

██████████,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE MARC NACHMAN,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-MONT-OT-23-21073

**DECISION**

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

**STATEMENT OF THE CASE**

On August 14, 2023, ██████████ and ██████████ (Parents), on behalf of their son, ██████████ (Student), filed a Due Process Complaint (Complaint) with the Montgomery County Public School (MCPS) system, which was transmitted to the Office of Administrative Hearings (OAH) on August 15, 2023. The Complaint sought mediation and a hearing to challenge the decision made by the IEP<sup>1</sup> team to place their child in the ██████████ – ██████████ ██████████ (██████████), a non-MCPS, non-public, special education school outside of the MCPS system.

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<sup>1</sup> Individualized Education Program.

Under the Individuals with Disabilities Education Act (IDEA) and applicable Maryland State law, the Parents are seeking placement at another non-public school closer to their home.<sup>2</sup> 20 U.S.C.A. § 1415(f)(1)(A) (2017);<sup>3</sup> 34 C.F.R. § 300.511(a) (2022);<sup>4</sup> Md. Code Ann., Educ. § 8-413(d)(1) (Supp. 2023);<sup>5</sup> Code of Maryland Regulations (COMAR) 13A.05.01.15C(1).

The MCPS declined to mediate, and the matter proceeded to the prehearing conference (Conference). On September 12, 2023, I conducted the Conference via the Webex teleconferencing system (Webex). COMAR 28.02.01.20B. Both of the Parents were present and represented themselves.<sup>6</sup> The Parents participated in the Conference by telephone. Stacy Reid Swain, Esquire, represented the MCPS and participated by video.

The hearing was scheduled for four days, starting on Tuesday, October 10, 2023. It concluded on the first hearing day. The Parents again represented themselves. Ms. Swain again represented the MCPS.

The forty-five-day timeline for issuing a decision ordinarily begins to run at the end of a thirty-day resolution period triggered by the filing of a due process complaint. 34 C.F.R. § 300.510(b)(2). In this case, the MCPS chose not to participate in mediation, and has therefore not resolved the due process complaint to the satisfaction of the Parents within the 30 days following the receipt of the Parents' due process complaint, allowing the hearing to proceed. 34 C.F.R. § 300.510(b).

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<sup>2</sup> At the Video Prehearing Conference (Conference), the Parents suggested placement at the [REDACTED]; no evidence was presented at the hearing regarding the appropriateness or availability of that placement.

<sup>3</sup> "U.S.C.A." is an abbreviation for the United States Code Annotated. Unless otherwise noted, all citations herein to the U.S.C.A. are to the 2017 bound volume.

<sup>4</sup> "C.F.R." is an abbreviation for the Code of Federal Regulations. Unless otherwise noted, all citations herein to the C.F.R. are to the 2022 bound volume.

<sup>5</sup> Unless otherwise noted, all citations herein to the Education Article are to the 2023 Replacement Volume of the Maryland Annotated Code.

<sup>6</sup> At the Conference and at the start of the hearing, the Parents were given the opportunity to retain an attorney of their own choosing and at their own expense. Both times the Parents declined this representation and affirmatively chose to represent themselves.

Under the regulatory timeline, the decision in this case normally would be due on Saturday, October 28, 2023, which is forty-five days after the end of the resolution period. 34 C.F.R. §§ 300.510(b)(1), 300.515(a). Because the due date does not fall on a workday, the decision due date would be moved forward to the last workday before the actual due date, or Friday, October 27, 2023.

Although the Parents filed their Complaint on August 14, 2023 (which was not received by the OAH until the following day, August 15, 2023), the Conference and mediation (the latter of which the MCPS declined) were scheduled for September 12, 2023. At the Conference, I ordered the parties to name their witnesses and experts five business days before the hearing.

The Parents stated, however, that they had not yet retained or considered retaining an expert to testify on their behalf, and indicated that they would need at least two weeks before that deadline to find and retain one, if they could do so at all. Adding the two weeks (fourteen calendar days) the Parents requested to find and retain an expert, to the discovery deadline (five business days, or seven calendar days, prior to the hearing) to provide the expert's name, *curriculum vitae* and report to the MCPS, the earliest date on which the hearing could start was twenty-one days after the Conference - Tuesday, October 3, 2023. I had previously been scheduled to conduct two specially assigned hearings on October 4 and 6, 2023, and Ms. Swain stated that the first day after October 3, 2023, that she was available was the first business day of the following week - Tuesday, October 10, 2023, a day after the October 9, 2023, State holiday (which added one calendar day to the discovery deadline date calculation, moving the deadline up to October 2, 2023). The parties agreed that this case would take four days - two days for each party's presentation.

To maintain continuity, the first four available contiguous days were Tuesday October 10, 2023, and the following three days that week - October 11, 12 and 13, 2023 - with an additional day if needed on Monday, October 16, 2023. Accordingly, the hearing was anticipated to end on October 16, 2023, leaving eleven days to write and issue a decision. The parties jointly requested that I extend the timeline to allow the case to be heard on the selected dates and to allow sufficient time for me to consider the evidence, evaluate legal arguments, and issue a decision. *Id.* § 300.515(c). The parties requested that I issue a decision not more than thirty days after the conclusion of the hearing. 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Educ. § 8-413(h); COMAR 13A.05.01.15C(14). I am therefore issuing this decision within thirty days of the last actual day of the hearing, which was October 10, 2023, or by November 9, 2023.

Procedure is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Educ. § 8-413(e)(1); Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); COMAR 13A.05.01.15C; COMAR 28.02.01.

### ISSUES<sup>7</sup>

Whether the challenged actions by the MCPS failed to meet the requirements of the law, and specifically,

1. Whether the Student's placement at [REDACTED], located in [REDACTED] County, is an appropriate placement for the Student for the 2023-2024 school year;

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<sup>7</sup> The list of issues was developed in conjunction with the parties during the Conference.

