

[REDACTED],

STUDENT

v.

FREDERICK COUNTY

PUBLIC SCHOOLS

BEFORE MARY PEZZULLA,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH NO.: MSDE-FRED-OT-23-00455

**DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
ORDER

**STATEMENT OF THE CASE**

On January 4, 2023, [REDACTED] and [REDACTED] (Parents), on behalf of their child, [REDACTED] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the Frederick County Public Schools (FCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);<sup>1</sup> 34 C.F.R. § 300.511(a) (2021);<sup>2</sup> Md. Code Ann., Educ. § 8-413(d)(1) (2022);<sup>3</sup> Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

<sup>1</sup> “U.S.C.A.” is an abbreviation for the United States Code Annotated. All citations herein to the U.S.C.A. are to the 2017 bound volume.

<sup>2</sup> “C.F.R.” is an abbreviation for the Code of Federal Regulations. All citations herein to the C.F.R. are to the 2021 bound volume.

<sup>3</sup> All citations herein to the Education Article are to the 2022 Replacement Volume of the Maryland Annotated Code.

I held a video prehearing conference on February 9, 2023. The Parents were present and represented by Ashley VanCleaf, Esquire. David Burkhouse, Esquire, represented the FCPS.

I held the hearing on April 26, 27, and 28, May 1, 2, 16, 17, and 18, and July 5, and 6, 2023.<sup>4</sup> Ms. VanCleaf represented the Parents and Mr. Burkhouse represented the FCPS.

Under the applicable law, a decision in this case normally would be due by March 20, 2023, which is forty-five days after the thirty-day resolution period.<sup>5</sup> 34 C.F.R.

§§ 300.510(b)(2), (c), 300.515(a); Educ. § 8-413(h); COMAR 13A.05.01.15C(14). However, the Parents requested hearing dates outside that timeframe in order to accommodate a motion schedule, as well as the schedule of the parties and to permit me thirty days in which to review the evidence and issue a written decision. 34 C.F.R. § 300.515(c); Educ. § 8-413(h). The parties initially reported a need for a total of eight days for a hearing, four days for each party, with each party contemplating calling six to eight witnesses. In order to accommodate a motion schedule, as the FCPS indicated its intention to file a Motion for Summary Decision, we began looking at dates in April. The FCPS was on spring break from April 7-14, 2023, and therefore not available. Ms. VanCleaf reported that she had another hearing before the OAH from April 17-25, 2023. The FCPS was also not available on April 17-19. Ms. VanCleaf was not available on May 3 or May 8 due to an IEP meeting and was not available on May 5 and 9-15 due to another hearing before the OAH. The Parents requested an extension of time in order to accommodate the motion schedule, as well as the schedule of the parties and to permit me thirty days in which

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<sup>4</sup> By agreement of the parties, the hearing was originally scheduled to conclude on May 18, 2023. During the first week of the hearing, it became apparent that the proceeding was going to require more than the scheduled eight days. The parties requested two additional days be added to the schedule.

<sup>5</sup> In this case, the Complaint was filed on January 4, 2023. The thirty-day resolution period ended on February 3, 2023. The parties participated in mediation on February 9, 2023, but as the mediation date fell outside the resolution period, it did not adjust the time frame for this matter. 34 C.F.R. § 300.510(c).

to review the evidence and issue a written decision. The FCPS opposed the request, stating that it would be beneficial for the hearing to occur as soon as practicable.

In order to calendar the matter sooner, the FCPS stated that it could file its dispositive motion as early as February 16, 2023. A further discussion on the record revealed that even if the FCPS filed its motion on February 16, 2023, in order to accommodate response time for the Parents, time to issue a ruling on the motion, and the 5-day disclosure deadline, the earliest the hearing could begin would be April 10, 2023, which was during the FCPS's spring break.

For the reasons discussed above, and at the request of the Parents, I granted the extension requested by the Parents. The parties were not able to conclude the hearing in the eight days chosen at the Prehearing Conference. Therefore, three additional days were added, July 5, 6, and 17, 2023.<sup>6</sup> The matter, however, was able to be concluded on July 6, 2023. As a result, my decision was due thirty days from July 6, 2023, which falls on Saturday, August 5th, making my decision due Friday, August 4, 2023.

Procedure is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Educ. § 8-413(e)(1); Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 13A.05.01.15C; COMAR 28.02.01.

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<sup>6</sup> Counsel for the Parents had no available days in May and only one available day in June. The parties agreed that it was preferable to have two consecutive days added and not add one day in June and one day in July. The first available days in July were July 5 and 6. On May 16, 2023, at the conclusion of the testimony for the day, I addressed with the parties the fact that the case was not progressing at the rate the parties had anticipated, we were still in the Parents' case in chief, and the Parents still had four witnesses they intended to call. The parties agreed to add another additional day of hearing to the schedule. Ms. VanCleeef was not available on July 7 or 10. Mr. Burkhouse was not available July 10 through 14. We scheduled an eleventh day of hearing for July 17, 2023. The hearing was ultimately able to be concluded on July 6, 2023, and the eleventh day was not necessary.

## ISSUES

The issues are:

1. Was the Student denied a free appropriate public education (FAPE) for the 2020-2021 (beginning January 4, 2021),<sup>7</sup> 2021-2022, and 2022-2023 school years because:
  - a. The FCPS failed to implement and provide sufficient special education services during the COVID-19 school closures;
  - b. The FCPS failed to consider COVID recovery services owed to the Student;
  - c. The FCPS failed to identify and provide goals and services based on the Student's disability related needs in Dyslexia, Dysgraphia, and Dyscalculia until October 2022;
  - d. The FCPS failed to determine the Student was eligible for and provide Extended School Year (ESY) services;
  - e. The FCPS failed to provide sufficient special education and related services, resulting in a lack of progress towards Individualized Education Program (IEP) goals;
  - f. The FCPS failed to provide sufficient special education services and placement for the 2022-2023 school year; and
  - g. The FCPS failed to investigate and consider how bullying impacted the Student's receipt of a FAPE?
2. If the Student was denied a FAPE, what is the appropriate relief?

## SUMMARY OF THE EVIDENCE

The list of exhibits<sup>8</sup> admitted into evidence is attached to this Decision as an Appendix.

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<sup>7</sup> The Parents' initial claims included a denial of FAPE in the 2019-2020 school year. On February 23, 2023, the FCPS filed a Motion for Partial Summary Decision (Motion) regarding claims arising outside of the two year statute of limitations time period. On March 31, 2023, I granted the FCPS's Motion and dismissed the claims arising prior to January 4, 2021. On April 26, 2023, prior to the start of the hearing, I confirmed with the parties the remaining issues and how the issues would be framed in my written decision.

<sup>8</sup> Only the exhibits that were entered into evidence are included in this list. Additional documents were submitted, but either not offered or offered and not admitted. Those documents have been retained with the file.

## Testimony<sup>9</sup>

██████████, the Student's mother, testified and presented the following witnesses:

- ██████████, Ph.D., admitted as an expert in bullying and children's mental health;
- ██████████, Ph.D., admitted as an expert in special education and school administration;
- ██████████, Ph.D., admitted as an expert in clinical psychology, children's mental health, and dyslexia, dysgraphia, and dyscalculia;
- ██████████,<sup>10</sup> admitted as an expert in special education, dyslexia, and education compliance, including compliance with COVID guidance;
- ██████████, Head of School for ██████████ (██████████), admitted as an expert in school administration and secondary English;
- ██████████, admitted as an expert in nursing, school health plans, and training for school teams in health related matters;
- ██████████, Frederick County ██████████, School Resource Officer (SRO); and
- ██████████, FCPS

The FCPS presented the following witnesses:

- ██████████, admitted as an expert in public school administration;
- ██████████, admitted as an expert in special education grades 6-12;
- ██████████, admitted as an expert in school psychology; and
- ██████████, admitted as an expert in special education

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<sup>9</sup> All expert witnesses were qualified upon a satisfactory examination of the witnesses' education, credentialing, and experience. See COMAR 28.02.01.21D; See, e.g., *Univ. of Md. Med. Sys. Corp. v. Waldt*, 411 Md. 207, 237 (2009) (determination whether proposed expert has sufficient training, knowledge or skill to render expert opinion is committed to the sound discretion of the judge); *Massie v. State*, 349 Md. 834, 850-51 (1998) (citations omitted) (A judge may determine that a witness is sufficiently familiar with the subject matter to render an expert opinion based on "the witness's formal education, professional training, personal observations, and actual experience.").

<sup>10</sup> Ms. ██████████ previous last name was ██████████, as is reflected on Parents Ex. 5.

## **FINDINGS OF FACT**<sup>11</sup>

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

### **Background**

1. In 2015, when the Student was nine years old and in the third grade, the FCPS performed a psychological assessment of the Student.
2. On May 12, 2015, the Student received her first IEP. The IEP included academic goals for reading comprehension and written language expression. The Student received an hour and twenty minutes of special education services to be provided in the general education classroom to address her written language expression goal and an hour and twenty minutes of services outside the general education classroom to address her reading intervention goal. It was also noted that the Student had a learning disability and required specialized instruction in reading comprehension. (FCPS Ex. 1).
3. In 2018, while a student at [REDACTED] Middle School, the Student had educational and psychological assessments performed. The Wechsler Intelligence Scale for Children-V (WISC-V) showed an overall cognitive functioning in the Low Average range. (Parents Ex. 16, p. 9). The educational assessment noted relative needs of letter-word identification, spelling, passage comprehension, and word attack. (Parents Ex. 15, p. 1). Specifically, the Student scored in the very low range for word attack. (Parents Ex. 15, pp. 2, 4).

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<sup>11</sup> The record in this matter is extensive. The hearing included ten days of testimony and argument. Any citations to the record are for illustrative purposes only. My findings, analysis, and legal conclusions are based on consideration of the parties' arguments and the credible evidence in the record. All admissible testimonial and documentary evidence was considered and given the weight it was due, regardless of whether it has been recited, cited, referenced, or expressly set forth in the Decision. *See, e.g., Mid-Atl. Power Supply Ass'n v. Md. Pub. Serv. Comm'n*, 143 Md. App. 419, 442 (2002) (emphasizing that "[t]he Commission was free to accept or reject any witness's testimony" and "the mere failure of the Commission to mention a witness's testimony" does not mean that the Commission "did not consider that witness's testimony").

4. The 2018 educational assessment noted that the Student may benefit from having a word bank or editing checklist, from having word problems read aloud to her, and from having movement breaks during class and testing. (Parents Ex. 15, p, 5).

5. The Student's April 16, 2019 IEP notes the Student's instructional grade level as 7th grade, which was her current grade, and notes [REDACTED]<sup>12</sup> English Language Arts data for literary text, written expression, informational text, and language conversation as "not met." (FCPS Ex. 10, p. 0203). The Student's [REDACTED] Math data for major content was "approaching" while the supporting content, mathematical reasoning, and modeling and application were "not met." (FCPS Ex. 10, p. 0204).

6. During the Student's eighth grade year, while at [REDACTED] Middle School, the FCPS ceased in-person classes due to the COVID-19 pandemic.

7. On May 5, 2020, [REDACTED] Middle School put into place a Distance Learning Plan (DLP) in order to implement the Student's April 2020 IEP.

8. At the time of the hearing in this matter, the Student was a junior/rising senior in the FCPS's [REDACTED]<sup>13</sup> [REDACTED], in which she participated in her classes remotely via the internet.

9. The Parents, not the FCPS, elected to place the Student the [REDACTED] [REDACTED].

10. Prior to her enrollment in the [REDACTED], the Student attended [REDACTED] High School ([REDACTED]) in Frederick County, Maryland.

2020-2021 School Year

11. The Student attended [REDACTED] beginning in the 2020-2021 school year.

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<sup>12</sup> [REDACTED] was not defined on the record.

<sup>13</sup> Although it was not defined on the record what made the program a "[REDACTED]" [REDACTED], it was clear that the Student received all instruction during this time in a remote or virtual format and did not attend in person classes.

12. On June 10, 2020, the Student's IEP team from her middle school met and approved an IEP for the Student. The IEP noted that the Student has a specific learning disability of dyslexia that affects the area of basic reading skills, or decoding, and reading comprehension. (Parents Ex. 22, p. 2).

13. The June 10, 2020 IEP noted goals in reading comprehension ("After reading grade level narrative or informational text, [the Student] will cite strong and thorough textual evidence to support analysis of what the text says explicitly as well as inferences drawn from the text with 75% 3 out of 4 texts"), written language expression ("When given a writing prompt and a graphic organizer, [the Student] will write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence with 75% on 3 out of 4 writing assignments"), and math problem solving ("Given a set of math problems, [the Student] will translate a real-world problem into a one-variable linear equation with 75% accuracy."). (Parents Ex. 22, pp. 22-23).

14. The June 10, 2020 IEP provided twenty minutes per day inside of the general education classroom for support within her language arts class for reading comprehension and written language expression and twenty minutes per day inside of the general education classroom for support in her math class for her math problem solving, for a total of forty minutes. It also provided for thirty minutes per week of instruction outside of the general education classroom for organizational help, including checking for missing assignments. It noted that the thirty minutes per week of organizational instruction/assistance could be provided by the Student's case manager during tutoring time. (Parents Ex. 22, p. 24).

15. On June 11, 2020, the FCPS, via the Student's current school of [REDACTED] Middle School, with the input of the Parents, updated the Student's DLP. The June 11, 2020



DLP listed the three IEP goals and further noted “NA” meaning not applicable under a line stating “Goals not conducive to distance learning.” (Parents 23, p. 1). The June DLP contemplated that the Student’s IEP goals were capable of being supported and implemented in a remote format.

16. At the start of the Student’s ninth grade year (2020-2021), the FCPS were still not open for in person learning, but were holding classes in a remote format due to the COVID-19 pandemic.

17. On September 25, 2020, the FCPS, via the Student’s now current school of [REDACTED], with input from the Parents, updated the Student’s DLP. It again listed the three IEP goals. The September 25, 2020 DLP noted that all three goals would be delivered through synchronous and asynchronous instruction. (FCPS Ex. 24).

18. The September 25, 2020 DLP further notes the Student’s instructional and assessment accommodations, as well as her supplementary aids and services, which were drawn directly from the Student’s June 2020 IEP. (FCPS Ex. 24, p. 0319).

19. The September 25, 2020 DLP contained three quarters of a page of “Parental Input” that notes the Student and Dr. [REDACTED] both had issues with Schoology, and struggling to make sure the Student is given credit for work or projects that have been completed. It further notes that the Student “is engaged throughout her day in her classes and seems to be effective learning this way.” (FCPS Ex. 24, p. 0317).

20. During this period, the Student received outside tutoring approximately two times per week for English and organizational skills and received math and language arts tutoring from various family members.

21. In October 2020, Ms. [REDACTED] reached out to the Parents to see if the Student could return to in person instruction at [REDACTED] two days per week for a half day each day. (Test. [REDACTED], p. 1734).<sup>14</sup>

22. The Parents declined to have the Student attend in person classes at [REDACTED] at that time, preferring that she continue with the virtual instruction due to COVID concerns.

23. The November 6, 2020 IEP Progress Report noted that the Student was making sufficient progress to meet each of the three IEP goals. The November 2020 IEP also noted that the Student was now utilizing the Achieve 3000 curriculum for reading.

24. For the spring 2021 semester, [REDACTED] offered a hybrid program where students could be assigned to a cohort and attend two days of in person instruction per week. The Parents again declined to allow the Student to attend in person classes at [REDACTED]. (Test. [REDACTED], p. 1736).

25. The January 26, 2021 IEP Progress Report noted that the Student was making sufficient progress to meet each of the three IEP goals. It was noted for the reading comprehension goal that the Student was utilizing the Achieve 3000 program and that her reading lexile level was a 365. (Parents Ex. 27, p. 3). A lexile level of a 365 is approximately a third grade reading level. (Test. [REDACTED], p. 844). For the written language expression goal, the progress report notes that the Student made progress on this goal by demonstrating her ability to independently compose one paragraph responses, and it lists three assignments completed with the scores of 100, 80, and 100. (Parents Ex. 27, p. 4). Finally, for the math problem solving goal, the report shows that the Student was enrolled in Algebra Acquisitions and was working with functions to determine if a function was linear or exponential. On four assignments she received scores of 100, 100, 80, and 100. (Parents Ex. 27, p. 5).

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<sup>14</sup> References to testimony will include the last name of the person testifying and the page number of the transcript.

26. On April 9, 2021, the Student's IEP team met for the Student's annual review. During this meeting, FCPS staff requested that the Student be made available for educational and psychological assessments, since her last assessments had been in 2018. At that time, the Parents declined to have the Student assessed, preferring to wait until the Student returned to in person instruction. (Parents Ex. 28, p. 9; Test. [REDACTED], p. 1749).

27. At the April 9, 2021 meeting, the IEP team reviewed the Student's 2018 educational assessment. This assessment noted that on the Woodcock-Johnson IV (WJIV), the Student had a Broad Reading cluster score of 78 (Low), which included a Letter-Word Identification score of 78 (Low), a Passage Comprehension score of 78 (Low), and a word attack score of < 40 (Very Low). Her Broad Written Language cluster score was 84 (Low Average), which included a Spelling score of 77 (Low), Writing Samples score of 98 (Average), and a Sentence Writing Fluency score of 91 (Average). It also provided a Broad Math cluster score of 82 (Low Average), which included an Applied Problems score of 84 (Low Average), a Calculation score of 83 (Low Average), and a Math Facts Fluency score of 86 (Average). (Parents Ex. 15, p. 4; Parents Ex. 28, p. 3).

28. It was noted during the April 2021 IEP meeting that the Student struggles with decoding, which impacts her reading comprehension and that, especially during distance learning, she had struggled with executive functioning skills such as inconsistent attendance and turning in work. (Parents Ex. 28, pp. 2-3). It further noted that the Student read at a level below her peers, and she required "significant reading supports" to access grade level text. (Parents Ex. 28, p. 14).

29. Attendance and work completion were noted to be areas of concern for the Student, but it was further highlighted that when the Student attended office hours, she

“demonstrated her ability to complete several assignments in a short amount of time.” (Parents Ex. 28, p. 14).

30. The IEP team again determined that the Student qualified for special education services as a student with a specific learning disability, dyslexia. (Parents Ex. 28, p. 11).

31. The IEP team discussed ESY but determined that the Student was not “working on critical life skills to warrant ESY” (Parents Ex. 28, p. 4) and that the Student “makes consistent progress and demonstrates growth.” (Parents Ex. 28, p. 28). Specifically, the IEP noted that the Student’s lexile level increased from 360 in January 2021 to 460 in March 2021. (Parents Ex. 28, p. 14).

32. The April 2021 IEP contained the following three goals:

- Reading Comprehension: With adult support, when given a grade level text, [the Student] will make appropriate inferences about the text and provide text examples to support [her] response, in order to earn [ ] 75% on completed classroom assessments.
- Written Language Expression: When given a writing prompt and a graphic organizer, [the Student] will produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience[,] in order to earn a written language rubric score of 75% or higher.
- Math Problem Solving: [The Student] will simplify and solve equations, with fading adult support and the use of a calculator on 3 out of 4 attempts with 75% accuracy.

(Parents Ex. 28, pp. 33-34).

33. The April 9, 2021 IEP provided five sessions per week for an hour and ten minutes (total of five hours and fifty minutes per week) of special education instruction inside of the general education classroom. It also provided for five sessions per week for twenty minutes (total of an hour and forty minutes per week) for services outside of the general education classroom. The IEP further stated that she required direct special education supports in co-taught

classes and/or in consultation with general educators and that she “requires direct special education support in the resource room to access small group testing, reteaching, monitoring of grades and progress on IEP goals.” (Parents Ex. 28, p. 36).

34. The April 9, 2021 IEP also provided accommodations, including: having directions read out loud; use of a highlighting tool; support with redirection to task; use of a graphic organizer; use of a spell checking device; use of a text to speech/human reader; testing in a small group in a quiet room with frequent breaks; use of a calculator on sections of a calculation test; access to a computer, use of a reader, and a copy of teacher notes to support her own note taking; and extended time for all assignments, projects, and assessments. (Parents Ex. 28, pp. 19-21).

35. The April 9, 2021 IEP provided seven instructional supports (repetition/modeling/step by step; break down assignments into smaller parts; revise and edit check list for extended writing pieces; read aloud to self; monitor independent work; check for understanding; and use of word bank to reinforce vocabulary and/or when extended writing is required), three program modifications (alternate way to demonstrate learning; chunking of texts; and weekly agenda/assignment list), four social/behavioral supports (encourage student to ask for assistance when needed; provide structured time for organization of materials; strategies to initiate and sustain attention; and frequent eye contact/proximity control), and one physical/environmental support (preferential seating). (Parents Ex. 28, pp. 22-26).

36. The April 2021 IEP significantly increased the Student’s special education services and supports as compared to the June 2020 IEP.

37. On June 3, 2021, the FCPS drafted a Planning Worksheet for Recovery/Compensatory Opportunities (Worksheet). The Worksheet notes that progress reports,

classwork, informal and formal evaluation tools, and parent feedback were used in making the determination regarding recovery/compensatory services. It further notes that the Student made progress from March 2020 through June 2020 and that from September 2020 to the current time the Student made progress on reading and written language, but did not make progress in math in April 2021. (Parents Ex. 31, pp. 2-3).

