

XXXX XXXX,

STUDENT

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

* BEFORE DENISE OAKES SHAFFER,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

* OAH No.: MSDE-BCNY-OT-14-25988

* * * * *

DECISION

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

STATEMENT OF THE CASE

On July 23, 2014, XXXX and XXXX XXXX (Parents) filed a request for due process hearing with the Office of Administrative Hearings (OAH) on behalf of their daughter, XXXX XXXX (Student), requesting a hearing to review the identification, evaluation, or placement of the Student by Baltimore County Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). On September 8, 2014, the OAH received notice that the parties had waived a resolution meeting.

I held a prehearing conference on September 24, 2014. The Parents were not present but were represented by Holly Parker, Esquire. Stephen Cowles, Esquire, represented the BCPS. By agreement of the parties, the hearing was scheduled for October 29, 30 & 31, 2014. Forty-five days from September 8, 2014, the date OAH received notice of the waiver of the resolution meeting, is October 23, 2014. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2013). The parties agreed to waive the 45-day time line for holding the hearing and issuing the

decision as their schedules did not allow the case to be scheduled for three days prior to October 23, 2014. They requested that I issue a decision no more than thirty days after the hearing concluded. *See* 34 C.F.R. § 300.515(c).

I held the hearing on October 29 & 30, 2014. The Parents were present and were represented by Ms. Parker. Mr. Cowles represented the BCPS. As the thirtieth day fell during the Thanksgiving holidays, the Parties agreed to an extension of time for only 26 days, until November 25, 2014, for me to issue a decision. 34 C.F.R. 300.515; Md. Code Ann., Educ. § 8-413(h) (2014).

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2013); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES¹

- (1) Whether BCPS failed to provide/develop an appropriate Individualized Education Program (IEP) for the 2013-2014 and 2014-2015 school years;
- (2) Whether BCPS failed to develop appropriate goals and objectives based on valid present levels of performance;
- (3) Whether BCPS failed to adequately and fully provide measurable data supporting academic progress;

¹ At the conclusion of the hearing, the Parents withdrew several issues that were set forth in the complaint and in the prehearing conference order. All parties agreed that the issues listed here are the issues to be decided based upon evidence produced at the hearing.

- (4) Whether BCPS failed to provide a full continuum of appropriate special education services; and
- (5) Whether BCPS failed to consider harmful effects of the program proposed by BCPS.

SUMMARY OF THE EVIDENCE

Exhibits

The parties agreed to use the numbering system produced by BCPS for all joint exhibits.

Unless otherwise noted, I admitted the following exhibits without objection:

- | | |
|-----------|---|
| BCPS # 1 | June 4, 2014 IEP |
| BCPS # 2 | February 27, 2014 IEP |
| BCPS # 3 | December 19, 2012 IEP |
| BCPS # 4 | WITHDRAWN |
| BCPS # 5 | WITHDRAWN |
| BCPS # 6 | June 4, 2014 IEP Team Summary |
| BCPS # 7 | April 2, 2014 IEP Team Summary |
| BCPS # 8 | February 27, 2014 IEP Team Summary |
| BCPS # 9 | December 11, 2013 IEP Team Summary |
| BCPS # 10 | December 12, 2012 IEP Team Summary |
| BCPS # 11 | November 28, 2012 IEP Team Summary |
| BCPS # 12 | September 12, 2012 IEP Team Summary |
| BCPS # 13 | September 12, 2012 Parent Permission for Assessment |
| BCPS # 14 | November 14, 2012 Psychological Assessment |
| BCPS # 15 | November 14, 2012 Speech and Language Assessment |

BCPS # 16 November 2, 2012 Educational Assessment

BCPS # 17 WITHDRAWN

BCPS # 18 December 16 & 18, 2013 Neuropsychological Evaluation (Dr. XXXX)

BCPS # 19 WITHDRAWN

BCPS # 20 WITHDRAWN

BCPS # 21 WITHDRAWN

BCPS # 22 BCPS Grade 4 Report Card, 2013-2014 School Year

BCPS # 23 BCPS Grade 3 Report Card, 2012-2013 School Year

BCPS # 24 Student's schedules for 2013-2014 & 2014-2015 School Years

BCPS # 25 February 27, 2014 Quarterly Progress Data for IEP Goal # 1

BCPS # 26 February 27, 2014 Quarterly Progress Data for IEP Goal # 2

BCPS # 27 February 27, 2014 Quarterly Progress Data for IEP Goal # 3

BCPS # 28 Math Grade Sheets, 2013-2014 School Year

BCPS # 29 Math Assignments, 2013-2014 School Year

BCPS # 30 "Word Work" Grade Sheets, 2013-2014 School Year

BCPS # 31 Language Arts Work Samples, 2013-2014 School Year

BCPS # 32 June 4, 2014 IEP Progress Report

BCPS # 33 December 19, 2013 IEP Progress Report

BCPS # 34 WITHDRAWN

BCPS # 35 WITHDRAWN

BCPS # 36 WITHDRAWN

BCPS # 37 WITHDRAWN

BCPS # 38 WITHDRAWN

BCPS # 39 WITHDRAWN

BCPS # 40 WITHDRAWN

BCPS # 41 A. Resume of XXXX XXXX
B. Resume of XXXX XXXX
C. Resume of XXXX XXXX
D. Resume of XXXX XXXX

Parents' Ex. # 1 Interim Progress Reports, September and October 2013

Parents' Ex. # 2 July 11, 2014 Student Update from [School 1]

Parents' Ex. # 3 September 26, 2014 Student Update from [School 1]

Parents' Ex. A Resume of XXXX XXXX, Ph.D.

Parents' Ex. B Resume of XXXX XXXX, M.D.

