

XXXX XXXX,

STUDENT

v.

BALTIMORE CITY

PUBLIC SCHOOLS

*** BEFORE ROBERT F. BARRY,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH Case No.: MSDE-CITY-OT-14-21690**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On June 18, 2014, XXXX XXXX and XXXX XXXX (Parents), by attorney Holly L. Parker, filed a due process complaint with the Office of Administrative Hearings (OAH) on behalf of their son, XXXX (Student), requesting a hearing to review the identification, evaluation, or placement of the Student by the Baltimore City Public Schools (City Schools) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). On July 21, 2014, the OAH received notice that the parties had participated in a resolution meeting on that date, which did not resolve the matter.

On August 4, 2014, I conducted a telephone pre-hearing conference with Ms. Parker on behalf of the Parents and attorney Darnell L. Henderson, Associate Counsel, Office of Legal Counsel, on behalf of the City Schools. I scheduled a hearing for six days in September 2014. The parties were aware of the time requirements for issuing a decision and that forty-five days from July 21, 2014, the date that the parties notified the OAH of the outcome of the resolution

session, was September 4, 2014, a date that would pass before the hearing even began. Due to the parties' attorneys' schedules, a hearing could not be scheduled to begin until September 15, 2014. The parties therefore expressly agreed to a decision due date beyond September 4, 2014, thereby waiving the requirement that a decision be issued within 45 days of certain triggering events. *See* 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2014); Code of Maryland Regulations (COMAR) 13A.05.01.15C (a hearing must be conducted and a decision is due within 45 days of certain triggering events, in this case, the notification to the OAH on July 21, 2014 of the unsuccessful resolution meeting).

On August 15, 2014, the City Schools filed a Motion for Partial Summary Decision as to four issues presented by the Parents in their due process complaint. The Parents filed an Answer to the School's motion on September 2, 2014. On September 8, 2014, I issued a Ruling on Motion for Partial Summary Decision, in which I granted the City Schools' motion as to one issue in its entirety and as to another issue in part. I ruled that the City Schools had not failed to consider all recommendations from private evaluators, *see* 34 C.F.R. § 300.324(a), and that the City Schools had not failed to offer appropriate extended school year (ESY) services to the Student for Summer 2013, *see* 34 C.F.R. § 300.106.

I held a hearing on September 15, 16, 17, and 18, 2014 at the OAH, 11101 Gilroy Road, Hunt Valley Maryland. Mr. Henderson and Diana Wyles, Associate Counsel, Office of Legal Counsel, represented the City Schools. Ms. Parker represented the Parents. At the conclusion of the hearing, the parties agreed to a due date of October 16, 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); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and 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.

ISSUES

The remaining issues, as stated in the due process complaint, are whether the City Schools: (1) failed to provide the Student a FAPE from January 2013 to the present; (2) failed to offer a FAPE for the 2014-2015 school year; (3) failed to fully and adequately identify and address all areas of the Student's suspected disability; (4) failed to provide services in a timely manner; (6) failed to make all decisions regarding the Student's special education programming in the context of a duly constituted IEP meeting; (7) failed to offer ESY services for Summer 2014; (8) failed to provide necessary accommodations and supports to the Student; and (9) failed to create an IEP that is reasonably calculated to confer an educational benefit for the 2013-2014 and 2014-2015 school years. Additional issues implicit in the Parents' stated issues are whether the City Schools should be legally required to reimburse the Parents for tuition for their private placement of the Student at [School 1] ([School 1]) for the 2014-2015 school year; and (2) provide compensatory education services to the Student for its failure to provide a FAPE from January 2013 to the present.

SUMMARY OF THE EVIDENCE

I admitted the following exhibits into evidence on behalf of the City Schools¹:

BOARD #1 - City Schools' Response to the Due Process Complaint

BOARD #2 - Due Process Complaint

¹ I retained the exhibit numbers used by the parties. Any exhibits that were not moved into evidence or that were moved into evidence, but not admitted, have been placed in a separate part of the case file.

- BOARD #3 - IEP, February 10, 2014, amended April 1, 2014
- BOARD #4 - Authorization, signed January 3, 2014
- BOARD #5 - IEP, November 25, 2013
- BOARD #6 - IEP Team Meeting Attendance Sheet, April 1, 2014
- BOARD #7 - IEP Team Meeting Attendance Sheet, February 10, 2014
- BOARD #8 - IEP Team Meeting Attendance Sheet, November 25, 2013
- BOARD #9 - IEP Team Meeting Attendance Sheet, November 13, 2013
- BOARD #10 - IEP Team Meeting Attendance Sheet, October 30 2013
- BOARD #11 - IEP Team Meeting Attendance Sheet, October 9, 2013
- BOARD #12 - Prior Written Notice, April 1, 2014
- BOARD #13 - Prior Written Notice, February 10, 2014
- BOARD #14 - Prior Written Notice, November 13, 2013
- BOARD #15 - Prior Written Notice, October 30, 2013
- BOARD #16 - Prior Written Notice, October 9, 2013
- BOARD #19 - Notice of IEP Team Meeting, November 14, 2013
- BOARD #20 - Notice of IEP Team Meeting, revised, November 14, 2013
- BOARD #21 - Notice of IEP Team Meeting, October 31, 2013
- BOARD #22 - Notice of IEP Team Meeting, October 14, 2013
- BOARD #23 - Notice of IEP Team Meeting, September 23, 2013
- BOARD #24 - Notice and Consent for Assessment, Reevaluation, November 25, 2013
- BOARD #25 - Notice and Consent for Assessment, Initial Evaluation, October 9, 2013
- BOARD #26 - Functional Behavioral Assessment (FBA) Summary Report, February 10, 2014
- BOARD #27 - Educational Assessment Report – Corrected, November 18, 2013

- BOARD #28 - Summary and Score Report, Woodcock Johnson III Normative Update Tests of Achievement (Form B), Compuscore Version 3.1, date of testing October 14, 2013
- BOARD #29 - Report of Psychological Evaluation, XXXX XXXX, School Psychologist, October 21, 2013
- BOARD #30 - Psychological Evaluation, XXXX XXXX, Ph.D., October 17, 2012
- BOARD #31 - Individualized Plan for Disabled Student Eligible Under Section 504 of the Rehabilitation Act, February 25, 2013
- BOARD #33 - Student Support Team Summary Form, Baltimore County Public Schools, November 29, 2012
- BOARD #34 - Student Eligibility Form for Students Identified with a Disability Under Section 504, Baltimore County Public Schools, November 13, 2012
- BOARD #35 - IEP Team Summary, Baltimore County Public Schools, Team Meeting on November 1, 2012
- BOARD #36 - City Schools Progress Report, XXXX XXXX, Special Education, March 25, 2014
- BOARD #37 - City Schools Psychological Services Progress Report, XXXX XXXX, M.A., School Psychologist, March 24, 2014
- BOARD #38 - City Schools Progress Report, XXXX XXXX, Reading Intervention, March 21, 2014
- BOARD #39 - City Schools Progress Report, XXXX XXXX, General Education, March 18, 2014
- BOARD #40 - City Schools Progress Report, XXXX XXXX, Special Education, February 3, 2014
- BOARD #41 - City Schools Progress Report, XXXX XXXX, Reading Intervention, February 3, 2014
- BOARD #42 - City Schools Progress Report, XXXX XXXX, Special Education, February 3, 2014 (same as BOARD #40)
- BOARD #43 - City Schools Progress Report, XXXX XXXX, General Education, February 3, 2014