38. On the June 17, 2021 Summary of Performance for the IEP, the following was recorded for the three IEP goals:

- The Student was found to be making sufficient progress to meet the Reading Comprehension goal; however, the description notes that the Student “made inconsistent progress to meet this goal” and her attendance was inconsistent, which negatively impacted her work completion and progress. It noted that her Achieve 3000 scores for April were 37.1% on the first attempt and 58.7% on the second attempt, for May were 67% on the first attempt and 79.3% on the second attempt; and for June there were no Achieve 3000 activities completed.
- The Student was found to be making sufficient progress to meet the Written Language Expression goal; however, the description notes that the Student “made inconsistent progress to meet this goal, also noting that her inconsistent attendance negatively impacted her work completeness and progress. It noted she earned a 65% on her “Exit Ticket” assignment and she did not complete her poetry analysis writing assignment.
- The Student was found to be making sufficient progress to meet her Math Problem Solving goal. It noted that she scored 100, 94, 100, 56, and 100 on assignments requiring her to solve one step equations and that the Student continues to benefit from adult support and scaffolding.

(Parents Ex. 30, pp. 3-6).

#### 2021-2022 School Year

39. The Student returned to in person instruction at [REDACTED] at the start of the 2021-2022 school year, her 10th grade year.

40. The IEP Team met on October 21, 2021. Despite being back in person at [REDACTED], both Dr. [REDACTED] and one of the Student’s classroom teachers noted that the Student

had difficulty with completing and turning in assignments and that the Student was behind on several assignments. (FCPS Ex. 34, p. 0415).

41. The IEP team discussed the Worksheet at the October 21, 2021 IEP meeting. (Test. ██████, pp. 1752-1753; FCPS Ex. 34, p. 0416). The IEP team determined that the school closure due to the COVID-19 pandemic did not negatively impact the Student's access to a FAPE and the Student had, via the DLP, continued to "make growth" on her IEP goals and objectives. As such, the IEP team concluded that the Student did not require any additional recovery or compensatory opportunities. (FCPS Ex. 34, p. 0416).

42. The October 21, 2021 IEP noted that Achieve 3000 data showed as of August 2021 that the Student had a lexile level of 535, which is below grade level. (FCPS Ex. 35, p. 0427). However, the October 25, 2021 progress report notes that the Student's beginning of year lexile increased from 430 to 465. The progress note does not mention the August 2021 lexile level of 535. (FCPS Ex. 35, p. 0451).

43. The October 21, 2021 IEP contained the following three goals:

- Reading Comprehension: [The Student] will determine a central idea of a text and analyze its development over the course of the text, including how it emerges and is shaped and refined by specific details; provide an objective summary of the text on 3 out of 4 attempts with 75% accuracy.
- Math Problem Solving: Given a formula sheet and use of a calculator, [the Student] will develop algebraic skills and reasoning abilities needed for problem solving across curricular content areas with 75% accuracy.
- Written Language Expression: When provided with a prompt, graphic organizers, and accommodations, [the Student] will write a multi-paragraph essay demonstrating [her] ability to summarize the text using grade appropriate writing skills as measured by the teacher provided rubric, with 75% accuracy.

(FCPS Ex. 35, pp. 0451-0453).

44. The October 21, 2021 IEP provided five sessions per week of special education services for an hour (total of five hours per week) inside of the general education classroom. It also provided for five sessions per week for twenty minutes (total of an hour and forty minutes per week) for services outside of the general education classroom. The IEP further stated that the Student required direct special education supports in co-taught classes and/or in consultation with general educators and that she “requires direct special education support in the resource room to access small group testing, reteaching, monitoring of grades and progress on IEP goals.” (FCPS Ex. 35, p. 0455).

45. The October 21, 2021 IEP provided for fifty minutes *less* per week of special education instruction in the general education class room than the April 2021 IEP.

46. Despite the notes by teachers and Dr. [REDACTED] that the Student was still having issues with executive functioning, such as time management, organization, and submission of work, the October 21, 2021 IEP did not contain any goals related to executive function or behavioral goals; however, it contained the exact same accommodations as listed in the April 2021 IEP. (*See Finding of Fact # 32*).

47. The October 21, 2021 IEP also contained the exact same instructional supports, program modifications, social/behavioral supports, and physical/environmental support as the April 2021 IEP. (*See Finding of Fact # 33*).

48. The October 21, 2021 IEP also noted that the Student did not qualify for ESY services. (FCPS Ex. 35, p. 0443).

49. Despite the FCPS seeking assessments at the April 2021 IEP meeting and the Parents’ desire to wait until the Student returned to in person instruction due to COVID-19



related concerns, neither formal or informal assessments were discussed or scheduled during the October 21, 2021 IEP meeting.

50. Had either formal or informal assessments been performed in October 2021, the Student's reading comprehension needs, specifically in decoding, would have been apparent, especially in light of the 2018 evaluation.

51. During the second quarter of the 2021-2022 school year, the Student was easily distracted by her phone and the use of social media. At various points the Student used her personal MacBook instead of the school issued Chromebook because she could access her phone and social media apps through her MacBook. (FCPS Ex. 75, p. 0714; Test. [REDACTED], p. 1757).

52. On January 14, 2022, the Student was approved for [REDACTED] ([REDACTED]).<sup>15</sup>

53. On January 19, 2022, the Parents, through counsel, requested an IEP meeting to discuss [REDACTED] as well as concerns regarding the Student's IEP programing. (Parents Ex. 34). The January 19, 2022 letter requesting an IEP meeting did not reference an assault against the Student or other bullying issues.

54. In February 2022, the Student applied to [REDACTED].

55. On February 27, 2022, Dr. [REDACTED] contacted [REDACTED] in order to have a psychological assessment completed for the Student, as such an assessment is required for [REDACTED]'s application process. (FCPS Ex. 49, p. 0527).

56. Dr. [REDACTED] completed a psychoeducational evaluation over two days in March 2022. Dr. [REDACTED] performed the following assessments: Wechler Adult Intelligence Scale-Fourth Edition

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<sup>15</sup> [REDACTED] is not a change of placement for a student, but requires the "concurrent delivery of instructional services and enrollment in a public school" and which "shall be provided for a student whose physical or emotional condition requires the student to be absent from school on an intermittent basis." COMAR 13A.03.05.01(C). This issue of whether the Student was properly on [REDACTED] is not an issue before me in this matter.

(WAIS-IV); Wechsler Individual Achievement Test-Forth Edition (WIAT-4); Developmental Test of Visual Motor Integration-Sixth Edition (VMI); Wide Range Assessment of Visual Motor Abilities (WRAVMA), Pegboard subtest; Grey Oral Reading Tests-Fifth Edition (GORT-5); Oral and Written Language Scales-Second Edition (OWLS-II); Feifer Assessment of Reading (FAR); Feifer Assessment of Mathematics (FAM); Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2), select subtests; NEPSY-II, select subtests; Wide Range Assessment of Memory and Learning-Second Edition (WRAML-2); Delis Kaplan Executive Functioning System (D-KEFS), select subtests; Conners-Third Edition (Conners-3) Parent, Teacher, and Self Reports; Behavior Rating Inventory of Executive Function-Second Edition (BRIEF-2), Parent and Teacher Reports; Behavior Assessment System for Children-Third Edition (BASC-3), Parent, Teacher, and Self Reports; Multidimensional Anxiety Scale for Children-Second Edition (MASC-2), Parent and Self Reports; and Test of Variables of Attention, v. 9.1. (Parents Ex. 43, p. 6).

57. On the WAIS-IV the Student had a full IQ score of 83, which is in the thirteenth percentile, which is Low Average, but her subtest scores were “inconsistent.” The Student scored Very Low in the Verbal Comprehension Index, Average in the Perceptual Reasoning Index, Very Low in the Working Memory Index, and Very Low in the Processing Speed Index. (Parents Ex. 43, pp. 6, 7, 32).

58. The CTOPP-2 and FAR were used to assess the Student’s phonological processing and phonemic awareness, which are cognitive abilities that form the foundation for reading skills.

59. On the CTOPP-2 the Student scored in the Low Average range, although she scored in the fifth percentile or Very Low range on the Elision task of the CTOPP-2, which required her to “omit specified sounds from within words (e.g., “playground” without “play”).”

60. On the FAR assessment, the Student largely scored in the Very Low range, although she scored in the Impaired range, or first percentile, on the Nonsense Word Decoding task.

61. Overall, the Student had major deficits with decoding and reading, indicating a “weakness in basic phonics skills, including sound-letter correspondence, and word recognition skills, as well as an effort to rely on guessing and problem-solving when unsure.” (Parents Ex. 43, pp. 9-10, 33-34).

62. The FAM assessment placed the Student in the Very Low range, although her subtest scores varied with the Student scoring in the Average range on the Forward Number Count, Rapid Number Naming, Linguistic Math Concepts, and Spatial Memory subtests; scoring in the Low Average range for Backward Number Count, Sequences, Addition Fluency, Multiplication Fluency, Number Comparison, Addition Knowledge, Subtraction Knowledge, and Division Knowledge subtests; scoring in the Very Low range in the Numeric Capacity, Subtraction Fluency, Division Fluency, and Multiplication Knowledge subtests; and scoring in the Impaired range of the Perceptual Estimation subtest. (Parents Ex. 43, pp. 34-35).

63. The Student’s FAM scores indicate that she had not mastered “simple math facts” which is common when a student has “weaker language ability.” Additionally, the Impaired range score for the Perceptual Estimation subtest indicates that the Student struggles with subitizing, meaning being able to automatically identify quantity, which is necessary in

mathematics to “support understanding of mathematical concepts” and to help “determine whether an answer is plausible.” (Parents Ex. 43, p. 15).

64. During the clinical interview portion of Dr. [REDACTED]’s assessment, the Student “endorsed occasional feelings of anxiety, especially around ‘friend drama.’ Rumors and misunderstandings related to social medial posts are a concern for her...When asked specifically about the recent physical assault she experienced, she denied intrusive thoughts or memories; reexperiencing the event or efforts to avoid thinking about it.” (Parents Ex. 43, pp. 18-19).

65. Based on her assessment, Dr. [REDACTED] concluded that the Student requires a “systematic, explicit and multisensory” individualized instruction for students with dyslexia in order to build her lacking decoding skills, reading fluency, and comprehension. She requires this intervention at the “highest possible level of intensity and frequency,” which research has shown to be 60-90 minutes per day in one-to-one or very small group instruction, five days per week. (Parents Ex. 43, p 23, Test. [REDACTED], p. 884).

66. The Student also requires support for reading comprehension, including multisensory strategies for vocabulary and grammar, morphology and orthographical processing to be taught throughout the day; an intervention to develop her oral language skills, including vocabulary and language mechanics; a multisensory math teaching approach in order to learn the “language of math” which should be taught on a daily basis; and individualized instruction in written expression. (Parents Ex. 43, pp. 23-24).

67. Dr. [REDACTED] provided the following diagnostic impressions for the Student: Attention Deficit Hyperactivity Disorder (ADHD), combined presentation; Language Disorder; Specific Learning Disorder with Impairment in Reading, to denote weakness in phonological processing, decoding, encoding (spelling) and fluency (dyslexia); Specific Learning Disorder with

Impairment in Written Expression, to denote weakness in accuracy, grammar, and punctuation accuracy, as well as clarity and organization (dysgraphia); Specific Learning Disorder with Impairment in Mathematics, to denote weakness in accurate and fluent calculation, memorization of arithmetic facts, and accurate math reasoning (dyscalculia). (FCPS Ex. 43, p. 23).

68. On March 16, 2022, the IEP team met. The Team Meeting Notes reflect that the purpose of the IEP meeting was “to review progress and discuss recent concerns. [The Student] has been accessing [REDACTED] instruction since 01/14/2022.” (FCPS Ex. 54, p. 0550).

69. During the March 16, 2022 IEP meeting, the 2018 assessments were discussed. The FCPS proposed updating the Student’s assessments, at which time the Parents informed the FCPS that they had engaged Dr. [REDACTED] to perform outside assessments. The Parents also requested that the FCPS perform informal assessments of the Student “specifically to address phonemic awareness and phonics.” (FCPS Ex. 54, p. 0551).

70. The FCPS requested that the Parents consent to the following assessments: Educational; Psychological; Observation; and informal assessments for phonemic awareness and phonics. (FCPS Ex. 54, p. 0552).

71. The Parents did not raise any concerns during the March 16, 2022 IEP meeting regarding bullying of the Student or that bullying was preventing the Student from attending her classes or receiving her services.

72. The IEP was amended to reflect that the Student was currently receiving [REDACTED] instruction and that was going to be reverified for an additional sixty days, upon doctor recommendation. (FCPS, Ex. 55, p. 0573).

73. The March 25, 2022 IEP Progress Report notes that the Student was making progress on all three of her IEP goals through her [REDACTED]. For both her reading comprehension

and written language expression goals, the IEP notes that she was successful with project-based learning, focusing on Beowulf in her English 10 curriculum, and plant and animal life in Biology. She was also focused on project-based learning in her Algebra 1 class, using workbook activities, tutorials, and interactive assignments with her [REDACTED] teacher noting that she was proud of the Student's "motivation and participation in understanding Algebraic equations and the concepts of order of operations." (FCPS Ex. 57, pp. 0592-0597).

74. On March 21, 2022 and May 24, 2022, the Student was reverified for [REDACTED] by her pediatrician, Dr. [REDACTED]. The March 21, 2022 reverification form notes a last appointment date of January 4, 2022 and lists medical conditions of "intermittent tachycardia & chest pain, anxiety/PTSD." (Parents Ex. 41, p. 1). The May 24, 2022 reverification form provides the same information. (Parents Ex. 45).

75. The Student was on [REDACTED] from January 14, 2022 through the remainder of the 2021-2022 school year.

76. The Student benefitted from the 1:1 teacher to student ratio of [REDACTED] and progressed well, earning all As in her classes. (FCPS Ex. 54, p. 0550).

77. In May 2022, the FCPS conducted a psychological assessment of the Student. Ms. [REDACTED] conducted the assessment and issued her report on May 20, 2022. Ms. [REDACTED] reviewed Dr. [REDACTED]'s assessment, as well as assessments completed by the FCPS in 2015 and 2018. She also administered the BASC-3, Teacher Report-Adolescent; the Conners-3, Teacher Form; and the Comprehensive Executive Function Inventory (CEFI), Teacher Form.

78. The IEP team met on May 31, 2022 to discuss the assessments. The IEP team determined that the Student met the criteria as a student with a specific learning disability (SLD) in the areas of reading, writing, and math, had an other health impairment (OHI) as evidenced by

her diagnosis of ADHD, combined type, and had characteristics of dyslexia, dysgraphia, and dyscalculia. Another IEP meeting was scheduled for June 16, 2022. (FCPS Ex. 71, pp. 0694-0695).

79. The IEP team reconvened on June 16, 2022 and implemented major changes to the Student's IEP. In addition to noting the Student's disabilities as they relate to reading comprehension, written expression, and math fluency, the IEP noted that the Student has problems with executive functioning, specifically, "clinically significant levels of inattention, as well as increased hyperactivity/impulsivity." (FCPS Ex. 76, p. 0747).

80. The IEP team discussed ESY services during the June 16, 2022 meeting. Despite adding a behavioral management goal, and goals regarding encoding, decoding, reading phonemic awareness, and reading fluency, the IEP team concluded that the IEP contained no critical life skills, the Student did not have any significant interfering behaviors, and there were no special circumstances present to require ESY services. Therefore, the IEP team did not recommend ESY services. (FCPS Ex. 76, pp. 0767-0768).

81. The June 16, 2022 Amended IEP contained the following goals:

- Reading Phonics: Given a list of real and pseudo single-syllable words containing the five syllable types (closed, open, silent-e, r-controlled, vowel team) with initial and final blends (digraphs and trigraphs), [the Student] will decode the words with 90% accuracy in 4 out of 5 trials.
- Self-management: Given an academic task, [the Student] will review the requirements, ask clarifying questions if needed, initiate the task, and sustain attention to complete the task, with no more than 2 verbal or non-verbal prompts, across all school settings, in 4 out of 5 opportunities.
- Encoding: When writing words and sentences that are orally dictated, or during independent writing, [the Student] will spell 8 out of 10 single-syllable words containing the five syllable types

(closed, open, silent-e, r-controlled, vowel team), with initial and final blends (digraphs and trigraphs) accurately in 3 out of 4 trials.

- Reading Phonemic Awareness: When orally presented with phonological awareness tasks comprised of words containing initial and final blends, and digraphs, [the Student] will apply phonemic awareness skills to manipulate (blend, segment, delete and substitute) the phonemes in a word to create a new target word with 90% accuracy in 3 out of 4 trials.
- Reading Fluency: Given a controlled text, [the Student] will increase her fluency, from her baseline, by 40 wcpm with 96% accuracy on 3 out of 4 trials.
- Reading Comprehension: [The Student] will determine a central idea of a text and analyze its development over the course of the text, including how it emerges and is shaped and refined by specific details; provide an objective summary of the text on 3 out of 4 attempts with 75% accuracy.
- Written Language Expression: When provided with a prompt, graphic organizers, and accommodations, [the Student] will write a multi-paragraph essay demonstrating her ability to summarize the text using grade appropriate writing skills as measured by the teacher provided rubric, with 75% accuracy.
- Written Language Expression: When given a grade level text, [the Student] will demonstrate increasing word skills and vocabulary knowledge by defining words with 80% accuracy on 4 out of 5 assignments.
- Math Problem Solving: Given a formula sheet and use of a calculator, [the Student] will develop algebraic skills and reasoning abilities needed for problem solving across curricular content areas with 75% accuracy.

(FCPS Ex. 76, pp. 0769-0780).

82. The June 16, 2022 Amended IEP provided for the following services:

- Direct special education instruction in a phonics based intervention<sup>16</sup> in a small group of no more than three students for forty-five minutes per day, five days a week (total of 3 hours 45 minutes weekly).

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<sup>16</sup> The FCPS implemented the Orton-Gillingham Plus (OG+) program for the Student.



- Specially designed instruction within the general education classroom three times a week for twenty minutes. The service delivery may be in multiple content areas such as history, English, etc. (total of 1 hour weekly).
- Specially designed instruction within the general education classroom to support her math goals four times a week for fifteen minutes (total of 1 hour per week).
- Specially designed instruction outside the general education classroom one time per week for twenty minutes to support her math problem solving goal (total of 20 minutes per week).
- Specially designed instruction inside the general education classroom to support her written language expression goals twenty minutes three times per week (total of 60 minutes per week).<sup>17</sup>
- Specially designed instruction outside the general education classroom to support her written language expression goal twenty minutes two times per week (total of 40 minutes per week).
- Specially designed instruction inside the general education setting for fifteen minutes five days a week to support her self-management goal (1 hour 15 minutes).
- Specially designated instruction one time per week for fifteen minutes outside of the general education setting to support her self-management goal.<sup>18</sup>

(FCPS Ex. 76, pp. 0782-0785).

83. Although Dr. [REDACTED] recommended that the Student required 60-90 minutes per day of intensive reading intervention, the June 2022 IEP only provided 45 minutes per day.

84. The IEP team was not able to complete their discussion regarding the Student returning to in person classes at [REDACTED]. The team discussed the Student's continuation in the [REDACTED]. The Parents had safety concerns regarding the bullying issues if the

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<sup>17</sup> This service was reference on the chart of services as being 20 minutes per session (p. 0782) but was listed in the services written on page 0784 as being 30 minutes per session. A review of the IEP Meeting Notes (FCPS Ex. 75, p. 0716) shows that 20 minutes is the correct amount of time per session.

<sup>18</sup> This service was referenced on the chart of services as being 15 minutes per session (p. 0783) but was listed in the services written on page 0785 as being 20 minutes per session. A review of the IEP Meeting Notes (FCPS Ex. 75, p. 0716) shows that 15 minutes is the correct amount of time per session.

Student were to return in person to [REDACTED] or any school within the FCPS system. The Parents believed that a nonpublic placement was necessary for the Student's safety. The IEP team agreed to "reconvene as soon as possible." (FCPS Ex. 75, p. 0716).

[REDACTED]

85. On July 6, 2022, the Student had an admission meeting at the [REDACTED]'s [REDACTED] Campus.

86. [REDACTED] is not a special education school and does not have certified special education teachers that can provide special education services or interventions.

87. Students are taught in a 1:1 setting, either in person or online. In addition to the 1:1 classes, students also participate in a homework café where they can interact with other students while being overseen and assisted by teachers.

88. If a student requires special education services, an outside tutor can be brought in, or the student can see the tutor off campus. Tutoring sessions, whether through the [REDACTED] [REDACTED] or an outside provider, are not credit bearing.

89. [REDACTED] is yearlong with four terms, two per semester. Each semester consists of twenty-five, fifty-minute class sessions, as well as twenty-five, fifty-minute homework café sessions. (Test [REDACTED], pp. 1362, 1392-1393).

90. Of the nine goals listed in the Student's most recent IEP (October 2022), [REDACTED] [REDACTED] would only be able to implement on its own the Self-Management goal. However, the instruction at [REDACTED] would support and reinforce what was taught during the tutoring sessions. (Test [REDACTED], pp. 1397-1401).

91. [REDACTED] is a more restrictive setting than the FCPS [REDACTED] [REDACTED] as it is a 1:1 teacher to student ratio; however, it is less restrictive than when the Student

was on [REDACTED]. [REDACTED], however, is not an educational placement, and is meant to be temporary due to a medical or emotional condition.

2022-2023 School Year

92. The Parents elected to enroll the Student in the FPCS' [REDACTED] for the 2022-2023 school year.

93. The IEP Team reconvened on October 17, 2022, which was the first available date for all team members.

94. The October 17, 2022 IEP contained the following goals:

- Reading Phonemic Awareness: When orally presented with phonological awareness tasks comprised of words containing initial and final blends, and digraphs, [the Student] will apply phonemic awareness skills to manipulate (blend, segment, delete and substitute) the phonemes in a word to create a new target word with 90% accuracy in 3 out of 4 trials.
- Self-management: Given an academic task, [the Student] will review the requirements, ask clarifying questions if needed, initiate the task, and sustain attention to complete the task, with no more than 2 verbal or non-verbal prompts, across all school settings, in 4 out of 5 opportunities.
- Written Language Expression: When provided with a prompt, graphic organizers, and accommodations, [the Student] will produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience with 80% accuracy.
- Written Language Expression: When given a grade level text, [the Student] will demonstrate increasing word skills and vocabulary knowledge by defining words with 80% accuracy on 4 out of 5 assignments.
- Encoding: When writing words and sentences that are orally dictated, or during independent writing, [the Student] will spell 8 out of 10 single-syllable words containing the five syllable types (closed, open, silent-e, r-controlled, vowel team), with initial and final blends (digraphs and trigraphs) accurately in 3 out of 4 trials.

