

██████████,
STUDENT
v.
CECIL COUNTY
PUBLIC SCHOOLS

BEFORE SYEETAH HAMPTON-EL,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-CECL-OT-20-12270

**RULING ON MOTION TO DISMISS, MOTION FOR SUMMARY DECISION, AND
MOTION TO STAY DISCOVERY**

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STATEMENT OF THE CASE

On June 2, 2020, Ms. ██████████, the Student's parent (Parent) filed a Due Process Complaint (Complaint) and requested mediation with the Office of Administrative Hearings (OAH) on behalf of her son, ██████████ (Student). On June 18, 2020, Rochelle Eisenberg, Esquire, responded to the Complaint and entered her appearance on behalf of the Cecil County Public School (CCPS). On July 8, 2020, Mark Martin, Esquire, entered his appearance on behalf of the Student.

Due to the COVID-19 pandemic and the delay in scheduling hearings, on July 24, 2020, Administrative Law Judge (ALJ) ██████████ held a prehearing conference with the parties to determine mediation dates and identify other issues.

On July 24, 2020, the CCPS filed a Motion to Dismiss, or in the alternative, a Motion for Summary Decision (Motion), and a Motion to Stay Discovery. On August 6, 2020, the Student filed a response to the Motion (Response).

The parties attended the mediation on August 12, 2020 and notified the OAH on the same date, that they did not resolve their dispute.

On August 13, 2020, I held a telephone prehearing conference to identify the issues and determine the hearing dates. By agreement, the parties selected hearing dates to begin on October 1, 2020 and conclude on October 12, 2020.

On August 21, 2020, the CCPS filed a Reply to the Response filed by the Student.

ISSUES

1. Should CCPS' Motion for Summary Decision be granted because there are no genuine disputes of material facts between the parties and the CCPS is entitled to judgment as a matter of law?
2. If the Motion is denied, should the CCPS Motion to Stay Discovery be granted?

SUMMARY OF EVIDENCE

The CCPS' Motion and Reply included an Affidavit signed by [REDACTED] and nine exhibits:

- Exhibit A – Student's final transcript, dated July 15, 2020
- Exhibit B – Student's test results, dated July 15, 2020
- Exhibit C – CCPS graduation requirements, undated
- Exhibit D – Student's transition plan 2019-2020, dated February 2, 2020
- Exhibit E – Email between CCPS and [REDACTED] ([REDACTED]) regarding the Student's enrollment, dated April 27, 2020

- Exhibit F – Prior Written Notice (PWN) and the Individual Educational Program (IEP) Meeting Participation Form dated May 21, 2020
- Exhibit G – Student’s Extended School Year (ESY) virtual delivery report, dated April 14, 2020 through July 13, 2020
- Exhibit H – CCPS [REDACTED] Letters for Algebra, Government and English to the Student, dated March 23, 2018
- Exhibit I – The Student’s Report Card for the Fourth Marking Period, dated April 20, 2020 through June 12, 2020.

The Student’s Response included five exhibits:

- Exhibit 1 – CCPS IEP Team referral for the Student, dated September 10, 2019¹
- Exhibit 2 – Student’s Neuropsychological evaluation, dated January 30, 2020²
- Exhibit 3 – Email from [REDACTED] to the Parent, dated May 22, 2020
- Exhibit 4 – Email from the Parent to [REDACTED] dated May 23, 2020
- Exhibit 5 – Email from the Parent to [REDACTED] and other CCPS personnel, dated May 28, 2020

UNDISPUTED MATERIAL FACTS

1. The Student is eighteen years old and was a senior at [REDACTED] High School for the 2019-2020 school year. The Student was identified as having a special education coding of Other Health Impairment. For the 2019-2020 school year, the Student had an IEP with goals in the areas of reading, behavior, and self-management. He also received transition services in the areas of academics and employment training. (CCPS Exhibit D).

¹ The document notes eighteen pages; however, only pages 1, 16-18 were provided.

² Pages provided included pages 1, 10-13.

