptive Language, Core

Language, and Language Content and Memory were all below average when compared with same-age peers. *(Id.)*

69. On the CASL, which measures the subject’s ability to identify the intended meaning of non-literal sentences, [Student]’s score fell in the average range compared to same-age peers and he displayed age-appropriate skills to interpret non-literal language. On the EVT-2, [Student]’s scores fell in the average range compared to same-age peers. *(Id.)*

70. [Student]’s scores on the GFTA-2 indicated performance in the average range compared to same-age peers. He was able to produce all sounds appropriately in all positions at the word-level. His conversational speech was 100% intelligible to Ms. XXXX, although his production of the “s” sound was somewhat distorted. *(Id.)*

71. Based on her observations and [Student]'s performance on the various assessment instruments, Ms. XXXX concluded expressive and receptive language were areas of weakness for [Student], while he displayed strengths in articulation, semantics and speech intelligibility. She recommended the continuation of SL interventions and services to meet [Student]'s needs. (*Id.*)

The Student and [School 1]

72. In Summer 2015, [Student] attended the summer program and received tutorial services at [SCHOOL 1]. (T. XXXX.) [Student]'s summer program focused on strengthening his skills in phonics, phonemic awareness, reading comprehension and fluency, and vocabulary. (P. Ex. 19.)

73. [SCHOOL 1] is a private day school for students who are learning disabled, diagnosed with ADHD, or both. It services students in 1<sup>st</sup> through 12<sup>th</sup> grade. (T. XXXX.)

74. Established in [year], [SCHOOL 1] uses an academic club methodology to teaching History and Social Studies, a form of experiential learning where the students spend a SY in an immersive study of a particular time period. Students use costuming, primary documents, and hands-on skills and drills in order to engage with the academic content. It is a multi-sensory learning experience designed for use with students who struggle with learning purely through reading a text. Reading at [SCHOOL 1] is taught in small groups with direct instruction, while Math is taught in small groups with direct instruction and a hands-on, multi-sensory component. The smallest class size at [SCHOOL 1] is two students to one teacher, while the largest is approximately thirteen students to two teachers. Teachers at [SCHOOL 1] are certified in either special education or specific content-areas, but the majority of the teachers are certified in special education. (*Id.*)

75. [Student] began attending [SCHOOL 1] as a full-time student in late-summer 2015. (T. XXXX.) After an approximately two-month period during which [SCHOOL 1] staff had the opportunity to instruct and observe him, an IEP team meeting convened on November 3, 2015 to develop an IEP for [Student] to be used for the remainder of the 2015-2016 SY. (P. Ex. 22.)

76. On the November 3, 2015 IEP, [Student]’s current levels of functioning (CLF)<sup>20</sup> were identified as follows:

- **Reading:** 1<sup>st</sup> grade, with strengths noted as comprehension-predictions, decoding-phonemic awareness, decoding-sight words, and print awareness; areas of need were noted to be in auditory processing, encoding-sight words, decoding-structural analysis, reading fluency, and receptive language.
- **Math:** Middle of 1<sup>st</sup> grade, with strengths identified as geometry-basic skills, organization of physical space, whole number calculation-addition without regrouping, and whole number calculation-subtraction without regrouping; areas of need were identified as application of calculation to problem solving, math reasoning, measurements-money, and whole number calculation-addition with regrouping.
- **Written Language:** 1<sup>st</sup> grade, with strengths noted as maintaining relevance to topic, organization of physical space, paragraph structure, and sequencing; areas of need were noted as grammar, mechanics, sentence structure, spelling, word retrieval, and writing fluency.
- **Academic Behavior and Executive Functioning:** Strengths included ability to work independently and to attend to classroom instructions and teacher directions, following classroom procedures, organization of work space, return of completed homework; areas of concern included following directions as given, when given, self-advocacy related to assistance and clarification, spatial awareness, understanding expectations of the course/teacher, and understanding and taking the perspectives<sup>21</sup> of others.
- **Speech/Language:** Relative strengths noted in auditory discrimination, expressive single-word vocabulary, receptive single-word vocabulary, speech fluency, and understanding aspects of social pragmatics such as greetings and the “rules” of social conversation; relative weaknesses noted in language formation

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<sup>20</sup> “Current levels of functioning” is the terminology used at [SCHOOL 1], but I draw the reasonable inference it is analogous in concept and purpose to the measurement of a student’s “present levels of performance” on an IEP drafted by a local education agency (in this case, MCPS).

<sup>21</sup> “Taking the perspective” of others refers to a person’s ability to understand the thoughts and feelings of other people. (T. XXXX.)

and organization, narrative skills, phonological awareness as applied to reading and spelling, reading fluency, speech production, understanding aspects of social pragmatics such as perspective-taking and problem solving, and written language.

- **Occupational Therapy:** Strengths include ability to cooperate, ability to take pride in his accomplishments, conscientiousness, creativity, curiosity, effort, and perseverance on tasks; areas of concern included excessive force applied when writing (which led to frequent fatigue), immature hand development (for in-hand manipulation), poor body awareness/endurance/printing skills/self-care skills/sensory regulation and modulation/spatial awareness, reversals when letter writing (for example, reversing the letters “b” and “d” for each other), weak hand/finger/trunk/upper body strength, and weak visual spatial organization.

(P. Ex. 22.)

77. The November 3, 2015 IEP included goals and objectives for [Student] in the areas of Math, Occupational Therapy, Reading, Speech/Language, Social/Behavioral, and Written Language. (*Id.*)

78. The November 3, 2015 IEP identified the following accommodations and modifications which were to be provided to [Student] in the classroom and during formal, informal, and standard testing:

- Extended testing time
- Advance notice of tests
- Extra time for processing information and formulating oral/written responses
- Paraphrasing/simplification of oral and written directions
- Preferential seating near the teacher
- Repetition of oral and written directions, as needed
- Small group setting
- Supervised movement breaks during testing sessions
- Administration of tests at best time of day for [Student] and, where necessary, tests administered over multiple days without exceeding total time of test
- Verbatim reading of the test/selected sections of the test or vocabulary

(Id.)

79. Under the November 3, 2015 IEP, [Student] was to receive services as follows:

<b>Service</b>	<b>Provider</b>	<b>Setting</b>	<b>Time</b>	<b>Type</b>	<b>Frequency</b>	<b>Duration</b>
Special Education	Special Education Team	Special Education	32 hrs.	Specialized Instruction	Per week	11/3/15 through 11/2/15
Speech/Language	SLP			Integrated Services <sup>22</sup>		11/3/15 through 11/2/15
Occupational Therapy	OT			Integrated Services		11/3/15 through 11/2/15
Occupational Therapy	OT	Special Education	45 min.	Individual	1 x Per week	8/31/15 through 8/30/16
Speech/Language	SLP	Special Education	45 min.	Individual	2 x Per week	8/31/15 through 8/30/16
Speech/Language	SLP	Special Education	45 min.	Group	1 x Per week	8/31/15 through 8/30/16

(Id.)

80. During the 2015-2016 SY, [Student] made progress on five of the six objectives

associated with his Reading goal, when measured between January 2016 and May 2016.

He continued to develop the skills targeted by the five objectives associated with his goal in Written Language. In Math, he had one goal and four associated objectives. Between January 2016 and May 2016, he made progress on two of the four goals and continued to develop the skills targeted by the remaining two goals. (P. Ex. 31.)

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<sup>22</sup> “Integrated services” means the services are provided within the classroom setting, as opposed to during individual pull-out sessions.

81. In Social Behavioral, Speech/Language, and Occupational Therapy, [Student] displayed developing skills in the areas targeted by his goals and objectives, although he did not master any of his objectives. (*Id.*)

82. On May 18, 2016, the [SCHOOL 1] IEP team convened to develop [Student]'s IEP for the 2016-2017 SY. Based on formal and informal measurements, his student work product during the year both in and out of class, and the observations of his instructors and specialists, [Student]'s CLF were identified as follows:

- **Reading:** 3<sup>rd</sup> grade, with strengths in comprehension (conclusions and predictions), decoding (sight words, phonemic awareness, structural analysis), and organization of personal space; concerns noted with respect to comprehension (summarization of material read), encoding (sight words, spelling), expressive language, vocabulary, and word retrieval.
- **Math:** 3<sup>rd</sup> grade, strengths noted as geometry-basic skills, multiplication concepts, whole number calculation-addition with and without regrouping, and whole number calculation-subtraction without regrouping; weaknesses noted in math reasoning, expressive language, and whole number calculation-multiplication and division.
- **Written Language:** 2<sup>nd</sup> grade, with strengths in maintaining relevance to topic, organization of physical space, paragraph sequence, sequencing, and simple sentence structure; areas of concern noted to be in editing, grammar, expressive language, multi-paragraph structure, organization of both oral and written language, revision, and writing fluency.
- **Academic Behavior and Executive Functioning:** Strengths in following classroom procedure, following directions as given and when given, ability to work independently, organization of the work space, attending to classroom instruction and teacher direction, and organization of work space; areas of concern include ability to demonstrate flexible thinking, checking for clarity of understanding, following through with study schedule and procedures, self-advocating for assistance and clarification, and understanding and taking the perspective of others.
- **Speech/Language:** Strengths remain the same as the beginning of the 2015-2016 SY; relative weaknesses noted in application of phonological awareness and sound-symbol correspondence to reading and spelling, aspects of social pragmatics (body positioning, perspective taking), aspects of syntax (use of subordinating conjunctions), language formation, narrative skills, receptive oral language, and verbal problem solving.

- **Occupational Therapy:** Areas of relative strengths and needs remain the same as the beginning of the 2015-2016 SY, although during the year, [Student] demonstrated increased awareness of his sensory processing needs and displayed growth in his motor planning skills, and continued to work on his body awareness, including the ability to move through space without bumping into others or encroaching on their personal space.

(P. Ex. 32.)

