[redacted]

STUDENT

v.

[redacted]

* BEFORE DENISE OAKES SHAFFER

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

* OAH NO.: MSDE-[redacted]OT-19-00420

* * * * * * * * * * * * *

DECISION

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STATEMENT OF THE CASE

On December 20, 2018, [redacted] (Parent), on behalf of her child, [redacted] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review a decision regarding placement of the Student by the [redacted] ([redacted]) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).[1]

I held a prehearing telephone conference (PHC) on January 15, 2019. The Parent represented herself.[2] William H. Fields, Assistant Attorney General, represented the [redacted]. By agreement of the parties, the hearing was scheduled for February 21 and 22, 2019. The parties agreed on the record at the PHC no agreement was reached at the January 10, 2019 resolution

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

[2] [redacted], the Student's father, was also present at the prehearing conference and throughout the hearing.

session. 34 C.F.R. § 300.510(c) (2018).[3] The applicable regulations concerning the time for filing a decision state the following, in 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.

Id. § 300.515.

> (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;
> (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.

Forty-five days from January 10, 2019, is February 24, 2019, the Sunday after the conclusion of the second day of the hearing. The Parents and [redacted] requested that I extend the timelines to allow the case to be heard on the selected dates and to allow sufficient time, up to 30 days, for me to consider the evidence, evaluate legal arguments, and draft a decision. *See id.* § 300.515(c).

I held the hearing on February 21 and 22, 2019. The Parent represented herself. Mr. Fields represented the [redacted] The legal authority for the hearing is as follows: IDEA, 20

[3] "C.F.R." is an abbreviation for the Code of Federal Regulations. Unless otherwise noted, all citations herein to the C.F.R. are to the 2018 volume.

The thirty day resolution period began on December 20, 2018 and would have expired on January 19, 2019. Nevertheless, the parties agreed at the PHC that on January 10, 2019 no agreement was reached. They further agreed that the timeframe for issuing a decision should begin, in accordance with 34 C.F.R. § 300.510(c)(2), on January 10, 2019 rather than on January 19, 2019 (end of resolution period). Although I do not have written documentation of this determination that no agreement could be reached on January 10, 2019, I accept the joint representation of the parties on this point.

U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1) (2018);[4] 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) procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings (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

1. Is [redacted]'s proposed change in placement proper?
2. Is [redacted] barred from serving the Student because: (a) [redacted] is authorized to serve students who are [redacted] loss; (b) [redacted] is not the least restrictive environment for the Student; and/or (c) [redacted] cannot properly provide augmentative communication or assistive technology to address the Student's communication needs?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parent, except as noted:

Parent Ex. 1 - November 5, 2018 Individualized Education Program (IEP)

Parent Ex. 2 - November 5, 2018 Progress Report on IEP goals

Parent Ex. 3 - October 10, 2018 Learning Accomplishment Profile – Third Edition (LAP-3 assessment.

Parent Ex. 4 - March 16, 2017 Patient Instructions for Tympanostomy tubes

[4] Unless otherwise noted, all references hereinafter to the Education Article are to the 2018 Replacement Volume of the Maryland Annotated Code.

Parent Ex. 5 - October 1, 2015 [redacted] Medicine Pediatric Genetics Report

Parent Ex. 6 - July 24, 2016 [redacted] Medicine Pediatric Neurology Report

Parent Ex. 7 - Article, C. Worster-Drought, "Speech Disorders in Children" 10 Develop. Med. Child Neurol. Pp. 427-440 (1968)

Parent Ex. 8 - Not admitted[5]

Parent Ex. 9 - Not admitted

Parent Ex. 10 - Definitions of various words from Dictionary.com

Parent Ex. 11 - Not admitted

Parent Ex. 12 - Notes from the January 10, 2019 Resolution Meeting

Parent Ex. 13 - [redacted] County Public School Brochure "Interpreting Services in the Classroom"

I admitted the following exhibits on behalf of [redacted], except as noted:

[redacted] Ex. 1 - [redacted] Admission Policy, 2017-2018 [redacted] Handbook

[redacted] Ex. 2 - Not admitted (same as Parent Ex. 8)

[redacted] Ex. 3 - November 5, 2018 IEP (Joint)

