

QA

[REDACTED]

STUDENT

v.

HOWARD COUNTY

PUBLIC SCHOOLS

* BEFORE JAMES T. MURRAY,
* ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-HOWD-OT-18-32751

* * * * *

DECISION

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STATEMENT OF THE CASE

On October 17, 2018, [REDACTED] on behalf of [REDACTED] (Student), filed a Due Process Complaint with Howard County Public Schools (HCPS) requesting an evidentiary hearing to determine whether the HCPS violated the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).¹ The HCPS transmitted the request to the Office of Administrative Hearings (OAH) on October 30, 2018.

A case resolution session was scheduled and, on October 31, 2018, the parties agreed in writing that no resolution could be reached. On November 8, 2018, I conducted a telephone pre-hearing conference (Conference) from the OAH in Hunt Valley, Maryland. Vaun Cleveland,

¹ "U.S.C.A." is the abbreviation for the United States Code Annotated. The U.S.C.A. is published by Thomson Reuters and contains the general and permanent laws of the United States, as classified in the official United States Code. Unless there is a change in the substantive law that was in effect at the time of the events at issue in this case, all citations herein to the U.S.C.A. are to the 2017 volume.

Esquire² represented the Student.³ Andrew Nussbaum, Esquire, Nussbaum Law, LLC represented the HCPS.

On November 9, 2018, I issued a Pre-Hearing Conference Report and Order (Order), which set forth the matters discussed during the Conference. By agreement of the parties, the hearing was scheduled for three days: November 29 and 30, 2018, and December 3, 2018 at the offices of the HCPS in Columbia, Maryland.

I advised the parties of the time requirements for issuing a decision, which I set forth in my Order. The applicable regulations state the following, in pertinent part:

- (a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c)—
 - (1) A final decision is reached in the hearing; and
 - (2) A copy of the decision is mailed to each of the parties.

34 C.F.R. § 300.515 (2017).⁴ The regulations in section 300.510 explain the resolution process as follows, in pertinent part:

(b) *Resolution period.*

(1) If the [local educational agency] has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period.

....

(c) *Adjustments to 30-day resolution period.* The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

- (1) Both parties agree in writing to waive the resolution meeting;
- (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;

² Mr. Cleveland entered his appearance on behalf of the Student on November 7, 2018.

³ Hereinafter, the term "Student" in this decision refers to the Student himself and the Parent.

⁴ The federal regulations that apply to the IDEA are found in Title 34 of the Code of Federal Regulations (C.F.R.). Unless there is a change in the substantive law that was in effect at the time of the events at issue in this case, all citations herein to the C.F.R. are to the 2017 volume.

(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

Id. § 300.510(c).

Therefore, in accordance with these regulations, the decision ordinarily would be issued on or before December 15, 2018, which is forty-five days after October 31, 2018, the day after the parties indicated in writing that no resolution was possible and notified the OAH that they did not resolve their dispute.

I may extend the time for issuance of the decision if either party requests on the record a specific extension of time beyond the forty-five day timeframe. *Id.* § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2018).⁵ The parties requested that I issue the decision thirty days after the close of the record. I found sufficient cause for granting the request and stated in my Order that the final decision would be issued thirty days after the close of the record, which would have been Wednesday, January 2, 2019. However, after the presentation of all evidence at the hearing, the parties requested that I hold the record open so that they could submit written closing arguments. Each side submitted a written closing argument. I received the Petitioner's Response to Closing, in rebuttal to the HCPS closing argument from the Parent on December 14, 2018 and the record closed that date. Accordingly, my decision is due no later than Sunday, January 13, 2019.

The hearing convened on November 29, 2018 as scheduled and concluded the same date. The Student was represented by Mr. Cleveland. Mr. Nussbaum represented the HCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Md. Code Ann. Educ. § 8-413(e)(1); and Code of Maryland Regulations (COMAR) 13A.05.01.15C. Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE)

⁵ Unless there is a change in the substantive law that was in effect at the time of the events at issue in this case, all citations to the Education Article of the Maryland Annotated Code are to the 2018 Replacement Volume.

procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

Did the HCPS deny the Student a Free and Appropriate Public Education (FAPE) by:

1. Placing the Student in a non-diploma track curriculum for the 2016-2017 school year (SY) and 2017-2018 SY; and
2. Placing the Student in a diploma track curriculum for the 2018-2019 SY without adequate special education and related services designed to meet the Student's unique needs?
3. If the Student was denied FAPE, what relief is appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Student:

1. IEP, 1/12/15
2. IEP, 2/12/16
3. IEP, 12/11/17
4. IEP, 2/23/18
5. Educational Assessment Report, 5/25/06
6. Educational Assessment Report, 3/30/09
7. Educational Assessment Report, 7/11/12
8. Educational Assessment Report, 10/27/14
9. Educational Assessment Report, 12/5/17
10. Student Progress Reports, various dates
11. Annual Goal Progress Report, 2/12/14
12. Annual Goal Progress Report, 3/02/16
13. Annual Goal Progress Report, 2/28/17
14. Annual Goal Progress Report, 2/23/18
15. IEP Team Meeting Report, 5/18/17
16. IEP Team Meeting Report, 6/12/17
17. IEP Team Meeting Report, 6/2/17
18. IEP Team Meeting Report, 5/18/17
19. IEP Team Meeting Report, 4/18/18
20. IEP Team Meeting Report, 10/4/18
21. Psychological Report, 2/1/05
22. Psychological Report, 11/26/14
23. Student work samples, various dates
24. [REDACTED] curriculum vitae (CV)

I also included the Student's written closing argument and response to closing memo into the record.

I admitted the following exhibits on behalf of the HCPS:

1. IEP Team Meeting Report, 10/9/14
2. IEP Team Meeting Report, 1/12/15
3. IEP Team Meeting Report, 3/11/15
4. IEP Team Meeting Report, 3/2/16
5. IEP Team Meeting Report, 10/4/16
6. IEP Team Meeting Report, 11/30/16
7. IEP Team Meeting Report, 12/22/16
8. IEP Team Meeting Report, 2/28/17
9. IEP Team Meeting Report, 3/1/17
10. IEP Team Meeting Report, 3/27/17
11. IEP Team Meeting Report, 4/24/17
12. IEP Team Meeting Report, 5/18/17
13. IEP Team Meeting Report, 6/2/17
14. Review of Independent Assessment – SLP, 6/2/17
15. IEP Team Meeting Report, 6/12/17
16. IEP Team Meeting Report, 10/5/17
17. Parental Consent Form, 10/5/17
18. IEP Team Meeting Report, 12/11/17
19. IEP Team Meeting Report, 2/23/18
20. IEP Team Meeting Report, 2/26/18
21. IEP Team Meeting Report, 3/14/18
22. IEP Team Meeting Report, 4/4/18
23. IEP Team Meeting Report, 4/12/18
24. Parental Consent Form, 4/12/18
25. IEP Team Meeting Report, 4/18/18
26. IEP Team Meeting Report, 10/4/18
27. IEP, 3/2/16
28. IEP, 2/28/17
29. IEP, 10/5/17
30. IEP, 12/11/17
31. IEP, 2/23/18
32. Educational Assessment Report, 10/27/14
33. Academic Assessment Report, 9/23/15
34. Educational Assessment Report, 12/5/17
35. Psychological Assessment Report, 6/4/12
36. Psychological Assessment Report, 11/26/14
37. Speech-Language Assessment Report, 12/1/14
38. Speech-Language Evaluation, 1/24/17
39. Occupational Therapy Assessment Report, 5/30/17
40. Progress Reports, 6/14/17
41. Progress Reports, 11/21/17
42. Progress Reports, 6/14/18

43. Work Samples, various dates
44. Letter from Maryland State Department of Education re: Complaint, 5/8/17
45. Letter from Maryland State Department of Education re: Complaint, 7/19/18
46. [REDACTED] CV
47. [REDACTED] CV
48. [REDACTED] CV
49. [REDACTED] CV
50. [REDACTED] CV
51. [REDACTED] CV
52. [REDACTED] CV
53. [REDACTED] CV
54. [REDACTED] CV
55. [REDACTED] CV
56. [REDACTED] CV
57. [REDACTED] CV
58. [REDACTED] CV
59. [REDACTED] CV

I also included the HCPS' written closing argument into the record.

