

XXXX XXXX,	*	BEFORE NICOLE PASTORE KLEIN,
STUDENT	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
PRINCE GEORGE'S COUNTY	*	OF ADMINISTRATIVE HEARINGS
PUBLIC SCHOOLS	*	OAH NO: MSDE-PGEO-OT-13-08301
*   *   *   *   *	*	

**DECISION**

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

**STATEMENT OF THE CASE**

On March 4, 2013, XXXX XXXX (Parent), on behalf of her minor child, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Prince George's County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2012). On that same day, PGCPS advised the OAH that the Parent and PGCPS had not resolved the dispute via a resolution session (and declined to participate in mediation) and, therefore, asked that a hearing be scheduled. 34 C.F.R. §§ 300.506 and 300.510 (2009). PGCPS then filed its response to the Parent's due process hearing request on March 4, 2013.

On March 4, 2013, I conducted a telephonic pre-hearing conference (TPHC) in the above-captioned matter.<sup>1</sup> The following individuals participated: Jeffrey A. Krew, Esquire, attorney for PGCPs, and Michael J. Eig, Esquire, attorney for the Parent and Student.

At the TPHC, the parties were advised of the time requirements for issuing a decision as set forth in 34 C.F.R. § 300.515. The parties' work schedules, i.e., counsels' three other currently on-going hearings before the OAH, prevented them from agreeing on hearing dates that would allow me to hold and complete the seven-day hearing within forty-five days from the date that the OAH was notified of the outcome of the resolution session, as required by 34 C.F.R. § 300.515 and Code of Maryland Regulations (COMAR) 13A.05.01.15C. Accordingly, the parties waived the time requirement and agreed that the decision would be issued within thirty days from the close of record. *See* 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2008). On March 7, 2013, I issued a TPHC Order detailing the same.

I held a seven-day hearing on April 8, 9, 15, 18 and 22-24, 2013, among three locations in Prince George's County, Maryland. The same counsel identified above represented the parties. The record closed on April 29, 2013, because I allowed the parties three business days (accounting for an intervening weekend) to submit legal memoranda on the complex issues presented in this case.

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); COMAR 13A.05.01.15C; and Maryland State Department of Education (MSDE) Guidelines for Maryland Special Education Mediation/Due Process Hearings. Procedure in the case is governed by the contested-case provisions of the Administrative Procedure Act; MSDE procedural regulations;

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<sup>1</sup> The Complaint and Response were filed on the same day that the TPHC was held, as a Motion to Withdraw had been granted in a prior case involving the same parties where it was agreed that the same documentation filed in the previous case would be adopted and utilized for the instant TPHC.

and the OAH Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A.05.01.15C; and COMAR 28.02.01.

### **ISSUES<sup>2</sup>**

1. Did PGCPs fail to provide the Student with a free and appropriate public education (FAPE) for the 2012-2013 school year by proposing an inappropriate individualized educational program (IEP) and placement at [School 1]?

2. If so, is tuition reimbursement (and any related services and costs) for the 2012-2013 school year at the [School 2], the Parent's unilaterally-chosen private school placement, appropriate?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The parties agreed to the following joint exhibits, which I accepted into evidence as follows:

Joint Ex. 1	March 29, 2009 Speech-Language Assessment Report by XXXX XXXX, SLP, PGCPs
Joint Ex. 2	April 26, 2011 IEP Team Meeting Documentation
Joint Ex. 3	June 22, 2011 Third Grade Report Card
Joint Ex. 4	November 29, 2011 IEP Team Meeting Documentation
Joint Ex. 5	January 9, 2012 Psychological Consultation/Conference Report by XXXX XXXX, Certified School Psychologist, PGCPs
Joint Ex. 6	January 27, 2012 IEP Team Meeting Documentation
Joint Ex. 7	April 16, 2012 Speech-Language Assessment Report by XXXX XXXX, CCC-SLP, PGCPs
Joint Ex. 8	May 1, 2012 Letter from Michael Eig to XXXX XXXX
Joint Ex. 9	May 22 and 23, 2012 Emails between XXXX XXXX and the Parent

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<sup>2</sup> These issues were also identified in the TPHC Order. There are no alleged procedural violations.

- Joint Ex. 10      June 19, 2012 Fourth Grade Report Card
- Joint Ex. 11      November 26, 2012 Classroom Observation by XXXX XXXX
- Joint Ex. 12      March 4, 2013 Request for Due Process Hearing

The Parent submitted the following exhibits, which I accepted into evidence, except where noted:

- XX Ex. 1      NOT INTRODUCED
- XX Ex. 2      August 7, 2008 Letter from the Parent
- XX Ex. 3      October 1, 2008 Baltimore County Public Schools (BCPS) Occupational Therapy Assessment Report
- XX Ex. 4      November 5, 2008 BCPS Section 504 Eligibility Form
- XX Ex. 5      November 5, 2008 BCPS Student Support Team Summary Form
- XX Ex. 6      November 5, 2008 BCPS Section 504 Occupational/Physical Therapy Interventions
- XX Ex. 7      February 10, 2009 PGCPS Notice and Consent for Assessment (Initial Evaluation)
- XX Ex. 8      NOT INTRODUCED
- XX Ex. 9      June 24, 2009 [School 1] Report Card
- XX Ex. 10      NOT ADMITTED
- XX Ex. 11      June 18, 2010 [School 1] Report Card
- XX Ex. 12      November 8, 2010 Psychological Evaluation
- XX Ex. 13      February 1, 2011 Progress Report on IEP Goals
- XX Ex. 14      February 7, 2011 Student Performance Report
- XX Ex. 15      NOT INTRODUCED
- XX Ex. 16      NOT INTRODUCED
- XX Ex. 17      NOT INTRODUCED
- XX Ex. 17A      November 4, 2011 Letter from Dr. XXXX XXXX
- XX Ex. 18      NOT INTRODUCED
- XX Ex. 19      NOT INTRODUCED
- XX Ex. 20      November 29, 2011 School Instructional Team/Supplemental Services Team Action Plan
- XX Ex. 21      January 7, 2012 Email to XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX and the Parent from XXXX XXXX
- XX Ex. 22      January 9, 2012 School Instructional Team/Supplemental Services Team Action Plan
- XX Ex. 23      NOT INTRODUCED
- XX Ex. 23A      January 16, 2012 Letter from Dr. XXXX XXXX
- XX Ex. 24      January 17, 2012 Prior Written Notice
- XX Ex. 25      January 27, 2012 School Instructional Team/Supplemental Services Team Action Plan
- XX Ex. 26      January 27, 2012 School Instructional Team/Supplemental Services Team Action Plan

XX Ex. 27	NOT INTRODUCED
XX Ex. 28	NOT INTRODUCED
XX Ex. 29	NOT INTRODUCED
XX Ex. 30	NOT INTRODUCED
XX Ex. 31	NOT INTRODUCED
XX Ex. 32	March 22, 2012 Neuropsychological Evaluation by Dr. XXXX XXXX
XX Ex. 33	NOT INTRODUCED
XX Ex. 34	April 19, 2012 Prior Written Notice
XX Ex. 35	NOT INTRODUCED
XX Ex. 36	April 24, 2012 IEP
XX Ex. 37	April 24, 2012 School Instructional Team/Supplemental Services Team Action Plan
XX Ex. 38	August 2011-April 2012 XXXX XXXX Notes
XX Ex. 39	April 26, 2012 Prior Written Notice
XX Ex. 40	NOT INTRODUCED
XX Ex. 41	May 1, 2012 Email to XXXX XXXX from XXXX XXXX
XX Ex. 42	NOT INTRODUCED
XX Ex. 43	June 7, 2012 Grammar Unit 1 Pretest
XX Ex. 44	NOT INTRODUCED
XX Ex. 45	June 26, 2012 XXXX XXXX Speech and Language Evaluation
XX Ex. 46	NOT INTRODUCED
XX Ex. 47	July 19, 2012 Woodcock-Johnson III Tests of Achievement Score Report
XX Ex. 48	NOT INTRODUCED
XX Ex. 49	August 16, 2012 Letter to XXXX XXXX, Esq. from Michael J. Eig, Esq.
XX Ex. 50	August 30, 2012 Letter to XXXX XXXX, Esq. from Michael J. Eig, Esq.
XX Ex. 51	August 30, 2012 Letter to the Parent from XXXX XXXX
XX Ex. 52	NOT INTRODUCED
XX Ex. 53	NOT INTRODUCED
XX Ex. 54	September 20, 2012 Email to Michael J. Eig, Esq., from the Parent
XX Ex. 55	October 31, 2012 [School 2] Report Card
XX Ex. 56	November 6, 2012 [School 2] Program Plan
XX Ex. 57	November 7, 2012 Letter to XXXX XXXX from Michael J. Eig, Esq.
XX Ex. 58	November 16, 2012 Letter to XXXX XXXX from Michael J. Eig, Esq.
XX Ex. 59	November 20, 2012 Email to the Parent from XXXX XXXX
XX Ex. 60	November 26, 2012 Email to Michael J. Eig, Esq., XXXX XXXX and XXXX XXXX from the Parent
XX Ex. 61	NOT INTRODUCED
XX Ex. 62	November 28, 2012 Letter to XXXX XXXX, OAH Clerk's Office, from Michael J. Eig, Esq.
XX Ex. 63	December 6, 2012 Email to Michael J. Eig, Esq., XXXX XXXX and XXXX XXXX from the Student
XX Ex. 64	December 7, 2012 Individual Student Report
XX Ex. 65	WITHDRAWN
XX Ex. 66	December 14, 2012 Letter from XXXX XXXX
XX Ex. 67	December 19, 2012 Letter to XXXX XXXX, Esq., from Michael J. Eig, Esq.
XX Ex. 68	NOT INTRODUCED

XX Ex. 69	NOT INTRODUCED
XX Ex. 70	January 8, 2013 Emails between Michael J. Eig, Esq., XXXX XXXX, XXXX XXXX, the Parent, and XXXX XXXX
XX Ex. 71	January 24, 2013 [School 2] Report Card
XX Ex. 72	January 29, 2013 Emails between the Parent and XXXX XXXX
XX Ex. 73	February 20, 2013 [School 2] Program Plan
XX Ex. 74	February 21, 2013 Individual Student Report
XX Ex. 75	March 4, 2013 Letter to XXXX XXXX from Michael J. Eig, Esq.
XX Ex. 76	[School 2] Work Samples
XX Ex. 77	Paragraph Writing Work Samples
XX Ex. 78	Resume and Maryland Educator Certificate for XXXX XXXX
XX Ex. 79	Resume for XXXX XXXX, M.D.
XX Ex. 80	Resume for XXXX XXXX, Ph.D.
XX Ex. 81	Resume and Maryland Educator Certificate for XXXX XXXX
XX Ex. 82	Resume and Maryland Educator Certificate for XXXX XXXX
XX Ex. 83	Resume for XXXX XXXX
XX Ex. 84	April 2, 2013 Letter to Michael J. Eig, Esq., from Dr. XXXX XXXX

PGCPS submitted the following exhibits, which I accepted into evidence, except where noted:

PGCPS Ex. 1	March 23, 24 and 26, 2009 Psychological Report by XXXX XXXX, Ed.M., NCSP, PGPCS
PGCPS Ex. 5	September 13, 2011 Email from Parent to XXXX XXXX
PGCPS Ex. 6	October 27, 2011 Observation Report by XXXX XXXX
PGCPS Ex. 8	January 9, 2012 IEP Team Meeting Documentation
PGCPS Ex. 12	April 17, 2012 Email from XXXX XXXX to XXXX XXXX
PGCPS Ex. 13 <sup>3</sup>	April 16 and 24, 2012 IEP Team Meeting Documentation
PGCPS Ex. 14	May 7, 2012 [School 2] Application for Admissions
PGCPS Ex. 16	June 7, 2012 Speech-Language Assessment Report by XXXX XXXX, PGCP
PGCPS Ex. 18	2011-2012 School Year Work Samples
PGCPS Ex. 19	July 9, 2012 IEP Team Meeting Documentation
PGCPS Ex. 20	November 7, 2012 Request for Due Process Hearing
PGCPS Ex. 22	November 28, 2012 Request for Due Process Hearing

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<sup>3</sup> This exhibit, for the most part, replicates XX Ex. 36—the IEP that is being challenged. During the hearing and in this Decision, for ease of reference, XX Ex. 36 will be utilized. If referring to the June 8, 2012 Progress Notes, then PGCPS Ex. 13 will be used.

PGCPS Ex. 23	January 17, 2013 Letter from Jeffrey Krew to Michael Eig, Esq.
PGCPS Ex. 25	XXXX XXXX Curriculum Vitae
PGCPS Ex. 26	XXXX XXXX Curriculum Vitae
PGCPS Ex. 27	XXXX XXXX Curriculum Vitae
PGCPS Ex. 28	XXXX XXXX Curriculum Vitae
PGCPS Ex. 29	NOT INTRODUCED
PGCPS Ex. 30	NOT INTRODUCED

### **Testimony**

The Parent testified and presented six additional witnesses to testify on her behalf:

1. XXXX XXXX, Educational Consultant; also accepted as an expert witness in special education;
2. XXXX XXXX, Director of Education, [School 2]; also accepted as an expert witness in special education;
3. Dr. XXXX XXXX, Psychologist; also accepted as an expert witness in pediatric neuropsychology;
4. Dr. XXXX XXXX, Therapist; also accepted as an expert witness in child psychiatry;
5. XXXX XXXX, Language Arts and Reading Specialist, [School 2]; also accepted as an expert witness in special education; and
6. XXXX XXXX, School Social Worker/Head of Counseling/Middle Division Coordinator, [School 2]; also accepted as an expert witness in social work with an emphasis on school-related social work.

PGCPS presented four witnesses to testify on its behalf:

1. XXXX XXXX, Special Education Resource Teacher, [School 1];

2. XXXX XXXX, Fourth Grade Teacher<sup>4</sup> and Reading Specialist, [School 1]; also accepted as an expert witness in elementary education with an emphasis on teaching reading;
3. Dr. XXXX XXXX, PGCPs Psychologist; also accepted as an expert witness in school psychology and neuropsychology; and
4. XXXX XXXX, Speech-Language Pathologist, [School 1]; also accepted as an expert witness in speech-language pathology.

### **PARTIES' JOINT STIPULATIONS OF FACT**

The parties submitted joint stipulations of fact which I incorporated into the record as follows.

