

**MONTGOMERY COUNTY PUBLIC
SCHOOLS**

v.

XXXX XXXX,

STUDENT

*** BEFORE DAVID HOFSTETTER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-MONT-OT-14-03195**

*** * * * ***

DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On January 31, 2014, the Montgomery County Public Schools (MCPS) filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of [Student] (Student) by MCPS under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). MCPS seeks a ruling that its speech and language assessment of the Student was appropriate, and that an independent educational evaluation (IEE) of the Student at public expense, as requested by the Student's parents, [Father] and [Mother] (the Parents)¹, is not warranted.

The relevant procedural history of this dispute, prior to the January 31, 2014 hearing request, is as follows. On July 5, 2013, a MCPS speech-language pathologist conducted an assessment of the Student. On or about August 9, 2013, the Parents requested an independent

¹ In this Decision, the term "Parents" shall refer to [Father] and [Mother]; the singular term "Parent" shall refer to [Mother].

educational evaluation (IEE) concerning the Student's speech-language abilities. On September 18, 2013, MCPS filed a due process complaint (MSDE-MONT-OT-13-XXXXX) with OAH seeking a ruling that its speech and language assessment of the Student was appropriate, and that an IEE of the Student at public expense, as requested by the Parents, was not warranted. On October 7, 2013, a Telephone Pre-hearing Conference (TPHC) was conducted with the Parents, MCPS counsel, and Administrative Law Judge (ALJ) XXXX XXXX. At the TPHC, the parties agreed to participate in a settlement conference on October 15, 2013 at MCPS' offices in Rockville, Maryland. A hearing on the merits was scheduled for October 22, 2013. At the TPHC, the Parents informed MCPS that they had contracted for a private speech-language assessment of the Student and that the assessment had been performed on August 31, 2013. At the settlement conference on October 15, 2013, the Parents provided MCPS with a copy of the written report of the private speech-language assessment conducted on August 31, 2013.

On October 17, 2013, MCPS filed a "Motion to Find that the Office of Administrative Hearings has no Jurisdiction Over this Case Where There is no Longer a Case or Controversy, Where the Case is Moot, Where the Parents Have Completed their Own Speech and Language Evaluation and Where the Parents Cannot Obtain any Relief from the Administrative Law Judge." On October 18, 2013, prior to any action being taken on the motion, MCPS withdrew its due process request.

On November 11, 2013, MCPS filed its second complaint (MSDE-MONT-OT-13-XXXXX.) That matter was assigned to ALJ XXXX XXXX. On December 17, 2013, a TPHC was held with the Parents, MCPS counsel, and ALJ XXXX. At the TPHC, a hearing on the merits was scheduled for February 10 and 11, 2014 at MCPS' Rockville offices. In addition, at the TPHC, ALJ XXXX ordered the parties to engage in a settlement conference and such

conference was scheduled for January 7, 2014 at OAH in Hunt Valley. On December 18, 2013, ALJ XXXX issued a Pre-Hearing Conference Report and Scheduling Order. In this document, ALJ XXXX incorrectly referred to the ordered settlement conference as a “mediation.” On the evening of January 6, 2014, the Parents left notice at OAH that they objected to participating in “mediation” and therefore would not attend the conference scheduled for the next day. The Parents did not inform MCPS of this decision. MCPS counsel arrived at OAH as scheduled on January 7, 2014, but the Parents were not present and, therefore, no settlement conference occurred. On January 15, 2014, ALJ XXXX issued a Corrected Pre-Hearing Conference Report and Scheduling Order. In that document, ALJ XXXX noted that, although he mistakenly used the word “mediation” in his Pre-Hearing Conference Report and Scheduling Order, it had been clear to all the parties that the event on January 7, 2014 was to be a settlement conference. Nevertheless, given the proximity of the pending hearing on the merits, he withdrew his order for a settlement conference.

Also during the TPHC on December 17, 2013, the Parents stated that they had not received the due process request in MSDE-MONT-OT-13-XXXXX, filed with OAH on November 11, 2013. ALJ XXXX ordered MCPS to send a copy of the due process request to the Parents and MCPS did so on that day. On December 19, 2013, the Parents filed a Motion to Dismiss on the ground that, because MCPS did not provide them with a copy of its due process request at the time of filing, the case should be dismissed. On January 23, 2014, ALJ XXXX granted the Motion to Dismiss.