[redacted] Ex. 4 - October 15 and October 18, 2018 Audiogram/Audiology report

[redacted] Ex. 5 - October 1, 2015 [redacted] Medicine Pediatric Genetics Report (Joint)

[redacted] Ex. 6 - November 16, 2015 [redacted] Medicine Report ([redacted])

[redacted] Ex. 7 - November 16, 2015 [redacted] Medicine Report ([redacted])

[redacted] Ex. 8 - June 18-19, 2019 email exchange between Parent and [redacted]

[redacted] Ex. 9 - June 24, 2018 email from Ms. [redacted] to Parent

[redacted] Ex. 10 - November 12, 2018 Prior Written Notice

[5] Parent's exhibits 8, 9 and 11 were not admitted as evidence in the hearing. Exhibits 8 and 9 are copies of Maryland Laws. I explained that the statutes would be considered but that they did not constitute evidence. Exhibit 11 was [redacted]'s Motion to Dismiss. I explained that the Motion to Dismiss was a pleading that is part of the record in this case and that it was not necessary for it to be an exhibit at the hearing.

[redacted] Ex 11-13 Not admitted[6]

[redacted] Ex. 14 - November 29, 2018 email from Parent to Ms. [redacted]

[redacted] Ex. 15 - November 29, 2018 email from Ms. [redacted] to Parent

[redacted] Ex. 16-21 –Not admitted

[redacted] Ex. 22 - Notes from the January 10, 2019 Resolution Meeting

Testimony

The Parent testified. The [redacted] presented the following witnesses:

- [redacted], Principal, [redacted]
- [redacted] Doctor of Audiology, who was admitted as an expert in the field of audiology
- [redacted], the Student's occupational therapist, who was admitted as an expert in occupational therapy
- [redacted], the Student's speech therapist, who was admitted as an expert in speech-language pathology
- [redacted], the Student's preschool teacher, who was accepted as an expert in the field of deaf education, and
- [redacted] Director of IEP Services at [redacted], who was accepted as an expert in the field of special education.

[6] I ruled on the record that [redacted] exhibits 11-13 and 16 through 21 were not relevant to the issues that the parties agreed to at the Prehearing conference.

FINDINGS OF FACT

The parties stipulated to the following facts:

1. The Student is a child with hearing ability, at this time.
2. The Student should have access to American Sign Language (ASL).
3. The Student should have access to speech-language services.
4. The Student should be educated in the least restrictive environment.
5. [redacted] can provide access to ASL.
6. It is important for the Student to be able to communicate with others as soon as possible.

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

1. The Student is four years old and enrolled in the preschool program at [redacted]. The Student has a form of cerebral palsy known as [redacted] Syndrome. As a result, the Student has difficulty forming sounds and at this time cannot effectively communicate using spoken language. The Student's [redacted] Syndrome does not impact his ability to form signs although his low muscle tone has impacted his ability to make some signs effectively.

2. The Student has delays in areas of cognition, receptive and expressive communication, adaptive and gross motor skills. He requires communication supports to interact with peers and adults.

3. At the time of his [redacted] admission, the Student had a conductive hearing loss due to the presence of fluid behind his eardrums. A conductive hearing loss is a medically treatable hearing loss.

4. As part of the June 2018 admissions meeting, the Student's parents and staff from [redacted] discussed the Student's conductive hearing loss and the possibility that, if the Student's hearing loss was corrected, [redacted] would recommend a return to the [redacted] County Public Schools ([redacted]CPS). In June of 2018, the IEP team discussed that ongoing assessments to measure hearing would be conducted.

5. The Student has had two sets of tympanostomy tubes surgically placed in his Eustachian tubes.[7] The first set did not resolve his hearing loss, and one tube fell out after approximately one year necessitating the second set of tubes. The second set, which he had inserted in August of 2018, resolved his conductive hearing loss. The Student visits his ENT every six months to confirm that the tubes are in place and functioning.

6. The tubes are not permanent; they last from six months to two years. It is unknown whether the Student will revert to having a conductive hearing loss when the current set of tubes falls out or otherwise malfunction. It is likely that the Student will need to have the tubes replaced throughout this childhood due to his small stature and cerebral palsy which leads to difficulty swallowing and with the draining of fluid in his middle ears.