1. The Student was born on XXXX, 2002.
2. The Student has been found eligible for special education services under the IDEA by PGCPs as a student with a Specific Learning Disability (SLD).
3. The Student began attending PGCPs in January 2009 during the second half of first grade at [School 1] ([School 1]).
4. PGCPs first evaluated the Student for special education services in March 2009.
5. In February 2012, the Student underwent a Neuropsychological Evaluation with Dr. XXXX XXXX (report dated March 22, 2012).
6. A copy of Dr. XXXX's report was shared with PGCPs.
7. IEP meetings were held on April 16 and 24, 2012.
8. The IEP team reviewed PGCPs' speech-language assessment and Dr. XXXX' assessment and agreed that the Student continued to qualify for special education services.

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<sup>4</sup> At all times relevant to this case, Ms. XXXX was employed by [School 1] as the Student's fourth grade teacher and reading specialist. Ms. XXXX is currently a second grade teacher at [School 1].



9. PGCPs proposed ten-and-a-half hours per week of specialized instruction for the Student in its April 2012 IEP, which included three hours of pull-out instruction and seven-and-a-half hours of special education in the general education setting, as well as six thirty-minute sessions of speech-language therapy outside the general education setting and one thirty-minute session of counseling outside the general education setting per month.

10. The Parent expressed her disagreement with the proposed IEP.

11. A PGCPs speech-language pathologist conducted a pragmatics evaluation in June 2012 (report dated June 7, 2012).

12. An IEP meeting was held on July 9, 2012 and the team reviewed the results of the pragmatics evaluation.

13. The Parent disagreed with the PGCPs proposed program and placement.

14. On November 7, 2012, the Parent filed a due process hearing complaint alleging that PGCPs proposed an inappropriate program and placement for the Student for the 2012-2013 school year.

15. On November 16, 2012, the Parent withdrew her due process complaint.

16. On November 26, 2012, XXXX XXXX, a special education teacher at [School 1], observed the Student at [School 2] ([School 2]).

17. On November 28, 2012, the Parent re-filed her due process complaint.

18. On February 7, 2013, the Parent filed a motion to withdraw her due process complaint without prejudice due to significant witness scheduling issues.

19. I granted the motion to withdraw without prejudice on March 4, 2013.

20. The Parent re-filed her due process complaint on March 4, 2013 alleging that PGCPS had proposed an inappropriate program and placement for the Student for the 2012-2013 school year.

21. The Parent completed the Student's application to [School 2] on May 7, 2012.

22. The Student visited [School 2] as part of the admissions process on June 6 and 7, 2012.

23. The Parent notified PGCPS that she was enrolling the Student at [School 2] for the 2012-2013 school year and seeking public funding for her placement in letters dated August 16 and 30, 2012.

24. The Student's first day at [School 2] was on September 18, 2012.

25. The Parent signed the enrollment contract at [School 2] on September 18, 2012.

### **FINDINGS OF FACT**

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:<sup>5</sup>

1. The Student is currently XX years old. She lives with the Parent and her younger sister in her maternal grandparents' home. She has resided in her grandparents' home since the middle of her first grade school year.

2. In addition to qualifying for special education services under the IDEA by PGCPS as a student with a SLD, the Student suffers from Attention Deficit Hyperactivity Disorder (ADHD), mood disorder/XXXX disorder, and anxiety. XX Exs. 12 and 32. She takes medication to help control these issues.

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<sup>5</sup> Although some Findings of Fact may cite to documents to support the finding, in more findings than not, there was also ample testimony to support the same. Due to the delay in receiving transcripts of the testimony presented in this case, specific transcript citations have been omitted.

3. The Student has deficits in fine motor control, speech and language functioning, reading, written language and math. She also has difficulty retaining information and sustaining her attention.

### **Educational background**

4. In the fall of 2008, the Student qualified for and was provided services under a Section 504 plan through BCPS. XX Exs. 3-6.

5. The Student attended kindergarten and the first half of first grade with BCPS at [School 3].

6. The Student enrolled in PGCPs during the second half of her first grade year and attended [School 1] through the fourth grade.

7. In February 2009, PGCPs first evaluated the Student for special education services. The Parent expressed concerns to PGCPs relating to the Student's motor skills, cognitive/intellectual and academic performance. XX Ex. 7. The Parent also expressed to PGCPs that the Student experienced temper tantrums and excessive crying. XX Ex. 12.

8. In March 2009, PGCPs conducted a thorough psycho-educational evaluation. PGCPs Ex. 1; XX Ex. 12.

9. At that time, the Student's [School 1] grades reflected that she had been progressing in reading, social studies, science, art, physical education, health, work habits, and social skills but that she was making inadequate progress in the areas of oral/written communication and math. PGCPs Ex. 1. She was also reading below grade level. PGCPs Ex. 1.

10. As part of the psycho-educational evaluation, on March 19, 2009, PGCPs observed the Student in her language arts classroom and during individualized one-on-one

testing sessions. PGCPs Ex. 1. Among other things, the Student sought out extra help from the teacher to a greater extent than her classmates. PGCPs Ex. 1; XX Ex. 12. In speaking with her teacher, PGCPs noted that the Student experienced “trouble with attention, motivation, learning, and that she shows symptoms of anxiety and unhappiness.” XX Ex. 12. PGCPs’ evaluators concluded that the Student was “significantly impaired” in the areas of fine motor control, speech and language functioning, reading, written language and math. XX Ex. 12. PGCPs further noted that the Student exhibited a short attention span, lack of self control and impulsivity. XX Ex. 12.

11. Also, as part of the psycho-educational evaluation, on March 23, 24 and 26, 2009, XXXX XXXX, Ed. M., NCSP, conducted an initial psychological assessment of the Student for PGCPs (report signed March 31, 2009) through various testing measures and assessment instruments. PGCPs Ex. 1. The following tests were administered and assessments procedures utilized: Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV),<sup>6</sup> A Developmental Test of Neuropsychological Functioning – Second Edition (NEPSY-II)<sup>7</sup> (selected subtests), Adaptive Behavior Assessment System—Second Edition (ABAS-II) Parent Form; ABAS-II Teacher Form; Structured Development History (SDH); Behavior Assessment System for Children—Second Edition (BASC-II)<sup>8</sup> Parent Rating Scales; and BASC-II Teacher Rating Scales. PGCPs Ex. 1.

12. The Student’s overall performance on the WISC-IV revealed that the Student’s cognitive functioning fell in the below average range. PGCPs Ex. 1. On the NEPSY-II, the

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<sup>6</sup> The WISC-IV is designed to measure general intellectual/cognitive functioning and enables one to gain an understanding of a student’s thinking and reasoning strengths and weaknesses. PGCPs Ex. 1.

<sup>7</sup> The NEPSY-II is designed to assess additional information pertaining to a student’s memory and learning abilities as well as assessing neuropsychological development in school-aged children. PGCPs Ex. 1.

<sup>8</sup> The BASC-II is utilized to gain an understanding of a student’s behavior in the school and home settings. JT Ex. 5.

Student's scores classified her in the well below expected level range in three areas, below expected level range in one area, and at expected level in three areas. PGCPs Ex. 1. Through the BASC-II and ABAS-II, the Parent and teacher ratings were entirely consistent—on the BASC-II, the Student demonstrated clinically significant issues and on the ABAS-II, the Student fell in either the average or below average range. PGCPs Ex. 1.

13. Other educational testing conducted by PGCPs using the Woodcock-Johnson Psycho-Educational Battery – Third Edition (WJ-III) “revealed weak math skills, in the low to low average range;” “reading at the pre-primer level;” “speed of reading low average;” and “reading comprehension was in the low range.” XX Ex. 12.

14. From the testing conducted in 2009, PGCPs determined that the Student should “receive as much individualized support as possible in the areas of motor skills, speech, math and written language.” PGCPs Ex. 1.

15. At the end of her first grade year, [School 1] reported (on June 24, 2009) that the Student had a “modified curriculum” for oral and written communication, reading and math. Her teacher commented that the Student, “has not made adequate growth” in oral and written communication and reading; in reading, “has difficulty decoding [and] difficulty applying skills;” and in math, “lacks understanding of concepts [and] lacks basic fact recall strategies.” The Student’s “work habits” were described as “not complet[ing] assignments, easily distracted, requires constant supervision.” XX Ex. 9.

16. At the end of her second grade year, [School 1] reported (on June 16, 2010) that the Student continued to have a “modified curriculum” for oral and written communication, reading and math, but it also added science to that list. Although she received letter grades of

A's and B's and was now beginning to "appl[y] strategies in reading," she remained below grade level (indicated as "BL" on report card) in reading.

17. In the fall of 2010, in the Student's third grade year, the Parent continued to have concerns, which she further continued to express to PGCPs, over the Student's lack of academic progress at [School 1]. She, therefore, took the Student to have an independent psychological evaluation. XX Ex. 12.

18. Dr. XXXX XXXX, Clinical Psychologist, performed a psychological evaluation on October 19 and 22, 2010, and November 8, 2010 (24-page report, dated January 14, 2011). At the time of her evaluation, the Student was eight years and six months of age and in the third grade. As part of her evaluation, Dr. XXXX spoke with the Parent. She reviewed various documentation from PGCPs including, but not limited to, a PGCPs March 2009 extensive psycho-educational evaluation (described in detail therein), the Student's most recent IEP—April 26, 2010, Progress Notes dated November 15, 2010, and, the third grade report card for the first quarter. She also spoke to Dr. XXXX XXXX, the Student's psychiatrist, and interviewed the Student. Dr. XXXX personally administered the WISC-IV, the WJ-III, the NEPSY-II, the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI), the Gray Oral Reading Test – Fourth Edition (GORT-4), the Gray Oral Silent Reading Test (GSRT) and the Roberts Apperception Test for Children (Roberts). She also asked the Parent as well as the Student's teachers to complete the Anser System Parent Questionnaire, the Conners' Rating Scales (Connors) and the Behavior Rating Inventory of Executive Functions (BRIEF).<sup>9</sup> XX Ex. 12.

19. When the Student was tested, she entered the testing situation with Dr. XXXX well and was quite personable and friendly. XX Ex. 12. Although she appeared a bit anxious,

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<sup>9</sup> The BRIEF is designed to measure executive control processes.

the Student demonstrated a willingness to work hard and was clearly interested in doing her best work. XX Ex. 12. However, she often lacked self-confidence and needed extra encouragement. XX Ex. 12. She exhibited a lack of consistent attention and was visibly distracted . . . interfering with her train of thought and leading to careless errors. XX Ex. 12. Dr. XXXX observed that “while [the Student] worked to the best of her ability, and had good rapport with [her], her lack of attention and distractibility as well as specific difficulties with language organization, visual-spatial organization and processing speed, most certainly had a negative impact on her performance during this assessment.” XX Ex. 12.

20. Dr. XXXX summarized that the results of this October-November 2010 evaluation confirmed much of what had previously been found when the Student was evaluated by PGCPs in 2009. XX Ex. 12. She concluded that the Student had significant problems with attention and sustained focus which interfere with her ability to process information and stay on track, creating inconsistencies in her performance. Nonetheless, while there are some areas of strength, the results highlight significant areas of concern that should be addressed. XX Ex. 12.

21. Dr. XXXX noted only one area of “relative strength”—“in the language arena,” pointing out that the Student showed age appropriate skills in verbal abstract reasoning, knowledge of vocabulary and social comprehension and judgment.” Otherwise, the Student exhibited relative weaknesses in her language processing abilities, significant relative weakness in visual-spatial processing and processing speed, variable memory as it was affected by inconsistent attention and concentration as well as some impulsive responding. XX Ex. 12.

22. “Despite her cognitive weaknesses,” Dr. XXXX explained that the Student shows “some age-appropriate skills.” Reading comprehension scores, however, ranged from average to

low average and were the equivalent of beginning of first grade (1.0), significantly below her current grade placement. Math also proved to be an area of relative weakness. XX Ex. 12.

23. Dr. XXXX concluded that the Student “struggles to figure out what she needs to do in different situations to be successful, both socially and academically. She is sensitive to the academic problems she is having in school and knows that she is often lost in the classroom. [She] is worn down by her academic problems and her self-esteem has suffered.” XX Ex. 12.

24. Dr. XXXX’ diagnostic impressions were that the Student suffered from: ADHD, Combined Type (DSM-IV-TR 314.01); XXXX Disorder NOS, by history (DSM-IV XXXX); Learning Disability Not Otherwise Specified for the visual-spatial processing weaknesses, slow processing speed and weak executive functions (DSM-IV-TR 315.9); Mathematics Disorder (DSM-IV-TR 315.1); and, Reading Disorder for the weak reading comprehension skills and inconsistent knowledge of phonics (DSM-IV-TR 315.00). Additionally, there were “clear indications that the Student’s language based weaknesses have resulted in gaps in her written language skills which will have a larger impact as the Student progresses through school and is asked to use spelling, language organization, understanding of grammar and capacity to produce content in a much more integrated way.” XX Ex. 12.

25. Based upon her extensive evaluation, Dr. XXXX offered many recommendations, most importantly, that the Parent “consider a specialized school program whose curriculum and instructional approaches directly address [the Student’s] needs.” While recognizing that the Student’s IEP addresses many of the concerns, she noted that “it is difficult to implement the level of support that [the Student] needs across the various domains identified so that she can succeed in a regular school setting.” She based this recommendation on the results of PGCPs’ prior assessment, her complete evaluation and the observations of the Student’s teacher, all of



whom/which “identify problems in all major academic areas” and, further noting, that the Student’s academic requirements will only increase, including the level and amount of independent work, which already is currently “quite challenging” for the Student. XX Ex. 12.

26. Academically, Dr. XXXX suggested that “[g]iven the severity and complexity of the Student’s difficulties which impact most aspects of her learning, [the Student] needs a certified teacher or tutor who has experience in the necessary strategies to work with her throughout the day every day.” XX Ex. 12. She noted that schoolwork is “often hard for [the Student] to understand without a great deal of support and she is at risk for falling even more behind;” therefore, she requires “thorough and consistent support to make good progress.” XX Ex. 12.

