[redacted]	**BEFORE WILLIAM SOMERVILLE,**
STUDENT	**AN ADMINISTRATIVE LAW JUDGE**
v.	**OF THE MARYLAND OFFICE**
BALTIMORE COUNTY	**OF ADMINISTRATIVE HEARINGS**
PUBLIC SCHOOLS	**OAH No.: MSDE-BCNY-OT-21-24494**

DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On October 22, 2021, [redacted] (Parent), on behalf of her child, [redacted] (Child or Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Baltimore County Public Schools (BCPS or school system) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017); [1] 34 C.F.R. § 300.511(a) (2020); [2] Md. Code Ann., Educ. § 8-413(d)(1) (2018); Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

I held a telephone prehearing conference on November 12, 2021. Both of the Child's parents (Parents) were present and were self-represented. Pamela Foresman, Esquire, represented the BCPS. Shortly thereafter, I issued a prehearing conference order.

[1] U.S.C.A. is an abbreviation for United States Code Annotated. Unless otherwise noted, all citations of 20 U.S.C.A. hereinafter refer to the 2017 bound volume.
[2] C.F.R. is an abbreviation for Code of Federal Regulations. Unless otherwise noted, all citations of 34 C.F.R. hereinafter refer to the 2020 volume.

I held the hearing on November 29, 2021.[3] The Parents were self-represented. Pamela Foresman, Esquire, represented the BCPS.

Procedure is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., Educ. § 8-413(e)(1) (2018); State Gov't §§ 10-201 through 10-226 (2021); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

Did the challenged actions by BCPS fail to meet the requirements of the law? Specifically:

1. Did the school system fail to provide the Student with a free, appropriate, public education (FAPE), in the current school year, because the Student has not been assigned an additional thirty minutes per week of speech/language therapy services and a full-time one-to-one aide, who will alleviate the Student's 1) tendency not to stay on task, and 2) biting and pinching of others, and

2. Is the Parent entitled to any of the relief requested in the complaint?

SUMMARY OF THE EVIDENCE

Exhibits

No exhibits were offered and admitted into evidence.

Testimony

The Parents testified in their case.

The BCPS made a motion for judgment at the end of the Parents' case.

[3] The matter was scheduled at the prehearing conference for three days, from November 29 through December 1, 2021.

FINDINGS OF FACT

Based upon demeanor evidence and the testimony, I find the following facts[4] by a preponderance of the evidence:

1. The Child (born in [redacted] 2017) is four years old and is enrolled full-time in a self-contained pre-school program at [redacted] Elementary School. His classroom has a teacher and two para-educators to assist. The class is not currently held by videoconference, nor is it "hybrid." The class is "in person."

2. The Child is currently diagnosed with autism spectrum disorder and has speech/language delays.

3. The Child is classified as "non-verbal" by special educators; he can now speak about twenty words. The Child grunts and cries out, at times, to communicate.

4. The Child has an IEP[5] and, at pre-school, among other things, he receives two 30-minute sessions of speech/language therapy each week.

5. The Child is currently using a communication board to help him communicate, and the Child has been trying a "smart board" as assistive technology.

6. In an IEP meeting in July 2021, "steady progress" was noted, and the Parents did not disagree. (Testimony.)

7. On October 22, 2021, one Parent requested a hearing to challenge the contents of the pending or impending IEP as denying the Child a FAPE.

8. On the Child's most recent IEP document, dated October 28, 2021, a school system employee, Ms. [redacted], accurately characterized the Child's recent communication progress as a "verbal explosion," which is a relative term-of-art in the speech/language therapy

[4] When a party makes a motion for judgment at the close of evidence of an opposing party's case, the ALJ can determine facts, as further explained below. COMAR 28.02.01.12E.
[5] IEP is a commonly-used acronym for individualized education program.

profession. The IEP or meeting notes also indicated that the Child's use of a communication board was progressing successfully.

9. The Parents recognize that the Child is making progress in communication skills.[6]

10. The Child is also currently receiving services from three outside providers to help with various deficits: 1) [redacted] (five hour per week); 2) [redacted] (ten hours per week of speech/language therapy, some of which is with two other children); and 3) [redacted] (one 30-minute speech/language therapy session per week).

11. Staff at [redacted] recently expressed that the Child's communication skills had increased.

12. Currently, the Child's pre-school teacher is, from time to time, filling out a "communication sheet" for the Parents, so that, at home, the Parents can attempt to elicit communication from the Child about what the Child experienced in pre-school.

