

XXXX XXXX,

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

*** BEFORE JEROME WOODS, II,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH NO.: MSDE-MONT-OT-16-39004**

* * * * *

DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On December 23, 2016, XXXX XXXX and XXXX XXXX (Parents), on behalf of their son, XXXX XXXX (Student), filed a Due Process Complaint with the Maryland Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010)¹.

I held a telephone prehearing conference on January 26, 2017 with the parties. Emily Rachlin, Esquire, represented the MCPS. The Parents represented the Student.

I held a hearing on February 16 and February 17, 2017 at the MCPS headquarters in Rockville, Maryland. Ms. Rachlin represented MCPS. The Parents represented themselves and the Student.

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

The Parents requested mediation. The mediation was scheduled for January 12, 2017. The Parents requested that the mediation scheduled for January 12, 2017 be postponed because they were moving to a new residence. MCPS agreed to the postponement. On January 26, 2017, the parties participated in the scheduled mediation. The parties informed the OAH on January 26, 2017 that the dispute was not resolved. At the prehearing conference on January 26, 2017, I informed the parties that the January 26, 2017 notification that the dispute was not resolved in mediation established the beginning of the forty-five day timeline for conducting the due process hearing and issuing a decision. Further, I informed the parties that the due process hearing must be held and a decision issued by March 10, 2017, which is forty-five days from January 26, 2017, the triggering event for the timeframe for a due process decision.² 34 C.F.R. § 300.510(c); 34 C.F.R. § 300.515(a) (2016).

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511 (2010); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); 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 procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Whether the Individualized Education Program (IEP) and placement developed by the MCPS is reasonably calculated to provide the Student with a free, appropriate public education (FAPE) for the 2016-2017 school year, and if not;

² The forty-fifth day is Sunday, March 12, 2017, so the decision is due the prior Friday, March 10, 2017.

2. Whether the Parents are entitled to the relief sought in the complaint or other appropriate relief?

SUMMARY OF THE EVIDENCE

A. Exhibits

MCPS offered the following exhibits, which I admitted into evidence, except where noted:

MCPS Ex 1 Not admitted

MCPS Ex 2 Behavioral Intervention Plan (BIP), April 19, 2016

MCPS Ex 3 IEP, April 19, 2016

MCPS Ex 4 Reevaluation Plan, April 19, 2016

MCPS Ex 5 Speech/Language Status report, May 24, 2016

MCPS Ex 6 Educational Assessment Report, June 16, 2016

MCPS Ex 7 School Psychologist Report, July 1, 2016

MCPS Ex 8 Functional Behavioral Assessment (FBA) and BIP, July 11, 2016

MCPS Ex 9 Reevaluation Determination, July 11, 2016

MCPS Ex 10 Behavioral Data 2015-2016 School Year

MCPS Ex 11 Invitation letters for IEP meeting, August 3, September 7, September 27, October 10, October 11 and October 17, 2016

MCPS Ex 12 Email from XXXX XXXX to XXXX XXXX, December 12, 2016

MCPS Ex 13 IEP, October 24, 2016

MCPS Ex 14 Letter to the Parents from Ms. XXXX, December 12, 2016

MCPS Ex 15 Letter from [School 1] to the Parents, November 16, 2016; Letter from XXXX Institute to the Parents, December 1, 2016; Letter from [School 2] to the Parents, November 3, 2016

MCPS Ex 16 [School 1] Program Description

MCPS Ex 17 Resume, XXXX XXXX, School Psychologist, MCPS

MCPS Ex 18 Resume, XXXX XXXX, XXXX Program Coordinator, MCPS

MCPS Ex 19 Resume, XXXX XXXX, Placement and Assessment Services Unit
Coordinator, MCPS

MCPS Ex 20 Resume, XXXX XXXX, Extensions Teacher, [School 3],
MCPS

MCPS Ex 21 Not Admitted

The Parents offered the following exhibits, which I admitted into evidence:

PNT Ex 1 XXXX Annual Report: Providing Training to Local School Systems

PNT Ex 2 Email from XXXX XXXX to Mr. XXXX, November 16, 2016

PNT Ex 3 Letter from [School 1] to the Parents, November 16, 2016

PNT Ex 4 Letter from Ms. XXXX to Ms. XXXX, November 16, 2016

PNT Ex 5 Email from Ms. XXXX to Mr. XXXX, November 17, 2016

PNT Ex 6 Description: [School 1] at XXXX

PNT Ex 7 Description: Job Position, Educational Assistant

PNT Ex 8 National Association of Private Education Center: Description: [School 1]-XXXX
Upper School

B. Testimony

The Parents testified on behalf of the Student.