#### **April 26, 2011 IEP**

27. On April 26, 2011, there was an IEP team meeting conducted as part of the Student’s annual review. JT Ex. 2. The Student’s primary disability was marked as SLD which included the following areas affected: Academic-Cognitive; Academic-Math Calculation; Academic-Reading; Academic-Speech and Language Expressive Language; Academic-Written Language Expression; and Physical-Fine Motor. JT. Ex. 2. The IEP indicated that the Student continued to show attention difficulties, impulsivity, academic delays, slow processing and grapho-motor speeds, low average fine motor skills and difficulty with organization. JT. Ex. 2.

28. The IEP also noted that the Student “requires small group and individual instruction in academics and language skills. She continues to work below grade level in reading, writing and math . . . [where those] deficits continue to affect her acquisition of skills and performance in all curriculum areas. She requires accommodations and modifications to gain access to the general education curriculum.” JT Ex. 2.

29. The Student received a total of seven hours of special education services per week—comprised of five hours pushed into the general education curriculum and two hours pulled out of the general education classroom (30-minute sessions four times per week for small group special education support with language arts and math skills). JT Ex. 2.

30. As a related service, the Student was to receive, from a speech and language pathologist, speech and language therapy in the form of 30 sessions for the IEP year either pushed into the general education classroom or pulled out; the sessions were to be 30 minutes in duration. JT Ex. 2.

31. In order for the Student to be able to achieve her IEP goals, the IEP repeatedly refers to her having “modified grade level direct instruction,” “small group support,” “guided practice,” “given full to moderate support,” and being provided “materials on her instructional and independent level.” JT Ex. 2.

32. Even with all of the accommodations, modifications and seven special education support hours provided to the Student during the 2011-2012 school year, she was unable to achieve any of the six goals or 24 objectives outlined on her IEP. JT Ex. 2.

33. The Student did not make meaningful progress during her fourth grade year. JT Ex. 2. Her inability to achieve these goals, despite intervention, required the IEP team to reconvene twice during her fourth grade year to determine how they could address the Student’s needs to ensure the Student received educational benefit in the future. JT Exs. 4 and 6.

34. Throughout the 2011 IEP Progress Notes, teachers plainly stated that the Student was making sufficient progress to meet goals, but the narrative descriptions of the Student are inconsistent with that claim. In math, the Student was “working below grade level” (4/13/11); “continue[d] to need full support . . .” (6/17/11); “progressing slowly” and “need[ed] constant

reinforcement and repetition of directions/guided practice” (11/10/11). In reading, the Student “continue[d] to work below grade level” (4/13/11) but benefitted from small group discussions to support her understanding of what she was reading (6/17/11). JT Ex. 2. In terms of speech and expressive language, the Student had a “difficult” first quarter of her fourth grade year (11/7/11). JT Ex. 2.

35. Due to concerns that the Student was not making progress and was falling further behind her peers, the Parent, once again, engaged outside experts to evaluate the Student.

### **Educational Consultant**

36. Sometime in August 2011, at the start of the Student’s fourth grade year at [School 1], the Parent hired XXXX XXXX, an educational consultant, to assist her in seeking an appropriate future placement for her daughter. XX Ex. 38.

37. During their initial conversation, the Parent conveyed to Mr. XXXX that she was concerned that her daughter was at least one year academically behind her grade level peers and, because of that, she wanted the Student placed at the [School 3] for fifth grade. XX Ex. 38.

38. At the outset, Mr. XXXX reviewed Dr. XXXX’s evaluation and the Student’s April 2011 IEP from which PGCPs was currently working. XX Ex. 38. Based upon his initial review, Mr. XXXX informed the Parent that he felt the Student cognitively had average potential but was impacted academically by her ADHD and multiple issues with processing, emotional, motor, speech and language. XX Ex. 38. In light of her profile, he believed that the Student’s IEP was generally inadequate but he did not think the [School 3] was “a good fit.” However, before he made any definitive recommendations, he expressed that he wanted to observe the Student in the classroom and speak with the teachers in those classrooms as well as her psychiatrist, therapist and tutor. XX Ex. 38.

39. In speaking with the Student's tutor, XXXX XXXX, who saw the Student twice per week for an hour each occasion and who was also the Student's second grade teacher, Mr. XXXX learned that the Student was one year behind on her reading level, she was at least two years behind on her math level, she was approximately one year behind in decoding and comprehension, and she used "inventive spelling." The Student also had difficulty beginning assignments, and lacked attention which impacted her ability to effectively focus. The Student was also a rule follower and really tried to do well; however, the work was difficult for her and therefore, she got frustrated easily. Ms. XXXX expressed concern that the Student's special education teacher had changed each of the last three years, that she no longer had the supports she used to have during second grade (when she became closer to grade level) because of budget cuts and, that in order for her to succeed in the classroom, she needed more one-to-one and small group work. XX Ex. 38.

40. On October 27, 2011, Mr. XXXX observed the Student at [School 1]. The math class he observed had 30 students with one general education teacher, Mr. XXXX, and one RTI (Response to Intervention) teacher. The Student needed a lot of cueing and calculator support to complete the multiplication and division problems that were being taught. Mr. XXXX explained to Mr. XXXX that the Student "typically needs a lot of support to do the steps and she is very forgetful" but that she does try hard and has a good attitude. XX Ex. 38; PGCPS Ex. 6.

41. The language arts class that Mr. XXXX observed had 29 students with one general education teacher, Ms. XXXX. Occasionally, there was also one special education support person in the classroom who would assist for approximately 30 minutes of the class. On this particular occasion, Ms. XXXX noted that it was a typical day in that the Student required a lot of support to be able to follow along with the class lesson. Although the Student volunteered

to read aloud, she was unable to decode the word “wilderness” twice (first saying “wild dress” then saying “worlderness”). The Student required more support in this classroom; particularly because of her problems with written expression and the formation of ideas. XX Ex. 38; PGCPs Ex. 6.

42. From the time he was hired through at least July 2012, Mr. XXXX participated in all IEP meetings and numerous IEP-related meetings which were held throughout the Student’s fourth grade year. During the course of this year, the Parent and Mr. XXXX attempted to work with PGCPs to develop an IEP that they believed would truly meet the Student’s educational needs. In doing so, they requested more related services, additional goals and objectives specifically tailored for weaknesses they felt had been identified and verified, and more appropriate specialized instruction throughout the school day. Some of their requests were incorporated into the present IEP and some were rejected by the rest of the IEP team. *See, e.g.*, XX Exs. 20-22, 24-26, 34, 37, 39, 42.

43. At the November 29, 2011 IEP meeting, the Student was still receiving the above-described seven hours per week of special education services. JT Ex. 2. The team noted that with this amount of support, she still needed assistance with organization, memory, anxiety, math, strategies to support independence, executive functioning, written language expression, language mechanics and decoding of new words. XX Ex. 38. At this time, the Student’s strengths lay in her personality traits; she was a pleasant student who wanted to please both her peers and adults and generally appreciated the supports she received. Her weaknesses were extensive in that they impacted her “performance across all content areas” and, in particular, the areas of processing, memory, expressive language, reading comprehension, math facts, finding words and sentence writing. JT Ex. 4.

44. At this time, she “require[d] small group and individual instruction in academics and language skills” and she “continue[d] to work below grade level in reading, writing, and math.” These deficits affected her acquisition of skills and performance in all curriculum areas and; therefore, “she require[d] accommodations and modifications to gain access to the general education curriculum.” JT Ex. 4.

45. Specifically, the Student’s math teacher expressed that even with special education support, the Student could not access the fourth grade general education curriculum and, both the math and science teacher reported the Student’s extreme frustration in class because of that. JT Ex. 4.

46. The Student’s classroom spelling program was now modified significantly and her pre-writing, language mechanics and writing skills required moderate to full support. She was further experiencing difficulties with capitalization and punctuation. JT Ex. 4.

47. Although concerned that she was not making progress towards her IEP goals and objectives and that her grades were not an accurate reflection of her present levels of functioning, the Parent remained supportive of the Student’s educational program at [School 1] and wanted to ensure that she had all the tools and supports necessary to succeed. JT Ex. 4.

48. On January 9, 2012, Certified School Psychologist XXXX XXXX administered the BASC-2 to the Parent and the Student’s fourth grade math teacher, Mr. XXXX, in order to have updated social-emotional functioning as part of an ongoing monitoring effort to provide additional information for continuing to plan an appropriate IEP. JT Ex. 5. Mr. XXXX’s ratings were in the normal range for all indexes, not indicating any significant issues of behavioral performance in the school setting. These ratings contrasted those of the Parent which showed the Student’s behavior in the clinically significant or at risk ranges for all indexes. JT. Ex. 5.

49. On January 27, 2012, an IEP meeting was held. There was a great deal of discussion regarding the proper disability coding for the Student. The Parent and Mr. XXXX lobbied for additional coding in speech, other health impairment and emotional but the PGCPs' team members rejected any such additions to coding. JT Ex. 6; XX Ex. 38. The team did, however, incorporate four additional areas "affected by" the Student's SLD: Academic-Math Problem Solving; Academic-Speech and Language Receptive Language; Academic-Written Language Mechanics; and Behavioral Self-management. *Compare JT Ex. 6 with JT. Ex. 2.*

50. At this time, the Student still "require[d] small group and individual instruction in academics and language skills" and she "continue[d] to work below grade level in reading, writing, and math." These deficits affected her acquisition of skills and performance in all curriculum areas and; therefore, "she require[d] accommodations and modifications to gain access to the general education curriculum." JT Ex. 6.

51. The Student's classroom spelling program was still being modified significantly and her pre-writing, language mechanics and writing skills continued to require moderate to full support as did her difficulties with capitalization and punctuation. JT Ex. 6.

52. Many other goals, objectives and accommodations were discussed as well. Some were agreed to and incorporated into the IEP and some were rejected. The biggest issue of debate was the number of special education service hours that the Student received/was to receive both inside and outside the general education classroom. JT Ex. 6; XX Ex. 38. Mr. XXXX argued that the Student required more hours of special education and suggested that the majority of her time should be spent with special education support. XX Ex. 38. The IEP team rejected the request to increase the number of service hours at that time. XX Ex. 38.

53. As a result of the various rejections to the IEP, the Parent elected to obtain a private psychological and educational assessment. The IEP team agreed to meet again after such an evaluation. JT Ex. 6; XX Ex. 38.

54. On February 2, 2012, Mr. XXXX sent an email to the Parent advising that although fourth grade students had been assigned a research project in music class, he, Ms. XXXX and Mr. XXXX<sup>10</sup> decided that the Student would be exempt from completing the assignment.<sup>11</sup> The Parent questioned the exemption if her daughter was supposedly performing well in school. XX Ex. 38.

#### **Dr. XXXX' neuropsychological evaluation**

55. On February 20 and 24, 2012, Dr. XXXX XXXX, Clinical Neuropsychologist, performed a comprehensive neuropsychological evaluation (25-page report, dated March 22, 2012). At the time of her evaluation, the Student was nine years and nine months of age and in the fourth grade. As part of her evaluation, Dr. XXXX interviewed the Parent. She also reviewed Dr. XXXX' previous evaluation (XX Ex. 12), the Student's fourth grade report card showing the first two quarter grades, and her most recent IEP dated November 29, 2011. Dr. XXXX requested and received written reports from the Parent and the Student's math teacher, and made behavioral observations. Dr. XXXX personally administered the WISC-IV, BRIEF, the Test of Everyday Attention for Children-Version A (TEA-Ch), the California Verbal Learning Test-Children's Version (CVLT-C), the Wechsler Individual Achievement Test-Third

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<sup>10</sup> I infer that Mr. XXXX is the Student's music teacher as nothing was presented to indicate otherwise.

<sup>11</sup> Sometime earlier in the 2011-2012 school year, fourth grade students participated in a science fair, where they were responsible for researching, writing and presenting their own projects. The Student exhibited grave difficulty in completing her science fair project, as she showed great frustration at home and at school until Mr. XXXX worked with her through every single step of the process. She was unable to perform any associated work on the project independently.



Edition (WIAT-III),<sup>12</sup> NEPSY-II , the WJ-III, the Beery Developmental Test of Visual Motor Integration (VMI),<sup>13</sup> the Wide Range Assessment of Motor of Memory and Learning-Second Edition (WRAML-2), the GORT-4, and the BASC-2 for Parent, Teacher and Child Self Report. XX Ex. 32.

56. The Parent retained Dr. XXXX in order to obtain a current assessment of the Student's neurocognitive strengths and weaknesses, to clarify diagnoses, and to assist in intervention and/or therapeutic program planning. She did so because she was concerned about the Student's academic progress. Despite receiving As on her report card, the Student did not appear to be on the same grade level as her peers, could not independently complete many class projects, assignments or homework, and was unable to talk about any of her schoolwork in any depth. XX Ex. 32.

57. On the WISC-IV, the Student's pattern of scores on this administration compared to the October/November 2010 administration was "highly consistent." For example, the Student continued to demonstrate relative strengths in verbal reasoning skills, scoring in the average range (VCI=93, 32<sup>nd</sup> percentile), and basic working memory, scoring in the low average range (WMI=88, 21<sup>st</sup> percentile). Also, she continued to demonstrate significant weaknesses in nonverbal/visual processing abilities (PRI=75, 5<sup>th</sup> percentile) and visual-motor processing speed (PSI=73, 4<sup>th</sup> percentile), both scores falling in the borderline range. XX Ex. 32.

58. In terms of executive control and functioning,<sup>14</sup> the Student continued to demonstrate clear vulnerabilities. In particular, she had difficulty with focused/sustained

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<sup>12</sup> The WIAT-III is designed to measure language capabilities.

<sup>13</sup> The VMI is designed to measure visual processing, visual motor integration and fine motor skills.

<sup>14</sup> Executive control/functioning refers to the mental organizational processes associated with initiating, implementing, monitoring, and revising strategies and plans of action. It requires sustained attention and effort, inhibition of impulses and working memory (mental manipulation abilities), as well as clerical and conceptual organizational abilities. XX Ex. 32.

attention, working memory, flexibility, emotional regulation, impulse control, organization and self-monitoring. XX Ex. 32. For example, on the TEA-Ch, she scored uniformly below average on all formal measures of attention, specifically struggling with both speed and accuracy on a visual attention/search task, as well as well below age expectations on a sustained auditory attention task. XX Ex. 32.

59. On the BASC-2, although the Student's teacher placed the Student in the average category on all categories but one, the teacher as well as the Parent found the Student to be at risk for functional communication. XX Ex. 32.

