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STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

* BEFORE RACHAEL BARNETT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-MONT-OT-18-02222

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DECISION

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STATEMENT OF THE CASE

On January 19, 2018, █ and █ (Parents), on behalf of their child, █ (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).² The Parents had declined MCPS' proposal to place the Student at his home school (the Public School) in a general education classroom with supports and services for the 2017 through 2018 academic year and opted to enroll the Student at the ***** School (the Private School).

On February 9, 2018, the parties notified the OAH that a resolution session occurred; however, they did not resolve their dispute. Immediately following an unsuccessful mediation, I

¹ In this decision, I have abbreviated the names of the Student and other related individuals and educational institutions to preserve the Student's confidentiality.

² U.S.C.A. is an abbreviation for United States Code Annotated.

held a telephone prehearing conference on February 9, 2018. Brian Gruber, Esquire, participated on behalf of the Parents. Zvi Greisman, Esquire, represented the MCPS. By agreement of the parties, the hearing was scheduled to begin on March 2, 2018 and continue on March 8, 9, 12, 13, and 15, 2018.

Due to inclement weather, the building where the hearing was scheduled was closed on March 2, 2018. Therefore, I held the hearing on March 8, 9, 12, 13, and 15, 2018. The hearing concluded on March 15, 2018.

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

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Did MCPS violate the IDEA, 20 U.S.C.A. § 1415(f)(1)(A)(2017), by denying the Student a free appropriate public education (FAPE) when MCPS placed the Student in a general public education setting, rather than a private placement for the 2017 - 2018 academic year?
2. If MCPS denied the Student a FAPE, is reimbursement to the Parents for the cost of the Student's unilateral placement at the Private School for 2017- 2018 school year appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

A complete list of exhibits is appended to this decision.

Testimony

█████ testified and the Parents presented the following additional witnesses:

- Dr. █████³ Director of the Center for Assessment and Treatment, admitted as an expert in pediatric neuropsychology with an emphasis on Autism
- █████ M.Ed., Ed. S., █████ Services, admitted as an expert in Special Education
- █████, teacher at the Private School
- █████ LCSW-C, social worker at the Private School, admitted as an expert in Social Work

The MCPS presented the following witnesses:

- █████ Special Education Supervisor, MCPS, admitted as an expert in Special Education
- █████, teacher at the Public School, admitted as an expert in Special Education
- █████, special education teacher at the Public School, admitted as an expert in Special Education
- █████, special education teacher at the Public School, admitted as an expert in Special Education
- █████, MCPS support speech-language pathologist, admitted as an expert in Speech Pathology

³ The identification of certain individuals, including Dr. █████, would not identify the Student; their names are therefore included in this decision.

PARTIES' STIPULATED FACT

1. MCPS' proposed Individualized Education Program (IEP) for the 2017-2018 academic year offered the Student two weekly sessions lasting thirty minutes each of Speech and Language Therapy and Occupational Therapy.

FINDINGS OF FACT

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

1. The Student is an eleven-year-old child residing in Montgomery County, Maryland.
2. Prior to March 2016, the Student resided in [REDACTED].
3. The Student attends the Private School.
4. The Private School provides special education in a small group classroom setting and serves students with Autism diagnoses. The Private School has an on-site social worker, [REDACTED] who assists students with their social-emotional needs.
5. MCPS has found the Student eligible for special education services as a student with Autism.
6. The Student has the following diagnoses: Autism Spectrum Disorder (Autism), Developmental Coordination Disorder,⁴ Reading Disorder, and Attention Deficit Hyperactivity Disorder (ADHD), Combined Type (mild). The Student's Autism falls in the mild-moderate range, but is moderated by his intelligence and motivation to learn.
7. The Student also has low processing speed, executive functioning and language weaknesses, and suffers from anxiety. His verbal and non-verbal abilities are average. He has challenges with social interactions.

⁴ The Student's expert witness, Dr. [REDACTED], explained that this means it is labor-intensive for the Student to write.