On January 28, 2014, MCPS filed the present complaint, MSDE-MONT-14-03195. On February 10, 2014, I conducted a TPHC in this matter. I issued a Pre-Hearing Conference

Report and Scheduling Order on February 11, 2014. At the TPHC, a hearing on the merits was scheduled for February 25, 2014 and March 5, 2014 by agreement of the parties.

Federal regulations require that the due process hearing be heard, and a decision issued, within forty-five days of certain triggering events described in the federal regulations. OAH received the due process complaint on January 28, 2014. Neither party requested mediation and a resolution session is not required for a school system hearing request. 34 C.F.R. § 300.510(a). Therefore, the triggering event for the forty-five-day time period in this case was the filing of the due process request. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. §§ 300.515(a) and (c) (2013). Forty-five days from January 28, 2014, the date MCPS filed its due process hearing request, is March 14, 2014. However, at the pre-hearing conferences conducted on February 10, 2014 and February 28, 2014 (see below), as well as at the close of evidence on March 5, 2014, the parties expressly and on the record waived the timeframe requirements of 34 C.F.R. §§ 300.515(a) and (c) (2013), and jointly requested and agreed to an extension of time, until thirty days after the conclusion of the hearing, for me to issue a decision. 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2008).

On February 25, 2014, I presided at the first day of hearing in this matter at MCPS' offices in Rockville, Maryland. The Student was represented by the Parent and both parents were present. MCPS was represented by Zvi Greismann, Esquire. As the first day of hearing proceeded, I concluded, and the parties agreed, that a third day of hearing would likely be necessary. The parties agreed to a second TPHC to be held on February 28, 2014 for the purpose of choosing a date for a third hearing day. The parties were instructed to have accessible at the TPHC all available dates for themselves and their witnesses. On February 28, 2014, I held a TPHC; the parties agreed that a third day of hearing would occur on March 10, 2014. The parties

again waived the timeframe requirements of 34 C.F.R. § 300.515(a) and (c) and expressly requested that I issue a decision no later than thirty days after the completion of the hearing. I issued a Second Pre-Hearing Conference Report and Scheduling Order on February 28, 2014.

On March 5, 2014, I presided at the second day of hearing in this matter. In the course of the day's evidence, MCPS rested and the Parent began and completed her own testimony. Following the completion of her testimony, the Parent stated that she did not intend to call any other witnesses, including her husband or any expert witnesses. MCPS stated that it did not intend to call any rebuttal witnesses. As such, evidence in the case closed without the necessity of a third day of hearing. The parties again, on the record, waived the timeframe requirements of 34 C.F.R. § 300.515(a) and (c) and expressly requested that I issue a decision no later than thirty days after the completion of the hearing.²

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2013); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and 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; MSDE procedural regulations; and the Rules of Procedure of OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13A .05.01.15C; COMAR 28.02.01.

ISSUE

The issue is whether MCPS should be required to pay for the IEE performed on August 31, 2013.

² I directed the parties to submit written closing arguments by March 12, 2014; both parties did so.

SUMMARY OF THE EVIDENCE

Exhibits

MCPS offered the following exhibits, which I admitted into evidence:

- MCPS Ex. # 1 - Report of Speech-Language Assessment, dated July 8, 2013
- MCPS Ex. # 2 - Comprehensive Assessment of Spoken Language, Publication Data, 1999
- MCPS Ex. # 3 - Clinical Evaluation of Language Fundamentals, Fourth Edition, Technical Report, undated
- MCPS Ex. # 4 - *Curriculum Vitae* of XXXX XXXX, undated
- MCPS Ex. # 5 - *Curriculum Vitae* of XXXX XXXX, undated
- MCPS Ex. # 6 - Individualized Education Program (IEP), dated October 28, 2013

The Parents offered the following exhibits, which I admitted into evidence:

- Parents Ex. # 1 - Emails between XXXX XXXX and the Parents, dated June 24 and June 25, 2013
- Parents Ex. # 2 - Emails between the Parents and XXXX XXXX, dated August 22 and 23, 2013
- Parents Ex. # 3 - Emails between the Parents and XXXX XXXX, dated July 8, 18, and 22, 2013
- Parents Ex. # 4 - Parents' notes from IEP Screening Meeting of May 31, 2013
- Parents Ex. # 5 - Grade Report for Student on Home and Hospital Teaching, dated June 13, 2013
- Parents Ex. # 6 - Audiology Testing Report, Preferred Audiology Services, dated August 2, 2013
- Parents Ex. # 7 - Evaluation Meeting Developmental Delay Addendum, IEP, dated March 3, 2005
- Parents Ex. # 8 - Report of Speech-Language Assessment, dated January 17, 2005
- Parents Ex. # 9 - Letter from XXXX XXXX to the Parents, dated February 1, 2012

