

[REDACTED]

STUDENT

v.

ANNE ARUNDEL COUNTY

PUBLIC SCHOOLS

* BEFORE MARC NACHMAN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-AARU-OT-18-09502
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DECISION

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STATEMENT OF THE CASE

On March 26, 2018, [REDACTED] (Parent), on behalf of her son, [REDACTED] (Student), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to review the Student's education program and placement of the Student by Anne Arundel County Public Schools (AACPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017).¹

On April 27, 2018, I conducted a telephone pre-hearing conference (Conference) in the above-captioned matter.² The Parent represented herself and the Student. [REDACTED]

¹ U.S.C.A. is an abbreviation for United States Code Annotated.
² The Conference was initially convened two days earlier on April 25, 2018, after an unsuccessful mediation. It was continued two days to April 27, 2018, in order for the Student's mother to consider options presented to her at the mediation. As it was not resolved by the latter date, the Conference went forward. As is the practice at the OAH, as well as in any legitimate mediation setting, this ALJ is not aware of any of the pre-hearing negotiations between the parties.

Esquire, represented AACPS. By agreement of the parties, the hearing was scheduled for May 16, 2018, at AACPS Headquarters, 2644 Riva Road, Annapolis Maryland, starting at 9:30 a.m.

I held the hearing on the scheduled date, location and time. Again, the Parent represented herself and the Student and Ms. [REDACTED] represented AACPS. The hearing concluded on May 16, 2018. The parties requested that the time requirements for issuing a decision be strictly adhered to. 34 C.F.R. §§ 300.510(c), 300.515(a) (2017). Therefore, in accordance with these regulations, the decision is being issued on or before Friday, June 8, 2018, which is forty-four³ days after April 25, 2018, the date of the mediation.

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) (2017); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2017); 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 OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUE

The issue is whether the IEP⁴ team, which met on March 23, 2018, improperly determined that the appropriate placement for the Student is the [REDACTED] Middle School [REDACTED], the Student's home school, instead of [REDACTED] ([REDACTED]), an AACPS Charter High School that the Student is already attending, because AACPS could not provide the

³ Decisions are due forty-five days after mediation; however, if the due date falls on a weekend or holiday, the decision is due the business day prior to the weekend or holiday date. Forty-five days from mediation falls on Saturday, June 9, 2018; therefore, the decision is due the weekday before that date, or Friday, June 8, 2018.

⁴ "Individualized Education Program."

Student the educational program necessary to provide him with a free appropriate public education (FAPE) at [REDACTED], but could do so at [REDACTED]

SUMMARY OF THE EVIDENCE

Exhibits

The Parent did not submit any exhibits that were accepted into evidence.⁵

I admitted the following exhibits on behalf of AACPS:

- AACPS Ex. 1. Prior IEP, dated March 29, 2017
- AACPS Ex. 2. No exhibit submitted
- AACPS Ex. 3. No exhibit submitted
- AACPS Ex. 4. Comprehensive Evaluation Review (with subparts a through e), dated February 8, 2018
- AACPS Ex. 5. No exhibit submitted
- AACPS Ex. 6. No exhibit submitted
- AACPS Ex. 7. No exhibit submitted
- AACPS Ex. 8. IEP Team Meeting Report Prior Written Notice (with subparts a through f), dated March 23, 2018
- AACPS Ex. 9. Present IEP, dated March 23, 2018
- AACPS Ex. 10. Quarterly Assessment Data Analysis, first three quarters 2017-2018 school year, undated
- AACPS Ex. 11. *Curriculum Vitae* (CV) of [REDACTED]
- AACPS Ex. 12. CV of [REDACTED]
- AACPS Ex. 13. CV of [REDACTED]

⁵ The Parent moved one exhibit into evidence that was not admitted because AACPS successfully objected to its introduction as the Parent did not timely provide the document to AACPS at least five days prior to the hearing in accordance with 34 C.F.R. § 300.512(a)(3) (2017). In order to present a complete record, the exhibit was marked for identification, and retained as part of the record for appeal purposes.