8. The Student was diagnosed with Autism at the age of two at [REDACTED] Institute.
9. At age six, the Student underwent his first neuropsychological evaluation.
10. For his first and second grade years, the Student attended the ***** School, a private day school located in Maryland (the Specialized School).
11. While he was in the second grade at the Specialized School, the Parents hired educational consultant, [REDACTED]
12. On January 13, 2015, Ms. [REDACTED] conducted an observation of the Student at the Specialized School and concluded that he was benefitting from his educational placement, but could benefit additionally from placement at the Private School.
13. Following Ms. [REDACTED]'s observation, the Parents elected to enroll the Student in the Private School.
14. The Student has been enrolled in the Private School, located in Montgomery County, Maryland since the beginning of the 2015 - 2016 academic year.
15. In March 2016, the Parents and Student moved from [REDACTED] to their current home in Montgomery County.
16. In September and October 2016, the Student underwent a neuropsychological evaluation with Dr. [REDACTED], Director of the Center for Assessment and Treatment. Dr. [REDACTED] made the diagnoses and findings references in Findings of Facts six and seven.
17. As of the 2017 - 2018 academic year, the Student is in the fifth grade at the Private School.
18. In the Private School, the Student receives special services pursuant to Diagnostic-Prescriptive Goals (DPG), a tool similar in function to IEPs used in the public school setting.

19. During his time at the Private School, the Student has been working towards academic independence. As of October 2017, the Student was able to do many academic tasks independently.

20. At the Private School, the Student exhibits significant emotional outbursts approximately two to three times per year. When they occur, it can take an individual staff person approximately twenty to twenty-five minutes with the Student outside of the classroom to de-escalate the Student.

21. The Student sometimes exhibits socially inappropriate behavior in his Private School setting, including staring at others, laughing at someone who is upset, balling up his fists, and making growling sounds. These are not daily behaviors.

22. The Student experiences some type of behavioral issue approximately twice per month.

23. The Student needs adult support to navigate social situations that he finds challenging.

24. On a daily basis, the Student expresses verbal frustration with classroom tasks. He often says, "I want to do it my way."

25. The Student has particular areas of academic interest, including modes of transportation and United States Presidents. He gladly works on academic tasks relating to his areas of interest but struggles when he needs to learn novel and less favored material.

26. The Student wants to ride the bus and attend public school with the other children in his neighborhood.

27. In the Spring of 2017, the Parents contacted MCPS to begin the special education eligibility process.

28. The Student's mother visited the Public School and two alternative public school settings within MCPS.

29. On March 21, 2017, MCPS sent the Parents a welcome letter and a packet of information to complete and return to MCPS.

30. The Parents submitted the Private/Parochial School Student Referral for Special Education Services to MCPS.

31. The Parents also submitted to MCPS a document entitled, Eligibility Screening Parent Interview/Questionnaire. The Parents did not answer the question, "Has your child had any evaluations of which the school may be unaware: educational, psychological, medical, other?" (MCPS 1-8).

32. In preparation for an IEP team meeting, the Parents provided MCPS with a copy of Dr. [REDACTED]'s Fall 2016 neuropsychological evaluation and a copy of the DPG from the Private School.

33. On March 27, 2017, MCPS sent the Parents a letter inviting them to attend an IEP team meeting at the Public School on April 19, 2017.

34. On April 19, 2017, the Parents and the rest of the IEP Team at the Public School participated in a screening meeting. At this meeting, the Parents authorized MCPS to conduct an assessment of the Student.

35. On April 26, 2017, [REDACTED], a special education teacher at the Public School, conducted a classroom observation of the Student at the Private School and produced a report of her observations and conclusions. The report summarized her observations of the Student's classroom participation and concluded that the Student demonstrated avoidance and frustration behaviors (including tossing a pencil down on his desk and slumping over) when he encountered a difficult task. She also concluded that the Student required classroom support throughout the

period of the observation to sustain work. [REDACTED], a special education teacher at the Public School, was also present for this observation.

36. On May 22, 2017, [REDACTED] returned to the Private School, accompanied by [REDACTED], and conducted an educational assessment of the Student. The Student greeted [REDACTED] and [REDACTED] introduced himself, and asked who they were. During this assessment, the Student worked at, and occasionally above, grade level. He struggled with tasks that required abstract reasoning and making inferences and was more successful with tasks that required a literal understanding of the material.

37. On May 31, 2017, [REDACTED] an MCPS speech-language pathologist, observed the Student at the Private School and assessed his language abilities; they were in the normal range for the Student's age.

38. The Parents and MCPS IEP team members met on June 5, 2017 and October 13, 2017 to develop the MCPS IEP.

39. The proposed MCPS IEP contained goals across all areas of need, including reading comprehension and strategy, mathematics, speech and language, social skills, occupational therapy, social and emotional behavior, and executive functioning.

40. The proposed MCPS IEP contained accommodations, supports and modifications to assist the Student. Relevant accommodations, supports and modifications included visual cues, notes and outlines, an electronic word processor, a graphic organizer, a visual organizer, extended time and a small group environment for testing, multiple breaks, small group instruction for reading, writing and math, and an adult (instructional assistant) designated to support the Student.