7. In October of 2018, Dr. [redacted] retested the Student's hearing. At that time, the Student's hearing was within normal range for both ears. He is able to hear speech sounds across all frequencies, including a whisper. That testing included a visual inspection of his tubes and a test to determine that the tubes were open and functioning.

8. As a result of this assessment, the Student is not eligible for special education services as a deaf or hard of hearing student.

9. The Student remains eligible for special education services under IDEA based on other challenges and disabilities, including an orthopedic impairment. The areas affected by his

[7] The Eustachian tubes are the canals that link the middle ear with the throat.

disability include Academic - communication, speech, and language expressive language; Early Learning Skills – mathematics; Physical – functional upper extremity/hand skills and gross motor.

10. The [redacted] is a public school for students from preschool through high school who are deaf or hard of hearing. [redacted] accepts deaf and hard of hearing students without regard to their ability to access the curriculum in a regular education setting. The decision to attend is dictated by "parent choice." (Test. [redacted]). Parent choice allows a family with a student who is deaf or hard of hearing to apply to [redacted] as a separate school from the county public schools.

11. The admissions criteria at [redacted] require that a student have a valid audiological assessment and states that the [redacted] programs and services are designed "to meet the educational needs of students whose primary disability is deafness or hard-of-hearing." ([redacted] Ex. 1).

12. [redacted]'s admission criteria do not address any student's ability to use spoken English or ASL prior to admission. The ability to acquire ASL is necessary to access the instruction at [redacted].

13. The language of instruction at the [redacted] is ASL. All instruction in academic or other topics is presented in ASL. [redacted] uses a "voice off" mode of instruction which means that teachers do not use spoken English for instruction. Students at [redacted] do not access instruction in the classroom through auditory information. Spoken English or other sounds may be used to prompt a student to attend to the lesson.

14. [redacted] revised the Student's IEP on November 5, 2018. The Student's IEP currently reflects that his primary disability is an orthopedic impairment. All aspects of the IEP were agreed upon by the team except for placement.

15. The Student requires an early childhood special education program where he can be provided access to sign language instruction for the purpose of expressive communication. (IEP, at 27). He also requires a spoken language instructional setting to receive direct instruction in the curriculum.

16. The Student's communication needs require instruction in a small group setting.

17. The Student needs the following related services: occupational therapy, physical therapy, and speech and language therapy.

18. The Student is making sufficient progress in meeting his IEP goals. He is demonstrating increased ability to use and understand signs related to routine school activities, and he is increasingly able to make his needs and wants known. He uses one to three-word sentences in ASL.

19. The Student is making progress on his occupational therapy goals. He has increased strength and endurance and is progressing on the foundational skills necessary to use ASL.

20. The Student is working on learning ASL and spoken English with his speech therapist.

21. The Student does not currently require assistive technology or augmented services.

22. On November 12, 2018, [redacted] issued a prior written notice advising the Parents that the November 5, 2018 IEP team meeting resulted in a decision that the Student no longer met the minimal criteria for placement at [redacted] and that the team recommended review and determination of placement by the [redacted] County Public Schools.

DISCUSSION

Applicable General Law

Maryland school districts are required to comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. § 1412; 34 C.F.R. § 300.2; *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 180-81 (1982). Maryland implements the IDEA for elementary and secondary students and adds additional procedural safeguards and substantive requirements beyond those required by the IDEA, through Title 8, Subtitle 4 of the Education Article of the Maryland Annotated Code and through COMAR 13A.05.01.

Maryland law and the IDEA mandate "that all children with disabilities have available to them a free appropriate public education that emphasizes special education[8] and related services[9] designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C.A. § 1400(d)(1)(A); *see also* COMAR 13A.05.01.01 (ensuring "a [FAPE] . . . in accordance with the student's [IEP]"). A FAPE is defined as special education and related services provided at public expense, under public supervision, that meet the standards of

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[8] Special education means "specially designed instruction," 20 U.S.C.A. § 1401(29), and "specially designed instruction" means instruction that adapts the "content, methodology, or delivery of instruction" to ensure a student's access to the general education curriculum. 34 C.F.R. § 300.39(b)(3).

