

██████████,

STUDENT

v.

HOWARD COUNTY

PUBLIC SCHOOLS

BEFORE JOHN T. HENDERSON, JR.

ADMINISTRATIVE LAW JUDGE

THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-HOWD-OT-22-28938

DECISION

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STATEMENT OF THE CASE

On November 28, 2022, ██████████, (Parent), on behalf of ██████████ (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 Howard County Public Schools (HCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);¹ 34 C.F.R. § 300.511(a) (2021);² Md. Code Ann., Educ. § 8-413(d)(1) (2022);³ Code of Maryland Regulations (COMAR) 13A.05.01.15C(1). The Complaint alleged that the HCPS denied the Student a free appropriate public education (FAPE) during the 2019-2020, 2020-2021 and 2021-2022 school years. The Parent requested that HCPS provide the Student with compensatory special education and related services, including

¹ “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.

² “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.

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

reimbursement of the parent's expenses for the 2019-2020, 2020-2021 and 2021-2022 school years.

Although the resolution period expired on December 28, 2022, the parties held a Resolution Meeting on February 1, 2023, without agreement. Counsel and the parties could not meet and resolve the matter within the thirty-day resolution period due to their schedules and the holidays that fell within the month of December 2022. On February 1, 2023, the parties notified the OAH that they did not resolve their dispute.

Under the applicable law, the decision in this case is due forty-five days after the conclusion of the thirty-day resolution period triggered by the filing of a due process complaint.⁴ 34 C.F.R. § 300.510(a), (b)(2). Md. Code Ann., Educ. § 8-413(h); COMAR 13A.05.01.15C(14). As of the date of the February 14, 2023 prehearing conference, the decision due date of February 10, 2023 had passed.⁵ *Id.* §§ 300.510(c)(1), 300.515(a). It was impossible to render a decision by February 10, 2023. Therefore, at the prehearing conference, counsel for both parties jointly moved to extend the timeline to a later date since it was impossible to render a decision by the statutory due date.⁶

Counsel and I discussed beginning the due process hearing in May of 2023, which allowed the parties to complete any contemplated discovery and have subpoenas issued for the hearing. There were no mutually convenient dates to begin the hearing until the week of May 20, 2023.

Therefore, the hearing began on May 23, 2023 and was scheduled to end after seven non-consecutive days on June 8, 2023. Subsequent to my Prehearing Conference Report and

⁴ The thirty-day resolution period ended on December 28, 2022.

⁵ The decision was due by the 45th day from December 29, 2022 (the day after the resolution period ended), or by Sunday, February 12, 2023. OAH policy requires issuing the decision on the business day before Saturday or Sunday, which was Friday, February 10, 2023.

⁶ Ashley VanCleaf, Esquire represented the Parent and Andrew Nussbaum, Esquire represented the HCPS at the prehearing conference.

Order issued on February 17, 2023, I learned I had a travel schedule for the OAH that conflicted with the last hearing date of June 8, 2023. Therefore, after communication with counsel and with their consent, a new last day was scheduled for June 20, 2023, which was held, closing the record.

During the hearing, the Parent was represented by Ashley VanCleaf, Esquire. The Student did not appear. Andrew Nussbaum, Esquire, represented the HCPS.

Accordingly, for the reasons discussed above, I extended the regulatory timeframe after joint motion of counsel agreeing to the hearing schedule. By request of the parties, the decision is due thirty days from the close of the record on June 20, 2023, or by Thursday, July 20, 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. Md. Code Ann., Educ. § 8-413(e)(1); Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Did the HCPS fail to provide the Student with a FAPE based on her unique circumstances during the 2019-2020, 2020-2021 and 2021-2022 school years, resulting in the Student not making sufficient progress?
2. Did the HCPS fail to evaluate the Student in all areas of suspected disabilities?
3. Did the HCPS fail to identify the Student as one having a disability requiring special education and related services resulting in a lack of progress?

4. If the HCPS failed to provide the Student a FAPE, then what is the appropriate remedy?
5. Did the HCPS confer upon the Student a regular high school diploma thus ending its obligation to provide a FAPE to the Student?⁷

SUMMARY OF THE EVIDENCE

Exhibits

I have attached a complete Exhibit List as an Appendix.

Testimony

The Parent testified and offered the testimony of the following witnesses:

- [REDACTED], Ph.D. – Qualified as an expert in the field of dyslexia, dysgraphia, dyscalculia,⁸ psychological and educational assessments, children’s mental health and autism.
- [REDACTED] – Qualified as an expert in the field of elementary, middle and high school math and general education. She is the Parent’s sister. The Student is her niece.
- [REDACTED], [REDACTED] – Qualified as an expert in the field of special education, general education and special education administration.
- [REDACTED] – Qualified as an expert in the field of special education, general education and specialized reading instruction.
- [REDACTED] – The HCPS counselor at the [REDACTED] High School ([REDACTED] HS).
- [REDACTED], Ph.D. – [REDACTED] HS psychologist.

⁷ Neither party raised the high school diploma at the prehearing conference as being an issue for this case. The evidence at the hearing disclosed the conferring of the regular high school diploma to the Student. The HCPS, in closing, argued that the issues in this proceeding are moot due to the conferring to the Student of the regular high school diploma.

⁸ “Dyslexia is a learning disorder that involves difficulty reading due to problems identifying speech sounds and learning how they relate to letters and words (decoding). Also called a reading disability, dyslexia is a result of individual differences in areas of the brain that process language.” . . . “A learning disorder in writing, also called dysgraphia, may cause the following: Slow handwriting that takes a lot of work.” . . . “A learning disorder in math, also called dyscalculia, may cause problems with the following skills: Understanding how numbers work and relate to each other.” *Dyslexia*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/dyslexia/symptoms-causes/syc-20353552> (last visited, July 1, 2023).

The following witnesses testified on behalf of the HCPS:

- [REDACTED] – Qualified as an expert in the field of special education transition services for public schools and administration supervision.
- Patricia Gunshore – Special Education Coordinator of Compliance, Nonpublic Services, and Family Support.
- Kelly Russo – Coordinator of Special Education Compliance and Dispute Resolution.
- [REDACTED] – Qualified as an expert in the field of special education.
- [REDACTED], Ph.D. – Qualified as an expert in the field of school psychology.
- [REDACTED] – Qualified as an expert in the field of speech language pathology.
- [REDACTED] – Qualified as an expert in the field of school counseling.
- [REDACTED] – Transition Teacher.
- [REDACTED] – Social Studies Teacher.
- [REDACTED] – Qualified as an expert in the field of teaching mathematics.

FINDINGS OF FACT

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

The Student's Background

1. The Student is nineteen years old. She lives with her adoptive mother, who is the Parent herein, her nineteen-year-old biological brother and her ten-year-old half-sister.

2. The Parent is an [REDACTED]. She was the Student's stepmother, having married the Student's biological father in or about 2010 when the Student was six years old.

3. The Student's biological mother died on [REDACTED], 2008 from [REDACTED] [REDACTED], [REDACTED] days after the Student's fourth birthday. Her biological father died in [REDACTED]

2012 after [REDACTED] while [REDACTED], when the Student was eight years old.

4. The Student attended private schools in Maryland up to and through the ninth grade, namely [REDACTED] school (fourth through fifth grade), [REDACTED] (sixth, seventh and eighth grades) and [REDACTED] (ninth grade).

Student Evaluations before entering the HCPS

5. The Student was professionally evaluated prior to entering the HCPS, as follows:

August 5 and 6, 2014: The Student was evaluated by [REDACTED], [REDACTED]. The Student was ten years old at the time of the evaluation and a rising fifth grader at the [REDACTED]. She was examined by [REDACTED], M.S. The purpose of the evaluation was to achieve a better understanding of the Student's speech and language skills and what areas were of concern for treatment and remediation. After diagnostic testing and evaluation, Ms. [REDACTED] recommended, among other things, that the Student receive individualized speech-language intervention one hour per week with a certified speech-language pathologist and to consider seeking a consultation for a possible diagnosis of ADHD.⁹ (Parent Ex. 2.)

March 12, 2015: The Student was evaluated by the [REDACTED]. The Student was eleven years old at the time of the evaluation and a fifth grader at the [REDACTED]. She was examined by [REDACTED], M.Ed. The purpose of the evaluation was to assess the Student's reading skills. After the diagnostic testing and evaluation, Ms. [REDACTED] recommended, among other things, that the Student receive reading fluency training, tutorial intervention, and have new information presented in multisensory formats. (Parent Ex. 3.)

April 2, 2015: The Student was evaluated by [REDACTED]. The Student was eleven years old at the time of the evaluation and in the fifth grade at [REDACTED]. She was examined by [REDACTED], Ph.D. The purpose of the evaluation was to assess her level and style of cognitive and educational functioning. After diagnostic testing and evaluation, Dr. [REDACTED], recommended, among other things, a host of learning accommodations and diagnosed the Student as meeting criteria for a reading disorder, mixed receptive-expressive language disorder, learning disorder, not other specified, and ADHD, inattentive type. (Parent Ex. 4.) [REDACTED], also evaluated the Student on April 9 and 28, 2015, where, after additional diagnostic testing, numerous strategies and interventions designed to help the Student's academic success were recommended. (Parent Ex. 4, p. 15.)

⁹ Attention Deficit Hyperactivity Disorder

December 22, 2016: The Student was evaluated by the [REDACTED] [REDACTED] ([REDACTED]). The Student was twelve years old at the time of the evaluation. She was examined by [REDACTED], M.A. The purpose of the evaluation was to receive a new speech and language evaluation due to the Parent having concerns regarding the Student's understanding of language, being understood, reading, writing and general academic performance. In summary, [REDACTED] determined after evaluation the presence of average receptive and expressive language abilities compared to chronological age and a reading disorder characterized by deficits in reading comprehension. It found that the Student had a specific reading disorder characterized by below average comprehension skills compared to her chronological age; and average receptive and expressive language skills compared to her chronological age. [REDACTED] recommended a host of learning habilitative services. (Parent Ex. 5.)

June 15, 2017: The Student was evaluated by the [REDACTED] Neuropsychology Department. The Student was thirteen years old at the time of the evaluation. She was examined by [REDACTED], Ph.D. The purpose of the evaluation was to provide the Parent with better understanding as to how the Student thinks so that the Parent could help her become more successful, confident and happy. In summary, Dr. [REDACTED] determined after evaluation and diagnostic testing, that the Student continues to suffer from ADHD, predominantly inattentive type, and other specified anxiety disorders. She recommended, among other things, a continuation of mental health services, to include medication management and behavior therapy and provide accommodations for ADHD. (Parent Ex. 6.)

