

XXXX XXXX,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

*** BEFORE STEVEN V. ADLER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-MONT-OT-16-15740**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On May 19, 2016, XXXX XXXX (Parent), acting on behalf of XXXX XXXX (Student), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to review the placement of the Student for the 2016-2017 school year by the Montgomery County Public Schools (MCPS), under the Individuals with Disabilities Education Act (IDEA). 20 United States Code Annotated (U.S.C.A.) § 1415(f)(1)(A) (2010).

On June 7, 2016, the parties participated in mediation, which did not resolve the Complaint, and subsequently advised the OAH of this result. 20 U.S.C.A. § 1415(e) (2010); 34 Code of Federal Regulations (C.F.R.) §§ 300.506 and .510(a)(3)(ii) (2015); Code of Maryland Regulations (COMAR) 13A.05.01.15B(1); COMAR 13A.05.01.15C(11)(d)(ii). Therefore, on June 7, 2016, I conducted a telephone pre-hearing conference (Conference) at the OAH in Hunt Valley, Maryland to schedule the due process hearing. 20 U.S.C.A. § 1415(f)(1)(B)(ii) (2010); 34 C.F.R. § 300.510(b) (2015); COMAR 13A.05.01.15C(11)(e) and (f)(iii). Emily B. Rachlin,

Esquire, represented the MCPS. The Parent, acting on behalf of the Student, represented herself. At the Conference, I advised the parties of the time requirements for issuing a decision. 34 C.F.R. § 300.510(b)(2) (2015); COMAR 13A.05.01.15C(14)(b). The Parent expressed her desire that the prescribed timeframes be strictly adhered to in the instant matter. Therefore, in accordance with the controlling law and regulations, I advised the parties at the Conference that the Decision would be issued on or before July 22, 2016, which is forty-five days after June 7, 2016, the date the parties participated in mediation and notified the OAH that they did not resolve the Complaint. Md. Code Ann., Educ. § 8-413(h) (2014); 34 C.F.R. § 300.515(a) (2015).

At the Conference, the parties agreed that the hearing on the merits would span three days and be held on June 28, 29 and July 1, 2016, commencing at 10 a.m., at the offices of the Board of Education of Montgomery County in Rockville, Maryland.

Accordingly, I held the hearing on the above dates, as scheduled. Zvi D. Greismann, Esquire, of the Office of General Counsel, represented the MCPS. The Parent, acting on behalf of the Student, represented herself. In-person Spanish language interpretation services were provided for the Parent throughout the entirety of the proceeding.

At the close of the Parent's case-in-chief, the MCPS made a Motion for Judgment (Motion), which I reserved ruling upon, and heard the merits of the MCPS's case-in-chief.

Given my decision in this matter, it is unnecessary to rule on the Motion.¹

¹ See Sections IV and V of the Discussion, below; *see also Mathis v. Hargrove*, 166 Md. App. 286, 306 (2005) (“The trial court is not only vested with the discretion to reserve ruling or *forego* ruling on the motion [for judgment] entirely, but that discretion exists even where a party meets all the technical requirements for summary judgment.”) (Emphasis added); COMAR 28.02.01.12E(3) (“A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.”).

The Parent submitted a written closing argument that was read into the record at the hearing and subsequently translated from Spanish to English by the OAH. MCPS elected to make an oral closing argument only.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2015); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and COMAR 13A.05.01.15C.

Procedure is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUE

The issue is whether the Student's 2016-2017 placement in the Autism Program (Program) at [School 1] (High School) is reasonably calculated to provide the Student with a free, appropriate, public education (FAPE).

SUMMARY OF THE EVIDENCE

Exhibits

Unless otherwise provided, I admitted the following exhibits on behalf of the Parent:

Student² Ex. 1 – Digital Video Disc of the Student, undated

Student Ex. 2 – Student's Service Coordinator's Monthly Contact Sheet, ranging in dates from February 1 through 29, 2016 (offered for admission in its entirety and all but pp. 6-7 excluded)

Student Ex. 3 – Student's Speech and Language Evaluation, dated February 10, 2015

Student Ex. 4 – Joint Letter from XXXX XXXX, Ph.D., and XXXX XXXX, MS, CCC-SLP, addressed to Whom it May Concern, dated February 12, 2016

² These exhibits were initially marked as Parent Exhibits and renamed Student Exhibits at the hearing.

- Student Ex. 5 – Letter from XXXX XXXX addressed to Whom it May Concern, dated June 6, 2016
- Student Ex. 6 – Re-evaluation Report of School Psychologist, dated March 3 and 7, 2016
- Student Ex. 7 – Student’s Individualized Education Program (IEP), dated April 17, 2015
- Student Ex. 8 – Student’s 2016-2017 IEP, dated May 5, 2016
- Student Ex. 9 – Behavioral and Educational Support Team Consultation Note, dated June 5, 2015
- Student Ex. 10 – Student’s Behavioral Intervention Plan (BIP), dated October 26, 2015
- Student Ex. 11 – Student’s Bilingual Multidisciplinary Evaluation, undated

Unless otherwise provided, I admitted the following exhibits on behalf of MCPS:

- MCPS Ex. 1 – Student’s 2016-2017 IEP, dated May 5, 2016 (marked for identification but not offered)³
- MCPS Ex. 2 – Student’s work samples, undated
- MCPS Ex. 3 – Student’s Educational Assessment Report, dated April 5, 2016
- MCPS Ex. 4 – Re-evaluation Report of School Psychologist, dated March 3 and 7, 2016
- MCPS Ex. 5 – Re-evaluation Report of School Psychologist, dated April 5, 2016
- MCPS Ex. 6 – Re-assessment Report of Speech-Language Pathologist, dated April 4, 2016
- MCPS Ex. 7 – Student’s Functional Behavioral Assessment (FBA), dated October 23, 2015, and BIP, dated October 26, 2015
- MCPS Ex. 8 – Student’s Behavioral Data Summary, ranging in dates from September 2015 to April 2016
- MCPS Ex. 9 – Behavioral and Educational Support Team Consultation Note, dated June 5, 2015
- MCPS Ex. 10 – Alt-MSA Appendix C: IEP Team Decision-Making Process Eligibility Tool, dated April 17, 2015
- MCPS Ex. 11 – Chart of Student’s Exhibited Classroom Behaviors, 2015-2016 school year

³ Retained for the record pursuant to COMAR 28.02.01.22C.

MCPS Ex. 12 – Student’s 2015-2016 IEP, dated April 17, 2015

MCPS Ex. 13 – Résumé of XXXX XXXX, undated

MCPS Ex. 14 – Résumé of XXXX XXXX, undated (marked for identification but not offered)⁴

MCPS Ex. 15 – Résumé of XXXX XXXX, undated

MCPS Ex. 16 – Résumé of XXXX XXXX, undated

There were no other exhibits offered or admitted.

Testimony

The Parent testified and presented the following expert and fact witnesses:

- XXXX XXXX, B.A, M.A., Ph.D, admitted as an expert in clinical psychology with a specialization in developmental disabilities, after *voir dire* and a satisfactory examination of Dr. XXXX’s credentials, training, knowledge, and experience.
- XXXX XXXX, B.A. (secondary education), B.A (Spanish), admitted as an expert in individual intensive support services, after *voir dire* and a satisfactory examination of Ms. XXXX’s credentials, training, knowledge, and experience.
- XXXX XXXX (fact witness only)
- XXXX XXXX (fact witness only)

The MCPS presented the following expert and fact witnesses:

- XXXX XXXX, B.A., M.E.Q. (Master’s Equivalency), admitted as an expert in special education with an emphasis in teaching students with intellectual disabilities, autism, and other health impairments, upon stipulation of the parties.
- XXXX XXXX, B.S., M.Ed., admitted as an expert in special education and educating students with autism, upon stipulation of the parties.

⁴ *Id.*

- XXXX XXXX, B.S., M.Ed., admitted as an expert in special education and educating students with autism, upon stipulation of the parties.

FINDINGS OF FACT

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

1. At all times relevant to the proceeding, the Student has been diagnosed with autism, enrolled in MCPS, and receiving special education services as a disabled person. Student Ex. 8; MCPS Exs. 3 and 12.
2. The Student is pursuing a Maryland High School Certificate of Program Completion (Certificate) rather than a Maryland High School Diploma. Student Ex. 8 at 23.
3. The Student is participating in a six-year program and is expected to earn his Certificate and exit MCPS on June 12, 2023. *Id.*
4. From sixth through eighth grade, the Student attended the XXXX (XXXX) program at [School 2] (Middle School), an educational institution of the MCPS. MCPS Ex. 3 at 2.
5. The Student has made only minimal progress at the Middle School and has not been successful in the XXXX program. Student Ex. 8 at 8, 42-43.
6. The Student's disability affects his abilities to read, write, comprehend, compute, communicate, problem solve, and remain on-task. *Id.* at 23.
7. During academic instruction, the Student has difficulty remaining in his seat and completing tasks without repeated prompting. *Id.* at 5.
8. The Student can construct simple sentences, particularly with the assistance of sentence starters or pictures. *Id.*

9. The Student's performance in math is at the second grade level and his written language is at the first grade level. The Student oral language is below grade level and his reading abilities are at a kindergarten to first grade level. In the arena of life skills and behavior, the Student's level of performance is below age expectancy. *Id.* at 5-7.

10. The Student frequently engages in off-task behavior, loud vocalizations, inappropriate verbal sounds, aggressively clapping his hands in close proximity to others, and inappropriate touching of others. Student Ex. 8 at 5, 7; MCPS Exs. 3 and 4; Test. of XXXX.

11. The Student's behaviors impair his abilities to complete academic assignments. *Id.*

12. In all academic arenas as well as in vocational training, community activities, and personal management, the Student needs fading prompting and fading adult support in order to balance his off-task behaviors with his need to develop the abilities to function independently. *Id.* at 25-34; Testimony (Test.) of XXXX.

13. MCPS has developed and implemented a Functional Behavioral Assessment (FBA) and a Behavioral Intervention Plan (BIP) to address the Student's behavioral concerns. MCPS Ex. 7; Student Ex. 8 at 10.

14. The FBA and BIP have been effective at reducing the frequency of some the Student's inappropriate and off-task behavior; however, the behaviors remain appreciably impactful on his abilities to complete academic assignments. Student Ex. 8 at 7; MCPS Exs. 3, 4, 8, 9, and 11; Test. of XXXX.

15. At the time of the hearing, the Student was fourteen years old and a rising ninth grader. As such, the Student's location and placement could not remain the same since the Middle School only serves students in sixth through eighth grade.

