

XXXX XXXX

STUDENT

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

*** BEFORE M. TERESA GARLAND,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-BCNY-OT-14-06757**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On February 25, 2014, [Father] and [Mother] (Parents), on behalf of their child, [Student] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a mediation as well as a hearing to review the identification, evaluation, or placement of the Student by the Baltimore County Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). In their complaint, the Parents alleged that the BCPS committed numerous violations of the Student’s special education rights, including: (1) failure to provide/develop an appropriate Individualized Education Program (IEP) for the 2013-2014 school year; (2) failure to offer appropriate extended school year (ESY) services for the summer of 2013; (3) failure to adequately and fully diagnose the Student in all areas of his suspected disability; (4) failure to develop appropriate goals and objectives based upon valid present levels of performance; (5) failure to adequately and fully provide measurable

data supporting academic progress; (6) failure to provide a full continuum of appropriate special education services; (7) failure to properly consider all information provided to the school, including, but not limited, to information provided by private evaluators; and (8) failure to consider the harmful effects of the program proposed by the BCPS.¹

Mediation between the parties was originally scheduled for March 12, 2014. However, on March 11, 2014, at the request of the BCPS, along with the agreement of the Parents, the mediation was rescheduled for March 24, 2014. The mediation was conducted on March 24, 2014. The parties were unable to reach an agreement.

Immediately following the mediation, I held a prehearing conference. The Parents were present and represented by Holly Parker, Esquire. J. Stephen Cowles, Esquire, represented the BCPS. By agreement of the parties, the hearing was scheduled for April 29 and 30, 2014. On March 27, 2014, I issued the Pre-hearing Conference Report and Scheduling Order. On March 31, 2014, the BCPS brought to my attention a mistake made in the Pre-hearing Conference Report and Scheduling Order.² As a result, a corrected Pre-hearing Conference Report and Scheduling Order was issued on April 1, 2014.

On April 11, 2014, the Parents filed a Motion for Summary Decision arguing that the BCPS failed to file a timely answer to their Due Process Complaint. The BCPS filed an answer to the Parents' Motion for Summary Decision on April 11, 2014. By letter dated April 18, 2014, I denied the Parents' Motion for Summary Decision.

¹ The broad issue addressed at the hearing was whether the Student was provided FAPE for the 2013-2014 school year and if not, whether placement at a non public day school at the school system's expense is appropriate. These will be the only issues discussed in this decision.

² The Pre-hearing Conference Report and Scheduling Order incorrectly listed the BCPS as filing the Due Process Hearing Request in this matter.

I held the hearing on April 29 and 30, 2014. Ms. Parker represented the Parents. Mr. Cowles represented the BCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a) (2013); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

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

ISSUES

1. Was the Individualized Education Program (IEP) and placement developed by BCPS reasonably calculated to provide the Student with a free appropriate public education (FAPE) for the 2013-2014 school year?
2. If there was a denial of FAPE, is placement at a non-public day school, at the expense of BCPS appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parents:

Parents Ex. 1 – XXXX XXXX, Ph.D., Curriculum Vitae, printed April 23, 2014

Parents Ex. 2 – Not admitted

Parents Ex. 3 – XXXX XXXX, Ph.D., Curriculum Vitae, undated

Parents Ex. 4 – BCPS IEP Team Summary, dated February 7, 2008, with the following attachments:

- BCPS Parent Notification of IEP Team Meeting, dated January 17, 2008

- Email from Parent to XXXX XXXX, dated January 15, 2008
- BCPS Parent Permission for Assessment, dated February 7, 2008
- BCPS Referral to Psychological Services, dated April 20, 2008
- BCPS Department of Special Education Educational Assessment, dated April 21, 2008
- BCPS Determination of Educational Disability, dated April 24, 2008
- BCPS Classroom Observation of Student Performance, dated April 23, 2008
- BCPS IEP Team Summary, dated April 24, 2008
- BCPS Parent Notification of IEP Team Meeting, dated April 8, 2008
- BCPS Classroom Observation of Student Performance, dated April 23, 2008
- BCPS IEP Team Summary, dated May 23, 2008
- [School 1] Student Progress Sheet, dated May 22, 2008
- BCPS Parent Notification of IEP Team Meeting, dated May 1, 2008
- IEP Snapshot, dated May 23, 2008

Parents Ex. 5 – BCPS Department of Special Education Educational Assessment, dated March 25, 2011, with the following attachment:

- BCPS Assessment Report, dated February 28, 2011

Parents Ex. 6 – IEP, dated September 12, 2013

Parents Ex. 7 – Emails between the Parent and XXXX XXXX, dated March 12 and 13, 2014

Parents Ex. 8 – Letter from XXXX XXXX, Associate Head of School, [School 2], to the Parents, dated December 6, 2013

Parents Ex. 9 – BCPS Middle School Report Card, dated June 14, 2013, with the following attachments:

- BCPS Grade 5 Report Card, printed June 6, 2012
- BCPS Grade 4 Report Card, printed June 8, 2011
- BCPS Grade 3 Report Card, printed June 15, 2010
- BCPS Grade 2 Report Card, undated
- BCPS Grade 1 Report Card, undated

Parents Ex. 10 - BCPS Interim Report, dated March 28, 2014, with the following attachment:

- IEP, dated February 25, 2014

I admitted the following exhibits on behalf of BCPS:

BCPS Ex. 1 – Withdrawn

BCPS Ex. 2 – BCPS Determination of Specific Learning Disability, dated December 11, 2013

- BCPS Ex. 3 – Withdrawn
- BCPS Ex. 4 – IEP, dated February 25, 2014
- BCPS Ex. 5 – Withdrawn
- BCPS Ex. 6 – [School 3] Teacher Report – XXXX, undated
- BCPS Ex. 7 – [School 3] Teacher Report – XXXX, undated
- BCPS Ex. 8 – [School 3] Teacher Report – XXXX XXXX, undated
- BCPS Ex. 9 – [School 3] Teacher Report – XXXX, undated
- BCPS Ex. 10 – [School 3] Teacher Report – XXXX XXXX and XXXX XXXX, undated
- BCPS Ex. 11 – Student Progress, undated
- BCPS Ex. 12 – Write up of Self-Advocacy Note Cards, undated
- BCPS Ex. 13 – Withdrawn
- BCPS Ex. 14 – Student Progress Report, dated March 24, 2014
- BCPS Ex. 15 – Arab-Israeli Conflict Test, dated February 10, 2014
- BCPS Ex. 16 – Withdrawn
- BCPS Ex. 17 – Withdrawn
- BCPS Ex. 18 – Resumes of XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, and XXXX XXXX, undated

I admitted the following joint exhibits on behalf of the Parents and the BCPS:

- Joint Ex. 1 – BCPS IEP Team Summary, dated February 25, 2014
- Joint Ex. 2 – BCPS IEP Team Summary, dated January 10, 2014, with the following attachments:
- BCPS Notice of Documents, dated December 19, 2013
 - BCPS Parent Notification of IEP Team Meeting, dated December 15, 2013
- Joint Ex. 3 – BCPS IEP Team Summary, dated December 11, 2013