- Math Problem Solving: Given a formula sheet and use of a calculator, [the Student] will develop algebraic skills and reasoning abilities needed for problem solving across curricular content areas with 80% accuracy.
- Reading Phonics: Given a list of real and pseudo single-syllable words containing the five syllable types (closed, open, silent-e, r-controlled, vowel team) with initial and final blends (digraphs and trigraphs), [the Student] will decode the words with 90% accuracy in 4 out of 5 assignments.
- Reading Comprehension: Given grade level text, [the Student] will determine the meaning of words and phrases and analyze how an author uses and defines the meaning of key terms by explaining the meaning and its use over the course of the document.
- Reading Fluency: Given a controlled text, [the Student] will increase her fluency, from her baseline, by 40 wcpm with 96% accuracy on 3 out of 4 trials.

(FCPS Ex. 87, pp. 0890-0897).

95. The October 2022 IEP provided for the same amount of special education services both inside and outside the general education classroom as the June 2022 IEP, although the October 2022 IEP noted that the services to work on the Self-Management goal was actually twenty minutes outside the general education classroom, not fifteen as there was confusion in the June 2022 IEP.

96. The October 2022 IEP continued to provide only forty-five minutes for the phonics based intervention.

97. As part of the placement discussion during the October 2022 IEP meeting, in order to address the Parents' concerns regarding the Student's safety at [REDACTED] due to the bullying the Student experienced, the FCPS offered that the Student could attend any other school within the FCPS system, offered a safety plan, offered that the Student could have check-

ins and check-outs with a trusted adult on campus, and offered to consider therapy as a service to be added to the IEP. (FCPS Ex. 81, p. 0806).

98. The Parents asserted that only a nonpublic placement outside of Frederick County could provide for the Student's safety. (FCPS Ex. 81, p. 0806).

99. A nonpublic placement would not prevent the Student from continued cyberbullying and harassment, as she had continued to experience such bullying behavior while on [REDACTED] and while in the [REDACTED].

### Bullying

100. On November 2, 2021, [REDACTED],<sup>19</sup> a student at [REDACTED] submitted a Bullying, Harassment, or Intimidation Reporting Form (bullying form) alleging that the Student had sent her threatening or intimidating messages and Snapchats, and had stared at her in the hallway at school.

101. In a Student Statement Form, the Student denied threatening [REDACTED], but stated that she texted [REDACTED] telling her "not to talk shit cuz I hear it." (FCPS Ex. 37, p. 0482).

102. [REDACTED] investigated the alleged bullying incident and determined that the alleged behavior did not meet the definition of bullying and that the bullying claim was not substantiated. (FCPS Ex. 36, p. 0474).

103. On November 5, 2021, [REDACTED], an Assistant Principal at [REDACTED], requested that [REDACTED] and her guardian sign an agreement for [REDACTED] to not have contact with the Student, including verbal comments or using social media to talk about the Student and noting that if the agreement was not adhered to, there would be progressive disciplinary measures taken. [REDACTED] and her mother signed the agreement. (FCPS Ex. 36, p. 0465).

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<sup>19</sup> Any students referenced in this decision will be referred to by initials only. If the student's initials are not available, they will be referred to by first name only.

104. Mr. [REDACTED] also requested that the Student and Dr. [REDACTED] sign such an agreement relating to [REDACTED]. Dr. [REDACTED] refused to sign the agreement or have the Student sign the agreement, but verbally told Mr. [REDACTED] that the Student would not have contact with [REDACTED]. (FCPS Ex. 36, p. 0466).

105. In December 2021, the Student began having problems with another [REDACTED] student, [REDACTED], and her group of friends. [REDACTED] believed that the Student had reported her to the administration for smoking marijuana in a bathroom at school and for cutting class. (Test. [REDACTED], p. 158).

106. In December 2021, Dr. [REDACTED] had at least one conversation with Ms. [REDACTED], an Assistant Principal at [REDACTED], about the bullying of the Student by [REDACTED] and her group of friends. Ms. [REDACTED] advised that the Student could talk to an SRO, should stay off social media as to limit her interaction with [REDACTED], and that the Student could file a bullying report. Dr. [REDACTED] and the Student decided to wait until after the winter break to take any additional action. Ms. [REDACTED] also provided the nonemergency number for the [REDACTED], should Dr. [REDACTED] require it while school was not in session. (Test. [REDACTED], pp. 1571, 1633).

107. The Student returned to school on January 3, 2022, after the winter break.

108. On January 3, 2022, Dr. [REDACTED] emailed Ms. [REDACTED], letting Ms. [REDACTED] know that no steps regarding the bullying had taken place over the winter break, but that the Student would like to speak to the SRO about the issues. (FCPS Ex. 38, p. 0490). Ms. [REDACTED] replied to the email, stating that she had planned to speak to the Student that afternoon, but the Student had gone home sick. (FCPS Ex. 38, p. 0490).

109. On January 4, 2022, the Student experienced an elevated heart rate and chest pain. She did not go to school, but instead saw her pediatrician, Dr. [REDACTED].

110. The Student returned to [REDACTED] on January 5, 2022.

111. During lunch on January 5, 2022, [REDACTED] assaulted the Student by pouring a bottle of water over her head, grabbing the Student's hair, and pulling the Student to the ground. The SRO, [REDACTED], was present in the cafeteria when the assault occurred and at least one [REDACTED] student recorded the assault on their cell phone.

112. [REDACTED] received a three-day suspension for the assault against the Student.

113. [REDACTED] filed a second-degree assault charge against [REDACTED] for the assault.

114. When [REDACTED] returned after her three-day suspension, a safety plan was put in place. The safety plan included that when [REDACTED] arrived at [REDACTED], she had to go directly to the office; she required an escort between classes or if she had to leave class for any reason; she would eat lunch in a separate room; she was only permitted to use the Assistant Principals' bathroom; and at the end of the day, she had to be escorted to her bus. (Test. [REDACTED], p. 1519; Test. [REDACTED], pp. 1572-1573).

115. In lieu of prosecution on the second-degree assault charge, [REDACTED] was permitted to participate in the [REDACTED]<sup>20</sup> program, which includes a counseling component. (Test. [REDACTED], p. 362).

116. Dr. [REDACTED] wanted to file a peace order against [REDACTED], but was provided contradictory information from the Department of Juvenile Services regarding the process. She attempted to file a peace order on behalf of the Student against [REDACTED], but was informed by the Department of Juvenile Services that since the assault occurred at school, the SRO would have to file the peace order.

117. After the assault on January 5, 2022, the Parents requested that the Student be excused from classes for the remainder of the semester. [REDACTED] granted this request.

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<sup>20</sup> Although not defined on the record, [REDACTED] stands for [REDACTED].

118. The administration at [REDACTED] was prepared to put a safety plan in place for the Student when she returned to [REDACTED], but the Student never returned to in person instruction at [REDACTED]. Although a possible safety plan was discussed with the Parents, including what would be included, the safety plan was never formalized as the Student never returned to classes at [REDACTED]. (Test. [REDACTED], p. 1577).

119. Even though the Student did not return to in person instruction at [REDACTED], [REDACTED]'s safety plan remained in place and her movements while at [REDACTED] were monitored. (Test. [REDACTED], p. 1573).

120. On January 11, 2022, the Parents and [REDACTED] staff, including Ms. [REDACTED], met to discuss the January 5, 2022 assault and to review additional social media posts and screen shots of messages that had been directed at the Student by [REDACTED] or by other students commenting on the posts and alleging that the Student uses racial slurs.

121. During the January 11, 2022 meeting, Ms. [REDACTED] discussed the importance of the Student limiting her social media use or “getting off of” social media. She also explained that [REDACTED] had completed its bullying investigation, but also recommended either the Student or Dr. [REDACTED] complete a bullying form for the January 5 incident. Ms. [REDACTED] showed Dr. [REDACTED] where to find the bullying form online. (Test. [REDACTED], p. 1559).

122. Neither the Student nor the Parents filed a bullying form for the January 5, 2022 incident.

123. As Dr. [REDACTED] was having a difficult time filing a peace order against [REDACTED], on or about January 11, 2022, [REDACTED] reached out to the Department of Juvenile Services to explain the situation and help facilitate Dr. [REDACTED]'s filing of a peace order against [REDACTED].



124. On January 11, 2022, Dr. [REDACTED] successfully filed for a peace order against [REDACTED]. The peace order was granted.

125. As a result of the January 11, 2022 meeting, [REDACTED] administrative staff reevaluated [REDACTED]'s safety plan and extended it in duration for forty-five days.

126. On or about January 21, 2022, [REDACTED] sent the Student an audio recording through another student's Snapchat in which she calls the Student names and states that she's glad she assaulted the Student. (Parents Ex. 79, p. 6; Parents Ex. 80, number 33).

127. At various times after the assault, the Student posted her own Tik Tok videos referencing [REDACTED]. Other people posted mean or harassing comments to the Student's Tik Tok videos.

128. On March 22, 2022, the Student attended a [REDACTED] game at [REDACTED]. The Student was told<sup>21</sup> that two [REDACTED] students were going to the game to fight her. The Student left the game and then received messages from the two students.

129. The Student's father reported the March 22nd incident to Ms. [REDACTED] Ms. [REDACTED] investigated the report and obtained student statements from two [REDACTED] students. Ms. [REDACTED] determined the March 22, 2022 incident did not involve [REDACTED], but stemmed from the Student dating the ex-boyfriend of another student and messaging the student about the new relationship.

130. Neither the Student nor the Parents completed a formal bullying report form for the March 22, 2022 incident.

131. In May 2022, [REDACTED] called the Student's cell phone multiple times. Dr. [REDACTED] answered one of the calls and tried to engage [REDACTED] and tell her to stop.

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<sup>21</sup> It is unclear from the record who told the Student about the threat against her, or how she was informed.

132. Neither the Student nor the Parents completed a formal bullying report form for the May 2022 phone calls.

133. On or about May 11, 2022, a student, [REDACTED], had an exchange through Tik Tok messages with the Student in which she threatened to come to the Student's home and assault her. The Student engaged with [REDACTED] and sent her the Student's address, essentially calling [REDACTED]'s bluff that [REDACTED] would come to her house. [REDACTED] then took a screenshot of the Student's address and posted it so that others could see it with the caption, "Who pullin up on her bitch ass wit me..." (Parents Ex. 79, picture 55).

134. The Student's father emailed Ms. [REDACTED] about the May 11, 2022 exchange, but neither the Parents nor the Student filed a bullying form. (FCPS Ex. 66).

135. As the threat was made outside of school hours and online, and did not impact the school day at [REDACTED], [REDACTED], an Assistant Principal at [REDACTED], responded to the Parents and advised that they should present this information to the Frederick County [REDACTED] [REDACTED] (Parents Ex. 79, p. 16).

136. On January 14, 2023, the Student came to [REDACTED] to pick up a form. The Student did not schedule an appointment to go to [REDACTED], nor did she alert staff that she would be present. She did not request any escorts and she came alone. The Student took a video while at [REDACTED] and at some point that day, posted the video to Tik Tok. At some point after the Student posted the video, a student with the screen name "[REDACTED]" commented "plz leave" and "nobody wants to see you."

137. On January 15, 2023, Dr. [REDACTED] filed an electronic bullying reporting form for [REDACTED]'s comments. Dr. [REDACTED] did not know the identity the student who made the comments, only the screen name of "[REDACTED]." (Parents Ex. 59, pp. 3-4).

138. On January 27, 2023, the Student completed an electronic bullying reporting form against [REDACTED], noting “I posted something on social media and she came after me, posting my number on social media and harassed me.” (Parents Ex. 59, pp. 1-2).

139. On or about February 3, 2023, [REDACTED] filed a bullying form against the Student, alleging that in January, the Student posted a video to Tik Tok referencing [REDACTED], saying “If we want to talk about people, let’s talk about [REDACTED].” (FCPS Ex. 101).

140. [REDACTED] will not attend [REDACTED] in the 2023-2024 school year as she graduated from [REDACTED] in the spring of 2023. (Test. [REDACTED], p. 618; Test. [REDACTED], p. 1783).

## DISCUSSION

### Burden of Proof

The standard of proof in this case is a preponderance of the evidence. COMAR 28.02.01.21K(1). To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). The burden of proof rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). The Parents are seeking relief and bear the burden of proof to show that the challenged actions by the FCPS did not meet the requirements of the law.

### Applicable Law and Legal Standard

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01. The IDEA requires “that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to

meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); *see also* Educ. § 8-403.

At the crux of this matter is the Student’s contention that the FCPS failed to provide her with a FAPE from January 4, 2021 through January 4, 2023. As a result, the Parents are seeking an Order that the Student be placed at [REDACTED] and for compensatory services in order to place the Student back to where she would have been had the FCPS properly provided special education services.

Under the IDEA, if the local educational agency (LEA) fails to provide a FAPE, private placement is appropriate “if the placement is reasonably calculated to accord the child educational benefits.” *M.M. ex rel. J.M. v. Foose*, 165 F. Supp. 3d 365, 370 (D. Md. 2015); *see also Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359 (1985).

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

While *Rowley*<sup>22</sup> declined to articulate an overarching standard to evaluate the adequacy of the education provided under the [IDEA], the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

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

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from

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<sup>22</sup> *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176 (1982).

schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.” A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child’s circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be “*specifically* designed” to meet a child’s “*unique* needs” through an “[i]ndividualized education program.”

*Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 998-999 (2017) (citations omitted; emphasis in original).

Directly adopting language from *Rowley*, and expressly stating that it was not making any “attempt to elaborate on what ‘appropriate’ progress will look like from case to case,” the *Andrew F.* Court instructs that the “absence of a bright-line rule . . . should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Id.* (quoting *Rowley*, 458 U.S. at 206). At the same time, the *Andrew F.* Court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, “[a] reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.* at 1002.

Ultimately, a disabled student’s “educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* at 1000. Moreover, the IEP must be reasonably calculated to allow a child to advance from grade to grade, if that is a “reasonable prospect.” *Id.*

At the beginning of each school year, each LEA is required to have in effect an IEP for each child with a disability in the LEA's jurisdiction. 20 U.S.C.A. § 1414(d)(2)(A). At least annually, the IEP team is required to review a child's IEP to determine whether the goals are being met. *Id.* § 1414(d)(4)(A)(i); 34 C.F.R. § 300.324(b)(1).

The development of an IEP is a prospective process. *See Andrew F.*, 137 S. Ct. at 999. The test of the appropriateness of the IEP is *ex ante* and not *post hoc*. *Adams v. State*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993); *J.P. ex rel. Popson v. W. Clark Cmty. Sch.*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002) (“[T]he measure of appropriateness for an IEP does not lie in the outcomes achieved. While outcomes may shed some light on appropriateness, the proper question is whether the IEP was objectively reasonable at the time it was drafted.” (Citation omitted). Thus, a judge in a due process hearing must look to what the IEP team knew when it developed the IEP, and whether that IEP, as designed, was reasonably calculated to enable the child to receive educational benefit. An IEP is essentially a “snapshot” in time and “cannot be judged exclusively in hindsight.” *See K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 818 (8th Cir. 2011); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). However, evidence of actual progress during the period of an IEP may also be a factor in determining whether a challenged IEP was reasonably calculated to confer educational benefit. *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009); *see also M.M. v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 532 (4th Cir. 2002).

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

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

20 U.S.C.A. § 1414(d)(3)(A).

Among other things, the IEP depicts a student's current educational performance, explains how the student's disability affects a student's involvement and progress in the general curriculum, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A.

IEP teams must consider the student's evolving needs when developing their educational programs. The student's IEP must include "[a] statement of the child's present levels of academic achievement and functional performance, including . . . [h]ow the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for non-disabled children) . . ." 34 C.F.R. § 300.320(a)(1)(i). If a child's behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, the use of positive behavioral interventions, strategies and supports to address that behavior. *Id.* § 300.324(a)(2)(i). A public agency is responsible for ensuring that the IEP is reviewed at least

annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision. *Id.* § 300.324(b)(1).

To comply with the IDEA, an IEP must, among other things, allow a disabled child to advance toward measurable annual academic and functional goals that meet the needs resulting from the child's disability or disabilities, by providing appropriate special education and related services, supplementary aids, program modifications, supports, and accommodations. 20 U.S.C.A. § 1414(d)(1)(A)(i)(II), (IV), (VI).

### Analysis

#### *COVID-19 school closures and consideration of COVID recovery services*

##### ***DLPs and June 2020 IEP***

During the Student's eighth grade year, while still at ██████████ Middle School, the FCPS ceased in-person classes due to the COVID-19 pandemic. Classes, and other school proceedings, such as IEP meetings, were moved to a virtual or remote format. On May 5, 2020, ██████████ Middle School put into place a DLP (Parent's Ex. 19) for the Student in order to implement the Student's April 2020 IEP.<sup>23</sup> ██████████ Middle School subsequently issued another DLP for the Student on June 11, 2020. (Parent's Ex. 23). On September 25, 2020, ██████████, the Student's placement for her ninth grade year, implemented a DLP. (FCPS Ex. 24). In October 2020, Ms. ██████████, the Student's special education case manager, reached out to the Parents to see if the Student could return to in person instruction at ██████████ two days per week for a half day each day. (Test. ██████████, p. 1734). The Parents declined to allow the Student to return to in person instruction due to ongoing concerns regarding the pandemic. This offer

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<sup>23</sup> The issue of whether the April 2020 IEP or May 2020 DLP provided the Student a FAPE are outside the IDEA's two-year statute of limitations of when the Parents knew or should have known of a cause of action. This issue was fully addressed in the Ruling on Motion issued on March 31, 2023, granting the FCPS' Motion regarding the Student's claims from April 2020 until January 4, 2021. I have included this information in the discussion because it is relevant history.



was again made to the Parents in the spring of 2021, but they declined that offer as well. The Student's November 6, 2020 IEP Progress Report notes that the Student was making progress on all three of her IEP goals.

The Parents argue that the FCPS failed to implement and provide sufficient special education services during the period when schools were closed to in person teaching due to the pandemic. The IEP in effect in January 2021 was the June 10, 2020 IEP. The June 10, 2020 IEP noted goals in reading comprehension: "after reading grade level narrative or informational text, [the Student] will cite strong and thorough textual evidence to support analysis of what the text says explicitly as well as inferences drawn from the text with 75% 3 out of 4 texts"; written language expression: "when given a writing prompt and a graphic organizer, [the Student] will write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence with 75% on 3 out of 4 writing assignments"; and math problem solving: "given a set of math problems, [the Student] will translate a real-world problem into a one-variable linear equation with 75% accuracy." (Parents Ex. 22, pp. 22-23).

The June 10, 2020 IEP provided twenty minutes per day inside of the general education classroom for support within her language arts class for reading comprehension and written language expression and twenty minutes per day inside of the general education classroom for support in her math class for her math problem solving, for a total of forty minutes. It also provided for thirty minutes per week of instruction outside of the general education classroom for organizational help, including checking for missing assignments. It noted that the thirty minutes per week could be provided by the Student's case manager during tutoring time. (Parents Ex. 22, p. 24). The June 2020 IEP additionally contained instructional supports to: revise and edit check list for extended writing pieces (periodically); read aloud to self (daily);

monitor independent work (daily); check for understanding (daily); and use a word bank to reinforce vocabulary and/or when extended writing is required (weekly). It included a program modification of a weekly agenda/assignment list; a physical/environmental support for preferential seating; and four social/behavioral supports including to encourage the Student to ask for assistance when needed; provide structured time for organization materials; utilize strategies to initiate and sustain attention; and for frequent eye contact/proximity control.

The Parents presented the testimony of Ms. [REDACTED], an educational consultant, who I admitted as an expert in special education, dyslexia, and education compliance, including compliance with COVID guidance. Ms. [REDACTED] testified that the specialized instruction services that were in the IEP were not included in the June 2020 DLP. (Test. [REDACTED], p. 1078). She spent a significant portion of her testimony explaining how the June 2020 IEP was poorly written and how the data presented in it made it difficult to know if the Student was actually making progress on those goals. (Test. [REDACTED], pp. 1071-1076). However, the June 2020 IEP is outside of the IDEA's statute of limitations, as I fully explained in my March 31, 2023 ruling. Her testimony on this matter was not particularly germane to this cause of action. The FCPS argued, and I agree, that the Parents may not use a claim for a denial of a FAPE in January 2021 to create a look back as to whether the June 2020 IEP was reasonably calculated to enable the child to receive educational benefit. Instead, I must focus my attention on the June 2020 IEP's implementation during the relevant statute of limitations period, beginning in January 2021.

Ms. [REDACTED] found flaws and fault in every aspect of every IEP she reviewed in this case. Her refusal to find that the FCPS did anything correctly implies a bias that lessens her credibility. This is especially true when compared to the testimony of Ms. [REDACTED] who was the

Student's special education case manager at [REDACTED] and whose testimony detailed her frequent interactions with Dr. [REDACTED] and the Student, and the services provided to the Student during the COVID period.

