

XXXX XXXX

v.

BALTIMORE COUNTY

PUBLIC SCHOOLS

\* BEFORE JOHN T. HENDERSON, JR.,

\* AN ADMINISTRATIVE LAW JUDGE

\* OF THE MARYLAND OFFICE

\* OF ADMINISTRATIVE HEARINGS

\* OAH NO.: MSDE-BCNY-OT-12-43423

\* \* \* \* \*

### DECISION

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### STATEMENT OF THE CASE

On November 7, 2012, XXXX XXXX, (Parent), on behalf of her son, XXXX XXXX (Student), filed a Due Process Complaint with the Maryland Office of Administrative Hearings (OAH) 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).

I held a telephone pre-hearing conference on December 3, 2012 with the parties. Steven Cowles, Esquire, represented BCPS and was present at the hearing. The Parent represented the Student. She participated via telephone conference.<sup>1</sup>

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<sup>1</sup> During the pre-hearing conference, the parties and representatives were advised of the time requirements for issuing a decision. The parties waived a resolution session but agreed to mediate their dispute after the Due Process Complaint was filed. In accordance with the regulations governing the time frames for the issuance of special education decisions, the decision in this case is due on or before Thursday, January 17, 2013, which is forty-five days from December 3, 2012, the date both parties participated in mediation without success. 34 C.F.R. §

I held a hearing on January 7 and 8, 2013. Mr. Cowles represented BCPS. The Parent represented the Student.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511 (2010); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

At the conclusion of the Student's case, BCPS moved for judgment arguing that there were no procedural issues raised by the Parent and that the Student failed to meet his burden of proof. My decision on BCPS' motion for judgment is provided after my findings of fact herein.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES**

1. Was the Individualized Education Program (IEP) proposed for the 2012-2013 school year reasonably calculated to provide the Student with a Free and Appropriate Public Education (FAPE)?
2. If there was a denial of FAPE, is the Parent entitled to tuition reimbursement from BCPS for the placement of the Student at a non-public school?

### **SUMMARY OF THE EVIDENCE**

#### **A. Exhibits**

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300.510(c)(3) and 300.515(a). The Student initially indicated that he did not want a mediation, but did not waive a resolution session. Thereafter, the BCPS indicated that it wanted a resolution session, but then instead scheduled a mediation session. There is no written mutual waiver of a resolution session. Nevertheless, no one complained that such a session should be held, and both parties participated in the mediation without objection.

The Parent offered the following exhibits on behalf of the Student, which I admitted into evidence:

Student Ex. 1 Due Process Documents

- a. Subpoena List of December 26, 2012
- b. Pre-Hearing Conference Report of December 5, 2012
- c. Notice of Hearing, dated December 4, 2012
- d. Special Education Mediation Agreement of December 3, 2012
- e. OAH Notice of December 29, 2012
- f. Notice of Mediation, dated November 27, 2012
- g. BCPS proposed mediation date of November 26, 2012
- h. BCPS request for Due Process Hearing, dated November 14, 2012
- i. BCPS notice of outcome of resolution session, dated October 26, 2012
- j. BCPS noticed of outcome of resolution meeting, dated October 25, 2012
- k. BCPS request for due process hearing, dated October 16, 2012

Student Ex. 2 2012 (Classroom Teacher – XXXX XXXX)

- a. IEP team summary, dated November 26, 2012
- b. IEP, dated November 19, 2012
  - i. Transition Plan
  - ii. Goals
- c. Extended School Year (ESY) request, dated November 19, 2012
- d. Annual Review Progress by XXXX, dated October 30, 2012
- e. Speech Language Annual Review, dated October 30, 2012
- f. Occupational Therapy Progress Report (XXXX XXXX), dated October 30, 2012
- g. Occupational Therapy Triennial Evaluation (XXXX XXXX), dated October 25, 2012
- h. Physical Therapy Annual Progress Report, dated October 26, 2012
- i. Psychologist Assessment of 2012
- j. Educational Assessment, dated October 1, 2012
- k. ESY request of October 1, 2012
- l. Speech Language Note and Pictures of Signs, dated October 17, 2012
- m. Alt-Maryland State Assessment (MSA), dated October 11, 2012
- n. Class letter, dated October 4, 2012
- o. Special Education Citizens Advisory Committee (SECAC) invitation, dated September 2012
- p. Alt-MSA July 2012
- q. Kindergarten Data Sheet for Brigance K&1 screen of July 18, 2012
- r. First Words Optimized Intervention Report of July 9, 2012
- s. Undated nursing notes re: inability to provide XXXX feedings
- t. Speech Language ESY (XXXX XXXX) of July 5, 2012
- u. IEP team summary of June 29, 2012
- v. Alt-MSA of February 16, 2012