- BOARD #44 - Psychological Services Progress Report, XXXX XXXX, School Psychologist, January 31, 2014
- BOARD #45 - Progress Report on IEP Goals, January 17, 2014
- BOARD #46 - Student Goal Matrix, February 3, 2014
- BOARD #47 - City Schools Progress Report, XXXX XXXX, General Education, October 1, 2013
- BOARD #48 - City Schools Progress Report, XXXX XXXX, General Education, October 18, 2013
- BOARD #49 - Report Card, 2013-2014
- BOARD #51 - Report Card, 2012-2013
- BOARD #52 - Student's Homework Samples
- BOARD #53 - Letter, February 10, 2014, from the MSDE to Ms. Parker
- BOARD #55 - Letter, December 23, 2013, from the MSDE to Ms. Parker
- BOARD #57 - Letter, December 17, 2013, from Ms. Parker to the MSDE
- BOARD #61 - 2014-2015 Enrollment Agreement, [School 1], August 25, 2014
- BOARD #62 - Application for Admission, [School 1], August 11, 2014
- BOARD #63 - Letter, June 18, 2014, from the 41st Legislative District Office, to the City Schools
- BOARD #66 - Retention Cover Sheet/Referral, 2012-2013
- BOARD #67 - E-mail, January 22, 2013, from XXXX XXXX, School Psychologist, to the Student's mother
- BOARD #68 - Letter, April 11, 2013, from [School 1] to the Student's mother
- BOARD #69 - Résumé of XXXX XXXX, School Psychologist
- BOARD #70 - Résumé of XXXX XXXX
- BOARD #71 - Résumé of XXXX XXXX

- BOARD #73 - Résumé of XXXX XXXX
- BOARD #74 - Résumé of XXXX XXXX, School Psychologist
- BOARD #75 - Résumé of XXXX XXXX
- BOARD #76 - Résumé of XXXX XXXX
- BOARD #77 - Baltimore County Public Schools' School Year Calendar, 2012-2013
- BOARD #78 - City Schools' School Year Calendar, 2012-2013

I admitted the following exhibits into evidence on behalf of the Parents:

- PARENTS #1 - Psychological Evaluation, XXXX XXXX, Ph.D., October 17, 2012
- PARENTS #4 - Letter, February 8, 2012, from XXXX XXXX, Ph.D., to [School 2] school staff
- PARENTS #5 - Individualized Plan for Disabled Student Eligible Under Section 504 of the Rehabilitation Act, February 25, 2013
- PARENTS #14 - Letter, September 18, 2013, from Ms. Parker to the City Schools
- PARENTS #19 - Dynamic Indicators of Basic Early Literacy Skills (DIBELS) Scores
- PARENTS #20 - DIBELS Scores
- PARENTS #21 - Letter, September 24, 2013, from the City Schools to Second Grade Parents and Guardians
- PARENTS #24 - Summary and Score Report, Woodcock Johnson III Normative Update Tests of Achievement, Compuscore Version 2.0, Norms based on age 8.6, date of testing October 14, 2013
- PARENTS #25 - Summary and Score Report, Woodcock Johnson III Normative Update Tests of Achievement, Compuscore Version 2.0, Norms based on grade 2.1, date of testing October 14, 2013
- PARENTS #30 - Letter and Complaint to the Division of Special Education, MSDE, November 27, 2013
- PARENTS #37 - IEP, February 10, 2014

PARENTS #39 - Due Process Complaint, March 31, 2014 (admitted for limited purpose of establishing date of due process complaint)

PARENTS #40 - Letter, June 2, 2014, from Ms. Parker to Mr. Henderson, with letter from XXXX XXXX, Executive Director, Office of Special Education, City Schools

PARENTS #41 - (not admitted)

PARENTS #42 - (not admitted)

PARENTS B - Résumé of XXXX XXXX

PARENTS C - Curriculum Vitae, XXXX XXXX, Ph.D.

Testimony

Both Dr. XXXX and Mr. XXXX testified on direct and in rebuttal. The Parents presented testimony from four additional witnesses:

1. XXXX XXXX, M.A., formerly a special education teacher at [School 3], who was accepted (during cross-examination) as an expert witness in special education and in administering the Woodcock Johnson III;
2. XXXX XXXX, Director of Admissions, [School 1];
3. XXXX XXXX, Director, Institute for Urban Research, [University], who testified as an expert in psychology;
4. XXXX XXXX, second-grade teacher, [School 3], who was accepted (during cross-examination) as an expert witness in elementary education.

The City Schools presented testimony from the following six witnesses:

1. XXXX XXXX, M.A., Student Support Teacher, [School 3], who testified as an expert witness in elementary education;
2. XXXX XXXX, IEP Chair, [School 3], who testified as an expert witness in special education and management of the IEP Process;
3. XXXX XXXX, M.Ed., Special Educator, [School 3], who testified as an expert witness in special education;
4. XXXX XXXX, M.A., School Psychologist, [School 3], who testified as an expert witness in school psychology;

5. XXXX XXXX, M.A., School Psychologist, [School 3], who testified as an expert witness in school psychology and the Section 504 Plan process;

6. Dr. XXXX

FINDINGS OF FACT

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

1. The Student is a nine-year-old boy, born XXXX, 2005, who lives primarily with his mother and older brother in Baltimore, Maryland.

2. The Student's mother, XXXX XXXX, Ph.D., is a XXXX. The Student's father, XXXX XXXX, works for XXXX. The Parents adopted the Student shortly after his birth; they divorced at some unknown date.

3. The Student attended the XXXX School in [City 1] through kindergarten.

4. In 2011, the Student moved with his mother to [City 2], Maryland, and attended [School 2], a Baltimore County public school for first grade (August 2011 to June 2012) and the first half of second grade (August 2012 to December 2012). [School 2] had not implemented the common core curriculum, a rigorous standardized curriculum, while the Student attended [School 2].

5. Beginning in October 2011, the Student received psychological treatment from XXXX XXXX, Ph.D.

6. On February 8, 2012, Dr. XXXX wrote a letter to [School 2] staff, indicating that the Student met the criteria for a diagnosis of ADHD-Combined Type, and qualified for special education services "to provide accommodations to address his ADHD symptoms that negatively impact his academic functioning. These accommodations may include, but are not limited to, preferential seating, extended time, frequent communication between home and school regarding assignments, organizational assistance, and use of behavioral management techniques to improve

adaptive functioning and reduce maladaptive behaviors associated with ADHD.” (PARENTS #4).

7. On October 17, 2012, Dr. XXXX issued a psychological evaluation of the Student, whom she had examined on October 1, 2012. (BOARD #30; PARENTS #1).

8. Dr. XXXX assessed the Student’s cognitive processing/intellectual functioning by administering the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV). The Student had the following scores: Verbal Comprehension Index - 87; Perceptual Reasoning Index - 94; Working Memory Index - 94; Processing Speed Index - 73. The Processing Speed Index is a timed test measuring an individual’s ability to quickly discriminate between various shapes; it also assesses an individual’s cognitive efficiency. Dr. XXXX noted: “Given the significant discrepancy between [the Student’s] Processing Speed score and his other index scores, the resultant Full Scale score (84) should be ignored (as it primarily reflects the arithmetic average of his discrepant abilities). Therefore, he should be viewed as [a] youth who displays low average to average verbal and nonverbal abilities but delayed processing speed.” (BOARD #30; PARENTS #1).

9. Dr. XXXX assessed the Student’s academic skills by administering the Woodcock Johnson Psycho-educational Battery – Test of Academic Achievement, Third Edition (WJ-Ach-III) – Select subtests.

10. On Broad Reading, a measure of reading achievement, the Student had a standard score of 100 (average), and the following average standard scores on subtests: Letter-Word ID, reading isolated words - 101; Reading Fluency, reading sentences accurately and efficiently - 100; and Passage Comprehension, ability to understand what is read - 99.

11. On Broad Math, a measure of math reading achievement, the Student had a standard score of 98 (average), and the following standard scores on subtests: Math Fluency, accurately and efficiently completing basic math - 99 (average); Calculation, performing math computations - 117 (high average); and Applied Problems, solving real world math problems - 87 (low average).