Although Ms. [REDACTED] acknowledged that the June 2020 DLP was created, or at least discussed and formulated during the June 2020 IEP meeting, she seemed to imply that the DLP should contain all the information contained in the IEP. She further did not address that the June 2020 DLP was created by the Student's middle school, which would have no way to know exactly what the DLP's implementation at [REDACTED] would look like. This fact is clearly why [REDACTED] staff, in consultation with the Parents, created a new DLP in September 2020. Ms. [REDACTED]' testimony focused on what the ideal DLP would look like. However, ideal is not and has never been the standard for a LEA's provision of a FAPE. Providing a student with access to specialized instruction and related services does not mean that a student is entitled to "[t]he best education, public or non-public, that money can buy" or all the services necessary to maximize educational benefits. *Hessler v. State Bd. of Educ. of Md.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. at 176).

Ms. [REDACTED] had the same complaints regarding the September 2020 DLP in that it did not specifically contain a schedule of when services were to be provided, as well as no delivery model. (Test. [REDACTED], pp. 1091-1092). However, based on Ms. [REDACTED]' testimony, the Student was in general education classes that were co-taught in algebra, English, and science, and there was special education support in her health/PE class. The classes had special education instruction assistants (SEIA) in them as well. (Test. [REDACTED], p. 1717). Although the September 2020 DLP could have – and for clarity perhaps should have – contained more detailed information, Ms. [REDACTED]' testimony made clear that the Student's IEP services were being

provided to her at that time in a virtual format. I must look at not just what a document says or purports, but also what actually occurred at the time. I do not find that the DLPs failed to implement the Student's IEP goals and services while in the virtual format.

Ms. [REDACTED] explained that in addition to the Student's virtual classes, the special education co-teachers also offered 1:1 tutoring sessions as well as small group sessions. Ms. [REDACTED] testified that she worked with the Student and Dr. [REDACTED] to make sure that the Student was supported while at home and that she helped to arrange tutoring sessions with the Student and co-teachers or SEIAs or with general education teachers, depending on what the Student needed. She reported, however, that the Student did not always attend the tutoring sessions, or sometimes would attend the tutoring sessions, but not the actual classes. (Test. [REDACTED], p. 1737). Ms. [REDACTED] also reviewed a log kept by faculty who worked with the Student during the distance learning timeframe that noted each interaction with and outreach to the Student. (FCPS Ex. 27). Although the June 2020 IEP notes that the supplementary aides and services were to be provided by the general and special education teachers, it does not preclude the assistance of SEIAs. Ms. [REDACTED] explained that reminders or emails were sometime sent to the Student or Dr. [REDACTED] by a SEIA. However, it was clear from Ms. [REDACTED]' testimony that the services themselves were being provided by the teachers or co-teachers.

During their testimonies, both Ms. [REDACTED] and Ms. [REDACTED] reviewed the Student's November 2020 progress report (Parents Ex. 27). Ms. [REDACTED], not having been part of the Student's IEP team or involved in her programing or teaching, was only able to discuss what she saw in the report as lacking. Specifically, Ms. [REDACTED] stated that the reading comprehension goal did not note a lexile level, so she was not able to determine on what level the Student was reading. She further stated that the note that accompanied this section indicated that the Student

benefitted from having text read aloud, “which would indicate that perhaps there’s a chance that her listening comprehension is being assessed and not her actual reading comprehension in this comment.” (Test. ██████████, p. 1095). She also stated because the goals listed only the names of the assignments themselves, without further detail she was unable to determine if the assignment aligned with the stated goal. (Test. ██████████, pp. 1095-1096). Finally, she opined that although for the math assignments the progress report notes the Student received scores of 93%, 100%, 100%, and 100%, she would take these scores with “a grain of salt” because she believed that the Student received significant help from Dr. ██████████ on these assignments. (Test. ██████████, p. 1097). I did not find Ms. ██████████’ testimony persuasive on these issues. It was based on speculation of what the content of the assignments may have been. Her statement that “perhaps there’s a chance” that the Student’s listening comprehension and not reading comprehension was being assessed is, at best, a guess, and is unpersuasive and unreliable.

Ms. ██████████’ testimony regarding the November 2020 progress report however, was detailed and specific. She explained that the Student was utilizing the Achieve 3000 program for reading, noted that the progress report showed the assignments and the results, including the scores for each attempt, and further described Achieve 3000 as:

So, Achieve 3000 is a program that works on reading comprehension, and essentially it adjusts to each individual student’s current level of reading. And the goal is making forward progress within that reading level. So you could have, say, 10 students at 10 different levels in the class, but they’re all working on, say, the same article. So it adjusts based on where that student is. So they take, like, an initial assessment. There’s beginning data points that are obtained. They get the scores, and then that sets where the student begins. However, before they begin the article, the class goes over the on-grade article as a whole. They use a certain set of guidelines and strategies as they outline. They graphic organize, they read through, they talk about it. And then the students work through that article at their own level. And the goal is that a student gets 75%, at least 75% on four opportunities, on four attempts, and that’s what moves them to the next level. So a 75% essentially like equates to the highest, like the range that’s required for passing. So, that’s a little deceiving sometimes when you see 75%.

(Test. ██████, p. 1725). Ms. ██████ offered detailed and precise testimony showing that the assignments listed for each of the goals related to the goal and required the Student to exercise the skills described in the goal. (Test. ██████, pp. 1731, 1893).

### *January 2021 IEP*

Ms. ██████ also testified regarding the Student's January 2021 IEP progress. She again went through each IEP goal. Regarding the reading comprehension goal, the progress report notes, "During term 2 of distance learning, [the Student] made progress to meet this goal. She continues to work on referring back to the text to support comprehension. Tools such as highlighting... and dictionary features...are utilized to support understanding of the text. At this time [the Student] benefits from staff modeling the behaviors of a strategic reader..." (Parents 27, p, 3). Ms. ██████ further explained that she was actively involved in the Student's case management, that she met and communicated with the Student's general and special education teachers regularly, and described herself as "very aware" of the Student's progress. (Test. ██████, p. 1729).

Ms. ██████ also discussed the Student's writing goal, noting that she earned 100s on each assignment and that she had progressed to independently composing one paragraph responses. Ms. ██████ also noted that the Student was writing one paragraph responses; however, she stated that a ninth grade student should be advanced in their writing well beyond one paragraph responses and should be able to compose not only paragraphs but pages of responses. (Test. ██████, pp. 1109-1110). Nevertheless, the fact that the Student's writing capability was not equal to that of an "average" ninth grader, does not, in and of itself, mean that her IEP goal was not appropriately written or that she was not making reasonable progress on the goal. Moreover,

Ms. [REDACTED] did not present an opinion as to why she believed the Student should be performing the same written work as other ninth grade students at that time.

Next, Ms. [REDACTED] reviewed the January 2021 progress report for the Student's math goal. She explained that the math goal was updated for the June 2020 IEP, so it notes for June that it was newly introduced, but then the Student made progress on the goal in both November 2020 and January 2021. In January 2021 the Student was enrolled in Algebra Acquisitions, and working with functions to determine if they were linear or exponential. On five assignments she received scores of 100, 100, 80, 100, and 85.

Finally, Ms. [REDACTED] discussed the Student's executive functioning and organizational skills during this time. While there was not a goal on her June 2020 IEP to address these issues, there were social/behavioral supports, such as providing weekly structured time for organization of materials, daily strategies to initiate and sustain attention, and daily supports to encourage her to ask for assistance when needed. Ms. [REDACTED] met weekly with the Student to develop a weekly, visual calendar. She also explained that special education co-teachers and SEIAs would do check-ins with the Student, although the Student would often not respond to check-in reminders or emails. (Test. [REDACTED], p. 1744; FCPS Ex. 27). Ms. [REDACTED] testified that the Student's poor attendance and failure to attend tutoring sessions was further proof that the Student required an IEP goal to address the issue and not just supports. However, on cross-examination, she conceded that she could not say whether the Student's poor attendance was just the result of an adolescent choosing not to engage. (Test. [REDACTED], p. 1269).

Ms. [REDACTED]' testimony was based on her personal knowledge and experience in working with the Student. She was knowledgeable about the Student's IEPs, her goals, her attendance, and her overall course of study and education. It was clear that she had worked closely with the

Student and Dr. [REDACTED]. Her opinions, based on her own knowledge of the Student and the overall situation, were more persuasive than Ms. [REDACTED]' testimony and opinions, which were rooted, not in her knowledge of the Student and her circumstances, but her work in special education compliance. This distinction in their testimonies carried through in their reviews of the April 2021 IEP.

### *April 2021 IEP*

Although at this time, the Student had the option to return to at least partial in person classes, the Parents elected for the Student to remain virtual. The FCPS argued that the Parents' position that the FCPS was not providing the Student a FAPE while schools were closed to in person classes is at odds with their election to keep the Student in virtual classes. I agree that, at least at the time, the Parents, although noting that the Student had some difficulty accessing Schoology to complete or turn in assignments, did not have a problem with the remote format itself and did not believe the remote format prevented the Student from receiving her special education services. However, even if it was a poor decision to not return the Student to in person classes, an issue that is not before me in this matter, the fact is that the FCPS offered this option and therefore still had an obligation to provide the Student with a FAPE in the virtual setting.

The April 2021 IEP, though, significantly increased the services provided to the Student. The April 2021 IEP provided for five weekly sessions, each for one hour and ten minutes inside of the general education classroom for special education services. It also provided for five sessions per week for twenty minutes for services outside of the general education classroom. The IEP further stated that she required direct special education supports in co-taught classes and/or in consultation with general educators and that she "requires direct special education



support in the resource room to access small group testing, reteaching, monitoring of grades and progress on IEP goals.” (Parents Ex. 28, p. 36).

During the April IEP meeting, the IEP team discussed the need for updated assessments for the Student, but the Parents did not give permission for the Student to be evaluated, citing COVID concerns, and wanting to wait until she returned to in person classes. Ms. [REDACTED] explained that the prior assessments were from 2018 and the FCPS wanted updated assessments in order to make sure that the Student received the most appropriate programming based on her actual needs and levels. Ms. [REDACTED] opined that even more changes would have been made to the Student’s IEP in 2021 if the IEP team had assessment results for the Student prior to 2022 when the Parents obtained private assessments.

Ms. [REDACTED], who also testified as an expert in special education, echoed this sentiment. She stated that had the Parents given permission for the assessments in April 2021, the Student’s programming would have been updated to include that assessment information so that her needs could be better met. Ms. [REDACTED], however, also conceded that there was no reason that the FCPS could not have conducted informal assessments of the Student at this time in order to gain additional information, specifically in light of the Student’s very low word attack score from 2018, noted continued struggles with decoding, and the increase of services in April 2021. (Test. [REDACTED], Day 9<sup>24</sup>).

The April 2021 IEP noted that the Student’s reading comprehension was below grade level. It also noted a lexile level of 460 from the Achieve 3000 program in February and March 2021, which is an increase from 365 in December 2020 and 360 in January 2021. It further mentioned that when the Student attended office hours, “she has demonstrated her ability to

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<sup>24</sup> At the time of the drafting and issuance of this decision, I had not yet received copies of the transcripts for days 9 and 10. Any references to testimony provided on those days will be indicated by the day.

complete several assignments in a short amount of time. Consistent attendance and work completion are areas of concern at this time.” (Parents Ex. 28, p. 14). The IEP also indicated that the Student was performing below grade level for her Math Problem Solving goal, that her current, interim grade in Algebra Acquisitions was a 49%, and that she struggled with “quick recall of math facts.” (Parents Ex. 28, p. 15). It further indicated that the Student was also performing below grade level for her Written Language Expression and stated that she had “difficulty in her ability to compose more complex, multi-level responses.” (Parents Ex. 28, p. 15).

Ms. [REDACTED] was critical of the Reading Comprehension goal in the April 2021 IEP (“with adult support, when given a grade level text, [the Student] will make appropriate inferences about the text and provide text examples to support [her] response, in order to earn [ ] 75% on completed classroom assessments”) because it did not include scaffolding. Ms. [REDACTED] expressed skepticism that without including scaffolding the Student would be able to access a grade level text when her lexile level placed her in the second or third grade range. (Test. [REDACTED], p. 1111). However, the goal makes it clear that there will be adult support (either through a general education or special education teacher, or an instructional assistant) and the objectives under the goals note that the Student will demonstrate previewing, rereading, and highlighting, will look for clues in the text to analyze, and will utilize vocabulary when discussing the literature. (Parents Ex. 28, pp. 33, 36).

Ms. [REDACTED] also opined that even without new assessments at this time, there was “enough information from the other data sources, including the teachers [sic] observations to indicate that decoding and fluency continue to be significant areas of deficit for her, and those are not addressed in this school or anywhere else in the IEP.” (Test. [REDACTED], p. 1112).

However, in her testimony, Ms. [REDACTED] testified that the IEP team did not have the data it needed to add decoding goals in April 2021, which was why they had requested permission for assessments, which was denied. (Test. [REDACTED], Day 9). I agree with Ms. [REDACTED].

As of April 2021, the team had three-year-old assessment data and some additional concerns that the Student was having issues with decoding. They also had information that the Student tended to rush through assignments or would try to catch up on multiple missing assignments at once, meaning her attention and accuracy played a role in her decoding. At that time, I find it was appropriate for the IEP team to not yet add a decoding goal, but, instead, increase the Student's direct special education services both inside and outside of the general education classroom. This afforded the Student an opportunity to work on her reading comprehension goal in class and also to work on issues regarding assignment completion or organizational skills in the resource room in a smaller group setting.

Not only did the April 2021 IEP increase the special education services, it also provided accommodations, including: having directions read out loud; use of a highlighting tool; support with redirection to task; use of a graphic organizer; use of a spell checking device; use of a text to speech/human reader; testing in a small group in a quiet room with frequent breaks; use of a calculator on sections of a calculation test; access to a computer, use of a reader, and a copy of teacher notes to support her own note taking; and extended time for all assignments, projects, and assessments. (Parents Ex. 28, pp. 19-21). The April 9, 2021 IEP additionally provided seven instructional supports (repetition/modeling/step by step; breaking down assignments into smaller parts; revising and editing check list for extended writing pieces; reading aloud to self; monitoring independent work; checking for understanding; and use of word bank to reinforce vocabulary and/or when extended writing is required), three program modifications (alternate

way to demonstrate learning; chunking of texts; and weekly agenda/assignment list), four social/behavioral supports (encourage student to ask for assistance when needed; provide structured time for organization of materials; strategies to initiate and sustain attention; and frequent eye contact/proximity control), and one physical/environmental support (preferential seating). In hindsight, when viewed in the light of the 2022 assessments completed for the Student, the April 2021 IEP may fall short. However, hindsight is not the standard. At this time, in April 2021, the IEP was reasonably calculated to confer educational benefit to the Student in light of her unique educational needs. The fact that future assessments revealed that the Student had greater needs does not invalidate or render the April 2021 IEP inappropriate.

#### *Consideration of COVID Recovery Services*

On June 3, 2021, the FCPS, via [REDACTED] staff, drafted a Worksheet for the Student. (Parents Ex. 31). The Worksheet was presented and discussed at the IEP team meeting on October 21, 2021. The October 21, 2021 IEP team meeting notes contain a section heading of “Recovery/Compensatory Opportunities” and states, “The IEP team completed the [Worksheet] and found that during the school closure the student was provided access to FAPE via the [DLP].” (FCPS Ex. 34, p. 0416). Dr. [REDACTED] testified that she did not recall the Worksheet, had never seen the Worksheet prior to litigation in this matter, and that she did not recall that there was any determination made regarding recovery or compensatory services at the October 2021 IEP meeting. (Test. [REDACTED], pp. 145, 397). I do not find this testimony credible. The IEP team meeting notes clearly address recovery/compensatory opportunities. Dr. [REDACTED] agreed that she received a copy of the meeting notes. At no time after receiving the notes did Dr. [REDACTED] alert the FCPS that the notes were incorrect and contained a summary of a discussion that did not occur. I find that recovery/compensatory services were discussed at the October 2021 IEP meeting.

Additionally, Ms. [REDACTED], who was present at the October 2021 IEP meeting, testified that Dr. [REDACTED] and the Student's stepfather were both present for the meeting and described the conversation regarding recovery/compensatory services as follows:

We talked at length about everything that was worked on with [the Student] during that period of virtual learning. So we looked at progress on goals. We talked about the service log. We talked about the one-on-one tutoring, the small-group tutoring, the sessions that I did with her, the reteaching, the modeling of concepts, the going back, the retutoring, if necessary, just the frequent and consistent communication that [the Student] benefited from. Not only was the communication with [the Student], but with [Dr. [REDACTED]]. I believe that I had a very good working relationship with the family. We collaborated regularly, at least weekly, if not a couple of times a week, just to always kind of talk, modify, and pivot. So I do believe that the conclusion was made that she was accessing her services as outlined in her IEP, and we did not recommend any recovery or compensatory services.

(Test. [REDACTED], pp. 1752-1753). Ms. [REDACTED]' testimony on this point makes it clear that at the October 2021 IEP meeting, the team fully discussed the Student's progress, any impact on her due to the COVID school closures, and whether the Student required any recovery services.

The Worksheet itself notes that the spring 2020 DLP, as well as the September 2020 DLP, were able to include all of the Student's IEP goals and that they were delivered through virtual class instruction and synchronous and asynchronous assignments and that all supplementary aides and accommodations were provided. (Parents Ex. 31, p. 2). The Worksheet also notes that progress reports, classwork, formal and informal evaluation tools and parent feedback were all considered in making a determination that the pandemic closures did not have a negative impact on the Student's receipt of a FAPE and that the Student did not require recovery services. (Parents Ex. 31, pp. 2-3).

Ms. [REDACTED] testified that she found the Worksheet to be completely deficient of any information that would be helpful in making a determination regarding recovery services. (Test. [REDACTED], pp. 1123-1124). However, her testimony does not take into consideration the

discussion held at the October 2021 IEP meeting, where all of that information was discussed, and at which Ms. [REDACTED] was not present. I understand that, ideally, Ms. [REDACTED], as an expert in compliance, would like to see much more detail in the Worksheet. Ms. [REDACTED] spent time in her testimony reviewing the MSDE's guidance regarding the return of students to in person classes and recovery services. She discussed a Technical Assistance Bulletin issued by the MSDE in June 2020 and revised in October 2020 (Parents Ex. 78). However, this guidance from the MSDE is simply that, guidance to LEAs. It is not binding authority that if not followed to the letter equates to a denial of a FAPE.

In this case and for *this* student, the Worksheet notes that progress on the IEP goals in reading and written language was made from March 2020-June 2020 and from September 2020 to "Current." It also notes that the Student did not make progress in math in April 2021. (Parents Ex. 31, p. 3). The April 9, 2021 progress report for the Student's math goal notes that on four assignments, the Student had scores of 88, 42, 59, and 35, which averages 56%, not the goal of 75%. (Parents Ex. 30, p. 5). The progress report further notes that "Despite a low grade and a lower-than-expected threshold, [the Student] did improve in the completion of assignments in Algebra Acquisitions. She is continuing to build upon her math calculation scores" and that the teacher suspected that the Student may be attempting to complete work too quickly and therefore was making mistakes typing numbers into her calculator. (Parents Ex. 30, p. 5). The progress report makes it clear that the reason that the Student did not make progress on this goal was not related to the COVID closure or remote learning.

Ms. [REDACTED] also testified that as of the October 2021 IEP meeting, the Student had grades of 71%, 50%, 65%, and 67% in her classes. (Test. [REDACTED], p. 1133). She averred that those grades indicate that the Student was not proficient in her classes and not mastering the

curriculum. However, Ms. [REDACTED]' testimony did not take into consideration that those were interim and not final grades, and that the Student had a history of not completing work and then completing it and submitting it last minute in order to bring up her grades. In fact, the parental input section directly under the grade on the IEP meeting notes indicates that Dr. [REDACTED] stated that even in person the Student was struggling with “organization, study skills and notetaking” and that “she is behind on several assignments.” (FCPS Ex. 34, p. 0415). The Student’s American Studies teacher noted that the Student “is not consistently completing her homework, which impacts her grades on assessments.” (FCPS Ex. 34, p. 0415).

The record in this case does not reflect that the FCPS failed to implement the Student’s IEPs during the COVID closures or remote learning period or that it failed to consider COVID recovery services owed to the Student. The FCPS implemented the Student’s IEPs and the evidence shows that the Student made progress during that time. It further shows that when the Student did not make progress, such as on her math goal in April 2021, it was not due to the implementation of her IEP during the COVID school closures.

#### Sufficiency of the October 2021 IEP

Beginning in the 2021-2022 school year, the Student was back to in person classes at [REDACTED]. The IEP team met on October 21, 2021. The October 21, 2021 IEP contained a Reading Comprehension goal (“[The Student] will determine a central idea of a text and analyze its development over the course of the text, including how it emerges and is shaped and refined by specific details; provide an objective summary of the text on 3 out of 4 attempts with 75% accuracy”); a Math Problem Solving goal (“Given a formula sheet and use of a calculator, [the Student] will develop algebraic skills and reasoning abilities needed for problem solving across curricular content areas with 75% accuracy”); and a Written Language Expression goal (“When

provided with a prompt, graphic organizers, and accommodations, [the Student] will write a multi-paragraph essay demonstrating [her] ability to summarize the text using grade appropriate writing skills as measured by the teacher provided rubric, with 75% accuracy”). (FCPS Ex. 35, pp. 0451-0453). It provided five sessions per week for an hour (total of five hours per week) inside of the general education classroom for special education services. It also provided for five sessions per week for twenty minutes (total of an hour and forty minutes per week) for services outside of the general education classroom. (FCPS Ex. 35, p. 0455). The October 21, 2021 IEP provided for fifty minutes less of special education instruction in the general education classroom than the April 2021 IEP.

