

XXXX XXXX,¹

STUDENT

v.

ANNE ARUNDEL COUNTY

PUBLIC SCHOOLS

* BEFORE DANIEL ANDREWS,
* ADMINISTRATIVE LAW JUDGE,
* THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-AARU-OT-17-03664

* * * * *

DECISION

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STATEMENT OF THE CASE

On February 3, 2017, XXXX XXXX and XXXX XXXX (Parents),² on behalf of the Student, filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH). On February 6, 2017, the OAH forwarded the Complaint to Anne Arundel County Public Schools (AACPS) (collectively with Parents, Parties). On February 16, 2017, AACPS notified the OAH that it would participate in mediation. On March 3, 2017, the OAH scheduled the mediation and also scheduled a prehearing conference (Conference) to be held afterward, should the parties not resolve the dispute.

On March 3, 2017, the Parties participated in mediation but the Parties were unable to resolve the dispute. The Parties sought to continue their discussion to resolve the dispute and requested that the Conference be postponed until March 7, 2017. I granted the Parties' request

¹ I have used the Student's and Parents' initials in this Decision to protect the Student's privacy and facilitate eventual publication.

² The Student's mother, XXXX XXXX, testified as a witness. When required, she will be individually identified.

and rescheduled the Conference to March 7, 2017, at which time the Parties stated on the record that they were unable to resolve the dispute. Based on this procedural history, the 45 day time period to issue a decision began on March 8, 2017 and would end on April 21, 2017. 34 C.F.R. § 300.515(a) (2016).³

On March 7, 2017, during the Conference, because AACPS would be filing a Motion that required a Response from the Parents, the Parties agreed that I would issue a Ruling on the Motion by April 21, 2017. The Parties also discussed scheduling conflicts and acceptable dates for a hearing on the merits.⁴ Finally, based on these scheduling issues, the Parties discussed the applicable time frame for issuing a written decision.⁵ Based on this discussion, the Parties jointly requested that I extend the time required to issue a written decision beyond the applicable 45 day time period. 34 C.F.R. § 300.515(c) (2016). I granted the Parties' request to extend the applicable time frames. *Id.* As agreed upon by the Parties, I shall issue a decision within 30 days of the close of the record.

On May 4, 2017, I convened a hearing to consider the merits of the Parents' Complaint. The hearing was continued to May 5, 8, 11, 12, 19 and June 12, 13, 14, 2017. The record closed on June 14, 2017. As a result, a written decision in this case is due by Friday, July 14, 2017.

The legal authority for the hearing is as follows: Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415(f) (2017);⁶ 34 C.F.R. § 300.511(a) (2016); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

³ "C.F.R." is the abbreviation for the Code of Federal Regulations.

⁴ The Parties agreed that a hearing on the merits would begin on May 4, 2017.

⁵ The conflicts that prevented the decision from being issued within the original 45 day timeframe, April 21, 2017, are documented in greater detail in a Prehearing Conference Report issued March 16, 2017.

⁶ "U.S.C.A." is the abbreviation for the United States Code Annotated. The United States Code Annotated is published by Thomson Reuters and contains the general and permanent laws of the United States, as classified in the official United States Code prepared by the Office of the Law Revision Counsel of the House of Representatives.

The contested case provisions of the Administrative Procedure Act, Maryland State Department of Education (MSDE) procedural regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

- 1) Whether AACPS denied the Student a free appropriate public education (FAPE) as defined by the IDEA during the 2014 – 2015 school year (third grade)?
- 2) Whether AACPS denied the Student a FAPE as defined by the IDEA during the 2015 – 2016 school year (fourth grade)?
- 3) Whether AACPS denied the Student a FAPE as defined by the IDEA during the 2016 – 2017 school year (fifth grade)?
- 4) Whether, during any applicable school year, the Parents' private unilateral placement was appropriate?
- 5) What, if any, relief is appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

I have attached an Exhibit List as an Appendix to this Decision.

Testimony

The Parents presented testimony from the following witnesses:

1. XXXX XXXX, Director of Advocacy, XXXX Group, L.L.C. Ms. XXXX was accepted as an expert in the field of special education.
2. XXXX XXXX, President and Owner of XXXX Associates. Dr. XXXX was accepted as an expert in the field of neuropsychology.

3. XXXX XXXX, the Student's mother, who was accepted as an expert in the field of curriculum and education.⁷
4. XXXX XXXX, the Student's teacher at the [School 3] during the 2014-2015 school year (third grade). Ms. XXXX was accepted as an expert in the field of special education.⁸

AACPS presented testimony from the following witnesses:

1. XXXX XXXX, Behavioral Specialist, Department of Special Education, AACPS. Ms. XXXX was accepted as an expert in the fields of special education and curriculum and instruction.
2. XXXX XXXX, Special Education Resource Teacher, Department of Special Education, AACPS. Ms. XXXX was accepted as an expert in the fields of special education and reading instruction.
3. XXXX XXXX, Nonpublic Specialist, AACPS. Ms. XXXX was accepted as an expert in the field of special education.
4. XXXX XXXX, Special Education Self-Contained Classroom Teacher, [School 1], AACPS. Ms. XXXX was accepted as an expert in the field of special education.
5. XXXX XXXX, Coordinator for Interagency and Non-Public Placements, AACPS. Ms. XXXX was accepted as an expert in the field of special education.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Background - 2013-2014 School Year (Second Grade)

1. During the 2013-2014 school year, the Student was in the second grade and attending [School 2] ([School 2]), which is the Student's home school.
2. The Student had an Individualized Education Plan (IEP) because of a disability identified as Developmental Delay, which affected the areas of fine motor skills, reading, math, written expression, and requisite learning skills.

⁷ During the hearing, the Student's mother was referred to as Dr. XXXX. All future references to her shall be as Dr. XXXX.

⁸ Ms. XXXX testified by telephone conference.

3. On May 29, 2013, an IEP Team developed an IEP for the Student's Second Grade school year.

4. The IEP Team determined the Student's Present Level of Academic Achievement (PLAAP) and Functional Development. Next, the IEP Team determined the Student's need for Special Considerations and Accommodations, including Supplementary Aids, Services, Program Modifications and Supports. The IEP Team then determined appropriate Goals and Objectives for the Student to achieve during the Second Grade. Afterward, the IEP Team determined the amount of Special Education and Related Services the Student would receive through the IEP. Finally, the IEP Team determined the educational setting, including the Least Restrictive Environment (LRE), where the IEP would be implemented.

5. As to the Student's PLAAP, in the area of Requisite Learning Skills, the IEP Team determined that a strength for the Student included that he could begin a task independently four out of five times and was able to complete a three step direction five out of five times. As a weakness, the Student had difficulty completing a task without verbal prompts and had difficulty remaining focused in a large group setting.

6. In the area of Instructional and Testing Accommodations, the Student was provided a scribe for writing, extended time and multiple or frequent breaks to complete tasks, and reduced distractions to focus on the task he was working on so he could timely complete the task.

7. In the area of Supports and Modifications on a daily basis across the educational curriculum, the Student was provided several instructional supports including:

- check for understand
- repetition of direction
- having Student paraphrase directions and information
- preferential seating in the front and center of classroom and facing point of instruction
- monitoring of all work with frequent check-ins

- use of alternative paper that provides increased structure and lines
- reduced distractions
- reduced information on a page to avoid visual overload
- enlarged font
- avoidance of any font size or type that is too difficult to read

8. Also, on a daily basis across the educational curriculum, the Student was provided program modifications through visual and physical breaks.

9. Additionally, on a daily basis across the educational curriculum, the Student was provided social and behavioral supports through a home-school communication program.

10. Further, on a daily basis across the educational curriculum, the Student was provided physical and environmental supports including the use of: a slant board, a chair to avoid static position, a guided reader, and a seat cushion for positioning in a regular chair.

11. In the area of Requisite Learning, as a goal, the IEP provided that the Student would demonstrate requisite learning behaviors by remaining on task and completing a task independently, four out of five times, when assessed.

12. To achieve the goal, as an objective, the Student would remain on task independently with no more than one verbal prompt, four out of five times when assessed. As another objective, the IEP Team agreed that the Student would independently complete a task with no more than two non-verbal prompts and no more than one verbal prompt, four out of five times, when assessed.

13. As to the Student's level of Special Education Services, the IEP Team determined that in the general educational setting, the Student would receive a total of seven hours and 30 minutes of special education instruction, provided primarily by a special education teacher, with other instructional support provided by a general instruction teacher and an instructional assistant. This model of instruction is referred to as a "co-taught" setting.

14. The Student's special education services were to be provided in the areas of Reading, Math, Requisite Learning, and Written Expression, as follows:

- two hours and 30 minutes per week in Language Arts (reading and written expression)
- four hours per week in Math
- one hour per week in Requisite Learning

15. As a related service, the IEP provided that the Student would receive Occupational Therapy (OT), in the general education setting, in two 30 minute sessions per month, to be provided by an Occupational Therapist or certified OT Assistant.

16. The Student received OT to address fine motor skill development and to assist in determining appropriate expectations and accommodations.

17. Based on the IEP, the Student's educational placement would be at [School 2], which is the Student's home school.

18. During the Second Grade year, a communication log was sent back and forth between the Student's teachers and Parents.

19. The communication log provided information regarding the Student's daily academic and behavior successes or challenges and included teacher or parent concerns regarding the Student's progress during his Second Grade year.

20. The communication log contained consistent reports by the Student's teachers regarding his difficulty with attention and distractions. Representative teacher reports included:

- On September 18, 2013, during whole group instruction, the Student was engaged off and on. He raised his hands multiple times to answer questions. During small group, the Student was chewing on things and making silly voices. The Student had a hard time collecting or understanding his thoughts and responses.
- On September 24, 2013, the Student was still having difficulty with staying focused but responded to direction, needed frequent redirection, and required frequent bathroom breaks.

- On October 2, 2013, the Student was very distracted by his cushion, and had to be asked several times to not put his feet on the desk, otherwise he had a good day.
- On October 17, 2013, the Student had another great day, worked hard on all his tasks, including his reading group assignment, although he had difficulty with comprehension.
- On January 27, 2014, the Student had some difficulty with a writing activity. He required a lot of encouragement to write in his organizer.
- On February 3, 2014, the Student was very excited, distracted, and disruptive. The teacher was unable to refocus the Student on tasks.
- On May 30, 2014, the Student read very well with a partner. In small group, the Student struggled to stay on task and required three verbal warnings.

2014-2015 School Year (Third Grade)

21. On February 18 and March 15, 2014, XXXX XXXX, an AACPS School Psychologist, performed a Psychological Assessment of the Student to determine the Student's intellectual, cognitive, attention and concentration functioning. To perform the assessment, Ms. XXXX considered teacher and Parent reports, reviewed the Students records, and used several standardized tests including the *Wechsler Intelligence Scale for Children, Fourth Edition* (WISC-IV) (partially administered)⁹ and the *Differential Abilities Scale, Second Edition* (DAS-II).

22. During the administration of the DAS-II, the Student was restless and fidgety, rocked hard in his chair, made lots of sounds, flipped objects, and engaged in off-task conversation. He required a great deal of re-direction to ensure that he was focused on the task presented.

23. Based on the Psychological Assessment, the Student's General Conceptual Ability (94) fell in the average range for same aged peers. On subtests for verbal and nonverbal

⁹ The WISC-IV was partially administered because it was discovered that the Student had recently performed the WISC-IV during another psychological evaluation. To avoid issues with validity of testing results, AACPS used the DAS-II.

reasoning the Student's score fell within the average range for same age peers. However, on the subtest for spatial reasoning, the Student's score fell within the below average range for same age peers. Ms. XXXX also noted concerns about the Student's distractibility, impulse control, and restlessness, which should be monitored.

24. As a result of the assessment, Ms. XXXX recommended that the Student receive several program modifications including allowing breaks and movement opportunity, chunking assignments into smaller parts, frequent feedback and encouragement, additional time to complete tasks, prompting to help the Student problem solve, encouraging the Student to rephrase or summarize information to assess comprehension, and monitoring the Student's organization and providing scaffolding/prompting for assistance.

25. On March 27, 2014, XXXX XXXX, an AACPS Special Education teacher, performed an Academic Assessment of the Student to determine the Student's present levels of performance in the areas of reading, math, and written expression, using a standardized test known as the *Wechsler Individual Achievement Test, Third Edition* (WIAT-III).

26. Based on the WIAT-III, the Student performed within the average range for peers his age in the areas of reading, math, and math fluency. However, the Student performed in the below average range for peers his age in the area of written expression.