The following witnesses testified on behalf of the MCPS:

1. XXXX XXXX, XXXX Program Coordinator, accepted as an expert in special education, emphasis in severe and profound handicapping conditions (autism);
2. XXXX XXXX, School Psychologist, accepted as an expert in school psychology, emphasis in autism;
3. XXXX XXXX, special education teacher, accepted as an expert in special education;
and

4. XXXX XXXX, Placement and Assessment Services Unit Coordinator, accepted as an expert in special education with an emphasis on placement of special needs students.

FINDINGS OF FACT

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

1. The Student is seventeen years old (date of birth: XXXX, 1999) and is currently attending school at [School 3] ([School 3]), an MCPS school, where he receives special education services, as a student with autism.
2. The Student is on track to receive a certificate of program completion at the end of the school year in which he turns twenty-one.
3. The Student receives all of his educational services in a separate classroom through the XXXX Program at [School 3].
4. The XXXX Program serves students of middle and high school age, who demonstrate significant cognitive disabilities, multiple disabilities, or autism. The students in the program receive systematic behavioral supports and services to reduce self-injurious and/or disruptive behaviors. The goal of the program is to provide intensive educational programming to enable students to acquire appropriate social and communicative skills and prepare them for post-secondary opportunities.
5. [School 3] is a comprehensive school with approximately two thousand students.
6. On April 19, 2016, the IEP team, including the Parents, convened to review and revise the Student's IEP for the 2016-2017 school year.
7. The Parents received notice regarding their Procedural Safeguards and Parental Rights for the April 19, 2016 IEP team meeting.

8. At the April 19, 2016 IEP team meeting, the team reviewed the Student's performance and lack of progress toward achieving the annual IEP goals and objectives. The team also discussed the Student's then present levels of performance as ascertained by the results of the evaluative data obtained from the then most recent evaluation conducted in October 2013 and also considered anecdotal information shared by the Parents and teachers regarding the Student's academic, social/emotional, oral language, written language, career/vocational, community, personal management and communication skills needs.

9. At the IEP team meeting on April 19, 2016, the IEP team, including the Parents, determined that the Student continued to require special education services under IDEA as a student with autism and continued to require specialized instruction and related services to address deficits in behavioral, speech/language, reading, career/vocational, community, personal management, written language, and mathematics skills.

10. The annual goals reviewed and developed on April 19, 2016 reflect the areas of deficits identified on the IEP as ascertained from the evaluative data.

11. The IEP required that in a separate classroom, the Student receive twenty-five hours and forty minutes per week of specialized instruction to address his behavioral, speech/language, reading, career/vocational, community, personal management, written language, and mathematics skills. Additionally, the Student was to receive one hour and thirty minutes per month of speech/language therapy services to further address his communication skills needs. The Student would also receive three hours and forty-five minutes weekly of physical education.

12. The Student's IEP contains numerous testing and instructional accommodations, use of assistive technology devices and supplementary aids and services to help him achieve the goals on the IEP.

13. The Student required a BIP to address his problematic behaviors.

14. The IEP team determined that the Student performed academically and emotionally at the pre-kindergarten to kindergarten range.

15. The Student has an extensive history of inappropriate behaviors and severe communications deficits.

16. Because of the Student's deficits, he requires extensive modified programming to access his curriculum.

17. The Student requires a small student to teacher ratio, a classroom that is well-structured, and regimented routines.

18. When reviewing the Student's progress toward achieving the annual goals as a Student in the XXXX Program, the team determined that the Student required a more structured setting than a separate classroom in a typical high school because of the Student's disruptive behaviors.

19. The Student's disruptive behaviors include engaging in emotional outbursts, running around the room, self-injurious behavior, excessive movement, clearing shelves, ripping objects off the wall, shredding clothing and class materials, non-compliance with directives, and engaging in negative attention-seeking behavior.

20. The Student is easily distracted by stimuli in his environment and requires a surrounding that is void of distractions.

21. The Student requires additional adult assistance in the form of a one-to-one support person in his classroom.
22. The Student cannot participate with non-disabled peers in academic activities because of his behavioral deficits.
23. The Student had a BIP to address his problematic behaviors.
24. While planning the Student's program for the 2016-2017 school year, the team discussed the Student's interfering and problematic behaviors at the IEP team meeting on April 19, 2016.
25. The Student was not making progress toward achieving the annual goals.
26. To address the Student's lack of progress toward achieving the annual goals and to determine whether the Student required a more restrictive placement, the team determined the Student required a full evaluation consisting of the implementation of new assessments, to be completed by the start of the 2016-2017 school year.
27. The team recommended that educational, psychological, speech/language, and FBAs be conducted in order to ensure that the Student's program continued to address his deficits and that the Student continue to receive services in the least restrictive environment.
28. The Parents agreed that new assessments were necessary as part of the Student's reevaluation and provided consent for the assessments to be conducted.
29. At the April 19, 2016 IEP team meeting, the team determined that the Student required a more structured setting than a typical high school because of the Student's disruptive behaviors.
30. On May 5, 2016, the Speech/Language Pathologist conducted an observation of the Student as part of the speech/language assessment. The speech/language assessment through

the observation was conducted to determine the Student's levels of performance regarding communication skills.