- Joint Ex. 4 – BCPS IEP Team Summary, dated October 16, 2013, with the following attachments:
- [School 3] Teacher Report – XXXX, undated
 - [School 3] Teacher Report – XXXX XXXX, undated
 - [School 3] Teacher Report – XXXX, undated
 - [School 3] Teacher Report – XXXX, undated
 - [School 3] Teacher Report – XXXX XXXX, undated
 - BCPS Notice of Documents, dated October 4, 2013
 - BCPS Parent Notification of IEP Team Meeting, dated September 27, 2013
- Joint Ex. 5 – BCPS IEP Team Summary, dated September 12, 2013, with the following attachment:
- BCPS Parent Notification of IEP Team Meeting, dated September 1, 2013
- Joint Ex. 6 – BCPS IEP Team Summary, dated April 17, 2013, with the following attachments:
- BCPS Occupational/Physical Therapy IEP Review/Progress Report, dated March 27, 2013
 - [School 3] Teacher Report – XXXX, undated
 - [School 3] Teacher Report – XXXX, undated
 - [School 3] Teacher Report – XXXX XXXX, undated
 - [School 3] Teacher Report – XXXX, undated
 - [School 3] Teacher Report – XXXX, undated
 - BCPS Parent Notification of IEP Team Meeting, dated March 13, 2013
- Joint Ex. 7 – IEP, dated April 17, 2013
- Joint Ex. 8 – IEP, dated September 12, 2013
- Joint Ex. 9 – IEP, dated January 10, 2014
- Joint Ex. 10 – IEP, dated February 25, 2014
- Joint Ex. 11 – BCPS Occupational Therapy Services Observation/Consultation Report, dated December 3, 2013
- Joint Ex. 12 – BCPS Classroom Observation of Student Performance, dated November 5, 2013
- Joint Ex. 13 – BCPS Department of Special Education Educational Assessment, dated October 21, 2013
- Joint Ex. 14 – Psychological Evaluation by XXXX XXXX, Ph.D., Clinical Psychologist, dated August 22, 2013

Testimony

The Parents testified and presented the following witnesses:

- XXXX XXXX, Ph.D., admitted as an expert in clinical psychology
- XXXX XXXX, teacher at the BCPS
- XXXX XXXX, teacher at the BCPS
- XXXX XXXX, teacher at the BCPS
- XXXX XXXX, Ph.D., admitted as an expert in psychology
- XXXX XXXX, Director of Admissions, [School 2]

The BCPS presented the following witnesses:

- XXXX XXXX, admitted as an expert in special education
- XXXX XXXX, admitted as an expert in special education.

STIPULATIONS OF FACT

1. The Student is thirteen years old, and his date of birth is XXXX, 2000.
2. The Student is identified as a student with a disability under the IDEA under the category of Specific Learning Disability.
3. According to the Student's IEP, the areas affected by his disability include reading, writing, mathematics and social/emotional/behavioral.
4. [School 3] is a public, comprehensive public day school. The Student began attending [School 3] in the 2012-2013 school year.
5. Prior to the start of the 2013-2014 school year, the Parents had the Student evaluated by XXXX XXXX, Ph.D. (Clinical Psychologist). The evaluation was conducted in July and August 2013.

6. The IEP Team at [School 3] convened on September 12, 2013, October 16, 2013, January 10, 2014 and February 25, 2014 to review the Student's IEP and to make revisions to his services if necessary.
7. On October 16, 2013, the IEP team convened and recommended an educational assessment and classroom observation. In addition, the team recommended an observation/consult by the occupational therapist. The Student's mother signed consent for these observations and assessments at that meeting.
8. XXXX XXXX, Special Education Teacher, conducted the educational assessment on October 21, 2013. XXXX XXXX, Special Education Department Chair, conducted the classroom observation on November 5, 2013. XXXX XXXX, Occupational Therapist (OT), conducted the OT observation and completed the consult; she issued a report dated December 3, 2013.

FINDINGS OF FACT

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

1. Prior to December 2013, the Student was identified as having an educational disability determined to be "other health impairments." The other health impairment was determined to be attention deficit hyperactivity disorder (ADHD).
2. The Student has received special education and related services throughout his school career.
3. The Student's IEP in effect at the start of the 2013-2014 school year was developed on April 17, 2013. The IEP reflects the areas of deficits identified on the IEP as ascertained from the evaluative data. The IEP requires that the Student receive all of his academic instruction in the least restrictive environment of a general education classroom in his home school (32

hours, 30 minutes per week).

4. The IEP requires that the Student receive three hours and forty five minutes of inclusion services per day. Areas identified as impacting the Student's academic achievement were reading and writing. The IEP also required that the Student receive the use of a human reader or audio recording of selected sections of text (Auditory Presentation Accommodations), mathematics tools and calculation devices (Materials or Devices Used to Solve or Organize Responses), and extended time and a half (Timing and Scheduling Accommodations). Further, the IEP required reduced distractions to the Student without further explanation. (Jt. 7.)
5. The Student was not eligible for Extended School Year (ESY) services for the summer of 2013.
6. On July 25, August 13, August 15, and August 19, 2013, the Student underwent a psychological evaluation by XXXX XXXX, PH. D. Dr. XXXX diagnosed the Student with ADHD-combined type; learning disorder not otherwise specified-visual processing deficits; and developmental coordination disorder (dysgraphia/dyspraxia by history). (Jt. 14.)
7. Dr. XXXX initially evaluated the Student in March 2006 because he had difficulty focusing and processing. During that evaluation, Dr. XXXX found that the Student had deficits in the area of sensory motor and visual motor functioning and exhibited language delays. His memory skills were also limited and impacting his school performance. In March 2006, Dr. XXXX provisionally diagnosed the Student as having ADHD. (Jt. 14.)
8. Over the course of her July and August 2013 evaluation, Dr. XXXX conducted numerous tests on the Student. These tests included: the Woodcock-Johnson Tests of Cognitive Ability; Wechsler Intelligence Scale for Children-IV; Wechsler Abbreviated Scale of

Intelligence; Wide Range Assessment of Memory and Learning-2; Developmental Test of Visual Motor Integration; Wechsler Individual Achievement Test-III; IVA+Plus; Behavior Rating Inventories of Executive Function, and Behavioral Assessment Scale for Children (Jt. 14.)