No witness on behalf of the FCPS provided testimony as to why the October 2021 IEP contained less special education instruction than the April 2021 IEP. Other than a return to in person instruction, there was not change in the Student’s situation or programming needs. There is no apparent reason in either the team meeting notes or the IEP itself to warrant a reduction in the amount of services. The IEP team meeting notes evidence that despite being back in person for instruction, the Student still had trouble with executing functioning issues such as organization, study skills, note taking, and consistently completing assignments. (FCPS Ex. 34, p. 0415). Additionally, the Reading Comprehension goal changed to remove the inclusion of “adult support” that was present in April 2021. In her testimony, Ms. [REDACTED] again referenced what she saw to be a lack of scaffolding regarding the Student’s reading comprehension goal. She noted that the lexile levels provided in the IEP for the Student were at a second or at most a third grade level and that the October 2021 IEP gave no indication as to how the Student was going to actually improve and make progress. She testified,

So really, it kind of retains this evidence of a second to approximately a third-grade reading level, but provide within that specific skills are areas where [the



Student's] demonstrating difficulty, and it doesn't allow for a roadmap of, you know, what are we supposed to then do? What goals would drive meaningful progress for her to scaffold toward grade-level proficiency?

(Test. ██████████, p. 1138). I agree with this assessment for the October 2021 IEP. The objectives for this reading goal are to objectively summarize a text and to analyze ideas, issues, rhetorical devices, and specific details in a text. (FCPS Ex. 34, p. 0415). These objectives just seem to be restatements of the goal. There is little difference between summarizing a text and determining the central idea of a text. They are slightly different words for essentially the same thing, but without guidance as to how that is going to happen, other than through Achieve 3000.

Additionally, while the Achieve 3000 data that is listed in the IEP notes that as of August 2021, the Student had improved her lexile level to 535, it then lists assignments that show a lexile level of 430. (FCPS Ex. 34, p. 0427). Then in the October 25, 2021 progress report, four days after the October 21, 2021 IEP, it does not reference the 535 lexile level, but states that the Student's beginning of year lexile "increased from 430 to 465." (FCPS Ex. 34, p. 0451). Finally, for the January 13, 2022 progress report for the same reading goal, it states that at the beginning of the year the lexile level "increased from 465 to 486." (FCPS Ex. 34, p. 0452). Again, there is no reference to the August 2021 lexile level of 535, or if by beginning of the year, it now means calendar year as opposed to school year. The FCPS did not clarify this through any testimony. I have only Ms. ██████████' interpretation through her testimony. While I am mindful that a lexile level is only one data point by which to help judge a student's progress, the progress reports for October 2021 and January 2022 only provide the lexile level and then assignment scores from Achieve 3000. And the lexile levels do not appear to be internally consistent. As such, I cannot confidently rely on them to indicate if the Student was making progress on this reading IEP goal. Although in the October progress report the Student is shown

to have received scores of 20/20, 20/20, 20/20, and 8/10, her overall term 1 grade is 71%. No further explanation is provided. For the previous IEPs, additional testimony was provided as to why or how the Student was making progress, or in the case of her math goal in April 2021, why she did not make progress.

Based on Ms. [REDACTED]' testimony and the contents of the October 2021 IEP, I do not find that the Student was making progress on her Reading Comprehension goal, or that the goal was reasonably calculated to allow her to make progress. The main data point provided by the FCPS, the lexile level, does not show the Student making progress. At this time, the Student is in tenth grade and reading at a second grade, possibly third grade level. Although she passes individual assignments, she does not ultimately make forward progress on her overall reading comprehension. From the 2018 assessments, the FCPS knew that while the Student had an overall cognitive functioning measuring in the Low Average range on the WISC-V, the WJIV showed that her scores were consistently in the Low range for her broad reading cluster, letter-word identification, and passage comprehension and Very Low for word attack. Despite the Student being back at [REDACTED] for in person instruction, having new assessments performed was not discussed at the October 2021 IEP meeting, nor did the FCPS use the information they had from the Student's academic and classroom records to perform any kind of informal assessments. The FCPS seemingly looked only at the Student's individual assignments, saw she was scoring well, and stated that the Student was making progress. In April 2021, the IEP team meeting notes that the Student "struggles with decoding" but the October 2021 IEP does not include this, nor does it include a goal to address this issue. It reduces the amount of services to

the Student. Additionally, the Student already had a disability coding of dyslexia since at least 2018.<sup>25</sup> This was not a new issue for the Student.

Throughout the hearing, the FCPS argued that the Parents rejected offers to increase services to the Student in 2022, instead seeking only a private placement as a remedy. The FCPS argued that it did not have an obligation to immediately move to remedy the situation with a nonpublic placement, but instead, appropriately attempted to address any issues through an increase in special education services to the Student. I do not disagree with this position; however, the record does not fully reflect that this position was supported by the FCPS's actions. For example, in April 2021 services were greatly increased to the Student, but then, by October, progress is not being made on the reading goal, but services are reduced. The FCPS had an opportunity in October 2021 to address the Student's struggles with reading comprehension, specifically decoding, but made no such change to the IEP, nor based on the record, even contemplated gathering more information through assessments. The FCPS argued that they did not have an affirmative obligation to obtain assessments after the Parents declined new assessments in April 2021. That is true. The regulation is permissive, not mandatory, as to a LEA filing a due process complaint in that situation. *See* 34 C.F.R. § 300.300(c). However, the FCPS had an affirmative obligation to provide the Student a FAPE, which, based on the October 2021 Reading Comprehension goal and her lack of progress on the goal, it failed to do.

Ms. [REDACTED] provided a similar analysis for the Student's October 2021 Math Problem Solving goal as she did regarding the Reading Comprehension goal. Ms. [REDACTED] looked at the Student's present level of performance as indicated through the Global Scholar Performance Series. She noted that in December 2020 the Student's math scale score was 3174 (High

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<sup>25</sup> IEPs from 2015, 2016, 2017, and 2018 identify that the Student has a "specific learning disability" but it is not until the 2018 IEP that it specifies dyslexia. (*See* FCPS Exs. 1, 3, 5, and 8).

Average) and that it decreased in May 2021 to 2804 (High Average) and then in September 2021 it increases slightly to 2808 (High Average). (Test. ██████████, p. 1139; FCPS Ex. 35, p. 0430). However, Ms. ██████████ characterized this change as “regressing significantly” and speculated that perhaps the Student had been using a calculator on the assessment, so it declined even with this aid. (Test. ██████████, p. 1139). I cannot give this testimony weight as it is based on suppositions and guess work. While there is clearly a decline from 3174 to 2808, Ms. ██████████ provided no explanation as to why she opined this to be a significant regression when the Student was still in the High Average range. She also criticized that the IEP did not note what exactly the Student’s issue with math was and that there was “no meaningful information in [the IEP] to either determine her progress or to drive meaningful goals.” (Test. ██████████, pp. 1139-1140). This is not supported by the IEP, which states for October 2021, “In the area of math, [the Student] struggles with the quick recall of math facts, which impacts her ability to problem solve. She has difficulty with multiple step operations.” (FCPS Ex. 35, p. 0429). Ms. ██████████ did not clarify what additional meaningful information she would have preferred to be included in the IEP.

Finally, Ms. ██████████ reviewed the Student’s Written Language Expression goal. She noted that she was not able to determine much about the Student’s current level of performance or if she was making progress on the goal, because the portions of the IEP addressing this goal simply regurgitated the lexile information that was provided in the reading goal. She testified that, “So, I can’t tell from these present levels whether or not [the Student] has actually made progress nor where she can go next. The only thing that comes through clearly is that she continues to perform below grade level in this area, and she continues to have significant

difficulty completing work.” (Test. ██████████, p. 1141; FCPS Ex. 35, pp. 0430-0431, 0453-0454).

Testimony from the FCPS regarding how the Student progressed on her Written Language Expression goal, or what challenges the Student had for this goal would have been helpful, as it had provided helpful regarding her goals on previous IEPs. A review of the October 2021 IEP, though, shows that at that time the Student had a grade of 76% in her English class and that on the assignments listed she received 10/10, 8/10, and 11/10,<sup>26</sup> and on her quizzes she received a 9.5/10 and 9/10. (FCPS Ex. 35, p. 0430). The IEP also notes that “When writing [the Student] struggles to develop coherent complex responses.” (FCPS Ex. 35, p. 0433). The October 25, 2021 progress note states that the Student is making progress on the goal and that she is “required to pre-read, practice, read for comprehension and generate a written response to the prompt based on the text provided using the Achieve 3000 reading intervention program.” (FCPS Ex. 35, p. 0454). Although more information or explanation would have been helpful, I find that the IEP contains sufficient information to show that it was reasonably calculated to enable the Student to progress appropriately, and that, at that time, she was making some progress on this goal.

The Parents argued that the FCPS failed to provide the Student a FAPE because it failed to identify and provide goals and services based on the Student’s disability related needs regarding dyslexia, dysgraphia, and dyscalculia until October 2022. As explained above, I find this argument persuasive as to the Student’s needs related to dyslexia and her Reading Comprehension goals, but not as to dysgraphia and her Written Language Expression goal, or to dyscalculia and her Math Problem Solving goal. Unlike with the Reading Comprehension goal, the Student, based on the October 2021 IEP and prior IEPs was making some progress on these

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<sup>26</sup> No explanation was provided as to how she obtained an eleven out of ten on an assignment.

goals. Although the Parents argued that the Student only made progress in Math because of the extensive tutoring she received, I do not have sufficient evidence regarding what services or programming she received through any tutoring, as opposed to what was provided by the FCPS. It is also unclear how, when the Parents declined to provide authorization for the FCPS to complete assessments when asked for such permission in April 2021, the Parents expected the FCPS to identify that the Student had the specific learning disabilities of dysgraphia and dyscalculia.

### Bullying

The Parents asserted that the FCPS failed to investigate and consider how bullying impacted the Student's receipt of a FAPE. The FCPS countered that all issues regarding the bullying of the Student, as well as allegations of the Student being a bully to others, were properly investigated and considered. Further the FCPS argued that the Student exacerbated the bullying situation and instigated additional allegations of bullying by making additional social media posts.<sup>27</sup>

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<sup>27</sup> The FCPS argued that no evidence of the Student's social media posts should be admitted into evidence as at some point in January 2023, after litigation had been initiated, the Student deleted her social media accounts, making their content no longer available. On the record at the hearing, I denied this motion. During closing, the FCPS again raised this issue and urged me to either strike the social media exhibits, give them no weight, or to make a negative inference regarding their deletion, citing to *Klupt v. Krongard*, 126 Md. App. 179 (1999). I decline these options and shall consider the evidence admitted during the hearing and give it the weight I consider appropriate, in light of the fact that they are social media posts made by teenagers, some of whom can only be identified by screen name. There is nothing in the record before me to indicate that the Student or the Parents deleted the social media accounts with any intention of destroying evidence. See *Klupt* at 200, noting that a prerequisite of an imposition of spoliation sanctions is a finding that there was an intent to destroy the evidence. In fact, there was ample testimony from both parties that the Student had been told multiple times to stop interacting on social media or to suspend or delete her accounts.

The MSDE’s Model Policy on Bullying, Harassment, or Intimidation defines bullying and cyberbullying as follows:

1. Bullying – is unwanted, demeaning behavior among students that involves a real or perceived power imbalance. The behavior is repeated, or is highly likely to be repeated, over time. To be considered bullying, the behavior must be intentional and include: 1) an imbalance of powers (students who bully use their physical, emotional, social, or academic power to control, exclude, or harm others), and 2) repetition (bullying behaviors happen more than once or are highly likely to be repeated based on evidence gathered).
2. Cyberbullying – is bullying that takes place over digital devices like cell phones, computers, and tablets. Cyberbullying can occur through texting, apps, or online via social media, forums, or gaming where people can view, participate in, or share content. Cyberbullying includes sending, posting, or sharing negative, harmful, false, or hurtful content about another student. It can include sharing personal or private information about someone else causing embarrassment or humiliation.

(Parents Ex, 75, p. 39). The model policy further notes that “bullying, harassment, or intimidation of any person on school property or at school-sponsored functions or by the use of electronic technology at a public school is prohibited in all Maryland schools.” (Parents Ex, 75, p. 40).

Neither the Supreme Court nor the Fourth Circuit have yet defined “bullying” in the context of the IDEA. In a 2013 Dear Colleague Letter, the U.S. Department of Education provided guidance to schools related to the bullying of students with disabilities and described bullying as such:

Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (*e.g.*, excluding someone from social activities, making threats, withdrawing attention, destroying someone’s reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology

(e.g., cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

U.S. Dep’t of Educ., Office of Special Educ. & Rehabilitative Servs., *Dear Colleague: Bullying of Students with Disabilities 2* (Aug. 20, 2013), available at <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf><sup>28</sup>

The Office of Special Education and Rehabilitative Services (OSERS) and Office of Special Education Programs (OSEP) in the U.S. Department of Education have taken the position that “bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of [FAPE] under the IDEA that must be remedied.” *Id.* at 2-3.

Maryland has not yet addressed bullying under the IDEA. The Second Circuit addressed that issue in *T.K. ex rel. L.K. v. New York City Department of Education*, 810 F.3d 869 (2d Cir. 2016). In that case, the Parents of an autistic child specifically requested that the IEP team address bullying of their child on two occasions, but the school declined to do so. Frustrated by the school’s refusal to address the alleged bullying in the context of the IEP, the parents unilaterally placed their child in a private school and sought reimbursement, alleging that the school’s failure to prevent bullying deprived the child of a FAPE. The Second Circuit concluded as follows:

The Department’s persistent refusal to discuss L.K.’s bullying at important junctures in the development of her IEP “significantly impede[d]” [the parents’] right to participate in the development of L.K.’s IEP. This constituted a procedural denial of FAPE . . . .

*Id.* at 877 (emphasis added) (citation omitted).

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<sup>28</sup> Last viewed July 27, 2023.



Because the court held that the school denied a FAPE as the result of procedural violations, the court expressly noted:

[W]e also need not and do not reach the question whether the bullying at issue here was so severe that the failure to address it . . . resulted in a substantive denial of FAPE. For the same reason, we express no opinion as to whether the District Court’s four-part test for determining when bullying results in the substantive denial of a FAPE correctly states the law.

*Id.* at 876 n.3.

The District Court had held:

[U]nder IDEA the question to be asked is whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities.

....

Conduct need not be outrageous to fit within the category of harassment that rises to a level of deprivation of rights of a disabled student. The conduct must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment. . . .

The rule to be applied is as follows: When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future.

...

It is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education. The bullying need not be a reaction to or related to a particular disability.

*T.K. ex rel. L.K. v. N.Y. City Dep’t of Educ.*, 779 F. Supp. 2d 289, 316-17 (E.D.N.Y. 2011).

That court further stated: “Where bullying reaches a level where a student is substantially restricted in learning opportunities she has been deprived [of] a FAPE. Whether bullying rose to this level is a question for the fact finder.” *Id.* at 318. Just this year, the District Court further addressed the issue of bullying and found that a safety plan that placed some burdens on a

student or contemplated certain actions by a student, while also placing requirements on school personnel was sufficient to show that the school had taken reasonable steps to prevent bullying and did not result in a denial of a FAPE. See *B.D. v. Eldred Cent. Sch. Dist.*, No. 22-CV-03637, 2023 WL 3025308 (S.D.N.Y. April 20, 2023).

The Eastern District of Pennsylvania has also addressed the issue of bullying as it relates to the IDEA. *N.M. ex rel. W.M. v. Cent. Bucks Sch. Dist.*, 992 F. Supp. 2d 452 (E.D. Pa. 2014). In *N.M.*, the Court affirmed a Hearing Officer's decision that a student with Post Traumatic Stress Syndrome (PTSD) was not denied a FAPE based in part on bullying. The assistant principal had raised the issue of programs to address bullying and "collaborated with teachers to develop a plan to 'quickly' address 'any issues that came up.'" *N.M.*, 992 F. Supp. 2d at 459. The school also placed the student's locker "in a highly visible area," arranged a place for him to go if a situation arose, and disciplined students identified as being involved in incidents that occurred. *Id.* Finally, the IEP team drafted an IEP that "contained significant changes to address the social/emotional needs of the student" and "a Behavioral Intervention Plan providing for coping skills, social skills, and self-regulating breaks." *Id.* at 461. The Court also noted that the Hearing Officer found that the school's proactive response included not just disciplining perpetrators, but also the administrator collaborating with the student's teachers to observe and then be proactive if they noticed any bullying. *Id.* at 470-71.

On the issue of bullying, the Hearing Officer found as follows:

[T]here is compelling evidence that the District did not deny the student FAPE in its handling of the student's social/emotional needs. First, the District was proactive in every regard in its response to those needs when such needs were brought to its attention. Second, each District witness testified quite credibly that they saw no school-based difficulties with the student in terms of bullying or peer relations. Indeed, the District was never dismissive of any parent or student inquiry or request in [this] regard; but the District witnesses were all quite credible when they testified that such reports surprised them because they

observed no incidents as suggested in the reports and the student's general affect was engaged, pleasant, and seemingly not affected by the reported incidents.

*Id.* at 462 (citations to evidence omitted).

In *S.S. ex rel. Street v. District of Columbia*, 68 F. Supp. 3d 1 (D.D.C. 2014), the parent sought injunctive and declaratory relief against the District of Columbia under the IDEA,<sup>29</sup> alleging among other things that the District of Columbia Public Schools (DCPS) violated the IDEA by failing to provide S.S. a FAPE due to disability harassment; failing to implement the IEP; failing to protect S.S. from bullying; and failing to provide home instruction. The Hearing Officer found that the parent failed to prove S.S. was denied a FAPE due to disability harassment and bullying; the court affirmed the Hearing Officer.

In *S.S.*, the Hearing Officer had found that the student missed 103 days of school in one school year due to hospitalization, and his absences—rather than bullying—resulted in failure to make academic progress during that year. *Id.* at 15. The Hearing Officer further found that the parent failed to show that S.S.'s fear and avoidance of school during another school year was due to bullying. *Id.*

In *M.L. v. Federal Way School District*, 394 F.3d 634, 650 (9th Cir. 2005), the Ninth Circuit recognized that unremediated teasing by classmates can deny a FAPE. In that case, the court considered whether a teacher was deliberately indifferent to bullying and the abuse so severe that the child could derive *no* educational benefit.

The position that, under some circumstances, bullying can result in the denial of a FAPE is consistent with the case law and with the position taken by the U.S. Department of Education in its 2013 Dear Colleague Letter:

Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or

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<sup>29</sup> The parent also alleged violations of Section 504 of the Rehabilitation Act.

her IEP. The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly. Additionally, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a parental request for an IEP Team meeting where a student's needs may have changed as a result of bullying.

*Bullying of Students with Disabilities, supra*, at 3.

The U.S. Department of Education elaborated in 2014 as follows:

[F]or the student with a disability who is receiving IDEA FAPE services . . . a school's investigation should include determining whether that student's receipt of appropriate services may have been affected by the bullying. If the school's investigation reveals that the bullying created a hostile environment and there is reason to believe that the student's IDEA FAPE services . . . may have been affected by the bullying, the school has an obligation to remedy the effects on the student's receipt of FAPE. Even if the school finds that the bullying did not create a hostile environment, the school would still have an obligation to address any FAPE-related concerns, if, for example, the school's initial investigation revealed that the bullying may have had some impact on the student's receipt of FAPE services.

. . . .

Ultimately, unless it is clear from the school's investigation into the bullying conduct that there was no effect on the student with a disability's receipt of FAPE, the school should, as a best practice promptly convene the IEP team . . . to determine whether, and to what extent: 1) the student's educational needs have changed; 2) the bullying impacted the student's receipt of IDEA FAPE services . . . ; and 3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly.

U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Servs., *Dear Colleague* 4-5, 7

(Oct. 21, 2014) (footnotes omitted),

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf><sup>30</sup>

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<sup>30</sup> Last viewed July 27, 2023.

The 2014 Dear Colleague Letter further indicates that changes that might trigger the obligation to convene an IEP team meeting and amend the student's IEP might include a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral outbursts, or a rise in missed classes.

In this case, it is uncontested that the Student was the victim of a bullying attack on January 5, 2022 when [REDACTED] assaulted the Student in the cafeteria. It is also clear that in December 2021, prior to the winter break, the Student had concerns regarding [REDACTED] and her friends, specifically that [REDACTED] thought the Student had reported her and her friends for skipping class and smoking in a school bathroom. (Parents Ex. 79, p. 2; picture 15). Finally, it is likewise clear that after the assault, while their direct contact was greatly reduced, [REDACTED] and the Student continued to bait each other on social media, with neither letting the back-and-forth exchanges and sniping go.

Since the majority of the interaction, apart from the assault, was online in public forums, more people than just the Student and [REDACTED] were involved. Multiple persons, some only identifiable by their screen names, commented on posts from the Student and [REDACTED]. One particularly egregious comment posted by a screen name of "[REDACTED]" told the Student to "kys" which is short for "kill yourself." (Parents Ex. 79, p. 30). I am sure that such comments and interactions, at the time they were made, made the Student feel anxious and upset.

I find it more likely than not that [REDACTED] and her friends spread rumors about the Student, specifically that she reported them to the school administration for smoking, and that the Student used racial slurs, as a way to gain support for [REDACTED]'s position in the bullying exchange. Dr. [REDACTED] testified in her capacity as an expert in bullying that such tactics by bullies are common in order for bullies to make themselves seem like the wronged party and to gain support. Dr. [REDACTED]'s testimony regarding bullying was compelling and revealed an in-

depth knowledge of the subject. It is clear that she understands the psychology behind bullying and the effects that bullying can have.

However, her testimony was not particularly helpful in this case as she did not specifically relate it to the Student in this case and whether or not the FCPS failed to investigate and consider how bullying impacted the Student's receipt of a FAPE. Dr. [REDACTED]'s testimony was handicapped by the fact that she was retained just before the hearing in this case and did not have access to the Student's medical records. Therefore, she could only speak in broad generalities that depression, mood, and symptoms of PTSD, such as avoidance, *can* affect a student's access to education, but she could not state definitively that this was the case for *this* student. (Test. [REDACTED], pp. 691, 707).

