

██████████,  
STUDENT  
v.  
MONTGOMERY COUNTY  
PUBLIC SCHOOLS

BEFORE KRYSTIN J. RICHARDSON,  
AN ADMINISTRATIVE LAW JUDGE  
OF THE MARYLAND OFFICE  
OF ADMINISTRATIVE HEARINGS  
OAH No.: MSDE-MONT-OT-20-11848

**DECISION**

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

**STATEMENT OF THE CASE**

On May 27, 2020, Michael Eig, Esquire, and Paula Rosenstock, Esquire, on behalf of ██████████ (Student) and ██████████ and ██████████ (Parents), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);<sup>1</sup> 34 C.F.R. § 300.511(a) (2019);<sup>2</sup> Md. Code Ann., Educ. § 8-413(d)(1) (2018);<sup>3</sup> Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

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<sup>1</sup> U.S.C.A. is an abbreviation for United States Code Annotated. Unless otherwise noted, all citations to Title 20 of the U.S.C.A. hereinafter cite the 2017 volume.

<sup>2</sup> C.F.R. is an abbreviation for Code of Federal Regulations. Unless otherwise noted, all citations to Title 34 of the C.F.R. hereinafter cite the 2019 volume.

<sup>3</sup> Unless otherwise noted, all citations to the Education Article of the Maryland Annotated Code hereinafter cite the 2018 Replacement volume.

The Complaint alleges that MCPS violated the IDEA by denying the Student a free appropriate public education (FAPE), by failing to develop an Individualized Education Program (IEP) and placement reasonably calculated to meet the Student's needs.

On August 5, 2020, I convened a telephone pre-hearing conference (Conference).<sup>4</sup> Paula A. Rosenstock, Esquire, participated on behalf of the Student and the Parents. Manisha Kavadi, Esquire, participated on behalf of MCPS. On August 7, 2020, I issued a Pre-hearing Conference Report and Order, which set forth the matters discussed during the Conference.

I advised the parties of the federal forty-five-day timeline for issuing a decision:

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

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

34 C.F.R. § 300.515(a).

Section 300.510(c) explains adjustments to the 30-day resolution period as follows:

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

- (1) Both parties agree in writing to waive the resolution meeting;

...

*Id.* § 300.510(c).

Under the adjusted timeline, the decision in this case would have originally been due on Friday, July 31, 2020, which is forty-five days after both parties agreed in writing on June 18,

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<sup>4</sup> This matter was originally scheduled for a Conference on July 30, 2020, but was postponed for good cause because Manisha Kavadi, counsel on behalf of MCPS, had an emergency.

2020 to waive the resolution meeting.<sup>5</sup> *Id.* §§ 300.510(c)(1), 300.515(a); Md. Code Ann., Educ. § 8-413(h); COMAR 13A.05.01.15C(14)(a).

On July 7, 2020, Administrative Law Judge (ALJ) Ann Kehinde, OAH, conducted a telephone conference with the parties to discuss the timeline above. As memorialized in a letter issued to the parties on July 16, 2020, ALJ Kehinde documented the various issues preventing the parties from participating in a hearing until after the forty-five-day timeframe. As a result, the parties jointly requested that ALJ Kehinde extend the timeline for holding a due process hearing and issuing a final decision. Finding good cause, ALJ Kehinde granted that request. 34 C.F.R. § 300.515(c).

Based on the continuing circumstances of the COVID-19 pandemic, MCPS's school closure, and the scheduling conflicts noted by the parties at the time of the Conference,<sup>6</sup> I found good cause to grant the parties' request extending the regulatory timeframe and scheduled the hearing, by agreement of the parties, for October 21, 22, 23, 26, 27, and 29, 2020. *Id.* § 300.515(c).

On September 28, 2020, Michael J. Eig, Esquire, on behalf of the Student and the Parents, filed a Motion for Continuance (Motion), explaining that the Student's educational consultant and primary expert witness was scheduled to undergo an unexpected medical procedure on October 21, 2020, the first day of the hearing, and would be unavailable for at least two weeks following the procedure. The Motion further noted that if the continuance was

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<sup>5</sup> The forty-fifth day from June 18, 2020 was Sunday, August 2, 2020. In accordance with the OAH operating procedures, when the due date for a decision in a special education proceeding falls on a weekend or on a holiday, the decision must be issued no later than the immediately preceding business day. In this case, the immediately preceding business day was Friday, July 31, 2020.

<sup>6</sup> Between August 2020 through October 2020, the following conflicts were noted: Ms. Kavadi was on previously scheduled leave on August 31 through September 4; Ms. Kavadi was in previously scheduled meetings on September 7, 9-11, 14, 15, 18, and October 28; Ms. Kavadi was in previously scheduled hearings on September 21-24, 29, and October 5-9; Ms. Rosenstock was in previously scheduled hearings on September 9, 10, 21-24, 29, and October 5-9; Mr. Eig was in previously scheduled hearings on September 14, 17, 21-24, 29, and October 5-9; and both Ms. Rosenstock and Mr. Eig were unavailable on September 28, 2020 in observance of a Jewish holiday.

granted, there was no potential harm to the Student, as he was being home schooled and was receiving educational benefit.

On October 1, 2020, I convened a telephone pre-hearing conference (Second Conference) to address the Motion. Ms. Rosenstock participated on behalf of the Student and the Parents. Ms. Kavadi participated on behalf of MCPS. In light of the Motion, Ms. Rosenstock further requested an extension of the timeframe in order to accommodate the unavailability of the Student's primary expert witness. Ms. Kavadi had no objection to the Motion. Upon review of supporting medical documentation provided on October 5, 2020, I found good cause to continue the hearing and granted the Motion. COMAR 28.02.01.16C.

On October 6, 2020, I issued a Pre-hearing Conference Report and Order, which set forth the matters discussed during the Second Conference. Based on the unavailability of the Student's primary expert witness and the scheduling conflicts noted by the parties at that time,<sup>7</sup> I found good cause to extend the regulatory timeframe as requested by Ms. Rosenstock and scheduled the hearing, by agreement of the parties, for February 1, 2, 3, 4, 5, 8 and 10, 2021, and I agreed to issue my decision thirty days after the conclusion of the hearing. 34 C.F.R. § 300.515(c); Md. Code Ann., Educ. § 8-413(h).

The hearing convened as scheduled on February 1, 2021 and the Student began his case presentation. However, a number of witnesses were unable to complete their testimony during

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<sup>7</sup> Between November 2020 through January 2021, the following conflicts were noted: MCPS and OAH were closed on November 3, 2020 in observance of Election Day; MCPS and OAH were closed on November 11, 2020 in observance of Veteran's Day; MCPS and OAH were closed on November 26 and 27, 2020 in observance of Thanksgiving; MCPS and OAH were closed on January 18, 2021 in observance of Martin Luther King, Jr. Day; Ms. Rosenstock and Mr. Eig were in previously scheduled hearings on November 2, 5, 6, 9, 10, 12, 13, 16-20, 23, 24, 30, December 1, 3, 4, 7-9, 14, 15, January 5-8, 11, 12, 14, 15, 20-22, 25, and 26; Ms. Kavadi was in previously scheduled hearings on November 6, January 14, 15, 20-22, 25, and 26; Ms. Kavadi was in a previously scheduled meeting on December 10; Ms. Kavadi was on previously scheduled leave on December 2 and January 19; Mr. Eig was on previously scheduled leave on December 18; and Ms. Kavadi and Ms. Rosenstock were on previously scheduled leave on December 21 through January 1.

the time originally scheduled and had to carry over their testimony to alternate days.

Additionally, following the luncheon recess on February 8, 2021, Ms. Kavadi became ill and requested a continuance until February 10, 2021. Ms. Rosenstock had no objection.

Accordingly, I found good cause to grant the emergency request for postponement and the hearing adjourned early on February 8, 2021. COMAR 28.02.01.16D.

The hearing reconvened on February 10, 2021 as scheduled. By the end of the day on February 10, 2021, the Student had completed testimony from all but one witness. As a result, the parties mutually agreed to add additional hearing dates of February 22, 23, 26, and March 2 and 4, 2021 to complete the proceeding. After reviewing the parties' calendars and witness availability, these were the first mutually available hearing dates. Ms. Kavadi was unavailable due to previously scheduled meetings on February 11 and 12, 2021. MCPS and the OAH were closed on February 15, 2021 in observance of Presidents' Day. Ms. Kavadi was on previously scheduled leave on February 16 through 19, 2021. Ms. Rosenstock was unavailable due to a previously scheduled meeting and hearing on February 24, 2021. Ms. Rosenstock was unavailable due to previously scheduled meetings on February 25, 2021.

The due process hearing reconvened on February 22, 2021 as scheduled. The Student completed his case presentation on February 22, 2021, at which time MCPS began presenting its case. By the end of the day on February 26, 2021, MCPS had completed testimony from all but two witnesses. As a result, the parties mutually agreed to add an additional hearing date of March 5, 2021 to complete the proceeding and allow sufficient time for closing arguments. MCPS completed its case presentation on March 4, 2021, at which time the Student presented his rebuttal case. The hearing concluded on March 5, 2021. The parties further requested that I extend the regulatory timeframe to allow thirty days from the close of the record to issue my

decision. 34 C.F.R. § 300.515(c); Md. Code Ann., Educ. § 8-413(h). Thus, pursuant to the parties' request, I agreed to issue my decision by April 2, 2021.<sup>8</sup>

Accordingly, I held a due process hearing on the merits on February 1, 2, 3, 4, 5, 8, 10, 22, 23, and 26, 2021 and March 2, 4, and 5, 2021 remotely via the Google Meet video conferencing platform. COMAR 28.02.01.20B(1)(b). Ms. Rosenstock represented the Student. Ms. Kavadi represented MCPS.

The legal authority for the due process hearing is governed by provisions set forth at 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1); COMAR 13A.05.01.15C.

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) 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. Were the IEPs<sup>9</sup> and placement developed by MCPS reasonably calculated to provide the Student with a FAPE for the 2018-2019 and 2019-2020 school years?

2. If there was a denial of FAPE for the 2018-2019 and 2019-2020 school years, should MCPS reimburse the Parents for their unilateral placement of the Student at the [REDACTED] [REDACTED] for the 2018-2019 and 2019-2020 school years?

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<sup>8</sup> The thirtieth day from March 5, 2021 is Sunday, April 4, 2021. In accordance with the OAH operating procedure discussed above, the decision shall be issued no later than Friday, April 2, 2021.

<sup>9</sup> At the outset of the hearing, Ms. Rosenstock clarified that the IEPs at issue are dated October 16, 2018, March 12, 2019, February 14, 2020, and May 21, 2020.

## SUMMARY OF THE EVIDENCE

### Exhibits<sup>10</sup>

I admitted the following exhibits on behalf of the Parents<sup>11</sup>:

- P- 1. Request for Due Process, 5-22-20;
- P- 2. Neuropsychological Evaluation by [REDACTED], 4-30-15;
- P- 3. Speech/Language Evaluation by [REDACTED], 7-2-15;
- P- 4. [REDACTED] Occupational Therapy Evaluation, 10-1-15;
- P- 5. [REDACTED] Occupational Therapy Progress Report, April 2016;
- P- 6. [REDACTED] Speech Language Progress Summary, April 2016;
- P- 7. [REDACTED] Speech Language Progress Summary, April 2017;
- P- 8. Email to Student's team from parent, 9-24-17;
- P- 9. Email from Dr. [REDACTED] regarding test results, 10-13-17;
- P- 10. Emails between parent and Dr. [REDACTED], 10-21-17 through 10-22-17;
- P-10A. Email from [REDACTED] to parent, 2-2-18;
- P- 11. Formal Observation Report by [REDACTED], 2-15-18;
- P- 12. Neuropsychological Evaluation by Dr. [REDACTED], 3-20-18;
- P- 13. Reading Recommendations Report by [REDACTED], 4-12-18;
- P- 14. [REDACTED] Individual Learning Plan, 5-8-18;
- P- 15. [REDACTED] Elementary End of Year Progress Report, 2017-2018;
- P- 16. SNAP-IV Teacher and Parent Rating Scale, 7-12-18;
- P- 17. Formal Observation Report by [REDACTED], 9-26-18;
- P- 18. Reactions to draft IEP by [REDACTED], 10-2-18;
- P- 19. NOT OFFERED;
- P- 20. MCPS IEP, 10-16-18;
- P- 21. MCPS Occupational Therapy Re-evaluation, 12-12-18;
- P- 22. MCPS Amended IEP, 3-12-19
- P- 23. [REDACTED] Learning Profile, June 2019;
- P- 24. [REDACTED] Student Therapeutic Report, 2018-2019;
- P- 25. [REDACTED] Student Progress Report, 2018-2019;
- P- 26. Letter serving notice and MCPS response letter, 8-7-19 and 8-20-19;
- P- 27. Letter to Emily Rachlin, Esq. from Paula A. Rosenstock, Esq., 8-28-19;
- P- 28. [REDACTED] Reading Data, 9-3-19 and 9-10-19;
- P- 29. PAT-2: NU Reading Score Report, 10-23-19;
- P- 30. NOT OFFERED;
- P- 31. [REDACTED] Learning Profile, October 2019;
- P- 32. NOT OFFERED;
- P- 33. NOT OFFERED;
- P- 34. MCPS Classroom Observation by [REDACTED], 11-19-19;
- P- 35. Formal Observation Report by [REDACTED], 12-3-19;
- P- 36. [REDACTED] Reading Data, 12-17-19;
- P- 37. [REDACTED] Student Schedule, 2019-20 School Year;

<sup>10</sup> Throughout the Decision, page numbers are designated as, for example, 12-5.

<sup>11</sup> Student's (P) Exhibits marked with an asterisk were objected to by MCPS. I permitted the parties to address their objections on the record. After considering the parties' positions, I admitted the documents as they are relevant evidence for the purpose determining the appropriateness of the Student's request for reimbursement of his private placement. I did not consider these disputed exhibits in determining the appropriateness of the IEPs at issue.

- P- 38. [REDACTED] Progress Report, 2019-2020;
- P- 39. [REDACTED] Student Math Samples, January 2020;
- P- 40. [REDACTED] Student Writing Samples, January 2020;
- P- 41. [REDACTED] Student Reading Samples, January 2020;
- P- 42. [REDACTED] Learning Profile, February 2020;
- P-42A. [REDACTED] Behavior Data Report, undated;
- P-42B. [REDACTED] MCPS IEP, 2-14-20;
- P- 43. [REDACTED] Behavior Intervention Plan, 3-31-20;
- P- 44. [REDACTED] MCPS Psychological Re-evaluation, 4-30-20;
- P- 45. [REDACTED] MCPS Specific Learning Disability Team Report, 5-15-20;
- P- 46. [REDACTED] MCPS Behavior Intervention Plan, 5-15-20;
- P- 47. [REDACTED] MCPS Prior Written Notice, 5-15-20;
- P- 48. [REDACTED] MCPS Amended IEP, 5-21-20;
- P- 49. [REDACTED] NOT OFFERED;
- P- 50. [REDACTED] Resume of [REDACTED];
- P- 51. [REDACTED] Resume of [REDACTED];
- P- 52. [REDACTED] Resume of Dr. [REDACTED];
- P- 53. [REDACTED] Resume of Dr. [REDACTED];
- P- 54.\* [REDACTED] Learning Profile, June 2020;
- P- 55.\* [REDACTED] Student Therapeutic Report, 2019-2020; and
- P- 56.\* [REDACTED] Progress Reports, 2019-2020.

