9/28/18 QA

[redacted]	*	BEFORE JENNIFER A. NAPPIER,
STUDENT	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
MONTGOMERY COUNTY	*	OF ADMINISTRATIVE HEARINGS
PUBLIC SCHOOLS	*	OAH No.: MSDE-MONT-OT-18-24983

* * * * * * * * * * * * *

DECISION ON MOTION TO DISMISS, MOTION FOR JUDGMENT, AND REQUEST FOR PROTECTIVE ORDER

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STATEMENT OF THE CASE

On August 6, 2018, Dr. [redacted] (Parent), on behalf of his son, [redacted] (Student), filed a Due Process Complaint (Complaint) with the Maryland Office of Administrative Hearings (OAH), alleging that Montgomery County Public Schools (MCPS) has violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415(f)(1)(A) (2017).[1,2]

I held a telephone prehearing conference (Conference) on August 24, 2018. The Parent represented the Student. Zvi Greismann, Esquire, represented MCPS. During the Conference, MCPS indicated that it intended to file a Motion to Dismiss by August 31, 2018. At that time, I

[1] "Filed" means "the earlier of when the document is postmarked or received at the [OAH] and, when required, served on the other parties to a proceeding or an administrative law judge." COMAR 28.02.01.02. The Complaint was dated August 7, 2018, but postmarked August 6, 2018. The OAH received the Complaint on August 8, 2018.
[2] U.S.C.A. is an abbreviation for United States Code Annotated.

indicated that I would rule on the Motion to Dismiss by September, 21, 2018;[3] however, upon reviewing the parties' filings[4] with regard to the Motion to Dismiss, I notified the parties that I would hear arguments on the motion at the outset of the September 24, 2018 hearing on the merits. My decision on MCPS Motion to Dismiss is set forth in the Discussion of this Decision, below.

I held the hearing on September 24, 2018 at the MCPS headquarters in Rockville, Maryland. The Parent represented the Student. Zvi Greismann, Esquire, represented MCPS. The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R. § 300.511(a) (2017); Md. Code Ann., Educ. § 8-413(e)(1) (2018); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

At the close of the Student's case, MCPS indicated that it did not intend to call any witnesses and made a Motion for Judgment. COMAR 29.02.01.12E. I deferred a final ruling on the Motion for Judgment and indicated that I would rule on the Motion for Judgment should I deny the Motion to Dismiss. My decision on MCPS' motion for judgment is also set forth in the Discussion section of this Decision.

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

ISSUES

1. Should the Student's Complaint be dismissed?

2. If the Motion to Dismiss is denied, should MCPS' Motion for Judgment be granted?

[3] Under normal circumstances, I would have been required to rule on the motion within thirty days of the filing of a response or the close of the response period, whichever was sooner. COMAR 28.02.01.12. However, in light of the forty-five-day timeline for issuing a decision in this matter, I shortened the timeframe for ruling on the motion.
[4] MCPS filed its Motion to Dismiss on August 31, 2018. The Parent filed an Opposition to Motion to Dismiss (Opposition) on September 10, 2018.

3. If neither the Motion to Dismiss nor the Motion for Judgment is granted, did MCPS fail to provide the Student with a free and appropriate public education (FAPE) during the 2014-2015 school year by failing to implement a provision of the Student's IEP requiring that he receive mathematics instructions in a separate classroom, and if so, is the Student entitled to the relief sought in the Complaint or other appropriate relief?

SUMMARY OF THE EVIDENCE

MCPS submitted the following exhibits in support of its August 31, 2018 Motion to Dismiss:[5]

MCPS Ex. 1-M OAH Decision, Case No. MSDE-MONT-OT-16-29351, November 10, 2016

MCPS Ex. 2-M United States District Court Notice, Civil Action No. [redacted] August 13, 2018

MCPS Ex. 3-M OAH Decision, Case Nos. MSDE-MONT-OT-17-05768 & MSDE-MONT-OT-17-07445

The Parent submitted the following exhibit in support of his Opposition:

Parent Ex. 1-O Letter from MSDE to the Parent and MCPS, July 1, 2016

During the hearing on the merits, the Parent offered the following exhibits, which I admitted into evidence, except where noted:

Parent Ex. 1 Not admitted

Parent Ex. 2 Student Progress Report, Winter 2014-2015; Recommendations for the Student's 2015-2016 reading and math instructional programs, and for gifted and talented identification, June 1, 2015; Grade 2 Progress Report Card, end of 2014-2015 school year

Parent Ex. 3 Not admitted

MCPS Ex. 1[6] IEP, March 24, 2015

[5] The parties originally used numbers to identify the exhibits attached to the Motion to Dismiss and the Opposition to the motion. In order to eliminate any confusion between the exhibits offered during the hearing on the merits and those which were attached to the Motion to Dismiss and Opposition, I have identified the attachments to the Motion to Dismiss and Opposition by adding either the letter "M" or "O".

