

XXXX XXXX

V.

MONTGOMERY COUNTY PUBLIC  
SCHOOLS

\* BEFORE MICHAEL J. WALLACE,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: MSDE-MONT-OT-13-41720

\* \* \* \* \*

**DECISION**

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ORDER

**STATEMENT OF THE CASE**

On November 4, 2013, [Father] and [Mother] (Parents), on behalf of their child, [Student] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting mediation and 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). On November 12, 2013, counsel for the Parents notified the OAH that the parties declined to mediate or conduct a resolution meeting. On November 14, 2013, the matter was scheduled for a telephone prehearing conference.

I held a telephone prehearing conference on December 4, 2013. The Student was represented by Michael J. Eig, Esq. Jeffrey A. Krew, Esq., represented the MCPS. By agreement, the parties requested that the hearing be scheduled for January 27-30, 2014. Under

the federal regulations, a hearing must be conducted and a decision is due within forty-five days of certain triggering events. 34 C.F.R. 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2013). I had counsel for the parties review each of their calendars to determine whether the hearing could be completed within the forty-five day period. Each attorney reviewed their calendar with me. Due to scheduling conflicts, including a multi-day due process hearing before the OAH and witness unavailability, the parties waived their right to have the hearing within the forty-five-day period and agreed that the decision in this case would be issued no later than thirty days after the record closed. 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2008).

The hearing was initially scheduled for four days beginning on January 27, 2014 through January 30, 2014. However, after the second day it became apparent that more days would be needed to complete the hearing, so three additional days; February 7, 26 and 28, 2014 were added. The matter, however, concluded on February 26, 2014, thereby requiring the cancellation of the seventh scheduled day, February 28, 2014. The record, however, was held open until the close of business on February 28, 2014 to allow counsel for the Student to submit additional documentation in support of his case. At the hearing, Mr. Eig continued to represent the Student and Mr. Krew continued in his representation of the MCPS. At the close of the Student's case, MCPS made a Motion for Summary Decision (Motion). After giving each party ample time to be heard on the Motion, I denied the Motion and proceeded with the hearing. At the conclusion of MCPS' case, MCPS renewed its Motion which I took under advisement and instructed the parties that I would issue my decision based on the evidence presented. The close of the record occurred on February 28, 2014.

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) (2013); 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. 2013); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES**

The issues in this case are as follows:

1. Did the MCPS fail to develop an appropriate Individualized Educational Plan (IEP) for the Student for the second half of the 2012-2013 school year and the entire 2013-2014 school year?
2. Did the MCPS inappropriately refuse to determine that the Student's placement should be at the [School 1] ([School 1]) for the second half of the 2012-2013 school year and the entire 2013-2014 school year; and if so
3. Is tuition reimbursement (and related expenses and costs) for the second half of the 2012-2013 school year and the entire 2013-2014 school year at [School 1], the Parents' unilaterally chosen private school placement, appropriate?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits on behalf of the Student:

- XX- 1. Request for Due Process Hearing, November 4, 2013;  
XX- 2. Report of Communication/Motor Evaluation, July 28, 2005;

- XX- 3. Developmental Evaluation Report, February 6, 2007;
- XX- 4. PEP Developmental Profile, February 19, 2008;
- XX- 5. PEP Psychological Evaluation, February 25, 2008;
- XX- 6. MCPS Evaluation Meeting Developmental Delay Addendum, March 16, 2007;
- XX- 7. MCPS Draft IEP, February 12, 2009;
- XX- 8. Emails between [Father] (Parent) and XXXX XXXX, June 24, 2009;
- XX- 9. in XXXX Medical Center Neuropsychological Evaluation, December 2, 2009;
- XX- 10. MCPS IEP, February 19, 2010;
- XX- 11. MCPS Report of Speech-Language Re-Assessment, March 25, 2010;
- XX- 12. MCPS First Grade Report Card, June 18, 2010;
- XX- 13. Parent Report, July 2010;
- XX- 14. MCPS IEP, August 26, 2010;
- XX- 15. MCPS Speech-Language Status Report, October 8, 2010;
- XX- 16. Letter from XXXX XXXX, Speech-Language Pathologist, March 2011;
- XX- 17. MCPS Second Grade Report Card, June 18, 2011;
- XX- 18. XXXX Medical Center Neuropsychological Evaluation by Dr. XXXX XXXX, Pediatric Neuropsychologist and Director of the Center for Autism Spectrum Disorders, XXXX Medical Center, December 8, 2011;
- XX- 19. MCPS Draft IEP, January 30, 2012;
- XX- 20. MAP-R Performance Level Chart, June 5, 2012;
- XX- 21. End of Year-Third Grade Mathematics Report, June 11, 2012;
- XX- 22. MCPS Third Grade Report Card, June 14, 2012;
- XX- 23. Educational Management Team Summary Meeting Notes, September 24, 2012;
- XX- 24. Emails between Parent and XXXX XXXX, October 15, 2012;
- XX- 25. MCPS Fourth Grade First Quarter Report Card, November 7, 2012;
- XX- 26. Observation Notes by Parent, November 27, 2012;
- XX- 27. Letter from XXXX XXXX to Parents, December 19, 2012;
- XX- 28. Letter from Parents to XXXX XXXX, December 26, 2012;
- XX- 29. Emails between Parent and XXXX XXXX, December 28, 2012;
- XX- 30. Email from Parent to XXXX XXXX, Esq., January 15, 2013;
- XX- 31. Emails between Parent, XXXX XXXX and XXXX XXXX, March 14, 2013;
- XX- 32. Educational Consultation Report by XXXX XXXX, March 15, 2013;
- XX- 33. [School 1] Diagnostic Prescriptive Goals, April 16, 2013;
- XX- 34. Letter from XXXX XXXX, Esq. to XXXX XXXX, May 9, 2013;
- XX- 35. Observation Report by XXXX XXXX, May 29, 2013;
- XX- 36. [School 1] Reading Testing, May 2013;
- XX- 37. [School 1] Fourth Grade Report Card, June 2013;
- XX- 38. Educational Consultation Report by XXXX XXXX, July 7, 2013 including a Comparison Chart by [Father] summarizing implementations of Dr. XXXX's recommendations at [School 2] & [School 1];
- XX- 39. Letter to Zvi D. Greismann, Esq. from Michael J. Eig, Esq., August 5, 2013;
- XX- 40. MCPS IEP, August 19, 2013;
- XX- 41. MCPS Observation of Student at [School 1], September 4, 2013;
- XX- 42. MCPS Classroom Observation at [School 1], September 4, 2013;
- XX- 43. MCPS IEP, September 16, 2013;
- XX- 44. Comparison of New IEP from MCPS with [School 1] DPG by XXXX XXXX, September 2013;

- XX- 45. MCPS IEP, September 23, 2013;
- XX- 46. IEP Meeting Notes by [School 1]; September 23, 2013
- XX- 47. Merged into XX 38;
- XX- 48. [School 1] Mid-Year Fifth Grade Report Card, December 2013;
- XX- 49. Emails between XXXX XXXX and XXXX XXXX,
- XX- 50. Resume of XXXX XXXX;
- XX- 51. Resume of XXXX XXXX;
- XX- 52. Resume of XXXX XXXX;
- XX- 53. Resume of XXXX XXXX;
- XX- 54. Resume of XXXX XXXX; and
- XX- 55. Resume of Dr. XXXX XXXX.

I admitted the following exhibits on behalf of the MCPS:<sup>1</sup>

- Board 1 Report of Speech-Language Re-Assessment, March 25, 2010;
- Board 2 Speech-Language Status Report, October 8, 2010;
- Board 3 Email from XXXX XXXX to Parent, March 10, 2012;
- Board 4 Student's IEP, May 14, 2012;
- Board 5 Student's 3<sup>rd</sup> Grade report card, June 8, 2012;
- Board 6 Student's work Samples from 3<sup>rd</sup> Grade;
- Board 7 Educational Management Team Summary, September 24, 2012;
- Board 8 Student's 4<sup>th</sup> Grade report card, October 26, 2012;
- Board 8A [School 1] Application for Admission, December 6, 2012;
- Board 8B Student Visit Report, December 11-12, 2012;
- Board 9 Student's work Samples from 4<sup>th</sup> Grade;
- Board 10 Student's 4<sup>th</sup> Grade Schedule;
- Board 10A [School 1] Private Enrollment Contract 2012-2013 Academic Year;
- Board 10B XXXX Education Group Intake Questionnaire, January 19, 2013;
- Board 10C XXXX Education Group Education Consultant Agreement, January 19, 2013;
- Board 11 Letter from XXXX XXXX to Parents, January 31, 2013;
- Board 11A Email from [Father] to XXXX XXXX, May 30, 2013;
- Board 16 Letter from Michael J. Eig, Esq. to XXXX XXXX, July 22, 2013 with attachments;
- Board 16A [School 1] Private Enrollment Contract 2013-2014 Academic Year;
- Board 18 Letter from Michael J. Eig, Esq. to Zvi Greismann, August 5, 2013;
- Board 21 Letter from Zvi Greismann to Michael J. Eig, Esq., August 9, 2013;
- Board 23 MCPS Classroom Observation, September 4, 2013;
- Board 24 MCPS Classroom Observation, September 4, 2013;
- Board 26 Student's IEP, September 23, 2013;
- Board 29A Email from Parent ([Mother]) to XXXX XXXX, January 2, 2014;
- Board 30 Curriculum Vitae of XXXX XXXX;
- Board 31 Curriculum Vitae of XXXX XXXX;
- Board 33 Curriculum Vitae of XXXX XXXX;
- Board 34 Curriculum Vitae of XXXX XXXX; and,
- Board 38 [School 1] Behavior Referral, January 16, 2014.

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<sup>1</sup> Omitted exhibit numbers represent exhibits not offered for admission.

## Testimony

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

- XXXX XXXX, Educational Consultant; accepted as an expert in special education;
- XXXX XXXX, Speech-Language Pathologist at [School 1], [Address]; accepted as an expert in speech and language pathology;
- XXXX XXXX, Special Education Teacher at [School 1]; accepted as an expert in special education;
- XXXX XXXX, Senior Social Worker at [School 1]; accepted as an expert in social work;
- XXXX XXXX, Lower Middle School Director at [School 1]; accepted as an expert in speech and language pathology, and;
- Dr. XXXX XXXX, Pediatric Neuropsychologist and Director of the Center for Autism Spectrum Disorders, XXXX Medical Center; accepted as an expert in Pediatric neuropsychology and the diagnosis and programming for autistic children.

