

XXXX XXXX,
STUDENT

v.

BALTIMORE CITY
PUBLIC SCHOOLS

* BEFORE BRIAN ZLOTNICK,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No: MSDE-CITY-OT-13-32689

* * * * *

DECISION

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STATEMENT OF THE CASE

On August 22, 2013, XXXX XXXX and XXXX XXXX (Parents), on behalf of their 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 Baltimore City Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2012)¹. On September 10, 2013, the parties attended a resolution meeting but failed to reach a settlement of their dispute. The parties notified the OAH of the outcome of the resolution session on September 16, 2013, and, therefore, asked that a hearing be scheduled. 34 C.F.R. §§ 300.506 and 300.510 (2013)². BCPS then filed its response to the Parent’s due process hearing request on September 4, 2013.

¹ All references to the IDEA are from the 2012 volume of the United States Code, unless otherwise cited.

² All references to the C.F.R. are from 2013, unless otherwise cited.

On October 17, 2013, Administrative Law Judge (ALJ) XXXX XXXX conducted a telephonic pre-hearing conference (TPHC). The following individuals participated: Darnell Henderson, Esquire, attorney for BCPS, and Mark B. Martin, Esquire, attorney for the 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 and Code of Maryland Regulations (COMAR) 13A.05.01.15C, which is forty-five days from the date that the OAH was notified of the outcome of the resolution session. As the earliest date available for the parties to commence the due process hearing was December 9, 2013, the OAH would be unable to hold and complete the hearing, as required under the regulations. Accordingly, the parties waived the time requirement and agreed that the decision would be issued within thirty days from the close of record. Md. Code Ann., Educ. § 8-413(h).(2008). On October 23, 2013, ALJ XXXX issued a TPHC Order detailing the same.

The case was reassigned to me and I held a seven-day hearing on December 9-13 and 16-17, 2013, at the OAH in Hunt Valley, Maryland. The record closed on December 17, 2013, after the parties presented oral closing arguments. Accordingly, the written decision is due on Thursday, January 16, 2014, which is thirty days after the close of the record.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1); 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; and the OAH Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13A.05.01.15C; and COMAR 28.02.01.

At the beginning of the hearing, BCPS presented a Motion to Quash the Parents' Subpoena Duces Tecum issued on December 2, 2013. After hearing argument, I granted the Motion on the record as I found the Subpoena Duces Tecum to be unduly burdensome.

Additionally, at the beginning of the hearing, the Parents made an oral motion to exclude the BCPS witnesses from testifying because BCPS violated the five-day rule regarding notification of witnesses to the parties. After hearing argument, I denied the motion to exclude on the record as I found the Parents' preparation for the hearing was not unduly hindered by the BCPS submission of their witness list on December 2, 2013, at 7:11 pm. BCPS had submitted all of its documents to the Parents on December 2, 2013, at 5:15 pm, but had inadvertently omitted its witness list. BCPS discovered this omission and subsequently emailed the witness list to the Parents' attorney at 7:11 p.m., on December 2, 2013.

ISSUES

1. Did BCPS fail to produce a properly constituted Individualized Education Program (IEP) team when it failed to include a general education or a special education teacher from [School 1] or any other general education setting at the July 29, 2013 IEP team meeting?
2. If so, has the Student consequently been denied a free appropriate public education (FAPE)?
3. Does BCPS' proposed placement of the Student in a public elementary school for the 2013-2014 School Year offer the Student FAPE?
4. If not, is the Parents' proposed placement in a private school appropriate to meet the Student's needs?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parents:³

- Parent Ex. #1 - Maryland Individualized Family Services Plan, dated January 9, 2009
- Parent Ex. #2 - Speech and Language Report, dated January 9, 2009
- Parent Ex. #3 - XXXX Institute (XXXXI) Assessment, dated October 16, 2009
- Parent Ex. #5 - Educational Assessment, dated December 11, 2009
- Parent Ex. #6 - January 15, 2010 IEP
- Parent Ex. #7 - Pre-Admission Visit Notes, dated February 5, 2010
- Parent Ex. #8 - Letter of Acceptance from [School 2], dated February 18, 2010
- Parent Ex. #9 - January 15, 2010 IEP, amended on March 19, 2010
- Parent Ex. #10 - XXXXI report, dated April 26, 2010
- Parent Ex. #11 - Progress Report for July 1, 2010 to October 14, 2010
- Parent Ex. #13 - December 16, 2010 IEP
- Parent Ex. #14 - Annual Review Report, dated December 16, 2010
- Parent Ex. #20 - Report from Dr. XXXX, dated March 19, 2012
- Parent Ex. #21 - Counseling Annual Review Report, dated October 30, 2012
- Parent Ex. #22 - Removed from the binder as it is a duplicate of Parent Ex. #27
- Parent Ex. #26 - Psychological Services Report, dated November 5, 2012
- Parent Ex. #27 - Annual Review Report for November 9, 2011 to November 5, 2012

- Parent Ex. #43 - Report from XXXX XXXX, dated July 12, 2013
- Parent Ex. #55 - [School 2] classroom schedule for 2013-2014 school year
- Parent Ex. #62 - Curriculum Vitae of XXXX XXXX

I admitted the following exhibits as Joint Exhibits:

- Joint Ex. #17 - IEP, dated November 7, 2011
- Joint Ex. #24 - Notice of Consent, dated November 5, 2012
- Joint Ex. #25 - IEP, dated November 5, 2012
- Joint Ex. #28 - Prior Written Notice, dated November 5, 2012
- Joint Ex. #30 - Educational Assessment, dated December 4, 2012
- Joint Ex. #31 - Speech and Language Evaluation, dated December 13, 2012
- Joint Ex. #32 - Psychological Report, dated December 21, 2012
- Joint Ex. #34 - IEP, dated January 10, 2013
- Joint Ex. #35 - Counseling Progress Report, dated January 10, 2013
- Joint Ex. #36 - Notice and Consent for Assessment, dated January 10, 2013
- Joint Ex. #37 - Psychological Report, dated February 26, 2013
- Joint Ex. #39 - IEP, dated April 8, 2013
- Joint Ex. #40 - Prior Written Notice, dated April 8, 2013
- Joint Ex. #41 - IEP, dated June 12, 2013

³The Parents presented a binder of exhibits, which were numbered 1-62. Some of those exhibits were admitted into evidence as Joint Exhibits. The Joint exhibits maintained the same numbers as provided in the binder.

