

XXXX XXXX¹

v.

MONTGOMERY COUNTY PUBLIC
SCHOOLS

* BEFORE MICHAEL D. CARLIS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-MONT-OT-13-28844

* * * * *

DECISION

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STATEMENT OF THE CASE

On July 26, 2013, XXXX XXXX and XXXX XXXX (Parents),² on behalf of their son, XXXX (Student), who was born on XXXX, 2003, filed a Due Process Complaint (Complaint) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a)-(d) (2013); Md. Code Ann., Educ. § 8-413(e)-(h) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C. The Parents requested reimbursement from the Montgomery County Public Schools (MCPS) for the secular portion of the Student's education at [School 1] ([School 1]), a special education program that serves the XXXX community and is located inside the [School 2].

¹ The Student's name is spelled XXXX, XXXX, and XXXX in the record, which includes two applications that are signed by at least one parent. In one application, the Student's name is spelled XXXX; in the other, XXXX. In the Request for Due Process, the Student's name initially is spelled "XXXX 'XXXX' XXXX" and, then, XXXX throughout the narrative. For this reason, I have spelled the Student's name as XXXX.

² Mrs. XXXX is also referred to in the record as XXXX XXXX. Because she is referred to as XXXX XXXX in the Request for Due Process, I have spelled her name that way.

The Complaint avers that the Student “has very important cultural needs that must be taken into account when designing an appropriate learning environment.” According to the Parents, their XXXX community’s customs related to dress, food, social activity, and religious adherence would make the Student’s “social interaction [with his peers in the public school] difficult” and would prevent his participation “in many parts” of the public school curriculum. The Parents allege that “MCPS” . . . proposed placement for [the Student] . . . is not appropriate for his religious and cultural needs.”

On November 13, 14, 15, 20, and 21, 2013, I held a due process hearing at the administration building of the MCPS in Rockville, Maryland.³ The contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Office of Administrative Hearings Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov’t §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13A.05.01.15C; and COMAR 28.02.01. Michael J. Eig, Esquire, and Michael J. Eig and Associates, P.C., represented the Parents. Jeffrey A. Krew, Esquire, and Jeffrey A. Krew, LLC, represented the MCPS.

ISSUES

The issues are as follows:

1. Whether the MCPS failed to provide the Student with a Free Appropriate Public Education (FAPE) for the 2012-2013 school year when it proposed an individualized educational program (IEP) -- which was to be implemented using a fundamental life skills curriculum in a self-

³ On August 19, 2013, the parties participated in a resolution meeting, but were unable to resolve their dispute. On September 13, 2013, I convened a telephone pre-hearing conference with the parties’ attorneys. The dates for the due process hearing were decided at this conference according to the availability of the attorneys and witnesses. Under COMAR 13A.05.01.15C(15), 34 C.F.R. § 300.515(a) (2013), 34 C.F.R. § 300.510(b)(2) (2013), and 34 C.F.R. § 300.510(c)(2) (2013), August 19, 2013, triggered the forty-five-day limit for issuing the due process decision. As discussed above, however, the hearing was held for five days beginning on November 13, 2013, and ending on November 21, 2013, which was after the forty-five-day period. Furthermore, the record remained opened after November 21, 2013, for the parties to submit written closing arguments according to a schedule that ended on December 24, 2013. As a result, the parties agreed that my decision would be issued no later than thirty days after that date; that is, no later than January 23, 2014.

contained public elementary school -- that did not address teaching the Student the religion and culture of his XXXX community; and if so,

2. Whether the Parents' unilateral placement of the Student at [School 1] provided him with a proper education for the 2012-2013 school year; and if so,

3. Whether the Parents' request for reimbursement from the MCPS for seventy percent of the Student's tuition and costs at [School 1] for what the Parents characterize as the secular part of the Student's Formal Educational Plan (FEP) at [School 1] is fair and equitable and does not violate the First Amendment of the United States Constitution.

SUMMARY OF THE EVIDENCE

Exhibits

The following were admitted for the Parents:⁴

- Parents 1: Request for Due Process, dated July 26, 2013;
- Parents 2: MCPS Psychological Assessment, dated April 27, 2009;
- Parents 3: [School 1] Application for Admission, dated April 29, 2010;
- Parents 4: [School 1] Progress Notes, dated June 3, 2011;
- Parents 5: Annual Review Meeting Noted, dated June 7, 2011;
- Parents 6: [School 1] Educational Goals and Objectives progress notes, dated June 2011;
- Parents 7: [School 1] Report Card for June 2011;
- Parents 8: [School 1] Weekly Update, ending September 2, 2011;
- Parents 9: [School 1] Weekly Update, ending September 23, 2011;
- Parents 10: Email, dated October 5, 2011;
- Parents 11: Email, dated November 22, 2011;
- Parents 12: [School 1] FEP for the school year 2011-2012;
- Parents 13: Update, dated May 16, 2012;
- Parents 14: [The Student's] Annual Review Meeting, dated June 5, 2012;
- Parents 15: [School 1] FEP, dated June 5, 2012;
- Parents 16: Present Level of Performance in Occupational Therapy, dated June 15, 2012;
- Parents 17: Educational Goals and Objectives, dated June 2012;
- Parents 18: Report Card, Grade 02;
- Parents 19: Report of Psychologist-Initial Evaluation, dated August 13, 2012;
- Parents 20: [School 1] Periodic Update, dated October 10-16, 2012;
- Parents 21: Occupational Therapy Evaluation, dated November 21, 2012;
- Parents 22: IEP, dated December 5, 2012;
- Parents 23: Addendum to IEP team meeting, dated January 9, 2013;
- Parents 24: Update, dated March 4, 2013;

⁴ The Parents' exhibits were pre-labeled as XXXX 1-56.

Parents 25: Email, dated April 4, 2013;
 Parents 26: Update, dated April 5, 2013;
 Parents 27: Update, dated May 13, 2013;
 Parents 28: [School 1] Daily Teachers' Report for the 2012-2013 school year;
 Parents 29: [School 1] FEP for the 2013-2014 school year;
 Parents 30: [School 1] Report Card for grade 3;
 Parents 31: [School 1] Progress Updates for the 2012-2013 school year;
 Parents 32: Letter, dated June 26, 2013, with transmittal attachments;
 Parents 33: Letter, dated July 29, 2013;
 Parents 34: Letter, dated August 6, 2013;
 Parents 35: Letter, dated August 29, 2013;
 Parents 36: Due Process – Resolution Meeting – Tracking Form;
 Parents 37: Questions for MCPS at [the Student's] Resolution Session;
 Parents 38: Letter, dated August 21, 2013;
 Parents 39: Email from XXXX XXXX, dated August 21, 2013, with attached letter;
 Parents 40: Letter to Parents, dated August 23, 2013;
 Parents 41: Letter to Parents, dated August 30, 2013;
 Parents 42: Update on the Student's progress, dated September 17, 2013;
 Parents 43: Letter to Parents, dated September 17, 2013;
 Parents 44: Letter to Parents, dated October 4, 2013;
 Parents 45: Letter to Parents, dated October 18, 2013;
 Parents 46: Letter to Parents, dated October 25, 2013;
 Parents 47: Letter to Parents, dated October 31, 2013;
 Parents 48: Teachers' reports for the 2012-2013 school year;
 Parents 49: Resume of XXXX XXXX;
 Parents 50: Resume of XXXX XXXX;
 Parents 51: Resume of XXXX XXXX;
 Parents 52: Resume of XXXX XXXX;
 Parents 53: Resume of XXXX XXXX;
 Parents 54: Board of Education of Montgomery County minutes of a meeting on July 2, 2001;
 Parents 55: School schedule for the Student; and
 Parents 56: [School 1]'s Helping XXXX Children Reach New Heights.