Parents' Ex. C Resume of XXXX XXXX

Parents' Ex. D Resume of XXXX XXXX

Testimony

The Parents testified and presented the following witnesses:

- XXXX XXXX, Assistant Principal, [School 2]
- XXXX XXXX, M.D., admitted as an expert in XXXX Syndrome
- XXXX XXXX, Ph.D., admitted as an expert in Neuropsychology
- XXXX XXXX, General Education Teacher
- XXXX XXXX, Special Education Teacher
- XXXX XXXX, Special Education Teacher
- XXXX XXXX, Educational Director, [School 1]
- XXXX XXXX, Special Educator, [School 1]

The BCPS presented the following witnesses:

- XXXX XXXX, admitted as an expert in special education.
- XXXX XXXX, School Counsellor, admitted as an expert in school counselling
- XXXX XXXX, admitted as an expert in school administration
- XXXX XXXX, Staff Development Teacher, admitted as an expert in reading

FINDINGS OF FACT

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

1. The Student is currently in the fifth grade at [School 1], a private school, where she enrolled at the beginning of the 2014-2105 school year. She spent the first four years at [School 2], a public school, and received special education services during each of those years. The Student was on the diploma track at BCPS.

2. The Student has XXXX Syndrome. XXXX Syndrome is an XXXX genetic condition that results in a range of neurodevelopmental disabilities including cognitive and learning difficulties. The cognitive and learning difficulties that the Student experiences as a result of the Syndrome are at the higher end of the spectrum of XXXX, and, consistent with the Syndrome, are expected to worsen as she ages. (T. XXXX, BCPS Ex. 18)

3. The Student receives medical and psychiatric support through the XXXX Clinic at XXXX Institute. (T. XXXX) The Student's diagnoses include Cognitive Disorder secondary to XXXX Syndrome, Mixed Receptive-Expressive Language Disorder, Attention Deficit Hyperactivity Disorder – Combined, Learning Disorders and Developmental Coordination Disorder. (BCPS Ex. 18)

4. The Student also exhibits a great deal of anxiety that results in repetitive and disrupting behaviors such as nail biting and picking at her skin and clothing. (BCPS Ex. 11, 16, 18)

5. The Student experiences deficits with processing speed which makes it very difficult for her to keep pace with her typically developing peers in the general education classroom. (T. XXXX, BCPS Ex. 7, 18) This contributed to the Student's problems with anxiety as she became increasingly aware, as she grew older, of the differences between herself and the other students in her class. (T. XXXX, BCPS Ex. 7)

6. During the 2011-2012 school year, the Student was in second grade. The Student's IEP services were primarily delivered through a "push-in" model. That is, the Student was in a large, general education setting with 20-24 other students. A special educator came into the classroom at certain times to provide assistance. There was not a full-time special educator assigned to the Student during her second grade year.

7. For the 2012-2013 school year, the Student was in third grade and was in the general education setting described above. In November of 2012, the IEP team was concerned with the Student's increasingly anxious behavior, her inability to attend to the curriculum, and with her inability to interact appropriately with peers. (T. XXXX; BCPS Ex. 10, 11) The team also noted the Student's difficulty with transitions and cognitive flexibility in the general education setting. (BCPS Ex. 11) During the third grade year, the Student received some "pull-out"² services during reading where she worked in a small group setting with a special educator using an intervention called XXXX. (BCPS Ex. 10) The Student remained in the general education setting for most of the day.

² "Pull-out" services involved the Student leaving the general education setting to work with another adult, sometime the paraeducator and sometimes the special education teacher. The Student either sat at a desk immediately outside the classroom or went to the resource room.

8. For the 2013-2014 school year, the Student was in the fourth grade. She began the year with the IEP that was in effect at the end of the third grade. As the year progressed, the Student experienced difficulty keeping up in all subject areas. BCPS recognized the issue and instituted a series of trials in an attempt to find a good fit for the Student. (T. XXXX, XXXX) For example, the language arts teacher, Mrs. XXXX, offered audio books of the material and allowed the Student to listen to the story repeatedly. This seemed to help the Student's comprehension and Mrs. XXXX incorporated the strategy into the Student's daily experience in reading. (T. XXXX)

9. In the December 20, 2013 IEP team meeting, the team moved the Student into a small group setting for math. Her special education teacher, Mrs. XXXX, noted that the Student became engaged in the small group setting and that the Student's "distraction is more evident on the whole group setting." (BCPS Ex. 9) Before she was moved into the small group classroom staffed by a special educator, the Student was not progressing on her math goals and objectives on her IEP and was receiving a failing grade. (BCPS Ex. 22, 28) Mrs. XXXX noted that the Student was able to demonstrate some math skills, but not in the general education setting. (T. XXXX) After she was moved to the small group setting, the Student made progress. She was able to earn Bs and As and work toward achieving the math goals and objectives on her IEP. (BCPS Ex. 22, 28) Mrs. XXXX noted during the IEP team meeting: "the small group math class has proven very successful for [the Student]. She has fewer distractions and focusses on her learning. She is an active participant." (BCPS Ex. 22) Mrs. XXXX testified that the small group setting provided a "huge benefit" for the Student and that it was the main reason why she was able to make progress on her math goals in the fourth grade. (T. XXXX)

10. In addition to the small group instruction for math, the Student received math intervention with Mrs. XXXX once a week during fourth grade. The Student also met with Mrs. XXXX three times a week for fifteen minutes to work on other subject areas including reading and writing. (BCPS Ex. 24)

11. The Student received some push-in services in the language arts, but these services were not delivered by a special educator. The language arts class had 23 students and three adults. None of the adults were special educators. The language arts block was 90 minutes long. For the first 15-20 minutes the whole class met to go over the lesson. For the remainder of the time the class split into smaller groups in the classroom. The Student's group generally had four other students. In the whole group setting, the Student did not participate and struggled to maintain attention on the lesson. In the smaller group, the Student did participate when prompted by the adult working with that small group. (T. XXXX)

12. A paraeducator was in the Student's general education classroom for science and social studies during the fourth grade year. The paraeducator was not assigned to the Student, but often worked with the Student in a small group or when she was performing independent tasks. The paraeducator was not a special education teacher. (T. XXXX, XXXX)

13. During the fourth grade year, the Student engaged in "lunch bunch" which was designed to allow her to practice appropriate social skills with her peers in the less structured settings of lunch and recess.