9. The Student requires a small, structured school environment to meet his learning needs. (Jt. 14, p. 19)
10. The Parents gave Dr. XXXX' August 22, 2013 report to the IEP team at the beginning of the 2013-2014 school year.
11. The IEP Team met on September 12, 2013 at the Parents' initiation. During this meeting, the Parents expressed concern regarding the Student's progress and gaps in learning. As a result, the IEP Team initiated a change in the Student's social studies schedule to place him in a class where his case manager, Ms. XXXX, is the inclusion teacher. Social Studies was not an area identified as impacting the Student's academic achievement.
12. On October 16, 2013, the IEP Team met and recommended the following assessments: Educational, Classroom Observation and Occupational Therapy.
13. On October 21, 2013, XXXX XXXX, Special Educator, conducted an Educational Assessment of the Student in the following skill areas: reading, math and spelling-written language. In conducting her assessment, Ms. XXXX reviewed records, interviewed teachers and conducted Woodcock-Johnson III Tests of Achievement: Form A. The Student's Broad Reading score was low with an estimated early fourth-grade-level of performance. His Letter-Word identification skills were low average, with an estimated fifth grade level of performance. The Student's Reading Fluency was low average, with an estimated fifth grade level of performance. His Passage Comprehension was in the very low range to age-level

expectations, with an estimated mid-second grade level of performance. Three subtests of the Broad Math Cluster - Calculation, Math Fluency and Applied Problems - were administered in order to assess acquisition of math skills. The Student scored in the low range according to age level expectations with an estimated mid-second grade level of performance. The three subtests of the Broad Written Language Cluster - Spelling, Writing Fluency, and Writing Samples - assess ability to communicate effectively and efficiently in written form. The Student scored in the low average range according to age level of expectations with an estimated sixth grade level of performance. (Jt. 13.)

14. The Educational Assessment indicated that the Student's academic achievement ranges from very low to low average according to age level expectations. The Student's strengths were identified as spelling and math fluency. His areas of need are writing fluency, passage comprehension and applied math problems. (Jt. 13.)
15. On November 5, 2013, XXXX XXXX, Special Educator, conducted a classroom observation of the Student during his reading class. The observation indicates the Student has the following strengths: good organizational skills; good work habits; good task completion; and he is motivated and participates. (Jt. 3.)
16. On December 3, 2013, Ms. XXXX, Occupational Therapist, observed the Student in pre-algebra and science class. In pre-algebra, the Student's handwriting was neat and legible and he did not show signs of distractibility or apparent anxiety. His work was organized and he was independent in managing his binder.
17. On December 11, 2013, the Student's IEP team reviewed the IEP. The Student has a Specific Learning Disability (SLD). The Student displays evidence of a cognitive processing disorder in the following areas: attention-visual and concentration; perception-visual/spatial;

integration - visual-motor; conceptualization - comprehension and reasoning; executive functioning - planning and organization; and, memory - working/short-term and retrieval/long-term. The Student's range of cognitive functioning is low average to extremely low. The Student's cognitive processing disorder results in inadequate achievement in the following areas: mathematics calculation; mathematics problem solving; reading fluency skills; reading comprehension, and written expression. (BCPS 2.) The Student's IEP continued to reflect "Other Health Impairments." Additionally, it was also amended to reflect that he has an SLD.

18. Until January 2014, the Student's primary disability as reflected on his IEP was "Other Health Impairments." The impairment was ADHD. The areas affected by the Student's ADHD, as reflected in all IEPs prior to January 2014 were reading and writing. (Jt.7 and 8.)

19. In January 2014, the Student's primary disability, as reflected on his IEP, was changed to "Specific Learning Disability."³ The areas of learning identified as being affected by the Student's disability are reading, writing, mathematics and social/emotional/behavioral. (Jt. 9.)

20. The January 2014 IEP removed the Student from the general education environment for reading and language arts to a self-contained classroom because the increased supplementary aids and services implemented in September 2013 were insufficient to meet his needs and he required more supports. In all other areas of learning, the Student remained in the general education setting. The Student was assigned a resource period for forty-five minutes every other day for instruction on organization and re-teaching of skills that are being taught in the

³ Specific learning disability (SLD) refers to a disorder in one or more of the basic psychological processes involved in understanding language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. 34 CFR 300.8 (c)(1)

classroom. In making this determination, the IEP Team used data from formal assessments and informal data as well as Dr. XXXX's psychological evaluation. (Jt. 2.)

21. In January 2014, the Student was transferred into teacher XXXX XXXX's self-contained seventh grade reading and language arts class. Ms. XXXX is the only educator in the classroom, which, except for the Student, includes only students with intellectual disabilities. The average reading grade level of the students in Ms. XXXX's reading class is 1.4 to 2.3. The Student's reading level is 4.5 to 5.0. (T. XXXX; Jt. 13.)
22. Ms. XXXX administered an informal reading comprehension assessment to the Student and he scored 8/8. He was given an informal writing assessment and scored 60%. (BCPS #4.)
23. For the grading period from January 30, 2014 through February 10, 2014, the Student's progress report in "Language!"⁴ showed a 99.4%. His Language Arts score during the same period was 104.9%. (Jt. 8.)
24. The Student's most recent Progress Report shows that his grade in "Language!" has dropped to a "C". (P. Ex. 10, p.4.)
25. Ms. XXXX's reading and language arts class does not challenge the Student and does not meet his needs. (T. XXXX.)
26. In late January 2014, the Student was placed in teacher XXXX XXXX's seventh grade math class. Ms. XXXX's class is a general education classroom with twenty-six students, fifteen of whom have IEPs. In addition to Ms. XXXX, the math classroom has a special educator (Ms. XXXX) as well as an instructional assistant (Ms. XXXX). Ms. XXXX teaches seventh grade curriculum in her math class. The Student's grade level performance in math is 4.0, fourth grade level. (T. XXXX.)

⁴ Language! (Language Exclamation) is reading.

27. The Student's October 21, 2013 Educational Assessment shows that he performs math calculations at a beginning fifth-grade level, math fluency at a sixth-grade level and applied problems at an estimated second grade level. These three subtests of the Broad Math Cluster showed that the Student performs at the mid-second grade level. (Jt. 14.)
28. The Student was given informal assessments which required him to evaluate expressions and solve equations from the seventh grade math curriculum. On January 13, 2014, the Student scored 0% using a calculator. On February 21, 2014, the Student scored 20% with a calculator. On April 4, 2014, the Student scored 30% with a calculator and 30% without a calculator. (BCPS 4; T. XXXX.)
29. In the Student's pre-algebra class prior to being moved to Ms. XXXX's class, the Student's grade fell from a "D" the first grading quarter to an "E" the second grading quarter. The second quarter ended January 17, 2014. (P. 6.)
30. In Mathematics IEP progress reports dated October 21, 2013 and January 31, 2014, the Student not making sufficient progress. (P. #6.)
31. The Student's February 25, 2014 third quarter interim report grade in pre-algebra is "D". The third quarter ended on March 28, 2014. (P. #10.)
32. The Student received a "C" in pre-algebra for the third quarter.
33. The Student received a grade of "F" for science in the fourth quarter. He had not completed his homework assignments and received a 60% on his classroom work. (P. 10.)
34. In February 2014, the Student's IEP was amended to reflect that the Student qualifies for special education services in the areas of reading, written language, occupational therapy, social/emotional/behavioral and mathematics. (Jt.10.)
35. Prior to January 2014, mathematics and social/emotional/behavioral deficits, had not been

identified as areas affected by the Student's disability.

