

██████████,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE RICHARD O’CONNOR,
ADMINISTRATIVE LAW JUDGE,

THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-20-28234

DECISION

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ORDER

STATEMENT OF THE CASE

On December 22, 2020, ██████████ and ██████████ (Parents) filed a Due Process Complaint with the Office of Administrative Hearings (OAH) on behalf of their daughter, ██████████ (Student), requesting a hearing to review the identification, evaluation, or placement of the Student by the Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. §§ 1400-1419 (2017);¹ 34 C.F.R. § 300.511(a) (2017);² Md. Code Ann., Educ. § 8-413(d)(1) (2018); Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

The Complaint alleges that MCPS violated the IDEA by denying the Student a free appropriate public education by failing to develop individualized education programs (IEP) appropriate for the Student’s needs. As a remedy, the Parents requested reimbursement for tuition

¹ U.S.C.A. is an abbreviation for United States Code Annotated. Unless otherwise noted, all citations of 20 U.S.C.A. refer to the 2017 bound volume.

² C.F.R. is an abbreviation for Code of Federal Regulations. Unless otherwise noted, all citations of 34 C.F.R. refer to the 2019 volume.

and related services at [REDACTED] ([REDACTED]) for the 2019-2020 and 2020-2021 school years and placement of the Student at [REDACTED] for the 2020-2021 school year.

On January 20, 2021, the parties waived, in writing, a resolution session. On February 2, 2021, I conducted a telephone pre-hearing conference, and, on February 8, 2021, I issued a pre-hearing conference report. Among other things, the pre-hearing conference report addressed 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 period under § 300.510(b), or the adjusted time periods described in § 300.510(c)—

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

34 C.F.R. § 300.515(a). As indicated, the forty-five-day timeline ordinarily begins to run at the end of a thirty-day resolution period triggered by the filing of a due process complaint. 34 C.F.R. § 300.510(b)(2).

Under the regulatory timeline, the decision in this case normally would have been due on March 6, 2021, which is forty-five days after the parties notified the OAH that they had waived the resolution session. 34 C.F.R. § 300.510(b)(1). At the time, the coronavirus pandemic was causing severe disruptions to the OAH's ability to conduct due process hearings. On March 12, 2020, Governor Lawrence Hogan ordered all Maryland public schools (including MCPS) closed; that order was later extended until the end of the 2019-2020 school year. Since then, MCPS has not opened their buildings for in-person hearings. Because of these factors and counsels' schedules, discussed below, it was not possible to hold a hearing and issue a decision before the forty-five-day timeline expired.

At the telephone pre-hearing conference, the attorneys and I discussed scheduling at some length. The parties jointly requested that the hearing take place and a decision be issued outside the forty-five-day timeframe, primarily because of counsels' documented trial schedules, which I deemed good cause. After agreeing that this hearing would probably require five days to complete, I inquired about counsels' respective schedules. Michael J. Eig, Esquire, representing the Parents, indicated that because of previously scheduled hearings before the OAH and in Washington, D.C., in other special education matters through May 2021, his earliest availability for this hearing would be in late May 2021. Specifically, Mr. Eig noted the following conflicts from his calendar:

OAH hearing February 4, 5, 16, 17, 24, 25, and 26, 2021;
OAH hearing February 18, 19, 22, and 23, 2021;
OAH hearing March 1, 4, 5, 8, 9, 11, and 12, 2021;
Washington, D.C. hearing March 2 and 3, 2021;
Washington, D.C. hearing March 16, 17, and 18, 2021;
Washington, D.C. hearing March 22 and 23, 2021;
OAH hearing April 6, 7, 8, 9, 12, 13, 14, 15, and 16, 2021;
Washington, D.C. hearing April 20 and 21, 2021;
OAH hearing April 26, 27, 28, 29, 30 and May 4, 2021;
OAH hearing May 10 and 11, 2021, and
OAH hearing May 12, 13, 14, 17, and 18, 2021.

The parties requested that the hearing take place on consecutive days, and I agreed that this would be more appropriate than trying to shoehorn the five days of the hearing into counsels' schedules one day at a time. The first available five-day consecutive period available by both counsel was May 24 to 28, 2021, and I scheduled the hearing for those dates.

As the time for the hearing drew near, counsel became apprehensive that five days would not be sufficient to complete the hearing. At the parties' request, I added June 18, 24, and 25, and July 1, 2021, to the hearing schedule, those being the next dates available on both counsels' calendars.

The hearing began as scheduled on May 24, 2021 and continued through that week. As feared, the hearing did not conclude on May 28, 2021, and the parties and I were prepared to

resume on June 18, 2021. However, on June 17, 2021, June 18 was declared a State holiday, cancelling all hearings. Mr. Eig then requested that the hearing date of June 25, 2021, be cancelled to allow him to attend a memorial service in New York City for a long-time friend. I granted that request, and the hearing resumed on June 24, 2021, continued on July 1, 2021, and concluded on July 9, 2021.

At the telephone pre-hearing conference, the parties requested that I issue a decision not later than thirty days after the hearing ends. I found good cause to grant that request. The thirtieth day after the conclusion of the hearing is August 8, 2021; however, that date is a Sunday, so I shall issue the decision not later than Friday, August 6, 2021.

I conducted the hearing on the Webex video platform. Parent [REDACTED] was present each day, represented by Michael J. Eig, Esquire; Michael J. Eig and Associates, P.C., 5454 Wisconsin Avenue, Suite 760, Chevy Chase, MD 20815. Eric Brousaides, Esquire; Carney, Kelehan, Bresler, Bennett & Scherr, LLP, 10715 Charter Drive, Suite 200, Columbia, MD 21044, represented MCPS.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Education Article of the Maryland Annotated Code, the Maryland State Department of Education procedural regulations, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); Md. Code Ann., Educ. § 8-413(e)(1) (2018); COMAR 13A.05.01.15C; and COMAR 28.02.01.

ISSUES

The issues are whether MCPS denied the Student a free appropriate public education by failing to develop IEPs appropriate for the Student's needs for the 2019-2020 and 2020-2021 school years, and, if so, whether the Parents' placement of the Student at [REDACTED] is appropriate

and entitles the Parents to reimbursement for tuition and related services at [REDACTED] for the 2019-2020 and 2020-2021 school years.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the Parents:

- P. Ex. 1. Request for Due Process Hearing, December 22, 2020.
- P. Ex. 2. Speech, Language & Literacy Evaluation by [REDACTED], Speech and Language Pathologist, October 9, 2017.
- P. Ex. 3. MCPS Report of School Psychologist by [REDACTED], February 2, 2018; MCPS Report of Speech-Language Assessment by [REDACTED], Speech-Language Pathologist, January 25, 2018; MCPS Educational Assessment Report by [REDACTED], Special Education Resource Teacher, February 5, 2018.
- P. Ex. 4. MCPS IEP, March 8, 2018.
- P. Ex. 5. MCPS Grade 1 Progress Report Card, 2017-2018.
- P. Ex. 6. Developmental Vision Evaluation Report by [REDACTED], O.D., July 19, 2018; Assessment of Auditory Processing by [REDACTED], Au.D., July 9, 2018.
- P. Ex. 7. Neuropsychological Evaluation by [REDACTED], Developmental Neuropsychologist, August 2018.
- P. Ex. 7A. MCPS Measures of Academic Progress Student Progress Report, Fall 2017 to Fall 2018; MCPS Grade 2 Progress Report Card, 2018-2019 (first and second marking periods); [REDACTED] Elementary Progress Report, 2018-2019 (first marking period); Elementary Teacher Report, September 18, 2018.
- P. Ex. 8. Five-day Verification Notice of Documents Provided After an IEP Meeting, October 25, 2018; IEP Team Meeting Sign-in Sheet, September 27, 2018; Prior Written Notice, October 9, 2018; MCPS IEP, September 27, 2018.
- P. Ex. 9. MCPS IEP Progress Report, January 25, 2019.
- P. Ex. 10. Formal Observation Report by [REDACTED],³ Special Education Consultant, March 6, 2019.

³ Ms. [REDACTED] s last name was [REDACTED] at the time of this report and some other documents in the file. Some witnesses referred to her as Ms. [REDACTED] but at the time of the hearing her last name was [REDACTED].

- P. Ex. 11. Reactions to proposed MCPS IEP draft by Ms. [REDACTED] after an IEP meeting on March 26, 2019.
- P. Ex. 12. Elementary Teacher Report, March 5, 2019; Student work samples, March and April 2019.
- P. Ex. 13. Prior Written Notice, May 2, 2019.
- P. Ex. 14. MCPS Amendment/Modification to Current IEP, May 14, 2019.
- P. Ex. 15. MCPS Grade 2 Progress Report Card, 2018-2019.
- P. Ex. 16. MCPS Gifted and Talented Education report to the Parents, June 3, 2019.
- P. Ex. 17. MCPS IEP Progress Report, June 14, 2019.
- P. Ex. 18. Letter from Mr. Eig to MCPS, August 7, 2019.
- P. Ex. 19. Phono-Graphix Screener Scoring Form, September 4, 2019; Reading a-z Benchmark Passage Running Record, September 10, 2019; Criterion Reference Decoding, Encoding, Red Words, Morphology Assessment, September 4 to 9, 2019.
- P. Ex. 20. Formal Observation Report by Ms. [REDACTED] November 6, 2019.
- P. Ex. 21. [REDACTED] IEP, November 7, 2019.
- P. Ex. 22. [REDACTED] progress report and Student work samples, November 2019.
- P. Ex. 23. [REDACTED] Assessment Summary, Fall 2019.
- P. Ex. 24. [REDACTED] mathematics (math) and writing samples, with analyses, January 2020.
- P. Ex. 25. [REDACTED] Reading Assessment Summary, May 2020.
- P. Ex. 26. [REDACTED] Speech-Language Progress Summary, May 2020.
- P. Ex. 27. [REDACTED] IEP progress report, June 2020.
- P. Ex. 28. [REDACTED] Occupational Therapy 2019-2020 Annual Report, June 12, 2020.
- P. Ex. 29. Psychological Assessment Report by [REDACTED], Psy.D., July 28, 2020.
- P. Ex. 30. [REDACTED] report, The Art of Storytelling, July 2020.
- P. Ex. 31. Letter from Mr. Eig to MCPS, August 17, 2020; letter from Emily Rachlin, MCPS Assistant General Counsel, to Mr. Eig, September 9, 2020.

- P. Ex. 32. Prior Written Notice, September 3, 2020; MCPS Team Consideration of External Report, September 3, 2020.
- P. Ex. 33. Reactions to proposed MCPS IEP draft by Ms. [REDACTED], September 14, 2020.
- P. Ex. 34. [REDACTED] Assessment Summary, Fall 2020.
- P. Ex. 35. Reactions to proposed MCPS IEP draft by Ms. [REDACTED], September 30, 2020.
- P. Ex. 36. Phono-Graphix Screener Scoring Form, September 19, 2020; Criterion Reference Decoding, Encoding, Red Words, Morphology Assessment, September 8 to 15, 2020.
- P. Ex. 37. Comparison of MCPS draft IEP with prior IEP by Ms. [REDACTED], September 27, 2020.
- P. Ex. 38. Prior Written Notice, October 5, 2020.
- P. Ex. 39. [REDACTED] Beginning of Year Assessment in math, October 7, 2020; Student work samples, September and October 2020.
- P. Ex. 40. [REDACTED] IEP, December 3, 2020.
- P. Ex. 41. MCPS Report of Speech-Language Assessment by [REDACTED], Speech-Language Pathologist, December 9, 2020.
- P. Ex. 42. Addendum to Report of Speech-Language Assessment, December 9, 2020.
- P. Ex. 43. MCPS Report of School Psychologist by [REDACTED], December 9, 2020.
- P. Ex. 44. Prior Written Notice, December 22, 2020.
- P. Ex. 45. Email correspondence from the Student's father to Ms. [REDACTED], January 17, 2021.
- P. Ex. 46. Prior Written Notice, January 29, 2021.
- P. Ex. 47. [REDACTED] 2020-2021 Mid-Year Report, February 5, 2021.
- P. Ex. 48. Email from the Student's mother to Mr. Eig and Ms. [REDACTED], February 11, 2021; Student work samples.
- P. Ex. 49. Formal Observation Report by Ms. [REDACTED], March 8, 2021.
- P. Ex. 50. Ms. [REDACTED]'s résumé.

- P. Ex. 51. Dr. [REDACTED]'s résumé.
- P. Ex. 52. [REDACTED]'s résumé.
- P. Ex. 53. [REDACTED] résumé.
- P. Ex. 54. [REDACTED] résumé.
- P. Ex. 55. Another copy of [REDACTED] IEP of December 3, 2020 with progress reports from January and May 2021.

I admitted the following exhibits into evidence on behalf of MCPS:

- M. Ex. 1. Prior Written Notice, November 9, 2017.
- M. Ex. 2. Speech, Language & Literacy Evaluation by [REDACTED], Speech and Language Pathologist, October 9, 2017.
- M. Ex. 3. Prior Written Notice, December 21, 2017.
- M. Ex. 4. MCPS Classroom Observation report by [REDACTED], Reading Specialist, December 7, 2017.
- M. Ex. 5. MCPS Team Consideration of External Report, December 2, 2017.
- M. Ex. 6. MCPS Educational Assessment Report by [REDACTED], Special Education Resource Teacher, February 5, 2018.
- M. Ex. 7. MCPS Report of School Psychologist by [REDACTED], February 2, 2018.
- M. Ex. 8. MCPS Evaluation Report and Determination of Initial Eligibility, February 15, 2018.
- M. Ex. 9. MCPS Specific Learning Disability Team Report, February 15, 2018.
- M. Ex. 10. Prior Written Notice, February 15, 2018.
- M. Ex. 11. MCPS IEP, March 8, 2018.
- M. Ex. 12. Neuropsychological Evaluation by [REDACTED], Developmental Neuropsychologist, August 2018.
- M. Ex. 13. Report from [REDACTED], Au.D., August 28, 2018.
- M. Ex. 14. Report from [REDACTED], Occupational Therapist, September 14, 2018.
- M. Ex. 15. Prior Written Notice, October 9, 2018.

