

[REDACTED]

STUDENT

v.

PRINCE GEORGE'S COUNTY

PUBLIC SCHOOLS

\* BEFORE BRIAN ZLOTNICK,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* CASE No.: MSDE-PGEO-OT-18-40023

\* \* \* \* \*

**RULING ON MOTION**

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**STATEMENT OF THE CASE**

[REDACTED] (Student) was found eligible for special education services in October 2015, while enrolled in the [REDACTED] County Public Schools ([REDACTED] CPS) as a student with the classification of other health impairment. The Student was enrolled in the Prince George's County Public Schools (PGCPS) from January 2017 through February 2018 when he returned to the [REDACTED] CPS. On December 28, 2018, [REDACTED] the Parent, on the Student's behalf, filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) and did not request a mediation session. On January 23, 2019, the parties attended the required resolution session and on January 24, 2019, the PGCPS notified the OAH that they did not resolve their dispute.

In the Complaint, the Parent alleged that the PGCPS has violated the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1415(f)(1)(A) (2017),<sup>1</sup> by denying the Student a free appropriate public education (FAPE), by failing to implement his CCPS Individualized

<sup>1</sup> U.S.C.A. is an abbreviation for United States Code Annotated.

Education Program (IEP) when he transferred to PGCPs and failing to develop an appropriate IEP to meet the Student's educational needs. The Parent also claimed that the PGCPs failed to follow proper procedures when it suspended the Student as a disciplinary measure and that the PGCPs made numerous other procedural violations regarding the Student. The Parent is seeking 125 hours of compensatory education and 70 hours of independent behavioral counseling/social work services for the Student and attorney's fees.

On February 11, 2019, I conducted a telephone pre-hearing conference at which the Parent was represented by Kimm Massey, Esquire, Jeffrey A. Krew, Esquire, represented the PGCPs. By agreement of the parties, the merits hearing was scheduled for Wednesday, February 27, 2019 and Thursday, February 28, 2019.

I advised the parties of the time requirements for issuing a decision. The applicable regulations state the following, in part:

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

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

34 Code of Federal Regulations (C.F.R.) § 300.515 (2017).

...

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

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

34 C.F.R § 300.510 (2017).

Therefore, in accordance with these regulations, the decision shall be issued on or before Wednesday, March 13, 2019, which is forty-five days from the January 24, 2019, notice of the

parties to OAH that the resolution session did not resolve their dispute. 34 C.F.R. §§ 300.510(c), 300.515(a) (2017).

I held the hearing on Wednesday, February 27, 2019. The Parent appeared for the hearing and represented herself. Mr. Krew represented the PGCPS. The legal authority for the hearing is as follows: Individuals with Disabilities Education Act (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) (2018); 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; the Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 13A.05.01.15C; COMAR 28.02.01.

### ISSUE

Should PGCPS's Motion for Judgment (Motion) be granted?

### SUMMARY OF THE EVIDENCE

I admitted the following exhibits on behalf of the PGCPS:

- BD. Ex. A - E-mail from Mr. Krew to the Parent, dated February 26, 2019
- BD. Ex. B - Delivery Confirmation of February 26, 2019 e-mail from Mr. Krew to the Parent
- BD. Ex. C - Parent's Five Day Disclosure, dated February 20, 2019

The Parent presented the following documents which I admitted as indicated:

- Parent Ex. 1 - E-mails between [REDACTED], Principal, [REDACTED] High School, and the Parent, dated March 8 and 9, 2017 – **ADMITTED INTO EVIDENCE**
- Parent Ex. 2 - MSDE's 2017-2018 Report Card for the PGCPS, [REDACTED] High School and [REDACTED] High School – **NOT ADMITTED INTO EVIDENCE**<sup>2</sup>
- Parent Ex. 3 - E-mail from the Parent to [REDACTED], Principal, [REDACTED] High School, dated May 12, 2017 – **ADMITTED INTO EVIDENCE**

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<sup>2</sup> I sustained the PGCPS objection to this exhibit on relevancy grounds.

