

**XXXX XXXX**

**v.**

**PRINCE GEORGE’S COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE MARLEEN B. MILLER,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* MSDE-PGEO-OT-13-01339**

**\* \* \* \* \***

**DECISION**

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

**STATEMENT OF THE CASE**

On January 10, 2013, XXXX XXXX and XXXX XXXX (the Parents) filed a Due Process Complaint (the Complaint) on behalf of their XXXX-year-old son, XXXX (the Student), against Prince George’s County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup> 20 U.S.C.A. § 1415(f)(1)(A) (2010). In the Complaint, the Parents allege that PGCPS offered insufficient/inappropriate special education and related services and inappropriately proposed placement of the Student in the [Program 1] Program ([PROGRAM 1]) at [School 1] ([School 1]) for the 2012-2013 school year.

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<sup>1</sup> The Parents first filed for mediation and a due process hearing on April 27, 2012, but they withdrew the request for a hearing, without prejudice, on or about May 25, 2012, to provide them with adequate time to employ counsel and to refile their hearing request.

Consequently, the Parents unilaterally placed the Student at a private school, [School 2] ([School 2]), for the 2012-2013 school year and are seeking tuition reimbursement from PGCPS, as well as continued placement and reimbursement of [School 2] tuition for the remainder of the current school year.

On March 4, 2013, PGCPS filed its response to the Complaint. In that response, PGCPS asserts that PGCPS' proposed placement of the Student with modifications and accommodations provided for in his Individualized Education Program (IEP) was reasonably calculated to provide a free and appropriate public education (FAPE) to the Student, that the Parents failed to provide proper notice regarding their unilateral placement of the Student at [School 2], and that [School 2] is not a proper placement for the Student.

On March 12, 2013, I convened a telephone prehearing conference (the Conference). Jeffrey A. Krew, Esquire, appeared on behalf of PGCPS and Michael J. Eig, Esquire, appeared for the Parents. On that same day, I issued a Prehearing Conference Report and Scheduling Order (the Order). On March 18, 2013, PGCPS filed a request to amend my Order, to which the Parents agreed, and the proposed change is reflected in my March 19, 2013 Amended Prehearing Conference Report and Scheduling Order. Also, on March 18, 2013, PGCPS filed a corrected response to the Complaint.<sup>2</sup>

Commencing on April 30 and continuing on May 2, 3, 13 and 14, 2013,<sup>3</sup> I held the requested due process hearing. On April 30, May 2 and May 3, the hearing took place at the Largo Government Center in Largo, Maryland. On May 13, 2013, I continued the hearing at the

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<sup>2</sup> The proposed amendment to my order and PGCPS' corrected response to the Complaint merely changed an error in what was previously stated to be PGCPS' proposed placement of the Student for the 2012-2013 school year.

<sup>3</sup> The March 13, 2013 hearing date was substituted for the previously scheduled March 1, 2013 hearing date, and a March 6, 2013 hearing date was cancelled for medical reasons, both at Mr. Eig's request.

Sasscer Administration Building in Upper Marlboro, Maryland. On May 14, 2013, the parties presented closing arguments by telephone conference. Throughout these proceedings, Mr. Eig continued to represent the Parents and Mr. Krew continued to represent PGCPS. During the hearing, PGCPS withdrew its claim that the Parents failed to provide proper notice regarding their unilateral placement of the Student at [School 2].

The hearing dates requested by the parties fell more than 45 days after the triggering events described in the federal regulations, which is the date on which my decision would have been due.<sup>4</sup> The parties therefore requested an extension of time until June 13, 2013 for me to issue a decision. 34 C.F.R. § 300.515 (2012); Md. Code Ann., Educ. § 8-413(h) (2008).

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2012); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C. The contested case provisions of the Administrative Procedure Act; the Maryland State Department of Education's procedural regulations and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A.05.01.15C, 28.02.01.

### **ISSUE(S)**

The issues in this case are as follows:

Was PGCPS' IEP for the Student's 2012-2013 school year reasonably calculated to enable him to receive educational benefit and provide him with FAPE?

Was PGCPS' proposed placement of the Student in the [PROGRAM 1] for the 2012-

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<sup>4</sup> 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2012). Both Mr. Krew and Mr. Eig were scheduled for at least three other lengthy special education hearings with other Administrative Law Judges between March and May 2013. Consequently, they were unavailable to go forward with this case before April 30, 2013.

2013 school year the least restrictive environment within which, with the modifications and accommodations provided for in his IEP, he could receive FAPE?

If not, was the Parents' placement of the Student at [School 2] for the 2012-2013 school year a proper placement?

### **SUMMARY OF THE EVIDENCE**

#### Exhibits

A complete Exhibit List is attached as Appendix III.

#### Testimony

The Student's mother testified and the Parents presented the following additional witnesses:

- XXXX XXXX
- XXXX XXXX, [School 2] Program Support Supervisor, qualified as an expert in Special Education
- XXXX XXXX, Director of [School 2]'s Lower and Middle School, [Program 2], qualified as an expert in Speech and Language (S/L) Pathology
- XXXX XXXX, [School 2] S/L Pathologist, qualified as an expert in S/L Pathology (testimony by telephone)
- XXXX XXXX, [School 2] Occupational Therapist, qualified as an expert in Occupational Therapy (OT) (testimony by telephone)

PGCPS presented the following witnesses:

- XXXX XXXX, [School 3]'s [Program 3] ([PROGRAM 3]) Coordinator, qualified as an expert in Special Education

- XXXX XXXX, qualified as an expert in OT
- XXXX XXXX, qualified as an expert in S/L Pathology
- XXXX XXXX, qualified as an expert in School Psychology
- XXXX XXXX, qualified as an expert in Special Education
- XXXX XXXX, [Program 1] Program Specialist, qualified 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 was born premature to the Parents on XXXX, 2002. He experienced numerous perinatal complications, including [disabilities]. He has also had two subsequent seizures associated with fever, strabismus, multiple ear infections, and mild right XXXX. He was later diagnosed with XXXX.

2. In June 2005, the Student (then age 32 months) received an evaluation through PGCPs' XXXX Program. The results showed relative strengths in social and gross motor development, but he displayed significant delays in cognitive development, adaptive skills, fine-motor skills, and expressive and receptive language skills. Consequently, PGCPs found him to be developmentally delayed.

3. At around age three, the Student began attending school full-time at [School 4] in XXXX, Maryland, receiving special education services from PGCPs pursuant to the Student's IEP.

4. PGCPs administered the Early Childhood Inventory in around January 2007, when the Student was 52 months old. At that time, the Student demonstrated gross motor skills

at the 40 month level, with skills in all other areas ranging from 24 to 32 months.

5. On or about February 14, 2008, a PGCPS School Psychologist assessed the Student's then current level of cognitive and adaptive functioning. The evaluation revealed that the Student was functioning on an approximately 28-month level, with somewhat higher scores in activities of daily living and socialization. (*See generally* Parents' Ex. 2.)

6. At age five, the Student began attending the full-day [PROGRAM 3] program at [School 3] ([School 3]), where he remained through the 2011-2012 school year. [School 3] has a population of around 370 children, approximately 106 of which are on IEPs. [PROGRAM 3] is an academically-based program providing special education to children with varying disabilities in a self-contained classroom with one teacher, one paraprofessional and between seven to ten children, all of whom are generally on the diploma track. [School 3] offers to [PROGRAM 3] children mainstreaming opportunities in music, media, art and physical education (PE), depending on each individual student's IEP.

7. In kindergarten, the Student's disability coding/primary disability was changed from developmentally delayed to mental retardation (now known as an intellectual disability).