There were no other exhibits offered or admitted.

Testimony

The Parent testified and presented the testimony of [REDACTED] who was accepted as an expert in special education placement and evaluation.

HCPS presented the following witnesses:

- [REDACTED] HCPS Speech Language Pathologist, accepted as an expert in special education
- [REDACTED] HCPS School Psychologist, accepted as an expert in school psychology
- [REDACTED] HCPS School Psychologist, accepted as an expert in school psychology
- [REDACTED] HCPS Special Education Reacher, accepted as an expert in special education

FINDINGS OF FACT⁶

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

1. The Student was born in [REDACTED] 1998. He is currently in the twelfth grade at [REDACTED] High School ([REDACTED]). The Student will not be eligible for special education services after the 2018-19 SY because he will be too old.
2. The Student is a student with a disability and is in need of special education and related services. He has had an Individualized Education Program (IEP) throughout his entire time in school. (Stipulation of the parties, Test. Parent)
3. The Student's current primary diagnosis is autism, however, his cognitive ability is significantly impaired. The Student's full range intelligence quotient (IQ) is approximately sixty-seven and he functions in the extreme low range (first percentile) of students his age. (Parent's Ex. (PE) 2, 21, 22)⁷ He also exhibits severe expressive and receptive language disorders. (PE 2)
4. The Student was first identified as a student with a disability at age four when he was diagnosed with a speech/language impairment by the multidisciplinary team at a Prince George's County Schools' learning center. (PE 5)
5. Initially, the Student received special education services under the category other health impairment due to diagnoses of attention deficit hyperactivity disorder (ADHD) and autism (Pervasive Developmental Disorder). Psychological testing affirmed these diagnoses when the Student was six years old. (PE 21)

⁶ The parties stipulated that the Student is a student with a disability, has autism, and is in need of special education and related services. Those stipulations are incorporated into the Findings of Fact.

⁷ The Parent's exhibits are marked "Petitioner," which I have shortened to "PE."

6. As a result of his diagnoses, the Parent moved to Howard County because she believed the public schools in Howard County are better than the public schools in Prince George's County. The Student has been enrolled in HCPS since that time. (Test. Parent)

7. The Student began attending [REDACTED] Elementary School ([REDACTED] ES), a Howard County Public School where he received special education services in reading, math writing, speech, and occupational therapy (OT). (PE 5)

8. In May 2006, while in the second grade at [REDACTED] ES, the Student was given an educational assessment using the Woodcock-Johnson Test of Achievement (WJ) III and found to be functioning generally from the very low to average range for children of his age. Compared to educational testing performed in January 2005, the Student's scores represented a slight drop in all test scores that relate to reading and written language, but increased in other areas. (PE 5)

9. In March 2009, while in the fifth grade at [REDACTED] ES, the Student was again tested using the WJ III. Compared to the educational assessment performed in 2006, the Student's scores represented a slight drop in all areas. (PE 6)

10. As of June 1, 2012, the Student's results on the Maryland School Assessment (MSA) were: proficient in reading; advanced in math; and basic in science. (PE 2)

11. In July 2012, another assessment of the Student using the WJ III was conducted while he was in [REDACTED] Middle School ([REDACTED] MS). Compared to the educational assessment performed in 2009, the Student's scores represented a slight drop in virtually all tests scores.⁸ (PE 7)

12. The Student matriculated from [REDACTED] MS and began attending tenth grade at [REDACTED] for the 2013-14 SY, where he was placed in the diploma track curriculum. (PE 1)

⁸Although not statistically significant, the Student's score for reading comprehension rose from 61 to 62.

13. As of May 1, 2014, the Student's High School Assessment (HSA) scores were as follows: Algebra/Data Analysis – did not meet standards after two attempts (374 and 349, passing score was 412); English – did not meet standards after two attempts (316 and 334, passing score was 396); “Combined Score” with Government – did not meet standards after two attempts (690 and 340, passing score was 1,602). (PE 2)

14. For tenth grade, the Student performed below the level of his peers. In reading, the Student improved in the area of continuing to answer “how” and “why” questions on his own. In math, the Student was able to memorize how to do simple equations, but continued to struggle with multi-step problems. The Student demonstrated progress in his written language skills; however, generalizations of his written language skills to his own writing still required assistance. (PE 1)

15. The Student completed the tenth grade and entered the eleventh grade. By that point the academic rigor had increased to the point where the Student could not fulfill graduation curriculum expectations. The Student had all Ds. Passing the Student to the eleventh grade was not an IEP Team decision. (HCPS Ex. 3)

16. On October 9, 2014, an IEP team was convened to discuss the Student's progress as a diploma bound student and to consider whether a revised IEP for an alternate educational (ALT MSA or certificate track) curriculum for the Student was needed because of this poor academic performance, the trouble he continued to have following basic classroom procedures, and his high level of frustration. (HCPS Ex. 1)

17. At the October 9, 2014 IEP meeting, the Student's interim grades were noted as follows: American Government E; Biology E; English E; Foundations of Technology B; Mathematical Design D; Theater Arts C; and Tutorial A. During the meeting, it was noted that the Student's grades had gotten worse since the interim grades were issued. (HCPS Ex. 1)

18. During the October 2014 meeting, the Parent questioned whether the IEP team could provide 1:1 support for the Student. Ms. [REDACTED] Administrator, offered that even with a 1:1, the Student would still be responsible for understanding and demonstrating knowledge of the content if he stayed in the diploma track. Ms. [REDACTED] Resource Teacher, discussed ALT MSA in lieu of a regular high school diploma and what that would mean for the Student. The Parent was against an ALT MSA track for the Student. The IEP team decided to do updated educational assessments on the Student to determine his present level of functioning. (PE 3)

19. In order for a student to be considered for an ALT MSA curriculum, the IEP Team must agree with the following criteria, which it did.

- (1) The student has an IEP
- (2) The student has a significant cognitive disability
- (3) The student[']s learning content [is] derived from the Maryland College and Career Ready Standards (MCCRS)
- (4) The student requires extensive, direct, repeated, and individualized instruction and substantial supports to achieve measurable gains in the grade and age-appropriate curriculum (PE 3)

20. After the October 2014 IEP meeting, the HCPS conducted an assessment of the Student using the WJ IV. Compared to the educational testing performed in 2012, the Student's scores were generally lower. (PE 8) Based on those assessments, Ms. [REDACTED] discussed placing the Student in a certificate track curriculum in order to give the Student the best chance of being a productive citizen upon leaving school. The Parent disagreed. (HCPS Ex. 1)

21. On January 12, 2015, the IEP team met to review assessment results, complete the evaluation process, and determine the Student's continued eligibility for special education services. The team determined that given the severity of the Student's disabilities, he should pursue an ALT MSA curriculum instead of the diploma track curriculum. The team modified the Student's IEP to reflect this change. The Parent disagreed with the IEP team's determination that

the Student should be in a certificate track alternate curriculum. At that point, the Student still could not state his address or telephone number. (HCPS Ex. 2)

