

██,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE MICHELLE W. COLE,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-21-19635

DECISION

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STATEMENT OF THE CASE

On August 31, 2021, ██████████ and ██████████ (Parents) filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) on behalf of ██████████ (Student) requesting a hearing to review Montgomery County Public Schools (MCPS)'s decision regarding the Student's individualized education program (IEP) and placement for the 2021-2022 school year 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).

In the Student's Complaint, the Parents allege that MCPS has violated the IDEA by failing to propose an appropriate placement for the Student for the 2021-2022 school year, denying the Student a free, appropriate, public education (FAPE). Specifically, the Parents

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.

challenge MCPS's decision to place the Student in the [REDACTED] ([REDACTED]) Program at [REDACTED] Middle School. The Parents' requested remedy is to place the Student in a program at the [REDACTED] in [REDACTED], Maryland, or in a similar program at a school with a smaller student-to-teacher ratio.

On October 19, 2021, I held a remote pre-hearing conference via Webex. Stacy Reid Swain, Esquire, participated on behalf of MCPS. The Parents participated on behalf of the Student. Based on a review of the parties' schedules for October and November 2021, the parties agreed to a hearing schedule which included various time slots over four days with a start date of October 27, 2021,³ and the decision due, within forty-five days of the conclusion of the resolution period, on November 12, 2021.

On October 22, 2021, MCPS filed a Consent Motion requesting that the forty-five-day timeframe for conducting the hearing and issuing a decision "be extended until 30 days after the record closes in this matter." *See* 34 C.F.R. § 300.515(c). In support of the Motion, MCPS maintained that "the scheduled hearing dates [do not allow] sufficient time to prepare for the upcoming hearing . . . [or] to request Subpoenas." Moreover, witnesses for MCPS were unable to testify beyond 5:00 p.m., which interfered with the existing agreed-upon schedule. The parties requested a second Conference to discuss scheduling matters and select new hearing dates. I granted the Consent Motion and request for a second pre-hearing conference.

On October 27, 2021, I conducted a second remote pre-hearing conference via Webex. Ms. Swain participated on behalf of MCPS. The Parents participated on behalf of the Student. At the conference, the parties again reviewed their schedules and selected the earliest mutually

³ The following schedule reflects the earliest available mutual dates and times that the parties could be available for the hearing: October 27, 2021, between 9:00 a.m. and 10:30 a.m. and 3:15 p.m. and 6:00 p.m.; October 28, 2021, between 11:30 a.m. and 2:15 p.m.; November 2, 2021, between 12:15 p.m. and 2:00 p.m.; and November 3, 2021, between 12:00 p.m. and 6:00 p.m.

available dates to hold the hearing after adding time for subpoena requests and exchange of discovery.⁴

Under the applicable law, a decision in this case normally would be due by November 12, 2021, forty-five days after the conclusion of the resolution period on September 30, 2021.⁵ 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Md. Code Ann., Educ. § 8-413(h) (2018); COMAR 13A.05.01.15C(14). However, an extension of the timeline is permitted under the due process procedural safeguards for the reasons expressed by the parties. 34 C.F.R. § 300.515(c). Thus, as set forth above, pursuant to the parties' request and agreement, I found good cause to extend the timeline, schedule the hearing on the hearing dates selected by the parties, and I agreed to issue my decision thirty days after the conclusion of the hearing. *Id.*; Md. Code Ann., Educ. § 8-413(h).

I held the hearing on November 15, 16, and 18, 2021. The Parents were self-represented. Ms. Swain represented MCPS.

Procedure is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education 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

Was the IEP and placement developed by MCPS for the 2021-2022 school year reasonably calculated to provide the Student with a FAPE?

If there was a denial of FAPE, is the Student's requested placement at [REDACTED]

[REDACTED] reasonably calculated to provide the Student with a FAPE?

⁴ Considering the timeframe for submission of subpoena requests and exchange of discovery, the first available hearing date was November 15, 2021.

⁵ Forty-five days from September 30, 2021 is Sunday, November 14, 2021.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted eleven exhibits on behalf of the Parents. I admitted forty-four exhibits on behalf of MCPS. A full list of exhibits is attached to this decision as an appendix.

Testimony

The Parents testified and presented the following witnesses: [REDACTED]; [REDACTED]; [REDACTED]; and [REDACTED].

MCPS presented the following witnesses: [REDACTED], whom I accepted as an expert in special education; [REDACTED], whom I accepted as an expert in special education; [REDACTED], whom I accepted as an expert in occupational therapy; [REDACTED], whom I accepted as an expert in special education [REDACTED], whom I accepted as an expert in school psychology; and [REDACTED], whom I accepted as an expert in special education.

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. The Student is thirteen years old (born in 2008) and lives with the Parents and one older sister.
2. English is the Student's first language. He has never received English as a Second Oral Language (ESL) services. The Parents speak [REDACTED] in the home when speaking to each other, but only use English when communicating with the Student. All testing and instruction are administered to the Student in English.
3. The Student is identified by MCPS as a student eligible for special education services under the IDEA. He has disabilities, including Autism Spectrum Disorder and Attention Deficit/ Hyperactivity Disorder.

4. The Student has received special education instruction and related services at all times relevant to this matter, and has been eligible for extended school year services because his “cognitive ability and adaptive skills [are] significantly below that of his same aged peers.” (MCPS Ex. 6 at 60).

5. The Student participates in a special needs program at [REDACTED] Church once per week for about one hour, where he is separated from the main congregation in a room of two to three special needs children. He receives one-to-one assistance from a trained buddy. The Student is provided a backpack with activities which are part of a ministry-based curriculum that has been tailored for the Student by the “[REDACTED]” team, which consists of church leaders and volunteers.⁶

6. The Parents have participated in all IEP meetings and were informed of their *Procedural Safeguards and Parental Rights* under the IDEA.

Preschool & Early Learning

7. In 2011, after receiving a diagnosis of autism, the Student was enrolled in the Birth to Three Program at his daycare in [REDACTED] [REDACTED] where he received speech-language, occupational, and behavioral therapies. At that time, the Student scored below the average range on expressive and receptive subtests of the Preschool Language Scales.

8. When he was three years old, the Student attended preschool four days per week at a [REDACTED] public school where he received special education services in the areas of cognitive, adaptive, and personal-social skills. He also received fifteen minutes per week of occupational therapy and forty minutes per week of speech-language therapy. At that time, the Student was working toward increasing the length of spontaneous utterances, with limited progress.

⁶ At least one church volunteer who is involved in the [REDACTED] program training is employed as a MCPS special education teacher.

9. The Parents moved to Montgomery County, Maryland in 2012, and enrolled the Student in MCPS. Initially the Student was placed in the [REDACTED] ([REDACTED]) at [REDACTED] Elementary School. Subsequently, he was moved to the [REDACTED], which was an intensive needs five-day per week program. The Student also received sixty minutes per week of speech-language therapy and thirty minutes per week of occupational therapy.

10. In January 2013, the Student was assessed through MCPS. His Brief IQ score on the Leiter International Performance Scale-Revised fell within the low range. He had difficulty problem-solving with non-verbal information, executing strategies, and switching among different strategies in order to problem-solve. He performed in the average range for visualization skills, which involved his ability to take in and process visual information effectively, and in the very low range for problem-solving ability. Several subtests of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition, which utilizes verbal instructions, were discontinued because the Student could not understand the instructions. The Student's performance on tasks that required language skills were in the extremely low range.

2013-2014 School Year: Kindergarten

11. For the Student's kindergarten school year, the Student was placed in the Autism Program⁷ at [REDACTED] Elementary School.

