

XXXX XXXX

v.

MONTGOMERY COUNTY PUBLIC
SCHOOLS

* BEFORE KATHLEEN A. CHAPMAN
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-MONT-OT-12-20911

* * * * *

DECISION

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ORDER

STATEMENT OF THE CASE

On May 23, 2012, XXXX and XXXX XXXX (Parents), on behalf of their daughter, XXXX XXXX (Student),¹ filed a Due Process Complaint with the Office of Administrative Hearings (OAH), requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). Thereafter, the MCPS scheduled a resolution meeting for June 18, 2012; however, on June 22, 2012, the MCPS advised the OAH that the parents had waived the requirement for a resolution meeting, via facsimile on June 15, 2012.²

I held a telephone prehearing conference on July 9, 2012. Throughout these proceedings,

¹ Throughout the hearing, the parties referred to the Student as [Student]; for uniformity purposes, I will do the same in this decision.

² 34 C.F.R. §§ 300.510(c) (2009); *see also* 34 C.F.R. § 300.508(d)(3)(i) (2009).

Michael J. Eig, Esquire, represented the Parents and Jeffrey A. Krew, Esquire, represented MCPS. Based on counsels' availability, witness unavailability and my vacation schedule, the parties requested that a four-day hearing be scheduled to begin on Thursday, September 6, 2012 and end on Tuesday, September 11, 2012.

Under federal regulations, a hearing must be conducted and a decision issued within 45 days of certain triggering events. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2012). The parties' requested hearing dates fell outside of the 45-day timeframe; therefore, they waived the right to have the hearing conducted and a written decision issued within the 45-day period.

The first two days (September 6 – 7, 2012) of the scheduled hearing were postponed when one of [Student]'s grandparents unexpectedly passed away and the family needed to travel out-of-state for the funeral. Subsequently, I held a multi-day hearing beginning on September 10, 2012 and concluding on January 4, 2013. The new hearing dates, again based on everyone's availability, included September 10, 2012, September 11, 2012, September 27, 2012, September 28, 2012, October 26, 2012, December 3, 2012, and January 4, 2013.³

At the close of the record, on January 4, 2013, the parties requested that my decision be issued on or before February 4, 2013. 34 C.F.R. 300.515; Md. Code Ann., Educ. § 8-413(h) (2008).

³ The case was scheduled for a hearing on October 29, 2012, but was postponed due to inclement weather. Four more hearing dates were added after September 28, 2012 because a number of issues came to light that affected the scheduling of the hearing, including availability of witnesses and illness of counsel. In addition, the hearing was expected to conclude on December 3, 2012, but was extended to January 4, 2013 when the Parents sought, and were granted, the admission into evidence of additional educational testing scores. The admission of this information generated the need to grant extra time to MCPS to observe the child, prepare a report and present testimony about the findings.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2009); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Did the Individualized Education Program (IEP) developed by MCPS, for placement at [School 1] ([School 1]), provide [Student] with a free appropriate public education (FAPE) for the 2010-2011, 2011-2012 and 2012-2013 school years; and, if not,
2. Should MCPS be directed to reimburse the Parents for expenses they already incurred for unilaterally placing [Student] at [School 2] ([School 2])?

SUMMARY OF THE EVIDENCE

A. Exhibits

I admitted the following exhibits on behalf of the Parents:

- | | |
|-------|---|
| XX-2 | Psychological Evaluation – XXXX XXXX, Ph.D., February 7, 8, 13, and 24, 2006, March 1 and 14, 2006 |
| XX-7 | IEP (School year 2008-2009), April 29, 2008 |
| XX-12 | E-mail to the Parents from XXXX XXXX, special education teacher at [School 3], ⁴ February 26, 2010 |
| XX-13 | Observation Report – XXXX XXXX, Director, XXXX Education Group, April 12, 2010 |
| XX-15 | Letter from XXXX XXXX, M.D., April 23, 2010 |

⁴ [School 3] ([School 3]).

- XX-16 Review of Private Evaluation – XXXX XXXX, Ph.D., MCPS, April 27, 2010
- XX-17 Letter from XXXX XXXX, Clinical Director, Center for Adoptive Families, Adoptions Together, April 27, 2010
- XX-18 Letter from XXXX XXXX, D.O., May 5, 2010
- XX-19 Letter to the Parents from XXXX XXXX, Ph.D., May 11, 2010
- XX-25 Fifth Grade Report Cards – [School 3], June 18, 2010; Progress Reports – [School 3], June 10, 2009, November 2, 2009, and April 5, 2010
- XX-26 Letter to XXXX XXXX, Principal ([School 3]), from Parents, July 28, 2010
- XX-27 Letter to XXXX XXXX from the Parents, August 1, 2010
- XX-30 Quarterly Individual Student Reports – [School 2], November 1, 2010
- XX-31 Quarterly Individual Student Reports – [School 2], February 3, 2011
- XX-32 Quarterly Individual Student Reports – [School 2], April 7, 2011
- XX-33 Parent Report, May 11, 2011; Classroom Observation by XXXX XXXX, XXXX RTSE⁵ ([School 1]), April 27, 2011; Secondary Teacher Reports ([School 2]) (each dated April 6, 2011) from XXXX XXXX, XXXX XXXX, and XXXX XXXX; FBA/BIP⁶ (MCPS), May 12, 2010
- XX-34 Speech and Language PLOP⁷ – unknown author, May 12, 2011
- XX-36 Letter to “To Whom it May Concern” from XXXX XXXX, LCSW-C, CSSWS ([School 2]), May 21, 2011, with proposed social/emotional goals and objectives
- XX-37 Letter to XXXX XXXX, Principal ([School 1]), and XXXX XXXX from the Parents, June 7, 2011
- XX-39 Written Language PLOP – XXXX XXXX, [School 2], June 16, 2011
- XX-40 Math Calculation PLOP – XXXX XXXX, [School 2], undated
- XX-41 Reading PLOP – XXXX XXXX, [School 2], June 16, 2011

⁵ XXXX (XXXX), Resource Teacher Special Education (RTSE).

⁶ Functional Behavioral Assessment (FBA), Behavioral Intervention Plan (BIP).

⁷ Present levels of performance (PLOP).

XX-42A [School 2] Program Plan (2010-2011)

XX-42B [School 2] Report Card (2010-2011)

XX-44 Update on [Student] by the Mother, October 2, 2011

XX-47 Behavior PLOP – XXXX XXXX, [School 2], January 28, 2012

XX-49 Observation Report – XXXX XXXX, January 31, 2012

XX-52 Secondary Teacher Reports – [School 2], February 2012

XX-53 Secondary Teacher Reports – [School 2], February 2012

XX-55 Secondary Teacher Reports – [School 2], February 2012

XX-57 IEP (School year 2011-2012), February 28, 2012

XX-61 Secondary Teacher’s Reports – [School 2], April 2012

XX-62 Secondary Teacher’s Reports – [School 2], April 2012

XX-63 Secondary Teacher’s Reports – [School 2], April 2012

XX-64 Secondary Teacher’s Reports – [School 2], April 2012

XX-65 Quarter 3 Progress Report Notes – [School 2]

XX-67 Review of Proposed IEP – XXXX Education Group, April 27, 2012

XX-70 Observation Report – XXXX XXXX, May 14, 2012

XX-72 Seventh Grade Report Card – [School 2], with Individual Student Reports, June 15, 2012

XX-74 [School 2] Program Plan, June 15, 2012

XX-76 Work Samples – [School 2]

XX-77 XXXX XXXX CV⁸

XX-78 XXXX XXXX CV

XX-79 XXXX XXXX CV

⁸ Curriculum vitae or resume (CV).

- XX-80 XXXX XXXX CV
- XX-81 XXX XXXX CV
- XX-82 [Student]'s typewritten speech
- XX-83 [School 2] Report Card, Quarter 1, October 26, 2012
- XX-84 Related Service/Quarter 1 Progress Summary ([School 2]), October 27, 2012
- XX-85 Woodcock Johnson III (WJ-III) Test of Achievement Summary Sheet, October 31, 2012, including Summary and Score Report, Table of Scores
- XX-86 [School 2] Program Plan, November 8, 2012
- XX-87 E-mails between XXXX XXXX and XXXX XXXX ([School 2]), November 21, 2012

I admitted the following exhibits on behalf of MCPS:

- MCPS-4 FBA/BIP, December 15, 2006
- MCPS-5 Consult Request Follow-Up – XXXX XXXX, MCPS, May 24, 2007
- MCPS-8 MSA⁹ Home Report, Spring 2009
- MCPS-12 Fifth Grade Report Card, June 19, 2009
- MCPS-13 Notification of Continuing Placement in an English Language Development Program, September 14, 2009
- MCPS-15 Report for Quarterly Progress – XXXX XXXX/XXXX XXXX, November 2009
- MCPS-16A [School 2] Application for Admission, February 24, 2010
- MCPS-17 MSA Home Report, Spring 2010
- MCPS-19 Parent Report, April 11, 2010
- MCPS-19A Letter from XXXX XXXX, Director of Admissions, [School 2], to the Parents, April 21, 2010
- MCPS-27 IEP (School year 2010-2011), June 8, 2010

⁹ Maryland State Assessment (MSA).

MCPS-23	FBA/BIP, May 12, 2010
MCPS-28	Fifth Grade Report Card, June 18, 2010
MCPS-29	Work Samples, 2009 – 2010 School year
MCPS-32	Classroom Observation Report – XXXX XXXX, April 27, 2011
MCPS-36	Request for Due Process Hearing (MSDE-MONT-OT-11-XXXX), November 16, 2011
MCPS-37	IEP (School year 2011-2012), November 18, 2011
MCPS-40	Report of Speech-Language Re-Assessment – XXXX XXXX, MCPS, January 13, 2012
MCPS-42	IEP (School year 2011-2012), February 2, 2012
MCPS-47	IEP (School year 2012-2013), April 30, 2012
MCPS-49	Response letter to Michael J. Eig, Esquire, from Jeffrey A. Krew, Esquire, May 30, 2012
MCPS-49B	Discipline Log Report ([School 2]), September 7, 2010 to September 5, 2012
MCPS-50	XXXX XXXX CV
MCPS-51	XXXX XXXX CV
MCPS-61	XXXX XXXX CV
MCPS-63	Related Studies Syllabus – [School 1] Course Objectives and Concepts
MCPS-64	Questionnaire, Outcomes and Identifying Information, undated
MCPS-65	WJ-III comparison score sheet (October 2010 and October 2011)
MCPS-66	WJ-III comparison score sheet (October 2010, October 2011 and October 2012)

I admitted the following exhibits on behalf of both parties:¹⁰

MCPS-11/XX-10	IEP (School year 2009-2010, with progress notes in June 2009, November 2009 and February 2010), May 4, 2009
MCPS-14/XX-11	Neuropsychology Initial Evaluation Notes – XXXX XXXX, Ph.D., October 6, 2009
MCPS-22/XX-20	Review of Non-MCPS Educational Assessment Report – XXXX XXXX, May 12, 2010
MCPS-27/XX-24	IEP (School year 2010-2011, with progress notes in June 2010), June 8, 2010
MCPS-30/XX-28	Letter to the Parents from XXXX XXXX, August 16, 2010
MCPS-31/XX-29	WJ-III Summary of Standard Scores, October 12, 2010
MCPS-33/XX-38	IEP (School year 2011-2012), May 16, 2011
MCPS-34/XX-43	Letter to the Parents from XXXX XXXX, July 1, 2011
MCPS-35/XX-45	WJ-III Summary of Standard Scores, October 19, 2011
MCPS-41/XX-48	Report of School Psychologist – XXXX XXXX, Psy.D., MCPS, January 30, 2012
MCPS-43/XX-50	Letter to OAH from Michael J. Eig, Esquire, (MSDE-MONT-OT-11-XXXX), February 3, 2012
MCPS-45/XX-58	Letter to Jeffrey A. Krew, Esquire from Michael J. Eig, Esquire, March 6, 2012
MCPS-46/XX-59	Letter to Michael J. Eig, Esquire, from Jeffrey A. Krew, Esquire, March 12, 2012
MCPS-48/XX-1	Request for Due Process Hearing, May 23, 2012

¹⁰ The parties separately identified the same documents for admission into the record. This list provides a cross reference of those admitted documents. When referencing these exhibits, I often use only the Parents' exhibit numbers in order to pinpoint a particular page in a large document.

B. Testimony¹¹

The following witnesses testified on behalf of the Parents:¹²

- XXXX, [Student]'s mother.
- XXXX XXXX, Director of XXXX Educational Group, an educational consulting company, was admitted as an expert in special education.
- XXXX XXXX (nee XXXX), former reading specialist at [School 2], was admitted as an expert in the instruction of reading.
- XXXX XXXX, LCSW-C, school social worker and counselor at [School 2], was admitted as an expert in the field of social work.
- XXXX XXXX, teacher of language arts and reading at [School 2], was admitted as an expert in language arts.
- XXXX XXXX, former Director of Special Education at [School 2], was admitted as an expert in special education.¹³

The following witnesses testified on behalf of MCPS:

- XXXX XXXX, resource teacher¹⁴ for special education at [School 1], was admitted as an expert in special education.
- XXXX XXXX, Psy.D., school psychologist, MCPS, was admitted as an expert in school-clinical child psychology.
- XXXX XXXX,¹⁵ former special education classroom teacher at [School 3] and the Student's case manager, was admitted as an expert in special education.

¹¹ The abbreviation "T" stands for testimony.

¹² With the exception of XXXX and XXXX XXXX, all of the Parents' witnesses testified via telephone.

¹³ Ms. XXXX is currently a professor at XXXX College teaching introduction to special education. She is also the assessment and consultation director for XXXX, a cognitive learning center.

¹⁴ MCPS refers to its special education department chairs as resource teacher special education (RTSE).

¹⁵ Ms. XXXX is currently working as program support for the MCPS' preschool education program.

FINDINGS OF FACT

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

1. [Student] is a XXXX-year-old female with the following diagnoses:
 - ADHD, combined (Other Health Impaired (OHI));
 - Reactive Attachment Disorder (RAD);
 - Mood Disorder, not otherwise specified (NOS);
 - Mixed Receptive-Expressive Language Disorder (Speech and Language Impaired);
 - Learning Disorder, NOS (specific learning disability in the areas of math, reading and written language); and
 - Post Traumatic Stress Disorder. (XX-11-12.)
2. [Student] receives outpatient treatment for these conditions which includes a medication regimen of XXXX 100 mg, XXXX 20 mg, XXXX 0.25 mg and XXXX 7.5 mg.¹⁶ (XX-15.)
3. [Student] also suffers from XXXX, for which she receives XXXX hours each day, and she wears glasses. (XX-18.)
4. [Student] meets the criteria for a student impacted by an XXXX (XX). (XX-48-20.)
5. However, since ADHD most impacts [Student]'s learning, it is considered her primary area of disability. (MCPS-41/XX-48-20.)

Background

6. On XXXX, 1997, [Student] was born in [Country] to parents who abandoned her at a hospital shortly after birth. (AL-2-3.) [Student] remained at the hospital for an unknown period of time. *Id.*

¹⁶ XXXX XXXX, M.D., the Student's treating psychiatrist, prescribed XXXX as a mood stabilizer and XXXX, XXXX and XXXX for the treatment of [Student]'s ADHD. (AL-15.)

7. Thereafter, [Student] resided in [Country]'s orphanages in a XXXX-speaking environment,¹⁷ with XXXX as her second language, until October 2003 when, at age six, she was adopted by XXXX¹⁸ and moved to the United States. (XX-2.)

8. Almost immediately, during the adoption process, [Student] began exhibiting emotional and/or behavioral issues that greatly troubled her new adoptive mother. (XX-2.) [Student] was hyperactive, defiant, and inattentive to appearance and hygiene. *Id.* In addition, she would throw screaming tantrums and intentionally destroy property or break things due to extreme clumsiness. *Id.*

9. Following the adoption, [Student] had a difficult time learning the English language. (XX-2-3.)

10. Frustrated by [Student]'s behavior, in February/March 2006, at the urging of XXXX XXXX, Clinical Director at the Center for Adoptive Families, XXXX took [Student] to see XXXX XXXX, Ph.D., a licensed psychologist, for a psychological evaluation. (XX-2; XX-17.)

11. XXXX communicated to Dr. XXXX that she intended to disrupt the adoption and return [Student] to the adoption agency because she "felt the problems with [Student] have been beyond her ability to handle." (XX-2-4.) XXXX also indicated to Dr. XXXX that she needed the evaluation "to help give potential new adoptive parents as clear a sense as possible of [[Student]'s] prognosis, strengths and weaknesses, and needs." (XX-2-1.)

12. About this same time, XXXX also precipitously told [Student] that she was going to be adopted by another family, before one had been chosen for her. (XX-2-4; XX-17-1.) This

¹⁷ At age five, [Student] was placed in an orphanage for older children where she was unloved and had little access to toys or stimulation. (XX-2-4.) In addition, the other children who resided at the orphanage with her were aggressive and ill-behaved. *Id.* There were also issues with abuse and neglect within the orphanage. (XX-17.)

conversation apparently occurred on [Student]’s birthday. (T. of XXXX, tr. 372.)