Dr. [REDACTED] candidly admitted that bullying situations, such as the one involving the Student, are complicated. (Test. [REDACTED], p. 717). She agreed that victims of bullying should be monitored on their social media, but that cutting a teenager off from social media could have a negative, isolating effect. (Test. [REDACTED], p. 716). She explained that a teenager in this Student's position may want to use social media to monitor the situation so that they are aware of what is going on or being said as the student may want to try to defend themselves, or try to defuse the situation and win people to their side. (Test. [REDACTED], p. 715). Dr. [REDACTED] also explained that the victim can turn provocateur, which it appears the Student did when she made posts referring to [REDACTED] being a bad person. (Test. [REDACTED], pp. 716-717). She was also clear that there needed to be a multilayered approach to addressing the bullying, not just moving the student who had been bullied. She explained that safety plans that monitor group spaces in schools are important, and that any safety plan should not just focus on the victim's behavior, but also the behavior on the part of the bully. Dr. [REDACTED] warned,

though, that sometimes close surveillance by the school can lead to the victim being singled out or made to stand out, which can also have a negative affect. (Test. ██████████, p. 722). Her opinion was that there should have been a safety plan in place to monitor ██████'s actions and to have some actions in place, such as counseling, to help regulate ██████'s underlying behaviors. She explained that her testimony was about what a school's best practice should be and that she was speaking broadly about general access to education, not specifically regarding the provision of a FAPE for the Student. (Test. ██████████, p. 723).

In this case, ██████████ responded to the January 5, 2022 assault. The SRO filed assault charges against ██████. ██████ was given a three-day suspension. A safety plan that limited her ability to move around the school was put in place for ██████ once she was done with her suspension. If the Student had returned to school, ██████████ was prepared to put a safety plan in place regarding the Student, so she could be escorted through the school and kept safe. ██████████ spoke with the Department of Juvenile Services to assist Dr. ██████████ with filing a peace order. As part of a plea regarding the criminal charges, ██████ was required to attend and complete the ██████ program, a component of which is counseling regarding the underlying actions for the crime.

It is unclear what the Parents believe the FCPS should have done regarding the cyberbullying that occurred outside of school. While I would not characterize it as fully mutual, the Student seemingly did not reduce her social media usage and made her own posts about ██████, some referencing ██████ by name. Although Dr. ██████████ testified that the Student could not have known that others would post comments to her videos, I do not believe this to be a credible assessment of the situation. It is clear that the Student would not have known the exact hateful things that would be said in the comments, but it is also clear that she made more than one social

media post for the purpose of garnering support for herself and painting [REDACTED] in a less favorable light. The fact that this tactic failed does not negate the original intent.

[REDACTED] investigated each incident that the Parents brought to their attention, including the incident in March regarding threats at a [REDACTED] game. [REDACTED] found the March incident to not be bullying as it did not involve [REDACTED] and determined it was seemingly a onetime occurrence due to the Student dating another student's ex-boyfriend and messaging the student about the new relationship. By May 2022, the Student was no longer an in person student at [REDACTED], but was in the [REDACTED], and the allegations of [REDACTED]'s cyberbullying did not occur at [REDACTED] and did not impact [REDACTED]'s school day, so the Parents were directed to the Frederick County [REDACTED]. I appreciate that the Parents felt like they were being shuffled around, but at that point in time, the Student was attending classes remotely and the online harassment that was occurring was not preventing her from attending her classes. The Student, by the election of the Parents, has already been physically removed from [REDACTED], first through [REDACTED] and then by enrollment in the virtual program. The bullying persisted online, in part, because of the actions of the Student. I wish to make it clear that I am not blaming the Student for being a victim of bullying. The Student in no way deserved to be assaulted or have malicious things said about her online. The evidence shows, however, that at least with regard to the cyberbullying, the Student could have taken steps to remove herself from the situation, but instead of doing so, continued to have interactions online by posting videos. The Student lacks "clean hands" in this situation.

The Parents also argued that [REDACTED] did not fully investigate the bullying allegations because the Parents did not complete bullying forms. I disagree. Ms. [REDACTED] was clear that bullying forms are supposed to be completed, but that not filing one did not prevent [REDACTED]



from investigating the allegations. Not completing the bullying form only meant that school personnel did not fill out an additional form, as Ms. [REDACTED] had done regarding the bullying allegations against the Student in November 2021. The evidence shows, though, that staff still investigated and gathered other information, including student statements. I also did not find Dr. [REDACTED]'s testimony credible that she did not initially know that she needed to complete a bullying form. Ms. [REDACTED] testified that she discussed the form with Dr. [REDACTED] on three different occasions, and on one of those occasions, at the January 11, 2022 meeting, she actually showed Dr. [REDACTED] where to find the electronic form on the website. Dr. [REDACTED]'s testimony was self-serving and seemingly selective on multiple issues. She unconvincingly stated that she did not believe the Student knew that others would comment on her Tik Tok videos, she did not remember anyone telling her that she or the Student should fill out a bullying form to report the bullying, and she also could not recall being at the October 2022 IEP meeting or at the meeting where the Worksheet was discussed. (Test. [REDACTED], pp. 193, 368, 395, 621). I found Dr. [REDACTED]'s convenient lack of recollection on issues, as well as the discrepancies between her version of events and what was recollected by others and reflected in exhibits to have made the majority of her testimony unreliable.

The Parents also argued that an IEP meeting should have been held immediately after the assault in January 2022 to discuss the bullying and its effect on the Student's access to a FAPE and that the bullying issue was never satisfactorily addressed in her IEP. The assault occurred on January 5, 2022. The Student never returned to in person instruction at [REDACTED] after that. On the evening of January 5, 2022, the Parents emailed Ms. [REDACTED] and requested that the Student be excused from classes for the remainder of semester. (FCPS Ex. 39, p. 0493). The Parents met with [REDACTED] staff on January 11, 2022 to discuss the January 5, 2022 assault and

bullying. This was not a full IEP team meeting, however, it is clear that scheduling a full IEP team meeting takes longer than a few days. It took until January 11, 2022 to simply find a date when both of the Parents could attend a meeting. (FCPS Ex. 50, p. 0502). On January 14, 2022, the Student was approved for “full-time, virtual [REDACTED].” (Parents Ex. 36). On January 19, 2022, counsel for the Parents sent a written request to counsel for the FCPS requesting “an [IEP] team meeting not only for the consideration of [REDACTED] services but also to update [the Student’s] IEP.” (Parents Ex. 34). An IEP meeting was held on March 16, 2022 and the IEP was amended at that time to reflect the Student’s [REDACTED] status.

While there is clearly a gap between when the Student went out on [REDACTED] and the actual IEP meeting, there is no indication, nor is there an allegation that the Student was not receiving special education services while on [REDACTED]. Additionally, the IEP meeting notes clearly state that “The purpose of today’s meeting is to review progress and discuss recent concerns. [The Student] has been accessing [REDACTED] instruction since 01/14/22.” (FCPS Ex. 54, p. 0550). While [REDACTED] was discussed, and Ms. [REDACTED] noted that the Student “has had a difficult time the past few years emotionally and with peers” the Parents, who were represented by counsel at the meeting, raised no concerns regarding any ongoing bullying or a denial of a FAPE due to bullying. (*Id.*, p. 0552).

Although both [REDACTED] forms in evidence indicate that the Student had diagnoses of tachycardia, chest pain, anxiety, and PTSD (Parents Exs. 41 & 51), the date that Dr. [REDACTED] evaluated the Student was January 4, 2022, the day before the assault by [REDACTED] occurred, and prior to when the majority of the alleged cyberbullying occurred. Dr. [REDACTED]’s testimony was inconsistent with the information on these forms in that she was adamant that the Student was not diagnosed with PTSD until months later by [REDACTED]. (Test. [REDACTED], p. 552).

Additionally, other testimony was provided that the source of the Student's tachycardia and chest pain were not related to anxiety or PTSD, but to other medical conditions. (Test. ■■■■, p. 587). Also, when completing the psychoeducational evaluation with Dr. ■■■■ in March 2022, the Student reported to Dr. ■■■■ that her tachycardia or increased heart rate has a sudden and random onset and that initially it was believed that anxiety played a role in her tachycardia, but the Student related that "they also occur when she is not feeling worried." (Parents Ex. 43, p. 19). When asked by Dr. ■■■■ specifically about the January 5, 2022 physical assault she experienced, "she denied intrusive thoughts or memories; reexperiencing the event or efforts to avoid thinking about it." (Parents Ex. 43, pp. 18-19). Dr. ■■■■'s evaluation also stated that "[The Student's] mood and levels of anxiety were described as typical for the most part and she has never been given a mental health diagnosis." (Parents Ex. 43, p. 5). Additionally, although the Student's father noted mild concern regarding the Student's anxiety on the BASC-3, which Dr. ■■■■ reported as a "borderline significant" score, neither her mother nor her teacher reported elevated ratings regarding anxiety. (Parents Ex. 43, pp. 18, 37-38). Also, on the self-report for the MASC-2, the Student did not report any anxiety outside of the typical range. (Parents Ex. 43, pp. 18, 39). I further note that Dr. ■■■■'s March 2022 evaluation makes approximately ten recommendations regarding the Student's academic needs. Her assessment, which is discussed in more detail below, does not note any ongoing anxiety regarding bullying or cyberbullying. It also does not make any recommendations regarding bullying, reducing bullying, counseling for bullying, or a different placement due to bullying.

Based on this contradictory evidence, it is unclear to me that the Student's anxiety or PTSD was the cause of her tachycardia or chest pains and was therefore preventing her from attending school. There was also no testimony that the Student felt nervous or anxious in class

because of the bullying, or that the bullying or her PTSD caused her to lack focus in class or avoid going to class. Dr. [REDACTED] testified generally that a symptom of PTSD can be avoidance, but she was clear that she did not know that to specifically be the case for the Student. On cross examination, Dr. [REDACTED] clarified that she was unaware that the Student's tachycardia was random and could occur when she was not under stress. (Test. [REDACTED], p. 704). Finally, there is nothing in the record to support that while the Student was on [REDACTED] and then attending the [REDACTED] that she was not attending or completing class work due to any issues caused by bullying. A review of the record shows that the Student had difficulty completing assignments and turning them in on time well before any bullying issues arose.

There is no indication in the record before me that the Student was denied a FAPE because the FCPS failed to investigate and consider how bullying impacted the Student's receipt of a FAPE. The issue before me is not whether the FCPS, or [REDACTED], completed the most thorough investigation into the Student's bullying or whether it made every effort to stop all bullying, harassment, or intimidation against the Student. If that were the issue, the answer would clearly be that it did not. The FCPS, however, took appropriate steps to investigate the bullying incidents that occurred while the Student attended [REDACTED] and for incidents that occurred during school hours or events.

The FCPS, through [REDACTED], crafted a safety plan for [REDACTED] in order to minimize her interaction with the Student if the Student returned to classes at [REDACTED] [REDACTED] staff offered to create a safety plan for the Student herself, to include escorts and other measures, should the Student return to in person instruction at [REDACTED]. The Parents did not explain how these safety plans would not have been sufficient to protect the Student while at [REDACTED]. On

at least three separate occasions, Ms. [REDACTED] talked to Dr. [REDACTED] about the bullying forms and showed her where to find them to complete. (Test. [REDACTED], p. 1559). [REDACTED] staff also recommended that the Student reduce her social media presence in order to let the animosity die down. (Test. [REDACTED], p. 1571). The Student declined the safety plan and continued to interact on social media sites.

At the September 7, 2022 IEP meeting, the Student's return to in person instruction at [REDACTED] was again discussed, along with the offer to create a safety plan for the Student, as well as a daily check-in and check-out with a trusted adult at [REDACTED]. The FCPS also offered to include therapy or counseling in the IEP if the Student was feeling anxious about being at [REDACTED]. The Parents disagreed with these measures. (FCPS Ex. 81, p. 806; Test. [REDACTED], p. 1785).

In her testimony, Dr. [REDACTED] noted that often, taking steps to address and reduce in person bullying also helps to reduce cyberbullying. She stated that "You could reduce cyberbullying by reducing more traditional forms of bullying, and that would be done by increased supervision." (Test. [REDACTED], p. 709). However, at each step, the Parents rejected the FCPS's proposals to get the Student back into in person classes with a safety plan, either at [REDACTED] or another school within the FCPS. While I credit Dr. [REDACTED]'s opinion that reducing in person bullying can lead to a reduction in cyberbullying, if the bullying is so pervasive as to prevent the Student from safely attending any FCPS, as the Parents hold, then it follows that that the bullying would follow the Student to a nonpublic placement. There is nothing in the record to indicate that a nonpublic placement would prevent the Student from continued cyberbullying and harassment, as she had continued to experience such bullying behavior while on [REDACTED] and while in the [REDACTED]. When asked specifically

what the [REDACTED] could offer to the Student if she were experiencing cyberbullying while enrolled there, Ms. [REDACTED]'s response lacked specificity. She stated that, "We're going to take care of [the Student], like I take care of all the students." (Test. [REDACTED], p. 1396). It is purely speculative that moving the Student to a private school outside of the FCPS would stop or even reduce any cyberbullying, especially when the Student continues to engage on social media.

March 2022 Psychoeducational Evaluation, March 2022 IEP, May 2022 Psychological Assessment, and June 2022 IEP

***Evaluation of Dr. [REDACTED], March 2022 Psychoeducational Evaluation***

In February 2022, Dr. [REDACTED] sought a private psychoeducational evaluation from [REDACTED]. Dr. [REDACTED] initially told the assessor, Dr. [REDACTED], that the purpose of the evaluation was for the Student's application to [REDACTED] and because the Student was not receiving appropriate programming from the FCPS for the Student's dyslexia. (FCPS Ex. 49). At that time, Dr. [REDACTED] had not conveyed to the FCPS that she was seeking a private assessment or that she did not believe that the Student's IEP services were adequately meeting her needs. On March 11, 2022, Dr. [REDACTED] conducted an intake with Dr. [REDACTED] and then conducted testing with the Student on March 14 and 22, 2022.<sup>31</sup>

Dr. [REDACTED] testified in this proceeding and was admitted as an expert in clinical psychology, children's mental health, and dyslexia, dysgraphia, and dyscalculia. Dr. [REDACTED]'s testimony was comprehensive, detailed, and easy to follow. She was well versed in the testing procedures, the testing results, and the Student's performance. The FCPS argued that Dr. [REDACTED]'s assessment was skewed because she was biased against the FCPS. The FCPS asserted that the bias is evidenced by the fact that Dr. [REDACTED] did not include in the Student's background information that the

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<sup>31</sup> See Finding of Fact #56 for the tests performed. Only some tests will be discussed in this section as needed. Parents Ex. 43, p. 6 lists the assessment procedures.

assessment was sought for purposes of private placement or that Dr. [REDACTED] believed the Student was not receiving proper services from the FCPS. I reject this argument.

Dr. [REDACTED] was clear that the background information section is meant to be a summary and does not contain every detail of every conversation ever had with a party. She further explained that while Dr. [REDACTED] initially contacted her because the assessment was necessary as part of the [REDACTED] application, in their subsequent interview, Dr. [REDACTED] and Dr. [REDACTED] further discussed the purpose of the assessment, and Dr. [REDACTED] explained that the goal is to provide a picture of the Student as a learner, and Dr. [REDACTED] agreed that was what she wanted as well. (Test. [REDACTED], pp. 921-922). More notable, though, is that the FCPS relied on Dr. [REDACTED]'s assessment and incorporated most of the recommendations in the assessment into the Student's October 2022 IEP. Not a single FCPS witness asserted that the assessment information should not have been utilized, or that it was flawed, or inaccurate, or opined that the October 2022 IEP did not provide the Student a FAPE because it relied on invalid assessments. I give great weight to Dr. [REDACTED]'s evaluation and to her testimony regarding the recommendations, particularly the academic recommendations, from the evaluation.

In the psychoeducational evaluation, Dr. [REDACTED] provided the following diagnostic impressions for the Student: ADHD, combined presentation; Language Disorder; Specific Learning Disorder with Impairment in Reading, to denote weakness in phonological processing, decoding, encoding (spelling) and fluency (dyslexia); Specific Learning Disorder with Impairment in Written Expression, to denote weakness in accuracy, grammar, and punctuation accuracy, as well as clarity and organization (dysgraphia); Specific Learning Disorder with Impairment in Mathematics, to denote weakness in accurate and fluent calculation, memorization of arithmetic facts, and accurate math reasoning (dyscalculia). (FCPS Ex. 43, p. 23). She

recommended ten academic interventions, including “60-90 minutes per day of one-on-one or very small group instruction” designed for students with dyslexia in order to build “decoding skills, reading fluency, and comprehension.” (FCPS, Ex. 43, p. 23).

The Student’s performance on the WAIS-IV gave her a full scale IQ score of 83, which is in the Low Average range. This was within the same range as the Student’s scores on the 2018 WISC-V, when she scored a full scale IQ score of 86, which was also in the Low Average range. Dr. [REDACTED] cautioned, however, that the WAIS-IV and WISC-V are different tests and are given to students of different age ranges, so data can differ for these reasons. (Test. [REDACTED], p. 890). She also explained that in both the 2018 and 2022 testing, the Student had some highly inconsistent results, which Dr. [REDACTED] finds to be typical of children with ADHD, meaning they score lower on tests that can be rushed through, but higher on tests that are in a format that is more difficult to rush through. (Test. [REDACTED], pp. 890-891). The WAIS-IV also showed that the Student was in the Very Low range for verbal comprehension, working memory, and processing speed. A review of the results of the various tests performed during the assessment shows that the Student’s scores often fall in the Low Average range, meaning she is performing at her approximate overall intellectual level. (Test. [REDACTED], Day 9).

Dr. [REDACTED] explained that when looking at the Student’s reading comprehension, she focuses on three areas or “buckets:” phonological processing (working with the sounds of language); decoding (understanding of sound and symbol relationships to reading); and word recognition (can a student read the words on the page and understand what they are reading). (Test. [REDACTED], p. 857). The CTOPP-2 placed the Student in the 12th percentile or Low Average range for her phonological awareness, but specifically on the elision subtest of the CTOPP-2, which requires a person to omit specific sounds from within words, she scored in the 5th



percentile, or Very Low range. (Parents Ex. 43, p. 43; Test. ■■■, pp. 857-858). Dr. ■■■ described decoding as sounding out words, meaning what sounds go with what letters. Dr. ■■■ opined that the Student should be able to look at a simple word, such as “cat” and be able to say it in approximately two seconds, but the Student is singularly unable to do such a task, scoring in the 1st percentile on the FAR, which Dr. ■■■ described as “the very bottom of our ladder in terms of skill level.” (Test. ■■■, p. 858). Dr. ■■■ described the Student’s inability to decode as holding her back and that she will often attempt to compensate using context or common sense, stating:

And more than that what we don’t see in the specific numbers is that it was incredibly slow, incredibly effortful, not an automatic process for her at all. She did try to guess and problem solve like many of our older kids did. So, she would put in similar words. She would make a couple attempts to get to a word, but that really didn’t help all that much. So weak decoding, weak word recognition skills, again by the time you’re her age – really by the time you’re in third and fourth grade we expect quick word recognition. You shouldn’t be sounding out anymore. It should be in the visual word form area of your brain. You should be able to see it and say it. Which she is not able to do. This impacts her comprehension when you can’t figure out the words on the page. Doesn’t matter how much comprehension Achieve 3000 you’ve done. It’s hard to understand what you’re reading. And so what you have to do is apply your background knowledge, apply your problem solving abilities and so that’s exactly what she did. And her reading comprehension really varied across measures.

(Test. ■■■, pp. 858-859). The Student scored in the Average range on the WIAT-4 for oral discourse comprehension and reading comprehension, but in the Very Low range for the FAR’s comprehension index and had a FAR total index of Impaired. (Parents Ex. 43, p. 34). Dr. ■■■ also explained that the Student scored in the 10th percentile on the GORT-5 but that “as a benchmark in general people need to be at the 30th percentile in reading skills to be able to function as sort of adults in society.” (Test. ■■■, p. 861).

Regarding the Student’s performance on the written expression tests during the assessment, Dr. ■■■ noted that the Student worked incredibly hard and put in a high level of

effort but described the work product as “very poor” and explained that the Student did not properly use punctuation or capitalization and made errors with noun/verb agreement and pronoun usage. (Parents Ex. 43, p. 13; Test. ■■■, p. 867). On the Written Expression portion of the OWLS-II, the Student scored in the 8th percentile, or in the Very Low classification. (Parents Ex. 43, p. 34).

The Student’s mathematics comprehension and ability were assessed by the FAM and the WIAT-4. On the FAM, the Student’s scores ranged from Average to Impaired depending on the skill or knowledge being assessed. On the WIAT-4, she scored in the Low Average range for numerical operations, math problem solving, math fluency-subtraction, and math fluency-multiplication, and in the Very Low range for math fluency-addition. Dr. ■■■ explained that the Student did not understand the concept of quantity, or what is bigger verses what is smaller. She further explained that this is a foundational element of understanding numbers and how they relate and “this really impacts math because you have to know if the answers you’re giving are plausible. So if you are solving a single variable algebra problem and you come up with 743, does that [answer] make sense...” (Test. ■■■, p. 870). The evaluation revealed that the Student struggles with math facts, remembering mathematical procedures, working through multi-step operations, and due to her reading difficulties, struggles with reading and understanding word problems. (Parents Ex. 43, p. 29).

