



STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

\* BEFORE KATHLEEN A. CHAPMAN,  
 \* AN ADMINISTRATIVE LAW JUDGE  
 \* OF THE MARYLAND OFFICE  
 \* OF ADMINISTRATIVE HEARINGS  
 \* OAH NO.: MSDE-MONT-OT-19-09151

\* \* \* \* \*

DECISION

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STATEMENT OF THE CASE

On March 22, 2019, [REDACTED] (Parent), on behalf of her daughter, [REDACTED] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).<sup>2</sup> On April 9, 2019, the parties attended the required resolution session. On April 18, 2019, the parties agreed that they were unable to resolve their dispute and notified the OAH of that conclusion in writing. 34 C.F.R. § 300.510(c) (2018).<sup>3</sup>

I held a telephone pre-hearing conference on May 6, 2019. The following individuals participated: Emily Rachlin, Esquire, on behalf of MCPS, and the Parent on behalf of the

<sup>1</sup> The Student's and other names have been masked in the Decision to protect the Student's privacy and facilitate eventual publication of the decision.  
<sup>2</sup> U.S.C.A. is an abbreviation for United States Code Annotated.  
<sup>3</sup> "C.F.R." is an abbreviation for the Code of Federal Regulations. Unless otherwise noted, all citations herein to the C.F.R. are to the 2018 volume.

Student. By agreement of the parties, a two-day hearing was scheduled for May 20 and May 22, 2019.

I held the hearing on May 20, 2019.<sup>4</sup> The Parent represented herself. Ms. Rachlin represented MCPS. The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R. § 300.511(a) (2018); Md. Code Ann., Educ. § 8-413(e)(1) (2018); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

The applicable regulations concerning the time for filing a decision state the following, in part:

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

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

*Id.* § 300.515.

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

- (1) Both parties agree in writing to waive the resolution meeting;
- (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;
- (3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

*Id.* § 300.510.

The parties requested that these timeframes be strictly adhered to. Therefore, in accordance with these regulations, the decision shall be issued on or before Friday, May 31, 2019,<sup>5</sup> which is within forty-five days of April 18, 2019, the date the parties informed the OAH that the resolution meeting concluded without a settlement. *Id.* §§ 300.510(c), 300.515(a).

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<sup>4</sup> The parties did not require a second day of hearings.

<sup>5</sup> The forty-fifth day falls on Sunday, June 2, 2019.

Procedure in this case is governed by 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. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 13A.05.01.15C; COMAR 28.02.01.

### ISSUES

Preliminary Matter:

Should MCPS' Motion for Judgment be granted?

The issues are as follows:

- (1) Did MCPS deny the Student a free appropriate public education (FAPE) during the 2018-2019 school year by failing to implement the October 10, 2018 Individualized Education Program (IEP), resulting in the Student not making progress toward academic goals?<sup>6</sup>
- (2) Did MCPS engage in procedural violations by failing to:
  - (a) provide the Parent with any assessment test data;
  - (b) afford the Parent an opportunity to inspect and review all education records with respect to the provision of FAPE showing the Student's progress toward IEP goals;
  - (c) have all necessary members of the IEP Team present during the March 5, 2019 IEP Team meeting; and
  - (d) provide the Parent with the IEP meeting notes within five days of the March 5, 2019 IEP Team meeting?

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<sup>6</sup> In the May 7, 2019 Conference Report, based on representations made by the Parent, I listed as one of the issues as whether MCPS failed to implement a March 2018 IEP; however, based on the record presented at the hearing, there is no March 2018 IEP. Instead, there is an April 16, 2018 IEP. Furthermore, it would appear from the record that the April 16, 2018 IEP was later revised on October 10, 2018 and, as such, the amended IEP is the operative IEP for determining whether MCPS denied the Student a FAPE during the 2018-2019 school year. Neither party filed a Motion to Correct the Conference Report to inform me of the error. Therefore, I modified the issue accordingly for purposes of this decision.

(3) Did any procedural violations impede the Student's right to a FAPE, significantly impede the Parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, or cause a deprivation of educational benefit?

(4) If MCPS denied the Student a FAPE, what is the proper remedy?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits on behalf of the Parent:

- Parent Ex. 1 – Notice of Individualized Education Program (IEP) Team Meeting, dated February 22, 2019; Alternative Assessments Eligibility Tool, dated March 5, 2019
- Parent Ex. 2 – Five-Day Verification Notice of Documents Provided After an IEP Meeting, dated October 12, 2018
- Parent Ex. 3 – Model Parental Consent Form, page 6 of a multi-page document, dated March 5, 2019; Evaluation Review of Cognitive/Adaptive Ability, an excerpt from a multi-page document, various dates; Speech-Language Re-Assessment Report, page 1 of a multi-page report, dated April 8, 2018 (Assessment date of March 14, 2018); Maryland Alternative Assessments, page 13 from a multi-page document, undated
- Parent Ex. 4 – IEP, Placement Data, page 33 of 35, dated March 5, 2019; [REDACTED] Neuroscience and Behavioral Medicine, Final Report, page 1 of 4, dated June 1, 2018
- Parent Ex. 5 – Counting One More and Drawing Moons, undated
- Parent Ex. 6 – Minute Math Addition, undated
- Parent Ex. 7 – True or False, date-stamped: December 12, 2018

I admitted the following exhibits on behalf of MCPS:

- MCPS Ex. 1 – Educational Assessment Report by [REDACTED] dated January 12, 2016
- MCPS Ex. 2 – Report of School Psychologist by [REDACTED] dated January 15, 2016
- MCPS Ex. 3 – Report of School Psychologist by [REDACTED] dated March 5, 2018
- MCPS Ex. 4 – IEP, dated April 16, 2018

- MCPS Ex. 5 – Model Parent Consent Form, dated April 16, 2018
- MCPS Ex. 6 – Amended IEP, dated October 10, 2018
- MCPS Ex. 7 – Participation in Alternate Assessments Criteria and Checklist, dated October 10, 2018
- MCPS Ex. 8 – Model Parent Consent Form, dated October 10, 2018
- MCPS Ex. 9 – School Year (SY) 2019 Quarterly Report Progress Notes
- MCPS Ex. 10 – Reading work samples, various dates
- MCPS Ex. 11 – Math work samples, various dates
- MCPS Ex. 12 – Social studies work samples, various dates
- MCPS Ex. 13 – IEP Team Meeting Sign-In Sheet, dated March 5, 2019
- MCPS Ex. 14 – IEP, dated March 5, 2019
- MCPS Ex. 15 – Resume of [REDACTED] Director, Department of Special Education Services, MCPS
- MCPS Ex. 16 – Resume of [REDACTED] Resource Teacher, Special Education, [REDACTED] Middle School ([REDACTED] MS)
- MCPS Ex. 17 – Resume of [REDACTED] Teacher, Special Education, [REDACTED] MS
- MCPS Ex. 18 – Resume of [REDACTED] Teacher, Special Education, [REDACTED] MS
- MCPS Ex. 19 – Resume of [REDACTED] Teacher, Special Education, [REDACTED] MS

Testimony

The Parent testified and presented testimony from the following witness:

- [REDACTED] Resource Teacher, Special Education, [REDACTED] MS, MCPS

MCPS presented the following witnesses, the Student's teachers at [REDACTED] MS, and each

witness was accepted as an expert in special education:

- [REDACTED] (Resource Teacher)
- [REDACTED] special education teacher (Social Studies Teacher)
- [REDACTED] special education teacher (Mathematics Teacher)
- [REDACTED] special education teacher (English Teacher)

## FINDINGS OF FACT

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

1. Except for a brief period of time in the sixth grade, the Student has attended the [REDACTED] program in MCPS' [REDACTED] Elementary School ([REDACTED] ES) (third through fifth grades) and [REDACTED] Middle School ([REDACTED] MS) (sixth grade).
2. The [REDACTED] program focuses on Alternative Academic Learning Outcomes aligned with Curriculum 2.0 and functional skills learned in school and community settings.
3. The [REDACTED] program offers a structured, small class setting.
4. In lieu of earning credits towards a Maryland High School Diploma, the Student is progressing toward a Maryland Certificate of Program Completion.
5. The Student is twelve years old and she has a significant cognitive disability.
6. The Student is qualified for special education and related services under the disability code of Intellectual Disability.
7. Academic areas affected by the Student's disability include: math problem solving, reading phonics, expressive language, pragmatics, receptive language, written language expression, and social skills.
8. On January 11, 2016, MCPS conducted a formal Educational Assessment utilizing the Brigance Inventory of Early Development III Standardized (Brigance IED III) to measure the Student's performance compared to that of same-aged children.
9. The Student's overall performance on the Brigance IED III fell in the weak area for literacy and the very weak range for math, indicating that the Student is performing significantly below grade level.

- a. In the literacy portion, the Student was able to show strong experience with books and texts, recite the alphabet, identify upper case letters, demonstrate some familiarity with the sounds that make up words, and read some community sight words and pre-primer sight words. She, however, demonstrated significant weakness in the area of visual discrimination, auditory discrimination, and phonological awareness.
- b. In the mathematics portion, the Student was able to compare different amounts, sort objects by 1 and 2 attributes, rote count to 20, match some quantities with numerals, and read numerals 1-10. She, however, demonstrated weakness in understanding number concepts, rote counting past 22, sorting objects by more than 2 attributes, solving word problems, knowing missing numbers in sequences, adding numbers, and subtracting numbers.

10. On January 15, 2016, MCPS conducted a psychological assessment (Psychological Assessment #1) to better understand the Student's cognitive, behavioral, and adaptive functioning.

11. The Psychological Assessment #1 consisted of reviewing the following sources of data: file review; classroom observation; behavioral observation (during testing); Reynolds Intellectual Assessment Scales (RIAS);<sup>7</sup> Comprehensive Test of Nonverbal Intelligence – Second Edition (CTONI-2)<sup>8</sup> – Parent Report; CTONI-2 – Teacher Report; Adaptive Behavior Assessment System, Third Edition (ABAS-3)<sup>9</sup> – Parent; and ABAS-3 – Teacher.

12. On the RIAS, the Student obtained a composite intelligence index of 41, which falls in the significantly below average range of general intellectual functioning compared to same-aged peers.

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<sup>7</sup> "The RIAS is an individually administered test of intelligence used to assess a range of cognitive abilities that represent a sample of what a person has learned and can use at the time of testing." MCPS Ex. 2.

<sup>8</sup> "The CTONI-2 is an individually administered, norm-referenced instrument that uses nonverbal formats to estimate the general intelligence of children ... whose performance on traditional, language-loaded intelligence tests might be adversely affected by subtle or overt impairments involving language or motor abilities..." MCPS Ex. 2.

