

██████████,

STUDENT

v.

HOWARD COUNTY

PUBLIC SCHOOL SYSTEM

BEFORE MARC NACHMAN,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-HOWD-OT-20-14664

DECISION

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STATEMENT OF THE CASE

On July 10, 2020, ██████████ and ██████████ (Parents),¹ on behalf of their child, ██████████ (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 Howard County Public Schools (HCPSS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);² 34 C.F.R. § 300.511(a) (2019);³ Md. Code Ann., Educ. § 8-413(d)(1) (2018); Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

The Complaint alleges that the HCPSS violated the IDEA by denying the Student a free appropriate public education (FAPE) for the 2019-2020 and 2020-2021 school years (and for the

¹ Although both Parents were present during the hearing, only the Student's mother testified. Therefore, when appropriate, reference to "Parents" will be to both, and the singular "Parent" will refer only to the Student's mother.

² U.S.C.A. is an abbreviation for United States Code Annotated. Unless otherwise noted, all citations of 20 U.S.C.A. hereinafter refer to the 2017 bound volume.

³ C.F.R. is an abbreviation for Code of Federal Regulations. Unless otherwise noted, all citations of 34 C.F.R. hereinafter refer to the 2019 volume.

summer session in 2020) because the HCPSS failed to determine eligibility and develop an Individualized Education Program (IEP) within the required timelines and to offer the Student a FAPE. The Complaint further alleges that HCPSS failed to provide researched-based instructional interventions to address all of the Student's unique needs, the Student's IEP failed to address the Student's need for a smaller classroom with fewer distractions, and the Student's IEP failed to include special education services and placement based on the Student's unique circumstances. The Parents' requested remedy is the Student's placement at the [REDACTED] School ([REDACTED]) for the 2020-2021 school year with the HCPSS paying for all tuition and related costs for the 2019-2020 and 2020-2021 school years and for the summer session in 2020.

Administrative Law Judge Jerome Woods, II, held a telephone conference on September 8, 2020, during which the parties moved for an extension of the timelines for holding a mediation, conducting a due process hearing, and issuing a final decision. Administrative Law Judge Woods found good cause to extend the timelines, due to the COVID-19 pandemic, the closure of the HCPSS, and the partial suspension of proceedings at the OAH. 34 C.F.R. §§ 300.510(b)(2), 300.515(a) and (c) (2019). A mediation was held on September 21, 2020 without success.

I held a telephone prehearing conference on September 21, 2020. The following individuals participated: Ashley VanCleaf, Esquire, on behalf of the Student, and Andrew Nusbaum, Esquire, on behalf of the HCPSS. The Parents did not participate. In light of the modification to the time requirements for conducting the hearing and issuing a decision, the parties requested that I issue the decision no later than thirty days after the close of the record. I found good cause to grant that request because of delays related to the COVID-19 pandemic, as well as delays occasioned by the schedules of counsel, the parties, and witnesses, all of which necessitated the hearing falling beyond the usual forty-five-day timeline. Therefore, the decision is due within thirty days from the close of the record.

I held the hearing by video conference on October 22, 23, 26, 29 and 30, 2020, and November 2 and 4, 2020. At the hearing, Ms. VanCleaf represented the Parents and Mr. Nusbaum represented the HCPSS. By agreement of both parties, the record remained open past the close of evidence for submission of written closing arguments, including the Parents' rewritten rebuttal closing. The written closing briefing schedule was as follows: Parents' written closing argument was due on Monday, November 23, 2020; the HCPSS written closing argument was due on Friday, December 4, 2020; and the Parents' rebuttal to the HCPSS closing was due on Monday, December 14, 2020.⁴ The parties complied with this schedule. Therefore, the record closed on December 14, 2020. By agreement, the decision was due thirty days after that date.

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

ISSUES

- (1) Whether HCPSS failed to determine eligibility and develop an IEP within the required timelines; and
- (2) Whether the IEP developed by HCPSS failed to offer the Student a FAPE based on her unique circumstances, as follows:
 - a. The IEP failed to provide researched-based instructional interventions to address all of the Student's unique needs;

⁴ This latter date was extended as a result of Parent's counsel's extenuating circumstances and with the agreement of opposing counsel. I found good cause for the extension.

- b. The IEP failed to address the Student’s need for a smaller classroom with fewer distractions; and
- c. The IEP failed to include special education services and placement based on the Student’s unique needs.

(3) Whether the Parents are entitled to the relief sought in the complaint or other appropriate relief, and in particular, placement of the Student at ██████ for 2020-2021 school year, with the HCPSS paying for all tuition and related costs for the 2019-2020 and 2020-2021 school year and summer session in 2020.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parents, unless otherwise noted:

- Parents Ex. 1 HCPSS Response to Complaint
- Parents Ex. 2 CV⁵ ██████
- Parents Ex. 3 CV ██████
- Parents Ex. 4 CV ██████
- Parents Ex. 5 CV ██████
- Parents Ex. 6 CV ██████
- Parents Ex. 7 Psychological Summary 2014
- Parents Ex. 8 HCPSS Educational 1/2015
- Parents Ex. 9 HCPSS Psychological 2/2015
- Parents Ex. 10 HCPSS Speech Language 2/2015
- Parents Ex. 11 HCPSS OT Evaluation 1/2015
- Parents Ex. 12 IEP 2/2015
- Parents Ex. 13 Parent Note
- Parents Ex. 14 IEP 2/2016
- Parents Ex. 15 HCPSS Educational Assessment 4/2016
- Parents Ex. 16 HCPSS Psychological 6/2016
- Parents Ex. 17 HCPSS OT 5/2016
- Parents Ex. 18 IEP 6/2016
- Parents Ex. 19 Report Card 15-16, Annual Goal Progress Report 6/2016

⁵ Curriculum Vitae.

- Parents Ex. 20 [REDACTED] Benchmarks 1/16, [REDACTED] School 16-17 Report Card, [REDACTED] School 17-18 Report Cards
- Parents Ex. 21 Psycho-Educational Evaluation 2/2018
- Parents Ex. 22 Parent Letter 11/2019
- Parents Ex. 23 Parent Questionnaire, Referral Form 11/2019
- Parents Ex. 24 HCPSS Child Find Program forms
- Parents Ex. 25 IEP Team Meeting Report 1/2/2020
- Parents Ex. 26 Parental Consent Evaluation Form 1/2/2020
- Parents Ex. 27 HCPSS Informal Reading Summary 1/2020-2/2020, Diagnostic Passages 1/2020
- Parents Ex. 28 HCPSS Educational Assessment Report 2/2020, Woodcock Johnson IV Score Report 1/2020
- Parents Ex. 29 HCPSS Psychological Assessment Report 2/2020
- Parents Ex. 30 IEP Team Meeting Report 2/28/2020, IEP 2/28/2020
- Parents Ex. 31 [REDACTED] Teacher Observations/Comments 1/2020, HCPSS Child Find Program forms
- Parents Ex. 32 Forward Thinking Consultation 2/5/2020
- Parents Ex. 33 Representation Letter 5/1/2020
- Parents Ex. 34 IEP Team Meeting Report 5/18/2020
- Parents Ex. 35 Draft IEP with AV Comments 5/18/2020
- Parents Ex. 36 Distance Learning Weekly Schedule, Proposed Schedule 10/1/2020
- Parents Ex. 37 [REDACTED] 18-19 T1 and T2 Report Cards, [REDACTED] 19-20 T1 Report Card, [REDACTED] 18-19 T3 Report Card, [REDACTED] 19-20 T1 T2 and T3 Report Cards, [REDACTED] Individualized Student Plan 20-21, Fall 20-21 Progress Report
- Parents Ex. 38 [REDACTED] Assessment Results Reports
- Parents Ex. 39 [REDACTED] Fee Schedule 20-21
- Parents Ex. 40 **[Not admitted into evidence]**
- Parents Ex. 41 **[Not admitted into evidence]**
- Parents Ex. 42 **[Not admitted into evidence]**
- Parents Ex. 43 HCPSS Emails
- Parents Ex. 44 US Dept. of Education COVID-19 Guidance Document
- Parents Ex. 45 MSDE Technical Assistance Bulletin # 20-01
- Parents Ex. 46 MSDE Technical Assistance Bulletin # 20-03
- Parents Ex. 47 HCPSS Documents
- Parents Ex. 48 HCPSS Plans for Continuity of Learning Documents
- Parents Ex. 49 HCPSS Special Education and Early Intervention Services COVID-19 documents
- Parents Ex. 50 HCPSS Guidance for Developing ASDM Plans 8/2020
- Parents Ex. 51 HCPSS Guidance for Outstanding 19-20 IBP Team Processes 9/2020
- Parents Ex. 52 HCPSS Data and Progress Monitoring: Data Collection Measures 8/27/2020
- Parents Ex. 53 HCPSS COVID-19 Compliance Resources Library 20-21

- Parents Ex. 54 HCPSS Board of Education Meeting Documents 9/24/2020
- Parents Ex. 55 **[Not admitted into evidence]**
- Parents Ex. 56 **[Not admitted into evidence]**
- Parents Ex. 57 Memorandum of Understanding: Related to COVID-19 4/23/2020

I admitted the following exhibits on behalf of HCPSS⁶:

- HCPSS Ex. 1 Notice of IEP Team Meeting -11/25/19
- HCPSS Ex. 2 Notice of IEP Team Meeting -12/11/19
- HCPSS Ex. 3 IEP Team Meeting Report-1/2/20
- HCPSS Ex. 4 Notice of IEP Team Meeting- 2/3/20
- HCPSS Ex. 5 IEP Team Meeting Report-2/28/20
- HCPSS Ex. 6 Notice of IEP Team Meeting- 5/11/20
- HCPSS Ex. 7 IEP Team Meeting Report-5/18/20
- HCPSS Ex. 8 Evaluation Report SLD⁷ Supplement - 2/28/20
- HCPSS Ex. 9 Evaluation Report ADHD⁸ Supplement - 2/28/20
- HCPSS Ex. 10 Referral for Student Suspected of Having a Disability
- HCPSS Ex. 11 Parent Questionnaire
- HCPSS Ex. 12 [REDACTED] Teacher Input
- HCPSS Ex. 13 Report of Psychological Assessment-1/15/20 through 2/5/20
- HCPSS Ex. 14 Report of Psychological Assessment- 6/2/16
- HCPSS Ex. 15 Educational Assessment Report-2/11/20
- HCPSS Ex. 16 Woodcock-Johnson Score Report-1/21/20
- HCPSS Ex. 17 Informal Reading Summary -1/21/20, 2/24/20
- HCPSS Ex. 18 QRI Testing Protocols
- HCPSS Ex. 19 [REDACTED] Reports
- HCPSS Ex. 20 Proposed IEP- 2/28/20
- HCPSS Ex. 21 Distance Learning Weekly Schedule
- HCPSS Ex. 22 Proposed Schedule - as of 10/1/20
- HCPSS Ex. 23 MSDE Technical Assistance Bulletin- 20-01
- HCPSS Ex. 24 MSDE Technical Assistance Bulletin- 20-03
- HCPSS Ex. 25 MSDE Technical Assistance Bulletin- 20-09
- HCPSS Ex. 26 CV - [REDACTED]
- HCPSS Ex. 27 CV - [REDACTED]
- HCPSS Ex. 28 CV - [REDACTED]
- HCPSS Ex. 29 CV - [REDACTED]
- HCPSS Ex. 30 CV - [REDACTED]
- HCPSS Ex. 31 CV - [REDACTED]

⁶ Many of these documents were also submitted into evidence by the Parents. For simplicity, when one of these documents is referenced, I will identify them by the Parents' exhibit numbers.

