

████████████████████,

STUDENT

v.

MONTGOMERY COUNTY PUBLIC

SCHOOLS

BEFORE H. DAVID LEIBENSPERGER,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH Case No.: MSDE-MONT-OT-23-25195

**RULING ON MONTGOMERY COUNTY  
PUBLIC SCHOOLS’ MOTION FOR JUDGMENT**

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**STATEMENT OF THE CASE**

On September 27, 2023, Dr. ██████████ and ██████████ (Parents)<sup>1</sup> filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) on behalf of ██████████ (Student), alleging that Montgomery County Public Schools (MCPS) failed to provide him with a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) for the 2023-2024 school year by placing him at ██████████ Middle School (██████ MS).<sup>2</sup> 20 U.S.C.A. § 1415(f)(1)(A) (2017);<sup>3</sup> 34 C.F.R.

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<sup>1</sup> Individually I will refer to the Parents as the Student’s father and the Student’s mother, respectively.

<sup>2</sup> At times, the parties also abbreviated the school name as “RTS.”

<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.

§ 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).

I held a remote prehearing conference via the Webex videoconferencing platform (Webex) on October 26, 2023. The Parents and Student were self-represented by the Parents. Stacy Reed Swain, Esquire, represented MCPS.

At the prehearing conference of this matter, I advised the parties of the time requirements for issuing a decision. The applicable regulations state the following, in part:

- (a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c) –
  - (1) A final decision is reached in the hearing; and
  - (2) A copy of the decision is mailed to each of the parties.

34 C.F.R. § 300.515.

Section 300.510 explains the resolution period in a due process proceeding as follows:

(b) Resolution period.

...

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period.

....

(c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

...

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible. . . .

*Id.* § 300.510.

The Complaint was filed with the OAH on September 27, 2023. On October 4, 2023, the parties notified the OAH that the resolution meeting was unsuccessful, and that no agreement was possible. Therefore, the forty-five days began to run the day after the parties informed the OAH that no agreement was possible. *Id.* § 300.510(c)(2). Accordingly, the timeframe for conducting

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<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 2022 Volume of the Maryland Annotated Code.

the hearing and issuing a decision in this matter would ordinarily expire forty-five days later, on November 17, 2023.<sup>6</sup> *Id.* § 300.515(a). However, based on the Parents' desire to file a motion for summary decision,<sup>7</sup> the parties' schedules and my schedule,<sup>8</sup> MCPS moved, and the Parents agreed, that I extend the timeline to allow the merits hearing to be held on the selected dates and to allow sufficient time for me to consider the evidence, evaluate legal arguments, and draft a decision. *Id.* § 300.515(c).

I may grant specific extensions of time at the request of either party. *Id.* Accordingly, based on the noted scheduling conflicts, and in order to allow the parties time to attempt to resolve this matter either by agreement or motion, and without the need for a full hearing, I found good cause to extend the regulatory timeframe as requested by the parties. *Id.* MCPS moved, and the Parents agreed, that I issue a decision within thirty days after the conclusion of the hearing, and I agreed to do so.

The parties anticipated needing five days to present this case. We collectively started looking at scheduling this matter as early as practicable, to allow sufficient time for the Parents to file their anticipated motion, for MCPS to file a response, and for me to rule on the motion. Given that motions were to be decided by December 22, 2023, the school system was on break,

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<sup>6</sup> Forty-five days from October 5, 2023 is November 18, 2023 which is a Saturday, making the deadline Friday November 17, 2023.

<sup>7</sup> At the October 26, 2023 prehearing conference, the parties requested an additional settlement conference, which was scheduled for November 9, 2023, based on their availability. The Parents also sought an opportunity to resolve the matter through a motion for summary decision, and with the input of the parties it was agreed that Parents would file their motion by November 15, 2023, MCPS would file its response by November 30, 2023, and I would issue a ruling on the motion by December 22, 2023.

<sup>8</sup> Although the Parents were available any date in January, Ms. Swain and I had several conflicts that prevented the hearing from being scheduled earlier. Ms. Swain was scheduled to be out of country and on leave January 2, 2024. On January 3 and 4, Ms. Swain was scheduled to be in a hearing in another matter before the OAH. On January 5, Ms. Swain was available. On January 8 through 12, Ms. Swain was scheduled to be in a hearing in another matter before the OAH. January 15, was the Martin Luther King Day holiday, and the OAH and the school system were both closed in observance. On January 16 and 17, Ms. Swain was scheduled to be in a hearing in another matter before the OAH. Ms. Swain was available January 18. On January 19, Ms. Swain was scheduled to be in an administrative meeting. On January 22, 2024, I had a previously-scheduled work obligation. Although Ms. Swain had two available dates earlier in January, the parties agreed they wanted the hearing dates to be sequential so that the hearing would not be disjointed, and to allow Ms. Swain sufficient time to prepare, given that she had several other hearings scheduled in January.

and I was on pre-scheduled leave after that until January 2, 2024, we began looking at hearing dates beginning January 2, 2024; however, both parties were unavailable until late January 2024, as discussed above.

As a result of the unavailability of counsel, the Parents, and me, and to avoid any long gaps between hearing dates, the parties and I agreed the hearing would be conducted on January 23, 24, 25, 26, and 29, 2024, beginning at 9:30 a.m. each day. However, the hearing concluded early, on January 26, 2024. As a result, my decision is due no later than February 23, 2024.<sup>9</sup> At the hearing, the Parents and Student were self-represented by the Parents. Ms. Swain, represented MCPS.

At the hearing, the Parents presented their evidence and then rested the Parents and Student's case in chief. Thereafter, MCPS made an oral Motion for Judgment pursuant to COMAR 28.02.01.12E, arguing that the Parents and Student had not met their burden to establish a violation of the IDEA and entitlement to relief. The Parents opposed the Motion for Judgment. I declined to issue a ruling on the record, and advised the parties I would hold the matter *sub curia* and issue a written decision. Thereafter, MCPS also rested and declined to present additional evidence.<sup>10</sup>

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

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<sup>9</sup> Thirty days from January 26, 2024 is February 25, 2024, which is a Sunday, making the deadline February 23, 2024.

<sup>10</sup> As discussed below, at the outset of the hearing, MCPS had already moved all of its exhibits into evidence.

## ISSUES

1. Whether the Parents and Student presented sufficient evidence to meet their burden of proof by a preponderance of the evidence that:<sup>11</sup>
  - a. MCPS denied the Student a FAPE for the 2023-2024 school year by failing to develop an appropriate Individualized Education Program (IEP), that would provide an appropriate placement for the Student that would meet the Student's needs, including the ability to interact socially with higher-functioning peers and that is closer to the Student's home?
  - b. MCPS denied the Student a FAPE for the 2023-2024 school year by placing him at ■■■MS?
  - c. MCPS denied the Student a FAPE by failing to propose a less restrictive setting than ■■■MS? or,
  - d. If ■■■MS is an appropriate placement for the Student to receive FAPE, is a shorter transportation trip to ■■■MS necessary to provide the Student with a FAPE?
2. If not, whether MCPS is entitled to judgment in its favor as a matter of law?