<sup>9</sup> The "[a]daptive skills as measured by the ABAS-3 are defined as those practical, everyday skills required to function and meet environmental demands, including effectively and independently taking care of oneself and interacting with other people." MCPS Ex. 2.

13. On the CTONI, the Student obtained a full scale index of 59, which falls within the very poor range and exceeds that of less than one percent of same-aged peers for general intelligence.

14. There was also a statistical difference between the Student's pictorial scale and geometric scale on the CTONI, which suggests that her analogical reasoning, categorical classification, and sequential reasoning are better developed when using pictured objects as compared to geometric figures/objects.

15. On the ABAS-3, the Student's general adaptive composite score ranged from below average to average range at home, and from extremely low to below average range at school.

16. Beginning March 2018, MCPS conducted a series of evaluations in anticipation of the IEP Team's annual review of the Student's IEP as well as placement for middle school (sixth grade).

17. On March 14, 2018, MCPS conducted a Speech-Language Re-Assessment Report.<sup>10</sup>

18. On April 8, 2018, MCPS conducted a Brigance Inventory of Basic Skills (Brigance)<sup>11</sup> to determine the Student's present levels of performance in reading, phonics, writing, receptive language, and mathematics.

- a. In phonics, the Student showed strength in letter and sound identification; however, her disability continued to negatively impact her progress in phonological awareness and sight word recognition, and was below grade level (2<sup>nd</sup> or 3<sup>rd</sup> grade).
- b. In written expressive language, the Student achieved positive gains in writing, but still struggled with writing from left to right independently with no supports.

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<sup>10</sup> Neither party provided the full Speech-Language Re-Assessment Report to be offered into evidence. The Parent only included an excerpt (page 1 only) from the Report. Parent Ex. 3.

<sup>11</sup> The results from the Brigance are found in the Student's April 16, 2018 IEP. MCPS Ex. 4.

- c. In receptive language, the Student made progress on her goals and was able to produce sentences with target verbs and plurals given an initial model; however, the Student continues to need support in inferring what might happen next in a lesson or story. The Student benefitted from models to imitate expanded sentence length, sentence starter prompts, verbal and visual choices when answering questions, and continuous verbal praise and reinforcement. The Student's receptive one-word picture vocabulary test score was below average as compared to same-age peers.
- d. In speech and language (expressive), the Student had made progress toward her goals. The Student enjoys communicating with others, but needs reminders to use varying comments and questions when engaging others. The Student benefits from modeling. The Student's utterances ranged from 2 to 12 words, which is below average when compared against same-age peers. The Student's expressive one-word picture vocabulary test score was below average as compared to same-age peers.
- e. In pragmatics, the Student made progress toward her goals – she can produce sentences with target verbs and plurals given an initial model. She is able to finish sentence starters to narrate sequences or picture scenes. She is often able to describe how characters or people might feel in a situation, but she is not able to infer what might happen next in a lesson or story. The Student's conversation skills are functional for her classroom environment, but she needs assistance with expanding her conversational skills for the community. She receives occupational therapy services for fine motor skills in writing words and numbers.

19. On April 16, 2018, MCPS conducted a psychological re-evaluation (Psychological Assessment #2) to obtain information about the Student's current levels of cognitive and adaptive functioning.

20. The Psychological Assessment #2 consisted of reviewing the following sources of data: a review of the Student's confidential and cumulative records; behavioral observations; Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V);<sup>12</sup> and ABAS-3.

21. On the WISC-V, the Student obtained a full scale IQ score of 42, which falls in the very low range. This score is comprised of subtest scores for the verbal comprehension index and the fluid reasoning index, both of which were also within the very low range.

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<sup>12</sup> "The WISC-V is a set of standardized questions and tasks that assess an individual's potential for purposeful and useful behavior." MCPS Ex. 3.

- a. According to the verbal comprehension subtest, which measures the ability to access and apply acquired word knowledge, the Student's score reflects that her ability to verbalize meaningful concepts, think about verbal information, and express herself using words is below age expectations.
- b. According to the visual spatial subtest, which measures the ability to evaluate visual details and understand visual spatial relationship in order to construct geometric designs from a model, the Student performed within the very low range demonstrating that her attention to visual details was weak.
- c. According to the fluid reasoning subtest, which measures the ability to detect the underlying conceptual relationship among visual objects and to use reasoning to identify and apply rules, the Student performed within the very low range demonstrating that her attention to visual details was weak despite prompts to look carefully at the visual stimuli.
- d. According to the working memory subtest, which measures the ability to register, maintain, and manipulate visual and auditory information in conscious awareness, the Student performed within the very low range for her age.
- e. According to the processing speed subtest, which assesses the ability to rapidly identify, register, and implement decisions about visual stimuli, the Student performed in the very low range. Fluctuations in attention and poor visual analysis skills impacted her performance.

22. On the ABAS-3, the Student's general adaptive composite score improved since the last time she was tested; it was now average for both home and school. This score is comprised of composite scores for conceptual, social, and practical skills.

- a. According to the conceptual composite, which measures communication, functional academics, and self-direction, the Student performed within the low to very low range compared to same-aged peers. Though very verbal, the Student continued to make grammatical mistakes when speaking. The Student's reading, writing, and math skills were below age and grade levels; she was not able to independently tell time, use a calendar, or demonstrate money skills. It was noted that the Student is highly supervised and supported by adults in school and in the community; therefore, the score for self-direction was askew.
- b. According to the social skills composite, which measures leisure activities and social skills, the Student displayed average skills and social skills is considered a strength for her.

- c. According to the working memory subtest, which measures the ability to register, maintain, and manipulate visual and auditory information in conscious awareness, the Student performed within the very low range for her age.
23. On April 16, 2018, an IEP Team meeting was held at [REDACTED] ES. MCPS shared the data from a variety of assessments<sup>13</sup> with the Parent during the IEP Team meeting.
24. The IEP Team agreed that the Student's level of maturity improved over the course of the past school year, including: navigating challenges such as waiting her turn without tears or glaring at peers and initiating strategies to cool off. She was eager to help around the classroom, work more independently, and appropriately use resources available to her. The Student was described as happy with a "bright smile." MCPS Ex. 6.
25. The April 16, 2018 IEP contained appropriate goals and objectives in the following areas: Math Problem Solving, Reading Phonics, Expressive Written Language, Social Interaction Skills, Receptive Language, Expressive Language, and Speech and Language Pragmatics.
26. Based on the information gleaned from the assessments, the IEP Team determined that the Student would benefit from her continued participation in the [REDACTED] program in middle school but the Parent disagreed.<sup>14</sup> While pleased with the Student's progress, the Parent wanted her daughter to exit the [REDACTED] program because she felt the Student had outgrown the need for special education. Instead, the Parent felt that the Student required a more challenging program, such as placement in a general education setting.

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<sup>13</sup> Brigance, Psychological Assessment #2, as well as academic specific assessments (Letter Identification Assessment (taken on January 8, 2018), Phonological Awareness and Sight Word Recognition (taken on January 8, 2018), Functional Communication Profile-Revised (taken on April 8, 2018), Arithmetic Fluency Assessment (taken on April 4, 2018), Receptive One-Word Picture Vocabulary Test (taken on April 4, 2018), Expressive One-Word Picture Vocabulary Test (taken on April 4, 2018), and Sight Word Recognition Assessment (taken on December 12, 2017).

<sup>14</sup> The IEP Team also determined that the Student was eligible for Extended School Year (ESY) services.

27. On April 22, 2018, the Parent formally issued a written refusal of the Student's IEP to be implemented in an alternative education program.

28. At the start of the 2018-2019 school year, the Student attended [REDACTED] Middle School ([REDACTED] MS) without an IEP.

29. The Student struggled in the regular education setting even with supports. The [REDACTED] MS teachers reported:

English 6: If her one to one isn't available she tends to roam around the class and get distracted. This hinders the academic environment. Math: [The Student] is a pleasant young lady who will be missed when she goes to [REDACTED] MS]. Often [the Student] invades personal space, but I've gotten use to her gentle spirit and nature. Academic Literacy: Socially, [the Student] displays below grade level behaviors, such as unwanted touching of hair, body, and limited concept of personal space. Science: [The Student] loves to be in class to interact with peers and teachers. When [a] task becomes difficult she may get frustrated and will need a break. Physical Education: [The Student] needs a lot of support in class every day. All activities and class assignments have to be significantly modified, and even then she is having difficulty and requires a lot of one on one attention. She is unable both physically and cognitively to partake in the games/activities with the rest of the class so a modified activity has to be given daily. She constantly needs reminders of what to do, even though the routine has been the same since of the beginning of the school year. Socially, she is also having difficulty as she needs constant reminders to not touch others and give others personal space. When I have talked to her about following directions and class expectations she has difficulty following what I am asking of her and she will often cry if corrected or if she does not get her way.

MCPS Ex. 6.

30. A re-evaluation meeting was held on October 4, 2018, which was followed by an IEP Team meeting held on October 10, 2018.

31. During the IEP Team meeting, MCPS shared excerpts from the data taken during the March 5, 2018 WISC-V, January 11, 2016 Educational Assessment, and March 5, 2018 ABAS-3, as well as classroom observations provided by the [REDACTED] MS teachers, with the Parent.

32. The Student's IEP was revised on October 10, 2018 to place the Student at [REDACTED] MS, in the [REDACTED] program, for the remainder of 2018-2019 school.

33. Pursuant to the [REDACTED] program, the Student's special education services would be provided outside of the general education classroom because the Student's special education and speech language therapy could not be provided in the regular classroom with supplementary aids, services, program modifications, and supports.

34. The IEP provided that the Student would receive:<sup>15</sup>

- special education services outside of the general education classroom in reading, mathematics, social studies, science, and English for a total of 4 hours and 35 minutes a day;
- for the rest of the day, physical education, electives, and lunch inside the general education setting for a total of 2.75 hours per day; and
- speech and language therapy outside of the general education setting for 2.25 hours per week.

35. The IEP Team agreed that all educational services would be co-taught and supported and, when provided outside the general education setting, in a small classroom environment of approximately 13 to 14 students.<sup>16</sup>

36. The October 10, 2018 IEP goals for achievement by April 15, 2019, included:

- a. Math Problem Solving – “Given an addition problem with numbers within 30, [the Student] will use physical objects to represent the problem, write an equation with a symbol for the unknown number and solve for the missing value for (4 out of 5) word problems.”
- b. Reading Phonics – “When given an unfamiliar independent level passage of no more than 80 words, [the Student] will read the passage aloud at a rate of 76 Words Correct Per Minute (95% accuracy) and pause after commas and periods

<sup>15</sup> This amounted to 10.25 hours per week in the general education setting, and 23.5 hours per week outside of general education.