2. Whether some other school chosen by the Parents, including a school in the MCPS system, is an appropriate placement.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

No exhibits were admitted on behalf of the Parents.<sup>8</sup>

I admitted the following exhibits on behalf of the MCPS:

#### **IEPs:**

MCPS Ex. 1 – April 20, 2021 IEP, Amended November 15, 2021 (MCPS 0001-0035)

MCPS Ex. 2 – March 2, 2022 IEP, Amended November 14, 2022 (MCPS 0036-0082)

MCPS Ex. 3 – January 24, 2023 IEP, Amended August 11, 2023 (MCPS 0083-0133)

#### **Prior Written Notices:**

MCPS Ex. 4 – November 16, 2021 Prior Written Notice (MCPS 0134-0135)

MCPS Ex. 5 – February 21, 2022 Prior Written Notice (MCPS 0136-0137)

MCPS Ex. 6 – March 8, 2022 Prior Written Notice (MCPS 0138-0139)

MCPS Ex. 7 – November 21, 2022 Prior Written Notice (MCPS 0140)

MCPS Ex. 8 – January 30, 2023 Prior Written Notice (MCPS 0141-0142)

MCPS Ex. 9 – March 1, 2023 Prior Written Notice (MCPS 0143-0144)

MCPS Ex. 10 – March 16, 2023 Prior Written Notice (MCPS 0145)

#### **Reports and Evaluations:**

MCPS Ex. 11 – Report of the School Psychologist (March 2, 2022) (MCPS 0146-0160)

MCPS Ex. 12 – Report of Speech-Language Assessment (March 2, 2022) (MCPS 0161-0167)

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<sup>8</sup> See discussion of the Parents’ putative exhibits under the heading “The Student’s pediatrician’s letter and report of office visit.” on page 9, below.

**Resumes:**

MCPS Ex. 13 – [REDACTED] (MCPS 0168-0169)<sup>9</sup>

MCPS Ex. 14 – [REDACTED] (MCPS 0170)

MCPS Ex. 15 – [REDACTED] (MCPS 0170)

Testimony

The Parents chose not to testify and relied on the testimony of the MCPS witnesses.

The MCPS presented the testimony of the following witnesses:

- [REDACTED], who was accepted as an expert in speech-language pathology;
- [REDACTED], school psychologist, who was accepted as an expert in school psychology; and
- [REDACTED], [REDACTED] Coordinator at the [REDACTED] Elementary School ([REDACTED]), who was accepted 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:

1. The Student is currently seven years of age.
2. The Student lives with the Parents.
3. The Student and Parents are residents of Montgomery County, Maryland
4. The Student's primary disability is autism.
5. The Student is presently in second grade.
6. The Student is presently on a diploma track.

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<sup>9</sup> Ms. [REDACTED] did not testify.

7. The primary areas affected by the Student's disability are academic (communication, math calculation, reading comprehension, reading phonics and written language expression) and behavioral (routines and procedures, self- management, social/emotional behavioral, and social interaction skills).
8. The Student struggles with transitions from preferred tasks such as computer time.
9. The Student is easily distracted and benefits from small group activities and reduced distractions around him.
10. The Student requires high levels of structure, verbal prompting, and multiple breaks to achieve educational benefit.
11. The Student requires one-on-one supervision for most academic and behavioral tasks.
12. The Student needs to be monitored by an adult to keep him on task.
13. The Student also needs support in writing as he has difficulty with attention and encoding.
14. The Student moves about the classroom when that movement is not indicated. He still gets some educational content from the teacher when he does so.
15. The Student's MCPS home school is [REDACTED] Elementary, an elementary school in the MCPS system.
16. [REDACTED] Elementary does not have programs necessary to address the Student's behavioral and academic needs and to provide him an appropriate education.

17. Under prior IEP team decisions, the Student has been educated at the [REDACTED] at [REDACTED], an elementary school in the MCPS system.
18. [REDACTED] is a program to educate students with various disabilities, including autism. However, the student teacher ratio is greater than the Student needs to achieve educational progress.
19. [REDACTED] cannot address the Student's behavioral and academic needs and provide him with an appropriate education.
20. The Student is aggressive with staff and peers if frustrated (slapping, kicking, or pushing other students and throwing tantrums on the floor), if he does not get to do his preferred activities (e.g., computer time, etc.). This reaction was frequent and increased in frequency by the end of the prior school year.
21. The Student is also an elopement risk.
22. The Student had IEPs created in 2021 (created on April 20, 2021 and amended on November 15, 2021), 2022 (created on March 2, 2022 and amended on November 14, 2022), and 2023 (created on January 24, 2023 and amended on August 11, 2023).
23. The IEP team established goals for behavior (routines and procedures, self-management, social emotional/behavior, and social interactions skills).
24. The IEP team also established goals for academics (communication, reading phonics, reading comprehension, math calculation, and written language expression).
25. The Student had objectives established to reach those goals, but was not making progress, requiring a referral to the Central IEP team for consideration of non-public placement.
26. The Student requires 100% of his instructional day (twenty-nine hours per week) by a special education teacher and an instructional assistant.

27. The Student also requires one hour of speech language therapy per week.
28. The Student requires extended school year (ESY) services.
29. Due to the Student's documented communication (receptive and expressive), pre-academics, and behavioral (classroom and social-emotional) needs, the Student requires a highly structured classroom taught by a special educator, who would provide the Student with consistent, direct, specialized instruction in a highly structured setting totally outside general education, with a low student to teacher ratio and numerous opportunities for repetition, practice and facilitation.
30. The placement recommended by the IEP team was a private, separate day school.
31. In the most recent IEP, the IEP team determined that the most appropriate placement for the Student would be the [REDACTED] ([REDACTED]), a non-MCPS, non-public day school outside of the MCPS system, located in [REDACTED] [REDACTED] County, Maryland.
32. The MCPS will provide the Student transportation to and from [REDACTED].
33. The Parents do not disagree with the Student's placement in a more intensive school program, but they do not want the Student to be educated in a location that is not in the county where they live.
34. The MCPS was willing to seek a closer school, but none were presently available.
35. The Parents did not present an acceptable substitute for [REDACTED] either within or outside Montgomery County.

## DISCUSSION

### **Burden of Proof**

The standard of proof in this case is a preponderance of the evidence. COMAR 28.02.01.21K(1). To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). The burden of proof rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). The Parents are seeking relief and therefore bear the burden of proof to show that the challenged actions by the MCPS did not meet the requirements of the law.

### **Procedure – sequence of testimony**

The sequence of presenting evidence at the hearing was addressed during the Conference. Pursuant to COMAR 28.02.01.11B(12) and (13), I ordered that the MCPS would present their evidence first. This sequence of presentations was better suited to ascertaining the facts, safeguarding the rights of the parties, ensuring procedural simplicity and administrative fairness, and eliminating unjustifiable expense and delay.

The parties were given an opportunity to object to this order of presentation, and the parties accepted it. I again asked the Parents at the start of the hearing whether they would still have no objection to the MCPS presenting their evidence first; the Parents had no objections.

