

XXXX XXXX

* BEFORE MARINA LOLLEY SABETT,

* AN ADMINISTRATIVE LAW JUDGE

v.

* OF THE MARYLAND OFFICE

MONTGOMERY COUNTY PUBLIC

* OF ADMINISTRATIVE HEARINGS

SCHOOLS

* OAH NO.: MSDE-MONT-OT-13-45637

* * * * *

DECISION

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ORDER

STATEMENT OF THE CASE

On December 4, 2013, [Father] and [Mother] (Parents), on behalf of their child, XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing only 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 December 5, 2013, the parties notified OAH that they waived their otherwise required Resolution Session Meeting. The matter was scheduled for a telephone prehearing conference on December 18, 2013.

I held a telephone prehearing conference on December 18, 2013. The Student was represented by Michael Eig, Esq. Jeffrey A. Krew, Esq., represented the MCPS. By agreement, the parties requested that the hearing be scheduled for January 22-24, 2014, and February 11-12, 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) (2012). In determining the schedule, 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 his calendar with me. Due to scheduling conflicts, including multi-day due process hearings before the OAH in which counsel for the parties were involved and various intervening holidays, 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).

Due to various weather conditions resulting in the closure and delay of MCPS, the hearing was cancelled on January 22, 2014, and began two hours late on January 23, 2014. Consequently, the parties agreed to an additional hearing day on February 19, 2014. The hearing was conducted on January 23-24, 2014, and February 11-12, and 19, 2014. The record closed on February 19, 2014. Mr. Eig represented the Student and Mr. Krew represented MCPS.¹

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a)-(d) (2012); Md. Code Ann., Educ. § 8-413(e)-(h) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

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

¹ Mr. Eig and Mr. Krew have been worthy adversaries and colleagues for many years, as they were both quick to point out on a number of occasions throughout the hearing. While the tone of the hearing in this matter was generally collegial, at times, it was somewhat confrontational between the attorneys, prompting Mr. Eig to write a letter of apology (dated February 20, 2014) to both Mr. Krew and me regarding "his role in the proceedings going somewhat awry" during the closing arguments on February 19, 2014. Mr. Krew wrote a response (dated February 24, 2014) essentially saying that no apology is necessary and I concur. Mr. Eig seemed concerned that his behavior in the closing might somehow impact my ability to focus on the facts and the law in this case, which it absolutely did not. I very much enjoyed working with Mr. Eig and Mr. Krew and look forward to the opportunity in the future.

ISSUES

The issues in this case are as follows:

1. Did MCPS fail to provide the Student a timely and appropriate placement under an appropriate Individualized Educational Program (IEP) for the 2012-2013 and 2013-2014 school years?
2. If so, is tuition reimbursement (and related expenses and costs) for the 2012-2013 and 2013-2014 school years at the [School 1], the Parents' unilaterally chosen private school placement, appropriate?

SUMMARY OF THE EVIDENCE

Exhibits²

I admitted the following exhibits on behalf of the Student:

- XX- 2. MCPS Psychological Evaluation, 6-1-2010;
- XX- 3. Psychological Report by Dr. XXXX XXXX, 12-6-2011;
- XX- 4. Letter to MCPS from parents, 3-23-2012;
- XX- 5. Letter to Zvi D. Greismann, Esq. from Michael J. Eig, Esq., 3-26-2012;
- XX- 7. Letter to Zvi D. Greismann, Esq. from Michael Eig, Esq., 3-29-2012;
- XX- 9. Letter to Zvi D. Greismann, Esq. from Michael J. Eig, Esq., 4-30-2012;
- XX- 10. Letter to Zvi D. Greismann, Esq. from Michael J. Eig, Esq., 4-30-2012;
- XX- 11. Letter to Michael J. Eig, Esq. from Zvi Greismann, Esq., 5-2-2012;
- XX- 13. [School 1] Application for Admission, 5-15-2012;
- XX- 16. MCPS Psychological Evaluation, 5-25-2012;
- XX- 17. Letter to Zvi D. Greismann, Esq. from Michael J. Eig, Esq., 6-1-2012;
- XX- 18. Emails between [Father] and XXXX XXXX, 6-5-2012;

² Omitted exhibit numbers represent exhibits not offered for admission.

XX- 19. Letter to Michael J. Eig, Esq. from Zvi D. Greismann, Esq., 6-6-2012;

XX- 21. MCPS 2011-12 Report Card, 6-14-2012;

XX- 22. Maryland School Assessment Score Report, Spring 2012;

XX- 24. Letter to [Parents] from XXXX XXXX, 6-21-2012;

XX- 25. [School 1] Intake Form, June 2012;

XX- 31. Letter to Zvi D. Greismann, Esq. from Michael J. Eig, Esq., 8-24-2012;

XX- 32. Letter to [Parents] from XXXX XXXX, 8-29-2012;

XX- 33. Letter to [Parents] from XXXX XXXX, 8-30-2012;

XX- 34. Letter to XXXX XXXX from Michael J. Eig, Esq., 8-30-2012;

XX- 35. Letter to [Parents] from XXXX XXXX, 8-31-2012;

XX- 36. [School 1] 2012-13 School Year Schedule;

XX- 38. Letter to XXXX XXXX from Michael J. Eig, Esq., 9-25-2012;

XX- 39. Letter to [Parents] from XXXX XXXX, 10-2-2012;

XX- 40. Letter to Michael J. Eig, Esq. from Zvi D. Greismann, Esq., 10-11-2012;

XX- 41. Letter to XXXX XXXX from Michael J. Eig, Esq., 10-15-2012;

XX- 42. Letter to Michael J. Eig, Esq. from Zvi D. Greismann, Esq., 10-18-2012;

XX- 43. Letter to Zvi D. Greismann, Esq. from Michael J. Eig, Esq., 10-19-2012;

XX- 44. Letter to Zvi D. Greismann, Esq. from Michael J. Eig, Esq., 11-13-2012;

XX- 45. [School 1] Formal Education Plan, 11-16-2012;

XX- 46. Letter to [Parents] from XXXX XXXX, 11-19-2012;

XX- 47. Letter to [Parents] from XXXX XXXX, 12-20-2012;

XX- 48. Letter to [Parents] from XXXX XXXX, 1-3-2013;

XX- 49. Letter to XXXX XXXX from Michael J. Eig, Esq., 1-3-2013;

XX- 50. Email from XXXX XXXX to XXXX XXXX, 1-28-2013;

- XX- 51. Email from XXXX XXXX to XXXX XXXX, 1-30-2013;
- XX- 52. Letter to [Parents] from XXXX XXXX, 2-5-2013;
- XX- 53. Letter to XXXX XXXX from Michael J. Eig, Esq., 2-7-2013;
- XX- 55. Letter to [Parents] from XXXX XXXX, 2-14-2013;
- XX- 56. Letter to XXXX XXXX from Michael J. Eig, Esq., 2-15-2013;
- XX- 58. Letter to [Parents] from XXXX XXXX, 2-26-2013;
- XX- 59. Letter to XXXX XXXX from Michael J. Eig, Esq., 2-27-2013;
- XX- 62. Authorization for Release of Confidential Information, 3-19-2013;
- XX- 64. Letter to XXXX XXXX from Michael J. Eig, Esq., 5-28-2013;
- XX- 65. [School 1] Formal Education Plan, 5-29-2013;
- XX- 66. [School 1] 8th;
- XX- 68. [School 1] Progress Updates, June 2013;
- XX- 70. Letter to Zvi D. Greismann, Esq. from Michael J. Eig, Esq., 8-5-2013;
- XX- 72. Letter to Michael J. Eig, Esq. from Zvi D. Greismann, Esq., 8-12-2013;
- XX- 73. [School 1] 2013-14 School Year Schedule;
- XX- 75. Letter to Michael J. Eig, Esq. from Jeffrey A. Krew, Esq., 9-4-2013;
- XX- 78. [School 1] 9th Grade Report Card Quarter 1, 2013-14 School Year, 12-06-2013;
- XX- 81. Resume of XXXX XXXX; and
- XX- 82 [School 1] 9th Grade Report Card Quarter 2, 2013-14 School Year, 2-11-2014.