<sup>16</sup> In the general education setting, there is a general educator accompanied by a paraeducator. Outside the general education setting, there are two adults – a special education teacher accompanied by a paraeducator, as well as the potential for two more adults depending on whether related services are being provided in the room. Trial Tr., 100 (Test. of Resource Teacher).

with direct teacher support (e.g. assistance tracking words, punctuation, attention), for (4 out of 5) passages as measured by (teacher running record or curriculum based assessments).”

- c. Expressive Written Language – “When given a writing prompt during a teacher-  
lied interactive writing session, [the Student] will use a digital tool (e.g. Microsoft  
Word or Google Docs) to write a (1)-paragraph story that includes appropriate  
formatting (e.g. spacing between words and sentences, punctuation,  
capitalization) with no more than (5) errors per (50 words), for (4 out of 5) digital-  
publishing activities.”
- d. Social Interaction Skills – “After watching a video model of peers in a small  
group responding to questions about their emotional state, when in a small group  
and asked a question by a familiar adult (e.g. teacher, SLP,<sup>17</sup> para-educator) about  
his/her current emotional state (e.g. teacher asks “How are you feeling?”), [the  
Student] will respond verbally (e.g. “I’m feeling excited.”) or by pointing to at  
least (1) image on an emotion chart within (3) seconds from when the question  
was asked, in (4 of 5) questions asked.”
- e. Receptive Language – “[The Student] will answer complex questions related to  
vocabulary, inference, prediction, and cause and effect.”
- f. Expressive Language – “[The Student] will produce complex sentences to  
comment on topic with correct verb tense and subject-verb agreement.”
- g. Speech and Language Pragmatics – “[The Student] will respond appropriately in  
oral discussions of 3 exchanges by answering questions, asking questions, or  
commenting.”

#### MCPS Ex. 6.

37. These are the same goals as written in the April 16, 2018 IEP.

38. In order to achieve these goals, the Student was to receive the following

supplementary aids, services, program modifications, and supports:

- Repetition of directions;
- Monitoring of independent work;
- Allow use of organizational aids;
- Allow use of manipulations;
- Allow use of highlighters during instruction and assignments;
- Use of pictures to support reading passages, whenever possible; and
- Use of altered/modified assignments.

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<sup>17</sup> This acronym was not defined.

39. The IEP Team, however, deferred their decision on whether Extended School Year (ESY) services would be necessary.

40. The IEP Team agreed that no new evaluations or re-assessments were necessary until March 4, 2021.

41. The Parent agreed with the contents of the October 10, 2018 IEP.

42. On November 7, 2018 and January 25, 2019, MCPS produced quarterly progress reports referencing the Student's progress on the aforementioned goals (Findings of Fact No.

33). The Student was making sufficient progress to meet her goals, as follows:

- a. Math Problem Solving – In November 2018, the Student was able to demonstrate 1:1 number correspondence up to 3 independently, but with frequent teacher modeling and opportunities for practice. In January 2019, the Student was able to demonstrate 1:1 number correspondence up to 4 independently with daily reminders and practice. With full staff support, the Student can add up to 10 using manipulatives and tell time with continued support and practice.
- b. Reading Phonics – In October 2018 (baseline), the Student was reading independently at text level 28 (or beginning third grade) with 75% accuracy. In November 2018, she was reading with 76% accuracy in 2 out of 5 trials. In January 2019, the Student was reading independently at text level 30 with 80% accuracy.
- c. Expressive Written Language – In November 2018, the Student incorporates proper punctuation in 3 out of 5 sentences, and is writing multi-sentence paragraphs with regularity, but she requires continued support and practice organizing her writing through the use of pre-writing and post-writing. In January 2019, the Student began utilizing a Chromebook to write up her final draft with increasing competency. The Student is also learning to slow down to carefully express and organize her thoughts.
- d. Social Interaction Skills – In November 2018, the Student regularly expresses how she is feeling to staff using emotions, such as “happy”, “sad”, “frustrated”, and “upset”, but she requires continued support to describe why she feels that way or what occurred prior to her feeling these emotions. In January 2019, the Student continues to work on communicating what specifically is making her feel a particular emotion.
- e. Receptive Language – In November 2018, there was not enough data to measure this goal. In January 2019, the Student is able to make predictions with visuals,

with little or no assistance. She continues to work on describing her reasoning or expressing which clues is being used to come to her conclusions.

- f. Expressive Language – In November 2018, there was not enough data to measure this goal. In January 2019, when reminded, the Student is able to produce a sentence containing 6 or more words. She is able to use subject verb agreements with little or no assistance, but continues to work on irregular verbs.
- g. Speech and Language Pragmatics – In November 2018, there was not enough data to measure this goal. In January 2019, the Student is able to engage in 3 conversational turns with verbal cues; she has more success with formulating questions than providing comments.

43. On February 22, 2019, MCPS placed the Parent on notice that it was convening an annual IEP Team meeting for March 5, 2019, to begin at 11:15 a.m. The purpose of the meeting was to update the IEP for the 2019 – 2020 school year based on the Student's progress.

44. MCPS informed the Parent that it anticipated the following school personnel to be present at the meeting: a special education teacher, the principal or designee, IEP Chair, and speech and language pathologist.

45. On March 5, 2019, an IEP Team meeting was started fifty minutes late. The Resource Teacher forgot the start time. The Resource teacher did not contact the Parent to tell her that the start time was delayed.

46. When the meeting convened, the Parent participated via telephone, and the Resource Teacher and the Social Studies Teacher were present at [REDACTED] MS. No one else from MCPS participated in the IEP Team meeting.<sup>18</sup>

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<sup>18</sup> Based on the credible evidence, I find that MCPS committed a procedural error on this issue. The Parent contends that she did not hear an introduction from the regular education teacher. Trial Tr., 59-60. The Resource Teacher testified that "I did all the talking" on behalf of the other IEP Team members. *Id.*, 65. The Resource Teacher also testified that the regular education teacher arrived late for the meeting, left early, and had only participated "[f]or most of the meeting." *Id.*, 48, 66. Though MCPS offered into evidence an IEP Team Meeting Sign-In Sheet (MCPS Exhibit 13) showing that the regular education teacher was present for the meeting, the Resource Teacher failed to obtain a signature from the regular education teacher on the Alternative Assessments Eligibility Tool (Parent Exhibit 1) to demonstrate that the parties were in agreement that the Student was eligible for alternative assessments. The latter must be signed by the participants of the IEP Team meeting and, according to the Resource Teacher, she failed to obtain the regular education teacher's signature on that form. *Id.*, 67-69.

47. The Resource Teacher conducted an abbreviated IEP Team meeting (it lasted approximately twenty to twenty-five minutes), she read through the 35-page IEP quickly, and she was the only MCPS representative to speak regarding the contents of the IEP.

48. The data gathered to support the contents of the March 2019 IEP came from MCPS teacher reports, gradebook data, the April 16, 2018 Psychological Assessment #2, January 11, 2016 Educational Assessment, and March 14, 2018 Speech-Language Re-Assessment Report.

49. The development of the March 2019 IEP depended on the speech and language pathologist's participation in the IEP Team meeting because of the recommendation for ESY services. In advance of the IEP Team meeting, the speech and language pathologist gave input with regard to the Student's present levels of performance as well as recommendations regarding proposed services and goals. The input was electronically submitted into the IEP. There had not been an agreement in advance of the meeting between the Parent and MCPS to excuse the special education provider's participation at the IEP Team meeting.

50. The development of the March 2019 IEP did not depend on a general education teacher's participation in the IEP Team meeting, but there had not been an agreement between the Parent and MCPS to excuse the general education teacher's participation in the meeting.

51. The meeting was contentious from the outset because of the Resource Teacher's failure to begin the meeting on time and because of her failure to update the Parent with a new start time.

52. For the present levels of performance, the March 2019 IEP recited many of the findings from the November 7, 2018 and January 25, 2019 quarterly progress reports, and expanded upon that information by providing updates as of March 2019.

53. New goals were incorporated into the IEP based on the Student's present levels of performance.

54. The March 2019 IEP provided the Student with the same amount of service hours as were contained in the October 2018 IEP.<sup>19</sup>

55. The IEP Team, however, determined that the Student was not demonstrating "emerging skills or breakthrough opportunities" and would likely experience regression on her program toward critical life goals over the school break. MCPS Ex. 14. The IEP Team further found that the Student's regular school year would be "significantly jeopardized" if she did not participate in ESY services for reading, math, and independent life skills. *Id.*

56. The recommendation for ESY services included four weeks of special education services (19.75 hours per week) and speech and language therapy as a related service (.75 hours per week).

57. The IEP Team determined that [REDACTED] MS was capable of implementing the March 2019 IEP.

58. The Parent told the IEP Team that she is working with the Student at home on time and money skills, and using punctuation in sentences. The Parent also inquired into additional academic opportunities for her daughter that may be offered by MCPS. The Parent stated that she and the child go to the public library twice a week to participate in tutorial services. Lastly, the Parent mentioned that the Student enjoys playing basketball.

59. The Resource Teacher did not provide the Parent with the requisite Five-Day Verification Notice of Documents Provided After an IEP Meeting form.

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<sup>19</sup> *Supra* Findings of Fact No. 34.

60. The Resource Teacher gave the Parent the IEP on March 15, 2019 and only provided the document to the Parent after the Parent asked about it.<sup>20</sup>

61. The Student does not present with behavioral issues in the classroom.

62. The Student does not require a one-on-one aide to access the curriculum.

63. The Student benefits from interacting with non-disabled peers.

### DISCUSSION

#### Presentation by the parties

In her Complaint, the Parent wrote:

On March 5, 2019, a conference call IEP meeting was scheduled, no teachers were present but one. [The Resource Teacher] promised to send home the IEP notes with sports information and tutor resources as of today 3-21-19 I have yet to receive any resources on a tutor for [the Student] or basketball information which I requested months ago. [The Resource Teacher] never returns my calls nor do I ever get any updates on [the Student's] progress or progress report[s]. [REDACTED] MS] does not accommodate [the Student's] intellectual disability. I did research and found a possible great fit school – [REDACTED] and [REDACTED] – these schools specialize in intellectual disability as well as emotional problems. ...

OAH Official Case Record. She also attached a copy of the March 5, 2019 IEP, with various handwritten notations, questioning (1) whether the Student made progress on the goals during the 2018-2019 school year; (2) why the IEP Team did not identify any area requiring a re-assessment; (3) going forward (2019-2020 school year), why there were no additions or modifications to special education or related services needed; and (4) why the Student was not participating in statewide assessments.<sup>21</sup> *Id.*

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<sup>20</sup> Parent's handwritten notation on the March 5, 2019 IEP, p. 1 of 35. See OAH Official Case Record. COMAR 28.02.01.22B(1).

<sup>21</sup> The Partnership to Assess the Readiness for College and Careers (PARCC) assessment.