November 30, 2017: The Student was re-evaluated by the [REDACTED] Speech and Language Pathology. The Student was thirteen years old at the time of the re-evaluation. She was examined by [REDACTED], M.S. The purpose of the re-evaluation was to provide the Parent with a speech-language evaluation secondary to concerns with receptive-expressive language and reading comprehension skills. In summary, [REDACTED] determined after evaluation and diagnostic testing, that the Student suffers from mixed receptive-expressive language disorder, with respect to chronological age and Dysarthria, a neuromotor speech sound production disorder and reading disorder, unspecified. She recommended, among other things, additional evaluations or treatment services and speech and language interventions for sixty minutes weekly. (Parent Ex. 7.)

Enrolling into the HCPS

6. On June 24, 2019, the Student enrolled in the HCPS for the 2019-2020 school year, entering the tenth grade at the [REDACTED] HS. She took Algebra I during the summer earning the grade of C, and began the tenth grade in August 2019.

7. Beginning March 2020, the Student, along with all students, were taught through virtual instruction using online video platforms due to the COVID-19 pandemic.

8. During the COVID-19 virtual learning period, the HCPS, as policy, did not give the students midterm exams or final exams for their courses. The HCPS students were assessed with Pass or Incomplete grades during the COVID-19 virtual learning period. A Pass was earned if the student completed fifty percent of the classwork. The Pass was considered an A grade and calculated within the student's GPA.

Student Evaluations after Enrolling into the HCPS

9. The Student was professionally evaluated and/or assessed after entering the HCPS, as follows:

November 10 and 19, 2021: The Student was evaluated by [REDACTED], Psy. D, of the [REDACTED]. The Student was seventeen years old at the time of the evaluation. The purpose of the evaluation was to provide a neuropsychological evaluation at the Parent's request. In summary, Dr. [REDACTED] determined after evaluation and diagnostic testing, that the Student's strengths and solid skills were in verbal comprehension, expressive and receptive language, verbal learning and memory, auditory working memory and visual spatial reasoning. Her cognitive vulnerabilities were verbal formulation/organization and word retrieval, processing speed (work production speed, output), visual spatial analysis (part-to-whole or whole-to-part integration, visual mentalization and manipulation), and attention and executive functioning. Dr. [REDACTED] opined, among other things, that "the amount of support [the Student] has received both in school and at home has been insufficient to accommodate her numerous neuropsychological vulnerabilities and she is quite unprepared for life after high school." (Parent Ex. 17, p. 9.) According to Dr. [REDACTED], the Student's performance on reading, writing and math academic achievement tests were, for the most part, solidly average. Dr. [REDACTED] opined that "[d]espite her previous diagnosis of learning disorder NOS,¹⁰ she has made significant academic gains due to the extensive interventions (e.g., tutoring, executive functioning, coaching, speech and language therapy, etc.) she has received over the years. She also did well on subtests tapping her phonological processing . . . She also demonstrated solid writing skills and her sentences were grammatically sound, correctly punctuated and sufficiently detailed. The [Student's] performance on academic math subtests indicates that, in addition to having average range quantitative reasoning abilities, she can translate that reasoning to paper-and-pencil measures of computational skill. That said, her attention disorder increases her vulnerability to making inattentive errors (observed during testing) as solving math problems requires sustained attention, working memory and self-monitoring. . . ." (Parent Ex. 17, pp. 9-10.)

¹⁰ Not Otherwise Specified.

Dr. [REDACTED] further opined that “[a]t the same time, [the Student] demonstrated academic weaknesses that, along with her other vulnerabilities . . . make various aspects of school and learning difficult for her.” (Parent Ex. 17, p. 10.) Dr. [REDACTED] found that the Student has “difficulty with emotion regulation and social communication, which makes it more challenging for her to navigate the social world.” (Parent Ex. 17, p. 10.) According to Dr. [REDACTED], her social difficulties are consistent with an autism spectrum disorder.

Dr. [REDACTED] further opined that the Student continues to meet the criteria for a generalized anxiety disorder and that she has a highly sensitive and reactive stress response (fight or flight).

Dr. [REDACTED] diagnosed the Student with Autism Spectrum Disorder, ADHD (combined presentation), generalized anxiety disorder, major depressive disorder (by history) and mixed expressive and receptive language disorder (by history). Dr. [REDACTED] recommended, among other things, that the Student receive supports and accommodations consistent with an IEP for special education services. According to Dr. [REDACTED], the IEP should provide that the Student remain in high school for an additional year and include annual goals related to direct instruction in independent living, pre-vocational skill development, and attention and executive functioning.

December 1, 2021: The Student was evaluated by [REDACTED], Speech Language Pathologist for the HCPS. The Student was seventeen years old at the time of the evaluation. The purpose of the evaluation was to determine eligibility for special education and related services. In summary, Ms. [REDACTED] concluded that the Student presented with high average receptive and expressive language skills, with above average ability to formulate age appropriate and relevant sentences. According to Ms. [REDACTED], there were no concerns regarding receptive and expressive language skills and additional assessments outside of a full comprehensive language battery were not warranted. (Parent Ex. 19.)

April 15, 2022: The Student was evaluated by [REDACTED], Ph.D., of the HCPS for a Psychological Assessment. The Student was eighteen years old at the time of the assessment. The purpose of the assessment was to determine if the Student qualified for special education services. In summary, among other things, Dr. [REDACTED] recommended a list of task encouragements that would assist the Student’s learning environment. (Parent Ex. 25, p. 11.¹¹)

¹¹ The Parent exhibit number 25 consisted of six Bates Stamped pages. The evaluation consisted of eleven pages. Pages two, four, six, eight, and ten were missing. It appeared the exhibit was copied double side of each page. The even pages were not transmitted with the exhibit.

The Student's ■ HS Career

10. The Parent requested the ■ HS to allow the Student to attend an additional year of high school because she believed the Student did not fulfill all of the graduation requirements and should have been specially accommodated for learning disabilities.

11. The Student did not want to repeat another year of high school when she learned she could graduate with a regular diploma.

12. On February 11, 2021, the ■ HS, through Mr. ■■■■■, school counselor, advised the Parent that based on the Student's earned credits, the Student would not have to repeat her senior school year, but would need to repeat one class. (Parent Ex. 9, p. 1.)

13. On May 24, 2021, the Parent emailed Mr. ■■■■■ and requested the ■ HS provide special education accommodations to the Student, due to her having diagnosed learning disabilities. Mr. ■■■■■ responded and forwarded the Parent's request to Ms. ■■■■■, the ■ HS Special Education Team Leader. (Parent Ex. 9, p. 11.)

14. On May 24, 2021, the Parent formally made a referral to the ■ HS for special education accommodations for the Student. (Parent Ex. 9, p. 24.)

15. The ■ HS did not convene an IEP team meeting for the Student.

16. On August 19, 2021, the Parent emailed Mr. ■■■■■ to follow up on plans to evaluate the Student for an IEP.

17. On August 23, 2021, Mr. ■■■■■ emailed the Parent to advise that he would follow up with the Special Education team leader regarding an IEP for the Student.

18. On September 24, 2021, the Student's math teacher reported to the Parent that the Student was not completing her homework assignments which was contributing to her D average grade for the class. (Parent Ex. 9, p. 9.)

19. On October 19, 2021, the Parent emailed Mr. [REDACTED] to again request the Student be reevaluated for accommodations for her diagnosed learning disabilities and that she be provided with special education accommodations. Mr. [REDACTED] emailed the Parent and advised her that he forwarded her request for accommodations to the [REDACTED] HS teacher in charge of special education. He stated he would “follow up to make sure [her request] is processed.” (Parent Ex. 9, p. 12.)

20. On October 21, 2021, the [REDACTED] HS through Ms. [REDACTED], scheduled an initial referral IEP meeting for November 4, 2021 to be conducted virtually. (Parent Ex. 9, p. 13.)

21. On November 4, 2021, the [REDACTED] HS conducted an IEP team meeting concerning the Student. (Parent Ex. 13.) Present at the IEP team meeting were the following persons:

[REDACTED], Administrator Designee
[REDACTED], Special Educator
The Parent
[REDACTED], Ph.D.
[REDACTED], School Counselor
[REDACTED], Tutor/Advocate

22. The November 4, 2021 IEP team determined that they needed updated assessments to assist with determining eligibility for special education accommodations. The team decided to reconvene the IEP meeting to review the updated assessments and if appropriate, determine the Student’s eligibility for special education and related services.

23. On February 21, 2022, the HCPS conducted an IEP team meeting concerning the Student. (Parent Ex. 22.) Present at the meeting were the following persons:

[REDACTED], Special Educator and Team Leader
[REDACTED], General Educator
The Parent
[REDACTED], Ph.D., School Psychologist
[REDACTED], School Counselor

██████████, Speech/Language Pathologist
██████████, Tutor/Advocate
██████████, Educator/Aunt of the Student¹²

24. The February 21, 2022 IEP team determined that the Student did not qualify for special education services because there was no data indicating the Student performed below grade level as a result of her identified disability.

25. On May 27, 2022, the IEP team met and determined to reschedule the IEP team meeting for June 1, 2022. Present at the May 27, 2022 IEP team meeting were the following persons:

██████████, Special Educator and Team Leader
██████████, General Educator
The Parent
██████████, School Counselor
██████████, Ph.D., Psychologist
██████████, ██████████, Special Education
██████████, Speech/Language Pathologist
Ashley VanCleeef, Esquire, Attorney
██████████, Tutor/Educational Assistant/Advocate

26. The general educator, Ms. ██████████ was excused to leave the May 27, 2022 IEP team meeting before it ended due to her professional classroom obligations that day. The IEP team, upon the Parent's urging, did not want to continue the meeting without a general educator present.

27. On June 1, 2022, the IEP team met and determined that pursuant to all of the data available, the Student performed on grade level and demonstrated mastery of the curriculum, despite not receiving any specialized instruction. The IEP team further determined that the Student also demonstrated mastery of the curriculum in all her classes and she met all graduation

¹² The ██████████ HS provided the Student with a Section 504 Plan (Plan) effective March 8, 2022. The ██████████ HS first determined the Student ineligible for a Plan in September 2019. The Plan is not an issue for me to consider.

requirements for assessments and course credits. (HCPS Ex. 8.) Present at the June 1, 2022 IEP team meeting were the following persons:

- ██████████, Special Educator and Team Leader
- ██████████, General Educator
- The Parent
- ██████████, School Counselor
- ██████████, Ph.D., Psychologist
- ██████████, Special Education
- ██████████, General Educator
- ██████████, Administrator
- ██████████, Tutor/Educational Assistant/Advocate

The Student's Grades from the ████████ HS

28. The HCPS passing grade for high school courses is a D, which is the grade above E or a failed grade.

29. The Student earned a 3.36 grade point average (GPA) for the 2019-2020 school year. She passed all of her classes. She earned a 2.00 GPA for the 2020-2021 school year. She did not pass Algebra II. All other classes she passed for the 2020-2021 school year. She earned a 2.22 GPA for the 2021-2022 school year. She passed all of her classes.