11. Dr. XXXX also assessed the Student's receptive language; executive functioning/attention; memory; visual/motor functioning; and behavior, emotions and personality.

12. On a screening test of receptive language and general verbal ability, the Student demonstrated average receptive language abilities, which was generally consistent with his expressive verbal abilities as measured on the WISC-IV and which would suggest that his optimal verbal abilities fall in the average range.

13. As to executive functioning/attention, the Student had significant difficulty with sustained attention on a continuous performance task; therefore, he could be expected to have more difficulty sustaining attention and focus when tasks increase in length or complexity.

14. As to visual/motor functioning, the Student's visual-motor integration abilities were in the high average range and his fine motor skills in his dominant hand were in the low average range.

15. As to behavior, emotions and personality, which were as assessed by multiple raters, including the Parents and the Student's teachers, the Student had moderate attention difficulties across home and school settings, most likely attributed to his frustration in sustaining attention to effortful tasks.

16. In her Summary and Impressions, Dr. XXXX reaffirmed the Student's diagnosis of ADHD, and noted his slow processing speed. She indicated that the Student's clinical presentation, primarily involving inattention, required focused treatment to avoid a high risk of outcomes such as academic underachievement, depression, and disruptive behavior.

17. Dr. XXXX recommended that the Student be given an IEP to address his emotional, behavioral, and academic needs. She specifically recommended classroom interventions and modifications to address the Student's processing speed and ADHD, such as an organization coach, shorter tasks, and a parent-teacher communication system.

18. As of October 2012, XXXX XXXX, M.D., was prescribing Adderall XR 10 mg for the Student for his ADHD. (BOARD #30; PARENTS #1).

19. At [School 2], as of October 8, 2012, the Student received interventions and supports, including a behavior chart, reminders, redirection, extended time, preferential seating, and supplemental phonics instruction. (BOARD #29; BOARD #35).

21. On November 1, 2012, at the Parents' request, an IEP team met at [School 2] to discuss the Student's educational performance or potential need for special education services. The Student's father, based on information that he had received from family members, indicated that the Student required an IEP for his emotions. (BOARD #35).

22. The IEP team considered input from the Parents, Dr. XXXX (by phone), and the Student's teachers, and concluded that a 504 plan under the federal Rehabilitation Act, rather than an IEP, might be appropriate for the Student. The IEP team decided that the evidence did not indicate that the Student had a disability for purposes of an IEP. (BOARD #35).

23. On November 13, 2012, the Student was identified as in need of a 504 plan because his ADHD substantially limited his major life activities of concentrating and learning. (BOARD #34).

24. On Friday, November 29, 2012, [School 2] finalized the Student's 504 plan. It included the following specific accommodations: preferential seating oriented towards the teacher or front of the room; reduced distractions to student; extended time to complete assignments and tests; behavior chart with reward system (with daily and weekly reinforcers) with goals to follow directions and complete work with one reminder; chunking the materials into smaller tasks; visual/kinesthetic reminders to stay on task and focus on the instruction; visual organizers; testing accommodations extended time reduce distractions to the student; multiple or frequent breaks; visual cues; meet with counselor periodically to discuss/provide instruction on organization parent contacts/meetings student assignments tests/quizzes; behavior chart. (BOARD #34).

25. Staff at [School 2] implemented the Student's 504 plan during the fifteen school days of December 2012. (BOARD #77).

26. On January 2, 2013, the Student enrolled and began classes at [School 3], a Baltimore City public school.

27. [School 3] voluntarily implemented the common core curriculum for the 2012-2013 school year.

28. Beginning in January 2013, the Student, who lacked some foundational reading skills for second-grade material at [School 3], received phonics-based reading intervention instruction in a small group pull-out setting from Ms. XXXX, and small group instruction within the classroom setting when appropriate.

29. On January 22, 2013, XXXX XXXX, a school psychologist at [School 3], sent an e-mail to Dr. XXXX informing her that a Student Support Team (SST) would meet on February 8, 2013 to review and possibly revise the Student's 504 plan. (BOARD #67)

30. On February 25, 2013, after considering Dr. XXXX's evaluation and the Student's present levels of performance, the SST revised the Student's 504 plan. The SST determined that the Student's attention problems were consistent with a handicapping condition of ADHD, which substantially limited his learning (especially writing, but also reading and math) and his ability to actively attend to lessons without accommodations in the classroom setting. The SST concluded that the Student required accommodations during daily instruction and testing in order to make academic progress and organize his materials and approach to tasks in the school setting. These accommodations included: preferential seating (e.g. reduced distractions, high teacher proximity); visual and verbal prompts and cues (e.g. time remaining, expected learning behaviors); reinforcement of positive work habits; breaking down larger units into smaller steps ("chunking"); visual organizers; multiple or frequent breaks (teacher directed); monitor test responses; check for understanding (e.g. directions, approach to use, what final product should look like); frequent feedback; repeat/rephrase directions or content as needed. (BOARD #31).

31. In March 2013, the Parents filed an application to enroll the Student in [School 1], a non-public, all special education school. The application was approved by [School 1] on April 11, 2013, but the Student remained at [School 3]. (BOARD #68).

32. The Student made limited progress in reading between January 2013 and June 2013 as he became more confident with recognizing patterns and blending sounds. (BOARD #31; PARENTS #5).

33. The Student's final grades for the 2012-2013 were: Unsatisfactory (60 and below) in Language Arts and Mathematics; Poor (60-69) in Science and Social Studies; Good (80-89) in Spanish; and Excellent (90 and above) in Physical Education, Visual Arts, and Music. (BOARD #51).

34. The Student was retained in second grade for the 2013-2014 school year. While the Student displayed some strengths (his phonics skills and basic sight words recognition had improved and he had learned to check and see if what he read made sense), his comprehension was not on grade level and he had trouble with inferential and critical thinking math skill problem solving. The Student was not academically ready for third grade; at the end of the 2012-2013 school year, he was reading at a beginning of second-grade level.

35. The Parents did not appeal the decision to retain the Student.

36. The Student's primary teacher for the 2013-2014 school year was Ms. XXXX, who had a classroom of twenty-nine students.

37. Throughout the 2013-2014 school year, the Student had two private tutors, XXXX XXXX (language arts) and XXXX XXXX (math), for three to four hours per week.

38. On September 18, 2013, the Parents expressed concerns about the Student's academic progress. (PARENTS #14).

39. On September 23, 2013, an IEP team met to review existing information and to determine the need for additional data. (BOARD #23).

40. On October 9, 2013, an IEP team met and considered existing evaluations, including input from the Student's teachers, Ms. XXXX and Ms. XXXX. The IEP team suspected that the Student's ADHD, an other health impairment under the IDEA, was adversely impacting his school performance. The IEP team agreed to conduct assessments of the Student's

academic performance in reading, mathematics, and written language, and emotional, social, and behavioral development. (BOARD #16; BOARD #25).

41. Over three days, October 14, 15, and 16, 2013, XXXX XXXX, formerly a special education teacher at [School 3], assessed the Student by, among other things, administering the Woodcock-Johnson III Normative Update Tests of Achievement (Form B). (BOARD #27).

42. Ms. XXXX inadvertently erred in scoring the Woodcock-Johnson by using the Compuscore Version 2.0, rather than the correct Compuscore Version 3.1. After the error was discovered, Ms. XXXX rescored the Woodcock-Johnson using the same raw scores that she had previously used. (Board #27).

43. The Student's standard scores on the Woodcock-Johnson ranged from 76 for academic fluency to 112 for story recall-delayed; his standard scores were generally in the 90s, the average range. The Student's grade-equivalencies ranged from 1.4 to 6.2, with most of them on the second-grade level. (BOARD #28). These scores were a valid representation of the Student's current levels of academic achievement.