13. [Student] was greatly impacted by XXXX’s actions, which was compounded by her upbringing in the orphanages. Dr. XXXX noted this in his evaluation:

Unconsciously, [Student] seems to feel abandoned, lacking in basic provision and nurturance, lacking in basic security, and only an equivocal, come-and-go-in-the-moment sense of bodily and personal intactness. She has a palpable sense that she could be consumed at any point by external dangers or by internal presses [sic] and dangerous contents. She seems conflicted, at a very elemental level, between wanting to fight the resulting fears and feelings, and fight to exist, and a more passive desire to succumb and desist from the painful struggles to self-regulate, function, experience, and develop. The good sign is that this conflict is active; [Student] has internal senses that both success and failures are possible, and as yet is uncertain how to integrate and make sense of that.

(XX-2-15.)

14. During the psychological evaluation, Dr. XXXX administered the following tests: Bender-II,¹⁹ Stroop,²⁰ WISC-IV,²¹ Peabody,²² GORT-4,²³ and WRAT3.²⁴ (XX-2.) These tests confirmed that [Student] suffers from an underlying neurological issue that appeared to contribute to her fine- and gross-motor issues. (XX-2-16.) More importantly, though, Dr. XXXX noted that [Student] displayed “significant self-regulatory issues” throughout the assessment and, in fact, he found it “quite exhausting to be with [Student].” (XX-2-7, 8.)

15. Dr. XXXX associated [Student]’s significant problems with attention, distractibility, hyperactivity and self-regulation to be a function of visual problems, current

¹⁸ XXXX is not [Student]’s current adoptive parent.

¹⁹ The Bender-II is a test of visual-motor coordination and integration, and fine-motor functioning. (XX-2-10.)

²⁰ The Stroop is a specific neuropsychological measure of some aspects of visually based attention. (XX-2-11.)

²¹ The WISC-IV (Wechsler Intelligence Scale for Children – 4th Edition) is an intelligence test used to determine language-mediated reasoning ability. (XX-2-12.)

²² In his report, Dr. XXXX referred to this test as the Peabody; however, as seen later in this decision, XXXX XXXX, when referencing Dr. XXXX’s findings, called the test the Peabody Picture Vocabulary Test (PPVT). (See n. 54 *infra*) The Peabody assesses receptive vocabulary and global, crystallized, verbal-cognitive ability.

²³ The GORT-4 (Gray Oral Reading Test – 4th Edition) is a test of oral reading.

²⁴ The WRAT3 (Wide Range Achievement Test – 3rd Edition) screens selected academic functions.

stressors, and problems with attachment. (XX-2-16.) [Student] was subsequently diagnosed as suffering from RAD and ADHD. (MCPS-5.)

16. Dr. XXXX did not see, though, a strong correlation between the self-regulatory issues and the severity of primary attention/executive functioning problems. (XX-2-16.) Instead, Dr. XXXX found that [Student]'s scores on the GORT-4 reinforced the likelihood that she only had a specific reading disability (XX-2-15) and her score pattern on the Stroop suggested that she had visually-based dyslexia and visual processing difficulties. (XX-2-11.) He wrote, "This is a score pattern suggestive of visually based dyslexia and visual processing difficulties that may be contributing to secondary problems with visual attention, but not the pattern typically seen in persons with primary visual attention problems." *Id.*

17. Further, Dr. XXXX determined that [Student]'s cognitive abilities, based on subtest scores on the WISC-IV, still ranged from borderline average to average, with the exception of her scores on letter-number sequencing, which indicated a mild deficit. (XX-2-12.)

18. Dr. XXXX's overall impression of [Student] was that she had more than one educationally handicapping condition, including: language, reading, written language, social/emotional, neurological and other health-related elements. (XX-2-19.)

19. With regard to the self-regulatory issues, Dr. XXXX recommended a more consistent limit-setting regimen, a strict reinforcement scheme and consequences for [Student]. (XX-2-16.)

20. On June 14, 2006, [Student] was placed with the Parents and an older brother pending her adoption.²⁵ (T. of XXXX, tr. 382.)

²⁵ The adoption became final in June 2007. (XX-17-1.)

IEP history²⁶

21. On May 9, 2006, MCPS evaluated [Student] for special education and developed an IEP for the 2006 – 2007 school year.²⁷ (XX-7-1.) In the process of doing so, the IEP Team reviewed and considered Dr. XXXX's report. (MCPS-41.)

22. In May 2007, during [Student]'s second grade year, staff at [School 3] consulted with XXXX XXXX, a Behavior Support Teacher with the MCPS ED Unit, seeking an assessment concerning [Student]'s "inconsistent and often unpredictable behavior." (MCPS-5.)

23. Mr. XXXX observed [Student] in one of her classrooms for an hour. *Id.* During the observation, [Student] demonstrated a short attention span of two to four minutes, fidgeting, being distracted by noises coming from different parts of the room, kicking small objects on the floor, frequently leaving her seat, and being uninterested in the lesson. *Id.* Yet, [Student] was still capable of listening and retaining information from the lesson being taught because she correctly answered a question about a concept that had just been taught. *Id.* In a Consult Request Follow-up report, dated May 24, 2007, Mr. XXXX recommended to [School 3] staff that [Student] be placed in a structured, consistent behavior intervention system and he mapped out a variety of strategies to accomplish this. *Id.*

24. From that point on, [Student] had a FBA and BIP. (T. of XXXX, tr. 918.)

25. After receipt of Mr. XXXX's report, the Team did not recommend a disability coding of ED. (T. of XXXX, tr. 918.) Instead, the Team concluded that [Student] had a primary

²⁶ In 2004, [Student] attended kindergarten at [School 4]. She reportedly did not make satisfactory progress and was recommended for retention. (MCPS-41.) [Student] then attended [School 5] from September 2004 to February 2005 as a kindergartener and, in February 2005, she returned to [School 4] to finish out kindergarten. *Id.* The next school year, [Student] attended first grade at [School 4]. *Id.*

²⁷ This IEP Team meeting occurred before [Student] was adopted by her Parents.

disability of OHI that affected her reading, oral and written expression, and math concepts. (XX-7-1.)

26. From September 2006 to June 2010, [Student] attended the XXXX (XXXX) program at [School 3] from second through fifth grades, during which time [Student] received special education services from MCPS pursuant to the IEPs that were developed for her annually.

2008 – 2009 school year IEP

27. An IEP Team met on April 29, 2008 to determine the special education services to be provided for [Student] the following school year (2008 – 2009). The Team consisted of: the Parents; XXXX XXXX, Chair/Principal; XXXX XXXX, Case Manager/special education teacher; XXXX XXXX, general education teacher; XXXX XXXX, Speech/Language Pathologist; XXXX XXXX, intern; and XXXX XXXX, OTR/L,. (XX-7.)

28. The Team reviewed [Student]’s PLOP, [Student]’s strengths and weaknesses, and information from the Parents. (XX-7.)

29. By the end of third grade, [Student] was performing at a second grade instructional level for reading and written language, a third grade level for mathematics, and below age or grade level for oral language, self regulation and classroom behavior. (XX-7-4 through -6.) Of particular concern to the Team was that [Student] was still having difficulty with stamina in writing tasks (she would only give minimal responses) and was easily overwhelmed by assignments. (XX-7-4.) Moreover, she had difficulty using age-appropriate oral language, in the areas of language content (vocabulary) and function (syntax/grammar). *Id.* Words and parts of words were often omitted. *Id.* Furthermore, [Student] was having difficulty in reading and decoding largely due to problems in visual tracking and visual processing. (XX-7-6.) These

weaknesses cut across all disciplines including reading, comprehension, vocabulary, sentence structure, and meaningfulness of oral language, thereby impacting on her ability to readily understand the curriculum. *Id.*

30. Taking this into account, the Team updated [Student]'s academic goals and objectives for the fourth grade school year. (XX-7-14 through -23.) Specifically, [Student]'s goals were to: (a) give complete, grammatically correct, and meaningful verbal responses (expressive grammar); (b) identify and repair her errors without verbal prompts (expressive grammar); (c) demonstrate improvement in her verbal responses so that they were intelligible and meaningful to the context (speech clarity); (d) improve her ability to use reasoning to produce meaningful, contextually-appropriate verbal responses (language content); (e) improve her ability to use reasoning to produce meaningful, contextually-appropriate verbal responses (informational text); (f) determine the important ideas and messages in literary and leveled texts in quarterly assessments and periodic check-ups (literary text); (g) compose oral, written, and visual presentations that express personal ideas, inform, and persuade in journals, quarterly writing assessments and writing projects (written language); (h) calculate equivalent measurements in unit assessments, check-ups or exit cards (mathematics); (i) comply with school rules in a socially acceptable way using contracts, checklists or teacher observations (behavior); (j) identify self-regulation strategies (self-regulation); and, (k) use strategies to decode unknown words as determined by informed measures (reading – decoding).

31. To accomplish this, the Team agreed on an IEP which provided for 6 hours and 48 minutes per week outside of general education, 45 minutes of which was dedicated to specialized reading instruction and 30 minutes of which was dedicated to math instruction. (XX-7-24, 25.) The IEP also provided for 24 hours in general education, with support from both a

regular and special education teacher. *Id.* In addition, the IEP detailed that [Student] would receive 50 30-minute sessions of speech-language therapy, 4 30-minute sessions of OT,²⁸ and 3 30-minute sessions with school staff to facilitate self regulation. (XX-7-24, 29.)

32. The Team further concluded that in order for [Student] to successfully access the curriculum, based on her disabilities, she should be provided with the following accommodations for instruction and testing: (a) human reader, (b) screen reader for verbatim reading of entire test, (c) scribe, (d) monitor test response, (e) graphic organization, (f) extended time, (g) multiple or frequent breaks, and, (h) reduction of distractions. (XX-7-9 through -11.) The Team concluded that [Student] did not need assistive technology. (XX-7-7.)

33. The Parents agreed with the other members of the Team that [Student] made progress in the third grade. (XX-7-30.) The Parents, likewise, agreed with the goals and objectives, and the provision of services that were outlined in the IEP. *Id.*

2009 – 2010 school year IEP

34. An IEP Team consisting of XX (Parent); XXXX XXXX, Case Manager/special education teacher; XXXX XXXX, Chair/Principal; XXXX XXXX, general education teacher; XXXX XXXX, Speech/Language Pathologist; and XXXX XXXX, ESOL,²⁹ met on May 4, 2009 to determine the special education services to be provided for [Student] during the 2009 – 2010 school year. (MCPS-11/XX-10.)

35. The Team reviewed [Student]’s PLOP, [Student]’s strengths and weaknesses, and information from the Parents. (MCPS-11/XX-10.)

36. In reviewing [Student]’s PLOP, the Team established that by the end of fourth grade, [Student] was making progress in all areas of her goals and objectives. (XX-10-4 through

²⁸ Occupational therapy (OT).

-6.) [Student]'s scores on the MAP-R³⁰ improved by 14 points. This, along with her scores on the F&P³¹ (O level) and QMT,³² showed improvement in comprehension and fluency. In addition, [Student] was now performing at the third grade instructional level. In mathematics, [Student] had a complete understanding of many fourth grade concepts. Based on unit tests, [Student] was performing either on-grade level (OGL) or above-grade level (AGL). For written language, [Student] was able to respond to a topic and prompts with the assistance of a graphic organizer and rubric/checklist. As an indicator of her success in this area, she received a 92% score on a persuasive writing piece. In the area of oral language, it was noted that [Student]'s strength had been her desire to communicate. Other relative strengths in this area included articulation and fluency. Using a behavior contract and feedback, coupled with parental support and input, [Student] was also making progress regarding her classroom behavior.

37. Other indicia of [Student]'s progress in the fourth grade included:

- a. Scoring as proficient³³ on the March 31, 2009 MSA³⁴ for reading and mathematics, with accommodations;³⁵ and
- b. Earning A's, B's, and outstanding and satisfactory achievement ratings on her June 19, 2008 report card even though [Student] was still performing below grade level in reading. (MCPS-12.)

²⁹ English for Speakers of Other Languages (ESOL).

³⁰ Measures of Academic Progress in Reading (MAP-R). The MAP-R is administered on the computer. (T. of XXXX, tr. 972-3.)

³¹ Fountas & Pinnell (F&P) is a guided reading instruction wherein certain alphabetic scores reflect a child's reading level.

³² Quarterly Monitoring Tools (QMT).

³³ Proficient means that [Student] was able to comprehend and understand the grade-level content. (T. of XXXX, tr. 928.)

³⁴ The MSA measures a child's performance against the Voluntary State Curriculum. (MCPS-8.)

³⁵ In order for [Student] to take this and subsequent MSAs, MCPS provided her with accommodations pursuant to her IEP. [Student]'s accommodations for reading and math included a "read to," scribe, extended time and reduced distractions, and for math, a calculator. (T. of XXXX, tr. 1043, 1045.)

38. By the end of fourth grade, [Student]'s disabilities continued to impact her academic achievement and/or functional performance, as noted below:

[Student] has difficulty in reading and decoding due to her problems in decoding and encoding processes, visual tracking, and visual processing. She also has written language difficulties due to issues with visual motor abilities. Problem solving in math would be due to her difficulty processing problems mentally and reading comprehension.

(XX-10-6.)

39. Taking this into account, the Team updated [Student]'s academic goals and objectives for the fifth grade school year. (XX-10-14 through -22.) In contrast to the prior year's IEP, the Team broke reading down into three sub-groups to include decoding after reading and during reading to address [Student]'s need to decode unknown words, make meaning from text and drawing inferences. For all three sub-groups, the text would be provided to [Student] at her instructional level. In the area of written language, the Team focused on [Student]'s need to elaborate on ideas by encouraging her teachers to work with her on the expression of personal ideas, and on her ability to inform and persuade the reader. Goals for expressive grammar and language content dealt with proper usage of grammar and words and understanding of how to target vocabulary in sentences. As for mathematics, since [Student] was still struggling with fractions and decimals by the end of her fourth grade year, the Team directed [Student]'s teachers to work with her on these two areas. Finally, with regard to behavior, the goal for [Student] included compliance with school rules in a socially acceptable manner with fewer prompts. Where applicable, the Team incorporated the necessary accommodations to help [Student] access the aforementioned curriculum.

40. To accomplish this, the Team reduced the number of hours of instruction outside of general education. (XX-10-25.) It provided for 4 hours and 14 minutes per week outside of

general education, 45 minutes of which was dedicated to specialized reading instruction. (XX-10-25.) The IEP also provided for 25 hours and 46 minutes per week in general education, with support from both a regular and special education teacher, 75 minutes of which was dedicated to reading/written language instruction/support and 60 minutes of which was dedicated to math instruction/support. (XX-10-23.) In addition, the IEP detailed that [Student] would receive 50 30-minute sessions of speech-language therapy. *Id.*

41. The Team also updated the list of accommodations (*see* Findings of Fact No. 29) for [Student] to successfully access the curriculum, to include: (a) test responses monitored due to attention concerns; and (b) calculation devices due to processing speed. (XX-10-10.) Above all, the Team felt that [Student] needed time to process and discuss situations/strategies with teachers in order to be successful. (XX-10-12.)

42. The Parents agreed with the other members of the Team that [Student] had made progress in the fourth grade. (XX-10-6.) The Parents, likewise, agreed with the goals and objectives, and the provision of services that were outlined in the IEP for [Student]'s fifth grade year. *Id.*

2010 – 2011 school year IEP

43. In anticipation of [Student] attending middle school in the Fall of 2010, her Parents sought a neuropsychology evaluation from XXXX Institute on October 6, 2009. (MCPS-14/XX-11-1.) The neuropsychological evaluation consisted of a history/background from XXXX, as well as the administration of several tests, including: WISC-IV, WIAT-III,³⁶

³⁶ WIAT-III (Wechsler Individual Achievement Test, 3rd edition) assesses academic skill levels.

Beery VMI,³⁷ WRAML-2,³⁸ Human Figure Drawings,³⁹ TEMAS,⁴⁰ Connors CBRS,⁴¹ BRIEF,⁴² and NEPSY-2.⁴³ (XX-11-3.) The evaluation was performed by XXXX XXXX, Ph.D.

44. Dr. XXXX summarized her evaluation, in pertinent part, as follows:

a. On the WISC-IV, [Student]'s achievement scores [(Verbal Comprehension Index (VCI) = 73, Perceptual Reasoning Index (PRI) = 92, Working Memory Index (WMI) = 104, Processing Speed Index (PSI) = 65, Composite Score (FSIQ) = 78)] showed her cognitive abilities to be in the range of borderline intelligence. (XX-11-4.) The scores also suggested that [Student] had a language-based learning disability. (XX-11-5.) Though it was clear, to [Student]'s credit, that she had been taught strategies for verbal problem solving, she still had a limited word bank and vocabulary, making it difficult for her to express herself – to elaborate, develop and expand on her ideas. (XX-11-6.)

b. On the Beery VMI, [Student]'s fine motor skills were determined to be excellent. (XX-11-5.) Her visual matching and discrimination skills were average and her copying and visual integration skills were in the low average range. *Id.*

c. On the WRAML-2, [Student] demonstrated memory deficits; in particular, her visual memory scores were lower than her WICS-IV PRI scores. (XX-11-6.) This suggested to Dr. XXXX that [Student]'s long-term memory recall and retrieval were not as strong as her short-term, or working memory skills. *Id.* Moreover, since these tests were performed in a quiet

³⁷ Beery VMI (Beery-Buktenica Developmental Test of Visual Motor Integration) assesses visual-motor skills.

³⁸ WRAML-2 (Wide Range Assessment of Memory and Learning, 2nd edition) measures visual and verbal memory.

³⁹ On this test, the student is asked to draw a person.

⁴⁰ TEMAS (Tell-Me-A-Story test) is an assessment instrument to understand youngsters with mental health issues.