## SUMMARY OF THE EVIDENCE

### Exhibits

The parties stipulated to the admission of their exhibits at the outset of the hearing. I admitted the following exhibits offered by the Parents and Student:

Parents Ex. A – The Student's Father's Curriculum Vitae

Parents Ex. B – The Student's Mother's Curriculum Vitae

Parents Ex. C – Video File of Student at Church, January 7, 2024

Parents Ex. D – Video File of Student at Church, January 7, 2024

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<sup>11</sup> At the prehearing conference, and the hearing of this matter, the parties and I agreed to the issues presented by the Parents and Student's Due Process Complaint.

- Parents Ex. E – Video File of Student at Church, January 7, 2024
- Parents Ex. F – Video File of Student at Church, January 7, 2024
- Parents Ex. G – Video File of Student at Church, January 7, 2024
- Parents Ex. H – Video File of Student at Church, January 7, 2024
- Parents Ex. I – Video File of Student at Church, January 7, 2024
- Parents Ex. J – Video File of Student at Church, January 7, 2024
- Parents Ex. K – Video File of Student at Church, January 7, 2024
- Parents Ex. L – ██████████ Curriculum Vitae
- Parents Ex. M – None<sup>12</sup>
- Parents Ex. N – Letter from Dr. ██████████ to MCPS, October 18, 2022
- Parents Ex. O – None
- Parents Ex. P – Letter from Dr. ██████████, October 17, 2023
- Parents Ex. Q – ██████████ Elementary School Award, June 9, 2021
- Parents Ex. R – National Junior Honor Society Nomination, undated
- Parents Ex. S – ██████████ Elementary School Award, May 9, 2017
- Parents Ex. T – Emails, October 2022
- I admitted the following exhibits offered by MCPS:<sup>13</sup>
- MCPS Ex. 1 – IEP, February 17, 2022
- MCPS Ex. 2 – IEP, March 15, 2022
- MCPS Ex. 3 – IEP, May 11, 2022
- MCPS Ex. 4 – IEP, June 13, 2022

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<sup>12</sup> The Parents subpoenaed a copy of Dr. ██████████'s and Dr. ██████████' curriculum vitae, and identified them as Exhibits M and O, respectively. Dr. ██████████ appeared at the hearing; however, she did not produce a copy of her curriculum vitae. Dr. ██████████ did not respond to the subpoena; however, the Parents indicated that she is no longer employed by ██████████, where the subpoena was served.

<sup>13</sup> MCPS' exhibits included Bates stamped page numbers. When referring to MCPS exhibit page numbers, I will refer to the Bates stamped page numbers.

- MCPS Ex. 5 – IEP, September 6, 2022
- MCPS Ex. 6 – IEP, October 4, 2022
- MCPS Ex. 7 – IEP, November 14, 2022
- MCPS Ex. 8 – IEP, December 15, 2022
- MCPS Ex. 9 – IEP, February 2, 2023
- MCPS Ex. 10 – IEP, May 25, 2023
- MCPS Ex. 11 – IEP, August 21, 2023
- MCPS Ex. 12 – Prior Written Notice, June 13, 2022
- MCPS Ex. 13 – Prior Written Notice, October 7, 2022
- MCPS Ex. 14 – Prior Written Notice, November 14, 2022
- MCPS Ex. 15 – Prior Written Notice, January 3, 2023
- MCPS Ex. 16 – Prior Written Notice, February 2, 2023
- MCPS Ex. 17 – Prior Written Notice, May 30, 2023
- MCPS Ex. 18 – Prior Written Notice, August 21, 2023
- MCPS Ex. 19 – Educational Assessment Report, March 2023
- MCPS Ex. 20 – Report of School Psychologist, April 2023
- MCPS Ex. 21 – Report of Speech-Language Re-Assessment, May 2023
- MCPS Ex. 22 – ██████████ Resume, undated
- MCPS Ex. 23 – ██████████ Resume, undated
- MCPS Ex. 24 – ██████████ Resume, undated
- MCPS Ex. 25 – ██████████ Resume, undated
- MCPS Ex. 26 – ██████████ Resume, undated
- MCPS Ex. 27 – ██████████ Resume, undated
- MCPS Ex. 28 – ██████████ Resume, undated

## Testimony

The Parents testified and presented the following witnesses: [REDACTED], [REDACTED], M.D., and [REDACTED], M.D.<sup>14</sup> The parties stipulated and I accepted that Dr. [REDACTED] would testify as an expert in child psychiatry, and the Student's father would testify as an expert in statistics.

MCPS did not present any witnesses.

## STIPULATIONS

At the outset of the hearing of this matter, the parties stipulated to the following facts as proposed by the Parents and Student:

1. The Student is autistic.
2. The Student's father is an expert in statistics and may use his expertise if deemed necessary during his testimony and any cross-examination at the hearing in this matter.<sup>15</sup>
3. Dr. [REDACTED] signed the [REDACTED] assessment letter dated October 18, 2022.

## FINDINGS OF FACT

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

1. The Student's primary disability of autism affects him in the following academic areas: cognitive, math calculation, reading comprehension, speech and language expressive language, speech and language pragmatics, speech and language receptive language, and written

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<sup>14</sup> When Dr. [REDACTED] was called to the stand, she testified regarding her medical and psychiatric credentials, but stated that she is a resident physician who only has a medical training license and not a full medical license (which she is not eligible for until 2025), and that she only sees patients under the supervision of a licensed physician. MCPS then objected to Dr. [REDACTED]'s qualifications as an expert witness. I took a recess to research that issue. Upon my return, and before any ruling was made, the Parents withdrew Dr. [REDACTED] as a witness, and asked to call Dr. [REDACTED] instead. I asked the Parents if they wanted to ask Dr. [REDACTED] about any factual matters related to this case and they declined. Dr. [REDACTED] was then excused.

<sup>15</sup> Despite this stipulation, the Student's father did not offer any opinions regarding statistics in his testimony.



language content; and in the following behavioral areas: self-management and social emotional/behavioral.

2. The Student transferred from [REDACTED] County Public Schools to MCPS on May 11, 2022, while in the sixth grade.

3. The Student began attending [REDACTED] Middle School, which is the Student's home/resident school, on May 23, 2022. He was given a modified schedule allowing him to leave at 1:20 p.m. each day, and he was given a significantly reduced workload to help him adjust to a new school late in the school year.

4. At that time, the Student also had an MCPS Central IEP Team referral to ascertain if a private placement would be more appropriate for his needs.

5. On June 13, 2022, MCPS recommended that the Student be referred to a private separate day school where all teachers are special education certified and where he would have access to a school social worker. MCPS further recommended that, until the Student was accepted at such a school, the Student be placed at [REDACTED] Middle School.

6. For the 2022-2023 school year, the Student was initially placed at [REDACTED] Middle School in the [REDACTED] program for his seventh-grade year.

7. In September of 2022, the Student did not like attending [REDACTED] Middle School. He would state he would rather go to [REDACTED] Middle School. His mother was driving him to school every morning at that time. When the Student did not want to attend school, it was a struggle to get him inside the building.