[9] 20 U.S.C.A. § 1401(26) provides:

> A) In general.
>
> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluative purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

the state educational agency, include appropriate education, and are provided in conformity with the child's IEP. 20 U.S.C.A. § 1401(9).

An IEP is a written statement for a student that includes the following: 1) the student's present levels of academic achievement and functional performance; 2) how the student's disability affects the student's involvement and progress in the general educational curriculum; 3) measurable goals; 4) a description of how progress will be measured; 5) the special education, related services, and supplemental aids and services the educational agency will provide the student; 6) an explanation of the extent to which the student will not participate in the regular classroom; and 7) the appropriate accommodations that are necessary to measure the student's academic achievement and functional performance. *Id.* § 1414(d)(1)(A).

As the "centerpiece" of the IDEA's "education delivery system" for disabled students, an IEP is a "comprehensive plan" for the "academic and functional advancement" for the student. *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.* at 999; *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 child's circumstances." *Id.* at 994, 996, 999.

An IEP must be developed through a collaborative process between the school district (including teachers and other school officials) and the student's parents. *See id.* at 994. The process of developing the IEP must be a "fact-intensive exercise [that is] informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." *Id.* at

999. When an IEP team considers changing the placement of a student, it is guided by the following:

> (a) The placement decision—
>
> (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
> (2) Is made in conformity with the [least restrictive environment (LRE)] provisions of this subpart, including §§ 300.114 through 300.118;
>
> (b) The child's placement—
>
> (1) Is determined at least annually;
> (2) Is based on the child's IEP; and
> (3) Is as close as possible to the child's home;
>
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs; and
> (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116.

"To the maximum extent appropriate," an IEP should provide for a disabled child's education in the LRE. 20 U.S.C.A. § 1412(a)(5)(A); *see also* 34 C.F.R. §§ 300.114-300.120; COMAR 13A.05.01.10A. "Mainstreaming of [disabled] children into regular school programs where they might have opportunities to study and to socialize with non[disabled] children is not only a laudable goal but is also a requirement of the [IDEA]." *DeVries ex rel. DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). However, while the IDEA's mainstreaming provision establishes a presumption for a student to remain in the general education setting, it is not an inflexible federal mandate. *Id.* ("The Act's language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every [disabled]

child."). The IDEA explicitly states that removal of children from the regular educational environment is appropriate "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C.A. § 1412(a)(5)(A). Congress thus recognized that regular classrooms are not always a suitable setting for the education of some disabled students. *Rowley*, 458 U.S. at 181 n.4; *see also* 34 C.F.R. § 300.115 (continuum of alternative placements). The nature of the LRE necessarily differs for each child, but could range from a regular public school to a residential school where twenty-four-hour supervision is provided. *See* COMAR 13A.05.01.10B.

In *DeVries*, the Fourth Circuit explained:

> In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the [IDEA]. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some [disabled] children simply must be educated in segregated facilities either because the [disabled] child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the [disabled] child is a disruptive force in the non-segregated setting.

882 F.2d at 879 (quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983)).

If a reviewing court determines that a student was denied a FAPE, the court may "grant such relief as [it] determines is appropriate." 20 U.S.C.A. § 1415(i)(2)(C)(iii). The ordinary meaning of these words confers "broad discretion" to the court to grant an appropriate remedy. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985). An administrative adjudicator "has broad discretion to fashion a remedy where he finds that a school district has denied a child a FAPE. Sitting in equity, [an administrative adjudicator's] authority is flexible and case-specific." *Lopez–Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 57 (D.D.C. 2016)

(citations omitted).