44. The Student's reading was assessed by Ms. XXXX using DIBELS and Text Reading Comprehension (TRC) assessments. At the beginning of the 2013-2014, the Student was reading 50 words per minute, just below the goal of 52 words per minute for a second grader at the beginning of the school year. His accuracy score was 98, above even the goal for a second grader at the end of the school year. (PARENTS #19). The Student scored 46 on the DORF Retell, with three bars, indicating that the Student was able to use 46 words to retell a story with three out of four crucial details in 60 seconds. (PARENTS #19; BOARD #47). These scores indicated that the Student was an accurate, but slow, reader who comprehended material at a

beginning of second grade level. At the beginning of the 2013-2014 school year, the Student had a TRC level of I (on a scale of B to Z), just below the goal level of J. (PARENTS #20).

45. In September 2013, Ms. XXXX changed the Student's instruction from a phonics-based program, and started the Student with decoding and context, using the direct instruction corrective reading program, a research-based program focusing on fluency.

46. By October 2013, the Student had improved to a TRC level of J, and by November 2013, the Student had improved to a TRC level of K, with an end of second grade goal level of N. (PARENTS #20). In October 2013, the Student's DORF Retell score had dropped to 28, which was still above the end of second grade goal of 27. All of Ms. XXXX's assessments of the Student's reading were valid assessments of his current performance.

47. On October 21, 2013, Ms. XXXX conducted a psychological evaluation of the Student. Ms. XXXX reviewed the Student's file, interviewed the Student's parents and teachers, observed the Student in the classroom, and administered formal personality and emotional assessments – the Behavior Assessment System for Children-Second Edition (BASC-2), and the Behavior Rating Inventory of Executive Function (BRIEF). (BOARD #29).

48. In a report, Ms. XXXX provided test results and interpretation and a summary and recommendations. The Student's teachers reported that the Student responded well to prompts to refrain from inappropriate or off-task behavior. Ms. XXXX recommended instructional strategies like those in the Student's 504 plan, and small-group instruction for reading (decoding, comprehension, and fluency). (BOARD #29).

49. On October 30, 2013, an IEP team met to review the assessments. The IEP team determined that the Student was eligible for special education services based on an other health impairment. (BOARD #15).

50. On November 13, 2013 and November 25, 2013, an IEP team met to draft the Student's IEP. (BOARD #14; BOARD #24).

51. The November 25, 2013 IEP provided accurate present levels of academic achievement and functional performance based upon teacher's and staff's observations, the Student's scores on the Woodcock-Johnson III Normative Update Tests of Achievement (Form B), DIBELS, work samples, and content assessments. (BOARD #5).

52. For the November 25, 2013 IEP, oral reading fluency assessments from October and November were available. The Student scored under 60 in October and just over 60 in November. The middle of year goal is 72 and the end of year goal is 87. (PARENTS #20).

53. The Student had the following grade-level performances:

Reading Fluency	2.1
Reading Vocabulary	3.0
Reading Comprehension	2.2
Math Calculation	2.3
Math Problem Solving	2.8
Communication	1.4

54. The Student's Written Language Content performance was at a beginning second grade level.

55. As to Social Emotional/Behavioral performance, the Student had minimal areas that required monitoring.

56. The Parents expressed their belief that the Student needed a non-public special education program like [School 1]. The Parents also expressed their belief that the Student needed math goals, partly because he still sometimes used his fingers to count.

57. The November 25, 2013 IEP contained the following goals:

Goal: Academic – Reading Fluency: By November 25, 2014, Student will increase reading accuracy and fluency from beginning of second grade level to middle of third grade level as measured by grade level guided reading text.

Goal: Academic – Reading Comprehension: By November 25, 2014, given middle of third grade level guided reading texts, Student will apply and refine comprehension skills with 90% accuracy.

Goal: Academic – Written Language Content: By November 25, 2014, [Student] will increase writing skills from beginning of second grade level to middle of third grade level in the areas of ideas and content, organization as measured by analysis of writing samples with 90% accuracy.

Goal: Academic- Communication: By November 25, 2014, [Student] will produce and comprehend grade level oral language, demonstrating competency in form, content, and use.

Goal: Behavioral – Social Emotional/Behavioral: By November 25, 2014, [Student] will improve school behavior in the area of work habits by demonstrating an increase in his organizational skills as recorded on the designated documentation system (i.e. notebook/desk checks, planner, point sheets, charting).

(Board #5).

58. The November 25, 2013 IEP did not provide any specific math goals.

59. The November 25, 2013 IEP contained the following school year services: 4.5 hours per week of special education services, all within the general education classroom, and 40 minutes per month of psychological services, also in the general education classroom. For the written language goals, a special education teacher would work with the Student three times per week for thirty minutes per day and a general education teacher would work with the Student twice weekly at thirty minutes per day for a total of 2.5 hours per week. The special education teacher would also address other goals as needed during her time in the classroom. The Student would receive his reading services (reading fluency, reading comprehension and communication

goals) in a small group provided by a general education teacher (Ms. XXXX) using a research-based reading intervention. Psychological services would be delivered as a direct service to the Student within the classroom setting by teaching and prompting use of positive behavior support strategies, and promoting skill practice. (Board #5).

60. The IEP team agreed to conduct a Functional Behavior Assessment.

61. The Parents did not provide consent for implementation of the Student's IEP until January 3, 2014.²

62. Ms. XXXX was assigned as the Student's special education teacher; she provided the three thirty-minute services provided for in the IEP.

63. The Student had the following DIBELS scores for the middle of the year: January 9, 2014 - DORF fluency 59 with a goal of 72; accuracy 98 with a goal of 96; and retell 66 with a goal of 21, with four details with a goal of two; January 30, 2014 - TRC at L level, which was the expected level. (BOARD #43).

64. As of January 31, 2014, after two direct services from a school psychologist for improving work habits and organizational skills, the Student demonstrated improvement picking up his charting system from the teacher's desk, accessing his belongings from the desk bin, and making changes within his desk to maximize organization. (BOARD #44; BOARD #45; BOARD #46).

65. On February 10, 2014, the IEP team met to review the results of the FBA and to review the Student's progress. The IEP team, including the Parents, decided that the Student did not need a behavioral intervention plan. (BOARD #13).

66. At the February 10, 2014 meeting, the Parents reiterated their belief that the

² The Parents initially did not consent to the implementation of the services in the IEP because they did not agree with aspects of the IEP, such as the amount of services. The Parents mistakenly believed that consenting to the implementation of the services in the IEP meant that they agreed to the entire IEP. (BOARD #55).

Student needed a math goal on his IEP. As of that date, the Student was on grade level in math, which did not include multiplication, which the Student was doing with his tutor, and he had mastered basic math facts (working with numbers up to 20). Based on teacher's assessment and the Student's progress in class, the school-based members of the IEP team determined that a math goal was not necessary. (BOARD #13).

67. The school-based members of the IEP team determined that the Student met the criteria to qualify for ESY for three academic goals (reading fluency, reading comprehension, and written language content). (BOARD #3; BOARD #13). The IEP provided that the Student would receive two one-hour sessions of ESY services per week for four weeks, outside of the general education classroom. (BOARD #3; BOARD #12).

68. The Parents requested a non-public placement for the Student because they felt that the teacher in the general education class did not have enough time to meet the Student's needs and that more intensive intervention was required. (BOARD #13).

69. As of March 18, 2014, the Student was making progress on his academic goals, and was performing at an excellent level in math and science and at a good level in language arts. (BOARD #39).

70. As of March 21, 2014, the Student was making progress on his reading goals by improving his comprehension and his ability to draw inferences. (BOARD #38).