- M. Ex. 16. MCPS Authorization for Assessment, September 27, 2018.
- M. Ex. 17. MCPS Motor Characteristics Checklist, September 27, 2018.
- M. Ex. 18. MCPS Team Consideration of External Report, September 27, 2018.
- M. Ex. 19. MCPS Team Consideration of External Report, September 27, 2018.
- M. Ex. 20. MCPS IEP, September 27, 2018.
- M. Ex. 21. Prior Written Notice, November 9, 2018.
- M. Ex. 22. MCPS IEP, November 8, 2018.
- M. Ex. 23. MCPS Summary Review of Non-MCPS Occupational Therapy Report by [REDACTED], Occupational Therapist, November 5, 2018.
- M. Ex. 24. MCPS Addendum to Summary Review of Non-MCPS Occupational Therapy Report, November 13, 2018.
- M. Ex. 25. Prior Written Notice, December 6, 2018.
- M. Ex. 26. MCPS IEP, December 6, 2018.
- M. Ex. 27. Prior Written Notice, May 2, 2019.
- M. Ex. 28. MCPS IEP, May 2, 2019.
- M. Ex. 29. MCPS Amendment/Modification to Current IEP, May 14, 2019.
- M. Ex. 30. Email from Mr. Eig's office to Mr. Brousaides, August 10, 2020; Psychological Assessment Report by [REDACTED], Psy.D., July 28, 2020.
- M. Ex. 31. Emails between Mr. Eig's office and Ms. Rachlin, August 18 to September 14, 2020; [REDACTED] IEP progress reports, May 2020; Phono-Graphix Screener Scoring Form, September 4, 2019; Reading a-z Benchmark Passage Running Record, September 10, 2019; Criterion Reference Decoding, Encoding, Red Words, Morphology Assessment, September 4 to 9, 2019.
- M. Ex. 32. Prior Written Notice, September 3, 2020.
- M. Ex. 33. MCPS Notice and Consent for Assessment, September 3, 2020.
- M. Ex. 34. MCPS Team Consideration of External Report, September 3, 2020.
- M. Ex. 35. Email from Mr. Eig's office to Ms. Rachlin, September 10, 2020, with 332 pages of [REDACTED] assessments, progress reports, and the Student's work samples attached.

- M. Ex. 36. Emails from Ms. Rachlin to Mr. Eig, September 10 and 17, 2020.
- M. Ex. 37. Emails between Ms. Rachlin and Mr. Eig's office, October 2, 6, and 8, 2020.
- M. Ex. 38. Prior Written Notice, October 5, 2020; email from Ms. Rachlin to Mr. Brousaides with attachments, October 6, 2020; email from [REDACTED] to the Student's mother with attachment, October 5, 2020; screenshot of Five-day Verification Notice of Documents Provided After an IEP Meeting, date unclear; MCPS draft IEP, September 30, 2020
- M. Ex. 39. Prior Written Notice, October 9, 2020; email from Ms [REDACTED] to the Student's mother, October 9, 2020; email from Ms. Rachlin to Mr. Brousaides, October 12, 2020.
- M. Ex. 40. Emails between Ms. Rachlin's office and Mr. Eig's office, October 19 to October 28, 2020.
- M. Ex. 41. Emails between Ms. Rachlin's office and Mr. Eig's office, October 19 to November 9, 2020.
- M. Ex. 42. MCPS Report of Speech-Language Assessment by [REDACTED], Speech-Language Pathologist, December 9, 2020.
- M. Ex. 43. MCPS Report of School Psychologist by [REDACTED], December 9, 2020.
- M. Ex. 44. Prior Written Notice, December 22, 2020.
- M. Ex. 45. Emails between Ms [REDACTED] and [REDACTED], October 8, 2020 to January 6, 2021.
- M. Ex. 46. Emails between Ms. Rachlin and Mr. Eig's office, December 22, 2020 to January 15, 2021.
- M. Ex. 47. Email from Ms. [REDACTED] to the Student's mother, January 7, 2021; email from Ms. Rachlin to Mr. Brousaides, January 15, 2021.
- M. Ex. 48. Emails between [REDACTED] and [REDACTED], January 14, 2021; email from Ms. Rachlin to Mr. Brousaides, January 15, 2021.
- M. Ex. 49. Five-day Verification Notice of Documents Provided After an IEP Meeting, January 21, 2021; MCPS draft IEP, September 30, 2020.
- M. Ex. 50. Prior Written Notice, January 29, 2021; Five-day Verification Notice of Documents Provided After an IEP Meeting, February 2, 2021.
- M. Ex. 51. Emails between Ms. Rachlin and Mr. Eig's office, January 28 to February 16, 2021.

- M. Ex. 52. Emails between Ms. Rachlin and Mr. Eig's office, February 9 to 23, 2021.
- M. Ex. 53. Prior Written Notice, February 23, 2021; Notice of IEP Team Meeting, February 23, 2021; MCPS draft IEP, September 30, 2020.
- M. Ex. 54. Prior Written Notice, March 15, 2021.
- M. Ex. 55. MCPS IEP, March 15, 2021.
- M. Ex. 56. Five-day Verification Notice of Documents Provided After an IEP Meeting, March 19, 2021.
- M. Ex. 57. MCPS Grade 2 Progress Report Card, 2018-2019.
- M. Ex. 58. MCPS Progress Report on IEP Goals, June 14, 2019.
- M. Ex. 59. MCPS Listening Behavior Checklists, March 14, 2019, November 1, 2018, and September 28, 2018.
- M. Ex. 60. Elementary Teacher Report, September 18, 2018; Student work samples, 2018.
- M. Ex. 61. Elementary Teacher Report, November 1, 2018; Student work samples, 2018.
- M. Ex. 62. Elementary Teacher Report, March 5, 2019; Student work samples, 2019.
- M. Ex. 63. MCPS Grade 1 Progress Report Card, 2017-2018.
- M. Ex. 64. MCPS progress report on IEP goals, June 15, 2018.
- M. Ex. 65. Elementary Teacher Report, undated (from first grade); Student work samples, 2017.
- M. Ex. 66. Elementary Teacher Report, February 7, 2018; Student work samples, 2018.
- M. Ex. 67. Elementary Teacher Report, February 27, 2018; Student work samples, 2018.
- M. Ex. 68. Measures of Academic Progress Student Progress Reports, Fall 2017 to Fall 2018; Student Profile, Winter 2018-19.
- M. Ex. 69. MCPS Reading Benchmarks, September 7, 2017.
- M. Ex. 70. 2017-2018 Measures of Academic Progress Expected Baseline Standards.
- M. Ex. 71. Measures of Academic Progress P/M Benchmarks.
- M. Ex. 72. Request for Due Process Hearing, December 2, 2019.
- M. Ex. 73. Letter from Ms. Rachlin to Mr. Eig, December 12, 2019.
- M. Ex. 74. Withdrawal of request for due process hearing, January 30, 2020.

- M. Ex. 75. Email from Mr. Eig's office to Ms. Rachlin, August 10, 2020.
- M. Ex. 76. Letter from Mr. Eig to Ms. Rachlin, August 17, 2020.
- M. Ex. 77. Request for Due Process Hearing, August 18, 2020.
- M. Ex. 78. Letter from Ms. Rachlin to Mr. Eig, August 28, 2020.
- M. Ex. 79. Letter from Ms. Rachlin to Mr. Eig, September 9, 2020.
- M. Ex. 80. Withdrawal of request for due process hearing, November 11, 2020.
- M. Ex. 81. Request for Due Process Hearing, December 22, 2020.
- M. Ex. 82. Letter from Ms. Rachlin to Mr. Eig, January 4, 2021.
- M. Ex. 83. Reactions to proposed MCPS IEP draft by Ms. [REDACTED] after an IEP meeting on September 27, 2018.
- M. Ex. 84. Formal Observation Report by Ms. [REDACTED], March 6, 2019.
- M. Ex. 85. Reactions to proposed MCPS IEP draft by Ms. [REDACTED], September 14, 2020.
- M. Ex. 86. Reactions to proposed MCPS IEP draft by Ms. [REDACTED], September 30, 2020.
- M. Ex. 87. Reactions to proposed MCPS IEP draft by Ms. [REDACTED] after an IEP meeting on December 17, 2020.
- M. Ex. 88. Formal Observation Report by Ms. [REDACTED] March 8, 2021.
- M. Ex. 89. Emails among the Student's mother, Ms. [REDACTED], and [REDACTED] [REDACTED] October 5, 2018 to April 11, 2021; [REDACTED] and Student Travel Teacher Reference Form, April 16, 2021.
- M. Ex. 90. [REDACTED]'s résumé.
- M. Ex. 91. [REDACTED] résumé.
- M. Ex. 92. [REDACTED] résumé.
- M. Ex. 93. [REDACTED] résumé.
- M. Ex. 94. [REDACTED] résumé.
- M. Ex. 95. [REDACTED] résumé.

- M. Ex. 96. Dr. [REDACTED] résumé.
- M. Ex. 97. MSDE Parental Rights – Maryland Procedural Safeguards Notice, revised March 2019.
- M. Ex. 98. Student work sample, November 19, 2020.

Testimony

The following witnesses testified for the Parents:

1. [REDACTED], the Parents' Special Education Consultant, accepted as an expert in special education and instruction of reading.
2. [REDACTED], Psychologist, accepted as an expert in psychology and special education.
3. [REDACTED], Director of Occupational Therapy at [REDACTED], accepted as an expert in school-based occupational therapy.
4. [REDACTED], Associate Head of the Elementary Division at [REDACTED] accepted as an expert in occupational therapy and special education administration.
5. [REDACTED], the Student's mother.
6. [REDACTED], Director of Speech, Language, and Literacy Services at [REDACTED], accepted as an expert in speech-language pathology and instruction of reading.

MCPS presented the following witnesses:

1. [REDACTED], Special Education Resource Teacher at [REDACTED] Elementary School ([REDACTED]), accepted as an expert in special education with an emphasis on reading.
2. [REDACTED], MCPS School Psychologist, accepted as an expert in school psychology.
3. [REDACTED], MCPS Speech-Language Pathologist, accepted as an expert in speech-language pathology.
4. [REDACTED], MCPS Occupational Therapist, accepted as an expert in occupational therapy with an emphasis on school-related functioning.
5. [REDACTED], Elementary Education Teacher at [REDACTED] accepted as an expert in elementary education.

FINDINGS OF FACT

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

1. The Student is ten years old and lives with her parents and brothers in [REDACTED], Maryland.
2. [REDACTED] is the Student's home school, which she attended for first and second grades during the 2017-2018 and 2018-2019 school years, respectively.
3. The Student is smart, talkative, friendly, and socially adept. She is eager to learn, puts a great deal of effort into her schoolwork, and tries very hard to please her teachers and other adults.
4. In October 2017, Speech and Language Pathologist [REDACTED] diagnosed the Student as having receptive and expressive language disorder.
5. In July 2018, Pediatric and Educational Audiologist [REDACTED] diagnosed the Student with central auditory processing disorder.
6. In August 2018, Developmental Neuropsychologist [REDACTED] [REDACTED] diagnosed the Student with auditory processing disorder, specific learning disorder with impairment in reading, frontal lobe and executive function deficit, and attention deficit hyperactivity disorder (ADHD).
7. In August 2018, Audiologist [REDACTED] diagnosed the Student with auditory processing disorder.
8. In July 2020, Psychologist [REDACTED] diagnosed the Student with ADHD, combined type dyslexia (a specific learning disability of reading), language-based dysgraphia (a specific learning disability of written expression), and procedural dyscalculia (a specific learning disability of math).

9. During first grade at [REDACTED] the Student was not making age-appropriate progress in reading, written language mechanics, and math calculation.

10. MCPS provided psychological, speech-language, and educational assessments in early 2018 and found the Student eligible for special education services.

11. The Student's first IEP was completed on March 8, 2018 and called for seven hours weekly of special education services, as follows: four weekly thirty-minute pull-out sessions for reading provided by a special education teacher, one thirty-minute session daily for writing in the general education classroom provided by a general education or special education teacher, and one thirty-minute session daily for math in the general education classroom provided by a general education or special education teacher.

12. The IEP also provided a number of supplementary aids and services, such as preferential seating, extra time to complete tasks, use of a graphic organizer, and others.

13. The Student received a new IEP on September 27, 2018, near the beginning of second grade. This IEP provided the same special education services as did the March 8, 2018 IEP.

14. The Student received another IEP on November 8, 2018, which called for four weekly forty-five-minute pull-out sessions for reading provided by a special education teacher, and one hour and forty minutes daily for writing and math in the general education classroom provided by a general education or special education teacher. In total, this IEP offered eleven and one-third hours of special education services weekly.

15. The Student received yet another IEP on December 6, 2018, which did not change the amount of special education services the Student received.

16. The Student received services under the November 8 and December 6, 2018, IEPs during the rest of the second grade school year. Ms. [REDACTED] was the Student's special education teacher, and Ms. [REDACTED] was her general education teacher.

17. Ms. [REDACTED] worked with the Student on reading during four forty-five-minute pull-out sessions per week, generally using the Early Interventions in Reading program. She also usually provided the Student writing support in the general education classroom, while a paraeducator usually provided math support.

18. The general education classroom contained about twenty-five pupils. The Student had an FM system to enable her to better hear and concentrate on the teachers' instructions and lessons.

19. At that time, MCPS was using the Fountas & Pinnell (F&P) system of reading levels to determine a student's instructional reading level.⁴

20. At the beginning of second grade, the Student's F&P instructional reading level was Level D. Although the F&P levels do not precisely correspond to grade levels, Level D is approximately equivalent to the end of kindergarten to the beginning of first grade.