2. Maryland State Assessment requirements for graduation include earning a minimum of twenty-five credits, completing the required service-learning hours, and passing four courses as well as passing the High School Assessment (HSA), the HSA re-test, or the [REDACTED] for four courses. In this case the Student earned 30.5 credits and successfully completed the [REDACTED] for Algebra, Government, and English. (CCPS Exhibit C). The HSAs or the [REDACTED] are aligned with the Maryland State standards in those content areas and are required in order to graduate with a regular Maryland State high school diploma. In contrast, the Modified-HSAs are not aligned with the Maryland State standards in order to graduate with a regular Maryland State high school diploma.
3. On February 4, 2020, the IEP team meeting met and discussed the Student's progress in transition activities. (CCPS Exhibit D). Transition services included the CCPS providing the Parent with the Maryland Transition Planning Guide for Individuals with Disabilities and reviewing the Student's eligibility for adult services such the Division of Rehabilitation Services (DORS), Developmental Disabilities Administration (DDA), Behavioral Health Administration (BHA), and Department of Labor Office of Workforce Development and Adult Learning (LABOR). The CCPS determined and the Parent agreed that the Student was not eligible for services offered by DDA and BHA.
4. On February 4, 2020, the Parent provided consent for the Student to be referred to DORS and LABOR.
5. On April 24, 2020, the CCPS emailed [REDACTED] ([REDACTED]) and worked to schedule a meeting. (CCPS Exhibit D).
6. On May 21, 2020, the CCPS held an IEP team meeting. During the IEP team meeting, CCPS staff reviewed the transition services and discussed with the Parent that the Student

had met all CCPS graduation requirements. The Parent did not note any disagreement that the Student had successfully completed all requirements for graduation. (CCPS Exhibit F).

7. On [REDACTED] 2020, the Student graduated from [REDACTED] High School and received a regular Maryland high school diploma. The Parent agrees that the Student was entitled to receive a Maryland high school diploma because he met the requirements for graduation. (CCPS Exhibit A and F)
8. The Student earned a 2.929 GPA. (CCPS Exhibit A).
9. The Student enrolled in the summer 2020 session at [REDACTED]. He is enrolled in two college level courses: History 102 Western Civics II with a current average of 95% and “Success in College and Beyond.” (CCPS Affidavit).

DISCUSSION

The OAH’s Rules of Procedure provide that “Upon motion, the ALJ may issue a proposed or final decision dismissing an initial pleading that fails to state a claim for which relief may be granted.” COMAR 28.02.01.12C. A motion to dismiss must be based solely on the four corners of the initial pleading and cannot rely on supplemental documents.

In contrast, a motion for summary decision relies on documents outside of the initial pleadings such as an affidavit, a self-authenticating document, testimony given under oath, or a document authenticated under oath. COMAR 28.02.01.12D(2). COMAR 28.02.01.12D was patterned after Maryland Rule 2-501(f). In *Worsham v. Ehrlich*, 181 Md. App. 711, 723 (2008), the Court of Special Appeals stated, “summary judgment is appropriate when there is no genuine dispute as to any material fact and the party in whose favor judgment is entered is entitled to judgment as a matter of law.” In order to prevail, the CCPS as “the moving party must, through

affidavits or other sworn statements of fact based on personal knowledge, demonstrate that no material fact is actually disputed.” *Lowman v. Consolidated Rail Corp.*, 68 Md. App. 64, (1986).

Finally, pursuant to COMAR 28.02.01.12D, a response to a motion for summary decision must identify the material facts in dispute and may be supported by an affidavit.

As the parties attached exhibits to their motions, and as I relied on the exhibits (as well as the Affidavit from Ms. [REDACTED]) in making my ruling, CCPS’ motion is properly a Motion for Summary Decision. For the reasons that follow, the CCPS’s Motion is granted.

The CCPS argued that on [REDACTED] 2020, the Student graduated from [REDACTED] High School after meeting all requirements for a regular Maryland High School diploma; therefore, pursuant to federal regulation and case law the Student’s case is moot. The CCPS relied on 34 CFR 300.102 (a)(3)(i)-(ii) and three cases from the 10th Circuit: *T. S. v. Independent School District. No. 54*, 265 F.3d 1090 (10th Cir. 2001); *Moseley v. Board of Education of Albuquerque Public Schools*, 483 F. 3d 689 (10th Cir. 2007); and, *Thomas R.W. v. Massachusetts Department of Education*, 130 F. 3d 477 (10th Cir.1997).