I admitted the following exhibits on behalf of MCPS:

- MCPS-1 [REDACTED] Email from MCPS counsel to Parent counsel, 3/20/2018
- MCPS-2 [REDACTED] Authorization for Release of Confidential Information, 8/16/2018
- MCPS-3 [REDACTED] Prior Written Notice, 9/4/2018
- MCPS-4 [REDACTED] Individual Learning Plan, 5/8/2018
- MCPS-5 [REDACTED], Elementary End of Year Progress Report, 2017-2018
- MCPS-6 [REDACTED] Occupational Therapy Annual Report, 5/7/2018
- MCPS-7 [REDACTED] Recommendation, 4/12/2018
- MCPS-8 [REDACTED] Observation Report, 9/26/2018
- MCPS-9 [REDACTED] Reactions to Draft IEP, 10/2/2018
- MCPS-10 [REDACTED] MCPS Team Consideration of External Report, 8/7/2018
- MCPS-11 [REDACTED] Parent Report, undated
- MCPS-12 [REDACTED] MCPS Observation at [REDACTED], [REDACTED], 9/25/2018
- MCPS-13 [REDACTED] Prior Written Notice, 10/19/2018
- MCPS-14 [REDACTED] IEP, 10/16/2018
- MCPS-15 [REDACTED] Prior Written Notice, 3/25/2019
- MCPS-16 [REDACTED] MCPS Occupational Therapy Re-Evaluation, 12/12/2018
- MCPS-17 [REDACTED] Amended IEP, 3/12/2019
- MCPS-18 [REDACTED] Letter from Parent counsel to MCPS, 8/7/2019
- MCPS-19 [REDACTED] MCPS Letter to Parent counsel, 8/20/2019
- MCPS-20 [REDACTED] Letter from Parent counsel to MCPS counsel, 8/28/2019
- MCPS-21 [REDACTED] Email from Parent counsel to MCPS counsel, 9/20/2019
- MCPS-22 [REDACTED] Learning Profile, June 2019
- MCPS-23 [REDACTED] Progress Report, 2018-2019
- MCPS-24 [REDACTED] Student Therapeutic Report, 2018-2019



MCPS-25 Student Reading Records, 9/3/2019 from ██████████  
 MCPS-26 Emails between Parent counsel and MCPS counsel, 9/20/2019  
 MCPS-27 Emails between Parent counsel and MCPS counsel, 9/20/2019 – 10/22/2019  
 MCPS-28 Authorization for Release of Confidential Information, 10/17/2019  
 MCPS-29 Email dated 10/23/2019 from Parent counsel to MCPS enclosing Student  
 work samples from ██████████  
 MCPS-30 Email dated 10/23/2019 from Parent counsel to MCPS enclosing Student  
 PAT-2 NU from ██████████  
 MCPS-31 10/28/2019 IEP Meeting Documents - Prior Written Notice, Appendix D,  
 Draft IEP, with attached cover email dated 10/31/19  
 MCPS-32 Email dated 11/18/2019 from MCPS counsel to Parent counsel  
 MCPS-33 Cover email from Parent counsel to MCPS counsel, 11/18/2019, regarding  
 ██████████ documents  
 MCPS-34 ██████████ Behavior Intervention Plan, 11/1/2019  
 MCPS-35 ██████████ Schedule, 2019-20 School Year  
 MCPS-36 ██████████ Learning Profile, October 2019  
 MCPS-37 Emails between MCPS counsel and Parent counsel re:  
 scheduling, 11/22/2019 – 12/5/2019  
 MCPS-38 Email from Parent counsel to MCPS, 12/21/2019, enclosing observation  
 report from ██████████ dated 12/3/2019  
 MCPS-39 Cover email from MCPS staff to Parent, 1/10/2020, re: observations and  
 draft IEP for upcoming IEP meeting  
 MCPS-40 MCPS Observation report by ██████████, 11/19/2019  
 MCPS-41 MCPS Observation report by ██████████, 11/19/2019  
 MCPS-42 MCPS Observation report by ██████████, 11/19/2019  
 MCPS-43 Email from Parent counsel to MCPS counsel, 1/14/2020  
 MCPS-44 Emails between Parent counsel and MCPS counsel, 1/15/2020  
 MCPS-45 Emails between Parent counsel and MCPS counsel, 1/24/2020 – 2/6/2020  
 MCPS-46 Reading data from ██████████, 12/17/2019  
 MCPS-47 Work samples from ██████████, 1/30/2020  
 MCPS-48 ██████████ Progress Report, 2019-2020  
 MCPS-49 Email from MCPS staff to Parent, 2/7/2020  
 MCPS-50 Prior Written Notice, Sign-in Sheet, and Notice and Consent for Assessment,  
 2/14/2020  
 MCPS-51 IEP, 2/14/2020  
 MCPS-52 Behavior graphs from ██████████, received 2/14/2020  
 MCPS-53 Emails between Parent counsel and MCPS counsel, 4/14/2020 - 4/17/2020  
 MCPS-54 MCPS Psychological Evaluation, 4/30/2020  
 MCPS-55 Blank  
 MCPS-56 MCPS Behavioral Intervention Plan, 5/15/2020  
 MCPS-57 ██████████ Behavioral Intervention Plan, 3/31/2020  
 MCPS-58 Prior Written Notice, 5/15/2020  
 MCPS-59 Amended IEP, 5/21/2020  
 MCPS-60 Email from MCPS staff to Parent re: amended IEP, 5/21/2020  
 MCPS-61 Resume – ██████████  
 MCPS-62 Resume – ██████████

MCPS-63     Resume – [REDACTED]  
MCPS-64     Resume – [REDACTED]  
MCPS-65     NOT OFFERED  
MCPS-66     NOT OFFERED  
MCPS-67     NOT OFFERED  
MCPS-68     NOT OFFERED

I admitted the following joint exhibit on behalf of the parties:

Joint. Ex. 1     Stipulation

Testimony

[REDACTED] (Mother or Parent) testified and presented the following witnesses:

- [REDACTED], Ph.D., accepted as an expert in pediatric neuropsychology;
- [REDACTED], M.Ed., accepted as an expert in special education;
- [REDACTED], Ph.D., accepted as an expert in clinical psychology; and
- [REDACTED], M.Ed., accepted as an expert in special education.

MCPS presented the following witnesses:

- [REDACTED], accepted as an expert in special education;
- [REDACTED], accepted as an expert in occupational therapy and school based occupational therapy;
- [REDACTED], accepted as an expert in special education; and
- [REDACTED] (formerly [REDACTED]), accepted as an expert in school psychology.

**STIPULATED FACT**

The Parents do not challenge or dispute MCPS’s proposal with regard to speech and language services for the 2018-19 and 2019-20 school years. (Jt. Ex. 1.)

## FINDINGS OF FACT

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

1. The Student is twelve years old (born in [REDACTED] 2008). (P-1-2.)
2. The Student and his family moved to Montgomery County, Maryland in September 2014. (Hr'g Tr. at 1320, 22-25 and 1321, 1-2.)<sup>12</sup>
3. For the 2014-15 school year, the Student attended his homeschool, [REDACTED] ([REDACTED]), for Kindergarten. (Hr'g Tr. at 1321, 3-9.) By the end of the Student's Kindergarten year, the Student was unable to read. Concerned by the Student's lack of reading progress, the Parents withdrew the Student from [REDACTED]. (Hr'g Tr. at 1205, 25 and 1206, 1-11.)  
  
[REDACTED]
4. In June 2015, the Student was accepted into the [REDACTED] ([REDACTED]). [REDACTED] is a private, full-time special education school approved by the MSDE. It specializes in educating children with language-based learning disabilities. (Hr'g Tr. at 805, 10-13.) It provides instruction in small group settings.
5. The Student began attending the [REDACTED] for first grade during the 2015-16 school year. He remained there for second grade and third grade during the 2016-17 and 2017-18 school years, respectively. (Hr'g Tr. at 1321, 16-23.)
6. While at the [REDACTED], the Student struggled to make academic progress, especially in reading. At the beginning of the 2017-18 school year (third grade), the Student read

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<sup>12</sup> Citations to the transcript are in the following format: Hr'g Tr. at page number and line(s).

on a Pre-primer I level (middle of kindergarten). By the end of the school year, the Student read on a Pre-primer III level (beginning of first grade). (P-15-3; *see also* Hr'g Tr. at 291, 13-16.)

7. The academic gap widened between the Student and his peers. As a result, in January 2018, the [REDACTED] notified the Mother that it did not intend to renew the Student's admission contract for the 2018-19 school year.

8. In February 2018, the Mother engaged educational consultant [REDACTED] for assistance in understanding the Student's lack of progress at the [REDACTED] as well as the school's intention not to renew the Student's admission contract for the upcoming school year.

9. On February 2, 2018, Mrs. [REDACTED] spoke with staff at the [REDACTED]. Staff primarily expressed concern about the extensive amount of 1:1 support that the Student required throughout the school day, which the school was not able to sustain. (P-10A.)

10. On February 15, 2018, Mrs. [REDACTED] observed the Student at the [REDACTED] across three different settings: reading, American Revolution Club, and math. (P-11.)

11. The Student received 1:1 instruction during reading. The instruction utilized a reading intervention called Wilson Foundations.<sup>13</sup> The Student had visual processing challenges decoding (reading) words and vowel production challenges when speaking (i.e., wet may sound like wit). (P-11-4.) Throughout the instruction, the Student required verbal and visual cues.

12. Following reading class, the Student successfully transitioned to American Revolution Club, which teaches American history, geography, and culture through project-based learning. (*See* P-15-8.) In this class, the Student received instruction with nine other students and three teachers. The Student followed directions and demonstrated attention to task. The

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<sup>13</sup> Wilson Foundations (this is an accurate spelling for Foundations) is a scope and sequence reading intervention that focuses on "carefully sequenced skills . . . [including] print knowledge, alphabet awareness, phonological awareness, phonemic awareness, decoding, vocabulary, fluency, and spelling." (P-15-1.)

Student successfully transitioned to outdoor instruction for the final twenty minutes of class, where he was able to use an electric sander with 1:1 support on a block of wood. (P-11-3.)

13. The Student successfully transitioned to math, where he received 1:1 instruction in a class with four other students and two other teachers. The Student worked on review problems involving multiplication and division. Manipulatives were not present at the table. Competing noise, which was apparent, did not affect the Student. The Student commented that the task was easy; when prompted by the teacher to use skip-counting as a strategy, he was able to self-correct and fix an error. The Student was given a chart noting the order of operations. (P-11-3 through P-11-4.)

14. To further ascertain the Student's difficulties at the [REDACTED], the Student underwent a neuropsychological evaluation with [REDACTED], Ph.D., in March 2018. (P-12.) As part of the evaluation, a series of cognitive assessments and rating scales were administered. Results from the Wechsler Intelligence Scales for Children, Fifth Edition revealed that the Student was functioning within the low average range (10<sup>th</sup> percentile) in terms of general intellectual ability. (P-12-6 and P-12-26.)

15. Evaluation results revealed difficulties with attention and various aspects of executive functioning, including initiation, planning, organization, task-monitoring, working memory, self-monitoring, and flexibility. (P-12-15.)

16. The Student demonstrated weaknesses with visual-spatial processing, graphomotor control, and language comprehension. (P-12-16 through P-12-17.)

17. In terms of social functioning, the Student demonstrated age appropriate non-verbal communication skills; he readily engaged in social chat or reciprocal conversation with no difficulty. As a result, Autism Spectrum Disorder was ruled out as a diagnosis. (P-12-18.)

18. Emotionally, the Student was found to be a sensitive child who is prone to low self-esteem surrounding his academic difficulties. (P-12-17.)

19. The Student was diagnosed with specific learning disabilities in the areas of reading, written expression, and math. Additionally, the Student has the following diagnoses: Attention Deficit Hyperactivity Disorder – Combined type (ADHD-C), Executive dysfunction, Expressive Language Disorder, Developmental Coordination Disorder, Visual Spatial Weakness, and Emotional Sensitivity/Vulnerability to Anxiety. (P-12-18.)

20. Based on the results of the assessments, Dr. [REDACTED] recommended “specialized educational programming provided by a special educator in a small group format with 1:1 follow-up instruction for academic subjects.” (P-12-19.) Dr. [REDACTED] noted that the educational setting must provide support for the Student’s receptive language weaknesses because the Student is at risk for missing information that is conveyed orally. (*Id.*) Further, Dr. [REDACTED] recommended that the Student receive Occupational Therapy (OT) to improve his fine motor and graphomotor weaknesses, and to support his attention regulation in the classroom. (*Id.*)

21. By April 2018, Mrs. [REDACTED] began providing 1:1 academic tutoring to the Student in reading using Orton-Gillingham;<sup>14</sup> the tutoring continued for fourteen sessions through the summer of 2018. (Hr’g Tr. at 313, 3-5.) Mrs. [REDACTED] recommended that the Student receive 1:1 instruction in an individualized Orton-Gillingham reading intervention infused with remediation for visual-spatial weaknesses, auditory discrimination, social-pragmatic language, and executive functioning skills within each lesson. She recommended that the Student receive this instruction five days a week for one hour. (P-13.)

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<sup>14</sup> Orton-Gillingham is a reading methodology that teaches “reading in a systemic, cumulative, and multi-sensory way.” (Hr’g Tr. at 249, 3-4.)

22. Dr. [REDACTED] and Mrs. [REDACTED] consulted with the [REDACTED] concerning their recommendations; however, the [REDACTED] did not invite the Student back for the 2018-19 school year.

23. The Student made the following progress by the end of his third grade year at the [REDACTED]:

- Reading: The Student made slow progress in reading. He benefited from one-to-one instruction due to difficulty maintaining attention and trouble filtering out extraneous sights and sounds; he also profited from a high degree of structure and predictability in his reading lessons. The Student's daily performance was noted to be inconsistent: at times, his performance was impacted by his anxiety, inattention, frequent need to move, and perseveration; at other times, the Student sustained attention for five to ten minutes without off-topic comments. (P-15-4.)
- Written language: The Student required one-to-one support for all pre-writing and writing tasks, in addition to a high degree of structure and scaffolding. Even with the supports provided, the Student struggled to complete any writing composition. Speech-to-Text technologies were introduced to the Student. While using the technology, the Student required an adult to direct his attention to the task. His written language was impacted by weaknesses in recalling information; it was noted that the Student should continue to work on brainstorming topics and oral rehearsal prior to writing to ensure thoughts connect to the topic and are coherent. (P-15-6.)
- Math: The Student made gains in math, including developing mental math skills and working on multiplication and division. The Student, who is a visual learner, benefitted from a multi-sensory approach that involved use of manipulatives. (P-15-7.)
- American Revolution Club: The Student was more engaged in the activities presented as the year went on, including learning about his character, Paul Revere, and reenacting the Revolutionary War battles. The Student worked best one-on-one. (P-15-8.)
- Science: The Student required teacher assistance recording information. During discussions and activities, the Student had difficulty generating ideas on his own and in group challenges. The Student contributed properly to the discussion when he was on task, but was easily distracted. (P-15-8.)
- Visual Arts: Art skills like drawing or visually planning continued to be difficult and frustrating for the Student, reflected by his "I can't" stance. When he was able to push through and overcome his tendency to avoid the work, he was proud of his work. (P-15-9.)
- P.E. and Motor Skills: The Student was proficient in cardiovascular endurance, eye-foot coordination, agility and flexibility, and eye-hand

coordination. He needed improvement in balance and knowledge/application of rules. (P-15-10.)

24. As of May 15, 2018, the [REDACTED] recommended the following accommodations for the Student: extended time for processing information and formulating responses, large print, simplification and repetition of oral and written directions, preferential seating near the teacher, small group setting, and use of assistive technology (i.e., speech-to-text, text-to-speech, and spell-check). (P-14-10.)

25. The Mother explored a multitude of placements for the Student for the 2018-19 school year, including the [REDACTED], [REDACTED], [REDACTED], [REDACTED] and the [REDACTED]; however, the Student was rejected from all of these schools. (Hr'g Tr. at 1310, 1-25 and 1311, 1-7 and 15-21.)

[REDACTED] ([REDACTED])

26. [REDACTED] is one of a dozen learning centers located in Montgomery County, Maryland. (Hr'g Tr. at 2031, 22-23.) It is housed within [REDACTED] ([REDACTED]). (Hr'g Tr. at 2032, 17-18.) It is a public, special education program that provides specialized instruction in self-contained classes for students in Kindergarten through fifth grade. (Hr'g Tr. at 2031, 3-10 and 2033, 12-14.)

27. Self-contained classes in the [REDACTED] consist of twelve students and two adults: a special education teacher<sup>15</sup> and a paraeducator.<sup>16</sup> (Hr'g Tr. at 2035, 7-15.) [REDACTED] [REDACTED] classes are frequented by a program support (a paraeducator who is a floater), a critical staffing paraeducator (who may be assigned to a medically fragile student), and various

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<sup>15</sup> All special education teachers from the [REDACTED] have been certified by the MSDE. (Hr'g Tr. at 2038, 1-11.)

<sup>16</sup> All paraeducators from the [REDACTED] have undergraduate degrees, except for one; at the time of the hearing, one paraeducator was working towards his or her undergraduate degree. (Hr'g Tr. at 2038, 12-25.)



specialists: occupational therapists, speech pathologists, and reading specialists. (Hr'g Tr. at 2035, 16-24; 2036, 7-16 and 19-21.) School counselors also frequent the [REDACTED] weekly to work with students on social skills; modeling of different social interactions (e.g., things that happen on the playground) is provided for students. (Hr'g Tr. at 2051, 4-12.)

28. [REDACTED] offers Orton-Gillingham as a reading intervention. All special education teachers and reading specialists have been trained in this methodology since the fall of 2018. At the time of the hearing, about half of the [REDACTED]'s paraeducators had been trained in it. (Hr'g Tr. at 2043, 8-11.)

29. While Orton-Gillingham is offered to students, MCPS does not designate it as a reading intervention on a student's IEP, recognizing that the needs of students is ever evolving and another research-based reading intervention may become necessary. (Hr'g Tr. at 2045, 4-25 and 2046, 1-12.)

30. The Zones of Regulation, a cognitive-behavioral framework that fosters self-regulation and emotional control, is used across all settings at [REDACTED], including the [REDACTED] (Hr'g Tr. at 1666, 11-14.)

31. [REDACTED] uses a token economy to reinforce positive behaviors. (Hr'g Tr. at 2097, 10-15.) The program incentivizes students by allowing them to accrue tokens to earn rewards. (Hr'g Tr. at 2302, 12-24.)

32. Teachers and paraeducators are trained in nonviolent crisis intervention and have experience dealing with students who have eloped. (Hr'g Tr. at 2086, 1-9.) When an elopement has occurred, staff is notified immediately and remains apprised of a student's whereabouts. (*Id.*, 10-25 and 2087, 1.) As a preventive strategy to elopement, staff will identify a student's triggers (e.g., student appears upset prior to recess, student slams something down, student paces back

and forth, etc.) and initiate an intervention, such as providing an alternative to allowing the student to go outside for recess (e.g., permit the student to invite one or two friends to play a game inside a small classroom with supervision from the [REDACTED] Coordinator, [REDACTED]). (Hr’g Tr. at 2087, 8-25.)