Parent Ex. 4 - Notice of IEP Team Meeting, dated January 9, 2018 – **ADMITTED INTO EVIDENCE**

Parent Ex. 5 - Student's Amended [REDACTED] CPS IEP, dated February 23, 2018 – **ADMITTED INTO EVIDENCE**

Parent Ex. 6 - Student's eleventh grade second quarter report card from [REDACTED] High School – **ADMITTED INTO EVIDENCE**

Parent Ex. 7 - [REDACTED] CPS Evaluation Report and Determination of Initial Eligibility, dated September 1, 2015 – **ADMITTED INTO EVIDENCE**

Parent Ex. 8 - Student's IEP, dated October 19, 2016 – **ADMITTED INTO EVIDENCE**

### **FINDINGS OF FACT**

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

1. The Student's birthdate is [REDACTED] 2001.
2. The Student was administered the Woodcock-Johnson IV Tests of Achievement on July 9, 2015. The Student's standard score for broad reading and broad math were in the average range and his broad written language score was in the low average range. (Parent Ex. 7).
3. On August 6, 2015, the Student was administered the Woodcock-Johnson IV Tests of Cognitive Abilities in which the Student's standard scores in the areas of comprehension/knowledge, fluid reasoning, short term/working memory, cognitive efficiency, auditory processing and general intellectual ability were within the average range. (Parent Ex. 7).
4. On September 1, 2015, the [REDACTED] CPS determined that the Student was eligible for special education services and identified the Student's disability as Other Health Impaired. (Parent Ex. 7).
5. In January 2017, the Student moved from his [REDACTED] County home to live with his father in Prince George's County. The Student attended [REDACTED] High School in the PGCP

system from January 2017 through February 2018. In March 2018, he returned to ██████████ County to reside with the Parent. (Parent's testimony).

## DISCUSSION

### PROCEDURAL HISTORY

On January 9, 2019, the PGCPs filed a Motion to Dismiss (Motion-1) in which it argued that the Parent's December 28, 2018 due process complaint for the instant matter was filed hours after the Parent had withdrawn her appeal that was scheduled for a hearing before Administrative Law Judge ██████████ on January 4, 2019. The PGCPs asserted in Motion-1 that the Complaint was filed in bad faith and therefore must be dismissed. The Parent filed a response to Motion-1 on January 16, 2019. On February 8, 2019, I issued my ruling denying Motion-1.

On January 16, 2019, the Parent filed a Motion for Judgment (Motion-2) which I considered to be a Motion for Summary Decision as it contained exhibits and affidavits and neither party had presented its case as of that date. On January 31, 2019, the PGCPs filed a Response to Motion-2.

On February 12, 2019, the PGCPs filed a Motion in *Limine* (Motion-3) to exclude admission into evidence the January 19, 2018 complaint filed by the Parent with the Maryland State Department of Education (MSDE); MSDE's March 29, 2018 letter of findings (LOF) addressing the January 19, 2018 complaint; and any evidence regarding coordination between the PGCPs and the ██████████ CPS involving the Student. On February 22, 2019, the Parent filed a response in opposition to Motion-3. On February 25, 2019, I notified the parties of my decision to deny Motion-3.

On February 19, 2019, the Parent filed a Motion to Amend (Motion-4) my prehearing conference order seeking to add language describing my ruling on the record which denied the Parent's request to have Motion-2 be the sole basis of her case and as such obviate the need for

any due process hearing dates. On February 22, 2019, the PGCPs submitted a response to Motion-4 and on February 25, 2019, I granted Motion-4 to amend the prehearing conference order to include a description of my ruling on the record to deny the Parent's request to forgo the scheduling of any hearing dates and have Motion-2 be her sole case in chief in this matter.

On February 22, 2019, I issued my ruling in which I denied Motion-2 and ordered that the due process hearing scheduled for February 27, and 28, 2019, would convene as scheduled. My assistant, [REDACTED] issued this ruling by mail and e-mail to the parties at approximately 2:30 p.m. on February 22, 2019. Subsequently, at approximately 5:17 p.m. on February 22, 2019, Ms. Massey notified the PGCPs and the OAH of her withdrawal as counsel for the Parent and Student in this case and that the Parent would represent the Student in this matter.