36. The Student has significant anxiety which manifests in his ripping and tearing his clothing, particularly socks, at home. The Student cries when doing his homework. His anxiety is related to school. (T. Parents.)

37. The Student does not appear anxious at school. He is compliant and well-behaved.

38. The Student's IEP contains a Behavioral Goal. The Objectives within this Goal are: organization; asking for assistance and clarification; and meeting classwork/homework deadlines. (BCPS 4.)

39. The Student is unable to self-advocate (ask for assistance, help, or guidance). He was given a "flash pass" to use anytime, no questions asked, when he needed to see Ms. XXXX or his guidance counselor. The Student has not used the flash pass.

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 Md. Code Ann., Educ., § 8-101 *et seq.* (2008 & 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, 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 could provide if given access to unlimited funds." *Barnett v. Fairfax Co. School Bd.*, 927 F.2d 146, 154 (4th 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 (4th 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 FAPE 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 IDEA. 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 (4th Cir. 2004); *M.M. ex rel. D.M. v. School Dist. of Greenville Co.*, 303 F.3d 523, 532 (4th 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.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th 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 “[t]o 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 IDEA 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 (4th Cir. 1997).

In a special education due process hearing, the burden of proof lies with the party seeking relief. *See Shaffer v. Weast*, 546 U.S. 49 (2005). In this matter, that party is the Parents, and the standard of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009).

The Parents' Case

The Parent's contend that the Student's IEP is not reasonably calculated to provide FAPE, nor has the Student been provided FAPE during the 2013-2014 school year because he is not progressing academically, many of his grades have been inflated, he has been placed in a self-contained reading and language arts classroom with intellectually disabled students, and his classroom size is too large to address the Student's specific learning disability. In support of their position, the Parents called a number of witnesses.

XXXX XXXX, Ph.D., is a clinical psychologist practicing in XXXX, Maryland. He was accepted as an expert in clinical psychology. He was contacted by the Student's mother who expressed concerns about the Student's worrying and behavioral manifestations including sleep disturbances and shredding his clothing. These behaviors were increasing in frequency and intensity and seemed related to school. On March 13, 2014, Dr. XXXX conducted an initial evaluation of the Student. During the evaluation, the Students shared that he was frustrated at

school because some of the work is too easy. Dr. XXXX also noted that the Students exhibited other behaviors such as writing lists of whatever was on his mind. On cross examination, Dr. XXXX conceded that he had not attended the Student's IEP meetings and had not provided a report to the IEP team.

XXXX XXXX is the Student's math teacher. She was a special educator for eight or nine years, but is now considered a general educator. She teaches general education seventh grade math. There are twenty-six students in her class and she estimated that fifteen of those students have IEPs. The classroom also includes a special education teacher, an instructional assistant and a one-to-one aid. Ms. XXXX stated that all teachers are responsible for implementing a student's IEP. The Student's IEP indicates that he performs math at the fourth grade level. (Jt. 10.) The Student came to her class in the end of January 2014. Ms. XXXX said she was not told why the Student was placed in her classroom, but presumed it was because of her background in special education and because she was a math teacher. Ms. XXXX supposed that the student\teacher ratio in her classroom made her classroom a good fit for the Student. There are three teachers for 26 Students.

Ms. XXXX testified that the Student's IEP contained four goals related to mathematics. (Jt. #9.) However, as of the hearing date, she was unable to articulate the Student's progress towards achieving the math goals. Moreover, Ms. XXXX had no baseline which reflected the Student's abilities in each mathematics goal when the Student began in her class. She stated that she would raise the Student to grade level using scaffolds and chunking⁵ the material. Ms. XXXX asserted that she is giving the Student the tools and strategies that will make him an independent learner. However, Ms. XXXX acknowledged that the Student's April 2013 IEP,

⁵ "Chunking" is breaking information down into smaller components.

which was in place upon the start of the school-year, did not contain any math goals. (Jt. 7.) She added that this omission concerns her as the special educator.

Ms. XXXX testified that the Student's current grade in her class is "A" or a "B" using the seventh grade curriculum. When questioned about the Student's current grade when he received an "E" on a quiz on February 14, 2014, Ms. XXXX stated that 50 to 60% of a Student's grade is based on class work. She testified that the Student does better on a two period day when the information is fresh. Ms. XXXX also testified that the Student does better in small groups and that it is fluid as to what teacher works with the Student. All three teachers constantly move throughout the room. Generally, Ms. XXXX will break down the homework assignments and Ms. XXXX teaches the curriculum. With respect to expressions and equations, Ms. XXXX asserted that the Student has become more comfortable. He interacts appropriately and answers more and more questions. However, she is not aware that any quantifiable data reflecting these improvements has been given to the Student's parents.

The Student has been given a series of classroom-based informal assessments which require him to evaluate expressions and to solve equations from the seventh grade curriculum. According to Ms. XXXX, on January 13, 2014, the Student scored 0% correctly using a calculator. On February 21, 2014, he scored 20% correctly using a calculator. On April 4, 2014, the Student scored 30% correctly with a calculator and 30% correctly without a calculator. The Student's mathematics goal is to accomplish 70% accuracy in the assessments using seventh grade curriculum. (Jt. 4.) The Student's mathematics goal has four individual objectives. The 30% score the Student achieved in April 2014 was as to the whole mathematics goal, not each objective. There was no baseline score which reflected the Student's level on each objective when he started in Ms. XXXX's class.

In Ms. XXXX's opinion, the Student can accomplish seventh grade curriculum with scaffolding and supports.

XXXX XXXX teaches seventh grade reading and language arts in a self-contained setting. The Student came to her classroom in January 2014. Ms. XXXX's department chair and the Student's case manager believed her classroom would be a "better fit" for the Student.

There are fourteen students in Ms. XXXX's reading class. Her class is designed for students with severe learning deficits/ intellectual disabilities. The average reading scores of the students in Ms. XXXX's class are first and second grade level. The Student's reading level is between fourth and fifth grade. His writing level is also between fourth and fifth grade.

The children in her class do not "hold on to information." Ms. XXXX said that "every day [for her students] is a blank page." Ms. XXXX also teaches Language Arts and has sixteen students in that class. The Student is in both Ms. XXXX's reading and language arts classes. Ms. XXXX is the only educator in her classroom.

Ms. XXXX described the Student as high functioning. Every other Friday, Ms. XXXX has a spelling bee for her class. The Student won the first two spelling bees, after which the other students took a vote and asked Ms. XXXX to lower the difficulty of the words.

In ascertaining the appropriateness of the Student's program, I found it compelling that Ms. XXXX said that her class is not challenging for the Student, and that the reading curriculum in her class is not addressing his needs. He already knows the material and needs more of a challenge. Her class is intended for students who are well below grade level (three grade levels below their present grade.) The Student is not well below grade level.