Parents Ex. # 10 - Comprehensive Speech and Language Assessment, date of evaluation August 8, 2013

Parents Ex. # 11 - Letter from XXXX XXXX to the Parents, dated November 14, 2013

Testimony

MCPS presented the following witnesses:

- XXXX XXXX, MCPS Speech Language Pathologist, accepted as an expert in the field of speech-language pathology.
- XXXX XXXX, MCPS Support Speech-Language Pathologist, accepted as an expert in the field of speech-language pathology.

The Parent testified behalf of the Student and called no other witnesses.

FINDINGS OF FACT

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

1. The Student was born XXXX, 2001.
2. When the Student was between three and four years of age, she received speech-language services from the MCPS “itinerant” program, including testing conducted in 2004 and 2005.
3. The Student was enrolled in MCPS from kindergarten through approximately February 24, 2014.
4. The Student did not have an IEP until October 28, 2013.
5. During the 2012-2013 school year, the Student was enrolled at the [School 1] ([School 1]), an MCPS school.

6. On May 31, 2013 an IEP screening meeting was held for the purpose of determining what, if any, testing should be administered to the Student in light of the Parents' concerns about the Student's academic abilities and progress.
7. Both parents attended the May 31, 2013 IEP screening meeting. The meeting was also attended by the Assistant Principal, the guidance counselor, a general education teacher, the school psychologist, and a special educator.
8. At the May 31, 2013 IEP screening meeting, the IEP team authorized psychological, educational and speech-language testing for the Student, to be conducted by MCPS staff.
9. On July 5, 2013, a speech-language assessment was performed by XXXX XXXX, M.S., an MCPS speech-language pathologist. Ms. XXXX is licensed by the State of Maryland as a speech-language pathologist.
10. Immediately prior to the July 5, 2013 testing, the Parent gave Ms. XXXX a copy of a speech-language assessment conducted on November 30, 2004 and January 7, 2005. Ms. XXXX briefly reviewed the document and the Parent took the document back. The Parent did not suggest that Ms. XXXX keep the document and did not at any time provide Ms. XXXX with a copy of the document.
11. As part of the July 5, 2013 assessment, the Student was administered the Comprehensive Assessment of Spoken Language (CASL). The CASL test includes measures of the following: expressive semantics (Antonyms); receptive and expressive syntax (Grammatical Morphemes, Sentence Comprehension); comprehension of figurative language (Nonliteral Language); and pragmatics (Pragmatic Judgment).
12. Ms. XXXX administered the CASL in accordance with the publisher's protocols.
13. The results of the CASL test administered to the Student are valid and reliable.

14. On each of the subtests set forth above, the mean score is 100 and the standard deviation is 15.
15. On the Antonyms subtest, the Student's standard score was 93, with a 90% confidence interval of 85-101.
16. Based on her score on the Antonyms subtest, the Student's expressive single word vocabulary was, at the time of testing, within normal limits for her age.
17. On the Grammatical Morphemes subtest, the Student's standard score was 93, with a 90% confidence interval of 86-100.
18. Based on her score on the Grammatical Morphemes subtest, the Student's syntactical skills were, at the time of testing, within normal limits for her age.
19. On the Sentence Comprehension subtest, the Student's standard score was 117, with a 90% confidence interval of 105-129.
20. Based on her score on the Sentence Comprehension subtest, the Student's ability to understand complex sentences was, at the time of testing, above average for her age.
21. On the Nonliteral Language subtest, the Student's standard score was 93, with a 90% confidence interval of 86-100.
22. Based on her score on the Nonliteral Language subtest, the Student's ability to understand figurative and complex language and to express her ideas about that information was, at the time of testing, within normal limits for her age.
23. On the Pragmatic Judgment subtest, the Student's standard score was 102, with a 90% confidence interval of 93-111.
24. Based on her score on the Pragmatic Judgment subtest, the Student's social language skills were, at the time of testing, above average for her age.