71. As of March 24, 2014, the Student was continuing to benefit from the accommodations in his IEP and to respond to positive supports. (BOARD #37).

72. As of March 25, 2014, the Student was making significant progress in the areas of math fluency: he was performing almost perfectly on assessments for addition and subtraction at a second-grade instructional level. The Student also made some progress on his reading and

written language goals, but, consistent with his processing speed weakness, performed below the sixteenth percentile on timed assessments. (BOARD #36).

73. On April 1, 2014, the IEP team met to review math data from the last thirty school days. The school-based members of the IEP team determined that the Student did not require a math goal or math services on his IEP. The Student was passing math with an E (excellent), with the only accommodation being occasional monitoring of responses (usually up to twice weekly) to prompt him to check over one or more of his answers. (BOARD #12).

74. The Student completed the 2013-2014 school year at [School 3]. The Student's final grades were: Good (80-89) in Language Arts and Mathematics; and Excellent (90 and above) in Science, Social Studies, Physical Education, Visual Arts, Music, and Technology. (BOARD #50). The Student was reading almost on grade level.

75. In late May 2014 or early June 2014, XXXX XXXX, Executive Director, Office of Special Education, City Schools, wrote a letter to the Parents indicating that the IEP team had determined that the student was eligible for ESY services that would be provided by a home-based teacher. The Parents did not respond to Ms. XXXX's letter.

76. On June 2, 2014, the Parents' attorney wrote a letter to the City Schools' attorney, in which she incorrectly indicated that the IEP team had determined that the Student was not eligible for ESY services. (PARENTS #40).

77. On August 2014, the Parents enrolled the Student at [School 1], a certified non-public, full-time special education school. [School 1] provides special education and related services for thirty hours per week in classrooms with an average of five students. All of the [School 1]'s students have been identified as having an educational disability and have either an IEP or a PEP [personalized education plan].

78. The Parents did not provide specific notice to the City Schools that they intended to enroll the Student in [School 1] and seek tuition reimbursement.

DISCUSSION

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1482 (2010), 34 C.F.R. Part 300 (2014), Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a free appropriate public education (FAPE). 20 U.S.C.A. § 1412(a)(1)(A) (2010).

In *Board of Education of the Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court described FAPE as follows:

Implicit in the congressional purpose of providing access to [FAPE] is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child. . . . We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200-01 (emphasis added). *See also In Re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991).

The IDEA contains the following, similar definition of FAPE:

special education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge. . . [and that have been] 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* Md. Code Ann., Educ. § 8-401(a)(3) (2014); COMAR 13A.05.01.03B(27).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of*

Maryland, 700 F.2d 134, 139 (4th Cir. 1983), *citing Rowley*. Instead, FAPE entitles a student to an IEP that is “reasonably calculated to enable the child to receive educational benefits.” *Id.* at 177. “Educational benefit” requires that “the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200 (emphasis added). *See also MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir. 2002), *citing Rowley*, 458 U.S. at 192; *see also A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004). Thus, the IDEA requires an IEP to provide a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt*, 908 F.2d 1200, 1207 (4th Cir. 1990). Yet, the benefit conferred by an IEP and placement must be “meaningful” and not merely “trivial” or “de minimis.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3rd Cir. 1988).

In addition to the IDEA’s requirement that a disabled child receive some educational benefit, the child must be placed in the “least restrictive environment” to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. 300.114(a)(2)(i) & 300.117. Yet, mainstreaming disabled children into regular school programs may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved. *Id.*

The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this case that is the Parents. In *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), the Supreme Court established a two-part test that must be satisfied before a court will order reimbursement for private placement. First, it must be determined that services provided

under an IEP at a public school are inappropriate. Second, the private placement sought by the parents must be appropriate under the IDEA.

As noted above, the remaining issues from the due process complaint are whether the City Schools: (1) failed to provide the Student a FAPE from January 2013 to the present; (2) failed to offer a FAPE for the 2014-2015 school year; (3) failed to fully and adequately identify and address all areas of the Student's suspected disability; (4) failed to provide services in a timely manner; (6) failed to make all decisions regarding the Student's special education programming in the context of a duly constituted IEP meeting; (7) failed to offer ESY services for Summer 2014; (8) failed to provide necessary accommodations and supports to the Student; and (9) failed to create an IEP that was reasonably calculated to confer an educational benefit for the 2013-2014 and 2014-2015 school years. Additional issues implicit in the Parents' stated issues are whether the City Schools should be legally required: (1) to reimburse the Parents for tuition for their private placement of the Student at [School 1] for the 2014-2015 school year; and (2) provide compensatory education services to the Student for its failure to provide a FAPE from January 2013 to the present. (I will address issues 3, 4, 6, and 7 specifically, with the clarification that issue 6 is an allegation that the City Schools predetermined the Student's placement; all of the other Parents' issues will be addressed in my discussion of the IEP. I will renumber all of the Parents' issues for purposes of my conclusions of law.)

The City Schools refuted all of the Parents' arguments, asserting that the Parents have exaggerated the Student's disability, and arguing that the City Schools acted appropriately in assessing the Student's academic and behavioral needs and developing an appropriate IEP that would provide the Student a FAPE in the least restrictive environment.

On the record in this case, I wholeheartedly agree with the City Schools on every issue. The Parents' case that the Student requires placement in a non-public, special education school was ill-conceived, poorly presented, and inconsistent with any rational understanding of special education law, especially as to the least restrictive environment requirement. There is absolutely no evidence in this record to support a conclusion that the Student, who has very mild learning and behavior disabilities, should be segregated in a non-public, all special education school. Most significantly, the Parents did not present expert testimony to support any of their arguments.³ The Parents themselves were unimpressive witnesses: they presented their beliefs as if they were facts, and, without presenting any objective evidence, accused [School 3] staff of incompetence, fraud, and a lack of concern for the Student. Dr. XXXX was evasive, and, despite my numerous admonitions, seemed almost unwilling to answer simple, direct questions. Mr. XXXX, while louder and more demonstrative than Dr. XXXX, was similarly evasive and unconvincing, simultaneously expressing his steadfast belief that the Student required extensive special education services, while acknowledging that he deferred to his own siblings and to Dr. XXXX on academic issues. In stark contrast to the Parents' testimony, the seven witnesses from [School 3] were very professional, testifying convincingly that they accurately assessed the Student's academic and behavioral needs and developed an appropriate IEP that provided the Student a FAPE in the general education classroom for the balance of the 2013-2014 school year and that would have continued to do so for the 2014-2015 school year. In *A.B. v. Lawson*, 354

³ The Parents presented Dr. XXXX XXXX as an expert in psychology, purportedly to explain a cultural issue that existed in this case. Dr. XXXX, who has published extensively on young black males, is a colleague of Dr. XXXX. He spoke informally with the Student and found him to be a bright young boy, who expressed criticism of one of his teachers for showing favoritism and pressuring him. Dr. XXXX reviewed an assignment that the Student had written, and interpreted it as a hostile act toward the teacher. Dr. XXXX endorsed the Student's placement at [School 1] because it was a good environment for the Student. Dr. XXXX did not know that [School 1] was an all special education school, and he knew nothing about [School 3]. I gave Dr. XXXX's testimony no weight because it did not explain any relevant cultural issue and was of no value on any special education issue.

F.3d 315, 327 n.6 (4th Cir. 2004), the court indicated that the opinions of educators are due great deference by an administrative law judge in a special-education hearing. Frankly, this case does not involve any subtle analysis of competing expert opinions (because the Parents presented no experts), or good-faith disagreements between the parties. The expert opinions of the City Schools' witnesses were not only unimpeached, they were particularly convincing because they always comported with basic common sense.