60. The Student's processing speed was weak in visual modality, scoring significantly below age expectations on certain tasks. For example, on timed visual search tasks involving symbols, she scored in the 5<sup>th</sup> percentile (WISC-IV, Symbol Search) and on the capacity to search for pairs of numbers in a row, she scored in the 2<sup>nd</sup> percentile (WJ-III, Visual Matching). XX Ex. 32.

61. The Student's language comprehension continued to test in the average range and a relative strength remained in her verbal reasoning skills. XX Ex. 32. The same was the case with her reading skills and ability to use phonics rules to decode unfamiliar words. XX Ex. 32. However, the test scores relating to the same placed the Student on second grade equivalents among the various subtests. Dr. XXXX noted that "despite [the Student's] relative strengths in reading, her skills in this area are not secure, and this fact in combination with her executive deficits in attention and working memory make her extremely vulnerable to reading problems when the complexity of the material increases." XX Ex. 32.

62. The Student demonstrated significant weakness in visual-spatial, visual-motor, graphomotor and fine motor skills. For example, she struggled on WISC-IV tasks involving

replicating three-dimensional designs with blocks (2<sup>nd</sup> percentile) and visual (pattern recognition) reasoning (2<sup>nd</sup> percentile). Similarly, she exhibited difficulty on the NEPSY-II visuospatial processing tasks (geometric puzzles-16<sup>th</sup> percentile) and (arrows-1<sup>st</sup> percentile). XX Ex. 32.

63. Additional testing continued to show that the Student's working memory was poor. Dr. XXXX concluded that the Student's performance on tasks of verbal learning and memory is impacted by executive weaknesses in working memory. For example, she had difficulty on the CVLT-C learning a list of 15 words that were read aloud to her, initially recalling only three on the first trial and only gaining a few more over successive trials. Dr. XXXX indicated that "[o]verall, the [Student's combined test] results show that [she] tends to learn complex verbal information less efficiently than her peers when she is not provided with an organizing structure." XX Ex. 32.

64. In looking at the Student's academic profile, math is an area of significant weakness for her. Her math skills fall extremely below age expectations, showing major difficulty across all areas. For example, on the WIAT-III she placed in the 1<sup>st</sup>, 2<sup>nd</sup> and 8<sup>th</sup> percentiles pertaining to every concept tested, i.e., money, place value, graphs, simple addition, simple subtraction, multiplication and word problems. XX Ex. 32.

65. Significantly, the Student's academic scores were well below grade equivalent scores (as well as in dramatically low percentiles) on every achievement test administered on the WIAT-III:

Subtest	Percentile	Grade Equivalent
Word Reading	25 <sup>th</sup>	2.9
Pseudoword Decoding	23 <sup>rd</sup>	2.4
Reading Comprehension	27 <sup>th</sup>	2.4
Spelling	23 <sup>rd</sup>	3.4

Sentence Composition	10 <sup>th</sup>	2.5
Essay Composition (Theme Development and Text Organization)	13 <sup>th</sup>	--
Math Problem Solving	1 <sup>st</sup>	1.8
Numerical Operations	8 <sup>th</sup>	2.7
Math Fluency-Addition	1 <sup>st</sup>	1.8
Math Fluency-Subtraction	2 <sup>nd</sup>	1.4
Math Fluency-Multiplication	8 <sup>th</sup>	3.4

XX Ex. 32.

66. Dr. XXXX reasoned that the results of her extensive evaluation supported continued diagnoses of ADHD-Combined Subtype and Mood Disorder-Not Otherwise Specified. Academically, Dr. XXXX found that the Student met the criteria for a diagnosis of Nonverbal Learning Disorder (NVLD), which encompassed her weaknesses in visual processing, fine and gross motor difficulties, attention problems, executive dysfunction and impaired mathematical skills. She further found that the Student met the criteria for diagnoses of Developmental Motor Coordination Disorder, Mathematics Disorder and Disorder of Written Language. XX Ex. 32.

67. Dr. XXXX specifically characterized the Student's profile by the following strengths and weaknesses:

- a. Good command of small units of verbal information, rote repetition, retention of information learned in a meaningful context, vocabulary and verbal concepts.
- b. Weaknesses in more complex receptive and expressive language, functional communication skills and verbal learning for larger amounts of information.

- c. Significant deficits in visual-motor integration, visual-spatial processing, nonverbal reasoning, visual scanning and graphomotor/fine motor speed and dexterity.
- d. Executive dysfunction with particular vulnerabilities in the areas of attention, working memory, self-monitoring, emotional control, impulse control, organization, flexibility and processing speed.
- e. Relative strengths in recoding, decoding, fluency and phonological processing with relative weaknesses in reading comprehension and significant learning disabilities in numerical operations, mathematical knowledge, math fluency and written language.
- f. Mild weaknesses in social cognition.

XX Ex. 32.

68. Dr. XXXX cautioned that the Student's neuropsychological protocol puts her at risk in certain situations and with certain materials; therefore, the following factors must be considered in order to fully understand and plan the appropriate educational interventions for her: overload, missing the forest through the trees, specific academic difficulties, peer social interventions and anxiety. XX Ex. 32.

69. In terms of overload, Dr. XXXX remarked that the Student can become over-stimulated and overloaded when she is required to handle complex material or situations and that interacting with more than one person at a time, entering a new situation, multi-step tasks, and integrating more than one material in a situation can impact her ability to stay focused and/or cause her to become anxious, to withdraw, or to have an emotional outburst. XX Ex. 32.

70. Regarding her “missing the forest through the trees,” because of her difficulty with organization and big-picture thinking, it is important for her to receive information in small chunks, have narrowly tailored outlines and specific routines. XX Ex. 32.

71. The Student’s specific academic difficulties with reading, reading comprehension, written expression and mathematics makes it arduous for her to work independently on a wide range of tasks so that it is especially important for her to be *taught in a highly structured and routine way with specialized attention*. XX Ex. 32.

72. Because of the Student’s problems with executive functioning, her peer social interaction skills should be worked on in a supportive one-to-one setting where she can target discreet skills, first with a supportive adult, then she can attempt them with another peer and slowly branch out to group settings. XX Ex. 32.

73. In light of the Student’s diagnosed anxiety, it is crucial for the school setting to be aware of those triggers and have plans to respond appropriately to times of vulnerability. XX Ex. 32.

74. Based upon Dr. XXXX’ extensive evaluation, she made numerous recommendations for school placement, classroom accommodations and specialized services to support the Student’s social and emotional development. Specifically, Dr. XXXX recommended that the Student be educated in a small self-contained classroom, and a classroom setting that is designed to support the development of social skills as well as academic skills. She also recommended a small student-teacher ratio, and that teachers be trained and experienced in working with children with significant learning disabilities and attention/executive deficiencies. XX Ex. 32.

75. Within this rubric, Dr. XXXX recommended more structure fashioned to include, but not limited to, seating close to teachers and away from distractions, and that she be allowed to utilize a cubby-type space for independent assignments. Dr. XXXX further recommended small group settings for lunch, recess and changing of classes, all with the monitoring of a closely situated adult. Dr. XXXX suggested that the Student be able to preview upcoming changes before they occur so as to avoid surprises, and have frequent one-to-one “check ins.” Dr. XXXX also suggested that the Student be provided with outlines and checklists when learning more complex material so as to build upon working memory, that the Student’s homework assignments be reviewed before school departure, notebook organization for school work and home-school communications, and appropriate equipment aids to *check* work (not to perform work). XX Ex. 32.

76. As to the Student’s specific academic areas of concern, Dr. XXXX felt the Student required specialized math instruction that encompassed presenting math concepts in an explicit, concrete, step-by-step method, intensive metacognitive reading comprehension approaches, detailed written expression techniques, and explicit teaching to learn skills that will enable the Student to learn, engage and retain on her own. These are all skills that non-learning disabled children in the general education setting are able to learn on their own. XX Ex. 32.

#### **April 24, 2012 IEP—the Student’s IEP at issue**

77. On April 16, 2012, the team met for its annual IEP review, to consider Dr. XXXX’ private assessment data and Ms. XXXX’s PGCPs’ speech-language report. XX Exs. 34, 36 and 38.

78. At the IEP team meeting, there was a lot of disagreement as to what the Student’s present levels of performance were and, therefore, what her future educational needs required.

PGCPS' teachers and officials had an entirely different outlook on the Student's capabilities at school versus what the Parent saw at home and what Dr. XXXX perceived in her assessment. XX Exs. 36-39.

79. On April 16, 2012, Ms. XXXX again administered the CELF-4 to the Student. The Student scored either in the average or above average range of functioning in each of the four areas tested (Receptive Language, Expressive Language, Language Content and Language Memory) as well as the Core Language score. JT Ex. 7.

80. On April 17, 2012, Mr. XXXX emailed Mr. XXXX requesting that the Student's present levels of performance be amended to incorporate Dr. XXXX' test results and, based upon the same, to include additional goals and objectives and more accommodations and aids. PGCPS Ex. 12; XX Ex. 38.

81. A majority of Mr. XXXX's requests were incorporated into the IEP. The big issue that remained in contention (to be discussed at the April 24, 2012 continuation of the IEP meeting) was the number of special education service hours that the Student would receive for the 2012-2013 school year. XX Ex. 38.

82. April 19, 2012 IEP Progress Notes indicated that the Student still required a great deal of support across all academic areas in the general education classroom. Math "continue[d] to be an area of difficulty" and her teacher reported that she particularly benefitted from learning using a variety of methods. Written language expression continued to pose problems with improper punctuation and capitalization making the Student off target for that particular objective. The Student was off target for the Paragraph writing objective, in that she was only able to construct one rather than two paragraphs. The Student still exhibited weaknesses in Written Language Mechanics with regard to line and word spacing and indenting. The Student



demonstrated areas of concern in Fine Motor with regard to letter size and spatial organization.

JT Ex. 6.

83. On April 24, 2012, the IEP meeting continued as planned from April 16, 2012.

XX Exs. 36, 38 and 39.

84. The Student's primary disability was marked as SLD which included the following areas affected: Academic-Cognitive; Academic-Math Calculation; Academic-Math Problem Solving; Academic-Reading; Academic-Speech and Language Expressive Language; Academic-Speech and Language Receptive Language; Academic-Written Language Expression; Academic-Written Language Mechanics; Behavioral-Organization; Behavioral-Social Emotional/Behavioral; and Physical-Fine Motor. XX Ex. 36.

85. The Student remained eligible for services because the Student continued to have difficulty with academics, self-management, speech, fine motor skills, organization and memory. XX Ex. 36.

86. At the IEP team meeting, the IEP team was unable to come to a consensus on the Student's present levels of performance (for speech and language pragmatics, social pragmatics, visual/scanning processing and amount of occupational therapy (OT) hours), as well as on specific goals and objectives (for organization, memory, social interactions and visual/scanning and processing). XX Exs. 36, 38, 39, 41.

87. Additionally, the Parent wanted an independent evaluation for speech as she and Mr. XXXX disagreed with PGCPs' speech-language evaluation results. XX Ex. 38.

88. The number of special education hours remained the main source of contention. PGCPs proposed an increase of three hours of service from the 2011-2012 school year, which would raise the total hours to be received to 10.5 hours. XX Ex. 36. The special education hours

were to be distributed via 7.5 hours pushed in to the general education classroom for math, reading, science and social studies and 3.0 hours pulled out from the general education classroom to receive individualized instruction in reading, math and social/emotional concerns. XX Ex. 36.

89. Math, the Student's agreed-upon weakest subject, was to be unsupported for the first half hour of class. Mr. XXXX, the Student's special education advisor, suggested that the Student needed five additional hours. XX Exs. 36, 38 and 41. The remaining PGCPs' team members refused to increase the number of service hours. XX Exs. 38, 39 and 41.

90. As a related service, the Student was to receive, from a guidance counselor, pulled out counseling services into a small group once per week for 30 minutes (only to occur for one month from the start date of the IEP) for the purpose of developing a self-management system in order to increase self-advocacy and anxiety identification measures. XX Ex. 36.

91. Also, as a related service, the Student was to receive, from a speech and language pathologist, speech and language therapy in the form of six sessions per month either pushed into the general education classroom or pulled out, sessions to be 30 minutes in duration. XX Ex. 36.

92. PGCPs expressed that the other 14.5 hours in the school week were not academic and; therefore, required no special education support. XX Ex. 36. The Parent and Mr. XXXX asked what that meant to which no definitive response was provided by PGCPs.

93. The Parent also requested a copy of the Student's schedule for 2012-2013 school year from PGCPs. PGCPs never responded to the request.

94. On May 1, 2012, Mr. XXXX emailed Mr. XXXX, again requesting that a reason be put in writing as to why PGCPs specifically rejected identifying certain present levels of performance and adding other goals and objectives, why PGCPs chose not to include the five additional service hours that Mr. XXXX proposed could be supported and, why it failed to

describe the alleged 14.5 hours of time in the school week that were non-academic and, therefore, did not require support. XX Ex. 41.

95. Neither Mr. XXXX nor anyone else from PGCPs ever responded to this request.

**[School 2]**

96. On June 7, 2012, while the Student was visiting [School 2], Mr. XXXX, [School 2]'s language arts teacher, issued to her a three-page "test" (the document was titled "Grammar Unit 1 Pretest") in seven language arts areas to determine the Student's baseline understanding on different concepts. XX Ex. 43. Mr. XXXX explained the same to her. The Student sat in the back of Mr. XXXX's classroom to take the test while Mr. XXXX instructed the three to five other students present in the front of the classroom.

97. The Student asked for clarification from Mr. XXXX a few times and he obliged, explaining the directions and what she was being asked to do.

98. Of the seven grammar areas tested, the Student was unable to attempt three of them, leaving them blank or placing a question mark beside them. Of the four remaining areas, the Student got at least one answer incorrect. XX Ex. 43.

**April 24, 2012 IEP—the Student's IEP at issue (continued)**

99. The June 8, 2012 IEP Progress Notes indicate that the Student still had yet to achieve one goal or objective. PGCPs Ex. 13.

100. In June 2012, XXXX XXXX, Speech-Language Pathologist, conducted a pragmatics assessment via the Comprehensive Assessment of Spoken Language (CASL), which measures language skills from processing, comprehension, expression and retrieval. PGCPs Ex. 16. She forwarded the results of that exam to Ms. XXXX, who immediately sent it to Mr. XXXX. XX Ex. 45. Ms. XXXX concluded that the Student scored in the superior range for her

age peers since she was able to process the information and make connections to past events or occurrences in her life and, further, expanded her sentence responses beyond what was expected. PGCPs Ex. 16; XX Ex. 45.