25. The core composite score for the Antonyms, Grammatical Morphemes, Sentence Comprehension, Nonliteral Language, and Pragmatic Judgment subtests was 99, with a 90% confidence interval of 94-100.
26. At the time of testing, the Student's language skills were within or above the average for her age group.
27. As part of the July 5, 2013 assessment, the Student was also administered the Formulated Sentences subtest of the Clinical Evaluation of Language Fundamentals- 4th Edition (CELF-4), which itself is considered a subtest of the CASL test.
28. The Formulated Sentences subtest of the CELF-4 was administered to the Student due to concerns about her use of organized expressive language. The Formulated Sentences subtest evaluates a student's ability to meaningfully use language.
29. As part of the CELF-4 subtest, the Student was given a word and asked to develop an appropriate sentence about a picture, using the word in the sentence.
30. The Student received a raw score of 44 and standard score of eight on the Formulated Sentences subtest. The mean for the Student's age group is 10, placing the Student in low-average range.
31. Ms. XXXX administered the CELF-4 in accordance with the publisher's protocols.
32. The results of the CELF-4 test administered to the Student are valid and reliable.
33. The Student's score on the CELF-4 was in the low average range for her age group.
34. As part of the July 5, 2013 assessment, the Student was also evaluated using other data, including the following: the recording of a speech-language sample; procedural exercises; narrative exercises; and, evaluation of articulation, fluency and voice.

35. In the speech-language sample portion of the assessment, Ms. XXXX recorded and evaluated a five-minute conversation with the Student in which the Student discussed her interests, pets, and the Fourth of July. Ms. XXXX later evaluated the recorded segment on various bases, including Mean Length of Utterance (MLU), formulation and organization of verbal expression, disfluencies, pauses, complexity of utterances and other factors. Based on the recorded speech-language sample, the Student's conversational language was, at the time of testing, average for her age.
36. As part of the July 5, 2013 assessment, the Student was asked to perform "procedural" exercises by which she was required to explain how to make a peanut butter and jelly sandwich, brush her teeth, and plant a flower. The Student was able to understand the exercise and formulate appropriate verbal explanations, without prompts, for each task. The Student's performance on the procedural exercises was within the average range for her age.
37. As part of the July 5, 2013 assessment, the Student was asked to tell the story of "The Three Little Pigs." The Student was able to do so, providing characters, setting, problem, actions, and conclusion. The Student's performance on this section was within the average range for her age.
38. As part of the July 5, 2013 assessment, Ms. XXXX evaluated the Student's articulation, fluency, and voice, all of which were within normal limits.
39. At the time of testing, the Student's speech-language skills were within normal limits. The Student's expressive language skills, while weaker than other tested skills, were also within normal limits.

40. Based on her assessment, Ms. XXXX recommended that no speech-language special education intervention be initiated regarding the Student.
41. Ms. XXXX also recommended that the Student be encouraged to wait before verbal responses; that teachers be certain they have the Student's attention before presenting information orally; that repetition and/or paraphrasing be used in presenting directions or classroom materials; and that the Student be permitted to use graphic organizers to help her organize her thoughts.
42. The instruments and methodologies used in Ms. XXXX's assessment of the Student were technically sound, valid, and reliable.
43. On August 9, 2013, an evaluation and eligibility meeting was held at [School 1] with MCPS staff and the Parents. The IEP team found the Student eligible for special education services under the educational code of Autism.
44. At the August 9, 2013 evaluation and eligibility meeting, the Parents requested that MCPS provide and pay for an IEE for the Student in the area of speech-language pathology.
45. As of August 30, 2013, MCPS had not responded to the Parents' request for an IEE.
46. On August 30, 2013, the Parent contacted the [School 2], a private special education school in XXXX, inquiring about the possibility of [School 2] personnel performing a speech-language assessment on the Student. The Parent was informed that such an evaluation could be performed the following day.
47. On August 31, 2013, XXXX XXXX, M.A., a speech-language pathologist at the [School 2], met with the Student and performed a speech-language assessment (the [School 2] evaluation.)