12. By the end of the Student's kindergarten year, he was able to identify numbers up to eighty, count to ten, read over 150 sight words, and answer basic reading comprehension questions with visual supports. He was able to use full sentences when making requests, but

⁷ The Autism Program is a self-contained classroom for students who have a diagnosis of Autism Spectrum Disorder and require learning and social supports as a result of their disability. Instruction is based on Alternate Learning Outcomes with an emphasis on the development of language, social skills and independence. The students also participate in community-based instruction based on IEP goals such as money management, social interaction, and safety skills.

often chose to communicate in one-word responses. The Student visited a general education kindergarten classroom for their reading centers and demonstrated an ability to participate in group activities and to follow classroom routines with minimal support.

13. Based on the Student's "significant progress" during kindergarten, the IEP team recommended that the Student transition to a [REDACTED] ([REDACTED]), which is a program in which the Student works toward earning a high school diploma.

2014-2015 School Year: First Grade

14. The Student was placed in the [REDACTED] at [REDACTED] Elementary School for his first-grade school year. He continued to receive special education instruction and services under his IEP.

15. The Student's IEP goals for the 2014-2015 school year included the following⁸:

Written Language: Given direct instruction, using a variety of strategies (drawing, dictating and writing letters/words) [the Student] will compose text to inform and/or persuade in 3/4 writing assignments.

Speech and Language: [The Student] will answer what, where and who questions about stories, activities or recent events; [The Student] will follow complex 1 step and 2 step directions.

Mathematics: Given necessary materials and fading teaching strategies (verbal, visual, gestural, model, and or physical prompts) [the Student] will understand measurement and data concepts; Given small group instruction, using a variety of mathematical tools, [the Student] will apply knowledge of numbers, operations and place value with 85% accuracy.

Classroom Management: Given positive reinforcement and verbal and gesture cues, [the Student] will transition across activities, environments, and away from preferred items.

(Parents Ex. 4).

16. The Student struggled in his transition to the [REDACTED]. He exhibited problem behaviors such as climbing, jumping, hiding under furniture, and eloping from different areas of the school building. In the classroom, the Student could not independently complete arrival and

⁸ The Parents presented only the May 22, 2014 IEP pages pertaining to the Student's goals.

dismissal procedures, whole group or small group activities and tasks, or interact with peers. He required a para-educator to work with him one-to-one and needed prompting and assistance to write words and to solve math problems. He also required direct supervision and assistance to transition through the school building. At that time, the Student relied only on non-verbal gestures to communicate.

17. On September 9, 2014, the Student's mother sent a letter to the "Coordinators of the Learning Centers for Special Need Kids" requesting a meeting to discuss the Student's placement. In support of her request, she stated:

From my point of view, the class where [the Student] is placed is not where he is supposed to be. This class is very crowded with more kids and less instructors. The crowd and the noises make [the Student] feel as if he were in recreation, so free to play or do what he wants. In this class you don't feel the little required stress and discipline of a learning place (a class room), kids are everywhere and seems like they take turn[s] to come to the table of the teacher for learning.

Even though [the Student] has made progresses, I don't think he is already at the level where he could be left on his own in a class room, he still needs more one-to-one and guidance. He needs a more structured class room.

(Parents Ex. 5).⁹

18. The Student remained in the [REDACTED] for the remainder of first grade, extended school year instruction, and the beginning of second grade.

19. Sometime in June 2015, the Parents sought a change of the Student's medication in order to see if this would affect the Student's behavior.

20. On July 13, 2015, during extended school year instruction, the Student refused to return to the school building after a sensory break, attempted to elope, and threw himself on the ground, hitting staff. As the staff attempted to guide the Student back into the school building, he became increasingly aggressive towards staff and required safe physical restraints to calm him.

⁹ The record fails to indicate when the IEP team met to discuss the Student's mother's request.

2015-2016 School Year: Second Grade

21. The Student continued in the [REDACTED] at [REDACTED] School for the beginning of second grade. His problem behaviors continued.

22. On November 3, 2015, the Student started screaming, kicking and punching the seat in front of him while being transported on a MCPS bus. He then unbuckled his seat belt and attempted to exit his seat several times.

23. At an IEP meeting held on November 20, 2015,¹⁰ the IEP team discussed the Student's failure to demonstrate independent work skills in the [REDACTED] or interact with his classmates. At that time, the Student was performing at a first-grade instructional level for reading and a kindergarten-level for math.

24. The Student returned to the Autism Program at [REDACTED] Elementary School in the middle of his second-grade year. Because the Student was exhibiting problem behaviors, several strategies were implemented such as a visual schedule with periodic built-in reinforcements, timers for breaks, and close adult proximity.

2016-2018 School Years: Third & Fourth Grade

25. The Student continued in the Autism Program at [REDACTED] Elementary School for the remainder of elementary school. His problem behaviors continued.

26. On March 16, 2017, the Student spit at a staff member and attempted to scratch and hit a staff member and peer. He threw classroom chairs and attempted to grab the staff member by the legs in order to cause the individual to fall.

27. On May 12, 2017, the Student disrobed and threw his shoes at his teacher.

¹⁰ The Parents submitted only portions of the November 20, 2015 IEP. Thus, it is unclear whether the Student's placement was discussed at the meeting.

28. On May 13, 2017, the Student's mother requested an IEP meeting to discuss the Student's increased problem behaviors at school, which was held on May 19, 2017.¹¹

29. On May 23, 24, and 26, 2017, the Student spit, grabbed, hit and scratched at staff members, disrobed, threw chairs, and attempted to overturn a table.

30. During his fourth-grade year, the Student had tantrums a few times per week and attempted to elope from his assigned areas.

2018-2019 School Year: Fifth Grade

31. During his fifth-grade year, the Student's problem behaviors decreased. He did not exhibit tantrums or aggressive behavior except for two occasions where he became upset and threw his shoes.

32. By the end of fifth grade, the Student's instructional level for reading vocabulary was at a third-grade level and his reading comprehension, written language, math calculation, and problem-solving abilities were at a second-grade instructional level. The Student continued to require direct support from MCPS staff and modifications of the curriculum and his assignments.

33. On February 5, 2019, ██████████ observed the Student for thirty minutes during his morning meeting in his Autism classroom. During that period, the Student required verbal prompts to sit in his seat for his group activity, but once he was seated, he remained in his seat for the duration of the activity. The Student immediately responded to the teacher's prompt to sign-in and wrote his name on the board. When greeted by his teacher, he responded, "Good morning, Miss ██████." (MCPS Ex. 1 at 9). During a calendar activity, the Student independently approached the board and circled the correct month when asked questions about the calendar. He also responded to questions from the para-educator about his drawing and read song titles and

¹¹ The Parents submitted only a few pages from the May 19, 2017 IEP. Thus, it is unclear what the purpose of the meeting was or what was discussed at the meeting.

other information from the morning slides. The Student participated in a moderate amount of saliva play,¹² but when asked to stop problem behaviors such as playing with a toy during instruction and throwing a ball in the air, the Student followed the direction of the para-educator to stop the behavior and put the item away.

34. On March 5, 2019, the Student participated in formal speech-language assessments, including the Peabody Picture Vocabulary Test (PPVT-4)¹³ and the Expressive Vocabulary Test (EVT-2).¹⁴ The Student required a testing modification whereby the administrator repeated the stimulus, which is not permitted when assessments are administered in a standardized manner. The testing was conducted over six fifteen to thirty-five minute sessions on different days, and the Student was permitted to intermittently use a fidget toy as reinforcement to continue testing.

35. On the PPVT-4, the Student performed below his age expectancy range for receptive vocabulary. He demonstrated impulsivity in selecting a response before considering all four choices, especially with more difficult items. When the administrator held the Student's arms or paused, the Student took more time to consider his responses. He demonstrated 79% accuracy for nouns, 60% accuracy for verbs, and 50% accuracy for adjectives.

36. On the EVT-2, the Student also performed below his age expectancy range for expressive vocabulary. The Student frequently named the object in the stimulus picture rather than the object requested by the prompt.