8. On February 11, 2009, an annual IEP meeting was held regarding the Student for the period between February 12, 2009 and February 11, 2010 (kindergarten to first grade). At the meeting, the Student's IEP Team (the Team) determined that the Student was functioning below grade level. The Team further concluded that the Student had fine motor problems and S/L needs and, therefore, provided for him to receive fifteen hours of direct OT per year (in thirty sessions) and thirty hours of direct S/L therapy (in sixty sessions) and to have a scribe available to write any answers for him. The Team further concluded that the Student did not require assistive technology or any behavior intervention plan. Because the Team found that the

Student's instructional outcomes were significantly discrepant from his non-disabled peers and that he required significant modifications in a small group setting, the Team decided that the Student would participate not only in academic subjects but, also, in non-academic subjects and extracurricular activities with his disabled peers during the remainder of the 2008-2009 kindergarten school year. The Team nevertheless concluded that the Student would participate in non-academic subjects and extracurricular activities with his non-disabled peers during first grade (the 2009-2010 school year), i.e., six hours and fifteen minutes out of the thirty-hour school week. (*See generally* Parents' Ex. 3 and *see* Appendix I for the IEP's goals.)

9. The results of the Woodcock Johnson Test of Achievement III administered to the Student on December 6, 2010 demonstrated sub-average intellectual functioning.

10. On or about January 7, 2011, the Student's PGCPS S/L Pathologist (Ms. XXXX) assessed the Student's articulation, which revealed that his speech was intelligible both in structured and unstructured settings and in conversation with his peers and staff. She found that he had no physiological deficits affecting his speech and that his fluency skills, vocal intensity and quality and pragmatic language skills<sup>5</sup> were all age-appropriate/within normal limits. While the Student demonstrated sound substitution errors, she found that some of them could be considered to be the result of dialectal differences rather than evidence of an articulation disorder because they were consistent with idiomatic African American English. (*See generally* Parents' Ex. 7, PGCPS Ex. 1.)

11. On January 16, 2011, XXXX XXXX, a PGCPS Certified Adaptive Physical Educator, assessed the Student's gross motor skills to be below age equivalent. Ms. XXXX

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<sup>5</sup> Pragmatic language skills include asking and answering questions, taking turns while engaged in activities, maintaining a topic, initiating conversation, maintaining appropriate eye contact, and using appropriate strategies for getting attention.

determined that he was able to participate in many games and activities but that he required some skills to be modified. The Student also required visual and verbal cues, physical assistance and hand-over-hand instruction to be able to participate with his peers during activities. He required a great deal of reinforcement, structure, routine, and a slower pace of instruction. Accordingly, Ms. XXXX recommended that the Student continue to receive Adaptive PE services to make sure adequate modifications were put into place during the Student's PE class and so that additional time for skill development and improvement could be provided. (*See generally* PGCPS Ex. 2.)

12. On February 2, 2011, an annual IEP meeting was held regarding the Student for the period between February 12, 2010 and February 11, 2011 (first grade to second grade). The Team noted that the Student required a small group setting (with a small student-teacher ratio) because he needed constant modeling and prompts to complete his work. The Parents expressed concerns regarding [PROGRAM 3] not being individualized enough to meet the Student's needs. The Team noted that the Student likes to work on the computer and is very determined to complete his work independently, preferring to receive assistance only after asking for it. Because of the Student's difficulties with fine motor skills and his significantly below-grade-level writing performance, the Team determined that he would continue to have the assistance of a scribe to record his answers and that he would benefit from someone monitoring his test responses. He was also provided the use of visual and graphic organizers to aid him in compiling and organizing his thoughts and a calculation device to help him complete mathematical concepts. The Team determined that the Student would be receiving only consultative SL and OT therapy. The Parents did not clearly understand that this meant the Student would no longer be receiving OT or S/L therapy, but, instead, those therapists would



only consult with the Student's classroom teacher and periodically come into the classroom to monitor the Student's performance. The Team further noted that the Student was easily distracted and would benefit from having his distractions reduced (Parent's Ex. 8, at 17), but he demonstrated no inappropriate behaviors showing a need for a behavioral intervention plan. (*See generally* Parents' Ex. 8.)

13. On or about February 8, 2011, PGCPs School Psychologist, XXXX XXXX, performed a psychological assessment of the Student. His General Adaptive Composite Score based on his father's responses on the ABASII was 61 and based on his teacher's responses was 65, with 100 being an average score. As a result of the evaluation, Ms. XXXX recommended, among other things, that his teachers continue to provide an appropriate level of academic challenge (based upon the Student's individualized academic needs for both independent and direct instruction purposes), that they try to keep to as much routine as possible, that directions be made clear and demonstrated as necessary for the Student's understanding, and that they continue to provide "hands-on" and/or experiential learning tools throughout his school day (including not only manipulatives, games, and music/dancing but, also, computer-based learning tools as appropriate). (*See generally* PGCPs Ex. 3.)

14. On or about February 28, 2011, PGCPs administered the Woodcock Johnson III, Tests of Achievement, Form A, to the Student, during which he appeared comfortable but often distracted. The Student's relative strengths were in basic reading and writing skills, spelling and calculation of basic addition facts. He scored low in reading fluency, math fluency, writing fluency and story recall. The testing showed that the Student's overall level of achievement, academic knowledge and skills, fluency with academic tasks, ability to apply academic skills, understanding of directions, reading, writing and mathematic skills, and knowledge of phoneme-

grapheme relationships were in the very low range for his age. The testing revealed that the Student required support in all academic areas, as well as modifications and accommodations for him to access the general education curriculum. The tester consequently suggested that, to improve the Student's reading skills, his teachers use manipulatives to help teach him concepts, provide systematic and extended practice to reinforce learning, simplify or shorten spelling lists or other written assignments, closely monitor his performance, teach him high-frequency words, encourage the Student to verbalize problem solving strategies, and provide him with frequent seat break opportunities. (*See generally* PGCSPS Ex. 4.)

15. On May 25, 2011, the Team met to discuss various placement options available to the Student other than [PROGRAM 3]. XXXX XXXX, a PGCP [PROGRAM 1] Program Specialist, came to the meeting to explain to the Parents what the [PROGRAM 1] program looked like in Prince George's County. The Parents expressed concern that the [PROGRAM 1] program would restrict the Student to a certificate of completion rather than a high school diploma,<sup>6</sup> and talked about some research they had done regarding various nonpublic programs. After an in-depth discussion that raised no other public placement options other than [PROGRAM 1], the Parents expressed their desire for the Student to remain in the [PROGRAM 3] program. The PGCP Team members (and Ms. XXXX) suggested that the Parents visit the [PROGRAM 1] program. The Team approved the Student for ESY services, and the Parents

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<sup>6</sup> Students may pursue a Maryland High School diploma or a Maryland High School Certificate of Program Completion. Students pursuing a diploma are instructed in the regular Maryland State curriculum and must take the Maryland High School Assessments (MSAs) in grades three through eight. The MSA includes tests in algebra/data analysis, biology, English, and government developed by the Maryland State Department of Education and intended to measure a student's skills and knowledge as set forth in the content standards for those subjects. *See* COMAR 13A.03.02.02B(5), 13A.03.02.09B. Generally, Students pursuing a Certificate are not instructed in the regular curriculum and take the Alternate Maryland School Assessments (Alt/MSAs). The curriculum in a Certificate program is modified from the general curriculum and generally focuses on skills necessary to function in the community. The special education and related services a student receives through his or her IEP are aligned with whether the student is pursuing a Certificate or Diploma.

questioned why such approval had not been given in past years.

16. Because the Parents were dissatisfied with the Student's lack of meaningful progress and [PROGRAM 1] being the only other placement option offered to the Student by PGCPs, the Parents employed an educational consultant, Dr. XXXX XXXX, to assist them in advocating for the Student.

17. On June 13, 2011, the Team met to follow up from the May 25, 2011 meeting. The Parents invited Dr. XXXX to be a part of this meeting and expressed their concerns about the current program not being individualized enough to meet the Student's needs. The Parents advised the Team that they had decided to have the Student privately assessed and that Dr. XXXX would be observing him in ESY or during the following school year. The Student's teacher discussed his then current reading level and his ability to memorize words versus using phonics. She noted the Student's difficulty with long vowel sounds and digraphs and his desire to participate, but mentioned that he at times struggled with staying on topic. The teacher agreed to share some work samples with the Parents from throughout the school year.