The MCPS presented the following witnesses:

- XXXX XXXX, Special Educator at [School 2] ([School 2]); accepted as an expert in special education;
- XXXX XXXX, Speech and Language Pathologist, MCPS; accepted as an expert in speech and language pathology;
- XXXX XXXX, Principal, [School 2]; accepted as an expert in school administration; and,
- XXXX XXXX, Special Educator at [School 2], accepted as an expert in special education.

## **STIPULATIONS OF FACT**

The parties stipulated to the following facts:

1. The Student was born on XXXX, 2002.
2. The Student is eligible to receive special education and related services under the educational disability of Autism, which is believed to impact him academically in reading

comprehension, math concepts, math computation, written expression, receptive language, expressive language, supralinguistic language, pragmatic language, attention, social/emotional functioning, and social interactions.

3. The Student began attending [School 2], an MCPS school, in the fall of 2008 for kindergarten.

4. In December 2009, the Parents had Dr. XXXX XXXX complete a neuropsychological evaluation of the Student.

5. In December 2011, the Parents had Dr. XXXX XXXX complete a neuropsychological evaluation of the Student.

6. In the fall of 2012, the Student began the fourth grade at [School 2] in the XXXX (XXXX) Program.

7. The Student's May 14, 2012 IEP called for fifteen hours per week of special education instruction in the general education setting with support, for math, science and social studies; five hours per week of special education instruction outside of the general education setting for reading and writing; one hour a month (two-thirty minute sessions) of counseling outside the general education setting; and, one hour a week (two-thirty minute sessions) of speech-language therapy outside the general education setting.

8. On December 26, 2012, the Parents withdrew the Student from MCPS and he began attending [School 1] in January 2013.

9. [School 1] is a nonpublic, full-time special education school.

10. On August 5, 2013, Michael J. Eig, Esq., the Parents' attorney, wrote to Jeffrey A. Krew, Esq., MCPS' attorney, advising that his clients intended to continue the Student at [School 1] for the 2013-2014 school year.

11. On August 26, September 16 and September 23, 2013, IEP team meetings were convened at [School 2] to conduct the Student's annual review.

12. The team proposed that the Student continue to attend the XXXX Program at [School 2] and receive the following special education and related services: nineteen hours a week of special education classroom instruction in the general education setting, with support, for math, science, reading, writing and social studies; five hours a week of special education classroom instruction outside the general education setting for reading; and, one hour a week (two-thirty minute sessions) of speech-language therapy outside the general education setting.

13. The Student currently attends the fifth grade at [School 1] for the 2013-2014 school year.

### **FINDINGS OF FACT**

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

1. The Student is an eleven-year-old child who is diagnosed with Autism Spectrum Disorder as well as Attention Deficit/Hyperactivity Disorder (ADHD), Predominately Inattentive Type and Learning Disorder, Not Otherwise Specified.
2. Initially, the Student displayed slow speech and language development when he was three as well as issues with his social interactions. He frequently became aggressive with peers and was easily frustrated.
3. In 2005, the Parents took the Student to speech and language pathologist, XXXX XXXX, for a private speech and language evaluation after which he was diagnosed with a receptive/expressive language disorder, cognitive/attention disorder, oral facial weakness and a speech disorder.



4. In 2007, the Student was referred to the MCPS Child Find Program where he was tested and demonstrated below age expectations on pre-academic skills and concepts as well as significant delays in receptive and expressive language.
5. He was found eligible for special education services and began attending the MCPS Preschool Education Program where he worked on improving his receptive and expressive language skills.
6. In fall 2008, the Student enrolled in kindergarten at [School 2]. He continued to receive speech and language therapy and made academic progress.
7. By first grade, he began to split his time between the XXXX Program and the general education classroom and continued to receive speech and language services. He also continued to show problems with his focus, his inability to complete tasks independently and a need for constant adult prompting.
8. In the December 2009 evaluation by Dr. XXXX XXXX, the Student showed extremely low verbal cognitive abilities and low average non-verbal processing skills. In addition, she determined that the Student showed a weakness in attention/working memory, emotional control, flexibility and conversation initiation; below average math achievement; impairments in executive functioning and a social learning disorder (high functioning Autism).
9. Dr. XXXX recommended that the Student receive special education services as a student with Autism from a special education team trained in Autism Spectrum Disorders, including a special educator, a speech and language therapist and a psychologist/school counselor.

10. In second grade, the Student continued to receive special education services and showed significant improvement in his behavior and executive functioning but still continued to need support.
11. In July 2010, the Student began receiving services from Speech and Language Pathologist XXXX XXXX. At the time services began, the Student showed limited conversational skills but by March 2011, he showed significant improvement and was able to maintain a conversation with a familiar adult for four to five exchanges and accurately interpret many of the facial expressions of his conversation partner. Improvement in this area was noted in the school setting as well.
12. At the beginning of third grade, in fall 2011, the Student continued to receive special education services in the XXXX Program as a student with Autism.
13. He received instruction in a small group setting and received pull-out services in a small group to focus on reading comprehension, math and writing. He also received weekly speech/language therapy during sessions in school as well as privately with Ms. XXXX.
14. During school year 2011-2012, the Student remained below grade level in reading but on grade level in math. The Student experienced problems with staying on task and needed instructions broken down into small chunks and written out for him.
15. The Student was working on grade level in math but continued to perform below grade level in reading.
16. In December 2011, the Parents took the Student for a neuropsychological evaluation with Dr. XXXX XXXX, a licensed pediatric neuropsychologist at XXXX Medical Center.

17. Dr. XXXX conducted two hours of clinical interviews with the Parents and the Student, behavioral observations of the Student and reviewed the Student's records. In addition, Dr. XXXX conducted eight hours of neuropsychological testing of the Student.
18. The Student scored in the low-average range in verbal and performance IQ. In addition, testing indicated that the Student continued to struggle in the area of executive functioning which impacted his attention span, working memory, organization and flexibility. This, in turn, made the Student susceptible to overload and frustration which made it extremely difficult for him to manage two stimuli simultaneously.
19. Dr. XXXX also found that the Student displayed a developmental language disorder. She noted that while he had strong decoding and sight word reading skills, he showed impairment in his overall core language skills with regard to receptive pragmatic and expressive language. She determined that the Student's academic skills were impacted by his language and executive deficits. The Student showed similar trends in math calculation, and also struggled with socialization concepts.
20. According to Dr. XXXX, the Student meets the criteria for Autism Spectrum Disorder as well as a Learning Disorder, Not Otherwise Specified. In addition, she noted that the Student continued to exhibit attentional problems indicating ADHD.
21. By the middle of school year 2011-2012, the Student was on grade level, with support in written language, decoding, and attention for learning, he was on a second grade level in reading comprehension and math and was below age expectancy in oral language skills.
22. By the end of school year 2011-2012, the Student's reading comprehension was described by his general education teacher to be excellent when the Student read a book

several times before discussing it. The Student received average final grades in reading comprehension, listening comprehension, writing, and math but needed improvement in math application and problem solving.

23. On the Measures of Academic Progress in Reading (MAP-R), the Student scored in the second percentile in fall 2011 and dropped to the first percentile in the spring of 2012, meaning he did not meet the benchmark for proficient or advanced for third graders.
24. On his third grade report card, the Student received final grades of “C” in all subjects except for a “B” in spelling and “O” in handwriting, music, art and physical education.
25. At this point, the Parents felt as though the Student was not making any meaningful progress and, with Dr. XXXX, met with the IEP team on September 24, 2012 to discuss the Student’s progress and to fine tune his fourth grade IEP for the 2012-2013 school year, which was drafted on May 14, 2012.
26. Dr. XXXX did not express any displeasure or dissatisfaction over the IEP but instead, merely discussed her own observations and suggested that they be considered in implementing the IEP during 2012-2013.
27. On October 8, 2012, the Parent visited [School 2] during an open house to observe the Student.
28. Late on Friday, October 12, 2012, the Parent sent a letter to Ms. XXXX, the Student’s fourth grade special education teacher, noting problems with the Student’s performance and what the Parent believed to be a lack of attentiveness on the part of teachers and aides. He also voiced his concern that the staff was not implementing the strategies that were suggested by Dr. XXXX.
29. Ms. XXXX responded to the Parent’s concerns on Monday, October 15, 2012.

30. By November 2012, the Parents continued to be concerned over what they believed to be the Student's lack of progress and the fact that the Student seemed to be frequently sad. The Parent did not share these feelings with [School 2] staff.
31. On November 27, 2012, the Parent went to [School 2] again for a classroom observation and noted his observations in writing. He did not share these observations or any complaints with anyone at [School 2].
32. On the Student's fourth grade report card after the first semester, he received "A"s and "B"s as well as "S" in all areas except for listening comprehension ("C") and math computation and application (problem solving), where he received "N" for needs improvement.
33. On December 6, 2012, the Parent submitted an application for the Student's admission to [School 1].
34. On December 11 and 12, 2012, members of [School 1] staff (XXXX XXXX and XXX XXXX) visited [School 2] where they observed the Student. Both concluded that the Student would be a suitable candidate for admission to [School 1].
35. [School 1] is a private full-time special education school in XXXX, Maryland for moderate to high functioning children. There are 130 children enrolled in the school, all of whom are disabled.
36. On December 19, 2012, the Student was accepted into [School 1].
37. On December 26, 2012, during the Christmas break, the Parents sent a letter to Mr. XXXX advising that they intended to withdraw the Student from MCPS and place him at [School 1] for the remainder of the 2012-2013 school year.