Based on the results of the Student’s assessments, Dr. ■■■ recommended academic interventions for the Student. These interventions included: individualized instruction for students with dyslexia to build decoding skills, reading fluency, and comprehension at the “highest possible level of intensity and frequency”; reading comprehension support for vocabulary and understanding grammar; morphology and orthographical processing to be taught

in direct interventions and throughout the school day; development of oral language skills, including vocabulary and language mechanics; multisensory instruction in grammar; a multisensory math teaching approach; individualized instruction in written expression; instruction that minimized “being ‘pulled out’ to receive special education services”; continued instruction throughout the summer months to minimize loss and “continue closing her learning gap”; and “an educational setting that specializes in educating students with language-based learning disorders.” (Parents Ex. 43, p. 24).

Dr. [REDACTED] was emphatic in her evaluation and in her testimony that the Student has severe learning impairments that impact her reading comprehension, her written language expression, and her mathematics processing. Due to the severity of her learning impairments and her current deficits or gaps in her academic skills, the Student requires intensive services to help her to learn the basics of reading, writing, and math, and to begin to close the gap in her learning. Her ability to learn is not only hampered by her learning disabilities, but also by her ADHD, which affects her attentional functioning. Dr. [REDACTED]’s evaluation, as well as the Student’s previous IEPs, show that the Student has consistently exhibited problems with paying attention, being distracted by others or by her phone, with completing assignments, and with turning in assignments for credit.

### ***March 2022 IEP***

At the time of the Student’s March 2022 IEP, the Student was still on [REDACTED] where she received 1:1 instruction. The Student was doing well on [REDACTED], having As in all four of her classes, English 10, Algebra 1B, Learning Strategies, and Biology. (FCPS Ex. 54, p. 0550). The March 25, 2022 progress report notes that the Student made progress to meet each of her academic goals. For her Reading Comprehension goal, it is noted that the Student was now using Project Based learning and was focusing on Beowulf, completing summaries, character

analysis, and reviews. (FCPS Ex. 57, p. 0592). For her Written Language Expression goal, the March progress report indicates that the Student currently had a grade of 99% and completed a Google Slice presentation for her Biology class on plant and animal life. (FCPS Ex. 57, p. 0595). Likewise, for her Math Problem Solving goal, the March progress report notes that she is making sufficient progress to meet this goal through Project Based learning, utilizing workbook activities, tutorials, and interactive assignments. It further notes that the Student “has a fundamental understanding of Algebra and is gaining a deeper understanding of concepts” and that she had a third term grade of 98%. (FCPS Ex. 57, p. 0597). The Student’s special education services had to be adapted because she was on [REDACTED] and she received fifteen minutes per week of outside general education services to help monitor her grades and progress. (FCPS Ex. 57, p. 0598).

Despite this reduction in special education services, the Student excelled during [REDACTED] at this time, greatly benefiting from the 1:1 instruction. During the March 2022 IEP meeting, the Parents informed the FCPS that Dr. [REDACTED] was completing a psychoeducational evaluation of the Student. In addition to the evaluation to be completed by Dr. [REDACTED], the FCPS requested permission to conduct their own additional assessments. The Parents signed the consent for assessments on April 11, 2022. (FCPS Ex. 55, p. 0557). The FCPS also noted that it would perform informal assessments of the Student “to look at phonemic awareness and phonics skills.” (FCPS Ex. 54, p. 0553). The FCPS never conducted any informal assessments.

#### ***The May 20, 2022 Psychological Assessment and June 2022 IEP***

The FCPS completed a Psychological Assessment of the Student on May 20, 2022. This assessment consisted of Ms. [REDACTED] reviewing the Student’s records and requesting that teachers complete the BASC-3, Conners-3, and the CEFI. The additional assessments performed

did not provide a tremendous amount of new information regarding the Student and her needs. The BASC-3 and Conners-3 were completed by different teachers than the teacher, Ms. [REDACTED], who completed these assessments for Dr. [REDACTED]'s evaluation. All four teachers scored the Student either in the At-Risk or Clinically Significant range for anxiety on the BASC-3. This differed from Dr. [REDACTED]'s assessment. The Parents argued that the elevation in the Student's anxiety was due to the fact that she was ending her [REDACTED] and was anxious about returning to [REDACTED] due to bullying. They also argued that during this time, the Student was still being cyberbullied. I agree that this is a possible reason; however, there is insufficient evidence before me to find this to be a fact by a preponderance of the evidence. Ms. [REDACTED] was clear in her testimony that the teachers completing the assessments were instructors from when the Student was in person at [REDACTED]. These teachers had not taught the Student since January 2022, immediately prior to her being assaulted.

The May 2022 FCPS assessment provided eight recommendations, most of which were included in Dr. [REDACTED]'s assessment, but additionally provided that the Student may benefit from "learning calming strategies to use when she is feeling overwhelmed or anxious about something" and that she may benefit from "breaks when she is feeling overwhelmed and checking in with a trusted school staff member." (FCPS Ex. 68, p. 0679).

Based on Dr. [REDACTED]'s and the FCPS's assessments, the IEP team determined that the Student qualified for special education services as a student with a SLD (dyslexia, dyscalculia, dysgraphia) and an OHI (ADHD combined presentation). Because of the amount of new information from the assessments, the IEP team set a meeting date for June 16, 2022.

The June 16, 2022 IEP contained goals in the areas of Reading Phonics, Self-management, Encoding, Reading Phonemic Awareness, Reading Fluency, Reading

Comprehension, Written Language Expression (2 goals), and Math Problem Solving. It also significantly increased services for the Student. This IEP provided for the following services outside the general education classroom: five sessions for forty-five minutes a day for phonics-based intervention; one session for twenty minutes each week for math problem solving; two sessions for twenty minutes each week for written expression; one session for fifteen<sup>32</sup> minutes for each week for self-management. The IEP also provided for the following services inside the general education classroom: three sessions for twenty minutes each per week for reading comprehension; four sessions for fifteen minutes each per week for math problem solving; three sessions for twenty minutes each per week for written expression; and five sessions for fifteen minutes each per week for self-management.

Both Dr. [REDACTED] and Ms. [REDACTED] opined that five sessions per week for forty-five minutes each session was not sufficient for the Student to make adequate progress on her reading comprehension goals. Dr. [REDACTED], in both her testimony and her evaluation, noted that due to her age and the severity of her disability, the Student required at least sixty to ninety minutes, five days a week, to make progress on this goal. Dr. [REDACTED] opined that an excessive number of pull-out services could make the Student feel self-conscious or embarrassed and that the Student is “more likely to feel comfortable and confident in a setting where all students have similar needs and receiving the same type of support throughout the school day.” (Parents Ex. 43, p. 24). Ms. [REDACTED], on the other hand, opined that because of her lack of reading comprehension, the Student would need specialized services in *every* course for the entirety of the instructional period. She further opined that “there's just no way that [the Student's] program could be

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<sup>32</sup> The IEP is unclear if this is fifteen or twenty minutes. It is written as fifteen in the IEP chart, but then shown as twenty minutes on the following page of the IEP. The IEP team meeting notes report it as fifteen minutes, but then the IEP notes from the October 2022 IEP states this as twenty minutes with the notes of “Updated previous to have minutes correspond between description and delivery.” (Parents Ex. 53, p. 5). This was not clarified at the hearing. Ultimately, I do not find the discrepancy of five minutes each week to be dispositive in this matter.

implemented within a comprehensive program” and that “she requires hyperindividualized instruction” and that “even small group or self-contained classrooms would not be appropriate for her at this stage.” (Test. ██████████, pp. 1190-1191).

Essentially, Ms. ██████████ maintained that the only way the Student could possibly make progress would be to have 1:1 instruction. I do not find this extreme position supported by the record. It is correct that while the Student has been on ██████████, she performed well, seemingly thriving on the individual instruction and attention. However, it does not follow that 1:1 instruction is the only way for the Student to make progress on her IEP goals and to be provided a FAPE. I agree with Ms. ██████████ that the Student’s case and needs are complicated. She has the learning disabilities of dyslexia, dysgraphia, and dyscalculia coupled with ADHD and health problems that have required her to be on ██████████ more than once. But just because the Student’s ideal learning environment is 1:1 does not mean that the FCPS is required to provide such an environment. I do not fault the Parents for wanting what is ideal for the Student, but they have provided no law or regulation that obliges the FCPS to supply the ideal.

Ms. ██████████ also took exception to the fact that the IEP services were broken down into short sessions, the longest being forty-five minutes and the shortest being fifteen minutes. She described the breakdown of the services and their delivery as an “intensified fracture” and criticized that “instead of bringing everything together with all this new information and synthesizing it and integrating it to create a cohesive program, it becomes more fractured and more piecemeal with trying to collect all these different myriad needs that she has.” (Test. ██████████, pp. 1190-1191). But it was clear through reviewing the IEPs, Dr. ██████████’s testimony, as well as Ms. ██████████’ testimony, that the Student continually has trouble paying attention and remaining on task. In fact, this was one of the reasons that the Self-Management goal was added

to the IEP. Shorter sessions may be beneficial to the Student to keep her on task. Additionally, the twenty-minute sessions for math problem solving that are outside the general education classroom are meant to be coordinated with the general education teacher to help provide continuity and support for the Student. (FCPS Ex. 76, p. 0784). The same is true for the twenty-minute sessions three times per week in the general education classroom where the IEP notes that “collaboration will occur between the special educator and general educators. Service delivery may be in multiple content areas (history, English, etc.)” (FCPS Ex. 76, p. 0784).

I do, however, find that the IEP services for forty-five minutes a day, five days a week, for the phonics-based intervention is not reasonably calculated for the Student to make progress on her Reading Comprehension goal. Dr. [REDACTED] and Ms. [REDACTED] were both admitted as experts in the field of dyslexia. Both opined that the standard for a student of this age and who is currently only reading at a second to third grade level, is to provide sixty to ninety minutes of instruction in the reading intervention. In the Parents’ rebuttal case, Dr. [REDACTED] specifically addressed this issue and stated that for older dyslexic readers the intervention needs to be in either one longer session or two shorter sessions per day. She explained that as the brain gets older, it becomes less responsive and by the time a student is in the fourth grade, they lose their responsiveness to being able to learn to read. (Test. [REDACTED], Day 9). This means it takes more time and energy to teach these phonological skills to older students.

During her testimony, Ms. [REDACTED] explained that the FCPS provided forty-five minutes per session of the OG+ instruction because, since the Student also has a diagnosis of ADHD, forty-five minutes is about the maximum that she would be able to tolerate the 1:1 intensive programming of the OG+ instruction. However, when explicitly asked if more than forty-five minutes per day, five days per week is provided to students, Ms. [REDACTED] stated that forty-five



minutes per day, five days a week was the standard amount of time provided. I specifically asked Ms. [REDACTED] if the FCPS could provide sixty or ninety minutes per day, but broken down into shorter sessions (i.e. two thirty minute sessions per day or two forty-five minute sessions) and whether or not that would be conducive to the OG+ programming. Ms. [REDACTED] responded that it was possible to break up the OG+ into shorter, more frequent sessions, but it was never even discussed with regard to the Student. It is clear that the FCPS made the determination of five, forty-five minutes sessions per week for the Student as a default and without considering the unique circumstances and specific needs of this Student in order for her to make progress. The Student in this matter has significant needs that are not being met. She was sixteen years old but was lacking the very elementary skills to allow her to be able to read. As such, I find that the FCPS denied the Student a FAPE during this time.

The Parents also argued that the June 2022 IEP did not provide the Student a FAPE because it failed to identify a placement for the Student. The Parents rely on the IEP team meeting notes that state that “Mr. [REDACTED] suggested an additional meeting to see what needs to be added to the IEP to keep [the Student] safe. The team can meet to discuss placement and service options.” (FCPS Ex. 75, p. 0716). I disagree with the Parents’ interpretation. The IEP team meeting notes are a summary of what was discussed. In reviewing the entirety of the notes, it is clear that the Student was in the [REDACTED] and would continue to be enrolled in that program the following school year. One of the assistant principals for the [REDACTED], Ms. [REDACTED], was present at the June 2022 IEP meeting and discussed how the Student’s special education services would be implemented, including that the OG+ program could be “provided after 4<sup>th</sup> block in the blended virtual program as the classes end at 12:30” and that there was a “co-taught Geometry course next year in the blended virtual program.” (FCPS

Ex. 75, p. 0716). The notes make it clear that the Student's placement was discussed, although the Parents were not happy keeping the Student within the FCPS, but that "Mr. [REDACTED] again said that a more substantive discussion needs to be had to talk about other options within the FCPS." (FCPS Ex. 75, p. 0716). The Parents may have disagreed with the placement of the Student within the FCPS and her continuation in the [REDACTED], but it was addressed and discussed at the June 2022 IEP meeting.

September 7, 2022 IEP meeting and October 17, 2022 IEP

The September 2022 IEP team meeting notes show that the Parents continued to request a nonpublic placement for the Student based on bullying issues that they reported the Student was still experiencing and that they did not believe the Student should be forced into the [REDACTED] in order to be safe. The meeting notes further reflect that the Student was still having some issues with attendance and work completion, but that she had COVID at the start of the semester, causing her to miss some days of school and to fall behind on assignments.

The October 2022 IEP contained the same special education services as the June 2022 IEP. The goals on the October 2022 IEP remained essentially the same, although the accuracy rate for the Reading Comprehension, Math Problem Solving, and Written Language Expression goals was increased from 75% to 80%. (Parents Ex. 53, p. 5). Again, I find that there was no specific consideration of providing additional time for reading intervention to address the Student's Reading Comprehension and phonological needs. The reading intervention services simply defaulted to five sessions per week for forty-five minutes each session. Again, nothing in the October 2022 IEP or meeting notes discusses why this amount of services was provided, other than, as Ms. [REDACTED] explained, that is the standard amount provided. Without the consideration of this student's specific needs, specifically her age and the severity of her

dyslexia, I cannot find that that this IEP was reasonably calculated to enable the Student to receive educational benefit.

### ESY

Section 300.106(b) of the C.F.R. defines ESY services as special education and related services that:

- (1) Are provided to a child with a disability—
  - (i) Beyond the normal school year of the public agency;
  - (ii) In accordance with the child’s IEP; and
  - (iii) At no cost to the parents of the child; and
- (2) Meet the standards of the [State Education Agency].

Subsection (a) further requires that “[e]ach public agency must ensure that extended school year services are available as necessary to provide FAPE[.]” 34 C.F.R. § 300.106(a)(1).

The Fourth Circuit has “articulated . . . a formal standard for determining when ESY services are appropriate under the IDEA: ‘ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.’” *Dibuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 189-90 (4th Cir. 2002) (citing *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002). “[U]nder this standard, ‘the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school.’” *Dibuo*, 309 F.3d at 190. “ESY Services are required under the IDEA only when such regression will substantially thwart the goal of ‘meaningful progress.’” *MM*, 303 F.3d at 538.

COMAR 13A.05.01.08B sets forth the process for such determinations:

- (2) Extended School Year Services.
  - (a) At least annually, the IEP team shall determine whether the student requires the provision of extended school year services in accordance with Education Article, §8-405, Annotated Code of Maryland.

- (b) The IEP team shall consider:
- (i) Whether the student's IEP includes annual goals related to critical life skills;
  - (ii) Whether there is a likelihood of substantial regression of critical life skills caused by the normal school break in the regular school year and a failure to recover those lost skills in a reasonable time;
  - (iii) The student's degree of progress toward mastery of IEP goals related to critical life skills;
  - (iv) The presence of emerging skills or breakthrough opportunities;
  - (v) Interfering behaviors;
  - (vi) The nature and severity of the disability; and
  - (vii) Special circumstances.
- (c) Following the consideration of factors described in §B(2)(b) of this regulation, the IEP team shall determine whether the benefits the student with a disability gains during the regular school year will be significantly jeopardized if that student is not provided with an educational program during a normal break in the regular school year.

The Parents argued that the FCPS failed to properly consider the Student's needs and determine eligibility for ESY services from January 2021 through January 2023. Specifically, the Parents argued that the FCPS failed to consider that reading, writing, and math are critical life skills, that the Student showed regression of her skills after returning from breaks, and that the Student's severe dyslexia should be a special consideration.

In reviewing the October 2021 IEP, Ms. [REDACTED] opined that the FCPS should have provided ESY services because the Student, as far back as her 2018 assessments, was showing a lack of phonological skills, which impeded her ability to learn to read. As a skill that a student is supposed to master much earlier in their schooling, this is a critical life skill. (Test. [REDACTED], p. 1172). Dr. [REDACTED] also opined that reading, writing, and math are critical life skills. (Test. [REDACTED], p. 895).

Ms. [REDACTED] also opined that not only was there a likely change of regression, but that the Student actually regressed. Ms. [REDACTED] specifically pointed to the data in the October 2021 IEP that noted for the Student's Reading Comprehension goal that in December the Student

had an average score of 97% on her first attempts in Achieve 3000, but then after the break in January the Student had an average of 81.5% and in February she had an average score of 87.5%. (Test. ██████████, p. 1143; FCPS Ex. 35, p. 0429). However, in reviewing that portion of the October 2021 IEP, I additionally note that although the average percentage on the Student's first attempt went down in January, it then improved in February and was actually at a higher lexile level. December's lexile level is at a 365, January's at 360, and February's at 460. (FCPS Ex. 35, p. 0429).

Dr. ██████ also projected that for a student with dyslexia, dysgraphia, and dyscalculia, it is never recommended to take the summer off because continuous education is important to close the gap between where the student is academically and where they should be and, in general, these children also regress without continuous instruction. (Test. ██████, pp. 849-850). She further explained that, in her opinion, the Student "definitely needs a great deal of intensive, individual year-round instruction in order to learn to read and do basic math." (Test. ██████, p. 850).

However, on cross-examination, Dr. ██████ stated that the Student's educational levels are "already at the bottom of the barrel" and agreed that the Student "can't regress much further." (Test. ██████, p. 918). She further opined that because of this, she considered the Student's inability to read, write, and do math to be an emergency. She described that in her estimation "This is an illiterate high school student. She needs every single possible thing that can happen to help move the needle. So that would include every service that the school and the parents can provide." (Test. ██████, p. 918).

I agree with Dr. ██████ and Ms. ██████████ that the basics of reading comprehension, such as phonics, decoding and encoding, along with writing and basic math skills are critical life skills. Without these basics, it is almost impossible to function as an adult in society. I also

agree that the Student's circumstances are unique or special in that she was in tenth grade and still lacking these fundamental skills. However, I do not find that the Parents have shown that without ESY services from January 2021 through January 2023 that there was such regression of the Student's skills as to substantially thwart meaningful progress. Although ideally, Dr. [REDACTED] believes that the Student, and really all students with dyslexia, dysgraphia, and dyscalculia, need year-round services, the evidence does not show that the Student substantially regressed during breaks. Ms. [REDACTED] pointed out an episode of regression, but overwhelmingly, the evidence shows that the Student remained on about the same lexile level, which was in the second or third grade band. There was not a noticeable regression from that level, although the evidence shows that the Student did not progress and could not progress due to her lack of intensive reading comprehension programming. Because of this, I do not find that the FCPS denied the Student a FAPE by failing to determine that she was eligible for ESY services.

#### Remedy

Having found that the FCPS failed to identify and provide goals and services relating to the Student's dyslexia beginning in October 2021, as well as failing to provide sufficient special education services for the 2022-2023 school year, I must next determine the appropriate relief for the Student.

The IDEA's procedural safeguards direct district courts to "grant such relief as the court determines is appropriate." 20 U.S.C.A. § 1415(i)(2)(C)(iii). Where a school district has failed to provide a FAPE, "a court will evaluate the specific type of relief that is appropriate to ensure that a student is fully compensated for a school district's past violations of his or her rights under the IDEA and develop an appropriate equitable award." *D.F. v. Collingswood Borough Bd. of*

*Educ.*, 694 F.3d 488, 498–99 (3d Cir. 2012) (quoting *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 720 (3d Cir. 2010)). The equitable relief authorized by 20 U.S.C.A, § 1415(i)(2)(C)(iii) most commonly results in reimbursement for private placement when the child was denied a FAPE, or prospective compensatory education. *G. ex rel R.G. v. Fort Bragg Dependent Sch.*, 343 F.3d. 295, 308 (4th Cir. 2003). Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to account for the period of time that a student was deprived of her right to a FAPE. Courts have held that to accomplish the IDEA’s purposes, a compensatory education award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid ex rel Reid v. Dist. of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

As a remedy, the Parents seek a compensatory educational award by way of a prospective placement of the Student at the [REDACTED] for the 2023-2024 school year, as well as the tutoring costs associated with this placement, as [REDACTED] is not a special education school. The Parents argued that the Student requires the 1:1 instruction that [REDACTED] provides, as well as the flexible schedule permitted by [REDACTED], due to the Student’s educational and health needs. The FCPS contended that [REDACTED] is not the least restrictive environment for the Student, as the Student would be taught in a 1:1 setting, only having peer interaction during homework café time.

Although [REDACTED] is not a special education school, Ms. [REDACTED]’s testimony was clear that [REDACTED] has mechanisms in place, by way of tutoring sessions, to provide special education services. Ms. [REDACTED] described the tutoring sessions offered by [REDACTED] as being “bricks in a wall” to help support a student and their educational

programming. (Test. ██████, pp. 1348-1349.). ██████, however, does not have a staff member trained in OG+ or any reading intervention. Ms. ██████ explained that while an outside tutor would have to be brought in to provide the reading intervention, ██████ ██████ would allot time in the Student's schedule for this service and then would use the Student's 1:1 classroom time to support the reading intervention and meet the Student's needs.

As the Parents did not unilaterally place the Student in a private education setting and are therefore not seeking reimbursement, but are instead seeking a prospective placement along with tutoring services for the Student as a compensatory award for a denial of a FAPE, I do not need a full analysis of the appropriateness of ██████, but rather must seek to remedy the denial of a FAPE in order to mitigate the harm done by the FCPS's denial of a FAPE to the Student. The overarching principle of a compensatory award is rooted in equity and what is necessary to remediate the denial of a FAPE. The Forth Circuit has held, "Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *G. ex rel R.G.*, 343 F.3d. at 309. In *Diatta v. District of Columbia*, the D.C. District Court held that educational programming sought as a compensatory award should be "reasonably calculated to confer the remedial and contemporary educational benefits" due to the student. 319 F. Supp. 2d 57, 67 (D.D.C. 2004).