30. The Student's grades earned from the ████████ HS are as follows:

Summer School 2018-2019 (before entering 10th Grade)

Course and Grade:

Algebra I

1 st Quarter	C
2 nd Quarter	B
Exam	D
3 rd Quarter	D
4 th Quarter	D
Exam	E
Final Grade	C

10th Grade, First Semester, Honor Roll; Weighted GPA = 3.29

Course and Grades:

American Government	B
English	B
Tutorial Period	A
Geometry	B

Earth and Space			
Systems Science	C		
Health	A		
Spanish	A		
10 th Grade, Second Semester; Weighted GPA = 3.43			
Course and Grades:			
American Government	B	Exam	D
English	B	Exam	C
Tutorial Period	A	Exam	A
Geometry	B	Exam	E
Earth and Space			
Systems Science	B	Exam	D
Health	A	Exam	A
Spanish	A	Exam	B
10 th Grade, Third Semester; Weighted GPA = 2.86			
Course and Grades:			
American Government	B		
English	B		
Tutorial Period	A		
Geometry	C		
Earth and Space			
Systems Science:	C		
Health	NA		
Lifetime Fit	B		
Spanish	B		
10 th Grade; Weighted GPA = 2.86			
Course and Grades:			
American Government	P		
English	P		
Tutorial Period	P		
Geometry	P		
Earth and Space			
Systems Science	P		
Health	N/A		
Lifetime Fit	NA		
Spanish	NA		
10 th Grade, Final Grade; Weighted GPA = 3.36			
Course and Grades:			
American Government	B		
English	B		
Tutorial Period	A		
Geometry	B		
Earth and Space			
Systems Science	B		
Health	A		

Lifetime Fit	B
Spanish	A

11th Grade, First Semester; Weighted GPA = 1.50

Course and Grades:

Theatre Arts	B
Algebra II	E
Marine Science	C
English 11	D

11th Grade, Second Semester; Weighted GPA = 1.25

Course and Grades:

Theatre Arts	C
Algebra II	E
Marine Science	C
English 11	D

11th Grade, Third Semester; Weighted GPA = 2.00

Course and Grades:

Theatre Arts	NA
Modern World History	B
Algebra II	NA
Spanish	E
Advanced Physical Science	C
Marine Science	NA
English 11	NA
United States History	B

11th Grade, Fourth Semester; Weighted GPA = 2.38 (No Final Exam Grades)

Course and Grades:

Theatre Arts	NA
Modern World History	C
Algebra II	NA
Spanish II; Honors	C
Advanced Physical Science	B
Marine Science	NA
English 11	NA
United States History	C

11th Grade, Final Grade; Weighted GPA = 2.00

Course and Grades:

Theatre Arts	B
Modern World History	B
Algebra II	E
Spanish II; Honors	D

Advanced Physical

Science	B
Marine Science	C
English 11	D
United States History	B

12th Grade, First Semester; Weighted GPA = 2.57

Course and Grades:

Algebra II	C
Theatre Company GT	A
Psychology	C
English 12	C
Astronomy	D
SAT Prep Course	B
Foundations of Technology	B

12th Grade, Second Semester; Weighted GPA = 2.43

Course and Grades:

Algebra II	D
Theatre Company GT	A
Psychology	D
English 12	B
Astronomy	C
SAT Prep Course	C
Foundations of Technology	B

12th Grade, Third Semester; Weighted GPA = 2.29

Course and Grades:

Algebra II	E
Theatre Company GT	A
Psychology	NA
Sociology	C
English 12	B
Astronomy	D
SAT Prep Course	NA
Leadership/Student Service	A
Foundations of Technology	D

12th Grade, Fourth Semester; Weighted GPA = 2.71

Course and Grades:

Algebra II	D	Exam
Theatre Company GT	A	A
Psychology	NA	NA
Sociology	B	C
English 12	C	B

Astronomy	C	D
SAT Prep Course	NA	NA
Leadership/Student Service	A	NA
Foundations of Technology	C	B

12th Grade, Final Grade; Weighted GPA = 2.57

Course and Grades:

Algebra II	D
Theatre Company GT	A
Psychology	C
Sociology	B
English 12	B
Astronomy	D
SAT Prep Course	B
Leadership/Student Service	A
Foundations of Technology	C

The Student’s Graduation from the ■ HS

31. The June 1, 2022 IEP team decided the Student did not meet eligibility criteria for special education. The IEP team determined that the Student does have clinical diagnoses and the presence of a disorder or condition, but the IEP team did not identify an educational impact because the Student met all grade level curriculum standards without receiving any specialized instruction and met all MSDE and the HCPS graduation requirements.

32. On June 17, 2022, the Student, having fulfilled all requirements, graduated from the ■ HS and earned a regular high school diploma. (Parent Ex. 41.)

33. Neither the Parent nor the Student formally objected to the Student graduating with the Class of 2022 and being conferred a regular high school diploma from the HCPS.

DISCUSSION

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; Md. Code Ann., Educ. §§ 8-401 through 8-417; 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* Md. Code Ann., § 8-403(a).

A FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 999 (2017); *Bd. of Educ. of the Hendrik Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181-82 (1982). COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of the student and the special education and related services to be provided to meet those needs. The goals, objectives, activities, and materials must be adapted to the needs, interests, and abilities of each student. 20 U.S.C.A. § 1414(d).

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

While *Rowley*^[13] declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

Andrew F., 137 S. Ct. at 998-99.

Notwithstanding the above language in *Andrew F.*, providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy” or all the services necessary to maximize educational benefits. *Hessler v. State Bd. of Educ. of Md.*, 700 F.2d 134, 139 (4th Cir. 1983) (*citing Rowley*, 458 U.S. at 176). Moreover, “once a FAPE is offered, the school district need not offer additional educational services.” *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002).

¹³ *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

The Parent asserts that the HCPS denied the Student a FAPE based on her unique circumstances during the 2019-2020, 2020-2021 and 2021-2022 school years, all while attending the ■ HS. The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). 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). Accordingly, as the Parent is seeking relief on behalf of the Student, she bears the burden to prove by a preponderance of the evidence that the HCPS’ determination regarding the Student’s eligibility for special education services was incorrect or inconsistent with the law. For the reasons that follow, I conclude that she has failed to meet that burden.

High School Graduation

On June 17, 2022, the HCPS conferred upon the Student her regular high school diploma, graduating from the ■ HS. The Parent filed her due process complaint on November 28, 2022.

In Maryland, to be awarded a regular high school diploma, a student shall generally meet the following requirements:

- (1) Complete the enrollment, credit, and service requirements as specified in this chapter;
- (2) Complete local school system requirements; and
- (3) Meet the graduation assessment requirements in the following ways:
 - (a) Achieve a passing score on the Maryland Comprehensive Assessments for Algebra I, science, government, and English 10;
 - (b) Achieve a combined score(s) as established by the Department on the Maryland Comprehensive Assessments; or
 - (c) Achieve a passing score on an approved alternative assessment as established by the Department, such as Maryland Comprehensive Assessment for Algebra II, Advanced Placement examinations, SAT, ACT, or International Baccalaureate examinations.

COMAR 13A.03.02.09B.

In Maryland, to meet the community service requirements to graduate with a high school diploma, a student is required to complete one of the following:

- A. Seventy-five hours of student service that includes preparation, action, and reflection components and that, at the discretion of the local school system, may begin during the middle grades; or
- B. A locally designed program in student service that has been approved by the State Superintendent of Schools.

COMAR 13A.03.02.05.

Finally, to meet Maryland's high school assessment requirements and be awarded a regular high school diploma, all students, who take high school level courses, must take the Maryland Comprehensive Assessment (MCA) for Algebra, Science, English, and Government after the student completes the required course or courses. COMAR 13A.03.02.06B. A school system must state on the student's performance record card only that the student has or has not met all assessment requirements. COMAR 13A.03.02.06E (1). "Met all assessment requirements" means achieving a passing score on all MCAs or meeting the requirements of the combined score option. COMAR 13A.03.02.06E(2).

An exception applied for the 2020-2021 and 2021-2022 school years, which provided that a student met the assessment requirement for Algebra I, English 10, Science, and Government if:

- (1) The student has passed the Algebra I course, English 10 course, science course, and government course; and
- (2) The student takes the Algebra I, English 10, science, and government Maryland Comprehensive Assessment aligned with the course.

COMAR 13A.03.02.06F.¹⁴

¹⁴ An exception to the MCA passing score requirement is also provided in COMAR 13A.03.02.09C(1), which provides that, for the 2020-2021 and 2021-2022 school years, students taking the Algebra I, English 10, science, and government MCA will meet the graduation assessment requirement for Algebra I, English 10, science, and government.

The IDEA and High School Graduation

Under the IDEA, generally, the obligation to make a FAPE available to all children with disabilities *does not apply to children with disabilities who have graduated from high school with a regular high school diploma.* 34 C.F.R. § 300.102(a)(3)(i), (emphasis added). An exception exists for children with disabilities who have graduated from high school but *have not been* awarded a regular high school diploma. *Id.* at (3)(ii), (emphasis added). Case law illuminates the effect that graduation with a regular high school diploma may have on due process claims and a hearing.

In *T. S. v. Independent School District No. 54*, the Court held that whether it had jurisdiction to consider T.S.'s claims was a close question since the claims might be construed as seeking compensatory relief. *T. S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1096 (10th Cir. 2001). The Court, however, held that the substantive basis for T.S.'s requests was so thin, and a possible challenge to his graduation so elusive, that the case was moot. *Id.* To understand the decision, it is important to understand the factual scenario the Court considered.

T.S. originally filed a due process complaint in his senior year of high school alleging that his school denied him a FAPE. After a hearing, the complaint was denied. In April of his senior year, an IEP meeting was held, and T.S. argued that it did not focus on transition services for post-graduation. On May 19, 1999, the last day of school, T.S. delivered a request for a due process hearing to the school district. T.S. complained that his IEP was insufficient, and the April IEP meeting was improperly conducted. Subsequently, the school determined that T.S. successfully completed all his academic requirements to graduate. The school district concluded that T.S. had graduated before the request for a due process hearing was received and was due no further relief under the IDEA. T.S. appealed the decision to the federal district court, which concluded that the

administrative decision to deny T.S.'s request for a due process hearing was proper. T.S. appealed that decision to the United States Court of Appeals for the Tenth Circuit (the Court).