- Joint Ex. #44 - Counseling Report, dated July 18, 2013
- Joint Ex. #46 - Occupational Therapy Report, dated July 29, 2013
- Joint Ex. #47 - IEP, dated July 29, 2013
- Joint Ex. #48 - Prior Written Notice, dated July 29, 2013
- Joint Ex. #49 - Psychological Progress Report, dated July 29, 2013
- Joint Ex. #50 - Due Process Complaint, dated August 22, 2013
- Joint Ex. #51 - BCPS Response to Due Process Complaint, dated August 30, 2013
- Joint Ex. #54 - IEP Progress Report, dated October 9, 2013

The following exhibits from the Parents' exhibit binder were not offered into evidence:

- Parent Ex. #4 - XXXXI evaluation, dated October 20, 2009
- Parent Ex. #12 - Occupational Therapy Annual Review, dated December 2010
- Parent Ex. #15 - Speech and Language Annual Review, dated December 2010
- Parent Ex. #16 - Counseling Report, dated November 7, 2011
- Parent Ex. #18 - Annual Review Report for December 17, 2010 to November 7, 2011
- Parent Ex. #19 - Speech and Language Report, dated November 2011
- Parent Ex. #23 - Occupational Therapy Report, dated October 2012
- Parent Ex. #29 - Speech and Language Report, dated November 2012
- Parent Ex. #33 - Progress Report for October 10, 2012 to January 7, 2013
- Parent Ex. #38 - Observation Notes from Dr. XXXX, dated March 18, 2013
- Parent Ex. #42 - Observation Notes from XXXX XXXX, dated July 8, 2013
- Parent Ex. #45 - Occupational Therapy Annual Review Report, dated July 2013
- Parent Ex. #52 - Letter from Mark Martin to Darnell L. Henderson and XXXX XXXX, dated September 30, 2013
- Parent Ex. #53 - Letter from Darnell L. Henderson to Mark Martin, dated October 1, 2013
- Parent Ex. #56 - Curriculum Vitae of XXXX XXXX
- Parent Ex. #57 - Curriculum Vitae of XXXX XXXX
- Parent Ex. #58 - Curriculum Vitae of XXXX XXXX
- Parent Ex. #59 - Curriculum Vitae of XXXX XXXX
- Parent Ex. #60 - Curriculum Vitae of XXXX XXXX
- Parent Ex. #61 - Curriculum Vitae of XXXX XXXX

I admitted the following exhibits on behalf of BCPS:

- Board Ex. #15 - Progress Report, July 2013
- Board Ex. #21 - Ms. XXXX's observation notes, dated July 8, 2013
- Board Ex. #22 - Dr. XXXX's observation notes, dated March 18, 2013
- Board Ex. #25 - Notice of IEP meeting, dated July 12, 2013
- Board Ex. #27 - Curriculum Vitae of XXXX XXXX
- Board Ex. #28 - Curriculum Vitae of XXXX XXXX, Ed.D. (Dr. XXXX)

The following exhibits from the BCPS' exhibit binder were not offered into evidence:

- Board Ex. #1 - OAH Notice of Hearing, dated October 24, 2013
- Board Ex. #2 - BCPS Response to Due Process Complaint

Board Ex. #3 -	Prior Written Notice, dated July 29, 2013
Board Ex. #4 -	Prior Written Notice, dated April 8, 2013
Board Ex. #5 -	IEP, dated July 29, 2013
Board Ex. #6 -	IEP, dated April 8, 2013
Board Ex. #7 -	IEP, dated January 10, 2013
Board Ex. #8 -	Psychological Report from XXXX XXXX, dated March 22, 2013
Board Ex. #9 -	Occupational Therapy Evaluation, dated January 10, 2013
Board Ex. #10 -	Educational Assessment, dated January 10, 2013
Board Ex. #11 -	Psychological Report, dated December 21, 2012
Board Ex. #12 -	Speech and Language Evaluation, dated November 19, 2012
Board Ex. #13 -	Progress Report – Psychological Consult, dated July 29, 2013
Board Ex. #14 -	Progress Summary – Speech and Language, dated July 2013
Board Ex. #16 -	Progress Report – Counseling, dated July 2013
Board Ex. #17 -	Occupational Therapy Annual Review Report, dated July 2013
Board Ex. #18 -	Progress Report – Counseling, dated April 2013
Board Ex. #19 -	Occupational Therapy Report, dated March 2013
Board Ex. #20 -	Review of Social Skills – Counseling, dated January 10, 2013
Board Ex. #23 -	Letter from Ms. XXXX to the Parents, dated August 14, 2013
Board Ex. #24 -	Request for Temporary Support Assistant, dated July 30, 2013
Board Ex. #26 -	Notice and Consent for Assessment, dated January 10, 2013

Testimony

The Parents presented the testimony of the following witnesses:

- XXXX XXXX, [School 2] Psychologist, accepted as an expert in school psychology and autism
- XXXX XXXX, Educational Specialist, BCPS Autism Programs, accepted as an expert in autism and curriculum instruction
- XXXX XXXX, Educational Associate, BCPS IEP Case Manager/Non-Public Liaison
- XXXX XXXX, Special Education Teacher, [School 2], accepted as an expert in special education
- XXXX XXXX, Educational Director, [School 2], accepted as an expert in special education and curriculum
- XXXX XXXX, Educational Consultant, accepted as an expert in special education and inclusive education
- XXXX XXXX, Student’s mother

BCPS presented the testimony of the following witnesses:

- XXXX XXXX, BCPS Non-Public Liaison
- XXXX XXXX, Educational Associate, BCPS IEP Case Manager/Non-Public Liaison, accepted as an expert in speech and language pathology

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Student was born on XXXX, 2006.
2. The Student received a speech and language evaluation from the XXXX Center for Autism and Related Disorders (XXXX) on September 21, 2009. She was diagnosed with autism. XXXX recommended that the Student receive at least two hours of speech and language services per week to address her difficulties with receptive and expressive language. XXXX also recommended that the Student should participate in a language-based pre-school program with a low student/teacher ratio and a mix of small group with one-to-one programming. (Parent Ex. #3).
3. On December 11, 2009, BCPS performed an educational assessment of the Student in which she demonstrated a range of pre-academic abilities with many skills above her age level. The Student also demonstrated language and social deficits that may impact her ability to function in a typical preschool environment. BCPS recommended that the Student receive individual and small group instruction with the following accommodations: repetition of directions; visual supports; supervised breaks; visual, verbal and physical prompts and cues; reward system; transition warnings; and preferential seating. (Parent Ex. #5).
4. An IEP meeting was held on January 15, 2010, where the IEP team reviewed the Student's speech and language progress report, educational assessment, occupational therapy evaluation and XXXX reports. The team changed the Student's disability code to autism and recommended private separate day school. The January 2010 IEP specified 27.5 hours per week of classroom instruction from a special education teacher outside of general education for 36 weeks. The IEP also called for one hour per week of occupational therapy and one hour per week of speech and language therapy as a related service for 36 weeks outside of general education. (Parent Ex. #6).

5. BCPS referred the Student to the [School 2] ([School 2]) and on February 18, 2010, [School 2] accepted the Student into its program. The Student enrolled in [School 2] on March 1, 2010. Her January 2010 IEP was amended on March 19, 2010 to reflect her placement at [School 2] as her service school. (Parent Exhibit ##8 & 9).

6. MSDE has approved [School 2] as a non-public special education school with pre-kindergarten through 6th grade classes. [School 2] is approved to serve autistic and developmentally delayed students as well as students who are speech and language or other health impaired. For the 2013-2014 academic year, [School 2] has 44 students enrolled in eight classes and the students are placed in multiple age groupings. [School 2] employs a 44-week academic year, which begins on July 1 and ends in June. (Testimony of XXXX XXXX and XXXX XXXX).

7. The Student attended pre-school during the 2010-2011 school year at [School 2], in accordance with the March 19, 2010 IEP.