Testimony

The Parent testified and presented the testimony of [REDACTED] the Student's grandmother.

The AACPS presented the following witnesses:

- [REDACTED] who was admitted as an expert in Elementary and Middle School Education
- [REDACTED] who was admitted as an expert in Special Education.
- [REDACTED] who was admitted as an expert in Special Education.

FINDINGS OF FACT

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

The Student

1. The Student is male and is presently twelve years of age.
2. The Student lives with his mother, the Parent.
3. In school year 2016-2017, the Student attended [REDACTED] Elementary School, an AACPS elementary school, which was the Student's home school. He received special education services during his elementary school tenure.
4. The Student has primary disabilities of Autism and Specific Learning Disabilities. The Student's testing established these disabilities.
5. The academic areas affected by the Student's disabilities are currently Reading, Math, Written Expression, and Expressive/Receptive Language. The areas previously determined to be affected by the Student's multiple disabilities included Fine/Visual Motor skills, Learning Behaviors, and Attention/Executive Functioning. These academic areas were identified in the Student's current (2018) and previous (2017) IEPs.

6. The Student's penultimate IEP was developed after an IEP team meeting on March 29, 2017, when the Student was attended [REDACTED] Elementary School.

7. The Student's current IEP was developed by the IEP team on March 29, 2018.

8. There were no procedural deficits in scheduling the IEP team meeting or producing the IEP.

[REDACTED]
9. [REDACTED] is a charter school in the AACPS system which determines its enrollment for new students by lottery. The school's emphasis is on STEM⁶ programs.

10. Sometime during the 2017-2018 school year, the Parent entered the Student into an AACPS lottery for enrollment at [REDACTED]. The Student was selected for enrollment at [REDACTED]. The staff at [REDACTED] received the Student's IEP from [REDACTED] Elementary and attempted to craft an educational program for the Student based on that IEP.

11. Classes at [REDACTED] are each 90 minutes in length. Students take the required Math, English and Science courses, as well as a World Language course.

12. [REDACTED] also has a Special Education Department which is involved in the Student's education.

13. [REDACTED] has some co-taught classes, but has no self-contained classrooms.

14. Although [REDACTED] follows the AACPS curriculum, it is an accelerated curriculum. For example, the initial Math curriculum starts with 6th grade Math, but it ends the year teaching 7th grade Math.

⁶ "Science, Technology, Engineering and Mathematics."

15. [REDACTED] is the Student's home school.

16. [REDACTED] is a general education middle school, follows the AACPS curriculum and has a Special Education program with services that are not available at [REDACTED]

17. [REDACTED] has co-taught classes, as well as self-contained classrooms for students who require this more restrictive teaching environment.

Present Educational Progress and Functioning

18. The Student is happy as a student at [REDACTED]. He is not, however, making academic achievement commensurate with the requirements of the school; he is not keeping up with the curriculum.

19. In Language Arts (English), the Student can read and decode on grade level, but his comprehension is on the 2nd grade level. He cannot therefore understand what he is reading, which is essential to keeping up with STEM classes.

20. In Written Expression, the Student's writing is between the third and fifth grade level.

21. In Math, the Student is performing in the first percentile of performance, or on a kindergarten through 2nd grade level.

22. The Student no longer needs related services for fine/sensorimotor skills.

23. Presently, the Student is in co-taught classes for Reading, Math and Written Expression, with pull-out services for those subjects with a Special Education teacher. These pull out sessions are scheduled during the time that the Student would be in a World Language class (Turkish). This level of services meets the March 2017 IEP requirements.

24. Despite the Special Education services being provided to the Student (co-taught classes, with pull-out), the Student is not making appropriate educational progress. His quarterly

assessment scores are generally regressing, and are not up to the class, school or district averages. He is failing his classes and not retaining the material he is being taught.

