XXXX XXXX	*	**BEFORE JENNIFER L. GRESOCK,**
	*	**AN ADMINISTRATIVE LAW JUDGE**
v.		
	*	**OF THE MARYLAND OFFICE**
BALTIMORE CITY PUBLIC	*	**OF ADMINISTRATIVE HEARINGS**
SCHOOLS	*	**OAH NO.: MSDE-CITY-OT-13-37226**

* * * * * * * * * * * * *

DECISION

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ORDER

STATEMENT OF THE CASE

On September 30, 2013, [Father] and [Mother][1] (Parents), on behalf of their child, [Student] (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) (2010).

I held a telephone prehearing conference on November 22, 2013. The Parents were present and represented by Wayne Steedman, Esquire. Darnell Henderson, Esquire, represented BCPS. Based on their respective schedules, Counsel for the parties expressly requested that this matter be scheduled for January 14, 15, 17, 21, and 23, 2014. After confirming the unavailability of Counsel until the requested dates, I scheduled the hearing for those dates.

[1] [Mother] uses the name XXXX XXXX professionally, and the latter name appears in some of the documents admitted into the record.

I held the hearing on January 14, 15, 17, 23, and 27, 2014. Because of inclement weather, the January 21, 2014 hearing date was cancelled and the date of January 27, 2014 was added, based on a joint proposal to me by Counsel for the parties. Mr. Steedman and his co-counsel, Cheryl Steedman, represented the Parents. Mr. Henderson represented BCPS.

Federal regulations require that the due process hearing be heard, and a decision issued, with 45 days of certain triggering events described in the federal regulations. The OAH received the due process complaint on September 30, 2013 and BCPS received it on October 1, 2013. A resolution session took place on October 11, 2013; this resolution session did not resolve the issues, and while the parties discussed a second resolution session, it did not occur. On November 4, 2013, BCPS notified OAH that the resolution period had expired and that no resolution had been reached. Therefore, the triggering event in this case was the conclusion of the 30-day resolution period on October 31, 2013. 34 C.F.R. § 300.510(b). The expiration of the resolution period on October 31, 2013, triggers the 45-day timeframe for the due process hearing and decision.[2] 34 Code of Federal Regulations (C.F.R.) § 300.510(b) and (c); 34 C.F.R. §§ 300.515(a) and (c) (2013). The hearing dates requested by the parties fell more than 45 days after the triggering event described in the federal regulations. However, during the telephone prehearing conference, the parties expressly waived this 45-day timeframe for the due process hearing and decision. In addition, at the conclusion of the hearing on January 27, 2014, the parties jointly agreed to an extension of time, until 30 days after the conclusion of the hearing, for me to issue a decision. 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2008).

[2] My Prehearing Conference Report erroneously identifies the October 11, 2013 resolution session as the triggering event. In fact, the triggering event is the expiration of the resolution period.

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) (2013); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; the Maryland State Department of Education procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13A .05.01.15C; COMAR 28.02.01.

ISSUE

The issue is whether BCPS offered a free appropriate public education (FAPE) to the Student for the 2013 - 2014 school year.

SUMMARY OF THE EVIDENCE

A. Exhibits

I admitted the following exhibits on behalf of the Parent(s):

P-1 BCPS Notice of Individualized Education Program (IEP) Team Meeting, dated October 4, 2013

P-2 BCPS Prior Written Notice, dated October 11, 2013

P-3 BCPS Notice of Documents Provided to Parent for Review at an IEP Meeting, dated November 25, 2013

P-4 Email chain between Mr. Henderson, Mr. and Ms. Steedman, and Ms. XXXX, dated November 22, 2013 through November 27, 2013

P-5 [District] Public Schools Reevaluation IEP, dated March 7, 2008

P-6 [District] Public Schools Annual Review IEP, dated October 20, 2009

P-7 [District] Public Schools Reevaluation Eligibility Determination, dated January 27, 2011

P-8 [District] Public Schools Annual Review IEP, dated October 1, 2012

P-9 XXXX by Marriott Receipt, dated August 25-27, 2013

P-10 XXXX Van Lines Receipt, dated August 27 and 28, 2013

P-11 BCPS Required Documentation for Registration or Transfer Online Printout, printed January 8, 2014

P-12 Email chain between Mr. Henderson, [Mother], XXXX XXXX, Mr. Steedman, and Ms. Steedman, dated September 26 through September 30, 2013

P-13 Letter from Ms. Steedman to OAH and BCPS, dated September 30, 2013; Request for Mediation, dated September 30, 2013

P-14 Email chain, dated October 29 – 31, 2013

P-15 BCPS Resolution Session form, dated October 11, 2013

P-16 City Schools' Response to Due Process Complaint, undated

P-17 Letter from [School 1], dated October 8, 2013; Speech and Language Report, undated; Occupational Therapy Rationale for Services, undated; Related Service Authorization Contract, dated October 9, 2013

P-18 Resume of XXXX XXXX

P-19 Observation Report by Ms. XXXX, dated December 17, 2013

P-20 Resume of XXXX XXXX

P-21 Email from Ms. XXXX to Mr. Henderson, dated December 20, 2013

P-22 Copy of a Date Book Page, dated September 26–28, 2013

P-23 [District], [State] Triennial Speech/Language Evaluation, dated December 15, 2010

P-24 [District] Public Schools Occupational Therapy Re-Evaluation, dated December 3, 2010

I admitted the following exhibits on behalf of BCPS:

BCPS-1	[Not offered for admission]
BCPS-2	[Not offered for admission]
BCPS-3	[Not offered for admission]
BCPS-4	[District] Public Schools Annual Review IEP, dated October 1, 2012
BCPS-5	BCPS Notice of Individualized Education Program (IEP) Team Meeting, dated December 11, 2013
BCPS-6	BCPS Prior Written Notice, dated December 2, 2013
BCPS-7	BCPS Notice of Individualized Program (IEP) Team Meeting, dated October 23, 2013
BCPS-8	BCPS Prior Written Notice, dated October 11, 2013
BCPS-9	BCPS Notice of Individualized Education Program (IEP) Team Meeting, dated October 4, 2013
BCPS-10	BCPS Consent for Release of Information, dated October 2, 2013
BCPS-11	BCPS Psychological Report, dated November 20, 2013
BCPS-12	Student Observation Report by XXXX XXXX, dated November 12, 2013
BCPS-13	BCPS Educational Assessment Report, dated November 7, 2013
BCPS-14	Occupational Therapy Re-evaluation, dated November 7, 2013
BCPS-15	BCPS Speech/Language Assessment Report, dated November 12, 2013
BCPS-16	[Not offered for admission]
BCPS-17	[Not offered for admission]
BCPS-18	BCPS School Calendar, 2013 -2014 School Year
BCPS-19	Resume of XXXX XXXX