41. The proposed MCPS IEP provided for the following instruction to occur outside general education: special education classroom instruction, speech and language therapy, occupational therapy, and counseling.

42. The proposed MCPS IEP provided that the Student would be in a general education setting for eighty-two percent of his thirty-hour school week, would receive the support of an instructional assistant throughout this time, and would have outside-the-classroom special education and related services support for approximately five hours and fifteen minutes weekly.

43. Ms. [REDACTED] attended the June 5, 2017 IEP meeting in person and participated in the development of the IEP with MCPS.

44. MCPS utilized the DPG in the development of the IEP.

45. [REDACTED], the Student's teacher in 2017 at the Private School, participated in the June 2017 IEP meeting telephonically. She shared her concerns regarding the Student's behavior, particularly that the Student balls up his fists when he is frustrated and that he experiences anxiety.

46. The Parents and MCPS agreed with the proposed IEP, with the exception of placement.

47. The Parents filed a Request for Due Process on January 19, 2018.

DISCUSSION

Relevant Law

Maryland receives federal education funding, and as such, Maryland school districts are required to comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. § 1412; 34 C.F.R. § 300.2; *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180-81 (1982). Maryland implements the IDEA for

elementary and secondary students, and adds additional procedural safeguards and substantive requirements beyond those required by the IDEA, through Title 8, Subtitles 3 and 4 of the Education Article of the Maryland Annotated Code and through COMAR 13A.05.01.

Maryland law and the IDEA demand “that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living,” 20 U.S.C.A. § 1400(d)(1)(A); *see also* COMAR 13A.05.01.01 (ensuring “a [FAPE] . . . in accordance with the student’s [IEP]”).

When a disability is suspected, a Maryland school system must perform an evaluation of the student. 20 U.S.C.A. § 1414(a)(1), (b); 34 C.F.R. §§ 300.301, 300.304, 300.305. The results of the evaluation are used to determine whether the student has a qualifying disability and whether the student is in need of special education and related services. *Id.* § 1414(a)(1)(C)(i), (b)(4); 34 C.F.R. § 300.306; COMAR 13A.05.01.06D. If it is determined the student has a disability as defined by the IDEA and is in need of special education and related services, a school system must develop an IEP for the student. 34 C.F.R. §§ 300.306(c)(2), 300.324 -300.328; COMAR 13A.05.01.07 -.09.

An IEP is “the primary vehicle through which schools provide a particular [disabled] student with a FAPE.” *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009). An IEP must include: a description of the student’s present levels of academic achievement and functional performance; a statement regarding how the student’s disability affects his or her involvement and progress in the general education curriculum; measurable annual academic and functional goals for the student; a description of how the student’s progress toward meeting those goals will be gauged; the special education and related services, and supplementary aides and services, that will assist the student in advancing toward attaining the goals; the program modifications or supports that will be provided for the student; and, when

possible, a description of how the student will be involved in and make progress in the general education curriculum. 20 U.S.C.A. § 1414(d)(1)(A). It must be developed through a collaborative process between the school district (including teachers and other school officials) and the student's parents. See *Andrew F.*, 137 S. Ct. at 994. The process of developing the IEP must be a "fact-intensive exercise . . . [that is] informed by the expertise of school officials . . . [and] by the input of the child's parents or guardians." *Id.* at 999.

As the "centerpiece" of the IDEA's "education delivery system" for disabled students, an IEP is a "comprehensive plan" for the "academic and functional advancement" for the student. *Id.* at 994, 999. It must be tailored to the student's "unique needs" with "careful consideration" of the student's present levels of achievement, disability and potential for growth. *Id.*; 20 U.S.C.A. § 1401(29). The IEP must be "appropriately ambitious," *Andrew F.*, 137 S. Ct. at 1000, and it must provide for "specially designed instruction" that is "reasonably calculated to enable the child to receive educational benefits" and to "make progress appropriate in light of the student's circumstances." *Id.* at 996 (quoting *Rowley*, 458 U.S. at 207), 999. The amount of progress anticipated for the student should be "markedly more demanding than the 'merely more than de minimis test'" applied in the past by many lower courts. *Id.* at 1000.

The test for whether an IEP is "appropriately ambitious," *id.* at 1000, and "reasonably calculated to enable the student to receive educational benefits," *id.* at 996, is different for each student; there is no bright-line rule or formula to determine whether an IEP provides a FAPE.⁵ *Id.* at 1001. For a student who is fully integrated in the regular classroom, FAPE would generally require an IEP to be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 996, 999 (citing *Rowley*, 458 U.S. at 203-04).