[6] The Parent, who received a copy of MCPS' exhibits prior to the hearing, utilized MCPS Ex. 1 during the examination of his witness and asked that the exhibit be admitted as evidence.

During the hearing on the merits, MCPS offered the following exhibits, which I admitted into evidence:

MCPS Ex. 2 IEP, October 30, 2014

MCPS Ex. 3 IEP, April 8, 2014

MCPS Ex. 4 *Curriculum Vitae* of [redacted]

Testimony

The Parent testified[7] and presented the testimony of [redacted] MCPS Special Education Teacher, admitted as an expert in special education.

MCPS did not offer any witnesses.

FINDINGS OF FACT

Based upon the MCPS' Motion to Dismiss, the Student's Opposition, the evidence offered in support of the Motion and Opposition, and oral and written argument presented by the parties, as well as stipulations made by the parties during the Conference, I find that the following facts are undisputed:

1. The Parent previously filed a due process complaint on September 23, 2016, alleging that the Student did not receive special education instruction in math in a separate special education classroom from May 5, 2015 through May 5, 2016, as provided for in his IEP.

2. On November 2 and 3, 2016, the Parent's September 23, 2016 due process complaint was the subject of a hearing before the OAH. The Parent represented the Student in that matter. A decision was issued in that matter on November 10, 2016.

[7] After the Parent presented the testimony of his first witness, Ms. [redacted], I asked who his next witness would be and he stated "no more witnesses." I then asked counsel for MCPS how he wished to proceed, he indicated that MCPS did not intend to call any witnesses and made a Motion for Judgment. It was only after counsel made his motion that the Parent asked if he would have an opportunity to testify, alleging that he was confused earlier when I asked him who his next witness would be. After some deliberation, I allowed the Parent to testify. I then allowed MCPS the opportunity to renew its Motion for Judgment.

3. On either November 2 or 3, 2016, the Student's third grade teacher testified that when the Student was in second grade, he received one-on-one math instruction in his general education classroom.

4. The Student was born on [redacted] 2007 and is eleven years old.

5. During the 2014-2015 school year, the Student was in second grade at [redacted] Elementary School, an MCPS school, where he received special education services, as a student with autism.

6. During the 2014-2015 school year, the Student had an IEP developed by MCPS.

7. The Student also attended [redacted] Elementary School when he was in third grade, during the 2015-2016 school year.

Based upon the evidence presented during the hearing on the merits, I find the following facts by a preponderance of the evidence:

8. The initial IEP for the 2014-2015 school year was approved during an April 8, 2014 IEP team meeting.

9. The April 8, 2014 and October 30, 2014 IEPs provided that the Student would receive "five hours of pull out special education services per week." Neither IEP specified what subject would be taught during the pull out instruction.

10. The March 24, 2015 IEP provided that the Student would receive "[ten] hours of pull out special education services per week for math and reading."

11. The Parent regularly attends IEP meetings, is engaged and often asks questions of the school teachers and staff.

12. The Parent was present at the March 24, 2015 IEP meeting.

13. From March 25, 2015 through the end of the 2014-2015 school year, the Student's special education teacher, [redacted] provided him one-on-one math

instruction while sitting at a table in the back of the general education classroom, instead of pulling him out for math instruction in a separate classroom.

14. Ms. [redacted] chose to provide the Student's math instruction in the general education classroom because she found that the Student experienced anxiety when he was away from the classroom and showed concern that he was not doing the same work as the students who remained in the general education classroom. Ms. [redacted] decided it was in the Student's best interest to have one-on-one instruction within the general education classroom so that he could see that he was doing the same work as the rest of the class, which would ease his anxiety and allow him to perform better.

15. The Parent filed a Due Process Complaint on August 6, 2018, alleging that the Student did not receive special education mathematics instruction in a separate classroom from August 25, 2014 to May 1, 2015, as stipulated in the IEP.