16. Once every three years a comprehensive re-determination evaluation of the Student takes place. This entails the commission and review of evaluations from the Student's teachers, school psychologist, and speech-language pathologist. MCPS Ex. 3-12; Test. of XXXX.

17. In April 2016, the Student's IEP team met⁵ (April IEP meeting) to discuss forming the Student's IEP for the next school year. The Parent was present and participated in the April IEP meeting through the services of a Spanish language interpreter.

18. At the April IEP meeting, which lasted approximately one and a half hours, all triennial evaluations and reports of the Student were discussed and reviewed. MCPS Exs. 3-12.

19. At the April IEP meeting, the IEP team discussed the merits of a placement for the Student for the 2016-2017 school year in general education, in the XXXX program at the High School, in the Program at the High School, and at [School 3] ([School 3]).

20. The High School is a public high school serving the needs of both general and special education students residing in Montgomery County. [School 3] is a public high school serving only special education students residing in Montgomery County.

21. The XXXX programs, at both the Middle School and the High School, are similar in class size and method of instructional delivery. Class sizes are up to thirteen students with one teacher and one or two para-educators. Instruction in the XXXX programs is in large groups of approximately half the class at a time. Test. of XXXX.

22. The Student needs a highly structured environment, a small class size with reduced distractions, and a low student to teacher ratio in order to remain on-task. Student Ex. 8 at 8, 13; MCPS Ex. 3 at 9; Test. of XXXX; Test. of XXXX; Test. of XXXX; Test. of XXXX.

⁵ The Student's IEP team consists of XXXX XXXX (Chair); Ms. XXXX (Case Manager and Special Educator), XXXX XXXX (Principal); XXXX XXXX (General Educator), and XXXX XXXX (Speech-Language Pathologist). Student Ex. 8 at 1.

23. The Student is most able to remain on-task when instructional material is delivered individually or in small groups of two to three. *Id.*; Test. of XXXX.

24. The Program at the High School has six students per class, one teacher and at least two full-time para-educators. Many classes also have additional staffing as the students need. The instructional content is delivered individually or in dyads or triads, meaning either one student or no more than two or three students at a time. Test. of XXXX; Test. of XXXX.

25. The Program at the High School employs the tools and principles of Applied Behavioral Analysis (ABA), such as errorless teaching, expressive and receptive language, and the discrete trial method of instruction. *Id.*

26. The Student benefits from the use of technology, such as screen readers, computers and calculators, to aid in his completion of academic tasks. Student Ex. 8 at 9, 11-12, 23, and 42; MCPS Ex. 3 at 6, 9.

27. There are three computers in each classroom in the Program as well as other technology, including a Promethean keyboard (a large television- size keyboard that projects images from a computer screen), an alpha smart (an independent keyboard with a small screen), and an iPad. Test. of XXXX.

28. Although needing a self-contained program for academic instruction, the Student benefits from socialization with non-disabled peers. Student Ex. 8 at 38.

29. Students in the Program at the High School have opportunities to socialize with their non-disabled peers at lunch and by participating in corollary sports (*i.e.*, non-competitive sporting activities with participants equal part special and general education students), adaptive classes (general education courses modified and taught by general education teachers), and traditional general education courses. Test. of XXXX; Test. of XXXX.

30. The Student needs vocational training with fading adult support in order to be able to transition to life after exiting MCPS. Student Ex. 8 at 28; Test. of XXXX; Test. of XXXX; Test. of XXXX.

31. As a part of their educational curriculum in the Program at the High School, students are provided vocational training at firms such as XXXX, [Hotel], [Gym], and in the administrative offices of the MCPS. Test. of XXXX; Test. of XXXX.

32. The focus of the Program at the High School is to implement the goals and objectives of each student's IEP and to provide each student with academic enrichment and vocational and community exposure and training. *Id.*

33. On May 5, 2016, the IEP team (May IEP meeting), with the Parent present,⁶ reconvened and after reviewing the goals and objectives of the IEP, selected the Program at the High School as the Student's placement for the 2016-2017 school year. Student Ex. 8; Test. of Parent; Test. of XXXX.

DISCUSSION

I

Governing Law

The identification, assessment, and placement of students in special education is governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010); 34 C.F.R. Part 300 (2015); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 and Supp. 2015); and COMAR 13A.05.01.

“Congress enacted IDEA in 1970 to ensure that all children with disabilities are provided a free

⁶ Spanish language interpretation services were provided for the Parent at the May IEP meeting. The Parent testified that the interpreter lacked the skills necessary to execute his office and so the Parent was unable to understand what was taking place. Ms. XXXX testified that the Parent shared these concerns with her after the meeting. The Parent stated that she did not advise any of the IEP Team members of her inability to understand what was being discussed at the meeting but did advise Ms. XXXX after the meeting was over. Upon cross-examination, however, the Parent stated that she was able to say all that she wished to say at the May IEP meeting. I am satisfied that the Parent's admission establishes that she participated in the May IEP meeting.

appropriate public education which emphasizes special education and related services designed to meet their unique needs and to assure that the rights of such children and their parents or guardians are protected.” *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (internal footnote, quotations, citations and brackets omitted).