14. The data collected by BCPS during the Student's fourth grade year showed that the Student's performance was inconsistent. Gains that appeared one day were gone the next, as is graphically demonstrated by the charts addressing the Student's reading comprehension goal and the three objectives associated with that goal. (BCPS Ex. 27)

15. The IEP team and teachers at [School 2] were proactive when it came to this Student. The team met in December 2013 to formally implement the changes to the math program that had been so successful. At that time, the Student's language arts teacher expressed concern about the Student's anxiety and attentional deficits. (BCPS Ex. 9) Because the Parents were concerned with the lack of progress on the annual IEP goals, they requested that BCPS collect more data to support the goals for the fourth grade year. The Parents also decided to engage an outside expert to evaluate the Student.

16. The team met again in February 2014 to review the data and to discuss progress. (BCPS Ex. 2, 8) The IEP team noted that the Student does not participate in a large group setting and that a small group format "facilitated her ability to follow oral directions and participate in activities with peers." (T. XXXX, BCPS Ex. 8) In a large group setting, the Student needed a lot of redirection as well as help getting started and maintaining attention. In a smaller setting, the Student was more willing to participate and was less anxious. (T. XXXX)

17. During the April 2, 2014 IEP meeting, the team considered the report and input of Dr. XXXX XXXX. Dr. XXXX confirmed that his testing was consistent with the testing conducted by BCPS. He also noted that as the Student progressed through the grades, the gap between her and her typically developing peers was growing. (T. XXXX) The IEP team considered the input of Dr. XXXX. That observation was supported by Ms. XXXX, the Student's speech/language pathologist, who reported that the Student's anxiety had increased during the fourth grade year and that her picking behaviors were more pronounced. (BCPS Ex. 7) Ms. XXXX also agreed that the Student was increasingly aware of the growing differences between the Student and the other students. (BCPS Ex. 7) The team decided to collect additional data to inform its consideration of Dr. XXXX's recommendation that the Student receive all of

her academic instruction, not just math, in a small self-contained classroom staffed by a special educator. (BCPS Ex. 7) Dr. XXXX expressed the opinion that the Student's peer group should be students who are closer to the Student's range of functioning. (T. XXXX, BCPS Ex. 7)

18. The IEP team reconvened on June 16, 2014 and worked collaboratively and constructively to develop appropriate goals and objectives for the Student for her fifth grade year.

19. The June 16, 2014 IEP set forth the plan for the Student's fifth grade year. The BCPS did not offer a small group setting for social studies or science. Rather the IEP provided for a 15-minute pull-out at the beginning of each of these classes so that Mrs. XXXX could review the content with the Student. The Student would then return to the large general education setting for the remainder of the instructional time and engage in independent or small group exercises. (BCPS Ex. 24)

20. With respect to the math curriculum, the June 16, 2014 IEP team continued the math intervention that had proven so successful in the fourth grade. (BCPS Ex. 1)

21. For language arts, which included reading, writing and spelling, the IEP provided that the Student was to receive 35 minutes in a small group special education setting and 70 minutes in the general education setting on a daily basis. (BCPS Ex. # 1)

22. The team also developed goals to address the Student's social skills. In fact, one of those goals was that the Student would "participate with a peer or small group of peers in a shared activity." (BCPS Ex. 1) This goal formalized the lunch bunch program that the Student seemed to enjoy in the fourth grade.

23. In the June 16, 2014 IEP meeting, the team discussed whether the Student would benefit from Extended School Year (ESY) Services. The team considered both one-on-one

tutoring as well as regular ESY. The team decided that tutoring would be more appropriate. As a rationale, the team noted that the Student struggled in both reading and math when the class was composed of ten or more students. The team was concerned that a “if [the Student] were in a larger group of 12-20 students, she would not be able to successfully access her learning due to anxiety and inattention, and would not benefit from the program.” (BCPS Ex. 6)

24. While the Parents agreed that the goals and objectives set forth in the June 16, 2014 IEP were appropriate, the Parents stated that the Student was not making sufficient progress and requested that the team consider a smaller instructional setting with fewer transitions through the day. They also expressed concern that the Student was not making academic progress and that she needed to be placed with peers within her range of cognitive development to reduce her anxiety over learning and better promote her social skills development. (BCPS Ex. 6)

25. The Student has had a history of difficulty managing transitions and demonstrating cognitive flexibility. (T. XXXX, BCPS Ex. 14) As is typical of Students with XXXX Syndrome, she benefits from routine, consistency and repetition. (BCPS Ex. 18)

26. To make progress and to pace the rate of instruction so that it is accessible, the Student requires a highly-structured, small classroom staffed by special educators for her academic subjects. (BCPS Ex. 18) The Student did not require segregation from her typically developing peers for nonacademic subjects such as art, gym, music, lunch and recess. The BCPS did not offer this setting for the 2014-2015 school year.

27. Prior to the start of the 2014-2015 school year, the Student enrolled in the [School 1]. [School 1] is an approved nonpublic school providing an intensive program in kindergarten through 9th grade for students with disabilities.

28. The Student has seven classmates in her main class and 2-3 classmates in her small group classes. (T. XXXX) In the main class, there are two teachers for the seven students. Subjects addressed in the main class include social studies, science, gym, art and music. The smaller groups receive math, reading, writing and spelling instruction and have one teacher per group. (T. XXXX) The Student is engaged in her learning in the small group setting and the program at [School 1] is appropriate to meet the Student's needs.

29. Since enrolling at [School 1], the Student has progressed in math and phonics although she continues to struggle with comprehension. She does not exhibit picking behavior and is overall less anxious and more engaged with her peers. (T. XXXX, XXXX)

30. The Student's social integration at [School 1] has been successful. She participates in social activities with her schoolmates including "power boost." (T. XXXX, XXXX)

DISCUSSION

Legal Framework: IDEA, IEPs, and FAPE, Generally

The IDEA requires "that all children with disabilities have available to them . . . a free appropriate education that emphasizes special education and related services designed to meet their unique needs" 20 U.S.C.A. § 1400(d)(1)(A). The IDEA provides federal money to the states to educate disabled children on condition that states comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. §§ 1412-1414; 34 C.F.R. § 300.2; *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Distr. v. Rowley*, 458 U.S. 176 (1982). Maryland's special education law is found at Md. Code Ann., Educ., § 8-101 *et seq.* (2014). The regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

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

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

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

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

FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. *Rowley*, 458 U.S. at 181-82. COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of the student and the special education and related services to be provided to meet those needs. The goals, objectives, activities, and materials must be adapted to the needs, interests, and abilities of each student. *See also* 20 U.S.C.A. § 1414(d). A student’s IEP must be reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 182.

