

██████████,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE RACHAEL BARNETT,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-22-02725

DECISION

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STATEMENT OF THE CASE

On February 4, 2022, ██████████ (Parent), on behalf of her child, ██████████ (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 Montgomery County Public Schools (MCPS) 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 prehearing conference on March 1, 2022. The Parent was self-represented. John Delaney, Esquire, represented the MCPS.

I held the hearing on April 19-20, 2022. The Parent was self-represented. John Delaney, Esquire, represented the MCPS.

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.

Under the applicable law, a decision in this case normally would have been due by April 20, 2022, forty-five days after the expiration of the thirty-day resolution period. 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)(b). The parties anticipated eight days of hearing. Therefore, MCPS requested an adjustment to and extension of the timeline because counsel’s schedule was full through the end of March 2022 and spring break for MCPS was scheduled during the week of April 11, 2022, which meant that many MCPS witnesses would not be available. 34 C.F.R. § 300.515(c); Educ. § 8-413(h). Counsel for MCPS provided this Administrative Law Judge with a copy of his remaining March calendar as evidence of his unavailability for eight days in March 2022. Furthermore, this ALJ was on leave the week of MCPS’s spring break and therefore could not hear the case or write a decision during that time. Since the Student anticipated hiring legal counsel, the Student agreed that there was good cause to extend the timeline. Since the parties believed eight days of hearing were needed and finding eight days within the forty-five-day time window was not possible, I determined that there was good cause to grant the request for a timeframe extension.

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

1. Was the Student denied a free and appropriate public education (“FAPE”) for the 2021-2022 school year because MCPS failed to propose a placement reasonably calculated to enable the Student to make progress in light of his unique circumstances?

2. Is the Parent entitled to the relief sought in the Request or other appropriate relief, and in particular, placement of the Student at the [REDACTED], in [REDACTED], [REDACTED] for the remainder of the 2021-2022 school year?

SUMMARY OF THE EVIDENCE

Exhibits

The Parent did not offer any documents for admission into evidence.

I admitted the following exhibits on behalf of MCPS:³

- MCPS Ex. 2 – Notice and Consent for Assessment, November 12, 2019
- MCPS Ex. 5 – Report of School Psychologist, January 25, 2020
- MCPS Ex. 8 – Confidential Psychological Evaluation, July 20, 2021
- MCPS Ex. 9 – Notice and Consent for Assessment, October 19, 2021
- MCPS Ex. 11 – Report of School Psychologist, December 6, 2021
- MCPS Ex. 12 – Report of Speech-Language Assessment, December 3, 2021
- MCPS Ex. 13 – Specific Learning Disability Team Report, December 14, 2021
- MCPS Ex. 15 – IEP, amended March 4, 2020
- MCPS Ex. 16 – IEP, amended June 8, 2021
- MCPS Ex. 17 – IEP, December 14, 2021
- MCPS Ex. 41 – Change of School Assignment Documents, 2018 – 2021
- MCPS Ex. 42 – Resume of [REDACTED], Special Education Teacher, MCPS
- MCPS Ex. 43 – Resume of [REDACTED], Instructional Specialist, MCPS
- MCPS Ex. 44 – Resume of [REDACTED], Principal of [REDACTED] Elementary School, MCPS
- MCPS Ex. 45 – Resume of [REDACTED], Supervisor, Department of Special Education, MCPS

³ There are gaps in the numerical listing of exhibits. All of the exhibits offered by MCPS were admitted into evidence; however, there were several exhibits not offered that were part of MCPS' exhibit binder.

MCPS Ex. 46 – Resume of [REDACTED], School Psychologist, MCPS

MCPS Ex. 48 – Resume of [REDACTED], Speech Pathologist, MCPS

Testimony

The Parent testified and presented the following witness: [REDACTED], grandmother of the Student.

