

**XXXX XXXX,**

**STUDENT**

**v.**

**MONTGOMERY COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE TARA K. LEHNER,**

**\* AN ADMINISTRATIVE LAW JUDGE**

**\* OF THE MARYLAND OFFICE**

**\* OF ADMINISTRATIVE HEARINGS**

**\* OAH No.: MSDE-MONT-OT-17-25088**

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**DECISION**

STATEMENT OF THE CASE  
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SUMMARY OF THE EVIDENCE  
PARTIES' STIPULATED FACTS  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSION OF LAW  
ORDER

**STATEMENT OF THE CASE**

On August 10, 2017, XXXX XXXX (Mother) and XXXX XXXX (collectively Parents) filed a Due Process Complaint (Complaint) on behalf of XXXX XXXX (Student) against Montgomery County Public Schools (MCPS) with the Office of Administrative Hearings (OAH). In their Complaint, the Parents indicated they did not want to participate in mediation. On August 23, 2017, the Parents and MCPS agreed in writing to waive the resolution meeting.

The Complaint alleges MCPS violated the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A.<sup>1</sup> §§ 1400-1419 (2017). Specifically, the Parents allege MCPS violated the IDEA by denying the Student a free appropriate public education (FAPE) for the 2015-2016, 2016-2017, and 2017-2018 school years. *Id.* § 1415(f)(1)(A). The Parents seek reimbursement from MCPS for the unilateral non-public/private placement of the Student at the [School 1]

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<sup>1</sup> "U.S.C.A." is an abbreviation for the United States Code Annotated. All citations to Title 20 of the U.S.C.A. are to the 2017 volume.

(Private School) for all three school years, and the placement of the Student, at MCPS's expense, at the Private School for the balance of the 2017-2018 school year.

The timeframe for the holding of the hearing and the issuance of a decision in this case expired on Friday, October 6, 2017; forty-five days after the parties agreed in writing to waive the resolution meeting. *See* 34 C.F.R. § 300.515(a).<sup>2</sup> During the telephone pre-hearing conference on September 19, 2017, I reviewed the calendars of the parties and their counsel and confirmed no dates were available for hearing prior to November 7, 2017.<sup>3</sup> The parties jointly requested I grant a specific extension to hold the hearing on November 7, 8, 15 and 16, 2017,<sup>4</sup> the first available dates, and that I issue a decision in this case on or before December 15, 2017. *See* 34 C.F.R. § 300.515(c). In light of the schedules of the parties and their counsel, I granted the request.

The hearing took place at the Montgomery County Board of Education in Rockville, Maryland. Michael Eig, Esquire, and Meghan Probert, Esquire, appeared on behalf of the Parents. Manisha Kavadi, Esquire, appeared on behalf of MCPS.

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

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<sup>2</sup> "C.F.R." is an abbreviation for the Code of Federal Regulations. All citations to 34 C.F.R. are to the 2017 volume.

<sup>3</sup> During the telephone pre-hearing conference, Ms. Kavadi, Mr. Eig, and I went through the calendar and it was deemed the parties, their counsel, or I were unavailable for hearing as follows:

- October 2 through 5, Mr. Eig had a previously scheduled hearing
- October 3 through 5, Ms. Kavadi was attending a professional conference
- October 10 and 11, this ALJ was attending a professional conference
- October 12, and 16 through 19, Mr. Eig had previously scheduled hearings
- October 18 through 20, Ms. Kavadi was observing holidays
- October 24, Mr. Eig had oral argument before the Fourth Circuit Court of Appeals in Richmond
- October 30 to November 3, Mr. Eig had previously scheduled hearings
- November 6, 9 and 10, Ms. Kavadi was on vacation
- November 13 and 14, Mr. Eig had a previously scheduled hearing.

<sup>4</sup> The hearing was also scheduled for November 17, 2017; however the hearing was completed on November 16, 2017. The November 17, 2017 hearing date was cancelled.

The contested case provisions of the Administrative Procedure Act, Maryland State Department of Education procedural regulations, and the Rules of Procedure of the OAH govern procedure. 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's proposed implementation of the Student's Individualized Education Program (IEP) and placement of the Student at [School 2] (Elementary School) fail to provide a FAPE to the Student for the 2015-2016 and 2016-2017 school years?
2. Did MCPS's proposed implementation of the Student's IEP and placement of the Student at [School 3] (Middle School) fail to provide a FAPE to the Student for the 2017-2018 school year?
3. If MCPS denied the Student a FAPE, is the reimbursement to the Parents for the cost of the Student's unilateral placement at the Private School for 2015-2016, 2016-2017 and the beginning of 2017-2018 school years, and the placement of the Student at MCPS's expense at the Private School for the balance of the 2017-2018 school year, appropriate?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

A complete exhibit list is attached as an appendix.

#### **Testimony**

The Parents presented the following witnesses:

- The Mother
- XXXX XXXX, Ed.D., Educational Consultant, whom I accepted as an expert in Special Education
- XXXX XXXX, M.Ed., BCBA, Elementary/Middle Program Director, the Private School, whom I accepted as an expert in Applied Behavior Analysis.

MCPS presented the following witnesses:

- XXXX XXXX, Special Education Teacher, MCPS, whom I accepted as an expert in Special Education with an emphasis in teaching children with autism

- XXXX XXXX, Instructional Specialist, MCPS, whom I accepted as an expert in Special Education with an emphasis in educating children with autism
- XXXX XXXX, R.N., MSN, Montgomery County Department of Health and Human Services Nurse Administrator, whom I accepted as an expert in nursing.

### **PARTIES' STIPULATED FACTS**

1. The Student is an eleven-year-old student residing in Montgomery County, Maryland.
2. The Student attends the Private School.
3. The Student has been found eligible for special education services as a student with autism.
4. The Student has been diagnosed with [Disease 1]([DISEASE 1]), and a pediatric XXXX syndrome (XXXX).
5. In 2007, at the age of two, the Student began receiving speech/language and occupational therapy (OT) services through XXXX Public Schools (XXPS).
6. In November 2008, the Student was evaluated by Dr. XXXX XXXX as part of his participation in a research trial at XXXX,<sup>5</sup> and was found to meet research criteria for autism spectrum disorder (ASD), with significant delays in developmental functioning and adaptive behavior.
7. In June 2011, Dr. XXXX XXXX, a neurologist at XXXX University, diagnosed the Student with XXXX following a strep infection. He responded well to intramuscular antibiotics and oral steroids and was administered intravenous immunoglobulin (IVIG) treatments.
8. The Student continued to be monitored for XXXX and was seen at the XXXX<sup>6</sup> Clinic at XXXX Hospital in the fall of 2012.

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<sup>5</sup> XXXX.

