

██████████,
PARENT,
ON BEHALF OF ██████████,
STUDENT
v.
MONTGOMERY COUNTY PUBLIC
SCHOOLS

BEFORE MARC NACHMAN,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-24-20142

DECISION

STATEMENT OF THE CASE
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ORDER

STATEMENT OF THE CASE

On July 25, 2024, ██████████ (Parent)¹ filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) on behalf of his son ██████████ (Student), requesting mediation and a due process hearing to review the placement of the Student by the Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);² 34 C.F.R. § 300.511(a) (2023);³ Md. Code

¹ The Parent was given the opportunity to add his wife, the Student's mother, as a party, but he declined to do so. Tr. Vol. 1(Page 45:13 to 45:18).

² "U.S.C.A." is an abbreviation for the United States Code Annotated. Unless otherwise noted, all citations herein to the U.S.C.A. are to the 2017 bound volume.

³ "C.F.R." is an abbreviation for the Code of Federal Regulations. Unless otherwise noted, all citations herein to the C.F.R. are to the 2023 bound volume.

Ann., Educ. § 8-413(d)(1) (Supp. 2024);⁴ Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

On August 22, 2024, I conducted a video pre-hearing conference (Conference) in the captioned matter. The Parent was present and represented himself and the Student, who also attended the Conference. John Delaney, Esquire, represented the MCPS. The Conference report was issued on August 23, 2024.

I held the hearing on October 8 and 9, 2024. The Parent again represented himself and the Student. Mr. Delaney again represented the MCPS.

Under the applicable law, a decision in this case normally would be due by Sunday, October 6, 2024,⁵ which is forty-five days after the parties notified the OAH that they did not resolve their dispute at the August 22, 2024 mediation. 34 C.F.R. §§300.510(b)(2), 300.515(a). However, the regulations authorize me to grant a specific extension of time at the request of either party. *Id.* § 300.515(c). In this case, the first day available for the hearing to commence after allowing the parties to file motions,⁶ and for the opposing party to respond thereto, and for me to rule on the anticipated motion is past the regulatory due date for the decision. Counsel for the MCPS asked that I issue my decision outside the statutory period, but no more than thirty days after the conclusion of the hearing; the Parent joined in that request.

I agreed to that request, and with the concurrence of the parties, I agreed to issue this decision within thirty days of the end of the hearing. However, the thirtieth day would have been Saturday, November 9, 2024. Therefore, the decision is being issued within twenty-nine days, one day before that Saturday, on Friday, November 8, 2024.

⁴ Unless otherwise noted, all citations herein to the Education Article are to the 2022 Volume of the Maryland Annotated Code.

⁵ Because that day is a weekend day, the decision would have been due on the immediately preceding business day, which was Friday, October 4, 2024.

⁶ The Parent indicated the intention to file an amended Complaint. If so filed, the MCPS wanted an opportunity to file a motion in opposition to the amendment. Although the Parent amended the Complaint on September 10, 2024, MCPS chose not to challenge the amendment.

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. Educ. § 8-413(e)(1); Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2024); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

Whether, for the 2024-2025 school year:

1. The Student's IEP is reasonably designed to provide the Student with a FAPE in the LRE;⁷
2. The Student should attend mathematics and history instruction in a general education setting instead of the self-contained classrooms in the [REDACTED];
3. The Student's IEP provided him with a FAPE, including special educational services and supports in the LRE; and
4. The MCPS can provide the curriculum and related services required in the IEP, including transportation.

Exhibits

I admitted the following exhibits on behalf of the Parent:

Parent Ex. 1 Therapist letter by [REDACTED] (undated and unsigned)

Parent Ex. 2 MCPS Regulation Regarding Student Transportation, revised August 22, 2019

I admitted the following exhibits on behalf of the MCPS:

Assessments, Reports, Evaluations⁸

MCPS Ex. 1 Report of School Psychologist, dated April 18, 2023, MCPS 0001-0016

MCPS Ex. 2 Educational Assessment Report, dated March 10, 2023, MCPS 0017-0026

⁷ This issue incorporates the Parent's intention to have the Student receive special education services at his home school, [REDACTED], under the IDEA.

⁸ These are the labels assigned by the MCPS, which I have adopted.

MCPS Ex. 3 Functional Behavioral Assessment, dated April 25, 2023, MCPS 0027-0035

MCPS Ex. 4 Behavioral Intervention Plan, dated April 25, 2023, MCPS 0036-0042

MCPS Ex. 5 Notice and Consent for Assessment, dated December 15, 2022, MCPS 0043-0044

Prior Written Notices (PWN)

MCPS Ex. 6 PWN dated December 15, 2022, MCPS 0045-0046

MCPS Ex. 7 PWN dated April 25, 2023, MCPS 0047-0048

MCPS Ex. 8 PWN dated June 1, 2023, MCPS 0049

MCPS Ex. 9 PWN dated December 6, 2023, MCPS 0051

MCPS Ex. 10 PWN dated March 4, 2024, MCPS 0053

MCPS Ex. 11 PWN dated June 3, 2024, MCPS 0055

Individualized Education Programs (IEP)

MCPS Ex. 12 IEP dated June 3, 2024,⁹ MCPS 0057-0113

MCPS Ex. 13 IEP dated March 4, 2024, MCPS 0114-0168

MCPS Ex. 14 IEP dated December 6, 2023, MCPS 0169-0214

MCPS Ex. 15 IEP dated June 1, 2023, MCPS 0215-0266

MCPS Ex. 16 IEP dated April 25, 2023, MCPS 0267-0311

MCPS Ex. 17 IEP dated December 15, 2022, MCPS 0312-0355

Communications

MCPS Ex. 18 IEP Meeting Notices (multiple dates), MCPS 0354-0369

MCPS Ex. 19 Letter to Parents, dated February 16, 2024, MCPS 0370

MCPS Ex. 20 Communications Log, 2022-2024, MCPS 0371-0389

MCPS Ex. 21 Email Correspondence with Parents (multiple dates), MCPS 0390-0444

⁹ In its index of exhibits, the MCPS listed the date of this IEP as June 12, 2024. MCPS Ex. 12. The actual date that the IEP team met to amend the IEP was June 3, 2024, which is the date also stated on the PWN. MCPS Ex. 11

Miscellaneous

MCPS Ex. 22 Attendance Report 2023-2024, MCPS 0445-0453

MCPS Ex. 23 Crisis Referrals and Risk Assessments, MCPS 0454-0510

MCPS Ex. 24 MCPS Response to Request for Administrative Review, dated July 18, 2024,
MCPS 0511-0512

MCPS Ex. 25 MCPS Response to Complaint, dated September 5, 2024, MCPS 0513-0515

MCPS Ex. 26 MCPS Response to Amended Complaint, dated September 20, 2024, MCPS 0516-
00517

Resumes

MCPS Ex. 27 [REDACTED], MCPS 0518-0519

MCPS Ex. 28 [REDACTED], MCPS 0520-0521

MCPS Ex. 29 [REDACTED], MCPS 0522-0524

MCPS Ex. 30 [REDACTED], MCPS 0525-0527

MCPS Ex. 31 [REDACTED], MCPS 0528-0530

MCPS Ex. 32 [REDACTED], MCPS 0531-0533

MCPS Ex. 33 [REDACTED] [Not submitted]

Testimony

The Parent testified and presented the testimony of his wife and the Student.

The MCPS presented the following witnesses:

- [REDACTED], who was accepted as an expert in general education and special education;
- [REDACTED], who was accepted as an expert in social work and counseling;
- [REDACTED], who was accepted as an expert in special education;
- [REDACTED], who was accepted as an expert in special education; and
- [REDACTED], who was 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:

Background

1. The Student is currently thirteen years of age.
2. The Student lives with his parents in Montgomery County, Maryland.
3. The Student attended [REDACTED] ([REDACTED]), an MCPS school, from kindergarten through the 5th grade.
4. For school year 2022-2023, the Student was a 6th grade student, attending [REDACTED] ([REDACTED]), an MCPS school.
5. At [REDACTED], the Student received some special education services under an IEP.
6. In February, March and April 2023, the Student submitted to psychological, educational and behavioral assessments conducted by MCPS staff.
7. The psychological assessment found the Student to have an average high intelligence quotient (IQ).
8. He was also found to exhibit symptoms of [REDACTED], [REDACTED] and [REDACTED] ([REDACTED]), and [REDACTED].
9. The Student had issues with his self-concept, anger and [REDACTED].
10. His [REDACTED] ([REDACTED]) caused him to have difficulties in maintaining satisfactory interpersonal relationships with teachers and other students.
11. The Student's education assessment determined that he was generally capable of average to higher than average achievement (save for a few exceptions).

12. The functional behavioral assessment (FBA) found that the Student had aggressive behavior as well as the potential for self-harm. These behaviors impacted the Student's and his peer's learning, as well as impacted his social relationships.

13. As a result of the FBA, a behavioral intervention plan (BIP) was created to target, prevent and respond to that behavior.

████████████████████

14. On June 1, 2023, an IEP team met at ██████████ and determined that the ██████████ at ██████████ would best meet his educational and social-emotional needs.

15. The Student was most recently¹⁰ a 7th grade student in the ██████████ located in a self-contained area of the ██████████ (██████████), a comprehensive middle school.

16. ██████████ is a setting that provides education services for ██████████ students with social-emotional needs.

17. ██████████ operates self-contained classrooms in three middle schools and three high schools in the MCPS system,

18. ██████████ is designed to help its students access the general education curriculum while attending to their social-emotional needs.

19. The curriculum used in teaching students in ██████████ is the same as that of the general education class; ██████████ special educators modify the curriculum to make it accessible to socially and ██████████ disabled students.

20. ██████████ has a low teacher to student ratio and offers flexible programming.

¹⁰The Student is not currently attending ██████████ or any MCPS school.

21. [REDACTED] also offers on-demand and scheduled counseling services as well as crisis management services.

22. [REDACTED] is staffed by special education teachers and counselors.

23. While in [REDACTED], the Student has had three IEPs written – on December 6, 2023, March 4, 2024, and the current IEP on June 3, 2024,

24. According to his current IEP, the Student's disability code is [REDACTED], and he also meets the criteria for [REDACTED].

25. According to his current IEP, the Student has also been diagnosed with [REDACTED], both [REDACTED].

26. According to his current IEP, the Student also has [REDACTED] and generalized [REDACTED] disorders.

27. As a result, the Student is considered a disabled student and receives services under an IEP.

28. According to his latest IEP, the areas affected by his disability are academic (written language expression) and behavioral (coping skills, self-management, social emotional, and social interaction skills).

29. The Student's current IEP calls for self-contained special education classes, counseling services and transportation.

30. The Student's educational program is exclusively conducted in [REDACTED] [REDACTED] at [REDACTED].

31. The Student also receives two ten-minute counseling sessions per week for his social-emotional needs, and two 45-minute group counselling sessions monthly.

32. [REDACTED] also offers the Student on-demand counseling/crisis services provided on site in the [REDACTED].

33. Students can move in and out of mainstream classes when they are ready to do so. There is a gradual preview period for students ready to access mainstream classes. Students can move between self-contained and general education classes flexibly.

Mainstreaming

34. Prior to the Student's December 6, 2023, IEP, the Student and his family expressed an interest in his attending general education classes at [REDACTED] outside of [REDACTED].

35. In his December 6, 2023, IEP, the Student was enrolled in a general education science class beginning at the end of the second marking period in January 2024.