The IDEA requires “that all children with disabilities have available to them a free appropriate education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]” 20 U.S.C.A. § 1400(d)(1)(A) (2010). The IDEA provides federal assistance to state and local education agencies for the education of disabled students, provided that states comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. §§ 1412-1414 (2010); 34 C.F.R. § 300.2 (2015); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

Maryland’s special education law is a creature of statute and is found at Md. Code Ann., Educ., § 8-401 *et seq.* (2014 and Supp. 2015). The Maryland regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

In part, the IDEA defines a FAPE as:

special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge;...[and] (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9) (2010).

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

Implicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the

handicapped child... We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 200-01. See also 34 C.F.R. § 300.17 (2015).⁷

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

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

20 U.S.C.A. § 1414(d)(3) (2010).

The IEP depicts the student’s current educational performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically designed instruction and services that will assist the student in meeting those objectives, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A) (2010).

Importantly, providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or nonpublic, that money can buy” or “all services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Md.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. 176). A student is not

⁷ A FAPE is defined in COMAR 13A.05.01.03B as follows:

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

entitled to the ideal. Instead, a FAPE entitles a student to an IEP that is “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 177.

“Educational benefit” requires that “the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200 (emphasis added). *See also MM ex rel. DM v. School Dist. of Greenville Cnty.*, 303 F.3d 523, 526 (4th Cir. 2002) (citing *Rowley*, 458 U.S. 176); *see also A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004). The IEP is not required to “maximize” educational benefit. It does not require the “ideal.” *A.B.*, 354 F.3d at 330. Its goals are more “modest.” *Id.* The IDEA requires an IEP to afford a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt*, 908 F.2d 1200, 1207 (4th Cir. 1990). It is sufficient that the benefit conferred by the IEP be “meaningful,” not merely “trivial” or “*de minimus*.” *Polk v. Cent. Susquehanna*, 853 F.2d 171, 182 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *see also Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005); *Bd. of Educ. of Frederick Cnty. v. Summers*, 325 F. Supp.2d 565, 576 (D. Md. 2004).

Further, while a school system must offer a program that provides some educational benefit, the choice of the particular educational methodology employed is left to the school system. *Rowley*, 458 U.S. at 208. “Ultimately, [IDEA] mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of that education to state and local school officials.” *Barnett v. Fairfax Cnty.*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).⁸

Although the law of special education has undergone a significant evolution since the case was decided, *Rowley* remains the standard for determining whether a child is being provided

⁸ As discussed below, the IDEA is not intended to deprive educators of the right to apply their “professional judgment.” *Hartmann v. Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

a FAPE under the IDEA. In *Rowley*, the Supreme Court set forth a two-part analysis to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA. Second, it must be determined whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive an educational benefit. *Rowley*, 458 U.S. at 207; *see also A.B.*, 354 F.3d at 319.

Once an IEP is shown to be procedurally proper, the judgment of the school system's educators regarding the child's placement should be questioned only with great reluctance by the reviewing authority. *Tice*, 908 F.2d at 1207. There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit, as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *A.B.*, 354 F.3d at 325-29; *M.M.*, 303 F.3d at 532-533. 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*, 118 F.3d at 1001; *see also Tice*, 908 F.2d at 1207.

Additionally, to the maximum extent possible, the IDEA seeks to mainstream, or include, the child into regular public schools; at a minimum, the statute calls for school systems to place children in the "least restrictive environment" (LRE) consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A) (2010). The nature of the LRE necessarily differs for each child but could range from a regular public school to a residential school where 24-hour supervision is provided. COMAR 13A.05.01.10B. Although the IDEA requires specialized and individualized instruction for a learning- or educationally-disabled child, it also mandates that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions

or other care facilities,” must be “educated with children who are not disabled[.]” 20 U.S.C.A. § 1412(a)(5)(A) (2010). It follows that the State and federal regulations that have been promulgated to implement the requirements of the IDEA also require such inclusion. 34 C.F.R. §§ 300.114 through 300.120 (2015); COMAR 13A.05.01.10A(1). The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. 20 U.S.C.A. § 1412(a)(5)(A) (2010); *Honig v. Doe*, 484 U.S. 305 (1988); *Rowley*, 458 U.S. at 181 n.4; *Hartmann*, 118 F.3d at 1001.

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Md.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. 176). Instead, a FAPE entitles a Student to an IEP that is *reasonably calculated* to enable that Student to receive educational benefit.

II

Burden of Proof

As the moving party, the Student bears the burden of proof, by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so,” when all of the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002); *see also Mathis*, 166 Md. App. at 310 n.5 (2005).

For the reasons set forth below, I find the Student has not met his burden.

III

A. Argument and Testimony of the Parent and her Witnesses

The Parent argued that the Program at the High School is a more restrictive environment than the Student enjoyed in the XXXX program at the Middle School and, as such, it is not the most appropriate placement for the Student. After visiting the Program at the High School, in May 2016, the Parent expressed grave concerns that there was a marked want of computer-based technology, that the students were chiefly non-verbal, and that students were engaged in non-academic tasks during an academic period. For these reasons, the Parent posited the Student would not receive a FAPE in the Program at the High School. Finally, the Parent explained that the Student had suffered a traumatic event in approximately March 2014 that deeply affected him and has occasioned certain behavioral problems at school that the MCPS has failed to properly and humanely address. In support of her position, the Parent offered her factual testimony and the expert testimony of Dr. XXXX and Ms. XXXX.

