

XXXX XXXX

V.

**MONTGOMERY COUNTY PUBLIC
SCHOOLS**

*** BEFORE STUART G. BRESLOW,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-MONT-OT-13-12499**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On April 2, 2013, [Father] and [Mother] (Parents), on behalf of their 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 the Montgomery County Public Schools (MCPS) 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 May 9, 2013. The Parents were represented
by Michael J. Eig, Esq. Jeffrey A. Krew, Esq., represented the MCPS. By agreement of the
parties, the hearing was scheduled for June 5, 7, and 12, 2013.

The hearing dates requested by the parties fell more than 45 days after the triggering
events described in the federal regulations, which is the date my decision is due. 34 C.F.R. §

300.510(b),(c); 300.515(a), (c) (2012). I had counsel for the parties' review each of their calendars to determine whether the hearing could be completed within the 45 day period. Each attorney reviewed his calendar with me. Both attorneys had due process hearings before the OAH that prevented them from agreeing to convene the hearing and complete it within 45 days from the waiver of the resolution meeting which occurred on April 24, 2013.

I held the hearing on the scheduled dates. Michael J. Eig, Esq., represented the Parents. Jeffrey A. Krew, Esq., represented the MCPS. At the close of the Parents' case, the MCPS made a Motion for Judgment (Motion). After giving each party ample time to be heard on the Motion, I denied the Motion and proceeded with the hearing. At the end of evidence, the MCPS renewed its Motion. The Motion was denied. The parties waived the time requirement and agreed that I would issue a decision within thirty days from the close of the record which occurred on June 12, 2013. 34 C.F.R. § 300.515(c) (2012); Md. Code Ann., Educ. § 8-413(h) (2008).

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a)-(d) (2012); Md. Code Ann., Educ. § 8-413(e)-(h) (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; 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. 2012); COMAR 13A .05.01.15C; COMAR 28.02.01.

ISSUES

The issues in this case are as follows:

1. Did the MCPS fail to provide the Student with a Free and Appropriate Public Education (FAPE) for the 2012-2013 school year by proposing an inappropriate educational program and placement at [School 1]?
2. If the MCPS failed to provide the Student with a free and appropriate public education for the 2012-2013 school year, is tuition reimbursement (and related expenses and costs) for the 2012-2013 school year at the [School 2], the Parents' unilaterally chosen private school placement, appropriate?

SUMMARY OF THE EVIDENCE

A. Exhibits

I admitted the following exhibits on behalf of the Parents:

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| P 1 | Request for Due Process Hearing, April 1, 2013 |
| P 2 | Letter from XXXX XXXX, Child Find Instructional Specialist to Parents, July 30, 2010 |
| P 6 ¹ | Neuropsychological Evaluation, [Center 1], February 10, 2011 |
| P 7 | Letter from XXXX XXXX, Ph.D, addressed "To Whom It May Concern," May 23, 2011 |
| P 8 | Four Year Old Child Participation and Progress Report, May 24, 2011 |
| P 9 | Letter from XXXX XXXX, addressed "To Whom It May Concern," undated |
| P 10 | Letter to XXXX XXXX, Director of Special Education Services, MCPS, from XXXX XXXX, Esq., August 10, 2011 |
| P 11 | Letter from XXXX XXXX, Esq., to XXXX XXXX, Esq., August 30, 2011 |
| P 12 | Letter from XXXX XXXX to Michael J. Eig, Esq., November 22, 2011 |
| P 13 | Observation Report from XXXX XXXX, January 12, 2012 |
| P 14 | [School 2] Kindergarten Progress Summary, January 2012 |

¹ Parent Exhibits 3, 4, and 5 were not offered into evidence.

- P 15 Letter from Michael J. Eig, Esq., with attached documents to XXXX XXXX, Esq., March 15, 2012
- P 16 MCPS Elementary Teacher Report, April 23, 2012
- P 17 Notes taken by Parent [Father] following a meeting with XXXX XXXX, April 2012
- P 18 Letter from Michael J. Eig, Esq., to XXXX XXXX, Esq., May 9, 2012
- P 19 Letter from Michael J. Eig, Esq., with attached [School 2] End-of -Year Report; to XXXX XXXX, Esq., June 4, 2012
- P 20 [School 2] Kindergarten Progress Summary, June 2012
- P 21 Letter from Michael J. Eig, Esq., to XXXX XXXX, Esq., August 6, 2012
- P 22. Letter from Michael J. Eig., Esq., to XXXX XXXX, Esq., August 14, 2012
- P 23 Letter from Michael J. Eig., Esq., to XXXX XXXX, Esq., August 21, 2012
- P 24 Letter from Michael J. Eig., Esq., to XXXX XXXX, Esq., August 30, 2012
- P 25 XXXX XXXX's notes of visit to [School 1], October 25, 2012
- P 26 Letter from Michael J. Eig, Esq., to XXXX XXXX, Esq., November 8, 2012
- P 27 Teacher Conference Notes, November 14, 2012
- P 28 Letter from Michael J. Eig, Esq., to XXXX XXXX, Esq., November 20, 2012
- P 29 Emails between XXXX XXXX and Parent [Mother] with behavior plan, December 5, 2012
- P 30 Letter from XXXX XXXX, Administrative Legal Assistant, to XXXX XXXX, MCPS, December 6, 2012
- P 31 XXXX XXXX's IEP Meeting notes, January 8, 2013
- P 32 Letter from XXXX XXXX, Principal, [School 1] to Parents, January 10, 2013
- P 33 [School 2] First Grade Progress Summary, January 2013
- P 34 Letter from Michael J. Eig, Esq., to XXXX XXXX, OAH, February 8, 2013

P 35 Letter from Michael J. Eig, Esq., to Jeffrey A. Krew, Esq., February 21, 2013

P 36 Letter from Michael J. Eig, Esq., to XXXX XXXX, OAH, March 4, 2013

P 37 Letter from Michael J. Eig, Esq., to XXXX XXXX, OAH, April 1, 2013

P 38 Letter from Michael J. Eig, Esq., to XXXX XXXX, MCPS, April 11, 2013

P 39 Letter from XXXX XXXX, Supervisor, Equity Assurance and Compliance Unit to Michael J. Eig, Esq., April 12, 2013

P 40 Resolution Meeting Tracking Form, April 16, 2013

P 41 Letter from Michael J. Eig, Esq., to XXXX XXXX, Esq., May 10, 2013

P 42 [School 2] First Grade Progress Summary, June 2013

P 43 Dolch Sight Words Reading Assessment, 2012-2013 School Year

P 44 Student Work Samples, 2012-2013 School Year

P 45 [School 2] Brochure, undated

P 46 Resume for XXXX XXXX

P 47 Resume for XXXX XXXX

P 48 Resume for Dr. XXXX XXXX

I admitted the following exhibits on behalf of the MCPS:

Board 1 not offered

Board 2 School Psychologist Report – XXXX XXXX, M.S., C.A.S., MCPS, November 12 and 15, 2010

Board 3 Developmental Evaluation Report – XXXX XXXX, M.A., Spec. Educ.; and XXXX XXXX, M.S., OTR/L, November 24, 2010

Board 3-A [School 2] Application for Admission- School Year 2011-2012, April 9, 2010[sic]

Board 4 School Psychologist Report and Review of Non-MCPS Psychological Evaluation- XXXX XXXX, Ph.D, May 9, 2011

