

**XXXX XXXX,**

**STUDENT**

**v.**

**MONTGOMERY COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE LATONYA B. DARGAN,**

**\* AN ADMINISTRATIVE LAW JUDGE**

**\* OF THE MARYLAND OFFICE**

**\* OF ADMINISTRATIVE HEARINGS**

**\* OAH Case No.: MSDE-MONT-OT-13-45095**

**\* \* \* \* \***

**DECISION**

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DISCUSSION  
CONCLUSIONS OF LAW  
ORDER

**STATEMENT OF THE CASE**

On November 26, 2013, the Montgomery County Public Schools (MCPS) filed a request for due process hearing with the Office of Administrative Hearings (OAH), seeking an order authorizing MCPS to perform educational and psychological assessments of XXXX XXXX (Student), after XXXX XXXX (Parent) declined to consent to the assessments. MCPS sought authorization for the assessments, which it deemed necessary to determine the Student’s present levels of academic achievement and his special education and related services needs, under the Individuals With Disabilities in Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).<sup>1</sup> In filing the due process complaint, MCPS indicated that it wanted mediation and a hearing.

Mediation was scheduled for December 18, 2013 at MCPS headquarters in Rockville, Maryland. The Parent and Student declined to mediate. I convened a telephone pre-hearing conference (Conference) on the same day. Zvi Griesmann, Esquire, represented MCPS. The

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<sup>1</sup> Unless otherwise specified, all references to the IDEA are to the 2010 replacement volume and 2013 supplement.

Parent represented the Student. The Conference was primarily devoted to establishing the order of proceedings. After an opportunity for input from the parties, we established merits hearing dates of January 13, 14 and 21, 2014. In accordance with the 45-day decision deadline articulated at 34 Code of Federal Regulations (CFR) §300.515(a) (2013), I advised the parties that I would issue a decision in this matter by February 3, 2014.<sup>2</sup>

On January 13, 2014, I convened the hearing as scheduled at MCPS headquarters in Rockville, Maryland. Mr. Griesmann represented MCPS and he was accompanied by three witnesses. Neither the Parent, nor anyone authorized to represent the Parent and Student, appeared for the hearing. Neither the Parent nor anyone authorized to represent the Parent and Student requested a postponement of the hearing, nor was the Parent's copy of the hearing notice returned to the OAH by the United States Postal Services as undeliverable or unclaimed. After waiting approximately 15 minutes beyond the hearing's scheduled start time, I noted on the record that the Parent failed to appear for the hearing, and I proceeded with the hearing in her absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.

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<sup>2</sup> With respect to the determination of the decision deadline, the applicable regulation anticipates that the parent(s) of a student with special education needs will file a request for due process hearing, and the regulation calculates the timeframe for holding a resolution session, as contemplated in 34 CFR §300.510, from the date of the filing of the parent's due process complaint. 34 CFR § 300.510(a)(1). The regulation is silent with respect to (a) a *local education agency* filing the request for due process hearing and (b) whether a resolution session is even required when the school system files the due process hearing request, or how, if at all, the timing of the resolution process is triggered when the party filing the request is the school system. The decision deadline under 34 CFR § 500.515(a) is calculated from the day after the parties either agree in writing to waive the resolution session, or agree in writing, after the commencement of mediation or the resolution session, that no agreement is possible. 34 CFR § 300.510(c)(1) and (2). In this case, MCPS filed the due process hearing request. It appears from 34 CFR § 300.510(a) that a resolution session is not required under this circumstance. Accordingly, I calculated the due date for the decision from the day after which the mediation was scheduled, as the Parent and Student did not attend the mediation and therefore no agreement could be reached. Forty-five days from December 19, 2013 is February 2, 2014, but that is a Sunday. The decision is therefore due on Monday, February 3, 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) (2013); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and COMAR 13A.05.01.15C.

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

### **ISSUE**

Is MCPS authorized to conduct educational and psychological evaluations of the Student, as recommended by his Individualized Education Program (IEP) team during a November 7, 2013 IEP re-evaluation planning meeting, despite the Parent's refusal to consent to the evaluations?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

A complete exhibit list is attached as an appendix.

#### **Testimony**

MCPS presented the following witnesses:

- XXXX XXXX, Ph.D., Lead School Psychologist, Emotional Disability Services, MCPS, whom I accepted as an expert in School Psychology, with an emphasis on working with students with Emotional Disability (ED)
- XXXX XXXX, Instructional Specialist, [Program], MCPS, whom I accepted as an expert in Special Education, with an emphasis on working with students with ED
- XXXX XXXX, ED Cluster Teacher, MCPS, whom I accepted as an expert in Special Education, with an emphasis on working with students with ED

No one testified for the Student and Parent.