⁷ Specific learning disability

⁸ Attention deficit hyperactivity disorder.

Testimony

The Parent testified, and the Parents presented the following witnesses:

- Dr. [REDACTED], Psychologist, who was accepted as an expert in Psychology, dyslexia, ADHD and anxiety
- [REDACTED], who was accepted as an expert in dyslexia, specialized instruction for students with dyslexia, as well as special education
- [REDACTED], Special Education teacher, who was accepted as an expert in special education, general education, and dyslexia
- [REDACTED], who was accepted as an expert in general education, dyslexia, and specialized reading interventions
- [REDACTED], Special Education teacher, who was accepted as an expert in special education and special education compliance

The HCPSS presented the following witnesses:

- [REDACTED], Instructional Facilitator, Middle Schools, who was accepted as an expert in special education
- [REDACTED], School Psychologist, who was accepted as an expert in school psychology and dyslexia
- [REDACTED], Instructional Team Leader, [REDACTED] Middle School, who was accepted as an expert in special education
- [REDACTED], Special Educator, [REDACTED] Middle School, who was accepted as an expert in special education and dyslexia
- [REDACTED], Instructional Facilitator for Nonpublic Services and Special Education Compliance, who was accepted as an expert in special education compliance

FINDINGS OF FACT

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

1. The Student is presently twelve years of age.
2. The Student has been diagnosed with two specific learning disabilities (SLDs), dyslexia and dyscalculia and one “other health impairment,” attention deficit hyperactivity disorder (ADHD).
3. The Student lives with her Parents and siblings in Howard County.

4. One of the Student's siblings currently attends [REDACTED] Middle School ([REDACTED]), which is the Student's home school.
5. The Student attended [REDACTED] Elementary School ([REDACTED]), a HCPSS public school, for kindergarten for the 2013-2014 school year and for first grade for the 2014-2015 school year. The Student remained at [REDACTED] for second grade for the 2015-2016 school year.
6. While at [REDACTED] the Student did not progress in her education. In kindergarten, she did not know her letters or their sounds, could not count using manipulatives, read pre-emergent books, or finish her schoolwork. Her peers were able to perform all of these skills.
7. In first grade at [REDACTED], the Student shied away from class and assignment challenges, avoided school by hiding in closets, and visited the nurse's office, complaining of non-existent ailments to get out of class.
8. In second grade, the Student could not remember the alphabet or identify sounds of the letters, which other peers could do. She required one to one assistance.
9. The Student felt that other students were making fun of her because she could not read. Daily, she would cry before going to school.
10. In 2014, [REDACTED], Ph.D., conducted a psychological assessment attributing the Student's educational deficiencies in relation to her peers to her ADHD and an adjustment disorder, but did not make a diagnosis of dyslexia.
11. At [REDACTED] the Student did not progress, and some of her skills regressed. An initial IEP was first developed for the Student in 2015 while a student at [REDACTED]
12. The Student failed to make educational progress at [REDACTED]
13. The Student had difficulties with larger class sizes, primarily due to her lack of skills and because she felt embarrassed in front of her peers, who would taunt her because she could not read. She worked better in small groups.

14. In early 2016, the Parents sought after school tutoring at the [REDACTED] School, a school for student with language-based learning disabilities, to help her recognize letters, read and obtain reading fluency.

15. [REDACTED], who tutored the Student at [REDACTED], recognized that the Student was dyslexic.

16. Dyslexia is a language-based learning disorder that affects a child's brain function, making it difficult for a student to identify letters and sounds and process language.

17. Because of the Parents' frustration with the Student's lack of progress at [REDACTED], they enrolled her at [REDACTED] for third grade (the 2016-2017 school year).

18. The Parents did not seek HCPSS funding for the Student's education at [REDACTED].

19. The Student progressed and her Parents re-enrolled her at [REDACTED] for the fourth grade (the 2017-2018 school year). The student began reading first grade books, although she still did not know math facts that her peers knew, nor could she manipulate currency, which was another grade-appropriate skill she was not able to accomplish.

20. [REDACTED] is a private day school that teaches students with dyslexia using multisensory education techniques and repetition, with a low student to teacher ratio using an individualized approach. This approach requires a low student to teacher ratio and individualized attention.

21. The Student was more successful at [REDACTED] than she was at [REDACTED] with small class sizes, individualized attention, and constant repetition.

22. In 2018, Dr. [REDACTED], a psychologist, examined the Student and diagnosed her with dyslexia, dyscalculia and ADHD. She described these conditions as "severe."

23. Dyslexia prevents the Student from being able to read fluently; nor could she consistently and accurately decode written language at her grade level.

24. The Student requires constant repetition for retaining skills that she learns. However, once the Student appears to master these skills, she frequently forgets them and requires constant repetition to maintain her proficiencies.

25. Dr. [REDACTED] also diagnosed the Student with dyscalculia, a number-based disorder. The Student has difficulties with math facts that her peers have already mastered and needs attention and accommodations, such as calculators and math tables, to perform her math assignments successfully.

26. For the 2018-2019 school year, the Parents enrolled the Student at [REDACTED] for the fifth grade.

27. [REDACTED] is a private school that specializes in educating student with dyslexia and dyscalculia using multi-sensory education methods. [REDACTED] teaches students using the Orton-Gillingham Approach (OG), which is a direct, explicit, multisensory, structured, sequential, diagnostic, and prescriptive way to teach literacy when reading, writing, and spelling.

28. [REDACTED] also provides a low student to teacher ratio (sometimes one-to-one, but never larger than eleven-to-one, in the Student's case). Reading and math interventions are done on a one-to-one basis, and they provide constant repetition to prevent the loss of reading and math skills.

29. At [REDACTED], the Student is now in the seventh grade, but is working at a fourth-grade math level.

30. [REDACTED] provides the Student with a supportive educational atmosphere, where she is not embarrassed by her lack of reading or math skills. With the low student to teacher ratio, when the Student gets off-task, she is easily redirected.

31. The Student is well-adjusted at [REDACTED] and participates in extracurricular activities in addition to her class work.

32. Sometime in 2019, the Parents heard that HCPSS was initiating OG interventions for its dyslexic students.

33. The Parents wanted the Student to return to HCPSS, and particularly her home school, [REDACTED], where one of her siblings attended.

34. The Parents had already signed a contract for and paid tuition to [REDACTED] for the 2019-2020 school year before the end of 2019 and was non-refundable.

35. By letter dated November 15, 2019, the Parents initiated the IEP process with HCPSS, advising that they wished to re-enroll the Student at [REDACTED] and requested an IEP meeting.

36. An IEP meeting was held on January 2, 2020, where the IEP team recommended the following updated assessments: educational assessment; reading skills; reading comprehension, reading fluency; mathematics calculation; mathematics reasoning; written expression; and vision.

37. Dr. [REDACTED] and Ms. [REDACTED], an HCPSS school psychologist, simultaneously observed the Student at [REDACTED] in a classroom setting.

38. An IEP meeting was held in February 2020 to review the assessments and an IEP was proposed. The Parents participated.

39. The Student, diagnosed with two SLDs (dyslexia and dyscalculia) and one other health impairment (ADHD), was deemed eligible for special educational services.

40. The IEP listed the Student's goals and objectives for English Language Arts (ELA) and math. The team determined that the Student could be educated at [REDACTED] in a general education classroom twelve hours per week: four hours for science and social studies, and two hours in English and math, and eight hours out of general education "pull-out" sessions

to provide special education interventions: two hours each for ELA and math and four hours for a reading seminar.

41. HCPSS would determine which research-based instructional interventions (interventions) it would use to educate the Student during the pull-out sessions.

42. Despite the information provided by Dr. [REDACTED] in her 2018 report, and from the [REDACTED] faculty, the IEP team did not find that the Student required a smaller class size or a lower student to teacher ratio.

43. In general education settings, class sizes contain approximately thirty-one students. At [REDACTED], in general education, the Student would be assisted by a para-educator, who was not trained in any of the interventions that the Student would receive in her pull-out sessions.

44. HCPSS has not yet decided which interventions it would provide the Student for the eight hours of pull-out sessions. HCPSS proposed using these sessions to provide several interventions in the fifty minutes allotted per day. In addition to the interventions, the time would be used to review classroom work that the Student would miss during pull-out sessions, decreasing the time that the Student would be provided the required interventions.

45. Although many of the interventions required fifty to sixty minutes per day to present, HCPSS intends to provide those services in a shorter time than they were designed for, based on the producer's recommendations, in order to fit all of the interventions and make-up class work into the pull-out time provided. Reducing the time to provide the interventions would make them less effective, putting the Student further behind.

46. The pull-out sessions made no provisions for repetition to help the Student maintain her reading or math skills.

47. Reading fluency was a goal on the IEP; however, there was no intervention identified or time to provide this intervention, other than during homeroom or otherwise in class, where the Student would be reading aloud in front of her peers for a shorter time than the intervention required.

48. The Student would miss time from her general education classes when participating in pull-out sessions. In addition to the interventions required, the pull-out sessions would also be used to provide the Student with time to make up the work she missed in her general education classes during the reading seminar time.

49. Entering and exiting the general education class would be embarrassing for the Student and would adversely affect her due to her diagnosis of ADHD. She would also have difficulty switching between several interventions presented in the fifty-minute pull-out session if more than one intervention were provided.

50. The Student requires specific, consistent, multisensory intervention, in classes with a low student to teacher ratio.

51. Under the IEP, HCPSS is unable to provide the educational program required by the Student that is reasonably calculated to enable her to make progress appropriate in light of her circumstances, considering her SLD, other health impairment, and the need for multisensory education with a low student to teacher ratio.

52. ██████ uses multisensory educational interventions and anticipates the need for repeated enforcement of skills that the Student would forget.

53. The Student has progressed with ██████'s program (particularly OG), and ██████'s proposed 2020-2021 Individualized Student Plan, which is based on Dr. ██████'s assessment of the Student's disability and educational needs, and provides the Student with private education services that are appropriate to her needs.

DISCUSSION

A. The Legal Framework

1. IEP and FAPE

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

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

(A) In General

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

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

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

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

The Supreme Court addressed the FAPE requirement in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), holding that FAPE is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* at 201 (footnote omitted). The Court set out a two-part inquiry to analyze whether a local education

agency satisfied its obligation to provide FAPE: first, whether there has been compliance with the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-07.