FAPE does not require “the best possible education that a school could provide if given access to unlimited funds.” *Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). It does, however, require the State to provide personalized instruction with sufficient support services to permit the student to benefit educationally. The IDEA requires that an IEP allow for a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990).

Although the law in special education has undergone a significant evolution in the past few decades, the Rowley case continues to set the standard for determining whether a child is being accorded a FAPE under the IDEA. In Rowley, the Supreme Court set forth a two-part

analysis. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA. Second, it must be determined whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefits.

Once an IEP is shown to be procedurally proper, the judgment of education professionals regarding the child's placement should be questioned only with great reluctance by the reviewing authority. *Tice*, 908 F.2d at 1207. There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004); *M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 532 (4th Cir. 2002).

Additionally, to the maximum extent possible, the IDEA seeks to include the child in regular public schools; at a minimum, the statute calls for school systems to place children in the "least restrictive environment" (LRE) consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). The nature of the LRE necessarily differs for each child but could range from a regular public school to a residential school where 24-hour supervision is provided. COMAR 13A.05.01.10B. Although the IDEA requires specialized and individualized instruction for a learning- or educationally-disabled child, it also mandates that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities," must be "educated with children who are not disabled[.]" 20 U.S.C.A. § 1412(a)(5)(A). It follows that the State and federal regulations that have been promulgated to implement the requirements of the IDEA also require such inclusion. 34 C.F.R. § 300.114 through 120; COMAR 13A.05.01.10A(1). The IDEA mandates that the school system segregate

disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. *Hartmann v. Loudon Cnty. Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997).

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

Parties' Contentions

It is important in this case to define the dispute between the parties precisely as it is quite narrow. BCPS and the Student's Parents worked collaboratively and constructively for many years. The parties agree that the results of educational testing performed by BCPS and Dr. XXXX are consistent. They agree on the Student's diagnoses, learning challenges and her need for intensive services to progress in the curriculum. The Parents do not contest the goals and objectives on the IEPs developed for 2013-2014 or for 2014-2015 and, in fact, testified that these goals were appropriate for the Student. In the event that I reach the issue, BCPS agrees that the [School 1] is an appropriate placement for the Student as defined by the Supreme Court in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

The Parents argue that the Student did not make meaningful progress during her fourth grade year, thereby depriving the Student of a FAPE. The Student's cognitive and behavioral difficulties coupled with that lack of progress, required that the BCPS consider a more restrictive placement for the 2014-2015 school year. BCPS failure to do so ensured that the proposed IEP for the fifth grade year was likewise not designed to provide educational benefit for the Student.

BCPS counters that the Student made progress toward achieving the annual goals on her IEP during the fourth grade year and thus argues that it provided the Student with a FAPE. Moreover, it points to the increased level of services provided in the 2014-2015 IEP and argues that this IEP was designed to allow the Student to receive educational benefit.

For clarity, I will address the issues stipulated to by the parties in a different order.

Whether BCPS failed to consider harmful effects of the program proposed by BCPS

The Parents did not cite any legal authority to support the contention that any failure of BCPS to consider the harmful effect of the program it proposed, by itself, would be a violation of the IDEA or a deprivation of the Student's right to a FAPE. Nevertheless, what is clear from the evidence is that the BCPS staff employed at [School 2] were committed to the Student and actively sought to engage with her Parents to develop a program that would meet the unique needs of the Student. The record is replete with instances where teachers informally tried different strategies in an effort to find a good fit for the Student. One example is the Student's use of an audio book for repetitive listening. (T. XXXX) Although this was not an explicit accommodation required by the IEP, it worked for the Student and her teacher was pleased to find this solution. I was impressed with Mrs. XXXX's and Mrs. XXXX's genuine concern for the Student's well-being and academic growth. They relished her successes and worked hard to continue to try different strategies that would allow the Student to progress, both academically and socially. Another example is the Student's participation in the lunch bunch program. This program was implemented outside of the IEP in an effort to alleviate some of the Student's social anxiety as it related to peer interactions. I found it to be a thoughtful, appropriate approach that the Student seemed to enjoy. Moreover, when the team at [School 2] found something that

worked, like the lunch bunch, or the math interventions, they incorporated those solutions into the IEP.

The evidence demonstrates that the BCPS staff at [School 2] never failed to consider the harmful effects of any technique or intervention they tried. The Parents have failed to meet their burden on this issue.

Whether BCPS failed to adequately and fully provide measurable data supporting academic progress

BCPS provided ample data for the IEP meeting and the hearing as is evidenced in BCPS Exs. 1, 2, 3, 22, 23, 25, 26, 27, 28, 32, & 33. Whether that data supported BCPS' position that the Student progressed academically will be addressed below.

Whether BCPS failed to develop appropriate goals and objectives based on valid present levels of performance

The Parents and their advocate at the IEP team meetings in fourth grade agreed that the goals and objectives for the fourth and fifth grade years were appropriate. (BCPS Ex. 6) The Parents presented evidence that the Student is working on similar goals at [School 1]. The Student's mother testified that she agreed that the goals were appropriate. As the evidence presented by the Parents is contrary to this assertion, I find that the Parents have not proven that BCPS failed to develop appropriate goals and objectives based on valid present levels of performance.

Whether BCPS failed to provide/develop an appropriate IEP for the 2013-2014 and 2014-2015 school years and whether BCPS failed to provide a full continuum of appropriate special education services³

As I have previously noted, the BCPS and the Student worked collaboratively throughout the Student's time at [School 2]. This constructive cooperation included the

³ I have combined these two issues and they are inextricable given the facts of this case.