During her opening remarks, the Parent also stated that she was “very unsatisfied with the support system” that is in place for her daughter at [REDACTED] MS. Trial Tr., 23. In support of her position, the Parent testified that:

My daughter has been a student at [REDACTED] MS] since 2018. My daughter has not made any progress, nor has any assessment tests been done. The resource counselor, [Resource Teacher], has made it impossible for me to follow up on my daughter’s progress. I have reached out to her on several occasions. [The Resource Teacher] refuses to give me any updates on my daughter’s progress. An IEP meeting was held on March the 5th, 2019 and no one was in attendance except for one teacher. The IEP notes show only one signature. No one is ever available when I call the school to speak to her teachers. They never return any of my calls. This has been going on since my daughter enrolled in 2018 at [REDACTED] MS]. [REDACTED] MS] has no curriculum in place that targets or challenges my daughter in areas unknown to her. I would like to review and inspect her school records. I have seen no recent assessments or educational plans for my daughter. I’m very unhappy with the way my daughter is being treated. I have seen her school work and it is unacceptable and horrifying to witness that the teachers in all of her classes are not directing her in punctuation, grammar, and writing smaller, nor are they using lined paper. I’ve taught [the Student] to write her full name and date in school. She is not being corrected in school when she fails to remember. [The Student] has an intellectual disability which makes it hard for her to stay on task. I’ve informed [the Resource Teacher] last year of this behavior. I had to call the school office 10 days later, after the IEP meeting, in order to receive a copy from [the Resource Teacher]. I’m entitled to a copy within five days of the IEP meeting. [The Resource Teacher] has treated me and my daughter unfairly in failing to allow my daughter the resources she needs to live and help her live a productive life. ... I will not allow my daughter to be treated in this manner any longer. I am withdrawing her from [REDACTED] MS] at the end of the school year. [REDACTED] MS] is unsupportive in advancing my daughter to a new level. This cannot be fixed the way they have all mistreated my daughter.

Trial Tr., 26-28 (Test. of Parent).

The Parent also testified that the Student’s Intellectual Disability negatively affects her ability to access the curriculum, because “[s]he’s unable to stay on task without having a one on one. She’s easily distracted and she does not stay on task.” *Id.*, 31-32. Moreover, the Parent insisted that she has asked MCPS personnel numerous times, at each IEP Team meeting, to allow the Student to have a one-on-one and the school system “always tell[s] me if one is available.”

*Id.*, 32. Referencing Parent Exhibit 4, the Parent testified that the Student's doctor is recommending one-on-one support. In that letter, dated June 1, 2018, the doctor wrote:

[The Student] is an 11 year old with moderate intellectual disability who presents for evaluation given mom's ongoing concerns that she is not being appropriately placed by her school. Though she remains significantly delayed compared to grade level, she has demonstrated an ability and willingness to learn, and should be challenged to continue improving her reading, writing, and math skills. She would also benefit greatly from skills training, including cooking, cleaning, and laundry, to help prepare her for independent living once she reaches adulthood. She has a good potential for living without need for day-to-day aid, and should be directed towards that goal.

Parent Ex. 4.

Therefore, the Parent is requesting placement at [REDACTED] because

[the Student] definitely needs a one on one all day long and they provide that. And also, in the summer, when school break is in, school is out for two weeks and they come back. They have their own ESY program where she's going to school all year long, only two weeks when school is out and [the Student] can definitely benefit from ESY all year long in the summer and they provide that.

And she can stay there until she's 21. When she becomes 18 they help to train her -- which she is certificate bound. Help to train her for a skill and [REDACTED] takes her to schools. They have Walgreens, Target, different places. They take them to work and they stay with them as a one on one coach and then they bring them back and that's when the school bus comes.

But [the Student] could stay there until she's 21, which I think will be a great fit because she needs one on one. She's easily distracted. She wanders off and she doesn't stay on course and her last three schools, [REDACTED] MS], [REDACTED] MS], and [REDACTED] ES] are all aware of this.

[The Student], if you leave her to be, she's -- could find her anywhere. A one on one coach would be perfect for [the Student] and in the back of Exhibit 4 her doctor even stated that [the Student] would do really good and maybe one day wouldn't need any assistance with a one on one if she's directed in learning a skill and having a one on one to show her really the meat of what she's supposed to be doing. Right now, [the Student] is left to herself in a classroom and she's pretty much the class clown and I'm just tired of it.

Trial Tr., 77-78 (Test. of Parent).

The Parent also called as her witness the Resource Teacher to testify concerning the alleged procedural errors that occurred during the March 5, 2019 IEP Team meeting. To begin, the Resource Teacher agreed that the meeting was a “little unorthodox,” because it did not start on time. Trial Tr., 48 (Test. of Resource Teacher). The Resource Teacher explained that due to a clerical error, she started the meeting late – instead of beginning the meeting as scheduled at 11:15 a.m., it began after 12:00 p.m. (approximately fifty minutes late). The Resource Teacher said that when she called the Parent, the Parent was clearly upset by the delayed start time. The Resource Teacher indicated, however, that she offered to have the meeting rescheduled, but the Parent said no.

The Resource Teacher disagreed with the Parent’s position that the meeting convened without all required Team members. The Resource Teacher testified that she, the Social Studies Teacher, and a general education teacher were present during the meeting. Though she agreed that the speech and language pathologist was not present at the meeting, the Resource Teacher stated that the speech and language pathologist’s participation was not necessary since the provider gave her input, electronically in the IEP, with regard to the Student’s present levels of performance, as well as recommendations regarding proposed services and goals, in advance of the meeting.

Despite the Parent’s protestations to the contrary, the Resource Teacher claimed that at the outset of the meeting, she and the other participants introduced themselves on the record followed by the Resource Teacher predominately taking over the conversation for the remainder of the meeting. The Resource Teacher felt it necessary to streamline the meeting since it started so late. The Resource Teacher also explained that due to the late start time she forgot to have the requisite paperwork available for signatures and had to obtain signatures after-the-fact. The

Resource Teacher said that she was not able to obtain the regular education teacher's signature despite her best efforts.

On the topic of assessments, the Resource Teacher explained that in March 2019 the IEP Team was conducting an annual meeting as opposed to a review meeting. The difference between the two is that the focus of an annual meeting is "where we look at progress and make updates to the IEP and updates on goals" and the review meeting is "where you go through all the updated testing, such as educational assessments, speech and language assessments, and psychological assessments." Trial Tr., 50 (Test. of Resource Teacher). The Resource Teacher testified that no new evaluations or re-assessments are required until March 4, 2021, unless the Parent requests testing beforehand. *Id.*, 51.

Finally, the Resource Teacher disagreed with the Parent's characterization that MCPS failed to provide her with a copy of the IEP within five days of the IEP Team meeting. The Resource Teacher explained that she had the Parent's verbal permission to provide her with copies outside the timeframe. The Parent provided the permission during the March 2019 IEP Team meeting. The Resource Teacher nevertheless acknowledged that "I may have just over-exercised my liberties with that" in providing the Parent with a copy of the IEP. *Id.*, 57.

For its part, MCPS argues that the Student is making meaningful progress in the [REDACTED] program at [REDACTED] MS, and she is appropriately placed. MCPS presented testimony from four experts in the field of special education to demonstrate that the Student is making or has made progress toward her goals during the 2018-2019 school year. Specifically, the Student is learning foundational skills in mathematics that she never had before, she is reading at the third grade level when at the start of the school year she was reading at the second grade level, and she is fitting in socially with her peers.

Before going into the curriculum, MCPS asked the Resource Teacher to testify about the Student's placement in the [REDACTED] program. The Resource Teacher began by indicating that she coordinates the special education program at [REDACTED] MS, which includes the scheduling of IEP meetings as well as supporting instruction and planning.

The Resource Teacher said that she first met the Student at the spring 2018 transition IEP Team meeting held on April 16, 2018 to discuss the Student's placement in middle school. The Resource Teacher testified that despite the IEP Team's recommendation that the Student continue in a [REDACTED] program at [REDACTED] MS,<sup>22</sup> the Parent said no and instead enrolled the Student in her home school, [REDACTED] MS. The Resource Teacher indicated that since the [REDACTED] program is an alternative learning outcome program, a parent's permission is necessary to place the child in that program. Here, the Parent did not consent to the Student continuing in the [REDACTED] program.

The Resource Teacher testified that the next time she interacted with the family was in October 2018, when she participated by telephone in an IEP Team meeting to amend the April 2018 IEP. The IEP Team meeting was held at [REDACTED] MS. According to the Resource Teacher, the Parent contacted her approximately two weeks prior to the IEP Team meeting to tour [REDACTED] MS and learn more about the [REDACTED] program at [REDACTED] MS. The Resource Teacher understood that the Student was not performing well at [REDACTED] MS and had a "few encounters – unpositive [sic] encounters." Trial Tr., 91 (Test. of Resource Teacher). After the tour, the Parent submitted her written approval for the Student to attend the [REDACTED] program at [REDACTED] MS. Thereafter, the Student began classes at [REDACTED] MS on October 10, 2018.

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<sup>22</sup> The Student was attending [REDACTED] ES' [REDACTED] program.

The Resource Teacher explained that the Student has a significant cognitive disability and, as such, qualifies to participate in Maryland Alternative Assessments. Very specifically, the testing found that:

[The Student's] scores [on Brigance IED III (per the January 12, 2016 Educational Assessment)], if you look at her overall literacy composite and mathematic composite scores, those are – she scored a 75, which is considered weak, and a 61, which is considered very weak. It just shows that she has difficulty with a lot of those basic foundational skills and she's still learning those basic foundational skills.

Trial Tr., 95-96 (Test. of Resource Teacher); *see also* MCPS Ex. 1. According to the March 5, 2018 psychological re-assessment, the Student's full scale IQ is 42 and her adaptive functioning is impaired. MCPS Ex. 3. According to the 2016 psychological assessment (MCPS Exhibit 2), the Student's scores "are significantly lower than you would see on age-alike peers[.]" and "[h]er verbal intelligence score was 43. Non-verbal intelligence was a 56 and her composite intelligence index was a 41." *Id.*, 96-97. Though, the WISC-V score shows social behaviors as a strength for the Student. MCPS Ex. 3.

In light of these test scores, the Resource Teacher confirmed that the Student is a good fit for the [REDACTED] program and her profile is on par with other students attending the [REDACTED] program at [REDACTED] MS. The Resource Teacher explained that "things that would come naturally for us, [the Student] needs to be explicitly taught," such as organizing a binder, consistently putting your name and date on a paper in the correct place, or making a purchase at the grocery store from start to finish is difficult for the Student. Trial Tr., 94 (Test. of Resource Teacher). The Resource Teacher indicated that the [REDACTED] program helps students to learn these life skills.