22. Special education supports, services, and accommodations for assessments are available to students in the diploma track curriculum or a certificate track curriculum. For students in the diploma track, the content of the curriculum may not be modified. All students must demonstrate mastery of all of the MSDE required subjects and pass the HSAs in order to graduate from high school with a diploma. For students in a certificate track, the curriculum content can be modified to meet the student's unique needs. (Test. [REDACTED])

23. On March 11, 2015, the IEP team met to conduct an annual review of the IEP and to review transition services for the Student. At that meeting the Parent voiced her dissatisfaction with the Student's progress and again noted her disagreement with the IEP Team's decision to place the Student into an alternate education curriculum. (HCPS Ex. 3)

24. During the eleventh grade, the Student performed below the level of his peers. In reading, the Student improved in the area of continuing to answer "how" and "why" questions on his own. In math, the Student was able to memorize how to do simple equations, but continued to struggle with multi-step problems. The Student demonstrated progress in his written language skills; however, generalizations of his written language skills to his own writing still required assistance. (PE 1)

25. As of February 2016, the Student had taken the modified Algebra High School Assessment (HSA) five times and the English HSA two times, but had not passed either. Content modified HSAs are no longer offered to any students. (Test. [REDACTED])

26. The Student's February 12, 2016, IEP reflected that the Student could not participate in the MSA, even with accommodations. (PE 2)

27. Although the Student made some progress toward his goals in the eleventh grade, he did not successfully accomplish any of his IEP goals. (Test. [REDACTED])

28. The IEP Team held an annual IEP review meeting on March 2, 2016. The team considered the Student's participation in ALT MSA and concluded that he should remain on that track because he was doing well in all of his classes when given modified assignments. The IEP team reviewed the present levels of performance in the draft IEP. The Parent reviewed them prior to the meeting and did not have any requests for revision. (PE 12; HCPS 4)

29. During the 2015-16 SY, the Student worked on passing a credit recovery course in U.S. History with 1:1 assistance, but only completed half of the course.⁹ (Test [REDACTED] Test [REDACTED])

30. On February 28, 2017, the IEP team met to conduct an annual IEP review and to review transition services for the Student. IEP meeting regarding the IEP continued on March 1, March 27, April 24, May 8, and June 2, 2017. During the meetings, the Parent voiced her dissatisfaction with the Student's progress and noted her disagreement with the IEP Team's answers to two of the questions on the Maryland Alt Assessment and the decision to keep the Student in an ALT MSA track. (HCPS Ex. 8-13)

31. During the February 28, 2017 IEP meeting, the IEP Team considered the Student's participation in ALT MSA and concluded that he should remain on that track because he was doing well in all of his classes when given modified assignments. The Parent stated she wanted the Student to graduate with a high school diploma and go on to college. She was concerned that the Student was not getting the credits he needed for a high school diploma and requested that the Student be placed back onto the diploma track curriculum. The Parent also wanted the Student to participate in programs where he could learn functional skills. (HCPS Ex. 8)

⁹A credit recovery course is available on line to students who have failed the course in school. If they successfully complete the credit recovery course, they will receive credit for the course toward their required diploma track credits.

32. As of the February 28, 2017 IEP meeting, the Student needed the following credits to graduate with a diploma: English 11, English 12, a technology credit, two math credits, biology and another science credit, three social studies credits, plus two more credits in one of three areas. He also needed to pass the HSA. (HCPS Ex. 8)

33. On March 2, 2017, the IEP team met to continue its annual IEP meeting and to review transition services for the Student. The IEP Team reviewed the Student's present levels of service and noted he would participate in ALT MSA because he met all criteria for participation. The Parent stated that the Student learns better at home because he is in a highly structured environment at home and he needs such an environment at school. The IEP Team approved the IEP. (HCPS Ex. 4)

34. At the June 12, 2017 IEP meeting, the Parent again expressed that she wanted the Student to earn a diploma. However, the Parent agreed to leave the Student in the certificate track curriculum so he could focus on employment skills for the little time he has left in school (HCPS Ex. 15)

35. On October 5, 2017, the Parent refused to give consent for the Student to continue in an ALT MSA curriculum, which the IEP Team had determined was the appropriate track for the Student. The Parent requested that the Student have a change in schedule to reflect courses that align with the diploma track curriculum. She did not otherwise suggest any modifications to the Student's IEP. (HCPS Ex. 13, 17)

36. On December 2017, the HCPS conducted another educational assessment of the Student, using the WJ IV. Compared to the educational testing performed in 2014, the Student's scores were generally higher, but his math score for applied problems was lower. (PE 9; HCPS Ex. 18)

37. On February 23, 2018, the IEP team met to conduct an annual review of the IEP. At that meeting the Parent and her advocate, Ms. [REDACTED] stated their dissatisfaction with the Student's progress. Ms. [REDACTED] stated that she did not believe the Student was making progress toward his goal of earning a high school diploma. (HCPS Ex. 19)

38. On February 26, 2018, the IEP team again met to complete an annual review of the IEP. At that meeting, the Parent and Ms. [REDACTED] again stated their dissatisfaction with the Student's progress. The IEP Team determined that the appropriate special education services to address the Student's needs were: twelve hours and forty-five minutes weekly in the general curriculum for math, social studies and science (four hours and fifteen minutes weekly per academic subject) as well as specialized instruction in the general education setting for four hours and fifteen minutes to work on goals and objectives, as well as content from his classes. He also was to receive accommodations in all areas, including 1:1 tutoring. Additionally, the Student was also to receive three thirty-minute session per month with the speech-language pathologist. The Parent also wanted the Student to continue to participate in courses where he could learn functional skills. (HCPS Ex. 20)

39. As of the date of the instant hearing, the Student had not successfully completed all of the requirements to graduate from high school with a diploma.

DISCUSSION

The IDEA's Requirement for a FAPE in the LRE

The identification, assessment, and placement of students in special education is governed by the IDEA.¹⁰ 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-419; COMAR 13A.05.01. "Congress enacted IDEA in 1970 to ensure that all children with disabilities

¹⁰ Maryland's special education law, based on the IDEA, is found beginning at section 8-401 of the Education Article. The Maryland regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

are provided a free 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 quotation marks, brackets, and footnote omitted).

The IDEA requires “that all children with disabilities have available to them a free appropriate public 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). 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. *Id.* §§ 1412-1414; 34 C.F.R. § 300.2; *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). 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” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A).

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

A FAPE is defined in the IDEA as special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A § 1401(9); *accord* 34 C.F.R. § 300.17.¹¹

¹¹ A FAPE is defined in COMAR 13A.05.01.03B(27) as “special education and related services” that:

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

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

Implicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

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

[a]s noted by the Third Circuit, “*Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a ‘mainstreamed’ classroom.” Since Amy Rowley was receiving passing grades and otherwise succeeding in school, the only question before the Court was whether the school was required to give Amy sufficient assistance to allow her to receive the same educational benefit as her non-disabled peers. The *Rowley* Court did not have occasion to consider the question of what level of educational benefit the school district would have been required to provide Amy Rowley had she not been progressing successfully through school in a regular education classroom.

Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 863 (6th Cir. 2004) (citation omitted).

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

In *Andrew F. v. Douglas County. School District RE-1*, the Supreme Court resolved the split in the circuits. The Supreme Court that held a FAPE must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances” and finding that “[t]he IDEA demands more” than “an educational program providing merely more than *de minimis* progress from year to year.” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 1001 (2017) (internal quotation marks omitted).¹²

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

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

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

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

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

¹² The Fourth Circuit has acknowledged that “[o]ur prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by *Andrew F.*” *M.L. ex rel. Leiman v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 752 (2018). For these reasons, any opinions of the Fourth Circuit or any circuit that adopted a no more than “*de minimis*” standard and any district court within those circuits that are cited or discussed below are not relied upon for their definition of a FAPE, but for other legal principles for which they remain the state of the law in this circuit and controlling precedent or persuasive authority.