The *Rowley* Court found, because special education and related services must meet the state's educational standards, that the scope of the benefit required by the IDEA is an IEP reasonably calculated to permit the student to meet the state's educational standards; that is, generally, to pass from grade-to-grade on grade level. *Rowley*, 458 U.S. at 204; 20 U.S.C.A. § 1401(9).

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

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

- (i) the strengths of the child;
- (ii) the concerns of the Parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

20 U.S.C.A. § 1414(d)(3)(A).

Among other things, the IEP depicts a student's current educational performance, explains how the student's disability affects a student's involvement and progress in the general curriculum, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A.

IEP teams must consider the student's evolving needs when developing their educational programs. A student's IEP must include "[a] statement of the child's present levels of academic achievement and functional performance, including . . . [h]ow the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for non-disabled children) . . ." 34 C.F.R. § 300.320(a)(1)(i). If a child's behavior impedes his or her learning or that of others, the IEP team must consider, if appropriate, the use of positive behavioral interventions, strategies and supports to address that behavior. *Id.* § 300.324(a)(2)(i). A public agency is responsible for ensuring that the IEP is reviewed at least annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision. *Id.* § 300.324(b)(1).

To comply with the IDEA, an IEP must, among other things, allow a disabled child to advance toward measurable annual academic and functional goals that meet the needs resulting from the child's disability or disabilities, by providing appropriate special education and related

services, supplementary aids, program modifications, supports, and accommodations. 20
U.S.C.A. § 1414(d)(1)(A)(i)(II), (IV), (VI).

Thirty-five years after *Rowley*, the parties in *Andrew F.* asked the Supreme Court to go further than it did in *Rowley* and set forth a test for measuring whether a disabled student had attained sufficient educational benefit. The Supreme Court revised the Tenth Circuit’s interpretation of the meaning of “some educational benefit,” which construed the level of benefit as “merely . . . ‘more than *de minimis*.’” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

The Supreme Court set forth a “general approach” to determining whether a school has met its obligation under the IDEA. While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, *Andrew F.* and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

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

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of disabled children in the United States ““were either

totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.” *Andrew F.*, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 179). A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child’s circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be “*specially* designed” to meet a child’s “*unique* needs” through an “[i]ndividualized education program.” *Andrew F.*, 137 S. Ct. at 998-99 (citations omitted). The Court expressly rejected the Tenth Circuit’s interpretation of what constitutes “some benefit”: When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Id.* at 1001 (citation omitted).

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

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

In addition to the IDEA's requirement that a disabled child receive educational benefit, the child must be placed in the "least restrictive environment" (LRE) to achieve a FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989). At a minimum, the statute calls for school systems to place children in the "least restrictive environment" consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). Placing disabled children into regular school programs may not be appropriate for every disabled child, and removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved.

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like HCPSS to offer a continuum of alternative placements that meet the needs of children with disabilities. 34 C.F.R. § 300.115. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services to be provided in conjunction with regular class placement. *Id.* § 300.115(b); COMAR 13A.05.01.10B(1). Consequently, removal of a child from a regular

educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. COMAR 13A.05.01.10A(2). In such a case, a FAPE might require placement of a child in a private school setting that would be fully funded by the child's public school district.

Unilateral placement

Parents may be entitled to retroactive reimbursement from the state for tuition and expenses for a child unilaterally placed in a private school if it is later determined that the school system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). The issue of reimbursement for unilateral placement was expanded in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Parents may recover the cost of private education only if (1) the school system failed to provide a FAPE; (2) the private education services obtained by the parent were appropriate to the child's needs; and (3) overall, equity favors reimbursement. *See Id.* at 12-13. The private education services need not be provided in the least restrictive environment. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

1. Burden of Proof

The standard of proof in this case is a preponderance of the evidence. *See* 20 U.S.C.A. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3). To prove an assertion or a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

The burden of proof rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). In this case, the Parents are seeking relief, and bear the burden of

proof to show that HCPSS failed to offer the Student a FAPE for the 2019-2020 and 2020-2021 school years, and that they are entitled to reimbursement for their unilateral placement of the Student at the [REDACTED] School for those years as well as for the 2020 summer session. For the reasons that follow, I find that the Parents partially met this burden, and conclude that HCPSS has not offered the Student a FAPE for the 2020-2021 school year,⁹ with an IEP that was reasonably calculated to meet her unique needs and that the Parents are therefore entitled to reimbursement for their unilateral placement of the Student at [REDACTED] in the 2020-2021 school year.

A. Position of the parties

The Parents' attorney filed a comprehensive complaint on behalf of the Student and the Parents. The Parents initially argue that HCPSS committed a procedural violation that should grant them relief. The Parents subsequently argued that the HCPSS IEP team failed to determine appropriate special education services in the area of reading and that the dual diagnosis of Dyslexia and ADHD necessitates specially designed services, in a small group setting, led by highly skilled professionals. The amount and quality of pull-out services is insufficient and disruptive, and the Student's participation in general education classes will not advance her education, as she cannot keep up. Moreover, the amount of time spent in special education services is insufficient for the Student to make progress appropriate in light of her circumstances. The Parents are seeking that HCPSS fund the Student's education at [REDACTED] for

⁹ For reasons discussed below, I am not ordering reimbursement for the 2019-2020 school year's tuition for the 2020 summer session at [REDACTED].

the 2019-2020 school year, the 2020 summer session at [REDACTED], and funding and placement at [REDACTED] for the 2020-2021 school year.

HCPSS counters that there is no credible evidence that the nature or severity of the Student's disability would require that the Student receive small class sizes and greater access to special education services, taught on a low student to teacher ratio. The IEP team determined that the Student did not require a small class size to access the general curriculum of her grade level. Because of this, HCPSS contends that the Student should attend her neighborhood school and receive the services indicated in the IEP. Stating that the LRE requirement is to place the Student in the school the Student would otherwise attend, and removal should only take place if the nature or severity of the disability is such that education in that school cannot be achieved, even in concert with supplemental aides and services, HCPSS does not believe that the Student's disabilities require removal from the home school. Additionally, HCPSS argues that small class size does not equate to special education, stating the Students two most recent schools offered small classes generally.

After reviewing all of the evidence in this case, I must conclude that HCPSS did not develop an IEP that was reasonably calculated to meet the Student's unique needs for the 2020-2021 school year, the only year that I find at issue. I have assessed the witnesses and explain below why I have reached that determination.

B. Procedural violation

The first issue raised by the Parents in their prehearing statement, which is noted as the first issue to be decided, is whether HCPSS failed to determine eligibility and develop an IEP within the required timelines. *Rowley*, 458 U.S. at 206-07. The remedy would be to right the wrong that occurred, assuming that there was a detriment resulting from the delay.

The IDEA provides procedural safeguards. With regard to claims of procedural violations under the statutory scheme, 20 U.S.C.A § 1415(f)(3)(E)(ii) provides:

(ii) Procedural issues. In matters alleging a procedural violation, [an Administrative Law Judge] may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

- (I) impeded the child’s right to a free appropriate public education;
- (II) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or
- (III) caused a deprivation of educational benefits.

Ms. [REDACTED] an HCPSS Compliance Officer, acknowledged that the IEP was developed 20 school days outside the required timeline to prepare an IEP, which is within 60 days of the assessments being completed (TR. 7, pp 15-17). The Parents argued that it was their intention to enroll the Student at HCPSS for the sixth grade with HCPSS (the 2019-2020 school year) had the IEP team developed an appropriate program. I find that the 20-day delay did not cause the Student to lose any educational opportunity nor did it interfere with the provision of FAPE. The Student was not in school at HCPSS and was already receiving her education at [REDACTED] without interruption or interference.¹⁰ *T.B. v. Prince George’s County Board of Education*, 897 F.3d 566, 573 (4th Cir. 2018), cert. denied, 139 S.Ct. 1307 (2019); *DiBuo v. Board of Education of Worcester County*, 309 F.3d 184 (4th Cir. 2002). The elements in 20 U.S.C.A § 1415(f)(3)(E)(ii)(I), (II) and (III) were not proven and the Parents are not entitled to relief due to the 20-day delay in the IEP process.

D. Relief sought for the 2019-2020 school year and summer session 2020

An issue in this case is what school years the Parents were eligible for reimbursement from HCPSS for the Student’s education at [REDACTED]. In their letter dated November 15, 2019, the Parents asked to re-enroll the Student at [REDACTED] and requested an IEP team meeting. Parent Ex. 22. The Parents had already signed a full year, non-refundable contract with [REDACTED] for the

¹⁰ In the following section of this decision, I found that the Parents would not have enrolled the Student at [REDACTED] during 2019-2020 school year even if they decided that the program was appropriate.

2019-2020 school year, similar to the 2020-2021 contract the Parents submitted into evidence. Parents Ex. 39. Although the Parent testified that she wanted to send the letter earlier, it was not sent until well into the 2019-2020 school year. Tr. V1, p. 176:11 to 177:4. Although the Parents asserted that they would have disenrolled the Student from an already paid-for private school which they assert provided a very satisfactory education for her, it is unlikely that they would have forfeited the remaining, paid-for balance of the 2019-2020 school year at [REDACTED]. This strains credulity – particularly when the Parents were so pleased with the Student’s progress. There is little doubt, based on the Student’s school enthusiasm and social involvement at [REDACTED], that taking her out of the school where the evidence showed she was so educationally, socially and emotionally invested, would be disruptive. The evidence does not support the Parents’ intention to remove the Student from [REDACTED] for any part of the 2019-2020 school year.

Although there is evidence that the Student has difficulty retaining information, there was no specific evidence supporting her need to attend the summer program at [REDACTED] or any indication that the Student attended at the Parents’ expense.

E. The Student’s educational and diagnostic history

The Student is presently twelve years of age. The Parent describes her as “intelligent, creative, friendly, kind, imaginative, athletic, funny and hard-working.” Tr. V1, p. 53:21 to 22. She has been diagnosed with dyslexia, dyscalculia, and ADHD. The Student is presently a seventh-grade student at [REDACTED]. The Student participates in after-school activities at [REDACTED], including cross-country, basketball, track and the horseback riding club. TR. V1, pp. 54:25 to 55:2.

The Parents became aware of the Student’s difficulties early when she could not write her own name and mixed up words. TR V1, pp. 55:12 to 55:17. In kindergarten, although the Student was advanced in the arts, she did not know any of her letters or the sounds they made,

could not count manipulatives, read pre-emergent books, or finish her schoolwork. Tr. V1. P. 55:22 25.