When we look at overall – [the Student] is a highly social young lady. So, when I spoke earlier to certain things we would have to -- that we would want to explicitly teach her, because she's so social we would want to make sure she's safe in the community and we can do social stories, things of that nature in our program and, you know, making sure she's well-versed in how to conduct herself,

knowing who is – safe people in the community if, for some reason, she was separated from her mother. Would she be able to identify the safe people in the community because she’s – being social is a strength for her. We need to teach her how to appropriately use that strength because, as you – this – could be something – those – those nuances, those inferences might be lost. ... So, we want to make sure we explicitly teach those pieces.

*Id.*

The Resource Teacher further explained that the [REDACTED] program is a non-diploma bound program for students with mild to moderate intellectual disabilities. The program marries a student’s IEP goals with the Maryland State standards and MCPS’ standards. [REDACTED] students are also exposed to grade-level content. In other words, the [REDACTED] program must adhere to Maryland’s grade standards of what skills students are able to learn and “massage and manipulate the curriculum to pull out those life skills.” Trial Tr., 99 (Test. of Resource Teacher). More specifically,

And see how they apply – when I say pull out those life skills, when we talk about decimals we might be talking about decimals – and we’ll talk about decimals more so in terms of money. When we talk about algebraic concepts, we talk about algebraic concepts in – you have \$5 in your pocket and you want to buy a \$3 bag of chips, do you have enough money? Those type of – so, we get to look at those real life concepts and play on those and pull those out and spend more time on that instruction.

*Id.* Additionally, there is a community piece where students in the [REDACTED] program have an opportunity to apply their skills in real life situations.

The Resource Teacher testified that the ultimate goal for students in the [REDACTED] program is for them to be:

very well-versed in their demographic information and those of their safe people to contact, like parents and guardians, knowing their phone number, knowing their address. We also want to make sure that we’re building upon those foundational skills, making sure they can communicate their full name. We also wanted to – we build upon their academics in reading and math and then just

exposing them to different life events or career opportunities. ... Because they do more vocational work in high school. So, we're still very academic.

*Id.*, 102.

The Resource Teacher further indicated that students in the [REDACTED] program participate in small self-contained classrooms (up to 14 students) for academics with no less than one special educator and one paraeducator present in the classroom, and in the general education setting (*e.g.* lunch, physical education and an elective) the students are interacting with non-disabled peers. In that setting, there is one general educator and one paraeducator.

The Resource Teacher testified that she has observed the Student in her academic classes and described her as “engaged in classroom – engaged in instruction and – and participating. She’s on par with her peers.” Trial Tr., 103 (Test. of Resource Teacher). The Resource Teacher also indicated that she often sees the Student during lunch break and described her in that setting as “typically happy.” *Id.*, 104. On the other hand, the Resource Teacher confirmed, to the best of her knowledge, that the Parent has not visited the Student at school nor observed her in the [REDACTED] classroom setting. The Resource Teacher further indicated that the Parent had not sought any records from her directly concerning the Student’s progress.

On the issue of curriculum, the English Teacher testified that she has been the Student’s developmental reading specialist since October 2018. According to the English Teacher, the instruction period is approximately forty-five to forty-nine minutes per day and includes: reading fluency, word work, and reading comprehension strategies and skills.

In terms of the Student’s progress during the 2018-2019 school year, the English Teacher testified that when the Student began attending the [REDACTED] in October 2018, her decoding baseline was at a text level of 28, which corresponds to beginning third grade. At the mid-year assessment in January 2019, the Student’s text level increased to 30, which corresponds to a mid-

third grade level. Today, the Student is decoding at a text level of 38, which corresponds to a late third grade level with self-correcting using Word. In addition, the Student is reading high frequency words at the third grade level as compared to the second grade level which was her baseline in October 2018. Furthermore, the Student's word attack skills are at a text level 38, which corresponds to a third grade level.

The Student's comprehension, on the other hand, is a grade level below that but the English Teacher described it as "understandable," because most [REDACTED] students struggle with their comprehension skills. Trial Tr., 141 (Test. of English Teacher). For instance, the Student can answer what, who, and where questions, but she struggles with why and how questions. On the other hand, the Student is able to glean details from text and identify the main idea from a text, but only with modified grade level text. To resolve this, the English Teacher gives individualized instruction to the student in the small group setting.

The English Teacher described the Student as "motivated in class. She likes reading and she likes to participate. She likes to raise her hand when she wants to answer, especially when it comes to comprehension instruction. ... She likes to express herself verbally." *Id.*, 144. The English Teacher also indicated that the Student does not present with any behavioral concerns in the classroom; the Student is motivated to learn.

In her expert opinion, the English Teacher testified that the Student has made meaningful and steady progress in English. Specifically, the Student is:

quite adept with letter/sound correspondence ... she can ... identify initial and final sounds, but [she is] inconsistent with the middle sounds as well as with manipulating phonemes so as to blend and segment it to decode words. She's able to decode the high frequency words with automaticity at beginning third grade level and readily decode words with consonant vowel consonant pattern and words with long vowel sounds, but inconsistent with compound words and words with prefixes and suffixes.

[F]or reading fluency, when she first came in October she -- it was indicated in the assessment that she's reading independently at text level 28 or beginning third grade level with 41 words per minute at 75 percent accuracy rate. She's noted to read in monotone with very little expression and mostly word by word with frequent extended pauses, sound outs, self-corrections, repetitions due to difficulties with specific words or word structures. ... Then mid-year assessment indicated that she's steadily making progress and she's now reading at level 30 or mid third grade level. And then the quarterly progress she indicated she was text level 38.

[F]or comprehension, it indicated that [the Student] scored eight out of 24 as she struggled with generating logical and reasonable questions related to that text, as well as in summarizing the text with ideas and facts in her own language. She's unable to make prediction about the text and mostly copied the words from the text. ... And the mid-year assessment indicated a score of 10, which is a little higher from the first one, out of 24 and, basically, she was demonstrating slow but steady progress and she struggles when it comes to understanding the text read and demonstrates weakness in using sufficient textual evidence to support or explain an idea or inference about the text.

Trial Tr., 146-147 (Test. of English Teacher). In her expert opinion, the English Teacher testified that the [REDACTED] program is an appropriate placement for the Student, who she described as a capable learner and squarely in the average range for peers in the [REDACTED] program, and she is motivated and eager to learn.

The Mathematics Teacher testified that she is the Student's math teacher during the second instructional period (approximately forty-eight minutes per day). The class size is approximately thirteen students with two teachers (herself and a paraeducator). According to the Mathematics Teacher, math is a challenge for the Student because:

[she] came to us at [REDACTED] MS] with really a deficit in her math foundational skills and that would be her rote counting, her one on one correspondence. And so, she's working at a very -- she's working at an appropriate level for her. She is learning addition and she is learning subtraction, as well as time skills and money skills.

Trial Tr., 159 (Test. of Mathematics Teacher).

Nevertheless, in her expert opinion, the Mathematics Teacher testified that the Student is absolutely making progress in math. The Student was performing at a kindergarten level in March 2019, and she is now performing at a lower first grade level in May 2019. In addition, since October 2018, the Student has been able to: (1) increase her rote counting to nine with more consistency, (2) consistently perform one on one correspondence to five, (3) count to thirty using a number line, (4) start work independently, and (5) persevere through and complete her work independently. The Mathematics Teacher also commented that:

one of the beautiful things also is to see that she's needing decreased support from teachers because we give her a great deal of support. She sits right next to me so that I can make sure to meet those needs and we're trying to lesson up, back up some of the supports to see what [the Student] can do on her own.

Trial Tr., 160-161 (Test. of Mathematics Teacher).

In addition, the Mathematics Teacher described the Student as “pretty happy” as well as “happy and productive,” but acknowledged that:

We redirect her a lot. [The Student] can get off task. Part of it is, again, because math is hard. It's hard because she doesn't have – she hasn't developed the foundational skills necessary. So, but over time I'm seeing less and less of that and that's what we hope for in a class, is to see a student who's starting to – to show some confidence and that's what she lacks in math. And so, yeah, we do redirect her. We see some off task behaviors and – but she's redirectable and she's amenable to it and she loves for us to work with her.

*Id.*, 163-164. However, the Mathematics Teacher did not suggest that the Student presented as a behavioral problem in the classroom; specifically stating, “I don't really see behavior needs.”

*Id.*, 168.

Overall, in her expert opinion, the Mathematics Teacher testified that the Student has made meaningful and steady progress in math. Specifically, “[w]ord problems are a strength for her because of her reading capability. She is able to read the word problems. She's able to pull the numbers out of the word problems.” *Id.*, 165. And, while the Student still struggles with

“What is the problem asking of me?” and “one on one correspondence,” the Mathematics Teacher is seeing improvement – “with supports we are working towards increasing her ability to do this with decreased support.” *Id.* Equally important, according to the Mathematics Teacher, “I’m noticing is her behaviors of I can’t do this are changing. I see less of those. I see her feel successful. I feel her able to start, continue, finish her work.” *Id.*, 166.

With respect to the Student’s present levels of performance, the Mathematics Teacher added:

I just did a sort of reassessment. I do them periodically throughout the year. ... What I found out is that she can rote count to nine. That – from memory. That’s an improvement. She can use a number line and now point to every number in its succession to 30. So, she’s doing the pointing herself, I’m no longer using that to do that. Her one on one correspondence is solidly from one to five, but she’s showing that she can do seven and nine as well, which is a huge improvement, consistently is – is how I use it.

For addition, I’m seeing some progress in the areas of application. So, it’s not just that there’s four plus two. What does it mean, four plus two? That means I’m putting these together. Because normally or prior, as [the Resource Teacher] eluded to, she’ll look at four blocks and she’ll look at two blocks but not know to add them together.<sup>23</sup> That’s what the – it is asking for, to apply those two things and get an answer. She’s now doing some of that on her own.

So, a lot less supports. Improvement, although small, a big success for her. A lot of this is in isolation so I’m trying to bring it out to context and that’s where you

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<sup>23</sup> When asked by the Parent about the Student’s progress in math and why it was the Student could not correctly answer basic math questions, the Resource Teacher testified that:

in regards to [the Student] needing someone to correct her, we want her to – A, be able to learn from her mistakes as we all do and give her an opportunity to grow. If someone is always correcting her as she goes along step by step she, A, doesn’t develop that self-awareness and security to kind of let – A, know it’s okay to make mistakes and okay to learn from her mistakes. And then I hope, with that type of instruction – if she does make a mistake during either a small group instruction – it’s an opportunity for reteaching. She needs – she needs to make mistakes because mistakes allow us to know how we need to change our instruction or what foundational skill we need to maybe go back to and provide her further support.

Trial Tr., 118 (Test. of Resource Teacher).

get the four plus two actually means you add the four plus the two, as I've put in some of the foundational skills over the last eight months. ... Oh, increased participation. You know, increased perseverance skills.

Trial Tr., 167-168 (Test. of Mathematics Teacher).