18. In or around September 2011, the Parents went to [School 1] to observe the [PROGRAM 1] class that was proposed as a possible placement for the Student. They observed that the students in the class (ranging from around seven to nine years old) were functioning at a lower academic and social level than the Student. Many of the students in the [PROGRAM 1] class were non-verbal; they could not answer any of the simple questions posed by the teacher (e.g., "What is the day today?" "What is it like outside today?"). The children were read to rather than engaged in reading, the teacher was referred to by the students as "grandma," and one student was eating popcorn off the floor. (Tr. 408-11.)

19. In September 2011, PGCPs administered to the Student the Scholastic Reading

Inventory (SRI) and the Developmental Reading Assessment (DRA) Level 2 (the second level of three kindergarten level books). The Student could successfully decode the words but showed insufficient/non-measurable comprehension. (*See* PGCPS Ex. 10.)

20. In September, October and November 2011, PGCPS administered to the Student the Math Units 1 through 3 Assessments, all of which indicated that the Student showed only a basic level of performance.

21. Dr. XXXX referred the Student to [Center 1] ([Center 1]) for a neuropsychological evaluation by XXXX XXXX, PhD, to determine his cognitive strengths and weaknesses, to clarify his diagnoses, and to assist in determining the appropriate services and educational planning for the Student.

22. Dr. XXXX's interviews/questionnaires revealed that the Student was making very slow academic progress in all areas in his self-contained, special education third grade program; that concerns existed about his impulsivity, attention problems/distractibility and significant fine-motor delays; and that he did not present with significant social or behavioral problems at school. His academic skills in reading, math, and written expression were extremely low, and he was unable to complete any work independently. The Student was a visual learner and particularly loved using the iPad.

23. Dr. XXXX's extensive testing of the Student in mid-October 2011 showed that, despite relative strength in processing/response speed and in the practical domain, including Health and Safety and Self-Care, the Student's full scale IQ of 46 placed him below the 0.1 percentile rank for his age. Consequently, Dr. XXXX determined that the Student suffered from an intellectual disability, in the moderate range, with his developmental age-equivalency generally falling at the 3.5 to 4 year level across both the language-based and visual-perceptual

problem-solving domains. His early reading skills tested at the early kindergarten level and his numerical operations testing placed him at the kindergarten, 5th month grade level. The Student demonstrated isolated relative strengths in rote auditory and visual registration and inspection skills. While the Student's speech rate, volume, and intonation were within normal limits, he displayed articulation problems. Nevertheless, his speech was intelligible to the careful listener. The Student sometimes used gestures, demonstration, pantomime, and nonverbal vocalizations rather than words to communicate, and his language structure was "telegraphic" at times, with omission of pronouns, articles, prepositions, etc. The Student had great difficulty understanding directions, requiring repetition, rewording, and demonstration when possible. He also had significant problems focusing and sustaining attention to task, even briefly in the highly structured, one-to-one testing environment. The Student's handwriting was notable for errors in letter formation, size, and spacing, but it was legible.

24. During Dr. XXXX's testing of the Student, he responded well to concrete reinforcers, specifically use of time on the iPad as an incentive for completing work and, consequently, he was able to attempt all that he was asked to do.

25. Based on Dr. XXXX's evaluation of the Student, she made the following conclusions and recommendations:

- A diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) is appropriate for the Student, but, before considering medication, it might be advisable to attempt environmental modifications, including placement in a less academically demanding program.
- The Student continues to be eligible for special education and related services under his current code of intellectual disability.

- The Student requires placement in a small group, highly-structured, self-contained program with modified curriculum and instructional methods.
- Although the Student should continue to receive instruction in academic skills and can be expected to continue to make slow progress in that area, he would also benefit from a functional life skills program with a community access component, if not for the following year, then at the beginning of middle school.
- Placement in a program with students who are non-verbal and/or have behavioral problems would be inappropriate for the Student because he needs the stimulation of communication and social interaction with peers to encourage development of his expressive language skills.
- The Student required an evaluation with an assistive technology expert, with particular attention to educational programming available for the iPad, for his use in and out of the classroom.
- The Student would benefit from a program with a concrete incentive system integrated into his daily schedule, through which he could earn points daily, which could then be exchanged for rewards, such as time on the iPad.

*(Id.)*

26. During the 2011-2012 school year, the Student received speech and language services only on a consult basis to improve his reading comprehension and to provide strategies to his teacher that would enhance the Student's receptive language skills. Consequently, he was able to answer some basic "WH" questions, as well as to identify story characters and settings.

Nevertheless, he had difficulty answering higher level questions and, by January 2012, his comprehension skills were on a first grade level, and he continued to require maximum verbal prompting and adult support during classroom instruction to complete tasks with accuracy. The speech and language accommodations provided to the Student included verbal prompting, visual cues, repetition of information, chunking of information, binary choices, and extra processing/response time. The Student continued to struggle with blending the beginning, middle and ending sounds in unfamiliar words and had difficulty recognizing the middle and ending sounds in words. He required prompting and assistance to blend sounds into words and he was unable to independently identify and produce long vowel sounds.

27. In late 2011 or early 2012, the Student was participating in the Handwriting Without Tears program, a research-based handwriting curriculum. By January 2012, he was able to correctly form letters when tracing, but had difficulty demonstrating correct letter formation independently.

28. By January 2012, the Student was able to recognize and produce all of the uppercase and lowercase letter names and sounds. He was able to write some letters of the alphabet when presented orally and could write his first and last name independently and without a model. He was sometimes able to draw pictures to represent ideas and could also copy short words and phrases when provided with a model. He was able to independently compose a sentence and dictate to a scribe the topic that he wanted to write about, but he had difficulty writing independently and spelling without direct support.

29. In January 2012, the Student was able to read at the final kindergarten level with 91% decoding accuracy and adequate comprehension. On the SRI, his Lexile score continue to define him as “At Risk.”

30. During small group reading, the Student used the Edmark program, a research-based intervention that focuses on reading and comprehension using whole-language (sight words) as opposed to phonics-based instruction. He was started with the Level 1 program, which teaches 150 basic sight words plus endings (-s, -ed, -ing), with the goal of advancing a nonreader to a Grade 1 reading level, with words being taught in sets of 10. By January 2012, the Student had mastered only the first 20 words in the program and was working on words 30-40.

31. In late 2011 or early 2012, the Student began using I-Station, a computer-based reading intervention program that focuses on phonics, phonemic awareness, vocabulary, and comprehension.<sup>7</sup> Within the program, the Student received an overall reading ability score of 193, which is equivalent to a kindergarten level. The program assesses his comprehension by his ability to pick the picture that best matches a sentence given orally. He was able to complete this activity with 58% accuracy in January 2012.

32. The Student's January 2012 Math FAST 2 Assessment again indicated only a basic level of performance.

33. By January 2012, the Student was still unable to work independently. He required a lot of prompting and modeling, easily lost focus and required redirection to continue working. He also required the use of manipulatives and visual representations to gain an understanding of concepts and to complete his work, frequently failing to understand the objectives taught during whole group instruction. During small group instruction, the objectives had to be significantly modified for the Student to attempt to understand the concepts. Even with significant modifications and accommodations, he did not always grasp the math concepts

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<sup>7</sup> No testimony or exhibits were presented regarding exactly when I-Station was introduced to the Student, how often it was used, how he was instructed to work with it, or the extent to which it was used to educate him rather than to merely assess his abilities.



taught.

34. By January 2012, the Student was able to sort objects by shape, extend basic shape patterns, read a picture graph, identify ordinal patterns up to the 10<sup>th</sup>, represent and count quantities up to 50, identify equal parts in a whole, tell time to the hour on an analog clock, solve one digit addition sentences using tally marks and picture symbols, count pennies and add and subtract penny amounts using representations, and count and write up to 100 with prompting and the use of the hundreds chart. He was only able to subtract one digit numbers after being reminded of the process and provided a model of how to do it. He was not able to tell time to the minute or five-minute interval. He struggled to identify coins and coin amounts.

35. By January 2012, the Student was able to access the PE curriculum with minimal modifications to actual skill implementation. He primarily needed to improve his attention during physical activities, which his Adaptive PE teacher expected would lead to an increase in his skill development.

36. Specific details regarding the Student's IEP goals and his 2009-2012 Progress Reports are provided in Appendix I to this Decision and incorporated by reference into these factual findings.