33. General education classes are co-taught by a general education teacher<sup>17</sup> and a special education teacher from the [REDACTED], which regularly requires teachers to collaborate on lesson planning. General education classes consist of twenty-four to twenty-five students (which includes students from the [REDACTED]). (Hr’g Tr. at 2055, 20-24.) General education classes provide students from the [REDACTED] with opportunities to interact with their non-disabled peers.

34. Speech pathologists and reading specialists “push-in” to the general education setting to provide additional support to students. (Hr’g Tr. at 2056, 6-12.) In addition, a case manager frequents classes to ensure that an IEP, and all specified supports, are being implemented wherever a student is located within the building (i.e., self-contained class or general education setting). (Hr’g Tr. at 2047, 14-17.)

35. Science and social studies in the general education setting are project-based and are taught in separate sixty-minute blocks. (Hr’g Tr. at 2049, 8-10 and 2059, 4-5.) Prior to being integrated into these classes, the [REDACTED] staff spends approximately ten to fifteen minutes pre-teaching students in the [REDACTED] on the upcoming lesson, including reviewing vocabulary, brainstorming ideas, and helping students to generate questions. (Hr’g Tr. at 2058, 13-25 and 2059, 1-25.) Students from the [REDACTED] are given a “cheat sheet” to take with them into the general education setting. (Hr’g Tr. at 2059, 25 and 2060, 1.) After the

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<sup>17</sup> The same general education teacher will teach science, social studies, and math to students.

pre-teaching concludes, the [REDACTED] students go to the general education setting, where they receive large group instruction that is co-taught by the general education teacher and a special education teacher from the [REDACTED] for approximately seven to ten minutes. (Hr'g Tr. at 2060, 9-12.) Following the large group instruction, the students work in small groups of four to five students (referred to as lab groups) on a project. (Hr'g Tr. at 2060, 12-14.) Careful consideration is given to grouping students into small groups. (Hr'g Tr. at 2060, 18-25 and 2061, 1-2.) The small groups do not have to remain in the classroom while working on projects; they can relocate to other areas in the school. Each student in the small group is assigned a role (i.e., recorder, presenter, materials gatherer, builder), relative to the student's strength. (Hr'g Tr. at 2061, 5-12.)

36. Math in the general education setting is taught in a seventy-minute block. The instruction is co-taught as noted above, but the special education teacher who co-teaches math is not from the [REDACTED]. (Hr'g Tr. at 2297, 22-24.) Students receive whole group and small group instruction in math. (Hr'g Tr. at 2299, 2-4.) Unlike science and social studies, students from the [REDACTED] who are performing on grade level in math do not receive pre-teaching prior to receiving math instruction in the general education setting. (Hr'g Tr. at 2300, 4-9.) If needed, a student from the [REDACTED] can receive re-teaching in math during the small group instruction or once the student has returned to the [REDACTED]. (Hr'g Tr. at 2300, 9-19 and 2306, 6-18.)

37. Specials (Art, Music, and P.E.) in the general education setting are taught during forty-five-minute blocks, in one of three groupings referred to as squads. (Hr'g Tr. at 2050, 5-8 and 2073, 7-8.) These squads consist of approximately seventeen to eighteen students<sup>18</sup>

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<sup>18</sup> This number reflects fifty-two students (i.e., forty students from two 4<sup>th</sup> grade general education classes added to twelve students from the [REDACTED]) divided into three squads. (Hr'g Tr. at 2073, 1-5.)

(including students from the [REDACTED]). The individual needs of students from the [REDACTED] are considered when grouping students into squads. (Hr'g Tr. at 2073, 9-20.) Specials are taught by general education teachers. Paraeducators accompany students from the [REDACTED] to specials. (Hr'g Tr. at 2074, 21-25 and 2075, 1.)

38. Students from third grade through fifth grade attend lunch and recess during the same period in the general education setting. This grouping consists of approximately 150 students.

39. Students are provided with forty minutes for recess at the playground. A staff of six to eight adults, which can include the principal, special education teachers, paraeducators, reading specialists, and [REDACTED] teachers, are present during recess to provide supervision, assist students by facilitating play groups, and support students in interpreting social cues and managing peer interactions. (Hr'g Tr. at 2082, 9-11, 19-25; 2083, 1-11, 24-25; and 2084, 1-4.)

40. Students are provided with thirty minutes for lunch in the lunchroom. Lunch is staffed with six to eight adults. (Hr'g Tr. at 2082, 12-13.) In addition, speech pathologists and occupational therapists frequent the lunchroom; counselors also run lunch bunch sessions with students. (Hr'g Tr. at 2084, 12-15, 20.)

41. Accommodations, supplementary aids, services, program modifications, and supports are available to students across all settings. (Hr'g Tr. at 2077, 18-22.)

42. In the spring of 2018, the Mother toured the [REDACTED] as a possible placement for the Student. During the tour, the Mother was particularly impacted by observing a science class in the general education setting. Believing the Student would receive less support

in the mainstreaming setting, the Mother felt the placement would not work for the Student.

(Hr'g Tr. at 1238, 2-20.)

43. In the spring of 2018, the Mother, on behalf of the Student, applied to the [REDACTED] ([REDACTED]) and the Student was accepted in June 2018. (Hr'g Tr. at 1239, 1-3 and 1240, 9-15.)

**2018-19 School Year: Fourth Grade**

44. The Student attended [REDACTED], by private placement, for the 2018-19 school year.

45. [REDACTED] is a private, full-time special education school that is not approved by the MSDE.<sup>19</sup> [REDACTED] offers small group instruction with low student-to-teacher ratios, typically four students to one teacher. (Hr'g Tr. at 806, 1-3.) During the Student's enrollment, [REDACTED] served students in Kindergarten through fifth grade. [REDACTED] shared space in the [REDACTED] located in [REDACTED], Maryland. (Hr'g Tr. at 935, 19-21.)

46. During the 2018-19 school year, the Student's fourth grade class consisted of eight students. (Hr'g Tr. at 812, 6-8.) The Student's schedule was as follows:

- Homeroom (8 students and 2 teachers<sup>20</sup>)
- Reading (4 students and 1 teacher)
- Math (2 students and 1 teacher)
- Language Arts (8 students and 2 teachers)
- Science (8 students and 2 teachers)
- Social Studies (8 students and 2 teachers)
- Specials<sup>21</sup> (8 students and 2 teachers)
- Lunch (8 students and 2 teachers)
- Recess (24 students<sup>22</sup> and 4 teachers)

(Hr'g Tr. at 812, 8-18; 813, 9-25; and 814, 1-7.)

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<sup>19</sup> According to [REDACTED], [REDACTED]'s founder decided not to go through the process to be approved by the MSDE. (See Hr'g Tr. at 802, 8-10.)

<sup>20</sup> With the exception of reading and math, the Student's classes were co-taught by a lead teacher and a teaching assistant (or teaching partner). Teacher credentials varied at [REDACTED], ranging from Associate Degrees to a Master's Degree in various fields, to those who had multiple years of teaching experience in the field of special education.

<sup>21</sup> At [REDACTED], specials include art, music, and fitness or adaptive P.E.

<sup>22</sup> This number reflects students from three separate classes.

47. The Student ate lunch in his classroom with his peers. (Hr'g Tr. at 963, 11-13.)

Recess was held outdoors at the playground or outdoor field. (Hr'g Tr. at 967, 11-15.)

48. During the 2018-19 school year, the Student adhered to a medication regimen of [REDACTED] (stimulant medication) and [REDACTED] (an ADHD booster) to assist with managing his ADHD-C diagnosis. The medications improved the Student's sustained attention for ten to fifteen minutes.

Mrs. [REDACTED]'s Observation of the Student at [REDACTED]

49. On September 26, 2018, Mrs. [REDACTED] observed the Student at [REDACTED] across two settings: homeroom and language arts. (P-17.)

50. On this date, the Student's homeroom class consisted of seven students and two teachers. Instrumental music played softly in the background. All Students utilized a Chromebook. The Student was attentive, followed directions, raised his hand to seek clarification about a keyboarding instruction, and received 1:1 instruction on how to use the shift key to capitalize a letter. Prompted by a visual cue projected on the smart board, the Student participated in a movement break prior to successfully transitioning to his language arts class. (P-17-1 through P-17-2.)

51. The Student's language arts class consisted of three students and one teacher on this date. At the teacher's instruction, the Student logged into Kahoot (a computer game) on his Chromebook and participated in a task requiring students to identify proper nouns out of three choices read aloud by the teacher. The Student chose thirty nouns, made three errors, and came in second place. The Student was disappointed, but was redirected after taking a motor break (i.e., he completed twenty wall push-ups). During a discussion about Egypt, the teacher provided highly scaffolded questioning with choices to get the Student to contribute to the discussion.

Before transitioning to the vocabulary lesson, the Student engaged in another movement break. Once the lesson started, the Student presented the teacher with a pass, indicating he needed a three-minute break. The Student independently took his break and timely returned to class. The Student copied a definition with support from the teacher, who kept her finger on the definition to maintain the Student's eye placement. During a reading exercise, the Student read a page aloud, while the teacher subvocalized unknown words to the Student. (P-17-2 through P-17-3.)

██████'s Strategies to Address the Student's Executive Function, Emotional, and Behavioral Needs

52. One of the ways that the Student's executive functioning challenges presented was in terms of the Student's organization of his papers, planner, desk, and locker area. To address this need, pictures of what the Student's desk or locker looked like when it was neat and organized were placed on his desk and inside his locker. The Student was then tasked with matching the area to the picture to keep himself organized. (Hr'g Tr. at 825, 12-18.) Additionally, the Student responded well to checklists, timers, visual schedules, and teacher check-ins to ensure sustained attention. (P-25-5.) He also benefitted from simplified verbal instructions and a visual understanding of task expectations.

53. The Student's presentation upon arrival to school varied; he was either in a down mood and resistant to coming or very silly and ramped up. (Hr'g Tr. at 823, 18-23.) As a result, ██████ provided the Student with a morning routine – or sensory diet – to assist the Student with emotional regulation. Each morning, the Student would report to ██████'s sensory room where he used equipment (i.e., trampoline, swing, stationary bike, or medicine ball) to help him reset into a calm, ready-for-learning state. The Student benefitted from utilizing sensory tools from

his individualized Zones of Regulation toolbox.<sup>23</sup> The Student also benefitted from use of a bouncy band at the bottom of his desk, which provided opportunities for sensory input and movement while seated during class instruction.

54. To help with self-regulation, [REDACTED] utilized a behavior contract, which incentivized the Student to be attentive, to follow directions, and communicate expectedly by allowing the Student to earn points towards a reward (e.g., earning additional time to throw a football with a coach at the end of the school day). In this regard, the Student was motivated to employ strategies to optimally respond to ongoing demands and problem solve through potential conflicts, such as using a break card to take a timed walk, taking a motor break, and utilizing sensory tools from his Zones of Regulation toolbox. (P-25-5.)

October 16, 2018 IEP Meeting

55. On October 16, 2018, an IEP meeting was held to develop an IEP and placement for the Student's 2018-19 school year.

56. The Student was identified by MCPS as a student eligible for special education services under the IDEA. The Student's primary disability was identified as a Specific Learning Disability (Dyslexia<sup>24</sup> and Dysgraphia.<sup>25</sup>) (MCPS-14-3.)

57. The Student's present levels of performance were as follows:

- Language and literacy: 1<sup>st</sup> grade
- Reading phonics: Kindergarten
- Reading fluency: 19<sup>th</sup> percentile at the end of 3<sup>rd</sup> grade
- Reading comprehension: Kindergarten
- Math calculation: 1<sup>st</sup> grade
- Math problem solving: 1<sup>st</sup> grade

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<sup>23</sup> The Zones of Regulation offered the following strategies and supports to the Student when needed: Blue (tired/sad) – wall push-ups, animal walks; Green (happy/ready) – listen to music, access to hand fidgets; Yellow (anxious) – carry heavy item like a medicine ball (i.e., heavy work); Red (angry) – carry heavy item, utilize swing. (MCPS-16-2.)

<sup>24</sup> “Dyslexia is a disorder that makes learning to read and/or interpret letters, symbols and words difficult.” (P-19-6.)

<sup>25</sup> “Dysgraphia is a disorder that impairs one's ability to write clearly and coherently.” (P-19-5.)



- Written language mechanics: Kindergarten
- Written language expression: Kindergarten
- Speech and language receptive language: Below age expectancy
- Speech and language expressive language: Below age expectancy
- Speech and language pragmatics: Below age expectancy
- Cognitive (Executive Functioning): Below age expectancy
- Phonological awareness: 1<sup>st</sup> grade
- Behavioral (Attention): Below age expectancy

(MCPS-14-6 through MCPS-14-14.)

58. The IEP team determined that the Student needed the following accommodations during instruction and testing: eliminate answer choice, general directions read aloud and repeated as needed, line reader mask tool, answer masking, spell check or external spell check device, graphic organizer, small group, specified area or setting, adaptive or specialized equipment or furniture, frequent breaks, reduced distractions, change location within school, extended time, human reader and scribe, and assistive technology (i.e., speech-to-text or text-to-speech). (MCPS-14-17 through MCPS-14-19.)

59. The IEP team determined that the Student required the following instructional supports daily: adult support; highly structured lesson with frequent activity change; multi-sensory instruction; repetition of directions, restating understanding of directions, and checking for understanding; access to a portable word processor; enlarged font; increase of white space; limited visual clutter on assignments and boards in classroom; assistance with organization; use of organizational aids, manipulatives, highlighters, tracking tool when reading text, proofreading checklist, and word bank to reinforce vocabulary and/or when extended writing is required; and frequent or immediate feedback. (MCPS-14-21 through MCPS-14-25.)

60. The IEP team determined that the Student required the following program modifications daily: modified homework to demonstrate understanding, picture schedule with

word pairing, and breaking down assignments into smaller units (or chunking). (MCPS-14-25 through MCPS-14-26.)

61. The IEP team determined that the Student required the following social/behavioral supports daily: shifting – reduction in workload, advanced notice for schedule changes, strategies to initiate and sustain attention, structured time for organization of materials, encouragement to ask for assistance when needed, and frequent changes in activities or opportunities for movement. (MCPS-14-26 through MCPS-14-27.)

62. The IEP team determined that the Student required the following physical/environmental supports daily: use of slant board, limited visual field (i.e., desk, walls, etc.), and extra time for movement between classes. (MCPS-14-27 through MCPS-14-28.)

63. The Student's 2018-19 IEP proposed specialized instruction in a self-contained classroom for reading, writing, and math; it proposed instruction in the general education setting with special education support for science, social studies, specials (i.e., Art, Music, P.E), lunch, and recess.<sup>26</sup> The IEP team proposed that the Student's IEP be implemented at the [REDACTED]. (MCPS-14-44 through MCPS-14-45.)

64. The Parent disagreed with the proposal for instruction in the general education setting for science, social studies, specials, lunch, and recess, as well as the proposed placement of the [REDACTED], amid concerns over the large class size, the pace of instruction, and the distraction level, which would prevent the Student from receiving an educational benefit. The Parent requested a fully self-contained program for the Student. (MCPS-13.)

65. After considering concerns shared by the Parent about the Student's OT needs, the IEP team recommended an OT assessment.

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<sup>26</sup> The 2018-19 IEP also proposed related service hours for speech and language; however, as these related service hours are not in dispute, I will not address them. (See Jt. Ex. 1.)

### OT Evaluation

66. Prior to the March 2019 IEP meeting, ██████████, MCPS OT/PT Assessment Team Coordinator, conducted an evaluation of the Student on December 12, 2018. (P-21.) The evaluation was conducted at ██████████ in a 1:1 setting. As part of the OT evaluation, the following tests were administered: Fine Motor Precision (tasks that require precise finger movement, such as drawing, coloring, cutting), Fine Motor Integration (copying basic to complex designs), Manual Dexterity (manipulation of small objects in a prescribed manner), and Visual Motor Integration (measures the degree to which visual perception and finger-hand movements are coordinated). The Student scored below average on the Fine Motor Precision test, average on the Fine Motor Integration test, functional on the Manual Dexterity test, and below average on the Visual Motor Integration test. (P-21-3 through P-21-4.)

67. The Student's performance on the assessments was impacted by his attention, the cognitive demands of the task (i.e., reading, writing, and spelling), and an increased work pace for items the Student perceived as hard. (P-21-3, 4, 6-7, and 9.)

68. The Student demonstrated his keyboarding skills during the assessment. He primarily used his index fingers with visual monitoring of the keyboard. He was familiar with basic editing tools such as backspace and was independent with controlling the track pad on his Chromebook to navigate between programs and to access the internet. The Student accurately typed two sentences from a model, correcting spelling errors as he typed. The Student noted his preference for a computer mouse rather than the track pad on his Chromebook. (P-21-7.)

69. The Student was able to produce legible written work when he took his time, was given structured paper, and was given spelling assistance. Ms. ██████████ recommended that if paper/pencil tasks are required in school, they should be limited to fill-in-the-blank or short

answer responses, with structured writing spaces provided and access to word banks when needed. Ms. [REDACTED] further noted that the accommodation of extended time may prove useful for the Student so that he does not feel compelled to rush through written assignments. (P-21-9.)