8. In September of 2022, in Reading class the Student would sometimes refuse instructions from teachers, call them inappropriate names, and elope from the classroom. He also refused to take the Reading Inventory and Phonics Inventory assessments given during the first quarter.

9. In September of 2022, in Math class, the Student did not interact with his peers at all. He would sometimes complete class assignments, and sometimes refuse to do so. He would sometimes read inappropriate things out loud to the class. On at least one occasion, the Student told his Math teacher that he was not coming back to school anymore because it is too far from his house.

10. In September of 2022, the Student had attended only a few Science, Physical Education, and Writing classes, and had not completed any assignments in those classes.

11. For reasons not contained in the record, the Student was absent from school from October 10, 2022 to at least February 2, 2023, while registered to attend ██████████ Middle School. For reasons not contained in the record, his attendance prior to that long-term absence was sporadic.

12. On October 18, 2022, the Student's treating psychiatrist at the time, Dr. ██████████ ██████████, wrote a letter in which she recommended a maximum twenty-five-minute commute for the Student because it will "benefit" the Student by "reduc[ing] his anxiety, irritability, behavioral outbursts and motion sickness." (Parents Ex. N.) She opined that the Student's "behavioral concerns" are "likely the result of" irritability due to motion sickness, and anxiousness about long distance travel from home. (Parents Ex. N.) Dr. ██████████ wrote that the Student's "behavior appears" to result from attending a school far from home, "and significant feelings of insecurity about his current program not meeting his academic needs...[the Student] has shown success with programs designed to meet his special needs...[s]uch an environment is likely to improve his current symptomology." (Parents Ex. N.)

13. On October 19, 2022, the Parents emailed Dr. ██████████'s letter to several MCPS employees. On October 21, 2022, MCPS' Special Education Program Specialist acknowledged receipt of the letter.

14. On November 14, 2022, MCPS entered the medical letter from Dr. [REDACTED], dated October 18, 2022, into the Student's file for consideration of distance in his educational placement.

15. On January 3, 2023, MCPS proposed that the Student attend the [REDACTED] at [REDACTED] Middle School until he was accepted into a separate day school.

16. Beginning in February 2023, the Student was assigned to the [REDACTED] at [REDACTED] Middle School with a modified, half-day schedule. He attended Physical Education, Read 180, Math, and Science classes.

17. By March 30, 2023, there had been four different occurrences where the Student escalated his behaviors, including spitting on staff/peers, hitting staff/peers, throwing objects, and being verbally aggressive (making threats, cursing, yelling). On a typical day, the Student would sometimes make comments about wanting to go home, but was nevertheless able to remain calm and continue at school. When the Student's behavior escalated, he had difficulty requesting a break or controlling his emotions until he was able to go home.

18. By June 16, 2023, the Student was able to identify appropriate break activities and was able to request a break when calm. He improved his ability to choose positive break activities and control his emotions when getting frustrated. However, when escalated or upset, it was difficult for him to appropriately ask for a break and to control his emotions. He would instead choose inappropriate videos to watch or make inappropriate comments to staff. It would take up to multiple class periods for the Student, once escalated, to be calm again and ready to learn.

19. The Student's current IEP, dated August 21, 2023, recognizes that there are days that the Student seems lost in his thoughts, perseverating on something, or distracted by his environment. On these days, the Student may refuse to do work by stating that he is finished or

leaving the classroom. The IEP recognizes that these behaviors significantly interfere with the Student's ability to receive an education.

20. The Student's current IEP includes a designated safe space for the Student to go when dysregulated and needing to process and problem solve.

21. The Student's current IEP includes controlled choice of assignments, where the Student has options to choose from for his assignments, which allows him to feel that he has some control throughout his day. The Student's choices may include choice in actual assignments, materials he uses on the assignment, or the way he is required to respond to demonstrate his learning.

22. The Student's current IEP includes sensory breaks at times when the Student is most likely to engage in an undesired behavior. Sensory breaks can be in the classroom or walks/breaks outside of the classroom. It can involve the use of specific sensory materials or sometimes simply a white board and marker for the Student to write his thoughts for a few moments.

23. The Student's current IEP includes extended school year (ESY) services, in part because there would be a regression of the Student's skills regarding classroom routines and procedures, and his progress in speech language and math calculation would be significantly jeopardized if he did not participate in ESY.

24. The Student's current IEP provides that all of his classes will be special education, outside of general education, and that the Student will take Reading Intervention, Science, Math, English, Resource, and Physical Education classes, and an elective course outside of general education.

25. The Student's current IEP provides him with counseling services.

26. The Student's current IEP provides him with transportation services. The Student requires and is provided transportation "curb to curb" (from his home to the school and back) daily on school days, and during ESY. The Student is also provided with a bus aide. The bus aide is able to provide the Student with music to listen to and other accommodations during the bus ride.

27. The Student's current IEP places him at [REDACTED] MS, a separate day school for special education students for the 2023-2024 school year in the eighth grade. At [REDACTED] MS, the Student will not participate with non-disabled peers during the school day.

28. MCPS has recommended a separate day school for the Student since June 13, 2022.

29. The placement at [REDACTED] MS took into consideration the Student's significant academic, behavioral and social emotional needs and his need for small structured classes, integrated services, and specialized supports throughout the school day; and that a referral to a separate day school would provide the most appropriate setting to provide the services outlined in the Student's current IEP.

30. A placement at the Student's home/resident school, [REDACTED] Middle School, was also considered in the Student's current IEP. The current IEP provides that the Student's needs were not compatible with the services available in [REDACTED] Middle School. The IEP team noted that placement at [REDACTED] MS was the closest possible school to the Student's home that could meet his needs.

31. In determining the Student's placement at [REDACTED] MS, MCPS considered less restrictive settings, including general education, and self-contained classes with the [REDACTED] [REDACTED]. However, the Student's needs as described in the current IEP are greater or too different than can be addressed in those settings.

32. MCPS has recommended that ██████ Middle School is an inappropriate placement for the Student since at least October 7, 2022, because that school would be unable to implement his IEP and provide a FAPE.

33. The Student's difficulties with lengthy travel were taken into consideration in the current IEP, which provides that the time spent in travel is outweighed by the benefits that the Student will receive for his needs.

34. The Student's mother attended the August 21, 2023 IEP meeting, and did not object to the IEP at that time.

35. Since the start of the 2023-2024 school year, on or about August 27, 2023, a special needs bus with a bus aide has arrived at the Student's home every morning to take him to ██████ MS.

36. The length of the bus trip between the Student's home and ██████ MS would be approximately one to two hours.

37. The Student has never ridden the bus to ██████ MS.

38. From the start of the 2023-2024 school year until a date in November 2023, the Parents did not even attempt to put the Student on the bus. They did not agree with the Student's placement at ██████ MS, and so were not attempting to put him on the bus. It is unclear from the record whether the Student attended ██████ MS between August and November 2023.