36. The Student began attending the mainstream science class, but became overwhelmed with the work and had difficulties working with other students in groups for labs, which is part of the course curriculum,

37. The Student's attendance markedly decreased, and he was not able to attend those classes on a consistent basis.

38. When he did attend, the work was overwhelming, and he sought the assistance of [REDACTED], a special education teacher in [REDACTED]. [REDACTED] would have been the Student's science teacher had he attended classes in the [REDACTED].

39. [REDACTED] taught the Student the mainstream science curriculum, but modified the curriculum suitable to the Student's educational needs.

40. During the school year, the Student's attendance dropped dramatically, just as his [REDACTED] increased dramatically.

41. On March 4, 2024, the IEP team met and the Student was disenrolled from the mainstream science class due to his inability to maintain the course work, inability to work with other students, and his resulting [REDACTED].

42. The Student was, however, enrolled in a mainstream physical education class conducted by [REDACTED], a special education teacher who taught the adaptive physical education class in [REDACTED] and also taught the mainstream physical education class at [REDACTED].

43. The Student had attendance problems in the mainstream physical education class, as well as difficulties working in groups with other students.

44. At the June 3, 2024 IEP team meeting, the Student was re-enrolled in [REDACTED] in self-contained academic classes, with no general education courses.

Enrollment at [REDACTED] ([REDACTED])

45. The Parent and Student and his mother sought two additional general education classes for the Student to attend – math and history for the 2024-2025 academic year.

46. The IEP team rejected that programming.

47. The Parent attempted to enroll the student in the general education program at [REDACTED] for the 2024-2025 academic year.

48. [REDACTED] denied the Student enrollment, as he was currently enrolled in the Bridge Program under the current IEP of June 3, 2024.

49. In contrast to [REDACTED], there are no intensive social-emotional services at [REDACTED].

50. The Student has not attended any MCPS school in the present (2024-2025) school year.

Social-emotional services

51. By the June 3, 2024, IEP team meeting, the Student had 65 absences from school and 87 instances requiring [REDACTED] and [REDACTED].

52. On at least two occasions, the Student was referred for [REDACTED] to manage his [REDACTED].

53. On one occasion, [REDACTED], [REDACTED] social worker, referred the Student to [REDACTED] ([REDACTED]) as a result of his [REDACTED] and other self-injurious behavior.

54. The Student's mother brought the Student to [REDACTED], who sought to [REDACTED].

55. The Student's mother [REDACTED] him for treatment.

56. The Student's mother believed that [REDACTED] knew that the Student would be forced to be [REDACTED] to the hospital and did not tell her.

57. In fact, [REDACTED] told the Student's mother that [REDACTED] was a possibility, and she did not make that recommendation, as admission decisions are up to the [REDACTED].

58. As a result of that incident, the Parent and the Student and his mother no longer trust [REDACTED].

Transportation

59. Additionally, the Parent had issues with school bus transportation.

60. Initially, the Parent sought to have the MCPS allow the Student to disembark from the school bus without being met by a parent. His rationale was that the Student's mother was not always able to get to the bus stop due to her physical condition.

61. The MCPS requires students riding special education buses to have a parent or guardian meet the disembarking student.

62. The Parent was provided with a form that would allow the Student to disembark without being met by a parent or guardian.

63. The Parent refused to sign the form.

64. On another occasion, the Student was returning home on an MCPS bus from an extracurricular activity and the bus driver would only take him to his former address, as that was his address of record.

65. When there was no one to meet the Student at the bus stop at the Student's former address, the bus returned him to the school and the Student had to be picked up by his father.

66. The Parent was asked to submit certain documents to change the Student's address, but he refused to submit those documents, offering partial documents instead which were not acceptable.

67. Although the Parent was aware that [REDACTED], a [REDACTED] resource teacher, telephoned the registrar to change the Student's address, the Student never rode the extracurricular bus again.

DISCUSSION

A Applicable Law

1 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 Cnty. 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 bear the burden of proof to show that the challenged actions by the MCPS did not meet the requirements of the law.

The MCPS moved for judgment at the close of the evidence offered by the Parent. I reserved on ruling on the motion until both parties' evidence had been presented. The MCPS

bears the burden on that motion by a preponderance of the evidence. COMAR 28.02.01.21K(2)(b).

2 FAPE under the IDEA

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; COMAR 13A.05.01. The IDEA offers States federal funds to assist in educating children with disabilities. In exchange for the funds, a State pledges to comply with a number of statutory conditions. Among them, the State must provide a FAPE to all eligible children.

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. § 1400(d)(1)(A); *see also* Educ. § 8-403. 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) of the U.S.C. and the applicable federal regulations.

The Supreme Court addressed the FAPE requirement in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), holding that a FAPE is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” 458 U.S. at 201 (1982) (footnotes omitted). The Court identified a two-part inquiry to analyze whether a local education agency satisfied its obligation to provide a FAPE: first, whether there has been compliance with the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. *Id.* at 206-07.

In 2017, the Supreme Court revisited the meaning of a FAPE, holding that for an educational agency to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017). Consideration of the student's particular circumstances is key to this analysis; the Court emphasized that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.* at 1001.

The "reasonably calculated" qualification recognizes that crafting an appropriate education program requires a prospective judgment by school officials. The IDEA contemplates that this fact-intensive exercise will involve consideration not only of the expertise of school officials but also the input of the child's parents or guardians. Any review of an IEP must include the recognition that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* at 999. Directly adopting language from *Rowley*, and expressly stating that it was not making any "attempt to elaborate on what 'appropriate' progress will look like from case to case," the *Endrew F.* Court instructs that the "absence of a bright-line rule . . . should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" *Id.* (quoting *Rowley*, 458 U.S. at 206). At the same time, the *Endrew F.* Court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, "[a] reviewing court may fairly expect [school] authorities 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 circumstances." *Id.* at 1002; *see also R.F. by and through E.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237 (4th Cir. 2019).

3 Deference

School officials should be afforded deference based on their expertise, and the IDEA “vests these officials with responsibility for decisions of critical importance to the life of a disabled child.” *Endrew F.*, 137 S. Ct. at 1001. *See also Lessard v. Wilton-Lyndeborough Coop. Sch. Dist. (Lessard II)*, 592 F.3d 267, 270 (1st Cir. 2010) (“The standard of review is thus deferential to the educational authorities, who have ‘primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs.’”).

However, this respect and deference is not limitless. *See, Cnty. Sch. Bd. of Henrico Cnty. 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.”). Therefore, “the factfinder 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 also 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.” *Id.* at 1467. Such a process “would render meaningless the entire process of administrative review.” *Sch. Bd. of Prince William Cnty., Va. v. Malone*, 762 F.2d 1210, 1217 (4th Cir. 1985) (citation omitted).

4 Placement vs. Location

There is a distinction between an educational placement and the location or site of an educational program. Regarding this distinction, the court in *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003), wrote:

“Educational placement,” as used in the IDEA, means *educational program—not the particular institution where that program is implemented. E.g.,*

Sherri A.D. v. Kirby, 975 F.2d 193 (5th Cir.1992) (“educational placement” not a place, but a program of services); *Weil v. Board of Elem. & Secondary Educ.*, 931 F.2d 1069 (5th Cir.1991) (transfer of child to another school was not a change in “educational placement”).... The provision that requires the IEP to specify the location is primarily administrative; it requires the IEP to include such technical details as the projected date for the beginning of services, their anticipated frequency, and their duration. *See* 20 U.S.C. § 1414(d)(1)(A)(vi).

White, 343 F.3d at 379 (emphasis added).

The distinction between placement and location was further explained by the hearing officer in *District of Columbia Public Schools, District of Columbia State Educational Agency 2011-1217*, 112 LRP 30086 (2012), p. 4:

Although IDEA does not define the term educational placement, the meaning falls somewhere between the physical school attended by a child and the abstract goals of a child’s IEP. *See, Laster v. District of Columbia*, [349] F. Supp. 2d 60 (D.D.C. 2005).¹ Hence, “‘placement’ refers to the *overall educational program offered*, not the mere location of the program.” *Roher v. District of Columbia*, 1989 WL 330800, pp. 2-3 (D.D.C. 1989); *Knight v. District of Columbia*, 877 F.2d 1025 (D.C. Cir. 1989).

Emphasis added and footnotes omitted.

5 Least restrictive environment (LRE)

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the least restrictive environment (LRE) to achieve a FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989). At a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). Placing disabled children into regular school programs may not be appropriate for every disabled child, and 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.

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like MCPS to offer a continuum of alternative placements that meet the needs of children with disabilities. 34 C.F.R. § 300.115. The continuum must include instruction in regular classes, special classes, special schools, home instruction, hospitals, and institutions, and it must make provision for supplementary services to be provided in conjunction with regular class placement. *Id.* § 300.115(b); COMAR 13A.05.01.10B(1).

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. COMAR 13A.05.01.10A(2).

6 Amendment to the Complaint

At the Conference, the Parent expressed his intention to file an amendment to the Complaint, which he did on September 10, 2024. The MCPS reserved its right to file a motion to strike to challenge the amendment. Instead on September 20, 2024, the MCPS responded to the amendment without moving to strike it. MCPS Ex. 26.

The IDEA has regulations concerning amendments to due process complaints:

(E) Amended complaint notice

(i) In general

A party may amend its due process complaint notice only if--

- (I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or
- (II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(20 U.S.C.A. § 1415(c)(2)(e)E(i) (2022)). Emphasis added.

Because the MCPS responded to the amendment in writing and did not move to strike it, the MCPS consented to the amendment. The first few moments of the hearing addressed and confirmed the wording of the fourth issue that was added by the Parent's amendment.

B Position of the parties

The Parent contends that the Student should continue to receive special education and related services under the IDEA, but at [REDACTED], the Student's home school, with a newly crafted IEP that was less restrictive than the present one, i.e., that the Student participate in more "mainstream" classes than were made available to him in [REDACTED]. He rejected the MCPS position that by disenrolling the Student from the [REDACTED] at [REDACTED] the Student could longer receive the benefit of either the IDEA or the ADA.

The Parent also claims that the MCPS does not provide the Student with supportive services, such as transportation and counseling.

The MCPS supports the June 2024 IEP, contending that its program appropriately provided FAPE in the LRE. It contends that increasing the amount of the Student's participation in "mainstream" classes, as the Parent wants, is not appropriate. It contends that the Student has been diagnosed with [REDACTED] as well as an [REDACTED] that makes social interactions difficult, and which became apparent in larger class sizes, such as those present in mainstream classrooms. It asserts that a fully-contained program was appropriate, which could not be provided in a comprehensive middle school, such as [REDACTED], which does not have the level of services or resources to meet the needs expressed in the IEP. It further contended that the self-contained [REDACTED] at [REDACTED] was not only appropriate, but offered the LRE because it was flexible enough to allow the Student the opportunity for some mainstreaming, which unfortunately, was not successful, as he was not able to consistently access the education

offered in the mainstream classes without the social and emotional supports present in the [REDACTED].

The MCPS further contends that it provides appropriate transportation and counseling.

C Background

1, The Student's psychological, educational and behavioral assessments

In February, March and April 2023, while a sixth-grade student at [REDACTED], the Student was subjected to a battery of tests to evaluate him psychologically, educationally and behaviorally. These tests were administered the year before the Student was admitted into [REDACTED] at [REDACTED]. Although the results of these tests were not subject to rigorous examination,¹¹ these examinations present data about the Student that informs the educational decisions reached by the IEP team.