48. Ms. XXXX performed a number of different tests on the Student, including portions of the Test of Auditory-Processing Skills – Third Edition (TAPS-3); the CELF-4; the Test of Problem Solving 2 (TOPS 2); the Gray Oral Reading Tests-Fifth Edition (GORT-5); the Test of Written Language-Fourth Edition (TOWL-4); the Test of Written Spelling-Fourth Edition (TWS-4); the Writing Process Test (WPT); and the Oral and Written Language Scales, Second Edition (OWLS-II).
49. Based on the results of the tests administered to the Student, Ms. XXXX concluded that the Student presented with weaknesses in the areas of auditory memory, language comprehension (both oral and written), language formulation and organization, as well as reading. Ms. XXXX recommended that the Student be placed in a full-time program for students with learning disabilities.
50. Ms. XXXX prepared a written report, which the Parents received on or around October 15, 2013.
51. On September 18, 2013, MCPS filed a due process complaint with OAH seeking a ruling that its speech and language assessment of the Student was appropriate, and that an IEE of the Student at public expense, as requested by the Student’s parents, was not warranted.
52. On October 7, 2013, at a TPHC, the date for the hearing on the merits was scheduled for October 22, 2013. At the TPHC, the Parents informed MCPS for the first time that they had contracted for a private speech-language assessment of the Student and that the assessment had been performed in August 2013.
53. On October 17, 2013, MCPS filed a “Motion to Find that the Office of Administrative Hearings has no Jurisdiction Over this Case Where There is no Longer a Case or

Controversy, Where the Case is Moot, Where the Parents Have Completed their Own Speech and Language Evaluation and Where the Parents Cannot Obtain any Relief from the Administrative Law Judge.” On October 18, 2013, prior to any action being taken on the motion, MCPS withdrew its due process request.

54. On November 11, 2013, MCPS filed its second complaint (MSDE-MONT-OT-13-XXXXX.) That matter was assigned to ALJ XXXX XXXX. On December 17, 2013, a TPHC was held with the Parents, MCPS counsel, and ALJ XXXX. At the TPHC, the hearing on the merits was scheduled for February 10 and 11, 2014 at MCPS’ offices in Rockville. In addition, at the TPHC, ALJ XXXX ordered the parties to engage in a settlement conference and such conference was scheduled for January 7, 2014 at OAH in Hunt Valley. On December 18, 2013, ALJ XXXX issued a Pre-Hearing Conference Report and Scheduling Order. In this document, ALJ XXXX incorrectly referred to the ordered settlement conference as a “mediation.” On the evening of January 6, 2014, the Parents left notice at OAH that they objected to participating in “mediation” and therefore would not attend the conference scheduled for the next day. The Parents did not inform MCPS of this decision. MCPS counsel arrived at OAH as scheduled on January 7, 2014, but the Parents were not present and therefore no settlement conference occurred. On January 15, 2014, ALJ XXXX issue a Corrected Pre-Hearing Conference Report and Scheduling Order. In that document, ALJ XXXX noted that, although he mistakenly used the work “mediation” in his Pre-Hearing Conference Report and Scheduling Order, it had been clear to all the parties that the event on January 7, 2014 was to be a settlement conference. Nevertheless, given the proximity of the pending hearing on the merits, he withdrew his order for a settlement conference.

55. On December 19, 2013, the Parents filed a Motion to Dismiss on the ground that, because MCPS did not provide them with a copy of its due process request at the time of filing in MSDE-MONT-OT-13-XXXXX on November 11, 2013, the case should be dismissed. On January 23, 2014, ALJ XXXX granted the Motion to Dismiss.
56. On January 31, 2014, MCPS filed the present complaint, MSDE-MONT-14-03195.
57. Prior to the [School 2] evaluation, the Parents did not inform MCPS that they intended to arrange for such an evaluation.
58. Subsequent to the [School 2] evaluation, the Parents did not inform MCPS of the evaluation until October 7, 2013.
59. On October 7, 2013, a pre-hearing telephone conference call was held with the Parents, MCPS counsel, and ALJ XXXX XXXX. In the course of that call, the Parents first informed MCPS of the evaluation at the [School 2].
60. On October 15, 2013, a settlement conference was held at MCPS headquarters in Rockville. At the settlement conference, the Parents provided MCPS with a copy of the speech-language assessment performed by XXXX XXXX.
61. On October 28, 2013, an IEP meeting was held concerning the Student. In attendance were the Parents; XXXX XXXX, M.S., a speech pathologist; the school principal; a general educator; a special educator; a guidance counselor; the school psychologist; and other MCPS personnel. At the meeting participants discussed the psychological, educational, audiological, and speech-language evaluations performed on the Student.
62. At the October 28, 2013 IEP meeting, the speech-language assessment performed by Ms. XXXX at the [School 2] was discussed in depth and considered by the IEP team.

