

[REDACTED]

STUDENT

v.

PRINCE GEORGE'S COUNTY

PUBLIC SCHOOLS

* BEFORE MICHAEL R. OSBORN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* CASE No.: MSDE-PGEO-OT-19-09483

* * * * *

RULING ON MOTION FOR JUDGMENT

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STATEMENT OF THE CASE

On March 26, 2019, [REDACTED] and [REDACTED] (Parents), on the Student's behalf, filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH).

In the Complaint, the Parents allege the Prince George's County Public Schools (PGCPS) denied the Student a Free Appropriate Public Education (FAPE) by failing to protect the Student from abuse or bullying by adult school staff at two PGCPS schools during the 2016-17 school year. As relief, the Parents request the PGCPS fund private school placement at [REDACTED] and compensatory education.

The Parents made no reference in the Complaint how the alleged unsafe educational placement violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A.

§ 1415(f)(1)(A) (2017),¹ its implementing regulations, any State law or regulation, or any State or federal education policies. The Parents did not allege any deficiency in the Student's Individualized Education Program (IEP) or assert that due to the failure of PGCPS to develop and implement an appropriate IEP the Student was denied FAPE. The Parents did not refer to any State or federal cases relating to staff abuse or bullying or assert the PGCPS violated the standards established in such cases. Similarly, the Parents did not refer to any statute, regulation, policy or case law that supports the relief requested.

On May 9, 2019, I conducted a Telephone Prehearing Conference (Conference). Gail B. Viens, Esquire., attended for PGCPS. [REDACTED] represented the Parents and the Student, and [REDACTED] Education Advocate, attended for the Student. During the Conference the Parents clarified that although the March 26, 2019 Complaint refers to "the last two years," the Parents withdrew the Student from [REDACTED] School on April 26, 2017, after which the Student was home-schooled.

On May 15, 2019, I issued a Prehearing Conference Order and Report (Report). In the Report, I established May 21 and May 22, 2019 as the dates for the hearing, and set various deadlines for requests for subpoenas, exchange of witness lists and documents, and motions. In the Report, I also identified the issues to be decided, as follows:

1. Was the Student subjected to abuse or bullying by PGCPS staff at [REDACTED] Elementary School or [REDACTED] School during the period March 26, 2017 through April 26, 2017?
2. If so, did the abuse or bullying result in denial of FAPE at [REDACTED] Elementary School or [REDACTED] School?

¹ U.S.C.A. is an abbreviation for United States Code Annotated.

3. Is [REDACTED] School or [REDACTED] School an appropriate educational placement?
4. If [REDACTED] School or [REDACTED] School is not an appropriate educational placement, is educational placement at [REDACTED] [REDACTED] appropriate?

On May 16, 2019, the PGCPs submitted a Motion to Amend Prehearing Order (Motion to Amend), asserting therein the Parents did not allege in the Complaint the PGCPs recommended either [REDACTED] Elementary School or [REDACTED] School for any placement after the 2016-2017 school year, and did not allege the PGCPs made an inappropriate school placement recommendation for the 2018-2019 or 2019-2020 school years. The PGCPs asserted the issue is whether current placement at [REDACTED] for the remainder of the 2018-2019 school year and for the 2019-2020 school year would be appropriate for an alleged denial of FAPE between March 26, 2017 and April 26, 2019.

I convened the hearing, as scheduled, on May 21, 2019. Ms. Viens was present for the PGCPs, and the Parents and Mr. [REDACTED] were present. I first addressed the Motion to Amend and, after hearing from the parties, granted the Motion to Amend. The issues for the hearing, as amended, are:

1. Was the Student subjected to abuse or bullying by PGCPs staff at [REDACTED] [REDACTED] Elementary School or [REDACTED] School during the period March 26, 2017 through April 26, 2017?
2. If so, did the abuse or bullying result in denial of FAPE at [REDACTED] Elementary School or [REDACTED] School?
3. Whether the alleged denial of FAPE due to allegations of bullying and abuse during the 2016-2017 school year, occurring between March 26, 2017 and

April 26, 2017, warrants a placement at [REDACTED] for the remainder of the 2018-2019 school year and the 2019-2020 school year?