In this case, the Student was initially denied a FAPE in October 2021 when, upon returning to in person instruction, the FCPS failed to discuss updating the Student's educational assessments, as had been discussed in April 2021. As reviewed above, the FCPS knew based on 2018 assessments and her current work that the Student had significant reading comprehension difficulties, specifically with decoding. All the FCPS experts agreed that had assessments been



performed prior to March and May 2022, more services would have been provided sooner. The FCPS knew at least as of October 2021 that the Student was reading on a second or third grade level based on the lexile levels present in her Achieve 3000 data. The FCPS also knew at that time that despite achieving passing grades on assignments, the Student's ability to read was not improving. In April 2021, the FCPS increased the Student's special education services significantly. However, in October 2021, without explanation or any additional assessments, those services were decreased. Additionally, the Reading Comprehension goal was not written in a way as to allow the Student to make meaningful progress. As addressed above, the goal itself contained no scaffolding as to how the Student would actually acquire reading comprehension.

Based on the totality of the record before me, I find that it would be equitable and appropriate for the Student to be awarded a prospective placement at [REDACTED] along with the necessary tutoring services to implement her reading comprehension intervention of OG+ at the rate of ninety minutes per day, five days a week, which equals 7.5 hours per week.

Dr. [REDACTED]'s testimony as to why the Student requires more than forty-five minutes per day of OG+ was specific and fact based, and I found it reliable. On the other hand, Ms. [REDACTED] was unable to explain how the FCPS determined that forty-five minutes per day of OG+ was appropriate, given the fact that it performed no individualized assessment to ascertain what her specific needs were. Her testimony was essentially that forty-five minutes per day is the default amount of time the FCPS allots for such instruction, although sometimes the FCPS a lot less than forty-five minutes. I also credit Dr. [REDACTED]'s testimony that the Student's current inability to read at more than a third grade level is an emergency and is not due to the Student's overall intelligence, but because she has not been given elementary skills that would allow her to be able to read.

Additionally, the Student is sixteen years old and therefore requires a more intensive intervention than a younger student would need. Although Dr. [REDACTED]'s evaluation notes a recommendation of sixty to ninety minutes, I find that due to the Student's extreme needs, the award should be for ninety minutes per day.

Although the FCPS argued that [REDACTED] is not the least restrictive environment for the Student, I do not find this argument germane to the interests of equity. In testimony, Ms. [REDACTED] opined that based on her knowledge of [REDACTED] she did not believe that it was an appropriate placement for the Student because it is restrictive and isolating and did not provide much opportunity to interact with peers. (Test. [REDACTED], Day 9). Even in a situation involving a unilateral private placement, the private education services need not be provided in the least restrictive environment. *M.S. ex rel. Simchick*, 553 F.3d at 319. Under questioning, Ms. [REDACTED] opined that the fact that [REDACTED] would need to bring in outside tutors for the reading intervention was not a bar to it being an appropriate placement for the Student. (Test. [REDACTED], Day 9).

In their Due Process Complaint, the Parents requested the remedy of an award of "compensatory services in the form of placement at [REDACTED] and reimbursement of related expenses including but not limited to assessments, tutoring, and therapy." During the ten days of hearing in this matter, however, the Parents did not present the cost of any assessments, either Dr. [REDACTED]'s March 2022 assessment, or any other assessments. While I accept that the Parents sought a private assessment because they did not want to wait additional time for the FCPS to complete assessments, the FCPS never refused to perform an assessment of the Student. 34 C.F.R. § 300.502(b)(1); *see also* Educ. § 8-405(b)(4)(i)(1); COMAR 13A.05.01.14B(1). As

such, I do not find that the Parents have met their burden to show that they are entitled to an award for the cost of the assessments.

Similarly, although Ms. [REDACTED] testified that [REDACTED] can incorporate a student's therapy into their class schedule, no testimony was provided that the Parents were seeking to include this for the Student. In fact, when the FPCS suggested therapy as a possible service during the October 2022 IEP meeting, the Parents declined and instead sought a nonpublic placement. Finally, while testimony established that [REDACTED] offers additional tutoring, there was no testimony as to what tutoring the Student would need in order to obtain educational benefits at [REDACTED], other than specifically, an outside tutor for the OG+ programming. As there was no testimony provided on this issue, I decline to include additional tutoring at [REDACTED] as part of the compensatory services award in this case. It would not be appropriate for me to speculate what the Student may need in terms of additional tutoring.

Although I find that the Student was denied a FAPE beginning in October 2021, I do not find it appropriate or necessary for equity to order placement at [REDACTED] or payment of OG+ tutoring for a period of time greater than the 2023-2024 school year. Beginning in January 2022, the Student was receiving services through [REDACTED]. While a FAPE must still be provided while on [REDACTED], because of the Student's medical needs, which necessitated the [REDACTED], the Student's special education services were greatly reduced. During that time, however, the Student was receiving 1:1 instruction, which, while not sufficient to take the place of an intensive reading intervention, helped the Student better access her learning. Had the Student had a specific reading intervention as part of her IEP during that time, I can only speculate as to how frequently or with what intensity she would have been receiving that program while on

█. There was no testimony as to whether the OG+ programming would have been provided in full while on █ or shortened to accommodate the Student's medical needs. As such, I decline to speculate on an hour for hour compensatory award for the OG+ tutoring. Instead, I find that in general, prospective placement at █ for the 2023-2024 along with 7.5 hours per week<sup>33</sup> of OG+ tutoring is the appropriate and equitable remedy.

Finally, while the Student sought "tutoring" in general as a remedy in the Due Process Complaint, no testimony was provided as to how many sessions of tutoring the Student would require at █. █ offers tutoring services, but there was no explanation as to how this tutoring would specifically support the Student or to rehabilitate the Student from the period of time she was not provided a FAPE. Much more time was spent illustrating █ 1:1 teaching environment and how that would benefit the Student. As such, the award of compensatory services by way of the placement of the Student at █ does not include any additional tutoring sessions other than the compensatory education hours for the OG+ program.

### **CONCLUSIONS OF LAW**

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

(1) The FCPS failed to provide the Student with a FAPE from October 2021 through January 4, 2023 as follows:

(a) By failing to identify and provide goals and services based on the Student's disability related needs in dyslexia; and

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<sup>33</sup> For purposes of calculation of this award, a school year in Maryland consists of thirty-six weeks.  $36 * 7.5 = 252$ .

(b) By failing to provide sufficient special education and related services, resulting in a lack of progress towards IEP goals;

(2) The FCPS did not fail to provide the Student with a FAPE from January 4, 2021 through January 4, 2023 as follows:

(a) By failing to implement and provide sufficient special education services during the COVID-19 school closures;

(b) By failing to consider COVID recovery services owed to the Student;

(c) By failing to identify and provide goals and services based on the Student's disability related needs in dysgraphia and dyscalculia until October 2022;

(d) By failing to determine the Student was eligible for and provide Extended School Year services;

(e) By failing to provide a placement for the 2022-2023 school year; and

(f) By failing to investigate and consider how bullying impacted the Student's receipt of a FAPE.

I further conclude that the Parents are entitled to placement of the Student at [REDACTED] [REDACTED] for the 2023-2024 school year, as compensatory education for the FCPS' failure to provide the Student a FAPE beginning in October 2021; the Parents are also entitled to 252 hours of compensatory education services for tutoring in the Orton-Gillingham Plus or similar intensive reading comprehension intervention. 20 U.S.C.A. §§ 1400-1482 (2017); 34 C.F.R. pt. 300 (2019); *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, (2017); *G. ex rel R.G. v. Fort Bragg Dependent Schools*, 343 F.3d. 295, 308 (4th Cir. 2003); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2018); and COMAR 13A.05.01.

## ORDER

I **ORDER** that:

1. The Frederick County Public Schools shall **FUND** placement of the Student at [REDACTED] [REDACTED] for the 2023-2024 school year;
2. The Frederick County Public Schools shall over the course of the 2023-2024 school year, provide 252 hours of compensatory education services for tutoring in the Orton-Gillingham Plus or similar intensive reading comprehension intervention; and
3. The Frederick Count Public Schools shall, within thirty [30] days of the date of this decision, provide proof of compliance with this Order to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, Maryland State Department of Education.

July 27, 2023  
Date Decision Issued

Mary Pezzulla  
Administrative Law Judge

MP/ds  
#204769

## REVIEW RIGHTS

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

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

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

**Copies Mailed To:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]





Parents Ex. 20 – IEP Progress Report, April 8, 2020

Parents Ex. 21 – ██████████ Middle School Progress Report, June 2020

Parents Ex. 22 – IEP, June 10, 2020

Parents Ex. 23 – DLP, June 11, 2020

Parents Ex. 27 – IEP Progress Report, January 26, 2021

Parents Ex. 28 – IEP Team Meeting Notes, April 9, 2021; IEP, April 9, 2021

Parents Ex. 29 – Interim Progress Report, May 15, 2021

Parents Ex. 30 – IEP Progress Report, June 17, 2021

Parents Ex. 31 – Planning Worksheet for Recovery/Compensatory Opportunities, June 3, 2021

Parents Ex. 33 – Email from Dr. ██████████ to the FCPS, November 8, 2021

Parents Ex. 34 – Letter from Ms. VanCleaf to Rochelle Eisenberg, Esquire, January 19, 2022

Parents Ex. 36 – ██████████ (██████) approval letter, January 21, 2022

Parents Ex. 37 – Email from Dr. ██████████ to the FCPS, April 11, 2022 with attached Notice and Consent for Assessment, April 11, 2022

Parents Ex. 41 – ████████ Reverification form, signed March 21, 2022

Parents Ex. 42 – Email chain between Parents and the FCPS, March 23-24, 2022

Parents Ex. 43 – Psychoeducational Evaluation, March 2022

Parents Ex. 44 – Email chain between Parents and the FCPS regarding bullying, various dates

Parents Ex. 45 – ████████ Reverification form, signed May 24, 2022

Parents Ex. 47 – Letter from ██████████ to the Parents, June 29, 2022

Parents Ex. 49 – Counselor Report to the IEP Team, September 7, 2022

Parents Ex. 51 – Interim Progress Report, September 27, 2022

Parents Ex. 53 – IEP Team Meeting Notes, October 17, 2022

Parents Ex. 55 – Email from Michael DuBey, Esquire to Ms. VanCleaf, November 4, 2022

- Parents Ex. 56 – IEP Progress Report, January 20, 2023
- Parents Ex. 57 – Reading Data, January 12, 2023
- Parents Ex. 58 – Interim Progress Report, January 24, 2023
- Parents Ex. 59 – Bullying Reporting Form, January 15, 2023
- Parents Ex. 60 – Email chain between FCPS personnel and the Parents, January 30-31, 2023
- Parents Ex. 61 – Department of Juvenile Services Peace Order Complaint Form, January 30, 2023
- Parents Ex. 63 – [REDACTED] medical records for the Student, January 16-21, 2023
- Parents Ex. 66 – [REDACTED] medical records for the Student, February 14, 2023
- Parents Ex. 68 – Email chain between the Parents and FCPS personnel, January 30, 2023 through February 8, 2023
- Parents Ex. 69 – Division of Rehabilitation Services Eligibility Determination, eligibility date, August 9, 2022
- Parents Ex. 73 – Medical Claims for the Student, January 1, 2019 – March 9, 2023
- Parents Ex. 74 – [REDACTED] informational printout, undated
- Parents Ex. 75<sup>1</sup> – MSDE Model Policy Bullying, Harassment, or Intimidation, December 2021
- Parents Ex. 77 – State and District Testing Results, grades 2-6, various dates
- Parents Ex. 78 – MSDE Technical Assistance Bulletin, Bulletin #20-09, revised October 2020
- Parents Ex. 79<sup>2</sup> – Documentation of bullying and harassment from [REDACTED],<sup>3</sup> undated (pp. 1-6)  
 Email from Dr. [REDACTED] to FCPS personnel, undated (p. 7)  
 Summary of bullying events prepared by Dr. [REDACTED], undated (pp. 8-9)  
 Email chains between the Parents and FCPS personnel, January 3-6, 2022 and May 11-13, 2022 (pp. 10-17)  
 Timeline of May 11, 2022 prepared by Dr. [REDACTED], undated (p. 18)

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<sup>1</sup> This exhibit contained multiple documents. Only pages 39-45, which contain the Model Policy, were admitted.

<sup>2</sup> This exhibit consists of multiple documents and photographs. Only certain pages of this exhibit were offered and admitted into evidence. I have indicated the pages that were introduced. The other pages will be retained with the file.

<sup>3</sup> Any students named in these documents or referenced in this decision will be referred to by initials only. If the student's initials are not available, they will be referred to by first name only.

Tik Tok Screenshots, undated (pp. 20-16)  
 Photograph of text message from [REDACTED] (pic. 1)<sup>4</sup>  
 Photograph of text message from [REDACTED] (pic. 2)  
 Photographs of text messages from [REDACTED] (pics. 4-5)  
 Photograph of text message from [REDACTED] (pic. 6)  
 Photograph of text message from [REDACTED] (pic. 7)  
 Photograph of text message from [REDACTED] (pic. 9)  
 Photograph of text message from [REDACTED] (pic. 10)  
 Photograph of text message from [REDACTED] (pic. 11)  
 Screenshots of message from [REDACTED] (pics. 12-14)  
 Screenshot of Schoology message to [REDACTED] (pic. 15)  
 Screenshot of message from [REDACTED] (pic. 16)  
 Screenshots of messages from [REDACTED] (pics. 17-19)  
 Screenshot of Snapchat post by [REDACTED] (pic. 20)  
 Screenshot of posts on [REDACTED] (pics. 22-23)  
 Screenshot of post by [REDACTED] (pic. 24)  
 Screenshots of posts on [REDACTED] (pics. 25-28)  
 Screenshot of message from [REDACTED] (pic. 29)  
 Screenshot of comments posted by screenname "[REDACTED]" (pic. 30)  
 Photograph of text message from [REDACTED] (pic. 31)  
 Screenshot of message from [REDACTED] (pic. 32)  
 Screenshot of phone (pic. 40)  
 Screenshot of comments made to Tik Tok video (pic. 47)  
 Screenshot of messages from [REDACTED] posted to Tik Tok video (pics. 51-52)  
 Screenshots of messages from [REDACTED] (pics. 54-58)  
 Screenshot of post made by [REDACTED] (pic. 59)  
 Screenshots of messages posted to a Tik Tok video posted by the Student (pics. 61-65)

Parents Ex. 80 – Thumb drive containing the following eight videos<sup>5</sup>:

- 2<sup>nd</sup> degree assault video
- May 11<sup>th</sup> 2<sup>nd</sup> movie [REDACTED]
- May 11<sup>th</sup> movie
- Movie about [REDACTED] tik tok [REDACTED] response
- Movie of [REDACTED] tik tok [REDACTED]
- Number 33<sup>6</sup>
- Response to [REDACTED]'s May 11 video
- [REDACTED] emailed to [REDACTED]

<sup>4</sup> The final sixty-six pages of the exhibits did not continue with the existing pagination, but started over at 1. To clearly identify each of these pages, I refer to them as pictures as they are either photographs or screenshots from a cell phone.

<sup>5</sup> The names listed are as they appear on the thumb drive.

<sup>6</sup> This is an audio recording only.

Parents Ex. 81 – Frederick County [REDACTED] Incident Report, January 12, 2022 with attached Arrest Report, January 5, 2022; Frederick County [REDACTED] Incident Report, January 19, 2022 with attached social media screenshots

I admitted the following exhibits on behalf of the FCPS:

- FCPS Ex. 1 – IEP, May 12, 2015
- FCPS Ex. 2 – Psychological Services Transmittal Form, May 12, 2015 with attached Psychological Assessment Report, assessment dates April 27 and 30, 2015
- FCPS Ex. 3 – Amended IEP, January 19, 2016
- FCPS Ex. 4 – IEP, May 10, 2016
- FCPS Ex. 5 – IEP, May 2, 2017
- FCPS Ex. 8 – Amended IEP, September 18, 2018
- FCPS Ex. 10 – IEP, April 16, 2019
- FCPS Ex. 24 – DLP, September 25, 2020
- FCPS Ex. 25 – IEP Progress Report, November 6, 2020
- FCPS Ex. 27 – Contact/Check-in Logs, various dates 2020-2021
- FCPS Ex. 34 – IEP Team Meeting Notes, October 21, 2021
- FCPS Ex. 35 – IEP, October 21, 2021
- FCPS Ex. 36 – Bullying, Harassment, or Intimidation Reporting Form, November 2, 2021; Agreement as to no contact with Student, signed by [REDACTED], November 5, 2021; Agreement as to no contact with [REDACTED], unsigned by Student, November 5, 2021; Incident Details screen for November 2, 2021 incident; Email from Dr. [REDACTED] to the FCPS, November 8, 2021; Bullying/Harassment/Intimidation Investigation Form, November 2, 2021
- FCPS Ex. 37 – Student Statement Forms, various dates
- FCPS Ex. 38 – Email chain between Dr. [REDACTED] and [REDACTED], January 3-4, 2022
- FCPS Ex. 39 – Email chain between the Parents and FCPS personnel, January 3-6, 2022
- FCPS Ex. 40 – Email chain between Dr. [REDACTED] and [REDACTED], January 6, 2022
- FCPS Ex. 41 – Email from Dr. [REDACTED] to [REDACTED], January 7, 2022

- FCPS Ex. 42 – Email chain between the Parents and FCPS personnel, January 10, 2022
- FCPS Ex. 43 – Department of Juvenile Services Peace Order Complaint Form, January 11, 2022
- FCPS Ex. 44 – Department of Juvenile Services Peace Order Complaint Form, January 30, 2023
- FCPS Ex. 45 – Email from [REDACTED] to Dr. [REDACTED], January 11, 2022
- FCPS Ex. 46 – Student’s report card for 2021-2022 school year, ending January 13, 2022
- FCPS Ex. 49 – Email chain between Dr. [REDACTED] and [REDACTED], February 27, 2022-March 2, 2022
- FCPS Ex. 50 – [REDACTED] Service Agreement, March 8, 2022
- FCPS Ex. 52 – [REDACTED] Developmental History Form, March 8, 2022
- FCPS Ex. 54 – IEP Team Meeting Notes, March 16, 2022
- FCPS Ex. 55 – Notice and Consent for Assessment, signed April 11, 2022
- FCPS Ex. 57 – Amended IEP, March 16, 2022
- FCPS Ex. 59 – Email chain between Parents and the FCPS, March 23-24, 2022
- FCPS Ex. 60 – Email from [REDACTED] to the Parents, March 24, 2022
- FCPS Ex. 63 – Email from Dr. [REDACTED] to Dr. [REDACTED], March 31, 2022
- FCPS Ex. 65 – Email chain between Parents and the FCPS, March 23-25, 2022
- FCPS Ex. 66 – Email from Mr. [REDACTED] to [REDACTED], May 11, 2022
- FCPS Ex. 68 – Confidential Psychological Assessment, May 20, 2022
- FCPS Ex. 69<sup>7</sup> – Forms coversheet, May 24, 2022; Letter from Parents to staff of Dr. [REDACTED], undated
- FCPS Ex. 71 – IEP Team Meeting Notes, May 31, 2022
- FCPS Ex. 72 – IEP Team Eligibility Report for Emotional Disability, May 31, 2022
- FCPS Ex. 73 – IEP Team Eligibility Report for Specific Learning Disability, May 31, 2022

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<sup>7</sup> Only pages Bates stamped 0681 and 0682 were admitted.

- FCPS Ex. 74 – IEP Team Eligibility Report for Other Health Impairment, May 31, 2022
- FCPS Ex. 75 – IEP Team Meeting Notes, June 16, 2022
- FCPS Ex. 76 – Amended IEP, June 16, 2022
- FCPS Ex. 78 – Email from [REDACTED] to Dr. [REDACTED], July 5, 2022
- FCPS Ex. 79 – Email from [REDACTED] to Dr. [REDACTED], July 5, 2022
- FCPS Ex. 80 – Email chain between [REDACTED] and Dr. [REDACTED], July 6-8, 2022
- FCPS Ex. 81 – IEP Team Meeting Notes, September 7, 2022
- FCPS Ex. 87 – IEP, October 17, 2022
- FCPS Ex. 101 – Electronically submitted Bullying, Harassment, or Intimidation Reporting Form, February 3, 2023
- FCPS Ex. 103 – Email from the Parents to the FCPS, January 30, 2023, forwarded to [REDACTED], February 6, 2023
- FCPS Ex. 106 – Photographs of messages on a cellphone sent by the Student, undated
- FCPS Ex. 107 – Screenshots of Tik Tok video posted by the Student, printed January 30, 2023
- FCPS Ex. 110 – *Curriculum Vitae* of [REDACTED], undated
- FCPS Ex. 111 – *Curriculum Vitae* of [REDACTED], undated
- FCPS Ex. 113 – *Curriculum Vitae* of [REDACTED], undated
- FCPS Ex. 114 – *Curriculum Vitae* of [REDACTED], undated
- FCPS Ex. 116 – [not admitted]<sup>8</sup>
- FCPS Ex. 117 – Woodcock-Johnson Technical Manual, Page 34, 2014

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<sup>8</sup> This exhibit is a thumb drive containing an audio recording. The recording was played on the record and used for impeachment purposes during the testimony of Dr. [REDACTED]. The audio recording was offered for admission into evidence. I did not admit the recording as it was recorded without the knowledge or permission of Dr. [REDACTED]. *See* Cts. & Jud. Proc. § 10-405 (2020). The thumb drive has been retained with the file along with the password with which to access the thumb drive.