83. The May 18, 2016 IEP included new goals and objectives for [Student] in the areas of Math, Occupational Therapy, Reading, Speech/Language, and Written Language skills. Goals and objectives in the area of Academic Behavior and Executive Functioning were developed and added. (*Id.*)

84. The May 18, 2016 IEP identified the following accommodations and modifications which were to be provided to [Student] in the classroom and during formal, informal, and standard testing:

- Extended testing time
- Advance notice of tests
- Extra time for processing information and formulating oral/written responses
- Individual administration, if necessary
- Location of testing with minimal distractions
- Paraphrasing/simplification of oral and written directions
- Preferential seating near the teacher
- Repetition of oral and written directions, as needed
- Small group setting
- Supervised movement breaks during testing sessions
- Administration of tests at best time of day for [Student]
- Verbatim reading of the test/selected sections of the test or vocabulary

(*Id.*)

85. Under the May 18, 2016 IEP, [Student] was to receive services as follows:

Service	Provider	Setting	Time	Type	Frequency	Duration
Special Education	Special Education Team	Special Education	32.75 hrs.	Specialized Instruction	Per week	5/18/16 through 5/17/17
Speech/Language	SLP			Integrated Services		5/18/16 through 5/17/17
Occupational Therapy	OT			Integrated Services		5/18/16 through 5/17/17
Speech/Language	SLP	Special Education	45 min.	Individual	2 x Per week	5/11/16 through 5/10/17
Speech/Language	SLP	Special Education	45 min.	Group	1 x Per week	5/11/16 through 5/10/17
Occupational Therapy	OT	Special Education	45 min.	Individual	2 x Per week	5/11/16 through 5/10/17

(Id.)

86. On April 4, 2017, the [SCHOOL 1] IEP team convened to develop [Student]’s IEP for the 2017-2018 SY. Based on formal and informal measurements, his student work product during the year, both in and out of class, and the observations of his instructors and specialists, [Student]’s CLF were identified as follows:

- **Reading:** 3<sup>rd</sup> grade, with strengths in comprehension (conclusions and predictions), decoding (sight words, phonemic awareness), and print awareness; concerns noted with respect to auditory comprehension, comprehension (recall of facts and sequence of events), encoding (sight words, spelling), reading fluency, test anxiety, vocabulary, and word retrieval.
- **Math:** Middle 3<sup>rd</sup> grade, strengths noted as estimation, geometry-basic skills, number sense, whole number calculation-addition, and whole number calculation-multiplication; weaknesses noted in fractions-concepts, math vocabulary, measurements-money and time, test anxiety, and whole number calculation-division.

- **Written Language:** Middle 2<sup>nd</sup> grade, with strengths in ability to generate simple sentences, ability to generate creative ideas for writing, writing fluency, spelling of learned patterns, topic maintenance, use of appropriate spacing and placement, use of capitalization rules, following group directions, and attending to stories and directions; areas of concern noted to be in omission of suffixes, spelling, difficulty recognizing sentence fragments, use of run-on sentences, lack of descriptive vocabulary in written work, editing, revision, use of multi-paragraph structure, organization of personal space, organization of oral and written language, test anxiety.
- **Academic Behavior and Executive Functioning:** Strengths in completing class- and homework, participation in class discussions and group activities, acceptance of constructive criticism, receptive to correction, able to follow oral and written directions, following classroom procedure, following directions as and when given, and attending to classroom instruction/teacher directions; areas of concern include difficulty organizing self, initiating assignments, sustaining attention, focusing, advocating for self and recognizing need for help; also easily distractible and anxious around routines and change.
- **Speech/Language:** Relative strengths noted as articulation, voice, simple sentence formulation, initiating and maintaining conversations with familiar adults, and greetings; relative weaknesses noted in compound/complex sentence formulation, receptive language (answering detail questions, inferential questions, understanding cause and effect relationships), oral expressive language, nonverbal communication, verbal problem solving, sound-symbol knowledge, listening, interrupting, and interjecting.
- **Occupational Therapy:** Areas of relative strengths and weaknesses remain the same as the 2015-2016 and 2016-2017 SYs, although [Student] displayed increasing anxiousness during the year.

(P. Ex. 60.)

87. The April 4, 2017 IEP included new goals and objectives developed for [Student] in the areas of Academic, Behavior, Executive Functioning, Math, Occupational Therapy, Reading, Speech/Language, and Written Language skills. (*Id.*)

88. The April 4, 2017 IEP identified the following accommodations and modifications which were to be provided to [Student] in the classroom and during formal, informal, and standard testing:

- Extended testing time
- Advance notice of tests

- Extra time for processing information and formulating oral/written responses
- For machine-scored tests, [Student] marks answers in test booklet; school personnel transfers answers to test sheet
- Location of testing with minimal distractions
- Paraphrasing/simplification of oral and written directions
- Preferential seating near the teacher
- Repetition of oral and written directions, as needed
- Supervised movement breaks during testing sessions
- Administration of tests at best time of day for [Student]
- Verbatim reading of the test/selected sections of the test or vocabulary
- Tests may be administered over multiple days without exceeding total time and within parameters of the test

(*Id.*)

89. Under the April 4, 2017 IEP, [Student] was to receive services as follows:

<b>Service</b>	<b>Provider</b>	<b>Setting</b>	<b>Time</b>	<b>Type</b>	<b>Frequency</b>	<b>Duration</b>
Special Education	Special Education Team	Special Education	31.25 hrs.	Specialized Instruction	Per week	4/4/17 through 4/4/18
Speech/Language	SLP			Integrated Services		4/4/17 through 4/4/18
Occupational Therapy	OT			Integrated Services		4/4/17 through 4/4/18
Speech/Language	SLP	Special Education	90 min.	Individual	Per week	4/4/17 through 4/3/18
Speech/Language	SLP	Special Education	45 min.	Group	Per week	4/4/17 through 4/3/18
Occupational Therapy	OT	Special Education	90 min.	Individual	Per week	4/4/17 through 4/3/18

*(Id.)*

90. During the 2016-2017 SY, [Student] mastered, with cues, five out of the eight objectives associated with his Reading goal and completely mastered two of the eight objectives, when his progress was measured between January 2017 and May 2017. For the remaining objective, he continued to develop the skills targeted by the objective during the year. (P. Ex. 62.)

91. For the goal associated with Written Language, [Student] mastered, with cues, four of the six objectives. For the two remaining objectives, he continued to develop the targeted skills. *(Id.)*

92. [Student] had one Math goal with seven associated objectives during the 2016-2017 SY. Based on the measurement of his progress between January 2017 and May 2017, he completely mastered two out of the seven objectives, and mastered, with cues, a third objective. For the four remaining objectives, the skills have not been introduced to him as of January 2017. By May 2017, he displayed development of the skills targeted by the objectives, even though his responses during trials were inconsistent. *(Id.)*

93. In the area of Academic Behavior and Executive Functioning skills, [Student] had two goals. The first goal had one associated objective. In January 2017, he had not displayed progress in meeting the objective. By May 2017, he displayed development of the targeted skill, even if his responses during trials were inconsistent. For the second goal, there were five associated objectives. In January 2017, [Student] showed no progress in the development of the skills targeted by the objectives. By May 2017, he displayed development of the skills targeted by all five objectives, although on trials his responses were inconsistent. *(Id.)*

94. For the 2016-2017 SY, [Student] had four Speech/Language goals, each with three associated objectives. His progress towards mastery of the objectives was wildly inconsistent between January 2017 and May 2017, varying between no progress on some objectives, and development of the targeted skills but with inconsistent trial responses on others. He did not master, even with cues, any of the Speech/Language objectives during the academic year. (*Id.*)

95. [Student] had six OT goals, with a combined total of fifteen objectives, for the 2016-2017 SY. On ten out of the fifteen objectives, he displayed development of the targeted skills throughout the academic year; although his responses across trials were inconsistent, he did not regress in the skill development for those objectives between January 2017 and May 2017. On the five remaining objectives, he regressed in skill development between January 2017 and May 2017. (*Id.*)

The MCPS IEP for the 2015-2016 SY

96. On June 12, 2015, an IEP team meeting convened at [SCHOOL 2] to develop [Student]'s IEP<sup>23</sup> for the 2015-2016 SY. The meeting was attended by [Mother] and the family's educational consultant, Ms. XXXX, and representatives of MCPS. The resulting IEP was finalized on July 10, 2015. (P. Ex. 18; MCPS Ex. 27.)

97. For the 2015-2016 SY, [Student] entered the 3<sup>rd</sup> grade. (T. XXXX.)

98. The July 10, 2015 IEP identified [Student]'s primary disability as Other Health Impairment, and identified the areas affected by the disability as Behavior, Math, Reading, Receptive/Expressive Language, and Written Language. The projected annual review date for the IEP was July 8, 2016. (MCPS Ex. 27.)

99. [Student]'s present levels of performance (PLP) were identified as follows:

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<sup>23</sup> This was an initial IEP developed for [Student].

- **Oral Language:** Below age expectations; weaknesses noted in expressive and receptive language skills and articulation at the conversational level; strengths noted as articulation at the word level, speech intelligibility, and vocabulary.
- **Reading:** 1<sup>st</sup> grade level; concerns noted with accuracy and fluency, oral demonstration of comprehension, and decoding.
- **Written Language:** 1<sup>st</sup> grade level; strengths noted as legible handwriting and ability to write multiple short sentences; areas of concern noted as conventions, ideas and development, organization, sentence fluency, use of voice, and word choice.
- **Math:** Below grade level; noted to display below average skills in computation and math applications.
- **Problem Solving:** Below grade level expectations; noted to display anxiety and nervousness when working alone; displays anxiety during journaling time and requires reassurances to continue working; noted difficulty problem-solving when stressed and difficulty with emotional self-regulation.