BCPS-20 Resume of XXXX XXXX

BCPS-21 Curriculum Vitae of XXXX XXXX

BCPS-22 Resume of XXXX XXXX

BCPS-23 Resume of XXXX XXXX

BCPS-24 Resume of XXXX XXXX

BCPS-25 Curriculum Vitae of XXXX XXXX

BCPS-26 Resume of XXXX XXXX

BCPS-27 Letter from [School 1] to the Parents, dated January 30, 2013

BCPS-28 [School 1] Application for Admission, dated December 12, 2012

BCPS-29 [School 1] – A Division of the XXXX Personal Education Plan, dated August 26, 2013

B. Testimony

The Parents testified and presented the following witnesses:

- XXXX XXXX, IEP Chairperson at [School 2] ([School 2]) (adverse witness);
- XXXX XXXX, accepted as an expert in special education;
- XXXX XXXX, accepted as an expert in special education;
- XXXX XXXX, Education Director, [School 1] (on rebuttal);

BCPS presented the following witnesses:

- XXXX XXXX, accepted as an expert in special education and IEP process management for BCPS;

- XXXX XXXX, accepted as an expert in special education and IEP process management;
- XXXX XXXX, accepted as an expert in general administration and general education;
- XXXX XXXX, accepted as an expert in special education;
- XXXX XXXX, school counselor at [School 2];
- XXXX XXXX, accepted as an expert in speech language pathology;
- XXXX XXXX, accepted as an expert in school psychology;
- XXXX XXXX, accepted as an expert in school-based occupational therapy;
- XXXX XXXX, accepted as an expert in special education;

FINDINGS OF FACT

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

1. The Student is a XX-year-old girl, identified by BCPS as intellectually disabled.[3]
2. In early 2012, the Student's family was living in [State], where the Student attended the [School 3], a private day school.
3. The Student was placed at the [School 3] by the [District] Public School district ([District]) as part of her Individualized Education Program (IEP).
4. The Student first received early intervention services, including speech and language therapy, occupational therapy, and physical therapy, as a preschooler in [State].
5. The Student attended a public school in [District] until the third grade (2008 – 2009 school year), when her IEP team placed her in the [School 4], a private day school. That

[3] The Student's [State] IEP identifies her as "communication impaired." Ex. P-7.

placement was pursuant to an IEP with an implementation date of September 4, 2008 through June 25, 2009.

6. The implementation date of the Student's next IEP was October 21, 2009 through October 20, 2010. However, despite the gap between this IEP and her previous one, the Student continued to attend the [School 4] at the start of the fourth grade (2009 – 2010 school year), with no break in public funding from [District].
7. The Student attended fifth grade (2010 – 2011 school year) at the [School 4] pursuant to her October 21, 2009 IEP and her next IEP, with an implementation date of January 28, 2011 through January 27, 2012.
8. The Student attended sixth grade (2011 – 2012 school year) at the [School 4].
9. The Student attended seventh grade (2012-2013 school year) at the XXXX School because of problems (unrelated to the Student or her performance) at the [School 4].
10. The IEP prepared by [District], with an implementation date of October 2, 2012 through October 1, 2013, identified the Student's disability as Communication Impaired. In addition to placement in a private day school, the IEP provides for small group speech therapy for 40 minutes twice per week and occupational therapy for 30 minutes once per week.
11. In August 2012, the Student's father began employment in the Baltimore area. He commuted daily between Baltimore and the family's home in [State].
12. On an unspecified date, the Student's mother contacted the XXXX Group for information as she researched schooling options for the Student in preparation for the family's move to the Baltimore area.
13. The XXXX Group told the Student's mother that public schools in Maryland were larger in terms of student population than the private school the Student had attended in [State].

14. In December 2012, the Student's mother submitted an application for the Student at the [School 1] ([School 1]).
15. On January 30, 2013, the Student was offered a place at the [School 1] for the 2013 -2014 school year, contingent on a signed contract or "placement by a jurisdiction."
16. In March 2013, the Parents signed a contract for the Student's placement at [School 1] for the 2013-2014 school year.
17. In June 2013, the Parents paid a tuition deposit for the Student at the [School 1].
18. During the summer of 2013, the Parents sought to buy a home in the Baltimore area.
19. In July 2013, the purchase contract for a home the Parents attempted to buy in Baltimore County did not materialize, and the Parents instead placed a bid on a home in Baltimore City, which was successful.
20. The Student's family checked into the XXXX by Marriott (Marriott) in Baltimore City on August 25, 2013, in preparation for their move from [State] to Baltimore City and in anticipation of the Student's first day of school on August 26, 2013. The family stayed at the Marriott through August 27, 2013.
21. The Student began school at the [School 1] on the first day of the 2013-2014 school year, August 26, 2013.
22. The family's move from [State] to Baltimore took place on August 27th and 28, 2013.
23. The family's move and adjustment to the Baltimore area was chaotic and difficult, and the Student's mother experienced severe depression in the weeks following the move.
24. On September 26, 2013, the Student's mother contacted the Student's home BCPS school, [School 2] ([School 2]) to inquire about enrolling her daughter.