## FINDINGS OF FACT

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

1. The Student (DOB: XXXX, 1998) has received special education and related services under IDEA through MCPS since the 2002-2003 school year (SY). (MCPS Ex. 1.)
2. The Student was initially screened through Child Find when he was three years old, at which time it was determined that he presented with difficulties in the areas of fine motor skills and problem solving skills, and he had delayed communication skills. His initial IEP team recommended identifying him as a student with significant developmental delays in need of special education services. (*Id.*)
3. During the 2002-2003 SY, the Student attended a special education pre-school program for two-and-a-half hours per day five days per week. Additionally, he received occupational and physical therapy services, as well as speech and language therapy. Behaviorally, the Student displayed impulsivity and a short attention span. He had difficulty following directions, staying on task, and playing with his peers without conflict. When asked to be seated during time outs, the Student would frequently refuse to do so, and he became aggressive and combative with the adult attempting to redirect him. (*Id.*)
4. As the Student approached the exiting age for the pre-school program, his IEP team recommended he be educationally assessed and undergo a psychological evaluation. In March 2003, the Student was assessed by school psychologist XXXX XXXX. Mrs. XXXX administered a number of tests, including the Stanford Binet (4<sup>th</sup> Ed.), to examine the Student's cognitive ability. The Student's cognitive abilities fell within

- the average range of intelligence. The administered tests also reflected the Student's tendency towards impulsivity and distractibility, and a difficulty in socially interacting with peers. Developmentally, the Student displayed deficits in visual reception, and significantly-delayed speech. (*Id.*)
5. After reviewing the assessment data, the IEP team recommended identifying the Student as speech and language-impaired, and placing him in the least restrictive setting. (*Id.*)
  6. From kindergarten through third grade, the Student was enrolled at [School 1], where he attended regular education classes for half the school day and received instruction for the other half of the day in a self-contained classroom. The Student continued to display impulsivity, difficulty following directions and remaining on task, and difficulty interacting with his peers without conflict. He was easily distracted and frequently had trouble completing class assignments. His behavior often interrupted class. As a result of his consistently-displayed behaviors, the Student's IEP team conducted a Functional Behavioral Assessment (FBA) of the Student and, based on the FBA results, developed a Behavior Improvement Plan (BIP) to address his social/emotional needs. (*Id.*)
  7. By second grade, the Student's behavioral problems increased. He began calling out in class more often, was more distracted than previously noted, and displayed increased difficulty maintaining attention to tasks. Although school staff implemented various interventions, including a reward system for positive behavior, schedule changes, and loss of recess time for negative behavior, the Student continued displaying disruptive behavior in class, as well as difficulty interacting with

his peers. He was referred to the principal's office multiple times throughout the SY because of aggressive behavior directed towards classmates. As a result of the increase in the Student's aggressive and disruptive behavior, his IEP team referred him for a psychological evaluation to determine if he had an attention deficit disorder. (*Id.*)

8. Dr. XXXX XXXX conducted the psychological evaluation of the Student, which demonstrated he had Attention Deficit Hyperactivity Disorder (ADHD).<sup>3</sup> As a result, the IEP team changed the Student's identification from speech and language-impaired to Other Health Impaired for the purpose of determining the proper special education and related services to meet his needs. The Student's IEP was revised to include goals and objectives designed to address his attention deficits, as well as his continued poor social interaction skills. (*Id.*)
9. In third grade, the Student continued to struggle in developing appropriate attention and social skills, although he displayed adequate academic growth in the areas of math, reading and writing. (*Id.*)
10. The Student transferred to [School 2] for fourth grade and remained there through fifth grade. He continued to receive special education and related services, including speech and language services, but his behavior in class, and in interacting with his peers, did not show significant improvement. During the 2008-2009 SY, when the Student was in fifth grade, he was suspended three times for fighting with other students. (*Id.*)
11. For sixth grade (the 2009-2010 SY), the Student transferred to [School 3]. During the school year, he displayed the following behavior: overreaction to minimal

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<sup>3</sup> The Student is prescribed medication to manage the symptoms of ADHD.