Illustrative of the broad grant of remedial authority and relevant here, courts have held that a "finding that the directives of IDEA would be best effectuated by ordering an IEP review and revision" is not improper on its face. *Adams v. Dist. of Columbia*, 285 F. Supp. 3d 381, 393 (D.D.C. 2018). "[T]his remedy was a reasonable reflection of the issues before the Hearing Officer and the administrative record. It appears, moreover, that such relief is not unusual in IDEA cases, including those in which the plaintiff requests private-school placement." *Id.* (citing *Pinto v. Dist. of Columbia*, 938 F. Supp. 2d 25, 28 (D.D.C. 2013) (noting that Hearing Officer determined that school system had developed an inappropriate IEP, but declined to grant placement at private school and instead ordered District to "convene a meeting to revise [the] IEP as appropriate within 30 days of a written request by Plaintiffs"); *Struble v. Fallbrook Union High Sch. Dist.*, 2011 WL 291217, at *7-8 (S.D. Cal. Jan. 27, 2011) (rejecting the argument that ALJ erred by "ordering the parties to meet again and develop a new IEP . . . rather than ordering a placement")). The *Adams* Court further explains:

> Even when a Hearing Officer finds "an actionable violation of the IDEA," courts have therefore upheld [a Hearing Officer Decision] ordering the parties to "convene an . . . IEP meeting within ten days of [the decision]" so that prospective placement would "not be addressed by this Court, but instead, by the IEP team, as soon as practicable." . . . . Such relief comports with the collaborative, team-based process envisioned under IDEA as the best way of pursuing the "fact-intensive exercise" of "crafting an appropriate program of education" for students with disabilities.

Id. at 397 (citations omitted).

As the moving party and the party seeking relief, the Parent bears the burden of proof, by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005); 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).

Law Related to the [redacted]

[redacted] is an independent government agency that is part of the elementary and secondary education system that makes up the public schools of this State. Educ. § 1-101(k). [redacted] was established in 1867 by an Act of Incorporation of the Maryland General Assembly. *See* 1867 Md. Laws 486 (ch. 247), *reprinted in* 133 *Archives of Maryland* 4698. That legislative action incorporated and funded the capital expenses for an "Asylum for the Deaf and Dumb, of the State of Maryland." *Id.* § 1, at 486. The declared purpose was that the institution "shall receive and educate all deaf and dumb persons sent to said Institution . . . ." *Id.* § 6, at 487.

In 1916, the General Assembly repealed section 1 of Chapter 247 of the Acts of 1867 for the purpose of renaming the institution as the "[redacted]" 1916 Md. Laws 124 (ch. 76), *reprinted in* 534 *Archives of Maryland* 124-25. Section 6 of the 1867 law was not amended at that time. In 1922 as part of a comprehensive reorganization of State government, the [redacted] was placed in the Department of Education and subject to the supervision of the State Superintendent of Schools. 1922 Md. Laws 55 (ch. 29), *reprinted in* 563 *Archives of Maryland* 57-58. In 1978, the General Assembly repealed previously existing laws governing education and recodified these laws in the Education Article.

Maryland law governing the education of deaf children and establishing the [redacted] is now found in Title 8, subtitle 3A of the Education Article. Maryland law defines a deaf child as "a child . . . who has a hearing impairment, and because of that impairment cannot progress satisfactorily in an ordinary public or private school." Educ. § 8-3A-01. The statute

reestablishes the [redacted] and provides for its governance. *Id.* § 8-3A-04. It requires the [redacted] to work with the State Department of education and each county school system "to meet the educational needs of deaf children." *Id.* § 8-3A-03. It also requires the [redacted] to adopt written admissions standards. *Id.* § 8-3A-04(h). Local school systems are required to inform all parents and guardians of "each hearing-impaired child" of the availability of the educational programs offered at [redacted] *Id.* § 8-3A-05. The law requires the [redacted] to operate a program of enhanced services for deaf students who have other moderate to severe disabilities. *Id.* § 8-3A-07(a).

Parties' Contentions

The Parent argues that the [redacted] is not precluded by Maryland law from serving a hearing student who has significant expressive language challenges and delays. She points to the language in the initial charter referring to children who are "deaf and dumb," and notes that the term "dumb" used to be common parlance for a child who was unable to speak. The Parent argues that [redacted] is an appropriate placement given the Student's expressive communication needs and given the IEP team's agreement that he needs direct instruction in ASL to make progress on his goals. In making that argument, the Parent points to the nature and severity of the Student's disabilities and argues that [redacted] is not a restrictive placement. The Parent notes that the Student's ability to hear may be temporary. Finally, the Parent argues that [redacted]CPS cannot provide a FAPE to the Student because it lacks the resources to provide ASL instruction to support the Student's goal to communicate with adults and peers as soon as possible. The Parent argues that the Student's individual needs for ASL instruction justify continued placement at [redacted]