The MCPS presented the following witnesses:

- [REDACTED], Acting Special Education Supervisor, admitted as an expert in general education and special education
- [REDACTED] Teacher, Department of Special Education, MCPS, admitted as an expert in special education
- [REDACTED], Instructional Specialist, MCPS, admitted as an expert in special education
- [REDACTED], Principal, [REDACTED] Elementary School, admitted as an expert in school administration, general education, and elementary education
- [REDACTED], School Psychologist, MCPS, admitted as an expert in school psychology
- [REDACTED], Speech Pathologist, MCPS, admitted as an expert in speech language pathology

FINDINGS OF FACT

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

1. The Student was born in [REDACTED] 2012, and he is currently in third grade at [REDACTED] Elementary School (“[REDACTED]”), located in [REDACTED] County. His classroom has between twenty-six to twenty-seven students.
2. The Student resides full-time with the Parent and other siblings.
3. [REDACTED] is an elementary school comprised of general education classrooms. [REDACTED] is not the Student’s assigned school based on his property address. Rather, he attends

██████████ based on a Change of School Assignment (COSA) and has attended on this basis since kindergarten.

4. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), combined type, classified as severe. He has also been diagnosed with a Specific Learning Disability.

5. The Student struggles academically. He is unable to read a book on a kindergarten level. He cannot write his full name or his phone number. He is at least two grade levels behind his peers in all academic subject areas.

6. The Student interacts positively with his classroom peers during recess and gym.

7. The Student has an older sibling who attends the ██████████, in ██████████, ██████████ (“██████████”), as well as another sibling who graduated from this school. There are approximately six students per classroom at ██████████.

8. In first grade (Fall 2019 – Spring 2020), the Student exhibited behavior problems including defiance and peer aggression. He struggled with reading.

9. On January 14 and 15, 2020, Ms. ██████████ conducted a comprehensive psychological evaluation of the Student. The assessment included a classroom observation and educational testing. The Student was very physically active in class. In testing, the Student’s non-verbal testing scores were superior to his verbal scores; however, his scores were generally low. On the Wechsler Intelligence Scale for Children, the Student scored below average in all areas of testing except one.

10. On February 19, 2020, ██████████ convened an IEP team meeting for the Student. The team created an initial IEP for the Student at this meeting. The team found the Student eligible for special education services based on a Specific Learning Disability in the areas of reading, written language and math and due to ADHD (though the team did not classify the

ADHD as an “other health impairment” at this time). This IEP placed the Student at [REDACTED].

Under the IEP, the Student received many in-class supports including slant board and manipulatives, a human scribe, and frequent and immediate feedback to his work performance.

11. In mid-March 2020, MCPS closed public schools, including [REDACTED], at the onset of the COVID-19 Pandemic. The Student began remote instruction shortly thereafter.

12. On February 2, 2021, the IEP team created a new IEP for the Student. The Student remained in remote learning at this time. Under this IEP, reading intervention services were added at a frequency of four times per week on a pull-out basis. His disability coding remained “Specific Learning Disability,” and [REDACTED] remained his assigned school. This IEP included many in-class supports, such as prompting and a human scribe.

13. On March 1, 2021, the Student underwent a private psychological evaluation with [REDACTED], PhD, Licensed Psychologist, through the [REDACTED] at [REDACTED]. The evaluator performed several assessments of the Student, and all but one of his scores (in visual-motor integration) were below average. The evaluator diagnosed the Student with ADHD, Combined Presentation, Severe, as well as Provisional Intellectual Disability or Specific Learning Disorder with impairment in reading, mathematics, and written expression. The assessor also noted that the Student’s scores on the Autism Spectrum Rating Scale (for ages six to eighteen) were beyond the cutoff score, which warranted further evaluation for Autism Spectrum Disorder (ASD). Dr. [REDACTED] also made several recommendations for the Student, including a smaller learning environment outside of general education.

14. Between March and April 2021, [REDACTED] phased in blended learning, which gave students the option of returning to the school building on a part-time basis, while still doing

at-home learning. The Student did not participate in blended learning; the Parent opted to keep him at home.

15. On July 20, 2021, Dr. [REDACTED] produced a written report of her findings, which the Parent subsequently shared with MCPS.

16. In late August 2021, [REDACTED] fully transitioned back to in-person instruction for the 2021-2022 academic year, and the Student returned to [REDACTED]. He initially developed a bond with his third-grade teacher, and his behavioral issues were less apparent than they had previously been.

17. In October, 2021, Ms. [REDACTED] observed the Student over two class periods at [REDACTED] and conducted a file review of his academic record. She ruled out a placement recommendation in a non-diploma track program.