31. The Functional Communication Checklist was administered as part of the speech/language assessment to assist in ascertaining the Student's communication skills.

32. With regard to communication function, the Student typically requires significant adult prompting to fulfill his communication needs. The Student will occasionally initiate communication interaction but does not always respond to communication interactions. Additionally, the Student uses communication to gain the attention of people within his environment, make requests, express rejection, express activity choice, respond to "yes/no" questions, express "more" and answer basic questions.

33. With regard to expressive language skills, the Student is typically a verbal communicator who can use words and short phrases. He benefits from picture cues to generate communication. He can repeat utterances of sentence length when provided a model. Additionally, the Student displays immediate exact echolalia and benefits from verbal and visual cuing for all expressive language interactions.

34. With regard to receptive language skills, the Student is able to respond to his name and anticipate familiar routines. The Student can follow one-to-two step directional commands with some repetition and direction breakdown. Additionally, the Student can identify objects through function and usually by color, size and/or shape. With prompting he can demonstrate comprehension of directional concepts and basic questions. He experiences difficulty interpreting nonverbal language.

35. An educational assessment was conducted on May 18, May 27 and June 9, 2016 to evaluate the Student's cognitive and academic abilities. As part of the educational assessment,

the Brigance Inventory of Early Development Standardized (Brigance IED III) test was administered and the Student was evaluated in the areas of academic skills/cognitive development, language development, receptive and expressive skills, literacy, mathematics, reading, written language, career/vocational, community and personal management skills. The Brigance IED III is designed to measure a student's performance compared to that of same-aged students from birth to seven years, eleven months. Despite the Student's age, the Brigance IED III was administered because informal assessments place the Student's present levels of performance in the pre-kindergarten through first grade range.

36. The educational assessment results indicate that with regard to reading skills, when focused and motivated, the Student can follow along with read aloud texts when given gestural prompts.

37. With regard to mathematics skills, when motivated, the Student can answer some word problems, count coins and bills, match digital and analog clocks to the hour and identify and count numbers from one to fifty.

38. With regard to written language skills, the Student can form and write the letters of his name with partial physical prompting and can type some when given prompts. When focused on instruction, the Student can independently select vocabulary words from a field of two that complete a sentence. The Student requires physical prompting with other handwriting assignments due to his need to practice fine motor movements.

39. With regard to career/vocational skills, the Student is able to complete one step assembly tasks and tasks involving sorting of like materials independently or with some verbal prompts. The Student excels at vocational tasks that address his sensory needs such as shredding. The Student is able to recycle, dispose of trash, shred and sweep with prompts.

40. With regard to community skills, the Student requires one-to-one support to navigate parking lots and stores due to personal safety concerns. When focused and motivated, he is able to select items from shopping lists and place them in the shopping cart. In order for the Student to complete required tasks in the community, he requires an environment that is free from noise and chaos.

41. With regard to personal management skills, the Student knows how to complete hygiene tasks, but shows resistance in completing the tasks (e.g., hand washing) without physical prompting. He requires physical prompting to complete toileting tasks, clean up his personal area after an activity or meal and to unpack his belongings.

42. The educational assessment results indicate that the Student requires a highly structured environment with frequent prompts, modeling and repetition. Additionally, he is often unavailable to work on academic skills because of his interfering behaviors.

43. The psychological assessment was conducted on May 12, May 18 and June 7, 2016. The Adaptive Behavior Assessment System-Third Edition (ABAS-3), The Autism Spectrum Rating Scale (ASRS), The General Adaptive Composite (GAC), The Behavior Assessment System for Children-Third Edition (BASC-3), classroom observation and The Leiter International Performance Scale-Third Edition (Leiter-3) were utilized to assess the Student's adaptive skills and social/emotional/behavioral needs. The areas assessed included: communication, self-care, community use, self-direction, health and safety, functional academics and leisure. The ABAS-3, GAC, BASC-3, ASRS and Leiter-3 assist with the diagnostic process and identification of behaviors associated with autism spectrum disorders.

44. The results of the psychological assessment indicate that most of the Student's adaptive skills fall within the below average range at home and the extremely low range at

school. Additionally, the Student does not consistently demonstrate all of the necessary self-help and independent skills that are typical of other students his age. Relative strengths were noted in the areas of communication, home living, and self-care with weaknesses noted in most areas across most settings. With regard to social/emotions skills, the Student engages in impulsive and hyperactive behaviors and experiences severe deficits with expressive and receptive communication skills.

45. An FBA and analysis was conducted on May 17, 2016. The purpose of the FBA and analysis was to invoke a testing condition in which the antecedent and consequent variables are systemically manipulated to determine the function of a particular behavior manifested by the Student.