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

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

When assessing whether a student was offered, given, or denied a FAPE, a judge must “afford great deference to the judgment of education professionals” *O.S.*, 804 F.3d at 360

(quoting *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)). A judge should not substitute her or his own “notions of sound educational policy for those of the school authorities which they review.” *Andrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 206). Additionally, a judge “should be reluctant . . . to second-guess the judgment of education professionals.” *Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). A judge should be mindful that local educators deserve latitude in determining the IEP most appropriate for a disabled child, and that the IDEA does not deprive these educators of the right to apply their professional judgment. See *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). Additionally, a judge must be careful to avoid imposing his or her view of preferable educational methods upon a school district. *Rowley*, 458 U.S. at 207; see also *A.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004). However, a reviewing judge may fairly expect the school system’s professionals “to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [his or her] circumstances.” *Andrew F.*, 137 S. Ct. at 1002.

The *Andrew F.* Court confirmed that a FAPE does not promise an “ideal” education. *Id.* at 999. Nor does it promise that a student with a disability will be provided with “opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.” *Id.* at 1001. A reviewing court must determine whether the IEP is “reasonable.” *Id.* at 999. It is also important to remember that the IDEA does not require “the best possible education that a school could provide if given access to unlimited funds.” *Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). Nor does it require the “furnishing of every special service necessary to maximize each handicapped child’s potential.” *Hartmann*, 118 F.3d at 1001.

The development of an IEP is a prospective process. *See Andrew F.*, 137 S. Ct. at 999. The test of the appropriateness of the IEP is *ex ante* and not *post hoc*. *Adams v. State*, 195 F.3d 1141, 1149 (9th Cir.1999); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993); *J.P. ex rel. Popson v. W. Clark Cmty. Sch.*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002) (“[T]he measure of appropriateness for an IEP does not lie in the outcomes achieved. While outcomes may shed some light on appropriateness, the proper question is whether the IEP was objectively reasonable at the time it was drafted.” (citation omitted)). Thus, a judge in a due process hearing must look to what the IEP team knew when it developed the IEP, and whether that IEP, as designed, was reasonably calculated to enable the child to receive educational benefit. An IEP is essentially a “snapshot” in time and “cannot be judged exclusively in hindsight.” *See K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d. 795, 818 (8th Cir. 2011); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). However, evidence of actual progress during the period of an IEP may also be a factor in determining whether a challenged IEP was reasonably calculated to confer educational benefit. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009); *see also M.M. v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002). The Supreme Court in *Rowley* similarly observed that a student’s achievement of passing marks and advancement from grade to grade is an important factor in determining if a student received educational benefit. *Rowley*, 458 U.S. at 207 n.28.

Burden of Proof

The party requesting a due process hearing under the IDEA bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 63 (2005). In this case that is the Student. The standard of proof is a preponderance of the evidence. Md. Code Ann. State Gov’t § 10-217 (2014). 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 Cty. Police*

Dep't, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)); see also *Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

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

Positions of the Parties

The Student

The Student contends that the HCPS violated the IDEA by failing to provide him with a FAPE. Specifically, the HCPS erred, according to the Student, by placing the Student in a non-diploma curriculum in high school instead of placing him in a diploma track curriculum. The Parent contends that the Student could be successful in the diploma track program, given the proper special education supports and services. The Parent further contends that because the Student was in a non-diploma track curriculum for two years in high school, he has gotten so far behind in the diploma track curriculum that he cannot be successful in his coursework with the special education supports and services the HCPS has been providing him since he has re-entered the diploma track program. The Parent complains that the Student has not made any progress and that he has not achieved any of the goals and objectives on his IEP. The Parent maintains that the appropriate placement for the Student is the [REDACTED] Academy, a private school in Howard County, and that the Student also needs compensatory education. Finally, the Parent contends that if the HCPS disagreed with her withdrawal of consent for the Student to participate in a non-diploma track curriculum, the HCPS was obligated to request a due process hearing on that issue.

Ms. [REDACTED] who was accepted as an expert in special education placement and evaluation, testified that the Student can learn anything given the appropriate services. In her view, the Student should never have been placed in the ALT MSA track, especially when he had just started high school. Usually, she said, a student is not considered for the ALT MSA track

until the twelfth grade. Ms. [REDACTED] stated that the Student was not making progress at [REDACTED] because he did not achieve any of the goals on his IEP. In her opinion, however, the Student can master the general education curriculum if given the appropriate special education supports and services.

Ms. [REDACTED] testified that children with the Student's cognitive level can make academic progress when provided adequate support. She testified that she has "placed" several low functioning children like the Student at [REDACTED] and they have flourished when given appropriate support services. She also testified that her own daughter was a student at [REDACTED] and her academic performance substantially improved in one year of instruction there.

According to Ms. [REDACTED], children placed at schools like [REDACTED] that are focused on disabilities do much better than in a public school setting. Such schools often allow students to be placed outside of general education and still earn credits toward a diploma, which is not an option at [REDACTED]. Students in such schools often make academic progress because of access to small group instruction, small teacher-to-student ratio and an intensive full-time special education program such as is offered at [REDACTED]. In Ms. [REDACTED]'s view, HCPS denied the Student FAPE by failing to consider the harmful effects that accompany refusal to change his placement to a more restrictive environment similar to that offered by [REDACTED].

On cross-examination, Ms. [REDACTED] stated that she was unaware of what classes the Student was taking before he was placed back in the diploma track curriculum. She stated that anyone can learn anything, if it is taught slow enough and intense enough and the person is given enough support. She testified that she was not sure of her daughter's cognitive levels, but characterized them as "average," but was unsure what an "average" cognitive level is.

On re-direct, Ms. [REDACTED] stated she was aware of the [REDACTED] program, which is not on the diploma track. She said she knows that the [REDACTED] program offers different assessment

techniques for its curriculum. She agreed that the diploma track curriculum cannot be modified; in order to earn a high school diploma a student must earn a certain number of credits in specific areas and pass the HSA. Ms. [REDACTED] conceded that the Student is cannot learn as quickly as his peers. Nevertheless, although he is slow, he is not incapable of learning. She acknowledged that the Student would likely never achieve one of his personal goals, which is to become a high school principal.

The Parent detailed the Student's educational history prior to his coming to [REDACTED]. She explained that she first noticed he was different when he began going to school. He was tested at around age four, and was diagnosed with ADHD, speech language problems and autism. In fact, she moved from Prince George's County to Howard because she thought he would get a better education and more services from HCPS. Regarding the Student's experience at [REDACTED] she echoed Ms. [REDACTED] concerns. She stated that education is important in her family and that she wants the Student to receive a high school diploma and then attend college someday. She believes that the Student needs extra help, which HCPS did not provide for him.

The HCPS assured her that [REDACTED] would provide what the Student needed and she was hopeful when he entered high school. The Parent stated that the Student did okay in tenth and eleventh grades, but at the end of the eleventh grade the IEP Team put him on the ALT MSA track for the twelfth grade. However, she believes that the Student could earn a high school diploma, if just given a chance. She never consented to the ALT HSA curriculum. Her goal all along was to have the Student earn a high school diploma. Although the Student was "on a roll" in the ALT MSA track, really enjoying school, and getting good grades, she wanted him to have a chance at getting a high school diploma. She stated that anyone would have trouble with the diploma track curriculum after coming back to it from the ALT MSA track, especially someone with the Student's disabilities. The Parent stated that employment, which the certificate

curriculum focuses on, is not an IEP goal; one goes to school to learn, not to enjoy it. She offered that she has been sending the Student to school since he was three years old so that he could get a high school diploma and will do whatever it takes to see that he gets a diploma. Her expectation is that the Student attend school to learn and do what he has to do, not just take “fluff” courses. The Parent opined that with his current educational level, the Student might be able to get a job as a cashier or other “minor job” where he only had to do what he was instructed to do. With a high school diploma, however, he would be eligible for better jobs or be able to go to college.