8. For the academic period of July 1, 2010 to October 14, 2010, the Student achieved her Behavioral – Social Interaction Skills goal and was making sufficient progress to meet the following goals of her January 15, 2010 IEP:

- Communication
- Academic - Preacademics
- Behavioral – Self Management
- Health – Sensory Integration
- Physical – Fine Motor
- Physical – Independent Community Living – Toileting

(Parent Ex. # 11)

9. The Student attended kindergarten during her 2011-2012 academic year at [School 2]. The Student was in a classroom with five other students, one lead special education teacher, one aide and a one-to-one instructional aide. The aid in her classroom was Ms. XXXX,

who was a certified teacher at that time. The Student is easily distracted by ambient noise and requires a token economy⁴ to receive educational benefit. (Testimony of XXXX XXXX).

10. The Student's special education kindergarten teacher at [School 2], XXXX XXXX, wrote an Annual Review Report on November 7, 2011, covering the period of December 17, 2010 to November 7, 2011. In October 2011, XXXX administered to the Student the Assessment, Evaluation, and Program System for Infants and Children Three to Six Years (AEPS), with the following results:

- Gross Motor – The Student easily navigates around objects while walking and running. She enjoys participation in recreation activities such as parachute play, scooter races, obstacle courses and organized games (basketball, softball).
- Fine Motor - The Student consistently uses her right hand to write and manipulate objects. The Student copies words and pictures from a model and is able to draw detailed pictures from memory.
- Social/Emotional/Behavioral – The Student enjoys being around classmates and will initiate a game with peers by asking a friend to play with her. The Student's attention to tasks varies and is dependent upon her interest, the distractions present and how she feels on that particular day. The Student is capable of following multi step directions. Often, her focus is fleeting and she needs verbal prompts and reminders to maintain attention throughout an activity.
- Adaptive/Self-Care – The Student maintains previously acquired self-help skills of dressing, bathroom independence and feeding.
- Early Literacy – The Student attempts to sound out and decode words based on letter sounds. She recognizes several words by sight and new words are being introduced to her through the reading program
- Early Math Literacy – The Student solidly identifies numbers up to 40, but beyond 40 she is inconsistent.

(Parent Ex. # 18)

11. To address her identified needs, the Student continues to require a small and structured full-day language-based special education program that will allow for redirection and reinforcement to complete tasks and maintain appropriate attention. (Parent Ex. # 18).

⁴Positive behavioral reinforcement system based on rewarding her for positive behaviors during the school day.

12. On November 7, 2011, an IEP meeting was held in which the AEPS and classroom observations were used to develop the Student's goals and objectives. This IEP specified 27.5 hours per week of special education instruction provided primarily by a special education classroom teacher and also provided by an instructional assistant. These services were performed outside of general education for 44 weeks from November 7, 2011 to November 7, 2012. The supplemental aids, services, program modifications and supports section specified a low student to teacher ratio and a small class size. The Student also received the following related services performed outside of general education for 44 weeks:

- OT – 30 minutes per week delivered primarily by an occupational therapist
- Counseling Services – 30 minutes per week delivered primarily by a school social worker
- Speech and Language – 90 minutes per week delivered primarily by a speech and language pathologist

The November 7, 2011 IEP placed the Student at [School 2]. (Joint Ex. # 17)

13. XXXX XXXX, a special education teacher at [School 2], began working with the Student in June 2010 as an assistant teacher in the Student's class. Ms. XXXX wrote and carried out lesson plans for the Student's kindergarten class and assisted with the implementation of the Student's IEP goals and objectives during the 2010-2011 school year. (Testimony of XXXX).

14. Ms. XXXX became the Student's special education teacher in July 2011 for her kindergarten year, the 2011-2012 school year. During the Student's kindergarten and first grade years, her class consisted of 6 students including herself as well as a special education teacher and two instructional assistants. (Testimony of XXXX).

15. During the 2011-2012 academic year, the Student developed an intense interest in certain subjects, such as dinosaurs and whales. Ms. XXXX modified the class curriculum to reflect the Student's interests to allow the Student to receive educational benefit. If the lessons

did not reflect the Student's intense interests at the time, the Student would tune out the lessons and fail to receive educational benefit. (Testimony of XXXX).

16. Ms. XXXX completed an Annual Review Report for the Student covering the period of November 9, 2011 to November 5, 2012. The Student mastered 100% of her literacy/reading, fine motor/written language and math goals. The Student is able to stay engaged in a particular activity for an entire 30-minute period; however, her attention to tasks varies based on her interest, distractions, and mood. The Student continues to require a small and structured full-day language-based classroom in order to continue making academic and social gains. The small structured setting allowed for redirection and reinforcement to complete tasks and maintain appropriate attention and engagement. (Parent Ex. # 27).

17. Ms. XXXX administered the Woodcock Johnson III Educational Assessment (WJ3) to the Student on December 4, 5, and 12, 2012. Ms. XXXX divided the WJ3 into three separate half-hour increments for the Student. The WJ3 was administered to the Student in a separate windowless room with only the Student and Ms. XXXX present. The Student began each test session eagerly and appeared interested in the tasks presented and provided a good effort. As the Student advanced through each test and items became more difficult, she seemed to lose motivation. (Joint Ex. # 30).

18. A standard score of 100 is average is on the WJ3 with the average range consisting of a score of 85-115. The Student had the following scores on the WJ3:

- Broad Reading – 117
- Broad Math - 108
- Broad Written Language - 116

The Student's overall level of academic achievement in reading, written language and math is within the high average range when compared to her same age peers. (Joint Ex. #30).

19. During the 2011-2012 school year, the Student had not yet acquired the skill of sitting on her own in a group activity. She has cried in reaction to loud noises, such as a nearby jackhammer being used in construction near [School 2]. (Testimony of XXXX).

20. When the Student was not interested in the instructional activity, she became distracted easily within her small class setting of six students. The Student often needed assistance to return to the instructional activity through the use of multiple reminders and incentives such as the [School 2] token economy. (Joint Ex. #35).

21. A speech and language evaluation of the Student was performed on November 19, 2012 by XXXX XXXX, Speech-Language Pathologist. The Student presented with a low average to mild deficit in her expressive and pragmatic language skills. The small classroom environment appears to have facilitated the Student's progress in the areas of speech and language. Ms. XXXX recommended that the Student would continue to benefit from speech and language therapy to target specific expressive and pragmatic language weaknesses related to academic performance. The Student's standard scores for Core Language, Receptive Language, Expressive Language and Language Structure fall within the average range. Ms. XXXX further indicates that because the Student's overall language scores fall within the average range, the team may wish to consider a reduction of speech and language services to one session per week. (Joint Ex. #31).

22. At [School 2], the Student received individual psychological counseling sessions that focused on her practice of new coping strategies to manage her anxiety and impulses. A small group setting allowed the Student to practice her coping strategies. (Testimony of XXXX XXXX).

23. XXXX XXXX performed a psychological evaluation of the Student in the fall of 2012. The evaluation was performed over four sessions to accommodate the Student's level of

attention and motivation. The Wechsler Intelligence Scale for Children – Fourth Edition (WISC-4) and the Universal Nonverbal Intelligence Test (UNIT) were administered to the Student. The Student has adequate ability across cognitive domains, but her ability to reason with concrete objects, shapes and figures exceeds her ability to process information verbally and with efficiency. The Student requires frequent breaks to regain mental energy and motivation during more complex work as her processing speed and working memory lead to mental exhaustion and subsequent impulsive or non-compliant behaviors. Mr. XXXX recommended that the Student continue to receive special education services to experience academic and social success and that the IEP team should consider her continued placement based upon her educational needs and in consideration of the level of success she has experienced in her current setting. (Joint Ex. #32).