DISCUSSION

Motion to Dismiss

Legal Framework

In its Motion to Dismiss, MCPS asserts that this case should be dismissed because (1) the complaint is barred by the statute of limitations set forth under the IDEA, and (2) the complaint must be barred under the principles of *res judicata* and collateral estoppel. The OAH's Rules of Procedure provide for consideration of a motion to dismiss under COMAR 28.02.01.12C and of a motion for summary decision under COMAR 28.02.01.12D. Those regulations provide as follows:

> C. Motion to Dismiss. Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

D. Motion for Summary Decision.

> (1) Any party may file a motion for summary decision on all or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavits.
> (2) The response to a motion for summary decision shall identify the material facts that are disputed.
> (3) An affidavit supporting or opposing a motion for summary decision shall be made upon personal knowledge, shall set forth the facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.
> (4) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

When a party makes a motion to dismiss, the movant has the burden to persuade the administrative law judge (ALJ) that the motion should be granted. *See Herbert v. State*, 136 Md. App. 458, 481 (2001). Pursuant to the OAH Rules of Procedure, an ALJ may grant a motion to dismiss where the initial pleading fails to state a claim for which relief may be granted. COMAR 28.02.01.12C. Thus, in reviewing the MCPS' Motion to Dismiss under COMAR 28.02.01.12C, I may not consider documents outside of the initial pleading. An "initial pleading" is defined by the OAH Rules of Procedure as "a notice of agency action, an appeal of an agency action, or any other request for a hearing by a person." COMAR 28.02.01.02B(7).

In contrast, when ruling on a motion for summary decision, an ALJ may also consider admissions, exhibits, affidavits, and sworn testimony, for the purpose of determining whether a hearing on the merits is necessary. *See Davis v. DiPino*, 337 Md. 642, 648 (1995) (comparison of motions to dismiss and for summary judgment), *aff'd in part, vacated in part*, 354 Md. 18 (1999).

When a motion to dismiss goes beyond the initial pleading, relying upon other documents, testimony or affidavits, then the motion may properly be treated as a motion for summary decision. *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772, 781-82 (1992), *cert. denied*, 330 Md. 319 (1993). Since the parties have attached documentary evidence to the Motion to

Dismiss and the Opposition and have relied on these documents, and I have considered these documents as evidence in making my decision on the Motion to Dismiss, I will consider the Motion to Dismiss to be a Motion for Summary Decision. I note, however, that there is no affidavit attached to MCPS' motion. Nevertheless, I find that a narrow exception to the requirement that the motion be supported by an affidavit should be applied in this case, where MCPS did not formally file its motion as a motion for summary decision and, practically speaking, MCPS' motion is not of a nature such that there is a specific individual who could provide such an affidavit. MCPS has not argued that any individual exists that could establish that the parent knew or should have known about the basis of his claim at an earlier date. Further, with regard to its collateral estoppel/*res judicata* argument, the OAH decisions and Court records are certainly the requisite evidence to support that argument.[8] Further, I find that the Parent's statements in his Opposition shall be sufficient in lieu of an affidavit, as he did not have notice that the Motion to Dismiss would be treated as a motion for summary decision; COMAR 28.02.01.12D(3) does not require that an affidavit be a sworn affidavit; and it is clear that his statements are based upon his personal knowledge and that he is competent to testify to the matters stated in his Opposition. Further, the Parent's Opposition sets forth facts that would be admissible into evidence.

Summary decision is appropriate where there is no genuine issue of material fact and a party is entitled to prevail as a matter of law. COMAR 28.02.01.12D(1). As previously stated, the requirements for summary decision under COMAR 28.02.01.12D are nearly identical to those for summary judgment under Maryland Rule 2-501, which contemplates a "two-level

[8] Such an exception is supported by a comparison of COMAR 28.02.01.12D to Maryland Rule 2-501, which governs summary judgment in Maryland Circuit Court and is nearly identical to COMAR 28.02.01.12D. Maryland Rule 2-501(a) states, in pertinent part: "The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleading or motion is filed or (2) based on facts not contained in the record." I find that in this case, an affidavit is unnecessary for me to consider the Motion, as MCPS has attached official records to the motion in the form of OAH decisions and a United States District Court notice.

inquiry." *See Richman v. FWB Bank*, 122 Md. App. 110, 146 (1998). The *Richman* court held in pertinent part that:

> [T]he trial court must determine that no genuine dispute exists as to any material fact, and that one party is entitled to judgment as matter of law. . . . In its review of the motion, the court must consider the facts in the light most favorable to the non-moving party. . . . It must also construe all inferences reasonably drawn from those facts in favor of the non-movant. . . .
>
> To defeat a motion for summary judgment, the non-moving party must establish that a genuine dispute exists as to a material fact. . . . A material fact is one that will somehow affect the outcome of the case. . . . If a dispute exists as to a fact that is not material to the outcome of the case, the entry of summary judgment is not foreclosed.