*(Id.)*

100. The July 10, 2015 IEP identified [Student] as a student with special communication needs and listed the following instructional and testing accommodations for him:

- Human reader or auditory recording of selected sections of text
- Visual cues
- Mathematics tools or computation devices
- Graphic organizers
- Visual organizers
- Extended time
- Multiple breaks
- Responses written in test booklet(s) rather than transferring to another sheet
- Monitoring of test responses
- Reduction of distractions

101. The IEP further identified the following supplementary aids, services, program modifications and supports, to be provided to [Student] on a daily basis across all academic settings:

- Allow use of highlighters during instruction and assignments
- Check for understanding
- Repetition of directions by both [Student] and his teachers
- Peer tutoring/paired work arrangement
- Picture schedule
- Wait time for oral responses
- Provide verbal and visual cues to support production and understanding of language
- Provide model of clear speech
- Pair written instructions with oral instructions and visuals
- Advanced preparation before calling on [Student] or before stating key information during instruction
- Reduce visual distractions on the page
- Modified assignments
- Break assignments down into smaller units
- Sensory tools; exercise band on chair or fidget toys
- Preferential seating

102. The July 10, 2015 IEP included goals and objectives for [Student] to address deficits in the areas of Behavior, Mathematics, Reading, Speech and Language, and Written Language skills. The Parents were to be notified of his progress on his goals and objectives via written quarterly progress reports. (*Id.*)

103. Under the July 10, 2015 IEP, [Student] was to receive services as follows:

<b>Service</b>	<b>Location</b>	<b>Description</b>	<b>Begin Date</b>	<b>End Date</b>	<b>Provider</b>	<b>Total Service Time</b>
Special Education: Classroom Instruction	Outside General Education	1 session @ 1 hr. 15 min. per day	7/10/2015	7/8/2016	Spec. Ed. Classroom Teacher	6 hrs. 15 min. weekly
Special Education: Classroom Instruction	Inside General Education	1 session @ 2 hrs. 5 min. per day	7/10/2015	7/8/2016	Spec. Ed. Classroom Teacher	10 hrs. 25 min. weekly
Related: SL – Related Services	Outside General Education	2 sessions @ 30 min. per week	7/10/2015	7/8/2016	SLP	1 hr. weekly

(*Id.*)

104. Under the July 10, 2015 IEP, for a thirty-hour school week, [Student]’s total time in the general education setting per week was twenty-two hours and forty-five minutes. His total time outside of the general education setting was seven hours and forty-five minutes, which included the one-hour per week of SL services provided by the SLP. [Student]’s total time in a general education setting without special educational instruction and related services was twelve hours and twenty minutes per week. The IEP identified the service school as [SCHOOL 2], [Student]’s public home school.

(*Id.*)

105. The July 10, 2015 IEP did not contain any goals and objectives for [Student] related to his issues with anxiety or his OT needs.

106. The Parents did not agree with the IEP team’s decision to place [Student] at [SCHOOL 2] as the service school. (T. XXXX.) By letter dated August 20, 2015, the Parents, through counsel, advised MCPS of their intention to enroll [Student] at [SCHOOL 1] for the 2015-2016 SY and requested MCPS fund the placement at [SCHOOL 1]. By

letter dated August 31, 2015, MCPS, through counsel, declined the Parents' request.  
(P. Ex. 20.)

#### The 2016-2017 MCPS IEP Process

107. For the 2016-2017 SY, [Student] advanced to 4<sup>th</sup> grade.
108. By letter dated August 3, 2016, the Parents, through counsel, contacted MCPS and requested initiation of the process for developing an IEP for [Student] for the 2016-2017 SY.<sup>24</sup> (P. Ex. 34.)
109. On October 6, 2016, an IEP team meeting was convened at [SCHOOL 1] to develop an IEP for [Student] for the 2016-2017 SY. At that time, the team determined it was necessary to have updated assessments, evaluations, and observations of [Student] because he had not been enrolled with MCPS and MCPS needed more information about his current educational performance, including his PLP in Math, Reading, and Written Language. The team further determined MCPS needed more information about [Student]'s current SL levels of functionality and performance, as well as his current behavioral, emotional, and social functioning levels. (MCPS Ex. 12.)
110. On November 1 and 2, 2016, XXXX XXXX, Special Education Resource Teacher, MCPS, conducted an educational assessment of [Student], during which she administered the WJ-4<sup>th</sup> Edition and several informal assessments, including a writing exercise. (MCPS Ex. 10.)
111. On November 14 and 29, 2016, Ms. XXXX conducted a SL re-assessment of [Student]. (P. Ex. 45; MCPS Ex. 7.)
112. On December 1, 2016, XXXX XXXX, M.S., Certified School Psychologist, MCPS, performed a psychological evaluation of [Student]. (P. Ex. 44; MCPS Ex. 9.)

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<sup>24</sup> The Parents renewed this request by letter dated August 9, 2016. (P. Ex. 35.)

113. On February 2, 2017, an IEP team convened to review the updated assessment and evaluation documents. (MCPS Ex. 6.)

The MCPS IEP for the 2017-2018 SY

114. For the 2017-2018 SY,<sup>25</sup> [Student] advanced to 5<sup>th</sup> grade at [SCHOOL 1].

115. On April 6, 2017,<sup>26</sup> the IEP team, including the Parents and a representative from [SCHOOL 1], convened to review the draft IEP. (MCPS Ex. 2.) The April 6, 2017 IEP identified [Student]’s primary disability as Specific Learning Disability and indicated the primary disability affected him in the following areas:

- Accepting the perspective of others
- Anxiety
- Attention
- Executive functioning
- Expressive language
- Math-calculation and application
- Receptive language
- Reading-comprehension, decoding, fluency
- Written language-written expression, written mechanics, spelling

(*Id.*)

116. [Student]’s academic, behavioral, and physical PLP, as of the April 6, 2017 meeting date, were identified as follows:

Academic

**Math:** 3<sup>rd</sup> grade instructional level; strengths noted in whole number calculation (addition) with or without regrouping, whole number calculation (subtraction) without

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<sup>25</sup> The 2017-2018 SY at [SCHOOL 1] began sometime in late August 2017.

<sup>26</sup> There were efforts to hold an IEP meeting between February 2, 2017 and April 6, 2017, but the proposed meeting dates had to be postponed due to the scheduling conflicts of various party participants. (T. XXXX, XXXX.)

regrouping, multiplication concepts, and geometry basic skills; weaknesses and areas of need noted to be in math reasoning, whole number calculation (multiplication and division), time, and fractions.

**Oral Language:** Below age expectancy; areas of concern were receptive language (including following multiple-step directions), comprehension of sentences which feature conjunctions, making inferences, identifying key details in information presented to him verbally, maintaining conversations, perspective-taking, and non-verbal communication.

**Reading:** 3<sup>rd</sup> grade instructional level; strengths noted as ability to read fluently with appropriate expression, recall of detail from text, use of decoding skills to decode multi-syllabic words; weaknesses and areas of need noted as vocabulary development, word retrieval, oral demonstration of comprehension, slow reading rate even when reading fluently.

**Written Language:** 2<sup>nd</sup> grade instructional level; strengths noted in use of beginning capitalization and end punctuation, generation of original ideas, use of transition words, production of grammatically-correct sentences; areas of concern include use of run-on sentences, lack of descriptive vocabulary in written work, organization of language, organization of physical space on paper, editing/revision skills.

#### Behavioral

**Attention:** Below age expectation in areas of sustaining attention and distractibility; significant weaknesses noted in working memory and processing speech, which is consistent with ADHD diagnosis.

**Executive functioning:** Slightly below age expectation; strengths noted in following classroom procedure, organization of work space, return of completed homework assignments; areas of concern noted in keeping individual materials organized, dealing with routines and changes to routines, and exhibiting flexible thinking.

**Social/Emotional:** Slightly below age expectation; areas of concern include ability to problem solve when stressed, dealing with anxiety, and ability to understand the perspective of others and to exhibit flexible thinking.

#### Physical

**Fine motor and self-regulation:** On grade level for fine motor skills, but self-regulation was below grade level; fine motor precision and manual dexterity noted as below average; handwriting skills tend to break down when cognitive tasks for written language increase.

(Id.)

117. The April 6, 2017 IEP identified [Student] as a student with special communication and assistive technology needs, and listed the following instructional and testing accommodations for him:

- Human reader or audio recording of selected sections of text
- Visual cues
- Notes and outlines
- Electronic word processors
- Ability to provide responses on test booklet
- Monitoring of his test responses
- Mathematics tools and calculation devices
- Graphic organizers
- Spelling and grammar devices
- Visual organizers
- Extended time on class assignments and tests
- Multiple breaks
- Reduction of distractions

118. The IEP further identified the following supplementary aids, services, program modifications and supports, to be provided to [Student] on a daily basis across all academic settings:

- Allow use of highlighters during instruction and assignments
- Check for understanding
- Repetition of directions by both [Student] and his teachers
- Allow use of manipulatives and organizational aids
- Paraphrase questions and instructions to ensure [Student]'s understanding

- Wait time for oral responses
- Provide alternative ways for [Student] to demonstrate learning (for example, with picture responses)
- Provide proofreading checklist
- Use of word bank to reinforce vocabulary
- Break multiple-step directions down in to single units
- Use of imagery
- Verbal and auditory cues
- Extra time for processing information and formulating oral/written responses
- Advanced notice of assessments
- Reduce visual distractions on the page
- Simplified sentence structure, vocabulary, and graphics on assignments and assessments
- Break assignments down into smaller units
- Have [Student] orally rehearse answers before writing them
- Supervised movement breaks
- Provide structured time for organization of materials
- Preferential seating

119. The April 6, 2017 IEP included goals and objectives for [Student] in the following areas:

- Attention, with four objectives
- Availability for Learning, with four objectives
- Behavior, with four objectives
- Behavior-Academic Tasks, with four objectives
- Executive Functioning, with four objectives

- Math Calculation, with four objectives
- Math-Measurement and Data, with four objectives
- Math-Problem Solving, with four objectives
- Reading-Comprehension, with four objectives
- Reading-Decoding and Encoding, with four objectives
- Reading-Fluency, with four objectives
- Speech and Language, three goals, with eleven objectives across the goals
- Written Language, with four objectives
- Written Language-Written Expression, with four objectives

121. Under the April 6, 2017 IEP, [Student] was to receive services as follows:

<b>Service</b>	<b>Location</b>	<b>Description</b>	<b>Begin Date</b>	<b>End Date</b>	<b>Provider</b>	<b>Total Service Time</b>
Special Education: Classroom Instruction	In General Education	14 hrs. 10 min. Per week	4/6/2017	4/5/2018	General Education Teacher (P) <sup>27</sup> Special Education Teacher (O) <sup>28</sup>	Weekly 14 hrs. 10 min.
Special Education: Classroom Instruction	Outside General Education	7 hrs. 30 min. Per week	4/6/2017	4/5/2018	General Education Teacher (P) Special Education Teacher (O)	Weekly 7 hrs. 30 min.
Related: OT	In General Education	30 min. Per month	4/6/2017	4/5/2018	OT (P)	Monthly 30 min.
Related: SL Therapy as a Related Service	Outside General Education	2 sessions @ 30 min. Per week	4/6/2017	4/5/2018	SLP (P)	Weekly 1 hr.

<sup>27</sup> “P” designates the primary provider of the service.

<sup>28</sup> “O” designates the other provider of the service.