On February 22, 2019, the PGCPs filed a Motion to Amend (Motion-5) my prehearing conference order which permitted the Parent to participate in the hearing by telephone. The PGCPs argued in Motion-5 that because it issued a subpoena to the Parent to appear at the hearing that my order allowing her to participate by telephone should be amended to require the Parent to appear for the hearing. On February 25, 2019, I notified the parties of my decision to grant Motion-5 to require the Parent to appear in person for the hearings scheduled for February 27 and 28, 2019.

On February 25, 2019, the PGCPs filed an Opposition to Withdrawal of Counsel for the Student and Parent (Motion-6) which requested an order striking Ms. Massey's withdrawal of appearance in this matter. On February 25, 2019, I notified the parties of my decision to deny Motion-6).

Further, on February 25, 2019, the PGCPs filed a Motion to Dismiss or, in the Alternative, for Summary Decision (Motion-7) in which it argued that since the Parent's five-day disclosure revealed that she did not intend to present any testimony at the hearing it was

therefore impossible for the Parent to meet her burden of proof in this matter. On February 25, 2019, I notified the parties of my decision to deny Motion-7.

### **PRELIMINARY MATTERS**

The PGCPs filed a request for a subpoena duces tecum with the OAH which in turn issued this subpoena to the Parent on February 14, 2019, requiring her to appear at the first day of the hearing on February 27, 2019, with all documents within her possession or control that relate to the Student's place of domicile from January 1, 2017 to March 1, 2018. The Parent did not provide any documents in response to the subpoena as she did not have any documents related to the Student's place of domicile. The Parent testified under oath that the Student resided with his father in [REDACTED] Maryland, from January 2017 to March 2018. The Parent testified that she never asked the Student's father for any documents related to the Student's residence with his father. The PGCPs made an oral motion for sanctions against the Parent for failing to comply with the February 14, 2019 subpoena duces tecum, specifically seeking dismissal of the Complaint. On the record I denied the PGCPs request for sanctions.

The PGCPs also made an oral Motion in *Limine* seeking to prevent the Parent from testifying at the hearing in accordance with her February 20, 2019 five day disclosure which indicated that the Parent did not intend to present any testimony at the due process hearing. On the record I denied this Motion as I ruled that since the Parent is a party to this case I would allow her to testify at the hearing but I would not allow her to present any witnesses on her behalf as no witnesses were disclosed in her February 20, 2019 disclosure notice.

The Parent sought to introduce documentary evidence that was identified in a supplementary five day disclosure form, dated February 22, 2019. The PGCPs objected to the introduction of any evidence identified in the February 22, 2019 disclosure form arguing that the form was not timely submitted. On the record I ruled that the Parent's February 22, 2019

supplemental five day disclosure form which listed additional documents that the Parent planned to submit into evidence, would not be accepted as it was filed less than five business days prior to the start of this hearing and therefore failed to comply with 34 C.F.R. § 300.512(3).

Lastly, the PGCPS made an oral Motion in *Limine* to restrict the Parent's testimony to the documents cited in her February 20, 2019 disclosure form. On the record I denied this Motion.

The PGCPS moved into evidence three exhibits that were presented to support its preliminary motions regarding the Parent's failure to comply with a subpoena and its request to deny the Parent an opportunity to testify in this matter. The Parent presented an opening statement and the PGCPS reserved its opening. The Parent testified, presented documents into evidence and then rested her case. Thereafter, the PGCPS made an oral Motion to Dismiss/Motion for Summary Decision/Motion for Judgment. The PGCPS declined to present its case in chief but requested to reserve its right to present its case if I deny its Motion to Dismiss/Motion for Summary Decision/Motion for Judgment. On the record I granted the PGCPS request and ruled that that if I denied its Motion I would convene a prehearing conference with the parties to schedule an additional hearing date for the presentation of the PGCPS case in chief. The Parent was given an opportunity to respond to the Motion and after her response I adjourned the hearing so that I could issue a written ruling on the Motion.