Id; *See also King v. Bankerd, Inc.*, 303 Md. 98, 111 (1985) (quoting *Lynx v. Ordnance Products, Inc.*, 273 Md. 1, 7-8 (1974)).

In reviewing a motion for summary decision, an ALJ may be guided by case law that explains the nature of a summary judgment in court proceedings. The Supreme Court has noted, regarding the standard for summary judgment, "[b]y its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). A mere scintilla of evidence in favor of a nonmoving party is insufficient to defeat a summary judgment motion. *Anderson*, 477 U.S. at 251. A judge must draw all justifiable inferences in favor of the non-moving party. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991).

The Court of Special Appeals has discussed what constitutes a "material fact," and the weight a judge ruling upon such a motion should give the information presented:

> "A material fact is a fact the resolution of which will somehow affect the outcome of the case." . . . "A dispute as to a fact 'relating to grounds upon which the decision is not rested is not a dispute with respect to a *material* fact and such dispute does not prevent the entry of summary judgment.'" . . . We have further

> opined that in order for there to be disputed facts sufficient to render summary judgment inappropriate "there must be evidence on which the jury could reasonably find for the plaintiff."
>
> ...
>
> [T]he trial court, in accordance with Maryland Rule 2-501(e), shall render summary judgment forthwith if the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. The purpose of the summary judgment procedure is not to try the case or to decide factual disputes, but to decide whether there is an issue of fact that is sufficiently material to be tried. . . . Thus, once the moving party has provided the court with sufficient grounds for summary judgment, [i]t is...incumbent upon the other party to demonstrate that there is indeed a genuine dispute as to a material fact."

Tri-Towns Shopping Ctr., Inc., v. First Fed. Sav. Bank of W. Md., 114 Md. App. 63, 65-66 (1997) (citations omitted) (emphasis in original).

Having considered MCPS' motion, the Parent's Opposition, and the documents attached to those filings and the initial pleadings, I will deny MCPS' Motion for the reasons that follow.

The Statute of Limitations

The time period in which to request a Due Process hearing with the OAH is controlled by the limitations period under Maryland law enacted to comply with the IDEA. *See* 20 U.S.C.A. § 1415(f)(3)(C) (2017). The applicable statute of limitations provides that the Due Process complaint must be filed within two years of the date the Parent knew or should have known of the action that formed the basis for the complaint. Md. Code Ann., Educ. § 8-413(d)(3) (2018); *see also* COMAR 13A.05.01.15C(1); 34 C.F.R. §§ 300.507(a)(2), 300.511(e) (2017). The IDEA requires that the school district inform parents of the two year limitations period applicable to the request for a Due Process hearing. 20 U.S.C.A. § 1415(d)(2)(E)(i) (2017).

There are two exceptions to the two-year timeline for filing a due process complaint. A parent is not bound by the two-year statute of limitations if (1) the parent was prevented from requesting a due process hearing because the local education agency made "specific misrepresentations that it had resolved the problem forming the basis of the complaint" or (2) the

local education agency withheld information it was required to provide to the parent. 20 U.S.C.A. § 1415(f)(3)(D); Md. Code Ann., Educ. § 8-413(d)(4) (Supp. 2017).