27. Based on the Academic Assessment, the Student would have difficulty meeting grade level expectations with written tasks and would need: extra time to complete tasks and require step-by-step guidelines for extended writing. Additionally, the Student would need the use of checklist, rubrics, and conferencing and peer editing with classroom written work.

28. On March 15, 2014, at the Parents' request, XXXX XXXX, Ph.D., (Dr. XXXX), a Pediatric Neuropsychologist, with XXXX Center (XXXX's), performed a neuropsychological evaluation of the Student.

29. Dr. XXXX considered the Student's relevant history, which was obtained through a clinical interview with the Student's mother, Dr. XXXX., and available medical and academic records provided by the Student's family.

30. At the time of the evaluation, the Student was in the Second Grade and had an IEP due to a Developmental Delay disability. Dr. XXXX also considered that, with accommodations, supports and services, including OT, all of which was provided through the IEP, the Student was earning As and Bs in all his classes.

31. During the evaluation, the Student was tired during morning testing, with worsening fatigue and irritability despite frequent movement breaks (e.g. bathroom, water, and stretch breaks). Upon return from lunch, the Student was more engaged in testing.

32. During the evaluation, the Student had difficulty with task persistence and would tend to give up easily but would put forth additional effort when prompted or encouraged. The Student required frequent encouragement, sometimes on a task by task basis, to persist with a task, particularly with tasks he found challenging such as a written task.

33. During the evaluation, the Student appeared to zone out several times when being spoken to, which required repetition of items. The Student was easily distracted by external stimuli and was fidgety throughout the evaluation.

34. In her evaluation, Dr. XXXX used several standardized tests to assess the Student, including: the WISC-IV to assess intellectual functioning; the *Behavior Rating Inventory of Executive Function* (BRIEF) to assess executive functioning; the *Comprehensive Test of*

Phonological Processing (CTOPP 2) to assess language skills; the *Beery Developmental Test of Visual Motor Integration* (Beery or VMI) to assess the Student's functioning with visual/motor integration; *Wide Range Assessment of Memory and Learning, Second Edition* (WRAML-2) to assess the Student's learning and memory function; and the *Woodcock-Johnson Test of Achievement, Third Edition* (WJ-III) to assess Academic functioning.

35. Based on the standardized testing, a strength for the Student included that his overall cognitive reasoning/intelligence fell within the average range, with age appropriate language and visual-spatial and memory abilities. Weaknesses for the Student included difficulties with sustaining attention and effort, executive functioning (working memory, cognitive flexibility, inhibitory control), phonological awareness, and visual-motor integration.

36. The Student's phonemic awareness and processing difficulty placed him at risk for a learning disability in reading and writing. Reading presented a particular risk area because it is a pre-requisite skill for all academic subject areas.

37. The Student's visual motor integration deficits placed the Student at risk for demonstrating what he knows through handwriting and other forms of written expression.

38. Based on the Student's evaluation, Dr. XXXX diagnosed the Student with a Specific Learning Disability (mild dyslexia), with impairment in reading and writing.

39. Dr. XXXX determined that the Student did not currently meet the criteria for Attention Deficit Hyperactivity Disorder (ADHD) or an anxiety or mood disorder. However, the Student was at risk to develop such disorders. The Student's difficulties with frustration tolerance, task persistence, sustained effort, weaknesses in attention, cognitive flexibility, and inhibitory control all presented obstacles to learning.

40. Based on the assessment, Dr. XXXX offered several recommendations for a proposed school setting, including:

- receiving academic supports through an IEP for a Specific Learning Disability;
- a medium class size (12 to 18 students) with increased access to individualized instruction; a larger class size (greater than 20 students) was not appropriate given the Student's needs;
- the Student's ideal classroom placement would be in a specialized classroom with children who experience similar attention/executive function and reading difficulties, either in a well-balanced general education "Team Taught" public class room setting or in a private school which caters to children with learning disabilities; and
- careful teacher selection that offered a calm and structured approach in a well-organized classroom and who has experience with children who require structure and flexibility within that structure.
- a researched based reading intervention program
- OT supports

41. Based on the evaluation, Dr. XXXX made several recommendations to provide the Student with a specialized instruction program, with supports and accommodations, to assist the Student with his difficulties in the areas of visual-motor integration and attention and executive functioning, many of which were incorporated into the Student's proposed Third Grade IEP.

42. After the fourth quarter marking period for Second Grade at [School 2], with modifications and accommodations, the Student was on grade level in Reading. He received an average "C" grade in reading strategies and comprehension of text; a good "B" or excellent "A" grade in Writing; and a "B" or "C" grade in Mathematics. In Math, the Student needed to show improvement in understanding and applying problem solving.

43. In Expected Student Behavior, the Student was progressing in the development of the skill to follow rules and direction of adults and showing responsibility. The Student consistently demonstrated the skill of participating in activities and demonstrations. The Student demonstrated emerging skills with staying on task.

44. On June 10, 2014, an IEP meeting was held to develop the Student's IEP for the

2014-2015 School Year (Third Grade). Attending the IEP meeting were an AACPS special education teacher, a general education teacher, an occupational therapist, and the Parents (the IEP Team).¹⁰

45. To develop the IEP, the IEP Team considered the Academic and Psychological Assessments performed by AACPS, Dr. XXXX's Assessment, the Student's Progress Reports, informal assessments, and Student work samples.

46. The IEP Team determined that the Student had a disability identified as a Specific Learning Disability, which affected areas of fine motor, reading, math, written expression, and requisite learning skills.

47. The IEP Team agreed upon the Student's PLAAP, including the Student's strengths and weaknesses and instructional grade levels, in the areas of Reading, Math, Written Expression, Fine Motor Skills, and Requisite Learning.

48. In the relevant areas, the IEP Team agreed that the Student's instructional grade levels were as follows:

- Reading - in sight words and comprehension, second grade level, and in decoding, first grade level
- Math - in problem solving, mid-first grade level, in numerical operations, second grade, and in math fluency (addition and subtraction), end of first grade
- Written Expression - in Alphabet Writing Fluency, Sentence Composition, and Spelling, mid-first grade
- Fine Motor and Requisite Learning Skills - below grade level expectation

49. In the area of Requisite Learning Skills, the IEP Team agreed upon the Student's strengths and weaknesses, and addressed the Student's ability to remain on task with verbal prompting. The Student was able to remain on task in a large group setting independently in a five minute increment during one out of three assessed periods, and in a ten minute increment

¹⁰ In this decision, there will be references to other IEP meetings, which involved different attendees. After identifying individuals who attended any subsequent IEP meeting I have referred to those in attendance as being the IEP Team.

during two out of three assessed periods. However, when given a task that he perceives difficult, the Student would display work avoidance behavior by leaving a task to sharpen his pencil, go to the bathroom, or rush to complete the work.

50. The IEP Team agreed on Instructional and Testing Accommodations for the Student, including:

- large print
- a human reader or audio recording for selected test selections
- visual cues
- a scribe
- monitoring of test responses
- visual organizers
- extended time
- multiple or frequent breaks
- reduced distractions to the Student and from other Students

51. The IEP Team agreed upon the Student's Supplementary Aids, Services, Program Modifications and Accommodations, which would be provided on a daily or periodic basis, including:

- use of a highlighter during instruction and assignments
- organizational aid
- frequent or immediate feedback
- reduced amount to copy from board
- copy of teacher/student notes
- practice keyboarding at least three times per week
- specialized word processing software to include word prediction, word list, written text read back and editing checklist
- provisions of a model for self-correcting responses
- reduced visual clutter during assignments
- student paraphrase of instruction to ensure understanding
- use of manipulatives
- visual aid during reading (visual tracker)
- pairing of verbal instruction with visual supports and prompts (checklists)
- word bank/work list for math
- home copy of text books
- adapted ruler
- breakdown assignment into small units
- reduced amount on a page

- breakdown math word problems into manageable steps
- enlarged font
- frequent changes in activity or opportunity for movement
- monitoring of student agenda book and correct for accuracy
- use of adapted paper for structured visual support in reading and math
- preferential seating
- use of a move and sit cushion and toggle chair
- use of slant board

52. The use of movement breaks was provided to the Student in all academic and non-academic classes as needed so the Student could participate in instruction. Movement breaks included having the Student move to an alternate place in the room to complete work or rotating from one activity to another and then back to the original activity, if needed. Movement breaks may also include permitting the Student to get a drink of water or complete an assigned task like delivering a message.

53. The IEP Team agreed upon the Student's goals and objectives in the areas of Reading, Math, Written Expression, Fine Motor Skills, and Requisite Learning. Specifically, the IEP Team agreed to the goals and objectives for the Student in the following instructional areas:

- Writing Text and Purposes
- Written Expression - Visual Motor
- Foundational Skills - Phonics and Word Recognition
- Measurement and Data
- Math Calculation
- Mathematics - Problem Solving
- Requisite Learning
- Reading Comprehension

54. The IEP Team did not agree as to the Student's Special Education Services and Educational Placement.

55. AACPS proposed that, in the general education /co-taught setting, the Student would receive a total of ten hours and 30 minutes of special education instruction, provided primarily by a special education teacher, with other instructional support provided by a general

education teacher and an instructional assistant.

56. The Student's special education services were to be provided in the areas of Language Arts, Math, Written Expression, and Requisite Learning, as follows:

- five hours per week in Language Arts (reading and written expression)
- five hours per week in Math
- 30 minutes per hour per week in Requisite Learning

57. AACPS also proposed that, outside the general education setting, referred to as a self-contained or pull-out setting, the Student would receive a total of 30 minutes per week of specialized instruction in the area of Requisite Learning, provided primarily by a special educator, with other instructional support from an instructional assistant or guidance counselor.

58. As a related service, AACPS proposed that the Student will receive OT, in the general education setting, in three 30 minute sessions per month, and be provided by an Occupational Therapist or certified OT Assistant. The Student received OT to address fine motor skill development and to assist the IEP Team to determine appropriate expectations and accommodations.

59. Based on the proposed IEP, AACPS determined that the Student had significant attention difficulties that interfere with his ability to access grade level curriculum. The Student would receive explicit instruction in requisite learning strategies outside of the general education setting to reduce distractions and increase focus, with additional support provided in the general education setting to apply the strategies.

60. Based on the proposed IEP, AACPS determined that in a 32 hour school week, the Student would spend 31 hours and 30 minutes in the general education setting and 30 minutes outside of the general education setting. AACPS also determined that the Student would spend approximately 98 percent of his special education within the general education setting with non-

disabled peers, and the special education services could be provided in the Student's home school. As a result, AACPS determined that the LRE to implement the IEP would be an educational placement at [School 2].

61. A typical general education class size at [School 2] ranges between 20 to 25 students.

62. The Parents disagreed with the proposed IEP due to the proposed general educational setting, including class size. The Parents were also concerned with the Student's educational support in Social Studies and Science class, which was not addressed on the IEP. Another concern for the Parents was that the IEP did not provide an emphasis on the Student's issues with attention or dyslexia and work avoidance behaviors.

63. On or about August 24, 2014, the Parents notified AACPS that it disagreed with the proposed Third Grade IEP and would be placing the Student at [School 3] ([School 3]), which is a licensed private special education school located in Anne Arundel County, Maryland.

2015-2016 School Year (Fourth Grade)

64. On May 22, 2015, XXXX XXXX, the Parents' educational consultant, observed the Student at [School 3]. At the time, the Student was in Third Grade. She observed a Language Arts class and an English class. Each observation was approximately 30 minutes in length.

65. The Language Arts class was taught by Ms. XXXX, a special educator, and contained four students.

66. During the observation, the Student demonstrated that he could follow classroom routine and procedures, was organized with materials to complete a task, answered literal and inferential comprehension questions correctly, and read from a 4.0 grade level text.

67. During the 30 minute observation, the Student called out seven times, interrupted

the teacher four times, needed prompting to expand his answer to an inferential comprehension question, did not want to write sentences because there was not enough space, and was distracted on several occasions at random times.

68. The English class contained nine students, and was taught by a Third Grade Lead Teacher, with the assistance of an Instructional Assistant. Also in the class were a Second Grade Lead Teacher, a technology coordinator, and a volunteer.

69. During the observation, the Student raised his hand to answer questions three times, demonstrated understanding of how to use technology for his assignment, and engaged a fellow student in an on-topic conversation about a graphic novel.

70. Also, during the observation, the Student vocalized nonsense noises during an iPad activity, needed verbal prompting to begin and maintain a task, received one-to-one support for 20 minutes during independent work time.