With respect to the psychological assessment performed in April 2023, the Student was found to have an average high IQ of 111. MCPS Ex. 1, p. 0004. He was also found to exhibit “behaviors and characteristics consistent with a diagnosis of an [REDACTED] across home and school settings.” MCPS Ex. 1, p. 6. The Student also demonstrated [REDACTED] symptoms and [REDACTED] as well. MCPS Ex. 1, p. 6. There were also concerns about his self-concept, anger and [REDACTED]. MCPS Ex. 1, pp. 6-7. Analyzing all of the data, the school psychologist theorized that the Student had an educational disability of [REDACTED], which may have explained why he is exhibiting an “inability to build or maintain satisfactory interpersonal relationships with peers and teachers as well as inappropriate types of behaviors or feelings under normal circumstances.” MCPS Ex. 1, p. 8.¹²

¹¹ The first mention of these tests was their reference in the MCPS closing, which invited their review. Accordingly, as there were no expert witnesses to fully present these results, I am giving them a cursory review to understand the Student's strengths and weaknesses.

¹² Neither party challenged this diagnosis.

The Education Assessment was conducted in February 2023 in the Student's 6th grade year at [REDACTED]. He was assessed as doing well, getting "A grades in math, science and social studies in grades 1, 2 and 3," but his absences increased over time: "[The Student's] absences throughout his elementary years summed up to 15.5 days in kindergarten, 40.5 days in first grade, 20.5 days in second grade, and 20.5 days in third grade and currently marks 55 days of absence in 6th grade" which was related to his [REDACTED]. MCPS Ex. 2, pp. 17. Despite these absences, he was assessed through educational testing¹³ as a very capable student:

Reading Letter-Word Identification	high average range of achievement ¹⁴
Passage Comprehension	low average range of achievement
Word Attack	very superior range of achievement
Oral Reading	superior range of achievement
Sentence Reading Fluency	average range of achievement
Reading Recall	average range of achievement
Mathematics: Applied Problems	high average range of achievement
Calculation	average range of achievement
Math Facts Fluency	high average range of achievement
Number Matrices	high average range of achievement
Written Expression: Spelling	average range of achievement
Writing Samples	average range of achievement
Sentence Writing Fluency	high average range of achievement
Spelling of Sounds	low range of achievement

The achievement scores showed that the Student is capable, but at times difficult in the testing situation, e.g., refusing to follow the instructions and doing the assignments as he wanted to do them, despite the instructions he was given, and showing [REDACTED] and disrespect to the tester, "plac[ing] himself as the victim in any problem or disagreement." MCPS Ex. 2, pp. 0024-0025. The tester did not assign a disability, as she declared it was not her role. MCPS Ex. 2, pp. 0025-0026.

¹³ The MCPS administered the Woodcock-Johnson IV - Tests of Achievement. Because no witness described its significance, I am merely reporting its raw scoring as illustrative.

¹⁴ "...achievement as compared to same-age peers."

The MCPS conducted an FBA in April 2023. MCPS Ex. 3. The following were listed as reasons for the assessment:¹⁵

- The student displays a pattern of repeated and frequent challenging behavior (e.g. aggression, biting, property destruction, elopement);
- The student's behavior has the potential for imminent, serious, physical harm to self and/or others and/or significantly interferes with the learning environment; and
- The student's behavior is significantly impacting at least one of the following: Student learning, Peer learning, Social relationships.

MCPS Ex. 3, pp. 0027-0028. Two behaviors were targeted: noncompliance and classroom disruption. To address these behaviors, a BIP was created to establish prevention strategies, teaching strategies, and response strategies were developed. MCPS Ex.3, pp. 0038-0040.

The take-away from these exhibits will be addressed below.

2 Description of [REDACTED] at [REDACTED]

[REDACTED] was accepted as an expert in special education. She is currently the behavior support teacher for MCPS [REDACTED] services. Tr.Vol. 1 (Page 151:15 to 151:18). In that capacity, she supports [REDACTED] teams in the six [REDACTED] in the MCPS system. Tr.Vol. 1 (Page 152:16 to 152:19).

Although I could summarize [REDACTED] description of [REDACTED], her testimony provided a comprehensive, organized and concise explanation of its operation, so I am quoting it in its entirety:

Q. Can you explain what [REDACTED] is?

A. Yes. [REDACTED] is a set of special education services offered within, it's like an umbrella. We have the social/emotional special ed services within Montgomery County. Some of those schools are in programs, a set of services called social/emotional special education services, then you have [REDACTED]. It's a continuum of services.

¹⁵ The sometimes lengthy context for these behaviors has been omitted, as it is not material to this decision, behavioral issues being confirmed by the witnesses' testimony.

Within the [REDACTED], we have a specific model where we are supporting student (sic) who have demonstrated significant impact, and it could be in different areas, but social and emotionally, that impact their ability to access grade level curriculum in a comprehensive setting.

So what we do within our comprehensive buildings, we have three middle school (sic), three high school (sic), we have the set of [REDACTED] that can offer support specifically for these students to help them be able to access the curriculum while getting support for the social/emotional behavioral needs that they have identified.

With our model, we have three to four teachers within the program. In this case, we have four teachers, and we have paraeducators, we have [REDACTED] who is the director, we have social worker [REDACTED], who all work together to support the students within that setting.

So, it is a low student to teacher staff ratio, and it has built in that social work component where students have the opportunity for either, including the group counseling, individual counseling, in class support, crisis support, at times communicating with outside service provider.

In addition, if you want to look at some of the areas that we focus on students typically in our program have more internalizing behaviors that are related to things like anxiety, frustration tolerance, needing support with social/emotional, peer relationships, maybe problem-solving perspective taking, so we offer a variety of ways to support those social/emotional needs through this program.

Additionally, excuse me, there is a behavior management system within the program where a student's data is being collected on a regular basis. Students get feedback on typically a biweekly basis on how they're doing towards meeting some of their goals, and that is used in helping us support how, how students are functioning, what other supports we may need to put in place to support their implementation of whatever strategies they may be working on.

Tr. Vol. 1 (Pages 153:21 to 155:22).

[REDACTED] also described the physical layout and operation of [REDACTED] at [REDACTED]. [REDACTED] is located in a suite of classrooms off the general education

hallway, which allows its staff to have small self-contained classes to support students' needs, even though it operates within a general education school building. The self-contained core academics that are taught in those classrooms, which although self-contained, follow the general education curriculum set for that grade level. This is accomplished because [REDACTED] teachers regularly meet with their general education content counterpart to understand the course work and how it is being taught, so that that they could take that information and prepare lessons for [REDACTED] students, matching the general education curriculum. Electives may be taught in the [REDACTED] suite in smaller sections to address the students' needs for closer assistance.

[REDACTED] provides group and individual counseling and provides students with "on the spot...in the moment support" with [REDACTED]; both also provide indirect assistance to the [REDACTED] staff. Tr. Vol. 1 (Pages 157:17 to 159:8)

There are three middle schools and three high schools that house [REDACTED] operations. Students are assigned based on their location and the location of their home schools. Not every MCPS school has a [REDACTED], so a student's home school may not house such a program. Tr.Vol. 1 (Page 156:13 to 156:25).

Although [REDACTED] testified that she did not have day-to-day contact with the Student, her opinion was that the program was appropriate after reviewing his IEP and his school record prior to admission. Tr.Vol. 1 (Page 161:14 to 161:19).

3 IEPs

The Student attended kindergarten through the 5th grade at [REDACTED], an MCPS school. He received some special education services at that school. For 6th grade, the Student attended [REDACTED], an MCPS middle school. He also received special education services under IEPs (MCPS Exs 6-8). On June 1, 2023, the IEP team at [REDACTED] met and determined that the Student would receive FAPE in the LRE in the [REDACTED] at [REDACTED], MCPS Ex. 8.

The Student is currently being educated under an IEP dated June 3, 2024.¹⁶ MCPS Ex. 12. In that IEP, the Student's disability code is [REDACTED], and he also meets the criteria for an [REDACTED]. (MCPS Ex. 12, p. 0058). He has also been diagnosed with [REDACTED], both [REDACTED]. He also has been diagnosed with obsessive-compulsive and generalized [REDACTED]. The areas affected by his disability are academic and behavioral, specifically coping skills, self-management, social emotional, and social interaction skills.

The current IEP calls for self-contained education in [REDACTED], except for two 45-minute sessions weekly of physical education in general education classes at [REDACTED]. MCPS Ex 12, p. 0108. The Student also receives counseling services under his IEP, including two ten-minute sessions weekly, for his social-emotional needs, and two 45-minute group counseling sessions monthly. MCPS Ex. 12, p. 0108-0109. He also has access to on-demand counseling/crisis services.

D Factual analysis

1 Inclusion

[REDACTED], who was accepted as an expert in special education, is a special education resource teacher at [REDACTED] at [REDACTED], and the coordinator of [REDACTED] at [REDACTED]. Tr.Vol. 1 (Page 181:21 to 181:24). In that capacity, she works with [REDACTED] to support students' emotional needs including crisis support. [REDACTED] evaluates and supports teachers, collaborating with [REDACTED]. She also facilitates IEP team meetings. Tr.Vol. 1 (Page 182:7 to 182:19).

In that latter capacity, [REDACTED] reviewed the Student's 6th grade program at [REDACTED], his former school. The Student's final IEP team meeting at [REDACTED] took place on June 1, 2023 (MCPS Ex. 8 and 15). Although [REDACTED] was not present at the meeting, she

¹⁶ Two IEPs at [REDACTED] preceded that one – December 6, 2023 (MCPS E. 14) and March 4, 2024 (MCPS Ex. 13). Both will be discussed below.

testified that she reviewed the Student's records from [REDACTED] as well as his June 1, 2023 IEP. Tr.Vol. 1 (Page 184:5 to 184:18). Despite the Student having some social/emotional support at [REDACTED], the IEP team determined that he needed more, which would be available to him at [REDACTED] at [REDACTED]. Tr.Vol. 1 (Pages 184:19 to 185:2).

Academically, the Student was in general education classes with non-disabled students, but with a special education teacher, or sometimes a paraeducator, present. To [REDACTED] knowledge, [REDACTED] did not have self-contained classes, although there were some resources available. The Student started off at [REDACTED] in all self-contained classes, including physical education. The Student was placed in [REDACTED] at [REDACTED] for the 2023-2024 school year.¹⁷

The Student's first IEP team meeting at [REDACTED] occurred on December 6, 2023; it was the Student's annual review. MCPS Exs.9 and 14. [REDACTED] attended the meeting and prepared the team reporter. Tr.Vol. 1 (Pages 186:24 to 187:4). The team made adjustments to the program based on the Student 1 (t's enrollment in [REDACTED], and although concerned about the negative impact that the Student's emotional needs would have on his mainstreaming success. Tr.Vol. 1 (Page 187:21 to 187:24). Despite these concerns, the IEP was amended to add the general education science course to his program, starting at the end of the second marking period. Tr.Vol. 1 (Pages 188:20 to 189:1); MCPS Ex. 9 and 14.

[REDACTED] testified that students can move in and out of general education classes at [REDACTED] when they are ready to do so. Tr.Vol. 1 (Page 159:9 to 159:19 and 160:5 to 160:13). Once a teacher recognizes that a student can take that step, there is a process allowing for a "preview" for the student to "get a feel" for the change. Tr.Vol. 1 (Pages 159:20 to 160:4). The move to mainstream classes is gradual and includes a transition period. Tr.Vol. 1 (Page 176:10 to

¹⁷ That IEP is not the subject of the Complaint.