provocation; aggression towards fellow students; frequent elopement from class; incomplete class- and homework assignments; inability/refusal to follow class rules or directions given in class; disrespect towards school staff; and, frequent interruption of classroom instruction. The Student was frequently referred to the principal's office as a disciplinary measure, and he was suspended eight times, for infractions ranging from verbal threats at classmates, insubordination towards staff, and fighting with other students. Although the IEP team conducted an updated FBA and revised the Student's BIP during the 2009-2010 SY, he continued to display aggressive, disruptive, inattentive, and insubordinate behavior. The Student also required significant supervision when at home, and assistance in completing homework. As a result of the frequency with which the Student disrupted class, eloped from class, or was removed from class for disciplinary reasons, his academic performance declined during the school year. (MCPS Exs. 1, 14.)

12. Due to the continuing difficulties the Student experienced in regulating his behavior during the 2009-2010 SY, the IEP team referred him for a psychological evaluation to determine if he presented with an emotional disability. (MCPS Ex. 1.)

13. On April 16 and 19, 2010, the Student was assessed by XXXX XXXX, Ph.D., of MCPS' Department of Student Services, Office of Psychological Services. As part of the assessment, Dr. XXXX reviewed the Student's school records, and interviewed both the Student and Parent. Additionally, Dr. XXXX collected data from the following measuring instruments:

- Weschler Intelligence Scale for Children-IV (WISC-IV)
- Wide Range Assessment of Memory and Learning-II (WRAML-II)

- Developmental Test of Visual Motor Integration, 5<sup>th</sup> Ed.
- Robert's Apperception Test for Children-2
- Self-Report of Personality-Child Form (BASC)
- Behavior Assessment System for Children-Parent Rating Scale
- Behavior Assessment System for Children-Teacher Rating Scale
- Conner's Teacher Rating Scale
- Conner's Parent Rating Scale
- Conner Rating Scale-Self Report
- Behavior Rating Inventory for Executive Functioning (BRIEF)-Parent Scale
- Behavior Rating Inventory for Executive Functioning-Teacher Scale
- Behavior Rating Inventory for Executive Functioning-Self Report

14. During Dr. XXXX's assessment of the Student, she found him to be friendly and forthright, and able to communicate clearly using simple vocabulary and short sentences. He had difficulty elaborating on his responses and explaining his actions. Dr. XXXX made the following additional observations of her interaction with the Student: he claimed that he is frequently provoked by other students and gets into altercations with them because "they mess with me and I'm not going to let them"; he believed his teachers did not care about or respect him, and were unwilling to let him "do stuff" in class; he acknowledged that he likes to talk during class and he wants to move around, so he does both, but he was unable to explain why he felt it was necessary to do so or what he accomplished by doing so; and, he denied being disrespectful to his teachers, and indicated that they did not help him. (*Id.*)



15. During the assessment, the Student was fidgety, easily distracted, and required frequent re-direction to tasks. He was motivated to do well on the testing portion and made good faith efforts to complete challenging tasks, and he responded favorably to Dr. XXXX's positive remarks about his effort and performance. (*Id.*)
16. The Student's results on the WISC-IV, which measures intellectual functioning, indicated he fell within the average range of intelligence, and displayed an evenly developed pattern of problem solving skills. He also demonstrated age-appropriate skills in the areas of working memory and processing speed, and language-based and visual processing skills. (*Id.*)
17. On the WRAML-II, which measures ability to actively learn and memorize verbal and visual information, the Student's overall performance fell within the average to below average range of functioning. His ability to remember verbal information fell within the average range, while his visual memory was below average level. His scores on the Attention and Concentration scales of the test also fell below average level. (*Id.*)
18. The Parent and the Student's teachers completed the Conner's Rating Scales (CRS), which are designed to gather information about a child's general attention skills across different settings. The CRS assesses a child's hyperactivity, inattention and impulsivity. The Student's scores on the CRS showed significant impairment on his ability to maintain an appropriate level of activity, to sustain attention, and to exert self-control. The Parent and teachers also reported elevated scores for the Student in the areas of aggression, defiance and peer relations. (*Id.*)