Dr. XXXX is a clinical psychologist at the Center for Autism Spectrum Disorders at XXXX Medical Center in XXXX and holds licensure from the State of Maryland the District of Columbia. Dr. XXXX has been treating the Student since approximately the fall of 2013 and on a weekly basis for at least the past six months. Dr. XXXX participated in the May IEP meeting by telephone. Dr. XXXX explained, both at the May IEP meeting and at the hearing that, in her opinion, the Student needs a program typified by a low student to teacher ratio, with intensive speech-language services, adaptive skills, and governed by principles of ABA. Dr. XXXX assessed that the Student needs one-to-one support in order to ensure he does not go off-task but also offered that a ratio of five students to three adults could ultimately be sufficient. Initially, however, Dr. XXXX posited that one-to-one support would be likely to be necessary. Finally,

Dr. XXXX opined that it is of vital importance that any placement selected for the Student focus on the transition to independent functioning in a non-school environment and tie academic accomplishments to vocational skills.

Dr. XXXX has not observed the Program at the High School herself, and initially assessed the Program to seem to be appropriate for the Student if the Program was as described by Ms. XXXX and the MCPS educators at the May IEP meeting. At the hearing, Dr. XXXX explained that if the Program at the High School was as described by the Parent, then she too would have grave concerns as to the sufficiency of opportunities for the Student's academic enrichment in such a milieu.

Ms. XXXX holds two undergraduate degrees, in secondary education and Spanish, and is licensed by the MSDE as a teacher of secondary education. Ms. XXXX provides services for the Student through a non-profit organization called XXXX (XXXX) where she has been employed for more than nine years. In addition to the Student, Ms. XXXX has worked with four other children who have autism through the auspices of XXXX. Ms. XXXX has worked with the Student for the past three years, assisting him with completing his homework and other tasks, and developing his social skills in the community through outings to locales such as restaurants and the library. Ms. XXXX generally spends an average of ten to twenty-five hours a week with the Student. Ms. XXXX did not observe the Program at the High School herself but has discussed with the Parent her experience when she visited the Program.

Ms. XXXX offered her opinion that the Student is capable of doing a great deal but needs one-to-one support to ensure he avoids distraction and completes tasks. Although opining that one-to-one support would be best for the Student, Ms. XXXX also acknowledged that it is important to develop the Student's abilities to independently complete tasks. To this end, Ms.

XXXX noted that when they are together in the community, the Student can complete some tasks independently entirely on his own, such as selecting and filling the refreshing beverage of his choice from a soda fountain in a restaurant, and some tasks with prompting, such as the need to present his library card to the librarian before he can borrow a volume. *See* Student Ex. 1.

The Parent's final witnesses, Ms. XXXX and Ms. XXXX, testified that while they too had not observed the Program at the High School, they know the Student and each are parents of children with autism. As such, they explained they have a certain understanding of the Student's educational needs and the, at times, complex relationship with the school system that can ensue.

B. Argument and Testimony of the MCPS and its Witnesses

The MCPS argued that the Parent's assessments of the Program at the High School are inaccurate and misapprehended. The MCPS contended that the selection of the Student's placement in the Program at the High School was a thoughtful deliberative process that considered all reports and evaluations of the Student and the opinions and recommendations of the IEP team, the Parent, and Dr. XXXX. Freely acknowledging that the Program at the High School is more restrictive than the XXXX program, the MCPS nevertheless contended that due to the Student's need for a highly structured self-contained program with a low student to teacher ratio and behavioral supports, it is the LRE in which the Student can receive an appropriate education. The MCPS maintained that its decision to place the Student in the Program at the High School for the 2016-2017 school year comports with the IDEA and is reasonably calculated to provide a FAPE in the LRE. For these reasons, the MCPS argued its decision should not be disturbed and the Parent's Complaint must fail. In support of its position, the MCPS offered the expert and factual testimony of Ms. XXXX, Ms. XXXX, and Ms. XXXX.

Ms. XXXX holds an undergraduate degree in special education and has completed a master's equivalency and advanced certification in the same field. MCPS Ex. 16. Ms. XXXX has taught in the XXXX program at the Middle School for the past thirteen years. *Id.* From the date the Student began attending the Middle School through the end of 2015-2016 school year, Ms. XXXX was the Student's primary special education teacher, and has been his case manager since he began attending the Middle School. Ms. XXXX offered her opinion that the Student does not require one-to-one support at all times and functions best academically in a structured setting with a low student to staff ratio. Ms. XXXX explained that the opinions of Dr. XXXX and the Parent were considered, as well as the results of all reports and evaluations of the Student, in forming the IEP and selecting the Program at the High School as the Student's placement for the 2016-2017 school year. Ms. XXXX stated that she is familiar with the XXXX program at the High School and feels it lacks the structured environment of the Program, which the Student would benefit from due to his frequent off-task behavior, just as described by Ms. XXXX. Student Ex. 8 at 27; MCPS Ex. 3 at 9.

Ms. XXXX expounded at length as to how she arrived at her opinion that the Program at the High School is an appropriate placement for the Student after considering and rejecting the XXXX program at the High School and [School 3]. Ms. XXXX stated that the chief factors driving her opinion are that the Program at the High School would permit the Student access to non-disabled peers, a lower student to staff ratio, fewer transitions (rotations for classes), the ability to engage in allied sports (with non-disabled peers), and that Ms. XXXX's former student teacher is a teacher in the program so she feels assured that the Student would receive only the best academic and vocational advancement and tools to address any deleterious behavioral manifestations.