The MCPS first presented their exhibits, which consisted of the Student’s school records, and the Parents lodged no objection to their admissibility. For each MCPS witness who testified, the Parents were allowed to challenge the witness’ expertise and then question the witness. The Parents were then invited to present further evidence by way of testimony or documents to support their case in chief.

The change in the order of presentations does not, however, alter the burden of proof.

**The Student’s pediatrician’s letter and report of office visit.**

On October 2, 2023, the Parents submitted a letter signed by the Student’s pediatrician, [REDACTED], M.D., and dated September 28, 2023, that stated the following:

To Whom it May Concern[:]

I am [the Student’s] pediatrician. His mother has informed me that MCPS has plans to change his school to one that is more than thirty minutes away. I disagree with this decision for multiple reasons. In addition to changing the environment he is familiar with it would also lengthen his school day significantly. The county should provide services within his school to support him there.

The pediatrician’s letter was only sent to the OAH and not to the MCPS attorney five days before the hearing. As explained during the Conference and written in the Prehearing Conference Order, the parties were to have exchanged exhibits, a list of witnesses they expected to offer at the hearing and *curricula vitae* of any expert witnesses at least five days prior to the hearing. 34 C.F.R. § 300.512 (2022).<sup>10</sup> Taking into account the State holiday on Monday, October 9, 2023, the parties were to have exchanged exhibits and witness lists with each other no later than the close of business on Monday, October 2, 2023. The parties were advised that I could prohibit the introduction of evidence that was not timely exchanged. *Id.* § 300.512(a)(3).

That deadline also applied to the exchange of evaluations completed by the date of submission as well as recommendations based on those evaluations that the parties intended to use at the hearing. *Id.* § 300.512(b)(1). Unless the opposing party consented to the introduction of such evidence, the evidence could be barred from being introduced at the hearing. *Id.* § 300.512(b)(2).

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<sup>10</sup> All references to the C.F.R. are to the version found in the 2022 Replacement Volume.

The MCPS first became aware of the pediatrician's letter at the start of the hearing and a copy was provided to its attorney to see if the MCPS had any objection to its admissibility. The Parents also attempted to submit into evidence notes from the Student's office visit with his pediatrician detailing the Student's recent examination on October 5, 2023. Those latter documents were not submitted into evidence.

Pursuant to 34 C.F.R. § 300.512, the MCPS objected to the admissibility of all of these documents, as they were not submitted to them at least five days prior to the hearing. The MCPS also objected to their admissibility because they had not been authenticated by the pediatrician or anyone from her office.

The Parents explained that they could not get an appointment with the pediatrician until October 5, 2023. They asked that I consider the office visit notes and admit them into evidence, but none were provided to me. An exception to the five-day disclosure rule is partly dependent on the consent of the opposing party. 34 C.F.R. § 300.512(b)(2). However, there were other impediments to the admissibility of those documents. Even if I were to have considered admitting those three pages into evidence, the Parents did not exchange the pediatrician's *curriculum vitae* with the MCPS as required under the prehearing order. Nor was the witness being presented at the hearing to testify in support of her opinion and face cross-examination challenging that opinion. Moreover, the office note introduced a new diagnosis – attention deficit and hyperactivity disorder (ADHD) – which was not previously diagnosed or disclosed.

I gave the MCPS an opportunity to review the documents and decide whether they would waive any objections and allow the documents to be admitted into evidence. The MCPS declined to waive its objection based on the authenticity, timeliness and the additional diagnosis of ADHD.

The MCPS explained that its witnesses were prepared to go forward on the prior diagnosis of autism, and that the IEP team would not have the opportunity to review and consider them. Furthermore, the MCPS would not be prepared to rebut the testimony of the physician, as they would not be prepared to present an opposing medical opinion.

That is the reason for the five day disclosure rule – the parties should be able to prepare for the hearing based on the evidence that was timely exchanged. The diagnosis of autism is the only health impairment that is presently subject to this hearing that the parties were prepared to address.

### **Amendment**

As indicated above, the Parents sought to hold the hearing claiming an additional, newly diagnosed, disability affecting the Student, i.e., adding ADHD to his diagnosis. The MCPS objected to this purported amendment, stating that they had prepared their defense based on the initial complaint alleging that only autism was the Student’s sole disability.

Although the Parents did not specifically ask to amend their complaint, that would be the only avenue to change the scope of this hearing. The IDEA has regulations concerning amendments to due process complaints:

#### **I Amended complaint notice**

##### **(i) In general**

A party may amend its due process complaint notice only if—

- (20) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or
- (II)** the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(20 U.S.C.A. § 1415I(2)IE(i) (2022)).

Neither of those conditions were met, and if so requested, an amendment to change the Student's disability for the purposes of the hearing would not have been permitted. The Parents disclosed the purported amendment prior to the hearing on the morning that hearing was scheduled to begin. The MCPS indicated that it had no intention to consent – either verbally or in writing – to amending the due process complaint. The MCPS counsel indicated that MCPS was prepared to conduct the hearing on the due process complaint the Parents filed, alleging the Student's disability was listed as autism and not ADHD (or even a combination of the two). If the Parents were allowed to amend their complaint (which they would have been unable to do, as they lacked the testimony of a credible expert witness), the MCPS indicated that they would be unable to defend the claim, not having prepared a countering physician witness. Moreover, even if I were inclined to grant the Parent's request, it was made on the morning that the hearing was starting, and I could “only grant such permission at any time not later than 5 days before a due process hearing occurs.” *Id.* The purpose of the regulation allows the parties to have an “opportunity to resolve the matter prior to the hearing” which the MCPS was not in a position to do, lacking any expert's involvement. *Id.* Nevertheless, the evidence in this case concerned the Student's behavioral and academic shortcomings. It is difficult for me to see whether an additionally alleged disability would have materially altered the testimony or ultimately the decision in this case.

### **Position of the parties**

The Parents contend that the IEP that places the Student at [REDACTED], located in [REDACTED] County, is not appropriate because it is too far from the Parents or other relatives if they need to respond to the Student in event of an emergency; they claim that it might take an hour to get to the Student.

The Parents also contend that the Student has a longer daily bus ride to school than he would if he attended a school in Montgomery County where the family lives. The Parents contend that the Student should attend a school located in Montgomery County.

The MCPS contends that the IEP placement decision is appropriate, and there are no schools within Montgomery County that would be an appropriate placement for the Student. The MCPS contends that its witnesses and exhibits support the appropriateness of this placement.

### **Legal requirements – FAPE (Free Appropriate Public Education)**

The identification, assessment and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., Educ. §§ 8-401 through 8-417; 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)(A).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *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 (footnote omitted). In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities.

