

██████████,  
STUDENT  
v.  
MONTGOMERY COUNTY  
PUBLIC SCHOOLS

BEFORE M. TERESA GARLAND,  
AN ADMINISTRATIVE LAW JUDGE  
OF THE MARYLAND OFFICE  
OF ADMINISTRATIVE HEARINGS  
CASE No.: MSDE-MONT-OT-19-34794

**RULING ON MOTION FOR JUDGMENT**

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CONCLUSION OF LAW  
ORDER

**STATEMENT OF THE CASE**

On November 6, 2019, ██████████ (Parent), on the Student’s behalf, filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH).

In the Complaint, the Parent expressed her disagreement with the Montgomery County Public Schools’ (MCPS) placement of the Student in a non-public school at ██████████ Academy, at MCPS expense. As relief, the Parent requests that the Student remain in a public school setting with supports in place.

The Parent made no reference in the Complaint how the non-public educational placement violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415(f)(1)(A) (2017),<sup>1</sup> its implementing regulations, any State law or regulation, or any State or federal education policies. The Parent did not allege any deficiency in the Student’s

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

Individualized Education Program (IEP) or assert that due to the failure of MCPS to develop and implement an appropriate IEP the Student was denied FAPE. The Parent did not refer to any statute, regulation, policy or case law that supports the relief requested.

On November 20, 2019, I conducted a Telephone Prehearing Conference (Conference). [REDACTED], Esquire, participated for MCPS. The Parent and the Student's father, [REDACTED] participated for the Student. During the Conference, the Parent requested a postponement of the Conference and a delay of the hearing in order to obtain counsel. The Parent asserted that she had been actively seeking a lawyer since the spring of 2019. I denied the Parent's request.

On November 22, 2019, I issued a Prehearing Conference Report and Order (Report). In the Report, I established December 9 and 10, 2019 as the dates for the hearing, and set various deadlines for requests for subpoenas, exchange of witness lists and documents, and motions. In the Report, I also identified the issues to be decided, as follows:

1. Is placement of the Student in a non-public school necessary to implement the Student's Individualized Education Program (IEP)?
2. Is MCPS required to provide a social worker or other social-emotional support at the Student's current school or other public school placement?

I convened the hearing, as scheduled, on December 9, 2019. Ms. [REDACTED] was present for the MCPS, and the Parent was present with Mr. [REDACTED] and her daughter, [REDACTED].

The Parent renewed her request for a postponement of the hearing in order that she might obtain counsel. I, again, denied her request as she had had ample opportunity to obtain counsel.

After denying the Parent's request for postponement, the Parent testified. She was not permitted to call witnesses or offer any documents for admission into evidence as she had not complied with the Report's order requiring an exchange of witness lists and documents no later

than the close of business December 2, 2019. In the midst of the Parent's testimony, she asked if she could withdraw her Complaint. I allowed her to exit the hearing room, with Mr. [REDACTED] and her daughter, to discuss whether she should withdraw her Complaint. Several minutes later, Mr. [REDACTED] entered the hearing room and conveyed that the Parent was experiencing a medical emergency. An ambulance was summoned and the hearing was suspended at approximately 10:45 a.m. The Parent was instructed that any request for a postponement of the following days' proceedings must be in writing with accompanying medical documentation and received at the OAH before the close of business on December 9, 2019. The Parent did not submit a request for postponement of the December 10, 2019 hearing continuation date.

I resumed the hearing on December 10, 2019. The Parent was present and made a preliminary request that I disregard her testimony of December 9, 2019. She also requested a "do over" of her opening statement. I denied both requests, but allowed her the opportunity to complete her testimony or clarify any testimony from the previous day. The Parent declined to offer any additional testimony. Thereafter, the MCPS made an oral Motion for Judgment (Motion). I did not issue a ruling on the record and advised the parties that I would hold the Motion sub-curia and allow the MCPS to move forward with its case in the interest of judicial economy.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R.<sup>2</sup> § 300.511(a) (2018); Md. Code Ann., Educ. § 8-413(e)(1) (2018); and Code of Maryland Regulations (COMAR) 13A.05.01.15C. Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; the Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann.,

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<sup>2</sup> Code of Federal Regulations

State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); COMAR 13A.05.01.15C; COMAR 28.02.01.