Although acknowledging that the decision to select the Student's placement was made before the Parent was able to observe the Program, Ms. XXXX underscored that the Parent's views were considered throughout the placement selection process, in both the April and May IEP team meetings, offering by way of example that the Parent was strongly opposed to [School 3], which the IEP team considered but did not select.

Ms. XXXX holds an undergraduate degree in special education and has completed a master's degree and advanced certification in the same field. MCPS Ex. 13. Ms. XXXX began her career with the MCPS as a special education teacher and has served as a county-wide program specialist for special education for the past twenty-two years. *Id.* Ms. XXXX explained that the MCPS has four high schools with Programs, which are uniformly equivalent and are predicated upon the principals of ABA, which she described in detail as errorless teaching, expressive and receptive language, and the discrete trial method of instruction. Ms. XXXX stated that the decision to select the location of where a student will participate in a particular Program is based solely on its geographic proximity to the Student. Ms. XXXX stated that community involvement and vocational training are significant components of the Programs as are opportunities for interaction with non-disabled peers at lunch, in classes, and through programs such as Best Buddies, which pairs disabled and non-disabled students for their mutual enrichment.

Ms. XXXX testified that she observed the Student at the Middle School during the week of April 18, 2016, for a period of approximately one hour and fifteen minutes, reviewed his then IEP, and had lengthy discussions with Ms. XXXX about his abilities and needs. Based upon this objective and subjective data, Ms. XXXX concluded that the Student needs more instructional support to stay on task than is provided in the XXXX program at the High School and

recommended the Program at the High School as being an appropriate program to meet the Student's needs.

Ms. XXXX holds an undergraduate degree in special education and has completed a master's degree in the same field. MCPS Ex. 15. Ms. XXXX serves as the chief special educator in the Program at the High School and MCPS's [School 4] and as a program specialist and coordinator of the extended school year program for students with autism spectrum disorder for the MCPS. *Id.* Ms. XXXX testified at length regarding the principles of ABA used in the Program at the High School, that instructional content is delivered individually to students, or in dyads or triads, the presence and use of technology in the classroom, and the emphasis placed on vocational training and community exposure for each student. Ms. XXXX averred that she reviewed the Student's then current and proposed IEPs, progress notes, and all available assessments and presented her recommendations at the May IEP meeting. At both the May IEP meeting and at the hearing, Ms. XXXX opined that the Program at the High School is likely to provide the Student with an appropriate education to meet the goals of his IEP.

IV

Analysis and Evaluation of the Evidence—

Student's Placement in the Program at the High School

The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412 (2010). Courts have defined the word "appropriate" to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Courts have directed that I must assess the evidence to determine whether the Student's IEP and placement were reasonably calculated to enable the Student to receive an appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the Student to benefit educationally from that instruction. *Rowley*, 458 U.S. at 200-03.

The Parent and the MCPS agree that the IEP team convened in April and May 2016 to discuss and decide the Student's placement for the 2016-2017 school year and the Parent was present and participated in both meetings. The Parent and the MCPS agree that they both had significant concerns about the suitability of the XXXX program at the High School and [School 3] as appropriate placements for the Student for similar reasons, and that the IEP team ultimately rejected both options for these reasons. Both parties concluded that the XXXX program was not appropriate as it lacked the structure and low student to teacher ratio the Student needs, amongst other reasons, and that [School 3] was not appropriate because it was too restrictive an environment as it did not permit socialization with non-disabled peers, amongst other reasons.

The Parent was unable to identify a placement she feels would be the LRE and provide the Student a FAPE, but stated that it must be one that fosters, encourages, and develops his great capabilities, addresses his behavioral needs, and provides one-to-one support. The MCPS argued that the Program at the High School meets precisely those specifications. I am persuaded the MCPS is correct.

Although not special educators, I found both Dr. XXXX and Ms. XXXX to be credible witnesses with good factual foundations to offer opinions regarding the Student's functionality generally and his academic needs specifically. However, I am not persuaded that either Dr. XXXX or Ms. XXXX, although the latter is an MCPS educator herself, are better positioned than the MCPS witnesses who work in, and with, the Program at issue to understand the nature and nuances of the Program itself and its reasonable likelihood of providing the Student with a

FAPE. Moreover, with the exception of psychological support for the traumatic event that befell the Student that Dr. XXXX recommended be a part of the Student's placement considerations, the entirety of the elements Dr. XXXX and Ms. XXXX identified as being vital to the Student's educational and life skills development are present in the Program at the High School.

Although Dr. XXXX and Ms. XXXX initially opined that the Student needed one-to-one support at all times both mollified this position in the course of their, respective, testimony by offering that one-on-one support may be necessary initially or at certain specific times. Ms. XXXX also acknowledged that the development of independent functionality can be stymied by continuous one-to-one support. I have also considered that when the Program at the High School was discussed at the May IEP meeting, Dr. XXXX's assessment was that it seemed like it could be appropriate for the Student based upon the way it was described by MCPS educators. Dr. XXXX only revised her position after considering the description of the Program provided by the Parent, which for the reasons discussed both above and below, I discount. Finally, I find that the nature of instructional delivery as explained by Ms. XXXX and Ms. XXXX and the ability to provide one-to-one support as needed in the Program at the High School speaks globally to the concerns raised by Dr. XXXX and Ms. XXXX.