Board 5	Preschool Education Program (PEP), XXXX XXXX, Special Educator, May 11, 2011
Board 6	IEP Team Meeting Documentation, May 11, 2011
Board 6-A	Letter to Parents from XXXX XXXX, M.Ed., Director, [School 2], May 11, 2011
Board 6-B	[School 2] Tuition Contract for 2011-2012, June 2, 2011
Board 7	IEP team meeting documentation, June 9, 2011
Board 7-A	Email to XXXX XXXX, XXXX XXXX and XXXX XXXX from Parent, [Father], November 15, 2011
Board 7-B	[School 2] Re-Enrollment/Tuition Contract for 2012-2013, February 26, 2012
Board 8	Classroom Observation, XXXX XXXX, Instructional Specialist, April 11, 2012
Board 9	IEP Team Meeting Documentation, May 29, 2012
Board 9-A	BASC-2 Teacher Rating Scales-Child completed by XXXX XXXX and XXXX XXXX, [School 2], June 5, 2012
Board 10	School Psychologist Report, XXXX XXXX, MCPS, June 7 and June 24, 2012
Board 11	Letter to Michael Eig, Esq., from XXXX XXXX, Esq., August 27, 2012
Board 12	IEP team meeting documentation, September 5, 2012
Board 13	IEP team meeting documentation, January 8, 2013
Board 14	Request for Due Process Hearing, February 8, 2013
Board 15	Letter to Michael Eig, Esq., from Jeffrey Krew, Esq., February 19, 2013
Board 16	Letter to Michael Eig, Esq., from Jeffrey Krew, Esq., April 10, 2013
Board 16-A	Achenbach Teacher's Report Form for Ages 6-18 completed by XXXX XXXX, Teacher, [School 2], May 6, 2013
Board 17	XXXX XXXX Curriculum Vitae
Board 18	XXXX XXXX Curriculum Vitae
Board 19	XXXX XXXX Curriculum Vitae

Board 20 XXXX XXXX Curriculum Vitae
Board 21 XXXX XXXX Curriculum Vitae
Board 22 XXXX XXXX Curriculum Vitae
Board 23 XXXX XXXX Curriculum Vitae
Board 24 XXXX XXXX Curriculum Vitae
Board 25 XXXX XXXX Curriculum Vitae
Board 26 XXXX XXXX Curriculum Vitae

B. Testimony

The Parent, [Father], testified and presented the following witness:

- XXXX XXXX, who was offered, but not accepted as an expert in special education

The MCPS presented the following witnesses:

- XXXX XXXX, accepted as an expert in psychology
- XXXX XXXX, accepted as an expert in special education
- XXXX XXXX, accepted as an expert in special education
- XXXX XXXX, accepted as an expert in psychology
- XXXX XXXX, admitted as an expert in special education

STIPULATIONS OF FACT

The parties stipulated to the following facts:

1. The Student is XXXX-years-old and has been diagnosed with Asperger's Disorder.
2. The Student was found eligible for special education services by the MCPS in December, 2010, as a student with Autism.

3. On April 9, 2011, the Parents completed an application for the Student to attend [School 2] ([School 2]) during the 2011-2012 school year.
4. On May 25, 2011, XXXX XXXX, M.Ed., Director of [School 2], wrote to the Parents advising that the Student had been enrolled in the Kindergarten class at [School 2] for the 2011-2012 school year.
5. On June 2, 2011, the Parents signed the Tuition Contract for the 2011-2012 school year at [School 2].
6. On May 11 and June 9, 2011, the MCPS held Individualized Education Program (IEP) meetings for the Student and proposed that he attend the [Program 1] ([PROGRAM 1]) program at [School 1] ([School 1]) for the 2011-2012 school year.
7. The Parents expressed their disagreement with the proposed program and placement at the IEP meetings.
8. On August 10, 2011, the Parents sent a letter to the school system formally rejecting the proposed placement and advising MCPS of their intention to place the Student at [School 2] and to seek public funding for the placement.
9. On February 26, 2012, the Parents signed a Re-Enrollment/Tuition Contract for the 2012-2013 school year at [School 2].
10. In April 2012, the MCPS staff observed the Student at [School 2].
11. An IEP meeting was held on May 29, 2012, where the MCPS proposed sixteen hours per week of specialized instruction for the Student at [School 1] in the [PROGRAM 1] program – fourteen hours in the general education setting and two hours outside of the general education setting.
12. The Parents rejected the proposed IEP and requested an updated psychological

assessment to assess the extent of the Student's anxiety and attention difficulties.

13. The Student's evaluation with the school system's psychologist was completed in June of 2012.

14. On August 21, 2012, the Parents served notice upon MCPS that they intended to maintain the Student's placement at [School 2] for the 2012-2013 school year and to seek public funding for the placement.

15. The first day of school in the 2012-2013 school year for the MCPS students was August 27, 2012.

16. The Student began first grade at [School 2] in the fall of 2012.

17. An IEP meeting was held on September 5, 2012, where the IEP team reviewed the psychological assessment and reconfirmed the Student's' eligibility for special education.

18. On September 5, 2012, the MCPS also updated the Student's IEP to reflect his present levels of achievement as reflected in his end-of-the-year [School 2] progress report.

19. On September 5, 2012, the MCPS proposed placement at [School 1] in the [PROGRAM 1] program for the 2012-2013 school year.

20. The Parents rejected the IEP.

21. On January 8, 2013, the MCPS held an annual review meeting to review the Student's IEP. MCPS proposed placement at [School 1] in the [PROGRAM 1] program consisting of sixteen hours per week of specialized instruction: fourteen hours in the general education setting and two hours outside of the general education setting. The Parents rejected the proposed program and placement.

FINDINGS OF FACT

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

1. The Student has just completed the 2012-2013 school year at the [School 2]. The Student was enrolled in the K-1 program.
2. [School 2] is a general education school, certified by the State of Maryland to educate students from kindergarten through the second grade. There are approximately 59 students enrolled at [School 2]. It is physically housed within [School 3], a private State of Maryland certified special education school, but is entirely separate from [School 3] and is run independently.
3. [School 2] does not prepare an IEP for its students.
4. Prior to entering [School 2] in late August 2011, the Student attended [School 4] (Preschool), beginning in September 2010, for several hours per day, five days per week.
5. The Student was referred to the [Center 2] ([CENTER 2]) by the MCPS speech office on October 7, 2010. The MCPS speech office referred the Student to the [CENTER 2] for the purpose of determining whether he showed a presence of an educational disability that may warrant special educational services.
6. The Student was assessed by the [CENTER 2] on November 12, 2010.
7. The evaluators indicated that the Student had above average scores on the school readiness composite. He also had difficulty regulating his behavior during unstructured

times and required a lot of redirection. He exhibited anxiety and was distractible and impulsive.

8. Based on the evaluation, the Student was referred to the Central Individualized Education Program team (CEIP) for determination of eligibility for special educational services.
9. It was determined by the CEIP team on December 3, 2010, that the Student should receive special education itinerant services at the Preschool for sixty minutes each week. Those services were provided by XXXX XXXX, Special Educator, Preschool Education Program (PEP), MCPS. Ms. XXXX is no longer employed by MCPS and no longer resides in the State of Maryland.
10. Ms. XXXX's supervisor during the time she provided services to the Student was XXXX XXXX; who is currently serving as XXXX with the MCPS. At the time services were being provided to the Student, Ms. XXXX was the Coordinator of the PEP.
11. At the suggestion of the Student's pediatrician, the Parents had a neuropsychological evaluation conducted by the Center for Autism Spectrum Disorders of the [Center 1] on February 10, 2011, under the supervision of Dr. XXXX XXXX, a licensed psychologist.
12. Having tested the Student, one of the recommendations of Dr. XXXX's team was that the Student be educated in a small classroom setting with low student to teacher ratio.
13. As a result of a referral by the [Center 1] division of Pediatric Neuropsychology, the Parents applied to enroll the Student at [School 2] for the 2011-2012 school year on April 9, 2011.