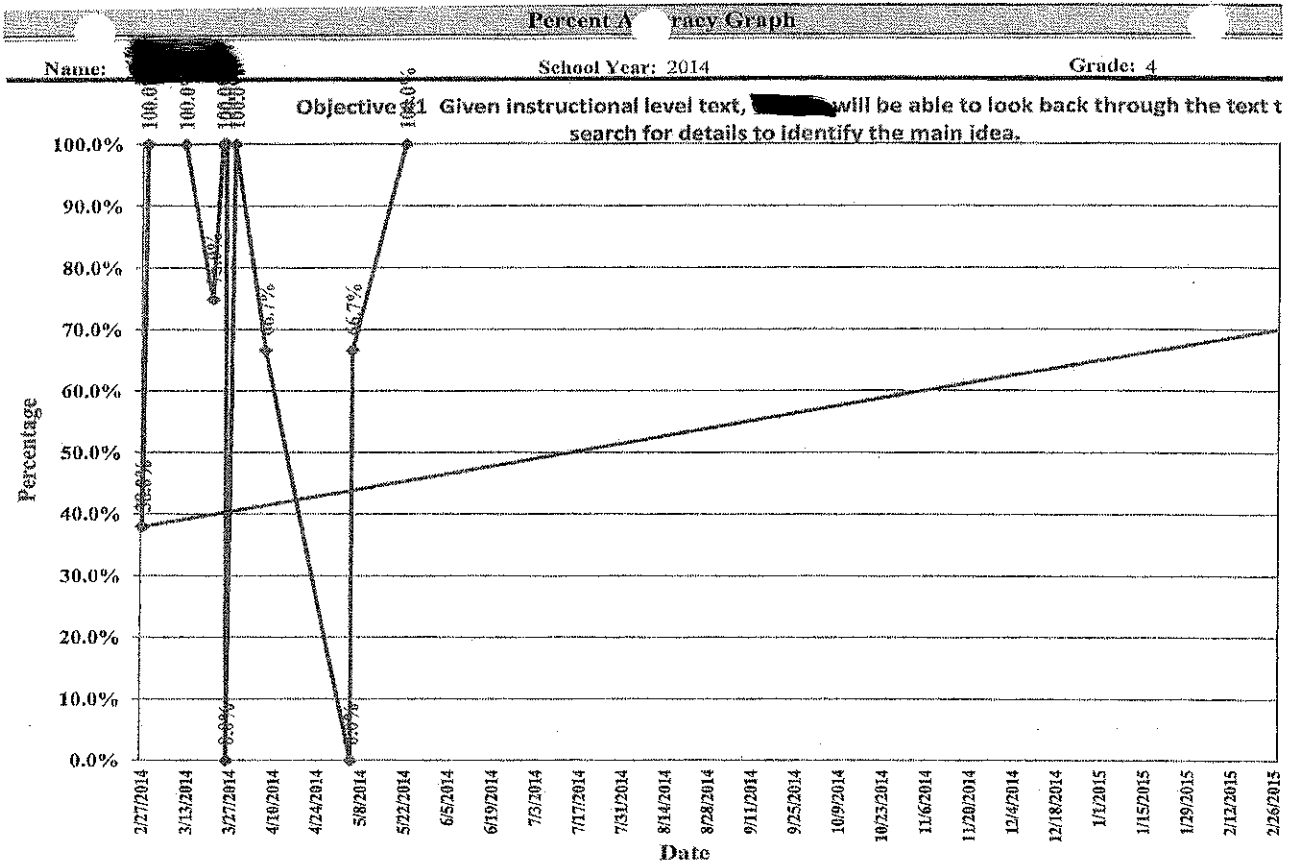
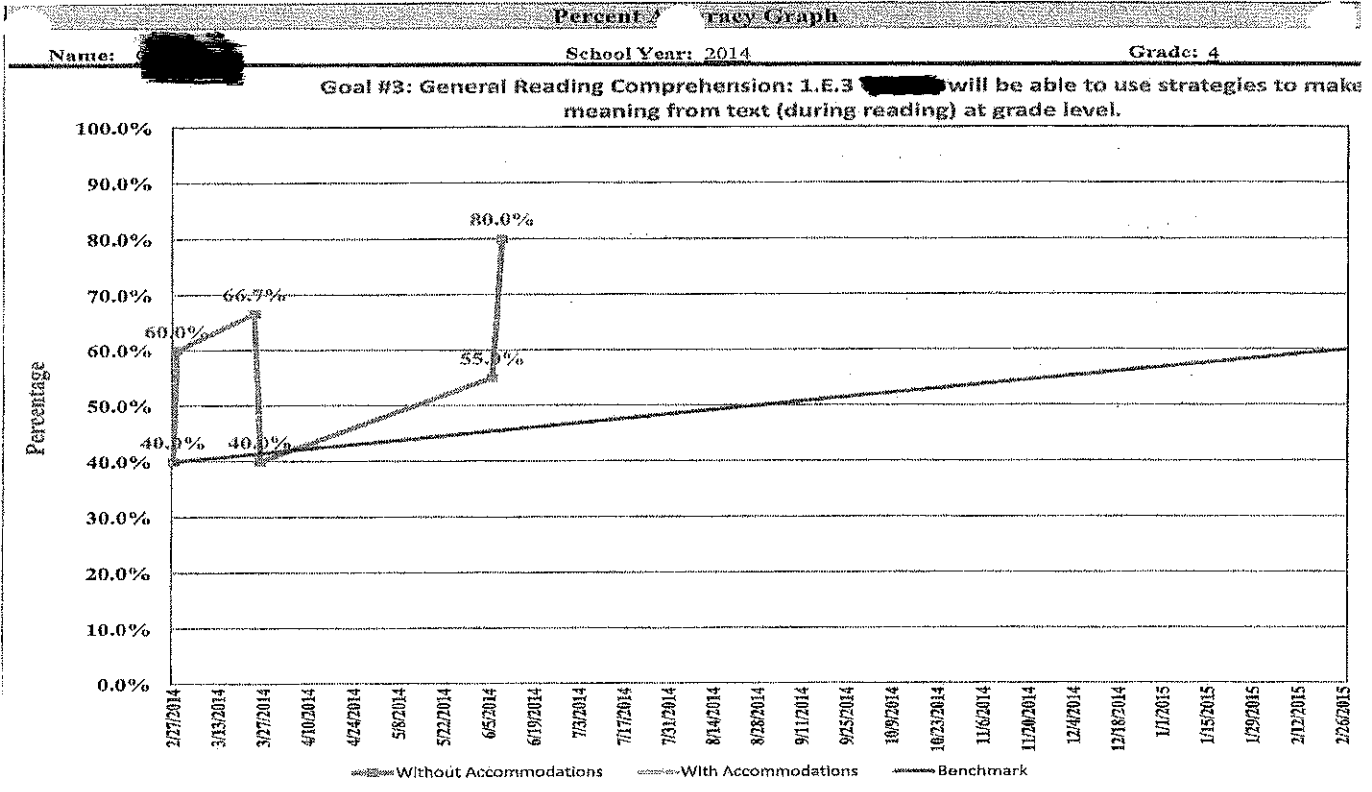
Student's fourth grade year and the development of the IEP for the fifth grade year. Despite this commitment, I find that the Student failed to make meaningful progress during her fourth grade year and that the Student was not afforded a FAPE by BCPS in fourth grade. Additionally, I find that the IEP developed for the fifth grade year was not appropriate and was not reasonably calculated to provide the Student a FAPE for fifth grade. In doing so, I conclude that for the Student to make meaningful educational progress, she required a small, self-contained classroom for her academic subjects including math, language arts, science and social studies. As BCPS has agreed that [School 1] is an appropriate placement, I will award tuition reimbursement for the 2014-2015 school year.