The Parent also described the Student's stress in first grade, when she hid in closets and went to the nurse's office when there was no physical ailment in order to avoid being in school. Tr. V1, p 57:16 to 18; Parents Ex. 13. In second grade, the Student's learning disabilities became apparent when she could not remember the alphabet or the sounds the letters made, nor could she read without one-on-one assistance. The Student felt that other children were making fun of her because she could not read, causing her to cry before school almost every day. Tr. V1, pp. 57:21 to 58:3. Growing frustrated with the teacher who attributed the Student's difficulties to being distracted and impulsive, and that "learning her math facts would boost her self-confidence, "the Parents withdrew the Student from HCPSS and enrolled her at the [REDACTED] School for third grade for the 2016-2017 school year. Tr. V1., p. 58:4 to 10. Ms. [REDACTED] who tutored the Student when she arrived at [REDACTED], described her as "very defeated." Tr. V4, p. 17:3 to 4.

Although HCPSS is correct that the due process complaint has a two-year limitations period which prevents me from providing any relief for those years, the Student's experience as a student is relevant to her present educational needs. [REDACTED], Ph.D., at [REDACTED], prepared a psychological assessment in 2014, showing the Student's deficiencies in relation to her peers after her kindergarten years. Dr. [REDACTED] determined the Student had ADHD and an adjustment disorder,¹¹ but did not make a diagnosis of dyslexia. Parents Ex. 7. The Student was unable to rhyme, sequence the days of the week or write her name other than in mirror image. An educational assessment, done in the same time period, found her to be easily confused and distracted. Parents Ex. 8. Similarly, a psychological assessment was prepared; this

¹¹ Dr. [REDACTED] recommended psychotherapy to help the Student with her coping skills; this treatment was determined unnecessary. The Parent testified that she consulted the Student's pediatrician, who diagnosed and treated her for Lyme Disease which diminished her mood and anxiety issues. Tr. V1, p. 165:16-24.

was the first mention that the Parents thought the Student might be dyslexic, although the diagnosis was not listed on the report (ADHD being the only diagnosis made in that report). Parents Ex. 9. The speech-language assessment showed consistent word issues. Parents Ex. 10.

The first professional to recognize the Student's dyslexia was [REDACTED] at [REDACTED] pursuant to an evaluation on February 25, 2016 after she reviewed the HCPSS IEP. Parents Ex. 14-0025. The Student's reading and math difficulties extended through her education at HCPSS. Parents Exs. 15, 16, 18¹² Her earlier occupational therapy (OT) evaluation was consistent over time as well. Parents Ex. 17. The Student's preference for one-on-one interaction with a teacher was noted in several places. Parents Ex. 19-002. The Parents' experience is that the Student gets lost in larger classes and she has consistently worked better in small groups, where she stays on task and works hard. Tr. V1, P. 133:3 to 12.

The Parents retained [REDACTED] to perform an education assessment in 2018. Parents Ex. 21. In her report, Dr. [REDACTED] identified the Student as having dyslexia: "Given her pattern of phonological weaknesses, as well as broader cognitive pattern (e.g., sequencing, working memory, and visual discrimination difficulties) that affect the development of reading skills, [the Student's] profile is consistent with an underlying diagnosis of dyslexia, a language-based learning disorder (referred to as a Specific Learning Disorder with Impairment in Reading)." Parent Ex. 21-0016. Using that data, her observation at [REDACTED] and the HCPSS reports, Dr. [REDACTED] diagnosed the Student with mixed dyslexia, which she qualified as severe. Ms. [REDACTED], who tutored her in reading, concurred, citing the Student's need for "so much repetition" to maintain a skill. Tr. V4. Pp. 22:22 to 23:9.

Regarding math, Dr. [REDACTED] also diagnosed the Student with dyscalculia. Dr. [REDACTED] wrote in her report that the Student's learning, despite that condition, was attributable to frequent repetition

¹² Although the information on these exhibits was detailed and showed the Student's reading and math deficiencies, they are being considered not to analyze the IEP details, but to illustrate that the Student's reading and math deficits were longstanding.

and mastering concepts over a longer period of time than would be required for another student. The Student's teacher observation from [REDACTED] includes the recognition that the Student works hard but continues to require substantial support. Ms. [REDACTED] and Ms. [REDACTED] testified that the math supports in the May 2020 IEP were insufficient for the Student. Ms. [REDACTED] testified that two hours of services inside general education and two hours outside general education were inappropriate, as the Student would not be able to access the seventh-grade math curriculum based upon her current level of math comprehension. Even at [REDACTED] the Student required "reference materials" (i.e., multiplication tables) and close supervision. Parent Ex. 31-0002.

Dr. [REDACTED]'s concern is that the Student would develop low self-esteem if she cannot succeed, particularly in front of her general education classmates. I find that this is similar to the Student's presentation in second grade when she avoided class due to her embarrassment, as testified to by the Parent. She could again be embarrassed because she could not read fluently in front of her peers.

The Parent described the Student's progress at [REDACTED], explaining that she was "starting over learning how to read" with one-on-one reading instruction, and working on her addition and subtraction facts. Tr. V1, p. 58:18 to 24.

The Parent testified that in the fourth grade at [REDACTED] for the 2017-2018 school year, the Student still did not know math or currency facts but was slowly progressing in reading using the OG method. Tr. V1, p. 59:4 to 59:10.

The Parents enrolled the Student at [REDACTED] for the fifth grade for the 2018-1019 school year so she could continue similar instruction as she received at [REDACTED] but in a setting that would challenge her more and allow her to participate in more extracurricular activities, such as arts, athletics and performing arts. Tr. V1, Page 59:11 to 19. She continued to attend [REDACTED] for

the sixth grade (2019-2020 school year and is presently still there for seventh grade as well (2020-2021 school year).

F. IEP process

The catalyst for the Parents initiating the IEP process by their November 15, 2019 letter was that they heard HCPSS was initiating a OG program similar to the one that ██████ used to educate the Student. The Parents expressed this anticipation during the January 2, 2020 IEP team meeting. Parents Ex. 25-0001. Stated simply, the witnesses who described the OG method of teaching explained that these students learned using multi-sensory methods of education, and they benefit from a low student to teacher ratio. The Parent, a ██████ at ██████ Elementary, wanted the Student to reenter the HCPSS school system – her rationale was that the Student could get an education similar to her ██████ experience, and her family would benefit by having an older sibling in the same school as the Student. The family could then have the same school day and vacation schedule. Additionally, the Student would not have to go to school so early as she did at ██████ (waking up at 6:00 a.m. to leave for school by 7:00 a.m., and arrive home around 5:00 p.m.), which is a significantly longer day than she would have at ██████. Tr. V1, pp 110-111.

On November 15, 2019, the Parents sent a letter to HCPSS advising that they were re-enrolling the Student into ██████ school, requesting an IEP meeting to “discuss what ██████ can offer [the Student].” Parents Ex. 22. An IEP team meeting was scheduled for December 29, 2019 but postponed and rescheduled at the Parents’ request. The meeting was ultimately held on January 2, 2020. Parents Ex. 25.

At the January 2, 2020 meeting, the team recommended updated assessments to answer the following questions to prepare for the IEP team meeting and eventual drafting of an IEP:

- What is [the Student's] current cognitive profile?

- What are [the Student's] current levels of academic performance in reading, math, and written expression?
- Does [the Student] meet the educational disability eligibility criteria for a Specific Learning Disability?
- What is the impact of [the Student's] previous clinical diagnosis of ADHD-Predominantly Inattentive Presentation on [the Student's] educational functioning?

The following assessments were recommended: Educational Assessment; Reading Skills; Reading Comprehension, Reading Fluency; Mathematics Calculation; Mathematics Reasoning; Written Expression; and vision. Parent Ex. 25-0002. The assessments were performed and reviewed at the subsequent meeting on February 28, 2020. Parent Ex 30.

1. Assessments conducted

Among the tests conducted were the following:

- Parents Ex. 27 HCPSS Informal Reading Summary 1/2020-2/2020, Diagnostic Passages 1/2020
- Parents Ex. 28 HCPSS Educational Assessment Report 2/2020, Woodcock Johnson IV Score Report 1/2020
- Parents Ex. 29 HCPSS Psychological Assessment Report 2/2020

Parent Ex. 30. The parties presented the evidence regarding these assessments well, with the Parents offering opposing experts to argue that the measures taken were either not appropriate to measure the metrics being tested, or that the measurements did not accurately assess the Student's abilities.

I gave great weight to the historic, anecdotal data observed and recorded over time describing the Student's educational course. These included school-based assessments, reports of teachers, periodic report cards, and an explanation by the Parent on how the Student adapted to various methods of instruction. As pointed out by these experts, the tests measured the student at a particular moment in time; the historic data gives a broader description of the Student's education capabilities and needs.

What I found more probative were the [REDACTED] classroom observations by both Dr. [REDACTED] and Ms. [REDACTED], and Dr. [REDACTED]'s psychological assessment. Without contradiction, Dr. [REDACTED] diagnosed the Student with dyslexia, dyscalculia and ADHD.

Dr. [REDACTED] and Ms. [REDACTED] simultaneously observed the Student in three classroom settings at [REDACTED] over two days in January and February 2020. Noting the Student's Composition class has a student-teacher ratio of seven to one, Ms. [REDACTED] indicated that the Student participates in class, and asks clarifying questions which the teacher described as typical of the Student's class performance. The Composition teacher indicated that the Student has difficulty with independent reading, though the Student understands the novels when audiobooks are used. On the day of observation of the Student's math class, the student-teacher ratio was four to one, with two students being absent. Even with this low student teacher ratio, both Ms. [REDACTED] and Dr. [REDACTED] noted the Student's difficulty with the subject matter. The math teacher noted the Student struggles with basic operations, even at the fourth-grade equivalent and scope of the subject matter, putting her approximately three grades below grade level. These findings are consistent with the additional observation of the English class; the Student is active and engaged¹³ but struggles with the subject matter and executive functioning that inhibits her ability to complete tasks.

In addition to the observation, teachers also provided written input forms. Ms. [REDACTED] noted in her report that the Student's Language Skills instruction had a student-teacher ratio of two to one, and that the Student can stay focused with prompts and redirection. The teacher also indicated that the Student has difficulty with reading fluency as she works on comprehension of

¹³ Of particular interest was the interpretation of the Student's helping other students. Ms. [REDACTED] considered it a sign that the Student was able to perform the work; Dr. [REDACTED] who had worked with the Student, indicated that this was merely an avoidance technique that she has observed in the Student when she was trying to perform the task herself.

short passages. It is a challenge for the Student to recall already learned information, requiring prompting in several areas.

Based on her observations, Ms. [REDACTED] suggested that the IEP team should incorporate recommendations, including the following: provide the Student with preferential seating close to the instructor to minimize peer distraction; when working independently, allow the student to work in an environment with reduced distractions; provide frequent check-ins to ensure the Student understands directions and expectations; and provide pre-writing strategies. Dr. [REDACTED] was more specific in her recommendations resulting from the observation. Regarding the Student's reading intervention, Dr. [REDACTED] recommended a high level of frequency and intensity, 90-120 minutes a day of individual and small-group instruction infused throughout the curriculum and not just "pull-out" instruction. Noting the interaction between dyscalculia and dyslexia, Dr. [REDACTED] recommended that the Student continue to receive multisensory mathematics instruction in a small-group format in order to make progress in mathematics. Finally, Dr. [REDACTED] noted that the Student needs support to assist with attention and executive functioning, most often found in a small class setting.