<sup>6</sup> Pediatric XXXX Associated with Streptococcal Infections

9. In 2013, testing revealed the presence of antinuclear antibodies and anticentromere antibodies; the Student was referred to Rheumatology and Immunology at XXXX Medical Center (XXXX Hospital).
10. In January 2015, the Student was diagnosed with [DISEASE 1] and began receiving in-home IVIG treatments to which he has had a positive response.
11. In July 2015, the Student began the Elementary/Middle Autism Program at the Private School.
12. In September 2015, the Student's Parents brought him to XXXX Hospital for a psychological evaluation by Dr. XXXX XXXX, who confirmed his previous diagnosis of ASD, but further diagnosed an accompanying intellectual disability (moderate) and language impairment.
13. In the fall of 2015, the family moved to [redacted], and contacted MCPS to begin the special education eligibility process on December 11, 2015.
14. An IEP screening meeting was held on February 22, 2016, and MCPS found the Student eligible as a student with autism.
15. MCPS requested to complete a psychological assessment which would focus on assessing the Student's school-based adaptive behavior skills. The Parents consented.
16. On March 7, 2016, XXXX XXXX, MCPS psychologist, completed an evaluation of the Student.
17. MCPS proposed the Autism Program at the Elementary School to implement the Student's April 2016 IEP.
18. The family's educational consultant, Dr. XXXX XXXX, completed observations of the Autism Program at the Elementary School on May 3, 2016 and June 2, 2016.

19. On June 9, 2016, the Parents sent MCPS behavioral data graphs provided by the Private School regarding the Student's issues with elopement and aggression, and requested an IEP meeting to discuss the new information.
20. An IEP meeting was held on August 4, 2016.
21. On August 5, 2016, the Parents served notice of their intent to maintain the Student's enrollment at the Private School for the 2016-2017 school year and requested that MCPS place and fund him there.
22. On August 9, 2016, MCPS declined the Parents' request and maintained that they had offered the Student a FAPE.<sup>7</sup>
23. On January 26, 2017, the Parents sent the Student's recently updated Private School IEP to MCPS and requested a meeting to consider the new information and begin the IEP process for his transition to middle school.
24. The Parents and MCPS met on April 4, 2017 to develop the IEP. MCPS proposed that the Student attend the Autism Program at the Middle School for the 2017-2018 school year.
25. On April 19, 2017, Dr. XXXX observed the MCPS Autism Program at the Middle School.
26. The Student's Parents filed a Request for Due Process on August 10, 2017.
27. On August 17, 2017, the Parents served notice of their intent to maintain the Student's enrollment at the Private School for the 2017-2018 school year and requested that MCPS place and fund him there.
28. On August 25, 2017, MCPS declined the Parents' request and maintained that it had offered the Student a FAPE.<sup>8</sup>

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<sup>7</sup> The Stipulated Fact included a statement that MCPS had also offered the Student's family a FAPE. Under the IDEA, the Student's Parents are not eligible for a FAPE, thus I deleted the reference to the Student's family.

<sup>8</sup> I deleted a reference to the Student's family being offered a FAPE.

## **FINDINGS OF FACT**

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

### **Background**

#### **2008-2012**

1. In September 2008, XXPS created an IEP for the Student and placed him in a preschool program in the school system.
2. Later that school year, the Student was transferred to another preschool program in the XXPS system due to concerns by the Parents regarding the quality of the staff at the first preschool and the Student's welfare.
3. In Spring 2010, the Parents became concerned about the Student's safety and supervision at the second preschool, and about whether the Student was receiving appropriate and sufficient special education services there. The Parents unenrolled the Student, and the Mother, along with the support of a team of therapists, began to homeschool the Student.<sup>9</sup>
4. In December 2010, while the Student was being homeschooled, the Student suffered an acute onset of obsessive compulsive behaviors. He was diagnosed with XXXX in June 2011, and this was attributed as the cause of these new behaviors.
5. The XXXX caused the Student to exhibit increased compulsive and obsessive rituals, including spitting.

#### **June 2013**

6. The Student was seven years old.
7. The Parents contacted XXPS to discuss enrolling the Student for the next school year (2<sup>nd</sup> grade). XXPS performed numerous evaluations of the Student, including observations by

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<sup>9</sup> The Student's Mother has an XXXX degree.

XXPS staff (an autism educator, a school psychologist, and a speech-language pathologist (SLP) in his homeschool environment.

8. XXPS offered an IEP to the Student with a placement in a self-contained autism classroom.
9. The Parents rejected this IEP due to the Parents' concerns that XXPS could not ensure the Student's safety and wellbeing. The Parents continued to homeschool the Student.

## **2015**

10. In Spring 2015, the Mother determined she could no longer educate the Student due to his maladaptive behaviors. She sought to enroll the Student in a school setting.
11. In June 2015, the Private School accepted the Student and the Parents enrolled the Student that July.
12. In July 2015, the Parents contracted with XXXX XXXX, an Education Consultant, for the purpose of seeking permanent funding from XXPS for the Student to attend the Private School.
13. In September 2015, the Student was not performing academically at grade level. He had significant delays in speech, language, communication, and social skills.
14. The Student was very rigid with schedules, rituals and other compulsions. When things did not go as he planned or wanted, he exhibited behaviors, including yelling and tantrums.<sup>10</sup> His tantrums could be lengthy and difficult to redirect.
15. The Student was impulsive. He grabbed and eloped to items/activities he wanted without first asking permission. Blocking was an effective strategy to address elopement.
16. The Student had significant attention issues. He had difficulty remaining seated during instruction. When he was distracted, he required constant redirection to task in order to

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<sup>10</sup> At this time, the Mother was reporting the Student was exhibiting self-injurious behavior; however, the Private School did not state this was happening in the school setting.

- learn. He often returned to working with one verbal prompt, but at times would need visual and or physical prompting, as well as hand-over-hand instruction.
17. The Student could not process large amounts of information or complex language. The Student needed tasks broken down into smaller parts.
  18. The Student frequently called out and became increasingly agitated when he did not have the teacher's full attention during group instruction. He needed frequent, short breaks from the group and consistent prompting to attend to the group leader and follow directions.
  19. The Student lacked judgment and did not comprehend dangers, including parking lots and hot stoves.
  20. The Student needed close adult supervision when transitioning inside or outside of the classroom.
  21. During non-instruction periods, such as lunch and recess, the Student did well when the Student was with an adult and one other student.
  22. The Student was independently motivated to work and was compliant and highly responsive to instruction.
  23. The Student responded well to fast-paced instruction, differential reinforcement (including social praise and token economy), first/then prompts, and frequent short breaks.
  24. The Student was highly motivated to interact with familiar adults, to approach known people, and to engage in conversation on specific topics or in routine/scripted interactions. He initiated greetings with adults at times, even when engaged in a preferred activity.

25. The Student did well during community outings with the Private School. When supported by Private School staff, he did well staying with the group. However, he did not monitor his surroundings.

**The December 2015 Private School’s IEP and Behavior Intervention Plan (BIP)**

26. An IEP developed by the Private School in December 2015 had goals for the following areas: adaptive behavior, including increasing personal space, decreasing elopement and decreasing yelling; language, including following the directions of “stop” and “come here,” and requesting preferred items; social skills, including looking toward a speaker, making eye contact, moving when someone says “excuse me,” and initiating greetings and salutations; fine motor skills, including buttoning clothing; oral language, including using a conversational tone; and math, reading, and spelling.<sup>11</sup>
27. A BIP was developed by the Private School and addressed the behaviors of elopement, yelling and tantrums.
28. The BIP’s intervention plan included: differential reinforcement of appropriate behaviors (e.g., praise, token economy); following a schedule; errorless teaching; extinction or removal of a desired item/activity if engaged in a targeted negative behavior; and backstepping (returning the student to step of the task/activity that was last performed in an appropriate manner).