First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-207. *See also A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4<sup>th</sup> Cir. 2004). An IEP is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the applicable law, detailed below. 20 U.S.C.A. § 1414(d)(1)(A).<sup>11</sup>

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. Of Educ.*, 700 F.2d 134, 139 (4<sup>th</sup> Cir. 1983), citing *Rowley*, 458 U.S. at 176. Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive some educational benefit. The United States Court of Appeals for the Fourth Circuit declined to interpret the IDEA to require “meaningful” benefit, rather than “some” benefit, reiterating that “a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.” *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F. 3d 354, 360 (4<sup>th</sup> Cir. 2015).

As discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically from those obtained by another student, depending on the needs that are present in each student. *Rowley*, 458 U.S. at 202.

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<sup>11</sup> The Parents did not allege any procedural violations.

In *Andrew F. v. Douglas County School District.*, 580 U.S. 386 (2017), the Court upheld the standard it established in *Rowley*, specifically that “a child has received a FAPE, if the child’s IEP sets out an educational program that is ‘reasonably calculated to enable the child to receive educational benefits.’” 580 U.S. at 394 (quoting *Rowley*, 458 U.S. at 207).

The Court explained, “For children receiving instruction in the regular classroom, this would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” *Id.* at 394 (quoting *Rowley*, 458 U.S. at 204). The Court noted that the student in *Rowley* was making excellent progress in the regular education classroom with the wireless transmitter and hearing aid provided by the school, but it declined to order a sign-language interpreter. *Id.* at 392. The Court found the IDEA “guarantees a substantively adequate program of education to all eligible children.” *Id.* at 394.

The Court in *Andrew F.* explicitly rejected the Tenth Circuit’s diluted interpretation of *Rowley* that had found “a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely . . . more than de minimis.’” *Andrew F.*, 580 U.S. at 397 (quoting the 10<sup>th</sup> Circuit in *Andrew F.*, 798 F.3d 1329, 1338). The Court held, “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate *in light of the child’s circumstances.*” *Andrew F.*, 580 U.S. at 399. The Court declined to define what appropriate progress would be in a given case, noting that courts should not “‘substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Id.* at 404 (quoting *Rowley* 458 U.S. at 206). Moreover, under *Rowley*, appropriate progress will look different depending on the Student’s capabilities. *Andrew F.*, 580 U.S. at 400.

## **Legal requirements – LRE (Least Restrictive Environment)**

In addition to the IDEA’s requirement that a child with a disability receive some educational benefit, the child must be placed in the “least restrictive environment” to the maximum extent appropriate, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2)(i).

Indeed, instructing children with disabilities with non-disabled peers is generally preferred if the student with disabilities can achieve educational benefit in the general education program. *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). Placing children with disabilities into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved. Nonetheless, the issue is not whether another placement is better for the student but whether the school district has offered a FAPE.

## **Review of the evidence**

The Student is a seven-year-old student diagnosed with the primary disability of autism. MCPS Ex. 3, p. 0083. The areas affected by his disability are:

- Academic – communication, math calculation, reading comprehension, reading phonics and written language expression; and
- Behavioral – routines and procedures, self- management, social/emotional behavioral, and social interaction skills.

MCPS Ex. 3, p. 0083. The Student has been enrolled in the [REDACTED] at [REDACTED] where his behavioral issues have adversely affected his academic performance.

After meeting and considering the Student's lack of progress in meeting his goals at [REDACTED], the IEP team, following a referral to the CIEP, decided to place the student at [REDACTED], a non-MCPS, non-public school outside of the MCPS system, located in [REDACTED] County, Maryland. The Student's most recent IEP, amended in August 2023, identifies [REDACTED] as the Student's appropriate placement. MCPS Ex. 3, p. 0160.

Several witnesses testified about the Student's lack of progress and his need for a more intensive placement.

[REDACTED] was well qualified and accepted as an expert in Speech-Language Pathology. She possesses two master's degrees and has had more than twenty years of experience as an elementary school speech pathologist. Ms. [REDACTED] is certified by the Maryland Department of Health as a Speech-Pathologist and has a national certification from the American Speech and Hearing Association. MCPS Ex., 15. She assesses and treats elementary school students who have speech and language impairments, including language fluency. Ms. [REDACTED]' testimony was consistent with her March 2, 2022 report. MCPS Ex. 12.

As part of her assessment, Ms. [REDACTED] contributed to creating the speech and language goals in the Student's IEPs based on her observations and both formal and informal data collection, all of which were used to assess the Student's receptive and expressive language. TR. pp. 41:22 to 42:12. She determined that the Student had strengths, although the Student's score for auditory comprehension, a formal test of receptive language and expressive communication, was below average. He scored 62 on the receptive test (an average range would be between 85 and 115), and his expressive score was 78, which was also below the average. TR. pp. 42:13 to 43:12.

But informally observing him, the Student expressed good quantitative and qualitative concepts, good letter recognition, counting, and print awareness. TR. p. 43:18 to 43:20. His sentences were longer than average for his age. TR. p. 44:2 to 44:14.

However, he had difficulty following verbal directions, asking and answering questions, and understanding and using descriptive language and he displayed delayed timeliness in making his responses – sometimes even minutes would go by between the question posed and his answer. TR. p. 45:21 to 46-4. The Student appeared not to attend the lesson, walking around the classroom.

However, he would still absorb the information and was able to respond to a relevant question about the material despite his apparent disconnectedness:

[A]lthough he would sort of physically move around the room a lot he could sort of walk in circles around the room and it may have looked that he wasn't attending. The teacher or a paraeducator may have asked him a question about what was being done, that lesson, the book being read and he was able to answer pretty accurately questions even if he didn't sort of physically appear to be attending. He was attending in his own way....

TR. p. 45:1 to 45:8. Ms. [REDACTED] recommended that the Student be educated in a smaller setting with greater attention being paid to him. TR. p. 47:5 to 47:14.

[REDACTED] was well qualified and accepted as an expert in school psychology. She received a master's degree in psychology and school psychology and is a certified as a school psychologist by the MSDE in Maryland as well as nationally through the National Association of School Psychologists. She maintains her certification through annual professional development and attends professional conferences in the State and nationally.

She has been a school psychologist for thirteen years, with the last ten of those years working in the MCPS system. TR. pp. 50:9 to 51:20. She described her duties as providing comprehensive or psychological services to students, including conducting psychological assessments to evaluate students – their cognitive ability, social emotional behavioral functioning and adaptive behavior functioning. TR. pp. 51:21 to 52:8. As a resource psychologist, she supports IEP teams and “504” teams under the Americans with Disability Act, determine students’ strengths and needs and recommending mental health services and crisis support as required.

