

#22-078
COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

Re: Child, by and through [REDACTED] parent(s), Parent v. County Public Schools
Case No. 22-078

Child & Parent(s)/Guardian:
child
parent(s)

Administrative Hearing Officer:

Child's Attorney/Advocate(s):
Advocate

County Public Schools' Attorney
Attorney for LEA

Superintendent of County Public Schools:
Dr. Superintendent

AMENDED DECISION¹

I. PROCEDURAL HISTORY²

On January 28, 2022, the parents, through their attorney, filed a due process complaint (DPC/complaint). (AR 1). The Hearing Officer held an initial telephonic prehearing conference (PHC) on February 7, 2022, to address matters pertaining to the DPC and issued a scheduling order. This order provided a summary of discussions that occurred during the PHC and related directives from the Hearing Officer. (AR 5).

The Hearing Officer held two additional PHCs. On February 23, 2022, such a conference occurred to clarify the issues, among other matters. (AR 12). Then on March 4, 2022, the Hearing Officer convened another PHC to address the LEA's objections to several of the parents' proposed

¹ This decision has been amended to make clerical corrections to the initial decision issued on May 17, 2022.

² Throughout the decision, the Hearing Officer will use the following abbreviations:

Transcript	-	Tr.
Parents' Exhibit		P
Local Educational Agency Exhibit	-	S
Administrative Record	-	AR

exhibits. Granting Parents' counsel leave to respond to the objections, the Hearing Officer deferred ruling on the LEA's opposition to any exhibits until the hearing. Moreover, a discussion ensued about the time proposed for each party to present his/her/its case. The Hearing Officer then found good cause and that the best interest of the child was served to expand the hearing time by seven hours. The due process hearing took place virtually over a seven-day period: March 9, 10, 11, 14, 23, 24, and 25, 2022.³ (AR 31). With one minor modification to the start time on March 25, 2022, the hearing occurred as scheduled.⁴

In addition to issuing orders/summary reports following each of the referenced PHCs, the Hearing Officer issued orders requested by the parties. Particularly, on February 21, 2022, the Hearing Officer issues subpoenas for the production of documents on behalf of the LEA, and on March 7, 2022, the Hearing Officer issued subpoenas for witness testimony on behalf of the parents/child. (AR ## 9 and 29).

Before testimonial evidence was taken during the hearing, the Hearing Officer admitted exhibits of the parties to which there were no objections. Because Parents' counsel did not object to the LEA's proffered exhibits, the Hearing Officer admitted all of the school's 92 exhibits. The LEA did not object to Parent's proffered exhibits 1 through 4, 6 through 12, 14⁵ through 29, 31 through 51, 53 through 77, 80, 82-83, and 85-86.⁶ The Hearing Officer, therefore, admitted Parents' exhibits to which there were no objections. Over the LEA's objections, during the course of the hearing Parents' exhibits 40, 43, 58, 65, and 71 were admitted as evidence. Parents did not ask that their exhibits numbered 5, 52, 78 through 79, and 81 be admitted as evidence during the hearing. Accordingly, they are not evidence in this case.

The established administrative record (AR) consists of AR 1 through 33 and the transcript. Neither party objected to the AR.

During the due process hearing, each party was allowed time to present an opening statement, conduct direct examination of their witnesses, cross examine the opposing party's witnesses, and if desired present rebuttal testimony. The parties jointly requested leave to present their closing arguments in writing after they had an opportunity to review the transcript. In addition a motion was made for extending the 45 day time period. The Hearing Officer granted the requests of the parties finding good cause and that doing so was in the best interest of the child. As such, the Hearing Officer extended the 45 day time period until May 17, 2022.

II. ISSUES

A. SCHOOL YEAR 2019-20 ISSUES

³ The parties were available to participate in the hearing on these days.

⁴ The parties agreed to this minor modification due to LEA counsel's schedule requiring his attendance in federal court on morning of March 25, 2022.

⁵ During the hearing, the LEA withdrew its objection to the parents' exhibit 14. Accordingly, the Hearing Officer admitted this exhibit.

⁶ Parents' counsel did not proffer an Exhibit 84. The LEA objected to Parents' exhibits 5, 14, 30, 40, 43, 52, 58, 65, 71, 78, 79, and 81. Parents' counsel withdrew exhibit 13.

1. Did the LEA fail to provide sufficient services and special education so that the student could make progress toward meeting [REDACTED] IEP goals and objectives (specifically goals/objectives in the “areas of need” and “ESY” sections of the IEP) and the general education curriculum?
2. Did the LEA fail to design a Temporary Learning Plan to address the student’s needs, but rather for administrative convenience?
3. Did the LEA deny the student a FAPE?

B. SCHOOL YEAR 2020-21 ISSUES

1. Did the LEA fail to provide sufficient services and special education so that the student could make progress toward meeting [REDACTED] IEP goals and objectives (specifically goals/objectives in the “area of need” and “ESY” sections of the IEP) and the general education curriculum?
2. During the LEA’s closure due to the Pandemic and upon the LEA’s reopening during the school year, did the LEA fail to design an educational programing for the student based on [REDACTED] unique circumstances, but rather on administrative convenience?
3. Did the LEA fail to offer sufficient recovery services to address the student’s loss of instruction during the COVID-19 school closure?
4. Did the LEA deny the student a FAPE?

C. SCHOOL YEAR 2021-22 ISSUES

1. Did the LEA fail to provide sufficient services and special education so that the student could make progress toward meeting [REDACTED] IEP goals and objectives (specifically goals/objectives set forth in the “transition,” “area of need,” and “ESY” sections of the IEP) and the general education curriculum?
2. Did the LEA base its decision to place the student at Public Day School on administrative convenience and not the student’s unique circumstances?
3. Did the LEA fail to offer a placement designed to meet the student’s unique disability and related needs?

4. Did the LEA deny the student a FAPE?

III. BURDEN OF PROOF

The United States Supreme Court held in *Shaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed.2d 387 (2005), that the party seeking relief bears the burden of proof. Therefore, in this case the parent bears the burden of proof as she is challenging the LEA's actions.

IV. STATEMENT OF FACTS

1. In early 2013, a licensed clinical psychologist conducted a psychological assessment of Child in spring, 2013, and diagnosed Child with Attention Deficit Hyperactive Disorder (ADHD). In her evaluative report, the psychologist states, among other findings, that the child maintains a number of specific symptoms of dyslexia. (P6 at 7 -10; S1 at 7 -10).

2. The local screening committee referred Child for an evaluation to determine if ■ was eligible for special education and related services. (S 6). Then in July, 2013, the child was determined eligible for special education and related services under the category of Other Health Impaired (OHI) with a diagnosis of ADHD. (S14 at 1).

3. The LEA reevaluated Child on December 6, 2018, and determined Child remained eligible for special education and related services under two categories: Specific Learning Disability (SLD) and OHI. (S 23 and S24 at 17).

Specific learning disability is defined as follows:

a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

34 CFR §300.8(c) (10); (Tr. Mar. 22 at 164-65)

Other Health Impaired is defined as follows:

Having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that – (i) is due to chronic or acute health problems such as asthma, [ADHD], ...; and (ii) adversely affects a child's educational performance.

34 CFR §300.8(c) (9); (Tr. Mar. 22 at 165-66)

4. Child attended Private Preschool and Kindergarten. (Tr. Mar 9 at 172/1. ■ graduated

from the private kindergarten school. (Tr. Mar 9 at 177-178).

5. Parents then enrolled Child in public school at Elementary School I during the 2013-14 school year to repeat kindergarten. (Tr. Mar. 9 at 178).

6. Before the end of the child's school year at Elementary School I, Parents removed the child from the public school and placed █████ in another private school, Kindergarten/Elementary Private School. While attending this private school, the child repeated kindergarten, completed first grade and a portion of second grade. Child was expelled from the school during █████ second grade year. (Tr. Mar. 9 at 183 -186; P 9 at 1 and P 22 at 2). The relevant school years were 2013-14, 2014-15, and 2015-16.

7. Parents home schooled Child for the remainder of █████ second grade year as well as █████ third and fourth grade school years. (Tr. Mar. 9, p. 186). During Child's third and fourth grade years, the parents used the Seton homeschooling program, which is a religious based program. Parents completed the program with the child for these two school years. (Tr. Mar. 9 at 187; P 10 and 11). Child's third and fourth grade school years were 2016-17 and 2017-18, respectively.

A. SCHOOL YEAR 2018-19 (5th grade year)

8. Parents concluded that Child required more assistance in reading than they could provide in the homeschool setting. Therefore, Parents reenrolled the child for █████ fifth grade (5th grade) year into the school district. Child attended Elementary School II for the 5th grade, the 2018-19 school year. (Tr. Mar. 9 at 192).

9. As referenced above, the LEA reevaluated Child upon █████ reenrollment. The eligibility committee determined on December 6, 2018, that █████ continued to be eligible for special education and related services under two categories: Specific Learning Disability (SLD) and OHI. (S23 and S24 at 17).

10. The child's IEP prepared for the 2018-19 school year provided the child with 13.25 hours per week of special education and related services in a special education setting. Parents agreed to the child's IEP for 5th grade, which was dated December 6, 2018. (S24 at 27).

11. The school district uses a form titled "IEP Progress Report-Annual Goal" to report quarterly on the progress a special education student is making on each of █████ IEP goals. (P 17).

12. Child's 5th grade IEP contained 13 goals. By the end of Child's third quarter in the 5th grade, the progress report identified █████ progress on one of the 13 goals as a "4" which meant that █████ was making sufficient progress toward achieving the goal within the duration of the IEP. For the remaining goals on █████ IEP, the child's progress was rated as a "3" which meant the child had demonstrated some progress toward achieving each of those goals. (P19; S 21).

13. The child's end of year general report card for grade 5 rated █████ achievement levels in Life, Work, and Citizenship skills. Concerning those areas, the child was rated at a "3" in six areas and a "2" in the remaining six areas. The higher the rating number, the more development noted.

For example, the “3” rating noted the child usually demonstrates concepts and skills taught. The “2” rating noted the child sometimes demonstrates concepts and skills of standards taught.

Regarding the child’s academic classes, ■■■ received “2s” in all areas assessed pertaining to language arts, science, and mathematics. There was one exception, in the areas of “writing effort” and “mathematics effort,” ■■■ received “3” ratings.

Child received “4s” in PE and music. The “4” rating designated that the child consistently demonstrates concepts and skills of standards taught. Child also received a “3” rating in all areas pertaining to art. Regarding history and social studies, the child was rated at a “2” in two of the five areas assessed, and ■■■ received a “1” (seldom demonstrates concepts and skills of standards taught) in three of the five areas taught.

(S 12).

14. Parents did not believe the child had made progress in the 5th grade. (Tr. Mar. 9 at 236/1-3).

15. The IEP team meet on June 10, 2019, to prepare the child’s IEP for ■■■ sixth grade (6th grade) year. During the meeting, the parent requested a Comprehensive Service Site (CSS) placement for the child. The school members of the team declined the request noting that the CSS is a specialized program for students with both internalizing and externalizing behaviors. The school members did not believe the child needed the level of services provided at CSS and such a placement would not be the child’s Least Restrictive Environment (LRE).

Parents believe their request for the child to be placed at CSS for the child’s 6th grade year was not granted because placing Child at the CSS would have been an inconvenience for the principal at the CSS. Particularly, parents state that the CSS had five (5) students already enrolled at the site and the principal did not desire to add another student. Accordingly, Parents’ reasoned that the LEA placed the child at ■■■ base elementary school.

Parents also requested a phonemic awareness goal on the IEP. The school members of the team refused the goal noting that testing, Kaufman Test of Educational Achievement (KTEA) and CORE Phonics Survey (CORE/CORE Phonics), did not indicate that such a goal was needed.

(P20 at 56; S31 at 19; Tr. Mar. 9 at 238 and 280).

B. SCHOOL YEAR 2019-20

16. Child began ■■■ 6th grade year at Elementary School II. (P20 at 67; S 31 at 30). This was school year 2019-2020.

17. When school started for the 2019-20 school year, the child’s current IEP was the IEP dated June 10, 2019. As written, this IEP’s duration was from June 10, 2019 - June 13, 2019, August 26, 2019 - June 10, 2020; essentially, the three days remaining in the 2018-19 school year and the entire 2019-2020 school year. The child’s placement under the June 10, 2019, IEP was Elementary

School II. The June 10, 2019, IEP provided the child with more services in the special education setting; specifically, 19.50 hours per week of special education services and/or related services in the special education setting. In addition, the IEP provided for ESY from July 1, 2019, to July 26, 2019.

Parent agreed to the IEP and its implementation.

(S 31 at 29-30,33; P 20 at 66-67, 70).

Child's 6th grade special education class was self-contained and included, in addition to the child, three other students: a fifth grader, a fourth grader, and a second grader. Most of the time, the second grader was not in the self-contained class. This was the case because ■■■ attended general education classes for ■■■ core classes. (Tr. Mar. 14 at 84, 160-161, 237).

18. The June 10, 2019 IEP also indicated that the child's reading level was beginning third grade (3rd grade). (P20 at 43; S 31 at 8).

November 2019 FAM and FAR Evaluations

19. Parents' Expert W (Expert W) evaluated the child in reading and mathematics on or about November 30, 2019. For this evaluation, Expert W administered two standardized tests to the child: the Feifer Assessment of Reading (FAR) and the Feifer Assessment of Mathematics (FAM). Expert W also consulted with the parents and had the parents complete a comprehensive background questionnaire. Additionally, Expert W reviewed some records pertaining to the child. (P22).

Expert W did not obtain any input from any of the school district's educators who at the time were or had been involved in educating the child. Expert W has not participated in any of the child's IEP meetings. His only involvement with the child was in administering standardized normed testing. (Tr. Mar. 9 at 107; P22).

During the November 2019 testing of the child, Child engaged in some interfering behaviors. ■■■ demonstrated significant restless motor behavior and distractibility. In addition, ■■■ efforts varied during the test. ■■■ voiced wanting to leave when tasks on the test were challenging. Expert W, the tests administrator, gave the child prompts, breaks, and encouragement. With those accommodations, the child completed the test. Expert W opined that the test results were valid. (P22 at 3).

The FAR and FAM tests are standardized. The FAR measures a student's reading ability and the FAM measures a student's math skills. Each test uses a grade level norm. (P 22).

On the November 2019 FAR assessment, the child's testing results indicated that ■■■ phonological index percentile rank was .4, ■■■ fluency index percentile rank was less than .1, and ■■■ comprehension index percentile rank was .4. By Expert W's testimony, this scoring showed that the child was very weak in both reading and sounding out words and that ■■■ was markedly deficient in reading comprehension. In essence, the FAR showed that 99% of students

in the 6th grade were reading better than the child. (P22 at 4 -5; Tr. Mar. 9 at 79-85).

Expert W recommended in his 2019 written report on the testing, a reading intervention program that is administered 4-5 days per week for a minimum of 45 minutes a day. (P22 at 13).

The child's overall testing results on the FAM showed Child's math skills fell in the 4th percentile. The child's scores in the three indexes made up █████ overall score. Those indexes showed that child was deficient in (i) procedural skills like counting and sequencing, (ii) verbal skills such as naming numbers and verbalizing responses to math questions within a certain allotted time, and (iii) semantics such as solving word problems. P 22 at 9-11).

In his November 19, 2019, report regarding math, Expert W recommended a multi-sensory research-based math program with daily progress monitoring.⁷ (P22 at 12).

Parents' Expert W agrees other than standardized testing, progress reports, report cards, and work samples can be used to measure a student's reading and mathematic abilities. (Tr. Mar. 9 at 126-127).

Parents' Expert W qualified as an expert in educational assessment and diagnosis of students with dyslexia. (Tr. Mar. 9 at 72).

Parents' Expert W is an advocate for parents and students and has testified numerous times on their behalf in due process hearings. (Tr. Mar. 9 at 103).

November 2019 Educational Evaluation

20. In November 2019, the LEA administered an educational evaluation. Test administered included the KTEA, 3RD Ed – Form A, the CORE Phonics, and the Fountas and Pinnell Benchmark Assessment System (BAS). The child's behavior during the test notes that █████ appeared motivated to do █████ best and did not require much redirection. The examiner noted that she believed the test results were accurate due to the behavior exhibited during the testing. (S 39 at 2).