**January to April 2016 – the first IEP proposed by MCPS**

29. The Student was ten years old and in 4<sup>th</sup> grade.
30. The Student took part in group instruction at the Private School. At times, he was disruptive, with behaviors such as stamping his feet, screaming at the teacher, reaching over the table for a preferred item, and repeating a demand. At other times he could

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<sup>11</sup> I do not discuss in detail the areas of math, reading and spelling because they are not at issue in the Complaint.

participate actively in the group without disruption, especially when given prompting, cueing, and praise from an aide. Frequent reinforcement breaks also helped with his behavior and participation.

31. MCPS drafted an IEP for the Student. MCPS worked in collaboration with the Parents, the Private School and the Parents' recently hired new education consultant, Dr. XXXX.
32. The proposed MCPS IEP was also developed based on the observations of the Student at the Private School by a MCPS Resource Teacher and an MCPS Autism Specialist.
33. An IEP Team meeting was held on April 15, 2016,<sup>12</sup> and included: special education staff from MCPS; a MCPS school psychologist; a MCPS OT; a MCPS SLP; the Student's Parents; their attorney; a special education teacher from the Private School; and Dr. XXXX.
34. The IEP Team agreed that the Student was certificate (not diploma) track and would participate in alternate assessments.
35. The proposed MCPS IEP's present level of performance (PLOP) sections described the Student in all areas of need, including oral language, behavior, safety, adaptive skills, social skills and gross motor.<sup>13</sup> It also discussed his XXXX and [DISEASE 1] diagnoses. The information contained within the PLOP sections was taken directly from the Private School documents provided to MCPS by the Parents, including the Private School's IEP, BIP, and Annual Education Report, and the evaluations performed by the XXXX Hospital psychologist and SLP, as complemented by the observations of the MCPS Resource Teacher.

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<sup>12</sup> The February 22, 2016 screening meeting, and the April 15, 2016 IEP meeting, appear from the record to have occurred outside the timeframes required by the IDEA. There are multiple references in the record to these meetings being rescheduled. (*See* P. 10, 17; MCPS 14 to 19, 21, 23, 24, 27.) At the hearing, the Parents' attorney acknowledged the delay and represented that the Parents were not asserting these delays were procedural violation by MCPS.

<sup>13</sup> It also included the Student's PLOP in written language, reading, math. However, as discussed above, these areas were not raised as an issue by the Parents in the Complaint; thus, I do not address these areas in my decision.

36. The proposed MCPS IEP contained goals across all areas of need, including speech/language, behavior, personal management, social skills, written language, reading, mathematics, and gross motor. Many of the goals addressed similar areas as the Private School IEP.<sup>14</sup> The IEP also contained goals that were added or expanded upon including: reciprocal play interactions with peers, including turn taking; personal management, including gathering and putting away school material and following arrival/departure/lunch routines; and speech intelligibility, for letter sounds and blends.
37. The proposed MCPS IEP contained accommodations, supports and modifications to assist the Student. Relevant accommodations, supports and modifications included: breaking assignments down into smaller units; errorless teaching; reminders for appropriate behavior; frequent and immediate feedback; frequent reminder of rules; multiple and frequent breaks; short instructions in simple language; concrete reinforces; fast-paced instruction; verbal and visual prompting, one-to-one instruction for new skill acquisition; and proximity control. It also provided the Student would be in a highly structured classroom.
38. The proposed MCPS IEP also implemented the BIP developed by the Private School.
39. The proposed MCPS IEP provided for the following instruction to occur outside general education: twenty-two hours, thirty minutes, of special education instruction weekly for all academic and related arts instruction; one hour, thirty minutes weekly for direct speech services; one hour monthly for direct physical therapy (PT) services; and thirty minutes quarterly for direct OT service.

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<sup>14</sup> Similar goals/objectives related to: requesting items before taking them; reducing incidences of elopement; yelling and tantrums; complying with classroom rules such as “stop” and “come here”; manipulating clothing buttons and fasteners; maintaining joint attention including eye contact and gaze shifting; reading sight words; interacting in a socially appropriate manner, including maintaining personal space, appropriate voice volume, and using greetings and manners.

40. The proposed MCPS IEP provided that the Student would be in the general education setting with special education support for five hours weekly during lunch and recess.
41. At this time, the Student had emerging social skills and was interested in interacting with others.
42. The proposed MCPS IEP offered Extended School Year services to the Student.
43. MCPS offered the Elementary School's Autism Program as the placement for the Student.
44. The Elementary School's Autism Program is a self-contained, outside of general education program, that provides specialized instruction in a highly structured setting with multiple opportunities for facilitated practice, direct modeling of academic and social skills, and teacher facilitation of skills to multiple situations and settings.
45. A classroom in the Elementary School's Autism Program has, on average, six students. It is taught by a Special Education teacher, and has at least two paraeducators in the classroom.
46. Students are supported by at least two paraeducators in the cafeteria.
47. Staffing for the students in the Autism Program is adjusted based on the needs of the students assigned to the classroom as demonstrated by collected data.
48. Applied Behavior Analysis (ABA) is used with the Students in the Autism Program. The data is analyzed daily by the special education teacher and a student's program is modified based on the data.
49. A MCPS Program Specialist visits each Autism Program classroom at least once a week. The Program Specialist also reviews the Student's ABA data and makes modifications to the student's programming.

50. The Elementary School's Autism Program classroom staff is familiar with and implements fast paced instruction and dense reinforcement strategies, such as token economy and social praise.
51. The Elementary School's Autism Program staff is experienced in working with students who elope, tantrum, have self-injurious behaviors, are unpredictable, and have compulsions and rituals.
52. The Elementary School's Autism Program takes the students into the community once a week.
53. The Elementary School's Autism Program also teaches life skills and social skills.
54. At times, non-disabled peers would join the disabled children in the classroom or at recess in a structured program named XXXX.
55. The Parents agreed to most elements of the proposed MCPS IEP.
56. The Parents did not enroll the Student at that time. The Parents were concerned with the Student attending lunch and recess in the general education setting and with there not being a full-time Registered Nurse (R.N.) assigned to the school.

**May to August 2016 – the updates to the April 2016 IEP proposed by MCPS**

57. In Spring 2016, MCPS agreed, and advised Dr. XXXX, that if the Student attended the Elementary School, the staffing would be adjusted to meet the needs of the Student.
58. On July 6, 2016, the Parents signed a tuition contract with the Private School for the 2016-2017 school year.
59. Throughout the Spring and Summer of 2016, MCPS, Dr. XXXX, and the Private School staff, continued to work collaboratively together on the proposed IEP. MCPS requested, and the Private School shared, additional information about the Student's behavior and social skills.

60. By August 2016, the Student had made progress on some math and reading objectives. He also had made progress in the following areas: using appropriate voice volume; asking before taking an object; demonstrating eye contact when someone approached/greeted him; demonstrating manners with regard to greetings and responding to simple questions; adhering to the commands of “stop” and “come here,” even when engaged in a preferred activity; and using and responding to greetings. He generally continued to need prompting to attend to speakers.
61. The Student was participating in group instruction at the Private School and in shared activities with peers, including taking turns on iPad games and sharing art supplies. He did this with substantial prompting.
62. The Student continued to elope. It mainly occurred when the Student asked for an item, but was told he could not have it.
63. The student was having tantrums more frequently. Tantrums lasted anywhere from a few seconds to fifteen minutes. Triggers were when the Student was denied access to a desired item, activity, ritual, or routine. Approximately once a day, the Student’s tantrum would include him hitting his head against a hard object.
64. Strategies being implemented by the Private Schools included: predictable schedules; preparation before transitions; “if/then” prompts; token economy; and prompting for the Student to use word to express his frustration. If preventative strategies were not successful, staff was utilizing: close proximity to ensure safety; additional staff to prevent injury; modifying the environment to prevent elopement; and use of mats to prevent injury against the tile floor or other hard objects.
65. The PLOP sections of the proposed MCPS IEP were updated in August 2016 based on this new information from the Private School. The majority of the rest of proposed MCPS

IEP remained the same as the April version, including the proposed special/general education hours and the proposed placement of the Student in the Autism Program at the Elementary School.