The Social Studies Teacher testified that the Student has attended her class since October 2018. The instruction period is approximately forty-five to fifty minutes per day, and the class size is approximately thirteen students with two teachers (herself and a paraeducator).

The Social Studies Teacher described the Student's performance in her classroom, when compared to her peers, to be "more or less in the middle. So, there are students that are higher than her and students that are lower than her." Trial Tr., 185 (Test. of Social Studies Teacher).

In terms of the Student's ability to navigate the class and engage in the curriculum, the Social Studies Teacher stated:

She had – she comes into class – at first she was hesitant about the routines of the classroom, but now she comes into class – I several different jobs in the classroom. So, she gets her – her journal and she starts her interactive notebook right away. In the beginning of the school year she needed more prompting, but now she's pretty self-sufficient.

She takes notes from the Promethean board. She – we also – we have a lot of classroom discussions and she – she raises her hand and participates in classroom discussions.

We also do projects in class, group activities, and she is more willing to participate. More motivated than she was in the beginning of the school year.

*Id.*, 186.

The Social Studies Teacher also described the Student as a "cheery student. She's happy. She is motivated to learn. She does participate in classroom discussions. So, generally, she's in a good mood." *Id.*, 189.

Finally, each of the witnesses for MCPS testified in their expert opinion that the March 5, 2019 IEP is reasonably calculated to provide the Student with a FAPE in the LRE, because the

IEP allows MCPS to tap into where the Student is academically. Moreover, the LFI program allows the school personnel to take grade appropriate information and instruction and adapt it in a manner that the Student is able to receive it. None of the experts agreed with the Parent that the Student requires a dedicated one-on-one aide in the [REDACTED] program. In her expert opinion, the Mathematics Teacher summarized it this way:

We are seeing incredible growth in reading and math, the two, what I would consider to be, core subjects. She – we’re seeing absolute growth in community independence. We’re seeing her learning how to do school in a way that I – I – that was necessary for her, how to come in, do your work, get settled, advocate for yourself. We’re seeing such positives and such increases in – in foundational skills to – for her, you know, future outcomes to be so much better.

Trial Tr., 178-179 (Test. of Mathematics Teacher). In addition, the Social Studies Teacher testified in her expert opinion that the Student is properly placed at the [REDACTED] program.

Both academically and socially. I think that she is properly placed. ... Because academically she falls more or less in the middle. We have students – well, in terms of social studies, we have students that are functioning at a fifth or sixth grade level, but then we have students at a kindergarten level in terms of reading and reading comprehension and she’s at a third grade level. ... And then, in terms of her social skills, she’s also more or less in the middle.

Trial Tr., 192 (Test. of Social Studies Teacher).

Regarding the procedural errors, MCPS disagreed with the Parent that it had committed multiple procedural violations stemming from the March 2019 IEP. According to MCPS, as described by the Resource Teacher during her testimony, all required members were present for the IEP Team meeting on March 5, 2019 and the Parent agreed that the finalized IEP may be sent home outside the five day timeline. In any event, MCPS avers that even if it had committed “minor procedural errors,” the errors did not interfere with the provision of FAPE.

Finally, MCPS contends that the evidence does not support a finding that the Student requires a more restrictive setting, such as the non-public placement being suggested by the

Parent. In the following statement, the Mathematics Teacher explained why interaction with non-disabled peers is so important for the Student:

They are transitioning in the hallways, all of the students, together and she is learning social cues. She's learning conversational skills by listening and watching other students do that. She's learning appropriate behavior, if that's something that's necessary. She's learning how to be with all different types of students and benefitting from all of that.

Trial Tr., 178 (Test. of Mathematics Teacher).

### Applicable General Law

Maryland school districts are required to comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. § 1412; 34 C.F.R. § 300.2; *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 180-81 (1982). Maryland implements the IDEA for elementary and secondary students and adds additional procedural safeguards and substantive requirements beyond those required by the IDEA, through Title 8, Subtitle 4 of the Education Article of the Maryland Annotated Code and through COMAR 13A.05.01.

Maryland law and the IDEA mandate “that all children with disabilities have available to them a [FAPE] that emphasizes special education<sup>24</sup> and related services<sup>25</sup> designed to meet their

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<sup>24</sup> Special education means “specially designed instruction,” 20 U.S.C.A. § 1401(29), and “specially designed instruction” means instruction that adapts the “content, methodology, or delivery of instruction” to ensure a student’s access to the general education curriculum. 34 C.F.R. § 300.39(b)(3).

<sup>25</sup> 20 U.S.C.A. § 1401(26) provides:

A) In general.

The term “related services” means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluative purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); *see also* COMAR 13A.05.01.01 (ensuring “a [FAPE] . . . in accordance with the student’s [IEP]”). A FAPE is defined as special education and related services provided at public expense, under public supervision, that meet the standards of the state educational agency, include appropriate education, and are provided in conformity with the child’s IEP. 20 U.S.C.A. § 1401(9).

An IEP is a written statement for a student that includes the following: 1) the student’s present levels of academic achievement and functional performance; 2) how the student’s disability affects the student’s involvement and progress in the general educational curriculum; 3) measurable goals; 4) a description of how progress will be measured; 5) the special education, related services, and supplemental aids and services the educational agency will provide the student; 6) an explanation of the extent to which the student will not participate in the regular classroom; and 7) the appropriate accommodations that are necessary to measure the student’s academic achievement and functional performance. *Id.* § 1414(d)(1)(A).

As the “centerpiece” of the IDEA’s “education delivery system” for disabled students, an IEP is a “comprehensive plan” for the “academic and functional advancement” for the student. *Andrew F.*, 137 S. Ct. at 994, 999. It must be tailored to the student’s “unique needs” with “careful consideration” of the student’s present levels of achievement, disability, and potential for growth. *Id.* at 999; *see also* 20 U.S.C.A. § 1401(29). The IEP must be “appropriately ambitious,” *Andrew F.*, 137 S. Ct. at 1000, and it must provide for “specially designed instruction” that is “reasonably calculated to enable the child to receive educational benefits” and to “make progress appropriate in light of the child’s circumstances.” *Id.* at 994, 996, 999.

An IEP must be developed through a collaborative process between the school district (including teachers and other school officials) and the student's parents. *See id.* at 994. The process of developing the IEP must be a "fact-intensive exercise [that is] informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." *Id.* at 999. When an IEP team considers changing the placement of a student, it is guided by the following:

- (a) The placement decision—
  - (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
  - (2) Is made in conformity with the [least restrictive environment (LRE)] provisions of this subpart, including §§ 300.114 through 300.118;
- (b) The child's placement—
  - (1) Is determined at least annually;
  - (2) Is based on the child's IEP; and
  - (3) Is as close as possible to the child's home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs; and
- (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116.

"To the maximum extent appropriate," an IEP should provide for a disabled child's education in the LRE. 20 U.S.C.A. § 1412(a)(5)(A); *see also* 34 C.F.R. §§ 300.114-300.120; COMAR 13A.05.01.10A. "Mainstreaming of [disabled] children into regular school programs where they might have opportunities to study and to socialize with non[disabled] children is not only a laudable goal but is also a requirement of the [IDEA]." *DeVries ex rel. DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). However, while the IDEA's mainstreaming provision establishes a presumption for a student to remain in the general education setting, it is not

an inflexible federal mandate. *Id.* (“The Act’s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every [disabled] child.”). The IDEA explicitly states that removal of children from the regular educational environment is appropriate “when the nature or 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). Congress thus recognized that regular classrooms are not always a suitable setting for the education of some disabled students. *Rowley*, 458 U.S. at 181 n.4; *see also* 34 C.F.R. § 300.115 (continuum of alternative placements). The nature of the LRE necessarily differs for each child, but could range from a regular public school to a residential school where twenty-four-hour supervision is provided. *See* COMAR 13A.05.01.10B.

In *DeVries*, the Fourth Circuit explained:

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the [IDEA]. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some [disabled] children simply must be educated in segregated facilities either because the [disabled] child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the [disabled] child is a disruptive force in the non-segregated setting.

882 F.2d at 879 (quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983)).

If a reviewing court determines that a student was denied a FAPE, the court may “grant such relief as [it] determines is appropriate.” 20 U.S.C.A. § 1415(i)(2)(C)(iii). The ordinary meaning of these words confers “broad discretion” to the court to grant an appropriate remedy. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369 (1985). An administrative adjudicator “has broad discretion to fashion a remedy where he finds that a school district has

denied a child a FAPE. Sitting in equity, [an administrative adjudicator's] authority is flexible and case-specific." *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 57 (D.D.C. 2016) (citations omitted).

### **Burden of Proof**

As the moving party and the party seeking relief, the Parent bears the burden of proof, by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005); Md. Code Ann., State Gov't § 10-217 (2014). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)); see also *Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

### **Motion for Judgment**

At the close of the Student's case, MCPS made a Motion for Judgment (Motion). COMAR 29.02.01.12E. In support thereof, MCPS argued that the Student failed to meet her burden in this case, as required by *Schaffer v. Weast*, and asserts that the case presented by the Parent fails to demonstrate by any degree that the April 2018, October 2018, or March 2019 IEPs were not reasonably calculated to provide the Student with a FAPE and that a non-public placement at [REDACTED] is an appropriate placement. Specifically, the Parent did not (1) present evidence as to the appropriateness of any IEP or whether the April 2018 or October 2018 IEPs were not reasonably calculated to provide a FAPE, (2) call anyone from [REDACTED] to testify in support of her request for a non-public placement, and (3) present any evidence, credible or otherwise, in regard to [REDACTED] as to why this program is an appropriate placement for the Student.

In response, the Parent indicated that she did not have enough time to have the Student's doctor from [REDACTED] Hospital to appear and testify on her daughter's behalf in support of her request for a non-public placement. Instead, the Parent relied on her own testimony, as the Student's mom for twelve years, to describe what is best for her child.

In support of the non-public placement, the Parent referenced the March 5, 2019 IEP which indicated that there was a lack of "emerging skills or breakthrough opportunities" and, as a result, "[the Student] would greatly benefit from the extended learning opportunities provided as an ESY [Extended School Year] service as she continues to work on his [sic] reading, math, and independent life skills." MCPS Ex. 14, p. 20 of 35. Moreover, the IEP Team stressed the necessity for ESY services, because it determined that "[the Student's] regular school year will be significantly jeopardized if she does not participate in ESY." *Id.*, at p. 21.