21. During the summer before second grade, the Student began to receive tutoring through [REDACTED], which is Ms. [REDACTED]'s business.

22. From the summer of 2018 until the end of second grade, the Student received three hours weekly of tutoring using the Orton-Gillingham approach to reading – one hour from Ms. [REDACTED] and two hours from [REDACTED], her employee.

23. During the Student's second grade year, Ms. [REDACTED] received training in Orton-Gillingham but did not use it with the Student.

⁴ Instructional reading level means that a student can benefit from instruction at a level providing a proper degree of difficulty. It lies between independence level (a student can pick up a book and read it) and frustration level (the text is too difficult for the student to read).

24. On January 25, 2019, MCPS evaluated the Student as “making sufficient progress to meet goal” on all her IEP goals.

25. By the end of second grade, the Student’s F&P instructional reading level had advanced to Level J, which is approximately equivalent to the end of first grade to the beginning of second grade.

26. In second grade, the Student’s writing was very difficult to decipher and most of the words she wrote were spelled incorrectly.

27. In fall 2017, the Student scored 137 on the math Measures of Academic Progress (MAP) test, which was twenty-five points below the norm for her first-grade peers.

28. In fall 2018, the Student scored 180 on the MAP, slightly above the norm for students beginning second grade.

29. The Student received all A’s on her report card for the fourth quarter of second grade. For the previous three quarters, her grades were mostly A’s, with a few scattered B’s mixed in, primarily in math and reading.

30. Meanwhile, the Parents had begun exploring the possibility of sending the Student to [REDACTED] and had secured the Student’s admission to [REDACTED] by March 1, 2019.

31. A new MCPS IEP was developed on May 2, 2019, which continued to offer the Student eleven and one-third hours weekly of special education services, using the same configuration as did the previous IEP. This IEP also included fifteen hours of extended school year (ESY) instruction over the summer of 2019 and added several goals and objectives.

32. The Parents requested that reading instruction using the Orton-Gillingham method be included in the Student’s IEP. MCPS declined this request.

33. The May 2, 2019 IEP was amended on May 14, 2019 to provide nine hours of ESY instruction.

34. On June 14, 2019, MCPS evaluated the Student as “making sufficient progress to meet goal” on all her IEP goals. However, several of the goals had been introduced in the May 2, 2019 IEP and the Student had been working on them for only about six weeks.

35. The Student did not attend ESY in 2019.

36. On August 7, 2019, the Parents informed MCPS that the Student would be attending [REDACTED] for the 2019-2020 school year. The Parents requested that MCPS place the Student at [REDACTED] and fund her attendance there. The Parents also requested that an MCPS IEP for 2019-2020 be developed and indicated that they would cooperate in the IEP process.

37. The May 2, 2019 IEP remained in place for the 2019-2020 school year.

38. The Student enrolled in [REDACTED] in fall of 2019.

39. [REDACTED] does not designate grades, such as third grade or ninth grade. Instead, it comprises Elementary, Intermediate, Junior High, and High School divisions. The Student was in the Elementary division.

40. [REDACTED] assessed the Student’s reading ability in September 2019 using the Phono-Graphix Screener Scoring Form, Reading a-z Benchmark Passage Running Record, and Criterion Reference Decoding, Encoding, Red Words, Morphology Assessment.

41. At the same time, [REDACTED] assessed the Student’s math ability using informal assessments.

42. In both reading and math, the Student was at a first grade level. In reading, she was at Level D, which was the same level as when she began second grade at [REDACTED]

43. During the 2019-2020 school year, [REDACTED] instructed the Student in reading using the Orton-Gillingham approach. The Student received instruction from a reading specialist in a class with one other pupil.

44. The Student received writing instruction in a class of twelve with three teachers. Math class had about twelve students with a special education teacher and an intern.

45. The Student was also in the [REDACTED]. [REDACTED] uses clubs as an academic tool primarily to teach history, geography, science, and culture, with some math and money concepts.

46. The Student received speech and language services in her homeroom class from Speech-Language Pathologist [REDACTED].

47. The Student also received occupational therapy (OT) services.

48. On March 13, 2020, [REDACTED] halted in-person instruction and services because of the COVID-19 pandemic. The Student received virtual instruction and services for the rest of the school year.

49. Attending school virtually was very difficult for the Student and did not provide her with the one-to-one instruction that she had been receiving in person.

50. By May 2020, after one school year at [REDACTED], the Student was reading at Level J, approximately equivalent to the beginning of second grade. This is the same reading level the Student had achieved at the end of second grade at [REDACTED].

51. The Student had made progress in writing but still made significant numbers of errors in spelling, capitalization, and punctuation. She was generally unable to write an expanded paragraph that included a topic sentence, supporting details, and a conclusion. The Student had mastered spelling most one-syllable words but had difficulty with longer words.

52. Virtual learning made addressing some of the Student's math goals impossible. At the end of the school year, the Student could usually solve two-digit addition and subtraction problems, recite the months and seasons of the year, and write numbers without reversing them (except for 9, which she inconsistently reversed). She had a reasonably good understanding of place values.

53. At the Parents' request, Dr. [REDACTED] performed a psychological assessment of the Student over two days in July 2020, after the Student had been at [REDACTED] for one year.

54. During testing, the Student showed impulsivity, problems concentrating, and impaired ability to hold information in her short-term memory.

55. The assessment showed that the Student had significant deficits in decoding, meaning that she was often unable to map sounds onto letters.

56. Decoding is a fundamental building block of learning to read.

57. On the Gray Oral Reading Test (GORT), the Student demonstrated major difficulties attempting to decode and comprehend first-grade-level texts. Her reading fluency was negatively impacted by her inability to recognize sight words. She often incorrectly guessed at words based on their initial consonant. After reading the texts, the Student showed little comprehension of what she had just read because all her attention had been focused on decoding the words rather than understanding the passage.

58. The Student had good verbal processing and comprehension skills, meaning that she could readily understand spoken language and remember passages read to her.

59. The Student's impaired ability to correlate sounds with letters also affected her writing, leading to many spelling errors. When asked to construct a complete sentence from a structured prompt, the Student wrote "the school day shudint be logr cus we wont to go hom" (The school day shouldn't be longer because we want to go home).

60. In math, the Student showed impaired addition knowledge and below average subtraction knowledge. Her number comparison score was average, meaning that she had normal “number sense.” On the Kaufman Tests of Educational Achievement, the Student scored in the below average range for all three math subtests. The Student’s reading and writing disabilities, as well as her attention difficulties, caused problems for her in developing math skills and knowledge.

61. On August 17, 2020, the Parents informed MCPS that the Student would be attending [REDACTED] for the 2020-2021 school year. The Parents requested that MCPS place the Student at [REDACTED] and fund her attendance there. The Parents also requested that an MCPS IEP for 2020-2021 be developed and indicated that they would cooperate in the IEP process.

62. The MCPS IEP process began in late August 2020, and the first IEP meeting took place on September 3, 2020. The Parents were active participants and cooperated during the process.

63. Developing a new IEP was an arduous process that took many months.

64. Delays in the IEP process occurred for several reasons, including new MCPS speech-language and school psychology assessments; MCPS reviews of non-MCPS assessments; the Parents declining to accept the services, goals, and objectives set forth in draft IEPs; the Parents’ submission of voluminous records from [REDACTED] for MCPS to review; difficulties in scheduling; and simply running out of time at meetings.

65. An MCPS IEP for the 2020-2021 school year was finalized on March 15, 2021.

66. The IEP placed the Student at [REDACTED] and offered five one-hour pull-out sessions weekly with a special education teacher (forty minutes for reading and twenty minutes for math). It also included three hours of special education support daily in the general education

classroom with special education and general education teachers and provided a twenty-minute counseling session with a school psychologist or counselor weekly. The total was twenty hours of special education services weekly, plus the counseling session.

67. The Parents requested that reading instruction using the Orton-Gillingham method be included in the Student's IEP. MCPS declined this request.

68. The Parents rejected the March 15, 2021 IEP and the Student continued attending [REDACTED] for the 2020-2021 school year.

69. In September 2020, [REDACTED] assessed the Student as reading at a mid-second-grade level.

70. In October 2020, [REDACTED] assessed the Student's math abilities. She was unable to tell time, could read and interpret graphs, and was inconsistent with addition and subtraction. She had trouble following multi-step directions and analyzing word problems. [REDACTED] considered the Student to be on the second grade level in math.

71. The Student's handwriting was slow and laborious, but legible, and she continued to reverse several letters regularly.

72. [REDACTED] developed an IEP for the Student on December 3, 2020.

73. The IEP called for the Student to receive one-to-one instruction in reading (using Orton-Gillingham) and writing, as well as instruction in math by the special education team. The IEP also provided speech-language and OT services.

74. [REDACTED] started the 2020-2021 school year using fully virtual instruction.

75. On October 20, 2020, the students began coming to school in person one day a week for clubs. The Student was in the [REDACTED].

76. One month later, [REDACTED] transitioned to four days a week in-person for reading, writing, and math, with Wednesdays remaining virtual.

77. After Thanksgiving, the school returned to virtual instruction as the pandemic raged.

78. By mid-January 2021, [REDACTED] was once again doing four days a week in-person and one day a week virtual.

79. By May 2021, despite receiving virtual instruction for much of the school year, the Student had made significant progress toward the reading goals and objectives in her [REDACTED] IEP.

80. The Student had mastered with cues three of the four objectives relating to the goal of phonemic awareness skills. On the fourth objective, she had progressed to a stage between developing the skill and mastering it with cues.

81. On the goal of improving sound-symbol knowledge by identifying sounds for different groups of letters, the Student had mastered one objective, mastered with cues four objectives, and was developing skill in one objective.

82. On the goal of reading words with several different characteristics, the Student had mastered one objective, mastered with cues four objectives, and was developing skill in two objectives.

83. On the goal of improving reading fluency, the Student had mastered one goal, mastered with cues two goals, and was developing skill in one goal.

84. On the goal of summarizing and identifying character motivation, the Student had made a little progress but had not really developed this ability.

85. The Student also made progress toward her goals in written language. On the spelling goal, the Student mastered with cues five objectives and was developing skill in two others, one of which had been recently introduced. All the objectives in this goal related to spelling one-syllable words.

86. On the goal of writing letters to represent verbally-presented sounds, the Student had mastered with cues one objective and was developing skill in two objectives.

87. On the goal of improving sentence formulation, the Student had mastered one objective, mastered with cues one objective, and was developing skill in two objectives.

88. On the goal of improving paragraph writing, the Student had mastered with cues three objectives and was developing skill in one objective. One objective had not been introduced.

89. On the goal of improving letter formation, the Student had mastered with cues the two objectives.

90. The Student was not as successful making progress in math. Of her four goals, the Student had not progressed beyond developing skill in any objective, although this was a bit of an improvement over her January 2021 progress reports, which all showed no progress.

91. During second grade at [REDACTED], the Student suffered high levels of stress and anxiety. She did not display these emotions at school, but upon her return home she would cry, express frustration at being unable to do the work, and refuse to do homework because it was too difficult. She thought of herself as stupid and despaired that she may never be able to perform like her peers.

92. The transition to [REDACTED] was difficult for the Student, but she eventually became comfortable with her enrollment there. She occasionally had meltdowns at home as she had at [REDACTED] but these were more related to her difficulties with virtual learning than with [REDACTED] itself.

93. The Student has executive functioning deficits that impair her decision making, planning, following instructions, beginning a task, and ability to organize.

94. The Student will remain in the Elementary Division if she attends [REDACTED] for the 2021-2022 school year.

DISCUSSION

The General Legal Framework

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01. The IDEA requires “that all children with disabilities have available to them a FAPE⁵ that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); *see also* Educ. § 8-403.

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

(A) In General

The term “child with a disability” means a child –

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

20 U.S.C.A. § 1401(3)(A); *see also* Educ. § 8-401(a)(2); 34 C.F.R. § 300.8; and COMAR 13A.05.01.03B(78).

The Supreme Court addressed the requirement of a free appropriate public education in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), holding that the requirement is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to

⁵ “FAPE” is an acronym meaning free appropriate public education.

the handicapped child.” *Id.* at 201 (footnote omitted). The court set out a two-part inquiry to analyze whether a local education agency satisfied its obligation: first, whether there has been compliance with the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 201, 206-07.

The *Rowley* Court found, because special education and related services must meet the state’s educational standards, the scope of the benefit required by the IDEA is an IEP reasonably calculated to permit the student to meet the state’s educational standards; that is, generally, to pass from grade to grade on grade level. *Id.* at 204; 20 U.S.C.A. § 1401(9).

The Supreme Court revisited the meaning of a free appropriate public education in a more recent case, holding that for an educational agency to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student’s circumstances. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017). Consideration of the student’s particular circumstances is key to this analysis; the Court emphasized in *Endrew F.* that the “adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Id.* at 1001.

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

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

20 U.S.C.A. § 1414(d)(3)(A). Among other things, the IEP depicts a student’s current educational performance, explains how the student’s disability affects the student’s involvement and progress in the general curriculum, sets forth annual goals and short-term objectives for

improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A. IEP teams must consider the student’s evolving needs when developing their educational programs. The student’s IEP must include “[a] statement of the child’s present levels of academic achievement and functional performance, including . . . [h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for non-disabled children)” 34 C.F.R. § 300.320(a)(1)(i). If a child’s behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, the use of positive behavioral interventions and strategies and supports to address that behavior. *Id.* § 300.324(a)(2)(i). A public agency is responsible for ensuring that the IEP is reviewed at least annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision. *Id.* § 300.324(b)(1).

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

Thirty-five years after *Rowley*, the parties in *Andrew F.* asked the Supreme Court to go further than it did in *Rowley* and set forth a test for measuring whether a disabled student had attained sufficient educational benefit. The framework for the decision was the Tenth Circuit’s interpretation of the meaning of *Rowley*’s “some educational benefit,” which construed the level

of benefit as “merely . . . ‘more than *de minimis*.’” *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

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

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

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

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.”’ A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

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

Endrew F., 137 S. Ct. at 998-99 (citations omitted; emphasis in original). The Court expressly rejected the Tenth Circuit’s interpretation of what constitutes “some benefit”:

When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving

instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to ‘drop out.’” The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

Id. at 1001 (citation omitted).