The following were admitted for the MCPS:⁵

MCPS 1: Psychological Evaluation, dated April 27, 2009;
 MCPS 2: Educational Assessment Report, dated April 30, 2009;
 MCPS 3: Classroom Observation, dated January 23, 2012;
 MCPS 4: Elementary Teacher Report for IEP, return date of February 1, 2012;
 MCPS 4A: Email from XXXX XXXX, dated March 23, 2012, with attachment;
 MCPS 5: Elementary Teacher Report for IEP, return date of May 25, 2012;
 MCPS 6: [School 1] FEP, dated June 2012;
 MCPS 7: Re-evaluation Planning Report, dated June 6, 2012;
 MCPS 7A: Registration Application, signed June 26, 2012;
 MCPS 8: Report of Psychologist-Initial Evaluation, dated August 10, 2012;
 MCPS 9: Report of Speech-Language Assessment, dated August 31, 2012;

⁵ The MCPS' exhibits were pre-labeled Bd. 1-22.

MCPS 10: Elementary Teacher Report, dated September 4, 2012;
MCPS 11: Educational Assessment, dated September 4, 2012;
MCPS 12: Report of IEP meeting on September 5, 2012;
MCPS 13: Addendum Report/Classroom Observation occurring on August 30, 2012;
MCPS 14: Report of Psychologist, dated September 25, 2012;
MCPS 15: Elementary Teacher Report, dated November 2, 2012;
MCPS 15A: Objection to admissibility sustained;
MCPS 16: Occupational Therapy Evaluation, dated November 21, 2012;
MCPS 17: Report of IEP meeting on January 9, 2013, with attachment;
MCPS 17B: [School 1] Financial Statement, dated May 13, 2012;
MCPS 18: Request for Mediation/Due Process Hearing;
MCPS 19: Letter, dated August 12, 2013;
MCPS 19A: [School 1] Financial Statement, dated August 13, 2013;
MCPS 20: Resume of XXXX XXXX;
MCPS 21: Resume of XXXX XXXX; and
MCPS 22: Resume of XXXX XXXX, Ph.D.

The following were admitted as OAH exhibits:

OAH 1: The Maryland Common Core Curriculum and Students with Disabilities informational sheet;
OAH 2: Top Ten Things Parents Need to Know about the Common Core State Standards;
OAH 3: COMAR 13A.04.04.01-.07; and
OAH 4: [School 3] Spanish Immersion Program.

Testimony

The following testified for the Parents:

1. XXXX XXXX, the father of the Student;
2. XXXX XXXX, a retiree from employment as an attorney for the federal government, accepted as an expert in XXXX;
3. XXXX XXXX, Director of XXXX Education Group, accepted as an expert in special education;
4. XXXX XXXX, Assistant Director/Director of Advocacy at the XXXX Education Group;
5. XXXX XXXX, Program Supervisor at [School 4], a private special education school, accepted as an expert in special education; and
6. XXXX XXXX, Division Chair for the lower and middle schools at [School 1], accepted as an expert in the teaching and supervision of special education in a XXXX day school.

The following testified for the MCPS:

1. XXXX XXXX, Ph.D., Psychologist for the MCPS, accepted as an expert in psychology;
2. XXXX XXXX, Special Education Instructional Specialist for the MCPS, accepted as an expert in special education; and
3. XXXX XXXX, Instructional Specialist in Special Education for the MCPS, accepted as an expert in special education with an emphasis on culturally and linguistically diverse students with disabilities.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. The Student was born on XXXX, 2003. He lives with the Parents and nine siblings in Montgomery County, Maryland. The family is part of the XXXX community. All the school-age children attend private XXXX schools.
2. The way of life of an XXXX is much different from that of the general population. The XXXX Bible and XXXX law and custom govern how an XXXX dresses, eats, prays, works, what holidays are celebrated, and almost every aspect of life, including social interaction and understanding and speaking XXXX.
3. The Student was diagnosed with [Disorder] at birth. He is eligible for special education services under federal and State law as a child with an intellectual disability. For some period of time, but only before kindergarten, the Student received special education services from MCPS. Since September 2009, he has attended [School 1], a special education program that serves the XXXX community and is located inside the [School 2].
4. Beginning on June 6, 2012, the parties met to discuss an IEP for the Student for his education during the 2012-2013 school year in the MCPS. The purpose of the initial meeting in June 2012 was to reevaluate the Student's current levels of academic achievement and educational performance. The parties agreed at this meeting to obtain updated assessments of the Student in education, speech and language pathology, and psychology.

5. The parties next met on September 5, 2012, and reviewed the results from some of the assessments. They agreed that intellectual disability was the Student's correct diagnosis and that an IEP should include goals in academics and social-adaptive skills. At this meeting, the parties agreed to obtain an occupational therapy (OT) assessment.
6. On June 20, 2012, Dr. XXXX conducted a psychological assessment of the Student. It showed significantly below average scores in all areas of cognitive functioning. Most of the Student's test scores were at or below the first percentile. This assessment was essentially the same as an assessment done by Dr. XXXX on March 30, 2009.
7. The Student's most recent educational assessments in February-March 2009 and July-August 2012 showed significantly below average performance in all academic areas in 2009 and weaknesses in all areas in 2012 on an instrument designed to test children functioning below the developmental age of 7. In all the academic and visual-motor areas, his scores in 2012 were aligned with children of kindergarten age, with some below and some at the first-grade level.
8. The Student is able to learn despite his severe intellectual disability, but he needs constant repetition and consistency.
9. On December 5, 2012, the parties met for a third time at an IEP team meeting. They reviewed the results of the assessments done by the speech and language pathologist and the occupational therapist (OT). The speech and language pathologist reported weaknesses in expressive grammar, vocabulary, syntax, and reported speech and language difficulties in practical environments. The OT reported decreased muscle tone and strength that impacted the Student's ability to manage classroom materials and personal belongings. At this meeting, the parties began to develop an IEP, but did not complete it.
10. The final IEP meeting was on January 9, 2013. A proposed IEP was completed, but it was rejected by the Parents. The Parents rejected the IEP because it does not provide functional

instruction to prepare the Student for life in the XXXX community. The Parents requested at the IEP meetings incorporation of goals and objectives designed to teach the Student about the laws and customs of XXXX. This was rejected by the MCPS as not part of the curriculum, too specific, religious, or not compatible with the Student's present levels.