176:19). [REDACTED] also offers the flexibility to return the student to the self-contained program if it is “appropriate” to do so. [REDACTED] concurred. Tr.Vol. 1 (Pages 195:19 to 196:3).

The Parent was not satisfied with [REDACTED]. He testified that the Complaint was filed when the Student did not want to attend [REDACTED] because he was not enrolled in two “mainstream” classes that he wanted to attend. Tr.Vol. 1 (Pages 22:22 to 23:1).¹⁸ The Complaint challenged the present IEP, seeking placement of the Student in those two general education classes.

The Student testified about his need for a change, explaining that “mainstream” classes had more students than [REDACTED] classes, which only contained five or six students. Tr.Vol. 1 (Page 42:14 to 42:14). The Student claimed that the lower number of students in the [REDACTED] classes “was taking a toll on my [REDACTED].” Tr.Vol. 1 (Page 42:15 to 42:17).

Although, in his testimony, the Parent referenced the Student’s therapist’s letter which he contends support that position, the therapist did not testify to support any opinions expressed in that letter. I cannot consider the contents of that unsigned and undated letter which does not

¹⁸ The Parent testified that a subsequent IEP team meeting on October 2, 2024, modified the earlier IEP of June 3, 2024. The Complaint, filed on July 25, 2024, challenged the IEP of June 3, 2024. The subsequent IEP of October 2, 2024, is not the subject of this hearing, and the objection to (i.e., motion to strike) the Parent’s direct testimony on the latter IEP was sustained. Tr. Vol. 1 (Pages 23:23 to 28:3).

allow an inquiry into its authenticity and contents, and specially, whether the therapist would have the expertise and basis to express any such opinion.¹⁹

In essence, the Parent contends that the Student is “bored” and “frustrated.” Tr.Vol. 1 (Page 37:17 to 37:17). He postulates that this condition resulted in more than a threefold increase in “incidents” between the first quarter (23 incidents) and the fourth quarter (87 incidents). Tr.Vol. 1 (Page 37:18 to 37:20). In that time, the student had 65 absences. MCPS Ex. 22. The Parent believes that a change in the Student’s environment, from [REDACTED] to [REDACTED], “might actually calm him down and try to get [him] more interactive with people in a constructive manner.” Tr.Vol. 1 (Page 37:21 to 37:24). The Student also endorsed mainstream physical education classes because “I don’t think they had the necessary resources to actually do a real physical ed class [in [REDACTED]], and there weren’t a lot of kids that wanted to participate in the activities, so all we did was walk and walk and walk for more than half the class, which really made me mad.” Tr.Vol. 1 (Page 43:10 to 43:23).

The MCPS witnesses take a different view of the cause of the Student’s discontent. [REDACTED], who was accepted as an expert in special education, was the Student’s English, science, social studies and resource teacher for the 2023-2024 seventh grade year. Tr.Vol. 1 (Pages 130:18 to 131:8). [REDACTED] testified that the school year “started off well. He did his work, he was thriving.” That forward progress ended, however, when “we switched one of the

¹⁹ COMAR 28.02.01.21D. addresses expert testimony in administrative hearings:

D. Expert testimony may be admitted, in the form of an opinion or otherwise, if the ALJ determines that the testimony will assist the ALJ to understand the evidence or to determine a fact in issue.

(1) In making that determination, the ALJ shall determine whether:

- (a) The individual's knowledge, skill, experience, training, or education is sufficient to qualify them as an expert;
- (b) Expert testimony on the particular subject is appropriate; and
- (c) There is a sufficient factual basis to support the testimony.

[REDACTED] unsigned and undated letter does not provide me with any of the criteria listed in the cited regulation that would be a prerequisite for me to accept the writer as an expert or consider her opinion.

mainstreams,²⁰ and he was falling behind, getting more anxious.” Tr.Vol. 1 (Page 131:9 to 131:15).

The “switch” was initially endorsed in the IEP of December 6, 2023. MCPS Ex. 14. As stated in item 5 of the PWN for that meeting, the IEP team was to consider adding a mainstream class at the end of the second marking period. MPS Ex. 9, p. 0051. █████ supported this decision “[t]o give him an opportunity to try mainstream, and...broaden his horizons, and he wanted to try something, so I kind of supported that.” Tr.Vol. 1 (Page 135:19 to 135:22).

As a result of the “opportunity,” the Student began expressing more anxiety and did not want to go to the mainstream science class, preferring to stay in █████ for science. Tr.Vol. 1 (Page 136:7 to 136:11). At the start of this transition, the Student would go to █████ classroom to “take a break and finish work” as she provided the Student with “a secure place for him to come.”²¹ She testified that this coping strategy was sanctioned in the IEP and was initially successful, but the school work was “piling up a little bit as the frustration grew.” The Student’s inclusion ended because “it got to a point where he was falling too far behind and having too many absences, [and] that it was switched to stay in my classroom because he was not attending, the attendance was getting very low.” Tr.Vol. 1 (Page 131:15 to 131:24). The Student experienced “issues with the labs working in groups” which increased his workload and caused him to complete this work one-to-one with █████ in █████ suite. Tr.Vol. 1 (Page 136:11 to 136:16). Larger class size, quick pacing and the need to keep up with the class (labs not done in class had to be done as homework), increased pressure on the Student, which contributed to his increasing distress. Tr.Vol. 1 (Pages 136:22 to 137:25 and Page 139:12 to 139:17) (“... he wasn’t coming into school, so he missed the entire, that whole science.”).

²⁰ █████ identified that mainstream class as science. Tr. Vol. 1 (Page 132:3 to 132:4)

²¹ █████ characterized this instruction as not being provided in the general education setting, but because he returned to █████ classroom at █████, it was being actually being provided in the self-contained setting. Tr. Vol. 1 (Page 196:20 to 196:21).

██████████ amplified this point in her testimony:

Q. And then take, if you can kind of describe what was going on with [the Student] then from the, that March IEP meeting through the end of the year.

A. We noticed an uptick in his ██████████, some of his agitation, and he was really struggling to make it through an entire school day. Sometimes it was not always determined what was kind of triggering, sometimes it was simply a snowball effect from missing several days of school, and [the Student] feeling very pressured and overwhelmed with missing work.

I know one referenced situation was in science class specifically there was a group project, and he was supposed to provide his own input, and because he hadn't been in school and had a challenging time with connecting with peers, that also caused a lot of ██████████, which then when he was present in school, we were working to catch him up, or he simply was so overwhelmed that we needed to respond more with some of those coping mechanisms.

Tr. Vol. 1 (Pages 190:14 to 191:6)

Although still ██████████, the Student did not display “as much” ██████████ in the self-contained ██████████ classes. Tr.Vol. 1 (Page 140:4 to 140:7).

The Student's participation in mainstream classes ended with the March 4, 2024 IEP team meeting. MCPS Exs. 10 and 13. Tr.Vol. 1 (Page 189:10 to 189:20).

Pressing his point, the Parent questioned ██████████ for an explanation that, even though the Student's science class inclusion “didn't work out,” why would the MCPS not attempt inclusion for math or history. ██████████ answered that they based their decision on the respective “environments.”

In the general education setting, the Student experienced “██████████, ██████████, or risk assessment meltdown, [and] because of his ██████████ and ██████████ around making up assignments for him, missing out on instruction, catching up.” The ██████████ that the Student experienced in missing assignments in science are no different than those in math “where there are concepts that

build upon each other daily” which poses a difficulty for a student that was missing significant time in school.

The Student “struggled with collaborative projects” which would have netted similar results if the Student inconsistently attended classes; this is what occurred in the science class. Tr.Vol. 1 (Pages 210:10 to 211:7). She opined that mainstream history class had a similar need for consistent attendance, and relied on group collaboration, which was not accomplished in the science mainstream class. Tr.Vol. 1 (Pages 210:24 to 211:7).

The Student explained that his foray into the mainstream science class in mid-year was not successful because the class was late in the day “and so, I usually had probably a [REDACTED] [be]fore, so sometimes I didn’t go.” Tr.Vol. 1 (Page 42:18 to 42:25). Nevertheless, the Student seeks more interaction than [REDACTED] affords him, and he complains that he was treated in such a way that he felt like he was being “dumbed down by the school.” Tr.Vol. 1 (Page 43:1 to 43:5).

When meeting again on June 3, 2024, the IEP team rejected a subsequent request for mainstreaming academic classes, at least for the immediate future. MCPS Ex. 11, p. 0055 and MCPS Ex. 12. The PWN for that meeting contained the following explanation:

Reasons the above listed options²² were rejected:

[The Student’s mother] requested that [the Student] increase his time in the mainstream setting for the 24-25 school year. Due to [the Student] having missed over 70 days of school, and emotional needs when present in school, the

²² The cited paragraph addressed the paragraph that preceded it:

The IEP team proposes the actions for the following reasons:

1. The IEP team proposed that [the Student] will continue to take mainstream PE and electives with support. The school team proposed that [the Student] remains self-contained for science, social studies, ELA, math, and resources. The team feels that due to [the Student’s] heightened emotional needs and chronic absences, the school team did not feel that more mainstream classes would support his needs. *[The Student’s mother] expressed that [the Student] will continue to regress if he is not provided with the classes of his choice.*

MCPS Ex. 11, p. 0055 (emphasis added).

team feels that [the Student] needed to remain in the self-contained setting. The parents disagreed with the recommendation. [The Student's mother] expressed that she was not concerned if her child were to fail his classes. [REDACTED] communicated that while the academics are important, it will support or address his social-emotional needs, where he required the support in Bridge. His attendance has also been a significant concern, as he has not consistently accessed his supports in [REDACTED] setting, [REDACTED] proposed that the needs, where he required the support [REDACTED]. His attendance has also been a significant concern, as he has not consistently accessed his supports in [REDACTED] setting, [REDACTED] proposed that the team follow up on his attendance for the following year.

MCPS Ex. 11, p. 0055. [REDACTED] endorsed that position. Tr.Vol. 1 (Page 143:11 to 143:25).

[REDACTED] explained the need for additional support available in [REDACTED] that would not be available in a general education setting:

Q. And would you have any, do you have any concerns about adding mainstream general academic classes to, to his services?

A. Yes, I have concerns.

Q. And why?

A. Because the rise in the emotional needs which then impacted the attendance, and then again, just with how he was responding to what we, he had prior to that, so from, again, he had challenges for a variety of reasons, but again, it was just to make sure at the time we could provide him the educational support curriculum in his way of needing it, and at the time we did not feel that a general education setting or more would address those academic needs because of the emotional impact being so significant at the time.

Tr. Vol. 1 (Pages 204:25 to 205:14); see also Tr.Vol. 1 (Page 206:2 to 206:21) (that the Student “be provided with the social/emotional supports, again, the flexibility that he needs in order to address that to make sure he can access the curriculum.”)

[REDACTED] concluded her testimony endorsing [REDACTED] testimony, opining that the IEP as written on June 2, 2024, provides the Student with a FAPE in the LRE. [REDACTED] concurred. Tr.Vol. 1 (Page 204:20 to 204:24 and pages 205:15 to 206:1) (“...the need for self-

contained, again addressing the emotional aspects, those services, those supports, those resources are provided and embedded throughout [REDACTED] [REDACTED].”).

