[redacted]	*	**BEFORE WILLIAM SOMERVILLE,**
STUDENT	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
PRINCE GEORGE'S COUNTY	*	**OF ADMINISTRATIVE HEARINGS**
PUBLIC SCHOOLS	*	**OAH No.: MSDE-PGEO-OT-19-20509**

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

DECISION

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

STATEMENT OF THE CASE

On July 1, 2019, [redacted] (Parent), on behalf of his child, [redacted] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Prince George's County Public Schools (PGCPS or School System) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).[1]

The parties attended a required resolution session and notified the OAH on August 1, 2019 that they had not resolved their dispute. I held a telephone prehearing conference on August 12, 2019. The Parent represented himself. Gail B. Viens, Esquire, represented the School System. By agreement of the parties, the hearing was scheduled for August 23, 2019.[2]

---

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

[2] The decision will be rendered within the 45-day timeframe. In accordance with the regulations and the agreement of the parties, the decision shall be issued on or before Friday, September 13, 2019, which is forty-five days after the end of the 30-day resolution session period, which ended on July 30, 2019. 34 C.F.R. §§ 300.510(c), 300.515(a).

I held the hearing on August 23, 2019. The Parent represented himself. Gail B. Viens, Esquire, represented the PGCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R. § 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; 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

The issues are whether the Student has been denied a free, appropriate, public education because: 1) the School System denied the Parent a right to appear at IEP meetings by e-mail messaging, and 2) the IEP contains an insufficient amount of speech therapy for the Student.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted no exhibits offered by the Parent.

I admitted the following exhibit offered by the School System:

SS Ex. 1 – Binder containing several documents, tabbed 1 through 7.

Testimony

The Parent testified and presented the following witness:

- [redacted] mother of the Student.

The School System presented the following witnesses:

- [redacted] qualified to offer opinions in "special education and early childhood education"
- [redacted] qualified to offer opinions in "speech-language pathology" and
- [redacted] qualified to offer opinions in "speech-language pathology."

FINDINGS OF FACT

Having considered demeanor evidence, testimony, and other evidence presented, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Student (DOB [redacted] 2014) was a pre-kindergarten student enrolled in the School System. He is developmentally delayed and was identified as eligible for special education. His current IEP indicates that his primary diagnosis is autism. (SS Ex. 1, tab 1.)

2. On November 12, 2018, the Parent and staff of the School System had an IEP meeting. (SS Ex. 1, tab 4.)

3. On December 6, 2018, the Student's mother and staff of the School System had an IEP meeting. (SS Ex. 1, tab 4.)

4. On March 11, 2019, the Parent and staff of the School System had an IEP meeting. (SS Ex. 1, tab 4.)

5. On April 12, 2019, the Parent and staff of the School System had an IEP meeting. (SS Ex. 1, tab 4.)

6. On April 29, 2019, the School System performed a speech-language assessment on the Student. The assessment showed that the Student's comprehension and expressive language were below expected levels for his age. (SS Ex. 1, tab 5.)

7. On May 6, 2019, the Parent and staff of the School System had an annual review IEP meeting. (SS Ex. 1, tab 4.) The Parent presented the IEP team with a report from the [redacted] The report suggested that the Student "would benefit from receiving intensive speech-language therapy services at school and privately at a frequency and intensity to provide positive, measurable gains." (SS Ex. 1, tab 6.) The team considered the report along with the School System's assessment. Speech-language services were addressed in the IEP document; six 20-minute sessions of speech-language instruction per month was proposed and implemented immediately.

8. On May 29, 2019, the Parent and staff of the School System had an IEP meeting. (SS Ex. 1, tab 4.) The Parent participated by telephone. The Parent asked for four 20-minute sessions of speech-language instruction, outside of the classroom, each week. The IEP team decided that two 20-minute sessions, in the classroom, each week (eight per month), in conjunction with weekly speech-language consult services provided to the teacher, to the special education teacher, and to an adult support person in the classroom, would be sufficient. (SS Ex. 1, tabs 2 and 1, at pp. 31 and 32.)[3] Two 20-minute sessions of speech-language instruction per week was proposed and implemented immediately.

9. On June 5, 2019, the School System issued to the Parent a written notice explaining the IEP team's determination to offer two 20-minute sessions of speech-language instruction per week in the classroom setting. (SS Ex. 1, tab 2.)

[3] The IEP document of May 6, 2019, as amended on May 29, 2019, although accurately setting forth the 8 sessions per month on page 31, had a typo on page 32 showing 6 sessions per month.

10. On or about July 1, 2019, the Parent filed a complaint by which he requested a hearing before the OAH.

DISCUSSION

Burdens

The Parent bears the burdens of production and persuasion by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005).