11. The proposed IEP includes a description of the Student's present levels of academic achievement and functional performance across the standard range of academic areas; goals and objectives in sixteen separate practical and functional areas; and the provision of special education services for twenty-eight hours and forty-five minutes per week, occupational therapy for one hour per week, and speech and language therapy for one hour per week, with four hours and fifteen minutes per week of exposure to non-disabled peers. The Student's placement was in the fundamental life skills curriculum in a self-contained classroom at [School 5].

12. On July 26, 2013, the Parents filed a request for a due process hearing with the MCPS.

DISCUSSION

General Law

The IDEA provides federal assistance to state and local educational agencies for the education of children with disabilities. 20 U.S.C.A. §§ 1400-1487 (2010). The purposes of the IDEA are:

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities, coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

Id. § 1400(d).⁶

To receive federal assistance, states must provide special education services that are designed to meet the unique and individual needs of disabled children. *Id.* § 1412. States must also provide related services, as needed, to allow eligible children to obtain educational benefit from special education services. *Id.* Those requirements fulfill a state’s obligation to provide a FAPE to children with disabilities. FAPE is defined as follows:

The term “free appropriate public education” means special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Id. § 1401(9). *See also* 34 C.F.R. § 300.17 (2013) (defining FAPE similarly).

A two-pronged analysis is used to resolve due process challenges to a local educational agency’s compliance with the IDEA: “First, has the State complied with the procedures set forth in the Act? And second, is the [IEP]⁷ developed through the Act’s procedures reasonably

⁶ Maryland’s General Assembly and the Department of Education have enacted laws and promulgated regulations implementing the IDEA in Maryland. Md. Code Ann., Educ. §§ 8-401-17 (2008 & Supp. 2013); COMAR 13A.05.01.

⁷ An IEP is “a written statement for a child with a disability that is developed, reviewed, and revised in accordance with §§ 300.320 through 300.324.” 34 C.F.R. § 300.22 (2013); *see also* COMAR 13A.05.01.03B(34).

calculated to enable the child to receive educational benefits?” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).

A FAPE is provided by personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction. *Rowley*, 458 U.S. 176. In *Rowley*, the Supreme Court explained as follows:

Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. ... We therefore conclude that the basic ‘floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Id. 200-201; *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990).

Summary of the Evidence

The parties do not dispute the material facts. The general or background facts are that the Student was born on XXXX, 2003; he was ten years old when the Complaint was filed. He lives with the Parents and his nine siblings in an XXXX “enclave” in Montgomery County. All his school age siblings attend private XXXX schools because the Parents believe their children “should be educated for an XXXX [XXXX] lifestyle.”

The Student is the Parents’ only child with significant educational disabilities. His eligibility for services under the IDEA is based on an intellectual disability, formerly called mental retardation in Maryland.⁸ The Student received special education services from the MCPS, but only for pre-kindergarten. He has been enrolled at [School 1] since September 2009.

The Student’s most recent psychological assessments in March 2009 and June 2012 resulted in a similar disability profile: “[S]ignificant deficits that create barriers to learning,”

⁸ The Student is also diagnosed with [Disorder].

with general cognitive abilities at or below the first percentile and “significantly below average social-adaptive skills.” On a non-verbal test of intelligence, the results were “very poor, meaning that it’s the lowest classification you can get in terms of classifying where the child is functioning.” Nonetheless, the Student “can learn” and “there’s nothing about his profile that says he cannot learn.”

The Student’s most recent educational assessments in February-March 2009 and July-August 2012 showed “significantly below average” performance in all academic areas in 2009 and “weaknesses” in all areas in 2012 on an instrument designed to test children “functioning below the developmental age of 7.” In all the academic and visual-motor areas, his scores in 2012 were “aligned with” children of kindergarten age, with some below and some at the first-grade level.

The parties also do not dispute the facts related to the IEP process that culminated in the Parents’ rejection of the proposed IEP for the 2012-2013 school year. The IEP meetings began on June 6, 2012. The attendees included Ms. XXXX, Ms. XXXX, and the Parents, among others. The purpose of the meeting was to re-evaluate the Student’s current levels of academic achievement and educational performance. The parties agreed that additional assessment information was needed, and the Parents authorized the MCPS to obtain assessments in the areas of education, speech and language, and psychology.

The parties next met on September 5, 2012, to review the results of the assessments. The attendees included Ms. XXXX, Ms. XXXX, Dr. XXXX, Mrs. XXXX, Ms. XXXX, and Ms. XXXX, among others. The parties agreed intellectual disability was the Student’s correct diagnosis. They further agreed that an educational program should contain goals in the areas of academics and social-adaptive skills and that the Student’s occupational therapy needs should be explored. Mrs. XXXX authorized the MCPS to obtain an occupational therapy assessment.

The OT and speech and language assessments were completed before the next IEP meeting in December 2012. The speech and language pathologist (SLP) evaluated the Student on August 29, 2012. The SLP reported weaknesses in the Student's expressive grammar and vocabulary, syntax, articulation, and speech-language difficulties in practical environments that "negatively impact educational performance in understanding verbal directions, expressing ideas verbally in class, and reading comprehension." The speech and language pathologist recommended the following classroom accommodations:

- Provide verbal cues when possible to increase comprehension of oral language.
- Have [the Student] verbally repeat important directions/information.
- Encourage [the Student] to verbalize whenever appropriate.
- Provide step-by-step directions, repeating when necessary.
- Rephrase and repeat directions when [the Student] appears to misunderstand.
- Model clear speech when [the Student] does not articulate.
- Praise [the Student] when he uses clear speech.

On November 21, 2012, the occupational therapist evaluated the Student's fine motor skills. Although the Student refused to finish the testing, the therapist diagnosed decreased muscle tone or strength that adversely affected the Student's ability to manage classroom materials and personal belongings, and she recommended one hour of physical therapy per week.

The next IEP meeting was on December 5, 2012. The attendees included Ms. XXXX, Mrs. XXXX, Ms. XXXX, and Ms. XXXX, among possibly others. At this meeting, the IEP team began to focus on the development of an IEP. The Student's present levels of functioning in oral language, mathematics, written language, reading, fundamental life skills, social/emotional skills, and fine motor coordination were identified. In the area of fundamental life skills, the draft IEP records the following:

Strengths: can say his first and last name, can navigate safely from one place to the next within a school building, knows some community signs (bathroom, exit, stop), washing his hands for personal cleanliness[.] Weaknesses: personal information, address, telephone number, managing his clothes.

The draft IEP also lists several instructional and testing accommodations and goals and objectives in written language, mathematics, fine motor skills, reading, self-advocacy behavior, community participation, and speech and language. The goal in the area of community participation reads as follows:

Given whole group and small group instruction about a preplanned community experience, teacher modeling, verbal prompts, visual clues, picture/graphics incorporated into instruction, opportunities to rehearse/practice, word banks/sentence starters, [the Student] will positively participate in a community experience and complete the assigned tasks related to the experience.