The CCPS Motion was supported by an Affidavit. The Affiant, [REDACTED], Instructional Coordinator for Special Education with CCPS, also served as the Student’s IEP Facilitator during his tenure at [REDACTED] High School. In her Affidavit, she affirmed that the Student met all the requirements for graduation including fulfilling the HSA requirement by completing the [REDACTED] in the areas of Government, Algebra, and English. As a result of completing the requirements, Ms. [REDACTED] averred that the Student graduated with a 2.929 GPA on [REDACTED] 2020 and received a regular Maryland High School Diploma.

In her Affidavit, Ms. [REDACTED] affirmed that a transition plan was established as part of the Student’s IEP as he moved from high school to community college. She also averred that she

emailed the Disability Services Specialist at [REDACTED] to assist the Student in applying for available services. Ms. [REDACTED] also noted that the IEP team met on May 21, 2020 and the Parent received notice that the Student completed the requirements to graduate. Although the Parent requested an additional IEE and tutoring post-graduation at the May 21, 2020 IEP meeting, the Parent did not contest or challenge the Student's graduation. In fact, the Parent indicated that the Student had enrolled at [REDACTED] and had also planned a virtual meeting to discuss the Student's attendance in a course on how to be successful in college.

In addition, during the summer the Student participated in ESY for Reading and Behavior and enrolled in two courses at [REDACTED]. The Student enrolled in History 102: Western Civics II and had an average of 95% and began a course called "Success in College and Beyond." (CCPS Affidavit). At ESY, the Student attended classes on Math and Reading Comprehension. On July 6, 2020, the Student was absent from the Reading Comprehension class. The Student attended the organizational and self-management class on July 13, 2020. The Student told Ms. [REDACTED] that "he considers college easier." (CCPS Ex. G).

The Parent argued the [REDACTED] 2020 graduation did not moot the Student's claim for compensatory education for a previous denial of FAPE. Specifically, the Parent argued that the Student was denied FAPE because of CCPS' refusal to change his special education disability coding to Learning Disabled, CCPS' refusal to allow the Parent to meaningfully participate in the IEP meeting process, and CCPS' failure to provide appropriate transition services.³ As a remedy,

³ Transition services available under IDEA for disabled children consist of a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation. 20 U.S.C.A. §1401(34).

the Parent seeks a change to the IEP and two years of 1:1 tutoring for 1.5 hours session for four days per week. The Student relied on several federal cases which defined compensatory education as an equitable remedy that is available as an appropriate form of relief if a Parent proves her claims that the Student was denied FAPE. The cases included an unpublished 4th Circuit decision⁴, *Garcia v. Board of Education of Albuquerque Public Schools*, 520 F. 3d 1116 (10th Cir. 2008), *Board of Education of Oak Park & River Forest High School District 200 v. Illinois State Board of Education*, 79 F.3d 654 (7th Cir. 1996), *Pihl v. Massachusetts Department of Education.*, 9 F.3d 184 (1st Cir. 1993), and *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

The cases cited by the Student while interesting are unpersuasive and not on point for the issue in this present case. Beginning with *Garcia*, the student did not graduate but instead dropped out of high school. The court upheld the District Court finding of not awarding compensatory educational services to a student who dropped out of school. In upholding the District Court’s refusal to award compensatory educational services to a student who dropped out of school, the 10th Circuit recognized that the District Court’s conclusion (that the student could receive the equitable services she sought by simply re-enrolling in school) was not an abuse of the District Court’s powers in exercising its traditional equitable powers. Similarly, the *Lester* case focuses on the determination of compensatory education for a student who had not graduated from high school. In the *Oak Park* case, the court determined that the “Stay Put⁵” provision was not available to a twenty-one-year-old student enrolled in a program for autistic students because the “Stay Put”

⁴ *Z.G. by & through C.G. v. Pamlico Cty. Pub. Sch. Bd. Of Educ.*, 744 F. App’x 769 (2018). Under Federal Rules of Appellate Procedure Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. I did not find this case relevant or persuasive as it did not address the issue of graduation.

⁵ “Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child....” (20 U.S.C.A. § 1415 (j)).

provision cannot be applied after a student turns twenty-one years old. In the *Pihl* case, the Court determined, that in order to get an award of compensatory education, a twenty-seven-year-old student must show he was denied FAPE before he turned twenty-one years old and his entitlement to a FAPE terminated. In the instant case, the Student's entitlement to a FAPE did not terminate because he turned twenty-one but because he earned a regular high school diploma.