⁴¹ Connors CBRS (Connors Comprehensive Behavior Rating Scale) is an instrument designed to provide an overview of child concerns and disorders.

⁴² BRIEF (Behavior Rating Inventory of Executive Function) is an assessment of executive function behaviors at home and at school.

⁴³ NEPSY-2 (a Developmental NEuroPSYchological Assessment) is a standardized test to assess all areas of executive function.

setting, Dr. XXXX remarked that should [Student] be placed in a mainstream classroom, distractions might derail her ability to keep on task and understand all of the processes. (XX-11-4.)

d. On the WIAT-III, [Student] struggled on the reading comprehension questions, answering only 40% correctly. (XX-11-7.) Though her ability to solve math word problems indicated a relative strength and the scores were in the low average range, [Student]’s spelling skills were her least developed area in the area of written expression. *Id.* Overall, [Student] demonstrated memory deficits. *Id.*

e. On the NEPSY-2, [Student] was capable of shifting from simple to difficult auditory attention tasks. (XX-11-10.) She also demonstrated an ability to tell time and she had visual planning and visual organization skills – all considered age appropriate. *Id.* However, [Student] had a tendency to get stuck cognitively. *Id.* When this occurred, she would become impulsive and have difficulties with self-monitoring. *Id.* In essence, she perseverated to the point of becoming distraught and defensive. (XX-11-9, 10.)

f. On the TEMAS, [Student]’s stories reflected themes of starvation, fears of being killed, aggression, bullies, stealing, and violence. (XX-11-11.) The overall impression from this test is that [Student] expends much of her energy being on-guard, or being angry. *Id.* Given her “chronic state of hypervigilance and ragefulness,” Dr. XXXX wrote, everything [Student] does is a real struggle for her. *Id.*

45. The Conners CBRS and BRIEF, on the other hand, are a parent’s report or opinion about the child’s attention, academic and behavioral/emotional issues, as well as executive functioning, respectively. (XX-11-7, 8.) Here, [Student] was seen as having

significant problem-solving rigidity,⁴⁴ combined with emotional dysregulation and poor inhibitory control. (XX-11-8.) In addition, [Student] had a very difficult time sustaining attention; thus, supporting the diagnosis of ADHD. (XX-11-7.)

46. Overall, Dr. XXXX determined that the test results underscored what Dr. XXXX had noted earlier in his 2006 psychological evaluation: that [Student] is a resilient young girl who “continues to work hard at her issues and hold on to a sense of hopefulness.” (XX-11-11, 12.) Yet, [Student] continued to struggle internally with issues surrounding her early experiences in the orphanages and the failed adoption with XXXX. As a result, Dr. XXXX found that these events, coupled with [Student]’s academic struggles, made it difficult for her “to keep her head above water emotionally and academically.” (XX-11-12.) Dr. XXXX found there to be no discrepancy between [Student]’s cognitive and academic skills. (XX-11-7.) [Student]’s cognitive abilities fell within the range of borderline intelligence. (XX-11-4.)

47. With regard to school accommodations for [Student] for the sixth grade year, Dr. XXXX made the following recommendations (XX-11-13):

a. Memory and language deficits – [Student] would benefit from repetition since she works at a slower pace than her mainstream peers. Care should be taken to avoid presenting multiple concepts in any academic area in a short period of time; otherwise, [Student] might become confused or overwhelmed.

b. Memory deficits in math – [Student] would benefit from the use of a math dictionary, which is a notebook containing step-by-step mathematical operations.

⁴⁴ “Problem solving rigidity” is a term of art and it explains rigidity in problem-solving due to wanting to continue to do things the old way.

c. Executive dysfunction – [Student] would benefit from working daily with a resource room teacher to list her homework assignments, with the goal of systematically tapering off of this accommodation over time.

d. Social skills – As part of [Student]’s IEP, she needs to be placed in a social skills group to acquire appropriate socialization skills. This can be accomplished by having [Student] join a lunch bunch group.

e. Counseling – Ongoing counseling was recommended to help [Student] (i) face her fears and encourage healthy forms of projective identification, (ii) repair her relationship with her brother, and (iii) deal with adolescence, in general.

48. With regard to the school advocacy accommodations, Dr. XXXX questioned whether placing [Student] in a small self-contained school setting (such as a private school) would be more “detrimental to [Student]’s self esteem. And that struggling and being overwhelmed in a mainstream setting [may be] less damaging.” (XX-11-12.)

49. Dr. XXXX did not observe [Student] in the school setting or review [School 3]’s education records on [Student], i.e., informal data (such as running records or curriculum-based assessments), prior to issuing her report. (T. of XXXX, tr. 969 and 970.)

50. On February 10, 2010, Ms. XXXX e-mailed the Parents to explain a situation that occurred at school that day involving [Student]. Ms. XXXX told the Parents that teachers, Ms. XXXX and Ms. XXXX, asked their students to take turns describing any concerns they may have about things bothering them in class. According to Ms. XXXX, the exercise was intended to build a positive environment within the classroom, but quickly spiraled into a finger-pointing session. While it was noted that [Student] had many opportunities to voice her concerns about other students in the classroom to resolve classroom dysfunction, when students began

identifying things that bothered them about her, [Student] got upset. Afterwards, when the class was transitioning to math, she (Ms. XXXX) observed [Student] upset and crying, stating that everyone was mean to her and picked on her. In a separate incident, occurring later in the day, Ms. XXXX told the Parents that [Student] confronted several of the boys from Ms. XXXX and Ms. XXXX' class with clenched fists, yelling and telling them to shut up because she believed they were talking about her. In response, the boys barked at her and called her a loser. This caused [Student] to return to her lunch table crying. Ms. XXXX concluded in her e-mail that the lunchroom incident was mediated with each side agreeing to leave the other alone. (XX-12.)

51. On February 24, 2010, the Parents applied for admission to [School 2]. (MCPS-16A.) On the application, they wrote that [Student] needed "consistency and structure. Small group environment. *Reading, writing and language skills. Social skills acquisition." *Id.*

52. Subsequent to that, the Parents hired XXXX XXXX, Director of XXXX Educational Group, as an educational consultant. (T. of XXXX, tr. 43.) On an intake form, the Parents described their reasoning for retaining Mr. XXXX, as follows:

We have had 2 professionals recommend to us that a private, specialized setting would best meet our daughter's educational needs. Our goal is to secure the best possible learning environment for our daughter so that she may thrive and grow to her fullest potential both educationally and emotionally.

(MCPS-64.)

53. On April 11, 2010, the Parents formally put MCPS on notice that they were "very concerned about [[Student]] moving on to middle school." (MCPS-19.) In the Parent Report, the Parents requested "more focus on reading & writing" and "small class size with focus on individualized instruction that addresses [[Student]'s] learning style." *Id.* In support of this

request, the Parents focused on how easily [Student] can be distracted in large settings and how she becomes frustrated by not performing to expectations. *Id.*

54. The next day, on April 12, 2010, Mr. XXXX observed [Student] in a co-taught class of nineteen students for fifty-five minutes. (XX-13.)

55. During Mr. XXXX's observation, [Student] (a) fidgeted in her seat, (b) perseverated over a title about a picture the class was discussing; (c) was argumentative with and physically aggressive toward peers, (c) interrupted class with her behavior; (d) blurted out information without first being called upon or raising her hand; (e) argued with the teacher over a grade; (f) had difficulty maintaining attention and inhibiting responses; and (g) had problems with oral expression. *Id.*

56. Based on this observation, Mr. XXXX identified [Student]'s strengths and weaknesses in the classroom, as follows:

Strengths

Contributes to class discussion;
Seems motivated to participate; and
Reading comprehension is on grade level, as is math.

Weaknesses

Problematic social interactions – argumentative;
Problems with oral expression;
Difficulties sitting still and maintaining attention;
Difficulties in inhibiting responses;
Written language is below grade level; and
Reading is below grade level.

(XX-13-2.)

57. In a written summary, dated April 12, 2010, Mr. XXXX concurred with the Parents that [Student] “[n]eed[ed] a small structured environment that can provide specialized

instruction and support related to her learning, attention, speech and language and social-emotional challenges.” (XX-13-3.)

58. At no point prior to making this recommendation did Mr. XXXX speak to Ms. XXXX about [Student]’s progress, review the informal data (T. of XXXX, tr. 138), or ascertain from [School 3] staff whether [Student] was having a typical behavior day.

59. On April 21, 2010, [School 2] offered [Student] a placement at its school for the 2010 – 2011 school year provided that she did not have a primary disability code of XX. (MCPS-19A.)

60. MCPS was unaware that the Parents had sought and received a placement for [Student] at [School 2] until August 2010. (T. of XXXX, tr. 947.) Similarly, the Parents did not express to MCPS any dissatisfaction regarding [Student]’s education at [School 3]. (T. of XXXX, tr. 954.)

61. At some point, the Parents provided MCPS with a copy of Dr. XXXX’s report and recommendations in an attempt to engage in a discussion about their concerns regarding [Student]’s transition to middle school. (XX-16-2.)

62. On April 27, 2010, XXXX XXXX, Ph.D., MCPS Psychologist, reviewed Dr. XXXX’s assessment report. (XX-16-1 through -3.) Dr. XXXX wrote that the WISC-IV findings identified [Student]’s intellectual abilities to be in the “low” range, with a full scale IQ score of 78 (90 – 109 is the average range). While Ms. XXXX agreed that the academic expectations for [Student] relied heavily on her language skills, Ms XXXX believed that the school data supported a finding that [Student] was functioning at a higher level than was suggested by the WISC-IV verbal comprehension index score of 73. Likewise, Ms. XXXX indicated that after meeting [Student], she felt [Student]’s conversational skills were better

developed than suggested by the WISC-IV scores. Finally, Ms. XXXX commented that Dr. XXXX's assessment did not include a review of any of [Student]'s school-gathered tests/assessments.

63. On April 30, 2010, the Team conducted an annual review meeting to discuss [Student]'s sixth grade IEP. (MCPS-27/XX-24.) Those present at the meeting included the Parents; XXXX XXXX, Principal; XXXX XXXX and XXXX XXXX, general education teachers; XXXX XXXX, Case Manager/special education teacher; XXXX XXXX, Guidance Counselor; XXXX XXXX, School Psychologist; XXXX XXXX, Speech/Language Pathologist; XXXX XXXX, family therapist;⁴⁵ XXXX XXXX, Advocate; and XXXX XXXX, RTSE ([School 1]). (XX-24-1.)

64. During this meeting, the Parents made a request for a formal review of Dr. XXXX's report and recommendations. (XX-24-36.) In addition, the Parents voiced their concerns about the appropriateness of placing [Student] in a public school setting for the sixth grade.

65. On May 12, 2010, XXXX XXXX, [Student]'s case manager and special education teacher, formally reviewed Dr. XXXX's assessment report. (MCPS-22/XX-20.) Ms. XXXX indicated that the formal assessment data contained in Dr. XXXX's report was only one piece of the puzzle and that MCPS would also need to look at school-gathered assessments/tests to determine if there was any correlation between the areas of need Dr. XXXX identified and those demonstrated at the school. Ms. XXXX made it clear that the informal data contained in Dr. XXXX's report was obtained without accommodations, except for math. According to Ms. XXXX, when accommodations and supplementary aids are in place for [Student], "[Student] has

⁴⁵ Ms. XXXX is the Clinical Director for the Center for Adoptive Families. The Parents and [Student] have been

shown a tremendous amount of growth.” (XX-20-3.) Ms. XXXX did not, however, discount the value of Dr. XXXX’s report – she noted that “[t]he testing allows us to make a plan to meet [[Student]’s] individual needs and educational plan for her academic success.” *Id.*

66. The Team⁴⁶ met again on May 18, 2010 and on June 8, 2010 to complete the annual review. At May 18, 2010 meeting, the Team discussed Dr. XXXX’s and Ms. XXXX’s reports, Mr. XXXX’s observation report, [Student]’s educational history and statements from the Parents. (XX-24-36.) The Team also reviewed the following letters from Ms. XXXX, Dr. XXXX, Dr. XXXX and Dr. XXXX, as well as the FBA/BIP. *Id.*

a. In her April 27, 2010 letter, Ms. XXXX strongly recommended that [Student] attend a smaller school with small class sizes, that was designed to educate children with special needs. (XX-17.)

b. In her May 11, 2010 letter, XXXX XXXX, Ph.D., [Student]’s psychologist,⁴⁷ stated that [Student] needed consistent support and frequent redirection in order to stay on task and regulate her behavior. Dr. XXXX also stressed that [Student] must have a very structured school and social environment with adequate adult attention. (XX-19.)

c. In his April 12, 2010 letter, Dr. XXXX strongly recommended that [Student] be placed in a non-public special education program with specialized instruction for children with language-based learning disabilities and a small student-teacher ratio. (XX-15.)

d. In her May 5, 2010 letter, XXXX XXXX, D.O., [Student]’s treating physician, cautioned the school that without a small educational setting, structured classes, and specialized individual

involved in counseling with Ms. XXXX since [Student]’s placement with the Parents.

⁴⁶ The Team consisted of the same participants who were present at the April 30, 2010 IEP meeting, but also included the following individuals: XXXX XXXX, Principal ([School 3]); XXXX XXXX, Pupil Personnel Worker (PPW); XXXX XXXX, Counselor ([School 1]); XXXX XXXX, Instructional Specialist.

⁴⁷ [Student] was involved in Dr. XXXX’s social competence group sessions.

instruction, [Student]'s emotional, psychological, and physical health would suffer and the progress sustained thus far would be lost. (XX-19.)

e. On May 12, 2010, [School 3] staff updated the FBA to document all of the interventions its teachers and administrators had been utilizing to address [Student]'s behavior.⁴⁸ Moreover, the purpose of the FBA was to better prepare [Student] for her transition to middle school. (MCPS-23; XX-33.) [School 3] staff agreed that the FBA would remain in effect through the end of fifth grade, with the expectation that the middle school team would review and revise it with new goals and expectations commensurate to [Student]'s needs in that setting. (MCPC-23; XX-24-10.) In pertinent part, the FBA provided:

- Of particular importance was [Student]'s daily struggle with her behavior in and outside of the classroom which included: (i) frequently calling out in class without first raising her hand or being called upon (5 times a day, low intensity); (ii) interrupting teachers and peers (5-6 times a day, low to high intensity); (iii) having difficulty maintaining her personal space (2-3 times per week, low to high intensity); (iv) having difficulty in social interactions with peers (on average 2 times per week, low to high intensity requiring adult intervention); and (v) having difficulty with transitions and in unstructured settings (1-2 times per week, low to high intensity).
- The FBA Team also described six critical incidents where [Student]'s behavior had escalated to a point where she received office referrals for verbal abuse to a classmate, disrupting the learning environment, hitting, pushing, kicking, and a bus report for slapping a student.
- In analyzing the behavior, the FBA Team agreed that the antecedents that often triggered [Student]'s behavior was her level of frustration or feeling overwhelmed by a task or situation. Oftentimes, too, [Student] reacted to "peer comment, peer facial expression, [her] interpretation of a social interaction, [or] someone bumping into her, during teacher led classroom instruction, [or] during small or large group discussions, [and]

⁴⁸ [Student] also had a specific recess plan in place to help her cope with peer relations in this unstructured environment. (T. of XXXX, tr. 941.) The goal of the plan was to not completely remove [Student] from recess, but reward her for good behavior by allowing her to stay in the library or media center two, and up to three, days per week – her preferred outlet in lieu of recess. *Id.*

classmates instigating her in an attempt to get a reaction from her.” (XX-33-16.)

- In managing [Student]’s behavior, [School 3] teachers employed a number of interventions or consequences (positive and negative), including: time outs, alternative learning location, problem solving/processing meeting, loss of recess, parent contact, recess plan, star bucks rewards and lunch bunches, to lessen [Student]’s disruptive behavior and influence a desirable behavior.
- When [Student] acted out, many of her peers tried to instigate a reaction out of her, ignored her, asked her to stop, or requested adult assistance.

(XX-33-15, 6.)

67. By the third IEP meeting, on June 8, 2010, the Team⁴⁹ had determined [Student]’s then-current PLOP.⁵⁰ (MCPS-27/XX-24.)

a. In reading, [Student]’s scores on the MAP-R and F&P improved from the prior year, by 9 points and to level S, respectively. (XX-24-6.) [Student]’s scores on decoding, screening and class work showed that she had a command of the material – she earned a 96% on screening vowel patterns, 94% on multisyllabic, and 85% on spelling. *Id.* [Student] also made progress in reading decoding and comprehension. (MCPS-15.) Likewise, [Student] showed improvement in comprehension and fluency. (XX-24-6.) Overall, [Student] was performing at the fourth grade instructional level for reading. *Id.*

b. In mathematics, [Student] was taking a co-taught advanced (sixth grade level) math class. (T. of XXXX, tr. 938.) (XX-24-6.) With scaffolding⁵¹ through the fifth grade material plus manipulatives, guide sheets and checklists, as well as repetition and practice,

⁴⁹ The Team consisted of the same participants that were present during the May 12, 2010 IEP meeting, but also included: XXXX XXXX, ESOL Teacher, and XXXX XXXX, OT, Physical Disabilities Assessment Team.

⁵⁰ Collectively, the Team determined the then-current PLOP; however, the Parents still questioned whether there was some discrepancy between norm testing (private reports) and school-gathered data. (XX-24-8.)