66. The Parents, Dr. XXXX, and MCPS staff attended an IEP Team meeting on August 15, 2016.<sup>15</sup>
67. MCPS employs Certified Nursing Assistants/Certified Medication Technicians as health room aides. They all have training to take the vital signs of a student in the school. A R.N. is always available by telephone to evaluate the results.
68. No additional medical intervention is required for the Student.
69. The Parents and MCPS staff were in agreement as to most of the contents of the proposed MCPS IEP. However, because MCPS would not provide a full-time R.N. at the school, and because the Student would be in general education for lunch and recess, the Parents did not enroll the Student in MCPS.

**January to August 2017 - the second IEP proposed by MCPS**

70. In January 2017, the Parents requested MCPS perform an annual/periodic review of the Student's MCPS IEP. The Parents provided MCPS with the most recent Private School IEP, progress reports, and BIP.
71. The January 2017 Private School IEP contained goals for the following areas of need: social skills (increasing attention toward a speaker, using social pleasantries, answering questions posed by a speaker); adaptive behavior (utilizing self-calming strategies, decreasing elopement, dropping, self-injurious behavior, and aggression); adaptive skills

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<sup>15</sup> The record reflects that a second IEP Team meeting was held on July 18, 2016. (MCPS 32, 37.) It appears from the record the team discussed the Parents' demand for a R.N. and MCPS required additional information from Dr. XXXX and a release from the Parents so that MCPS staff could speak to Dr. XXXX. (See MCPS 28-39.) No one testified as to the specifics of this meeting.

(personal hygiene, dressing); life skills (safety in the community, typing, email use); and vocational skills.<sup>16</sup>

72. The Student's BIP was again updated by the Private School in March 2017 and provided to MCPS. The BIP continued to address the behaviors of elopement, tantrums, and self-injurious behavior. Accommodations were included in the BIP, including: increased physical prompting during transitions; work area with reduced visual distractions; intensive one-to-one instructions; small group (one adult-to-two students) instruction; frequent reminders; frequent reinforcement; and advanced preparation for changes in routine.
73. The Private School had discontinued the Student's involvement in the community outings due to his inability to follow safety directions and his body dropping, head banging, and elopement while in the community.
74. At school, the Student followed rules to stay on his feet, maintain a calm voice, stay with teachers, and have a calm body.
75. The Student responded to his name when called by looking toward the speaker.
76. The Student requested preferred items regularly instead of accessing them without permission.
77. The Student was highly motivated to interact with adults and peers.
78. The Student enjoyed swinging on the playground and working on art projects.
79. The Student still had difficulty attending to the instructor during group instruction and would put his head down and speak out of turn frequently.
80. The Student responded well to concrete reinforcers, such as token economy.

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<sup>16</sup> There were also goals for math, written language and reading comprehension. I do not discuss these areas of need because they were not asserted as an issue by the Parents in the Complaint.

81. After receiving all of this information, MCPS developed a proposed IEP for the Student.<sup>17</sup>
82. The proposed MCPS IEP described the Student and his PLOP for all areas of need, including oral language, written language, reading, math, recreation/leisure activities, social skills, adaptive behavior, independent/daily living skills, community, and gross and fine motor. The information contained within the PLOP sections was taken directly from the Private School's most recent IEP and BIP.
83. The proposed MCPS IEP contained goals across all areas of need, including: adaptive behavior (calming activities, decreasing elopement, aggression, dropping, self-injury); adaptive skills (hygiene, vocational tasks); community (following safety directions); speech/language (answering questions and using pleasantries); social skills (attention to lead instructor); occupational therapy (arrival and departure routines, feeding, and dressing); leisure activities (appropriate use of free time); and physical therapy (posture).<sup>18</sup>
84. The proposed MCPS IEP included implementation of the most recent BIP developed by the Private School.
85. The proposed MCPS IEP contained accommodations, supports and modifications for assisting the Student in accessing the curriculum and being available to learn. The accommodations and supports included: visual cues; multiple and frequent breaks; frequent and immediate feedback; repetition of directions; concrete reinforcement; short instruction; errorless teaching strategies; frequent reminder of rules; preferential seating; alternate seating options; and encouragement and reinforcement of appropriate behavior.

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<sup>17</sup> The Student was eleven years old at the time, a 5th grader.

<sup>18</sup> It also included goals for written language, reading, and mathematics.

86. The proposed MCPS IEP provided for a highly structured classroom with reduced distractions to help the Student maintain focus on assigned tasks. It also included that there should be a low staff-to-student ratio; adult support; frequent eye contact/proximity control; physical delineations of boundaries across all settings; close adult proximity at all times; and adult support throughout the day.
87. Each goal of the proposed MCPS IEP reiterated the Student was to have close adult proximity, differential reinforcement, and concrete reinforcers.
88. The proposed MCPS IEP provided for the following hours outside of general education: twenty-two hours, fifty minutes, of special education weekly for all academic and related arts instruction; one hour weekly for direct services by a speech therapist; thirty minutes quarterly for direct services provided by an OT; one hour monthly for direct services provided by a physical therapist.
89. The proposed MCPS IEP provided for five hours weekly in general education for lunch and recess.
90. MCPS determined there was no data that suggested the Student could not be included in general education, with special education support, during lunch and recess.
91. Had the Student enrolled in MCPS, the Student's IEP would have been revised for his transition to middle school. The revised IEP would have provided for thirty minutes in general education for lunch. There is no recess in the general education setting at the Middle School.
92. The proposed MCPS IEP offered Extended School Year services to the Student.
93. The placement proposed by MCPS continued to be in the Autism Program at the Elementary School. The Student's placement for the next school year would have been the Autism Program within the Middle School.

94. The Middle School Autism Program is similar to the Elementary School version. It usually has seven students in a classroom, and is taught by a Special Education teacher and three paraeducators. It includes more of a focus on the mastery of activities of daily living and social skills, and includes community outings twice weekly.
95. At least three paraeducators support the students during lunch in the cafeteria.
96. Staffing for the Autism Program, and for the students in the classroom, is adjusted based on the needs of the students assigned to the classroom as demonstrated by collected data.
97. ABA is used with the students in the Autism Program. The data is analyzed daily by the special education teacher and a student's program is modified based on the data.
98. A MCPS Program Specialist visits each Autism program classroom at least once a week. The Program Specialist also reviews the students' ABA data and makes modifications to the students' programming.
99. The Middle School's Autism Program classroom staff is familiar with implementing fast paced instruction and dense reinforcement strategies, such as token economy and social praise.
100. The Middle School's Autism Program staff is experienced in working with students who elope, tantrum, have self-injurious behaviors, are unpredictable, and have compulsions and rituals.
101. The IEP Team met to review the proposed MCPS IEP on April 4, 2017.<sup>19</sup> The meeting included: MCPS general and special education teachers; MCPS occupational therapist and speech-language pathologist; MCPS assigned R.N.; the Student's Parents and their attorney; the Private School's Autism Division Director; and the Private School's Autism Head Teacher.