39. On September 27, 2023, the Parents filed the Due Process Complaint that is the subject of this matter.

40. On October 17, 2023, Dr. ██████, the Student's current treating psychiatrist, provided a letter to the Parents in which she opined that to "maximize [the Student's] educational success," she "propose[d]" that the Student be transported to school in a manner that allows for less than thirty minutes of transportation time from his home. (Parents

Ex. P.) She stated that alternative transportation “should be considered” in order to lessen the Student’s “anxiety/outburst associated with lengthy transportation.” (Parents Ex. P.) She further stated, “[t]he school does not have to change.” (Parents Ex. P.)

41. Beginning in November 2023, the Parents attempted to have the Student ride the bus to ■■■MS. When they would do so, the Student would refuse to get on the bus. After the Student would refuse to ride the bus, his mother would drive the Student to ■■■MS.

42. The Parents attempted, for approximately one month to have the Student ride the bus to ■■■MS. After that month, the Parents would sometimes still ask the Student to ride the bus, but mostly his mother has simply driven the student to ■■■MS every day without attempting to get him to ride the bus.

43. When his mother drives the Student to ■■■MS, he arrives late, at approximately 10:00 a.m., due in part to her seeing one of her other children off to school.

44. When his mother takes the Student to school, the trip takes forty minutes or longer, depending on traffic.

45. The Student frequently protests going to school at ■■■MS, even when his mother drives him. On one occasion in early December 2023, the Student hit his mother while on their way to ■■■MS.

46. His mother picks the Student up from ■■■MS every day at approximately 11:30 a.m. The latest the Student has stayed at ■■■MS on a school day was 2:25 p.m. The Student will elope from the school and attempt to follow his mother home, or create a disruption when he arrives at school. ■■■MS will then contact his mother. It is unclear from the record whether his mother is instructed by school officials to pick up the Student, or decides to do so herself.

47. The Student's mother's ability to find employment has been negatively affected by her schedule of taking the Student to ■ MS and picking him up early.

## 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) (quoting *Maryland Civil Pattern Jury Instructions* 1:7 (3d ed. 2000)); see also *Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005). 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 and Student are seeking relief and bear the burden of proof to show that the challenged actions by MCPS did not meet the requirements of the law.

At the close of the Parents and Student's case, MCPS moved for judgment, arguing the Parents and Student had not met their burden of proof. The OAH Rules of Procedure regarding a motion for judgment provide as follows:

- (1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.
- (2) When a party moves for judgment at the close of the evidence offered by an opposing party, the ALJ may:
  - (a) Proceed to determine the facts and to render judgment against an opposing party; or
  - (b) Decline to render judgment until the close of all evidence.



(3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made.

COMAR 28.02.01.12E.<sup>16</sup>

When considering a motion for judgment in a non-jury trial, the judge, as the trier of fact, may determine the facts and render judgment against the non-moving party if they have failed to present sufficient evidence to meet their burden of proof. *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 353 (1986). The judge may evaluate the evidence, including making inferences, determining credibility, and drawing conclusions in determining whether the non-moving party has met their burden of proof. *Id.*

The powers and duties of an administrative law judge (ALJ) are outlined in COMAR 28.02.01.11, and provide, in relevant part, as follows:

A. An ALJ shall:

...

(2) Take action to avoid unnecessary delay in the disposition of the proceedings. . . .

B. An ALJ has the power to regulate the course of the hearing and the conduct of the parties and authorized representatives, including the power to:

...

(4) Consider and rule upon motions in accordance with this chapter; [and]

...

(12) Issue orders as are necessary to secure procedural simplicity and administrative fairness and to eliminate unjustifiable expense and delay[.]

In the instant case, the Parents and Student filed the Due Process Complaint; therefore, they bear the burden of proof by a preponderance of the evidence. *Schaffer*, 546 U.S. at 62. Here, the Parents and Student have not met their burden of proof and MCPS' Motion for Judgment will be granted.

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<sup>16</sup> This provision in the OAH Rules of Procedure is analogous to the Maryland Rules of Civil Procedure regarding motions for judgment in the circuit and district courts. *See* Maryland Rules 2-519 and 3-519. Thus, I find that case law interpreting the circuit and district court provisions is persuasive and informative regarding the proper interpretation of the OAH rule.

## Analysis

### FAPE

The identification, assessment, and placement of students in special education is 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,<sup>17</sup> 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 (4th 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, discussed below. 20 U.S.C.A. § 1414(d)(1)(A).

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<sup>17</sup> The Parents and Student have not alleged any procedural violations.

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 (4th Cir. 1983) (citing *Rowley*, 458 U.S. at 176). Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive 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 (4th 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. 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, “[f]or 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 *Endrew 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.’” *Endrew F.*, 580 U.S. at 397 (quoting the 10th Circuit in *Endrew 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.” *Endrew 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. *Endrew F.*, 580 U.S. at 400.

Transportation constitutes a “related service” under the IDEA. 34 CFR §300.34(a). MCPS never argued that transportation for the Student is not an appropriate “related service,” and the Student’s IEP currently provides transportation services for the Student in the form of a special needs bus “curb to curb” with a bus aide on board every school day.

#### Least Restrictive Environment

In addition to the IDEA’s requirement that a child with a disability be enabled to 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).

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.

*The Parents and Student Did Not Establish a Violation of the IDEA*

The Parents and Student Did Not Establish that the Placement of the Student at a School Where He Only Interacts with Other Special Education Peers Is Not Reasonably Calculated to Provide the Student With a FAPE

■ MS is a separate special education environment, and the Student's attendance at that school means he will not interact with general education students during the school day. The Parents and Student argued that if the Student is not exposed to general education students (what the Parents referred to as "mainstream peers"), his agitation increases, and that the Student "will do and act better in a different school."<sup>18</sup> (Testimony, Student's father.) To support these assertions, the Student's father testified that the Student wants to be placed in a school with non-disabled peers. The Student's mother testified that she does not believe an all-special needs school is good for the Student, and he would do better in an "inclusive" program. (Testimony, Student's mother.) The Student's father testified that the Student has more difficulty and conflict interacting with his older eighteen-year-old autistic sister but gets along better with his younger ten-year-old non-disabled sister. The Parents also introduced into evidence videos of the Student at church, in which the Student is shown saying hello and goodbye to other parishioners, engaging in minimal small talk, and sitting calmly during the service.<sup>19</sup> The Parents also

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<sup>18</sup> The Student's mother also testified that she does not believe the Student has enough work to keep him busy, and that he needs a curriculum that keeps him busier until the end of each class. However, the only example she gave was Art class. She said that when the Student is in the "right program," he attends school every day. However, the appropriateness of the curriculum in providing a FAPE for the Student was not raised as an issue in this case. The testimony that the Student attends school every day in certain circumstances is also contradicted by the Student's otherwise undisputed poor attendance record.