14. The Parents looked at a number of private schools for the 2011-2012 school year, before settling on [School 2], but did not consider enrolling the Student in any school that was considered a special education school. The Parents wanted the Student to be with general education students and not special education students.
15. Towards the end of the 2010-2011 school year at the Preschool, May 11, 2011, Ms. XXXX issued a report describing the Student's strengths and weaknesses in various subject areas. Academically, the Student demonstrated strengths. He also developed over the school year in play skills and began to take his own initiative as he socialized with peers. He still demonstrated inattention and self-directed behavior which interfered with his availability for learning. Ms. XXXX recommended that the Student needs significant adult interventions to support him with his availability for learning.
16. On May 11, 2011, the same day that Ms. XXXX's report was issued, an IEP team meeting was held. Both Parents were in attendance during the meeting along with Ms. XXXX, Ms. XXXX's supervisor, XXXX XXXX, Dr. XXXX XXXX, school psychologist, XXXX XXXX, Instructional Specialist and Special Educator as well as several other individuals.
17. Dr. XXXX XXXX began the discussions by reviewing the neuropsychological evaluation conducted under the direct supervision of XXXX XXXX, Ph.D., of the Center for Autism and Spectrum disorders with the [Center 1]. The neuropsychological evaluation took place on February 10, 2011, when the Student was [age].
18. Prior to reporting on Dr. XXXX's neuropsychological evaluation at the IEP meeting of May 11, 2011, Dr. XXXX conducted a psychological review and evaluation of the Student to assess his current level of cognitive and social and emotional functioning

and to make programming and placement recommendations to the IEP team. She issued a report on May 9, 2011, the contents of which were also shared with the IEP team on May 11, 2011, along with her review of Dr. XXXX's neuropsychological evaluation.

19. The test data obtained by Dr. XXXX's team were insufficient, not presented clearly and not reflective of appropriate scores.
20. Dr. XXXX and her team never observed the Student in a classroom setting at [School 2] or elsewhere. As part of her evaluation, Dr. XXXX observed the Student in his [School 2] classroom on April 8, 2011.
21. At the time of the evaluation by Dr. XXXX, the Student's cognitive abilities extended into the average range. The Student could handle the demands of a regular kindergarten curriculum with special education supports.
22. A small classroom setting with low student-to-teacher ratio was recommended by Dr. XXXX's team, in addition to the services of a school psychologist/behavior management expert and speech and language intervention along with occupational therapy.
23. As part of the IEP team meeting that occurred on May 11, 2011, discussions were held among the participants concerning the placement of the Student for the 2011-2012 school year, including the [PROGRAM 1] program at [School 1].
24. In his placement at the Preschool, the teacher-to-student ratio was one to five. The Parents raised concerns during the May 11, 2011 IEP team meeting that the Student needs a small structured class size for the Student to succeed. The Parents were concerned that the Student gets easily overloaded from a sensory standpoint and this

causes him to have behavioral issues that negatively impact his learning. The Parents were also concerned about non-structured times during the school day and were concerned that the Student would not do well during these periods.

25. Following the May 11, 2011 IEP team meeting, the Parents requested that the neuropsychology team who evaluated the Student on February 10, 2011 under the direction of Dr. XXXX summarize its academic recommendations.
26. On May 23, 2011, a member of Dr. XXXX's neuropsychology team who participated in the evaluation of the Student, Dr. XXXX XXXX, Ph.D., responded to the Parents' request by summarizing the findings of the team and recommending that the Student's primary class of instruction have a student to teacher ration not to exceed three-to-one with an optimal class size not to exceed eight to ten students.
27. Neither [School 2] nor the [PROGRAM 1] program at [School 1] offers a student-to-teacher ratio lower than three-to-one.
28. On May 25, 2011, the Student was accepted into [School 2] and the [School 2] administration requested that the Parents provide [School 2] with a \$750.00 non-refundable deposit.
29. The Parents and [School 2] entered into a tuition contract for the Student's enrollment in [School 2] for the 2011-2012 school year on June 2, 2011. Having signed the tuition contract, the Parents became contractually responsible for the full annual tuition for that school year. The tuition for the 2011-2012 school year was \$25,500.00.
30. On June 9, 2011, knowing that they had already enrolled the Student in [School 2] and had financially committed to paying [School 2] \$25,500.00 whether the Student attended [School 2] or not, neither Parent informed the IEP team members of the

Student's 2011-2012 enrollment at [School 2] or their financial commitment to [School 2].

31. The Parents had no intention of sending the Student to [School 1] after becoming financially committed to [School 2] on June 2, 2011.
32. At the end of the 2010-2011 school year, the Student's teacher, Mrs. XXXX provided a Participation and Progress Report for the Student. He was proficient in nearly all areas evaluated. She described that she learned much from the Student and that she had enjoyed watching him develop socially, emotionally and academically during the year.
33. At the June 9, 2011 meeting, the IEP team recommended that certain supplementary aids and services be provided to the Student, including an adaptive chair, advance preparation for schedule changes, social skills training and listed a number of goals and objectives. The IEP team recommended that he be provided sixteen hours of special education services in the general education setting and four hours of specialized instruction outside of the general education setting.
34. On August 10, 2011, the Parents informed the Director of Special Education Services for MCPS, XXXX XXXX, that they had rejected the proposed [PROGRAM 1] [School 1] placement and that they would be enrolling the Student at [School 2] for the 2011-2012 school year. The Parents also informed Ms. XXXX that they would seek public funding for the placement.
35. On November 15, 2011, the Parent, [Father], sent an email to representatives of [School 2], including its Director, XXXX XXXX, thanking them for their efforts to support the Student and assisting them in pursuing reimbursement from MCPS. He also requested

that an update be sent to his attorney before the Thanksgiving holidays the following week.

36. On November 22, 2011, the Program Specialist for [School 2], XXXX XXXX, wrote to the Parents' attorney in response to the Parents' request for assistance in their pursuit of reimbursement from the MCPS.
37. At some point in time after November 22, 2011, the Parents decided not to seek reimbursement from MCPS for the 2011-2012 school year.
38. The Student was accepted to attend [School 2] because he had good academic skills and vocabulary and needed individualized attention to address maladaptive behaviors.
39. There is typically two staff in the classroom of fourteen students all the time at [School 2]. The Student's main teacher is certified in special education.
40. At [School 2], the Student exhibited maladaptive behaviors. These included stealing of objects, hoarding things when frustrated; hitting and kicking the teacher when frustrated, urinating on the bathroom floor and on the toilet paper roll, and talking about weapons and killing people.
41. The Student is receiving private psychological therapy outside of [School 2]. [School 2] does not offer psychological services for its students.
42. [School 2] provides a progress summary for each student in its program. The progress report is issued at mid-year and again at the end of the school year.
43. The progress reports for the mid-year and the end of the school year show that the Student exhibited strength in academic areas and weakness in social skills and emotional development, although there is some noted progress from the mid-year report to the end-of - year report in these areas.