25. Despite the co-taught classes and pull-out services, the Student is not getting FAPE at [REDACTED] as he cannot access his education in the large, unstructured setting of classes at [REDACTED]

IEP Contents

26. Under the present (March 2018) IEP, the Student would be educated in self-contained classrooms for Math and Language Arts. In those subjects, the student/teacher ratio would be low, with five to six students per class.

27. The Student would be in general education classrooms for Social Studies and Science, which are being co-taught with a Special Education teacher. The co-taught classes at [REDACTED] are a similar size to those at [REDACTED], but they are significantly shorter – 50 minutes at [REDACTED] and 90 minutes at [REDACTED]

28. Both of these changes (the self-taught classes and shorter class periods) are reasonably calculated to enable the Student to make progress appropriate in light of his circumstances.⁷

29. In order to access education in the classroom and make appropriate educational progress in light of his circumstances, the Student needs to be in a self-contained classroom, with more individualized attention from the teacher for Math and English classes. He can access his education in co-taught classes for some subjects (e.g., Social Studies and Science).

30. These Special Education services are not available at [REDACTED], but these resources are available at [REDACTED]

⁷ The IEP also calls for Extended School Year (ESY) services and Speech/Language and Occupational therapy. Those IEP elements are not presently at issue.

DISCUSSION

Legal Framework

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Student has the burden of proving by a preponderance of the evidence that the IEP and recommended school placement developed by the AACPS is not reasonably calculated to provide the Student with FAPE for the 2018-2019 school years, and that the changes proposed by the IEP team which changed the Student's school placement to [REDACTED] is not appropriate or reasonably calculated to provide the Student with FAPE. Specifically, the Parent has abandoned her demand to have the Student placed at [REDACTED] but questions whether the IEP should be less restrictive (i.e., retaining co-taught classes for all of the Student's classes, instead of some self-contained classes).

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487, 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2017), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1).

FAPE is statutorily defined as "special education and related services" that are provided "in conformity with the [IEP] required under section 1414(d)" of the IDEA. 20 U.S.C.A. § 1401(9).⁸ In 2017, the United States Supreme Court ruled that FAPE "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017). Rejecting the "merely more than *de minimis*" test applied by the Tenth Circuit, *see id.* at 1000, the Court iterated and clarified principles originally set forth in *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

⁸ In *Endrew F.*, the Court observed that it remains "[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided." *Id.* (comparing 20 U.S.C. § 1401(18) (1976 ed.) with 20 U.S.C. § 1401(9) (2012 ed.)).

Directly adopting language from *Rowley*, and expressly stating that it is not making any “attempt to elaborate on what ‘appropriate’ progress will look like from case to case,” the *Andrew F.* Court instructs that the “absence of a bright-line rule ... should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Andrew F.*, 137 S.Ct. at 1001 (citing *Rowley*, 458 U.S. at 206). At the same time, the *Andrew F.* Court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, “a reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Andrew F.*, 137 S.Ct. at 1002.

An IEP is the “primary vehicle” through which a public agency provides a student with a FAPE. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009). To comply with the IDEA, an IEP must, among other things, allow a disabled child to advance toward measurable annual academic and functional goals that meet the needs resulting from the child’s disability or disabilities, by providing appropriate special education and related services, supplementary aids, program modifications, supports, and accommodations. 20 U.S.C.A. § 1414(d)(1)(A)(i)(II), (IV), (VI).

An IEP shall include “[a] statement of the child’s present levels of academic achievement and functional performance, including” and, specifically, “[h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children).” 34 C.F.R. § 300.320(1). A public agency is responsible for ensuring that the IEP is reviewed at least annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision. 34 C.F.R. §

300.324(b). When an IEP team considers changing placement of a student, it is guided by the following:

(a) The placement decision-

- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
- (2) Is made in conformity with the [least restrictive environment (LRE)] provisions of this subpart, including §§ 300.114 through 300.118;

(b) The child's placement-

- (1) Is determined at least annually;
- (2) Is based on the child's IEP; and
- (3) Is as close as possible to the child's home;

- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs; and
- (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116 (2016).