<sup>19</sup> The example of the church as a place where the Student better interacts with non-disabled people was undercut by the testimony of the Student's mother, who said that the Student had attended that church three to four times, but did not really know anyone there.

presented the testimony of the Student's private music teacher, Mr. [REDACTED], who testified to the Student's friendliness in their interactions.<sup>20</sup>

The Parents argued that, based on this evidence, the Student should have interactions with general education students during the school day. They did not present evidence regarding to what extent it would be appropriate for the Student to have interactions with general education students in order to receive a FAPE. Nor did they present evidence demonstrating how the IEP's placement of the Student in a setting where he interacts only with other special education students deprived him of an IEP reasonably calculated to enable him to make appropriate progress. *Andrew F.*, 580 U.S. at 399.

For example, there was insufficient evidence comparing the Student's progress when he had more interaction with general education students to his progress when he was with predominantly or only special education students, and insufficient evidence demonstrating that any change in progress was due to the type of students he was interacting with. On that basis alone, the Parents and Student failed to meet their burden of proof as to their claim that MCPS denied the Student a FAPE by failing to develop an IEP that included the ability to interact with higher-functioning peers at school.

Moreover, the testimony of Dr. [REDACTED] was contrary to the position taken by the Parents and Student. When asked by the Parents whether the Student interacts well with "mainstream peers" at school or other social settings, Dr. [REDACTED] responded that the Student struggles with social communication with other children and understanding social cues, and that is why he recommended special education for the Student. When asked by the Parents whether the Student would interact and function better in a room with mostly people with special needs or students who do not have autism or special needs, Dr. [REDACTED] replied: "More probably the special

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<sup>20</sup> Mr. [REDACTED] also testified that the music lessons are mostly an opportunity for the Student to play whatever he wants and receive feedback.

education would be better, if you're talking about the school," and continued that special education classes will have more support and more "one-on-one," which would be better for the Student. (Testimony, Dr. █████.) Dr. █████' October 17, 2023 letter corroborated this, stating: "[t]he school does not have to change." (Parents Ex. P.)

In addition, at the June 13, 2022 IEP meeting, the Student's mother noted that when the Student went into general education classes in sixth grade, that was when he "went down-hill." (MCPS Ex. 11, p. 545.) She stated that the Student had been in "self-contained classes" since the age of three, and going to a general education classroom was "overwhelming." (MCPS Ex. 11, p. 545.) The Parents also admitted there is nothing inherently wrong with █████MS as a school; the Student's mother testified that █████MS is a beautiful school, and a place where she might like to work herself.

Although it was not raised by the Parents and Student at the hearing, the April 2023 report of the school psychologist recommended that, "[the Student] *may benefit* from inclusion in a *social program* where he can interact with typically-developing peers." (MCPS Ex. 20, p. 618) (emphasis added.) The school psychologist did not testify. But even if I were to assume that statement is completely accurate, it only reflects that the Student might benefit in some unidentified manner from an inclusionary social program – not that the Student requires interactions with typically-developing peers during the school day in order to receive a FAPE.

The Parents and Student Did Not Establish That There Is an Appropriate Less Restrictive Placement than █████MS for the Student

Related to the Parents and Student's claim that MCPS has denied the Student a FAPE by placing him in a special-education-only school, they further claim that RTMS is not the least restrictive placement for the Student. However, Dr. █████'s testimony again undercuts that assertion because he opined that the special education environment is the most appropriate environment for the Student.

Since the Student first transferred to MCPS he has had a central IEP referral to ascertain if a separate day school placement would be more appropriate for his needs. Since June 13, 2022, MCPS has recommended that the Student be referred to a separate day school where all teachers are special education certified and where he would have access to a school social worker. However, since 2022, the Student has had less restrictive placements, at ██████ ██████ Middle School and ██████ Middle School. Those were both considered as placements while the Student's current IEP was being developed.

A placement at ██████ Middle School was considered not compatible with the Student's needs. General education and self-contained classes with the ██████ were also considered, but also found to be incompatible with the Student's needs and unable to provide a FAPE for the Student. The ultimate placement of the Student at ██████ MS, a separate day school, took into consideration the Student's significant academic, behavioral, and social emotional needs; his need for small structured classes, integrated services, and specialized supports throughout the school day; and that a referral to a separate day school would provide the most appropriate setting to provide the services outlined in the current IEP. The testimony and evidence presented by the Parents and Student did not establish facts to the contrary.

At the August 21, 2023 IEP meeting, the Student's mother expressed that she was not sure where the Student should be placed, that she was concerned about him being in an entirely specialized program, and that the Student's level of disability meant that a placement in an all general education or special education environment was not appropriate. (MCPS Ex. 11, p. 543.) However, at that time, the Parents also did not offer a more appropriate placement for the Student than ██████ MS or demonstrate that ██████ MS was not an appropriate placement. That is where things still stand today. The Parents remain concerned, but have been unable to establish that the placement at ██████ MS violates the IDEA. I certainly understand the Parents' concern for their



child and their desire that he receive the most appropriate placement possible so that he can receive the best education possible. However, as discussed above, a student is not entitled to “the best education, public or non-public, that money can buy” or “all the services necessary to maximize” educational benefits. *Hessler*, 700 F.2d at 139 (citing *Rowley*, 458 U.S. at 176).

There may be no such thing as a “perfect” placement for the Student. Nonetheless, the evidence presented by the Parents and Student did not establish that a less restrictive environment than ■■■MS would be reasonably calculated to provide the Student with an educational benefit, or that the current placement is not reasonably calculated to provide an educational benefit to the Student. *Andrew F.*, 580 U.S. at 394.

The Parents and Student Did Not Establish That the IEP’s Provision of Transportation Services, Resulting in an Approximately One or Two Hour Bus Ride, Is Not Reasonably Calculated to Provide the Student With a FAPE

The Parents argued that the Student’s bus ride to ■■■MS is too long, and that the length of the bus ride is the reason why the Student has refused to ride the bus, and therefore the transportation services provided are not reasonably calculated to confer an educational benefit and violate the IDEA. The Parents established that the Student refuses to ride the bus to school. The bus is a special needs bus with an aide on board that comes directly to his door. The Parents established that the Student is currently barely attending school. The Student’s mother drives him to ■■■MS every day, and the trip takes at least forty minutes, without traffic. Once he arrives late around 10:00 a.m., the Student will then create a disturbance or elope from the school. The school contacts his mother, who then picks him up within an hour or two of his arrival at the school. Based on this typical scenario, a reasonable inference could be made that the Student is currently not receiving an educational benefit.

However, the Parents and Student have not established that the transportation services provided by MCPS are not *reasonably calculated* to enable the Student to make progress

appropriate in light of his circumstances. *Andrew F.*, 580 U.S. at 399. In particular, they have not established that, if the Student had a shorter ride to school, he would ride the bus, or remain at school once there. They have not established that if the transportation services were modified, the Student would receive any greater educational benefit, and therefore they have not established that the transportation service provided in the current IEP are not reasonably calculated to confer an educational benefit on the Student. They did not introduce any evidence of how MCPS could provide the Student with shorter transportation, much less to conform with the twenty-five to thirty minutes that they believe should be the maximum transportation time. Lastly, they did not establish what amount of progress for the Student would be appropriate in light of his circumstances or that the failure to achieve that amount of progress was due to the length of the bus ride.

