MONTGOMERY COUNTY	**BEFORE EILEEN C. SWEENEY,**
PUBLIC SCHOOLS	**AN ADMINISTRATIVE LAW JUDGE**
v.	**OF THE MARYLAND OFFICE**
[redacted],	**OF ADMINISTRATIVE HEARINGS**
STUDENT	**OAH No.: MSDE-MONT-OT-20-12273**

DECISION

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

STATEMENT OF THE CASE

On June 3, 2020, Montgomery County Public Schools (MCPS) filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to show that a psychological evaluation it administered to [redacted] (Student) on April 7, 2020, was appropriate, and that an independent educational evaluation (IEE) of the Student at public expense, as requested by [redacted] and [redacted], (Father or Mother individually, and Parents collectively) is not warranted. 20 U.S.C.A. § 1415(f)(1)(A) (2017); [1] 34 C.F.R. §§ 300.502(b)(2)(i), 300.511(a) (2019); [2] COMAR 13A.05.01.15C(1).

The parties participated in a telephone conference with Administrative Law Judge (ALJ) [redacted] on July 9, 2020 to determine the status of the case in light of COVID-19 closures and restrictions. The parties agreed that they were ready to move to a hearing and, accordingly, a

[1] U.S.C.A. is an abbreviation for United States Code Annotated. Unless otherwise indicated, all references to Title 20 of the U.S.C.A. hereinafter cited are to the 2017 version.
[2] C.F.R. is an abbreviation of the Code of Federal Regulations. Unless otherwise indicated, all references to Title 34 of the C.F.R. hereinafter cited are to 2019 version.

telephone prehearing conference (Conference) was scheduled. On July 14, 2020, I conducted the Conference, at which MCPS was represented by Stacy Reid Swain, Esquire, and the Student/Parents were represented by Wayne D. Steedman, Esquire. On July 16, 2020, I issued a Telephone Prehearing Conference Order.

On September 2, 3, 8 and 9, 2020,[3] I held a hearing via video conference on the Google Meet platform. Robin Silver, Esquire, and Yvette N. A. Pappoe, Esquire, represented MCPS. Mr. Steedman represented the Student/Parents.

Neither party requested mediation, and a resolution session was not required because MCPS filed the due process complaint. 34 C.F.R. § 300.510(a); COMAR 13A.05.01.15C(11)(d)(iii). Therefore, under the applicable law, a decision in this case would normally have been due by Friday, July 17, 2020.[4] 34 C.F.R. §§ 300.510(b)-(c), 300.515(a); Md. Code Ann., Educ. § 8-413(h) (2018); COMAR 13A.05.01.15C(14). However, the parties requested hearing dates outside that timeframe and because the hearing was not scheduled to conclude until September 9, 2020, the parties expressly requested an extension of the deadline to conduct the hearing and issue a decision. At the Conference, I granted the request to extend the timelines and, at the parties' request, I agreed to issue a decision by October 9, 2020, thirty days after the completion of the hearing. 34 C.F.R. § 300.515(c); Educ. § 8-413(h).

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education (MSDE)

[3] These dates were selected after a careful review of the calendar with counsel, who already had several special education due process hearings or other matters scheduled in July and August. These included due process hearings Ms. Swain has scheduled for July 27-30, 2020, August 4-14, 2020, and August 17-19, 2020, and a trial Mr. Steedman has scheduled for August 11-13, 2020. In addition, the Student's Parent (an attorney) had previously scheduled court proceedings on August 20 and 21, 2020.

[4] Forty-five days after the June 3, 2020 due process complaint was Saturday, July 18, 2020. Accordingly, a decision would have been due the Friday before that.

procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., Educ. § 8-413(e)(1) (2018); State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

(1) Was a psychological evaluation of the Student conducted by MCPS on April 7, 2020 appropriate under the IDEA; and

(2) Should MCPS be required to pay for an IEE at the public's expense?

SUMMARY OF THE EVIDENCE

Exhibits

I have attached as an Appendix to this Decision the exhibits I admitted into evidence on behalf of MCPS, which were identified by pre-marked Bates numbers,[5] and the eleven exhibits I admitted into evidence on behalf of the Student/Parents.[6]

Testimony

MCPS presented the following witnesses:

- The Mother
- [redacted], M.Ed., Ph.D., School Psychologist, MCPS, accepted as an expert in school psychology
- [redacted], M.A., Psy.S., Coordinator, Division of Psychological Services, MCPS, accepted as an expert in school psychology
- [redacted] M.Ed., 5th grade teacher, [redacted], [redacted] Elementary School, MCPS, accepted as an expert in general education

[5] MCPS and the Parents did not offer into evidence some of the pre-marked exhibits contained in their exhibit binders. In that case, I have indicated "Not admitted." I note also that the list of exhibits in the Appendix refers to some exhibits out of order so that it is consistent with the exhibit list submitted by MCPS.
[6] Individual pages of each exhibit were separately numbered, e.g., 1-1, 1-2, 1-3, etc.

The Father testified on behalf of the Student/Parents. In addition, the Student/Parents presented the following witnesses:

- [redacted], M.A., Ph.D., School Psychologist, [redacted] Public Schools, accepted as an expert in school psychology
- [redacted], Ph.D., ABN,[7] accepted as an expert in psychological assessments

FINDINGS OF FACT

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

1. The Student is an intellectually gifted eleven-year-old boy.

2. The Student attended [redacted] Elementary School [redacted], MCPS, from kindergarten through the beginning of the fifth grade (2019-2020 school year). Academically, he excelled in all grades.

3. The Student was assessed at [redacted] when he was in kindergarten due to concerns regarding his speech intelligibility. He was found eligible for speech language services to address his articulation needs and was enrolled in speech-language services beginning June 2015.

4. An IEP team meeting was held on April 19, 2018. The Mother was an IEP team participant.

5. At the time of the Student's April 19, 2018 IEP, the Student's Primary Disability was Speech or Language Impairment. The areas affected by the disability were: "Academic – Speech and Language Articulation, Behavioral – Social Emotional/Behavioral." (MCPS 58.) The Student's speech impairment affected his ability to express his thoughts and ideas clearly in the classroom.

[7] Awarded Diplomat of American Board of Professional Neuropsychology.

6. The Student's Present Level of Academic Achievement and Functional Performance in the area of Behavioral Social Emotional/Behavioral, was below expectations, and the IEP team found this area impacted the Student's academic achievement and/or functional performance.

7. At the time of the April 19, 2018 IEP meeting, the Mother reported that the Student was easily distracted and needed to be refocused often. He sometimes needed reminders to finish homework, but once he focused, he was able to complete it. She reported that the Student is a very smart boy and she expressed concerns that his self-esteem may be affected by the special education services he was receiving.

8. With regard to Social/Behavioral Supports, the Student received the following in order to access the curriculum: strategies to initiate and sustain attention provided by the General Education Teacher, daily beginning April 19, 2018 and ending April 18, 2019, across school settings.

9. The April 19, 2018 IEP included a Behavioral – Social Emotional/Behavioral goal: by April 19, 2019, 80% of the time, "given verbal reminders and modeling, [the Student] will accept correction with pro-social and positive reactions." (MCPS 72.) Objectives included the following: 1) the Student will pause and listen to his conversational partner; and 2) the Student will ask a peer question to clarify an assignment.

10. As of a March 28, 2019 progress report, the Student was not making sufficient progress to meet the Behavioral – Social Emotional/Behavioral goal. The progress report indicated that the IEP team needed to meet to address the insufficient progress.

11. An IEP team meeting was held on April 3, 2019. The Student's Primary Disability and areas affected by the disability remained the same.

12. The April 3, 2019 IEP provided for Social/Behavioral supports for the Student beginning on that date, including: available quiet space with a timer; use of positive reinforcement; a flash pass for use if he needs a break or to calm down emotionally; check-ins with a trusted adult; encouragement/reinforcement of appropriate behaviors in academic and non-academic settings; strategies to initiate and sustain attention across school settings.

13. The April 3, 2019 IEP contained two Behavioral – Social Emotional/Behavioral goals, with related objectives. The first goal was that by April 2, 2020, 70% of the time, "[d]uring a frustrating moment that interrupts a school activity [the Student] will use . . . pre-taught self-calming strategies (movement break, deep breathing, quiet space break) and return to task within 3 minutes." (MCPS 3.) The objectives relating to that goal were that the Student will 1) identify feelings of being frustrated or angry; 2) seek adult support for problem solving; 3) apply an adult/self-generated strategy, when given two choices; and 4) self-calm and re-enter classroom activities.

14. The second goal was that by April 2, 2020, 70% of the time, "[g]iven a task that evokes feelings of self-doubt, [the Student] will choose/use a self-esteem strategy to maintain positive . . . self image and peer relations." (MCPS 5.) The objectives relating to the goal were that the Student will 1) accurately describe behaviors of himself and others; and 2) use positive self-talk and avoid the use of self-deprecating language.

15. At the time of a June 14, 2019 progress report, the Student was making sufficient progress to meet both Behavioral - Social Emotional/Behavioral goals. With regard to the first, he had shown some progress in using self-calming strategies when frustrated. He had sought out adult support and, with guidance and support, would self-calm and re-enter the activity. With regard to the second, he had shown growth in his ability to maintain a positive self-image. He continued to need adult support and guidance to maintain this positivity.

16. The Student received counseling services at [redacted].[8]

17. In October 2019, the Student transferred to the [redacted] ([redacted]) program, a gifted and talented program at [redacted] Elementary School ([redacted]), MCPS, where he remained for the rest of the 2019-2020 school year.

18. On October 30, 2019, [redacted], the Student's fifth grade homeroom, Science/Social Studies/Math teacher, emailed the Father about an incident in the lunchroom that day involving an interaction between the Student and another student where the Student became upset and began crying, covering his head with his lunch box and pulling his arms into his shirt. The Student struggled to articulate the situation through his crying. Later in the classroom, he gave another group of students the finger when Mr. [redacted] told that group they were loud. The Student then became upset again and started crying, calling himself stupid, and putting his head in his shirt. He subsequently slammed his hands down on the table and yelled that he wanted to go to the board. As students were modeling, he yelled at them that they were wrong.

19. Mr [redacted] entered his communications with the Parents in the school communication log.

20. The Parents had an initial intake conference[9] (intake meeting) on November 1, 2019, which was attended by the school psychologist, [redacted], M.Ed., Ph.D., and the Parents, among others. The IEP team discussed an amendment to the Student's IEP to change his counseling services. The IEP team determined that the Student's progress was not measurable at that time.

[8] This information was gleaned from the testimony of the MCPS school psychologist and from a November 6, 2019 Prior Written Notice which resulted from an Intake Meeting after the Student changed schools, which refers to counseling services at [redacted] and to feedback from the Student's previous counselor. It was not made clear when he began receiving counseling services at [redacted].

[9] [redacted] one of MCPS' expert witnesses, explained that an initial intake conference is basically a meeting and a discussion between parents and school representatives.

21. On November 6, 2019, as a result of the intake meeting and in response to feedback from the Student's previous counselor and the Parents, and observations of the Student, MCPS proposed an amendment to the Student's April 3, 2019 IEP establishing that he would receive thirty minutes of counseling per week with a counselor outside of the general education classroom. A periodic review meeting would be set in order to discuss the Student's academic process so far and the need for any additional considerations and testing. Since he just started attending [redacted], teachers would provide feedback on his performance at the end of period two and reassess if more supports are needed.

22. Sometime after he transitioned to [redacted], the Student began receiving thirty minutes of counseling per week from the school counselor and began seeing a private psychotherapist.

23. On November 15, 2019, Mr [redacted] emailed the Father about an incident on World Kindness Day, when students gave each other stickers for acts of kindness. The Student demanded a sticker from another student. He got in the student's face and yelled, "Give me a sticker" several times. When Mr. [redacted] addressed his behavior with him, the Student became upset, saying he was the only one without a sticker. Later, when the students were lining up, the Student again got in a student's face and made hand gestures. When Mr. [redacted] spoke to the Student, the Student stated that he (the Student) was bad and that he did not understand the point of kindness, "because it doesn't matter if you can't be regular." He stated, "I'll never be regular, and kids won't like or play with me . . . . "I'm not normal" . . . . "I hate all of humanity" . . . . "People don't understand what I mean;" and "I don't like that I'm not normal." (MCPS 300.) He was crying the entire time and during certain moments he was unintelligible when answering some questions.

24. On November 27, 2019, Mr. [redacted] emailed the Father in part:

> [The Student] had a good week last week. He completed most of his work, and was able to regulate his emotions throughout the day. He is struggling a bit this week. He has been avoiding work when possible, and when directed to complete tasks he become[s] argumentative or begins crying.
>
> [[redacted] the Student's Reading/English and Language Arts (ELS) teacher] and I continue to be concerned about his emotional well-being. . . . He is very preoccupied with getting "good" grades, and when things get challenging he resists the work and becomes upset. The work in [redacted] is very challenging and will continue to get more challenging as the year progresses. If he doesn't complete his assignments this will impact his grades. . . . this seems to be a source of anxiety for [the Student]. . . .
>
> Mrs. [redacted] and I are concerned that as he begins receiving more grades he will struggle with his emotions if they are not A's, and this will impact his daily functioning in the classroom.. . . .

(MCPS 302.)

25. On December 5, 2019, Mr. [redacted] emailed the Father about an incident that day where the Student argued with his group members and raised his voice.

26. On December 9, 2019, Mr [redacted] emailed the Father that the Student had written during an assignment: "I am going to blow up the world." (MCPS 332.)

27. In a January 21, 2020 Elementary Teacher Report prepared by Mrs. [redacted] and Mr. [redacted] the Student's teachers expressed concerns regarding organization and socializing at appropriate times. With regard to focusing on instruction/activity and working collaboratively with team members, one or both teachers indicated, "mostly satisfactory, but can be concerns." (MCPS 110.)