I admitted the following exhibits on behalf of MCPS:

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| 1 | 5/25/10 | Speech-Language Re-Assessment - XXXX XXXX, MS, CCC-SLP (MCPS) |
| 2 | 1/12/12 | Summary of Parent Conference |
| 4 | 2/1/12 | IEP Team Meeting Documentation |
| 5 | 2/27/12 | IEP Team Meeting Documentation |
| 6 | 3/27/12 | IEP Team Meeting Documentation |

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| 7 | 5/1/12 | Classroom Observation by XXXX XXXX |
| 8 | 5/10/12 | Classroom Observation by Dr. XXXX XXXX |
| 9 | 5/11/12 | Classroom Observation by Dr. XXXX XXXX |
| 10 | 5/14/12 | Classroom Observation by XXXX XXXX |
| 10-A | 5/15/12 | [School 1] Application for Admission |
| 11 | 5/23/12 | Classroom Observation by XXXX XXXX |
| 12 | 4/23/12 - 5/25/12 | Data Collection Summary |
| 13 | 5/25/12 | Report of School Psychologist - XXXX XXXX , Ph.D., NCSP (MCPS) |
| 14 (p. 1) | 6/4/12 | Note from Father |
| 14 (p. 2) | 6/6/12 | Letter to Michael Eig from Zvi Greismann |
| 14 (p. 3) | 6/7/12 | Letter to Parents from XXXX XXXX |
| 14 (p. 4) | 6/12/12 | Letter to Parents from XXXX XXXX |
| 15 | 9/30/11 - 6/12/12 | Attendance Record |
| 14 (p. 5) | 6/13/12 | Note from Mother |
| 16 | 6/14/12 | 7 th Grade Report Card |
| 16-A | 8/14/12 | [School 1] Registration Application 2012-2013 |
| 14 (p. 6) | 8/1/12 | Letter to Michael Eig from Zvi Greismann |
| 14 (p. 7) | 8/2/12 | Letter to Zvi Greismann from Michael Eig |
| 16-B | 8/16/12 | Letter to Parents from XXXX XXXX, [School 1] |
| 16-C | 8/20/12 | [School 1] Terms, Conditions and Fulfilment of Financial Obligations |
| 17 | 8/20/12 | IEP Team Meeting Documentation |
| 18 | 8/29/12 | Educational Status Rpt - XXXX XXXX and XXXX XXXX (MCPS) |
| 19 (p. 1) | 8/29/12 | Letter to Parents from XXXX XXXX |
| 19 (p. 3) | 8/30/12 | Letter to Parents from XXXX XXXX |
| 19 (p. 5) | 8/30/12 | Letter to XXXX XXXX from Michael Eig |
| 19 (p. 6) | 8/31/12 | Letter to Parents from XXXX XXXX |
| 19 (p. 8) | 9/25/12 | Letter to XXXX XXXX from Michael Eig |
| 19 (p. 9) | 10/2/12 | Letter to Parents from XXXX XXXX |
| 19 (p. 11) | 10/11/12 | Letter to Michael Eig from Zvi Greismann |
| 19 (p. 12) | 10/15/12 | Letter to XXXX XXXX from Michael Eig |
| 19 (p. 13) | 10/18/12 | Letter to Michael Eig from Zvi Greismann |
| 19 (p. 14) | 10/19/12 | Letter to Zvi Greismann from Michael Eig |

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| 19 (p. 15) | 11/13/12 | Letter to Zvi Greismann from Michael Eig |
| 20 | 11/16/12 | [School 1] Formal Education Plan |
| 19 (p. 16) | 11/19/12 | Letter to Parents from XXXX XXXX |
| 19 (p. 17) | 12/18/12 | Email to XXXX XXXX from XXXX XXXX |
| 19 (p. 18) | 12/20/12 | Letter to Parents from XXXX XXXX |
| 19 (p. 20) | 1/3/13 | Letter to Parents from XXXX XXXX |
| 19 (p. 21) | 1/3/13 | Letter to XXXX XXXX from Michael Eig |
| 19 (p. 22) | 2/5/13 | Letter to Parents from XXXX XXXX |
| 19 (p. 24) | 2/7/13 | Letter to XXXX XXXX from Michael Eig |
| 19 (p. 26) | 2/14/13 | Letter to Parents from XXXX XXXX |
| 19 (p. 28) | 2/15/13 | Letter to XXXX XXXX from Michael Eig |
| 19 (p. 29) | 2/22/13 | Letter to Zvi Greismann from Michael Eig |
| 19 (p. 30) | 2/26/13 | Letter to Parents from XXXX XXXX |
| 19 (p. 32) | 2/27/13 | Letter to XXXX XXXX from Michael Eig |
| 19 (p. 33) | 3/7/13 | Letter to Michael Eig from Zvi Greismann |
| 19 (p. 34) | 3/8/13 | Letter to Zvi Greismann from Michael Eig |
| 21 | 3/19/13 | CIEP Team Meeting Documentation |
| 22 | 3/27/13 | Referral Letters to [School 2], [School 3] and [School 4] from XXXX XXXX |
| 23 | 4/29/13 | Email to XXXX XXXX from XXXX XXXX |
| 26 | 7/16/13 | Letter to XXXX XXXX from [School 2] |
| 27 | 7/23/13 | Letter to XXXX XXXX from [School 3] |
| 28 | 7/24/13 | Letter to XXXX XXXX from XXXX XXXX |
| 29 | 8/12/13 | Letter to Michael Eig from Zvi Greismann |
| 30 | 12/4/13 | Request for Due Process Hearing |
| 31 | 12/16/13 | Letter to Michael Eig from Jeffrey Krew |
| 32 | 12/18/13 | Letter to Michael Eig from Jeffrey Krew |
| 35 | | XXXX XXXX Curriculum Vitae |
| 36 | | XXX (XXXX) XXXX Curriculum Vitae |
| 37 | | XXXX XXXX Curriculum Vitae |
| 46 | 1/23/14 | [School 1] Financial Statement 2013-2014 |
| 47 | | Notes of conversations with XXXX and XXXX |
| 48 | | Maryland School Assessment, Home Report, Grade 6, 2011 |

Testimony

The Student presented the following witnesses:

- The Parents, [Parents]; and
- XXXX XXXX, Lower Middle School Division Chair of [School 1] and the XXXX program, who qualified as an expert in teaching and supervision of special education at a XXXX day school.