The only testimony regarding the Student's refusal to ride the bus to ■■■MS was provided by his mother. That testimony was contradictory and confusing. She did not address the issue of the Student refusing to ride the bus in her direct testimony, other than to say she has been driving the Student to ■■■MS since November 2023. On cross-examination, she initially testified that the Student does not refuse to take the bus, but that he does not know the importance of going to school on the bus. She testified that the Student cannot tell the Parents that he is not going to take the bus or not going to go to school. This testimony was confusing, because the Parents had previously argued in their Motion for Summary Decision, that the Student refuses to ride the bus to ■■■MS. When I asked the Student's mother to clarify her testimony, she then said that the Student does not get on the bus when asked, and will say he does not want to go to "that school." (Testimony, Student's mother.) Also confusing was that the Student's mother testified that after protesting, he would eventually get on the bus. However, later she clarified that the Student has never taken the bus to ■■■MS.

The Parents are clearly under the impression that the Student refuses to ride the bus or remain at school because of the length of the bus ride, but they did not establish the basis of that impression. It is particularly difficult to conclude that the length of the bus ride is the reason the Student refuses to ride the bus to ■■■MS, when the Student has never ridden the bus to ■■■MS.

In fact, there was evidence of a myriad of possible reasons for why the Student may be refusing to ride the bus to ■■■MS. His mother testified that the Student believes ■■■MS is too far away. She also admitted that because the Student has never taken the bus to ■■■MS, she cannot say whether he would be able to successfully manage the bus ride to ■■■MS. She testified that when the Student starts a new school, he has a lot of behavioral issues. She testified that once the Student learned that he could elope from school and his parents would just pick him up, he would do it more frequently. The same would seem true for the bus ride – that the Student learned once he refused, he would be driven by his parents. She testified that the Student simply does not like ■■■MS because he does not feel like he belongs there, in part because he is the tallest student there (the Student is six feet tall), and that the Student thinks the school is for “little kids.” (Testimony, Student’s mother.) At the June 13, 2022 IEP meeting, the Student’s mother stated that since COVID, the Student has refused to go back to school.

The Student also exhibited similar behaviors when attending ■■■ Middle School, which indicates the refusal to ride the bus or remain at school is not caused by the length of the bus ride to ■■■MS. While attending ■■■ Middle School, there were similarly many potential reasons why the Student was refusing to ride the bus or regularly attend school. In the April 2023 report of the school psychologist it was noted that, while the Student was still attending ■■■ Middle School, “[w]hen [the Student] becomes upset he may occasionally throw items, show aggression toward staff, curse, spit, elope, or pull his pants down....some days [the Student] is happy and has no behavioral issues, and other days he

struggles greatly to stay in the classroom.” (MCPS Ex. 20, p. 612.) At that time, the Student was on a half-day schedule and was picked up by his mother at 11:30 a.m. every day. It was further noted while attending ██████████ Middle School, “[the Student] is sometimes triggered by being asked to enter the school building in the morning, but other days he has no issues entering the school building....[The psychologist observed]...[the Student] to occasionally verbally protest (‘I don’t want to do this’) or put his head down on his desk in protest....” (MCPS Ex. 20, p. 612.) In the classroom observation of the Student on April 14, 2023, while the Student was attending ██████████ Middle School, it was noted that, “[the Student] shared that school scares him because of the loud noises, particularly his other classmates and the bell. [The Student] also does not like how far the school is from his house (repeatedly said ‘this school is too far’).” (MCPS Ex. 20, p. 605-606.) The travel time to ██████████ Middle School was never established in this case.<sup>21</sup>

In the April 2023 report it was also noted that, “some days [the Student] seems to have a huge amount of anxiety about entering the building...On these days he may display interfering behaviors such as aggression and profanities. Other days, [the Student] is completely fine....” (MCPS Ex. 20, p. 603.) Similarly, his mother reported in April 2023 that, “[t]he family often had to pass [the Student’s] old middle school in the car which caused tantrums that involved eloping, scratching, and spitting. These behaviors stemmed from not wanting to go to school at ██████████ Middle.” (MCPS Ex. 20, p. 604.) That is not unlike the Student’s behavior when going to ██████ MS. The Student’s mother testified that even when she drives the Student to ██████ MS, he protests, and once even hit her because he did not want to go to school.

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<sup>21</sup> Although the Student complained that ██████████ Middle School was too far, it was noted in the April 2023 school psychologist’s report that, “[a] review of [the Student’s] IEP report card reveals that he is making sufficient progress in all IEP goal areas. This includes reading comprehension, math calculation, written language, and speech/language.” (MCPS Ex. 20, p. 603.)

In the April 2023 school psychologist's report, it was noted that the Student was, at that time, on a partial day schedule in the ██████ Middle School ██████, and that, "[t]his is due to extreme anxiety related to school and subsequent school refusal...[the Student] is often resistant to engage in work." (MCPS Ex. 20, p. 602-03.) As part of the current IEP, it was noted in February 2022 that:

Task refusal, avoidance and aggressive behaviors have been seen when demands become overwhelming [for the Student]...When [the Student] is not actively engaged in his learning, he will stand up and frequently say, "I'm all done now." "We're all done." At times, with redirection, he does return to his seat but appears to not be listening or participating in the instruction. Other times, he may cause a classroom disruption through inappropriate activities such as using inappropriate language loudly, sexual behaviors/activities, and leaving the classroom or school building.

(MCPS Ex. 11, p. 546, 548.) In September 2022, the Student was also noted to have multiple refusal-type behaviors that bear no apparent relation to the length of the trip to school – refusing teacher instructions, eloping from classrooms, refusing exams, and refusing to complete class assignments.

In short, the Student's refusal to ride the bus has not been limited to ██████MS, nor has it been sufficiently linked to the length of the bus ride, as opposed to several other potential causes.

Moreover, while the Parents challenged the ██████MS transportation trip as too long, the Parents did not reliably establish the actual length of the bus trip. The Student's father testified the bus ride is one and a half hours. His mother testified the bus ride is approximately one hour each way, to and from school. However, she also testified that the Parents were given a bus schedule, showing the bus arriving at their home at 7:00 a.m. or 7:17 a.m. and then at ██████MS at 8:40 a.m., and then leaving ██████MS at 3:30 p.m., and arriving home at 5:30 p.m. No copy of that schedule was admitted into evidence. The Student has never actually ridden the bus to ██████MS,

so the actual length of the trip is not known.<sup>22</sup> His mother testified that taking the Student to ■■■MS herself takes at least forty minutes, without traffic (and without picking up/dropping off other students).

For all of these reasons, I am unable to conclude, by a preponderance of the evidence, what is the reason why the Student refuses to ride the bus. While the Student's disability might play a role in his refusal to ride the bus to school, I am also unable to conclude that by a preponderance of the evidence. Therefore, I am unable to conclude that the IEP, which includes the placement at ■■■MS and transportation services, is not "reasonably calculated" to enable the child to receive some educational benefit. *Rowley*, 458 U.S. at 206-207; *see also A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004). "[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.'" *Endrew F.*, 580 U.S. at 394 (quoting *Rowley*, 458 U.S. at 207). The Parents and Student have not established that the IEP does not provide a "basic floor of opportunity" for the Student to have access to specialized instruction and related services that have been individually designed to give educational benefit to the Student. *Rowley*, 458 U.S. at 200-201.