28. With regard to the Student's social emotional needs, Mr. [redacted] and Mrs. [redacted] noted concerns in the following areas: interactions with staff; interactions with students; problem solves when stressed; and raises hand/waits to be called on. They commented: "It is difficult to assess [the Student] academically as his anxiety prevents him from completing many

assignments. He becomes easily frustrated in academic and social situations and this has been exacerbated by the challenge of the [redacted]." (MCPS 110.)

29. As of a January 24, 2020 progress report on the Student's IEP, the Student was making sufficient progress to meet the Behavioral – Social Emotional/Behavioral goals on his IEP. The school counselor reported that he had been working on the following:

- identifying positive and negative reactions to the feeling of anger,
- recognizing how our anger is triggered in different ways and to varying degrees,
- identifying the physical sensations of anger,
- practicing self-regulation through calming breathing techniques,
- identifying warning signs when our feeling of anger is triggered, in order to keep big feeling under control,
- identifying difficult feelings,
- identifying "core feelings" we most often mask with our anger,
- exploring positive and negative consequences of our choices,
- self-regulating by thinking through all choices before impulsive decisions.

(MCPS 4; Parent Ex. 7.)

30. The school counselor indicated that the Student was very strong in identifying his emotions and the triggers, but there was still work to be done with practicing self-regulation through calming breathing techniques when experiencing "core feelings" that he masks with his anger. The Student also needed to work on replacing his self-defeating thoughts with positive words or affirmation; the self-defeating thoughts tended to make him feel small, unworthy, ashamed and closed off, and the behavior further added to his struggle with emotional regulation.

31. An IEP meeting was held on January 28, 2020. At that meeting, the IEP team had discussions about looking further into the Student's emotional functioning. The Student's teachers and speech pathologist were extremely concerned about the Student's anxiety and perfectionistic tendencies, and the IEP team felt that they were so significant as to warrant further investigation.

32. The Parents gave background information on the Student at the November 2019 intake meeting and at his IEP meetings. The Father described the Student as affectionate, helpful, very competitive and driven to be the best academically. The Student often worries about his grades. Regarding the Student's emotional range, the Father did not see the Student shutting down as reported from the school and reported that the Student's tendency to get very mad and frustrated had lessened.

33. The Mother described the Student as an affectionate, loving boy who hugs her all the time. She recognized that he does not always understand that he cannot hug others without permission, which she often discussed with him. Socially, the Student sometimes likes being with others, but he often likes being alone. He tends to be a perfectionist and gets frustrated when he does not perform at top level. The Mother reported that when the Student was three years old and his baby sister was born, he did not understand, and pulled away from her when she tried explaining things about the new baby.

34. One of the Parents also stated that the Student always strived to be the best one, and if he was not the best at a game or activity, it demoralized him, and he would cry and say negative things about himself.

35. The Parents believed the Student could do well in the [redacted] program if he could regulate his emotions.

36. Levels of Performance were shared with the Parents at the January 2020 IEP meeting, and the decision was made to further assess the Student in the areas of psychological, educational and expressive/receptive language. MCPS used Teacher reports, parent concerns, observation, and counseling data as a basis for the proposal.

37. The term "autism" was not used at the January 2020 IEP meeting. Just after the January 2020 IEP meeting, Dr. [redacted] asked the Mother if the term "autism" had ever been

brought up during school related discussions or conferences. The Mother responded, "'*No; never*.'" (MCPS 132; Parent Ex. 4-3).

38. On January 28, 2020, the Student's April 3, 2019 IEP was amended.[10]

39. On January 28, 2020, the Father signed a MCPS Notice and Consent for Assessment (Consent form), which indicated that based on the determination of the IEP team on that date, the IEP team needed additional information/data to determine special education and related services. The Consent form also indicated that the IEP team decided to administer additional assessments in the areas of special education and psychological testing, as well as expressive and receptive language. The Consent form indicated that based on the information considered, the IEP team recommended evaluation in the following areas listed on the form: Academic Performance: Reading, Mathematics, and Written Language; Communication: Expressive/Receptive Language; Intellectual/Cognitive Functioning; and Emotional/Social/Behavior Development.

40. The Consent form further stated:

> [The Student] presents difficulties in the areas of writing and comprehension of information, as well as expression of information. Additionally, he also needs to be assessed in his needs regarding attention and behavior (anxiety).

(MCPS 89.)

41. An assessment for autism falls within the purview of an assessment for Emotional/Social/Behavior Development.

42. On January 29, 2020, MCPS provided the Parents with a Prior Written Notice setting forth MCPS' proposed action (evaluation/re-evaluation, assessments, and review/revision of the Student's IEP), and explaining the basis for MCPS proposed assessments.

[10] It was not clear what the amendment was. The November 2019 Prior Written Notice suggests that the counseling outside of general education was added to the IEP.

43. The Prior Written Notice explained the reasons why MCPS proposed to take that action as follows:

> The IEP team determined that [the Student] is demonstrating problems in the realm of social/emotional development, as well as academic underperformance in Writing, Reading. He has also demonstrated difficulty understanding information presented orally, understanding class reading, speaking in complete sentences to express ideas and speaking clearly. He displays a high degree of anxiety which impedes him from participating in some academic activities.

(MCPS 91.)

44. The IEP team referred the Student for a comprehensive special education evaluation, including a school psychological assessment.

45. A purpose of the psychological assessment was to produce test findings that would "assist the IEP team in determining whether [the Student's] social/emotional issues constitute a different or additional disability, and [to] inform the special education decision-making as [the Student] prepares to transition to middle school next school year." (MCPS 131.)

46. On February 11, 2020, , the Student's physical education teacher sent an email to the Father indicating that the Student had been volunteering to help teach kindergarteners during recess. She described him as ". . . *the best helper . . . .The kindergarteners are so excited to see him. He does a great job demonstrating skills, keeping students in their personal space, tying shoes, etc.*" (MCPS 133; Parent Ex. 4-4).

47. On February 21, 2020, Mr. [redacted] emailed the Father about an incident in class where the Student asked the Teacher when he was going to stop talking. Mr. [redacted] asked the Student to leave the room for a few minutes and the Student made self-deprecating comments when Mr [redacted] retrieved him:

> He proceeded to say things like, "I am just bad", I am not good", "people don't like me", "I'm stupid", "I have no friends", I can't do anything right", "you think I'm bad", "you think I am stupid", "you think I can't do anything right", "my family thinks I'm stupid". I assured him that this was not mine, nor anyone else's opinion of him and pointed out several areas of strength (math, science, social

> studies, friends that he has, etc . . .) He said he didn't believe it and he can only focus on negative things.
>
> We were in the hallway and I asked him to return to the classroom and he said he didn't want to because, "no one like[s] me and I am scared." When I asked him what he was scared of he told me he thought someone would hurt him, because, "someone could have a gun in their bag" . . . .. He was crying during most of our conversation. When he came back into the classroom and was encouraged to work on his assignment he was filled with excuses as to why he couldn't complete it.

(MCPS 243.)

48. On February 24, 2020, Mr. [redacted] emailed the Father that lately the Student appeared to be very emotional and that he mentioned being scared or afraid a lot. Mr. [redacted] advised the Father that the Student's negative self-talk had been increasing and impacting the Student's ability to self-regulate. Mr [redacted] further stated that he and Mrs. [redacted] had both noticed that the Student seemed more stressed and anxious during the past week.

49. On February 26, 2020, the Father emailed Mr. [redacted] that he received his emails and took them seriously; he would immediately discuss Mr [redacted]'s concerns with the Student.

50. [redacted], M.A., CCC-SLP, performed a speech/language assessment of the Student; she met with the Student seven times during the period of February 7-21, 2020. Ms. [redacted] observed that during the assessment, the Student "displayed a positive demeanor most of the time. He displayed a high level of anxiety when answering questions, oftentimes requesting repetitions and wanting to talk about his options prior to giving an answer. There was also a tendency to overthink and overanalyze questions and answers." (MCPS 159.)

51. Ms. [redacted] reported no emotional/behavioral issues observed by her during her classroom observation of the Student in Mr [redacted] Math class on March 5, 2020.

52. On February 25, 2020, [redacted], Special Education Teacher, observed the Student in Mr. [redacted]'s Social Studies class for 35 minutes. The Classroom Observation form completed by her rated areas as "Behavior Not Observed," "Significant Problem," "Some

Problem," "No Problem," and "Strength." (MCPS 112.) She rated the Student as having Some Problem with attention and organization. She rated him as having No Problem with activity level, social interaction, work habits, and motivation. Ms. [redacted] did not mention in the written portion of her Classroom report any social/emotional/behavioral problems observed by her.

53. On March 2, 2020, Ms. [redacted] observed the Student in Mrs [redacted]'s Reading/ELA class for thirty minutes.[11] Ms. [redacted] did not observe behavior relating to organization. She did not rate the Student at all with regard to attention or work habits. She rated him as having No Problem with activity level, social interaction**,** task completion, and motivation. In the written portion of her Classroom Observation, Ms**.** [redacted] reported: "As the teacher was talking about the directions, [the Student] was tapping his hands on the rug." (MCPS 113.)

54. Ms. [redacted] performed an Educational Assessment of the Student. She met with the Student six times during the period of March 3-12, 2020. Ms. [redacted] did not report any emotional/behavioral issues during the assessment.

55. On March 3, 2020, Mr. [redacted] emailed the Father, with a copy to the Student's private psychotherapist:

> A fellow classmate of [the Student] came to me today to discuss some inappropriate behavior [the Student] has been exhibiting towards her. She says that [the Student] has been touching (Hugging/brushing up against her) in special classes and recess. She also mentioned that he will seek out eye contact and when it is obtained he is touching himself "inappropriately", which she said includes his privates.
>
> She also says he has been saying inappropriate things. The example she provided was that when she was resting her head in her hands he said, "you look depressed, do you want to commit suicide?" This specific incident coincides with the week [the Student] was having a particularly difficult time in school emotionally.

[11] Mrs [redacted] was not present at the time – a substitute teacher was present.

> When he first arrived at [redacted] [,] he had a preoccupation with this student and hugged her often. She expressed her uncomfortableness with this and we spoke to [the Student]. I have not observed it happening in my classes since.

(MCPS 246.)

56. On March 13, 2020, Mr. [redacted] again emailed the Father, with a copy to the Student's private psychotherapist:

> Another student came to me today to say that [the Student] has been touching her and when she asks him to stop he makes a joke of it. . . . He became upset when he found out I would be sharing the information with you, but it obviously needs to be addressed.
>
> On the positive side, [the Student] was able to complete his math assessment with minimal distractions and reminders. I also observed him enjoying conversation with friends at lunch.

(MCPS 296.)

57. Sometime prior to the April 7, 2020 MCPS psychological assessment, Mr [redacted] described the Student as "a smart, eager-to-please boy with a good sense of humor. However, [the Student] seems quite competitive and becomes fixated on perfection, and if not attained, such as in writing assignments, he becomes stuck and avoidant and may shut down." (MCPS 132; Parent Ex. 4-3.) Another concern was that the Student used a lot of negative words to describe himself.

58. The school counselor reported that she saw occasional improvement when the Student was encouraged to use the calming centers, and he was able to process his feelings; however, the Student could have difficulty calming himself when upset.

59. The school principal reported that during her interactions with the Student, she had talked to him about his fixation on being perfect and constant questions about how to improve. She was also concerned that his anxiety overrides his ability to demonstrate what he knows; she wanted to be sure the Student had the support he needed in preparation for transitioning to middle school.

60. Mrs. [redacted] reported that the Student is outgoing and affectionate toward friends and enjoys reading and connecting with stories. However, Mrs. [redacted] saw a disconnect between the Student's capability and actual performance, especially in writing. The Student's vocabulary sheet came back blank each week, and in class he rarely finished a writing prompt. Sometimes the Student was open to Mrs. [redacted] scribing, while other times he had heightened anxiety that got in the way. Although she believed he could do the work, he was hard to convince; and if the Student thought he would not earn an A, he would shut down. Because of these challenges, Mrs. [redacted] found it difficult to evaluate what the Student can do.

61. Dr. [redacted] conducted an "Initial School Psychological Assessment" of the Student. Dr [redacted] has worked as a school psychologist for MCPS since 1998. She holds a B.A. in Psychology, a M.Ed. in Counseling Psychology, and a Ph.D. in Counseling Psychology (ancillary School and Clinical Psychology). She is certified as a school psychologist in Maryland. Dr. [redacted] has performed approximately 1,200 – 1,500 psychological assessments, approximately 25-30% relating to an emotional condition/disability.

62. Dr [redacted] stated in the Background Information section of her report that the Student's transition to [redacted] was difficult for him. "Soon after entering the [redacted] program with other intellectually gifted students, [the Student's] self image took a blow, he became very unhappy, and often complained that he wanted to return to [redacted]. After a two to three month adjustment, [the Student] came to enjoy being in the program." (MCPS 131; Parent Ex. 4-2.)

63. The following procedures were components of Dr [redacted] 's evaluation:

I.E.P Initial Intake Conference
I.E.P. Reevaluation Planning Conference
Record Review
Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)
Connors Comprehensive Behavior Rating Scale (Connors): - Teacher Form
Autism Spectrum Rating Scale (ASRS): Teacher form
Staff consultations

Observations
Parent information[12]

64. When conducting a psychological evaluation, the school psychologist is responsible for choosing which tests to conduct in order to address the reason(s) for which the student was referred for assessment.

65. The WISC-V was the central cognitive measure used by Dr [redacted]. It is an assessment of general intelligence and "was designed to ascertain purposeful intellectual skills needed for academic success for youth six to 16 years of age. The Full Scale IQ, which is the best representation of general intelligence, is derived from several subtest scores within each of the five factors: *Verbal Comprehension Index (VCI), Visual Spatial Index (VSI), Fluid Reasoning Index (FRI), Working Memory Index (WMI), and Processing Speed Index (PSI).*" (MCPS 135; Parent Ex. 4-6.)