18. On October 19, 2021, the IEP team met to discuss Dr. [REDACTED]'s report. The team decided to refer the Student for further assessment by MCPS. In particular, the team requested a new psychological report to determine whether the Student met the criteria for an intellectual disability.

19. As the fall semester progressed, the Student's behavior issues reemerged as classroom demands increased. The Student often became frustrated when he was unable to perform classwork. As a result, he often acted out or left the classroom.

20. On November 18, 2021 and December 3, 2021, Ms. [REDACTED] conducted a speech-language assessment of the Student. She created an assessment report. The Student had weaknesses in both expressive and receptive vocabulary. His strengths were in forming sentences and engaging in a conversation. He typically did not speak in complete sentences and on one of the assessment dates, he required frequent redirection. Ms. [REDACTED] recommended the

Student receive six sessions of thirty minutes each per month in speech therapy on a pull-out basis. The Student was not previously receiving speech therapy in school.

21. On December 6, 2021, Ms. [REDACTED] issued a report that reflected a psychological re-evaluation of the Student. Prior to completing the report, she performed several tests on the Student. Based on these tests, Ms. [REDACTED] determined that while the Student's verbal cognitive functioning met the criteria for intellectual disability, his nonverbal cognitive functioning did not. Therefore, he did not meet the criteria for intellectual disability.

22. In advance of the upcoming mid-December IEP meeting, Ms. [REDACTED] observed the Student. While she did not produce a written report, she observed the Student get up frequently from his seat in class and that he was unable to complete the coursework at the pace the instruction was occurring.

23. On December 14, 2021, [REDACTED] held another IEP meeting. At this meeting, the team reviewed the Student's academic performance since February 2021, as well as recent assessments. The Student had made progress towards his goals; however, it was slow progress. The team identified significant attentional issues and changed the disability identification code from Specific Learning Disability to Specific Learning Disability and Other Health Impairment. The team determined the Student required a change in placement and proposed the [REDACTED] [REDACTED] at [REDACTED] Elementary School ("the [REDACTED]"). The Parent disagreed with this placement recommendation.

24. MCPS has [REDACTED] located throughout the county. Students who attend the [REDACTED] are typically performing two or more grade levels below their peers in reading and in mathematics.

25. [REDACTED] students receive interventions in these subject areas.

26. [REDACTED] are located within public schools that serve general education peers, and students enrolled in MCPS learning centers have opportunities to attend classes and socialize with their general education peers.

27. [REDACTED] classrooms are staffed with a special education teacher and a paraeducator.

28. There are approximately twelve students per classroom in the [REDACTED] [REDACTED] classrooms, and each classroom is comprised of same-grade-level peers, meaning the Student would attend class with other third grade students (and next year with other fourth grade students).

29. The [REDACTED] at [REDACTED] Elementary School offers two reading instruction methodologies, Orton Gillingham and Willie Gray Reading Blast intervention – both would be available to the Student.

30. Pursuant to the December 2021 IEP, the Student would attend art, music and physical education with his general education peers at [REDACTED] Elementary School.

DISCUSSION

Burden 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). The burden of proof rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). The Parent is seeking relief and bears the burden of proof to show that the placement of the Student at the [REDACTED] [REDACTED] did not meet the requirements of the law. COMAR 28.02.01.21K(1), (2)(a).

Additionally, at the close of the presentation of the Student's evidence, the MCPS moved for summary judgment in favor of MCPS. The MCPS bears the burden to show it is entitled to summary judgment as a matter of law. COMAR 28.02.01.21K(1), (2)(b); COMAR 28.02.01.12E. I declined to render judgment until the close of all evidence to avoid any additional delays in this matter.