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

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

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the “least restrictive environment” to achieve a free appropriate public education, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred, if

the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989). 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). Placing disabled children into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved.

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like MCPS to offer a continuum of alternative placements that meet the needs of children with disabilities. 34 C.F.R. § 300.115. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services to be provided in conjunction with regular class placement. *Id.* § 300.115(b); COMAR 13A.05.01.10B(1); COMAR 13A.05.01.03B(71). Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved. COMAR 13A.05.01.10A(2). In such a case, a free appropriate public education might require placement of a child in a private school setting that would be fully funded by the child’s public school district.

Parents may be entitled to retroactive reimbursement from the state for tuition and expenses for a child unilaterally placed in a private school if it is later determined that the school system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985). The issue of reimbursement for unilateral placement was expanded in *Florence County School District*

Four v. Carter, 510 U.S. 7 (1993), where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Under *Burlington*, parents may recover the cost of private education only if (1) the school system failed to provide a free appropriate public education; (2) the private education services obtained by the parent were appropriate to the child's needs; and (3) overall, equity favors reimbursement. The private education services need not be provided in the least restrictive environment. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). The standard of proof is a preponderance of the evidence. See 20 U.S.C.A. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3). To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). The Parents, therefore, have the burden of proving that MCPS failed to provide the Student with a free appropriate public education for the 2019-2020 and 2020-2021 school years, and that they are entitled to reimbursement for their unilateral placement of the Student at [REDACTED].

Analysis

1. This Case is Unusual

Typically in special education litigation, especially cases in which parents are seeking reimbursement for private school tuition, the parents and the public schools disagree, often vehemently, about the progress a student has made and the severity of the student's disability. In this case, however, the parties generally agree on the facts of the Student's progress, the nature of her disability, and the development of the MCPS IEPs. In fact, MCPS and the Parents have undertaken herculean efforts over several years to agree on IEPs that would satisfy both parties.

Their ultimate failure was primarily caused by differing interpretations of the underlying facts, not disagreements about the facts themselves.

The parties agree, for example, that the Student showed academic progress during second grade at [REDACTED] under the IEP that was in place for that school year. Ms. [REDACTED] the Parents' educational consultant who has been monitoring the Student since 2018, testified about the Student's receiving all A's on her final second grade report card and agreed that the Student "earned those grades." (How the Student achieved her grades is an area of disagreement that I shall address later in the decision.)

The Student's third grade MCPS IEP was in place by May 2, 2019, and does not seem to have been revisited thereafter except for a very minor amendment on May 14, 2019. The Parents rejected the placement at [REDACTED] and the eleven and one-third hours weekly of special education services and elected to enroll the Student at [REDACTED]. In the following year, however, the Parents and MCPS engaged in a months-long effort to develop an IEP for the 2020-2021 school year. MCPS undertook new speech-language and school psychologist reports, and reviewed Dr. [REDACTED]'s psychological report. The Parents provided hundreds of pages of assessments, records, and work samples from [REDACTED], which MCPS also reviewed. After considering the Parents' input, including advocacy at IEP meetings from Ms. [REDACTED] and Mr. Eig, MCPS developed an IEP on March 15, 2021, that placed the Student at [REDACTED] and provided twenty weekly hours of special education services and one twenty-minute counseling session every week. This was an increase of eight and two-thirds hours (seventy-seven percent) over the previous IEP and shows beyond doubt that MCPS recognized the Student's severe disability and negotiated the proposed IEP in good faith.

The witnesses who testified, all dedicated professionals, did not significantly disagree about the Student's academic levels or need for services. Those employed by MCPS or [REDACTED]

██████ may have viewed the evidence in the light most favorable to their own institutions, but all testified honestly and their opinions are well supported. Unlike the situation in most special education contested cases, there is no need for me to assess the credibility of witnesses and decide which are worthy of belief. Rather, the question is what weight to give the testimony of each witness, as all were credible.

2. *The Student is Not Entitled to a Cadillac*

In *Doe v. Bd. of Educ. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993), the court wrote:

The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA.

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public that money can buy” or to “all services necessary to maximize his or her potential.” *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. 176). In other words, an IEP must be reasonably calculated to offer the child educational benefit, but not necessarily the most educational benefit that the child is capable of achieving. The IEP is not required to maximize the child's potential or be the best possible program for the child.

In *Rowley*, the Supreme Court rejected the principle that special education services “be sufficient to maximize each child's potential ‘commensurate with the opportunity provided other children.’” 458 U.S. at 198. *Rowley*, as stated previously, held that an IEP must be formulated to give a handicapped student “some educational benefit.” *Id.* at 201, 207. The Court declined to address what “educational benefit” might look like or how much benefit is necessary to satisfy

the IDEA. This reasoned lack of precision left the phrase open to interpretation, leading to some courts holding that the IDEA was satisfied by an IEP formulated to produce more than merely minimal academic progress. *See, e.g., Urban v. Jefferson County School Dist. R-1*, 89 F.3d 720, 726-27 (10th Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir.1988), *cert. denied*, 488 U.S. 103 (1989).

Endrew F. clarified educational benefit to some extent by doing away with the “merely more than *de minimis*” standard. 137 S.Ct. at 1001. An IEP must be “appropriately ambitious” in light of a child’s circumstances to pass muster under the IDEA. *Id.* at 1000. But the *Endrew F.* Court rejected the argument that the public schools must offer a disabled student academic opportunities substantially equal to those of non-handicapped peers. *Id.* at 1001. Thus, the standard for the Student in this case is to prove that the MCPS IEPs did not provide the opportunity to achieve meaningful academic progress in light of her circumstances.

Demonstrating that [REDACTED] is the placement in which she could best maximize those opportunities or make the most academic progress is not meaningful, as she is not entitled to the academic program that is best for her, but only one that is calculated to produce meaningful progress.

3. *The Crux of the Matter*

The ultimate question in this case is really quite simple: does the Student need full-time special education instruction in a self-contained setting? The Parents rejected the 2019 (third grade) and 2021 (fourth grade) MCPS IEPs because, among other things, they placed the Student at [REDACTED] which is primarily a general education school for mostly non-disabled students. For 2021, even though the Student would have received twenty weekly hours of special education services, just five of those hours would be delivered outside the general education classroom. For the remaining twenty-five hours of the school week, the Student would have been in the general

education classroom, at lunch or recess, or attending specials (art, music, and physical education). The Parents felt that the Student needed more individual instruction, including Orton-Gillingham for reading, that could be delivered only in self-contained setting such as [REDACTED]. The remainder of this decision will address whether the Parents have proved the Student's need for that intensity of special education instruction.

4. The Parties' Differing Presentations

As noted in the Summary of the Evidence, the Parents' witnesses included none of the Student's teachers at [REDACTED]. Instead, the Parents presented the Student's educational consultant, a psychologist who evaluated the Student in 2020, a [REDACTED] administrator, a speech-language pathologist, an occupational therapist, and the Student's mother. The Parents' general approach was to provide a broad picture of the Student, the impact of her disability on her academic progress, her educational needs, her struggles over the last three years, and how she was able to achieve a measure of success at [REDACTED]. The Parents hoped that this approach would demonstrate the inadequacy of the MCPS IEPs.

In contrast, MCPS focused on witnesses who could provide evidence of the Student's academic progress at [REDACTED] in second grade. To this end, MCPS called the Student's special education and general education teachers from that year and a school psychologist. MCPS also presented a speech-language pathologist and an occupational therapist. The basis of the MCPS approach was to show that, because the Student made solid progress in second grade with the IEP that was in place for that year, the proposed third and fourth grade IEPs, which provided the same services for third grade and considerably more for fourth grade, would have enabled the Student to continue to make meaningful progress.

The parties' respective speech-language pathologists and occupational therapists testified on the issue of whether the Student needed those services in her IEPs. This is really a secondary

issue that is not of great importance on the questions of the adequacy of the IEPs and the Student's academic progress. For now, I shall leave aside the speech-language and OT issues and concentrate on the MCPS IEPs and the Student's needs and progress.

5. Second Grade According to MCPS

Ms. [REDACTED] the Student's special education teacher, testified that she provided four forty-five minutes of one-to-one reading instruction to the Student every week after the IEP on November 8, 2018 went into effect. Ms. [REDACTED] used the Early Interventions in Reading program with the Student and measured her progress using that program as well as the F&P texts. Ms. [REDACTED] explained that the Student started second grade with reading abilities typical for the end of kindergarten to the beginning of first grade. She needed instruction in phonology, meaning understanding phonemes, which are the smallest units of sound. The next step, phonics, is matching letters to those units of sound. Once a student knows the sounds that the letters represent, she can decode words by sounding them out, which is reading.

The Student's second grade IEPs did not contain a phonemic awareness goal until December 6, 2018, but Ms. [REDACTED] said Early Interventions in Reading includes it as part of the Student's reading instruction. Ms. [REDACTED] testified that by the end of second grade the Student was reading at an F&P instructional Level J, which is approximately the end of first grade to the beginning of second grade, and that the Early Interventions in Reading assessments showed similar progress. In other words, the Student had made a year of growth in reading over one school year, which Ms. [REDACTED] characterized as "great progress."

Ms. [REDACTED] also testified that in math the Student was making very good progress in problem solving at the end of second grade. Referring to the IEP of December 6, 2018, Ms. [REDACTED] noted the Student's MAP score of 180 in fall 2018 as being slightly above the norm for beginning second graders and called this a "huge gain" over her score of 137 in fall 2017. This

progress, though, occurred mostly in first grade and cannot really be attributed to the Student's second grade IEPs.

Ms. [REDACTED]'s opinion as an experienced special education teacher with expertise in reading was that [REDACTED] "absolutely" could meet the Student's educational needs during third and fourth grades under the IEPs developed for those school years. She based this opinion on the Student's making "so much progress" since the IEPs went into effect in March 2018, particularly one year's progress in reading.

Ms. [REDACTED] the Student's general education second grade teacher, bolstered Ms. [REDACTED]'s testimony by saying that the Student "made tremendous progress" in reading during second grade. Regarding the Student's report card, Ms. [REDACTED] testified that the Student's A's were "not gifts" but that the Student earned those grades based on weekly assessments given throughout the year. Ms. [REDACTED] also stated that the Student mastered second grade math concepts at [REDACTED] and was surprised to learn that [REDACTED] assessed her as being at a first grade level in 2019.

Ms. [REDACTED] explained the classroom setup and the class's daily routine, which the Student learned after two or three weeks, as is typical. The year began with twenty-four pupils in the class, expanding to twenty-seven or twenty-eight by the end of the year. The school day was divided into blocks for math, writing, reading, lunch and recess, social studies or science, and specials. Each block began with general instruction for ten to thirty minutes, then the students assembled in small groups for more individualized instruction. One paraeducator was normally in the classroom to assist. The small groups were usually based on reading levels, and the Student was in a group with two or three classmates.

Ms. [REDACTED] described the Student as having a positive attitude and being happy to be at school. She called her "kind of a guidance counselor" because she would mediate when her

friends had conflicts. According to Ms. [REDACTED], the Student used her friends for classroom support in a positive way and was never hesitant to speak up to request clarification or ask questions about an assignment.

On cross-examination, Ms. [REDACTED] was asked about an incident when the Student's mother came to talk to the class on career day about her job as an [REDACTED]. Afterward, the class was tasked with writing thank you letters to Dr. [REDACTED]. (P. Ex. 12, p.18.) Ms. [REDACTED] described the Student's effort as "significantly less well-developed" than those of most of her peers. Ms. [REDACTED] testified that the Student had help with this assignment, probably from Ms. [REDACTED] but that her writing does not show significant concerns. This was in April 2019, toward the end of second grade. Ms. [REDACTED] then testified about another assignment (M. Ex. 62, p.13) done about the same time in which the Student's writing told the author's purpose and gave examples, just as asked.

Ms. [REDACTED] also said that she worked with the Student every day in math and reading small groups, and about once a week in writing, which Ms. [REDACTED] usually handled. Ms. [REDACTED]'s ultimate opinion was that the Student was succeeding in all second grade subjects with accommodations and support.

School Psychologist [REDACTED] evaluated the Student in 2018 to help prepare the Student's first IEP. Her testing showed that the Student had many strengths and a high-average IQ, but struggled in reading. Her testimony about the Student's second grade progress was limited to talking about the third grade IEP prepared on May 2, 2019. Ms. [REDACTED] stated her opinion that the IEP's eleven and one-third hours weekly of special education instruction were sufficient to meet the Student's needs based on the Student's progress in the prior year. Ms. [REDACTED] also testified that nothing in the Student's psychological profile precludes her from being educated with non-disabled peers for a portion of the day. In coming to this opinion, Ms.

██████████ considered Dr. ██████████'s report and her own evaluation of the Student's executive functioning performed in 2020.

6. *Second Grade According to the Parents*

The Student's mother testified that, in general terms, second grade did not go well and was worse than first grade. It appeared to Dr. ██████████ that the Student's peers were progressing, but she was not. She testified that she had observed the Student in the classroom several times⁶ and saw a look on her daughter's face that told her that the Student "was lost." One such observation was at an open house in October 2018, when the classroom was much more crowded than usual. Dr. ██████████ stated that the Student could not recognize her own name on the board and had to ask what group she was in. In the small group, the Student was unable to log on to her Chromebook to follow the lesson; a friend logged her on when it was over so she could read the lesson after the others were finished. Dr. ██████████ was "devastated" by what she had seen.