Related: SL Therapy as a Related Service	In General Education	1 session @ 30 min. Per week	4/6/2017	4/5/2018	SLP (P)	Weekly 30 min.
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122. Under the April 6, 2017 IEP, for a thirty-hour school week, [Student]’s total time in the general education setting per week was twenty-one hours and thirty minutes. His total time outside of the general education setting was eight hours and thirty minutes, which included the one-hour per week of SL services provided by the SLP. His total time in the general education setting without special education instruction or related services was six hours and fifty minutes. The IEP identified the service school as [SCHOOL 2], [Student]’s public home school. (*Id.*)

123. The Parents disagreed with the amount of OT services proposed by the April 6, 2017 IEP. They requested more frequent direct OT services, to include therapeutic exercise, individualized keyboarding program, and an individualized handwriting program. Despite the Parents’ disagreement, the IEP did not increase the amount or frequency of OT services. (*Id.*)

124. The Parents also did not agree with the IEP team’s decision to place [Student] at [SCHOOL 2] for the 2017-2018 SY. (T. XXXX.) By letter dated August 17, 2017, the Parents, through counsel, advised MCPS of their intention to enroll [Student] at [SCHOOL 1] for the 2017-2018 SY and requested MCPS fund the placement at [SCHOOL 1]. By letter dated August 25, 2017, MCPS, through counsel, declined the Parents’ request. (P. Ex. 64.)

**DISCUSSION**

***Legal Framework***

*IDEA and IEPs Generally*

The IDEA requires “that all children with disabilities have available to them ... a free appropriate education that emphasizes special education and related services designed to meet their unique needs[.]” 20 U.S.C.A. § 1400(d)(1)(A). The IDEA provides federal money to the states to educate disabled children on condition that states comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. §§ 1412-1414; 34 C.F.R. § 300.2; *Board of Ed. of the Hendrick Hudson Central School Distr. v. Rowley*, 458 U.S. 176 (1982). Maryland’s special education law is found at Maryland Code Annotated, Education Article § 8-101 *et seq.* (2014). The regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

A free appropriate education is defined in COMAR 13A.05.01.03B as follows:

(27) “Free, appropriate public education (FAPE)” means special education and related services that:

- (a) Are provided at public expense, under public supervision and direction;
- (b) Meet the standards of the Department, including the requirements of 34 CFR §§300.8, 300.101, 300.102, and 300.530(d) and this chapter;
- (c) Include preschool, elementary school, or secondary education; and
- (d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

FAPE is similarly defined in the IDEA and in the applicable federal regulations. 20 U.S.C.A. § 1401(9); 34 C.F.R. § 300.17.

FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. *Rowley*, 458 U.S. at 181-182. 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 goals, objectives, activities, and materials must be adapted to the needs, interests, and abilities of each student. 20 U.S.C.A. § 1414(d). A student’s IEP must be reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 182.

In *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), the United States Supreme Court provided further clarification of what is meant by “educational benefits,” when it explained that under the IDEA, a school district will meet its substantive obligation if it offers an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 1001. The *Endrew F.* Court acknowledged there will be situations where, unlike the student in *Rowley*, the child in question may not progress smoothly through the regular curriculum. The Court indicated that in those situations, if smooth progression through the regular curriculum is not a reasonable prospect, the student’s IEP does not need to aim for grade level advancement. The Court supplied an important caveat to this, however, when it stated the 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.” *Id.* at 1000. Further, while the Court acknowledged its holding described a general standard and not a formula, it iterated the importance of the specificity of IEPs, noting that “[the] adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Id.* at 1001.

Although the law in special education has undergone a significant evolution in the past few decades, the *Rowley* case and its progeny like *Endrew F.* set the standard for determining whether a child is being accorded a FAPE under the IDEA. In *Rowley*, the Supreme Court set forth a two-part analysis. First, a determination must be made as to whether there has been compliance with the procedures set forth in the Act. Second, it must be determined whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefits.

Once an IEP is shown to be procedurally proper, the judgment of educational professionals should be shown deference by a reviewing court, and the absence of a bright-line rule of what

constitutes appropriate progress is not an invitation to the reviewing authority to “substitute their own notions of sound educational policy for those of the school authorities which they review.” *Rowley*, 458 U.S. at 206. While the judgment of the educational professionals involved is entitled to deference, the IDEA contemplates that the crafting of the IEP is done with input from both the school officials who would work with the child *and* the child’s parents. *Id.* at 208-209. By the time any disagreement between school authorities and parents reaches a reviewing court, that 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 the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 1001-1002.

To the maximum extent possible, the IDEA seeks to include the child in regular public schools; at a minimum, the statute calls for school systems to place children in the “least restrictive environment” (LRE) consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). The nature of the LRE necessarily differs for each child but could range from a regular public school to a residential school where 24-hour supervision is provided. COMAR 13A.05.01.10B. Although the IDEA requires specialized and individualized instruction for a learning- or educationally-disabled child, it also mandates that “to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities,” must be “educated with children who are not disabled[.]” 20 U.S.C.A. § 1412(a)(5)(A). It follows that the State and federal regulations that have been promulgated to implement the requirements of the Act also require such inclusion. 34 C.F.R. § 300.114 through 120; COMAR 13A.05.01.10A(1). The IDEA mandates the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. *Hartmann v. Loudon County Bd. of Educ.*, 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997).

### *Private Placements and Reimbursement*

The Supreme Court has articulated the requirements for reimbursement when the private placement desired by a child's parents is proper, but the one recommended by the school system is inappropriate. The Court has upheld the right of the parents to unilaterally place a learning disabled child in a private school and to recover reimbursement from the local educational agency when the educational program offered by school authorities is not reasonably calculated to provide a FAPE. *Sch. Committee of the Town of Burlington, MA v. Dept. of Education*, 471 U.S. 359 (1985). This reimbursement right may even apply when the placement selected by the parents does not meet all of the standards applicable to private placements effectuated by the State itself. *Carter v. Florence County School Dist. Four*, 950 F.2d 156 (4<sup>th</sup> Cir. 1991), *aff'd*, 510 U.S. 7 (1993); *see also*, 34 C.F.R. § 300.148(a) and (c). Reimbursement for a private placement is authorized even in those situations, such as the one presented by this case, the student in question has never attended the proposed public placements. *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 243 (2009).

As recognized in *Burlington* and *Carter*, parents who unilaterally remove a child from a public school system placement without the consent of school officials, and who place their child at a private school, “do so at their own financial risk.” *Burlington*, 471 U.S. at 374. Before they can expect to recoup their expenses for the private placement, parents must meet a two-pronged test under those cases: (i) the placement proposed by the school system is not reasonably calculated to provide a child with FAPE, and (ii) the private unilateral placement is proper.

### *Burden of Proof*

The burden of proof in a due process hearing is by a preponderance of the evidence and rests with the party bringing the due process complaint. *Schaffer v. Weast*, 546 U.S. 49 (2005). Therefore, the burden in this matter is on the Parents. To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so” when all of the

evidence is considered. *Coleman v. Anne Arundel Co. Police Dep't*, 369 Md. 108, 125 n.16 (2002). For the reasons articulated below, I find the Parents have satisfied their burden of proof.

### ***The Merits of the Case***

#### *Arguments of the Parties*

I note at the outset the Parents made no challenge to MCPS' procedural compliance with the IDEA. The Parents challenged the recommendation of the MCPS members of the Student's IEP team to implement his IEP at his home school, i.e. the school he would attend if not disabled under IDEA, of [SCHOOL 2], in a general education setting for the majority of the school day, during the 2015-2016 and 2017-2018 SYs. They noted that [Student] has a complex set of neuro-psychological and physiological issues which work together to significantly impact his ability to learn and to adequately access his educational programming. Despite this constellation of deficits, various testing and assessments demonstrate [Student] is of average cognitive capability; he is capable of learning new concepts and generalizing them across various contexts as long as he receives the proper accommodations, services and supports, and receives them at a sufficient intensity level.

The Parents argued the IEP proposed by MCPS for the 2015-2016 SY, finalized on July 10, 2015, was not appropriate because it failed to identify areas of need for [Student], related to disabilities which could have a negative impact on his ability to access his educational curriculum. Specifically, the July 2015 IEP did not identify (1) either [Student]'s ADHD and its attendant impact on his ability to pay and sustain attention in the classroom setting, or (2) his needs and deficits with respect to executive functioning and how they impact his ability to access the curriculum. According to the Parents, [Student]'s issues with attention and executive functioning were known as early as 2013, when Dr. XXXX XXXX performed his first extensive neuro-psychological evaluation of [Student]. As the July 2015 IEP did not identify these areas of

disability/areas affected by disability, there were no goals and objectives, or services and supports, identified in the July 2015 IEP which would mitigate the impact attention and executive functioning deficits have on [Student]'s ability to access his curriculum. These omissions on the July 2015 IEP denied [Student] a FAPE.

The Parents further argued, with respect to the 2016-2017 SY, MCPS denied [Student] a FAPE because it did not develop and have in place an IEP at the start of the 2016-2017 SY. The Parents noted the July 2015 IEP essentially "expired" at the end of July 2016. Under the IDEA, IEPs are to be reviewed on a yearly basis and, where necessary, updated with information about the child's academic and functional levels of performance, any newly identified areas of need or disability, revised or additional goals and objectives, and revised or additional accommodations, modifications, services and supports. Here, MCPS did not finalize an IEP for [Student] during the 2016-2017 SY until April 6, 2017, at which point there were only two months left in the school year. The Parents noted they advised MCPS, in writing, they sought a FAPE for [Student] for the 2016-2017 SY and did so far enough in advance for an IEP to be developed which covered the school year. Despite being a student in need of special education and related services under IDEA, [Student] was without a current IEP, developed by and with input from MCPS, for the majority of the 2016-2017 SY. As a result, according to the Parents, he was denied a FAPE.

The Parents further argued the intensity of some of the services proposed for [Student] in the April 6, 2017 IEP, which governs the 2017-2018 SY, were not appropriate in light of his unique needs. Specifically, the Parents challenged, as insufficient, the proposed thirty minutes of OT services per month in the general education classroom. They argued [Student]'s OT needs, which included fine and gross motor impairments, required more frequent, direct OT services, to

include therapeutic exercise, an individualized keyboarding program, and an individualized handwriting program.