71. As part of her observation, Ms. XXXX interviewed a School Psychologist familiar with the Student, who reported the following:

- the Student's largest class size has a ratio of five students to one teacher
- in a larger class the Student has difficulty with paying attention and following instruction
- Math is a strength for the Student
- Art, Writing, and Fine Motor skills are weak areas, the Student cannot write a paragraph independently
- the Student is exposed to this curriculum throughout his school day
- in Decoding, the Student has the most difficulty with manipulation of phonemes

72. On May 26, 2015, XXXX XXXX, a behavioral specialist with AACPS, observed the Student at [School 3]. Ms. XXXX observed the Student's Language Arts class, which had four students in the class and one teacher, and lasted approximately thirty minutes. Ms. XXXX also observed the Student's English class, which had five students and one teacher, and lasted approximately 30 minutes.

73. During the observation, the Student placed his feet up on a table four times. When performing a reading task, the Student read out loud a passage and read 163 words correctly and made 11 errors. He did not stop for punctuation. The reading passage was on the 3.8 grade level. The Student responded appropriately to redirection and followed directions. During a later observation, for a five minute period, the Student called out six times and was distracted by other students walking in the hallway. In a writing exercise, the Student required prompting to use end punctuation, became frustrated, kicked his desk, and put his head down. With teacher encouragement, the Student stopped his behavior.

74. Ms. XXXX also spoke with [School 3] teachers who reported that the Student has difficulty sustaining attention and requires lots of prompting to stay on task.

75. [School 3] issued the Student a Progress Report in the Fall of 2014 and Spring of 2015. The Progress Reports indicate the Student's progress in several areas by using letter designations, which are defined as follow:

- I - Introduced, the skill was recently introduced
- E - Emerging, needs significant teacher assistance
- P - Progressing, beginning to show independence
- S- Secure, competent and independent

76. The Student's Spring 2015 Progress Report indicated that, at the end of his Third Grade year, in Language Arts, the Student was Progressing or Secure in several areas and subareas, including:

- Phonological Awareness
- Phonics
- Fluency
- Reading Comprehension, Word Level
- Reading Comprehension, Sentence Level
- Reading Comprehension, Passage Level
- Reading Comprehension, Support Skills
- Spelling, Advanced Code
- Spelling, Multi syllable Level

- Spelling, Alphabet and Dictionary Skills
- Handwriting
- Keyboarding

77. In Language Arts, the Student was reading books on grade level 3.0 to 3.8. The Student was decoding on grade level 3.5 to 4.0, with teacher support. The Student's comprehension was on grade level 3.0 to 3.5, with teacher support.

78. The Student's Spring 2015 Progress Report indicated that in English/Oral Language, the Student was Progressing or Secure in several areas and subareas, including:

- Communication
- Grammar and Mechanics
- Composition
- Literature
- Vocabulary
- Study Skills
- Work Habits/Behavior

79. The Student's Spring 2015 Progress Report indicated that in Social Studies and Science, the Student was Progressing or Secure in several areas and subareas, including:

- Content Skills
- Work Habits/Behavior

80. The Student's Spring 2015 Progress Report indicated that in Math, the Student was Progressing or Secure in several areas and subareas, including:

- Patterns and Functions
- Numeric Graphic Representations of Relationships
- Number Theory
- Expressions, Equations, and Inequalities
- Number Computation
- Estimates
- Money
- Geometry
- Solid Geometric Figures
- Transformation
- Measurement Units, Tools, Calendar
- Problem Solving Strategies

81. In the Student's Progress Report teachers reported that the Student was engaged in the curriculum, enjoyed sharing his ideas, and was easily distracted but was able to be redirected back to task.

82. On June 29, 2015, an IEP meeting was held to develop the Student's IEP for the 2015-2016 School Year (Fourth Grade). Attending the IEP meeting were an AACPS special education teacher, a general education teacher, a reading teacher, an OT, a behavioral specialist, an assistant principle, and a program manager of compliance. Also attending the meeting were the Parents, Ms. XXXX (educational consultant), and Benjamin Massarsky (attorney) (collectively the IEP Team).

83. The IEP Team determined that the Student's disability remained a Specific Learning Disability, which affected areas of fine motor, reading, math, written expression, and requisite learning skills.

84. During the IEP meeting, in addition to the Student's prior educational record, the IEP Team considered the Student's [School 3] Progress Reports, [School 3]'s reading intervention "Read Naturally" and "Phono-Graphix" screening reports, observations of the Student at [School 3] performed by Ms. XXXX and Ms. XXXX, and Student work samples from [School 3].

85. The IEP Team agreed upon the Student's PLAAP, including instructional grade level and strengths and weakness in the areas of Reading, Math, Written Expression, Fine Motor Skills, and Requisite Learning.

86. In the following areas, the IEP Team agreed that the Student's instructional grade level were as follows:

- Reading - in decoding, end of third grade, and in comprehension, beginning of third grade

- Math - second grade
- Written Expression - second grade Fine Motor and Requisite Learning Skills - below grade level expectations

87. The IEP Team agreed upon the Student's Supplementary Aids, Services, Program Modifications and Accommodations, which would be provided on a daily or periodic basis, most of which were carried over from the Student's Third Grade IEP. However, added to the Fourth Grade IEP, in the area of Social and Behavior Supports, the IEP provided, on a daily basis, frequent reminders of rules and adult support. Additionally, the IEP provided for a home-school communication system.¹¹

88. The IEP Team agreed upon the Student's goals and objectives in the areas of Reading, Math, Written Expression, Fine Motor Skills, and Requisite Learning.

89. Specifically, the IEP Team agreed to the goals and objectives for the Student in the following instructional areas:

- Phonics and Word Recognition
- Reading Comprehension
- Math Calculation
- Mathematics - Real world problems
- Written Language
- Written Language - Conventions

90. In the area of Requisite Learning, as a goal, the IEP provided that, through verbal prompts and a checklist, the Student would follow classroom rules and complete independent work with decreased prompting from baseline (from five prompts to no more than three prompts). As objectives to achieve the goal, the IEP provided that the Student would bring necessary materials for an activity or class; the Student would comply with writing requests with no more than three verbal prompts; and the Student would increase the amount of time on a task

¹¹ During the hearing, Ms. XXXX testified that there was some disagreement between AACPS and the Parents regarding the communication system. The Parents requested daily communication. AACPS proposed weekly communication.

over baseline.

91. The IEP Team did not agree as to the Student's Special Education Services and Educational Placement.

92. AACPS proposed that, in the general education /co-taught setting, the Student would receive a total of seven hours and 30 minutes of special education instruction, provided primarily by a special education teacher, with other instructional support provided by a general education teacher and an instructional assistant.

93. In the general education/co-taught setting, the Student's special education services were to be provided in the areas of Math, Reading, Written Language, and Requisite Learning, as follows:

- five hours per week in Language Arts (reading and written expression)
- two hours and 30 minutes per week in Math
- one hour per week in Requisite Learning¹²

94. AACPS also proposed that, outside the general education setting, in a self-contained or pull-out setting, the Student would receive special education instruction for a total of five hours per week in the area of Reading and Written Language, primarily provided by a special educator and an instructional assistant. A typical self-contained or pull-out setting would contain approximately five students.

95. In the self-contained or pull-out setting, the Student's special education services were to be provided in the areas of Reading and Written Language as follows:

- Two and a half hours per week in Reading
- Two and a half hours per week in Written Language

96. As a related service, to address fine motor skill development, AACPS proposed that

¹² After reviewing the Fourth Grade IEP, I noticed that the IEP provided a total of seven hours and 30 minutes of special education in the general education/co-taught setting, but also included this extra hour in Requisite Learning, which would make the total eight hours and 30 minutes. Neither party explained the discrepancy, and, after reviewing the record, I could not find any clarification for this discrepancy.

the Student would receive OT, in the general education setting, provided by an Occupational Therapist or certified OT Assistant, as follows:

- three 30 minute sessions per month, from August 24, 2015 to October 30, 2015
- one 30 minute session per month, from October 30, 2015 to June 26, 2016

97. Based on the proposed IEP, AACPS determined that in a 32 hour school week, the Student would spend 27 hours in the general education setting and five hours outside of the general education setting. AACPS also determined that the Student would spend approximately 84 percent of his special education within the general education setting with non-disabled peers, and the special education services could be provided in the Student's home school. As a result, AACPS determined that the LRE to implement the IEP would be an educational placement at [School 2].

98. The Parents disagreed with the proposed service hours in a general education/co-taught setting because the Student required a smaller classroom setting to attend to the instruction across all academic areas. Additionally, the Student would become self-conscious about being singled out with frequent prompting.

99. On August 5, 2015, the Parents provided written notice to AACPS that they disagreed with the proposed Fourth Grade IEP and were placing the Student at [School 3] for the 2015-2016 Fourth Grade school year.

2016-2017 School Year (Fifth Grade)

100. On February 1 and 3, 2016, Dr. XXXX, a neuropsychologist, performed a neuropsychological examination of the Student.

101. As a part of his evaluation, Dr. XXXX reviewed the neuropsychological evaluation performed by Dr. XXXX, including the Student's standardized test results on the WISC-IV and WJ-III. Dr. XXXX also reviewed the Psychological and Academic evaluations performed by

AACPS.

102. In his evaluation, Dr. XXXX used several standardized tests to assess the Student, including: the WISC-V to assess intellectual functioning; the WJ-IV to assess academic functioning; the BRIEF to assess executive functioning; the CTOPP 2 to assess phonological awareness; and the VMI to assess the Student's functioning with visual/motor integration.

103. Based on the WJ-IV, the Student's standard test scores were as follows:

Reading

Letter-Word Identification - 76

Sentence Reading Fluency - 92

Passage Comprehension - 93

Word Attack- 80

Word Reading Fluency - 80

Math

Math Facts Fluency - 87

Calculation - 74

Applied Problems - 64

Written Language

Spelling - 78

Writing Fluency - 83

Spelling of Sounds - 92

Total Fluency Score (reading, math, written language) - 86

104. Based on Dr. XXXX's evaluation, the Student was diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD), a Specific Learning Disorder in reading and

105. mathematics, Developmental Coordination Disorder including bilateral fine motor slowing, visual construction deficits, and dysgraphic handwriting.

106. Cognitively, based on the WISC-V, the Student performed in the low average range, with relative weakness in sustained attention, grapho-motor speed, and verbal abstract reasoning. The Student had strength in his general fund of information.

107. Academically, based on the WJ-IV, the Student had a Broad Reading score in low

average range. However, basic reading skills were in the borderline range and were marked by a weakness in word attack and single word decoding skills. The Student's comprehension, oral reading, and sentence reading fluency skills fell within the average range.

108. The Student's Broad Mathematics score fell within the borderline range; he exhibited difficulties in Applied Problem Solving and Calculation skills. His math fluency was in the low-average range.

109. The Student's Broad Written Language score fell in the low average range, with a borderline score in Spelling and a low average score in Writing Samples. The Student also demonstrated borderline phonemic decoding and phonological awareness scores. The Student did have strengths in word efficiency and phonological memory.

110. The Student's neuropsychological functioning revealed strengths in verbal list learning, verbal working memory, short free and cued recall skills, immediate memory for sentences, and semantic fluency or the ability to retrieve words given a categorical clue. Weaknesses were in fine motor speed and efficiency, visual construction and perceptual organizational skills, and sustained visual attention.

111. Emotionally, the Student presented with a concern for his ability to self-advocate and a low tolerance for frustration. He presented with elevations reflecting anxiety, withdrawn behavior, and depression symptoms. However, the Student did not meet diagnostic criteria for an anxiety disorder, but his symptoms merited continued observation.

112. Based on his assessment, Dr. XXXX recommended that the Student required special education services to make appropriate progress, including:

- a highly structured, self-contained classroom throughout the school day due to the cumulative impact of the Student's attention, learning and motor coordination disorders
- a small class size with a low student to teacher ratio throughout the school day

- a science based reading program to address decoding, fluency, vocabulary, and comprehension
- occupational therapy to address deficits in fine motor speed, visual construction skills, and handwriting
- a reliable home school communication strategy
- frequent checks to ensure comprehension
- chunking of materials
- cueing prior to being called on in class so the Student can begin to formulate a response
- pre-reading and pre-writing rubrics
- word banks and graphic organizers
- preferential seating
- repetition of previously taught skills

113. The Student's Spring 2015 Progress Report indicated that, at the end of his Third Grade year, in Language Arts, the Student was Progressing or Secure in several areas and subareas, including:

- Phonological Awareness
- Phonics
- Fluency
- Reading Comprehension, Word Level
- Reading Comprehension, Sentence Level
- Reading Comprehension, Passage Level
- Reading Comprehension, Support Skills
- Spelling, Advanced Code
- Spelling, Multi syllable Level
- Spelling, Alphabet and Dictionary Skills
- Handwriting
- Keyboarding

114. In Language Arts, the Student was reading books on grade level 3.0 to 3.8. The Student was decoding on grade level 3.5 to 4.0, with teacher support. The Student's comprehension was on grade level 3.0 to 3.5, with teacher support.