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<sup>19</sup> There are multiple references in the record to this meeting being rescheduled. (*See* MCPS 52 to 57.)

102. The Parents agreed to most elements of the proposed IEP.
103. The Parents rejected the proposed IEP. They did not agree with the inclusion of the Student in general education during lunch/recess. The Parents wanted an R.N. to be present at the school.

## **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 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, *Andrew F.*, 137 S. Ct. at 994, 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.<sup>20</sup> *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). However, for a student that 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)). A judge should not substitute their own “notions of sound educational policy for those of the school authorities which they review.” *Andrew 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

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<sup>20</sup> 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 ADA. *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.

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 Endrew 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). However, evidence of actual progress during the period of an IEP may also be a factor in determining whether a challenged IEP was reasonably calculated to confer educational benefit. *M.S.*, 553 F.3d at 327 (it was proper to consider the student’s actual progress on standardized tests as one factor in determining whether the student’s unilateral private placement was appropriate); *see also M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002) (the student’s actual educational progress during the relevant time period was an important measure of the IEP’s success). The Supreme Court in *Rowley* similarly observed that a student’s achievement of passing marks and advancement from grade to grade is an important factor in determining if a student received educational benefit. *Rowley*, 458 U.S. at 207 n. 28.

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). The parents of the student 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, as such the Parents have the burden of proving their case.

The Parents allege that the three IEPs proposed by MCPS in 2016 and 2017 were not reasonably calculated to provide the Student with a FAPE. Specifically, the Parents allege that the proposed IEPs and the placement of the Student within the Autism Programs at the Elementary School (for the 2015-2016 and 2016-2017 school years) and the Middle School (for the 2017-2018 school year) were inappropriate for the following reasons: the inclusion of the Student in the general education setting for lunch and recess was dangerous and would not provide the Student with educational benefit; the staffing at the placements was insufficient to meet the Student’s needs; and the data collection and analysis for the Student would not be sufficient.

For the reasons articulated below, I find the Parents have not proven that the IEPs and the proposed placements offered by MCPS for each of the three school years failed to offer the Student a FAPE. Thus, I do not award the Parents their requested relief.

### **2016 IEP**

It is undisputed that MCPS undertook a fact intensive analysis of the Student when it created this IEP for the Student. When the Parents first approached MCPS in December 2015, the Parents provided a packet of information regarding the Student. This packet included: thorough reports from a psychologist and a SLP at XXXX Hospital; a report from the Parents' educational consultant (at the time, Ms. XXXX); and, from the Private School, an Annual Education Report, a summary of the Student's current levels of performance, an IEP, a BIP, and an OT report. It is clear from the record that MCPS considered all of these documents when it developed the IEP. The IEP PLOP sections thoroughly incorporate all of this information, including the Student's relative strengths and areas of need in oral language, written language, reading, math, behavior, safety, adaptive skills, social skills, and posture. It also discussed his XXXX and [DISEASE 1] diagnoses. Additionally, to ensure it had a clear picture of the Student, MCPS sent a Resource Teacher and an Autism Specialist to observe the Student at the Private School, and had a school psychologist seek additional information regarding the Student's adaptive skills, prior to developing this IEP. Also, after the April IEP meeting, MCPS contacted the Private School and sought additional information about the Student. It then worked closely with the Parents, the Private School, and Dr. XXXX to update the proposed IEP to address the Student's recent progress on goals and the intensification of his tantrum behavior.

The goals, objectives, accommodations, and supports contained within this IEP were clearly tailored to the Student's unique needs. It is undisputed that the Student had significant and complex needs as a result of his ASD, XXXX and [DISEASE 1]. As the findings of fact

demonstrate, the Student suffered from significant cognitive, attention and behavior issues, including tantrums and compulsions, and these limitations had a significant impact on his availability for learning. He was delayed in academics, speech, communication and social skills. He was impulsive and was an elopement risk, and he lacked the judgment to understand danger in his environment.

The IEP developed by MCPS included goals for all of the Student's identified areas of need, including speech/language, behavior, personal management, social skills, written language, reading, mathematics, and physical therapy. Many of the goals were similar to the goals contained in the Private School IEP<sup>21</sup>; however, the MCPS IEP contained many important additional goals and objectives, including: reciprocal verbal interactions; reciprocal play interactions with peers such as turn taking; personal management skills, such as gathering and putting away school material and following arrival/departure/lunch routines; and increasing speech intelligibility, for letter sounds and blends. Additionally, the IEP contained the specific supports and accommodations recommended by the Private School and the XXXX Hospital psychologist to address the Student's language and cognitive limitations, rigidity, impulsivity, and limited attention. The accommodations and supports outlined within the findings of fact clearly addressed the Student's identified needs.<sup>22</sup> Most relevantly, the proposed MCPS IEP provided the Student with one-to-one instruction to acquire new skills. It also provided for "frequent eye contact/proximity control," reminders for appropriate behavior, and frequent reminder of rules, to address the elopement concerns. To address his needs during group instruction, the IEP provided for positive, concrete reinforcement and frequent breaks. Finally,

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<sup>21</sup> Similar goals/objectives related to: requesting items before taking them; reducing incidences of elopement, yelling and tantrums; complying with classroom rules such as stop and come here; manipulating clothing fasteners; maintaining joint attention, including eye contact and gaze shifting; reading sight words; and interacting in a socially appropriate manner, including maintaining personal space, appropriate voice volume, and using greetings and manners.

<sup>22</sup> There were additional accommodations and supports in the IEP that are not relevant to the Decision.

the IEP incorporated the Private School's BIP, for the behaviors of eloping, yelling, and tantrums.

The goals and objectives in this IEP were challenging and ambitious and, along with his BIP, established a comprehensive plan for his academic and functional advancement. For example, at that time, the Student was not consistently requesting an item before eloping toward it; however there was an objective for the Student to request items or activities in a complete simple sentence before attempting to take them across varied settings. The Student was not taking part in reciprocal verbal interactions; an objective was developed to address this. The Student was not making eye contact or exhibiting joint attention; objectives were developed seeking improvement in these areas. The Student was eloping, yelling and having tantrums; objectives were developed that sought a decrease in the frequency of each. Overall, there were forty comprehensive objectives contained within the IEP for skills the Student was not demonstrating at that time.

The IEP also offered direct speech therapy services (1.5 hours weekly) by an SLP, as recommended by the XXXX Hospital psychologist, and direct services for OT and PT. Finally, the proposed IEP offered Extended School Year services to the Student.

MCPS offered the Elementary School Autism Program as the placement. This placement ensured the bulk of the Student's instruction, including electives, would be outside general education. It is a self-contained program with small (on average six students), highly structured classrooms, implementing highly specialized teaching strategies. It is the type of program recommended by the XXXX Hospital psychologist and the Private School staff. The classrooms are also heavily staffed with a minimum of three adults (a special educator and two paraeducators). Also, as additionally recommended by the Private School and the XXXX Hospital psychologist, the program utilizes ABA instruction for its students.