The KTEA is a standardized, norm-referenced test. It was administered to the child in fall 2019, to measure █████ skills in math, reading, writing, and listening comprehension. On the KTEA, the child's standard composite scores in math, reading fluency, comprehension, and written language indicate the child was performing in the "below average" range in those areas.⁸

⁷ Expert W administered the FAM and FAR again to the child about August 2021. For the updated assessments, he met with the child in his office. Child did engage in some interfering behaviors. In Expert W's opinion those off task behaviors may have suppressed the child's scores on the tests, but only slightly. The child's testing scores indicated █████ scored again below the 1st percentile in reading on the FAR, and scored in the 1st percentile on the FAM. Expert W concluded that the child had not made any progress in reading since he administered the first FAR and the child had regressed in math since he administered the first FAM. Recommendations offered in the 2021 evaluative report and by Expert W during the due process hearing were a full-time and small educational setting, reading interventions 4-5 times a week, research based reading intervention program such as Wilson Reading Program, and comprehensive reading and math instruction. (Tr. Mar. 9 at 91-95, 143, 146-147; P61 at 29-34).

⁸ Standard scores on the KTEA are in the 85 to 115 range. All of the child's composite scores that were deemed below average were in the low to high 70s. (P25 at 93; S 42 at 19 and S 39 at 7)

Percentiles noted were reading composite 8, math composite 3, written language composite 3, and comprehension composite 4. Child's sound symbol composite indicated [REDACTED] fell in the average range. Subtests of this composite included phonological awareness and nonsense word decoding. In both subtest areas, the child's scoring fell in the average range. [REDACTED] percentile for sound symbol was 47.⁹ (S39 at 7).

On the CORE Phonics, the examiner noted that the child met expectations. The IEP dated January 31, 2020, indicates the survey included real and nonsense words and the child met [REDACTED] benchmarks; that is 14+/15 and 21+/24. (S39 and S42 at 19; P 25 at 93).

BAS testing showed the child's reading fell at the beginning 3rd grade level. (S39 at 3).

Recommendations presented in the November 2019 Educational Evaluation included, but were not limited to, a research based writing program, word prediction software due to [REDACTED] deficits in spelling, and a research based math program. (S39 at 5).

January 31, 2020, IEP Meeting

21. On January 31, 2020, the IEP team met to hold an annual review of the child's educational planning. Testing and assessment data were provided and discussed, to include results of the BAS, CORE Phonics, and KTEA that were administered in November 2019. In addition, data regarding QRI reading assessments, the University of Oregon's Oral Fluency Probe, and the San Diego Quick Assessment of Reading Ability was provided. (P25 at 93-94; S42 at 19-20; Tr. Mar. 14 at 97-98 and 172-173).

The report on the University of Oregon's Oral Fluency Probe indicated that as of December 2019, the child showed [REDACTED] oral fluency was at 6th grade level. [REDACTED] did so by reading 117 words per minute with one error and reading 113 words correctly with two errors.

The report on the QRI wordlists indicated that the child performed at 5th grade instructional level under one assessment and at 6th grade instructional level on another assessment.

Under QRI reading assessment, a comprehension assessment could not be completed due to the child's frustration.

The January 31, 2020, IEP also reflects that data regarding the San Diego Quick Assessment of Reading Ability was provided. This assessment was done January 2020. It demonstrated that the child could read independently at 4th grade level, instructional at the 5th grade level, and with frustration at the 6th grade level.

(P25 at 93-94; S 42 at 19-20).

The IEP dated January 31, 2020, also noted the child was making progress in writing. (P25 at 95; S42 at 21).

⁹ The subtests included in this composite were phonological awareness and nonsense word decoding where the child's percentiles were determined to be 63 and 34, respectively.

During the 2019-20 school year, the Child was participating in the Corrective Reading Program. (P25 at 80; S42 at 6).

Child's progress in math was also noted in the January 31, 2020, IEP. The IEP mentioned that Child was participating in the Connection Math Concepts program. (S42 at 14; P25 at 88). Information regarding █████ math goals and progress noted the following percentages: 65%, 80%, 100%, 60%, 92%, 72%, 89%, and 75%. Scores from the child's unit test and post assessments were as follows: 100%, 100%, 95%, 88%, 92%, 100%, 100%, 89%, and 85%. (P25 at 95; S 42 at 21).

The Hearing Officer finds that as of January 31, 2020, the child was making progress in reading, math, and writing.

As referenced above, in the 6th grade, the child participated in the Corrective Reading Program. Teachers implementing this reading intervention were required to receive training in the program before using it with students. (Tr. Mar. 14 at 26). 6th Grade Case Manager had been trained on how to implement the program in September 2019, and was using this reading program with the child. (Tr. Mar. 14 at 57-58, 100). One requirement of the reading program was the administration of mastery tests to a student participating in the reading program. Giving mastery tests is critical to the program because it serves to determine if a student has grasped the concept just taught and being tested by the mastery test. If after testing, the teacher determines a student does not understand the concept that was taught, reteaching must follow. Reteaching in this situation is important because often understanding the concept that the child is being tested on is essential to understanding the next concept to be taught by the teacher. (Tr. Mar. 14 at 73)

During the January 31, 2020, IEP meeting it was determined that 6th Grade Case Manager had not administered the child some reading mastery tests as they were designed to be given under the Corrective Reading Program. A curriculum resource teacher was requested to, among other things, assure compliance with implementation of the Corrective Reading Program. (Tr. Mar. 14 at 33-36).

The role of a curriculum resource teacher entails (i) providing the school district with wide training for teachers, (ii) supporting teachers and instructional assistants, (iii) observing teachers and making recommendations to them, and (iv) attending some IEP meetings. (Tr. Mar. 14 at 10, 13, 20, 51). As a result of the request for a curriculum resource teacher, 6th Grade Curriculum Resource Teacher (6th Grade CRT) became involved in the child's case around January 2020. She attended the child's January 31, 2020 and April 17, 2020 IEP meetings. After getting involved, 6th Grade CRT observed 6th Grade Case Manager in her class on several occasions following the January 31, 2020 IEP meeting. 6th Grade CRT made recommendations to the teacher regarding using the reading program. The purpose of the recommendations was to assure that the Corrective Reading Program was being implemented appropriately.¹⁰ 6th Grade CRT determined the case manager performed her job satisfactorily. She also determined that 6th Grade Case Manager administered the mastery tests that previously had not been given; that the child passed those tests;

¹⁰ CRT had received training in the Corrective Reading Program several years ago. She has worked with at least 20 students who use the program. (Tr. Mar. 14 at 58).

and that the child was making progress in the reading program. (Tr. Mar. 14 at 34-36, 61-63, 69, 79-80 and 187-188; P 25 at 75; P 32 at 5;S 47 at 2).

During the January 31, 2020, IEP meeting, the team also addressed the child's behavior. The team acknowledged the behavior system in place. Under this system, the child received a check for every 5 minutes of being on task. Further, [REDACTED] was able to redeem [REDACTED] checks throughout the day for a preferred task. (P 25 at 95;S42 at 21).

In addition to the LEA addressing the child's behavior by using the check system discussed during the January 31, 2020, IEP meeting, 6th Grade CRT coached the case manager on using the point system imbedded in the Corrective Reading Program. This point system was designed to motivate students to participate. (Tr. Mar. 14 at 68).

Closing of School

22. On or about March 15, 2020, all public schools in the Commonwealth of Virginia were closed pursuant to the Governor's order due the COVID-19 Pandemic and surging covid-19 cases. (Judicial Notice; Tr. Mar. 25 at 171-172).

23. The LEA's special education staff transmitted a progress report to the child's parents on or about April 3, 2020. This Progress Report specified the progress the child was demonstrating toward achieving [REDACTED] IEP goals. Those goals addressed cognitive attention, reading, mathematics (math), writing/written language, social skills, and communication. (P 31).

24. The goals as stated on the student's April 3, 2020, progress report and IEP are as set forth here:

Cognitive/Attention Goal 1

With three or less prompts, [Child] will complete a given task (up to 3 steps) within a designated period of time, utilizing a checklist on 8 out of 10 opportunities (1 opportunity per day over 10 consecutive days) measured per quarter. (P 31 at 1).

Child's progress report for April 3, 2020, rated the child's progress toward cognitive goal 1 at a 3. A "3" progress rating notes "the student has demonstrated some progress towards achieving this goal." (P 31 at 1).

Cognitive/Attention Goal 2

When [Child] becomes frustrated when working on an activity, [REDACTED] will use a learned coping strategy and return to the activity within 5 minutes on 4 of 5 opportunities measured per quarter. (P31 at 2).

Child's progress report for April 3, 2020, rated the child's progress toward cognitive goal 2 at a 2. A "2" progress rating notes "the student has not yet demonstrated progress toward achieving this goal." (P 31 at 2).

Reading Goal 1

[Child] will read a beginning of fourth grade level text with 96% accuracy with 98 correct words per minute on 3 of 4 assessments per quarter. (P 31 at 3).

Child's progress report for April 3, 2020, rated the child's progress toward reading goal 1 at 4. A "4" progress rating notes "the student is making sufficient progress toward achieving this goal within the duration of this IEP." (P 31 at 3).

Reading Goal 2

When given a variety of 4th grade level texts, [Child] will locate supporting evidence from text to help explain the main idea with 80% accuracy on 3 of 4 samples assessed per quarter. (P 31 at 4).

Child's progress report for April 3, 2020, rated the child's progress toward reading goal 2 at 4. (P 31 at 4).

Reading Goal 3

When given a list of 20 real and nonsense multisyllabic words (included closed, open, and r-controlled syllables), [Child] will decode them with 90% accuracy on 4 out of 5 samples assessed per quarter. (P 31 at 5).

Child's progress report for April 3, 2020, rated the child's progress toward reading goal 3 at 4. (P 31 at 5).

Writing/Written Language Goal 1

[Child] will write a clear topic sentence focusing on the main idea with two supporting details and a concluding sentence on 3 out of 4 writing samples assessed per quarter. (P 31 at 6).

Child's progress report for April 3, 2020, rated the child's progress toward writing goal 1 at 3. (P 31 at 6).

Writing/Written Language Goal 2

Given electronic tools, [Child] will edit writing for complete sentences with correct capitalization, punctuation (commas in series, sentence ending, apostrophes in contractions) and verb tense to meet end of 3rd grade level expectations on 3 of 4 samples assessed per quarter. (P 31 at 7).

Child's progress report for April 3, 2020, rated the child's progress toward writing goal 2 at 3. (P 31 at 7).

Writing/Written Language Goal 3

When given a list of ten phonetic multi-syllabic words (included

closed, open, and r-controlled syllables), [Child] will correctly spell the words with 80% accuracy 4 out of 5 samples assessed per quarter. (P 31 at 8).

Child's progress report for April 3, 2020, rated the child's progress toward writing goal 3 at 4. (P 31 at 8).

Writing/Written Language Goal 4

[Child] will independently organize ■ thoughts and ideas using prewriting strategies in 3 out of 4 samples per quarter. (P 31 at 9).

Child's progress report for April 3, 2020, rated the child's progress toward writing goal 4 at 3. (P 31 at 9).

Mathematics Goal 1

[Child] will solve multi-step practical problems involving addition, subtraction, multiplication, and division with 80% accuracy on 4 of 5 samples assessed per quarter. (P 31 at 10).

Child's progress report for April 3, 2020, rated the child's progress toward math goal 1 at 4. (P 31 at 10).

Mathematics Goal 2

When given a graphic organizer and manipulatives, [Child] will solve addition and subtraction with fractions and mixed numbers including regrouping, and express answers in simplest form with 80% accuracy on 4 of 5 samples assessed per quarter. (P 31 at 11).

Child's progress report for April 3, 2020, rated the child's progress toward math goal 2 at 2. (P 31 at 11).

Social Skills Goal

With no more than two prompts, [Child] will use situationally appropriate rules of conversation (e.g. appropriate turn taking, topic maintenance, tact, telling the truth without excessive embellishment) when interacting with peers and adults on 3 out of 4 opportunities quarterly. (P 31 at 12).

Child's progress report for April 3, 2020, rated the child's progress toward ■ social skills goal at 3. (P 31 at 12).

Communication Goal

[Child] will use specific language to effectively express ■ knowledge (including discussing ■ own experiences as they relate to a topic of study, providing evidence to support an opinion/idea, and discussing key elements of curriculum related materials) on 3

out of 4 opportunities quarterly. (P 31 at 13).

Child's progress report for April 3, 2020, rated the student's progress toward communication goal at 3. (P 31 at 13).

25. Parents viewed the progress reports as failing to show that the child made improvements. For example, Parents state that the child's reading level at the end of 5th grade year was reported as "N" (beginning third grade reading level), and by April 2020 of sixth grade year, was still reading at that level. In addition, Parents state that the comments associated with at least some of the progress codes are inflated when compared to what school staff reported to Parents. Moreover, according to the parents, the child's behavior was regressing and progress in math had stalled. (Tr. Mar. 9 at 263-67).

26. The April 3, 2020, progress report on reading goal 1 states that on the BAS administered February 2020, the child was at a N reading level with 97% accuracy.¹¹ As stated on the report, the N reading level was as of February 2020, not April 2020. Child's progress on the goal was described as making progress toward achieving the goal within the duration of the IEP. (P 31 at 3). The IEP's duration was until June 2020. (P20 at 66).

As a comparison, the 5th grade June 13, 2019, progress report (particularly reading goal 1) states that the child was reading at a Fountas and Pinnell level N with 96% accuracy and 62 words when administered the BAS. Additionally, the child's progress was rated a 2 (not yet demonstrating progress toward the goal). (P 31 at 3).

IEP dated May 26, 2020

27. The IEP dated May 26, 2020, covers IEP meetings held on April 17, 2020, and May 26, 2020. (S 47; P 33 at 2-50).

April 17, 2020 IEP Meeting

28. The IEP team met on April 17, 2020, to prepare the child's annual IEP and to address the child's transitioning from elementary school to middle school. (S 47 at 29; P 33 at 30).

29. During the April 17, 2020, meeting the team discussed the child's progress in reading. The IEP notes that the team did not have access to all the reading data as it was contained at the school which was closed. IEP notes indicate the child's reading data would be updated once the schools reopened. The IEP team noted that the team had not seen as much progress in writing as desired. (Tr. Mar. 9 at 273; S 47 at 29; P 33 at 30).

30. During the April 17, 2020, meeting, the team also discussed the child's behavior. It was noted that the child's behavior was impacting progress at a more significant level. (Tr. Mar. 9 at 272/2-4). For example, regarding the child's writing, the IEP notes the child's behavior can impact ability to produce written work. (S 47 at 29; P 33 at 30). Behaviors the child was

¹¹ The IEP dated May 26, 2020, indicates that on the February 2020 BAS results, the student demonstrated reading at instructional level N, correctly answering 4/9 comprehension questions. (S 47 at 34; P 31).

exhibiting included, among others, verbally stating that ■■■ did not want to do a task, touching materials that did not belong to ■■■, hitting and kicking furniture, and leaving the classroom without permission. (S 47 at 30; P 33 at 31).

The April 17, 2020, IEP specifically mentions, among other behavior problems, two suspensions Child received in February 2020. Particularly, on February 24, 2020, the child's assistant principal suspended the child for the remainder of the day, for the following:

- Refusal to follow classroom directions and instructions
- Interfering with learning in the classroom
- Grabbing a staff member
- Leaving the building

(P27; S 43 and S 47 at30; P 33 at 31).

Also, on February 25, 2020, the assistant principal suspended the child for two days for the following behavior:

- Attempting to hit another student with ■■■ recorder
- Minor insubordination
- Elbowed a staff member, threw school materials, and kicked administration

(P28; S 43 and S 47 at30; P 33 at 31).

31. As referenced in the April 17, 2020, IEP, because of child's escalating behavior issues, the IEP team had initiated a Functional Behavior Assessment (FBA) on March 9, 2020. (S 47 at 29-31; P 33 at 30-33). However, the LEA only collected data from March 9, 2020, to March 12, 2020, because effective March 12, 2020, schools were closed by order of the Governor of the state and by the LEA. As referenced previously, the closures were necessitated by a global pandemic, surging cases of COVID-19 and related deaths and hospitalizations.

Accordingly, the LEA determined it would resume collection of data for the FBA once school reopened to in-person learning. (S 47 at 29-31; P 33 at 30-33). This meant that as of the date of the April 17, 2020, IEP meeting, there was no FBA completed.