**ISSUE**

Should MCPS's Motion for Judgment be granted?

**SUMMARY OF THE EVIDENCE**

The Parent presented no exhibits as she had not complied with the Report's order.

I have attached, as an Appendix, the documents which were presented in MCPS' case-in-chief.

**FINDINGS OF FACT<sup>3</sup>**

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

1. The Student is fourteen years old and attends the eighth grade at [REDACTED] Middle School, a public school. The Student receives Special Education Social Emotional Support Services. The student to educator ratio is five to eight students per one teacher and two para-educators.
2. During the 2018-2019 school year, the Student's IEP team met seven times to address the Student's academic and behavioral difficulties. The Parent, the Student, the Student's father and his sister attended the IEP meetings.
3. The Student's educational assessment in the areas of Reading Phonemic Awareness, Reading Comprehension and Math Calculation were at the first grade level.
4. The Student's assessment in Written Language Expression, Social Emotional/Behavioral, Social Interaction Skills and Self-Management were either below grade level or below age expectancy.
5. The Student has not made sufficient progress to meet any of his IEP goals.

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<sup>3</sup> The Parent's testimony was not helpful in formulating the Findings of Fact. She did, however, read from two of MCPS' documents during her testimony. MCPS Exhibit 29, 9/6/19 Amended IEP, and MCPS Exhibit 31, Discipline Referrals 2018-2019 School Year. I have incorporated information from these documents in the Findings of Fact.

6. During the 2018-2019 school year (through January 31, 2019), the Student had sixty-nine office referrals for the following: inappropriate language; abusive language; bullying; disruption; fighting/physical disruption; truancy; and defiance.

7. The Student is not receiving educational benefit in the public school setting.

8. The academic members of the Student's IEP team and the MCPS Central Placement Unit determined that a fully self-contained, private educational placement that will provide the Student intensive, one-on-one Special Education Social Emotional Support Services is necessary to implement the Student's IEP and to provide FAPE.

9. The Parent disagrees with any private placement.

## **DISCUSSION**

### **Legal Framework**

FAPE, required under IDEA as condition to receipt of federal funds, is education that is specifically designed to meet unique needs of disabled child, supported by such services as are necessary to permit child to benefit from instruction. IDEA, 20 U.S.C.A. §§ 1400(d)(1)(A), 1412(a)(1). A school district offers a FAPE by providing personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction. *Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982).

In *Endrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017), the Supreme Court held that a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Id.* at 993. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education is fact intensive, informed not only by the expertise of school officials but also by the input of the child's parents or guardians. *Id.*

The burden of proof at an administrative hearing challenging the sufficiency of an IEP and whether that IEP provided a FAPE is upon the Parents and Student. *Shaffer v. Weast*, 456 U.S. 49, 62 (2005). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Civil Pattern Jury Instructions* 1:7 (3d ed. 2000)); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

Here, the Parent has not challenged either the personalized instruction and support services developed by the IEP team and included in the IEP or whether the IEP was reasonably calculated to provide the Student a FAPE. The Parent contends that the Student’s IEP can be implemented in a public school with social-emotional supports. She stated she did not like the non-public schools that the IEP team identified and that the family considered for the Student. The Parent did not meet her burden of proof to show that the IEP developed by the IEP team, including the Parent, was not reasonably calculated to provide the Student a FAPE.

### **Motion for Judgment**

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

#### **E. Motion for Judgment.**

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

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

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

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

COMAR 28.02.01.12E.