To determine if the Court had jurisdiction to hear the case, it considered two legal concepts, which it succinctly stated as:

If a student has graduated and does not contest his graduation, the case is moot. Once a student has graduated, he is no longer entitled to a FAPE; thus any claim that a FAPE was deficient becomes moot upon graduation. This rule applies, of course, only where a student does not contest his graduation, and where he is only **seeking prospective** – rather than compensatory relief.

Id. at 1092 (emphasis added) (internal citations omitted).

It is important to note that T.S. filed his due process complaint on the day of graduation. The Court was uncertain if T.S. had challenged his graduation by the timing of the due process complaint. Therefore, the Court discussed the claims of T.S., as if he sought to challenge graduation from high school and was seeking compensatory education services. *Id.* at 1092. As to whether T.S. was challenging his graduation, the Court observed that:

For a claim based on deprivation of a due process hearing and/or other procedures, to be cognizable, it must be linked with a consequent loss of substantive benefits. *Here, these deprivations must involve loss of qualification for graduation.* This loss would import defects in the educational program such that T.S. had yet to meet certain requirements for graduation from the district. Thus, T.S. would have to argue that his graduation was invalid. It is difficult to find any such contentions in T.S.'s submissions on this appeal.

Id. at 1093 (emphasis provided).

Ultimately, the Court concluded that *T.S.* did not directly challenge his graduation and without a substantive deprivation, any procedural claims were meritless and provided no basis for compensatory relief.

Otherwise, the Court precisely stated that “once a student has graduated, he is no longer entitled to a FAPE; thus any claim that a FAPE was deficient becomes moot upon graduation.” *Id.* at 1092. The Court explained that “[ha]d T.S. contested his graduation, or shown entitlement to

some post-graduation services, the timing issue might have been sticky.” *Id.* at 1096. The Court observed that the request for a due process hearing came on the day of T.S.’s graduation and that “[t]he school district cites^[15] clearly established law that its obligations to T.S. ceased upon graduation.” *Id.* “The obligation to make FAPE available to all children with disabilities does not apply with respect to ... [s]tudents with disabilities who have graduated from high school with a regular high school diploma.” *Id.* Thus, the Court held, if T.S. had properly graduated, the hearing officer would not have had jurisdiction over the IDEA claims, and T.S.’s case was properly dismissed. *Id.*

In *Fisher v. Friendship Public Charter School*, 2012 U.S. Dist. LEXIS 59510 (D.C. Cir. 2012), the District Court for the District of Columbia held that upon graduating from high school, a student is not entitled to FAPE and any claims that a FAPE was deficient become moot. *Id.*, at 14. The *Fisher* court acknowledged that it had no guidance from its own Circuit and looked to the Tenth Circuit’s holdings in *Mosley*¹⁶ and *T.S.* as well as the Seventh Circuit’s holding in *Nathan R.*¹⁷ to conclude “[w]e now hold the issue of whether the School was obliged to provide special education services to Nathan during his expulsion is moot because he has graduated from high school.” The *Fisher* court observed that under the IDEA, any award of compensatory education would have no effect on either party. Thus, the *Fisher* court reasoned, graduation rendered the Student’s pre-graduation¹⁸ due process complaint moot and it dismissed the appeal. *Fisher*, at 14. *Fisher* differs from *T.S.* in that in *Fisher*, the court held that a

¹⁵ The school cited, 34 C.F.R. § 300.122(a)(3)(i), which has been recodified as 34 C.F.R. § 300.102(a)(3)(i).

¹⁶ *Mosley v. Bd. of Educ. of Albuquerque Pub. Schs.*, 483 F.3d 689, 693 (10th Cir. 2007).

¹⁷ *Bd. of Educ. of Oak Park v. Nathan R., ex rel. Richard R.*, 199 F.3d 377 (7th Cir. 2000).

¹⁸ The Parent argued that because she filed the Due Process Complaint before the Student graduated, the Complaint survived graduation and must not be dismissed. The Parent cited no authority on this point other than “the IDEA.” *T.S.* is instructive. It elaborated on the timing of the filing of the complaint. “Much has been made of the timing of T.S.’s final due process hearing request. Had T.S. contested his graduation, or shown some entitlement to some post-graduation services, the timing issue might have been sticky. The request for a due process hearing came on the day of T.S.’s graduation. . . . The request for a due process hearing was arguably made after T.S. had completed his educational program, and was thus entitled to no further services. . . . The high school IDEA obligations cease once the student has completed the general graduation requirements. . . . In any event, the question of the specific point in time at which the due process hearing request became effective is immaterial.” 265 F.3d at 1096.

legitimate graduation rendered a due process complaint moot, even if the complaint sought compensatory damages.

When a school district intends to graduate a special education student before the student reaches the age of twenty-one, it must give prior written notice to the student's parents regarding this change in educational placement. 20 U.S.C. § 1415(b)(3), 34 C.F.R. § 300.102(a)(3)(iii). The student's parents may then file a "complaint" with the school, contesting the graduation. *See id.* § 1415(b)(6)(A). The Parent in the instant case did not at any time assert that the HCPS failed to comply with the graduation notice requirement, and she filed no complaint contesting graduation.

T.S., discussed above, provides a gateway through which a complaining parent can make an assertion that a due process complaint is not moot even if the student has already graduated. *T.S.* requires both a successful challenge to the graduation, and a request for relief that is compensatory,¹⁹ not prospective,²⁰ in nature. A parent or student seeking relief despite graduation may also find some support in *Gorski*, which held that "legitimate graduation" means the student was not graduated through "social promotion" and that the school did not use testing procedures that made it impossible for a handicapped child to fail. *Gorski*, 1988 U.S. Dist. LEXIS 18210, at 9-10.

Was there a substantive deprivation of rights resulting from the HCPS procedural defect?

The HCPS does not dispute that the ■■■HS's special education team failed to schedule an IEP meeting within the required statutory period. The procedures at 34 C.F.R. § 300.301(c)(1)

¹⁹ When fashioning equitable relief for a denial of a FAPE, the hearing examiner has broad discretion. *Sch. Comm of Burlington v. Dep't of Educ*, 471 U.S. 359, 370-71 (1985). Compensatory education is an equitable remedy that the court may award in crafting appropriate relief. *See Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994); *Reid v. District of Columbia*, 401 F.3d 516, 523-524 (D.C. Cir. 2005). It is available to remedy an educational deficit created by a school system's failure to provide a student with a FAPE over a given period of time. *G v. Fort Bragg Indep. Sch.*, 343 F.3d 295, 309 (4th Cir. 2003).

²⁰ "1. Effective or operative in the future <prospective application of the new statute>. Cf. retroactive. 2. Anticipated or expected; likely to come about. . . ." Black's Law Dictionary (11th ed. 2019).

and COMAR 13A.05.01.06(A)(1) require procedural timelines for completing assessments and determining eligibility within 60 days of consent or 90 days of receiving the Parent's referral. Here, the Parent made her first referral on May 24, 2021. The ■ HS did not convene the first IEP meeting until November 4, 2021, well beyond ninety days of receiving the May 24, 2021 referral.

In Maryland, COMAR 13A.05.01.04 outlines the procedures required when a child is suspected of having an educational disability and provides that a teacher or a parent of a student may make a referral for assessment of a suspected disability. The referral must be made in writing. The IEP team then completes an initial evaluation of the student within sixty days of parental consent for assessments and ninety days of receiving written referral. COMAR 13A.05.01.06A. In this case, the HCPS does not meet any exception requirements to the timeline for completion of the initial evaluation. The HCPS admits that it violated the procedural timeline. For reasons stated further, I find The HCPS committed a procedural violation but not a substantive violation.

This issue was discussed by the Fourth Circuit in *T.B. v. Prince George's County Board of Education*, 897 F.3d 566 (4th Cir. 2018), *cert. denied*, 2019 U.S. LEXIS 1695 (2019). The Administrative Law Judge (ALJ) in that case concluded that the School System violated the IDEA by "failing to respond to the Parents' requests and conduct a timely evaluation." *Id.* at 572. In fact, the ALJ found that the failure to timely respond was "inexcusable." *Id.* at 573. However, as the Fourth Circuit noted: "The fact of a procedural IDEA violation does not necessarily entitle [the student] to relief, however. To obtain the compensatory education he seeks, [the student] must show that this defect in the process envisioned by the IDEA had an adverse effect on his education." *Id.*

As further noted by the Court: “In other words, a procedural violation cannot qualify an otherwise ineligible student for IDEA relief.” *Id.* In *Department of Education v. Ria L.*, 2012 U.S. Dist. LEXIS 190762, 40 (D. Hawaii 2012), the Court concluded that since the record did not support a finding that the student was eligible for autism specific services during the relevant time period, the procedural failure to evaluate her for autism could not be said to have deprived her of educational opportunities.

Here, there is no dispute that the ■ HS committed a procedural violation by conducting the initial IEP meeting beyond the time required by the regulations. For the reasons stated below, I find the procedural violation did not substantively violate the Student’s rights under the IDEA.

Is there a basis for compensatory relief?

Having graduated with a regular diploma does not automatically render the due process complaint moot if the Student is seeking compensatory relief. *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1092 (10th Cir. 2001). Here, within her due process complaint filed on November 28, 2022, the Student pled the following:

- HCPS failed to timely evaluate the Student.
- HCPS failed to evaluate the Student in all areas of suspected disabilities.
- HCPS failed to identify the Student as one with a disability requiring special education and related services.
- HCPS failed to provide the Student with appropriate special education and related services, resulting in a lack of progress.

The Student sought the remedies of finding the HCPS failing to provide her a FAPE and order the HCPS provide her with compensatory special education and related services, including reimbursement of the Parent’s expenses.

According to the Student, Courts may award compensatory services as an equitable remedy for IDEA violations based on their authority under 20 U.S.C.A. § 1415(i)(2)(C)(iii) and 34 C.F.R. § 300.516(c)(3) to grant "appropriate" relief. *See, e.g., Ferren C. v. School Dist. of*

Philadelphia, 54 IDELR 274 (3rd Cir. 2010), and *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs*, 49 IDELR 241 (10th Cir. 2008). The purpose of compensatory education is to put the student in the position she would have occupied if the district had complied with its IDEA obligations all along. *See, e.g., Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005).

Determining the Failure to Provide a FAPE

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* Md. Code Ann., Educ. § 8-403.