101. The Student received all As and Bs, except for a C in Math, on her end-of-year fourth grade report card (dated June 19, 2012). Oral and Written Language, Reading, Science and Social Studies denote the grades given were based upon a modified curriculum. JT Ex. 10.

102. On July 9, 2012, an IEP meeting was convened to review Ms. XXXX's speech-language assessment whereby the team determined that no revisions to the Student's April 24, 2012 IEP were necessary based upon that assessment.

103. The Parent again requested a copy of the Student's schedule for 2012-2013 school year from PGCPs. PGCPs never responded to the request.

104. The Student's April 24, 2012 IEP was not created in such a way as to permit her to make meaningful progress on her IEP goals or to obtain educational benefit. The IEP merely allowed for three more special education service hours to be provided to the Student in the same fashion as the previous hours had been provided, even though that was not effectively working. She was not able to access or even be exposed to portions of the general education curriculum as noted by her teachers, the IEP, and report card, all of which indicated that the subjects were being modified.

105. The Student received the allocated number of service hours indicated on her April 26, 2011 IEP. While the Student's teachers recorded that she was making sufficient progress to meet her goals, the fact remains that she never achieved one goal and/or objective.

106. Each and every goal and corresponding objective from the April 26, 2011 IEP was copied in its entirety and placed into the April 24, 2012 IEP.

107. Besides those exact same goals and objectives, the IEP team inserted additional goals and objectives into the April 24, 2012 IEP.

108. The Student requires a self-contained special education class and greater one-to-one support for her academic subjects.

109. The Student's evaluations, coupled with the fact that she had been receiving targeted intervention for several years without achieving any goals or objectives, suggested that she needed a highly structured, small group environment for her academic subjects. She also required direct instruction in social skills and social communication.

**[School 2] (continued)**

110. [School 2] is a MSDE-approved nonpublic school that provides instruction for students with disabilities.

111. [School 2] offers a small class setting for all academic subjects, including science and social studies. Its curriculum is wedded to the State curriculum in all areas. The classes are tailored to the Student's academic abilities and the speech and social skills training and support are embedded in the day-to-day learning.

112. The Student is currently engaged in a small group setting, having anywhere from two to five students in her classes.

113. The Student's social integration at [School 2] has been successful. She has participated in school activities, including performing in a school production.

114. In the first quarter of the 2012-2013 school year, which ended on or about October 31, 2012, the Student made all As and Bs. In giving her these grades, [School 2] teachers noted that although the Student exhibited good, strong or excellent effort and participation, she required maximum support in all of her core subject areas (reading, math,

language arts and science), significant support in social studies, and moderate support in her specials (social skills, physical education and Spanish). XX Ex. 55.

115. On or about November 6, 2012, [School 2] formulated its Program Plan for the Student. The Program Plan lacks denotation of all present levels of performance for the Student. XX Ex. 56.

116. On November 12, 2012, XXXX XXXX, the Student's reading teacher, sent the Parent an email informing her of the Student's exemplary display of academic confidence at school on that day. XX Ex. 59.

117. On November 26, 2012, Mr. XXXX, the Student's former special education teacher at [School 1], observed the Student at [School 2] during her reading/language arts class and math class, which were 45 minutes and 40 minutes in duration respectively. JT Ex. 11. The reading/language arts class had five students and one special education teacher. Mr. XXXX observed nothing unusual as to the Student's academic and social behavior. JT Ex. 11. The math class had two students and one special education teacher. Mr. XXXX observed that the Student had significant problems in math calculation, math reasoning and memory. JT Ex. 11. His notes of his observation, however, do not reflect the same.

118. The Student takes a social skills class with three other students that is facilitated by XXXX XXXX, LCSW-C, CSSWS. The program is designed to enhance self-awareness and self esteem, develop and enrich critical thinking like problem solving and decision making skills, increase students' abilities to accept and seek out appropriate risks, cultivate group, classroom and overall community team building, facilitate the ability to interact with others in a positive and respectful manner, and develop and integrate self advocacy skills. XX Ex. 66. Although the program is comprehensive, it is also narrowly tailored to incorporate the developmental needs of

individual students and specific Program Plan goals. XX Ex. 66.

119. On December 14, 2012, Ms. XXXX drafted a report regarding the Student's progress in her social skills class and how the Student had dealt with stressful situations and anxiety thus far. XX Ex. 66. She noted that [School 2] had "begun to see glimmers of the [Student's] potential when she does not feel she is in a stressful environment." XX Ex. 66. She listed some examples demonstrating how the Student's confidence has grown. XX Ex. 66.

120. In the second quarter of the 2012-2013 school year, which ended on or about January 24, 2013, the Student again made all As and Bs. In giving her these grades, [School 2] teachers noted that although the Student exhibited good, strong or excellent effort and participation, she required maximum support in all of her core subject areas and some specials (reading, math, language arts, science and social skills) and significant support in social studies. XX Ex. 71.

121. On or about January 25, 2013, [School 2] revised its Program Plan for the Student. XX Ex. 56.

122. On or about February 20, 2013, [School 2] again revised its Program Plan for the Student. XX Ex. 56.

123. [School 2] is a proper placement for the Student.

## **DISCUSSION**

### **I. FAPE AND UNILATERAL PLACEMENT**

#### **Summary of the Law**

The identification, assessment, and placement of students in special education is governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 and Supp. 2013); 34 C.F.R. Part 300; Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 and 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 states comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. §§ 1412-1414, 34 C.F.R. § 300.2; *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

As a condition of this assistance, the respective 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); § 1412(a)(1)(A). Maryland’s General Assembly and the MSDE have enacted statutes and regulations, respectively, implementing the IDEA for Maryland’s students. Maryland’s special education law is found at sections 8-401 through 8-417 of the Education Article of the Annotated Code of Maryland. COMAR 13A.05.01 contains the Maryland regulations governing the provision of special education to children with disabilities.

Under both federal and State law, children with disabilities have the right to a FAPE. In part, the IDEA defines a FAPE as:

special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge;...[and] (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9). In *Rowley*, the Supreme Court described a FAPE as follows:

Implicit in the congressional purpose of providing access to a [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.



*Rowley*, 458 U.S. at 200-201. The Fourth Circuit has explained that IDEA does not require local education agencies to “furnish[] every special service necessary to maximize each handicapped child’s potential.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997). Indeed, a student is not entitled to “the best education, public or nonpublic, that money can buy” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4<sup>th</sup> Cir. 1983), citing *Rowley*. While expressly not required to maximize potential, school systems are required to provide each disabled student with a “meaningful” education. *Rowley*, 458 U.S. at 192. Therefore, a FAPE is satisfied when a child’s IEP is designed to allow the child to receive educational benefit. *Rowley*, 458 U.S. at 203. However, the benefit conferred by an IEP and placement must be “meaningful” and not merely “*de minimus*.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

To provide a FAPE, the educational program offered to a student must be tailored to the particular needs of the disabled child 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 depicts the student’s current educational 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 objectives, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A). IEP teams *must*

consider the students' *evolving needs* when developing their educational programs. *Schaffer v. Weast*, 554 F.3d 470 (4<sup>th</sup> Cir. 2009).

The Supreme Court has set out a two-part inquiry to determine whether a local education agency has satisfied its obligation to provide a FAPE to a student with disabilities. An administrative law judge or a court must first determine whether there has been compliance with the procedures set forth in the IDEA and, second, whether an IEP developed through the required procedures is reasonably calculated to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 206-207. If a local education agency fails to comply with the procedural requirements of the law, however, a FAPE has only been denied if the procedural shortcoming resulted in a loss of educational opportunity for the child. *M.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523 (4<sup>th</sup> Cir. 2002). As indicated above, there are no alleged procedural issues in this case.

In addition to the IDEA's requirement that a disabled child receive some educational benefit, the child must be placed in the "least restrictive environment" to achieve a FAPE. *A.B. v. Lawson*, 354 F.3d 315, 319 (4<sup>th</sup> Cir. 2004). This means that, ordinarily, disabled and non-disabled students should be educated in the same class. 20 U.S.C.A. § 1412(a)(5)(A). Including, or mainstreaming, disabled children into regular school programs may not be appropriate for every disabled child, however. 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. In such a case, a FAPE might require placement of a child in a private school setting that would be fully funded by the child's public school district. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

The IDEA, however, does not require a local educational agency to pay for the cost of private education if the agency made a FAPE available to the child and the parents elected to place the child in a private school. 34 C.F.R. § 300.148 (2012). Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (citing *Burlington* at 373-374). Parents may recover the cost of private education only if (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parent were appropriate to the child's needs.

The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parent bears the burden of proving here that (1) PGCPs' proposed IEP and placement for the 2012-2013 school year was not reasonably calculated to provide the Student with a FAPE and (2) that [School 2] was an appropriate placement for the student for this year.

When the parent presents first-hand expert testimony regarding the inappropriateness of the school system's placement, it is then the responsibility of the school system to somehow show why its program/placement is appropriate. Additionally, when the parent produces expert and lay testimony, as well as evaluations and observation reports, all clearly supporting the inappropriateness of the school system proposal, it is then incumbent upon the school system to demonstrate how it has crafted an appropriate IEP and placement for the student.

### **Failure to Make Educational Progress Pursuant to the IEP**

An IEP that provides the opportunity for only "trivial advancement" is insufficient and denies the student a FAPE. *Cavanaugh v. Grasmick*, 75 F. Supp. 2d 446 (D. Md. 1999) ("[I]t is imperative that the educational placement 'be likely to produce progress, not regression or trivial

educational advance’”), quoting *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985), cited with approval in *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3rd Cir. 1999) (iterating an earlier holding that the “IDEA ‘calls for more than a trivial educational benefit’ and requires a satisfactory IEP to provide ‘significant learning,’ . . . and confer ‘meaningful benefit’”) (citations omitted).

Pursuant to the IDEA and implementing regulations, the IEP is to be comprised of:

a statement of measurable annual goals, including academic and functional goals designed to– (A) Meet the child’s needs that result from the child’s disability to *enable the child to be involved in and make progress in the general education curriculum*; and (B) Meet each of the child’s other educational needs that result from the child’s disability;

34 C.F.R. § 300.320(a)(2)(i) (emphasis added); *see also* COMAR 13A.05.01.09A(1)(b).

In evaluating the adequacy of an IEP, the Fourth Circuit has directed courts and Administrative Law Judges (ALJs) to consider a student’s progress. *M.S. ex rel. Simchick v. Fairfax County School Bd.*, 553 F.3d 315, 327 (4th Cir. 2009); *Lexington County School District v. Frazier*, U.S. Dist. LEXIS 107813 (D.S.C. 2011). Although not binding authority, but seemingly persuasive, in *D.B. v. Bedford County School Bd.*, 708 F. Supp. 2d 564 (W.D. Va. 2010), the federal court in Virginia considered a case in which the school system refused to consider D.B. as a student with special education needs despite evidence that he had a learning disability and required services to address it. Accordingly, the Court found a denial of FAPE. The court specifically considered D.B.’s lack of progress as measured by both his IEP and standardized test scores, specifically relying on the fact that “D.B. was making only trivial, minimal academic advancement toward the goals in his IEP,” and the proposed IEP was therefore not “reasonably calculated to confer an educational benefit beyond minimal academic advancement . . . .” *Id.* at 584.

The court found, of particular relevance here, to its analysis that the school system had “copied nearly verbatim most of D.B.’s goals and benchmarks from the previous IEP.” *Id.* at 586. The court held that “the marginal benefits of educating D.B. in an inclusion setting are outweighed by his educational needs.” *Id.* See also, *Klein Independent School Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012) (holding that, “Promotion from grade to grade is less indicative of a disabled student’s receipt of a FAPE where it appears that the student was promoted pursuant to a school policy rather than his achievement, where good grades are traceable to exemptions from standard expectations intended to circumvent rather than address his area of disability, and when independent evaluations contradict the amount of progress otherwise to be inferred from class promotion”).

## **II. PARTIES’ ARGUMENTS**

The Parent alleged that PGCPs failed to offer the Student a FAPE for the 2012-2013 school year by proposing an inappropriate IEP and placement at [School 1]. The Parent is seeking tuition reimbursement for the 2012-2013 school year at [School 2], her unilaterally-chosen private school placement.

The undisputed facts are as follows: The Student is eligible to receive special education and related services under the educational disability coding of SLD, which impacts her in math calculation, math problem solving, reading, expressive and receptive language, written language expression, written language mechanics, cognition, organization, social/emotional/behavioral and fine motor areas. At the time of the hearing, the Student was XX years old, turning XX just before the final day of hearing. She was educated by BCPS before she and her mother moved in with her grandparents in Prince George’s County during her first grade year. The Student then started school at [School 1] midway through her first grade year. At the outset, PGCPs

conducted a thorough evaluation of the Student's academic and social/emotional capabilities to determine her present levels of performance, strengths and weaknesses and educational needs. She was educated at [School 1] until the end of her fourth grade year.

On April 16 and 24, 2012, IEP team meetings were convened to conduct the Student's annual review. In addition to PGCPs personnel, the Parent, her educational advocate and private clinical neuropsychologist participated. After review of all available information, including the Student's academic performance, teacher input, a private neuropsychological evaluation completed by Dr. XXXX (dated March 22, 2012), and a speech-language assessment completed by Ms. XXXX, CCC-SLP, a PGCPs speech-language pathologist (dated April 16, 2012), the team determined that the Student remained eligible for special education and related services under the educational disability of SLD, determined the Student's then-current present levels of educational performance and developed an IEP (also encompassing instructional/testing accommodations and supplementary aids, services and program modifications/supports). The team recommended that the Student receive the following special education and related services from April 24, 2012 to April 23, 2013: three hours per week of special education classroom instruction outside the general education setting; seven hours and 30 minutes per week of special education classroom instruction within the general education setting; 30 minutes per month (one, 30-minute session) of counseling services outside the general education setting; and, three hours per month (six, 30-minute sessions) of speech-language therapy outside the general education setting. The team also discussed the educational advocate's proposed changes (e.g., the Student's disability coding, present levels of performance, additional goals and objectives related thereto and increased special education support hours) to the Student's IEP. PGCPs agreed to some revisions, but held steadfast as to the SLD sole coding and 10.5 total hours per week of

special education services. PGCPs felt that the least restrictive environment in which the Student's educational needs could be met was [School 1]. The Parent advised the team that she disagreed with the proposed IEP and requested written explanations as to precisely why certain goals and objectives were rejected, special education hours could not be increased, what comprised the remaining school day hours for which the Student would not receive services, and a copy of the Student's 2012-2013 school schedule. PGCPs did not respond to any of these requests.