115. The Student's Spring 2016 Progress Report indicated that in Language Arts the Student was Progressing or Secure in several areas and subareas, including:

- Phonological Awareness
- Decoding

- Morphology
- Fluency
- Comprehension
- Comprehension support skills
- Spelling
- Handwriting
- Keyboarding
- Work Habits (comes to class prepared, follows oral direction, participates in class, completes work on time, uses work time effectively, seeks assistance when needed, shows readiness to learn)

116. The Student’s Language Arts teacher found the Student to use his background knowledge to make valuable contributions to class discussion. Although, the Student required cueing to keep connections relevant. He benefitted from frequent teacher check-ins. The Student occasionally needed encouragement to initiate a task but was easily redirected.

117. The Student’s Spring 2016 Progress Report indicated that in English/Oral Language the Student was Progressing or Secure in several areas. However, the Student demonstrated emerging skills requiring significant teacher assistance in the following areas:

- Following multi-step direction
- Asking relevant questions related to topics discussed in class
- Formulating complete sentences orally in response to a question
- Applying the comma rule to words in a series or list
- Composing a “Brain Frame” to retell a story or event
- Ordering ideas so the text reads logically
- Applying revision strategies during writing
- Proofreading written work
- Responding to inferential questions

118. In his English/Oral Language Class, the Student was often off-topic to threads of discussion and direction. Calling on the Student frequently to share his opinion or knowledge helped keep him attentive and actively involved. He was encouraged to take time to reread his written work, check for missing words or ideas, and add information as needed.

119. The Student’s Spring 2016 Progress Report indicated that in Social Studies and

Science, the Student was Progressing or Secure in several areas. However, the Student demonstrated emerging skills requiring significant teacher assistance in the following areas:

- Applying knowledge independently
- Using content vocabulary when expressing thoughts or ideas
- Recalling information from past lessons
- Following oral directions
- Actively participating in class
- Using work time effectively
- Seeking assistance when needed
- Showing readiness to learn

120. In Social Studies and Science, the Student benefited from teacher prompting to start an assignment, focusing on the teacher during discussion, and listening to directions. The Student's ability to focus on classroom discussion was inconsistent. He lost focus frequently and required teacher intervention.

121. The Student's Spring 2016 Progress Report indicated that in Math, the Student was Progressing or Secure in several areas and subareas, including:

- Patterns and Functions
- Place Value
- Number Computation
- Estimates
- Fractions
- Geometry
- Measurement Units, Tools, Calendar
- Problem Solving Strategies
- Work Habits

122. In Math, the Student benefitted from explicit teaching before learning reasoning strategies. He required occasional reminders about posture or side conversations but was easily redirected.

123. On August 6, 2016, the Parents provided to AACPS the Student's Summer Progress Reports from [School 3], which the AACPS informed the Parents were not provided within

sufficient time to consider for an IEP meeting scheduled on August 9, 2016.

124. On August 9, 2016, an IEP meeting was held to develop the Student's IEP for the 2016-2017 School Year (Fifth Grade). Attending the IEP meeting were an AACPS special education teacher, a general education teacher, a compliance specialist, a special education resource teacher, a school psychologist, and an OT. Also attending the meeting were the Parents and Benjamin Massarsky (attorney) (collectively the IEP Team).

125. The IEP Team determined that the Student's disability remained a Specific Learning Disability, which affected areas of visual/fine motor skills, reading, math, written expression, and requisite learning skills.

126. During the IEP meeting, in addition to the Student's prior educational record, the IEP Team considered the Student's [School 3] Progress Reports (Spring 2015 and 2016), [School 3]'s reading intervention "Read Naturally" and "Phono-Graphix" screening reports (May 2016), observations of the Student at [School 3] (May 2016), Dr. XXXX's neuropsychological report, and the Student's writing samples.

127. The IEP Team agreed upon the Student's PLAAP, including instructional grade level and strengths and weakness in the areas of Reading, Math, Written Expression, Fine Motor Skills, Requisite Learning Behavior, and Fine Visual Motor Skills.

128. In the following areas, the IEP Team agreed that the Student's instructional grade levels were as follows:

- Reading - in decoding and comprehension, beginning fourth grade
- Math - third grade
- Written Expression - third grade
- Requisite Learning Skills - significantly below grade level expectations
- Fine Motor and Visual Skills - moderately below expectations of same aged peers

129. The IEP Team agreed upon the Student's Supplementary Aids, Services, Program

Modifications and Accommodations, which would be provided on a daily or periodic basis, most of which were carried over from the Student's Fourth Grade IEP, with the addition of the use of magnification devices as a presentation accommodation.

130. In the area of Presentation Accommodations, because of the Student's difficulty with attention, the IEP provided the Student with visual cues to redirect the Student to stay on task. The IEP also provided other accommodations to address the Student's difficulty with visual motor integration and written language.

131. In the area of Response Accommodations, because of the Student's difficulty with attention, the IEP provided the Student with a graphic organizer to address deficits in working memory and attention, and provided that the Student's test responses would be monitored. In this area, the IEP also provided other accommodations to address difficulties with written language and math calculations.

132. In the area of Timing and Scheduling Accommodations, because of the Student's ADHD and difficulty with initiating, remaining, and completing tasks, the IEP provided extended time and frequent breaks to sustain his attention.

133. In the area of Setting Accommodations, because of the Student's distractibility and ADHD, the IEP provided the Student with reduced distractions during testing and instruction. Further, to address issues with the Student making noises, singing, or using a robotic voice, the IEP provided for redirection to stop.

134. In the area of Social and Behavioral Supports the IEP Team carried over the same supports contained in the Student's Fourth Grade IEP, including a home-school communication system.

135. The IEP Team agreed upon the Student's goals and objectives in the areas of

Reading, Math, Written Expression, Fine Motor Skills, and Requisite Learning.

136. Specifically, the IEP Team agreed to the goals and objectives for the Student in the following instructional areas:

- Reading Vocabulary
- Reading Phonics
- Reading Comprehension
- Math Calculation
- Mathematics – Real world problems
- Written Language
- Written Language – Conventions

137. In the area of Requisite Learning, as a goal, the IEP provided that, through the use of verbal prompts and self-monitoring strategies, the Student sustain attention to tasks for up to ten minutes with fading verbal prompts. As objectives to achieve the goal, the IEP provided that the Student would sustain attention for ten minutes with two or fewer verbal prompts. Another objective provided that the Student would sustain attention for ten minutes with one or fewer verbal prompts.

138. The IEP Team did not agree as to the Student's Special Education Services and Educational Placement.

139. In the general education/co-taught setting in the area of Language Arts, AACPS proposed that the Student would receive a total of five hours of special education instruction, provided primarily by a special education teacher, with other instructional support provided by a general education teacher and an instructional assistant.

140. Outside the general education setting, in a self-contained or pull-out setting, AACPS proposed that the Student would receive special education instruction for a total of eight hours and 20 minutes per week in the areas of Language Arts and Math.

141. Specifically, in the self-contained or pull-out setting, the Student's special

education services would be provided as follows:

- Two hours and 30 minutes per week in Language Arts
- Five hours and 50 minutes per week in Math

142. As a related service, AACPS proposed that the Student would receive OT, in the general education setting, provided by an Occupational Therapist or certified OT Assistant, as follows:

- Two 30 minute sessions per month, from August 9, 2016 to October 28, 2016
- One 30 minute session per month, from October 29, 2016 to August 8, 2017

143. AACPS proposed that the Student would receive OT to address fine motor skill development and to assist the IEP Team to determine appropriate expectations and accommodations.

144. Based on the proposed IEP, AACPS determined that in a 32 hour school week, the Student would spend 23 hours and 40 minutes in the general education setting and eight hours and 20 minutes outside of the general education setting. AACPS also determined that the Student would spend approximately 73 percent of his special education within the general education setting with non-disabled peers, and the special education services could be provided at [School 2]. As a result, AACPS determined that the LRE to implement the IEP would be an educational placement at [School 2].

145. The Parents disagreed with the proposed service hours and education placement because, due to his inattention issues, the Student would not make sufficient educational progress in a general education setting with 20 to 25 students; instead, the Student required a small class size of five to seven students taught by a special educator.

146. At the IEP meeting on August 9, 2016, the Parents verbally informed AACPS that they disagreed with the proposed IEP and would be placing the Student at [School 3] for the

2016-2017 Fifth Grade school year.

147. After the IEP meeting on August 9, 2016, AACPS proposed to schedule another IEP meeting to consider the [School 3] Summer Progress Reports provided to AACPS on August 6, 2017. However, at the time, the Parents did not agree to set another IEP meeting date.

148. On August 15, 2016, by a letter to the Parents' attorney, AACPS again offered to convene an IEP meeting to consider the Parents' concerns and to determine if revisions to the Student's IEP would be appropriate.

149. On August 16, 2016, the Parents provided written notice to AACPS that they disagreed with the proposed August 9, 2016 IEP and were placing the Student at [School 3] for the 2016-2017 Fifth Grade school year.

150. On November 11 and 15, 2016, XXXX XXXX, a Non-Public Specialist with AACPS, observed the Student at [School 3] to assess his functioning in the areas of Reading, Math, and Written Expression. During her observation, Ms. XXXX observed the Student's Social Studies, Math, and English classes.

151. The Student's Social Studies class size included eight students and two adults. The Student demonstrated a potential deficit in organization of his materials. The Student volunteered to read aloud and read single sentences with fluency. The Social Studies text was at a 4.9 grade level. He worked well with a partner. As to his reading skills, the Student readily participated, followed directions, and performed well in the school setting, which was typical for the Student.

152. The Student's Math class included two students. In Math, the Student had difficulty count by five, using the "counting up" strategy for subtraction, using the "doubles plus 1" strategy for addition, and subtracting with renaming. The Student's difficulties demonstrated

that he was performing at the Second to Third grade level, but mostly Second grade level, well below grade level in math calculation and concepts.

153. The Student's English class size included seven students and two adults. The Student's handwriting was immature. He demonstrated understanding of sentence structure and was able to diagram and rearrange a complex sentence. However, his self-generated sentences were simple or compound and run-on, without punctuation. He misspelled several words. The Student demonstrated strong typing skills but weak basic writing skills. The Student's writing sample was well below grade level with respect to mechanics and content.

154. On November 29, 2016, another IEP meeting was held to develop the Student's IEP for the 2016-2017 School Year (Fifth Grade). Attending the IEP meeting were an AACPS special education teacher, a general education teacher, a special education resource teacher, a school psychologist, an OT, and a coordinator from the Interagency and Non-Public Placement Office. Also attending the meeting were the Parents, Mr. Massarsky, and Ms. XXXX (collectively the IEP Team).

155. The IEP Team determined that the Student's disability remained a Specific Learning Disability, which affected areas of visual/fine motor skills, reading, math, written expression, and requisite learning skills.

156. During the IEP meeting, in addition to the records considered during the August IEP meeting, the IEP Team also considered the Student's 2016 Summer Progress Reports from [School 3].

157. The IEP Team agreed upon the Student's PLAAP, including instructional grade level and strengths and weakness in the areas of Reading, Math, Written Expression, Fine Motor Skills, Requisite Learning Behavior, and Fine Visual Motor Skills.

158. In the following areas, the IEP Team agreed that the Student's instructional grade levels were as follows:

- Reading - in decoding, fifth grade, and in comprehension, beginning of fourth grade
- Math - late second to early third grade
- Written Expression - late second to beginning third grade
- Requisite Learning Skills - below grade level expectations
- Fine Motor and Visual Skills - moderately below expectations of same aged peers

159. The IEP Team agreed upon the Student's Supplementary Aids, Services, Program Modifications and Accommodations, which would be provided on a daily or periodic basis, all of which were carried over from the Student's August 2016 IEP and for the same reasons provided in the August 2016 IEP.