66. The Student's performance on the WISC-V was as follows:

> [The Student's] general cognitive/intellectual abilities, that is, thinking, reasoning, and problem-solving skills, are superior compared to average children of the same age, with no weaknesses noted." (MCPS 142; Parent Ex. 4-13.) "When considered with peers of comparable age, [the Student] earned a Superior *Full Scale IQ* score of 129. The respective percentile rank identifies his cognitive skills as equal to or better than [99] percent of students within his age range.[13] Furthermore, all indicators of thinking, reasoning, and problem-solving skills (*Expanded Verbal Comprehension*, *Visual-Spatial*, and *Fluid Reasoning Index* scores) are Superior and range between the 99th and 92nd percentile ranks. [The Student's] cognitive proficiency indicators (Working Memory and Processing Speed) are High Average, and rank from Very Superior to solid Average with no significant weaknesses noted.

(MCPS 136; Parent Ex. 4-7.)

[12] Although her report indicates that she also relied upon "[Conners Rating Scale]: - Parent form [and] [Autism Rating Scale]: Parent form," as discussed below, Dr [redacted] acknowledged that the Parents did not respond to the Parent questionnaires sent to them. (MCPS 131.) Rather, anecdotal information from the Parents was a component of the evaluation.

[13] Dr [redacted] testified that the 97th percentile referred to in the report was a typographical error.

67. The Conners is "a set of rating scales that are used to gather information about the behaviors and feelings of children and adolescents and can help identify a number of childhood disorders. The responses to statements are combined into several groups of items. Each group of items describes a certain type of behavior (such as problems with mood, anxiety, and peer relationships). The responses are compared to what is expected for average boys [the Student's] age." (MCPS 138; Parent Ex. 4-9.)

68. The Conners and the Autism Spectrum Rating Scale (ASRS) are objective/norm-reference tests.

69. Based on the Students' aforementioned behaviors, some of which were indicative of a student with an autism spectrum disorder, Dr [redacted] chose to administer the Conners and the ASRS to assess the Student's social, emotional, and behavioral concerns. She asked Mr. [redacted] and Mrs. [redacted] with whom the Student spent much of his school day, to complete the Conners and ASRS questionnaires.

70. On March 8, 2020, Dr. [redacted] emailed the online Conners and ASRS Parent questionnaires to the Father and asked the Parents to complete them. The Parents never responded and never contacted Dr [redacted] with questions or concerns about the questionnaires.

71. Dr [redacted] called the Father on at least two occasions after March 8, 2020 as a follow up on the questionnaires. The Parents still did not respond.

72. The scores on the Connors CBRS are classified as follows:

T-score range	Indicator	Classification and Description
70+	***[14]	*Very Elevated – many more concerns than are typically reported*
65-69	**	*Elevated – more concerns than are typically reported*
60-64	*	*Slightly Elevated* – somewhat more concerns than are typically reported
40-59		*Average* – typical behaviors; no particular concerns
<40	<	*Low* – lower than average; no concerns in that domain
n/a		Scale not included in findings

73. The Student had the following relevant scores on the Connors:

Conners CBRS	Homeroom Teacher	ELA Teacher
Emotional Distress: Worries a lot; may show signs of depression or may have physical complaints; may have ruminating thoughts.	90***	90***
Upsetting Thoughts/Physical Symptoms: Has upsetting thoughts and/or ruminations. May complain about physical symptoms; may show signs of depression.	90***	90***
Defiant/Aggressive Behaviors: May be argumentative; may defy requests from adults; may have poor control of anger or may lose temper; may be physically and/or verbally aggressive; may show violence, bullying, and destructive tendencies; may seem uncaring.	70***	74***
Hyperactivity/Impulsivity: High activity levels; may be restless; may have difficulty being quiet. May act without first thinking; may call out and interrupt others; may have difficulty waiting his turn.	75***	75***

[14] Dr. [redacted] testified that no asterisk means "average," one asterisk means "mildly elevate," two mean "moderate," and three mean "severe" compared to the average peer..

Perfectionist and Compulsive Behaviors: Rigid, inflexible. Have repetitive behaviors. May be overly concerned with issues such as germs or cleanliness. Can be driven by feelings of inadequacy.	90***	85***
Conners CBRS – DSM-V Symptom Scales		
ADHD Predominantly Inattentive Presentation: Significant inattentiveness, distractibility and lack of focus or concentration.	62*	75***
*ADHD Predominantly Hyperactive/Impulsive Presentation:*Significant restlessness, over-activity and impulsivity.	74***	84***
Symptoms of Oppositional Defiant Disorder: may purposefully defy or oppose authority figures; may be rebellious and engage in power struggles with adults.	82***	90***
Symptoms of Major Depressive Episode: Is sad, gloomy, irritable and low mood for many days at a time.	90***	90***
Symptoms of Manic Episode: extremely elevated mood; arousal, elation and irritability.	90***	90***
Symptoms of Generalized Anxiety Disorder: Excessive worrier about things in general.	90***	90***
Symptoms of Social Anxiety/Phobia: Avoids or becomes embarrassed or distressed about doing things in front of others.	67**	75***
Symptoms of Obsessive-Compulsive Disorder: Mentally stuck with repetitive, upsetting thoughts/ideas/behaviors.	85***	90***
Symptoms of Autism Spectrum Disorder (ASD): Problems with social communication, understanding social cues, and odd, unusual, atypical behaviors .	65**	73***

74. The Conners was not validly completed because Dr. [redacted] did not include in her report the validity scales required in order to determine if the teachers filled out the Teacher Questionnaires and scored the Student in an unbiased manner.

75. The ASRS falls under the umbrella of assessments for Social/Emotional/ Behavioral Development, to which the Parents agreed on the Consent form. Although the term

"autism" was not specifically used at the January 2020 IEP meeting, the Parents were aware of behaviors reported by teachers and other staff that may be symptomatic of autism and those behaviors were discussed at the January 2020 IEP meeting.

76. The ASRS questionnaire "was designed to identify behaviors associated with **Autism Spectrum Disorders (A.S.D.)** for youth aged six through 18 years. The *Total Score* consists of a composite of three primary areas affected by autism: *Social/Communication*, *Unusual Behaviors*, and *Self-Regulation*. The *Treatment Scales* are the individual domains that make up the three composite areas and assist in identifying specific characteristics that may need attention, monitoring or therapeutic intervention." (MCPS 140; Parent Ex. 4-11).

77. The *Total Score* scale indicates the extent to which the child's behavioral characteristics are similar to boys his age diagnosed with autism spectrum disorder. The DSM-V scale identifies how close the child's symptoms match the Diagnostic Statistical Manual—Fifth Edition criteria for an autism spectrum disorder.

78. The scores on the ASRS are classified as follows:

T-score Range	**Indicator**	**Classification and Description**
70+	***	*Very elevated – many more concerns than are typically reported*
65-69	**	*Moderately Elevated – more concerns than are typically reported*
60-64	*	*Slightly elevated – somewhat more concerns than are typically reported*
40-59		*Average – typical behaviors ; no particular concerns*
<40	<	*Low – lower than average; no concerns noted*

79. The findings from Mr. [redacted] and Mrs. [redacted] are as follows:

Autism Spectrum Ratings Scales	**ELA Teacher**	**Homeroom Teacher**
Total Score: *Indicates whether the behavior profile is similar to youth diagnosed with an Autism Spectrum Disorder.*	65**	68**
Social/Communication: Inappropriate use of verbal and non-verbal communication to initiate, engage in,and maintain social contact	63*	49
Unusual Behaviors: Has trouble tolerating changes in routine. Engages in apparently purposeless, stereotypical behaviors. Overreacts to certain sensory experiences.	60*	70***
Self-Regulation: Has deficits in attention and/or motor/impulse control; may be easily upset and argumentative.	63*	70***
DSM-V Scale: Has symptoms directly related to the DSM-V diagnostic criteria for an Autism Spectrum Disorder	61*	62*
Treatment Scales		
Peer Socialization: Has limited interest and capacity to engage successfully in activities that develop and maintain relationships with other children.	66**	63*
Adult Socialization: Has limited interest and capacity to engage successfully in activities that develop and maintain relationships with adults	62*	67**
Social/Emotional Reciprocity: Has limited ability to provide an appropriate emotional response to another person in a social situation	64*	55
Atypical language: Spoken communication may be repetitive, unstructured, or unconventional.	62*	71***
Stereotypy: Engages in apparently purposeless, repeated movements, noises, or behavior.	54	63*

Autism Spectrum Ratings Scales	**ELA Teacher**	**Homeroom Teacher**
Behavioral Rigidity: Has difficulty tolerating changes in routine, activities, or behavior; aspects of the environment must remain unchanged.	69**	78***
Sensory Sensitivity: Overreacts to certain experiences sensed through touch, sound, vision, smell, or taste.	43	43
Attention: Has trouble appropriately focusing attention on one thing while ignoring distractions; appears disorganized.	61*	71***

80. Dr [redacted] misinterpreted the results of the *DSM-5* scale scores, finding that they fell at the lower end of the mild range, indicating a low probability that the Student has an autism spectrum disorder.

81. During Dr. [redacted]'s 50-minute observation of the afternoon reading block in Mrs. [redacted]'s class, Dr. [redacted] observed:

> Mrs. [redacted] instructed students to close their books, and while [the Student] complied, he began tapping his book on the desktop, then bent his arm over his shoulder and made slapping sounds against his upper back. . . . While students were assembling, [the Student] made indecipherable vocalizations while rotating his mouth. . . . While still on the carpet, [the Student] knelt on the floor then momentarily held the corner of the book in his mouth. He then squatted and banged on the floor with his fist. [The Student's] behavior stood out again because he turned away from the teacher, and made sounds in his hand. He momentarily self-corrected, then resumed kneeling, but on a coloring book. . . . [The Student] continued kneeling with his body in constant motion.

(MCPS 134; Parent Ex. 4-5.)

82. The observations of teachers, examiners and other school staff are meant to provide a snapshot for the school psychologist assessing a student of the student's current functioning and behaviors. Dr [redacted]'s role was to consider all the data to establish a complete picture of the Student in order to determine if he has an emotional condition.

83. Dr [redacted] concluded:

> [The Student] exhibits significant symptoms in several psychiatric diagnostic categories with compounding effects on his overall sense of well-being. Although [the Parents] did not complete their behavior checklists, they supplied background information that is supportive of significant emotional concerns. The teacher reports, teacher behavior checklists and all other available information show [the Student's] symptoms of generalized anxiety, major depression, perfectionism, and obsessive-compulsive thinking are quite severe compared to average boys of the same age. Moreover, these results are extremely powerful, deviate significantly from the typical feelings and behaviors of his peer group, and are unresponsive to interventions available in the general education school setting.

(MCPS 142-43.)

84. In reaching her conclusions, Dr [redacted] was aware of and considered that the Student is a student with high cognitive functioning.

85. Pursuant to MCPS protocols, Dr. [redacted] made a determination in her report, based on all information gathered, that the Student exhibited one or more of the following characteristics of a student with an "emotional condition" for educational purposes, over a long period of time and to a marked degree, that adversely affects his educational performance:

1) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3) Inappropriate types of behavior or feelings under normal circumstances;
4) A general, pervasive mood of unhappiness or depression; or
5) A tendency to develop physical symptoms or fears associated with personal or school problems.

(MCPS 143.)

86. Although Dr. [redacted] concluded that the Student has an emotional condition, Dr. [redacted] intentionally did not include a determination in her report as to whether the Student met the criteria for an Emotional Disability. Her role was to bring her report back to the IEP team and discuss the results of her assessment at the IEP meeting. The ultimate determination regarding whether the Student has an Emotional Disability and whether he is eligible for special

education and related services must be decided by the IEP team as a whole considering all available information.

87. In Part I of a May 19, 2020 Emotional Disability Multidisciplinary Evaluation Form (Multidisciplinary Evaluation Form), to be completed by the school psychologist, Dr. [redacted] indicated that the Student met the second, third and fourth characteristics of an emotional condition.

88. In Part II of the form, Dr [redacted] concluded, along with other members of the IEP team, that the Student did not meet the criteria for Emotional Disability found in the IDEA and in COMAR 13A.05.01.03 because the IEP team could not determine that the Student's emotional condition had an adverse educational impact. Specifically, there was no evidence that despite having received supportive regular education assistance the Student still exhibited behaviors that are directly related to the emotional condition documented by Dr [redacted]'s report.

89. With regard to the MCPS psychological evaluation of the Student, testing and assessment materials and procedures used to assess the Student's need for special education and related services were selected and administered in a manner which was not racially or culturally discriminatory. The tests selected were standardized on children from the Student's cultural and linguistic background.

90. The Student was assessed in all areas related to his suspected disability.

91. The MCPS school psychologist used a variety of assessment tools and strategies to gather sufficient relevant functional, cognitive, developmental, behavioral, academic, and physical information, and information provided by the Parents. These included the Conners, ASRS, and WISC-V; parent input; teacher input (including input from two teachers who saw the Student every school day); information from an intake meeting and IEP meetings; record review; staff consultations; and formal and informal observations

92. A single procedure was not used as the sole criterion for determining if the Student is a student with a disability and an appropriate educational program for the Student.

93. The testing and assessment materials and procedures used to assess the Student's need for special education and related services were technically sound and properly provided and administered in the student's native language or other mode of communication.

94. The standardized tests administered to the Student were valid for the specific purpose for which they were used, and administered by trained and knowledgeable personnel.

95. Not all of the tests, specifically the Conners, were administered in conformance with the instructions provided by the producer of the test because validity scores, required to show a lack of bias by the teachers who scored the Student in response to the Teacher questionnaires, were absent

96. Tests and other assessment materials were not limited to procedures designed to provide a single general intelligence quotient and included procedures tailored to assess specific areas of educational need.