In general terms, the Student's mother testified that in second grade the Student "could not read" or look at a book at home. The Student might be able to read a simple word that she saw often, such as "sat" but could not understand why her watch showed "Sat." (for Saturday). Dr. ██████████ also testified that the Student could not write and refused to undertake simple writing tasks, such as making a birthday card for a friend. The Student, according to her mother, did not understand math concepts and needed manipulatives to add and subtract. The concept of 100 was "way over her head." All these difficulties persisted throughout second grade, prompting the Parents to apply to ██████████ during that school year.

Dr. ██████████ also recounted the Student's extreme emotional responses to school. The Student worked very hard at her school lessons every day and came home exhausted by her

⁶ It was unclear whether all these observations were during second grade.

efforts and suffering from stress and anxiety. She would cry when she got home, refuse to do homework because she did not understand it, and berate herself for her lack of understanding.

Ms. [REDACTED] testified that when she and Ms. [REDACTED] started tutoring the Student in summer 2018, the Student could not read because she could not attach sounds (phonemes) to letters (phonological awareness). Ms. [REDACTED] described the Student as “very needy” and said that she worked on phonological awareness with the Student throughout her second grade year by rhyming, counting syllables, identifying individual phonemes in words and speaking them, and “cleaning up” sound production.

A major point of Ms. [REDACTED]’s testimony was that the [REDACTED] staff believed that the Student was making more progress than she actually was because of the benchmarking system they were using and an assumption that students do not need to work on phonological awareness after kindergarten. She explained that reading measurements like F&P are often easy for bright children to master even if they lack the foundations of reading. The pupil can look at a picture accompanying the text, decode an initial letter, and produce an answer than seems like reading. Ms. [REDACTED] agreed that the [REDACTED] staff properly assessed the Student as reading at an F&P Level J by the end of second grade, because that was the level of work that the Student produced. But she testified that the Student was not really decoding the text but was using other strategies to figure out the words. These strategies, according to Ms. [REDACTED], can often work satisfactorily until third or fourth grade, but then the dyslexic student “hits a wall” because she has not developed the essential building blocks of learning to read.

Ms. [REDACTED] testified that the Student was particularly adept at hiding her weaknesses. The Student is very intelligent, an extremely hard worker, and socially savvy, said Ms. [REDACTED]. She has a “bubbly personality” and can fool people by looking to a

neighbor for help and “flying under the radar.” Ms. [REDACTED] called the Student “the queen of compensation” for her ability to make her teachers think she understood something when she really did not.

Ms. [REDACTED] also agreed with the Student’s mother’s assessment of the Student’s emotional state. She testified that after school, before beginning the tutoring session the Student needed fifteen minutes to decompress after an exhausting day at school and sometimes would cry. Ms. [REDACTED] stated that the Student “poured all she had” into school and that her body was tired afterward. She noted that the Student would not be frustrated and crying if she were really making good progress at [REDACTED]

Ms. [REDACTED] formally observed the Student at [REDACTED] once, on March 6, 2019. Over two hours, she saw Ms. [REDACTED] working on writing with the Student in the general education classroom and on reading one-to-one in the resource room. Ms. [REDACTED] noticed a constant “hum” of activity in the general education classroom, but the Student was wearing an FM system to help her hear the teachers. The Student’s writing was slow and labored, with errors in letter formation, spelling, and spacing. The reading lesson was from Early Interventions in Reading, and the Student was usually able to read as instructed and answer questions correctly.

In general terms, Ms. [REDACTED] expressed the opinion that the Student has always needed Orton-Gillingham to make real progress in learning to read. She explained that Orton-Gillingham instructors undergo extensive training and that the Orton-Gillingham approach, when used properly, is infused throughout the school day into all aspects of learning. It is used to establish the basic building blocks of reading – phonemes, phonological awareness, and decoding – that will enable a student to progress to higher levels of reading and be able to

learn in the higher grades. Ms. [REDACTED] testified that Early Interventions in Reading is not as useful and has not shown the same levels of effectiveness for dyslexic children.

Dr. [REDACTED] evaluated the Student in the summer of 2020, after her first year at [REDACTED]. In addition to a doctorate in psychology, Dr. [REDACTED] also holds master's and bachelor's degrees in special education and was a special education teacher in MCPS for four years. She testified as an expert in psychology and special education. The tests she administered to the Student were normed for nine-year-old third graders and included tests of cognitive ability and academic achievement. As such, they are relevant to the Student's second grade year, because cognitive ability impacts her ability to progress academically, and achievement indicates what she has learned over three years of instruction.⁷ Dr. [REDACTED] testified that one cannot attribute the Student's progress in 2020 to [REDACTED], but also stated that she was not testifying about the Student's progress at [REDACTED].

Looking at measurements of academic achievement, on the Test of Word Reading Efficiency, the Student was timed reading conventional words and fake words to test her ability to map sounds onto letters. Dr. [REDACTED] called it reading without decoding, but not memorizing. The Student's score was below the first percentile, meaning that of 100 children her age, she would be the most impaired. The second part of that test was phonemic decoding of fake words, where the Student scored below the fifth percentile, which Dr. [REDACTED] considered borderline.

Dr. [REDACTED] described the GORT as a "very sound test" that asks the child to read all-text passages with no pictures. The test-taker reads aloud, has to recognize or decode words, and cannot guess. The test administrator times the reading and counts errors, then takes the text away and asks comprehension questions. The Student was unsuccessful reading first-grade level texts,

⁷ The Student attended kindergarten at a [REDACTED] school in [REDACTED]. The record contains no indication that the Student received significant academic instruction during that year.

with very impaired accuracy. Dr. [REDACTED] said that the Student's scores were "not the lowest I've ever seen"⁸ but showed that the Student could not decode and therefore had no comprehension. She noted that the Student tended to guess at words after seeing the first letter, for example, "mix" for "Mimi." The Student scored as impaired on all four GORT subtests.

On the Kaufman Tests of Educational Achievement, the Student's scores were in the borderline to average ranges in reading, below average in math, and impaired (in the second percentile) in spelling. On the Feifer Assessment of Writing, the Student was low borderline on two subtests, below average on two, and average on one. On the Test of Orthographic Competence, the child is asked to show how speech sounds are represented on paper, i.e., as letters. Dr. [REDACTED] testified that the Student did not recognize the letter choices in one subtest and found unscrambling letters to make words in the other subtest "very difficult." The Student scored in the borderline and low average ranges on the two subtests.

The Feifer Assessment of Mathematics showed the Student as average in number composition, impaired in addition knowledge, and below average in subtraction knowledge. Dr. [REDACTED] testified that the Student's math reasoning was "not bad" but she was having trouble with procedures despite having been working on them for three years. She characterized the Student's progress as very slow.

Summarizing the Student's disability, Dr. [REDACTED] testified, "She's got impairments all over the place." She described the Student's reading as not typical, and said that the Student was not doing what most MCPS kindergartners can do. Dr. [REDACTED] called the Student's combined-type dyslexia the most severe form of that impairment, but acknowledged that there are academic disagreements about different types of dyslexia.

⁸ Ms. [REDACTED] testified that the Student's GORT scores were among the lowest she had ever seen.

Dr. [REDACTED] also expressed some criticisms of the MCPS approaches to reading, without specifically referring to second grade at [REDACTED]. She testified that the F&P assessment system has been lately criticized for showing poor correspondence between what the F&P assessments show that a child can read and what the child can actually read. Other criticisms are that the F&P levels are not sequential, do not provide predictive powers, can give false negatives, and can hide some struggling readers. In her opinion, these drawbacks prevented MCPS from identifying the Student's reading problems. Dr. [REDACTED] mentioned the International Dyslexia Association and the Journal of School Psychology as providing this unfavorable information about F&P, but did not cite any scholarly treatises in particular.

Regarding Early Interventions in Reading, Dr. [REDACTED] mentioned that it is often used as a Response to Intervention, which is not special education. She stated that only one of seven studies shows that it is effective, but again did not cite any scholarly research.

Dr. [REDACTED] agreed with Ms. [REDACTED] that compensation strategies can mask a student's difficulties in reading until third or fourth grade. At that point, those strategies are no longer effective and the child "ends up in my office."

7. The Weight of the Evidence

At the hearing, I found the Parents' presentation of evidence more effective than that of MCPS. Essentially, MCPS attempted to defend its conclusion that the Student made significant progress in second grade, especially in reading. Ultimately, this effort was unsuccessful.

Ms. [REDACTED] and Ms. [REDACTED] are obviously dedicated teachers with vast arsenals of knowledge and training. There is no doubt that they are very effective at instructing special education and general education students and developing IEPs. Nevertheless, one cannot overlook the fact that they are MCPS employees tasked with demonstrating that the MCPS IEPs, which they helped to develop, were appropriate. Their evidentiary presentations were narrowly focused on the

Student's achievements at [REDACTED], which basically were that the Student progressed from Level D to Level J in the F&P assessments, made progress in writing and math, and earned all A's on her second-grade report card. MCPS attributed those A's to the Student's real progress in all areas.

The parties agree that the Student earned those A's and demonstrated an ability to read F&P Level J. The weight of the evidence, though, shows that the Student's achievements were illusory and were not based on her real abilities.

As stated previously, the witnesses who testified presented the facts as they observed them and opinions based on their knowledge, information, and expertise. All were credible and honest. I accord greater weight to the Parents' witnesses, for several reasons.

Commonly in special education litigation, the adjudicator hears from "hired gun" experts who are brought in to advocate for the result that the parents desire. Their opinions and testimony are often supported by little more than their impressive credentials. Neither Ms. [REDACTED] nor Dr. [REDACTED] is in this category.

Ms. [REDACTED] has two Master of Education degrees and a Bachelor of Arts degree in psychology. She has been a teacher, administrator, or otherwise involved in education for thirty years. She is an instructor in Orton-Gillingham and has used that method for twenty years. From 2009 to 2015, Ms. [REDACTED] taught at the [REDACTED] in [REDACTED], where she used the F&P reading assessment tool regularly, although not by choice. In 2015, Ms. [REDACTED] opened [REDACTED], a private practice providing educational consultation and advocacy, as well as tutoring using Orton-Gillingham and other methods.

Very often, one hears from experts in this type of case who have had limited contact with the student for whom they are advocating. They may have conducted testing or an evaluation,

done an observation, and reviewed the student's records. In contrast, Ms. [REDACTED] has a long history with the Student, having begun tutoring her in the summer of 2018, before second grade, and continuing all through second grade. Ms. [REDACTED] saw the Student at least weekly, provided services to her, met and communicated with the Parents regularly, and, by her own count, attended at least ten IEP meetings. Ms. [REDACTED] continued to consult and advocate for the Student after she enrolled at [REDACTED], up to the present day.

Ms. [REDACTED] testified quite convincingly that the Parents came to her because they were confused and needed help, not because they had staked out a position and needed an expert to help them get what they wanted. The Parents had moved to Montgomery County in the summer of 2017 and enrolled the Student in first grade. They began to see that she was having extreme difficulties in reading and was not making typical progress. They turned to Ms. [REDACTED] because they did not understand the special education processes or their child's disability. The Parents accepted the March 8, 2018 IEP that provided seven hours weekly of special education services, but by the end of first grade had begun to understand the severe nature of the Student's dyslexia and other impairments, and enlisted Ms. [REDACTED] to tutor the Student and help them develop IEPs that they considered appropriate.

Thus, although she is for purposes of this hearing a contractor for the Parents, I found Ms. [REDACTED]'s testimony to be unbiased and driven by a sincere desire to enable the Student to make meaningful academic progress. That testimony homed in on two areas: 1) that the so-called progress that MCPS saw in second grade was not real; and 2) that the Student needed Orton-Gillingham and individual instruction in a self-contained classroom to achieve real progress. I found her testimony convincing on both counts.

Ms. [REDACTED] work with the Student during the second-grade school year demonstrated that the Student could not read because she could not attach sounds to symbols.

The Student was clearly bright, but was unable to retain what she learned about phonemes and letters, so Ms. [REDACTED] and Ms. [REDACTED] worked with her on phonological awareness using Orton-Gillingham. The goal was to build up the Student's foundation of reading so she could make meaningful progress.

During second grade, the Student spent the same amount of time receiving Orton-Gillingham instruction (three hours weekly) as she did in one-on-one reading instruction from Ms. [REDACTED] (also three hours). In those circumstances, whatever progress the Student made in reading that year cannot be attributed solely to the services she received under her IEPs.

An important piece of evidence that supports Ms. [REDACTED]'s testimony is the reading assessments that [REDACTED] performed in September 2019 (P. Ex. 19). These show that the Student was reading at a first grade level when she entered [REDACTED]. No witness challenged the accuracy of these assessments, and they show that the Student was not reading at a beginning of second grade level three months after [REDACTED] staff said that she was. Ms. [REDACTED] testified that a "summer slide" would not produce such regression. The Student tested in reading as being at about the same level where she was at the beginning of second grade.

The evidence establishes that, during second grade, the Student was able to use her intelligence, clues in the reading materials, and social strategies to produce work that seemed to indicate significant progress in reading – from Level D to Level J. The reality, however, is that she could not read at Level J or anything close to it. MCPS accepted the Student's production as actual progress when, in fact, it was false progress. Because of this, MCPS failed to understand the depth of the Student's disability and the need to start over in reading by building a strong foundation of phonemes, phonological awareness, and decoding.

Ms. [REDACTED] testified that Orton-Gillingham is the “gold standard” in teaching reading and that the Student needed this level of intensity to learn. She also required individual intervention throughout the school day from specialists with expertise in reading. According to Ms. [REDACTED], the Student could not get effective special education instruction in a general education classroom because of her difficulties in central auditory processing. She said Ms. [REDACTED]’s classroom was well-run but that there was “way too much going on” in the classroom to enable the Student to receive effective special education instruction there. In summary, Ms. [REDACTED] testified that the only possible way for the Student to make meaningful educational progress was in a setting of individualized attention infused with Orton-Gillingham during the whole school day.

I found Ms. [REDACTED]’s testimony internally consistent, logical, and well supported by other evidence. She displayed a wealth of knowledge about the Student, reading intervention methods, and special education. I give great weight to her testimony.