⁵ In *Rowley*, the Supreme Court also held that a FAPE may be found to have been denied a student when a school fails to comply with the procedures set forth in the IDEA. *Rowley*, 458 U.S. at 206; see also *Bd. of Educ. v. I.S. ex rel. Summers*, 325 F. Supp. 2d 565, 580 (D. Md. 2004) (quoting *Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629, 634 (4th Cir. 1985)). In this case, however, the Parents do not allege any procedural violations by MCPS.

However, for a student who is not fully integrated and/or cannot be reasonably expected to achieve grade-level advancement, the “educational program must be appropriately ambitious in light of [the student’s] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *Id.* at 1000. Regardless, “every child should have the chance to meet challenging objectives.” *Id.*

When assessing whether a student was offered, given or denied a FAPE, a judge must “afford great deference to the judgment of education professionals.” *O.S. v. Fairfax County Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (quoting *E.L. ex rel Lorsson v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)). Judges should not substitute their own “notions of sound educational policy for those of the school authorities which they review.” *Endrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 206). Additionally, a judge “should be reluctant ... to second-guess the judgment of education professionals.” *Tice ex rel. Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). A judge should be mindful that local educators deserve latitude in determining the IEP most appropriate for a disabled child, and that the IDEA does not deprive these educators of the right to apply their professional judgment. *See Hartmann ex rel. Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

Additionally, a judge must be careful to avoid imposing his or her view of preferable educational methods upon a school district. *Rowley*, 458 U.S. at 207; *see also A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004). However, a reviewing judge may fairly expect the school system’s professionals “to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [his or her] circumstances.” *Endrew F.*, 137 S. Ct. at 1002.

The *Endrew F.* Court further clarified that a FAPE does not promise an “ideal” education. *Id.* at 999. Nor does it promise that a student with a disability will be provided with

“opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.” *Id.* at 1001. A reviewing court must determine whether the IEP is “reasonable.” *Id.* at 999. It is also important to remember that the IDEA does not require “the best possible education that a school could provide if given access to unlimited funds.” *Barnett ex rel. Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). Nor does it require the “furnishing of every special service necessary to maximize each handicapped child’s potential.” *Hartmann*, 118 F.3d at 1001.

The development of an IEP is a prospective process. *See Andrew F.*, 137 S. Ct. at 999 (“... crafting an appropriate program of education requires a prospective judgment by school officials ... informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians”). Thus, a judge in a due process hearing must look to what the IEP team knew when it developed the IEP, and whether that IEP, as designed, was reasonably calculated to enable the child to receive educational benefit. *See K.E. ex rel. K.E. v. Indep. Sch. Dist. No.15*, 647 F. 3d. 795, 818 (8th Cir. 2011) (an IEP is essentially a snapshot in time, and “cannot be judged ‘exclusively in hindsight’ because the court ‘must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.’” (internal citations omitted); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir.1990) (an IEP is a snapshot, not a retrospective, and must take into account what was, and was not, objectively reasonable when the snapshot was taken).

The IDEA also requires that a disabled student remain in the least restrictive environment (LRE) “to the maximum extent appropriate.” 20 U.S.C.A. § 1412(a)(5)(A); *see also* 34 C.F.R. §§ 300.114-.300.120; COMAR 13A.05.01.10A(1). “Mainstreaming of [disabled] children into regular school programs where they might have opportunities to study and to socialize with non[disabled] children is not only a laudable goal but is also a requirement of the [IDEA].” *DeVries*

ex rel. DeBlaay v. Fairfax Cty. Sch. Bd., 882 F.2d 876, 878 (4th Cir. 1989). However, while the IDEA's mainstreaming provision establishes a presumption for a student to remain in the general education setting, it is not an inflexible federal mandate. *Id.* ("The Act's language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child."); *Hartmann*, 118 F.3d at 1001. The IDEA explicitly states that removal of children from the regular educational environment is appropriate "when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C.A. § 1412(a)(5)(A). Congress thus recognized that regular classrooms are not always a suitable setting for the education of some disabled students, and the IDEA provides that federal funds may be used to educate some disabled students in private setting at public expense. *Rowley*, 458 U.S. at 181 n. 4; *see also* 34 C.F.R. § 300.115 (continuum of alternative placements). The nature of the LRE necessarily differs for each child, but could range from a regular public school to a residential school where twenty-four-hour supervision is provided. *See* COMAR 13A.05.01.10B.