Special Education Law Overview

The identification, evaluation, and placement of students in special education are governed by the IDEA, state statutes, and state and federal agency regulations. 20 U.S.C. §§ 1400-1482 (2017 & Supp. 2019); 34 C.F.R. Part 300 (2018); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2018) and COMAR 13A.05.01. The IDEA requires "that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C.A. § 1400(d)(1)(A) (Supp. 2018); 20 U.S.C.A. § 1412; *see also* Md. Code Ann., Educ. § 8-403 (2018).

Title 20, Section 1401(9) of the United States Code defines FAPE:

> (9) Free appropriate public education -- The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Similarly, 34 C.F.R. § 300.17 defines FAPE:

> Free appropriate public education or FAPE means special education and related services that —
>
> (a) Are provided at public expense, under public supervision and direction, and without charge;
>
> (b) Meet the standards of the SEA, including requirements of this part;
>
> (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

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

Rowley, 458 U.S. at 200, 201.

A student is not entitled to "[t]he 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.*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. 176. The *Rowley* Court further stated that with regard to challenges to the IEP, the issue is whether the IEP is "reasonably calculated to enable the child to" benefit educationally. *Id.* at 203-04. The issue is not whether the IEP will enable the student to maximize his or her potential. The Court in *Endrew F. v. Douglas County School District*, 137 S. Ct. 988, 999 (2017) further clarified that a FAPE does not promise an "ideal" education. Nor does it promise that a student with a disability will be provided with "opportunities to achieve academic success, attain self-sufficiency, and contribute

to society that are substantially equal to the opportunities afforded children without disabilities." *Id.* at 1001.

The IDEA requires that an IEP provide a "basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (citing *Rowley*, 458 U.S. at 201). The act does not establish a "requirement to guarantee any particular outcome for the child." *King v. Bd. of Educ.*, 999 F. Supp. 750, 767 (D. Md. 1998). The IEP, however, must be "appropriately ambitious," *Endrew F.*, 137 S. Ct. at 1000, and it must provide for "specially designed instruction" that is "reasonably calculated to enable the child to receive educational benefits" and to "make progress appropriate in light of the student's circumstances." *Id.* at 996 (quoting *Rowley*, 458 U.S. at 207), 999.

To the maximum extent possible, the IDEA seeks to have children placed in regular public school environments, but in any case, to have them placed in the "least restrictive environment" (LRE) that is consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5).

Arguments of the Parties

The Parent argues that at some point the School System did not allow him to appear at an IEP meeting by e-mail[4] and that prohibition violated the IDEA. He does not argue, however, that such a violation prevented him from participating in the IEP formulating process.

The Parent also argues that people at the [redacted] suggested that the Student would benefit from intense and frequent speech-language instruction and he argues that two 20-minute sessions per week is not intense and frequent enough.

[4] E-mail is an abbreviated way to express "electronic mail." Unlike "instant messaging," e-mail is not instantaneous. Compared to regular mail, however, "the data is transferred almost instantaneously to the receiving location, allowing the sender and receiver to interact quickly." M. Drake, *Private, Legislative and Judicial Options in Clarification of Employees Rights to Content of their Electronic Mail Systems*, 32 Santa Clara L. Rev. 167, 169 – 170 (1992).

The School System argues that the Parent has not met his burdens on either issue. With regard to the procedural issue, the School System argues that not only has the Parent failed to offer evidence of an episode or incident when he alleges the School System did not let him appear at an IEP meeting by e-mail, but the law does not contemplate IEP team members appearing by e-mail. The School System also argues that the Parent attended IEP team meetings and he was willing to attend in person and by telephone.

With regard to the issue on the amount of speech-language instruction, the School System argues that the Parent has offered no credible evidence about how many hour per week of speech-language instruction was meant by the writer of the [redacted] s report, and that the amount that the IEP team set forth in the Student's IEP is sufficient to allow the Student to make educational progress.

IEP Meetings by E-mail?

The IDEA provides procedural safeguards. With regard to claims of procedural violations under the statutory scheme, one statute, 20 U.S.C.A § 1415(f)(3)(E)(ii), provides:

> (ii) Procedural issues. In matters alleging a procedural violation, [an Administrative Law Judge] may find that a child did not receive a free appropriate public education only if the procedural inadequacies--
> (I) impeded the child's right to a free appropriate public education;
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefits.

The Parent suggests that a code section, 20 U.S.C.A. § 1414(d)(3), provides authority for his theory that a parent has a statutory procedural right to have, or to "attend," an IEP meeting[5] by e-mail messages being sent back and forth. I see no such authority in the code section he

[5] The process of developing the IEP, which generally culminates in an IEP team meeting, must be a "fact-intensive exercise . . . [that is] informed by the expertise of school officials . . . [and] by the input of the child's parents or guardians." *Endrew F.*, 137 S. Ct. at 999.

cites. Another code section, 20 U.S.C.A. § 1414(f), on the other hand, authorizes the parties to *agree* to use alternative means to "meet," such as teleconference and videoconference.[6]

For centuries, a "meeting" has meant a "single official gathering of people to discuss or act on matters in which they have a common interest." *Black's Law Dictionary*, (11th ed. 2019).