Dr. [REDACTED], whose credentials I discussed previously, also gave compelling testimony worthy of considerable weight. Like Ms. [REDACTED], Dr. [REDACTED] did not demonstrate any bias in favor of the Parents or against MCPS. She is somewhat familiar with MCPS policies and procedures, having been a special education teacher there for four years, albeit over twenty years ago. Dr. [REDACTED]’s involvement with this case is limited to her one evaluation of the Student in 2020. Obviously, the Parents brought her to the hearing to testify as their expert.

Dr. [REDACTED]’s testimony primarily concerned the Student’s results on the normed tests she administered. These tests are objective measures and their results were not challenged at the hearing. The Student’s performance on the tests of academic achievement were summarized in the previous section above. Essentially, they showed that as of the summer of 2020, the Student could not read or spell successfully at a first grade level. Dr. [REDACTED] attributed the Student’s poor

performance to her disabilities, which she diagnosed as combined type dyslexia, dysgraphia, dyscalculia, and ADHD.⁹

As explained above, Dr. [REDACTED] called into question MCPS's use of F&P to assess the Student's reading ability and Early Interventions in Reading to provide instruction. Although she did not refer specifically to any journal articles, her testimony dovetailed with Ms. [REDACTED]'s testimony about those programs and provided excellent support for the contention that MCPS failed to identify the Student's needs in reading and did not adequately address them.

Dr. [REDACTED] testified that the Student needs a systematic data-based reading intervention that breaks everything into "tiny bits." She also requires teachers who are highly trained in a phonics program and can provide a systematic, sustained program of structured literacy and curriculum management. Such a program may include Orton-Gillingham. Dr. [REDACTED] testified that [REDACTED] is both the most appropriate placement for the Student and the least restrictive environment because the Student cannot receive the services she needs in any school setting that includes a general education classroom. Referring to the most recent MCPS IEP, Dr. [REDACTED] stated, "It's not about the hours, it's about the method."

I also give great weight to the Student's mother's testimony. Dr. [REDACTED] is highly educated, intelligent, and observant. She interacts with the Student every day and is uniquely positioned to describe the Student's emotional state and her everyday ability to read and write. Her testimony leaves no doubt that the Student was emotionally fragile and subject to meltdowns during her second grade year at [REDACTED]. As Ms. [REDACTED] stated, the Student would not have these reactions if she were really succeeding.

⁹ Although Ms. [REDACTED] called the Student "a mover," there is no indication that she has the hyperactivity component of ADHD.

I also find compelling Dr. [REDACTED]'s testimony that the Student cannot, and probably never will, pick up a book and read for pleasure. The Student understands her disability and is willing to work extremely hard to overcome it, but is nowhere near success now.

One tactic that MCPS used consistently at the hearing was to have the witnesses focus, during both direct and cross-examination, on the evaluations or parts thereof that showed the Student's many strengths. Certainly, the Student does have these strengths, such as in overall intelligence, verbal comprehension, fluid reasoning, and some areas of memory. Emphasizing the Student's abilities, though, does not make her disabilities any less severe. The weight of the evidence establishes that the Student suffers from severe dyslexia which diminishes her ability to write, spell, and perform math calculations. Additionally, her executive functioning is impaired, causing difficulties in starting tasks, following directions, and concentrating.

Considering the evidence as a whole, I find that the MCPS IEPs of May 2, 2019 for third grade and March 15, 2020 for fourth grade were not reasonably calculated to provide a free appropriate public education for the Student. To summarize the foregoing discussion, the reasons for the IEP's inadequacy are that they do not provide sufficient special education services for the Student, do not provide enough individual instruction, place the Student in a general education classroom for most of each school day, and do not call for reading instruction using the Orton-Gillingham approach.

Regarding this last inadequacy, MCPS does not specify instructional methodologies on IEPs as a matter of policy. This approach complies with special education law, but in this case the evidence shows that Orton-Gillingham is the one method with a chance of success for the Student. Accordingly, an IEP that omits it is inappropriate.

The third grade IEP called for eleven and one-third hours of special education instruction, including eight and one-third in the general education classroom. Ms. [REDACTED] testified that

this level of service was chosen because the Student had been successful in second grade with the same amount of services. As has been shown, the Student was actually not successful in second grade; in fact, she made little or no academic progress and was able to use her compensation strategies to mask her shortcomings. Keeping the same level of services for third grade produced a highly inadequate IEP.

For fourth grade, MCPS proposed twenty hours of special education and twenty minutes of counseling for the Student every week. But again, fifteen of the special education hours were to be provided in the general education classroom. Put another way, the Student would be educated with non-disabled peers for twenty-five of the weekly thirty school hours.

The Parents and MCPS put tremendous time and effort into developing the fourth grade IEP. Its goals and objective seem to be acceptable to both parties. But its placement of the Student at [REDACTED] and provision of only five hours weekly outside the general education classroom would not allow the Student to meet those goals.

This is not a free appropriate public education. The Student faces severe disadvantages in the general education classroom. As Ms. [REDACTED] and Dr. [REDACTED] stated, the Student can use her social skills in this setting to grasp at things and appear to be learning, but she really is not. The evidence establishes that a free appropriate public education for this Student is a self-contained special education classroom with heavy emphasis on individualized instruction by teachers trained to teach Orton-Gillingham and incorporate it throughout the school curriculum. The evidence is overwhelming that these methods are necessary for the Student to make reasonable academic progress in light of her disability. The MCPS IEPs did not include the services the Student required for the 2019-2020 and 2020-2021 school years and denied the Student a free appropriate public education.

8. *Was Placement at [REDACTED] Appropriate?*

With the determination that the MCPS IEPs did not provide a free appropriate public education, the Parents have satisfied the first requirement of *Burlington*, 471 U.S. 359. To be awarded reimbursement, they must also show that [REDACTED] was an appropriate placement for the Student.

Ms. [REDACTED], the Associate Head of the Elementary Division at [REDACTED] testified that [REDACTED] is a private special education day school serving a student population with language-based learning disabilities. Some [REDACTED] students have ADHD, and all have language-based differences and average to above-average intelligence. All need and receive individual instruction in reading. The Student fits this profile, and Ms. [REDACTED] stated that “she is exactly where she needs to be.” She described the Student as “one of the most happy people” at school and indicated that she works very hard to succeed at her lessons.

One of Ms. [REDACTED]’s more interesting statements was that someone like the Student “can’t hide” at [REDACTED]. By this she meant that because instruction is intensely individualized, the Student would not be able to use her social skills and other compensatory strategies to appear to understand a lesson when she actually does not.

The Student received Orton-Gillingham instruction at [REDACTED], infused throughout the school day. Ms. [REDACTED] the Director of Speech, Language, and Literacy Services at [REDACTED], testified that the Student’s scores on assessments in the fall of 2020 showed that by November the Student was reading at instructional Level K, equivalent to the middle of second grade. Thus, she had progressed from Level D to Level K in less that a year and a half at [REDACTED], progress that she could not have made without Orton-Gillingham.

Ms. [REDACTED] has continued to follow the Student during her enrollment at [REDACTED]. She testified that as of the week before the hearing began, the Student was at [REDACTED].

reading instructional Level M. She also said that she had told the Parents in 2019 that the Student would be a good fit at [REDACTED], and that the results have confirmed this one hundred percent. The Student, said Ms. [REDACTED] is now thriving in her own community. She had a transition period when she missed [REDACTED], but soon her fatigue decreased and her confidence increased. Ms. [REDACTED] emphasized that at [REDACTED] the Student got Orton-Gillingham through individual intervention every day with the methodology infused throughout the school day. This, she said, is exactly what the Student requires.

Dr [REDACTED] agreed, testifying that [REDACTED] is the proper placement for the Student because she needs super-specialized small group instruction. [REDACTED] provides this daily through teachers with the necessary expertise, in a milieu conducive to learning.

The Student's mother summed up her feelings about [REDACTED] by saying of the Student, "Thank God she's there." Dr. [REDACTED] testified that the Student's first few weeks at [REDACTED] were hard because she did not know the routine, but the Student quickly accommodated and became a perfect fit for her new environment.

MCPS attacked the Student's placement at [REDACTED] on two fronts. First, MCPS argued that [REDACTED] was not the least restrictive environment for the Student. The IDEA dictates that students be educated in the least restrictive environment that is consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A).

Often in this type of case, the public school system presents evidence of how a disabled student can "model" her non-disabled peers and benefit by being with those peers for at least part of the day. That did not happen in this case. Ms. [REDACTED] testified that the Student was sociable and friendly and interacted with her peers appropriately. She also used her classmates for support, but Ms. [REDACTED] did not mention any need to "model" non-disabled peers. Similarly, Ms. [REDACTED] testified that the Student was social and friendly, but did not see her rely on peers in the

classroom. Neither teacher testified about why [REDACTED] was the Student's least restrictive environment in third and fourth grade, nor did they say anything about the Student's placement at [REDACTED].

As stated above, Ms. [REDACTED] testified that nothing in the Student's profile indicates that she could not be educated with general education students for at least part of the day. She also testified that the Student does not need a self-contained setting because that level of support is not necessary. She also did not mention the Student's placement at [REDACTED], except to say that she spoke with the school psychologist there.

MCPS's argument on least restrictive environment would be more compelling if the school system had in some way acknowledged the possibility of providing the continuum of services required by 34 C.F.R. § 300.115 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). MCPS did not offer, and apparently did not consider, placement for the Student anywhere but [REDACTED], a general education setting. Undoubtedly, MCPS has placements that offer smaller class sizes and more individual instruction. None, however, were on the table for the Student. The Parents' choice was to accept or reject [REDACTED] as the least restrictive environment.

I conclude that [REDACTED] was not the least restrictive environment consistent with the Student's educational needs. As stated previously, the Student needs individual instruction in self-contained classes, and placement at [REDACTED] did not meet those needs. [REDACTED] is a highly restrictive environment, but parental placements need not meet the least restrictive environment requirement of the IDEA, which exists to prevent public school systems from segregating disabled students away from their non-disabled peers. *Simchick*, 553 F.3d at 327. On the issue of least restrictive environment, the Parents' placement of the Student at [REDACTED] [REDACTED] was proper.

MCPS's second method of assailing the propriety of the Student's enrollment at [REDACTED] was to allege that the Student has not really made significant academic progress during her two years there. The evidence belies this assertion.

MCPS emphasized that, during her first year at [REDACTED] the Student seemed to make exactly the same progress in reading as she did in second grade at [REDACTED] from Level D to Level J. The evidence provides several explanations for this that do not align with MCPS' contention.

First, as has been demonstrated, the Student was not actually reading at Level J at the end of second grade at [REDACTED]. She achieved this benchmark by using her compensatory strategies rather than by really learning to read through phonemes, phonics, and decoding. [REDACTED] had to teach the Student reading at the foundational level because she had never mastered these basic concepts. The fact that the Student was once again at Level D in September 2019 underscores these difficulties.

Second, the 2019-2020 school year was interrupted in March 2020 by the COVID-19 pandemic, and the Student's learning was severely disrupted for the rest of that school year. Several witnesses testified that the Student was far less successful with virtual learning than with in-person. The Student's progress slowed significantly, or perhaps halted altogether, in March 2020.

Third, there is no doubt that the Student made actual progress at [REDACTED] during the 2020-2021 school year. As Ms. [REDACTED] testified, she was reading at Level M in May 2021, with sixty-seven words correct per minute and one hundred percent accuracy. As Ms. [REDACTED] said, "That's a victory." The IEP progress report of May 2021 shows that the Student had mastered a few of her reading and writing goals and was able to master many others with prompts. One must bear in mind that a significant portion of the 2020-2021 school

year was conducted virtually. Still, the evidence shows that the Student has made actual, measurable progress during her time at [REDACTED].

The evidence most favorable to MCPS on this point is the Student's low scores on Dr. [REDACTED]'s GORT in July 2020, which showed the Student struggling to read at even a first-grade level. No witness was able to explain why the Student would test at this level after a year at [REDACTED]; Ms. [REDACTED] stated that the scores show the Student's extreme disability.

However, these low scores are not fatal to the Parents' placement of the Student at [REDACTED]. They came in the midst of a long period of virtual instruction, which was not beneficial for the Student since she could not receive her usual intense level of instruction. The evidence that the Student has progressed academically at [REDACTED] clearly outweighs the evidence that on this test the Student had not made progress.

On the issue of lack of progress at [REDACTED], the Parents' placement of the Student at [REDACTED] was proper. Having determined that MCPS's objections to the Student's placement at [REDACTED] are without merit, I conclude that the Parents' placement of the Student at [REDACTED] is appropriate.

9. Speech-Language and OT Services

[REDACTED] has provided speech-language and OT services to the Student for most of the last two years (OT was suspended for a while during virtual learning). The evidence shows that those services are not necessary for the Student to make reasonable academic progress.

Ms. [REDACTED], the MCPS Speech-Language Pathologist, evaluated the Student in December 2020 in preparation for the 2020-2021 IEP. She performed the assessment virtually over three days and described the Student as respectful, friendly, poised, polite, and cooperative. Ms. [REDACTED] noted that the Student seemed to have variable attention during the Oral Passage

Understanding Scale test but still showed listening comprehension skills that were within age expectancy. Over the seven subtests in the Comprehensive Assessment of Spoken Language instrument, the Student demonstrated skills within age expectancy in every area. On the Test of Narrative Language, the Student was well above age expectancy on both subtests (Comprehension and Production). Ms. [REDACTED] also recorded, transcribed, and analyzed a conversational language sample with the Student, which showed that the Student's skills were above the expected range for same-aged, typically-developing peers.

In addition to formal testing, Ms. [REDACTED] reviewed speech-language assessments the Student received in the past. Regarding the October 2017 evaluation by [REDACTED], Ms. [REDACTED] noted that the Student tested in the average range on all subtests except listening comprehension, which was slightly below the expected level for her age. The same general result occurred on [REDACTED]'s assessment of January 25, 2018 – the Student showed abilities ranging from low average to high average. Ms. [REDACTED] also testified that Dr. [REDACTED]'s evaluation in 2020 indicated that the Student had strong verbal expression and narrative skills, made inferences, and could recall information in context.