Regardless of the disparities in test results and criticism of the choice and methods of testing pointed out by opposing experts, the Student qualified for a special education services due to her SLD (dyslexia and dyscalculia) and ADHD (other health impairments). The question is whether the IEP, supported by HCPSS and opposed by the Parents, is reasonably calculated to enable the child to receive some educational benefit.

2. IEP team meetings

At the February 28, 2020 meeting, the Student was found to have met the criteria for an SLD and OHI.¹⁴ At the subsequent meeting on May 18, 2020, the IEP was discussed and developed. Parents Ex. 35.¹⁵

The IEP listed goals and objectives, provided for twelve hours in the general education setting: four hours for science and social studies, and two hours in English and math, with eight hours out of general education (sometimes referred to as “pull-out” services) consisting of two hours each for ELA and math and four hours for a reading seminar. As a group, the team did not find support for a smaller class size, favoring instead access to the Student’s general education peers. Parent Ex. 30-0041. The Student’s placement would be at her home school [REDACTED], which would also be the LRE, placing the Student with general education peers. Parents Ex. 34. The Parents opposed the IEP team recommendations, although they participated as members of that team.

On May 18, 2020, the Parents’ counsel attended the IEP team meeting and submitted some changes that the team adopted. HCPSS is correct that the Parents are not contesting the

¹⁴ “Other health impairment.” The Student qualified for Special Education services in first grade due to her OT evaluation; the IEP had not yet identified dyslexia as a qualifying condition. Parents Ex. 12.? Was this already in the decision? It seems out of left field.

¹⁵ This exhibit is the same as HCPSS Ex. 20 except for notations written by Parents’ counsel and submitted to the IEP team for review of the draft May 18, 2020 IEP. Parents Ex. 35.

goals and objectives,¹⁶ but the Parents do question the means by which those goals are met.¹⁷

HCPSS contends that their program is research-based and adequate to educate the Student; that the Parents have not demonstrated the need for a smaller class size or a lower student to teacher ratio; and that the Parents have not demonstrated that the IEP and interventions provided fail to address the unique circumstances of the Student.

¹⁶ Ms. [REDACTED] provided a concise description of the language goals:

Q. All right. And when you testified earlier on direct in response to my questions and you had talked about your opinions regarding the appropriateness of the IEP and the placement and the service hours, was that based on the IEP as revised with the additional goals and objectives that Ms. Vancleef went through with you?

A. Yes, sir.

Q. Okay. Ms. Vancleef went through the IEP goals and objectives with you, which I'm not going to do right now, but let me ask you just a couple of questions. You used a couple of terms that I want to make sure the record's clear about. Decoding means what?

A. The process of reading words, breaking them out, phonemic awareness, those kinds of things.

Q. And phonemic awareness means what?

A. Understanding the phonemes, which are the sounds that letters or combinations of letters make.

Q. Encoding?

A. Spelling, spelling those sounds that we make.

Q. And reading comprehension, what is that exactly?

A. Understanding what, the meaning behind what those words, so when you put words together, understanding what a text is saying, being able to answer questions, things like that.

Q. Okay, and lastly I want to ask you, what is fluency?

A. Fluency is sort of the rate and rhythm in which a person reads.

Tr. V6, pp. 159:11 to 160:14.

¹⁷ Fluency goals were not initially included in the IEP, but the team agreed to add them. Nevertheless, the pull-out times were not increased to provide a specific time for this intervention, as discussed below.

G. Parent's issues with the IEP

1. The IEP failed to provide researched-based instructional interventions to address all of the Student's unique needs

The special education services proposed for the IEP were as follows:

. . . special ed services in the general ed setting for science and social studies for 4 hours each weekly. In ELA and math, 2 hours in the general ed setting and 2 hours out of general ed setting (each class) weekly [and] 4 hours out of general ed weekly for reading seminar. This is a total of 12 hours in the general ed setting; 8 hours out of the general ed setting.

Parents Ex. 34-0003. Ms. [REDACTED] confirmed that formula. Tr. V2, p. 266:7 to 17.

Although the IEP proposed by HCPSS recognized the Student's strengths and deficits, it provided little support to address her severe dyslexia and dyscalculia or ADHD. There were pull-out services to be provided, but these were based on programs, that although researched-based instructional interventions, were given in larger setting (approximately four students), with other students who may have different disabilities and reading levels than the Student's. Although teaching methodology is left to the school to choose and institute, it must be part of an "otherwise appropriate IEP." *County School Board of Henrico v. Z.P.*, 399 F.3d 298, 308 (4th Cir. 2005). But if I determine that the IEP is not appropriate because it does not provide the Student with FAPE, HCPSS' choice of the methods used are immaterial.

Ms. [REDACTED] did not know which reading intervention program was going to be used to teach the Student "... We have [V]isualizing, [V]erbalizing; we have Read 180; we have System 44; we've done other ones in the past. We try to identify what a student needs and we figure out how we can implement that, which intervention will work best." Ms. [REDACTED] acknowledged that "Really Great Reading" was the program HCPSS decided to implement first; that program choice was not made when the IEP was being developed, but rather the program was chosen in anticipation of the hearing. Tr. V6, p. 36:3 to 25. Ms. [REDACTED] testified that the interventions were unnamed to allow the school to "have flexibility in changing the intervention based on the data that the

student is showing us.” Tr. V6, p. 177:17 to 24. There seemed to be little thought whether that program would be appropriate for a student with the Student’s disabilities (particularly dyslexia and dyscalculia).

No HCPSS witness adequately addressed whether any of these systems were specifically designed for addressing the specific needs of dyslexic students. Ms. [REDACTED] did not feel qualified to respond to that question. Ms. [REDACTED] testified that “some of them” might be designed with those students in mind but did not specify which ones were or whether they would be the intervention chosen for the Student. Tr. V6, p. 71:18 to 20.

Although school systems have discretion on which methodologies are used, it is difficult to determine whether the chosen interventions will be able to be presented in the time set forth in the IEP for the pull-out sessions. Ms. [REDACTED] testified for HCPSS that although the IEP called for four hours of pull-out services per week, she did not know how long those specific chosen interventions would require to be implemented. Tr. V6, pp. 27:23 to 28:15.

Ms. [REDACTED] cited the number of interventions planned for the daily fifty-minute pull-out:

Q And how long did those take daily to implement?

A Thirty minutes.

Q And then how long does a phonics intervention take to implement?

A Twenty to thirty minutes as well.

Q And then how long does the fluency intervention take? Because her -- her fluency goal also said that she would have a fluency intervention.

A Yeah -- we would build that into that during that 50-minute block of time.

Q So, that sounded like that was at least a 50-minute block for the reading comprehension, as well as the phonics, if not longer. Correct?

A Yes. We could -- I mean, we could also build in that fluency during that English time frame for the warmup. It just is when the teachers are going to be able to take an IEP and implement appropriately during her instructional day.

Tr. V2, pp. 269:19 to 270:10.

Ms. [REDACTED] offered expert testimony regarding the pull-out hours proposed in the IEP. Ms. [REDACTED] ran the numbers. As she was familiar with the Visualizing and Verbalizing reading comprehension intervention, she testified that it required "a minimum of 60 minutes per day, five days per week. SIM [another reading program] requires a minimum of 45 minutes, five days per week. So, just on the comprehension intervention alone, you've exceeded the number of hours that were proposed for reading intervention." Tr. V2, p. 309:1-17.

Ms. [REDACTED] acknowledged that the time required for some interventions that were being considered exceeded the amount of time that was allotted for the pull-out services. One program might need an hour a day, and it might have taken two hours to complete more than one intervention. Accordingly, Ms. [REDACTED] was "lean[ing] back on school teams to determine where those -- where that would fit into her middle school schedule." Tr. V2, pp. 271:13 to 272:8.

Moreover, Ms. [REDACTED] said the Student would not miss general education work or material because the two pull-out small groups would also cover curriculum covered in the general education class. Ms. [REDACTED] also testified that the service hours were not only used for the interventions, but to address missed class work as well:

Q Okay. And in thinking about her being out of the English class and out of that math class for part of that time, was there a period of the day where she was going to have an opportunity to make up that work that she missed?

A She would have been doing it with that special educator and that resource -- in that out time period. She wouldn't have had to make up additional work. When we --

Q So when the reading intervention for comprehension be provided?

A During that reading seminar time.

Tr. V2, p. 268:6 to 15; Tr.V6, p. 190:6 to:13. Ms. [REDACTED] also said it can be curriculum, intervention, remediation all things in one. Adding the time anticipated to provide the interventions, as well as that needed to address missing class work, the witnesses could not explain how all of these would fit within the daily fifty-minute pull-out period.

One means of fitting these interventions into the time allotted would be to reduce the time spent on the interventions. With regard to the amount of time required for each intervention, Ms. [REDACTED] testified that the manufacturer of the Really Great Reading program gave “flexible scheduling guidelines” and suggestions how to present the program in thirty, forty or sixty minutes of instructional time. Tr. V6, pp 184:2 to 13. Ms. [REDACTED] explained further:

Q. What guidance have you received?

A. Just how to implement it in terms of timing and how to implement it when you have students who not only have decoding needs, but comprehension needs and balancing that within the class period. So, currently I'm using HD Word, but even with Boost or BLAST, which are other really great reading programs, we have received, like, flexible timing options and how that can be implemented within our 50-minute class period.

Q. What do you mean by flexible timing options?

A. So, like a standard lesson typically is about, a full session would be 60 minutes, but obviously we can be constrained depending on school schedule and so there's guidance on how to adjust that and, either shortening certain pieces or making sure that you are using instructional time appropriately.

TR. V6, pp. 93:19 to 94:9; Tr. V6, pp. 146:24 to 147:10. She would use Really Great Reading for 25 to 30 minutes per day, leaving time for other instruction. Tr. V6, p. 134:16 to 23.

Ms. [REDACTED] in her rebuttal, opined that if the programs were provided for half the time suggested by the manufacturer, the interventions would take twice long to be effective; with a student so far behind, this delay would not be acceptable. Add that to the use of the pull-outs for classroom work, the time to present the interventions would further be reduced. Ms. [REDACTED] also testified that providing more than one intervention in a pull-out session, or missing classwork because of a pull-out intervention, would not be handled easily for a distractible ADHD student.