⁵¹ Scaffolding refers to the idea that specialized instructional supports need to be in place in order to best facilitate

[Student] was developing an understanding of all concepts. *Id.* [Student]'s scores on the unit tests supported a conclusion that she had a good command of the material and was working at a fifth grade instructional level. *Id.*

c. In written language, [Student] was performing at the fourth grade instructional level. Evidence of improvement is demonstrated by her grades on the following projects: she earned 22/24 points on a feature article, 32/50 points on a biographical research project, and she averaged 2/4 points on written responses. (XX-24-6.) [Student] also demonstrated that she is able to independently complete graphic organizers and gather information. *Id.*

d. In oral language, [Student] was still performing below age expectancy; nevertheless, [Student] demonstrated that she was able to complete assignments and self-correct grammatical and sentence structure errors with fewer prompts or cues. (XX-24-6.) [Student] was also showing improved problem solving in social situations. *Id.*

e. In task completion, [Student] was performing below grade level expectancy, but she was aware of the expectations and was able to follow routines. (XX-24-7.) Moreover, accommodations, such as sticky notes and paper, had helped [Student] with completing and turning in assignments because these allowed her to write down thoughts/comments. *Id.*

f. In peer relations, [Student] was performing below grade level expectancy, but she was social with peers, compassionate and liked to help others in need. (XX-24-7.)

68. [Student]'s academic performance was consistent with her cognitive expectations. (T. of XXXX, tr. 968.)

69. Other indicia of [Student] showing progress in the fifth grade included her scoring proficient on the Spring 2010 MSA for reading and mathematics, as well as earning A's, B's,

and outstanding and satisfactory achievement on her June 18, 2010 report card. (MCPS-17, 28; XX-25.) While [Student] continued to perform below grade level in reading, she made a year's progress. (T. of XXXX, tr. 974.) (MCPS-28; XX-25.)

70. By the end of fifth grade, [Student]'s disabilities continued to impact her academic achievement and/or functional performance in the following ways:

[Student]'s disability ... in the area of verbal comprehension and processing speed cause her to have difficulty processing problems and completing tasks quickly. This impacts her ability to follow multi-step directions, comprehension and recalling complex concepts. This also impacts her academic success in reading, written language, math, science and social studies.

(XX-24-8.)

71. The Team updated [Student]'s academic goals and objectives for the sixth grade school year. (AL-24-17 through -28.) All of the goals listed included new skills for [Student], for instance,

a. Speech and Language – [Student] will explain her thinking and rationalization about a topic, event, action, picture or story with no more than one reminder. She will also use at least four words correctly in a sentence to tell, summarize or paraphrase an event, topic or story. With supports, the material will involve longer sentences, paragraphs and short stories that [Student] will be required to comprehend and express vocabulary and concepts in proper sentence structure using pertinent supporting details from the text;

b. Reading – Given text at [Student]'s instructional level and/or grade level, she will determine important ideas and messages in informational texts;

c. Reading Fluency – Given instructional level text, [Student] will read the text with 90% accuracy and with appropriate pacing, intonation and expression;

d. Written language – With the use of word processing tools, [Student] will locate,

retrieve and use information from various sources to express personal ideas, inform and persuade with supporting documentation;

e. Written language (Spelling) – with supports, [Student] will apply conventional spelling in written language;

f. Mathematics – with supports, [Student] will analyze number relations and compute;

g. Behavior – the goals/objectives from the FBA were reiterated here. In essence, [Student] will develop healthy ways to form and manage peer relationships with fading adult support in multiple settings; and

h. Behavior (Self Advocacy) – when faced with a frustrating and/or emotional situation, [Student] will protect own rights in a constructive manner with fading adult support in multiple settings.

72. Thereafter, the Team reduced the number of hours of instruction outside of general education. (XX-24-29, 30.) It provided for 5 hours and 3 minutes per week outside of general education, 45 minutes of which was dedicated to speech/language therapy and 2 – 15 minute sessions for counseling. (XX-24-29.) The IEP also provided for 24 hours and 57.50 minutes per week in general education, with support from both a regular and special education teacher. (XX-10-30.)

73. The increase in service hours reflected a change in the structure of the day from elementary school to middle school. (T. of XXXX, tr. 1024.)

74. Furthermore, the Team updated the list of accommodations (*see* Findings of Fact Nos. 32 and 41) for [Student] to successfully access the curriculum, to include: (a) books on tape; (b) recorded books; (c) notes, outlines and instructions; (d) electronic note-takers and word

processors; (e) responses on test booklet; (f) spelling and grammar devices; and (g) visual organizers. (XX-24-11 through -13.) Small group instruction was listed as an accommodation to ameliorate distractibility in the classroom, as well. (XX-24-13.)

75. In determining the LRE⁵² in which to implement [Student]'s IEP, the Team considered the XXXX program model for middle school. Based on the information noted above, the Team determined that [Student] had made academic and social progress in the full inclusion model XXXX during elementary school. The consensus of the Team was that the LRE in which [Student]'s educational needs could be met was the XXXX program at [School 1].

76. The Parents disagreed with the placement. They felt [Student]'s needs could not be met in the recommended MCPS placement. Specifically, they wrote, "[Student] needs a small classroom for students with language based learning disabilities, as well as support for students with social/emotional issues related to RAD. Needs support throughout the day. Services such as speech and language integrated throughout the day." (AL-24-37.)

77. [Student]'s last day of school at [School 3] was June 15, 2010 at the end of fifth grade.

78. On August 6, 2010, the Parents provided MCPS with a 10-day notice, dated August 1, 2010, of their intent to withdraw their daughter from the recommended public school placement of [School 1]. (AL-27.) In support thereof, the Parents claimed that the goals and objectives contained in the 2010 – 2011 IEP were not reasonably calculated to provide their daughter with FAPE. They expressed their belief that [Student] had not made sufficient academic progress at [School 3] to warrant placing her at [School 1]. The Parents asserted that [School 1] is ill-equipped to respond to [Student]'s significant speech and language disorders

⁵² Least restrictive environment (LRE).

because it lacks (a) appropriate and sufficient therapeutic support, (b) social skills training, (c) smaller class sizes, and (d) low student-teacher ratios. The Parents told MCPS that they were placing their daughter at [School 2] and were seeking reimbursement for the placement.

79. On August 16, 2010, Ms. XXXX responded to the Parents' letter by informing them that the decision of the Team would not be changed. (MCPS-30/XX-28.)

Placement comparisons ([School 2] v. [School 1])

80. [School 2] is an educational program that serves students, grades 5 through 12, with language-based learning disabilities. (T. of XXXX, tr. 730.)

81. As a student at [School 2], [Student] would not be eligible for a Maryland diploma; instead, she would receive a [School 2] diploma. (T. of XXXX, tr. 817.)

82. [School 2]'s total student population is approximately 73 disabled students. (T. of XXXX, tr. 819.) Of that number, the middle school population is approximately 13 to 15 students. (T. of XXXX, tr. 798.) Of that number, only 3 to 6 students are girls. *Id.*

83. The classroom size at [School 2] is a maximum of 8 students per teacher, except for reading and math tutorials, which are groups of no more than 3 students per teacher. (T. of XXXX, tr. 732.)

84. Most of the children who attend [School 2] have a diagnosis of dyslexia. (T. of XXXX, tr. 792.) Many other students have a diagnosis of phonological processing disorder. *Id.*

85. [School 2] is not equipped to accept students with a primary disability code of XX. (MCPS-19A.)

86. [School 1] has a diverse population of approximately 875 students, comprised of disabled and non-disabled students. (T. of XXXX, tr. 1210.)

87. At [School 1], MCPS offers several special education programs, including the XXXX and XXXX. (T. of XXXX, tr. 1210-11.)

88. The XXXX program services approximately 85 special education students with disability codes varying from autism, intellectual disabilities, specific learning disability, speech and language disability to other health impairments. (T. of XXXX, tr. 1210-11.)

89. The XXXX program services approximately 17 students with a disability code of either XX or other health impairment. (T. of XXXX, tr. 1211.)

90. All students in the XXXX program are assigned to a case manager. (T. of XXXX, tr. 1222.) Depending on the student's schedule, the case manager sees a child at least once a day and sometimes two or three times per day. *Id.*

91. The main difference between the two programs (XXXX and XX) is that the XXXX program has a behavior support teacher, school psychologist and social worker working directly with its student population. (T. of XXXX, tr. 1211, 1260.) The XXXX program also has more flexibility in regards to self-contained English and math classes, depending on the needs of its students. (T. of XXXX, tr. 1212.)

92. A student in the XXXX program may access the social skills classes taught in the XXXX. (T. of XXXX, tr. 1212.)

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93. During the admissions process, [School 2] administrators review whatever documents are appended to an application, along with a participatory student visit, to determine whether a student is a good fit for their program. (T. of XXXX, tr. 760.)

94. [School 2] administrators will also discuss a student's prior academic experiences to ascertain how the student did in that prior setting in order to predict how they will succeed at [School 2]. (T. of XXXX, tr. 802.)

95. In [Student]'s case, [School 2] administrators did not obtain a copy of her cumulative folder from MCPS, including IEPs, before deciding whether to admit her into their program. (T. of XXXX, tr. 809-10.)

96. Without the cumulative folder, [School 2] lacked a full and complete picture of [Student]'s goals, objectives, PLOP, accommodations, behavioral issues and needs prior to admitting her to the school.⁵³

97. For instance, in response to questions on the application about behavior and significant social issues in school, the Parents described [Student]'s behavioral issues, as follows:

At times [[Student]] has trouble with social interactions – kids being mean or excluding. [Student] also has decreased social skills. ADHD behaviors – can be silly and off task at times. Wants to be a leader and 1st. She can be bossy at times....Frequent arguing with one student in particular. At first both students were brought to the office during recess to play a game together, after several times, and behavior continued, now [Student] has been told by staff to stay away from this other student.

(MCPS-16A.)

98. [Student] began attending sixth grade at [School 2] on August 26, 2010.

99. As part of its Middle Division programming, [School 2] offers a weekly social skills group. The class includes weekly groups, community groups and field trips. (XX-36-1.) [Student] participated in the weekly social skills group as well as weekly individual counseling sessions with a Masters in Social Work student intern. (XX-36-2.) The sessions covered

⁵³ Later, when XXXX XXXX, the school social worker and counselor at [School 2], started working with [Student] she had a copy of [Student]'s 2010 – 2011 IEP and FBA/BIP. (T. of XXXX, tr. 572.)

conflict resolution, self-confidence and self-esteem building, strengthening friendships and relationships, and perceptions. *Id.*

100. Unfortunately, acting out at school was an issue for [Student] at [School 2]. From September 7, 2010 to May 13, 2011, [Student] engaged in eighteen separate incidences of misbehavior that resulted in discipline for cheating, rudeness, arguing, yelling, disruptive behavior, spilling another child's drink, boundary issues, not following directions, and taunting a peer. (MCPS-49B.)

101. [School 2] did not create a FBA/BIP, or anything that was similar to the document MCPS created that had data on progress, checkpoints and interventions (*see* MCPS-4), for [Student] during the sixth grade. (T. of XXXX, tr. 581.) [School 2] also did not have a written lunch plan in place for [Student]. (T. of XXXX, tr. 602.)

102. On May 21, 2011, Ms. XXXX wrote a letter to the Parents (addressed to "To Whom It May Concern") expressing concerns about [Student]'s rocky relationships with her peers. (T. of XXXX, tr. 544.) Ms. XXXX explained, in part, that [Student] had a difficult time trusting people and reacted to others in a hostile and suspicious way, oftentimes "blurting out impulsive kind of verbalizations." *Id.* Ms. XXXX told the parents that she feared [Student]'s credibility among her peers might be impacted and could undermine her potential for friendships. (AL-36-2.) Equally important, Ms. XXXX conveyed the concern voiced by [Student]'s teachers, counselors and advisors at [School 2] that [Student]'s academic performance was being significantly impacted by her social/emotional issues. (XX-36-1.)

103. To deal with the situation, Ms. XXXX recommended that [Student] receive 45 minutes of individual in-school counseling to address self-esteem, problem solving and

interpersonal development within the school environment, and she proposed social/emotional goals and objectives for [Student]. (XX-36-2, 3.)

104. Once a student is enrolled at [School 2], and every year thereafter, [School 2] will administer the WJ-III test for “pre- and post-test purposes.” (T. of XXXX, tr. 757.)

105. In the fall of her sixth grade year at [School 2], on October 12, 2010, [Student] took the WJ-III on October 12, 2010, without accommodations. (T. of XXXX, tr. 86.) (MCPS-31/XX-29.) The test scores revealed [Student]’s overall level of achievement to be **low**. (XX-29-2.) When broken down into categories, academic skills, application of academic skills, and fluency on academic tasks were all in the **low range**. *Id.* Moreover, when the scores were compared against age appropriate peers, [Student]’s standard scores (SS) were in the **low average** for broad reading, basic reading skills, brief reading, math reasoning, brief mathematics, and written expression. *Id.* And, [Student]’s SS for broad math mathematics, math calculation skills, broad written language and brief writing were in the **low range**. *Id.*

106. By the time [Student] took the WJ-III, more than four months had elapsed from the end of the school year at [School 3]. In the interim, [Student] did not participate in extended school year services.

107. In advance of the 2011 – 2012 IEP Team meeting, on or about April 2011, several of [Student]’s teachers at [School 2] submitted Secondary Teacher Reports to MCPS for its review:

a. XXXX XXXX, [Student]’s reading teacher, expressed concern about [Student]’s performance in her class at all levels, including: (i) reading – accurately and fluently, understanding class readings, being able to interpret lengthy text, keeping up with longer readings, and decoding; (ii) participation – focusing on teacher/activity; and (iii) social/emotional

– demonstrating appropriate interactions with students, problem solving when stressed, and raising hand or waiting to be called. (XX-33-6, 8.) [Student]’s strength, on the other hand, was her ability to contribute during class discussions. (XX-33-8.) In the comments section, Ms.

XXXX wrote:

[Student]’s reading is poor due to very low ability to decode. She has great difficulty with spelling. Both are well below grade level. She has difficulty with impulsivity which affects her ability to interact appropriately with peers, wait to be called on in class, and stay focused on instruction or tasks.

Id.

b. XXXX XXXX, [Student]’s math and science teacher, expressed concern about [Student]’s performance in both of her classes, in particular: (i) reading – accurately and fluently, understanding class readings, being able to interpret lengthy text, and keeping up with longer readings (ii) written language – organization, voice, diction, sentence fluency and conventions; (iii) oral communication – speaking in complete sentences to express ideas and speaking clearly; (iv) organization – completing assignments by the due date; (v) participation – focusing on teacher/activity and requesting accommodations; and (vi) social/emotional – demonstrating appropriate interactions with students, problem solving when stressed, and raising hand or waiting to be called. (XX-33-6, 8.) In the comments section, Ms. XXXX wrote:

[Student] needs help keeping ideas straight when writing. She has trouble staying focused on topics in class. When stressed, she shuts down.

(XX-33-11.)

c. XXXX XXXX, [Student]’s social studies teacher, likewise expressed concern about [Student]’s performance in her class, in particular: (i) reading – accurately and fluently, understanding class readings, being able to interpret lengthy text, and keeping up with longer readings (ii) written language – voice, diction, sentence fluency and conventions; (iii) oral

communication – understanding information presented orally, understanding class readings, speaking in complete sentences to express ideas, and expressing own ideas; (iv) participation – refraining from socializing and focusing on teacher/activity; and (v) social/emotional – demonstrating appropriate interactions with staff and students, problem solving when stressed, raising hand or waiting to be called, and focusing. (XX-33-6, 8.) Ms. XXXX considered [Student]’s strength, on the other hand, her ability to be organized and to contribute to class discussions. (XX-33-13, 14.) In the comments section, Ms. XXXX wrote:

[Student] consistently engages in disrespectful interactions with peers and adults. She is unable to focus on content. She becomes easily agitated and defiant when experiencing stress. She is unsatisfied with efforts, relies on others’ opinions instead of her own. She is far behind in writing and reading.

(XX-33-14.)

108. On April 27, 2011, XXXX XXXX observed [Student] for thirty-four minutes in a math class at [School 2]. (MCPS-32; AL-33-4.) The class consisted of five students: comprised of four boys and one girl ([Student]). During the observation, [Student] sat alone at a desk while the four boys shared two desks. At the outset of the observation, [Student] was argumentative with her teacher after she was told that her answers were wrong. [Student], however, was able to re-focus and return to her work. At another point, during a conversation with [Student], the teacher needed to remind [Student] about the tone of her voice. [Student] politely told another student that his pencil had fallen to the floor. At the end of class, [Student] followed the teacher’s instructions about putting papers away in her binder and getting the teacher’s signature for the homework and point sheets. Ms. XXXX observed that [Student] was the first to complete this task.

109. On May 16, 2011, the Team conducted an annual review of [Student]'s IEP, with the Parents and [School 2] staff participating. (MCPS-33/XX-38.) After review of all available information, including [Student]'s academic performance at [School 2], parent feedback, curriculum-based assessments, teacher reports from [School 2], WJ-III test results, and an observation by XXXX XXXX, the Team determined the then-current PLOP and developed an IEP.

110. The Parents and MCPS disagreed on the amount of time that [Student] should be afforded for individual counseling. As noted above, Ms. XXXX had recommended 45 minutes of individual therapy. The Parents asked [Student]'s therapists, doctors and teachers at [School 2] to discuss their concerns with the Team about [Student]'s behavior and how it impacted her ability to access the curriculum. While the Team listened to the request, MCPS believed that [Student]'s record supported only a social skills class (to be provided through the ED program at [School 1]), plus fifteen minutes per week of counseling.