The parties were unable to finalize the Student's IEP at this meeting. The Parents were concerned about the emerging content of the IEP. Their concerns included "identifying, understanding/distinguishing between, and determining XXXX snacks/foods." The notes from this IEP also indicate:

The family believes that [the Student's] functional life skill needs are different [from] a non-XXXX student's functional life skill needs and these are non-negotiable items and these are necessary for him to function independently in his specific community. He needs to know which hobbies/interests can be pursued on religious days, identifying and applying XXXX symbols, knowing when to say appropriate blessings at the appropriate time, [and] applying rituals and blessings at the appropriate times.

The IEP was finalized on January 9, 2013. The attendees at this meeting included Ms. XXXX, Ms. XXXX, the speech and language pathologist, the occupational therapist, Mrs. XXXX, and Ms. XXXX. Most of the decisions reached at the December 2012 IEP meeting were incorporated into the proposed IEP. The descriptions of the Student's present levels of academic

achievement and functional performance in each subject matter area are essentially the same as those listed on the December 2012 IEP.⁹

The final IEP includes a list and description of supplemental aides, services, and program modifications and supports that were not part of the December IEP. These include the daily use by the special education teacher of the following: (i) manipulatives, (ii) frequent and/or immediate feedback, (iii) picture schedule, (iv) breaking tasks into simpler steps, (v) fading verbal/visual prompts/cues, (vi) exemplars of student work, (vii) opportunities for re-teaching and reassessment, (viii) repeated/rephrased directions, (ix) pictorial word bank/sentence starters, (x) wait time for the formulation of oral responses, (xi) pictures to support reading passages when possible, (xii) provide for home-school communication system, (xiii) reinforcement of positive behavior, and (xiv) positive/concrete reinforcers.

The final IEP also contains goals and objectives in the following eleven areas: (i) written language, (ii) mathematics, (iii) functional mathematics, (iv) fine motor coordination, (v) reading, (vi) functional reading, (vii) self-advocacy, (viii) functional writing, (ix) behavior, (x) community participation, and (xi) speech and language. In regard to the mathematics goals, the objectives include, among others, telling time in intervals of half hour and hour using an analog clock and identifying coins. In the area of functional reading, goals include learning to identify increasingly larger number of community/safety signs. And, in the area of community participation, the objectives include: (i) identify a variety of predetermined items from a given list, (ii) explain/share ideas about the community experience, (iii) complete the instructional related to the community experience, and (iv) identify predetermined community signs.

The final IEP also provides for placement in a self-contained, special education program at [School 5] where the Student would receive instruction in the fundamental life skills

⁹ The January 2013 IEP lists, for the first time, “managing when his face is dirty or when his nose is running” as a weakness in the fundamental life skills area.

curriculum and receive a high school certificate of completion. The IEP provides for twenty three hours and forty-five minutes of special education services outside the general education program, five hours of special education services in the general education program, one hour per week of both occupational therapy and speech and language therapy.

The Parents rejected the final IEP because MCPS refused to incorporate goals and objectives related to the Student's XXXX culture as part of the Student's educational plan. The final IEP summarized the Parents' disagreements as follows:

The family believes that the community participation goal is tricky as [the Student] should be [sic] be expected to participate in a general [c]ommunity outing if it does not align with his XXXX rules.¹⁰ For example, if they are expected to order food at a restaurant, [the Student] may not be able to eat at that restaurant, nor would he ever go to a restaurant that was not XXXX.

The final IEP also lists the Parents' "concerns/request regarding [the Student's] proposed placement in MCPS" as follows:

1. I feel that the IEP focuses on preparing [the Student] to "fit in" with the general community instead of the one he will live in. [The Student] needs to learn skills that are relevant to his "real world."
2. He is not capable of generalizing what he learns at school to home and vice-versa. [H]e needs the same information taught in beoth [sic] settings.
3. The teachers he will have at school will not have in-depth knowledge of his cultural and religious practices.
4. [The Student] will never be able to cook at an MCPS location, which is included in the FLS learning domain.
5. In the community, he will be exposed to things that go against his cultural beliefs.
6. [The Student's] reading needs are different in order to function indepdently [sic] in his community. He needs to be able to identify which foods he will be able to eat (which is stated in the curriculum) and which foods he cannot.
7. [The Student] needs to follow certain cultural routines and will not have the opportunity to do those practices in the public school.
8. The behaviours [sic] expected of a non-XXXX person are vastly different from those in the XXXX community.
9. Without an educator who understands the cultural needs of [the Student], undue burden on the parents to know how to meet his instruct-

¹⁰ It is clear from the context, and the entire due process hearing, that this should read: "should **not** be expected to participate"

tional needs in order to attain the independent living skills he needs.

The Student continues to attend [School 1] where he receives a proper education.

DOES THE MCPS' IEP FOR THE 2012-2013 SCHOOL YEAR PROVIDE THE STUDENT A FAPE?

In a case like this -- where parents have rejected the public school's proposed IEP, the child is attending a private school, and parents request public reimbursement for tuition -- an administrative law judge must first determine whether the public school's proposed IEP offered the child a FAPE. *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985). In addition, because the Parents filed the due process complaint, they have the burden, by a preponderance of the evidence, to prove the inadequacy of the proposed IEP. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

The Parents argue that the IEP does not provide FAPE because it fails to “address the culture and literacy that [the Student] needs to learn despite the overt reality that the challenges he faces in acquiring those skills ‘result from [his] disability.’” The Parents’ argument flows from what they see as a confluence of (i) the Student’s intellectual disability, (ii) the Student’s membership in the XXXX community, and (iii) the nature of the MCPS’ obligations under the IDEA.

The Student’s disability

The parties agree that the Student is eligible for special education and related services under the IDEA based on a diagnosis of intellectual disability. Mr. XXXX testified that the Student has a “significant” intellectual disability, although he is capable of learning with an “intensive, repetitive, and structured kind of program.” Tr. 234. Dr. XXXX agrees that the Student “can learn,” but his cognitive functioning is “extremely low,” and he has “a pervasive weakness in significant areas, in major areas of the learning domain, consisting of visual processing, consisting of verbal skills as well as processing speed as well as language

development.” Tr. 499, 500. Ms. XXXX agrees the Student needs structure and repetition to learn and acquire skills. Tr. 657. Ms. XXXX also agrees the Student needs a lot of structure, repetition, and reinforcement to learn. Tr. 843.

The parties disagree about whether the Student can generalize what he learns from one setting to a different setting. The Parents’ witnesses do not think he can. Mr. XXXX testified that the Student “needs consistency between home and school” and “needs to be part of a group where it’s consistent, where other kids are doing the same things where it’s the same thing that’s done at home and in school, so, it’s all -- all part of one structured, consistent package.” Tr. 224. Ms. XXXX testified that “once [the Student] has a skill, it’s critical that it be developed in a variety of areas across a variety of settings.” Tr. 365. Dr. XXXX, on the other hand, testified that the Student “can generalize,” although “it might take him longer.” Tr. 544.