As a compromise, the Student was assigned to the mainstream physical education class. Tr.Vol. 1 (Page 192:2 to 192:6). However, these witnesses’ concerns were confirmed in the mainstream physical education class.

2 Physical Education

One of the Student’s attempts at inclusion while enrolled in [REDACTED] was physical education.²³ [REDACTED], who was qualified as an expert in general and special education, taught at a number of MCPS schools before teaching at [REDACTED], where he was the full-time health education teacher in both [REDACTED], adaptive physical education teacher in [REDACTED], and a general physical education teacher at [REDACTED]. [REDACTED] was also a resource teacher in [REDACTED] of the 2023-2024 school year. Tr.Vol. 1 (Page 74:8 to 74:12). [REDACTED] “adaptive PE” which he defined as “special program within the school setting that takes the physical education curriculum and adapts it for students based on what their needs would be.” Tr.Vol. 1 (Page 75:8 to 75:14). [REDACTED] testified that he would follow the curriculum required for that grade level, but would adapt the program for the special needs of the students in that program. Tr.Vol. 1 (Page 81:8 to 81:18).

[REDACTED] testified that the Student was inquisitive. He benefitted from the [REDACTED] [REDACTED] as he was able to ask questions and work at his pace, being given extra time to work,

²³ The Parent questioned the witness’ recollection that he was the Student’s physical education teacher in the 2023-2024 7th grade school year. [REDACTED] acknowledged that he was mistaken about being the Student’s teacher for physical education in that year. Tr. Vol. 1 (Pages 89:21 to 90:12). Nevertheless, the witness did recall the Student’s attendance in the general education setting for physical education, and his recollections about the Student’s behavior in the self-contained setting was limited to health, and not physical, education:

Q. Okay. So for, just to be clear, you had him in general ed for PE, and health for, self-contained for health?

A. Yes, sir.

Tr. Vol. 1 (Page 93:5 to 93:21).

and benefitting from both the teacher and para-educators present. The low student to teacher ratio allowed the Student to have one-to-one attention at times. Tr.Vol. 1 (Page 81:19 to 81:24). Nevertheless, he recalled that when the Student was assigned to work in groups, his occasional “arguments or disagreements” with his peers would require separating the Student from the confrontation, which ██████ testified could only be done in a smaller, inclusive setting such as ██████. Tr.Vol. 1 (Pages 78:9 to 79:24).

In the March 4, 2024 IEP, the Student was placed in the general education physical education class, where he “did well at times,” but his attendance eventually declined. Also, like his behavior in the self-contained setting, the Student had disagreements serious enough to prompt his removal from the class. Tr.Vol. 1 (Pages 80:5 to 81:7). ██████ concern was that the Student was missing educational opportunities because he was not coming to class; he could not learn if he were not present. Tr.Vol. 1 (Pages 81:24 to 82:4). “The consistency in the adaptive PE setting was way better than the consistency in the general physical education setting.” Tr.Vol. 1 (Page 84:12 to 84:14). Comparing general and adaptive special physical education, “in the adaptive physical education, it is a lot easier to catch up on certain things for PE because of the continuous moving pieces of the lessons in physical education that build on each other for the ultimate goal, whatever the objectives are within that unit.” Tr.Vol. 1 (Page 95:1 to 95:14). ██████ opined that it would be easier in an adaptive physical education setting to go back to a lesson if there were an absence or a string of absences.

██████ attended the June 2024 IEP team meeting where he expressed these concerns about the Student’s sporadic attendance for mainstream physical education; he favored the adaptive physical education in the self-contained setting. MCPS Ex. 11 and 12.

3 Programming at [REDACTED] – location

An IEP team meeting followed on June 3, 2024, during which the Parent advised that the Student would not return to [REDACTED] at [REDACTED] and instead would attend his home school, [REDACTED]. The Parent was told at the IEP team meeting that if the Student disenrolled at [REDACTED] at [REDACTED] and went to his home school ([REDACTED]), he would no longer be considered a special education student and give up “up all his rights under, as a special ed student, and specifically [give] up his rights under the IDEA Act and the ADA Act.” Tr.Vol. 1 (Page 23:5 to 23:11).

The Student described his first and only day at [REDACTED] during which he “got on the bus and ...was told to go to the office. Then I was, I’m pretty sure I was given a piece of paper and then told to sign away my IEP rights, which I refused.” Tr.Vol. 1 (Page 44:6 to 44:13). The Student’s mother confirmed this interaction, further explaining what the school official said:

...I asked her what was going on. She said that they could not enter him in the system, because he was already put in the system at the other school. So just to be clear, we were at [REDACTED] [REDACTED], which is his official home school, but since he was in the system at [REDACTED] for [REDACTED] [REDACTED], they could not register him at this school at [REDACTED].

Tr. Vol. 1 (Pages 51:25 to 52:7). She further explained that [REDACTED] would not unenroll him, so he remained enrolled in that program and could not enroll in another program unless he became a “normal mainstream student” at [REDACTED] waiving his rights under the IDEA and the ADA. Tr.Vol. 1 (Page 52:8 to 52:15).

The Parent testified that he disagreed with the MCPS position, and that the Student attended [REDACTED] for one day, and has not been back to any MCPS school since. The MCPS witnesses confirmed the Student’s nonattendance.

The Parent asked [REDACTED] her opinion about leaving special education in favor of general education exclusively, her answer was strongly phrased, consistent and definitive:

Q. So if he dropped out of special ed and just goes into general education, you don't think he'll do very well?

A. My opinion is I wouldn't suggest that, no.

Q. Right.

A. He won't get the support....

Tr. Vol. 1 (Pages 147:25 to 148:5). [REDACTED] agreed, basing her opinion on a similar analysis. Tr.Vol. 1 (Page 163:6 to 163:17).²⁴ The difference in the programs is highlighted by the Student's absence since the start of the school year:

Q. So he came back tomorrow, how would you all get him caught up?

A. So we have co-teachers, paraeducators. We will focus, we have advisory periods, resource periods where he can work to get that instruction provided in the setting and the pacing that we can adjust based on his needs in the self-contained setting.

Q. And if he's that frustrated by being behind, is that going to help, or work? And if it doesn't work, will there be another plan?

A. We'd have to revisit as a team and look at what resources we have provided, whether it we need to look at interventions. For example, if we need to look at periods for plug out and pull in, whatever that may look like.

In terms of if it were to be participating in a general education setting, I don't believe that they can catch him up on the material that has been missed since the beginning of the year rather than we have staffing provided where we can again be flexible on that schedule with where he's working the classes and content that he needs.

Tr. Vol. 1 (Pages 212:8 to 213:3)

A necessary part of the inclusion discussion is the LRE analysis. [REDACTED] opined that even if the team had recommended the two academic classes in a general education setting,

²⁴ I also note that in this instance, the Parent's lack of an expert to counter this very strong and reasoned opinion, which is factually based, is fatal to his presentation.

██████████ would still be the LRE because the Student requires the services provided in ██████████ that would not be available in less restrictive settings, such as ██████████, his home school or even ██████████r without ██████████ being provided. Tr.Vol. 1 (Page 166:6 to 166:19).

██████████ lists the services that the Student requires that his home school – or even any general education setting without a ██████████ or similar program – cannot provide him: professionals with knowledge and experience to provide him with coping strategies to support him when he experiences ██████████, frustration; tolerance; emotional regulation; and “in the moment support” for stressors that can keep him on track and safe. These services are not available in a comprehensive school setting such as his home school.²⁵ Tr.Vol. 1 (Pages 164:15 to 165:24). The Parent provided no proof to the contrary.

²⁵ ██████████ provided an example of the care, attention and flexibility afforded students in ██████████ that would not be available in a fully general educational setting:

Q. Okay. You mentioned having some informal meetings prior to that in terms of trying to get [the Student] back to school. Can you describe what was going on?

A. Yes. Because we were noticing his risk assessments were early on throughout the day, we decided to adjust his schedule to at least pinpoint where he was successful, so I don't remember the exact period, but if I can just speak as an example.

For example, he was, when he was available and participating, he was making it about mid morning to about third period, so we determined the third period was a good place for him to start. And then, you know, every roughly month or few weeks, we'd get him used to that schedule and then try to push for another class or two.

It was, it really depended on the day. Some days he made it, but still needed the social/emotional support. He might not have been able to attend even his gen ed classes, and then some days he really struggled to even make it through the abbreviated schedule. He did not make it to a full day by the end of the year.

Tr. Vol. 1 (Pages 193:25 to 194:19).

██████████ strongly supported the Student's re-enrollment in ██████████, that although more restrictive than would be present in a comprehensive school setting, his present IEP would still be the LRE for this student:

Q. And so given that you think that the special education services and related services were appropriate and that ██████████ was the least restrictive environment, or is the least restrictive environment for [the Student], do you have an opinion as to whether the IEPs for [the Student] that have been developed placing him in ██████████ offer him a free, appropriate public education?

A. I do.

Q. And what is that opinion?

A. Based on the fact that he's not only getting those social/emotional services that are important for his long-term well being and the building of those strategies to support his long-term well being, that he is also being provided a curriculum for students who are diploma bound that is the general education curriculum for the grade level.

Tr. Vol. 1 (Pages 166:24 to 167:14).²⁶

4 Related services – counseling

The counseling services provided in the present IEP calls for at least two ten-minute counseling sessions weekly with the school counselor, and two forty-five-minute sessions monthly with the school social worker. MCPS Ex. 12, p. 0108.²⁷

The MCPS presented the testimony of ██████████, who was accepted as an expert in social work and counseling. ██████████ held many positions in the MCPS since 2009, the most recent of which was in the "██████████", the ██████████ and ██████████ since the school year 2023/2024." Tr.Vol. 1 (Page 100:21 to 100:23). In that capacity, ██████████ worked with the Student.

²⁶ The Parent suggested that the Student be provided "504" services at ██████████. Tr. Vol. 1 (Page 214:2 to 214:3). Such a request for services under the ADA is beyond the scope of the Complaint, the hearing, the delegation, and consequently this decision.

²⁷ The Parent described the services as "two 15-minute, one half-hour meeting every week with a counselor." Tr. Vol. 1 (Page 33:20 to 33:20). This was the counseling from the prior IEP. The difference is not material, but pointed out for accuracy.

Regarding the IEP, [REDACTED] testified that the Student required counseling services as a related service to:

...benefit...from being able to take a break, leave an environment that he felt was intolerable or frustrating, and be able to process the concern, calm down, and then decide like what coping strategies he could use to go back to class or whatever the best situation, the decision would be for him in a given situation.

Tr. Vol. 1 (Page 120:12 to 120:18). Moreover, she believed that such related services were “appropriate” and were required to provide the Student with a FAPE. Tr.Vol. 1 (Pages 122:20 to 123:4).²⁸

[REDACTED] testified that her role as the social worker at [REDACTED] required her to provide “direct services to students for individual counseling on their IEPs... social skills, psychoeducational groups to students by grades...social work case management as needed to families...[and] crisis prevention and crisis intervention services as needed to our students.” Tr.Vol. 1 (Pages 101:21 to 102:9). Although the Student’s current IEP only called for him to receive ten minutes of services twice weekly, she saw him “a lot more because of the risk assessments that I did.” Tr.Vol. 1 (Page 103:3 to 103:5); MCPS Ex. 12, p. 0108.