In the present case, the Parent challenged the IEP team's proposed placement of the Student at [REDACTED] for the 2018-2019 school year, set forth in the IEP dated March 23, 2018 (AACPS Ex. 9). In that IEP, as well in the prior IEP of March 29, 2017 (AACPS Ex. 1), the Student's "Primary Disability" was listed as "Multiple Disabilities: Autism, Specific Learning Disability." The later IEP listed the "Areas affected by disability" as "Reading, Math, Written Expression, [and] Expressive/Receptive Language" which was less inclusive than the areas listed in the prior IEP.⁹ The Parent did not challenge the more limited list of disabilities, but the reduced list of disabilities does not affect the outcome of this decision.

⁹ The prior disabilities also included "Fine/Visual Motor...Learning Behaviors, Attention/Executive Functioning." AACPS Ex. 1.

Background

The Student is a twelve-year-old boy who lives with the Parent, who is his mother; his grandmother is also involved in his care. The Student has presently been assessed as having multiple disabilities: Autism and Specific Learning Disabilities (AACPE Ex. 9). The Student was previously attended the [REDACTED] Elementary School, an AACPS elementary school, which was also the Student's home school (AACPS Ex. 1). At some time during the 2017-2018 school year, the Parent applied to enroll the Student at [REDACTED] through a lottery, whereby AACPS students would be randomly selected to be enrolled in and attend [REDACTED]. The Student is currently enrolled at and attends [REDACTED]. The Student's IEP team met and on March 29, 2018, it determined that due to the Student's circumstances, the appropriate placement for the Student would be at [REDACTED] which is the Student's home school.

[REDACTED] is a general education middle school in the AACPS system that AACPS contends offers the educational programs and accommodations that AACPS contends would provide the Student FAPE in the least restrictive environment.

Comparison of the two schools

Mr. [REDACTED] the Principal at [REDACTED] described the educational program at the school. The program at [REDACTED] emphasizes STEM (Science, Technology, Engineering and Math). Mr. [REDACTED] testified about the school's structure and program. STEM classes are taught in 90-minute blocks and, although the curriculum at [REDACTED] generally follows the AACPS curriculum, subjects (such as Math) are taught in an accelerated manner. For example, although the [REDACTED] Math curriculum starts out even with the AACPS curriculum for 6th grade students throughout the county, the curriculum is accelerated, ending up the year teaching the 7th grade Math curriculum. There are no self-contained classes available at [REDACTED] and the Student gets the necessary individualized attention only through pull-out programming.

██████████ is the Student's home school, meaning that if he did not attend ██████████, he would attend ██████████ which is his neighborhood school. The program at ██████████ presents a general education curriculum with more concentrated and shorter class periods scheduled daily. Ms. ██████████ who oversees the Special Education program at ██████████ and is familiar with its resources, explained the school's educational program. ██████████ teaches the general AACPS curriculum, co-teaching some classes and having self-contained classes for other subjects. The other major difference is that there are special education components at ██████████ that are not available at ██████████ including self-contained classrooms providing the Student with a higher student/teacher ratio.

Issues and position of the parties

Initially, the Parent sought as a remedy that the enrollment process at ██████████ be changed so that prospective students chosen through the admission lottery would not be disappointed if ██████████ could not accommodate their special education needs. Ostensibly, the Parent sought to have the special education components available at ██████████ included in the programming at ██████████. The Parent rejected the use of self-contained classes at ██████████ in favor of more co-taught classes for the Student at ██████████.