The MCPS presented the following witnesses:

- XXXX XXXX, special education resource teacher and department chair at [School 5], who was qualified as an expert in special education;
- XXXX XXXX, a seventh grade teacher at [School 5] in the XXXX Program, who was the Student's case manager for the 2011-2012 school year and was qualified as an expert in special education; and
- XXXX XXXX, Coordinator in the MCPS Placement and Assessment Services Unit, who was qualified as an expert in special education with an emphasis on placement of special needs students

STIPULATIONS³ AND FINDINGS OF FACT

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

1. [Student] ("the Student") was born on XXXX, 1998. **(Stipulated.)**
2. The Student is a fourteen-year-old student who has been diagnosed with Attention Deficit Hyperactivity Disorder and an anxiety disorder. **(Stipulated.)**

³ The parties jointly filed the "Parties' Proposed Stipulations of Fact" on January 14, 2014, which I have incorporated here in this "Stipulations and Findings of Fact." If the term "Stipulated" is referenced at the end of a numbered paragraph, then such paragraph was among those to which the parties stipulated on January 14, 2014. I incorporated such stipulations with my findings in an effort to maintain a chronological recitation of the facts.

3. The Student has been found eligible for special education by MCPS as a student with a Specific Learning Disability, which is believed to impact him academically in reading, math and written expression. **(Stipulated.)**
4. The Student attended the XXXX (XXXX) Program at [School 5] (“[School 5]”) for seventh grade during the 2011-2012 school year. **(Stipulated.)**
5. In addition to receiving special education services at [School 5] in the XXXX program in the seventh grade (2011-12 school year), the Student received such services in the sixth grade at [School 5], he received special education services in the XXXX program at [School 6] for grades four and five, and attended [School 7] for four years prior to that time. Board Ex. 13.
6. At the request of the Student’s neurologist, the Student was referred to XXXX XXXX, Psy.D to assess the Student’s executive functioning and to update the Student’s previous psycho-educational evaluations. XX- 3-1.
7. Dr. XXXX XXXX conducted a psychological evaluation of the Student (report dated December 6, 2011). The Parents provided Dr. XXXX’s psychological evaluation to MCPS on January 12, 2012. **(Stipulated.)**
8. By report dated December 6, 2011, Dr. XXXX indicated that the assessment measured the Student’s executive, intellectual, social and emotional functioning, as well as his academic achievement using standardized instruments. XX-3-23.
9. Her “Summary Findings” included the following:

[The Student] currently meets the criteria for learning disorders of writing reading and mathematics. Furthermore, he meets the criteria for disorders of attention processing and developmental coordination. Additionally, [the Student] appears to be experiencing physical symptoms associated with depression and anxiety, such as problems with sleep, eating and lethargy, however, these symptoms may be components of complications due to a medical condition or reaction to medication, and require further exploration. [The Student] is also experiencing substantial social challenges at school.

XX-3-1.

10. The summary of the recommendations that Dr. XXXX made based on her evaluation of the Student are as follows:

Recommendations include a re-evaluation of [the Student's] psychiatric medications, a thorough medical evaluation (which includes a check of nutrient levels), an evaluation by a developmental optometrist (to further assess visual processing), individual therapy for [the Student] to improve social skills, and parent counseling to assist in increasing effective communication and responses within the family given [the Student's] challenges. Contacts for these services have been provided to [the Parents]. Additionally, resources to explore neurofeedback as an adjunct treatment, to begin an exercise program, and to address [the Student's] food aversions were also provided. Although [the Student] already has a comprehensive IEP through which he receives multiple accommodations, some added recommendations were made for [the Student] at school.

XX-3-24.

11. The specific analysis and recommendations made by Dr, XXXX regarding [the Student] at school are as follows:

A review of [the Student's] March 2011 IEP indicates that many supports are currently in place proving needed accommodations to increase [the Student's] academic success. Current accommodations include speech and language therapy, the use of assistive technology, extended time for tests and assignments, preferential seating, a setting to reduce distractions, and multiple instructional supports. Results from this evaluation indicate that [the Student] will require these accommodations over the long-term. In addition to the accommodations currently listed in [the Student's] IEP, the following recommendations are made:

- i. Due to [the Student's] poor visual memory, he will benefit from being provided externalized visual reminders by teachers, an unexpected necessity for his age.
- ii. Individuals with attention deficits are known to be more productive if given frequent breaks. A "10-3-10" rule of thumb, where [the Student] would work for 10 minutes, be allowed a 3 minute break, and then work for another 10 minutes, may increase his productivity on tests and assignments.
- iii. Teenagers with executive function deficits can benefit from a school "coach" or mentor. One successful way of organizing this arrangement has been for the identified coach or mentor to function as the student's "locker", where the student checks in for 5 minutes at the beginning of the day, for 5 minutes at lunchtime, and for 5

minutes at the end of the day. In [the Student's] case, the coach could not only function as an external organizing source, but as an emotional support for any difficult social encounters that may arise, given his experience with having been bullied at school in the past.

XX-3-13.

12. In connection with receiving the results of the evaluation, the Student's mother raised concerns about keeping the Student in public schools, and expressed a desire to find a more appropriate learning environment for him that would support the Student emotionally, socially, and academically. XX-3-24.
13. On January 12, 2012, the Parents had a conference with some of the Student's teachers and other members of his support team at [School 5], including Ms. XXXX (science), Mrs. XXXX (English), Ms. XXXX (pupil enrichment), Assistant Principal XXXX, Mrs. XXXX (school counselor), and Mrs. XXXX (resource teacher and the Student's case manager). The purpose of the meeting was to provide the Parents with an update of the Student's academics and to get the Parents' feedback, with the overall goal of making "suggestions and recommendations to support [the Student's] academic success." Bd. Ex. 2.
14. On February 1, 2012, an IEP team meeting was convened and the team reviewed Dr. XXXX's psychological evaluation. **(Stipulated.)**
15. At that meeting, among other things, a provision for morning, mid-day, and afternoon check-ins by the Student with teachers or counseling, if needed, was added to the IEP. Also added was that if the Student does not understand or is taking too long to understand homework, Parents will write a note on homework for the teachers to clarify and help the Student. Bd. Ex. 4, p. 37.
16. At the February 1, 2012 meeting the reasons why MCPS wanted to enroll the Student in a reading intervention program was discussed in depth. The Student's father needed to

discuss the schedule change with the Student's mother before he could agree. The reading intervention program was first offered to the Parents in December 2011.

XXXX T. 634; Bd. Ex. 4, p. 37.

17. The reading intervention program was accepted by the Parents on February 24, 2012.

Bd. Ex. 6, p. 35.

18. On February 27, 2012, an IEP team meeting was convened to conduct the Student's annual review. The IEP developed proposed eight hours per week of special education outside the general education setting, twelve hours per week inside the general education setting, and three hours per month of speech and language therapy outside the general education setting, with service dates of February 27, 2012 through March 26, 2012. The Student would continue to attend the XXXX Program at [School 5].

(Stipulated.)

19. At the February 27, 2012 meeting, the Parents continued to express that the Student was falling through the cracks and what MCPS was offering was not enough. When asked specifically what the Parents wanted, they did not say. Bd. Ex. 6, p. 35.