24. Ms. XXXX performed an Annual Review Report Summary in October 2012, which indicated that the Student mastered 100% of the following goals:

- Literacy/Reading
- Fine Motor/Written Language
- Math

The Student required a small and structured full day language based classroom in order to continue making academic and social gains. (Parent Ex. #27).

25. A Speech and Language Annual Review Summary was drafted in November 2012 by XXXX XXXX, Speech-Language Pathologist, in which Ms. XXXX indicated that the Student has made progress toward her speech and language IEP goals. Ms. XXXX recommended a full-time structured, multi-sensory language-based learning environment with a small student to teacher ratio to allow the Student to learn and use new information. (Joint Ex. #29).

26. An IEP meeting was held on November 5, 2012, which reviewed the Student's updated Classroom Annual Report Summary, dated October 2012; Speech and Language Annual

Review Report Summary, dated November 2012; Occupational Therapy Annual Review Report Summary, dated October 2012; and Counseling Annual Review Report, dated October 2012. At the IEP meeting, XXXX XXXX recommended a cognitive assessment for the Student. This IEP contained goals in the following areas:

- Reading Vocabulary
- Reading Comprehension
- Math Calculation
- Math Problem Solving
- Written Language Mechanics
- Speech and Language – Receptive Language
- Speech and Language – Expressive Language
- Speech and Language – Pragmatics
- Behavioral – Social/Emotional
- Behavioral – Social Interaction
- Physical – Sensory/Motor

The IEP specified 27.5 hours of special education services provided primarily by a special education classroom teacher for 44 weeks outside of general education from November 5, 2012 to November 5, 2013. The supplemental aids, services, program modifications and supports section specified a low student to teacher ratio and a small class size. The IEP also specified the following related services performed outside of general education for 44 weeks:

- OT – 30 minutes per week delivered primarily by an occupational therapist
- Counseling Services – 30 minutes per week delivered primarily by a school social worker
- Speech and Language – 90 minutes per week delivered primarily by a speech and language pathologist

The November 5, 2012 IEP placed the Student at [School 2]. (Joint Ex. #25)

27. A Speech and Language Evaluation was performed on the Student on November 8, 9, 13, 15, and 19, 2012 by her School Speech and Language Pathologist, XXXX XXXX. The Student's standard scores for Core Language, Receptive Language, Expressive Language and Language Structure all fall within the average range. The Student's score on Language Content was above average. The Student presented with a low average to mild deficit in her expressive

and pragmatic language skills. The small classroom size has facilitated the Student's progress in speech and language. (Joint Ex. #31).

28. For the academic period of October 10, 2012 to January 7, 2013, the Student achieved her Physical-Sensory Motor goal and was making sufficient progress to meet the following goals of her November 5, 2012 IEP:

- Speech and Language – Receptive Language
- Speech and Language – Expressive Language
- Speech and Language – Pragmatics
- Behavioral – Social/Emotional
- Behavioral – Social Interaction Skills

29. The IEP team met for a reevaluation meeting on January 10, 2013, to review Mr. XXXX's Psychological report and the updated Speech and Language, Educational, and Occupational Therapy reports. The IEP team agreed that the Student continues to present as a student with the educational disability of autism. The IEP team agreed to order a social/emotional/behavioral assessment including reevaluation for autism.

30. At the January 10, 2013 meeting, XXXX XXXX, the BCPS Non-Public Liaison, stated that the Student may be ready to return to BCPS for the 2013-2014 school year since she has made tremendous gains and her test scores fall in the average range for her chronological age. The supplemental aids, services, program modifications and supports section specified a low student to teacher ratio and a small class size. This IEP also specified 28.5 hours of special education services provided primarily by a special education teacher outside of general education for 44 weeks from January 10, 2013 to January 9, 2014 with placement remaining at [School 2]. (Joint Ex. #34).

31. As a result of the January 10, 2013 IEP meeting and the BCPS Notice of Consent for Assessment, a psychological assessment of the Student was performed on February 26, 2013 by BCPS Psychologist, XXXX XXXX. Mr. XXXX administered WISC-4 and the UNIT tests to

the Student. On the WISC-4 the Student demonstrated high average non-verbal reasoning skills, average verbal skills, average working memory skills and average processing speed abilities. The Student's full IQ measured by the UNIT exam was in the superior range of functioning. Mr. XXXX found that the Student continues to meet the criteria for Autism Spectrum Disorder. The Student displays sensory sensitivity, unusual behaviors and behavioral rigidity at times. Mr. XXXX agreed that the Student's current accommodations, modifications and school-based services appear to be appropriate as well as the recommendations included in XXXX XXXX's January 2013 psychological report. (Joint Ex. #37).

32. XXXX XXXX, LCSW-C, [School 2] Social Worker, completed a Review of Social Skills Counseling for the Student on January 10, 2013. Ms. XXXX noted that the Student exhibits above average hyperactivity in the school setting when she is not interested in the instructional activity. The Student becomes easily distracted in her six-student classroom and often needs assistance to return to the task through the use of multiple reminders and incentives such as those addressed by the school-wide token economy. (Joint Ex. #35).

33. Dr. XXXX XXXX was asked by Ms. XXXX to observe the Student in the classroom setting. On March 18, 2013, Dr. XXXX observed the Student in her classroom setting from an observation area next to the classroom. Dr. XXXX observed the Student for approximately 45 minutes and was only able to make a visual observation because the observation area was outside of the classroom. The Student was engaged in a reading assignment and was sitting on a therapeutic ball during the assignment. Dr. XXXX did not provide her notes or a written report to the IEP team at its July 29, 2013 IEP meeting. (Testimony of Dr. XXXX and Board Ex. #22).

34. An IEP meeting was held on April 8, 2013, at which meeting XXXX XXXX participated and shared the results of his psychological evaluation of the Student. XXXX

XXXX, Special Education Teacher at [School 1] also participated in the IEP meeting. This IEP also indicated in the supplemental aids, services, program modifications and supports section that the Student should have a low student to teacher ratio and a small class size. The Student's services remained unchanged at 28.5 hours of special education instruction delivered primarily by a special education classroom teacher for 44 weeks from April 8, 2013 to January 9, 2014. The Student's services are delivered outside of general education and her placement remained at [School 2]. (Joint Ex. #39).

35. For the academic period of April 3, 2013 to June 12, 2013, the Student achieved two of her Math – Problem Solving goals and was making sufficient progress to meet the goals in the following areas of her November 5, 2012 IEP:

- Academic – Reading Vocabulary
- Academic – Reading Comprehension
- Academic – Math Problem Solving
- Academic – Written Language Mechanics
- Academic – Speech and Language – Expressive Language
- Academic – Speech and Language – Pragmatics
- Behavioral – Social Interaction Skills

(Joint Ex. #41)

36. The Student began her second grade year in July 2013 at [School 2]. The Student transitioned into a new classroom with a new special education teacher, XXXX XXXX, and three new classmates. After an initial smooth transition to her new learning environment, the Student's social/emotional behavior regressed with more interfering behaviors during class. (Testimony of XXXX).