19. The Student completed the self-report version of the CRS, and gave himself elevated scores in the areas of aggression, defiance, hyperactivity, impulsivity, and restlessness. He indicated that these areas often affect his functioning in both academic and social settings. (*Id.*)
20. The Parent and teachers also completed BRIEF questionnaires, which collect information about behaviors necessary to engaging in purposeful problem solving. Some of the functions assessed in the questionnaire include: the ability to initiate a task and to exercise self-control when performing the task; the ability to organize and plan an activity; the ability to shift strategies and to monitor behavior; the ability to regulate and control emotions when actively involved in problem solving; and, the capacity to hold information in the memory while completing multiple tasks. (*Id.*)
21. The Parent's and teachers' responses on the BRIEF questionnaires showed elevated scores in most of the areas the Student's executive functioning skills. He has difficulty maintaining self-control, planning and organizing activities, and in monitoring his own behavior. Additionally, he has difficulty mentally manipulating and reorganizing information he needs to recall to solve problems. He also has pronounced difficulty regulating his emotions. (*Id.*)
22. Based on the results of the testing instruments Dr. XXXX administered to the Parent and teachers designed to evaluate the Student's social and emotional functioning, the Student had significant difficulty in his ability to interact with peers. He became easily upset with others, and resolved conflicts by instigating arguments or fights. When the Student felt challenged or threatened, or did not get his way in a situation,

he reacted in an angry, hostile manner, often becoming physically and verbally aggressive to the other parties in the situation. (*Id.*)

23. Upon review of the information collected through the assessment, Dr. XXXX concluded that given the extensive, pervasive nature of the behavioral difficulties experienced by the Student throughout his school career, and his consistent inability to regulate his emotions, or to modulate them to levels appropriate for the given circumstances, the Student met the criteria under IDEA to be identified as having an emotional disability (ED). She further recommended the Student be placed in a small group setting with a low student-to-teacher ratio, and be subject to an integrated behavior management system that is implemented across the school day. The Student would benefit from placement in a highly-structured academic environment in which his emotional needs are addressed as part of the academic programming. (*Id.*)
24. As a result of Dr. XXXX' psychological assessment and concluding recommendations, the Student was transferred to the [School 4] at the start of the 2010-2011 SY and placed in the [Program] Program ([Program]). (MCPS Ex. 3.) [Program] is implemented in MCPS locations able to sustain an interdisciplinary team of educational professionals who utilize various strategies and techniques to assist students with emotional and behavioral disability to access their educational programming. [Program] teams are comprised of four special education teachers, eight para-educators, a school psychologist, a licensed clinical social worker, a behavior support teacher, and a resource teacher for special education. (T.<sup>4</sup> XXXX.) [Program] classes are smaller than, and provide more behavioral support than, general education classes. (MCPS Ex. 3.)

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<sup>4</sup> The abbreviation "T" stands for testimony.

25. At the start of the 2010-2011 SY, the Student was enrolled in [Program] classes for English, Math, Science, Pupil Enrichment and World Studies. He was in general education classes for Art and Physical Education. (MCPS Ex. 3.)
26. Despite being in [Program] classes for the majority of the school day, the Student continued to engage in disruptive behavior in class, including frequent failure/refusal to follow class rules or instructor directions, and physical and verbal aggressiveness towards peers and staff. He was suspended eight times during the 2010-2011 SY for a range of behaviors including physically attacking fellow students, fighting, and harassment of peers. (MCPS Exs. 3, 14.)
27. During the first quarter of the 2011-2012 SY, on or around November 13, 2011, the Student's IEP team conducted an updated FBA. The team noted that in the 44 days in which school was in session by the time the FBA was conducted, the Student was referred to the Student Support Center (SSC) approximately 54 times to problem solve for various behaviors, including elopement from class, inappropriate language, class disruption, disrespect, threats, sexual harassment, and other inappropriate peer relations. The team further observed that many of the Student's instances of poor behavior occurred when he was being held accountable for his actions, or challenged in any way by a teacher or peer. The Student's behavior would frequently escalate to cursing, kicking desks and trashcans, and punching objects in the room when he was asked to leave the classroom and report to the SSC. The Student's conduct indicated a continuing inability to channel feelings of anger, disappointment, or frustration in socially appropriate ways. (MCPS Ex. 3.)

28. As a result of the November 13, 2011 FBA, the IEP team developed a BIP for the Student on or around December 9, 2011. The BIP called for the following interventions/strategies to manage the Student's behavior:

- Contacting the Parent to retrieve the Student when he comes to school without taking his medications, to reduce instances of unsafe and disruptive behavior in the halls and classroom when the Student is unmedicated
- Placing the Student on "eyeball escort" during non-transition times, to reduce instances of disruptive and disrespectful behavior during non-transition times, and to reduce the instances of elopement from class

(MCPS Ex. 3.)