20. On March 27, 2012, an IEP team meeting was convened. The team proposed that the Student receive eight hours per week of special education outside the general education setting, twelve hours per week inside the general education setting, and three hours per month of speech and language therapy outside the general education setting, with service dates of March 27, 2012 through February 25, 2013. The Student would continue to attend the XXXX Program at [School 5]. **(Stipulated.)**

21. At the March 27, 2012 IEP team meeting, the Parents requested that an MCPS school psychologist conduct an evaluation due to concerns of negative peer interactions, to which the team agreed, and the Parents provided consent. **(Stipulated.)**

22. To address concerns the Parents had that the Student was being bullied, various observations were made of the Student in which no such bullying behaviors were observed. Bd. Ex. 7, 8, 9, 10, 11.
23. From April 20, 2012 to May 18, 2012, XXXX XXXX, Ph.D., an MCPS school psychologist, completed her psychological evaluation of the Student (report dated May 25, 2012). **(Stipulated.)**
24. The summary and recommendations of the May 25, 2012 evaluation stated, in part:

In the current assessment, results of behavior rating scales indicate that most of the teachers' responses resulted in clinically significant scores in the area of learning problems. Several of the teachers' responses resulted in clinically significant scores in the area of depression and/or anxiety; however, clinically significant scores in these areas were not reflected consistently across all classroom settings. The results of the parent rating scales did result in clinically significant scores on scales that reflect depression, withdrawal, and hyperactivity; however, their responses did not result in a clinically significant score on the scale that reflects anxiety.

In the observations completed by this examiner, no overt signs of peer interaction difficulties were apparent. In addition there were no overt signs of cautiousness or apparent nervousness/fear about approaching peers socially. [The Student] was observed (in these and in incidental observations) approaching other students (often for brief interactions) in the halls or in the cafeteria. In the observations [the Student] generally participated in class activities along with other students (except in the one class where he did not take an assessment because he had been absent the two previous days). During the observations [the Student] exhibited a dependent learning style, asking questions of and requesting support from the teachers before seeming to attempt some activities on his own. Teachers in the observed classes readily gave him the requested support. Accommodations to classroom and homework assignments were readily and easily provided. It should be noted that in several instances, [the Student] was resistant to receiving the support.

In interview sessions, [the Student] used the term "bullying" often; it appeared that he used the term to describe any peer interactions that are problematic or negative in nature. [The Student] did indicate some continuing concern about negative peer interactions. (There is one boy he finds bothersome both in Art class and in PE) At the same time, he was able to recount an instance where he successfully solved a difficulty with a peer and was able to acknowledge that his counselors and teachers form a team that supports him when he needs it. He appears to have internalized some of the principles of navigating peer interactions that present challenges (though he will continue to need support in applying such

principles). [The Student's] counselors and teachers will have to be vigilant in continuing to ensure that any forms of negative peer interactions that may occur are quickly and consistently addressed. In this way, [the Student] can continue to feel the support of his perceived "team" of counselors and teachers. The school staff (and counselors in particular) will need to continue providing problem-solving and/or emotional support that may be necessary as any peer interaction issues arise. In addition, participation in any after-school activities (such as his membership in XXXX) which provide the opportunity for positive interaction should be encouraged.

XX-16-7 and 16-8.

25. On May 18, 2012, the Student's mother submitted an "Application for Admission" -- a formal request for consideration of the Student as a potential student in [School 1] ([School 1]), which has approximately twenty-five students in grades K-12. [School 1] is physically housed in [School 8], which is a nursery through 12th grade modern XXXX day school with approximately seven hundred and fifty students. Board Ex. 10-A; XXXX T. 258. With the application, she submitted a non-refundable fee of \$250.00. Board Ex. 10-A.
26. All of the students at [School 1] are XXXX. Given Equal Opportunity considerations, [School 1] would consider a non-XXXX applicant. XXXX T. 295. Nonetheless, XXXX, [School 1]'s lower and middle school division chair and member of the admissions committee that accepted the Student to [School 1], would voice his opinion against admittance of a non-XXXX student to [School 1]. XXXX T. 306.
27. On June 5, 2012, the Student visited [School 1] and initially refused to come out of the car. When the Student did come out of the car towards the end of his visit, he "sat in the little classroom, sat in the office and cried." XXXX T. 307.
28. An IEP meeting was scheduled for June 6, 2012, but the Parents' attorney canceled because he would be out of the country on vacation. XX-17.

29. Due to various previously scheduled meetings and mandatory trainings of the MCPS faculty and staff, the earliest time that the various MCPS staff could reschedule the June 6, 2012 IEP meeting was July 19, 2012. [Father] T. 66.
30. Despite the meeting being canceled, the Student's father went to [School 5] and demanded a meeting with special education department head, XXXX XXXX, and others on the premise that he had mentioned at the end of a series of emails back and forth with Mrs. XXXX on the day before that he "would like to review everything in more detail with you tomorrow at 9 am." XX-18-2. Mrs. XXXX never addressed that request in the emails with the Student's father and was totally unaware that he wanted a meeting. The Student's father wanted to get all of the teachers out of their exams (as testing was being conducted) in order to speak to him right then. Although Mrs. XXXX tried to explain to the father that once the meeting was canceled, the teachers were released back to conduct exams for their students, that did not seem to appease him. Mrs. XXXX said that the father was so aggressive and intimidating, she went back and got her principal to speak with him. XXXX T. 543-545.
31. On June 7, 2012, Mrs. XXXX sent a letter to the Parents scheduling the IEP meeting for July 19, 2012. The Parents declined that date because the Parents were likely going to be away on vacation. [Father] T. 65-66.
32. On June 15, 2012, the Student interviewed at [School 1] for a second time, and was able to participate in the interview process, which included going to classes with other children. XXXX T. 308-09.
33. On July 31, 2012, [School 5] staff sent an email to the Parents and their attorney offering a meeting for August 2, 2012, at 2 p.m., as the staff at [School 5] had that date available and offered it up even though it was not within the "ten days". On August 1,

2012, MCPS faxed a letter to the Parents' attorney confirming that the lack of a response to that email meant that the Parents were unavailable, and had August 21 or 22, 2012, at 1 p.m., available for an IEP meeting.

34. On August 2, 2012, the attorney for the Parents sent a letter to MCPS confirming a meeting for August 20, 2012, at 1:30 p.m.
35. On August 14, 2012, the Parents executed a "Registration Application" that reserved a spot for the Student at [School 1] for the 2012-2013 school year. Bd. Ex. 16-A; XXXX T. 264.
36. On August 16, 2012, [School 1] sent an offer letter for the Student to attend [School 1] for the 2012-2013 school year, along with a financial breakdown of the expenses and financial aide offered. Bd. Ex. 16-B; XXXX T. 265-66.
37. On August 20, 2012, the Parents executed a "Terms, Conditions and Fulfillment of Financial Obligations" contractually obligating the Parents to pay [School 1] so that the Student could attend [School 1] during the 2012-2013 school year. Bd. Ex. 16-C; XXXX T. 265.
38. On August 20, 2012, a periodic review IEP team meeting was convened. The team proposed that the Student receive eight hours a week of special education classroom instruction outside the general education setting for pupil enrichment and reading intervention; sixteen hours a week of special education classroom instruction within the general education setting in co-taught/supported classes for math, English, world studies, science and arts rotation; forty-five minutes a week (1-45 minute session) of speech-language services outside the general education setting; one hour and five minutes a week (1-65 minute session) of counseling services outside the general education setting; and forty-five minutes a week (1-45 minute session) of speech-

language services in the general education setting, with service dates of August 20, 2012 to February 25, 2013. The team made a referral to a Central IEP team (CIEP) to make a placement determination. **(Stipulated.)**

39. The placement determination was referred to CIEP because some members of the [School 5] team thought that the Student required a self-contained English class that was not available in the services at [School 5]. Bd. Ex. 17, p. 40;XXXX T. 770. The IEP that was in place through February 2013 did not contain a provision for such a class, which is why it was being referred to CIEP to be discussed. *Id.* Given that the referral to CIEP was seven days before the start of school “and the Stay Put Program was the last approved document,” the services on the August 20, 2012 IEP would be the services in place “until the recommendation for a more intensive program could be discussed and implemented.” XXXX T. 772.
40. It was stated throughout the August 20, 2012 IEP that [School 5] was the Student’s residence and service school, and although not explicitly stated in the prior written notice, given the timeframe involved (seven days before the start of school) and that CIEP had not yet met, [School 5] is where the Student would have reported for his first day of class in the 2012-2013 school year, had he not been enrolled in [School 1]. Bd. Ex. 17.
41. On August 24, 2012, the parents notified MCPS that they would be placing [the Student] at [School 1] and reserved the right to seek public funding for the placement. **(Stipulated.)**
42. By letter dated August 31, 2012, MCPS scheduled a CIEP meeting for September 24, 2012, at 10:30 a.m. Bd. 19, pp. 6-7.