The IDEA defines a FAPE as special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9); *see also* Md. Code Ann., Educ. § 8-401(a)(3).

To be eligible for special education and related services under the IDEA, a student must meet the definition of a “child with a disability” as set forth in section 1401(3) and the applicable federal regulations. The statute defines “child with a disability” as a child:

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8; Md. Code Ann., Educ. § 8-401(a)(2); and COMAR 13A.05.01.03B(78). Thus, to qualify for special education under the IDEA, the student must (1) have a qualifying disability and (2) by reason thereof need special education and related services. *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 382 (5th Cir. 2007). The Student here was evaluated under the criteria for having intellectual disabilities, speech or language impairments, serious emotional disturbance and autism.

The IDEA defines special education as special designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including –

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.

20 U.S.C.A. § 1401(29). The regulations define specially designed instruction as:

Adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction – (i) [t]o address the unique needs of the child that result from the child’s disability; and (ii) [t]o ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

A child who is advancing through the grades without failing is not categorically excluded. *Id.* § 300.101. A determination that a child is eligible must be made on an individual basis by the group responsible within the child’s local educational agency (LEA) for making eligibility determinations. *Id.*

I. Child Find

The IDEA imposes an affirmative obligation known as “child find” on states, as follows:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are

identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C.A. § 1412(a)(3). The “child find” provision applies to, among others, “children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade.” 34 C.F.R. § 300.111(c)(1).

To implement its child find obligations, LEAs are further required to evaluate children to determine whether they meet the definition of “child with a disability.” 20 U.S.C.A. § 1414(a); 34 C.F.R. § 300.122. LEAs are required to conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability. 20 U.S.C.A. § 1414(a)(1)(A); 34 C.F.R. § 300.301(a). The purpose of the initial evaluation is “(I) to determine whether a child is a child with a disability . . . and (II) to determine the educational needs of such child.” 20 U.S.C.A § 1414(a)(1)(C)(i); 34 C.F.R. § 300.301(c)(2). Either a parent of a child or an LEA “may initiate a request for an initial evaluation to determine if the child is a child with a disability.” 20 U.S.C.A § 1414(a)(1)(B); 34 C.F.R. § 300.301(b).

In conducting the evaluation, the LEA shall:

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--

(i) whether the child is a child with a disability; and
(ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 U.S.C.A § 1414(b)(2); 34 C.F.R. § 300.304(b). The LEA must also ensure that the assessment includes all areas related to the suspected disability. 20 U.S.C.A § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4).

After the LEA conducts its evaluation, the IEP team, including the parents, must meet to determine whether the child is a “child with a disability” and the educational needs of the child. 20 U.S.C.A § 1414(b)(4)(A); 34 C.F.R. § 300.306(a)(1). The IEP team is required to review existing evaluation data on the child, including evaluations and information provided by the parents of the child. 20 U.S.C.A § 1414(c)(1)(A); 34 C.F.R. § 300.305(a)(1). Based on the IEP team’s review of existing evaluation data, and input from the child’s parents, the team must identify what additional data, if any, is needed to determine:

- (i) whether the child is a child with a disability . . . and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;
- (ii) the present levels of academic achievement and related developmental needs of the child;
- (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
- (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

20 U.S.C.A § 1414(c)(1)(B); 34 C.F.R. § 300.305(a)(2). The LEA shall administer such assessments and other evaluation measures as may be needed to produce the additional data identified by the IEP team. 20 U.S.C.A § 1414(c)(2); 34 C.F.R. § 300.305(c).

Failure to meet the child find obligation may constitute a procedural violation of the IDEA. *T.B., v. Prince George’s Cnty. Bd. of Educ.*, 897 F.3d 566, 572 (4th Cir. 2018) (citation omitted). But such a procedural violation “will be ‘actionable’ only ‘if [it] affected the student’s substantive rights.’” *Leggett v. D.C.*, 793 F.3d 59, 67 (D.C. Cir. 2015) (*quoting Lesesne ex rel. B.F. v. D.C.*, 447 F.3d 828, 832, 834 (D.C. Cir. 2006)).

The IEP is the “primary vehicle” through which a public agency provides a student with a FAPE. *Andrew F.*, 137 S. Ct. at 994; *see also M.S. ex rel Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009). The IEP must consider:

- (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).

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).

To comply with the IDEA, an IEP must, among other things, allow a student with a disability 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).

When a court determines by a preponderance of the evidence that a LEA has failed to provide a FAPE to a child with a disability, the court is authorized to “grant such relief as the court determines is appropriate.” *Id.* § 1415(i)(2)(C)(iii). Courts enjoy “broad discretion” in fashioning relief, and “equitable considerations are relevant” in doing so. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369, 374 (1985).

In this case, the HCPS IEP team determined the Student did not need an IEP for it to deliver a FAPE. The █ HS convened four IEP meetings, beginning November 4, 2021 (First IEP

meeting). Subsequently, IEP meetings were held on February 21, 2022 (Second IEP meeting), May 27, 2022 (Third IEP meeting) and June 1, 2022 (Fourth IEP meeting).

The First IEP meeting convened pursuant to the Parent's initial referral made on May 24, 2021. The IEP team considered suspected disabilities suggested by the Parent, listed as follows:

- Autism
- Emotional Disability
- Specific learning disability
- Speech/Language impairment

In addition, the Parent had concerns about the Student's skills in the following areas:

- Reading
- Written Expression
- Mathematics
- Attention/Learning behaviors
- Communication
- Memory
- Social/Emotional

The Parent suggested to the IEP team, among other things, that the Student needed to be in the front of her classes where teachers can see her and she can see and hear the teachers without distraction. The Parent advocated that the Student needed extended time on her tests and assignments and to have instructions explained to her in a different way for her understanding. According to the Parent, the Student needed a lot of repetition to fully understand and grasp concepts. The Parent opined that the Student needed to be held accountable for her work by her teachers and needed them to check in on her to make certain she understood what to do for each assignment. The Parent offered that the Student needed textbooks at home and books on tape/CD/online to be read to her. According to the Parent, the Student needed whatever the standard is for a child that has ADHD, anxiety, depression, expressive/receptive language disorder, generalized learning disability, generalized reading comprehension disability and slow processing speed with a very traumatic past and likely on the autism spectrum. The IEP team

determined that it needed updated assessments to assist with the eligibility determination. It was determined that the Parent would provide assessments outside of the HCPS and she would consent to assessments provided by the HCPS. The IEP team agreed to reconvene to review those assessments.

During the Second IEP meeting, the Parent disclosed, among other things, that the Student had a “difficult few months” due to a friend losing her father in ██████████ of 2021, the COVID-19 lockdowns causing her significant anxiety and her struggling with her new diagnoses of Autism. In addition, the Parent advised that the Student required significant tutoring outside of school in order to do well in her classes. The Parent believed that the Student was “passed through” her classes during the COVID-19 pandemic. The Parent advocated for the Student to receive some training in work skills and inquired about programs offered through the HCPS, such as the Community Connections and Project Search. The IEP team advised that Community Connections is not open to diploma seeking students and Project Search requires DORS²¹ and DDA²² eligibility.

Ms. ██████████ provided the Speech/Language Assessment report for the assessments administered by the HCPS in December of 2021. According to Ms. ██████████, the Student’s overall score was high and she did very well on many of the subtests.

The Parent provided the report of Dr. ██████████, where the Student was tested on November 10, 2021 and November 19, 2021. In summary, Dr. ██████████’s report diagnosed the Student with Autism Spectrum Disorder (her first diagnosis of the disorder), ADHD, Generalized Anxiety Disorder, Major Depressive Disorder and Mixed Expressive and Receptive language disorder.

Regarding the testing assessments, Dr. ██████████ summarized that the Student was in the average range for broad reading, letter work identification, passage comprehension, word attack,

²¹ Division of Rehabilitation Services.

²² Developmental Disabilities Administration.

sentence reading fluency, broad math, calculation, applied problems, math fluency, broad written language, spelling, writing samples and sentence writing fluency. She determined that the Student was in the low average range for oral reading. Dr. [REDACTED] reported she reviewed the Student's then current grades. All of the courses had grades above seventy-four percent (C grade) with the exception of Foundations of Technology, which was reported to be at twenty-eight percent, or a failing grade. Neither party called Dr. [REDACTED] to testify at the hearing.

The IEP team decided at the Second meeting that the Student did not qualify for services under the IDEA because she did not meet the eligibility criteria for an IDEA disability category. It opined that "although a disability has been identified through [the Student's] clinical diagnoses, [the Student did] not meet eligibility criteria for special education because there is no data indicating she is performing below grade level as a result of her identified disability."

During the Third IEP meeting, the IEP team reviewed the eligibility categories of Autism, Other Health Impairment due to ADHD and Emotional Disability. The Third IEP meeting report advised that during the Second IEP meeting, two assessments were reviewed, which were Ms. [REDACTED]'s Speech/Language Assessment and Dr. [REDACTED]'s Neuropsychological Evaluation. The IEP team also reviewed additional school-based data collected after the Second IEP meeting.

For the Third IEP meeting, classroom observation reports were provided by the following classes: Foundations of Technology; Astronomy; Algebra 2 and Sociology. Reported for all classes were at risk to elevated concerns in the areas of anxiety, withdrawal, social skills and leadership. The Student's Astronomy teacher, Mr. [REDACTED], reported the most concerns. His scores yielded clinically elevated scores in the areas of depression and attention.

Ms. [REDACTED], identified the Student's ratings within the average range across all areas, indicating no more concerns than her same age peers. Mr. [REDACTED] found clinical elevations

in the areas of inattention, executive functioning, and peer relations. His ratings produced at risk to clinically elevated scores on ADHD Predominantly Type and Oppositional Defiant Disorder.

Regarding the Autism Behaviors Rating Scale-Social Responsiveness, Ms. [REDACTED] (English co-teacher) and Ms. [REDACTED]'s scores fell in the normal range across all areas. Mr. [REDACTED]'s ratings fell in the mild to moderate range across most areas.

Ms. [REDACTED] reported that the Student passed her Algebra 2 class, did well at the beginning of the year but earned an E for the third quarter. According to Ms. [REDACTED], the Student's fourth quarter performance was inconsistent but she earned a D for the quarter and passed the class for the twelfth grade year. The IEP Team determined that the Student met all graduation requirements and was scheduled to graduate and earn her diploma in June 2022. Neither party called either Mr. [REDACTED] or Ms. [REDACTED] to testify at the hearing.