70. Ms. [REDACTED] noted that the Student was receptive to using emotional regulation strategies to help him participate more fully in his educational program, and recommended continued monitoring of sensory supports with consultation from OT. (P-21-9.)

71. Overall, the OT assessments revealed the following strengths for the Student: functional fine motor precision once attention is gained; functional grasp patterns for classroom tool use and object manipulation; functional in-hand movements; foundational visual motor skills to support production of letters/numbers; emerging keyboarding skills; sufficient fine motor skills to manage school tools, materials, and personal belongings; and functional mobility. (P-21-8.)

72. The assessments also revealed continued needs in the areas of written output and visual motor integration. It was recommended that the school team consider permitting keyboarding to become the Student's primary means of written output because it guarantees a legible product, and allows for ease of editing and assistive technology supports for organization and spelling. (P-21-9.)

73. Based on the results of the assessments, Ms. [REDACTED] concluded that the Student needed one, thirty-minute session of OT per month. (P-21-10.)

#### March 12, 2019 IEP Meeting

74. On March 12, 2019, an IEP meeting was held to review the Student's updated OT assessments.

75. The Student's goals and objectives and present levels of performance were updated to include an entry for Fine Motor Coordination. The present levels of performance indicated below average to average, but functional for school needs. (MCPS-17-14.)

76. The IEP team determined that the Student required additional instructional supports daily: provide wireless mouse when frequent editing is required, provide uppercase letter overlay to Chromebook keyboard to minimize confusion, and allow use of erasable pen for paper/pencil tasks (the Student's preferred tool). (MCPS-17-22.)

77. The IEP team determined that the Student required an additional physical/environmental support monthly: sensory diet. Specifically, OT would "consult with classroom staff to monitor effectiveness of established sensory supports that include heavy work movement breaks (i.e., access to trampoline, swing, weighted materials). Consultation should occur at least monthly or as needed if more frequent." (MCPS-17-29.)

78. The Student's 2018-19 IEP was amended to include one, thirty-minute session per month of OT support "directly to and on behalf of the Student to monitor his fine motor coordination skills along with needed sensory supports available to him." (MCPS-17-47.)

79. The Parent disagreed with the frequency of the proposed OT related service hours, requesting instead daily OT for the Student.

80. Based on the Parent's disagreement with the amended IEP, Ms. [REDACTED] followed up with [REDACTED] from [REDACTED]'s OT program on March 20, 2019 to inquire about the Student's morning routine, as set forth above in Finding of Fact 53. Ms. [REDACTED] confirmed that upon arriving to [REDACTED], the Student selects alerting or calming activities in the school's motor gym (sensory room), independently uses the equipment with supervision, and typically rotates through two stations for two to three minutes before discerning if he is ready for class. Ms.

█████ also confirmed the Student's ability to independently take a timed movement break from his classes to walk around the school or get a drink. (MCPS-17-14 through MCPS-17-15.)

81. █████ has a sensory room comparable to █████. (Hr'g Tr. at 1927, 2-8.) Staff would monitor the Student for safety when using the equipment. (Hr'g Tr. at 1862, 2-4.)

*Student's Progress Report for the Second Semester of the 2018-19 School Year*<sup>27</sup>

82. By the end of the second semester of the Student's fourth grade year, the Student was being instructed on a beginning third grade level for reading. Orton-Gillingham was introduced into the Student's curriculum during the second semester; the Student made significant progress in phonemic awareness. The Student scored between meeting standards and exceeding standards for decoding and sight word recognition. The Student met standards for oral reading/fluency and comprehension. (P-25-1 and P-25-3.)

83. In math, the Student was being instructed on a fourth grade level. He showed growth in recalling basic math facts in all four operations, and was quick to grasp new concepts and retain what was learned. He showed solid understanding in concepts such as angles, lines, two dimensional shapes, symmetry, and finding area and perimeter. With teacher encouragement, incentives, and visual directions, he was able to stay on task. The Student met standards for math fact automaticity, computation, conceptual understanding, and problem solving. (P-25-1 and P-25-5.)

84. In written language, the Student met standards for written expression/ideas and sentence structure. The Student scored between working towards standards and meeting standards for grammar and punctuation, paragraph structure, and spelling application. The

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<sup>27</sup> At █████, the school year comprises two semesters. The progress report ranks the Student's performance on a scale (1= below standards, 2 = works toward standards, 3 = meet standards, 4 = exceeds standards). (P-25-1.)

progress report noted that the Student's inattention affected the fluidity of his writing. Graphic organizers, timers, and movement breaks helped the Student to focus. (P-25-1 and P-25-4.)

85. In handwriting, the Student met standards for legibility, spacing/alignment, and application across curriculum. (P-25-1.)

86. In social studies, the Student was being instructed on a fourth grade level.<sup>28</sup> The Student met standards for knowledge of unit concepts and class work. The Student scored between working towards standards and meeting standards for participation/discussion. A narrative was not provided concerning the Student's performance in social studies. (P-25-1.)

87. In science, the Student was being instructed on a fourth grade level.<sup>29</sup> The Student met standards for knowledge of unit concepts, class work, and participation/discussion. A narrative was not provided concerning the Student's performance in science. (P-25-2.)

88. In work study skills, the Student scored between meeting standards and exceeding standards for class participation. The Student met standards for following directions, attending to task, organization of materials, completing work neatly, completing work in a timely manner, working independently, and completing homework. (P-25-2.)

89. In conduct, the Student met standards for respecting peers, teachers, and school property, and demonstrating self-control. (P-25-2.)

Individual Therapy with Dr. [REDACTED]

90. Beginning in March 2019, the Student began attending individual therapy with Dr. [REDACTED], a licensed clinical psychologist, for weekly forty-five-minute sessions. The Mother contacted Dr. [REDACTED] because the Student was having difficulty with self-regulation,

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<sup>28</sup> While the Student's instructional level for social studies is not noted on the progress report, Ms. [REDACTED] noted the instructional level during her testimony. (See Hr'g Tr. at 1171, 17-23.)

<sup>29</sup> While the Student's instructional level for science is not noted on the progress report, Ms. [REDACTED] noted the instructional level during her testimony. (See Hr'g Tr. at 1171, 17-23.)

frustration tolerance, managing issues with peers, following directions at home and at school, and some emotional challenges. (Hr'g Tr. at 706, 5-9.)

91. No sessions were conducted during the summer of 2019; sessions resumed in the fall of 2019 and continued through the time of the hearing. (Hr'g Tr. at 675, 18-22.)

92. Dr. [REDACTED] worked with the Student concerning transitioning from preferred tasks to non-preferred tasks, advocating for himself, interpreting social cues, and problem-solving with peers.

93. Dr. [REDACTED] also consistently worked with the Student concerning his tendency to perseverate (i.e., get stuck or hyper focus on something), instead of thinking flexibly and problem solving to move forward. (Hr'g Tr. at 680, 19-25 and 681, 1-4.)

#### Extracurricular Activities

94. During a period not specified in the record, the Student participated in basketball. The team was coached by the Student's neighbor. The Student did not attend school with any of his teammates; he played with non-disabled peers. On at least one occasion, the Student ran in the wrong direction while playing, upsetting his teammates. The Student received coordination training, which improved his basketball skills. (Hr'g Tr. at 1259, 1-18.)

95. The Mother convinced staff at the [REDACTED] about starting a flag football team. The Student's team comprised students from the [REDACTED], all of whom had special needs. The Student's team competed against teams from the [REDACTED] area that comprised non-disabled peers. The Student remained on the team even after he began attending [REDACTED] through his fifth grade year. On one occasion while playing football, the Student got upset, became dysregulated, and eloped from the game. (Hr'g Tr. at 1465, 20-22.)



96. The Student participated on the [REDACTED] swim team for three years since the summer of 2018. Swimming, because it is mostly an individual sport (except for relays), was good for the Student because he did not have to worry about how his performance would affect the team. Approximately 100 to 150 kids were present at the swim meets. The Mother provided support to the Student during these meets. In addition, the Student would stay with one of the coaches the entire time before he swam. (Hr'g Tr. at 1255, 16-22.)

97. During his fifth grade year, the Student participated in baseball. On one occasion, the Student got hit in the head with the baseball while wearing a helmet. The coach advised the Student that if he felt anything in his head to tell him. The Student subsequently perseverated on his head during the game. In the middle of a play, the Student advised he had a headache and was taken out of the game. (Hr'g Tr. at 1466, 3-22.)

98. The Student participated in Boy Scouts with his neighborhood troop during his fifth grade year. His den consisted of eight kids. He successfully participated in weekly troop meetings with twenty to thirty kids. (Hr'g Tr. at 1398, 17-25 and 1399, 1-15.)

99. Between Kindergarten and the summer of 2019 (before the Student's fifth grade year), the Student participated in a summer day camp, Camp [REDACTED], which was directed by one of his neighbors, Ms [REDACTED]. Over the years, the camp grew in size from having six kids to twenty kids by the summer of 2019. The Student participated in various activities including hiking, swimming, playing tennis, and playing Pokémon with non-disabled peers. Neither Ms. [REDACTED] nor the counselors in the camp had training in special education. (Hr'g Tr. at 1248, 6-25; 1249, 1-14; 1399, 16-21; 1400, 2-14.)

**2019-20 School Year: Fifth Grade**

100. The Student remained at [REDACTED], by private placement, for the 2019-20 school year.

101. During the 2019-20 school year, the Student's fifth grade class consisted of eight students; the student-to-teacher ratios remained consistent with the 2018-19 school year.

102. The Student continued to adhere to a medication regimen of [REDACTED] and [REDACTED] to assist with managing his ADHD-C diagnosis.

103. As of October 2019, [REDACTED] recommended the following accommodations for the Student: using visual aids to augment comprehension; using visual cues to review schedule, expectations, and rules; using quiet signs, stop signs, and voice thermometers; providing preferential seating (near teacher and instruction); providing seating away from distractions (i.e., distracting students, hallway traffic, and noises); using sensory strategies throughout the day (i.e., breaks cards and fidgets); structuring activities/tasks for minimal auditory distraction; emphasizing visual and gestural prompts rather than verbal prompts; using multi-sensory cues; having student repeat back directions; providing picture or written task analysis for multi-step tasks; breaking large chunks of work into smaller parts; using graphic/visual organizers; providing visual rule cards (i.e., raise hand, follow directions) on desk or table; providing keyboarding for written work; using social stories; demonstrating tasks step-by-step before asking the Student to do it; showing the "final product" after demonstrating step-by-step tasks; providing role modeling (i.e., social skills) and role playing; providing social skills training during recess and free time periods; providing immediate feedback using verbal or gestural cues; providing arrival and departure checklists or visual reminders; providing time to unwind or rest after vestibular and high energy activities; providing opportunities to have a drink of water

during the day; modifying lesson to emphasize essential concepts for mastery; using manipulative materials to increase participation in learning experience, modifying length and content of assignments; designating a safe or quiet place in classroom; using break card for breaks; using a coping card with behavioral coping options; allowing motor breaks throughout the day; allowing use of hand fidgets to self-regulate; allowing student to stand to complete work; using a human reader; using audiotapes; using a scribe for note taking or tests; allowing flexible schedule; extended time for testing; small group size; providing assistance with directions; allowing use of math aids (i.e., calculator, manipulative, and arithmetic tables); and allowing use of spelling aids. (P-31-12 through P-31-14.)

October 24, 2019 IEP Meeting

104. On October 24, 2019, an IEP meeting was held to develop an IEP and placement for the Student's 2019-20 school year. During the meeting, the IEP team reviewed the Student's present levels of performance, accommodations, and supplementary aids and services. Towards the end of the meeting, ██████ raised concerns about the Student's behavior through anecdotal reports, but no behavioral data was provided at the meeting. ██████ agreed to provide data after the meeting. Accordingly, counsel, on behalf of the Student, requested to continue the IEP meeting, which was rescheduled to November 2019. (MCPS-31-2 through MCPS-31-3.)

105. On November 18, 2019, the Student, through counsel, requested via email to continue the November 19, 2019 IEP meeting in order to allow updated reading assessments to be reviewed by MCPS and reflected in the IEP. The email contained various attachments, including ██████'s draft copy of a Behavior Intervention Plan (BIP) dated November 1, 2019. (MCPS-33.) The IEP meeting was rescheduled for January 17, 2020. (MCPS-37.)

106. Days before the January 2020 IEP meeting, counsel, on behalf of the Student, requested a continuance, noting the Mother's father had been moved to hospice. (MCPS-43.) The Parent agreed to waive the timeline for the annual IEP meeting and the meeting was rescheduled for February 14, 2020. (MCPS-44.)

MCPS's Staff's Observations of the Student at [REDACTED]

107. On November 19, 2019, [REDACTED], MCPS psychologist, and [REDACTED], [REDACTED] Coordinator, conducted observations of the Student at [REDACTED].

108. When Ms. [REDACTED] entered the Student's writing class, the Student was finishing up an Orton-Gillingham spelling assessment in a small group with one teacher. After completing the assessment and turning in his homework, the Student transitioned appropriately for snack time. Students went to the back of the class and began playing Clue. The Student helped to coordinate the game and explained some of the rules to his peers. He also invited another peer to join the game. Following snack time, the Student returned to his seat for a writing assignment. (MCPS-42.)

109. Ms. [REDACTED] also observed the Student in writing class, which consisted of eight students and two adults: one teacher and one paraeducator. The teacher instructed students that they would be writing pen pal letters to their buddies at the [REDACTED]. The class started to generate ideas of things to write to their buddy; the Student did not participate in the discussion. At the appropriate time, the Student went to a desk located in the hallway outside of the classroom to complete his writing assignment. The Student used his Chromebook. He wore a pair of headphones to utilize speech-to-text. The teacher commented to Ms. [REDACTED] that the Student produces a significant amount of work with the accommodation. The Student had intermittent support for writing; no one sat with him. The Student remained engaged with the

task even when the paraeducator or teacher walked away from him. At one point, the Student called for the teacher to ask a question. The teacher responded to the hallway, answered his question, and returned to the classroom. After finishing his letter, the Student reentered the classroom and advised the teacher he was done. The Student joked with the teacher about the closing of his letter, which the teacher noted the Student made more “child appropriate.” Notably, the teacher did not give any advance notice to the class that the writing task would be over soon; she just announced that it was over. The Student was not impacted by the lack of advance notice. The Student was the first person out of the classroom to go to his math class. The Student transitioned appropriately for math class. (MCPS-40.)

#### Increase in Negative Behaviors

110. During the fall of 2019, the Student began to exhibit an increase in emotional outbursts<sup>30</sup> and instances of non-compliance<sup>31</sup> that could no longer be managed solely by the Student’s behavior contract.

111. The Student’s emotional outbursts ranged from screaming, yelling, and crying to shutdowns where the Student vocalized that he was not doing a particular task. (*See Hr’g Tr. at 833, 5-8.*)

112. The Student’s instances of property destruction included breaking pencils, throwing items, and grabbing objects off the walls and desks. (*See Hr’g Tr. at 832, 15-18.*)

113. The Student displayed aggression towards peers and staff. Instances of aggression towards peers typically occurred during fitness or recess, but did not involve the

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<sup>30</sup> According to ██████ an emotional outburst includes any occurrence or attempt to hit, kick, grab, or push another individual; throw items; run away from the instructor; or shouting, crying, and/or engaging in negative vocal exchanges with peers. (MCPS-34-2 through MCPS-34-3.)

<sup>31</sup> According to ██████, non-compliance includes “[a]ny instance in which the Student engaged in vocal refusal (i.e., “I’m not doing that”) in addition to the absence of a targeted response within 10 seconds after being presented with a demand/prompts to transition from a high[ly]-preferred activity to a less[er]-preferred activity.” (MCPS-34-4.)

Student hitting or grabbing peers. (See Hr’g Tr. at 1071, 5-6.) The Student displayed aggression towards staff by puffing up his chest, getting into the personal space of staff, and moving towards staff in a threatening manner. (See Hr’g Tr. at 832, 24-25 and 833, 1-2.)

114. On multiple occasions, the Student eloped from the classroom, but remained within the school building (i.e., he would walk out of the classroom and down the hallway). (See Hr’g Tr. at 1073, 4-10; *see also* Hr’g Tr. at 831, 24-25 and 832, 1-3.)

115. On at least two occasions, the Student eloped from school grounds during fitness and recess. (See Hr’g Tr. at 832, 4-5 and 1166, 15-17.) One of these instances of elopement required ██████’s entire behavioral response team to respond to the Student. The team followed the Student outside and informed him that the police would be called if he did not stop. When the Student stopped, the team employed de-escalation strategies for approximately twenty minutes, until the team was able to get the Student to walk back to school grounds. The Student was counseled further until he was able to reset, at which time he was brought back into the school.

116. Notwithstanding these behaviors, the Student never caused injury to himself or others.

██████’s Draft BIP

117. In response to these behaviors, ██████ formulated a draft BIP on November 1, 2019. (MCPS-34.)

118. According to ██████, the Student’s emotional outbursts were triggered when the Student felt he was being falsely accused of something or when there was a perceived injustice.

██████ hypothesized that the primary functions of the Student’s emotional outbursts were escape/avoidance and attention. To address this behavior, ██████ implemented strategies and

supports such as visual schedules, first-then language, social stories, break cards, movement/sensory breaks, and a behavior contract. The BIP lacked baseline data concerning the frequency, intensity, duration, and specific type of emotional outbursts displayed by the Student between September 1, 2019 through November 1, 2019. (MCPS-34-1 through MCPS-34-3.)