XXXX XXXX, Ph.D., a clinical psychologist, was admitted as an expert in the field of psychology.

On July 25, August 13, August 15, and August 19, 2013, Dr. XXXX conducted a psychological evaluation of the Student. The Student's parents requested the evaluation of the Student's cognitive and academic functioning to determine if his academic and behavioral needs were being met in his current school placement. Dr. XXXX initially evaluated the Student in March 2006 due to problems with focus and processing skills. During that evaluation, Dr. XXXX found that the Student had average cognitive skills, but deficits in the area of sensorimotor and visual motor functioning, as well as language delays.

During her evaluation, Dr. XXXX conducted the Wechsler Intelligence Scale for Children test. A score of 90 -109 is in the average range. In the area of perceptual reasoning, the Student scored 65. In the area of working memory, the Student's score was 62. In the area of processing speed, the Student scored 78. In verbal comprehension, the Students scored 83. The Student's full scale score for all areas, above, was 67. In her testimony, Dr. XXXX reviewed her report page-by-page. She noted that the Student's educational assessment in 2013 reflected a Passage Comprehension score of 67. That same test in 2011 reflected a score of 88. The Student's score dropped 20 points in two years because he could not get to the next level. (Jt. 13 and P. 5.) Likewise, the Student's score in Applied Problems dropped from 85 in 2011 to 70 in 2013. Dr. XXXX opined that the scores dropped because the Student has not continued to acquire skills at complex, higher levels.

Dr. XXXX further stated that, based on the Student's learning deficits, it is inappropriate to place the Student in a classroom with children who have intellectual disabilities. The Student can perform at an average or better level with supports. He needs a lot of support with visual processing and requires "chunking" to understand task demands.

Dr. XXXX was concerned that the Student does not advocate for himself. Because he is

a pleaser, he says things are OK, but then goes home and shreds his socks. Dr. XXXX recommended smaller class sizes for the Student because the Student gets lost in a bigger classroom and has attention and impulsivity issues.

[Father] is the Student's father. He explained that the Student displayed speech problems very early in his life. The Student's pediatrician diagnosed him as dyspraxic, which [Father] described as like dyslexia as to speech. The Student also finds it hard to use eating utensils. [Father] testified that the Student was in the Infants and Toddlers Program and had also attended speech therapy.

In reviewing the Student's April 17, 2013 IEP, [Father] noted that the Student's primary disability was Other Health Impairment: ADD/ADHD. (Jt. 7.) The Student received all of the special education services in the general education classrooms. The Student's September 12, 2013 IEP Progress reports of October 21, 2013 and January 31, 2014 indicate that the Student was not making sufficient progress to meet his math goal. (P. 6.) Additionally, that same IEP on those same progress report dates showed that the Student was not making sufficient progress to meet his reading goal.⁶ [Father] said that once Dr. XXXX's report was submitted to the school, the IEP meetings increased in frequency and the Student's classrooms were changed. Further, the Student's class work seemed to be getting easier. On at least two occasions, the Parents noted changes to the Student's grades which caused them concern. In a March 13, 2013 Teacher Report, the Student's physical education teacher noted that the Student received a 44% on a take home quiz which the teacher did not count for the Student's grade so it would not adversely affect his final grade. (Jt. 6.) On March 12, 2014, the Student's mother noted that the Student's science teacher, Ms. XXXX, had given a score of 100% to the Student on assignment he had yet

⁶ The Progress Code of January 31, 2014 notes "Making sufficient progress to meet goal." However, the Description clearly indicates "[The Student] is not making progress toward this goal."

to turn in and which was late. (P. 7.) [Father] continued that he and the Student's mother have documented several instances where grades appeared to have been altered upward. Additionally, [Father] stated that he was worried about placing the Student in a self-contained reading and language arts classroom with students with intellectual disabilities and who may also have behavioral problems.

An IEP meeting was convened on December 11, 2013 in which the school psychologist participated for the first time. During this meeting, [Father] expressed his concern that the Student's homework was too difficult. He conveyed that he and his wife spent two hours each evening re-teaching the Student the material taught in school that same day. Both the Parents and the Student were becoming increasingly frustrated. The Student was displaying outward signs of anxiety while at home by shredding his clothing using scissors and knives. He was particularly shredding his socks. [Father] noted that he brought this shredded clothing to several IEP meetings. However, the school psychologist was not included in the IEP meetings held on January 10, 2014 and February 25, 2014 when he brought the clothing. (Jt. 2 and 10.)

Additionally, [Father] testified that, on an almost daily basis, he and the Student's mother access "Edline", through the BCPS website which allows viewing of the Student's daily grades. This year, the Student's day-to-day Edline grades showed "Fs" and zeros, and the next day those grades would be changed upward. [Father] said that he relied on the County to look into what was going on with his son. He and his wife were very proactive, but it was not until the Student was re-tested by Dr. XXXX that "the light went on and everything changed."

The Parents explored alternative school placement for the Student based on Dr. XXXX's recommendation of a small class size. They looked at four schools, three of which were not appropriate for the Student's needs. The fourth school, [School 2], met the Student's needs. The

class size was small (five or six students per class), all the teachers were certified special educators and his observation was that the students were “bright, intelligent and creative.” The Student spent several days at the school and he loved it. He was making friends when he had lost friends at his present school. Dr. XXXX’ first recommendation, based on the Student’s history and her evaluation, is that he requires closer supervision of his learning and should be placed in a smaller classroom with specific educational support for his learning style. [School 2] has a small classroom population taught by certified special educators.

[Mother]⁷ is the Student’s mother. She stated that she logs into Edline three to four times per week to check on the Student’s grades. On several occasions, she has seen grades changed from a “D” to a “B”.⁸ These changes have increased in frequency since the January 2014 IEP meeting. [Mother] expressed concern also that the Student is not earning the grades he receives. In one instance, the Student turned in an assignment a month late and was given a “B+”. Further, she was unaware that the Student was given a “flash pass” and did not know of it until the Student asked [Mother] if he could use it to check on the well-being of the family dog that tore his ACL. The Student’s anxiety level is high and he has continued to shred his clothing at home using scissors. [Mother] recently found a knife in the student’s drawer.

XXXX XXXX is the Director of Admissions for [School 2] ([School 2]). She takes families on tours of the facility, facilitates the admission process for all students from first through twelfth grade and assures that students are appropriately placed.

All faculty and staff at [School 2] are certified Special Educators and the school is a certified non-public school through MSDE. There are 100 Students, grades one through twelve,

⁷ While [Mother] was called in rebuttal, it was more logical to include her testimony at this point in my decision.

⁸ BCPS did not provide an explanation for the grade increase, which rationally leads me to believe the Student’s grades were inflated.

who attend [School 2] and each student's curriculum is individualized based on his or her learning profile. After reviewing the Student's assessments and all documentation provided by the Parents, Ms. XXXX determined that [School 2] is an appropriate placement for the Student because the school can offer a program that meets his needs as identified by the evaluative data. The Student has been accepted into the school. (P. 8.)