The Student’s XXXX community

There is no dispute that the Student is being raised in the XXXX community. The Parents’ primary complaint is that the IEP does not address what he needs to learn to be a functional member of that community. As described below, the XXXX Bible, laws, and customs control the manner in which an XXXX eats, dresses, prays, and generally conducts him- or herself.¹¹

All of the Parents’ school-age children attend private XXXX schools that “teach the XXXX way of life.” Tr. 29. XXXX XXXX explained that it is important that the Student learn to be an XXXX because “that is the life style we live” and “believe in very strongly.” Tr. 34. Furthermore, XXXX XXXX testified, “[T]here would be no greater pleasure for a parent that is

¹¹ The record includes frequent references to the difference between the religion of XXXX and the culture of XXXX. This often occurred in the context of questions or testimony about what is missing from the MCPS’ proposed IEP and in the Parents’ closing arguments. XXXX XXXX, the only witness accepted as an expert in XXXX, testified, however, that there is no significant difference between the religion and culture of XXXX. Tr. 167.

like us to see our children go in pretty much the same way that we go . . . [and] we think it is also right.”

XXXX XXXX explained that XXXX “is a culture that observes XXXX law as reflected in the Bible and the XXXX and in the codes of XXXX law, which -- which regulates and affect XXXX people’s lives in its totality.”¹² Tr. 167. XXXX must “follow XXXX law in all aspects of their lives” (Tr. 175) and “orthodox religious people believe they are required to train their children to follow the same path.” Tr. 168. XXXX XXXX testified about difficulties a public school would have in educating a child to be an XXXX:

The -- the practical difficulties are that the public school would have to accommodate the many differences in life style that XXXX children are subject to, like food, like holidays, national holidays, Christian holidays, its effect on music. The -- the effect on the interaction of kids with each other, social interaction, of going to parties, visiting each other’s homes is beset with a lot of difficulties because of the numerous restrictions that XXXX kids -- XXXX kids live by.

Tr. 190.

XXXX XXXX testified that it is “extremely important” for an XXXX to follow the rules of XXXX and explained that XXXX is “system of restrictions and prohibitions on what an XXXX is allowed to eat.” Tr. 171, 176. XXXX XXXX testified that “XXXX food means food that has been certified by a XXXX,” and certification means “[the food] meets the requirement that XXXX lists for XXXX food.” Tr. 35.

XXXX XXXX testified that the essential rules of XXXX are that XXXX foods and XXXX foods must be kept separate, and all foods must be distinguished as XXXX or not XXXX. Tr. 37. XXXX symbols -- there are dozens of them -- distinguish between XXXX and non-XXXX foods. Tr. 39. The rule of separation prohibits the mixing of XXXX foods and XXXX foods; they cannot be cooked using the same pots and pans or eaten using the same plates

¹² See *supra* note 11

and utensils or together. XXXX XXXX testified that his family must wait “five hours” between eating a XXXX and XXXX meal. Tr. 56. Furthermore, there are XXXX, or blessings, an XXXX must learn to say over food.

XXXX XXXX testified about how a public school program might harm the Student by teaching him incorrectly:

A basic component in training a child for what life will be, it is very important for [the Student] to know, for independent living, how to cook, how to take care of himself.

Since [the Student] has a lot of rules about cooking, if he weren’t taught those rules, it wouldn’t be helping him at all and would not be preparing him for his way of life. In fact much of what he is taught there [MCPS] we would probably have to un-teach him before we would teach him the way that he would be doing it.

Just as several examples, we have already spoken about XXXX and not XXXX food. As a nice small example, an XXXX, before he uses an egg, checks the egg to make sure there are no blood spots in it. If there is a blood spot in the egg, the egg is not considered to be XXXX. If [the Student] is not taught to do that, then he is cooking in an improper way, according to XXXX law, just an example.¹³

Tr. 53.

The Student also dresses differently from non-XXXX. He wears a XXXX, or “XXXX,” which is “a demonstration of respect for God.” Tr. 45, 178. He also wears XXXX, which is a XXXX. Tr. 45, 175. “It is very discernable, when you see him, that he is not your average kid, but that he subscribes to some religion.” Tr. 46.

In addition, XXXX observe the XXXX, from XXXX to forty-five minutes after XXXX. Tr. 184. XXXX is a day of rest during which XXXX law prohibits thirty-nine categories of labor, including cooking, traveling in a motorized vehicle, and the operation of any electrical appliance. Tr. 184-85. Furthermore, explained XXXX XXXX, XXXX do not carry anything

¹³ XXXX XXXX also testified that he saw the Student eat a piece of a non-XXXX cupcake during a birthday party when the Student attended a pre-kindergarten classroom at MCPS. XXXX XXXX testified that he was not upset at the Student for what he had done, but “in terms of who he is and what we would like him to be, that’s, for us, a horrifying experience,” because “a basic component of XXXX is eating XXXX food.” Tr. 43.

outside the XXXX on Saturdays. An XXXX is a demarcated boundary around an XXXX community within which XXXX may carry things on Saturdays. Tr. 186. XXXX XXXX testified that the Student needs to be educated about the XXXX:

I would never expect him to be able to build an XXXX. I would never expect him to be able to check an XXXX to make sure if it is XXXX permissible, which means that it is okay under XXXX law. That I would never expect him to do. But generally, XXXX doesn't carry where there is no XXXX, that I would. And I would expect him to ask, is the XXXX serviceable this weekend? That is a question that every XXXX child and young adult would ask.

Tr. 55.

XXXX XXXX also testified that it is important for the Student to learn the XXXX calendar:

It is important for him [the Student] to realize that there is a holiday coming up. We prepare for a holiday before a holiday comes, we just don't allow it to happen to us. We make sure that we are ready for it. We are schooled in what the holiday is about and try to get into the mindset of that holiday, so obviously you would need to know where we are in the calendar and what is coming next. It's important.

Tr. 58.

The following exchange between Mr. Eig and XXXX XXXX took place about holidays:

Q. Speaking of holidays, I assume [the Student] observes holidays?

A. Yes.

Q. What holidays does he observe?

A. XXXX holidays.

Q. Are there a lot of them?

A. Yes.

Q. Especially in September?

A. Yes.

Q. When you went to observe in Montgomery County at [[School 5]], did you see any reference to holidays in their curriculum in any way?

A. Yes, I did. I believe it was [[School 5]]. We saw that one of the main parts, one of the main components of the class there was to train the children in the use of the calendar. So the way that they would differentiate the months, there was a picture under every month. So Halloween for November and a tree for December, et cetera.

Q. Is that a problem?

A. That's disturbing for us, yes.

Q. Because?

A. [The Student] does not celebrate those holidays and some of those holidays, we would have a very difficult time explaining to him why we do or don't celebrate those holidays.