37. When the Student's class at [School 2] was combined with another class to work on an activity, she had a harder time focusing and controlling her impulses. (Testimony of XXXX).

38. In July 8, 2013, XXXX XXXX (XXXX), Educational Associate, BCPS, observed the Student in her reading class for approximately 45 minutes. The Student was able to complete her task in a timely manner performing it independently and was easily redirected. (Testimony of XXXX).

39. XXXX XXXX, Educational Consultant, was hired by the Student's mother because of a discussion during the April 8, 2013 IEP meeting that the Student might move to [School 1]. Ms. XXXX observed the Student in her classroom setting on July 12, 2013 from 9:30 a.m. to 11:30 a.m. Ms. XXXX observed the Student in her Writing class followed by her Reading Class and then Recreation at 11:00 a.m. Ms. XXXX recommended small group instruction with a low student to teacher ratio. The Student's teacher needs to be flexible in her approach to instruction in order to gear lessons towards the Student's interests to allow her to attain learning. (Testimony of XXXX and Parent Ex. #43).

40. The Parents visited [School 1] on May 2, 2013. This visit was a tour of the school provided to all parents with children that were interested in attending [School 1] and it was conducted in the evening after the school day had ended. The Student's mother requested an opportunity to observe a class in session at [School 1] prior to the July 29, 2013, IEP meeting, but such a visit was not facilitated by BCPS.

41. An IEP meeting was held on July 29, 2013, with the following individuals:

- XXXX, Non Public Liaison, BCPS
- XXXX XXXX, Non Public Liaison, BCPS
- Student's mother and father
- XXXX XXXX, Educational Consultant
- XXXX XXXX, School Psychologist, BCPS
- XXXX XXXX, Speech and Language Pathologist, [School 2]
- XXXX XXXX, Special Education Teacher, [School 2]
- XXXX XXXX, Occupational Therapist
- XXXX XXXX, Social Worker, [School 2]
- XXXX XXXX, Special Education Teacher, [School 2]
- XXXX XXXX, Educational Director, [School 2]

- Dr. XXXX, Educational Specialist, BCPS

(Joint Ex. #47)

42. An IEP team should consist of a public school administrator with knowledge of the full continuum of services within the local education placement. (Testimony of Dr. XXXX).

43. There were no general education or special education teachers from [School 1] at the July 29, 2013 IEP meeting. (Testimony of XXXX).

44. The July 29, 2013 IEP specified goals in the following areas:

- Reading Phonics
- Reading Fluency
- Reading Vocabulary
- Reading Comprehension
- Math Calculation
- Math Problem Solving
- Written Language Mechanics
- Speech and Language Expressive Language
- Speech and Language Pragmatics
- Cognitive
- Social/Emotional
- Social Interaction Skills

(Joint Ex. #47)

45. The July 29, 2013 IEP added a Temporary Support Assistant (TSA) for a 36 -eek period from July 30, 2013 until January 9, 2014. The TSA would support the Student during instruction by providing repetition, rephrasing, redirection and other strategies and supports identified in supplemental aids and services, as needed. Small class size and low student to teacher ratio as a supplemental aid and service was removed from the July 29, 2013 IEP. (Joint Ex. #47 and Testimony of Dr. XXXX).

46. The July 29, 2013 IEP specified one hour of special education instruction per day provided to the Student by a special education teacher outside of general education. The IEP also specifies two hours of special education instruction provided daily by a general education

teacher in the general education setting. The Student would also receive one hour per week of counseling services provided by a school social worker outside of general education and 30 minutes per week of speech and language therapy provided by a speech/language pathologist outside of general education. This IEP specifies 23.5 hours per week in general education during a 30-hour school week with placement at [School 1], a public general education setting. (Joint Ex. #47).

47. The two hours per day of special education instruction specified in the July 2013 IEP would be primarily provided by the Student's general education teacher in consultation with a special education teacher regarding the Student's IEP goals and objectives. The IEP does not specify that the ten hours per week of special education instruction provided in the general education setting would be provided by a special education teacher who would be inserted into the Student's general education classroom (push-in model). (Testimony of XXXX and Joint Ex. #47).

48. Only BCPS staff at the July 29, 2013 IEP meeting agreed with the decision to reduce the Student's special education instruction and to step down her services from [School 2] to a general education setting. Ms. XXXX, Ms. XXXX and the Parents disagreed with the reduction in special education instruction for the Student. (Testimony of XXXX).

49. The Parents visited [School 1] with XXXX in October 2013. The Parents discussed the implementation of the July 29, 2013 IEP's goals, objectives and supplemental aids and services with Ms. XXXX, the Assistant Principal at [School 1]. (Testimony of Ms. XXXXX).

50. Ms. XXXX did not know what percentage of the ten hours of special education instruction specified in the July 29, 2013 IEP would be implemented by a special education teacher in the Student's classroom at [School 1]. There are 12 classrooms for the kindergarten

through third grade levels at [School 1] and one special education teacher is assigned for every student with an IEP for those grade levels. [School 1] does not employ a behavioral reinforcement system similar to the token economy utilized at [School 2]. (Testimony of XXXX).

51. A large classroom setting of approximately 25 students would require the Student to expend so much effort understanding her surroundings that she would not have the energy she needs to focus on her academic instruction. Increasing the size of the Student's classroom size could provoke anxiety in the Student and increase the level of distraction the Student experiences. (Testimony of XXXX and XXXX XXXX).

52. Increasing the pace of instruction in the Student's classroom also impacts her ability to function academically and impacts her behaviors in the classroom. Even with [School 2]'s small structured class setting, the Student requires significant educational supports to benefit academically. (Testimony of XXXX and XXXX XXXX).

DISCUSSION

Motion for Judgment

At the close of the Parents' case, BCPS made a Motion for Judgment. Under the OAH Rules of Procedure, a party may move for judgment at the close of the evidence offered by an opposing party, as provided in COMAR 28.02.01.12E:

(1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.

(2) When a party moves for judgment at the close of the evidence offered by the opposing party, the judge may:

(a) Proceed to determine the facts and to render judgment against an opposing party; or

(b) Decline to render judgment until the close of all evidence.

COMAR 28.02.01.12E is patterned after Md. Rule 2-519, Motion for Judgment, and is the OAH equivalent. Md. Rule 2-519 “allows the court to proceed as the trier of fact to make credibility determinations, to weigh the evidence, and to make ultimate findings of fact.” *Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 402, n. 4 (1998). In deciding a Motion for Judgment, the judge is not required to view the evidence in a light most favorable to the non-moving party. *Id.*

BCPS argued that the Student’s issue regarding the proper evaluation of the Student should be dismissed. I disagree. The issue of student evaluations is not an issue in this matter and was never raised by the Parents during their case or in their due process complaint. Accordingly, I denied the BCPS Motion for Judgment on the record and the hearing on the merits proceeded.

Merits

The Governing Law

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parents have the burden of proving the allegations made against BCPS. The burden is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2009). To prove their case by a preponderance of the evidence, the Parents must show that it is more likely than not that BCPS failed to provide the Student a free and appropriate public education (FAPE). Merely asking questions and raising doubt does not constitute proof by a preponderance of the evidence.