37. Along with formal assessments, the Student participated in informal assessments of his speech-language ability. He was able to follow simple one-step directions given occasional verbal repetition of the command with 100% accuracy. He followed one-step

¹² Saliva play refers to the Student's "behavior of spitting and rubbing saliva on his desk." (MCPS Ex. 1 at 9).

¹³ In the PPVT-4, the Student is asked to select from four pictures the one that best represents the single vocabulary word spoken by the administrator.

¹⁴ In the EVT-2, the Student is asked to name a picture or state a synonym for a stimulus word and picture.

directions involving more advanced body parts, such as “touch your neck,” with 80% accuracy. For two-step directions containing sequential concepts, such as “touch your shoulders and then tell me your name,” the Student was able to independently follow the direction with 40% accuracy. With verbal prompting, the Student’s accuracy increased to 60%.

38. On March 29, 2019, [REDACTED], MCPS School Psychologist, administered assessments to measure the Student’s non-verbal cognitive ability (TONI-4)¹⁵ and his adaptive skills (Vineland-3)¹⁶, which refer to the Student’s daily living skills. When compared with same-aged peers, the Student performed in the average range for non-verbal cognitive ability which ranked him at the thirty-ninth percentile compared to same-aged peers, and low range on adaptive behaviors, which included socialization, communication, and functional skills. The Student exhibited weaknesses in the areas of social communication, repetitive behaviors, and self-stimulation. At that time, Dr. [REDACTED] recommended that the Student remain in the Autism Program, as it appeared that the Student was “amenable to and benefitting from services provided through his current program.” (MCPS Ex. 2 at 17).

39. At the May 30, 2019 IEP meeting, the Parent reported that the Student “is not able to distinguish between appropriate and inappropriate behaviors, often displays behaviors that should be displayed in private settings, cannot put jacket on independently if sleeves are inside out, cannot button a button-up shirt, and displays inappropriate behaviors when eating.” (Parents Ex. 6). The IEP team agreed to add a self-management goal to address the problem behaviors raised by the Parent.

2019-2020 School Year: Sixth Grade

¹⁵ The Test of Nonverbal Intelligence, Fourth Edition (TONI-4) uses nonverbal formats to measure a student’s problem-solving ability.

¹⁶ The Vineland Adaptive Behavior Scales-Third Edition (Vineland-3) compares a student’s ability to perform everyday life activities with other same-aged individuals based on rating scales completed by the Student’s parent and his teacher.

40. During his sixth-grade school year, the Student was placed in the Autism Program at ██████████ Middle School. He made progress on his self-management goals, including being able to identify appropriate and inappropriate behaviors when given pictures and minimal prompting, to close the door when toileting or showering without reminders, was able to “turn the sleeves outside in” before putting on his jacket two out of five times, and could button all but the top button of a button-up shirt. (Parents Exs. 7, 8).

41. At the January 7, 2020 IEP meeting, the IEP team reviewed the Student’s assessments and current performance levels and agreed that the Student continued to be a student on the Autism Spectrum who needs “a smaller classroom environment with a low staff : student ratio.” (MCPS Ex. 6 at 39).

42. The Student was being instructed on a third-grade level for reading vocabulary and a second-grade level for reading comprehension, written language content, math calculation and math problem-solving.

43. The Student’s math goals included learning functional skills such as adding different dollar bills, completing scheduled appointments using a digital clock, and deciding if he has enough money to purchase priced items. During the IEP meeting, the Student’s father requested increased math skills for division and word problems, and the IEP team agreed to add an objective for division.

44. The Student continued to need accommodations and modifications to access the curriculum such as a human reader to read and repeat directions, redirection to maintain on-task behavior, graphic organizers to aid in comprehending the curriculum, frequent breaks and changes in the order of activities to maintain attention, reducing distractions, paper-based edition to independently indicate test responses, a scribe “for all portions of assessments due to difficulty processing and producing written language,” and extended time for testing. (MCPS Ex. 6 at 51-53). Further, the Student’s assignments were broken down into smaller simpler units across all settings.

45. The Student continued to receive occupational therapy, speech-language therapy, and extended school year services.

46. The IEP team considered the Student's present levels of performance, IEP progress notes, teacher reports, examples of the curriculum, instructional samples, and the Student's work. Based on this information, the team determined that the Student met the following criteria for participating in alternate assessments and alternate instructional standards:

(1) The student has an IEP that includes specially designed instruction comprised of accommodations, evidence-based practices, program modifications, personnel support, and evidence the student cannot access the general education standards despite ongoing interventions;

(2) The student has a significant cognitive disability that impacts intellectual functioning and adaptive behavior;

(3) The student is learning content derived from the MCCRS in English/language arts and Mathematics and the Next Generation Science Standards with grade-level curriculum significantly modified in order for the student to access knowledge and skills that allow the student to make progress; and

(4) The student requires extensive, direct, repeated, and individualized instruction and substantial supports to achieve measurable gains in the grade and age-appropriate curriculum.

(*Id.* at 240). The IEP team also agreed that the Student's cognitive and social deficits affected his ability to satisfy the seventy-five service-learning hours requirement, which it reduced to zero hours.

Graduation requirements were explained to the Parents and the IEP team agreed that the Student would participate in alternate assessments based on alternate academic achievement standards. The Student's father signed Alternate Appendix A, which provides:

I have been informed that if my child is determined eligible to participate in the alternate assessments and/or alternate instructional standards through the IEP team decision-making process:

If my child continues to participate in the Maryland Alternate Assessments and/or the alternate instructional standards, he/she will be progressing toward a

Maryland Certificate of Program Completion. His/her continued participation in the alternate assessments and/or alternate instructional standards will not prepare him/her to meet Maryland's high school diploma requirements.

The decision for my child to participate in the alternate assessments and/or alternate instructional standards must be made annually.

(MCPS Ex. 34 at 239).

47. In the Spring of the Student's sixth-grade year, MCPS closed for a period of time due to the COVID-19 pandemic. For the remainder of the school year, MCPS transitioned to virtual learning for all students.

48. Beginning in April 2020, the Student participated in virtual learning according to an Individualized Special Education Distance Learning Plan.

2020-2021 School Year: Seventh Grade

49. At the Parents' election, the Student continued virtual learning through the 2020-2021 school year. During virtual instruction, one parent remained with the Student at all times to keep his attention focused on the lesson. The Parents also supplemented virtual learning instruction with fourth, fifth, and sixth-grade activities from workbooks on which the Student's mother would work with the Student one-to-one.

50. While working with his mother, the Student was able to complete math activities from a fourth and fifth grade activity book.

51. At the January 5, 2021 IEP meeting, the IEP team reviewed the Student's 2019 evaluation information. At that time, the Student was being instructed at a third-grade level for reading comprehension and math calculation, and at a second-grade level for written language content. He was performing below age expectancy for speech and language, social emotional/behavior, and self-management.

52. The Student's January 5, 2021 IEP goals included:

Reading Comprehension: Given repetition, adapted texts, necessary materials, visuals, errorless teaching, and faded prompts, [the Student] will use details from the text to answer "wh"¹⁷ questions.

Written Language: Given support, visual aids, repetition, fading teaching procedures, [the Student] will write to express his thoughts and ideas.

Math Calculation: Given manipulatives, visuals, fading prompts, and errorless teaching, [the Student] will add, subtract, and multiply numbers.

Speech and Language: [The Student] will use targeted language to interact with familiar adults and peers with minimal verbal prompts and visual cues; [The Student] will show understanding of oral language with increased length and complexity by answering vocabulary related and why questions when given minimal verbal prompts.

Behavioral-Self-management: Given explicit modeling of motor sequences, repetition, social stories, visuals, differential reinforcement, and faded prompts, [the Student] will exhibit appropriate self-management skills.

Behavioral-Community: Given adult support, visual supports, and faded prompts, [the Student] will use a picture list to find items independently and use the next dollar strategy to pay for the items.

Daily Living Skills: Given task analysis and explicit modeling of motor sequences, visual supports and prompt hierarchy, [the Student] will demonstrate new independent personal care and hygiene skills with 80% accuracy as measured by task analysis.