AACPS countered, challenging the justiciability of Parent's issue designation and remedy, stating that the IDEA concerns the education of a single student, and not the education of prospective students. AACPS also challenged the Parent's position that the programming available at ██████████ should be made available at ██████████. AACPS also challenged the Parent's assertion that the present IEP calling for self-contained classes was more restrictive than it needed to be, and that less restrictive alternatives (such as co-teaching major subjects) should be tried first. AACPS countered that the Student did receive co-taught teaching in some subjects at

█████ (Math and Language Arts), but that he was not making appropriate academic progress even with that assistance.¹⁰

Present level of functioning at █████

The parties agree that the Student is happy at █████ fitting in with other students socially. Nevertheless, Mr. █████ testified that the Student still needs to keep up with the curriculum, which he is not presently doing.

Assessing the Student's present level of reading, math, written expression and expressive/receptive language assessments, scores in all of these areas indicate an impact to the Student's academic achievement and functional performance (AACPS Ex. 9a). Mr. █████ testified that the Student still has deficits in Language Arts, with a deficit in reading comprehension. The Student can read and decode, but he cannot understand and comprehend what he is reading, which Mr. █████ testified is an essential skill for studying STEM subjects.

During the IEP process, the Student was assessed as needing many "Special Considerations and Accommodations" on a daily basis for the entire school year by a Special Education Teacher, General Education Teacher and an Instructional Assistant, with periodic assistance by those professionals and Occupational Therapists and assistants and Speech/Language Pathologists and assistants (AACPS Ex. 9m-o). Based on the Student's performance at █████ these services were expanded from the prior IEP (AACPS Ex. 1 i-j). ESY was also indicated (AACPS Ex. 9p), as it was in the prior IEP (AACPS Ex. 1k).

In Math, the Student's performance is in the first percentile, as his Math abilities are at the second grade level, his progress having remained relative flat since that grade; the team

¹⁰ At the close of the Parent's case-in-chief and at the conclusion of all of the evidence, AACPS orally moved for a summary decision in its favor, stating that the Parent had not presented sufficient evidence to support her allegations and her due process complaint should be dismissed. I declined to grant the motion, explaining that I had two responsibilities – one was to decide the matter, and the other was to create a record for any subsequent appeal, which would best be done by allowing both parties to present their evidence. The decision in this case was reached after considering all of the evidence presented by both parties.

found that Math skills “are his greatest area of need” with his grade level performance between K and 2nd grade (AACPS Ex. 9g). In reading, the Student can read on a 6th grade level, but his comprehension is on a 2nd grade level, with better comprehension of fictional reading as opposed to non-fictional reading (AACPS Ex. 9g). The Student’s “Written Expression” presents a challenge to the Student. Although the Student is able to spell certain types of words and correctly respond to prompts, he was failing English class because he did not engage in the writing process and needed “constant redirection to the writing task;” he function on the 5th grade level for basic skills, but on the 3rd grade level for written expression (AACPS Ex. 9h). The Student similarly showed strengths and weakness in Expressive/Receptive Language, but due to deficits in responding to assessment questions, he was determined to perform below his grade level (AACPS Ex. 9h).

The Student was found to have performed at an appropriate age level for fine/sensorimotor skills (AACPS Ex. 9h), which was an improvement from his prior IEP performance levels (AACPS Ex. 1c). As a result of these levels of achievement and performance, the IEP team determined that the Student “has difficulty accessing the general education curriculum and is required to be removed from class to receive small group instruction.” AACPS Ex. 9i. Despite these pull-out services, the Student is not progressing academically, as demonstrated in the Student’s Quarterly Data assessment Analysis, which Mr. [REDACTED] explained was the Student’s test scores for the first three quarters of school year 2017-2018 during which data has been tabulated:¹¹

¹¹ The fourth quarter assessment data had not been presented at the hearing, as that quarter had not yet ended.