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487, 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008), and COMAR 13A.05.01. The IDEA provides that all children with

disabilities have the right to a FAPE. 20 U.S.C.A. § 1412. Courts have defined the word “appropriate” to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Clearly, no bright line test can be created to establish whether a student is progressing or could progress educationally. Rather, the decision-maker must assess the evidence to determine whether the Student’s IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined a FAPE as follows:

Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child... We therefore conclude that the basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to give educational benefit to the handicapped child.

458 U.S. at 200-201. In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefits. 458 U.S. at 206-207. See also, *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. at 176. Instead, a FAPE

entitles a student to an IEP that is reasonably calculated to enable that student to receive educational benefit.

The IDEA provides every disabled child the right to a FAPE which is defined as special education and related services that: are provided at public expense, under public supervision; meet the standards of the State educational agency; include appropriate education; and are provided in conformity with the child's IEP. 20 U.S.C.A. § 1400(d)(1)(A). An IEP must outline a student's current educational status (present levels of performance), establish annual goals, and detail the special educational services and other aids the child will receive. 20 U.S.C.A. § 1414(d)(1)(A)(i). The IEP must also describe the frequency and location of the services and modifications. 20 U.S.C.A. § 1414(d)(1)(A)(i)(VII). An IEP is substantively satisfactory if it is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207.

In addition to the IDEA's requirement that a disabled child receive educational benefit, the law mandates that the child must be placed in the "least restrictive environment" (LRE). This means that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5)(A). Nonetheless, mainstreaming disabled children into regular school programs may not be appropriate for every disabled child. 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, FAPE might require placement of a child in a private school setting that would be fully funded by the child's public school district. *See School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

The IDEA also provides "procedural safeguards to insure the full participation of parents and proper resolution of substantive disagreements." *Burlington*, 471 U.S. at 368. As is relevant

here, those safeguards include the opportunity of parents with a disabled child to participate in meetings with respect to the identification, evaluation and educational placement of the child. 20 U.S.C.A. § 1415(b)(1).

The Student in the present case is a XXXX-year-old girl with autism. She performs in the average to high average range cognitively but suffers from social and emotional issues that impact her ability to attain educational benefit.

The Student received services from a young age through the Infant and Toddlers program. She has attended [School 2] since 2010 when her IEP specified a special education setting outside general education. The Student has been at [School 2] since March 2010 with an IEP each year specifying continued placement at [School 2].

By January 2013, BCPS was considering whether a public school placement could meet the Student's needs and it recommended an additional psychological assessment performed by a BCPS psychologist. Ultimately, a psychological assessment was performed by BCPS Psychologist XXXX XXXX, on February 26, 2013.

The IEP team held a subsequent meeting on April 8, 2013, to evaluate XXXX XXXX's report and other updated educational assessments of the Student. The Parents participated in this IEP meeting as well as a special education teacher from [School 1] and the team maintained the Student's placement in a full time special education setting at [School 2].

The IEP team reconvened on July 29, 2013 and recommended that the Student be placed in a public school with five hours per week of special education services provided by a special education teacher outside of general education and ten hours of special education instruction provided by a general education teacher in the general education setting. The IEP specified placement at [School 1], a BCPS general education setting. The Student would have a TSA, that is, a one-on-one aide with her at all times.

The Parents presented two arguments. First, they allege procedural error because BCPS failed to have educators from [School 1] at the July 29, 2013 IEP meeting and failed to provide them an opportunity to observe a classroom setting at [School 1]. Accordingly, the Parents allege that BCPS denied them meaningful participation in the IEP process.

Second, the Parents challenged the adequacy of the special education instruction described in the IEP. They argue that the IEP fails to provide the Student FAPE because of the reduction of service hours and the increase in general education hours in a general education setting. The Parents maintained that [School 2] is still an appropriate placement.

BCPS responded that there were no procedural violations and that [School 1] can implement the IEP and it is the LRE. The Student has made significant progress in most of her academic areas and keeping her at [School 2] would inhibit her ability to model non-disabled peers in a LRE.

The Parents bear the burden of proving that BCPS violated the procedural mandates of the law, that the IEP is substantively deficient, and that [School 2] is an appropriate placement. I find that the Parents failed to prove that BCPS violated the procedural safeguards of the law. The Parents were provided sufficient opportunity to participate in the IEP team meetings. I do find, however, that the Parents established by a preponderance of the evidence that the July 29, 2013 IEP fails to provide the Student FAPE because it places the Student in a general education classroom when she requires special education instruction in all classes. Finally, I find that the Parents established by a preponderance of the evidence that [School 2] is an appropriate placement.

I. Procedural Violations

The *Rowley* Court explained that it is “no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents . . . a large measure of

participation at every stage of the administrative process [] as it did upon the measurement of the resulting IEP against a substantive standard.” *Rowley*, 458 U.S. at 205-06.

Not every violation of a procedural requirement under the IDEA is sufficient grounds for relief. *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002). “[T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.” *Id.*, quoting *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); see also *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 534 (4th Cir. 2002); *Wagner v. Bd. of Educ. of Montgomery County*, 340 F.Supp.2d 603, 617 (D. Md. 2004).

a. Presence of a general education teacher and special education teacher from [School 1] at the July 29, 2013 IEP meeting.

The Parents asserted that BCPS failed to have a general education teacher and a special education teacher from [School 1] present at IEP meeting on July 29, 2013.

20 U.S.C.A. § 1414(d)(1)(B) (2010) outlines the composition of the IEP team and states, in pertinent part:

The term “individualized education program team” or “IEP Team” means a group of individuals composed of—

...

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment)

Section 1414(d)(3)(C) establishes that “[a] regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child[.]” The Student’s special education teachers from [School 2] attended the meetings; however, no general education teachers or special education teachers from [School 1] participated in the July 29, 2013 IEP meeting.

Assuming the team was not properly constituted, I turned to a decision of the Second Circuit, which addressed the extent of participation required by the general education teacher in the recent case of *K.L.A. v. Windham Southeast Supervisory Union*, 371 F. App'x. 151 (2d Cir. 2010). In *K.L.A.*, the parents argued that the IEP team meetings were procedurally defective because the regular education teacher at the proposed placement only attended some of the meetings. The Court held in *K.L.A.* that “the mere absence of a regular educator at any given IEP meeting is not a *per se* procedural violation.” *Id.* at 153. The real issue, according to the Court, was whether the regular educator had attended IEP meetings “to the extent appropriate.” *Id.* The Court reasoned that although the participation of the regular education teacher was required by the IDEA, the analysis of whether the participation of the regular education teacher was satisfactory should not be reduced to a “strict counting exercise.” *Id.* at 154. Instead, the Court framed the issue as whether the increased presence of the general educator could have led to a different educational placement for the student. In holding that the parents suffered no prejudice from the absence of the general educator’s input, the Court relied on the fact that the parents had already enrolled the student in the recommended educational placement irrespective of the opinion of the regular education teacher.

In this matter, the discussion regarding services was led by XXXX at the July 29, 2013 meeting and she found that the Student’s academic progress warranted a transition from a full time special education placement to a general education setting with proper supports and accommodations. The Parents argued that since a visit to an in-session classroom at [School 1] was not facilitated by BCPS in addition to the lack of a general or special education teacher from [School 1] at the July 2013 IEP, the Student was denied FAPE. I disagree. While it would have been helpful for the Parents to gain an understanding of the nature of the classroom setting at [School 1] and how that setting would be able to incorporate the Student’s IEP, I find that the

Parents were not prejudiced by this as they objected to the BCPS decision to transition the Student from [School 2] to a general education setting. The Parents position would not have changed even if representatives from [School 1] were present as their objection was to the transfer to a general education setting, not necessarily the location of that setting. Accordingly, I find that the Parents did not meet their burden to show that the Student was prejudiced by the lack of any special education or general education teachers from [School 1] or any other general education setting at the July 29, 2013 IEP meeting.