63. At the October 28, 2013 IEP meeting, the IEP team concluded that the Student did not qualify for speech-language services.
64. In December 2012, while in the sixth grade at [School 1], a classmate told the Student that she would “beat up” the Student. Later that day, the classmate did attack the Student. The Student was subsequently suspended for not reporting the threat.
65. In March 2013, the Student brought to school a dart blow gun she had made using a sewing needle as a dart. The Student demonstrated the device on another student. The Student was suspended for bringing a weapon to school.
66. While suspended, the Student tried to run away from home by climbing out of her upper story window. While attempting to do so, the Student fell and broke her leg.
67. As a result of her broken leg, the Student received Home and Hospital Teaching (HHT) services from MCPS until sometime in February 2014.
68. In February 2014, the Parent began home-schooling the Student; at the time of the hearing in this matter, the Student was not enrolled in MCPS.

DISCUSSION

When a local education agency performs an evaluation of a student, the student’s parents have the right to seek an IEE as a procedural safeguard. 20 U.S.C.A. §1415(b)(1). However, the right to obtain an IEE at public expense is qualified. 34 C.F.R. §300.502 states the following in pertinent part:

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

The appropriateness of an evaluation, however, is not determined by the progress, or lack thereof, a student experiences after being evaluated, or whether everyone agrees with the findings and recommendations of an evaluation. Instead, regulations provide guidance in assessing whether an assessment is appropriate; 34 C.F.R. §300.304 requires that certain standards are met when assessing a child:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must –

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child ...

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

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

(c) Other evaluation procedures. Each public agency must ensure that –

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield

accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Similarly, COMAR 13A.05.01.05C provides:

C. Assessment Materials.

(1) A public agency shall ensure that testing and assessment materials and procedures used to assess a student's need for special education and related services are:

(a) Technically sound; and

(b) Provided and administered in the student's native language or other mode of communication, in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer.

Whether the MCPS testing was appropriate

In this case, the expert testimony of the MCPS witnesses establishes that Ms. XXXX possessed the proper education, training, licensing, and qualifications to administer the tests and to interpret their results, as required by 34 C.F.R. §300.304(c)(1)(iv). T. 42-45³, T. XXXX; MCPS Ex. 4. Indeed, the Parents did not object to the admission of either Ms. XXXX or Ms. XXXX as experts in speech-language pathology and did not dispute that that Ms. XXXX was qualified to administer and evaluate the testing performed by the Student. T. 44, 109.

Moreover, it is clear that that the testing adhered to the requirements of 34 C.F.R. §300.304. As required by 34 C.F.R. §300.304(b)(1) and (2), MCPS did not rely on any single measure or assessment, but rather used a variety of assessment tools and measures as part of the CASL and the CELF-4 testing.⁴ The testing included tools measuring expressive semantics, expressive and receptive syntax, comprehension of figurative language, and pragmatics. Testing included tools resulting in quantitative measurements as well as tools interpreted qualitatively, including procedural exercises, story-telling, articulation, fluency, and voice. MCPS Ex. 1. In her testimony, Ms. XXXX thoroughly explained each method she used in assessing the Student, why she chose each test and instrument, and the validity and reliability of each of the testing

³ References to the transcript of the hearing in this case shall be in the form "T. [page number]."

⁴ COMAR 13A.05.01.05B(2) mirrors the federal regulations and requires that a variety of assessment tools be used to assist the IEP team in gathering relevant functional, cognitive, developmental, behavioral, and physical information and information provided by the parent.

instruments.⁵ T. 46-90. MCPS also presented the testimony of Ms. XXXX's supervisor, XXXX XXXX, who testified that each of the assessments used by Ms. XXXX were recognized in the field as reliable and valid and that each was appropriate for use in evaluating the Student. She also testified that the results of Ms. XXXX's testing was accurate and reliable. T. 112-113.