(MCPS Ex. 8 at 161-72; Parents Ex. 8). The Student continued to require many of the same accommodations and modifications to access the curriculum as were implemented in sixth grade, including a human reader, a human scribe, calculation device, frequent breaks, reduced distractions, paper-based edition, and extended time.

53. The IEP team considered the Student's present levels of performance, IEP progress notes, teacher reports, daily instructional data accommodations, formal and informal assessments, examples of the curriculum, instructional objectives, and the Student's work.

¹⁷ "Wh" questions refer to "who," "what," and "where."

Based on this information, the team determined that the Student met the criteria for participating in alternate assessments and alternate instructional standards and would pursue a Certificate of Program Completion. The IEP team completed Appendix A, setting forth the participation criteria and checklist, which was signed by the Student's father.¹⁸ Again, the IEP team agreed that the Student's cognitive and social deficits affected his ability to satisfy the seventy-five service-learning hours requirement, which it reduced to zero hours.

54. Under the Student's IEP, the Student would receive all classroom instruction in the special education setting except for lunch and one elective class daily in which the Student would participate with general education peers with staff support.

55. As of January 2021, the Student was able to read third-grade passages fluently and accurately, and answer comprehension questions after reading an adapted passage independently when provided three to five response options. He continued to need support when answering why and how questions about a picture or passage and, although his ability to answer yes/no questions improved, he still needed verbal and gesture prompting. He was able to create four-word sentences about pictures when provided a word bank and template.

56. In the area of math calculation, the Student was able to add and subtract two-digit numbers and multiply single and some two-digit numbers independently. He was able to add like bills, but continued to need support when adding unlike bills. He required minimal support when using a calculator to add and subtract numbers with decimals, and was able to answer division problems when there was no remainder.

¹⁸ Neither of the Parents signed initials under the portion of Appendix A which indicates that the Parents understand that the Student will be progressing toward a Maryland Certificate of Program Completion, will not be prepared to meet Maryland high school diploma requirements, and that the decision to participate in alternate assessments will be made annually. However, based on the father's signature on the initial portion of the form, the IEP notes, and the Appendix A statement reporting "no disagreement," I conclude that the Parents were informed and agreed that the Student met the criteria for participation in alternate assessments and instruction at the January 5, 2021 meeting.

57. The Student's problem behaviors were significantly reduced. He was working on reducing the number of times he loudly "clears his throat," the only interfering behavior that was noted during the Student's seventh-grade year.

58. The Parents reported that the Student "has made a lot of progress academically and behaviorally" and requested consideration of "other special education programs which feature more challenging academics." (MCPS Ex. 7 at 97).

59. The IEP team agreed that additional information and assessments were required to help inform the decision regarding the Student's placement.

60. On June 3, 2021, ██████████ MCPS School Psychologist administered a battery of tests to provide updated and in-depth information about the Student's cognitive functioning. She administered the DAS-II,¹⁹ which provided a General Conceptual Ability score and a Special Nonverbal Composite score. The Student performed in the very low range on both assessments, showing weaknesses in all areas when compared to same-aged peers. When looking at the Student's performance on various subtests, he exhibited a relative personal strength in non-verbal problem-solving, even though his score was below average compared to same-aged peers.

61. In administering the assessments of the Student's verbal ability, which involved the Student's ability to define words and identify a common theme among groups of words, Ms. ██████ was required to administer items that began at an elementary school age because the Student was unable to provide an answer to items at the starting point for his age range. Likewise, on the sequential and quantitative reasoning subtests for non-verbal reasoning, Ms. ██████ had to move to a younger starting point that asked the Student to complete patterns with shapes and objects because he could not apply a rule to numbers in order to complete a pattern.

¹⁹ The Differential Ability Scale-Second Edition (DAS-II) is a comprehensive cognitive assessment which includes subtests that measure an individual's verbal reasoning, nonverbal reasoning, and spatial cognitive abilities.

62. The Student's ratings on the 2021 Vineland-3 were consistent with his 2019

Vineland-3 ratings, falling within the low to moderately low range as follows:

<u>Domain</u>	<u>Teacher 2019 Rating Score</u>	<u>Parent 2019 Rating Score</u>	<u>Teacher 2021 Rating Score</u>	<u>Parent 2021 Rating Score</u>
Communication	68	77	60	78
Daily Living Skills	65	73	58	70
Socialization	46	66	42	72

63. On June 15, 2021, the IEP team met to discuss the Student's updated assessments, and the IEP in effect for the Student at the start of the 2021-2022 school year was amended.

64. Based on updated assessments, the IEP team completed a new Appendix A. Because the IEP meeting was conducted virtually, the Parents verbally gave their consent to sign Alternate Appendix A on their behalf, setting forth the IEP team's agreement that the Student met the criteria to participate in alternate assessments and alternate instructional standards and would be working toward a Maryland Certificate of Program Completion. (MCPS Ex. 38).

65. At that time, the Student was still attending classes virtually. The IEP team discussed the Student's present levels of performance, his updated assessments, his decrease in problem behaviors, his academic growth and progress, his progress on mastering daily living skills, his ability to work independently, his need for supports, his ability to ask for assistance and wait, and his ability to be challenged academically. On the issue of placement, the following discussion occurred:

- The Parents reported that the Student continued to do well at home. They agreed that the Student required a more challenging curriculum than that provided in the Autism Program, and requested that the Student be placed in a diploma program at [REDACTED]
- The school IEP team members recommended the [REDACTED] Program as a MCPS option in the least restrictive environment (LRE).

(MCPS Ex. 8 at 145). The [REDACTED] Program is a self-contained classroom for sixth, seventh, and eighth grade students with a student-to-teacher ratio of 11 to 3. The program offers a more challenging curriculum than the Autism Program and encourages more independence. According to a student's IEP, the program affords students with the opportunity for instruction and interaction with general education students for electives and in areas of strength for the individual student.

66. The IEP team considered the following placement options:

- General education/home school model
- Autism Program
- Diploma Program at [REDACTED]
- [REDACTED] Program at [REDACTED] Middle School

(MCPS Ex. 8 at 177). The school IEP team members found the home school model to be inappropriate for the Student based on the Student's IEP, present levels and assessment results. It found the Autism Program to be inappropriate because it no longer was the LRE based on the Student's academic and behavioral progress. It found the [REDACTED] to be inappropriate because "[the Student's] IEP present levels and assessment results do not suggest readiness for grade level content at this time. Also, school-based IEP team cannot place students into non-public settings." (MCPS Ex. 8 at 177). It found the [REDACTED] Program to be appropriate based on the Student's "current strengths and needs as documented in recent psychological assessment and present levels." (*Id.*).

67. In November 2021, the Student's mother visited [REDACTED] Middle School to observe the [REDACTED] Program. She spent thirty minutes at the school of which five to ten minutes were spent in the [REDACTED] classroom. At the time of her observation, the teacher was at the front of the room providing instruction to students who were seated at desks arranged in rows. At some point, one student left the classroom and went to the quiet room, which is a room in which students are permitted to go to calm themselves, and no one followed him.

68. The Student does not require one-to-one support services under his IEP and only occasionally has required one-to-one assistance when being instructed for the first time on a concept.

69. The Student enjoys his elective art class in the Autism Program.

70. Based on the Student's assessments, teacher and parent feedback, and the Student's IEP, the Student's profile is similar to other students in the ■■■ Program.

71. At all times relevant to this matter, the ■■■ Program was capable of implementing the Student's IEP. Sometimes, the ■■■ teacher uses the physical arrangement of the classroom to create opportunities to break the larger group into smaller groups or to meet individually with students in order to teach similar topics to students who are not at the same instructional level.

DISCUSSION

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., §§ 8-401 through 8-417 (2018); COMAR 13A.05.01. The IDEA requires "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* Md. Code Ann., § 8-403(a).

FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. *Endrew F. v. Douglas County School District*, 137 S. Ct. 988, 999 (2017); *Bd. of Educ. of the Hendrik Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181-82 (1982). COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of the student and the special education and related services to be provided to meet those needs. The goals, objectives, activities, and materials must be adapted to the needs, interests, and abilities of each student. 20 U.S.C.A. § 1414(d).

The Supreme Court set forth the following “general approach” to determining whether a school has met its obligation under the IDEA:

While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* at 207, 102 S. Ct. 3034. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. *Id.* at 208-209, S. Ct. 3034. Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* at 206-207, 102 S. Ct. 3034.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. See §§ 1414(d)(1)(A)(i)(I)-(IV). This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.”’ *Rowley*, 458 U.S., at 179, 102 S. Ct. 3034 (*quoting* H.R. Rep. No. 94-332, p. 2 (1975)). A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child’s circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be “*especially* designed” to meet a child’s “*unique* needs” through an “[*i*]ndividualized education program.” §§ 1401(29), (14) (emphasis added).

Andrew F., 137 S. Ct. at 998-99.

Notwithstanding the above language in *Andrew F.*, providing a student with access to specialized instruction and related services does not mean that a student is 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. of Md.*, 700 F.2d 134, 139 (4th Cir. 1983)

(citing *Rowley*, 458 U.S. at 176). It does, however, require the State to provide personalized instruction with sufficient support services to permit the student to benefit educationally.

In addition to the IDEA's requirement that a disabled child receive appropriate educational benefit, the child must be placed in the LRE to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i) and 300.117. Yet, placement in the general education environment may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. 34 C.F.R. § 300.114(a)(2)(ii).

Finally, when making decisions regarding the appropriate placement, the issue is not whether another school is better or even as appropriate as the school offered by the school district, but whether the school district has offered a FAPE. The Court has upheld the right of the parents to unilaterally place a learning disabled child in a private school and to recover reimbursement from the local educational agency when the educational program offered by school authorities is not reasonably calculated to provide a FAPE. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985).

The Parents assert that the Student was denied a FAPE based on MCPS's proposed placement in the [REDACTED] Program. The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). 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). Accordingly, as the

Parents are seeking relief on behalf of the Student, they bear the burden to prove by a preponderance of the evidence that MCPS failed to provide the Student with a FAPE in the LRE for the 2021-2022 school year. For the reasons that follow, the Parents have failed to meet that burden.

The Parents assert that the Student was denied a FAPE because MCPS failed to develop an appropriate IEP and placement for the 2021-2022 school year. While they agree that the Student requires more academic challenges than can be provided in the Autism Program, they do not support MCPS's recommendation for placement in the [REDACTED] Program. They contend that the Student requires one-to-one assistance in a classroom with a more challenging academic program and a small student-to-teacher ratio. They believe that the [REDACTED] Program will overwhelm the Student and cause him to lose progress, as occurred previously when the Student was moved to the [REDACTED]. They have asked that the Student be placed at the [REDACTED] or a similar program, which they assert is a better fit for the Student.

The Parents testified regarding their knowledge of the Student, his learning ability, and their wish for him to attend the [REDACTED]. The Student's father discussed the Student's placement in the [REDACTED], which he described as a "disaster." He stated that the class size doubled from the Student's autism class and the Student was unable to remain in his seat or follow directions with the large number of students, which he stated caused the Student to lose skills and regress before the Student was returned to the Autism Program. The Student's father reported that he did not want a repeat of that experience for the Student, which he feared would occur if the Student was placed in the [REDACTED] Program.

The Student's mother recounted the Student's history and education. She stated that she and the Student's father relied on the expertise of the school professionals when they agreed to the Student's placement in the [REDACTED], which she believes is similar to the [REDACTED] Program. She

described the Student's experience at the [REDACTED] which was marked by repeated instances of the Student's problem behaviors. She stated that the Student became sad and aggressive and did not want to go to school. According to the Student's mother, when she attempted to address her concerns with MCPS, MCPS claimed that there were no other placements available and did not respond for many months. At that point, she stated, it was clear to everyone that the [REDACTED] was not an appropriate placement for the Student, and the Student returned to the Autism Program where he struggled with another transition and continued to exhibit problem behaviors at home and at school.

She reported that the Student progressed over time, but stated that his level of improvement was "not enough" considering the Student's learning capacity. Based on her observations of the Student, especially during virtual learning, she reported that she believes the Student can achieve, "using the regular curriculum," and earn a diploma, as long as he is provided appropriate supports. She stated that the Student "is gifted and can learn."

She reported working intensively with the Student during virtual learning and expressed a need for the Student to have one-to-one assistance, which she reported benefitted the Student during virtual learning while he worked at home on supplemental work, including performing math calculations from fourth, fifth, and sixth grade-level activity books. She described the process that she followed when working with the Student on new concepts, which involved one-to-one assistance, repetition and prompting.

The Student's mother agreed that she participated in the decision to change the Student's placement so that the Student could be challenged. However, she stated that she did not agree with the recommendation to place the Student in the [REDACTED] Program, which she believes is too big and allows the Student too much independence. She recounted her observations when she visited the [REDACTED] Program and stated that the Student will not thrive in this type of environment.

Based on her knowledge of how the Student learns, she maintained that the Student requires a smaller student-to-teacher ratio and one-to-one assistance, which she reported can be provided to him at the [REDACTED], which in her opinion is the best fit for the Student.

In support of their contention that the [REDACTED] Program is not an appropriate placement for the Student, the Parents presented testimony from several witnesses who they reported know the Student well. Each witness reported that the Student struggled in large groups and did well with one-to-one support.

MCPS contends that the Student's IEP for the 2021-2022 school year is reasonably calculated to provide the Student with a FAPE and the [REDACTED] Program is the appropriate placement for the Student in the LRE. It presented testimony from MCPS educators and staff, including the Student's teachers and members of the IEP team, regarding the Student's IEP and the school district's placement decision. All of the MCPS witnesses testified similarly regarding the Student's present levels and abilities, his progress in the Autism Program, and the reasons that the witnesses believe that the [REDACTED] Program is the appropriate placement for the Student. They reviewed the Student's IEP and opined that the IEP and placement for the 2021-2022 school year were appropriate based on the Student's needs and circumstances.

Analysis

This is a unique case because most of the witnesses who testified at the hearing have special knowledge of the Student, whether through the educational process or in his home and community. Further, all of the witnesses who testified appeared to care about what happens next for the Student and want to avoid a circumstance like that which occurred when the Student was moved to the [REDACTED]. I found all of the witnesses who testified at the hearing to be credible, competent witnesses. However, because the issue before me involves questions regarding the

appropriateness of the IEP and placement, I found certain testimony more helpful to a determination of the case.

Even though the Parents are most knowledgeable about the Student and his abilities, particularly after spending more than one year with the Student in the Student's virtual classroom, they are not educators and are not familiar with the MCPS's programs and processes. Likewise, while many of the witnesses who provided testimony on the Student's behalf have direct and personal knowledge of the Student and have observed him in settings similar to a classroom setting, they also do not possess any expertise in special education, IEPs, or MCPS's processes.

██████████ a family friend, neighbor, and mother of a child with autism, testified that the Student sometimes wanders off on his own when he is with a group of children. ██████████

██████████ a church volunteer who worked as the Student's buddy in the ██████████ program, testified that the Student has a short attention span, does not like to share toys, does not want to congregate with other children, and periodically gets agitated if someone interrupts her one-to-one interaction with him at church. ██████████, a long-time family friend,

testified that the Student is unable to focus in large group activities and will stay focused if you hold his hands or if he is involved in an activity that he likes, such as using the computer.