97. The results of assessment procedures accurately reflected the Student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting impaired sensory, manual, or speaking skills.

98. A report of the assessment procedures administered to the Student in each area of suspected disability, written, dated and signed by Dr. [redacted] was made available to the IEP team, including the Parents, at the time of the evaluation. The report included a description of the Student's performance in each area of suspected disability; relevant information; and instructional implications for the Student's participation in the general curriculum.

99. The MCPS psychological evaluation was not sufficiently comprehensive to identify all of the Student's special education and related services needs.

DISCUSSION

General Legal Background

"'Congress enacted IDEA in 1970[ ]to ensure that all children with disabilities are provided 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.'" *Forest Grove Sch. Dist. v. T.A.* , 557 U.S. 230, 239 (2009) (citation omitted) (alterations in *Forest Grove*).

"Free appropriate public education" (FAPE) is defined as follows:

> **(9) Free appropriate public education**
> The term "free appropriate public education" means 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 . . . .

20 U.S.C.A. § 1401(9).

"A school provides a FAPE by developing an IEP for each disabled child." *J.P. ex rel. Peterson v. Cnty. Sch. Bd.*, 516 F.3d 254, 257 (4th Cir. 2008). The IEP consists of a written statement for each child with a disability, 20 U.S.C.A. §§ 1401(14); 1414(d)(1)(A)(i), which "must contain statements concerning a disabled child's level of functioning, set forth measurable goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *J.P.*, 516 F.3d at 257 (citations omitted).

"[The] IDEA 'imposes an affirmative obligation on any state receiving federal assistance to identify and evaluate all children suffering from disabilities who may be in need of special education and related services.'" *E.P. v. Howard Cty. Pub. Sch. Sys.*, No. ELH-15-3725, 2017

WL 3608180 p. 2 (D. Md. Aug. 21, 2017) (citations omitted), *aff'd per curiam*, 727 F. App'x 55 (4th Cir. June 19, 2018).

Applicable statutes and regulations require an IEP team[15] to make a determination regarding IDEA eligibility, in part, based on the assessment reports completed by qualified examiners. 20 U.S.C.A. § 1414(b)(4)(A); 34 C.F.R. § 300.305(a)(1), (2); COMAR 13A.05.01.06C(1), (2).

Parents who disagree with a school evaluation may, under certain circumstances, obtain an IEE at public expense. 34 C.F.R § 300.502(a)(1). An IEE is defined as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." *Id*. § 300.502(a)(3)(i).

The Code of Federal Regulations further provides in pertinent part as follows with regard to the performance of an IEE by a local education agency at Parents' request:

> (b) Parent right to evaluation at public expense.
> . . .

[15] 20 U.S.C.A. § 1414(d)(1)(B) provides:

> **(B) Individualized education program team**
>
> The term "individualized education program team" or "IEP Team" means a group of individuals composed of—
> **(i)** the parents of a child with a disability;
> **(ii)** not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
> **(iii)** not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
> **(iv)** a representative of the local educational agency who--
> **(I)** is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
> **(II)** is knowledgeable about the general education curriculum; and
> **(III)** is knowledgeable about the availability of resources of the local educational agency;
> **(v)** an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
> **(vi)** at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
> **(vii)** whenever appropriate, the child with a disability.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
> (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.
> (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
> (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

Id. § 300.502(b)(1)-(4).

"[A] parent is only entitled to an IEE at public expense if the evaluation by the public agency was not appropriate." *E.P.*, 2017 WL 3608180 p. 5; *see also* 34 C.F.R. § 300.502(b)(3).

The federal regulations provide guidance in determining whether an assessment is appropriate. 34 C.F.R. § 300.304 provides in pertinent part:

> (b) Conduct of evaluation. In conducting the evaluation, the public agency must—
> (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
> (i) Whether the child is a child with a disability under § 300.8; and
> (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
> (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
> (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
> (c) Other evaluation procedures. Each public agency must ensure that—
> (1) Assessments and other evaluation materials used to assess a child under this part—
> (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;
(iii) Are used for the purposes for which the assessments or measures are valid and reliable;
(iv) Are administered by trained and knowledgeable personnel; and
(v) Are administered in accordance with any instructions provided by the producer of the assessments.
(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).
(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;
. . .
(6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304(b)-(c)(1)-(4), 6, 7. Similarly, COMAR 13A.05.01.05A, B(1)-(3), C, D provides:

.05 Assessment.

A. Nondiscrimination. A public agency shall ensure that testing and assessment materials and procedures used to assess a student's need for special education and related services are selected and administered in a manner which is not racially or culturally discriminatory.
B. Assessment Procedures.
(1) A student shall be assessed in all areas related to the suspected disability, consistent with 34 C.F.R. § 300.304(c)(4).

(2) A variety of assessment tools and strategies shall be used to gather sufficient relevant functional, cognitive, developmental, behavioral, academic, and physical information, and information provided by the parent to enable the IEP team to determine:

(a) If the student is a student with a disability;

(b) The student's educational needs;

(c) The content of a student's IEP, including information related to enabling the student to be involved in and progress in the general curriculum, or, for preschool students, to participate in appropriate activities; and

(d) Each special education and related service needed by a student, regardless of whether the need is commonly linked to the student's disability.

(3) A single procedure may not be used as the sole criterion for determining:

(a) If a student is a student with a disability; and

(b) An appropriate educational program for a student.

. . .

C. Assessment Materials.

(1) A public agency shall ensure that testing and assessment materials and procedures used to assess a student'' need for special education and related services are:

(a) Technically sound; and

(b) Provided and administered in the student's native language or other mode of communication, in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer.

(2) A standardized test administered to a student shall be:

(a) Valid for the specific purpose for which it is used; and

(b) Administered by trained and knowledgeable personnel in conformance with the instructions provided by the producer of the test.

(3) Tests and other assessment materials are not limited to procedures designed to provide a single general intelligence quotient and include procedures tailored to assess:

(a) Specific areas of educational need; and

(b) The extent to which a student with limited English is a student with a disability, rather than measuring a student's English language skills.

(4) The results of assessment procedures selected for use with a student with impaired sensory, manual, or speaking skills shall accurately reflect the student's aptitude or achievement level, and the other factors procedures purport to measure, rather than the student's impaired sensory, manual, or speaking skills, except when those skills are the factors that procedures purport to measure.

D. Report of Assessments.

(1) A report of assessment procedures administered to a student in each area of suspected disability, as determined in accordance with Regulation .04 of this chapter, shall be available to the parents, consistent with Education Article, § 8-405, Annotated Code of Maryland, and to the IEP team at the time of the evaluation.

(2) Each report of assessment procedures shall be written, dated, and signed by the individual who conducted the assessment.
(3) Each report of assessment procedures shall include:
(a) A description of the student's performance in each area of suspected disability;
(b) Relevant information in accordance with §B(2) of this regulation;
(c) Instructional implications for the student's participation in the general curriculum or, for a preschool student, participation in appropriate activities; and
(d) A description of the extent to which assessment procedures were not conducted under standard conditions, consistent with 34 C.F.R. § 300.304(c).

Contentions/Burden of Proof

In this case, the Parents requested an IEE from MCPS because they did not agree with an April 7, 2020 psychological assessment conducted by MCPS. MCPS contends that it properly denied that request because the MCPS psychological evaluation was appropriate and that an IEE at public expense is not warranted.

The Parents contend that the MCPS psychological assessment was inappropriate because of significant methodological flaws and misinterpretations, it was not sufficiently comprehensive to merit the conclusions reached, and the conclusions in the assessment went beyond the data.

The standard of proof in this case is a preponderance of the evidence. *See* 20 U.S.C.A. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3). 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 Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). The burden of proof rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). In this case, MCPS bears the burden of proof as it is the party seeking relief.

MCPS's Case

Mother

The Mother was called as a witness by MCPS. She provided some background about the Student's education and personality. She indicated that he attended [redacted] until he transferred

to [redacted] in October 2019, where he was in the gifted and talented program. She described her son as competitive, brilliant, loving, and caring.

The Mother did not recall many details regarding special education or related services the Student received a [redacted] She remembered that he had an IEP and that he had some help for speech because he was sometimes not understood.

The Mother recalled an IEP team intake meeting at [redacted] on November 1, 2019 and testified that the Parents were part of the IEP team. She could not recall if services were added to the Student's IEP as a result of that meeting, but the Parents stipulated to the admissibility of a November 6, 2019 Prior Written Notice proposing the amendment of the Student's IEP to include thirty minutes of counseling weekly outside the general education classroom.

The Parents further stipulated that they signed a January 28, 2020 Consent form, which indicates the IEP team recommended evaluation of the Student to include assessments in Academic Performance, Communication, Intellectual/Cognitive Functioning, and Emotional/Social/Behavior Development. The Mother testified that only the Father signed the form because she did not want to sign it.

The Mother had no recollection of meeting MCPS school psychologist [redacted]. She recalled that at the November 2019 IEP meeting, "they asked a little bit about [the Student]." (Testim. Mother at 33.)

The Mother acknowledged that she never completed a Parents questionnaire as part of the tests performed by Dr. [redacted] but testified that she never saw a questionnaire. She testified that only the Father has an email account and that she never spoke about a questionnaire with the Father. The Mother further testified that she did not remember receiving any communications from the school asking her to complete the Parent questionnaire

As discussed below, I found the Mother's testimony to be vague and sketchy.

[redacted]

Dr [redacted], who was accepted as an expert witness in school psychology, testified about her educational and professional background (as set forth in the Findings of Fact) and that she has performed approximately 1,200 – 1,500 psychological assessments, approximately 25-30% of them relating to an emotional condition or disability.

Dr [redacted] testified that a psychological assessment is usually prompted by an IEP team referral. An IEP team considers and discusses input from teachers, classroom observations, and observations of a student throughout the school day. The team discusses how a student functions emotionally compared to his peers, any concerns about his behavior, and how his peers respond to him. It the team suspects that the student has more difficulty than is usual, the team may recommend taking a closer look to see if his emotions/behavior is interfering with his ability to learn and access the curriculum.

Dr [redacted] testified that when she conducts a psychological assessment relating to an emotional condition, she makes a determination, based on the gathering of all available information, whether the student meets one or more of the following five criteria of a student with an "emotional condition" for educational purposes. The criteria must have been met, over a long period of time and to a marked degree and adversely affect the student's educational performance:

1) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3) Inappropriate types of behavior or feelings under normal circumstances;
4) A general, pervasive mood of unhappiness or depression; or
5) A tendency to develop physical symptoms or fears associated with personal or school problems.

(MCPS 143.)

Dr [redacted] testified that after the Student transitioned from [redacted] to [redacted], his April 3, 2019 IEP from [redacted] was amended on January 28, 2020 as a result of an IEP re-evaluation planning meeting where there was discussion relating to the Student's emotional functioning, and concerns were raised that he might have more than just the speech/language disability identified at [redacted]. She noted that the Student had social/emotional/behavioral goals on his IEP and received thirty minutes of counseling services weekly outside general education. Assessments, including a psychological assessment, were recommended by the IEP team in January 2020, and approved by the Parents. Specifically, the Student was to be assessed in the area of "Emotional/Social/Behavior Development." (MCPS 89.) Dr [redacted] testified that "social" refers to how a student interacts with others; "emotional" refers to how he responds and presents (e.g., happy, low mood); "behavior" refers to outward behavior (e.g., attention, focus, regulating the body).

When asked about her overall findings, Dr. [redacted] testified that the results of the evaluation were overwhelmingly significant for anxiety and depression, observed compulsive thinking, and repetitive patterns. The Student's scores compared with other students of the same gender and age ranged from average to severe. He often had the highest possible score. Dr. [redacted] found that "[t]hese ratings are indicative of considerable emotional suffering due to extreme anxiety and worrying, difficulty controlling ruminating thoughts, and a drive to overcome feelings of inadequacy." (MCPS 140.)

Furthermore, based on her assessment, Dr. [redacted] concluded:

> [T]he probability of an Autism Spectrum Disorder[16] was ruled out . . . but I still have concerns about some vulnerabilities that he does have. And in the emotional realm, he had very significant symptoms of anxiety, depression, tendency to become . . . very irritable . . . and . . . he had a lot of difficulty . . . interpreting social cues and forming relationships with peers in a sustained way, [and] had difficulties with routines.
>
> And so my feeling is that [the Student] definitely manifested what's considered an emotional condition.

(Testim. [redacted] at 86.)

It was Dr. [redacted]'s expert opinion that the testing methods she employed were appropriate to assess the Student's needs; she used a variety of technically sound instruments administered according to the standards and protocols for the assessments; used for the purposes for which they were developed; interpreted according to protocols of the test; her conclusions were appropriate and in accordance with MCPS protocols; and her report was appropriate.

Dr. [redacted] presented as professional and well-versed in the testing of students for an emotional condition. Her credentials indicate that she is an experienced and knowledgeable school psychologist. However, as discussed below, it might have been helpful to MCPS' case if she had been called back as a rebuttal witness to Dr. [redacted]'s and Dr. [redacted]'s testimony relating to the absence of validity scales on the Conners and to explain in greater detail her scoring on the ASRS.

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[16] COMAR 13A.05.01.03B(8) defines autism as follows:

(8) "Autism" means a developmental disability that:
(a) Does not include emotional disability as defined in §B(23) of this regulation;
(b) Significantly affects verbal and nonverbal communication and social interaction;
(c) Is generally evident before 3 years old;
(d) Adversely affects a student's educational performance; and
(e) May be characterized by:
(i) Engagement in repetitive activities and stereotyped movements,
(ii) Resistance to environmental change or change in daily routines, and
(iii) Unusual responses to sensory experiences.