[REDACTED] described the risk assessment form as a tool to ascertain the level of risk to the student. Tr.Vol. 1 (Page 104:3 to 104:7). Her intervention might require a call to a student’s parents, referral to a crisis center, or referral “straight to the ER if it’s an imminent risk of safety issue with the student not being stable or able to be safe.” Tr.Vol. 1 (Page 104:8 to 104:14).

²⁸ The Parent asserted in his question to [REDACTED] that the Student “doesn’t choose to deal with the social worker” so he was seeking a “work around for that. [REDACTED] explained that there are other providers in the building who can provide those services, such as the school psychologist or a counselor from [REDACTED] who could handle crises as well. Tr. Vol. 1 (Page 214:10 to 214:22).

██████████ has initiated multiple Crisis Referrals and Risk Assessments and ██████████ Risk Assessments forms for the Student. MCPS Ex. 23. Once a student expresses “a clear statement of harm” to a teacher or coteacher “about wanting to ██████████,” the parent is then advised and a referral to the ██████████ or other health professional is made. Tr.Vol. 1 (Page 109:6 to 109:15). The MCPS completed these referrals for the Student sixteen times during the 2023-2024 school year starting in September 2023, and continuing on throughout the school year, which increased in frequency beginning in February 2024. MSDE Ex. 23 and Tr.Vol. 1 (Page 110:11 to 110:16). Those increased contacts were also tracked in the Student Contact Log. MCPS Ex. 20.

Some of those referrals originated in classroom frustration or conflicts with peers. Tr.Vol. 1 (Page 114:7 to 114:13).

The Parent seems satisfied that the Student is receiving counseling, and seeks similar services²⁹ if the Student were enrolled in ██████████. But if the Student were enrolled back at ██████████, he would not want the Student to be counseled by ██████████.

The Parent testified that he, his wife and the Student are not willing to speak with ██████████ because of a referral she made to the ██████████, which resulted in the Student being ██████████ into the hospital in lieu (or under the threat) of an ██████████ ██████████. Tr.Vol. 1 (Pages 33:25 to 34:5).

The Student’s mother testified about the MCPS referral to the ██████████ that resulted in the Student being admitted as an ██████████. The Student’s mother testified that she felt betrayed by the referral and now mistrusts ██████████, who testified that she was not aware of the Student’s mother’s feelings until the mother testified at the hearing. Tr.Vol. 1 (Page 115:13 to 115:18).

²⁹ The Parent did not describe the particular services that he sought at ██████████, and he offered no expert to address how these services would be provided.

██████████ explained that after completing several risk assessments since the beginning of the school year, she “felt that [the Student] would benefit from more, you know, a secure environment like a ██████████ where he could become more stabilized in terms of his mood, but also have that opportunity to, to have intensive therapy services.” Tr.Vol. 1 (Page 116:10 to 116:14). Although not making any specific recommendations to ██████████ (as she explained that the ██████████ staff made their own admission decisions), ██████████ testified that she did advise the family that ██████████ had both inpatient and partial hospital programs

They [██████████] run their own admissions process or intakes or whatever it is that they call it, and I know I had mentioned that in this hospital they both have inpatient as well as ██████████ program, and that they will assess whether he’s suited to one or the other.

. Tr.Vol. 1 (Page 117:18 to 117:22). ██████████ advised the ██████████ of all of the Student’s triggering events. In an addendum to her May 8, 2024 ██████████ Reporting Form, ██████████ wrote the following summary of the year’s events:

So far this school year this worker conducted 16 risk assessments due to recurrent and frequent ██████████ and/or ██████████ behaviors. The dates of these risk protocols for ██████████ are:

9/27/2023; 10/11/2023; 12/7/2023; 12/13/2023; 1/11/2024; 1/22/2024; 2/5/2024; 2/7/2024 [was a threat to other and not included in ██████████ protocol but via a Behavioral Threat Assessment process by school administrators]; 2/12/2024; 2/13/2024; 2/27/2024; 2/29/2024; 3/5/2024; 4/18/2024; 4/24/2024; 5/2/2024, and 5/8/2024. The ██████████ referral of 10/11/2024 was directly to ██████████.

[The Student] shares he also has ██████████ at other times, at home and parents have informed me that they have utilized the ██████████ on their own accord on several occasions. This was during the time they were seeking a therapist and/or were on a wait list for one. He commenced therapy in March of this year.

MCPS Ex. 23, p 0510. ██████████ made their own admission decision, and ██████████ made no recommendations.

5 Related services – transportation

The June 2023 IEP provided the Student with transportation to [REDACTED].

MCPS Ex. 15, p. 0261. The Parent asserted that the MCPS violated its transportation regulations (Parent's Ex. 2). He cited the following excerpt:

II. PROCEDURES

...

D. Student Safety

...

5. School and Parental Partnership for Student Safety³⁰

...

c) Parents/guardians are responsible for their student's safety along their walking route and/or at the bus stop.

...

(2) Parents/guardians are responsible for providing supervision along their student's walking route and/or at the bus stop that is appropriate to the student's age and maturity. Parents/guardians are responsible for supervision of students until they board the bus for school and upon exiting the vehicle after school.

...

(d) So that children are prepared for those occasions when parents/guardians may be unable to meet the bus or are late, parents/guardians are encouraged to instruct their children what they are to do in their parents/guardians' absence, as bus operators are not able to ensure that each student is met by a parent/guardian *except in those circumstances described in (c) above*.

³⁰When citing this regulation, the Parent neglected to reference subsection (5). As the Parent intended to reference the cited regulation, I included the heading for subsection (5) for context.

Parent Ex. 2. Emphasis added. The reference to “(c) above” in the last cited subsection is to the subsection immediately prior to (d):

(c) Parents/guardians are responsible for meeting prekindergarten and Head Start students on mid-day buses *and students on special education buses* at their assigned bus stops. When these students are not met, bus operators will follow established procedures to ensure student safety until students and parents/guardians can be reunited.

Emphasis added. Although the “established procedure” was not cited, the crux of the Parent’s testimony on this point was that if the Student’s mother were unable to meet the bus, the Student would be returned to the school, where the Parent would have to retrieve him.

██████████ described the event:

Q.... So how did you become first aware that this was a problem?

A. [The Student] attended his after-school program, and then later that afternoon I was notified that [his] bus took him to his old address for his after-school club, and that [the Student]... was brought back to ██████████ because again, they have to drop the student off at the address where the student resides for there to be a hand, not hand to hand drop off, but someone is there to receive the child. Because there was, it was his old address, it was a liability issue that he could not be left there.

Tr. Vol. 1 (Pages 199:24 to 200:9)

The Parent complains that, because of this incident, the Student was not being provided transportation to attend extra-curricular activities. The Student’s participation stopped because the bus driver would only drive the Student to the family’s “old address.” Because there was no one to meet the Student at that address, under the regulations, the driver “brought him back to school.” Tr.Vol. 1 (Page 30:11 to 30:15).

The Parent asserts that the Student’s IEP includes transportation, which is not satisfied by enforcing this requirement. He contends that if the Student is returned to the school, the Parent would not be able to retrieve the Student at the school until 5:00 or 6:00 p.m. He claims not to

have been given a satisfactory answer about who will “watch [the Student] and for how long” until he arrives. Tr.Vol. 1 (Page 30:3 to 30:9).

The Parent testified that although he provided the MCPS with his present address in an email between the Parent and the MCPS (MCPS Ex. 21, pp 0390-0393), the MCPS still required him to complete a change of address form and provide a copy of his lease. [REDACTED] wrote:

I did share with registrar your new address, but they will also need this document completed.

Attached you will find the form. In addition, they will need

- **a tax bill, closing statement or the lease document with the current address.**

MCPS Ex. 21, p. 0391. The Parent refused to submit his complete lease document, stating that he would provide the “section that had the address, the terms, the dates, and was more than happy to send the signature block” but nothing more, claiming (but not citing any regulation) that he was not required to do so. Tr.Vol. 1 (Pages 30:16 to 31:2).

[REDACTED] testified that the “partial piece” of the verification would not permit the registrar to update the Student’s address “based on what kind of documentation was provided.” Tr.Vol. 1 (Page 200:17 to 200:20). The Parent testified that although he chose instead to transport the Student to and from extra-curricular activities, the Student stopped going, refusing to do so.

[REDACTED] confirmed that the incident only occurred once and that the Student “on his own chose not to attend anymore, but I was willing to just work with the bus to update his address, but [he] did not want to attend after school activities after that point.” Tr.Vol. 1 (Page 201:10 to 201:17). [REDACTED] testified that she could have telephoned the registrar to correct the address to accommodate transportation to and from the after school activities, which was a separate transportation issue. Tr.Vol. 1 (Page 201:18 to 201:22). [REDACTED] testified that at the IEP team meeting, although the address was not correct in the MCPS system, she “made sure

to confirm the address that [the Parent and his wife] confirmed as their residence. Even though it's not in their system, I just made the phone call to transportation to continue it without disruption." Tr.Vol. 1 (Page 203:1 to 203:5 and page 203:9 to 203:13).

The Parent testified that, although he chose instead to transport the Student to and from extra-curricular activities, the Student stopped going, refusing to do so. He claims that this is a failure by the MCPS to provide transportation as specified in the IEP.

The Parent's stated remedy was that the Student not be required to be met at the bus stop, as his mother has a disability so that she "usually can't get up a lot of the time to go stand at the door or walk down the walkway to the bus." Tr.Vol. 1 (Page 29:6 to 29:9).³¹ [REDACTED] testified, however, that this matter was addressed, but that again the Parent did not cooperate to follow through with the solution:

...So we just expressed that there was a form that we could provide from transportation for them to sign so that [the Student] can get himself into his own home without the presence of an adult or parent or guardian.

Q. All right. And did you ever receive the form back?

A. [The Parent] declined to sign the form.³²

Tr. Vol. 1 (Page 202:10 to 202:16).

³¹ If the Student were no longer a special education student at [REDACTED], this regulation would no longer be applicable, and the Student would not have to be met by a parent or guardian at the bus stop. Tr. Vol. 1 (Pages 29:24 to 30:1). However, as a remedy, the Parents still want the Student to receive special education services at [REDACTED], but not be treated as a special education student under the cited transportation regulations, allowing him to exit the bus without the need for being met at the stop.

³² While questioning [REDACTED], the Parent explained his rationale for not returning the form:

Q. All right. And the only solution for the drop off is signing the form?

A. Yes.

Q. Which as I've indicated, I'm probably not trusting enough of MCPS to sign anything at this point.

Tr. Vol. 1 (Page 210:4 to 210:8)

E. Legal analysis

1 Motion for Judgment

At the close of the Parent's presentation and, again, before presenting its closing, the MCPS moved for judgment on the basis that the Parent failed to present a prima facie case. On this point, the MCPS argued that there was no expert testimony and the Parent's presentation was merely based on his personal opinion and recitation of facts.

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

E. Motion for Judgment.

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

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

(a) Proceed to determine the facts and to render judgment against an opposing party; or

(b) Decline to render judgment until the close of all evidence.

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

COMAR 28.02.01.12E.