BCPS' Case

BCPS argues that the Student's IEP is reasonably calculated to provide FAPE and that he is making appropriate progress. In support of its position, BCPS presented the testimony of two witnesses: XXXX XXXX and XXXX XXXX.

XXXX XXXX, the IEP Team chair who teaches the Student's math class with Ms. XXXX, was accepted as an expert in special education.

The Student's seventh grade pre-algebra class has two certified teachers, one instructional assistant and another assistant. There are twenty-six students in the class. Ms. XXXX is the lead teacher, but the implementation of IEPs is divided among the other professionals. Ms. XXXX testified that she takes notes, prepares assessments and prepares appropriate homework for the students.

Ms. XXXX asserted that the Student participates in math class. Socially he seems happy and jokes with the other students. Academically, he participates and is engaged, although he is quiet when being introduced to new material. The Student began in her class at the end of January 2014 as a result of a "team" decision because the Student was failing in his then-current math class. Ms. XXXX said that her class offered a "higher adult/student ratio."

In September 2013, the IEP team met to review and possibly revise the Student's IEP. As a result of that meeting, in which the team had the benefit of Dr. XXXX' assessment, the

team added “supports” and changed the Student’s social studies class. Ms. XXXX, the Student’s case manager, was the special educator in the new social studies class and the team believed her added support would benefit the Student. (Jt. 5.)

The team convened again on October 16, 2013, and was joined by the school psychologist. Ms. XXXX recounted that there was a recommendation to have the school psychologist review Dr. XXXX’ assessment and also a recommendation for an Occupational Therapy consultation because of concerns regarding the Student’s fine motor skills. The IEP was not changed in October 2013.

On December 11, 2013, the IEP Team met again. In this meeting, the Team discussed Informal Assessments (Teacher Reports, classroom observation) and Formal Assessments. Ms. XXXX administered the Woodcock Johnson III in the areas of reading, written language and mathematics. There was also an Occupational Therapist’s observation included in the discussion and Team Summary. (Jt. 3.) According to Ms. XXXX, in this meeting the Team discussed the Student’s “coding.” The Team determined that the Student had a Specific Learning Disability. (BCPS 2.)

On January 10, 2014, the Team met again and revised the IEP by placing the Student in self-contained classes for reading and language arts. The Parents disagreed with this recommendation and their disagreement was documented. (Jt. 2, p. 5.) The Student’s IEP now reflected goals in the areas of reading, writing, math and behavior. Ms. XXXX stated that the IEP addresses the Student’s needs because “I know the Student and they address his needs.” She also stated that based on formal and informal assessments, the Team recommended that the Student be placed in a self-contained language arts and reading class. The accommodations recommended for the Student at this meeting were: a human reader; a scribe; notes/outlines; a

calculator; a computer; extended time for work; breaks; and reduced distractions.

In February 2014, the Team determined that the Student was progressing. His language arts grade before being placed in the self-contained classroom was 72; after his placement, the Student's grade increased to 106. (Jt.1.) Ms. XXXX explained that the Teacher Reports indicate that the Student is "excelling academically." The Student was having positive progress. She further stated that the IEP was appropriate based on the Student's grades, affect, class participation and Teacher Reports. Therefore, Ms. XXXX concluded, the IEP was calculated to provide educational benefits.

Ms. XXXX said that there was no particular reason that the Team changed the Student's Social Studies classroom; she just thought it was a positive change for the Student and was "honoring the Parent's concerns." The Parent's made her aware of the Student's clothes-shredding and the Parents brought a bag of the shredded clothing to an IEP meeting, but the Student's behavior was not included in the IEP notes. Ms. XXXX testified that the Parents expressed "major concern" about the Student's progress, but that their concerns were not noted in the IEP Team Summary. Further, Ms. XXXX stated that the fact that the Student is scoring 100% or greater in Ms. XXXX's class is not an indication that the work in that class is not challenging the Student.

XXXX XXXX, a special educator at [School 3], was accepted as an expert in special education. She is an inclusion teacher, which she explained is a special educator in general education classes which have students with IEPs. She is also the Student's case manager; he was assigned to her case load in the summer of 2013. Additionally, Ms. XXXX is the Student's resource room teacher every other day.

During resource room time, which began in January 2014, she and the Student review

missing assignments, upcoming tests and organize his notebook. If these tasks are accomplished and time allows, the Student may study for tests. In the resource room, she provides the Student direct one-on-one support for organization, study habits, self-advocating and material review. Additionally, Ms. XXXX provided the Student a “flash pass” which allows him to leave the classroom to see either his guidance counselor or Ms. XXXX at any time, no questions asked. The “flash pass” was implemented to address the Student’s anxiety and lack of self-advocacy. Ms. XXXX did not know why the Student had not been assigned to the resource room before January 2014.

As the Student’s case manager, Ms. XXXX makes sure the IEP is timely, monitors Progress Reports, communicates with the Student’s teachers and parents, and monitors that the Student’s IEP is being implemented. She asserted that there have been no teacher concerns regarding the implementation of the Student’s IEP.

Ms. XXXX prepared a Progress Report to address the Parents’ concerns that the Student was not advocating for himself. According to Ms. XXXX, the Student’s grades “definitely improved” after the [classroom] change. However, in responding to concerns regarding the Student’s placement in Ms. XXXX’s self-contained reading and language arts class, Ms. XXXX conveyed that there was no other self-contained class available with appropriate peers. Although the Student is the only student in Ms. XXXX’s class who does not have intellectual disabilities, the Student needed more special education services. Ms. XXXX has not observed the Student in Ms. XXXX’s classroom.

Finally, Ms. XXXX expressed that the Student’s IEP was “extremely” calculated to meet the Student’s needs.

Analysis

a. Was the Student's IEP Reasonably Calculated to provide FAPE?

Generally, the parties did not dispute the nature and extent of the Student's deficits. The Student's deficits are in the areas of reading, written language, behavior (self-advocating) and math. To find that the IEP is appropriate, I must determine whether it addresses the Student's specific needs and is reasonably calculated to provide him educational benefit, i.e., whether it is "likely to produce progress, not regression or trivial educational advancement." *Cypress – Fairbanks*, 118 F.3d 245, 248 (5th Circuit 1997). The Parents presented compelling evidence that the Student is not receiving educational benefit under the structure of his present IEP. In fact, the data shows that the Student has regressed. The record is replete with concrete evidence that the Student's cognitive functioning has declined precipitously since 2008 (P. 4.), when he was administered the Woodcock-Johnson III Tests of Achievement: Form A. The test was administered again in both 2011 (P. 5.) and 2013. (Jt. 13.) As is apparent from the chart, below, the Student's scores increased between 2008 and 2011, but have declined noticeably in all but one area between 2011 and 2013:

Battery Clusters	Standard Score – 2008	Standard Score - 2011	Standard Score - 2013
Broad Reading	88	90	79
Broad Mathematics	78	85	73
Broad Written Language	70	84	85
Academic Skills	86	92	87
Academic Fluency	90	84	78

Academic Applications	70	80	68
Basic Reading Skills	88	85	Left Blank
Total Achievement	Left Blank	85	77

It is also disconcerting that BCPS presented testimony from Ms. XXXX, who asserted that the Student was “excelling academically” when the evidence belies this statement.