The IEP team did not complete its work during the Third IEP meeting because the Parent's attorney suggested that a general educator was needed during the full meeting for input and to complete the team's work in filling out information for supplementary aids and services for ADHD, Emotional Disability and Autism to determine the Student's eligibility for special education and related services.²³ The IEP team agreed to reconvene on June 1, 2022, to have a general educator present and make an eligibility determination.

During the Fourth IEP meeting, the IEP team met to reconsider the Student's eligibility for special education and related services and considered the eligibility categories of Autism, Other Health Impairment due to ADHD and Emotional Disability. Ms. [REDACTED] advised that the Student did not use her 504 accommodations in her Algebra 2 class; that she declined small group testing and she did not use extended time for assignments or assessments. The Student's overall grade was impacted because she struggled to complete and timely turn in her

²³ The general educator, Ms. [REDACTED], left the meeting early due to classroom obligations.

assignments. According to Ms. [REDACTED], the Student declined to use extra time when offered to turn in the assignments, with some items not completed and left blank. When the Student was provided with the opportunity to come back to finish assessments that had unanswered items, she did not do so.

During the IEP meeting, Ms. [REDACTED] opined that the Student does not use her accommodations because she does not understand how to do the math and when she feels overwhelmed, she shuts down. Ms. [REDACTED] further stated that the Student needed extra instruction in math, including a lot of clarification and breaking down of math problems and assignments. Ms. [REDACTED] indicated that the Student passed her Algebra 2 class, despite not having additional instruction or tutoring in math and there was no data to indicate the Student required specialized instruction in math. According to Ms. [REDACTED], the Student did well when participating in class, often volunteering during class activities. Often with hints and reminders, Ms. [REDACTED] stated that the Student demonstrated strong overall math skills and strong skills in solving equations. Ms. [REDACTED] opined that the Student understood the Algebra 2 content. Despite Ms. [REDACTED]'s opinion that the Student gets confused when problems include multiple steps and that her inconsistent homework completion and low assessment scores were due to her not understanding the material, Ms. [REDACTED] indicated that the Student was able to demonstrate mastery of the curriculum without specialized instruction.

The Parent opined that there is consistently a disconnect between the Student's performance in class and her homework completion and performance on assessments. The Parent stated that the Student always participates in class but is not able to demonstrate mastery when she has to complete things independently.

Despite the opinions of Ms. [REDACTED] and the Parent, the IEP team determined that, based on all of the data available regarding the Student's performance and grades in her Algebra 2 class,

the Student performed on grade level and demonstrated mastery of the curriculum, despite not receiving any specialized instruction. According to the IEP team, the Student also demonstrated mastery of the curriculum in all of her other classes and she met all graduation requirements for assessments and course credits.

The IEP team completed the supplementary aids and services forms based on the additional input from the Student's current teachers regarding educational impact. The IEP team determined, based on the completion of the forms, that the Student did not meet eligibility criteria for special education at that time. According to the IEP team, although the Student had clinical diagnoses and the presence of a disorder or condition noted on the supplementary aids and services forms, it did not identify an educational impact because the Student met all grade-level curriculum standards without receiving any specialized instruction and met all MSDE and HCPS graduation requirements.

The Student is Seeking Compensatory Relief

The Student, in general, is entitled to an amount of compensatory education reasonably calculated to bring her to the position that she would have occupied but for an HCPS failure to provide a FAPE. In Pennsylvania, compensatory education was defined as follows:

“[C]ompensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting ‘appropriate relief.’ ” More specifically, as the Fourth Circuit has explained, “[c]ompensatory 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.” Overlooking this equitable focus, the [student's] hour-for-hour formula in effect treats compensatory education as a form of damages—a charge on school districts equal to expenditures they should have made previously. Yet “[t]he essence of equity jurisdiction” is “to do equity and to [mold] each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.”

* * *

Rather, we hold that where there is a finding that a student is denied a FAPE and the Panel determines that an award of compensatory education is appropriate, the

student is entitled to an amount of compensatory education reasonably calculated to bring [her] to the position that [she] would have occupied but for the school district's failure to provide a FAPE. As noted by the District of Columbia Circuit, doing so may require awarding the student more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education, because (s)he has progressed appropriately despite having been denied a FAPE.

B.C. ex rel. J.C. v. Penn Manor Sch. Dist., 906 A.2d 642, 650-651 (Pa. Commw. Ct. 2006).

The Student here did not appear to testify about what compensatory educational services she may have benefitted from but for a failure to provide FAPE by the HCPS. The Parent testified that she is seeking reimbursements of \$4,750.00 for the [REDACTED]/Dr. [REDACTED] professional assessments of the Student, \$15,000.00 for reimbursement for tutoring costs for two tutors, and paying in the future \$75,000.00 to an unnamed school in [REDACTED] identified by her as a college internship program. The Parent did not provide an invoice from [REDACTED]/Dr. [REDACTED] or a cancelled check paying [REDACTED]/Dr. [REDACTED]. Neither Dr. [REDACTED] nor anyone from [REDACTED] appeared to testify as to what was paid for the assessment or owed by the Parent for the same.

On cross-examination, the Parent testified that the Student's two tutors were Ms. [REDACTED] and Ms. [REDACTED]. Ms. [REDACTED] tutored the Student in the summer of 2021, two days per week for about an hour until the end of August 2022. Ms. [REDACTED] would work with the Student on executive functioning skills, helping her with reading comprehension, teaching her how to read an excerpt and to pick out the important points or facts from the excerpt. Also, Ms. [REDACTED] would help the Student with reading comprehension and what was described as paper writing.

In addition, the Parent testified that Ms. [REDACTED], (The Parent's sister), would fill in when Ms. [REDACTED] was not available. Ms. [REDACTED] was a general education teacher and not a special educator. She advocated to the Parent that the Student should enroll in the HCPS and leave the private school system, given, in her opinion, the Student's educational needs. As "fill in" tutor, Ms. [REDACTED] would supplement Ms. [REDACTED]'s tutoring areas and would help the Student in Math

also. Neither tutor testified as to what they were paid by the Parent or owed by her for tutoring services.

Ms. [REDACTED] testified as an expert in the field of general education. Her opinions were generally about the Student needing to repeat the twelfth grade and needing unspecified compensatory educational services.

Ms. [REDACTED] testified that she provided the Student with tutoring during her eleventh grade school year or 2020-2021 and confirmed she helped the Student in math. According to Ms. [REDACTED], she would meet with the Student every two months.²⁴

The Parent did not provide invoices, receipts, cancelled checks, proposals, contracts or any other credible evidence tending to show and corroborate her testimony that the assessment was paid, the tutors were paid and a college actually exists for the purposes she stated offering services to a student for the sum of money the Parent quoted. I do not find the Parent's testimony sufficient to meet her burden of proof regarding payments for tutoring services paid or currently due; nor do I find she has met her burden of proof regarding the future costs of the college internship program she seeks enrollment of the Student. Therefore, I find the Parent has failed to meet her burden that she incurred expense for compensatory services. I also find the \$75,000.00 college internship tuition to be prospective in nature.

Ms. [REDACTED] attended the February 21, 2022 IEP meeting. She also agreed with Dr. [REDACTED]'s written assessment that the Student should have a formalized education plan, remain in high school for an additional year, and have annual goals related to direct instruction and independent living, prevocational skills, attention and executive functioning. She did not attend the November 4, 2021, May 27, 2022 or June 1, 2022 IEP meetings. She testified to offer her expert opinion as an educator that she believed that as of June 1, 2022, the Student "was in need

²⁴ Ms. [REDACTED] began formally tutoring the Student during her fourth grade year of private school, on an irregular basis about every two months, for about one hour each session.

of a specialized education program.” After reading the June 1, 2022 IEP team meeting report, she disagreed with their determination that the Student’s educational disabilities did not have an educational impact. Ms. [REDACTED] opined that she “definitely kn[e]w that it did.” Ms. [REDACTED] further testified about her “belief” that there was an educational impact, as follows:

Okay, because there was not much that she could do independently, and she never had any goals that were set by the school system for them to accurately say that she has met those goals and could graduate. As a matter of fact, somewhere on this document, a little later, it says that they felt that she met all the graduation requirements, which I know she did not complete, like there was a service component that she did not complete, again, related to her disability. So I just do not agree with this decision whatsoever. I think that when you see all her evaluations, whether it's the psychological or the neuropsych evaluation, you can see that she has a lot of needs and that, luckily, her mother was able to provide a lot of tutoring services on a weekly basis to keep her sort of managing her disability. But I do believe it's the responsibility of the public school system to offer that in school, which she did not receive those services in school.

(Transcript, Vol. 2, p. 77.) Ms. [REDACTED]’s educational experience is at the elementary school level. She has not taught high school age children for the HCPS. Given her accepted general education expert opinions about her experience with the Student as her tutor and as a participating member of the February 21, 2022 IEP team meeting, she did not state specifically what specialized instruction should have been provided to the Student that was reasonably calculated to place the Student in a position that she would have occupied but for the argument that the HCPS failed to provide a FAPE. Ms. [REDACTED] concluded the following:

No, the Howard County Public School System should not have given her a degree.

* * *

Because she is lacking life skills to be able to be a productive member of society. She can't seem to consistently hold down a job. She is far below her peers as far

as her social interactions. And then just the sheer fact that she has reading and language disabilities speaks to the fact that she struggles to retain information. And I very much worry about her being able to be successful independently.

(Transcript, Vol. 2, p. 104.)

Ms. [REDACTED] further opined that the Student needed another year of high school because the Student cannot function right now the way her peers can function. According to Ms. [REDACTED] the Student does not have life skills or a transition plan, and she struggles to express herself in all areas. (Transcript Vol. 2, p. 112.)

Ms. [REDACTED] testified as an expert in the field of special education, general education and specialized reading instruction. Ms. [REDACTED] testified that she provided the Student with tutoring during her eighth grade school year or beginning November 2017. She was referred to the Student by the [REDACTED] private school. Subsequently, she began limited tutoring of the Student in the tenth grade. Ms. [REDACTED] had hip replacement surgery in November 2019 and a second hip replacement surgery in February 2020. She did not tutor the Student during that period. Ms. [REDACTED] testified that she saw the Student for tutoring during the Student's twelfth grade year.

According to Ms. [REDACTED], she had post-graduation experience with the Student, described by her as follows:

When [the Student] finished school, we found that she really didn't have the life skills that she needed. And so because of my history with her and she trusted me and we had a good rapport, I continued to see her through last summer and work with her on just making a routine in life. Being able to do things like banking, being able to do things like planning a recipe and cooking and taking responsibility and organizing her life, just to be able to clean her room and function, working on communication, trying to find a way to help her recognize what she might be good at for a job and attempting to apply for jobs with her. But she just crumpled. She was so stressed that it wasn't something that we could do. So, yes, I did some life coaching as kind of an educator and mom who'd raised four kids of my own, just what did she need to know? She needed to know the medication she was on and how to make doctors' appointments and how to fill prescriptions, and she just was not an independently functioning young adult at all.