Regarding math, Ms. [REDACTED] testified that two hours of services inside general education and two hours outside general education was inappropriate, as the Student would not be able to

access the seventh-grade math curriculum based upon her current level of math comprehension. Ms. ██████ explained that “a child with significant decoding and reading comprehension deficits, attentional deficits, is going to need support in a grade level classroom to access text to get her thoughts on paper, to participate fully in the general education curriculum and make progress in that regard, [Y]ou can't even touch that program with the hours that were offered.” Tr. V2, pp. 309:19 to 310:3.

Moreover, despite the Student’s severe and documented dyslexia and reading issues, Ms. ██████ acknowledged that assistance in the general education classroom would be provided through paraeducators, who are not required (or even anticipated) to have had training in the reading interventions or math interventions. Tr. V6, p. 27:12 22. The Parents’ expert opined that nothing would be gained through this assistance.

“Fluency and assisting [the Student] with access her regular classes” – something that Ms. ██████ testified would be also addressed in the pull-out time - was not addressed. Tr. p.309:13-17. Although fluency intervention was a goal requiring an intervention, Ms. ██████ was not aware of any instructor at ██████ who is performing that intervention. Tr. V6, pp. 145:25 to 146:10. If there were none, she would receive training; she did not indicate how much lead time that training would require. In the past, when Ms. ██████ worked with students in need of fluency intervention, she did so during ten to fifteen minutes of homeroom time. Tr. V6, pp. 157:21 to 158:6. Ms. ██████ opined that any fluency program implemented required at least forty-five minutes to accomplish. She was not sure how it could be done in a large classroom, as reading out loud was indicated, timing the exercises were required, and the Student would be distracted by others in the room. Providing a fluency intervention as a classroom warm-up, as was suggested, would have to be done in front of other students, which was embarrassing to a student who was not fluent.

The Parents and their experts also raised concerns about pulling the Student out of class for the interventions. Dr. [REDACTED] testified in rebuttal that children notice other children leaving or entering a classroom, causing frustration and anxiety for the student and a distraction to the other students in the room. Regardless of the method of pulling out (e.g., starting in the pull-out then going back to the classroom, or leaving before the end of the period) it was still disruptive and embarrassing, particularly to a student new to middle school. Therefore, the easiest means to assist the Student would be to have the Student complete the intervention in a set class period, where she should not need to walk in and out of the classroom, nor miss the general education class work. Having the Student work in self-contained classroom with a low student to teacher ratio, with like peers, where she would not be embarrassed, would recognize the Student's unique circumstances.

1. The IEP failed to address the Student's need for a smaller classroom with fewer distractions; and

The Parents disagree with the hours of service and how those services were going to be provided, explaining:

A. I rejected the IEP because I didn't think that the -- like the -- the instruction would be what she needed. I -- we rejected the IEP because the class sizes were very large. We rejected the IEP because [the Student] would have been pulled out from her English class and her math class every day. So, she would be missing half of that class, stilling needing to do all of that work. I mean, to stand up in the middle of those classes, leave with the other children that also were being pulled out into a small instruction group for either math or language arts.

I knew that wasn't a good situation for [the Student] because we had seen what happened when that happened earlier in elementary school.

Tr. V1, pp,186:15 to 187:2.

The Parents were particularly concerned that the Student would initially be placed in a larger class to see how she would perform. They were not satisfied with this assurance:

Q. Okay. And as far as class size, had you talked about class sizes at the IEP meeting?

A. We did.

Q. And what were you told?

A. That, I think, Ms. [REDACTED] said that there – there was no documentation about small class sizes [REDACTED] and that they would have to see how [the Student] did in a large class size before they will consider moving her into a smaller class size.

Tr. V1, pp. 189:19 to 190:2. They were led to believe that the typical class size was thirty-one students. Tr. pp 190:19 to 191-24. This was not disputed.

The Parents' witnesses showed that educating the Student in a general education setting, with a large number of general education students, with little support in the classroom, other than two hours of pull-out services, is insufficient to provide the Student with an appropriate education required by *Rowley* and *Endrew F.*

Ms. [REDACTED] testified that the Student would be supported in the general classroom to make sure she is accessing the information. That did not explain how a student with such deficits could participate in a general education classroom with a larger number of students and a higher student teacher ratio than what she is used to. There was little testimony about how that assistance would be provided.

Although teachers at [REDACTED] did not testify at the hearing,¹⁸ they prepared reports in January 2020 on HCPSS Child Find forms for the IEP team to consider. Test results are instructive, but they are only a snapshot of the student's strengths, weaknesses, functioning and educational needs that are displayed in one hour of one day. I consider these reports significant and probative because they

¹⁸ HCPSS questioned why [REDACTED] teachers were not testifying on behalf of the Parents. The Parent explained that the school will not allow its teacher to attend special education hearings, and if she were to have subpoenaed a teacher, the Student would be disenrolled from the school. Tr. V1, pp. 114:17 to 115:1; pp. 183:8-24.

were written by teachers who are familiar with the Student's current functioning and who have interacted with the Student on a daily basis for a longer period of time.

Even with smaller class size and individual attention at [REDACTED], the Student continues to have difficulties. Parents Ex. 31 encompasses several HCPSS Child Find forms completed by the Student's teachers at [REDACTED], which were shared with the IEP team. Of note, the cover pages (Parents Ex. 31-0001 and 0002) discuss the Student's positive outlook on her education, but also her challenges with it.

The Student's Composition teacher states that "her spelling, grammar and mechanics are weak, even with proofreading and support technologies; she often cannot identify misspelled words nor remedy them independently." Comparing [the Student] to students in her same grade, the Student's teacher "frequently" found that she continues to guess at words, and has difficulty with spelling, writing at an appropriate speed, punctuation and organization. Parents Ex. 31-0007.

The Student's literature teacher reiterated the Student's creativity and comprehension but confirms the Student's difficulty with "spelling many words, even with access to spell check and other supports. Often her written work contains many errors of spelling and punctuation. Independent reading is difficult for [the Student]... She struggles to recall information when she reads without the aid of outside support." Parents Ex. 31-0001. Completing the HCPSS Child Find forms checklist of frequently observed problems in comparison to other students in the same grade, the teacher repeats his concerns expressed above, adding that she "does not normally read out loud during class....[and has] significant trouble expressing herself in writing especially with spelling. She has access to technology for all assignments and tests." Parents Ex. 31-0005.

The Student's Language Skills (reading and spelling) class has a two to one student teacher ratio. Even with this high degree of attention, her teacher writes that she uses prompts and redirection to keep her on task, and that the Student "requires prompting to remember spelling and

suffix rules, syllable types, syllable division patterns, and morphology meanings. On a daily basis, she practices timed reading of words (real and nonsense), sentences and short passages...” with reminders to use correct capitalization and punctuation. Parents Ex. 31-0002. Comparing the Student to students in her same grade on the HCPSS Child Find form considered by the IEP team, the teacher frequently observed the following problems:

Reading:

- Difficulty with letter/word recognition
- Word guessing
- Slow, constant sounding out of words
- Difficulty with comprehension (factual, critical)

Written expression:

- Difficulty with spelling
- Difficulty with writing speed
- Difficulty with completing written work
- Difficulty with punctuation
- Difficulty writing a sentence
- Difficulty organizing sentences and ideas into meaningful paragraphs

Discrimination

- Difficulty discriminating letter symbols

Memory

- Difficulty remembering what is seen
- Difficulty remembering what is heard
- Difficulty retaining information over a period of time

Attention/Organization/Activity Level

- Difficulty beginning a task
- Difficulty maintaining attention
- Easily distracted
- Loses or forgets work and/or materials
- Difficulty with organization
- Difficulty completing tasks

Social/Emotional

- Inconsistency in performance

Daily work

- Incomplete homework assignments

The language skills teacher also noted that “reading, writing and comprehension are extremely difficult tasks for her.” Parents Ex. 31-0004.

Lastly, the Student’s seventh grade math teacher states that she is working “from a 4th grade equivalent scope and sequence.” The teacher writes that, despite her “great effort in math class,” [The Student] “struggles with her basic operations, and she makes frequent computation errors. [She] struggles with remembering the steps to multi-digit multiplication and long division. She benefits from reference materials to reduce her working memory load. *[The Student] works hard but continues to need significant support.*” Emphasis added. Parent Ex. 31-0002. Comparing the Student to students in her same grade on the HCPSS Child Find form considered by the IEP team, the teacher frequently observed the following problems:

Mathematics:

- Difficulty with number recognition
- Difficulty with number concepts
- Difficulty with basic operations (Multiplication, Subtraction, Division)
- Difficulty understanding place value
- Difficulty with number concepts

Discrimination

- Difficulty solving word problems

Memory

- Difficulty retaining information over a period of time

Visual Motor Coordination

- Difficulty with paper/pencil tasks
- Difficulty copying from the board

Attention/Organization/Activity Level

- Easily distracted
- Loses or forgets work and/or materials
- Difficulty with organization
- Difficulty completing tasks

Social/Emotional

- Interrupts and distracts class/easily redirected

The Student's teachers at [REDACTED] are able to analyze her needs and present her education due to the small size of her classes. She is with like peers and is not embarrassed to perform on her level, as she was at [REDACTED]. [REDACTED] teachers are able to give her this attention due to the low student to teacher ratio, described in Parents Ex. 37 (pp. 0001-0030). The Student was "lost" in the larger classroom; she is not lost at [REDACTED].

3. The IEP failed to include special education services and placement based on the Student's unique needs.

Dr. [REDACTED] testified that children with dyslexia and dyscalculia need repetition and individual attention to make progress in light of the Student's circumstances. Ms. [REDACTED] concurred on the need for repetition and constant enforcement, even over material that appeared to have already been mastered:

And, unfortunately, with kids with dyslexia like [the Student], you'll think that you have something in there and you will have spent some time on it and you'll think that it's mastered. So you move on to the next thing, but then when you do an assessment, or, like, maybe a few weeks later you're noticing that sound, they didn't get that sound. We need to go back and review that and repeat that lesson.

So a lot of repetition, a lot of hands-on, we did games. We did painting. We did just as many things as we could think of to do that were hands-on and to get moving. That's what we did.

Tr. V4, p. 16:7 to 18. This regression was evidenced on the Student's third grade report card. Tr. V4, pp. 19:25 to 20:21; Parents Ex. 20-0033. Ms. [REDACTED] explained the role of repetition for dyslexic students:

Q. You mentioned something earlier in regard to it's important to master something before moving on; why is that?

A. Because dyslexic children, one of the hallmarks of a child that is dyslexic is they -- they understand something in the moment and then the very next -- and so the teacher may think that they got, oh, this

child understands and so tomorrow I can do something totally difference because the child understands what I did yesterday. But that's not true. A child like [the Student] and definitely [the Student] would certainly get something in the moment and then go to apply it the next day and it's gone. So, it's really important to achieve a really high level of mastering a skill so they don't have to think about it. They just do it and you have to achieve that level of mastery over a long period of time. And that kind of depends on the child.

Tr. V1, p 230:3 to 19.