Q. Such as?

A. Such as Halloween.

Q. Because?

A. We don't celebrate Halloween because Halloween is a -- it's not a XXXX holiday, it's a Pagan holiday and we don't celebrate that holiday. So to explain to [the Student] why everybody else in his classroom is celebrating that and we aren't would be difficult for us. Also, [the Student] has very limited hard drive space, should we say, and we didn't want to use up that space with something that would be extraneous to him, at best.

Tr. 50-51.

XXXX XXXX also testified that the "ultimate source, of course, [of things one has to learn to be a good, observant XXXX] is the Bible." Tr. 59. XXXX XXXX also testified that it is "essential" that the Student learn to read XXXX on "two levels." One level is "an emotional level" related to the Student being able to read a "few verses in the XXXX" at his XXXX so that he "feels like he is part of things"; and the other level is to be able to learn what "the XXXX wants of him" by reading in XXXX what the XXXX commands. Tr. 74-76. In addition, the Student needs to learn about XXXX, or "commandments from God," which are taught to XXXX children in school. Tr. 59, 205. The Bible contains 613 XXXX.

The nature of MCPS' obligations under the IDEA, according to the Parents

The Parents rely on three sections of the IDEA as legal support for their general argument that the MCPS has failed to offer the Student a FAPE because the final IEP does not incorporate teaching him the XXXX way of life. They rely on sections 1400(c)(1) and (c)(5)(B) of the IDEA to argue that "[the Student] has a right to become reasonably self-sufficient and economically independent within the community that he and his family select." Parents' Written Closing (PWC) at page 1.

20 U.S.C.A. § 1400(c) (2010) states:

(c) Findings

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

...

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by

...

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.

The Parents also rely on sections 1400(d)(1)(A), 1401(29), and 1401(34) of the IDEA; *Bd. of Educ. of Hendrick County Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); and COMAR 13A.04.05 to argue that MCPS is obligated “to educate [the Student] to live in the XXXX community[.]” and section 1414(d)(1)(A) of the IDEA to allege that the “MCPS has refused to include goals in [the Student’s] [IEP] that address culture and literacy that he needs to learn despite the overt reality that the challenges he faces in acquiring those skills, ‘result from [his] disability.’” PRC pages 2 and 15.

20 U.S.C.A. § 1400(d) (2010) states:

...

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.

20 U.S.C.A. § 1401 (2010) provides:

Except as otherwise provided, in this chapter:

(29) Special Education

The term “special education” means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and

institutions, and in other settings; and
(B) instruction in physical education.

...

(34) Transition Services

The term “transition services” means a coordinated set of activities for a child with a disability that—

(A) is designed to be within a results oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supportive employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

COMAR 13A.04.05 regulates “[e]ducation that is multicultural.” The Parents rely on portions of the following regulations:

COMAR 13A.04.05.01A states:

.01 Scope

A. Assurance of success for all students in Maryland is dependant upon quality and equity in education., which empowers students to make decisions on important social and personal issues, and take action to help solve them. The intent of this chapter is to provide for local school systems’ guidelines and goals for education that is multicultural, that will enable the school systems to provide curricula, instruction, staff development, and instructional resources that are multicultural while recognizing our common ground as a nation. These will enable children to demonstrate knowledge, understanding, and appreciation of cultural groups in the State, nation, and world.

The subsections in Regulation .04 that are cited by the Parent are as follows:

COMAR 13A.04.05.04:

...

B. Curriculum.

...

(2) Goal. To provide pre-K--2 curriculum, which develops the valuing of cultural groups in the United States as an integral part of education for a culturally pluralistic society. The curriculum shall provide opportunity for students to demonstrate the following attitudes and actions:

(a) Valuing one’s heritage;

- (b) Valuing the uniqueness of cultures other than one's own;
 - (c) Valuing the richness of cultural diversity and commonality;
 - (d) Respecting diverse cultural groups throughout the world;
 - (e) Awareness of and sensitivity to individual differences within various cultural groups; and
 - (f) Eliminating stereotypes related to race, ethnicity, region, religion, gender, socioeconomic status, age, and individuals with disabilities.
- C. Instruction.

- ...
- (2) The instructional program shall:
- (a) Promote a school climate that reflects the diversity of the community;
 - (b) Promote a school climate in which different cultural linguistic patterns are respected;
 - (c) Promote grouping of students to reflect cultural diversity;
 - (d) Ensure that a student may not be denied access to equally rigorous academic instruction on the basis of cultural background;
 - (e) Use instructional activities which recognize and appreciate students' cultural identities and learning styles;
 - (f) Address racism, sexism, bias, discrimination, and prejudice;
 - (g) Use organizations promoting cultural and ethnic understanding;
 - (h) Use instructional activities that promote an understanding of and a respect for a variety of ways of communicating, both verbal and nonverbal;
 - (i) Use instructional materials which reinforce the concept of the United States as a pluralistic society within a globally interdependent world while recognizing our common ground as a nation;
 - (j) Incorporate multicultural instructional materials in all subject areas; and
- (k) Provide opportunities for students to analyze and evaluate social issues and propose solutions to contemporary social problems.

D. Staff Development.

- (1) Goal. To include in staff development experiences that prepare school system personnel to design, manage, implement, and evaluate multicultural education.
- (2) The experiences in § D(1) of this regulation include:
- ...
- (b) Activities to identify instructional strategies, techniques, and materials appropriate for education that is multicultural;
 - (c) Training in assessing the prior knowledge, attitudes, abilities, and learning styles of students from varied backgrounds in order to develop multicultural instructional programs[.]

Analysis

The gravamen of the Parents' complaint is the following: "MCPS has just refused to consider adding instruction that will prepare [the Student] for an XXXX way of life, and that violates his right to a FAPE. It is clear that the school system's proposed IEP cannot prepare

[the Student] for life in his XXXX community, rendering it inappropriate.” Parents Rebuttal Closing (PRC) at page 11. Furthermore, they insist that the MCPS’ proposed IEP fails to provide the Student with a FAPE because

[n]ot only has [the] MCPS failed to propose an educational program for [the Student] that would prepare him to be a successful, independent member of his XXXX community, but the school system’s witnesses at the hearing repeatedly testified that they would not personalize [the Student’s] IEP to meet his unique needs or include any of the bilingual or bicultural education he needs to be part of his community.

PWC at page 16.

Moreover, according to the Parents,

There is no rational argument that such goals [“addressing skills necessary for the practice of the XXXX culture and rituals”] do not belong in [the Student’s] IEP. . . . [A]s the IDEA states, these annual goals [“telling time and making change”] can be either academic and functional. What we know about [the Student] is that his functioning for the rest of his life is primarily going to be in an XXXX Community. Consequently, his functional IEP goals should not merely address skills such as reading and visual discrimination, but they should address them functionally. That means that the reading instruction should be in both English and XXXX, and the visual discrimination instruction should focus on telling various XXXX symbols apart on food packaging. And, of course, the time recognition mentioned above should focus on how long [the Student] must wait after a XXXX dish to eat XXXX. All these things belong in [the Student’s] IEP goals because they are all functional and/or academic skills that he needs in his community and in his culture, and the acquisition of them is seriously impacted by his educational disability. It is not more complicated than that.