25. Also on September 26, 2013, the Parents' attorney contacted BCPS and sought to have the Student's IEP extended, which BCPS discussed but was ultimately not willing to agree to.
26. The following day (Friday, September 27, 2013), the Student's mother went to [School 2] with the documents required. Ms. XXXX assisted her with the enrollment process but did not have the computer access required to complete the enrollment. That step needed to be completed by Mr. XXXX, who was unavailable that day.
27. On Monday, September 30, 2013, Mr. XXXX entered the Student into the computer system. Late that evening, he emailed the Student's mother with confirmation of her enrollment.
28. On September 30, 2013, the Parents filed a request for a due process hearing.
29. Also on September 30, 2013, Ms. XXXX contacted [District] to obtain a copy of her most recent IEP.
30. On October 3, 2013, [District] informed Ms. XXXX that the Student's entire original file had been sent to the [School 1].
31. Ms. XXXX promptly contacted the [School 1] to obtain a copy of the Student's most recent IEP.
32. On October 11, 2013, BCPS convened an IEP meeting, pursuant to a notice dated October 4, 2013. The notice indicated that the purpose of the meeting was to review existing information to determine the need for additional data and to discuss and determine comparable services to be provided until the initial evaluation was completed.
33. At the October 11, 2013 IEP meeting, the participants included Ms. XXXX, the Parents, the Parents counsel, and Mr. Henderson. The IEP team did not discuss specific comparable services.

34. On November 7, 2013, Ms. XXXX conducted an occupational therapy assessment of the Student.
35. On November 7, 2013 Ms. XXXX conducted an educational assessment of the Student.
36. On November 12, 2013, Ms. XXXX observed the Student at the [School 1].
37. On November 12, 2013, Ms. XXXX completed a speech and language report based on a record review and observations conducted at the [School 1] on October 31, 2013 and November 5, 2013.
38. On November 20, 2013, Ms. XXXX conducted a psychological evaluation of the Student.
39. On December 2, 2013, BCPS convened an IEP meeting, pursuant to a notice dated October 23, 2013. The notice indicated that the purpose of the meeting was to review written referral and/or existing data and information, and, if appropriate, determine eligibility for special education services.
40. At the December 2, 2013 IEP meeting, the IEP team discussed the assessments that had been conducted as well as progress reports from the [School 1].
41. On January 6, 2014, BCPS convened an IEP meeting, pursuant to a notice dated December 11, 2013. The notice indicated that the purpose of the meeting was to develop the IEP.
42. At the January 6, 2014 IEP meeting, the IEP team discussed development of the Student's IEP.
43. The Student has never attended [School 2] or participated in any school-based activities there.

DISCUSSION

Motions for Summary Decision

The Parents filed a Motion for Partial Summary Decision[4], arguing that BCPS failed to extend the Student's IEP or create an interim IEP, thereby denying the Student FAPE; that BCPS failed to provide the Student with comparable services to which she was entitled in transferring from an out-of-state school district where she had an IEP in effect; and that BCPS excluded the Student's Parents from participating in the decision process with, thus denying the Student FAPE. Arguing that the material facts in support of these contentions were not in dispute, the Parents moved for Partial Summary Decision. The Parents provided affidavits and other documentation in support of their motion. BCPS filed a motion in opposition, along with a cross motion for Summary Decision, also with affidavits in support.

The OAH Rules of Procedure provide for consideration a motion for summary decision under COMAR 28.02.01.12D. Those regulations provide as follows:

> D. Motion for Summary Decision.
>
> (1). Any party may file a motion for summary decision on all or part or an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavits.
>
> …
>
> (4) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered in entitled to judgment as a matter of law.

COMAR 13A.05.01.15C(12) requires that due process hearings be conducted in accordance with COMAR 28.02.01, the Rules of Procedure of the OAH. The OAH Rules of

[4] The Parents' motion is for Partial Summary decision because they moved for judgment only with regard to a finding that BCPS failed to provide FAPE; during the prehearing conference, the parties agreed that the issue included whether the [School 1] constituted an appropriate placement, if I were to find BCPS failed to offer FAPE.

Procedure permit an administrative law judge to grant summary decision if the judge finds that "(a) [t]here is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law." COMAR 28.02.01.12D(4). This regulation is substantially similar to both Maryland Rule 2-501 and Rule 56 of the Federal Rules of Civil Procedure. Therefore, it is appropriate to refer to interpretations of each for guidance in the application of the proper standard. *See Commodity Futures Trading Commission v. Noble Wealth Data Information Services, Inc.*, 90 F. Supp. 2d 676, 684 (D. Md. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

An opposing party "may not rest upon the mere allegations or denials of the adverse party's pleading" but must come forward with "specific facts showing that there is a genuine issue for trial." *Commodity Futures Trading*, 90 F. Supp. 2d at 685 *(citing Matsushita Electronic Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "Mere unsupported speculation . . . is not enough to defeat a summary judgment motion." *Ennis v. Nat' l Ass'n of Bus. & Educational Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995) (amended March 14, 2008).

Facts are material if they would affect the outcome of a case; there is a genuine issue of fact if the evidence would allow a "reasonable [fact finder to] . . . return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. A mere scintilla of evidence in favor of a nonmoving party is insufficient to defeat a summary judgment motion. *Id.* at 251. In deciding a motion for summary judgment, or summary decision, the evidence, including all inferences there from, is viewed in the light most favorable to the nonmoving party. *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 62 (1984).

To defeat a motion for summary decision, the opposing party is required to raise a genuine dispute as to at least one material fact and the purpose of the administrative hearing is to

resolve the disputed facts. If no material facts are genuinely disputed, no hearing is required. COMAR 28.02.01.12D.

I reserved judgment on the Motions pending the conclusion of the hearing and indicated that I would be ruling on the motions in my final written decision. The parties do in fact agree on most of the material facts in this case; there is very little in dispute. However, as BCPS highlighted in its response to the Parents' motion, there is clearly disagreement as to when the Student transferred from [State] to BCPS. While the Parents offered evidence to show that the family moved after the 2013-2014 school year began, BCPS offered the affidavit of Mr. XXXX, who was informed by staff at the [School 1] that the Student transferred to the [School 1] during the summer, before the 2013-2014 school year began. The date of the transfer is relevant to the application of 34 C.F.R. § 300.323(f), which applies to transfers within the same school year.

The Parents challenge Mr. XXXX's affidavit as "triple hearsay," and urge me to discard it because it is not based on his personal knowledge. They also argue that it is clearly refuted by their own supporting documentation, including affidavits from each of the Parents. Finally, they contend that the date of the Student's transfer is irrelevant because the evidence establishes that the Student attended a summer program in [State] before she started the 2013–2014 school year at the [School 1].