DISCUSSION

Burdens of Proof

The standard of proof in this case is a preponderance of the evidence. COMAR 28.02.01.21K(1). To prove an assertion or a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). In the case on the merits, the burden of production of evidence rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). The Parents are seeking relief and bear the burdens of proof[7] to show that the challenged action by the BCPS did not meet the requirements of the law.

[6] One example of educational progress recognized by the Parents is the recent "verbal explosion" phenomenon. The Parents, however, attribute the educational progress to their efforts outside of school.

[7] Maryland law has long recognized that the "burden of proof" is more precisely discussed in terms of a burden of production and a burden of persuasion. *Owens-Corning v. Walatka*, 125 Md. App. 313, 325, fn. 5 (1999) (citing Lynn McLain, *Maryland Evidence* § 300.1, at 132 (1987)).

With regard to weighing and evaluating the evidence, a trier of fact can accept some, all, or none of the evidence offered. *Sifrit v. State*, 383 Md. 116, 135 (2004); *Edsall v. Huffaker*, 159 Md. App. 337, 341-43 (2004), *cert. den.*, 387 Md. 122 (2005). Demeanor evidence played an important role in this matter. *See Bragunier Masonry Contractors, Inc. v. Maryland Comm'r of Labor and Indus.*, 111 Md. App. 698, 717, n.7 (1996); *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 487 (2d Cir. 1952).

With regard to prevailing on its motion for judgment at the end of the Parents' presentation of evidence, the school system bears the burden to show that either the Parents have not offered evidence to satisfy one or more of the required elements of proof, or that once facts are rendered on the evidence offered in Parents' case, the Parents have not met their burdens on the merits. COMAR 28.02.01.21K(2); (3) and COMAR 28.02.01.12E; *Pahanish v. Western Trials, Inc.*, 69 Md. App. 342, 353 (1986) (analogy to the Maryland Rules of Civil Procedure on a motion for judgment).

Arguments of the Parties

The school system argues that the Parents have not offered evidence that is credible, weighty, or persuasive on the elements of proof that the Parents are required to prove. The school system focuses on, among other things, the lack of any credible expert opinions on the Child's need for a one-to-one aide in order to attain educational benefit. It argues that the evidence adduced in the Parent's presentation shows that the Child made meaningful educational progress under the current IEP, without a one-to-one aide and without an additional thirty minutes of speech/language therapy each week, in the pre-school program.

The Parents argue that there is educational progress, but in their opinion, it is because of the services that the Child receives outside of the pre-school program. They argue that the Child

needs the one-to-one aide and the extra thirty minutes of speech/language therapy each week in order to be in an "ideal situation to allow the Child to prosper."

Special Education Law Overview

The identification, evaluation, and placement of students in special education are governed by the IDEA, state statutes, and state and federal agency regulations. 20 U.S.C. §§ 1400-1482 (2017 & Supp. 2021); 34 C.F.R. Part 300; Md. Code Ann., Educ. §§ 8-401 through 8-417 (2018) and COMAR 13A.05.01. The IDEA requires "that all children with disabilities have available to them a free appropriate public education [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) (Supp. 2021); 20 U.S.C.A. § 1412; *see also* Md. Code Ann., Educ. § 8-403 (2018).

Title 20, Section 1401(9) of the United States Code defines FAPE:

> (9) Free appropriate public education -- The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Similarly, an agency rule, 34 C.F.R. § 300.17, defines FAPE:

> Free appropriate public education or FAPE means special education and related services that —
>
> (a) Are provided at public expense, under public supervision and direction, and without charge;
>
> (b) Meet the standards of the SEA, including requirements of this part;

(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

The requirement to provide FAPE is satisfied by providing personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction. *Bd. of Educ. v. Rowley,* 458 U.S. 176 (1982). In *Rowley,* the Supreme Court defined FAPE as follows:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child….We therefore conclude that the basic "floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to give educational benefit to the handicapped child.

Rowley, 458 U.S. at 200, 201.

A student is not entitled to "[t]he best education, public or non-public, that money can buy" or "all the services necessary" to maximize educational benefits. *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley,* 458 U.S. 176. The *Rowley* Court further stated that with regard to challenges to the IEP, the issue is whether the IEP is "reasonably calculated to enable the child to" benefit educationally. *Id*. at 203-04. The issue is not whether the IEP will enable the student to maximize his or her potential.