I next addressed compensatory education, and inquired of the Parents if they wanted me to consider compensatory education in the event I found the PGCPS had denied the Student a FAPE, but also found that private placement was inappropriate. Following discussion, the Parents withdrew their request for compensatory education, making clear the only remedy they sought was private placement.

After resolution of procedural issues, the Parents presented evidence. Mr. [REDACTED] testified, presented the testimony of Mr. [REDACTED] presented documents, then rested the Parents' and Student's case. Thereafter, the PGCPS made an oral Motion for Judgment (Motion), which the Parents opposed. I declined to issue a ruling on the record and advised the parties I would issue a written decision and, if the Motion is denied, the hearing would reconvene May 31, 2019, at 9:00 a.m., when the PGCPS would be given an opportunity to present evidence. I adjourned the hearing.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R.² § 300.511(a) (2018); Md. Code Ann., Educ. § 8-413(e)(1) (2018); 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; the Maryland State Department of Education 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.

ISSUE

Should PGCPS's Motion for Judgment be granted?

² Code of Federal Regulations

SUMMARY OF THE EVIDENCE

The Parents presented Parents' Exhibit 1, consisting of 89 pages, some of which were withdrawn, some of which were admitted as evidence, and some of which were excluded from evidence, as indicated:

Pages 1-27 Withdrawn

Pages 28-29 Prior Written Notice, April 26, 2017 Admitted

Pages 30-32 Statement of [REDACTED] September 11, 2018 Excluded

Pages 33-34 [REDACTED] article, September 27, 2016 Excluded

Pages 35-39 [REDACTED] article September 13, 2016 Excluded

Pages 40-42 Media station [REDACTED] online article, October 12, 2016 Excluded

Pages 43-46 [REDACTED] article, March 2, 2016 Excluded

Pages 47-52 PGCPS Administrative Procedure for Reporting Suspected Child Abuse and Neglect, effective August 27, 2018 Admitted

Pages 53-56 Professional Vita, [REDACTED] undated Admitted

Pages 57-62 Communication Assessment Report, January 16, 2019 Excluded

Pages 63-64 Test of Gross Motor Development, January 22, 2019 Excluded

Pages 65-66 Assistive Technology Evaluation, January 23, 2019 Excluded

Pages 67-69 PGCPS Assessment Report, February 12, 2019 Excluded

Pages 70-87 Individualized Education Program, draft, February 1, 2019 Excluded

Pages 88-89 Withdrawn

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Student's birthdate is [REDACTED] 2008.
2. The Student was attending [REDACTED] Elementary School at the beginning of the 2016-2017 school year.

3. In January 2017, the PGCPS transferred the Student to [REDACTED]

[REDACTED] School ([REDACTED]).

4. The Student attended [REDACTED] during the period March 26, 2017 through April 26, 2017.

5. At some undetermined time in 2017 Mr. [REDACTED] was told by an aid in the Student's classroom that another aid was abusing students.

6. [REDACTED] brought the aid's allegations of abuse to the attention of the Principal at [REDACTED]

7. The Parents were dissatisfied with the [REDACTED] Principal's response to allegations of abuse and, on April 26, 2017, withdrew the Student from [REDACTED]

8. The Parents have home-schooled the Student since April 26, 2017.

DISCUSSION

Legal Framework

A school district offers a FAPE by providing personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction. *Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982). Courts determine whether the IEP was "substantively adequate, namely, whether it was reasonably calculated to enable the child to receive educational benefits." *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167, 189 (2d. Cir. 2012).

In *Endrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017), the Supreme Court held that a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Id.* at 993. The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education is fact intensive, informed not only by the expertise of school officials but also by the input of

the child's parents or guardians. *Id. Andrew F.* did not address bullying or abuse, and did not hold that bullying or abuse is a "circumstance."