29. During the 2011-2012 SY, the Student was suspended 12 times for a range of behaviors including classroom disruptions, physical and verbal threats to peers, disrespect to staff, insubordination, refusal to obey school police, and physical attacks on peers. (MCPS Ex. 14.)

30. The Student enrolled for the ninth grade at [School 5] ([School 5]), which has [Program] programming, for the 2012-2013 SY. The Student was in [Program] classes for all core subjects, and in general education classes for electives and Physical Education. The Student is on the diploma track. (MCPS Ex. 5.)

31. During the 2012-2013 SY, the Student frequently refused to follow the directions of his teachers and counselors, or to follow school rules. He would come to school, but he regularly refused to go to or remain in his classrooms. He engaged in bullying behavior towards classmates, and was regularly disrespectful towards teachers and other staff members. Although the Student is of average intelligence and has average cognitive capabilities, he did not pass the 1<sup>st</sup> or 2<sup>nd</sup> quarters of the SY. (T. XXXX.)

32. On or around October 4, 2012, the Student physically attacked a classmate. As a result, he was suspended for a period of one day, and directed to serve two days of In-School Intervention. (MCPS Ex. 4.)
33. On or around January 17, 2013, an IEP team meeting convened to conduct the annual review of the Student's IEP. The team noted that the Student continued to display significant attention deficits and difficulty remaining on task, which affected his comprehension of coursework materials. The team also noted the Student's persistent poor impulse control, frequent insubordination, and disruptive in-class behavior, and that all of these attributes made it difficult for the Student to access the general education curriculum, and had a negative impact on his social relationships. The IEP team recommended continued placement in [Program] programming, and a possible referral to the Central IEP team because the Student's "disruptive behaviors and poor impulse control significantly impact the learning environment for himself and others to such a degree that he requires a highly supervised structured small group setting," including crisis intervention and problem solving strategies. (MCPS Ex. 5.)
34. On or around May 15, 2013, the Student received an out-of-school suspension for three days for refusal to obey school policies. (MCPS Ex. 7.)
35. On or around August 28, 2013, the Student was suspended for one day, out-of-school, as a result of insubordination. (MCPS Ex. 9.)
36. On or around September 10, 2013, the Student got into a verbal confrontation with a fellow student, which escalated to the Student making physical threats, including throwing a pen at the other student's face. He was directed to report to the SSC for problem solving. Although he left the classroom, he did not go directly to the SSC.

Instead, he roamed the hallways. He was approached by a [School 5] security and resource officer, who attempted to re-direct him. When the officer placed a hand on the Student's shoulder, the Student attempted to punch the officer. The officer arrested the Student and transported him to the XXXX Children Center, a juvenile detention facility. (MCPS Ex. 10.)

37. As a result of the incident on September 10, 2013, the Student was suspended for 10 days, to be served out-of-school, and the [School 5] principal recommended that he be expelled. (MCPS Ex. 11.)

38. On September 24, 2013, the Student's IEP team convened a meeting to determine if the Student's behavior on September 10, 2013 was a manifestation of his ED. The team, which included the Parent, reviewed the events of September 10, 2013, as well as the Student's IEP progress reports for the current and immediately preceding school year. The team determined that the Student's September 10, 2013 behavior was a manifestation of his ED, decided to conduct an FBA by September 24, 2013, and recommended that the Student be returned to his placement in the [Program] program. Additionally, the team discussed the possibility that the Student's current IEP goals and objectives may not be appropriate for him, and noted that he did not appear to be making progress on them. The school-based members of the team suggested to the Parent that it was necessary to have updated assessments performed on the Student to ensure the appropriateness of the Student's program. (MCPS Ex. 10.)

39. As a result of the IEP team's September 24, 2013 determination that the Student's behavior on September 10, 2013 was a manifestation of his ED, the Student's suspension was reduced from 10 days to two. (MCPS Ex. 13.)
40. On or around November 7, 2013, the IEP team, with the exception of the Parent, who did not attend, convened for a re-evaluation planning meeting.<sup>5</sup> The team noted that the Student had not undergone educational or psychological assessments since April 2010. The team determined that updated educational and psychological assessments would be helpful to assess the Student's present levels of academic achievement and his present levels of social and emotional functioning. (MCPS Ex. 12.)
41. MCPS notified the Parent of the IEP team's recommendation that the Student be reevaluated on or around November 11, 2013. (MCPS Ex. 13.)
42. On or around November 25, 2013, the Student was suspended for fighting. (MCPS Ex. 14.)
43. As of January 6, 2014, the Student's cumulative GPA was 1.06.