A motion for judgment under COMAR 28.02.01.12E is analogous to motion for judgment under Maryland Rule 2-519. In *Driggs Corporation v. Maryland Aviation Administration*, 348 Md. 389 (1998), the Maryland Court of Appeals explained how a motion for judgment under Rule 2-519 is considered, which is instructive on how to consider a motion made under COMAR 28.02.01.12E. The *Driggs* Court explained:

In Maryland court proceedings, such a motion is now termed a motion for judgment (Md. Rule 2-519); formerly, it was known as a motion to dismiss, if made in a non-jury case, or a motion for directed verdict, if made in a jury case. The purpose of such a motion, whatever its denomination, is "to allow a party to

test the legal sufficiency of his opponent's evidence before submitting evidence of his own."

The issue traditionally presented by such a motion is a purely legal one—whether, as a matter of law, the evidence produced during A's case, viewed in a light most favorable to A, is legally sufficient to permit a trier of fact to find that the elements required to be proved by A in order to recover have been established by whatever standard of proof is applicable. To frame the legal issue, the court must accept the evidence, and all inferences fairly deducible from that evidence, in a light most favorable to A; it is not permitted to make credibility determinations, to weigh evidence that is in dispute, or to resolve conflicts in the evidence.

Id. at 402-03 (citations and footnote omitted).

The MCPS argued that the issues in this case are complex, as they generally involve determining the appropriateness of special education recommendations, review of data, and other educational issues that are "typically" presented through the testimony of expert witnesses. In the present case, the Parent did not present any expert testimony to address the operative question whether the Student's present IEP was reasonably calculated to provide him a FAPE in the LRE. The MCPS argued that what the Parent presented, through his testimony and that of the Student and his mother, was merely their "disagreement" with the appropriateness of the program and the provision of services.

The Parent opposed the motion, arguing that retaining experts would have been financially prohibitive. But as explained above, I cannot consider the undated and unsigned letter from [REDACTED], who was purported to be the Student's therapist, as expert testimony supporting the Parent's Complaint.

I offered a delay in the hearing to consider the MCPS motion for judgment. I alternatively offered to reserve my decision on the motion, deciding it as part of the decision I am presently rendering. Because the MCPS witnesses were prepared to testify on the day of the hearing, and because they might not be available later in the week if the motion were denied, the MCPS chose to go forward presenting their case in chief, allowing me to reserve on the motion.

The Parent did not oppose this decision, as allowing the MCPS to present their case would have less impact on his work schedule. Accordingly, I reserved ruling on the motion to dismiss until rendering this decision.

The decision reached in this case, however, renders the motion for judgment moot.

2 Burden of proof

One of the Parent's concerns - expressed in his opening, contained in his testimony and his questions of the witnesses, and argued in opposing the MCPS motion for judgment and in his closing – was the imbalance in assigning him the burden of proof and in his access to the data collected by and presented by the MCPS witnesses at the hearing. The Parent rejected *Schaffer* because other (unspecified) States have rejected that mechanism for assigning the burden. The Parent contended that he presented a prima facie case which was sufficient to go forward, intimating that the burden should have been on the MCPS. There is no legal support for this proposition.

Additionally, the Parent argued that assigning him the burden was unfair, as the MCPS's position was supported by predetermined data. He also claims that he was not privy to the data collected by the MCPS, but in fact, it was always there – in teacher reports, discussion with school personnel and in the documents presented at the hearing, many of which he had access to; the PWSS, MCPS Exs. 6-11; the IEPs, MCPS 12-17; communication between the Parent and the Student's mother and the school, MCPS Exs. 19-21. The Parent and his wife were aware of what occurred during the IEP team meetings (MCPS Ex. 18), the Student's attendance record (MCPS Ex. 22), and the crisis referrals (MCPS Ex. 23). Both the MCPS and the Parent monitored the Student's progression from self-contained to general education classes, and sometimes back again. The school staff's reasons for those moves were "transparent."

The Parent is very involved in the Student's education, and his commitment to communicating with the school was present throughout the record. What the Parent decided to do with that data informed his presentation.

The Parent also pushed for quantitative rather than qualitative data – wanted to measure the Student's performance under the goals numerically. Tr.Vol. 1 (Page 169:5 to 169:15). Although the Parent acknowledges that some criteria can be counted – such as absences and outbursts – his need for numerical data for complex educational decisions is misplaced.

All of the teachers and school staff who interacted with the Student or studied his file testified at the hearing with educationally sound analyses based on their training, years of experience and observations of the Student. Although collecting numerical data may support one position or another, it is the experienced experts who can gather non-numerical data in order to make a sound educational decision. That is what occurred in this instance, and the Parent's argument to shift the burden is rejected.

3 FAPE

In *Endrew F. v. Douglas County School District*, 580 U.S. 386 (2017), the Supreme Court reiterated the standards for evaluating IEPs, reiterating what it expressed in its 1982 *Rowley* decision:

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. [*Rowley*], 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, 102 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.

580 U.S. at 399 (emphasis added). The instruction offered must be “*specially designed*” to meet a child's “*unique needs*” through an “[i]ndividualized education program.” §§ 1401(29), (14). *Endrew F.*, 580 U.S. at 400.

In the present case, the June 2023 IEP team recognized that the Student was in need of social and emotional support, and that he required a flexible program with a low teacher to student ratio. MCPS Ex. 15. The IEP team also recognized the Student's need for on demand crisis intervention. It endorsed the self-contained [REDACTED] at [REDACTED]. The restrictive placement was continued by IEP teams meeting in December 2023, March 2024 and June 2024. MCPS Exs. 14, 13 and 12. However, in March 2024, the Student was placed in a mainstream science class, but without success. The Parent sought to try sending the Student to [REDACTED], his home school, for general education classes with some special education support.

The evidence showed [REDACTED] does have the appropriate resources for the Student, and the Parent did not present any evidence to oppose that. The Student's deficits – oppositional behavior, inability to work in groups, [REDACTED], and the need for social and emotional support on almost a daily basis – outweigh any favorable factors to the Student's participation in general education classes – intelligence, inquisitiveness and the desire to be in a mainstream class. Mainstreaming was attempted and unfortunately failed, through no fault of the Student or the MCPS staff. [REDACTED] provide a safe place for the Student when he was falling behind in his mainstream science class – even though enrolled in the general education science class, he received his instruction in the self-enclosed [REDACTED] setting.

Even [REDACTED], who instructed the student in general education physical education, explained that the Student did not do well in a larger group where group dynamics and attendance is important.

The Parent's chief contention appears to be that the Student should be educated in the general education setting at [REDACTED], but that elements of the IEP should still be

implemented there. Simply stated, the Parent does not want the Student at the [REDACTED] any longer.³³

Instead, the Parent wants to Student to have the chance to attend the two mainstream classes he advocates for, math and history. But the Student had already attempted mainstream science, for which he was unfortunately not ready. His absences increased, and his attendance in the general education classes declined as his participation in the [REDACTED] with [REDACTED] increased to the extent that he was no longer getting his education in general education but in the self-contained classrooms. [REDACTED] testified that the Student's participation in physical education outside [REDACTED] was marred by peer conflicts and absences which were difficult to make up. These deficits would be magnified in the math and social studies general education classes that the Parent seeks.

The Parent's philosophy – "If it worked out great. If it didn't work then [the Student] would have voluntarily gone back into the [REDACTED] classes and not complained a whole lot"³⁴ – is not the basis for an educational program that must be uniquely designed for the Student and "reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Endrew F*, 97 S.Ct.. at 1002. The Parent presented no expert opinions to support such a gamble.

The Parent declares that he and MCPS are at an impasse because he "consider[s] the academics probably more important than the social/emotional...." The Parent gives good reason for the need for academic performance – developing critical thinking skills and preparing for college and/or the work force. But as the MCPS experts explained, if the Student absents

³³ The Parent made this position apparent by attacking the transportation service, even though he could have signed two forms to correct the Student's address or benefit from [REDACTED] telephone call to the transportation department which paved the way for the Student to attend extra-curricular activities after school. He also attempted to disrupt [REDACTED] counseling obligation by refusing those services from [REDACTED]. Notwithstanding his opposition to [REDACTED], the MCPS indicated its ability to substitute other professions in her place.

³⁴ Tr. Vol. 2 (Page 233:11 to 233:14).

himself from school and is in a consistent state of turmoil (and crisis), he cannot access his education. In his testimony, the Student showed himself to be an intelligent³⁵ and sensitive individual. For that, the Student and his parents should be proud. But I could discern from the Student's testimony that he is full of self-doubt and deprecation, which could be further fueled by eschewing the emotional support presently available in [REDACTED].

The Parent did not explain how subjecting the Student to more likely failures would benefit him either academically or emotionally. The Parent's prediction that "It may be a rough ride, but it will work itself out at the end"³⁶ is not based on any facts or opinions expressed during the hearing or in any of the documents in evidence and has no design other than his sincere hope that "it will work itself out at the end."

The Parent presents no probative evidence that sending the Student into a general education setting when he is not ready, and without the intensity of emotional supports available to him in [REDACTED], could be "reasonably calculated" to be successful.

To the contrary, the MCPS witness unanimously testified that removing the Student from the self-contained classes he needed was not appropriate as inclusion was attempted with poor results, requiring even more counseling services needed than before the Student's inclusion experience. The MCPS witnesses explained in detail how the Student's enrollment at [REDACTED] was reasonably calculated to allow the Student to "make progress appropriate in light of the student's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. at 1001. Those "unique circumstances" included the Student's inability to work with other students and attend a sufficient amount of classes so he would not fall behind; and when he did fall behind, the need for catching up and being educated in the self-contained classroom with [REDACTED]. Those

³⁵ The Student's IQ of 111 rated in the "high average" range. MCS Ex. 1, p. 0004.

³⁶ Tr. Vol. 2 (Page 234:15 to 234:16)

circumstances also included the Student's need for ongoing counseling and on-demand crisis intervention that was always available to [REDACTED] students.

In many instances, the IEP teams can only rely on their prospective judgment, which cannot always be based on experience. In the present case, however, their judgment is informed by the Student's experience in participating in two mainstream classes – science and physical education. As the MCPS witnesses explained, having worked with the Student, their “prospective judgment” is based on what has already occurred.

4 “Placement”

The Parent alleged the deficiency in the Student's IEP was that he was not placed in mainstream classes and he seeks those classes in the Student's home school. In *AW v. Fairfax County School Board*, 372 F.3d 674 (4th Cir. 2004), the Fourth Circuit Court of Appeals addressed the term “educational placement” thusly:

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

Id. at 682 (footnote omitted).

The IDEA provides that special education is “a service for such children rather than a place where such children are sent.” 20 U.S.C.A. § 1400(c)(5)(C). As such, there is a distinction between “placement” and the physical location of the educational environment. In 1994, the Office of Special Education Programs (OSEP), of the U.S. Department of Education, issued an opinion letter on the subject of determining when a “change in educational placement” had

occurred. With regard to the indicator of a change in placement, the opinion letter stated, “the public agency responsible for educating the child must determine whether the proposed change would substantially or materially alter the child’s educational program.” Letter from OSEP to Joseph Fisher, Assistant Comm’r, Tenn. State Dep’t of Educ. (July 6, 1994), *published in* 21 IDELR 992, 995.

By and large, the Parent’s testimony reflected the frustrations of a concerned parent who believes that the MCPS decision to place the Student in the self-contained classrooms at [REDACTED] is not in his son’s best interest. The Parent’s opinion is that [REDACTED] is not the right program and is not the right school setting (brick and mortar) for the Student.