[redacted], who was accepted as an expert in general education, was the Student's homeroom, Math, Science, and Social Studies teacher in the [redacted] program during the fifth grade at [redacted]. He has taught for approximately fifteen years, and currently has a provisional elementary 1 through 6 certification and a K through 12 certification. Mr. [redacted] testified that he has experience working with children with emotional disabilities and autism, including children in the gifted and talented program at [redacted]

Mr. [redacted] taught the Student in-person for 4-5 months and then virtually for two and a half months during the COVID-19 pandemic. Mr. [redacted]'s description of the Student was consistent with that in his written observations as set forth in the Findings of Fact. He emphasized that the Student exhibited anxiety and perfectionism, asked a lot of questions for clarity, struggled with working in groups, resulting sometimes in conflict if he was not in charge, and tended to get upset leading to an inability to complete assignments. In addition, the Student worried a lot about not getting As and disappointing his family.

In addition to formal meetings, Mr. [redacted] recalled having informal conversations with Dr. [redacted] when they would discuss how the Student was doing.

Mr [redacted] presented as sincere, with good recall of facts. When he spoke of the Student, the tone of his voice conveyed genuine care and concern.

[redacted] Coordinator for Psychological Services, MCPS, was accepted as an expert witness in school psychology. Ms. [redacted] has a B.A. and a M.A. in Psychology, a Psy.S. in School Psychology,[17] and a Post-Master's Certificate for Administration. She has been a certified school psychologist for approximately 23 years, was a MCPS school psychologist from

[17] Ms [redacted] described this as "equivalent to a Masters + thirty" degree." (Testim. [redacted] at 380.)

October 1977 through July 2017, and has held the position of Coordinator since July 2017. She sat on an MCPS Emotional Disturbance Committee from 1997 to 2003 and co-authored "Procedures for Confirming Emotional Disturbance and Mental Retardation." Ms [redacted] performed approximately 50-70 psychological assessments per year during her twenty years as a MCPS school psychologist.

As Coordinator, Ms [redacted] is responsible for, among other things, evaluating MCPS assessments that have come up to MCPS' dispute resolution committee (DRC) to make sure they are "defensible." (Testim. [redacted] at 383.) She described the process she goes through in evaluating a psychological assessment. First, she looks at the reason for referral (the concerns that were presented to the school psychologist on the IEP team). Then she makes sure that the assessment consists of all of the pieces of information that a school psychologist is supposed to have, followed by ensuring that the proper instruments were used appropriately based on the referral question. Ms.[redacted] then looks to see that observations are present in the report. She makes sure that the data gathered answers the questions and that the information is properly interpreted based on the data, e.g., that it matches the scores if it is norm reference data.[18] She also ensures that the conclusions that are drawn in the assessment are based on the data that is presented in the rest of the report.

As Coordinator, Ms [redacted] reviews approximately two to three psychological assessments per month; approximately one third are related to Emotional Disability. On cross-examination, Ms. [redacted] testified that in the last three years, she has determined approximately two to three times a year that an assessment was not defensible and appropriate.

[18] Dr. [redacted] defined "norm referenced measures," as "measures that have been normed based on the representative sample of students across the United States." (Testim [redacted] at 435.)

When asked how MCPS determines whether a Student has an Emotional Disability, Ms. [redacted] testified that MCPS has procedures for such a determination and follows guidance set forth in the IDEA and COMAR. The process starts with a determination by the school psychologist whether there is evidence that the Student has an emotional condition based on five criteria. Ms. [redacted] referred to a MCPS Multidisciplinary Evaluation Form, which the school psychologist completes indicating whether she has found evidence of one or more of the characteristics for an emotional condition that have existed over a long period of time and to a marked degree (Part I). If the existence of an emotional condition has been confirmed by the school psychologist, the IEP team then determines if there is a resulting educational impact and completes Part II of the form.

Specifically, about the Student, Ms [redacted] testified that she read through all of the records in evidence, including Dr. [redacted]'s report, because the Parents requested an IEE and indicated they wanted the report removed from the Student's school records. Ms. [redacted] determined that the sources of data matched the reasons for referral, and the background information was comprehensive. She ensured that observations were done, and she determined that the norm referenced data was there and was an appropriate measure for the referral, and that the data reflected Dr. [redacted]'s conclusions.

It was Ms. [redacted]'s opinion that Dr. [redacted]'s psychological assessment "was comprehensive . . . had information necessary to make the decisions she made. And it was completely defensible." (Testim. [redacted] at 403.)

Ms. [redacted] presented as professional and well-versed in protocols and procedures for the testing of students for an emotional condition/Emotional Disability. Her credentials indicate that she is extremely experienced and knowledgeable in the field of school psychology.

Student/Parents' Case

[redacted], who was accepted as an expert witness in school psychology, has been a school psychologist employed by [redacted] Public Schools for a little over two years. Before that, she was a school psychologist in [redacted] County Public Schools for approximately eight months. She has a B.A. in Psychology and Global Gender Studies, a M.A. in Global Gender Studies, and a Ph.D. in School Psychology. She is certified as a school psychologist in Maryland and in the [redacted]. On cross examination, Dr. [redacted] indicated that she performs psychological evaluations approximately once per week.

Dr [redacted] testified that she is familiar with the "best practices" in school psychological assessments and that the two foundational sources for best practices are from the National Association of School Psychologists (NASP) and the American Psychological Association (APA) guidelines. She testified that those are "basically our guide in our field." (Testim. [redacted] at 522.)

Dr. [redacted] presented as academically knowledgeable but practically inexperienced. Dr. [redacted] indicated that her knowledge of how MCPS identifies a student who might qualify for special education services stemmed from sitting in on testing and IEP meetings as part of a practicum while attending [redacted] University. She further acknowledged she has never published anything relating to psychological evaluations diagnosing emotional disabilities in children, noting that her research specialty is [redacted] families from an [redacted] region.

[redacted]

[redacted], who was accepted as an expert witness in psychological assessments, has been a licensed psychologist in Maryland since 1991 (and in [redacted] since 1988). He is the

President and owner of [redacted] (October 1999 to present), a multidisciplinary practice serving individuals with neurobehavioral disorders. Prior to that, Dr. [redacted] was Associate Director of the [redacted], [redacted]. (July 1994-September 1999) and was employed at the [redacted] (1991-September 1994), [redacted] (1990-1991), and the [redacted] Dr [redacted] has a B.S. with Highest Distinction in Psychology, a M.S. in Psychology, and a Ph.D. in Clinical Psychology. He is an Awarded Diplomat of American Board of Professional Neuropsychology.

Dr [redacted] practice specializes in attention disorders, learning difficulties, brain injury, seizure disorders and pervasive development disorders. Seventy-five percent of his practice involves performing psychological assessments; he performs approximately 175-200 per year. He frequently works with numerous county school systems in Maryland, including Montgomery County, and just finished an IEE relating to another student at the joint request of parents and MCPS. In addition, he has conducted training of school psychologists in psychological assessments for [redacted] County Public Schools.

Based on his review of MCPS' and the Parent's exhibits, it was Dr. [redacted]'s expert opinion that the MCPS psychological evaluation of the Student was not appropriate because of significant methodological flaws and inaccuracies, it is not sufficiently comprehensive to merit the conclusions reached, and the conclusions in the assessment went beyond the data.

Dr. [redacted] presented as knowledgeable in the field of psychology. Although his background is not as focused on school psychology as MCPS' expert witnesses, based on his

testimony and a review of his credentials, I find that he has enough experience with regard to school psychological assessments to offer his expert opinion in that regard.[19]

Father

The Father described the Student as loving, smart, and with high standards for himself. The Father testified that his family has high standards to be the best they can, including in school. He has never heard the Student call himself stupid or not normal and believes the Student actually thinks he is superior because he is so highly intelligent. The Father testified that because of the Student's speech/language difficulties, the Student sometimes does not express himself well.

The Father's testimony, discussed in greater detail below, indicated that he did not have a full grasp of the Student's history at school as it relates to social/emotional/behavioral concerns.

Analysis

As indicated above, the Parents are only entitled to reimbursement for an IEE if the MCPS evaluation was not appropriate.

As noted by the court in *E.P.*:

> Of significance, "[w]hen challenging an educational evaluation, the pivotal question is whether the District's methods employed were adequate. This is because the "'key to an educational evaluation is the methodology employed. Accordingly, the "'conclusions, or lack thereof, cannot be inadequate unless the methodology is inadequate . . . .'"

E.P., 2017 WL 3608180 p. 23 (citations omitted).

For the reasons that follow, I find that the MCPS psychological evaluation was not appropriate and the Parents are entitled to independent educational evaluations at public expense.

[19] I do not find it significant, as suggested by MCPS, that the Student's private psychotherapist did not testify. There is no evidence that she has any expertise in school psychology or that she had factual knowledge relevant to the issues before me.

I find that, in essence, this case involves disputes as to whether the MCPS school psychologist used a variety of assessment tools and strategies in her assessment, pursuant to 34 C.F.R. § 300.304(b)(1) and COMAR 13A.05.01.05B(2); used a test for the purpose for which it was intended and for which it is valid and reliable, pursuant 34 C.F.R. section 300.304(c)(1)(iii) and COMAR 13A.05.01.05C(2)(a); and whether the Student was assessed in accordance with instructions provided by the producer of an assessment, pursuant to 34 C.F.R. § 300.304(c)(1)(v) and COMAR 13A.05.01.05C(2)(b).

In addition, at issue is whether the MCPS psychological evaluation was sufficiently comprehensive to identify all of the child's special education and related services needs, pursuant to 34 C.F.R. § 300.304 (c)(6), and whether the psychological report included relevant information required by COMAR 13A.05.01.05D(3)(b).

An additional issue is whether the MCPS report of assessments otherwise complied with COMAR 13A.05.01.05D.

Based on my review of the evidence, including MCPS' records, testimony of witnesses for the MCPS and for the Parents (including admissions made by the Parents' expert witnesses), I find that MCPS has met its burden of proof with regard to compliance with the other criteria for an appropriate assessment set forth in the 34 C.F.R. § 300.304 and COMAR 13A.05.01.

I turn to the Parties' specific disputes.

Inappropriate Tests

Initially, I note that Dr. [redacted] first testified that the WISC-V was not an appropriate test to administer to the Student given the stated purpose of the evaluation and because the Student's cognitive skills were not in question.[20] He then testified that it was all right for Dr. [redacted] to use

[20] Dr. [redacted] had no dispute with how Dr. [redacted] interpreted the WISC-V results.

the WISC-V, but she should have explained in her report why she did so. I have addressed the appropriateness of the MCPS psychological report below.

According to the Parents, MCPS did not use an appropriate test and the psychological evaluation should have included more tests. Rather, the MCPS school psychologist relied on the Conners, which was inadequate and did not provide a full picture of the Student.

It was Dr. [redacted]s opinion that the MCPS school psychologist assessment was inadequate because she failed to use a direct measure of the Student's emotional functioning. In addition, the Conners is a broad test meant to be an overview and Dr. [redacted] used it for other than that purpose.

Dr. [redacted] testified that psychologists have access to multiple standardized objective measures of emotional functioning, such as the Reynolds Adolescent Depression Inventory, the Children's Depression Inventory II, the Multi-Anxiety Scale for Children II, and the Beck Youth Inventories, as well as projective measures requiring more clinical interpretation, such as the Children's Apperception, the Robert's Apperception Test and the Sentence Completion Test.

Dr. [redacted] and Ms. [redacted] both testified, however, that the Conners is an objective measure of the Student's emotional functioning. Equating "objective" to "norm referenced", Dr. [redacted] testified that the WISC-V, Conners and ASRS are objective/norm referenced tests.

When asked on cross-examination if she used any objective data to evaluate the Student, Dr [redacted] testified:

> Well, both questionnaires -- and I considered the results from the autism checklist as well, because although it's classified as an instrument that can identify an autism spectrum disorder, it identifies a lot more than that, and that's why I felt the information was still very helpful in identifying his profile.
>
> For example, there are items on there that look at specifically peer socialization, adult socialization. There's social emotional reciprocity, behavior rigidity. Those are all rich points of data, and in both cases, both instruments are well-researched. They're not just something somebody cooked up, but they are well-documented, well-researched based on very large samples of students -- or raters, whether they

> be teachers, students, or parents. And by having a normative group, then they can establish what does normal or average look like, and kind of using maybe a model such as a bell-shaped curve, they can then establish what average scores consist of what's, you know, high average marks or moderately high or severely high. So, these are considered objective.

(Testim. [redacted] at 174-75.)

On cross-examination, Dr. [redacted] acknowledged that the responses to the Teacher questionnaires are usually based on observational data from the teachers, [s]o, I guess everyone's opinion is subjective, but when you gather a lot of information and put it together as a cluster, you can begin to identify patterns." (Testim. [redacted] at 174.)

When asked whether there are other assessments that are more objective to assess a child's emotional functioning, Dr. [redacted] responded: "You'd have to give me an example, because as far as I know, these are very, very reliable, well-researched instruments. (Testim. [redacted] at 178.) She described the Conners as "a very good comprehensive measure we use pretty widely in the school system because it captures a variety of behaviors, emotionality, and the social aspect." (Testim. [redacted] at 74-75.)

Ms. [redacted] testified that the Conners was one of several appropriate instruments that could be used in this case and it was properly administered and interpreted. She further testified that MCPS does not require a school psychologist to use certain assessment tools – the psychologist may pick the tools the psychologist deems appropriate based on the reason for the referral. It was Ms [redacted]' opinion that Dr. [redacted] used a variety of tools in her assessment, including the WISC-V, Conners and ASRS.

I placed greater weight on the testimony of MCPS's expert witnesses than on Dr. [redacted]'s testimony with regard to this issue. Dr. [redacted] and Ms. [redacted] have greater experience focused on school psychology, including psychological evaluations of a Student for educational purposes. While Dr. [redacted] had impressive credentials and many years of experience in the

field of psychology, the primary focus of Dr. [redacted]'s and Ms. [redacted]'s decades of experience has been in the area of school psychology.