The City Schools did not fail to provide services (by failing to identify the Student as having a disability and being in need of an IEP) in a timely manner

The Student transferred into [School 3] in the middle of second grade in January 2013, after just recently having been identified as being in need of a 504 plan based on ADHD and a weakness with processing speed. [School 3]'s staff began with the very reasonable hypothesis that the Student did not need an IEP. They considered the information concerning the 504 plan that had just recently been implemented at [School 2], the Student's transitions from [City 1] to [City 2] to Baltimore City, and the Student's transition from [School 2]'s state curriculum to [School 3]'s self-imposed, more rigorous, common-core curriculum. After determining that the Student did not have the first-grade and early-second-grade foundational skills necessary to master [School 3]'s more difficult curriculum, staff at [School 3] immediately implemented interventions for the Student, such as small-group in-class instruction and pull-out phonics-based reading instruction from Ms. XXXX. On February 25, 2013, [School 3]'s SST revised the Student's 504 plan to provide accommodations, such as instructional strategies and classroom modifications to address the Student's attention and learning problems. Despite these accommodations, the Student did not succeed academically at [School 3] during the 2012-2013 school year, failing Language Arts and Mathematics, and receiving a Poor in Science and Social

Studies. At the end of the 2012-2013 school year, the Student was generally performing at a beginning of second-grade level; he was not ready to advance to the third grade.

Throughout the hearing, the Parents expressed dissatisfaction with the Student having been retained in second grade, and essentially argued that [School 3] should have developed an IEP for the Student immediately upon his transfer in January 2013. [School 3]'s decision to pursue a 504 plan for the Student to address his ADHD and processing speed issues was the kind of decision to which I am required to give deference. Moreover, the City School's theory the Student had not developed foundational skills is extremely reasonable, as was [School 3]'s decision to retain the Student. As Ms. XXXX, the school psychologist, testified, the retention was an intervention to permit the Student to resolve his skill gap by developing and mastering second-grade skills. Ms. XXXX also noted that [School 3] agreed to consider a referral for an IEP by October 31, 2013 if the Student still was not demonstrating sufficient skills. [School 3]'s staff's decisions concerning the 2012-2013 school year and the retention of the Student for second grade were very much in line with the obvious intent of the IDEA to maintain students, as much as possible, in the general education curriculum.

The City Schools did not fail to fully and adequately identify and address all areas of the Student's suspected disability

The Parents argued that the City Schools failed to fully and adequately identify and address all areas of the Student's suspected disability. Dr. XXXX felt that the City Schools somehow had misdiagnosed the Student, although the ADHD diagnosis was the same one determined by Dr. XXXX, and the Student's weakness in processing speed was endorsed by Ms. XXXX's testing. The City Schools conducted appropriate assessments, including an educational assessment, a psychological evaluation, informal assessments, and a functional behavioral assessment. The City Schools complied with its obligation to use a variety of assessment tools

and strategies to gather functional, developmental, and academic information about the child that may assist in determining whether a child has a disability and in developing the content of an IEP. *See* 34 C.F.R. § 300.304.

The Parents did not indicate what other disability the Student might have until closing argument when Ms. Parker asserted that the City Schools should have suspected that the Student had a specific learning disability. The relevant federal regulation, 34 C.F.R. § 300.309 provides, in part, that a child may be determined to have a specific learning disability if:

(a) . . .

(1) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards:

- (i) oral expression
- (ii) listening comprehension
- (iii) written expression
- (iv) basic reading skill
- (v) reading fluency skills
- (vi) reading comprehension
- (vii) mathematics calculation
- (viii) mathematics problem solving.

(2) (i) The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention; or

(ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§ 300.304 and 300.305; and

(3) The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of –

- (i) a visual, hearing, or motor disability;
- (ii) mental retardation;

- (iii) emotional disturbance;
- (iv) cultural factors;
- (v) environmental or economic disadvantage; or
- (vi) limited English proficiency.

(b) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in §§ 300.304 through 300.306—

(1) Data that demonstrate that prior to, or as part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

(2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

34 C.F.R. § 300.309(a) and (b)(1) and (2).

The Parents provided no expert report or other evidence that would suggest that the City Schools should have suspected that the Student had a specific learning disability. Dr. XXXX's report did not address this issue, and the evidence in the record indicates that the Student's reading problem, as hypothesized by Ms. XXXX and other [School 3] staff, likely was related to his lack of foundational skills, or, in the language of the regulation, a lack of proper learning experiences. Once the Student received phonics-based reading instruction and then research-based reading instruction from Ms. XXXX, he was able to bring his reading essentially up to grade level by the end of the 2013-2014 school year. There is no reason that the City Schools should have suspected or identified the Student as having a specific learning disability.

The educational assessment completed by the City Schools was valid, and the November 25, 2013 IEP contained accurate present levels of the Student's academic performance

An IEP shall include “a statement of the child's present levels of academic performance.”

20 U.S.C.A. § 1414(d)(1)(A)(i)(I) (2010); 34 C.F.R. § 300.320(a)(1). The Parents asserted that

the educational assessment completed by the City Schools was invalid and did not provide accurate measures of the Student's present performance. This argument, which is completely without merit, deserves extended and detailed analysis mainly because it demonstrates the serious intellectual and ethical flaws with the presentation of the Parents' entire case, but also because the Parents' other arguments concerning the IEP are based upon this meritless argument. The Parents, without the benefit of any expert testimony, objective evidence, or honest, coherent examination of the City Schools' witnesses, improperly castigated the professional competence of Ms. XXXX and the validity of the City Schools' educational assessment.

At the outset of the hearing, the Parents presented testimony from Ms. XXXX, ostensibly to demonstrate that the scores that she reported for the Student's performance on the Woodcock Johnson III that Ms. XXXX administered in October 2013 were not valid. As noted above, after Ms. XXXX administered the Woodcock Johnson III to the Student, she initially used an incorrect version of Compuscore (Version 2.0) to compute the Student's scores. This error was discovered before the IEP team meeting on November 25, 2013, and Ms. XXXX, using the same raw data (the Student's answers), then used the correct version of Compuscore (Version 3.1) for age 8.6, and recomputed the Student's scores. There is simply no rational basis for the Parents' belief that the scores ultimately reported by Ms. XXXX were invalid.

Ms. Parker questioned Ms. XXXX about two exhibits, PARENTS #24 and PARENTS #25, supposedly to prove that there were problems with Ms. XXXX's assessment. Ms. XXXX testified that PARENTS #25, which is the Score Report for Compuscore Version 2.0 with norms based on grade level 2.1, was not used at all because norms based on grade level are reported by the computer program, but not used by professionals (at least by City Schools) to report results on the Woodcock Johnson III. Ms. XXXX further testified that PARENTS #24, which is the

Score Report for Compuscore Version 2.0 with norms based on age 8.6, was the score report that she initially used incorrectly to report the Student's scores. The correct Score Report for Compuscore Version 3.1 with norms based on age 8.6, was presented in evidence as BOARD #28. Most egregiously, Ms. Parker asked Ms. XXXX to compare the Student's academic fluency scores across the three scoring reports (76, 83, and 98), despite Ms. XXXX's explanation that two of these results (83 and 98) were meaningless based on what was obviously an innocent error that was corrected well before any scores were used at the IEP team meeting on November 25, 2013.

Ms. Parker asked Ms. XXXX about a significant difference between the Student's score on a subtest for on the Woodcock Johnson III that she administered and the one administered by Dr. XXXX. The Student had scored a 117 on math calculation with Dr. XXXX (his only high average score) and an 88 with Ms. XXXX. Ms. XXXX testified that she could not draw any conclusion from one such difference on one score on one subtest. The Parents asserted, once again without any expert opinion, that the different scores demonstrated a decline of some significance, rather than an anomaly among otherwise consistent scores on the two administrations of the Woodcock Johnson III. As to the Student's correct academic fluency score of 76, Ms. XXXX testified that this is a very broad measure that says that the Student may take a little longer than other students his age to process material, a statement very consistent with Dr. XXXX's assessment.