44. The Student does not receive special education instruction at [School 2] although he is taught by a State certified special education teacher. The Student receives four hours of speech therapy and occupational therapy per week at [School 2].
45. Neither [School 2] nor MCPS have conducted a functional behavioral assessment (FBA) for the Student or prepared a Behavior Intervention Plan (BIP) for the Student.
46. [School 2] does not use the ABC approach to behavior modification. This type of behavior approach looks at the antecedent that triggers the behavior, the behavior itself, and the consequences of the behavior.
47. [School 2] uses a checklist to monitor behaviors, but does not utilize empirical data for this purpose.
48. The Student's outside psychological therapist recommended to the Parent, [Mother], a behavior plan which the Parent forwarded to the Student's classroom teacher. This plan was intended to address the Student's maladaptive behaviors of taking things or collecting things.
49. [School 2] does not have any records of an individual behavior modification plan for the Student or a behavior checklist for the Student.
50. The maladaptive behaviors that the Student has demonstrated while at [School 2] are not representative of the behaviors observed by his teacher at the Preschool or Ms. XXXX, who provided special education services through PEP while the Student was enrolled at the Preschool.
51. In either late December 2011 or early January 2012, XXXX XXXX requested that XXXX XXXX observe the Student as the Student was preparing to transition from preschool to [School 5], his home school.

52. Ms. XXXX met with Mrs. XXXX, the Student's teacher at the Preschool. When the Student was in small centers, he was allowed, as an accommodation, to pick and choose which center he wanted to go to. He participated in discussions with classmates and the teacher used other accommodations to enable him to be successful.
53. Ms. XXXX did not observe any maladaptive behaviors from the Student during her one hour observation, nor did Mrs. XXXX inform Ms. XXXX of any maladaptive behaviors while Ms. XXXX was observing the Student.
54. On February 26, 2012, the Parents entered into a Re-Enrollment/Tuition Contract for the 2012-2013 school year at the [School 2].
55. Pursuant to the terms of the contract with [School 2], the Parents would not be responsible for the full annual of tuition if they provided written notice to the school by May 31, 2012. The Parents did not provide [School 2] with written notice.
56. During the Spring of 2012, the Parents requested that the MCPS conduct a periodic review of the Student.
57. The assignment to observe the Student was given to XXXX XXXX, Instructional Specialist. She observed the Student for one hour on April 11, 2012 at [School 2].
58. During the observation, the Student was attentive and participated in group activities. He was fidgety but was not distracting to his peers. She observed no maladaptive behaviors.
59. There was an attempt by the Student's math teacher and XXXX XXXX during Ms. XXXX's observation of the Student to solicit problem target behaviors from the Student and demonstrate them to Ms. XXXX; they were unsuccessful in triggering any targeted behaviors from the Student.

60. Ms. XXXX did not observe any significant behavioral problems during her observation of the Student.
61. Following the observation, Ms. XXXX met with the Parents. The Parent, [Father], requested that the meeting be recorded. Notes of the recording were transcribed by him. Although he advised Ms. XXXX that he would provide her with the transcribed copy, he did not provide a copy to Ms. XXXX.
62. On May 29, 2012, an annual review IEP team meeting was held. In addition to the Parents and their counsel, those in attendance included Ms. XXXX, XXXX XXXX, Special Educator at [School 1], XXXX XXXX, School Psychologist, and others.
63. At the meeting, Ms. XXXX reported on her observations of the Student at [School 2]. The IEP team recommended sixteen hours of [PROGRAM 1] services with support at [School 1] for the 2012-2013 school year. The Parents did not approve of the placement at [School 1], but did agree with the goals and objectives of the IEP. The team agreed that psychological testing would be completed based upon the request of the Parents.
64. Two days after the IEP team meeting, May 31, 2012, the Parents became financially obligated to [School 2] for the entire 2012-2013 school year tuition fees.
65. Ms. XXXX XXXX, School Psychologist, conducted a psychological re-evaluation of the Student based upon a review of the records, consultation with XXXX XXXX, the Behavior Assessment System for Children-2(BASC)-Parent Report, Teacher Report, the Conners 3- Parent Report, Teacher's Report and the most recent IEP team meeting.
66. Ms. XXXX was unable to observe the Student at [School 2] because the school year had just ended when she was assigned to prepare the re-evaluation.

67. The Connors 3 test results indicate that the Student experiences symptoms of ADHD/Hyperactive type and characteristics of oppositional defiant disorder.
68. The BASC2 was completed by the Parents and the Student's two teachers. The Parents and the teacher agreed that the Student exhibited very elevated levels of anxiety as compared to the general population.
69. The Student's adaptive skills fall within the average range.
70. The Student shows strong capacity to learn.
71. Interfering issues of attention and anxiety along with defiance and aggression and difficulty with peer relations require interventions for the Student.
72. On September 5, 2012, after the school year had already begun at both the MCPS and [School 2], another IEP meeting was held to review the psychological re-evaluation conducted by Ms. XXXX. The Parent, [Mother], was present along with her counsel. In addition, Ms. XXXX was present as were XXXX XXXX, Special Educator, XXXX XXXX and others.
73. The IEP team recommended sixteen hours of special education, totally in the general education classroom with supports based on the end-of-year progress report from [School 2] and the psychological evaluation by Ms. XXXX.
74. The IEP developed by the IEP team could be implemented at [School 1].
75. [School 1] has a class size of approximately twenty-five students. In the class of students, there are currently three students with an IEP.
76. The class at [School 1] is taught by a general educator along with a special educator, Ms. XXXX, and a paraprofessional throughout the day.

77. Ms. XXXX has successfully educated children in her class who display aggressive behavior. In those situations where there are significant behavioral issues, an FBA and a BIP plus a contract with the student are typically employed to eliminate the maladaptive behaviors.
78. Students in the [School 1] [PROGRAM 1] program often return to their home school after successfully addressing their individual goals and objectives.
79. If additional supports are needed to address particular concerns with a child, they are provided.
80. The sixteen hours per week of special education services are provided throughout the day, depending on the activity. Ms. XXXX co-teaches with the classroom teacher and assists students as needed, whether the student has an IEP or not.
81. The IEP team did not, at either the May 29, 2011 or the September 5, 2012 meeting, request that a FBA be conducted for the Student.
82. At [School 1], quarterly progress reports are issued by the special educator in addition to the report cards issued by the general educator.
83. On October 26, 2012, XXXX XXXX observed the [PROGRAM 1] program at [School 1] for thirty minutes. She observed that the students were well behaved and were on task without reinforcement.
84. An IEP team meeting took place on January 8, 2013. In addition to both Parents and their counsel, XXXX XXXX and the general educator at [School 1], who would be the Student's teacher if he had attended [School 1], were present along with several others.
85. XXXX XXXX was invited to report on her observation of the [School 1] [PROGRAM 1] program by telephone during the meeting of January 8, 2013.

86. Ms. XXXX reported her observations to the team, explaining that the students she observed at [School 1] were well-behaved. She also expressed her concern that the Student needs to be with children who are good role models because he is at risk of copying negative behaviors.
87. The [School 1] [PROGRAM 1] program is capable of meeting the educational needs of the Student with the accommodations recommended by the MCPS educational professionals.
88. The May 29, 2012 IEP followed up with the September 5, 2012 IEP is appropriate to allow the Student to benefit educationally from the instruction described in the IEP.