Student Ex. 3 2011 (Class teacher):

- a. IEP Goals of October 5, 2011
  - i. Printed on November 16, 2012
  - ii. Printed on November 15, 2012
  - iii. Printed on August 2, 2012
  - iv. Printed on August 1, 2012
  - v. Printed on June 6, 2012
  - vi. Printed on April 17, 2012
  - vii. Printed on February 1, 2012
  - viii. Printed in November, 2011
- b. ESY request for 2011-2012
- c. Draft IEP from team meeting of September 12, 2011
- d. BCPS Nursing Assessment of September 12, 2011
- e. Speech-Language Annual Review of September 9, 2012
- f. Annual Review Progress Note of September 12, 2011
- g. Physical Therapy Annual Progress Report of September 1, 2011
- h. Occupational Therapy Annual Progress Report of September 2, 2011
- i. Notice of Documents, dated September 1, 2011
- j. Alt MSA Home Report parent copy for 2010-2011

Student Ex. 4 2010

- a. Alt MSA 2010-2011 Final Test Document of October 28, 2010
- b. IEP Goals of September 6, 2010
  - i. Printed April 13, 2011
  - ii. Printed November 15, 2010
  - iii. Printed August 4, 2011
- c. IEP approved September 16, 2010
- d. Parental input, undated (submitted for September 16, 2010)
- e. IEP team summary, dated September 16, 2010
- f. ESY Request for 2010-2011, dated September 16, 2010
- g. IEP services, dated September 16, 2010
- h. IEP draft, dated September 13, 2010
- i. Physical Therapy Annual Progress Report, dated September 1, 2010
- j. Occupational Therapy Annual Progress Report
- k. Annual IEP Review Adapted Physical Education for September 1, 2010
- l. Annual Review progress notes, dated September 13, 2010
- m. Speech Language Annual Review, dated September 1, 2010
- n. IEP team summary, dated January 13, 2010
- o. Alt MSA Home Report; parent copy for 2009-2010
- p. Amended IEP, dated January 13, 2010
- q. IEP goals, dated January 13, 2010; printed August 5, 2010
- r. IEP team summary, dated August 6, 2009
- s. Amended IEP, dated January 20, 2009

Student Ex. 5 2009

- a. Alt MSA for 2009-2010; Final Test Document
- b. Health Assessment Summary, dated September 16, 2009
- c. Adapted Physical Education, dated September 1, 2009
- d. Augmentative and Alternative Communication Assessment, dated October 12, 2009
- e. Speech/Language Assessment, dated September 15, 2009
- f. Psychologist Assessment, dated September 15, 2009
- g. Educational Assessment, dated September 15, 2009
- h. IEP team meeting, dated September 16, 2009
  - i. Present level of academic achievement and functional performance, dated September 16, 2009
  - ii. Goals dated September 16, 2009
- i. Physical Therapy assessment dated September 4, 2009
- j. Physical Therapy note of August 2009
- k. Home and Hospital Notice, dated September 14, 2009
- l. IEP team summary, dated September 17, 2009
- m. Alt MSA Home Report for 2009 Reading and Math
- n. IEP Team Goals, dated January 20, 2009
  - i. IEP XXXX Department of Education for April 26, 2006

Student Ex. 9 Chart prepared by Parent

The following exhibits were offered by the Parent but were not admitted into evidence:

Student Ex. 3 2011 (Class teacher):

- e. Draft IEP from team meeting of September 12, 2011

Student Ex. 6 2008

- a. IEP team summary, dated September 17, 2008
- b. IEP team meeting, approved September 17, 2008
- c. Speech/Language IEP team report, dated September 17, 2008
- d. Physical Therapy Annual Progress Report, dated September 15, 2008
- e. Occupational/Physical Therapy Annual Progress Report, dated September 17, 2008
- f. IEP team goals, dated September 17, 2008
- g. Alt-MSA Home Report for 2008 Reading and Math
- h. Alt-MSA for 2008-2009 draft test document