Ruling on the Motion

A judge ruling upon a motion for summary judgment is concerned with whether a dispute of material fact exists. *Tri-Towns Shopping Ctr., Inc. v. First Fed. Sav. Bank of W. Md.*, 114 Md. App. 63, 65 (1997). Maryland courts have provided the following guidance about what constitutes a "material fact," about the method of proving such facts, and about how a judge ruling upon such a motion should weigh the information presented:

A material fact is a fact the resolution of which will somehow affect the outcome of the case. . . . The trial court, in accordance with Maryland Rule 2-501(e) shall render summary judgment forthwith if the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. The purpose of the summary judgment procedure is not to try the case or to decide factual disputes, but to decide whether there is an issue of fact that is sufficiently material to be tried. Thus, once the moving party has provided the court with sufficient grounds for summary judgment, it is . . . incumbent upon the other party to demonstrate that there is indeed a genuine dispute as to a material fact. He does this *by producing factual assertions, under oath*, based on the personal knowledge of the one swearing out an affidavit "Bald, unsupported statements or conclusions of law are insufficient."

Id. at 65-66 (citations omitted, emphasis in original).

MCPS argued that it is entitled to summary judgment because the Parent provided insufficient information about the profile of student who attends [REDACTED]; because the learning center at [REDACTED] Elementary provides the small classroom environment the Parent desires; and because the Parent failed to provide sufficient evidence that the IEP proposed by MCPS does not offer the Student a FAPE. The Parent opposed the motion and asked to move forward with the hearing but did not elaborate.

MCPS' own argument calls into question important material facts related to the [REDACTED].

[REDACTED] The Parent testified that she has been to the [REDACTED] at [REDACTED] to observe in the past and that there were too many children per classroom to meet the Student's needs. The Parent testified that she been provided different classroom totals for the students in the [REDACTED], either eight to ten or ten to twelve students per class. The Parent stated that even in the [REDACTED], the Student would struggle if he were called to read because he would not be able to read text. Based on the Parent's testimony, there are material facts to be determined about how [REDACTED]'s [REDACTED] works, including how many children there are per classroom and how the Student would be supported in the [REDACTED] classroom. Understanding the nature of how his proposed placement would service him is essential to determining whether or not the IEP, as proposed, offers the Student a FAPE. For these reasons, I decline to grant summary judgment in favor of MCPS.

Applicable Law

The IDEA's Requirement for a FAPE

A school system's obligation under the IDEA is to provide all children with disabilities a FAPE. 20 U.S.C.A. § 1400(d)(1)(A); 34 C.F.R. § 300.101(a).

A FAPE is defined in the IDEA as 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.

20 U.S.C.A § 1401(9); accord 34 C.F.R. § 300.17.⁴

In *Rowley*, the Supreme Court described a FAPE as follows:

Implicit in the congressional purpose of providing access to a [FAPE] 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 provide educational benefit to the handicapped child.

458 U.S. at 200-01. The Court held that a FAPE “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” *Id.* at 188-89.

After *Rowley*, a split in the circuits of the United States Courts of Appeal developed over precisely what “some educational benefit” meant. Some circuits, notably the Fourth and Tenth, understood it to mean “some” benefit more than a “*de minimis*,” “minimal,” or “trivial” benefit; while others, such as the First, Third, and Ninth Circuits interpreted the standard to mean a “meaningful” benefit. Compare *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015), and *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338-41 (10th Cir. 2015), with *D.B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012), and *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008), and *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988).

The Supreme Court resolved the split in the circuits by granting *certiorari* to review the Tenth Circuit’s opinion in *Andrew F.* The Supreme Court held a FAPE must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”

⁴ A FAPE is defined in COMAR 13A.05.01.03B(27) as “special education and related services” that:

- (a) Are provided at public expense, under public supervision and direction;
- (b) Meet the standards of the Department, including the requirements of 34 CFR §§ 300.8, 300.101, 300.102, and 300.530(d) and this chapter;
- (c) Include preschool, elementary, or secondary education; and
- (d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

and finding that “[t]he IDEA demands more” than “an educational program providing merely more than *de minimis* progress from year to year.” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 1001 (2017) (internal quotation marks omitted).⁵

Child With a Disability

To be eligible for special education and related services under the IDEA, a student must meet the definition of a “child with a disability” as set forth in Section 1401(3) and the applicable federal regulations. The statute defines “child with a disability” as a child:

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8; Md. Code Ann., Educ. § 8-401(a)(2); and COMAR 13A.05.01.03B(78). “Other health impairment” is defined as:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child’s educational performance.