With the exception of the Parent, there was no witness at the hearing with greater involvement with the Student than Ms. XXXX. Ms. XXXX has served as the Student's primary educator and case manager for the past three years and has been intimately involved in evaluating and assessing the Student's skills, abilities, and needs throughout that time. Student Ex. 8; MCPS Ex. 2, 3, and 7-12. I find Ms. XXXX is uniquely well-positioned to offer factual and opinion testimony about the Student's educational abilities and needs. It is also readily apparent from observing her testimony that Ms. XXXX cares deeply for the Student and is

heavily vested in his success.⁹ I found Ms. XXXX's factual testimony about the XXXX program and its inability to meet the Student's needs credible and her opinions regarding the appropriateness of the Program at the High School thoughtful, persuasive, and compelling. For these reasons, I give Ms. XXXX's opinions great weight.

I do not doubt that the Parent is genuinely and profoundly troubled by what she observed when she visited the Program at the High School in May 2016. However, as discussed above, I am persuaded that the MCPS's witnesses, particularly Ms. XXXX and Ms. XXXX, as the chief special educator in that Program and the county-wide program specialist for that Program, respectively, are better positioned than the Parent, who observed the Program only once for a relatively brief period or her witnesses, who have not observed the Program themselves, to offer factual and opinion testimony about the nature of the Program.

I have also considered that the Parent visited the Program at the High School on one occasion only, for approximately twenty minutes, and her exchanges with Ms. XXXX were filtered through another; that is, an interpreter, and much may have been lost in interpretation. I find this accounts for some, if not all, of the Parent's misconceptions of what she was observing and the inferences she drew from those observations. For example, the Parent expressed grave concern at observing a student engaged in an arts and crafts-like project during what the Parent understood to be math class. At the hearing, Ms. XXXX explained that in the Program at the High School, there is not a rigid adherence to class periods and subject matter demarcation. Ms. XXXX expounded upon this point further and with detailed and vivid recollection testified as to what each student was engaged in at the time of the Parent's visit in May 2016. Directly speaking to the Parent's concerns about the apparent want of academic instruction in an academic subject matter, Ms. XXXX described the precise and particular academic, vocational,

⁹ This observation is equally true of Dr. XXXX, Ms. XXXX, and, of course, the Parent.

and behavioral adjustment tasks that each student was engaged in at the time of the Parent's May 2016 visit. Ms. XXXX explained that the student in question was engaged in a coloring project not because that is the method by which math is taught at the Program at the High School, but because the student in question was receiving a reward for having already successfully completed his required academic assignment and elected to engage in craft-making because it brought him contentment and joy. I find Ms. XXXX's account credible and find it provides an alternate innocuous account of events from that which was inferred by the Parent, and I accept it as fact, on the record before me.

Speaking to the Parent's concern that the students she observed during her May 2016 visit to the Program at the High School were entirely non-verbal, Ms. XXXX stated that students in the Program at the High School span those that speak only in single words or short sentences to those who employ scripted speech to students who speak in full, unscripted sentences. I found Ms. XXXX to be a credible witness with an expansive and detailed knowledge of the Program at the High School and, as such, give her opinions great weight and credit her factual testimony.

Much like the above example, I am persuaded that, on the record before me, Ms. XXXX successfully refuted all the Parents concerns about the Program at the High School in a dispositive manner. Ms. XXXX testified credibly regarding the numbers of computers and other technology available in the classroom in the Program at the High School, the individual, dyad, or triad delivery of instruction, the use of principles culled from ABA, the presence of educators, para-educators, and related support staff in the classroom, and the academic and vocational aspects of the program. Ms. XXXX explained that the focus of the Program at the High School is to use students' academic skills and abilities to prepare them for independent living and life after exiting the public school system. I find Ms. XXXX's opinion that the Program at the High

School will provide the Student with a FAPE and will meet the goals of his IEP to be more compelling and persuasive than the Parent's opinion because I find that Ms. XXXX has a deeper factual foundation for her assessment of the Program than the Parent and that Ms. XXXX has extensive expertise educating students with disabilities, which places her in a superior position to offer opinions in that arena.

Much like Ms. XXXX, Ms. XXXX presented as a knowledgeable and credible witness intimately familiar with the workings of the Program at the High School and, generally, within the MCPS. Ms. XXXX described the use of ABA principles in the Program at the High School and the focus on community activity and vocational training, and I credit her testimony on these matters. Speaking directly to the Parent's, Dr. XXXX's, and Ms. XXXX's concerns regarding the Student's need for one-to-one support, Ms. XXXX explained that initially it was likely the Student would need one-to-one support to familiarize himself with the physical layout of the High School, and in certain academic tasks, and this would be provided in the Program at the High School. Speaking directly to the points raised by Ms. XXXX, Ms. XXXX stated that the Program starts off with more adult support and gradually steps it down, as needed, in order to develop independent skills and functioning in each student.

After having observed the Student in the XXXX program at the Middle School and having reviewed his most recent IEP, Ms. XXXX opined that the IEP goals are designed to meet the Student's needs and the Program at the High School meets the Student's needs, as identified in his IEP. I find Ms. XXXX's opinion to accord with the credible evidence of record and to be well supported, factually, and so I give it great weight.