[redacted] argues that it cannot continue to implement the Student's IEP because Maryland law mandates that it serve deaf and hard of hearing children. It asserts that because the Student's

hearing is normal, [redacted]'s "voice off" environment deprives him of the opportunity to access spoken English and academic instruction through an auditory environment. [redacted] argues that it cannot provide the Student an appropriate education in the primarily visual environment that exists at [redacted] It notes that, for a hearing child, [redacted] is a restrictive environment and that if it failed to recommend a change of placement to [redacted]CPS, it would violate the LRE requirements of state and federal law. It also argued that it could not provide augmentative or assistive technology that the Student may need to address his communication needs.

Analysis

The first issue identified by the parties was: "Is [redacted]'s proposed change in placement proper?" This issue may be addressed succinctly. There is no proposed change in placement to consider. A placement decision can be made only after the development of an IEP and in accordance with its terms. 34 C.F.R. § 300.116; *see also Spielberg ex rel. Spielberg v. Henrico Cty. Pub. Schs.*, 853 F.2d 256, 258-59 (4th Cir. 1988). In *Spielberg*, the Fourth Circuit held that it was a violation of the IDEA to make a placement decision to transfer the Student, Jonathan, from his private placement to his local public school before developing an IEP upon which to base that placement. In this case, the [redacted] IEP team developed an IEP that sets out appropriate goals, services and related services which allow the Student to make education progress at [redacted] There is no IEP developed with appropriate goals, services, and related services that is reasonably calculated to allow the Student to make educational progress in the [redacted]CPS.

As there is no proposed placement based on the Student's IEP, the answer to the first question posed by the parties must be "No." I find that, at this time, [redacted] has not proposed a proper change in placement for the Student.

The second issue the parties agreed I should resolve was: "Is [redacted] barred from serving the Student because: (a) [redacted] is authorized to serve students who are deaf/have hearing loss; (b) [redacted] is not the least restrictive environment for the Student; and/or (c) [redacted] cannot properly provide augmentative communication or assistive technology to address the Student's communication needs." Subpart C may also be resolved succinctly.

The evidence at the hearing was uncontroverted that the Student does not require augmentative communication or assistive technology to address the Student's communication needs at the present time. Moreover, the law mandates that if the Student were to need these services in the future, [redacted] would collaborate with the public school system to provide these tools. Each of [redacted]'s witnesses agreed that this was their obligation and that they would do so for this Student, or any other Student enrolled in [redacted] whose IEP required these resources.

Parts (a) and (b) of the second inquiry are interwoven, and I will address them together. As set forth above, the Maryland laws defining the role and function of [redacted] have evolved from its formation in 1876 to the present day. It is not necessary for me to resolve whether the initial enactment in 1876 intended for the school to serve children who were deaf and children who were unable to speak. I must confine my analysis to what the law means for this Student at this time in the history of [redacted].

The Education Article requires the [redacted] to engage in the education of children who are deaf or hard of hearing. It requires the school to establish admission criteria. Those admission criteria must be read as a whole and in light of the statutory mandates of the Education Article. The first paragraph of the admissions policy informs all that follows. It states:

> Under the direction of the [redacted] Board of Trustees, [redacted] provides a free, appropriate, public education (FAPE) to Maryland's deaf and hard of hearing students who meet [redacted]'s criteria for admission.

([redacted] Ex. 1). This introductory paragraph negates the Parent's argument that the Admissions Policy does not set forth explicitly that a child must be deaf or hard of hearing to meet the minimum requirements for admission. The "hearing status" section provides:

> Applicants to [redacted] must have a valid audiological assessment completed by a qualified examiner. . . [redacted] programs and services are designed to meet the educational needs of students whose primary disability is deafness or hard-of-hearing. Applicants must be able to acquire and maintain adequate ASL skills in order to learn through a visual modality . . . .

(*Id.*).