The Parent denied, although reflected in the IEP Team minutes of January 12, 2015, that she had ever stated she thought throughout all of his years in school, the Student has not been allowed to be independent enough and he relies on support staff too heavily. She admitted that the Student does not know how to take a bus and has failed his driver’s license written examination three times. She noted, however, that she has a college diploma, yet twice failed her driver’s test. The Parent testified that the Student was supposed to be working on employment skills at school, but she learned from the Student that he was picking up trash in the cafeteria as part of his school work program.

The HCPS

The HCPS disputed that it has not provided the Student with FAPE. It also argues that the Student’s placement is appropriate given that the Parent insists the Student remain in a diploma track curriculum even though the Student should properly be in a non-diploma track curriculum where he could get the benefit of more functional courses more suited to his abilities and needs, and modifications to the courses available to him in the non-diploma track. According to the HCPS, the Student’s progress has been appropriate in light of his circumstances. For these reasons, the HCPS contends that the Student’s complaint should be denied.

██████████ a Speech/Language Pathologist at ██████████ and former Special Education Team Leader there, was accepted as an expert in Special Education. She holds a certificate of Clinical Competence in Speech/Language Pathology from the American Speech-Language-Hearing Association, she is licensed by Maryland as a Speech/Language Pathologist, and has a Maryland Advanced Professional Certification as an Administrator I and a Pathologist. Ms. ██████████ also has a Bachelor of Arts degree in Speech-Language Pathology and Audiology and a Master of Science degree in Speech-Language Pathology. She testified that she worked with the Student his first two years at ██████████ while he was in the general education curriculum and he struggled from the beginning. During that time, the Student was often frustrated, banging his head against the wall and hitting lockers. She stated that the IEP Team looked at all of the data, which was relatively consistent through the years and concluded that the diploma track was not appropriate for the Student. The IEP Team then answered the questions required by the MSDE to see if the Student met the criteria for ALT MSA. According to the IEP Team, based on the data and the answers to the questions, the Student was placed on an ALT MSA curriculum. Ms. ██████████ noted that in high school there are essentially two different tracks: diploma track and non-diploma track. Students in the diploma track may have modifications to their assessments, but the curriculum may not be modified. In the diploma track general curriculum, Ms. ██████████ explained, the Student would have to successfully complete social studies, four years of math, three years of English, a foreign language credit, community service and several other elective courses. He would also have to pass his HSA, a standard assessment, in certain areas. In the non-diploma or ALT MSA track, the curriculum is modified and a student may also have modified assessments. The ALT MSA track is less academic in nature. The academic content is modified to meet the Student's abilities and much of the program is functional in nature, such as learning job skills and participating in work programs, which may

lead to employment. Ms. [REDACTED] stated that the more services provided to the Student to help him to be able to learn the material means there is less time for him to learn the academic materials needed to graduate with a diploma.

While in the ALT MSA curriculum, the Student's work improved and he was much happier. He was making progress, which was reflected on the present levels of his IEP. However, in 2017, the Parent withdrew her consent for the Student to be a non-diploma bound student. Ms. [REDACTED] opined that although the Student can learn, he will not be successful at that level. No amount of services will enable him to master all of the requirements for a high school diploma and pass the HSA. For instance, the Student was working on a credit recovery course in U. S. History for an entire year with 1:1 assistance, yet he is still not yet halfway through the course.

On cross-examination, Ms. [REDACTED] agreed that the Student did not meet any of his goals while in the certificate track. She stated, however, that the Student did better than when he was in the diploma track and did make progress. She averred that a student can make progress without mastering a goal.

[REDACTED] a School Psychologist for the HCPS, was admitted as an expert in School Psychology. She holds an Advanced professional Certificate in School Psychology, has a Bachelor of Arts in Psychology and English, a Master of Arts in Educational Psychology and Statistics, and a Certificate of Advanced Study in School Psychology. She testified that she attended about ten IEP Team meetings for the Student since he came to [REDACTED] in 2012. While the Student was in the general education curriculum, she observed him in three classes. In those classes, the Student had difficulty initiating tasks independently and needed help to complete tasks.

Ms. [REDACTED] explained the results of the educational testing. She indicated that the latest test results were consistent with earlier results; variations in the scores from test to test were not statistically significant. The Student's full-range score of 56 on that assessment placed him in the

second percentile, meaning that ninety-eight percent of his same age peers performed as well as or better than he did on those same tests. On the Autism Rating Scale, the Student's highest score of "average" was from the Parent, but his school scores were low. Ms. [REDACTED] stated that due to the Student's significant cognitive issues and his level of functioning, she believes the most appropriate curriculum for the Student is the ALT MSA.

On cross-examination, Ms. [REDACTED] explained the Autism Rating Scale. She testified that it looks at a variety of adaptive behaviors. Ms. [REDACTED] said it was common for a student to be rated higher at home, but in the Student's case the school ratings were consistent with all of the other available data.

[REDACTED] also a School Psychologist for the HCPS, was admitted as an expert in School Psychology. Ms. [REDACTED] is a Nationally Certified School Psychologist. She has a Bachelor of Science degree in Clinical Psychology, a Master of Arts degree in School Psychology and Certificate of Advanced Study. She reiterated much of what Ms. [REDACTED] attested to and said that she agreed. She also noted that while accommodations may be made to assessments in the regular education diploma track curriculum, which is mandated by MSDE, modifications to the curriculum are not permitted. Agreeing with Ms. [REDACTED] she stated that more services outside of the general education classroom results in less learning of the academic materials needed to graduate. She stated that she concluded the Student needs an ALT MSA curriculum based on all of the data. She explained the answers to the questions that must be asked before placing a student on an ALT MSA track pointed to an ALT MSA curriculum for the Student. She noted that accommodations were made for the Student when taking the MSA, such as fewer questions and simplified wording, but he was still unable to pass the MSA tests he took. He failed some of them more than once. All of this, she explained, points to an ALT MSA curriculum for the Student.

While in the certificate track curriculum, the Student made some progress, but there was less rigor in academic areas and the content of the material was modified for him.

Ms. [REDACTED] related that when the Student returned to the diploma track curriculum, he continued to get all of his special education services but not as much of it was provided outside of the general education classroom. According to Ms. [REDACTED] general education subject area teachers have more training in their discrete areas and are better equipped to teach those subjects. The Student needed to try to learn those materials because he needed twenty-one credits to complete his diploma requirements and only had nine.

In response to cross-examination, Ms. [REDACTED] explained that the variance in scores from the various educational tests over the years is not statistically significant because all tests have some margin of error. All of the Student's test scores fall within the same range standard deviation on a bell curve.

[REDACTED] is a special education teacher for the HCPS. She was admitted as an expert in Special Education. Ms. [REDACTED] has a Masters degree and a Bachelors of Science degree, and holds an Advanced Professional Certificate in Special Education Endorsements: Severe and Profound Disabilities, Administrator I. As a special education teacher, she is responsible for overseeing services, participating in IEP meetings and helping to develop goals and objectives. Additionally, she oversees special education services from para-educators and outside sources, all of which support the general education teachers. When the Student returned to the general education diploma track curriculum in 2017, he was provided with seventeen hours of services within the general education curriculum and 8.5 hours outside of the regular curriculum, which was appropriate for his needs. In that IEP, the Student did not receive fewer hours of special education services, the services were just delivered differently. The number of special education hours and services a student receives are based on the student's needs, not what track he is on.