MCPS argues that the Parent knew or should have previously known of the action forming the basis of his complaint because he "filed the exact same allegations with respect to the 2015-2016 school year[]." MCPS asserts that the August 6, 2018 Complaint, regarding allegations concerning the 2014-2015 school year, was filed well outside of the two-year timeframe for filing such a complaint. MCPS argues that it is "unfathomable" that the eleven-year-old autistic Student suddenly informed the Parent in 2018 that he did not receive math instruction in a separate classroom in second grade, during the 2014-2015 school year. MCPS further argues that given that the Parent has previously filed numerous due process complaints and complaints with MSDE, and attended IEP meetings, he should have thought to ask someone in the school system about the Student's math instruction during the 2014-2015 school year long ago. MCPS posits that the idea that the Parent was not aware of the instant claim when filing the due process complaint with regard to the 2015-2016 school year strains credulity

The Parent asserts that in making its argument, MCPS has applied an overly restrictive interpretation of the statute of limitations provided for in the IDEA and the exceptions to the statute of limitations. The Parent contends that he did not know, nor should he have known, that he had grounds to file a complaint until August 2018 when his autistic son informed him that he did not receive math instruction in a separate classroom during the second grade/2014-2015 school year. The Parent asserts that his son was previously unable to convey that he did not receive mathematics instruction in a separate classroom because he does not have language skills or emotional and intellectual capabilities of a typical child his age. In addition, the Parent asserts that although MCPS previously informed him that the Student had not received math instruction in a separate classroom during third grade, MCPS did not inform him that the Student also did

not receive math instruction in a separate classroom during second grade. The Parent further argues that in considering whether he should have known about MCPS' failure to provide the student math instruction in a separate classroom during the 2014-2015 school year, I should take into consideration the Students' limitations when he was in second grade—namely that he was seven-year-old autistic child with developmental delays who did not like to talk about school. He asserts that you cannot simply ask an autistic child if the services in his IEP are being implemented. He further asserts that it is necessary to go to the school to observe a child in class, but sometimes it is difficult to get to the school and that even when he hired someone to go to the school to observe the Student in class, it was possible that the Student did not have math instruction on that day of the observation. The Parent essentially argues that he had no way of knowing of the basis for the instant claim because the school did not notify him that the Student did not receive math instruction in a separate classroom during the 2014/2015 school year.

Clearly there is a genuine dispute of material fact with regards to the date on which the parent knew or should have known that the Student was not receiving mathematics instruction in a separate classroom during the 2014-2015 school year. I note that the November 20, 2016 OAH decision with regard to the Parent's September 23, 2016 due process complaint establishes that the Parent's assertion that he did not know of the action forming the basis of instant August 6, 2018 Complaint until August 2018 is patently false. MCPS Ex. 1-M, p. 15. In the Discussion section of the November 20, 2016 decision, ALJ [redacted] indicated that during the hearing held on November 3 and 4, 2016, the Student's third grade teacher testified that "[i]n the second grade, the Student was instructed in math in the general education classroom with a 1:1 aide." *Id.* The Parent also represented the Student in that hearing, and therefore had an opportunity to cross-examine the third grade teacher. *See id.* at p. 2. In addition, he was undoubtedly mailed a copy of the November 10, 2016 decision. Thus, MCPS has established that at the latest, the Parent

actually knew that the Student did not receive math instruction in a separate classroom during the second grade/2014-2015 school year as of November 3, 2016. However, since that date falls within the two-year statute of limitations, MCPS still has not established that it is entitled to judgment as a matter of law based on its argument with regard to the statute of limitations. Despite the Parent's intentionally false representation as to the date on which he first learned that the Student did not receive math instruction in a separate classroom, in considering the Motion to Dismiss (as a motion for summary decision) I still must make all reasonable inferences in the Parent's favor. Therefore, at this stage I must infer that the Parent first knew or should have known of the basis for his complaint on November 3, 2016. Consequently, the Motion to Dismiss must be denied with regard to the statute of limitations argument.

***Res Judicata*/Collateral Estoppel**

MCPS also argues that the Parent's August 6, 2018 Complaint should be barred under the doctrines of collateral estoppel and *res judicata*. Under the doctrine of collateral estoppel (or issue preclusion) "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Murray Int'l Freight Corp. v. Graham*, 315 Md. 543, 547 (1989) (quoting Restatement (Second) of Judgments, § 27 (1982)).[9] In *Garrity v. Md. State Bd. of Plumbing*, 447 Md. 359 (2016), the Court of Appeals held that "agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court." Garrity at 380. The *Garrity* Court set forth a four-part test for the application of collateral estoppel:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?

[9] The Court of Special Appeals has observed on several occasions that "the Court of Appeals gives considerable, and at times, persuasive weight to the position taken by the American Law Institute in Restatement (Second) of Judgments." *Garrity v. Md. State Bd. of Plumbing*, 221 Md. App. 678, 687 (2015) (quoting *Bryan v. State Farm Mut. Auto Ins. Co.*, 205 Md. App. 587, 602 (2012).