Finally, ██████████, Director of the Children's Ministry at ██████████,

testified that the Student is affected by large groups and increased stimulation, which may cause the Student to react in a way that wears on the volunteers who are working with him. He

described some of the Student's coping behaviors such as crying out, biting his hand, and throwing objects on the floor. Mr. ██████████ explained that they have attempted to include the

Student with a larger group of middle-school-aged children for special activities, but reported

that the Student did not do well with the increased stimulation.

Dr. [REDACTED] and Mr. [REDACTED] were provided copies of the Student's IEP prior to the hearing and provided opinions based on this review in light of their experiences with the Student. Each testified that the Student cannot thrive in a larger learning environment and performs well in a smaller learning environment. Mr. [REDACTED] opined that a classroom of six to fifteen students will not be good for the Student or his teacher. While I recognize that both witnesses have experience in education, I did not place any greater weight on their testimony than the other lay witnesses because they lack expertise in the special education field. Dr. [REDACTED] has a Master's degree in curriculum development and literacy and a Ph.D. in cultural studies. She teaches at a small private school in [REDACTED]. At the hearing, she did not describe, in any detail, her training or experience or demonstrate any particular knowledge of special education or the IEP process, and was not offered as an expert in any particular area. Further, her testimony involved only her personal interactions with and observations of the Student in his home and the community. She did not teach the Student nor observe him in his classroom. Likewise, while Mr. [REDACTED] does have some experience educating children as an ESL online instructor and also working with special needs students in the [REDACTED] program, he did not demonstrate any expertise in this area as it pertains to special education, the development and implementation of IEPs, or considerations regarding a student's placement. Like Dr. [REDACTED]'s testimony, Mr. [REDACTED]'s testimony focused on his personal observations of the Student while serving as the Student's buddy in the [REDACTED] program.

While the above testimony is relevant to understanding the Student's needs and unique circumstances, I do not place significant weight on the witnesses' opinions regarding the appropriateness of the Student's placement in the [REDACTED] Program. I compare this testimony to that of the MCPS witnesses, who include the Student's teachers and MCPS staff who have worked with the Student over the last two years, conducted assessments, participated in the development

of the Student's IEP, and who are familiar with the MCPS's programs and processes. Most of the witnesses had routine contact with the Student in the public school setting and observed him in the Autism Program with his peers and in his at-home setting during virtual instruction. These witnesses described their knowledge of the Student, his present levels and abilities, and expressed opinions based on their familiarity with the MCPS's programs, including the [REDACTED] Program.

To the extent that certain of the MCPS witnesses have direct knowledge of the Student, his achievement and behavior, and the processes followed by MCPS, I give more weight to their testimony than to the Parents' witnesses, who have less exposure to the Student in a formal classroom setting and are less familiar with the Student's IEP and the placement options considered by the IEP team. In particular, I placed significant weight on [REDACTED]'s testimony, as the Student's teacher in the Autism Program since the beginning of his sixth-grade year and a participant in the development and implementation of the Student's IEP.

The IEP and placement developed by MCPS for the 2021-2022 school year was reasonably calculated to provide the Student with a FAPE in the LRE.

The crux of the Parents' complaint involves the IEP team's decision to place the Student in the [REDACTED] Program instead of the Parents' preferred placement at the [REDACTED]. Many of the Parents' concerns are based on their negative experience with the [REDACTED], which they argue is significantly similar to the [REDACTED] Program. Specifically, they complain that the [REDACTED] Program is inappropriate because the Student requires a smaller student-to-teacher ratio and a less traditional classroom setting than what is provided in the [REDACTED] Program. As such, they maintain that the [REDACTED] Program is equivalent to a placement that has been proven inappropriate and unsuccessful for the Student and should not be repeated. They assert that the [REDACTED] [REDACTED] is the best fit for the Student, and, since the [REDACTED] Program is diploma-based, the Parents seemingly challenge the IEP team's determination that the Student be instructed using alternate standards and assessments in pursuit of a Certificate of Program Completion.

However, the issue before me is not whether another school is better or even as appropriate as the school offered by the school district, but whether the school district has offered a FAPE. As already stated, I am not permitted to compare the █ Program and the █ Program to determine which program best serves the Student. *See Hessler*, 700 F.2d at 139 (*citing Rowley*, 458 U.S. at 176) (stating that providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy”). The question is whether placement in the █ Program provides the Student with a FAPE in the LRE. On this issue, I am persuaded that the █ Program is an appropriate placement and constitutes the LRE based on the Student’s IEP and his unique needs and circumstances.

I found Ms. █’s testimony persuasive on this issue as she knows the Student well and is familiar with the MCPS’s programs and processes. She described the Student’s progress in the Autism Program since the beginning of his sixth-grade year. She reviewed the Student’s behaviors, his current levels of performance, and his strengths and weaknesses, which she reported the team considered in developing the Student’s IEP and placement. She reported that the Student has shown significant growth in the Autism Program, and his problem behaviors have decreased considerably. She compared his abilities and challenges to other students in the Autism Program, noting that the Student had more skills, was capable of independently working next to other students, and was ready for a more challenging curriculum with appropriate supports. Overall, she described the Student as a great learner who was able to stay on task and work independently with minimal redirection.

She also described the █ Program, which she characterized as “a step up from the Autism Program,” and stated that the █ Program, like the Autism Program, provides supports to the students based on the Student’s individualized needs as set forth in the IEP. Regarding the

differences between the [REDACTED] Program and the Autism Program, she stated that the [REDACTED] Program is a more challenging program with a higher level of work and more independence. Based on the Student's needs and circumstances, Ms. [REDACTED] opined that the [REDACTED] Program would benefit the Student.

I also found Ms. [REDACTED]'s and Mr. [REDACTED]'s testimony helpful to my determination on this issue. Ms. [REDACTED], the resource teacher for the [REDACTED] Program, reviewed the Student's assessments, teacher and parent feedback, and the Student's IEP, and reported that the Student's profile is similar to other students in the program and that the Student's IEP can be implemented in the [REDACTED] Program. She stated that the [REDACTED] Program was appropriate for the Student and would allow the Student to continue making progress with additional challenges while providing all necessary supports under the Student's IEP.

[REDACTED], MCPS Special Education Program Specialist, Autism Unit, testified regarding MCPS's recommendation for placement in the [REDACTED] Program, which he reported was the "next step up the ladder" from the Autism Program and constituted the LRE. He described the factors which the team considered in reaching its decision, including that the Student was not performing at grade-level, but had made progress across all areas of instruction and required a more challenging academic program; still exhibited mild behavior problems, but did not require a behavioral intervention plan; still needed supports and modifications to access the curriculum; and was able to participate in group instruction, work independently, and learn through explanation. He also noted that the Student's functional daily skills were more advanced than most other students in the Autism Program.

Based on the above testimony from the Student's teacher and members of the IEP team, it is clear that the IEP team considered the Student's unique circumstances when it made the determination to place the Student in the [REDACTED] Program. I agree with the MCPS witnesses that,

based on the placement options available to the Student, including the home school model, the Autism Program, the ██████████ Program, and the █████ Program, that the █████ Program is an appropriate placement for the Student which is capable of providing a FAPE to the Student in the LRE. All members of the IEP team agreed that the Student had outgrown the Autism Program and was ready for a more challenging curriculum, but was not yet ready for grade-level instruction or a more aggressive placement because the Student's present levels and assessments indicated that the Student was performing well-below same-aged peers and still required specialized instruction and significant modifications and supports to access the curriculum.

I am not persuaded by the Parents' argument that the █████ Program is inappropriate based on the student-to-teacher ratio or the physical arrangement of the classroom. Initially, I do not place great weight on the Student's mother's criticisms of the █████ Program, as her opinions are based on a five to ten minute observation. I also believe that, before the Student's mother visited the program, she had already prejudged the █████ Program based on the Student's prior experience in the █████, and that her opinion was reinforced when she observed a student leave the classroom without the level of supervision that she believed would be appropriate for the Student.