On July 9, 2012, another IEP team meeting was convened. The Parent, her educational advocate, and her attorney participated. The team reviewed a speech-language assessment completed by Ms. XXXX, a PGCPs speech-language pathologist, (dated June 7, 2012) and determined that no revisions were necessary to the Student's April 26, 2012 IEP. PGCPs maintained that the IEP and placement recommendation remained appropriate.

On August 16, 2012, the Parent's attorney wrote to PGCPs' attorney advising that the Parent intended to place the Student at [School 2] for the 2012-2013 school year. At the beginning of the 2012-2013 school year, the Student attended the fifth grade at [School 1], but was withdrawn by the Parent in mid-September 2012 to attend [School 2].

The Parent posited that the question before me is whether the April 24, 2012 IEP developed by PGCPs was reasonably calculated to confer meaningful educational benefit. The best way to judge whether the IEP was appropriate, the Parent put forth, is to consider the Student's progress during the 2011-12 school year with a very similar level of service.<sup>15</sup> There are many other ways to measure educational progress, including the analysis of standardized test scores, by looking at a child's ability to master IEP goals, and by observation. The record before

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<sup>15</sup> The difference between the fourth and fifth grade IEPs amounts to about forty-five minutes more of special education hours per day in fifth grade. Both IEPs had the Student receiving the great majority of her education at [School 1] in the mainstream.

me, the Parent argued, reveals that the Student failed to make meaningful educational progress using any and all of these measures. Hence, the Parent insisted that the Student clearly required significantly more special education hours and services than the PGCPS team was proposing.

The Parent's perception during the 2011-2012 school year was that the Student was not receiving the special education services she needed and, as a result, the Student no longer wanted to attend school. The Parent felt that PGCPS failed the Student. The Parent argued that the Student's needs were documented approximately four years ago through PGCPS testing and observation but now, PGCPS has "come up short." Indeed, even with one-third of the Student's time spent receiving special education services, the Student failed to "achieve" one goal or the myriad of objectives in her fourth grade IEP. Furthermore, her low level academic achievement testing scores revealed the same.

The Parent maintained that she tried to work with PGCPS over the course of the Student's fourth grade year, but to no avail. Realizing that the Student needed much more intensive special education services than PGCPS was willing to provide, the Parent claimed that PGCPS thereby denied the Student a FAPE, and the Parent had to pull the Student out of [School 1] and place her into a full-time special education environment. The Parent noted that since the Student transferred to [School 2], she enjoys going to school.

PGCPS countered that the decisions of the April 16 and 24, 2012 and July 9, 2012 IEP teams were proper, both procedurally and substantively, and that the Student and the Parent were provided all rights to which they were entitled under the IDEA and its Maryland state counterpart. PGCPS argued that the IEP developed and the placement recommended by PGCPS for the 2012-2013 school year provided the Student with appropriate individualized special education and related services in the least restrictive environment in which she could receive



meaningful educational benefit. An educational program and placement at a private special education school, such as [School 2], would not provide the Student with meaningful educational benefit in the least restrictive environment. Accordingly, PGCPs maintained that the cost of any tuition reimbursement to which the Parent would otherwise be entitled should be reduced or denied because her actions throughout the IEP team process were unreasonable and designed solely for the purpose of obtaining public funding for the Student's unilaterally-chosen placement.

To that end, PGCPs posited that the evidence did not sustain the Student's arguments. It countered that it was the Parent who failed the Student by refusing to help the Student with her homework and by taking away the tutor that the Student grew accustomed to and needed. PGCPs noted that it had put in place a dedicated, competent support staff for the Student at school—and, whatever issues she had going on at home behaviorally had no connection to her school work as her classroom performance and grades told a different story. The PGCPs put forth that the Student's academic output was fully congruent with her cognitive expectations.

PGCPs conceded that although it was not maximizing the Student's educational benefit, the Student was receiving what the law required—some meaningful educational benefit through an IEP that was individually designed to meet her special educational needs. It cautioned that whether the Student was happier at [School 2] is not an issue for this case but, moreover, [School 2]'s program did not meet the core standards of PGCPs.

### **III. ANALYSIS**

#### **General**

In deciding whether PGCPs' April 24, 2012 proposed IEP for the 2012-2013 school year was reasonably calculated to enable the Student to receive some educational benefit, the

“IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent.” *A.B.*, 354 F.3d at 328. Indeed, IDEA mandates that it “leave[] the substance and the details of [the proper education for a disabled child] to state and local school officials.” *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4<sup>th</sup> Cir. 1991). Furthermore, the Fourth Circuit has espoused that a reviewing authority, *i.e.* the ALJ, has always been bound and should continue to be reluctant to second-guess professional educators. *MM v. School District of Greenville County*, 303 F.3d 523, 532 (4<sup>th</sup> Cir. 2002).

However, the Fourth Circuit has also stressed that deference to the professional educators does not “somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate. . . . the fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate.” *County Sch. Bd. v. Z.P.*, 399 F.3d 298, 307 (4<sup>th</sup> Cir. 2005). Indeed, “giving deference only to school personnel based on their personal experience with a student and their perspective of the record would eliminate the need for a due process hearing.” *K.S. ex rel. P.S. v. Fremont Unified Sch. Dist.*, 545 F. Supp. 2d 995, 1004 (N.D. Cal. 2008), citing *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1474 (9<sup>th</sup> Cir. 1993). Similarly, the United States Court of Appeals for the D.C. Circuit stated that, “In considering the evidence, the reviewing court must give ‘due weight’ to the expertise of the school officials responsible for providing the child’s education. Where there is no indication that the school officials’ expertise has been brought to bear on the individual needs of the handicapped child, however, the deference granted will be commensurately lower.” *McKenzie v. Smith*, 771 F.2d 1527, 1535, n. 17 (D.C. Cir. 1985) (internal citation omitted).

In accordance with the IDEA and the Supreme Court and Fourth Circuit case law construing it, as will be explained, I find that the PGCPS' April 24, 2012 proposed IEP for the 2012-2013 school year was not tailored to the Student's particular needs in order to provide her with a FAPE. This was evidenced through the testimony of her [School 1] teachers and the tests, assessments, and work samples which demonstrated her cognitive and academic abilities. I further find that [School 2] is the least restrictive environment for the Student to achieve a FAPE. Interestingly, none of PGCPS' witnesses or experts could testify to the contrary as all of them admitted they either knew nothing or not enough information to compare [School 2] to [School 1]. Rather, each of PGCPS' witnesses could only proffer that the Student should remain exposed to general education students in a general education curriculum. As will also be explained, mere exposure to general education students is not enough.

Taking into consideration the required legal deference I am bound to give to PGCPS' experts and educators, I found nearly all of the Student's current educators or therapists who testified and who had been regularly dealing with the Student for approximately eight months (*i.e.*, Mr. XXXX, Ms. XXXX, Mr. XXXX, the Parent, Dr. XXXX and Dr. XXXX) to be rather credible. They each exhibited great knowledge in their particular area of teaching/expertise about the Student, whether it be how she handled her workload and homework at [School 1], how she responded to medication for her somatic issues, how she tested academically and cognitively during her fourth grade year, how she began and progressed at [School 2], and how she was expected to continue progress at [School 2]. Each of the Student's current special education instructors were accepted as expert witnesses and

each had specialized and particular knowledge of the Student's every day performance in a classroom setting and/or ongoing one-to-one instruction.

Contrastingly, PGCPS failed to present sufficient evidence to rebut the Parent's case. First, it did not provide any expert testimony in special education. Second, the three instructors that did testify did not appear to be sincere when looking at the Student's [School 1] work samples they submitted and the various IEP notations and progress notes. When the Student's IEPs tell a different story than the teachers' testimony, then the teachers' testimony should no longer be accorded the legally required "great deference." Interestingly, the one expert who did testify for PGCPS, Dr. XXXX, a school psychologist, did not know the Student, had never evaluated the Student, had never attended one IEP meeting regarding the Student nor ever had any contact with the Student whatsoever. He was simply there to rebut the Parent's psychological expert, Dr. XXXX, who by contrast, did meet, interview and evaluate the Student as well as attend IEP meetings on behalf of the Student.

The battle between the two psychological experts focused a great deal on the Student's primary disability coding. Dr. XXXX testified that the Student is presenting as an individual with NVLD, contrasting Dr. XXXX who although agreed that some features of the NVLD diagnosis were evident, stated that he would not go as far as to change the primary disability coding. PGCPS also intimated that because NVLD is not a DSM-IV sanctioned diagnosis, then it does not carry any weight. It appeared that PGCPS used the coding issue in an attempt to discredit Dr. XXXX and provide a smokescreen to the issues at hand. Coding, however, is not the central issue in this case. Rather, the question before me is whether the 2012-2013 IEP was reasonably calculated to provide the Student a FAPE—no matter what the coding.

By all witness accounts, the Student was described as a sweet, loving child who is eager to please and genuinely wants to learn. It was undisputed that the Student presents with multiple diagnoses (e.g., ADHD, complex learning disabilities and anxiety), all of which impact her learning abilities and capabilities; therefore, the issues associated with those disorders need to be carefully taken into account to ensure that the Student is in the appropriate learning environment which will enable her to achieve meaningful educational progress. I find that the Student's learning disabilities and emotional needs are severe and pervasive enough to require specialized instruction in a small, self-contained classroom, with similarly situated intellectual peers. In that regard, I found Dr. XXXX, an expert in pediatric neuropsychology, highly credible when she testified as to the Student's cognitive abilities related to her academic potential, having spent two days with the Student, administering a battery of cognitive, academic, and functional tests to the Student, interviewing the Parent and reviewing written questionnaires given to the Parent, the Student and one of her PGCPS' teachers. I found it significant to see how the Student viewed herself, her abilities and her inabilities; more so because the Student was well-liked by her teachers and was eager to do well and perform well. The Student's internal observations, therefore, played a major role in determining how and why she was unable to successfully succeed in the [School 1] fourth grade academic setting.

Interestingly, the work samples entered into evidence by PGCPS were severely lacking. If they were meant to show that the "fourth grade" education the Student was provided was meaningful, they surely did not. Indeed, Mr. XXXX, the Student's special education resource teacher, testified that the majority of the math work provided were warm-up exercises; i.e., they reflected simple addition and simple subtraction problems where, beyond single-digit calculations, the Student often failed. When asked to testify about the reading and written

language materials among the work samples, he declined, requesting that Ms. XXXX, her general education reading teacher, do so instead. As the person responsible for the Student's special education needs, I would expect that he would have been prepared to speak about *all* of the Student's work, whether that be in math or reading. His inability to do so made his testimony and further observations regarding the Student's actual abilities and her present and future needs less reliable.

Besides the fact that I rejected Mr. XXXX as an expert in special education, he was unable to speak about the Student with any assertive confidence. For example, when testifying about the Student's science fair project on direct examination, he said that she was able to do portions of it independently. Then, on cross examination, when questioned specifically about what portions he provided absolutely no assistance on, he backtracked to say that although he aided the Student through every step of the science fair project, she was still able to do some independent work on it. When I then tried to get clarification on how much work he provided on the project versus the Student's independent work, he was equivocal and it appeared as if he was attempting to stretch the details of the Student's actual independence.

The same goes for Ms. XXXX. Although I found her to be quite credible, she admittedly was not an expert in special education nor pretended to know the nuances of special education versus general education. As a general education teacher, she conceded the same. While I believed her testimony pertaining to the Student's functional capacities in *her* classroom, Ms. XXXX (as well as the Parent) testified that Ms. XXXX had a special relationship with the Student, a relationship that allowed the Student to sufficiently contain her anxiety and any emotional issues in Ms. XXXX's classroom. Even with that said, however, the recent (Dr. XXXX report) academic testing scores expressly reveal that the Student was two grade levels

below her peers with whom she was being taught in a general education classroom. Moreover, Ms. XXXX conceded that the Student did not achieve any of her reading, writing and language goals on her fourth grade IEP, nor did she achieve one single objective. Mr. XXXX also conceded to the same as to all of the Student's math goals and objectives—not one goal or a mere objective set forth in the IEP was achieved.

Hence, to maintain the identical placement at [School 1] but for adding three special education hours in the form of the same old push-in/pull-out structure that was not presently working for the Student, would result in continuing an IEP that is not reasonably calculated to provide the child with meaningful educational benefit. Indeed, three of the four PGCPs' witnesses essentially said the same. Mr. XXXX, Ms. XXXX and Dr. XXXX all agreed that the Student required more intense specialized instruction, however, what PGCPs had been offering and what it proposed to continue to offer to the Student was all that they had to offer. Each testified that although the Student could benefit from smaller self-contained instruction, *[School 1] did not offer such instruction*—and that [School 1] was already providing to the Student the most specialized instruction it could give. Unfortunately, [School 1]'s program, as had been proven, was not sufficient to meet the Student's unique needs and, even more so, going forward.

#### **FAPE**

In terms of identifying and recognizing the Student's needs, from the outset, PGCPs' testing by Ms. XXXX from when the Student first arrived at [School 1] revealed that the Student required some small group individualized instruction as she presented with severe deficits in certain areas, i.e. academics, behavioral/social, fine motor and anxiety. Indeed, Ms. XXXX expressly stated that, among other things, with regard to motor skills, speech, written language and math, the Student needed "as much individualized support as possible." PGCPs

Ex. 1. [School 1] attempted to accommodate the Student's needs with various supplementary aids and through mostly push-in with some limited pull-out special education services into/from the general education classroom, class sizes that had an average of 30 students. While the Student proceeded through the third grade, both cognitive and academic testing as well as classroom performance, particularly in math and written language expression, showed the Student performing in the low average or below average ranges and was falling behind her grade level peers.