MCPS determined this placement was the LRE for the Student given “his need for specialized instruction in a highly structured setting with multiple opportunities for facilitated practice, direct modeling of academic and social skills, and teacher facilitation of skills to multiple situations and settings.” (P. 21-49.) Additionally, MCPS determined the Student needed “a significant amount of behavioral supports and interventions that were not able to be provided in a general education classroom in order for him to successfully access the general education curriculum; thus, warranting a self-contained classroom for all academic areas.” (*Id.*) However, the IEP included that the Student would participate in the general education setting for one hour a day, “appropriate[ly]” special education support, during lunch and recess. (MCPS 25-62.)

The IEP Team met twice to consider this proposed IEP, and the meetings included MCPS staff, the Parents, a special education teacher from the Private School, the Parents’ newly hired educational consultant Dr. XXXX, and the Parents’ attorney. All parties agree that MCPS worked collaboratively with the Parents, and took into consideration and incorporated many of their suggestions, and the suggestions of their educational consultant and the Private School. The Parents also agree that MCPS accurately captured the Student’s functional and academic strengths and needs, and that the IEP goals and objectives, and most of the accommodations and supports, were appropriate for the Student. However, despite the development of this comprehensive IEP, and the specialized instruction that would be provided to the Student within this placement, the Parents rejected the IEP offered by MCPS.

The Parents asserted that the Student would not benefit from being in the general education setting and were concerned about his safety within that environment.<sup>23</sup> With regard to

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<sup>23</sup> As discussed above, at the time the IEP was offered, the Parents asserted the Student needed an R.N. on staff at the school at all times. At the hearing, the Parents withdrew this allegation from consideration. However, counsel for the Parents asserted that MCPS’s failure to provide a R.N. for the Student demonstrated MCPS’s lack of interest and concern for the Student. I find, however, the evidence supports the opposite. At the hearing, Ms. XXXX, a R.N. assigned to MCPS by the Montgomery County Department of Health and Human Services, testified she made multiple attempts to reach Dr. XXXX to get clarification as to the doctor’s medical order. Ms. XXXX recalled that

the educational benefit, Dr. XXXX testified that the noisy cafeteria and playground offered the Student “no educational benefit.” She opined that the Student would exhibit behaviors such as yelling and tantrums more frequently in this unstructured environment, and thus, would be unavailable for any instruction or interaction during that time. Further, Dr. XXXX and Ms. XXXX stated the Student did not have the skills to observe and imitate, and as such, non-disabled peer modeling would not be a reason to place him in that setting. Ms. XXXX, however, did admit that she did not have data to support her opinion since non-disabled peers are not available at the Private School and the Private School does not have a setting similar to the Elementary School’s cafeteria.

With regard to the Student’s safety, the Parents asserted that the doors in the cafeteria opened to the parking lot and presented an opportunity for the Student to elope into a dangerous situation due to his lack of judgement and awareness regarding the potential dangers in his environment. The Mother also expressed concern that the Student would elope from the playground. She offered that the staffing in the Elementary School’s Autism Program did not

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when she reached Dr. XXXX, Dr. XXXX stated the Student only needed someone at the school who could monitor the Student’s vital signs the day after the Student received an infusion, including temperature, pulse, blood pressure, and respiration. She stated that she asked Dr. XXXX if the Student necessitated any additional interventions besides this monitoring, such as the administration of oxygen, and Dr. XXXX advised her that the Student did not. Ms. XXXX’s efforts and diligence in this instance is one of many examples of the efforts MCPS took to identify the needs of the Student.

I also find that MCPS’s refusal to offer a R.N. at the school for the Student was consistent with MCPS school nursing policy and the Nurse Practice Act. (*See* COMAR 10.27.11, 10.27.09.03I; MCPS 49 – Delegation of Nursing Functions to Unlicensed Direct Care Providers in a School Setting.) As explained by Ms. XXXX, a physician may issue a medical order (as in this case for the monitoring of an individual’s vital signs), but an R.N. may implement the medical order in any way that is permitted by the Nurse Practice Act. In this case, the Nurse Practice Act permits an R.N. to delegate the taking of an individual’s vital signs to a trained non-R.N., so long as the R.N. is available, either through phone or other method of consultation, to interpret the results. (*See* MCPS 49-4 – monitoring vital signs for reporting to a R.N. or a physician is a delegable nursing service.) She further explained that the school nurses are either Certified Nursing Assistants or Certified Medical Technicians, and they are trained to take the vital signs of the students, and that a R.N. is available at all times to interpret the results by telephone. Based on this information and evidence, I conclude that MCPS’s interpretation and plan for implementation of Dr. XXXX’s order was reasonable. The record does not support the Parents’ (now withdrawn) assertion that the Student would be denied a FAPE unless an R.N. was present for the Student in the school building.

support the Student in this setting, and was a recipe for disaster given his speed, unpredictability, and propensity for elopement.

With regard to the Student's safety, MCPS responded that the teachers and staff in the Autism Program are familiar with students who elope, have tantrums, and are unpredictable, and they know how to address these concerns. While MCPS did not minimize the severity of the Student's maladaptive behaviors, Ms. XXXX and Ms. XXXX stated that the IEP, as offered, ensures that staff would implement effective strategies to support the Student in this setting, including: fading the Student into the cafeteria and playground setting; placing the Student at a table far from the cafeteria doors; ensuring a staff member was always in close proximity to the Student in these settings; positioning staff to block exits on the playground; and instituting concrete reinforcements to encourage his appropriate behavior.

With regards to the appropriateness of including the Student with non-disabled peers, Ms. XXXX and Ms. XXXX explained that placing the Student in the general education setting allows opportunities for the Student to generalize emerging or learned skills beyond the classroom and in the natural environment. MCPS had been told the Student was seeking out and enjoying social interactions with adults in the Private School and Ms. XXXX offered this further supported exposing the Student to this setting. Finally, Ms. XXXX cautioned that MCPS may not remove a student from the general education setting unless it has data to support that removal is necessary, and at this time there was no data to support removal. However, she explained, once the Student is enrolled, if the data supported his removal from that setting, the Student's IEP would be modified.

I find MCPS has provided cogent and responsive explanations for its decision to include the Student in the general education setting during lunch and recess. In this case, there are numerous references in the Private School's records regarding the Student's motivation to

interact and attempt to engage in limited conversation with adults. Also, the Student had emerging skills in participating in shared activities with peers, including taking turns on iPad games and sharing art supplies. Additionally, the Student had emerging social skills, such as greetings and polite gestures. Given the limitations of his disabled peers, the most reinforcing opportunities for the Student in the Private School were interactions with the Private School's staff. However, in the Elementary School, the Student would have unlimited opportunities to attempt appropriate interactions with non-disabled peers (including those in the XXXX program), supported and guided by the accompanying special education staff. Also, I consider that the Student was actively and successfully taking part in community outings. All of the witnesses at the hearing, as well as the XXXX Hospital psychologist, agreed that placing the Student in the community is an important part of his education because it presents him with opportunities to enhance and generalize his behavior, social, and daily living skills in the real world. The school cafeteria and playground are equally as relevant as a grocery store or a library. Finally, given the lack of data regarding the Student's involvement within a cafeteria, I find MCPS's plan to gather data and then modify the Student's IEP, if necessary, to be reasonable. As discussed above, a student must remain in the LRE "to the maximum extent appropriate" and removal is appropriate only "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).