Class	Quarter	Points	Score
English	2017-18 Q 1	3/23	13%
English	2017-18 Q 2	3/24	13%
English	2017-18 Q 3	5/22	23%
Math	2017-18 Q 1	0/12	0%
Math	2017-18 Q 2	4/12	33%
Math	2017-18 Q 3	2/12	17%
Science ¹²	2017-18 Q 1	1/16	7%
Science	2017-18 Q 2	1/16	6%
Soc. Studies	2017-18 Q 1	0/16	0%
Soc. Studies	2017-18 Q 2	1.6/16	10%
Soc. Studies	2017-18 Q 3	0/16	0%

(Excerpted from App. Ex. 10). Analyzing this data, Mr. [REDACTED] explained that the Student was not making any meaningful progress in Math, Science and Social Studies where the scores regressed over the quarters. The Student did have an increased score in English, but it was significantly lower than the class average (59%, 67% and 76%, respectively), school average (64%, 71% and 76%, respectively), and district average (65%, 70% and 75%, respectively). The data demonstrated that the Student was not making appropriate educational progress in light of his circumstances, and the witnesses' anecdotal evidence supports these assessment results. Prior and Present IEP Comparisons

The IEP team met on March 23, 2018 and reviewed the Student's assessments; goals and then objectives were identified (AACPS Ex. 9q-s), **which** were not challenged by the Parent at the hearing. The following is a comparison of the services provided under the prior and current IEP's (AACPS Exs. 1 o-p and AACPS Ex. 9t-w), as well as a comparison of the LRE analyses (AACPS Exs. 1q and 9v):

¹² Only two quarters of Science class assessments were presented.

Prior IEP (created March 29, 2017)

Subject	Location	Length of time	Frequency	Details	LRE analysis
Reading, Math, Written Expression	In General Education	5 hours	Weekly	2 hours of special education services in Math, and 3 Hours of Special Education Services in Reading/Writing	
Math, Written Expression	Outside General Education	4 hours	Weekly	2 hours special education services in math and 2 hours Special Education Services in writing outside general education weekly	

Inside General Education 80% or more of the school day

Present IEP (created March 23, 2018)

Subject	Location	Length of time	Frequency	Details	LRE analysis
Math, Language Arts	Outside General Education	8 hours	Weekly	4 hours of Special Education Services in Math weekly and 4 hours of Special Education Services in Language Arts weekly in a self-contained program	

Social Studies, Science	In General Education	8 hours	Weekly	4 hours of Special Education Services in Social Studies weekly and 4 hours of Special Education Services in a co- taught classroom.	
					Inside General Education 40-79% of the school day

Under both IEPs, ESY services and Speech/Language remained fairly constant, with the Speech/Language services unchanged at 2 sessions for 30 minutes monthly (one hour monthly), and the Occupational Therapy services totaling the same 30 minutes quarterly, but provided in one 30 minute session instead of the prior brace of 15 minute sessions. The ESY services tracked the regular year program, generally outside a general education setting.

Present IEP

The Parent did not raise any objection to the procedure used to create the IEP. Once an IEP is shown to be procedurally proper, the judgment of education professionals regarding the child's placement should be questioned only with great reluctance by the reviewing authority. *Tice ex rel. Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990).

Nevertheless, the Parent disagrees with the Student being taught in self-contained classrooms for Language Arts and Math, but AACPS supports the present IEP team's decision – the Student was already in co-taught classes for these subjects, and despite the pull out services, he was falling behind.

The present IEP calls for the Student to be in a self-contained classroom for Math and Language Arts, as the co-taught classes have not benefited him. Mr. [REDACTED] testified that the

Student can get educational benefit in a self-contained setting that he did not get in co-taught classes in those subjects (Math and Language Arts).

Ms. [REDACTED] who testified as an expert in Special Education, was the Student's co-teacher in Math and Language Arts, and provided him pull out services on a one-to-one basis for those subjects, in accordance with the existing IEP. She testified that the comprehensive evaluation performed on the Student showed that the Student was performing significantly below grade level in all academic areas. Although the Student's reading decoding was at grade level, his comprehension was on a second grade level, his knowledge of basic skills was on a fifth grade level and his written expression was on a third grade level. Based on these levels, Ms. [REDACTED]'s unchallenged opinion is that the Student is not able to access education in the co-taught classroom. She also questioned whether [REDACTED] could provide the Student with the accommodations he needs, particularly as there are no self-contained classes available to him in the school. Instead, her opinion was that the Student needs a differently structured classroom – he needs the self-contained classroom to remediate his Math and Written Expression deficiencies. She explained that self-contained classrooms provide a smaller ratio of students to teachers, can more quickly address individual needs, as opposed to co-taught classrooms where there are many other students' needs that have to be addressed as well. Ms. [REDACTED] supports the changes in the IEP that would place the student in self-contained classrooms for those problem areas - Math and Language Arts. She also supports co-taught classes for Science and Social Studies, which are not available at [REDACTED]