38. On January 2, 2013, the Parent's signed an enrollment contract for the Student with [School 1] and the Student began attending the school on January 3, 2013.
39. On January 19, 2013, the Parent contacted XXXX XXXX, an educational consultant, to "help get the public school [to] pay tuition for [the Student] at [[School 1]]."
40. On that same date, the Parents signed an Educational Consultant Agreement with Mr. XXXX. Mr. XXXX reviewed the Student's school records from [School 1] as well as [School 2] and visited [School 2] on February 28, 2013 and [School 1] on May 29, 2013.
41. In the meantime, on April 16, 2013, [School 1] created a diagnostic prescriptive goals (DPG) document for the Student. In creating the DPG, [School 1] staff did not interview MCPS teachers but instead utilized records, including IEPs, provided by the Parents as well as notes from observing the Student during his time at [School 1] and the notes taken by Ms. XXXX and Ms. XXXX during their visit to [School 2] on December 11 and 12, 2012.
42. The DPG focuses on the Student's expressive, receptive and pragmatic speech and language issues, reading comprehension, written expression, math, and socialization issues.
43. On August 5, 2013, counsel for the Parents advised MCPS that the Student would be attending [School 1] during the 2013-2014 school year and requested that MCPS fund the Student at this placement since, in the view of the Parents, no appropriate special education program was identified or offered by MCPS.
44. On August 26, September 16 and September 23, 2013, IEP team meetings were convened at [School 2] to conduct the Student's annual review.

45. On September 4, 2013, [School 2] staff (Ms. XXXX, Ms. XXXX, XXXX XXXX and Ms. XXXX) conducted classroom observations of the Student at [School 1].
46. Ms. XXXX and Ms. XXXX observed the Student at recess for five minutes and in math and science for approximately one hour and fifteen minutes. Ms. XXXX observed the Student in reading and speech for approximately one hour then briefly at recess.
47. Ultimately, the IEP team proposed that the Student be placed in the XXXX Program at [School 2] and receive nineteen hours a week of special education classroom instruction in the general education setting, with support, for math, science, reading, writing and social studies; five hours a week of special education classroom instruction outside the general education setting for reading; and, one hour a week (two-thirty minute sessions) of speech-language therapy outside the general education setting.
48. The Parents did not agree with this decision and elected to keep the Student at [School 1] for 2013-2014.

## **DISCUSSION**

### **The Legal Framework**

The identification, assessment, and placement of students in special education are 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. 2013) and COMAR 13A.05.01. The IDEA provides that all students with disabilities have the right to a Free Appropriate Public Education (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 200-01. 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 206-07. 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). See also *M.M. v. School District of Greenville County*, 303 F.3d. 523, 527 (4th Cir. 2002).

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).<sup>2</sup>

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

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<sup>2</sup> 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 Cir. 996, 1001 (4th Cir. 1997).

C.F.R. § 300.114(a)(2) (2013). 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 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) (2013). 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 373-74). 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 2013-2014 at [School 2], 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 1] 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 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).

### **Motion for Judgment**

At the close of the Parent's case, MCPS moved for judgment, asserting that the Parents, in their case in chief, did not establish that MCPS failed to develop an appropriate IEP for the Student for the second half of the 2012-2013 school year and the entire 2013-2014 school year or that MCPS inappropriately failed to determine that the Student's placement should be at [School 1] for the second half of the 2012-2013 school year and the entire 2013-2014 school year. The Motion was denied at that time and MCPS proceeded to present its case. At the close of its case, MCPS renewed its Motion for Judgment. At that time, I reserved my decision on the Motion for Judgment until such time that my written decision was issued.

The Parents presented their case and provided the testimony of several witnesses who provided information that suggested that the Student suffered from Autism Spectrum Disorder as well as ADHD, Predominately Inattentive Type and Learning Disorder, Not Otherwise Specified

and is eligible for special education services. In addition, the Parents also provided evidence to suggest that the MCPS IEPs for the second half of the 2012-2013 school year and the entire 2013-2014 school year do not provide for a FAPE and that MCPS decision to place the Student at [School 2] was not appropriate.

The OAH's Rule of Procedure regarding Motions for Judgment reads as follows:

E. Motion for Judgment.

- (1) A party may move for judgment on any or all issues in any action at the close of the evidence offered by an opposing party. The moving party shall state with particularity all reasons that the motion should be granted. Objection to the motion for judgment is not necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.
- (2) When a party moves for judgment at the close of the evidence offered by the opposing party, the judge may:
  - (a) Proceed to determine the facts and to render judgment against an opposing party;
  - (b) Decline to render judgment until the close of all evidence.

COMAR 28.02.01.12E.

COMAR 28.02.01.12E is patterned after Md. Rule 2-519, which provides as follows:

- (a) **Generally.** A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.
- (b) **Disposition.** When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

Md. Rule 2-519(a),(b).

The Maryland Court of Special Appeals reiterated the standard of review of a motion for judgment:

We review the grant of a motion for judgment under the same standard as we review grants of motions for judgment notwithstanding the verdict. *Johnson & Higgins of Pa., Inc. v. Hale Shipping Corp.*, 121 Md. App. 426, 450 (1998). We assume the truth of all credible evidence on the issue, and all fairly deducible inferences therefrom, in the light most favorable to the party against whom the motion is made. *Nissan Motor Co. Ltd. v. Nave*, 129 Md. App. 90, 116-17 (1999) *cert. denied*, 357 Md. 482, (2000). Consequently, if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration. *Washington Metro. Area Transit Auth. v. Reading*, 109 Md. App. 89, 99 (1996). *Orwick v. Moldawer*, 150 Md.App. 528, 531-32 (2003).

This Court earlier stated:

We stated the proper analysis a trial court should undertake in ruling on motions for judgment in *James v. General Motors Corp.*, 74 Md. App. 479, 484-85, *cert. denied*, 313 Md. 7 (1988):

[W]hen ruling on a motion for a judgment the trial judge must consider the evidence, including the inferences reasonably and logically drawn therefrom, *in the light most favorable to the party against whom the motion is made*. If there is any evidence, no matter how slight, legally sufficient to generate a jury question, the motion must be denied.... An appellate court reviewing the propriety of the grant or denial of a motion for judgment by a trial judge must conduct the same analysis. [Emphasis added]

Thus, if there are any disputed issues of fact, Maryland Rule 2-519 precludes the trial court from resolving them, unless there is no jury. *See Garrison v. Shoppers Food Warehouse*, 82 Md. App. 351, 354 (1990).

*Tate v. Bd. of Education of Prince George's Co.*, 155 Md. App. 536, 544-45 (2004), *citing Azar v. Adams*, 117 Md. App. 426, 435 (1997).

However, in adopting Rule 2-519 in 1984, the Court of Appeals also made a significant change in practice when such a motion is made by B at the close of A's case in a **non-jury** action. In that situation, “the Rule no longer requires the court to view the evidence in a light

most favorable to A and to consider only the legal sufficiency of the evidence, so viewed, but allows the court to proceed as the trier of fact to make credibility determinations, to weigh the evidence, and to make ultimate findings of fact.” *The Driggs Corporation v. Maryland Aviation Admin.*, 348 Md. 389, 402, n. 4 (1998). Similarly, under OAH’s rule, in deciding a Motion for Judgment, the judge is not required to view the evidence in a light most favorable to the non-moving party.<sup>3</sup> However, as the discussion below indicates, this change is not pertinent here.

Under COMAR 28.02.01.12E, the Administrative Law Judge (ALJ) may proceed as the trier of fact to make credibility determinations, to weigh the evidence, and to make ultimate findings of fact. Here, the Parents presented their case in a credible manner. Their evidence certainly lent credence to their assertion that the Student was not making any educational gains at [School 2] and that the proposed IEP for 2013-2014 as well as placement at [School 2] could not adequately address the Student’s needs. In addition, the Parents provided evidence to suggest that [School 1] was an appropriate placement for the Student. With nothing more, the Parents certainly presented enough evidence to go forward and to allow MCPS to refute the Parents’ contentions. With these considerations in mind, I shall deny MCPS’ Motion for Judgment.

## **Merits**

### **Student Background**

The Student is an eleven-year-old child who, as noted above, is diagnosed with Autism Spectrum Disorder as well as ADHD, Predominately Inattentive Type and Learning Disorder, Not Otherwise Specified. Initially, the Parents noted concerns with the Student’s slow speech and language development when he was three. Early on, they also noted concerns with his social

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<sup>3</sup> In *Driggs*, the Board of Contract Appeals treated the motion as if it was a Motion for Summary Decision, but the OAH rule for each of those motions is different.

interactions as he became aggressive with peers and was easily frustrated. The Parents took the Student for a private speech and language evaluation in 2005 where he was diagnosed with a receptive/expressive language disorder, cognitive/attention disorder, oral facial weakness and a speech disorder. In 2007, the Student was referred to the MCPS Child Find Program where he was tested and demonstrated below age expectations on pre-academic skills and concepts as well as significant delays in receptive and expressive language. It was also noted that the Student's play and social skills were not typical for a child of his age. He was found eligible for special education services and began attending the MCPS Preschool Education Program where he worked on improving his receptive and expressive language skills.

In fall 2008, the Student enrolled in kindergarten at [School 2]. He continued to receive speech and language therapy and made academic progress. By first grade, he began to split his time between the XXXX Program, which was a self-contained classroom, and a general education classroom. He continued to receive speech and language services but showed problems related to a lack of focus, inability to complete tasks independently and a need for constant adult prompting. He also struggled in math.

In December 2009, the Student was evaluated by Dr. XXXX XXXX, who determined that the Student possessed extremely low verbal cognitive abilities and low average non-verbal processing skills. In addition, she determined that the Student showed a weakness in attention/working memory, emotional control, flexibility, problems with conversation initiation, below average math achievement, impairments in executive functioning and a social learning disorder. She recommended that he receive special education services as a student with Autism from a special education team trained in autism spectrum disorders, including a special educator, a speech and language therapist and a psychologist/school counselor. In second grade, the

Student continued to receive special education services and showed significant improvement in his behavior and executive functioning but still continued to need support.

In July 2010, the Student began receiving services from Speech and Language Pathologist, XXXX XXXX. At the time these services began, the Student showed limited conversational skills but by March 2011, he showed significant improvement and was able to maintain a conversation with a familiar adult for four to five exchanges and accurately interpret many of the facial expressions of his partner. Ms. XXXX also noted improvement in the school setting as well.

At the beginning of third grade in fall 2011, the Student continued to receive special education services in the XXXX Program as a student with Autism. He received instruction in a small group setting, receiving pull-out services in a small group to focus on reading comprehension, math and writing. He also received weekly speech/language therapy sessions in school as well as privately. During the school year, the Student remained below grade level in reading but on grade level in math. The Student also experienced problems with staying on task and needed instructions broken down into small chunks and written out for him. On his report card, the Student's teacher stated that he was working on grade level in math but continued to perform below grade level in reading, noting that he could read a book and get much information from pictures, but had trouble comprehending the written material.