Student Ex. 7 2007

- a. IEP team summary, dated September 27, 2007
- b. IEP team meeting, dated September 27, 2007
  - i. IEP team meeting goals dated September 24, 2007

Student Ex. 8 2006

- a. IEP team for September 25, 2006
  - i. Progress report for November 6, 2006 through July 23, 2007
- b. IEP team for July 10, 2006

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

- BCPS #1 IIEP, dated November 19, 2012
- BCPS #2 IEP Team Summary, dated November 19, 2012
- BCPS #3 Progress Review, Speech/Language Annual Review, dated October 30, 2012
- BCPS #4 Physical Therapy Annual Progress Report, dated October 26, 2012
- BCPS #5 Occupational Therapy Annual Report, dated October 30, 2012
- BCPS #6 Annual Review Progress Note, dated October 30, 2012
- BCPS #7 IEP Team Summary, dated October 1, 2012
- BCPS #8 Psychological Assessment, conducted by Dr. XXXX XXXX, dated September 21, 2012
- BCPS #9 Physical Therapy Assessment Report, conducted by XXXX XXXX, dated September 17, 2012
- BCPS #10 Speech-Language Assessment Report, conducted by XXXX XXXX, dated September 18, 2012
- BCPS #11 Educational Assessment Report, conducted by XXXX XXXX, dated October 1, 2012
- BCPS #12 Occupational Therapy Assessment Report, conducted by XXXX XXXX, dated September 14, 2012
- BCPS #13 IEP Team Summary, dated June 29, 2012
- BCPS #14 Parent Permission for Assessment, dated June 29, 2012
- BCPS #15 IEP, dated October 5, 2011
- BCPS #16 IEP Team Summary, dated October 5, 2011



- BCPS #17     Annual Review Progress Report, dated September 12, 2011
- BCPS #18     Occupational Therapy Progress Report, dated September 2, 2011
- BCPS #19     Speech-Language Annual Review, dated September 12, 2011
- BCPS #20     Physical Therapy Progress Report, dated September 1, 2011
- BCPS #21     IEP, dated September 16, 2010
- BCPS #22     Parent Permission for Assessment, dated August 6, 2009
- BCPS #23     Educational Assessment Report, conducted by XXXX XXXX, dated  
September 15, 2009
- BCPS #24     Speech-Language Assessment Report, conducted by XXXX XXXX, dated  
September 15, 2009
- BCPS #25     Psychological Assessment Report, conducted by Dr. XXXX XXXX,  
dated September 15, 2009
- BCPS #26     Occupational Therapy Assessment Report, conducted by XXXX XXX,  
dated September 11 & 14, 2009
- BCPS #27     Physical Therapy Assessment Report, conducted by XXXX XXXX, dated  
September 4, 2009
- BCPS #28     Augmentative and Alternative Communication Assessment Report,  
conducted by XXXX XXXX, dated October 12, 2009
- BCPS #29     IEP Progress Report (November 2011 – August 2012)
- BCPS #30     IEP Progress Report (November 2010 – June 2011)
- BCPS #31     Special Education Progress Report, completed by XXXX XXXX, January  
2013 Update
- BCPS #32     BCPS Physical Therapy Services, Student Log, 2012-2013 school year
- BCPS #33     BCPS Occupational Therapy Services, Log Notes, 2012-2013 school year
- BCPS #34     BCPS Speech-Language Student Log, 2012-2013 school year
- BCPS #35     Résumés of BCPS Witnesses

B. Testimony

The Student was not present. The Parent testified and presented testimony from the following witnesses:

1. XXXX XXXX, Speech Pathologist, [School 1], BCPS
2. XXXX XXXX, Occupational Therapist Assistant, [School 1], BCPS
3. XXXX XXXX, LPN, private duty nurse for the Student
4. Dr. XXXX XXXX, Physical Therapist, [School 1], BCPS

The following witnesses testified on behalf of the BCPS:

1. XXXX XXXX, Teacher, Special Education, [School 1], BCPS, accepted as an expert in special education
2. Dr. XXXX XXXX, School Psychologist, [School 1], BCPS, accepted as an expert in school psychology and special education
3. XXXX XXXX, Principal, [School 1], BCPS, accepted as an expert in administration and special education
4. XXXX XXXX, Assistant Principal, [School 1], BCPS

**FINDINGS OF FACT**

The parties stipulated in writing and on the record at the hearing to the following facts:

1. The Student is thirteen years old, and his date of birth is XXXX, 1999.
2. The Student is identified as a student with a disability under the IDEA under the category of Multiple Disabilities.
3. The Student has been diagnosed with autism spectrum disorder, XXXX, and profound intellectual disability.
4. According to his IEP, the areas affected by the Student's disabilities include communication, personal management, reading, mathematics, physical education, gross motor and fine motor skills, as well as health.
5. [School 1] is a separate, special education public day school. Services available at the school are special education instruction and related services, including physical therapy,



occupational therapy, and speech language services. The Student began attending [School 1] in the 2006-2007 school year.