111. Thereafter, the Team recommended that [Student] receive the following special education and related services following fifth grade from June 9, 2011 to June 7, 2012: 20 hours and 50 minutes a week of special education classroom instruction in the general education setting, in a co-taught classroom, for math and English, and science and world studies with special education support; 9 hours and 10 minutes a week of special education classroom instruction outside general education setting for reading, resource and a weekly social skills group; 3 hours a month (4 – 45 minute sessions) of speech-language therapy in the general education setting; and 15 minutes a week (1 – 15 minute session) of counseling in the general education setting. (MCPS-33/XX-38.) The Team did not, however, recommend any new or different accommodations. *Id.*

112. More or less, this new IEP doubled the amount of time [Student] would be spending in special education classroom instruction outside general education when compared to her IEP in sixth (5 hours and 3 minutes per week versus 9 hours and 10 minutes a week). This change was a reflection the program [Student] attended at [School 2] during the sixth grade

113. Finally, the consensus of the Team was that the LRE in which [Student]'s educational needs could be met continued to be the XXXX program at [School 1]. The reasoning for this was [Student]'s MSA test scores, the recommendation from the prior year's Team at [School 3], and the services outlined in her sixth grade IEP. (XX-38-38.)

114. On June 7, 2011, the Parents wrote to XXXX XXXX, principal at [School 1], and Ms. XXXX advising them that they were rejecting the IEP and placement of their daughter at [School 1]. (XX-37.) The Parents claimed that the IEP lacked information regarding [Student]'s current PLOP and, in their opinion, it hampered the Team's ability to develop specific measurable goals and objectives for the 2011 – 2012 school year. As a further basis, the Parents argued that [School 1] did not provide individual counseling for its students. Referencing Ms. XXXX's May 21, 2011 letter, the Parents contended that [Student] required 45 minutes each week of counseling in order to successfully access the curriculum. In conclusion, the Parents told MCPS that they were keeping their daughter at [School 2] and were seeking reimbursement for the placement.

115. On June 7, 2011, Ms. XXXX XXXX responded to the Parent's letter informing them that they were welcome to submit any additional documentation they felt necessary to support their position, but that based on the current data the decision of the Team would stand. (MCPS-34/XX-43.)

116. On November 16, 2011, the Parents filed a Request for Due Process Hearing (MSDE-MONT-OT-11-XXXX) seeking reimbursement for [Student]’s placement at [School 2] for the 2011 – 2011 school year. (MCPS-36.)

117. On November 18, 2011, the Team re-convened to discuss the 2011 – 2012 IEP, with the Parents, [School 2] staff and counsel participating. (MCPS-37.) At this meeting, the Parents submitted additional documentation, including a Parent Report (XX-44); curriculum-based assessments and measurements (XX-39, 40, and 41); 2010 – 2011 [School 2] Report Card (XX-42B); and WJ-III (MCPS-41/XX-48) for the Team’s review and consideration.

118. The Team summarized [Student]’s PLOP as follows (MCPS-37):⁵⁴

a. Language Arts – [Student] had issues with the development of ideas, organization, voice and conventions when writing, reading accurately and fluently, understanding class reading, interpreting lengthy text, and keeping up with readings. Other concerns included [Student]’s inability to make inferential interpretation from text, refrain from socializing in the classroom, and understand vocabulary usage and cause/effect. On the other hand, a strength for [Student] was her classroom participation and interest in reading.

b. Math/Science – [Student] demonstrated satisfactory skills with basic operations and math concepts, but was having difficulties with math application and solving multi-step problems. It was also noted that [Student] was functioning below grade level in written language and using appropriate verb-subject agreement. Other concerns included speaking clearly and in complete sentences, socializing, focusing on the teacher/activity, demonstrating appropriate

⁵⁴ The Team also reviewed [Student]’s PLOP for behavior and reading but those reports were not contained in the IEP record.

interactions with students, problem solving when stressed, raising hand and waiting to be called on, organization, and retrieving information when called upon.

c. Reading – Reading Level 5. Concerns included reading accuracy and fluency, understanding class readings, interpreting lengthy text, keeping up with longer readings, and spelling. While [Student] had good sight word skills, she continued to struggle with vocabulary and using it appropriately. She could answer observational questions but had difficulty with higher order thinking skills and questioning. Additional concerns included understanding information presented orally, refraining from socializing, focusing on the teacher or activity, demonstrating appropriate interactions with staff and peers, problem solving when stressed, and raising her hand to be called on. Strengths include notebook organization, completing assignments by due date, arriving with necessary materials, and participating in class discussions. [Student] had a tendency to be immature and impulsive. She required frequent reminders to listen to a question before responding.

d. Social Studies – Concerns with all areas of reading and using correct voice, diction, sentence fluency, and conventions in writing. Additional concerns included understanding information presented orally, understanding class readings, speaking in complete sentences, and following conventions of a conversation. [Student] also had difficulty focusing on the teacher or activity, demonstrating appropriate interactions with peers/staff, problem solving when stressed, raising hand and waiting to be called on, and understanding social cues. Strengths included all areas of organization.

119. In light of the updated information, the Team determined that psychological and speech-language evaluations were warranted, as well as a classroom observation.

120. On January 13, 2012, XXXX XXXX, MCPS, conducted a speech-language re-assessment. (MCPS-40.) The assessment consisted of a history/background from XXXX, an interview with [Student], a classroom observation, as well as the administration of several tests, including: the PPVT-4,⁵⁵ EVT-2,⁵⁶ and CASL.⁵⁷

121. Ms. XXXX summarized her findings, in pertinent part, as follows (MCPS-40):

a. PPVT-4 – Compared to age expectations, [Student]’s single word receptive vocabulary is slightly, but not significantly, below expectancy range. Her performance was comparable to her performance during the administration of the PPVT-III in October 2006.

b. EVT-2 – Compared to age expectations, [Student]’s single word expressive vocabulary is below expectancy range. Her performance was comparable to that during the administration of the EVT in October 2006.

c. When comparing the two scores (PPVT-4 and EVT-2), Ms. XXXX noted that she observed no clinically significant difference between [Student]’s receptive vocabulary, as tested on the PPVT-4, and her expressive vocabulary, as tested on the EVT-2, suggesting the absence of word retrieval difficulties and expressive vocabulary deficits.

⁵⁵ PPVT-4 (Peabody Picture Vocabulary Test, 4th Edition) is a measure of receptive vocabulary for Standard American English.

⁵⁶ EVT-2 (Expressive Vocabulary Test, 2nd Edition) is a measure of expressive vocabulary, word retrieval and Standard American English.

⁵⁷ CASL (Comprehensive Assessment of Spoken Language) is a measurement of delayed language, spoken language disorders, dyslexia, and aphasia.

d. CASL – Compared to age expectations, [Student]’s overall spoken language skills are below expectancy range. [Student]’s semantic abilities, as demonstrated by the Synonyms subtest, are roughly consistent with those demonstrated in the PPVT-4 and EVT-2. Of particular concern to Ms. XXXX was [Student]’s semantic/verbal reasoning abilities – she found [Student]’s responses to be literal in nature, meaning that [Student] failed to see beyond the concrete aspects of what she heard.

e. During the observation, [Student] demonstrated functional oral communication skills in the math class, but the demands placed on her were minimal in the context of the game that was being played. On the other hand, during the teacher-led discussion, [Student]’s ability to focus and participate was less than optimal, and her difficulty in shifting topics at the beginning of the class period was also notable.

122. Ms. XXXX concluded that [Student] demonstrated spoken language needs, particularly in the areas of semantics and verbal reasoning, which she believed impacted [Student]’s ability to gain meaning from complex linguistic information she hears and her ability to convey complex linguistic information orally. (MCPS-40.)

123. With regard to school accommodations for [Student], Ms. XXXX indicated that continued speech-language supports may be warranted as a related service in order for [Student] to address her deficit spoken language areas. (MCPS-40.)

124. On January 30, 2012, XXXX XXXX, Psy.D., school psychologist, MCPS, conducted a psychological evaluation. (MCPS-41/XX-48.) The evaluation consisted of a history/background from the XXXX an interview with [Student], classroom and lunchroom observations, as well as the administration of several tests, including: Conners-3⁵⁸ (Parent,

⁵⁸ Conners-3 (Conners, 3rd Edition) is a rating scale designed to assess ADHD and related learning behavior, and

[School 2] teacher and Student ratings); BASC-2⁵⁹ (Parent, [School 2] teacher and Student ratings); RCMAS-2,⁶⁰ and RADS-2.⁶¹

125. Dr. XXXX summarized her findings, in pertinent part, as follows:

a. On the BASC-2, [Student] continued to display many of the characteristics of her diagnoses (*see* Findings of Fact No. 1) in the home and school settings. (XX-48-18.) With regard to the aggression and conduct problems, [Student]'s early life experiences are compounded by current symptoms of anxiety, depression, and frustration with academic challenges and may result in oppositional and defiant behaviors.

b. The results of the Conners-3, in conjunction with the BASC-2 data, indicate that learning problems continue to affect [Student]. (XX-48-19.) In particular, [Student] appears to be significantly impacted by ADHD, Combined Type. According to the data gleaned from [Student]'s teachers, [Student]'s difficulties with attention, hyperactivity, and impulsivity are impacting her learning. The teachers also described [Student] as socially and emotionally immature compared to same age peers, and unable to interpret social cues. [Student], too, self-reported difficulties with peer relationships, including being teased and not being included in activities by peers at school and feeling that her friends do not have free time to spend with her.

c. On the RADS-2, [Student]'s depression scores fell within normal range. (XX-48-19.)

d. On the RCMAS-2, [Student] obtained moderately problematic range scores for Total Anxiety and Worry. (XX-48-19.) Dr. XXXX, however, did not believe these scores

emotional problems.

⁵⁹ BASC-2 (Behavior Assessment System for Children, 2nd Edition) is a behavior rating scale designed to provide a description of the child's behavior in a standard format.

⁶⁰ RCMAS-2 (Revised Children's Manifest Anxiety Scale, 2nd Edition) is a 49-item self-report instrument designed to assess the level and nature of anxiety in children from 6 to 19-years-old.

adequately captured the significance of [Student]’s emotional difficulties as described by her Parents and teachers, and as observed during her interview with [Student]. Dr. XXXX largely attributed this to problematic self-report measures consisting of either [Student] wanting to present herself in a good light, or [Student] not fully understanding the questions and response options.

e. During the classroom observation,⁶² [Student]’s behavior revealed consistent characteristics of ADHD, Combined Type. (XX-48-19.) Here, [Student] displayed impulsivity, restless behaviors, and a high activity level. Evidence of this was seen in [Student]’s inability to follow oral directions, stay on task, complete class work, and sit still. [Student] was also calling out, responding impulsively, and arguing with the teacher. [Student] also needed something to play with, like a fidget. All of these behaviors were being displayed in a highly structured environment with a student to teacher ratio of 4 to 1. During the lunchroom observation,⁶³ [Student] did not interact socially with her peers. She sat down alone at a table to eat her meal until a teacher joined her.

126. Overall, Dr. XXXX determined that the test results indicated that [Student] continues to display characteristics consistent with ADHD, Combined Type. (XX-48-20.) Results also indicate that [Student] continues to display symptoms of anxiety and depression, which may be expressed at times as anger, oppositional behaviors, and risk-taking behaviors. Dr. XXXX indicated that given [Student]’s cognitive profile as a student with learning disabilities, she may also experience frustration with academic challenges, which compounds her

⁶¹ RADS-2 (Reynold’s Adolescent Depression Scale, 2nd Edition) is a self-report measure that provides evaluation of depression symptomatology in adolescents.

⁶² [School 2] staff informed Dr. XXXX that [Student] was suffering from a very high level of test anxiety on the day she observed her in class. (T. of XXXX, tr. 1099.)

⁶³ [School 2] staff also informed Dr. XXXX that [Student] was suffering from an earache on the day she observed

difficulties with ADHD. As such, [Student] presents a complex constellation of issues affecting her learning and social/emotional functioning.

127. With regard to school accommodations for [Student], Dr. XXXX made the following recommendations (AL-48-20):

- a. Structured school environment with consistent behavior intervention system;
- b. Accommodations for reduced distractions, preferential seating, extended time, movement breaks, use of fidgets, support for transitions, and flash pass or other tool for access to adult support in the school when needed;
- c. Continued interventions in the areas of social skills such as social skills group and participation in activities such as sports which allow connection to peers in the community; and,
- d. Continued communication between home and school as well as collaboration with mental health providers outside the school.

128. Dr. XXXX's report was well received by the Parents in that it was thorough and well written. (T. of XXXX, tr. 1123-24; T. of XXXX, tr. 875; T. of XXXX, tr. 93-4.)

129. On February 2, 2012, a re-evaluation determination IEP Team meeting was convened, with the Parents, [School 2] staff and counsel participating. (MCPS-42.) At this meeting, the Team reviewed all of the available information, including Ms. XXXX's and Dr. XXXX's reports. Having considered these assessments, the Team determined that [Student] continued to be eligible for special education services under the educational disability coding of OHI. However, no other substantive discussions took place when the Parents submitted an unsigned draft speech evaluation from XXXX XXXX, Ph.D., XXXX Hearing and Speech Center, conducted in January 2012, for the Team's review. In addition, the Parents requested a

her in the lunchroom. (T. of XXXX, tr. 1107.)

Periodic Review meeting to incorporate the new speech evaluation, any current PLOP and observation when determining the IEP. The Team agreed to reconvene the IEP meeting on February 28, 2012.

130. On February 3, 2012, the Parents withdrew their Request for Due Process Hearing. *Id.* (MCPS-43/XX-50.)

131. On February 28, 2012, a periodic review IEP Team meeting was convened; the Parents, their attorney, their educational advocate (Mr. XXXX), and [School 2] staff were present. (XX-57.) The Team conducted a review of all available information, including the following: [Student]'s academic performance leading up to this point; Mr. XXXX's January 31, 2012 observation (XX-49); teacher reports from [School 2] (XX-49, 52, 53 and 55); recent evaluations performed by Dr. XXXX,⁶⁴ Ms. XXXX (MCPS-40) and Dr. XXXX (MCPS-41/XX48); and PLOP (XX-47).

132. The Team revised the IEP (including appropriate instructional/testing accommodations and supplementary aids, services and program modifications/supports) and recommended that [Student] receive the following special education and related services from February 28, 2012 to June 7, 2012: 8 hours and 20 minutes a week of special education classroom instruction outside the general education setting for reading intervention and social skills group, 20 hours and 40 minutes a week of special education classroom instruction in the general education setting for math and English in a co-taught classroom and science and world studies with special education supports, 15 minutes a week (1 – 15 minute session) of counseling

⁶⁴ The Team read Dr. XXXX's report into the record. (MCPS-46.) In pertinent part, Dr. XXXX wrote that "[Student] demonstrates a 'moderate receptive and expressive language disorder, characterized by deficits at the word, sentence, and discourse level.' She 'continues to need instruction to be provided in a classroom where the pace, density and complexity of language for instruction can be adjusted.' Additionally, speech-language services

outside the general education setting, and 45 minutes a week (1 – 45 minute session) of speech-language therapy outside the general education setting. (XX-57.)

133. The Team also proposed a self-contained special education class for reading, but the Parents disagreed with the intervention recommended. (MCPS-46/XX-59.)

134. Furthermore, it was the consensus of the Team that the LRE in which [Student]'s educational needs could be met continued to be the XXXX program at [School 1].

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135. In the fall of her seventh grade year at [School 2], on October 19, 2011, [Student] took the WJ-III, again without accommodations. (MCPS-35/XX-45.) The test scores revealed [Student]'s overall level of achievement to be **low**. (XX-45-1.) When broken down into categories, [Student]'s academic skills were in the **low average** range. *Id.* Her ability to apply academic skills was within the **low average** range. Her fluency on academic tasks was in the **low** range. *Id.* Moreover, when the scores were compared against age appropriate peers, [Student]'s SS were in the **low average** for broad reading, basic reading skills, brief reading, and math reasoning. *Id.* And, [Student]'s SS for broad math mathematics, math calculation skills, brief mathematics, broad written language, written expression, and brief writing were in the **low** range. *Id.*

136. When compared to the WJ-III scores from the prior year, [Student] made year-to-year progress on many sub-tests but, in some instances, the scores were lower. Moreover, based on the standard scores, she was not closing the gap.

137. [Student] “began the year not being able to go to the lunch room and instead going to the library to eat on her own” due to her behavior. (XX-49-3.) In addition, from

continue to be warranted.” (XX-57-3.)

October 10, 2011 to June 8, 2012, [Student] was engaged in twelve separate incidences of misbehavior that resulted in discipline for being defiant; cursing; name calling; being disrespectful to teachers, staff and peers; making fun of another student; arguing with a teacher; and throwing scissors. (MCPS-49B.)

138. At the annual review meeting on April 30, 2012, with the Parents, [School 2] staff, Mr. XXXX, and counsel participating, the IEP team met to review [Student]'s proposed IEP for the 2012 – 2013 school year. (MCPS-47.)