In any event, the record fails to support the Parents' claim that the Student was denied a FAPE based on the physical characteristics of the █████ Program. At all times, including the Student's years in the Autism Program in which the Student was one of up to eight students with one teacher and one para-educator, the Student has required specialized instruction, related services, and supports in a "small" structured learning environment. MCPS witnesses agreed that the █████ Program, which consists of eleven students, one teacher, and two para-educators, constitutes a small, structured learning environment. Moreover, ██████████, the resource teacher for the █████ Program, explained how the █████ teacher uses the physical arrangement of the classroom to create opportunities to break the larger group into smaller groups or to meet

individually with students in order to teach similar topics to students who are not at the same instructional level. I find this testimony to cut against the Parents' argument since the classroom arrangement serves as a benefit under these circumstances. Further, Ms. ██████ reported that additional supports are often provided in the ██████ Program based on specific activities that the class is doing.

The Parents assert that a small, structured learning environment means a one-to-one or near one-to-one student-to-teacher ratio and desk arrangement with the Student's desk in close proximity to the teacher. The record fails to support this contention. The Parents have not provided any credible evidence to support their claim that the size or structure of the program interferes with the Student's ability to access the curriculum or to make progress. Certainly, the Student's IEP does not include one-to-one support services. While I understand the Parent's claim that the Student does well when a parent or other individual works directly with the Student, and Ms. ██████ testified that the Student sometimes requires one-to-one assistance when she introduces new concepts, the record does not support a contention that the Student requires this level of support to access the curriculum or to make progress. Indeed, the Student has made significant progress in the Autism Program and has demonstrated an ability to work independently without one-to-one support services.

I also am not persuaded by the Parents' argument that the Student's lack of success in the ██████ predicts a similar result for the Student in the ██████ Program. While I recognize that the ██████ and the ██████ Program may have common characteristics, there is no indication that the similarities noted by the Parents affect the Student's ability to access the curriculum or to make progress. As already stated, I am not persuaded that the larger class size or classroom arrangement has any impact. Moreover, a lot has happened since the Student experienced problems in the ██████. Since returning to the Autism Program in the second grade, the Student

has become more mature, has developed a better understanding of appropriate and inappropriate behaviors, has developed his adaptive and functional skills, and has demonstrated strengths in academic areas. He is able to independently complete his work in the classroom, ask for assistance when it is needed, and wait for assistance. He also has developed an interest in elective classes, such as art, and is able to utilize the supports that are provided in his IEP. Moreover, the two programs are distinct programs and the Student's goals and level of supports as set forth in the Student's IEP are different. The IEP team considered all of this information when it reached its decision on the Student's placement. Accordingly, I do not find the Student's educational experience in the [REDACTED] to have any bearing on the appropriateness of the Student's placement in the [REDACTED] Program.

Finally, I conclude that the [REDACTED] Program is the LRE for the Student. A public agency is required to provide special education and related services in the LRE:

In General. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child 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); *see* 34 C.F.R. § 300.114(a). Federal regulations provide for a continuum of educational placements, including regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115. Maryland regulations similarly provide for special education and related services in the LRE. COMAR 13A.05.01.10. In *DeVries v. Fairfax County School Board*, the Fourth Circuit instructed:

The [IDEA]'s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child. As the Sixth Circuit Court of Appeals 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 Act. 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 handicapped children simply must be educated in segregated facilities either because the handicapped 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 handicapped 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. 1983), cert. denied, 464 U.S. 864).

In this case, the IEP team considered the placement options available, including a general education/home school model, the Autism Program, the [REDACTED], and the [REDACTED] Program, and after considering the benefits and harmful effects of each placement in light of the Student's circumstances, the school-based IEP team agreed to placement in the [REDACTED] Program as the LRE. As a self-contained special education classroom, with opportunities for the Student to participate in electives and lunch with general education students, I conclude that MCPS properly determined that the [REDACTED] Program was an appropriate placement for the Student which constitutes the LRE in which the Student can be provided a FAPE.

MCPS did not deny the Student a FAPE by failing to place the Student in a diploma-based program.

To the extent that the Parents challenge the Student's placement in a non-diploma based program, I am not persuaded that this decision denied the Student a FAPE. At all times relevant to this matter, the Student's cognitive ability has remained below that of his same-aged peers and the Student has required significant modifications to access the curriculum. On the issue of achievement, I was persuaded by [REDACTED]'s testimony regarding her evaluation and assessment of the Student. She reviewed the Student's scores on the brief cognitive test, which indicated that the Student needed a lot of support for his communication and functional daily life skills. Regarding the additional assessments Ms. [REDACTED] administered on June 3, 2021, which she

stated represented a comprehensive view of the Student's cognitive ability, she reported that the Student's scores indicated a mild cognitive impairment. She further reported that the Student has difficulty with verbal reasoning, which suggested that following the general curriculum would be very difficult for the Student because the curriculum is language-based and includes abstract language concepts. She concluded:

[The Student] had difficulty understanding and working with language concepts at the level expected for his age and will likely struggle to learn in a classroom that relies heavily on language as the primary mode of instruction. [The Student] works best with concrete visual information that is presented in small chunks at a time. He also has difficulty identifying and using strategies to solve more complex problems, such as those using quantitative reasoning skills. His overall cognitive functioning is impaired and falls well below the expected level for a child his age.

(MCPS Ex. 5 at 34).

Ms. [REDACTED] reported that the Student's cognitive ability has remained consistent over time. To illustrate, she reviewed the Student's scores on the March 2019 assessments with the June 2021 assessments. She noted similar scores in the low to moderately low range for adaptive functioning on the 2019 and 2021 Vineland-3, with the Parent's ratings consistently being higher than the teacher's ratings. She also compared the Student's performance on the TONI-4 and the Matrices Subtest of the DAS-II, which measure an individual's non-verbal problem-solving ability. She explained that the TONI-4 is a less comprehensive test which only measured one aspect of the Student's cognitive ability, and that the Student's achievement on that test supported a conclusion that non-verbal problem-solving is a relative strength for the Student. She then pointed to the Student's score on the DAS-II Matrices Subtest, which also measures non-verbal problem-solving ability, and noted that, even though the Student performed in the below average range on the Matrices Subtest, this score also indicated that non-verbal reasoning was a relative strength for the Student when looking at his other scores on the DAS-II. Finally, she reported that the observations of the Student and informal assessments are consistent with the

Student's performance on the March 2019 and June 2021 assessments, which indicate that the Student remains in the low range when compared to his same-aged peers.

The Student's educational record further supports Ms. [REDACTED]'s conclusions, which weighs against the Student's participation in a diploma-based program. Indeed, the Student has required specialized instruction and related services throughout his education. At all times, he has needed extensive supports and modifications in order to access the curriculum and has consistently performed below his age expectancy and grade-level.

In 2020 and 2021, the IEP team completed the Alternate Appendix A checklists, which set forth the criteria for participation in alternate learning outcomes. The checklist includes factors which affect a student's ability to access the general education curriculum and "reflect the pervasive nature of a significant cognitive disability." (MCPS Ex. 36 at 247; MCPS Ex. 38 at 254). In this case, based on the Student's present levels of performance, his IEP, and current data, the IEP team determined that the Student met the criteria for participating in alternate assessments and alternate instructional standards and would pursue a Certificate of Program Completion. The IEP team also agreed that the Student's cognitive and social deficits affected his ability to satisfy the service-learning hours requirement for graduation and reduced the number of required hours to zero.

On this point, I also considered Ms. [REDACTED]'s opinion that a diploma-track program was not appropriate for the Student at this time. She explained that, while the Student is ready for greater academic challenges than what is offered in the Autism Program, he is still far behind the instructional level of his same-aged peers and still requires supports and modifications to access the curriculum and develop his functional daily living skills. The evidence overwhelmingly supports a conclusion that the Student is not capable of meeting the requirements for earning a

high school diploma. As such, the IEP team's determination that the Student would participate in Alternate Learning Outcomes and pursue a Certificate of Program Completion was appropriate.