II. Substantive Violations

Generally, the parties did not dispute the nature and extent of the Student's disabilities, her present levels of performance and her need for counseling and speech and language services. All the IEPs on record document that the Student's primary disability is autism and that the areas affected by her disability are math (calculation and problem solving), reading (comprehension and vocabulary), speech and language (expressive, pragmatic and written language mechanics), behavioral (social/emotional and social interaction skills). Instructional and testing accommodations on the IEPs include visual and graphic organizers, extended time with multiple or frequent breaks and an environment that minimizes auditory and visual distractions. (Joint Ex. #47).

The January 15, 2010 IEP called for 27.5 hours of direct special education instruction provided by a special education classroom teacher. This IEP was amended on March 19, 2010 to reflect the Student's placement at [School 2]. Another IEP was held on November 7, 2011 and it maintained 27.5 hours of direct special education instruction for the Student with placement remaining at [School 2]. This IEP also specified a low student teacher ratio and a small class size. The Student's IEP remained unchanged when the IEP team reconvened on November 5, 2012 as it still specified 27.5 hours of special education services provided primarily by a special

education teacher with placement remaining at [School 2]. The IEP team reconvened on January 10, 2013 to review Mr. XXXX's psychological report along with updated speech and language, educational and occupational therapy reports. The January 2013 IEP specified 28.5 hours of special education services provided by a special education teacher outside of general education with placement remaining at [School 2]. At the January 2013 IEP, the team agreed to order a social/emotional behavioral assessment of the Student and that assessment was performed by BCPS psychologist, XXXX XXXX. Mr..XXXX agreed that the Student's current accommodations and school-based services were appropriate and he also agreed with Mr. XXXX's recommendations from his psychological evaluation. Mr. XXXX's participated in an April 8, 2013 IEP meeting in which he shared the results of his psychological evaluation. The April 2013 IEP team left the Student's services unchanged at 28.5 hours of special education instruction delivered by a special education instructor outside of general education resulting in the Student's continued placement at [School 2].

XXXX, the BCPS non-public liaison, along with Dr. XXXX, BCPS educational consultant, championed the Student's transition from [School 2] to a general education setting at [School 1]. The non-BCPS participants at the July 2013 IEP meeting, namely the Parents, and [School 2] teachers, related services providers and staff, objected to the BCPS decision to transition the Student from [School 2] to a general education setting. The Parents argued that a general education setting would not provide the Student with FAPE. I agree.

BCPS presented Dr. XXXX XXXX, who was accepted as an expert in autism and curriculum instruction. Dr. XXXX testified that the July 29, 2013 IEP would provide the Student with FAPE. Dr. XXXX asserted that a special education teacher would be assigned to re-teach, pre-teach and implement the IEP goals and objectives for the Student's seven subject areas during the allotted one hour per day of instruction outside the general education setting.

Dr. XXXX went on to state that the Student does not need a small class size to receive educational benefit. She based this belief on the Student's psychological report, educational assessment, progress notes and IEP goals/objectives. Dr. XXXX noted that the Student was performing at or above her grade level in broad reading, broad math and broad written language. Dr. XXXX also stated that during her observation of the Student, the Student did not show any outward signs of autism and that her progress reports indicated sufficient progress in all of her IEP objectives. She also reiterated that the TSA assigned to the Student in accordance with the July 2013 IEP would ease her transition to [School 1].

XXXX, accepted as an expert in speech and language pathology, also testified on behalf of BCPS. XXXX was the IEP case manager and non-public liaison for BCPS. She testified that the Student's strong academic skills, average to above average cognitive profile and average to superior speech and language assessments were relied upon by her when she posed to the IEP team that the Student was ready to transfer from [School 2] to [School 1]. XXXX also relied on her July 8, 2013, 45 minute observation of the Student in her class at [School 2] in forming her opinion that the Student was ready to transfer to [School 1].

I agree with BCPS' assertion that the Student's cognitive scores are in the high average range. Her December 2012 WISC-3 scores, with the average range consisting of a score of 85-115, were as follows:

Broad Reading -	117
Broad Math -	108
Broad Written Language -	116

I also agree with BCPS that the Student is making sufficient progress in her IEP goals and objectives while mastering some of those objectives. However, I find that the Student's current special education teachers along with the psychological assessments performed all indicate that

the Student would not receive educational benefit in a general education setting due to her social/emotional behavioral issues that would inhibit her ability to learn in such a setting.

The Fourth Circuit has noted, in the context of federal court review of a decision made by a state special education hearing officer, that a court should be reluctant to second-guess professional educators: “As we observed in *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990), ‘once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.’ Indeed, we should not ‘disturb an IEP simply because we disagree with its content,’ and we are obliged to ‘defer to educators’ decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides.’” *Id.* (internal citation and quotations omitted). *MM ex. Rel. DM v. School District of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002).

Therefore, I am giving deference to Ms. XXXX and Mr. XXXX over the opinions expressed by Ms. XXXX and Dr. XXXX due to their extensive knowledge of the Student’s classroom performance and behavioral issues. Observation of the Student in the academic environment is a crucial element in determining how she has made academic progress. Ms. XXXX, accepted as an expert in special education, has by far the most experience with the Student in the classroom setting as she began working with her in June 2010 as an assistant teacher in the Student’s class and she later became the Student’s special education teacher at [School 2] in July 2011. Ms. XXXX modified the class curriculum to reflect the Student’s intense interest in certain subjects such as whales or dinosaurs. This was necessary because if the lessons were not tailored to the Student’s specific interests, she would tune out the lessons and fail to receive educational benefit. Ms. XXXX noted that the Student requires a small structured academic setting to allow for redirection and reinforcement to facilitate her ability to

complete tasks and maintain attention. Ms. XXXX also noted that the Student is easily distracted even in her small class setting of six students and that she has cried in reaction to loud noises. Ms. XXXX disagrees with BCPS' assertion that the July 2013 IEP provides the Student with FAPE. She believes that the Student would not receive educational benefit when placed in the general education setting with more than 20 students in a class. Ms. XXXX opined that the Student continues to need a small structured full-time special education setting in order to receive educational benefit.

Ms. XXXX's opinion is echoed by XXXX XXXX, School Psychologist at [School 2]. Mr. XXXX has provided psychological consultative services to the Student on at least a quarterly basis for the past three years. Mr. XXXX testified that the Student requires a separate private day school setting with a low student to teacher ratio because of her anxiety and the fact that she is easily distracted by ambient noise. Mr. XXXX also noted that the Student needs frequent breaks to regain mental energy and motivation during more complex work as her processing speed and working memory lead to mental exhaustion and subsequent impulsive or non-compliant behaviors.