In *DeVries*, the Fourth Circuit stated:

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

DeVries, 882 F.2d at 878-79 (quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.)).

If a reviewing court determines that a student was denied a FAPE, the court may "grant such relief as [it] determines is appropriate." 20 U.S.C.A. § 1415(i)(2)(C)(iii). The ordinary

meaning of these words confers “broad discretion” to the court to grant an appropriate remedy. *School Comm. of Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369 (1985).

Reimbursement for a unilateral private placement is one such appropriate remedy. *Id.* at 370.

Parents may receive reimbursement for a private unilateral placement even in cases where the student never attended the proposed public placement. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238-243 (2009). Parents who unilaterally place the student in a private school do so at their own financial risk as they must demonstrate that the placement proposed by the school system was not reasonably calculated to provide a child with FAPE and the private unilateral placement is proper. *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993).

The burden of proof in a due process hearing is by a preponderance of the evidence and rests with the party bringing the due process complaint. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

Analysis

The Parents brought this due process complaint against MCPS; thus, the Parents have the burden of proving their case.

The Parents allege that the two IEPs proposed by MCPS in 2017 were not reasonably calculated to provide the Student with a FAPE. Specifically, the Parents argue that the proposed placement of the Student in a general education classroom at the Public School for the 2017 – 2018 school year was inappropriate, because the Student requires a small learning environment and a specific methodology in order to access a school curriculum and benefit from instruction.

For the reasons articulated below, I find the Parents have not proven the proposed placement offered by MCPS for the 2017 – 2018 school year failed to offer the Student a FAPE. Thus, I do not award the Parents their requested relief.

June 2017 IEP

The evidence shows that once the Parents contacted MCPS in the Spring of 2017, MCPS began the special education eligibility process by sending the Parents a welcome letter and a packet of information to complete and return. The Parents filled out the Eligibility Screening Parent Interview/ Questionnaire and the Private/Parochial School Student Referral for Special Education Services and returned both documents to MCPS. The Parents did not answer the question, “Has your child had any evaluations of which the school may be unaware: educational, psychological, medical, other?” (MCPS 1-8). The Parents did not provide MCPS with school observation notes completed by [REDACTED] M.Ed., Ed. S., in January 2015 and March 2017, nor an initial neuropsychological evaluation conducted when the Student was six years old, nor documentation of his initial Autism diagnosis. The Parents did provide MCPS with a copy of a Fall 2016 neuropsychological evaluation completed by Dr. [REDACTED] Director of the Center for Assessment and Treatment, and a copy of the DPG from the Private School. MCPS was able to consider only the information available to it at the time of the June IEP meeting.

It is clear from the record that MCPS considered the latter documents in concert with Private School teacher input and recommendations from Ms. [REDACTED] when MCPS developed the IEP. The IEP team relied upon Dr. [REDACTED]’s assessment of the Student from the outset of the IEP process. The notes from the April 19, 2017 screening meeting indicate, “[t]he team decided to accept the neuropsychological report for psych, speed, and academic[s].” (MCPS 2-15). The notes also referenced Dr. [REDACTED]’s rating of the Student’s processing speed at the 2nd percentile,

Autism diagnosis, and concerns with anxiety, attention, and limited vocabulary. Mr. [REDACTED] testified that the information contained under the section “teacher input” in the June IEP came from the Private School. [REDACTED] the Student’s classroom teacher at the Private School, participated telephonically in the June IEP meeting and provided insight about the Student and his needs to facilitate academic success. During the IEP meeting, MCPS worked with Ms. [REDACTED] to develop the IEP and incorporated recommendations from the DPG into the IEP document, including the Student’s use of graphic organizers, verbal prompts, looking back within a text and goals of engaging in peer conversations. The DPG also recommends a small group setting, which the IEP provides the Student for testing to reduce distractions and academic anxiety. The IEP also provides for the Student to participate in small group instruction “to support academic understanding in reading, writing, and math.” (P 12 - 26). To accommodate the Student’s transition from a small-group Private School setting to a larger general education setting for the majority of the school day, MCPS also offered the Student the full-day support of an instructional assistant.

When developing the June IEP, MCPS also relied upon data gathered by MCPS teachers and professionals during its own observations and assessments of the Student. On April 26, 2017, a special education teacher from the Public School, [REDACTED] conducted a classroom observation of the Student at the Private School. [REDACTED] testified that she could see and hear the Student, but the Student could not see or hear [REDACTED] from her observation room. [REDACTED] testified that the Student had academic strengths but struggled with reasoning and motivation to work. [REDACTED] did not observe any speech deficiencies.