37. On January 27, 2012, the Team conducted an annual IEP meeting regarding the Student. Ms. XXXX's attendance at the meeting concerned the Parents (and Dr. XXXX, who accompanied the Parents to the meeting) because they had thought that the issue of placing the Student in the [PROGRAM 1] Program had been laid to rest. The Team noted that the Student required direct support for all activities and was receiving the following accommodations during instruction and testing: verbatim reading, a scribe, monitored test responses, visual organizers, graphic organizers, extended time, multiple/frequent breaks and reduced distractions. The Team

further noted that the Student had some motor delays, but many of them stemmed from his difficulty staying on task and following directions, his distracted behavior making it harder for him to learn new concepts. No new goals or objectives were introduced for the Student because the Student had yet to master any of his previously set goals. The Team discussed Dr. XXXX's evaluation of the Student and concluded that her test results were commensurate with PGCP's 2006, 2008 and 2011 assessments. The Team reviewed the Student's levels of performance for reading, math and written language, and the Parents raised their concerns that the Student should be receiving direct services (rather than merely the consultative S/L and OT services he had been receiving that year) and that the Student required a smaller student/teacher ratio (no less than 3:1) to make any meaningful progress. The Parents further discussed with the Team their observation of the [PROGRAM 1] class and their consequential conclusion that placement of the Student in such a class would be inappropriate. At that time, the PGCP's members of the Team decided not to discuss any change of placement for the Student because the only option they were considering was [PROGRAM 1] and the Parents were upset about (and clearly unwilling to agree to) that proposed placement. Consequently, the Team agreed to reconvene closer to the end of the school year, and the Parents left with the intention to arrange for their own assessments of the Student and to look further into private school placements to better address the Student's needs. (*See generally* PGCP's Ex. 6.)

38. Because the Parents remained dissatisfied with the Student's lack of progress in the [PROGRAM 3] Program, with PGCP's unwillingness to provide direct OT and S/L services to the Student and with PGCP's apparent intention to place the Student in the [PROGRAM 1] Program, on February 12, 2012, the Parents submitted an application for the Student to attend [School 2]. (*See* PGCP's Ex. 7.)

39. On March 27, 2012, the Parents had the [Center 2] in XXXX, [State 1] perform an OT evaluation of the Student. The assessment was performed by XXXX XXXX, MOTR/L, who noted, as a result of the evaluation, the following:

- He had difficulty dealing with distractions and remaining on task.
- He had a definite dysfunction in social participation.
- He had low muscle tone in his trunk and lower extremities and some hyper-tonicity in his upper extremities, particularly in his hands.
- He had deficits in auditory processing/both hypo-responsiveness and hyper-responsiveness to auditory input.
- He had a definite dysfunction in motor planning.
- He leaned on walls and other objects for balance and lacked awareness of his posture.
- He rocked and fidgeted when seated.
- He had poor body awareness and coordination/appearing clumsy.
- He displayed a pencil grasp that is typical for children with a need to compensate for decreased strength, which does not allow for more controlled fine movements of the fingers.
- He had difficulty with sizing, spacing and formation of letters.
- He failed to cross midline when completing work.
- He had below average manual dexterity, balance and coordination.
- He displayed deficits in visual processing and visual-motor skills, which greatly impacted his fine motor skills.

Nevertheless, the examiner noted that, given the right sensory and environmental supports, the

Student could readily participate in learning experiences to acquire new skill sets. (*See generally* Parents' Ex. 16.)

40. On April 26, 2012, [School 2] notified the Parents that their application had been accepted for the Student's 2012-2013 enrollment, commencing on July 9, 2012.<sup>8</sup>

41. On April 27, 2012, the Parents filed for mediation and a due process hearing to challenge PGCPS' alleged failure to provide FAPE to the Student, but they withdrew the request for a hearing, without prejudice, on or about May 25, 2012, to provide them with adequate time to employ counsel and to refile their hearing request. (*See* PGCPS Ex. 9.)

42. Throughout the Student's attendance in the PGCPS' [PROGRAM 3] Program, he demonstrated attention deficits and the inability or unwillingness to stay focused on assigned tasks, which significantly interfered with his availability for learning. Although all of the Team Members were well aware of these problems, no goals or objectives or behavioral modification plan was ever proposed or placed in his IEP to address the Student's needs in this regard. The only relevant accommodation that PGCPS made for the Student to assist in improving his focus and attention was to place his desk near the teacher's so that she or her assigned paraprofessional could notice and remind him to return to an assigned task when they observed that his focus had strayed.

43. During the Student's attendance in PGCPS' [PROGRAM 3] Program, the PGCPS Team members set forth annual goals for him, which were unrealistic if the Student was not provided with the necessary tools to be available for learning. Consequently, the Student made insignificant progress on those goals from February 2010 through June 2012. The Student never completely mastered any of the goals set for him while he attended [School 3]'s [PROGRAM 3]

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<sup>8</sup> [School 2] has an eleven-month school year, starting in July. (*See* TR. 164.)

Program.

44. Although PGCPs staff were well aware throughout the Student's attendance in the [PROGRAM 3] Program that he had a keen interest and surprising good ability in using computers (particularly an iPad) and computer programs/applications, it was not until the Parents raised the issue at the Student's January 2012 IEP meeting that PGCPs staff even considered arranging to provide the Student with an assistive technology evaluation to determine the benefits to the Student of using a computer to pique his interest, to install software to help him master any of his IEP goals, or to otherwise address any of his needs (particularly lack of attention/focus).<sup>9</sup> Moreover, the PGCPs members of the IEP Team never considered the advantages of teaching the Student to provide answers on a computer, rather than using a scribe to record his answers.

45. On June 8, 2012, the Parents signed an [School 2] School Tuition Contract.

46. PGCPs arranged for a Team meeting to be held for the Student on July 3, 2012, but because a thunderstorm caused power to be lost at [School 3], the meeting was postponed.

47. On July 3, 2012, the Parents (through counsel) provided notice to PGCPs that they intended to withdraw the Student from [School 3] and place him at [School 2], at public expense, but they would nevertheless be attending the postponed IEP meeting once it was rescheduled. (*See* Parents Exs. 18-20.)

48. On or about July 9, 2012, the Student began his attendance at [School 2] for the 2012-2013 school year in the [Program 2] program. The class includes seven third and fourth grade students, a head teacher, an associated teacher, an assistant teacher and two one-on-one

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<sup>9</sup> The only computer based intervention introduced to the Student was I-Station, but insufficient detail was provided by PGCPs regarding the Student's use of that reading intervention. *See Supra*, n 9.

aides.

49. The first and most important challenge that [School 2] staff addressed was the Student's inattentiveness and inability to follow classroom rules and remain on task. [School 2] staff successfully used behavior modification techniques with the Student, providing him with immediate reinforcement by giving him tokens for appropriate classroom behavior. Every twenty to thirty minutes, he was permitted to use the tokens he had earned to engage in a preferred activity for three to five minutes, such as being able to use the computer or Wii. His teachers also used behavior-specific praise and sent daily reports to his Parents regarding the Student's classroom behavior so that they could provide further reinforcement. These efforts have continued and have significantly increased the Student's availability for learning. (*See* Parents Ex. 30 and 32 and testimony of XXXX XXXX.)

50. The base tuition for the Student to attend [School 2] was \$49,192.00. [School 2] charges additional fees for related services, including S/L therapy, OT and physical therapy. To enroll the Student in [School 2] for the 2012-13 school year, the Parents were required to pay half of the tuition, \$24,598.00, no later than June 15, 2012. The Parents intended to ask PGCPS to fund the private placement at the next IEP meeting, then scheduled for July 3, 2012.

51. On August 13, 2012, the Team met at [School 3], and the PGCPS members agreed to provide the Student with direct S/L services (once per week for thirty minutes) and direct OT services (three times per month for strengthening and posture).<sup>10</sup> The Parents and Dr.

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<sup>10</sup> COMAR 13A.05.01.16C(4) states as follows:

(4) If the parent decides to enroll the student in a nonpublic school without the consent of or referral of the local school system, an impartial hearing officer or a court may require the local school system to reimburse the parent for the reasonable costs of the placement if the local school system had not made FAPE available to the student *in a timely manner before the parent enrolled the student in the nonpublic school.* . . .