Ms. [REDACTED] testified that she would not recommend speech-language services for the Student because almost all her scores on testing were consistently in the average range. She acknowledged that according to their reports, the Student's teachers at [REDACTED] saw her as much more impaired than did Ms. [REDACTED]. Nevertheless, objective data show that the Student's skills meet or exceed expectations for same-age peers and that the Student does not need speech-language services for academic success.

Ms. [REDACTED] testified for the Parents in support of the Student's receiving speech-language services. I accepted Ms. [REDACTED] as an expert in speech-language pathology and instruction of reading, and the bulk of her testimony concerned the Student's difficulties in reading and her

need for Orton-Gillingham instruction. Ms. [REDACTED] has not evaluated the Student formally or provided any speech-language services to her.

Testifying about Ms. [REDACTED]'s assessment of the Student, Ms. [REDACTED] stated that it shows the success of [REDACTED] program. She acknowledged a "difference of opinion" with Ms. [REDACTED] on whether the Student needs speech-language services.

On this issue, I consider Ms. [REDACTED]'s testimony much more compelling. Her own formal testing of the Student showed no need for speech-language services, and her review of past evaluations indicated that the Student has always had speech-language skills that are right around average for her age. Ms. [REDACTED] testified that about sixty percent of students at [REDACTED] receive speech-language instruction, so it may be that [REDACTED] provides this service almost as a matter of course. But Ms. [REDACTED]'s testimony does not come close to establishing that it is a service necessary for the Student's educational progress.

On the OT issue, MCPS offered testimony from Ms. [REDACTED] who has been an occupational therapist with the school system for twenty-five years and has performed over 2000 OT evaluations. Ms. [REDACTED] reviewed the Student's school records, looked at previous OT evaluations, and talked with Ms. [REDACTED] and [REDACTED] staff.

The Student received a private OT evaluation from [REDACTED] on September 14, 2018. Reviewing this evaluation, Ms. [REDACTED] noted that the Student scored in the Typical Performance range on all the Dunn Sensory Profile¹⁰ subtests except one, multisensory processing, which was in the Probable Difference range. On the Bruininks-Oseretsky Test of Motor Proficiency, Ms. [REDACTED] stated that the first three subtests, fine motor precision, fine motor integration, and manual dexterity, are important for OT. The Student's raw scores on these

¹⁰ Scoring on this test is divided into Typical Performance, Probable Difference, and Definite Difference.

tests were eighteen, sixteen, and ten, respectively. According to Ms. [REDACTED], the first two scores show that the Student had foundational fine motor skills. The report stated that the score of ten was in the low average range, and Ms. [REDACTED] testified that, according to the Student's teachers, she had adequate manual dexterity to function in the classroom.

Ms. [REDACTED] recommended one-to-one OT in the school setting to address the Student's handwriting, visual processing, bilateral coordination, and overall sensory regulation. Ms. [REDACTED] did not agree and emphasized that educators cannot use test scores alone to recommend OT services; one must consider classroom data and behaviors as well. She testified that she used to give all these subtests years ago but found that the results do not correlate with classroom skills. She also said that some of the subtests, such as bilateral coordination (doing different things with different sides of the body) do not measure skills that pupils use in the classroom. According to Ms. [REDACTED], the results of Ms. [REDACTED]'s tests are inconsistent with her recommendation for OT services. Ms. [REDACTED] was particularly scornful of the recommendation that the Student be allowed to chew gum in the classroom.

Ms. [REDACTED] also went through MCPS Occupational Therapist [REDACTED] review of Ms. [REDACTED]'s report. That review, dated November 5, 2018, considered comprehensive school data, conferences with the Student's teachers, and classroom observations. Ms. [REDACTED] called it typical of what occupational therapists do.

Ms. [REDACTED] found no fine motor concerns about the Student's ability to function in the classroom, no bilateral coordination concerns, and no tool use concerns. At an IEP meeting on November 8, 2018, the Parents raised concerns about the Student's ability to cross her body midline, which could negatively affect her handwriting. To address this worry, Ms. [REDACTED] had a one-to-one session with the Student on November 13, 2018, in which she observed the Student performed several tasks designed to test crossing the midline. Ms. [REDACTED] concluded: "After

detailed assessment that reviewed functional skills which require crossing midline in a school environment, it is determined that [the Student] has the ability to smoothly and spontaneously cross midline to functionally use classroom tools.” M. Ex. 24. Ms. [REDACTED] recommended that based on her review of all available information and her assessment of the Student, OT services were not necessary.

Ms. [REDACTED] also reviewed [REDACTED] Occupational Therapy 2019-2020 Report of June 12, 2020 by Occupational Therapist [REDACTED], who was providing OT services to the Student for forty-five minutes per week. Ms. [REDACTED] included several tests the Student had taken in the fall of 2019 in which the Student was rated as below average on a non-standardized assessment called the Elementary Division Handwriting Screening, which apparently is a [REDACTED] instrument. The Student was also below average on the Beery-Buktenica Developmental Test of Visual Motor Integration (Beery) and on a test of Grip and Pinch Strength. Although not specifically stated in the report, Ms. [REDACTED] obviously recommended continued OT services for the Student.

Ms. [REDACTED] questioned the Beery results, since they came only one year after the Student scored average on the same test. She testified that it is not best practice to give the test again unless the test-taker has a new medical condition. Overall, Ms. [REDACTED] dismissed Ms. [REDACTED]’s recommendations as not supported by most of the available data, which show that the Student is functional in the classroom for OT purposes.

Regarding Dr. [REDACTED]’s recommendation that the Student receive OT for penmanship, Ms. [REDACTED] clarified that occupational therapists do not work on penmanship and are not handwriting teachers. She testified that “there are lots of factors” in messy handwriting, and, if fine motor skills are one of those factors, OT can help. Ms. [REDACTED] also stated that [REDACTED] IEPs, by including OT services, dismissed prior testing, MCPS’s reviews of non-MCPS

OT reports, input from [REDACTED] teachers, and input from [REDACTED] teachers. The provision for OT, she testified, was based in insufficient data and was incorrect.

Opposing Ms. [REDACTED]'s testimony was Ms. [REDACTED], Director of Occupational Therapy at [REDACTED]. Ms. [REDACTED] testified that she has known the Student since she enrolled at [REDACTED] two years ago; she has not worked directly with the Student but supervises the occupational therapists who have reviewed the Student's records. She stated that most students at [REDACTED] have OT needs and that all receive OT integrated into their school days.

Regarding the Student, Ms. [REDACTED] testified that all her previous OT assessments showed a need for OT services for letter reversal, handwriting, visual/perceptual deficits, and bilateral coordination. She said that the Student's IEP would not be appropriate without an OT component and that licensed occupational therapists can help the Student because of their strong knowledge base of how the brain and body work. Ms. [REDACTED] acknowledged that she had "a professional difference of opinion" with Ms. [REDACTED].

Analyzing the evidence on the OT issue is complicated somewhat by the fact that no one who evaluated the Student or provided OT services to her testified. The evidentiary record contains reports from Ms. [REDACTED], Ms. [REDACTED], and Ms. [REDACTED] but interpretation of that evidence comes from Ms. [REDACTED] and Ms. [REDACTED]. Both are very experienced occupational therapists with impeccable credentials.

The MCPS IEPs at issue in this case do not include an OT component. Bearing in mind that the Parents have the burden to prove the inappropriateness of those IEPs, the evidence is insufficient to meet that burden. Generally, I found that Ms. [REDACTED]'s testimony, combined with Ms. [REDACTED]'s reports, outweighed the Parents' evidence. Ms. [REDACTED] went out of her way to address the Parents' concerns in 2018 and still found no need for OT. Ms. [REDACTED]'s depth of knowledge and intimate familiarity with the relevant data was more convincing than Ms.

█'s. Based on this evidence, I find that OT services are not necessary for the Student's educational progress.

10. Remedy

The Parents have met their burdens to show that the MCPS IEPs of 2019-2020 and 2020-2021 were not reasonably calculated to allow the Student to make meaningful educational progress in light of her circumstances, and that their unilateral placement of the Student at █ was appropriate. They have satisfied the first two prongs of *Burlington*. The third, as stated by the Court, is that "equitable considerations are relevant in fashioning relief." 471 U.S. at 374. I find that equity favors relief for the Parents.

The record contains no figures showing how much the Parents spent for tuition and related services at █; no doubt it was a considerable sum. Having met their burden, the Parents are entitled to recover those costs. However, it may be that █ charged additional fees for speech-language and OT services. The Parents did not prove that those services were necessary for the Student's IEPs. Therefore, if the Parents paid additional fees for speech-language and OT services, they may not recover those costs.

The due process complaint in this case was filed over seven months ago. It asks for tuition reimbursement for the 2019-2020 and 2020-2021 school years and placement of the Student at █ for the 2020-2021 school year. The latter request might be considered moot since the school year has ended, but tuition reimbursement cannot be granted unless the Parents' unilateral placement is found appropriate. Accordingly, I shall grant both requests. I also caution that this decision has no bearing on the 2021-2022 school year, which is imminent.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that MCPS's IEP of May 2, 2019 was not reasonably calculated to provide the Student with

educational benefit in light of her circumstances and did not provide a free appropriate public education for the Student. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Board of Education of the Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. § 1415(f)(1)(A) (2017).

I further conclude as a matter of law that MCPS's IEP of March 15, 2021 was not reasonably calculated to provide the Student with educational benefit in light of her circumstances and did not provide a free appropriate public education for the Student. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Board of Education of the Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. § 1415(f)(1)(A) (2017).

I further conclude as a matter of law that the Parents' placement of the Student at [REDACTED] was appropriate and reasonably calculated to enable the Student to receive educational benefits. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

I further conclude as a matter of law that the Parents are entitled to reimbursement of funds expended for tuition and related services for their placement of the Student at [REDACTED] for the 2019-2020 and 2020-2021 school years; with the exception of any funds expended for speech-language services or occupational therapy services. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

I further conclude as a matter of law that the Student's placement for the 2020-2021 school year was properly at [REDACTED], at public expense. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*,

510 U.S. 7 (1993); *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

ORDER

I **ORDER** that the Montgomery County Public Schools shall reimburse the Parents for funds expended for tuition and related services for their placement of the Student at [REDACTED] [REDACTED] for the 2019-2020 and 2020-2021 school years; with the exception of any funds expended for speech-language services or occupational therapy services; and I further

ORDER that the Student's placement for the 2020-2021 school year was properly at [REDACTED] [REDACTED] at public expense; and I further

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

August 3, 2021
Date Decision Issued

Richard O'Connor
Administrative Law Judge

ROC/dlm
#193154

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]

██████████,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE RICHARD O'CONNOR,

ADMINISTRATIVE LAW JUDGE,

THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-20-28234

FILE EXHIBIT LIST

I admitted the following exhibits into evidence on behalf of the Parents:

- P. Ex. 1. Request for Due Process Hearing, December 22, 2020.
- P. Ex. 2. Speech, Language & Literacy Evaluation by ██████████ Speech and Language Pathologist, October 9, 2017.
- P. Ex. 3. MCPS Report of School Psychologist by ██████████, February 2, 2018; MCPS Report of Speech-Language Assessment by ██████████, Speech-Language Pathologist, January 25, 2018; MCPS Educational Assessment Report by ██████████ ██████████ Special Education Resource Teacher, February 5, 2018.
- P. Ex. 4. MCPS IEP, March 8, 2018.
- P. Ex. 5. MCPS Grade 1 Progress Report Card, 2017-2018.
- P. Ex. 6. Developmental Vision Evaluation Report by ██████████, O.D., July 19, 2018; Assessment of Auditory Processing by ██████████, Au.D., July 9, 2018.
- P. Ex. 7. Neuropsychological Evaluation by ██████████, Developmental Neuropsychologist, August 2018.
- P. Ex. 7A. MCPS Measures of Academic Progress Student Progress Report, Fall 2017 to Fall 2018; MCPS Grade 2 Progress Report Card, 2018-2019 (first and second marking periods); ██████████ Elementary Progress Report, 2018-2019 (first marking period); Elementary Teacher Report, September 18, 2018.
- P. Ex. 8. Five-day Verification Notice of Documents Provided After an IEP Meeting, October 25, 2018; IEP Team Meeting Sign-in Sheet, September 27, 2018; Prior Written Notice, October 9, 2018; MCPS IEP, September 27, 2018.
- P. Ex. 9. MCPS IEP Progress Report, January 25, 2019.

- P. Ex. 10. Formal Observation Report by [REDACTED], Special Education Consultant, March 6, 2019.
- P. Ex. 11. Reactions to proposed MCPS IEP draft by Ms. [REDACTED] after an IEP meeting on March 26, 2019.
- P. Ex. 12. Elementary Teacher Report, March 5, 2019; Student work samples, March and April 2019.
- P. Ex. 13. Prior Written Notice, May 2, 2019.
- P. Ex. 14. MCPS Amendment/Modification to Current IEP, May 14, 2019.
- P. Ex. 15. MCPS Grade 2 Progress Report Card, 2018-2019.
- P. Ex. 16. MCPS Gifted and Talented Education report to the Parents, June 3, 2019.
- P. Ex. 17. MCPS IEP Progress Report, June 14, 2019.
- P. Ex. 18. Letter from Mr. Eig to MCPS, August 7, 2019.
- P. Ex. 19. Phono-Graphix Screener Scoring Form, September 4, 2019; Reading a-z Benchmark Passage Running Record, September 10, 2019; Criterion Reference Decoding, Encoding, Red Words, Morphology Assessment, September 4 to 9, 2019.
- P. Ex. 20. Formal Observation Report by Ms. [REDACTED], November 6, 2019.
- P. Ex. 21. [REDACTED] IEP, November 7, 2019.
- P. Ex. 22. [REDACTED] progress report and Student work samples, November 2019.
- P. Ex. 23. [REDACTED] Assessment Summary, Fall 2019.
- P. Ex. 24. [REDACTED] mathematics (math) and writing samples, with analyses, January 2020.
- P. Ex. 25. [REDACTED] Reading Assessment Summary, May 2020.
- P. Ex. 26. [REDACTED] Speech-Language Progress Summary, May 2020.
- P. Ex. 27. [REDACTED] IEP progress report, June 2020.
- P. Ex. 28. [REDACTED] Occupational Therapy 2019-2020 Annual Report, June 12, 2020.
- P. Ex. 29. Psychological Assessment Report by [REDACTED], Psy.D., July 28, 2020.
- P. Ex. 30. [REDACTED] report, The Art of Storytelling, July 2020.