The Court in *Endrew F. v. Douglas County School District*, 137 S. Ct. 988, 999 (2017), further clarified that a FAPE does not promise an "ideal" education. 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.

The IDEA requires that an IEP provide a "basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt County Sch. Bd*., 908 F.2d 1200,

1207 (4th Cir. 1990) (citing *Rowley*, 458 U.S. at 201). The act does not establish a "requirement to guarantee any particular outcome for the child." *King v. Bd. of Educ.*, 999 F. Supp. 750, 767 (D. Md. 1998). The IEP, however, must be "appropriately ambitious," *Endrew 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 child's circumstances." *Id*. at 999 through 1001.

Motion for Judgment

At the end of the Parent's evidentiary presentation, the school system made a motion for judgment in its favor, arguing that 1) the evidence offered by the Parents was insufficient to satisfy elements of proof with regard to the statutory violation alleged by the Parents, or that, 2) even if there was some evidence offered to attempt to satisfy the elements, when that evidence is weighed and assessed, and findings of fact rendered, the Parents will not have met their evidentiary burdens. COMAR 28.02.01.12E. A movant bears the burdens with regard to such a motion. COMAR 28.02.01.21K.

The Rules of Procedure of the OAH address motions for judgment. COMAR 28.02.01.12E. The rule states the following:

> 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 ALJ 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.

The OAH's procedural rule on a motion for judgment is almost identical to Md. Rule 3-519 (Motion for Judgment in the District Court) and Md. Rule 2-519 (Motion for Judgment in the circuit courts, as that rule applies to bench trials). Discussion about these court rules is applicable by analogy. The rules permit a judge in a bench trial to decide such a matter on the sufficiency of the evidence or to find facts at the end of a plaintiff's (in this administrative matter, the Parents') case. Niemeyer and Schuett, *Md. Rules Commentary*: 340 (2nd ed. 1992) (citing *Pahanish v. Western Trials, Inc.*, 69 Md. App. 342 (1986)). In such a case, an Administrative Law Judge (ALJ) can properly grant the motion for insufficient evidence, i.e., evidence not produced to attempt to satisfy each element of proof in the administrative action. Alternatively, if the Parents have offered some evidence in an attempt to satisfy each element, an ALJ can take the next step in the analysis and grant the motion. In the second scenario, although some evidence was produced in an attempt to satisfy the elements, the ALJ can rule that such evidence was not credible, weighty, or persuasive.

The fundamental elements of proof in this case are: 1) the Child is a child with a qualifying disability, and 2) the Child is being denied FAPE, in the current school year, for lack of a one-to-one aide, or for lack of an additional 30-minute session of speech/language therapy. 20 U.S.C.A. § 1400(d)(1)(a); *see also* Prehearing Order, November 15, 2021 (issues on the merits articulated).

Analysis

In order for the Parents to prevail in the instant case, the Parents must demonstrate that 1) the Child is a child with a qualifying disability, and 2) the school system is currently denying the Child a FAPE for lack of a one-to-one aide, or for lack of an additional 30-minute session of

speech/language therapy. There is no dispute that the Child is a child with a qualifying disability. The dispute is over whether the Child has been denied a FAPE for the two specific reasons posited by the Parents.

In the instant case, the method to demonstrate a denial of FAPE is to show that, despite efforts of the school system, the Child's IEP is not "reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County School District*, 137 S. Ct. at 1001. If the Parents have shown that the Child's IEP is not reasonably calculated to enable the Child to make progress appropriate in light of the Child's disabilities, and other circumstances associated with the Child, then the motion can be denied, and the school system will then have an opportunity to put on its case.[8]

I agree with the school system that the Parents have not demonstrated in their case that the Child's IEP is not reasonably calculated to enable the Child to make appropriate educational progress. The Parents have not shown a denial of FAPE. The Parents admit that the Child has made educational progress. (Finding of Fact 9.) The Parents opine, however, that the progress was attained by their efforts to secure additional services outside of the IEP. Other educational professionals recognize that the Child is making meaningful educational progress. (Finding of Fact 11.) In addition, Ms. [redacted], a service provider hired by the Parents, recently recognized that the Child was progressing. Ms. [redacted] recently recognized that the Child had undergone a "verbal explosion." Clearly, the four-year-old Child is making meaningful progress in light of his circumstances. On the basis of the evidence offered in the Parent's portion of the case, I cannot determine that the Child's IEP is not reasonably calculated to enable the Child to make appropriate educational progress. I can conclude that the IEP is not preventing the Child from