46. The FBA and analysis found that the Student demonstrated the following problematic behaviors as determined by anecdotal information and the FBA: loud vocalizations, yelling, screaming, aggression (kicking, biting, hitting, self-injury), tantrums, non-compliance and property destruction.

47. In order to assist the Student with maintaining appropriate behaviors, the Student requires the following updates to his BIP, which were added:

- Use visual schedule and routine throughout the day, i.e., use picture schedule to review what is happening next when the Student becomes agitated;
- Shorten the Student's work time when engaged in challenging activities;
- Use prompts such as verbal, gestural model so that the Student can comply with instruction;
- Use wait time;
- Use sensory integration to negate the over-stimulated environment, i.e., lights, loudness, brightness and activity;
- Use tactile intervention, i.e., allow the Student to shred strings, bags, paper, cloth; use hand held massager, play dough and other items the Student can hold or manually manipulate;
- Allow the Student to go on walks, run, exercise;
- Use weighted vest;
- Use sound reducing headphones;

- Use hats, sunglasses to reduce brightness;
- Use verbal and visual picture cues;
- Staff person to walk beside Student to prevent elopement;
- Use timers;
- Block self-injurious behavior;
- Block the Student from shredding his own clothes and destroying property;
- Use reminders; and
- Use physical intervention/seclusion when safety is a concern.

48. On July 11, 2016, the IEP team convened, including the Parents and their attorney and reviewed the Student's performance and lack of progress toward achieving the annual IEP goals and objectives. The team also discussed the Student's present levels of performance as ascertained by the results of the evaluative data obtained from the assessments ordered at the IEP team meeting on April 19, 2016 and anecdotal information shared by the Parents and a teacher regarding the Student's academic, social/emotional, functional, adaptive and communication skills needs.

49. The team determined that the Student continued to require special education services under the IDEA as a student with autism and continued to require specialized instruction and related services to address the deficits that interfere with his ability to achieve the annual goals.

50. The Student's present levels of performance as indicated by the evaluative data and anecdotal information shared at the July 11, 2016 IEP team meeting indicate that the Student was not making progress in the separate classroom in the large comprehensive school.

51. The Student required a more restrictive environment to access his educational program because of his interfering behaviors. The behaviors were present despite the use of a BIP to address the Student's needs.

52. Some of the behavioral interventions in place prior to the July 11, 2016 IEP team meeting included walking the Student around the building to calm him down, use of positive reinforcements, use of a reward system and providing things to shred.

53. The team discussed the phenomenon that despite the use of his BIP daily, the Student had to leave the classroom approximately every ten minutes for at least five to ten minutes in order to calm him down, and that the Student was engaging in self-injurious behaviors.

54. Because the Student had to routinely leave the classroom to calm down, he missed a lot of instruction during his regular school day.

55. The IEP team including the Parents agreed that the Student required a more restrictive environment in which to access his educational program and that the MCPS Central IEP team would convene to review and revise the Student's IEP and placement.

56. The Student's BIP was revised to address his problematic and interfering behaviors.

57. The BIP was implemented during the time the Student received Extended School Year Services in the summer prior to the start of the 2016-2017 school year.

58. The IEP team agreed the Student would continue to receive his educational services at [School 3] in the separate classroom with the implementation of the revised BIP until his new placement was determined.

59. On August 3, 2016, MCPS sent notice to the Parents inviting them to an IEP team meeting on August 16, 2016 at 1:00 p.m. in the Placement and Assessment Services unit at the MCPS headquarters. The purpose of the meeting was to review the IEP and revise it as appropriate and identify the placement.

60. The Parents were unable to attend an IEP team meeting on August 3, 2016 and requested that it be changed.

61. On September 7, 2016, MCPS sent notice to the Parents inviting them to an IEP team meeting on September 26, 2016 at 2:15 p.m. in the Placement and Assessment Services unit at the MCPS headquarters. The purpose of the meeting was to review the IEP and revise it as appropriate.

62. The Parents were unable to attend an IEP team meeting and requested that it be changed.

63. On September 27, 2016, MCPS sent notice to the Parents inviting them to an IEP team meeting on October 10, 2016 at 11:15 a.m. in the Placement and Assessment Services unit at the MCPS headquarters. The purpose of the meeting was to review the IEP and revise it as appropriate.

64. The Parents were unable to attend an IEP team meeting and requested that it be changed.

65. On October 11, 2016, MCPS sent notice to the Parents inviting them to an IEP team meeting on October 24, 2016 at 1:00 p.m. in the Placement and Assessment Services unit at the MCPS headquarters. The purpose of the meeting was to review the IEP and revise it as appropriate.