6. During the 2011-2012 school year, the Student attended [School 1] and received special education services in accordance with the IEP, dated October 5, 2011. The special education services included special education classroom instruction, speech language therapy, physical therapy, occupational therapy, and physical education services.

7. During the 2009-2010 school year, the Parent expressed concerns regarding the Student's global progress at [School 1], and renewed her concerns in the 2010-2011 and 2011-2012 school years.

8. The IEP team convened on October 5, 2011, to review and revise the IEP. At that meeting, the Parent expressed disagreement with the placement at [School 1] based on the Student's overall failure to make significant, expected progress, especially in communication. The Parent also believed that the Student was not safe at [School 1].

9. At the October 5, 2011, IEP team meeting, the Parent requested placement at the [School 2] for children with XXXX. The Student continued at [School 1] for the 2011-2012 school year.

10. On June 29, 2012, the IEP team met and determined that assessments would be conducted to determine the Student's present levels of academic and functional performance. The Parent provided consent for psychological, educational, physical therapy, occupational therapy, and speech language assessments.

11. On October 1, 2012, the IEP team at [School 1] reconvened to review the results of the assessments. At the meeting, the 2011-2012 school year IEP was extended to allow the team to review the goals and objectives and revise the IEP to address the Student's needs.

12. The IEP team, without the Parent, reconvened on November 19, 2012 to finalize the IEP. The school-based members of the team approved the IEP for the Student, which included the provision of special education and related services at [School 1].

13. During the 2012-2013 school year, the Parent has continued to express disagreement with the recommendation for the Student to attend [School 1] and renewed her request for placement at [School 2].

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

14. The Student is non-verbal and is at risk for underestimation of his abilities.

15. The 2011-2012 and 2012-2013 IEP goals and objectives were approved by all team members, but the Parent does not agree with the placement at the [School 1].

16. The Student's severe disabilities in the areas of cognition, adaptive functioning, adaptive behavior, communication, and motor functions significantly impact his performance across the curriculum. He needs a highly structured setting, with visually modified environment and activities, imbedded life skills instruction, combined with highly structured and positive behavioral supports. This negatively impacts his ability to participate in a less restrictive setting.

17. The Student has a history of childhood XXXX failure, infantile XXXX and intellectual impairment. He had a XXXX in the fall of 2009.

18. The Student does not communicate with words. He uses a combination of sign language and picture books called Pragmatic Organization Dynamic Display (PODD). The PODD consists of nine pictures on each page of a bound book. The Student uses his PODD more than four times during the school day.

19. The Student had the services of a private duty nurse (PDN), a licensed practical nurse, during the period of his eighth year of age through July 2012, when the PDN ceased

employment with the Student. The PDN accompanied the Student to school and cared for his needs during the school day.

20. The IEP of October 5, 2011 stated that the Student continued to display needs in the areas of reading, math, and writing. At that time, it was agreed that he continued to need special education and related services to meet learning outcomes.

21. The October 5, 2011 IEP listed the Student's academic communication strengths. He was able to follow some simple commands and respond to his name. He answered simple yes or no questions with prompting, matched pictures with prompting, made choices by pointing, used some picture symbols or photographs to communicate wants and needs and used some gestures (waves, points). He recognized pictures of common objects and actions. The IEP further determined that the Student needed to improve functional language skills using pictures.

22. The Student's physical strengths were listed as being able to demonstrate the ability to self feed with a spoon. He tolerated hand washing with hand over hand assistance at the wrist. He assisted with his toileting routine by standing, pulling down and up pants, and sitting on the toilet. He was able to take off his shoes and socks independently and indicated discomfort by fussing.

23. The Student's academic reading strengths were listed as touching pictures in a book with prompting, turning pages in a book with assistance to separate pages and closing the book when finished. He used switch devices to answer reading questions with prompting.