██████████, who also testified as an expert in dyslexia, was familiar with both HCPSS reading programs and ██████████. From her record review, she opined that the Student made progress at ██████████ – even if slow and steady – which was the result of the low student to teacher ratio, small class size and an educational staff that consistently deals with dyslexic students who require repeated phonics and math reteaching.¹⁹

No provision in the IEP addressed the Student's unique circumstances – that she needs intense repetition to master a concept. Although the methodology to teach is within the discretion of the school, HCPSS was not sure which program they would use to initiate their interventions. Even with the programs that their witnesses mentioned, there was no program presented that would address this unique need, which the Parents' experts demonstrated was a hallmark of dyslexia and dyscalculia. Having a paraeducator in the classroom with the Student, who is not familiar with dyslexia, dyscalculia or the interventions required to support such a student, is woefully inadequate to meet those unique circumstances. Although the HCPSS witnesses meant well, they did not tailor their programming to the unique needs of the Student – a small student to teacher ratio, small classes that would minimize disruptions, frequent repetition of material that was mastered and then lost, and an atmosphere where the Student feels comfortable. This could

¹⁹ I considered the relevance of Ms. ██████████'s testimony, due her limited, three-hour interaction with the Student. Nevertheless, I considered Ms. ██████████ to be familiar with dyslexic students and their education at ██████████ and relied on her opinion in that regard.

not be achieved by the Student sitting in a classroom with a textbook she cannot read, or worse, fearing being asked to read it aloud when she could not do so. That would create a hint of the [REDACTED] memories that caused her such anxiety that she became a frequent visitor to the nurse's office and brought this anxiety home. The Parent testified about how Student would react to larger, not individualized classes, which was clear by her history at [REDACTED] and a component of the current IEP:

And [the Student's father] was commenting after our conferences how different her [REDACTED] conferences have been since we've -- you know, we've been talking so much about in [REDACTED] and how would go to the conferences and we -- we would hear she's not paying attention. She's off task. She does homework hard. She doesn't finish her work. But when we go to these [REDACTED] conferences we hear that she is an enthusiastic learner. She works hard. She wants to learn. She's helpful. She's positive. It's very different.

Tr. V1, p. 142:9 to 17.

For these reasons, I have determined, by a preponderance of the evidence, that the IEP proposed by HCPSS was not reasonably calculated to enable the Student to make progress appropriate in light of her circumstances. *Andrew F.*, 137 S.Ct. at 1001.

H. Unilateral placement

The issue of reimbursement for unilateral placement was expanded in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Parents may recover the cost of private education only if (1) the school system failed to provide a FAPE; (2) the private education services obtained by the parent were appropriate to the child's needs; and (3) overall, equity favors reimbursement. *See Id.* at 12-13. The private education services need not be provided in the least restrictive environment. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009)

Having found that the IEP proposed by HCPSS was not reasonably calculated to enable the Student to make progress appropriate in light of her circumstances, the next question is whether the Student can receive “an appropriate education” at [REDACTED]. *Florence*, 510 U.S. at 14.

The [REDACTED] program was described in the Student’s Individualized Student Plan²⁰ for the 2020-2021 school year. Parents Ex. 37-001-2. Recognizing the Student’s “learning educational assessment and learning profile” based on Dr, [REDACTED]’s February 2018 assessment, the document describes how [REDACTED] teachers would address the Student’s spelling, decoding, reading fluency, comprehension and mathematics deficiencies. For each subject area, the document lists the class sizes, instructional approaches, and accommodations to be provided.

The Student’s Language Skills class has a two to one student teacher ratio and is designed for her to master her instruction: “decoding strategies/practice, fluency training (Reading A-Z, morphological awareness/vocabulary instruction (Infercabulary/Worldy Wise, and spelling instruction.” Parent Ex. 37-0031. Her listed accommodations are:

- Access to a variety of seating options
- Modification of class assignments by reducing the number of items required
- Opportunity to demonstrate mastery of content in a variety of ways
- Extended time on all assessments
- Option for a reader for assessments
- Chunking assignments, especially reading
- Access to spell and grammar check on all written assignments.

The Student’s literature class has a ten to one teacher ratio and the composition portion of the class has a five to one ratio. The instruction method is again multi-sensory, and her writing is color coded. The accommodations are similar.

The Student’s math class has a six to one student to teacher ratio, and is designed for “explicit, multi-sensory instruction, slow/deliberate pacing based on mastery, modified curriculum (below grade level), visual presentation of concepts using drawings/graphics and

²⁰ This document is similar to an IEP in that it addresses what course the Student’s education will take. It is not as formalized as the HCPSS IEP, as there are no legal requirements for its structure or content.

manipulatives.” Parent Ex. 37-0031. The accommodations are similar, but have some adjustments for math instruction:

- Access to multiplication chart and/or calculator
- Extended time for assessments
- Chance to check and revise answers on assessments (for calculation errors)
- Access to notes in a digital or printed format
- Access to assignments electronically
- Access to the standing desk
- Access to formulas
- Opportunity to demonstrate knowledge through class discussion

The Student’s science class has a ten to one student teacher ratio, and is designed for “explicit, multi-sensory instruction with a significant amount of hands-on, experiential learning.”

Parent Ex. 37-0032. The classroom accommodations are:

- Extended time on assessments
- Use of speech to text (voice typing) and spell check for all in-class work, assessments, and homework
- Spelling NOT counted on assessments
- Priority seating
- Formulas provided for classwork and tests
- Notes available electronically
- Access to audio (Read & Write) or verbatim reader for all in-class work, assessments, and homework

Finally, the Student’s social studies class has an eleven to one teacher ratio, designed for “Instruction: discussion-based, multi-sensory instruction with use of primary sources.” Parent

Ex. 37-0032. Accommodations are:

- Extended time on assessments
- Access to audio (Read & Write) or verbatim reader for all in-class work, assessments, and homework
- Use of speech to text (voice typing) and spell check for all in-class work, assessments, and homework
- Opportunity for flexible seating, use of fidgets, standing/moving during lecture and classwork

The present teacher report for the fall 2020-2021 term shows that the Student is doing well in this environment. Parents Ex. ?P. 37-0033. Excerpts from earlier report cards show her

progress. In her skills class in the first trimester for the 2018-2019 school year, the Student's units of study included phonology (basic spelling patterns and vowel teams). As an example, she had already moved up three levels in Reading A to Z since the beginning of the first trimester of the 2018-2019 school year (Parents Ex. 37-0001), three more levels in the second trimester (Parent Ex. 37-0004).²¹

The Parent and her witnesses described how the education program at [REDACTED] provides her with an appropriate education in light of the child's circumstances.

[REDACTED] was accepted as an expert in dyslexia, specialized instruction for students with dyslexia, as well as special education. She testified about her educational history and work experience, particularly working with dyslexic students as a teacher and director of curriculum at the [REDACTED] School, which she described as a school for children with language-based learning disabilities. She was also the academic director at [REDACTED] for their summer dyslexia education program, later becoming an outreach instructor going to area public and private schools to train teachers how to teach dyslexic children. In 2011, she started the [REDACTED] School. Ms. [REDACTED] has 120 hours of OG training, as well as other training in various reading programs.

Ms. [REDACTED] has had personal teaching experience with the Student, tutoring her in the second grade after school at [REDACTED]. Ms. [REDACTED] supported the Student's reading difficulties as far back as second grade; she was unable to read "CVC"²² words at greater than a 33% accuracy rate, which was in the low range for a second-grade student. Tr. V1, p. 221:12 to 25.

From her training and experience teaching dyslexic children, Ms. [REDACTED] described how the Student, as a dyslexic child, could progress in reading using her senses:

[The Student], needed it to be taught not only explicitly but she had to look at the a, trace it with her hand and say, ah, and say it all at the same time. Not just once,

²¹ The teacher commented that this movement since the first of the year represented one grade level. Parents Ex. 37-0004.

²² Consonant-vowel-consonant words, such as "cat."

but maybe 30 times to get it right, because that's what dyslexia is. *It needs to be taught over and over and over again*, using the eyes, the ears, your body, anything to get that basic road skill into the child's brain and memorized so that can be automatic with it when they read. That's what multi-sensory means, using more than one learning modality, visual, aesthetic, auditory, and putting them together at the same time to present material to a child in order to make it stick in their brain better.

Tr. V1, p. 227:4 to 16. Emphasis added.

Ms. [REDACTED] described the learning environment that would be beneficial for the Student – multiple interventions and not pushing “inappropriate” text in front of her, as it would cause frustration and regress her learning:

Q. And then based on having observed students in public schools having worked with the Student, reviewed her progress here, what is your expert opinion as to the type of learning environment that the Student requires to be able to make progress?

A. So, she requires multiple interventions throughout her day. And she also requires that in the part of her daily science and social studies where she really can grasp those types of concepts that she not have to rely solely on reading and writing to demonstrate her knowledge. She needs like a rich (inaudible) experience so that she's with teachers that are trained and understands, this is a child that can think. This is a child that can? learn. But this is not necessarily a child that you can just open a text book in front of and expect that she'll read it.

So, she needs teachers that understand that, the nature of her learning disability and also that can support the interventions throughout the day by not putting inappropriate text in front of her before she's ready for it. So, she really needs a full program with interventions that globally supported throughout school.

Q. What do you mean by inappropriate text in front of her?

A. You know, [the Student] is on CVC words, for example, and learning those, and she's learning those in the second grade, well, that's well below a second grade skill. So, you're teaching a science class and you put a book in front of a child that's dyslexic and ask them to read it

and respond, you can really interfere with the intervention instruction. One, the -- that -- that material is not geared towards where they are, so the rules that they have learned so far don't match up and the child resorts to guessing to make sense of the task. That's not what you want them to do. You don't want them to guess. You want them to learn to decode properly. So, you -- you try taking the guessing away from them.

So, if they were to go back into a classroom and the teacher doesn't understand that, they just think because you have a bright child in front of you, I can just put this text and then they just start guessing again. One, it's a frustrating experience, it can cause a lot of anxiety. And it kind of undoes everything that's going on in the intervention -- the reading intervention if that makes sense.

Tr. V1, pp 231:19 to 233:13.

Ms. [REDACTED] indicted the need for a higher level of intervention based on the severity of the Student's dyslexia:

Q. Where would you put [the Student] on the scale of students that are dyslexic? How would you characterize that as minimum? moderate? significant? severe? What would be your descriptor for her dyslexia?

A. I would say severe. I've worked with some kids and I still do tutoring on the side with some kids that they -- all it is is that they need extra time or a multisensory way. But [the Student], it's severe because she just -- she needs so much repetition. She needs that one-on-one, that small group, that individualized attention in order for her to be able to retain and grasp and then go back and revisit, if needed. She's the type of child that, you know, in? a large classroom would get lost.

Tr. V4, pp. 22:22 to 23:9. "She would benefit from a small group, if not one-on-one with less distractions." Tr. V4, p. 24:12 to 23. Although Ms. [REDACTED] acknowledged that the Student was "easily redirected,"²³ the logical inference is she still needs someone present to identify and monitor that behavior, redirecting her so that she can stay on task.