66. The Parents were unable to attend an IEP team meeting and requested that it be changed.

67. On October 17, 2016, MCPS sent notice to the Parents inviting them to an IEP team meeting on October 24, 2016 at 8:45 a.m. in the Placement and Assessment Services unit at the MCPS headquarters. The purpose of the meeting was to review the IEP and revise it as

appropriate. The notice also informed the Parents that this IEP team meeting was the fifth meeting scheduled and that the meeting would proceed in the Parents absence if they could not attend. MCPS took this action in order to ensure that the Student received an education program that addressed his unique needs.

68. The IEP team including the Parents convened on October 24, 2016 as scheduled. At the meeting, the team reviewed and developed the IEP goals and objectives.

69. The goals and objectives address the Student's deficits and the Parents agreed with the annual goals developed to address the Student's deficits.

70. The IEP requires that the Student receive thirty hours per week of specialized instruction to address his behavioral, speech/language, reading, career/vocational, community, personal management, written language, and mathematics skills and thirty minutes per week of speech/language therapy services to further address his communication skills needs.

71. The Student's IEP contains numerous testing and instructional accommodations, use of assistive technology devices and supplementary aids and services to help him achieve the goals on the IEP.

72. The Student continued to require a BIP to address his problematic behaviors identified in the FBA conducted as part of the reevaluation.

73. When reviewing the Student's lack of progress toward achieving the annual goals, the team determined that the Student required a more structured setting than a typical high school because of the Student's disruptive behaviors. Additionally, with regard to the least restrictive environment in which the Student would receive his program, the team considered the continuum of placements in which to implement the IEP and determined that the Student receive all of his instruction in a separate day school.

74. The Student is required to receive all of his educational services in a separate day school because he requires a small teacher- to-student ratio that is well-structured, and regimented with routine. Additionally, he requires a setting in which he can participate in sensory breaks and where his BIP can be implemented.

75. Referrals were made to [School 2] ([School 2]), [School 4] ([School 4]), [School 5] ([School 5]) and the [School 1] ([School 1]) at XXXX. The Student's IEP was sent to each school with the referrals.

76. Staff from [School 2] informed MCPS staff that the Student could not attend the school as it did not have an age appropriate classroom that could meet the Student's needs.

77. The Parents elected not to meet with staff from [School 4].

78. [School 5] informed MCPS staff that it could not implement the Student's IEP.

79. [School 1] staff informed MCPS that it could implement the Student's IEP.

80. Students at [School 1] attend classroom and community-based instruction individually and in small groups. A student-to-staff ratio of one-to-two is maintained at all times. Instructional areas are determined by each Student's IEP. Additionally, each student has an individual schedule for programming in school that outlines the student's instructional day.

81. The Student's educational needs can be met at the [School 1].

82. A nonpublic special education day school is the least restrictive environment in which the Student's IEP can be implemented.

83. [School 1] is the location where the Student's IEP can be implemented.

DISCUSSION

Burden of Proof

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parents have the burden of proving that the Student's IEP was not reasonably calculated to provide educational benefit to him, and that placement at a separate/special education day school is inappropriate.

The Parents contend that the Student's IEP for the 2016-2017 school year is not reasonably calculated to meet the unique needs of the Student.

The Parents are requesting that the Student be placed at [School 5]'s separate day school, or another unidentified school because they believe [School 1] cannot meet the Student's needs. The burden of proof on these issues is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014).

With regard to the appropriateness of the Student's IEP, to prove their case by a preponderance of the evidence, the Parents must convince me that it is more likely than not that the Student's IEP failed to provide the Student with a FAPE. Merely raising doubt does not constitute proof by a preponderance of the evidence.

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (2010), 34 C.F.R. Part 300, Md. Code Ann., Educ.

§§ 8-401 through 8-417 (2008 and Supp. 2016), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a free, appropriate public education. 20 U.S.C.A. § 1412. Courts have defined the word "appropriate" to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Clearly, no bright line test can be created to establish whether a student is

progressing or could progress educationally. Rather, the decision-maker must assess the evidence to determine whether the Student's IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *See, In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined a FAPE as follows:

Implicit in the congressional purpose of providing access to a "free appropriate public education" 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 give educational benefit to the handicapped child.

458 U.S. at 200-201. In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. 458 U.S. at 206-207. See also, *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004).

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

educational benefit. Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or receipt of passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991) (finding that a student's passing grades and advancement does not resolve the inquiry as to whether a FAPE has been afforded to the student). Similarly, a finding that a student is not progressing at the same speed as his/her peers does not shed light on whether a student has failed to gain educational benefit. As discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically from those obtained by another student, depending on the needs that are present in each student. 458 U.S. at 202.