XXXX questioned PGCPs' previous refusal to provide direct services to the Student and disagreed with the proposed goals/objectives for the Student. Because of the Student's slow progress toward his IEP goals and objectives and his significantly below grade level and functioning, the PGCPs members of the Team determined that the Student should take the Alt. MSA (to which the Parents agreed) and that the Student should be taken off the diploma track and placed in the intermediate [PROGRAM 1] class at [School 1] for the 2012-2013 school year (to which the Parents strongly disagreed). (*See generally* PCSPS Ex. 14.)

52. [PROGRAM 1] is PGCPs' program for students between the ages of five and twenty-one with significant cognitive impairments, generally as a result of intellectual disability, autism, multiple disabilities, or traumatic brain injury. The expressive and receptive language abilities of [PROGRAM 1] students generally range from typical age equivalence of twenty-four months to six years of age. The program is primarily aimed at helping students become as independent as possible in functional academics, social skills (e.g., communication), community relations, and personal care (generally referred to as functional life skills or FLS). Rather than being on the diploma track, students attending [PROGRAM 1] aim towards a certificate of completion. [PROGRAM 1] students take the Alt-MSAs rather than the MSAs and, in the latter years of attendance in the [PROGRAM 1] Program, are focused on learning the skills necessary to transition into the community.

53. [School 1] contains general education classes and two [PROGRAM 1] classes, one for kindergarten through third grade students (the primary class) and the other for fourth through sixth grade students (the intermediate class). In the 2012-2013 school year, the

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(Emphasis supplied.) Consequently, it is irrelevant that PGCPs offered these necessary services to the Student *after* the Parents notified PGCPs of it unilateral placement and the Student began attending [School 2].

[PROGRAM 1] class in which PGCPs proposed to place the Student contained ten students (three of whom were non-verbal), one teacher and one paraprofessional. There were also two dedicated aides (each assigned to assist a specific student requiring one-on-one assistance throughout the day).

54. In October 2012, [School 2] staff performed OT, S/L and PT evaluations of the Student. (*See* Parents Exs. 21-23.) Because the OT assessment revealed the Student's limited level of independence for completing fine motor classroom tasks, poor body awareness/motor control, and lack of bilateral control adversely impacted his independence in school, [School 2] recommended that he receive 60 minutes of OT per week to address these areas. (Parents Ex. 21.) Based on the Student's assessed needs in the areas of articulation, feeding, fluency, voice, expressive, receptive and pragmatic language, [School 2] staff recommended that the Student receive 90 minutes per week of direct S/L therapy and 30 minutes per week of S/L consultation services. (Parents Ex. 22.) Because the PT assessment revealed that the Student would benefit from receiving school-based therapy to improve his postural and midrange control, balance, flexibility, spatial awareness and motor planning to safely, efficiently and independently access his school environment, [School 2] recommended that he receive 60 minutes a week of direct PT services during the 2012-2013 school year. (Parents Ex. 23.)

55. On October 10, 2012, the [School 2]'s S/L, OT and PT providers sent an email to the Parents regarding the amount of recommended therapy for the Student. (Parents Ex. 52.)

56. [School 2]'s October 17, 2012 School Function Assessment of the Student showed his strongest areas to be traveling up and down stairs, hygiene, clothing management, maintaining and changing positions, computer and equipment use, and manipulation with movement.



57. By November 11, 2012, [School 2] had sufficiently evaluated the Student's special needs by, among other things, informal assessments, observations, PGCPS IEP review, and updated OT, S/L, and physical therapy evaluations to determine his present levels of performance and to set IEP goals for the Student. Those goals and the Student progress on those goals through March 2013 are set forth in Appendix II to this decision.

58. Throughout the class day at [School 2] on November 16, 2012, the Student engaged in a large number of instances of saying "no," throwing objects and low intensity aggression. After the Student's father arrived to pick him up, the Student screamed, cried, hit, grabbed and kicked teachers, requiring a restrictive escort. Once calm, the Student was taken to the nurse for a body check and then allowed to leave with his father. The Student's father was informed of the afternoon's events by the director of Behavior Services. The Student never engaged in similar, aggressive behavior either before or after the incident. (Parents Ex. 59.)

59. On November 28, 2012 and continuing on December 15, 2012, an IEP meeting was held at [School 2], during which the Team discussed the Student's present levels of performance in various areas and decided to add a social goal to his IEP. The Team further determined that the November 16, 2012 incident appeared isolated to the single occurrence and, therefore, no emergency procedures needed to be added to the Student's IEP at that time. The Parents requested that the Team explore additional ways in which technology could be included in the Student's academic program. Because of monetary restraints, the Parents decided that the Student should receive only 60 of the 120 minutes of recommended S/L therapy, only 30 of the recommended 60 minutes of OT and no PT services. (Parents Ex. 61.) Consequently, the Student has been unable to receive sufficient OT to address all of his fine motor and visual motor deficits. (Parents Ex. 27.)

60. On January 10, 2013, the Parents filed the Complaint in this case.

61. By January 2013, the Student was receiving reading and math every day in his [Program 2] Program Class at [School 2]. He received 75 minutes of reading per day, which included word work, reading and written expression in a Balanced Literacy Program. The Student received instruction in social studies and science in the afternoon. He also received S/L and OT services. His social interaction has increased since starting at [School 2]. (*See generally* PGCPs Ex. 15.)

62. On January 29, 2013, XXXX XXXX, [School 3]'s [PROGRAM 3] Coordinator, observed the Student for forty-five minutes during math instruction in his [Program 2] Program Class at [School 2]. She observed the Student's receipt of tokens for correct answers regarding the day of the week and a corrected answer regarding the date. (He knew it was Tuesday but initially stated it was January 28 and, after several tries, corrected his answer to January 29.) Next, the Student was given a post-it and asked to write the number "88" for the 88<sup>th</sup> day of school. The Student was asked what day of school would be the next day, and he correctly replied "89 will be tomorrow." The next task that he was asked to complete was counting by 5s, 10s, and 2s with the teacher. The Student was more independent with counting by 10s. After work on a word problem and receiving an explanation from the teacher that "giving" is plus and the word "taking" is minus, the Student earned enough tokens to play for a short time on the computer /Wii, with a timer set. After the observation, Ms. XXXX spoke with [School 2] staff about the Student's schedule and accomplishments. (*See generally* PGCPs Ex. 15 and the testimony of XXXX XXXX.)

63. Since the Student began attending [School 2] in July 2012, he has accomplished the following:

- He progressed from being unable to remain focused (e.g., staring at the ceiling, unable to remain in his seat and unable to follow the teacher's directions) to sitting and attending to the teacher throughout a twenty-to-30-minute activity.
- He progressed from communicating by pointing and gesturing to communicating in phrases.
- He learned to independently request preferred food items using appropriate attention gaining strategies, eye contact and a learned phrase in all opportunities.
- He learned to describe events that were occurring or to make comments independently that were appropriate to the situation and affect portrayed by the characters in a movie.
- Given action pictures on an iPad, the Student learned to describe the pictures by producing subject-verb-object phrases (given verbal and visual cues) in 2 out of 5 opportunities and (given verbal, visual and gestural cues) in 3 out of 3 opportunities.
- The legibility, letter formation, size, and spacing of his handwriting improved substantially.
- He progressed from being able to read less than 15 of the Fountas and Pennil 100 high-frequency sight words to reading all 100 (85 by February 2013).
- He progressed from being able to read Level A and B (kindergarten level) readers with between 91 and 100% decoding accuracy to reading a Level

D (first grade level) reader with 91% decoding accuracy.<sup>11</sup>

- He progressed from reading a Level A reader with around 65% accuracy for comprehension and a Level B reader with around 57% accuracy for comprehension to being able to read a Level C reader with 62% accuracy for comprehension and a Level D reader with 62% accuracy for comprehension.
- The Student began to recognize when he misread a word and learned to reread the sentence correctly without prompting.
- In writing, he progressed from drawing pictures and verbally producing labels that the teacher would write to dictating complete sentences about pictures and spelling and independently writing high frequency words.
- The Student progressed from being unable to spell any words, using single words to describe a picture and experiencing difficulty forming complete sentences to being able (with use of a word wall) to write more high frequency words, verbally produce a simple sentence about a picture and write labels for pictures using inventive spelling but the correct first letter of the word with 80% accuracy.
- In math, the Student advanced in addition from the mid-kindergarten level to the mid-first grade level. He learned to count by 2's, 5's, and 10's; to identify the name and value of a penny, nickel, dime, and quarter; to add together dimes and pennies under a one dollar amount; to tell time to the

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<sup>11</sup> In PGCPS Ex. 10 a handwritten note states that, in the [PROGRAM 3] program, the Student could read Level 4 with 90% decoding accuracy and with a “13” in comprehension accuracy; yet, no one explained at the hearing what “13” means in terms of percentages. I also question why this is the only handwritten entry.

hour; to compute addition doubles facts to 20; to compute +1 and -1 addition and subtraction problems with sums to 11; to read, to represent, and to compute simple addition and subtraction word problems with prompting from an adult.