In sum, both expert witnesses credibly testified that the testing administered on July 5, 2013 was sound, valid, reliable, and properly administered.⁶ Although the Parents had an opportunity to call their own experts (a third day of hearing had been set aside largely for that purpose), they declined to do so. As a result, the testimony of MCPS' expert witnesses stands un rebutted by other expert testimony. I conclude that the testing and evaluation provided by MCPS complied with the requirements of 20 U.S.C.A. §1415(b)(1), 34 C.F.R. §300.502, 34 C.F.R. §300.304, and COMAR 13A.05.01.05C.⁷

Issues Concerning Timeliness

The Parents argued that MCPS failed to, on a timely basis, either file for a due process hearing or agree to pay for an IEE. 34 C.F.R. § 300.502(b)(2) provides that the public agency

⁵ Maryland law also specifically requires that the testing and assessment materials and procedures used to assess a student's need for special education and related services are technically sound and that any standardized test administered to a student be valid for the specific purpose for which it is used. COMAR 13A.05.01.05C(1).

⁶ The Parent strenuously argued that Ms. XXXX's evaluation was defective because an earlier speech-language evaluation performed when the Student was four years old was not properly reviewed or considered by Ms. XXXX prior to testing. Although there was testimony that this evaluation was for some reason missing from MCPS records, the Parent, on the advice of Ms. XXXX, provided a copy of the report to Ms. XXXX just before her evaluation of the Student. T. 83, 136. Ms. XXXX reviewed the evaluation briefly and returned it to the Parent. T. 83-84. While the Parent criticizes Ms. XXXX for not fully considering the earlier assessment, the Parent, inexplicably, did not give a copy to Ms. XXXX to keep and review at length. In any event, there is no reason to believe that the earlier assessment would have resulted in a different outcome in the assessment performed by Ms. XXXX. Indeed, the Parent did not suggest a single measure, analysis, or conclusion that might have been different if Ms. XXXX had had more time to consider the earlier evaluation. As Ms. XXXX testified, although the earlier document might have been helpful in providing historical information, the purpose of Ms. XXXX's assessments was to look at the Student's abilities and skills "at this point in time" and that Ms. XXXX's evaluation did that. T. 158.

⁷ The Parent also argues that Ms. XXXX's report did not fully recount the Student's history in all areas, but rather merely directed the reader to other reports without further detail. Ms. XXXX testified that such incorporation by reference, so to speak, was an accepted and appropriate practice in the field. T. 159.

must take one of these two courses “without unnecessary delay.”⁸ While it is true that MCPS did not initially file for a due process hearing until September 18, 2013, the reality is that at no time after August 31, 2013, when the [School 2] evaluation was performed, was there an actual need for MCPS to act to provide an IEE. As of that date, an IEE had already been performed by a practitioner of the Parents’ choosing and the only remaining issue was the possibility of reimbursement. Although MCPS did not in fact file until September 18, 2013, the issues before me would be no different if it had filed on September 1, the day after the private testing. Once the private testing secured by the Parents had been performed, the Parents were certainly not injured by a delay in obtaining an IEE, even given the delay in MCPS filing for a hearing.

Given the fact that school was not in session during the summer and most teachers and other professional personnel were not working, I decline to conclude that the delay from August 9, 2013 to September 18, 2013 was an “unnecessary delay,” or, even it was, that such delay automatically entitles the Parents to reimbursement. As to the tangled procedural history of this case, I am not persuaded that its convolutions require reimbursement where the MCPS speech-language assessment provided appropriate testing and the question of reimbursement was submitted (even if imperfectly) to adjudication within a reasonable period, given the summer school schedule in effect at the time of the Parents’ request.

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,

⁸ The term “unnecessary delay” is not defined in the regulations.

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 present case, there is no evidence to support the view that the MCPS delay in requesting a due process hearing interfered with the provision of a FAPE to the Student. Indeed, at the time of the Parents' request for an IEE, the IEP process was well underway, and MCPS had provided a comprehensive speech-language assessment the month before. The Student did not suffer any educational loss or fail to receive a FAPE as a result of the delay.⁹

The October 28, 2013 IEP and MCPS' obligation to consider all test results

As discussed above, the critical question before me is not the *results* of the MCPS testing, but whether it was properly administered in accordance with the standards and requirements set forth above. Nevertheless, I note that the result of the MCPS testing established that the Student's speech-language skills were within the normal range. While the Student's abilities in the area of expressive language skill were weaker than in other areas, even in that area, the results were in the low normal range. The results are significant, given MCPS' obligation to consider both the results of its own testing and the [School 2] testing in developing an IEP.