DISCUSSION

The Legal Framework

The identification, assessment, and placement of students in special education is governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2013), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2012) and COMAR 13A.05.01. The IDEA provides that all students with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412 (2010). 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 (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 provide 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; second, there must be a determination as to whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. 458 U.S. at 206-207. The Parents did not allege nor did they produce any evidence to support a finding that the MCPS failed to comply with procedures. As there were no procedural compliance issues, the following analyses will first turn on whether the IEP, as developed, is reasonably calculated to enable the Student to receive educational benefit.

To provide a FAPE, the student’s educational program must be tailored to the student’s particular needs and take into account:

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

20 U.S.C.A. § 1414(d)(3)(A) (2010).

Among other things, an IEP depicts a student’s current educational performance, sets forth annual goals and short-term objectives and measurement of improvements in that

performance, describes the specifically-designed instruction and services that will assist a student in meeting those objectives, and indicates the extent to which a student will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A) (2010).

Furthermore, while a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system. *Rowley*, 458 U.S. at 208. “Ultimately, the [IDEA] mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of that education to state and local school officials.” *Barnett v. Fairfax County School Board*, 927 F. 2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).²

In addition to the IDEA’s requirement that a disabled child receive some educational benefit, a student must be placed in the least restrictive environment (LRE) to achieve a FAPE. Pursuant to federal statute, disabled and nondisabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5)(A) (2010). Yet, placing disabled children into regular school programs may not be appropriate for every disabled child. Consequently, 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. *Id.* and 34 C.F.R. § 300.114(a)(2) (2012). In such a case, a FAPE might require placement of a child in a private school setting that would be fully funded by the child’s public school district. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369 (1985).

There has always been a statutory preference for educating children with learning disabilities in the LRE with their non-disabled peers. The IDEA provides as follows:

To the maximum extent appropriate, children with disabilities, including

² The IDEA is not intended to deprive educators of the right to apply their “professional judgment.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F. 3rd 996, 1001 (4th Cir. 1997).

children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A) (2010).

However, this “mainstreaming” requirement is “not an inflexible federal mandate.”

Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997).

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

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Accordingly, in this matter, the Parents have the burden of proving that the Student’s IEP, specifically as it pertains to the Student’s proposed placement for school year 2012-2013 at [School 1], is not reasonably calculated to provide educational benefit to the Student. If I determine that a FAPE was not afforded to the Student, then the Parents have the burden of showing that [School 2] is an appropriate private school placement.

Providing a student with access to specialized instruction and related services does not

mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*. Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive educational benefit. The IEP “must contain statements concerning a disabled child’s level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child’s progress.” *M.M. v. School District of Greenville County*, 303 F. 3d. 523, 527 (4th Cir. 2002). The IEP is not required to “maximize” educational benefit; it does not require the “ideal.” *A.B. ex rel B.B. v. Lawson*, 354 F.3d 315, 327,330 (4th Cir. 2004).

Position of the Parties

Parents

The Parents argue that the MCPS has not provided the Student with a FAPE for the 2012-2013 school year. Although the Parents are not seeking reimbursement for their unilateral placement of the Student at [School 2] for the 2011-2012 school year, the Parents claim that the MCPS failed to provide a FAPE for the Student for that year as well and that is why they enrolled the Student at [School 2] for that school year. The IEPs for both school years are not substantially different. The IEP provides for sixteen hours of special education services in a general education classroom at the [School 1] [PROGRAM 1] program. For the IEP covering the school year 2011-2012, four of the sixteen special education service hours would have been outside of the general classroom and twelve hours would have been inside the general classroom. This was subsequently changed for the 2012-2013 school year to sixteen hours of special education in the general education classroom. The Parents argue that placing the Student in the [School 1] [PROGRAM 1] program for 2012-2013 would result in a denial of a FAPE. As a

result of the denial of a FAPE, they argue that [School 2] is an appropriate unilateral placement for the Student and that the MCPS should reimburse them the cost of tuition and related costs and expenses for the Student's attendance at [School 2] during the 2012-2013 school year.

MCPS

The MCPS argues that it provided the Student with a FAPE for the 2012-2013 school year based on the IEP team recommendations that the [PROGRAM 1] program at [School 1] would provide the Student with personalized instruction with sufficient support services to permit the Student to benefit educationally from that instruction. Alternatively, if it is determined that the MCPS did not afford the Student a FAPE, then MCPS's argues that [School 2] is not an appropriate placement for the Student and that reimbursement for tuition and related costs and expenses should be denied.

Student Background

The Parent, [Father], testified that as a young child, the Student was sensitive to light and to loud sounds. He would flap his arms and rock back and forth. [Father] reported that the Student had a high level of anxiety and would get frustrated and anxious when change in his normal routine would occur. For example, his mother would have to pick him up from school every day. If she was not there when school ended, he would cry and scream and have a "melt-down."

The Parents brought these behaviors to the attention of the Student's pediatrician who recommended that the Student be evaluated. He was identified by MCPS Child Find as a student who may be eligible for special education in July, 2010. (P 2). He was referred to the [CENTER 2] from the MCPS speech office on October 7, 2010, for the purpose of determining the presence of an educational disability that may result in the need for special education services. He was

assessed in November 2010 by the [CENTER 2]. The Student was observed in his preschool class as well as outside the class during testing. The results confirmed the Parents' concerns about the Student's difficulty in regulating behavior and need for frequent redirection. The Student was referred to the CEIP team to determine eligibility for special education services while he attended preschool.

The Parent, [Father], is a high school math teacher at [School 6], a school within the MCPS. He testified that it is his desire that the Student be educated in a general education classroom. He does not want the Student to be educated in a classroom with high-functioning autistic students.

2010-2011 School Year

The Student was found to be eligible for special education services on December 3, 2010, by the IEP team which determined that he should receive sixty minutes per week of preschool special education itinerant services while he was attending the Preschool during the 2010-2011 school year. The [CENTER 2] determined that the Student demonstrated needs in the areas of attending to skills, participating appropriately during nonstructured classroom activities and in large group activities. Ms. XXXX, the special educator assigned to the Student, completed a report on May 11, 2011 at the end of the school year outlining the progress he had made since he was receiving special education services and included recommendations for the following school year. She noted that the Student performed strongly in academic areas but had a high activity level, inattention and self-directed behavior that interfere with his availability for learning. She reported that the Student needed significant adult interventions to support him. She reported her findings at the IEP meetings of May 11 and June 9, 2011. She observed that the Student had made progress interacting with his peers. When he was first observed, he was independent and

solitary in his play and interactions with peers in small and whole group settings, but over the last months of the school year, he began to take his own initiatives with his peers. He consistently showed an interest in friendships with specific students. Mrs. XXXX, the Student's classroom teacher, provided an end-of -year Progress Report (P 8) which noted proficiency in most areas and progress in interpersonal development. She remarked that she "enjoyed watching him develop socially, emotionally and academically during the year." She did not mention any maladaptive behaviors, such as hitting and kicking the teacher, stealing objects, or urinating on the bathroom floor. Mrs. XXXX recommended that the Student be placed in a regular education program with a smaller class size and an adult aide to help the Student continue his progress.