24. The Student's academic math strengths were listed as being able to stack blocks with persistent verbal prompting and modeling. He can put items within a container. He followed some directions with model prompts. He can put together simple form boards with verbal prompts.



25. The Student's physical education strengths were listed as continuing to improve locomotor skills and participating in games and activities. He tolerated hand over hand tactile assistance and enjoyed participating in ball skills activities, such as bowling.

26. The Student's gross motor strengths were listed as pushing and scooting himself back in his chair with minimal prompting. He walked with two hands held for distances of greater than fifty feet. He walked with a gait trainer using forearm prompts more than one hundred feet and demonstrated increasing independence with sit to stand using a support surface. He ascended and descended stairs using bilateral rails, with moderate to minimal assistance from an adult. He walked household distances while pushing an XXXX. He demonstrated that he could walk throughout the [School 1] holding onto one arm of an adult.

27. The Student's physical fine motor strengths were listed as continuing to respond well to verbal cues and praise to complete activities. His fine motor abilities improved throughout the year with partial physical assistance to complete most tasks.

28. Dr. XXXX conducted a psychological assessment of the Student on August 31, 2012, September 5, 2012 and September 21, 2012. The Student's performance on the cognitive portion of the Bayley Scales of Infant Development, Third Edition, approximated the twenty-two month age level, which was one month less than his assessment of 2009. While the Student completed a few new items, he did not do as well on color sorting and matching or pegboards. His adaptive skills fell below the first percentile when he was compared to peers of his chronological age.

29. The current approved IEP, dated November 19, 2012, listed the Student's areas affected by disability as being communication, personal management, reading, mathematics, physical education, gross motor, fine motor and health. He continued to display needs in the

areas of reading, math, and writing. At that time, it was agreed that he continued to need special education and related services to meet learning outcomes.

30. The November 19, 2012 IEP team participants were XXXX, XXXX, XXXX XXXX, (special education school nurse), XXXX, XXXX, XXXX and XXXX.

31. Pursuant to the 2012-2013 IEP, the Student will receive speech and language therapy two times per week. One session will take place in the classroom in a small group and the second session will take place in the therapy room on a one to one basis. Occupational therapy services will be provided in both individual and group settings. When seen in the classroom it will focus on curriculum based activities. Occupational therapists will work in conjunction with staff to implement sensory strategies as needed.

32. The Student will receive direct physical therapy services on an individual and group basis. He will be given opportunities for functional movement with a weekly mobility schedule. Physical therapists will also collaborate with the physical education teacher to help with motor coordination activities and endurance activities for the Student during physical education.

33. It is expected that the Student will achieve three to six months of cognitive progress per year.

34. The Student's overall current functioning level is two years, six months.

35. The Student is enrolled in the Extended School Year program (ESY) of the [School 1].

36. The Student's class at the [School 1] consists of five students and four adults, who are the teacher, an instructional assistant and two staff adults. The Student is a good worker and usually stays on task until the task is complete. The Student receives more than thirty minutes a

day in communication training, integrated throughout the school day. There are eighty students at the [School 1] with disabilities, composed of six students in each class.

37. The Student is able to use computer-based programs for instruction and communicative purposes.

38. The evaluative data used to develop the Student's IEP for the 2012-2013 school year was ascertained from assessments conducted during the 2012 school year as part of the Student's evaluation.

39. The 2012-2013 IEP can meet all of the Student's educational, medical and physical needs and facilitate the progress of the IEP.

40. The Parent seeks to enroll the Student with the [School 2] located in XXXX, Maryland. The school population approximates thirty-two students, having a smaller teacher/pupil ration than [School 1]. The tuition approximates \$20,000 per year.

41. The Student has not been accepted for enrollment at [School 2].

42. The 2012-2013 IEP meets the needs of the Student. [School 1] is capable of implementing the IEP.

### **DECISION ON MOTION FOR JUDGMENT**

At the conclusion of the Student's case, BCPS moved for judgment arguing that there were no procedural issues raised by the Parent and the Student failed to meet his burden of proof.

The OAH's Rules of Procedure, COMAR 28.02.01, apply to this matter. A Motion for Judgment is governed by COMAR 28.02.01.12E, which states the following:

E. Motion for Judgment. (1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of



any opposing party's case. (2) When a party moves for judgment at the close of the evidence offered by an opposing party, the judge may: (a) Proceed to determine the facts and to render judgment against an opposing party; or (b) Decline to render judgment until the close of all evidence. (3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

The issue is whether either the motion for judgment made by BCPS during the hearing should be granted because the Student failed to meet his burden of proof. BCPS argues that the Parent failed to present evidence of any procedural deficiencies, or any evidence that the IEP is not appropriate for the Student's needs.