119. According to [REDACTED] the Student's noncompliance behaviors were triggered when the Student was presented with a demand to transition from a highly-preferred activity to a lesser-preferred activity. [REDACTED] hypothesized that the primary functions of the Student's noncompliance behaviors were escape/avoidance and attention. To address this behavior, the team implemented strategies and supports such as visual schedules, break cards, frequent reviews of classroom rules and expected behaviors, role-playing, and practicing ways to ask for a break. The BIP lacked baseline data concerning the frequency, intensity, and duration of the noncompliance behaviors exhibited by the Student between September 1, 2019 through November 1, 2019. (MCPS-34-4 through MCPS-34-6.)

120. The BIP also instituted a safe person call protocol to address instances when the Student appeared to be escalating. (MCPS-34-7.) This accommodation provided the Student with immediate assistance from a designated safe person: an adult the Student identified as someone who can help him begin the process of resetting with strategies and support. (P-38-4 through P-38-5.)

121. The BIP did not contain the details of the elopement from school grounds requiring the behavioral response team. After the BIP was instituted on November 1, 2019, the Student had no further instances of elopement from school grounds. (Hr'g Tr. at 1167, 2-5.)

*Student's Progress Report for the First Semester of the 2019-20 School Year*

122. By the end of the first semester of the Student's fifth grade year, the Student was being instructed on a fifth grade level in math. The Student exhibited an increased understanding of the order of operation calculations and successfully grasped multi-digit multiplication and long division with the support of a color-coded graphic organizer. When an aspect of the task proved difficult or frustrating for him, the Student struggled to initiate and complete the work independently, leading him to seek more teacher support than he required. With teacher encouragement and prompting to use his break cards, the Student was typically able to come back in the classroom and complete the assignment with minimal teacher support. Reading word problems was challenging for the Student; he required maximal teacher support to complete word problems. The Student scored between working towards standards and meeting standards for math fact automaticity and conceptual understanding. The Student worked towards standards in computation and problem solving. (P-38-1 and P-38-4.)

123. The Student was being instructed on a beginning third grade level for reading.<sup>32</sup> The Student continued to receive instruction in Orton-Gillingham. The Student was able to use his knowledge to decipher unfamiliar words when reading in isolation and in text, and he was able to read multiple paragraphs with 95% decoding accuracy. With support, he was able to spell words in isolation during dictation with 92% accuracy, increasing his encoding (spelling) accuracy. The Student was able to read a passage and then answer comprehension-based questions about the passage with 98% accuracy. He continued to benefit from verbal prompting, his behavioral contract, and taking motor breaks to help his focus. The Student scored between

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<sup>32</sup> While the instructional level is not noted on the Student's progress report, a Fountas and Pinnell benchmark assessment from September 2019 revealed that the Student was reading on Level N, which is the equivalent of the beginning of third grade. (P-28.)



working towards standards and meeting standards for decoding and oral reading/fluency. The Student met standards for sight word recognition and comprehension. (P-38-1 and P-38-3.)

124. In written language, the Student scored between meeting standards and exceeding standards for written expression/ideas. The Student worked towards standards in spelling application and grammar and punctuation. The Student scored between working towards standards and meeting standards in sentence structure and paragraph structure. The Student used speech-to-text technology to facilitate his writing process. The Student was becoming increasingly skilled at using the tool effectively, ensuring his typed text adhered to standards of spacing, capitalization, and punctuation. During the pre-writing process, the Student worked well with organizers that supported his ability to expand and clearly express his thoughts. (P-38-1 and P-38-3.)

125. In handwriting, the Student met standards for legibility, spacing/alignment, and application across curriculum. (P-38-1.)

126. In social studies, the Student was being instructed on a fifth grade level.<sup>33</sup> The Student met standards for knowledge of unit concepts. He scored between working towards standards and meeting standards for class work. The Student scored between meeting standards and exceeding standards for participation/discussion. In a narrative pertaining to work study skills and conduct, the Student was described as increasingly confident in his academic abilities, demonstrated by his volunteering to read aloud to the class during social studies. (P-38-1 and P-38-4.)

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<sup>33</sup> While the Student's instructional level for social studies is not noted on the progress report, Ms [REDACTED] noted the instructional level during her testimony. (See Hr'g Tr. at 1171, 17-25 and 1172, 1-5.)

127. In science, the Student was instructed on a fifth grade level.<sup>34</sup> The Student scored between working towards standards and meeting standards for knowledge of unit concepts. The Student met standards for class work and participation/discussion. No narrative was provided concerning the Student's performance in science. (P-38-2.)

128. In work study skills, the Student scored between working towards standards and meeting standards for class participation, following directions, attending to task, organization of materials, and completing work neatly. The Student worked towards standards for completing work in a timely manner and working independently. The Student scored between below standards and working towards standards for completing homework. (P-38-2.)

129. In conduct, the Student scored between below standards and working towards standards for respecting peers and respecting teachers. The Student scored between working towards standards and meeting standards for respecting school property. The Student worked towards standards for demonstrating self-control. The Student needed support to interact in a kind and friendly manner when socializing with individual peers. The report noted that when the Student gets frustrated or angry, he struggles to regulate his emotions. (P-38-2 and P-38-4.)

February 14, 2020 IEP Meeting

130. The IEP meeting from October 24, 2019 was reconvened on February 14, 2020 to finish developing an IEP and placement for the Student's 2019-20 school year.

131. On the morning of the February 14, 2020 IEP meeting, [REDACTED] provided MCPS with a behavioral graph, which noted four separate instances of non-compliance resulting in the Student's sustained duration outside of the classroom:

- November 18, 2019 – 15 minutes
- December 16, 2019 – 40 minutes

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<sup>34</sup> While the Student's instructional level for science is not noted on the progress report, Ms. [REDACTED] noted the instructional level during her testimony. (See Hr'g Tr. at 1171, 17-25 and 1172, 1-5.)

- January 27, 2020 – 60 minutes
- February 10, 2020 – 130 minutes; Student had to be picked up early by parent<sup>35</sup>

(MCPS-52.)

132. Because the behavioral graph was just provided to MCPS on the morning of the IEP meeting, MCPS did not have sufficient time to review and consider the data.

133. The Student's present levels of performance were updated as follows:

- Language and literacy: 3<sup>rd</sup> – 4<sup>th</sup> grade
- Reading phonics: 3<sup>rd</sup> – 4<sup>th</sup> grade
- Reading fluency: end of 3<sup>rd</sup> grade/beginning of 4<sup>th</sup> grade
- Reading comprehension: end of 3<sup>rd</sup> grade/beginning of 4<sup>th</sup> grade
- Math calculation: 5<sup>th</sup> grade
- Math problem solving: 5<sup>th</sup> grade
- Written language mechanics: 3<sup>rd</sup> grade
- Written language expression: 3<sup>rd</sup> grade
- Speech and language receptive language: Below age expectancy
- Speech and language expressive language: Below age expectancy
- Speech and language pragmatics: Below age expectancy
- Cognitive (Executive Functioning): Below age expectancy
- Behavioral (Social/Emotional): Below age expectancy
- Behavioral (Attention): Below age expectancy
- Fine Motor Coordination: Below average to average, but functional for school needs

(MCPS-51-6 through MCPS-51-17.)

134. Math was no longer noted on the Student's IEP as an area that impacted the Student's academic achievement or functional performance. (MCPS-51-9 through MCPS-51-11.)

135. The IEP team determined that the Student did not require a BIP, finding instead that the Student's behavioral needs could be addressed through the IEP's supplementary aids, services, and goals and objectives. (MCPS-50-2.)

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<sup>35</sup> At the time of the hearing, Ms. [REDACTED] had no recollection of the impetus for this incident.

136. The Student's goals and objectives were updated to include an entry for Behavioral: Social/Emotional. The goal stated, "Given models, adult prompts and visuals, [the Student] will use learned coping strategies to self-regulate and to decrease amount of time he is disengaged from classroom activities." (MCPS-51-37.) Two objectives were noted: (1) "[the Student] will comply with verbal directions to enter the classroom after a break[, and] (2) [the Student] will use non-verbal cues (timer) to comply with re-engaging in an activity after he has taken a break." (MCPS-51-37.)

137. The IEP team determined that the Student required the following social/behavioral supports daily: visual cues for comprehension, schedules, rules, voice thermometers; break time after high energy tasks to regulate body and calm (as needed); token board, behavior contract, or point chart (as needed); strategies to initiate and sustain attention; and provide frequent change in activities or opportunities for movement. (MCPS-51-29 through MCPS-51-30.)

138. The IEP team considered the Student's needs and determined that the Student needed the following accommodations during instruction and testing: eliminate answer choice, general administration direction read aloud and repeated as needed, line reader mask tool, spell check or external spell check device, graphic organizer, answer masking, small group instruction, specified area or setting, frequent breaks, reduce distractions to self, text-to-speech, speech-to-text, human reader, human scribe, monitor test response, and extended time. (MCPS-51-21 through MCPS-51-23.)

139. The IEP team determined that the Student required the following instructional supports daily: small group instruction; speech-to-text for writing; provide demonstration of task before student does work and exemplars of final product; visual cues for classroom rules, arrival

and dismissal routines; provide wireless mouse for Chromebook use when frequent editing is required; allow use of erasable pen for paper/pencil tasks; restate understanding of given directions; access to portable word processor; multi-sensory cues; limit amount to be copied from board; limit amount of visual clutter on both assignments and on board in the classroom; repetition of directions; use of word bank to reinforce vocabulary and/or when extended writing is required; provide assistance with organization; allow use of manipulatives and organizational aids; provide proofreading checklist; and provide frequent or immediate feedback. (MCPS-51-24 through MCPS-51-28.)

140. The IEP team determined that the Student required the following program modifications daily: modified homework to demonstrate understanding, picture schedule with words pairing, and chunking. (MCPS-51-28 through MCPS-51-29.)

141. The IEP team determined that the Student required the following physical/environmental supports daily: visual boundary to contain student in specific area; preferential seating; and use of break cards, motor breaks, and fidgets to self-regulate. (MCPS-51-30.)

142. The Student's 2019-20 IEP proposed specialized instruction in a self-contained classroom for reading and writing; it proposed instruction in the general education setting with special education support for math, in addition to science, social studies, specials, lunch, and recess. The IEP team proposed that the Student's IEP be implemented at the [REDACTED] (MCPS-51-44 through MCPS-51-45.)

143. The Parent requested that Orton-Gillingham be identified in the IEP as the Student's reading intervention; however, MCPS disagreed with listing a specific reading intervention in the IEP. (MCPS-50-2.)

144. The Parent had several disagreements with the proposal. First, the Parent disagreed with the proposal for all instruction in the general education setting, which now included math. The Parent requested a fully self-contained program for the Student across all subjects. Second, the Parent disagreed with the decision not to list Orton-Gillingham as a reading intervention in the IEP. Third, the Parent disagreed with the decision not to provide a BIP for the Student. Finally, the Parent disagreed with the proposed placement at the [REDACTED]. (MCPS-50-2.)

145. In March 2020, [REDACTED] resorted to virtual learning in response to the COVID-19 pandemic. (Hr'g Tr. at 819, 2-10.)

146. On March 31, 2020, [REDACTED] updated its BIP for the Student. The BIP contained updated baseline data regarding emotional outbursts and noncompliance behaviors. Specifically, the BIP reported that the Student engaged in two instances of emotional outbursts on December 4, 2019 and December 5, 2019. (MCPS-57-3.) It also reported that the Student engaged in noncompliance behaviors on four occasions: September 9, 2019, October 11, 2019, October 24, 2019, and November 1, 2019. (MCPS-57-4.) Current levels of the Student's behaviors were unable to be obtained due to the pandemic and school closure.

#### Psychological Evaluation

147. The Student underwent a psychological evaluation with [REDACTED], MCPS psychologist, in April 2020. (MCPS-54.) The evaluation included rating scales from the Mother and [REDACTED] (one of the Student's teachers at [REDACTED]), as well as telephone interviews with the Mother and the Student. Updated cognitive assessments of the Student, which require face-to-face administration, were not administered due to the pandemic.

148. Data from the rating scales confirmed that the Student exhibited defiant and aggressive behaviors more frequently. The Student frequently lost his temper, falsely accused others, and had difficulty controlling his anger. The Student had difficulty with self-regulation, impulse control, waiting his turn, interrupting others, and tolerating changes in his routine. (MCPS-59-15.) During the Student's interview, he reported that he finds it difficult to calm down when he gets mad. The Student's anger is triggered when he feels like he is being blamed for something that he did not do.

149. Although cognitive and educational assessments were unable to be completed, information obtained from [REDACTED] about the Student's performance continued to confirm deficits in reading despite implementation of an intensive research-based intervention: Orton-Gillingham. The Student made progress with support from the intervention, but continued to perform below grade level expectations. (MCPS-54-15.)

150. Consistent with the Student's ADHD-C diagnosis, rating scales and interviews corroborated that the Student has difficulty with attention, hyperactivity, impulsivity, and executive functioning, which significantly impact his academic, social, and home functioning. (MCPS-54-16.)

151. Ms. [REDACTED] recommended implementing the following strategies to support the Student's behavioral regulation: encouraging the Student to utilize relaxation strategies (i.e., listening to calming music, taking a walking break, using the Calm app, etc.), supporting the Student in learning about his body's warning signs for anger, encouraging the Student to use emotion words to express his frustration and anger, and utilizing restorative practices after peer and adult conflicts to allow the Student to express his feelings and feel heard, while also facilitating his understanding of how his behavior impacts others. (MCPS-54-17.)

MCPS's Development of a BIP for the Student

152. Based on the updated behavioral data from [REDACTED] (i.e., February 14, 2020 behavioral graph and March 31, 2020 updated BIP from [REDACTED]) and the psychological evaluation, MCPS developed a BIP for the Student on May 15, 2020. (MCPS-56.) The BIP targeted emotional outbursts and noncompliance behaviors.

153. The BIP identified prevention strategies to deal with the behaviors, including using visual schedules, first-then language, a coping skills menu, non-verbal prompts to select coping strategy, Zones of Regulation supports, and modeling and providing feedback on behavior card/feedback form when the Student has followed directions, used expected language/tone with peers and adults, and stayed with the group when inside and outside. (MCPS-56-2.)

154. The BIP identified the following response strategies to both behaviors: non-verbal cues to use coping strategies, avoidance of verbal exchanges when the Student is demonstrating non-compliant behaviors, wait time before repeating directives, planned ignoring, removal of students from class if behavior becomes overly disruptive to learning, and giving the Student time to cool down.<sup>36</sup> (MCPS-56-3 through MCPS-56-4.)

May 15, 2020 IEP Meeting

155. On May 15, 2020, the IEP team convened to update the Student's IEP for the remainder of the 2019-20 school year and to develop an IEP and placement for the Student's 2020-21 school year.

156. The IEP team proposed a BIP for the rest of the 2019-20 school year. As such, the February 14, 2020 IEP was amended to include the May 15, 2020 BIP. (MCPS-59-21.) No

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<sup>36</sup> This list is not exhaustive.



other changes were made to the Student's IEP or placement for the remainder of the 2019-20 school year.

157. The Parent again requested that Orton-Gillingham be identified in the IEP as the Student's reading intervention; however, MCPS disagreed with listing a specific reading intervention in the IEP. (MCPS-58-1.)

158. Concerning the Student's IEP and placement for the 2020-21 school year (6<sup>th</sup> grade), the IEP proposed specialized instruction in a self-contained classroom across all subjects. (MCPS-59-45 through MCPS-59-47.) MCPS proposed that the Student's IEP be implemented at the [REDACTED] located at [REDACTED].

## **DISCUSSION**

### ***I***

#### ***Governing Law***

##### ***The IDEA's Requirement for a FAPE in the Least Restrictive Environment (LRE)***

The identification, assessment, and placement of students in special education is governed by the IDEA.<sup>37</sup> 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-419; COMAR 13A.05.01. "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) (internal quotation marks, brackets, and footnote omitted).

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<sup>37</sup> Maryland's special education law is a creature of State statute, based on the IDEA, and is found beginning at section 8-401 of the Education Article. The Maryland regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

The IDEA requires “that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . .” 20 U.S.C.A. § 1400(d)(1)(A). The IDEA provides federal assistance to state and local education agencies for the education of disabled students, provided that states comply with the extensive goals and procedures of the IDEA. *Id.* §§ 1412-1414; 34 C.F.R. § 300.2; *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Additionally, to the maximum extent possible, the IDEA seeks to mainstream, or include, the child into regular public schools; at a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A).

The nature of the LRE necessarily differs for each child but could range from a regular public school to a residential school where twenty-four-hour supervision is provided. COMAR 13A.05.01.10B. The IDEA requires specialized and individualized instruction for a learning or educationally-disabled child. Nonetheless, “[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities,” must be “educated with children who are not disabled . . . .” 20 U.S.C.A. § 1412(a)(5)(A). It follows that the State and federal regulations that have been promulgated to implement the requirements of the IDEA also require such inclusion. 34 C.F.R. §§ 300.114 through 300.120; COMAR 13A.05.01.10A(1).

The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. 20 U.S.C.A. § 1412(a)(5)(A); *Rowley*, 458

U.S. at 181 n.4; *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997); *see also Honig v. Doe*, 484 U.S. 305 (1988).