Analysis

Generally, the obligation for a FAPE⁶ does not apply to a student who graduates from high school with a regular high school diploma meaning "the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards."

§300.102(a)(3). An exception exists for students who graduate but do not earn a regular high school diploma. *Id.* The case law further explains this general rule.

In *T. S. v. Independent School District No. 54*, 265 F. 3d 1090 (10th Cir. 2001) the Court held a claim for injunctive relief is moot once a student graduates from high school with a regular high school diploma. In the *T.S.* case, the parent sought transition services post-graduation and the Court deemed those types of injunctive relief were precluded. The court determined any transition services are prospective relief and "[t]hus no longer the responsibility of the school district who obligations ceased upon T.S.'s graduation." *Id.* at 1095. The Court held, that in the absence of a challenge to the graduation, the student has in effect conceded that the procedural defect regarding the IEP was harmless. *Id.* at 1094. The court further reasoned students seeking services post-graduation may seek accommodation under the Rehabilitation Act. *Id.* at 1095.

⁶ *Endrew F. ex. Rel. Joseph F. v. Douglas County School District*, 137 S. Ct. 988 (2017) provides significant guidance when reviewing an IEP and when determining if the actions or lack thereof denied a FAPE to the Student. FAPE is defined as the "special education and related services have been provided at public expense, under public supervision and direction, and without charge; meet the standards of the State educational agency; include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C.A §1401(9).

In *Moseley v. Board of Education. of Albuquerque*, 483 F.3d 689 (10th Cir. 2007), the Court held the student graduated before filing an appeal, and the graduation makes the request for injunctive relief moot. In addition, the Court determined that the local school district did not deny the student a FAPE by failing to fully evaluate the need for real-time captioning for a Deaf student.

More recently, in *Moynihan v. W. Chester*, 2020 WL 1676394, the Third Circuit upheld the District Court's dismissal of the parents' claims for injunctive and declaratory relief because the student had graduated high school. However, the Third Circuit remanded the case to the District Court to reconsider the parents' claims that they incurred "out of pocket expenses" for the allegedly inappropriate IEPs prior to their son's graduation. The Third Circuit held that compensatory education claims in the form of reimbursement of "out of pocket expenses" could survive a mootness challenge. In addition to the fact that a Third Circuit case is not binding in Maryland, the facts in *Moynihan* are distinguishable from the instant facts. The Parent in this case has not alleged she had "out of pocket expenses" that she incurred as the result of an allegedly defective IEP provided by CCPS. In the present case, on [REDACTED] 2020, the Student graduated from [REDACTED] High School with a regular high school diploma, which is not being challenged. The Parent does not contest or challenge the grades earned by the Student. Well before the graduation date, the Parent did not challenge the statement during the February 4, 2020 IEP meeting that the Student was on track to graduate or the statements during the May 21, 2020 IEP team meeting that the Student would graduate in [REDACTED]. The CCPS notified the Parent that the Student had satisfied all requirements to graduate and the Parent did not challenge the determination. The Parent only asked for post-graduation services, but never argued the graduation was improper or that Student did not satisfy the State requirements to obtain a regular high school diploma. It is undisputed that the Student satisfied all the requirements for graduation including meeting the Maryland high school

assessment requirement for Algebra, Government, and English by successfully completing the [REDACTED], which is aligned with Maryland graduation standards. (See Exhibit H).

In all the of the cases cited by the CCPS and the Parent, two principles are present. First, generally the due process complaint filed by a student who graduated with a regular high school diploma is moot. Secondly, the cases make a distinction between prospective or injunctive relief and compensatory education for a previous denial of FAPE.

Amending the IEP to include a different special education disability coding for a student who has graduated is injunctive relief and moot as a result of the unchallenged graduation. Citing *Nathan*⁷, the *T. S.* court determined the student concedes the defect was harmless since the student failed to challenge the graduation. *T. S. v. Independent School District No. 54*, 265 F. 3d 1090, 1094 (10th Cir. 2001).