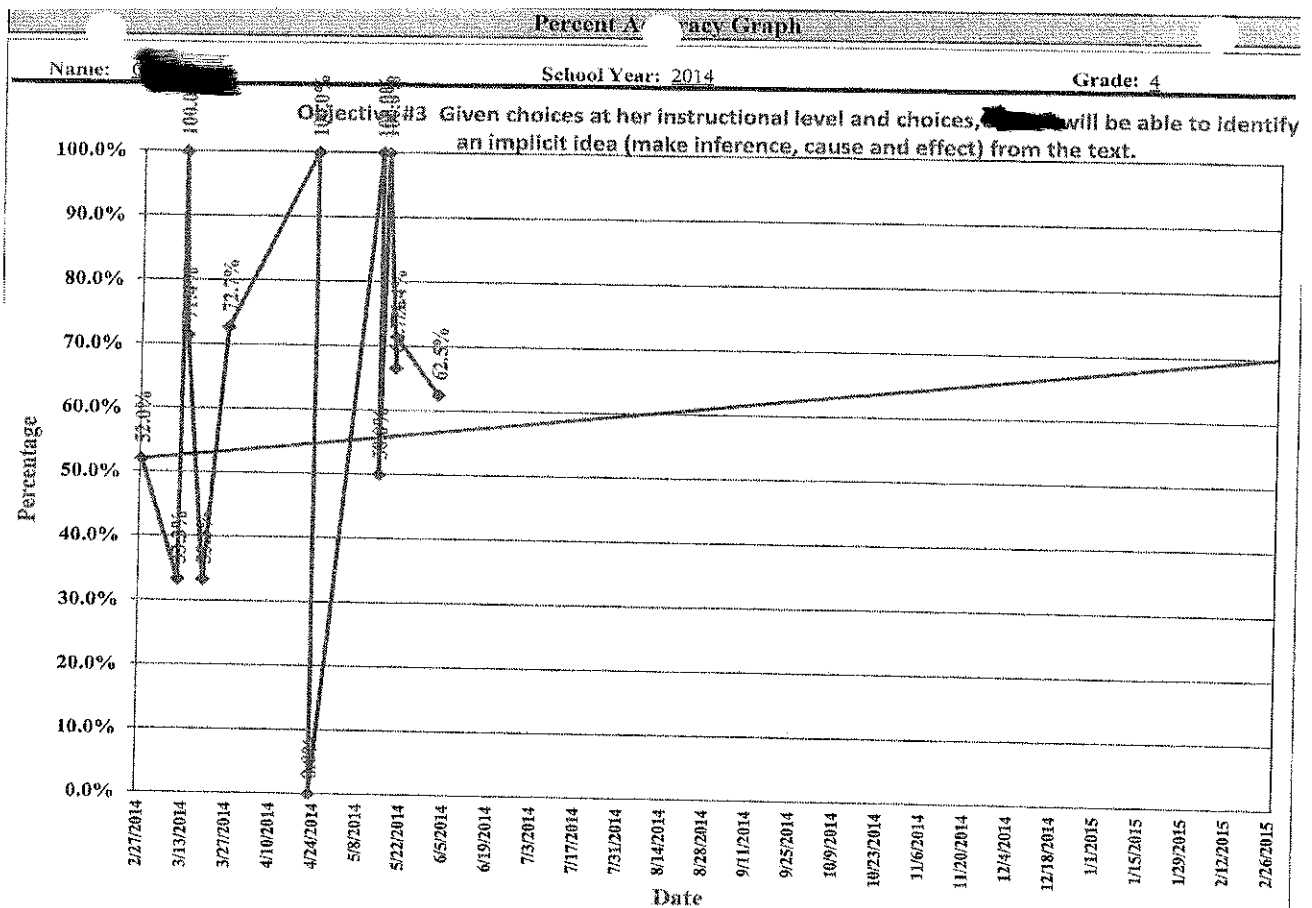
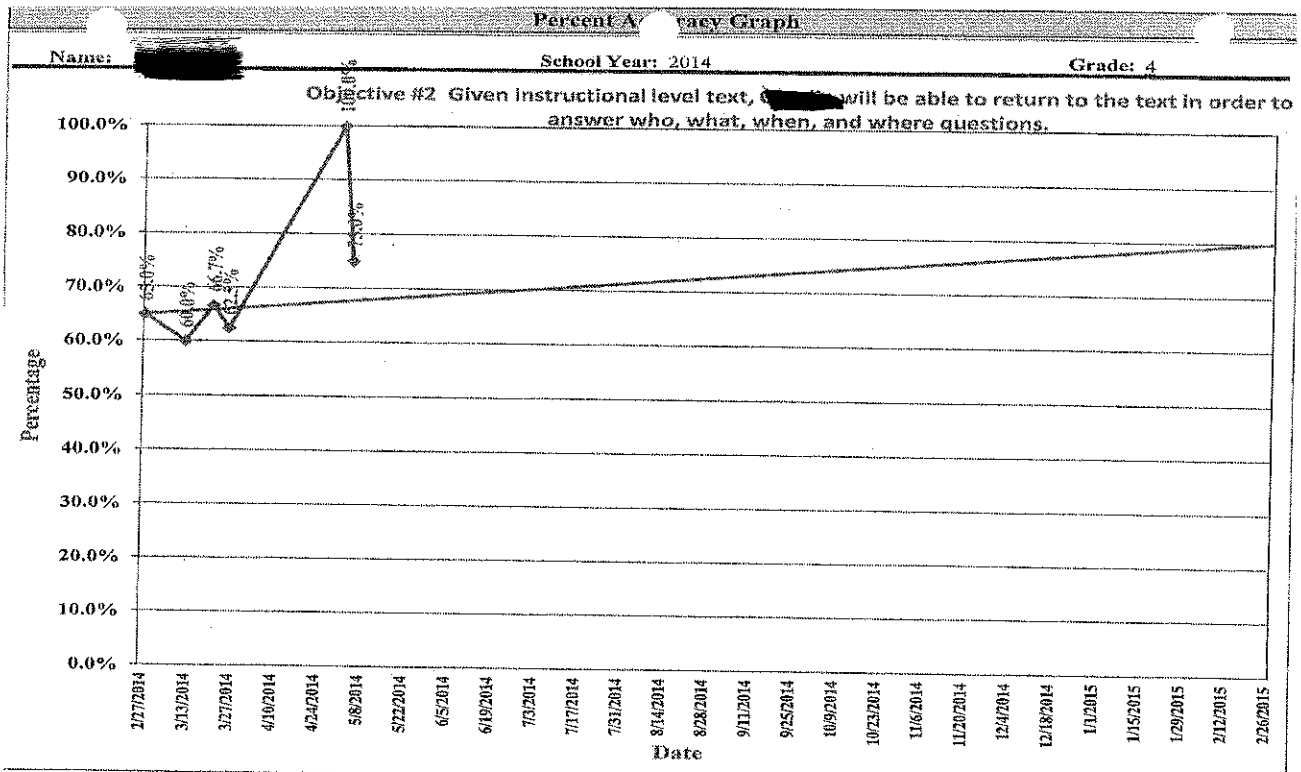
I am mindful of the fact that the IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. *Hartmann*, 118 F.3d 996. The nature and severity of the Student's disability in this case was discussed by Dr. XXXX and Dr. XXXX. XXXX Syndrome is a genetic disorder that causes a range of difficulties for individuals that XXXX. This Student's array of symptoms as a result of the Syndrome is at the higher end of the spectrum for XXXX. She has impaired cognitive flexibility, significant deficits in processing speed, and significant problems with attention. As she got older, the Student became more aware of the differences between herself and her peers which led to pronounced anxiety manifested by picking at her skin and clothing. I found it compelling that Dr. XXXX and Dr. XXXX testified that the problems that the Student experienced as a result of her XXXX Syndrome would get progressively worse over time. As the evidence showed in this case, the Student needed more intensive services as she progressed through the grades, not only because