When [REDACTED] returned to the Private School to assess the Student on May 22, 2017, she was impressed with how friendly the Student was and willing to work with her and [REDACTED] (who accompanied [REDACTED]). [REDACTED] testified the Student read a passage fluently and expressively, but

struggled with reading comprehension questions. However, when he was allowed to refer back to the text, he was able to answer questions. █████ concluded that the Student was reading at a “Level S,” which corresponded to the fourth grade level, meaning that he read on grade level.

█████'s May 22, 2017 evaluation also included mathematics and writing. The Student performed mathematics problems at the fourth grade level and also did a limited amount of fifth grade work. █████ testified that the Student was more proficient with concrete mathematics concepts than abstract work. █████ concluded that the Student was on grade level in mathematics. When █████ directed the Student to write about anything he wanted, he created a paragraph with a topic sentence, content, and a conclusion. He did so without prompting.

█████, a special education teacher at the Public School, accompanied █████ for her observations assessments of the Student. As an expert in the field of special education, █████ testified that after reading the Student's DPG, she was “concerned about his communication” but once she saw him in an academic setting, she realized that the Student could do work independently, used his communication skills to engage with others, and applied previously learned material on and above grade level during his academic assessment. She testified the Public School had students with similar needs and disabilities at his grade level who had been her special education students when she serviced the third and fourth grades. She opined that the Public School would be able to service the Student. █████ further opined that the Student would benefit from exposure to non-disabled peers and that the Public School could meet the Student's academic needs. █████ attended the June IEP meeting and agreed with MCPS' recommendations for services and placement.

█████ an MCPS speech-language pathologist, conducted an observation and language sample analysis on May 31, 2017, which led her to the conclusion that the Student was within average range for his age in speech and language. She testified that during her observation of the

Student in a classroom setting at the Private School, he attended to what the teacher said and wrote responses when the teacher asked questions. One of his verbal answers to a teacher question was incorrect; however, he did not exhibit any anxiety or frustration when he erred. After the observation, [REDACTED] met with the Student to conduct a language sample analysis. The Student introduced himself, using nice manners, and told [REDACTED] about his favorite family activities. [REDACTED] noted that the Student's expressive language was good while discussing topics of interest to him. The Student had a total of fifty utterances, whereas twenty-five is the minimum in an MCPS language assessment, so his language sample was longer than necessary. The Student took turns during most of the conversation and responded to all of [REDACTED]'s questions. [REDACTED] noted the Student had a tendency to start and stop talking and found the Student was at the lower range of normal for fluidity of language. Overall, [REDACTED] concluded the Student was within the average range for speech and language.

Despite [REDACTED]'s findings that the Student was within the average range for his age, she testified that she agreed with the IEP team's recommendation that the Student receive two thirty-minute sessions weekly in the area of speech and language, noting that he was receiving speech and language services at the Private School. As an expert in Speech-Language Pathology, [REDACTED] opined that the Student had good language comprehension and he was able to interact with others. Therefore, he was able to be serviced in a general education setting at the Public School.

The parties developed the goals, objectives, accommodations and supports in concert and agreed that they are appropriate to support the Student's needs. However, the Parents disagreed with the placement recommendation, because they do not believe that the IEP can be implemented in a general education setting. MCPS documented the Parents' concerns as follows, "Parents are concerned with [the Student's] social support. They feel that being in a large class his behaviors and anxiety would increase and impact him in a negative way. They

feel that he has be[en] receiving specific social skills training at [the Private School] and he needs to be able to apply those skills before entering into a large general education setting.” (MCPS-7-72).

MCPS acknowledged that a transition from the Private School to the Public School would be a major change for the Student. However, it determined that this placement was the LRE for the Student given the data collected, because the Student would be

successful in the home school model program with supports documented throughout the IEP and with a[] emphasis on his initial transition at the beginning of the school year. The team feels that [the Student] would benefit from access and exposure to typical peers.

(MCPS- 7-72).

Indeed, [REDACTED] and [REDACTED], experts in special education, and [REDACTED] an expert in Speech-Language Pathology, all opined that the Student would be appropriately placed in a general education setting at the Public School.

The Parents’ experts, Ms. [REDACTED] and Dr. [REDACTED] opined that the Student is not academically ready for a general education public school placement. They cited concerns with the Student’s level of attention, need for prompting, academic anxiety, and need for a social learning curriculum (which the Private School provided to the Student, but the Public School would not). [REDACTED] testified that when she toured the Public School and saw the large busy classrooms, she knew that the school was not suitable for her son.