Temporary Learning Plan

32. Temporary Learning Plan (TLP) is an educational plan for a child to help abate regressing during the school closure and to provide some continuity of education during the closure. The TLP was not meant as a substitute for the student's IEP. The TLP did not provide for all the child's accommodations and services in the student's IEP. (S 47 at 32; P 33 at 33). The TLP was voluntary. A TLP was offered to all students, disabled and nondisabled. Participation in the plan was not required. (Tr. Mar. 25 at 190).

33. The LEA developed a TLP for the student for the period April 14, 2020- June 12, 2020. The TLP contained the following goals, accommodations, and services:

Goals:

Goal 1: When given a variety of 3rd grade level texts, [Child] will locate supporting evidence from the text to help explain the main idea on 2 out of 3 opportunities

Goal 2: When given a list of 20 real and nonsense multisyllabic words (including closed, open, and with prefixes/suffixes), [Child] will decode the words utilizing learned strategies on 2 out of 3 opportunities

Goal 3: [Child] will write a clear topic sentence focusing on the main idea with two supporting details and a concluding sentence on writing samples on 2 out of 3 opportunities

Goal 4: [Child] will solve multi-step practical problems involving addition, subtraction, multiplication, and division by showing ■ work and labelling ■ answers on 2 out of 3 opportunities

Accommodations/Distance Learning

Flexible schedule

Extended time

Frequent Breaks (directed by the teacher which can include getting a drink of water, going to the bathroom, etc.)

Graphic Organizers

Respond using word processor

Spell Checker

Dictation in English to Scribe

Calculator

Reduced Language Level/Reading level/Plain English

Shortened Assignments

Assistive Technology Support from ATS (Co-Writer, Lexia Core5 Reading)

Services/Distance Learning

NCE/Mathematics: 4hours/weekly (small group), SPED teacher (Distance Learning)

NCE/Language Arts: 4 hours/weekly (small group), SPED teacher (Distance Learning)

Speech: 20 minutes monthly

34. The TLP services could be delivered in a variety of ways, to include by telephone, email, pre-recorded videos, and/or video conferencing sessions. (S 47 at 32-33; P 33 at 33-34).

35. In the virtual setting, the child was receiving ■■■ math through the math intervention program known as Transmath. (Tr. Mar. 9 at 269/19-22).

36. Parents aver that the services and placement during the 2019-20 school year were inadequate. Parents state the IEP team should have completed a FBA and developed a Behavior Intervention Plan (BIP) to address the child's behaviors as they were occurring more frequently and impeding ■■■ progress in school. In addition, the IEP team should have provided additional services to help the child progress toward meeting ■■■ writing goals. Moreover, the child should have been in a Comprehensive Service Site. Yet school members of the IEP team rejected that placement. Furthermore, the child requires another reading program because ■■■ is not progressing in the Corrective Reading Program. Parents indicated the child was also not progressing in math and to some degree regressing. Moreover, parents state the child was not placed with ■■■ emotional peers in the 6th grade. (Tr. Mar. 9 at 238-241; 245; 256-258; 263-267; 273).

May 26, 2020 IEP Meeting

37. On May 26, 2020, the IEP team met again. At this meeting, the IEP team continued the annual review of the child's IEP. This included planning for the child's transition from elementary school to middle school.

The IEP team discussed the child's placement for ■■■ seventh grade (7th grade) year. The LEA members of the IEP team determined that the CSS was the appropriate placement for the child and that this placement was the least restrictive environment (LRE). It was a more restrictive environment than the base school, but less restrictive than the Public Day School.

Regarding the CSS proposed placement, Parents expressed concerns about a CSS placement. Parents did not believe the placement was appropriate considering the child had started leaving class or the school building without permission. Parents feared the large size of the CSS Middle School would encourage the child to continue this behavior. Also, Parents maintained that the child required a small class size, behavior supports present at the school, and the availability of crisis counseling at the school. Parents stated base school, CSS, and public day school were all inappropriate placements for the child.

(S 47 at 28-29; P 33 at 29-30; Tr. Mar. 9 at 280-285).

38. The May 26, 2020, IEP also provided for Extended School Year (ESY) Services. Those services were to take place in a virtual setting. For math, the TransMath Online program was set to be used. Parents' view was that the child required ESY in person. (S 47 at 29; P 33 at 30).

The May 26, 2020, IEP was prepared with the thought that the 2020-21 school year would start with in person instruction. Parent consented to the May 26, 2020 IEP, but did disagree with

some of the IEP's content and services or lack of services provided. (S49; P 34 and P 37).

Student's 6th grade report card

39. The child's end of year general report card for grade 6, which is dated June 12, 2020, rated ■■■ achievement levels in Life, Work, and Citizenship Skills and Effort. The child was rated in all areas at a "2" (noting the child sometimes demonstrates concepts and skills of standards taught).

Regarding the child's academic and elective classes, in history and social studies, science, health, art, and mathematics, ■■■ received "3s" in all areas taught or assessed. This rating indicated that the child usually demonstrated concepts and skills of standards taught. In language arts, ■■■ received five "3"s and three "2"s.

In PE, Child received a rating of "4" (this rating indicated that the child consistently demonstrated concepts and skills of standards taught). In general music, Child received a mixture of 3 and 4 ratings.

(S 35).

40. A comparison of the child's 5th grade general report card and ■■■ 6th grade general report card demonstrates that in the academic and elective subjects, the child received more "3" and "4" ratings on ■■■ 6th grade report card than on ■■■ 5th grade report card.

In the area of Life, Work, and Citizenship, the child received all 2s on ■■■ 6th grade general report card as compared to ■■■ receiving a mixture of "3"s and "2"s on ■■■ 5th grade report card. (S 12 and S35).

Overall, on child's 6th grade report card, ■■■ received 15 (2s); 27 (3s); 10 (4s). On ■■■ 5th grade report card ■■■ received 3 (1s); 26 (2s); 4(3s); 12(4s). A comparison of the two general report cards indicates, the child performed better overall during ■■■ 6th grade year. (S12 and S 35).

ESY

School was closed due to the pandemic for the period the child was to receive ESY services under ■■■ May 26, 2020, IEP. Accordingly, the LEA offered Child virtual ESY. Parent had expressed that she thought the child needed direct person to person ESY, but consented to virtual ESY because the service was only offered in the virtual setting. Under the IEP, while receiving ESY through distance learning, Child worked on three goals as set forth in the IEP. There was one goal in reading/English, one in mathematics, and one in writing. Child's progress report on ■■■ goals during ESY notes ■■■ met the criteria for each goal addressed during ESY. (S52 at 1-2).

C. SCHOOL YEAR 2020-2021

41. The LEA had anticipated that school would open in person by the start of the 2020-21

school year. However, due to the pandemic and surging COVID 19 cases, schools remained closed for in person instruction. Accordingly, schools opened with distance learning for all students except a few who had severe disabilities. In addition, for the 2020-21 school year, the opening date for schools was delayed until September 2020. Also instructional days for students were reduced from five days to four. The on line classes were synchronized with the teacher and students present on a screen at the same time while the teacher was providing instruction. (Tr. Mar. 22 at 22).

42. For ■■■ 7th grade year, the child was placed at a CSS. Specifically, ■■■ placement was CSS Middle School. (S 47 at 46; P 35 at 47).

A Comprehensive Service Site is an intensive educational program that is housed in a base school. Four such sites exist for middle schoolers in the school district. The CSS where the child's IEP team placed ■■■ for the 2020-21 school year is located in region 1 of the school district. CSS is housed in a base school. In the case of the child involved in the matter before this Hearing Officer, the CSS is located at CSS Middle School. Features of each CSS include behavior supports, a smaller student to teacher ratio than in a typical self-contained classroom in a base school setting. In addition, students attending a CSS have access to the counseling resource teacher as a behavior support. Moreover, the CSS has access to clinicians. Additional staffing is also provided. Furthermore, there is tracking data throughout the day regarding students. Students in the CSS also have access to the general education population usually at lunch and during PE, and as decided by the IEP team.

In the case of Child, the IEP team made a decision that not all ■■■ classes would be in the CSS program. The child's reading and math classes were in a special education classroom, but not in the CSS program. ■■■ PE class was in a general education setting.

(Tr. Mar. 22 at 30-33).

At the time, the child attended CSS Middle School, there were 1100 students in the base middle school, but there were only 17 students in the CSS program. (Tr. Mar. 22 at 25 and 33).

As referenced above, the beginning of Child's 7th grade school year was virtual. The schedule was four days of synchronous instruction, to imitate as best the LEA could, a typical in person day of instruction. The instruction was given using a block schedule of even and odd days. This meant the child's classes met every other day. (Tr. Mar. 22 at 22 -23).

Support was provided in the virtual setting. The child's case manager and also counseling resource teacher (7th Grade Case Manager/CRT) would be emailed by a teacher requesting the assistance of the CRT to assist the child if ■■■ was having behavior issues; that is, refusing to work or avoiding work. The child would enter a break out room with CRT where a conversation ensued regarding expectations for class. Once the child was able to return to the class for learning, ■■■ would be returned to the virtual main class. CTR received requests for support at least several times a week, sometimes daily. (Tr. Mar. 24 at 301 - 306).

The CSS provided behavior supports also once the child returned to "in-person" learning.

From one to several times during a class period, a teacher would request behavior supports due to the child being distracted and interfering with the learning environment. CRT /7th Grade Case Manager would come to the classroom and speak with the child. If she deemed it appropriate, she would ask the child to accompany her so [REDACTED] could take a break and have an opportunity to speak to CRT about [REDACTED] feelings. Then CRT would try to make a plan for the child so that [REDACTED] was able to return to the class. By way of example, if the child was toiling with an assignment, the two of them would set a time for how long [REDACTED] would work on the assignment before [REDACTED] could take a break. Typically, the plan consisted of the child at least attempting the assignment for 10 minutes before taking a five minute break. As in-person learning continued, the child was willing to come with CRT and discuss [REDACTED] difficulties with class assignments and design a plan to be able to return to class. Mostly the plan was as stated above. Child would work for 10 minutes and then be allowed a break. A timer was used to keep up with the time. In addition, when the child was fidgety or needed something to occupy [REDACTED] hands [REDACTED] was permitted to have toys for that purpose. (Tr. Mar. 24. at 310).

IEP dated August 28, 2020

43. Due to the virtual educational setting, on September 2, 2020, there was an addendum to Child's IEP. The purpose of this addendum was to amend the IEP so that it was adapted to the LEA's implementation of distance learning due to the pandemic. (P 38 at 29; S 53 at 28).

44. As instructional days had been reduced to four days for all students, the child's IEP was modified to reflect this change. The modification resulted in a reduction of the child's special education service hours. Particularly, under the May 26, 2020, IEP, child was provided 24.5 hours of special education services for an emotional disability. (P 33 at 46; S 47 at 45). The September 2, 2020, addendum to the IEP reduced the child's special education service hours for emotional disability to 16.5. (Tr. Mar. 9 at 288; P 33 at 46 and P 38 at 29; S 47 at 45 and S 53 at 28).

45. Also, the child's speech and language services were reduced from 2 hours a month to 1.5 hours a month. (Tr. Mar. 9 at 289; P 33 at 4 and P 38 at 29-30; S 47 at 45 and S 53 at 28-29). In addition there were some modifications to the child's IEP goals. (P38 at 51-52).

While in the virtual setting, the child had classes four days a week [REDACTED] had the same classes. Mondays were designed to be staff work days. For the first month and a half of virtual school, Parents were in the room with the child while [REDACTED] was being taught. Thereafter, the parents were not in the room, but in close proximity so they could observe what was occurring. (Tr. Mar. 9 at 292-293).

46. The parents were not in agreement with the changes made to the child's IEP. (Tr. Mar. 9 at 290). [REDACTED] 7th grade year lasted from September 2020, until about March 9, 2021, when Child returned to school for in-person learning. (P 45 at 82).

IEP Quarterly Progress Reports for 2020-21 School Year

48. The LEA issued quarterly progress reports to communicate Child's advancement toward attaining the IEP goals. (S57; P 39; P47; P51).

49. Reading goal 1 of the 2020-21 IEP reads as follows:

[Child] will read a beginning of 4th grade level text with 98% accuracy with 100 words per minute on 3 of 4 assessments per quarter.

Child's progress report on reading goal 1 indicated that at the end of the first quarter of child's 7th grade year, ■■■ could read 4th grade text with 70 words per minute. Child's progress report indicates that by the end of the second quarter, the child could read 5th grade text at 80 words per minute with 96% accuracy. By March 26, 2021, given a 4th grade text, the child read 108 correct words per minute with 98 % accuracy. By June 11, 2021, the progress report indicates that the child could read a 5th grade text at 80 words per minute with 98 % accuracy and 75 words per minute with 98 % accuracy.

For the first, second, third, and fourth marking periods, the child received progress codes 3, 4, 5, and 5, respectively. Accordingly, the child's progress on reading goal 1 ranged from demonstrating some progress towards achieving the goal (first quarter's progress) to the child meeting the criteria for the goal during the third and fourth quarters. (S 57; P 39; P47; P51)

The 2020-21 IEP second reading goal reads as follows:

When given a list of 20 real and nonsense multisyllabic words (included closed, open, r-controlled, vowel teams, and with prefixes/suffixes), [Child] will decode them with 90% accuracy on 4 out of 5 samples assessed per quarter.

By testimony of 7th Grade Reading Teacher, the child did make progress toward the goal. ■■■ moved from two syllables, real and nonsense words, in the first two quarters to three or more syllables during the 3rd and 4th quarters.

The teacher's progress report on this goal notes that during the first, second, and third quarters, the child demonstrated some progress towards achieving the goal. During the fourth quarter, the child's progress had advanced to making sufficient progress toward achieving the goal during the duration of the IEP. (S 57; P 39; P47; P51)

50. The 2020-21 IEP contained two reading comprehension goals. Reading comprehension goal one states the following:

When given a variety of mid-4th grade level texts, [Student] will independently locate supporting evidence and vocabulary from the text to answer implicit and explicit questions with 80% accuracy on 3 of 4 samples assessed per quarter.

The progress reports completed by 7th Grade Reading Teacher state that the child's progress for the above noted reading comprehension goal in quarters one, two, and four was demonstrating

some progress towards achieving the goal. For the third quarter, progress noted indicated the child was making sufficient progress towards achieving the goal. The teacher explained the progress noted by stating that the child did pass the DRA2 Level 40 fiction. Per testimony of 7th Grade Reading Teacher, this performance indicated the child understood fourth grade text. (S 57; P 39; P47; P51)

51. Reading comprehension goal two states the following:

After listening to a reading selection/text orally by ■ teacher or audio, [Child] will be able to answer explicit and implicit comprehension questions orally with 80% accuracy on 4 out of 5 trials measured quarterly.

The evidence shows that the child received progress ratings ranging from “the child demonstrating some progress towards achieving the goal” in quarters one, three, and four. For the second quarter, the teacher indicated the child was making sufficient progress towards achieving the goal within the duration of the IEP in quarter three. (S 57; P 39; P47; P51)

52. The child’s 2020-21 IEP contained five goals pertaining to writing.

Writing goal 1 reads as follows:

[Child] will independently organize ■ thoughts and ideas using prewriting strategies (i.e. graphic organizers) in 3 out of 4 samples per quarter.

Progress ratings indicated the child made some progress toward achieving the goal during the first two quarter. During the last two quarters, the report notes that the child made sufficient progress toward achieving the goal within the duration of the IEP. (S 57; P 39; P47; P51)

Writing goals 2, 3, and 4 read as follows:

Goal 2 [Child] will write 3 paragraphs with a clear topic sentence focusing on the main idea with three supporting details and a concluding sentence on 2 writing samples assessed per quarter.

Goal 3 [Child] will organize ■ written response with a clear beginning, middle, and end and incorporating text evidence, appropriate vocabulary, and 3 or more supporting details with 80% accuracy on 3 out of 4 samples per quarter.

Goal 4 When given a list of 20 real multisyllabic words (included closed, open, r-controlled, vowel teams, and with prefixes/suffixes), [Child] will encode them with 80% accuracy on 4 out of 5 samples assessed per quarter.