Maryland law requires [redacted] to work with local school systems to meet the needs of deaf students. Educ. § 8-3A-03. It defines a student who is deaf as one who has a hearing impairment. *Id.* § 8-3A-01. When the statute and admissions criteria are read together, it is clear that [redacted] was not designed to provide educational opportunities to hearing children, even a hearing child with significant difficulty in formulating and acquiring speech.

It follows that [redacted] is not the least restrictive environment for a student who has hearing ability. 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. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (quoting *E.L. ex rel. Lorsson v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 517 (4th Cir. 2014)). Judges should not substitute their own "notions of sound educational policy for those of the school authorities which they review." *Endrew 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 ex rel. 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 ex rel. Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). 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." *Endrew F.*, 137 S. Ct. at 1002.

[redacted]'s witnesses were experienced in deaf education and testified about the environment at [redacted] and described both its strengths and its limitations. For a student who is deaf or hard of hearing, the visual environment allows the development of a full range of educational opportunities in ASL. ASL is the exclusive, not primary, method of academic instruction. Each witness elaborated on the fact that sufficient opportunity for a hearing student to acquire spoken language is simply unavailable at [redacted] Each described the Student's growing ability to understand vocabulary in both spoken English and ASL. There is no disagreement that the Student continues to experience challenges in expressing vocabulary in both spoken English and ASL. Most compelling was the testimony of [redacted] witnesses describing the different methods used to teach reading to hearing children and deaf children. Principal [redacted] Ms. [redacted] and Ms. [redacted] each testified that the Student needed to be exposed to spoken English for instruction to allow him to acquire the phonetic and pre-reading skills that he will need to progress academically. I am persuaded by their testimony and well-supported opinions that an environment that significantly limits the Student's exposure to spoken English will impede his progress and limit his opportunities to achieve academic success, particularly in the area of reading.

Therefore, I conclude that the [redacted] is not and cannot be the least restrictive environment for this Student given his current level of hearing as measured by his hearing assessment in

October of 2018. I agree with the Parent that there is evidence in the record to support a conclusion that the Student's normal hearing levels may not persist permanently. The Student may experience a conductive hearing loss if his tubes fall out or malfunction. The Student may lose his hearing as a result of a genetic deletion. These changes are prospective and hypothetical. [redacted]'s witnesses testified that the Student could be evaluated for admission at any future time if his hearing becomes impaired. An IEP and a placement decision are based upon a "snapshot" in time. *See K.E. ex rel. K.E. v. Indep. Sch. Dist. No.15*, 647 F.3d. 795, 818 (8th Cir. 2011) (An IEP is essentially a snapshot in time and "cannot be judged 'exclusively in hindsight' because the court 'must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.'") (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir.1990))).

In November of 2018 when this IEP was developed, the Student was not deaf or hard of hearing. Consequently, the Student does not meet the minimum admission criteria for [redacted] and [redacted] is not the least restrictive placement for the Student. Because [redacted] is not the least restrictive setting, I conclude that [redacted] is not providing FAPE in the least restrictive environment as required by the IDEA and Maryland law.

Remedy

At the hearing, I asked the parties to be precise in their request for relief. The Parent requested a determination that the Student's placement at [redacted] was appropriate and that he should remain at [redacted] [redacted] asked that the Parents be ordered to begin the process of transferring the Student's IEP to the [redacted]CPS. [redacted] explicitly stated that they were not seeking an order disenrolling the Student from [redacted] Rather [redacted] acknowledged its willingness to

continue to provide services to the Student pending a placement decision by the IEP team convened by [redacted]CPS.

This case requires a "through the looking glass" approach to the IDEA. The Parent sought to prove that [redacted] was providing a FAPE in the least restrictive setting and that its decision to transfer placement to [redacted]CPS was improper; [redacted] sought to prove that it was not and could not provide FAPE in the least restrictive setting and that its decision to transfer placement to [redacted]CPS was proper. I have determined that [redacted] is not providing FAPE in the least restrictive environment. I have also determined that [redacted]'s "placement decision" was improper because it preceded the development of an IEP by [redacted]CPS. [redacted]'s requested relief implicitly acknowledges this predicament in that it does not seek the Student's immediate disenrollment.