2. Was there a final judgment on the merits?

3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Id. at 369, (quoting *Wash. Suburban Sanitary Comm'n v. TKU Assocs.*, 281 Md. 1, 18–19 (1977)). If all four questions are answered in the affirmative, collateral estoppel should be applied. *Id.*

The doctrine of *res judicata* (or claim preclusion)

> bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation." The doctrine embodies three elements: (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) there was a final judgment on the merits in the prior litigation.

Comptroller v. Science Applications Intern. Corp., 405 Md. 185, 195-96 (2008) (quoting *R & D 2001 v. Rice*, 402 Md. 648, 663 (2008)).

Explaining the difference between *collateral estoppel* and *res judicata*, the Court has observed:

> *Collateral estoppel* is concerned with the factual implications of an earlier litigation of a different case, whereas res judicata is concerned with the legal consequences of a judgment entered earlier in the same case.... *Res judicata*, by contrast, is concerned with the legal consequences of a judgment regardless of whether the judgment was based on the ultimate factual merits or on the basis of a legal ruling having nothing to do with the ultimate factual merits.

Smalls v. Maryland State Dep't of Educ., 226 Md. App. 224, 233 (2015).

Moreover, "[i]n *collateral estoppel* law, the factual issue must actually be resolved on its merits by the factfinder before it acquires any preclusive effect. In *res judicata* law, by contrast,

it is a legal decision rather than a factual determination that concerns us." *Smalls,* 226 Md. App. at 235.

MCPS alleges that the Parent's August 6, 2018 Complaint in this case is the "same complaint" that he filed on September 23, 2016 with regard to the 2015-2016 school year which has been adjudicated and has been appealed to the United States District Court. *See* MCPS Ex. 1-M & 2-M. MCPS asserts that the Parent has filed several other due process complaints in the past (including two filed on February 27, 2017 and another filed on March 12, 2017), and argues it is apparent the Parent is well aware of the IEP process and how to exercise the procedural safeguards provided under the IDEA.

The Parent argues that that August 6, 2018 Complaint is "different and nonidentical" to prior complaints. He also asserts that the issue raised in the August 6, 2018 Complaint could not have been raised during the prior litigation because he was unaware that the Student had not received math instruction in a separate classroom while in the second grade at that the time that he filed his September 23, 2016 Complaint.

In the September 23, 2016 due process complaint, the Parent alleged that the Student did not receive special education instruction in math in a separate special education classroom from May 5, 2015 through May 5, 2016. In the instant August 6, 2018 Complaint the Parent alleged that the Student did not receive special education instruction in math in a separate classroom from August 25, 2014 through May 1, 2015. Clearly the parties to both actions are identical; an OAH hearing was held on November 3 and 4, 2016, during which the Parent was given a fair opportunity to be heard; and there was a final judgment on the merits with regard to the September 23, 2016 due process complaint. However, I find that although the nature of the complaints is identical, the issue differs in that each complaint is with respect to a separate and

distinct timeframe. Thus MCPS has failed to establish that all four factors required for the application of collateral estoppel are present in this case. *See Garrity* at 369.

Similarly, MCPS has failed to establish that the three factors required for the application of *res judicata* are present in this case—not only has MCPS failed to prove that the issue in this case is identical to the case stemming from the September 23, 2016 due process complaint, but it also failed to establish that the issue in this case could have been raised and determined during that prior litigation. As previously discussed, with regard to the Motion to Dismiss (considered as a motion for summary decision), I must infer from the evidence that November 3, 2016 is the earliest date on which the parent knew that the Student was not provided math instruction in a separate classroom during the second grade/2014-2015 school year. Thus, there is insufficient evidence at this stage to establish that the Parent was aware of the basis for the August 6, 2018 Complaint when he filed the September 23, 2016 due process complaint. Clearly, the Parent could not have litigated an issue at a time when he was unaware of its existence. Therefore the Motion to Dismiss (considered as a motion for summary decision) must also be denied with regard to the collateral estoppel and *res judicata* argument.

Motion for Judgment

At the close of the Parent's case-in-chief, MCPS indicated that it did not intend to call any witnesses and made a Motion for Judgment during which MCPS also renewed its Motion to Dismiss.

COMAR 28.02.01.12E governs a Motion for Judgment and states 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 the 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 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.