When, on October 7, 2013, the Parents first informed MCPS of the [School 2] testing, MCPS was under no immediate obligation to take any action, as the test results were unknown (at least to MCPS). Once the [School 2] test results became known and available to MCPS (the

⁹ MCPS argued that the Parents' failure to inform MCPS of the [School 2] evaluation until October 7, 2013, as well as their failure to appear at the settlement conference on January 7, 2014, constitute obstruction of the educational process and should result in denial of reimbursement. *See, C.G. v. Five Town Community School District*, 588 F.Supp.2d 175, 182 (1st Cir. 2008); 20 U.S.C. §1412(a)(10)(C)(iii)(III) ("[t]he cost of reimbursement [for private placement] . . . may be reduced or denied . . . upon a finding of unreasonableness with respect to actions taken by the parents." Given that no specific provision of law requires parents to notify a local agency that an IEE has been performed, that the section cited above applies to private school placements and not IEEs, and that no specific harm occurred to MCPS as a result, I cannot conclude that the Parents' actions bar reimbursement.

Parents provided the written report to MCPS on October 15, 2013), its obligation was to review and consider the report. 34 C.F.R. 300.305 (a)(1)(i) provides that an IEP team must review “[e]valuations and information provided by the parents of the child”

Ms. XXXX testified extensively as to the results of both the XXXX evaluation and the [School 2] evaluation. She further testified that based on her review of both sets of testing, she recommended to the IEP team that the Student not be offered speech-language special education services. Ms. XXXX testified that she and the October 28, 2013 IEP team members specifically discussed the results of the [School 2] testing, stating, “At this point in time [*i.e.*, at the IEP meeting], we talked about the results of [the [School 2]] report in depth, [the Student’s] performance on it, we talked about the assessment measures and the results and we discussed the judgments and recommendations from the report as well.” T. 120. When asked on direct examination for the basis of her opinion and her recommendation to the IEP team that the Student did not qualify for speech-language services, she responded:

What’s the basis? Well, her performance, looking at her performance on the speech and language testing that was done for her, she did exhibit language skills within the average range. She did exhibit the ability to converse meaningfully, to use language functionally, and to use appropriate grammar and syntax and words to express her meaning. She did exhibit vocabulary skills within the average range as well as receptive and expressive language skills. And by that I mean her understanding of language and her ability to put thoughts into words and to express what she meant to say. Conversationally, she was able to talk through a process. She was able to speak to a topic that’s more a narrative language or giving a monologue. She was able to stay on topic, take turns in her conversation, have a back-and-forth conversation, if you will with Ms. XXXX.

T.at 127-128.

Ms. XXXX further testified that her review of the [School 2] evaluation did not change her view that the Student did not require the services of speech-language therapist “to address any expressive or receptive language needs.” T. 127. Ms. XXXX explained her disagreement

with the [School 2] recommendation and her own opinion and recommendation to the IEP team as follows:

In the public school setting, one of – in order to – criteria for speech pathology services in the public school setting, there are a couple of criteria for that. One is the identification of a speech or language impairment, and the other is educational impact of that impairment. And from the information that I reviewed on [the Student], her oral language skills, in my mind, were within the average range. There were – her language skills are weaker than other skills that she has, but a weakness does not necessarily rise to the level of an impairment. And so based on the information that I reviewed on her, her – she shows some language skills that are weak, but not necessarily in the clinically significant range, which would indicate impairment. So looking over the information, I was not seeing evidence of a speech and language impairment for [the Student].

T. at 129-130.

It is important to note that the applicable legal issue in this case does not require a determination that one set of testing was “better” or “worse” than the other. Indeed, it is to be expected that testing by two different professionals, conducted on different days, with some variation in the instruments employed, lasting differing amounts of time, and so on, would yield results that are not identical. Rather, as discussed above, the only question is whether the MCPS evaluation was performed appropriately and whether the [School 2] evaluation was considered by MCPS in the course of the IEP process.

In this case, the evidence is overwhelming that that the speech-language evaluation conducted by MCPS was proper, comprehensive, and in compliance with the applicable law and that the [School 2] evaluation was considered by the IEP team.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the MCPS speech-language evaluation of the Student was appropriate under the applicable

standards, and the Parent is not entitled to an IEE at public expense. 20 U.S.C.A. §1415(b)(1); 34 C.F.R. §§ 300.304, 300.502(b)(3); COMAR 13A.05.01.05C.

ORDER

I **ORDER** that the MCPS speech-language assessment of July 5, 2013 is appropriate and that the Parents' request for an IEE at public expense be denied.

April 4, 2014
Date Decision Mailed

David Hofstetter
Administrative Law Judge

DH/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.