139. The Team reviewed [Student]'s PLOP as of April 2012 (toward the end of seventh grade). (MCPS-47.) Specifically,

a. In reading, [Student] was performing at a sixth grade level. On the June 2010 PLOP, [Student] was performing at a fourth grade level. (*See Findings of Fact No. 67.*) When compared against the June 2012 PLOP, [Student] improved two grade levels. This is the same rate of progress [Student] was performing at [School 3] prior to sixth grade.

b. In mathematics, [Student] was performing at a fifth/sixth grade level. On the June 2010 PLOP, [Student] was performing at a fifth grade level. (*See Findings of Fact No. 67.*) When compared against the June 2012 PLOP, [Student] had improved one and one-half grade levels. This is not the same rate of progress [Student] was performing at [School 3] prior to sixth grade.

c. In written language, [Student] was performing at a fifth/sixth grade level. On the June 2010 PLOP, [Student] was performing at a fifth grade level. (*See Findings of Fact No. 67.*) When compared against the June 2012 PLOP, [Student] improved half a grade level. This is not the same rate of progress [Student] was performing at [School 3] prior to sixth grade.

d. In oral language and behavior, [Student] was performing below age expectancy. On the June 2010 PLOP, [Student] was performing at the same level. (See Findings of Fact No. 67.)

140. Prior to the meeting, Mr. XXXX provided MCPS with a list of proposed changes to the IEP. The Team agreed with many of Mr. XXXX's suggestions and changed the IEP accordingly. For example, [Student]'s native language was changed to XXXX, her PLOP in reading was changed to grade six, number relations was added as an area of concern in math, and self-advocacy was added as a goal. Additionally, a number of objectives from the [School 2] Program Plan⁶⁵ were added at Mr. XXXX's suggestion, including developing and demonstrating effective decision making and problem solving skills, verbalizing feelings of frustration and anger during counseling sessions, identifying instances of negative peer pressure and developing constructive strategies to use in response, identifying unknown words and using context and/or a dictionary to determine the appropriate definition, answering questions that asked her to recall or locate information, and composing grammatically correct simple sentences.

141. At the conclusion of the meeting, after considering all available data,⁶⁶ MCPS proposed essentially the same IEP as the prior year, with placement at [School 1].

142. On May 23, 2012, the Parents filed a Request for Due Process Hearing, which is the subject matter of this hearing, seeking reimbursement for [Student]'s placement at [School 2] for three school years (2011 – 2010, 2011 – 2012, and 2012 – 2013). (MCPS-48/XX-1.)

Post IEP

⁶⁵ The [School 2] Program Plan is the equivalent of an IEP.

⁶⁶ Secondary Teacher Reports (XX-61, XX-62, XX-63, XX-64) and Quarter 3 Progress Report Notes (XX-65).

143. From August 23, 2012 to October 26, 2012, [Student] was engaged in five separate incidences of misbehavior that resulted in discipline for rude and disrespectful behavior; teasing; rough housing; being defiant; kicking a peer. (MCPS-49B.)

144. In the fall of her seventh grade year at [School 2], on October 31, 2012, [Student] re-took the WJ-III, without accommodations. (XX-85.) The test scores revealed [Student]'s overall level of achievement to be **low average**. (XX-85-2.) When broken down into categories, application of academic skills and fluency on academic tasks were in the **low average** range. *Id.* Moreover, when the scores were compared against age appropriate peers, [Student]'s SS were in the **low average** for broad reading, brief reading, math reasoning, brief mathematics, broad written language and brief writing scores. *Id.* [Student]'s SS for broad math mathematics and math calculation skills were in the **low** range. *Id.*

145. The scores on the WJ-III were a mixed bag with [Student] showing improvement in some areas and declining in other areas.

DISCUSSION

I. Law

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1482 (2010), 34 C.F.R. Part 300 (2010), Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2012), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a free, appropriate public education. 20 U.S.C.A. § 1412(a)(1)(A) (2010). The IDEA defines FAPE as “special education and related services that...have been provided at public expense, under public supervision and direction, and without charge;...meet[ing] the standards of the State educational agency;...and are provided in conformity with the individualized education program required under section [1414(d) of this

title].” 20 U.S.C.A. § 1401(9) (2010). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2012); COMAR 13A.05.01.03B(27).

In *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court described FAPE as follows:

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

458 U.S. at 200-01 (emphasis added). *See also In Re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all services necessary to maximize his or her potential.” *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. 176). Rather, FAPE entitles a student to an IEP that is “reasonably calculated” to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 204.

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

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

20 U.S.C.A. § 1414(d)(3) (2010). The IEP identifies a student’s present levels of academic and functional performance, sets forth annual goals and short-term objectives for improvements in

that performance, describes the specifically-designed instruction and services that will assist the student in meeting those goals and objectives, and indicates the extent to which the child will be able to participate with children without disabilities in regular educational programs. 20

U.S.C.A. § 1414(d)(1)(A).

In addition to the IDEA's requirement that a child with disabilities receive some educational benefit, the child must be placed in the "least restrictive environment" to achieve FAPE, meaning that children with disabilities must be educated with children without disabilities in the regular education environment to the maximum extent appropriate. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. 300.114(a)(2)(i) & 300.117 (2010). Removal of a child from the regular educational environment occurs only when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. *Id.*

The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parents in this case bear the burden of proof. For the reasons that follow, the Parents did not meet their burden of proof.

II. Position of the Parties

A. Parents

The Parents contend that the Student did not make appropriate educational progress in the fifth grade and that this set the stage for [Student] falling significantly behind in reading, math and written expression. XXXX testified, "I mean, she always made some progress year-to-year, but she always remained behind as well." (T. of XXXX, tr. 394-5.) The Parents cited the test results from the WIAT-III administered by Dr. XXXX on October 6, 2009 as evidence of [Student]'s pure skill level which, in their opinion, demonstrated that she was only performing at

a first to third grade level in the fifth grade.⁶⁷ (See FN 44.) The Parents felt that the WJ-III test results in October 2010 underscored this point even further because it, too, showed [Student] performing at essentially a third or fourth grade equivalent, with some variation.

Likewise, the Parents contend that since MCPS afforded [Student] accommodations, consistent with her IEP, the teacher assessments and MSA scores in reading were imperfect measures of her achieving educational progress. In particular, the Parents argued that by allowing a reader on the MSA, the test became a test of listening comprehension and not reading. (T. of XXXX, tr. 86.) Moreover, Mr. XXXX lamented that scoring “proficient” on the MSA is “not some kind of stellar rating that would indicate that she’s really making wonderful progress.” (T. of XXXX, tr. 86.) Similarly, Mr. XXXX testified, “I think grades are subjective. I know that in particularly [sic] elementary school[s] that teachers look at students as individuals, grade them on how they see them making progress and don’t want to deflate them with bad grades.” (T. of XXXX, tr. 61.)

The Parents stressed, and their witnesses concurred, how disconcerting this was for

67 WIAT-III			
<u>Standard/Composite Scores</u>	<u>Standard Scores (SS)</u>	<u>Age Equivalent</u>	<u>Grade Equivalent</u>
Total Reading SS = 76	Word Reading SS = 80	8.8 years	3.0
Basic Reading SS = 82	Reading Comprehension SS = 81	7.4 years	2.1
Reading Comprehension and Fluency SS = 72	Pseudo-word Decoding SS = 84	7.8 years	2.5
	Oral Reading Fluency SS = 69	7.8 years	2.3
	Oral Reading Accuracy SS = 80	8.4 years	2.7
	Oral Reading Rate SS = 67	6.8 years	1.5
Mathematics	Numerical Operations SS = 74	8.8 years	3.3
Composite Score SS = 80	Math Problem Solving SS = 89	8.8 years	3.2
Written	Essay Composition SS = 96	<8.0 years	2.8
Language Expression SS = 80	Word Count SS = 103	Average	2.1
	Theme Development and Text Organization SS = 87	Average	
	Spelling SS = 70	7.4 years	2.1
	Sentence Building SS = 67	Low Average	
	Sentence Combining SS = 108		

[Student] because of the “multiplicity of problems” she exhibits as a learning disabled student, with a code of OHI as a result of significant attention and executive dysfunction, speech-language deficits, and emotional issues. The Parents described being genuinely worried about their daughter transitioning to a public middle school since it is a different environment altogether from elementary school in so many ways. (T. of XXXX, tr. 404.) So, leading up to the annual IEP meeting in 2010 for the sixth grade school year, the Parents sought an evaluation from XXXX to “reassess where we were at the moment. [Student] faces so many challenges, and so we wanted to know also, is there something we were missing? Is there something we should be doing differently? Because it’s our belief that she has so many challenges, we don’t need to be doing anything to make those challenges unnecessarily greater.” (T. of XXXX, tr. 405.)

As for Dr. XXXX’s report and recommendations that [Student]’s profile was a good match for a small, self-contained, school setting, XXXX stated that “my first reaction was, ‘This makes sense educationally, but what’s going to be [the] emotional impact?’” (T. of XXXX, tr. 408.) According to XXXX, at the suggestion of Dr. XXXX, she spoke to XXXX XXXX for a second opinion to discuss [Student]’s prospects for sixth grade in light of her unique needs. (T. of XXXX, tr. 412.) In her April 27, 2010 report, XXXX XXXX wrote, in pertinent part:

Research indicates that children who have faced abuse and neglect can have problems with language, fine and gross motor delays, impulsivity, disorganized attachment, depression, attention and hyperactivity, and extensive other developmental complexities. In [Student]’s case, she experienced both abuse and neglect as a developing infant, toddler, and school age child, likely resulting in neurobiological changes impacting her ability to organize and regulate her cognitive, emotional and behavioral functioning. [Student]’s intellectual capacities, coupled with her willingness to engage in and respond to therapeutic interventions, have enabled her to gain many compensatory strategies that have helped her progress in academic, social and family situations.

...

[Student]’s Functioning in a School Setting: Given [Student]’s “wiring,” she has difficulty managing interpersonal interactions in a consistently healthy manner. She gravitates socially toward children she perceives as “exciting;” many of whom have poor impulse control and exhibit behavioral problems. In her current school environment, [Student]’s most vulnerable times, when she get [sic] into the most “trouble,” are often during lunch and recess when social interactions become increasingly problematic for her due to a lack of structure. She is easily influenced by other children’s behavior and she often projects that they have a negative opinion of her. As a result, [Student]’s social interactions in the class room, as have been reported, include argumentative interactions and difficulties inhibiting responses. Obviously, these behaviors interfere with her capacity for learning.

Concerns and Recommendations: The pre-teen and teen years, for many children are likely to become increasingly problematic. Even for mentally healthy children, often it is a significant time of dysregulation as hormonal changes and identity and control issues further interfere with healthy personality structures. [Student]’s history of trauma, along with her academic and social difficulties, will put her at higher risk, during this vulnerable life stage, of using alcohol, drugs or other risky behaviors to self-medicate. An additional risk factor is that she has been wearing a XXXX and will have to continue to do so for an indefinite period of time to correct her XXXX. Although she has adjusted to this intrusive XXXX, wearing it in middle school may contribute to her feeling increasingly isolated and even subject her to being a victim of bullying.

It is important for [Student] to be in an environment that will encourage her to function at an optimal level so that she can be open to learning. If [Student] attends her neighborhood middle school, it is likely that she will experience the larger classes, cafeteria, locker room, and bus time as more confusing and loosely structured. In this environment, she will be at risk for becoming increasingly more dysregulated. This would have a significant negative impact on her social, emotional and academic progress. I strongly recommend, therefore, that [Student] attend a smaller school, with smaller class size, and one that is designed to educate children with special needs.

(XX-17.)

XXXX testified that after receiving the report, she and her husband began exploring non-public special education schools, and, in the Spring of 2010, applied to [School 2]. XXXX was quick to mention that while they saw this as a good fit for [Student], [Student]’s treating

physicians and counselor overwhelming supported the idea too. In his April 23, 2010 letter, Dr.

XXXX wrote, in pertinent part:

[[Student]] has had a partial positive response to treatment with medication, with greater stability of moods, decreased impulsive behaviors, and an inability [sic] to sustain focus and attention. A classroom observation, however, by Mr. XXXX XXXX, an educational consultant, documented continuing significant problems with impulsive behaviors and inattentiveness, which compromised both [Student]'s learning, peer relationships, and classroom functioning. These problems have persisted despite adequate medication treatment and the provision of special education services in her current school setting...The school environments provided within the public school setting, will be overwhelming for [Student] and will present unnecessary impediments to her having a successful school experience.

(XX-15.)

In her May 5, 2010 letter, Dr. XXXX wrote, in pertinent part:

[Student]'s current adoptive family, the [Parents], have worked hard to provide her with the means to cope with her broken adoption, her physical and psychological disabilities and transition into the school system. She regularly attends speech therapy for expressive and receptive language impairment as a result of hypoxia, ischemic encephalopathy, hypertensive-hydrocephalic syndrome sustained at birth and occupational therapy for her XXXX for which she receives XXXX 23 hours a day and follow up with her orthopedist, Dr. XXXX, at XXXX University. She is in counseling for her behavioral issues, including oppositional defiant disorder, and attends a social skills group led by psychologist, Dr. XXXX XXXX. She also is treated for her ADHD with prescription therapy and follows up with a psychiatrist. [Student] also suffers from anisometropic amblyopia [an eye condition requiring glasses] and follows with Dr. XXXX XXXX. Lastly, [Student] has documented cytomegalovirus exposure and adenopathy and follows closely with Dr. XXXX XXXX.

Given the above medical conditions, it would be prudent to allow [Student] to attend an educational system of small, structured classes with specialized, individualized instruction throughout the day to meet her needs as a psychologically and physically challenged young girl. Without such accommodations and support, [Student]'s emotional, psychological, and physical health would invariably suffer and her progress sustained thus far would be likely lost.

(XX-18-1.)

In her May 11, 2010 letter, Dr. XXXX wrote, in pertinent part:

[[Student]] really likes having the group's attention; however, she has a difficult time doing it in a socially acceptable manner. She frequently engages in silly behavior and makes inappropriate comments in an effort to make the other group members laugh. When another group member attempts to give her feedback regarding her off task behavior, [[Student]] would become defensive and angry. She would often say something hurtful or mean in response. In addition, it is very challenging for [[Student]] when she has to compromise and wait her turn during conversations or while playing a game. It has also been difficult for her when she has not able to have her way or when not chosen as the group leader. During these times, [[Student]] would show her disappointment by complaining and engaging in inappropriate behavior (snatching something from someone's hands, dancing around, etc.).

...

In summary, although [[Student]] has shown gradual improvement in her self-regulation, she needs consistent support and frequent redirection to stay on task and behave appropriately. It is important that [[Student]] have a very structured school and social environment with adequate adult attention in order for her to perform to her potential. [[Student]] is a sweet girl, who possess [sic] many strengths. However, she can often push people away due to her impulsivity and low frustration tolerance. It would benefit [[Student]] to continue to focus on self-regulation and perspective taking in an effort to enhance her peer relationships. In particular, [[Student]] needs to continue to work on her ability to manage and express negative feelings (anger and disappointment) appropriately.

(XX-19-2.)

Once at the table with the IEP Team, XXXX testified to being dismayed by the offer from MCPS to implement the IEP at [School 1] for the sixth grade school year. This surprised XXXX because [Student] would largely be taught in the general education setting – “it was co-taught math and English, paraeducation for science and social studies.” (T. of XXXX, tr. 415.) The Parents “felt like she needed more inclusion, smaller classes, had concerns over the counseling.” (T. of XXXX, tr. 416.) After having observed [Student] in the classroom, Mr. XXXX concurred. “[W]hat I was seeing in the classroom that day [was] that I believed that she needed a smaller classroom environment where she would have more supervision and more interaction with the teacher. And she needed support not only for her learning issues, but also

for her attention, her speech and language issues. And also her social/emotional challenges were very evident during the observation.” (T. of XXXX, tr. 51.) Mr. XXXX remarked, “you don’t always see emotional issues when you observe, but here they were very pronounced.” (T. of XXXX, tr. 49-50.)

XXXX testified that it was at that point that she and her husband decided it was necessary to enroll [Student] at [School 2], because “[b]efore even the end of [School 3], she was having a difficult time...she was feeling the struggle academically.” (T. of XXXX, tr. 404-5.) In fact, “she seemed to struggle more with the writing process. She did not enjoy writing.” (T. of XXXX, tr. 437.) Likewise, XXXX recalled “5th grade math homework could sometimes take hours, a great deal of frustration, crying and breaking down.” (T. of XXXX, tr. 436.)

As for the IEP goals, objectives and accommodations, Mr. XXXX, too, found fault with the MCPS’s proposal. Here, he stated,

Given all the peers that she would deal with wherever she goes, but thinking about a regular school setting where there’s a large number of peers and there are many unstructured times, those are the times, again, as her behavior plan rightly points out, what she needed most support with was unstructured times. Times between classes, lunch time, PE locker room, bus time, all times when she would be at her locker between classes. Those can be problematic times for any student during middle school years, but for a student with the challenges that [Student] faces, they would be especially problematic.

(T. of XXXX, tr. 68.) Yet, according to Mr. XXXX, MCPS failed to craft an FBA and BIP that could be transferrable to the middle school. On this point, he said the scenarios in the FBA dealt with how to respond to misbehavior during recess when recess is not an element in the sixth grade for unstructured time. With so much potential for chaos in [Student]’s day, the Parents are certain that she needs plenty of counseling, up to 45 minutes, to process and work through these issues.