(Transcript Vol. 2, pp. 130-131.)

Ms. [REDACTED] attended all four IEP meetings. She testified that at the November 4, 2021 IEP meeting, she shared information that she was working with the Student as her tutor and doing assignments together. (Transcript Vol. 2, at p. 163-164.) She further reported that the Student was struggling in all her classes. According to Ms. [REDACTED], the IEP team determined that they wanted current levels of performance, meaning the team was not going to rely on historical information. The team wanted to get new information from the Student's teachers to decide if she was eligible or not for "any kind of services." (Transcript Vol. 2, p. 165.) Ms. [REDACTED] stated that she disagreed with the IEP team's decision, but understood the need for evaluating current levels of the Student's performance, although, she testified, she was uncomfortable with the pace of the team using the Student's entire senior year to determine if an IEP was required.

Ms. [REDACTED] further opined that the Student would need classroom accommodations that would include "somebody" like a special educator who could be with her more frequently to keep her on task, to explain things she was not understanding. She opined that the Student needed "a lot more support." Ms. [REDACTED] felt like if the IEP team prepared an IEP and "really understood the severity of what was going on for [the Student] then so many more things could have been put in place." (Transcript, Vol. 2, p. 172.) Ms. [REDACTED] never observed the Student's classroom performance.

Ms. [REDACTED] was asked on direct examination, regarding her participation at the February 21, 2022 IEP team meeting, as to her expert opinion of the IEP team's decision. She testified as follows:

Yeah, I would have said that she meets the criteria for a student with disability and that she also meets the criteria for a student who there's an educational impact for. And I would have thought that, I have to say, as a private tutor who supported her and worked so hard with her to complete assignments and things like that, at the end of the day, we were trying to do everything we could to build up her skills, to build up her understanding, to develop her abilities and not wanting her to fail. And it truly breaks my heart that we would have needed to let her

absolutely fail for her to get the services she needed. And that's just heartbreaking.

(Transcript, Vol. 2, p. 173.) She did not say that she provided this opinion to the IEP team on February 21, 2022.

Regarding the May 27, 2022 IEP meeting, Ms. [REDACTED] testified that she “would have said [the Student] had both” the presence of a condition and the evidence of an educational impact to be eligible for special education and related services. (Transcript, Vol. 2, p. 180.) She did not say that she provided this opinion to the IEP team on May 27, 2022. It is noted that this team meeting was continued to June 1, 2022 due to needing a general educator’s presence for the entire meeting.

Regarding the June 1, 2022 IEP meeting, Ms. [REDACTED] testified in answering the question on direct examination, offered an opinion about the IEP team’s decision that there was no educational impact in light of the Student’s educational disabilities. According to Ms. [REDACTED], the decision “was awful” because she realized that the Student was getting a “tremendous amount of specialized instruction, which still wasn’t quite helping bridge the gap and was still missing many of the points that she needed. So I was pretty flabbergasted.” (Transcript, Vol. 2, p. 183.) She did not say that she provided this opinion to the IEP team on June 1, 2022.

Ms. [REDACTED] was asked on direct examination, to hypothetically state what an IEP would have looked like for the Student. Her opinion was as follows:

I think she needed to meet with a counselor on a regular basis, and she needed social skills development. She certainly needed academic support. I think she needed an IEP, and she needed an IEP that would have provided so many of the services that I was providing. She needed, you know, accommodations which would have been put in the IEP. She needed push-in assistance in many of her classes. She needed something that would have allowed her to access this material and develop more independent skills. So I think they would have needed to work on that reading comprehension. They would have needed to work on her math skills, they would have needed to provide support for her to access other generalized education classes, if you will. But I think they also wouldn't have put her, placed her in things like astronomy and things that -- Just more appropriate

general studies is what she needed to be able to go on to have all the basis you're supposed to have when you go to college, right? To be able to write a paper on her own, to be able to read a book and understand it and explain it, to be able to apply for a job and to be able to function at that job. And I feel that as a person with autism and given her anxiety, her depression, the ADHD components, you know, I think she would have been a student who would have gone on possibly till she was 21 because she needs those skills. She needs all of those continuing education skills that a program like that can provide her.

(Transcript, Vol. 2, pp. 185-186.) Ms. [REDACTED] stated that she did not have a conversation with the IEP team about her belief that the Student's grading was being averaged to a higher grade at the June 1, 2022 IEP meeting. However, she disagreed with the decision that there was no educational impact because the Student "was not consistently turning in schoolwork; she was receiving extensive tutoring assistance and still doing poorly at school." Finally, Ms. [REDACTED] opined that the diploma conferred upon the Student by the HCPS is "a shell."

Much of the testimony from the Parent and the tutors were opinion, either loosely based on fact in evidence or formed by their beliefs as to how things should be regarding the Student's public high school education. Interestingly, the Student did not testify for her own case. By the time of the hearing, she was a nineteen-year-old adult who had not been adjudicated of being incompetent needing a guardian or conservator. The evidence showed that she is verbal and has the ability to effectively communicate and answer questions. Her testimony may have either confirmed the "beliefs" of witnesses or contradicted them. Such remains unknown in the context of this case.

Dr. [REDACTED] testified as an expert in the field of dyslexia, dysgraphia, dyscalculia, psychological and educational assessments, children's mental health and autism special education, general education and specialized reading instruction. She stated that the school based IEP team which she was a part, did not have the same concerns as Dr. [REDACTED]'s opinion that the Student had significant areas of weakness in life skills. The team did not have concerns with the Student's independent functioning. (Transcript, Vol. 3, p. 119.)

Dr. [REDACTED] testified for the Student as a fact witness and as an expert for the HCPS in the field of school psychology. She has served three years as a school psychologist for the HCPS. She conducted a psychological assessment of the Student on April 15, 2022. Dr. [REDACTED] attended all four IEP meetings.

She testified that the June 1, 2022 IEP team determined that the Student did not qualify for special education because the team “felt there was not an educational impact.” (Transcript, Vol. 3, p. 161.) The team made the determination, according to Dr. [REDACTED]’s testimony, as follows:

So we go through supplement forms that discuss clinical criteria, and whether there is, you know, a clinical condition present. And then we discuss educational impact, which is really about a student making progress towards state standards. And at that time, [the Student] had actually already made progress towards and completed all state standards because she'd earned her diploma.

(Transcript, Vol. 3, p. 162.)

She also agreed with Dr. [REDACTED]’s written assessment that the Student should have a formalized education plan, remain in high school for an additional year, and have annual goals related to direct instruction and independent living, prevocational, skills, attention and executive functioning. She did not attend the November 4, 2021, May 27, 2022 or June 1, 2022 IEP meetings.

Ms. [REDACTED] testified for the Student as an expert in the field of special education, general education and special education administration. She is an educational consultant, self-employed with [REDACTED]. Although Ms. [REDACTED] attended approximately “1,000” IEP meetings to her estimation, she did not attend any of the Student’s IEP team meetings. (Transcript, Vol. 4, p. 17.)

In reviewing the reports admitted into evidence of this case, Ms. [REDACTED] opined the following:

[The Student] is certainly a student that requires specialized instruction, you know, along with those adaptive skills and functional life skills that need to be -- She needs to have them because how is she going to be successful outside of the school system when she doesn't have those basic functioning skills to navigate her environment and to navigate possibly a further education school setting or a job situation, when she still is working on independent living and working on communication and working on these basic things that we sometimes take for granted that all of our kids kind of have, that they just kind of get them or innately know them when they leave the high school setting. But clearly from the data, it shows that [the Student] doesn't have them, so therefore she needs direct instruction for them.

(Transcript, Vo. 4, pp. 67-68.) The IEP team did not have the benefit of Ms. [REDACTED]'s opinion at any team meeting.

Upon questioning, Ms. [REDACTED] testified that in her expert opinion she was “really unclear of how” the February 21, 2022 IEP team determined that there was no data indicating that the Student was performing below grade level as a result of her identified disability.

(Transcript, Vol. 4, p. 75.) She opined that the decision that the Student needed an IEP was a “definite yes.” The Student “should have been eligible” in her opinion. She acknowledged the Student received “average scores” on her private assessments that are in evidence, but pondered as to “why aren’t her grades all basically A’s, B’s and C’s.” She wondered why the Student was failing things. (Transcript, Vol. 4, pg. 76.)²⁵

Ms. [REDACTED] was asked her expert opinion as to the Student’s unique needs based upon her disabilities. She answered as follows:

And when you say, “unique needs,” my mind goes to an IEP. And what she would need that would be different from what she was receiving and all the other kids were receiving in school. So, yeah, if she had qualified, I see lots of different

²⁵ The evidence shows that the Student failed Algebra II, the first and second semester of the eleventh grade and failed the class for the year. She also failed Spanish the third semester of the eleventh grade. The Student passed Algebra II the first semester of the twelfth grade with a C, failed the class the third semester of the twelfth grade and passed the class the fourth semester of the twelfth grade with a D. She passed Algebra II and earned a D as her final high school grade.

things. I see addressing pragmatic language. I see specialized instruction in math.

* * *

Certainly those adaptive skills would need to have some goals around them. I believe that certainly transition. She needed some help with transition, transition planning, transition goals. Definitely math calculation and math problem-solving. Maybe some written-language expression, based on the things that I read. Executive functioning skills, getting started, following through with work and completing work, handing it in, all those kinds of things. Coping skills because she had been diagnosed with anxiety as well as depression. So kind of how to manage that in a school setting when she was feeling elevated. I don't know if I said self-advocacy skills. I think that's a huge piece, too, to ask when you need.

(Transcript, Vol. 4, pp. 77-78.)

If the IEP team found educational impact and created an IEP that was before me for review, and there were no procedural errors, the law recognizes that “once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.” *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). Logic dictates that if the education professionals did not formulate an IEP, then I should also be reluctant to second-guess that decision. Being reluctant, however, does not mean I cannot reach a different conclusion in either situation.

In this case however, none of the expert witnesses who testified at the hearing persuaded me that the IEP team failed to reasonably determine there was adverse educational impact resulting from the Student’s identified learning disabilities, to include her being autistic. The expert witnesses who actually attended the IEP team meetings either did not provide the IEP team with their opinions during the meeting or offered opinions that did not convince the IEP team away from their determining no educational impact.