While I agree that Mr. XXXX's affidavit is explicitly based on his reliance on statements by Ms. XXXX, of the [School 1], he is an employee of the Office of Special Education's Nonpublic Placement Services and spoke to Ms. XXXX in the course of his employment. He had every reason to believe the information was reliable. Viewed in the light most favorable to the nonmoving party, I find his affidavit reliable enough for purposes of denying the motion for summary judgment. While the Parents did provide supporting documentation regarding the timing of their move from [State] to the Baltimore area, the details are adequately complex (for

example, [Father]'s affidavit states that the Student's family relocated to Baltimore over the summer but established residence in Baltimore City on August 28, 2013) that a hearing, with the opportunity for cross-examination, is necessary to resolve and clarify the facts with regard to the timing of the Student's move and transfer from [State] to Baltimore City. Because these facts are key to my analysis of 34 C.F.R. § 300.323(f), cited by both parties in this case, I am not persuaded by the Parents' motion or BCPS's cross-motion that there are no material facts in dispute. Accordingly, I will consider this case on the merits.

Merits

Legal Framework

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (2010), 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. This includes children who attend private schools, who must also be identified, located, and evaluated. 20 U.S.C.A. § 1412(a)(3)(A).

This case involves a student who transferred school districts. The IDEA includes specific provisions for children with disabilities who transfer within the same state and who transfer outside a state:

> (I) Transfer within the same State
> In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.
>
> (II) Transfer outside State
> In the case of a child with a disability who transfers school districts within

> the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

20 U.S.C.A. § 1414(d)(2)(C)(i).

With regard to FAPE, 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 child 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 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.

Background

This case arose in the wake of the XXXX family's difficult and chaotic move from [State] to Baltimore City. In [State], the Student, a seventh-grader, was attending a private day school after she was placed there by her public school district, [District]. When the family planned their move to the Baltimore area, they were uncertain as to which Maryland school district they would be residing in. The Parents enrolled the Student in the [School 1], a private day school, and then moved from [State] just as the 2013-2014 school year began, even residing briefly in a Baltimore hotel to facilitate the move and the Student's first day of school at the [School 1]. A month after the school year began (and both BCPS and the [School 1] began the 2013–2014 school year on the same day), the Student's mother sought legal assistance in an effort to have the Student's placement at the [School 1] publicly funded by BCPS. She was advised to promptly enroll the Student in BCPS, as the [State] IEP was set to expire within a matter of days.

Her enrollment (and there is disagreement between the parties about the meaning of that term, and its implications for this case, discussed below) triggered the IEP process for BCPS, and

an IEP meeting was promptly scheduled. The Parents' complaint does not extend to the IEP process that is still taking place at the time of the writing of this decision, and the Parents stipulated that BCPS has handled the initial evaluation process in accordance with the law. However, the Parents object to BCPS' handling of the Student's special education needs while the IEP process in BCPS is pending, the Student remains at the [School 1], and BCPS did not yet have a finalized IEP for the Student as of the date this hearing concluded.[5]

Arguments of the Parties

The Parents argue that BCPS has denied the Student FAPE while its IEP process is pending. They allege that BCPS failed to extend the Student's [State] IEP even though it was about to expire or to develop an interim IEP. Further, the Parents contend that under 34 C.F.R. § 300.323(f), BCPS was obligated to provide services comparable to those specified in the Student's IEP from [State] while its own IEP process was pending, and that no comparable services were offered in the initial IEP meeting, as required. The Parents also allege that they were not consulted with regard to comparable services. Finally, the Parents argue that the self-contained classroom ultimately mentioned (but not officially proposed, as they allege the law requires) by BCPS does not itself constitute "comparable services."

Because they allege that BCPS has failed to meet its obligation to provide the Student FAPE, the Parents ask that I find the [School 1] to be an appropriate placement and order that BCPS reimburse the Parents for the cost of tuition there, from October 11, 2013 (when the first BCPS IEP meeting was held) at least until BCPS completes the IEP process for the Student.

BCPS argued that it has complied fully with the law, that 34 C.F.R. § 300.323(f) is not applicable, and that the Student is not entitled to comparable services. Further, BCPS argues that

[5] I noted that the timeframe for the finalized IEP had not yet concluded at the time of this hearing and the Parents alleged no violation on this issue.

even if the Student was entitled to comparable services, such services were in fact offered to the Student. Additionally, BCPS argues that the Student's enrollment at the [School 1] by her Parents was a unilateral placement. Finally, BCPS argues that the Parents have acted unreasonably in filing their due process request on the same day they enrolled the Student in BCPS.

Ripeness

At the close of the Parents' case, BCPS first raised the issue of ripeness as grounds, in part, for its motion for judgment. BCPS argued that the Parents filed their request for a due process hearing on the very same day that they enrolled the Student at BCPS (September 30, 2013), when it was clearly premature to allege that BCPS had failed to meet its obligations. The Parents acknowledged that they filed that day because they wanted to file their request before the [State] IEP expired, but agreed that no relief should vest before October 11, 2013, which is the date of the IEP meeting where they argue comparable services should have been offered but were not.

The Parents argued that it is not appropriate for BCPS to challenge the ripeness of the Parents' complaint in argument, and that if BCPS believed the complaint was not ripe, it should have filed a motion to dismiss. I find that the failure to file a motion to dismiss does not bar my consideration of the ripeness of the complaint. Further, a motion to dismiss can be filed at anytime during a proceeding and is based on a failure to state a claim for which relief may be granted. COMAR 28.02.01.12C. The Parents' complaint alleges that BCPS failed to extend the Student's IEP or to offer comparable services. Clearly, even if the facts are viewed in the light most favorable to the Parents, they filed their complaint extremely quickly upon enrolling the Student in BCPS. The Student's mother's first contact with BCPS was on September 26, 2013 (a Thursday); the complaint was filed a mere four days later (on Monday). However, because the

Parents were seeking an extension of the IEP or an interim IEP, or a clear offer of services comparable to the [State] IEP, before the expiration date of the [State] IEP (October 1, 2013), I find that their complaint was not prematurely filed. The Parents had been engaged in discussions with BCPS for several days, seeking to have the [State] IEP extended or comparable services made available; that BCPS declined to extend it is central to the Parents' complaint, and was clearly a contested issue at the time the Parents' filed their complaint. However, the Parents are limited to the issues specified in their complaint as of the date it was filed, September 30, 2013.