The language of COMAR 28.02.01.12E is essentially the same as the language for motions for judgment in district court and non-jury trials in circuit court. Therefore, case law that addresses the nature of motions for judgment in civil proceedings also explains the nature of those motions in administrative proceedings. In *Panhanish v. Western Trail, Inc.*, 69 Md. App. 342 (1986), the Court explained:

> [W]hen a party has moved for judgment, the court is allowed as trier of fact to determine the facts and render judgment thereon. The trial judge is not compelled to make any evidentiary inferences whatsoever in favor of the party against whom the motion for judgment is made.
>
> . . .
>
> In the case *sub judice*, the matter was tried by the court. Thus, the trial judge was allowed to evaluate the evidence, *as though he was the jury*, and to draw his own conclusions as to the evidence presented, the inferences arising therefrom, and the credibility of the witnesses testifying.

Panhanish, 69 Md. App. at 353.

MCPS' Argument

As previously indicated, in making its Motion for Judgment, MCPS also renewed its Motion to Dismiss. Therefore, I will incorporate the parties' arguments on the Motion to Dismiss into the arguments on the Motion for Judgment. MCPS additionally argues that the Student had has otherwise failed to meet his burden in this case and asserts that the case presented by the Parent supports a decision in MCPS' favor. MCPS points out that the only witness to testify in this matter, the Student's special education teacher, Ms. [redacted] (accepted as an expert in special education) did not opine that MCPS failed to provide the Student with a FAPE; and in

fact, Ms. [redacted] testified that by the end of the school year, the Student had made progress in math. MCPS asserts that as a special education teacher who worked with the Student and provided him with specialized math instruction during the 2014-2015 school year, Ms. [redacted] has the most credibility, expertise, and knowledge regarding what was in the Student's best interest and her expert opinion should be given deference.

MCPS further argues that the only credible evidence in the record indicates that it would not have been in the Student's best interest to pull him out of the classroom for separate instruction, given his anxiety and that Ms. [redacted] established that there was a sound reason as to why she determined it was best to have the Student continue to receive math as he had during the rest of the year.

The Parent's Argument

The Parent asserts that he has provided ample evidence that there was a material substantive failure to implement the March 24, 2015 IEP. He argues that Ms. [redacted]s testimony that the Student was not pulled out for math instruction in a separate classroom, as provided for in the IEP, is conclusive. He argued that based on the rulings in *Van Duyn ex rel. Van Duyn v. Baker School Dist.5J*, 502 F.3d 811 (9th Cir. 2007) and *Bd. of Educ. of Montgomery Cnty. v. Brett Y.*, 959 F.Supp. 705, 709 (D.Md.1997), an IEP must be implemented immediately. He further argues that if the school does not agree with an IEP, they may request another IEP meeting, but cannot simply choose not to implement the current IEP. He argues that the Student has proved its case and MCPS' motion for judgment should be denied.

Analysis

First, I shall consider the parties' arguments pertaining the Motion to Dismiss (as they have been incorporated into the arguments on the Motion for Judgment), in the context of MCPS' Motion for Judgment. For the reasons previously stated, when considering the Motion to

Dismiss, I treated it as a motion for summary decision. *See Hrehorovich*, 93 Md. App. 772 at 781-82. Although when considering the arguments on the Motion to Dismiss I found that the motion should be denied, I am not required to make the same finding when considering those arguments in relation to the Motion for Judgment, as a ruling on a motion for summary decision requires an ALJ to apply different standards than when ruling on a Motion for Judgment.

As explained above, in considering a motion for summary decision, an ALJ may issue a decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. COMAR 28.02.01.12D(4). Additionally, the ALJ must consider the facts in the light most favorable to the non-moving party. *Richman,* 122 Md. App. 110 at 146. However, when considering a Motion for Judgment after hearing the merits of a case, the ALJ may determine the facts and render judgment based upon those facts. *Panhanish*, 69 Md. App. 342 at 353. Further, the ALJ is not required to make any evidentiary inferences in favor of the non-moving party. *Id.*

During a hearing on the merits, the party who filed the request for a due process hearing, in this case, the Student, bears the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005); Md. Code Ann., State Gov't § 10-217 (2014). 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 Pattern Jury Instructions* 1:7 (3d ed. 2000)); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005). For the reasons that follow, I find that the Student has failed to prove by a preponderance of the evidence that the Complaint should not be barred under the statute of limitation and therefore I shall grant MCPS' Motion for Judgment.