In December 2011, the Parents took the Student for a neuropsychological evaluation with Dr. XXXX XXXX at XXXX Medical Center. Dr. XXXX conducted two hours of clinical interviews with the Parents and the Student, behavioral observations of the Student and reviewed the Student's records. In addition, Dr. XXXX conducted eight hours of neuropsychological testing of the Student. The results of the evaluation indicated that the Student was in the low



average range in verbal and performance IQ. In addition, testing indicated that the Student continued to struggle in the area of executive functioning which, in turn, impacted his attention span, working memory, organization and flexibility. This made the Student susceptible to overload and frustration which made it extremely difficult for him to manage two stimuli simultaneously. Dr. XXXX also found that the Student displayed a developmental language disorder. She noted that while he had strong decoding and sight word reading skills, he showed impairment in his overall core language skills with regard to receptive and expressive language. Specifically, Dr. XXXX found that the Student knew the meaning of many words and had some understanding of many concrete word relationships but as the complexity of these words increased, he had more difficulty inferring and conveying meaning. She further determined that the Student particularly had problems with abstract language, such as words with multiple meanings. She found that his receptive and expressive language skills were also impaired making it difficult for him to follow simple oral instructions and to convey a story. She noted that the Student demonstrated his best understanding when he worked with visual materials and cues. Dr. XXXX determined that the Student's academic skills were impacted by his language and executive deficits. While he could read text, his ability to comprehend this text was severely compromised and he consistently scored in the low average range in comprehension as well, requiring visual presentation of texts and picture prompts. The Student showed similar trends in math calculation, showing considerable difficulty in concepts such as borrowing and carrying during operations of adding and subtracting multiple digit numbers.

Dr. XXXX further noted that the Student struggled with socialization concepts and was well below age expectations in that area. He particularly had problems approaching others and following social rules in structured as well as unstructured situations. He continued to have

problems showing appropriate emotions and tended to say rude and embarrassing things in public. He often interrupted people and struggled in ending conversations in an acceptable manner. Dr. XXXX stated that the Student was impacted by his tendency to interpret language in a concrete, literal manner which limited his ability to decipher what was going on around him. His pragmatic language skills also continued to be an area of significant concern.

Dr. XXXX concluded that the Student met the criteria for Autism Spectrum Disorder as well as a Learning Disorder Not Otherwise Specified. In addition, she noted that the Student continued to exhibit attentional problems indicating ADHD and made a number of recommendations, including special education services and support with a classroom aide, and in speech and language therapy, targeting comprehension and formulation. She further suggested social skills and social development intervention with particular attention to pragmatic language skills, a coordinated team approach, increased familiarity and structure with classroom based accommodations including a visual curriculum, and a mechanism to prevent overload and reduced workload.

By the middle of school year 2011-2012, the Student was on grade level, with support in written language, decoding, and attention for learning, he was on a second grade level in reading comprehension and math and was below age expectancy in oral language skills. By the end of the school year, the Student's reading comprehension was described by his general education teacher to be excellent if the Student read a book several times before discussing it. The Student received average final grades in reading comprehension, listening comprehension, writing, and math but needed improvement in math application and problem solving. The Student however, on the MAP-R, which is measured in Rasch units, an achievement scale that measures growth over time, scored in the second percentile in fall 2011 and dropped to the first percentile in the

spring of 2012 meaning that he did not meet the benchmark for proficient or advanced for third graders.

At this point, the Parents felt as though the Student was not making any meaningful progress and, with Dr. XXXX, met with the IEP team on September 24, 2012 to discuss the Student's progress and to fine tune his fourth grade IEP for school year 2012-2013, which was drafted on May 14, 2012. Dr. XXXX was not at the meetings when the IEP was developed and drafted but was present at the September 2012 meeting to discuss her findings and recommendations. She did not express any displeasure over the IEP at that time but testified, however, that during this meeting, the [School 2] staff seemed to minimize the Student's speech and language issues and failed to provide enough information to allow the Parents and private therapists to be consistent in their approach to educating the Student. Dr. XXXX, during her testimony, also implied that she spent the time at the September 2012 meeting critiquing the 2012-2013 IEP. However, each of the MCPS witnesses who were at the same meeting, Ms. XXXX, Ms. XXXX, Mr. XXXX, and Ms. XXXX, all stated independently that Dr. XXXX did not express any displeasure over or critique the IEP but instead, merely discussed her observations and suggested that they be considered in implementing the IEP during the 2012-2013 school year. This is evident after reading the notes taken during the September 2012 meeting.

On October 8, 2012, the Parent visited [School 2] during an open house to observe the Student. Late on Friday, October 12, 2012, he sent a letter to Ms. XXXX expressing his opinion that the Student seemed confused during a writing session when the topic of a word with two meanings (cold) came up. He noted that an inordinate amount of time was taken to clarify the

problem and that the teacher did not notice the confusion in the Student. The Parent also noted his concerns that during recess, the child seemed sad and was not playing with anyone or otherwise socially engaged. He further observed that during art, the Student was confused over the instructions for the project that he was working on and that the teacher did not seem to notice. He voiced his concern that the recess and art teachers were not implementing the strategies that were suggested by Dr. XXXX and discussed during the September 2012 meeting. Ms. XXXX responded to the Parent's concerns on Monday, October 15, 2012.

By November 2012, the Parents continued to be concerned over what they believed to be the Student's lack of progress and the fact that the Student seemed to be frequently sad. On November 27, 2012, the Parent went to [School 2] again for a classroom observation, and noted his observations in writing but did not share these observations or any complaints with anyone at [School 2].

On December 6, 2012, the Parent submitted an application for the Student's admission to [School 1] and on December 11 and 12, 2012, members of [School 1] staff (XXXX XXXX and XXXX XXXX) visited [School 2] where they observed the Student for short periods of time (less than fifteen minutes per observation) and both concluded that the Student would be a suitable candidate for admission to [School 1]. On December 19, 2012, the Student was accepted to [School 1] and on December 26, 2012, during the Christmas break, the Parents sent a letter to [School 2] Principal, XXXX XXXX, advising that they intended to withdraw the Student from MCPS and place him at the [School 1] for the remainder of the 2012-2013 school year. Mr. XXXX forwarded this letter to MCPS, which waived the ten day notice requirement per COMAR 13A.05.01.16C and 34 CFR Section 300.148 and on January 2, 2013, the Parent's

signed an enrollment contract for the Student with [School 1] where the Student began attending classes on January 3, 2013.

On January 19, 2013, the Parent contacted XXXX XXXX, an educational consultant, to “help get the public school [to] pay tuition for [the Student] at [[School 1]].” On that same date, the Parent’s signed an Educational Consultant Agreement with Mr. XXXX. Mr. XXXX familiarized himself with the Student’s history by reviewing the Student’s school records from [School 1] and [School 2] and visited [School 2] on February 28, 2013 then [School 1] on May 29, 2013. In addition, Mr. XXXX considered Dr. XXXX’s December 2011 report.

On July 7, 2013, Mr. XXXX issued a report wherein he concluded that the Student was not being appropriately served at [School 2] because he was not being provided the comprehensive specialized instruction that he needed, as specified in his 2012-2013 IEP. Specifically, Mr. XXXX opined that areas such as written expression, social interaction and pragmatic language were not being addressed through specialized instruction and that other areas were not being addressed in a way to allow the Student to make progress. Mr. XXXX further concluded that the recommendations of Dr. XXXX were not being implemented. Mr. XXXX expressed his belief that the Student was making meaningful progress at [School 1] and that [School 1] was implementing the needed specialized instruction and accommodations as well as the recommendations of Dr. XXXX, thereby making [School 1] the appropriate educational placement for the Student.

On August 5, 2013, counsel for the Parents advised MCPS that the Student would be attending [School 1] during the 2013-2014 school year and requested that MCPS fund the Student at this placement since no appropriate special education program was identified or offered by MCPS. On August 26, September 16 and September 23, 2013, IEP team meetings

were convened at [School 2] to conduct the Student's annual review. In the meantime, [School 2] staff (Ms. XXXX, Ms. XXXX, XXXX XXXX and Ms. XXXX) conducted classroom observations of the Student at [School 1] on September 4, 2013. Ms. XXXX and Ms. XXXX observed the Student at recess for five minutes and in math and science for approximately one hour and fifteen minutes. Ms. XXXX observed the Student in reading and speech for approximately one hour, then briefly at recess.

With regard to her observation of the Student at [School 1], Ms. XXXX testified that she observed the Student working on tasks that he mastered in third grade and felt that he was working on tasks that were too easy for him. She stated that he was not being challenged by the work that was being presented to him. She also stated that the Student appeared to be working more independently than the other three children he was working with and that the Student did not interact with any of these other children. Similarly, Ms. XXXX testified that the Student appeared to be less engaged at [School 1] during her observation than he did during his time at [School 2]. She felt that the math that the Student was working on was the same material that he had already mastered in third grade and noted that he was quickly progressing through his packet of work at a much quicker rate than the other students working with him. These students were also disabled. She expressed her opinion that the [School 1] material that was being presented to the Student was less advanced than what the Student was taught at [School 2]. She also expressed her belief that while [School 1] met some of the Student's academic needs, overall, it lagged behind what the Student needed both academically and socially. She did not believe that [School 1] is the LRE for the Student as it contains no general education instruction or the non-disabled peer interaction that the Student needs to progress socially.

Ms. XXXX echoed Ms. XXXX's testimony regarding these observations and noted that the Student was not socially engaged with any of his peers and that in fact, he was very abrupt and somewhat withdrawn at times during her observation.

Ultimately, the IEP team proposed that the Student be placed in the XXXX Program at [School 2] and receive nineteen hours a week of special education classroom instruction in the general education setting, with support, for math, science, reading, writing and social studies; five hours a week of special education classroom instruction outside the general education setting for reading; and, one hour a week (two-thirty minute sessions) of speech-language therapy outside the general education setting. The Parents did not agree with this decision and elected to keep the Student at [School 1] for the 2013-2014 school year.