The IEP is reasonably calculated to provide the Student with a FAPE

The Student is identified as a student with autism under IDEA. The IEP developed for the 2016-2017 school year required that the Student receive special education services under IDEA as a student with autism. Specifically, the Student's IEP was reviewed on April 19, 2016, July 11, 2016 and October 24, 2016. At the April 19, 2016 IEP team meeting, the team essentially determined that the student continued to require specialized instruction and related services to address his behavioral, speech/language, reading, career/vocational, community, personal management, written language, and mathematics skills deficits. The Student's IEP contained a BIP and numerous testing and instructional accommodations, use of assistive technology devices and supplementary aids and services to help him achieve the goals on the IEP.

The goals and objectives of the IEP were developed in accordance with the applicable law and regulations and the Parents did not dispute the developed goals when the IEP was

revised on April 19, 2016. This is very important because the annual goals are what determine the Student's placement.

An IEP is the "primary vehicle" through which a school provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax County School Bd.*, 553 F. 3d 315, 319 (4th Cir. 2009). The IEP "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *M.M. v. School District of Greenville County*, 303 F. 3d 523, 527 (4th Cir. 2002); *see* 20 U.S.C.A. § 1414(d)(1)(A). The IEP should be the result of a collaborative process, usually one or more meetings, in which the parents and their representatives discuss the child's abilities and needs with school staff.

At the IEP team meeting on April 19, 2016 the team, including the Parents, developed an IEP that included goals and objectives to address the Student's deficits. The team considered all of the evaluative data ascertained to determine the Student's then-present levels of performance, the Student's academic and behavioral performance, and considered information provided by the Parents.

It is overwhelmingly clear from the record and testimony that the Parents are knowledgeable, caring, and diligent with regard to the Student's academic and social/emotional needs. The record demonstrates that the Parents are vigilant in assessing the Student's progress and extremely diligent in investigating services, strategies or therapies that they think could help the Student achieve success in school. In observing the Parents' demeanor while testifying, I was convinced that they genuinely have a difference of opinion with MCPS personnel about whether the Student would receive educational benefit from the program that the IEP team developed, to be implemented at [School 1]. In this case, the Parents believe the Student would

be unsafe at [School 1] and have simply adopted a preference for another school, i.e. [School 5], and therefore assume that this separate day school is the only placement and location where the Student can learn and make progress. The Parents did not present credible evidence that established that the program and placement offered and developed by MCPS is inappropriate for the Student. Additionally, the Parents did not present any corroborating evidence to support their assertions that the Student's problematic behaviors result from a physical ailment.

In evaluating the appropriateness of the Student's IEP at the IEP team meeting on April 19, 2016, the team essentially determined that the Student requires a small, structured milieu with extensive supports. Essentially all of the witnesses agree that the Student requires a program that offers a significant amount of supports as a result of his behavioral, attentional, academic and social/emotional skills needs. Mr. XXXX, the XXXX Program Coordinator and Mr. XXXX, a special educator and the Student's teacher, testified that the Student required more intensive, structured support to address his deficits.

In the XXXX Program at [School 3], the Student was receiving one-to-one support in his classroom and received support from three other para-educators as well as the special education teacher. The Student's classroom had approximately six students. Despite being in a small classroom with additional adult assistance, and despite the implementation of a BIP, the MCPS witnesses testified that the Student was not making progress toward achieving the annual goals because of his significant interfering behaviors. Some of the Student's interfering behaviors included making himself bleed, hitting himself, extreme aggression and shredding his clothes. Despite the use of a reward system, walking the Student around the hallways, positive reinforcement and redirection, the Student's interfering behaviors continued. The Student's

behaviors were so intense that he was missing significant amounts of time from class because he was being walked outside of the classroom in order to calm him down.

To address the Student's lack of progress toward achieving the annual goals and to determine whether the Student required a more restrictive placement, new assessments were conducted as part of the Student's reevaluation. Given the Student's profound deficits, he requires a program designed to assist him with his academic, behavioral and communication needs with extensive behavioral supports.

The evidence establishes that the Student requires a special education setting that incorporates a high level of structure, support, and small group instruction. This is the type of program that is being offered at [School 1]. As discussed previously, the Student's disability primarily has impacted his speech/language, social/emotional, and academic skills. These deficits, when not adequately addressed, significantly hinder his progress in the general curriculum. Because of these deficits, the Student requires a milieu in which behavioral, academic and speech/language supports are heavily integrated into his program.

Subsequent to the April 19, 2016 IEP team meeting, the Student was assessed by various evaluators. A review of the assessment results indicates that the evaluators recommended that the Student receive specialized instruction, intense accommodations and supports, direct speech/language and behavioral intervention services as part of his curriculum, integrated into the program. This is exactly what MCPS offered through [School 1].

Ms. XXXX, school psychologist, stressed that the Student does not benefit from receiving his education in a comprehensive school because of excessive sensory stimulation. Essentially, the Student becomes overly stimulated because of noise, lights, and other environmental stimuli that cause the Student to engage in problematic behaviors which include

self-injurious behaviors. In fact, all of the MCPS witnesses agree with these assertions as well. Moreover, it was fatal to the Parents' case that they could not offer a single witness who could testify as to the alleged inappropriateness of the program and placement offered by MCPS.