She explained that the Student requires a lot of help with his functional skills so that he can learn easier in the classroom. All of the time spent on special education services related to enabling the Student to learn benefits from the academics in order to graduate with a diploma is time that the Student is not in the classroom being taught those subjects. After being moved to the ALT MSA track, the Student still received out-of-class tutoring, but was in the general education classroom more, assisted by a special education co-teacher or para-educator, for his academics. The use of tutorial time for increasing the Student's non-academic skills conflicts with the time needed for the Student to learn the subject content he needs to master in order to graduate with a diploma. The student has a very slow learning rate, he has difficulty analyzing and drawing inferences. He can learn; he increased three reading levels in four years, but he will never catch up with his peers or be able to master certain subjects. By the end of the 2017-18 SY, the Student's progress began to wane and he was experiencing a high level of frustration. Even with supplemental supports and services, such as flash cards, pictures and extra assistance, the Student could not master the content. She pointed out that even with 1:1 assistance, the Student was only about half way through the course to obtain recovered credit in U. S. History.

Ms. [REDACTED] testified that the services included in the IEP when the Student was in the ALT MSA track in for the 2015-2016 SY were appropriate. During that period, the Student did well, was feeling successful and even participating in after-school activities. His learning was more functional and his assignments were modified. For example, instead of writing a ten paragraph essay, he would have to write a one paragraph essay. In Theater, he would memorize a short monologue rather than a long one. She testified that although the Student did not achieve his goals, he did master some objectives toward his goals. Although he did not achieve his goal of making inferences eighty percent of the time, he did decrease his need for prompts. He was also in the enclave program, where eight students go into the community with two staff and a para-

educator to sample jobs. Before they went into the community, the students did “building jobs”, which included sorting recycling and classroom instruction. The Student went on work-study to an elementary school, where he helped out by reading to students and monitoring them. The Student likes children and received glowing reviews from that experience. He was learning with pride. If he had stayed in the ALT MSA track, he would have moved into Community Connections, where he could have learned life skills, such as opening a bank account and he might have been able to audit community college classes. Hopefully, from there he would have progressed into Project Search, through the Howard County Government, which has a very high rate of hiring Students from the program.

During cross-examination, Ms. [REDACTED] acknowledged that the IEP Team did not file for due process regarding the Parent’s refusal to consent to the Student being continued in the ALT MSA track. She said that it is possible that the IEP Team minutes could contain discrepancies, but it is unlikely. She noted that at some point, the Parent began recording the IEP meetings. She said that she did not see the Student receive 1:1 services in the regular classroom, but the classes were small. However, he did receive some 1:1 assistance from special educators and para-professionals. Ms. [REDACTED] agreed that the number of special education hours provided to the Student did not increase when he moved from the ALT MSA track to the regular education diploma track curriculum.

Evaluation of the Evidence

Although the Student’s primary diagnosis is autism, his history of substantial cognitive impairment is well documented in the record and supported by ample data. The same is true of his receptive and expressive language problems. Due to his disabilities, the Student has had problems throughout his entire school career keeping up with the curriculum.

The Parent's principle complaint, in a nutshell, is that during his public education in the HCPS, particularly in high school, the Student has made little educational progress because he has not achieved any of the goals on his IEP. The evidence in that regard is disputed by the HCPS. Its position is that the Student has made good progress in light of his abilities. The HCPS admits that the Student has not achieved any of his IEP goals, but maintains that he has still made meaningful progress. While in the ALT MSA curriculum, the Student did well and was happy in school. In the diploma track curriculum, however, he made less progress. He progressed more slowly in the diploma track curriculum because he learns slower than his peers and falls further behind as the work gets harder. He has to work harder just to try to keep up, which causes him to become frustrated.

“Absent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task.” *Hartmann by Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1000-1001 (4th Cir. 1997). It is clear that a parent is only one member of an IEP team and that in this case the Parent had more than adequate opportunity participate in the development of the Student's IEPs. To ensure parental participation, the IDEA requires, *inter alia*:

[a]n opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

20 U.S.C.A. § 1415(b)(1). 34 C.F.R. § 300.501(b) (2017) further defines “parent participation in meetings,” in pertinent part, as follows:

- (1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—
 - (i) The identification, evaluation, and educational placement of the child;
 - and
 - (ii) The provision of FAPE to the child.

Additionally, the regulations governing parental participation provide that “[e]ach public agency shall take steps to ensure that one or both of the parents with a child with a disability are present at each IEP meeting or are afforded the opportunity to participate[.]” 34 C.F.R. § 300.345(a) (2017). *Accord* COMAR 13A.05.01.07. This was certainly done with respect to the Parent.

Using the above standards for guidance, I turn to the facts of this case. In applying those facts to the controlling law, as explained below, I conclude that the Parent failed to prove that placing the Student in a certificate track curriculum was a denial of FAPE, or that the Student was placed in a diploma track curriculum for the 2017-2018 and 2018-2019 SYs without adequate special education and related services designed to meet the Student’s unique needs.

The Student was first identified with a speech/language impairment when he was four. Based on psychological testing when he was six years old, the Student began receiving special education services under the other health impairment category, due to diagnoses of ADHD and autism. In order to provide the Student with the best public education, the Parent moved to Howard County where the Student began receiving special education services in reading, math writing, speech, and OT while in elementary school. Educational assessments in 2005 and 2006 showed that the Student was functioning generally in the very low range for children of his age. Later testing in 2009, 2012 and 2017 confirmed the results of the earlier tests. Variations in the test results are not statistically significant.

The Student began attending tenth grade at [REDACTED] for the 2013-14 SY in the regular education diploma track curriculum. Virtually all students in Howard County are placed in the diploma track curriculum when they first enter high school to give them an opportunity to see how well they do in the general education curriculum before considering an ALT MSA track. By the end of 2014, the Student had taken HSAs in Algebra/Data Analysis, English and Government, with modified assessment techniques. He did not pass any of them after two

attempts at each. For tenth grade, the Student continued to perform below the level of his peers. In reading, the Student improved in the area of continuing to answer “how” and “why” questions on his own. In math, the Student was able to memorize how to do simple equations, but continued to struggle with multi-step problems. The Student slowly progressed in his written language skills; however, generalizations of his written language skills to his own writing was still lacking.

The Student’s progress through school was consistent with the data about his cognitive level and ability to learn. In all academic areas, he was still performing well below his same age peers. Academically, the Student is able to memorize information in order to provide some appropriate responses, but is unable to make inferences, which inhibits his overall progress. The Student was also having problems following basic classroom procedures. He had difficulty with losing materials, maintaining notebooks required for every class, and forgetting information. Consequently, for the eleventh grade, the IEP team met to discuss whether the Student should be considered for a certificate track curriculum. As Ms. [REDACTED] who has a Masters degree in Special Education and is Director of the Department of Special Education for HCPS, noted at an IEP meeting on November 30, 2016, it made sense that the Student’s progress decreased because he is not learning as fast as his same aged peers. Further, as the work becomes more difficult, the greater the Student’s frustration level. This same theme was echoed by the HCPS witnesses at the hearing. Nevertheless, the Parent believes that, with enough 1:1 support and hard work, the Student can master the general education diploma track curriculum.