### **Position of the Parties**

#### **Parents**

The Parents argued that the MCPS has not provided the Student with a FAPE for the second half of the 2012-2013 school year and the entire 2013-2014 school year. The Parents claimed that because the MCPS failed to provide a FAPE for the Student for those school years, they were compelled to enroll the Student at [School 1] for the second half of school year 2012-2013 and all of 2013-2014. They are now seeking reimbursement for their unilateral placement of the Student at [School 1] for this time period.

The Parents contended that the IEP developed and approved for the 2012-2013 and 2013-2014 school years was not appropriate because it called for continued placement at [School 2].

The Student began the 2012-2013 year at [School 2] but in December 2012, the Parents abruptly announced their decision to remove the Student from [School 2] and place him at [School 1] where he currently remains as a fifth grade student today.

The Parents argued that placing the Student at [School 2] for 2013-2014 would again result in a denial of a FAPE. As a result of the denial of a FAPE, they argue that [School 1] 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 1] during the second half of the 2012-2013 school year and for all of the 2013-2014 school year.

Specifically, the Parents, for the most part, agreed with the goals and objectives on the 2013-2014 IEP, but not the decision regarding placement at [School 2]. They argued that while MCPS tried in good faith to provide the Student with a FAPE at [School 2], they failed at doing so and could not provide an appropriate placement or services for him. They further argued that [School 1] was an appropriate placement. As support, the Parents offered the testimony of the Student's father as well as [School 1] staff and the reports and testimony of Dr. XXXX and Mr. XXXX as discussed herein, and argued that the Student was not making any meaningful progress at [School 2] and needed more services in a more restrictive setting. They further contended that the Student, since being at [School 1], is happier and has progressed socially as well as academically. The Parents further asserted that when they gave notice that they intended to pull the Student out of MCPS and place him at [School 1], MCPS did nothing in response.

The Parent provided, at times, emotional testimony about the Student and provided some insight into his disabilities and how they affected him both socially and academically. The Parent stated that he always understood that the Student could reach full potential with proper education but understands that he has some limitations and challenges. As the Student progressed through third grade, the Parent felt that the child was not making adequate progress in areas such as language, reading and behavioral skills. He further stated that the Student began expressing unhappiness on a consistent basis in third grade which drove the Parent to contact Dr.



XXXX for an evaluation. Based on his own concerns as well as Dr. XXXX's report, the Parent felt that [School 2] was not meeting the Student's needs academically as well as socially. He specifically noted concerns in the area of socialization and felt as though the Student was being rebuffed by the other children. He mentioned instances of what he considered to be bullying and teasing by other children, which in turn agitated the Student and made him frequently sad. He stated that due to their concerns over a lack of social and academic progress, he and his wife considered pulling the Student from MCPS and homeschooling him but later opted to place the Student in a private school, away from the general education setting. They ultimately placed the Student at [School 1] and feel that he has since made a great deal of progress, has a better demeanor and is generally much happier. The Parent stated that he hired Mr. XXXX to provide an honest assessment of the Student's progress as well as the [School 2] program, as compared to the [School 1] program, in anticipation of placement for 2013-2014.

The Parents also presented the expert testimony of Dr. XXXX, as discussed above, as well as the testimony of Mr. XXXX. In addition, the Parents presented the expert testimony of [School 1] staff members; XXXX XXXX, XXXX XXXX, XXXX XXXX, and XXXX XXXX. Their testimony is discussed below, particularly as it pertains to the DPG as well as the services offered at [School 1].

Mr. XXXX testified that he was contacted by the Parent in January 2013 to provide an educational assessment of the [School 1] as well as the [School 2] programs with the desire to keep the Student at [School 1]. Mr. XXXX stated that he told the Parent that he would provide an honest assessment, be it pro or con as far as the [School 1] program was concerned, as it applied to the Student. He admitted that the January 19, 2013 Intake Questionnaire indeed indicated that the Parent contacted him to "help get the public school [to] pay tuition for [the

Student] at [[School 1]].” On that same date, the Parent’s signed an Educational Consultant Agreement with Mr. XXXX. Mr. XXXX testified that he familiarized himself with the Student’s history by reviewing the Student’s school records from [School 1] and [School 2] and visited [School 2] on February 28, 2013 and [School 1] on May 29, 2013. In addition, Mr. XXXX considered Dr. XXXX’s December 2011 report. He testified that he explained his purpose to [School 2] staff when he visited the school, indicating that he was there to help develop the Student’s educational program at [School 1]. He ultimately issued his report on July 7, 2013.

Staff at [School 2], however, all unanimously testified that the conclusions contained in Mr. XXXX’s report were without basis. A great deal of testimony revolved around the fact that Mr. XXXX, according to the Intake Questionnaire completed by the Parents in January 19, 2013, was hired specifically to help get MCPS to pay for the Student’s tuition at [School 1]. Mr. XXXX, however, according to all of the witnesses for MCPS, failed to mention this to [School 2] staff when he visited the school and only indicated that he was there to help the Student succeed in his educational endeavors.

Ms. XXXX testified that she met Mr. XXXX on one occasion; February 28, 2013, when he came to [School 2]. Ms. XXXX stated that Mr. XXXX told her that he was there to get some insight as to how the Student’s program should be developed at [School 1]. He gave her no indication that he was there in preparation for a potential due process hearing. Ms. XXXX further disagreed with Mr. XXXX’s conclusion in his report that the Student was not receiving the weekly fifteen hours of specialized instruction in the general education setting called for in the IEP. She testified that this is patently false as she has observed the methods and content of the Student’s education at [School 2]. She testified that there was no basis for his conclusion especially since Mr. XXXX did not ask anyone about the number of hours per week in special

education instruction the Student was receiving. Ms. XXXX also referred to Mr. XXXX's comment "when asked about programming, [School 2] staff said they couldn't think of a better option in MCPS. They didn't say that [the Student] didn't need different or more, just that this was the best of available options." She stated that his statement indicated to her that MCPS was just settling for the XXXX Program at [School 2] because there was nothing else available. She noted that this comment was made completely out of context and that she specifically told Mr. XXXX that [School 2] was the best option for the Student because he WAS making progress. She stated that in addition, she told Mr. XXXX that there were other options available but none of these options were appropriate for the Student. She stated that if other more appropriate options existed, then they would have been considered.

XXXX XXXX testified that he was also not aware that Mr. XXXX wanted to come to [School 2] on a fact finding mission but believed that he was there to help the Student transition to [School 1]. Mr. XXXX echoed Ms. XXXX's testimony in that the conclusion that the Student was not receiving fifteen hours of specialized instruction per week was unfounded.

XXXX XXXX also testified that Mr. XXXX's conclusions were made out of context. She stated that no one at the February 28, 2013 meeting said that [School 2] was not appropriate as Mr. XXXX inferred. In addition, she testified that it was not an accurate characterization by Mr. XXXX that there was no better option than [School 2] for the Student, suggesting that [School 2] was merely adequate and that MCPS could not otherwise meet his needs. In reality, Ms. XXXX stated that MCPS did not consider any other programs because other programs were not needed; [School 2] was able to meet all of the Student's needs. Ms. XXXX noted that Mr. XXXX did not ask for any data during his visit but instead relied solely on Maryland School Assessment (MSA) testing to form the basis for his conclusions. Mr. XXXX noted in his report

that the Student, while at [School 2], scored as basic in the MSA Reading Assessment but that he progressed at [School 1] from an independent level at grade two from less than 50% accuracy on the third grade level to at least 50% in all areas to as high as 75% in some areas. Ms. XXXX stated that this test cannot be the sole basis for drawing conclusions because it only considers a narrow snapshot of the Student's capabilities. She further noted that without additional valid data, Mr. XXXX's conclusions are unfounded and without support. She specifically commented on Mr. XXXX's chart that was included with his report, noting that it was not accurate. She maintained that the Student did receive full support in the general education classroom and that the [School 2] team met weekly to discuss the Student's progress and to make any needed adjustments in their strategy. She noted that Mr. XXXX did not ask any specific questions about the Student's instruction and questioned Mr. XXXX's support for the assertions that he made in his report. She also stated her belief that Mr. XXXX was not forthcoming with [School 2] staff during his visit and deliberately concealed his purpose for being there.

The purpose of Mr. XXXX's hire by the Parents is, for the most part, irrelevant here. It does not matter whether he was hired merely for due process considerations to help the Parents get MCPS to pay for the Student's tuition at [School 1] or for the more noble reason of helping the Student transition to [School 1] and to develop the most appropriate program for him. The evidence established that Mr. XXXX was hired by the Parents to provide them with support in their endeavor to place and keep the Student at [School 1]. While the Parent testified that he wanted Mr. XXXX to provide him with an honest assessment of the Student's educational needs, the fact is that Mr. XXXX was hired after the Student was enrolled at [School 1] clearly with the intention of providing information that would keep the Student there. While the reasoning behind the hire is irrelevant, the nature of how Mr. XXXX dealt with MCPS hints of bad faith

and affects the credibility of his assessment and conclusions which were described unanimously by [School 2] staff to be unfounded.

### **MCPS**

The MCPS argued that it provided the Student with a FAPE for the 2012-2013 school year and would have done so during 2013-2014 based on the IEP team recommendations that the XXXX Program at [School 2] would have provided the Student with personalized instruction with sufficient support services to permit the Student to benefit educationally from that instruction. In addition to contending that the Student was receiving a FAPE at [School 2], MCPS further contends that the Parents pulled the Student out of [School 2] without giving MCPS a chance to address the Parents' concerns. Alternatively, MCPS argued that if it is determined that MCPS did not afford the Student a FAPE, then [School 1] is not an appropriate placement for the Student. Accordingly the MCPS requested that reimbursement for tuition and related costs and expenses should be denied.

MCPS presented the testimony of staff members at [School 2] who are all professional educators and were familiar with the Student from his time there since kindergarten.

Ms. XXXX testified and in addition to her statements and analysis noted above, expressed her belief that [School 2] was the most appropriate placement for the Student. Ms. XXXX has extensive experience in special education and with autistic children. She testified that she has been familiar with the Student since the first grade when the Student was in a self contained classroom, was mainstreamed in social studies and science, and that she began teaching him in second grade in the XXXX Program. Before she began teaching him, she spoke to his first grade teacher and observed the Student in the classroom in order to familiarize herself with him, and to obtain his background and history. She noted that he had issues typical of an

autistic child with regard to communication skills, socialization and his attention span. She stated that during second grade, he made significant progress and was able to communicate and read more effectively while comprehension remained an issue. She stated that he could answer the “wh” questions (who, what, where, when) regarding material that he read and stated that his writing was more organized. She noted that she was in constant contact with Ms. XXXX, the child’s speech and language therapist, in order to constantly tailor the Student’s program on an ongoing basis. Ms. XXXX confirmed to Ms. XXXX that the Student was mastering the “wh” questions.