Finally, and most significantly, with respect to both MCPS-proposed IEPs, the Parents argued it is not appropriate for [Student] to receive educational instruction in a general education setting such as [SCHOOL 2]. His constellation of needs – particularly with respect to anxiety, attention, executive functioning, processing speed, reading and writing fluency, and working memory – are such that he requires instruction in a small, self-contained special education classroom, with integrated OT and SLP services, in order to access his educational curriculum and make appropriate progress. According to the Parents, there is nothing in the record which suggests that given [Student]’s circumstances, he could make educational progress in a general education setting for the majority of the school day or week. MCPS has not, the Parents argued, provided a cogent explanation for why it believes he could do so. By proposing IEPs for the 2015-2016 and 2017-2018 SYs which would find [Student] in the general education classroom for the majority of the school day, MCPS failed to design a program for [Student] which actually took into consideration his constellation of disabilities and how the interaction of those disabilities affects the way he learns. In failing to do so, MCPS denied [Student] a FAPE.

For its part, MCPS argued it developed detailed and appropriate IEPs for the 2015-2016 and 2017-2018 SYs, and the Parents did not produce any evidence to demonstrate MCPS could not implement the IEPs as proposed, including the provision of the supplementary aids, services, accommodations, and supports. According to MCPS, the Parents did not have any objection to the substantive features of the July 10, 2015 IEP, including the identification of [Student]’s PLP, the areas of need, the identified goals and objectives, or the proposed supplementary aids, services, accommodations, and supports. The only aspect of the July 10, 2015 IEP the Parents disagreed with was [SCHOOL 2] as the LRE determination. With respect to the April 6, 2017

IEP, the Parents disagreed with [SCHOOL 2] as the proposed placement and the amount of OT services. They did not, MCPS argued, disagree with the identification of [Student]'s PLP, the areas of need, the goals and objectives, or the proposed supplementary aids, services, accommodations, and supports. MCPS noted it incorporated many of the suggestions of the Parents and their educational consultant, Mr. XXXX, as well as information from [SCHOOL 1], into the April 6, 2017 IEP.

With respect to the amount of OT services in the April 2017 IEP, MCPS argued that based on XXXX XXXX's OT evaluation of [Student], his OT needs do not have a significant impact in the classroom setting and, therefore, do not significantly interfere with his ability to access his educational curriculum. Accordingly, the amount of OT services proposed in the April 2017 IEP is appropriate for [Student].

MCPS further challenged the credibility of Dr. XXXX with respect to his opinion on [Student]'s areas of need. Specifically, MCPS argued Dr. XXXX's opinions, as articulated in the September 23, 2014 psycho-educational evaluation, are undermined by (1) the fact that he failed to include an anxiety diagnosis, even though he diagnosed [Student] as having anxiety in his May 2013 evaluation, and (2) the fact he deleted an autism spectrum disorder diagnosis from the first version of the evaluation after speaking with [Mother] and the executive director of [SCHOOL 1]. According to MCPS, it is problematic Dr. XXXX revised the September 2014 evaluation report without noting he had done so, particularly given that [SCHOOL 1] does not service children with autism diagnoses. MCPS urged me to give less weight to Dr. XXXX's opinions in light of these issues with his September 2014 evaluation report.

Finally, MCPS argued that under IDEA, disabled children should be educated with their non-disabled peers and the implementation of a child's educational program in the LRE, where appropriate, is actually a requirement of the IDEA. Here, MCPS proposed a program that would

provide [Student] a FAPE while allowing him to interact with and develop alongside non-disabled peers. MCPS argued it has the ability to implement the proposed July 2015 and April 2017 IEPs, and the Parents' assertion that [Student] could not receive educational benefit if he attended [SCHOOL 2] is purely speculative and, thus, not a viable challenge to the appropriateness of either IEP. According to MCPS, the Parents have not presented evidence to support a finding the school system could not implement either the July 2015 or the April 2017 IEP at [SCHOOL 2] in a manner that would confer [Student] with educational benefits.

### ***Analysis***

#### *Placement in the General Education Setting Under the July 2015 and April 2017 IEPs*

Upon review of the record, it is clear that the most significant area of disagreement between the parties lies in the question of whether [Student] could receive a FAPE if he spent the majority of the school day/week in the general education classroom. With respect to both MCPS-proposed IEPs, the Parents, with the assistance of their educational consultants Ms. XXXX and Mr. XXXX, were actively involved in and cooperative with the process. The lines of communication between [Mother] and various MCPS representatives remained open and cordial at all times. (*See* P. Exs. 5, 11-13; MCPS Ex. 44.) The July 10, 2015 IEP meeting notes do not indicate disagreement from the Parents with respect to [Student]'s identified PLP, goals and objectives, or services and supports. (MCPS Ex. 27, p. 54; T. XXXX.) The April 6, 2017 IEP meeting notes reflect the Parents disagreed with the amount of OT services, but there is no mention they took issue with the identified areas of need, the PLP, the goals and objectives, or the services and supports. (MCPS Ex. 2, p. 75.)

The Parents' primary challenge to the MCPS-proposed IEPs lies with the determination of the LRE to be [SCHOOL 2], and with [Student] spending the majority of the school day, and thus the majority of the school week, in the general education setting. Under the July 2015 IEP,

[Student] would have spent twenty-two hours and forty-five minutes, out of a thirty-hour week, in the general education setting. Of the hours [Student] spent in the general education setting, ten hours and twenty-five minutes included special education instruction, broken down into one session per school day, for a period of two hours and fifteen minutes. Under the April 2017 IEP, [Student] would have spent twenty-one hours and thirty minutes, out of a thirty-hour week, in the general education setting. Of the hours spent in the general education setting, fourteen hours and ten minutes included special education instruction. Under both IEPs there were portions of the school day [Student] would be in a general education setting without any special education instruction or related services.

In support of their position that [Student] would not be able to meaningfully access his educational curriculum if he spent the majority of the day in a general education setting, the Parents presented XXXX XXXX, Ph.D., whom I accepted as an expert in Special Education. Dr. XXXX, who presented as very knowledgeable of [Student] and his particular set of needs, testified in support of the Parents' contention that [Student] requires a small, self-contained special education classroom setting to appropriately access his curriculum. Dr. XXXX was very familiar with [Student], not only in his capacity as a student in the [Program] at [School 1], but also in her capacity as the XXXX family's case manager. Additionally, for approximately six weeks during the 2016-17 SY, she had to fill in for [Student]'s regular Math teacher. In her role as a case manager, Dr. XXXX is responsible for reviewing admission materials, including evaluations, referrals, and teacher recommendations, and for discussing with the admissions team whether the child applicant is a good fit at [SCHOOL 1].

In the time she has known and worked with [Student], Dr. XXXX observed him to display executive functioning deficits, which manifest in his ability to start and complete tasks, and to remain organized while working on tasks. According to Dr. XXXX, [Student]'s executive

functioning deficits are consistent with his ADHD diagnosis. [Student] also has difficulty with processing speed, another characteristic that is consistent with his ADHD diagnosis.

Additionally, he displayed behaviors consistent with anxiety. As an example, Dr. XXXX discussed [Student] exhibiting a pronounced anxiety around the issue of getting picked up at the end of the school day; he perseverates on the questions of who is picking him up and how he is getting home from school and he would sometimes get so fixated on the issue, he would start to cry. Dr. XXXX also noted that any changes to [Student]'s schedule cause him to become incredibly anxious, which is consistent with his executive functioning deficits, as it is difficult for him to organize himself to perform new, unfamiliar tasks.

Dr. XXXX had the opportunity to review [Student]'s work product from [SCHOOL 1]. When he first arrived at [SCHOOL 1] at the start of the 2015-2016 SY, his work showed weaknesses in reading: he was dysfluent when reading aloud, he did not read for punctuation or meaning, and despite being in the 3<sup>rd</sup> grade, he was reading at approximately a 1<sup>st</sup> grade level. (*See also* P. Exs. 26 and 28.) Additionally, [Student] is identified as having SL deficits, which require certain supports and services in order for him to access his educational curriculum. In Dr. XXXX's opinion, based on [Student]'s issues with anxiety, ADHD/attention, executive functioning, and processing speed, as well as the deficits he showed in reading and SL, it would have been very difficult for him to access the curriculum if he was in a larger, general education setting with fewer special education supports and related services. According to Dr. XXXX, [Student]'s ability to access instruction depends on the setting in which the instruction takes place; in Reading and Math, for example, he needs to be in a very small setting, usually him and one other student, in order to successfully access the curriculum. Dr. XXXX testified that based on her observations of [Student] during his time at [SCHOOL 1], as well as the observations of the teachers and service professionals who work with him, he is a student who required a

smaller, intensive setting of specialized instruction. (P. Ex. 52.) In Dr. XXXX's opinion, it is appropriate for [Student] to be in full-time special education programming with related services because of his particular constellation of needs. She was further of the opinion it would not be appropriate, based on [Student]'s unique needs and challenges, for him to be in a general education setting, with no special education supports and services, for an approximately seven-to-ten hour period per week.

Dr. XXXX was corroborated in her testimony about [Student]'s ability to appropriately access his educational curriculum in a self-contained special education classroom by XXXX XXXX, M.Ed., whom I accepted as an expert in Special Education. Mr. XXXX served as the family's educational consultant, taking over the role from Ms. XXXX,<sup>29</sup> in August 2016. Mr. XXXX has worked in the field of Education for over thirty years, and he consults for families with students enrolled in both public and private schools. He explained that as an educational consultant, his primary concern is to understand a child's strengths, weaknesses, skills, and needs, and then, once he has a comprehensive understanding of the child's capabilities and limitations, to recommend a placement which works best with the child's unique profile. Mr. XXXX explained that in the majority of cases on which he consults, he is hired earlier in the process, usually before parents know for sure they might request a due process hearing. He is not hired to help secure a certain outcome, and he explains this to his clients upfront. From his perspective, he is hired to develop a professional opinion about the child's educational needs and how they can be met, regardless of any preference towards private or public school.

As part of his involvement in this case, Mr. XXXX took the following actions to aid him in developing an opinion and recommendations for [Student]'s educational programming: reviewed all of the available educational records provided to him by the Parents; reviewed Dr.

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<sup>29</sup> Ms. XXXX was unable to continue in her capacity as educational consultant to the XXXXs because of an emergency situation in her own family. (T. XXXX, XXXX.)

XXXX's evaluations of [Student]; familiarized himself with [Student]'s various diagnoses and with the scores on the objective tests which were administered to [Student]; observed [Student] in his placement at [SCHOOL 1]; observed the proposed placement at [SCHOOL 2]; and participated in five IEP meetings at [SCHOOL 2] and one IEP meeting at [SCHOOL 1].