## **DISCUSSION**

### ***Legal Framework***

#### *IDEA, IEPs, and FAPE Generally*

The IDEA requires "that all children with disabilities have available to them ... a free appropriate education that emphasizes special education and related services designed to meet their unique needs[.]" 20 U.S.C.A. § 1400(d)(1)(A). The IDEA provides federal money to the states to educate disabled children on condition that states comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. §§ 1412-1414; 34 C.F.R. § 300.2; *Board of Educ. of the Hendrick Hudson Central School Distr. v. Rowley*, 458 U.S. 176 (1982). Maryland's special education law is found at

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<sup>5</sup> The Parent was provided with prior notice of the meeting date and time. (MCPS Ex. 13.)



Md. Code Ann., Education, § 8-101 *et seq.* (2008 and Supp. 2013). The regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

A free appropriate education (FAPE) is defined in COMAR 13A.05.01.03B as follows:

(27) “Free, appropriate public education (FAPE)” means special education and related services that:

- (a) Are provided at public expense, under public supervision and direction;
- (b) Meet the standards of the Department, including the requirements of 34 CFR §§300.8, 300.101, 300.102, and 300.530(d) and this chapter;
- (c) Include preschool, elementary school, or secondary education; and
- (d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

FAPE is similarly defined in the IDEA and in the applicable federal regulations. 20 U.S.C.A. § 1401(9); 34 C.F.R. § 300.17.

FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. *Rowley*, 458 U.S. at 181-182. COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of the student and the special education and related services to be provided to meet those needs. The goals, objectives, activities, and materials must be adapted to the needs, interests, and abilities of each student. 20 U.S.C.A. § 1414(d). A student’s IEP must be reasonably calculated to enable the child to receive educational benefits. *Rowley*, at 182.

FAPE does not require “the best possible education that a school system could provide if given access to unlimited funds.” *Barnett v. Fairfax Co. School Bd.*, 927 F.2d 146, 154 (4<sup>th</sup> Cir. 1991). It does, however, require the State to provide personalized instruction with sufficient support services to permit the handicapped child to benefit educationally. The IDEA requires that an IEP

allow for a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990).

Although the law in special education has undergone a significant evolution in the past few decades, the *Rowley* case still sets the standard for determining whether a child is being accorded a free appropriate public education under the IDEA. In *Rowley*, the Supreme Court set forth a two-part analysis. First, a determination must be made as to whether there has been compliance with the procedures set forth in the Act. Second, it must be determined whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefits.

Once an IEP is shown to be procedurally proper, the judgment of education professionals regarding the child’s placement should be questioned only with great reluctance by the reviewing authority. *Tice*, 908 F.2d at 1207. There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *A.B. by D.B. v. Lawson*, 354 F.3d 315, 325-329 (4<sup>th</sup> Cir. 2004); *M.M. ex rel. D.M. v. School Dist. of Greenville Co.*, 303 F.3d 523, 532-533 (4<sup>th</sup> Cir. 2002). Courts have held that “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.” *Hartman v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1997).

Additionally, to the maximum extent possible, the IDEA seeks to include the child in regular public schools; at a minimum, the statute calls for school systems to place children in the “least restrictive environment” (LRE) consistent with their educational needs. 20 U.S.C.A. §

1412(a)(5)(A). The nature of the LRE necessarily differs for each child but could range from a regular public school to a residential school where 24-hour supervision is provided. COMAR 13A.05.01.10B. Although the IDEA requires specialized and individualized instruction for a learning- or educationally-disabled child, it also mandates that “to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities,” must be “educated with children who are not disabled[.]” 20 U.S.C.A. § 1412(a)(5)(A). It follows that the State and federal regulations that have been promulgated to implement the requirements of the Act also require such inclusion. 34 C.F.R. § 300.114 through 120; COMAR 13A.05.01.10A(1). The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. *Hartmann v. Loudon County Bd. of Educ.*, 118 F.3d 996 (4<sup>th</sup> Cir. 1997).

#### *Burden of Proof*

The burden of proof in a due process hearing is by a preponderance of the evidence and rests with the party bringing the Due Process Complaint. *Schaffer v. Weast*, 546 U.S. 49 (2005). Therefore, the burden in this matter is on MCPS.