As part of the preparation for the IEP meetings which were held on May 11, 2011 and June 9, 2011, the MCPS requested that Dr. XXXX XXXX conduct a psychological review/evaluation to assess the Student's current level of cognitive and social/emotional functioning and to make programming and placement recommendations. (Board 4). Dr. XXXX observed the Student in the classroom. She also reviewed the report from Dr. XXXX's team at [Center 1]. Dr. XXXX found that the test data presented by Dr. XXXX's team was insufficient, clearly presented and did not reflect appropriate scores. She mentioned that the cognitive test data should be supplemented with classroom observations and teacher consultation in order to present a comprehensive picture of the Student's current profile. Dr. XXXX's team never observed the Student at the Preschool. XXXX XXXX, qualified as an expert in special education and who has been certified in special education since 1976, observed the Student at the Preschool prior to the May 11, 2011 IEP team meeting. She reported on her observations at the IEP team meeting. She did not observe any maladaptive behaviors in the classroom. She did note that there were a lot of accommodations to enable the Student to be successful. At the IEP

meeting of May 11, 2011, Ms. XXXX recommended specialized instruction. She is very familiar with the [School 1] [PROGRAM 1] program and informed the IEP team that the [PROGRAM 1] teachers could support the Student's educational needs. She explained that there are always two adults in the room at the [PROGRAM 1] program, including the general education teacher and either a special education teacher or a paraprofessional. The Parents were not in favor of the [School 1] [PROGRAM 1] placement because they believed that the classes were too large, and they questioned what would happen in such an environment if the Student were to have a behavior problem or a meltdown. The Parent, [Mother], did not want the Student to be labeled if one teacher were to give him special attention. Despite the Parents' concerns, Ms. XXXX assured the Parents that the [PROGRAM 1] program at [School 1] would be able to provide the necessary supports for the Student.

The IEP team met again on June 9, 2011, and the team recommended supplementary aids and listed individual goals and objectives. The team recommended sixteen hours of special education services in the general education classroom and four hours of specialized instruction outside of the general education setting. The Parents did not agree with the recommended placement.

Unilateral Placement at [School 2]

The Parents have always been consistent in their desire to have the Student educated in a small classroom. Although no evidence was introduced at the hearing, it would not be surprising if most parents would prefer that their children be educated in classrooms with a small number of students rather than a large number of students. There were approximately fourteen students in the Student's classroom at [School 2]. If he were to attend the [School 1] [PROGRAM 1] program, the numbers would be higher, approximately twenty-five. With two educators in a

classroom at both [School 2] and [School 1], it is obvious that there is a lower student to teacher ratio at [School 2] than at [School 1]. I find that based on the evidence, it is essentially the small classroom size that led to the Parents' decision to place the Student at [School 2] rather than at [School 1]. I base this finding, in part, on the circumstances that led to the Student's placement at [School 2] for the 2010-2011 school year.

On April 9, 2011, the Parents, after looking at only general education private schools for the Student for the 2011-2012 school year, selected [School 2] and filed an enrollment application. (Board 3A). The Student was accepted on May 25, 2011, to attend [School 2] for the 2011-2012 school year. XXXX XXXX, a co-founder of [School 2] and current Program Specialist/Parent Educator explained that the reasons why parents apply to [School 2] are the small teacher to student ratio, and a strong social learning program with emphasis on socialization. The Student was accepted based on good academic skills, vocabulary, pragmatic needs, maladaptive behaviors and the need for individualized attention.

The Parents were obviously sold on the program at [School 2] as they entered into a tuition contract for the 2011-2012 school year on June 2, 2011. (Board 6B). By entering into this contract on June 2, 2011, the Parents were financially committing themselves to pay to [School 2], \$25,500.00, whether the Student attended class there or not. (Board 6B, paragraph 6). As a result, in order to accept the IEP team's June 9, 2011 recommendation for placement at [School 1] for the 2011-2012 school year, the Parents would have been required to pay [School 2] the full tuition amount. I find that the Parents had no intention of sending the Student to the [School 1] [PROGRAM 1] program once they were already financially committed to [School 2]. Nevertheless, they attended the June 9, 2011 IEP meeting. Although the Parent, [Father], did not recall whether he informed the IEP team that he had already committed the Student to [School

2], I find that he did not tell the IEP team of his decision. First, throughout his testimony, the Parent had trouble recalling many events, this included. Second, if he had mentioned that the Student was already committed to attending [School 2], I would have expected to see that mentioned in the IEP meeting notes. Clearly, a revelation that his son was not going to [School 1] because he was already enrolled at [School 2] would have been mentioned, especially while reviewing the goals and objectives, the number of hours of special education in the general education setting and outside of it along with the supplementary supports that were planned for the upcoming school year. Finally, if the Parents had disclosed that the Student was going to attend [School 2] at the June 9, 2011 meeting, they likely would not have waited until August 10, 2011 to notify MCPS that they intend to place the Student at [School 2] and seek public funding after rejecting the proposed placement on June 9, 2011. (P10).

Although the Parents eventually withdrew their request for reimbursement from MCPS for 2011-2012, despite seeking assistance from the Director of [School 2], XXXX XXXX and obtaining a letter supporting their placement from XXXX XXXX on November 22, 2011 (P12), the circumstances of the 2011-2012 placement of the Student at [School 2] reflects on the motivation of the Parents and their sincerity during the IEP process. I find the Parents' failure to disclose the information about the Student's placement at [School 2] or their commitment to pay tuition for the entire year as of May 31, 2011 very troubling. The Parents applied to [School 2] before the May 11 or June 9, 2011 IEP team meeting. Counsel for the Parents argued that all that was required to enroll was \$ 750.00 to hold the space. If an IEP was accepted by the Parents, then they would have only lost their deposit and would still have been able to enroll the Student at [School 1]. Counsel referred to the deposit as a place holder, to allow the Parents to decide whether to enroll the Student at [School 2] or not. If these were the facts, counsel for the

Parents would be correct. However, by the time the June 9, 2011 meeting was held, the Parents were already committed to [School 2] for the entire year's tuition, whether the Student attended or not. I cannot envision a scenario where the Parents would be willing to forfeit \$25,500.00 and send the Student to [School 1], or to any other MCPS school or program.

Once the Parents were convinced that a small classroom size would be the only way that their child would thrive both academically and socially, their participation in the IEP process, especially during the June 9, 2011 IEP meeting, was purely for the purpose of preserving an opportunity to seek reimbursement from MCPS. The reason that they no longer are seeking reimbursement from MCPS for the 2011-2012 school year is unexplained but it may be attributable to having already committed to [School 2] before the IEP team had an opportunity to finalize the IEP for the 2011-2012 school year at its June 9, 2011 meeting.

2010-2011 School Year

The Student began class at [School 2] on August 29, 2011. His class was comprised of fourteen students with two teachers, one State certified in special education and another associate teacher. He is taught in a general education setting. None of the students in his class have an IEP. The Student does receive speech and occupational therapy in class, but receives no psychological services. XXXX XXXX, testified that at [School 2], the Student receives no special education services and although she testified that the Student does not need an IEP, she later testified that it might be appropriate to have an IEP for social and emotional skills.

Ms. XXXX did not testify as an expert in special education, although she was offered as an expert in the field. Although she received a Master of Arts degree in special education from XXXX University in 1990, and has degrees in audiology and speech pathology, she is not a certified special education teacher. Having obtained her state certification in special education in

1991, she allowed the certification to lapse sometime thereafter because she claimed that someone told her that she was “grandfathered” and did not have to renew her certification. She subsequently discovered that she was no longer certified in special education and has failed to obtain recertification in the field. It is unclear from the testimony when her certification lapsed, but she indicated that it may have lapsed either five or ten years after receiving it. Even assuming that the certification has lasted 10 years, this means she has not been certified in special education for twelve years or more. She has not been a special education teacher in the classroom since 2004 when she left [School 3] school, a state certified special education school. If she wanted to be considered an expert in special education, she should have done the work necessary to receive a certificate that would allow her to be a State certified special education teacher. If being a certified special education teacher was important to her, she should not have relied on the advice of some unnamed person but verified her eligibility for certification herself. Her role at [School 2] is not as a teacher. She is essentially an administrator, having founded [School 2] with XXXX XXXX.