The Parent's argument in response is that she has presented evidence that the IEP did not identify measurable annual goals that are specific to the Student's needs pursuant to the requirements of IDEA.

At the hearing of January 7, 2013 and January 8, 2013, I declined to render judgment at that time and took the matter under advisement until the close of all the evidence. BCPS then proceeded with its case and offered evidence in defense. For the reasons stated below, the motion for judgment is GRANTED.

## **DISCUSSION**

### **Burden of Proof**

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parent has the burden of proving that the Student's IEP was not reasonably calculated to provide educational benefit to him and that placement at a separate day school is appropriate.

The Parent contends that the Student's IEPs for both the 2011-2012 and 2012-2013

school years were not reasonably calculated to meet the unique needs of the Student and that, as a result, BCPS did not offer the Student a FAPE. The Parent is requesting that the Student be placed at [School 2], a private special education program and that BCPS bear the cost of approximately \$20,000 per year. The Parent maintains that [School 2] is the least restrictive environment in which to implement the Student's IEP. The burden of proof on these issues is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009).

To prove her case by a preponderance of the evidence, the Parent must present evidence that it is more likely than not that each disputed IEP failed to provide the Student a FAPE. Merely raising doubt does not constitute proof by a preponderance of the evidence.

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (2010), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412. Courts have defined the word "appropriate" to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Clearly, no bright line test can be created to establish whether a student is progressing or could progress educationally. Rather, the decision-maker must assess the evidence to determine whether the Student's IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4<sup>th</sup> Cir. 1991).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined a FAPE as follows:



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

458 U.S. at 200-201. In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefits. 458 U.S. at 206-207. See also, *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4<sup>th</sup> Cir. 2004).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the 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 (4<sup>th</sup> Cir. 1983), citing *Rowley*, 458 U.S. at 176. Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive educational benefit. Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or receipt of passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. See *In Re Conklin*, 946 F.2d 306, 316 (4<sup>th</sup> Cir. 1991) (finding that a student’s passing grades and advancement does not resolve the inquiry as to whether a FAPE has been afforded to the student). Similarly, a finding that a student is not progressing at the same speed as his/her peers does not shed light as to whether a student has failed to gain educational



benefit. As discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically with another student, depending on the needs that are present in each student. 458 U.S. at 202.

**Each IEP is reasonably calculated to provide the Student with a FAPE**

In this case, the Student is identified as a student with autism spectrum disorder, XXXX, and profound intellectual disability. Each IEP requires that the Student be provided direct special education instruction in all academic areas, to address deficits in oral and written communication skills, mathematics, reading, task completion, attention, social and motor skills, with significant supplementary aids, accommodations and related services.

The goals and objectives of each IEP were developed in accordance with the applicable law and regulations. An IEP is the “primary vehicle” through which a school provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax County School Bd.*, 553 F. 3d 315, 319 (4<sup>th</sup> Cir. 2009). The IEP “must contain statements concerning a disabled child’s level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child’s progress.” *M.M. v. School District of Greenville County*, 303 F. 3d 523, 527 (4<sup>th</sup> Cir. 2002); see 20 U.S.C.A. § 1414(d)(1)(A). The IEP should be the result of a collaborative process, usually one or more meetings, in which the parents, and their representatives, discuss the child’s abilities and needs with school staff.

On October 5, 2011, June 29, 2012, October 1, 2012 and November 19, 2012, the [School 1] IEP team developed an IEP that included goals and objectives to address the Student’s identified academic, social/emotional, occupational/motor skills and communication needs. The team considered assessments, therapy notes and any information provided by the Parent.

The Parent disputes whether any IEP was reasonably calculated to provide the Student with a FAPE. In evaluating the appropriateness of the Student's IEP, the Parent argues that the IEP and placement offered by BCPS is inappropriate because there were no identifiable measurable annual goals that are specific to the Student's needs pursuant to the requirements of the IDEA.