34 C.F.R. § 300.8(c)(9); COMAR 13A.05.01.03B(51).

⁵ The Fourth Circuit has acknowledged that “[o]ur prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by *Andrew F.*” *M.L. ex rel. Leiman v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 752 (2018). For these reasons, any opinions of the Fourth Circuit or any circuit that adopted a no more than “*de minimis*” standard and any district court within those circuits that are cited or discussed below are not relied upon for their definition of a FAPE, but for other legal principles for which they remain the state of the law in this circuit and controlling precedent or persuasive authority.

The IEP

To provide a FAPE, the educational program offered to a student must be tailored to the particular needs of the disabled child by the development and implementation of an IEP, taking into account:

- (i) the strengths of the child;
 - (ii) the concerns of the parents for enhancing the education of their child;
 - (iii) the results of the initial evaluation or most recent evaluation of the child;
- and,
- (iv) the academic, developmental, and functional needs of the child.

20 U.S.C.A. § 1414(d)(3)(A); *see also Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985) (“The *modus operandi* of the Act is the already mentioned individualized educational program.” (internal quotation marks omitted)).

The IEP depicts the student’s current educational performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically designed instruction and services that will assist the student in meeting those objectives, and indicates the extent to which the child will be able to participate in regular educational programs.

20 U.S.C.A. § 1414(d)(1)(A); *accord* 34 C.F.R. § 300.22; Md. Code Ann., Educ. § 8-405(a)(4).

As the “centerpiece” of the IDEA’s “education delivery system” for disabled students, an IEP is a “comprehensive plan” for the “academic and functional advancement” for the student. *Andrew F.*, 137 S. Ct. at 994, 999. It must be tailored to the student’s “unique needs” with “careful consideration” of the student’s present levels of achievement, disability, and potential for growth. *Id.*; *see also* 20 U.S.C.A. § 1401(29). The IEP must be “appropriately ambitious,” *Andrew F.*, 137 S. Ct. at 1000, and it must provide for “specially designed instruction” that is “reasonably calculated to enable the child to receive educational benefits” and to “make progress appropriate in light of the student’s circumstances.” *Id.* at 996, 999 (quoting *Rowley*, 458 U.S. at 207). The amount of progress anticipated for the student should be “markedly more demanding than the

merely more than *de minimis* test” applied in the past by many lower courts. *Id.* at 1000 (internal quotation marks omitted).

The test for whether an IEP is “appropriately ambitious,” *id.*, and “reasonably calculated to enable the student to receive educational benefits,” *id.* at 996, is different for each student; there is no bright-line rule or formula to determine whether an IEP provides a FAPE.⁶ *Id.* at 1000-01. For a student who is fully integrated in the regular classroom, a FAPE would generally require an IEP to be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.* at 996, 999 (citing *Rowley*, 458 U.S. at 203-04). However, for a student who is not fully integrated and/or cannot be reasonably expected to achieve grade-level advancement, the “educational program must be appropriately ambitious in light of [the student’s] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *Id.* at 1000. Regardless, “every child should have the chance to meet challenging objectives.” *Id.*

When assessing whether a student was offered, given, or denied a FAPE, a judge must “afford great deference to the judgment of education professionals” *O.S.*, 804 F.3d at 360 (quoting *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)). A judge should not substitute his or her own “notions of sound educational policy for those of the school authorities which they review.” *Andrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 206). Additionally, a judge “should be reluctant . . . to second-guess the judgment of education professionals.” *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). A judge should be mindful that local educators deserve latitude in determining the IEP most appropriate for a disabled child, and that the IDEA does not deprive these educators of the right to apply their professional judgment. *See Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001

⁶ In *Rowley*, the Supreme Court also held that a FAPE may be found to have been denied a student when a school fails to comply with the procedures set forth in the IDEA. 458 U.S. at 206; *see also Bd. of Educ. v. I.S. ex rel. Summers*, 325 F. Supp. 2d 565, 580 (D. Md. 2004).

(4th Cir. 1997). Additionally, a judge must be careful to avoid imposing his or her view of preferable educational methods upon a school district. *Rowley*, 458 U.S. at 207; *A.B.*, 354 F.3d at 325.