Ms. [REDACTED] testified from the Report of the School Psychologist prepared by [REDACTED], another nationally certified school psychologist, dated March 2, 2022. MCPS Ex. 11. Ms. [REDACTED] did not write the report, but was familiar with its contents. The report included assessments of the Student’s cognitive ability (i.e., how well he learns) as well as his behavior and social emotional functioning and adaptive behavior functioning, which includes communication, social and life skills. The assessments were conducted both formally and informally through face-to-face interviews and observations.

Ms. [REDACTED] explained the report. It includes information from teachers and service providers, showing that the Student was making *some* progress in his foundational skills, but was struggling to maintain attention and remaining in his assigned area during instruction – he moved about the classroom when that movement was not indicated. Although the Student appears to be “off task,” he still learns – he was able to answer questions posed to him on the topic being taught. He struggles with transitions from preferred tasks such as computer time. TR. pp. 55:7 to 56:1.

The Student is easily distracted and would benefit from small group activities and reduced distractions around him. MCPS Ex. 3, p. 0103. The Student requires monitoring to stay on task and supports with writing, as he has difficulty with attention and encoding. *Id.*

In the school environment, the Student requires one to one individual support, which is provided by a teacher or aide sitting or walking with him. When he was observed in structured activities (e.g., being asked to complete a task when he is given an activity to complete) and non-structured activities (e.g., playing with his peers), he showed frustration and distraction, requiring prompting to stay on task. The Student put forth adequate levels of effort and attention during the testing, but would require high levels of structure, verbal prompting and required multiple breaks after five to seven minutes of attention. MCPS Ex. 11.; TR. pp. 56:17 to 58:9).

Testing the Student's conceptual, communication and functional skills (i.e., "how he completes tasks, self-direction and motor skills, his fine and gross motor skills," including social skills - "his ability to interact with others"), the Student's scores fell in the low range based on teacher and his Parent's reports – low, extremely low, and significantly low, depending on the index. TR. p. 61:4 to 61:20.

Regarding the Student's social emotional and behavioral functioning, the witness testified that the home and teacher rating scale confirmed the diagnosis of autism, as well as attention and hyperactivity, defiance, and aggressive behavior including temper and emotionally dysregulated mood and affect. TR. pp. 62:6 to 63:4.

The evaluator's recommendation was that the Student would benefit from structural behavioral supports and strategies in the classroom and at home, such as the use of a timer to balance timing work with time on equal preferential activities such as the use of the computer.

The recommendations also included the use of a “token board” from which he could earn preferred activities or rewards. Frequent breaks and the use of visual cues to support his verbal expression and reminders were also suggested. TR. pp. 62:6 to 63:4.

The report concluded as follows:

Results of the current cognitive assessment along with his academic progress suggest he should continue to receive access to grade level curriculum with necessary scaffolding to support his language acquisition and interfering behaviors. Students benefit from the appropriate level of challenge and structured support. If work is too easy or unstructured, he may demonstrate (sic) increased interfering behaviors. If work is too hard, he may also demonstrate increased interfering behaviors to avoid the task. FBA<sup>12</sup> data should be analyzed to determine if he is demonstrating work avoidance due to difficulty or due to not enough challenge.

MCPS Ex. 11, p. 0160. Ms. [REDACTED] emphasized the need for structure and challenges to keep the Student on track, non-aggressive, engaged, and learning.<sup>13</sup>

Ms. [REDACTED] was accepted as an expert in special education. Ms. [REDACTED] has worked for the MCPS for twenty-seven years and is presently the [REDACTED] at [REDACTED], which is a program for students who have significant academic and social skills needs. The Student is presently attending that school.

Ms. [REDACTED] testified as chair of the Student’s IEP team about the Student’s IEP. MCPS Ex. 3. Ms. [REDACTED] confirmed that the Student’s primary disability is autism which affects his comprehension, calculations, written language, expression and behavior, including social interactions, self-management, routines and procedures. TR. p. 77:5 to 77:6.

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<sup>12</sup> Ms. [REDACTED] explained that an “FBA,” or Functional Behavioral Analysis, is a tool used to collect observational data about what triggered the adverse behavior so that the team could determine the cause of that behavior.

<sup>13</sup> The Parents questioned the timeliness of the report and the lack of a more current assessment. Although the point was well-taken, I did not find the age of the report significant in light of the other witnesses’ more recent observations confirming those results.

Reviewing the Student's IEP, the Student's behavior was concerning – particularly his risk of elopement, aggression in the classroom, inability to sustain attention for academic and generally his noncompliance resulting in aggressive behavior (e.g., slapping, kicking or pushing other students) when demands were being placed on him. TR. p. 78:6 to 78:24. Although the Student did not have one-on-one supervision in kindergarten, he presently has that coverage for safety reasons – to keep him from eloping and preventing his aggressive behavior that increased towards the end of the last academic year. TR. pp. 78:25 to 79:14. The Student would run around and throw himself on the ground, scream and get aggressive towards other students and staff, tearing classroom materials if he did not get to do his preferred activities. TR. pp. 79:15 to 80:1.

To address this behavior, the IEP had goals in social and emotional areas. For example, the Student's goal for "Behavioral - Routines and Procedures" was the following:

Given a social story, adult support, visual reminders in classroom activities, and positive reinforcements, [the Student] will demonstrate active listening 60% of the time over a quarter.

The quarterly objectives included: orienting himself towards the teacher or speaker (Objective 1); when he wants to ask or answer a question; raising his hand, waiting to be called on (Objective 2); and answering questions accurately (Objective 3. MCPS Ex. 3, p. 0113; TR. pp. 80:11 to 81:1. He did not meet those objectives, failing to make sufficient progress to meet the goals. MCPS Ex. 3, p. 0114; TR. p. 81:2 to 81:5.

The Student's "Behavioral- Self-management" goal was:

Given a fading prompt hierarchy, adult supervision, a social story, visual and verbal prompts, sustained attention, picture schedule/visual supports, modeling, and positive reinforcement, [the Student] will request to use the bathroom.

After failing to meet four progressively modified objectives (from progressive prompting to verbally requesting bathroom use), he failed to make sufficient progress towards his goal in the first three progress reports, and the third and fourth report succinctly explains the Student's lack of progress:

Due to [the Students] inattention, staying in location, aggressive behavior, following simple directions, lack of interest in activities, and participation in academic activities, [the Student] did not make progress ... the case has been referred to CIEP.