Progress reports show for each quarter, the child was demonstrating some progress toward achieving the goals. (S 57; P 39; P47; P51)

53. Writing goal 5 reads as follows:

Given electronic tools (i.e. CoWriter), [Child] will edit ■ writing for proper sentence structure with correct punctuation, usage, and sentence formation with a teacher created checklist/rubric assessed on 2 of 3 writing samples measured per quarter.

The child was assessed on three short-term objectives pertaining to this goal. The benchmark objectives involved correct punctuation, verb usage, and proper sentence formation. Commentary on ■ progress toward meeting the benchmark objectives indicated that the child had demonstrated editing for correct punctuation on 2 samples per quarter. Comments also indicated that the child was able to edit ■ writing correctly for correct subject-verb agreement and noun-pronoun agreement. Progress notes also indicate that the child could edit ■ compositions for correct sentence formation. (S 57; P 39; P47; P51)

54. The child's math goal 1 reads as follows:

[Child] will solve multi-step practical problems involving addition, subtraction, multiplication, division, and fractions with 80% accuracy on 4 of 5 samples assessed per quarter.

Progress codes indicate the child made some progress toward achieving the goal during the first two quarters of the 2020-21 school year. During the third and fourth quarters, the child's progress advanced to the point ■ was making sufficient progress toward achieving the goal within the duration of the IEP. Notes for the fourth quarter indicate that the child made a lot of progress in the 4th quarter when solving multi-step practical problems involving adding, subtraction, multiplication, division, and fractions. On measured samples, the child scored 100%, 100%, 100%, 66%, and 20%. (S57; P 39; P47; P51).

55. Math goal 2 reads as follows:

When given a graphic organizer and manipulatives, [Child] will solve addition and subtraction with fractions and mixed numbers, including regrouping, and express answers in simplest form with 80% accuracy on 4 of 5 samples assessed per quarter.

During the first two quarters, the child was demonstrating some progress toward achieving the goal. By the third and fourth quarters ■ progress had improved. Comments for the fourth quarter indicate that the child was making progress using the graphic organizer and other resources and that ■ was independently solving some problems. (S 57; P 39; P47; P51)

56. Math goal 3, was implemented about January 21, 2021. Progress noted for quarters 3 and 4 indicate the child was making some progress toward achieving the goal. (S 57 at 20; P51 at 20).

57. The child's IEP contained two cognitive/attention goals.

Cognitive/Attention goal 1 With three or less prompts, [Child] will complete a given task (up to 3 steps) within a designated period of time, utilizing a checklist, on 8 out of 10 opportunities measured monthly.

By the fourth quarter, the child's progress rating indicated that ■■■ was making sufficient progress toward achieving the goal. A comment associated with the rating noted that the child had shown growth in ■■■ ability to complete given tasks within a designated period of time. Data collected during the quarter showed that the child met the criterion 7 out of 10 opportunities.

(P57; P51).

Cognitive/Attention goal 2 When [Child] becomes frustrated when working on an activity, ■■■ will use a learned coping strategy and return to the activity within 5 minutes on 4 of 5 opportunities measured per quarter.

Progress report indicated that during the second and third quarters child was demonstrating some progress toward achieving the goal. By the fourth quarter ■■■ progress had grown more and ■■■ was making sufficient progress toward achieving the goal. A comment associated with the fourth quarter progress notes that with teacher prompting to select and use a learned coping strategy, the child has shown progress in ■■■ ability to return to task within 5 minutes. On data collected, the child showed the criteria for the goal on 7 out of 9 opportunities. (S 57 at 22; P51 at 22).

58. The child's behavior goal reads as follows:

Behavior goal 1 When provided with clear visual and/or verbal behavior expectations by ■■■ teachers, [Child] will follow classroom rules and teacher procedures in all classroom settings on 9 out of 10 opportunities measured monthly.

For the second and third quarters, the child received progress codes indicating ■■■ was demonstrating some progress toward achieving the goal. For the fourth quarter the child had shown more progress. ■■■ progress code noted that ■■■ was making sufficient progress toward achieving the goal within the duration of the IEP. A comment associated with the fourth quarter progress code noted that the child demonstrated increased difficulty when asked to transition from a preferred task to a non-preferred one. But, on data collected during the quarter, the child was able to demonstrate the criteria for the goal on 7 out of 10 opportunities. (S 57 at 23; P51 at 23).

59. The child's communication goal 1 reads as follows:

Communication goal 1 With one or fewer prompts and visual support, [Child] will use specific language to effectively express ■■■

knowledge (including discussing [redacted] own experiences as they relate to a topic of study, providing evidence to support an opinion/idea, and discussing key elements of curriculum related materials) on 3 out of 4 opportunities quarterly.

The child received progress code ratings of “3” for the first and second quarters on [redacted] progress toward this goal. For the third and fourth quarters, [redacted] received ratings indicating that [redacted] was making sufficient progress toward achieving the goal within the duration of the IEP. A comment associated with the progress rating for the fourth quarter notes that the child has become more willing to interact/accept help from adults on 2/3 observed activities. Further, [redacted] raised [redacted] hand to speak on an occasion and was able to summarize a lesson for another student in three sentences with no prompts.

(S57 at 24; P51 at 24)

On communication goal 2, the child received quarterly progress reports indicating that [redacted] had demonstrated some progress toward achieving the goal. (S57 at 25-26; P 51 at 25-26).

General Report Card for 7th Grade

60. Student’s report card for [redacted] 2021-22 school year contained the following grades and comments pertaining to the eight courses taken by the child.

Course	QTR	1 st QTR	2 nd SEM	1 st QTR	3 rd QTR	4 th FINAL GRADE	COMMENTS
Pers Development	A	A	A	A	A	A	receives accommodations
US History 7	A	A		A	A	A	receives accommodations Engages in learning
Literacy 7	A	A		A	A	A	receives accommodations
English 7	A-	B+		B	B	B	receives accommodations
Health&PE 7	B	A	A			A	
Health&PE 7				A-	A	A	
Invest in Env Sci	A	A		A	A	A	receives accommodations Engages in learning
Mathematics	A	A		A	A	A	receives accommodations

(P 50;S69.

61. Parents were wary of the progress codes and grades the child received during the child’s

7th grade year. As an example, the parents state that a DRA assessment showed the child reading at a 3rd grade level; however, progress reports in reading state ■■■ is showing progress. In addition, Parents state that they believe the child guessed on at least one math assessment and the score on that test fails to reflect what ■■■ actually knows. Moreover, Parents state that the comments on ■■■ progress reports are not consistent with the progress codes. Further, Parents describe the grades as inflated in light of the school district adopting a grading policy which in effect gives a student 50 unearned points on any assignment. As another example of inflationary grades, the parents point to a grade the child received in one of ■■■ classes during the third quarter. According to the parents, the child completed only one reading assignment out of five assigned. Even so, ■■■ received a 90. (Tr. Mar. 9 at 291-296, 305-309, 316-320, 325-325).

62. The math intervention program(s) used with the child during the 7th grade was TransMath for teacher instruction and VMath for independent on-line learning by the child. (Tr. Mar. 9 at 296; Tr. Mar. 14 at 343). 7th Grade Math Teacher delivered the TransMath program as best ■■■ could in the virtual setting.

In the virtual setting, there were four students in the classroom on the computer screen. Breakout sessions were used to take a student out of the main classroom and provide one on one assistance. In addition, the 7th Grade Case Manager /CRT was available to provide supports inside the virtual class and outside the classroom in breakout sessions. The child did receive some one on one assistance in breakout rooms.

7th Grade Math Teacher did observe that during on-line learning, at times the child was distracted or exhibited avoidance behaviors. The teacher used several methods to redirect the child. They included breaking a problem into smaller sections, providing incentives for the child to continue to work, and giving prompts on the computer screen.

In addition, to address the child's avoidance behavior, the math teacher used positive reinforcement. Further, the teacher implemented an award system. Basically, under this system, the child could earn rewards for positive behavior and redeem rewards earned for a break or an activity he preferred.

When the child returned to in-person learning, ■■■ was in a self-contained math class. As with the virtual class, there were four students in the class. All of them were essentially at the same skill level and they were all working on taking the SOLs. In addition to the teacher in the classroom, there was an instructional assistant. As with the virtual learning, if the child needed one on one help, it could be provided in the class. Moreover, when appropriate, a counseling resource teacher provided support in the class or outside of the class. The positive reinforcement and reward system that were in place during virtual learning remained in place once the child was returned to in-person instruction.

(Tr. Mar. 14 at 311, 329-333, 342-345).

63. The reading program used with the child during ■■■ 7th grade year was Orton-Gillingham IMSE (IMSE). (Tr. Mar. 9 at 300; Tr. Mar. 24 at 257). 7th Grade Reading Teacher had been trained in the reading program during the 2019-20 school year. In addition, immediately before

the start of the 2020-21 school year, she received additional training on how to implement the program in a virtual setting. Per her testimony, 7th Grade Reading Teacher followed the scope and sequence of the IMSE reading intervention program. This included making sure that a student mastered a skill before moving on to the next skill. 7th Grade Reading Teacher qualified as an expert in special education. (Tr. Mar. 24 at 261, 270).

64. 7th Grade Reading Teacher opined that the IMSE intervention was beneficial for child. (Tr. Mar. 24 at 267. For the child's 8th grade year, 7th Grade Reading Teacher recommended that the child continue with the IMSE reading intervention. (Tr. Mar. 14 at 272).

65. The child's 7th grade reading teacher provided reading instruction in the class to the child for about 80 minutes twice a week. The entire class was reading intervention. There were eight students in the class. All of the students had been pre-assessed for reading and had been determined to be at the same reading level. (Tr. Mar. 14 at 243-249-250, 273). From the teacher's observations, the child moved at a faster pace than ■■■ classmates. Most of the students were only working on two syllable words. Child could do three syllable words. Therefore, the teacher would give Child three syllable words to work on. This contrasted with 7th Grade Reading Teacher giving the other students words with fewer syllables to work on as an assignment. (Tr. Mar. 24 at 266).

Moreover regarding the child learning at a faster pace, when the LEA operated in a virtual setting for six and a half months of the school year, the child was sometimes placed in a breakout room for accelerated instruction. With the teacher's implementation of the IMSE reading intervention program, she observed that the child was able to focus more due to the sensory component of the program. 7th Grade Reading Teacher also observed that while the virtual setting was challenging and at times frustrating to the child, ■■■ was able to perform adequately. (Tr. Mar. 14 at 249, 279, 281-282).

7th Grade Reading Teacher met with her students one on one at least one time a week for 5 to 10 minutes. Child had less refusals when there was a one on one setting. ■■■ enjoyed the smaller setting. (Tr. Mar. 24 at 267).

7th Grade Reading Teacher assessed the child's reading in several ways. One tool she used was the Diagnostic Reading Assessment (DRA). The DRA assessment starts with a student reading a text aloud to assess ■■■ oral fluency composite score. This score provides a student's accuracy, expression, phrasing, and oral fluency rate. A student also answers prediction type questions. The next portion of the DRA involves a student reading the rest of the text silently and answering some comprehension questions. The child did not like doing the second part of the DRA and would start to refuse and need teacher prompting. (Tr. Mar. 14 at 264-66, 283-285).

On a reading assessment Data sheet involving nonsense words, 7th Grade Reading Teacher noted that as of January 2021, the child was able to decode with 80 % accuracy and encode two syllables at 90% accurately. This put ■■■ at a first grade level in these areas according to the assessment. (P 43; Tr. Mar. 14 at 252-255). However, ■■■ ability to read passages that were not nonsensical was at a 3rd grade level as shown by DRA testing. (Tr. Mar. 14 at 285-286).

Another way 7th Grade Reading Teacher assessed her students was by work they did on

class assignments. Usually 8 to 12 assignments were given a quarter. (Tr. Mar. 24 at 274-275).

Child's grade in her class and progress noted were based on several things, to include classwork and assessments.

66. Parents' Expert A (Expert A) watched videos of 7th Grade Reading Teacher instructing the child in reading. According to Expert A, the video instruction of 7th Grade Reading Teacher demonstrated that 7th Grade Reading Teacher was not properly implementing the IMSE program. (Tr. Mar. 14 at 223-226; P 85 and P 86).

7th Grade Reading Teacher disputes the claim. According to 7th Grade Reading Teacher, the lesson as portrayed on the video was proper. First there was a three part drill designed to work on letter sound and identification. Visual cards were used. Then the visual cards were used to blend in real and nonsense words. 7th Grade Reading Teacher explained that the lesson was on a sight word – a word that one cannot use phonetic patterns to decode. 7th Grade Reading Teacher stated that the activity was an appropriate reading activity in November 2020, because all her students, including Child, needed practice on the sight word she selected. (Tr. Mar. 24 at 273-74).

67. The evidence is insufficient to show that 7th Grade Reading Teacher improperly implemented the IMSE.

Recovery Services

68. Recovery services are services offered or provided by the LEA to students whose learning may have been adversely impacted by the COVID-19 school closure and resulting distance learning. (Tr. Mar. 22 at 55-56).

69. Parents' requested reading data and indicated a desire for the child to also be provided recovery services in reading. (S58 at 28). The LEA provided the data. The LEA did not provide recovery services in reading for several reasons. For one, the child was receiving reading instruction in ■■■ English 7 class and an elective class, Literacy 7. In addition, the school members of the IEP team noted that the child was already receiving afterschool math recovery and ■■■ behavior problems were more prevalent in the afternoon when ■■■ was tired. The school members decided the child would be overwhelmed if on top of ■■■ math recovery services, reading recovery services were added. (Tr. Mar. 9 at and Tr. Mar. 22 at 51-52, 58).

70. The LEA provided Parents with a prior written notice indicating that reading recovery services were not offered to the child. (S61 at 53).

Child's progress in math increased upon the implementation of recovery services and the child's return to in person learning. (S 61 at 27 and S 63 at 26; P 51 at 17-19).

71. A reading assessment conducted on April 8, 2021, indicated the child was reading fiction on a "end of 5th grade level." (P 48 at 123; S63 at 27).

D. SCHOOL YEAR 2021-2022

72. The IEP team held three meetings to plan for the child's eight grade (8th grade) school year. Those meetings were held on April 15, 2021, June 4, 2021, and June 17, 2021. (Tr. Mar. 22 at 74: S63 at 1-2; P 48 at 97-98). During those IEP meetings all areas of the child's needs were considered. The IEP goals were formed by the IEP team. (Tr. Mar. 22 at 74-75).

73. By her testimony, AP of CSS Middle School opined that the child's goals on the IEP dated June 17, 2021, were appropriate. (Tr. Mar. 22 at 75).

74. Regarding services for the child during [REDACTED] 8th grade year, the team proposed 30 hours of special education services; 29.5 hours a week in the educational setting and 2 hours a month of speech language services in the special education setting. Hence, as proposed on the IEP dated June 17, 2021, the child would be in a special education setting full time. (Tr. Mar. 22 at 77; S 63 at 38).

FBA/BIP for 8th grade year

75. The IEP dated June 17, 2021, also provided a Behavioral Intervention Plan. (S63 at 41-42; P48 at 137-138). This BIP was designed from data collected during a FBA conducted in spring 2021. The targeted behavior during the FBA was refusals to comply with a direction or command. The commands or directions were typically involving a classroom or academic expectation. (Tr. Mar. 22 at 78-79).

The BIP identifies the child as needing to build a social/emotional skill (communicating wants/needs) and a behavioral skill (attempting to initiate tasks). The measurable goal on the BIP reads as follows:

When asked to comply with a non-preferred task demand/prompt in [REDACTED] s academic classes, [Child] will ask or signal for a break to escape or delay initiation of demand or expectation.

Four environmental modifications or proactive strategies by the LEA were identified as set forth here: (i) modify amount or type of activity, (ii) provide choice of task or preferred activity, (iii) offer student regularly scheduled breaks, or (iv) incentive plan with the child earning tallies (1, 2, or 3 depending on the level of demand) for complying with tasks. 5 tallies will equate to 1 minute of preferred time which the child will choose from. The BIP notes that the frequency of the behavior will be counted daily in the academic classes.

The BIP indicates that the child's progress would be reviewed on October 4, 2021. The Measurable Criteria noted on the BIP includes the following:

Identify target increase in replacement behavior (i.e., quantify the increase)
[Child] will ask or signal for a break 4 times a day
Identify target decrease in problem behavior (i.e., quantify the decrease)
[Child] will decrease refusals to 14 per day (decrease of 25% from baseline)

(Tr. Mar. 22 at 79; S63 at 41-42; P 48 at 137-138).