This respect and deference, while unquestionably a well-settled principle of review under the Act, both within and without this circuit, is not limitless. *See Cty. Sch. Bd. of Henrico Cty. v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the [judge] of the obligation to determine as a factual matter whether a given IEP is appropriate.”). “[T]he fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate.” *Id.*; *see Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993) (“Indeed, if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary.”).

“To give deference only to the decision of the School Board would render meaningless the entire process of administrative review.” *Sch. Bd. of Prince William Cty., Va. v. Malone*, 762 F.2d 1210, 1217 (4th Cir. 1985) (citation omitted). A reviewing judge may fairly expect the school system’s professionals “to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [his or her] circumstances.” *Andrew F.*, 137 S. Ct. at 1002.

The *Andrew F.* Court confirmed that a FAPE does not promise an “ideal” education. *Id.* at 999. The *Andrew F.* Court declined to adopt the reasoning that FAPE promises a student with a disability with “opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.” *Id.* at 1001. A reviewing court must determine whether the IEP is “reasonable.”

Id. at 999. It is also important to remember that the IDEA does not require “the best possible education that a school could provide if given access to unlimited funds.” *Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). Nor does it require the “furnishing of every special service necessary to maximize each handicapped child’s potential.” *Hartmann*, 118 F.3d at 1001.

The development of an IEP is a prospective process. *Andrew F.*, 137 S. Ct. at 998-99. Other circuits and district courts have held the test of the appropriateness of the IEP is *ex ante* and not *post hoc*. *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 524 (D.C. Cir. 2018); *Adams v. State*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993); *J.P. ex rel. Popson v. W. Clark Cmty. Sch.*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002) (“[T]he measure of appropriateness for an IEP does not lie in the outcomes achieved. While outcomes may shed some light on appropriateness, the proper question is whether the IEP was objectively reasonable at the time it was drafted.” (citation omitted)). Thus, a judge in a due process hearing must look to what the IEP team knew when it developed the IEP, and whether that IEP, as designed, was reasonably calculated to enable the child to receive educational benefit and make appropriate progress. An IEP is essentially a “snapshot” in time and cannot be judged “with the benefit of hindsight.” *See Z.B.*, 888 F.3d at 524; *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 818 (8th Cir. 2011); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).

Least Restrictive Environment

In addition to the IDEA’s requirement that disabled children receive a FAPE, the law requires that, to the maximum extent appropriate, children with disabilities be educated with their non-disabled peers. 20 U.S.C.A. § 1412(a)(5). This requirement is referred to as “least restrictive environment.” The IDEA mandates that removal of children with disabilities from the

regular educational environment shall occur 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). Accordingly, in such a case a FAPE might require placement of a student in a private school setting that would be fully funded by the student's public school district. 34 C.F.R. § 300.115; COMAR 13A.05.01.10B.

An agency is required to ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115(a). The continuum is required to include alternative placements such as instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b)(1). The continuum must also allow for supplementary services to be provided in conjunction with regular class placement. 34 C.F.R. § 300.115(b)(2).

Analysis

The Parent only challenged the December 14, 2021 placement recommendation by the IEP team; she did not challenge any aspect of the preceding IEP nor the content of the December 14, 2021 IEP. The parties agree that [REDACTED] is no longer an appropriate placement for the Student. Ms. [REDACTED], the principal of [REDACTED] testified that [REDACTED] was unable to implement the Student's IEP in third grade and opined that a change in placement was necessary to do so. The parties also agree the Student is below grade-level academically and requires a smaller, more supportive and more accommodating learning environment.

The parties disagree about where that smaller, supportive and learning environment should be. The Parent argued in her closing that she wants "the best" for the Student. While this is a natural feeling for a caring parent to have, the Court was clear in *Endrew F.* that the IDEA does not promise an ideal education. Rather, the IEP must be "reasonably calculated to enable the child to make progress in light of his circumstances." *Endrew F.* 135 S.Ct. at 1002.

Ms. [REDACTED] testified about the Student's intellectual abilities. She tested the student in both first and third grade. She concluded the results were similar – his cognitive abilities were below average across various tests in both non-verbal and verbal intelligence; however, his verbal intellectual skills were notably lower than non-verbal intellectual skills. She agreed with the IEP team that a smaller educational setting than a general education classroom is appropriate because he is a student with multiple learning disabilities whose cognitive levels are below average, though he did not meet criteria for intellectual disability based on his non-verbal cognitive abilities.