Extension of the IEP or Interim IEP

The Parents argued that to provide FAPE, BCPS was required to either extend the IEP set to expire on October 1, 2013 or develop and implement an interim IEP. (See Ex. P-8.) Noting that BCPS agreed it had an obligation to provide FAPE, the Parents argued that the IEP is how FAPE must be provided, and thus by allowing the IEP to expire, BCPS could not possibly provide FAPE, by definition. Put simply, in the absence of an IEP, no FAPE could be provided. BCPS responded that no statute or regulation required an extension of the IEP or an interim IEP, and that it took appropriate steps, fully in compliance with the IDEA, immediately once the Student enrolled in BCPS.

I am persuaded that BCPS had no obligation to extend the IEP or to provide an interim IEP. BCPS is correct that the Parents cited to no provision that imposes such a requirement. I do not find that the failure to extend the Student's [State] IEP or to develop and implement an interim IEP itself constitutes a failure to provide FAPE. While it is true that an IEP is the tool by which a school district provides FAPE, the Student's enrollment in BCPS the day before her IEP from another school district is set to expire does not obligate the new school district specifically to extend an IEP or create an interim IEP.

The fact that the [State] IEP had an implementation date that extended into the 2013-2014 school year is of no consequence. In its commentary to the final regulations, the U.S. Department of Education explained that even if a public agency develops an IEP at the end of the school year or over the summer to be implemented in the next school year, the individual agency "could decide to adopt and implement that IEP, unless the new public agency determines that an evaluation is needed." 71 Fed. Reg. 46682 (August 14, 2006). This explanation clearly indicates that the federal regulation is not intended to compel the new public agency to adopt and implement the IEP, even if the prior public agency had prepared the IEP specifically for the school year in which the child has enrolled with the new public agency.

34 C.F.R. § 300.323(f) and "Services Comparable"

In the absence of an extension of the IEP or an interim IEP, the Parents argue that BCPS is required to provide the Student with services comparable to those described in her [State] IEP, pursuant to 34 C.F.R. § 300.323(f).[6] This provision reads:

> (f) IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency) until the new public agency --
>
> (1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and
>
> (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324.

There is also a Maryland regulation that largely, but not precisely, tracks the federal regulation. The Maryland regulation, COMAR 13A.05.01.09E(2) provides: "When a student with a disability with an IEP in effect in accordance with §D of this regulation transfers to a public agency in Maryland from another state, as specified in 34 C.F.R. § 300.323(f), the public

[6] This regulation is derived from 20 U.S.C.A. § 1414(d)(2)(C).

agency in which the student intends to enroll, in consultation with the student's parents, shall provide FAPE to the student, including services comparable to those identified in the former public agency's IEP," until the public agency takes the steps also enumerated in 34 C.F.R. § 300.323(f).

These two regulations are the basis for the Parents' argument that the Student was entitled to services comparable to those specified in her [State] IEP, and that BCPS's failure to offer those services constitutes a denial of FAPE. The Student, contends the Parents, transferred from [District] to BCPS with an IEP still in effect, and BCPS failed to consider that IEP and to offer services comparable to it. To that end, the Parents offered the testimony of XXXX XXXX, IEP chairperson at [School 2], that comparable services were not discussed at the October 11, 2013 IEP meeting, even though the Notice of Meeting had indicated it would be discussed. (Ex. P-1.) Ms. XXXX acknowledged that the only mention of comparable services at the meeting was that they would be discussed later. She also testified that the [State] IEP, which had expired October 1, 2013, was not extended, and no interim IEP was proposed, drafted, or implemented. No evidence was offered to contradict this.

The Parents also testified regarding the timing of their move to Baltimore City. [Mother] testified that the family actually moved at the end of August 2013, and that the Student began attending the [School 1] on August 26, 2013. The Parents provided evidence from the hotel in which they stayed just before the move and from the moving company in support of their contention. (Exs. P-9 and P-10.) This evidence was intended to counter BCPS's argument that the Student enrolled at [School 1] during the summer of 2013. Because the Student enrolled at the [School 1] during the summer, argued BCPS, she did not enroll "within the same school year," and is thus not entitled to comparable services. However, BCPS never supported its assertion that the Student attended the [School 1] during the summer of 2013 with any evidence.

The Parents, on the other hand, offered evidence as to the likely reason for BCPS's confusion on this point: XXXX XXXX, Education Director for the [School 1], testified that she mistakenly told XXXX XXXX, Educational Associate, that the Student had attended the [School 1]'s extended school year (summer) program. Ms. XXXX explained in her testimony that she confused the Student with another student with similar needs. The facts thus clearly establish that the Student began school at the [School 1] on the first day of the 2013–2014 school year, and that BCPS's contention to the contrary was based on misinformation.

This means that contrary to the Parents' argument, the Student did not enroll in BCPS "within the same school year" as her enrollment in her [State] school district as contemplated by 34 C.F.R. § 300.323(f). That the Student's prior IEP had an implementation date of October 1, 2013 does not make her enrollment in BCPS on September 30, 2013 "within the same school year" as her placement at the XXXX School by [District] for the prior school year. The plain meaning of a school year is the academic year, which began on August 26, 2013. (Ex. BCPS-18.) Indeed, when the federal regulation was first proposed on June 21, 2005, it referred to the "same academic year" rather than the "same school year." The change occurred "because 'school year' is the term most commonly understood by parents and school officials." 71 Fed. Reg. 46753 (August 14, 2006). More significantly, the relevant section of the IDEA itself refers to a "child with a disability who transfers school districts within the same academic year." 20 U.S.C.A. 1414(d)(2)(C)(i)(II).

That the Parents actual moving date was August 27 and August 28, 2013, after the start of the school year, also does not establish that the Student transferred from [State] to BCPS "within the same school year." The evidence is uncontroverted that the Student never attended school in [State] during the 2013–2014 school year and that the Parents secured her place at the [School 1] with a deposit paid in June 2013. The Parents argued that 34 C.F.R. § 300.232(f) is meant to

provide the protection of uninterrupted services, and yet the Parents enrolled the Student in the [School 1] without ever contacting BCPS or seeking any services at all from BCPS. To rely on a provision intended to ensure uninterrupted services for transfer students and to argue that BCPS failed to meet its obligations when in fact the Parents did not even approach BCPS until a month into the 2013–2014 school year, is disingenuous; clearly, there was never any risk of an interruption of services. Regardless, as the Student was never a student at [District] during the 2013-2014 school year, she cannot have transferred from [District] to BCPS during that school year. Instead, she began the 2013–2014 school year as a student at the [School 1].