ESY

76. The IEP team also proposed Extended School Year for the child, either virtually or in-person. The school members of the IEP team preference was for the child to attend ESY in person. Transportation would be provided if the child attended in person. The purpose of offering ESY was to assist the child in maintaining progress and alleviate regression. Because ESY was for an abbreviated period (four weeks), the service was not designed to address all the child's goals. Accordingly, ESY focused on only four of the child's goals: one reading goal, one writing goal, one math goal, and one behavior goal. (Tr. Mar. 22 at 80-81; S63 at 44; P48 at 140).

Public Day School

77. During the June 17, 2021, IEP meeting, the IEP team continued discussing the child's placement for █████ 8th grade year. This included considering the LRE. After significant discussions about placement, the school members of the team proposed placement at Public Day School. (Tr. Mar. 22 at 75-76 and 82-83; S63 at 37 and 43; P 48 at 133 and 139).

78. The Hearing Officer finds that this proposal was made after much consideration about the child's needs and the intensive services offered at the Public Day School.

79. The Public Day School is more restrictive than the CSS. Only special education students, in grades kindergarten to 8th grade attend Public Day School. The students attending Public Day School have various disabilities. The school itself is housed in a small standalone building. In addition to the school building being small, class sizes are also. Before the pandemic, the number of students in a typical class ranged from 7 to 10 students. Since students have returned from distance learning, the class size during the 2021-22 school year is even smaller, averaging between two to five students per class. Notwithstanding, PE classes may have up to nine students in them. Moreover, the student population at Public Day School is small. Currently, that number is 45 students. Pre-pandemic student enrollment was about 75 to 80 students.

Moreover, staff at Public Day School is designed for the restrictive "special education only" school setting. All teachers at Public Day school are certified special education teachers, except those providing instruction in elective courses - art and music. There is a teacher and an instructional assistant in each class. In addition to the teacher and instructional assistant, Public Day School offers the students an expansive clinical staff. The clinical staff consists of two social workers, two school psychologist and a school counselor. In addition, staff at Public Day school includes four coaching resource teachers. These teachers are also certified in special education and have expertise in behavior management. The coaching resource teachers are assigned to support students throughout the building.

(Tr. Mar. 24 at 21-31).

80. Public Day School provides several behavioral supports for the students. One is "team

support.” This support is effectuated by associating every teacher with a team. This team consist of a social worker, psychologist, and coaching resource teacher. This team supports both the classroom teacher and the students in the teacher’s class. Particularly, the teacher meets with and works with the team for the purpose of noting students’ progress and providing supports to the students in the teacher’s class. In addition, the team is in the teacher’s class daily during instruction providing assistance to students and the teacher. The type of support delivered to a student can include, but is not limited to, helping the student regarding social and/or emotional development and assisting the student(s) in addressing an area of behavior need that has been identified in the student’s IEP.

Another behavior support provided by Public Day School is a “formal positive behavior and intervention system.” Featured in this support is the point system. Particularly, a students can earn points for displaying positive behavior during each class period. A total of nine points can be earned by a student per period in the areas of safety, engagement, and citizenship. Students receive feedback on their behavior throughout the school day. Students can redeem earned points for items in the school’s online store.

In addition a student can earn “Public Day School” points. These points can be earned for any reason related to a positive behavior. The number of points earned can be in any quantity. A student can redeem these points for a reward selected by the student, to include a social event.

Moreover, for pupils whose behavior may require more than the point system to facilitate positive behavior adaptation, Public Day School has implemented a “check-in” and “check-out” system. With this system, the student checks in with support staff at the beginning of the school day. The student’s goals for the day and strategies are reviewed. At the end of the day, the student “checks-out” with support staff reviewing the progress ■■■ made during the day and planning for the next school day.

In addition, to the extent a student’s behavior necessitates and provides a BIP in ■■■ IEP, Public Day School implements the BIP.

Additional behavior supports and interventions have been implemented at Public Day School. For example, staff accompany students throughout the day when they are in movement. Sections within the building are locked during the school day; that is, the cafeteria is locked, the gymnasium, and so forth. Further students enter and use the bathroom one at a time. These measures have been implemented to prevent students from meandering to a part of the building they are not supposed to enter.

(Tr. Mar. 24 at 32-40).

81. In addition to providing behavioral supports, Public Day School offers academic supports. Intensive interventions in math, English, and reading are offered, including research based reading programs. During the current 2021-22 school year, intensive math interventions being provided include the TransMath and VMath programs. Intensive interventions being offered in reading include the Corrective Reading, Language Live, and Lexia programs. (Tr. Mar. 24 at 45-49).

Public Day School is not limited to offering the programs mentioned. This is the case because as the needs of a student may dictate, Public Day School has the ability to provide additional programs as interventions. For example, if a student enrolls at Public Day School and is deemed to require the Wilson Reading Program (WRP) as a reading intervention, Public Day School would have trained staff implement the program. If staff is not already trained on how to implement the program, the Office of Special Education and Instruction would timely provide the training required so that the program could be appropriately employed.¹² (Tr. Mar. 24 at 117-119. 184).

82. In addition to the intervention programs that are offered or able to be offered at Public Day School, the Public Day School implemented an enrichment program during the 2021-22 school year. This enrichment program has been named the Innovative and Improvement Plan. Public Day School launched this plan using funds that were provided to the school district to design a plan to address any loss of learning by students as a result of the pandemic. In preparing the plan, the Public Day School (i) reviewed the mathematical, literacy, and wellness progress of their middle school students and (ii) identified those with significant deficits. Then Public Day School developed an after-school program with the funds for the students to participate in weekly. The students attend the after school program multiple times a week to improve or reinforce skills. AP of Public Day School has observed that this afterschool program has helped the students accelerate their learning during the regular school day. (Tr. Mar. 24 at 51-52).

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83. ESY, offered on site at Public Day School, is another academic support at Public Day School. Child's June 17, 2021, IEP provided for ESY from 28, 2021, to July 23, 2021. One advantage to the child (had ■■■ attended ESY) would have been the opportunity for Public Day School staff and the child to become familiar with one another just prior to the start of the 2021-22 school year. By becoming acquainted during ESY, staff could have determined (i) if the child required a reading intervention such as the WRP and (ii) if training of staff was required to implement the intervention. If so, that training could have been obtained prior to school starting for the 2021-22 school year. Accordingly, there would have been no delay in implementing the reading intervention. (Tr. Mar. 24 at 184).

84. AP of Public Day School, Educational Specialist, AP of CSS, MAS representative, 7th Grade Case Manager participated in the April 15, 2021, June 4, 2021, and June 17, 2021 IEP meetings. Those meetings were devoted to planning for the child's 8th grade year. 7th Grade Case Manager and special education teacher attended at least two of those meetings. All of these educators opined that the IEP dated June 17, 2021 is an appropriate IEP.

85. The IEP dated November 4, 2021, did add counseling to the child's related services. Otherwise it remained the same as the IEP dated June 17, 2021. The educators also opined that the IEP dated November 2021 IEP is appropriate.

The school members of the IEP team determined placement is appropriate at Public Day School. Further, placement remains appropriate even though the child would be required to transition from Public Day School to a high school at the end of 8th grade year. (Tr. Mar. 24 at 88-

¹² The Office of Special Education and Instruction is responsible for monitoring the implementation of the intervention programs, training staff to use them, and making sure they are appropriately implemented. (Tr. Mar. 24 at 49).

90 and 347).

IEP dated November 4, 2021

86. The IEP team held IEP meetings on September 10, 2021, and November 4, 2021. The resulting IEP is the one dated November 4, 2021. A representative from the Private Day School attended the two IEP meetings and shared results of placement tests the Private Day School had administered to the child in language, reading, and math. Data from Private Day School regarding the child's behavior was also shared by the representative. (Tr. Mar. 9 at 344 and 348; S 71 through 73; S 74 at 31).

87. In addition, discussions occurred about the child's placement. The LEA members of the IEP team continued to believe Public Day School was an appropriate placement for the child. (Tr. Mar. 9 at 347; at S 74 at 49).

The team also discussed services for the child. Parents believed the child required one-on-one assistance. The LEA members of the team did not agree. (Tr. Mar. 9 at 346).

88. Regarding related services, Parents' Expert C, also a Private Day School representative, attended the November 4, 2021 IEP meeting. She shared her observations of the child at Private Day School during the meeting. This included Expert C describing the child as having low self-esteem and difficulty making friends and recommending counseling. The LEA members of the IEP team agreed. The IEP team added two hours of counseling per month. (S 74 at 44; P 59 at 44; Tr. Mar. 11 at 132; Tr. Mar. 22. At 88).

89. AP of CSS Middle School attended the November 4, 2021 IEP meeting. She continues to believe the IEP proposed by the LEA is appropriate and that Public Day School is the appropriate placement for the child. (Tr. Mar. 22 at 89-90).

Private Day School

90. During the IEP meeting held on June 17, 2021, parents informed the school members that they were not in agreement with the IEP and notified the school members of the IEP team that they were unilaterally placing the child at Private Day School and seeking reimbursement. (S63 at 25; P48 at 121).

91. Private Day School's normal enrollment is 72 students. Students enrolled are in grades 3 through 12, as well as students up to age 22. The school serves students with various disabilities, to include autism, learning disabilities, multiple disabilities. The students may be from various jurisdictions including the LEA's district. At Private Day School, students are grouped according to their social functioning as well as their academic level of functioning. Private Day School serves students who have had behavior problems in the public school or who have failed in public schools. Seclusion rooms are utilized at Private Day School as a way to protect staff and other students from students whose behaviors are so severe that they may harm themselves or others.

(Tr. Mar. 11 at 106-108).

92. Students at Private Day School require the restrictive environment because their behaviors are characterized as being aggressive, volatile, destructive, and dangerous to the students exhibiting the behaviors as well others. Child’s behaviors do not rise to the level of those behaviors typically displayed by students at the Private Day School. (Tr. Mar. 22 at 287-288).

93. Private Day School reports that it has implemented the LEA’s IEP dated June 17, 2021.

94. Child receives related services at the Private Day School. Specifically, ■■■ receives 30 minutes of speech-language services a week. A report regarding those services dated January 24, 2022, states that the child has increased participation, engagement, and work completion in speech-language services during the second quarter of the school year at the Private Day School. (P 67). In addition, a note dated January 31, 2022, reports that the child has made some progress toward ■■■ speech-language communication goal. This progress report indicates that it was authored by the child’s speech language pathologist. (P 69).

In addition to the child receiving speech therapy as a related service at the Private Day School, the child also receives counseling as a related service. A written report of the child’s counseling dated January 31, 2022, notes that the child is benefiting from counseling to address ■■■ overall social emotional needs and areas specific to emotional regulation, adaptive coping skills and social skill learning. (P 68).

95. Reports from Private Day School indicate that the child is overall reading at a 4th grade level. However, ■■■ progress report dated February 2022 indicates in a commentary that the child can read an 8th grade passage with an average fluency rate of at least 125 words per minute with 80% accuracy in 2 out of 4 opportunities. (P 72 at 1).

96. Child refuses to use the Wilson Reading Program workbooks at Private Day School. (Tr. Mar. 11 at 113).

97. Private Day School progress reports show the child making mostly “some progress toward each goal or making sufficient progress toward ■■■ goals.” (P71).

98. On or about November 9, 2021, the child was involved in a serious incident at Private Day School. (P 66).

99. Child’s report card from Private Day School shows ■■■ has received the following first and second quarter grades:

Course	1 st Quarter Grade	2 nd Quarter Grade
English 9	C+	B+
Algebra 1	C	B-
Biology	B+	B-
US/VA History	B-	C+
Art 1	A-	B-
Health/PE	A	B

(P71).

100. Results of the Woodcock Johnson Reading Mastery Test (WRMT) administered on or about March 1, 2022, by staff at Private Day showed the child's scoring had increased as compared to the KTEA taken in 2021. (P 71).

Other Facts

101. AP of CSS Middle School observed the child in a history class at the Private Day School. The child required multiple prompts from the teacher. There was a teacher and instructional assistant in the classroom. (Tr. Mar. 22 at 86-87).

102. By her testimony, AP of CSS does not believe the Private Day School is an appropriate placement for the child. Further, she opined that the child does not require a one-on-one assistant; that is, an adult to sit with █████ throughout the day. According to AP of CSS a one-on-one assistant would make the child dependent rather than independent. AP of CSS Middle School is familiar with the Private Day School and has transitioned students to Private Day School. AP of CSS describes the behaviors of students at Private Day School as much more severe than Child's behaviors. AP of CSS stated that the behaviors of students at Private Day School often require hours to calm them down. Further, their behaviors can involve being physical to the point that they harm themselves and/or others. (Tr. Mar. 22 at 89-92).

103. 6th Grade Case Manager/special education teacher implemented a teacher created writing program with the child. To supplement this program, she used materials from the school district and from the Step-Up to writing program. (Tr. Mar. 14 at 152).

104. Fall of 2019, 6th Grade Case Manager collected behavior data to conduct a FBA. After collecting this data and assessing the child's behavior, a determination was made that the child did not require a BIP at that time. (S37 at 19). Then in January/February, prior to the close of schools in March of 2020, the child's inappropriate behaviors (refusals, work avoidance, distractibility, and the like) increased. The IEP team discussed conducting a FBA and implementing a BIP as needed. On or about March 9, 2020, 6th Grade Case Manager started collecting data for this purpose, but then due to the Governor's order to close schools and the closure of them, the FBA was not completed. This is the case because reliable data could not be collected concerning the child's behavior because █████ could not be observed in-person to collect the data. (S 42 at 22 and S 47 at 30-31; P23, P29, and P 74). Hence, the FBA could not be completed during the 2019-20 school year.

105. Parents' Expert A qualified as an expert in dyslexia, reading intervention, special education, and reading specialist. (Tr. Mar. 10 at 165).

After reviewing educational testing of the child from 2018, 2019, and 2021, that assessed the child's reading ability, she opined that the child made only slow progress in reading from 2018 to August 2021. Further she opined that reading intervention programs used during that time were

not intensive enough. She recommended the Wilson Reading Program. (Tr. Mar. 10 at 188-189)

Expert A also reviewed the WRMT, 3rd Edition that was administered to the child by Private Day School on March 1, 2022. Expert A concluded that the reading test results show that the child has made excellent progress in reading since August 2021. (Tr. Mar. 10 at 211).

Expert A has never taught the child and has not attended an IEP meeting involving the child. She has reviewed some records pertaining to the child and a video of a virtual reading class taught by 7th Grade Reading Teacher. She is a teacher in another school district and teaches reading; however, she does not use the Wilson Reading Program.

106. 7th Grade Reading Teacher qualified as an expert in special education. She taught the child reading during ■■■ 7th grade year. She opined that the goals on ■■■ 8th grade IEP are appropriate. Moreover, she recommended that the child use the IMSE reading intervention program in the 8th grade.

107. Parents' Expert P qualified as an expert in special education, administration, ADHD, and dyslexia. (Tr. Mar. 11 at 34).

He observed the child on one occasion at Private Day School. He has not taught the child or administered any tests to the child. He attended IEP meetings pertaining to the child on March 12, 2021, April 15, 2021, June 4 and 17, 2021, as an advocate for the child/parents. (Tr. Mar. 11 at 63-69).

Expert P opined that the child was not making progress in writing. He opined that the Private Day School was the LRE. (Tr. Mar. 11 at 58).

108. Parents' Expert C qualified as an expert in the areas of reading specialist and intervention, special education, and dyslexia. (Tr. Mar. 11 at 105).

Parents' Expert C holds a Wilson 1 dyslexia practitioner certification. She is also qualified to provide instruction in the Brian Spring Orton-Gillingham program. (Tr. Mar. 11 at 97).

109. The Educational Evaluation dated August 2, 2021, states the results should be viewed with caution due to the child displaying significant avoidance and refusal type behaviors during the testing. Assessment scores from the evaluation reflect the child performing in the below average range on math concepts and applications, math computation, nonsense word decoding, associational fluency, spelling, reading vocabulary, listening comprehension, word recognition fluency and decoding fluency. Child's scores in (i) phonological processing and (ii) letter and word recognition were in the low range. (P 54 at 2).