The MCPS witnesses testified credibly with regard to their understanding of the Student's deficits and how they impact his ability to progress in the general curriculum. I found them to be credible because the evaluative data indicates that the Student's communication and social/emotional deficits significantly impact his performance in school and in the community. All of the MCPS witnesses opined that behavioral and communication supports are the most important components of the Student's educational program because without these, it would be difficult for the Student to access his educational program. The Parents do not disagree with these assertions.

Given the Student's profound behavioral, academic and communication deficits, he requires a program designed to enhance his functioning in these areas. Under the IEP in effect at the start of the school year, and its subsequent revisions, the Student would receive speech/language services to assist him with his communication needs and extensive behavioral supports to address his social/emotional needs.

It is important to note that even though formalized assessments were conducted to assist in ascertaining the Student's strengths and weaknesses, the formalized assessments were not the sole source of the evaluative data used to determine the Student's strengths, weaknesses and levels of performance. The record indicates that the IEP team drew from many sources in addition to formalized assessments, including observations and the Parents' ratings, to accurately determine the Student's present levels of performance.

The record is replete with credible evidence that when the team developed the Student's program, they considered the Student's strengths, the Parents' concerns for enhancing the Student's education, the most recent assessments, and the Student's deficits as determined by his past and present levels of academic performance.

When developing the Student's program, including the numerous accommodations, behavioral supports, supplementary aids and services, the team considered the fact that the Student requires extensive behavioral interventions and regimented structure during the Student's entire school day, to ensure that the Student will not engage in self-injurious behavior, engage other students inappropriately, and succumb to attentional distractions.

In accordance with federal and State regulations, in developing and revising the IEP and placement for the 2016-2017 school year, the team first determined the Student's present levels of academic achievement and functional performance. The meeting minutes and detailed notes from the IEP meetings conducted indicate that the team then determined how the Student's disability impacts involvement and progression in the general curriculum. Next, annual goals were reviewed, and revised as appropriate to meet the Student's needs.

In this case, the evidence supports the fact that all of the annual goals address the Student's deficits and the IEP is reasonably calculated to meet the individualized needs of the Student. The goals directly address the areas of deficits, numerous supplementary aides and supports have been integrated into the program, and the IEP indicates how progress on the goals will be measured.

Least Restrictive Environment is Appropriate

Under IDEA, the Student must be placed in the least restrictive environment to achieve a FAPE. Pursuant to federal statute, disabled and nondisabled students should be educated in the

same classroom. 20 U.S.C.A. § 1412(a)(5). Yet, placing disabled children into regular school programs may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. *Id.* and 34 C.F.R. § 300.114(a)(2). That does not mean, however, that in such a case, placement of a child in a non-public school setting, at the public school district's expense, is the only option available that would allow a child to receive a FAPE. If a public school setting has a self-contained special education program that allows the child to access the curriculum and receive educational benefit, then IDEA's requirement that a disabled child be educated in the least restrictive environment would be accomplished by placement in the public school program. To the maximum extent appropriate, children with disabilities "are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aid and services cannot be achieved satisfactorily." 20 U.S.C. §1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2). However, this "mainstreaming" requirement is "not an inflexible federal mandate." *Hartmann v. Loudoun County Bd. of Educ.*, 118 F. 3d 996, 1001 (4th Cir. 1997). MCPS was obligated to provide the Student with a placement that affords him at least an opportunity to interact with nondisabled peers, if he will receive educational benefit in that placement. That is not the case in this matter. The Student cannot receive his education in an environment with nondisabled peers.

At the April 19, 2016 IEP team meeting and the subsequent IEP team meetings, when developing the Student's IEP for the 2016-2017 school year, the IEP team discussed the Student's

progress toward achieving the annual goals as a tenth grade student at [School 3] in the XXXX Program in a separate class. The parties agree that the team determined the Student required a more structured setting than a typical high school because of the Student's problematic and interfering behaviors displayed during the 2015-2016 school year. Additionally, with regard to the least restrictive environment in which the Student would receive his program, the team discussed various placements along the continuum of placements. The team determined the Student could no longer receive his educational program in a separate classroom in a typical comprehensive school, but required a separate day school.

As indicated above, in determining the educational placement of a student with a disability, the public agency must ensure that the placement decision is made by the IEP team in conformity with the least restrictive environment provisions, determined at least annually, be based on the student's IEP, and be as close as possible to the student's home. 34 C.F.R. §300.116. In selecting the least restrictive environment, the public agency must consider any potential harmful effect on the student or on the quality of services that the student needs. 34 C.F.R. §300.116. This is exactly what the IEP team did. Specifically, the team determined that the Student could receive his services in a separate day school. The team recognized that with regard to location and setting, the Student's IEP needed to be revised because a large school containing approximately two thousand students like [School 3] was too overwhelming for the Student, as evidenced by the disruptive and problematic behaviors that he exhibited during the school day because of his exposure to external stimuli. The team discussed that a separate day school could meet the Student's need for receiving his academic program in a smaller, more structured environment.