²³ The ease of redirection was based on a one to one setting at small table. Tr. V4, p. 39:4 to 12.

At [REDACTED] the Student did not make progress. Her reading scores decreased and she had difficulty with phonics, decoding and encoding simple “VCV”²⁴ words, which was what was required of her, despite a reading specialist four days a week for 20 minutes in a one to one setting. Parents Ex. 15-0004. The testing showed that her skills regressed within a larger group setting even though pull-out services were provided addressing her general skills. Placing the Student in a classroom where she was embarrassed because she was not able to read promoted the avoidance behavior the Parent presented in her testimony. To that end, Ms. [REDACTED] also opined that the Student functions best in small groups, because she would have less to process, and have a close relation with her teacher. Tr. V1, p 234:4 to 13. V1, p. This concern also took into consideration the Student’s ADHD diagnosis which caused her to be prone to distraction. Tr. V1, pp. 239:24 to 240:15.

[REDACTED], another expert in dyslexia, testified from her expertise as well as her experience teaching the Student at [REDACTED]. Her experience, confirmed by other witnesses, is that it might appear that the Student would master a skill, but she observed the Student lost that skill if it was not consistently practiced and relearned. The need to monitor and reteach even the most basic skills would be accomplished by teaching the Student in a low student teacher ratio class (sometimes one to one, sometimes two to one) to reinforce the retention of that information.

For these reasons, I find that the private education services obtained by the Parents at [REDACTED] for the 2020-2021 school year were appropriate to the Student’s needs. Overall, equity favors reimbursement; there is no evidence to the contrary. *See Carter*, 510 U.S. at 12-13.

²⁴ Vowel,consonant, vowel.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

1. HCPSS did not commit a procedural violation that impeded the provision of FAPE or deprived the Student of educational benefit. 20 U.S.C.A § 1415(f)(3)(E)(ii). *T.B. v. Prince George’s County Board of Education*, 897 F.3d 566, 573 (4th Cir. 2018), cert. denied, 139 S.Ct. 1307 (2019); *DiBuo v. Board of Education of Worcester County*, 309 F.3d 184 (4th Cir. 2002).
2. The IEP developed by HCPSS failed to offer the Student a FAPE based on her unique circumstances. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).
3. Parents are entitled to placement of the Student at [REDACTED] for the 2020-2021 school year, with HCPSS paying for or reimbursing all tuition and related costs for that school year; relief is denied for the 2019-2020 school year and summer session in 2020. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

ORDER

I **ORDER** that:

1. The Student’s placement for the 2020-2021 school year is at the [REDACTED] School,
2. HCPSS will pay for or reimburse the Parents all tuition and related costs for that school year upon presentation of a legitimate billing.
3. The Howard County Public School System shall, within thirty days of the date of this decision, provide proof of compliance with this Order to the Chief of the Complaint

Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, Maryland State Department of Education.

January 13, 2021
Date Decision Issued

Marc Nachman
Administrative Law Judge

MC/dlm
#189944

REVIEW RIGHTS

A party aggrieved by this final decision may file an appeal within 120 days of the issuance of this decision with the Circuit Court for Baltimore City, if the Student resides in Baltimore City; with the circuit court for the county where the Student resides; or with the United States District Court for the District of Maryland. Md. Code Ann., Educ. § 8-413(j) (2018). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

A party appealing this decision must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing of the filing of the appeal. The written notification must include the case name, docket number, and date of this decision, and the court case name and docket number of the appeal.

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

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

STUDENT

v.

HOWARD COUNTY

PUBLIC SCHOOL SYSTEM

BEFORE MARC NACHMAN,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-HOWD-OT-20-14664

FILE EXHIBIT LIST

I admitted the following exhibits on behalf of the Parents:

- Parents Ex. 1 HCPSS Response to Complaint
- Parents Ex. 2 CV [REDACTED]
- Parents Ex. 3 CV [REDACTED]
- Parents Ex. 4 CV [REDACTED]
- Parents Ex. 5 CV [REDACTED]
- Parents Ex. 6 CV [REDACTED]
- Parents Ex. 7 Psychological Summary 2014
- Parents Ex. 8 HCPSS Educational 1/2015
- Parents Ex. 9 HCPSS Psychological 2/2015
- Parents Ex. 10 HCPSS Speech Language 2/2015
- Parents Ex. 11 HCPSS OT Evaluation 1/2015
- Parents Ex. 12 IEP 2/2015
- Parents Ex. 13 Parent Note
- Parents Ex. 14 IEP 2/2016
- Parents Ex. 15 HCPSS Educational Assessment 4/2016
- Parents Ex. 16 HCPSS Psychological 6/2016
- Parents Ex. 17 HCPSS OT 5/2016
- Parents Ex. 18 IEP 6/2016
- Parents Ex. 19 Report Card 15-16, Annual Goal Progress Report 6/2016
- Parents Ex. 20 [REDACTED] Benchmarks 1/16, [REDACTED] School 16-17 Report Card, [REDACTED] School 17-18 Report Cards
- Parents Ex. 21 Psycho-Educational Evaluation 2/2018
- Parents Ex. 22 Parent Letter 11/2019
- Parents Ex. 23 Parent Questionnaire, Referral Form 11/2019
- Parents Ex. 24 HCPSS Child Find Program forms
- Parents Ex. 25 IEP Team Meeting Report 1/2/2020
- Parents Ex. 26 Parental Consent Evaluation Form 1/2/2020
- Parents Ex. 27 HCPSS Informal Reading Summary 1/2020-2/2020, Diagnostic Passages

- 1/2020
- Parents Ex. 28 HCPSS Educational Assessment Report 2/2020, Woodcock Johnson IV Score Report 1/2020
 - Parents Ex. 29 HCPSS Psychological Assessment Report 2/2020
 - Parents Ex. 30 IEP Team Meeting Report 2/28/2020, IEP 2/28/2020
 - Parents Ex. 31 [REDACTED] Teacher Observations/Comments 1/2020, HCPSS Child Find Program forms
 - Parents Ex. 32 Forward Thinking Consultation 2/5/2020
 - Parents Ex. 33 Representation Letter 5/1/2020
 - Parents Ex. 34 IEP Team Meeting Report 5/18/2020
 - Parents Ex. 35 Draft IEP with AV Comments 5/18/2020
 - Parents Ex. 36 Distance Learning Weekly Schedule, Proposed Schedule 10/1/2020
 - Parents Ex. 37 [REDACTED] 18-19 T1 and T2 Report Cards, [REDACTED] 19-20 T1 Report Card, [REDACTED] 18-19 T3 Report Card, [REDACTED] 19-20 T1 T2 and T3 Report Cards, [REDACTED] Individualized Student Plan 20-21, Fall 20-21 Progress Report
 - Parents Ex. 38 [REDACTED] Assessment Results Reports
 - Parents Ex. 39 [REDACTED] Fee Schedule 20-21
 - Parents Ex. 40 **[Not admitted into evidence]**
 - Parents Ex. 41 **[Not admitted into evidence]**
 - Parents Ex. 42 **[Not admitted into evidence]**
 - Parents Ex. 43 HCPSS Emails
 - Parents Ex. 44 US Dept. of Education COVID-19 Guidance Document
 - Parents Ex. 45 MSDE Technical Assistance Bulletin# 20-01
 - Parents Ex. 46 MSDE Technical Assistance Bulletin# 20-03
 - Parents Ex. 47 HCPSS Documents
 - Parents Ex. 48 HCPSS Plans for Continuity of Learning Documents
 - Parents Ex. 49 HCPSS Special Education and Early Intervention Services COVID-19 documents
 - Parents Ex. 50 HCPSS Guidance for Developing ASDM Plans 8/2020
 - Parents Ex. 51 HCPSS Guidance for Outstanding 19-20 IBP Team Processes 9/2020
 - Parents Ex. 52 HCPSS Data and Progress Monitoring: Data Collection Measures 8/27/2020
 - Parents Ex. 53 HCPSS COVID-19 Compliance Resources Library 20-21
 - Parents Ex. 54 HCPSS Board of Education Meeting Documents 9/24/2020
 - Parents Ex. 55 **[Not admitted into evidence]**
 - Parents Ex. 56 **[Not admitted into evidence]**
 - Parents Ex. 57 Memorandum of Understanding: Related to COVID-19 4/23/2020

I admitted the following exhibits on behalf of HCPSS¹:

- HCPSS Ex. 1 Notice of IEP Team Meeting -11/25/19
- HCPSS Ex. 2 Notice of IEP Team Meeting -12/11/19
- HCPSS Ex. 3 IEP Team Meeting Report-1/2/20
- HCPSS Ex. 4 Notice of IEP Team Meeting- 2/3/20
- HCPSS Ex. 5 IEP Team Meeting Report-2/28/20
- HCPSS Ex. 6 Notice of IEP Team Meeting- 5/11/20
- HCPSS Ex. 7 IEP Team Meeting Report-5/18/20
- HCPSS Ex. 8 Evaluation Report SLD² Supplement - 2/28/20
- HCPSS Ex. 9 Evaluation Report ADHD Supplement - 2/28/20
- HCPSS Ex. 10 Referral for Student Suspected of Having a Disability
- HCPSS Ex. 11 Parent Questionnaire
- HCPSS Ex. 12 [REDACTED] Teacher Input
- HCPSS Ex. 13 Report of Psychological Assessment-1/15/20 through 20/5/20
- HCPSS Ex. 14 Report of Psychological Assessment- 6/2/16
- HCPSS Ex. 15 Educational Assessment Report-2/11/20
- HCPSS Ex. 16 Woodcock-Johnson Score Report-1/21/20
- HCPSS Ex. 17 Informal Reading Summary -1/21/20, 2/24/20
- HCPSS Ex. 18 QRI Testing Protocols
- HCPSS Ex. 19 [REDACTED] Reports
- HCPSS Ex. 20 Proposed IEP- 2/28/20
- HCPSS Ex. 21 Distance Learning Weekly Schedule
- HCPSS Ex. 22 Proposed Schedule - as of 10/1/20
- HCPSS Ex. 23 MSDE Technical Assistance Bulletin-20-01
- HCPSS Ex. 24 MSDE Technical Assistance Bulletin- 20-03
- HCPSS Ex. 25 MSDE Technical Assistance Bulletin- 20-09
- HCPSS Ex. 26 CV - [REDACTED]
- HCPSS Ex. 27 CV - [REDACTED]
- HCPSS Ex. 28 CV - [REDACTED]
- HCPSS Ex. 29 CV - [REDACTED]
- HCPSS Ex. 30 CV - [REDACTED]
- HCPSS Ex. 31 CV - [REDACTED]

¹ Many of these documents were also submitted into evidence by the Parents. For simplicity, when one of these documents is referenced, I will identify them by the Parents' exhibit numbers.

² Specific learning disability