## II

### ***Burden of Proof***

As the party seeking relief, the Student bears the burden of proof,<sup>38</sup> by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014); *Schaffer*, 546 U.S. at 56-58, 62;<sup>39</sup> *cf.* 20 U.S.C.A. § 1415(i)(2)(C)(iii); *Rowley*, 458 U.S. at 206; 34 C.F.R. § 300.516(c)(3) (establishing preponderance of the evidence as the standard for judicial review of a state's final administrative decision under the IDEA). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

"In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your mind [ ] a belief that it is more likely true than not true." *Coleman*, 369 Md. at 125 n.16. Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.*; *see*

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<sup>38</sup> "[H]istorically, the concept encompassed two distinct burdens: the "burden of persuasion," *i.e.*, which party loses if the evidence is closely balanced, and the "burden of production," *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005); *accord Bd. of Trustees, Cmty. College of Balt. Cty. v. Patient First Corp.*, 444 Md. 452, 469 (2015) ("The phrase 'burden of proof' encompasses two distinct burdens: the burden of production and the burden of persuasion.").

<sup>39</sup> In assigning the burden of persuasion to the Parents and Student, the *Schaffer* Court observed "Congress appears to have presumed instead that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances." 546 U.S. at 60.

*Schaffer*, 546 U.S. at 56-58. For the reasons set forth below, I find the Student has failed to meet his burden to prove the denial of a FAPE for the 2018-19 and 2019-20 school years.

### ***III***

#### ***Positions of the Parties***

The Student contends MCPS disregarded the opinions of the persons best suited to know what is reasonably likely to confer an educational benefit on the Student and help him progress academically when it crafted IEPs for the 2018-19 and 2019-20 school years that did not specify Orton-Gillingham as the Student's reading intervention, did not provide the Student with a BIP, and otherwise called for inclusion in general education, an insufficient number of OT related service hours, and placement at the [REDACTED]. For these reasons, and as a remedy for its failure to provide him a FAPE, the Student seeks reimbursement for his private placement at [REDACTED] for the 2018-19 and 2019-20 school years.

MCPS contends its educators, relying on the data available to them, and in collaboration with the Student's Parent, his private school teachers, private psychologists, and educational advocate, made a reasoned exercise of educational judgment in proposing IEPs with appropriate goals, objectives, and service hours, that properly balanced the student's educational needs with the IDEA's mandate to educate disabled children in the LRE. For this reason, MCPS maintains its decision should not be disturbed.

### ***IV***

#### ***Analysis***

##### ***A. The Provision of a FAPE***

A school system's obligation under the IDEA is to provide all children with disabilities a FAPE. 20 U.S.C.A. § 1400(d)(1)(A); 34 C.F.R. § 300.101(a).

A FAPE is defined in the IDEA as special education and related services that—

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

20 U.S.C.A § 1401(9); *accord* 34 C.F.R. § 300.17.<sup>40</sup>

In *Rowley*, the Supreme Court described a FAPE as follows:

Implicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200-01. The Court held that a FAPE “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” *Id.* at 188-89. However,

[a]s noted by the Third Circuit, “*Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a ‘mainstreamed’ classroom.” Since Amy Rowley was receiving passing grades and otherwise succeeding in school, the only question before the Court was whether the school was required to give Amy sufficient assistance to allow her to receive the same educational benefit as her non-disabled peers. The *Rowley* Court did not have occasion to consider the question of what level of educational benefit the school district would have been required to provide Amy

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<sup>40</sup> A FAPE is defined in COMAR 13A.05.01.03B(27) as “special education and related services” that:

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

Rowley had she not been progressing successfully through school in a regular education classroom.

*Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 863 (6th Cir. 2004) (citation omitted).<sup>41</sup>

After *Rowley*, a split in the circuits of the United States Courts of Appeal developed over precisely what “some educational benefit” meant. Some circuits, notably the Fourth and Tenth, understood it to mean “some” benefit more than a “*de minimis*,” “minimal,” or “trivial” benefit; while others, such as the First, Third, and Ninth Circuits interpreted the standard to mean a “meaningful” benefit. Compare *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015), and *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338-41 (10th Cir. 2015), with *D.B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012), and *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008), and *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988).

The Supreme Court resolved the split in the circuits by granting *certiorari* to review the Tenth Circuit’s opinion in *Andrew F.* The Supreme Court held a FAPE must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances” and finding that “[t]he IDEA demands more” than “an educational program providing merely

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<sup>41</sup> The *Rowley* Court expressly acknowledges this in its opinion, observing:

It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

*Rowley*, 458 U.S. at 202.

more than *de minimis* progress from year to year.” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 1001 (2017) (internal quotation marks omitted).<sup>42</sup>

### ***B. The Modus Operandi of the IDEA—the IEP***

To provide a FAPE, the educational program offered to a student must be tailored to the particular needs of the disabled child by the development and implementation of an IEP, taking into account:

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

20 U.S.C.A. § 1414(d)(3)(A); *see also Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 368 (1985) (“The *modus operandi* of the Act is the already mentioned individualized educational program.” (internal quotation marks omitted)).

The IEP depicts the student’s current educational performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically designed instruction and services that will assist the student in meeting those objectives, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A); *accord* 34 C.F.R. § 300.22; Md. Code Ann., Educ. § 8-405(a)(4).

As the “centerpiece” of the IDEA’s “education delivery system” for disabled students, an IEP is a “comprehensive plan” for the “academic and functional advancement” for the student.

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<sup>42</sup> The Fourth Circuit has acknowledged that “[o]ur prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by *Andrew F.*” *M.L. ex rel. Leiman v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 752 (2018). For these reasons, any opinions of the Fourth Circuit or any circuit that adopted a no more than “*de minimis*” standard and any district court within those circuits that are cited or discussed below are not relied upon for their definition of a FAPE, but for other legal principles for which they remain the state of the law in this circuit and controlling precedent or persuasive authority.

*Andrew F.*, 137 S. Ct. at 994, 999. It must be tailored to the student’s “unique needs” with “careful consideration” of the student’s present levels of achievement, disability, and potential for growth. *Id.*; see also 20 U.S.C.A. § 1401(29). The IEP must be “appropriately ambitious,” *Andrew F.*, 137 S. Ct. at 1000, and it must provide for “specially designed instruction” that is “reasonably calculated to enable the child to receive educational benefits” and to “make progress appropriate in light of the student’s circumstances.” *Id.* at 996, 999 (quoting *Rowley*, 458 U.S. at 207). The amount of progress anticipated for the student should be “markedly more demanding than the merely more than *de minimis* test” applied in the past by many lower courts. *Id.* at 1000 (internal quotation marks omitted).

The test for whether an IEP is “appropriately ambitious,” *id.*, and “reasonably calculated to enable the student to receive educational benefits,” *id.* at 996, is different for each student; there is no bright-line rule or formula to determine whether an IEP provides a FAPE.<sup>43</sup> *Id.* at 1000-01. For a student who is fully integrated in the regular classroom, a FAPE would generally require an IEP to be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.* at 996, 999 (citing *Rowley*, 458 U.S. at 203-04). However, for a student who is not fully integrated and/or cannot be reasonably expected to achieve grade-level advancement, the “educational program must be appropriately ambitious in light of [the student’s] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *Id.* at 1000. Regardless, “every child should have the chance to meet challenging objectives.” *Id.*

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<sup>43</sup> In *Rowley*, the Supreme Court also held that a FAPE may be found to have been denied a student when a school fails to comply with the procedures set forth in the IDEA. 458 U.S. at 206; see also *Bd. of Educ. v. I.S. ex rel. Summers*, 325 F. Supp. 2d 565, 580 (D. Md. 2004).



When assessing whether a student was offered, given, or denied a FAPE, a judge must “afford great deference to the judgment of education professionals . . . .” *O.S.*, 804 F.3d at 360 (quoting *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)). A judge should not substitute his or her own “notions of sound educational policy for those of the school authorities which they review.” *Andrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 206). Additionally, a judge “should be reluctant . . . to second-guess the judgment of education professionals.” *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). A judge should be mindful that local educators deserve latitude in determining the IEP most appropriate for a disabled child, and that the IDEA does not deprive these educators of the right to apply their professional judgment. *See Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). Additionally, a judge must be careful to avoid imposing his or her view of preferable educational methods upon a school district. *Rowley*, 458 U.S. at 207; *A.B.*, 354 F.3d at 325.

This respect and deference, while unquestionably a well-settled principle of review under the Act, both within and without this circuit, is not limitless, however. *See Cty. Sch. Bd. of Henrico Cty. v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the [judge] of the obligation to determine as a factual matter whether a given IEP is appropriate.”).

“[T]he fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate.” *Id.*; *see Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993) (“Indeed, if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary.”).

“To give deference only to the decision of the School Board would render meaningless the entire process of administrative review.” *Sch. Bd. of Prince William Cty., Va. v. Malone*, 762 F.2d 1210, 1217 (4th Cir. 1985) (citation omitted). A reviewing judge may fairly expect the school system’s professionals “to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [his or her] circumstances.” *Endrew F.*, 137 S. Ct. at 1002.

The *Endrew F.* Court confirmed that a FAPE does not promise an “ideal” education. *Id.* at 999. Nor does it promise that a student with a disability will be provided with “opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.” *Id.* at 1001. A reviewing court must determine whether the IEP is “reasonable.” *Id.* at 999. It is also important to remember that the IDEA does not require “the best possible education that a school could provide if given access to unlimited funds.” *Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). Nor does it require the “furnishing of every special service necessary to maximize each handicapped child’s potential.” *Hartmann*, 118 F.3d at 1001.

The development of an IEP is a prospective process. *Endrew F.*, 137 S. Ct. at 998-99. Other circuits and district courts have held the test of the appropriateness of the IEP is *ex ante* and not *post hoc*. *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 524 (D.C. Cir. 2018); *Adams v. State*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993); *J.P. ex rel. Popson v. W. Clark Cmty. Sch.*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002) (“[T]he measure of appropriateness for an IEP does not lie in the outcomes achieved. While outcomes may shed some light on appropriateness, the proper question is whether the IEP was objectively reasonable at the time it was drafted.” (citation omitted)). Thus, a judge in a due

process hearing must look to what the IEP team knew when it developed the IEP, and whether that IEP, as designed, was reasonably calculated to enable the child to receive educational benefit and make appropriate progress. An IEP is essentially a “snapshot” in time and “cannot be judged exclusively in hindsight.” See *Z.B.*, 888 F.3d at 524; *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 818 (8th Cir. 2011); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).

Fourth Circuit case law, however, eschews such a bright line rule as its sister circuits and has “concluded that, in some situations, evidence of *actual progress* may be relevant to a determination of whether a challenged IEP was reasonably calculated to confer some educational benefit.” *M.S. ex rel. Simchick v. Fairfax County Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009) (emphasis in original) (citing *M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002)). Actual progress is not dispositive, however, although important, it is but one factor used to determine the appropriateness of the IEP at issue. *M.S.*, 535 F.3d at 327.

The Supreme Court in *Rowley* similarly observed that a student’s achievement of passing marks and advancement from grade to grade is an important factor in determining if a student received educational benefit. *Rowley*, 458 U.S. at 207 n.28.

Addressing the appropriate weight to be given to evidence of a student’s progress taken by the district court after the close of the administrative record, the Fourth Circuit cautioned of the danger and lack of fairness to the school system inherent in giving significant weight to such evidence and courts engaging in a hindsight review. *Schaffer ex rel. Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009). Explaining that evidence of educational progress must be treated cautiously, the *Schaffer* Court concluded that “[j]udicial review of IEPs under the IDEA is meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask

whether, at the time an IEP was created, it was reasonably calculated to enable the child to receive educational benefits.” *Id.* (citations and quotation omitted). Guided by this legal framework, I turn to the facts of this case.

### *C. Appropriateness and Adequacy of the Student’s IEPs*

#### **Inclusion in the General Education Setting**

The Student’s witnesses argued that the inclusion model offered by MCPS failed to offer the Student a FAPE because his deficits in reading and writing, coupled with his executive function, attention, and social-emotional needs, far exceed his opportunity to succeed in a general education setting where he would encounter larger class sizes (as opposed to small group instruction with 1:1 support), become easily distracted, and unable to keep up with the pace of the instruction.

MCPS responded that the Student could make appropriate progress in the general education inclusion setting under its proposed IEPs, which offered the Student individualized supports and programming addressing the Student’s reading and writing deficits, as well as his executive function, attention, and social-emotional needs.

#### **Science and Social Studies**

While the Student would encounter larger class sizes (twenty-four to twenty-five students) and student-to-teacher ratios (twelve students to one teacher) in the general education setting at ██████, I am not persuaded that the larger class sizes or student-to-teacher ratios in and of themselves is determinative on the issue of whether the Student was denied a FAPE.<sup>44</sup> Rather,

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<sup>44</sup> The Student’s performance at the ██████ highlights this point. Notwithstanding the small class sizes and 1:1 support that the Student received at the ██████, the Student still struggled to make academic progress. (See Findings of Fact 4 through 7.)

I consider the class size and student-to-teacher ratio in the context of the delivery of instruction and individualized programming for the Student.

I note that science and social studies are co-taught by a general education teacher and special education teacher. Because the classes are frequented by paraeducators, a case manager, and various service providers (e.g., occupational therapist, speech pathologist, and reading specialist), the student-to-teacher ratio is subject to change. For example, in a class of twenty-four students, if a paraeducator frequented the Student's class, the student-to-teacher ratio would be lessened from 12:1 to 8:1; if a paraeducator and a service provider frequented the Student's class, the student-to-teacher ratio is further lessened to 6:1, promoting smaller group instruction.

I find it significant that before the Student enters the general education setting for science or social studies, he would receive a preview of the upcoming lesson during a pre-teaching session in the [REDACTED]. Not only would the pre-teaching expose the Student to vocabulary, provide the Student with visuals, and assist the Student with brainstorming and/or generating questions or ideas for the lesson, I find it would facilitate the Student's transition into the general education setting from a self-contained setting (i.e., the [REDACTED]), enable the Student to access the curriculum, and keep up with the pace of the instruction. Once in the general education setting, the majority of the class period is devoted to small group instruction, where the Student, having been methodically placed into a lab group of four students and assigned a designated role relative to his strength, will work on a project with his peers. Because the lab groups are not required to remain in the classroom while working on projects, the Student's group would be permitted to move about the building, which undercuts the Student's experts' distractibility concerns stemming from the size of the class.

On redirect examination, Ms. [REDACTED] was asked how [REDACTED] was able to expose the Student (who was reading below grade level) to grade level curriculum in science or social studies. (*See Hr’g Tr. at 1177, 17-25.*) In response, Ms. [REDACTED] identified various accommodations and supports that enabled the Student to demonstrate his knowledge of the concepts being taught, including use of assistive technology during reading assignments so the Student could “listen to it rather than have to decode it,” and modified written assignments where the Student could access a word bank or just fill in the blank. (*Hr’g Tr. at 1178, 1-11.*) Concerning the pace of instruction, Ms. [REDACTED] testified that [REDACTED] utilized a great deal of repetition and project-based, multi-sensory learning rather than paper and pencil tasks. (*Hr’g Tr. at 1178, 12-17.*)

Like [REDACTED] science and social studies in the general education setting at [REDACTED] is project-based. The evidence in the record establishes that the Student would receive accommodations to address his reading and writing deficits (e.g., human reader, human scribe, text-to-speech, speech-to-text, use of a tracking tool when reading text, use of a word bank, extended writing time, proofreading checklist, access to spell check, modified homework to demonstrate understanding, etc.). Concerning pacing, the Student’s instructional supports and program modifications mandate multi-sensory instruction, repetition of directions, and checking for understanding.

There is no question that the Student’s executive function needs, which present as challenges with organization, working memory, and perseveration, impact the Student’s ability to learn. However, the IEPs propose accommodations and supports to address these needs. As it relates to organization, the IEPs provide for assistance with organization, use of organizational aids, and structured time for organization of materials. To address the Student’s working

memory weaknesses, the IEPs provide for repetition of directions, restating understanding of directions, checking for understanding, and chunking.

The Student's perseverance (or what witnesses commonly referred to as "stickiness") presents in the context of his struggles with cognitive shifting; that is, being able to think flexibly once an idea has taken hold. One of the best perseverance illustrations was recounted by the Mother concerning the family's Super Bowl party from earlier this year. Notwithstanding how much the Student loves football, how his favorite player was playing in the Super Bowl with the Student's favorite team, and the spread of food to mark the occasion, the Student perseverated on the fact that there was no special drink (i.e., Dr. Pepper) at the party. As a result, the Student got stuck on this one thing and was unable to enjoy the game, notwithstanding his family's efforts to help him get unstuck. By the third quarter, the Student's father went to McDonald's to get the Student a chocolate shake, which helped the Student to shift and move past his perseverance. (See Hr'g Tr. at 1290, 17-25; 1291, 1-25; and 1292, 1-16.) Mrs. [REDACTED], the Student's educational consultant, testified that the Student, who has grown in self-awareness concerning his perseverance, describes this stickiness as "a wall that he can't move." (Hr'g Tr. at 271, 12-14.) Mrs. [REDACTED] testified that she now tells the Student to "step around that wall" and otherwise offers one-to-one assistance to help the Student with shifting. (Hr'g Tr. at 282, 10-14.)