Furthermore, I credit Dr [redacted]'s professional judgment. "When challenging an educational evaluation, the pivotal question is whether the District's methods employed were adequate . . . . Because IDEA evaluations depend on the exercise of professional judgment, they are entitled to a reasonable degree of deference." *West Chester Area Sch. Dist. v. G.D.*, 2017 WL 379440 p. 3 (E.D. Penn. Jan. 25, 2017).

Moreover, the evidence shows that the Conners was not used as a stand-alone measure. I note also that on cross-examination**,** Dr. [redacted] acknowledged that psychological assessments typically encompass different sources of data and that there are several tests available to identify the same suspected disorder and it is up to the psychologist to determine which tests to perform.

Based on her relative lack of experience conducting school psychological evaluations, I do not place as much weight on Dr. [redacted]'s testimony as I do on the testimony of the other expert witnesses. Nonetheless, I find it noteworthy that she acknowledged that the Conners is a fine a source of data, and that information from the Student's intake conference, the IEP re-evaluation planning conference, record review, staff consultations and observations were also appropriate sources for social/emotional/behavioral data. Dr. [redacted] also acknowledged on cross-examination that Dr. [redacted] used a variety of assessment tools for sources of data.

Thus, based on the above testimony and my review of the MCPS psychological report, I find a preponderance of the evidence establishes that Dr. [redacted] used a variety of appropriate assessment tools and strategies, including the Conners, ASRS, and WISC-V; parent input; teacher input including input from two teachers who saw the Student every school day; information from an IEP intake meeting and IEP meetings; record review; staff consultations; and formal and informal observations. I further find that a preponderance of the evidence

established that the Conners (and the ASRS) are objective assessments employed by MCPS in evaluating the Student and the MCPS used the Conners for the purpose for which it was designed, i.e., "to gather information about the behaviors and feelings of children and adolescents [and] help identify a number of childhood disorders." (MCPS 138; Parent Ex. 4-9.)

Parent Questionnaires

Dr [redacted] and Dr. [redacted] were both of the opinion that Dr. [redacted] did not gather enough information from the Parents and that Dr [redacted]'s statement in her Summary and Conclusions that the background information provided by the Parents was "supportive of significant emotional concerns" was vague and inaccurate. (Parent Ex. 4-13.)

It was undisputed by MCPS that the Parents did not complete the Conners and ASRS Parent questionnaires. Dr. [redacted] testified that Parent questionnaires are very important to get a picture of the Student as a whole – it is important to gather information regarding the Student's behaviors at home, school, and in the community. She testified that the school psychologist can write a report without the Parent questionnaire responses but must document in the report her efforts to obtain them. Dr. [redacted] testified it is best practice to keep a record of all attempts and mention the need for further parent input in the Conclusion of the psychological report.

On cross-examination, Dr. [redacted] agreed that when parents do not complete questionnaires, it is appropriate to use anecdotal information *if* the psychologist has not attempted other means, such as an interview.

When asked on direct examination how, if at all, the absence of responses to Parent questionnaires affected the assessment, Dr. [redacted] responded:

> Well, that's (sic) can be a complex question . . . I always want the parent to have their input, not just verbally, but through questionnaires so that we can have the standard scores, and . . . standard scores just help us to understand how the child compares to children of the same gender and age range and this part of the picture, and parents . . . have important input in that; however, the fact that its an educational disability and we're looking at who the child is at school, not necessarily who he is outside of school, and

> having the parent information does not preclude us from making the decision about whether or not its's an educational disability.

(Testim. [redacted] at 79-80.).

Dr. [redacted] testified that she has prepared other reports throughout her career without completed Parent questionnaires. In addition, anecdotal information can be an important piece in understanding the Student. She testified that in this case, the Parent's information listed under Background Information in her report was "very significant, and it was an important piece of information in terms of understanding [the Student]." (Testim. [redacted] at 81.)

Ms. [redacted] also acknowledged that parent input is important and required for an evaluation. When asked if the absence of parent input in an evaluation has a negative impact on the reliability of the evaluation, she answered: "It can. Not always." (Testim. [redacted] at 438.) She emphasized that parent input is not always available and that when that occurs, parent information from meetings with the parents can be used.

With regard to what anecdotal information she obtained from the Parents, Dr. [redacted] indicated she considered information provided by the Parents at the November 2019 Intake meeting at [redacted] and at IEP meetings. Her report corroborates her testimony. In addition, my review of the information from the Parents included in the Background Information section, as set forth in the Findings of Fact, supports Dr [redacted]'s conclusion that the information "was supportive of significant emotional concerns."

Again, for the reasons set forth above, I placed more weight on Dr. [redacted]'s and Ms. [redacted]'s expert testimony. Thus, I find that background information the Parents gave at the intake meeting and IEP meetings provided sufficient information for the psychological assessment regarding the Student's social emotional behavior as it relates to a potential educational disability. I further find that the MCPS psychological evaluation was not inappropriate merely because the evaluator did not formally interview the Parents or otherwise

obtain more data from them. I find Dr. [redacted] properly relied upon the anecdotal information described in her report.

Finally, although the Parents testified to the contrary, I believe Dr. [redacted]'s testimony that she attempted at least twice to contact the Parents about completing the questionnaires even though she did not produce a written record of those attempts. I found her testimony more reliable than the Parents in that regard. The Parents were not even aware of Dr. [redacted]'s emails to the Father transmitting the questionnaires despite the fact that at the January 2020 IEP meeting, she let them know she would be sending them. (The Father told her at that time to send them to his email address because the Mother did not have one). In addition, in light of the issues MCPS had been reporting to them about the Student, certainly one would expect the Parents to be on the lookout for communications from MCPS. Thus, I find it is likely that the Parents were less than attentive to communications from MCPS and that it is likely they simply did not give Dr. [redacted]'s attempts to communicate with them the attention they deserved.

Accordingly, I further find that the MCPS psychological assessment was not an inappropriate assessment of the Student based on a lack of data from the Parents.

Lack of Correlation Between Teacher/Examiners Observations and Conners Scores

It was Dr. [redacted]'s opinion that the MCPS psychological report was methodologically flawed because there was a lack of correlation between the observations of the teachers/examiners and the Conners scores, requiring that Dr. [redacted] obtain additional corroborating data from them. Dr. [redacted] and Dr. [redacted] testified that the teachers' and examiners' reports contained at times no observations of any emotional concerns, or observations that conflicted with their own observations or the observations of others, as well as with the Conners scores. Dr. [redacted] also asserted that Dr [redacted] failed to consider all of the

behaviors observed by teachers and examiners, including those inconsistent with the Conners scores.

Dr [redacted] testified that given the Student's clinically elevated scores on the Conners, indicating behavior that is pervasive and frequent, one would expect to see significant behavioral difficulties in the classroom, "constant . . . every day and in different aspects – different periods." (Testim. [redacted] at 526.) Dr. [redacted] testified that he would have also expected to see some behaviors consistent with the Conners scores on the multiple occasions Ms. [redacted] met with the Student for the Educational Assessment.

In addition, referring to Ms. [redacted]'s February 25, 2020 and March 2, 2020 classroom observations, Dr. [redacted] testified that Ms. [redacted]'s observation of "Some problems" (meaning once a week and/or that maybe the student needs a little bit of redirection) in Mr [redacted]'s class with attention and organization is not an indication of an Emotional Disability under the IDEA and is not consistent with the Conners scores. The indication of "No Problem" in other areas (e.g., activity level, social interaction, work habits, and motivation) is also inconsistent with the Conners scores. It was likewise for the observation of "No Problem" in Mrs. [redacted]'s class in such areas as activity level, social interaction, task completion and motivation. Nor did Dr. [redacted] see any indicators of an Emotional Disability, as defined in the IDEA, in Ms. [redacted]'s March 13, 2020 Educational Assessment Report .

Dr. [redacted] and Dr. [redacted] both indicated that Ms. [redacted]'s comment in her April 9, 2020 Report of Speech-Language Re-Assessment that the Student had a displayed a positive demeanor most of the time was also inconsistent with the highly elevated Conners scores. Dr. [redacted] also emphasized that Ms. [redacted]'s classroom observation of the Student showed nothing consistent with the elevated Conners scores.

Dr. [redacted] also believed that an email from the Student's physical education teacher to the Father, noting he is a good helper and does a great job demonstrating skills and keeping students in a personal space was inconsistent with the Conners scores.

In addition, according to the Parents' experts**,** there was nothing in Dr. [redacted]'s classroom observations of the Student indicative of a significant emotional disability. They further asserted that the Student's behaviors during testing described by Dr.[redacted] were inconsistent with the Conners scores, noting that she reported the Student's "activity level did not impede his ability to focus [and] although active and restless, he continued to be very attentive and engaged in the process." (Parent Ex. 4-6.) Dr. [redacted] would have expected the Student's restlessness to have some impact on the Student's performance based on the Conners scores.

Dr. [redacted] further testified that based on Dr. [redacted]'s statement in her report that "[a]fter a two to three month adjustment period, [the Student] came to enjoy being in the program," she would not have expected to see the Conners scores the Student had at the time of the psychological assessment.

It was Dr [redacted]'s opinion that based on the inconsistencies, Dr. [redacted] should have either limited her conclusions, or gathered more data. She should have moved from the broad Conners overview to more specific test(s). Dr. [redacted] testified that when there are the aforementioned types of inconsistencies, best practices dictate that the school psychologist do further evaluations that can include more interviews or another source of data.

Ms. [redacted] emphasized in her testimony, however, that "[o]bservations are snapshots. They are moments in time and you need to look at all the data together and come to conclusions that way." (Testim. [redacted] at 404-05.) The fact that not all staff saw concerning behaviors each time they observed the Student did not detract from other "snapshots" indicating those behaviors.

For example, the information provided by the teachers was "still quite concerning and represent[ed] emotionality." (Testim. [redacted] at 463.)

Dr. [redacted] also indicated that observations "are only snapshots" and "that's why the teacher reports, background information, the things they log are so critical, because it gives us a much more thorough picture of him as a learner in class." (Testim. [redacted] at 71.) She testified it was her job as the school psychologist evaluating the Student to consider all of the observations and reports of behavior and to put them all together to form a full picture of the Student.

When asked specifically about Ms. [redacted]'s observations of the Student over multiple assessment dates, Dr. [redacted] stated:

> Ms. [redacted] had several testing sessions, one-on-one with [redacted]. So, those don't really count we're talking about how a student presents in a classroom, because that's just a very different dynamic, very different setting. Her classroom observations that each were 30 minutes, she observed something very different from the teachers, but again, the teachers are a culmination of working with him every day, most hours a day, versus two 30-minute snapshots.

(Testim. [redacted] at 143.)

Specifically, with regard to Ms. [redacted]'s multiple observations of the Student during testing, Ms. [redacted] testified that it did not surprise her that Ms. [redacted] stated that during most of the time, the Student displayed a positive demeanor. She testified this was "[b]ecause when you're in a testing situation, you're one on one. You have the undivided attention of the person in the room. . . . [Y]ou don't have all of the other challenges around you that you might see in a classroom setting." (Testim. [redacted] at 462.)

Additionally, in addition to observing during her assessment that the Student displayed a positive demeanor most of the time, Ms. [redacted] observed that "[h]e displayed a high level of anxiety when answering questions, oftentimes requesting repetitions and wanting to talk about his options prior to giving an answer. There was also a tendency to overthink and overanalyze questions and answers." (MCPS 159.) In the written portion of her Classroom Observation, Ms.

[redacted] reported: "As the teacher was talking about the directions, [the Student] was tapping his hands on the rug." (MCPCS 113.)

Dr. [redacted] testified that on the day she observed Mrs. [redacted]'s class, Mrs. [redacted] told her that the Student was having a better-than-usual day. In addition, Dr [redacted] reported during her classroom observation that the Student was tapping, making slapping sounds against his upper back, holding the corner of a book in his mouth, banging on the floor with his fist, and making sounds in his hand, and that he was kneeling with his body in constant motion. Dr. [redacted] noted that although it did not interfere with his ability to focus during testing, the Student at times squirmed quite a bit in his chair, was humming and engaged in some type of movement like tapping, bending his fingers on his forehead, drumming his fingers, and shifting and sliding down in his chair.

Dr [redacted] acknowledged that perhaps her statement in her report that the Student "came to enjoy the program," was ill-phrased and that what she meant was that he "OK with being there," whereas "prior to that, he complained pretty much every day that he wanted to go back home and did not want to be there, but after this period of adjustment, he was happy about -- he liked the way the teaching was delivered . . . . because it's a different model of instruction." (Testim. [redacted] at 109-11.) When asked if that sounded consistent with a child who was, according to the Teacher questionnaires, showing extreme signs of depression that were pervasive and intense. Dr. [redacted] responded:

> Well, human beings are multi-layered, and we can't – there's an element of the Student where he loves to learn, and he's smart and able to achieve a lot of joy and pleasure out of learning, even I think in the face of not feeling good about himself and about things. So, I don't think there's one way to characterize a child who feels -- who may feel depressed or anxious. That's -- you know, we look at strengths and weaknesses in children, and that is a strength of his, is the love of learning.

(Testim. [redacted] at 111-12.) I note also that Mr. [redacted]'s testimony indicated that although January and February 2020 were good months for the Student because fewer incidents took place, February, in particular was difficult.[21]

Mr [redacted] further testified that the day Ms [redacted] observed his class was not a typical day for the Student in terms of behavior. He indicated that the Student worried a lot daily; he showed signs of depression intermittently (several times a week) and had ruminating thoughts intermittently. There were weeks where the Student was sad and gloomy for the majority of the week. The Student talked a lot about being tired and frustrated and about his back hurting. Mr. [redacted] further testified that the Student exhibited social anxiety (excessive fear of performing or talking in front of others) when he was performing an assignment task that he was struggling with because it was in writing or he was concerned about making mistakes or about his grade. In addition, the Student was argumentative frequently (several times a week). Mr. [redacted] observed perfectionistic and compulsive behaviors daily. Mr. [redacted] further testified that the Student would go through periods where he would get really excited and then the following days would be the exact opposite. He also testified that most weeks, at least several times a week, something would cause the Student to get upset or to worry excessively.