The Parent did not present sufficient evidence, either in the form of fact witness testimony, expert witness testimony or otherwise, to overcome her burden of proof by a preponderance, that any deficiency of the Student’s academic performance or the state of her

average academic performance required the HCPS to determine a negative educational impact for the Student who was diagnosed with intellectual disabilities, learning disabilities and is autistic.

The IEP team found, based on the data it finally considered at the June 1, 2022 IEP meeting, that the Student's identified learning disabilities had no adverse impact on her education performance and she did not need special education services to access the general education curriculum. The IEP team determined that compensatory services were not needed.

The various opinions offered in testimony do not persuade me that the ■ HS IEP team made determinations without the benefit of reasonably considering the accepted data. In addition, any procedural violation by the ■ HS did not substantively deprive the Student of her rights under the IDEA. There was no credible evidence offered by the Parent, tending to show that the Student's learning disabilities, to include her being autistic, negatively affected her academic performance. She graduated from high school with a 2.2 GPA. Her grade level is in the average category. Her high school performance was similar to non-disabled students. The Parent failed to meet her burden tending to show that the HCPS should have determined a need for special education services, to include tutoring and providing for private assessments. I find no basis to determine the Student is entitled to contemporary relief as a remedy.

The Student's Graduation from High School

■■■■■ was the Student's School Counselor at the ■ HS, having thirty-four years in service as a counselor. I qualified him as an expert in the field of school counseling. He provided testimony which explained the Student's graduation requirements to include, due to the COVID-19 pandemic, waiver/exemptions of certain high school assessments the HCPS granted to all students. The courses exempted were Algebra, English and Government. He also confirmed that the Student completed the Leadership/Student Service Learning class that provided the equivalency of having seventy-five service hours required for graduation. He

further testified that a passing grade in Maryland is a score of 60, which translates into the letter grade of D. According to Mr. [REDACTED], students having a D average GPA would be eligible to graduate and receive a high school diploma from the HCPS. He further confirmed that the Student's final weighted GPA for her senior year was 2.2, or a C grade, in the satisfactory educational level category.

Mr. [REDACTED] further confirmed that a student is required to earn twenty-one course credits as a graduation requirement and the Student earned 26.25 credits. There was no change in the state academic standards, according to his testimony due to the COVID-19 pandemic. He answered "no" to the question of whether the HCPS pushed students into graduation when they failed to meet graduation requirements. He further testified that he was aware of general education students who did not graduate because they failed to meet the graduation standards. Finally, Mr. [REDACTED] testified that once a student has met the graduation requirements, there is no returning to the school for an additional educational year.

I found Mr. [REDACTED]'s expertise as a school counselor helpful and informative. I found his testimony overall to be credible and consistent with the relevant exhibits, to include the Student's official transcript.

The Parent, according to her counsel, has the opinion that the Student was granted a meaningless "diploma that isn't worth the paper it was printed on." She believes that the [REDACTED] HS pushed the Student through her classes and the Student was getting intermittent instruction throughout her high school career. According to the Parent, her purpose of enrolling the Student into the public school system was to get special education supports the Parent believed the Student needed to be a successful adult.

The IEP teams convened by the [REDACTED] HS did not agree with the Parent. The team determined the Student's diagnosed conditions did not adversely affect her educational performance and the

Student did not need special education; and the Student fully accessed the general education curriculum, a fact evidenced by her being conferred a regular Maryland high school diploma on June 17, 2022.

The objective data that the HCPS used to confer a diploma upon the Student contrasts with the Parent's opinion about her daughter's educational progress. The Student received a regular high school diploma. Additionally, the Student, through the Parent, did not file the Due Process Complaint before the Student graduated with a full diploma and did not challenge the Student's ability to receive the full diploma in any substantive or procedural way. As the Court in *T.S.* said, "once a student has graduated, [he or she] is no longer entitled to a FAPE; thus any claim that a FAPE was deficient becomes moot upon graduation, subject to the Student seeking compensatory relief." *T. S.*, 265 F.3d at 1092. Here, the Student was apparently prepared for, actually sought and was properly deemed eligible for graduation from high school at the end of her senior year. In addition, I have found that the Parent has not met her burden of proof that the Student is entitled to compensatory relief. As a result, consistent with *T.S.*, there is no obligation on the part of the HCPS to make FAPE available to the Student. 34 C.F.R. 300.102(a)(3)(i) (2021). The Parent failed to prove by a preponderance of the evidence that an exception exists for the Student. *Id.* at (3)(ii).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that all issues raised in these proceedings that claimed the HCPS:

- Failed to provide the Student with a FAPE, based on her unique circumstances during the 2019 through 2022 school years;
- Failed to evaluate the Student in all areas of suspected disabilities;

- Failed to identify the Student as one having a disability requiring special education and related services resulting in a lack of progress; and
- Resulting in a remedy of providing compensatory services and reimbursements to the Student,

are moot and there is no basis for contemporary relief. *T. S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090 (10th Cir. 2001); *Porter v. Clarke*, 852 F.3d 358 (2017).²⁶

I further conclude as a matter of law that the Student met Maryland’s requirements to receive a regular high school diploma. COMAR 13A.03.02.03; COMAR 13A.03.02.05; COMAR 13A.03.02.06; COMAR 13A.03.02.09.

I further conclude as a matter of law, that on June 17, 2022, the Student graduated with a regular high school diploma and the HCPS does not have an obligation to make FAPE available to the Student. 34 C.F.R. 300.102(a)(3)(i). *T. S. v. Indep. Sch. Dist. No. 54*, 265 F. 3d 1090 (10th Cir. 2001).

ORDER

I **ORDER** that the November 28, 2022 Due Process Complaint filed by the Parent on behalf of the Student is hereby **DISMISSED**.

July 18, 2023
Date Decision Issued

John T. Henderson, Jr.
Administrative Law Judge

JTH/at
#206215

²⁶ “[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *Id.* 362.

REVIEW RIGHTS

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

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

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

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

██████████,

STUDENT

v.

HOWARD COUNTY

PUBLIC SCHOOLS

BEFORE JOHN T. HENDERSON, JR.

ADMINISTRATIVE LAW JUDGE

THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-HOWD-OT-22-28938

APPENDIX: EXHIBIT LIST

I admitted the following exhibits on behalf of the Student¹:

- P1 CV ██████████
- P1.1 CV ██████████
- P1.2 CV ██████████
- P1.3 CV ██████████
- P1.4 CV ██████████
- P2 Speech Language Evaluation 8/2014
- P3 ██████████ Testing 3/2015
- P4 Psychological Assessment 4/2015
- P5 ██████████ Speech Language Evaluation 12/2016
- P6 ██████████ Neuropsychological 6/2017
- P7 ██████████ Speech Language 11/2017
- P8 504 Plan Denial 9/2019
- P9 Referral Emails 2021
- P10 Parent Input
- P11 Referral Form 5/2021
- P12 Individualized Education Program (IEP) Planning Form 2020-2021
- P13 IEP Team Meeting Report 11/2021
- P14 Parent Questionnaire 11/2021
- P15 Emails 11/2021
- P15.1 Emails 10/2021
- P16 Parent Consent 11/2021
- P17 Neuropsychological Evaluation 11/2021
- P18 Teacher Survey: Speaking and Listening
- P19 Speech and Language Assessment Report 12/2021
- P20 Emails 1/2022 – 3/2022
- P21 Consent for Assessments 2/2022
- P22 IEP Team Meeting Report 2/2022
- P23 Section 504 Meeting Documents and Emails
- P23.1 Section 504 Plan

¹ The Student's exhibit list is presented in the same format as created by her attorney and submitted to me on June 6, 2023.

- P24 Teacher Input for 504
- P25 HCPSS Psychological Assessment 3/2022
- P26 Emails 4/2022
- P27 Emails 1-2/2022
- P28 Attendance Records
- P29 Request for IEP Screening, Compensatory Services, and Records
- P30 Emails 4/2022
- P31 Letter Not Meeting Requirements for Graduation
- P32 Emails 5/2022
- P33 Transcript 5/2022
- P34 IEP Team Meeting Report 5/2022
- P35 Response to Attorney
- P36 Review of Independent Assessment
- P37 Speech and Language Assessment Report 12/2021
- P38 MSDE MPIA on HCPSS COVID Plan
- P39 HCPSS Frequently Asked Questions on Recovery Services
- P40 HCPSS Status as of 10/2020
- P41 HCPSS Grade Reports
- P42 [REDACTED] Emails
- P43 [REDACTED] Emails
- P44 [REDACTED] Emails
- P45 [REDACTED] Emails
- P46 Voicemail – Spanish Teacher
- P47 Request for Production of Documents – 504 and IEP Documents
- P48 CELF 5 Test Objectives and Descriptions

I admitted the following exhibits on behalf of the HCPS²:

1. Section 504 Eligibility – 9/24/19
2. IEP Team Meeting Report – 11/4/21
3. IEP Team Meeting Report – 2/21/22
4. Review of Independent Assessment – 2/21/22
5. Section 504 Eligibility – 3/8/22
6. Section 504 Plan – 3/8/22
7. IEP Team Meeting Report – 5/27/22
8. IEP Team Meeting Report – 6/1/22
9. Evaluation Report – ADHD Supplement – 6/1/22
10. Evaluation Report – Emotional Disability Supplement – 6/1/22
11. Evaluation Report – Autism Supplement – 6/1/22
12. Report of Psychological Assessment – 3/12/22
13. Speech-Language Assessment Report – 12/1/21
14. Attendance data
15. Graduation Credit Requirements
16. Student Graduation Requirement Profile

² The HCPS's exhibit list is presented in the same format as created by its attorney and submitted to me on June 5, 2023.

17. [Vacant]
18. Progress Reports - 2019-2020
19. Progress Reports - 2020-2021
20. Progress Reports - 2021-2022
21. High School Transcript - 6/22/2021
22. High School Transcript - 1/17/2023
23. Technical Assistance Bulletin - Improving Outcomes for Students with Disabilities
24. Emails re: DORS Information- May, 2022
25. CV - Patricia Gunshore - Coordinator, Department of Special Education
26. CV - [REDACTED] - Instructional Facilitator
27. CV - Kelly Russo - Coordinator of Special Education Compliance and Dispute Resolution
28. CV - [REDACTED] - Special Education Instructional Team Leader
29. CV - [REDACTED] - School Psychologist
30. CV - [REDACTED] - Speech Language Pathologist
31. CV - [REDACTED] - School Counselor
32. CV - [REDACTED] - Transition Teacher
33. CV - [REDACTED] - Social Studies Teacher
34. CV - [REDACTED] - Math Teacher