PWC 19-20.

There is virtually no dispute about material facts. The MCPS’ proposed IEP for the 2012-2013 school year does not provide an educational program that teaches the Student the ways of the XXXX community. Although the Parents accuse the MCPS of abdicating an obligation under the IDEA to “prepare [the Student] for life in his XXXX community,” I do not agree because I find that the IDEA, and corresponding State law, imposes no such obligation on the MCPS.

The IDEA obligates the MCPS to offer the Student a FAPE. Section 1401(9) of Title 20 defines a FAPE as,

“special education and related services that— (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9) (2010); *see also* 34 C.F.R. § 300.17 (2013) (same definition); Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2013) (essentially the same definition); COMAR 13A.05.01.03B(27) (essentially the same definition).

“Special education” is “**specially designed instruction**, at no cost to parents, to meet the unique needs of a child with a disability, including— (A) instruction conducted in the classroom . . . and in other settings; and (B) instruction in physical education.” 20 U.S.C.A. § 1401(29) (2010) (emphasis added); *see also* 34 C.F.R. § 300.39 (2013) (adding speech-language pathology services and others); Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2013) (essentially the same); COMAR 13A.05.01.03B(71) (adding speech-language pathology services and others). COMAR 13A.05.01.03B(72) defines “specially designed instruction” as “the adaptation of content, methodology, or delivery of instruction to address the unique needs of a student with a disability **to ensure access to the general curriculum**, so that the student can meet the educational standards that apply to each student within the jurisdiction of the public agency.” (Emphasis added).

“Related Services” are “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education” 20 U.S.C.A. § 1401(26) (2010); *see also* 34 C.F.R. § 300.34 (2013) (generally the same, but including a laundry list of services); Md. Code Ann., Educ.

§ 8-401(a)(4) (Supp. 2013) (essentially the same); COMAR 13A.05.01.03B(65) (generally the same, but including a laundry list of related services and exclusions).

In *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 186 (1982), the Court decided “what is meant by the [IDEA’s] requirement of a ‘free appropriate public education[.]’” In reaching its decision, the Court referred to the IDEA’s definition of FAPE as “cryptic,” but determined that “if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a ‘free appropriate public education’ as defined by the Act.”¹⁴ *Id.* at 189.

The specific issue before the *Rowley* Court, however, was whether Congress intended a FAPE also to “meet some additional substantive standard.” *Id.* at 189-90. This specific issue arose because the dispute brought to the Court was: what amount of educational benefit to the disabled child was enough to satisfy the appropriate requirement of a FAPE? The Court examined the legislative history of the IDEA to discern Congress’ intent in order to answer that question.

The congressional record showed that Congress “sought primarily to make public education available to handicapped children.” This paramount intent flowed from socio-educational data showing that about one million of “roughly” eight million “handicapped” children were excluded from public education and over one half of those attending public schools were receiving an inadequate education. The Court explained:

By passing the [IDEA], Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly “[recognized] that in many instances the

¹⁴ The “definitional checklist” includes that the educational instruction and services “be provided at public expense and under public supervision, meet the State’s educational standards, approximate the grade levels used in the State’s regular education, and comport with the child’s IEP.” *Rowley*, 458 U.S. at 189.

process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome.” Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Id. at 192 (citation omitted).

The Court specifically held that a State satisfies its requirement to provide a disabled child with a FAPE:

By providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id. at 203-204.

The Parents’ argument that the “fundamental problem with the MCPS’ position is that it removes the ‘I’ from [the Student’s] IEP” (PWC page 17) and that the IDEA requires the MCPS to provide the Student “necessary help in accessing whatever **his curriculum** might be” (PWC page 23, emphasis supplied) is incorrect.

As discussed above, Congress enacted the IDEA to require states to make public education available to disabled children. Nothing in the IDEA, corresponding State law, or enabling regulations require a state educational agency to individualize an educational program to a disabled child’s religion, culture, or community enclave. This was essentially Ms. XXXX’s testimony when she was asked to explain why MCPS did not include religious or cultural goals and instruction in the IEP. She testified that “specially designed instruction” is “strategy,” “instruction,” “related services,” and “specific” reading or math “interventions . . . that meet the

needs of a student's educational disability in order that they can access and make progress in the general curriculum as defined by the school system area, the local education agency." Tr. 799.

The language relied on by the Parents in *Rowley* -- that FAPE is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" -- must be understood in the context of the purpose of the IDEA and statutory language that addresses the IEP. As discussed above, Congress enacted the IDEA to require local educational agencies to provide disabled children access to the public school curriculum, not, as the Parents argue here, to access his XXXX community.

Subsection 1414(d) of the IDEA addresses IEPs and makes clear that the goals and objectives in an IEP are "designed to . . . meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general educational curriculum" ¹⁵ 20 U.S.C.A. § 1414(d)(1)(A)(II)(aa) (2010). In addition, when addressing reviews and revisions of IEPs, the IDEA makes clear that a revision of goals and objectives is required when a review shows lack of progress "in the general education curriculum." 20 U.S.C.A. § 1414(d)(4)(ii)(I) (2010). In other words, the IDEA requirement that local educational agencies offer disabled children appropriate education means that the local agency must use special education and related services that are intended to provide disabled children meaningful access to the general curriculum, despite the child's disabling conditions. That is what is meant by the "I" in the IEP.

The Parents also refer to language in the preamble to the IDEA in support of their argument that the IDEA requires that the MCPS "must teach [the Student] and assist in his preparation for life in the XXXX community." PWC at page 14. They refer to the following:

"The purposes of this chapter are— (1)(A) to ensure that all children with disabilities have

¹⁵ The Parents emphasize §1414(d)(1)(A)(II)(bb), which requires the annual goals "to meet each of the child's other educational needs that result from the child's disability." This language does not alter the IDEA's purpose of individualizing an education program to the child's disability in a manner that ameliorates the adverse effect of the child's disability on his or her ability to access the school's curriculum.

available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” PWC at page 14 (quoting 20 U.S.C.A. § 1400(d)(1)(A) (2010)). There is nothing in that language that requires MCPS to teach the Student how to integrate into his XXXX community. Furthermore, a preamble to a statute “is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers” when the operative sections of the statute are clear. *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 885 (4th Cir. 1984) (quoting *Ass’n of Am. R.R. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)). As discussed above, the *Rowley* Court addressed the meaning of the IDEA’s FAPE requirement without reference to section 1400(d), and the operative parts of the IDEA only require a local educational agency to create an educational program that allows the disabled child reasonably to access the general curriculum.

The Parents also refer to COMAR 13A.04.05 and argue that Regulations .01, .04, and .05 make “[t]he obligation for MCPS to educate [the Student] to live in the XXXX community . . . even more compelling” This argument is not persuasive because Chapter 05 does not regulate the State’s implementation of its FAPE requirement under the IDEA, and Chapter 05 does not require Maryland public schools to educate a child to function in accordance with XXXX.