Although I have no doubt that the Parent is tremendously and genuinely upset by what she perceives as the callous indifference of the MCPS to the harm the Student suffered in the

traumatic event he experienced outside school, the MCPS, through the credible, unrefuted testimony of Ms. XXXX, established that it has been responsive to the Student's needs, fashioning and implementing an FBA and BIP to address the behavioral manifestations of the traumatic event the Student suffered. MCPS Ex. 7, 9. The Parent perceived this as the MCPS punishing the Student for what befell him. The MCPS contended that it is obliged to address the behavioral concerns no matter from what quarter they arise or the Student's absolute lack of blameworthiness for their origins, and they did so here through the development and implementation of an FBA and BIP. Here, too, I am persuaded the MCPS is correct.

The Parent did not take exception to any other aspect of the IEP goals and objectives other than the placement decision. For the reasons discussed both above and below, I am not persuaded the Parent has established her case to prove that the MCPS's placement decision is not reasonably calculated to provide the Student a FAPE in the LRE.

I am persuaded that Ms. XXXX and Ms. XXXX are better positioned than the Parent and her witnesses to assess the nature of the Program at the High School. I find Ms. XXXX and Ms. XXXX's description of the Program to be credible, competent, and determinative evidence. I find Ms. XXXX's assessment of the Student's needs to be credible and established fact on the record before me. I find the Student's needs for a highly structured academic environment, with a small class size, a low student to teacher ratio, individual instructional delivery, or in groups of two or three, vocational training, community exposure, and interaction with non-disabled peers are met by the Program. Due to the Student's significant behavioral problems and frequency with which he goes off-task, I find the Program is the LRE in which the Student can receive a FAPE. Therefore, I find the Student's IEP in general, and placement in the Program in

particular, is reasonably calculated to confer an educational benefit on the Student, within the meaning of *Rowley*.

V

Conclusion

To comply with the IDEA, an IEP must, amongst other things, allow a disabled child to advance toward measurable annual academic and functional goals that meet the needs resulting from the child's disability or disabilities, by providing appropriate special education and related services, supplementary aids, program modifications, supports, and accommodations.

20 U.S.C.A. § 1414(d)(1)(A)(i)(II), (IV), (VI) (2010). The child's disability or disabilities and resulting needs are determined by using a variety of relevant functional, developmental, and academic information, including assessments and other evaluative materials. 20 U.S.C.A. § 1414(a)(1)(C)(i), (b)(2)-(3) (2010).

In weighing the evidence, I am particularly mindful that the body of controlling case law from the United States (U.S.) Supreme Court and the U.S. Court of Appeals makes plain that great deference is owed to the professional opinion of the educators who have worked with the Student, that the MCPS is not required to make its placement decisions based on the Parent's desires, no matter how heartfelt, nor must the MCPS select the most appropriate placement as the Parent contends, but instead, merely an appropriate placement reasonably calculated to provide a FAPE. The credible evidence of record establishes that the Program at the High School is just that. *See Rowley*, 458 U.S. at 203 ("Insofar as a State is required to provide a [disabled] child with a free appropriate public education, we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.") (Internal quotation omitted); *A.B.*, 354 F.3d at 328 (4th Cir.

2004) (“IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent.”); *MM*, 303 F.3d at 526 (4th Cir. 2002) (“[A] FAPE must be reasonably calculated to confer *some* educational benefit on a disabled child.”) (Emphasis added) (internal citation omitted); *Tice*, 908 F.2d at 1207 (“[O]nce a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals...we must defer to educators’ decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides.”) (Internal citation and quotation omitted).

I am extremely sympathetic to the Parent for whom it is patently obvious to even the most casual of observers loves the Student in a way that is immeasurable and cannot be quantified in an administrative proceeding, and wishes to ensure the Student receives only the best education available. I have only tremendous respect for the Parent and her truly laudable objectives, but this is not the mandate of the IDEA. *MM*, 303 F.3d at 526-27 (“The IDEA does not...require a school district to provide a disabled child with the best possible education. And once a FAPE is offered, the school district need not offer additional educational services. That is, while a state must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child...the Act does not require the furnishing of every special service necessary to maximize each handicapped child’s potential.”) (Internal citations and quotations omitted).

No matter how emotionally compelling the Parent’s case may be, I am bound to apply the law as it is written and interpreted by precedential courts. Applying the law to the facts, I find the Parent has failed to meet her burden of proof to show that the MCPS’s decision to place the Student in the Program at the High School is not reasonably calculated to provide a FAPE in the

LRE, or otherwise violates the mandates of the IDEA. For these reasons, I must deny the Complaint and uphold the MCPS's placement decision.

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law, that the decision of the Montgomery County Public Schools to place the Student in the Autism Program at [School 1] for the 2016-2017 school year is reasonably calculated to provide a free, appropriate public education in the least restrictive environment, and does not violate the Individuals with Disabilities Education Act. 20 U.S.C.A. § 1400(d)(1)(A) (2010); 20 U.S.C.A. § 1412(a)(5)(A) (2010); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004); *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 526-27 (4th Cir. 2002); *Tice v. Botetourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990).

ORDER

I **ORDER** that the Due Process Complaint filed by the Parent is **DENIED**. I further **ORDER** that the decision of the Montgomery County Public Schools to place the Student in the Autism Program at [School 1] for the 2016-2017 school year is **AFFIRMED**.

July 21, 2016
Date Decision Mailed

Steven V. Adler
Administrative Law Judge

SVA/da

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2014). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

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