The Parents argue that while the federal regulation specifies that the transfer must be "within the same school year," the Maryland regulation contains no such limiting language. However, the Maryland regulation specifically references and incorporates the federal regulation; it does not conflict with it. Because COMAR 13A.05.01.09E(2) does not conflict with the federal regulation, and in fact incorporates it ("as specified in 34 C.F.R. § §300.323(f)"), I conclude that the language in 34 C.F.R. § 300.323(f) limits the requirement to provide comparable services to transfers "within the same school year." The interpretation proposed by the Parents would disregard that language entirely, favoring the Maryland regulation over the federal regulation, and rendering the language of the federal regulation – and of the IDEA provision upon which it relies – superfluous.

BCPS also argued that 34 C.F.R. § 300.323(f) applies only to student transfers from one public agency to another, and not when a student transfers from a private placement by her parents to a public placement, as is the case here. The Parents objected to BCPS raising this argument at the hearing, saying that this was the first time BCPS had made the argument, and that the Parents were thus not properly notified that BCPS would be relying on it. While it is true that BCPS had not previously articulated this argument in exactly the way it did during the

course of the hearing, BCPS has maintained its position that 34 C.F.R. § 300.323(f) was inapplicable since filing its Response to the Parents' complaint. Accordingly, I do not find that my consideration of this argument is unduly prejudicial to the Parents.

The language of 34 C.F.R. § 300.323(f) does not explicitly specify that it refers to a direct transfer from one public agency to another. However, it refers to a child who "transfers to a public agency in a new State, and enrolls in a new school within the same school year." The relevant provision of the IDEA refers to a child who "transfers school districts within the same academic year." In this case, the Student clearly did not transfer public school districts within the same academic year. To the contrary, the Parents produced clear evidence that she moved from [State] just in time to begin a new school year in Maryland, and that she began attending classes at the [School 1] on the very first day of the 2013-2014 school year. No transfer took place between school districts during the school year. Accordingly, I find that 34 C.F.R. § 300.323(f) is inapplicable in this case and does not require BCPS to offer the Student services comparable to her [State] IEP. Nonetheless, I also note that BCPS did in fact make available comparable services, despite its clumsy handling of the offer. When the Student first enrolled, BCPS appeared to be confused about what the IDEA required with regard to the Student, first agreeing that it had an obligation to offer services comparable and then, after the Parents filed for a due process hearing, arguing that it did not. Nonetheless, Ms. XXXX testified that BCPS was fully prepared to place the Student in a self-contained classroom at [School 2].

The Parents argued that this offer of comparable services was objectionable both procedurally and substantive inadequate. The Parents allege that no clear offer was ever made, and that any supposed offer by BCPS was procedurally inadequate because it was not made after the required consultation with the Parents and in the context of an IEP meeting and did not consider the specifics of the [State] IEP. They further allege that it was substantively inadequate

because it included no specifics with regard to speech therapy and occupational therapy and because the [State] IEP allowed for the Student to receive instruction in a self-contained classroom for the entire school day, while [School 2] could provide no such arrangement.

I first address the alleged procedural errors by BCPS. The Parents offered the testimony of Ms. XXXX, who confirmed that despite comparable services being noted on the notice for the October 11, 2013 IEP meeting, that discussion did not in fact take place at the meeting. This is consistent with the testimony of the Parents. However, there is no specific requirement that comparable services be offered at an initial IEP team meeting. The Parents cite to 71 Fed. Reg. 46681 (August 14, 2006), which includes an explanation indicating that a determination of "comparable services" must be made "by the child's newly designated IEP Team." Any discussion of comparable services, claim the Parents, took place only at the resolution session, which would not be the IEP team, and the details of which would be inadmissible.

Neither the federal nor State regulations detail what is meant by "provid[ing] services comparable." Certainly there is no document in evidence that shows the Parents were provided with a written explanation of the program into which the Student would be placed, and no evidence that the specifics of the program were discussed. However, it is also clear that the Parents understood that the Student would be placed in the self-contained classroom at [School 2] (the Student's mother testified that she understood BCPS to be offering placement there) and that they were provided with an opportunity to observe the self-contained classroom, to ask questions of the special education teacher and other [School 2] staff members, and to voice their concerns about placement at [School 2].

That comparable services were not offered as promptly as the Parents wished, or with specifics, is most likely due to the Student's mother's frank honesty that she was enrolling the Student at [School 2] strictly for purposes of seeking funding for tuition at the [School 1] and her

admission that she did not intend for the Student to enroll at [School 2]. Ms. XXXX testified that when the Student's mother first contacted [School 2] on September 26, 2013, the latter explained that she had retained a "top attorney" and would be seeking public funding for her daughter's tuition at the [School 1]. I emphasize that these statements by the Student's mother do not undermine my conclusion that she was acting in good faith (discussed below); to the contrary, her transparency about her reason for enrolling the Student at [School 2] demonstrates her belief that she was taking appropriate steps to secure FAPE for the Student in the only way she believed it was possible to do. Nonetheless, the Parents' posture that they never actually planned for the Student to attend [School 2] likely factored into BCPS's failure to provide specifics about comparable services. Finally, I note that the Parents' first contacted BCPS on September 26, 2013 (a Thursday), and then filed this complaint four days later (on September 30, 2013, a Monday). BCPS did not even have a copy of the Student's [State] IEP at that time; it could hardly be expected to produce a detailed program for the Student in such a short time. Accordingly, I find that while BCPS's process was not ideal, it was not so procedurally inadequate (particularly in light of the brief time the Parents waited before filing their complaint) that it constitutes a failure to offer comparable services.