In this case, it is clear that the MCPS-based members of the IEP team believed the Student's IEP could no longer be implemented in a separate classroom in a typical school but needed to be implemented in a separate day school. MCPS provided four schools that could possibly implement the IEP. This is a critical point because the Parents believe that the Student's program should be implemented at a separate day school operated by [School 5]. MCPS believes the appropriate separate day school is [School 1].

In *Letter to Trigg*, 50 IDELR 48, OSEP, 2007, OSEP determined that when two or more equally appropriate locations are available, a district may assign a child with disabilities to the school or classroom of its choosing. While OSEP opinions are not legally binding, courts have deferred to OSEP guidance in resolving issues where the IDEA is ambiguous, and the United States Supreme Court has also been guided by OSEP policy.

The evidence indicates that a more restrictive change in placement with regard to the least restrictive environment was necessary, that being a change from a separate class in a comprehensive school to a separate day school. The Parents do not want the Student to attend [School 1] and argued that [School 1] was predetermined as the location for the Student to receive his educational services, once the IEP team determined the Student required a separate day school. The evidence does not support the Parents' assertions.

MCPS staff made referrals to the potential four schools ([School 2], [School 4], [School 5]) and [School 1]. The Student's IEP was provided with the referrals. [School 2] was unable to implement the IEP. The Parents elected not to meet with staff from [School 4]. The Parents preferred school, [School 5], informed MCPS staff that it could not implement the Student's IEP. [School 1] staff informed MCPS that it could implement the Student's IEP. Additionally, [School 1] offers the type of program the Student requires. Students at [School 1] attend classroom and

community-based instruction both individually and in small groups. The school has a student staff ratio of one-to-two and instructional areas are determined by the Student's IEP.

The Parents and the witnesses presented by MCPS essentially agree that the Student can become overly stimulated, inattentive, disruptive and experience difficulty staying on task. These behaviors are precisely why the Student requires a small, structured program that also includes a token economy or rewards system to address the Student's problematic behaviors. MCPS conducted an FBA and developed a BIP to assist with controlling and eliminating the Student's problematic behaviors. The documentary evidence (i.e., the assessment results) supports the opinions rendered by MCPS staff. Again, there is no dispute in this case regarding the Student's strengths and weaknesses. The dispute is mainly over the location and the kind of placement along the continuum of placements that will be appropriate for the Student. MCPS staff who have worked with the Student believe that the Student's IEP can be effectively implemented at [School 1] and I agree. The judgment of educational professionals such as these is ordinarily entitled to deference. *G. v. Ft. Bragg Dependent Schools*, 343 F.3d 295, 307 (4th Cir. 2003); *M.M. v. School District of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002). Where appropriate, I have given deference to MCPS staff, where the assertions are supported by concrete evaluative data regarding the Student's needs, including observations and the Student's performance. For the reasons cited above, I find that the Student's IEP can be implemented in a separate day school at [School 1]. Additionally, the Parents asserted that the Student would not be safe at [School 1] because there may be other students at the school with significant disabilities that may engage in problematic behaviors that could affect the Student. I do not find this assertion to be credible. A description of [School 1] indicates that a staff ratio of one-to-two is maintained at all times or as specified by a student's IEP. This would ensure that another

student's problematic behaviors do not interfere with the Student's ability to access his educational program.

The law recognizes that "once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals." *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990). Therefore, absent any evidence to persuasively dispute the well-reasoned judgment of the MCPS witnesses, I agree with MCPS that the IEP and placement developed by the public agency is appropriate and reasonably calculated to meet the individualized needs of the Student.

The evidence supports MCPS' conclusion that the Student requires a special education setting that incorporates a high level of structure, individualized instruction and support and small group instruction, exactly the type of program that can be implemented at [School 1].

In conclusion, after carefully reviewing all of the evidence presented by the Parents and MCPS, I find that MCPS developed an appropriate IEP and placement for the 2016-2017 school year.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Parents have failed to establish that the IEP and placement offered by the Montgomery County Public Schools for the 2016-2017 school year was not reasonably calculated to offer the Student educational benefit. 20 U.S.C.A. §§ 1400 - 1487 (2010).

I further conclude that the IEP and placement proposed by Montgomery County Public Schools for the 2016-2017 school year was reasonably calculated to offer the Student a FAPE. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

ORDER

I **ORDER** that the Parent's request to have the Student placed at [School 5] or another separate day school is **DENIED**.

March 8, 2017
Date Decision Mailed

Jerome Woods, II
Administrative Law Judge

JW/ac

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. 2016). 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.