Mr. XXXX testified about the observation he did of [Student] at [SCHOOL 1] on September 15, 2016. (*See* P. Ex. 36.) During the observation, he noticed that while [Student] seemed engaged and interested, he required – even in a class with other students with learning challenges – a lot of attention, asked a lot of questions for clarification and for repetition of instructions, and had very little social interaction with his classmates. During the observation, Mr. XXXX could see the challenges [Student] has with his processing speed. As he explained, it takes [Student] a while to understand what he is supposed to be doing. Additionally, Mr. XXXX noted the anxious nature of some of [Student]'s interactions during the class.

Based upon his review of [Student]'s educational records and the various available evaluation reports, Mr. XXXX believes [Student] is cognitively capable of working with grade-level content; he is of average intelligence and his verbal comprehension and scores in visual fields are also in the average range. Mr. XXXX cautioned, however, that [Student]'s combination of significant disabilities has an impact on his ability to learn, and any educational program designed for [Student] must take into account the way his disabilities interact with one another. In Mr. XXXX's opinion, [SCHOOL 1] is a "very good fit" for [Student] because he is of average intelligence and has the cognitive capacity to perform the work, but he is learning disabled, with significant noted impairments in Reading, Writing, and Math. [SCHOOL 1] is a good fit because of its smaller class size and the interactive, integrated nature of the instruction. In Mr. XXXX's opinion, [Student] requires very specialized, differentiated instruction, such as having an in-class assignment broken down to its component parts so he can understand each

step of the assignment. He recommended [Student] for a full-time special education placement, with highly-trained special education staff and with small-group settings throughout the school day, in order to achieve significant educational progress. (P. Ex. 59.)

In addition to observing [Student] at [SCHOOL 1], Mr. XXXX also observed a class session at [SCHOOL 2] in June 2017. He observed a 5<sup>th</sup> grade Math class, in which a special educator was providing specialized instruction while the general education teacher was going over the daily, grade-level lesson with the rest of the class. There were twenty-three students in the class and the special educator was working with a group of approximately seven students at a table in the back of the classroom. While Mr. XXXX was of the opinion that [SCHOOL 2] was a “fine” school, he does not believe it was an appropriate placement for [Student] based on what he observed. The pull-out group was too large. Additionally, with [Student]’s attention issues, the overall class size and the two teachers speaking at the same time would have made it difficult for him to maintain attention and to understand the lesson. In Mr. XXXX’s opinion, the proposed placement of [Student] at [SCHOOL 2] for the 2015-2016 and 2017-2018 SYs would not provide [Student] with a FAPE. According to Mr. XXXX, given [Student]’s unique set of challenges, being in a general education setting would not enable him to receive a FAPE. His constellation of disabilities and learning issues, particularly his anxiety and his executive functioning and processing speed deficits, are such that placing him in general education would be an anxiety-ridden, overwhelming experience for him which would make it difficult for him to access his educational curriculum. Of particular note, Mr. XXXX tackled head-on the issue that MCPS is arguably at a disadvantage developing an educational program for [Student] because he has never been enrolled in a public school under MCPS’ jurisdiction. In Mr. XXXX’s opinion, it would not be appropriate to place [Student] at [SCHOOL 2] and “wait for him to fail there” before putting him somewhere like [SCHOOL 1].

Mr. XXXX and Dr. XXXX were corroborated in their testimony about the appropriate placement for [Student] by XXXX XXXX, Ph.D., whom I accepted as an expert in Neuropsychology. Dr. XXXX, like Mr. XXXX and Dr. XXXX, presented as a knowledgeable witness in terms of general professional expertise, as well in terms of understanding [Student]'s profile as a person and student with disabilities. Dr. XXXX conducted neuropsychological evaluations of [Student] in May 2013 and September 2014. (P. Exs. 2 and 6; MCPS Ex. 62.) The May 2013 evaluation was quite extensive, taking place across three days and involving a battery of educational and psychological testing instruments administered to [Student]. During the May 2013 evaluation, Dr. XXXX concluded [Student] had significant deficits in receptive language and expressive language, and he demonstrated behaviors consistent with a child on the autism spectrum, including certain coordination deficits. Dr. XXXX also concluded, based on [Student]'s testing, that [Student] had learning disorders in Math, Reading, and Written Language. Overall, Dr. XXXX found that [Student] was of average intellectual ability, but he had significant issues/deficits with attention – he was impulsive, raced through the work to finish, and had trouble staying on task the more complicated the problems became. Based on the May 2013 evaluation, Dr. XXXX thought [Student]'s placement at [SCHOOL 3] was a good one, and he was of the opinion that beyond [SCHOOL 3], [Student] would “fare best” in a small and supportive special education program that could provide intensive intervention to address his areas of need. (P. Ex. 2, p. 14.)

For the September 2014 evaluation, Dr. XXXX did not did not perform a full-scale evaluation like he did in May 2013, but he did administer four instruments to [Student]. Dr. XXXX was aware, as of the September 2014 evaluation, the Parents were interested in enrollment at [SCHOOL 1] as a possibility for [Student]. In his opinion, [SCHOOL 1] was a good fit for [Student]. It is a school that specializes in dealing with students who have learning disabilities in concert with ADHD, and it has the kind of student-teacher ratio and deploys the

kind of intensive interventions he believes [Student] needs in order to access his education curriculum. While Dr. XXXX acknowledged [SCHOOL 1]'s restrictive nature as a school specifically for students with learning disabilities, he was of the opinion it was an appropriate placement for [Student] because of his "multiplicity of needs." In Dr. XXXX's opinion, if [Student] *only* had ADHD, he could probably meaningfully access his educational curriculum in a less-restrictive setting. [Student], however, actually has learning disorders in three academic areas, a SL disorder, ADHD, and issues with physical coordination. As those combined needs have an impact on his ability to access his educational curriculum, the appropriate setting for him, according to Dr. XXXX, is a smaller, self-contained one with numerous interventions in place.

In Dr. XXXX's opinion, what [Student] needs cannot be delivered in an inclusion program, i.e., a program where [Student] is in a general education classroom setting but with special education supports and services. Dr. XXXX believes that if [Student] were in a general education setting, even with special education services being provided within the classroom, it is unlikely he would be able to learn. Specifically, Dr. XXXX believes [Student]'s anxiety and rigidity of thinking affect his ability to focus during the school day. Dr. XXXX noted there are far more children in a general education setting than in a self-contained one, and it would be overwhelming for [Student] to be in that setting for the majority of the school day.

I note that some time at the hearing was spent by MCPS making a challenge to Dr. XXXX's testimony on the basis of an administrative irregularity with his September 23, 2014 Psycho-Educational Evaluation. There were two versions of the report, one of which was admitted as Parent Exhibit 6, the other of which was admitted as MCPS Exhibit 62. Neither version of the evaluation lists anxiety as one of [Student]'s diagnoses. The MCPS copy of the evaluation includes a reference to autism spectrum disorder (ASD) as one of [Student]'s

diagnoses, while the Parents' copy, which was originally offered as the official version, did not.<sup>30</sup> Dr. XXXX prepared a declaration which explained why there were two versions of the September 23, 2014 evaluation report, neither of which was marked as a "draft." (P. Ex. 73.)

XXXX XXXX, Ph.D., whom I accepted as an expert in Psychology and School Psychology, testified on behalf of MCPS that it is not best practice to issue two versions of the same report without making it explicit, on the face of at least one of the documents, there has been some kind of revision to the report. She also questioned the omission of an anxiety diagnosis in the September 2014 evaluation despite Dr. XXXX's inclusion of an anxiety diagnosis in his initial, May 2013 evaluation of [Student]. Finally, Dr. XXXX was perplexed at why the reference to an ASD diagnosis appears in one version of the September 2014 evaluation report, but not the other. MCPS argued these irregularities undermined the credibility of Dr. XXXX's opinions. The school system further seemed to suggest the reference to autism was deleted by Dr. XXXX at the Parents' request in order to make [Student]'s application to [SCHOOL 1] more likely to be approved.

I am satisfied by Dr. XXXX's explanations for the differences between Parent Exhibit 6 and MCPS Exhibit 62. He was chagrined at his failure to include the anxiety diagnosis, a lapse he described as an "oversight" on his part. He testified that an anxiety disorder diagnosis is correct for [Student] in light of the behaviors described by his parents, teachers, and in other records Dr. XXXX reviewed as part of the evaluation process. With respect to the ASD diagnosis, it was clear from Dr. XXXX's discussions in both evaluations that this was always a borderline issue for him. When he first evaluated [Student], he found [Student] displayed stronger social skills in his interactions with Dr. XXXX than the documentary record, and even his parents' accounts, suggested he possessed. He made appropriate eye contact with Dr. XXXX and he engaged in socially appropriate conversational exchanges. (P. Ex. 2, p. 13.) In May 2013, Dr. XXXX noted

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<sup>30</sup> Parent Exhibit 6 recommends [Student] be "follow[ed] to determine whether [ASD] still applies," but it does not list ASD as a specific diagnosis.

that [Student] presented with characteristics which are consistent with ASD, but he stopped short of assigning the diagnosis to [Student]. Additionally, in his testimony and the declaration he prepared, Dr. XXXX explained it was his usual practice to produce a draft of an evaluation report for parents to review and discuss with him before he finalized it. To the best of his recollection, he did not deviate from that practice with the XXXXs; unfortunately, due to administrative error, *both* the draft and final versions of the September 23, 2014 report got into circulation among [Student]'s educational records.

To put things bluntly: people – even competent, successful, and educated professionals with a wealth of knowledge in their chosen fields – make mistakes. Both versions of the September 23, 2014 psycho-educational evaluation finding their way into [Student]'s educational record was clearly a mistake. It is not, however, one that I find puts a dent in Dr. XXXX's overall credibility concerning his analysis about [Student] and his psychological and educational needs.

In addition to Dr. XXXX, Dr. XXXX and Mr. XXXX, I also heard testimony from [Mother], whom I accepted as an expert in Special Education, related to [Student]'s areas of need and his ability to access his educational curriculum. While [Mother] is a party to the case, and it is unusual to qualify a party as an expert, she has extensive experience as a special educator, and her professional qualifications, coupled with her status as [Student]'s mother, gave her a distinctly persuasive perspective on the case.