Ms. [REDACTED] pointed out that the changes suggested in the IEP move the Student to a more restrictive setting for all subjects, but only one step at a time, moving the student from co-taught classes in Math and Language Arts to a self-contained setting, and moving him from a general education classroom for Science and Social Studies to co-taught classes, which are not

available at [REDACTED] but which would be available at [REDACTED]. Ms. [REDACTED] opined that the Student is not making progress with the instruction that he is now receiving at [REDACTED] but the other options would result in the requisite educational progress.

Ms. [REDACTED] who oversees the Social Education Department at [REDACTED] and coordinates services for students having IEPs, testified as an expert in Special Education. Ms. [REDACTED] observed the Student for 90 minutes in a Language Arts class and believes that he would benefit from the more structured environment of a self-contained Language Arts and Math class, and co-taught classes for the other subjects. Ms. [REDACTED] testified that [REDACTED] is the Student's home school, and it has the resources that would meet the Student's needs under the current IEP. Ms. [REDACTED] also testified that the structure at [REDACTED] was more fitted to the Student's academic needs and abilities: the classes are only 50 minutes long, which would allow the Student better retention due to the shorter class periods; the self-contained classes have 4 to 6 students; co-taught classes have at least two adults for 30 students. In those co-taught classes, the Student could be pulled out of the classroom for re-teaching and reinforcement once areas of weakness are discovered, and he could then go back to the classroom with those skills reinforced.

Reliance on opinions and testimony of the AACPS educators

Although the Parent has the burden of proof in this matter, she did not present any expert witnesses, although she had the opportunity to do so. Nevertheless, I considered the evidence as a whole, considering whether the testimony of the AACPS expert witnesses could support any aspect of the Parent's case.

Courts have held that “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

I found the testimony of the expert witnesses presented by AACPS to be clear, detailed, logical, and persuasive. Their witnesses were accepted as experts in their respective educational fields based on their education and years of experience. I found their conclusions to be sound and supported by other evidence in the record. In addition, the educators demonstrated substantial knowledge of the Student's history and educational programming. This testimony unquestionably supported the present IEP team's placement and service decision.

"Placement" v. "Location"

Although the term "placement" is often used informally to refer to the school which a student will attend, "placement" and "location" are not synonymous. The Parent wants the required services to be provided at [REDACTED] which is a "location" under the IDEA and its predecessor legislation. A student's placement is the totality of the services, accommodations, and so on, specified in the student's IEP; it is not the geographical location where those services are provided. Educational placement, as used in the IDEA, means educational program—not the particular institution where the program is implemented. In *A.W. v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004), the Court determined that "educational placement" does not secure a student's right to attend school in a particular classroom at a particular location, but the "placement" is driven by the program available in the target school. In the present case, not only is the necessary self-contained program not available at [REDACTED] but it is available in [REDACTED] which is the Student's home school.¹³

There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *A.B. by D.B. v. Lawson*, 354 F.3d 315, 325-329 (4th Cir. 2004); *M.M. ex rel. D.M. v. School Dist. of Greenville Co.*, 303 F.3d 523, 532-533 (4th Cir. 2002); *Barnett v. Fairfax County School Board*, 927 F.2d 146

¹³ The IDEA and accompanying regulations provide that a student shall be educated "as close as possible to the child's home." 34 C.F.R. § 300.116(b)(3) (2017).