110. The Psychological Evaluation administered on August 5, 2021, states "that the results of the evaluation are not considered to be a valid estimate of the child's overall ability at this time due to ■■■ refusal to complete the assessment and the results will not be listed." (P 55 at 4).

111. On a Word Identification and Spelling Test administered in September 2021, the child

scored in the 5th percentile in word identification. In spelling, sound symbol and fundamental literacy, the child scored at the 1st percentile. The examiner observed the child initially refusing the test. During testing, the child was observed being distracted and frustrated. ■ had to be redirected and prompted during the test. (P62).

IV. LEGAL ANALYSIS

In a special education administrative due process proceeding initiated by the parents, the burden of proof is on the parents to establish by a preponderance of the evidence that the LEA has failed to provide the student with FAPE concerning the issues they have raised. Schaffer, ex rel. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

The Parents must prove the inappropriateness of each year's IEP. *M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315 (4th Cir. 2009) (stating that the appropriateness of a particular placement must be considered on a year-by-year basis); see also *Devine v. Indian River Cnty. Sch. Bd.*, 249 F.3d 1289, 1292 (11th Cir. 2001) citing *Bales v. Clarke*, 523 F. Supp. 1366, 1370 (E.D.Va. 1981)("[the] party attacking the IEP bears the burden of showing that the IEP is inappropriate.").

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the Supreme Court reaffirmed and further explained the fundamental standard of appropriateness under the IDEA, first set out in its decision 40 years ago in *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

Specifically, the Court reaffirmed that an appropriate education for a student with a disability is one that is, "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 999. The Court further explained that an IEP typically should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 999.

Concerning a child who is not fully integrated in the regular classroom and not able to achieve on grade level, the child's educational program should be "appropriately ambitious in light of his circumstances". *Id.* at 1000. At the same time, *Andrew F.* reaffirms a related core notion in *Rowley*, i.e., that an IEP must be "reasonable", but not "ideal." *Id.* (citing *Rowley*, 458 U.S. at 206-07).

A. SCHOOL YEAR 2019-2020

The issues before the Hearing Officer for school year 2019-20 are as set forth below:

1. Did the LEA fail to provide sufficient services and special education so that the student could make progress toward meeting ■ IEP goals and objectives (specifically goals/objectives in the "areas of need" and "ESY" sections of the IEP) and the general education curriculum?
2. Did the LEA fail to design a Temporary Learning Plan to

address the student's needs, but rather for administrative convenient?

3. Did the LEA deny the student a FAPE?

In the case at bar, Parents argue that the 2019-20 IEP is deficient because the child failed to make progress in math, writing, reading, and █ behavior. Moreover, the parents contend the Temporary Learning Plan (TLP) implemented during the school closure failed to address the child's needs. Accordingly, the parents contend that the LEA denied the child a FAPE during the 2019-20 school year. After a careful examination of the evidence, the Hearing Officer finds the parents have failed to meet their burden.

1. Did the LEA fail to provide sufficient services and special education so that the child could make progress toward meeting █ IEP goals and objectives (specifically goals/objectives in the "areas of need" and "ESY" sections of the IEP) and the general education curriculum?

The child's IEP progress reports demonstrate progress. The child's IEP progress reports (reports) show advancement by the child. According to the explanation provided on those reports regarding what the progress codes mean, a "2" represents the child has not yet demonstrated progress toward achieving the goal;" a "3" means the child has demonstrated some progress toward achieving the goal; and a "4" denotes the child is making sufficient progress toward achieving the goal within the duration of this IEP. The evidence shows that during the child's 6th grade year, the child's IEP contained 13 goals: two cognitive-attention goals, three reading goals, four writing goals, two math goals, one social skills goal, and one communication goal. The child's final IEP progress report on those 13 goals is dated April 3, 2020.¹³

In the area of reading, the child improved. The child received a final progress code of "4" on all █ reading goals. As an example of the child's progress, the evidence shows the child entered 5th grade reading on a beginning third grade level. The April 3, 2020, progress report indicates that by February 2020, the BAS showed the child was reading at a mid-third grade level. In addition, notes reflect the child was reading at a faster pace. Particularly the progress report notes reflect that as of June 2019, the BAS showed the child was reading 62 words per minute with 96% accuracy. However, by April 3, 2020, on informal testing the child demonstrated reading 94 words per minute with 99% accuracy.

In writing, the child also improved. Child received a final progress code of "3" on three of the writing goals and a "4" on one of the writing goals. For example, comments regarding █ progress on the report show the child developing the ability to edit █ writing by utilizing electronic tools. In addition, the child made advancement toward independently organizing █ thoughts and ideas using prewriting strategies.

In math, the child showed advancement toward █ goal on solving multi-step practical problems involving addition, subtraction, multiplication, and division. On this goal, the progress

¹³ No end of the year progress report was completed because the schools in the Commonwealth of Virginia were closed as of March 13, 2020 due to the global Covid-19 pandemic.

report indicates that the child was making sufficient progress toward achieving the goal within the duration of the IEP. A comment about ■■■ progress noted that ■■■ was adequately advancing. On the child's second math goal, as of April 2, 2020, according to the report, the child had not yet demonstrated progress toward achieving the goal.

Moreover, the child had demonstrated some progress toward achieving ■■■ social skills and communication goals as indicated by the "3" rating reported in each of those areas.

On the progress report, the child received a final progress code of "3" on one cognitive-attention goal and a "2" on the other.

In sum, by the close of school during the child's 6th grade year, ■■■ was making sufficient progress toward achieving five of ■■■ IEP goals and demonstrating some progress towards achieving another six of ■■■ IEP goals. Out of the 13 goals, there were only two where the child had not yet shown progress toward achieving them. The Hearing Officer finds that an end of year progress report demonstrating improvement in most academic areas can meet the FAPE standard set forth in *Andrew F. See M.L. V. Smith*, 72 IDELR 218 (Md. 2018). (noting meaningful progress shown by the child making progress toward ■■■ IEP goals even though the progress was not even).

The Hearing Officer finds the child's end of year progress report shows advancement toward reaching ■■■ goals during the 2019-2020 school year.

Moreover, the child's 6th grade report card demonstrates progress. The evidence indicates that the LEA issued the child's final report card for ■■■ 6th grade year about June 12, 2020. The report card identifies a child's achievement level per subject by using a number system from "1" through "4." The "4" equates to consistently demonstrating concepts and skills of standard, the "3" to usually demonstrating concepts and skills of standard, the "2" to sometimes demonstrating concepts and skills of standard taught, and the "1" to seldom demonstrating concepts and skills of standard taught. The child's report card notes that in history and social studies, science, math, and health, the child received "3s" as the final level of achievement in all areas assessed per subject. In art, the child also received all "3s." In language arts, ■■■ received five "3"s and three "2"s in areas assessed.

In PE, Child's assessment level was "4." In general music, ■■■ received some "4s" and some "3s" in areas assessed.

In life, work, and citizen skills and effort, the child was assessed at a "2" in all areas. The child received no level "1" ratings on ■■■ skills and/or effort levels.

A comparison of the child's 6th grade final report card and ■■■ 5th grade final report card substantiates the child made progress in the 6th grade. In reviewing the child's final report card for the two school years, the Hearing Officer notes that on the child's final 5th grade report card, ■■■ received mostly "2s" and even several "1s." By contrast, on ■■■ 6th grade final report card, the child received mostly "3s" and "4s."

Accordingly, the Hearing Officer finds that in addition to the progress reports showing advancement, the child's 6th grade end of year report card demonstrates the same.

In making her finding, the Hearing Officer has considered the parents' contentions that the progress reports and grades either fail to show improvement or are inflated. For instance, parents aver that the child was reading at a Level N at the end of █████ 5th grade year and was still at that level as per the progress report dated April 3, 2020. Regarding this claim, the child's "end of 5th grade IEP" notes that when the child was administered the BAS in May [2019], the child read at a Fountas and Pinnell Level N (beginning of 3rd grade) with 96% accuracy. (P 20 at 45). The child's Progress Report dated April 3, 2020, states that "on the BAS administered February 2020, [the child] is at a Level N (which is a mid-3rd grade level) with 97% accuracy." (P31 at 3). Accordingly, the Hearing Officer does not find the reading level designated by the BAS in May 2019 is the same as the reading level designated by BAS testing in February 2020. One notes a beginning 3rd grade level; the other a mid-3rd grade level. Moreover, the mid-3rd grade level was not at the end of the child's 6th grade year but only a little over half way through the school year. This is the case because the BAS (per the comment) was administered in February 2020, not April, 2020.

Other evidence of record refutes the parents' accusations. The child's 6th grade case manager/special education teacher was responsible for noting the child's progress regarding █████ goals in reading, writing, and cognitive-attention. These goals covered eight of the child's IEP goals. By 6th Grade Case Manager's testimony, to determine the child's achievement, she administered assessments and gave daily assignments related to the child's IEP goals. Child's progress codes issued were based on █████ performances, not fabrication or embellishment.

In addition, 6th Grade Case Manager credibly testified that she assessed the child's reading, to include █████ phonemic awareness, in several ways. The evidence shows that 6th Grade Case Manager has taught special education for 32 years. She received training in September 2019, in implementing the Corrective Reading Program and administering the mastery tests. Means she employed to note and/or assess the child's progress included (i) utilization of the Corrective Reading Program and using activities and lessons that accompanied the corrective reading decoding program, (ii) consideration of work the child did in the corrective reading program, (iii) using goal sheets wherein the child had to read words with different letter patterns and relating those goal sheets to the child's IEP goals, (iv) administering mastery tests that accompanied lessons within the Corrective Reading Program to determine the child's mastery of concepts, (v) utilizing a spelling phonetic book and relating it to the corrective reading program, and (vi) considering assessments. Assessments considered included those administered by the lead special education teacher, BAS and Fountas & Pinnell benchmark assessments, KTEA assessment on phonemic awareness, and Core Phonics surveys. Based on all these methods used, 6th Grade Case Manager determined the child's progress.

Regarding the mastery tests, the Hearing Officer is cognizant of evidence showing that initially at least two mastery tests had not been given to the child or scored appropriately. However, 6th Grade Case Manager testified that she administered those tests following the IEP meeting and the child passed them. 6th Grade Curriculum Resource Teacher corroborated the case manager's testimony.

The Hearing Officer found the testimonies of 6th Grade Case Manager and 6th Grade CRT credible.

The evidence is simply insufficient to show the progress reported on the child's progress reports and report card has been inflated or fabricated.

Furthermore, the parents claim the child was not placed with [REDACTED] emotional peers in 6th grade. The evidence shows that the child was a 6th grader. There were three other students in [REDACTED] self-contained setting: a fifth grader, a fourth grader, and a second grader. Most of the time the second grader was not in the self-contained because [REDACTED] attended general education classes for [REDACTED] core classes. Services provided for in the child's IEP for the 2019-20 school year included the child spending 10.5 hours a week with [REDACTED] nondisabled peers for lunch, recess, and specials. Under the facts, the Hearing Officer cannot find the child's self-contained setting was inappropriate because the child had no opportunity to be with [REDACTED] emotional peers.

Moreover, for reasons already stated, the parents have failed to show the child did not make progress in math and writing.

Regarding the writing, in addition to the progress report and report card showing progress, notes from the IEP meeting held on April 17, 2020 state that the child made progress in writing. However, it was not as much progress as the IEP team desired. The team proposed a writing program but did not identify any specific program to be implemented. The evidence shows 6th Grade Case Manager implemented a teacher created program. To supplement this program, she used various materials of the school district such as checklists on the 3rd grade level. Further, the child utilized a computer program such as Co-writer to assist [REDACTED] in editing [REDACTED] writing.

Accordingly, the Hearing Officer finds as proposed by the IEP, a writing program was implemented and the child made progress in writing.

Moreover, the parents argue that the child's behavior was regressing and [REDACTED] required a FBA and BIP. The evidence shows that in the fall of 2019, 6th Grade Case Manager collected behavior data and the child's behavior was assessed. The IEP team then determined that a BIP was unnecessary. Then in January/February of 2020, prior to school closer, the child's inappropriate behaviors started to increase. The IEP team discussed conducting a FBA and designing a BIP. And on March 9, 2020, 6th Grade Case Manager started collecting behavioral data, but then schools were forced to be closed due to the pandemic. Accordingly, no reliable data; that is, in-person data, could be collected on the child's behaviors. The FBA could not be completed.

Regarding ESY services, the evidence is insufficient to show that the virtual ESY offered the child during the school closure denied the child FAPE. Because of the school closure, the IEP team offered the child ESY in a virtual setting. Parents desired an in-person setting, but they accepted virtual ESY under the circumstances. Due to the short period for ESY, only three of the child's goals were addressed in ESY: a reading/English goal, one math goal, and one writing goal. Child's progress report on goals addressed during ESY notes [REDACTED] met the criteria for each goal

addressed.

The evidence is insufficient to show services offered for ESY were deficient.

2. Did the LEA fail to design a Temporary Learning Plan to address the student's needs, but rather for administrative convenient?

By order of the Governor of the Commonwealth of Virginia, all schools in the state were ordered closed as of March 13, 2020, to slow the spread of the coronavirus. The schools remained closed for the remainder of the school year. The LEA offered all students a TLP. Under the TLP, assignments were voluntary and students were not graded on the work. The TLP was not intended to replace the child's IEP. Due to the TLP's voluntary nature, there was no denial of FAPE because the LEA did not implement the child's IEP. *See O.J. v. Woodward-Granger Cmty. Sch. Dist.*, No. 19-19 (Iowa Dep't of Educ., June 8, 2020).

3. Did the LEA deny the student a FAPE?

Considering the above, the Hearing Officer finds the LEA did not deny the child a FAPE during school year 2019-20.

Moreover, the hearing officer finds that the decision the school members made regarding the IEP and placement was not made for administrative convenience.

The LEA offered an appropriate IEP for the 2019-20 school year.

B. SCHOOL YEAR 2020-21

The issues before the Hearing Officer for school year 2020-21 are set forth below:

1. Did the LEA fail to provide sufficient services and special education so that the student could make progress toward meeting ■■■ IEP goals and objectives (specifically goals/objectives in the "area of need" and "ESY" sections of the IEP) and the general education curriculum?
2. During the LEA's closure due to the Pandemic and upon the LEA's reopening during the school year, did the LEA fail to design an educational programing for the student based on ■■■ unique circumstances, but rather on administrative convenience?
3. Did the LEA fail to offer sufficient recovery services to address the student's loss of instruction during the COVID-19 school closure?
4. Did the LEA deny the student a FAPE?

1. Did the LEA fail to provide sufficient services and special education so that the child could make progress toward meeting █ IEP goals and objectives (specifically goals/objectives in the “area of need” and “ESY” sections of the IEP) and the general education curriculum?

The Hearing Officer finds the child made progress during █ 2020-21 school year with the supports and services in place. This is demonstrated in several ways, to include teacher observations, classwork, assessments, progress reports, and report cards.

Math

Math progress was shown in several ways.

7th Grade Math Teacher’s observations indicate Child made some progress. The math teacher gave 10-12 assignments per quarter to be graded. He observed the child was excited about the class and performed well on quizzes and classwork. The child earned an “A” in the class.

Moreover, teacher input as noted in several IEPs reflects the child’s growth in math. To this point, comments regarding the January 4, 2021, IEP meeting mention that the child received 92% on a unit quiz and 100% on a module test. While IEP meeting notes from a January 8, 2021, IEP meeting indicate that the child had shown regression toward one math goal pertaining to fractions, the IEP team addressed the regression by providing the child with recovery services for nine weeks and supplementing those with an additional 12 weeks. As referenced in a March 12, 2021 IEP, the impact of those services and a change in the child’s classroom structure proved positive. The child progressed faster in math lessons. This was the case even though the child continued to engage in some “work avoidance” behaviors. Furthermore, the June 4, 2021, IEP indicates that the child continued to improve in math. As an example, it was reported that the child scored 100% on a recent assessment involving adding, subtraction, multiplication and division of fractions. Teacher input also shows that by June 4, 2021, the child was able to identify some geometric angles.

In addition, quarterly progress reports support the child’s development in math class. Particularly, the child’s IEP contained three math goals. On math goals 1 and 2, for the first two quarters, the child was noted to be demonstrating progress toward achieving the goal(s). For the third and fourth quarters, the child had advanced in the class to the point that progress reports noted █ was making sufficient progress toward achieving the goal within the duration of the IEP.