Mr [redacted] also testified, "[The Student] fidgeted a lot either tapping or he had a tendency to kind of spin his hand in the air or he would kind of twist his finger in his hair or play with things inside his desk" (Testim. [redacted] at 372.).

When asked on cross-examination if any of the above alleged inconsistencies raised any question in her mind as to the reliability of the Teacher questionnaires, Ms. [redacted] answered, "It does not – it does not make me question the reliability at all." (Testim. [redacted] at 146.)

[21] Students switched to visual learning in March due to the COVID-19 pandemic.

Again, I have placed greater weight on the expert testimony of MCPS' witnesses, including Mr. [redacted] who saw the Student for a large portion of every school day.

In addition, factually, I find that Dr. [redacted]'s testimony establishes that she reviewed and considered all the relevant information, good and bad. Furthermore, many observations reported by teachers and examiners were consistent with the Conners and ASRS scores. For example, Mr [redacted]'s emails refer to comments the Student made about hating humanity and blowing up the world, self-deprecating comments, anxiety, argumentativeness, and inappropriate touching of other students.

The Parents questioned Dr. [redacted] about the accuracy of her statement in her report that "[t]he teacher reports, teacher behavior checklists *and all other available information* show [the Student's] symptoms of generalized anxiety, major depression, perfectionism, and obsessive-compulsive thinking are quite severe compared to average boys of the same age." (MCPS 142-42) (emphasis added). Dr [redacted] acknowledged that the phrase "all other available information" may have been too all-encompassing in light of variations in sources of data gathered and that the phrase, "much of the available information" may have been better. However, in light of her other testimony, I find that her choice of words in that regard did not alter the validity of her conclusions.

Accordingly, I find that a preponderance of the evidence does not establish that the MCPS psychological report was methodologically flawed because there was a lack of correlation between the observations of the teachers/examiners and the Conners scores.

Validity Scales

Dr. [redacted] testified that the Conners was not validly completed because Dr. [redacted] did not include in her report validity scales required in order to determine if the teachers filled out the Teacher Questionnaires and scored the Student in an unbiased manner. Dr. [redacted] testified:

> [T]he Conners was revised several years ago, it was 2009, and included three validity indicators. . . . [P]sychological assessment requires that you . . . have a – sort of an unbiased viewpoint. . . . I'm not sure why Dr. [redacted] didn't provide those because they are a requirement in order to determine if the teachers filled out the scale in an unbiased manner.

(Testim. [redacted] at 642.)

Dr. [redacted] testified that the Conners has three empirical validity indicators: positive impression, negative impression, and inconsistency. A positive impression elevation suggests that the teachers are presenting the child in an overly positive manner. A negative impression suggests that they are presenting him in an overly negative manner. He further testified: "There are marke[d] elevations on the [Conners], four standard deviations above the mean of multiple scales without a determination that the teachers approached the checklist in an unbiased manner. So those should've been presented." (Testim. [redacted] at 642.)

On cross-examination, Dr. [redacted] acknowledged that he had no reason to believe that Mr [redacted] or Mrs. [redacted] would do anything other than fill out the Conners rating scales to the best of their ability and knowledge of the Student in the classroom, but testified that the validity scales are an important part of the Conners.

Dr. [redacted] testified that she could not say if Dr. [redacted] assessed the Student in accordance with any instructions provided by the producer of the assessments, because she was not there when Dr [redacted] performed the Conners.

Dr. [redacted] testified generally that she followed protocols for administering the Conners but did not specifically address the validity scales. In order for me to be able to determine that the validity scales were 1) administered; and 2) showed no bias which might impact the Teachers' scores, I need evidence to that effect.

Although when asked on cross-examination if the lack of the validity scales in the report impacts the appropriateness of the psychological assessment of the Student, Dr [redacted]

responded: "No, not necessarily," I understood that to mean that the impact on the appropriateness of the assessment would depend on the results of the validity scales. Dr. [redacted] elaborated: "[W]hat I want to ask Dr. [redacted] is were . . . the validity scales . . . within normal range. The . . . Conners give you three options, probably valid, possibly invalid, probably invalid. And we'd want to know that the first condition, probably valid was met. . . in order to interpret the scales. And to me, because there were so many significant elevations that . . . would be a concern." (Testim. [redacted] at 707) (emphasis added).

Accordingly, I find that MCPS failed to prove by a preponderance of the evidence that the Student was assessed in accordance with instructions provided by the producer of the Conners.

Reason for Referral/Consent

The Parents contend that they were not told ahead of time that the Student would be tested for autism and they did not consent to it on the Consent form, which does not mention autism. According to the Parents, because consent was never given, the ASRS should not have been administered and its inclusion rendered the evaluation inappropriate.

MCPS contends that the ASRS was properly administered because of behaviors reported and discussed with the Parents that indicated the possibility the Student was on the autism spectrum and because the scores were elevated for symptoms of autism spectrum disorder on the Conners DSM-V Symptoms Scales. MCPS further argues that the Parents did consent to a test for autism when they signed a Consent form consenting to assessments in the area of Social/Emotional Behavioral Developmental.

Initially, I note that although the Conners scores did raise concerns about autism, the fact that the ASRS Parent questionnaires were sent to the Parents at the same time as the Conners Parent questionnaires indicates that was not the reason Dr. [redacted] decided to test the Student for

autism. Nonetheless, the Conners results bolstered MCPS' assertion of the need for testing for autism.

Both Parents indicated that at the January 28, 2020 IEP meeting, no one said they were going to evaluate the Student to see if he is on the autism spectrum and Dr. [redacted] acknowledged that term was not specifically mentioned at that IEP meeting. Additionally, the Father stated that no one reviewed with him the tests that were to be given.

The Father recalled meeting with Dr [redacted] for approximately five minutes after the IEP meeting when he signed the Consent form but stated there was no discussion at that time about autism. He believed all assessments related to speech/language and that the Student had progressed on his social emotional goals.

Dr [redacted] testified that she is familiar with the best practices in school psychology with regard to obtaining parental consent for evaluation of a student for autism. According to Dr. [redacted], this includes having some discussion with parents and the IEP team about such testing before obtaining the parents' signatures on the Consent form. Dr. [redacted] testified that if consent is not properly obtained, it would impact "the significance of . . . the scales. . . within the data. Within . . . your hypothesis." (Testim. [redacted] at 549.) She emphasized, "[]The reason for the referral . . . dictate[s] the testing." (Testim. [redacted] at 550.)

Given the reasons for the Student's referral for a psychological assessment, it was Dr. [redacted]'s opinion that Dr. [redacted]'s use of the Conners was appropriate but the use of the ASRS was "of question" because there was no referral for concerns about autism. (Testim [redacted] at 514.)

When asked if he agreed that autism could fall under the category of Social/Emotional/Behavioral Disorder,[22] Dr [redacted] said it is a descriptive term under which

[22] I note the questioner used the word "Disorder;" however, I find it does not differ in relevant substance to the word

autism could fall. On cross-examination, Dr. [redacted] acknowledged that if an examiner was going to be looking for any criteria for autism, that would fall under the category of Emotional/Social/Behavior Development checked on the Consent form. But on redirect, she testified that the Consent form, under the heading "Document basis for decision," should have specifically referred to autism.

Ms. [redacted] testified it is not necessary to obtain a separate consent from a Parent for testing for autism if the Parent has agreed to an assessment for the broader area of Emotional/Social/Behavioral Development. The ASRS is not automatically given when there is a referral for that broader area but may take place depending on the difficulties a student is exhibiting. When asked what would lead a psychologist to ask teachers and/or parents to complete an ASRS, she testified: "The difficulties that a student [has] with rigidity and flexibility for separating thoughts and activities and interests would lead someone to do that. . . . Having difficulties with social interactions might also, depending on how those looked or how pervasive they were." (Testim [redacted] at 410.)

When asked on cross-examination whether, if a student presented features of autism, it would be discussed during an IEP meeting or other forum, Ms. [redacted] testified that is not always the case: "[S]ometimes at meetings you're talking about behaviors that a student is exhibiting and sometimes you actually mention specific disabilities that you're concerned about." (Testim. [redacted] at 471.)

Dr. [redacted] indicated that a reason she included the ASRS in her assessment was that "in talking about [the Student] with the family and with his teachers, there were features that were discussed that [one] tend[s] to see with children that have been identified with an autism spectrum disorder. And I wanted to be sure that I took a look. . . so that we could differentiate

"Development" on the Consent form.

that, but also just to help us better understand [the Student]." (Testim[redacted] at 81.) She further testified: "his thinking tends to be . . . what we call polarized black and white. Either it is or isn't, and there were other features with his social emotional – with his relationships, with peers and the rigidity and other factors. I wanted to just check [it] out and see if there could be an underlying autism spectrum that we may not have been aware of." (Testim[redacted] at 82.)

On cross-examination, Dr.[redacted] recalled that she discussed the Conners with the Parents. She acknowledged that the Parents did not know at the time they gave consent that she was going to administer a test for autism. She testified, "It wasn't actually specified as being something to investigate." (Testim.[redacted] at 96.) However, according to Dr.[redacted], she did broach the subject of autism with the Mother right after the January 2020 IEP meeting: "I asked the mom had the term ever been discussed when he was younger, because some of the behaviors that were described can also be seen on children with a spectrum disorder." (Testim.[redacted] at 96.)

Again, for the reasons set forth above, I placed more weight on the expert testimony of MCPS' expert testimony. In addition, I believed Dr[redacted]'s testimony indicating that she raised the topic of possible autism with the Parents shortly after the January 2020 IEP meeting and before testing. The Background Information section of the MCPS psychological evaluation indicates that "[w]hen asked if the term autism had ever been brought up during school related discussions or conferences, [the Mother] said, "*No, never*." (MCPS 132).

Based on Dr.[redacted]'s and Ms.[redacted]'s testimony, and even in part on Dr.[redacted]'s testimony, I find that a preponderance of the evidence establishes that the ASRS fell within the reason for referral assessment agreed to (Emotional/Social/Behavior Development) and that any alleged failure to obtain prior parental consent specifically for the autism assessment did not render the psychological evaluation inappropriate. Indeed, Dr.[redacted]'s performance of the

ASRS was in accordance with the requirement set forth in IDEA and COMAR that the child be assessed in all areas related to a suspected disability. 34 C.F. R. § 300.304(c)(6); COMAR 13A.05.01.05B(1).

Finally, I note that whether the Consent form itself was appropriate is not the question here. [23] As discussed above, my focus must be on the appropriateness of the assessment itself, not on any alleged failure to obtain consent before assessments were administered.

Context

The Parents asserted that in reaching her conclusions, Dr. [redacted] did not consider that highly intelligent students tend to overthink and overanalyze. Dr. [redacted] contended that Ms. [redacted]'s statement indicating that the Student has those characteristics should have been couched in terms of "who this kid is" to give it some context, i.e., a child with high cognitive functioning, who is therefore likely to be more questioning and to overthink and overanalyze. (Testim. [redacted] at 652.)

Dr. [redacted] testified that it was her experience, when working in [redacted] [24] with gifted and talented middle school students and observing them in testing, that very bright students can overthink and overanalyze at times.

Dr. [redacted] acknowledged on cross-examination that often children who are very bright want to think things through and really try to analyze and understand things. She further acknowledged that there are bright students who display high levels of anxiety when answering questions, request repetitions and want to talk about their options before answering. She

[23] 34 C.F.R. § 300.9(a)-(c)(1) provides in pertinent part that "Consent means that . . . . (a) [t]he parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication; (b) [t]he parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and (c) . . . [t]he parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

[24] Dr. [redacted]'s resume indicates she was an intern in [redacted].

testified, however, that "there are bright students who do this and it's anxiety and there are bright students who do this and it's not anxiety." (Testim. [redacted] at 461.)

Mr [redacted] testified that "[t]here are definitely other students who strive to be perfectionists as well and didn't ask as many questions or ask for as much clarification as [the Student] did. And they also didn't have the other events that I described earlier as accompanying their school experience." (Testim. [redacted] at 367-68.)

I find there is no basis for a conclusion that Dr. [redacted] did not consider the Student's intellectual abilities. The Background Information in her report notes that she was aware the Student was in the [redacted] program at [redacted] and the WISC-V results show he is highly intelligent.

Neither of the Parent's experts explained what specific analysis or additional testing should have been conducted to analyze the issue of whether the Student's high intelligence was the cause of the behaviors he was exhibiting.

Emotional Condition/Emotional Disability

Dr. [redacted]'s report and Part I of the Multidisciplinary Evaluation Form subsequently signed by her indicate that the Student had one or more of the characteristics of an emotional condition over a long period of time and to a marked degree. Part II, signed by the IEP team (except for the Parents), answers "no" to the question: "Is there evidence that despite having received supportive regular education assistance the student still exhibits behaviors that are directly related to the emotional condition documented by the psychologist's report?" (MCPS 167.) Accordingly, the IEP team determined that the Student did not meet the criteria for Emotional Disability.

Ms. [redacted] acknowledged that the characteristics of an emotional condition as set forth in Dr [redacted]'s report and in Part I of the Multidisciplinary Evaluation Form completed by Dr.

[redacted] are substantially similar to the definition of Emotional Disability as set forth in COMAR 13A.05.01.03B(23).[25]

A question posed by Parents' counsel to Ms [redacted] and referenced in the Parents' Closing Argument indicates that the Parents are asserting that the fact the IEP team subsequently determined there was no Emotional Disability meant that Dr. [redacted]'s report saying there was an emotional condition was incorrect.