Once at [School 2], Ms. XXXX testified that [Student] was much like the student he observed on April 12, 2010. She was “very much in survival mode, as I’d described, very on guard around other students, didn’t related easily to students or staff. It took her awhile to warm up to staff. And they say significant issues in reading, writing, math, speech and language, attention, social interactions, organization, ability to advocate for herself.” (T. of XXXX, tr. 81-2.) XXXX XXXX concurred, “She was a student who needed a lot of help, a lot of help.” (T. of XXXX, tr. 763.) Over time, Mr. XXXX and [School 2] teachers felt that the Middle Division curriculum, supports, small environment and 45-minutes weekly of social skills group and individual counseling “ha[d] been really successful to address ... social/emotional deficits.” *Id.* At home, as well, the Parents saw progress in [Student]’s interpersonal relationship skills, social skills, etc. (T. of XXXX, tr. 449.) As an example of how far [Student] has come, her parents shared with me that [Student] was elected President of the XXXX in the fall of 2012. Below is [Student]’s typewritten speech:

Hi everyone, my name is [Student][.] It’s nice to see you today. I believe everybody is smart definitely if you pick me as your president. Everyone will know what’s going to happen when the government knows what’s going to happen.

I am mature, Responsible, honest, and trusted by my peers and teachers. I love to plane different activities and field trips. I believe fundraising is the way to make money to cover activities. Everyone will vote for field trips and no one is going to be left out.

The most important things are to have fun and schedule many fun trips also activates. I do not mind skipping recess because I know that student Government is more important so I can make every one smile.

I am always on time to class and I have good grades. My favorite subject is math and language arts. I like to write books and I play sports.

I try not to be mean to my peer because it actually makes me feel bad. I try not to be bossy and if I act like it let me know, so I can do something about it.

My goal is to make everybody happy and say that this year was one of the best years you ever had. I will make a really good leader. I hope to make everybody's life easy. I know that we are going to have fun this year.

If you don't pick me as president I understand but it will be sad. That just means that I need to try harder because I never give up!!! Plus I know that other people are good too. I will still participate in all the activities and help out with the bake sale.

THANKS FOR VOTEING ON ME.

(XX-82.) (Syntax and typing errors were contained in original.)

Revisiting the issue of [Student]'s lack of academic progress, Mr. XXXX testified that once [Student] started [School 2] she was given a WJ-III test. Mr. XXXX stated that when he compared the test scores from the WJ-III and against the WIAT-III, he saw "a consistency... 'she's below grade level and it's, you know, in many cases almost two years, so about one to two years depending on exactly what we're looking at.'" (T. of XXXX, tr. 81.) Since being at [School 2], the Parents argued that the academic programming there has helped their daughter bridge the gap Mr. XXXX explained,

It provides very small classes. When I observed [[Student]] I believe it was five students in each class with a certified special education teacher. They are very strong in teaching her reading, really one of the few schools that really matches reading methodologies to specific students rather than just saying this is what we have. It's a wonderful program and all students will benefit from that. They really do individualize. In addition to the academic specialized instruction, they do a good job with letting students learn in alternative ways with having technology available. Then they have lots of related services that are integrated throughout the day.

(T. of XXXX, tr. 82.)

The Parents exclaimed that by the end of [Student]'s third year at [School 2], she made educational progress. XXXX certainly saw a definite shift in [Student]'s ability to finish homework independently and in her enjoyment of school. (T. of XXXX, tr. 434-5, 439.)

[Student]’s teachers at [School 2] described for me their personal observations of [Student] in the classroom. In particular, XXXX XXXX testified, “[Student] either came into 6th grade below grade level, or lost all of her skills during the summer between 5th and 6th grade, in spite of the fact that between 6, 7, and 8th grade she has retained a remarkable amount of information over the summer.” (T. of XXXX, tr. 709-10.) The Parents also indicated that they updated MCPS with [Student]’s PLOP from [School 2] to show that she was making progress despite her disabilities.

As further support that [Student] was making progress, Mr. XXXX directed me to the WJ-III test scores (presented in chart form below) and said, “She’s making progress now, good progress, so she’s getting closer to her academic expectancy. Again, I told you that I look at her cognitive potential in terms of her perceptual reasoning score. That’s part of my background as somebody who looks at gifted kids with disabilities and looks at very discrepant presentations, and she does have a very discrepant cognitive presentation.” (T. of XXXX, tr. 154.)

WJ-III (administered at [School 2])						
	October 2010 Grade: 6		October 2011 Grade: 7		October 2012 Grade: 8	
	(MCPS-31/XX-29)		(MCPS-35/XX-45)		(XX-85)	
	SS	GE ⁶⁸	SS	GE	SS	GE
Brief Achievement	76	3.7	81	4.6	82	5.4
Total Achievement			78	4.7	81	5.8
Broad Reading	84	4.4	87	5.6	86	6.2
Broad Math	78	4.3	76	4.5	79	5.3
Broad Written Language	75	3.5	75	4.0	84	5.9
Brief Reading	85	4.3	86	5.0	87	5.1
Brief Reading Skills	85	4.0	89	5.1	91	7.1
Brief Math	83	4.5	79	4.7	83	5.5
Math Calc Skills	73	4.1	71	4.3	75	5.1
Math Reasoning	87	4.7	89	5.8	84	5.9
Brief Writing	74	3.1	79	4.2	80	6.1
Written Expression	84	4.7	79	4.5	91	7.1
Academic Skills	73	3.7	77	4.6	80	5.5

⁶⁸ GE means grade equivalent.

Academic Fluency	76	4.0	75	4.5	81	6.0
Academic Apps	87	4.8	84	4.9	86	5.9
Letter/Word Identification	82	4.0	88	5.4	87	6.1
Reading Fluency	85	4.8	94	7.3	86	6.4
Calculation	81	4.7	78	4.7	84	5.9
Math Fluency	66	2.6	68	3.1	67	3.4
Spelling	68	2.5	75	3.4	79	4.4
Writing Fluency	83	4.5	72	3.6	93	7.6
Passage Comprehension	92	5.4	84	4.3	89	6.0
Applied Problems	88	4.5	87	4.7	89	5.6
Writing Samples	90	4.9	93	6.2	91	6.2
Word Attack	90	4.0	91	4.5	96	6.8
Quantitative Concepts	86	5.0	95	7.3	81	5.4

For all of the reasons stated above, the Parents are seeking placement and funding at [School 2] for 2010 – 2011, 2011 – 2012, and 2012 – 2013 because they believe MCPS failed to provide [Student] with FAPE in the LRE.

B. MCPS

Ms. XXXX, [Student]’s teacher for the fourth and fifth grade, as well as her case manager, testified that “the [Student] that presents on paper is not the same child that presents in a classroom environment.” (T. of XXXX, tr. 965.) “When she has resources available to her, manipulatives, accommodations, ...all the things that are in her IEP in order for her to be successful, she was demonstrating her ability to access the curriculum, demonstrate,... her understanding.” *Id.* Examples of this, according to Ms. XXXX, is that [Student] made a year’s growth in writing in the fifth grade, with two months remaining in the school year. (T. of XXXX, tr. 977.) She based her opinion on various factors, including [Student]’s scores on the MAP-R, F&P and the Orbit WRAP (Writing and Reading Assessment Profile). (T. of XXXX, tr. 972-977.) Specifically on the MAP-R, [Student]’s fourth grade fall score was 201 and her fifth grade spring score was 212. (T. of XXXX, tr. 972.) Ms. XXXX explained that when “[t]he expected growth in fifth grade is 4 points, from a 208 to a 212” and “[w]hereas, from fall of 2009

to winter 2010, [Student] had grown 9 – she had gone up 9 points,” it is tremendous growth. (T. of XXXX, tr. 972.) Ms. XXXX also pointed out that the MAP-R assessment is done on a computer. Therefore, the only accommodation for [Student] is reduced distractions because “there’s no read to. You know, they’ve got to read it on their own and everything, you know, so that she was able to read it, comprehend it, answer the question.” (T. of XXXX, tr. 973.) Similarly, on the Orbit WRAP, the students are given a prompt and asked to respond in writing to the prompt. Other than reduced distractions, there are no other accommodations. Ms. XXXX pointed out that scoring is done according to criteria which covered the content and the form, and when she compared [Student]’s writing against the criteria, she noticed that [Student]’s “writing was clear, and it made sense. There was a beginning and an end. She correctly used capitalization and punctuation in her writing. Areas of need were kind of her sequence of ideas, her spelling and revising to add detail. Which really for me confirmed what I already knew and what I already had seen as her strengths and needs, and had already put in the IEP for transition.” (T. of XXXX, tr. 976.) This indicated to Ms. XXXX that “there were skills that she [[Student]] was able to do independently.” (T. of XXXX, tr. 976.) As for the F&P, Ms. XXXX stated,

So at the beginning of the school year she was – her instructional reading level was a “P,” which was the end of third grade, and as of April – so the beginning of that school year. So September ’09 to April of 201, her current instructional reading level was an “S,” which was the end of fourth grade. So from September to April she had made a year’s progress on this using this assessment tool. So, yes, she was still reading one year below, but she had made a year’s progress.

(T. of XXXX, tr. 974.)

In response to the allegations made by the Parents as to the WIAT-III and WJ-III, Ms. XXXX stressed that in order to gain any insight from the raw data from these two tests it is imperative that the evaluator also look at informal data, such as the running record and

curriculum-based assessment (like those discussed above). Ms. XXXX explained the importance this way “We always, any time we do an educational assessment, have to have an observation because we’re looking at the testing data. But we also want to observe and see how the student is performing and what the student looks like in the classroom.” (T. of XXXX, tr. 970.) When both variables are reviewed, then [Student]’s academic performance is totally consistent with her cognitive expectancies. (T. of XXXX, tr. 968.) While Ms. XXXX agreed that there were areas of need, which is why interventions were in place, the different assessment measures, such as the MAP-R, showed [Student] making progress. In particular, “Her understanding of the grade-level content and material was stronger than her ability to read it independently.” (T. of XXXX, tr. 932.)

On the issue of the MSAs, Ms. XXXX found it significant that [Student] tested proficient on the MSA for two years. Ms. XXXX unequivocally stated that the “MSA isn’t testing of the ability to read. MSA is testing XXXX ability to comprehend and understand grade-level content and curriculum, and answer comprehension questions and respond to questions in regard to that content.” (T. of XXXX, tr. 1041-42.) Unlike the WIAT-III or WJ-III, Ms. XXXX agreed that [Student] was allowed to take the MSA with accommodations. Though, she was quite clear in her testimony that the testing nevertheless captured her ability to access grade level content. (T. of XXXX, tr. 928.)

In terms of [Student]’s behavior, Ms. XXXX testified that “there were peaks and valleys, and there was ... good days and bad days.” (T. of XXXX, tr. 940.) “It was not a consistent behavior all day throughout the day.” (T. of XXXX, tr. 1050.) And, “a lot of times the behavior is what would impact her ability for learning.” (T. of XXXX, tr. 980.) So, while “[s]he was progressing. There were still concerns with appropriate interactions with staff and with peers.

The impulsivity, raising her hand, waiting to be called on.” (T. of XXXX, tr. 946.) Ms. XXXX also noticed that [Student] had more difficulty with boys than girls. (T. of XXXX, tr. 949.)

Ms. XXXX testified, however, that [School 3] had a lot of structures and routines in place for [Student], and as time went on, [Student] was starting to utilize those things more independently with less support and reminders from the teachers. (T. of XXXX, tr. 940.) One such support was the use of sticky notes to curtail [Student]’s impulsivity and yelling out in the classroom. (T. of XXXX, tr. 952.) Ms. XXXX also pointed out that [Student] was a student where things could easily set her off, so the teachers frequently monitored those triggers and addressed them before they got out of hand. *Id.* Moreover, since unstructured time was very difficult for [Student], [School 3] created a recess plan (*See* FN 50.) Other supports that were in place for [Student] included, but were limited to, lunch bunches and star bucks tickets that may be cashed in at the school store or at the end of the year party. (T. of XXXX, tr. 944.) Another community-based program [Student] enjoyed was helping the younger kids and more disabled students. *Id.* Ms. XXXX added that [Student] was really receptive to these various supports. *Id.* Moreover, by the end of fourth and fifth grade, [Student] had a couple of girls who she had friendships with and interacted with during recess. (T. of XXXX, tr. 950.) In fact, [Student] performed in the variety show with two girls that she was friends with. (T. of XXXX, tr. 951.)

On transitioning to sixth grade, Ms. XXXX agreed with the Parents that it is a big change from fifth grade. (T. of XXXX, tr. 956.) That is why, according to Ms. XXXX, [School 3] updated the FBA/BIP in the fifth grade. The focal point of the team’s discussion was the transitions or unstructured moments during the school day for [Student], such as recess and hallways. The reasoning behind this was “we were the team that had the most background and understanding with her” and “in order for the middle school team to be prepared, it was

important that our team gave them what was being done [at [School 3]].” (T. of XXXX, tr. 981.) Moreover, once at [School 1], the teachers then could develop a FBA/BIP that specifically addressed that environment. (T. of XXXX, tr. 981-2.)

In looking at the proposed IEP for sixth grade, Ms. XXXX confidently testified that the goals, objectives, levels of service, and accommodations were “very appropriate and able to meet [[Student]’s] needs.” (T. of XXXX, tr. 989.) Ms. XXXX based her answer on her experience working with [Student] during the fourth and fifth grades and the progress she had seen her make during those two years. Notable were [Student]’s scores on the aforementioned assessments, but also her grades – earning A’s and B’s. Consistent with the Findings of Fact, Ms. XXXX also noted that the IEP Team carefully tracked [Student]’s progress from year-to-year at [School 3] and drafted appropriate goals and objectives, considering all available information at the time, for all three school years (2010 – 2011, 2011 – 2012, and 2012 – 2013).

Ms. XXXX also agreed that the service school for the IEP, [School 1], was appropriate; she stated, “I knew...what reading interventions they had, how those were – how the reading interventions were implemented, what those classes looked like, what their co-taught classes looked like, what other programs and resources were available inside the building.” Ms. XXXX also saw the benefit of [Student] interacting with her nondisabled peers for modeling good behavior. (T. of XXXX, tr. 994.)

Dr. XXXX, MCPS psychologist, also recommended [School 1]’s XXXX program. Dr. XXXX stated, based on her evaluation of [Student] and feedback from her mother and the teachers at [School 2], “I believe that what [Student] would benefit from is a structured school environment, which implies that there is structure, it does not imply class size, and consistent behavior intervention systems, such as FBA and BIP, which is monitored and implemented with

fidelity over time, and I believe that with that I thought [Student] could access the curriculum.” (T. of XXXX, tr. 1164.) Dr. XXXX even went further to say that [Student] could be appropriately programmed for a structured program of 30 students as opposed to a structured program of 10 students. *Id.* Dr. XXXX explained, “Students who can have a variety of needs, learning disabilities, [OHI] and possibly other disabilities as well can receive resource support, they can receive co-taught classes where there would be a general educator as well as a special education in the classroom. Some classrooms have paraeducator support as well.” (T. of XXXX, tr. 1130-31.)

As an additional basis, Dr. XXXX considered [School 1] to be both appropriate and the LRE for [Student] because, in her opinion, there was no reason to segregate [Student] from her non-disabled peers with whom she could interact to her great benefit. Dr. XXXX further added that [Student] does not need to be in an environment where there are no nondisabled peers because the opportunities to be among nondisabled peers would greatly benefit [Student] in terms of her socialization skills, whether it is academic model peers, social model peers, friendships or just the general social setting. (T. of XXXX, tr. 1131.) Dr. XXXX also saw as a benefit of [School 1] the fact that [Student] would be at her home school, strengthening bonds with friends in the community. (T. of XXXX, tr. 1134.) In contrast to [School 1], Dr. XXXX conveyed great concern about the fact that [Student] was in a school where she was one of very few females. (T. of XXXX, tr. 1132.)

As for the counseling recommendation of 15 minutes per week, Dr. XXXX testified, that [Student] would benefit, throughout her day, from teachers who were aware of her problem-solving difficulties or attentional difficulties and who had access to her FBA/BIP. The team, as a whole, would be working together to provide [Student], in all of her settings, as much support as

they could, as indicated in the IEP. (T. of XXXX, tr. 1173.) Therefore, it was Dr. XXXX's opinion that a separate individual therapy session of 45 minutes a week was unnecessary.

As head of the special education department at [School 1], Ms. XXXX testified, "We get a lot of IEPs from all over the state and country, and you know, when I'm reading through an IEP of a child I don't know and I see something, you know, that alarming, I – you know, you know what you're looking for. I would say that there's nothing in [Student]'s profile that, you know, would make me think that she couldn't be successful there." (T. of XXXX, tr. 1269.) Similarly, "[a]fter grading IEPs, reviewing IEPs for that many years, and now, you know, supervising the department, you can tell very quickly whether students are appropriate or not appropriate at a glance, without observation, just based on their needs outlined in the IEP." (T. of XXXX, tr. 1223.)

Ms. XXXX also remarked that "[w]e've had many students with very similar profiles to [Student]'s, both in cultural background as well as social-emotional diagnosis and academic present levels." (T. of XXXX, tr. 1224.) In fact, the school has another adoptee from XXXX. *Id.* Likewise, Ms. XXXX expressed a deep understanding of the challenges students, such as [Student], have in building relationships. "Probably the biggest, the one that impacts the most is the [RAD]. That can often create challenges for students with that diagnosis. They have difficulties with building relationships and maintaining the relationships. So, you know, we often have to work pretty hard at developing and maintaining those relationships with students with that diagnosis." (T. of XXXX, tr. 1225.)

Finally, with regard to the appropriateness of [School 2], both Ms. XXXX and Dr. XXXX described their observation of [Student] at [School 2] and remarked that the rigor of the studies during those times they were present were not to the same standard as MCPS. Dr.