Ms. XXXX also observed that socially, the Student made the most gains in the general education setting. She noted that he participated in group activities and benefitted by modeling the behavior of his non-disabled peers in the general education classroom. Ms. XXXX testified that the trend continued in third grade where she again was his special education teacher. The Student moved away from the self contained classroom to some extent and was in general education with special education pull-outs and support with reading comprehension, writing and math. By the end of third grade, the Student was more independent and wanted to be more on his own without support.

Ms. XXXX emphasized that the Student was limited cognitively, referring to Dr. XXXX’s finding that the child had a full scale IQ of 81 as tested on the Wechsler Abbreviated Scale of Intelligence (WASI). She noted that she agreed with this assessment as it was consistent with her own observations and experience with the Student. Ms. XXXX further stated that although the Parents were pleased about the Student’s progress as noted in the May 14, 2012 IEP for school year 2013-2014 and indicated no discontent with the program at [School 2], Ms. XXXX believes that the Parent sometimes had higher expectations for the Student than the child

was capable of given his limited cognitive ability. She expressed her belief that the Student was performing within his cognitive abilities and in some cases was exceeding them at [School 2]. She also noted that the Parent consistently expressed his desire to have the Student in the mainstream as much as possible.

While, Ms. XXXX agreed with many of Dr. XXXX's observations and comments, she noted that Dr. XXXX only spent a limited amount of time with the Student and simply was not as familiar with the child. Ms. XXXX also took some exception to some of Dr. XXXX's suggestions. For example Dr. XXXX suggested the use of social stories and scripts in improving the Student's socialization and communication skills but Ms. XXXX believes that the Student has outgrown this strategy and thought that the use of gestures is now appropriate to help the Student to conform his behavior to an appropriate level in any given situation. Ms. XXXX further observed that Dr. XXXX administered eight hours of testing to the Student after two hours of interviews. She expressed her belief that this was entirely too much for the Student and most likely impacted the validity of Dr. XXXX's assessment. She noted that while she did not reject and tried to incorporate as many of Dr. XXXX's suggestions as she could, many had to be modified if they were to be applied to the Student at all. She also commented on the observations of XXXX XXXX, an extern who worked with Dr. XXXX during the evaluation of the Student, regarding whether the strategies suggested in Dr. XXXX's report could be implemented at [School 2]. Ms. XXXX expressed these comments to the Parent in an email dated March 10, 2013. Ms. XXXX stated that these comments were made after Ms. XXXX reviewed a draft of the Student's IEP for school year 2013-2014. Ms. XXXX did not agree with many of Ms. XXXX's observations feeling that they were made out of context since she observed only one special education and one general education class at [School 2].

In addressing the Student's below-average to low-average test scores, Ms. XXXX noted that the Student historically had anxiety over and did not generally perform well on tests. She stated that despite test scores, the Student could consistently demonstrate that he was indeed grasping the concepts taught especially in the area of social skills.

Ms XXXX, the Student's speech and language pathologist, testified that she also has extensive experience with the Student. She evaluated him initially when he was in first grade and immediately detected weaknesses in the child's expressive, receptive and pragmatic language skills. She reviewed Ms. XXXX's 2005 report as well as the 2007 MCPS speech and language evaluation and her own evaluation from March 2010 to establish the Student's baseline. In addition, Ms. XXXX worked with Ms. XXXX, the child's private speech and language pathologist beginning in July 2010. Ms. XXXX reviewed the Student's DPG and noted that it contained goals that were already mastered by the Student at [School 2]. In addition, she reviewed Dr. XXXX's report and cautioned that it was not written by a speech and language pathologist and that speech and language testing is generally not administered by a psychologist. She observed that the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) that was administered during Dr. XXXX's evaluation is generally not administered by psychologists and noted that the CELF-4 has a large number of subtests. She testified that the ones listed in Dr. XXXX's report constituted approximately half of the available CELF-4 subtests. Ms. XXXX does not believe that a complete speech and language evaluation was given to the Student by Dr. XXXX.

XXXX XXXX testified that she has over twenty-five years of experience as a special education teacher. She taught the Student in fourth grade and was familiar with him when he was in third grade as well, anticipating that she would be teaching him the following year. She



worked with Ms. XXXX prior to the end of the Student's third grade year to develop strategies for fourth grade. Ms. XXXX testified that the Student was easily receiving fifteen hours of special education instruction by a conservative measure. She stated that during most weeks, he probably received more than that. Ms. XXXX further commented on Mr. XXXX's comment that the Student was not receiving the fifteen hours mandated by the IEP. She stated that his observation was unfounded as he never inquired as to how many hours the Student was receiving. On the other hand, she further testified that she generally agreed with the recommendations of Dr. XXXX and stated that they were implemented as much as possible. She stated that she spoke with Dr. XXXX on a regular basis during the first half of fourth grade to continually obtain her feedback and to make any needed adjustments to the provision of services to the Student.

Ms. XXXX further provided detail about the Student's schedule and the types of services that he was receiving in fourth grade before he was pulled out of MCPS. Her opinion as to the areas of need and the services needed by the Student were consistent with Ms. XXXX and Ms. XXXX. She described the Student's gains and weaknesses in developing his social skills. She stated that she worked on keeping the Student on topic during conversations and worked with him on being tolerant of others' points of view even though the Student did not necessarily agree with them. She agreed with the other staff at [School 2] that at this point, the Student did not need social stories and scripts as he had outgrown this strategy. She further noted that the Student was working on his writing skills and reading comprehension and was making measurable progress. Ms. XXXX noted that the Parents seemed to be pleased with the Student progress and commented on the Parent's visits in the fall of 2012. While the Parent noted concerns in October that were addressed by Ms. XXXX, she was not aware of the Parent's

concerns after the November observation. In fact, Ms. XXXX was not even aware that the Student was being pulled out of [School 2] until the Student told her.

### **[School 1] DPG**

There was much discussion regarding the DPG document that was drafted at [School 1] on April 16, 2013, for the Student. A DPG is similar to an IEP in that it outlines a series of goals and objectives for the student to reach during the school year, targeting a particular student's needs and weaknesses. In creating the DPG, [School 1] staff did not interview MCPS teachers but instead utilized records, including IEPs, provided by the Parents as well as its own notes from observing the Student during his short time at [School 1]. In addition, [School 1] staff considered the notes taken by Ms. XXXX and Ms. XXXX during their visit to [School 2] in December 2012. The DPG at issue focuses on the Student's expressive, receptive and pragmatic speech and language problems, reading comprehension, written expression, math, and socialization issues.

XXXX XXXX, the Director at [School 1], testified that the Student is currently in fifth grade with eight children in his class. She stated that she did not evaluate or observe the Student prior to his admission but that observations were made of him during his initial enrollment period until his DPG was created in April 2013. She noted that the Student has difficulty with social issues, particularly picking up social cues and further noted that his difficulties with expressive, receptive and pragmatic language impact his ability to learn. She stated that the Student needs extensive support and feels that the Student will benefit from being segregated with disabled peers until he learns social coping skills. She hopes that, at some future point, the Student can then be transitioned to a less restrictive setting with non disabled peers.

XXXX XXXX also testified that the DPG is appropriate. She testified that the Student has difficulties with expressive, receptive and pragmatic language which impacts his ability to learn and stated that she helped develop the Student's DPG in April 2013. She stated her belief that because the Student continues to struggle with speech and language issues, he continues to have socialization issues. She felt that the Student will continue to have problems with non-disabled peers because socially, the pace in a general education setting is just too fast for the Student at this time.

XXXX XXXX also testified in support of the [School 1] program as well as the DPG. She stated that the Student indeed has difficulty with social skills and noted that he needs repetition to reinforce learned skills. She stated that the Student needs small classes with a considerable amount of support and expressed her belief that being with non-disabled peers in a general education setting would only serve to overwhelm the Student until he can develop these skills. She believed that [School 1] is most appropriate for the Student presently.

XXXX XXXX testified in support of the [School 1] program and the DPG. She stated that she is currently the Student's teacher and that the Student's biggest challenge is comprehending what is presented to him. She noted his issues with pragmatic language and stated that socially, the Student is progressing but still needs a significant amount of adult intervention. She believes that [School 1] is the most appropriate setting for the Student at this time because, in her opinion, he is benefitting from a social as well as an academic standpoint. She admitted, however, that she has not observed the Student outside of the [School 1] setting.

Ms. XXXX, on the other hand, after reviewing the DPG, noted that many of the goals centered on topics that the Student had already mastered in third grade at [School 2]. She stated that in reading comprehension, he had achieved all of these goals in the second and third grade.

In written expression, he was already able to achieve two of the four goals outlined, in math, many of the goals were the same as those covered in third grade and in emotional/social interaction, all goals were already met in third grade. In addition, Ms. XXXX noted that [School 1] placed a great deal of emphasis on scripts or social stories as a teaching strategy but as noted above, she felt that the Student had outgrown this strategy because he already knew social rules; he just had difficulty in applying them. Ms. XXXX further emphasized that the Student needs to be educated with nondisabled peers. She stated that he routinely used his nondisabled peers as role and behavioral models and frequently patterned his behavior after what he observed in them. Without this, in a more restrictive setting without nondisabled peers, the Student will lose this opportunity to model his behavior by interacting with nondisabled peers.

Similarly, Ms. XXXX testified that there were many discrepancies between the IEPs at [School 2] and the DPG. Specifically, she noted that the compare and contrast goal as well as the goals regarding concrete questions (who, what, when, where) and following two to three step directions on the DPG were similar to the goals that the Student had in second grade and mastered in third grade. On the fourth grade IEP, these goals were no longer felt to be needed and added that inferential questions such as “how” and “why” needed to be targeted as goals. She further stated that the Student could already sequence stories and was working on retelling stories in fourth grade. She stated that she was not sure why the goals he had mastered in second and third grade were included on the DPG at [School 1] unless it was just for reinforcement purposes. In providing services to the Student, she developed a plan for speech and language services in cooperation with Ms. XXXX and indicated that she was concerned that the DPG did not challenge the Student enough and that he needed to progress to the next level to realize any

gains. She further stated that she was not there for the DPG meeting and that no one from [School 1] contacted anyone at [School 2] for input in developing the DPG.