In *School Committee of the Town of Burlington, Massachusetts v. Department of Education*, 471 U.S. 359, 370 (1985), the Supreme Court held: "[i]n a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school."

The burden of proof at an administrative hearing challenging the sufficiency of an IEP and whether that IEP provided a FAPE is upon the Parents and Student. *Shaffer v. Weast*, 456 U.S. 49, 62 (2005).

The IDEA does not include provisions relating to bullying or abuse of students eligible for special education services. I have found no reported opinion by the United States Court of Appeals for the Fourth Circuit, or any Maryland court, which addresses what Parents or Students must prove at a due process hearing under the IDEA to demonstrate an IEP failed to provide a FAPE due to abuse or bullying.

In *T.K. and S.K., on behalf of L.K. v. New York City Department of Education*, 32 F. Supp. 3d 405 (E.D.N.Y. 2014), relying on a standard established in *T.K. v. New York City Department of Education*, 779 F. Supp. 2d 289 (E.D.N.Y. 2011), the Court addressed the due process complaint of parents of a severely autistic child who alleged the student was denied FAPE due to the school's failure to prevent bullying. The Court held a disabled student is deprived of FAPE when school personnel are deliberately indifferent, or fail to take reasonable steps to prevent bullying, that substantially restricts a child with learning disabilities in her or his educational opportunities. *Id.* at 417. The bullying does not need to be outrageous, but must be

sufficiently severe, persistent, or pervasive that it creates a hostile environment. *Id.* When responding to a bullying incident, a school must take prompt and appropriate action, investigate the harassment, and if it is found to have occurred, take appropriate steps to prevent it in the future. *Id.* at 418. The focus will be on the impact on the specific student the subject of the bullying and the methods implemented by a school district to address the bullying in the student's IEP. *Id.*

In this case, the burden is on the Parents to prove that the Student was subjected to bullying or abuse by PGCPS staff between March 26, 2017 and April 26, 2017, that as a result the Student was denied a FAPE, and further, to prove if the Student was denied a FAPE that private placement at [REDACTED] is appropriate.

Motion for Judgment

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

E. Motion for Judgment.

- (1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.
- (2) When a party moves for judgment at the close of the evidence offered by an opposing party, the judge may:
 - (a) Proceed to determine the facts and to render judgment against an opposing party; or
 - (b) Decline to render judgment until the close of all evidence.
- (3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

COMAR 28.02.01.12E.

When considering a Motion for Judgment during a non-jury trial, the judge, as the trier of fact, may determine the facts and render judgment against the non-moving party. *Pahanish v.*

Western Trails, Inc., 69 Md. App. 342, 353 (1986). The judge may evaluate the evidence, including making inferences, determining credibility and drawing conclusions. *Id.*

The powers and duties of an Administrative Law Judge are outlined in COMAR 28.02.01.11, and state, in relevant part, as follows:³

.11 Powers and Duties of Judges.

A. A judge shall:

...

(2) Take action to avoid unnecessary delay in the disposition of the Proceedings. . . .

B. A judge has the power to regulate the course of the hearing and the conduct of the parties and authorized representatives, including the power to:

...

(4) Consider and rule upon motions in accordance with this chapter;

...

(11) Issue orders as are necessary to secure procedural simplicity and administrative fairness and to eliminate unjustifiable expense and delay[.]

In the instant case, the Parents, on the Student's behalf, filed the Complaint with the OAH; therefore, the Parent/Student bears the burden of proof by a preponderance of the evidence. *Schaffer*, 546 U.S. at 62. 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 Civil Pattern Jury Instructions* 1:7 (3d ed. 2000)); see also *Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

At the close of the Parents' presentation the PGCPS argued that the Parents failed to establish any element of their case. The Parents argued the evidence presented was sufficient to warrant denial of the Motion.