160. The IEP Team agreed upon the Student's goals and objectives in the areas of Reading, Math, Written Expression, Fine Motor Skills, and Requisite Learning, all of which were carried over from the August 2016 IEP.

161. The IEP Team did not agree as to the Student's Special Education Services and Educational Placement.

162. In the general education/co-taught setting, in the area of Social Studies and Science, AACPS proposed that the Student would receive a total of two hours and 30 minutes of special education instruction, provided primarily by a special education teacher, with other instructional support provided by a general education teacher and an instructional assistant.

163. Outside the general education setting, in a self-contained or pull-out setting, AACPS proposed that the Student would receive special education instruction for a total of 15 hours per week in the areas of Language Arts and Math, which would be primarily provided by a special educator and an instructional assistant.

164. The proposed IEP continued to recommend OT as a related service at the same level of service as proposed in the August 2016 IEP.

165. Based on the proposed IEP, AACPS determined that in a 32 hour school week, the Student would spend 17 hours in the general education setting and 15 hours outside of the general education setting. AACPS also determined that the Student would spend approximately 53 percent of his special education within the general education setting with non-disabled peers. However, the Student would require more services than are available at [School 2] but which are available at [School 1] ([School 1]). As a result, AACPS determined that the LRE to implement the IEP would be an educational placement at [School 1].

166. In April 2017, XXXX XXXX, a school psychologist at [School 3], assessed the Student's academic achievement using the WJ-IV. The Student's standard test scores are as follows:

Reading

Letter-Word Identification - 85
Sentence Reading Fluency - 105
Passage Comprehension - 96
Word Attack - 86
Word Reading Fluency - 101

Math

Math Facts Fluency - 87
Calculation - 86
Applied Problems - 77

Written Language

Spelling - 80
Writing Fluency - 109
Spelling of Sounds - 96

Total Fluency Score (reading, math, written language) - 96

DISCUSSION

Applicable Law

Congress enacted the IDEA to ensure that children with disabilities are provided with a FAPE which “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) (2017). “The IDEA . . . requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017). The federal government provides federal education funding to states that choose to comply with the IDEA. 20 U.S.C.A. §§ 1411-1414 (2017); 34 C.F.R. § 300.2 (2016); *Bd. of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176 (1982). Federal funding is conditioned upon a state’s compliance with the extensive goals and procedures of the IDEA. *Rowley*, 458 U.S. at 179. Maryland implements the IDEA, and adds additional procedural safeguards and substantive requirements above those required by the IDEA. *See generally* Md. Code Ann., Educ. §§ 8-401 through 8-419 (2010 & Supp. 2016); COMAR 13A.05.01.

School systems are required to identify, locate, and evaluate all children with disabilities, regardless of the severity of their disabilities, who are in need of special education and related services. 20 U.S.C.A. § 1412(a)(3)(A) (2017). Once a child is identified as needing special education and related services, a “Team” will meet to develop an IEP for the child. *Id.* §§ 1412(a)(4), 1414(d). “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Rowley*, 458 U.S. at 181.

The IEP Team should consist of the student’s parent(s); at least one general education teacher (if the student is participating in the general education environment); at least one special education teacher; and a representative of the local education agency who can provide or supervise the provision of specially designed instruction that can meet the needs of the student

and who is knowledgeable about the general education curriculum and the availability of resources. The Team should also consist of an individual who can “interpret the instructional implications of evaluation results” 20 U.S.C.A. § 1414(d)(1)(B)(v) (2017). If appropriate, the Team should also consist of the student. *Id.* § 1414(d)(1)(B)(vii).

An appropriate IEP “must contain statements concerning a disabled child’s level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child’s progress.” *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 527 (4th Cir. 2002). The appropriateness of an IEP “turns on the unique circumstances of the child for whom it was created.” *Andrew F.*, 137 S. Ct. at 992. Additionally, an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 999. Section 1414(d) of the IDEA, set out in part below, specifically describes what must be contained in an IEP.

(1) Definitions

.....

The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child’s present levels of academic achievement and functional performance, including—

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child’s other educational needs that result from the child’s disability;

(III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of

majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

20 U.S.C.A. § 1414(d)(1)(A)(i) (2017). In developing the IEP, the IEP Team shall consider the student's strengths, parental concerns, evaluation results, and "the academic, developmental, and functional needs of the [student]." *Id.* § 1414(d)(3)(A).

The student's IEP should be reviewed at least annually to determine if the student's annual goals are being achieved. *Id.* § 1414(d)(4)(A)(i). In addition, the IEP should be revised, as appropriate, to address: any lack of progress towards meeting annual goals; the results of any evaluation conducted under section 1414; additional information provided by the parent(s); the student's anticipated needs; or other matters. *Id.* § 1414(d)(4)(A)(ii). Local education agencies are required to ensure that the student's parent(s) are members of any group that makes decisions regarding the educational placement of the student. *Id.* § 1414(e).

A school is required to have an IEP in place for each student with a disability "[a]t the beginning of each school year" *Id.* § 1414(d)(2)(A). Failure to have an IEP in place would amount to a procedural violation. *See Gadsby v. Grasmick*, 109 F.3d 940, 950 (4th Cir. 1997). Nevertheless, procedural violations need to amount to actual interference with the provision of a FAPE to conclude that the school failed to provide a FAPE. *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990).

The IDEA also imposes a requirement that students be educated in the LRE. The statute requires:

To the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled, and . . . removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes . . . cannot be achieved satisfactorily.

20 U.S.C.A. § 1412(a)(5)(A) (2017); *see also* 34 C.F.R. § 300.114 (separation from regular education should only occur “if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”). Case law also provides insight into how the issue of LRE affects a student’s placement. In *DeVries v. Fairfax County School Board*, 882 F.2d 876 (4th Cir. 1989), the Fourth Circuit acknowledged that mainstreaming disabled children where they may have opportunities to study and socialize with nondisabled children “is not only a laudable goal but is also a requirement of the [IDEA].” *Id.* at 878. Although in *DeVries*, the Court found that mainstreaming is not appropriate for every disabled child, it nonetheless held that even if a segregated program was able to provide a superior program, if the non-segregated program could provide educational benefit while providing access to non-disabled peers, the segregated program would be inappropriate under the IDEA. *Id.* at 878-79.

Judicial review of an IEP “is meant to be largely prospective and to focus on a child’s needs looking forward.” *Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir. 2009). As a result, courts should focus on whether, at the time the IEP was created, the IEP was “reasonably calculated to enable the child to receive educational benefits.” *Id.* (quoting *Rowley*, 458 U.S. at 207). “[P]rospective review would be undercut if significant weight were always given to evidence that arose only after an IEP [was] created.” *Id.*

If the public school system fails to provide a FAPE under the IDEA, private placement is appropriate “if the placement is reasonably calculated to accord the child educational benefits.” *M.M. ex rel. J.M. v. Foose*, 165 F. Supp. 3d 365, 370 (D. Md. 2015). Moreover, parents who unilaterally change their child’s placement “do so at their own financial risk. They are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA

and that the private school placement was proper under the [IDEA].” *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (emphasis in original). A parent can recover tuition reimbursement if they show the following: “(1) the proposed IEP was inadequate to offer the child a FAPE, and (2) the private education services obtained by the parents were reasonably calculated to enable the child to receive educational benefits.” *Foose*, 165 F. Supp. 3d at 370; *see also Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359 (1985); *Carter*, 510 U.S. at 15. However, the IDEA does not require a local educational agency to pay for the cost of private education if the agency has made a FAPE available to the child and the parents have nevertheless elected to place the child in a private school. 34 C.F.R. § 300.148(a); 20 U.S.C.A. § 1412(a)(10)(C)(ii) (2017).

Analysis

Preliminary Issues

The Parents did not argue that there were any substantive procedural violations during the development of any relevant IEPs, except for one issue which allegedly occurred in August 2016. The Parents argue that AACPS is required to have an IEP in place for the Student at the beginning of the school year. They contend that, as of August 2016, just prior to the Student’s Fifth Grade school year, AACPS did not propose an IEP until November 2016, well after the start of the Student’s Fifth Grade school year. For this reason, the Parents allege a procedural violation occurred, which denied the Student a FAPE. I find the Parents’ argument on this issue to be without merit.

The evidence demonstrated that during the development of the Student’s August 2016 IEP, the IEP Team collaborated and agreed upon all components of the Student’s IEP except for the levels of Services to be provided to the Student inside and outside of the general education

environment and the proposed education placement at [School 2]. As will be made clear later in my analysis, the Parents' substantive concern was about class size in the general education/co-taught setting, which they argue would prevent the Student from making educational progress due to complexity of his learning disabilities combined with his inattention and distractibility issues. The factual issue that drove the need for another IEP meeting in November was not the IEP Team's failure to develop an IEP in August, but [School 3] Summer School Progress Reports that were provided to AACPS on August 6, 2016. Because AACPS did not have sufficient time to consider the new information for the August 9, 2016 IEP meeting, the IEP Team suggested another IEP meeting be scheduled. However, at the time, the Parents did not agree to set another IEP meeting date. The Parties failed to explain why the meeting did not occur until November 2016. However, on August 9, 2016, the IEP team developed and proposed a complete IEP. I find that an IEP was in place for the beginning of the school year, but for the Parents' approval and subsequent amendments if required based on the [School 3] reports. Under these circumstances, I do not find any substantive procedural violation occurred during the development of the proposed August 2016 IEP.

Another issue raised by the Parents is whether the Student would receive a Reading Intervention Program throughout the school day, as recommended by Dr. XXXX, Dr. XXXX, and Ms. XXXX. Because AACPS did not propose, in any relevant IEP, that the Student be taught using a Reading Intervention Program, the Parents contend that the Student would not be able to access the educational curriculum and make meaningful progress. Without dispute, at [School 3], the Student is being taught using a Reading Intervention Program referred to as Read Naturally and Phono-Graphix.

Generally, questions of educational methodology must be left to the school system when

a FAPE has been offered. *Rowley*, 458 U.S. at 208. Here, the Parents contend that a Reading Intervention Program is required for a FAPE. AACPS presented testimony from several witnesses, described below, that Reading Intervention Programs are evidence based programs that must be delivered with fidelity and in accordance with the developers or manufactures' protocols. In essence, AACPS asserts that a Reading Intervention Program cannot be modified or individualized according to the Student's unique needs and for this reason it is not specifically included in the IEP. However, AACPS agrees that the Student would be eligible for a Reading Intervention Program, and if he attended an AACPS program, he would be taught using such a program in all classes throughout the school day.

The Parents presented insufficient evidence to show that the absence of a Reading Intervention Program in the IEP denied the Student a FAPE. Based on the general proposition that the school system chooses methodology and the AACPS's evidence that their teachers would use such a program but must have leeway to individualize the program for the Student, I conclude that the omission of a Reading Intervention Program in the proposed IEP did not deny the Student a FAPE.

Substantive Issue

Based on the Student's educational progress, including demonstrated inattention and distraction issues since the Second Grade, and the complexity of his Specific Learning Disability, the Parents argue that AACPS never fully understood the Student's unique circumstances and failed to offer each school year an IEP that would provide the Student with a FAPE. Relying on *Andrew F.*, the Parents assert that AACPS must offer an IEP that is reasonably calculated to enable the Student to make progress in light of the Student's unique circumstances. In this case, the Parents contend that the Student's unique circumstances, his

inattention and distractibility, combined with his learning disability, presented a challenge for the Student to appropriately behave in a classroom and to access the curriculum with sufficient progress. The Parents concede that this case is not about the Student's PLAAP, his goals or objectives, or supplementary aids and accommodations provided in any relevant IEP. Instead, at the time of each IEP, the Student required a quality specialized education in a small class setting like that offered at [School 3]. The Parents argue that each of their witnesses consistently testified that the Student required a small class setting, no larger than five students, because if placed in a larger class size of 20 or more students, he will not be able to do his work and learn. The Parents contend that they established that the Student required, across all educational areas, the small class setting like the one offered by [School 3]. After each proposed IEP, the Parents argue that because AACPS never offered a fully self-contained specialized education in a small class setting they took the necessary action to place the Student at [School 3]. Finally, under the standards provided through the law developed by the *Burlington* and *Carter* cases, the Parents contend that the private placement of the Student at [School 3] was reasonably calculated to enable the child to receive educational benefit and seek reimbursement for the costs incurred.