Interesting to note is that the information derived from the DPG in the area of oral language indicated that the Student could answer simple yes/no and simple “wh” questions with 60% accuracy, while progress notes from March 2012, as well as during the observation by [School 2] staff at [School 1] on September 4, 2013, showed that he was answering these questions with 80% accuracy. Similarly, the [School 1] DPG indicated that the Student could retell three to four step stories with 60% accuracy but the June 2012 progress notes indicated that he was doing this with 80% reliability. Information provided from [School 1] further indicated that the Student could engage in a conversation on an unpreferred topic of conversation across two turns while progress notes from June 2012 indicated that he could do it across three turns, his private speech and language pathologist indicated that in September 2012 he could do it across four to five turns and notes from the [School 1] observation by [School 2] staff on September 4, 2013 showed up to three turns.

Ms. XXXX also commented on the development of the DPG and expressed her concerns that the Student was at [School 1] receiving instruction for three months from January to April 2013 without any input from [School 2] staff. She testified that the goals on the DPG were not appropriate for the Student in that they targeted skills that the Student already mastered at [School 2] such as those dealing with the “wh” questions, comparing and contrasting, story recounting, and following two to three step directions.

### **2013-2014 School Year**

The Student finished the 2012-2013 school year at [School 1] and on August 5, 2013, counsel for the Parents advised MCPS that the Student would be attending [School 1] during the 2013-2014 school year and requested that MCPS fund the Student at this placement since no appropriate special education program was identified or offered by MCPS. In August and September 2013, IEP team meetings were convened at [School 2] to conduct the Student's annual review and during the process, Ms. XXXX, Ms. XXXX, XXXX XXXX and Ms. XXXX conducted classroom observations of the Student at [School 1]. With regard to her observation of the Student at [School 1], Ms. XXXX testified that she observed the Student working on tasks that he mastered in third grade and felt that he was working on tasks that were too easy for him. She stated that she felt he was not being challenged by the work that was being presented to him. She also stated that the Student appeared to be working more independently than the other three children he was working with and that the Student did not interact with any of these other children. Similarly, Ms. XXXX testified that the Student appeared to be less engaged at [School 1] during her observation than he did during his time at [School 2]. She felt that the math that the Student was working on contained material that he already had already mastered in third grade and noted that he was quickly progressing through his packet of work at a much quicker rate than the other students working with him, who were also disabled. She expressed her opinion that the [School 1] material that was being presented to the Student was less advanced than what the Student was taught at [School 2]. She also expressed her belief that while [School 1] met some of the Student's academic needs, overall, it lagged behind what the Student needed both academically and socially. She did not believe that [School 1] is the LRE for the Student as

it contains no general education instruction or the nondisabled peer interaction that the Student needs to progress socially.

Ms. XXXX echoed Ms. XXXX's testimony regarding these observations and noted that the Student was not socially engaged with any of his peers at [School 1] during the observation and that in fact, appeared to be very abrupt and somewhat withdrawn at times. In drafting the 2013-2014 IEP, Ms. XXXX stated that she worked with Ms. XXXX in establishing goals and objectives for the Student. Important to note is that Ms. XXXX, the speech and language pathologist at [School 1], did not contact Ms. XXXX or Ms. XXXX before creating the speech and language goals on the [School 1] DPG.

Ultimately, the IEP team proposed that the Student be placed in the XXXX Program at [School 2] and receive an additional four hours per week of special education classroom instruction in the general education setting than the previous year, with support, for math, science, reading, writing and social studies; five hours a week of special education classroom instruction outside the general education setting for reading; and, one hour a week of speech-language therapy outside the general education setting.

In their respective testimony, Ms. XXXX, Ms. XXXX and Ms. XXXX were all extremely objective in their assessment of the Student and were clearly familiar with the child through their daily contact with him virtually since he began attending [School 2] in kindergarten. From this testimony, I am persuaded that the Student needs a relatively small classroom setting, with instructional supports, such as supports for socialization issues, staying on task and being organized and enhanced teacher feedback, to name just a few. His IEPs provide for that and the Parents do not deny that the Student needs those accommodations. While the Parent provided emotional and heartfelt testimony regarding the Student, as well as the

reports of Dr. XXXX and Mr. XXXX, MCPS provided more persuasive evidence of the Student's educational needs. The Parent argued simply that the IEP does not provide for the best placement for the Student and that [School 1] is better.

There was very little offered to suggest that the IEPs developed by MCPS were inappropriate other than with regard to the placement determination. Without more, I cannot find that the MCPS failed to provide the Student a FAPE for the 2012-2013 and 2013-2014 school years. In evaluating the appropriateness of the IEP team's decision on placement, I find that the IEP team considered assessment results, information from the Student's teachers and service providers, information from the private evaluators, and concerns of the Parents, and developed an IEP that was consistent with the evaluative data, as required by the regulations. The goals address all of the deficits identified by the evaluative data. All the deficits that impact the Student's ability to progress in the general curriculum have been addressed either through the development and implementation of an annual goal or with the provision of appropriate accommodations. The Parents did not offer any evidence that the annual goals are inappropriate to meet the Student's needs.

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



and quotations omitted). *MM ex rel DM v. School District of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002).

While 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*, I note, 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 have, thus, also given equal consideration to the Parents’ witnesses as well. The Parents’ witnesses testified that the Student has benefitted greatly from his time spent at [School 1] due to the unique small setting. I find that the evidence they presented does support that contention to a limited degree. In all respects, I have certainly given their testimony the appropriate consideration, as discussed above. With that said, I find that the Parents did not offer sufficiently credible evidence to contradict the opinions offered by MCPS staff.

The Fourth Circuit has also provided guidance for evaluating conflicting testimony, especially conflicting testimony between experts:

First, in crediting the testimony of any witness, the Hearing Officer must explain *why* it (sic) chose to do so over conflicting testimony by another witness. In this regard, the Hearing Officer should be especially concerned with explaining why he may choose to credit the testimony of one of the [Parents’] expert witnesses over [school’s expert witnesses], whose professional opinions as local educators regarding the adequacy of the Summer 2001 IEP are entitled to deference. *MM [v. School District of Greenville County]*, 303 F.3d at 532-33. Additionally, if the Hearing Officer chooses to credit the testimony of any witness who did not actually observe [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.”

*JH v. Henrico County School Board*, 395 F.3d 185, 197-198 (4th Cir. 2005).

This case presents somewhat conflicting testimony between the expert witnesses presented by the MCPS and those presented by the Parents. It also presents the MCPS' expert witnesses' testimony commenting on the scope of services that are needed by the Student. Following the guidance of the Fourth Circuit, I am reluctant to second guess the expert testimony of the MCPS's witnesses: Ms. XXXX, Ms. XXXX, Ms. XXXX, and Mr. XXXX. Ms. XXXX, Ms. XXXX, and Ms. XXXX were all involved with the Student's IEP process essentially from the beginning of his enrollment at [School 2]. In addition to being educators whose opinions are entitled to deference, Ms. XXXX, Ms. XXXX, and Ms. XXXX are all also vastly familiar with the Student, having worked with him on a daily basis over the past several years.

As indicated above, Ms. XXXX has known the Student since he began attending [School 2]. She was his special education teacher in third grade and she worked with his previous teachers in developing strategies for his third grade year. In addition, she worked daily with Ms. XXXX who had worked with the Student since he was in first grade. Both collaborated on a daily basis during the end of second grade and throughout the Student's third grade year, constantly adjusting the scope of the services that were to be provided to the Student where needed. By the end of the third grade year, Ms. XXXX began her preparations for developing a plan for the Student during fourth grade in school year 2012-2013. Again, there was collaboration between Ms. XXXX, Ms. XXXX, and Ms. XXXX. It is abundantly clear that the [School 2] staff, thus, was extremely familiar with the Student and his educational needs. While the Parents contend that the Student was not making any progress, Ms. XXXX, Ms. XXXX, and Ms. XXXX all testified to the contrary, that the Student was making educational gains despite his limited cognitive abilities and was meeting many of the goals and objectives contained in his

IEPs for 2011-2012 and 2012-2013. There was also evidence that established that the Parents were, for the most part, satisfied with the Student's progress to that point and indicated as such on his IEPs for third and fourth grades. MCPS acknowledges that the Parents wanted to see more progress in some areas such as reading comprehension, social skills and math. [School 2] staff wanted to see more progress as well. Ms. XXXX stated, however, that the Student was making as much progress as could be expected given his limited cognitive abilities. It is important to note that the Parents did not raise any complaints and staff at [School 2] was not aware that the Parents were even considering taking the Student out of MCPS until December 2012, when the Student told Ms. XXXX that he was leaving [School 2] and going to [School 1]. In fact, even at the time of the Parent's November 27, 2012 visit to [School 2], he had not voiced any complaints or displeasure over the implementation of the Student's IEP other than his observations of October 8, 2012 when he visited [School 2]. Even at that time, however, his October 12, 2012 email to Ms. XXXX was presented only to raise concerns that he had over some apparent confusion by the teachers and what the Student needed. In sum, he only requested that staff fully understand that the Student needed a structured and focused education, step by step instruction and structured social time. On October 15, 2012, Ms. XXXX responded, but she did not hear from the Parent again until the decision was made to enroll the Student at [School 1].

The expert witnesses presented by the Parents are now also familiar with the Student as they have been providing educational services to him since January 2013. Dr. XXXX, however, is a psychiatrist, not an educator, and had little, if any, contact with the Student prior to her evaluation and report that serves as the cornerstone of the Parent's case. While I found her testimony and report to be somewhat insightful, I do not feel that her evaluation presented a

totally accurate picture of the Student. She testified that she interviewed the Student for two hours then administered tests for eight hours. At this point in time, Dr. XXXX was not as familiar with the Student as she could have been as she, essentially, had just met him. Ms. XXXX testified that this amount of testing would have been overwhelming to the Student given his cognitive abilities and disabilities. On this point, I must defer to Ms. XXXX as she was substantially more familiar with the Student and his capabilities than Dr. XXXX.