43. On September 24, 2012, a CIEP team meeting was convened. The team was unable to complete the process and agreed to continue the meeting. **(Stipulated.)**
44. At that September 24, 2012 meeting, Mr. XXXX was unaware that the Student was already enrolled at [School 1], and no one from [School 1] was invited to attend. Mr. XXXX indicated that the presence of [School 1] was a key component of the meeting because it was the Student's current program of instruction. XXXX T. 783.
45. Mr. XXXX also agreed to personally observe the Student at [School 1] because Mr. XXXX had questions about what he was reading in the paperwork about the Student and wanted to observe the Student personally. XXXX T. 877. Although permission was requested to visit [School 1] on September 27, 2012, as of October 11, 2012, consent from the Parents for MCPS to observe the Student at [School 1] had yet to be given. XXXX T. 788 and 879-81.
46. On October 15, 2012, the attorney for the Parents requested that the October 22, 2012 CEIP meeting be canceled in order for MCPS to have time to contact [School 1] and conduct an observation of the Student at that school. Bd. 19, p. 12; XXXX 789-90.
47. On October 19, 2012, the attorney for the Parents sent a letter to MCPS informing them of the name and number of a contact at [School 1] and granting implicit permission for MCPS to observe the Student at [School 1]. Bd. 19, p. 14; XXXX T. 790-91.
48. On December 5, 2012, Mr. XXXX observed the Student at [School 1]. Given the initial delay in granting consent coupled with Mr. XXXX's duties as the chair of MCPS central IEP meetings, this was the earliest he was able to observe the Student at [School 1]. XXXX T. 789 and 794.
49. On November 19, 2012, MCPS sent notice to the Parents that the CIEP meeting would take place on December 14, 2012. Bd. Ex. 19, p. 16. That meeting was canceled,

however, because Mr. XXXX had to testify in a due process hearing on that date as mandated by a judge. XXXX T. 885.

50. On December 20, 2012, another CIEP meeting was set for January 16, 2013. Bd. Ex. 19, pp. 18-19. As XXXX was unavailable on January 16, 2013, the meeting was rescheduled for January 28, 2013. Bd. Ex. 19, pp. 20-21.
51. On January 28, 2013, the CIEP meeting was canceled due to adverse weather conditions. XXXX T. 798.
52. On February 5, 2013, another CIEP meeting was set for February 19, 2013. Bd. Ex. 19, pp. 23-24. The Parents could not attend the meeting so the Parents canceled.
53. On February 14, 2013, another CIEP meeting was set for February 22, 2013. Bd. Ex. 19, pp. 27-28. MCPS staff could not, however, attend this meeting. MCPS wanted to go forward with the CIEP meeting on February 19, 2013, because there was a concern about delay and MCPS did not want to be “the victims” of such a delay. XXXX T. 800. The Parents and their representatives were not available so the meeting was delayed yet again. *Id.*; Bd. Ex. 19, pp. 25-26.
54. On February 26, 2013, another CIEP meeting was scheduled for March 19, 2013, at 1:30 p.m. Bd. Ex. 19, pp. 31-32.
55. On March 19, 2013, the CIEP team meeting was continued. The team revised the Student’s IEP and recommended twenty hours a week of special education classroom instruction outside the general education setting for math, English, world studies, science and reading intervention; eight hours a week of special education classroom instruction for supported arts rotation and physical education; forty-five minutes a week (1-45 minute session) of speech- language services outside the general education setting; one hour and five minutes a week (1-65 minute session) of counseling services

outside the general education setting; and forty-five minutes a week (1-45 minute session) of speech-language services in the general education setting. The consensus of the team was that the least restrictive environment in which the Student's educational needs could be met was a private separate day school program and recommended that referrals be sent to [School 3], [School 2] and [School 4]. **(Stipulated.)**

56. The CIEP team concluded that the Student required a private separate day school program and referrals be sent to [School 3], [School 2] and [School 4]. **(Stipulated.)**
57. At the March 19, 2013 CIEP meeting, the Parents had no objection to the substance of the proposed IEP, including the referral of the case to a private placement. T. 225.
58. At the March 19, 2013 meeting, Mr. XXXX stated that [School 5] could meet the Student's educational needs but due to the friction between the Parents and the school, it would not be beneficial for the Student to return to [School 5]. Board Ex. 21, p. 4; see XXXX T. 312.
59. [School 5] staff had become increasingly frustrated with their interactions with the Student's Parents throughout the 2011-2012 school year as the Parents continued to articulate that nothing that [School 5] teachers were doing was correct, despite the fact that services were being implemented and [School 5] staff was doing a good job with the Student. The Parents were increasingly demanding and very condescending to [School 5] staff. XXXX T. 518-20; XXXX T. 651.
60. In his thirty-one years of working at the MCPS central IEP office, the last twenty of which he has been the head chairperson, Mr. XXXX has conducted roughly 30,000 IEP meetings. XXXX T. 766-67. The March 19, 2013 CIEP meeting with the Parents was one of the most uncomfortable and tension-filled meetings Mr. XXXX had every experienced. He was particularly shocked at the agitated and excitable manner of the

Student's mother and had never seen a parent behave the way that she did in a meeting. Mr. XXXX has seen Parents of disabled kids upset because of the grief process that the Parents are undergoing, but the mother's behavior at the March 19, 2013 CIEP meeting was beyond what he was used to seeing. XXXX T. 767-68.

61. [School 5] could have programmed/provided for the Student and continued to meet his needs but for the relationship between the [School 5] staff and the Student's Parents.

Mr. XXXX had never seen anything like it before. XXXX T. 805

62. Mr. XXXX further indicated that the team could not recommend [School 1] because it was not approved by the Maryland State Department of Education (MSDE). *Id.*

63. At the time of the March 19, 2013 CIEP meeting, the Student's mother expressed concern that if the Student had to visit three different schools, such disruption would raise the Student's anxiety level. Bd. Ex. 21, p. 41. The Student's father expressed concern that bringing the Student on interviews will increase the Student's anxiety, affecting his performance at [School 1]. *Id.* The Student's father inquired whether the three schools could observe the Student at [School 1]. *Id.* Mr. XXXX thought that was a good idea and suggested that the Parents bring up that question when the parents spoke to the three referred schools. *Id.*

64. MCPS sent referral packets to [School 3], [School 2] and [School 4]. **(Stipulated.)**

65. Such referral packets were sent on March 27, 2013.

66. The referral to [School 3] was appropriate because it was close to the Student's home, it is a certified private separate day school that specializes in working with children with learning disabilities, and it also works with children on the autism spectrum, which Mr. XXXX thought might be helpful given the Student's rather quirky behaviors. XXXX T. 811.