Later in the hearing, Dr. XXXX, again without any objective evidence, testified to her firm belief that Ms. XXXX incorrectly administered the Woodcock Johnson III to the Student. In closing argument, Ms. Parker continued this baseless argument about the Student's scores on the Woodcock-Johnson. I have belabored the Parents' argument on Ms. XXXX's results on the

Woodcock Johnson III because undercuts the Parents' other arguments concerning the present levels of performance, goals and objectives, and services in the Student's IEP.

I have no doubt whatsoever that Ms. XXXX correctly administered the Woodcock Johnson III to the Student and that the scores that she reported were valid. On subtests, the Student's scores ranged from 76 to 107, with most scores in the 90s. I note that Ms. XXXX reported scores that were very consistent with the scores reported by Dr. XXXX, such as Broad Reading (94 vs. 100) and Broad Math (90 vs. 98). As summarized in the findings of fact, the Student's grade level performances for communication, reading fluency, reading comprehension, math calculation, math problem solving, and reading vocabulary, ranged from 1.4 (communication) to 3.0 (reading vocabulary). The Student's written language content performance was at a beginning second grade level. All of these scores are consistent with the City Schools' position that the Student was performing at approximately a beginning of second-grade level, with certain strengths and weaknesses, most notably in communication and written language content.

On the IEP written on November 25, 2013, the Student's present levels of academic achievement were based not only on the Woodcock Johnson III, but also on DIBELS assessments, work samples, and content assessments. Ms. XXXX, a student support teacher who provided small-group instruction in reading using phonics-based methods to the Student beginning in January 2013, and who testified as an expert in elementary education assessments, explained the Student's DIBELS assessments. Ms. XXXX gave her opinion that the Student's scores on the DIBELS assessments were accurate and not, as asserted by the Parents, again without any evidence, inflated. At the beginning of the 2013-2014, the Student was reading 50 words per minute, just below the goal of 52 words per minute for a second grader at the

beginning of the school year. His accuracy score was 98, above even the goal for a second grader at the end of the school year. Ms. XXXX testified that these scores indicated that the Student was an accurate, but slow, reader who comprehended material at a beginning of second grade level.

In September 2013, Ms. XXXX had started the Student with decoding and context, using a direct instruction corrective reading program, a research-based program to work on the Student's fluency. For the November 25, 2013 IEP, the Student's oral reading fluency assessments from October and November were available. The Student scored under 60 in October and just over 60 in November. The middle of year goal is 72 and the end of year goal is 87. At the beginning of the 2013-2014 school year, the Student had a TRC level of I (on a scale of B to Z), just below the goal level of J. By October 2013, the Student had improved to a level of J, and by November 2013, the Student had improved to a level of K. At the beginning of the 2013-2014, the Student scored 46 on the DORF Retell, with three bars, indicating that the Student was able to use 46 words to retell a story with three out of four crucial details in 60 seconds. In October, the Student's DORF Retell score had dropped to 28, which was still above the end of second grade goal of 27. I am convinced that the DIBELS assessments and the TRC assessments, like the scores on Woodcock-Johnson, were valid and presented an accurate assessment of the Student's present level of academic performance.

The November 25, 2013 IEP, as amended on February 10, 2014 and April 1, 2014, was not defective because it did not include a specific math goal

An IEP shall include a statement of measurable annual goals, including academic and functional goals, 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 education curriculum; and

meet each of the child's other educational needs that result from the child's disability. 20

U.S.C.A. § 1414(d)(1)(A)(i)(II) (2010); 34 C.F.R. § 300.320(a)(2).

The November 25, 2013 IEP contained the following goals:

Goal: Academic – Reading Fluency: By November 25, 2014, Student will increase reading accuracy and fluency from beginning of second grade level to middle of third grade level as measured by grade level guided reading text.

Goal: Academic – Reading Comprehension: By November 25, 2014, given middle of third grade level guided reading texts, Student will apply and refine comprehension skills with 90% accuracy.

Goal: Academic – Written Language Content: By November 25, 2014, [Student] will increase writing skills from beginning of second grade level to middle of third grade level in the areas of ideas and content, organization as measured by analysis of writing samples with 90% accuracy.

Goal: Academic- Communication: By November 25, 2014, [Student] will produce and comprehend grade level oral language, demonstrating competency in form, content, and use.

Goal: Behavioral – Social Emotional/Behavioral: By November 25, 2014, [Student] will improve school behavior in the area of work habits by demonstrating an increase in his organizational skills as recorded on the designated documentation system (i.e. notebook/desk checks, planner, point sheets, charting).

(BOARD #5).

Several of the City Schools' witnesses, including Ms. XXXX, who suggested the 90% accuracy goals for reading comprehension and written language content, testified to their expert opinion that the goals in the IEP were appropriate. The Parents argued that the Student's IEP was inappropriate and not reasonably calculated to provide the Student a FAPE, in part, because, over the Parents' objection, it did not contain any specific math goals. Dr. XXXX testified that the Student's math tutor, Mr. XXXX, told her that the Student needed math goals. At an IEP team meeting on November 13, 2013, the Parents requested that math goals for calculation and

fluency be added to the then draft IEP, based on the Student's scores on the Woodcock Johnson III and the comments from the Student's private math tutor. The school-based team members determined that the Student did not need specific math goals based on his ability to complete math work in the classroom setting. The issue of math goals was also addressed at IEP team meetings on November 25, 2013, February 10, 2014, and April 1, 2014. As of February 10, 2014, the Student was on grade level in math, which did not include multiplication, which the Student was doing with his tutor, and he had mastered basic math facts (working with numbers up to 20). As of March 25, 2014, the Student was making significant progress in math fluency, performing almost perfectly on assessments for addition and subtraction at a second-grade instructional level. The Student had some difficulty with word problems and concepts, which was consistent with his general reading and decoding issues. On April 1, 2014, the IEP team met to review math data from the last thirty school days. The school-based members of the IEP team determined that the Student did not require a math goal or math services on his IEP. The Student was passing math with an excellent, with the only accommodation being occasional monitoring of responses (usually up to twice weekly) to prompt him to check over one or more of his answers. The Student's final grade in math was a good. The City Schools carefully considered whether the Student needed a math goal and reasonably decided that he did not.

To counter the City School's evidence, the Parents asserted that the Student's grades in math (and other subjects) were inflated. The Parents, however, did not present any expert testimony to support this assertion of grade inflation – no tutor, educator, or psychologist, and they also failed to explain why the Student's teachers would be motivated to inflate his grades. Moreover, even if I somehow concluded that the Student needed a math goal on his IEP, it

certainly would not follow that he needed to be placed in a non-public, special education school to receive services for that goal.

The November 25, 2013 IEP provided necessary accommodations and supports to the Student, and provided the intensity of services required by the Student to receive academic benefit in the least restrictive environment

Pursuant to the November 25, 2013 IEP, the Student was to receive 4.5 hours per week of special education services in the general education classroom, and 40 minutes per month of psychological services in the general education classroom. The special education teacher would provide services in the general education classroom three times per week for thirty minutes; a general education teacher would provide services twice weekly for thirty minutes. A general education teacher, Ms. XXXX, would provide reading services (reading fluency, reading comprehension and communication goals) four times per week for thirty minutes in a small group using a research-based reading intervention. Psychological services were to be delivered as a direct service by Ms. XXXX, the school psychologist, to the Student within the classroom setting by teaching and prompting use of positive behavior support strategies, and promoting skill practice within the setting where the Student would be expected to use the strategies. Several witnesses for the City Schools, including Ms. XXXX, the [School 3]'s IEP Chair, testified that the services in the IEP were appropriate for the Student.