As stated above, the applicable statute of limitations provides that the due process complaint must be filed within two years of the date the Parent knew or should have known of the action that formed the basis for the complaint. Md. Code Ann., Educ. § 8-413(d)(3) (2018); *see also* COMAR 13A.05.01.15C(1); 34 C.F.R. §§ 300.507(a)(2), 300.511(e) (2017). As previously discussed, the Parent stated in his September 10, 2018 Opposition that he first became aware that the Student had not received math instruction in a separate classroom during the 2014-2015 school year (the basis for the Complaint) when the Student relayed that information him in August 2018. The Parent also made this assertion during his argument on the Motion to Dismiss. The Parent did not further address this issue during the presentation of the case on the merits and he failed to offer any evidence to corroborate his assertion that he first learned of the basis for his Complaint in August 2018, or to otherwise establish the date on which he first knew or should have known that he had cause to file the Complaint. I note that during the August 24, 2018 Conference, the Parent indicated that he intended to offer the Student as a witness at the hearing on the merits, but he did not do so on the date of the hearing. In any event, ALJ [redacted]s November 10, 2016 decision clearly establishes the Parent was aware of the basis for the Complaint no later than November 3, 2016, contrary to the Parent's assertion that he learned of the issue in August 2018.

Although the evidence in the record provides an indication of the *latest* date on which the Parent knew or should have known of the basis for the Complaint, it does not establish when the Parent *actually* knew or should have known of the basis of the Complaint. The Parent had the burden to establish by a preponderance of the evidence that he first knew or should have known of the basis for the Complaint sometime after August 5, 2016. Since the Parent's only assertion as to that date has been proven false and he has offered no other evidence with regard to that issue, the parent has failed to prove by a preponderance of the evidence that he did not know and should not

have known of the basis for the Complaint prior to August 6, 2016. Therefore I find that the August 6, 2018 Complaint is barred by statute of limitations and will grant MCPS' Motion for Judgment. 20 U.S.C.A. § 1415(f)(3)(C) (2017); Md. Code Ann., Educ. § 8-413(d)(3) (2017).

Since I have determined that filing of the Parent's August 6, 2018 Complaint is barred by the statute of limitations and granted the MCPS' Motion for Judgment, I will not reach the issue of whether the Complaint is barred under the principles of collateral estoppel and *res judicata*; nor will I reach the issues of whether MCPS failed to provide the Student with a FAPE during the 2014-2015 school year.

MCPS' Request for a Protective Order Against the Parent

At the conclusion of the hearing, MCPS also requested that I issue a protective order against the Parent, requiring that any time the Parent elects to file a request for a due process hearing in the future, he be allowed to do so only with leave of court, through the OAH. MCPS' bases this request on its assertion that the Parent's filing of multiple due process complaints thus far have taken considerable time and resources from MCPS, the courts, and the OAH. The Parent asserts that MCPS' request is extraordinary, inappropriate and contrary to the ideals and procedural safeguards of the IDEA.

The mere fact that a Parent has not prevailed on previous due process complaints does not establish that the Parent filed his or her complaints in bad faith or that such complaints were otherwise frivolous. Further, I am unaware of any law, rule, or regulation which grants an ALJ the authority to grant the protective order MCPS seeks and MCPS has not cited any such law, rule or regulation in making its request. Therefore, MCPS' request for a protective order shall be denied.

CONCLUSIONS OF LAW

I conclude as a matter of law that MCPS' Motion for Summary Decision must be denied as there is a genuine dispute of material fact and MCPS is not entitled to judgement as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); COMAR 28.02.01.12D.

I further conclude that the Parent is barred by the statute of limitations from compensation for the failure of Montgomery County Public Schools to provide the Child mathematics instruction in a separate class room during the 2014-2015 school year. 20 U.S.C.A. § 1415(f)(3)(C) (2017); Md. Code Ann., Educ. § 8-413(d)(3) (2017).

I further conclude that MCPS is not entitled to a protective order against the Parent.

ORDER

I **ORDER** that MCPS' Motion to Dismiss is **DENIED.**

I further **ORDER** that MCPS' Motion for Judgment is **GRANTED.**

I further **ORDER** that MCPS's request for a protective order against the Parent is **DENIED.**

Signature Appears on Original

September 28, 2018
Date Decision Issued

Jennifer A. Nappier
Administrative Law Judge

JAN/cmg
#176013

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) (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]