In support of their case, the Parents presented the testimony of XXXX XXXX. Ms. XXXX holds a Master of Science Degree in Education from 1994. She holds Maryland Advanced Professional Certificates in Special Education for grades 1 through 8, and an Advanced Professional Certificate in Elementary Education for grades 1 through 6. Ms. XXXX possesses several specialty certifications in a variety of Reading Intervention Programs. From 1994 through 2007, Ms. XXXX was a Special Education Teacher or Resource Teacher in XXXX County and XXXX. Since 2006, Ms. XXXX has been the Director of Advocacy for the XXXX Group, LLC. In this capacity she has collaborated with families and schools to develop

appropriate IEPs based on a student's academic, behavioral, and social needs. She has been accepted in past due process hearings as an expert in the areas of dyslexia, IEP services, and placement. In this case, Ms. XXXX was accepted as an expert in the field of Special Education.

Ms. XXXX has been involved with the Student and his Parents to provide services as an educational consultant during the development of the Student's IEPs for each relevant school year. She has reviewed and was familiar with the Student's educational records, including the psychological evaluations performed by AACPS, Dr. XXXX, and Dr. XXXX. Ms. XXXX also observed the Student at [School 3], on May 22, 2015, and was familiar with the AACPS general education environment. After her observation of the Student, Mrs. XXXX issued a written report, which was admitted into evidence as P 45. My Findings of Fact numbers 64 through 71 reflect Ms. XXXX's observation of the Student at [School 3]. Through her report, Ms. XXXX made several recommendations for the Student's education including that the Student continue at [School 3] because he required a small student-to-teacher ratio due to the Student's inattention and distractibility. Ms. XXXX also recommended that the Student required an evidence based reading program embedded throughout his school day, and should be taught alongside peers with similar cognitive abilities and learning profiles.

With this background, Ms. XXXX testified and provided her opinions regarding the appropriateness of each relevant IEP. Ms. XXXX testified that the Student has significant attentional issues that impact him across the entire educational setting. She explained that the Student has a Specific Learning Disability in the areas of reading, written language, math, fine motor and visual skills, and requisite learning skills. The Student also has issues with anxiety. Based on the Student's attention profile, his learning disability, and his developmental coordination profile, Ms. XXXX opined that, in a general education environment, with a class

size of 20 to 25 students, the Student would significantly be exposed to more distractions than he would be at [School 3], which has a class size of five students to one teacher. For this reason, Ms. XXXX opined that a class setting that proposed a general education environment, even if a special educator would be involved and providing co-taught special education services, such an environment would be inappropriate for the Student.

During her testimony, Ms. XXXX reviewed the 2014-2015 Third Grade IEP proposed by AACPS on June 10, 2014, including the proposed services inside general education and outside of general education. The proposed IEP offered to provide the Student with ten hours and 30 minutes per week of special education in a general education/co-taught environment. In this environment, the IEP addressed the Student's education needs by providing five hours per week in Language Arts, including reading and written expression, and five hours per week in Math. Also in the general education/co-taught setting, the IEP proposed 30 minutes per week of special education in the area of Requisite Learning Skills. Ms. XXXX explained that Requisite Learning Skills covers several learning behavior issues required so that a student can access the educational environment including organization, attention, and the ability to transition. Ms. XXXX also noted that the proposed IEP provided the Student with 30 minutes of special education per week outside of general education in the area of Requisite Learning. Because the IEP proposed approximately 11 hours per week of special education, with the majority of those hours being in the general education/co-taught setting, and the remaining educational hours of approximately 21 hours, based on a 32 hour school week, would be in a general education setting, Ms. XXXX opined that the proposed IEP would not be appropriate to meet the Student's needs. In support of her position, Ms. XXXX observed that in the area of Reading, the Student's PLAAP indicated that the Student was on First Grade level in decoding and Second Grade level

in comprehension and sight words. For this reason, in Ms. XXXX's opinion, the Student required a more intensive, more restrictive setting, like that at the [School 3], which would provide at least 30 hours of special education in a self-contained environment across all academic areas. In such a setting, Ms. XXXX believed the Student would be given the opportunity to meet his education needs, including his deficits in Reading, and close a gap in his educational skill deficits. Ms. XXXX added that the Student required a great amount of support to address not only his reading and writing needs but, most of all, his attentional needs. For these reasons, Ms. XXXX recommended that the Student required a very small student to teacher ratio in a self-contained classroom across all academic areas like that offered at [School 3].

Ms. XXXX offered similar testimony as to the Student's proposed 2014-2015 Fourth Grade IEP. Ms. XXXX reviewed the amount of hours provided to the Student in the general education/co-taught setting and acknowledged that AACPS was providing seven hours and 30 minutes of special education in Language Arts and Math, which is at least three service hours per week less than the Third Grade IEP. She also understood that the proposed IEP increased services hours outside of general education, in a pull-out setting, by providing the Student with five hours special education in the areas of Reading and Written Language, which was not provided on the Third Grade IEP. However, Ms. XXXX continued to opine that the proposed Fourth Grade IEP was inappropriate for the same reasons as the Third Grade IEP. To support her position, Ms. XXXX testified about an observation made by the Student's Third Grade Language Arts teacher at [School 3], Ms. XXXX. Sometime during the Third Grade year, Ms. XXXX advised Ms. XXXX that her Language Arts class was a class size of four, which included the Student. A fifth student was added to the class, which became very disruptive for the Student and affected his ability to pay attention and access the curriculum being presented. Based on this

relative small increase in class size, even in a setting that already provided the Student with reduced environmental distractions, the Student's distractibility and inattention affected his learning.

Ms. XXXX also testified about the Student's proposed Fifth Grade IEPs, which were dated August 9, 2016 and November 29, 2016. Ms. XXXX acknowledged that the August IEP proposed the Student would receive five hours per week of special education in the general education/co-taught setting, which was a decrease of two hours and 30 minutes from the Fourth Grade IEP. She also recognized that the August IEP proposed to provide the Student with eight hours and 20 minutes per week of special education outside of the general education, which was an increase of three hours and 20 minutes from the Fourth Grade IEP. Due to the decreasing amount of service hours inside the general education setting since the Third Grade, Ms. XXXX agreed that AACPS was moving in the right direction but that the Student still required a self-contained setting for all academic areas due to his issues with inattention and distractibility. In November 2016, AACPS proposed to increase the Student's service hours outside of the general education setting to 15 hours. Ms. XXXX explained that this IEP was the first time AACPS proposed to offer the Student a self-contained setting for Language Arts and Math, with two hours and 30 minutes of special education inside the general education/co-taught setting for Social Studies and Science. Again, Ms. XXXX opined that the November 2016 IEP was a step in the right direction but was inappropriate for the Student's needs.

The Parents also presented the testimony of XXXX XXXX. Since 2014, Ms. XXXX has been a teacher at [School 3] and has taught Fourth through Sixth Grade Language Arts and Social Studies to students with learning disabilities including dyslexia, dyscalculia, and executive function. In 1998, she earned a Master Degree in Education. Ms. XXXX was

accepted as an expert in the field of special education.

During the 2014-2015 Third Grade school year, Ms. XXXX was the Student's Language Arts teacher. In her testimony, Ms. XXXX recalled that the Student was eager to learn and had strong verbal skills especially when using his prior knowledge to make connections in class. She indicated that the Student did have difficulties with phoneme manipulation, comprehension, and written expression. Ms. XXXX also indicated that the Student had behavioral issues due to anxiety, inattention, and organization. As a result, it was a hard for the Student to work independently by staying on task, especially if the task was challenging.

Ms. XXXX testified that [School 3] prefers to keep the Language Arts class to a five student to one teacher ratio. She recalled that when the Student was in a larger student setting of eight, the Student would not engage by answering questions, he would get lost, and have anxiety. She explained that teachers would have to redirect the Student's attention back on task, which would have to be done several times throughout the class period. She stated that [School 3] adapted instruction for the Student to address his behavioral issues by using checklists, self-monitoring tools, graphic organizers, a scribe for writing, and movement activities.

Ms. XXXX testified about the Student's Spring 2015 Progress Report, which was admitted into evidence as P 42. She explained by the Spring of 2015, the Student had been in a smaller class setting and was improving in his phoneme manipulation, he was showing more of an interest in reading on his own, and had less inhibitions. In the smaller class setting, Ms. XXXX testified that the Student was better at being able to remain on task and was participating more.

Based on her knowledge of the Student during the 2014-2015 Third Grade school year, Ms. XXXX testified that a class size of 20 or more students would not be good for the Student

because his anxiety would return, which would inhibit his learning and the Student would not get enough individual attention to meet his needs. In Ms. XXXX's opinion, the Student required an educational environment like [School 3], which would offer small class size, teachers who can instruct diagnostically as the year progresses, and contains an accepting community of similarly situated students. Ms. XXXX explained that class size is a huge factor for the Student. In a class size of 20 or more students, she opined that the Student would not have the same educational success because he needs a smaller environment where someone can really pay attention to his specific learning needs.

The Parents also presented the testimony of XXXX XXXX, who has a Doctorate Degree in Clinical Psychology. Since October 1999, he has been the President and owner of XXXX Associates and serving children with neurobehavioral disorders through a multidisciplinary practice. His practice specializes in children with attention disorders and learning disabilities and also provides a broad range of clinical consultation and assessment services. He is licensed in Maryland as a Psychologist and is board certified with American Board of Professional Neuropsychology.

Dr. XXXX performed a neuropsychological assessment of the Student on February 1 and 3, 2016. In addition to administering several standardized tests for his evaluation, Dr. XXXX reviewed the Student's performance on a previous Psychological and Academic assessment conducted by AACPS, the neuropsychological evaluation performed by Dr. XXXX, several standardized test scores performed by [School 3] in April 2017, and also interviewed the Student and the Parents. Dr. XXXX issued a report regarding his assessment of the Student and provided several recommendations regarding the Student's educational needs, which was admitted into evidence as P 54. My Findings of Facts numbers 100 through 110 are based on Dr. XXXX's

report.

Based on the Student's performance on standardized testing conducted by Dr. XXXX, he explained in detail the Student's disorders in the areas of Reading, Math, Dysgraphia, ADHD, and Anxiety and the impact these disorders had on the Student's ability to learn.

Dr. XXXX also discussed what significance there may be between the Student's performance during the WJ-IV test administered by him and the Student's performance on the April 2017 WJ-IV administered by [School 3]. He explained that standardized tests are "aged normed," meaning standardized tests scores are based on typically developing peers. As a result, when two standardized tests scores stay the same over time, it means the child's rate of progress is consistent with a typically developing child rather than a child with a learning disability. He also explained that children with learning disabilities often progress in a positively accelerating curve. In other words, over time the child does not have much progress and then suddenly there is progress. He explained that this experience is often referred to as "breaking the code" or "the light came on" and means that a combination of neurodevelopment and appropriate intervention over time will yield a more rapid rate of progress. As a result, based on the two WJ-IV test scores from 2016 and 2017, the Student's standard scores reflected substantial progress across the majority of the scores, which was indicative of meaningful progress. Dr. XXXX explained that based on his comparison of the two WJ-IV test scores, the Student's placement in a small highly structured environment, which employed an evidence based reading program like Read Naturally, yielded meaningful progress. Further, because the different scores are beyond any standard measure of error, the changes demonstrated a reliable improvement in the Student's academic functioning across multiple indexes.

Dr. XXXX testified about the recommendations he made in his February report including

the need for a highly structured self-contained environment throughout the Student's school day. In his opinion, the Student's cumulative impact of his executive functioning deficit, dyslexia, dysgraphia, anxiety, and ADHD required a smaller classroom. In such a setting, the Student could be monitored, be provided an opportunity to rehearse previously taught skills, an evidence based reading program could be implemented throughout the day, and distractions would be minimized. Dr. XXXX explained that the Student is impulsive, calls out, requires teacher redirection, prompting, and cueing. In a larger class size, with more students, it would be harder to provide the attention the Student requires. A larger, more inclusive class environment is too complex and moves too fast for the Student. In Dr. XXXX's opinion, the Student would be less available for learning in a larger class size. Dr. XXXX understood the value of being educated with typically developing non-disabled peers in a community-based inclusive school setting. However, on balance, based on the intensity of the Student's needs, Dr. XXXX opined he required the small self-contained environment in order to make the meaningful progress. Dr. XXXX indicated that ADHD is the quintessential executive function disorder. He stated that ADHD is a neurodevelopmental disorder and affects the Student's capacity for self-regulation. ADHD impacts the Student's capacity for behavioral control; his capacity to control cognition working memory; getting started on tasks; persisting without prompts, reminders, and cues; and to monitor the accuracy of his performance.