the material became more difficult, but also because XXXX Syndrome made it difficult for her to build on the skills as she acquired them.

In her fourth grade year, the Student made some progress on some of her IEP goals; most notably, in math. Mrs. XXXX testified that once the Student was moved into the small group setting and was taught by a special educator, she improved and was able to demonstrate and build upon her skills. Mrs. XXXX attributed the Student's ability to succeed to the smaller setting. Mrs. XXXX noted: "[T]he small group math class has proven very successful for [the Student.] She has fewer distractions and focusses on her learning. She is an active participant." (BCPS Ex. 22) Mrs. XXXX noted that the small group setting provided a "huge benefit" for the Student in that it was the main reason why she was able to make progress on her math goals in the fourth grade. (T. XXXX)

The Student was not able to have the same success in her other academic subjects. The record is replete with evidence, detailed in the findings of fact, that the Student was unable to attend to the instruction in a larger group. She did not participate; she was anxious; and not surprisingly, she failed to make progress on her goals in this setting. While the BCPS data did show some progress on goals other than math, particularly vocabulary, the data purporting to show progress on the Student's reading comprehension goals and objectives is not convincing. In fact, the following graphs purporting to depict the "progress" the Student made in the area of reading comprehension illustrate the point:





I reproduced the graphic data here because I found the visual representation of the “progress” compelling and consistent with my understanding of the challenges facing the Student as a result of the nature and severity of her XXXX Syndrome. The graphs show only that the Student was able to demonstrate knowledge on some occasions but not others. I find that during the fourth grade year, with respect to her reading comprehension goals, the Student did not build on the skills learned in the past to make progressive gains. The only consistent thing about the language arts data, including assessments, reports cards, and work samples, is that they were inconsistent. Some days, the Student participated in and attended to the instruction in the general education classroom, but most times, she did not. On some days, she was able to come up with accurate answers to reading comprehension questions, and on some days she was not. I am mindful of the fact that all students have good days and bad days. But this Student’s progress was measured over the course of her fourth grade year. Progress as it is ordinarily defined means “movement forward or toward a place” or “gradual betterment.”⁴ With the exception of math, her “progress” was like a yo-yo rather than a slightly sloped upward line.