The Parent tried to supplement the school system's services by hiring a private tutor, one who was actually employed by PGCPs, and by engaging psychological and therapeutic services for the Student. Indeed, various IEP notes and meeting notes relate the same, expressing that the Parent was very involved, helped with homework, wanted the best for the Student and actively participated in her educational development. Dr. XXXX's extensive evaluation indicated that this matriculating fourth grader needed a more structured small group setting. Based upon her extensive evaluation, Dr. XXXX offered many recommendations, most importantly, that the Parent "consider a specialized school program whose curriculum and instructional approaches directly address [the Student's] needs." XX

Ex. 12. While recognizing that the Student's IEP addresses many of the Student's weaknesses, she noted that "it is difficult to implement the level of support that [the Student] needs across the various domains identified so that she can succeed in a regular school setting." *Id.* She based this recommendation on the results of PGCPs' prior assessment by Ms. XXXX, her personal evaluation and the observations of the Student's teacher, all of whom/which "identify problems in all major academic areas." *Id.* She further cautioned that the Student's academic requirements would only increase, including the level and amount of



independent work. Hence, because the schoolwork currently was “quite challenging” for the Student, Dr. XXXX recommended that more special education services be rendered before the Student fell too far behind her grade level peers.

Still, the Parent persevered and kept her daughter at [School 1] for her fourth grade year. However, she did this while voicing her concerns year after year to the IEP team, and each IEP and related meeting notes recognize the same. The April 26, 2011 IEP services and accommodations essentially remained the same and the Student still continued to struggle academically, socially/emotionally and with fine motor skills. Although the Student’s report card showed grades of As and Bs, those grades were noted by PGCPs to be based upon a modified curriculum. In light of the discrepancies, in March 2012, the Parent hired an independent evaluator, Dr. XXXX, to conduct a thorough neuropsychological valuation. Not surprisingly, Dr. XXXX’ various test results basically confirmed earlier testing done by Dr. XXXX and Ms. XXXX, that the Student required intensive small group support and more specialized individualized instruction.

However, after the 2011-2012 school year, the Parent became quite concerned that the Student did not achieve one single goal or objective on her April 26, 2011 IEP. Further, The IEP team then replicated the 2011 IEP by copying every single goal and objective onto the April 24, 2012 IEP for the 2012-2013 school year, added even more goals and objectives thereto, but then to achieve these goals and objectives, *merely added three more hours of special education service*. The three additional hours were to be provided in the same fashion—primarily push-in with limited pull-out—that had been previously provided without success. The Parent asked that PGCPs reconsider this limited increase in services and, further, explain precisely why, for the remaining 14.5 hours of the school week, the Student did not require any services (particularly

when the science class fair project required complete special education support and the music class project she was exempted from participation). PGCPs never replied and, accordingly, the Parent chose an alternative school placement for the Student.

From my review of the evidence, the Student's strengths lie in her perseverance, positive attitude and unabashed requests for assistance from her instructors. From Mr. XXXX's classroom observations, Ms. XXXX's and Mr. XXXX's testimonies and written records as well as reviews of the various IEPs and progress notes, the Student has only shown the ability to be successful in a general education class when she has been given step-by-step, one-to-one instruction in the classroom. The Student's challenges lie in her inability to recall successful math, decoding and reasoning strategies, when being presented with new or even slightly different, but more complex material.

Although PGCPs' witnesses testified that the Student is able to access the general education curriculum successfully, as also reflected in her mostly A and B report card grades, they minimize the denotations that she is being taught via a "modified curriculum." Ms. XXXX testified that modified curriculum means only that she receives supports and accommodations and that the report card computer program does not permit a denotation to indicate that the Student is being taught through such a modified curriculum. Indeed, there is no dispute that the Student is one to three years behind grade level across all subject areas, so it is difficult to understand how it is possible for her to achieve As and Bs, particularly when compared to her general education, on-grade level peers. Moreover, the Student's April 26, 2011 IEP goals consistently refer to "modified grade level direct instruction," "small group support," "guided practice," "given full to moderate support," and given "materials on her instructional and independent level" in order for the Student to be able to achieve them. JT Ex. 2. Hence, it

appears more likely than not, that the Student's grades and academic realities more accurately reflect that the general education curriculum was being modified in order for the Student to be able to access it.

For example, Mr. XXXX testified that although [School 1] fourth grade students had been assigned a research project in music class, the Student's teachers decided that the Student would be exempt from completing the assignment. The Parent questioned the exemption if the Student was supposedly performing well in school. I, too, question the exemption because if the Student truly was able to access the fourth grade general education curriculum, then why not allow her to participate and complete all fourth grade requirements. PGCPS' decision, appropriately questioned by the Parent, raises suspicion and casts doubt on other PGCPS' arguments and its witnesses' testimony in that regard.

There was great debate over the [School 2] Grammar Unit 1 Pretest that Mr. XXXX administered to the Student. PGCPS vehemently argued that it was unworthy of consideration when looking at the Student's present levels of performance. PGCPS' witnesses all were adamant that given the Student's test anxiety issues, her stress level would have been elevated at the time this test was given, it was labeled a "test" and she was in a new environment in a classroom, school and teacher with which she had no familiarity. Because of that, PGCPS argued that the Student would not have been able to perform at the level she normally does in her familiar [School 1] setting among teachers with which she is comfortable. While I agree that the Student certainly has a history of test anxiety and emotional issues, interestingly, she displayed the identical grammar issues on the "pretest" that she was also struggling with at [School 1]. For example, the Student's IEP progress notes and formalized academic testing on the subtests show the precise areas of concern that were displayed on the pretest; i.e., run-on sentences, incorrect

capitalization, missed punctuation, inability to diagram sentences. Indeed these were all also goals and objectives on the Student's April 26, 2011 IEP that she was currently working from and, ultimately, unable to achieve. Furthermore, when reviewing the "intake notes" from each of the various "unfamiliar" examiners who tested the Student (e.g., Ms. XXXX, Dr. XXXX, Dr. XXXX), the Student came into the settings willingly, participated in the process easily and remained engaged throughout the testing. Generally, although the Student may not comprehend everything she is confronted with, she tries hard and asks questions if unsure. I have no doubt, as Mr. XXXX testified, that the Student exhibited the same type of behaviors in the situation before him and, therefore, I do not discount the Student's abilities or lack thereof on the Pretest.

#### **Comparison of April 26, 2011 & April 24, 2012 IEPs**

Over the course of one year, the April 24 2012 IEP incorporated five additional areas affected by the Student's disability: Academic-Math Problem Solving; Academic-Speech and Language Receptive Language; Academic-Written Language Mechanics; Behavioral-Organization; and Behavioral-Social Emotional/Behavioral. *Compare JT. Ex. 2 with XX Ex. 36.*

Interestingly, the April 26, 2011 IEP indicated that the Student qualified for special education services because she "*requires small group and individual instruction in academics and language skills. She continues to work below grade level in reading, writing and math . . . [where those] deficits continue to affect her acquisition of skills and performance in all curriculum areas. She requires accommodations and modifications to gain access to the general education curriculum.*" JT Ex. 2 (emphasis added). It was very specific and narrowly tailored to her eligibility issues. Contrastingly, the April 24, 2012 IEP removes that language inserting instead what appears to be more boilerplate type language that the Student "continues to qualify for special education services as a student with a specific learning disability." XX Ex. 36. The

removal is thought provoking in that not one witness testified that any of those April 26, 2011 deficits disappeared; rather, they either remained constant or grew worse. And, a comparison of Dr. XXXX' testing and Dr. XXXX' testing further reveals the same.

The only difference was that during the 2011-2012 school year, the Parent hired an educational consultant who attended every IEP-related meeting. Now, someone with expertise in the area of special education (beyond the various cognitive/academic evaluators) shared the Parent's concern that the Student was falling academically further behind her grade level peers. The April 24, 2012 IEP does not delineate how or why the Student no longer requires small group and/or individual instruction. As well, there is no notation as to how or why the Student no longer requires accommodations and modifications in order to access the general education curriculum. Yet, five *more* areas affected by her disability are outlined in the 2012-2013 IEP. Taking all of this into consideration, and when compounding the various teachers' testimonies, the addition of a mere three special education hours, most of which is comprised of pushing into a large general education classroom, does not appear to be adequate to meet the Student's educational needs.

In light of some of the testimony from the Parent, opposite that of Ms. XXXX, Ms. XXXX and Mr. XXXX, that the Student presents differently on an emotional and somewhat behavioral level at home than she does at [School 1], PGCPs argued that it was not the school system who failed the Student but, rather, the Parent. The Parent conceded that for the Student's second and third grade years, she hired a tutor, who was one of the Student's PGCPs teachers, who assisted the Student with her homework and reinforced academic concepts at home. PGCPs made much ado about the fact that the Parent terminated the tutor's services for the Student's fourth grade year, opting instead to hire an educational consultant. The Parent testified

quite convincingly that she was doing everything she could to aid her daughter's growth not only academically, but also mentally, having engaged a psychiatrist as well as therapist for the past several years for the Student. She stated that financially, being a single parent and living with her parents, when the Student began to fall behind so dramatically in the third grade, she had to make a tough economic choice, and opted to forego the tutor and engage a consultant. She simply could not afford both, especially when factoring in the therapist, psychiatrist and the various evaluations that she paid for independently. She figured that she would take on the role of helping the Student with her homework to the best of her ability. PGCPs argued that the Parent was "irresponsible" for doing this and that she should have sought out alternate sources of funding either through a bank loan or grandparent loan. I give this argument no credit, because the law is clear that it is the school system which must provide the Student with a FAPE, not the Parent. This is not to say that a parent should not be involved in her child's education, but it is not the parent's responsibility to make up for what the school system is lacking.

Interestingly, just one year prior, the April 26, 2011 IEP team remarked that the Student's "mother is very supportive of her school program, helping [the Student] with her homework and assigned projects" and further noting that the Parent was taking the initiative at her own expense to have her daughter re-evaluated independently outside the school system. JT Ex. 2. These comments by PGCPs officials lent further credibility to the Parent's testimony herein. Hence, although PGCPs also attempted to show that the Parent engaged an educational consultant for the sole purpose of ensuring that the Student was to be sent to the [School 3] for her fifth grade year, I am not convinced by that argument. Case in point, her daughter did not end up attending the [School 3]. The evidence established that the Parent went into the various 2011-2012 school year IEP meetings, albeit with Mr. XXXX, with the goal of creating an IEP that would allow the

Student to reach the academic level of her classmates. It was obvious that the current level of instruction was not working for the Student and the Parent did not want the Student to fall further behind academically, which would have, in effect, taken a larger mental toll on the Student at home.

I agree with the Parent that certainly the clearest evidence of the Student's failure to make adequate progress at [School 1] is demonstrated by her failure to master goals and objectives on her IEP over multiple years. A comparison of her IEP from April 2011 (JT Ex. 2) with the IEP of April 2012 (XX Ex. 36) reveals that nearly all of her goals were merely carried over from the year before. Some of the goals and objectives had slight changes in the verbiage, but when read in their entirety, they addressed the same skills. *Compare*, XX Ex. 36, pp. 33-37 with JT Ex. 2, pp. 28-30. These include all of the math calculation goals and objectives (many of the objectives are word-for-word identical), the speech and language expressive language goal and objectives, the reading goals and objectives, and fine motor goals and objectives. *Id.* In addition, while the written language expression goals were somewhat expanded to target longer writing samples, the focus of many of the objectives remained the same and included the correct use of initial capital letters, end punctuation, and learning new vocabulary words. XX Ex. 36, p. 34. The repetition of these goals and objectives confirms that the Student failed to master her goals in one year's time as targeted under the IDEA. Not only does the evidence establish this lack of mastery, but the school system's own witnesses testified that the Student had not mastered *a single goal in her IEP during fourth grade*. *See also*, Progress Notes (all noting "making sufficient progress to meet goal" but no mastery as of June 2012). PGCPs Ex. 13, pp. 37-40.<sup>16</sup>

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<sup>16</sup> PGCPs witnesses, Mr. XXXX and Ms. XXXX, explained that each and every goal and objective in the Student's fourth grade IEP were presumed achievable when written if she were provided appropriate special

In fact, the Student was working on some of the same skills in 2010 during her third grade year. Her November 5, 2010 progress notes show goals that target her ability to “add and subtract two and three digit numbers with and without regrouping.” XX Ex. 13, p. 2. This objective is repeated, *word for word* in her April 2011 and April 2012 IEPs. Moreover, the progress notes reveal that as of June 2012, she was still struggling with this skill. It states that “[e]ven with additional support, subtraction beyond one digit and regrouping is still an area of difficulty.” PGCPS Ex. 13, p. 38. The same is true with her ability to correctly use initial capital letters and end punctuation, a skill that was targeted and inconsistent in February 2011 (XX Ex. 13, p. 2) and remained an area of need in June 2012 (PGCPS Ex. 13, p. 39). This was confirmed by [School 2] both during her initial visit to the school via the “pretest” and at the start of the school year by her teacher, Mr. XXXX. *See* XX Ex. 41 and XX Ex. 73. Notably, these are areas in which she had made progress in her short time at [School 2]. *See* XX-73, pp. 6-9.

The Student’s WJ-III scores while she was at [School 1] are further evidence of her failure to progress. She was tested in October 2010 by Dr. XXXX and again by Dr. XXXX in 2012. A comparison of the two tests reveals that the Student’s scores remained the same in five areas (scores that changed by only one or two points are essentially staying the same), went up in one area, and went *down in ten areas that were tested*. The testimony at the hearing established that these scores should either stay the same or go up as a student learns. Such a dramatic decrease in so many areas tested on the WJ-III indicates a lack of progress. *Compare*, XX Ex. 12, p. 23 *with* XX Ex. 47.

This is precisely the situation with the Student. She failed to make adequate progress as reflected in her IEP goals and standardized test scores during her years at [School 1]. Despite this failure to progress, the school system insisted that she remain in the inclusion setting with

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education support.



minimal specialized instruction. During the hearing, however, three of the school system's four witnesses explicitly agreed that the Student needed more special education – Dr. XXXX, Mr. XXXX, and Ms. XXXX. They just did not know *how much more*, because of lack of contact with the Student (testimony of Dr. XXXX), lack of experience and expertise (testimony of Mr. XXXX), or lack of special education certification (testimony of Ms. XXXX).

In sum, as noted, when examining the April 26, 2011 IEP goals and objectives, the Student did not achieve one—out of six goals and 24 objectives. As a result, nearly all of the goals and objectives were carried over to the April 24, 2012 IEP. To have “some meaningful benefit,” it is logical that the Student would have had “some” sense of accomplishment. There was none here. Moreover, with the repetition of the same goals and objectives that she did not accomplish through the previous IEP, the Student was set up to fail again the following year, with even more goals and objectives to account for the additional areas affected by her learning disability. It is no surprise then that the Parent would seek to have someone independently review PGCPs' manner of instructing the Student.