More recently, the law has recognized certain uses of technology to allow people to gather figuratively, and to discuss a matter without being physically in close proximity. An agency regulation, 34 C.F.R. § 300.322, addresses the efforts that a school system must make to attempt to get a parent to attend a meeting, as well as an alternative means to have a parent attend, virtually, without being physically present. 34 C.F.R. § 300.322(c); .328 (parties rnay agree to meeting participation through use of means such as video conferences and telephone conferences); *see also* COMAR 13A.05.01.07D(7).[7] Such means of meeting through certain technologies allow immediate, instantaneous, contemporaneous communication back and forth, and allow participants to read body language, demeanor, and voice inflection, as applicable.[8] As counsel for the School System argues, a meeting contemplated by the applicable rules is a gathering, whether real or virtual, by which there is an opportunity for a "dynamic exchange of ideas, in the moment."

Maryland law contemplates, and to some extent requires, oral explanations at IEP meetings. Md. Code Ann., Educ., § 8-405(b)(5)(i)(1). Maryland executive branch agency regulations that address the process of providing a FAPE define the term "meeting" for purposes of formulating an IEP. The agency regulation provides:

---

[6] Federal regulations also acknowledge that an IEP team can proceed in an IEP meeting without a parent if a parent decides not to attend. 34 C.F.R. § 300.322(d).

[7] E-mail is directly addressed in federal agency rules. 34 C.F.R. §300.505 allows a parent to elect to receive certain notices by e-mail if the school system, in its discretion, makes that option available.

[8] Use of these technologies is not new. *See* Md. Rules 2-801 through 2-106 (simultaneous electronic participation and communication); Md. Code Ann. State Gov't §1-211(electronic appearance); COMAR 28.02.01.02B and C (electronic appearance); 31.03.02.02 (continuing professional education – electronic live exchange of information).

(42) Meeting.
(a) "Meeting" means a prearranged event when personnel of a public agency, a parent, and others who have knowledge or special expertise regarding the student, at the discretion of the public agency or the parent, come together at the same time and place to discuss matters related to the identification, evaluation, educational placement, and the provision of FAPE for a student with a disability.
(b) "Meeting" does not include:
(i) Informal or unscheduled conversations with public agency personnel;
(ii) Conversations on issues of teaching methodology, lesson plans, or coordination of service provision, if these issues are not addressed on the student's IEP; or
(iii) Preparatory activities of public agency personnel necessary to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

COMAR 13A.05.03.01B(42)

Nowhere in federal or State law, or in federal or State agency regulations, does there exist a procedural right of a parent, a teacher,[9] or any IEP team member to "appear" at a meeting by e-mail.

The judiciary has addressed this issue, tangentially. In *McKnight v. Lyon County Sch. Dist.*, 70 IDELR 181 (Dist. Nev. 2017), the federal district court entered summary judgment against a parent who claimed that a school system refused to engage in an IEP review meeting via e-mail. The school system argued that e-mail does not provide an opportunity for an IEP team to engage in the discussions that Congress contemplated when Congress required in the statutory scheme that IEP teams must meet. The school system also argued that email-only participation would limit collaboration by members of the IEP team. The court concluded that, among other things, the parent did not address issue of meetings held by e-mail in the parent's response to the motion. The court granted the motion against the parent.

In the instant case, I conclude that attendance by e-mail is not contemplated by the statutory concept of an IEP team meeting. E-mail does not allow people to come together at the same time and place to discuss a matter. E-mail is not simultaneous and does not allow

[9] School System team members are generally *required* to attend unless excused by a parent. 20 U.S.C.A. §1414(d)(1)(c).

participants to read body language, demeanor, or voice inflection; it does not allow an opportunity for a "dynamic exchange of ideas, in the moment." Attempting to hold a meeting by e-mail would be an extremely awkward, slow process and the result would not fit the definition of "meeting." Not only is e-mail not contemplated by the law as a means to attend a meeting, but it has not been shown that, with regard to an appearance at a meeting, a parent has a statutory procedural right to "phone it in" by e-mail. *See Am. Center for Law & Justice v. U.S. Dept. of State*, 289 F. Supp. 3d 81, 92 (Dist. D.C. 2018) (discussion of a perfunctory, "phone it in" response to a Freedom of Information Act challenge). Moreover, the Parent in the instant case has not shown any incident, instance, or episode by which the School System denied his use of e-mail to appear at a meeting, or interfered with his use of e-mail.