. Although Dr. [redacted] acknowledged that she has seen forms similar to MCPS' Multidisciplinary Evaluation form which refers to an emotional condition, Dr. [redacted] testified that she is not familiar with that term as it pertains to school psychological evaluations.

Acknowledging that the question on Part II of the form is very poorly worded, Dr. [redacted] testified, however, that a "no" answer did not mean Dr. [redacted]'s report was inaccurate. (MCPS 167.) Dr. [redacted] testified:

> The reason this was answered no is because he had not been – he had been having difficulties at [redacted] but had not been at [redacted] long enough for supports to be in place for mitigation supports to be there. . . It's not because there isn't an emotional condition[,] it's that the supports that he needs to address those issues

[25] That regulation provides:

> (23) Emotional Disability.
>
> (a) "Emotional disability" means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, that adversely affects a student's educational performance:
>
> (i) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
> (ii) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
> (iii) Inappropriate types of behavior or feelings under normal circumstances;
> (iv) A general, pervasive mood of unhappiness or depression; or
> (v) A tendency to develop physical symptoms or fears associated with personal or school problems.
> (b) "Emotional disability" includes schizophrenia.
> (c) "Emotional disability" does not include a student who is socially maladjusted, unless it is determined that the student has an emotional disability.
>
> . . .

> of emotionality haven't been in place long enough at [redacted] for this to be answered yes, basically.
>
> And you'll see that in the documentation section [on the form under that question], the change of school and educational program, all of these play a role in, at least in part, to the struggles that [the Student] has had.

(Testim. [redacted] at 433-34.)

Ms. [redacted] noted that a student can have an emotional condition but not have need for special education supports and not have need for qualification as a student with an Emotional Disability.

Based on Ms. [redacted]'s testimony, I find that a preponderance of the evidence establishes that the use of the term "emotional condition" by MCPS psychologists is not intended to be synonymous with the term "Emotional Disability." Her testimony indicates that the use of the former term in the MCPS Multidisciplinary Evaluation Form to be completed by the school psychologist is a descriptor meant to elicit certain information rather than a formal determination of an educational disability. Indeed, while the characteristics used by a school psychologist as evidence that an emotional condition exists are similar to the criteria for an Emotional Disability, Dr. [redacted]'s report and Part I of the Multidisciplinary Evaluation form specifically provide that the finding of such evidence is a prerequisite to finding that the Student has an Emotional Disability.

If the Parents also contend, in essence, that Dr. [redacted] inappropriately made the determination that the Student has an Emotional Disability, a preponderance of the evidence also does not support that contention. As noted by the Court in *E.P.*:

> Neither IDEA nor applicable federal and State regulations contain a requirement that the assessment reports include a recommendation or determination regarding IDEA eligibility. Rather, the applicable statute and regulations require the IEP team to make the determination regarding IDEA examiners.

E.P., 2017 WL 3608180 p. 19; *see also* 20 U.S.C.A. § 1414(b)(4)(A); 34 C.F.R. § 300.305(a); COMAR 13A.05.01.06C.

Dr. [redacted] explained that she intentionally did not determine in her assessment whether the Student has an Emotional Disability because that was a determination that must be made by the full IEP team after it received and considered the results of the assessment. In addition, Dr. [redacted] included language in her report that addresses the limited role of her individual assessment and the broader evaluative role of the entire IEP team. The Reason for Referral section states: "The test findings will assist the IEP team in determining whether [the Student's] social/emotional issues constitute a different or additional disability, and will inform the special education decision-making as [the Student] prepares to transition to middle school next school year." (MCPS at 131.) The Summary and Conclusions section states: "[T]he results of this assessment will assist the . . . [redacted] IEP team in determining whether [the Student] presents with a different or additional educational disability. . . . It is the charge of the [redacted] I.E.P. team to determine whether [the Student's] emotional condition has an educational impact, which would constitute an Emotional Disability as a primary educational disability." (MCPS at 142-43.)

Misinterpretation of ASRS

According to the Parents, Dr [redacted] misinterpreted the scores on the ASRS as indicating a "low probability" of autism. The Parents contend that the scores showed a need for further testing. (MCPS 142.)

Dr. [redacted] testified as follows:

> There are two critical scores [on the ASRS]. The . . . first is total score and the second is [DSM-V]. So the total score has an elevation of 65. That's 1.5 standard deviations below the mean. That would be interpreted as indicating an elevated score suggesting that [the Student] exhibits symptoms that many children with an autism spectrum disorder [have]. The second, the [DSM-V] scale, 61, and you'll notice the [asterisk] after it. Well the [asterisk] is there because the scoring protocol provides and whenever there is an elevation that's beyond one standard deviation from the mean. And this is a t-distribution, it has a mean of 50, and a

> standard deviation of 10. So we know that 65 is above the 90th percentile. So, the conclusion would be that he does exhibit symptoms consistent with children with autism spectrum disorder that are not typical rather than below probability of autism.

(Testim. [redacted] at 643.)

Dr. [redacted] indicated generally that she properly scored the tests administered by her in accordance with testing protocols. Neither she nor Ms. [redacted] addressed Dr. [redacted]'s specific and detailed testimony regarding the misinterpretation of the scoring of the ASRS. I note that other portions of Dr. [redacted]'s report seem to support Dr. [redacted]'s assertion that the scores do not reflect a low probability of autism. After finding "low probability," she stated:

> None-the-less, [the Student] exhibits significant behaviors on several of these scales. Both teachers see mild to moderately high interpersonal problems on *Peer* and *Adult Socialization* scales. This means [the Student] has difficulty interacting and engaging in activities that develop and maintain relationships. In ELA class, [the Student] exhibits significantly more difficulties than in his homeroom on measures of *Unusual Behaviors*, *Self-Regulation*, *Atypical Language*, *Behavioral Rigidity*, and *Attention*. These scales reflect considerable difficulties tolerating changes in routine, controlling his impulses and emotionality, use of unusual language, and difficulty focusing while ignoring distractions. In homeroom but not in ELS, [the Student] shows mild problems with Social/Communication (inappropriate verbal and nonverbal communication) and Social/Emotional Reciprocity (reciprocating appropriate verbal and emotional responses during social interactions).

(MCPS 141-42; Parent Ex. 4-12–4-13.)

Accordingly, based on Dr. [redacted]'s testimony and the lack of specific contradictory testimony by MCPS' expert witnesses, I find that a preponderance of the evidence indicates that Dr. [redacted] misinterpreted the ASRS scores as indicative of a low probability of autism, rendering the MCPS's psychological evaluation of the Student inappropriate under the IDEA and COMAR.

Report of Assessments

Based on my findings above, I do not find merit in the Parents' assertion that the Summary in the MCPS school psychologist's report should have discussed the potential impact on the school psychologist's conclusions of the missing Parent questionnaires. Furthermore, my

review of Dr. [redacted]'s report indicates that it contained a section with the heading "Summary and Conclusions," in which she noted the Parent's lack of response. The IDEA and COMAR do not specify that information and information about attempts to contact parents must go in a report, much less in a specific section.

Based on my findings above, I also do not find merit in the Parents' assertion that the MCPS school psychologist's report should have referred to a need for additional data, and a need to move from a broad overview to a more specific assessment of emotional function based on inconsistencies. Furthermore, since I have found that the use of the WISC-V was appropriate, I do not find merit in the assertion that Dr. [redacted] should have explained in her report why she performed the WISC-V test. In addition, I find that although the MCPS school psychologist misinterpreted the ASRS scores, there is no evidence that she failed to include information relating to the assessments based on her findings.

Finally, Dr. [redacted] acknowledged that the lack of validity scales in the report did not necessarily impact the appropriateness of the MCPS psychological assessment.

Summary

MCPS failed to prove by a preponderance of the evidence that it conducted a comprehensive assessment that complied with the IDEA and applicable federal and State regulations. A preponderance of the evidence indicates that the methodology used by MCPS was flawed and that the MCPS evaluation was inappropriate. Thus, the Parents are entitled to an IEE at public expense.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the psychological evaluation of the Student conducted by MCPS on April 7, 2020 was not appropriate because the MCPS failed to prove by a preponderance of the evidence that the

MCPS school psychologist administered validity scales as part of the Conners and failed to prove that she properly interpreted the scores on the ASRS. 34 C.F.R. § 300.304(c)(1)(v), (6) (2019); COMAR 13A.05.01.05C(2)(b).

I further conclude as a matter of law that MCPS is required to pay for an independent educational evaluation at the public's expense. 34 C.F.R § 300.502(a)(1), (b)(2) (2019).

ORDER

I **ORDER** that Montgomery County Public Schools shall pay for an independent educational evaluation of the Student at the public's expense; and further

ORDER that Montgomery County Public Schools shall, within thirty days of the date of this decision, provide proof of compliance with this Order to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, Maryland State Department of Education.

October 9, 2020
Date Decision Issued

Eileen C. Sweeney
Administrative Law Judge

ECS/emh
#188036

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) (2018). 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]

MONTGOMERY COUNTY	**BEFORE EILEEN C. SWEENEY,**
PUBLIC SCHOOLS	**AN ADMINISTRATIVE LAW JUDGE**
v.	**OF THE MARYLAND OFFICE**
[redacted]	**OF ADMINISTRATIVE HEARINGS**
STUDENT	**OAH No.: MSDE-MONT-OT-20-12273**

APPENDIX

I admitted the following exhibits, identified by pre-marked Bates numbers, on behalf of MCPS:

Number	Exhibit
1-6	April 3, 2019 IEP, amended January 28, 2020
7-8	Not admitted
9	Not admitted
10-11	Not admitted
12-13	Not admitted
14-15	Not admitted
16-17	Not admitted
18-57	2019-2020 IEP (IEP team meeting date: June 12, 2020)
58-78	2018 IEP (IEP team meeting date: April 19, 2018)
79	Not admitted
80	Not admitted
81-82	Not admitted
83-84	Not admitted
85-86	November 6, 2019 Prior Written Notice
87-88	Not admitted
89-90	January 28, 2020 Notice and Consent for Assessment
91-92	January 29, 2020 Prior Written Notice
93-94	Not admitted
95-97	Not admitted
98-99	Not admitted
100-101	Not admitted
102	Not admitted
103	Not admitted
104	Not admitted
105-107	Not admitted
108-110	January 21, 2020 Elementary Teacher Report
111-114	February 25, 2020 Classroom Observation

115-118	March 2, 2020 Classroom Observation
119-129	March 13, 2020 Educational Assessment Report
130-145	April 7, 2020 Report of School Psychologist
146-151	Not admitted
158-163	April 9, 2020 Report of Speech Language Re-Assessment;
152-153	Not admitted
154-156	Not admitted
157	Not admitted
164-165	Not admitted
166-167	May 19, 2020 Emotional Disability Multidisciplinary Evaluation Form - Confidential
168	May 20-26, 2020 Emotional Disability Evaluation Form signatures
169-170	Undated resume of [redacted], M.Ed.
171-174	Undated resume of [redacted], M.A., Psy.S.
175-176	Undated resume of [redacted], M.Ed., Ph.D.
177	Not admitted
178-183	Not admitted
184-189	Not admitted
190-196	Not admitted
197-202	Not admitted
203-206	Not admitted
297-298	October 30, 2019 emails
207-213	Not admitted
214-218	Not admitted
219	Not admitted
220-221	Not admitted
222	Not admitted
223-224, 303	Not admitted Not admitted
226	Not admitted
225	Not admitted
227-230	Not admitted
231-236	Not admitted
237	Not admitted
238-239	Not admitted
240	February 24, 2020 emails
241	Not admitted
242-244	February 26, 2020 emails
245	February 28, 2020 email
246	March 3, 2020 email
247-248	March 3-4, 2020 emails
249	Not admitted
250	March 3-4, 2020 emails
251	Not admitted
252	Not admitted
253	March 8-11, 2020 emails
254	Not admitted

255-256	Not admitted
257	Not admitted
258-259	Not admitted
260-262	Not admitted
263-269	Not admitted
270	Not admitted
271	Not admitted
272-274	Not admitted
275-276	Not admitted
277-279	Not admitted
280-281	Not admitted
282-283	May 28, 2020 email
284	Not admitted
285	Not admitted
286	Not admitted
287	Not admitted
288-291	Not admitted
292-294	February 26, 2020 – March 13, 2020 [redacted] emails
295	Not admitted
296	February 26, 2020 – March 13, 2020 [redacted] emails
297-298	October 30, 2019 [redacted] email
299-300	November 15, 2020 emails
301-302	November 27, 2020 email
304	December 10, 2020 email
305-310	Not admitted
311-313	Not admitted
314-316	Not admitted
317-318	Not admitted
319-329	Not admitted
330-337	October 30, 2019 – June 17, 2020 [redacted] Communication Log
338-339	Not admitted
340-341	Not admitted
342-343	March 8, 2020 email
344-346	March 8, 2020 email

I admitted the following exhibits on behalf of the Parents:

Parent Ex. 1	February 25, 2020 Classroom Observation by [redacted]
Parent Ex. 2	March 2, 2020 Classroom Observation by [redacted]
Parent Ex. 3	March 13, 2020 Educational Assessment Report by [redacted]
Parent Ex. 4	April 7, 2020 Report of School Psychologist – Initial School Psychological Assessment by [redacted], Ph.D.

Parent Ex. 5-1	April 9, 2020 Report of Speech-Language Re-Assessment, by [redacted], MA, CCC-SLP (one page)
Parent Ex. 6	April 14, 2020 Draft IEP
Parent Ex. 7	April 17, 2020 IEP, amended January 28, 2020
Parent Ex. 8	Not admitted
Parent Ex. 9	Undated Curriculum Vitae of [redacted], Ph.D.
Parent Ex. 10	Undated Curriculum Vitae of [redacted], Ph.D.
Parent Ex. 11	March 8, 2020 email from Dr. [redacted] to [redacted]