Most telling is that BCPS ordered an additional psychological assessment of the Student which was performed by BCPS psychologist XXXX XXXX on February 26, 2013. Mr. XXXX participated in the April 2013 IEP meeting and he agreed that the Student's current accommodations, modifications and school based services were appropriate. Mr. XXXX also agreed with the recommendations made in Mr. XXXX's January 2013 report. Essentially, Mr. XXXX agreed that continued placement for the Student at [School 2] was appropriate.

In summary, I find that Ms. XXXX's and Mr. XXXX's observations of the Student should be given deference because of their professional expertise and first-hand observations of her. On the other hand Dr. XXXX and Ms. XXXX only observed the Student for a brief period of time.

Dr. XXXX observed the Student for 45 minutes in March 2013, and that observation was only visual in nature as she was outside of the classroom. Further, Ms. XXXX only observed the Student for a 45 minute period during her reading class in July 2013. Accordingly, I find the testimony of Ms. XXXX and Mr. XXXX to be more convincing than the testimony of Dr. XXXX and XXXX.

Additionally, Ms. XXXX, accepted as an expert in special education and inclusive education, observed the Student for two hours her classroom on July 12, 2013. Ms. XXXX also found that the Student requires small group instruction with a flexible teaching philosophy that allows the teacher to gear lessons towards the Student's particular interests to allow her to attain learning.

Furthermore, the Student's difficulties with a larger general education setting were illustrated when Ms. XXXX combined her class with another class for an activity which resulted in the Student having a harder time focusing and controlling her impulses. Both Ms. XXXX and Mr. XXXX believe that a larger classroom setting of approximately 25 students would result in the Student expending such effort into understanding her surroundings thereby sapping the energy she needs to focus on her academic instruction. Again, I place greater deference on the opinions of Ms. XXXX and Mr. XXXX due to their extensive experience with the Student.

The additional service provided in the July 2013 IEP to assist the Student in her transfer to a general education setting was the inclusion of a TSA and the use of picture and graphic organizers. Putting aside for the moment that the IEP fails to specifically state that the TSA will be trained in autism, the question is whether a TSA and the additional use of graphic organizers are sufficient to provide the Student meaningful access to education in the general education setting, or whether the Student requires direct specialized instruction delivered by a special education teacher in all areas. The evidence establishes that placement in a general education

classroom even with a TSA and additional graphic organizers, fails to provide the Student FAPE.

In Mr. XXXX's opinion, the Student requires a classroom with a low student-to-teacher ratio and an educational setting that is calm and quiet. Most importantly, he testified that increasing the pace of instruction will impact her ability to function academically and would also impact her behaviors in the classroom resulting in her not receiving a meaningful educational benefit in that setting.

As stated above, Mr. XXXX also testified that the Student requires a small class setting with as few distractions as possible. The general education classroom at [School 1] would have approximately twenty-five students enrolled, which fails to meet the Student's needs.

Mr. XXXX's testimony and report along with Ms. XXXX's testimony, specifically on the issue of the Student's cognitive functioning and ability to receive meaningful educational benefit in the general education classroom, is persuasive and proves that the July 29, 2013 IEP fails to provide FAPE. If the IEP provided that the Student would receive all instruction in a special education classroom, that IEP might have provided her FAPE. That is not the IEP before me. The July 29, 2013 IEP requires the Student to be included in general education classes for all but five hours per week with a TSA who may or may not be required under the IEP to be trained in autism, and that setting is inappropriate. The progress achieved by the Student at [School 2] was because of her small structured setting with a full-time special education instructor.

I find that the Student's disability requires a small structured special education setting that cannot be provided in a general education setting. The Student's vulnerability to distraction and inability to keep pace in a general education setting would result in her failure to obtain educational benefit in a general education setting such as [School 1].

Further, BCPS did not present any witnesses from [School 1] or any other general education setting to testify regarding their ability to implement the Student's IEP in their setting.

The only connection made by BCPS regarding [School 1]’s ability to implement the July 2013 IEP was through Ms. XXXX’ testimony that she discussed the IEP with Ms. XXXX, Assistant Principal at [School 1], and that Ms. XXXX indicated that the IEP could be implemented. However, without further examination through both direct and cross examination, I cannot rely on this single statement to find that [School 1] is capable of implementing the Student’s July 2013 IEP, particularly in light of the testimony of persons such as Ms. XXXX and Mr. XXXX who have the best first-hand knowledge of the Student’s education needs. Accordingly, I find that the July 2013 IEP does not provide the Student with FAPE in reference to its placement of services in a general education setting at [School 1].

III. Continued Placement at [School 2]

The parties agree that the Student has made steady progress at [School 2]. BCPS argued that [School 2] is not an appropriate placement because it is not the LRE for the Student because she has no contact with non-disabled peers and her cognitive scores indicate that she is ready for placement in a general education setting.

BCPS asserted that the Student would greatly benefit from modeling non-disabled peers at [School 1]. It asserted that [School 1] is the LRE setting for the Student. 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 acquire a FAPE. This means that, ordinarily, disabled and non-disabled students should be educated in the same class. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114(a)(2)(i) and 300.117.

BCPS points out that IDEA’s mandate that disabled children be educated in the LRE 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 so long as it is consistent with the IDEA goal of providing

disabled students with an appropriate education. Where necessary for educational reasons, public school placement with instruction in a general education classroom assumes a subordinate role in formulating an educational program. *See Rowley*, 458 U.S. at 181.

Mr. XXXX and Ms. XXXX acknowledged that exposure to non-disabled peers would benefit the Student. It is a trade-off, however, and in their opinion, it is better for the Student to have intensive services rather than peer exposure. Mr. XXXX and Ms. XXXX also indicated that any benefit derived by the Student's interaction with non-disabled peers would be offset by her inability to function in a large classroom setting in which the increased pace of instruction and the inability to create lessons based on the Student's intense particularized interests would prevent the Student from obtaining educational benefit. Mr. XXXX and Ms. XXXX agreed that the Student requires an ongoing, intensive level of intervention. The Student continues to make educational progress at [School 2] toward her IEP goals and such progress was only achieved due to the small structured setting with a token-based behavioral reinforcement system found at [School 2]. Based on Mr. XXXX and Ms. XXXX's testimony and reports and Mr. XXXX's report, coupled with the lack of evidence presented by BCPS regarding [School 1]'s ability to implement the Student's IEP in a manner to allow the Student to receive educational benefit, I find that the Parents have established that [School 2] is the LRE at this time and is a placement where the Student will receive meaningful educational benefit.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact and discussion, I conclude as a matter of law that BCPS provided a properly constituted IEP team meeting on July 29, 2013 and did not deny the Student FAPE on that basis. 20 U.S.C.A. § 1415(b)(1); *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985); *M.C.E. v. Board of Ed. of Frederick Co.*, 57 IDELR 44 (U.S. District Ct., Md. (2011))

I further conclude as a matter of law, however, that BCPS' proposed placement of the Student in a public elementary school for the 2013-2014 school year fails to offer the Student FAPE, and that [School 2] is appropriate to meet the Student's educational needs. 20 U.S.C.A. § 1400(d)(1)(A) (2010); *Board of Educ. v. Rowley*, 459 U.S. 176 (1982).

ORDER

I **ORDER** that the BCPS continue to place the Student at [School 2] for the 2013-2014 school year.

January 8, 2014
Date Decision Mailed

Brian Zlotnick
Administrative Law Judge

BMZ/emh

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.