Being dissatisfied with what she considered to be a minimal increase in special education instruction for the 2012-2013 school year, the Parent demanded more hours. PGCPs responded that for the remaining five hours of academic time, the Student did not require specialized instruction. According to PGCPs, the 14.5 hours left in the school week was non-academic time and; therefore, the Student did not require any special education support. The Parent and Mr. XXXX then requested a proposed schedule for the Student for her upcoming fifth grade year at [School 1] as well as a description of the academic hours versus non-academic hours in the school week. PGCPs never provided either document.

## Small Group Instruction

The IDEA requires an appropriate level of specialized instruction in the IEP in order for a student to attain annual goals and make progress in the general education curriculum. As demonstrated throughout the hearing and as described fully above, the Student was not making progress and often failing to access the general education curriculum. She therefore required more services than the IEP team proposed in her April 2012 IEP. This was the testimony of the Parent's witnesses, three of whom were experts in special education. It was also the testimony of many of the school system witnesses, none of whom were special education experts. Dr. XXXX, the school psychologist who reviewed the Student's file, agreed, in part, with Dr. XXXX' recommendation, acknowledging that the Student required *some* level of self-contained special education. While he was not willing to make a specific recommendation about which classes needed to be self-contained without more information, he did testify that she needed at least her math class self-contained. This, however, was not proposed in the IEP for the Student at [School 1]. Pursuant to that IEP, she was to receive some pull-out services, but was not scheduled to be in any self-contained classes, as Ms. XXXX and Mr. XXXX testified, because the school did not offer such a class.

Mr. XXXX also acknowledged that the Student required additional services. In fact, he told the IEP team at the April 2012 IEP meeting that she required more hours, but the team failed to propose the level of additional services the Mr. XXXX felt was necessary.<sup>17</sup> The school's lack of services cannot be a reason for denying the Student the individualized education that she needs. If the Student requires more intensive special education in order to make progress, it

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<sup>17</sup> In response to the question about whether she needed more specialized instruction, Ms. XXXX testified that she was not qualified to answer that question since she was not a special educator.

should have been proposed, regardless of what [School 1] can specifically offer.<sup>18</sup>

As laid out in the Findings of Fact in great detail, all of the non-PGCPS therapists and evaluators have long been recommending more intensive services for the Student. PGCPS also acknowledged the Student's significant needs during PGCPS' initial evaluation in 2009, which found that she required "direct assistance to stay on task, and complete her work, throughout the school day." PGCPS Ex. 1. In 2010, the Student was assessed by Dr. XXXX who found that she had a variety of needs including "language-based weaknesses and visual perceptual weaknesses including problems with visual reasoning, slow processing speed, weaknesses in working memory, significant problems with attention, distractibility and impulsivity and poor executive functioning." XX Ex. 12, p. 16. As a result, Dr. XXXX recommended a "specialized school program whose curriculum and instructional approaches directly address [the Student's] needs." *Id.* She addressed the Student's IEP finding that "it is difficult to implement the level of support that [the Student] needs across various domains identified so that she can succeed in a regular school setting." *Id.* at 17.

Interestingly, Dr. XXXX reached nearly identical recommendations a couple of years later in her neuropsychological evaluation of the Student. Her assessment found similar areas of need concluding that, "Her attention/executive difficulties, learning difficulties and emotional needs are severe and pervasive enough to require specialized instruction in a small, self-contained classroom." XX Ex. 36, p. 10. Dr. XXXX explained her recommendations in her testimony, concluding that the Student required this level of service to address her pervasive and serious learning needs.

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<sup>18</sup> Proposing certain services because it is what a school has available is considered predetermination and a denial of FAPE. *Spielberg by Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988) (School system found in violation of the IDEA when it selected the placement and then drafted the IEP to fit that placement).

As discussed in *Rowley*, what constitutes educational benefit for different children may differ dramatically, depending on the disabilities that are present. *Rowley*, 458 U.S. at 202. More importantly, as illustrated in this case, the particular way a disability affects learning must be analyzed. One cannot assume that academic measures, such as grades, are always indicative of a FAPE, since a disability may affect a child in other ways, such as emotionally, socially and behaviorally, as the anxiety, XXXX/mood disorder and ADHD did herein with the Student. As seen here, various BASC-II and BRIEF teacher and Parent assessments recognized the Student's attention problems and test-taking anxiety.

It is clear that the Student exhibits multiple areas of disability that impact her educational progress. In light of the extensive documentation, testing and testimony presented at the hearing, particularly that of PGCPs' own witnesses, I find that the August 24, 2012 proposed IEP was not reasonably calculated to provide meaningful educational benefit to the Student. Accordingly, PGCPs denied the Student a FAPE for the 2012-2013 school year.

## **Reimbursement**

### *Proper Standard*

If a denial of FAPE is found, the Supreme Court has instructed that the ALJ should then consider the parental placement. In *Burlington*, the Court explained that, "parents who disagree with the proposed [educational program] are faced with a choice: go along with the [proposed program] to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Sch. Committee of the Town of Burlington, Massachusetts v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). To avoid compromising a child's right to FAPE, the Court concluded that, if "a court determined that a private placement desired by the parents was proper under the Act and that [a proposed] placement in a public school was

inappropriate,” the IDEA authorizes, “retroactive reimbursement to parents.” *Id.* This result is necessary because, “[t]he Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.” *Id.* In *Carter*, the Supreme Court reaffirmed its ruling in *Burlington* and explained that, “public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State’s choice.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

The test of whether a parental placement is “proper under the Act” is whether “the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 163 (4th Cir. 1991) (quoting *Rowley*, 458 U.S. at 207). It is crucial to distinguish the standard of “proper” required of parental placements from that of “appropriateness” required of school system placements. Parental placements are held to a less strict standard because, “it hardly seems consistent with the Act’s goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child’s needs in the first place.” *Carter*, 950 F.2d at 164. The Supreme Court in *Carter* specifically considered whether, “parents are barred from reimbursement because the private school in which [their child is] enrolled did not meet the [IDEA] definition of a ‘free appropriate public education.’” 510 U.S. at 13. The Court held, “that they are not, because [the IDEA’s] requirements cannot be read as applying to parental placements.”<sup>19</sup>

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<sup>19</sup> For example, the admitted failure of [School 2] to include all present levels or goals on its version of an IEP for the Student does not preclude relief under *Burlington/Carter*. Under *Carter*, the private school need not have an IEP

Other federal Circuit Courts have also considered the issue of reimbursement of a parentally-selected program when a school system denies the student a FAPE. In *Mr. I v. Maine Sch. Admin. Dist. No. 55*, the First Circuit applied the “reasonably calculated” test to the parentally-selected program and recognized that implicit in a parent’s decision to place privately is the notion that, “parents rightfully decide on a private placement when it addresses, at least in part, their child's special educational requirements . . . .” *Mr. I v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 24 (1st Cir. 2007). The First Circuit agreed with both the Sixth and the Second Circuits that the private school must be consistent with the purpose of the IDEA and, “provide some element of special education services in which the public school placement was deficient.” *Berger v. Medina City School Dist.*, 348 F.3d 513, 523 (6th Cir. 2003); *see also, Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 (2nd Cir. 2006).

More recently, the Second Circuit in *Frank G.* found that parents need not show that the private school is able to meet every last one of the child’s special education needs. Parents must, instead, show that the program is “supported by such services as are necessary to permit the child to benefit from instruction.” *Frank G.*, 459 F.3d at 365 *citing Rowley*, 458 U.S. at 188-89.

#### *Least Restrictive Environment Analysis Does not Apply*

In *M.S.*, 553 F.3d at 327, the Fourth Circuit rather clearly explained the relationship of least restrictive environment and tuition reimbursement:

Although we have never held that parental placements must meet the least restrictive environment requirement, *see Carter*, 950 F.2d at 160 (noting that “the [IDEA]’s preference for mainstreaming was aimed at preventing *schools* from segregating handicapped students from the general student body” and that “the school district ha[d] presented no evidence that the [IDEA’s preference for mainstreaming] was meant to restrict *parental* options when the public schools fail to comply with the requirements of the [IDEA] (emphasis in original)), the district court's consideration of Lindamood-Bell’s restrictive nature

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or even certified special education teachers as long as its individualized approach is benefitting the student.

was proper because it considered the restrictive nature only as a factor in determining whether the placement was appropriate under the IDEA, not as a dispositive requirement.

(emphasis in original). *See also Morgan v. Greenbrier County West Virginia Bd. of Educ.*, 83 Fed. Appx. 566, 572 (4th Cir. 2003). In *Carter*, the court further expressed strong doubt as to whether the least restrictive environment requirement of the IDEA, 20 U.S.C.A. § 1412(5)(A) (West 2000), applies to parental placements. *Carter*, 950 F.2d at 160 (noting that “the school district has presented no evidence that the policy was meant to restrict parental options”).

Additionally, other federal circuit courts addressing the issue have held that the least restrictive environment requirement does not apply with the same force to parental placements as it does to placements advocated by school districts. *See M.S. ex rel. S.S. v. Bd. of Educ.*, 231 F.3d 96, 105 (2nd Cir. 2000) (stating that mainstreaming “remains a consideration” but noting that parents “may not be subject to the same mainstreaming requirements”); *Cleveland Heights-University Heights Sch. Dist. v. Boss*, 144 F.3d 391, 399-400 (6th Cir. 1998) (failure to meet mainstreaming requirements does not bar reimbursement). It should be noted that the IDEA’s preference for mainstreaming was aimed at preventing schools from segregating handicapped students from the general student body. *Carter*, 950 F.2d at 160. Although the courts have not definitively resolved the proper role of the mainstreaming requirement when considering parental placements, it is clear that requirement should not be applied in the strictest sense.

PGCPS argued that the IDEA’s mandate that disabled children be educated in the least restrictive environment renders the public school placement at [School 1] superior to [School 2], which educates only children with disabilities. However, public school placement with “mainstreaming” in general education classes must be pursued as long as it is consistent with the IDEA goal of providing disabled students with an appropriate education. Where necessary for

educational reasons, public placement with instruction in a general education classroom assumes a subordinate role in formulating an educational program. *Rowley*, 458 U.S. at 181.

Each of PGCPS' witnesses testified that [School 1] would be the least restrictive environment for the Student. However, each also conceded that they could not testify with any real certainty as to the precise programming offered by [School 2]. They all claimed that exposure to non-disabled peers would benefit the Student greatly. The Parent's witnesses also conceded to the same. Yet, each of the Parent's witnesses also stated that it is more beneficial for the Student to receive more intensive special education services rather than peer exposure. All of the psychological reports indicated that the Student would benefit from either more structured, one-to-one instruction, or smaller class sizes, none of which [School 1] offers.

In sum, there is no basis for denying the Student the proper and highly beneficial education she is receiving at [School 2]. The Parent's experts all testified to the benefit she is receiving at [School 2], both academically and socially/emotionally. The exhibits also reveal her progress in the program. *See* XX Ex. 73. In this case, the benefit that the Student is receiving from her placement at [School 2] outweighs the fact that the placement is more restrictive. Upon a showing that PGCPS failed to provide her with a FAPE, the inquiry turns to the whether the parental unilateral placement at [School 2] was proper. That placement meets her needs and the Parent should therefore receive reimbursement. *See* Findings of Fact, Nos. 110-123.

#### *Counsel's Behavior*

The Parent's counsel asked that I take into consideration PGCPS' counsel's behavior during the oral closing arguments on the final day of hearing in that the Parent "respectfully suggest[s] that this type of behavior is quite relevant to the ALJ's decision on [the Student's] placement." Parent's Closing Memorandum, pp. 1-4. That behavior, among other things,



consisted of PGCPS’ counsel’s name calling—labeling the Parent as “irresponsible,” calling the primary educational consultant, a special education expert who has served both the public and private sectors for nearly forty years, a “hired gun,” and describing an eminent neuropsychologist who evaluated the Student at the Parent’s request, as spouting “psycho-gibberish,” Further, in reference to one of the Student’s teachers at her new private school, whom I accepted as a special education expert, counsel claimed that the teacher was “arrogant;” and called the Student’s therapist, who is an experienced expert in pediatric psychiatry, “ignorant” when it came to education. *Id.*

The Parent stated that as the Supreme Court has repeatedly underscored, from its first ruling in *Rowley* forward, the jurisdiction in a due process appeal draws heavily on equitable principals. Parent’s counsel argued the ALJ is to “do the right thing” under the law, noting that the evidence confirms that the “right thing” is to fund the Student at [School 2], and what happened during the final day of hearing, as improper as it was, serves to underscore how “right” that type of relief is for this family. *Id.* Because of this type of conduct, Parent’s counsel pointed out that parents of disabled children are loath to challenge school systems when they understand that this type of brutal defense may be hurled at them.

While I do agree that PGCPS’ counsel went above and beyond presenting a typical legal and fact-based closing argument by making such irrelevant comments, I do not need to consider such commentary in making my ruling, because I have already found that [School 2] is proper based on the testimonial and documentary evidence presented.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that PGCPS failed to provide the Student with a FAPE for the 2012-2013 school year by

proposing an inappropriate IEP and placement at [School 1]. 20 U.S.C.A. § 1414(d) (2010); 34 C.F.R. § 300.320(a)(2)(i); COMAR 13A.05.01.09A(1)(b); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *M.S. ex rel. Simchick v. Fairfax County School Bd.*, 553 F.3d 315, 327 (4th Cir. 2009).

I further conclude as a matter of law that tuition reimbursement for the 2012-2013 school year at [School 2], the Parent's unilaterally-chosen private school placement, is appropriate. As there was no evidence or argument presented as to the reimbursement of any related services and costs, none were considered. *Rowley*, 458 U.S. at 181; *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

### **ORDER**

I **ORDER** that the Parent's request for reimbursement of the Student's tuition at the [School 2] for the 2012-2013 school year be, and is hereby, **GRANTED**; and I further

**ORDER** that the Parent's request for reimbursement for unidentified related services and costs is **DENIED**.

May 29, 2013  
Date Order Mailed

\_\_\_\_\_  
Nicole Pastore Klein  
Administrative Law Judge

NPK/kkc

## **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.