Although not qualified as an expert, XXXX XXXX is familiar with the Student and has observed the [School 1] [PROGRAM 1] program. She also participated by telephone in an IEP meeting that was held on January 1, 2013.

XXXX XXXX was requested by the Parents to assist them in seeking reimbursement from the MCPS for the 2011-2012. In response to the request, Ms. XXXX wrote a letter to Parents’ counsel describing the Student’s behaviors and services he receives at [School 2]. (P 12). Ms. XXXX described maladaptive behaviors, including stealing, urinating on the bathroom floor and toilet paper roll, aggression toward teachers and threatening language, and talking about weapons and killing people. These behaviors continued during the 2012-2013 school year

as well. [School 2] has not conducted a FBA or proposed a BIP. [School 2] has a checklist to address maladaptive behaviors, however none was produced by the Parents and apparently, if there was one, it no longer exists.

The maladaptive behaviors described by Ms. XXXX are not representative of the behaviors observed by his teacher at the Preschool or by Ms. XXXX, who provided special education services to the Student at the Preschool.

During the course of the school year, the Student made progress. A mid-year and end-of-year report were generated that demonstrates that the Student was strong academically and that he was making progress in the social areas, developing skills in areas to “satisfactory” or “still developing” skills. He still had emerging skills in demonstrating flexibility and compliance. The Parents were pleased with the Student’s progress. On February 26, 2013, the Parents entered into a Re-Enrollment/Tuition Contract for the 2012-2013 school year at [School 2].

Following the signing of the contract, the Parents requested that MCPS conduct a periodic review of the Student. XXXX XXXX, Instructional Specialist for MCPS and State certified in special education observed the Student. Ms. XXXX accompanied Ms. XXXX during the observation that took place on April 11, 2011 at [School 2]. Although the Student was fidgety, he was not distracting to his peers. Ms. XXXX described the maladaptive behaviors attributable to the Student. Ms. XXXX did not observe any of these behaviors. To try and demonstrate that the maladaptive behaviors occur in the classroom, Ms. XXXX and the classroom teacher tried to trigger the maladaptive behaviors. They were unsuccessful. Ms. XXXX has never seen anyone try this method and opined that triggering maladaptive behaviors is not a recognized technique in special education.

On May 29, 2012, an annual review IEP team meeting was held. At the meeting, the goals and objectives were established for the 2012-2013 school year. The Parents did not object to the goals or the objectives. The IEP team recommended that the Student be educated at the [PROGRAM 1] program at [School 1] for the 2012-2013 school year. The team agreed that psychological testing would be conducted based upon the request of the Parents. Ms. XXXX, a state certified psychologist, conducted the re-evaluation. She was unable to observe the Student in the classroom because school was ending at the time she was assigned to conduct the evaluation. The results of the evaluation were not inconsistent with previous reports that the student has high levels of anxiety and characteristics of defiance and aggression. Her report was shared with the IEP team on September 5, 2012 after the school year had started at both [School 2] and at the MCPS. The team recommended sixteen hours of special education training with supports at [School 1].

There are three students at [School 1] that have an IEP. There would be two teachers available throughout the day, including the general education teacher, the special educator or a paraprofessional. The special education teacher or paraprofessional would assist the students with their IEP but would also assist general education students as necessary. The sixteen hours would be spread throughout the day. The Parents' concerns about unstructured time, including recess and lunch would be addressed as needed. Ms. XXXX, the certified special educator who would have been assigned to the Student, has had students in the past with similar problems as the Student and was successfully able to educate them. She testified that if behavior became a problem, the Student would be evaluated through a FBA and a BIP, if necessary, along with a contract with the Student to eliminate the maladaptive behaviors. Most importantly, many of her students were able to return to their home schools after successfully addressing their individual

goals and objectives. The Parents would prefer that the Student attend his home school at some point so that he could be with his peers who live in the neighborhood.

The IEP for the 2012-2013 School Year is Appropriate

One of the primary purposes of the IDEA was “to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs” 20 U.S.C.A. § 1400(d)(1)(A) (2010); *see also MM, supra*.

Under IDEA, a state must provide all children with disabilities a FAPE. 20 U.S.C.A. §§ 1400(c), 1412(d)(1)(1)(A). A FAPE requires the school district to provide instruction that suits the child's needs, as well as related services to ensure that the child receives some educational benefit from instruction. 20 U.S.C.A. § 1401(9); *see also* Md. Code Ann., Educ. § 8-401(a)(3)(Supp. 2012) (defining FAPE); 20 U.S.C.A. § 1401(26) (2010) (defining related services). However,

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential. (citations omitted).

Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993).

Rather the[FAPE] requirement is satisfied when the state provides the disabled child with ‘personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.’ *A.B ex rel. D.B.. v. Lawson*, 354 F. 3d 315, 330 (4th Cir. 2004), citing *Rowley*, 458 U.S. at 203.

In this case, the MCPS has provided the Student with a FAPE for the 2012-2013 school year. There is no dispute that the classroom size is larger than the classroom size he attended at

[School 2]. However, this is not the determinative factor in deciding whether the Student was afforded a FAPE for 2012-2013. As stated earlier, it is likely that most parents, whether their child has an IEP or not, would prefer smaller class sizes to larger class sizes. Dr. XXXX, and her team recommended a small class size for the Student based upon observation and testing, although Dr. XXXX did not observe the Student in a classroom setting. Dr. XXXX opined that the Student qualifies for an IEP to address his cognitive academic and social needs. (P6).

Neither Dr. XXXX nor any other member of her team testified at the hearing on the merits. Nevertheless, I give credit to her report because the team conducted extensive testing and did observe the Student, although not in the classroom setting. I do not, however, give her opinion as much weight as the MCPS experts who observed the Student in the classroom and who testified at the hearing under oath and were subject to cross-examination. In addition, I gave Dr. XXXX's report less weight because it was nearly two years old at the time of the 2012-2013 school year.

The IEP offered by the MCPS addresses the Student's needs identified in Dr. XXXX's report with the exception of small class size. In addition to the small class size, Dr. XXXX's team recommended a school psychologist/behavior management expert to help the Student manage his impulses and behaviors. A psychologist from the MCPS is available to assist the Student and the special education teacher, Ms. XXXX, explained, in great detail, how the [School 1] [PROGRAM 1] program uses data obtained from a FBA to develop a BIP and a behavior contract, as necessary. Dr. XXXX explained in her report that

[T]he behavior management expert will help [the Student] manage his behavior and impulses. The behavioral management expert would also be a crucial collaborator in the design and implementation of a highly structured program of positive behavioral supports, with particular focus on establishment of routines and safety practices. (P 6, page 8)

These services, recommended by Dr. XXXX, are either unavailable or not used at [School 2]. They are available at the [School 1] [PROGRAM 1] program and have been implemented for students in the past in Ms. XXXX's classroom. Although the IEP for 2012-2013 did not include a FBA or BIP, the maladaptive behaviors noted by XXXX XXXX in her observation of the Student at [School 2] were not seen by Ms. XXXX when she observed the Student at [School 2], even after the Student was given triggers to set off these behaviors. If the maladaptive behaviors were presented by the Student in the [School 1] [PROGRAM 1] program, there are professionals available to conduct an FBA and implement a BIP.