[Mother] provided background information about [Student]'s combination of developmental and learning issues. She explained that when he was as young as approximately four months old and had difficulty XXXX, she and [Father] suspected there was a developmental issue at play. As a result, they contacted the ITP and [Student] began receiving OT services at approximately four months of age in May 2006. [Student] graduated from ITP to PEP-Classic and received a half-day of special education services, four days per week, prior to kindergarten. She

and [Father] enrolled [Student] at [SCHOOL 3] for half days when he was approximately three-and-a-half. He attended [SCHOOL 3] for part of the day and PEP-Classic for the rest of the day until approximately June 2011, when he aged out of PEP-Classic after turning five.

During her testimony, [Mother] dispelled any sense she was ever predisposed against sending [Student] to [SCHOOL 2]. As she explained, [SCHOOL 2] is [Student]'s home school; both of his older siblings attended and she wanted [Student] to continue the family tradition. She and [Father] always assumed [Student] would attend the same public school as his siblings. They had mixed feelings about ultimately sending [Student] to a private school. They both believe in the public school system, particularly in the sense of community that attending public school fosters in children who live in the same neighborhood as the school where they are enrolled. According to [Mother], at the time [Student] would have started kindergarten and transitioned to [SCHOOL 2] from [SCHOOL 3], however, he was still not potty-trained. As a result, the principal of [SCHOOL 2] recommended the Parents hold [Student] back for another year until he was potty-trained, and they decided to keep [Student] at [SCHOOL 3] for at least one more year. [Mother] testified that throughout the period [Student] was in the PEP and attending [SCHOOL 3], he also received SL services with XXXX XXXX, SLP.

[Mother] explained the issues with which [Student] has dealt throughout his life, including anxiety and impulsivity, rigidity in his thinking and his approach to routines, and difficulty in social interaction with same-aged peers. (*See also* P. Ex. 2.) One area in which [Mother] provided particular insight related to [Student]'s ability to perform in large-group settings, both socially and quasi-academically. As she explained, she and her husband tried to put [Student] in intramural soccer, but it was too overwhelming for him because there were so many kids. It triggered his anxiety and he cried a lot. Additionally, when it was time to enroll [Student] in XXXX school, he initially started his studies in a class with ten other children and

one teacher. That, too, proved to be too overwhelming for him. His XXXX school program was subsequently modified, so that he is in a three-student class with one teacher. In [Mother]’s opinion, it would be difficult for [Student] to be in a general education setting, even with special education supports and services, for several hours per week; he would not be able to progress if he did not have the kind of attention he receives in a small-group setting with specialized instruction. For this reason, [Mother] did not believe the placement of [Student] at [SCHOOL 2], as proposed in the July 2015 and April 2017 IEPs, is an appropriate one in light of his needs. Based on [Student]’s needs, the smaller-class, self-contained setting at [SCHOOL 1] enables him to access his educational curriculum. In [Mother]’s opinion, had [Student] gone to [SCHOOL 2], and spent the majority of the school day in a general education classroom, he would have been “lost” and he would not have gotten the attention he needed in order to make educational progress.

To her credit, [Mother] candidly acknowledged she does feel some trepidation about [Student] being in an educational setting, like [SCHOOL 1], where every student is disabled in some way and he is in an exclusively special education classroom. She does wonder what the future holds for [Student] in terms of him being in a setting that is *not* exclusively special education/self-contained, and whether he would be able to manage in such a setting. As she explained, however, one of the most critical factors in the Parents’ decision to send [Student] to [SCHOOL 1] was that he was already significantly behind academically, in terms of his PLP, at the time he aged out of [SCHOOL 3]. In her opinion, in light of that fact and based on the proposed July 2015 IEP, [Student] “didn’t have the time” for them to give him a chance at [SCHOOL 2] first, in a primarily general education setting.

MCPS challenged the Parents’ position on the appropriate placement for [Student] with the testimony of XXXX XXXX and XXXX XXXX, both of whom I accepted as experts in

Special Education, and XXXX XXXX, Ph.D., whom I accepted as an expert in Psychology and School Psychology. MCPS' witnesses maintained the July 2015 and April 2017 IEPs were reasonably calculated to provide [Student] a FAPE, and that [SCHOOL 2] was an appropriate choice for his LRE.

XXXX XXXX testified about the nature of [SCHOOL 2] and its programming, as well as the Parents' interactions with MCPS in the development of the two MCPS-proposed IEPs. Ms. XXXX became familiar with the XXXXs because the Parents contacted [SCHOOL 2] around the point in time [Student] was expected to age out of [SCHOOL 3] and he needed to be programmed for potential enrollment in public school. According to Ms. XXXX, a meeting was held on June 12, 2015, attended by [Mother] and Ms. XXXX, as well as MCPS representatives. Ms. XXXX acknowledged that part of the difficulty for the MCPS/[SCHOOL 2] members of the IEP team is they "didn't know" [Student] directly because he had never been enrolled in an MCPS school as of the time the 2015-16 IEP was developed; the MCPS team members had to rely on documentation about [Student], including the evaluations from Dr. XXXX, the observation reports prepared by Ms. XXXX and Ms. XXXX, and the teacher and progress reports from [SCHOOL 3].

Ms. XXXX testified the June 12, 2015 IEP team discussed LRE options, including (1) a special education classroom outside of the Student's home school, and (2) a combination of push in and pull out services within the home school of [SCHOOL 2]; the team also discussed pull out speech services. The MCPS members of the team ultimately recommended [SCHOOL 2] as the LRE, with twenty-two hours and forty-five minutes of instruction in general education setting, and seven hours and fifteen minutes in the special education setting. Ms. XXXX discussed where [SCHOOL 2] falls on the continuum of placements contemplated under the IDEA. [SCHOOL 2] is a neighborhood school with special education services and programming on-site.

It has an on-site counselor and on-site social worker. Additionally, both SL services and OT services are available. Staff at [SCHOOL 2] utilizes small-group instruction and one-to-one instruction, where necessary and appropriate. When a student requires specialized instruction for reading, reading interventions are developed based on the student's specific needs, as is the delivery model for services. The students at [SCHOOL 2] are generally all on the Maryland high school diploma track, so in the classroom, they work on grade level content. As Ms. XXXX explained, if [Student] were enrolled at [SCHOOL 2] and he remained on the diploma track, he would be exposed to grade-level curriculum. The material would be presented to him in a manner consistent with his instructional level, and the delivery of the grade-level instruction would be modified to accommodate his particular needs. Ms. XXXX noted the typical general education class size at [SCHOOL 2] is approximately twenty to twenty-five students to one teacher, which she acknowledged is not what could be characterized as a "small" group. She also indicated there are currently students at [SCHOOL 2] with profiles similar to [Student]'s who receive instruction in the general education setting.

According to Ms. XXXX, when compared to other children who have received special education instruction at [SCHOOL 2], [Student] does not have the greatest number of needs she has seen, and he is consistent with other children she has seen in terms of his multiplicity of needs. In her opinion, both the July 2015 IEP and the April 2017 IEP were appropriate for [Student] and could have been appropriately implemented at [SCHOOL 2]. While acknowledging the general education classroom size is larger than what [Student] was used to, Ms. XXXX believed it is important to expose [Student] to grade-level material so MCPS could ascertain what gaps existed between his actual ability and what is expected of a child at his grade level.

Ms. XXXX's testimony as to the appropriateness of the July 2015 and April 2017 IEPs, and the ability of staff at [SCHOOL 2] to appropriately implement them, was corroborated by Dr. XXXX. Dr. XXXX acknowledged she has not worked with [Student] directly, but she reviewed his educational record and the various assessments, evaluations, and observation reports related to him. She has also worked in the capacity of school psychologist with MCPS for more than two decades, and she has served as a mentor to, and frequently worked with, the staff psychologists at [SCHOOL 2] for the past several years. Dr. XXXX testified she is familiar with the special education programming at [SCHOOL 2], and based on her knowledge of the program and what she understands of [Student] based on her review of his records, it was her opinion that the July 2015 IEP was reasonably calculated to provide [Student] a FAPE and it could have been appropriately implemented at [SCHOOL 2]. Similarly, she reviewed the April 6, 2017 IEP and found that it "comprehensively addressed" [Student]'s needs across the core academic subjects, in attention, and in behavior and socialization. Additionally, Dr. XXXX explained there are a variety of practices the staff at a public school like [SCHOOL 2] could employ to assist [Student] in managing his anxiety while in the school setting, including providing advance warning, visual schedules, allowing him more time to transition between classes, and verbal and visual cueing. With respect to [Student] being in a general education setting, it was also Dr. XXXX' opinion that he would benefit from being in a classroom setting with non-disabled peers because he would learn grade-level material, he would have the chance to model the social behaviors of non-disabled peers, he would be able to practice adapting his own behaviors to those models.

The opinion of Ms. XXXX and Dr. XXXX that the July 2015 and April 2017 IEPs were reasonably calculated to provide [Student] a FAPE and could be appropriately implemented at [SCHOOL 2] was shared by XXXX XXXX, whom I accepted as an expert in Special Education.

Like Ms. XXXX and Dr. XXXX, Ms. XXXX does not know [Student] personally and has not worked directly with him, but she reviewed his educational record. She also attended two IEP meetings during Spring 2017 related to the development of the April 2017 IEP. In her capacity as an Instructional Specialist, Ms. XXXX has had the opportunity to work with and support the staff at [SCHOOL 2]. She testified that even in the generalized education setting at [SCHOOL 2], there are multiple opportunities for students to receive specialized, small-group, instructional interaction. In her opinion, with the appropriate accommodations and technology, [Student] should be able to access grade-level educational content. She was also of the opinion [Student] should be exposed to grade-level content because he has the cognitive ability to understand it, with the appropriate supports and accommodations. According to Ms. XXXX, the MCPS-proposed IEPs provide the appropriate supports and accommodations. Ms. XXXX candidly acknowledged that she agrees [Student] should receive *some* specialized instruction and receive *some* instruction outside the general education setting. Based on her review of his entire record, however, she does not believe he requires *all* of his instruction in a specialized, self-contained special education setting.