³ This provision in the OAH rules of procedure is akin to the Maryland Rules regarding Motions for Judgment in the circuit and district courts. See Maryland Rules 2-519 and 3-519. Thus, I find that case law interpreting the circuit and district court provisions is persuasive and informative regarding the proper interpretation of the OAH provision.

The Parents' and Student's Evidence

The Student transferred to [REDACTED] from [REDACTED] Elementary School in January 2017. Mr. [REDACTED] offered during his opening argument that the Student is autistic and that one of the Student's manifestations of autism is echo-layered speech, which means the Student mimics what he sees and hears. Mr. [REDACTED] stated that on an unspecified day after school the Student exhibited uncharacteristically hostile behavior which, he believed, the Student must have observed at school. He testified the Student instructed himself to sit down and to shut up, that he hit himself in the chest, and invited others to fight him. Mr. [REDACTED] also said the Student used profanity he did not learn at home. He attributed the changes in the Student's behavior to a culture of abuse at PGCPS, and argued that only public placement would remove the Student from this culture.

When the Parents presented evidence, Mr. [REDACTED] testified he was told by an aid in the Student's classroom that she had witnessed abuse in the Student's classroom. The statements by the aid were not specific as to when she observed the abuse.

Mr. [REDACTED] testified about his background and said he has been retained in Prince George's County as an education advocate approximately one hundred times.

I admitted documentary evidence which included a PGCPS Prior Written Notice to the Parents of an IEP Team meeting on April 26, 2017, the current PGCPS Administrative Procedure for Reporting Suspected Child Abuse and Neglect, and Mr. [REDACTED]'s Professional Vita.

Analysis

The Parents did not prove, by a preponderance of the evidence, that the Student was bullied or abused by PGCPS staff between March 26, 2019 and April 26, 2019.

The Parents did not prove, by a preponderance of the evidence, that as a result of bullying or abuse during the period March 26, 2017 through April 26, 2017 the Student was deprived of

educational benefit – that is, the Parents did not prove a denial of FAPE. I do not reach the issue of whether the bullying standard established in *T.K. and S.K.* applies here.

The Parents presented no evidence relating to [REDACTED] or whether, in the event the Student was deprived of a FAPE, [REDACTED] was an appropriate placement. Thus, I will not evaluate the evidence under *Burlington*.

Accordingly, the Parents' evidence is insufficient to prove the Student was denied a FAPE or that private placement at [REDACTED] is appropriate.

Mr. [REDACTED]'s testimony reflected his frustrations. He believes the PGCPS failed to respond appropriately to alleged staff abuse. However, dissatisfaction with the PGCPS response is not sufficient alone to sustain the Parents' proof burden. The record does not present evidence legally sufficient to demonstrate that the PGCPS ever failed to offer the Student a FAPE, or that private placement is appropriate.

Because the Parents have failed to prove the Student was abused by staff during the relevant period, March 26, 2017 through April 26, 2017, and failed to prove the Student was denied a FAPE, I need not address the question of the remedy.

Therefore, the Motion for Judgment will be granted and the Complaint is dismissed.

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Motion for Judgment should be granted in favor of the PGCPS at the conclusion of the Student's case and that the Complaint of March 26, 2019 should, therefore, be dismissed. COMAR 28.02.01.11 and 12E; *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342 (1986); *Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167 (2d. Cir. 2012); *School Committee of the Town of Burlington*,

Massachusetts v. Department of Education, 471 U.S. 359 (1985); *Shaffer v. Weast*, 456 U.S. 49 (2005).

ORDER

I **ORDER** that the Prince George's County Public School's Motion for Judgment is **GRANTED** and the Parents' and Student's Due Process Complaint of March 26, 2019 is hereby **DISMISSED**.

I further **ORDER** that the hearing scheduled May 31, 2019 is hereby **CANCELLED**.

Signature Appears on Original

May 30, 2019
Date Ruling Mailed

Michael R. Osborn
Administrative Law Judge

MRO/cj
#180068

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 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.

Copies emailed on date of issue and mailed by United States Postal Service to:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]