### **MOTION FOR JUDGMENT**

Although argued by the PGCPS as Motion to Dismiss/Motion for Summary Decision/Motion for Judgment, I find that the OAH Rules of Procedure clarify that since this Motion was made at the close of the Parent's case and before the presentation of the PGCPS case, it is a Motion for Judgment, thus I will treat the PGCPS's motion as a Motion for Judgment pursuant to COMAR 28.02.01.12E.



The OAH Rules of Procedure regarding a Motion for Judgment state as follows:

E. Motion for Judgment.

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

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

- (a) Proceed to determine the facts and to render judgment against an opposing party; or
- (b) Decline to render judgment until the close of all evidence.

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

COMAR 28.02.01.12E.

When considering a Motion for Judgment during a non-jury trial, the judge, as the trier of fact, may determine the facts and render judgment against the non-moving party. *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 353 (1986). The judge may evaluate the evidence, including making inferences, determining credibility and drawing conclusions. *Id.*

The powers and duties of an Administrative Law Judge are outlined in COMAR 28.02.01.11, and state, in relevant part, as follows:<sup>3</sup>

**.11 Powers and Duties of Judges.**

A. A judge shall:

...

- (2) Take action to avoid unnecessary delay in the disposition of the Proceedings. . . .

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<sup>3</sup> This provision in the OAH rules of procedure is akin to the Maryland Rules regarding Motions for Judgment in the circuit and district courts. *See* Maryland Rules 2-519 and 3-519. Thus, I find that case law interpreting the circuit and district court provisions is persuasive and informative regarding the proper interpretation of the OAH provision.

B. A judge has the power to regulate the course of the hearing and the conduct of the parties and authorized representatives, including the power to:

...  
(4) Consider and rule upon motions in accordance with this chapter;

...  
(11) Issue orders as are necessary to secure procedural simplicity and administrative fairness and to eliminate unjustifiable expense and delay[.]

In the instant case, the Parent, on the Student's behalf, filed the Complaint with the OAH; therefore, the Parent/Student bears the burden of proof by a preponderance of the evidence.

*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) (quoting *Maryland Civil Pattern Jury Instructions* 1:7 (3d ed. 2000)); see also *Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

At the close of the Parent's case, the PGCPs argued that the Parent failed to establish a *prima facie* case. The Parent's only response was that the PGCPs failed to provide the Student with a FAPE.

The Parent provided limited testimony regarding the domicile status of the Student and offered exhibits into evidence. The Parent did not present any witnesses to support or explain her exhibits and she merely offered those exhibits without any testimony to connect how each exhibit supported her Complaint regarding the failure of the PGCPs to provide the Student with a FAPE.

The Parent's Complaint outlined the issues involved in this matter and those issues were identified in my February 11, 2019 prehearing conference order as follows:

1. Did PGCPs deny the Student a FAPE by failing to implement the Student's existing individual education program (IEP) and behavior intervention plan (BIP) when he transferred to PGCPs from █ CPS from January 2017 through March 9, 2017?

2. Did PGCPS deny the Student a FAPE by failing to implement the Student's PGCPS-created IEP from March 2017 through December 2017?

3. Did PGCPS deny the Student FAPE by failing to review and revise the Student's BIP from █ CPS on or about March 9, 2017?

4. Did PGCPS deny the Student a FAPE by failing to implement the Student's PGCPS-created BIP from March 2017 through February 2018?

5. Did PGCPS deny the Student a FAPE by decreasing the amount of social services to be provided to the Student in his IEP, without a documented basis, when it reviewed and revised his IEP on or about October 23, 2017?

6. Did PGCPS deny the Student a FAPE by failing to make a determination at a February 20, 2018 manifestation determination review for the Student?

7. Did PGCPS deny the Student a FAPE by failing to provide him with specialized instruction during periods when he was subject to disciplinary suspensions?

8. Did PGCPS deny the Student a FAPE by failing to revise the Student's BIP after his disciplinary suspensions in January and February 2018?

9. Did PGCPS deny the Student a FAPE by failing to prepare quarterly IEP progress reports for the Student from January 2017 through November 2017?

10. Did PGCPS deny the Student a FAPE by failing to provide the Parent with prior written notice of all IEP team decisions from January 2017 through February 2018?