COMAR 13A.05.01 regulates the State’s implementation of the IDEA. COMAR 13A.04.05 regulates multicultural education. Even if the Parents had proven that the MCPS failed to comply with the regulatory requirements in COMAR 13A.04.05, such noncompliance does not create a right for them to file a due process complaint under the IDEA. Furthermore, COMAR 13A.04.05 does not grant individuals remedial rights.

The Department promulgated COMAR 13A.04.05 to provide “guidelines and goals for education that is multicultural . . . and “that will enable the school systems to provide curricula [and] instruction . . . that are multicultural. . . . COMAR 13A.04.05.01A.

COMAR 13A.04.05.04B(1) does not address IEPs or the IDEA; it addresses the development of a curriculum that “enables students to demonstrate an understanding of and an appreciation for cultural groups in the United States as an integral part of education for a culturally pluralistic society.” COMAR 13A.04.05.04B(2) also does not address IEPs or the IDEA; it addresses the provision of “curriculum, which develops the valuing of cultural groups in the United States as an integral part of education for a culturally pluralistic society.” These subsections are for the development of curricula that encourage social tolerance for differences among cultures; they do not obligate teaching a child any particular culture or, in this case, a religion.

COMAR 13A.04.05.04C addresses providing “instruction” to students to enable them to obtain “an understanding of and appreciation for cultural groups as an integral part of education for a culturally pluralistic society.” Regulation .04C(2) enumerates the goals and general content of such instruction, but there is nothing in this regulation that mentions the IDEA or IEPs or in any way requires the MCPS to instruct an individual student to be an XXXX.

COMAR 13A.04.05.04D(1) addresses the inclusion of “experiences that prepare school system personnel to design, manage, implement, and evaluate multicultural education” in staff development. Regulations .04D(2)(b) and (c) provide that such experiences “identify instructional strategies, techniques, and materials appropriate for education that is multicultural” and provide “[t]raining in assessing the prior knowledge, attitudes, abilities, and learning styles of students from varied backgrounds in order to develop multicultural instructional programs[.]” These regulations do not address any requirement that a child’s educational program under the

IDEA must be designed to include teaching him or her how to become a member of his or her insular cultural community. They address staff development, and they, like the others, are for the purpose of creating general education that encourages tolerance and understanding of cultural differences. None of them provides legal support for the proposition that the MCPS' proposed IEP for the Student's 2012-2013 school year failed to provide a FAPE.

The Parents argue that the IEP is inappropriate and a denial of a FAPE because it does not provide an educational program that teaches the Student how to function as a member of his XXXX community. However, two of the Parents' witnesses who testified as experts in special education agreed that the IEP would be appropriate for the Student if he were not being reared as an XXXX. Ms. XXXX agreed that the proposed IEP would be appropriate if the Student were being raised in a family of atheists. Tr. 426. When asked whether the goals and objectives in the proposed IEP would be appropriate for the Student if he were not XXXX, Mr. XXXX testified, "I think they are appropriate, although I thought they could have been more inclusive." He agreed the final IEP would provide the Student with some educational benefit. Tr. 259-60. Furthermore, XXXX XXXX agreed that MCPS's proposed IEP's goals and objective would meet the Student's secular needs (Tr. 88),¹⁶ and, but for the Student's cultural needs, his placement at [School 5] would meet his special and general educational needs. Tr. 89.

The absence of goals and objectives expressly related to XXXX does not render the Student's educational program inappropriate. The Student's IEP is reasonably calculated to provide him with some educational benefit because it adequately addresses the Student's disability-based impediments to learning and appropriately provides for special education and related services that reasonably should enable him to benefit from the MCPS' curriculum. The Parents' position essentially is that the Student's IEP fails to provide a FAPE because it is not

¹⁶ XXXX XXXX later testified that the IEP would not meet the Student's secular needs "because his secular needs include making him as a person and fitting into his cultural milieu. The secular IEP contravenes that." Tr. 107.

reasonably calculated to teach him to participate in his XXXX community. However, as discussed above, the absence of goals that address the Student's XXXX does not, as a matter of law, render the Student's educational program inappropriate. Accordingly, I do not find that the MCPS' proposed IEP for the Student's 2012-2013 school year denied him a FAPE. The proposed IEP fully complies with the requirements of the IDEA.¹⁷

DOES THE STUDENT'S ENROLLMENT AT [SCHOOL 1] PROVIDE HIM A PROPER EDUCATION?

Because I have concluded that the Parents failed to prove that the proposed IEP for the Student's 2012-2013 school year in the MCPS did not provide a FAPE, it is not necessary for me to address this issue in more detail than to say, based on my review of the record and the testimony of the Parents' witnesses, [School 1] provides a proper education.

¹⁷ Although the MCPS has no burden of proof, I have reviewed the proposed IEP and the legal requirements for the provision of FAPE, and I am satisfied that the proposed IEP conforms to the legal requirements set forth in the relevant federal and State law.

DOES THE PARENTS' REQUEST FOR TUITION REIMBURSEMENT VIOLATE THE FIRST AMENDMENT?

Because I have concluded that the Parents failed to prove that the proposed IEP for the Student's 2012-2013 school year in the MCPS did not provide a FAPE, it is not necessary for me to address this issue.¹⁸

CONCLUSIONS OF LAW

I conclude the following:

A. The Parents have failed to prove that the IEP offered by the MCPS was not reasonably calculated to offer the Student with a meaningful educational benefit for the 2012-2013 school year. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2013); Md. Code Ann., Educ. § 8-403 (2008); COMAR 13A.05.01.03B(71); *see Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

B. The IEP and placement proposed by MCPS for the 2012-2013 school year are reasonably calculated to offer the Student a FAPE. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985).

ORDER

I **ORDER** that the Parents' request for a declaration that [School 1] is the proper educational placement for the Student and for reimbursement for the costs of the Student's attendance at [School 1] for the 2012-2013 school year is **DENIED**.¹⁹

January 23, 2014
Date Decision Mailed

Michael D. Carlis
Administrative Law Judge

¹⁸ The MCPS also makes a bad faith argument that is not necessary for me to address based on my ruling regarding the FAPE issue.

¹⁹ After the close of the record, the parties' attorneys submitted the following correspondence to me. Mr. Krew wrote on January 2, 2014, that he objected to what he thought was Mr. Eig's unfair characterization in the PRC of how he treated witnesses during the hearing. Shortly after Mr. Eig received a copy of Mr. Krew's correspondence, he submitted an email on the same date objecting to what he believed was Mr. Krew's violation of OAH's rules and the schedule I set for the parties' submission of closings. Mr. Eig requested sanctions and separately submitted legal authority. Mr. Krew followed Mr. Eig's email with an email of his own in which he placed responsibility for his initial correspondence squarely on Mr. Eig's shoulders. Both parties have asked me to respond, which I do: I do not think sanctions are appropriate, and I do not think that either attorney's behavior during the hearing was outside the boundaries of acceptable conduct.

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.