Additionally, I find MCPS's plan for the prevention of the Student's elopement and tantrums in these settings was similarly appropriate, and was supported by the Student's PLOP and the proposed IEP. The Private School reported that, during non-work times such as lunch and recess, the Student was appropriately staffed with a ratio of two students to one staff member. This is similar to the minimum staffing the Student would have received in the

Elementary School's cafeteria and playground. The proposed IEP also provided that, throughout the day and in all settings, including in the cafeteria and on the playground, the Student would receive accommodations and supports, including: errorless teaching; differential reinforcement of appropriate behaviors; token economy; frequent eye contact/proximity control; and frequent reminders of rules. These accommodations and supports included by MCPS were recommended by the Private School as strategies to address the Student's elopement and tantrum behavior.

The Parents' assertion that these accommodations and supports would not be implemented in such a way as to ensure the Student's safety is speculative, and speculation is not a basis for me to conclude a student was denied a FAPE. Instead I must consider the four corners of the IEP, and based on the contents outlined above, I conclude the IEP offered appropriate accommodations and supports to ensure the Student's behaviors of elopement and tantrum would be handled appropriately.<sup>24</sup>

Ultimately, the Parents did not enroll the Student in MCPS and demanded MCPS pay for the Student's placement at the Private School for his 5<sup>th</sup> grade school year (2016-2017). MCPS declined to pay for the private placement. However, for the reasons discussed above, I find the evidence supports my conclusion that MCPS offered the Student a FAPE through this IEP.

### **2017 IEP**

In January 2017, the Parents forwarded the most recent IEP, present levels, and BIP developed by the Private School to MCPS so MCPS could perform an annual review of the Student's MCPS IEP. All of the evidence in the record supports the conclusion that MCPS once again undertook a fact intensive analysis of the Student. It reviewed and considered the Student's updated relative strengths and needs from the Private School's documents, and incorporated

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<sup>24</sup> Dr. XXXX testified that at the time this IEP was developed, the Parents did not request MCPS provide the Student with a one-to-one aide for lunch and recess. Additionally, Dr. XXXX's report of her observation of the Elementary School noted that Ms. XXXX told Dr. XXXX that the staffing at the program would be increased when the Student enrolled.

them into the MCPS IEP. MCPS also sent out two experienced Autism specialists from MCPS to observe the Student at the Private School.

The goals, objectives, accommodations, and supports contained within this 2017 IEP were once again clearly tailored to the Student's unique needs. The goals for the Student were expanded to address his recently identified needs in recreation/leisure and community. Additionally, the IEP contained many of the same supports and accommodations offered in the previous IEP, but were expanded to include the following throughout the day in all settings: a low staff-to-student ratio; adult support for the Student; physical delineations of boundaries across all settings; and close adult proximity at all times. Also, each goal of the IEP explicitly reiterated the Student was to be given close adult proximity, differential reinforcement, and concrete reinforcers. These additional supports and accommodations were included because the Student's behaviors of elopement and tantrum had escalated.

The goals and objectives in this IEP were similarly challenging and ambitious and, along with the Private School BIP that was incorporated into the IEP by MCPS, established a comprehensive plan for his academic and functional advancement. There were forty objectives contained within the IEP for skills the Student was not demonstrating at that time. For example, there were objectives for the Student to: initiate and sustain self-calming activities; complete arrival and departure routines; gather and put materials away; increase attention to the lead instructor in a group setting; follow safety directions when in the community; ask for assistance with a task; maintain his hygiene; complete vocational tasks; answer "wh" questions; answer yes or no questions; and independently complete leisure activities.

MCPS offered the Elementary School Autism Program as the placement for the balance of the 2016-2017 school year; however, the parties agree that MCPS was proposing the Middle School Autism Program as the placement for the upcoming 2017-2018 school year. Again, as

recommended by the Private School and the Parents' educational consultant, the Middle School program is a self-contained program with small, highly structured classrooms, that implements highly specialized teaching strategies. The classrooms have, on average, seven students to at least four adults (a special educator and three paraeducators). Also, the program utilizes ABA instruction for its Students, and provided a more expanded curriculum for daily life skills with community outings twice weekly.

The IEP offered the same service hours, including five hours weekly in general education for lunch and recess for the conclusion of the Elementary School year.<sup>25</sup> Again, MCPS determined this placement was the LRE for the Student given "his significant delays across all academic areas and with adaptive behavior," and his need for "intensive, individualized, systematic instruction in order to make progress ..." (P. 39-56.) It also reflected that "data supports [he] benefits from a small structured setting with a low teacher to student ratio that provides individualized instruction with behavior communication supports." (*Id.*) MCPS again noted that it did not have the data to support the Student's removal from the general education setting for lunch and recess. But it did agree that the Student would appropriately be removed from the general education setting for electives at the Middle School. The IEP also offered direct speech therapy services (one hour weekly) by an SLP, and direct services for OT and PT, outside of general education.

The IEP Team met on April 4, 2017. The meeting included MCPS general and special education teachers and staff; a MCPS OT; a MCPS SLP; a MCPS-assigned R.N.; the Student's Parents; their attorney; the Private School's Autism Division Director; and the Private School's Autism Program's Head Teacher. All parties agree that MCPS worked collaboratively with the Parents' team, and took into consideration and incorporated many of their suggestions, and the

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<sup>25</sup> As explained by Ms. XXXX, had the Student enrolled in MCPS, when the Student transitioned to middle school the next fall, the IEP would have been revised to eliminate the thirty minutes daily for recess because middle school does not have recess.

suggestions of their educational consultant and the Private School. The Parents also agreed that MCPS accurately captured the Student's functional and academic strengths and needs, and that the IEP goals and objectives, and most of the accommodations and supports, were appropriate for the Student. Additionally, the parties again agreed the Autism Program at the Middle School was an "excellent" program with "phenomenal teachers." (T. XXXX.)

Clearly, based on the evidence outlined above, this IEP proposed by MCPS was reasonably calculated to provide the Student with educational benefits and offered the Student a FAPE. It was developed and carefully crafted through a fact intensive and collaborative process with the Parents, the Private School, and the Parents' educational consultant. It created a comprehensive plan for the Student's functional and academic advancement, and included ambitious and challenging objectives that were appropriate considering the Student's levels of achievement, disability and potential for growth. It provided supports and accommodations tailored to the unique needs of the Student.

The Parents, however, once again did not agree it was appropriate for the Student to be in the general education setting for lunch and recess and did not enroll the Student in MCPS.

Based on the evidence in the record, I conclude that MCPS's explanation for its inclusion of the Student in general education setting during lunch for the 2017-2018 school year was cogent and responsive. With regard to the Student's safety, just as the Elementary School Autism Program staff are experienced, the Middle School Autism Program staff is similarly experienced in working with students who elope, tantrum, have self-injurious behaviors, are unpredictable, and have compulsions and rituals. The staff is also familiar with implementing strategies to encourage adherence to rules and appropriate behavior. Additionally, the IEP ensured the Student was properly supported through a low staff-to-student ratio, adult support, frequent eye contact/proximity control, and close adult proximity at all times. Finally, the IEP noted that there

will be physical delineations of boundaries for the Student across all settings, which was identified by the Private School as an effective method for preventing the Student's elopement. While on one hand it is concerning the Private School discontinued the Student's involvement in the community outings due to his inability to follow safety directions and his self-injurious behavior, the Private School also advised MCPS that, in the Private School, the Student was following rules to stay on his feet, have a calm voice, stay with teachers, and have a calm body within the school setting. There was no reason for MCPS to believe the Student would not be as successful in the cafeteria. Therefore, MCPS's plan to include the Student in the general education setting, without any data to demonstrate it was not appropriate, was reasonable given the legal requirement of LRE.