67. [School 4] is a very data-driven program that serves children with significant learning disabilities and has about twenty-three different reading programs, which is particularly helpful given the Student's reading deficit. The Student and the family would get a good picture of the Student's progress as they pretest, test throughout, and graph the progress so there is no confusion as to progress made. XXXX T. 811.
68. [School 2] is licensed to provide services to children with specific learning disabilities and speech and language impairments.
69. At the time of the three referrals, the Student's mother did not want to disrupt the Student as he was "comfortable in his environment." She believed the Student was learning, making friends, and blossoming and had found such a comfortable "niche" after the "nightmare that went on at [School 5]." [Mother] T. 452. The Student's mother was concerned that after a year of being at [School 1], she did not want to "install in him the anxiety and fear of not knowing where he is going to be next year of -- of having that uncertainty after he's established himself." *Id.*
70. XXXX XXXX Admissions Director of [School 3], first contacted the Student's mother on April 5, 2013, to schedule a visit. The Student's mother indicated that she did not wish to schedule a visit at that time and that if she changed her mind, she would contact Ms. XXXX. Bd. Ex. 27; XXXX T. 812-13.
71. On April 29, 2013, XXXX XXXX, Ed.D.,⁴ Executive Director of [School 4], notified MCPS that as of April 29, 2013, she had made three attempts to schedule an intake and tour of [School 4] with the Parents, but had been unsuccessful as she had not received

⁴ MCPS asked that Dr. XXXX be permitted to testify as a rebuttal witness in this case, given the testimony of the Student's mother at the hearing. The Parents objected on the basis that Dr. XXXX had not been disclosed as a witness under the "five day rule." I sustained the objection based upon the arguments of counsel and upon the fact that I found Dr. XXXX's contemporaneous correspondence highly reliable and probative, as will be discussed in greater detail *infra*.

any return calls. On that date, Dr. XXXX was about to make the fourth attempt to schedule. Bd. Ex. 23.

72. Eventually, [Mother] returned the call to Dr. XXXX and explained that the Student would not be touring the [School 4] program. Bd. Ex. 28. The Student's mother inquired if Dr. XXXX would be willing to observe the Student at [School 1], to which Dr. XXXX agreed and indicated that she would bring another teacher from [School 4] to observe as well. *Id.* Dr. XXXX and the Student's mother agreed that the mother would speak to the Student's teachers and have them contact Dr. XXXX with schedule information, etc. for purposes of such visit. Despite this, Dr. XXXX heard nothing further from the Parents or [School 1] on this issue. *Id.*
73. On June 6, 2013, the Parents had executed a Registration Application for the Student, with a registration fee in the amount of \$1,000.00. Bd. Ex. 23-A. On June 6, 2013, the Parents also executed a "Terms, Conditions, and Fulfillment of Financial Obligations" that obligated the Parents to enroll the Student at [School 1] for the 2013-2014 school year, unless the Student was not accepted into the [School 1] program for the 2013-2014 school year. The Parents also requested that their registration fee check not be cashed until the Parents became aware of the amount of tuition aid they would receive for the [School 1] program for the 2013-2014 school year. *Id.* In any event, in neither the 2012-2013 school year nor in the 2013-2014 school year did the Parents make their financial obligation to [School 1] conditioned on a MCPS school placement or referral for the Student.
74. By letter dated July 24, 2013, Dr. XXXX indicated that the [School 4] would accept the Student for admission to [School 4] for the upcoming 2013-2014 school year after her review of the file, as it appeared that the Student's profile was very consistent with

many students in the [School 4] program. Normally, the [School 4] acceptance process includes a parent meeting and student visit. Dr. XXXX was comfortable accepting the Student upon a record review. Bd. Ex. 28.

75. By letter dated August 5, 2013, the attorney for the Parents notified MCPS that the Student would be attending [School 1] for the 2013-14 school year, and requested that MCPS “place him and fund him at that placement.” XX-70-2.
76. By letter dated August 12, 2013, MCPS declined such request for funding and placement. XX-72-1.
77. There are approximately nine hundred and fifty students at [School 5], one hundred and fifty of which have IEPs. XXXX T. 495.
78. The Student was absent eighteen days in the 2011-12 school year. XXXX T. 655; Bd. Ex. 15.
79. The Student would work with the teachers in pupil enrichment class on things he had missed during these absences. XXXX T. 656.
80. Despite the fact that the work was sent home with the Student to make up after such absences and calls were made or emails sent to the Parents describing what needed to be done, the Student rarely made up his work after such absences. When the Student missed so much school, he lost his basis of knowledge, making it difficult to catch-up and learn. XXXX T. 657-58; XXXX T. 552-554.
81. The Student would smile a lot and skip down the hallways at [School 5] and appeared happy there. XXXX T. 658; XXXX T. 527.
82. The Student suffered no educational detriment by enrolling at [School 1] at the beginning of the 2012-2013 school year. XXXX T. 781.

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 and appropriate 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. *Bd of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). 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).

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

Further, the IDEA does not require a local educational agency to pay for the cost of private education if the agency has made a FAPE available to the child and the parents have nevertheless elected to place the child in a private school. 34 C.F.R. § 300.148(a) (2012). Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). 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 for the 2012-2013 and 2013-2014 school years was 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 the [School 1] is the appropriate private school placement, and that MCPS is responsible for reimbursing the Parents the tuition and expenses that they paid on behalf of the Student for the 2012-2013 and 2013-2014 school years that the Student has spent at [School 1].

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. 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. *Id.* at 206-07.

Using the Supreme Court's two-pronged analysis in *Rowley*, I conclude that the Parents did not prove that MCPS committed procedural violations. To the extent that they did commit such procedural violations, such violations did not actually interfere with the provision of a FAPE to the Student or that MCPS otherwise failed to provide the Student a FAPE in either the 2012-2013 or 2013-2014 school year. Accordingly, the remaining issue of whether the Parents are entitled to reimbursement of the Student's tuition at [School 1] for the 2012-2013 and 2013-2014 school years is moot.

MCPS Is Not Responsible for Any Procedural Violations of the IDEA – The First Prong Under *Rowley*

The *Rowley* Court explained that it is “no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents . . . a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.” *Rowley*, 458 U.S. at 205-06. That being said, not every violation of a procedural requirement under the IDEA is sufficient grounds for relief. *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cnty*, 309 F.3d 184, 190 (4th Cir. 2002). “[T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.” *Id.*, (quoting *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997)); see also *MM ex rel. DM v. Sch. Dist. of Greenville Cnty*, 303 F.3d 523, 534 (4th Cir. 2002); *Wagner v. Bd. of Educ. of Montgomery Cnty*, 340 F. Supp. 2d 603, 617 (D. Md. 2004).

In the instant case, the Parents allege that “[b]ecause of a series of delays, MCPS has denied [the Student] a free and appropriate education by failing to even suggest an appropriate program or placement for him until almost the end of the 2012-2013 school year” and that the Student “did not have a finalized IEP for most of the 2012-2013 school year.” Request for Mediation/Due Process hearing (Due Process Complaint Notice), dated December 4, 2013, p. 6.⁵

MCPS argues that to imply that the delays in scheduling the CIEP were caused by MCPS is disingenuous; that there was an IEP in place in which [School 5] was the service school; that if there was a procedural error it was of no educational impact as MCPS provided the Student with a FAPE; and the Parents stymied the placement decisions made by MCPS at the various private schools because at the end of the day the Parents were only really interested in seeking reimbursement for placement of the Student at [School 1]. For the reasons that follow, I agree with MCPS as to each point.