What is clear from the record is that the Student had significant difficulties in a large group setting and did substantially better in a smaller group. The teachers and other staff at [School 2] noted this repeatedly in the IEP meetings beginning in third grade and continuing through the final fifth grade IEP. In third grade, the team noted that the Student had “difficulty with transitions and cognitive flexibility in the general education setting.” (BCPS Ex. 11) Early in the fourth grade year, the team discussed the Student’s “distraction in a whole group setting.” (BCPS Ex. 9). The Student’s fourth grade language arts teacher noted that the Student did not participate in the whole group setting and struggled to maintain her attention on the lesson. The team noted and celebrated the Student’s successes in math once she was removed from the

⁴ See Merriam-Webster, <http://www.merriam-webster.com/dictionary/progress> (last visited Nov. 21, 2014).

general education setting and placed with a small group of three students in a class that was taught by a special educator, noting that such a setting provided a “huge benefit” for the Student. (BCPS Ex. 22, T. XXXX) Toward the end of her fourth grade year, the team noted that the Student did not participate in a large group setting and that a small group format “facilitated her ability to follow oral directions and participate in activities with peers.” (T. XXXX, BCPS Ex. 8) In a large group setting the Student needed a lot of redirection as well as help getting started and maintaining attention. In a smaller setting, the Student was more willing to participate and was less anxious. (T. XXXX) Finally, the June 16, 2014 IEP team considered a range of ESY services and determined that one-on-one tutoring would be more appropriate than the ESY classroom. As a rationale, the team noted that the Student struggled in both reading and math when the class was composed of ten or more students. The team was concerned that “if [the Student] were in a larger group of 12-20 students, she would not be able to successfully access her learning due to anxiety and inattention, and would not benefit from the program.” (BCPS Ex. 6)

The observations of the school staff were confirmed by the testimony and opinion of Dr. XXXX who opined that the Student needed a small, self-contained classroom in order to make meaningful progress. As the evidence in the record concerning the Student’s experience in the classroom support this conclusion, I find that the Student needs to have all of her academic subjects, not just math, taught in this setting in order for her to receive a FAPE.

While the Student’s 2013-2014 IEP contained appropriate goals and objectives, most of it was not implemented in the small self-contained setting that the Student required to make meaningful progress, to allow her to access the general curriculum, or to obtain academic benefit. I find that the BCPS failed to provide the Student a FAPE in fourth grade.

The same analysis applies to the IEP developed for fifth grade. The BCPS did not offer a small group setting for social studies or science. Rather, the IEP provided for a 15 minute pull-out at the beginning of each of these classes so that Mrs. XXXX could review the content with the Student. The Student would then return to the large general education setting for the remainder of the instructional time and engage in independent or small group exercises. (BCPS Ex. 24) This plan would have required the Student to transition into a general education setting with the lesson already in progress. Given the lack of cognitive flexibility that is a hallmark of the Student's XXXX Syndrome and the difficulties that were noted with her willingness to engage and participate in the general education setting, this plan was not reasonably calculated to provide educational benefit. With respect to the math curriculum, the June 16, 2014 IEP team appropriately continued the math intervention that had proven so successful in the fourth grade. (BCPS Ex. 1) For language arts, which included reading, writing, and spelling, the fifth grade IEP was substantially similar to the fourth grade IEP⁵ and provided that the Student was to receive 35 minutes in a small group, special education setting and 70 minutes in the general education setting on a daily basis. (BCPS Ex. # 1) While the amount of time each day in special education went from 15 minutes to 35 minutes, the bulk of the Student's language arts instruction was to occur in the general education setting. As was aptly documented by her teachers in fourth grade, this level of intervention allowed only inconsistent and momentary progress.

While the Student's 2014-2015 IEP contained appropriate goals and objectives, most of it was not implemented in the small, self-contained setting that the Student required to make meaningful progress, to allow her to access the general curriculum, or to obtain academic

⁵ The fourth grade IEP provided intervention services in language arts three days a week for fifteen minutes each day.

benefit. I find that the IEP developed by BCPS for fifth grade was not reasonably calculated to provide the Student a FAPE.

The Parents also asserted that the BCPS failed to consider the continuum of appropriate special education services. The BCPS records demonstrate that the team did consider the Parents' request for a more restrictive placement. Although there was some mention in the documents that [School 2] did not have a full-time self-contained classroom, Mrs. XXXX testified that the school would have created one if the team felt it was necessary. The notes of the June 2014 IEP team meeting reflect that the team discussed a more restrictive placement, but felt that the Student's needs could be met in the less restrictive setting proposed in the IEP.

Placement at the [School 1]

While BCPS did not contest that [School 1] is an appropriate placement for the Student, I will briefly set forth the governing law. When a state receiving IDEA funding fails to provide a FAPE, the child's parent may remove the child to a private school and then seek tuition reimbursement from the state. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). Under the IDEA, parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Carter*, 510 U.S. at 15 (citing *Burlington*, 471 U.S. at 373-74). A parent may recover only if (1) the proposed IEP was inadequate to offer the child a FAPE, and (2) the private education services obtained by the parent were appropriate to the child's needs. While school systems are required to provide a FAPE in the least restrictive environment (LRE), private placements only have to be proven appropriate. *Id.*

[School 1] is an approved non-public school serving children with learning disabilities. Prior to her enrollment, staff at [School 1] reviewed the Student's records, including Dr.

XXXX's assessment, and determined that they could meet the Student's needs. The Student enrolled and has been making progress, both academically and socially. Therefore, I find that the Parents are entitled to reimbursement for their unilateral placement of the Student at [School 1] for the 2014-2015 school year. *Carter*, 510 U.S. 7.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student was denied FAPE during the 2013-2014 school year and that the IEP proposed for the 2014-2015 school year was not reasonably calculated to allow the Student to receive a FAPE in fifth grade. I further conclude as a matter of law that BCPS' proposed continued placement of the Student in the general education setting for her academic subjects for the 2014-2015 school year fails to offer the Student FAPE. I conclude that [School 1] is appropriate to meet the Student's educational needs. 20 U.S.C.A. § 1400(d)(1)(A) (2010); *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.*, 471 U.S. 359 (1985); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Hartmann v. Loudon Cnty. Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997).

ORDER

I **ORDER** that the Parents' request for the Student's placement at [School 1] for the 2014-2015 school year be, and is hereby, **GRANTED**; and I further **ORDER** BCPS to pay for the tuition for the 2014-2015 school year.

November 24, 2014
Date Decision Issued

Denise Oakes Shaffer
Administrative Law Judge

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) (2014).

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.

DOS/fe