The 2020-21 school year started with virtual learning due to the COVID-19 pandemic health crisis. In the virtual setting for child’s math class, the classroom was set up with the students and teacher appearing in synchrony on the video screen. There were four students in the class. Breakout sessions were also used where a student could be taken out of the main virtual classroom for a one on one session in a virtual breakout room with the teacher or counseling resource teacher. The child did receive some one on one assistance. Methods employed to address the child’s avoidance behavior during distance learning included redirection, breaking a problem into smaller steps, providing incentives for the child to continue to work, having the child verbally provide an answer to a problem while the teacher penned the child’s answer, and providing prompts on the

screen.

Once the child returned to ■■■ math class for in-person instruction, math instruction was delivered to the child in a self-contained class with three other students. All these students were at about the same skill level and they were working on taking the SOLs. Also, a teacher and instructional assistant were in the class. One on one assistance was provided at times. When deemed appropriate, a counseling resource teacher provided support in the class or outside of the classroom. Further in the class, positive reinforcement was practiced. Additionally, to promote appropriate behavior, the teacher implemented an award system where the child could use rewards earned to take a break or do a preferred activity.

Child's services also included the implementation of math intervention programs. They were TranMath for instruction and VMath for independent on-line learning. 7th Grade Math Teacher implemented the reading program to the extent possible.

The Hearing Officer notes that in ■■■ math class it was common for prompts to be given to the child to cause ■■■ to start or complete assignments. In addition, the child was not graded on a 7th grade level. This was because of the child's deficits in math. ■■■ was not functioning on grade level in math. Moreover, the child was not fully integrated into the general educational setting. Considering the overall unique circumstances of the child, the Hearing Officer finds the child made progress in math with the multiple services and accommodations provided by the LEA.

The Hearing Officer has considered the parents' complaints that the LEA declined to change that child's math class as requested by the parents. Parents believed the child was inappropriately grouped with three other students who were on the autism spectrum and that the behaviors of these students impeded the child's learning. Furthermore, the Hearing Officer has considered the complaint that the teacher did not implement the math programs with fidelity. The Hearing Officer has determined the evidence is insufficient to demonstrate inappropriate grouping. Regarding 7th Grade Math Teacher's deliverance of the TransMath/VMath program, the Hearing Officer finds he implemented the program as best ■■■ could when one considers the challenges of providing virtual instruction and teaching during the pandemic.

Writing

In writing, the child's progress report for the first three quarters indicates the child was making some progress towards achieving the IEP writing goals. In addition, ■■■ received a final grade of "B" in English for the 2020-21 school year. Moreover, the evidence shows that Child worked on writing assignments in history class, composing paragraphs and letters. In fact, part of ■■■ history grade was based on those writing assignments. Of note, the child received an "A" in history on ■■■ report card. History Teacher supplied samples of the child's writings to ■■■ case manager to assist the case manager in preparing the child's progress report on ■■■ writing goals. 7th Grade Case Manager concluded that the child could form proper sentences, use verbs correctly, and correctly used plurals; benchmark objectives in writing. Although the IEP team desired to see more growth in writing, the team observed that the child had progressed in writing.

The Hearing Officer finds, the child was making slow progress in writing; however, this

progress met the FAPE standard considering the child was not on grade level and not fully integrated in the general educational setting. *See K.D. Downingtown Area Sch. Dist.*, 904F3d 248, 72 IDELR 261 (3RD Cir. 2018). (indicating that slow progress does not mean FAPE not provided. Also, noting that because student not fully integrated, there is no reason to presume that the student should advance at the same pace as ■■■ grade-level peers).

Behavior

The IDEA requires that the IEP adequately address the child's behavior needs. *E.H. v. Bd. Of Educ. Of Shenendehowa Cent. Sch. Dist.*, 361 F. App.x 156, 53 IDELR 141 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 2064, 110 LRP 18650 (U.S. 2010). Child displayed avoidance and refusal behaviors that interfered with ■■■ accessing the curriculum and, at times, the learning of others. To address the child's behavior problems, the IEP Team initialed a FBA during the 2019-20 school year. However, schools closed by the Governor's order on or about March 13, 2020, of the 2019-20 school year. Distance learning followed for the 2020-21 school year until March 9, 2021. Hence, school closure and distance learning precluded completing the FBA which is the precursor to the BIP. Once the child returned to in-person learning in spring, 2021, the LEA collected data regarding the child's targeted behaviors, conducted the FBA, and designed a BIP to address the child's avoidance behaviors. The Hearing Officer finds it was reasonable for the LEA to resume the FBA after the child returned to in person learning, rather than attempt to collect unreliable data during the time the child was receiving instruction virtually.

The Hearing Officer also finds the LEA has addressed the child's behavior needs consistent with the state's applicable special education regulation found at 8 VAC § 20-81-160(A)(2). This is to say, the child's IEP team developed goals and services targeting the child's "avoidance behaviors" when presented with non-preferred tasks. Regarding the 2020-21 school year, at least two of the child's IEP goals addressed these behaviors: the cognitive/attention goal(s) and behavior goal. These goals were all dealt with in the self-contained special education setting. In addition, as just previously mentioned, within a relatively short time after the child returned to in person instruction, the team conducted a FBA during the 2020-21 school year and then provided for a BIP in the child's IEP dated June 17, 2021, IEP.

The Hearing Officer also notes that the LEA took other steps to address the child's behaviors, to include providing supports such as the Counseling Resource Teacher at the CSS, implementing a positive behavior rewards system and placing the child in a self-contained class with a low number of students. The evidence demonstrates that the child did incrementally improve ■■■ behavior. The IEP team recognized this progress, but the team desired more progress. Hence, the school members of the IEP team recommended a more restricted learning environment than the CSS. They recommended a public day school setting which the evidence shows offers more behavior supports than those provided at a comprehensive service site. Presumably with those additional supports, the public day school setting would offer an even greater opportunity for the child to improve ■■■ behavior.

The Hearing Officer finds the LEA has addressed the child's interfering behaviors. Further, the child's progress reports showed ■■■ was making sufficient progress toward the behavior goal.

Reading

Teacher observation demonstrate reading progress.

The child's 7th grade reading teacher provided reading instruction in the class to the child for about 80 minutes twice a week. From the teacher's observations, the child moved at a faster pace than ■■■ classmates. To this point, when the LEA operated in a virtual setting for six and a half months of the school year, the child was sometimes placed in a breakout room for accelerated instruction. With the teacher's implementation of the IMSE reading intervention program, she observed that the child was able to focus more due to the sensory component of the program. 7th Grade Reading Teacher also observed that while the virtual setting was challenging for the child, ■■■ was able to perform adequately.

In addition, the child's performance on assignments the teacher gave during class indicated the child was making progress in reading. The evidence shows that the teacher based the child's grades on assignments given in class. According to 7th Grade Reading Teacher, usually eight to twelve such assignments were given per quarter. The evidence shows that the child earned an "A" in the class based on ■■■ performance on those assignments.

Progress reports indicating the child's advancement toward ■■■ reading IEP goals demonstrated the child was making progress in reading. The child's IEP for the 2020-21 school year contained four reading goals.

Reading goal 1 of the 2020-21 IEP reads as follows:

[Child] will read a beginning of 4th grade level text with 98% accuracy with 100 words per minute on 3 of 4 assessments per quarter. (S 57)

At the end of the first quarter of child's 7th grade year, ■■■ could read 4th grade text with 70 words per minute. Child's progress report indicated that by the end of the second quarter, the child could read 5th grade text at 80 words per minute with 96% accuracy. By March 26, 2021, given a 4th grade text, the child read 108 correct words per minute with 98 % accuracy. By June 11, 2021, the progress report indicated that the child could read a 5th grade text at 80 words per minute with 98 % accuracy and 75 words per minute with 98 % accuracy.

For the first, second, third, and fourth marking periods, the child received progress codes 3, 4, 5, and 5 respectively pertaining to "reading goal 1." Accordingly, the child's progress on reading goal 1 ranged from demonstrating some progress towards achieving the goal (first quarter's progress) to the child meeting the criteria for the goal (third and fourth quarters' progress).

Reading goal 2 of the 2020-21 IEP reads as follows:

When given a list of 20 real and nonsense multisyllabic words (included closed, open, r-controlled, vowel teams, and with

prefixes/suffixes), [Child] will decode them with 90% accuracy on 4 out of 5 samples assessed per quarter.

By testimony of 7th Grade Reading Teacher, the child did make progress toward the goal. ■ moved from two syllables, real and nonsense words, in the first two quarters to three or more syllables during the 3rd and 4th quarters.

The teacher's progress report on this goal notes that during the first, second, and third quarters, the child demonstrated some progress towards achieving the goal. During the fourth quarter, the child's progress had advanced to making sufficient progress toward achieving the goal during the duration of the IEP.

The 2020-21 IEP contained two reading comprehension goals. Reading comprehension goal one states the following:

When given a variety of mid-4th grade level texts, [Student] will independently locate supporting evidence and vocabulary from the text to answer implicit and explicit questions with 80% accuracy on 3 of 4 samples assessed per quarter.

The progress reports completed by 7th Grade Reading Teacher state that the child's progress for the above noted reading comprehension goal in quarters one, two, and four was demonstrating some progress towards achieving the goal. For the third quarter, progress noted indicated that the child was making sufficient progress towards achieving the goal. The teacher explained the progress noted by stating that the child did pass the DRA2 Level 40 fiction. Per testimony of 7th Grade Reading Teacher, this performance indicated the child understood fourth grade text.

Reading comprehension goal two states the following:

After listening to a reading selection/text orally by ■ teacher or audio, [Child] will be able to answer explicit and implicit comprehension questions orally with 80% accuracy on 4 out of 5 trials measured quarterly.

The evidence shows that the child received progress codes during quarters one, two, and four indicating that the child was demonstrating some progress toward achieving the goal. For the third quarter, the teacher indicated the child was making sufficient progress toward achieving the goal within the duration of the IEP.

Furthermore, teacher assessments administered by 7th Grade Math Teacher illustrated the child was making progress toward ■ reading IEP goals. One tool 7th Grade Reading Teacher employed to evaluate the child's reading was the DRA. 7th Grade Reading Teacher conducted several such assessments during the school year. The evidence shows that earlier DRA testing during the school year showed the child reading at a third grade level. This reading assessment was reported during the IEP meeting held on March 12, 2021. A month later after the child had returned to in-person learning, DRA test administered on April 8, 2021, revealed that the child was

now reading at about an “end of 5th grade level.” Hearing Officer does note that in the area of reading fiction, the child made significant progress. Of note also, the child retains a relative weakness in decoding nonsense words, but based on the April 2021 DRA assessment, the child presents as being able to read at approximately an “end of 5th grade level.”

The Hearing Officer found the testimony of 7th Grade Reading Teacher credible. Her testimony coupled with other evidence of record demonstrate that the child made meaningful progress toward his reading goals.

The Hearing Officer now turns her attention to the Parents’ experts.

The Hearing Officer is mindful of testimony presented by Parents’ Expert A. This witness qualified as an expert in dyslexia, reading intervention, reading specialist, and special education. After reviewing evaluative reports such as the 2019 KTEA and reading data sheets providing DRA assessment results, she concluded that the child has made only “slow” progress in reading from October 2020, until February 2021. She opined that the Educational Evaluative Report from 2021 also showed the child made only slow progress in reading. She opined that the child requires a more intense reading program than the Corrective Reading Program or IMSE program used by 7th Grade Reading Teacher. Expert A recommended the Wilson Reading Program. The Hearing Officer gives little weight to this testimony as Expert A had no personal involvement in the child’s education, she has never taught the child nor has she attended any IEP meetings involving the child. Her only exposure to the child was a review of some of [REDACTED] records about five days before the due process hearing and her review of a video of [REDACTED] in a virtual reading class that occurred in November 2020.

The Hearing Officer has also considered Parents’ Expert A’s accusation that 7th Grade Reading Teacher improperly implemented the IMSE reading program. 7th Grade Reading Teacher responded to this allegation. After reviewing the videos and carefully considering the claims, the Hearing Officer has concluded the evidence is not sufficient to show 7th Grade Reading Teacher inappropriately implemented the reading program.

Standardized Testing

The Hearing Officer is also mindful of standardized testing indicating the child’s reading and math either stalled or regressed from the 5th grade to the 7th grade. She has also considered expert opinion relying on those normed tests to substantiate a finding of no growth or regression in reading and/or math. Little weight is given to those opinions for several reasons mentioned here.

Parents’ Experts A, W, and P do not have a direct relationship with the child. They have never taught the child and are using primarily only one tool to assess [REDACTED] ability.

Further, utilizing standardized normed reference measures to determine a child’s progress at this time during the continuing pandemic is not recommended. The Virginia Department of Education explains in its guidance document that “ the impact of trauma from COVID closures, disruption in educational programming, and comparison to different age groups within the

normative sample make use of standardized norm referenced test inappropriate to measure progress.” *VDOE Considerations for COVID Recovery Services for Students with Disabilities* at 12. Parents’ Expert W based his opinion solely on the standardized testing [REDACTED] had administered.

Even Parents’ Expert P agreed that because of child’s learning disability and [REDACTED] dyslexia, it was likely Child would not respond well to virtual learning which was [REDACTED] instructional setting for a year due to the pandemic. As a result, Expert P stated, regression or stagnation in the child’s learning is predictable.

Hearing Officer also notes it is not proper to give great weight to the standardize test because Child’s testing condition was unlike the testing conditions of the students to which [REDACTED] was compared. This is the case because of the child’s disability and related behavior issues: refusals, avoidance behaviors, and frustration during testing.

2. During the LEA’s closure due to the Pandemic and upon the LEA’s reopening during the school year, did the LEA fail to design an educational programing for the student based on [REDACTED] unique circumstances, but rather on administrative convenience?

For reasons already discussed in prior sections, the Hearing Officer finds child’s programming was designed to meet [REDACTED] unique needs.

The evidence shows that the CSS Middle School offered interventions for the child’s course work. In addition it offered behavior supports the child required. The child made progress.

3. Did the LEA fail to offer sufficient recovery services to address the student’s loss of instruction during the COVID-19 school closure?

Recovery services are services offered to address a loss of services due to COVID-19. *See VDOE Guidance Document, Virginia Department of Education Considerations for COVID Recovery Services for Students with Disabilities* at 3.

Parents’ requested reading data and indicated a desire for the child to also be provided recovery services in reading. (S58 at 28). The LEA provided the data. The LEA did not provide recovery services in reading for several reasons. For one, the child was receiving reading instruction in [REDACTED] English 7 class and an elective class, Literacy 7. In addition, the school members of the IEP team noted that the child was already receiving afterschool math recovery and [REDACTED] behavior problems were more prevalent in the afternoon when [REDACTED] was tired. The school members decided the student would be overwhelmed if on top of [REDACTED] math recovery services, reading recovery was added.

The LEA provided Parents with a prior written notice indicating that reading recovery services were not offered to the child.

The LEA did provide recovery services in math for 21 weeks. The child’s progress in math accelerated.

Hearing Officer finds the evidence insufficient to show the recovery services provided were deficient.

4. Did the LEA deny the student a FAPE?

No denial of FAPE.

Moreover, the hearing officer finds that the decision the school members made regarding the IEP and placement was not made for administrative convenience.

The LEA offered an appropriate IEP for the 2020-21 school year.

C. SCHOOL YEAR 2021-22

1. Did the LEA fail to provide sufficient services and special education so that the student could make progress toward meeting [REDACTED] IEP goals and objectives (specifically goals/objectives set forth in the “transition,” “area of need,” and “ESY” sections of the IEP) and the general education curriculum?
2. Did the LEA base its decision to place the student at the [REDACTED] Middle School program on administrative convenience and not the student’s unique circumstances?
3. Did the LEA fail to offer a placement designed to meet the student’s unique disability and related needs?
4. Did the LEA deny the student a FAPE?

Parents, in effect contend that the services, and placement proposed in the IEPs dated June 17, 2021 and November 4, 2021 (IEPS) are inappropriate. Further Parents argue that their unilateral placement at Private Day School is proper and they are due reimbursement for tuition and related expenses.

Before determining if reimbursement of tuition and related expenses should be granted, the Hearing Officer must first address the parents’ contention that the IEPs are inappropriate. *Sch. Comm. Of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 556 IDELR 389 (1985).