[8] I explained to the parties that I would consider the motion, and that if I denied the motion, I would schedule the rest of the hearing quickly. Md. Code Ann., State Gov't. §§ 10-201(2021) (efficiency); 10-210(7) (2021)(dismissal); COMAR 28.02.01.12 (motions) and COMAR 28.02.01.11A(2) (take action to avoid unnecessary delay in the disposition); B(4) (consider and rule upon motions); B(7) (grant continuances); B(11) (eliminate unjustified expense and delay).

making appropriate progress. I can conclude that the Child is gaining meaningful educational benefit from his IEP. The school system need not further defend itself by putting on its defense.

This case, typically, would be a "battle of the experts." Typically, I would expect to hear testimony from professionals who had been qualified to offer professional opinions. I heard no testimony from experts who were first qualified to offer opinions. No professional opinion or theory was offered based upon specific facts or data. No such opinion evidence was tested by cross examination. There was no persuasive opinion evidence to show that the IEP was not reasonably calculated to enable the Child to make appropriate educational progress. There was no persuasive opinion evidence to show that whatever educational progress the Child is making, or might make in the near future, is attributable to services provided outside of the Child's IEP. There was no persuasive opinion evidence that a one-to-one aide would alleviate the Child's tendency not to stay on task or the Child's biting and pinching of others. There were no professional reports and documents offered, including the very IEP that is being challenged.[9]

At best, the Parents offered their personal opinions that it would be "ideal"[10] if the Child had a one-to-one aide and more speech/language therapy in pre-school. The Parents offered various reasons why they believed that additional speech/language services and a one-to-one aide[11] would be beneficial to the Child, but they offered no credible, persuasive, or weighty opinion that without the addition of those services, the Child's IEP would remain not "reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County School District*, 137 S. Ct. at 1001. The evidence before me does not support a conclusion that the Child's IEP caused a denial of FAPE for lack of

[9] It would seem to be an almost impossible task to determine whether an IEP is reasonably calculated to provide a FAPE if the IEP is not in evidence.
[10] Testimony of the Child's father.
[11] Some reasons why the Parents would like a one-to-one aide assigned to the Child are: to enhance the Child's safety; to improve the Child's hygiene; to relieve the pre-school teacher of some tasks; and to help explain to the Parents what the Child's school day was like.

a one-to-one aide, or for lack of an additional 30-minute speech/language therapy session each week.

There being no showing of a denial of FAPE, I need not further address the issue of relief requested.

On the basis of this record, I am compelled to conclude that the Parents have not met their burdens of production or persuasion in the presentation of their case, and the motion should be granted. COMAR 28.02.01.12E; *Schaffer v. Weast*, 546 U.S. 49 (2005)(assignment of burdens).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the evidence adduced in the Parent's case does not support a conclusion that the Child was denied a FAPE for lack of a one-to-one aide, or for lack of an additional 30-minute speech/language therapy session. The school system has shown that it is entitled to judgment in favor of the school system. COMAR 28.02.01.12E; *Pahanish v. Western Trials, Inc.*, 69 Md. App. 342 (1986).

ORDER

Based upon the evidence and argument offered at the hearing on November 29, 2021, it is hereby

ORDERED that the Baltimore County Public School's motion for judgment is **GRANTED**, and it is further

ORDERED that this matter be, and is hereby, **DISMISSED**.

December 8, 2021
Date Decision Issued

William J.D. Somerville III
Administrative Law Judge

WS/emh
#195528

REVIEW RIGHTS

A party aggrieved by this final decision may file an appeal within 120 days of the issuance of this decision with the Circuit Court for Baltimore City, if the Student resides in Baltimore City; with the circuit court for the county where the Student resides; or with the United States District Court for the District of Maryland. 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.

A party appealing this decision 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 appeal. The written notification must include the case name, docket number, and date of this decision, and the court case name and docket number of the appeal.

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

Copies Mailed to:

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted],	**BEFORE WILLIAM SOMERVILLE,**
STUDENT	**AN ADMINISTRATIVE LAW JUDGE**
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FILE EXHIBIT LIST

No exhibits were admitted into evidence.