Like any loving parent, the Parent wants her child to be successful. Unfortunately, the severity of the Student’s problems make academic success, in a conventional sense, not possible for the Student. The Parent, however, refuses to accept that the Student’s disabilities have such a dramatic impact on his ability to learn. Her opinion, however, is informed only by her expectations and, perhaps, by Ms. [REDACTED]

Ms. [REDACTED] testified that given 1:1 support, enough time and the proper accommodations, the Student can learn anything. It follows then, the fact that the Student did not achieve any of his IEP goals was because he needed more services, which is a denial of FAPE. Ms. [REDACTED] opinion, however, was not supported by any data. Ms. [REDACTED] did not offer evaluations, peer reviewed literature or reports to support her statements, or specify what other services, besides more 1:1 instruction, the Student should have been provided. It is clear that the Parent and Ms. [REDACTED] were dissatisfied with the Student's placement in the certificate track curriculum at [REDACTED] but the Parent presented no evidence that the Student's IEP was deficient. Ms. [REDACTED] was the Parent's only expert. Her testimony was general; she did not mention any specific deficits in the IEP or explain why any part of it was inappropriate. She did give examples of apparently successful students at [REDACTED] but details were few and documentation non-existent. She offered her daughter as one of those success stories, but when queried about her daughter's cognitive level, she at first said she was not sure, and then stated "average." She was not sure what I.Q. is considered average. Given that she was unsure of her own daughter's cognitive level, I find Ms. [REDACTED] insight regarding other [REDACTED] students' cognitive levels, as well as the Student's cognitive level, less than persuasive. Further, although offered and accepted as an expert in special education placement and evaluation, I find her credentials marginal compared to the credentials of the HCPS' experts. Ms. [REDACTED] testified that she has a Master's degree in education, over ten years-experience in special education in a school setting, and some graduate credits in special education. However, it is not clear that Ms. [REDACTED] actually has a degree in education¹³ and she does not have a degree in special education or psychology.

¹³ Ms. [REDACTED] CV, summarizing her credentials states: "I have Bachelors of Science, graduate level Special Education Certification, and a Master of Arts in Education with a specialization in Teacher Leadership." However, the educational history she listed states: University of [REDACTED] "Special Education Certification, 21 Graduate Credit Hours..."; [REDACTED] Community College (one course); The University [REDACTED] [REDACTED] "JTPA Secretarial/Word Processing Training Program..."; [REDACTED] University, Bachelor of Science, "History Major and General Business Minor." She also acknowledged that the name of her company as listed on the CV is not correct because the CV is not up-to-date.

She has virtually no credentials related to "evaluation." Therefore, in light of the entire record, I give little weight to Ms. [REDACTED] opinions at the hearing and at IEP meetings, regarding the Student's ability to learn if given the correct environment and supports, his alleged lack of progress, or whether he was denied FAPE. I also lack enough information to determine if [REDACTED] [REDACTED] could be an appropriate placement for the Student. Ms. [REDACTED] touted the success of [REDACTED] [REDACTED] but offered no information, not even a brochure, about its programs, availability as a placement for the Student, or specifics about what kind of individualized approach it might be able to offer the Student in order to enable him to earn a high school diploma. Her anecdotal information about the success of [REDACTED] students is inadequate to demonstrate that [REDACTED] [REDACTED] could be an appropriate placement for the Student.

The record reflects that throughout high school, the Student received twelve hours and forty-five minutes weekly in the general curriculum for math, social studies and science (four hours and fifteen minutes weekly per academic subject) and tutorial services. He also was provided with specialized instruction in the general education setting for four hours and fifteen minutes weekly to work on goals and objectives, as well as content from his classes. For testing, he received accommodations in virtually every area. When he was in the certificate track curriculum, his hours of service remained the same, but how he received some of his services was different. He also participated in job training and was learning other functional skills. In the diploma track curriculum, the Student received more services in the classroom from a general education teacher or para-educator because he needs to learn the general curriculum in order to graduate with a diploma. After the Student was placed back in the diploma track curriculum, the Parent also wanted the Student to continue to focus on functional training as well. As pointed out by the HCPS's witnesses, there was not enough time in a school day for the Student to concentrate on learning the academics he needed to graduate with a diploma and receive

instruction in functional skills at the same time. In fact, in the diploma track curriculum, although was making progress toward his IEP goals, he was unable to master few of his required courses, even with 1:1 assistance. The Student was falling further behind; he simply cannot learn as quickly as his same age peers.

The Parent views the Student's failure to master any of the goals on his IEP as a lack of progress. She claims, therefore, that the Student's IEP is inappropriate. The record does not support that claim. The development of an IEP is a prospective process. *See Andrew F.*, 137 S. Ct. 988 at 999. Although outcomes might shed some light on an IEP's appropriateness, the measure of appropriateness for an IEP is not based only on the outcomes achieved. In fact, an IEP must be "appropriately ambitious." *Id.* at 1000. It is true that a student's achievement of passing marks and advancement from grade to grade may be an important factor in determining if a student received educational benefit. *Rowley*, 458 U.S. at 207 n.28. Unfortunately, that is not so here, in light of the Student's circumstances. The great weight of evidence in this case is that no matter the level of special education supports and services, even 1:1 instruction, the Student cannot be expected to master a high school diploma track curriculum. Further, if a student always achieves all of the goals and objectives on an IEP, it could be said that the IEP is not "appropriately ambitious."

The specific evidence by the HCPS's experts that the Student was making some progress was not refuted. Their testimony was cogent and responsive. The Parent believes that the Student should have made more progress academically but presented no persuasive evidence to show that, even given more supports and services, the Student could have made better progress. The Parent feels that the life skills the Student was learning in the ALT MSA track, and enjoying learning, were mere "fluff" and that because he was in the ALT MSA for two years, he lost

ground academically. She believes that in order to receive FAPE, the Student must receive his instruction in a segregated setting such as is offered at [REDACTED]

IDEA requires a student to be educated in the LRE.

The school district has met its obligation to provide a FAPE when (a) the district complies with the procedural requirements of the IDEA, and (b) the IEP developed by the district is reasonably calculated to enable the student to receive educational benefits. *See id.* (citation omitted). The law expresses a strong preference for children with disabilities to be educated in an integrated setting with their non-disabled peers, to the extent that integration is appropriate. *See Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir.1998) (citation omitted). To that end, special education and related services must be provided in the “least restrictive environment” (“LRE”) that is consistent with a child’s needs. *See id.* A child should be segregated only “when the nature or severity” of a child’s disability is such “that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5).

V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 108–09 (N.D.N.Y. 2013)

Like here, in *V.M.*, math concepts were very difficult for the Student to acquire and experts noted that “care must be taken to challenge [the student] without setting expectations that are well above [the student’s] developmental levels,” because such could cause frustration and a decreased sense of efficacy in the student’s academic self-perception. *Id.* at 110.

Here, the HCPS has met its obligation to provide FAPE. While in the certificate track program at [REDACTED] the Student was making significant progress in learning life skills. Obviously, the Student was, as the Parent was told he would be, at a disadvantage in returning to the diploma track. Nevertheless, his IEP, as designed and implemented, was reasonably calculated to enable the child to receive educational benefit. His progress was more than *de minimis*; he progressed appropriately in light of his circumstances. Thus, the Student was not denied FAPE by the HCPS because his IEP and its implementation at [REDACTED] was tailored to his needs and reasonably calculated to enable the Student to receive educational benefits.

Another contention by the Parent is that if the HCPS believed the Student should have remained in the certificate track curriculum after tenth grade, it was obligated to have exercised its right to due process and requested a hearing on that issue. The Parent points out that in such case, the HCPS would have had the burden of proof. This argument is not persuasive. The HCPS contends that it was not obligated to request a hearing and it would further disrupt relations between the Parent and the HCPS if the HCPS went to hearing to try to force the Parent to change the Student's curriculum track.

In 2016, the Maryland General Assembly enacted a statute, now codified at section 8-405(f) of the Education Article,¹⁴ which gives a parent the right not to consent to their child being placed into a certificate track curriculum, despite what an IEP team might determine is the most appropriate track for the child. In October 2017, the Parent exercised that veto power. Consequently, the HCPS had to remove the Student from the ALT MSA curriculum and place him back into the diploma track curriculum. This was based solely on the Parent's desire that the Student graduate from high school with a diploma. While the Parent undoubtedly wants to do what she believes is best for her son, her plan for the child is that he graduate from high school with a diploma, even if he is unhappy and frustrated while attempting to do so.