Dr. XXXX testified that the Student required thirty hours of weekly special education services, like the services he is receiving at [School 1]. She provided no evidence to support her position, and made no effort to suggest a compromise somewhere between 4.5 hours and 30 hours as an alternative. I defer to the opinions of the educators because once again those opinions are grounded in the evidence and reflect the services that are appropriate for a child with a very mild disability.

The biggest problem with the Parents' case against the IEP concerns the issue of least restrictive environment. As noted above, the IDEA requires that a disabled child be placed in the least restrictive environment to achieve a FAPE, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. 300.114(a)(2)(i) & 300.117. The IDEA, in part, was a response to historical practices of segregating children with disabilities from the general education program. Removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. The City Schools' witnesses, including Ms. XXXX, Ms. XXXX, and Ms. XXXX, the Student's special education teacher, provided their expert opinions on least restrictive environment, which simply stated the obvious that there is no educational or legal basis for the Student to be receiving special education services outside of the general education classroom. Dr. XXXX testified that she considered the [School 1] to be the least restrictive environment for the Student. Dr. XXXX's comment about the least restrictive environment reflects her fundamental misunderstanding of the concept. Ms. XXXX explained the LRE continuum, which runs roughly from general education 80% or more of the time to a placement in a non-public full-time special education school, with no or little interaction with non-disabled students. The Parents presented no evidence remotely supporting their theory that the Student's disability is so severe that he cannot receive educational benefit in a general education setting. The truth is that he did receive such benefit in general education within a public school.

The City Schools did not fail to provide the Student a FAPE from January 2, 2013 to the present; and the IEP proposed by the City Schools on November 25, 2013 for the remainder of the 2013-2014 school year and for the beginning of the 2014-2015 school year was reasonably calculated to provide the Student a FAPE

As noted above, a FAPE entitles a student to an IEP that is reasonably calculated to enable the child to receive some meaningful, non-trivial, educational benefit. The record in this case contains overwhelming evidence that the Student received meaningful educational benefit from the IEP by making significant progress during the 2013-2014 school year with the limited services prescribed in the November 25, 2013 IEP. Moreover, he made this progress while receiving all of his services in a general education classroom. The Student received grades of excellent or good and his reading improved to almost grade level by the end of the 2013-2014 school year. Dr. XXXX claimed that the Student's grades were inflated, that he performed poorly on homework, that teachers finished some of the Student's work, and that the Student performed differently, apparently less proficiently, with his private tutors. Ms. XXXX testified that homework was not checked for accuracy, just to see whether it was completed and returned. Ms. XXXX testified that the Student's writing flourished. She agreed that his processing, as measured on timed tests, continued to be slow, but that he succeeded on assignments when given time per his IEP accommodations, and when he took his time on math word problems. The Parents did not present any expert testimony to support the assertion of grade inflation or teacher manipulation of assignments, or, as noted before, the teachers' motivation to inflate the Student's grades. I commend [School 3]'s staff's equanimity in the face of the unwarranted accusations made by the Parents and their attorney during this case.

The overwhelming evidence in this case is that the IEP was reasonably calculated to provide the Student a FAPE for the period of November 25, 2013 through November 25, 2014. It contained accurate measures of the Student's present level of academic achievement, appropriate goals, appropriate services and accommodations, and an appropriate placement in the least restrictive environment. The expert opinions of the educational professionals who drafted and

implemented the IEP – that the IEP provided the Student a FAPE and would have continued to provide him a FAPE – stand unimpeached and are unassailable. *See Tice v. Botetourt*, 908 F.2d 1200, 1207 (4th Cir. 1990) (a reviewing court (or administrative law judge) must defer to educators’ decisions about an IEP that provides a child the basic floor of opportunity that access to special education and related services provides).

The November 25, 2013 IEP provided for ESY services for Summer 2014

A public school agency must ensure that ESY services are available as necessary to provide FAPE. 34 C.F.R. § 300.106(a)(1). On February 10, 2014, the school-based members of the IEP team determined that the Student met the criteria to qualify for ESY for three academic goals (reading fluency, reading comprehension, and written language content). The IEP provided that the Student would receive two hours of ESY services per week for four weeks, outside of the general education classroom. In late May 2014 or early June 2014, XXXX XXXX, Executive Director, Office of Special Education, City Schools, wrote a letter to the Parents indicating that the IEP team had determined that the student was eligible for ESY services that would be provided by a home-based teacher. The Parents did not respond to Ms. XXXX’s letter. On June 2, 2014, the Parents’ attorney wrote a letter to the City Schools’ attorney, in which she incorrectly indicated that the IEP team had determined that the Student was not eligible for ESY services. The Parents did not avail themselves of the ESY services that were offered by the City Schools. At the hearing, the Parents criticized City Schools for not offering specific ESY services, but it is obvious that the Parents did not even attempt to ask City Schools about specific ESY services. In any event, the Parent’s contention that the City Schools did not offer ESY services for Summer 2014 is simply not true.

The school-based members of the IEP team did not predetermine the Student's placement

The Parents, without any evidence whatsoever, alleged that the school-based members of the IEP team predetermined the Student's placement outside of the IEP team process, thus violating the Parents' right to be a part of the IEP team. *See* 20 U.S.C.A. § 1414(d)(1)(B)(i) (2010). This frivolous argument is belied by the extensive record of [School 3]'s efforts in drafting and implementing the Student's IEP and the very reasonable determination, made in open IEP team meetings with the Parents in attendance, that the Student, for educational and legal reasons, belonged in a general education setting.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as follows:

1. The City Schools did not fail to provide services (by identifying the Student as having a disability and being in need of an IEP) in a timely manner. *See* 20 U.S.C.A. § 1414 (2010).
2. The City Schools did not fail to fully and adequately identify and address all areas of the Student's suspected disability. *See* 20 U.S.C.A. § 1414(b) (2010); 34 C.F.R. § 300.304.
3. The educational assessment completed by the City Schools was valid, and the November 25, 2013 IEP contained accurate present levels of the Student's academic performance. 20 U.S.C.A. § 1414(d)(1)(A)(i)(I) (2010); 34 C.F.R. § 300.320(a)(1).
4. The November 25, 2013 IEP, as amended on February 10, 2014 and April 1, 2014, was not defective because it did not include a specific math goal. 20 U.S.C.A. § 1414(d)(1)(A)(i)(II) (2010); 34 C.F.R. § 300.320(a)(2).

5. The November 25, 2013 IEP provided necessary accommodations and supports to the Student, and provided the intensity of services required by the Student to receive academic benefit in the least restrictive environment. *See* 20 U.S.C.A. § 1412 (2010).

6. The IEP proposed for the Student on November 25, 2013 for the balance of the 2013-2014 school year and for the beginning of the 2014-2015 school year was reasonably calculated to provide the Student a free appropriate education in the least restrictive environment. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

7. The November 25, 2013 IEP provided for ESY services for Summer 2014. 34 C.F.R. § 300.106(a)(1).

8. The school-based members of the IEP team did not predetermine the Student's placement. *See* 20 U.S.C.A. § 1414(d)(1)(B)(i) (2010).

9. The Parents are not entitled to reimbursement of tuition and expenses for their unilateral placement of the Student at [School 1] for the 2014-2015 school year. *Burlington School Committee v. Department of Education.*, 471 U.S. 359, 370 (1985).

ORDER

I **ORDER** that the Parents' due process request is denied in its entirety. I further **ORDER** specifically that the Parents' request for reimbursement for the cost of tuition and related costs incurred by the Parents for the Student's private, unilateral placement at [School 1], the non-public special education school that the Student currently attends, for the 2014-2015 school year, is denied.

October 16, 2014
Date Decision Mailed

Robert F. Barry
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.