11. If PGCPS denied the Student a FAPE, what is the appropriate remedy?

Regarding issue #1, the Parent did not provide any witness testimony from the █ CPS or the PGCPS to explain the content of the Student's █ CPS IEP and how it should have been implemented by the PGCPS. Further, the 2016 █ CPS IEP submitted into evidence by the Parent is incomplete as there are sections missing and there are portions of that document that are

illegible due to poor photocopying. The only IEP submitted by the Parent from the PGCPS was the amended February 23, 2018 IEP but again, without any testimony from educational professionals who were charged with implementing the Student's educational programming, it is impossible for me to discern whether the PGCPS failed to implement the Student's PGCPS IEP when he transferred to ██████ High School in January 2017.

As for issue ## 2, 3, 4, and 5, the Parent failed to provide any evidence of the PGCPS's failure to implement the Student's IEP from March 2017 through December 2017 as no witnesses testified regarding the content of that IEP and how the instruction received by the Student failed to follow that IEP. Similarly, the Parent did not support her contentions that the PGCPS failed to review and revise the Student's PGCPS BIP and failed to implement the Student's PGCPS-created BIP from March 2017 through February 2018, as no evidence from any service providers was presented to support these claims.

Issue ## 6, 7, and 8 all concern the Parent's argument that the Student was denied FAPE by the PGCPS's failure to follow proper procedures when the Student was disciplinarily suspended from school. The only evidence presented by the Parent related to these issues was a January 9, 2018 notice of an IEP meeting scheduled for January 19, 2018 to conduct a manifestation determination (Parent Ex. 4). The Parent provided no testimonial or documentary evidence regarding any suspensions imposed against the Student or the content of any instruction or changes to the Student's BIP that were made or not made during the Student's suspensions. There is simply no evidence before me that allows for any discussion regarding these issues.

Finally, the Parent alleged in her Complaint through issue ## 9 and 10 that the PGCPS denied the Student a FAPE by failing to prepare the Student's quarterly IEP progress reports from January 2017 through November 2017 and failing to provide the Parent with prior written notice of all IEP team decisions from January 2017 through February 2018. Again, the Parent

did not testify regarding these allegations and also did not present any witnesses in support of these assertions. Even if I found that the Parent presented sufficient evidence to establish that the PGCPS committed these procedural violations, which I do not, the Parent would still have to establish a link between any such violations and denial of educational benefit for the Student in order to establish a denial of the Student's FAPE. *DiBuo v. Bd. Of Educ. Of Worcester County*, 309 F.3d 184 (2002). In sum, the Parent's lack of evidence fails to meet her burden to establish that these procedural violations occurred.

Accordingly, the Parent's unsubstantiated allegations do not amount to errors sufficient to sustain the Parent's position that the Student was denied FAPE.

The Parent's testimony reflected the frustrations of a concerned parent who believes that the PGCPS failed to provide appropriate services to the Student. However, the Parent's opinion and obvious dissatisfaction with the PGCPS is not sufficient alone to sustain her burden. The record does not present evidence legally sufficient to demonstrate that the PGCPS ever failed to offer the Student a FAPE.

Accordingly, since the Parent has failed to prove the Student was denied FAPE, I need not look at the question of the remedy. The Motion for Judgment will be granted. The PGCPS also requested that if I granted its Motion I should dismiss the Parent's Complaint with prejudice. I find that the Parent proceeded with her case in chief and did not unduly delay the hearing process or act in bad faith in relation to the Complaint. Therefore, the PGCPS's request that any dismissal of the Complaint be made with prejudice is denied.

### **CONCLUSION OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Motion for Judgment should be granted in favor of the PGCPS at the conclusion of the

Student's case. COMAR 28.02.01.11 and .12E; *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 353 (1986).

**ORDER**

Prince George's County Public School's Motion for Judgment is **GRANTED** and the Student's Due Process Complaint is hereby **DENIED**.

Signature Appears  
on Original

March 6, 2019  
Date Ruling Mailed

Brian Zlotnick  
Administrative Law Judge

BMZ/emh  
#178518

**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 to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2018). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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

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

Copies Mailed To:

[Redacted]

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