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 69 IDELR 174 (2017), the Supreme Court reaffirmed and further explained the fundamental standard of appropriateness under the IDEA, first set out in its decision 40 years ago in *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

Specifically, the Court confirmed that an appropriate education for a student with a disability is one that is, “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” 137 S. Ct. at 999. The Court further explained that an IEP

typically should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 999.

Concerning a student who is not fully integrated in the regular classroom and not able to achieve on grade level, the child's educational program should be "appropriately ambitious in light of his circumstances". *Id.* at 1000. At the same time, Andrew F. reaffirms a related core notion in Rowley; i.e., that an IEP must be "reasonable", but not "ideal." *Id.* (citing Rowley, 458 U.S. at 206-07). The child's proposed June 17, 2021 IEP and November 4, 2021 IEP clearly meet the threshold requirements set forth in *Andrew F.*

As previously referenced, the first inquiry the Hearing Officer must undertake is whether the IEPs are appropriate. *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S. 359, 556 IDELR 389(1985). To determine if the LEA's proposed IEPs make a free appropriate public education (FAPE) available the Hearing Officer must apply the *Rowley* two part test as adjusted by *Andrew F v. Douglas County School District RE-1*

The *Rowley* analysis provides that the disabled child is deprived of a FAPE under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to a FAPE or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. *Rowley, supra*, 206-7 (1982). In order to meet the second prong of the *Rowley* test regarding a school district's substantive obligation under the IDEA, "[.]a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew v. Douglas Cty. Sch. Dist. RE-1*, 2017 WL 1066260 (2017). The Court also stated that "[.]the essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Id.*

Focusing now on the first part of the *Rowley* Test, the IDEA states that the hearing officer may find that the student was denied a FAPE for procedural inadequacies only if they: (1) impeded the student's right to a FAPE, (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child, or (3) caused a deprivation of educational benefits. 34 CFR 300.513; 8 VAC 20-81-210(O)(17).

Alleged Procedural Error

The parents' allege one procedural violation in their closing argument. Essentially, the parents claim that the LEA predetermined the child's placement for the 2021-2022 school year. This argument is not persuasive. Of note, the IEP team held three meetings to discuss the child's IEP prior to the 2021-22 school year beginning. They were held on April 15, 2021, June 4, 2021, and June 17, 2021. A review of the IEP dated June 17, 2021, as well as consideration of the evidence presented during the hearing clearly indicate the LEA did not predetermine the child's placement. Rather, the evidence demonstrates that significant discussions took place regarding the child's educational plan for the 2021-22 school year, to include the child's placement. Particularly, notes regarding the June 17, 2021, IEP meeting explicitly state "[t]he team reconvened to continue the placement discussion." That discussion resumed and resulted in the school members forming an opinion that Public Day School was the appropriate placement for the

child. The parents disagreed (as they have a right to do) and informed the school members during the meeting that they planned to place the child at Private Day School and seek reimbursement. The parents followed through on their announcement.

Likewise, the Hearing Officer finds insufficient evidence of subsequent predetermination by the LEA. To this point, the IEP team met again on September 10, 2021, and November 4, 2021. These meetings resulted in the IEP dated November 4, 2021. In these meetings, among other discussions, the team discussed the child's placement again. The team listened to representatives from Private Day School and reviewed assessments from Private Day School, and considered how the child was doing at Private Day School. Moreover, the parents' request for MAS to participate was honored as the evidence shows that a representative of MAS, participated in the September and November meetings. This person is knowledgeable about private schools wherein the LEA may refer students for placement. The MAS liaison is also familiar with Private Day School as the LEA in the past has referred students for placement at Private Day School.¹⁴ There were participants at both meetings able to share knowledge about private schools, Private Day School, and Public Day School. The above referenced evidence fails to show predetermination by the LEA.

Having made this determination, the Hearing Officer is cognizant that there was testimony that some LEA staff may have conferred about the child outside of an IEP meeting to become more knowledgeable about the child. However, such a conversation about a student outside an IEP meeting does not constitute predetermination.

Accordingly, the Hearing Officer finds the evidence insufficient to show a procedural violation which denied the parents meaningful participation and the child a FAPE.

Furthermore, the Hearing Officer finds the evidence insufficient to show the child was placed at Public Day School because it was administratively convenient for the school members of the IEP team to do so.

Appropriateness of the Proposed IEP for the 2021-22 School Year

Now the Hearing Officer turns to the second prong of the *Rowley* test which as noted previously examines whether the IEP is reasonably calculated for the child to receive an educational benefit.

The Hearing Officer finds the IEPs dated June 17, 2021, and November 4, 2021, are appropriate.

The IEP dated June 17, 2021

The IEP team took great care to develop the referenced IEP holding three meetings where the team engaged in significant discussions about the child. Parents do not appear to challenge the IEP's goals and the Hearing Officer finds them appropriate. To this point, the evidence shows

¹⁴ The evidence shows that recently the LEA has banned the use of seclusion. Because Private Day School does utilize seclusion rooms, the LEA had determined it will no longer refer students to Private Day School.

staff drafting the goals was directly involved with the child and familiar with the needs to be addressed in the goals and attended to them in their draft. In addition, the parents' offer slight, if any, evidence contrary to the goals' appropriateness. Accordingly, the Hearing Officer finds the goals set forth in the IEP are appropriate.

Accommodations proposed on the IEP include read aloud, visual aids, breaks, and online audio on SOLs. The parents do not challenge the accommodations.

Hearing Officer also finds the services appropriate that are proposed in the IEP and offered by placement at Public Day School. Services proposed on the IEP include 30 hours of special education services per week, to include speech language therapy for 2 hours a month, or .5 hours a week in the special education setting. The evidence shows that the school members of the IEP team concluded that the child had made some progress at CSS Middle School, but ■■■ could make more progress at Public Day School. Hence, the IEP dated June 17, 2021, places the child at Public Day School for the 2021-22 school year.

As demonstrated by the evidence, the features of the Public Day School are noted here. The Public Day School is more restrictive than the CSS as only special education students are enrolled in the school. Students enrolled are from kindergarten through eighth grade and they have various disabilities. The school itself is housed in a small standalone building; that is, separate from a base or regular school. Another feature includes small class sizes. The evidence demonstrated that typically before school closure due to the pandemic, classes contained between 7 to 10 students. Since students have returned from distance learning, the class size during the 2021-22 school year is even smaller, averaging between two to five students per class. Notwithstanding, physical education classes may have about nine students. Moreover, all teachers at Public Day school are certified special education teachers, except those providing instruction in elective courses – art and music. There is a teacher and an instructional assistant in each class. Evidence shows that currently the entire enrollment at Public Day School is 45 students. Pre-pandemic numbers were about 75 to 80 students. In addition to the teacher and instructional assistant, Public Day School offers the students an expansive clinical staff. The clinical staff consists of two social workers, two school psychologist and a school counselor. In addition, staff at Public Day school has four coaching resource teachers. These teachers are also certified in special education and have expertise in behavior management. The coaching resource teachers are assigned to support students throughout the building.

In addition, at Public Day School, students' classes are held daily. This provides more frequency in instruction than the CSS or regular base middle school and presumably facilitates retention. There are only two electives, music and art. In addition there are fewer after school activities. The Public Day School is the most restrictive school setting offered by the school district.

Behavior supports

Public Day School offers a higher degree of behavior supports to assist students in improving their behaviors and developing their social-emotional skills.

As an example, Public Day School has implemented “team support.” In practice, every teacher is associated with a team. This team consist of a social worker, psychologist, and coaching resource teacher. The team assigned to a teacher supports both that classroom teacher and the students in the teacher’s class. Particularly, the teacher meets with and works with the team for the purpose of noting students’ progress and providing supports to the students in the teacher’s class. In addition, the team is in the teacher’s class daily during instruction providing assistance to students and the teacher. The type of support provided can include, among others, helping a student regarding social and/or emotional development and assisting a student in addressing an area of behavioral need identified in a student’s IEP.

The Hearing Officer notes that this degree of support provided by “team support” is much more than that offered at the CSS. In contrast, at the CSS there was one or two counseling resource teachers. Although their duties require them to provide behavior support, these counseling resource teachers at a CSS are not assigned to a particular teacher and her students. They are responsible for providing behavioral support for the entire student body at the CSS. At CSS Middle School the student body consisted of more than 1000 students. Moreover, the CSS Middle School counseling resource teachers were not necessarily in a classroom daily.

In addition to “team support,” Public Day School offers a formal positive behavior and intervention system. A feature of this support is the point system. With this system, students can earn points for positive behavior during each class period. A total of nine points can be earned per period in the areas of safety, engagement, and citizenship. Students receive feedback on their behavior throughout the school day. Students can redeem earned points for items in the school’s online store.

In addition to a student’s opportunity to earn points in ■■■ classes, a student can also earn “Public Day School” points. “The Public Day School” points can be earned for any reason related to a positive behavior (such as a student raising ■■■ hand at the appropriate time in class). The number of points earned can be in any quantity. A student earning such points is allowed to redeem them for a reward selected by the student. Rewards can include not only a tangible item but also a social event such as a school party.

For a student whose behavior may require more than the point system to facilitate positive behavioral adaptation, a “check-in” and “check-out” system has been implemented at Public Day School. With this system, the student checks in with support staff at the beginning of the student’s school day. The student’s goals for the day and strategies are reviewed. At the end of the day, the student “checks-out” with support staff reviewing the progress the student has made during the day and the student plans for the next school day.

Moreover, to the extent a student’s behavior has required a BIP on ■■■ IEP, Public Day School implements the BIP.

Additional behavior supports and interventions have been implemented at Public Day School. For example, staff accompany students throughout the day when they are in movement. Sections within the building are locked during the school day; that is, the cafeteria is locked, the gymnasium, and so forth. Further students enter and use the bathroom one at a time. These

measures have been implemented to prevent or deal with a student(s) leaving an area without permission. Accordingly, these measures address concerns about the child exhibiting “elopement behaviors.”

Academic supports

Public Day School offers strong academic supports also. Specifically, Public Day School offers algebra and interventions in math, English, and reading, to include research based reading programs. Currently, the Public Day School is offering TransMath and VMath as math interventions and in reading Corrective Reading, Language Live, and Lexia are being provided.

The evidence shows that Public Day School is not limited to offering the programs mentioned here. To this point, the child’s IEP dated June 17, 2021, offered the child ESY services. The dates of this service was from June 28, 2021, to July 23, 2021. The evidence demonstrates that if a student receives ESY and thereby attends summer school the summer immediately before the regular school year, there is an opportunity for the Public Day School staff to become familiar with the student and to determine if the student requires any interventions. If so and if Public Day School requires staff to be trained in the implementation of those interventions, the training can occur prior to the beginning of the regular school year. As such, staff would be able to start the regular school year (in this case the 2021-22 school year) implementing the interventions required by the student. Hence, the Hearing Officer finds the LEA had the ability to offer the child the Wilson Reading Program if ■■■ required this program to progress in reading.

In addition to the intervention programs that are offered or able to be offered at Public Day School to intensify learning, Public Day School has recently implemented an enrichment afterschool program during the 2021-22 school year. The program is known as the Innovative and Improvement Plan. Public Day School launched this plan using special funds provided to the LEA to design a plan to address any loss of learning by students as a result of the pandemic. In preparing the plan, Public Day School (i) reviewed the mathematical, literacy, and wellness progress of their middle school students and (ii) identified those students with significant deficits. Then Public Day School developed an after-school program with the funds for the students to participate in weekly. Under this plan, the students attend the program after school on multiple days during the week to improve or reinforce skills. AP of Public Day School has observed that this afterschool program has helped the students accelerate their learning during the regular school day.

IEP dated November 4, 2021

A review of the November 4, 2021, IEP shows that the services provided in this IEP are similar to those provided for in the IEP dated June 17, 2021, except two hours of counseling has been added to the November 4, 2021, IEP. In both IEPs, the child is scheduled to be in the special educational setting full time; that is, 30 hours a week. ESY in the IEP dated November 4, 2021, is provided for but could not be finalized because the IEP team required additional information. Placement remains at Public Day School in both IEPs.

Regarding the IEPs dated June 17, 2021, and November 4, 2021, the Hearing Officer finds they are appropriate and that placement at Public Day School is appropriate. This is the case

because Public Day School has the ability to provide reading, English, and math interventions to address the child's weaknesses in those areas. Although the parents contend that Public Day School does not offer Wilson Reading Program which they assert the child requires, the evidence shows that if the child is deemed to require Wilson Reading Program, the LEA can provide it. Moreover, the Public Day School's recently launched Innovative and Improvement Plan offers the child an opportunity to accelerate ■■■ learning during the regular school day. Behavior supports offered by Public Day School are thorough and can address the child's behavioral needs, to include the child's deficits in self-regulation. Further, Public Day School provides for ESY on its campus. This continuity in the location of services during the regular school year and the summer alleviates the need for the child to transition to another school for summer session.

In essence, Public Day School can provide intensive academic and behavior supports for the child. This was the opinion of the educators. The Hearing Officer finds the evidence supports their view and she respects their judgement.

In *Endrew F.*, the Supreme Court of the United States confirmed that deference must be given to the professional judgments of educators. It held that a court or hearing officer is required to give deference to the opinions of school board witnesses who are professional educators "based on the application of expertise and the exercise of judgment by school authorities." *Endrew F.*; see also *Rowley* 458 U.S. at 206-208; *M.M.*, 303 F.3d at 533.

Like *Rowley*, *Endrew F.* is also careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators. In *Hartmann v. Loudoun County*, the Court stated: Although section 1415(e)(2) provides district courts with authority to grant 'appropriate' relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section 'is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' (citations omitted)[.] [t]hese principles reflect the IDEA's recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment. 118 F.3d 996, 1000-1001 (4th Cir. 1997).

AP of Public Day School, 7th grade case manager, MAS Manager all opined that the child's placement was appropriate at Public Day School. Professional educators in the school division, who are the ones most familiar with Child, and the educational programming available within the school division, who have familiarized themselves with the private program, have testified regarding the appropriateness of the educational decisions rendered regarding the child.

The LEA's witnesses who testified regarding the child have substantial training, expertise and experience in working with children both with and without disabilities, in educational programming in the Virginia public school setting, and with the child. The Hearing Officer gives deference to their judgement regarding the educational programming and the placement of the child for the 2021-22 school year.

The Hearing Officer also finds that Public Day School is the LRE. Further, the evidence fails to show that the proposed placement in the IEPs dated June 17, 2021, and November 4, 2021,

is inappropriate because after the 8th grade, the child will need to transition to a high school.

Moreover, the Hearing Officer finds that the decision the school members made regarding the IEP and placement was not made for administrative convenience.

The LEA offered appropriate IEPs for the 2021-22 school year.

Because the Hearing Officer has found that the IEPs are appropriate, the Hearing Officer is not required to determine if the Private Day School is appropriate. Even so, if the Hearing Officer were to find the LEA did not provide FAPE (which the Hearing Officer has not determined) the Hearing Officer finds the Private Day School is not an appropriate placement for the child. This is the case because the evidence demonstrates that the students who typically are enrolled at Private Day School require the more restrictive environment because their behaviors are characterized as being aggressive, volatile, destructive, and dangerous to the student as well others. In fact, the degree of the behaviors are evident by Private Day School administration concluding that the school requires “seclusion rooms” to protect staff and others. Although the child does have behavior problems they do not rise to the level of those routinely displayed by students that normally attend Private Day School. For this reason, the Hearing Officer finds Private Day School inappropriate.

V. DECISION AND ORDER

The Hearing Officer finds the LEA has not denied the child a FAPE during school years 2019-20, 2020-21, and 2021-22.

VI. PREVAILING PARTY

The Hearing Officer have the authority to determine the prevailing party on the issues and find the prevailing party on all issues is the LEA.

VII. APPEAL INFORMATION

This decision is final and binding, unless either party appeals in a federal district court within 90 calendar days of the date of the original decision issued on May 17, 2022 or in a state circuit court within 180 calendar days of the date of the original decision issued on May 17, 2022.

ENTERED THIS 24th day of May 2022.

Ternon Galloway Lee, Hearing Officer

Cc: Parents' Counsel
Parents
LEA's Counsel
LEA Representative

VDOE Coordinator
Hearing Officer Monitor