- The Student learned to identify the date, including the day of the week, month, and year (with gestural prompting from an adult).
- He no longer perseverated on the schedule (what comes next or when he would be going home).
- He developed strategies for dealing with sensory overload that previously prevented him from continuing regular activities (e.g., he learned to put headphones on if loud music upset him and, then, to return to dancing with his classmates).
- He progressed from depicting a person by drawing a circle with eyes, mouth, hands, and feet to drawing an identifiable person, including all of the body parts (head, eyes, nose, mouth, ears, body, arms, legs, hands, and feet) with visual cues.
- The Student learned to follow direction with approximately 55% accuracy without gestural prompts and 100% accuracy with gestural prompts (e.g., pointing).
- In structured therapy settings, tactile kinesthetic prompts have been an effective strategy in aiding the Student's production of the stop sounds in the initial and final position of CV (consonant vowel) or VC (vowel consonant) words. When these cues were provided, the Student learned to

produce stop sounds in CV words in 7 out of 7 opportunities and VC words in 3 out of 3 opportunities with tactile kinesthetic prompts. Without tactile kinesthetic prompts, the Student produces CV words in 2 out of 4 opportunities given verbal and/or visual prompts.

- Given a gestural prompt to orient the Student's body towards the speaker/listener, he learned to use phrases such as "I want \_" with appropriate eye contact and gestures in 3 out of 3 trials.
- Given simple, novel, one-step directions based on directional concepts of "up" or "down," the Student learned to follow directions with 100% accuracy.
- Given action pictures, use of the iPad or gestural, verbal and visual prompts, he learned to produce subject-verb-object phrases.
- He learned to complete his mastered morning work independently.
- He used assistive technology to assist him in writing.
- The Student learned to cross midline to complete motor challenges.
- Rather than express frustration, the Student learned to make an alternative plan if the solution was obvious and concrete (eg., if a student was sitting in his chair, he would move to another chair).
- The Student progressed from limited tolerance of playing on the playground and little if any interaction with peers to running and playing with peers on the playground.
- He required far less redirection.

*(See generally Parents Exs. 27, 28, 31, 35, 38, 40 and the testimony of XXXX XXXX; see also*

Appendix II to this Decision.)

64. Throughout the Student's [PROGRAM 3] attendance he was generally adept at his functional life skills, such as safety awareness, dressing, and toileting.

65. While the Student's social skills have improved, he still needs to improve upon his peer interaction before he can benefit from a less restrictive environment.

### **DISCUSSION**

The Parents have challenged PGCP's failure to provide FAPE to the Student and PGCP's proposed placement of the Student in the [PROGRAM 1] program for the 2012-2013 school year. Consequently, they are requesting reimbursement for their unilateral placement of the Student at [School 2].

The Supreme Court has placed the burden of proof upon the party seeking relief in an administrative hearing under the IDEA. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parents bear the burden of proof and, for the reasons set forth below, I conclude that the Parents have met that burden.

#### ***The IDEA's Requirements***

The identification, assessment and placement of students in special education is governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2013), 34 C.F.R. Part 300 (2012), Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2012), and COMAR 13A.05.01. The IDEA provides federal assistance to state and local education agencies for the education of disabled students, provided that the agencies comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. §§ 1412-1414 (2010); 34 C.F.R. § 300.2.

The IDEA provides that all children with disabilities have the right to receive FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (2010). The IDEA defines FAPE as "special education and related

services that . . . have been provided at public expense, under public supervision and direction, and without charge; . . . [that] meet the standards of the State educational agency; . . . and are provided in conformity with the individualized education program required under section 1414(d). . . .” 20 U.S.C.A. § 1401(9) (2010). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2012); COMAR 13A.05.01.03B(27). As a condition of receiving federal assistance, state and local public educational agencies must have in effect policies and procedures which assure that children with disabilities residing in the State have access to a FAPE “that emphasizes special education and related services designed to meet their unique needs.” 20 U.S.C.A. § 1400(d)(1)(A) (2010); *see also id* §1412(a)(1)(A); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2012); COMAR 13A.05.01.

To provide FAPE, the educational program offered to a student must be tailored to the particular needs of a child with disabilities by the development and implementation of an IEP, taking into account:

- (i) the strengths of the child;
- (ii) the concerns of the parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child;
- and
- (iv) the academic, developmental, and functional needs of the child.

20 U.S.C.A. § 1414(d)(3) (2010). The IEP identifies a student’s present levels of academic and functional performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those goals and objectives, and indicates the extent to which the child will be able to participate with children without disabilities in regular educational programs. *Id.* § 1414(d)(1)(A).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court



described FAPE as follows:

Implicit in the congressional purpose of providing access to [FAPE] 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 provide educational benefit to the handicapped child.

458 U.S. at 200-01 (emphasis added). *See also In re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991).

Although the law in special education has undergone a significant evolution in the past few decades, the *Rowley* case still sets the standard for determining whether a child is being accorded FAPE under the IDEA. In *Rowley*, the Supreme Court set forth a two-part analysis for determining whether a school district has offered FAPE to a student with disabilities. A determination first must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, as to whether the IEP, as developed through the required procedures, was reasonably calculated to provide FAPE. *Rowley*, 459 U.S. at 206-07.

Because PGCPs has dropped its initial contention that the Parents failed to provide proper notice of their unilateral placement, no procedural issues need be addressed here. Consequently, the only remaining question is whether the Student’s PGCPs IEPs were reasonably calculated to provide FAPE.

***PGCPs’ Failure to Provide FAPE to the Student***

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 services necessary to maximize his or her potential.” *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. 176). Rather, FAPE entitles a student to

an IEP that is “reasonably calculated” to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 204.

In *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993), the Court explained the difference between a program that maximizes a student’s potential and one that is reasonably calculated to provide educational benefit by comparing it to the difference between a Cadillac and a “serviceable Chevrolet.” *Id.* at 459-60. Using that analogy, PGCPs argued in closing that this case is about a Chevy and a Cadillac, [School 2] being the Cadillac for which it should not be required to pay when it allegedly offered the Student the required Chevrolet. I disagree. As Parents’ counsel asserted in his closing argument, if PGCPs was going to offer the Student a Chevy, then it should have offered one that could run, that could take the Student from one point to the other without breaking down. The even better analogy offered by the Parents’ attorney was that what PGCPs offered was to build the Student a roof on a house without the necessary foundation, i.e., a behavior modification plan to deal with the attention deficits that rendered the Student unavailable for learning.

With the numerous exhibits admitted in this case and the extensive testimony by the parties’ witnesses, counsel drew the following clear picture of the Student’s strengths and needs. He is a likable and pleasant child, who suffers from a moderate intellectual disability that prevents him from functioning on grade level in virtually every academic area and requires him to be educated in a small group setting with a small student-teacher ratio. His strengths include his independence in attending to his personal needs and his ability and strong interest in working on computers, iPads and other technological devices. The Student does not generally engage in

the type of maladaptive behavior often seen in intellectually disabled children.<sup>12</sup> Nevertheless, he has great difficulty paying attention and staying on task, which has frequently interfered with his ability to be available for learning.