When considering a Motion for Judgment during a non-jury trial, the judge, as the trier of fact, may determine the facts and render judgment against the non-moving party. *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 353 (1986).<sup>4</sup> The judge may evaluate the evidence, including making inferences, determining credibility and drawing conclusions. *Id.*

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

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

A. A judge shall:

...

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

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

...

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

...

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

At the close of the Parent's presentation, which was remarkably brief, the MCPS argued that the Parent failed to establish any element of her case. The Parent offered no response to MCPS' motion for judgment.

**The Parent's Evidence**

The Parent testified that several non-public placements were explored by MCPS and communicated to her. A placement at [REDACTED] was considered, but the Student was not accepted at

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<sup>4</sup> This language of the Motion for Judgment provision in the OAH rules of procedure is akin to the Maryland Rules regarding Motions for Judgment in the circuit and district courts. *See* Maryland Rules 2-519 and 3-519. Thus, I find that case law interpreting the circuit and district court provisions is persuasive and informative regarding the proper interpretation of the OAH provision.

that placement.<sup>5</sup> The [REDACTED] School was also was also considered, but the Student was too high functioning. The Parent testified that the Student's father visited the [REDACTED] Academy and rejected that placement as he believed the Student would regress in that setting.

## Analysis

In *AW v. Fairfax County Public School Board*, 372 F. 3d 674 (4<sup>th</sup> Cir. 2004) the Fourth Circuit Court of Appeals addressed the term “educational placement” thusly:

“Consideration of the structure and the goals of the IDEA as a whole, in addition to its implementing regulations, reinforces our conclusion that the touchstone of the term “educational placement” is not the location to which the student is assigned but rather the environment in which educational services are provided. To the extent that a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of “mainstreaming” and affording access to a FAPE, the goal of protecting the student's “educational placement” served by the “stay-put” provision appears to be met. Likewise, where a change in location results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a change in “educational placement” occurs”

*Id.* at 682.

There is a distinction between “placement” and the physical location of the educational environment. In 1994, the Office of Special Education Programs (OSEP), of the U.S. Department of Education, issued an opinion letter on the subject of determining when a “change in educational placement” had occurred. With regard to the indicator of a change in placement, the opinion letter stated, “the public agency responsible for educating the child must determine whether the proposed change would substantially or materially alter the child's educational program.” The letter further stated that a change in location alone would not necessarily

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<sup>5</sup> [REDACTED] is a mental health residential treatment facility of the [REDACTED] located in [REDACTED] [REDACTED] This facility serves adolescents and their families from the central Maryland region, the [REDACTED] and parts of [REDACTED]. [REDACTED] is staffed by qualified multidisciplinary treatment teams, providing treatment and educational programs for adolescent boys and girls aged 12 to 17.6 who are experiencing emotional, behavioral and learning difficulties. [https://\[REDACTED\]](https://[REDACTED])



substantially or materially alter the child's educational program. U.S. Dept. of Educ., Office of Special Education Programs, *Policy Letter to Fisher* (Apr. 18, 1994) 21 IDELR 992, 993 (OSEP 1994).

I conclude that the evidence offered by the Parent did not support her due process hearing request. The Parent presented her own testimony but offered no specific information sustaining the allegation in her due process hearing request. Her testimony did not proceed beyond the level of a bare allegation that she disagreed with MCPS' placement of the Student at the ██████ Academy. She did not provide me with any documentation or expert witnesses, or other witnesses to sustain or corroborate her allegation. The Parent established that she disagrees with MCPS regarding the Student's placement, but offered nothing more. Accordingly, the Parent's unsubstantiated allegations do not amount to errors sufficient to sustain the Parent's position that the Student was denied FAPE.

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

It is undisputed that there was no change in the Student's IEP related to personalized instruction and services. The Parent did not contend that the IEP could not be implemented at the ██████ Academy or that the IEP could be implemented in a public setting. Thus, MCPS is entitled to prevail as a matter of law. Accordingly, the Motion for Judgment will be granted and the Complaint is dismissed.

## CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Motion for Judgment should be granted in favor of the MCPS at the conclusion of the Student's case, and that the Complaint of November 6, 2019 should, therefore, be dismissed. COMAR 28.02.01.11 and 12E; *AW v. Fairfax County Public School Board*, 372 F. 3d 674 (4<sup>th</sup> Cir. 2004); *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342 (1986); *Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Shaffer v. Weast*, 456 U.S. 49 (2005).

## ORDER

I **ORDER** that the Montgomery County Public School's Motion for Judgment is **GRANTED** and the Student's Due Process Complaint of November 6, 2019 is hereby **DISMISSED**.

December 27, 2019  
Ruling Mailed

M. Teresa Garland  
Administrative Law Judge

MTG/sw  
#183588

## REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2019). 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 and Emailed To:**

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**CASE No.: MSDE-MONT-OT-19-34794**

**APPENDIX**

Exhibit No.	Description
MCPS-1	Report of School Psychologist by ██████████, dated 1/23/2017
MCPS-2	Educational Assessment Report by ██████████, dated 1/23/2017
MCPS-3	FBA, dated 1/18/2018
MCPS-4	BIP, dated 1/18/2018
MCPS-5	IEP, dated 2/2/2018
MCPS-6	Prior Written Notice, dated 2/12/2018
MCPS-7	BIP, dated 11/30/2018
MCPS-8	Manifestation Determination, dated 12/4/2018
MCPS-9	Prior Written Notice, dated 12/5/2018
MCPS-10	Classroom Observation by ██████████, dated 1/23/2019
MCPS-11	Educational Assessment Report by ██████████, dated 1/28/2019
MCPS-12	Report of School Psychologist by ██████████, dated 2/15/2019
MCPS-13	BIP, dated 2/15/2019
MCPS-14	Manifestation Determination, dated 2/15/2019
MCPS-15	IEP, dated 2/15/2019
MCPS-16	Prior Written Notice, dated 2/15/2019
MCPS-17	Manifestation Determination, dated 3/6/2019
MCPS-18	Prior Written Notice, dated 3/6/2019
MCPS-19	Student Record Transmittal, dated 3/5/2019
MCPS-20	Memorandum from ██████████ to ██████████, dated 3/12/2019
MCPS-21	Email from ██████████ to parents and school team, dated 4/15/2019
MCPS-22	Data, dated 4/9/2019 through 4/26/2019
MCPS-23	IEP, Amended 5/3/2019
MCPS-24	Prior Written Notice, dated 5/10/2019
MCPS-25	Manifestation Determination, dated 5/28/2019
MCPS-26	Prior Written Notice, dated 5/28/2019
MCPS-27	IEP, Amended 7/24/2019
MCPS-28	Prior Written Notice, dated 7/30/2019
MCPS-29	IEP, Amended 9/6/2019
MCPS-30	Prior Written Notice, dated 8/26/2019
MCPS-31	Discipline Referrals, 2018-2019 school year
MCPS-32	Communication Log, 2018-2019 school year

Exhibit No.	Description
MCPS-33	Report Card, 2018-2019 school year
MCPS-34	Letter to Parent from [REDACTED], dated 9/10/2019
MCPS-35	Individual Incident Summary Forms, 2019-2020 school year
MCPS-36	Student Progress Report – MAP data
MCPS-37	Resume of [REDACTED] School Psychologist, MCPS
MCPS-38	Resume of [REDACTED], Coordinator, Central Placement Unit, MCPS
MCPS-39	Resume of [REDACTED], Emotional Support Teacher, [REDACTED] MS, MCPS
MCPS-40	Resume of [REDACTED], Resource Teacher for Special Education, [REDACTED] MS, MCPS
MCPS-41	Resume of [REDACTED], Assistant Principal, [REDACTED] MS, MCPS