In addition, I find that the comparable services were substantively adequate. The Student's IEP from [State], dated October 1, 2012 includes the following: placement at a private day school (>50%), identified as [School 3]; reading (daily), math (daily), social studies (daily), electives (daily), language arts (daily), science (three periods per week), and physical education (daily) in a self-contained classroom; two 40-minute sessions of speech therapy (small group) per week; and one 30-minute session of occupational therapy per week. The IEP identifies the Student's disability as "communication impaired." (Ex. P-8.) It further details that while the IEP team considered a general education placement, with accommodations, supplementary aids,

and supports, these solutions were not considered "sufficient because [the Student's level of anxiety is too high in the public school setting." The IEP team noted that "[a]t this time, no suitable special classroom program is available within the school district that meets [the Student's] individual needs necessitating an out of district placement." Finally, the IEP noted that one option for transitioning the Student to a less restrictive environment would be "opening a self-contained classroom for students with similar needs and hiring more staff trained in occupational therapy, speech and language therapy and counseling."

BCPS offered persuasive evidence that it had just such a self-contained classroom in which to place the Student while BCPS proceeded with the IEP process. This classroom, at [School 2], fluctuates between six and fifteen students, includes the core academic subjects, and is taught by a special education teacher. Mr. XXXX and Ms. XXXX testified that occupational therapy and speech and language therapy are available to the Student. The Parents argued that placement at [School 2] would not be comparable because the Student would have to attend "specials" in a general education classroom, and because the large population of students at [School 2], which is approximately 1,400 students, would overwhelm the Student when she was outside the self-contained classroom (arriving at and leaving school, lunchtime, hallway transitions for lunch and specials). In addition, the Parents argued that offering "placement" is not the same as offering comparable services, as services refers to the specifics that were never delineated in this case. Finally, the Parents expressed concern about the teaching environment in the self-contained classroom where the class size fluctuates for different subjects, presumably causing transitional activity that could be distracting or distressing to the Student.

It is true that the self-contained classroom at [School 2] is not identical to the program specified in the [State] IEP. The IEP places her in a private school, while [School 2] is a public school. However, key to the [State] IEP is the self-contained classroom, which is available at

[School 2] for all of the core classes. The Student would attend specials with general education students but Ms. XXXX testified that accommodations and modifications could be provided (and are in fact provided for other special education students). While Ms. XXXX and Ms. XXXX testified about the Student's need for one-to-one support at times, her [State] IEP does not call for that level of support in the classroom. (See P-8, page 9.) Nor does the [State] IEP specify the need for a small school environment.

The Parents vehemently argued that the Student's anxiety was much too extreme for her to be able to function in a public school environment, much less to make academic progress. The Parents even suggested that a public school placement would be abusive to the Student. The Parents cited specific language in the [State] IEP that states that while the IEP team considered a supported general education program, the Student's "deficits in communication, cognition, motor skills, memory, phonetic awareness, attention, qualitative concepts, social skills, and functional life skills" led the IEP team to reject this option as "inappropriate." The [State] IEP team further wrote that the supported general education program was also rejected because "the harmful effects of such a placement, including minimal educational benefit due to lack of structure or individualization of instruction, loss of self esteem, and loss of social status among peer group, outweigh any potential gains." Finally, the IEP team concluded that the Student's "level of anxiety is too high in the public school setting."

I do not find that this language means that only a private school setting would constitute services comparable to those delineated in the [State] IEP. As noted in the IEP, the recommendation was prepared based on the "[a]vailability of program options in [the Student's] home school and overall proximity of the program to her home" in [State]. A self-contained classroom was clearly not an option based on the statement in the IEP that opening such a classroom would be one way to provide a less restrictive environment. Accordingly, the

statements about the Student's anxiety were made with regard to placement in a general education classroom with supports, which is not the placement that BCPS proposed.

While it is true that the Student's placement at [School 2] would mean the Student had specials, including art, music, and physical education, in a general education classroom, these classes represent a relatively small portion of the Student's school day. Significantly, 34 C.F.R. § 300.323(f) does not require identical services – only comparable. When the final federal regulations were published, the U.S. Department of Education noted in the accompanying commentary that it was not defining "comparable services" because it interprets the word to have its plain meaning, which is "similar" or "equivalent." 71 FR 46753 (August 14, 2006). With regard to lunch and transitions between classes, Ms. XXXX testified that modifications can be made for both. A teacher accompanies the special education students to the classrooms for specials. A teacher can also be made available for the Student to eat lunch in a classroom, according to Ms. XXXX.

Clearly, the Parents do not view [School 2] as an ideal option for the Student. The Parents undoubtedly want what is best for the Student, and I am persuaded that they have acted in good faith in an effort to provide the Student with a safe, comfortable learning environment where she is most likely to thrive. However, BCPS's obligation to the Student stems from her enrollment in BCPS at the end of September 2013. At that time, BCPS initiated the IEP process, promptly scheduled an IEP meeting and began the initial evaluation process. Because the Student did not transfer to BCPS from [District] during the same school year, BCPS was not required to offer comparable services. Nonetheless, BCPS did offer placement at [School 2], in a self-contained, special education classroom.

Whether the Student Actually "Enrolled" in BCPS

In its closing argument, BCPS argued that the Student never actually enrolled in BCPS, suggesting that she had no right to services through BCPS. BCPS cited to COMAR 13A.05.09.02B(3), which defines "enroll" and "enrollment" to mean "attending classes and participating fully in class activities." The Student never attended [School 2] and participated in no activities, argued BCPS, and thus was never enrolled. The Parents stipulated that this was indeed the case. Accordingly, BCPS appears to be suggesting that the Student was not entitled to any services at any time.

This argument is puzzling for a number reasons. First, BCPS has repeatedly acknowledged its obligation to provide the Student with FAPE. Second, BCPS did in fact promptly begin the IEP process upon the Student's enrollment on September 30, 2013. Third, as the Parents countered, the definition of enrollment cited by BCPS in COMAR 13A.05.09.02B(3) is specific to programs for homeless children, and clearly not intended to be a broad definition for IEP purposes. And finally, the argument is puzzling because this is the first time BCPS has raised the issue – in closing argument.

For all of the above reasons, I decline to consider BCPS's argument that the Student was not enrolled in BCPS.

Parentally-Placed Private School Children with Disabilities

The enrollment argument submitted by BCPS dovetails with another argument that the Parents found objectionable as outside of the scope of the issue as defined for this due process hearing. In essence, BCPS argued that the Student's enrollment at the [School 1] meets the definition of 34 C.F.R. § 300.130, which defines "parentally-placed private school children with disabilities" as "children with disabilities enrolled by their parents in private, including religious, schools or facilities . . . ." Accordingly, under 34 C.F.R. § 300.137, the Student would have no "individual right to receive some or all of the special education and related services that a child

would receive if enrolled in a public school." Instead of FAPE, a services plan would be developed under 34 C.F.R. § 300.137(c).