The Parents also did not establish that any other appropriate placement would entail a shorter transportation time for the Student than his current transportation time to ■■■MS. For example, there was no evidence presented regarding the length of the trip for the Student either to ■■■■■ School, or ■■■■■ Middle School. Although his mother testified that the Student wants to attend ■■■■■ Middle School, as discussed above, the Parents did not demonstrate that there is any other school that would meet the Student's unique needs and be appropriate for him to attend. It is clear from the IEP that ■■■■■ Middle School would not

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<sup>22</sup> The Student's father also speculated that the bus ride can make the Student ill, and that there are exhaust fumes and disorderly students on the bus. However, I did not find that testimony to be credible, given that the Student has never actually taken the bus to or from ■■■MS.



The letter from Dr. [REDACTED] adopted by Dr. [REDACTED] never identifies in what manner the Student's educational success would be "maximized" by a shorter bus trip.<sup>23</sup> The letter does not assert that a shorter bus trip would make the Student more willing to ride the bus, or remain at school once there. The letter itself does not provide the medical or factual bases of the opinions, making it impossible to evaluate their accuracy. The letter also explicitly declined to endorse a change of schools.

Dr. [REDACTED] made clear in his testimony that he had an insufficient basis for adopting the opinions expressed in the October 17, 2023 letter. Dr. [REDACTED] is a treating psychiatrist for the Student; however, he primarily supervises psychiatrist-trainees, such as Dr. [REDACTED], and has only met the Student twice. Another physician performs the evaluations of the Student and discusses it with the Parents and Student, and Dr. [REDACTED] will come at the end of the session and talk briefly with the Parents and Student. Dr. [REDACTED] testified that he has not seen the Student's IEP, which demonstrates that the transportation time was considered, but the benefits of the placement at [REDACTED] MS were determined to outweigh the transportation time concerns. Although Dr. [REDACTED] was aware that the Student's school provides special education for autism, he did not know the exact details of the curriculum or services. He testified he has never visited the Student in an educational setting, has never taken part in an IEP meeting, and has never spoken to any member of the IEP team (other than the Parents). He testified he knew from the Student's chart that he had "some difficulties attending school," but he was unaware of the Student's months-long absence in the 2022-2023 school year, or the length of that absence. He testified that he was not aware that there is a bus aide provided for the Student on the bus.

In addition, Dr. [REDACTED] testified that the basis for his opinion and for the recommendation for a shorter bus ride was information provided to him by the Parents. He testified there was no

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<sup>23</sup> A student is not entitled to "all the services necessary to maximize" educational benefits. *Hessler*, 700 F.2d at 139 (citing *Rowley*, 458 U.S. at 176).



basis for his opinion that the Student was refusing to ride the bus due to the length of the ride, other than the information provided by the Parents. He testified that the Parents told him that the Student's bus ride is one and a half to two hours, and that the length of the bus ride agitated the Student on the bus and caused him to refuse to attend school. He testified it was his understanding that the Student had actually ridden the bus; he was unaware the Student had never ridden the bus to ■■■MS.

Perhaps most importantly, Dr. ■■■ admitted that the Student may be refusing to get on the bus, not because of the length of the trip, but "because of things going on in school," such as difficulties in the classroom or bullying. (Testimony, Dr. ■■■.) In the April 2023 school psychologist report, it was noted that, "[the Student] is reported to generally be alone, has difficulty making friends, and is often unwilling to join in group activities." (MCPS Ex. 20, p. 616.) Dr. ■■■ testified that he does not know if the Student would remain at school if he was given a shorter bus ride, because of "other factors" of which he is not aware. (Testimony, Dr. ■■■.)

The Parents also argued that MCPS had failed to consider the October 18, 2022 medical note from Dr. ■■■ when placing the Student at ■■■MS. However, that is simply not true. On October 19, 2022, the Parents emailed Dr. ■■■'s letter to several MCPS employees. On October 21, 2022, MCPS' Special Education Program Specialist acknowledged receipt of the letter. On November 14, 2022, MCPS entered the medical letter from Dr. ■■■ into the Student's file for consideration of the distance to school in his educational placement. The Student's current IEP provides him with transportation services, including a bus aide, "curb to curb" from his home to the school, daily on school days, and during ESY. The bus aide is able to provide the Student with music to listen to and other accommodations during the bus ride. As discussed above, other placements for the Student were considered, but were determined

inappropriate. Moreover, the current IEP provides that the Student's difficulties with travel time were taken into consideration and that the time spent in travel is outweighed by the benefits that the Student will receive for his needs in his placement at ■■■MS.

Dr. ■■■■■'s October 18, 2022 medical note, even if taken as completely accurate, fails to establish that the length of the Student's transportation to ■■■MS violates the IDEA, or that a shorter travel time would result in better attendance by the Student. Dr. ■■■■■'s letter recommended a maximum twenty-five-minute commute for the Student because it will "benefit" the Student by "reduc[ing] his anxiety, irritability, behavioral outbursts and motion sickness." (Parents Ex. N.) Further, she opined that the Student's "behavioral concerns" are "likely the result of" irritability due to motion sickness, and anxiousness about long distance travel from home. (Parents Ex. N.) Dr. ■■■■■ opined that the Student's "behavior appears" to result from attending a school far from home, "and significant feelings of insecurity about his current program not meeting his academic needs...[The Student] has shown success with programs designed to meet his special needs...[s]uch an environment is likely to improve his current symptomology." (Parents Ex. N.)

Dr. ■■■■■ never identifies the behaviors or symptoms she is talking about that she believes would be improved by a shorter bus trip. She never states that a shorter bus trip would result in the Student's willingness to ride the bus, or remain at school once there. Moreover, she identifies "significant feelings of insecurity about his current program not meeting his needs," as a possible cause of the Student's "behavior." She also never states the medical or factual bases of her opinion, making it impossible to evaluate its accuracy. If, like Dr. ■■■■■'s opinion, it is based entirely on the belief of the Parents that the bus trip is too long, it would not establish a sufficient basis for declaring that the IEP's provision of transportation services to the Student is not reasonably calculated to confer an educational benefit.

As discussed above, there is insufficient evidence of why the Student refuses to ride the bus or attend school for more than a brief period. Therefore, I am unable to conclude that the IEP sets out an educational program that is not reasonably calculated to enable the Student to receive educational benefits. *Andrew F.*, 580 U.S. at 394. To the contrary, the IEP appears to make significant efforts to provide the Student with an educational benefit. He is provided with a designated safe space and sensory breaks when he is feeling dysregulated, as well as counseling services. He is given a controlled choice of assignments to help him feel more control over his work. He is provided with ESY to prevent regression of skills during otherwise lengthy school breaks. And he has been provided with curb-to-curb transportation to and from school that includes a bus aide. The Student's refusal to ride the bus, for reasons that the Parents have been unable to reliably establish, does not render the Student's IEP violative of the IDEA.