XXXX testified, “the entire period appeared to be spent on review and preparation for the test,...I guess given that it’s a special education setting and that there’s often a reduction of workload or modification of content, but it was quite reduced.” (T. of XXXX, tr. 1151.) Ms. XXXX said, “[w]ell, the rigor – again, I was only there about one session, but there wasn’t a – I didn’t think the rigor was very high. I mean, they only had to complete a worksheet.” (T. of XXXX, tr. 1230.) Ms. XXXX further went on to say, “we would never just give them a worksheet and ask them to work on a worksheet. There would be some direct instruction in every class period, some review, maybe review of past concepts that were taught, and then direct instructions.” *Id.*

During her testimony, Dr. XXXX described the psychological evaluation she conducted, along with her interview with the Student. Based on statements made to her, Dr. XXXX stated that [Student] was not at all pleased with [School 2] – she felt like she was “trapped in box.” (T. of XXXX, tr. 1108.) This was concerning since [Student] perceived her peer relationships at school to be negative. *Id.* She said her peers call her names. *Id.* Moreover, if she says something back, she is typically the one who gets into trouble. *Id.* [Student] also did not feel included – she would rather go to the library and read a book than be involved in recess. *Id.*

III. Analysis

The Parents argued that they should be reimbursed for the cost of [School 2] where [Student] was unilaterally placed in the 2010 – 2011, 2011 – 2012, and 2012 – 2013 school years.

The cost of a unilateral placement by parents is ordinarily not borne by the public school system. However, under some circumstances, parents may be entitled to reimbursement.

“In a case where a court determines that a private placement desired by the

parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear, without cavil, that ‘appropriate’ relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.”

Burlington School Comm. v. Dept. of Educ., 471 U.S. 359, 369 (1985). The *Burlington* Court also noted:

[W]e are confident that by empowering the court to grant “appropriate” relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

Id. at 370. See also *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 951 (4th Cir. 1997).

In *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) the Court stated:

[P]ublic educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State’s choice. This is IDEA’s mandate, and school officials who conform to it need not worry about reimbursement claims.

510 U.S. at 15. Moreover, the following provision is contained in the IDEA at 20 U.S.C.A. §

1412(a)(1)(c)(ii):

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Discussing reimbursement of private school tuition under the IDEA, the federal appeals court in *Carter v. Florence County Sch. Dist.*, 950 F.2d 156, 163 (4th Cir. 1991), *aff’d*, 510 U.S. 7 (1993) (citing *Rowley*, 458 U.S. at 207), wrote, “when a public school system has defaulted on its obligations under the [IDEA], a private school placement is ‘proper under the Act’ if the education provided by the private school is ‘reasonably calculated to enable the child to receive

educational benefits,” The *Carter* court further wrote:

In sum, we do not believe that the Act as written forbids reimbursement when parents place their child in a private school that has not been approved by the state, and we join those courts that have so held. As interpreted by *Burlington*, the Act imposes only two prerequisites to reimbursement: that the program proposed by the state failed to provide the child a free appropriate public education, and that the private school in which the child is enrolled succeeded in providing an appropriate education, i.e., an education that is reasonably calculated to enable the child to receive educational benefits.

Carter, 950 F.2d 156, 164.

Given the amount of evidence in this case, I found it easiest to let the record speak for itself in terms of whether MCPS made a good faith effort to develop an IEP that was reasonably calculated to enable [Student] to receive educational benefits. The bottom line is yes, MCPS did.

As captured in the Findings of Fact, under “Background,” [Student] has endured much at a young age as aptly described by Dr. XXXX, Dr. XXXX, Dr. XXXX, Ms. XXXX, Dr. XXXX, Dr. XXXX, and Dr. XXXX in their various reports and letters. In fact, Dr. XXXX’s report was the precursor to developing all IEPs since 2006. Notably in Dr. XXXX’s report, he wrote that with a consistent limit-setting regimen, a strict reinforcement scheme plus consequences, this should help [Student] with her self-regulatory issues. In fact, MCPS did exactly that in 2007 after an XX consult and an FBA/BIP was created. Ms. XXXX testified credibly that while there were peaks and valleys in [Student]’s behavior, on a whole, it worked for [Student] because she was able to access the curriculum and progress from grade-to-grade.

As for Dr. XXXX’s report, I am likewise persuaded by Ms. XXXX’s description of why the report, standing alone, fails to capture [Student] as a student. Here, Ms. XXXX gave me many examples of informal school-based assessments where [Student] was not given the usual and customary accommodations and still performed well. Had Dr. XXXX’s report contained an

observation or included a section where she compared [School 3]'s informal data, then her report would be have been more persuasive and thorough. Unfortunately, the Parents did not call Dr. XXXX as a witness to better explain her findings or to challenge Ms. XXXX's testimony.

Be that as it may, even Dr. XXXX commended MCPS for creating an IEP for the fifth grade school year where, in her words, the "goals were comprehensive and appropriate and written as if [Student] already had a diagnosis of a specific learning disability." (XX-11-13.) The only recommendation Dr. XXXX had for MCPS was "[Student] needs time to process and discuss situations in order to be successful." *Id.* In addition, in her report she corroborates Ms. XXXX's testimony that the test scores "suggest that [Student] qualifies for accommodations on all tests: in-class and state mandated. These are not to be limited to extended time, a scribe and a reader." (XX-11-14.) In fact, according to the 2010 – 2011 IEP, this is exactly what MCPS offered in terms of accommodations. (*See* Findings of Fact Nos. 32, 41, and 74.) An equally important segment of Dr. XXXX's report was addressing social skills. Here, Dr. XXXX wrote, "I suggest that [Student] participate either and/or in a friendship dyad or lunch bunch at school. For a friendship dyad she would be paired with one other child for the session." According to Ms. XXXX, this was already occurring at [School 3] and, according to Ms. XXXX, would be incorporated at [School 1]. At [School 2], on the other hand, the loss of lunchroom privileges was a frequent penalty to [Student] for her behavior, particularly in 2011. Likewise, Dr. XXXX's lunchroom observation corroborates that [Student] did not appear to have a "buddy" during the lunch hour.

With regard to Mr. XXXX's observation and recommendations, I did not find his presentation credible for a number of reasons. First, it was clear to me, from the sequence of events that the Parents had made up their minds on sending their daughter to [School 2] one day

before they hired and paid Mr. XXXX for his services as their advocate. When this was brought to his attention during cross examination, Mr. XXXX refused to give a straight-forward honest answer; instead, he hemmed and hawed about how he must keep an open mind to all options on the table and advocate for his client accordingly. Unfortunately, his actions rang truer than his words. The day after being hired, Mr. XXXX observed [Student] at [School 3] for fifty-five minutes and issued a report detailing his observation, and [Student]’s “strengths” and “weaknesses.” Also included in the report was a recommendation that was exactly the same as his client – [Student] needed a small structured environment. Unfortunately, there is no indication in the record that Mr. XXXX collaborated with [School 3] teachers to ascertain whether or not his observation was typical for [Student] nor did he ask to review [Student]’s informal file. Ms. XXXX credibly explained that all three components are necessary to get the most optimal picture of the student and that did not occur here.

Another point of discontent I have with Mr. XXXX is the fact that when he observed [Student] at [School 2] on January 31, 2012, he spent time speaking to several [School 2] teachers, before writing a report that detailed [Student]’s “strengths” and “challenges.” (XX-49.) Certainly by changing the word “weakness” to “challenge” connotes that [Student] had no weaknesses whatsoever at [School 2]. Given his role as an advocate seeking a particular outcome ([School 2]) for his client, I am not persuaded that his testimony, even though he was qualified as an expert in special education, provides much more than a mouthpiece for his client.

At the 2010 IEP Team meetings, the Parents submitted a number of letters of support on behalf of their daughter. I found each of these letters to be heartfelt and sincere, but, like Mr. XXXX’s April 12 report, the writers did not indicate that they were familiar with [Student]’s informal file, observed her in the classroom or discussed her case with [School 3] staff to

substantiate their conclusion that [Student] needed a small structured environment. What is worse, Dr. XXXX nearly copied word from word Mr. XXXX's April 12 report which suggests to me that all of the letters were solely intended to be a letter writing campaign and MCPS was permitted to give the information its proper weight.

As for the 2010 – 2011 IEP, I am persuaded by Ms. XXXX's testimony that the Team brought to the table several years of experience knowing [Student] as a student and understanding her unique needs when it determined the next school year's goals and objectives and service location ([School 1]). In contrast, the Parents brought to the table Mr. XXXX and his report, Ms. XXXX and her letter, the various letters from treating physicians and Dr. XXXX's report. As I have discussed above, neither collectively nor individually, did these efforts outweigh the credible and persuasive evidence, based on [Student]'s PLOP, that she made progress on her educational goals. Moreover, when MCPS accounted for the Parents' genuine concern about [Student]'s ability, or lack thereof, to navigate the public middle school it updated the FBA/FIB. The argument that it did not include specific information from the middle school is disingenuous because as Ms. XXXX testified the document was following [Student] to the middle school and it contained specific data and information about [Student]'s behavior.

The greatest struggle in this case appeared to be the test results on the WJ-III. On this point, the Parents' argued that the test results conclusively showed that [Student] could not have made progress at [School 3] when her scores were showing her at grade equivalents second, third and fourth grades. This argument fails largely because, as Ms. XXXX testified, more information is needed to make sense of the scores,

We would never use scores in Montgomery County to make major decisions without a narrative report, because behaviors and – you know, there's a lot of things that can impact a performance on an assessment.

(T. of XXXX, tr. 1353.)

When we write reports, there's a narrative paragraph for each subtest. There's a paragraph about test behavior. There's also usually an observation included in the report, as well as a summary and recommendation.

(T. of XXXX, tr. 1354.)

It's a piece of what we look at. I wouldn't even say it's a great – you know, a big piece. More classroom performance, performance on state, core curriculum benchmarks. Those are things that we would take more into account, because it's how they're functioning in the setting that they're in.

(T. of XXXX, tr. 1345.) Interestingly, none of the Parents' witnesses, including Mr. XXXX challenged Ms. XXXX on this point. Instead, the discussion focused primarily which of the scores carried more weight – the standard score, the grade equivalency score, or the age equivalency score. Ms. XXXX testified that MCPS “only look[s] at standard scores, which are based on age.” (T. of XXXX, tr. 1352.) Mr. XXXX agreed with MCPS that this is their protocol, he simply disagreed that it was the correct protocol.

In addition, the evidence showed that the WJ-III score fluctuated and went lower (yes, some went higher). Mr. XXXX testified that this pattern was consistent with a student who is learning a new skill and it takes time to master the skill, so that test results will be lower, but once the skill is achieved, then the test scores will reflect that as well. Mr. XXXX made it sound so common sense, but he had no data or research to support this view. Ms. XXXX, on the other hand, testified that the scores were stagnant because [Student] is only growing at about a year's advance. I find Ms. XXXX's testimony to be more credible than Mr. XXXX because it is consistent with [Student]'s present grade performance per the 2012 PLOP. Without more, I am disinclined to put much, if any weight into these scores. They are not supportive of the Parents' case.

The facts are clear that [Student]'s first year at [School 2] was fraught with issues. [Student] struggled academically and behaviorally. The first quarter grades at [School 2] showed D's and F's for tests. While the argument by the Parents is that [Student]'s success, or lack thereof, is a direct function of MCPS failure to provide her with FAPE in the fifth grade. Their argument nevertheless fails because they did not provide me with a better benchmark than the WJ-III and the [School 2] teachers' testimony. Notably, the evidence showed that none of [Student]'s teachers reached out to the teachers at [School 3] to ascertain [Student]'s achievement levels in the fifth grade to better understand her needs, goals and objectives in the sixth grade. In other words, [School 2] had no idea what [Student]'s baseline was after transitioning to the sixth grade. They made assumptions only. More was needed, as I have earlier stated, to corroborate and support this argument.

Another area of concern was that [School 2] did not have in place a behavioral plan for [Student] so that its staff could better predict and prevent behaviors that impacted on [Student]'s learning and interaction with others. What is true, from the outset, is that [School 2] did not accept students with XX because it was not set up to deal with students with that type of coding. As Dr. XXXX testified and included in her report, while MCPS did not code [Student] as XX, [Student]'s behavior meet the definition of XX. As such, a reasonable inference can be made that [School 2] was not a good fit for [Student] and the constellation of all her needs.

The evidence in this case is clear that [School 2] is not the LRE. By sheer numbers, [School 2]'s Middle Division had only 17 students, mainly males. The record is also clear that in many instances [Student] was being taught one-on-one; though, the typical class was four or five to one. Aside from the testimony noted above from MCPS witnesses regarding the male to female student ratio, one thing stood out to me and that was [Student]'s peer's reaction to her. In

her testimony and report, Dr. XXXX described [Student]'s belief that her classmates called her names and did not allow her to participate in activities. What struck me about this is the fact that in [Student]'s world at [School 2] she is being judged by her disabled peers who are making fun of her. And, given the size of the school, as Ms. XXXX commented in her letters to MCPS during the IEP process this, too, can be incredibly excluding. Certainly this would have an impact on [Student]'s self-esteem. At the very least, at [School 3], the student's reactions varied from to ignoring [Student], telling her to stop her behavior or by seeking help from a teacher when she acted out. At no point did the entire school population at [School 3] exclude [Student]. As such, the likelihood of exclusion is so much greater at [School 2] just because of the small student population.

As described above by the MCPS witnesses, [School 1] had all the supports in place for [Student] based on her unique and individualized needs. Finally, based upon the factual testimony, opinion testimony, and the other evidence offered, I conclude that the IEP and proposed placement, to be implemented at [School 1]'s XXXX program, provided [Student] with educational benefit and FAPE. The IEPs that were in effect during the three school years at issue were impressive. Collectively, with varying start dates, they called for speech and language, reading, reading fluency, written language, mathematics and behavior interventions, FBA/BIP, 15 minutes of counseling, social skills group, supports and accommodations and it was to be implemented at [School 1]'s XXXX program. In support thereof, Dr. XXXX, who was admitted an expert in school-clinical child psychology, testified that based on a number of factors (her psychological assessment of [Student], review of MSA test scores and [Student]'s informal file, the accommodations that were in place, her classroom observation, her interviews with [Student], her mother and [School 2] teachers, plus her knowledge about [School 1]'s

XXXX program), [School 1] was the LRE. Moreover, Dr. XXXX touched upon during her testimony that [Student]’s academic expectancies was where her intelligence measured, at a borderline level. As such, at [School 3], [Student] was performing commensurate with her cognitive ability. I found Dr. XXXX to be well-spoken, confident and unflappable. Remarkably neither the Parents nor their expert challenged Dr. XXXX’s report. Therefore, I find her testimony was above reproach and the Parents had no answer for Dr. XXXX’s testimony. As such, I am persuaded that three IEPs developed by MCPS for [Student] provided her with FAPE in the LRE.

Finally, the Parents made the argument that MCPS kept increasing service hours for [Student] after it received certain data from [School 2]. The Parents claimed that in doing so, it was an admission of fault that MCPS failed to provide FAPE in the first instance. This argument is spurious since a hindsight-based review of a prior school year’s IEP and placement that is not permitted under the IDEA. *See Schaffer ex rel. Schaffer v. Weast*, 554 F.3rd 470, 475 (2009).

IV. Summary

In the instant case, I am persuaded that the Parents demonstrated that [School 2] provided [Student] with “some educational benefit.” *See Taylor v. Sandusky*, 43 IDELR 4 (D. Md. 2005) (“some educational benefit” test also applies to unilateral placement); *but see Indianapolis Public Sch. v. M.B.*, 771 F. Supp. 2d. 928, 930 (S. D. Ind. 2011) (in which the court quoted the Sixth Circuit Court of Appeals from *Berger v. Medina City Sch. Dist.*, 348 F. 3d 513, 523 (2003), writing “[A] unilateral private placement cannot be regarded as ‘proper under the [IDEA]’ when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient”). [School 2] teachers and [Student]’s Parents have contended that, by the eighth grade, [Student] was calming down, was more cognizant of her

behaviors, had been elected president of her Middle Division program, and was more organized. Therefore, I would have to agree with the Parents that these are strengths the IEP Team had envisioned for [Student] when it drafted the each of the IEPs. *See Jaccari v. Bd. of Ed.*, 690 F. Supp. 2d. 687, 705 (N. D. Ill., 2010) (mere positive behavioral steps can manifest educational benefit).

That said, the Parents did not, however, show that the school system failed to provide, at the time, a program that was reasonably calculated to provide a FAPE to [Student] in the LRE. *Carter*, 950 F.2d 156, 164. Therefore, the Parents are not eligible for reimbursement for the private placement at [School 2] for the 2010 – 2011, 2011 – 2012, and 2012 – 2013 school years

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that Individualized Education Programs (IEP) developed by MCPS for placement at [School 1], provided the Student with a free appropriate public education during the 2010 – 2011, 2011 – 2012, and 2012 – 2013 school years. 20 U.S.C.A. §§ 1401(9), 1412(a)(1)(A), 1412(a)(5), 1414(d)(1)(A) (2010); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Hessler v. State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983); *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003).

ORDER

I **ORDER** that the Due Process Complaint filed by the Parents on May 23, 2012 is **DISMISSED**.

February 8, 2013
Date Decision Mailed

Kathleen A. Chapman
Administrative Law Judge

KAC/ch

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. §8-413(j) (2008).

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

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