The Parent is familiar with [REDACTED], because one of her children has graduated from the school and experienced tremendous academic growth there. She testified he entered [REDACTED] unable to read and has learned to do so, earning good grades and a high school diploma. Additionally, she has another child currently attending [REDACTED]. The Parent has been to [REDACTED] and testified that there are six children in a classroom, with two to three paraeducators. The students at [REDACTED] receive significant in-class support. She believes the Student would receive the support he needs at [REDACTED] and wants him to succeed like her older son has. Clearly, [REDACTED] is a school the Parent is comfortable with and she believes it can meet the Student's learning needs.

In her report, Dr. [REDACTED] recommended a smaller learning environment for the Student and remarked: "If he remains in the general education setting, he is at risk for continued overstimulation and behavioral dysregulation further disrupting his ability to learn, which is already challenged by his baseline cognitive and academic functioning." (MCPS Ex. 8, p. 48). Dr. [REDACTED] made the following additional recommendations: instruction in cognitive flexibility, organization and planning, intervention in reading, writing, and math, ensuring the Student has an appropriate foundation in academic areas before introducing new skills, allowing the Student

additional time to do work and preparation for transitions, teacher cues for attention and self-regulation, breaking work into small chunks and reduced distractions. Dr. [REDACTED] did not specify how many children should be in a smaller classroom or what type of academic placement would be appropriate for the Student. Furthermore, she did not testify at the hearing to elaborate on her recommendations. Since the Parent offered no expert testimony whatsoever, there is no expert opinion in the record to suggest that the Student requires the type of learning environment [REDACTED] has to make progress appropriate in light of his unique circumstances.

The Parent testified that the [REDACTED] at [REDACTED] Elementary School would not be an appropriate placement for the Student because he would act out even with ten children in a classroom. Ms. [REDACTED] testified there are currently twelve students in the third-grade classroom at the [REDACTED], which would make the Student the thirteenth in the classroom. Ms. [REDACTED] further testified that the students work in small groups in the [REDACTED]. Additionally, she testified that there are peers at the [REDACTED] at the same level as the Student, which would remove the frustration at [REDACTED] where the material is too advanced for the Student. Ms. [REDACTED] opined this learning environment would increase the Student's involvement in the classroom. Furthermore, Ms. [REDACTED] testified that his IEP does not reflect that the Student cannot be around general education peers, and the Student would have the opportunity to interact with general education peers while enrolled at [REDACTED]'s [REDACTED]. His December 2021 IEP reflects twenty-five hours in special education out of a total of thirty-two hours and five minutes per week, so the Student could have specials, lunch, and recess with general education peers.

To meet the requirements of 20 U.S.C.A. §1412(a)(5), it is essential to ensure the Student's placement reflects the least restrictive environment for his education. While not all counties in Maryland have [REDACTED] available as part of their continuum of special

education settings, MCPS does. For some students, [REDACTED] bridge the gap between fully removed special education settings and general education settings, because they are located within public schools and their enrolled students may attend general education classes to the extent appropriate for their individual needs, while still participating in slower-paced and supportive instruction in [REDACTED] classrooms.

In October 2021, Ms. [REDACTED] observed the Student in [REDACTED] and conducted a file review of his educational record. Her assessment of a student is common when a placement in an alternative outcomes setting is being considered. She testified that students in these settings work towards certificates of completion, not high school diplomas. When she observed the Student, she saw him over two periods which included recess. During recess, she testified he called his classmates over for a huddle during a basketball game and high fived other players. She concluded that the Student is not appropriate for a non-diploma track program and ruled out this recommendation for him. She opined that he is best suited for a diploma-track program and that a non-public placement would be too restrictive for him because he would lose access to his general education peers, relationships he clearly values. She further opined that a [REDACTED] would give him the slower pace of instruction he needs to grasp the most salient aspects of grade-level material while enabling him to have relationships with non-disabled peers.