(4th Cir. 1991). There are no legal requirements that mandate a school system to provide all manner of programs at each of its schools; the law only mandates that the school system have an appropriate program available to the student in its system, lest the student be permitted a non-public placement, which is not being sought in this matter.

Barnett was decided under the Education of the Handicapped Act (EHA), which is the predecessor to the IDEA. The definitions, processes and requirements in the EHA are at the root of the IDEA (e.g., FAPE, LRE, etc.). The Court considered whether, under the EHA, school systems were required to duplicate all of its educational services in each of its neighborhood schools, or whether they could centralize those educational resources in particular schools in its system. In deciding that the local school boards could centralize special education programs, the Court agreed with the lower court, stating that "...in light of the finite resources available for the education of handicapped children, a school system is not required to duplicate a small, resource-intensive program at each neighborhood school." Accordingly, AACPS is not required to provide self-contained classes required for the Student's education at all of its schools, including [REDACTED]. As long as the appropriate educational program is provided by the local educational agency (in this case AACPS), the requirements of IDEA are met. More significantly, those programs are not only provided by AACPS, they are provided in the Student's home school, satisfying other discrete requirements of the IDEA.

LRE

The nature of LRE necessarily differs for each child but could range from a regular public school to a residential school where 24-hour supervision is provided. COMAR 13A.05.01.10B. Although the IDEA requires specialized and individualized instruction for a learning- or educationally-disabled child, it also mandates that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities," must

be “educated with children who are not disabled[.]” 20 U.S.C.A. § 1412(a)(5)(A). It follows that the State and federal regulations that have been promulgated to implement the requirements of the Act also require such inclusion. 34 C.F.R. § 300.114 through 120; COMAR 13A.05.01.10A(1). The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997). In the present case, AACPS is seeking to educate the Student in the LRE which is consistent with FAPE in [REDACTED] where appropriate and adequate supports exist, as opposed to [REDACTED] where these supports are not available.

The 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 educational environment cannot be achieved. 34 C.F.R. § 300.114(a)(2)(ii). Based on the unanimous opinions of qualified, experienced educators who testified at the hearing, it is obvious that the removal of the Student from a regular educational environment at [REDACTED] even with the limited special education supports available to the Student in that school, is necessary for him to have any chance at receiving a FAPE. The unchallenged evidence of the appropriateness of the educational placement at [REDACTED] is overwhelming.

Conclusion

In sum, the Parent has not met her burden in demonstrating that the Student could remain at [REDACTED] with the support services presently being provided and available in that placement, as opposed to being placed in the program at [REDACTED] where the Student would have greater and more appropriate academic support. The evidence is clear that the Student has not made the requisite progress on his goals at [REDACTED] and that, despite their best efforts, the program at [REDACTED] cannot meet the Student’s needs. The evidence is also clear that [REDACTED] would be able to

implement the Student's IEP in the least restrictive environment which is consistent with his needs.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion:

I conclude, as a matter of law that the Parent has failed to prove by a preponderance of the evidence that the IEP of March 23, 2018, offered by the Anne Arundel County Public Schools was not reasonably calculated to enable the Student to make progress appropriate in light of his circumstances. 20 U.S.C.A. §§ 1400 - 1487 (2010).

I further conclude, as a matter of law, that IEP and placement developed for the Student by the Anne Arundel County Public Schools for the 2018-2019 school year at [REDACTED] is reasonably calculated to offer the Student a free appropriate public education in the least restrictive environment in light of the Student's circumstances. *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).

I further conclude, as a matter of law, that the Anne Arundel County Public School system does not need to duplicate the Special /Education Program provided at [REDACTED] at [REDACTED]. *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991).

ORDER

I **ORDER** that Parent's due process complaint filed on behalf of the Student on March 26, 2018 is **DENIED AND DISMISSED**.

June 7, 2018
Date Decision Issued

Signature Appears on Original
[REDACTED]

Marc Nachman
Administrative Law Judge

MN/emh
#174223

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2017). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file 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.

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