Dr. XXXX also discussed the Student's proposed November Fifth Grade IEP. He understood AACPS' recommendation for 15 hours of special education outside of general education, in a small self-contained/pull-out class setting. He also understood the IEP proposed two hours and 30 minutes of special education inside general education, in a co-taught setting, for Social Studies and Science. Further, he understood that that out of a 32 hour school week,

the remaining academic education hours would be inside general education supported by the Student's IEP. Under these circumstances, Dr. XXXX indicated that the proposed IEP would be inconsistent with his recommendations and previously stated opinions. He explained that even in the co-taught environment, with a class size of 20 to 25 students, based on the Student's executive functioning deficits, the complexity of his learning disabilities, the two hours and 30 minutes will be a lost opportunity for instruction for the Student and at the Student's age that lost opportunity is substantial. In such a setting, Dr. XXXX opined that the Student would not make progress. For the same reasons, Dr. XXXX testified that earlier IEPs were also inappropriate for the Student because each IEP consistently underestimated the intensity of the Student's needs. In Dr. XXXX's opinion, each IEP represented an incremental approach to intervention, which would have resulted in significant difficulties in the Student's foundational literacy, self-regulation, and ultimately issues with anxiety.

Dr. XXXX., the Student's mother, testified in great detail about the process of developing each IEP. She explained her concerns with the Student's behavioral issues, including inattention, distraction, and work avoidance. She also understood the Student's diagnosis of a Specific Learning Disability and the impact this disability had on the Student's ability to function and make educational progress within the general education/co-taught setting. Because of her concern, she anticipated the need to obtain private evaluations from Dr. XXXX and Dr. XXXX, as well as advice from Ms. XXXX, so that the Parents could advocate for the Students' need for a self-contained small class environment like [School 3] offers. In Dr. XXXX's opinion, the Student was on a trajectory of needing more services and supports. Based on her own research, Dr. XXXX understood that the Student was at a critical point in his developmental life where it would be important for him to gain literacy skills without delay so the Student would be able to

remain successful in school without frustration and/or a lack of confidence. She testified that when the Student was at [School 2] he was showing anxiety and frustration and did not want to go to school. She struggled at home to get the Student to do his homework. Since being placed at [School 3], the Student has transformed into a child who is excited to read, is actively engaged, and has become very involved with his education as well as his teachers and fellow students.

Regarding the need for a small class size like [School 3] offers so the Student can effectively manage his inattention and distractibility with supports, Dr. XXXX agrees with the opinions of Dr. XXXX, Dr. XXXX, and Ms. XXXX. After the November 2016 IEP was proposed by AACPS, Dr. XXXX and her husband, XXXX XXXX, both went to [School 1] to observe the setting, including a small self-contained classroom, during which time instruction was being provided by XXXX XXXX, a special education teacher with AACPS. Based on her observation, Dr. XXXX characterized the classroom as grand central station, with other staff members coming into or passing through the classroom. To Dr. XXXX it appeared that three separate classes were occurring because three students were sitting at a table and each were receiving instruction from three para-educators. She observed that the students in the classroom were not paying attention or were exhibiting work avoidance behaviors. She saw no routines or procedures being followed and, to Dr. XXXX, it appeared that there was no classroom management by the teacher. Dr. XXXX also observed students throwing clip boards and other teachers who spoke inappropriately to students. Based on the level of distractions and lack of control of the classroom, Dr. XXXX testified that the Student would not make any educational progress at [School 1] and the proposed placement was inappropriate.

AACPS argues that during each relevant IEP school year, based on the data it had at the

time, it proposed an IEP that was reasonably calculated to provide the Student with a FAPE. AACPS asserts that each IEP was developed using information obtained through the Student's educational record, testing, or observations by AACPS, and input from the Parents, including information the Parents provided from independent testing, observations, and educational records from [School 3]. With all the information provided, AACPS developed each IEP in collaboration and with agreement with the Parents, except in the areas of Services to be provided inside and outside the general education environment, due to the concern of large class size, and the proposed education placement, which also relates to class size concerns. However, AACPS contends that the each IEP addresses the impact a general education setting class size may have on the Student's disability and inattention issues through the provision of specialized instruction, supplementary aids and services, and instructional and testing accommodations. For these reasons, AACPS requested that the Due Process complaint filed by the Parents be denied.

To support its position, AACPS presented the testimony of XXXX XXXX. Ms. XXXX has a Master Degree in Education, Curriculum, and Instruction. She has been employed by AACPS as a special education teacher, resource teacher, or a behavioral specialist since 2008. She was accepted as an expert in the field of special education, curriculum, and instruction. Ms. XXXX's testimony focused on the Student's 2015-2016 Fourth Grade IEP but also addressed the 2014-2015 Third Grade IEP.

Ms. XXXX participated in the development of the Student's 2015-2016 Fourth Grade IEP. Ms. XXXX testified that, after a review of the Student's educational record, reports from [School 3], and Dr. XXXX's assessment, the IEP Team began to develop the Student's IEP. She explained that after collaboration and agreement, the Student's PLAAP, goals and objectives, supplemental aids and services, and testing accommodations were all agreed upon. However,

Ms. XXXX did note that the Parents wanted a daily communication log and disagreed with AACPS' proposal for a quarterly report.

During her testimony, Ms. XXXX discussed why a Reading Intervention Program was not included in the Student's IEP. She testified a Reading Intervention Program is not specialized instruction designed to meet a student's unique needs. When providing an evidence or researched based intervention it has to be delivered with fidelity, and if the program is modified or adapted to a student's needs it is not being delivered with fidelity. For this reason, Ms. XXXX stated that AACPS does not put a Reading Intervention Program into an IEP.

Ms. XXXX also reviewed the proposed Service hours inside and outside the general education setting, including the related service of OT, and explained that the Parents disagreed with the proposed service hours. She explained the Service hours were proposed based on several factors including the Student's strengths and weaknesses in each area affected by his disability and the Student's reported level of grade performance. With this background the IEP Team proposed service hours so that the Student could meet grade level curriculum, with supports.

Throughout the Student's Fourth Grade IEP, Ms. XXXX testified that the Student's issue with inattention and distractibility were addressed. The IEP provided for visual cues because of the Student's inattention, which would help him to remain on task. The IEP provided a graphic organizer so the Student could get his thoughts from his brain to a piece of paper in a coherent manner. The IEP provided for the monitoring of his test responses so it can be determined that the Student was appropriately responding to questions posed. She explained that extended time was provided because the Student had difficulty with initiating tasks and sustaining his attention to complete the task. The use of multiple breaks also served the purpose of assisting the Student

to maintain his attention. The IEP provided for reduced distractions, which served the purpose of addressing the Student's inattention and ADHD issues. In essence, Ms. XXXX testified all the supports and accommodations provided on the Student's IEP are designed to address not only the Student's learning disabilities but his issues with inattention and distractibility.

Ms. XXXX explained that the general education/co-taught setting at [School 2] would have had as many as 25 students in a class, although she indicated that it could have been less due to enrollment. She testified such a setting would have been appropriate for the Student through a highly engaging instruction that would be supported by the IEPs supplementary aids and supports and accommodations, which would have been infused throughout his school day. However, Ms. XXXX acknowledged that as class size gets bigger, the potential for the Student for being distracted and off-task grows, which would be same for any student. She also testified that in the areas of Social Studies and Science, the instruction of which would be offered inside the general education without co-taught setting, the Student would be provided the same meaningful education benefit through the implementation of the IEPs supplementary aids and services and accommodations.

Ms. XXXX disagreed with the opinion of Ms. XXXX and her recommendation for a small class size of five students because she felt that class size was an arbitrary number. In Ms. XXXX's opinion, based on the Student's PLAAP, the goals and objectives, with support provided through the supplementary aids and services and accommodations, the Student would gain meaningful educational benefit in a class larger than five.

XXXX XXXX also testified on behalf of AACPS. Ms. XXXX has a Master of Education and Reading. She has received training in several different Reading Intervention Programs. She has been employed by AACPS as a special education teacher or resource teacher

since 1998. She was accepted as an expert in the field of special education and reading.

Ms. XXXX participated in the development of the Student's August 2016-2017 Fifth Grade IEP. Like Ms. XXXX, Ms. XXXX explained what a Reading Intervention Program is and why it is not included in an IEP developed by AACPS. Ms. XXXX's testimony about a Reading Intervention Program did not differ from Ms. XXXX's testimony.

As to the development of the IEP, Ms. XXXX's testimony mirrored the testimony of Ms. XXXX. She explained that based on the information considered for the August IEP, the IEP Team agreed upon the Student's PLAAP, goals and objectives, supplemental aids and services, and testing accommodations. Ms. XXXX also described the levels of Service which were proposed by AACPS, including the hours of service inside and outside of the general education setting as well the proposed education placement at [School 2]. Ms. XXXX testified that the combination of instruction in a general education/co-taught setting would expose the Student to non-disabled peers and allow him to engage in the rich dialogue that occurs in this type of setting. However, the Student would also receive the support of a special educator and the IEPs supplemental aids, services, modifications, and supports to gain educational benefit. Ms. XXXX also explained that the Parents disagreed with the proposed service hours.

Ms. XXXX also offered testimony to address the appropriateness of the proposed IEP, in particular as it addressed the Parents' concern about class size and the impact of the Student's inattention and learning disabilities to access instruction. Ms. XXXX explained that the Student has difficulty with attention and executive functioning, which impacts his learning, his ability to organize, and his ability to remain on task within the classroom setting. The Student's proposed Fifth Grade IEP contained the same testing accommodations and the same supplementary aids, services, modifications, and supports provided by the Fourth Grade IEP. Much like Ms. XXXX,

Ms. XXXX explained that the supplementary aids, services, modifications, and supports serve the purpose of increasing and sustaining the Student's attention so that he could access the instruction with meaningful progress. Ms. XXXX added that all AACPS teaching staff members are trained to work with children's attention and distractibility difficulties. In her opinion the Student did not require a self-contained small class setting because, according to [School 3] reports, the Student was easily re-directed and could be educated with non-disabled peers. She also testified that whether it is a small or large class size success in a general education co-taught setting will depend on whether there is solid and engaging instruction provided within a structure to provide the student with the supports and accommodations that the student needs. Ms. XXXX added the number of students in a class is not determinative as to the appropriateness of a setting for a child. As it applies to the Student, Ms. XXXX opined that solid instruction was embedded in the Student's IEP through supplementary aids, services, modifications, and supports and the goals and objectives, which would capitalize on the Student's strengths so he can achieve educational benefit.

Ms. XXXX also testified about the development of the Student's November 2016 IEP, which resulted in a change of Services hours for the Student. In this IEP, AACPS proposed to increase the Student's special education hours outside of the general education setting, in a self-contained small class setting, to 15 hours for Language Arts and Math. The November IEP also proposed to provide two hours and 30 minutes of special education inside the general education/co-taught setting. However, Ms. XXXX offered no further testimony to support her earlier position as to how the IEP as proposed appropriately addressed the Student's inattention and learning disabilities in the context of a larger general education/co-taught setting.

During the hearing, there was substantial testimony as to the reasons why AACPS

increased the Student's Services hours to almost a full half-day in a small class setting. The Parents did not disagree with the increase in Services hours outside the general education setting and, in fact, believed AACPS was moving in the right direction. However, the Parents continued to disagree with any hours in the general education/co-taught setting for all the reasons they have raised throughout this case. They maintain that only placement in a small class setting all day will provide the Student a FAPE, which I address later in this decision.

Also during the hearing, there was a significant amount of testimony regarding the proposed educational placement at [School 1], which is the location where AACPS would implement the IEP. The Parents did not agree to this location because they found the classroom chaotic. The testimony of Dr. XXXX regarding the Parents' observations of [School 1] raised an issue about whether [School 1] was a proper school setting for the Student. The testimony of Ms. XXXX seemed to support the testimony of Dr. XXXX, especially as to the behavior and distractions that occurred during the observations. However, Ms. XXXX also explained that the conduct observed by the Parents was very unusual and has not occurred before or since the observation. The exercise of observing a class, for an hour or less, or on two separate days, can yield variable results. A favorable impression is formed if it was a good day. An unfavorable impression, if it was a bad day.

Either way, the outcome of a limited observation time period does not provide sufficient evidence to persuade me that the educational placement at [School 1] is inappropriate for the Student. Additionally, for the reasons I discussed above, there is no credible evidence to demonstrate that a teacher at [School 1] could not properly implement the level of support and accommodation that the Student needs to satisfactorily be educated in the general education/co-taught setting. I find the Parents did not prove that AACPS failed to offer a FAPE because it

proposed [School 1] as the location of services.