Finally, the Parent has not shown any required prejudice under the statute, such as a procedural violation that "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child." 20 U.S.C.A § 1415(f)(3)(E)(ii). The Parent has not met his burdens on this procedural issue.

Sufficient Speech-Language Instruction?

The Parent suggests that in light of an assessment report from the [redacted] recommending that the Student "would benefit from receiving intensive speech-language therapy services at school and privately at a frequency and intensity to provide positive, measurable gains," it is the Parent's belief that the amount of speech-language instruction set forth in the current IEP is not enough. The Parent suggests that the Student really needs four 20-minute sessions of speech-language instruction each week. The implication is that the School System would be denying a FAPE unless it provides four 20-minute sessions each week.

In order to prevail in this case, the Parent must show by a preponderance of the evidence that to gain meaningful educational benefit in light of the Student's circumstances, the Student needs more than the amount of speech-language instruction and services offered by the School System. *Schaffer v. Weast*, 546 U.S. 49 (2005) (burdens); *Endrew F. v. Douglas County School District*, 137 S. Ct. 988, 999 (2017) (educational benefit in light of a student's circumstances).

In the instant case, the Parent has shown that the amount of speech-language services to help the Student was an issue before the IEP team (Findings of Fact 6, 7, and 8), that the [redacted] recommended services, both private and public, "at a frequency and intensity to provide positive, measurable gains" (Finding of Fact 7), that the School System furnished, and is furnishing weekly two 20-minute sessions, in the classroom, and that the Parent believes that four 20-minute sessions each week is required for this Student. The Parent has not shown with credible expert testimony, or otherwise, that the Student was not gaining meaningful educational benefit with the speech-language services provided by the School System. The Parent has not shown that the current IEP is not "reasonably calculated to enable the child to receive educational benefits" and to "make progress appropriate in light of the student's circumstances." *Endrew F.* at 996 (quoting *Rowley*, 458 U.S. at 207), 999. There was no credible opinion evidence on that point, or factual evidence offered to support such an opinion.

The School System offered several opinions that the Student was making meaningful educational progress with the two 20-minute speech-language sessions per week, in conjunction with the speech-language consult services given to the Student's general education teacher, his special education teacher, and the adult support person. The opinions were clear, well-articulated, and supported by factual evidence.

Ms. [redacted] the Student's special education teacher, testified credibly that the speech-language sessions need to be relatively short for the Student, and because the Student

does not "generalize" well what he has learned, the sessions should be in the classroom with his peers. She credibly opined that the Student is making meaningful progress in speech-language skills, in that, among other things, the Student began talking in full sentences.

Ms. [redacted] the Student's speech-language instructor, offered a credible opinion that two 20-minute speech-language sessions per week is appropriate in order to allow the Student to gain meaningful educational benefit. She noted that the additional adult support in the classroom and the speech-language consult would effectively supplement the speech-language services.

Ms. [redacted] a speech-language instruction specialist with the School System, offered a persuasive opinion that two 20-minute speech-language sessions per week is appropriate for the Student. She noted that the determination was made after considering the Parent's concerns and reviewing records, reports, data, and observations of the Student. She explained the speech-language consult services and the additional adult support that were being offered in the Student's IEP. She opined that during the school day, if one provider is not working with the Student, then another probably will be. She credibly opined that the two 20-minute speech-language sessions per week, in conjunction with the other services and supports in the Student's IEP, would allow the Student to attain "positive, measurable gains."

Although the School System has no burden to show that the Student was making "progress appropriate in light of the student's circumstances," *Endrew F.* at 996 (quoting *Rowley*, 458 U.S. at 207), 999, under these facts and circumstances, the School System's witnesses offered "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 [the Student's] circumstances." *Endrew F.*, 137 S. Ct. at 1002. The Parent has not met his burdens on this substantive issue.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parent has not shown by a preponderance of the evidence that the Student was denied a FAPE for a procedural violation, 20 U.S.C.A § 1415(f)(3)(E)(ii). I also conclude that the Parent has not shown the Student was denied a FAPE for a lack of necessary speech-language services that would provide the Student an opportunity to make "progress appropriate in light of the student's circumstances." *Endrew F. v. Douglas County School District*, 137 S. Ct. 988, 996 and 999 (2017); *Schaffer v. Weast*, 546 U.S. 49 (2005).

ORDER

I **ORDER** that the Parent's complaint be, and is hereby, **DISMISSED**.

Signature Appears on Original

September 9, 2019
Date Decision Issued

William J.D. Somerville III
Administrative Law Judge

WS/emh
#181750

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); 20 U.S.C.A. § 1415(i)(2). 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 Mailed to:

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]