- P. Ex. 31. Letter from Mr. Eig to MCPS, August 17, 2020; letter from Emily Rachlin, MCPS Assistant General Counsel, to Mr. Eig, September 9, 2020.
- P. Ex. 32. Prior Written Notice, September 3, 2020; MCPS Team Consideration of External Report, September 3, 2020.
- P. Ex. 33. Reactions to proposed MCPS IEP draft by Ms. [REDACTED] September 14, 2020.
- P. Ex. 34. [REDACTED] Assessment Summary, Fall 2020.
- P. Ex. 35. Reactions to proposed MCPS IEP draft by Ms. [REDACTED] September 30, 2020.
- P. Ex. 36. Phono-Graphix Screener Scoring Form, September 19, 2020; Criterion Reference Decoding, Encoding, Red Words, Morphology Assessment, September 8 to 15, 2020.
- P. Ex. 37. Comparison of MCPS draft IEP with prior IEP by Ms. [REDACTED] September 27, 2020.
- P. Ex. 38. Prior Written Notice, October 5, 2020.
- P. Ex. 39. [REDACTED] Beginning of Year Assessment in math, October 7, 2020; Student work samples, September and October 2020.
- P. Ex. 40. [REDACTED] IEP, December 3, 2020.
- P. Ex. 41. MCPS Report of Speech-Language Assessment by [REDACTED], Speech-Language Pathologist, December 9, 2020.
- P. Ex. 42. Addendum to Report of Speech-Language Assessment, December 9, 2020.
- P. Ex. 43. MCPS Report of School Psychologist by [REDACTED], December 9, 2020.
- P. Ex. 44. Prior Written Notice, December 22, 2020.
- P. Ex. 45. Email correspondence from the Student's father to Ms. [REDACTED] January 17, 2021.
- P. Ex. 46. Prior Written Notice, January 29, 2021.
- P. Ex. 47. [REDACTED] 2020-2021 Mid-Year Report, February 5, 2021.
- P. Ex. 48. Email from the Student's mother to Mr. Eig and Ms. [REDACTED] February 11, 2021; Student work samples.
- P. Ex. 49. Formal Observation Report by Ms. [REDACTED], March 8, 2021.

- P. Ex. 50. Ms. [REDACTED]'s résumé.
- P. Ex. 51. Dr. [REDACTED]'s résumé.
- P. Ex. 52. [REDACTED] [REDACTED]'s résumé.
- P. Ex. 53. [REDACTED] résumé.
- P. Ex. 54. [REDACTED] résumé.
- P. Ex. 55. Another copy of [REDACTED] IEP of December 3, 2020 with progress reports from January and May 2021.

I admitted the following exhibits into evidence on behalf of MCPS:

- M. Ex. 1. Prior Written Notice, November 9, 2017.
- M. Ex. 2. Speech, Language & Literacy Evaluation by [REDACTED], Speech and Language Pathologist, October 9, 2017.
- M. Ex. 3. Prior Written Notice, December 21, 2017.
- M. Ex. 4. MCPS Classroom Observation report by [REDACTED], Reading Specialist, December 7, 2017.
- M. Ex. 5. MCPS Team Consideration of External Report, December 2, 2017.
- M. Ex. 6. MCPS Educational Assessment Report by [REDACTED], Special Education Resource Teacher, February 5, 2018.
- M. Ex. 7. MCPS Report of School Psychologist by [REDACTED], February 2, 2018.
- M. Ex. 8. MCPS Evaluation Report and Determination of Initial Eligibility, February 15, 2018.
- M. Ex. 9. MCPS Specific Learning Disability Team Report, February 15, 2018.
- M. Ex. 10. Prior Written Notice, February 15, 2018.
- M. Ex. 11. MCPS IEP, March 8, 2018.
- M. Ex. 12. Neuropsychological Evaluation by [REDACTED], Developmental Neuropsychologist, August 2018.
- M. Ex. 13. Report from [REDACTED], Au.D., August 28, 2018.
- M. Ex. 14. Report from [REDACTED], Occupational Therapist, September 14, 2018.

- M. Ex. 15. Prior Written Notice, October 9, 2018.
- M. Ex. 16. MCPS Authorization for Assessment, September 27, 2018.
- M. Ex. 17. MCPS Motor Characteristics Checklist, September 27, 2018.
- M. Ex. 18. MCPS Team Consideration of External Report, September 27, 2018.
- M. Ex. 19. MCPS Team Consideration of External Report, September 27, 2018.
- M. Ex. 20. MCPS IEP, September 27, 2018.
- M. Ex. 21. Prior Written Notice, November 9, 2018.
- M. Ex. 22. MCPS IEP, November 8, 2018.
- M. Ex. 23. MCPS Summary Review of Non-MCPS Occupational Therapy Report by [REDACTED], Occupational Therapist, November 5, 2018.
- M. Ex. 24. MCPS Addendum to Summary Review of Non-MCPS Occupational Therapy Report, November 13, 2018.
- M. Ex. 25. Prior Written Notice, December 6, 2018.
- M. Ex. 26. MCPS IEP, December 6, 2018.
- M. Ex. 27. Prior Written Notice, May 2, 2019.
- M. Ex. 28. MCPS IEP, May 2, 2019.
- M. Ex. 29. MCPS Amendment/Modification to Current IEP, May 14, 2019.
- M. Ex. 30. Email from Mr. Eig's office to Mr. Brousaides, August 10, 2020; Psychological Assessment Report by [REDACTED], Psy.D., July 28, 2020.
- M. Ex. 31. Emails between Mr. Eig's office and Ms. Rachlin, August 18 to September 14, 2020; [REDACTED] IEP progress reports, May 2020; Phono-Graphix Screener Scoring Form, September 4, 2019; Reading a-z Benchmark Passage Running Record, September 10, 2019; Criterion Reference Decoding, Encoding, Red Words, Morphology Assessment, September 4 to 9, 2019.
- M. Ex. 32. Prior Written Notice, September 3, 2020.
- M. Ex. 33. MCPS Notice and Consent for Assessment, September 3, 2020.
- M. Ex. 34. MCPS Team Consideration of External Report, September 3, 2020.

- M. Ex. 35. Email from Mr. Eig's office to Ms. Rachlin, September 10, 2020, with 332 pages of [REDACTED] assessments, progress reports, and the Student's work samples attached.
- M. Ex. 36. Emails from Ms. Rachlin to Mr. Eig, September 10 and 17, 2020.
- M. Ex. 37. Emails between Ms. Rachlin and Mr. Eig's office, October 2, 6, and 8, 2020.
- M. Ex. 38. Prior Written Notice, October 5, 2020; email from Ms. Rachlin to Mr. Brousaides with attachments, October 6, 2020; email from [REDACTED] to the Student's mother with attachment, October 5, 2020; screenshot of Five-day Verification Notice of Documents Provided After an IEP Meeting, date unclear; MCPS draft IEP, September 30, 2020
- M. Ex. 39. Prior Written Notice, October 9, 2020; email from Ms. [REDACTED] to the Student's mother, October 9, 2020; email from Ms. Rachlin to Mr. Brousaides, October 12, 2020.
- M. Ex. 40. Emails between Ms. Rachlin's office and Mr. Eig's office, October 19 to October 28, 2020.
- M. Ex. 41. Emails between Ms. Rachlin's office and Mr. Eig's office, October 19 to November 9, 2020.
- M. Ex. 42. MCPS Report of Speech-Language Assessment by [REDACTED], Speech-Language Pathologist, December 9, 2020.
- M. Ex. 43. MCPS Report of School Psychologist by [REDACTED], December 9, 2020.
- M. Ex. 44. Prior Written Notice, December 22, 2020.
- M. Ex. 45. Emails between Ms. [REDACTED] and [REDACTED], October 8, 2020 to January 6, 2021.
- M. Ex. 46. Emails between Ms. Rachlin and Mr. Eig's office, December 22, 2020 to January 15, 2021.
- M. Ex. 47. Email from Ms. [REDACTED] to the Student's mother, January 7, 2021; email from Ms. Rachlin to Mr. Brousaides, January 15, 2021.
- M. Ex. 48. Emails between [REDACTED] and [REDACTED], January 14, 2021; email from Ms. Rachlin to Mr. Brousaides, January 15, 2021.
- M. Ex. 49. Five-day Verification Notice of Documents Provided After an IEP Meeting, January 21, 2021; MCPS draft IEP, September 30, 2020.

- M. Ex. 50. Prior Written Notice, January 29, 2021; Five-day Verification Notice of Documents Provided After an IEP Meeting, February 2, 2021.
- M. Ex. 51. Emails between Ms. Rachlin and Mr. Eig's office, January 28 to February 16, 2021.
- M. Ex. 52. Emails between Ms. Rachlin and Mr. Eig's office, February 9 to 23, 2021.
- M. Ex. 53. Prior Written Notice, February 23, 2021; Notice of IEP Team Meeting, February 23, 2021; MCPS draft IEP, September 30, 2020.
- M. Ex. 54. Prior Written Notice, March 15, 2021.
- M. Ex. 55. MCPS IEP, March 15, 2021.
- M. Ex. 56. Five-day Verification Notice of Documents Provided After an IEP Meeting, March 19, 2021.
- M. Ex. 57. MCPS Grade 2 Progress Report Card, 2018-2019.
- M. Ex. 58. MCPS Progress Report on IEP Goals, June 14, 2019.
- M. Ex. 59. MCPS Listening Behavior Checklists, March 14, 2019, November 1, 2018, and September 28, 2018.
- M. Ex. 60. Elementary Teacher Report, September 18, 2018; Student work samples, 2018.
- M. Ex. 61. Elementary Teacher Report, November 1, 2018; Student work samples, 2018.
- M. Ex. 62. Elementary Teacher Report, March 5, 2019; Student work samples, 2019.
- M. Ex. 63. MCPS Grade 1 Progress Report Card, 2017-2018.
- M. Ex. 64. MCPS progress report on IEP goals, June 15, 2018.
- M. Ex. 65. Elementary Teacher Report, undated (from first grade); Student work samples, 2017.
- M. Ex. 66. Elementary Teacher Report, February 7, 2018; Student work samples, 2018.
- M. Ex. 67. Elementary Teacher Report, February 27, 2018; Student work samples, 2018.
- M. Ex. 68. Measures of Academic Progress Student Progress Reports, Fall 2017 to Fall 2018; Student Profile, Winter 2018-19.
- M. Ex. 69. MCPS Reading Benchmarks, September 7, 2017.
- M. Ex. 70. 2017-2018 Measures of Academic Progress Expected Baseline Standards.

- M. Ex. 71. Measures of Academic Progress P/M Benchmarks.
- M. Ex. 72. Request for Due Process Hearing, December 2, 2019.
- M. Ex. 73. Letter from Ms. Rachlin to Mr. Eig, December 12, 2019.
- M. Ex. 74. Withdrawal of request for due process hearing, January 30, 2020.
- M. Ex. 75. Email from Mr. Eig's office to Ms. Rachlin, August 10, 2020.
- M. Ex. 76. Letter from Mr. Eig to Ms. Rachlin, August 17, 2020.
- M. Ex. 77. Request for Due Process Hearing, August 18, 2020.
- M. Ex. 78. Letter from Ms. Rachlin to Mr. Eig, August 28, 2020.
- M. Ex. 79. Letter from Ms. Rachlin to Mr. Eig, September 9, 2020.
- M. Ex. 80. Withdrawal of request for due process hearing, November 11, 2020.
- M. Ex. 81. Request for Due Process Hearing, December 22, 2020.
- M. Ex. 82. Letter from Ms. Rachlin to Mr. Eig, January 4, 2021.
- M. Ex. 83. Reactions to proposed MCPS IEP draft by Ms. [REDACTED] after an IEP meeting on September 27, 2018.
- M. Ex. 84. Formal Observation Report by Ms. [REDACTED], March 6, 2019.
- M. Ex. 85. Reactions to proposed MCPS IEP draft by Ms. [REDACTED] September 14, 2020.
- M. Ex. 86. Reactions to proposed MCPS IEP draft by Ms. [REDACTED], September 30, 2020.
- M. Ex. 87. Reactions to proposed MCPS IEP draft by Ms. [REDACTED] after an IEP meeting on December 17, 2020.
- M. Ex. 88. Formal Observation Report by Ms. [REDACTED], March 8, 2021.
- M. Ex. 89. Emails among the Student's mother, Ms. [REDACTED], and [REDACTED], October 5, 2018 to April 11, 2021; [REDACTED] and Student Travel Teacher Reference Form, April 16, 2021.
- M. Ex. 90. [REDACTED] résumé.
- M. Ex. 91. [REDACTED] résumé.
- M. Ex. 92. [REDACTED] résumé.

- M. Ex. 93. [REDACTED] résumé.
- M. Ex. 94. [REDACTED] s résumé.
- M. Ex. 95. [REDACTED] résumé.
- M. Ex. 96. Dr. [REDACTED] résumé.
- M. Ex. 97. MSDE Parental Rights – Maryland Procedural Safeguards Notice, revised March 2019.
- M. Ex. 98. Student work sample, November 19, 2020.