I found a classroom observation conducted by Mrs. [REDACTED] on September 26, 2018 to be particularly informative on addressing the Student's perseverance tendencies in the classroom. During the Student's language arts class, he was observed playing a computer game. The Student was disappointed when he came in second place. Noting the disappointment, the teacher, using a verbal prompt, responded to the Student, "Big problem or little problem?"

(P-17-2.) The Student was then offered a motor break, completed a series of wall push-ups, was redirected from his disappointment, and able to attend to the instruction. (*Id.*) Notably, the Student's IEPs provide for adult support, opportunities for movement, and strategies to initiate and sustain attention (e.g., verbal or visual prompts), all of which are responsive to the Student's perseveration needs. Moreover, as noted above, the Student is able to articulate when he is feeling stuck. To that end, I find the social/behavioral support of encouraging the Student to ask for assistance when needed is appropriate and will facilitate adult support when the Student needs help with cognitive shifting.

I find that the Student's IEPs employ a number of supports to address the Student's attention needs. For example, in response to the Student's ability to become easily distracted by visual clutter on worksheets or walls in the classrooms, supports to limit the amount of visual clutter on assignments and on boards in the classroom are provided on the Student's IEPs. In addition, the Student's IEPs provide for reduced distractions, alternate locations, and preferential seating for the Student. Chunking would be implemented as a program modification, bearing directly on the delivery of instruction so that the Student can access the curriculum. Moreover, there is no dispute that frequent movement breaks enable the Student to reset and focus himself. Accordingly, the IEPs provide the Student with frequent breaks, opportunities for movement, and strategies to initiate and sustain attention (i.e., verbal and visual prompts).

Concerning the Student's social-emotional needs, [REDACTED] like [REDACTED] employs the Zones of Regulation and a token economy to promote self-regulation and emotional control, as well as reinforce positive behaviors. In addition, the Student would have the opportunity to work on his social skills weekly with school counselors who frequent the [REDACTED] and provide modeling of various social interactions for students. Unlike [REDACTED] the inclusion model



proposed in the Student's IEPs provides opportunities for the Student to interact with non-disabled peers. At the hearing, Ms. ██████ reflected on the tremendous value that comes from such interactions, including, for example, working on pragmatic language. She explained that while the Student may work with a speech pathologist in isolation on these skills, the Student would have an opportunity in the inclusion setting to practice these skills by "volleying" (or speaking) back and forth with peers. (Hr'g Tr. at 2079, 14-25 and 2080, 1-10.) As a result, that isolated teaching in pragmatic language is applied to a functional setting. (Hr'g Tr. at 2080, 10-13.)

Based on the foregoing, I find the delivery of instruction for science and social studies in the general education setting, coupled with the individualized accommodations, supplementary aids, services, program modifications, and supports outlined in the Student's IEPs, will enable the Student to access the curriculum and make reasonable progress in the light of the Student's circumstances. Therefore, the Student's argument that he was denied a FAPE on this ground does not prevail.

### Math

The Student's witnesses objected to MCPS's proposal offering the Student math instruction in the general education setting for the 2019-20 school year. The Student's witnesses raised concerns about the Student's ability to access the curriculum without one-to-one support given his deficits in reading, writing, and executive functioning (e.g. organizational challenges and working memory weaknesses). Specifically, Ms. ██████ testified that the Student's executive functioning challenges impacted the way he did math calculations. She advised he needed accommodations to help him with writing numbers, spacing numbers, and breaking down language in any math word problems. (Hr'g Tr. at 857, 4-9.)

Having reviewed the evidence, I am not persuaded that the Student has met his burden in proving that MCPS denied him a FAPE based on its proposal for math instruction in the general education setting. By the 2019-20 school year, the Student was performing on grade level in math. As discussed above, the student-to-teacher ratio in the general education setting is subject to change depending on the number of providers who “push-in” to the classroom to deliver services. As a result, the student-to-teacher ratio can range from 12:1 to 6:1, which allows for small group instruction. In addition, the general education inclusion model provides co-teaching by a general education teacher and special education teacher, where the majority of the class period is spent in small group instruction (i.e., lab groups consisting of four students). In addition to a reading specialist who can “push-in” to math to deliver services, the Student would have access to a human reader, a human scribe, a line reader mask tool, and assistive technology (speech-to-text, text-to-speech, or spell check) as an accommodation for his deficits in reading and writing. To address the Student’s challenges with organization, the Student’s IEP provided for use of graphic organizers and manipulatives. To address the Student’s challenges with attention, the IEP provided for frequent breaks, use of fidgets to self-regulate, preferential seating, reduced distractions, and strategies to initiate and sustain attention (e.g., teacher prompting). Supports such as demonstrating the task to the Student and providing an exemplar of the final product, in conjunction with repetition of directions, restating understanding of directions, modified homework to demonstrate understanding, chunking, and visual cues for comprehension address the Student’s working memory weaknesses and undercuts the Student’s experts’ concerns about the Student’s ability to keep up with the pace of the instruction. The Student’s working memory weaknesses and ability to keep up with the pace of the instruction are

further minimized by the re-teaching that is available to the Student during small group instruction and when the Student returns to the [REDACTED].

For the foregoing reasons, I find that the 2019-20 IEP proposing math instruction in the general education setting will enable the Student to access the curriculum and make reasonable progress in the light of the Student's circumstances. Accordingly, the Student has failed to meet his burden in proving that MCPS denied him a FAPE when it proposed math instruction in the general education setting.

Specials (Art, Music, and P.E.)

Specials in the general education setting are taught by a general education teacher; a paraeducator accompanies students from the [REDACTED] to specials. Class sizes consist of seventeen to eighteen students, resulting in a student-to-teacher ratio of 9:1. I find instruction for specials in the general education setting provides the Student with another opportunity to engage with his non-disabled peers and practice his pragmatic language in a functional setting, rather than in isolation, as noted above.

Ms. [REDACTED] emphasized that accommodations, supplementary aids, services, modifications, and supports follow the Student throughout the day and across settings. Ms. [REDACTED] testified that art, for example, can be particularly laborious for kids that have fine motor needs. (See Hr'g Tr. at 2075, 10-16.) In order to accommodate such a student, Ms. [REDACTED] explained that the special education teacher from the [REDACTED], the general education art teacher, and the paraeducator will discuss the student's needs during lesson planning to determine how to modify projects or otherwise provide appropriate accommodations for the student (e.g., pre-cutting materials for a student who has issues with fine motor coordination.) (See Hr'g Tr. at 2075, 17-25 and 2076, 1-7.) I considered the Student's performance in Visual

Arts from his 2017-18 school year at the [REDACTED]. An end of the year progress report noted that skills such as drawing or visually planning were difficult and frustrating for the Student, such that he took an “I can’t” stance. The report also noted that when the Student was able to overcome his tendency to avoid the work, he was proud of his artwork. (See P-15-9.) In conjunction with this end of the year progress report, I also considered an OT assessment conducted by [REDACTED], discussed more fully below, which revealed functional fine motor precision and functional grasp patterns for classroom tool use and object manipulation. (P-21-8.) On this record, the evidence does not establish that the Student requires a self-contained setting for art.

Ms. [REDACTED] testified that P.E. at the elementary school level is skill based, rather than team based, resulting in individualized instruction provided by the general education P.E. teacher and paraeducator. (See Hr’g Tr. at 2080, 16-23 and 2081, 1-9.) The record establishes that P.E. is an area of relative strength for the Student. (See P-15-10.) Additionally, I note that the Student has participated in a range of extracurricular activities including flag football, basketball, baseball, and Boy Scouts successfully with non-disabled peers. While P.E. at the elementary school level is not team based, the Student’s ability to participate in extracurricular activities with non-disabled peers informs my decision that he can participate in the general education inclusion model for P.E.

Based on the foregoing, I conclude that the Student would receive adequate adult support (general education teacher and paraeducator) and a low student-to-teacher ratio (8:1) in all specials. Because of the co-teaching model, the Student’s special education teacher from the [REDACTED] would take part in lesson planning with the general education teacher and paraeducator to discuss the Student’s needs relative to each special, in order to ensure his ability

to access the curriculum through accommodations, modifications, and supports. For these reasons, I find that the Student's IEPs will enable the Student to access the curriculum and make reasonable progress in the light of the Student's circumstances. Accordingly, MCPS offered the Student a FAPE when it proposed the general education inclusion model for instruction in specials.

### Lunch and Recess

As it relates to recess, the Student's therapist, Dr. [REDACTED], raised concerns about the Student's ability to encounter more opportunities to persevere before an adult could intervene. She gave the following as an example:

[I]f another student makes a face at him [referring to the Student] or says a comment, ... he has time to get focused on what that student says. And it's difficult for him to reengage in something else. So he is directing his own attention and his own activities, as opposed to in the classroom where the teacher is directing it and setting structure and clear expectations for him. The time it could take from something starting to an adult intervening is longer in recess than it is in the classroom. So there is more time for [the Student] to start to get angry and overreact or start to get stuck before an adult can intervene to get him redirected.

(Hr'g Tr. at 695, 12-23.)

Dr. [REDACTED] went on to explain how [REDACTED] restructured its recess to provide more support and supervision for the students. She explained that if a student was starting to get into a disagreement, that an adult could respond relatively quickly and could coach the Student through the challenge, or if the Student was escalating, the adult could implement the BIP very quickly.

(Hr'g Tr. at 696, 18-25 and 687, 1.)

According to Ms. [REDACTED], a staff of six-to-eight adults provides supervision to 150 students during the recess period at Dufief, resulting in a student-to-teacher ratio of 25:1 or 19:1. As set forth in Finding of Fact 39, those staff members – ranging from the principal, special education teachers, paraeducators, reading specialists, and teachers from the [REDACTED] – not

only provide supervision to students, but also assist students with facilitating play groups, and support students in interpreting social cues and managing peer interactions.

While Dr. [REDACTED] raised a valid contention, it is important to note that she has not observed the Student in any classroom setting, recess setting, or any setting outside of her office. (Hr'g Tr. at 700, 10-17.) She also has not frequented the [REDACTED] or observed recess at [REDACTED]. To that end, I credit the testimony of Ms [REDACTED] that supports are in place to assist the Student with peer interactions and perseveration tendencies during recess. Additionally, I find the weekly social skills training offered to students in the [REDACTED], which provides modeling of social interactions (including things that happen on a playground) further mitigates Dr. [REDACTED]'s concerns. (See Finding of Fact 27.) Finally, the Student's involvement in extracurricular activities with non-disabled peers further promotes his ability to participate in the general education inclusion model for recess.

There was testimony that by the fall of 2019, the Student eloped from [REDACTED] on two separate occasions, one of which occurred during recess. Notably, staff at [REDACTED], which includes the [REDACTED] staff, have enacted preventive strategies to elopement, including identifying a student's triggers (e.g., student appears upset prior to recess) and initiating an intervention (e.g., providing an alternative to allowing the student to go outside for recess). Based on the elopement preventive strategies employed by [REDACTED] I am not inclined to find that MCPS's proposal for recess in the general education inclusion setting was inappropriate, notwithstanding the Student's elopement from school grounds on two occasions.

Like recess, lunch in the general education setting at [REDACTED] consists of 150 students and six-to-eight adults (or student-to-teacher ratio of 25:1 or 19:1). In addition to the staff present to monitor lunch, it is important to note that other service providers frequent the lunch period: speech

pathologists, occupational therapists, and school counselors, who run lunch bunch sessions with students. Moreover, the Student's accommodations and supports follow him into the lunch period, so he will continue to be able to take frequent breaks, have a specified seating area, have positive behavior reinforced through [REDACTED]'s token economy, and have access to techniques from the Zones of Regulation to help with his self-regulation and emotional control. As such, the record does not establish that the Student was denied a FAPE based on the proposal for lunch in the general education inclusion setting.

### **OT Related Service Hours**

The Student's primary contention about the OT related service hours concerns the frequency of the hours – one thirty-minute session per month – and the Parent's concern about the [REDACTED]'s ability to replicate the Student's morning routine as implemented at [REDACTED]. MCPS through its expert witness, [REDACTED] argued that its thirty-minute monthly proposal for OT related service hours is reasonable because the Student's performance on the OT assessments did not reveal any fine motor coordination deficits. As such, Ms. [REDACTED] testified that the monthly allotment is sufficient to monitor the Student's motor skills and ability to access sensory supports. (*See Hr'g Tr. at 1941, 5-7.*) Moreover, Ms. [REDACTED] explained that the Student's morning routine, which is not included in the thirty-minute monthly service allotment, is capable of being replicated at [REDACTED] through the sensory diet support reflected in the March 2019 Amended IEP.

Having considered the evidence in the record, I find that the Student has not met his burden in proving that the proposed OT related service hours denied him a FAPE. Significant to my decision is the fact that the Student's performance on the December 2018 OT assessments were not impacted by deficits in fine motor coordination; rather, his performance was impacted

by his inattention, the cognitive demands of the task, and the Student's increased work pace for items he perceived as difficult. I further find that Ms. [REDACTED] considered these needs and made, for example, recommendations for extended time, limiting paper/pencil tasks to fill-in-the-blank or short answer responses, access to a word bank, use of spell check and other assistive technology, and use of keyboarding as the Student's primary means of written output. These recommendations had already been incorporated into the Student's 2018-19 IEP.

After consideration of the Student's needs for sensory input, the IEP team amended the 2018-19 IEP to provide the Student with an additional physical/environmental support: a sensory diet. The IEP specifically provided that OT would "consult with classroom staff to monitor effectiveness of established sensory supports that include heavy work movement breaks (i.e., access to trampoline, swing, weighted materials). Consultation should occur at least monthly or as needed if more frequent." (MCPS-17-29). I find this support provides the Student with an opportunity to implement the sensory diet that proved effective for him at [REDACTED]. Notably, [REDACTED] has a sensory room comparable to [REDACTED] where staff can provide the Student with supervision.

My assessment of the proposed OT related service hours is further guided by a follow-up conversation that Ms. [REDACTED] had with Ms. [REDACTED] as set forth in Finding of Fact 80. Notably, Ms. [REDACTED] confirmed the Student's independence in the use of equipment in the sensory room, the Student's ability to individually discern his readiness for class after rotating through the stations, and the Student's self-sufficiency in taking timed movement breaks from class. I find the Student's autonomy in these tasks bolsters Ms. [REDACTED]'s expert opinion that the Student does not require additional OT related service hours.



Based on the foregoing, I find Ms. [REDACTED] provided a cogent and responsive explanation for MCPS's refusal to increase the Student's OT related service hours. Accordingly, I am not persuaded that the Student was denied a FAPE based on the proposal for one, thirty-minute monthly session of OT related service hours.

### **Orton-Gillingham Reading Intervention**

I am not persuaded that the Student was denied a FAPE because the February 14, 2020 IEP and May 15, 2020 Amended IEP did not specify Orton-Gillingham as the Student's reading intervention. The undisputed testimony was that the [REDACTED] offers Orton-Gillingham to students. In fact, Ms. [REDACTED] testified that the Student would receive Orton-Gillingham as his reading intervention. (Hr'g Tr. at 2042, 14-15.) Ms. [REDACTED] explained that MCPS declined to identify Orton-Gillingham as the Student's reading intervention in the IEP because it would be legally bound to continue to offer the intervention to the Student, even if it no longer proved effective. Ms. [REDACTED] explained that the needs of students evolve, and it may become necessary to offer another research-based intervention to a student. I find Ms. [REDACTED] provided a cogent and responsive explanation for MCPS's refusal to specify Orton-Gillingham in the Student's IEP. Therefore, the Student's argument that he was denied a FAPE on this ground does not prevail.

### **BIP**

There is no dispute that by the fall of 2019, the Student displayed an increase in negative behaviors (i.e., emotional outbursts and noncompliance). The Parent and her witnesses advocated for a BIP for the Student's 2019-20 IEP; however, the IEP team declined to offer the Student a BIP, finding instead that the Student's behavioral needs could be addressed through the IEP's supplementary aids, services, goals and objectives.

Concerns about the Student's behavior were first raised at the end of the October 24, 2019 IEP meeting through anecdotal reports by Ms. [REDACTED]; however, no behavioral data was provided to the IEP team during that meeting. (*See* Hr'g Tr. at 2326, 11-15.) The October 2019 IEP meeting was ultimately continued to allow [REDACTED] to furnish those reports to MCPS, which it did on November 18, 2019. Notably, the BIP, which was a draft,<sup>45</sup> did not specify the type of emotional outbursts that were being demonstrated by the Student (e.g., hitting, kicking, grabbing, or pushing another individual; throwing items; running away from an instructor; or engaging in negative vocal exchanges with peers). (*See* MCPS-34; *see also* Hr'g Tr. at 2336, 1-7.) The BIP did not contain detailed information about the Student's elopement from school grounds. The BIP lacked baseline data concerning the frequency, intensity, and duration of the emotional outbursts and instances of noncompliance. (*See* MCPS-34; *see also* Hr'g Tr. at 2336, 8-14.) Moreover, the BIP indicated that the Functional Behavior Assessment, which is what informs the BIP, was conducted on the same day: November 1, 2019. (*See* Hr'g Tr. at 2332, 19-20; 2333, 15-19.) As a result, the BIP left many unanswered questions for MCPS.