Another witness for AACPS was XXXX XXXX. Ms. XXXX is employed as a Non-Public Specialist with the AACPS Department of Special Education. She earned a Master in Education in 1980 and has 37 years of experience in general education, special education, and nonpublic settings. Ms. XXXX was accepted as an expert in the field of special education.

Ms. XXXX participated in the development of the Student's November 2016 IEP. She also observed the Student at [School 3] on November 11 and 15, 2016. My Findings of Fact numbers 148 through 151 reflect Ms. XXXX's observation of the Student.

Ms. XXXX testified that she has experience placing children in non-public schools, including children with attention and distractibility issues. However, she explained that placement in a non-public school usually requires that the student demonstrate he or she has extreme behaviors. In this case, Ms. XXXX testified that the Student was performing academically below grade level, but he is very cooperative and if he is off-task he is easily redirected, which does not amount to extreme behavior problems. In Ms. XXXX's opinion the Student was an ideal child to be in a public school. In relation to inattention and distractibility, Ms. XXXX explained that for some children a smaller class size is essential, but those are children with intensive behaviors. In terms of being able to focus and make progress, in her opinion, it is more about good instruction.

XXXX XXXX testified on behalf of AACPS. Ms. XXXX is a special education teacher in a self-contained classroom at [School 1] and was the teacher providing instruction at the time the Parents observed the setting at [School 1]. Ms. XXXX provided general testimony about the daily classroom and schedule at [School 1], including the use of a Reading Intervention Program, OT, and provision of supplemental aids, services, and supports. As a response to the Parents'

observation and concerns, Ms. XXXX testified after the Parents left [School 1] the students wondered why they were being observed for such a long period of time and wondered why the observers had returned on a second day. Ms. XXXX explained that the students expressed to her some anxiety about being observed and were upset and displayed frustration with the experience. She testified that usually observation lasts 30 minutes or less but the Parents were there for much longer than usual. She stated that the students have never acted that way before or since. Ms. XXXX also disagreed with the Parents' concern that there was no classroom management.

XXXX XXXX was the last witness presented by AACPS. Ms. XXXX earned a Master Degree in Special Education in 1977. She has been employed by AACPS in the field of special education since 1980. She has over 44 years of experience in general and special education in public and non-public settings. Ms. XXXX was accepted as an expert in the field of special education.

Ms. XXXX also participated in the development of the Student's November 2016 Fifth Grade IEP. In response to the Parents' position that the Student required a full day small class setting like that offered at [School 3], Ms. XXXX opined that the Student did not require such a restrictive placement. She explained that based on the information provided during the IEP meeting the Student does not need to be privately placed in a setting like [School 3]. She stated that the nature and severity of the Student's disabilities, his out-going social nature, his ability to be redirected are descriptors rarely possessed by a student requiring private placement. She explained that the Student's learning behaviors as described by Ms. XXXX, including that he complies with routines and schedules, is prepared with materials, and works well with a peer are all characteristics of a child for which public placement is appropriate. Ms. XXXX acknowledged that the Student's standardized testing showed variable results with strengths and

weaknesses in different areas. She also understood that the Student's [School 3] Progress Reports indicated that he was performing below grade level, which is why the Student's PLAAPs were modified. However, in Ms. XXXX's opinion none of the Student's grade level performances indicated private placement. Ms. XXXX also noted that the neuropsychological reports reflect that the Student is social and is able to engage with non-disabled peers. Those reports and teacher reports indicate that the Student has a good foundation of prior knowledge that he is eager to share. These factors indicate the Student would benefit from the general education setting. Ms. XXXX acknowledged that the Student demonstrates issues with inattention, distractibility, and the need for redirection but considers the reports of these behaviors to mild in terms of what a typical non-public student would demonstrate. She concluded that, based on the Student's academic, learning behavior, and sociability profile, he is not a student who requires a full day of special education programming in a restrictive setting like [School 3].

As noted earlier, an appropriate IEP "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 527 (4th Cir. 2002). The appropriateness of an IEP "turns on the unique circumstances of the child for whom it was created" and "must be reasonably calculated to enable a child to make progress in light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

As I considered whether the proposed IEPs provided the Student with a FAPE under the standards described by *Andrew F.*, I was also mindful that IDEA requires that a student be educated in the LRE and "removal of children with disabilities from the regular educational

environment occurs only when the nature and severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C.A § 1412(a)(5)(A) (2017); *see also DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989).

As the Parties noted during the hearing, “the big elephant in the room” is class size. I conclude that the Parents have failed to prove that the Student requires a more restrictive environment than a general education/co-taught classroom, with supports, services and pull-outs.

The Parents’ chief disagreement is that each IEP proposed the Student spend the majority, if not half his class time, within a combination of classes provided in a general education/co-taught setting or regular general education without co-taught services. Both settings would involve a class size greater than 20 to 25 students. According to the Parents’ experts in these settings, based on the Student’s unique circumstances with inattention, distractibility, and ADHD, the Student would not be able to make satisfactory educational progress, which denies the Student a FAPE. In the opinion of the Parents’ experts, the Student requires the small class size like that offered at [School 3].

AACPS responded that the nature or severity of the Student’s inattention and distractibility as impacted by his disability does not require removal from the general education setting. In other words, AACPS contends that the Student can be educated in the LRE. AACPS’ position is based on information provided by [School 3] and through observations, which indicates that despite the Student’s inattention and distractibility, he is easily redirected back onto task.

This case presents a classic conflict between the credibility of opposing expert witnesses. I was impressed with Dr. XXXX’s testimony. In his assessment of the Student, he considered

Dr. XXXX's report, the Student's progress reports, and teacher reports about the Student's behavior in the small class size at [School 3], as well as his own neuropsychological assessment. Dr. XXXX's report was presented during the development of the Student's 2016-2017 Fifth Grade school year IEP.

Based on the assessment, the Student's cognitive and academic functioning was in the low average to borderline range, with variable strengths and weaknesses in each area. As to the Student's neuropsychological functioning, Dr. XXXX found weaknesses in fine-motor speed and efficiency, perceptual organizational skills, and sustained attention. In addition to these deficits, Dr. XXXX diagnosed the Student with ADHD. His testimony on this diagnosis was helpful. As Dr. XXXX explained, ADHD is the quintessential executive function disorder, which impacts the Student's capacity for self-regulation, cognition, working memory, and behavioral control. Dr. XXXX explained that a less structured setting, referring to a large general education setting, would require greater self-control, which would predictably be more difficult for the Student. He testified that the general education environment, which he referred to as an inclusion environment, is too complex and moves too fast that the Student would not have the opportunity to make educational progress. With this background, Dr. XXXX opined that the Student's needs are so substantial that he requires the more restrictive environment of a small self-contained class setting across all academic areas.

However, Dr. XXXX failed to sufficiently explain why the Student's disabilities are so complex and so severe that he can only function in a small classroom. He did not, for example, explain where on a spectrum of a learning disability and inattention disorder does the Student fall in an attempt to describe the severity of his deficits. It is not enough to state that the Student has a learning disability and ADHD, which causes distractibility, and then conclude that a small

classroom is required for any educational benefit, especially when the evidence shows that the Student is easily redirected. Absent more specific testimony, Dr. XXXX's testimony failed to sufficiently address why the supports and services proposed in the IEP would be inadequate to address the Student's needs.

Similarly, Ms. XXXX testified that the Student has significant attentional issues that impact him across the entire educational setting, but failed to explain why the supports and services in the IEP are inadequate. She noted that Ms. XXXX advised her that when a fifth student entered the class of four in which the Student was participating, the classroom became very disruptive for the Student and affected his ability to pay attention and access the curriculum being presented. However, there is no indication that Ms. XXXX described if, how, and when the Student was able to refocus and what type of intervention the Student required to return his attention to school work.

Dr. XXXX made similar findings in her report that was considered during the development of the Student's 2014-2015 Third Grade school year IEP. However, at the time, Dr. XXXX found that the Student did not meet criteria for a diagnosis of ADHD. Nevertheless, Dr. XXXX recommended that the Student was at risk for developing this disorder and that a difficulty with frustration tolerance, task persistence, sustained effort, inattention, and inhibitory control all presented obstacles to learning. Accordingly, Dr. XXXX also recommended that the Student required a small class size. Her specific opinion was that a larger class size, greater than 20 students, was not appropriate given the Student's needs. Based on the consistent findings by both Dr. XXXX and Dr. XXXX, it is clear that the opinions of both would be applicable to all relevant IEP school years.

Opposing the opinion of Dr. XXXX and Dr. XXXX are Ms. XXXX, Ms. XXXX, Ms.

XXXX, and Ms. XXXX. According to Ms. XXXX and Ms. XXXX, through quality classroom instruction, supported by the Student's supplementary aids, services, program modifications, and supports, which would be infused through any general education setting, the Student would gain satisfactory educational benefit. The opinion of Ms. XXXX and Ms. XXXX do not provide me with much evidence to support AACPS' position except to establish that the Student requires support within the school setting to access the curriculum. Ms. XXXX's testimony established that AACPS has placed children with inattention and distractibility in a non-public restrictive setting, but those children demonstrate extreme behaviors requiring such a disfavored placement.

Ms. XXXX's testimony put into context the Student's unique circumstances to explain why, in her opinion, the Student did not require the restrictive environment of private placement in a setting like [School 3]. Ms. XXXX discussed the nature and severity of the Student's disability including that he was easily redirected, social, complies with routines and schedules, and works well with other students. Ms. XXXX acknowledged that the Student was academically functioning with below grade level performance but also explained that is why the IEPs have adjusted the Student's PLAAP and goals and objectives. She recognized, like every witness in this case has, that the Student has a good foundation of prior knowledge that he is willing to share in a classroom. Finally, Ms. XXXX was familiar with the Student's record of inattentiveness and distractibility as reported by [School 3] teachers and as recorded during observations. However, she considered such behavior to be mild and not so severe that the behaviors warranted private placement.

Like Dr. XXXX and Ms. XXXX, Ms. XXXX failed to state exactly what a typical non-public student would look like and how the Student differed. However, she listed specific characteristics that would permit the Student to be successful in a general education setting with

supports. I found her testimony persuasive. Particularly, I find it significant that the Student is distracted in the small classroom at [School 3], but teachers are able to redirect his attention. The Student can reasonably be expected to be distracted in a larger class size, but there is no evidence that a teacher in a large class cannot also redirect the Student. The Parents speculate that in a larger classroom, the teacher will not notice when the Student loses focus. This impression ignores the fact that the IEP calls for a co-taught classroom where the staff will know the Student has an IEP and that attention is a concern for which there are supports the staff must implement. Without question the Parents' position is that an increased class size from five to 25 will result in a proportional increase in distraction to the Student. From this position, based on the complexity of his learning disability as impacted by inattention and distractibility issues, the Student would not be able to make educational progress in any proposed general education setting. For the Parents' position to be correct, I must be persuaded by a preponderance of the evidence that the nature and severity of the Student's educational disabilities are such that placement in the general education setting cannot be achieved satisfactorily. After considering all the evidence and the opinions of both Dr. XXXX and Dr. XXXX, I conclude that the Parents have not met their burden. The evidence clearly demonstrated that since the Second Grade, the Student has showed a consistent pattern of inattention and distractibility. Observations revealed that the frequency of the Student's inattention can occur multiple times in a class period if not within several minutes. However, the evidence also demonstrated that the Student can perform in the class and make educational progress through implementation of the supplemental aids, services, program modifications, and supports of the type provided in each of the Student's proposed IEPs. Except for a general concern that a teacher in a general education setting would not be able to provide the Student with the same level of individualized attention like the Student

receives at [School 3], there is no credible evidence to demonstrate that a teacher in a general education setting could not properly implement the level of support and accommodation that the Student needs to satisfactorily be educated in the general education setting. Accordingly, because the IEPs for each relevant school year were otherwise properly developed and were reasonably calculated to enable a child to make educational progress in light of the Student's unique circumstances, I conclude that each IEP provided the Student with a FAPE.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parents failed to prove that AACPS denied the Student a FAPE during the 2014 – 2015 school year, the 2015 – 2016 school year, and the 2016 – 2017 school year. 20 U.S.C.A. § 1415(f) (2017); *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

ORDER

I ORDER that the Parents' February 3, 2017 Due Process Complaint is DENIED.

July 14, 2017
Date Decision Mailed

DA/da

Daniel Andrews
Administrative Law Judge

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2016). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party 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 court action. The written

notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

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