I have no doubt that the Parents are very concerned and involved parents who have only the best of intentions for the Student. MCPS, however, provided a wealth of evidence to establish that it has been involved with the Student since kindergarten and until he was pulled out of [School 2], taught him every day. Each of the [School 2] experts testified credibly that the Student needs inclusion with non-disabled peers and that he was making progress despite limited cognitive abilities. In addition, [School 1] staff, which was not as familiar with the child, developed the DPG without obtaining information from those most familiar with him. The evidence showed that Mr. XXXX only saw the Student for one hour and ten minutes on May 29, 2013 and Dr. XXXX met with the Student for two hours then administered eight hours of testing in December 2011, that was felt by [School 2] staff to do little more than overwhelm the Student. The resulting DPG covered strategies and material that were already presented to and mastered by the Student at [School 2], which gave the appearance that he was doing so much better at [School 1]. In addition, according to [School 2] staff, the Student was not progressing socially at [School 1], was not engaged with his peers and lost the inability to interact with non disabled peers.

MCPS suggested that the Parents attempted to thwart the IEP process for 2013-2014 and acted in bad faith in their dealings with MCPS by not giving MCPS the opportunity to address

the Parents' complaints and the Student's needs before the Parents removed him from [School 2]. MCPS argued that the Parents acted in bad faith by failing to notify it that they were removing the Student from [School 2] until after the fact and in their hiring of Mr. XXXX simply for the purpose of getting MCPS to pay for the Student's tuition at [School 1]. MCPS argued that had the Parent been forthright with MCPS and presented their concerns and intention to remove the Student from MCPS prior to actually doing so, MCPS could have addressed their specific concerns.

The Fourth Circuit Court of Appeals has observed:

To the contrary, every indication is that the School District would have responded to his concerns earlier had they known about them. School boards must be given adequate notice of problems if they are to remedy them, and must be given sufficient time to respond to those problems before they can be held liable for failure to act.

*Combs v. School Board of Rockingham County* 15 F.3d 357, 363-64 (4th Cir. 1994).

In addition, the Court noted:

Congress deliberately fashioned an interactive process for the development of individualized education programs. In so doing, it expressly declared that if parents act unreasonably in the course of that process, they may be barred from reimbursement under the Individuals with Disabilities Education Act, 20 U.S.C.S. §§ 1400-1415. *See* 20 U.S.C. § 1412(a)(10)(C)(iii)(III) (providing that "[t]he cost of reimbursement . . . may be reduced or denied . . . upon a judicial finding of unreasonableness with respect to actions taken by the parents"). *C.G v. Five Town* 513 F.3d 279 (4th Cir. 2008).

There was no specific evidence presented, however, to show that the Parents intentionally tried to be evasive with MCPS or tried to act in bad faith in removing the Student from [School 2] or during the IEP process for 2013-2014. It is apparent, however, that they were happy with the move to [School 1], felt that the Student's performance improved there and that he was making academic gains. While I cannot find that they specifically acted in bad faith, I do believe that it is extremely unlikely that they would have placed the Student back at [School 2] for 2013-

2014 if, in their vision, a more favorable IEP was developed, as they contend. It was their clear intention to move the Student to [School 1] and to keep him there as well as to have MCPS pay for his tuition, as is evidenced in the contract with Mr. XXXX. I also find that the testimony and report of Mr. XXXX was slanted toward the Parents' interests and point of view since it was they who hired him for the sole purpose of getting MCPS to pay for the Student's tuition at [School 1]. I must also consider the limited amount of time that Mr. XXXX spent with the Student and the apparent lack of fact gathering on his part in making his conclusions, which was unanimously described by [School 2] staff as unfounded. In making this conclusion, I must also consider any motivation on the part of MCPS to provide any evidence that was not geared solely to the best interests of the Student. The [School 2] teachers and staff had no financial or other incentive to provide inflated assessments or grades for the Student, as Mr. XXXX suggested during his testimony, or to otherwise suggest services or a placement that the Student did not need.

Counsel for the Parents also suggested that because MCPS increased the number of special education hours and services on the 2013-2014 IEP, it follows that the IEPs for prior years were insufficient. I do not find any merit to this argument. The IEP process is an objective as well as subjective ongoing yearly process that must consider the progress or lack of progress in a particular child. Goals and objectives constantly need to be adjusted, either downward or upward, to keep pace with a particular child's successes, failures and overall development based on an observation and assessment of previous progress and future needs. Just because MCPS increased the number of special education classroom instruction by four hours from 2012-2013 to 2013-2014, does not mean that prior IEPs were insufficient. It just means that based on current observations of the Student's progress or lack of progress, as well as the scope of his current material and future needs, he requires additional services to achieve current academic,

and in this case, social success.

Finally, the Parents suggested that the Student was subject to harassment at [School 2] because of his disability which could be detrimental in the general education setting. The only evidence of any teasing or “bullying” occurred while he was at [School 1] sometime in early January 2014, when the Student’s mother noted in an email to [School 1] that some of the Student’s classmates were making fun of his food and in another incident sometime around January 6, 2014, where other classmates called the Student “fat.” There was no evidence of any instances of harassment or bullying at [School 2] presented during the hearing.

This has been a complex case to analyze. There have been many experts who have testified regarding the best interests of the Student. I have no doubt that all of the opinions and comments expressed have been with the best interests of the Student in mind. The Parents, on the advice of professionals, after being concerned about the progress that the Student was making made a reasonable decision to place the Student in a private, full-time special education school. The Parents asserted that the Student has succeeded there and should remain there but the issue before me, however, is not whether the Student was successful at [School 1] or even whether [School 1] is the best placement for the Student. The issues are whether MCPS developed an appropriate IEP for the Student for the second half of the 2012-2013 school year and the entire 2013-2014 school year and whether MCPS properly placed the Student at [School 2]. If not, then the issues that remain are whether [School 1] is an appropriate placement for the Student and if so whether tuition reimbursement (and related expenses and costs) for the second half of the 2012-2013 school year and the entire 2013-2014 school year at [School 1] is appropriate.

Based on the evidence presented and the above discussion, I must find that MCPS

developed an appropriate IEP for the Student for the second half of the 2012-2013 school year and the entire 2013-2014 school year that was reasonably calculated to allow him to receive educational benefit, and, as set forth below, that [School 2] was the LRE that allowed him to do so.

The MCPS offered the Student an extensive amount of special education services. The MCPS' position that the services provided to the Student at [School 2] would have resulted in meaningful and not merely trivial or de minimis educational benefit is well-supported by the testimony from MCPS' expert witnesses.

In reaching that conclusion, I particularly credit the testimony of Ms. XXXX, Ms. XXXX and Ms. XXXX, who are all vastly familiar with the Student, his capabilities and needs from years of teaching and providing services to him. Moreover, I am relying strongly on their testimony that the Student needs the exposure to non-disabled peers in the LRE and that being in a more restrictive environment strictly with disabled peers will be counterproductive.

### **LRE**

While the application of the LRE requirement does not mandate incremental adjustments of a student's academic setting, I do agree with the unanimous testimony of the [School 2] staff that the spirit of the requirement requires a school and an ALJ to consider less restrictive environments. The Student here went from a general education environment to a private, all-special education school, a move that removed the Student from interaction with non-disabled peers.

While the Parent's concerns and action in moving the Student to [School 1] are eminently understandable, I find on the record in this case that under the IDEA the XXXX Program at [School 2] was the 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) (2013). The IEP team recommended that the Student be placed at [School 2] in the XXXX Program. I am sympathetic to the Parents' desire to have the child receive the best education possible and to maximize his full potential. However, the law does not require the public agency to fund educational services for a student at a private day school unless the necessary supplementary aids and services, and the Student's goals and objectives, render it to be impossible to educate the Student in a less restrictive placement. After carefully reviewing all of the evidence presented by the parties, I find that the Student's 2012-2013 IEP was designed by his IEP team with a full understanding of the Student's educational needs, as well as his behavioral issues. Appropriate goals, objectives and other services are included in the Student's IEP, which are reasonably calculated to allow the Student to make meaningful educational progress. Moreover, as the evidence established, the IEP team's decision to place the Student at [School 2] for the 2012-2013 academic year, as well as the 2013-2014 school year, will afford the Student a FAPE because he will have the opportunity to receive educational benefit in the LRE. Due to his disability, [School 2] must provide some of the Student's instruction outside the general classroom setting; however, placement at [School 2] allows the Student to maintain the opportunity to interact with peers and adults while building improved social behaviors. As previously discussed, I am persuaded that [School 2] has the staff and

structure to implement the Student's IEP. A more restrictive setting would be in violation of the IDEA. 34 C.F.R. § 300.114(a)(2) (2013).

In conclusion, pursuant to *Florence Co. v. Carter*, 510 U. S. 7, 114 S.Ct. 361 (1993), the appropriateness of a parent's private placement choice is analyzed only if the IEP results in a denial of a FAPE. *Carter*, 510 U.S. 7; *Burlington*, 471 U.S. 359. In this matter, I have concluded that the IEP and placement offered by the public agency provided the Student with a FAPE. Accordingly, an analysis pursuant to *Burlington* and *Carter* is inapplicable and the issue of whether [School 1] is appropriate does not need to be addressed in this decision.

### **CONCLUSIONS OF LAW**

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

1. The IEP proposed by the MCPS for the second half of the Student's 2012-2013 school year as well as the entire 2013-2014 school year was reasonably calculated to provide the Student a free appropriate education in the least restrictive environment. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

2. The Parents are not entitled to reimbursement of tuition and expenses for their unilateral placement of the Student at [School 1] for the second half of the Student's 2012-2013 school year or for the entire 2013-2014 school year. *Burlington School Committee v. Department of Education.*, 471 U.S. 359, 370 (1985).

### **ORDER**

I **ORDER** that the Parents; request for reimbursement for the cost of tuition and related costs and services incurred by the Parents for the Student's unilateral placement at [School 1], the non-public school that the Student currently attends, for the second half of the Student's

2012-2013 school year as well as the entire 2013-2014 school year, is **DENIED**.

March 21, 2014  
Date Decision Mailed

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Michael J. Wallace  
Administrative Law Judge

MJW/da

### **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.