The Parent did not necessarily disagree with the recommendation made by the IEP Team, but instead believes that [REDACTED] ESY program, which she described as being "all summer long" and "up to 21 years," was a better or "really good fit" for her daughter, because

by [the Student] being on a third grade level when she's in the sixth grade, she needs someone one on one to really push her because the potential is there but it's not being pulled out of her at the school she's at right now. And I'm sure a one on one would really help her dig her heels in the ground and get to know what she's supposed to know in order to live a productive life and [REDACTED] is known for living for independence. A lot of the kids there are working now. They have a one on one coach and they seem to be really, really happy in – in that school and that's all I witnessed, just me going there for about an hour. They are one on one and she needs one on one. . . . And she can stay there until she's 21 and that's a really good thing for her, by her being so behind. So, she can catch up and she won't miss so much of school because she can stay there until she's 21 because she's three years behind and that school would really help to advance her to fill out job applications.

Trial Tr., 80-82 (Test. of Parent).

Finally, as examples for why she believes MCPS failed her daughter and is not providing her a FAPE, the Parent complained that the Student simply watches other students in her classroom, “comes home with papers from crayon[] coloring,” and never comes home “with lined paper.” *Id.* 81. This scares the Parent. *Id.* That is why she wants to give [REDACTED] a try, because she feels the one-on-one support would benefit her daughter.

I deferred ruling on the Motion until the close of the record, COMAR 29.02.01.12E(2)(b), and I further indicated that my ruling shall be included in the final decision, COMAR 29.02.01.12B(6).

COMAR 28.02.01.12E governs a Motion for Judgment and states as follows:

E. Motion for Judgment

(1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all the reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.

(2) When a party moves for judgment at the close of the evidence offered by an opposing party, the judge may:

(a) Proceed to determine the facts and to render judgment against an opposing party; or

(b) Decline to render judgment until the close of all evidence.

(3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

The language of COMAR 28.02.01.12E is essentially the same as the language for motions for judgment in district court and non-jury trials in circuit court. Therefore, case law that addresses the nature of motions for judgment in civil proceedings also explains the nature of

those motions in administrative proceedings. In *Panhanish v. Western Trail, Inc.*, 69 Md. App. 342 (1986), the Court explained:

[W]hen a party has moved for judgment, the court is allowed as trier of fact to determine the facts and render judgment thereon. The trial judge is not compelled to make any evidentiary inferences whatsoever in favor of the party against whom the motion for judgment is made.

...  
In the case *sub judice*, the matter was tried by the court. Thus, the trial judge was allowed to evaluate the evidence, *as though he was the jury*, and to draw his own conclusions as to the evidence presented, the inferences arising therefrom, and the credibility of the witnesses testifying.

*Panhanish*, 69 Md. App. at 353.

### **Analysis on Motion**

Though I do not discount the Parent's perspective that she knows what is best for her daughter, her testimony alone is insufficient to demonstrate by a preponderance of the evidence that MCPS denied the Student a FAPE; thus addressing the first issue of the Parent's Complaint.

The *Andrew F.* Court explained that a challenged IEP must be examined to determine if it describes the child's present level of performance, including explaining "how the child's disability affects the child's involvement and progress in the general education curriculum." *Id.* at 994 (citing 20 U.S.C.A. § 1414(d)(1)(A)(i)(1)(aa)). The IEP also must "set out 'measurable annual goals, including academic and functional goals,' along with a 'description of how the child's progress toward meeting' those goals will be gauged," *id.* (citing § 1414(d)(1)(A)(i)(I)-(III)), and "describe the 'special education and related services ... that will be provided' so that the child may 'advance appropriately toward attaining the annual goals' and, when possible, 'be involved in and make progress in the general education curriculum.'" *Id.* (citing § 1414(d)(1)(A)(i)(IV)).

The *Endrew F.* Court made it clear that, for a student who is fully integrated into the regular classroom, the IEP should provide a level of instruction reasonably calculated to meet the unique needs of a student that result from the disability and to permit a student to advance through the general curriculum. However, when a student is not fully integrated into the regular classroom and is not able to achieve on grade level, the “educational program must be appropriately ambitious in light of [the student’s] circumstances....” 137 S. Ct. at 1000.<sup>26</sup> “The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* Summarizing its holding, the Court said: “[The IDEA] requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 1001.

*Endrew F.* explained that this decision is fact-specific: appropriate progress is different in every case, depending on the student’s unique circumstances. The Court explained its reasoning as follows:

We will not attempt to elaborate on what “appropriate” progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Rowley*, 458 U.S. at 206.

At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child’s IEP should pursue. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is

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<sup>26</sup> The student in *Endrew F.* was diagnosed with autism and was exhibiting behaviors that interfered with his educational progress.

reasonably calculated to enable a child to make progress appropriate in light of [the child's] circumstances.

137 S. Ct. at 1001-02 (some citations and parallel citations omitted).

The challenged IEP for the 2018-2019 school year is the October 10, 2018 IEP. As noted in the Findings of Fact, the April 16, 2018 IEP was amended on October 10, 2018 to permit the Student to access special education services in the sixth grade. Prior to the start of the 2018-2019 school year, the Parent declined special education services for the Student.

The IEP must state "how the child's disability affects the child's involvement and progress in the general education curriculum[.]" 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa). Prior to the drafting of the April 2018 IEP, MCPS conducted a series of evaluations in anticipation of the Student attending middle school. The evaluations focused on the Student's present levels of performance in reading, phonics, writing, receptive language, and mathematics. The data collected from the evaluations underscored the need for the Student to continue in the [REDACTED] program in middle school. Moreover, the outcomes from the testing mirrored earlier testing that showed the Student's significant cognitive disability placed her significantly below average in general intellectual functioning and extremely low to below average adaptive skills.

Though the classroom testing showed the Student was making progress toward goals towards the end of the 2017-2018 school year, the Student was nevertheless functioning below average when compared to her same-age peers. Inexplicably, the Parent felt the Student made so much progress that her daughter no longer required special education services and rejected the April 2018 IEP.

When the parties reconvened in October 2018 to amend the April 2018 IEP in order for the Student to be enrolled at [REDACTED] MS' [REDACTED] program, the October 2018 IEP contained the same academic and functional goals from the April 2018 IEP. The Parent did not argue, nor do I find,

that doing so violated IDEA. The IEP Team reviewed the prior data from assessments conducted in March 2018, as well as classroom observations from ■ MS teachers, and determined that the Student was completely unable to navigate the general education setting, despite “significantly modified” activities and class assignments, and gained little from her two to three months sans an IEP. MCPS Ex. 6. Consequently, I am not surprised that the Student’s progress from April 2018 to October 2018 was essentially unchanged.<sup>27</sup>

Next the IDEA requires that the IEP team create an IEP tailored to the Student’s unique needs that contains:

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. . . .

*Id.* § 1414(d)(1)(A)(II). As described in Findings of Fact Number 36, the October 2018 IEP agreed to by the parties contained seven goals commensurate with the Student’s unique needs in mathematics (problem solving), reading phonics, expressive written language, social interaction skills, receptive language, expressive language, and speech and language pragmatics. Each goal also contained no less than three objectives per each discipline. Moreover, each of the witnesses for MCPS testified, in their expert opinion, that the Student was making meaningful progress toward her goals as underscored by her present levels of performance as of April 2019.

An IEP must contain a description of “the special education and related services and supplementary aids and services” that the school will provide for the child. *Id.*

§ 1414(d)(1)(A)(i). The IEP identified the special considerations and accommodations the Student requires in order to access the curriculum. The Parent did not claim that the

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<sup>27</sup> Neither party presented evidence of regression of critical life skills caused by the normal summer vacation break.

accommodations were inappropriate nor did she argue that the teachers at [REDACTED] MS were not implementing the IEP with fidelity. In fact, I found that the IEP mirrored the recommendations contained in the assessments. According to the Brigance IED III:

It is recommended [that the Student] be taught in a small group setting with minimal distractions and a low student to teacher ratio. [The Student] requires explicit behavioral and social instruction to regulate behavior, promote whole body listening, and clear her body of distractions. [The Student] requires modeling, visual representation, and repetition of directions/task in order to be successful. With practice, modeling, and a faded hierarchy of prompting, and consistent repetition, [the Student] is able to access instruction and assessment. She has a strong ability to retain information she has learned and has excellent memory skills. [The Student] benefits tremendously from hands on, multimodal instruction and learns very well given think alouds. She benefits from being asked to repeat the direction and teach a peer/teacher the task she is working on. [The Student's] strongest reinforce is positive recognition/attention from adults. She enjoys being a leader and helper in the classroom and thrives when she is kept busy with academic and/or non-academic tasks. [The Student] often needs sentence starters, sentence frames, word banks, or models in order to successfully express herself clearly. She also benefits from a field of choices for her answers. [The Student] is able to follow multi-step instructions but really requires slow and concise repetition of the directions (with visual representation or model if possible) in order to allow her to process the direction. She also requires a significant amount of wait time to allow for language processing. [The Student] also benefits from praise, enthusiasm, movement breaks, explicit social/behavior strategies (cool off, see 3 before you see me, whole body listening, gesture responses) to promote on task and pro social classroom behavior.

MCPS Ex. 1.

According to the Psychological Assessment #1, the following interventions and accommodations were recommended:

- Break up tasks into workable, specific, and obtainable steps.
- Reinforcing persistence is very important to help maintain/increase motivation.
- Seek to link work to [the Student's] specific interests – This will aid in keeping her focused on the topic at hand.
- Give her assignments focusing on high interest material – This may help to maintain/increase [the Student's] interest and give her the opportunity to practice skills that are taught.

- A multi-sensory approach to teaching in a small classroom environment will allow [the Student] the benefit of all modalities for learning and enhance her processing and comprehension of material.
- Provide opportunities for a variety of learning experiences, in and out of school.
- Teach learning strategies; reteach as necessary, basic skills.
- Reduce auditory distractions in the classroom.
- Reinforce [the Student] for attending based on successively longer periods of time, planning for success. Consider an individual motivation and behavior contract to reinforce and encourage positive behaviors.
- Ensure that [the Student] has eye contact before giving directions, explanations or new instruction.
- Rephrase and restate important information to provide auditory redundancy.
- Preferential seating in the classroom to minimize distractions and to ensure that she is actively paying attention when information is being presented.
- Incorporate fun, vigorous exercise breaks throughout the day.
- Provide [the Student] with a predetermined signal when off-task.
- When introducing new concepts and skills, use modeling and demonstration and “think aloud” in front of [the Student]. Allow for over-practice of newly learned skills.
- [The Student] may benefit from participating in social skills programming available at school to gain experience in and confidence with social interactions.

MCPS Ex. 2.

Finally, according to the Psychological Assessment #2, the following was recommended:

- [The Student] should continue to participate in a highly structured environment with frequent review and practice of skills and multi-sensory presentation of lessons.
- [The Student] continues to need specialized and direct instruction to support her deficits in verbal problem-solving, visual problem-solving, and expanding her social communication and functional academic skills.
- Provide pictorial support and visual schedules to foster independence in completing routines and navigating the community.
- Continue to provide [the Student] with opportunities to be included in the general education setting with fading adult support.