Inasmuch as the Parents and Student did not meet their burden of proof to establish a violation of the IDEA by a preponderance of the evidence, MCPS is entitled to judgment in its favor as a matter of law. COMAR 28.02.01.12E.

Nonetheless, it is clear that the Student is having great difficulty going to and remaining at school. By all accounts, the Student is capable at times of learning and regulating his behavior. The videos of the Student at church show a nice, soft-spoken young man. It is my sincere hope that MCPS, the Parents, the IEP team, and the Student's medical providers can work together to determine the causes of the Student's school refusal, and help the Student to overcome those challenges.

## CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parents and Student did not present sufficient evidence to meet their burden of proof by a preponderance of the evidence that MCPS denied the Student a FAPE for the 2023-2024 school year by failing to develop an appropriate IEP that would provide an appropriate placement for the Student that would meet the Student's needs, including the ability to interact socially with higher-functioning peers and that is closer to the Student's home. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2)(i); 34 CFR §300.34(a); *Andrew F. v. Douglas County School District*, 580 U.S. 386 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F. 3d 354 (4th Cir. 2015); *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315 (4th Cir. 2004); *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989); *Hessler v. State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983).

I conclude as a matter of law that the Parents and Student did not present sufficient evidence to meet their burden of proof by a preponderance of the evidence that MCPS denied the Student a FAPE for the 2023-2024 school year by placing him at ■■■ MS. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2)(i); *Andrew F. v. Douglas County School District*, 580 U.S. 386 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F. 3d 354 (4th Cir. 2015); *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315 (4th Cir. 2004); *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989); *Hessler v. State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983).

I conclude as a matter of law that the Parents and Student did not present sufficient evidence to meet their burden of proof by a preponderance of the evidence that MCPS denied the Student a FAPE by failing to propose a less restrictive setting than ■■■ MS. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2)(i); *Andrew F. v. Douglas County School District*, 580

U.S. 386 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F. 3d 354 (4th Cir. 2015); *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315 (4th Cir. 2004); *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989); *Hessler v. State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983).

I conclude, as a matter of law that the Parents and Student did not present sufficient evidence to meet their burden of proof by a preponderance of the evidence that a shorter transportation trip to ■■■MS is necessary to provide the Student with a FAPE. 34 CFR

§ 300.34(a); *Andrew F. v. Douglas County School District*, 580 U.S. 386 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F. 3d 354 (4th Cir. 2015); *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315 (4th Cir. 2004); *Hessler v. State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983).

Therefore, I conclude, as a matter of law, that MCPS' Motion for Judgment should be granted and that the Due Process Complaint of September 27, 2023 will be dismissed. COMAR 28.02.01.11 and 12E; *Shaffer v. Weast*, 456 U.S. 49 (2005); *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342 (1986).

### **ORDER**

I **ORDER** that Montgomery County Public Schools' Motion for Judgment is **GRANTED** and the Parents' and Student's Due Process Complaint of September 27, 2023 be and hereby is **DISMISSED**.

February 7, 2024  
Date Decision Issued

H. David Leibensperger  
Administrative Law Judge

HDL/ckc  
#209671

**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:**

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████████████████████,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

BEFORE H. DAVID LEIBENSPERGER,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH Case No.: MSDE-MONT-OT-23-25195

**FILE EXHIBIT LIST**

The parties stipulated to the admission of their exhibits at the outset of the hearing. I admitted the following exhibits offered by the Parents and Student:

Parents Ex. A – The Student’s Father’s Curriculum Vitae

Parents Ex. B – The Student’s Mother’s Curriculum Vitae

Parents Ex. C – Video File of Student at Church, January 7, 2024

Parents Ex. D – Video File of Student at Church, January 7, 2024

Parents Ex. E – Video File of Student at Church, January 7, 2024

Parents Ex. F – Video File of Student at Church, January 7, 2024

Parents Ex. G – Video File of Student at Church, January 7, 2024

Parents Ex. H – Video File of Student at Church, January 7, 2024

Parents Ex. I – Video File of Student at Church, January 7, 2024

Parents Ex. J – Video File of Student at Church, January 7, 2024

Parents Ex. K – Video File of Student at Church, January 7, 2024

Parents Ex. L – ██████████ Curriculum Vitae

Parents Ex. M – None<sup>24</sup>

Parents Ex. N – Letter from Dr. [REDACTED] to MCPS, October 18, 2022

Parents Ex. O – None

Parents Ex. P – Letter from Dr. [REDACTED], October 17, 2023

Parents Ex. Q – [REDACTED] Elementary School Award, June 9, 2021

Parents Ex. R – National Junior Honor Society Nomination, undated

Parents Ex. S – [REDACTED] Elementary School Award, May 9, 2017

Parents Ex. T – Emails, October 2022

I admitted the following exhibits offered by MCPS:

MCPS Ex. 1 – IEP, February 17, 2022

MCPS Ex. 2 – IEP, March 15, 2022

MCPS Ex. 3 – IEP, May 11, 2022

MCPS Ex. 4 – IEP, June 13, 2022

MCPS Ex. 5 – IEP, September 6, 2022

MCPS Ex. 6 – IEP, October 4, 2022

MCPS Ex. 7 – IEP, November 14, 2022

MCPS Ex. 8 – IEP, December 15, 2022

MCPS Ex. 9 – IEP, February 2, 2023

MCPS Ex. 10 – IEP, May 25, 2023

MCPS Ex. 11 – IEP, August 21, 2023

MCPS Ex. 12 – Prior Written Notice, June 13, 2022

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<sup>24</sup> The Parents subpoenaed a copy of Dr. [REDACTED]'s and Dr. [REDACTED]'s curricula vitae, and identified them as Exhibits M and O, respectively. Dr. [REDACTED] appeared at the hearing; however, she did not produce a copy of her curriculum vitae. Dr. [REDACTED] did not respond to the subpoena; however, the Parents indicated that she is no longer employed by [REDACTED], where the subpoena was served.



- MCPS Ex. 13 – Prior Written Notice, October 7, 2022
- MCPS Ex. 14 – Prior Written Notice, November 14, 2022
- MCPS Ex. 15 – Prior Written Notice, January 3, 2023
- MCPS Ex. 16 – Prior Written Notice, February 2, 2023
- MCPS Ex. 17 – Prior Written Notice, May 30, 2023
- MCPS Ex. 18 – Prior Written Notice, August 21, 2023
- MCPS Ex. 19 – Educational Assessment Report, March 2023
- MCPS Ex. 20 – Report of School Psychologist, April 2023
- MCPS Ex. 21 – Report of Speech-Language Re-Assessment, May 2023
- MCPS Ex. 22 – ██████████ Resume, undated
- MCPS Ex. 23 – ██████████ Resume, undated
- MCPS Ex. 24 – ██████████ Resume, undated
- MCPS Ex. 25 – ██████████ Resume, undated
- MCPS Ex. 26 – ██████████ Resume, undated
- MCPS Ex. 27 – ██████████ Resume, undated
- MCPS Ex. 28 – ██████████ Resume, undated