Delays by the Parents in the scheduling of the CIEP meeting should not result in a finding of a procedural violation by MCPS.

After Dr. XXXX completed her month-long psychological testing of the Student at the Parents’ request (culminating in a May 25, 2012 report), MCPS tried to schedule an IEP meeting on June 6, 2012, only to be chastised by the Parents’ attorney for unilaterally scheduling the meeting, a meeting that he could not attend because he would be out of the country on vacation. On June 7, 2012, MCPS offered July 19, 2012, as the next date that MSPC personnel were available given a very full schedule of mandatory trainings and meetings at the end of June and beginning of July. The Parents indicated, however, that they would likely be on vacation on that date and were unavailable for the July 19, 2012 meeting. Ultimately, a periodic IEP meeting was

⁵ Beyond the Due Process Complaint Notice, the Parents also argued in closing that because MCPS did not specify a particular placement for the 2013-2014 school year, that the Student was also denied FAPE. Under 34 CFR § 300.511(d), the party requesting a due process hearing “may not raise issues at the due process hearing that were not raised in the due process complaint, unless the other party agrees otherwise.” As Mr. Krew objected and did not agree that this issue be raised, I will not consider it here.

held on August 20, 2012, at which meeting recommendations were made that a CIEP meeting be scheduled regarding placement decisions because there was a recommendation made by Ms. XXXX that the Student be enrolled in self-contained English classes that [School 5] did not have. XXXX 770-71; Bd. Ex. 17, p. 40. The Student had an IEP in place and given that the referral to CIEP was seven days before the start of school “and the Stay Put Program was the last approved document,” the services on the August 20, 2012 IEP would be the services in place “until the recommendation for a more intensive program could be discussed and implemented.” XXXX T. 772. On that same date, the Parents enrolled the Student at [School 1].

The CIEP meeting was scheduled for September 24, 2012; however, the meeting had to be rescheduled because Mr. XXXX did not know that the Student was enrolled in [School 1] and he thought it imperative that a representative from where the Student was currently enrolled be at the meeting. The meeting was rescheduled for October and was cancelled at the Parents’ request to give Mr. XXXX time to observe the Student at [School 1]. Mr. XXXX was ultimately able to observe the Student on December 5, 2012, and the CIEP meeting was scheduled for January 19, 2013. The Parents canceled yet again because XXXX was unavailable. On January 28, 2013, the meeting was rescheduled but it snowed and there had to be a weather cancellation. The CIEP meeting was rescheduled for February 19, 2011, but the Parents and their representatives were unavailable yet again. Finally, the meeting took place on March 18, 2013.

It seems manifestly unfair to hold MCPS responsible for a delay in when the chronology shows that much of the delay and lack of cooperation came from the Parents’ side, particularly given that the Parents are now attempting to use that delay as a sword in an attempt to seek funding for their unilateral private placement. As explained by the Court in *MM v. School Dist. of Greenville Cnty.*, 303 F. 3d 523, 535 (4th Cir. 2002), “it would be improper to hold [the] School District liable for the procedural violation of failing to have the IEP completed and

signed, when that failure was the result of [the parents'] lack of cooperation.” *Id.* at 534 (quoting district court slip op. at 15); *see also C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 50, 69 (3rd Cir. 2010) (finding that “[a]lthough the IEP was not completed in the first meeting, it was the Parents and not the District who delayed the continuation of the meeting until the start of classes...[w]e decline to hold that a school district is liable for procedural violations that are thrust upon it by uncooperative parents”).

Any procedural violations committed did not result in a loss of FAPE to the Student.

To the extent that MCPS committed any procedural errors in this case, however, I find that such violations did not actually interfere with the provision of a free appropriate public education to the Student. *DiBuo*, 309 F.3d at 190. Specifically, there was no expert that testified for the Parents that indicated that the Student was being denied FAPE because of anything in his IEP or because of anything that MCPS was or was not doing. In fact, the report of Dr. XXXX, the doctor who did an independent psychological assessment of the Student for the Parents, seemingly praised MCPS indicating that “many supports are currently in place providing needed accommodations to increase [the Student’s] academic success.” XX-3-13. Rather, the evidence presented at the hearing seems to indicate that the reason the Student may have had a “C” average (with A’s and B’s in some subjects but a D in English and Math) and experienced a significant drop in his MSA scores from the 2010-2011 (6th grade) to the 2011-2012 (7th grade) school year was due to the fact that he needed an adjustment of his psychiatric medication; he needed a thorough medical evaluation (which includes a check of nutrient levels as he was a very quirky eater) given his lethargy etc. as described by Dr. XXXX in her report (*see, e.g.*, XX-3-1 and 24); he had missed eighteen days of school in the 2011-2012 school year; and he rarely made up his work at home. Although the Student worked with his teachers in school to assist him in

making up the work he missed, he was losing the basis of his knowledge by missing so much school and by failing to make up his work at home.

While the Parents indicated that the reason for at least some of the Student's absences was the Student's fear of coming to school because of bullying, an objective basis for such reason was not supported by the evidence at the hearing. [School 5] did numerous observations of the Student in the classroom and no such incidents were observed. Similarly, the teachers and administrators would see the Student looking generally very happy in his environment on a day-to-day basis. The Parents intimated that such bullying would not occur while people are looking; however, Dr. XXXX, the school psychologist, who did an extensive evaluation of the Student, and the teachers made very specific observations about the Student in response to the Parents' concerns and would have picked up on cues that might indicate problematic social interactions. While there were two incidents involving physical contact between the Student and another student, Dr. XXXX explained in her report that the Student used the term "bullying" often, using the term to describe any peer interactions that are problematic or negative in nature. Moreover, the school counseling staff at [School 5] had implemented a provision in a February 1, 2012 IEP for morning, mid-day and afternoon check-ins by the Student with teachers or counseling, if needed, which would have further addressed any concerns that the Student had during the day regarding any real or imagined negative peer interactions.

Mr. XXXX and Ms. XXXX testified at the hearing that [School 5] could have programmed for the Student in accordance with the services on the August 20, 2012 IEP in place while CIEP met to discuss and implement the recommendation for an even more intensive program. Given that the referral to CIEP was seven days before the start of school "and the Stay Put Program was the last approved document," Mr. XXXX and the [School 5] staff would have made sure that the services on the August 20, 2012 IEP would be implemented with fidelity as

they had done in the past, but they were never given that opportunity because the Parents enrolled the Student at [School 1] on the same day as the August 20, 2012 IEP meeting and the referral was made to the CIEP. It was clearly stated in the August 20, 2012 IEP that [School 5] was the Student's residence and service school, and although it does not so explicitly state in the prior written notice, given the timeframe involved and that CIEP had not yet met, [School 5] is where the Student would have reported for his first day of class in the 2012-13 school year, had he not been enrolled in [School 1].