MCPS Ex.3, pp. 0115 - 0116; TR. p. 81:6 to 81:14.

The Student's "Behavioral – Social Emotional/Behavioral" goal was:

Giving a small group, adult support, repetition, visual and verbal prompt, sustained attention, picture schedule/visual supports, first/then chart, modeling, and positive reinforcement, [the Student] will participate in instruction and classroom for 12 minutes in three out of five trials over an academic quarter.

MCPS Ex.3, pp. 0120 and 0121. The fifth progress report echoed the first four – that the Student was not making sufficient progress to meet the goal. The fifth progress report matched the earlier ones.<sup>14</sup> MCPS Ex. 3, pp. 0121-0122. The same result was reported for his "Behavioral – Social Interactions Skills" goal<sup>15</sup> which resulted in two substantially similar progress reports, the latest of which read, "[D]ue to the students continuous difficulties with attention and staying in location, he did not make progress, and the case has been referred to CIEP." MCPS Ex. 3, p, 0126.

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<sup>14</sup> "Due to [the Students] inattention, staying in location, aggressive behavior, following simple directions, lack of interest in activities, and participation in academic activities, [the Student] did not make progress ... the case has been referred to CIEP."

<sup>15</sup> "Given verbal reminders, modeling, multiple breaks, sensory strategies, facilitated play opportunities, visual and verbal prompts, first/ then language, sustain[ed] attention, and positive reinforcements, [the Student] will initiate and sustain positive peer interactions in 3 out of 5 trials over a period of two weeks." MCPS Ex. 3, p. 0125.

The Student ended the year not making sufficient, or in some instances any, progress in meeting academic goals either. There was no progress in reaching his goals for “Academic-Communication,”<sup>16</sup> “Academic-Reading Phonics,”<sup>17</sup> “Academic – Reading Comprehension,”<sup>18</sup> “Academic – Math Calculation,”<sup>19</sup> “Academic – Written Language Expression,”<sup>20</sup> Ms. [REDACTED] confirmed these results. TR. pp. 81:25 to 82:17.

Ms. [REDACTED] then explained the “Services” section of the IEP, which comprised twenty-nine hours outside general education per week taught by a special education teacher and an instructional aid. MCPS Ex. 3, p. 0127. Ms. [REDACTED] also explained that the Student had one-on-one support as well to “...help him engage in his classwork...and be proactive ....when we see his behaviors start to escalate within the classroom and to make sure he is getting the reinforcement in the things that are listed on his IEP.” TR. p. 85:14 to 85:19. He also was to receive one hour (two thirty-minute sessions) with a speech language pathologist. MCPS Ex. 3, p. 0127. A similar schedule of services during the extended school year (ESY) was also to be provided. MCPS Ex. 3, p. 0128.

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<sup>16</sup> “Given verbal and visual support, [the Student] will demonstrate overall communication skills by following 2-step instructions, sequencing 3-4 events, answering factual yes/no questions, and using 2-4 word sentences to answer a variety of wh questions and express himself in 8/10 opportunities by January 2024.” MCPS Ex. 3, p.0116

<sup>17</sup> “Given a small group, adult support, repetition, visual and verbal prompts, strategies to sustain attention, picture schedule/visual supports, modeling, and positive reinforcement, [the Student] will know and apply grade-level phonics and word analysis skills in decoding words 3 out of 5 times over an academic quarter.” MCPS Ex. 3, pp.0117-0118.

<sup>18</sup> “Given a small group, adult support, repetition, visual and verbal prompts, strategies to sustain attention, picture/visual supports, modeling, and positive reinforcement, [the Student] will ask and answer questions about key details in a text 3 out of 5 times over an academic quarter.” MCPS Ex. 3, p.0119.

<sup>19</sup> “Given a small group, adult support, repetition, visual and verbal prompts, strategies to sustain attention, picture schedule/visual supports, modeling and positive reinforcement, [the Student] will add and subtract within 20 in 3 out of 5 trials over an academic quarter.” MCPS Ex. 3, p. 0122.

<sup>20</sup> “Given sentence frames, models, faded hierarchy of prompts, visual and verbal prompt, adult support strategies to sustain attention, picture schedule/visual supports, modeling, and positive reinforcement, [the Student] will contribute to an opinion piece in which he introduces the topic or names the book he is writing about, state and opinion, supply a reason for the opinion and provide some sense of closure in 3 out of 5 trials over an academic quarter.” MCPS Ex. 3, p. 0124.

In Ms. [REDACTED]' opinion, which was uncontroverted, the Student could not access instruction in his current educational setting because:

...he needs a smaller environment where social skills and behavioral supports are really infused throughout the school day, as well as they are receiving direct instruction of those. When I am talking about a smaller class I am talking about a class size of maybe five or six students with enhanced adult support that is, you know, able to really give him the kind of behavioral supports that he needs.

TR. pp. 85:20 to 86:6. Ms. [REDACTED] further opined that other MCPS programs were considered – including the [REDACTED] and the [REDACTED] – but none were appropriate based on the Student's current need for a smaller, comprehensive special education environment, with support from social skills and behavioral supports that are not available in his current placement, or the two alternative placements mentioned above. TR. pp. 86:21 to 88:1. The Student's behaviors and inattention make evaluating academic progress a difficult task. TR. p. 88:2 to 88:10.

In the earlier IEPs (MCPS Ex. 1 and 2), the Student was making some progress, but the progress was less than the MCPS expected and needed for the Student to progress satisfactorily as his goals were not being met. TR. p. 98:11 to 98:16.

Accordingly, in light of the Student's "delay in communication, cognition, and social impact [of] his ability to interact with peers and adults, access curriculum, and precipitate in age appropriate activities even with the use of supplementary aids and services," the team rejected the public options because "[d]ue to documented communication (receptive and expressive), pre-academics, and behavioral (classroom and social-emotional) needs [, the Student] requires a highly structured classroom taught by a special educator. He requires consistent, direct, specialized instruction in a highly structured setting with a low student to teacher ratio and numerous opportunities for repetition, practice and facilitation." MCPS Ex. 3, p. 0130.

Questioned by the Parents, Ms. [REDACTED] reiterated that the Student would not make academic or social progress even if he continued to receive one-on-one services in any of the MCPS schools that were considered, and he would not receive an appropriate education in any available public school setting. TR. p. 91:4 to 91:14.