Based on this record, even if I found that the placement offered by MCPS was not reasonably calculated to provide the Student with a FAPE, I do not find the [REDACTED] Program to be an appropriate placement for the Student because it is a diploma-based program at a private institution for high functioning individuals with autism. As such, this program is not reasonably calculated to meet the Student's needs, and, as a private institution serving only disabled students, does not qualify as the LRE.

I conclude that MCPS properly considered the Student's unique needs and circumstances when it determined that the Student would be placed in the [REDACTED] Program, which I find is an appropriate placement in the LRE. Thus, MCPS has met its substantive obligation under the IDEA by offering the Student an IEP and placement reasonably calculated to enable the student to make progress appropriate in light of his circumstances in the LRE.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the IEP and placement proposed by MCPS for the 2021-2022 school year was reasonably calculated to offer the Student a FAPE in the least restrictive environment. 20 U.S.C.A. § 1412(a)(5) (2017); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117 (2020). *Andrew F. ex rel. Joseph F. v. Douglas County School Dist.*, 137 S. Ct. 988 (2017).

As I have concluded that the Student is provided a FAPE in the least restrictive environment in the [REDACTED] program at [REDACTED] Middle School, I further conclude that the Parents are not entitled to their requested remedy of placement at the [REDACTED]. 34 C.F.R. § 300.148 (2020).

ORDER

I **ORDER** that the August 31, 2021 Due Process Complaint filed by the Parents on behalf of the Student is hereby **DISMISSED**.

December 16, 2021
Date Decision Issued

Michelle W. Cole
Administrative Law Judge

MWC/dlm
#195771

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:

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

BEFORE MICHELLE W. COLE,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-21-19635

APPENDIX - FILE EXHIBIT LIST

I admitted the following exhibits on the Parents' behalf:

Parents Ex. 1 Health Assessment, 03/18/18; Letter from ██████████, M.D., 05/24/11; Notes, 04/12/11; Clinic Report, 01/19/11; Diagnostic Criteria, undated

Parents Ex. 2 IEP Notice Letter, 11/26/12; IEP Response Form, 12/6/12; Notice of IEP Documents, 12/12/12; IEP, 12/6/12; Parent Report, 12/2/12; Report of Speech-Language Re-Assessment, 02/25/13; Report of School Psychologist, 02/17/13

Parents Ex. 3 Prior Written Notice, 06/07/13; IEP, 06/7/13

Parents Ex. 4 Transition to Other Programs Profile Worksheet, 06/14; IEP, 06/4/14; Behavior Chart, 10/24 – 1/17¹

Parents Ex. 5 ████████ Student Profile, 5/22/14; Letter from Parent requesting placement change, 09/9/14; Student Daily Report, 09/10/14 and 09/11/14; Letter from Extended School Year Coordinator, 07/14/15; Documentation of Physical Interventions or Seclusion, 07/13/15; Detailed Disciplinary Report, 11/3/15; School Bus Disciplinary Report, 11/3/15; Speech-Language Status Report, 11/16/15; IEP Meeting Notice, 11/17/15; IEP pages, 11/20/15; Addendum, 11/20/15

Parents Ex. 6 Authorization for Assessment, 05/26/17; Documentation of Physical Interventions or Seclusion, 3/16/17, 5/23/17, 5/24/17, and 5/26/17; Email from Parent, 05/13/17; IEP Meeting Notice, 02/21/17; IEP Team Meeting Response Form, 04/18/17; IEP pages, 05/19/17; Parent Report, undated; Occupational Therapy Discharge Summary, 08/5/19; Speech-Language Therapy Discharge Note, 08/2/19; Report of Speech-Language Re-Assessment, 03/5/19; Educational

¹ The year is not indicated on the document.

Assessment Report, 04/2/19; Report of School Psychologist, 03/29/19; IEP Notes and Decisions, 05/30/19; Prior Written Notice, 05/31/19

Parents Ex. 7 Progress Report on IEP Goals, 11/19/19; Quarterly Progress Notes, 11/8/19

Parents Ex. 8 IEP, 01/7/20; IEP, 01/5/21; IEP Meeting Sign-In Sheet, 06/15/21; Progress Report on IEP Goals, various dates

Parents Ex. 9 Student Report Cards, various dates

Parents Ex. 10 Student Work, undated; [REDACTED] Middle School Contact List and Autism Program Information, undated

Parents Ex. 11 Student work, undated

I admitted the following exhibits on MCPS's behalf:

MCPS Ex. 1 Report of Speech-Language Re-Assessment, 3/5/19

MCPS Ex. 2 Report of the School Psychologist Re-Evaluation, 03/29/19

MCPS Ex. 3 Educational Assessment Report, 4/2/19

MCPS Ex. 4 Notice and Consent for Assessment, 5/27/21

MCPS Ex. 5 Report of the School Psychologist Re-Evaluation, 6/15/21

MCPS Ex. 6 IEP, 01/07/20

MCPS Ex. 7 IEP, 01/05/21

MCPS Ex. 8 IEP (Amended), 06/16/21

MCPS Ex. 9 Prior Written Notice, 05/31/19

MCPS Ex. 10 Prior Written Notice, 01/07/20

MCPS Ex. 11 Prior Written Notice, 04/21/20

MCPS Ex. 12 Prior Written Notice, 06/15/20

MCPS Ex. 13 Prior Written Notice, 09/21/20

MCPS Ex. 14 Prior Written Notice, 01/05/21

MCPS Ex. 15 Prior Written Notice, 05/27/21

MCPS Ex. 16 Prior Written Notice, 06/16/21

MCPS Ex. 17 Five-Day Extenuating Circumstances Notice of Documents, 12/20/19

MCPS Ex. 18 Five-Day Disclosure Notice of Documents, 12/13/20

MCPS Ex. 19 Five-Day Verification Notice of Documents, 01/5/21

MCPS Ex. 20 Five-Day Notice of Documents, 06/07/21

MCPS Ex. 21 Five-Day Verification Notice of Documents, 06/16/21

MCPS Ex. 22 IEP Team Meeting Sign-In Sheet, 01/07/20

MCPS Ex. 23 IEP Team Meeting Sign-In Sheet, 01/05/21

MCPS Ex. 24 IEP Team Meeting Sign-In Sheet, 05/27/21

MCPS Ex. 25 IEP Team Meeting Sign-In Sheet, 06/15/21

MCPS Ex. 26 IEP Meeting Notes, 01/07/20

MCPS Ex. 27 Student Report Card for 2019-2020 School Year, 6/19/20

MCPS Ex. 28 Student Report Card for 2020-2021 School Year, 6/23/21

MCPS Ex. 29 MCPS Letter to Parent Regarding Extended School Year

MCPS Ex. 30 Service Log, 07/13/20 - 08/11/20

MCPS Ex. 31 Service Log, 08/13/20 - 06/15/21

MCPS Ex. 32 Alternate Learning Outcomes Recovery Data Summary Tool, 04/17/20 - 11/6/20

MCPS Ex. 33 Emergency Evacuation Accommodation Form

MCPS Ex. 34 Alternate Appendix A - Participation Criteria Checklist, 01/07/20

MCPS Ex. 35 Alternate Appendix C- Parental Consent Form, 01/07/20

MCPS Ex. 36 Alternate Appendix A - Participation Criteria Checklist, 01/05/21

MCPS Ex. 37 Alternate Appendix C- Parental Consent Form, 01/05/21

MCPS Ex. 38 Alternate Appendix A - Participation Criteria Checklist, 06/15/21

MCPS Ex. 39 Resume of ██████████, undated

MCPS Ex. 40 Resume of ██████████, undated

MCPS Ex. 41 Resume of [REDACTED], undated

MCPS Ex. 42 Resume of [REDACTED], undated

MCPS Ex. 43 Resume of [REDACTED], undated

MCPS Ex. 44 Resume of [REDACTED], undated