PGCPS was well aware of how much the Student's lack of focus interfered with his ability to learn, but did nothing to address the problem except place him closer to the teacher so that she could remind him to pay attention to what was being said or to the work that he was supposed to be doing.<sup>13</sup> Both parties' witnesses consistently testified at the hearing to the Student's attention deficits, and I found approximately one dozen references in PGCPS' June 2009 through January 2012 progress reports noting how the Student's lack of attention/focus adversely affected his ability to progress. (*See* Appendix I to this Decision.) Similarly, at the Student's IEP meetings, the Team expressly noted that his inability to maintain attention/focus and to stay on task adversely impacted his ability to progress. *See, e.g.*, Parent's Ex. 8, at 17. Nevertheless, the Team noted on the same IEPs that he had no inappropriate behaviors that demonstrated any need for a behavior intervention plan. *See, e.g.*, Parent's Ex. 8, at 15.

Given the foregoing picture of the Student, it does not take an expert to question why PGCPS never initiated any type of behavior intervention plan to deal with his serious attention problems. Failing to do so deprived the Student of the "basic floor of opportunity" envisioned

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<sup>12</sup> The November 16, 2012 incident at [School 2] is apparently the only occasion in which the Student engaged in any aggressive behavior at school. (*See* Parents Ex. 59.) PGCPS would have me conclude that this incident indicates that [School 2] is an inappropriate placement for the Student. Nevertheless, the Student's mother adequately explained in her testimony that the isolated incident could be blamed on her husband's return to work after delivery of the Student's new sibling and the Student's frustration with the attention his mother was paying the crying baby when she dropped the Student off at school that day. (Tr. 459-61.)

<sup>13</sup> Ms. XXXX testified that she or her paraprofessional *always* noticed and addressed when the Student became distracted in class and never left him to his own devices. (*See, e.g.*, Tr. 922.) Given the student/teacher ratio in the class and Ms. XXXX's admission that at least one child in the class had more severe problems than the Student, I simply fail to find her testimony to be credible. In contrast, I do find credible the testimony of the Student's mother that when she observed the Student's second grade class, he was sitting in the back of the class looking off at the walls" for a substantial period of time without being redirected. (*See* Tr. 400.) In third grade, she reportedly watched from outside the Student's class and observed him looking around the room for ten to fifteen minutes

by the IDEA. *See Rowley*, 458 U.S. at 201, *Tice v. Botecourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990). Moreover, in light of the Student's well-known interest in and ability to use the iPad and other computer-related devices,<sup>14</sup> it defies understanding why his IEPs consistently indicated that an assistive technology evaluation was unwarranted. *See* PGCPS Ex. 8. In failing to explore how computer use could provide educational benefit to the Student, PGCPS clearly ignored his greatest strength, in violation of 20 U.S.C.A. § 1414(d)(3)(A)(1)(2010)(i). It was not until the January 2012 IEP meeting that the Parent's frustration with that omission finally led PGCPS staff to even consider whether an assistive technology evaluation might generate useful ideas on how the Student's technological gifts might be used to assist in educating him.<sup>15</sup>

Interestingly, almost immediately upon beginning his instruction at [School 2], staff at that educational institution recognized that the Student's attention problems had to be addressed first and that a behavior modification plan that offered computer use as a reward would motivate him to focus on his work. Not surprisingly, once the Student's attention deficits had been addressed by [School 2], he made the substantial progress noted in my factual findings. *See also* Appendix II.

I recognize that the main question here is not whether [School 2] has done a better job of educating the Student (which it obviously did). The real question is whether PGCPS offered the

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without anyone attempting to get his attention. (Tr. 402.)

<sup>14</sup> For example, PGCPS' own school psychologist recognized the Student's technological gifts as early as February 2011, (PGCPS Ex. 3), but the Team did nothing to act on that information.

<sup>15</sup> I recognize that substantial deference must be given to educators and school officials to allocate scarce resources in determining the individualized education program most appropriate for a disabled child. *See A.B. v. Lawson*, 354 F.3d 315 325-29 (4th Cir. 2004); *M.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 532-533 (4th Cir. 2002). *Hartman v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). Nevertheless, this is not a case in which the program is the issue but, rather, one in which the Student's chances of success were substantially impeded by PGCPS' failure to make the Student available for learning by addressing his obvious needs and strengths. Deference is only required "as long as an IEP provided the child the basic floor of opportunity that access to special

Student FAPE by the production and implementation of IEPs for the Student that were reasonably calculated to educationally benefit him. I conclude that PGCPs did not.

While a few entries in the Student's many progress reports from the [PROGRAM 3] program state that a goal had yet to be introduced or that he was making limited progress to meet a particular goal, virtually every other progress report from April 2009 through January 2012 consistently states as to almost every goal that the Student is "making sufficient progress to meet goal." If that were truly the case, then why do none of his progress reports indicate that he ever mastered any of those goal set for him on his IEPs? *See* Appendix I. Because I find the notation that the Student was "making sufficient progress to meet goal" was at best boilerplate and at worst gratuitous, I have removed it from each entry in Appendix I, providing instead summaries of PGCPs staff progress notes as to what, if anything, the Student actually was able to accomplish.

Presumably, PGCPs proposed taking the Student out of the [PROGRAM 3] Program and placing him in [PROGRAM 1] at [School 1] because he had made little, if any, meaningful progress on the IEP goals. Nevertheless, PGCPs would conversely have me believe that when the Student left [PROGRAM 3], he could do almost everything that the [School 2] witnesses and documents claim he learned, for the first time, at [School 2]. The only real progress that PGCPs concedes the Student made at [School 2] was in learning to read all 100 frequently used sight words in six months, something PGCPs acknowledged the Student had been unable to accomplish in his three years in the [PROGRAM 3] Program.

The [School 2] witnesses and documents clearly establish that less than one month after leaving the [PROGRAM 3] Program and entering [School 2], the Student could not accomplish

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education and related services provides." *MM*, 303 F.3d at 532.

all or most of the tasks that one of his classroom teachers, XXXX XXXX, testified he had learned to perform at [PROGRAM 3]. Comparing her testimony to the Student's progress reports, the testimony of the [School 2] witnesses and the testimony of the Student's mother, I cannot find Ms. XXXX's testimony on his alleged progress (generally given in response to leading questions) credible in that regard. Moreover, Ms. XXXX's uncomfortable demeanor when providing those answers would have made me leery even in the absence of evidence to the contrary.<sup>16</sup>

Because PGCPs' IEPs for the Student failed to adequately address the Student's significant and well-known attention deficits or to take advantage of his greatest strength, his computer acumen and interest, I find that those IEPs were not reasonably calculated to provide FAPE to the Student.<sup>17</sup> Consequently, he made no meaningful progress on his IEP goals, as a result of which PGCPs decided to place the Student in the [PROGRAM 1] Program at [School 1]. As Parent's Counsel noted in closing argument, PGCPs could not produce any evidence or research establishing the efficacy of that program, whose students apparently function at or below the Student's level.

In justifying the proposed placement of the Student at [PROGRAM 1], PGCPs relies heavily on the [Center 1] neuropsychological evaluation report of Dr. XXXX, to whom the Student was referred for testing by the Parents' former educational consultant. *See* Parent's Ex.11. One of Dr. XXXX's recommendations was that, although the Student should "continue

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<sup>16</sup> The Student had two different classroom teachers in the [PROGRAM 3] Program, Ms. XXXX and Ms. XXXX, and he apparently spent more time with Ms. XXXX in the [PROGRAM 3] program. Nevertheless, PGCPs never called Ms. XXXX to testify at the hearing. One cannot help but wonder that since Ms. XXXX is no longer employed by PGCPs, whether her testimony would have been different from that of Ms. XXXX.