The IEP for the 2012-2013 school year contained measureable social and emotional goals and objectives to achieve those goals. Again, the Parents had no issue with either the goals or the objectives. Each of the special education experts who observed the Student in the classroom, including XXXX XXXX and Ms. XXXX, recommended the [School 1] [PROGRAM 1] program based on the information that was available to them. They are both very familiar with the [School 1] [PROGRAM 1] program and recommended it based on the Student's needs and their experience with the program. I give great weight to their testimony based on their knowledge of the [School 1] program and their professional expertise in the area of special education. The judgment of educational professionals such as these is ordinarily entitled to deference. *G. v. Ft. Bragg Dependent Schools*, 343 F.3d 295, 307 (4th Cir. 2003); *M.M v. Sch. Dist. of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002).

As previously stated, there is no allegation of any procedural issue with the IEP. The law recognizes that "once a procedurally proper IEP has been formulated, a reviewing court should be reluctant to second guess the judgment of education professionals. *Tice v. Botetourt County*

School Board, 908 F.2d 1200, 1207 (4th Cir.1990). However, “the required deference to the opinions of the professional educators [does not] somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether the IEP is appropriate simply because a teacher or other professional testified that the IEP is appropriate.” *County Sch. Bd. v. Z.P. ex. Rel. R.P.* 399 F.3d 298, 307 (4th Cir. 2005). I am mindful of this, and based on the evidence before me, I find that the IEP, as written, would permit the Student to benefit educationally from the instruction provided in the IEP.

The [School 1] [PROGRAM 1] program provides good role models for the Student. When XXXX XXXX observed students in the [School 1] [PROGRAM 1] program and reported at the IEP team meeting on January 8, 2013, she noticed that the students were very well behaved. She also noticed that the students did not need support for the entire period. She was concerned that the Student would get anxious during the unsupervised period and be unable to sustain effort without ongoing teacher attention and/or a reinforcement system. (P 31). While she stated at the January 8, 2013 IEP team meeting that the Student was at risk of copying negative behaviors, and needs to be with good role models, she was unable to explain at the hearing why having well behaved students which she observed in the [School 1] [PROGRAM 1] program would be anything but good role models for the Student. I gave little weight to her testimony because I did not find her to be a credible witness. She co-founded [School 2]. [School 2] is a private school and receives payment for their services through tuition payments. [School 2] has grown from eight students to 59 students today. I do not question whether she would encourage parents to enroll their children in her school if they would not benefit from instruction at [School 2]. However, once the student is enrolled at [School 2] and it is determined that the child is progressing educationally as determined by progress reports

throughout the school year, Ms. XXXX and her co-founder, XXXX XXXX would likely be motivated to encourage parents to keep their student in their program. In furtherance of encouraging parents to re-enroll their students in subsequent years at [School 2], it is in the school's best interests for Ms. XXXX to cooperate with the Parents in trying to obtain reimbursement from MCPS for the cost of tuition.

Finally, XXXX XXXX, at the request of the Parents following the May 29, 2012 IEP team meeting, was asked to conduct an additional assessment to assess the extent of anxiety and attention difficulties that the Student was experiencing. She was unable to observe the Student in the classroom because she was given the assignment at the end of the school year and was unable to make arrangements to observe the Student. Although she was unable to observe the Student, I still find her testimony credible and persuasive. As stated by the 4th Circuit Court of Appeals in the case of *JH v. Henrico County School Bd*, 395 F.3d 185, 197-198 (4th Cir. 2005), "if the Hearing Officer chooses to credit the testimony of any witness who did not actually observe [the student] in the school setting, the Hearing Officer needs to expressly acknowledge such fact and explain why he chose to credit that witness's testimony anyway. The same goes for the crediting of any expert witness." As part of her evaluation, Ms. XXXX consulted with XXXX XXXX and administered the BASC-2 and the Conners 3. She reviewed Dr. XXXX's and Dr. XXXX's reports which she found still relevant. She found consistency between the home and school settings for anxiety and hyperactivity/impulsivity in the Student. These continue to interfere with the Student's functioning. Academic areas were not a concern, however interfering issues of attention and anxiety as well as defiance and aggression and peer relations require interventions by identifying antecedent events and triggers and developing a repertoire of replacement behaviors. She suggested that the Student might benefit from a FBA. She

concluded by stating that exposure to appropriate peer relations would provide good models for the Student to emulate, particularly since he has shown strong cognitive capacity to learn.

Emulating good role models, such as the ones observed by Ms. XXXX at [School 1], would be part of the Student's daily routine if he was enrolled in that program. I find Ms. XXXX to be a very credible witness with decades of experience in psychology. She expressed confidence that the Student's needs could be met in the [School 1] [PROGRAM 1] program. I concur with her conclusion.

Least Restrictive Environment (LRE)

It is a legal requirement that a student with disabilities be educated in the least restrictive environment to achieve a FAPE. The law requires that these students participate in the same activities as their nondisabled peers to the maximum extent appropriate. 20 U.S.C.A. § 1412(a)(5) (2010). The IDEA regulations require the IEP team to first consider whether the provision of supplementary aids and services will permit placement of a student with a disability in the regular education environment rather than a more restrictive environment. 34 C.F.R. § 300.114(a)(2) (2012). The IEP team recommended that the Student be placed in the [School 1] [PROGRAM 1] program within the general education classroom. He is to receive sixteen hours of special education per week, spread throughout the day. For 2012-2013, the IEP team did not recommend that part of the sixteen hours of special education be provided outside of the general education classroom. In the general education classroom, the Student would have good role models to emulate and would be only one of four students with an IEP. As a student with a disability, if he were to attend [School 1], he would be in the least restrictive environment to receive educational benefit.

Finally, the Parents' decision to reject the IEP for the 2012-2013 school year and enroll the Student at [School 2] was their own decision to make as parents. The reports from teachers who taught the Student during the school year and a review of test data indicate that the Student is making progress. [School 2] may be an excellent school and have excellent teachers along with a good academic track record in transitioning its students to higher grades; however, that is not the issue I am asked to decide. Pursuant to *Carter*, the appropriateness of a parent's private placement choice and whether they may be entitled to reimbursement of tuition fees and costs is analyzed only if the IEP results in denial of a FAPE. 510 U.S. 7; 15. The Parents have the burden of proving that the IEP denied the Student a FAPE. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). I find that the Parents have not met their burden. Having established that the MCPS has provided the Student with FAPE for the school year 2012-2013, the second *Carter* prong, whether the placement at the private placement, in this case [School 2], is appropriate does not apply.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parents have failed to establish that the IEP offered by the MCPS was not reasonably calculated to offer the Student with a meaningful educational benefit for the 2012-2013 school year. 20 U.S.C.A. §§ 1400- 1482 (2010 & Supp. 2013).

I further conclude that the IEP and placement proposed by MCPS for the 2012-2013 school year is reasonably calculated to offer the Student a FAPE. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993).

As I have concluded that the Student was provided a FAPE at the [School 1] [PROGRAM 1] program, the Parents are not entitled to receive reimbursement as a result of their unilateral placement of the Student at [School 2] for the 2012-2013 school year. 34 C.F.R. § 300.148 (2012).

ORDER

I **ORDER** that the Parents' request to have their expenses reimbursed for the costs of the Student's attendance at [School 2] for the 2012-2013 school is **DENIED**.

July 1, 2013
Date Decision Mailed

Stuart G. Breslow
Administrative Law Judge

SGB/rbs

REVIEW RIGHTS

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

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

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