But there was no evidence that the intensive counselling services at [REDACTED] could be provided at [REDACTED], even if that placement were otherwise determined appropriate (which it was not). Accordingly, I find that the IEP team did choose a placement that was “reasonably calculated to enable the child to receive educational benefits” and it was not a comprehensive school. *Endrew F.* 580 U.S. at 399.

5 Least Restrictive Environment

In addition to the IDEA’s requirement that a child with a disability receive some educational benefit, the child must be placed in the “least restrictive environment” to the maximum extent appropriate, 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).

(2) Each public agency must ensure that—

- (i) 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 nondisabled; and
- (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114 (a)(2). Indeed, instructing children with disabilities with non-disabled peers is generally preferred if the student with disabilities can achieve educational benefit in the general education program. *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). Placing children with disabilities into regular school programs may not be appropriate for every disabled child and 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.

By maintaining the Student in the self-contained classrooms of [REDACTED], the June 3, 2024 IEP avoids placing the Student in general education classes that he is not yet able to pursue because of his absences, [REDACTED] caused by the workload, and his inability to work with his peers. In [REDACTED], the Student is taught the same curriculum as in general education, but in a flexible context. Even in [REDACTED], the Student had increased crises through the year, which had to be managed by a crisis specialist on staff.

[REDACTED] did not foreclose the chance for the Student’s return to general education in the future when he is ready to do so. Tr.Vol. 1 (Page 163:18 to 163:22). But for the reasons explained above, this was not the time and the IEP as written on June 3, 2024, is reasonably designed to provide the Student a FAPE in the LRE.

The nature and severity of the Student’s disability is such that education in a regular classroom cannot be achieved – at least not now.

6 Deference

The Parent conceded that [REDACTED] is “one option” to providing the Student FAPE in the LRE, but that it is not the only option. Tr.Vol. 2 Hearing - 100924, (Page 235:20 to 235:23). Courts have held that “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these

educators of the right to apply their professional judgment.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997); ., 770 F.Appx. 796, 74 IDELR; *see also, R.E.B. v. State of Hawaii, Department of Education* 125 (United States Court of Appeals, 9th Circuit (2019) Teachers needed the flexibility “to select the methodology that best fit [the student’s] needs as they arose”).

The Parent disputes the MCPS position that [REDACTED] is appropriate and the LRE for the Student. The Parent contends that all of the MCPS witnesses come to the same conclusion, which he pejoratively characterizes as “group think.” But each expert at the hearing supported their position and all came to the same conclusion based on what occurred.

I found the testimony of the expert witnesses presented by the MCPS to be clear, detailed, logical, and persuasive. Their witnesses were accepted as experts in their respective educational fields based on their education and years of experience. I found their conclusions to be sound and supported by other evidence in the record. In addition, the educators demonstrated substantial knowledge of the Student’s history and educational programming. This testimony unquestionably supported the present IEP team’s placement and service decision. They earned their deference.

7 Related services – counseling

Regarding the counseling component of the IEP, the Parent’s disagreement was having [REDACTED] provide those services. I cannot comment on whether the Parent was correct to mistrust [REDACTED] as a result of the [REDACTED] referral, but a school has the right to assign personnel to particular roles in a student’s education. Nevertheless, the personnel charged with growing the social and emotional life of a student is a sensitive position of trust. [REDACTED] testified that [REDACTED] is not the only special educator in the school that can assist the

Student. As such, the services have been proven to be required and can be performed by alternative personnel who are already in the school setting.

The Parent's plan to place the Student at [REDACTED] in general education classes and with support comparable to that available at [REDACTED] is ill-advised and unsupported. Not only has the Student shown that he is not yet ready for inclusion in a general education setting, but if it eventually created the pressure and [REDACTED] that it created with one mainstreaming class (science), there would be no sufficiently robust crisis support that is available in [REDACTED]. The MCPS is not required to have intensive programs like that at [REDACTED] available in each school throughout the system.³⁷ There are three middle school programs in the county, and [REDACTED] at [REDACTED] is the closest to the Student's home school. As such, if the Parent rejects [REDACTED] in favor of the general education program at [REDACTED], he choose to do this without the required supports, which the MCPS witnesses have demonstrated to be antithetical to an appropriate educational choice, risking further emotional turmoil that has been shown to become apparent in a pressured atmosphere with a greater number of peers that the Student cannot yet handle successfully..

8 Related services - transportation

The MCPS contends that the transportation issues raised by the Parent are not IDEA issues. Nevertheless, I will consider this issue because the Parent argues that transportation is a related service in the IEP and he "think[s] the whole transportation thing will come to a screeching end within a week. And then we'll be back to square one."³⁸

But there are two components to the transportation issue. One involves the commute to and from school (as opposed to extracurricular activities). Other than the inability of the

³⁷ *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991). ("...in light of the finite resources available for the education of handicapped children, a school system is not required to duplicate a small, resource-intensive program at each neighborhood school.").

³⁸

Student's mother meeting him at the bus stop, there was little evidence that the system broke down. Section II, subparagraph D.5.c.2. requires a parent or guardian of a special education student to meet the bus when the student exits the bus at the end of the school day. ■■■

■■■■ solution was to have the Parent sign a form that would bypass that requirement and allow the Student to enter the home without a parent or guardian being present. This proposed solution was presented to him, but the Parent refused to sign the form. The Parent's expressed but unexplained distrust effectively scuttled the solution that the Parent sought.

The transportation to and from extracurricular activities suffered the same fate. The Parent refused to provide the required documents to change his address. Regardless of those requirements (which the Parent defies), ■■■■ bypassed the requirement by phoning the transportation office herself to change the address. Still, the Parent transported the Student, who, although able to use the bus for extracurricular activities, stopped going despite the MCPS's efforts to ease transportation.³⁹ As he refused the solution to this issue, the Parent has no claim.⁴⁰

9 Curricula

The MCPS witnesses testified that they use the same curriculum as the mainstream general education teacher, even collaborating with them in lesson plans. The difference is the amount of work required of students who need the assignments modified. The proof or equal curricula is that the Student was going back and forth between the mainstream science class and ■■■■, who was teaching the Student the same lessons, but in a flexible manner in ■■■

³⁹ Although not in evidence, in his closing argument, the Parent proffered a reasonable explanation why the Student stopped attending extra-curricular activities: "I went and picked him up several times and he got tired of feeling different because daddy picked him up and stopped going." Tr. Vol. 2 (Page 235:15 to 235:17). This situation could have been remedied if the Parent provided the information the school found necessary. Alternatively, there is no evidence that transportation for those activities was used after Ms. Anderson telephoned in the correction, allowing transportation to bring the Student to his current address.

██████████. The Parent did not present any proof to challenge this testimony; his mere conjecture does not support his burden.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that

1. The Student's current IEP, providing for his education in the self-contained classrooms in ██████████ at ██████████, with scheduled and on-demand social-emotional counseling and crisis support, is reasonably calculated to provide the Student with a FAPE in the LRE;
2. The Parent's proposal to have the Student attend general education classes at ██████████ without the present social emotional supports available at ██████████, and not at ██████████, is not reasonably calculated to provide FAPE in the LRE;
3. The Student's IEP is reasonably calculated to provide the required social and emotional counselling services and supports; and
4. The MCPS can provide the curriculum and Student transportation services provided in the IEP.

ORDER

I **ORDER** that the Parent's complaint is DENIED and DISMISSED.

November 8, 2024
Date Decision Issued

Marc Nachman
Administrative Law Judge

MN/ja
#214915

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) (Supp. 2024). 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]
Bethesda, MD 20817

John Delaney, Esquire
Montgomery County Public Schools

[REDACTED]
[REDACTED]
[REDACTED]

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██████████,
PARENT,
ON BEHALF OF ██████████,
STUDENT
v.
MONTGOMERY COUNTY PUBLIC
SCHOOLS

BEFORE MARC NACHMAN,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-MONT-OT-24-20142

FILE EXHIBIT LIST

I admitted the following exhibits on behalf of the Parents:

Parent Ex. 1 Therapist letter by ██████████ (undated and unsigned)

Parent Ex. 2 MCPS Regulation Regarding Student Transportation, revised August 22, 2019

I admitted the following exhibits on behalf of MCPS:

Assessments, Reports, Evaluations¹

MCPS Ex. 1 Report of School Psychologist, dated April 18, 2023, MCPS 0001-0016

MCPS Ex. 2 Educational Assessment Report, dated March 10, 2023, MCPS 0017-0026

MCPS Ex. 3 Functional Behavioral Assessment, dated April 25, 2023, MCPS 0027-0035

MCPS Ex. 4 Behavioral Intervention Plan, dated April 25, 2023, MCPS 0036-0042

MCPS Ex. 5 Notice and Consent for Assessment, dated December 15, 2022, MCPS 0043-0044

Prior Written Notices (PWN)

MCPS Ex. 6 PWN dated December 15, 2022, MCPS 0045-0046

MCPS Ex. 7 PWN dated April 25, 2023, MCPS 0047-0048

MCPS Ex. 8 PWN dated June 1, 2023, MCPS 0049

¹ These are the labels assigned by the MCPS, which I have adopted.

MCPS Ex. 9 PWN dated December 6, 2023, MCPS 0051

MCPS Ex. 10 PWN dated March 4, 2024, MCPS 0053

MCPS Ex. 11 PWN dated June 3, 2024, MCPS 0055

Individualized Education Programs (IEP)

MCPS Ex. 12 IEP dated June 3, 2024,² MCPS 0057-0113

MCPS Ex. 13 IEP dated March 4, 2024, MCPS 0114-0168

MCPS Ex. 14 IEP dated December 6, 2023, MCPS 0169-0214

MCPS Ex. 15 IEP dated June 1, 2023, MCPS 0215-0266

MCPS Ex. 16 IEP dated April 25, 2023, MCPS 0267-0311

MCPS Ex. 17 IEP dated December 15, 2022, MCPS 0312-0355

Communications

MCPS Ex. 18 IEP Meeting Notices (multiple dates), MCPS 0354-0369

MCPS Ex. 19 Letter to Parents, dated February 16, 2024, MCPS 0370

MCPS Ex. 20 Communications Log, 2022-2024, MCPS 0371-0389

MCPS Ex. 21 Email Correspondence with Parents (multiple dates), MCPS 0390-0444

Miscellaneous

MCPS Ex. 22 Attendance Report 2023-2024, MCPS 0445-0453

MCPS Ex. 23 Crisis Referrals and Risk Assessments, MCPS 0454-0510

MCPS Ex. 24 MCPS Response to Request for Administrative Review, dated July 18, 2024.

MCPS 0511-0512

MCPS Ex. 25 MCPS Response to Complaint, dated September 5, 2024, MCPS 0513-0515

² In its index of exhibits, the MCPS listed the date of this IEP as June 12, 2024. MCPS Ex. 12. The actual date that the IEP team met to amend the IEP was June 3, 2024, which is the date also stated on the PWN. MCPS Ex. 11

MCPS Ex. 26 MCPS Response to Amended Complaint, dated September 20, 2024, MCPS 0516-00517

Resumes

MCPS Ex. 27 [REDACTED], MCPS 0518-0519

MCPS Ex. 28 [REDACTED], MCPS 0520-0521

MCPS Ex. 29 [REDACTED], MCPS 0522-0524

MCPS Ex. 30 [REDACTED], MCPS 0525-0527

MCPS Ex. 31 [REDACTED], MCPS 0528-0530

MCPS Ex. 32 [REDACTED], MCPS 0531-0533

MCPS Ex. 33 [REDACTED] [Not submitted]