In recommending [REDACTED], a nonpublic placement that is an intensive special education placement with a lower teacher to student ratio than that available in the MCPS system, the IEP team found that the placement would provide the student an appropriate education in the least restrictive environment, even weighing the benefits of that education against the time and distance to travel to that location. MCPS Ex. 3, p. 0131; TR. p. 88:2 to 88:10.

### **Closing Arguments**

The Parents did not have any witnesses to present and waived their right to testify and at the end of the MCPS presentation, chose to proceed to closing argument.<sup>21</sup> They argued that they do not challenge the IEP team's decision to place the Student in a private school – in this instance an inclusive special education program with a low teacher to student ratio.

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<sup>21</sup> The Parents were advised that a closing argument is no longer evidence, but it is summation as to why the parties believe they should succeed.

JUDGE: Okay. Well, let me suggest this. A closing argument is no longer evidence but it is summation as to why the parties believe they should succeed. My concern is -- and again, I don't represent you. I am not acting as a lawyer. I am not giving you legal advice. My concern is that you bring things up in closing that are not in evidence then it is not admissible. So, I mean, if there is anything else you want to tell me now that is fine. If you do want to waive the testimony and go to closing that is fine too. I am just letting you know what the parameters are.

[The Parent]: Okay. Yeah, I have nothing else to say.

TR. p. 101:9 to 101:21.

Therefore, they did not object to the placement decision, but rather, they rejected the location of the program. The Parents explained that they are Montgomery County residents, and the Student has been placed in a school located in ██████████ County where, they argued, it would be difficult for them or their family members to get to the school if an emergency arose. The Parents asked that before the Student is moved from his present placement, the placement decision be delayed until there was an opening in an appropriate private school located in Montgomery County closer to their home in Montgomery County. The Parents have made several inquiries at private schools in Montgomery County, but without success. Accordingly, the Parents do not challenge the placement – just the location. And they have no evidence that any of these possible schools could enroll the Student or provide him with a FAPE.

In its closing, MCPS reiterated that the Parents bear the burden of proof in a due process hearing where they challenge the IEP team decisions. *Schaffer*, 546 U.S. at 56-58. Although the MCPS presented the bulk of the evidence, it was still incumbent for the Parents to prove their case – the MCPS asserts that they did not.

### **Analysis**

I agree with the MCPS that the Parents did not meet their burden of proof. The evidence was uncontradicted that the Student was not making sufficient progress in almost all of his goals – behavioral, social and academic – even with the use of supplementary aides, services and supports. Even with one-on-one support, those goals have been unattainable in his current placement at the ██████████, and the expert opinion supported the finding that none of the other MCPS programs would provide any better result. The IEP team’s placement of the Student at ██████████ – a private, self-contained program with a low student teacher ratio – is reasonably

calculated to provide the Student with FAPE, and move him towards his goals. The Parents do not disagree, but they question the location of the program.

## **FAPE**

In *Endrew F. v. Douglas County School District*, 580 U.S. 386 (2017), the Supreme Court reiterated the standards for judging IEPs, reiterating what it expressed in its 1982 *Rowley* decision:

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. [*Rowley*], at 207, 102 S.Ct. 3034. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. *Id.*, at 208–209, 102 S.Ct. 3034. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*, at 206–207, 102 S.Ct. 3034.

580 U.S. at 399 (emphasis added). The instruction offered must be “*specially designed*” to meet a child’s “*unique needs*” through an “[*i*]ndividualized education program.” §§ 1401(29), (14). *Endrew F.*, 580 U.S. at 400.

In the present case, the IEP team recognized that the Student was getting little or no educational benefit in his current placement at [REDACTED]. To remedy the situation, they chose to refer the Student to the CIEP for placement in a full day autism program that the MCPS did not provide. Even the Parents agree that the Student is better served if placed in an all-inclusive program. Based on the ample evidence discussed above, I have no doubt that the IEP that the team fashioned is reasonably calculated to enable the Student to make progress appropriate to his circumstances. Accordingly, I find that the IEP team did choose a placement that was were “reasonably calculated to enable the child to receive educational benefits.” *Endrew F.* 580 U.S.

at 399. The Student's placement in the all-inclusive program is appropriate. The Parents, however, object to the program's location.

### **Least Restrictive Environment**

Although this point was not challenged in earnest by the Parents, a discussion on LRE is indicated. In addition to the IDEA's requirement that a child with a disability receive some educational benefit, the child must be placed in the "least restrictive environment" to the maximum extent appropriate, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2)(i).

(2) Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114 (a)(2). Indeed, instructing children with disabilities with non-disabled peers is generally preferred if the student with disabilities can achieve educational benefit in the general education program. *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989).

Placing children with disabilities into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved.

The Student has been enrolled at [REDACTED], which does have disabled and non-disabled peers in proximity. But the evidence shows that the Student would not benefit from any program that does not have the intensity and low teacher student ratio of an all-inclusive

autism program, such as the program at [REDACTED]. The program at [REDACTED] cannot provide for that intensity. The IEP team also considered other less inclusive programs in the MCPS system ([REDACTED], [REDACTED]), but those programs could not provide the intensity of services that the experts opined would be needed so that the Student could make some educational progress.

The program at [REDACTED] would be the LRE for the Student.

### **Location**

Regarding the distinction between educational placement and location or site or the program, the court in *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003), wrote:

As noted, the IDEA requires that the parents be part of the team that creates the IEP and determines the educational placement of the child, 20 U.S.C. § 1414(d)(1)(B); and the IEP is to include location, 20 U.S.C. § 1414(d)(1)(A)(vi) (IEP must include the projected date for the beginning of services and their anticipated frequency, location, and duration). Additionally, 20 U.S.C. § 1414(f) requires the local education agency to ensure that the parents are members of any group that makes decisions on educational placement.

These statutory provisions do not, however, explicitly require parental participation in site selection. “Educational placement”, as used in the IDEA, means educational program—not the particular institution where that program is implemented. *E.g.*, *Sherri A.D. v. Kirby*, 975 F.2d 193 (5th Cir.1992) (“educational placement” not a place, but a program of services); *Weil v. Board of Elem. & Secondary Educ.*, 931 F.2d 1069 (5th Cir.1991) (transfer of child to another school was not a change in “educational placement”). *Thus, contrary to the Whites' position, that parents must be involved in determining “educational placement” does not necessarily mean they must be involved in site selection. Moreover, that the parents are part of the IEP team and that the IEP must include location is not dispositive. The provision that requires the IEP to specify the location is primarily administrative; it requires the IEP to include such technical details as the projected date for the beginning of services, their anticipated frequency, and their duration. See 20 U.S.C. § 1414(d)(1)(A)(vi).*

*White*, 343 F.3d at 379 (emphasis added)..