During the Parent's testimony, she spent considerable time and effort to suggest that stated goals within older IEPs were not obtained by the Student and/or were not capable of being measured. She maintained that there was no data to support progress as reported within the older IEPs. As an example, she referenced the October 5, 2011 IEP where objective number one of the Fine Motor goal provided the following:

Given adaptive paddle scissors, [the Student] will be able to cut a 6 inch piece of paper in half with partial physical assistance to manipulate the paper and verbal cues to push in 8 of 10 targeted trials.

The progress report of November 14, 2011 provides the following:

Objective 1, [The Student] requires paddle scissors for cutting; once engaged [the Student] will cut 2-3 snips with verbal and gestural prompts with improved visual attending.

The progress report of February 2, 2012 provides the following:

Objective 1, Through positioning in a regular chair and posturing, [the Student] is able to manipulate a paddle scissor and cut a 6 inch piece of paper in half with partial physical assistance at the wrist 2 out of 6 times.

The progress report of April 18, 2012 provides the following:

[The Student] has mastered objective number 1.

According to the Parent, there was no particular data to prove that the Student mastered objective number 1. Since she had no at-home experience with the Student cutting with scissors,

she did not believe the skill was learned. Therefore, in her view, goals were not being met; and if not met, then the Student was not being provided an FAPE.

The Parent maintains that the [School 2] program is the appropriate placement for the Student because the Student requires a small setting that includes highly structured and consistently applied behavioral components, with related services of speech/language, occupational therapy and mental health services. This small setting, in her view, would enhance the Student's opportunities to obtain his physical and educational goals. However, other than her own opinion testimony, she presented no evidence to demonstrate what [School 2] could provide the Student that he was not receiving from [School 1].

It is clear from the record and testimony that the Parent is knowledgeable, caring, and diligent. The record demonstrates that she is sufficiently vigilant in assessing the Student's progress and makes effort to investigate methods, placements or therapies that she believes could help her son. In observing the Parent's demeanor while testifying, I conclude that she genuinely has a difference of opinion with BCPS personnel about whether the Student would receive educational benefit from the program offered by BCPS. However, the Parent has simply adopted a preference for a school and therefore assumes that this is the only placement where the Student can learn and make progress. Her arguments, without any evidence, that the mastery of the IEP goals or at the least some progress made, are not reliable without sufficient data to evidence progress, are not supported by credible evidence. She presented no witness that would agree with her opinion.

The Parent's witness, Nurse XXXX, who was the PDN for the Student, had cursory knowledge of the IEP. I did not find her testimony reliable. She was not an IEP team participant and she had no knowledge of the Student's progress goals. Moreover, all the other witnesses



called by the Parent, who were BCPS employees, agree that the Student would benefit from the [School 1] program. The Parent could not offer a single witness who could testify credibly to the alleged inappropriateness of the [School 1] Program.

Given the Student's profound communication deficits, he requires a program designed to enhance his communication skills. Under the current IEP, the Student would receive direct speech/language services to assist him with his communication needs.

The evidence establishes that the Student requires a special education setting that incorporates a high level of structure, support, and small group instruction. This is the type of program that is being offered at the [School 1] program. As discussed previously, the Student's disability primarily has impacted his speech/language and academic skills, and he possesses other deficits that hinder his progress in the general curriculum. He requires an environment in which behavioral supports are integrated into his program. He has been assessed by various evaluators who recommended that he receive accommodations and support, as well as direct speech/language, occupational therapy and behavioral services as part of his curriculum and integrated in the program, which is what is being offered in the BCPS program.

It is important to note that even though formalized assessments were conducted to assist in ascertaining the Student's strengths and weaknesses, the formalized assessments were not the sole source of the evaluative data used to determine the Student's strengths and weaknesses. The IEP team drew from many sources, such as formalized assessments and observations, as well as any information provided by the Parent to accurately determine the Student's present levels of performance.

#### **[School 1] is the Least Restrictive Environment**

Under IDEA, the Student must be placed in the least restrictive environment to achieve a

FAPE. Pursuant to federal statute, disabled and nondisabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5). Yet, placing 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.* and 34 C.F.R. § 300.114(a)(2). That does not mean, however, that in such a case, placement of a child in a non-public school setting, at the public school district's expense, is the only option available that would allow a child to receive a FAPE. If a public school setting has a self-contained special education program that allows the child to access the curriculum and receive educational benefit, then IDEA's requirement that a disabled child be educated in the least restrictive environment would be accomplished by placement at the public school program. [School 1] provides that opportunity.