#### *The Merits of the Case*

MCPS seeks to conduct updated educational and psychological assessments of the Student because it believes that his current placement in [Program] at [School 5] is not meeting his educational needs. The school system argues that with updated assessments, it can better understand the psychological, emotional, social, and behavioral landscape of the Student as that landscape exists currently. Such an understanding is necessary for MCPS to develop an IEP and determine a placement better suited to enabling the Student to access his educational curriculum

and receive a FAPE. MCPS seeks an order authorizing it to conduct a reevaluation of the Student, including necessary educational, psychological, and social assessments.

The IDEA articulates the obligation of a local education agency such as MCPS to conduct initial evaluations to determine if a child is a child with a disability in need of special education and related services, and it authorizes local education agencies to conduct re-evaluations in certain defined circumstances. The statute provides, in relevant part, as follows:

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations, parental consent, and reevaluations.

(1) Initial evaluations.

(A) In general. A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this subchapter.

(B) Request for initial evaluation. Consistent with subparagraph (D), either a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(C) Procedures.

(i) In general. Such initial evaluation shall consist of procedures--

(I) to determine whether a child is a child with a disability (as defined in section 1401 of this title) within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and

(II) to determine the educational needs of such child.

...

(D) Parental consent.

(i) In general.

(I) Consent for initial evaluation. The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401 shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

...

(ii) Absence of consent.

(I) For initial evaluation. If the parent of such child does not provide consent for an initial evaluation under clause (i)(I), or the parent fails to respond to a request to provide the consent, the local educational agency may pursue the initial evaluation of the child by utilizing the procedures described in section 1415 of this title, except to the extent inconsistent with State law relating to such parental consent.

...

(2) Reevaluations.

(A) In general. A local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections (b) and (c)--

(i) *if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or*

(ii) if the child's parents or teacher requests a reevaluation.

(B) Limitation. A reevaluation conducted under subparagraph (A) shall occur--

(i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and

(ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.

...

(b) Evaluation procedures.

(1) Notice. The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation. In conducting the evaluation, the local educational agency shall--

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an

appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

...

20 U.S.C.A. § 1414(a) (emphasis supplied). *See also*, 34 C.F.R. §§ 300.303 and 300.304.

Dr. XXXX XXXX, whom I accepted as an expert in school psychology with an emphasis on working with students with ED and who has worked as a school psychologist with MCPS for a decade, has worked with the Student for the past three-and-a-half years. She has counseled him individually and has participated in several IEP team meetings during both the Student's middle school and high school careers. Dr. XXXX presented as very knowledgeable of the Student. She described him as an intelligent young man who is academically capable, but who is not meeting his full potential due to frequently being unavailable for instruction because of his ED. The Student is very impulsive and emotionally labile, has difficulty maintaining relationships with peers, and is verbally abusive to both peers and school staff. If the Student does not want to be in class on a particular day, or work on a given assignment, he will frequently leave the room, and he requires significant redirection to return to his task. He becomes combative, physically and verbally, with peers when he feels challenged or disrespected; the most minor of provocations evoke exaggerated emotional responses from him. In Dr. XXXX' opinion, updated assessments for the Student are vital to determine the services and placement he needs, as it appears as though the public placement at [School 5] within [Program] is not meeting his needs for either dealing with his ED or receiving educational benefit. The Student is cognitively and intellectually capable of performing his class work, but his ED and the ways in which the ED manifests itself throughout the school day, frequently interferes with the Student being available for learning.

Dr. XXXX' testimony about the relationship between the Student's disability and his inability to make meaningful educational progress, was corroborated by that of XXXX XXXX, whom I accepted as an expert in special education with an emphasis on working with students with ED, and by XXXX XXXX, whom I accepted as an expert in special education with an emphasis on working with students with ED. Ms. XXXX is an Instructional Specialist in the [Program] program, and she has worked with the Student since he was in the seventh grade. When she first met the Student, he impressed her as intelligent and academically capable, but not meeting his academic or intellectual potential. Ms. XXXX noted that the Student's educational records reflect he consistently has behavioral problems that necessitated his frequent removal from the classroom, either as a referral to the SSC or the principal's office. Understandably, if the Student is frequently not in class, he is not available for learning and he does not receive the educational benefits of engaging in the class work. In concert with Dr. XXXX, Ms. XXXX believed the Student's current placement in the [Program] program within [School 5] might not be sufficient to meet the Student's emotional, social, and psychological needs so that he is able to access the curriculum and obtain educational benefit from doing so. Ms. XXXX noted that the Student has various behavioral interventions in place under his BIP, including an escort for classes, an individually-assigned case manager, and resource pull-out instruction with emphasis on social interaction, and even with these behavioral interventions in place, the Student is regularly removed from the classroom for being disruptive, disrespectful towards peers and staff, and threatening towards peers and staff. Ms. XXXX believed that updated formal assessment/testing is necessary to determine what additional services the Student needs to help him obtain a FAPE, because at this time, his ED prevents him from meaningfully participating in his education. In Ms. XXXX's words, "the social and emotional component of [the Student's]