MCPS Ex. 3.

The Parent, however, argued that the Student's educational program was not appropriately ambitious, because the Student was not using proper grammar or punctuation, was coloring with crayons, and was unable to do simple addition. Parent Exs. 5-7. The Parent's position, however, is not supported by the credible evidence and none of the expert witnesses for MCPS agreed with her point of view.

On the issue of grammar and punctuation, the Social Studies Teacher testified that the Student is able to write sentences, though maybe not paragraphs. In any event, the teacher stated that she is not grading the Student for punctuation; instead, she is focused on the content of the Student's work. Trial Tr., 193 (Test. of Social Studies Teacher). The Social Studies Teacher also explained that in her class there is a fair amount of mapping so the use of crayons may be appropriate. *Id.*, 189. The English Teacher also indicated that she encourages the Student to use highlighters to track what she is reading or underline the text. *Id.*, 154 (Test. of English Teacher). With respect to crayons, the English Teacher said "I don't have any coloring activity work focused on decoding drills and comprehension. If there is any activity that she colors, it's when she's going to illustrate her summary of the – the text." *Id.*, 152. When the Parent asked the Resource Teacher about the use of crayons, the Resource Teacher made a similar statement, "If it's an art class, they would use crayons. If it's something such as social studies and they're labeling a map, doing coloring, that would be appropriate." *Id.*, 132 (Test. of Resource Teacher). Finally, the Mathematics Teacher flatly denied ever using the Minute Math Addition paper introduced into evidence by the Parent, stating "It's too stressful. It's pretty much a recipe for failure. They get very stressed out. There's too much on a paper. This would be very visually overstimulating for most of our students." *Id.*, 177 (Test. of Mathematics Teacher).

I am also concerned that the Parent believes the Student's use of crayons, etc. is not age appropriate for a child in the sixth grade (the Parent asked the English Teacher whether it was "normal for a sixth grader to color?") Trial Tr., 152. This line of questioning is inconsistent with the Supreme Court's ruling in *Endrew F.* where it found that children not fully integrated in a regular classroom, the IEP need not necessarily "aim for grade-level advancement." *Endrew F.*, 137 S. Ct. at 1000. Consequently, given the Student's significant cognitive disability, there should be no reason to presume that she should or can advance at the same pace as her age-level peers.

I am also not persuaded by the Parent's characterization of the record that the Student requires a one-on-one aide or coach. The Student's academic performance across all academic disciplines demonstrates that she is able to access the curriculum with the level of support currently provided in the [REDACTED] program. Furthermore, the Parent did not offer any rebuttal to the Research Teacher's expert testimony that the Student does not display the type of behaviors that would warrant the use of a one-on-one aide.

- Q. Is – in your years supervising the [REDACTED] Program have you ever had students who do require a direct one to one aide?
- A. Yes.
- Q. Can you tell me a little bit about why those – those particular students required a one to one aide?
- A. It may be due to physical impairment. It may be to – for attentional/instructional needs. It might be behavioral.
- Q. Okay. Can you give – can you expand a little bit upon – about the attentional/instructional needs that would require a one to one?
- A. Students that can't sustain attention for five minutes –
- Q. Okay.
- A. – 10 minutes, provide like several interruptions throughout the instruction block. Like 33 times within five minutes, things of that nature.
- Q. Okay. And is [the Student] demonstrating that –
- A. Not to my knowledge.
- Q. – level of need? Okay. What about behaviorally? What would that look like?

- A. Behaviorally, that would be students who elope from a classroom. Their behaviors can cause physical, possible psychological, harm to themselves or others and they need kind of someone to help them or support them with meeting the day to day demands of like – just recalibrating themselves so that they can be available for instruction.
- Q. Okay. And to your knowledge does [the Student] demonstrate those types of behavioral needs?
- A. No, not to my knowledge.
- Q. Okay. Are there behavioral concerns with regard to [the Student]?
- A. Nothing to – nothing outstanding to my knowledge.

*Id.*, 132-133 (Test. of Resource Teacher). Conversely, each of the Student's teachers corroborated the Resource Teacher's testimony by indicating that the Student did not display behavioral issues in their respective classrooms.

Though not specifically mentioned by the Parent during her testimony, but clearly evident by her handwritten notations on the March 2019 IEP, she appears to believe that the October 2018 IEP is not reasonably calculated to provide a FAPE because of the recommendation for ESY services. The fact that the IEP Team in April 2019 determined that the Student was not demonstrating "emerging skills or breakthrough opportunities," would likely experience regression on her program toward critical life goals over the school break, and that her regular school year would be "significantly jeopardized" if she did not participate in ESY services for reading, math, and independent life skills, MCPS Ex. 14, does not amount to proof that MCPS denied the Student a FAPE. In *I.O. v. Smith*, 73 IDELR 15 (United States Court, Maryland (2018)), the Court held that an IEP must be judged at the time it was created, not in hindsight.

In summary, the Parent's presentation lacked credible evidence to support a finding that MCPS failed to provide the Student a FAPE and that placement should be at [REDACTED]. The doctor's note in evidence (Parent Exhibit 4) did not underscore the need for a one-on-one or

private placement. To the contrary, I found the doctor's recommendation to be an endorsement of the [REDACTED] program that MCPS offers at [REDACTED] MS.

I appreciate that the Parent may not fully understand the law as it pertains to the provision of special education services. The Supreme Court in *Andrew F.* emphasized,

"To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." This standard is framed in terms of each child's unique circumstances because "[a] focus on the particular child is at the core of the IDEA." Consequently, "the benefits obtainable by children at one end of the spectrum [of disability] will differ dramatically from those obtainable by children at the other end, with infinite variations in between.

*R.F. v. Cecil Cty. Publ. Sch.*, 919 F.3d 237, 246 (2019) quoting *Andrew F.*, 137 S.Ct. at 999 (internal citations removed).

Given this standard, I find that the Student's April 2018, October 2018, and April 2018 IEPs were "specially designed" to meet her "unique needs" through an "individualized education program." 20 U.S.C.A. § 1401(14), (29). In addition, I find that the [REDACTED] program at NMMS can and is implementing the Student's IEP. Therefore, I shall grant MCPS' Motion for Judgment with respect to issue number one.

#### Analysis – Procedural Violations

The second issue the parties agreed I should resolve was: "Did the MCPS engage in procedural violations by failing to: (a) provide the Parent with any assessment test data; (b) afford the Parent an opportunity to inspect and review all education records with respect to the provision of FAPE showing the Student's progress toward IEP goals; (c) have all necessary members of the IEP Team present during the March 5, 2019 IEP Team meeting; and (d) provide the Parent with the IEP meeting notes within five days of the March 5, 2019 IEP Team meeting?"

The third issue is intertwined with the second issue – “Did any procedural violations impede the Student’s right to a FAPE, significantly impede the Parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, or cause a deprivation of educational benefit?”

These issues may be addressed succinctly.

Under § 1415(f)(3)(E)(ii)(II), an ALJ must answer each of the following in the affirmative to find that a procedural violation of the parental rights provisions of the IDEA constitutes a violation of the IDEA: (1) whether the plaintiff’s “alleg[ed] a procedural violation,” (2) whether that violation “significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents’ child,” and (3) whether the child “did not receive a [FAPE]” as a result.” *Id.* § 1415(f)(3)(E). Unless an ALJ determines that a given procedural violation denied the child a FAPE, she may only order compliance with the IDEA’s procedural requirements and cannot grant other forms of relief, such as private placement or compensatory education.

*R.F.*, 919 at F.3d 248 (internal citations removed).

As noted in the Parent’s Complaint, she argued that only the Resource Teacher and the Social Studies Teacher were present for the March 5, 2019 IEP Team meeting, § 1414(d)(1)(B), and MCPS did not provide her with a copy of the IEP within the 5-day timeframe, Md. Code Ann., Educ. § 8-405(E)(1)(2). I am persuaded by the Parent’s testimony and evidence, which was not sufficiently refuted by the Resource Teacher’s testimony, that MCPS committed the alleged procedural violations. While I found the Resource Teacher’s testimony credible when she discussed the substance of the [REDACTED] program, her credibility suffered greatly when she refused to acknowledge the errors she committed while conducting the March 5, 2019 IEP Team meeting. Her lack of candor and insincerity regarding who was present during the meeting and when she provided the Parent with the IEP contributed to my finding that a violation had indeed occurred. I am not, however, persuaded that the violations impeded the Parent’s opportunity to participate in the decision-making process concerning the Student’s IEP. The Resource Teacher

testified, and the Parent did not dispute, that the Parent was offered the opportunity to reschedule the March 5, 2019 IEP Team meeting when it was obvious the delayed start time of the meeting would result in an abbreviated meeting. I am also persuaded by the testimony of both witnesses that the Parent provided input during the meeting that was included in the Student's IEP. MCPS Ex. 14. Moreover, as outlined in detail above, MCPS is providing the Student a FAPE.

Therefore, the Student is not eligible for the relief for which she seeks, *i.e.* placement at [REDACTED] based on the procedural violations.

On the other hand, I do not find credible evidence that MCPS failed to provide the Parent with any assessment test data or afford her an opportunity to inspect and review all education records with respect to the provision of FAPE showing the Student's progress toward IEP goals. While I am not discounting the Parent's sincere belief that MCPS failed in this regard, the Parent did not substantiate her claim with corroborative evidence. On the other hand, based on my review of the record, MCPS has kept the Parent abreast of the Student's progress. *See* MCPS Exs. 4, 6, 9, 14. I am also persuaded that the Parent is of the erroneous belief that MCPS is required to provide additional testing for the Student, such as a Brigance IED III; MCPS is correct in its understanding of the requirements for evaluations and reevaluations under IDEA, 20 U.S.C. § 1414(c)(4).

### Summary

For the reasons stated above, I find that the Parent and the Student have not met their burden of proving the Student was eligible to receive special education and related services or that she was denied a FAPE, or that the procedural violations warranted a private placement. *Schaffer v. Weast*, 546 U.S. 49 (2005).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parent failed to prove that the Montgomery County Public Schools did not offer the Student a free appropriate public education for the 2018 – 2019 school year. I further conclude as a matter of law that the Parent failed to prove that the procedural violation of the parental rights provisions of the IDEA constituted a violation of the IDEA. 20 U.S.C.A. § 1414; 34 C.F.R. §§ 300.148; *Andrew F. v. Douglas Cty. School Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence Cty. Sch. District Four v. Carter*, 510 U.S. 7 (1993).

ORDER

I **ORDER** that the Parent’s request for private placement for the 2019 – 2020 school year is **DENIED**.

Signature Appears on Original  


May 31, 2019  
Date Decision Mailed

Kathleen A. Chapman  
Administrative Law Judge

KAC/da  
#180110v1A

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) (2018). 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.

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]