Ms. [REDACTED] also observed the Student in third grade at [REDACTED]; though she did not state when she did so, it took place in advance of the December 2021 IEP meeting. She testified the Student often got up from his seat and the teacher pulled him over to a small group, and even in that setting he was unable to do the class assignment. She testified the pace of instruction was too quick for him. She opined the Student needs specially designed instruction in a setting with an educator and paraeducator for support to ensure he understands the coursework and can do the

assigned work. She further opined that he is appropriate for a [REDACTED], because they are designed to offer students what the Student needs. Furthermore, she opined the December 14, 2021 IEP could be implemented as written at the [REDACTED] [REDACTED].

It is essential to remember that a FAPE requires that a student receive both an appropriate placement, and an education that conforms with his IEP. Ms. [REDACTED] and Ms. [REDACTED] [REDACTED], both of whom were qualified as experts, testified that the December 14, 2021 IEP can be implemented at the [REDACTED]. Not a single witness testified that [REDACTED] could implement the December 14, 2021 IEP. The Parent did not dispute the appropriateness of the IEP, just the placement recommendation. Without knowing if [REDACTED] is capable of implementing the IEP, placement of the Student in this non-public setting cannot be assured to provide the Student with a FAPE.

Andrew F. requires school professional to provide a “cogent and responsive explanation for their decisions” related to the IEP, and they have done so in this case. *See* 135 S.Ct. at 1002. MCPS acknowledged it was not able to implement the IEP at [REDACTED] and several witnesses explained why [REDACTED] is not an appropriate placement for the Student, as well as why the [REDACTED] is appropriate and is capable of implementing the IEP as written. This recommendation is based on several observations, three sets of educational testing, knowledge of what the [REDACTED] offer and an understanding of who the Student is as a learner and a person. For all of these reasons, I agree with the recommendation of MCPS to place the Student at the [REDACTED] because I find it is the placement that offers him a FAPE in the least restrictive environment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parent has not proven that Montgomery County Public Schools violated the Individuals

with Disabilities Education Act by failing to provide the Student with a free appropriate public education for the 2021-2022 school year. I further conclude as a matter of law that the Parent failed to prove that she is entitled to placement of the Student at the [REDACTED] and payment of tuition, costs, and expenses for the remainder of the 2021-2022 school year. 20 U.S.C.A. § 1400(d)(1)(A) (2017); 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. § 300.115 (2019); *Andrew F. v. Douglas Cty. School Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005).

ORDER

I **ORDER** that the Parent's request for placement at and payment of tuition, costs and expenses at the [REDACTED] for the 2021-2022 school year is **DENIED**.

May 16, 2022
Date Decision Mailed

Rachael Barnett
Administrative Law Judge

RAB/at
197934

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]

[REDACTED],

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE RACHAEL BARNETT,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-22-02725

FILE EXHIBIT LIST

Exhibits

The Parent did not offer any documents for admission into evidence.

I admitted the following exhibits on behalf of MCPS:

MCPS Ex. 2 – Notice and Consent for Assessment, November 12, 2019

MCPS Ex. 5 – Report of School Psychologist, January 25, 2020

MCPS Ex. 8 – Confidential Psychological Evaluation, July 20, 2021

MCPS Ex. 9 – Notice and Consent for Assessment, October 19, 2021

MCPS Ex. 11 – Report of School Psychologist, December 6, 2021

MCPS Ex. 12 – Report of Speech-Language Assessment, December 3, 2021

MCPS Ex. 13 – Specific Learning Disability Team Report, December 14, 2021

MCPS Ex. 15 – IEP, amended March 4, 2020

MCPS Ex. 16 – IEP, amended June 8, 2021

MCPS Ex. 17 – IEP, December 14, 2021

MCPS Ex. 41 – COSA Documents, 2018 – 2021

MCPS Ex. 42 – Resume of [REDACTED], Special Education Teacher, MCPS

MCPS Ex. 43 – Resume of [REDACTED], Instructional Specialist, MCPS

MCPS Ex. 44 – Resume of [REDACTED], Principal of [REDACTED] Elementary School,
MCPS

MCPS Ex. 45 – Resume of [REDACTED], Supervisor, Department of Special Education, MCPS

MCPS Ex. 46 – Resume of [REDACTED], School Psychologist, MCPS

MCPS Ex. 48 – Resume of [REDACTED], Speech Pathologist, MCPS