The IEP team reconvened the IEP meeting on February 14, 2020. Right before the meeting began, [REDACTED] provided MCPS with a behavioral graph, containing additional data about the Student's noncompliance behaviors. However, as the graph was provided right before the meeting, MCPS did not have time to review or consider the data. Because the BIP lacked pertinent information concerning the frequency, intensity, and duration of the Student's behaviors, Ms. [REDACTED] explained that MCPS felt the Student's behaviors did not rise to the level

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<sup>45</sup> Ms. [REDACTED] testified that all of [REDACTED]'s documents appear in draft form because they are working documents. Interestingly, [REDACTED]'s updated BIP dated March 31, 2020 does not say draft. (*See* MCPS-57.)

requiring a BIP, finding instead that the behaviors could be managed through supplementary aids, services, and goals and objectives. (Hr'g Tr. at 2339, 1-14.) Ms. [REDACTED] further explained:

So, when we're talking about frequency, intensity, and duration, we can have behaviors that can be managed through less intensive supports, like an individual behavior contract or something like that. But when the intensity, the duration, and the frequency becomes more pronounced, the behavior is lasting for a longer period of time, it's occurring more often. That's when we need to look at, you know, a behavior intention plan.

(Hr'g Tr. at 2344, 13-19.)

MCPS's decision to reject the Parent's request for a BIP was informed by its staff's observation of the Student during a writing class at [REDACTED] on November 19, 2019, during which no behavioral concerns were noted. (Hr'g Tr. at 2329, 24-25 and 2330, 1.) Accordingly, MCPS proposed that the Student's behaviors could be managed through supports, (e.g., rules, behavior contract, token board, voice thermometers, visual boundary to contain the Student in specific area, etc.) and goals and objectives (e.g., given models, adult prompts, and visuals, the Student will use learned coping strategies to self-regulate and to decrease the amount of time he is disengaged from classroom activities). Based on the foregoing, I find Ms. [REDACTED] provided a cogent and responsive explanation for MCPS's refusal to offer the Student a BIP in the February 14, 2020 IEP.

Although the IEP team subsequently amended the Student's 2019-20 IEP to include a BIP for the Student, I am not persuaded that this change denotes that the February 14, 2020 IEP was deficient for failing to propose a BIP. Notably, between the February 14, 2020 IEP meeting and the May 15, 2020 IEP meeting, new information concerning the Student's behaviors was provided to the IEP team: (1) a behavioral graph reflecting four separate instances of noncompliance, (2) an updated BIP from [REDACTED], and (3) the results of rating scales and interviews from the Parent and the Student's teacher concerning the Student's behaviors.

As noted above, the IEP team was unable to consider the behavioral graph presented to it right before the February 14, 2020 meeting. The graph noted four instances of noncompliance that resulted in sustained duration outside the classroom on November 18, 2019 (i.e., fifteen minutes), December 16, 2019 (i.e., forty minutes), January 27, 2020 (i.e., sixty minutes), and February 10, 2020 (i.e., 130 minutes; the Student had to be picked up early by a parent). Additionally, the updated BIP from March 31, 2020 included new baseline data for the Student's emotional outbursts and instances of noncompliance by providing dates of occurrence for the behaviors. Finally, the results from the April 2020 rating scales from the Parent and the Student's teacher confirmed an increase in the Student's defiant and aggressive behaviors, which impacted his ability to be available for instruction. Accordingly, based on the new information provided to the IEP team concerning the Student's behaviors, it subsequently amended the Student's 2019-20 IEP to include a BIP.

### **LRE**

Having considered and weighed the totality of the evidence, I conclude that the Student has not met his burden of proving that the IEPs proposed by MCPS failed to offer the Student a FAPE. The evidence shows that the IEPs proposed by MCPS offered the Student a FAPE in the least restrictive environment – the general education inclusion setting at the [REDACTED] at [REDACTED] – and that this placement is appropriate.

### **Proposal for Fully Self-contained Setting Across All Subjects for the 2020-21 School Year**

The IEP and placement proposed for the 2020-21 school year is not before me in the instant appeal. (See P-1.) Nevertheless, the Student argued that my decision concerning whether he was denied a FAPE for the 2018-19 and 2019-20 school years should be informed by the 2020-21 proposal, which recommends fully self-contained classes across all settings.

In response, MCPS argued that the programming and placement proposed for the 2020-21 school year pertains to *middle school*, as opposed to elementary school, which is a significant change in placement. Ms. [REDACTED] opined that the change from elementary school to middle school is the biggest transition in a student's schooling career. (Hr'g Tr. at 2018, 22-25.) In support of her opinion, she explained how students are assigned different teachers for every subject, as opposed to the elementary school model where students are assigned one primary teacher for different subjects (e.g., science, social studies, and math). (Hr'g Tr. at 2025, 10-15.) In addition, she explained that the social-emotional piece really comes into play because students are much more independent in the middle school setting. (Hr'g Tr. at 2019, 1-2.) In the instant case, she testified that various factors were considered in terms of the IEP and placement proposal recommending a fully self-contained program for the 2020-21 school year, including the Student's increase in negative behaviors between February 2020 through May 2020, the Student's social-emotional needs, and the availability of supports in the middle school setting. (Hr'g Tr. at 2019, 3-14, 25; 2020, 1-5; and 2026, 7-25.)

The Student's argument would have more muster if, for example, the IEP team proposed instruction in the general education setting during the Student's fourth grade year (2018-19), and then, in a sweeping change, the IEP team proposed instruction in a fully self-contained setting across all subjects for the Student's fifth grade year (2019-20). However, that is not the case. The 2020-21 IEP proposal deals with an entirely different program and placement: the [REDACTED] [REDACTED] at [REDACTED]. Not to mention, the proposal considered things that do not impact the proposals in the instant case, such as the availability of supports in the middle school setting to address the Student's needs. As a result, I decline to consider the 2020-21

proposal in my determination of whether the Student was denied a FAPE for the 2018-19 and 2019-20 school years.

**Claim for Reimbursement of Tuition, Costs, and Expenses Associated With [REDACTED] Placement**

Under *County School District Four v. Carter*, 510 U.S. 7 (1993), and *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985), whether a parent's private placement choice is proper is analyzed only if the IEP proposed by the local education agency results in the denial of a FAPE. I have concluded in this case for the reasons set forth above that the IEP and placement offered by MCPS provides the Student a FAPE. Therefore, under *Carter* and *Burlington* the issue of whether the Student's placement at [REDACTED] is proper is not required to be addressed further in this decision. As MCPS did not deny the Student a FAPE, the Parents' claim for reimbursement of tuition, costs, and expenses associated with the Student's unilateral placement at [REDACTED] is respectfully denied.

**CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law, that the Student has not proven that Montgomery County Public Schools violated the Individuals with Disabilities Education Act by failing to provide the Student with a free appropriate public education, by failing to provide him with an appropriate individualized education program and placement for the 2018-2019 and 2019-2020 school years. I further conclude as a matter of law that the Parents failed to prove that they are entitled to reimbursement for tuition and expenses at the [REDACTED] for the 2018-2019 and 2019-2020 school years. 20 U.S.C.A. § 1400(d)(1)(A) (2017); 34 C.F.R. § 300.148 (2019); *Andrew F. v. Douglas Cty. School Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982);

*Florence Cty. Sch. District Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005).

### **ORDER**

I **ORDER** that the Parents' request for placement at and reimbursement for tuition, costs and expenses at the [REDACTED] for the 2018-2019 and 2019-2020 school years is **DENIED**.

April 1, 2021  
Date Decision Mailed

Krystin J. Richardson  
Administrative Law Judge

KJR/dlm  
#190339

### **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]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED],

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE KRYSTIN J. RICHARDSON,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-20-11848

**FILE EXHIBIT LIST**

I admitted the following exhibits on behalf of the Parents:

- P- 1. Request for Due Process, 5-22-20;
- P- 2. Neuropsychological Evaluation by [REDACTED], 4-30-15;
- P- 3. Speech/Language Evaluation by [REDACTED], 7-2-15;
- P- 4. [REDACTED] Occupational Therapy Evaluation, 10-1-15;
- P- 5. [REDACTED] Occupational Therapy Progress Report, April 2016;
- P- 6. [REDACTED] Speech Language Progress Summary, April 2016;
- P- 7. [REDACTED] Speech Language Progress Summary, April 2017;
- P- 8. Email to Student's team from parent, 9-24-17;
- P- 9. Email from Dr [REDACTED] regarding test results, 10-13-17;
- P- 10. Emails between parent and Dr. [REDACTED], 10-21-17 through 10-22-17;
- P-10A. Email from [REDACTED] to parent, 2-2-18;
- P- 11. Formal Observation Report by [REDACTED], 2-15-18;
- P- 12. Neuropsychological Evaluation by Dr. [REDACTED], 3-20-18;
- P- 13. Reading Recommendations Report by [REDACTED], 4-12-18;
- P- 14. [REDACTED] Individual Learning Plan, 5-8-18;
- P- 15. [REDACTED] Elementary End of Year Progress Report, 2017-2018;
- P- 16. SNAP-IV Teacher and Parent Rating Scale, 7-12-18;
- P- 17. Formal Observation Report by [REDACTED], 9-26-18;
- P- 18. Reactions to draft IEP by [REDACTED], 10-2-18;
- P- 19. NOT OFFERED;
- P- 20. MCPS IEP, 10-16-18;
- P- 21. MCPS Occupational Therapy Re-evaluation, 12-12-18;
- P- 22. MCPS Amended IEP, 3-12-19
- P- 23. [REDACTED] Learning Profile, June 2019;
- P- 24. [REDACTED] Student Therapeutic Report, 2018-2019;
- P- 25. [REDACTED] Student Progress Report, 2018-2019;
- P- 26. Letter serving notice and MCPS response letter, 8-7-19 and 8-20-19;
- P- 27. Letter to Emily Rachlin, Esq. from Paula A. Rosenstock, Esq., 8-28-19;
- P- 28. [REDACTED] Reading Data, 9-3-19 and 9-10-19;
- P- 29. PAT-2: NU Reading Score Report, 10-23-19;
- P- 30. NOT OFFERED;
- P- 31. [REDACTED] Learning Profile, October 2019;
- P- 32. NOT OFFERED;

- P- 33. NOT OFFERED;
- P- 34. MCPS Classroom Observation by [REDACTED], 11-19-19;
- P- 35. Formal Observation Report by [REDACTED], 12-3-19;
- P- 36. [REDACTED] Reading Data, 12-17-19;
- P- 37. [REDACTED] Student Schedule, 2019-20 School Year;
- P- 38. [REDACTED] Progress Report, 2019-2020;
- P- 39. [REDACTED] Student Math Samples, January 2020;
- P- 40. [REDACTED] Student Writing Samples, January 2020;
- P- 41. [REDACTED] Student Reading Samples, January 2020;
- P- 42. [REDACTED] Learning Profile, February 2020;
- P-42A. [REDACTED] Behavior Data Report, undated;
- P-42B. MCPS IEP, 2-14-20;
- P- 43. [REDACTED] Behavior Intervention Plan, 3-31-20;
- P- 44. MCPS Psychological Re-evaluation, 4-30-20;
- P- 45. MCPS Specific Learning Disability Team Report, 5-15-20;
- P- 46. MCPS Behavior Intervention Plan, 5-15-20;
- P- 47. MCPS Prior Written Notice, 5-15-20;
- P- 48. MCPS Amended IEP, 5-21-20;
- P- 49. NOT OFFERED;
- P- 50. Resume of [REDACTED];
- P- 51. Resume of [REDACTED];
- P- 52. Resume of Dr. [REDACTED];
- P- 53. Resume of Dr. [REDACTED];
- P- 54. [REDACTED] Learning Profile, June 2020;
- P- 55. [REDACTED] Student Therapeutic Report, 2019-2020; and
- P- 56. [REDACTED] Progress Reports, 2019-2020.

I admitted the following exhibits on behalf of MCPS:

- MCPS-1 Email from MCPS counsel to Parent counsel, 3/20/2018
- MCPS-2 Authorization for Release of Confidential Information, 8/16/2018
- MCPS-3 Prior Written Notice, 9/4/2018
- MCPS-4 [REDACTED] Individual Learning Plan, 5/8/2018
- MCPS-5 [REDACTED], Elementary End of Year Progress Report, 2017-2018
- MCPS-6 [REDACTED] Occupational Therapy Annual Report, 5/7/2018
- MCPS-7 [REDACTED] Recommendation, 4/12/2018
- MCPS-8 [REDACTED] Observation Report, 9/26/2018
- MCPS-9 [REDACTED] Reactions to Draft IEP, 10/2/2018
- MCPS-10 MCPS Team Consideration of External Report, 8/7/2018
- MCPS-11 Parent Report, undated
- MCPS-12 MCPS Observation at [REDACTED], [REDACTED], 9/25/2018
- MCPS-13 Prior Written Notice, 10/19/2018
- MCPS-14 IEP, 10/16/2018
- MCPS-15 Prior Written Notice, 3/25/2019
- MCPS-16 MCPS Occupational Therapy Re-Evaluation, 12/12/2018
- MCPS-17 Amended IEP, 3/12/2019
- MCPS-18 Letter from Parent counsel to MCPS, 8/7/2019
- MCPS-19 MCPS Letter to Parent counsel, 8/20/2019
- MCPS-20 Letter from Parent counsel to MCPS counsel, 8/28/2019
- MCPS-21 Email from Parent counsel to MCPS counsel, 9/20/2019

MCPS-22 [REDACTED] Learning Profile, June 2019  
 MCPS-23 [REDACTED] Progress Report, 2018-2019  
 MCPS-24 [REDACTED] Student Therapeutic Report, 2018-2019  
 MCPS-25 Student Reading Records, 9/3/2019 from [REDACTED]  
 MCPS-26 Emails between Parent counsel and MCPS counsel, 9/20/2019  
 MCPS-27 Emails between Parent counsel and MCPS counsel, 9/20/2019 – 10/22/2019  
 MCPS-28 Authorization for Release of Confidential Information, 10/17/2019  
 MCPS-29 Email dated 10/23/2019 from Parent counsel to MCPS enclosing Student work samples from [REDACTED]  
 MCPS-30 Email dated 10/23/2019 from Parent counsel to MCPS enclosing Student PAT-2 NU from [REDACTED]  
 MCPS-31 10/28/2019 IEP Meeting Documents - Prior Written Notice, Appendix D, Draft IEP, with attached cover email dated 10/31/19  
 MCPS-32 Email dated 11/18/2019 from MCPS counsel to Parent counsel  
 MCPS-33 Cover email from Parent counsel to MCPS counsel, 11/18/2019, regarding [REDACTED] documents  
 MCPS-34 [REDACTED] Behavior Intervention Plan, 11/1/2019  
 MCPS-35 [REDACTED] Schedule, 2019-20 School Year  
 MCPS-36 [REDACTED] Learning Profile, October 2019  
 MCPS-37 Emails between MCPS counsel and Parent counsel re: scheduling, 11/22/2019 – 12/5/2019  
 MCPS-38 Email from Parent counsel to MCPS, 12/21/2019, enclosing observation report from [REDACTED] dated 12/3/2019  
 MCPS-39 Cover email from MCPS staff to Parent, 1/10/2020, re: observations and draft IEP for upcoming IEP meeting  
 MCPS-40 MCPS Observation report by [REDACTED], 11/19/2019  
 MCPS-41 MCPS Observation report by [REDACTED], 11/19/2019  
 MCPS-42 MCPS Observation report by [REDACTED], 11/19/2019  
 MCPS-43 Email from Parent counsel to MCPS counsel, 1/14/2020  
 MCPS-44 Emails between Parent counsel and MCPS counsel, 1/15/2020  
 MCPS-45 Emails between Parent counsel and MCPS counsel, 1/24/2020 – 2/6/2020  
 MCPS-46 Reading data from [REDACTED], 12/17/2019  
 MCPS-47 Work samples from [REDACTED], 1/30/2020  
 MCPS-48 [REDACTED] Progress Report, 2019-2020  
 MCPS-49 Email from MCPS staff to Parent, 2/7/2020  
 MCPS-50 Prior Written Notice, Sign-in Sheet, and Notice and Consent for Assessment, 2/14/2020  
 MCPS-51 IEP, 2/14/2020  
 MCPS-52 Behavior graphs from [REDACTED], received 2/14/2020  
 MCPS-53 Emails between Parent counsel and MCPS counsel, 4/14/2020 - 4/17/2020  
 MCPS-54 MCPS Psychological Evaluation, 4/30/2020  
 MCPS-55 Blank  
 MCPS-56 MCPS Behavioral Intervention Plan, 5/15/2020  
 MCPS-57 [REDACTED] Behavioral Intervention Plan, 3/31/2020  
 MCPS-58 Prior Written Notice, 5/15/2020  
 MCPS-59 Amended IEP, 5/21/2020  
 MCPS-60 Email from MCPS staff to Parent re: amended IEP, 5/21/2020  
 MCPS-61 Resume – [REDACTED]

MCPS-62 Resume – [REDACTED]  
MCPS-63 Resume – [REDACTED]  
MCPS-64 Resume – [REDACTED]  
MCPS-65 NOT OFFERED  
MCPS-66 NOT OFFERED  
MCPS-67 NOT OFFERED  
MCPS-68 NOT OFFERED

I admitted the following joint exhibit on behalf of the parties:

Joint. Ex. 1 Stipulation