[School 5] staff had many conferences and IEP meetings with the Student's Parents in the 2011-2012 school year (e.g., January 12, 2012, February 1, 2012, February 27, 2012, March 27, 2012, and August 20, 2012), had their school psychologist, Dr. XXXX, do an in-depth evaluation of the Student from April-May 2012 (culminating in her May 25, 2012 report at Bd. Ex. 13), and conducted classroom observations of the Student to attempt to address any issues that the Parents had regarding the Student's education and development. [School 5] staff, however, was increasingly frustrated with their interactions with the Student's Parents throughout the 2011-2012 school year as the Parents were increasingly demanding and very condescending, and continued to articulate that nothing that [School 5] staff was doing was correct, despite the fact that services were being implemented and the staff was doing a good job with the Student. The negative interactions culminated at the March 19, 2013 CIEP meeting, prompting Mr. XXXX to testify that the March 19, 2013 meeting with the Parents in this case was one of the most uncomfortable, tension-filled meetings he had ever attended. Although Mr. XXXX believed that [School 5] was capable of delivering the self-contained English class services to the client, he believed that the parents were aggressive and hostile and that nowhere else in the County would have been any different for these parents in a few months, which is why he made a very child-centered decision and referred the case out to a separate private day school.

Given the 30,000 or so IEP meetings he has conducted, I found Mr. XXXX's testimony very credible and compelling. The fact that Dr. XXXX did not make any recommendation for a private school and found the [School 5] IEP was comprehensive with multiple accommodations also confirms the fact that [School 5] could have programmed for the Student but for the friction with the Parents. XX-3-24. It is not surprising to me that the difficulty that the [School 5] staff had with the Parents is not documented throughout the IEPs. The staff at MCPS is trained to work collaboratively with Parents, and did not put in editorial comments that may only incite. The Student suffered no educational detriment by enrolling at [School 1] at the beginning of the 2012-2013 school year, and could have been appropriately programmed for at [School 5] had he stayed. The Student suffered no educational detriment and was not denied a FAPE as a result of any procedural violation that may have been committed by MCPS in this case.

Parents failed to cooperate in the referral process frustrating the placement in the instant case.

At the March 19, 2013 CIEP meeting, the Parents had no objection to the substance of the proposed IEP, including the referral of the case to a private placement. T. 225. Mr. XXXX, who was qualified as an expert in special education with an emphasis on placement of special needs students, testified at some length as to the appropriateness of the three schools proposed by MCPS, [School 2], [School 3], and [School 4]. Mr. XXXX opined specifically that both [School 3] and [School 4] would have provided the Student with a FAPE for the 2013-2014 school year. XXXX T. 835-36.

As described above, MCPS provided these placement options to the Parents given the friction that had developed between the school and the Parents, not because [School 5] could not accommodate the Student. Moreover, as of June 6, 2013, the Parents had entered into a contract for the Student to go to [School 1], a school to which MCPS could not refer students given that it

was not an approved Maryland State Department of Education program. Mr. XXXX testified that he would not place a child there in any event because he thought it was discriminatory that XXXX indicated that he would likely voice his opinion against admittance of a non-XXXX child to [School 1]. XXXX T. 796-97; XXXX T. 306.

At the March 19, 2013 CIEP meeting, MCPS made three specific referrals to the Parents at the time of the IEP meeting. Bd. Ex. 21, p. 41. Indeed, Mr. XXXX had the Parents execute authorizations for the release of confidential information to get the ball rolling on a selection from one of these placements, and such referrals were sent out to the three schools on March 27, 2013, eight days after the meeting. *Id.* at pp. 42-45. Further, the referral process was discussed at some length at the meeting, including the fact that the Parents would be called to set up meetings and interviews with the three referred schools. *Id.* at 41. The Student's mother expressed concern that the Student would suffer too much anxiety if he were required to actually interview at the proposed schools. The Student's father expressed concern that the various interviews at other schools might cause anxiety and unduly disrupt the school day for the Student at [School 1] and queried whether the various school representatives could observe the Student at [School 1]. Acknowledging that this was a good idea, Mr. XXXX suggested that the Parents inquire about such an arrangement when each of the referred schools called to set up appointments.

When Ms. XXXX XXXX from [School 3] called the Student's mother on April 5, 2013, the mother told Ms. XXXX that she did not wish to schedule a visit at that time and if the mother changed her mind, she would call Ms. XXXX. This was documented in a July 23, 2013 letter that Ms. XXXX sent to MCPS indicating that the file was being closed for inactivity. The Parents were copied on that letter. Bd. Ex. 27. Similarly, on April 29, 2014, Dr. XXXX of [School 4] sent an email indicating that she had called the Student's mother going on four times

and had yet to receive a response. Bd. Ex. 23. When the mother finally did respond, Dr. XXXX agreed to observe the Student at [School 1] and bring another teacher as well. The mother agreed to speak to the Student's teachers at [School 1] and have them contact Dr. XXXX, but Dr. XXXX never heard anything else. Nonetheless, after a review of the file, [School 4] determined that the Student's profile was consistent with many of the students in the [School 4] program, and the Student was accepted without an interview for the 2013 -2014 school year by letter dated July 24, 2013. Bd. Ex. 28.

The Student's mother testified that the letter from Ms. XXXX was only partially accurate because she was waiting for Ms. XXXX to come and visit the Student at [School 1]. [Mother] T. 476. She also testified that Dr. XXXX did not agree to visit, and that the mother was not responsible for speaking with the Student's teachers at [School 1] so that they could contact Dr. XXXX, as was documented in Dr. XXXX's July 24, 2013 letter. [Mother] T. 480. I do not find the mother's testimony credible. While I very much appreciate the fact that she admitted that she has memory issues, given such issues along with the passage of time, I find the somewhat contemporaneous letters a much more credible indicator of what really occurred. Indeed, the letters consistently document the mother's lack of cooperation.

Moreover, as the mother testified, she did not want to disrupt the Student as he was "comfortable in his environment." She believed the Student was learning, making friends, and blossoming and had found such a comfortable "niche" after the "nightmare that went on at [School 5]." [Mother] T. 452. The Student's mother was concerned that after a year of being at [School 1], she did not want to "install in him the anxiety and fear of not knowing where he is going to be next year of -- of having that uncertainty after he's established himself." *Id.* While I understand that the mother had expressed these concerns with regard to the Student being required to go to other schools to interview, such concerns are even more applicable to changing

schools all together. I do not fault the mother for wanting what she believes is best for her son and the evidence presented shows that the mother believes that the best school for her son is [School 1]; however, that does not mean that MCPS is legally obligated to pay for it.

I find that the Parents intentionally tried to thwart the placement process and as such, it would be improper to hold MCPS responsible for any procedural violation due to alleged delays in the private school referral process. *MM*, 303 F. 3d at 535. Indeed, there is no credible evidence that the Parents would have accepted any FAPE offered by MCPS that did not include reimbursement for [School 1]. MCPS is not obligated by the IDEA to provide a disabled child with an optimal education. MCPS is only obliged to provide a FAPE, which it did in this case with no loss in educational opportunity for the Student. *Id.*

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that MCPS provided the Student a timely and appropriate placement under an appropriate Individualized Educational Plan (IEP) for the 2012-2013 and 2013-2014 school years. 20 U.S.C.A. §§ 1400- 1487 (2010).

I further conclude that the IEPs and placement determined by MCPS were reasonably calculated to offer the Student a free and appropriate public education. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002); and *MM v. School Dist. of Greenville Cnty.*, 303 F. 3d 523, 535 (4th Cir. 2002).

ORDER

I **ORDER** that the Parents' request for reimbursement for and placement of the Student at the [School 1] for the 2012-2013 and 2013-2014 school years at the expense of Montgomery County Public Schools, is **DENIED**.

March 21, 2014
Date Decision Mailed

Marina Lolley Sabett
Administrative Law Judge

MLS/lh

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.