With regard to the appropriateness of the Student in this setting, the Private School informed MCPS that the Student continued to be highly motivated to interact with adults and peers. The IEP contained social skills and adaptive behavior goals, such as increasing attention toward a speaker, using social pleasantries, answering questions posed by a speaker, and utilizing self-calming strategies. These goals would appropriately be addressed and generalized in this setting.

Ultimately, however, the Parents did not enroll the Student in MCPS and demanded MCPS pay for the Student's placement at the Private School for his 6<sup>th</sup> grade school year (2017-2018). MCPS declined to pay for the private placement. However, for the reasons discussed above, I find there is insufficient evidence to support a conclusion that MCPS denied the Student a FAPE through this IEP. In fact, the overwhelming and abundant evidence demonstrates the Student was offered a FAPE.

### **Additional arguments raised by the Parents in their Due Process Complaint**

At the hearing, the Parents offered additional reasons to support their assertion that the Student would not have been offered a FAPE through these IEPs. They argued the MCPS Autism programs: were not appropriately staffed to meet the Student's needs; would not provide one-to-one discrete trial ABA instruction to its students; would not collect data for Student's behaviors as frequently as is necessary; and would not have a Board Certified Behavior Analyst (BCBA) on staff to appropriately review the data collected.

It appears from the record that the Parents did not raise these alleged deficiencies at the times the IEPs were offered;<sup>26</sup> but rather, raised them for the first time in the Due Process Complaint. Arguably, the Parents waived their right to assert these concerns in this Due Process hearing. A school system should be permitted to address parents' displeasure/concerns with a proposed IEP and/or a placement without first hearing about them in a Due Process Complaint. However, in the interest in issuing a comprehensive decision, I address each allegation below.

The Parents argued the Autism Programs were not appropriately staffed for the Student's needs. The Mother, Dr. XXXX, and Ms. XXXX testified that they observed students in the Elementary and Middle School programs being left to work independently while the staff worked with other students in the classroom. They offered that the Student would not be capable of working independently due to his distractibility and compulsions, and because of his behaviors of elopement and tantrum, he would be in danger if he was not provided with constant adult supervision and intervention. They also expressed concern that the Student cannot effectively and safely participate in group instruction in the classroom without significant support and prompting to attend to the teacher.

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<sup>26</sup> In fact, Dr. XXXX and Ms. XXXX both testified that the only issue that was not in agreement by the parties in each IEP was the setting for lunch and recess.

MCPS responded that the IEP would dictate the staffing within the classroom, and, if the Student, even with all of the accommodations and supports contained within the IEP, needed additional staff support, MCPS would provide the support to the Student.

In 2016, the IEP provided for accommodations and supports throughout the day, including during group instruction and non-instruction periods. Strategies such as a token economy, frequent, short breaks, and consistent prompting were included. Additionally, the 2017 IEP provided for a low staff-to-student ratio, adult support, proximity control, close adult proximity at all times, and adult support throughout the day. In both the 2016 and 2017 IEPs, MCPS would be required to staff the classroom to provide the supports outlined in the IEP. The Parents' and Dr. XXXX's belief and concern that MCPS would not provide the appropriate staffing is speculative and is not a basis to support a determination that a FAPE was denied. The four corners of the IEP provide for appropriate support, and MCPS would be required to staff the classroom appropriately.

Additionally, the Parents' position that the Student would be denied a FAPE if he was not provided with one-to-one ABA instruction is also not supported by the evidence. Ms. XXXX testified that the Student could not learn in a dyad (one instructor/two children). However, Ms. XXXX did not provide any data to support her assertion. The 2016 IEP clearly offered that the Student would receive this one-to-one instruction for new skill acquisition. The 2017 IEP, however, was silent as to the exact ratio of teaching. This IEP provided the Student would receive intensive, individualized, systematic instruction in a low teacher-to-student ratio.

Ms. XXXX explained that MCPS will provide ABA and other evidenced based behavior therapy instruction to the Student at the level that is necessary for the Student to acquire the expansive goals and objectives contained in his IEP. She stated that MCPS will evaluate the Student when he enters the program and determine what he needs at that time. Given the lack of

concrete data on the issue, I do not find it unreasonable for MCPS to choose to evaluate the Student before committing to an instructional methodology.

Dr. XXXX's assertion that the Autism Programs do not collect data for Student's behaviors as frequently as is necessary is also not supported by any concrete evidence. Ms. XXXX explained that data is collected on students' behaviors all the time, but that the staff is taught to be discrete when doing so because students know when they are being watched and it can affect their behavior. This is a reasonable explanation for why Dr. XXXX did not observe this data being collected during her brief observations.

Finally, I do not find that the Autism Programs' failure to have BCBA's on staff at each school renders their program a denial of FAPE per se. As explained to by Ms. XXXX, many special educators are trained and experienced in the evaluation and assessment of data. She explained that MCPS Program Specialists also train staff on data analysis and program implementation. I also find it relevant that the State of Maryland only recently required the licensure of BCBA's despite ABA being an established behavior intervention program for decades. There is no evidence that the Student would have been denied a FAPE for either of the proposed IEPs if his data was reviewed by a non-BCBA.

**Requested Relief**

Because, I find that the Student was offered IEPs that were reasonably calculated to provide him with a FAPE for all three school years, I will not grant the Parents' requested relief.

The evidence demonstrates that unless MCPS offered the Private School as a placement, the Parents would not have accepted the MCPS IEPs, no matter how comprehensive they were. In the past, the Parents rejected three XXPS public autism programs, and in each case they reasoned the Student would be unsafe in the program. Additionally, the Parents enrolled the Student in the Private School in 2015, without first attempting to obtain an IEP and placement

from XXPS. Finally, the Parents' hired Ms. XXXX in 2015, and the reason for hiring her was for purposes of securing public funding for the Student's placement at the Private School. These facts collectively demonstrate the Parents had no intention to place the Student anywhere but in the Private School.

There is no doubt that 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. As the evidence in the record demonstrates, MCPS offered the Student two IEPs and two placements that were reasonably calculated to provide the Student with significant educational benefits. Thus, the expense of the Student's education at the Private School must be born the Parents.

#### **CONCLUSION OF LAW**

Based on the Findings of Fact and Discussion, I conclude as a matter of law that the IEPs and associated placements proposed by MCPS for the 2015-2016, 2016-2017, and 2017-2018 school years were reasonably calculated to ensure the Student would receive a FAPE. 20 U.S.C.A. § 1414; *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, Bd. of Educ. v. Rowley*, 458 U.S. 176, 180-81 (1982).

#### **ORDER**

I **ORDER** that the Parents' request for reimbursement for the Student's non-public placement at the Private School for the 2015-2016, 2016-2017 and 2017-2018 school years at MCPS expense is hereby **DENIED**.

December 14, 2017  
Date Decision Mailed

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Tara K. Lehner  
Administrative Law Judge

TKL/cmg

## **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.