I agree with the Parents that this argument is beyond the scope of the due process hearing. The parties agreed that the issue was whether BCPS had provided the Student, upon her enrollment in BCPS, with FAPE; this issue does not extend to whether the Student is entitled to a services plan as a parentally placed, private school student. Both parties did agree, however, on the applicability of 34 C.F.R. § 300.148, which refers to the placement of children by parents when FAPE is at issue. 34 C.F.R. § 300.148(c) provides in part that a "court or hearing officer may require the [public] agency to reimburse the parents for the cost of [private] enrollment if the court or hearing officer finds that the agency has not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." In this case, I am not finding that the public agency failed to provide FAPE, so this provision is inapplicable.

BCPS repeatedly argued that the Parents should be denied reimbursement, or any award should be reduced due to the unreasonable actions of the Parents. This argument is grounded in 34 C.F.R. § 300.148(d), which states that the cost of reimbursement may be reduced or denied based on certain considerations, including a failure by the parents to meet proper notice requirements when rejecting a proposed IEP and opting for a unilateral private placement, or a judicial finding of unreasonableness with regard to the actions of the parents. BCPS alleged that a number of actions by the Parents were unreasonable: the Parents filed their due process request on the same day that they enrolled the Student in BCPS; the Student's mother informed [School 2] school staff that she was enrolling the Student in order to obtain funding for tuition at the [School 1] and that she had retained a "top attorney" for that purpose; and the Student's mother's admission that she never intended for the Student to attend [School 2]. Citing to *Maynard ex rel.*

G.M. v. District of Columbia, 701 F. Supp.2d 116 (D.D.C. 2010), BCPS argues that even if I find that BCPS failed to provide FAPE, reimbursement should be denied or reduced.

Because I am not finding that the Student was denied FAPE, there is no need for me to specifically consider whether reimbursement should be denied or reduced based on the reasonableness of the Student's Parents. However, had I determined that the Student was denied FAPE, I would not have denied or reduced any reimbursement due based on the Parents' actions. While filing for a due process hearing on the same day that the Student enrolled in BCPS gave BCPS little opportunity to set the IEP process in motion, I found the testimony of the Student's Parents with regard to both the way the IEP process worked in [State] and the difficulty and chaos of the move from [State] to Baltimore compelling.

The [State] IEP process is relevant because testimony suggested it was a more fluid, less rigid process. IEPs expired during the Student's years of schooling, and yet services continued (including the funding of her placement at a private school), without any apparent concern from the school district or the Parents about the absence of a current IEP. The Student's mother described the placement process in [State] as friendly and collegial. In addition, the Parents reasonably believed that the Student required placement at a private school, as she had been placed at one in [State].

As BCPS pointed out, this is not to say that the Parents were unaware of the appropriate channels for pursuing public funding for a private placement. [Mother] testified under cross examination that she understood that the Student received public funds for her private placement in [State] because she was placed there by the public school district. [Mother] fully acknowledged that she had "dropped the ball" with regard to the IEP process for the Student; she agreed that she never contacted any public school district in Maryland before or after the move from [State] until she contacted BCPS on September 26, 2013. She explained that she failed to

contact BCPS earlier because she struggled with severe depression in the wake of a difficult move to Baltimore.

In *Maynard*, the student's mother, no longer able to afford private school tuition for her son, a special education student, enrolled him in public school over the summer. She then sought to schedule a prompt IEP meeting with school staff. When almost a month went by and his mother continued to be told that necessary school staff members were on vacation, she provided the school district with ten days' notice of her intent to unilaterally enroll her son in the private school he had been attending. At the start of the school year, she continued to make attempts to enroll him in the public school system (despite having enrolled him in private school), to no avail. The hearing officer found that the student's mother acted unreasonably because she gave the school district less than a month to convene an IEP meeting, despite the fact that it was summer and many school staff members were unavailable and the school she wanted her son to attend was under construction. The district court upheld the hearing officer's finding of unreasonableness and thus also the hearing officer's denial of reimbursement, a consequence of unreasonableness under 34 C.F.R.§ 300.148(d).

The case at hand is similar to *Maynard* in that the Parents sought prompt action from BCPS. However, the student's mother in *Maynard* sought to get the IEP process in motion quickly, despite the unavailability of staff, and unilaterally enrolled her son in private school when no IEP meeting was convened within a month. In contrast, the Parents are not objecting to the pace of BCPS's IEP process, and they have not responded with a unilateral placement. Instead, the Parents are seeking comparable services, which are required in some circumstances while the development and implementation of an IEP is in progress. While I have concluded that in this case the Student is not entitled to comparable services, I also do not find that the Parents were unreasonable in their actions. Had the Student been entitled to comparable services, BCPS

would have been required to provide such services. Based on their understanding that the Student was entitled to comparable services, and their concern about the approaching expiration date of the [State] IEP, the Parents acted reasonably.

The Appropriateness of the Student's Placement at [School 1]

Extensive testimony and other evidence was offered with regard to whether the [School 1] was an appropriate placement. I allowed this evidence because had I found that BCPS failed to offer FAPE, as the Parents urged me to do, my next step would have been to consider the appropriateness of the Student's program at the [School 1]. This evidence included testimony and documents related to assessments and evaluations of the Student, the identification of the Student as "intellectually disabled" (to which the Parents objected), and information about the typical profile of students at the [School 1]. Because I have not concluded that BCPS failed to provide FAPE, as the Parents alleged, and because the Parents stipulated that the IEP process pending in BCPS was in compliance with the law, the scope of my decision does not extend to the appropriateness of the [School 1]. I decline to make findings regarding the assessments and evaluations conducted in the course of the pending IEP process, which had not yet concluded at the time of the hearing in January 2014.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that BCPS's actions do not constitute a failure to offer the Student FAPE. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); 34 C.F.R. § 300.323(f).

ORDER

I **ORDER** that the Parents' request for reimbursement for tuition for [School 1], from October 11, 2013, to the end of the 2013–2014 school year, is **DENIED.**

February 25, 2014
Date Decision Mailed

_____
Jennifer L. Gresock
Administrative Law Judge

JLG/bp

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.