<sup>17</sup> Upon my questioning, Ms. XXXX testified that in the 2011-2012 school year, the Student used the computer in class approximately twenty minutes each day. (Tr. 1032) I cannot give much weight to that testimony because the Student's IEP made no provision for such use, Ms. XXXX failed to explain whether that use was educational or recreational, and I have serious questions regarding Ms. XXXX's credibility, as further explained in this Decision.

to receive instruction in functional academic skills and can be expected to continue to make slow progress in that area, he would also benefit from a functional [life skills] program with a community access component, if not for the [following] year, then at the beginning of middle school.” Parent’s Ex.11, at 10. Nevertheless, she further noted that “[p]lacement in a program with students who are non-verbal and/or have behavioral problems would be inappropriate for the Student because he needs the stimulation of communication and social interaction with peers to encourage development of his expressive language skills.” *Id.* at 10-11. Dr. XXXX also recommended that PGCPs arrange for him to have an assistive technology evaluation and that his serious attention deficits be addressed by a behavior management system available in the classroom to assist in keeping him focused on his assigned tasks. *Id.* at 11. Specifically, Dr. XXXX suggested that the Student “would benefit from a program with a concrete incentive system integrated into [his] daily schedule, through which he could earn points daily[,] which could then be exchanged for rewards[,] such as time on the iPad.” *Id.* at 10. Although [School 2] paid attention to and acted on all of these recommendations, PGCPs apparently only took notice of the suggestion that the Student receive instruction in functional life skills with a community access component as a basis for placing him in the [PROGRAM 1] Program.<sup>18</sup>

Dr. XXXX also recommended that the Student be provided *both* direct and consultative S/L therapy. Yet, when the Team reviewed that report it ignored the Parent’s request for direct S/L therapy for the Student, as well as their request for direct OT therapy, at the January 2012 annual IEP meeting. Despite substantial evidence that the Team’s February 2011 removal of direct S/L and OT services from the Student’s IEP was a mistake, it was not until after the

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<sup>18</sup> I cannot help but question whether and to what extent the Student would receive any additional benefit from the functional skills he might learn in the [PROGRAM 1] program, as it does not appear from the record that the Student had any deficits in functional life skills.

Parents unilaterally placed the Student at [School 2], in August 2012, that the PGCPs Team members finally agreed to again provide direct S/L and OT to the Student.

Based on the foregoing, I conclude that the February 2011 and January 2012 IEPs that failed to provide direct S/L and OT to the Student, failed to make use of his technological gifts, and failed to address the attention problems that rendered him unavailable for learning were not reasonably calculated to provide FAPE to the Student. Consequently, the issue remains whether the Parents are thereby entitled to reimbursement of the sums they paid to [School 2] for the Student's 2012-13 school year.

### ***Unilateral Placement***

In *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), the Supreme Court held that parents who believe that the education proposed by the public school system is inappropriate may unilaterally place their child in a private school. In addition, the Court held that parents are entitled to reimbursement from the state for tuition and expenses if it is later determined that the school system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education.

The issue of unilateral placement/reimbursement was further expanded in *Carter v. Florence County School District Four*, 950 F.2d 156 (4th Cir. 1991), where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Citing *Burlington*, the Court found that the IDEA imposes only two prerequisites to reimbursement: 1) that the program proposed by the state failed to provide FAPE and 2) that the private school in which the child was enrolled succeeded in providing FAPE.

In *Carter*, the Fourth Circuit stated as follows:

Conditioning reimbursement under *Burlington* on state approval of the



private school would undermine the values and policies the Act was enacted to further.” . . . The Act envisions, of course, that the primary providers of educational opportunities for handicapped children will be the public schools. When those schools fail to meet their responsibilities, however, parents may be left to their own devices in finding a school that provides the specialized educational environment necessary to educate their children.

950 F.3d at 164.

In *Hanson v. Smith*, the United States District Court for the District of Maryland

further stated:

If a school system cannot meet its burden of providing an appropriate education in a public school setting, it must then fund the cost of a private school. In a case where the segregated facility is considered superior, the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated setting. . . . If they can, the placement in the segregated school would be inappropriate under the Act.

212 F.Supp. 2d 474, 482 (D. Md. 2002) (citations omitted.)

The 1998 amendments to IDEA codified the *Burlington* and *Carter* decisions. Title 20, section 1412(a)(10)(C)(i) and (ii) of the United States Code states, in pertinent part, as follows:

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency.

(i) In general

[T]his subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment. . . .

COMAR 13A.05.01.16C similarly states, in pertinent part, as follows:

(1) If a local school system has made a FAPE available to a student with a disability and the parent chooses to place the child in a nonpublic school, the local school system is not required to pay for the student's education at the nonpublic school.

....

(4) If the parent decides to enroll the student in a nonpublic school without the consent of or referral of the local school system, an impartial hearing officer or a court may require the local school system to reimburse the parent for the reasonable costs of the placement if the local school system had not made FAPE available to the student in a timely manner before the parent enrolled the student in the nonpublic school. . . .

(5) Reimbursement may be reduced or denied by the impartial hearing officer or court if the:

(a) Parent failed to notify the local school system of the decision. . . ;

(b) Parent's actions were unreasonable; or

(c) Parent failed to make the student available for assessment before the student's removal, after the local school system provided the parent with written notice of its intention to assess the student. . . .

*See also* Md. Code Ann., Educ. § 8-413(k) (2008).

When in January 2012 the Parents realized PGCPs' clear intention to inappropriately place the Student in the [PROGRAM 1] Program for the 2012-13 school year, I find they acted reasonably in looking for an alternative, private placement that might aid the Student in making the academic progress that he had been unable to achieve in the [PROGRAM 3] Program and would have almost certainly failed to achieve in the [PROGRAM 1] Program. Given the progress the Student has made at [School 2], due to its having promptly addressed the Student's attention problems and having taken advantage of his technological gifts, I conclude that the Parents made an appropriate choice by placing him there.

The only real issue raised by PGCPs as to the alleged inappropriateness of [School 2] relates to the fact that all [School 2] students have educational disabilities and, therefore, it is

arguably not the least restrictive environment within which he could have made educational progress. I recognize that a statutory preference exists for educating children with learning disabilities in the least restrictive environment with their non-disabled peers. 20 U.S.C.A. § 1412(a)(5) (2010). *See also*; 34 C.F.R. §§ 300.114 through 300.117 (2012).

The Fourth Circuit in *DeVries v. Fairfax County School Board*, 882 F.2d 876 (4th Cir. 1989) followed the Sixth Circuit's mainstreaming standard, stating as follows:

The [IDEA]'s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child. As the Sixth Circuit Court of Appeals stated:

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.

*Id.* at 878-79 (quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), *cert. denied*, 464 U.S. 864). *See also Hartmann v. Loudon County Bd. of Educ.*, 118 F. 3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998).

For the reasons set forth above, I conclude that any marginal benefit the Student might have received from mainstreaming was far outweighed by the benefits, educational and otherwise, he gained from [School 2]'s segregated setting, that the Student's placement at [School 2] was appropriate, and that the Parents should be reimbursed for the tuition and OT and

S/L service costs the Parents paid to [School 2] for the 2012-2013 school year.

### CONCLUSIONS OF LAW

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

- PGCPs' IEP for the Student's 2012-2013 school year was not reasonably calculated to enable him to receive educational benefit and to provide him with FAPE;
- PGCPs' proposed placement of the Student in the [PROGRAM 1] for the 2012-2013 school year was inappropriate;
- The Parents' placement of the Student at [School 2] for the 2012-2013 school year was a proper placement;
- The Parents are entitled to reimbursement for the tuition and OT and S/L service costs the Parents paid to [School 2] for the 2012-2013 school year.

20 U.S.C.A. § 1412 (2010); Md. Code Ann., Educ. § 8-413 (2008); COMAR 13A.05.01.14 & .16; *Schaffer v. Weast*, 546 U.S. 49 (2005); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Devries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989); *Doe v. Bd. of Educ. of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993).

## **ORDER**

I **ORDER** as follows:

1. PGCPS shall reimburse the Parents for the Student's tuition and S/L and OT expenses provided by [School 2] for the 2012-13 school year;
2. If corrective action is required by this decision, the local education agency shall, within 30 days of the date of this decision, provide proof of compliance to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, the Maryland State Department of Education.

June 12, 2013  
Date Decision Mailed

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Marleen B. Miller  
Administrative Law Judge

MBM/rbs

## **REVIEW RIGHTS**

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. § 8-413(j) (2008).

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

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