Academic progress is an important factor, among others, in ascertaining whether the Student’s IEP was reasonably calculated to provide FAPE.

Ms. XXXX and Ms. XXXX’s undated Teacher Report for pre-algebra shows that the Student had a class average of 86%, but needs improvement in class participation (self-advocacy), class work completion, quality of independent work and assessment scores. Either Ms. XXXX or Ms. XXXX commented on the report “when given independent work - he will not know what to do.” (BCPS 10.) However, in a document which compiled the results of Teachers Reports, the Student’s pre-algebra grade was noted as 90.8% as of February 10, 2014 and 71% as of March 21, 2014. (BCPS 11.) The Student’s Interim Report, dated February 25, 2014, showed a pre-algebra grade of “D” (P. 10).

	Before IEP Implementation 1/2014 (Jt.1)	Undated Teacher Report (BCPS 10)	2/10/14 Score (BCPS 11)	2/25/14 Interim Report Score (P. 10)	3/21/14 Score (BCPS 11)	3/28/14 Report Card (P. 10)
Math	65%	86%	90.8%	D	71%	C

In BCPS Exhibit 11, the Student’s science grade as of February 10, 2014 was a 72%, with a notation that “[The Student] has the highest raters for behavior, preparedness, work

completion and homework completion. *Id.* The Student’s February 25, 2014 Interim Report science grade reflected a C- and his April 2, 2014 Progress Report reflects a grade of “F”.

	Before IEP Implementation 1/2014 (Jt.1)	2/10/14 Score (BCPS 11)	2/25/14 Interim Report Score (P. 10)	3/28/14 Report Card (P. 10)	4/2/14 Interim Report
Science	74%	72%	C-	C	F (50%)

Likewise, the Student’s reading scores have plummeted. Ms. XXXX noted on the Student’s April 2, 2014 IEP Reading Progress Report that the Student was making sufficient progress. (BCPS 4.) As the chart below demonstrates, the Student’s reading grade fell from an “A+” on his February 2014 report card to a “C” in his April 2014 Interim Report. The date of the IEP Progress Report is the same as on the Interim Report.

	Before IEP Implementation 1/2014 (Jt.1)	2/10/14 Score (BCPS 8 & 11)	2/25/14 Interim Report Score (P. 10)	3/28/14 Report Card (P. 10)	4/2/14 Interim Report
Language! (reading)	83%	99.4%	A+	A	C (74%)
Language Arts	72%	104.9%	A	B	B (82%)

The implementation of the Student’s Behavioral Goals has been no more successful than the implementation of his math and reading goals. It is important to note that the Student’s homework assignments took two hours per night prior to January 2014. (Jt. 3 and T. [Father].) Beginning in January 2014, the Student’s homework in Language and language arts was eliminated. The April 7, 2014 Behavioral Goal Progress Report in the Student’s February 25, 2014 IEP indicates that he is making sufficient progress and is meeting deadlines for homework.

Two classes had no homework and Progress Reports dated March 24, 2014 showed the Student with a grade of 60% for homework in Math and Homeroom (Ms. XXXX) and 50% in Science.

<u>IEP Objective:</u>	<u>1.Organization</u>	<u>2.Asking for assistance (self-advocacy)</u>	<u>3. Meeting deadlines(homework/classwork)</u>
Math	Difficulty finding work in binder because every paper is blue. (BCPS 1)	Inconsistency with skill attainment; prompts are necessary. (BCPS 1.); Needs improvement in class participation, class work completion, quality of independent work and assessment scores. When given individual work, he will not know what to do. [The Student] rejects the blue overlay and sometimes offers that white paper is fine. (BCPS 10 & 11.)	60% - 3/24/14 Progress Report (BCPS 14)
Language! (Reading)	No comments		No Homework (BCPS 8 & 14)
Language Arts			No Homework (BCPS 8 & 14)
Social Studies		Student does not self-advocate. Requires "Check-in." Does not volunteer answers. (T. XXXX)	100%. (BCPS 14)
Science			50% - 3/24/14 Progress Report (BCPS 14); 0% - 4/2/14 Progress Report (P. 10)
Homeroom (XXXX)			60% - D - 3/24/14 Progress Report. (BCPS 14)

The public agency must ensure that the IEP team reviews and revises the IEP, as appropriate, to address the lack of expected progress toward achievement of the annual goals, information from the parent, or the student's anticipated needs. 34 CFR §300.324. In this case, on the following dates, September 12, 2013, October 16, 2013, December 11, 2013, January 10, 2014 and February 25, 2014, the Team met to review and/or revise the Student's IEP. The IEP Team had been availed of Dr. XXXX's in-depth, detailed Psychological Evaluation, which she prepared after spending four days evaluating and testing the Student. While the IEP Team convened meetings in September 2013 (which was initiated by the Parents), October 2013, December 2013, January 2014 and February 2014, the Team Summaries of the meetings make no reference to Dr. XXXX's evaluation or recommendations. [Father] hand-delivered the evaluation to the school on September 10, 2013, two days before the IEP meeting. (Jt. 5 - 9/1/13 Notification of IEP Meeting.) Further, between September 2013 and January 2014, no IEP team member contacted Dr. XXXX to discuss the results of her evaluation or her recommendations moving forward. While the IEP Team made recommendations to change the Student's math and reading classrooms, the self-contained reading classroom was deemed inappropriate by Dr. XXXX (T. XXXX.) as well as Ms. XXXX, the Student's reading teacher. (T. XXXX.) Moreover, while many of Dr. XXXX's recommendations were implemented, such as having a human reader and scribe, preferential seating, extended time for work completion and efforts to reduce distractions, these accommodations alone are not meeting the Student's needs. The primary recommendation by Dr. XXXX was a smaller classroom setting. Dr. XXXX's testimony was very specific and her opinion was supported by evidence in the record. For example, on January 10, 2014, the IEP Team recommended that the Student be availed forty-five minutes of resource room time every other day for "re-teaching of skills that are being taught in classes." (Jt. 2.) The presence of this

accommodation is significant for two reasons. First, it acknowledges that the Student is not learning in his present classroom setting because he must be re-taught the material being taught in those classrooms. Second, it demonstrates that BCPS understands that the Student's disability requires that he receive instruction in a smaller setting. However, the resource room accommodation is insufficient to meet the Student's need because it does not address the Student's inability to learn in a larger classroom; it merely attempts to ameliorate the effects of the large classroom settings on the Student's learning by re-teaching the material. For these reasons, I afforded Dr. XXXX' expert testimony significant weight. The recommendation of a smaller classroom setting, according to Dr. XXXX, addresses the Student's attention and impulsivity issues because the evaluative data indicates the Student "gets lost in bigger classrooms," which significantly affects his ability to remain emotionally available for learning. The only classroom size which was reduced in number pursuant to the Student's IEP was his reading/language arts class. In that class, the Student, by all accounts, is functioning at a substantially higher level than the other students, who have intellectual disabilities. According to Ms. XXXX, the Student was placed in Ms. XXXX's self-contained reading and language arts class because there was "no other self-contained class available with appropriate peers." The unavailability of a self-contained reading and language arts classroom with appropriate peers is, in itself, inappropriate. Ms. XXXX further stated that it was deemed "best" to place [the Student] in a special education classroom. Further, the evidence is that the Student's math class with Ms. XXXX has twenty-six students. The Student's IEP was not reasonably calculated to meet the Student's needs because it did not provide him with the opportunity to receive instruction in a small classroom setting. In the larger classroom environment, the Student is

simply unable to receive meaningful educational benefit because his deficits require that he receive instruction in a smaller setting.