The distinction between placement and location was explained by the hearing officer in *District of Columbia Public Schools, District of Columbia State Educational Agency 2011-1217*, 112 LRP 30086 (2012), p. 4:

Although IDEA does not define the term educational placement, the meaning falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP. *See, Laster v. District of Columbia*, [349] F. Supp. 2d 60 (D.D.C. 2005).<sup>22</sup> Hence, "'placement' refers to the overall educational program offered, not the mere location of the program." *Roher v. District of Columbia*, 1989 WL 330800, pp. 2-3 (D.D.C. 1989); *Knight v. District of Columbia*, 877 F.2d 1025 (D.C. Cir. 1989).

The last of the above-cited cases addresses the convenience factor relevant to the present controversy. Inconvenience may be a factor in the appropriateness of a placement, but it may not be if transportation is provided. "Assuming it is so inconvenient that the point is relevant, [the school system] did offer to accommodate the [the Student's] transportation needs, in light of which we cannot conclude that [the placement] is so inaccessible as to render it inappropriate." *Knight*, 877 F.2d at 1030 (D.C. Cir. 1989).

The Parents alleged that the distance may have been inconvenient in case of an emergency, but neither the distance and nor frequency of the contingency were quantified, challenging the Parent's ability to meet their burden.

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<sup>22</sup> In addressing the placement of a student in a stay put situation, the court made a distinction between "placement" and the physical location of a program:

Although the IDEA does not define the term "then-current educational placement," the meaning of the term "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Bd. of Educ. of Cmty High Sch. Dist. No. 218*, 103 F.3d at 548; *see also Spilsbury*, 307 F.Supp.2d at 26–27 (explaining that "the IDEA clearly intends 'current educational placement' to encompass the whole range of services that a child needs" and that the term "cannot be read to only indicate which physical school building a child attends.)

*Laster v. Dist. of Columbia*, 394 F. Supp. 2d 60, 64–65 (D.D.C. 2005).

The IEP specifically addressed the appropriateness of the placement (and that no other physically closer program would provide the Student with FAPE), and it provided for the Student's transportation.

Accordingly, I reject the Parent's assertion that the site or location of the appropriate placement prevents the Student from receiving a FAPE in the LRE.

### ***"Burlington"* Analysis**

The Parents failed to identify an alternative program, or provide adequate evidence to establish the appropriateness of any alternative program. Although the [REDACTED] was mentioned during the Conference as an alternative placement for the Student, it was only mentioned once during the hearing – and that was only to recall the issues identified during the prehearing conference. TR. p. 9:14 to 9:25.

The analysis of whether a parent's private placement choice is proper is required only if the IEP proposed by the local education agency results in the denial of a FAPE. I find that it did not. But even if I were to have found the IEP inappropriate, the Parents presented no alternative program that could be appropriate for this Student. *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985); 34 CFR 300.148 (c).<sup>23</sup>

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<sup>23</sup> Although *Burlington* involved a parent seeking reimbursement for a unilateral placement, the analysis comparing the alternative placements is applicable in this case as well.

## CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

1. The Student's placement at [REDACTED], located in [REDACTED] County, is an appropriate placement for the Student for the 2023-2024 school year;
2. No other school chosen by the Parents, including a school in the MCPS system, is an appropriate placement for the Student for the 2023-2024 school year.

## ORDER

I **ORDER** that Parents' complaint is without merit and is hereby **DISMISSED**.

November 9, 2023  
Date Decision Issued

Marc Nachman  
Administrative Law Judge

MN/sh  
#207941

## REVIEW RIGHTS

A party aggrieved by this final decision may file an appeal within 120 days of the issuance of this decision with the Circuit Court for Baltimore City, if the Student resides in Baltimore City; with the circuit court for the county where the Student resides; or with the United States District Court for the District of Maryland. Md. Code Ann., Educ. § 8-413(j) (Supp. 2023). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

A party appealing this decision 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 appeal. The written notification must include the case name, docket number, and date of this decision, and the court case name and docket number of the appeal.

The Office of Administrative Hearings is not a party to any review process.

**Copies Mailed To:**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

██████████,  
STUDENT

v.

MONTGOMERY COUNTY  
PUBLIC SCHOOLS

BEFORE MARC NACHMAN,  
AN ADMINISTRATIVE LAW JUDGE  
OF THE MARYLAND OFFICE  
OF ADMINISTRATIVE HEARINGS  
OAH No.: MSDE-MONT-OT-23-21073

**FILE EXHIBIT LIST**

**Exhibits**

No exhibits were admitted on behalf of the Parents.<sup>1</sup>

I admitted the following exhibits on behalf of the MCPS:

**IEPs:**

MCPS Ex. 1 – April 20, 2021 IEP, Amended November 15, 2021 (MCPS 0001-0035)

MCPS Ex. 2 – March 2, 2022 IEP, Amended November 14, 2022 (MCPS 0036-0082)

MCPS Ex. 3 – January 24, 2023 IEP, Amended August 11, 2023 (MCPS 0083-0133)

**Prior Written Notices:**

MCPS Ex. 4 – November 16, 2021 Prior Written Notice (MCPS 0134-0135)

MCPS Ex. 5 – February 21, 2022 Prior Written Notice (MCPS 0136-0137)

MCPS Ex. 6 – March 8, 2022 Prior Written Notice (MCPS 0138-0139)

MCPS Ex. 7 – November 21, 2022 Prior Written Notice (MCPS 0140)

MCPS Ex. 8 – January 30, 2023 Prior Written Notice (MCPS 0141-0142)

MCPS Ex. 9 – March 1, 2023 Prior Written Notice (MCPS 0143-0144)

MCPS Ex. 10 – March 16, 2023 Prior Written Notice (MCPS 0145)

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<sup>1</sup> See discussion of the Parents' putative exhibits under the heading "The Student's pediatrician's letter and report of office visit.7, below.

**Reports and Evaluations:**

MCPS Ex. 11 – Report of the School Psychologist (March 2, 2022) (MCPS 0146-0160)

MCPS Ex. 12 – Report of Speech-Language Assessment (March 2, 2022) (MCPS 0161-0167)

**Resumes:**

MCPS Ex. 13 – [REDACTED] (MCPS 0168-0169)<sup>2</sup>

MCPS Ex. 14 – [REDACTED] (MCPS 0170)

MCPS Ex. 15 – [REDACTED] (MCPS 0170)

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<sup>2</sup> Ms. [REDACTED] did not testify.