ED gets in the way of his ability to access the curriculum.” Ms. XXXX’s opinion was that the Student would benefit from “insight-oriented” counseling throughout the school day, and she emphasized that the assessment data MCPS has on him is out-of-date. As she observed, “he hasn’t been tested since sixth grade. We need to know what’s going on with him *now*.” Ms. XXXX felt that the Student was in “a lot of emotional pain” that manifests itself in his behaviors, and MCPS needs to figure out the impetus of the pain in order to create a meaningful educational program for him.

Ms. XXXX shared the concerns of Dr. XXXX and Ms. XXXX that the Student’s current IEP and placement may no longer be what the Student needs to achieve a FAPE. Ms. XXXX was the Student’s case manager for the 2012-2013 SY. She explained that the Student would often come to school, but would either not go to class at all, or not remain in class. He engaged in behavior towards classmates that she described as “bullying”, and he was regularly disrespectful towards authority figures. According to Ms. XXXX, the Student often “came to school angry” and seemed to seek out opportunities with classmates and staff to engage in confrontations. During the 2013-2014 SY, the Student became “even more flagrant” in his disregard of authority figures, and he was more unpredictable with respect to the behaviors of others that he viewed as provocative. According to Ms. XXXX, the Student was so unpredictable and emotionally volatile in the 2013-2014 SY, that peers who were friends with him during the 2012-2013 SY distanced themselves from him, as they no longer felt safe around him. In Ms. XXXX’s opinion, MCPS cannot meet the Student’s needs at [School 5], even with [Program] programming implemented, because he is not available for instruction. He most likely needs a more intensive and structured setting than [School 5], but the only way for MCPS to determine this is if the Student is reevaluated.



## *Summary*

Based on the evidence, MCPS has met its burden of proving by a preponderance of the evidence that the Student should be formally reevaluated, via educational and psychological assessments, to determine his current educational and related services needs. The Student is an intelligent, cognitively capable young man, but he is not currently receiving educational benefit from his programming at [School 5] because of his behavioral and social/emotional deficits. His ED, which is pervasive and long-standing, regularly interferes with his ability to be available for learning; he is disruptive when he is in class, to the point that he frequently has to be removed from class via referral to the SSC or the principal's office. The Student has not undergone formal assessments since April 2010. It is clear that MCPS needs an updated comprehensive picture of the Student's emotional, psychological, and social landscape, as well as his current levels of functional performance, in order to devise an IEP better designed than the one he currently has to provide the Student with a FAPE. Accordingly, under 20 U.S.C.A § 1414(a)(2), I authorize MCPS to conduct a reevaluation of the Student in accordance with the procedures outlined in 20 U.S.C.A. § 1414(a)(2)(b).

## **CONCLUSIONS OF LAW**

Based on the Findings of Fact and Discussion, I conclude as a matter of law that MCPS is authorized to conduct educational and psychological evaluations of the Student, as recommended by his IEP team during a November 7, 2013 IEP re-evaluation planning meeting, despite the Parent's refusal to consent to the evaluations. 20 U.S.C.A. § 1414(a)(2); 34 C.F.R. §§ 300.303 and 300.304 (2013).

**ORDER**

I **ORDER** that Montgomery County Public Schools is authorized to conduct educational and psychological evaluations of the Student, as recommended by his IEP team during a November 7, 2013 IEP re-evaluation planning meeting.

I further **ORDER** that Montgomery County Public Schools shall conduct the reevaluation of the Student in a manner consistent with the provisions of 20 U.S.C.A. § 1414(a)(2) and 34 C.F.R. §§ 300.303 and 300.304 (2013).

January 31, 2014  
Date Decision Mailed

\_\_\_\_\_  
Latonya B. Dargan  
Administrative Law Judge

LBD/kkc

**REVIEW RIGHTS**

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

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

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