As is noted above, an administrative adjudicator "has broad discretion to fashion a remedy where he finds that a school district has denied a child a FAPE. Sitting in equity, [an administrative adjudicator's] authority is flexible and case-specific." *Lopez–Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 57 (D.D.C. 2016) (citations omitted). In fashioning this remedy, I am aware of the fact that [redacted]CPS is not a party to this proceeding. Nevertheless, as set forth above, [redacted] and [redacted]CPS have a statutory obligation to collaborate to address the needs of deaf students with disabilities. That obligation extends to this Student, whose hearing status has changed since his enrollment in [redacted] I am also aware that [redacted] invited representatives from [redacted]CPS to the November 2018 IEP meeting and the [redacted]CPS scheduled an IEP meeting that was canceled by the Parents pending resolution of this due process hearing.

Finally, the remedy is informed by statutory child find[10] obligations as well as the obligations of a school district to implement an IEP when a student transfers into that school

[10] This Student is already a student with an IEP. A parent does not have initial obligations under child find, that obligation rests with the [redacted]CPS. COMAR 13A.05.01.04.

district with an existing, agreed upon, IEP from another public agency within the same State.[11] This remedy is also informed by the requirement that all members of the IEP team work together in good faith to develop a program of education that will be "appropriately ambitious," and tailored to the student's "unique needs" with "careful consideration" of the student's present levels of achievement, disability, and potential for growth. *Endrew F.*, 137 S. Ct. at 999-1000; *see also* 20 U.S.C.A. § 1401(29).

Within thirty days of this order, [redacted] shall convene an IEP meeting in collaboration with the [redacted] CPS system. Prior to that meeting, [redacted] shall reassess the Student's hearing to confirm that he continues to have normal hearing at this "snapshot in time." Ms. [redacted] testified that the Student was scheduled to have his progress reevaluated using the Learning Accomplishment Profile within weeks of the February 22, 2019 hearing date. If that reevaluation has not yet occurred, [redacted] shall conduct this assessment prior to the scheduled IEP meeting. [redacted] shall provide these assessments as well as the IEP currently in place to address the Student's needs prior to the scheduled IEP meeting. After the existing IEP is adopted or a new IEP is drafted, [redacted] and [redacted] CPS shall propose a placement for the Student that is designed to provide a free and appropriate public education in the least restrictive setting.

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[11] The IDEA includes specific provisions for children with disabilities who transfer within the same state:

> In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

20 U.S.C.A. § 1414(d)(2)(C)(i)(I).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that [redacted] has not proposed a proper placement for the Student. 34 C.F.R. § 300.116 (2018); *see also Spielberg ex rel. Spielberg v. Henrico Cty. Pub. Schs.*, 853 F.2d 256, 258-59 (4th Cir. 1988). I conclude that [redacted] is not providing a free and appropriate public education in the least restrictive environment. 20 U.S.C.A. § 1412(a)(5)(A) (2017); *see also* 34 C.F.R. §§ 300.114-300.120 (2018); COMAR 13A.05.01.10A; *DeVries ex rel. DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). I conclude that the Parent's requested relief is not the appropriate remedy for this denial. I further conclude that the appropriate remedy is to reconvene an IEP team that will either adopt the existing IEP or develop a new IEP for the Student and designate a placement where that IEP may be implemented. 20 U.S.C.A. § 1415(i)(2)(C)(iii) (2017).

ORDER

I **ORDER** that:

[redacted] shall convene an IEP meeting in collaboration with the [redacted]CPS system within 30 days of this Order;

Prior to the meeting, [redacted] shall reassess the Student's hearing and conduct the Learning Accomplishment Profile;

Prior to the meeting, [redacted] shall provide these assessments as well as the IEP currently in place to [redacted]CPS and to the Parents;

Upon adoption of the existing IEP or development of a new IEP, [redacted] and [redacted]CPS shall identify a placement for the Student that is designed to provide a free and appropriate public education in the least restrictive setting.

[redacted] shall, within 30 days of the date of this decision, provide proof of compliance to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, the Maryland State Department of Education.

Signature Appears on Original

March 19, 2019
Date Decision Issued

Denise Oakes Shaffer
Administrative Law Judge

DOS/jf
#178610

Copies Mailed To:

[redacted]

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) (2018). 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.