During the presentation of the BCPS case, all but one of the BCPS witnesses were qualified as experts in their respective fields. Each expert witness opined that the Student's program at the [School 1] is appropriate and the Parent did not offer any evidence to contradict the opinions offered by BCPS staff; nor were any experts tendered on behalf of the Parent.<sup>2</sup>

The dispute is mainly over what kind of placement the Student should attend. The judgment of educational professionals such as these is ordinarily entitled to deference. *G. v. Ft. Bragg Dependent Schools*, 343 F.3d 295, 307 (4<sup>th</sup> Cir. 2003); *M.M. v. School District of Greenville County*, 303 F.3d 523, 532 (4<sup>th</sup> Cir. 2002). Where appropriate, deference is given to

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<sup>2</sup> The parent called several of the BCPS employees as her witnesses but did not seek to qualify them as experts in their fields. Many of the witnesses called by the Parent were then called by BCPS and qualified as experts in their field during the BCPS case. It is also noted that the Student's father, XXXX XXXX, Sr., was present at the hearing. He did not testify. There was no evidence presented that he participated in the IEP team meetings.



BCPS staff where the assertions are supported by evaluative data regarding the Student's needs, including observations and the Student's performance. For the reasons cited above, I find that the Student's IEP for the 2012-2013 school year can be implemented in the [School 1] program.

I find that the BCPS placement offers the Student the opportunity to receive educational benefit in the least restrictive environment. Though I am sensitive to the Parent's concerns, the Parent has failed to prove that the Student can only receive a FAPE if his program is implemented in another school where he will have a different student to teacher ratio.

The law recognizes that "once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals." *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990). Therefore, absent any evidence to persuasively dispute the well-reasoned judgment of the BCPS witnesses, I agree with BCPS that the IEP and placement developed on November 19, 2012, is appropriate and reasonably calculated to meet the individualized needs of the Student.

I recognize the Parent's desire to have her child receive the best education possible, and that she believes, in this case, that the best education possible would be placement at [School 2]. However, the law does not require the public agency to fund educational services for a child at a private school simply because the parent is seeking the best education for the child. Instead, in order to prevail, the Parent must prove that the placement determined by the public agency will amount to a denial of a FAPE and that the identified private school is an appropriate placement. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

In *Carter*, the Supreme Court upheld a lower court's decision to order reimbursement to the parents for private tuition, after the court's determination that the IEP was inappropriate and that the private school selected by the parents would offer the child an appropriate education.



Specifically, the Supreme Court concluded that parents are “entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act.” *Carter*, 510 U.S. at 15. Here, the Parent has the burden of proof and, unlike in *Carter*, she has failed to establish that BCPS did not develop an appropriate IEP and placement on November 19, 2012. To the contrary, with regard to the November 19, 2012 IEP team meeting, the public agency ensured that the IEP team developed an IEP that included special education and related services designed to meet the unique needs of the Student that arose from the Student’s disability.

**The Student is not Entitled to Placement at [School 2] Program**

The Parent argued that [School 2] is appropriate as a private placement for the Student. Pursuant to *Carter*, the appropriateness of the Parent’s private placement choice is analyzed only if the IEP results in a denial of a FAPE. *Carter*, 510 U.S. 7. In this matter, I have concluded that the IEP and placement offered by the public agency offers the Student a FAPE. Accordingly, an analysis pursuant to *Carter* is inapplicable and the issue of whether the Parent’s proposed placement is appropriate does not need to be addressed in this decision.

In conclusion, after carefully reviewing all of the evidence presented by the Parent, I find that the burden of proof has not been met. BCPS developed an appropriate IEP and placement on November 19, 2012 that it is reasonably calculated to provide a FAPE for the Student.

**CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Parent has failed to establish that the IEP offered by the Baltimore County Public Schools was not reasonably calculated to offer the Student educational benefit. 20 U.S.C.A. §§ 1400 - 1487 (2010).

I further conclude that the IEP and placement proposed by Baltimore County Public Schools on November 19, 2012 was reasonably calculated to offer the Student a free and appropriate public education. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

**ORDER**

I **ORDER** that the Parent's request to have the Student placed at the [School 2] program, at the expense of Baltimore County Public Schools, is **DENIED**.

January 17, 2013  
Date Decision Mailed

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John T. Henderson, Jr.  
Administrative Law Judge

JTH/rbs

## **REVIEW RIGHTS**

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. §8-413(j) (2008).

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.