Although BCPS presented testimony regarding student/teacher ratio in the Student's classrooms, it did not address Dr. XXXX's recommendation of small classroom size for the Student. The two concepts are not interchangeable. Dr. XXXX was quite specific: class size matters. The Student is lost in large classrooms. BCPS presented no explanation as to why it holds that the Student does not require a small classroom or why, based on Dr. XXXX's evaluation, it has not placed the Student in smaller classrooms. In fact, when Ms. XXXX was asked how the Student's IEP goals address his needs, she replied, "I know [the Student] and they address his needs." BCPS did not articulate that the Student does not require a small classroom setting, and it never addressed the issue and offered no explanation as to why the Student was placed in Ms. XXXX's reading and language arts class other than it was deemed best for him.

The testimony of the Parents' witnesses as well as the BCPS' witnesses is consistent in one area: The Student is a hard worker and he wants to learn. All of the evidence presented in this case confirms this axiom. However well intentioned and determined the Student's teachers and IEP Team may be, the evidence before me demonstrates that the Student has not only not made progress, but he is either stagnating or regressing in many areas. Despite the Student's lack of progress, BCPS did not make appropriate revisions to his program to address his lack of progress. While there is no guarantee that the Student is going to make progress, his IEP has failed to address his educational needs. Additionally, the Student's progress, relied upon by BCPS, was not meaningful and only represented "some minimal academic advancement." *Hall ex. rel Hall v. Vance County Bd. Of Educ.*, 774 F.2d 629 (4th Cir. 1985).

Finally, the Student's Woodcock-Johnson III Tests of Achievement: Form A scores declined from 2011 to 2013 to a considerable degree. The Student's anxiety at home has increased at an alarming rate since the beginning of the 2013-1014 school-year. School staff was aware of this. This is precisely why it is paramount that the Student receive his educational services in a smaller classroom setting as it will assist him with his social/emotional needs regarding anxiety. He is shredding his clothing by the bags-full and his mother recently found a knife in his drawer. The Student is, understandably, clearly frustrated. He wants to learn but he cannot learn in his present environment: in classrooms of between twenty-five and thirty-one students or in a self-contained class setting of sixteen students with abilities well below those of the Student. The testimony of Dr. XXXX, as well as her written report, and the concrete academic evidence before me, convinces me that the Student requires a small, structured classroom setting that can better accommodate his learning style. This type of structure is available at [School 2] where the student-teacher ratio is approximately six to one. He is not receiving educational benefit in his current program at [School 3] and BCPS has offered no evidence that the small classroom setting the Student requires is available at [School 3]. The Student cannot receive an appropriate education in the BCPS because the school system has not developed a program to meet the unique needs of the Student because his classes are simply too large. Dr. XXXX's testimony and report, specifically on the issue of the Student's cognitive functioning, is persuasive and proves that the IEP developed by BCPS, which does not allow for a smaller classroom setting for his academic classes despite his deficits, failed to provide FAPE. If the IEP provided that the Student would receive instruction in a smaller classroom, that IEP might have provided him FAPE. However, that is not the IEP before me.

b.Private Placement

The evidence before me demonstrates that the Student has been in a large classroom environment in the seventh grade for most of his academic classes. His anxiety-related behaviors (which cannot be dismissed or overlooked) began in the sixth grade. His Woodcock-Johnson III Tests of Achievement scores have dropped precipitously between 2011 (fourth grade) and 2013 (sixth grade), which Dr. XXXX attributes to the Student being unable to get to the next level and because he has not acquired skills with complex, higher levels. The diminishment of the Student's skills appears to have substantially occurred in the seventh grade. Hence, it is appropriate to grant the Parents' request for private placement at [School 2] and order BCPS must pay for it.

The Parents have requested that the Student's education be provided at [School 2]. [School 2] is a nonpublic school approved by MSDE to provide instruction to students with disabilities. For the reasons recited above, [School 2] is appropriate because the structure of the program at the school can meet the Student's needs. The director of the school testified as to the components of the school's structure, class size and qualifications of its special educators. All of the Student's identified deficits can be addressed at the school. Additionally, I recognize that a statutory preference exists for educating children with learning disabilities in the least restrictive environment with their non-disabled peers. 20 U.S.C.A. § 1412(a)(5) (2010). See also; 34 C.F.R. §§ 300.114 through 300.117 (2012).

The Fourth Circuit in *DeVries v. Fairfax County School Board*, 882 F.2d 876 (4th Cir. 1989) followed the Sixth Circuit's mainstreaming standard, stating as follows:

The [IDEA]'s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child. As the Sixth Circuit Court of Appeals stated:

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. *Id.* at 878-79 (quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), cert. denied, 464 U.S. 864). See also *Hartmann v. Loudon County Bd. of Educ.*, 118 F. 3d 996, 1001 (4th Cir. 1997), cert. denied, 522 U.S. 1046 (1998).

For the reasons set forth above, I conclude that any marginal benefit the Student might have received from mainstreaming is far outweighed by the benefits, educational and otherwise, he may gain from [School 2]'s segregated setting because of its smaller classroom setting. Placement at [School 2] for the 2014-2015 school year is appropriate, and BCPS must pay for the tuition.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that during the 2013-2014 school year, BCPS failed to offer the Student FAPE. I further conclude as a matter of law that BCPS's proposed continued placement of the Student in the general and self-contained classrooms in a public middle school for the 2014-2015 school year fails to offer the Student FAPE, and that [School 2] is appropriate to meet the Student's educational needs. 20 U.S.C.A. § 1400(d)(1)(A) (2010); *Board of Educ. v. Rowley*, 459 U.S. 176 (1982).

ORDER

I **ORDER** that the Parents' request for the Student's placement at [School 2] for the 2014-2015 school year be, and is hereby, **GRANTED**; and I further **ORDER** BCPS to pay for the tuition.

May 28, 2014
Date Decision Mailed

M. Teresa Garland
Administrative Law Judge

MTG/tc

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.