Ultimately, the desire to change the Student's IEP is a form of injunctive relief. Amending the IEP would do little as the Student has already graduated and is not challenging the graduation or interested in returning to high school. In sum, the Student's 2.9 GPA, receipt of a regular high school diploma, matriculation into college, and successfully taking a college-level history course during the summer is inconsistent with the Parent's contention that the Student did not receive FAPE.

In the Complaint, the Parent seeks two years of 1:1 tutoring to help with the transition to college for 1.5 hours, four days a week at [REDACTED]. [REDACTED] is a transition program that "provides a bridge experience for post-high school students." (Response p.8). Compensatory education is an equitable remedy that the court may award in crafting appropriate relief. See *Parents of Student W. v. Puyallup School District No. 3*, 31 F. 3d 1489, 1497 (9th Cir.

⁷ *Board of Educ. v. Nathan R.*, 199 F.3d 377, (381) (7th Cir. 2000).

1994). It is available to remedy an educational deficit created by a school system's failure to provide a student with a FAPE over a given period of time. *G ex rel. RG v. Fort Bragg Independent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

The Parent does not dispute the Student graduated with a regular high school diploma and has started [REDACTED]. While the Parent alleges the CCPS failed to recognize reading deficits or provide required transition services, she does not dispute the affidavit of [REDACTED] or the IEP submitted by CCPS. The Student graduated with a 2.929 GPA (CCPS Ex. A). Ms. [REDACTED] along with other members of the IEP team conducted an annual student interview on September 3, 2019 at which time the Student indicated his interest in attending college to become an engineer. During the same interview, the CCPS administered a career cluster interest/aptitude inventory and identified his top career clusters. (CCPS Ex. D).

On February 4, 2020, the IEP team meeting met and the CCPS discussed the Student's progress in transition activities. The goals included meeting with the Student to complete college applications, research disability services, assistance applying for grants and scholarships, and completing a career assessment. (CCPS Ex. D). As a result of the assistance, the Student applied to [REDACTED], [REDACTED], and [REDACTED]. In addition, the Student applied to [REDACTED] disability services. On April 24, 2020, the CCPS emailed [REDACTED] and worked to schedule a meeting. He also submitted one scholarship application. On the same date, the CCPS provided the Parent with the Maryland Transition Planning Guide for Individuals with Disabilities and reviewed the Student's eligibility for adult services such the DORS, DDA, BHA, and LABOR. The CCPS determined and the Parent agreed that the Student was not eligible for services offered by DDA and BHA. On February 4, 2020, the Parent provided consent for the Student to be referred to DORS and LABOR. The Parent does not dispute that the CCPS requested consent in September 2019.

While several courts have awarded compensatory education after a student graduated from high school, the court first must find a denial of FAPE. However, in this case the Parent failed to show how the Student who earned a 2.9 G.P.A. and a regular Maryland High School diploma was denied a FAPE. The Student satisfied all requirements for graduation including the assessment requirements. Upon graduating the Student enrolled into [REDACTED] and had a 95% in a college level History 102L Western Civics II class. As the Student continued his transition to college, the CCPS supported him by working with the [REDACTED] staff to schedule a meeting with the disability coordinator. The Parent even shared this information during the May 21, 2020 IEP meeting.

During the summer, the Student reported to Ms. [REDACTED] that he is doing great in his college class and considers college to be easier than high school. From all accounts this Student is succeeding post-graduation after successfully earning a regular high school diploma. Based on the facts presented, I find that the Student failed to challenge the regular high school diploma awarded on June 16, 2020. By not challenging the regular high school diploma awarded by CCPS, the Parent is not challenging FAPE; therefore, the case is moot. As I have granted the Motion for Summary Decision, I do not need to address the Motion to Stay Discovery as it is moot.

CONCLUSIONS OF LAW

For the stated reasons, I conclude as a matter of law the CCPS's Motion for Summary Decision is granted as the CCPS is entitled to a judgment as a matter of law. I conclude that the Motion to Stay Discovery is moot. COMAR 28.02.01.12D.

ORDER

I ORDER:

1. The Cecil County Public School's Motion for Summary Decision is
GRANTED

2. The merits hearing scheduled for October 1, 2020 through October 12, 2020
is **CANCELLED**.

September 8, 2020
Date Ruling Issued

Syeetah Hampton-EL
Administrative Law Judge

SAH/kdp
Doc. #187386

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. 2019). 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]

[REDACTED]