As noted above, under current Maryland law, effective July 1, 2017, an IEP Team shall obtain written consent from a parent if the team proposes to enroll the child in an alternative education program that does not issue or provide credits toward a Maryland high school diploma or identify the child for the alternative education assessment aligned with the State's ALT MSA. Md. Code Ann., Educ. § 8-405(f)(1) (Supp. 2018). If the parent refuses to consent, the IEP team may use the dispute resolution options listed in section 8-413 of the Education Article to resolve the matter. *Id* at (f)(3).

¹⁴See Laws of Md. 2017 ch. 727 § 1, effective July 1, 2017.

Section 8-405(f) has no analog in federal law. The only law relating to parental consent under IDEA concerns consent to evaluations and services. *See* 20 USC §1414(a)(1)(D)(4) and (c)(3) (2017). If a parent does not consent to testing, the local education agency (LEA) may pursue due process options. 20 USC §1414(a)(1)(D)(ii)(I). If, however, a parent refuses to consent to services, the LEA may not provide special education services to the child. 20 USC §1414(a)(1)(D)(ii)(II). Also, under federal law, the determination of the educational needs of the child is required to be made by the IEP team. *See* 20 U.S.C.A. § 1414(a)(4)(A). Maryland law regarding special education procedures is required to conform to federal law.

Section 8-405(f) of the Education Article is, to say the least, not a model of clarity and its intent less than clear. On one hand, it appears that the General Assembly believes that whether a student should be in the diploma or certificate track curriculum is not a component of FAPE *per se*, but rather more akin to the provision of a special education service. Under federal law, if the parent of a child with a suspected disability refuses to consent to the provision of special education and related services, the LEA may not resort to due process in order to provide special education and related services to the child and the LEA shall not be considered to be in violation of the requirement to make available FAPE to the child. 20 U.S.C.A. § 1414(a)(1)(D)(ii). On the other hand, if a parent refuses to consent to a non-diploma track curriculum, the “individualized education program team” may use the dispute resolution options listed in § 8-413 of the Education Article to resolve the matter. Md. Code Ann., Educ. § 8-405(f)(3) (Supp. 2018). Section 8-413(f), which parallels federal law, provides two dispute resolution mechanisms, mediation and a due process hearing, both of which are initiated with a written complaint. A due process complaint may be filed to resolve a dispute over “the identification, evaluation, educational placement, or the provision of free appropriate public education, *in accordance with federal law.*” Md. Code Ann., Educ. § 8-413(a)(3) (Emphasis added.) However, this issue cannot

arise under federal law and IEP teams are not “public agencies.” Furthermore, a non-diploma track curriculum, at least in the context of this case, is a special education service: the curriculum is modified to meet the educational needs and capabilities of the Student. Accordingly, in order for Maryland law to be consistent with federal law, it remains to be seen if an “IEP program team” may, through a due process hearing, force a student into a non-diploma track curriculum against a parent’s wishes. In any event, that issue is not before me. Nothing in section 8-413(f) requires an IEP team to file for due process. However, had the IEP team done so on this issue and due process was determined to be available, the IEP team would certainly have prevailed given the evidence in this record.

Summary

Looking at all the evidence presented on the issue of whether the Student’s IEP provides a FAPE, a fairly clear picture of the Student emerges. This is a twenty-year-old young man whose cognitive impairments, speech language difficulties, and autism severely affect his availability for learning. Although he can learn, because of his disabilities, despite being provided with significant special education and related services, he falls further behind his peers in trying to master the general education curriculum. Although, the evidence is overwhelming that the Student could achieve the most benefit from an ALT MSA curriculum tailored to his unique needs, the Parent insists, as is her right under Maryland law, that the Student continue his education in the regular diploma track curriculum.

The evidence strongly suggests that the Parent’s picture of the Student’s disabilities is somewhat skewed by her intensive involvement with his education through the years. For example, the Parent testified that she believes the Student is average. In this belief, the Parent ignores the ramifications of the Student’s disabilities and the fact that as the Student progresses in school, academic requirements become more difficult. The Parent does not recognize her own

role in contributing to the Student's lack of success in high school; the Student has not been committed to either curriculum; he was not allowed to remain in the ALT MSA track long enough to reap the benefits of the programs that track offers and he was frustrated by the academics in the regular education curriculum. Undoubtedly, the Parent wants the Student to succeed in school, but her good intentions alone will not accomplish that goal.

The HCPS failed to meet the Parent's expectations concerning the Student's education. However, the evidence presented by HCPS shows overwhelmingly that the Student's IEP is reasonably calculated to provide him a FAPE and that was being properly implemented in the LRE. The HCPS's witnesses all testified that the Student is making meaningful educational progress, and the Parent presented little or no credible evidence to contradict this testimony. Ms. [REDACTED] testimony was not supported by objective evidence.

In this case, I gave great weight to the testimony of the school professionals who have worked with the Student since he has been at [REDACTED] and the data on which that relied. They saw him daily or weekly and are in the best position to judge his progress as the year progressed. There simply is nothing in the evidence, especially given the Student's circumstances, that shows the Student did not make appropriate progress under his IEP in light of his circumstances.

One of Congress's primary purposes in enacting IDEA was "to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs...." 20 U.S.C.A. § 1400(d)(1)(A); *see also VM*, 954 F. Supp. 2d 102*supra*. Under IDEA, a state must provide all children with disabilities a FAPE. 20 U.S.C.A. §§ 1400(c), 1412(a)(1). A FAPE requires the school district to provide instruction that suits the child's needs as well as related services to ensure that the child receives some educational benefit from instruction. 20 U.S.C.A. § 1401(8); *see also Md. Code Ann., Educ.* § 8-402(a)(3) (2009) (defining FAPE); 20 U.S.C.A. § 1401(22) (defining related services).

With that standard in mind, I find that the Student's IEPs in effect for school years 2015-16 through 2018-19, were reasonably calculated to provide the Student a FAPE in the LRE in light of his circumstances. I also find that the Student has made meaningful educational progress under those IEPs.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that HCPS did not deny the Student a free appropriate education for the 2015-16 through 2018-19 school years by failing to develop and implement an appropriate IEP which addressed the Student's circumstances. 20 U.S.C.A. §§ 1401(9); 20 U.S.C.A. § 1412(a)(1); *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

I further conclude as a matter of law that HCPS did not deny the Student a free appropriate public education from January 2015-16 through the 2018-19 school year by placing the Student in the general education curriculum for tenth grade, moving him to a certificate track curriculum for the eleventh and twelfth grade, and then placing him back into the general education curriculum when the Parent withdrew her consent for the Student to continue in the certificate track curriculum. 20 U.S.C.A. §§ 1401(9); 20 U.S.C.A. § 1412(a)(1); 34 C.F.R. §§ 300.114-300.120; Md. Code Ann. Educ. § 8-405(f) (Supp. 2018); COMAR 13A.05.01.10A; *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *DeVries ex rel. DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989)

I further conclude as a matter of law that the placement of the Student at [REDACTED] High School, regardless of the curriculum the Parent wants the Student to receive his special education

and related services in, is the least restrictive environment. 20 U.S.C.A. § 1401(9); 20 U.S.C.A. § 1412(a)(5)(A); Md. Code Ann. Educ. § 8-405(f) (Supp. 2018).

ORDER

I **ORDER** that the Parent's complaint filed October 17, 2018, is denied and dismissed.

January 7, 2019
Date Decision Mailed

Signature Appears on Original

James T. Murray
Administrative Law Judge

JTM/cmg
#177055

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 with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2017). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file a request for judicial review 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.

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]