Ms. [REDACTED] observed the Student in two separate school settings and participated in the first IEP meeting, rather actively according to Mr. [REDACTED]. Ms. [REDACTED] testified that she felt the IEP team was open to her input. As an expert in special education, she opined that the Student needs classroom support, because he requires close monitoring as he transitions towards independent work. Otherwise, when he gets “stuck” he can become dysregulated. Also, he struggles with reading comprehension due to difficulty in interpreting meaning. When he

encounters new material, he can become frustrated and will proclaim that he has to do it, “my way” not the “teacher’s way.” Ms. [REDACTED] was concerned that the Student is “vulnerable to overload” and could shut down or become explosive in a general education setting with robust expectations. She opined that the Student needs a modified curriculum that unfolds slowly, whereas general education follows a set schedule. Furthermore, she testified that the Student is successful at the Private School with his current behavioral support system, that behavioral supports would be less available under the IEP and that his current social skills class is not available at all in the Public School.

The Parents’ opinion directly contradicts the opinion of MCPS, which is that the Student is suitable for a general education setting for most of the school day and he would receive supplementary instruction in small-group out-of-classroom sessions. The conflict between the parties remained the same after the October 13, 2017 IEP meeting.

October 2017 IEP

The October 2017 IEP carried over the content of the June 2017 IEP, but was retyped into a new computer system adopted by MCPS during the summer of 2017, to produce a fresh document. As a result, the IEP looks different but has nearly identical content. Other than a typographical error acknowledged by [REDACTED] during the hearing, there was one important addition to the IEP document as a result of the October IEP process.

In preparation for the October 2017 IEP meeting, the Parents provided MCPS with an addendum authored by Dr. [REDACTED]. In his addendum, Dr. [REDACTED] describes the Student as a “curious, earnest, loving and socially motivated child who is academically motivated, enjoys learning, and enjoys going to school.” (P-9). He assessed the student as being of average intelligence and further explained, “He has demonstrated nice improvements in functioning over

the past three years, including significant improvements in his self-regulation, language and social and practical living skills.” *Id.*

Dr. [REDACTED] cites continuing issues including being sensitive to criticism and prone to feeling anxious about school performance “(e.g., during tests).” *Id.* However, he opined, “[the Student’s] Autism symptoms, complex language disorder, attention and executive functioning deficits, fine motor weaknesses, very slow processing speed, and weakness in self-regulation will likely prevent him from being able to access the educational curriculum in a mainstream educational setting, even with the extensive supports and an individual aide.” *Id.* Finally, Dr. [REDACTED] opined that the Student needs Autism support specialists as part of his education. *Id.*

MCPS responded to this feedback by offering the Student an Autism consultation to determine what additional services and supports could accommodate the Student at the Public School. [REDACTED] testified that during an Autism consultation, a professional reviews data collected by the team and collaborates with the special education teacher and general education teacher to provide student supports. In the Student’s case, the consultation would have included the instructional assistant. [REDACTED] attended the October 20, 2017 IEP meeting and further testified that it concerned placement. She understood that Dr. [REDACTED]’s addendum explained his disagreement with the placement offered by MCPS; however, as an expert in special education, she opined that the Student does not require a self-contained classroom as part of his services. Rather, his placement in a general education classroom with a thirty-five-minute block per day out-of-class instruction in reading, would be appropriate for the Student. Finally, she opined, the IEP is comprehensive to address all of the Student’s needs.

I find MCPS provided cogent explanations for its decision to include the Student in the general education setting for eighty-two percent of his school day in the 2017 – 2018 academic year. With regard to the Student’s Autism-related issues, MCPS offered an Autism consultation

to ensure that once the Student integrated into a larger classroom setting, his social-emotional needs would be met. The IEP offered him one hour per month of counseling services with a school guidance counselor. The Student would also have the support of the instructional assistant. Additionally, the findings of the MCPS assessments demonstrate that the Student is not so socially impaired that he would be unable to adequately communicate and interact in a general education setting. Rather, he presented as a friendly, engaging and eager student. Furthermore, the Student's mother acknowledged that the Student has asked to attend the Public School with his neighborhood peers. ██████ made MCPS well aware of the Student's behavioral issues; however, the Student was only rarely experiencing significant outbursts by June 2017. MCPS offered to provide the student with a functional behavioral assessment under the IEP to manage these behaviors. ██████ testified that the Public School services students similar to the Student and that the Public School was prepared to receive him after the June IEP meeting.