After considering the evidence, I find it is more likely than not that if [Student] was placed in a regular-sized, general education classroom at [SCHOOL 2] for the majority of the school day, even with integrated special education instruction, supports, services and accommodations, he would not receive a FAPE. I find the Parents' witnesses and documentary evidence to be more persuasive on the issue of [Student]'s ability to access his education curriculum, namely, that he requires a small, self-contained classroom setting with specialized and differentiated instruction. [Student] has multiple, documented areas of need. He has consistently, throughout his educational career, displayed issues with anxiety, attention, executive functioning and organization, oral and written expressive/receptive language,

processing speed, speech and language production and expression, and working memory. He is learning disabled in the core academic subjects of Math, Reading, and Written Language. His combination of needs, and the way those needs interact with one another, have a profound impact on his ability to effectively navigate his educational curriculum and derive benefit from it.

[Mother] testified without contradiction about how [Student] performs when placed in any kind of large-group setting. The Parents signed him up for intramural soccer and enrolled in him in a standard-sized class at XXXX school. Both contexts proved to be overwhelming to him, to the point where he could not effectively participate. His original XXXX school class was ten students to one teacher, but he was not able to engage because it presented too much distraction. There is no evidence in the record of [Student] being able to perform academically in a large group setting. The record is replete with references to his distractibility and impulsivity – even when in a small-group setting – as well as his need for frequent repetition of the tasks he is expected to perform. Everyone who has worked with him at [SCHOOL 1] has recommended he be in a small-group, self-contained classroom with specialized instruction in order to access his educational curriculum. [Student]’s constellation of disabilities and needs, and the interplay between them, makes it more likely than not that if he was in a general education classroom of approximately twenty-five to twenty-eight classmates and two instructors speaking, he would not be able to attend lessons in a way that was educationally beneficial for him.

I am mindful the MCPS witnesses – all of whom were generally very knowledgeable in their areas of expertise – believe the June 2015 and April 2017 IEPs are appropriate for [Student] and can be appropriately implemented at [SCHOOL 2]. Of the MCPS witnesses, however, only Ms. XXXX and Ms. XXXX have ever interacted with [Student] or observed him at [SCHOOL

1]. I understand MCPS' desire to adhere to the IDEA's call for inclusion of disabled children in educational settings with their non-disabled peers; indeed, mainstreaming is an important and laudable goal. However, IDEA also maintains that IEPs should be crafted in light of a given disabled student's strengths, limitations, and areas of need. The evidentiary record weighs more heavily in favor of a finding that the appropriate educational placement for [Student] at this time, given his overall profile, is a self-contained special education classroom with integrated special education supports and services. I agree with the Parents' witnesses that it is more likely than not that if [Student] were placed in a general education classroom for the majority of the school day/week, he would not be able to make educational progress that is appropriate in light of his circumstances. I am particularly persuaded in this regard by the opinions of [Mother] and Mr. XXXX related to [Student]'s already significant lag when it comes to grade-level academic performance. Specifically, I agree that it would not be appropriate to essentially take a "let's try this and see what happens" approach with [Student]'s education by placing him in a general education setting for the majority of the school day, especially in the core academic subjects. I recognize the importance of mainstreaming disabled students with their non-disabled peers. This particular child, however, has a combination of disabilities which interact with each other in ways that preclude him, at this time, from receiving meaningful educational benefit from inclusion in the general education classroom.

As the July 2015 and April 2017 IEPs contain LRE determinations which place [Student] in the general education setting for approximately two-thirds of the school day/week (including some hours where he receives no special education instruction, services, or supports), the IEPs are not reasonably calculated to provide [Student] a FAPE. I find it is more likely than not the July 2015 IEP and the April 2017 IEP are not appropriate. As I find the MCPS-proposed IEPs

are not appropriate because of their LRE determinations, I need not answer the question of whether either IEP was inappropriate for other reasons.

*The Lack of an IEP for the 2016-2017 SY*

There is no dispute between the parties that during the 2016-2017 SY, an MCPS-proposed IEP for [Student] was not developed until April 6, 2017. There is also no dispute that the July 10, 2015 IEP naturally expired on or around August 3, 2016, and from August 3, 2016 through April 5, 2017, there was no current MCPS-proposed IEP for [Student]. (T. XXXX.) The evidence demonstrates the Parents notified MCPS on August 3, 2016 to advise they wanted an IEP for [Student] for the upcoming SY. (P. Ex. 34; T. XXXX.) A meeting was initially scheduled for later in August 2016, but it was re-scheduled to September 2016. The September 2016 meeting was also re-scheduled, with a meeting eventually convening on October 6, 2016. (MCPS Ex. 14; T. XXXX.) During the October 6, 2016 meeting, it was agreed by everyone involved that before an IEP could be developed, MCPS needed time to review any evaluations, assessments, and observations reports done for [Student] during the 2015-2016 SY, because MCPS wanted a clearer picture of his present levels of academic and functional performance. (T. XXXX, XXXX; MCPS Ex. 12.) The Parents were cooperative, provided all necessary authorizations, and never prevented anyone from MCPS from observing [Student] at [SCHOOL 1]. (T. XXXX, XXXX.)

I am mindful of the need for a local education agency to obtain updated assessments when necessary and, of course, to review any educational records compiled when a student is in a private placement and the local education agency has not previously provided educational services to the student. The development of any IEP necessarily hinges on having comprehensive, current data about how the student performs in an educational setting. The simple fact of the matter, however, is that MCPS did not propose an IEP for [Student] until the 2016-2017 SY was approximately 80% completed. As [Student] is a student in need of special

education and related services, MCPS' failure to propose an IEP for the majority of the school year is a denial of FAPE. *Gerstmyer v. Howard County Public Schools*, 850 F. Supp. 361, 365-366 (D. Md. 1994).

*The Appropriateness of the Private Placement at [SCHOOL 1]*

Having found that the proposed placement in the general education setting in both the July 2015 and April 2017 IEP is not educationally appropriate, I must now determine if the placement at [SCHOOL 1] is appropriate. Based on the record before me, I find that it is.

As noted above, [SCHOOL 1] is a school which exclusively services learning disabled students. [Student] spends the majority of his school day in self-contained special education classroom settings. [SCHOOL 1] uses an integrated approach to instruction, which includes multi-sensory techniques for teaching beyond speech and writing (such as art, music, and role-playing). (T. XXXX.) As Dr. XXXX compellingly explained, while some students do complete their entire grade school career at [SCHOOL 1], it is generally not intended to be a "forever" placement. The overall goal of [SCHOOL 1] is to make it possible for each child to return to the general education setting once the child has caught up academically and developed stronger social/emotional skills.

Dr. XXXX testified to the progress [Student] made while at [SCHOOL 1], particularly in the core academic areas. (*See also* P. Ex. 32, 62.) When he came to [SCHOOL 1] at the beginning of the 2015-2016 SY, which marked his entry to 3<sup>rd</sup> grade, [Student]'s instructional performance in Reading was at 1<sup>st</sup> grade level. (P. Ex. 22.) By Spring 2016, he was at a 3<sup>rd</sup> grade level. According to Dr. XXXX, during [Student]'s second year at [SCHOOL 1] (the 2016-2017 SY), staff saw meaningful growth in his ability to decode words, even as he still struggled to comprehend what he was reading. (P. Ex. 32.) In Math, [Student] started the 2015-2016 SY with an instructional performance at the 1<sup>st</sup> grade level. By Spring 2016, he was at a 3<sup>rd</sup> grade

level. (P. Ex. 32.) While his progress in Written Language was more incremental, with an increase from the 1<sup>st</sup> grade instructional level (as of Fall 2015) to a 2<sup>nd</sup> grade instructional level (as of Spring 2016), he nevertheless made progress. (*Id.*) In Dr. XXXX's opinion, [Student]'s academic progress while at [SCHOOL 1] can be attributed to programming that targets and meets his academic needs, the smaller instructional environment, and the intensive level of services and supports he receives. For example, in Reading, [Student] works in a group with either a 1:1 or 2:1 student-teacher ratio for forty-five minutes every day to address particular skills with which he needed improvement.

[Mother] also spoke about [Student]'s progress. She noted that he had some initial anxiety about going to [SCHOOL 1] because for six years all he knew in terms of school was [SCHOOL 3]. After approximately the first week, however, he was excited to be at [SCHOOL 1], which was a new experience for the Parents. According to [Mother], [Student] has voiced to her that he liked being in smaller groups while at school, and he particularly liked having people in school who had issues similar to the ones with which he himself struggled. During the course of the 2015-2016 SY, the Parents could see [Student]'s improvement in terms of Reading and Math, as he demonstrated a greater understanding of his class- and homework assignments and an increased ability to actually do his homework. The Parents also noticed that during his time at [SCHOOL 1], [Student] became more socially active and increasingly able to have play dates with peers. Since his enrollment at [SCHOOL 1], [Student] has received educational benefit across the academic areas affected by his combination of disabilities. He has developed skills as identified in his goals and objectives across various target areas, has mastered with cues a number of his objectives, and completely mastered others. (P. Ex. 32, 62.) [SCHOOL 1] is an appropriate educational placement for [Student] for the 2015-2016, 2016-2017, and 2017-2018 SYs.

## CONCLUSIONS OF LAW

Based on the Findings of Fact and Discussion, I conclude as a matter of law as follows:

1. The Parents are entitled to reimbursement for their unilateral placement of the Student at the [School 1] for the 2015-2016 and 2016-2017 SYs because: (a) the placements proposed by MCPS for those SYs was not reasonably calculated to provide the Student with a FAPE, and (b) the private unilateral placement of the Student at the [School 1] is appropriate; and
2. The Student should be placed at the [School 1] for the 2017-2018 SY because this school is able to meet the unique needs of the Student. *Board of Ed. of the Hendrick Hudson Central School Distr. v. Rowley*, 458 U.S. 176 (1982); *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017); *Sch. Committee of the Town of Burlington, MA v. Dept. of Education*, 471 U.S. 359 (1985); *Carter v. Florence County School Dist. Four*, 950 F.2d 156 (4<sup>th</sup> Cir. 1991), *aff'd*, 510 U.S. 7 (1993).

## ORDER

I **ORDER** the Parents' request for the Student's placement at the [School 1] for the 2017-2018 SY is **GRANTED**; and

I further **ORDER** Montgomery County Public Schools to reimburse the Parents for the cost of the Student's tuition at the [School 1] for the 2015-2016 and 2016-2017 SYs.

If corrective action is required by this decision, the local education agency shall, within 30 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.

November 22, 2017  
Date Decision Mailed

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Latonya B. Dargan  
Administrative Law Judge

## **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.