With regard to the Student's attentional issues, MCPS offered the Student small-group pull out sessions on a daily basis to address his attention-related challenges to reading comprehension. Furthermore, the instructional assistant was available to the Student to redirect his attention back to work, as his teacher in the Private School had a history of doing. The DPG from the Private School indicated that the Student was increasingly working on an independent basis, and the MCPS teachers who assessed the Student observed this ability as well. I give credence to the opinions of ██████ and ██████ who opined that the IEP would meet the Student's educational needs. Indeed, under *Hartman*, local educators deserve latitude in determining the IEP most appropriate for a disabled child. *Id.*, 118 F. 3d at 1001.

The Student has never been enrolled in public elementary school and he is now in the fifth grade. He is certainly accustomed to a small-group private school setting where teachers provide him extra supports to facilitate his learning process and he has access to a social skills

class. By Ms. [REDACTED] s account,⁶ which I have no reason to doubt, he is doing well in the Private School. She commented in her 2017 assessment that the Student has made good progress since her prior observation in 2015, shortly before he entered the Private School. From the Parents' perspective, the Private School offers their son, the Student, an ideal education. However, FAPE does not promise an ideal education. *Andrew F.*, 137 S. Ct. at 999.

The MCPS assessors found the Student to be engaging, communicative, and willing to do work. The actual work he did was predominantly at grade level, leading MCPS to the logical conclusion that placement in a general education setting for the majority of the Student's school day would be appropriate. Despite the Student's good performance on his assessments, MCPS continued to offer the Student special education services, including speech and language services, occupational therapy, guidance services, and the assistance of an instructional assistant. Given the snapshot of the Student in 2017 when the IEP was developed, the MCPS' placement offering predominantly regular classes with the aforementioned supplementary aids and services was reasonably calculated to offer the Student a FAPE.

With regard to whether the placement of the Student in the general education classroom at the Public School is the LRE, it is interesting that the Student would prefer to attend the Public School over the Private School. The Student's curiosity about public school is consistent with the MCPS assessors' opinions that the Student could be appropriately integrated into a general education setting with non-disabled peers. Indeed, [REDACTED] explained that there is a cohort of students similar to the Student that she has served as a special educator at the Public School. [REDACTED] explained that when the IEP was developed, the Student's social skills had advanced to a point where he could take turns in conversation, respond to classroom questions, ask questions about others and talk about himself. The MCPS assessors were surprised by how friendly he was

⁶ Again, the Parents did not provide MCPS with Ms. [REDACTED] reports prior to or during the development of the Student's IEP; however, Ms. [REDACTED] shared her understanding of the Student's needs and abilities with MCPS during the IEP process.

when they first met him. While the IEP team discussed the possibility of placing the Student into a more restrictive setting, they concluded that removing the Student from the regular educational environment for the majority of his school day is not appropriate. Under the IDEA, mainstreaming disabled students is required “unless the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C.A. § 1412(a)(5)(A). The record in this matter reflects that the Student’s LRE is a general education classroom in his home school for the majority of the school day.

The Parents did not enroll the Student in the Public School and demanded MCPS pay for the Student’s placement at the Private School for the 2017 – 2018 academic year. MCPS has not paid for the private placement. For the reasons discussed above, I find there is insufficient evidence to support a conclusion that MCPS denied the Student a FAPE for the 2017 – 2018 academic year through the IEP. Since I find the Student was offered an IEP that was reasonably calculated to provide him with FAPE for the 2017 – 2018 academic year, I will not grant the Parents’ requested relief. The only placement the Parents were willing to accept was at the Private School.

Parents have the right to educate their children in the school of their choice; however, parents may not use public funds to do so unless the program offered by a school district fails to offer a FAPE. MCPS offered the Student an IEP that was reasonably calculated to provide the Student with significant educational benefits. Thus, the expense of the Student’s education at the Private School must be borne by the Parents.

CONCLUSIONS OF LAW

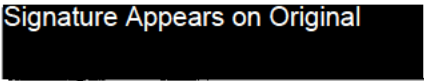
Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the IEP recommended Public School placement for the 2017 – 2018 school year was reasonably calculated to ensure the Student would receive a FAPE. 20 U.S.C.A. § 1412(a)(5)(A);

Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017); *Hartmann ex rel. Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

ORDER

I **ORDER** that the Parents' request for reimbursement for the Student's non-public placement at the Private School for the 2017-2018 school year at MCPS expense is denied.

March 26, 2018
Date Decision Mailed

Signature Appears on Original 

Rachael Barnett
Administrative Law Judge

RAB/da
#1730091A

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2017). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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

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

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